आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ 'एच' मुंबई
IN THE INCOME TAX APPELLATE TRIBUNAL "H" BENCH, MUMBAI

श्री डी. करुणाकर राव, लेखा सदस्य, एवं श्री अमरजीत सिंह, न्यायिक सदस्य, के समक्ष
BEFORE SHRI D. KARUNAKARA RAO, AM AND
SHRI AMARJIT SINGH, JM

आयकर अपील सं/ I.T.A. No.4852/Mum/2016
(**निर्धारण वर्ष** / Assessment Year:2010-11)

Seth Walchand Hirachand Memorial Trust Hincon House, 11th Floor, 247 Park, L.B.S. Marg, Vikhroli (West) Mumbai - 400083	**बनाम**/ Vs.	Income Tax Officer (Exemp.) II (1) 5th Floor, Piramal Chambers, Parel, Lalbaug Mumbai - 400012
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AAATW0014E		
(पीलार्थी **/Appellant**)	..	(प्रत्यर्थी / **Respondent**)

Assessee by:	Ms. Vaibhavi Patel
Revenue by:	Shri M. C. Omi Ningshan

सुनवाई की तारीख / Date of Hearing: 05.01.2017
घोषणा की तारीख /Date of Pronouncement: 29.03.2017

आदेश / O R D E R

PER AMARJIT SINGH, JM:

The assessee has filed the present appeal against the order dated 11.05.2016 passed by the Commissioner of Income Tax (Appeals)-1, Mumbai [hereinafter referred to as the "CIT(A)"] relevant to the A.Y. 2010-11.

2. The assessee has raised the following grounds:-

"Ground No.1:

On facts and in the circumstances of the case and in law, the learned CIT(A) erred in confirming the Assessing Officer's action of not allowing the accumulation of 15% of income as allowed under section 11(1)(a) of the Act.

The addition made by the learned Assessing Officer be deleted.

Ground No.2:

On the facts and in the circumstances of the case and in law, the learned CIT(A) erred in confirming the Assessing Officer's action of not allowing exemption under section 10(33) of the Act, on dividend amounting to Rs.2,76,459/- received on investments in units and mutual funds.

The addition made by the learned Assessing Officer be deleted.

Ground No.3:

On facts and in the circumstances of the case and in law, the learned CIT(A) erred in not adjudicating the Assessing Officer's action of not allowing the current years (A.Y.2010-11) excess application of Rs.20,93,366/- to be carried forward toe subsequent year(s).

The addition made by the learned Assessing Officer be deleted.

Ground No.4:

On facts and in the circumstances of the case and in law, the learned CIT(A) erred in not adjudicating the Assessing Officer's action of not allowing the brought forward excess application to Rs.7,41,31,385/-

The addition made by the learned Assessing Officer be deleted.

3. The brief facts of the case are that the assessee filed its return of income on 03.09.2010 along with the Income and Expenditure Account, Balance Sheet and Audit Report in Form No.10 B declaring total income to

the tune of Rs. (-) 7,62,24,751/-. The case was selected for scrutiny under CASS therefore notice u/s.143(2) of the Income Tax Act, 1961 (in short "the Act") was issued on 13.09.2011 which was duly served upon the assessee. Subsequently, the notice u/s.142(1) of the Act was also issued to the assessee on 24.02.2012 and 30.05.2012. The assessee is the Trust which has been registered with the Director of Income Tax (Exemption), Mumbai u/s.12A and 80G of the Act. The assessee claimed the exemption u/s.11 of the Act and claimed an amount of Rs.2,83,801/- as accumulation u/s.11(1)(a) of the Act being 15% of the gross receipts which was not allowed as no income remains after deducting the regular administrative expenditure and expenses towards the application of object. It was also found that the assessee did not include its dividend of units of UTI received during the year amounting to Rs.2,76,459/-, as it was exempt u/s.10(33) of the Act.

4. Since the said dividend income was earned on the asset which was the part of the property held under Trust as such income so earned was the part of the income of the Trust which was available for application, therefore, the said exemption was not granted. The assessee also claimed an amount of Rs.20,93,366/- as deficit for setting it off in future years which was also not allowed. Feeling aggrieved the assesse filed an appeal before the CIT(A) who confirmed the order, therefore, the assessee has filed the present appeal before us.

ISSUE NO.1:-

5. Under this issue the assessee has challenged the confirmation of the order of the Assessing Officer by the CIT(A) in which the CIT(A) has confirmed the order of the Assessing Officer for not allowing the accumulation of the 15% and the income was allowed u/s.11(1)(a) of the Act. The learned representative of the assessee has argued that this issue has been covered by the order passed by the Hon'ble Income Tax Appellate Tribunal, Mumbai bench in case of ADIT(E) 1(2) Vs. Sayaji Ubakhin Memorial Trust (ITA No.5646/Mum/2011) dated 17.05.2013. However, on the other hand the learned representative of the department has strongly relied upon the order passed by the CIT(A) in question. Before going further, it is necessary to advert the finding of the ADIT(E) 1(2) Vs. Sayaji Ubakhin Memorial Trust (ITA No.5646/Mum/2011) dated 17.05.2013 on record:-

