

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE S.V.BHATTI

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THE HONOURABLE MR.JUSTICE BASANT BALAJI

MONDAY, THE 15<sup>TH</sup> DAY OF NOVEMBER 2021 / 24TH KARTHIKA, 1943

ITA NO. 18 OF 2019

AGAINST THE ORDER IN ITA 313/2018 OF I.T.A.TRIBUNAL,COCHIN BENCH,

ERNAKULAM

APPELLANT/S:

M/S.ILAHIA TRUST,  
MARKET ROAD, VELLORKUNNAM VILLAGE, ILAHIA TRUST,  
MUVATTUPUZHA-686673, REPRESENTED BY ITS CHAIRMAN, SHRI  
K.M. PAREETH.

BY ADVS.

T.M.SREEDHARAN (SR.)

SRI.V.P.NARAYANAN

SMT.DIVYA RAVINDRAN

SRI.R.BHASKARA KRISHNAN

RESPONDENT/S:

THE COMMISSONER OF INCOME TAX,  
C.R BUILDING, I.S. PRESS ROAD, COCHIN-682018.

OTHER PRESENT:

SC CHRISTOPHER ABRAHAM

THIS INCOME TAX APPEAL HAVING COME UP FOR HEARING ON 15.11.2021,  
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

## J U D G M E N T

S.V. Bhatti, J.

Heard learned Senior Advocate Mr T M Sreedharan for appellant and learned Standing Counsel Mr Christopher Abraham for respondent.

2. M/s. Ilahia Trust/Assessee is the appellant herein. The Commissioner of Income Tax, Cochin/Revenue is the respondent. The assessee is a Trust registered under Section 12AA of the Income Tax Act 1961 (for short 'the Act'). The instant appeal arises from the order of the Income Tax Appellate Tribunal (for short 'Tribunal') Cochin Bench dated 29.10.2018 in I.T.A. No.313/Coch/2018. The issues relate to the return filed by the assessee for the Assessment Year 2012-13.

2.1 As an Educational Trust registered under Section 12AA, the assessee claims that the income of the Trust for the Assessment Year up to and including the Assessment Year 2010-11 is exempt from the computation of total income of the assessee. The assessee for the subject assessment year, on 01.01.2013, filed the return under the Act declaring the total income of the assessee as 'Nil'. The assessee, admittedly, established and running four educational institutions. The case of the assessee was selected for scrutiny and statutory notices under Section 143(2) and 142(1) were issued by the Assessing Officer. The Assessing Officer issued notice calling upon the assessee to explain the advance of a sum of Rs.72,45,000/- in favour of M/s.VUS Timbers. M/s. VUS Timbers is a proprietary concern of Mrs. K Sainaba. The Proprietrix K Sainaba is the wife of Managing Trustee Sri V U Sidhik of the assessee/Educational

Trust. The advance made in favour of M/s. VUS Timbers since is not compliant with the general purpose of running the Trust, the Assessing Officer called upon the assessee to show-cause as to why the provisions of Section 13(1)(c) of the Act should not be invoked and disallow the advances made by the assessee in favour of M/s. VUS Timbers. The assessee, in its reply dated 19.11.2014, stated that the assessee had taken steps to establish a medical college; the wood requirement of the proposed building for the medical college has been placed on M/s. VUS Timbers and, therefore, the amount has been advanced to M/s. VUS Timbers. The assessee does not dispute the standing of M/s. VUS Timbers *vis-a-vis* the Managing Trustee of the assessee. It is stated the amount received from the assessee was repaid by M/s. VUS Timbers during the Financial Years 2012-13; 2013-14; and 2014-15.

2.2 The other issue which needs to be referred to at this

stage is, the assessee has described one Mr Varghese Innocent in the list of sundry creditors. The total amount shown against the name of Varghese Innocent is Rs.21,27,846/-. The assessee was called upon to explain the outflow from the Trust account a sum of Rs.21,27,846/-. The reply is that the said Varghese Innocent carried out a few works for the assessee/Trust and the amount has been paid towards consideration for the works carried out by the said contractor. Then, the next question raised by the Department is what are the works carried out by Varghese Innocent and whether TDS was effected while making the payment. The assessee could not place on record the details of effecting TDS on the amount paid to Varghese Innocent. The failure to comply with Section 40(a)(ia) of the Act has been noted and the amount claimed towards capital investment has been disallowed by the Assessing Officer.

2.3 The Assessing Officer, through order in Annexure-A

dated 11.03.2015, finalized the assessment of the assessee calling upon the total tax payable by the assessee together with interest amounting to Rs.2,86,95,959/-. The assessee filed appeal before the Commissioner of Income Tax (Appeals). The CIT (Appeals), through the order dated 10.04.2018 in Annexure-B, dismissed the appeal. The assessee filed second appeal before the Tribunal in ITA No.313/Coch/2018. The Tribunal, through the order dated 29.10.2018 filed as Annexure-D, dismissed the appeal filed by the assessee. Hence, the appeal under Section 260A of the Act.

