

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

TAX APPEAL NO. 1190 of 2014

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR.JUSTICE KS JHAVERI

and

HONOURABLE MR.JUSTICE K.J.THAKER

- =====
- 1 Whether Reporters of Local Papers may be allowed to see the judgment ?
 - 2 To be referred to the Reporter or not ?
 - 3 Whether their Lordships wish to see the fair copy of the judgment ?
 - 4 Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder ?
 - 5 Whether it is to be circulated to the civil judge ?
- =====

COMMISSIONER OF INCOME TAX RAJKOT III....Appellant(s)

Versus

PUJYA SHRI JALARAMBAPA AND MATUSHRI VIRBAIMA CHARITABLE TRUST....Opponent(s)

Appearance:

MR PRANAV G DESAI, ADVOCATE for the Appellant(s) No. 1

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CORAM: **HONOURABLE MR.JUSTICE KS JHAVERI**
and
HONOURABLE MR.JUSTICE K.J.THAKER

Date : 11/11/2014

ORAL JUDGMENT

(PER : HONOURABLE MR.JUSTICE KS JHAVERI)

1. This is an appeal by the appellant-

revenue, challenging the order of the ITAT, Rajkot (for short, 'the Tribunal'), Dated : 30.05.2014, rendered in ITA No. 249/Rjt/2014, whereby, the Tribunal allowed the appeal filed by the Respondent-Trust.

2. The brief facts of the case are that the Respondent-Trust, which came to be created in the year 2002, on 13.09.2013 made an application for recognition under Section 80G(5) of the Income Tax Act, 1961 ('the Act', for short), in the prescribed format before the appellant. A report from the field office was called by the appellant and later on the application of the Respondent-Trust came to be rejected on the ground that the Respondent-Trust had failed to spent 85 per cent of the amount for the A.Y.s 2010-11, 2011-12 and 2012-13. Being dissatisfied with the same, the Respondent-Trust preferred an appeal before the CIT(A), which dismissed its appeal. Therefore, the Respondent-Trust carried the matter before the Tribunal, which passed the impugned order. Hence, the present appeal.

3. The appellant-Revenue has, by way of this appeal, raised the following question of law for our consideration;

"Whether the ITAT is justified in law as well as on facts in directing recognition u/s. 80G(5) of the Income Tax Act to the assessee Trust?"

4. At the outset, Mr. Desai, learned Advocate for the appellant, very fairly invited our attention to a decision of this Court rendered in Tax Appeal No. 306 of 2014 and the allied matters, wherein, this Court answered the very same issue in favour of the assessee and against the Revenue by observing as under in Para-7 thereof;

"7.0. Heard the learned advocates for the respective parties at length and perused the order passed by the learned Commissioner as well as impugned judgment and order passed by the learned Tribunal. At the outset, it is required to be noted that the question is with respect to the recognition approval under Section 80G(5) of the Act to the respective assessee trust. The same was refused by the Commissioner by observing that trust failed in making expenditure to the extent of 85% of its income which is required as per clause (i) of subsection (5) of Section 80G of the Act. However, it is required to be noted and it is not in dispute that as such main object of the trust as per trust deed are educational, social activities, medical etc. Therefore, the short question which is posed for consideration of this Court is whether in the facts and circumstances of the case learned Tribunal has committed any error in quashing and setting aside the order passed by the Commissioner rejecting the application made by the assessee trust seeking approval under Section 80G(5) of the Act and has erred in directing Commissioner to grant recognition under Section 80G(5) of the Act? As such issued involved in the present

case is now not *res integra* in view of the decision of the Division Bench in the case of N.N.Desai Charitable Trust (supra). While considering the certification of institution for the purpose of Section 80G, the Division Bench has specifically observed and held that inquiry should be confined to finding out if institution satisfies prescribed conditions as mentioned in Section 80G of the Act. In the aforesaid case also the Commissioner refused the application for registration under Section 80G(5) of the Act on the ground that in the past for some period the petitioner had not applied 75% of the income of the trust for the purpose of trust. While considering the aforesaid and the scope of the inquiry at the time of recognition under Section 80G(5) of the Act by the appropriate authority, the Division Bench has observed and held as under:

"From the aforesaid it appears that the sole ground that has prevailed with the CIT in refusing the application is that because in the past for some period the petitioner has not applied 75 per cent of the income of the trust for the purposes of the trust, therefore, the income of the assessee was liable to be included in the taxable income and the assessee did not fulfill the condition of s. 80G(5)(i) of the Act.

