

आयकर अपीलीय अधिकरण “एक-सदस्य मामला” न्यायपीठ मुंबई में।
IN THE INCOME TAX APPELLATE TRIBUNAL “SMC” BENCH, MUMBAI

श्री शमीम याहया, लेखा सदस्य के समक्ष ।
BEFORE SHRI SHAMIM YAHYA, ACCOUNTANT MEMBER

आयकर अपील सं./I.T.A. No. 4108/Mum/2017

(निर्धारण वर्ष / Assessment Year: 2012-13)

Dy. CIT (Exemptions)-2(1), Room No. 519, 5 th Floor, Piramal Chambers, Lalbaug, Lower Parel, Mumbai-400 012	बनाम/ Vs.	Mandke Foundation Rao Saheb Achutrao Patwardhan Marg, Four Bunglows, Andheri (W), Mumbai-400 053
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. AATM 4557 G		
(अपीलार्थी /Appellant)	:	(प्रत्यर्थी / Respondent)

अपीलार्थी की ओर से / Appellant by	:	Shri N. Hemalatha
प्रत्यर्थी की ओर से/Respondent by	:	Shri Jitendra Sanghavi

सुनवाई की तारीख / Date of Hearing	:	09.10.2017
घोषणा की तारीख / Date of Pronouncement	:	10.10.2017

आदेश / ORDER

Per Shamim Yahya, A. M.:

This is an Appeal by the Revenue directed against the Order by the Commissioner of Income Tax (Appeals), Mumbai (‘CIT(A)’ for short) dated 08.03.2017, pertaining to the assessment year (A.Y.) 2012-13.

2. The grounds of appeal read as under:

1. "Whether on the facts of the case and in law the Id.CIT(A) erred in aliening the appeal of the assessee on account of disallowing depreciation on fixed assets of Rs.60,92,65,396/- in contravention of the decision of Escorts

Ltd. Vs. UOI199 ITR 43 wherein it was held that since section 11 of the Income Tax Act provides for deduction capital expenditure incurred on assets acquired for the objects of the trust as application and does not specifically & expressly provide for double deduction on account of depreciation on the same very assets acquired from such capital expenditure, no deduction shall be allowed u/s.32 for the same or any other previous year in respect of that asset as it amounts to claiming a double deduction."

2. "Whether, on the facts and in the circumstances of the case and in law the Id. CIT(A) erred in allowing the appeal, when the Delhi High Court in the case of Charanjiv Charitable Trust and Kerala High Court in the case of Lissie Medical Institutions vs CIT 76 DTK (Ker) 372 has decided the issue in the favour of the department after considering the decision of Rouble Supreme Court in the case of Escorts Ltd (199 ITR 43)."

3. "Whether, on the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in allowing the depreciation claim of the assessee by relying upon the judgment of Hon'ble Bombay High Court in the case of Institute of Banking Personnel Selection, ignoring the fact that the Department has not accepted the said decision of the jurisdictional High Court on merit of the case, but due to smallness of tax effect appeal was not filed before Hon'ble Supreme Court. Also, the Id CIT (A) erred in relying upon the judgment of Hon'ble high Court in the case of CIT vs. Shri Vile-Parle Kelvani Mandal, without appreciating the fact that Department has not accepted the decision on merit and filed SLP, but subsequently withdrawn the same as there was no claim of depreciation on exempted assets. Moreover, the Revenue has filed SLPs on this issue in other cases inclusive the case of G.D. Birla Medical Research & Educational Foundation (S.L.P.(C) No. 24904 of 2016(C.A.No.8294 of 2016) and in this case leave has been granted by the Hon'ble Apex Court and in all cases issue is pending for adjudication before the Hon'ble Apex Court.

4. "Whether on the facts of the case and in law the Ld.CIT(A) erred in allowing the carry forward of deficit of Rs. 17,00,61,327/-and allowing set off against the income of the subsequent years."

