
(1994) 12 MAD CK 0039

In the Madras High Court

Case No : Writ Petitions No"s. 203, 6632, 10838 of 1989, 14032 of 1991, 4827 of 1992 and 2228 and 8971 of 1993

Thanthi Trust

APPELLANT

Vs

Central Board of Direct Taxes and others

RESPONDENT

Date of Decision : 19-12-1994

Acts Referred:

Income Tax Act, 1961 — Section 11, 11(1), 11(4), 11(4A), 119

Citation : (1995) 213 ITR 639

Hon'ble Judges : T. Somasundaram, J;K.A. Swami, J

Bench : Division Bench

Advocate : Dr. Debi Prasad Pal, for the Appellant; S.V. Subramanian, for the Respondent

Judgement

T. Somasundaram, J.—These writ petitions have been filed for the issue of a writ of certiorarified mandamus to quash Circular No. 372 (see Kaka Ba and Kala Budh Public Charitable Trust Vs. Commissioner of Income Tax, Gujarat-I and Others,), dated December 8, 1983, issued by the Central Board of Director Taxes and the orders of the second respondent dated July 28, 1988, February 22, 1989, June 30, 1989, June 30, 1990, March 21, 1991, March 20, 1992, February 22, 1992 and April 19, 1993, denying exemption u/s 11 of the Income Tax Act, 1961, hereinafter referred to as the Act, to the petitioner-trust for the assessment years 1984-85 to 1991-92, respectively, and to direct the second respondent to consider the petitioner"s claim for exemption u/s 11 of the Act, independent of Circular No. 372 (see Kaka Ba and Kala Budh Public Charitable Trust Vs. Commissioner of Income Tax, Gujarat-I and Others,), dated December 8, 1983.

2. The petitioner-trust was created under an instrument of declaration of trust on March 1, 1954, for the purpose of establishing the Tamil daily ("Daily Thanthi") by the founder of the said newspaper one Sri S. B. Aditanar, who was carrying on the business of printing and publishing the said newspaper as the sole proprietor

since 1943. The petitioner-trust is an assessee on the file of the second respondent Income Tax Officer in P.A. No. 47-005-AZ-5117.

3. On July 9, 1957, the founder of the trust executed a supplementary deed wherein he declared that the trust created by the document dated March 1, 1954, was irrevocable. Again, the founder of the trust, on June 28, 1961, executed a supplementary deed. By the said supplementary deed, the founder directed that the surplus income of the said trust, after defraying all the expenses, should be devoted by the trustees for the following purposes :

- (1) Establishing and running a school or college for the teaching of journalism.
- (2) Establishing and/or running or helping to run schools, colleges or other educational institutions for teaching arts and science.
- (3) For establishing of scholarships for students of journalism, arts and science;
- (4) Establishing and/or running or helping to run hostels to students;
- (5) Establishing and/or running or helping to run orphanages; and
- (6) Other educational purposes.

4. For the assessment year 1968-69, the previous year ending June 30, 1967, the petitioner filed its return of income on October 10, 1968, admitting an income of Rs. 13,62,954 and claimed exemption u/s 11 of the Income Tax Act, 1961, hereinafter referred to as the "Act", on the ground that 75 per cent. of such income had been applied for charitable purposes, and the assessee-trust filed a return declaring a net income of Rs. 11,39,300 for the assessment year 1969-70 and claiming exemption in respect thereof u/s 11 of the Income Tax Act, 1961. The Income Tax Officer rejected the assessee's claim for exemption u/s 11(1) for the assessment years 1968-69 and 1969-70. Aggrieved by such assessments, the assessee preferred an appeal in I.T.A. Nos. 21 and 41 of 1972-73 before the appellate authority contending that the reasons given by the Income Tax Officer for denying the exemption were not proper and sound.

5. In respect of the assessment years 1968-69 and 1969-70, the appellate authority held that it would be safe to presume that the High Court in C.S. No. 90 of 1961 upheld the validity of the supplementary deed dated June 28, 1961. He also held that the High Court by passing judgment and decree in the manner it had done in C.S. No. 90 of 1961, had accepted the assessee's plea that the original objects of the trust had been fulfilled and hence the decree passed by the High Court was mandatory in nature and all authorities functioning within its jurisdiction were bound to follow the same. On the question as to whether the assessee could be said to have applied its income for charitable purposes, the appellate authority held that in view of the fact that the college authorities had subsequently withdrawn and utilised the amounts credited to its account in the books of the assessee, it could not be said that the assessee had not applied its income for charitable objects. He also stated that there was no time limit

prescribe by the Act for such application. Aggrieved by the order of the appellate authority, the Income Tax Officer preferred an appeal to the Income Tax Appellate Tribunal. The Income Tax Appellate Tribunal, but its order dated April 22, 1978, and September 25, 1978, has held that by reason of the judgment and decree of this court in C.S. No. 90 of 1961, the objects of the trust are only those set out in the schedule to the decree and they are charitable objects and that the petitioner will be entitled to exemption from tax in respect of such income derived from the business as is shown to have been actually parted with by it and actually spent on such charitable objects during the relevant previous years. On a reference made by the Tribunal, the Division Bench of this court in Tax Cases Nos. 1240 to 1245 of 1979 held that the petitioner-trust is entitled to claim exemption u/s 11 of the Act. This judgment is in Commissioner of Income Tax Vs. Thanthi Trust, . The SLP filed by the Department was dismissed by the Supreme Court.

