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

Reserved on: 3rd February, 2014
% *Date of Decision: 18th March, 2014*

\+ **ITA No.321/2013**
\+ **ITA No.322/2013**
\+ **ITA No.323/2013**

DIRECTOR OF INCOME TAX (EXEMPTION) ..... Appellant
Through: Mr. N.P. Sahni, Sr. Standing Counsel.

versus

CHARANJIV CHARITABLE TRUST ..... Respondent
Through: Ms. Shashi M. Kapila with Mr. R.R. Maurya and Mr. Pravesh Sharma, Advocates.

CORAM:
MR. JUSTICE S. RAVINDRA BHAT
MR. JUSTICE R.V. EASWAR

R.V. EASWAR, J.

1. All the three appeals have been filed by the revenue under Section 260A of the Income Tax Act, 1961. They challenge the impugned order of the Tribunal passed on 30.04.2012 in three appeals filed before it, two by the assessee relating to the assessment years 2006-07 and 2007-08 and one by the revenue relating to the assessment year 2006-07. In other words, in respect of the assessment year 2006-07, there were cross-

appeals before the Tribunal and in respect of the assessment year 2007-08, it was the assessee which was in appeal. All the appeals were disposed of by a common.

2. The brief facts giving rise to the present appeals are as follows. The assessee is a Charitable Trust which was granted registration under section 12A of the Act on 28.05.1976. In respect of the assessment year 2006-07, it filed a return of income declaring Rs.Nil as its income. On 31.10.2006 this return was processed under Section 143(1). Subsequently a scrutiny of the return was initiated and notices under Sections 142(1) and 143(2) were issued. A sum of Rs.8,60,1600/- was shown by the assessee as the proceeds of the sale of assets, being land. It appears that M/s. Ansal Properties and Industries Ltd. (APIL) owned certain plots of land earmarked for schools, dispensaries, etc. The assessee in furtherance of its objects to open a school, entered into agreements with APIL on 18.03.2004 and 14.03.2004 for purchase of the land situated at Palam Vihar, New Delhi. In these agreements the assessee paid 95% of the price of the land to APIL and simultaneously obtained possession of the plots. It would appear that one of the conditions of the agreement was that in case the allotment of plots is cancelled later, the assessee will be liable for

cancellation charges of 10% of the cost of plots. The advance paid by the assessee was recorded in books of accounts for the financial year 2004-05 and the amount so advanced was added to the list of fixed assets. In the assessee's books and as advances received in the books of APIL.

3. In April, 2005 the assessee cancelled the sale agreement and the monies paid to APIL were returned to the assessee in instalments. No cancellation charges were however levied by APIL. The entire amount of Rs.8,60,1600/- which was earlier paid was returned by APIL. In the course of the assessment proceedings, the AO doubted the genuineness of the transaction of projects of the plots. He noted the following features: -

(i) Even after the lapse of more than one year from the date of the agreement to sell, the sale was not completed and no registered document was executed and in respect of the delay, there was no explanation;

(ii) There was no evidence for taking possession of the land;

(iii) APIL did not declare any income by way of the transaction (i.e. sale of the land to the assessee) in the relevant year when

the agreement to sell were executed which shows that even possession of the land was not parted with; and

(iv) Though the agreements were cancelled on 21.04.2005 the assessee-Trust made entries in its books for the cancellation only on 31.03.2006 i.e. the last date of the accounting year.

4. The assessee's explanation was that the transactions were genuine, were duly entered into the books, that the payments were made through banking channels, that the plots were sought to be acquired in furtherance of the objects of the trust and there was nothing to suspect the motives of the assessee in entering into those transactions. This was, however, not accepted by the assessing officer who took the view that the real motive of the assessee was to advance its surplus monies to APIL without charging any interest and since APIL was a prohibited person within the meaning of Section 13(3), the provisions of Section 13(1)(c)(ii) were attracted with the result that the assessee could not be allowed the exemption under Section 11.

5. In the course of the assessment proceedings, the assessing officer also noted that the assessee claimed to have received corpus donation of Rs.1.5 crores from one S. Jagjit Singh, S/o. S. Bachan Singh through a

pay order. Under Section 12(1) of the Act, all voluntary contributions received by a trust will be deemed to be income derived from property held under trust wholly for charitable purposes, except those contributions which are made with a specific direction that they shall form part of the corpus of the trust. The effect of Section 12(1) is that non-corpus donations which are treated as income derived from property held under trust will have to be subjected to the provisions of Section 13. Corpus donations, however, will not be treated as income derived from property held under trust and, therefore, the provisions of Section 13 will not be attracted. Having regard to the relevance of the corpus donations in the assessment of a trust, the assessing officer issued notice under Section 131 and got the statement of Jagjit Singh recorded by the Additional Director of Income Tax (Exemptions). It would appear that Jagjit Singh stated that he had some disputes with regard to the clearance of title to the land with DLF and in order to resolve the dispute, DLF was directed to pay Rs.1.5 crores to the assessee. He would, however, appear to have stated that there was no specific direction given by him that the donation would be a corpus donation. The assessing officer, on the basis of the statement of Jagjit Singh, invoked the provisions of Section 68 of the Act and added

the amount of Rs.1.5 crores as the assessee's income. A similar addition was made in respect of another corpus donation of Rs.25 lakhs claimed to have been received from one Piyush Jain through an account payee cheque; the said donor failed to appear before the AO in response to the notice issued under Section 131.