> "5. With regard to Ground No.2 of appeal, the Assessing Officer observed that if the trust has not left with surplus and there is deficit, then there can be no accumulation made. AO has stated that accumulation or setting apart of 15% of income has been allowed by virtue of provision of section 11(1)(a) of the Act when assessee is not able to spend the entire amount and when the entire amount has been spent, there is no surplus left that can be accumulated. Aggrieved, assessee filed appeal before ld. CIT(A).
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> 6. On behalf of assessee, it was submitted that as per section 11(1)(a), the expenditure incurred by a trust or institute on the

objects of the trust by way of application of income derived from the property held for religious or charitable purposes is deductible from the income. It was submitted that there is no bar in law and there are no specific provisions in the Act which says that such deduction of 15% for accumulation will not be allowed in case of deficit. Such 15% accumulation is allowable irrespective of whether 85% of the income have been applied to charitable purposes or not. Ld. CIT(A) after considering the submission of the assessee stated that AO is not justified in denying the claim of the assessee for the accumulation of income and, accordingly, allowed the claim of the assessee. Being aggrieved, department is in appeal before the Tribunal.

7. We observe that ld CIT(A) has allowed the claim of the assessee, inter alia, observing as under:

> "6.3 I have considered the A.O.'s order as well as the appellant's A/R submission. I have also carefully observed the findings of the Hon'ble Supreme Court in the case of programme for community organization reported in 248 ITR I, wherein the Hon'ble Supreme Court, while delivering the said judgement has stated that "Having regard to the plain language of the above provisions, it is clear that a charitable or religious trust is entitled to accumulate twenty five percent. Thus,

taking note of all these facts, I find merits int eh arguments of the appellant. Besides this, I also get strong opined from the recent judgment of Hon'ble Bombay High Court in the case of CIT Vs. Trustees of Bhat Family Research Foundation, wherein the Hon'ble Bombay High Court states that Ït is clear from clause (a) of sub-section (1) of section 11 that income derived from proper held under trust wholly for charitable purposes or religious purposes shall not be included in the total income to the extent to which it is applied for such purposes in India and, where it is accumulated for such application to the extent whichever is higher. The exemption of accumulated income to the extent of 25% or Rs.10,000/-, whoever is higher, is unqualified and unconditional.." Further to that, I also place reliance to the judgment of Hon'ble Supreme court in the case of Addl. CIT Vs. A.I.N. Rao Charitable Trust (1995) 129 CTR 205, wherein it is held that exemption available u/s.11(1)(a) i.e. 15% of income is unfettered and not subject to any conditions.

6.4. Considering all the above factual position as well as the case laws referred as above, I consider it proper and appropriate to hold that the A.O. was not justified in denying the claim of the appellant for

accumulation of income. Accordingly this ground of appeal is allowed.

8. We observe that ld CIT(A) has relied on the decision of Hon'ble Supreme Court in the case of A.I.N. Rao Charitable Trust(supra), wherein, it is held that exemption available u/s.11(1)(a) i.e. 15% of income is unfettered and not subject to any conditions. In the case before us, assessee has claimed 15% accumulation u/s.11(1)(a) of the Act. Hence, we do not see any reason to interfere with the order of the Ld. CIT(A) and reject ground of appeal taken by department."

6. On appraisal of the above mentioned order it is not in dispute that the matter of controversy has been decided in favour of the assessee by the Hon'ble Income Tax Appellate Tribunal by following the decision of the Hon'ble Supreme Court decision in case of CIT Vs. A.I.N. Rao Charitable Trust (1995) 129 CTR 205. In view of the order passed by the co-ordinate bench we allowed this issue in favour of the assessee and delete the addition confirmed by the CIT(A) in question. Accordingly, this issue is decided in favour of the assessee against the revenue.

ISSUE NO.2:-

7. Under this issue the appellant has challenged the confirmation of the disallowance of dividend income of Rs.2,76,459/- from investment in UTI units as exempt u/s.10(33) of the Act. The

Assessing Officer deleted the said income from the property and applied the provision of section 11 of the Act. The contention of the assessee is that the dividend income was already exempted u/s.10(33) of the Act. Therefore, the same was not require to be considered u/s.11 of the Act. The learned representative of the assessee has argued that this issue has already been decided in favour of the assessee by Hon'ble Income Tax Appellate Tribunal, Mumbai bench in ITA No.3807/Mum/2015 for A.Y.2011-12 dated 04.02.2016 in case titled as ACIT (Exemption)-I(1) Vs. Jamshetjee Tata Trust. However, on the other hand the learned representative of the department has strongly relied upon the order passed by the CIT(A) in question. Before going further it is necessary to advert the finding of the Hon'ble Income Tax Appellate Tribunal, Mumbai bench in ITA No.3807/Mum/2015 for A.Y.2011-12 dated 04.02.2016 in case titled as ACIT (Exemption)-I(1) Vs. Jamshetjee Tata Trust:-

> "**5**. We have heard the rival submissions and perused the material before us. We find that the AO had denied the exemption to the assessee-trust on many a counts including non application of 85% of the income of the trust for charitable purposes, violation of the provisions of section 13(1)(d) and 13(2)(h) of the Act etc. He was of the opinion that the income should be taxed at the maximum marginal rate and that the assessee was not entitled to claim deduction u/s.10(34),10 (35). We find that all the issues raised by the AO have been dealt by the Tribunal while deciding the appeal for the earlier AY. We are reproducing the relevant part of the order and same reads as under:
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> > *"6. We have considered the rival submissions as well as relevant material on record. The income of the charitable/religious trust or institution is exempt u/s 11 of the Income Tax Act subject to the fulfillment of conditions stipulated u/s 11 and 13 of the Act.*

