IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH: 'E', NEW DELHI

BEFORE SHRI BHAVNESH SAINI, JUDICIAL MEMBER
AND
SHRI O.P. KANT, ACCOUNTANT MEMBER

ITA No.2061/Del./2017
Assessment Year: 2012-13

ITO(E), Room No. 105, CGO Complex-2, Kamla Nehru Nagar, Ghaziabad	**Vs.**	Om Charitable Trust, 47/L-4, Jawahar Quarter, Meerut.
		PAN :AAATO1865D
(Appellant)		**(Respondent)**

Appellant by	Shri V. Raja Kumar, Adv.
Respondent by	Ms. Rakhi Vimal, Sr.DR

Date of hearing	23.01.2020
Date of pronouncement	03.02.2020

ORDER

PER O.P. KANT, AM:

The present appeal by the Revenue is directed against order dated 20.01.2017 passed by learned Commissioner of Income Tax(Appeals), Meerut [in short 'the CIT(A)'] pertaining to assessment year 2012-13. The Revenue has raised following grounds of appeal:

1. *On the facts and circumstances of the case, the learned CIT(A) has erred in deleting the addition of Rs. 1.60.62.047/- by opining that the provision of section 13 is not applicable without considering the fact that assessee has not carried out any charitable activity.*

2. *On the facts and circumstances of the case, the learned CIT(A) has erred in law and in facts in directing to allow to the assessee brought forward loss (being excess application) amounting to Rs.5,80,12,138/- to carry forwarded to next year(s) for setting old against income of subsequent year.*

3. *On the facts and circumstances of the case, the learned CIT(A) has erred in law and facts directing to allow brought forward of loss of Rs.5,80.12.138/- without considering the facts that assessee is registered u/s 12AA of the I.T. Act, and the provision of section 11/12 A A of the l.T. Act. does not allow carrying forward of excess application to subsequent year(s).*

4. *Appellant craves leave to modify/ amend or add any one or more grounds of appeal.*

2. The brief fact of the case are that the assessee filed income tax return on 05.10.2012 declaring Nil income. The case was selected for scrutiny and statutory notice under Section 143(2) of the Income-tax Act, 1961 (in short 'the Act') was issued. During the course of assessment proceedings, from the perusal of the details filed by the assessee, the Assessing Officer found that the assessee had made investment in purchase of land and flats amounting to Rs.13,80,840/- and Rs. 1,03,86,970/- and had also given advance of Rs.42,94,237/- for flat. The assessee was asked by the Assessing Officer to explain the investment made of Rs.1,17,67,810/- in purchase of land and advance made of Rs.42,94,237/- for purchase of flat because, according to the AO, they are not invested for charitable purposes. The assessee filed reply; however, the Assessing Officer was not satisfied with the reply and held that the assessee did not file any evidence in support of the claim that land and flats had been purchased for carrying out charitable activities. According to the learned AO, the assessee also did not produce any evidence that activities of the

trust as mentioned in the deed can be done in the flats and lands purchased by the trust. Consequently, the Assessing Officer made disallowance of Rs. 13,80,840/- and Rs.1,03,86,970/- for purchase of land and Rs.42,94,237/- for purchase of Flat, totaling Rs.1,60,62,047/-.

2.1 On further appeal, learned CIT(A) quashed the order of the AO and held that the investments made by the assessee in purchase of land at Village Samaspur, Jhunjhuni and Sikandarabad as also for purchase of flats are in preparation to establishing a university and not in the nature of any "real estate" operation. The assessee is, therefore, entitled to benefits of Section 11 of the Act. The learned CIT(A) also allowed the benefit of carry forward of losses to next assessment year. Hence, the Revenue is before the ITAT.

3. Ground no. 1 of the appeal of Revenue relate to denying the benefit of section 11 of the Act and addition of Rs.1,60,62,047/-.

3.1 Before us, the learned Departmental Representative relied on the order of the Assessing Officer and submitted that the assessee has failed to produce any evidence that the investment was for the purposes of charitable activities and, therefore, the Assessing Officer is justified in denying the benefit of exemption under Section 11 of the Act.

3.2 On the contrary, the learned Authorized Representative submitted that identical issue was involved in assessment year 2011-12, i.e., immediately preceding assessment year, wherein the assessee's investment in purchase of land, tube well, flat etc., totaling to Rs.2,67,51,128/-, which was not allowed by the Assessing Officer as investment made for the purpose of the

charitable. He submitted that the Tribunal in ITA No. 4961/Del/2015 for Assessment Year 2011-12 (order dated 01.01.2019) has dismissed the appeal of the Revenue and allowed the benefit to the assessee. Accordingly, he submitted that the issue in dispute is covered in favour of the assessee, thus, the appeal of the Revenue might be dismissed.

