

**IN THE INCOME TAX APPELLATE TRIBUNAL
"H" BENCH, MUMBAI**

**BEFORE SHRI PRASHANT MAHARISHI, AM &
SHRI N. K. CHOUDHRY, JM**

I.T.A. No. 912/Mum/2023
Assessment Year: 2017-18)

Dy.CIT (Exemption) -2(1)
Room No. 608, 6th Floor, MTNL
Building, Cumballa Hill, Mumbai-
400026.

Vs.

**Shri Kutchi Visa Oswal Jain
Manav Seva Kendra**, Dahisar C/o
Navneet Hi Tech, SV Road, Dahisar,
Mumbai-400068.

PAN No. **AAATS2711C**

Appellant) :

Respondent)

**Appellant/Department by
Assessee/Respondent by**

:
:

Sh. S.N. Kabra, Ld. Sr.DR
Sh. Prakash Jotwani, Ld. Adv.

**Date of Hearing
Date of Pronouncement**

:
:

14.06.2023
12.07.2023

ORDER

Per N. K. Choudhry, JM:

The Revenue Department/Appellant herein has preferred this appeal against the order dated 25.01.2023 impugned herein passed by Ld. Commissioner of Income Tax (Appeals)-1/ National Faceless Appeal Centre (NFAC), Delhi {in short 'Ld. Commissioner')} u/s 250 of the Income Tax Act 1961 (in short 'the Act').

2. In this case, on perusing the financials of the Assessee, the AO observed as under:

“The Assessee is also running a Pharmacy store in its Hospital and the gross turnover of the Trust is of Rs. 27,99,03,717/-. The Assessee sold medicines and drugs to the patients through the Pharmacy store of Rs. 8,40,06,345/- whereas cost of the medicines as per details furnished by the Assessee was Rs. 6,67,43,965/-. Thus, there is a profit of Rs. 1,72,62,379/- on transactions of Pharmacy store. The profits of Pharmacy store comes at 20.54% of its turnover and total turnover of the Pharmacy store is around 30.01% of total Hospital collections from inpatients and outpatients charges.

2.1 The AO on the basis of aforesaid facts, show caused the Assessee, as to why the surplus out of Pharmacy store should not be treated as Business Income under section 11(4A) of the Act.

2.2 The Assessee in response to show-cause notice, preferred not to file any reply, therefore, the AO treated the surplus of Rs. 1,72,62,379/- out of Pharmacy store as Business Income under section 11(4A) of the Act and taxed accordingly, by observing as under:

The turnover of Pharmacy store is around 30.01% of total Hospital collections, thus seeing its turnover, it cannot be said to be minor, accidental and mere accompanying activities, as is

expected when the words used in the law are 'incidental to charitable purpose'. Further profit out of this Pharmacy store is not minor and is around 20.54% of Pharmacy store turnover. The nature, volume, frequency and surplus of these transactions clearly shows that it is systematic business activity of the Assessee trust.

Second and equally important conditions to be fulfilled by Assessee trust to claim exemption of this pharmacy surplus has to maintain separate books of accounts in respect of the same. However, Assessee trust has not maintained separate books of accounts in respect of Pharmacy store. Here merely maintaining some ledgers of medicines purchases and sales does not amount to maintaining separate books of accounts.

3. The Assessee being aggrieved against the addition of Rs. 1,72,62,379/- made by the AO, preferred first appeal before the Ld. Commissioner.

4. The Ld. Commissioner, while relying upon the judgments passed by the Hon'ble Bombay High Court in the case of Baun Foundation Trust Vs. CIT-1, Mumbai {Writ Petition No.1206 of 2010 decided on 27th March 2012} and the co-ordinate bench of the Tribunal at Mumbai in the cases of Hiranandani Foundation, Mumbai Vs. ADIT (E) (2)(1) {ITA No. 1772/2017 decided on 05.02.2020} and DCIT (E), Mumbai Vs. National Health and Education Society (ITA No. 1958/Mum/2016), deleted the aforesaid addition of Rs. 1,72,62,379/- by holding as under :

“The commercial activities of medical store are to be considered as activities for charitable purpose. Section 11(4) of the Act cannot be applied to the Assessee trust. The Pharmacy store is in the Hospital premises, is incidental and ancillary to the dominant charitable object of running the Hospitals by the Assessee. In the instant case, the Assessee is maintaining separate books of accounts and financial statements of Pharmacy store and has complying twin conditions mentioned in sub-section (4A) of section 11 of the Act, therefore, the income accrued from Pharmacy store is incidental to the dominant object of running Hospital by the Assessee, hence, the action of the AO is not justified in treating the Pharmacy store of the Assessee as separate business entity and the profits therein as taxable income.”

5. The Revenue/Department being aggrieved, is in appeal before us. The Ld. Departmental Representative (DR) mainly argued that in PCIT (E), Mumbai Vs. National Health and Education Society (ITA No. 1772/2017 decided on 05.02.2020) though the Hon’ble High Court of Mumbai decided the issue in favour of the Assessee by relying upon the judgment in the case of Baun Foundation Trust (supra), however, it is a fact that in that case the pharmacy was for in-house/captive consumption of the Hospital and not for over the counter sale in general but here in this case the Assessee is also selling the drugs and medicines to outsiders, therefore, the Assessee is not entitled for the

benefit as claimed for on the basis of the judgments, on which the Ld. Commissioner granted the relief to the Assessee.