There are two testes to be qualified by the trust or institution to avail the exemption u/s 11 of the Act. These two tests are broadly categorized as application of income and source of income the conditions and manner of application of income as enumerated u/s 11 (5) of the Act. Whereas the condition of source of income are provided under section 13 and particularly under sub section 1 and 2 of section 13 of Income Tax Act. We are concerned only with the conditions prescribed in clause (d) of sub section (1) and clause (h) of subs section (2) of section 13. Both these tests are to be qualified for exemption u/s 11. First we will deal with the issue of application of income in conformity with the provisions of section 11 of the Act. For ready reference we quote section 11(1) as under:-

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6.1 As per section 11(1), the income derived from property held under trust wholly for charitable or religious purposes shall not be included in the total income of the trust/institution to extent such income is applied for charitable/religious purpose in India, and in case such income is accumulated or set apart for application to such purpose in India to the extent such accumulation is not in excess of 15% of the total income from such property. Thus if the income derived from the property held under trust is applied to the extent of 85% for charitable/religious purpose in India, such income is exempt. This condition of application of 85% of income is relaxed to the extent that if the same is applied in the immediate subsequent year and the assessee's trust exercise such option in writing before the expire of time allowed u/s 139(1) of Income Tax Act for furnishing the return of income then it would be deemed to be income applied to such purpose during the previous year in which the income was derived. Sub section 2 of section 11 further relaxes the condition of application or deemed application of 85% of income during the relevant previous year if such income is accumulated or set apart either in whole or in part for application to such purpose in India subject to the condition provided under this sub section 2 which reads as under:-

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6.2 Thus the trust would not lose exemption even 85% of the income applied or deemed applied during the year if the whole or part of such income is accumulated or set apart for application of such purpose in India by giving notice in writing to the AO and the money so accumulated or set apart is invested or deposited in the form or mode specified in sub section (5) of section 11. The mode of investment and deposit under sub section (5) as under:-

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6.3 The assessee before us undisputedly has not complied with the condition of application of 85% of the income during the year as well as the investment/deposit of accumulation of the shortfall in terms of sub section (2) and (5) of section 11. This fact is apparent from the details of the income and application claimed as under:-

Details of Income		
Less application of income		
Expenses on the objects of the trust	*160.93*	
Administrative expenses	*2.73*	
Contribution to PTA fund	*- 0.93*	*164.59*

6.3 For the purpose of application of income in terms of section 11 (1) and (2), the entire income of the trust has to be considered including the dividend and long term capital gain claimed as exempt u/s 10. It is pertinent to mention that for availing the exemption u/s 11, the income derived from the property held under trust has to be considered irrespective of the fact that some of the income so derived is also exempt u/s 10, therefore, 85% of the entire income without exclusion of dividend and long term capital gain on shares has to be applied for such purpose in India for availing deduction u/s 11. As it is clear from the details given above that out of total income of Rs. 714.42 crores, the assessee trust has applied during the year only Rs 164.59 crores. The balance has been invested in the shares of Tata Sons Ltd which is not in conformity with section 11(5) of the Income Tax Act. The Ld. Senior Counsel submitted that the assessee had exercised option under clause 2 of the Explanation and the income applied for such purpose in next year shall be deemed to have applied in previous year. He has referred the letter dated 13.09.2010 whereby the assessee exercised its option under clause 2 of the Explanation to section 11 (1)(a) of the Income tax Act. It is pertinent to note that while computing the application of the income the assessee has excluded dividend and long term capital gain as well as short term

capital gain and shown the income at Rs. 25.78 crores. Whereas the total income of the assessee including capital gain and dividend income is Rs. 714.42 crores. To meet the requirement of 85% of the income of Rs. 714.42 crores, the assessee was required to apply or deemed to have been applied the income to the extent of Rs. 607.43 crores. As per the details, the assessee has applied Rs. 164.93 crores during the year and nothing has been brought before us to show that the shortfall of more than 446 crores has been applied in the immediate following year. Therefore, apparently the assessee trust has not applied the shortfall of more than 446 crores in the immediate next year in terms of the Explanation to section 11(1) of the Act. Because the assessee has already applied the entire balance amount in the shares of Tata Sons Ltd., therefore, the question of application of shortfall in the immediate next year does not arise.

7 Now we turn to the issue of condition of source of income in terms of section 13 of the Income Tax Act. The AO has disallowed the exemption on two violations viz. violation of section 13(1)(d)(iii) and section 13(2)(h). So far as the conditions required to be fulfilled u/s 13(1)(d)(iii) are concerned any income from the shares in a company other than public sector company or shares prescribed or form of investment under clause (xii) of sub section 5 of section 11 is not exempt u/s 11 of the Act. Section 13(1)(d) reads as under:-

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7.1 In the case of the assessee the dividend income, long term capital gain and short term capital again derived from the shares of TCS held by the assessee in contravention of section 13(1)(d)(iii). The shares of TCS were received by the assessee in the year 2001-02 and there is no dispute that holding of these shares by assessee is beyond the permitted limit of time period prescribed u/s 13(1)(d). The Ld. Senior Counsel however has argued that the bonus shares received by the assessee on 19.06.2009 are not held by the assessee beyond the limit permitted by the proviso to section 13(1)(d) of the Act. This contention of the Ld. Senior Counsel is not acceptable simply on the reason that the time period permitted under proviso to section 13(1)(d) is to exit from non permissible investment/holding of shares and convert the same into permissible investment. Clause (iia) of proviso has been inserted by the Finance Act 1991 to secure that mere accretion of the existing holding of shares by way of bonus shares or acceptance of donation in kind or any asset not

conforming to the provisions of section 11(5) will not make the fund or trust or institution lose tax exemption if the trust/institution covert the asset not conforming to section 11(5) into permissible investment within one year from the end of the Financial Year in which such bonus shares or other assets are received or on 31.3.1992 whichever is later. The explanatory note on the provision as issued by the CBDT vide Circular no. 621 dated 19.12.1991 reported in 195 ITR (st) 154 is relevant on this point. Para 15.2 of the said Circular reads as under:-

