IN THE INCOME TAX APPELLATE TRIBUNAL
"G" BENCH, MUMBAI

BEFORE SMT. KAVITHA RAJAGOPAL, JM &
MS PADMAVATHY S, AM

I.T.A. No. 1833/Mum/2023
(Assessment Year: 2013-14)

The Synthetic & Art Silk Mills Research Association Samira Marg, Worli, Mumbai-400025. **PAN :AAATT4271E**.	Vs.	**Commissioner of Income Tax (Exemption),** Room No. 601, Cumballa Hill MTNL TE Building, Pedder Road, Dr. Gppalrao Deshmukh Marg, Cumballa Hill, Mumbai-400026.
Appellant)	:	**Respondent**)

Appellant/Assessee by	:	Shri Girish Dave & Tanzil R. Padvekar, Adv.
Revenue/Respondent by	:	Shri Dr. Kishor Dhule, CIT-DR
Date of Hearing	:	30.11.2023
Date of Pronouncement	:	19.12.2023

O R D E R

Per Padmavathy S, AM:

This appeal is against the order of the Commissioner of Income Tax, (Exemption), Mumbai dated 23.03.2023 passed under section 263 of the Income tax Act, 1961 (for short the 'Act') for the AY 2013-14. The assessee raised the following grounds:

1. On the facts and circumstances of the case and in law, the power exercised by Ld. Commissioner of Income Tax (in short referred to as the Ld. CIT) under Sec. 143(3) r.w.s. 263 of the Act, in law, is patently illegal as the Re-assessment Order subjected to revision is not erroneous or nor it is prejudicial to interest of the Revenue and hence, impugned Order dt. 23/03/2023 needs to be quashed.

2. On the facts and under the circumstances of the case, Ld. CIT has erred in invoking the proceedings since the assessment order dated 04.04.2022 was passed accepting the return and exemption claim of the appellant based on their earlier revision proceedings completed by the Ld. CIT vide order dated 05.03.2021.

3. On facts and circumstances of the Case, Ld. CIT conveniently misinterpreted provisions of Sec. 10(21) of the Act when language of said provision is plain and unambiguous and any income of the "Research Association" is exempt from Income Tax.

4. The Ld. CIT failed to understand that the Legislature has given exemption to "Any income" as per said expression used at beginning of Sec. 10(21) and failed to understand that the exemption to Income from Tax is not restricted to particular class or category of Income nor based on source of income.

5. The Ld. CIT misinterpreted provisions of Sec. 10(21) of the Act that the Legislature has treated 'Research Association' as separate class and only for limited purpose provisions of Sec. 11 of the Act are made applicable mutatis mutandis.

6. The Ld. CIT erred in holding that the income derived from Auditorium Hire Charges, Hoarding Sites & Service charges, and Licence Fees/rent are not connected or incidental to attainment of objectives of the Appellant when no such conditions are present in Sec. 10(21) of the Act and hence, impugned Order is based on erroneous findings & said Order deserves to be squashed.

7. Appellant crave leave to add to, amend, modify or delete any of the above grounds in the interest of justice.

2. The assessee is a Public Charitable Trust registered under section 12A of the Act. The assessee is also approved research organization under section 35(1)(ii) of the Act. The assessee filed the return of income on 25.09.2013

declaring income at Rs. Nil after claiming exemption under section 11 of the Act. The assessee's assessment was re-opened by issue of notice under section 148 of the Act dated 28.03.2018. The reason for re-opening was that the benefit under section 11 was denied to the assessee by invoking the proviso to section 2(15) in assessee's case for AY 2009-10 and 2015-16. Accordingly the AO re-opened the assessment stating that the assessee by claiming exemption under section 11 has understated the income for AY 2013-14 and that the income has escaped assessment within the meaning of section 147 of the Act. In response the assessee filed letters dated 25.07.2018 and 30.07.2018 to submit that the Proviso to section 2(15) of the Act is not applicable to the assessee since the activities of the Trust are not in the nature of Trade, commerce or business and that the assessee is engaged in imparting education through various ways such as research and conducting educational courses.