6. By Act 41 of 1975, the following clause was inserted in section 13 of the Act as section 13(1)(bb) with effect from April 1, 1977 :

"13. (1) Nothing contained in section 11 or section 12 shall operate so as to exclude from the total income of the previous year of the person in receipt thereof

(bb) in the case of a charitable trust or institution for the relief of the poor, education or medical relief, which carries on any business, any income derived from such business, unless the business is carried on in the course of the actual carrying out a primary purpose of the trust or institution"

7. In the course of assessment for the years 1979-80 to 1983-84, the respondent raised an objection regarding the claim to exemption u/s 11 of the Act, on the ground that by virtue of section 13(1)(bb) of the Act, the trust is not entitled to claim exemption. The petitioner herein contended that the Division Bench of this court has categorically held that the business is carried on in the course of actually carrying out the purpose of the trust and hence the petitioner is entitled to claim exemption. The respondent has rejected the contention holding that the decision of this court will not be applicable after introduction of section 13(1)(bb). On this ground, respondent No. 2 has passed orders for all the assessment years holding that the petitioners is not entitled to claim exemption.

8. Aggrieved by the orders of assessment dated July 28, 1988, passed by the Income Tax Officer denying exemption u/s 11 of the Act, for the assessment years 1979-80 to 1983-84, the petitioner-trust filed Writ Petitions Nos. 198 to 202 of 1989 before this court to quash the said assessment orders. The said Writ Petitions Nos. 198 to 202 of 1989 were also heard by us along with this batch of writ petitions. Today, we have passed orders allowing Writ Petitions Nos. 198 to 202 of 1989 Thanthi Trust Vs. Assistant Commissioner of Income Tax,), holding that the Income Tax Officer is not correct in denying exemption to the petitioner-trust u/s 11 for the assessment years 1979-80 to 1983-84, relying on section

13(1)(bb) of the Act.

9. By the Finance Act, 1983, the following sub-section (4A) was introduced in section 11 of the Act, with effect from April 1, 1984 (See Commissioner of Income Tax Vs. Labala Haribandhu Sahu,) :

"Section 11(4A). Sub-section (1) or sub-section (2) or sub-section (3) or sub-section (3A) shall not apply in relation to any income, being profits and gains of business, unless -

(a) the business is carried on by a trust wholly for public religious purposes and the business consists of printing and publication of books or publication of books or is of a kind notified by the Central Government in this behalf in the Official Gazette; or

(b) the business is carried on by an institution wholly for charitable purposes and the work in connection with the business is mainly carried on by the banterers of the institution, and separate books of account are maintained by the trust or institution in respect of such business ..."

10. For the assessment years 1984-85 to 1991-92, the second respondent herein passed orders of assessment in respect of the petitioner-trust, holding that the petitioner-trust is not entitled to claim exemption u/s 11 of the Act, in view of Circular No. 372 (See Kaka Ba and Kala Budh Public Charitable Trust Vs. Commissioner of Income Tax, Gujarat-I and Others,), dated December 8, 1983, issued by the Central Board of Direct Taxes and in view of sub-section (4A) of section 11 of the Act. Aggrieved by the said orders of assessment denying exemption to the petitioner u/s 11 of the Act for the assessment years 1984-85 to 1991-92, the petitioner has filed these writ petitions seeking the reliefs set out earlier in the opening paragraphs of this order.

11. Dr. Debi Prasad Pal, learned senior counsel for the petitioner, submitted in the first place that the order of the second respondent denying the claim of the petitioner regarding exemption u/s 11 of the Act is based solely on Circular No. 372 (see Kaka Ba and Kala Budh Public Charitable Trust Vs. Commissioner of Income Tax, Gujarat-I and Others,), dated December 8, 1983, issued by the Central Board of Direct Taxes and hence the orders challenged in these writ petitions are unsustainable in law. Learned senior counsel further submitted that on a true and proper interpretation of section 11(4A) read with section 11(4) of the Act, section 11(4A) cannot apply where the business itself is held under a trust for a charitable purpose as in the present case. The contention of learned senior counsel is that section 11(4A) of the Act will apply only to a case where the business carried on by the trust is not held under trust for a charitable purpose but the said income being the profits and gains of business is earned by a public trust created wholly for religious purposes or by an institution, in such a case, such income will be eligible for exemption u/s 11 only if the two conditions laid down in clause (a) or (b) of sub-section (4A) of section 11 of the Act are satisfied. According to learned senior counsel for the petitioner, in the present

