

BEFORE THE COMMISSIONER OF INCOME TAX [APPEALS],

NATIONAL FACELESS APPEAL CENTRE, DELHI

IN THE MATTER OF XYZ CHARITABLE TRUST

ARGUMENT NOTE FOR AY 2016-17

The appellant hereby discusses the issues raised in the appeal with respect to the above assessment year and the submissions relating to the said issues.

GROUND NO:1

The order of the Learned Income Tax Officer, Exemption Ward, Thrissur, in so far as it is prejudicial to the assessee is opposed to law, facts and circumstances of the case.

SUBMISSIONS WITH RESPECT TO THE ABOVE GROUND

This is a general ground and requires no explanation.

GROUND NO:2

Section 68 is unenforceable because the income referred to therein being a case of deemed income has not been deemed to be income in the said section. Section 68 is also inapplicable on a close interpretation and also on a combined reading of the said section with section 115BBE, section 4, section 5, section 14 and other applicable provisions of the Income Tax Act, 1961.

SUBMISSIONS WITH RESPECT TO THE ABOVE GROUND

As per section 115BBE, if the total income includes any income referred to in section 68 and is reflected in the ITR or if the total income determined by the AO

includes income referred to u/s 68, tax will be charged at the rate of 60%. But as per section 14, total income shall include only those income which can be classified under the five heads. But the unexplained money referred to in section 68 is income without any source. Therefore, it cannot be classified under any of the five heads of income as mentioned in section 14. Hence, it is headless. By a combined reading of section 4, 5, 14, 68 and 115BBE, the unexplained money cannot be made taxable in the hands of the appellant.

GROUND NO:3

The impugned order is unsustainable since the assessment ought to have been done u/s 144 instead of section 143(3) taking in to consideration the facts and circumstances of the case.

SUBMISSIONS WITH RESPECT TO THE ABOVE GROUND

The assessing officer herself had stated in the impugned order that the appellant had not responded to the notices u/s 142(1) dated 15/08/2018 and 30/11/2018. As per section 144, if the appellant fails to comply with all the terms of a notice issued under sub-section (1) of section 142, the Assessing Officer, after taking into account all relevant material which the Assessing Officer has gathered, shall, after giving the assessee an opportunity of being heard, make the assessment of the total income or loss to the best of his judgment and determine the sum payable by the assessee on the basis of such assessment. Hence, the order issued u/s 143(3) is invalid and the whole assessment is unsustainable.

GROUND NO:4

The Assessing Officer failed to issue Show Cause Notice which is mandatory as per instruction number 20/2015 dated 29.12.2015. Even after a specific request was made

by the Authorised Representative of the Appellant on the ground that he requires taking of expert legal advice.

SUBMISSIONS WITH RESPECT TO THE ABOVE GROUND

It is submitted that it is the duty of the assessing officer to issue pre-assessment notice proposing the demand of assessment before issue of assessment order. The assessing officer is bound to provide an opportunity to the appellant to submit his explanations/ objections against proposed demand. Non-issuance of pre-assessment notice leads to denial of the basic rights of natural justice to the appellant. Also, the pre-assessment notice is to be invariably issued irrespective of the type of assessment, whether u/s 143(3) or 144. Hence, the order needs to be quashed. **Letter dt 20-12-2018 enclosed as Annexure.**

GROUND NO:5

The addition of Rs.61,91,409.60 in the fixed assets which was claimed in the return was ignored by the Assessing Officer which he ought to have allowed as application.

SUBMISSIONS WITH RESPECT TO THE ABOVE GROUND

It is submitted that the appellant had applied Rs. 61,91,409.60/- towards capital expenditure the bifurcation is given below for reference:

Building	:	Rs. 51,48,893.00	
Computers	:	Rs. 29,950.00	
Furniture & Fittings	:	Rs. 5,44,816.60	
Books	:	<u>Rs. 4,67,750.00</u>	<u>Rs. 61,91,409.60</u>

The same is already shown in the audited financials filed by the appellant. As per the income tax provisions, capital expenditure will also be treated as application of income. But the assessing officer while passing the order rejected our claim of application of income and treated the whole amount of receipts received during the year as income and charged the tax.

GROUND NO:6

The impugned order is illegal and unsustainable since the Assessing Officer assessed the same as Income from Other Sources whereas section 68 is headless. If the income is assessed as Income from Other Sources, source is explained and therefore sec.68 is inapplicable.

SUBMISSIONS WITH RESPECT TO THE ABOVE GROUND

The appellant submits that the assessing officer, in his order, had added the cash credit receipts of Rs. 38,08,360/- as income taxable under section 68 but had classified the said receipts in his computation sheet under the head Income from Other Sources. The very inclusion of the above sum under the head "income from other sources" indicates that the sum has a source. Section 68 applies only when the source as well as nature of income is unexplained. If source is explained S.68 is inapplicable even if nature is unexplained. Likewise, if nature is explained still source is unexplained S.68 cannot be applied. In other words, it is submitted that S.68 applies only if both NATURE and SOURCE of income remain unexplained. Income chargeable under the head Income from Other Sources have a definite source. Hence, section 68 is not applicable and the impugned order is illegal and unsustainable.

GROUND NO:7

It is submitted that the AR was not informed by the Assessing Officer that he is going to invoke sec.68 of the Income Tax Act and hence denied an effective opportunity to consider the applicability of sec.68 and seeking expert opinion.

SUBMISSIONS WITH RESPECT TO THE ABOVE GROUND

The AO is bound to intimate the proposed tax additions and the basis of such additions which was lacking in the case of the appellant. The opportunity denied is an act of violation of principles of natural justice. Hence, the impugned order needs to be quashed.

GROUND NO:8

It is submitted that capital expenditure of Rs.10,42,516/- as addition to fixed assets and even noted by the Assessing Officer should be allowed as application of income. It is reflected in the Receipt & Payment Account also.

SUBMISSIONS WITH RESPECT TO THE ABOVE GROUND

Please refer the submission to Ground No 5. **Copy of Receipts and payments account is attached.** [Rs. 10,42,516/- is the total of addition of fixed assets other than the building.]

GROUND NO:9

It is submitted that sec.11 excludes income from being included in the Total Income subject to the conditions of application etc and otherwise if the conditions are not satisfied, this income will be included in the Total Income. Therefore, computation of Total Income which is defined u/s 2(45) is a condition which cannot be complied with in this case. Since, sec.5 is not applicable to sec.68 and in the absence of inclusion of

sec.68 income in the definition of income u/s 2(24), the provision of sec.115BBE is also not applicable.

SUBMISSIONS WITH RESPECT TO THE ABOVE GROUND

Section 5 is the section defining the scope of total income under the Income Tax Act. As per s.5, the total income includes all income from whatever source derived it means the source must be definite to consider a receipt as income for the computation of total income. Section 68 and s.115BBE applies to income which is headless. Hence, such income cannot be brought under the purview of s.5 ie total income. Hence, all receipts those taxed classified under s.68 cannot be taxed under the income tax act. Hence, the demand is to be waived and the order is to be quashed.

GROUND NO:10

It is submitted that the Assessing Officer charged the tax not u/s 115BBE but under Maximum Marginal rate as defined u/s 2(29C) of the Income Tax Act. Hence, the demand is unenforceable and void.

SUBMISSIONS WITH RESPECT TO THE ABOVE GROUND

The rates of tax as per s.115BBE is 60% but the AO had imposed tax at MMR even after classifying the income under s.68. The contentions of the AO regarding the classification of income and its chargeability are contradicting. Hence, the said order lacks clarity regarding the taxability of cash credits. Hence, the order needs to be quashed.

GROUND NO:11

Even according to the Assessing Officer, the credits are not found in the daybook which is to be regarded as the primary books of accounts and hence section 68 is not applicable.

SUBMISSIONS WITH RESPECT TO THE ABOVE GROUND

It is submitted that, according to the AO, the advances amounting to Rs.38,08,360/- is not credited in the books of accounts. Unless the sum is found credited in the books of account, section 68 cannot be applied. That is, section 68 is applicable only to those sums which is credited in the books and the assessee offers no/satisfactory explanations. Hence, the irregularities and mismatch in the AO's finding points out that the learned AO had not passed the assessment order undergoing a detailed and satisfactory scrutiny of the books of accounts. Therefore, the order arising as a result of such scrutiny needs to be quashed.

GROUND NO:12

The excess application of previous/past years may kindly be allowed as application of the current year ie AY 2016-17 and the courts have taken the view that it is permissible.

SUBMISSIONS WITH RESPECT TO THE ABOVE GROUND


The appellant submits that section 11 and 12 applies to a registered trust where it is allowed to set off the excess application made in previous years as application of the current year. Attention is invited to the judgement of Hon'ble Madras High Court in **Commissioner of Income-tax v. Matriseva Trust[2003] 128 Taxman 261 (Madras)** where it was held that deficiency of funds of instant year could be setoff by assessee-trust against earlier year's surplus. Hence, the excess application made during

the earlier years are to be allowed as application made during the year under appeal.
Caselaw attached as Annexure.

Hope your goodself would consider the above submission of the appellant and dispose the appeal granting complete relief. Please note that the appellant found the notice calling for written submission only after the last date of submission. Hence, the appellant humbly requests your goodself to condone the delay in filing the written submission and treat the same as being filed within the due date of submission. The inconvenience caused to your goodself due to the delay in filing the written submission is deeply regretted. The delay was unintentional.

Hope your goodself would accept the same and do the needful.

15.01.2021



APPELLANT