3. The assessee while filing objections to the reasons recorded dated 06.08.2018 made an alternate plea before the AO that the assessee being engaged in carrying out research activities and being notified under section 35(1)(ii) is entitled to the benefit under section 10(21) of the Act. The assessee vide letter dated 31.10.2018 also filed the revised computation claiming deduction under section 10(21) of the Act before the AO. The AO vide order dated 14.11.2018 passed under section 143(3) r.w.s. 147 of the Act accepted the alternate submission of the assessee held that the assessee's income is exempt under section 10(21) of the Act and accordingly completed the assessment assessing the income at Rs. Nil.

4. The CIT(Exemption) (herein after "First CIT(Exemption)"), Mumbai on perusal of the assessment recorded noticed that the assessee's income includes the

following amounts which have been considered for the purpose of claiming exemption under section 10(21) of the Act:

Auditorium Hire Charges	Rs. 36,14,729/-
Hoarding Site and Service Charges	Rs. 79,84,044/-
Licence Fee / Rent	Rs. 1,19,81,018/-
Total	**Rs. 2,35,79,791/-**

5. The First CIT (Exemption) was of the view that the above income is not eligible for exemption under section 10(21) of the Act and that the AO has allowed the deduction without verification of the above transactions. To this extent the First CIT (Exemption) considered the order of the AO passed under section 143(3) r.w.s 147 of the Act to be erroneous and prejudicial to the interest of the Revenue and issued a show-cause notice under section 263 of the Act dated 17.02.2021. The assessee submitted before the First CIT (Exemption) that the impugned receipts are generated out of incidental activities of the Trust and are fully utilized for attainment of the objective of the Trust which is research and development activities carried out with the view to make contributions in the textile and allied science. The assessee further submitted that the incidental receipts become a source to sustain and bridge the gap and recoup the expenses required to attain the objects of the Trust and therefore, the above receipts are covered for exemption under section 10(21) of the Act being on account of incidental activities for the attainment of its objectives and being utilized fully on such objects.

6. The First CIT (Exemption) after considering the submissions of the assessee held that -

> *"4. The matter is considered. On careful consideration of the written submissions filed by the assessee trust, I am not convinced that the Auditorium Hire Charges as well as Hoarding Site and Service charges*

and licence fees/rent are incidental to the objectives of the trust. In this connection, it is seen that the objectives of the trust is to conduct research and development activities in the textile sector and Offering auditorium on hire as well as dealing in contracts for site, hoarding charges etc. are in no way intrinsically connected or incidental to the attainment of the objectives of the trust. During the course of hearing, the authorized representative made an oral argument that the revenue generated from these streams are utilized towards objectives of the trust. I am not convinced by these arguments as it is not the end use of the revenue generated that would decide the issue whether these businesses are incidental to the objects of the trust. It is clear that the assessee has different verticals of activities. The public charitable vertical of research and development activities in textile sector is completely non-aligned to the business verticals of auditorium hire, hoarding site and services charges or rental income. In view of the same, I am satisfied that the assessment done by the AO u/s. 143(3) r.w.s. 147 dated 14/11/2018 is erroneous in so far as it is prejudicial to the interest of the revenue. Hence, this assessment order dated 14/11/2018 is set aside with the direction to the AO to redo the assessment after according the assessee reasonable opportunity of being heard.

7. The assessee preferred an appeal before the Tribunal against the order of the First CIT (Exemption) dated 05.03.2021. In the mean time the AO completed the assessment under section 144 r.w.s. 263 of the Act on 31.03.2022 assessing the income of the assessee at Nil. The relevant observation of the AO is as extracted below:

"4. Thereafter, vide order u/s 263 of the Act dated 05/03/2021, the CIT(Exemptions), Mumbai has set aside the assessment order dated 14/11/2018.

5. Accordingly, notice u/s 142(1) of the IT. Act dated 17.08 2021 was issued to the assessee to furnish details as per the annexure enclosed therein on or before the date specified therein However, the assessee has not submitted any details. Thereafter, another notice u/s 142(1) of the IT Act dated 15 01 2022 was issued to the assessee to furnish details as per the annexure enclosed therein on or before the date specified therein and the same was delivered on the However, the assessee has not submitted any details.

6. Considering the return of income filed, data available on records, the assessment is finalised as per the returned income of Rs. NIL.

7. Assessed u/s 144 r.ws 263 & 144B of the I.T. Act, 1961 as above Give credit for prepaid taxes, Charge interest u/s 234A. 234B. 234C, 234D and u/s 244A Issue demand notice & Challan accordingly."

8. Accordingly the assessee withdrew the appeal filed before the Tribunal against the order passed under section 263 for reason that the AO while passing order under section 144 r.w.s. 263 has given relief to the assessee assessing the income at Rs. Nil. Accordingly, the Tribunal did not go into the merits of the issue and disposed of the appeal as withdrawn vide order dated 26.04.2022.

9. Subsequently the CIT (Exemption) [hereinafter "second CIT(Exemptions)"] once again issued a show cause notice under section 263 of the Act by invoking the provisions of Explanation 2 to section 263 stating that the order passed by the AO under section 144 r.w.s. 263 dated 31.03.2022 is erroneous and prejudicial to the interest of the Revenue, since the AO did not carry out any enquiry or verification which should have been made and that the directions of the First CIT (Exemption) under section 263 of the Act have not been considered.

10. The assessee vide reply dated 17.03.2023 submitted that the impugned issue has already been considered by the AO as per the directions under section 263 of the Act to redo the assessment and has allowed the claim in favour of the assessee after perusing the materials on record. The assessee further submitted that issuing a notice to undertake proceedings under section 263 on the same issue once again is a mere change of opinion and shall bring hardship to the

assessee. The assessee also submitted that the impugned income are arising out of incidental activities and would be eligible for exemption under section 10(21) of the Act. The second CIT (Exemptions) did not accept the submissions of the assessee and set-aside the order of the AO under section 144 r.w.s. 263 of the Act dated 04.04.2022 with a direction to conduct the assessment proceedings focusing on the impugned issued and pass speaking order carefully enumerating facts, circumstances, verification and findings.

11. The ld. Authorized Representative (AR) submitted that the AO though has passed the order under section 144 r.w.s. 263 of the Act has stated that he has considered the return of income and data available on records and finalised the assessment assessing the income at Nil. The ld. AR drew our attention to the various submissions made before the AO during the original re-assessment proceedings with regard to the claim of exemption under section 11 and with regard to the alternate submission on the claim of exemption under section 10(21) of the Act. The Ld. AR also drew our attention to the submission made before the First Revisionary proceedings under section 263 wherein the assessee had made submissions with regard to the impugned income which is the subject matter of the current proceedings also. The ld. AR therefore, argued that the data available on record as mentioned in the order under section 144 r.w.s. 263 contain all the relevant details which have been perused by the AO and that the AO has applied his mind while allowing the claim of exemption under section 10(21) of the Act assessing the income at Nil. It is submitted by the ld. AR that the second CIT (Exemptions) is not correcting invoking Explanation 2 to section 263 since none of the conditions as stipulated under section Explanation 2 is applicable to the order passed by the AO under section 144 r.w.s. 263. The ld. AR further submitted that when the impugned income which were subject matter

of the original revisionary proceedings were duly considered and held to be eligible for exemption under section 10(21) of the Act, initiating revisionary proceedings once again on the same issue is only a change of opinion by the Revenue and not sustainable. On merits the ld. AR submitted that as per the provisions of section 10(21) any income of a research association which is approved under section 35(1)(ii) of the Act that is applied wholly and exclusively towards the objects of the trust is eligible for exemption under section 10(21) of the Act. It is also submitted that as per the 3rd proviso to section 10(21) any income from the business incidental to the attainment of its objectives and separate books of accounts are maintained are also eligible for exemption under section 10(21). In our attention was drawn to the financial statements of the assessee to substantiate that the income is applied towards the objects of the trust and that the assessee has maintained separate books of accounts for the impugned income (pages 1 to 20 of the paper book). Therefore, the ld. AR submitted that the assessee is entitled for exemption under section 10(21) and that the AO has taken one possible view and has allowed the exemption to the assessee. The ld. AR relied on the decision of the Chennai Bench of the Tribunal in the case of Association of Surgeons of India Vs. DDIT (Exemption)-1 (2017) 82 taxamann.com 68 wherein it was held that the income earned from letting out of Auditorium was eligible for exemption under section 11 when the income was applied to the objects of the Trust.

12. The ld. DR on the other hand vehemently argued that the second CIT (Exemptions) has invoked the provisions of Explanation 2 to section 263 in which sub-clause (a) provides that the order shall be deemed to be erroneous and prejudicial to the interest of the Revenue, if the order is passed without making enquiries or verification which should have been made. The ld. DR submitted

that since order of the AO is passed under section 144 r.w.s. 263 it is evident that that the assessee did not file any details pertaining to the impugned income for the verification of which, the order under section 143(3) r.w.s.147 was set aside by the First CIT (Exemptions). The ld. DR further submitted that the AO in the order of assessment under section 144 r.w.s. 263 has not brought out anything with regard to the verification carried out by him based on the material available records and the basis on which the AO has come to the conclusion that the impugned income are eligible under section 10(21) of the Act. Therefore, it was submitted by the ld. DR that the second CIT(Exemptions) has correctly invoked the provisions of Explanation 2 to section 263 and prayed that the order under section 263 should be upheld. On merits, the ld. DR submitted that for the purpose of claiming exemption the theory of source and application cannot be used to claim that the income has been used for the objects of the Trust.

13. We have heard the parties and perused the material on record. The assessee is a Public Charitable Trust having registration under section 12A of the Act and is also certified as a research organisation under section 35(1)(ii) of the Act. The assessee had filed the original return of income claiming deduction under section 11. The case was re-opened based on the re-assessment done in assessee's case for AY 2010-11 wherein the assessee was denied the benefit of deduction under section 11. From the perusal of records it is noticed that the AO while passing the order for AY 2010-11 had held that the assessee being a certified research organisation under section 35(1)(ii) ought to have claimed exemption under section 10(21) instead of deduction under section 11 and since the assessee has not made such a claim under section 10(21) the assessment was completing by not considering the exemption. For the year under consideration before the AO the assessee referred to the order for AY 2010-11 to make the

alternate claim of exemption under section 10(21) and also filed the revised return in response to notice under section 148 accordingly. The AO while completing the assessment under section 143(3) r.w.s.147 accepted this alternate plea of the assessee and allowed the exemption under section 10(21). The first CIT (Exemptions) initiated proceedings under section 263 for the reason that certain incomes which are not incidental to the attainment of the objects of the assessee have been included while allowing the exemption under section 10(21) and the order of the AO under section 143(3) r.w.s.147 was set aside. The AO has sent two notices under section 142(1) dated 17.08.2021 and 15.01.2022 calling on the assessee to justify the claim of exemption towards income derived from Auditorium Hire charges, Hoarding site & service charges and rent. The AO also issued a show cause notice under section 144, dated 29.03.2022 requiring the assessee to furnish the relevant details. The AO proceeded to complete the assessment under section 144 r.w.s.263, stating that the assessee has not submitted any details. The AO in the said order has stated that the return of income and other data available on records have been considered and assessed the income of the assessee as NIL. The second CIT (Exemptions) has invoked the explanation 2 to section 263 that the AO has not carried out the enquiry or verification that ought to have been done and therefore the order of the AO under section 144 r.w.s 263 is erroneous and prejudicial to the interest of the revenue.

14. Before proceeding further we will look at the provisions of section 263 which reads as follows:-

> ***Revision of orders prejudicial to revenue.***
>
> ***"263.*** *(1) The [99][Principal Chief Commissioner or Chief Commissioner or Principal Commissioner] or Commissioner may call for and examine the record of any proceeding under this Act, and if he considers that any order passed therein by the Assessing Officer [1][or the Transfer Pricing Officer, as*

the case may be,] is erroneous in so far as it is prejudicial to the interests of the revenue, he may, after giving the assessee an opportunity of being heard and after making or causing to be made such inquiry as he deems necessary, pass such order thereon as the circumstances of the case justify, [2][including,—

(i) an order enhancing or modifying the assessment or cancelling the assessment and directing a fresh assessment; or

(ii) an order modifying the order under section 92CA; or

(iii) an order cancelling the order under section 92CA and directing a fresh order under the said section].

*Explanation 1. - ******

Explanation 2.—For the purposes of this section, it is hereby declared that an order passed by the Assessing Officer [or the Transfer Pricing Officer, as the case may be,] shall be deemed to be erroneous in so far as it is prejudicial to the interests of the revenue, if, in the opinion of the Principal [95][Chief Commissioner or Chief Commissioner or Principal] Commissioner or Commissioner,—

(a) the order is passed without making inquiries or verification which should have been made;

(b) the order is passed allowing any relief without inquiring into the claim;

(c) the order has not been made in accordance with any order, direction or instruction issued by the Board under section 119; or

(d) the order has not been passed in accordance with any decision which is prejudicial to the assessee, rendered by the jurisdictional High Court or Supreme Court in the case of the assessee or any other person.

*Explanation 3 - ******"*

15. Thus, from close scrutiny of the provisions of section 263, it is evident that twin conditions are required to be satisfied for exercise of revisional jurisdiction under section 263 of the Act i.e., firstly, the order of the Assessing Officer is erroneous; and secondly, it is prejudicial to the interests of the revenue on account of error in the order of assessment. The Bombay High Court in the case of *Gabriel India Ltd. (1993) 203 ITR 108* has explained as to when an order can be termed as erroneous as follows:-

"From the aforesaid definitions it is clear that an order cannot be termed as erroneous unless it is not in accordance with law. If an income tax officer acting in accordance with the law makes a certain assessment, the same cannot be branded as erroneous by the Commissioner simply because, according to him, the order should have been written more elaborately. This section does not visualise a case of substitution of the judgment of the Commissioner for that of the Income-tax Officer, who passed the order, unless the decision is held to be erroneous. Cases may be visualised where the Income tax officer while making an assessment examines the accounts, makes enquiries, applies his mind to the facts and circumstances of the case and determines the income either by accepting the accounts or by making some estimate himself. The Commissioner, on perusal of records, may be of the opinion that the estimate made by the officer concerned was on the lower side and left to the Commissioner he would have estimated the income at a figure higher than the one determined by the Income tax officer. That would not vest the Commissioner with power to examine the accounts and determine the income himself at a higher figure. It is because the Income tax officer has exercised the quasi judicial power vested in him in accordance with law and arrived at a conclusion and such a conclusion cannot be termed to be erroneous simply because the Commissioner does not feel satisfied with the conclusion ……. There must be some prima facie material on record to show that the tax which was lawfully exigible has not been imposed or that by the application of the relevant statute on an incorrect or incomplete interpretation a lesser tax than what was just has been imposed."

16. We notice that the second CIT (Exemptions) has drawn support from newly inserted *Explanation 2* below section 263(1) of the Act introduced by Finance Act, 2015 w.e.f. 1-6-2015 for his action. The *Explanation 2 inter alia* provides that the order passed without making inquiries or verification 'which should have been made' will be deemed to be erroneous insofar as it is prejudicial to the interest of the Revenue. It is on this basis, the assessment order passed by the AO under section 144 r.w.s.263 of the Act has been *set aside* with a direction to the AO to pass a fresh assessment order. It will be therefore imperative to dwell upon the impact of *Explanation 2* for the purposes of section 263 of the Act. The aim and object of introduction of aforesaid *Explanation* by Finance Act, 2015 was explained in CBDT Circular

No. 19/2015 [F.NO.142I14/2015T PL], Dated 27-11-2015 which is reproduced hereunder:

> *"53. Revision of order that is erroneous in so far as it is prejudicial to the interests of revenue.*
>
> *53.1 The provisions contained in sub-section (1) of section 263 of the Income-tax Act, before amendment by the Act, provided that if the Principal Commissioner or Commissioner considers that any order passed by the Assessing Officer is erroneous in so far as it is prejudicial to the interests of the Revenue, he may, after giving the assessee an opportunity of being heard and after making an enquiry pass an order modifying the assessment made by the Assessing Officer or cancelling the assessment and directing fresh assessment.*
>
> *53.2 The interpretation of expression "erroneous in so far as it is prejudicial to the interests of the revenue" has been a contentious one. In order to provide clarity on the issue, section 263 of the Income-tax Act has been amended to provide that an order passed by the Assessing Officer shall be deemed to be erroneous in so far as it is prejudicial to the interests of the revenue, if, in the opinion of the Principal Commissioner or Commissioner. (a) the order is passed without making inquiries or verification which, should have been made; (b) the order is passed allowing any relief without inquiring into the claim; (c) the order has not been made in accordance with any order, direction or instruction issued by the Board under section 119; or (d) the order has not been passed in accordance with any decision, prejudicial to the assessee, rendered by the jurisdictional High Court or Supreme Court in the case of the assessee or any other person.*
>
> *53.3 Applicability: This amendment has taken effect from 1st day of June, 2015."*