"Further a new clause (iia) has been inserted in the proviso in clause (d) of sub section (1) of section 13 to secure that mere accretion to the existing holding of shares by way of bonus shares or acceptance of donations in kind or any asset not conforming to the provision of section 11(5) will not make the fund or trust or institution lose tax exemption. The trusts or institutions will, however, be' required to dispose or convert the assets not conforming to the requirement of section 11(5) into permissible investment within one year from the end of the financial year in which such bonus shares or other assets are received or 31-3-1992, whichever is later."

7.2 Thus it is clear that clause (iia) of the proviso to section 13(1)(d) was inserted with a view that holding of the asset not conforming to the provisions of section 11(5) would not make the trust or institution lose tax exemption is such assets were disposed off or converted into permissible investment within one year form the end of the Financial year in which such assets were received. Due to certain anomalies and hardship arising out of the requirement of the proviso to section 13(1)(d) clause (iia) was further amended vide Finance Act 1992 whereby the period of disinvestment allowed upto 31st March 1993 or within one year form the end of the Financial Year in which the such assets were received whichever is later.

7.3 In the case in hand, though the assessee held the bonus shares of TCS for the duration which is within the time limit prescribed under clause (iia) of the proviso to section 13(1)(d) the assessee converted the assets being bonus shares of TCS into the preferential share of Tata sons Ltd. Jamsetji Tata Trust 18 which is not a conversion into the asset/investment permissible u/s 11(5) of the Act. Therefore, clause (iia) of proviso to section 13(1)(d) would not rescue the assessee from the mischief of section 13(1)(d) (iii) of the Income Tax Act. The intent behind the insertion of clause (iia) of the proviso is to exit form non permissible investment, and to convert into permissible investment and not to just

change one non permissible investment to another non permissible investment. If it is permitted it will defeat the very purpose of object of the said clause of the proviso.

8. The next question arises is, violation of provisions of section 13(2)(h) which reads as under:-

> *"(h) if any funds of the trust or institution are, or continue to remain, invested for any period during the previous year (not being a period before the 1st day of January, 1971) in any concern in which any person referred to in sub- section (3) has a substantial interest."*
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> *8.1 The AO held that investment in shares of Tata Sons Ltd is in contravention of clause (h) of sub section 2 of section 13 because Tata Sons Ltd., is a concern in which the person referred in sub section 3 has substantial interest. Ld. Senior Counsel though reiterated the assessee's stand taken before the authorities below however he has contended that violation of section 13(2)(h) would not render the entire income of the trust lose exemption u/s 11. In support of his contention he has relied upon the decision of the Tribunal in the case of Tata Education Trust and Tata Social Welfare Trust (supra). As far as the violation of clause (h) of section 13(2) is concerned we find that the author of the assessee trust and its relative definitely have a substantial interest in the Tata Sons Ltd, therefore, the investment in the shares of Tata Sons Ltd is clear violation of clause (h) of section 13(2). We have given our serious thought on the issue and are of the view that violation of section 13(1)(d) and section 13(2)(h) would disqualify exemption of income from the investment in non conforming of section 11(5) but not the entire income of trust if the other income of the trust otherwise fulfill the condition for exemption. The Coordinate bench of this Tribunal in the case of Tata Education Trust and Tata Social Welfare Trust (supra) has decided a similar issue in para 13 as under:-*
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> *"13 We have heard the parties. The assessee is a public charitable trust. During the previous year relevant to the assessment year under appeal, the assessee derived its income from interest and dividend. Since the assessee continued to hold the shares of Tata Sons Ltd. beyond the permitted date prescribed for disinvestment u/s 13(1)(d), the exemption wad denied by the AO and the entire income of the assessee was*

brought to tax except the dividend income received on shares of Tata Sons Ltd. On appeal, the Ld. CIT(A) has held, following his appellate order dated 20.06.2000 for AY 1996-97, that the entire income of the assessee would not attract disqualification for the purpose of section 11 but only the income derived form the investments falling in prohibited category would be chargeable to tax. In his appellate order for A.Y. 1996-97, the Ld. CIT(A) has followed the decision of this Tribunal in Guru Dayal Berlia Charitable Trust, 34 ITD 489 in which it has been held that only the relevant income derived from impermissible investment would be subjected to tax and the non-fulfillment of the condition stipulated in section 13(1)(d)(iii) would not deprive a trust of its exemption from tax in respect of other income which has already been granted to it in earlier years. The order of the Ld. CIT(A) is in conformity with the order of this Tribunal referred to by him in his appellate order for AY 1996-97. In this view of the matter,, his order is confirmed. Appeal filed by the Department is dismissed."

