IN THE INCOME TAX APPELLATE TRIBUNAL
"B" BENCH : BANGALORE

BEFORE SHRI SUNIL KUMAR YADAV, JUDICIAL MEMBER
AND SHRI INTURI RAMA RAO, ACCOUNTANT MEMBER

ITA No.893/Bang/2016
Assessment year : 2012-13

The Deputy Commissioner of Income Tax (E), Circle 1, Bangalore.	Vs.	M/s. Sri Taralabalu Jagadguru Bruhanmatt, Sirigere, Chitradurga – 577 541. **PAN: AABTS 4660D**
APPELLANT		RESPONDENT

Appellant by	:	Shri G. Kamalakar, Standing Counsel
Respondent by	:	Shri S. Ramasubramanian, CA

Date of hearing	:	03.07.2017
Date of Pronouncement	:	07.07.2017

O R D E R

Per Sunil Kumar Yadav, Judicial Member

This appeal is preferred by the revenue against the order of CIT(Appeals) mainly on three grounds. One is with regard to disallowance of depreciation, second is with regard to carry forward of excess application of income and third is with regard to accumulation of income, whether it should be on gross receipts or net income after deducting the expenditure.

2. During the course of hearing, the ld. counsel for the assessee has contended that all the three impugned issues are covered by the order of

Tribunal in the case of *ITO v. Shraddha Trust, ITA No.899/Bang/2016* in which one of the Members of this Bench was the author of the order. Copy of the order of Tribunal is placed on record.

3. The ld. DR did not dispute these facts.

4. Having carefully examined the grounds of appeal raised before us and the order of Tribunal in the case of *Shraddha Trust*, we find that identical issues were adjudicated by the Tribunal in that case and having relied upon the judgments of Hon'ble jurisdictional High Court and the Hon'ble Apex Court, the Tribunal has decided the issues in favour of the assessee. For the sake of reference, we extract the relevant portion of the order of Tribunal as under:-

> "3. Briefly facts of the case are as under: The respondent-assessee is a public charitable trust registered under the provisions of section 12AA of the Income-tax Act, 1961 [hereinafter referred to as 'the Act'] with the object of rendering services in education. Return of income for the assessment year 2011-12 was filed on 28/09/2011 declaring nil income. After processing the return of income under the provisions of section 143(1) of the Act, assessment was completed u/s 143(3) of the Act vide order dated 11/03/2014 at total income at nil. While doing so, the AO has not allowed depreciation of Rs.9,97,081/- as application of income and allowed accumulation of income at 15% of the net income and not allowed excess application of income for carry forward to subsequent years.
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> 4. Being aggrieved, an appeal was filed before the CIT(A), who vide impugned order, had allowed depreciation as application of income following the ratio laid down by the jurisdictional High Court in the case of CIT vs. Society of the Sisters of St.Anne (146 ITR 28) and the decision of the Tribunal in the case of Jyothi Charitable Trust (60 taxmann.com

165)(Bang-Trib.). The CIT(A) allowed the accumulation of 15% of gross receipts following the law laid down by the Hon'ble Supreme Court in the case of CIT vs. Programma for Community Organisation (248 ITR 1) and also allowed carry forward of excess application of income to the subsequent years following the co-ordinate bench of Tribunal in the case of CIT vs. City Hospital Charitable Trust (42 ITR (Trib) 583) and DCIT vs. Manipal Academy of Higher Education (44 ITR(Trib) 18).

5. Being aggrieved by this order, the revenue is in appeal before us in the present appeal.

6. Ground Nos.1 to 4 challenge the direction of the CIT(A) allowing depreciation as part of application of income of the trust. This issue is no more res integra as the Hon'ble jurisdictional High Court, in the case of CIT vs. Karnataka Reddy Janasangha (389 ITR 229)(Kar) considering several precedents on the issue, held that the same does not amount to double deduction and the same is allowable and the amended provisions of section 11(6) of the Act are prospective in nature and operative effective from 01/04/2015. The relevant paragraph of the judgment is reproduced below:

> "15. The question involved in this case is no more res integra. This question was considered by this Court as far back as in the year 1984, in the case of Society of the Sister's of St.Anne (supra) wherein the Division Bench of this Court has held thus:
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> > '9. It is clear from the above provisions that the income derived from property held under trust cannot be the total income because s. 11(1) says that the former shall not be included in the latter, of the person in receipt of the income. The expression "total income" has been defined under s. 2(45) of the Act to mean "the total amount of income referred to in s. 5 computed in the manner laid down in this Act". The word "income" is defined under s. 2(24) of the Act to include profits and gains, dividends, voluntary payment received by trust, etc. It may be noted that profits and gains are generally used in terms of business or profession as provided u/s. 28. The word "income", therefore, is a much wider term than the expression "profits and gains of business or

profession". Net receipt after deducting all the necessary expenditure of the trust (sic).

10. There is a broad agreement on this proposition. But still the contention for the Revenue is that the depreciation allowance being a notional income (expenditure?) cannot be allowed to be debited to the expenditure account of the trust. This contention appears to proceed on the assumption that the expenditure should necessarily involve actual delivery of or parting with the money. It seems to us that it need not necessarily be so. The expenditure should be understood as necessary outgoings. The depreciation is nothing but decrease in value of property through wear, deterioration or obsolescence and allowance is made for this purpose in book keeping, accountancy, etc. In Spicer & Pegler's Book-keeping and Accounts, 17th Edn., pp. 44, 45 & 46, it has been noted as follows :

'Depreciation is the exhaustion of the effective life of a fixed asset owing to 'use' or obsolescence. It may be computed as that part of the cost of the asset which will not be recovered when the asset is finally put out of use. The object of providing for depreciation is to spread the expenditure, incurred in acquiring the asset, over its effective lifetime; the amount of the provision, made in respect of an accounting period, is intended to represent the proportion of such expenditure, which has expired during that period.'

16. Similar view is taken by the other High Courts viz., Gujarat, Punjab and Haryana, Delhi, Madras, Calcutta and Madhya Pradesh in the following judgments.

(1) Commissioner of Income-tax, v. Framjee Cawasjee Institute, 109 CTR 463 [Guj.];

(2) Commissioner of Income-tax, v. Raipur Pallottine Society,. [1989] 180 ITR 579 [MP]

(3) Commissioner of Income-tax, v. Seth Manilal Ranchoddas Vishram Bhavan Trust 198 ITR 598 [Guj.];

(4) Commissioner of Income-tax, v. Bhoruka Public Welfare Trust [1999] 240 ITR 513 [Cal.];

(5) Commissioner of Income-tax, v. Rao Bahadur Calavala Cunnan Chetty Charities 135 ITR 485 (Mad.)]

(6) Commissioner of Income-Tax v. Market Committee, Pipli [(2011) 238 CTR (P&H) 103

Allowing depreciation in subsequent years, on the capital asset, which has already availed the benefit of deduction in computing the income of the trust in the year of its acquisition is considered by the Punjab and Haryana High Court in the case of Market Committee, Pipli (supra) and held thus:

'9. In the present case, the assessee is not claiming double deduction on account of depreciation as has been suggested by learned counsel for the Revenue. The income of the assessee being exempt, the assessee is only claiming that depreciation should be reduced from the income for determining the percentage of funds which have to be applied for the purposes of the trust. There is no double deduction claimed by the assessee as canvassed by the Revenue. Judgment of the Hon'ble Supreme Court in Escorts Ltd., & Anr. (supra) is distinguishable for the above reasons. It cannot be held that double benefit is given in allowing claim for depreciation for computing income for purposes of section 11. The questions proposed have, thus, to be answered against the Revenue and in favour of the assessee.'