It would be apposite here to reproduce the relevant provisions of s. 80G(5)(i) of the Act.

"Where the institution or fund derives any income such income would not be liable to inclusion in its total income under the provisions of ss. 11 and 12 [or clause (22) or clause (22A) or

clause (23) or clause (23AA) or clause (23C) of s. 10".

Before embarking on analysing the provisions of subs.(5) of s. 11(1), one must notice that s. 11(1) does not relate to assessment of the trust or the institution whose income are not liable to be included in the computation of taxable income under various provisions of the Act referred therein. Primarily, s. 11(1) is related to giving deduction in respect of donations made by a person who, but for this provision, would not be eligible for such deduction because the donations are not ordinarily considered to be expenses incurred for the purpose of earning income and liable to be deducted therefrom. Since all donations generally are not treated eligible for deduction, but only such donations as are made to funds or institution named in subs. (2) of s. 11(1) are eligible for such deduction and as noticed by us above, it also includes a general clause "any fund or institution to which this section applies" a provision was needed to identify the trusts or funds or institution not specifically named in statute, but fell in that category. That object was achieved by enacting subs. (5) of s. 11(1) which helps identify the funds or institutions donation to which qualifies for deduction under s. 11(1). It provides that fund or institution referred to in clause (2)(iv) are such whose income would not be liable to be included in its total income under the provisions of ss. 11 and 12 or clause (22) or clause (22A) or clause (23) or clause (23AA) or clause (23C) of s. 10. Prior to insertion of clause (vi), it being not a statutory requirement, even in the absence of a certificate under s.

11(1), it was possible for a donor to satisfy an ITO independently about the eligibility of donation made by him for deduction. It was in order to keep a check on an inquiry into such details which may not be possible for every donor to harness and make good a claim which otherwise he is legitimately entitled to make, and also to relieve ITO to hold such enquiry in respect of donations made to such institution at different levels and to avoid possibility of different conclusions reached by different officers in relation to donations made to the same fund or institution, to simplify the procedure, the provision was made for recognising, what was, a prevailing practice by making a statutory provision in that regard. It is also to be noticed that whether the income of an institution or fund would ultimately be liable to inclusion in its total income at the close of assessment year or not cannot be determined at the time of making of donation. The eligibility of the donation for deduction has to be considered with reference to the point of time at which donation is made and not with respect of the time in future depending on assessment of the donee. That is where the use of the verb in future tense 'would' has been used and not in present or past perfect tense so as to take into consideration the actual inclusion or exclusion or the extent of inclusion or exclusion. The direct nexus of clause (i) of subs. (5) of s. 11(1), appears to us, is to the eligibility of the institution or the fund to claim that its income is not liable to be included in computation of total income. The two are different concepts. First, whether an institution or fund is such whose income is not liable to be included in the computation

of total income it depends on its status or character. The second is actual assessment of income, which necessarily takes place in future after donation is received by the donee on fulfillment of other conditions about application of income by the eligible trusts, which in the very nature of things can operate only after receipt of income. The actual extent of exclusion from or inclusion in the computation of total income, the receipts of such institution or fund, depends on fulfillment of further conditions which may or may not exist at the close of the year and has no direct relation to the purpose with which the provision is made. The latter falls in the realm of the assessment of the trust, institution or fund which derives income which is not ordinarily includible in its total income. The liability to assessment is not affected by issuance of recognition certificate or approval certificate issued under clause (vi) of subs. (5) of s. 11(1) nor it depends upon the fact whether donor is ultimately gets deduction in respect of such donation. It may be relevant to take cognizance that all donations are not in their entirety eligible for deduction. There exists a maximum limit also for such eligibility and donations beyond such limit by a person may not get deduction, even if it is to an approved institution under s. 11(1). Likewise, actual inclusion of any income in the assessment of the donee as taxable income, does not affect the entitlement of the donor to claim deduction under s. 11(1), if on the date when he made the donation the conditions were fulfilled. That was the law before the insertion of clause (vi) and apart from the fact that by introducing clause (vi) with r. 11AA a method of proving the

eligibility to claim deduction has been provided by the statute, there has been no alternation in the substantive provision, that is to say, entitlement of the donor to claim deduction depends on the eligibility of the donee to claim exemption of its income on the date when donation is made. Examining from this angle, we find that for applicability of ss. 11 and 12, what is required is that such trust must have moved an application for registration under s. 12A and registered for that purpose. Once a trust is registered under s. 12A, its income from property, which includes donations whether covered under s. 11(1)(d) or under s. 12 such donations are deemed to be income from property, is not to be included in its total income under s. 11 or s. 12. The equity under s. 80G(5) cannot go beyond that.