5. "Whether, on the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in allowing the claim of the assessee for carry forward of the said deficit, ignoring the fact that there was no express provision in the I T Act, 1961 permitting allowance of such claim."

6. "Whether, on the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in allowing the claim of the assessee for carry forward of the said deficit by relying upon the judgment of Hon'ble Bombay High Court in the case of Institute of Banking Personnel Selection, ignoring the fact that the Department has not accepted the said decision of the jurisdictional High Court on merit of the case, but due to smallness of tax effect appeal was not filed before Hon'ble Supreme Court. However, on this issue the department has filed SLPs in other cases before the Hon'ble Apex Court inclusive the case of MIDC (SLP (Civil) 9891 of 2014), in which leave has been granted and the issue is pending for adjudication before the Hon'ble Supreme Court.
3. There are two issues arising out of the above grounds of appeal. First issue relates to disallowance of the depreciation. Second issue relates to the disallowance of carry forward of deficit to be set off against the income of the subsequent years.
4. I have heard both the counsel and perused the records. It transpires that upon Assessing Officer's (AO) disallowance on the above said two issues, the Ld. CIT(A) has allowed the assessee's appeal by following the Hon'ble jurisdictional High Court's direct decision on the issues. Both the counsel fairly agreed that the issues are covered in favour of the assessee by the decision of Hon'ble jurisdictional High Court relied upon by the Ld. CIT(A). The Revenue has also agreed to this in the grounds for appeal raised herein above as it is mentioned that Department has not accepted the Hon'ble High Court's decision on these issues. Be that as it may, the Hon'ble jurisdictional High Court's decision is binding upon the ITAT. In this regard, I may gainfully refer to the order of Ld. CIT(A) on both the issues as under:

First issue: Disallowance of depreciation, the Ld. CIT (A) has held as under:

- 5.2 I have considered the facts and circumstances of the case, gone through the assessment order of the A.O and the submissions of the appellant and also discussed the case with the AR of the appellant. The contentions and submissions of the appellant are being discussed and decided here in under:
- i. The Assessing Officer has not treated the depreciation as application of income on the ground that it amounts to double deduction. Appellant has submitted that in a number of judgments, depreciation had been allowed

as application of income u/s. 11. In this regard I find that the issue is directly covered in appellant's favour by the judgment of Hon'ble Bombay High Court in the case of CIT Vs. Institute of Banking Personnel 264 ITR 110 wherein the Hon'ble Court has observed as under:

"4. Question No. 2 herein is identical to the question which was raised before the Bombay High Court in the case of Director of Income Tax (Exemption) v. Framjee Cawasjee Institute (1993) 109 CTR 463 (Bom). In that case, the facts were as follows: The assessee was the Trust. It derived its income from depreciable assets. The assessee took into account depreciation on those assets in computing the income of the Trust. The Income Tax Officer held that depreciation could not be taken into account because; full capital expenditure had been allowed in the year of acquisition of the assets. The assessee went in appeal before the Assistant Appellate Commissioner, The appeal was rejected. The Tribunal, however, took the view that when the Income Tax Officer stated that full expenditure had been allowed in the year of acquisition of the assets, what he really meant was that the amount spent on acquiring those assets had been treated as 'application of income' of the Trust in the year in which the income was spent in acquiring those assets. This did not mean that in computing income from those assets in subsequent years, depreciation in respect of those assets cannot be taken into account. This view of the Tribunal has been confirmed by, the Bombay High Court in the above judgment. Hence, Question No. 2 is covered by the decision of the Bombay High Court in the above judgment. Consequently, Question No. 2 is answered in the affirmative i.e., in favour of the assessee and against, the department."

ii. In a recent judgement in case of Director of Income-tax (Exemptions), Mumbai v. Shri Vile Parle Kelavani MandaS [2015] 58 taxmann.com 288 Hon'ble Bombay High Court held :

