REPORTABLE

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

ITA No. 1075 of 2008

with

ITA No.930 of 2009

ITA No. 30 of 2010

ITA No.589 of 2008

ITA No. 25 of 2009

% *Date of Decision: 27th July, 2010*

1) ITA No. 1075 of 2008

DIRECTOR OF INCOME TAX . . . Appellant

through : Ms. Prem Lata Bansal, Advocate

VERSUS

RAGHUVANSHI CHARITABLE TRUST . . .Respondent

through: Nemo

2) ITA No. 930 of 2009

DIRECTOR OF INCOME TAX . . . Appellant

through : Ms. Prem Lata Bansal, Advocate

VERSUS

MANAGEMENT DEVELOPMENT INSTITUTE . . .Respondent

through: Mr. Ajay Vohra with Ms. Kavita Jha, Advocates

3) ITA No. 30 of 2010

DIRECTOR OF INCOME TAX . . . Appellant

through : Ms. Prem Lata Bansal, Advocate

VERSUS

NATIONAL INSTITUTE OF URBAN AFFAIRS . . .Respondent

through: Nemo

4) ITA No. 589 of 2008

through : Ms. Prem Lata Bansal, Advocat

VERSUS

MANAGEMENT DEVELOPMENT INSTITUTE . . .Respondent

through: Mr. Ajay Vohra with Ms. Kavita Jha, Advocates

5) ITA No. 25 of 2009

DIRECTOR OF INCOME TAX (EXEMPTION) . . . Appellant

through : Ms. Prem Lata Bansal, Advocate

VERSUS

THE HUNGER PROJECT . . .Respondent

through: Mr. S.R. Wadhwa, Advocate

CORAM :-
HON'BLE MR. JUSTICE A.K. SIKRI
HON'BLE MR. JUSTICE REVA KHETRAPAL

1. Whether Reporters of Local newspapers may be allowed to see the Judgment?
2. To be referred to the Reporter or not?
3. Whether the Judgment should be reported in the Digest?

A.K. SIKRI, J. *(Oral)*

1. The following questions of law are sought to be raised in all these appeals:

a) Whether the Income Tax Appellate Tribunal was correct in law in allowing the assessee to carry forward deficit of the current year and to set off the same against the income of subsequent years?

b) Whether the Income Tax Appellate Tribunal was correct in law in allowing the assessee to carry forward and set off the losses against the income of subsequent year ignoring that the determination of income under Sections 11 to 13 is a separate code and does not contain such provisions as contained in Chapter-VI of the Act?

c) Whether adjustment of deficit (excess of expenditure over income) of current year against the income of subsequent year would amount to application of income of the Trust for charitable purposes in the subsequent year within the

2. Learned counsel for the Revenue submitted that it is not necessary to go into the facts of each case inasmuch as the aforesaid questions are pure questions of law and are related to interpretation, which has to be given to Section 11 of the Income Tax Act (hereinafter referred to as 'the Act'). The relevant portion of Section 11 of the Act reads as under:

> **"Section 11. Income from property held for charitable or religious purposes. -** (1) Subject to the provisions of sections 60 to 63, the following income shall not be included in the total income of the previous year of the person in receipt of the income -
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> (a) Income 322 derived from property held under trust wholly for charitable or religious purposes, to the extent to which such income is applied to such purposes in India; and, where any such income is accumulated or set apart for application to such purposes in India, to the extent to which the income so accumulated or set apart is not in excess of twenty-five per cent of the income from such property
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> *Explanation.* - For the purposes of clauses (a) and (b), -
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> (1) In computing the twenty-five per cent of the income which may be accumulated or set apart, any such voluntary contributions as are referred to in section 12 shall be deemed to be part of the income;
> (2) If, in the previous year, the income applied to charitable or religious purposes in India falls short of seventy-five per cent of the income derived during that year from property held under trust, or, as the case may be, held under trust in part, by any amount -
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> (i) for the reasons that the whole or any part of the income has not been received during that year, or
> (ii) For any other reason, then -
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> (a) In the case referred to in sub-clause (i), so much of the income applied to such purposes in India during the previous year in which the income is received or during the previous year immediately following as does not exceed the said amount, and
> (b) In the case referred to in sub-clause (ii), so much of the income applied to such purposes in India during theprevious year immediately following the previous year inwhich the income was derived as does not exceed the said amount,
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> may, at the option of the person in receipt of the income (such option to be exercised in writing before the expiry of the time allowed under sub-section (1) of section 139 for furnishing the return of income) be deemed to be income

the amount of income applied to such purposes, in the case referred to in sub-clause (i), during the previous year in which the income is received or during the previous year immediately following, as the case may be, and, in the case referred to in sub-clause (ii), during the previous year immediately following the previous year in which the income was derived.

