

IN THE INCOME TAX APPELLATE TRIBUNAL
LUCKNOW BENCH "SMC", LUCKNOW

BEFORE SHRI. T.S. KAPOOR, ACCOUNTANT MEMBER
AND SHRI PARTHA SARATHI CHAUDHURY, JUDICIAL MEMBER

ITA No.157/LKW/2017
Assessment Year:2010-11

Income Tax Officer (Exemptions) Lucknow	v.	M/s Army Wives Welfare Association Headquarter Central Command Lucknow
		TAN/PAN:AAATC7776K
(Appellant)		(Respondent)

Appellant by:	Smt. Neelam Agrawal, D.R.		
Respondent by:	Shri V.B. Bhargav, FCA		
Date of hearing:	02	05	2018
Date of pronouncement:	04	05	2018

ORDER

PER PARTHA SARATHI CHAUDHURY, J.M:

This appeal preferred by the Revenue emanates from the order of the Id. CIT(A)-IV, Lucknow dated 15/12/2016 on the following grounds of appeal:-

1. The Ld. CIT(A) has erred on facts and in law in allowing the claim of exemption u/s 10(23AA) of the Income Tax Act, 1961 as the claim of exemption u/s 10(23AA) of the Income Tax Act, 1961 has been made during the assessment proceedings and assessee is registered u/s 12AA of the Income Tax Act, 1961 and claiming exemption u/s 11 of the Income Tax Act, 1961 in preceding years, current year and subsequent years in the Return of Income. Exemption u/s 12AA of the Income Tax Act, 1961 is granted

subject to the fulfillment of conditions laid down in section 11,12 and 13 of the Income Tax Act, 1961.

2. The Ld. CIT(A) has erred on facts and in law in deleting the addition of Rs. 20,15,000 /- made u/s 40(a)(ia) of the Act. In the decisions of Hon'ble ITAT Amritsar, Hon'ble ITAT Mumbai and Hon'ble Mumbai High Court it is held that provisions of section 40(a) of the Act are not applicable in case of a charitable Trust or institutions where income exempted is computed in terms of Section 11 of the Act. In this case exemption u/s 11 of the Income Tax Act, 1961 has been denied for violation of section 13 of the Income Tax Act, 1961.

3. The Ld. Commissioner of Income Tax (Appeals) has erred on facts and in law in restricting the Maximum Marginal Rate on the addition of Rs. 1,54,745/- and Rs. 2,95,185/- made u/s 13 of the Income Tax Act, 1961 whereas the exemption u/s 11 of the Income Tax Act, 1961 has been denied in this case in the assessment order dated 12.02.2016.

4. Appellant craves leave to add or amend any one or more of the grounds of appeal, as stated above as and when need of doing so arises with the prior permission of the Hon'ble Bench.

2. The facts of the case are as under:-

a) The appellant filed return of income showing loss of Rs.(-) 39,16,892/-. Order u/s 143(3) of the Act was passed by ITO, Range-IV(I), Lucknow on 30.03.2013 assessing total income at Rs.4,07,610/-. Case was later on transferred to ITO(Exemption), Lucknow.

b) The AO noted that appellant had made payment of Rs.20,15,000/- to an event organizer during the year for

organizing an event but appellant had not deducted TDS on the same, therefore, the provisions of section 40(a)(ia) of the Act were violated.

c) Case was reopened and notice under section 148 of the Act was issued to the appellant. Subsequently, statutory notices u/s 142(1) of the Act and questionnaire were issued which were complied with.

d) Assessment was completed u/s 143(3) r.w.s 147 of the Act vide order dated 12.02.2016 where total income was assessed at Rs.39,40,110/- after making following additions/disallowances.

- AO noted that appellant had paid an amount of Rs.20,15,000/- to an event organizer but not deducted TDS on the same. AO held that appellant had violated the provisions of section 40(a)(ia) of the Act and disallowed this amount of Rs. 20,15,000/-.
- The AO held that as per order passed u/s 143(3) of the Act, the appellant had violated provisions of section 13 of the Act, therefore, exemption u/s 11 or 12 of the Act are not allowable to the appellant. In view of this fact, a disallowance of Rs.20,15,000/- was made to total income of the appellant u/s 40(a)(ia) of the Act and this amount was added to total income of the appellant.