A perusal of s. 11 and s. 12 would disclose that income from property held for charitable or religious purposes under a trust is not included in the total income of the previous year of the persons in receipt of the income where any such income has accumulated or set apart for application to such purposes in India to the extent to which the income so accumulated or set apart is not in excess of 25 per cent of the income from such property. In clause (d) of subs.(1) of s. 11 income in the form of voluntary contributions made with a specific direction that they shall for part of the corpus of the trust or institution, that is to say, donations made with directions that the donation shall form part of corpus of the trust or institution are also not includible in the income of the trust. It may be further observed that merely because the accumulation of the

income from property exceeds 25 per cent it does not result in inclusion of the entire income in the taxable income of the assessee. The two conditions speak out, firstly, that income derived from property to the extent to which such income is applied to such purposes in India is not to be included in the computation of total income and it is only where there is accumulation of income, such accumulation exceeds 25 per cent shall not be liable to be exempt from income but in case accumulation is restricted to 25 per cent even accumulation is not to be included in the computation of total taxable income. That too is not in absolute terms. In that regard subs. (2) of s. 11 points out certain conditions and contingencies in which that limit is also relaxed. We need not dilate here in detail on this aspect. This we have noticed only for the purpose of showing, firstly, that as on the date when donation is made which is the relevant date for the purposes of claim of donor to deduction under s. 11(1) it is not possible to point out what shall be the exact state of affairs that will exist at the close of the year nor is it possible for the person considering the application for approval, which requires to consider whether the income derived by such trust would not be liable to be included in its total income, can determine, nor as on the date of application whether the income which will henceforth be derived by the trust asking for approval, if it is otherwise eligible to claim exemption from the inclusion of such income in the taxable income, would in fact be entitled to sustain that claim to the fullest extent or not at the time of assessment. That is the jurisdiction and Authority of the AO to enquire into

and make appropriate order at the time when assessment of the trust is being made. The Authority examining the question whether a fund or institution is eligible to be certified for the purposes of s. 11(1) is not to act as an AO and pronounce upon the pending assessments. The CIT, in examining this aspect, in respect of pending assessments, in our opinion, exceeded his jurisdiction while considering the application for approval. He, as a matter of fact, stepped into the jurisdiction of the AO, decided upon the claim of the assessee in respect of its assessment of income then pending and acted as if he was the AO deciding upon the assessment of the trust. While dwelling on the merits of pending assessment he failed to consider that upto 31st March, 1998, the trust has already enjoyed approval and the donors who had already made donations to it would be entitled to such benefit notwithstanding the fate of assessment of the trust. The actual assessment of the trust and its actual liability to tax in accordance with provisions of s. 11 and 12 and 12A has no bearing on the claim of the donors for what benefit approval is accorded. Explanation 2 to s. 80G(5) which tells in no uncertain terms that a deduction to which the assessee is entitled in respect of donation made to an institution or fund to which subs. (5) applies shall not be denied merely on either or both the following grounds, namely, that any part of income of the institution or fund has become chargeable to tax due to noncompliance with any of the provisions under s. 11, s. 12 and/or s. 12AA and under clause (c) of subs. (1) of s. 13 the exemption under s. 11 or 12 can be denied to an institution or fund in respect of income accruing or arising

to it from any investment referred to in clause (h) of subs. (2) of s. 13.

Likewise, the institution or fund whose income is not to be included in the taxable income of the recipient under provisions of s. 10, namely, clause (22) or clause (22A) or clause (23) or clause (23AA) or clause (23C) would go to show that these clauses identified different institutions for the purpose of granting exemptions, some of which require approval by publication in Official Gazette, some of which require to bear a particular character or the like. Once that character or the condition is fulfilled, s. 10 operates. For illustration, under clause 22, as it was in force upto 31st March, 1999, any income of a university or other educational institution existing solely for educational purposes and not for purposes of profit was not to be included in total income. Now, if an approval is sought by such institution what the approving Authority can seek to enquire is whether the applicant university or educational institution which is solely existing for educational purposes, and whether its purpose is not to earn profit. Under clause (23) exemption is in respect of income of an association or institution established in India which may be notified by the Central Government in the Official Gazette having regard to the fact that the association or institution has as its object the control, supervision, regulation or encouragement in India of the games of cricket, hockey, football, tennis or such other games or sports as the Central Government may, by notification in the Official Gazette, specify in this behalf. The application for approval in respect of any such institution, if it falls within clause