(1A) For the purposes of sub-section (1), - (a) where a capital asset, being property held under trust wholly for charitable or religious purposes, is transferred and the whole or any part of the net consideration is utilised for acquiring another capital asset to be so held, then, the capital gain arising from the transfer shall be deemed to have been applied to charitable or religiouspurposes to the extent specified hereunder, namely :-

(i) where the whole of the net consideration is utilised in acquiring the new capital asset, the whole of such capital gain;
(ii) Where only a part of the net consideration is utilised for acquiring the new capital asset, so much of such capital gain as is equal to the amount, if any, by which the amount so utilised exceeds the cost of the transferred asset;

(b) Where a capital asset, being property held under trust in part only for such purposes, is transferred and the whole or any part of the net consideration is utilised for acquiring another capital asset to be so held, then, the appropriate fraction of the capital gain arising from the transfer shall be deemed to have been applied to charitable or religious purposes to the extent specified hereunder, namely :-

(i) Where the whole of the net consideration is utilised in acquiring the new capital asset, the whole of the appropriate fraction of such capital gain;

(ii) In any other case, so much of the appropriate fraction of the capital gain as is equal to the amount, if any, by which the appropriate fraction of the amount utilised for acquiring the new asset exceeds the appropriate fraction of the cost of the transferred asset.

Explanation. - In this sub-section, -

(i) "appropriate fraction" means the fraction which represents the extent to which the income derived from the capital asset transferred was immediately before such transfer applicable to charitable or religious purposes;
(ii) "Cost of the transferred asset" means the aggregate of the cost of acquisition (as ascertained for the purposes of sections 48 and 49) of the capital asset which is the subject of the transfer and the cost of any improvement thereto within the meaning assigned to that expression in sub-clause (b) of clause (1) of section 55;
(iii) "Net consideration" means the full value of the consideration received or accruing as a result of the transfer of the capital asset as reduced by any expenditure incurred wholly and exclusively in connection with such transfer.

(1B) Where any income in respect of which an option is

during the period referred to in sub-clause (a) or, as the case may be, sub-clause (b), of the said clause, then, such income shall be deemed to be the income of the person in receipt thereof -

(a) In the case referred to in sub-clause (i) of the said clause, of the previous year immediately following the previous year in which the income was received; or

(b) In the case referred to in sub-clause (ii) of the said clause, of the previous year immediately following the previous year in which the income was derived."

3. It was the submission of Ms. Bansal that Section 11 which falls under Chapter-III is with the captioned 'Income from property held for charitable or religious purposes' and thus specifically deals with the income derived from the properties which are held by the trust wholly for charitable or religious purposes. It further stipulates that the types of income enumerated in clause (a) to (d) of sub-Section (1) of Section 11 are not to be included in the total income of the previous years if the conditions contained in those clauses are fulfilled. For example, in clause (a) when it is mentioned that a particular income which is derived from property held under the trust wholly for charitable or religious purposes is not be to included if the following conditions are satisfied:

(a) It is not only that income which is applied for such purposes in India;

(b) Where such income is accumulated or set apart for application to such purposes in India to the extent to which the income so accumulated or set apart is not in excess of 15% of the income from such property.

4. Ms. Bansal accordingly pointed out that Section 11 was made or to the provisions of Sections 60 to 63 and secondly to the extent of 85% of income was applied towards the charitable purposes that too in the same year. Referring to the *Explanation* to the Section, her submission was that that explanation lays down certain contingencies under which the income is not applied in the particular year can be carried forward to the next year and no other provisions could be incorporated or applied while determining the question as to whether the income from the property held for charitable or religious purposes, is to be included to the total income of the previous year or not. She also drew our attention to Section 14 of the Act, which deals with different heads of the income and predicated on that she submitted that while classifying the income under different heads, as per Section 14 which falls in Chapter – IV, the income which is excluded under Section 11 is not to be taken into consideration. It is only after excluding the income under Section 11, further exercise is to be taken under the income shall fall. Thereafter, further provisions contained in Chapter-IV to VI would apply relating to deduction, etc. She submitted that Sections 70 to 74 which deal with 'set off or 'carry forward' or 'carry forward and set off' of loss fall in Chapter VI of the Act and they would have application only in those cases where the income is computed under the different heads classifying in Section 14 of the Act and as per the provisions of Chapter IV. Based on the aforesaid submissions, her argument was that in no other circumstance, if there was a deficit in the current year, that would be allowed to be set off against the income of subsequent year.

5. Learned counsel appearing for the respondents refuted t aforesaid submission made by the learned counsel for the Revenue, and their submission was that the case is clearly covered by the Gujarat High Court's judgment in the case of ***Commissioner of Income Tax*** vs. ***Shri Plot Swetamber Murti Pujak Jain Mandal*** [211 ITR 293].

6. We find from the order of the Income Tax Appellate Tribunal (hereinafter referred to as 'the Tribunal') that the Tribunal has decided the issue in favour of the assessee by placing reliance on the aforesaid judgment of the Gujarat High Court. We have gone through the judgment of Gujarat High Court in ***Shri Plot Swetamber Murti Pujak Jain Mandal (supra)***. It could not be disputed by the learned counsel for the Revenue that the question of law raised and answered in the said case was identical to the one raised in the present appeals. This question was decided in favour of the assessee interpreting the provisions of Section 11 of the Act. The relevant discussion contained in the said judgment is in the following terms:

> "3. The learned DR sought to rely upon the finding of AO. None was present on behalf of the assessee. We find that the issue is answered by Hon'ble Gujarat High Court in the case of CIT vs. Shri Plot Swetamber Murti Pujak Jain Mandal (1995) 211 ITR 293 (Guj), wherein the High Court observed as under:
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> > "We are, therefore, of the opinion that the adjustment of he (sic. the) expenses incurred by the trust for charitable and religious purposes in the earlier year against the income earned by the trust in the subsequent year would amount to applying the income of the trust for charitable and religious purposes in the subsequent year in which such adjustment has been made and will have to be excluded from the income of the trust u/s 11(1)(a) of the Act."
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> No contrary decision has been cited. From the aforesaid judgment, it is clear that there is no bar in computing income of subsequent year after allowing set off of excess amount spent on object of trust, as this also amounts to application of income. Thus, there is no infirmity in the order of the learned CIT(A)."

7. The submission of the learned counsel for the Revenue, however was that the aforesaid case does not decide the question correctly. She submitted that the Gujarat High Court proceeded on the premise that there was no limitation in Section 11, which provides that the income should have been applied for charitable or religious purposes 'only' in the year in which the income has arisen. This, according to the learned counsel, was a wrong premise and contrary to the expression of provision contained in Section 11(1)(c) read with explanation and Section 11(1)(c) categorically suggests to the contrary, viz., the income has to be applied for charitable or religious purposes 'only' in the year in which it has arisen. However, we find that the Gujarat High Court has discussed this issue in greater detail and relying upon the Circular No. 100 dated 24.01.1973 issued by the Central Board of Direct Taxes and the judgment of the Rajasthan High Court in the case of ***Commissioner of Income Tax*** vs. ***Maharana of Mewar Charitable Foundation*** [164 ITR 439 (Raj.)]. We may also point out at this state that the aforesaid view of Rajasthan High Court and Gujarat High Court has been consistently followed by other High Courts in the following judgments:

(i) ***Commissioner of Income Tax*** vs. ***Institute of Banking*** [264 ITR 110 (Bom.)];

(ii) ***Commissioner of Income Tax*** vs. ***Siddaramanna Charities Trust*** [96 ITR 275 (Mys); and

(iii) ***Commissioner of Income Tax*** vs. ***Matriseva Trust*** [242 ITR 20 (Mad.)].

8. It would be fruitful to refer to the discussions contained ***Institute of Banking (supra)***, Per. Hon'ble Mr. Justice S.H. Kapadia, which is advanced before us by the learned counsel for the Revenue to repel the same in the following words:

> "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 and whether such adjustment should be treated as application of income in the subsequent year for charitable purposes? It was argued on behalf of the Department that expenditure incurred in the earlier years cannot be 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 of expenditure to be set off against the surplus of the subsequent years on the ground that tin 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 "Profits 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 the 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 th Act. Our view is also supported by the judgment of the Gujarat High Court in the case of *CIT* v. *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."

9. It is clear from the above that as many as five High Courts have interpreted the provision in an identical and similar manner. Learned counsel for the Revenue could not show any judgment where any other High Court has taken contrary view. Since we are in agreement with the view taken by the aforesaid High Court, we answer these questions in favour of the assessee and against the Revenue.

10. Before we part with, we may point out that learned counsel for t assessee in ITA No.589/2008 and ITA No.25/2009 submitted that the questions involves in these two appeals are purely academic. In these cases even in the current year, more than 75% / 85% (as the case may be) of the income was applied for charitable purpose and therefore, no set off was required to be claimed. Further, it is not necessary to go into this issue once we have decided the question of law in favour of the assessee.

11. In view of the aforesaid discussions, these appeals are dismissed.

(A.K. SIKRI)
JUDGE

(REVA KHETRAPAL)
JUDGE

JULY 27, 2010.
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