

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX APPEAL NO. 292 OF 2002

The Cotton Textiles Exports  
Promotion Council, Mumbai

....Appellant

V/s.

ITO (Exemptions), I(1), Mumbai  
and anr.

....Respondents

\* \* \* \* \*

Mr. Jehangir Mistri, Senior Counsel a/w. Mr. Niraj Sheth,  
Mr. Rajesh Poojary i/by. Mulla & Mulla and Cragie  
Blunt and Caroe, Advocate for the appellant.

Mr. Charanjeet Chanderpal a/w. Ms. Namita Shirke,  
Advocate for the respondent.

**CORAM :-**

**M.S. SANKLECHA, &**

**SANDEEP K. SHINDE, JJ.**

**DATE :-**

**27TH JUNE, 2018.**

**P.C. :-**

1. This Appeal under Section 260A of the  
Income-Tax Act was admitted on 2<sup>nd</sup> September, 2004  
on the following substantial questions of law :

*“Whether on the facts and in the*

*circumstances of the case, the Tribunal failed to appreciate that the original order of assessment dated 16.3.88 was framed without allowing the benefits of section 11 of the Act and hence the assessee could not have raised the ground of the method of computing taxable income, if any, when applying section 11 of the Act, in an appeal against the said order ?”*

2. This Appeal relates to Assessment Year 1985-86.

3. The appellant-Assessee was incorporated as a Company under Section 26 of the Indian Companies Act, 1913. The object of the appellant was to promote export of cloth and yarn. In the above view, the appellant was consistently claiming the benefit of income not being included in its total income in terms of Sections 11 to 13 of the Act i.e. income from property held for charitable purposes.

4. For the subject Assessment Year, the appellant filed its return of income claiming the benefit of Sections 11 to 13 of the Act and offered Nil amount as taxable income. The Assessing Officer, by an order dated 16<sup>th</sup> March, 1988 passed under Section 143(3) of the Act held that the appellant is not entitled to be benefit of Section 11 of the Act. This was for the reason that it had a current bank account in Frankfurt, West Germany where it had established an office to promote the export of cloth and yarn from India. This current Bank Account to carry out its day-to-day activities was held to be investments in contravention of Section 11(5) read with Section 13(1)(d) of the Act. On the aforesaid ground, the entire benefit under Section 11 of the Act was disallowed and income was computed under the Head “Profit and Gains in Business”.

5. Being aggrieved with the order dated 16<sup>th</sup> March, 1988 the appellant filed an appeal to the Commissioner of Income-Tax, (CIT (Appeals). By an

order dated 6<sup>th</sup> February, 1989 the CIT (Appeals) allowed the appellant's appeal, inter-alia, holding that as the appellant had a Liason office in West Germany, the expenses of that office had to be incurred out of remittances from India which were kept in the Current Account with a Bank in West Germany. Consequently, it was held that, there was no evidence of any interest being earned on the same. Therefore, amounts in a current account of a Bank would not constitute an investment making Section 11(5) read with Section 13(1)(d) of the Act inapplicable to the present facts. In view of the above, the order of the Assessing Officer was set aside and the assessment was restored to the Assessing Officer to pass a fresh order after extending the benefit of Section 11 of the Act.

6. Consequent to the above, the Assessing Officer on 27<sup>th</sup> March, 1989 gave effect to the order dated 6<sup>th</sup> February, 1989 of the CIT (Appeals). However, while giving effect to the order of the CIT

(Appeals), all the expenses which were incurred to earn the gross income was not taken into account resulting in a surplus which became taxable even after application of Section 11 of the Act.

7. Being aggrieved with the order dated 27<sup>th</sup> March, 1989 of the Assessing Officer giving effect to the order of the CIT (Appeals), the appellant filed an appeal to the CIT (Appeals). By an order dated 9<sup>th</sup> July, 1992, the CIT (Appeals) set aside the order dated 27<sup>th</sup> March, 1989 of the Assessing Officer giving effect to the order dated 6<sup>th</sup> February, 1989 of the CIT (Appeals). This inter-alia on the ground that the order was passed without giving a hearing to the petitioners and figures taken to determine the exempted income had to be reworked. Besides, holding the provisions of Section 11(1) of the Act were not correctly applied so as to determine whether or not, there is a surplus income in the subject Assessment Year which could be subjected to tax.