3. Aggrieved by the order of the Assessing Officer, assessee preferred an appeal before the Id. CIT(A). With regard to assessee

claiming exemption under section 10(23AA), it was observed and held by the Id. CIT(A) as under:-

"In the original assessment passed u/s 143(3) of the Act the appellant claimed exemption u/s 10(23AA) of the Act during course of assessment proceedings. The AO did not allow the claim in view of judgement of Hon'ble Apex Court in the case of M/s Goetze India reported in 284ITR 323. Appellant filed an appeal before Ld. CIT(A) who held that the AO rightly applied the decision in case of M/s Goetze India and denied claim u/s 10(23AA) of the Act.

Appellant filed further appeal before Hon'ble ITAT who vide order dated 14.01.2016 set aside the matter back to the file of Ld. CIT(A) holding that judgement in case of M/s Goetze India impinges on powers of AO but not of CIT(A).

This ground of appeal has been decided by the undersigned in the appellant order passed in the case of appellant dated 14.12.2016 for AY 2010-11 whereby it is held that on merit exemption u/s 10(23AA) should be allowed to the appellant. Since this ground of appeal has been decided in favour of the appellant in Appeal No. 68/CIT(A)-4/Lko/15-16 vide order dated 14.12.2016 in case of appellant for AY 2010-11, therefore, there is no need to repeat the same again in this order also. Therefore, this ground of appeal becomes academic in nature as same has been allowed vide separate order dated 14.12.2016."

4. We have perused the case records and we find that this issue has already been decided in favour of the assessee in appeal No.68 vide order dated 14/12/2016 for assessment year 2010-11 following which Id. CIT(A) has provided relief and therefore we do not find any infirmity with the findings of the Id. CIT(A) and relief provided to the assessee is sustained.

5. With regard to disallowance under section 40(a)(ia) to the tune of Rs.20,15,000/-, it was observed and analysed by the Id. CIT(A) as under:-

“6.1 The appellant contended that TDS is not applicable on a Charitable Society registered u/s 12A of the Act as expenditure has to be seen from the point of view of application of income for charitable purpose. It was contended that Section 40(a)(ia) is not applicable to a charitable society registered u/s 12A of the Act. The contention of the appellant is supported by following judgements of Hon'ble High Court and Hon'ble ITAT's.

a) Hon'ble ITAT Amritsar in Bala Farid Vidyak Society, Bathinda vs. ACIT vide order dated 31.01.2011 in ITA No. 180/2010(ASR)

b) Hon'ble ITAT Mumbai in M/s Mahatama Gandhi Seva Mandir Mumbai vs. DDIT(E) vide order dated 11.05.2012 in ITA No. 4138/Mum/2011.

c) Hon'ble ITAT, Amritsar in ACIT, Range-III, Jalandhar Vs. Jalandhar improvement Trust vide order dated 09.06.2011 in ITA NO. 155(Asr)/2010.

d) Hon'ble Mumbai High Court in Bombay Stock Exchange Ltd. Vs. DDIT(Exemption) reported in 365 ITR 181.

6.2 The undersigned has gone through the order of Hon'ble ITAT, Amritsar in case of ACIT, Range-III, Jalandhar vs. Jalandhar Improvement Trust for A.Y. 2005-06. The issue involved was whether the Ld. CIT(A) erred in deleting additions of Rs.2,75,544/- (Payment towards works contract), Rs.16,72,161/- (Advertisement expense payment) and Rs. 1,40,90,000/- (Payment to HPCL for work contract for laying pipeline) which was

made by AO by invoking provisions of section 40(a)(ia) of the Act. The Hon'ble ITAT dismissed the appeal of Revenue and upheld the order of Ld. CIT(A). The relevant portion is reproduced as under:-

"Having heard both the parties, we find that similar issue came up for consideration before this Bench, in the case of Bhatinda Vs. The Asstt. CIT, Circle-I, Bhatinda, in ITA No.180(Asr)/2010 for the assessment year 2006-07 and the Tribunal vide its order dated 31 January, 2011, allowed the appeal of the assessee. The relevant finding part of the impugned ITA T order is reproduced hereunder:-