3.3 We have heard the rival submissions of the parties and perused the relevant material available on record. In the year under consideration also, the assessee has made investment in land and advances for construction towards corpus donations. The learned CIT(A) has accordingly after considering the submissions of the assessee, allowed the appeal of the assessee by observing as under:

> *"I agree with the contentions of the assessee for the impugned year that the investment is made towards purchase of land and flats to make appropriate compliance with UP Private Universities Act, 2010 which requires a minimum of 50 acres of land for establishing a university. I also find that the trustees of the assessee trust were also a part of the city Educational and Social Welfare Society which is already running several educational institution and vide a court order in misc. case number 87 of 2007, the Hon'ble Court of Additional District Judge, Court No. 2, Meerut has vide order dated 05.03.2008 ordered transfer of properties and institutions from City Educational and Social Welfare Society to the assessee trust which affirms the intention of the assessee to establish a university.*
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> *The argument that a university cannot be established without having invested in the requisite infrastructure first is of substance and I hold that the investments made by the assessee in purchase of land at Vill. Samaspur, Jhunjhuni and Sikandarabad as also for purchase of flats are in preparation to establishing a university and not in the nature of any "real estate" operation. The assessee is therefore entitled to benefits of section 11 of the invocation of section 13(1)(b) by the AO is misdirected and unfounded and therefore quashed. Ground no. 1-6 are, therefore, allowed.*

3.4 We find that identical issue was involved in the immediately preceding assessment year, wherein the Tribunal in ITA No. 4961/Del/2015 (supra) has decided the issue in favour of the assessee by observing as under:

> *"9. After considering the rival submissions, we do not find any merit in the Departmental Appeal. It is an admitted fact that assessee trust is registered u/s 12AA of the Act. The main objects of the assessee trust are to work for upliftment of the rural area and to promote education. The assessee in pursuance of the objects of the trust carried out certain activities as explained above. The assessee further explained that it wanted to open a Private University and for that efforts were going on to acquire huge land and to comply with the rules and regulations for forming Private University. In reference thereto assessee made investment in land and flats which were ultimately to be converted into source of opening of a Private Educational University. It is a fact that section ll(5)(x) authorizes investment in immovable property. The AO has not considered the investment in land and flat has been done for charitable purposes. He has not accepted the explanation of assessee that investment in immovable property has been done as preliminary steps towards establishment of University. The AO was under the impression that in order to qualify for charitable purpose, the trust has to spend the amount on charitable activities only. However, section ll(5)(x) of the Act clearly authorize investment in immovable property for claiming exemption u/s 11 of the Act. If the findings of the AO are accepted then no investment would be qualified u/s 11(5) of the Act. Since the investment in immovable property is permitted as per section ll(5)(x) of the Act, therefore, there was no necessity for the assessee to prove that it was done so for charitable purposes. Section 11(5) provides that accumulated amount u/s 11(2) has to be kept in specified moods of investment which include investment in immovable property. It does not provide such immovable property must be meant for any specific purposes. Therefore, there is nothing wrong committed by assessee so as to violate any provisions of law. The identical issue was considered and decided by ITAT Delhi 'G' Bench in the case of M/s The Scientific & Educational Advancement Society (supra) in which in para 13 it was held as under:*
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> > *"13. We have heard the Ld. Representatives of both the parties and perused the material available one record. The Ld.CIT(A) recorded in the order that land at Dhokra was purchased by the assessee-society in the years 2001 and 2003. It was sold for a consideration of Rs. 9.11 crores in AY 2007-08 which resulted into profit/income at Rs. 8.44 crores which was claimed as exempt u/s 11(1 A) of the I.T. Act,*