17. High Court of Bombay in the case of Institute of Banking (supra) after placing reliance on the Judgment of CIT v. Muniswarat Jain (1994 TLR 1084) on an identical issue, held:—

'In that matter also, a similar argument, as in the present case, was advanced on behalf of the

revenue, namely, that depreciation can be allowed as deduction only under section 32 of the Income Tax Act and not under general principles. The court rejected this argument. It was held that normal depreciation can be considered as a legitimate deduction in computing the real income of the assessee on general principles or under section 11(1)(a) of the Income Tax Act. The court rejected the argument on behalf of the revenue that section 32 of the Income Tax Act was the only section granting benefit of deduction on account of depreciation. It was held that income of a Charitable Trust derived from building, plant and machinery and furniture was liable to be computed in normal commercial manner although the Trust may not be carrying on any business and the assets in respect whereof depreciation is claimed may not be business assets. In all such cases, section 32 of the Income Tax Act providing for depreciation for computation of income derived from business or profession is not applicable. However, the income of the Trust is required to be computed under section 11 on commercial principles after providing for allowance for normal depreciation and deduction thereof from gross income of the Trust. In view of the aforestated Judgment of the Bombay High Court, we answer question No. 1 in the affirmative i.e., in favour of the assessee and against the department.'

18. The Judgment in Escorts Limited (supra) was rendered by the Apex Court in the context of Section 10(2)(vi) and Section 10(2)(xiv) of the 1922 Act or under Section 32(1)(ii) and Section 35(2)(iv) of the 1965 Act. It was the case of the assessee claiming a specified percentage of the written down value of the asset as depreciation besides claiming deduction in 5 consecutive years of the expenditure incurred on the acquisition of the capital asset used for scientific research. In such circumstances, the Apex Court held thus:

'There is an apparent plausibility about these arguments, particularly in the context of the alleged departure in the language used by S. 10(2)(xiv) from

that employed in S. 20 of the U.K. Finance Act, 1944. We may, however, point out that the last few underlined words of the English statute show that there is really no difference between the English and Indian Acts; the former also in terms prohibits depreciation only so long as the assets are used for scientific research. In our opinion, the other provisions of the Act to which reference has been made - some of which were inserted after the present controversy started - are not helpful and we have to construe the real scope of the provisions with which we are concerned. We think that all misconception will vanish and all the provisions will fall into place, if we hear in mind a fundamental, through unwritten, axiom that no legislature could have at all intended a double deduction in regard to the same business outgoing, and if it is intended it will be clearly expressed. In other words, in the absence of clear statutory indication to the contrary, the statute should not be read so as to permit an assessee two deductions both under S. 10(2)(vi) and S. 10(2)(xiv) under the 1922 Act or under S. 32(1)(ii) and 35(2)(iv) of the 1922 Act - qua the same expenditure. Is then the use of the words "in respect of the same previous year" in clause (d) of the proviso to S. 10(2)(xiv) of the 1922 Act and S. 35(2)(iv) of the 1961 Act contra-indication which permits a disallowance of depreciation only in the previous years in which the other allowance is actually allowed. We think the answer is an emphatic 'no' and that the purpose of the words above referred to is totally different. If, as contended for by the assessees, there can be no objection in principle to allowances being made under both the provisions as their nature and purpose are different, then the interdict disallowing a double deduction will be meaningless even in respect of the previous years for which deduction is allowed under S. 10(2)(xiv)/S. 35 in respect of the same asset. If that were the correct principle, the assessee should logically be entitled to deduction by way of depreciation for all previous years including those for which allowance have been granted under the provision relating to scientific

research. The statute does not permit this. The restriction imposed would, therefore, be illogical and unjustified on the basis suggested by the assessees. On the other hand, if we accept the principle we have outlined earlier viz. that, there is a basic legislative scheme, unspoken but clearly underlying the Act, that two allowances cannot be, and are not intended to be, granted in respect of the same asset or expenditure, one will easily see the necessity for the limitation imposed by the quoted words. For, in this view, where the capital asset is one of the nature specified, the assessee can get only one of the two allowances in question but not both.'

19. Section 11 of the Act deals with application of income different from revenue expenditure or allowance. Thus, the Judgment of the Apex Court in the case of Escorts Ltd., (supra) is distinguishable and as such is not applicable to the Charitable Trusts where income is to be computed under Chapter III of the Act. Accordingly, the judgment of Lissie Medical Institutions (supra) based on Escorts Ltd., (supra), is not applicable to the facts of the present case.

20. It is also to be noticed that while in the year of acquiring the capital asset, what is allowed as exemption is the income out of which such acquisition of asset is made and when depreciation deduction is allowed in the subsequent years, it is for the losses or expenses representing the wear and tear of such capital asset incurred if, not allowed then there is no way to preserve the corpus of the Trust for deriving its income as held in Society of Sisters of St. Anne (supra). This judgment of co-ordinate Bench of this Court is binding on us and we have no reasons to disturb the settled position of law at this length of time/depart from the said reasoning. As such, the arguments advanced by the Revenue apprehending double deduction is totally misconceived.

21. Section 11[6] inserted with effect from 1.4.2015 by Finance Act No. 2/2014, reads as under:

'(6) In this section where any income is required to be applied or accumulated or set apart for application, then, for such purposes the income shall be determined without any deduction or allowance by way of depreciation or otherwise in respect of any asset, acquisition of which has been claimed as an application of income under this section in the same or any other previous year.'

22. The plain language of the amendment establishes the intent of the legislature in denying the depreciation deduction in computing the income of Charitable Trust is to be effective from 1.4.2015. This view is further supported by the Notes on Clauses in Finance [No. 2] Bill, 2014, memo explaining provisions and circulars issued by the Central Board of Direct Taxes in this regard. Clause No. 7 of the Notes on Clauses reads thus:

'Clause 7. of the Bill seeks to amend section 11 of the Income-tax Act relating Income from property held for charitable or religious purposes. The existing provisions of the aforesaid section contain a primary condition that for grant of exemption in respect of income derived from property held under trust, such income should be applied for the charitable purposes in India, and where such income cannot be so applied during the previous year, it has to be accumulated in the prescribed modes. It is proposed to insert sub-sections (6) and (7) in the said section so as to provide that—

(i) where any income is required to be applied or accumulated or set apart for application, then, for such purposes the income shall be determined without, any deduction or allowance by way of depreciation or otherwise in respect of any asset, acquisition of which has been claimed as an application of income under this section in any previous year, and

(ii) where a trust or an institution has been granted registration under clause (b) of sub-section (1) of section 12AA or has obtained registration at any

> time under section 12A [as it stood before is amendment by the Finance (No. 2) Act, 1996] and the said registration is in force for any previous year, then, nothing contained in section 10 [other than clause (1) and clause (23C) thereof] shall operate to exclude any income derived from the property held under trust from the total income of the person in receipt thereof for that previous year.

This amendment will take effect from 1st April, 2015 and will, accordingly, apply in relation to the assessment year 2015-16 and subsequent years'.

The Memo explaining the provisions in Finance [No. 2] Bill, 2014 reads thus:

'The second issue which has arisen is that the existing scheme of section 11 as well as section 10(23C) provides exemption in respect of income when it is applied to acquire a capital asset. Subsequently, while computing the income for purposes of these sections, notional deduction by way of depreciation etc. is claimed and such amount of notional deduction remains to be applied for charitable purpose. Therefore, double benefit is claimed by the trusts and institutions under the existing law. The provisions need to be rationalized to ensure that double benefit is not claimed and such notional amount does not excluded from the condition of application of income for charitable purpose'.

23. Paragraphs 7.5, 7.5.1, 7.6 of Central Board of Direct Taxes Circular reported in 371 ITR 22 makes it clear that the said amendment shall take effect from 1.4.2015 and will accordingly apply in relation to the assessment year 2015-16 and subsequent assessment years.

24. The Constitution Bench of the Apex Court in Vatika Township (P.) Ltd.'s case (supra), had laid down general principles concerning retrospectivity in Paragraphs 33 and 34, and the same is extracted hereunder:

'33. We would also like to point out, for the sake of completeness, that where a benefit is conferred by a legislation, the rule against a retrospective construction is different. If a legislation confers a benefit on some persons but without inflicting a corresponding detriment on some other person or on the public generally, and where to confer such benefit appears to have been the legislators object, then the presumption would be that such a legislation, giving it a purposive construction, would warrant it to be given a retrospective effect. This exactly is the justification to treat procedural provisions as retrospective. In Government of India & Ors. v. Indian Tobacco Association, the doctrine of fairness was held to be relevant factor to construe a statute conferring a benefit, in the context of it to be given a retrospective operation. The same doctrine of fairness, to hold that a statute was retrospective in nature, was applied in the case of Vijay v. State of Maharashtra & Ors. It was held that where a law is enacted for the benefit of community as a whole, even in the absence of a provision the statute may be held to be retrospective in nature. However, we are confronted with any such situation here.