3. The issues relate to the payment of Rs.72,45,000/- in favour of M/s. VUS Timbers and Rs.21,27,846/- in favour of Varghese Innocent. Rs.72,45,000/- is claimed as advance paid for the purchase of wood and the sum of Rs.21,27,846/- is shown as expenses incurred for construction work and payment made without TDS to the contractor Varghese Innocent.

Substantial Question Nos. 1 to 3

3. Substantial question nos. 1 to 3 read thus:

“(i) Whether on the facts and in the circumstances of the case, the Appellate Tribunal is justified in dismissing the appeal by rejecting all the claims for exemption/deduction in the Assessment Order Annexure-A?

(ii) Is the Appellate Tribunal justified in making addition of Rs.72,45,000/- and estimating interest thereon as diversion of funds of the Trust amounting to violation of exemption u/s.11 of the Act r.w.s. 13(1)(c) and in levying tax at maximum marginal rate thereon?

(iii) Whether on the facts and in the circumstances of the case, the assessing and Appellate Authorities, including the Appellate Tribunal are justified in estimating and adding Rs.13,04,700/- as income of the Trust and assessing the same at maximum marginal rate as stated in the ground above? Are not the above additions arbitrary, illegal and unsustainable in law?”

4. Senior Advocate Mr T M Sreedharan contends that the assessee was granted registration under Section 12AA of the Act on 01.04.2000 and the assessee being an Educational Trust, the income is exempt from the computation of total income for

the subject assessment year as well. The conduct of assessee since its inception till the show-cause notice issued by the Assessing Officer is completely blemishless. The assessee, being an Educational Trust, is discharging the objects for which the Trust has been established. The assessee, as part of providing education and establishing more colleges, planned to establish a medical college in the State of Kerala. The assessee, as a measure in this behalf, paid a sum of Rs.72,45,000/- to M/s. VUS Timbers and the said amount is an advance made by the assessee in favour of M/s. VUS Timbers. The Assessing Officer erred in fact by prejudicially presuming against the assessee by referring to the solitary circumstance that the Proprietrix of M/s. VUS Timbers is the wife of the Managing Trustee – Mr V U Sidhik. The plan of the assessee since could not go forward, the assessee during the Financial Years referred to above has received the advance paid to M/s. VUS Timbers. Therefore, the



order of the Assessing Officer, as confirmed by the CIT (Appeals) and the Tribunal, is suffering from the erroneous and illegal understanding of the normal circumstances which had taken place in the subject Assessment Year. The order, giving effect to the provision under Section 13(1)(c), is untenable. According to him, the issues require reconsideration, if this Court is not convinced on the ground that the findings recorded by the authorities suffer from excessive subjective satisfaction, to wit, matter could be remanded to Tribunal.

5. Learned Standing Counsel Mr Christopher Abraham, replying to the argument of assessee, states that the Assessing Officer and the CIT (Appeals) have, in fact, taken note of each one of the circumstances stated by the assessee by way of reply to the show-cause notice, and the authorities were convinced because of the failure of the assessee to establish the *bona fides* of the reply given by it in the payment made to M/s. VUS

Timbers. In other words, the assessee failed to place material relating to permissions granted for establishing a medical college, the timing of payments made to M/s. VUS Timbers and that the advance payment was made in furtherance of a project planned by the assessee. In the absence of material on the very basic reply given by the assessee, acceptance of reply given by the assessee would be illegal and the Officers do not enjoy so much discretion under the Act to accept unsupported reply. He invited our attention to each one of the findings recorded by all the three authorities and argued that the questions raised, firstly, do not arise for consideration and secondly, there is no perversity in any of the findings recorded by the orders in Annexures-A, B and D. This Court ought not to decide the legality of the conclusions recorded by the authorities by looking at fresh material now placed by the assessee before this Court. Even, such material does not inspire confidence for the

limited purpose of remitting the matter to the Tribunal. He prays for answering all the three questions in favour of the Revenue and against the assessee.

6. The argument of assessee proceeds to convince this Court that the reply given by the assessee is not considered and led to a finding which resulted in the inclusion of Rs.72,45,000/- as income of the assessee. The further argument is that the orders did not consider the material placed by the assessee in support of its plan to establish a medical college and/or subsequent inability to go ahead with the establishment of medical college as planned. Therefore, the assessee prays for firstly answering the questions in favour of the assessee, and secondly for sending the matter back to Tribunal for consideration and disposal afresh. We can, having perused the record, state that the argument is *de hors* what has been categorically and specifically adverted to by the Assessing

Officer, CIT (Appeals) and the Tribunal. However, we would look at a few circumstances to appreciate the argument of assessee.