6. In the course of the assessment proceedings the assessing officer found a debit balance of Rs.16,55,448/- in the name of Charanjiv Charitable Educational Society. It was explained that the said society was a charitable institution established in the State of Chhattisgarh by the trustees of the assessee. It was formed as a separate institution as the assessee desired to establish a private university in the State of Chhattisgarh whose laws did not permit any institution outside the State to establish any university in the State. According to the assessee, the said society was formed only with the object of establishing a university in Chhattisgarh, which was in conformity with the objects of the trust. It was thus explained that the advancing of the money to the said society without charging any interest did not in any manner violate the provisions of Section 13(1)(c)(ii) of the Act. Detailed written submissions were also filed before the assessing officer together with the correspondence with

the government of Chhattisgarh in order to show that the debit balance in the account of the society was not any interest free advance and therefore there was no question of any application of the income or property of the trust directly or indirectly for the benefit of any prohibited person. The assessing officer did not accept the explanation and held that the Trust was not entitled to the exemption.

7. In respect of the assessment year 2007-08, the assessing officer took the same stand as he took in the assessment year 2006-07 on the question of exemption under Section 11 and for the same reasons. He also added an amount of Rs.25 lakhs claimed to have been received by the assessee from M/s. Kuber Swamy Ashutosh Consultancy Pvt. Ltd. and Rs.9,06,000/- from M/s. Sun System Institute of Information Technology as corpus donations, disbelieving the assessee's version and invoking Section 68 of the Act. He also took steps to verify both the donations. M/s. Kuber Swamy Ashutosh Consultancy Pvt. Ltd. furnished the copy of the bank statement to show the payment made to the assessee and also furnished the copy of the receipt issued by the assessee, the PAN number and copy of the bank certificate confirming the payment made to the assessee. The assessing officer rejected the evidence on the ground that

the donor never filed any return of income and did not submit its audited balance sheet as on 31.03.2006. Moreover, the assessee did not produce the Director of the donor company despite specific direction in this Court by the assessing officer. As regards the corpus donation from Sun System Institute of Information Technology the assessing officer took steps to verify the same and issued a letter under Section 133(6) calling for information but there was no compliance. He, therefore, added both the corpus donations under Section 68. The assessing officer also disallowed depreciation on certain assets on the ground that the cost of those assets was allowed as application of the income of the trust for charitable purposes and allowance of depreciation of those assets would amount to double allowance which is not permissible.

8. There was an appeal to the CIT (Appeals) in which the assessee challenged the findings recorded by the assessing officer. As regards the violation of the provisions of Section 13(1)(c)(ii) on the ground that the assessee advanced sums to APIL without charging any interest, the CIT (Appeals) examined the relevant agreements under which the amount was advanced and held that there were written agreements which were backed by bank transactions and other documentary evidence to show that the

amount was advanced to APIL for purchase of land for setting up a school, that the giving of possession is evidenced by the agreements and the possession letters, that the payments were recorded in the books of accounts as for purchase of land and in these circumstances the assessing officer was not justified in holding that the provisions of Section 13(1)(c)(ii) read with Section 13(3) were attracted. As to the finding of the assessing officer that an adjustment entry was passed in the accounts of the assessee only on the last day of the financial year, he held that considering the totality of the circumstances and the evidence available, the accounting entry did not affect the genuineness of the transaction. There were other findings recorded by the CIT (Appeals) based on the accounts that the amount advanced by the assessee to the APIL did not represent any loan or advance but represented payments made towards purchase of plots reserved for school/ dispensary and, therefore, there was no question of charging any interest or security. He, therefore, held that there was no violation of provision of Section 13(1)(c)(ii) read with Section 13(3).

9. As regards the objection of the assessing officer based on the debit balance of Rs.16,55,448/- appearing in the assessee's balance sheet in the

name of Charanjiv Educational Society on the basis of which he came to the conclusion that there was a violation of Section 13(1)(c)(ii) read with Section 13(2)(a)/ 13(3), the CIT (Appeals) held that the debit balance arose on account of the desire of the assessee to establish an educational institution (private university) in the State of Chhattisgarh. According to the law prevailing in Chhattisgarh, no society established outside that State could open a private university. In order to overcome this legal hurdle the assessee formed and registered a trust by name "Chirajiv Educational Society" as an independent unit in Chhattisgarh. The signatories to the trust deed were the trustees of the assessee. The object of the society was charitable and similar to the objects of the assessee trust. The assessee provided the funds to the aforesaid society for the purpose of meeting the expenditure required for establishing the private university. These funds were utilised by Charanjiv Educational Society for purchase of land, contribution to the endowment fund, etc. The society received permission from the Chhattisgarh government and also made the required payments in order to establish the private university. However, in the year 2005 the Supreme Court struck down Sections 5 and 6 of Chhattisgarh Niji Khsetra Vishwavidalaya Regulatory Commission

(Sthapana Aur Viniyaman) Adhiniyam, 2002 as a result of which the Chhattisgarh government by letter dated June, 2006 informed the society that the project could not be fulfilled and returned the deposit of Rs.2 crores by account payee cheque which in turn was returned by the society to the assessee trust. The other amounts advanced by the assessee to the society were also returned as and when they were received back by the society. The establishment, legal and other expenses incurred by the society were to be made good by the assessee on closure of operations by the society in 2008 pursuant to the letter of the government. On these findings, the CIT (Appeals) held that there was no violation of the provisions of Sections 13(1)(d) read with Section 11(5) as this was not a case of deposit of funds of the trust in unauthorised modes. On the contrary, the amount was utilised for the purpose the educational object and no benefit was derived by the society or their trustees or any other interested party. In this view of the matter, the CIT (Appeals) held that the assessing officer was not justified in denying the exemption under Section 11 to the assessee on the ground that the funds of the assessee were utilised for the benefit of a prohibited person.

10. So far as the ground relating to depreciation is concerned, the CIT (Appeals) took note of the judgment of the Supreme Court in ***Escorts Ltd. vs. UOI***, (1993) 199 ITR 43 and held that in arriving at the real income of the trust, deduction for depreciation cannot be allowed if the capital expenditure incurred in acquiring the asset has been allowed as application of income, since allowance of depreciation in such a case would amount to double deduction. On the basis of this judgment the CIT (Appeals) upheld the disallowance of the depreciation.

11. As regards the addition made under Section 68 in respect of the donation received from Jagjit Singh, the CIT (Appeals) held after examining the relevant facts that the assessee had filed a confirmation letter from the donor which was found untrue on later inquiry. The CIT (Appeals) noted that the donor had denied the making of any donation and had made a statement to that effect before the ADIT (Investigation). On the basis of the denial, the CIT (Appeals) held that the source of the receipt of the amount of Rs.1.50 crores was not approved. He accordingly upheld the addition.

12. As regards the addition of Rs.25 lakhs under Section 68, stated to be received as corpus donation from Piyush Jain, the CIT (Appeals) after

examining the evidence held that since the assessee failed to produce the donor or any proof of donation towards the corpus of the trust and even failed to demonstrate that the amount was received for a purpose other than the corpus, the amount was rightly added by the assessing officer.

13. In the appeal for the assessment year 2007-08 a different incumbent in the office of the first appellate authority, found himself unable to follow the decision taken by his predecessor in respect of the disallowance of the exemption under Section 11 on the ground of violation of Section 13(1)(c)(ii) read with Section 13(3). According to him, both in respect of the advances made to APIL and the debit balances in the account of Charanjiv Educational Society, there was a violation of the above statutory provisions disentitling the assessee from the benefit of exemption under Section 11. The addition made under Section 68 of the Act on account of corpus donations received from M/s. Kuber Swamy Ashutosh Consultancy Pvt. Ltd. and Sun System Institute of Information Technology were also confirmed.

14. The matter reached the Income Tax Appellate Tribunal in cross appeals for the assessment year 2006-07. In the assessee's appeal the challenge was to the addition of Rs.1.50 crores and Rs.25 lakhs made

under Section 68 and the addition of the development fund charges of Rs.59,58,384/- which represented the corpus of the trust which was obliged to be spent on the objects of the trust. In the appeal by the revenue, the decision of the CIT (Appeals) that there was no violation of the provisions of Section 13(1)(c)(ii) read with Section 13(3) of the Act was challenged. There was also a ground relating to certain amounts which were held by the CIT (Appeals) to be eligible for the benefit of Section 11(1)(d). The Tribunal in its consolidated order held that there was no violation of the provisions of Section 13(1)(c)(ii) read with Section 13(3) either on account of the monies belonging to the assessee having been advanced to APIL without any interest or security or on account of the existence of debit balances in the account of Charanjiv Educational Society. So far as the advances made to APIL are concerned the Tribunal accepted that they were made for acquisition of plots for the objects of the trust and were not advances made without any interest or security so as to attract the provisions of Section 13(1)(c)(ii)/ 13(3) of the Act. The findings of the Tribunal, summarised in paragraph 19.3 of its order, are as below: -

> "*(a) Assessee is a charitable institution, there is no change in it's objects. It carried on educational*

institutions and intended to further its objects by opening new schools and a university.

(b) APIL owned reserved educational plots and it's agreements to sale of such reserved plots with group educational trust do not carry any element of primary suspicion.

(c) The agreements are being held as colorable devise as they are not registered and therefore, cannot be considered evidence. Assuming even that agreements cannot be produced as evidence; the contemporaneous records for AY 2004-05; 2005-2006; bank accounts and other relevant evidence does support the explanation of the assessee. Besides its trite law that an evidence which may not be admissible in court of law can be admissible for income tax purposes. This is so as in income-tax proceedings there is no lis or adversarial proceedings between assessee and department. Income tax proceedings are not fettered by technical rules of evidence and evidence which has bearing on the subject matter and is primarily relied can be considered in income tax proceedings. The agreements and other record is complimentary to each other, corroborative to each other. In our considered view on the basis of contemporaneous evidence like account books, bank accounts and returns of income it cannot be held that assesses explanation in this behalf is unbelievable. Some minor issues here and there about posting a journal entry at the end of the year or difference in nomenclature cannot make a transaction colourable, which otherwise has corroborative evidence.

(d) From APIL copy of account in the assesses books it clearly emerges that more often than not APIL had credit balance, thus it has been providing monetary support to trust now and then. Therefore, a

presumption cannot be drawn that APIL diverted the funds without proper justification for its use.

(e) Assessee debited 95% advance to asset acquisition a/c itself indicate that because of substantial advance and possession it treated the plots as its assets. Treatment of these amounts as advances in APIL books, does not militate against assessee's method of accounting. Both maintain independent accounts; assessee under Trust regulations and APIL under normal Company Law and commercial principles, method of accounting and revenue recognition principles. Therefore, the alleged variation in categorization of accounting in two different set of books will not convert valid transactions into colourable transactions.

(f) So far we have been unable to find any motivation on the part of APIL to clandestinely divert Trust Funds for its personal use. Before the agreements and after the termination of agreements APIL had interest free credit balance with assessee. On cancellation of plots their amount has been duly returned within reasonable time on running account basis.

(g) Revenue has an objection that possession of plots and valuable rights to insist for specific performance were vested in assessee, they have been relinquished. Apropos assessee contends that cancellation of plots was in the interest of trust as by that time it had moved on to better projects including a university. Since no cancellation charges were to be levied, it terminated the agreements. In our view every entity has a right to carry on its objectives in the manner it best considers. Revenue cannot step in the shoes of the trustee in these matters. If the explanation is prima facie convincing and reasonably corroborated by record, evidence and explanation; the same should not be rejected on ipse-dixit.

> *(h) In view of the foregoings we see no reason to interfere with the finding of ld. CIT (A) which have been arrived at after due consideration of evidence, record, explanations and case laws mentioned above. Revenues reliance on the case of Kanhaya Lal Punj Trust (supra) has been rightly distinguished and held to be not applicable to the assesses case in view of the contemporaneous evidence.*"

15. So far as the debit balances in the account of Charanjiv Educational Society is concerned, which was one of the grounds of the assessing officer to deny the exemption under Section 11 is concerned, the finding of the Tribunal is as under: -

> "*21. Apropos revenue ground about debit balances against CES also we see no infirmity in the order of CIT(A). It has been held that assessee in furtherance of its objects intended to open a university at Chhatisgarh, proper formalities were completed, due to Supreme Court order the object could not be achieved in the hands of the assessee. Therefore, it formed this charitable society with same objects and trustees and incurred the expenses which are shown as advance to CEC. In our view, even if the same amount was donated to CEC in place of advance, in that eventuality also it would have been allowed as application to objects. CIT (A) rightly dismissed this ground which had no merit.*"

16. We are leaving out the finding of the Tribunal relating to the corpus donations treated by the assessing officer as not being eligible for the

benefit of Section 11(1)(d) since no question has been raised before us by the revenue on this point.

17. The Tribunal's finding in the assessee's appeal with respect to the addition made under Section 68 is that the assessee has successfully demonstrated the identity of the donors, the source of the payment, the PAN numbers, original confirmation, etc. and in the light of the documentary evidence, which were not pursued by the assessing officer by making further inquiries, and, therefore, the assessee has discharged the onus of establishing the identity and creditworthiness of the donors as also the genuineness of the donations. The additions of Rs.1.50 crores and Rs.25 lakhs were accordingly deleted. As regards the assessee's ground claiming allowance of depreciation in computing the real income for the purpose of determining the application of income despite the investment in the assets having been allowed as application of income, the Tribunal, purporting to follow a judgment of this Court in ***DIT vs. Vishwa Jagrati Mission*** in ITA No.140/2012 dated 29.03.2012 [since reported in (2013) 262 CTR (Del) 558], held that in the light of this judgment the assessee was entitled to claim depreciation on the cost of the assets, the investment in which was already allowed as application of income.

18. We are leaving out the finding of the Tribunal in relation to the treatment accorded to the development fund charges of Rs.59,58,384/- recovered during the year and directly credited to the corpus of the trust because no question of law has been raised on this aspect before us.

19. In the appeal by the assessee for the assessment year 2007-08, the Tribunal took the same view so far as the claim for exemption under Section 11 is concerned. It also deleted the additions made under Section.

20. The following substantial questions of law are framed: -

ITA Nos.321/2013 & 323/2013 (assessment year 2006-07)

(i) (a) Whether on the facts and in the circumstances of the case the Tribunal was right in law in holding that there was no violation of Section 13(1)(c)(ii) read with Section 13(3) of the Income Tax Act, 1961 in respect of the transactions which the assessee had with M/s. APIL and Charanjiv Educational Society and consequently in holding that the assessee was entitled to the exemption under Section 11?

(b) Was such decision perverse?

(ii) Whether the Tribunal was right in law in holding that the assessee was entitled to depreciation on the assets, the cost of which has been allowed as deduction as application of income?

(iii) Whether on the facts and in the circumstances of the case the Tribunal was justified in deleting the addition of Rs.1.50 crores and Rs.25 lakhs received from Jagjit Singh and Piyush Jain respectively, by invoking Section 68 of the Act?

ITA No.322/2013 (assessment year 2007-08)

(i) (a) Whether on the facts and in the circumstances of the case the Tribunal was right in law in holding that there was no violation of Section 13(1)(c)(ii) read with Section 13(3) of the Income Tax Act, 1961 in respect of the transactions which the assessee had with M/s. APIL and Charanjiv Educational Society and consequently in holding that the assessee was entitled to the exemption under Section 11?

(b) Was such decision perverse?

(ii) Whether on the facts and in the circumstances of the case the Tribunal was justified in deleting the addition of Rs.25 lakhs and

Rs.9.06 lakhs being amounts claimed to have been received by the assessee as corpus donations from M/s. Kuber Swamy Ashutosh Consultancy Pvt. Ltd. and Sun System Institute of Information Technology respectively by invoking Section 68 of the Act?

21. We may first take up the fundamental question as to whether the assessee was ineligible for the exemption under Section 11 on the ground that there was contravention of the provisions of Section 13(1)(c)(ii) read with Section 13(3) of the Act. It is necessary to briefly notice the statutory provisions in this regard. Section 11 exempts any income derived from property held under trust wholly for charitable or religious purposes to the extent to which it is applied to such purposes in India, to the extent of 85% of such income. Charitable purposes are defined in Section 2(15). There is no dispute that the objects pursued by the assessee fall within the said definition. Even if the objects of a trust satisfies the definition of "charitable purpose" as per Section 2(15), it does not automatically confer exemption to the trust; it has to further get itself registered under Section 12A. This condition is also satisfied in the present case since the assessee was registered under Section 12A on 28.05.1976. There are further conditions for being eligible to the

exemption. Section 13(1) enumerates instances under which the provisions of Section 11 granting exemption will not operate. One such instance is furnished by clause (c)(ii) which says that if any part of the income or any property of the trust is, during the relevant previous year, used or applied directly or indirectly for the benefit of any person referred to any sub-section (3), the exemption will not be allowed. Sub-section (3) enumerates the prohibited persons and there is no dispute that the assessee's case falls within clause (e) of sub-section (3). There is another provision which we have to notice and that is Section 13(2) which in clauses (a) to (h) thereof sets out illustrative instances where the income or property of the trust may be deemed to have been used or applied for the benefit of a prohibited person.

22. It is also to be noted that even if there is one instance of application or use of the income or property of the trust directly or indirectly for the benefit of any prohibited person, the trust will lose the exemption in respect of its entire income. Therefore, if in respect of the monies paid either to APIL or to Charanjiv Educational Society, it is found that the provisions of Section 13(1)(c)(ii) read with Section 13(3) of the Act are not followed, the trust would lose its exemption entirely, with the result

that the assessment of its income will be made according to the provisions of the Act.

23. With the above prefatory observations we may examine the facts of the case relating to the monies advanced to APIL. Before the assessing officer the assessee submitted that the agreements were entered into with APIL in the financial year 2003-04 for purchase of land in Palam Vihar and advance of Rs.86,01,600/- was made. In its letter dated 26.11.2008 written to the assessing officer, the assessee admitted that though payment was made possession was not taken by the trust. The payment was, however, treated as application of income (towards charitable purposes) in the said financial year. In the same letter it was further averred that due to various reason the assessee changed its mind and the agreements were cancelled; the amount was refunded to the assessee in the financial year relevant to the assessment year 2006-07. The refunded amount was reduced from the fixed assets to which they had been debited. Having said this, in its subsequent letter dated 18.12.2008 the assessee appears to have changed its stand. In this letter it was admitted that though no registered deeds were executed but possession of the plots were given to the assessee in the financial year 2003-04. The attention of the assessing

officer was drawn to the clauses 16 and 20 of the agreements dated 18.03.2004 and 24.03.2004 which stipulated that on receipt of 95% of the amount, physical possession of the plots was handed over to the assessee by APIL. It was explained that these clauses were unfortunately overlooked by the assessee and the attention of the assessing officer was not drawn to that in the earlier letter. The assessee also enclosed copies of its letter dated 31.3.2005 to APIL and the reply of APIL dated 21.04.2005. It is significant that these letters had not been filed with the assessing officer along with the assessee's earlier letter. The assessing officer dealt with the assessee's submissions in both the letters and noted that there was a significant change in the assessee's stand vis-a-vis taking over possession of the land. He issued summons to APIL under Section 131 of the Act in response to which APIL submitted that no income from the transaction was shown in its return for the assessment year 2004-05. Apparently the assessing officer was of the view that in case possession of the land had been handed over to the assessee in the financial year 2003-04 by APIL, as claimed by the assessee in the subsequent letter dated 18.12.2008, the provisions of Section 2 (47)(v) of the Act which defines "transfer" inclusively for the purpose of levying capital gains, would be

applicable and capital gains would have been declared by the APIL but in view of APIL's reply, the assessing officer concluded that possession of the land was not given to the assessee. He further noted that the amount of Rs.8,60,16,000/- continued to remain with APIL for the whole of the next financial year i.e. 2004-05 without any progress in the transaction. No sale deed was signed for more than one year even assuming that there were agreement to sell entered into in the month of March, 2004. He found it unusual that the assessee would part with 95% of the price of the land without even taking possession of the same and would wait for such a long period without getting the sale registered in its name. He also found it unusual that it was on the last day of the financial year 2004-05 that the assessee claimed to have written to APIL cancelling the deal which was accepted by the letter dated 21.04.2005. The assessing officer also noticed that even though APIL agreed on 21.04.2005 to cancel the agreements, the copy of the ledger account of APIL in the books of the assessee did not reveal any corresponding entry made on the said date; the entry reflecting the cancellation of the agreement to sell was passed in the accounts only on 31.03.2006. He further noted from the account that even after cancellation of the deal two cheques for Rs.80 lakhs and Rs.75 lakhs

were given to APIL on 29.11.2005 and 13.12.2005 for which there was no explanation. On these facts and relying upon certain authorities including the judgment of this Court in ***Kanahya Lal Punj Charitable Trust Vs. Director of Income Tax (Exemptions) (Delhi)***, (2008) 297 ITR 66, the assessing officer took the view that there was a violation of Section 13(1)(c)(ii) read with Section 13(2) read with Section 13(3)(e). These findings were not accepted either by the CIT (Appeals) who decided the appeal for the assessment year 2006-07 or by the Tribunal.

24. Counsel for the revenue submitted that the findings of the Tribunal are perverse and have been recorded by taking into account irrelevant considerations and by ignoring relevant material. We are inclined to agree. The statutory provisions which we have referred to have to be applied stringently by having regard to their object, viz., to prevent misuse of the exemption provision. It is difficult to see how the assessee-trust can advance about 95% of the price of the land allegedly purchased by it for its objects and not insist on the lands being conveyed to it within reasonable time or within the time which it normally takes. If the trust is quite serious about pursuing its objects of running schools/ dispensaries, it should have insisted on conveyance of the lands within a reasonable

period of time or at least stipulated for interest or adequate compensation or damages in case of failure to honour the alleged agreements. Counsel for the assessee pointed out that no advances were given in the previous year relevant to the assessment year 2006-07 and that they were all given in the earlier years and were only refunded in the accounting year ended on 31.03.2006. This argument is bereft of any merit and in fact reinforces the contention of the revenue that the monies were lying with APIL for a longer period without any interest or security, even taking into account the amounts refunded by APIL in the relevant previous year. Moreover, the Tribunal failed to take note of the fact that the assessee had taken contradictory stands before the assessing officer on a crucial aspect i.e. possession of the land. In its letter dated 26.11.2008 the assessee admitted that though payment of Rs.8,60,16,000/- had been made to APIL, possession of the land was not taken. But in its letter dated 18.12.2008 the assessee filed copies of the agreement dated 18th and 24th March, 2004 to show that they contained clauses to the effect that physical possession of the plots had been handed over by APIL and explained that these clauses were overlooked by it while making submissions vide letter dated 26.11.2008. It is difficult to believe how the

assessee could forget or could have overlooked that it had taken possession of the land and admit to the contrary in its letter dated 26.11.2008, if in fact and truth it had taken possession of the land pursuant to the relevant clauses in the agreements. Even if it is accepted for the sake of argument that the assessee had taken physical possession of the lands, there is no explanation as to why the agreements were cancelled, except a vague statement in the letter dated 26.11.2008 that it changed its mind due to "*various factors*". The assessee is a trust; surely, such decisions are expected to be taken formally in meetings of the trustees with reasons for the decisions being discussed and minuted. No minutes were produced; a vague statement is made that the trust changed its mind due to various factors, without being specific. The amount advanced is quite substantial and particularly when it is admitted that the amount was advanced to a prohibited person within the meaning of Section 13(3), it was the burden of assessee to establish beyond any doubt or suspicion that the advance was made *bona fide* and with the genuine object of acquiring land for the pursuit of the objects of the trust. Further, even though APIL accepted the request for cancellation of the agreements by letter dated 21.04.2005, the entry reflecting the cancellation of the

agreement was passed in the assessee's account only after almost a year i.e. on 31.03.2006 which is the last day of the relevant accounting year. This fact will have to be noted and appreciated keeping in view the whole perspective and not in isolation. Even if the agreements were cancelled on 21.04.2005, there is no explanation why further amounts of Rs.80 lakhs and Rs.75 lakhs were advanced to APIL on 29.11.2005 and 13.12.2005 respectively. These amounts also did not bear any interest nor was any security taken.

25. Counsel for the assessee would, however, contend that the chart set out in the order of the Tribunal would show that the account between the assessee and the APIL is a running account and if the entries are taken as a whole it would be seen that it is APIL which is funding the assessee and not the other way round. It was again submitted that in the 12 month period ended on 31.03.2006, no monies flowed out from the assessee to any prohibited person. This latter submission has already been dealt with by us *supra*. As to the contention that it is only a running account between the assessee and the APIL, we are unable to give effect to the submission since Section 13(1)(c)(ii) read with Section 13(2) does not appear to make any distinction between a running account where there is