8. Being aggrieved with the order dated 9<sup>th</sup> July, 1992 of the CIT (Appeals), the Revenue and the appellant, both filed Appeals before the Tribunal. By the impugned order dated 8<sup>th</sup> October, 2001 the Tribunal allowed the Revenue's Appeal holding that the Appeal from Order giving effect to the order of the CIT (Appeals) raised issues which were not the subject matter of appeal filed in the first round i.e. from the order of the Assessing Officer dated 16<sup>th</sup> March, 1988 passed under Section 143(3) of the Act to the CIT (Appeals). It was held that, the Appeal from Order giving effect to the order of the CIT (Appeals) is only restricted to the action of the Assessing Officer in not following the directions of the Appellate Authority. On the aforesaid ground, the impugned order dated 8<sup>th</sup> October, 2001 of the Tribunal held that the CIT (Appeals) in its order dated 9 July 1992 had exceeded its jurisdiction in deciding the issues which were not agitated in the appeal filed earlier against the order dated 16<sup>th</sup> March, 1988 of the Assessing Officer passed

under Section 143(3) of the Act. Consequently, the order dated 9<sup>th</sup> July, 1992 of the CIT (Appeals) in favour of the appellant was quashed and set aside by allowing the Revenue's Appeal before it.

9. We find that the appeal which was originally filed to the CIT (Appeals) from the order dated 16<sup>th</sup> March, 1988 under Section 143(3) of the Act was on account of rejection of the claim for benefit under Section 11 of the Act. This rejection of Section 11 benefit resulted in the appellant being assessed to tax under the Head "Income from Business or Profession". On Appeal, the CIT (Appeals) by an order dated 6<sup>th</sup> Feb, 1989 set aside the order of the Assessing Officer and directed the Assessing Officer to grant the benefit of Section 11 to the appellant while assessing the appellant to tax for the subject Assessment Year. It was while giving effect to the order dated 6<sup>th</sup> February, 1989 of the CIT (Appeals), the Assessing Officer has taken figures which were incorrect besides incorrectly

applying the provisions of Section 11 of the Act to determine surplus income, if any, which could be subjected to tax. Thus, the order dated 27<sup>th</sup> March, 1989 of the Assessing Officer giving effect to the Appellate Order, had not appropriately dealt with the directions of the CIT (Appeals) as contained in the order dated 6<sup>th</sup> February, 1989. This is on account of incorrect application of Section 11 of the Act, inter-alia, taking incorrect figures to carry out/give effect to the direction of the Appellate Authority. Thus, the Appeal was in the facts of this case to the CIT (Appeals) was only to ensure proper effect is given to it is order dated 6<sup>th</sup> February, 1989 by the Assessing Officer.

10. In any event, in the present facts, the impugned order of the Tribunal could not set aside the order dated 9<sup>th</sup> July, 1992 of the CIT (Appeals), on the ground that while dealing with an Appeal from the order dated 27<sup>th</sup> March, 1989, (which gives effect to the order of the Appellate Authority) it could not deal

with the issues which were not raised earlier while filing an appeal from an order passed under Section 143(3) of the Act as there issues did not arise. Thus in the facts of the present case, this would lead to injustice as the appeal filed originally from the order of the Assessing Officer under Section 143(3) of the Act was only on denial of the claim for benefit of Section 11 of the Act. It was allowed by order dated 6<sup>th</sup> February, 1989 of the CIT (Appeals) which directed the Assessing Officer to extend the benefit of Section 11 to the appellant while determining the income which could be subjected to tax for the subject Assessment Year. It is while giving effect to the order of the CIT (Appeals), that the Assessing Officer has committed errors in applying Section 11 of the Act in determining the surplus income which would be subject to tax. These issues were not a subject matter of consideration by the Assessing Officer in the earlier Assessment order dated 16<sup>th</sup> March, 1988 under Section 143(3) of the Act. Therefore, the issues now

raised by the appellant-Assessee before the CIT (Appeals) could never have been raised by the appellant while challenging the earlier order. There can be no wrong with a remedy. Moreover, the purpose and object of the orders passed under the Act is to ensure that the Act is properly implemented and the Assessee is not burdened with tax which under the law, it is not obliged to pay. Thus, the finding in the impugned order dated 2<sup>nd</sup> September, 2004 in the peculiar facts of this case, that an appeal from an order giving effect to the grounds which were not raised in the earlier Appeal filed from the order dated 16<sup>th</sup> March, 1988 of the Assessing Officer under Section 143(3) of the Act is not correct.

11. In the above view, substantial question of law is answered in the Affirmative i.e. in favour of the appellant-assessee and against the respondent-Revenue.



Rane

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Wednesday, 27.6.2018

12. Appeal allowed. No order as to costs.

**(SANDEEP K. SHINDE, J)**

**(M.S. SANKLECHA, J)**