(iv) of subs. (2) of s.80G, an enquiry by the CIT could only extend to find out whether the association or institution is so notified under s. 10(23). It cannot by itself examine the validity or correctness of notification nor can it grant approval even if he concludes that such institution exists for the purposes mentioned in subs. (23), if notification by Central Government is not issued in that regard. That is demonstrative of the scope of enquiry by the CIT while enquiring the existence of condition under s. 80G(5)(i). That extends to eligibility to exemption under various provisions of the IT Act referred to in that subsection, but not to actual assessment which depends on fulfillment of further conditions by the eligible institutions, trusts or funds. In none of these cases inquiry of the CIT under s. 80G(5)(vi) extend to the actual computation of income under the assessment that is likely to be framed. We see no reason that such exercise can be taken in respect of a trust which is claiming exemption not under s. 10 but under s. 11 and 12 of the Act, once the CIT finds that the person who is claiming approval is the assessee who claimed his income not liable to be included in taxable income under s. 11 or 12. The enquiry relates to whether it is registered under s. 12A, whether it is a trust wholly for charitable purposes or religious purposes, and whether income received by it is liable to be considered under s. 11, but it does not go beyond that to examine as an AO whether the income received by it at the close of any particular year or years was or was not actually be included in taxable income in the past. This consideration must be whether the income receivable by it will or will not be liable to be considered for exclusion under s. 11. Such enquiry

obviously cannot include in enquiry whether at the close of previous year the donee will actually be able to sustain such claim because of fulfillment of some conditions by him as to applicability or accumulation of income, as it is not possible to predicate that in praesenti when donation is made. As we have noticed above, that question would depend upon the facts existing at the close of the assessment year and at the time of considering the application it cannot be examined in the light of what is going to happen in pending assessments in respect of which approval certificate was already existing and assessment of which would not affect the donations made to the trust during that year."

5. Mr. Desai, however, submitted that the aforesaid decision would not apply to the facts of the case on hand, and therefore, the Tribunal erred in passing the impugned order. He, further, submitted that the Tribunal ought to have appreciated the fact that the principle which will apply at the time of registration of a Trust under Section 12AA of the Act does not apply in same manner, while recognizing the donations made to it. He, then, submitted that for the purpose of benefit of Section 80G, it is necessary that no income under either Section 11 or Section 12 is included in the total income of the trust. He, then, lastly submitted that the Tribunal ought to have appreciated the fact that the assessee had not spent nearly 85 per cent of the amount

towards the object of the trust. He, therefore, submitted that the appeal be allowed.

6. Having heard the learned Counsel for the appellant-revenue and having gone through the material on record including the orders passed by the CIT(A) as well as the Tribunal, we are unable to accept the submission made by Mr. Desai that the decision of this Court, as referred herein above, would not apply to the case on hand. It is well settled position of law that at the time of granting approval under Section 80G of the Act, what is to be examined is the object of the trust and so far as the aspect of income is concerned, same can be very well examined by the AO at the time of framing assessment. However, in the case on hand, the assessee-Trust was refused recognition only on the ground that the assessee-Trust had not spent 85 per cent of the amount towards the objects of the Trust. The Tribunal, while passing the impugned order, relied on a decision of the Punjab & Haryana High Court in **"CIT VS. SURYA EDUCATIONAL & CHARITABLE TRUST"** [2011] 203 Taxmann 53, wherein, the High Court held that at the stage of registration under Section 12AA of the Act, the extent and nature of activities are not required to be examined and the same is required to be examined in assessment proceedings. Similar view is taken by this Court

in Tax Appeal No. 306 of 2014 and the allied matters. In view of the above discussion, we are of the opinion that the Tribunal committed no error in issuing direction to grant recognition to the Respondent-Trust under Section 80G(5) of the Act. Since, the issue is squarely covered by the aforesaid decisions, we refrain ourselves from making any further observations.

7. In the result, the issue is answered in favour of the assessee and against the revenue. The present appeal fails and is **DISMISSED**. No order as to costs.

(K.S.JHAVERI, J.)

(K.J.THAKER, J)

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THE HIGH COURT
OF GUJARAT

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