17. Thus it is important to show that the view taken by the AO is wholly unsustainable in law before embarking upon exercise of revisionary powers and that the revisionary powers cannot be exercised for directing a fuller inquiry to merely find out if the earlier view taken is erroneous particularly when a view was already taken after inquiry. If such course of action in the light of the *Explanation 2* is permitted, then the by excise of revisionary powers the Revisional Commissioner can find fault with each and every

assessment order without himself making any inquiry or verification and without establishing that assessment order is not sustainable in law. This would inevitably mean that every order of the lower authority would thus become susceptible to section 263 of the Act and that, will cause serious hardship to the tax payer concerned and this is not intended by the legislation by the insertion of the Explanation 2.

18. When we examine the facts of the present case in the context of the above legal position, we notice that entitlement of the assessee for exemption under section 10(21) has been the core issue in entire proceedings for the year under consideration. In the original return the assessee had claimed deduction under section 11 and it was only during the reassessment proceedings under section 147 of the Act, the alternate claim of exemption under section 10(21) is made by the assessee. From the perusal of records all the details pertaining to the alternate claim of the assessee have been submitted and are part of the records. Therefore there is merit in the claim of the ld AR that the order under section 144 r.w.s.263, though the assessee did not make any fresh submissions, all the details pertaining to eligibility of the assessee for exemption under section 10(21) have been examined by the AO and he has taken a possible view that the impugned incomes are correctly included for the purpose of exemption. In this context it is relevant to notice that in the celebrated decision of the Hon'ble Supreme Court rendered in the case of Malabar Industrial Co. Ltd. v. CIT [2000] 109 Taxman 66/243 ITR 83 (SC) in the context of revision proceedings u/s 263 it is held that *"Every loss of revenue as a consequence of an order of AO cannot be treated as prejudicial to the interests of the revenue, for example, when an Income-tax Officer adopted one of the courses permissible in law and it has resulted in loss of revenue; or where two views*

are possible and the Income-tax Officer has taken one view with which the Commissioner does not agree, it cannot be treated as an erroneous order prejudicial to the interests of the revenue unless the view taken by the Income-tax Officer is unsustainable in law"

19. As per the provisions of section 10(21) any income of a research association approved for the purpose of clause (ii) or clause (iii) of sub-section (1) of section 35, is exempt provided it applies its income, or accumulates it for application, wholly and exclusively to the objects for which it is established. The third proviso to section 10(21) provides that nothing contained in this clause shall apply in relation to any income of the research association, being profits and gains of business, unless the business is incidental to the attainment of its objectives and separate books of account are maintained by it in respect of such business. The claim of the assessee is that the income derived from Auditorium Hire charges, hoarding site & service charges and rent are incidental to the attainment of the objectives of the assessee trust and the reason for excise of revisionary power under section 263 is that the said income is not incidental to the objectives. During the course of hearing the ld. AR relied on the decision of the Chennai Bench of the Tribunal in the case of Association of Surgeons of India (supra) wherein it was held that the income earned from letting out of Auditorium was eligible for exemption under section 11 when the income was applied to the objects of the Trust. Therefore there is merit in the contention that whether the impugned income is incidental to the objects of the assessee trust is a debatable issue and that the AO while allowing the exemption in the order passed under section 144 r.w.s.263 has taken a possible view upon verifying the details available on record. In view of above discussions and applying the ratio laid down by the Apex court in the case of Malabar Industrial Co. Ltd (supra) we hold

that the conclusion of the second CIT (Exemptions) that the order passed by the AO is erroneous is not tenable and liable to be quashed.

20. In the result, the appeal of assessee is allowed.

Order pronounced in the open court on 19-12-2023.

Sd/-	***Sd/-***
(KAVITHA RAJAGOPAL)	**(MS. PADMAVATHY S)**
Judicial Member	**Accountant 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