case, as the business carried on by the petitioner is itself held under trust for a public charitable purpose, the business is carried out only and exclusively for the purpose of carrying out the charitable objects as found by the Division Bench of this court in Commissioner of Income Tax Vs. Thanthi Trust, , the provisions of section 11(4A) cannot have any application. Learned senior counsel also contended that the circular of the Central Board of Direct Taxes bearing No. 372 (see Kaka Ba and Kala Budh Public Charitable Trust Vs. Commissioner of Income Tax, Gujarat-I and Others,), dated December 8, 1983, is inconsistent and in conflict with the true legal position on a correct interpretation of section 11(4A) read with section 11(4A) of the Act and as such the said circular is illegal and liable to be quashed.

12. Per contra, Mr. S. V. Subramanian, learned senior counsel for the Revenue, submitted that after the insertion of sub-section (4A) of section 11 in the Act, with effect from April 1, 1984, the petitioner-trust cannot claim exemption u/s 11, because on the facts of present case, clause (a) or (b) of sub-section (4A) of section 11 will not be applicable to the petition-trust and hence, its income is not entitled to exemption from Income Tax. Learned senior counsel for the Revenue also contended that the claim for exemption has been denied to the petitioner, not on the basis of Circular No. 372 (see Kaka Ba and Kala Budh Public Charitable Trust Vs. Commissioner of Income Tax, Gujarat-I and Others,), dated December 8, 1983, but on the ground that the petitioner is not entitled to the exemption u/s 11 of the Act, in view of the introduction of sub-section (4A) in section 11 of the Act, with effect from April 1, 1984. The further contention of learned senior counsel for the Revenue is that the petitioner has effective alternative remedies under the Act itself for challenging the assessment orders and, therefore, the petitioner is not entitled to any relief in these writ petitions.

13. In the light of the rival contentions of learned senior counsel for the parties, the following points arise for consideration in these writ petitions :

(1) Whether, on the facts and circumstances of the case, the second respondent is correct in denying exemption to the petitioner u/s 11 of the Act, for the assessment years 1984-85 to 1991-92, in view of sub-section (4A) of section 11 of the Act ?

(2) Whether Circular No. 372 (see Kaka Ba and Kala Budh Public Charitable Trust Vs. Commissioner of Income Tax, Gujarat-I and Others, dated December 8, 1983, is invalid on the ground that it is inconsistent with the provisions contained in sections 11(4A) and 11(4) of the Act, and whether the said Circular No. 372 (see Kaka Ba and Kala Budh Public Charitable Trust Vs. Commissioner of Income Tax, Gujarat-I and Others,) dated December 8, 1983, and the orders of assessment challenged in these writ petitions, are liable to be quashed ?

(3) Whether the writ petitions are liable to be dismissed on the ground that the petitioner has not exhausted the alternative remedies of appeal to the appellate authority and the further appeal to the Tribunal against the orders of

assessments, challenged in these writ petitions ?

Point No. 1. - According to section 11(1)(a) of the Act, 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 such income is accumulated for application to such purposes in India, to the extent to which the income so accumulated or such part is not in excess of 25 per cent. of the income from such property, shall not be included in the total income of the previous year of the person in receipt of the income. Section 11(4) of the Act provides that for the purposes of section 11, property held under trust includes a business undertaking so held. According to section 2(15) of the Act, "charitable purpose" includes relief of the poor, education, medical relief, and the advancement of any other object of general public utility. In the petitioner's own case in respect of the assessment years 1968-69 and 1969-70, the Division Bench of this court, in Tax Cases Nos. 1240 to 1245 of 1979, in Commissioner of Income Tax Vs. Thanthi Trust, , considering the character of the petitioner trust created under the trust deed dated March 1, 1954, and the supplementary trust deed dated June 28, 1961, and the effect of the judgment of this court in C.S. No. 90 of 1961 has held that the founder of the trust has created a public charitable trust, that the decision of this court in C.S. No. 90 of 1961 creates a legal obligation on the trustees to spend the income from the trust, after defraying the expenses of the newspaper business for the charities set out in the schedule to the decree in C.S. No. 90 of 1961, and, therefore, the trust property, which is the business itself should be taken to be held under a legal obligation for the various charitable objects, that those charitable objects fall under relief of the poor and education referred to in section 2(15) of the Act and that the primary purpose of the trust is to carry out the charitable objects and the business is carried on only as a means in the course of the actual carrying out of the primary purpose of the trust and not as an end in itself. In view of the said decision of the Division Bench of this court in Commissioner of Income Tax Vs. Thanthi Trust, , rendered in a proceeding between the same parties interpreting the very same trust deeds and the decisions in C.S. No. 90 of 1961, on the file of this court, there is no difficulty in holding that the petitioner-trust is a charitable trust for the relief of poor and education and that the business undertaken is property held under the trust and that the business is carried on only in the course of the actual carrying out of the primary purpose of the trust and therefore, the petitioner is entitled to claim the exemption u/s 11(1) of the Act. As already stated, today, we have passed orders allowing Writ Petitions Nos. 198 to 202 of 1989 Thanthi Trust Vs. Assistant Commissioner of Income Tax,), which relate to the assessment years 1979-80 to 1983-84, relying on the decisions of the Division Bench of this court in Commissioner of Income Tax Vs. Thanthi Trust, , holding that the primary purpose of the trust is to carry out charitable objects and that the business is carried on only as a means in the course of the actual carrying out of the primary purpose of the trust and, therefore, section 13(1)(bb) of the Act, cannot stand in the way of the petitioner claiming the