8.2 We further note that while deciding the similar issue the Tribunal in the case of Guru Dayal Berlia Charitable Trust Vs. ITO has reproduced the relevant part of the explanatory note on the Finance Act 1984 vide Circular no. 387 in para 6 of the said order which reads as under:-

"***6***. *Being aggrieved by the orders of the CIT(A), the assessee has come up in appeal before the Tribunal. The learned counsel for the assessee reiterated the submissions, which were made before the IT authorities and strongly urged that they should have accepted the assessee's contention that it would lose exemption under S. 11 of the Act in respect of the dividend income only. He was fair enough to state that it is not in dispute that by virtue of the provisions of S. 11 (5) of the Act, the assessee would lose exemption under S. 11 of the Act, as it is holding 12,000 preference shares of the National Rayon Corporation Ltd. However, he hastened to state that the assessee would lose exemption under S. 11 of the Act in respect of the dividend income received on the said shares and not in respect of other income earned by it. In other words the learned counsel for the assessee wanted to impress upon us that just ca se the assessee was not in a position to dispose of the shares of National Rayon Corporation Ltd., it should not lose exemption contemplated under S. 11 of the Act in respect of other income earned by*

it. In this connection h invited our attention to Circular No. 387 containing explanatory notes on the Finance Act, 1984, more particularly paragraph 28.6 which reads as under.

28.6 It may be noted that new sub-s. (1A) inserted in s. 161 of the IT Act, which provides for taxation of the entire income received by trusts at the maximum marginal rate is applicable only in the case of private trusts having profits and gains of business. So far as the public charitable and religious trusts are concerned, their business profits are not exempt from tax, except in the cases falling under cl. (a) or cl. (b) of s. 11(4A) of the IT Act. As the maximum marginal rate of tax under the new proviso to s. 164(2) applies to the whole or a part of the relevant income of a charitable or religious trust which forfeits exemption by virtue of the provisions of the IT Act in regard to investment pattern or use of the trust property for the benefit of the settlor. etc., contained in s. 13(l)(c) and (d) of that Act, the said rate will not apply to the business profits of such trust which are otherwise chargeable to tax. In other words, where such a trust contravenes the provisions of s. 13(l)(c) or (d) of the Act, the' maximum marginal rate of income tax will apply only to that art of the income which has forfeited exemption under the said provisions".

8.3 After considering the explanatory note the Tribunal decided the issue by holding that the provision of section 164(2) along with the proviso thereto would come into operation and only such income would be brought to tax at the maximum marginal rate which could not be treated as exemption by virtue of non fulfillment of conditions of investment in specified securities as prescribed u/s 11(5). The Hon'ble Jurisdictional High Court in the case of Director of Income Tax (Exemption) Vs. Sheth Mafatlal Gagalbhai foundation Trust (249 ITR 533) as held in para 6 as under:-

"Section 164 of the Income-tax Act does not create a charge on the income of a discretionary trust. The word "charge" in Section 164 means "levy". Section 164(2) refers to the relevant income which is derived from property held under trust wholly for charitable or religious purposes. If such income consists of severable portions, exempt as well as taxable, the portion which is exempt is to be left out and the portion which is not exempt is charged to tax as if it is the income of the association of persons. Therefore, a proviso was inserted

by the Finance Act of 1984 with effect from April 1, 1985, under which in cases where the whole or any part of the relevant income is not exempt under Section 11 or Section 12 because of the contravention of Section 13(1)(d), then tax shall be charged on such income or part thereof, as the case may be, at the maximum marginal rate. In other words, only the non-exempt income portion would fall in the net of tax as if it was the income of the association of persons. On the other hand, Section 11(5) lays down various modes or forms in which a trust is required to deploy its funds. Section 13(1) lays down cases in which Section 11 shall not apply. Under Section 13(1)(d)(iii), it has been laid down that any share in a company, not being a Government company, held by the trust after November 30, 1983, shall result in forfeiture of exemption. By virtue of proviso (iia) it has been laid down that any asset which does not form part of permissible investment under Section 11(5) shall be disposed of within one year from the end of the previous year in which such asset is acquired or by March 31, 1993, whichever is later. In the present case, the assessee was required to dispose of the shares under the said proviso by March 31, 1995 (see the judgment of this court in I. T. A. No. 81 of 1999, decided on September 14, 2000--Director of Income-tax (Exemptions) v. Shardaben Bhagubhai Mafatlal Public Charitable Trust [2001] 247 ITR 1). The shares have not been disposed of even during the assessment year in question. Now, under Section 164(2) it is, inter alia, laid down that in the case of relevant income which is derived from property held under trust for charitable purposes, which is of the nature referred to in Section 11(4A), tax shall be charged on so much of the relevant income as is not exempt under Section 11. Section 164(2) was reintroduced by the Direct Tax Laws (Amendment) Act, 1989, with effect from April 1, 1989. Earlier it was omitted by the Direct Tax Laws (Amendment) Act, 1987. However, the Legislature inserted a proviso by the Finance Act, 1984, with effect

from April 1, 1985. By the said proviso, it is, inter alia, laid down that where the whole or part of the relevant income is not exempt by virtue of Section 13(1)(d), tax shall be charged on the relevant income or part of the relevant income at the maximum marginal rate, The phrase "relevant income or part of the relevant income" is required to be read in contradistinction to the phrase "whole income" under Section 161(1A). This is only by way of comparison. 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. In the circumstances, we find merit in the contention of the assessee that in the present case, the maximum marginal rate of tax will apply only to the dividend income from shares in Mafatlal Industries Limited and not to the entire income. Therefore, income other than dividend income shall be taxed at the normal rate of taxation under the Act."