5. We have heard both the parties and have gone through the material available on record. In the case of ITO vs. Sangat Sahib Bhai Pheru Sikh Educational Society, Faridkot, the Amritsar Bench of the IT AT has held as under:-

"In this case, the facts of the case as recorded above has clearly proved that the assessee is an Educational Society running Educational Institution for nonprofit purposes. This fact is admitted by the AO in the assessment order itself and the exemption from the tax under section 10(22) of the Income Tax Act has been allowed in favour of the assessee in the assessment order. Copy of the audited balance sheet is filed in the paper book which shows that the assessee has prepared the income and expenditure account of the educational society and as such the assessee was not carrying on any business or profession and is also not carrying on any business as is referred to in section 49 AB(c) of the Income Tax Act. The assessee has no sales, turnover or gross receipts from the business or profession as specified under section 44AB, therefore, the provisions of section 44AB are not attracted in this case. The income of

the assessee is exempt as admitted by the AO, therefore, the decision of the IT AT, Mumbai 'A' Bench in the case of Indian Magnum Fund (supra) Is clearly applicable to the present appeals.'

5.1 In the case of Asstt. CIT vs. India Magnum Fund reported in (2002) 74 TTJ (Mum) 620, the Mumbai 'A' Bench of the Tribunal has held as under:-

"It is well settled that there has to be legal basis for any levy of taxes in India. As per Art. 265 of the Constitution of India, "no tax shall be levied or collected except by authority of law". The legal basis for levy of income tax is given in s.4. It provides for charge of income tax "in respect of the total income of the previous year of every person". It is, therefore, clear that charge of Income tax under the IT Act, 1961, is in respect of the "total income". It is clear that the total income is only that the Act. Chapter IV of IT Act provides for "computation of total income". Sec. 44AB is only one of the sections enacted under chapter IV-D, dealing with computation of profits and gains of business or profession. In other words, S.44AB becomes operative when there is computation of profits and gains of business or profession as a part of total income. If there is no computation of total income or for that matter, no computation of profits and gains of business as a part of computation of total income, the provisions of s. 44AB would simply not take off. The income of the assessee is admittedly wholly exempt under s. 10(23D). Section 10(23D) is part of Chapter III of the Act. The heading of Chapter III is "Incomes which do not form part of total income". Therefore, provisions of s. 44AB cannot and do not have any application in relation to incomes which are enumerated under chapter III and are expressly excluded

from total income. The reiterate, s. 44AB is operational only when profits and gains of business or profession are to be computed for the purpose of computation of total income to meet the requirements of the provisions of s. 4. That being so, any income which is designated as "Incomes which do not form part of total income" have nothing to do and cannot be subjected to the provisions of s. 44AB. In view of the discussion in the foregoing paragraphs, the assessee was not liable to obtain any audit report within the meaning of s. 44AB. For this reason, the impugned order of the CIT(A) canceling penalty under s. 271B cannot be interfered with."

5.2 Respectfully following these Tribunal decisions, this ground of appeal filed by the assessee is allowed."

6.1 Thus, respectfully following the aforesaid order of the Tribunal, this ground of appeal of the revenue is dismissed."

6.3 Similarly, the Hon'ble ITAT, Mumbai in case of Mahatama Gandhi Seva Mandir vs. DCIT(E), Mumbai for A.Y. 2007-08 in ITA No. 4138/Mum/2011 held that provisions of section 40(a) are not applicable in case of charitable trust or institution where income and expenditure is computed in terms of section 11 of the Act. The relevant portion of the order is reproduced as under:-

7. We have carefully considered the rival submissions of both the parties and also the impugned order before us. It is an admitted fact that the assessee is a charitable trust, which is duly registered under section 12A and accordingly its income and expenditure is computed in terms of section 11. The issue before us is whether the disallowance under Section 40(a)(ia) can be made for the non deduction of TDS under section 194 in the case of such kind of assessee.