exemption u/s 11(1) of the Act, in respect of the assessment years 1979-80 to 1983-84.

14. The next question we have to examine is whether sub-section (4A) of section 11 can be applied to the case of the petitioner-trust u/s 11, on the ground that sub-section (4A) stands in the way of the petitioner getting the exemption u/s 11 for the assessment years in question. Section 11(4A) came into effect from April 1, 1984, and it says that sub-section (1) or sub-section (2) or section (3) or sub-section (3A) shall not apply in relation to any income, being profits and gains of business, unless (a) the business is carried on by a trust wholly for public religious purposes and the business consists of printing and publication of books or publication of books or is of a kind notified by the Central Government in this behalf in the Official Gazette; or (b) the business is carried on by an institution wholly for charitable purposes and the works in connection with the business is mainly carried on by the beneficiaries of the institution. It is not in dispute that the petitioner-trust is not a trust created wholly for public religious purposes. It is also not in dispute that the petitioner-trust is not an institution. On the other hand, the petitioner-trust is a trust created for a public charitable purpose, falling in section 2(15) of the Act. Clause (a) of section 11(4A) will not apply to the case of the petitioner-trust as it is public charitable trust, whereas clause (a) of sub-section (4A) deals with the income being profits and gains of business carried on by a trust created wholly for public religious purposes; and clause (a) does not deal with the income derived from the business undertaking held under the trust for public charitable purposes. Similarly, clause (b) of section 11(4A) also will not apply to the petitioner, because clause (b) will apply only to the income being profits and gains of person carried on by an institution and not by a trust. The contention of learned senior counsel for the Revenue is that the exemption u/s 11(1) of the Act will be available to the petitioner only if it satisfies both the conditions prescribed in clauses (a) and (b) of section 11(4A), that the petitioner-trust is neither a trust created wholly for public religious purposes, nor it is an institution and thus it does not satisfy either of the conditions prescribed in clauses (a) and (b) of section 11(4A) of the Act and, consequently, the petitioner cannot claim exemption u/s 11(1) of the Act. We are unable to accept the above contention of learned senior counsel for the Revenue. As already pointed out, according to section 11(1)(a) of the Act, income derived from property held under trust (which includes a business undertaking), wholly for charitable or religious purposes to the extent to which such income is applied to such purposes in India, shall not be included in the total income of the previous year of the person receiving the same. It is clear that section 11(1)(a) concerns itself with income derived from the property held under trust which includes business undertaking so held, wholly for charitable or religious purposes, whereas sub-section (4A) of section 11, does not concern itself with any income derived from property held under trust for charitable purposes, but only concerns itself with income being profits and gains of business carried on by a trust wholly for public religious purposes or business carried by an institution wholly for charitable

purposes. Thus, it is clear that the provisions of sub-section (4A) can be applied only to income being profits and gains of business carried on by a trust, which is not held under trust and the said sub-section (4A) cannot be applied to a case where the business undertaking itself is held under trust for charitable purposes as in the present case. There is force in the contention of learned senior counsel for the petitioner that sub-section (4A) of section 11 will apply only in a case where the business carried on by the trust is not held under trust for a charitable purpose, but the said income from business being the profits and gains of business earned by a trust, created wholly for public religious purposes or by an institution in such a case, the income will be eligible for exemption only when the two conditions laid down in clauses (a) and (b) of sub-section (4A) of section 11 are satisfied. In the present case, inasmuch as the business carried on by the petitioner is itself held under trust for public charitable purposes and the business is carried on only for the purposes of carrying on the charitable objects as found by the Division Bench of this court in Commissioner of Income Tax Vs. Thanthi Trust, the provisions of sub-section (4A) of section 11 cannot have any application. Section 11(1)(a) grants exemption to income derived from property held under trust wholly for charitable or religious purposes to the extent indicated in that section, whereas section 11(4A) denies exemption to income being profits and gains of business carried on by a trust wholly for public religious purposes or an institution, unless the conditions prescribed in clause (a) or (b) of sub-section (4A) of section 11 are satisfied. Section 11(4A) has no application to the petitioner-trust as it is not a trust wholly for public religious purposes, but it is a trust created for public charitable purposes.