8.4 Following the above decision we hold that the breach of section 13(1)(d) and 13(2)(h) would lead to forfeiture of exemption of income derived from such investment and not the entire income would be subjected to the maximum marginal rate of tax u/s 164(2). Thus the exemption u/s 11 is available to the assessee only on the income to the extent the same is derived in conformity of section 11 and applied during the year for such purpose of charitable trust.

9. Ground No.2 is regarding denial of exemption u/s 10(34), 10(35) and 10(38).

9.1 The assessee claimed that dividend income on shares and unit and long term capital gain on sale of shares are exempt u/s 10(34), 10(35) and 10(38) respectively. The AO denied the exemption on the ground that the income derived from the property held by the trust and not any other person, section 11 exclusively deals with the income derived from the property held under trust and not section u/s 10(34), 10(35) and 10(38). Hence the AO held that there is a violation u/s 13 and as a result of the same exemption u/s 11 is denied. The assessee cannot claim the alternative claim for exemption u/s 10(34), 10(35) and 10(38) because these sections do not deal with income derived from the property held under the trust. If the income of the trust which is not held exempt u/s 11, 12 and 13 is allowed to exempt under other sub sections of section 10 it will lead to open ground for trust to exercise long term securities income and dividend income and claimed exemption of the same under other sub sections of section 10 of Income Tax Act.

9.2 On appeal, CIT(A) concur with the view of AO.

9.3 Before us, the Ld. Senior Counsel has submitted that any income by way of dividend referred to in section 115O of the Income Tax Act is exempt from tax u/s 10(34) of the Income Tax Act. Since the dividend is already subjected to tax at the hand of the distributing company u/s 115O and, therefore, it cannot be taxed twice. Once the income is exempt u/s 10 it would not required to be qualified u/s 11 of the Act. In support of his contention he has relied upon the decision of Hon'ble Delhi High Court in the case of CIT Vs. Divine Light Mission. (278 ITR 659) and submitted that the Hon'ble High Court dealt with an identical issue regarding agricultural income exempt u/s 10(5) of the Income Tax Act held that this income is not required to be considered at all even for the purpose of section 11 of the Income Tax Act. Thus the Ld. Senior Counsel has submitted that if exemption is available u/s 10 then section 11 is irrelevant. He has relied upon the following decisions:-

(i) Commissioner Of Income-Tax. Vs. Seethakathi Trust (295 ITR 520.)

(ii) Brahmin Educational Society vs Assistant Commissioner Of Income tax (227 ITR 317)

(iii) Commissioner of Income Tax vs. Rao Bahadur Calavala Cunnan Chetty Charities [1982] (135 ITR 485)

(iv) Bar Council Of Uttar Pradesh vs Commissioner Of Income-Tax (143 ITR 584)

(v) Commissioner of Income-tax. v. Bar Council of Maharashtra. (130 ITR 28)

9.4 The Ld. Senior Counsel referred the observations of these decisions and submitted that once the income is exempt u/s 10, same cannot be said to be taxed u/s 11 to 13. He has further contended that if the exemption is available to the assessee under two provisions of the Act, then the assessee is entitled to exemption under the provision which is more beneficial.

9.5 On the other hand, Ld. DR has submitted that as per section 11 of the Act, the income from the property held under trust is covered under this section and not u/s 10 of the Income Tax Act. He has contended that both these sections are part of chapter III and, therefore, section 11 being specific provision for exemption of income from the property held under trust would override general provisions. He has emphasized that the provisions under same chapter should be considered harmoniously while dealing with special mischief. Sections 11, 12 and 13 are strings of provisions and if the case is covered by these special provisions then general law would not apply. He has put forth the logic that section 13

dehors the applicability of section 11 and in the same manner it would also dehors the applicability of section 10 if there is a violation of section 13 of the Act.

9.6 We have considered the rival submissions as well as relevant provisions of law. The exemption u/s 10 is income specific irrespective of the status/class of person. Whereas the exemption under section 11 is person specific though on the income derived from the property held under the trust. Further the exemption u/s 11 is subject to the application of income and modes or form of deposit and investment. The Hon'ble High Court in the case of CIT Vs. Divine Light Mission (supra) while dealing with an identical issue has held in para 9 as under :

"So far as question No.4 of paragraph No. 3 with regard to agricultural income is concerned, section 10(5) of the Act specifically points out that agricultural income shall not be included in computing the total income of a previous year and hence the question is required to be answered in favour of the assessee and against the Revenue. This income is not required to be considered at all even for the purpose of section 11 of the Act."

9.7 While deciding the question that the agricultural income was income from the property held under the trust can be denied exemption u/s 11 of the Income Tax Act. the Hon'ble High Court has held that the agricultural income shall not be included in the computation of total income of previous year in view of section 10(5) of the Act. Therefore, this income is not required to be considered for the purpose of section 11 of the Act. In the case of his holiness Silasari Kasivasi Muthukumaraswami Thambiran AVL & Ors. Vs. Agricultural Income Tax Officer & Ors. (113 ITR 889) the Hon'ble High Court of Madra has held that the agricultural income derived by charitable or religious trust is exempt u/s 10 could not be said to be brought to tax u/s 11 to 13. Similar view has been taken in the series of decisions as relied upon by the Ld. Senior Counsel when the question involved was the allowability of exemption u/s 10, (22), (23) Vs. section 11 and 13. In our view the exemption u/s 11 is available on the income of the public charitable /religious trust or institution which is otherwise taxable in the hands of other persons. Thus the income which is exempt u/s 10 cannot be brought to tax by virtue of section 11 and 13 of the Act because no such pre condition is provided either u/s 10 or 11 to 13 of Income Tax Act. Therefore, section 11 to 13 would not operate as overriding affect to the section 10 of the Act. The language of these provisions does not suggest

that either section 10 is subjected to the provisions of section 11 to 13 or section 11 to 13 has any overriding affect over section 10. Therefore, the benefit of section 10 cannot be denied by invoking the provisions of section 11 to 13 of the Act. Once the conditions of section 10 are satisfied then no other condition can be fastened for denying the claim under section 10 of the Act.