6. On the contrary the Ld. AR supported the impugned order and claimed that the impugned order has been passed in accordance with law and by following the judgments of Hon'ble jurisdictional High Court and therefore does not suffers any perversity, impropriety and or illegality.

7. We have heard the parties and perused the material available on record. The AO in this case, mainly made the addition of Rs. 1,72,62,373/- on account of profit on transaction of Pharmacy store, by taking refuge of the provisions of section 11(4A) of the Act and held that Pharmacy store is not incidental to the attainment of the objects of the Assessee trust.

7.1 The provisions of section 11(4A) have clearly carved out the exception qua non-applicability of the provisions of section 11(4) of the Act, where the business is incidental to the attainment of the objectives of the trust or, as the case may be, institution, and separate books of account are maintained by such trust or institution in respect of such business. For clarity the provisions of section 11(4A) of the Act are reproduced hereunder:

Sub-section (1) or sub-section (2) or sub-section (3) or sub-section (3A) shall not apply in relation to any income of a trust or an institution, being profits and gains of business, unless

the business is incidental to the attainment of the objectives of the trust or, as the case may be, institution, and separate books of account are maintained by such trust or institution in respect of such business.

7.2 Therefore as per the provisions of section 11(4A), First we have to consider, as to whether the business of pharmacy store/chemist shop is incidental to the objects of the Assessee/trust.

7.3 In CBDT Circular No. 11/2008 dated 19.12.2008 (Point No. 2.1) as relied upon by the Ld. Commissioner, it has been clarified that the proviso to section 2(15) of the Act will not apply to medical relief etc. and where the purpose of a trust or institution is relief of the poor, education or medical relief, it will constitute 'charitable purpose' even if it incidentally involves the carrying on of commercial activities. For clarity relevant clarification reads as under:

"The newly inserted proviso to section 2(15) will not apply in respect of the first three limbs of section 2(15), i.e., relief of the poor, education or medical relief. Consequently, where the purpose of a trust or institution is relief of the poor, education or medical relief, it will constitute 'charitable purpose' even if it incidentally involves the carrying on of commercial activities."

7.4 No doubt, the Hon'ble High Court in CIT(E), Mumbai Vs. National Health and Education Society (supra) as relied upon by the Ld. DR, dealt with the situation wherein the Pharmacy was used for in-house/captive consumption of the Hospital and not for over the counter sale in general, however, the Hon'ble High

Court in the case of Baun Foundation had taken into consideration the situation, wherein the general public were also using the facility/chemist shop and the Hon'ble High Court clearly held that this is a facility which is intended to be used predominantly by patients and their relatives. Though the general public is not prohibited from using the facility, the crucial question to ask or the test to answer whether the establishment of chemist shop shall be incidental or ancillary to the dominant object and purpose, which is set up and conduct a Hospital for philanthropic purpose.

7.5 Medicines are one of the most common healthcare interventions and play a significant role in patients' health management. Pharmaceuticals are an integral part of patient care. Admittedly the Assessee is running a Hospital and also having in-house patient's facilities, therefore, the medicines are essentials for the treatment of in-house patients especially. The Assessee is also giving treatment to out-patients, and therefore out-patients and even outsiders as well, are at their liberty/option to purchase the medicines from the Assessee's Pharmacy store, as there cannot be any restriction. The Assessee may be on commercial basis but in fact, directly-indirectly providing medical relief by selling medicines to the in-house patients and outpatients and outsiders as well and therefore protected by CBDT Circular (supra) as well. It is also not the case here that the Assessee has established Chemist/Pharmacy store exclusively for outpatients/outsideers and has utilized

surplus from the operation of a chemist shop, for other objects than the prescribed objects. Hence on the aforesaid analyzations, we don't have any hesitation to hold that running of the chemist shop is not only essential but also incidental or ancillary to the dominant object and purpose to run a hospital and thus the Assessee has complied with first condition of section 11(4A) of the Act.

7.6 Coming to the second condition of section 11(4A) of the Act, as to whether the Assessee is maintaining separate books of account in respect of such business/chemist shop. We observe that the Ld. Commissioner has given categorical findings that the Assessee is maintaining separate books of accounts and financial statements for pharmacy store, hence the Assessee also complied with 2nd condition of section 11(4A) of the Act.

7.7 Thus we are in concurrence with the conclusion of the Id. Commissioner that the Assessee-trust has complied with the twin conditions, as set out in section 11(4A) of the Act, therefore, the income accrued from Pharmacy store is incidental to the dominant object of running Hospital by the Assessee, hence, the action of the AO is not justified in treating the Pharmacy store of the Assessee as separate business entity and the profits therein as taxable income.

7.8. Resultantly the impugned order, do not requires any interference, as the same does not suffers from any perversity, improperity and/or illegality.

8. In the result, appeal filed by the Revenue/Department stands dismissed.

Orders pronounced in the open court on 12-07-2023.

Sd/-

(PRASHANT MAHARISHI)
Accountant Member

Sd/-

(N. K. CHOUDHRY)
Judicial Member

SK, Sr.PS.

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. DR, ITAT, Mumbai
4. Guard File
5. CIT

BY ORDER,

(Dy./Asstt.Registrar)
ITAT, Mumbai