Under the Income Tax Act, computation of total income is made under the various heads of income, viz:-

- i) Salary*
- ii) Income from house property*
- iii) Profits and gains from business or profession*
- iv) Capital gains*
- v) Income from other sources.*

7.1 Now, let us examine section 11 and section 40 to decide this controversy. Section 11 to 13 is a part of chapter 3 under the heading "Income which does not form the part of the total income". Section 11(1) provides that "subject to the provisions of Section 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". Thereafter it is provided as to how the income and to what extent it can be applied for charitable purposes. The manner in which the income can be applied has been laid down in Section 11(1) to Section 11(5). Section 13 provides exception to Section 11 wherein such an income can be excluded from the exempt income of the trust. Thus, section 11 to 13 provides for application of income by a trust for charitable purposes and to that extent, subject to certain conditions, income of the trust is treated to be exempted from taxation. The incomes which are computed under the various heads of income, the mode of computation has been provided under respective sections.

7.2 Here we are concerned with section 40, which is part of computation of profit and gains from business or profession. The profits and gains from business or

profession are computed under section 28 and section 29 states that "the income referred to in section 28 shall be computed in accordance with the provisions contained in section 30 to 43 D". Thus, section 30 to 43 provides various kinds of deductions which are to be made while computing the profit of the assessee from business or profession. Section 40 provides an exception to such deductions which have been provided in section 30 to 38 and starts with a non obstante clause reading as under:-

"notwithstanding anything to the contrary in sections 30 to 38, the following amounts shall not be deducted in computing the income chargeable under the head "profits and gains of business or profession."

Thus, Section 40 is applicable only when deductions under sections 30 to 38 are being made in computing the income chargeable under the head "profits and gains of business or profession" under section 28. The exception in section 40 is carved out, only for the purpose of Section 28 and not for computing the exemption of income of a charitable trust under section 11. The disallowance made under section 40(a) will only go to enhance the business profit of an assessee whose income is assessable under section 28 and not otherwise. Hence, provisions of section 40(a)(ia) are not applicable in case of charitable trust or institution where income and expenditure is computed in terms of section 11.

8. Accordingly, we do not find any merit in the orders passed by the assessing officer as well as by the CIT(A) and delete the disallowance made under section 40(a)(ia) on account of non-deduction of TDS for sum of Rs.3,06,457/- and the Ground No. 1 as raised by the assessee stands allowed.

6.4 Similarly, the Hon'ble Mumbai High Court in the case of *M/s Bombay Stock Exchange vs. DDIT (Exemption)*, Mumbai reported in 365 ITR 181 in para 14(E) of the order held that the income of petitioner is exempted u/s 11 of the Act and he is not carrying on any business, therefore, section 40(a)(ia) of the Act has no application.

6.5 In the present case, the appellant is a charitable institution/society registered u/s 12A of the Act. Its income is claimed as exempt u/s 11 of the Act. Section 11 falls under chapter III with heading "income which do not form part of total income." On the other hand section 40(a) of the Act falls under chapter IV with the heading "Computation of total income". It is clear that section 40 applies to deduction claimed in computing the income chargeable under the head "profit and gains of business and profession" Thus, section 40(a) has no application to the facts of the present case as section 40 is applicable only when deductions under section 30 to 38 of the Act are being made while computing "Profit and gains of business or profession" under section 28 of the Act. Section 40 is carved out only for the purpose of section 28 of the Act and will not come into play in cases of Charitable Society/Institution which have claimed exemption of income u/s 11 of the Act.

6.6 In view of the facts outlined above and the decisions of Hon'ble ITAT Amritsar, Hon'ble ITAT Mumbai and Hon'ble Mumbai High Court it is held that provisions of section 40(a) of the Act are not applicable in case of a charitable Trust or institutions where income and expenditure is computed in terms of Section 11 of the Act. As a result the disallowance made by the AO u/s 40(a) (ia) of the Act in the case of the appellant to the tune of Rs. 20,15,000/-, is hereby deleted."

6. We find that the order of the Id. CIT(A) on this issue is a speaking order having placed his reliance on the Co-ordinate ITAT Amritsar and Mumbai Benches and also following the decision of Hon'ble Bombay High Court. We, therefore, find no infirmity with the findings of the Id. CIT(A) and relief granted to the assessee is hereby sustained.

7. In the result, appeal of the Revenue is dismissed.

Order pronounced in the open Court on 04/05/2018.

Sd/-
[T.S. KAPOOR]
ACCOUNTANT MEMBER

Sd/-
[PARTHA SARATHI CHAUDHURY]
JUDICIAL MEMBER

DATED: 4th May, 2018

JJ:0205

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT(A)
4. CIT
5. DR