7. To begin with, this Court takes note of the fact that M/s. VUS Timbers is a proprietary concern of Mrs K Sainaba, and Mrs K Sainaba is the wife of Managing Trustee Sri V U Sidhik. From Annexure-E ledger account extract of Ilahia Trust, of M/s. VUS Timbers it is shown that on 16.02.2012 under two receipts a sum of Rs.72,45,000/- was paid to M/s. VUS Timbers. As per Annexure-G(a) the communication received by the assessee from Kerala University of Health Sciences dated 03.12.2012 shows that the application of the assessee was returned. The assessee, in Annexure-G(b)(5) dated 29.11.2012, has applied for the grant of Essentiality Certificate by the Health University. A bare look at even the very documents now filed by the assessee discloses that the payment/advance in

favour of M/s. VUS Timbers is anterior to any of the steps now relied on by the assessee. This circumstance is sufficient to belie the entire explanation offered by the assessee in this behalf. The admitted circumstances are that advances have been made in favour of the Managing Trustee's wife. The explanation offered is for the purchase of wood for proposed construction of a medical college. The purchasing of wood is for the medical college to be established by the assessee/Educational Trust. Each one of the above reasons looked at independently, in the background of material placed on record by the assessee, this Court is of the view that the findings recorded by the Tribunal confirming the findings of facts recorded by the authorities under the Act are available conclusions, and do not warrant interference of this Court. The reasoning of Tribunal's order in paragraph 3.5, reads as follows:

“3.5 We have heard the rival submissions and perused the

material on record. Section 13(1)(c) of the I.T.Act states that if any income of the trust during the previous year is used or applied directly or indirectly to any person referred to in sub-section (3) of section 13, provisions of section 11 will not have application. Admittedly, the amount has been advanced to M/s. VUS Timbers, a proprietary concern of wife of the Managing trustee. Therefore, the advance clearly comes within the mischief of section 13(1)(c) of the I.T.Act unless it is proved that the said advance is for the purpose of assessee-trust itself. It is the claim of the assessee that the amount has been advanced for purchase of timber for the proposed construction of a medical college. It is an admitted fact that permission was given for the setting up of medical college. The assessee has also not produced any application or other documents which ought to have been submitted to the Governmental authorities or Medical Council of India for the proposal for setting up of medical college. The story of the assessee is far from convincing that the advance has been made for the purchase of timber. The timber is normally purchased only subsequent to the construction of the building and even without constructing any building, the assessee had made the advance for purchase of timber. It is also an admitted fact that no wood was received by the assessee. Therefore, in the garb of purchase of timber, the advance amounts were diverted for the personal benefit of an

interested party, who is mentioned in section 13(3) of the I.T.Act. Therefore, there is clear violation of provisions of section 13(1)(c) of the I.T.Act. The contention of the assessee that the amounts were returned by account payee cheques and within a short period is of no consequence. Only a small portion of the advance was repaid to the assessee trust within four months from the date of advance. Therefore, the repayment by M/s.VUS Timbers of all the advance by account payee cheques is of no significance insofar as there was already a violation of provisions of section 13(1)(c) of the I.T.Act. Therefore, the CIT(A) is justified in directing the A.O. to treat an amount of Rs. 72,45,000 as advance as income to the assessee. The assessee was paying interest on borrowings, and therefore, notional interest at the rate of 18% on the advance of Rs.72,45,000 was rightly brought to tax as income of the assessee by the A.O. Therefore, we see no reason to interfere with the findings of the CIT (A). Accordingly, we confirm the order of the CIT (A) on this issue.”

Nothing more is needed except to record that the findings of fact recorded are tenable from available circumstances and there is no substantial question involved warranting interference of this Court. Hence, the questions are answered

in favour of the Revenue and against the assessee.

Substantial Question nos. 4 and 5

8. Substantial question nos. 4 and 5 deal with issues arising under Section 40(a)(ia) related to non-compliance with the requirement of deduction of TDS. The questions read thus:

“(iv) Did not the Appellate Tribunal err in law in disallowance of Rs.21,27,846/- being the amount paid for contract executed by invoking Sec.40(a)(ia) and in levying income thereon at maximum marginal rate, as if the same constituted income of the appellant?

(v) Did not the Appellate Tribunal err in law in disallowing labour charges expenses to the extent of Rs.5,40,390/- and treating the same as payment in violation of the statutory provision and levying income tax thereon at maximum marginal rate? Are not the findings of the Appellate Tribunal perverse in law and liable to be set aside?”

8.1 The statutory obligation of the assessee to conform to the requirement of Section 40(a)(ia) of the Act is not in dispute. The fact that no TDS was effected while making the



payment of Rs.21,27,846/- in favour of one Varghese Innocent towards consideration for contract works is also not in dispute. The explanation, in the understanding of this Court, does not deal with any of the relevant aspects of law or fact for independently examining the question to find out whether the findings recorded by the orders referred to above warrant interference. It is sufficient to refer to the findings recorded by the Tribunal in this behalf which read as follows:

“4.4 We have heard the rival submissions and perused the material on record. Admittedly, no tax was deducted on the payment of Rs.21,27,846. The assessee has not proved that the provisions of section 40(a)(ia) of the I.T.Act does not have any application on the said payment of Rs.21,27,846. Hence, the A.O. was correctly disallowed the expenditure by invoking the provisions of section 40(a)(ia) of the I.T.Act, which was confirmed by the CIT(A). Hence, we see no reason to interfere with the order of the CIT(A) and we confirm the same.”

8.2 The assessee failed to demonstrate how the above

finding warrants interference of this Court, particularly by referring to the substantial questions framed in this behalf. The questions are not substantial questions of law, and the adjudication is in accordance with the requirements of law and circumstances presented by the very return filed by the assessee. The questions are answered, hence, in favour of the Revenue and against the assessee.

Substantial Question Nos. 6 & 7

9. Substantial question nos. 6 & 7 read as follows:

“(vi) Is not the computation of total income and the levy of interest u/s 234A and 234B as per the modified order dated 25.05.2018 erroneous and contrary to the statutory provision and hence, liable to be set aside?

(vii) Is not the entire order of the Appellate Tribunal arbitrary, illegal and unsustainable in law?”

9.1 The questions relate to the levy of interest under Section 234A and 234B of the Act. The non-compliance with

statutory requirements and inviting one or the other consequence thereof is not disputed. The discretion is rightly exercised by the Assessing Officer for levying interest on the tax determined in this behalf. Since the other questions are answered in favour of the Revenue and against the assessee, these questions follow suit and are answered, accordingly, in favour of the Revenue and against the assessee. All the findings of the Tribunal are confirmed. The order of the Tribunal is in accordance with law and no exception could be taken and questions answered accordingly.

Income Tax Appeal is dismissed. No order as to costs.

sd/-

S.V.BHATTI

JUDGE

sd/-

BASANT BALAJI

JUDGE

APPENDIX OF ITA 18/2019

PETITIONER ANNEXURE

- ANNEXURE A TRUE COPY OF THE ASST. ORDER DATED 11/3/2015 PASSED BY THE ASSISTANT COMMISSIONER OF INCOME TAX (EXEMPTION), KOCHI.
- ANNEXURE B TRUE COPY OF THE ORDER IN APPEAL NO.ITA 300/EXEM/EKM/CIT(A)III/2015-16 DATED 16/4/2018 PASSED BY THE CIT (A)-II, KOCHI.
- ANNEXURE C TRUE COPY OF ORDER OF THE MODIFIED ORDER DATED 25/5/2018 PASSED BY THE DEPUTY COMMISSIONER OF INCOME TAX (EXEMPTIONS), KOCHI.
- ANNEXURE D TRUE COPY OF THE ORDER IN ITA NO.313/COCH/2018 DATED 29/10/2018 PASSED BY THE INCOME TAX APPELLATE TRIBUNAL, COCHIN BENCH.
- ANNEXURE E TRUE COPY OF LEDGER ACCOUNT OF M/S.VUS TIMBERS, MUVATTUPUZHA.
- ANNEXURE F TRUE COPY OF LEDGER FOLIO OF SHRI VARGHESE - CONTRACTOR FOR THE PERIOD FROM 1/4/2011 TO 31/3/2012.
- ANNEXURE G TRUE COPY OF THE ORDER U/S 12AA OF THE I.T.ACT 1961 DATED 30./11/2007 PASSED BY THE COMMISSIONER OF INCOME TAX, KOCHI.
- ANNEXURE G(A) COPY OF COMMUNICATION RECEIVED FROM THE KERALA UNIVERSITY OF HEALTH SCIENCES NO.6924/AC.1/1/2012/KUHS DATED 3/12/2012.
- ANNEXURE G(B) TRUE COPY OF APPLICATION FOR STARTING NEW MEDICAL COLLEGE, BEFORE THE KERALA UNIVERSITY OF HEALTH SCIENCES AND ITS ENCLOSURES.

ANNEXURE G(C)

TRUE COPY OF THE REPLY TO THE NOTICE DATED 29/12/2014 TO THE ASSESSING AUTHORITY PURSUANT TO THE HEARING CONDUCTED ON 26/12/2014 FOR THE ASSESSMENT YEAR 2012-13.

ANNEXURE G(D)

TRUE COPY OF LETTER SUBMITTED ON 26/12/2014 BY THE APPELLANT TO THE ASSESSING OFFICER.