

## CASE NO.:

Appeal (civil) 4406-4410 of 1996  
Appeal (civil) 4759-4761 of 1998  
Appeal (civil) 4395-4402 of 1996  
Appeal (civil) 497-499 of 2000  
Appeal (civil) 5772 of 2000

## PETITIONER:

THE ASSISTANT COMMISSIONER OF INCOME TAX, MADRAS ETC. ETC.

Vs.

## RESPONDENT:

THANTHI TRUST ETC. ETC.

DATE OF JUDGMENT: 31/01/2001

## BENCH:

S.P. Bharucha, N. Santosh Hegde & Y.K. Sabharwal

## JUDGMENT:

Bharucha, J.

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One S.K. Adityan founded a daily newspaper called the Dina Thanthi in 1942. On 1st March, 1954 he created a trust called the Thanthi Trust. The property that he settled upon trust was the business of the said newspaper as a going concern. The objects of the Trust were to establish the said newspaper as an organ of educated public opinion for the Tamil reading public and to disseminate news and to ventilate opinion upon all matters of public interest through it. On 9th July, 1957 Adityan executed a supplementary deed of trust that declared that the Trust was irrevocable. On 28th July, 1961 Adityan executed another supplementary deed of trust. Thereby he directed that the surplus income of the Trust, after defraying all expenses, should be devoted to the following purposes :

- establishing and running a school or college for the teaching of journalism;

- establishing and/or running or helping to run schools, colleges or other educational institutions for teaching arts and science;

- establishing of scholarships for students of journalism, arts and science;

- establishing and/or running or helping to run hostels for students;

- establishing and/or running or helping to run orphanages; and

- other educational purposes.

On 6th November, 1961 the Income Tax Officer proposed to

disallow the claim of the Trust for exemption under Section 4(3)(i) of the Income Tax Act, 1922 for the Assessment Years 1955-56 to 1961-62. The Trust challenged the correctness of the tentative decision by filing a writ petition in the High Court of Judicature at Madras. On 25th June, 1961 the trustees of the Trust took out an originating summons in the High Court and therein, on 2nd March, 1962, the High Court upheld the validity of the supplementary deed of trust and held that the trustees of the Trust were bound to devote the surplus income of the Trust to the purposes mentioned therein. On 4th October, 1963 the High Court allowed the writ petition filed by the Trust and quashed the ITOs tentative decision (52 I.T.R. 453). The claim for exemption made by the Trust under Section 4(3)(i) of the 1922 Act for the Assessment Years 1955-56 to 1961-62 was thereafter allowed.

For the Assessment Years 1962-63 the claim made by the Trust for exemption under Section 11 of the Income Tax Act, 1961 (the Act) was allowed on 28th February, 1969. The ITO then impounded the books of accounts of the Trust relevant to the Assessment Years 1965-66 to 1967-68 and he demanded the production of books of account relevant to the Assessment Years 1962-63 to 1964-65. This was the subject matter of challenge in a writ petition filed by the Trust. On 23rd March, 1969 the Trust was issued three notices under Section 148 of the Act to reopen its assessments for the Assessment Years 1965-66 to 1967-68. These notices were challenged in a writ petition filed by the Trust. Notices were, thereafter, issued to the Trust to reopen its assessment for the Assessment Years 1956-57 to 1961-62 and these were the subject matter of a writ petition filed by the Trust. On 21st December, 1972 a Division Bench of the High Court of Madras quashed the notices for reopening the assessments for the Assessment Years 1956-57, 1958-59, 1960-61 and 1961-62. It upheld the notices that related to the Assessment Years 1957-58, 1959-60, 1965-66, 1966-67 and 1967-68 (91 I.T.R. 261).