1961, in AY 2007-08. The assessee-society also filed Form-10 along with return of income in which income to the extent of Rs. 7,22,67,210/ - was set apart for utilization in future pursuant to the resolution dated 31.10.2007 wherein it was resolved that money received after sale of the above property may be reinvested for purchase of land in Gurgaon for Educational/Vocational purposes. The assessee-society, out of the sale consideration, made investment in immovable properties at Sadhrana, Aravalli, Gopalpura and Lohari. It is not in dispute that land at Village-Dhokra held for educational purposes which is also evident Lohari. It is not in dispute that land at Village-Dhokra held for educational purposes which is also evident from the orders passed under section 10(23C)(vi) by CCIT for A.Ys. 2002-2003 to 2004-2005 and for A.Y. 2005-2006. The Ld. CCIT would not have granted approval under this provision if such land had not been meant for educational purposes. Similarly, the assessment order for A.Y. 2006-2007 was passed under section 143(3)/148, but, proceedings under section 148 have been dropped vide Order dated 16.12.2010 by verifying that assessee-society is registered under section 12A of the I.T. Act. Similarly, assessment order for A.Y. 2007-2008 was passed under section 143(3) which was appealed before Ld. CIT(A) who has granted benefit under sections 11 and 12 of the I.T. Act to the assessee-society. The order of Ld. CIT(A) have been upheld by the Tribunal. The Ld. CIT(A) in the order for A.Y. 2007-2008 has specifically noticed that in respect of unutilized amounts, assessee-society has for the purpose of Section 11(1) set apart/accumulated profits of Rs. 7,22,67,210/ - filed Form No. 10 along with return of income and also subsequently, made investment in purchase of land to the extent of Rs.8,71,42,582/-. Hence, the income to the extent of Rs. 7.22 crores was treated to have been applied for charitable purposes. It is well settled law that exemption under section 11(1 A) for capital gains for a charitable trust has been upheld in the case of CIT vs. Aurobindo Memorial Fund Society (2001) 247 ITR 93 (Mad.) and DIT (Exemptions) vs. DLF Qutab Enclave Complex Medical Charitable Trust (2001) 248 ITR 41 (Del.) (supra). If the land at Dhokra village was not meant for charitable purposes, the assessee-society would not have got benefit of Sections 11 and 12 for all these years. We, therefore, held that the land at Village- Dhokra which was sold in A.Y. 2007-2008 was meant for educational purposes only. Copy of Form No. 10 is filed at page-146 of the paper book and copy of the resolution of assessee- society is filed at page-147 of the paper book and contention of assessee-society has been accepted by Ld. CIT(A) in A.Y. 2007-2008 above and his view have been confirmed by the Tribunal. It is also not in dispute that assessee-society

purchased lands at Sadhrana, Gopalpura and Lohari aggregating to Rs.7,20,56,368/-. Therefore, short fall of Rs.2,10,842/- is the income remaining to be applied to five years period allowed under section 11 (2) which has not been expired in assessment year under appeal i.e., A.Y. 2008-2009. Therefore, this amount also cannot be brought to tax. Since the assessee- society purchased the lands for a sum of Rs. 7.20 crores for educational purposes, therefore, there is nothing wrong in the explanation of assessee-society. The Ld. CIT(A) already found that land at Sadhama have been used for educational purposes. The remaining two properties at Gopalpura and Lohari cannot be treated as not for charitable purposes merely for the reasons that these have not been used. Non-user or passiveness of the lands purchased cannot be treated as user for non-charitable purposes. Section 11(5) provides that accumulated amount under section 11(2) has to be kept in specified modes of investment, which include investment in immovable property. It does not provide that such immovable property must be meant for any specific purpose. Therefore where is nothing wrong in explanation of assessee-society in purchasing the properties. In the case of Shri Surat Panjarapole Trust vs. AC IT (supra), it was held that none-use of the land or passiveness of land is not equal to its holding the land for non-charitable purposes. Thus, in our view, the assessee- society having purchased the above-mentioned land, has used the accumulated amount for charitable and educational purposes. No evidence have been brought on record by the Revenue to prove that land at Gopalpura and Lohari were used for non-educational and non-charitable purposes. The Ld. CIT(A) made a reference to two properties at Aravalli which have got no bearing on the issue, as the said two properties according to the explanation of assessee-society, are not utilized for accumulated profits under section 11(2) of the I.T. Act because the accumulation have been made under section 11(2) in respect of three properties only i.e., Sadharna, Gopalpura and Lohari. Ld. CIT(A) wrongly applied Section 11 (IB) of the I.T. Act as the assessee-society accumulated its income under section 11 (2) and in that situation Section 11 (IB) is not applicable. Accumulation was under section 11(2) and not under Explanation to sub-section 11(1) as is clear from the order passed by the Ld. CIT(A) and the Tribunal in AY 2007-2008 and it was clearly noticed that Form-10 have been filed in A.Y. 2007-2008 which is applicable for accumulation of income under section 11 (2) only. The findings of the Ld. CIT(A) at Section 11 (3) is applicable is also not correct because income accumulated under section 11 (2) was applied for educational purposes. Considering the totality of the facts and

circumstances of the case noted above in the light of finding of fact recorded by the Ld. CIT(A) and Tribunal in A.Y. 2007-2008, it is clear that no addition could be made against the assessee- society of such nature. The order of the Ld. CIT(A), therefore, cannot be sustained in law for enhancing the income of assessee-society of Rs.6,77,16,875/- and that too by invoking Section 11 (IB) and Section 11(3) of the I.T. Act, which are not applicable to the case of the assessee- society. The decisions relied upon by the Ld. D.R. are not applicable to the facts of the case. In view of the above discussion, we set aside the Order of the Ld. CIT(A) and delete the addition of Rs.6,77,16,875/-. Accordingly, appeal of the assessee-society is allowed. "