15. Further, section 11(1)(a) of the Act grants exemption generally in respect of income derived from property held under trust wholly for charitable or religious purposes. Sub-section (4A) carves out only certain categories of income, namely, income being profits and gains of business carried on by a trust wholly for public religious purposes and institutions and denies exemption to such income being profits and gains of business unless the conditions prescribed in clause (a) or (b) of sub-section (4A) are satisfied, leaving the income derived from property held under trust for charitable purposes, to be taken care of by the provisions of section 11(1)(a) read with section 11(4) of the Act. In these circumstances, we are of the view that the provisions contained in section 11(1)(a), so far as they relate to income derived from property held under trust for charitable purposes, as in the present case, are concerned, they are not affected or touched by the amendment introduced to section 11 by the insertion of sub-section (4A). Again by inserting sub-section (4A), if it was intended to narrow down the scope of section 11(1)(a) so as to withdraw the exemption enjoyed by income derived from property held under trust for charitable purposes, it would have been mentioned specifically that the scope of section 11(1)(a) was being restricted to that extent. But this not being down here, it cannot at all be contended that something that was already included in section 11(1)(a) has been removed by the insertion of sub-section (4A).

16. If the petitioner can claim exemption on the plain wording of section 11(1)(a) of the Act, we cannot deprive it of its benefits by implication or by a deduction process when sub-section (4A) does not in express terms cover the case. It is a settled position of law that in the case of fiscal statutes that impose pecuniary burden, if a reasonable doubt exists, the construction most beneficial to the subject must be adopted.

17. This is also the view taken by a Division Bench of the Madhya Pradesh High Court in Commissioner of Income Tax Vs. Seth Kirodimal Charity Trust, . The question that arose in that case was whether the income from the business or property held under trust is entitled to exemption u/s 4(3) (i) of the Indian Income Tax Act, 1922, and that case involved the interpretation of section 4(3) (i) and clause (b) of the proviso to it. The assessee in that case, a charitable trust, claimed exemption u/s 4(3) (i) of the Indian Income Tax Act, 1922, in respect of Rs. 1,82,654 earned as interest on certain loan advances and Rs. 3,48,930 earned as profits on certain transactions in hessian. The Appellate Tribunal held that the provisions of section 4(3) (i) governed the two items and made them exemption from Income Tax as "income derived from property held under trust" within the meaning of that section. On a reference to the High Court, the High Court while confirming the order of the Appellate Tribunal, held as follows (at page 673) :

"Having heard the learned counsel for the parties, we are of the opinion that on a true construction of the provisions of section 4(3) (i) of the Act, the question had been correctly decided by the Tribunal.

Clause 3 of section 4 of the Act, prior to its amendment by Act No. 25 of 1953, was as follows :

"(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) Any income derived from property held under 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.

(ia) Any income derived from business carried on on behalf of a religious or charitable institution when the income is applied solely to the purposes of the institution and -

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

(b) the work in connection with the business is mainly carried on by beneficiaries of the institution."

After the amendment of 1953, the clause read as follows :

"(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) 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

Provided that such income shall 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 for application thereto in which case it shall be deemed to be the income of the in which it is so applied or ceases to be so accumulated or set apart."

Examining the effect of the amendment, S. T. Desai J. in *Dharma Vijaya Agency Vs. Commissioner of Income Tax, Bombay City I*, said :

"The question I put to myself is, are the words "income derived from business carried on on behalf of a religious or charitable institution" in proviso (b) wide enough to carve out from clause (i) all such property as consists of business ? A business which falls within the ambit of clause (i) may be carried on by persons in whom it is vested under trust, and the trustees may still not be persons in whom it is vested under trust, and the trustees may still not be carrying on the business on behalf of any religious or charitable institution. Of this, there seems to be little doubt. Therefore, it is impossible to equate the scope of proviso (b) with the scope of property consisting of business held under trust wholly for religious or charitable purposes. It must of necessity mean that we have in clause (i) a very wide category of business which is trust property, and we have in proviso (b) a restricted and a lesser category of business which is carried on by or on behalf of a religious or charitable institution. This, to my mind, is the plain reading of clause (i) of section 4(3) read with the proviso : and if this be the position, it is extremely difficult to accede to the argument pressed before us on behalf of the Department that although the insurance agency business, of which a trust was created, is within the operation of clause (i) of section 4(3), it is yet hit by the initial words of proviso (b) to clause (i)."

In our opinion, the purpose of section 4(3) (i) and that of the proviso (b) is distinct and separate and, though enacted as a proviso, that proviso was not intended to carve out from the ambit of clause (i) cases where a trust carried on

business.