On 29th January, 1981 a Division Bench of the High Court dismissed references under the Act in respect of the assessment of the Trust for the Assessment Years 1968-69 and 1969-70 (137 I.T.R. 735). The High Court held :

The founder of the trust clearly evinced an intention to create public charitable trust as seen from the preamble and clause 3(k) of the original trust deed and the charitable objects referred to in the schedule to the decree in C.S. 90 of 1961 have to be fulfilled from and out of the income from the business which is directed to be held under trust or other legal obligation. Those charitable objects fall within the first 2 categories referred to in Section 2(15) viz. Relief of the poor and education. It is to carry out and fulfill those objects the business is carried on. Thus, the primary purpose is to carry out the charitable objects and the business is carried on as a means in the course of the actual carrying out of that primary purpose and not as an end in itself. While the predominant object of the trust is the carrying out of the charitable objects referred to in two of the three categories of charitable purposes referred to in Section 2(15), the carrying on of the business which is actually the property held under trust or other legal obligation is incidental and the profit resulting from the business can be taken to be a by-product.

The Revenue preferred a petition for special leave to appeal against the judgment of the High Court on the said references. In so far as it related to the eligibility of the Trust to claim the exemption under Section 11 of the Act, leave was declined.

Having set out the background, we now come to the first of the three controversies before us. It relates to Section 13(1)(bb), which was introduced into the Act with effect from 1st April, 1977 and remained on the statute book until omitted with effect from 1st April, 1984. The relevant portions of Section 11 and Section 13(1)(bb) then read as follows :

Section 11

Income from property held for charitable or religious purpose.

(1) Subject to the provisions of sections 60 to 63, the following income shall not be included in the total income of the previous year of the person in receipt of the income.

(a) 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;

Section 11(4)

For the purposes of this section property held under trust includes a business undertaking so held,

Section 13(1)(bb)

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

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 of a primary purpose of the trust or institution.

The claim of the Trust for exemption for the Assessment Years 1979- 80 to 1983-84 was rejected, having regard to the provisions of Section 13(1)(bb). The rejection was challenged in a writ petition filed by the Trust in the High Court. The High Court upheld the contention of the Trust (213 I.T.R. 626). This is the first decision of the High Court that is under appeal by the Revenue.

The High Court relied upon its earlier decision in the case of the Trust, reported in 137 I.T.R. 735, which had become final and binding on the Revenue, namely, that the primary purpose of the Trust was to carry out its charitable objects and that the business is carried on only as a means in the course of the actual carrying on purpose of the Trust. It said that it had, therefore, no hesitation in holding that the requirement of the last portion of Section 13(1)(bb) namely unless the business is carried on in the course of the actual carrying out of a primary purpose of the trust or institution is satisfied. We must also point out here that though the decision in CIT vs.

Thanthi Trust [1982] 137 I.T.R. 735 (Mad) was rendered by the Division Bench with regard to the assessment years 1968-69 and 1969-70 and Section 13(1)(bb) of the Act was introduced with effect from April 1, 1977, inasmuch as the finding rendered by the Division Bench in the said decision is in express language of Section 13(1)(bb) of the Act, it is not open to the Revenue to contend that the decision in CIT vs. Thanthi Trust [1982] 137 I.T.R. 735 (Mad) will not be applicable to the petitioners case in respect of the assessment years in question, after the introduction of Section 13(1)(bb) of the Act.

Section 11(4A) was introduced into the Act with effect from 1st April, 1984. So far as it is relevant, Section 11 then read thus :

Section 11

Income from property held for charitable or religious purpose.

(1) Subject to the provisions of sections 60 to 63 the following income shall not be included in the total income of the previous year of the person in receipt of the income.

(a) 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;

(4) For the purposes of this section property held under trust includes a business undertaking so held and where a claim is made that the income of any such undertaking shall not be included in the total income of the persons in receipt thereof, the income tax Officer shall have power to determine the income of such undertaking in accordance with the provisions of this Act relating to assessment and where any income so determined is in excess of the income as shown in the accounts of the undertaking, such excess shall be deemed to be applied to purposes other than charitable or religious purposes.