inter-flow of funds and a case of pure advance. Section 13(2) makes it clear that the instances listed in its clauses (a) to (h) are only illustrative and without prejudice to the generality of the provisions of Section 13(1)(c). The prohibition is on the use or application of any part of the income or property of the trust, during the relevant previous year, for the direct or indirect benefit of any prohibited person. When funds of assessee trust are lying with APIL – even though they were not advanced in the relevant accounting year – and no interest or security is taken, it is a case of direct use of the funds for the benefit of a prohibited person. Clause (a) of Section 13(2) says that even if the income or property of the trust continues to remain lent to any prohibited person for any period during the relevant previous year without security or interest, it would be a case of deemed misapplication. This shows that it is not necessary that there should be any advance payment to the prohibited person in the relevant accounting year. At this juncture it is relevant to point out a crucial aspect. The provision makes reference to income or property of the trust being "*lent*" or continued to be "*lent*" to any prohibited person. If the funds of the assessee had been given to APIL without any agreement to sell being entered into there would have been no defence to

the assessee as that would have been a clear case of monies lent or continue to be lent without interest or security. It is only in order to get out of the clutches of the said clause that the assessee appears to have conceived of a device and entered into documentation with APIL to make it appear as if the monies were not "*lent*" to APIL, but were given for the purpose of acquiring lands under agreements to sell, for the objects of the trust. This explains why the assessee admitted before the assessing officer in its first letter that it had not taken possession of the lands, but resiled from that position in its second letter, realising its faux par, citing some clauses in the agreements. Taking possession of the lands has not been established as a fact by adducing evidence.

26. The argument of the counsel for the assessee that the CIT (Appeals) and the Tribunal have entered concurrent findings of fact which should not normally be disturbed unless they are perverse is technically correct; however, we are in agreement with the submission of the counsel for the revenue that the findings of the CIT (Appeals) (for the assessment year 2006-07) and the Tribunal are superficial and have not taken note of the normal course of human conduct and probabilities. A little probing or scratching of the surface was all that was required on the part of the

Tribunal to find out the truth about the claim of the assessee. The Tribunal has chosen, erroneously – this we say with respect – to ignore the normal course of human conduct and probabilities of the case and has preferred to be led simply by the documentation presented by the assessee. Each and every objection taken by the assessing officer has been attempted to be explained away by the assessee and the Tribunal overlooked that the facts have to be looked at cumulatively and as a whole; it failed to realise that and the real transaction between the assessee and APIL is not just an aggregate of the several component parts thereof; the authenticity of the transaction has to be examined by keeping in view the conspectus of the facts without missing the woods for the trees.

27. In the aforesaid view of the matter, we hold that the findings of the Tribunal on this aspect cannot be upheld. We uphold the findings of the assessing officer and hold that in advancing the amount of Rs.8,60,16,000/- to APIL the assessee committed a violation of the provisions of Section 13(1)(c)(ii) read with Section 13(2) and Section 13(3) of the Act. The trust was accordingly not eligible for the exemption under Section 11 of the Act for both the years.

28. It is further necessary to examine whether the advance made to Charanjiv Educational Society can be said to be in violation of the aforesaid provisions. On this aspect we are unable to find fault with the approach of the Tribunal. The relevant facts have already been noticed by us. The amounts were advanced by the assessee to the society which in turn deposited them with the Chhattisgarh government for the purpose of establishing a private University. The relevant documentary evidence is on record and has been noticed and relied upon by the Tribunal. It is only after the judgment of the Supreme Court that the position became certain that entities established outside the State of Chhattisgarh cannot be permitted to open private universities in the State. The monies were thereafter returned to the assessee. On these facts it is not possible to question the correctness of the view taken by the Tribunal. We are accordingly of the view that the assessing officer was not right, as held by the Tribunal, in denying the exemption under Section 11 on the ground that by advancing monies to Charanjiv Educational Society the assessee committed a violation of Section 13(1)(c)(ii) read with Section 13(2) and Section 13(3) of the Act.

29. It is now necessary to examine the other two questions of law. We may take up the applicability of Section 68 in respect of the donations received from Jagjit Singh and Piyush Jain in the previous year relevant to the assessment year 2006-07. So far as the Jagjit Singh is concerned, the Tribunal has deleted the addition on the ground that the assessee has successfully demonstrated the identity of the donors, the source of the payment, the PAN number and by filing the confirmation letters. These were not pursued by the assessing officer by making further inquiries. The Tribunal, however, has overlooked that Jagjit Singh, in some other proceedings made a statement on oath denying the fact that he made any corpus donations to the assessee trust. What he stated was that an amount of Rs.1.5 crores was payable to him by DLF in a tripartite dispute between him, APIL and DLF out of which a sum of Rs.1.5 crores was paid by DLF directly to the assessee as corpus donation of Jagjit Singh. The Tribunal has held that it is not possible to view the transaction with suspicion merely because some other entity, which owes money to Jagjit Singh, had made the donation on behalf of Jagjit Singh in discharge of the debt to Jagjit Singh. It has also observed that Jagjit Singh was not cross-examined by the assessee on the statement said to have been made by him

before another income tax authority in some other proceedings denying the making of the donation. The Tribunal has also found that the money has actually been given to the trust which has also used it. In these circumstances the Tribunal deleted the condition. The findings recorded by the Tribunal cannot be said to be perverse. Similarly in respect of the donation received from Piyush Jain, the Tribunal has noticed that the assessee was able to establish the identity of the donor and the source of the payment which was through account payee cheque, and give the PAN number and bank details. These details were not inquired into by the assessing officer and nothing adverse was found. It is in these circumstances that the Tribunal has deleted the addition. The findings of the Tribunal which are based on relevant material cannot be called perverse.

30. So far as the claim of depreciation is concerned the decision of the Tribunal cannot be countenanced. The Tribunal has overlooked that the cost of the assets has already been allowed as a deduction as application of income, as held by the CIT (Appeals) as well as the assessing officer. It was their view that allowing depreciation in respect of assets, the cost of which was earlier allowed as deduction as application of income of the

trust, would actually amount to double deduction on the basis of the ruling of the Supreme Court in *Escorts Ltd. vs. UOI* (*supra*). In respect of the additions to the fixed assets made during the previous year relevant to the assessment year 2006-07, the CIT (Appeals) held that since the cost of the assets was not allowed as a deduction by way of application of income, depreciation should be allow. The CIT (Appeals) has thus made a distinction between assets the cost of which was allowed as deduction as application of income and assets, the cost of which was not so allowed. The Tribunal has not kept this distinction in view, but has proceeded to rely upon a judgment of this Court in *DIT vs. Vishwa Jagrati Mission* (supra). In the judgment of this Court the question was whether the income of the assessee, which was a charitable trust, should be computed on commercial principles and if so, whether depreciation on fixed assets used for charitable purposes should be allowed as a deduction. This Court noticed that there was a consensus of judicial opinion on this aspect and held, after referring to those authorities as well as a circular of the CBDT issued on 19.07.1968, that while computing the income of the trust available for application for charitable purposes, depreciation on assets used for charitable purposes should be allowed. The point to be noticed is

that in this judgment, this Court referred to and distinguished the judgment of the Supreme Court in *Escorts Ltd.* (*supra*) on the ground that in *Escorts* (*supra*), the Supreme Court was concerned with a case where the deduction of the cost of the asset was allowed under Section 35(1) as capital expenditure incurred on scientific research and, therefore, no deduction for depreciation on the very same assets was held allowable under general principles of taxation, as it would amount to double deduction. The judgment of this Court in *DIT vs. Vishwajagrati Mission* reinforces the principle that if the cost of the asset has been allowed as deduction by way of application of income then depreciation on the same asset cannot be allowed in the computation of the income of the trust. The distinction has not been kept in view by the Tribunal which seems to have erroneously relied on the judgment of this Court to direct allowance of depreciation even in respect of assets, the cost of which has already been allowed as application of income. We accordingly hold that the Tribunal was not justified in directing the allowance of depreciation in respect of such assets.

31. In ITA No.322/2013, which relate to the assessment year 2007-08 the issues are consequential. In that year the assessing officer denied

exemption to the trust under Section 11 on the ground that there was a violation of Section 13(1)(c)(ii) read with Section 13(3) arising out of the advances given to APIL and Charanjiv Educational Society. His attention would appear to have been drawn to the order of the CIT (Appeals) in respect of the assessment year 2006-07 in which both the issues were decided in favour of the assessee and it was held that the exemption under Section 11 cannot be denied on the aforesaid grounds. The assessing officer, however, proceeded to complete the assessment by denying the exemption under Section 11 since the department had filed an appeal before the Tribunal against the order of the CIT (Appeals) for the assessment year 2006-07. While computing the income of the assessee, the assessing officer made several additions and disallowances and determined taxable income Rs.3,64,64,753/-. By virtue of the order of the Tribunal for the assessment year 2007-08, the trust has been given the exemption under Section 11 of the Act. The Tribunal further held that since the trust is eligible for exemption under Section 11, the additions made under Section 68 of the Act have to be examined on the yardstick applicable to donations received by a charitable trust. It then proceeded to examine those additions and deleted the same. Since we have reversed

the order of the Tribunal on the question of exemption under Section 11 for the assessment year 2006-07.

32. In line therewith, we hold that the Tribunal was not right in law in holding that the assessee was entitled to the exemption under Section 11 in respect the assessment year 2007-08. So far as the decision of the Tribunal in respect of the corpus donations are concerned, which have been added under Section 68, the Tribunal has deleted the addition of Rs.25 lakhs in respect of the corpus donation received from M/s. Kuber Swamy Ashutosh Consultants Pvt. Ltd. and Rs.9.06 lakhs received from M/s. Sun System Institute of Information Technology Pvt. Ltd. (total Rs.34.06 lakhs). The Tribunal has examined the evidence and deleted them. No perversity has been pointed out in its decision to do so.

33. In the result both aspects of the first substantial question of law which is common to both the assessment years 2006-07 and 2007-08 are answered in the negative, in favour of the revenue and against the assessee. The second question of law relating to the assessment year 2006-07 is also answered in the negative, in favour of the revenue and against the assessee. The third question of law for the assessment year 2006-07 and the second question of law for the assessment year 2007-08

are decided in the affirmative, in favour of the assessee and against the revenue. The appeals of the revenue are accordingly partly allowed.

(R.V. EASWAR)
JUDGE

(S. RAVINDRA BHAT)
JUDGE

MARCH 18, 2014
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