9.8 In view of the above discussion and following the various decisions (supra) we hold that the dividend income on shares and mutual funds and long term capital gain on sale of shares an exempt u/s 10(34),10(35) and 10(38) respectively and cannot be brought to tax by applying section 11 and 13 of the Act.

10. Ground No. 3 is regarding education grant given to Indian students for studying abroad.

10.1 The assessee has given grants to various Indian students/persons to pursue their education/higher education in various universities abroad. The AO noted that the grant is released by the assessee only after obtaining the first semester results of their education outside India from each scholar. The AO was of the view that the application of income as well as charitable purpose, both should be in India and execution of charitable purpose may be inside or outside India. The AO relied upon the decision of Hon'ble Delhi High Court in the case of Director of Income Tax (Exemption) Vs. National Association of Software and Services Companies (345 ITR 362) and held that the amount of Rs. 1,53,50,000/- spent by the assessee for education grant to the students is not application of its income for charitable purpose in India and accordingly disallowed the exemption u/s 11.

10.2 On appeal CIT(A) confirmed the action of the AO.

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10.5 We have considered the rival submissions and perused the relevant material. The assessee has given grant to 97 scholars studying in various institutions and universities outside Indian and the total amount of grant is Rs. 1,53,50,000/-. The assessee paid the grant in India and for the purpose of education of Indian students/persons, thus the charitable purpose of the grant is education of Indian persons. The application of income of the assessee completes at the point when the assessee released the grant which took place in India. The decision relied upon by the revenue is not applicable in the facts of the present case as the application of income took place in India and for the purpose of education of Indian students/persons. Therefore, for taking education by

beneficiary from abroad would not amount to application of income of the assessee outside India. In the case of Bharata Kalanji Vs. Income Tax Officer (supra) the Chennai Bench of this Tribunal while deciding a question arising from the payment of Rs. 1.55 lakh made to a travel corporation of Indian for sending a troop on tour. The AO treated the expenditure as application of income of the trust for charitable purpose. However CIT revised the assessment and was of the opinion that this expenditure was prohibited and was not applied for purpose of trust in India and, therefore, not eligible for exemption u/s 11. The main object of the trust was to advance, propagate, increase and promotion of Indian classical and Folk arts and Indian music etc. The trust was invited by the Government of Nigeria to give certain dance performance abroad. Accordingly the trust send a troop and paid a sum of Rs. 1.55 lakh being the passage money to the Travel Corporation of India. The Tribunal held in para 6 as under:-

"6. The crucial question is only whether the conditions in section 11 are complied with. That section states that the income derived from property held under trust wholly for charitable purposes shall not be included in the total income to the extent to which such income is applied to such purposes in India. The question is whether this section requires the application of money in India or the carrying out of the purposes in India or both. The contention of the revenue is that apart from the money being spent in India even the purpose must be carried out in India. The section itself contradicts this contention. Section 11(1)(c)(ii) provides that income applied to such purposes outside India is exempt in the case of trust created before 1-4-1952 subject to the approval of the Board. This underlines the principle that Governments do not forego their revenue in favour of charges paid outside their countries and hence the relevant consideration is whether the situs of the application of the money and not the place in which the objects of the trust may become effective. It may be pertinent to refer to section I O(16) which exempts scholarships granted to meet the cost of education where also the CBDT itself does not consider scholarship granted for education abroad as money spent outside India. Similarly, in the present case of such a wide object of propagation of art it would be difficult to confine it to the shores of the land. We are of the considered opinion that the expression "applied to such purposes in India" refers only to the situs of the expenditure and not" to the place 'where the "purposes" are carried out. The fact that the troupe gave the performance abroad is therefore no disqualification for

> treating he amount actually spent in India as application of the amount for charitable purposes. The Commissioner also referred to collections made for performances given as an activity for profit. We find that such performances do not constitute activities for profit as the collections are in the nature of donations received for the purposes of the trust. Hence this objection also cannot be sustained, It follows that the exemption granted by the Income-tax Officer was not erroneous and did not require to be reviewed by the Commissioner. Hence his order u/s 263 is cancelled. The appeal is allowed."
>
> *10.6 Similarly in the case of CEO Clubs India Vs. Director of Income Tax (Exemption), co-ordinate bench of this Tribunal has held in para 11 as under:-*
>
> "The other objection of the DIT was that the activities of the Assessee were not confined to India and therefore registration cannot be granted. The basis for these observations is that conferences were to be held outside India. We are of the view that holding of conferences abroad would not make the activities of the Assessee being carried out outside India. The benefits of such conference will ultimate go to Assessee and its members. It cannot be said that the activities of the Assessee were carried on outside India."
>
> *10.7 Following the above decisions of Tribunal, we hold that the education grant given to the Indian students in India for education/higher education abroad fulfills the conditions of application of money for such purpose in India."*
>
> Finally, the Tribunal partly allowed the appeal filed by the assessee. Respectfully following the order of the Tribunal for the earlier year we decide all the effective grounds(GOA1-5)against the AO."