"As far as question No.4 is concerned, this Court has repeatedly held that there is nothing like double deduction. When the assessee has acquired an asset from the income of the trust and thereafter the amount that is claimed is the depreciation on the use of the assets, such depreciation claim does not mean double deduction. The deduction earlier claimed is towards towards application of funds of the trust for acquiring assets. The latter is depreciation and it is permissible deduction considering the use of

the assets. This has been clarified repeatedly by this Court. If any reference is required then the case of CIT v. Institution of Banking Personnel Selection (IBPS) [2003] 264 ITR 110/131 Taxman 386 (Bom.) is enough."

iii. Respectfully following the above observations of Hon'ble jurisdictional High Court, the Assessing Officer is directed to allow the claim of depreciation as application of income u/s. 11 of the I. T. Act.

Second issue: disallowance of carry forward of deficit to be set off against the income of the subsequent year.: The Id CIT(A) has held as under:

6.2 I have considered the facts and circumstances of the case, gone through the assessment order of the A.O and the submissions of the appellant and also discussed the case with the AR of the appellant. The contentions and submissions of the appellant are being discussed and decided here in under:

i. Relying upon several case laws the appellant stated that deficit of the current year is required to be carried forward to the subsequent years. On perusal of the facts I find that the case of appellant is squarely covered by the judgement of Hon'ble Bombay High Court in the case of Institute of Banking Personnel 264 ITR 110 wherein the Hon. Jurisdictional High Court has observed as under –

....."5. Now coming to question No. 3, the point which arises for consideration is: whether excess of expenditure in the earlier years can be adjusted against the income of the subsequent year and whether such adjustment should be treated as application of income in subsequent year for charitable purposes? It was argued on behalf of the department that expenditure incurred in the earlier years cannot be met out of the income of the subsequent year and that utilization of such income for meeting the expenditure of earlier years would not amount to application of income for charitable or religious purposes. In the present case, the assessing officer did not allow carry forward of the excess of expenditure to be set off against the surplus of the subsequent years on the ground that in the case of a Charitable Trust, their income was assessable under self-contained code mentioned in section 11 to section 13 of the Income Tax Act and that the income of the Charitable Trust was not assessable under the head "profits and gains of business" under section 28 in which the provision for

carry forward of losses was relevant. That, in the case of a Charitable Trust, there was no provision for carry forward of the excess of expenditure of earlier years to be adjusted against income of subsequent years. We do not find any merit in this argument of the department. Income \ derived from the trust property has also got to be computed on commercial principles and if commercial principles are applied then adjustment of expenses incurred by the Trust for charitable and religious purposes in the earlier years against the income earned by the Trust in the subsequent year will have to be regarded as application of income of the Trust for charitable and religious purposes in the subsequent year in which adjustment has been made having regard to the benevolent provisions contained in section 11 of the Act and that such adjustment will have to be excluded from the income of the Trust under section 11(l)(a) of the Act. Our view is also supported by the judgment of the Gujarat High Court in the case of CIT v. Shri Plot Swetamber Murti Pujak Jain Mandal (1995) 211 ITR 293 (Guj). Accordingly, we answer question No. 3 in the affirmative i.e., in favour of the assesses and against the department."

- ii. Respectfully following the ratio laid down by the Hon. High Court as above, the AO is directed to allow the carry forward of deficit in the succeeding years after due verification of facts.
5. Since the Id. CIT(A) has followed the Hon'ble jurisdictional High Court decision mentioned here-in-above, I do not find any infirmity in the same. Hence, I uphold the order of Id. CIT(A).
6. In the result, this appeal filed by the Revenue stands dismissed.
परिणामतः राजस्व की अपील खारिज की जाती है ।

Order pronounced in the open court on 10.10.2017

Sd/-

(Shamim Yahya)

लेखा सदस्य / Accountant Member

मुंबई Mumbai; दिनांक Dated : 10.10.2017

व.नि.स./Roshani, Sr. PS

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent
3. आयकर आयुक्त(अपील) / The CIT(A)
4. आयकर आयुक्त / CIT - concerned
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard File

आदेशानुसार/ BY ORDER,

**उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai**