

**(2013) 12 AHC CK 0102**  
**In the Allahabad High Court**  
**Case No : Income Tax Appeal No. 349 of 2013**

Commissioner of Income Tax

APPELLANT

Vs

Moti Ram Gopi Chand Charitable Trust

RESPONDENT

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**Date of Decision :** 09-12-2013

**Acts Referred:**

**Citation :** (2014) 360 ITR 598

**Hon'ble Judges :** Surya Prakash Kesarwani, J; Sunil Ambwani, J

**Bench :** Division Bench

**Advocate :** Shambhu Chopra, for the Appellant;

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## Judgement

1. We have heard Shri Shambhu Chopra, learned counsel for the income tax Department. The affidavit of service has been filed.

2. This appeal u/s 260A of the income tax Act, 1961, arises out of the order dated June 14, 2013, passed by the income tax Appellate Tribunal in I.T.A. No. 4667/Del/2011 relating to the assessment year 2008-09.

3. The appeal has been preferred on the following substantial questions of law:

1. Whether, on the facts and in the circumstances of the case, the hon''ble income tax Appellate Tribunal has erred in law in directing the Assessing Officer to condone the delay and irregularity in filing Form 10 if the assessee has spent the amount in the next year ignoring the non-compliance with the statutory provisions of filing Form 10 within the prescribed limit and that the delay in filing of Form 10 can only be condoned by the Commissioner of income tax as per the Central Board of Direct Taxes Circular No. 273, dated June 3, 1980 (see [1980] 126 ITR (St.) 27) ?

2. Whether, on the facts and in the circumstances of the case, the hon''ble income tax Appellate Tribunal has erred in law in directing the Assessing Officer to allow the exemption claimed by the assessee ignoring the judgment of the hon''ble Supreme Court in the case of The Commissioner of Income Tax,

Vidarbha, Nagpur Vs. The Nagpur Hotel Owners" Association Nagpur, which holds that Form 10 was to be filed before completion of the assessment ?

4. We have gone through the orders of the Assessing Officer, Commissioner of income tax (Appeals) and the income tax Appellate Tribunal.

5. Brief facts giving rise to the appeal are as follows:

The brief facts of the case are that the assessee is a society registered under the Societies Act and also registered u/s 12A of the income tax Act, 1961. The society is running MG Public School at Circular Road, Muzaffarnagar. The assessee filed its return of income declaring nil income as per computation of income as under:

However, the Assessing Officer observed that the assessee had not utilized the funds for charitable purpose as per the provisions of the Act and held as under:

Again from a perusal of the return it is noticed that the total receipts of the assessee is Rs. 1,97,84,940 which included sale of land for Rs. 24,01,245, becomes total receipts of Rs. 2,21,86,240. The total application of funds as indicated in the income and expenditure account is Rs. 97,10,705. The expenditure on capital asset is at Rs. 81,99,026 made up of the following. Thus, the total application of fund is at Rs. 1,79,09,731, i.e., (Rs. 97,10,705 + Rs. 81,99,026). In brief out of the total receipts of Rs. 2,21,86,240, the application of fund is only to the extent of Rs. 1,79,09,731 which is only at 80.72 per cent.

As the application of funds is less than 85 per cent and there is no application u/s 11(2) along with the return, the exemption u/s 11 of the income tax Act, 1961, is not available to the assessee. Accordingly, vide notice dated December 18, 2009, and dated December 29, 2009, the assessee was required to explain why the exemption u/s 11 may not be disallowed. Vide letter dated March 4, 2010, the assessee furnished its reply as under:

That the trust is carrying on activity of providing education to the children irrespective of caste and creed and mainly on charitable purposes. In the year under consideration, the return of income has been filed along with the audit report in Form 10B along with the application for allowability of accumulated funds of Rs. 24,04,624 to be used in the next year. The copy of the application is being enclosed for your ready reference. The exemption u/s 11 of the income tax Act, 1961, cannot be denied while the funds accumulated have been kept in bank as per the provisions of section 11(5)(iii) with Schedule I;"

Along with this reply, the assessee also filed notice u/s 11(2)(a) of the income tax Act read with rule 17 of the income tax Rules, 1962, for accumulation of income. The letter is addressed to the Additional Commissioner of income tax.

The Assessing Officer, however, did not consider the contention of the assessee and made the disallowance because of the following:

(i) the notice u/s 11(2)(a) is not in a specified form as per rule 17 of income tax

Rules, 1962. The prescribed form is Form 10;

(ii) the letter states that amount of Rs. 24,04,624 shall be utilized in the next year and it does not state the purpose for which it is being accumulated;

(iii) the application dated September 26, 2008, is filed on October 21, 2008, and, therefore, cannot be considered as notice as it should have been filed before the expiry of time allowed u/s 139 for furnishing of return of income which is 30th September of each year; and

(iv) the notice is signed by Shri Dinesh Mohan, advocate, and not by secretary or the president of the society.

Dissatisfied with the order, the assessee filed an appeal before the learned Commissioner of income tax (Appeals) who, after going through the submissions and on the basis of material on record, allowed the benefit of capital expenditure of Rs. 81,99,026 and reduced the taxable income to Rs. 42,75,263 by making the following calculation.

6. The income tax Appellate Tribunal relying upon CIT v. Zirat Mir Syed Ali Hamdani decided by the Jammu and Kashmir High Court and The Commissioner of Income Tax, Vidarbha, Nagpur Vs. The Nagpur Hotel Owners' Association Nagpur, held that information with full details as required in Form 10 was furnished for setting apart and carrying forward the unspent amount for spending in the next year. The Tribunal found that the contents of Form 10 are similar to the contents of the letter sent by the assessee. The Assessing Officer denied the exemption on the ground of technical default of not conveying its intention on the prescribed form. The provisions of section 11(2) providing for requirement of exercising the option within the specified time is directory. The Tribunal held that the Assessing Officer has power to condone the delay specially in the circumstance that the assessee had filed audited balance-sheet for the assessment year 2009-10 (the next assessment year) before the Assessing Officer for claiming for unspent amount was spent in the prescribed period. He also demonstrated that the assessee had made investment in the next year amounting to Rs. 1,25,17,086 and thus the purpose of the provisions of the Act have been achieved.

7. In The Commissioner of Income Tax, Vidarbha, Nagpur Vs. The Nagpur Hotel Owners' Association Nagpur, the Supreme Court held that the notice of accumulation must be given to the assessing authority u/s 11 before the assessment is concluded. It was held that the assessing authority must have this information at the time he completes the assessment. In the absence of any such information it will not be possible for the assessing authority to give the assessee the benefit of such exclusion and once the assessment is so completed, it would be futile to find fault with the assessing authority for having included such income in the assessable income of the assessee. Therefore, even assuming that there is no valid limitation prescribed under the Act and the Rules even then. It is reasonable to presume that the intimation required u/s 11 has to be

furnished before the assessing authority completes the concerned assessment. In the present case, the application u/s 11(2) was not filed with the return. The information, however, was given during the process of the assessment, before the assessment was completed. The assessee had given notice u/s 11(2)(a) of the Act read with rule 17 of the Rules of 1962 for accumulation of income to the Additional Commissioner of income tax. The Assessing Officer, however, did not consider the contention of the assessee.

8. We do not find substance in the contention of Shri Shambhu Chopra that unless the information, which was otherwise provided by the assessee is furnished in Form 10, the Assessing Officer could not have taken into consideration and was entitled to reject it. The benefit of the exemption is on setting apart of the 85 per cent amount to be spent in the next year before the assessment is complete and not on the furnishing of information on the prescribed form. There was sufficient material before the Assessing Officer both in the shape of the information furnished within the prescribed period and the proof of not only setting apart 85 per cent of the amount to be spent in the next year but also the expenditure of that amount in the next year. The insistence of furnishing of information on Form 10 as a condition precedent, is insistence on the form and not the substance of the provisions of the Act.

9. The Tribunal has taken precaution and remanded the matter to examine the books of account of the assessee for the assessment year 2009-10 to find out whether the amount was spent in the next year and if the investment exceeds the unspent amount within the prescribed period with directions that if such finding is arrived at, the Assessing Officer will condone the delay and irregularity in filing Form 10, and should allow the exemption, if found to be eligible otherwise.

10. We do not find any error of law in the order of the Tribunal. When a request by way of letter, which complies with the requirement and furnishes all the information required in Form 10 was made available on record and there was sufficient proof before the Assessing Officer that the amount was not only kept apart but was also spent in the next year, the adherence to the form and not substance was not valid exercise of power by the Assessing Officer and the Commissioner of income tax (Appeals).

11. The questions of law Nos. 1 and 2 are decided in favour of the assessee and against the Department. The income tax appeal is dismissed.