It is now well-settled that the word "property" would also include a business : (See Commissioner of Income Tax Kerala and Coimbatore Vs. Krishna Warriar, and Thiagesar Dharma Vanikam Vs. Commissioner of Income Tax, Madras, .

The provisions of section 4(3) (i) apply to "any income derived from property held under trust"; and if "property" includes business, it applies to any income derived from any business held under trust. It cannot be disputed that the income covered by the two items in question was income derived from business of the trust distinct from income derived from business carried on on behalf of a religious or charitable institution.

Proviso (b), on the other hand, does not concern itself with "any income derived from any property (including business) held under trust" but with "income derived from business carried on on behalf of a religious or charitable institution", that it to say, on behalf of a religious and charitable institution as distinct from a trust which latter is specifically governed by the provisions of section 4(3) (i) of the Act in regard to all kinds of property including business.

The contention that the provisions contained in proviso (b) are a further restriction on the provisions of section 4(3) (i) and take the income derived from business of the trust from out of its ambit has been negatived in (1944) 12 ITR 385; J.K. Trust Vs. Commissioner of Income Tax/excess Profits Tax, Bombay City, ; The Trustees of The Charity Fund, Esplanade Road, Fort, Bombay Vs. The Commissioner of Income Tax, Bombay, ; Dharma Vijaya Agency Vs. Commissioner of Income Tax, Bombay City I, ; Commissioner of Income Tax, Bombay City I Vs. Cotton Textiles Export Promotion Council, ; DHARMODAYAM CO. Vs. COMMISSIONER OF Income Tax, KERALA., and Thiagesar Dharma Vanikam Vs. Commissioner of Income Tax, Madras, .

In Commissioner of Income Tax Kerala and Coimbatore Vs. Krishna Warriar, , the Supreme Court said :

"Clause (i) section 4(3) of the Act takes in every property or a fractional part of it held in trust wholly for religious or charitable purposes. It also takes in such property held only in part for such purposes. Business is also property within the meaning of the said clause. Clause (b) of the proviso to section 4(3) (i) applies only to a business not held in trust but carried on on behalf of religious or charitable institutions."

After the aforesaid decision of the Supreme Court there can be no controversy on the question of construction of section 4(3) (i) and clause (b) of the proviso to it; and this was clearly stated by this court in its judgment dated December 1, 1967, in Miscellaneous Civil Case No. 247 of 1966."

18. Again, as rightly pointed out by learned counsel for the petitioner, if the contention of the Revenue that unless the conditions prescribed in clause (a) or (b) of sub-section (4A) are fulfilled, the exemption u/s 11(1)(a) cannot be

granted in respect of income derived from the property held under trust for public charitable purpose is accepted, the effect of such construction canvassed on behalf of the Revenue would be that sub-section (4) of section 11 would become superfluous and meaningless. As seen from section 6 of the Finance Bill, 1983, which proposed amendment to section 11 of the Act, the attempt at the Bill stage was to omit sub-section (4) of section 11 and replace the same by a new sub-section (4) in the following terms (see Commissioner of Income Tax, Bombay City-II Vs. Blundell Eomite Paints Ltd.,) :

"(4) Nothing contained in sub-section (1) or sub-section (2) or sub-section (3) or sub-section (3A) shall apply in relation to any income being profits and gains of business."

19. However, when the Finance Bill, 1983, became the Finance Act, 1983, sub-section (4) in the present form is retained and sub-section (4A) was newly inserted in section 11 of the Act. Section 11(4) declares that for the purpose of section 11 "property held under trust" shall include a business undertaking and, therefore, a business can also be held under trust for a charitable purpose and where it is so held, its income would be exempt from tax, provided, of course, the other requisite conditions for exemption are satisfied. If the construction of section 11(4A), as canvassed by learned senior counsel for the Revenue is accepted, no exemption can be granted u/s 11(1)(a) in relation to any income derived from the property held under trust, unless the conditions prescribed under clause (a) or (b) of sub-section (4A) are satisfied. The construction of sub-section (4A), contended for on behalf of the Revenue, would thus have the effect of rendering sub-section (4) of section 11 redundant, after the enactment of sub-section (4A). As pointed out by the apex court, in Additional Commissioner of Income Tax, Gujarat Vs. Surat Art Silk Cloth Manufacturers Association, , we cannot accept such a construction which renders sub-section (4) of section 11 superfluous and meaningless. On the other hand, the construction which we are placing on sub-section (4A), namely, that section 11(4A) will have no application to income derived from property held under trust for charitable purposes, leaves a certain area to section 11(4) of the Act, for its operation, notwithstanding the enactment of sub-section (4A) and, therefore, we must prefer that construction to the one submitted on behalf of the Revenue. The above view of ours is also fortified by the decision of the apex court in Additional Commissioner of Income Tax, Gujarat Vs. Surat Art Silk Cloth Manufacturers Association, . In that case, Surat Art Silk Cloth Manufacturers" Association, a company incorporated under the Indian Companies Act, had the following objects, (a) promoting commerce and trade in art silk yarn, raw silk, cotton yarn, art silk cloth, silk cloth and cotton cloth, (b) carrying on all or any of the business of art silk and other commodities on behalf of its members, (c) to obtain import licences for import of the said commodities, (d) to obtain export licences and export cloth manufactured by the members, and (e) to buy and sell and deal in all kinds of cloth and other goods and fabrics belonging to and on behalf of the members, etc., and its property was to be solely and exclusively applied for the promotion