8. On appraisal of the above mentioned order it is not in dispute that the matter of controversy has been decided in favour of the assessee by the Hon'ble Income Tax Appellate Tribunal by following the decision of Hon'ble Delhi High Court in the case of CIT Vs. Divine Light Mission. (278 ITR 659) *and* Commissioner Of Income-Tax. Vs. Seethakathi Trust (295 ITR 520.) and Brahmin Educational Society vs Assistant Commissioner Of Income tax (227 ITR 317) and Commissioner of Income Tax vs. Rao Bahadur Calavala Cunnan

Chetty Charities [1982] (135 ITR 485) and Bar Council Of Uttar Pradesh vs Commissioner Of Income-Tax (143 ITR 584) and Commissioner of Income-tax. v. Bar Council of Maharashtra. (130 ITR 28). It is specifically held that the dividend income on shares and mutual funds and long term capital gain on sale of shares an exempt u/s 10(34),10(35) and 10(38) respectively and cannot be brought to tax by applying section 11 and 13 of the Act. In view of the order passed by the co-ordinate bench we allowed this issue in favour of the assessee and delete the addition confirmed by the CIT(A) in question. Accordingly, this issue is being decided in favour of the assessee against the revenue.

ISSUE NO.3 & 4:-

9. Under these issues the assessee has challenged the confirmation of the order of the Assessing Officer by the CIT(A) in which the Assessing Officer did not carry forward the excess application of Rs.20,93,366/-. The assessee has excess expenditure over income of Rs.20,93,366/- (Rs.16,08,208 – 37,01,574/-). The assessee claimed the carry forward of the same which was declined by the Assessing Officer and confirmed by the CIT(A). The learned representative of the assessee has argued that this issue is decided in favour of the assessee, the decision of the Hon'ble Bombay High Court in the case of CIT Vs. Institute of Banking (264 ITR 110). It is also argued that the Hon'ble Income Tax Appellate Tribunal has also decided this issue in favour of the assessee in the decision of ADIT (E) 1(2) Vs.

Sayaji Ubakhin Memorial Trust (ITA No.5646/Mum/2011) and in case of ITO(E) Vs. Shri Sadguru Seva Trust (ITA No.3387/Mum/2015). Before going further, it is necessary to advert the case decided by the Hon'ble Bombay High Court in the case of CIT Vs. Institute of Banking (264 ITR 110) on record:-

> "Now coming to question No.3, the point which arises for consideration is : whether excess of expenditure in the earlier years can be adjusted against the income of the subsequent year for charitable purposes? It was argued on behalf of the Department that expenditure incurred in the earlier years cannot met out of the income of the subsequent year and that utilization of such income for meeting the expenditure of earlier years would not amount to application of income for charitable or religious purposes. In the present case, the Assessing Officer did not allow carry forward of the excess expenditure to be set off against the surplus of the subsequent years on the ground that in the case of a charitable trust, their income was assessable under self-contained code mentioned in section 11 to section 13 of the Income Tax Act and that the income of the charitable trust was not assessable under the head "profit and gains of business" under section 28 in which the provision for carry forward of losses was relevant. That, in the case of a charitable trust, there was no provision for carry forward of the excess of

expenditure of earlier years to be adjusted against income of the subsequent years. We do not find any merit in this argument of the Department. Income derived from the trust property has also got to be computed on commercial principles and if commercial principles are applied then adjustment of expenses incurred by the trust for charitable and religious purposes in the earlier years against the 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 adjustment has been made having regard to the benevolent provisions contained in section 11 of the Act and that such adjustment will have to be excluded from the income of the trust under section 11(1)(a) of the Act. Our view is also supported by the judgement of the Gujarat High Court in the case of CIT Vs. Shri Plot Swetamber Murti Pujak Jain Mandal [1995] 211 ITR 293. Accordingly, we answer question No.3 in the affirmative, i.e. in favour of the assessee and against the department."

10. By following the above said laws of the Hon'ble Income Tax Appellate Tribunal in case of ADIT (E) 1(2) Vs. Sayaji Ubakhin Memorial Trust (ITA No.5646/Mum/2011) and in case of ITO(E) Vs. Shri Sadguru Seva Trust (ITA No.3387/Mum/2015) has decided this issues are in favour of the assesse. Nothing contrary to the above said

finding. The issue no.4 is quite similar to the issue no.3. The above said law is applicable on both the issues, therefore, we are of the view that the assessee is entitled to carry forward the excess application to the subsequent years. Therefore, we decided these issues in favour of the assessee against the revenue.

11. In the result, the appeal filed by the **assessee is hereby ordered to be Allowed.**

Order pronounced in the open court on 29th March, 2017.

Sd/-	Sd/-
(D.KARUNAKARA RAO)	**(AMARJIT SINGH)**
लेखा सदस्य / ACCOUNTANT MEMBER	**न्यायिक सदस्य/JUDICIAL MEMBER**

मुंबई Mumbai; दिनांक Dated : 29th मार्च, 2017
MP

आदेश की प्रतिलिपि ग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार /(Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई **/ ITAT, Mumbai**