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

Reserved on: 27th April, 2012
% *Date of Decision: 10th May, 2012*

\+ **ITA No.17/2011**
\+ **ITA No.18/2011**
\+ **ITA No.19/2011**
\+ **ITA No.20/2011**
\+ **ITA No.472/2011**
\+ **ITA No.477/2011**
\+ **ITA No.480/2011**
\+ **ITA No.519/2011**
\+ **ITA No.520/2011**

DIRECTOR OF INCOME TAX (EXEMPTION) .....Appellant
Through: Mr.Sanjeev Sabharwal, Sr. Standing.
Mr.Abhishek Maratha, Sr. Standing Counsel with Ms.Anshul Sharma, Adv.

Versus

NATIONAL ASSOCIATION OF SOFTWARE AND SERVICES COMPANIES ....Respondents
Through: Mr. Ajay Vohra, Ms. Kavita Jha & Mr. Somnath Shukla, Advocates.

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE R.V. EASWAR

1. Whether Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporters or not ? Yes
3. Whether the judgment should be reported in the Digest? Yes

R.V. EASWAR, J.:

These nine appeals are filed by the Revenue for the assessment years 1998-99, 2002-03, 2003-04, 2004-05, 2005-06 and 2006-07. They have been filed under Section 260A of the Income Tax Act, 1961, hereinafter referred to as "the Act".

2. The respondent-assessee is the National Association of Software and Services Companies (NASSCOM). The appeals in ITA Nos.472/2011 and 18/2011 for the assessment year 1998-99 are taken as the lead matters.

3. The assessee is a trust registered under Section 12A of the Act by order dated 29.06.1998. In respect of the assessment year 1998-99, it filed a return of income declaring "nil" income on 22.10.1998. The return was first accepted under Section 143(1)(a) on 26.03.1999 but was subsequently selected for scrutiny. Accordingly notices were issued under Section 143(2) of the Act. In the course of the assessment proceedings the Assessing Officer examined the financial statements such as income and expenditure accounts, balance sheet, etc. On a perusal thereof he noted that the assessee had filed a declaration under the Voluntary Disclosure of Income Scheme, 1997 (VDIS) and had paid taxes of ₹43,76,812/- in respect of the income for several years up to and including the assessment year 1997-98. The payment of the taxes was claimed by the assessee to represent

application of the income of the trust for purposes of Section 11(1)(a) of the Act. He also noticed that the assessee had incurred an expenditure of ₹38,29,535/- on events/ activities held by the assessee outside India (Hanover, Germany). The expenditure was also incurred outside India. The Assessing Officer took the view that the expenditure cannot be considered as application of income in India for charitable purposes. He accordingly considered the aggregate of these two amounts as income not applied for charitable purposes in India and computed the surplus of the assessee-trust in the following manner: -

"Gross Receipts	₹2,56,84,141/-
Less Exemption u/s 11(1)	
Amount actually applied*	₹77,94,166/-
Application applied u/s 11(2)	₹33,00,000/-
25% of Income accumulated for application.	₹64,21,035/-
Assets purchased	₹1,12,011/-
	₹1,76,27,212/-
Surplus ₹80,56,929/-"	

4. The CIT (Appeals) upheld the view taken by the Assessing Officer with regard to the payment of taxes and the expenditure incurred in Germany in connection with a trade fair held there. He

accordingly confirmed the computation of the surplus at ₹80,56,929/- as made by the Assessing Officer.

5. The assessee carried the matter in further appeal before the Tribunal. The Tribunal found that the taxes paid under VDIS related to the assessment years 1989-90 to 1997-98 and that they were paid to protect the existence of trust which was absolutely necessary for its continuance. According to the Tribunal, if the taxes paid are not to be treated as application of income of the trust, it would amount to reducing the corpus of the trust by the amount of taxes paid which would be to the detriment of the trust. In this view of the matter and following the judgment of the Madras High Court in ***Commissioner of Income Tax v. Janaki Ammal Ayya Nadar Trust***, (1985) 153 ITR 159, the Andhra Pradesh High Court in ***Munna Lal and Sons v. CIT***, (1991) 187 ITR 378 and the Gujarat High Court in ***CIT v. Ganga Charity Trust Fund***, (1986) 162 ITR 612, the Tribunal held that the payment of taxes under the VDIS should be treated as application of income of the trust.

6. So far as the expenditure incurred in Germany is concerned, the Tribunal was of the view that the words "is applied to such purposes in India" appearing in Section 11(1)(a) of the Act only mean that the purposes of the trust should be in India and that the application of the income of the trust need not be in India. It was observed that "the fact that the legislature has put the words "to such purpose" between "is applied" and "in India" shows that the application of income need not

be in India, but the application should result and should be for the purposes of charitable and religious purposes in India. In this view of the matter the Tribunal accepted the contention of the assessee in respect of both the payment of the taxes under the VDIS and the expenditure incurred outside India and held that both represented application of the income to charitable purposes in India.

7. The Revenue challenges the decision of the Tribunal. After hearing both the sides, the following substantial questions of law is framed: -

> "1. Whether on a proper interpretation of Section 11(1)(a) of the Act, the Tribunal was right in law in holding that the payment of taxes of ₹43,76,892/- under the VDIS amounted to application of income of the assessee-trust to charitable purposes in India?
>
> 2. Whether on aproper interpretation of Section 11(1)(a) of the Act, the Tribunal was right in law in holding that the expenditure of ₹38,29,535/- incurred outside India amounted to application of income to charitable purposes in India?"

8. Section 11(1)(a) of the Act runs as follows: -

> "*11.(1) Subject to the provisions of section 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* –

> *(a) income 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 [fifteen] per cent of the income from such property;*"

9. So far as the first question regarding payment of the taxes is concerned, the argument of the Revenue before us is that the taxes paid represent the share of the government in the profits or surplus of the trust and neither under the Act nor under commercial principles can taxes be considered as an appropriate deduction in ascertaining the amount available to the assessee for application to charitable purposes. It is submitted that payment of taxes no doubt may deplete the liquid resources of the assessee but the availability of liquid resources and the computation of the income available for application to charitable purposes are two different exercises which should not be mixed up.

10. It is true that payment of taxes is not allowable as a deduction in computing the profits of the business carried on by the assessee. There are several reasons for the prohibition. Firstly, taxes are paid after the income is earned. They, therefore, represent application of income and not expenditure incurred for the purposes of earning the income. Secondly, taxes represent the Crown's share in the profits of the businessman. Thirdly, taxes are considered as a personal

obligation of the trader and, therefore, not allowable. Fourthly, there is a specific bar on taxes being allowed as a deduction in Section 40(a)(ii) which says that any sum paid on account of any rate or tax levied on the profits or gains of any business or profession or assessed at the proportion of, or otherwise on the basis of any such profits or gains shall not be deducted in computing the income chargeable under the head "profits and gains of business or profession". These principles have been recognized in several decisions, some of which are the following: -

a) Ashton Gas Company v. Attorney General & Others, (1906) A.C. 10 (HL).

b) The Chief CIT v. The Eastern Extension Australasia & China Telegraph Company Ltd., (1921) ITC 120 (Mad.)

c) Province of Bihar v. Rai Shambhu Lal Bose, 15 ITR 176 (Pat.)

d) Bharat Commerce & Industries Ltd. v. CIT, (1998) 230 ITR 733 (SC).

11. The question before us, however, is not a simple question as to whether taxes on income are deductible in computing the taxable income of the assessee. The question before us is whether, while applying Section 11(1)(a) and determining the income available to the trust for application to charitable purposes, the availability of the income should be considered in the light of the commercial principles or whether such income is also to be arrived at or determined as ordained in the Act. This question has come up for consideration

before several High Courts. We may briefly notice some of them. In ***Commissioner of Income Tax v. Ganga Charity Trust Fund***, (1986) 162 ITR 612 the question arose as to whether the income tax liability of ₹77,972/- should be allowed as a deduction while computing the income available for application to charitable purposes in accordance with Section 11(1)(a) of the Act. The Gujarat High Court held that "income derived from trust property" for the purposes of Section 11(1)(a), must be determined on commercial principles and in doing so, all outgoings including outgoing by way of income tax paid by the assessee-trust must be deducted and it is only from the surplus income in the hands of the trustees that the question of application or accumulation or setting apart of income can arise. The question was examined by the Madras High Court in ***Commissioner of Income Tax v. Janaki Ammal Ayya Nadar Trust***, (1985) 153 ITR 159. In this judgment, the Court placed reliance on circular No.5 dated 19.06.1968 issued by the CBDT. The relevant portion of the circular is extracted below: -

> "*2. Section 11(1) provides that subject to the provisions of sections 60 to 63, 'the following income shall not be included in the total income of the previous year……' The reference in sub-section (1)(a) is invariably to 'income' and not to 'total income'. The expression 'total income' has been specifically defined in section 2(45) of the Act as 'the total amount of income computed in the manner laid down in this Act'. It would, accordingly be incorrect to assign to the word 'income', used in section 11(1)(a), the same meaning as has been specifically*

assigned to the expression 'total income', vide section 2(45).

3. In the case of a business undertaking held under trust, its 'income' will be the income as shown in the accounts of the undertaking. Under section 11(4), any income of the business undertaking determined by the Income-tax Officer, in accordance with the provisions of the Act, which is in excess of the income as shown in its accounts, is to be deemed to have been applied to purposes other than charitable or religious, and hence it will be charged to tax under sub-section (3). As only the income disclosed by the account will be eligible for exemption under section 11(1), the permitted accumulation of 25% will also be calculated with reference to this income."

Relying on the circular, it was held by the Madras High Court that the expenditure incurred by a charitable trust by way of payment of tax out of the current year's income has to be considered as application for charitable purposes because such payment has to be made to preserve the corpus, the existence of which is absolutely necessary for the trust. In ***Commissioner of Income Tax v. Trustee of H.E.H.***, (1981) 127 ITR 378, the Andhra Pradesh High Court had expressed the view that only such income which is left after deducting the expenditure or such of the monies which are left with the trust after meeting all expenditure, that the surplus income can be arrived at and that such surplus income has to be computed on the basis of commercial principles. In that case, wealth tax and income tax had been paid by the trust during the relevant years though they related to

the preceding assessment years. Nevertheless, the High Court held that the payments should be deducted from the income of the trust for the purposes of arriving at the income available for application to charitable purposes. Similar view has been taken by the Calcutta High Court in ***Commissioner of Income Tax v. Birla Janahit Trust***, (1994) 208 ITR 372 and, by the Madhya Pradesh High Court in ***Commissioner of Income Tax v. Raipur Pallottine Society***, (1989) 180 ITR 579.

12. Thus, it appears that there is a consensus of judicial view on the question whether payment of taxes can be considered as a proper deduction while determining the income available to a trust for application to charitable purposes as required by Section 11(1)(a) of the Act. The question is not whether taxes are allowable while computing the business income of an assessee under the provisions of the Act. The question is whether the word "income" used in Section 11(1)(a) of the Act must be assigned the same meaning as the words "total income" as defined in Section 2(45) of the Act. The CBDT itself has opined in the circular cited above that it would be incorrect to assign to the word "income" used in Section 11(1)(a) the same meaning as has been statutorily assigned to the expression "total income" under Section 2(45) of the Act. Having regard to the authorities noticed above and keeping in view the fact that the long-settled position, which has also been accepted by the CBDT, should not be upset, particularly where the statute which we are dealing with

is an all-India statute, we express our agreement with the judicial trend and hold that the payment of taxes under the VDIS is to be deducted before arriving at the commercial income of the assessee-trust that is available for application to charitable purposes. We are thus in agreement with the view taken by the Tribunal on this point.

13. We now proceed to the examination of the second substantial question of law framed by us. The question is whether the expenditure of ₹38,29,535/- incurred by the assessee-trust on events/ activities held in connection with the exhibition in Hanover, Germany amounts to application of the income in accordance with Section 11(1)(a) of the Act. The argument put forward by the learned Standing Counsel for the Revenue was that the expenditure, even if it is considered as application of the income, was outside India and the mandate of the Section is that the income should be applied in India to charitable purposes and this condition not having been satisfied, the Tribunal was clearly wrong in holding that the expenditure should be considered as application of the income of the trust in India. The argument of the assessee is that there is no such mandate in the Section to the effect that the income of the trust should be applied in India and that the only requirement is that the purposes should exist in India and if that is satisfied, the income can be applied for such purposes even outside India. According to the learned counsel for the assessee, so long as the purposes are in India, it does not matter as to where the situs of the application is.

14. A little historical background is necessary to be brought out in understanding the mandate of Section 11. Section 11 of the Act corresponds to Section 4(3)(i) of the Indian Income Tax Act, 1922, hereinafter referred to as the "old Act". That Section, before its repeal by the Act, stood as under: -

> "*4. Application of income.*
>
> *(3) Any income, profits or gains falling within the following classes shall not be included in the total income of the person receiving them:*
>
> *(i) Subject to the provision of clause (c) of sub-section (1) of section 16, any income derived from property held under trust or other legal obligation wholly for religious or charitable purposes, in so far as such income is applied or accumulated for application to such religious or charitable purposes as relate to anything done within the taxable territories, and in the case of property so held in part only for such purposes, the income applied or finally set apart for application thereto:*
>
> *Provided that such income shall be included in the total income –*
>
> *(a) if it is applied to religious or charitable purpose without the taxable territories, but in the following cases, namely:*
>
> *(i) where the property is held under trust or other other legal obligation created before the commencement of the Indian Income-tax (Amendment) Act, 1953 (XXV of 1953), and the income therefrom is applied to such purposes without the taxable territories; and*

(ii) where the property is held under trust or legal obligation created after such commencement, and the income therefrom is applied without the taxable territories to charitable purposes which tend to promote international welfare in which India is interested,

the Central Board of Revenue may, by general or special order, direct that it shall not be included in the total income;

(b) in the case of income derived from business carried on on behalf of a religious or charitable institution, unless the income is applied wholly for the purposes of the institution and either –

(i) the business is carried on in the course of the actual carrying out of a primary purpose of the institution, or

(ii) the work in connection with the business is mainly carried on by beneficiaries of the institution;

(c) if it is applied to purposes other than religious or charitable purposes or ceases to be accumulated or set apart from application thereto in which case it shall be deemed to be the income of the year in which it is so applied or ceases to be so accumulated or set apart.

(ii) Any income of a religious or charitable institution derived from voluntary contributions and applicable solely to charitable purposes."

15. Before being amended by the Income Tax (Amendment) Act, 1953, w. e. f. 1.4.1952, Section 4(3)(i) of the old Act read as follows: -

> "*(i) any income derived from property held in trust or other legal obligation wholly for religious or charitable purposes, … and in the case of property so held in part only for such purposes, the income applied or finally set apart for application thereto.*"

16. The position both before 1.4.1952 and thereafter, so far as Section 4 (3)(i) is concerned, has been noticed and contrasted by Subba Rao, J., speaking for a Bench of three Judges of the Supreme Court in ***H.E.H. Nizam's Religious Endowment Trust v. Commissioner of Income-Tax***, (1966) 59 ITR 582. The learned Judge observed as under: -

> "*Under the said clause, trust income, irrespective of the fact whether the said purposes were within or without the taxable territories, was exempt from tax in so far as the said income was applied or finally set apart for the said purposes. Presumably, as the State did not like to forgo the revenue in favour of a charity outside the country, the amended clause described with precision the class or kind of income that is exempt thereunder so as to exclude therefrom income applied or accumulated for religious or charitable purposes without the taxable territories.*"

17. If we carefully notice the above observations, it would appear clear that under the provision as it existed prior to 1.4.1952, there was no difference maintained between application of the income of the trust within or without the taxable territories. The provision as it existed after the amendment made w. e. f. 1.4.1952 makes a reference to application or accumulation for application of the income of the trust "to such religious or charitable purposes as relate to anything done within the taxable territories". Mr. Vohra, learned counsel for the assessee, in an assiduously prepared argument, contended that the words "as relate to anything done

within the taxable territories" clearly show that the charitable purposes must be executed within the taxable territories and that it was immaterial where the income is actually applied. It is difficult to conceive of a situation under which the charitable purposes are executed within the taxable territories but the income of the trust is applied elsewhere in the implementation of such purposes. Be that as it may, the position is put beyond doubt by the proviso to Section 4(3)(i) of the old Act. It says that the income of the trust shall stand included in its total income if it is applied to religious or charitable purposes throughout/ within the taxable territories. The proviso is indicative of the object of the main provision. In the main part, it was provided that the income of the trust should be applied within the taxable territories to religious or charitable purposes and in the proviso an exception was carved out to provide that if the income is applied outside the taxable territories, even though to religious or charitable purposes, the trust will not secure the exemption from tax in respect of such income. Two situations were anticipated for which provision was made in the proviso itself. In these two situations, the Central Board of Revenue (CBR, the present CBDT) was empowered to direct by general or special order, that in such cases the income of the trust shall not be included in the total income merely because the income was applied to charitable purposes outside the taxable territories. The first situation was where the property was held under a trust or other legal obligation created before 1.04.1952. The second situation was where the property was held under trust or other legal obligation created after the aforesaid date and the income therefrom is applied outside the taxable territories to charitable purposes as are done to promote international welfare in which India is interested. In these two

cases the income of the trust could be applied or spent outside India without losing exemption, provided the CBR passes an appropriate order.

18. The Supreme Court in the judgment cited above explained the rationale behind the proviso. Adverting to Craies in his book "Statute Law", Sixth Edition, Page 217 where the learned author had explained the effect of an excepting or qualifying proviso, it was observed thus: -

> "*.....The proviso to clause (i) excepts the two classes of income subject to the condition mentioned therein from the operation of the substantive clause. It comes into operation only when the said income is applied to religious or charitable purposes without the taxable territories. In that event, the Central Board of Revenue, by general or special order, may direct that it shall not be included in the total income. The proviso also throws light on the construction of the substantive part of clause (i) as the exception can be invoked only upon the application of the income to the said purposes outside the taxable territories. The application of the income is praesenti or in future for purposes in or outside the taxable territories, as the case may be, is the necessary condition for invoking either the substantive part of the clause or the proviso thereto.*"

19. We should have thought that the position for which Mr. Vohra contends was quite unarguable after the aforesaid elucidation by the Supreme Court, but with his usual perseverance he claims that the judgment or the observations made therein are not against the proposition canvassed by him. In order to appreciate the argument of Mr. Vohra, it is necessary to refer briefly to the facts of the case cited supra. The Nizam of Hydrabad created a trust for charitable and religious objects, some of which had to be effectuated in the taxable territories and some outside the taxable

territories (in Mecca and Madina). The income of the trust properties was directed to be accumulated until the death of the Settler. In the assessment made to income tax for the assessment years 1952-53 and 1953-54, the assessee claimed exemption in respect of the income arising from the trust property as per Section 4(3)(i) of the old Act. The taxing authorities noticed that there were four religious objects enumerated in the trust deed out of which two were to be effectuated in Mecca and Madina. The trust deed also conferred absolute discretion upon the trustees to apply the income of the trust to one or more of the four categories of religious purposes. The Income Tax Officer, on a construction of the trust deed held that so far as the income that was to be applied to religious and charitable purposes situated outside the taxable territories was concerned, since no order had been made by the CBR under clause (a) of the proviso to Section 4(3)(i) of the old Act, the income did not qualify for exemption. His view was upheld by the Appellant Assistant Commissioner on a different ground. The assessee carried the matter in appeal to the Tribunal which affirmed the view taken by the taxing authorities. On a reference to the Andhra Pradesh High Court, it was held by the Division Bench (reported in (1963) 48 ITR 992) that if there is plurality of objects, and the trustees are given an unfettered discretion to apply the income for an object which is not a charitable object, the entire income was outside the scope of exemption. The High Court held that since the trustees of Nizam's Trust had a discretion to apply the trust fund for purposes outside the taxable territories for which the CBR had declined permission, the income did not fall within the scope of Section 4(3)(i) of the old Act. The High Court observed thus: -

> "*In cases where the income is actually expended outside the taxable territories, there can be no question of exemption except in circumstances and to the extent referred to in proviso to section 4(3). We are not concerned in this case with the proviso, for the stage of application of the income had not yet been reached. We are concerned only with accumulation of income. In our view, the words "to such religious or charitable purposes as relate to anything done within the taxable territories" occurring in section 4(3)(i) must govern both the actual application of the income and the accumulation thereof for its eventual application. The same considerations, as relate to the application of the income, must also govern its accumulation. Accumulation is a process ancillary to the application. It is a mode of investment. It is not an end. It is a means to an end, the end being its application to religious and charitable objects within the taxable territories. So long as it cannot be predicated with certainty that the income is wholly to be applied for religious or charitable purposes within the taxable territories, the accumulation of the income for such application cannot fall within the ambit of section 4(3)(i) of the Act.*"

20. It was the above judgment which was taken up in appeal to the Supreme Court by the trust, to which we have already referred. The Supreme Court dismissed the appeal. The argument of the learned counsel for the assessee that these judgments do not militate against the contention put forward by him is difficult to be accepted. The proviso to Section 4(3)(i) of the old Act is clear. Coming to the present Act, which is the 1961 Act, Section 11(1)(c) conveys the same idea which the proviso to Section 4(3)(i) of the old Act conveyed. The Section is couched in the following terms: -

"*11.(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 –*

(a) …….

(b) ……..

(c) Income [derived] from property held under trust –

(i) Created on or after the 1st day of April, 1952, for a charitable purposes which tends to promote international welfare in which India is interested, to the extent to which such income is applied to such purposes outside India, and

(ii) For charitable or religious purposes, created before the 1st day of April, 1952, to the extent to which such income is applied to such purposes outside India:

Provided that the Board, by general or special order, has directed in either case that it shall not be included in the total income of the person in receipt of such income;"

21. Here again it may be noticed that sub-clause (ii) of clause (c) of sub-section (i) of Section 11, in substance provides for the same condition which was imposed by sub-clause (i) of clause (a) of the proviso to Section 4(3)(i) of the old Act. Sub-clause (i) of the clause (c) of sub-section (1) of Section 11 of the Act is in the same terms as sub-clause (ii) of clause (a) of the proviso to Section 4(3)(i) of the old Act. Since these provisions are similar both under the old Act and under the present Act, the observations made by the Supreme Court in the judgment (cited supra) are applicable with equal force to the provisions of Section 11(1)(c) of the Act.

22. Mr. Vohra's contention that the words "to the extent to which sucn income is applied to such purposes in India" appearing in Section 11(1)(a) of the Act only require that the charitable purposes should be confined to India and the application of the income of the trust to the execution of such purposes can be outside India, with respect, appears to us to be also opposed to the natural and grammatical meaning that can be ascribed to the words. The word "applied" is a verb used in past tense. In the provision, it is used in the transitive form because it is followed by the words "to such purposes in India". It answers three questions which would arise in the mind of the reader: apply what? applied to what? and where? The answers would then make the meaning obvious. The answer to the first question would be: apply the income of the trust. The answer to the second question will be: applied to charitable purposes. The answer to the third question will be: applied in India. Thus even grammatically speaking it seems to us that the group of words "to such purposes in India" qualifies the preceding verb "applied". It is a case of a verb being qualified by two prepositions which follow, viz., "to" and "in". So read, it seems clear to us that grammatically also it would be proper to understand the requirement of the provision in this way, that is, that the income of the trust should be applied not only to charitable purposes, but also applied in India to such purposes. The submission of Mr. Vohra that the words "in India" qualify only the words "such purposes" so that only the purposes are geographically confined to India does not appear to us to be the natural and grammatical way of construing the provision. That would break or clog the natural flow of the entire group of words "to the extent to which such income is applied to such purposes in India". The meaning sought to be attached by Mr.

Vohra to the words "in India" as qualifying only the "purposes" places a strain on the natural or grammatical interpretation of the group of words. If what Mr. Vohra contends is correct, then Section 11(1)(c) may become redundant and otiose. If as he says, the income of the trust can be applied even outside India so long as the charitable purposes are in India, then there is no need for a trust which tends to promote international welfare in which India is interested and which was created after 1.4.1952 to apply to the CBDT for a general or special order directing that the income to the extent to which it is applied to the promotion of international welfare outside India shall not be denied the exemption, nor would it be necessary for a charitable or religious trust created before the aforesaid date to seek such an order from CBDT in respect of its income which is applied to charitable or religious purposes outside India. In our opinion, therefore, the words "in India" appearing in Section 11(1)(a) and the words "outside India" appearing in Section 11(1)(c) of the Act qualify the verb "applied" appearing in these provisions and not the words "such purposes".

23. Mr. Vohra protests that we would be changing the group of words appearing in Section 11(1)(a) by displacing the words "in India" and transposing them between the words "applied" and the words "to such purposes" and thus re-drafting the clause in the following manner: -

> "*to the extent such income is applied in India to such purposes.*"

If, as we have explained in the preceding pagaraph, grammatically also the group of words as they exist in the clause are to be understood as expressing the requirement that the income of the trust should be applied in

India to charitable or religious purposes, then even if we were to relocate the words "in India" in the manner in which Mr. Vohra says that we are doing, it would make no difference to the meaning to be ascribed to the group of words. Perhaps in that case the meaning would have been brought out in still more precise or clear terms but there are different ways of expressing the requirement that the income of the trust should be applied in India in order to get exemption and even if we were to assume that the language used in the clause is not sufficiently expressive of the idea, sitting here we should be able to set right and construe the provision in the manner in which it makes sense, unless by construing the words in the manner in which we have done, there results an absurdity which cannot be countenanced at all. We have earlier referred to the judgment of the Supreme Court in ***H.E.H. Nizam's Religious Endowment Trust*** (supra) wherein it was observed that though before 1.4.1952 there was no requirement as to the territorial limits within which the income should be applied to charitable purposes, after 1.4.1952 the position was different since the government perhaps thought that it could not forego the revenue where the income of the trust is not actually applied within the territorial limits of India. This was the result of the amendment made by the Income Tax (Amendment) Act, 1953 w. e. f. 1.4.1952 when Section 4 (3)(i) of the old Act was recast to bring out clearly the territorial limits within which the income of the trust needs to be applied in order to secure exemption. Thus whatever might have been the position prior to 1.4.1952, it is clear that after that date it was not the intention of the legislature to forego the tax as well as the benefits arising out of the application of income of the trust within the territorial limits of India. The position has remained unchanged

from 1.4.1952 for at least 60 years now. Therefore, it cannot be said that by construing Section 11(i)(a) in the manner that the requirement therein is that the income of the trust should be applied in India for charitable or religious purposes, we are doing any violence to the provisions nor can it be said that we are condoning an absurd result.

24. We do not intend to burden this order with a plethora of authorities on the construction of a Section, but since a point of grammar is also involved in the interpretation of the provision, we think it fit and appropriate to briefly refer to a few rules of interpretation laid down in some of the decided cases. In ***Jugalkishore Saraf v. M/s. Raw Cotton Co. Ltd.***, AIR 1955 SC 376, S. R. Das, J. speaking for the Supreme Court observed as follows: -

> "*The cardinal rule of construction of statutes is to read the statute literally, that is by giving to the words used by the legislature their ordinary, natural and grammatical meaning. If, however, such a reading leads to absurdity and the words are susceptible of another meaning the Court may adopt the same. But if no such alternative construction is possible, the Court must adopt the ordinary rule of literal interpretation. In the present case a literal construction of the rule leads to no apparent absurdity and, therefore, there can be no compelling reason for departing from that golden rule of construction.*"

In ***Kanai Lal Sur v. Paramnidhi Sadhukhan***, AIR 1957 SC 907, Gajendragadkar, J. speaking for the Supreme Court, stated the rule as follows: -

> "*The words used in the material provisions of the statute must be interpreted in their plain grammatical meaning and it is only when such words are capable of two constructions that*

the question of giving effect to the policy or object of the Act can legitimately arise. When the material words are capable of two constructions, one of which is likely to defeat or impair the policy of the Act whilst the other construction is likely to assist the achievement of the said policy, then the Courts would prefer to adopt the latter construction."

Following the rule of interpretation laid down by the House of Lords in ***Grey v. Pearson***, (1857) 6 HL Cas 61, the Supreme Court in ***Union of India v. Rajiv Kumar***, (2003) 6 SCC 516 quoted the rule in the following manner: -

"*25. The golden rule for construing wills, statutes, and, in fact, all written instruments has been thus stated:*

"The grammatical and ordinary sense of the words is to be adhered to unless that would lead to some absurdity or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified, so as to avoid that absurdity and inconsistency, but no further." (See Grey v. Pearson)"

25. What we have done is to construe Section 11(1)(a) in accordance with the rules laid down in the above judgments.

26. It may not be out of place to state that the view of the learned authors Kanga and Palkhivala in their treatise on "Law and Practice of Income Tax" is the same as ours. In their 4th Edition (1958), which is a treatise on the old Act, the following observations appear at page 197 of the book in the commentary of Section 4(3)(i):

"(d) *The exemption is restricted to such portion of the income as is in fact applied, or accumulated or set apart for application, to religious or charitable*

purposes within the taxable territories. The territorial limit of application of income –viz. the taxable territories – is as essential to secure exemption as the nature of the purpose – viz. religious or charitable.

But it is not essential that the trust itself should be expressly confined to purposes within the taxable territories. If the trustees, as a matter of fact though not as a matter of legal obligation under the trust, restrict the application of the income to purposes within the taxable territories, that would be sufficient compliance with the clause."

At page 219, the following observations appear as commentary on the proviso to the section: -

"*Proviso. Para. (a). – Foreign charities. – The substantive part of cl. (i) enacts that exemption can be claimed in respect of only such portion of the trust-income as is applied to religious or charitable purposes within the taxable territories. Para (a) of the Proviso is a corollary to that substantive provision and it provides that such portion of the income of a religious or charitable trust is to be included in the total income as is in fact applied to religious or charitable purposes outside the taxable territories. In other words, the Revenue confines the right of exemption to only such trusts as are administered for the benefit of the public of India and does not extend it to foreign charities. Two exceptional cases are, however, provided for, in which the Central Board of Revenue may by general or special order grant exemption from tax in respect of income applied to religious or charitable purposes outside the taxable territories : (a) where the trust or other legal obligation was created before the commencement of the Income-tax (Amendment) Act, 1953, and (b) where the trust or other legal obligation is created after such commencement and the income is applied outside the taxable territories to charitable purposes which tend to promote international welfare in which India is interested.*"

In the 6th Edition (1969), the same observations appear at page 244 in the commentary under Section 11 of the present Act. The view remains unchanged in the 8th Edition brought out in the year 1990 (at page 349) and in the 9th Edition brought out in the year 2004 (at page 505). We are fortified in our conclusion by the view expressed by the learned authors.

27. We now come to the last part of the submission of Mr. Vohra, learned counsel for the assessee. He suggested (of course, without giving up or conceding his main arguments dealt with above) that the time has now come to take a fresh look at the Section and having regard to the globalisation of commerce and the vast strides made in cross-border trade and flight of capital, it is the need of the hour to shed conservative thinking on the subject and adopt a bold and innovative approach by dispensing with the requirement that the application of the income of the trust should be in India in order to secure exemption for the trust. His point was that this can be achieved by construing or interpreting the section in the manner suggested by him. He also points out that the benefits of the application of the income outside the taxable territory will ultimately trickle down to India. He also pointed out by way of example an anomaly that is likely to arise because of the interpretation which we have placed upon the provision. He says that in the case of a trust whose object is the giving away of scholarship to meritorious students, the cost of air tickets purchased in India and borne by the trust to enable the student to go abroad for higher studies will be exempted from tax because the application of the income is in India, whereas the amount of fees paid by the trust abroad to the University there would not be exempt because it amounts to application of the income of the trust outside India, even though there is no difference

between the two so far as the charitable nature of the purpose is concerned. In both the cases, according to him, the income is applied to the charitable purposes only.

28. What Mr. Vohra says is not without force or merit but we are required to interpret the statute as it is and not in the manner in which we think the law ought to be. We need to distance ourselves from matters of policy. Innovative thinking has its limits. Judicial adventurism, masquerading as judicial innovativeness should not result in legislation. Policy, so far as we are concerned, is uncharted territory into which we should feel chary of making forays. Secondly, we ought to be wise enough to know that in the matter of exemption from tax in all-India statute, judicial restraint, and not innovativeness or novelty, may be the proper approach to follow in order that the long settled legal position is not turned upside-down. We must, however, appreciate the tenacity with which the matter was argued before us by the learned counsel on behalf of the assessee but we are afraid that he is looking up the wrong tree.

29. The next submission of the learned counsel for the assessee was that in case the expenditure incurred in Germany is not to be considered as application of the income of the trust in India for charitable purposes, then only the net surplus, that is to say the excess of the receipts in connection with the trade fair in Germany over the expenditure incurred there can be considered as a surplus and be excluded. In other words what is being contended is this. Out of the gross receipts of ₹2,56,84,141/-, the receipts in connection with the Hanover Trade Fair should be segregated and instead of excluding the entire receipts on the ground of improper

application of the income of the trust, it should be reduced by the amount of expenditure of ₹38,29,535/- incurred in Hanover, Germany and only the balance amount shall be considered as income not applied for charitable purposes in India. In the absence of any specific provision permitting this, we are unable to accept the contention.

30. The last submission in this connection was that an opportunity may be directed to be granted to the assessee to make good the shortfall in the application of the income of the trust, as a result of the view we have taken, by permitting the assessee to apply for accumulation of the amount in shortfall for future application. In support of the claim, the decision of this Court in ***Continental Construction Ltd. v. Union of India***, (1990) 185 ITR 230 is cited. The option to accumulate the income for future application to charitable purposes has to be exercised by the trust in writing before the expiry of the time allowed under Section 139(1) for furnishing the return of income, as provided in Explanation (iib) below Section 11(1) of the Act. In respect of all the years that are before us in which the question of application of income outside India arises, such time limit has already expired and we are informed by the learned Sr. Standing Counsel that there is no provision to condone the delay. In view of this difficulty, we are unable to accede to the prayer made on behalf of the assessee. We have also gone through the judgment of the Division Bench of this Court relied upon by the assessee. That was a case where the assessee was denied the benefit of Section 80-O of the Act. The decision of the taxing authorities was upheld by the Court. The assessee had also raised an alternative claim for deduction under Section 80HHB of the Act. The eligibility of the assessee to the claim under Section 80HHB was not disputed by the

assessing authorities. The Division Bench of this Court noticed that the income tax authorities did not allow the assessee's claim under Section 80HHB because the assessee had not complied with certain formalities such as creation of reserves in its accounts. It is in this background that this Court held that it will be extremely unfair not to give the benefit to the assessee under Section 80HHB. It was thus directed that the Income Tax Department should not stand on mere technicalities and must give an opportunity to the assessee to fulfill the requirements of Section 80HHB(3) within a reasonable time. It has to be remembered that the writ court can issue such direction based on equitable considerations and in the interest of justice, but our jurisdiction under Section 260A of the Act is not so wide as writ jurisdiction. We have no such discretion in the absence of any specific provision in the Act. We are accordingly unable to accept the request of the assessee.

31. We, therefore, hold that the amount of ₹38,29,535/- spent by the assessee-trust in Hanover, Germany cannot be considered as application of the income of the trust in India for charitable purposes. The substantial question of law is thus answered in favour of the assessee in so far as the payment of taxes under the VDIS is concerned and in favour of the Revenue so far as the expenditure incurred outside India (Germany) is concerned.

32. The next question which arises is regarding the applicability of Section 28(iii) of the Act. The assessee received non-refundable admission fee from its members as well as annual subscription charges. The non-refundable admission fee was ₹5,000/- for each member payable at the time

of admission and ₹3,000/- in the case of associate member. Apart from this amount, every member was required to pay an annual subscription of an amount based in relation to the turnover of the member. There is no dispute with regard to the one-time admission fee received from the members. The Tribunal has held that the one-time admission fee is not taxable under Section 28(iii) and Mr. Sabharwal, learned Sr. Standing Counsel for the Revenue has fairly stated that this part of the order of the Tribunal cannot be questioned. However, the Assessing Officer has also brought the annual subscription fee received from each member to tax under Section 28(iii) of the Act. According to the Assessing Officer, one of the main objectives of NASSCOM is to provide value added services to its members and further under clause 13 of the aims and objectives listed in the memorandum of association, the objects include "to act as a clearing house, as an information centre for the members of the association and provide co-operative services in their common benefits". According to the Assessing Officer, the assessee being a National Association of Software Service Companies, it was natural for it to provide such services to its members. He noted that the services also included the following: -

- "*It provides information on the Indian domestic* ***Market*** *It has successfully launched the Domestic trade Net, wherein tender enquiries on computers and related product and compiled and sent to member.*
- *It* ***informs its members*** *on changes in policies of Government of India with regard to computer software and software services.*
- *It organizes seminars/ conferences/ exhibitions in India and abroad. This is aimed* ***at helping members in their business promotion.***

- *On an annual basis, it sends about 150-200 circulars to* ***all its members explaining new policies of Government agencies, market information and other relevant statistics.***"

From the above, the Assessing Officer took the view that there were specific services rendered by the assessee to its members and therefore the annual subscription fee was assessable under Section 28(iii).

33. On appeal the CIT (Appeals) held that the annual subscription received from the members was not taxable under Section 28(iii). The Revenue carried the matter in appeal to the Tribunal. We note that the Tribunal has not separately dealt with the assessability or otherwise the annual subscription fee, though it has referred to the assessability of the non-refundable admission fee and decided that issue specifically. We also find that in paragraph 13, the Tribunal has considered the non-refundable admission fee and the annual subscription charges in a consolidated manner and it seems to us that they have been dealt with together. In the circumstances, we proceed to frame the following substantial question of law on the footing that the Tribunal has decided the issue in favour of the assessee: -

> "Whether on a proper interpretation of Section 28(iii) of the Act, the Tribunal was right in law in holding that the annual subscription fees received by the assessee-trust from its members was not taxable under the said provision?"
>
> Section 28(iii), is as follows: -

> "*28. The following income shall be chargeable to income-tax under the head "Profits and gains of business of profession", -*
>
> *(i)* …….
>
> *(ii)* ……..
>
> *(iii) Income derived by a trade, professional or similar association from specific services performed for its members;*"

34. In expounding Section 10(6) of the old Act, which was the precursor of Section 28(iii) of the present Act, the Supreme Court in ***Commissioner of Income-tax, West Bengal v. Calcutta Stock Exchange Association Ltd.***, (1959) 36 ITR 222, observed that the performance of the services of the description mentioned in that sub-section, may, but for the words of that section, have amounted to carrying on business in respect of those services. It was further observed that unless the assessee is brought within the terms of the Section, the receipt in question cannot be charged to income tax. The Supreme Court approved the view of the Calcutta High Court that the Section contemplated "services in regard to the matter outside the mutual dealings for which the association was formed for the transaction of which it exists as a mutual association." The section thus partly erodes the principle of mutuality by bringing to tax receipts on account of rendering of specific services by the association to its members. The Supreme Court stated that the words "performing specific services" in their opinion mean in the context, "conferring particular benefits" upon the members. If this test is applied to the present case it will be seen that in consideration of the receipt of the annual subscription fees, the assessee-trust has not been

shown to have performed any specific services to the members. Whereas the annual subscription fees is a recurring receipt, receivable by the assessee-trust by mere efflux of time irrespective of whether any services are rendered or not to the members, what is contemplated in Section 28(iii) is the receipt of fees from particular members to whom specific services have been rendered by the trust. The annual subscription fee is paid merely to keep the membership alive on yearly basis. The distinction between the two being clear, and in the absence of any evidence to show that the assessee receives fees from the members as a "quid pro quo" for specific services rendered to them, we are unable to hold that the Tribunal was wrong in holding that the annual subscription fees was not assessable under the section. The substantial question of law is thus answered in the affirmative, in favour of the assessee and against the Revenue.

35. Turning to the other appeals, we take up the appeal for the assessment year 2002-03 which is ITA No.520/2011. In this order the first substantial question of law relates to the applicability of Section 28(iii) of the Act. For the reasons stated by us in ITA No.472/2011 and 18/2011, this question is answered in the affirmative, in favour of the assessee and against the Revenue.

36. The only other substantial question of law which arises in this appeal relates to the corpus donation of ₹7,70,000/- received by the assessee. The finding of fact recorded by the Tribunal is that the members who paid the one-time admission fee were aware that it can be spent by the assessee only for the purposes of acquiring a capital asset and, therefore, the amount must

be held to be a corpus donation, not taxable as income. Since this is essentially a finding of fact no substantial question of law arises for our consideration.

37. We now take up ITA No.20/2011 relating to the assessment year 2003-04. This arises out of ITA No.2554/Del/2006 filed by the Revenue before the Tribunal which was disposed of by order dated 12.03.2009. The only substantial question of law which arises relates to the applicability of Section 28(iii) of the Act. In line with our decision for the assessment year 1998-99, the substantial question of law is answered in affirmative, in favour of the assessee and against the Revenue. No other substantial question of law arises for this year.

38. We now turn to ITA No.17/2011 and 477/2011, both of which relate to the assessment year 2004-05. ITA No.17/2011 arises out of ITA No.4564/Del/2007 borne in the file of the Tribunal and disposed of by it by order dated 12.03.2009. This order, as already noted, is a consolidated order disposing of the appeals, both by the assessee and by the Revenue for several assessment years. ITA No.4564/Del/2007 is the appeal by the assessee before the Tribunal for the assessment order 2004-05. The order of the Tribunal shows that the only ground taken by the assessee was that the departmental authorities were not right in holding that the expenditure incurred on events and activities outside India did not represent application of income in India for the purposes of Section 11(1)(a) of the Act. In tune with our decision in respect of assessment year 1998-99 in ITA No.17/2011 the substantial question of law is answered in favour of the Revenue and against the assessee.

39. We now turn to ITA No.477/2011 which arises out of ITA No.172/Del/2008 in the file of the Tribunal. ITA No.172/Del/2008 before the Tribunal is an appeal by the Revenue relating to the assessment year 2004-05 in which three issues were raised: -

(i) Applicability of Section 28(iii) of the Act in respect of annual subscription fees.

(ii) Exemption in respect of the corpus donation received.

(iii) Deduction for provision made for doubtful debts.

With regard to the applicability of Section 28(iii), in line with our decision in the appeal for the assessment year 1998-99 the substantial question of law is answered in favour of the assessee and against the Revenue. As regards the exemption allowable in respect of the corpus donation, here also the substantial question of law, following our decision for the assessment year 1998-99, is answered in favour of the assessee and against the Revenue.

40. As regards the provision for bad and doubtful debts, the question again is whether in computing the income of the trust on commercial principles, the provision can be deducted or where the deduction can be allowed only in accordance with the provisions of Section 36(i)(vii) read with Section 36(2)(i) of the Act. We have already held that the income of the trust available for application to charitable purposes in India should be computed not in accordance with the strict provisions of the Income Tax Act but should be computed in accordance with commercial principles and it is on this footing that the payment of Income Tax Act under the VDIS

was treated as a deduction and as proper application of the income of the trust. The same line of reasoning holds good for the provision for bad and doubtful debts. Even under the computation provision of the Act such a provision was considered allowable up to and including the assessment year 1988-89 and it was only from the assessment year 1989-90 that the Act required that a mere provision would not be allowable as a deduction and the actual writing off of the debt was a necessary pre-condition. Be that as it may, under the commercial principles it has always been recognized that a provision, reasonably made for a loss or an outgoing, can be deducted from the income if there is apprehension that the debt might become bad. There is nothing brought on record to show that the provision was not made bonafide. In such a situation, the ratio of the decisions cited by us while dealing with the deductibility of the taxes paid under the VDIS will equally apply. We accordingly hold that while computing the income available to the trust for application to charitable purposes in India in accordance with Section 11(1)(a) the provision for doubtful debts must be deducted. Accordingly, we frame the following substantial question of law and answer the same in the affirmative in favour of the assessee and against the Revenue: -

> ""Whether the Tribunal was right in law in holding that the provision for doubtful debts must be deducted from the income of the trust on commercial principles, for the purposes of Section 11(1)(a) of the Act?"

41. We now turn to the appeals for the assessment year 2005-06. ITA No.19/2011 arises out of ITA No.89/Del/2009 on the file of the Tribunal.

Before the Tribunal the appeal was by the Revenue and two issues were raised: -

(i) Taxability of annual subscription fees under Section 28(iii);

(ii) Taxability of the corpus donation received by the trust.

These two substantial questions of law, following our earlier decision, are answered in favour of the assessee and against the Revenue.

42. ITA No.480/2011 arises out of ITA No.3625/Del/2008 which was an appeal by the assessee before the Tribunal in which it challenged the decision of the departmental authorities that the expenditure incurred outside India did not amount to application of income for charitable purposes in India within the meaning of Section 11(1)(a) of the Act. This issue and the substantial question of law arising therefrom in line with our earlier decision is decided/ answered in favour of the assessee and against the Revenue.

43. We now turn to the assessment year 2006-07. ITA No.519/2011 arises out of ITA No.4468/Del/2009 in the file of the Tribunal which was an appeal by the assessee. Before the Tribunal the assessee had taken only one issue in appeal, namely, whether the expenditure of ₹1,70,85,034/- incurred outside India on events and activities held outside India did not qualify for exemption under Section 11(1)(a) of the Act. In line with our earlier decision, the substantial question of law arising from this issue is decided in favour of the Revenue and against the assessee.

44. In the result the appeals are disposed of as above with no order as to costs.

R.V.EASWAR, J

SANJIV KHANNA, J

MAY 10, 2012
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