of the above objects and no part of the income or property could be distributed amongst the members in any form or utilised for their benefit either during its operational existence or on its winding up or dissolution. The association claimed exemption in respect of its income u/s 11(1)(a). The Supreme Court held that the dominant or primary purpose of the assessee was to promote commerce and trade in art silk yarn, etc., and the other objects specified in clauses (b) to (e) of its memorandum of association were merely powers incidental to the carrying out of the dominant and primary purpose, that the dominant or primary purpose of the promotion of commerce and trade in art silk, etc., was an object of public utility not involving the carrying on of any activity for profit within the meaning of section 2(15) and that, therefore, the assessee was entitled to the exemption u/s 11(1)(a). The Supreme Court also held that as the words, "not involving the carrying on of any activity for profit" qualify or govern only the last head of charitable purpose and not the earlier three heads in section 2(15) and that if the purpose of a trust or institution is relief of the poor, education or medical relief, the requirement of the definition of "charitable purpose" would be fully satisfied, even if an activity for profit is carried on in the course of the actual carrying out of the primary purpose of the trust or institution. In that decision, the Supreme Court, while dealing with the scope of sections 2(15), 11(4) and 13(1)(bb) of the Act and the area of operation of section 11(4) of the Act, after the introduction of section 13(1)(bb) of the Act, held as follows (at page 18) :

"Moreover, another consequence of the construction canvassed on behalf of the Revenue would be that section 11, sub-section (4), would be rendered wholly superfluous and meaningless. section 11, sub-section (4), declares that for the purpose of section 11 "property held under trust" shall include a business undertaking and, therefore, a business can also be held under trust for a charitable purpose and where it is so held, its income would be exempt from tax, provided, of course, the other requisite conditions for exemption are satisfied. It may be pointed out that section 11, sub-section (4), where it provides that a business may also be properly held under trust, does not bring about any change in the law because even prior to the enactment of that provision, it was held by the Judicial Committee of the Privy Council in the *Tribune's* case [1939] 7 ITR 415 that properly in the corresponding section 4(3) (i) of the Act of 1922 included business and this principle was affirmed by the pronouncements of this court in *J.K. Trust, Bombay Vs. Commissioner of Income Tax, Excess Profits Tax, Bombay City*, and *Commissioner of Income Tax Kerala and Coimbatore Vs. Krishna Warriar*, . section 11, sub-section (4), merely gave statutory recognition to this principle. Now, section 13(1)(bb), introduced in the Act of 1961 with effect from April 1, 1977, provides that in the case of a charitable trust or institution for the relief of the poor, education or medical relief which carries on any business, income derived from such business would not be exempt from tax unless the business is carried on in the course of the actual carrying out of a primary purpose of the trust or institution. Where, therefore, there is a charitable trust or institution falling within any of the first three categories of charitable

purpose set out in section 2, clause (15), and it carries on business which is held by it under trust for its charitable purpose, income from such business would not be exempt by reason of section 13(1)(bb). section 11, sub-section (4), would, therefore, have no application in the case of a charitable trust or institution falling within any of the first three heads of "charitable purpose". Similarly, on the construction contended for on behalf of the Revenue, it would have no applicability also in the case of a charitable trust or institution falling under the last head of "charitable purpose" because according to the contention of the Revenue, even if a business is held under trust by a charitable trust or institution for promotion of an object of general public utility, income from such business would not be exempt since the purpose would cease to be charitable. The construction contended for on behalf of the Revenue would thus have the effect the rendering section 11, sub-section (4), totally redundant after the enactment of section 13(1)(bb). We do not think we can accept such a construction which renders a provision of the Act superfluous and reduces it to silence. If there is one rule of interpretation more well-settled than any other, it is that if the language of a statutory provision is ambiguous and capable to two constructions, that construction must be adopted which will give meaning and effect to the other provisions of the enactment rather than which will give none. The construction which we are placing on section 2, clause (15), leaves a certain area of operation to section 11, sub-section (4), notwithstanding the enactment of section 13(1)(bb) and we must, therefore, in any event, prefer that construction to the one submitted on behalf of the Revenue."