(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 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 beneficiaries of the institution;

and separate books of accounts are maintained by the trust or institution in respect of such business.

The Trust claimed the benefit of the exemption under Section 11 in respect of the Assessment Years 1984-85 to 1991-92. The ITO rejected the claim. The Trust filed writ petitions challenging the rejection. The High Court upheld

the claim of the Trust (213 I.T.R. 639). It held that inasmuch as the business that was carried on by the Trust was itself held under trust for public charitable purposes and it was carried on only for the purposes of carrying out the charitable objects of the Trust, as had been found in the earlier judgment, the provisions of Section 11(4A) had no application. This is the second decision of the High Court under appeal by the Revenue.

Section 11(4A) was substituted with effect from 1st April, 1992 and it now read thus :@@

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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 of a trust of an institution, being profits and gains of business, unless the business is incidental to the attainment of the objectives of the trust or, as the case may be, institution and separate books of accounts are maintained by such trust or institution in respect of such business.

The ITO rejected the claim of the Trust for exemption under the amended Section 11(4A). A writ petition was filed in the High Court, and, relying upon the earlier decision, the High Court quashed the orders of assessment for the Assessment Years 1992-93, 1995-96 and 1996-97 (238 I.T.R. 635). This is the third decision under appeal by the Revenue.

In so far as Section 13(1)(bb) is concerned, the learned Solicitor General appearing for the Revenue, submitted that a business, to be excepted from the clutches of Section 13(1)(bb), must be one carried on in the course of the actual carrying out of a primary purpose of a public charitable trust. In other words, it must be a business carried on in the course of actually carrying out the work of relief of the poor, education and medical relief. Any business carried on for generating revenue, which revenue is used for furthering the charitable purpose for which the trust was established, is not an activity in the course of the primary purpose of the trust and does not fall within this exception.

Dr. Pal, learned counsel for the Trust, drew a distinction between a business that was held under trust and a business that was carried on by a trust. He submitted that there was a difference between income derived from a business that was a property or part of the corpus of a public charitable trust and income derived from a business which was carried on by such a trust but which was not held under trust; in other words, there was a legal obligation to use the income for the public charitable purpose of the trust in the first case and not in the latter. This Court had noted the distinction in Additional Commissioner of Income-Tax, Gujarat vs. Surat Art Silk Cloth Manufacturers Association (121 I.T.R. 1), Commissioner of Income-Tax, Kerala and Coimbatore vs. P. Krishna Warriar (53 I.T.R. 176), Commissioner of Income-Tax, Kerala vs. Dharmodayam Co. (109 I.T.R. 527). The provisions of Section 13(1)(bb) applied only to a public charitable trust which carried on a business that it did not hold in trust. They did not apply to a public charitable trust, such as the Trust, which held

the business in trust.

No judgment of this Court has been pointed out to us in which the provisions of Section 13(1)(bb) have been interpreted. Only passing references thereto are to be found in some of the judgments aforementioned.

A public charitable trust may hold a business as part of its corpus. It may carry on a business which it does not hold as a part of its corpus. But it seems to us that the distinction has no consequence insofar as Section 13(1)(bb) is concerned. Section 13(1)(bb) provides, so far as is relevant to this case, that the provisions of Section 11 shall not operate so as to include in the total income of the previous year of a public charitable trust 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 of a primary purpose of the trust. Section 13(1)(bb), therefore, will apply to a public charitable trust for the relief of the poor, education or medical relief that carries on a business, regardless of whether or not that business is held by the trust in trust, that is, as a part of its corpus. Even a business that is held by such a trust as a part of its corpus is carried on by the trust and, therefore, Section 13(1)(bb) will apply to such trust.

A judgment of this Court which comes closest to putting a meaning to Section 13(1)(bb) is the concurring judgment of R.S. Pathak, J. (as he then was) in Additional Commissioner of Income-tax, Gujarat v. Surat Art Silk Cloth Manufacturers Association (1980) 121 ITR 1. He said, When it was found that judicial decisions had held the restrictive clause (not involving the carrying on of any activity for profit) in Section 2(15) to control the fourth head (the advancement of any other object of general public utility) only, and not also the first three heads (relief of the poor, education and medical relief) in the definition, Parliament attempted to secure its original intent by enacting section 13(1)(bb). The two provisions represent the mode of funding finance for working out the purpose of the trust or institution, by deriving income from the corpus of the trust property and also from an activity carried on in the course of actual carrying out of the purpose of the trust or institution. The learned Judge did not, it will be seen, analyse Section 13(1)(bb), nor, in the context of the case before him, was he required to. Upon analysis, it appears to us that the words used in Section 13(1)(bb) are wide enough to control not only the profit from an activity carried on in the course of the actual carrying out of the purpose of the trust or institution but also income from the corpus of the trust property if the corpus of the trust includes a business. This is for the reason that a trust or institution carries on the business that is part of its corpus just as much as a trust or institution carries on a business that is not a part of its corpus, and Section 13(1)(bb) operates in respect of a charitable trust or institution for the relief of the poor, education or medical relief which carries on any business. (Emphasis supplied).

The requirement of Section 13(1)(bb) is that the exemption under Section 11 will not be available to such a trust that carries on any business unless the business is

carried on in the course of the actual carrying out of the primary purpose of the trust, that is to say, unless the business is carried on in the course of actually accomplishing a primary purpose of the trust; the business must, therefore, be carried on in the course of the actual accomplishment of relief of the poor, education or medical relief. As an example, a public charitable trust for the relief of the poor, education and medical relief that carries on the business of weaving cloth and stitching clothing by employing indigent women carries on the business in the course of actually accomplishing its primary object of affording relief to the poor and it would qualify for the exemption under Section 11.

The business that the Trust carries on is that of running a newspaper. That business, though it is held by the Trust as a part of its corpus, and, therefore, in trust, does not directly accomplish, wholly or in part, the Trusts objects of relief of the poor and education. Its income only feeds such activity. It cannot be held to be carried on in the course of the actual accomplishment of the Trusts objects of education and relief of the poor. It is, therefore, not possible to accept the argument on behalf of the Trust that it is entitled to the exemption under Section 11.

The High Court, in the first judgment under appeal, held that it was not open to the Revenue to contend that the earlier decision (in 137 ITR 735) would not apply to the case of the Trust for the assessment years in question after the introduction of Section 13(1)(bb) of the Act because the finding rendered in that decision was in the express language of Section 13(1)(bb). We are unable to agree. The earlier decision was not rendered in the context of Section 13(1)(bb). That provision was not on the statute book at that time. That the provision employs language akin to that employed in the earlier decision cannot mean that in a proceeding directly related to that provision the Revenue is barred by reason of the principles of res judicata from contending that the income of the Trust is not exempt under that provision.

This brings us to the second controversy, relevant to the Assessment Years 1984-85 to 1991-92 during which period of time sub-section (4A) of Section 11, as originally enacted, was in operation. It was contended by the learned Solicitor General that by reason of sub-section (4A) the income derived from a business held under trust wholly for charitable or religious purposes would not be included in the total income of the previous year in the case only of (a) a trust for public religious purposes, if the business was of printing and publishing books or of a notified kind; or (b) an institution wholly for charitable purposes, if the work in connection with the business was mainly carried on by the beneficiaries of the institution, provided that separate books of accounts had been maintained in respect of such business.

Learned counsel for the Trust laid emphasis on the fact that in the Bill to introduce sub-section (4A) into Section 11, sub-section (4) thereof had been proposed to be deleted, but it had been retained when the Bill was passed. A business held under trust had, therefore, not been intended to be excluded from the benefit of Section 11 by reason of the enactment of sub-section (4A). This was also evident

from the fact that sub-section (4A) did not mention in its non obstante clause sub-section (4).

Sub-section (4) of Section 11 remains on the statute book, and it defines property held under trust for the purposes of that section to include a business so held. It then states how such income is to be determined. In other words, if such income is not to be included in the income of the trust, its quantum is to be determined in the manner set out in sub-section (4).

Sub-section (1)(a) of Section 11 says that income derived from property held under trust only for charitable or religious purposes, to the extent it is used in the manner indicated therein, shall not be included in the total income of the previous year of the trust. Sub-section (4) defines the words property held under trust for the purposes of Section 11 to include a business held under trust. Sub-section (4A) restricts the benefit under Section 11 so that it is not available for income derived from business unless (a) the business is carried on by a trust only for public religious purposes and it is of printing and publishing books or any other notified kind or (b) it is carried on by an institution wholly for charitable purposes and the work in connection with the business is mainly carried on by the beneficiaries of the institution, provided, in both cases, that separate books of account are maintained by the trust or the institution in respect of such business. Trusts and institutions are separately dealt with in the Act (Section 11 itself and Sections 12, 12A and 13, for example). The expressions refer to entities differently constituted. It is thus clear that the newspaper business that is carried on by the Trust does not fall within sub-section (4A). The Trust is not only for public religious purposes so it does not fall within clause (a). It is a trust not an institution, so it does not fall within clause (b). It must, therefore, be held that for the assessment years in question the Trust was not entitled to the exemption contained in Section 11 in respect of the income of its newspaper.

We now address the third controversy, which relates to sub-section (4A) of Section 11 as substituted with effect from 1st April, 1992. The learned Solicitor General submitted that while the substituted sub-section (4A) gave trusts and institutions a wider latitude than the earlier sub-section (4A), it had still to be construed to mean that a trust or institution would not get the benefit of Section 11 unless the business it carried on was carried on in the course of the actual carrying out of a primary purpose of the trust or institution. Dr. Pal, on the other hand, submitted that the substituted sub-section (4A) was couched in wide language and a trust was entitled to the benefit of Section 11 if it utilized the income of its business for the purposes of achieving its objects.

The substituted sub-section (4A) states that the income derived from a business held under trust wholly for charitable or religious purposes shall not be included in the total income of the previous year of the trust or institution if the business is incidental to the attainment of the objective of the trust or, as the case may be, institution and separate books of account are maintained in respect of such business. Clearly, the scope of sub-section (4A) is more beneficial to a trust or institution than was

the scope of sub-section (4A) as originally enacted. In fact, it seems to us that the substituted sub-section (4A) gives a trust or institution a greater benefit than was given by Section 13(1)(bb). If the object of Parliament was to give trusts and institutions no more benefit than that given by Section 13(1)(bb), the language of Section 13(1)(bb) would have been employed in the substituted sub-section (4A). As it stands, all that it requires for the business income of a trust or institution to be exempt is that the business should be incidental to the attainment of the objectives of the trust or institution. A business whose income is utilized by the trust or the institution for the purposes of achieving the objectives of the trust or the institution is, surely, a business which is incidental to the attainment of the objectives of the trust. In any event, if there be any ambiguity in the language employed, the provision must be construed in a manner that benefits the assessee. The Trust, therefore, is entitled to the benefit of Section 11 for the Assessment Year 1992-93 and thereafter. It is, we should add, not in dispute that the income of its newspaper business has been employed to achieve its objectives of education and relief to the poor and that it has maintained separate books of account in respect thereof.

Accordingly, Civil Appeals 4406-4410 of 1996, 4395-4402 of 1996, 4759-4761 of 1998 and 5772 of 2000 are allowed in as much as they relate to the Assessment Years 1979-80 to 1991-92 and the two judgments of the Madras High Court relating thereto (reported in 213 I.T.R. 626 and 213 I.T.R. 639) are set aside. Civil Appeals 497-499 of 2000 are dismissed. There shall be no order as to costs.