10. Following the above order of the Tribunal, we do not find any justification to interfere with the order of the Ld. CIT(A). We may also note that assessee has explained that out of the addition in question as made by AO, the amount of Rs. 2,25,50,000/- was in fact towards corpus donation. The assessee produced confirmation and bank account and relevant details to prove it was a corpus donation. Therefore, it could not be added to the income of the assessee. The Ld. CIT(A) correctly directed to delete the addition. The Revenue did not challenge the deletion of addition on account of corpus donation. Therefore, findings of fact recorded by Ld. CIT(A) are confirmed. If the corpus donation is excluded nothing would survive against the assessee so as to make any addition. In this view of the matter, there is no merit in Departmental appeal. Same is accordingly dismissed."

3.5 Thus, respectfully following the decision of the Tribunal (supra), the ground no. 1 of appeal of the Revenue is dismissed.

4. The ground no. 2 and 3 relate to directions of learned CIT(A) for allowing the carry forward loss of Rs.5,80,12,138/- to next year for setting off against income of subsequent year.

4.1 We have heard the rival submissions of the parties and perused the relevant material on record. Thought the Assessing Officer did not give any comment on the carry forward of the losses, however, the learned CIT(A) allowed the carry forward of the losses observing as under:

".....I, therefore find that the contention of the assessee is correct and the loss of Rs (-) 4,15,70,160/- to be brought forward, set off from the current income, if any or in case of loss of current year i.e Rs.(-)1,64,41,978/- in the impugned matter the total of Rs(-) 5,80,12,138/- is hereby carried forward to the subsequent years. I am further fortified in my above findings by various judgments of the Hon'ble ITAT Delhi benches which have consistently held in favour of the assessee on this issue.

In the case of Director of Income Tax Vs Raghuvanshi Charitable Trust [2011] 197 Taxmann 170 Delhi it has been held that section 11 of the Income Tax Act, 1961 Charitable or religious trust-Exemption of income from property held under trust- Whether a trust can be allowed to carry forward deficit of current year and to set off same against income of subsequent year would amount to application of income of trust for charitable purposes in subsequent year within the meaning of section ll(l)(a) - held Yes.

I have also decided the similar issue in favour of the assessee in the case of Devender Kumar Garg Charitable Trust for the A/Y 2011-12 vide order dated 18-11-2015 in ITA number 541/2013-14. Thus following the rule of consistency and in respectful agreement with the aforesaid order of Hon'ble ITAT, I allow the surplus/loss of Rs (-)4,15,70,160/- as brought forward from A/Y 2011-12 along with current year's loss of Rs.1,64,41,978/- totaling to Rs (-)5,80,12,138/- be allowed to be carried forward to A/Y 2013-14. The AO is directed to compute the loss accordingly and allow the same to be carried forward to A/Y 2012-14."

4.2 The identical issue has been decided by the Tribunal (supra) in assessment year 2011-12 observing as under:

"15. After considering the rival submissions, we do not find any justification for Ld. CIT(A) to reject the claim of assessee. Ld. Counsel for assessee rightly contended that the authorities below have failed to appreciate that income has to be computed commercially even in cases covered u/s 11-13 of the Act and resultant loss, if any, arising due to surplus application of income has to be computed and carry forward to the next year to be set off therein. The AO has not given any findings on the same. The Ld. CIT(A) without examining the issue in detail dismissed the claim of assessee because section 11 provides for exemption of income of charitable organization. However, it is a fact that assessee claimed carry forward of the losses for subsequent year as per law which should have been appreciated and should be considered in favour of the assessee. This issue is covered by above judgment referred above. We, accordingly, set aside the orders of the CIT(A) and restore this issue to the file of the AO with direction to allow the

claim of assessee after verifying the facts on record. The AO shall give reasonable sufficient opportunity of being heard to the assessee. In the result, Cross Objection of the assessee is allowed for statistical purposes."

4.3 Respectfully following the finding of the Tribunal (supra), the finding of the learned CIT(A) is upheld. Ground nos. 2 & 3 of appeal of the Revenue are dismissed.

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

Order is pronounced in the open court on 3rd February, 2020.

Sd/-	***Sd/-***
(BHAVNESH SAINI)	**(O.P. KANT)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Dated: 3rd February, 2020.
RK/-
Copy forwarded to:
1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar, ITAT, New Delhi