20. For all the reasons stated above, we have no hesitation in holding that sub-section (4A) of section 11 will have no application to income derived from property held under trust which includes business for charitable purposes, as in the present case and that the second respondent is not correct in denying exemption to the petitioner u/s 11, for the assessment years 1984-85 to 1991-92, in view of sub-section (4A) of section 11 of the Act and, therefore, the impugned orders are liable to be quashed. Point No. 1 is answered accordingly.

21. Point No. 2. - Circular No. 372 (see Kaka Ba and Kala Budh Public Charitable Trust Vs. Commissioner of Income Tax, Gujarat-I and Others,), dated December 8, 1983, issued by the Central Board of Direct Taxes, which is also challenged in these writ petitions, reads thus (at page 25) :

"The Finance Act has inserted a new sub-section (4A) in section 11 of the Income Tax Act to provide that the provisions of sub-section (1) of that section relating to exemption of income derived from property held under trust for charitable or religious purposes; or of sub-section (2) thereof relating to accumulation or setting apart of such income for application to such purposes; or the connected provisions of sub-sections (3) and (3A) of the said section will not apply in relation to profits and gains of business. This provision will apply irrespective of whether the profits and gains are derived from a business carried on by the trust or institution or from a business undertaking which is held in trust for such

purposes"

22. The said circular proceeds on the basis that sub-section (4A) will apply irrespective of the fact whether the profits and gains are derived from a business carried on by the trust or institution or from a business undertaking which is held in trust for such purposes. Under point No. 1, while interpreting sub-section (4A), we have held that the said sub-section (4A) will have no application to income derived from business undertaking which is held under trust for charitable purposes. In view of the above view taken by us on a careful interpretation of section 11(4A) read with section 11(4) of the Act, we have no hesitation in holding that Circular No. 372 (see Kaka Ba and Kala Budh Public Charitable Trust Vs. Commissioner of Income Tax, Gujarat-I and Others,) dated December 8, 1983, does not give the correct interpretation of sub-section (4A) of section 11 of the Act and that it is inconsistent with the provisions contained in the said sub-section (4A) read with sub-section (4) of section 11. The view expressed in the said circular that sub-section (4A) will apply, irrespective of whether the profits and gains are derived from a business carried on by the trust or institution or from a business undertaking which is held in trust for charitable purposes, is not warranted by the plain language of sub-sections (1), (4) and (4A) of section 11 and, therefore, it has to be held that the said Circular No. 372 (see Kaka Ba and Kala Budh Public Charitable Trust Vs. Commissioner of Income Tax, Gujarat-I and Others,) is invalid and liable to be quashed. The second respondent, while passing the impugned orders, denying exemption u/s 11(1) to the petitioner also placed reliance on the Circular No. 372 (see Kaka Ba and Kala Budh Public Charitable Trust Vs. Commissioner of Income Tax, Gujarat-I and Others,) dated December 8, 1983. On that ground also, the impugned assessment orders are liable to be quashed. Point No. 2 is answered accordingly.

23. Point No. 3. - No doubt, the petitioner is having an effective alternative remedy by way of appeal before the appellate authority and further appeal before the Tribunal and these writ petitions could not have been entertained, if this objection, regarding the maintainability was raised and brought to the notice of this court, when these writ petitions came up for admission or immediately thereafter. However, it is seen from the records that some of the writ petitions in this batch, have been entertained by this court in the year 1989 and they are pending for nearly five years. The counter-affidavits in these writ petitions have been filed before this court, only on November 28, 1994, when these writ petitions were taken up for final hearing, raising the contentions that the petitioner is having an alternative remedy and that the writ petitions are liable to be dismissed on that ground. However, as the writ petitions have been admitted that kept pending before this court all these years, we are of the view that it is not proper to dismiss these writ petitions, at this stage, on the ground that the petitioner has not exhausted the alternative remedy. Inasmuch as these cases involve interpretation of section 11(4A) of the Act, on the undisputed facts of this case, and as it is also in the interest of the Revenue to have the issues in question settled early, the petitioner is not directed to avail of the remedy of

appeal. Point No. 3 is answered accordingly.

24. In the result, in view of our findings on points Nos. 1 to 3, the writ petitions are allowed, the orders of assessment passed of the second respondent and Circular No. 372 (see Kaka Ba and Kala Budh Public Charitable Trust Vs. Commissioner of Income Tax, Gujarat-I and Others,), dated December 8, 1983, issued by the Central Board of Direct Taxes, challenged in these writ petitions are quashed and all the matters covered by the writ petitions are remitted to the second respondent, with a direction to proceed afresh and complete the assessments for the years 1984-85 to 1991-92, according to law and in the light of our findings in this order, with regard to the petitioner's claim for exemption u/s 11 of the Act, without reference of Circular No. 372 (see Kaka Ba and Kala Budh Public Charitable Trust Vs. Commissioner of Income Tax, Gujarat-I and Others,), dated December 8, 1983, issued by the Central Board of Direct Taxes. However, there will be no order as to costs.