34. In such cases, retrospectively is attached to benefit the persons in contradistinction to the provision imposing some burden or liability where the presumption attaches towards prospectivity. In the instant case, the proviso added to Section 113 of the Act is not beneficial to the assessee. On the contrary, it is a provision which is onerous to the assessee. Therefore, in a case like this, we have to proceed with the normal rule of presumption against retrospective operation. Thus, the rule against retrospective operation is a fundamental rule of law that no statute shall be construed to have a retrospective operation unless such a construction appears very clearly in the terms of the Act, or arises by necessary and distinct implication. Dogmatically framed, the rule is no more than a presumption, and thus could be displaced by outweighing factors'.

> 25. The Apex Court in the said judgment, while interpreting the proviso, whether to be applied retrospectively or prospectively, has considered the Notes on Clauses appended, the Finance Bill and the understanding of the Central Board of Direct Taxes in this regard. The Apex Court has also taken cognizance of the fact that the legislature is fully aware of 3 concepts insofar as amendments made to a statute:
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> (i) prospective amendments with effect from a fixed date;
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> (ii) retrospective amendments with effect from a fixed anterior date; and
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> (iii) clarificatory amendments which are prospective in nature.
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> Keeping in view, the aforesaid principles enunciated by the Apex Court, in Vatika Township (P.) Ltd.'s case (supra), it would be safely held that Section 11(6) of the Act is prospective in nature and operates with effect from 01.04.2015. This is further clarified when compared with certain other provisions which have been made retrospectively in the same Finance Act.
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> 26. For the foregoing reasons, we answer the question of law in favour of the Assessee and against the Revenue.
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> 27. In the result, all the appeals are dismissed."

> 5. In view of the above, as the questions are already covered by the decision of this Court as conceded by the learned Counsel for the appellants-Revenue, it cannot be said that any substantial question of law would arise for consideration."

The decision of the CIT(A) is in consonance with the law laid down by the Hon'ble jurisdictional High Court in the case of Karnataka Reddy Janasangha (supra) in the above case. We do not find any fallacy in the reasoning adopted by the CIT(A). Hence, the grounds of appeal No.1 to 4 are dismissed.

7. The other grounds of appeal relates to Whether accumulation of income should be on gross receipt or net income after deducting the expenditure, is covered by the decision of the Hon'ble Supreme Court in the case of CIT vs. Programme for Community Organisation (248 ITR 1)(SC) wherein it was held that 25% should be calculated on the gross receipts of income and not on the net income. Therefore, these grounds of appeal raised by the revenue are dismissed.

8. The final grounds of appeal relates to carry forward of excess application of income to subsequent years. This issue is covered against the revenue by co-ordinate bench of Tribunal in the case of Deputy Director of Income-tax vs. Jyothy Charitable Trust (60 taxmann.com 165). The relevant part of the order is reproduced below:

> "14. We have considered his submission. Section 11(1)(a) does not contain any words of limitation to the effect that the income should have been applied for charitable or religious purpose only in the year in which the income has arisen. The application for charitable purposes as contemplated in section 11(1)(a) takes place in the year in which the income is adjusted to meet the expenses incurred for charitable or religious purposes. Hence, even if the expenses for such purposes have been incurred in the earlier years and the said expenses are adjusted against the income of a subsequent year, the income of such subsequent year can be said to be applied for charitable or religious purposes in the year in which such adjustment takes place. In other words, the set-off of excess of expenditure incurred over the income of earlier years against the income of a later year will amount to application of income of such later year. The above is the position of law as held in the case of CIT v. Maharana of Mewar Charitable Foundation [1987] 164 ITR 439/[1986] 29 Taxman 476 (Raj) and CIT v. Plot Swetamber Murti Pujak Jain Mandal [1995] 211 ITR 293 (Guj.). In CIT v. Institute of Banking Personnel Selection [2003] 264 ITR 110/131 Taxman 386 (Bom.) it was held that in case of charitable trust whose income is exempt under s. 11, excess of expenditure in the earlier years can be adjusted against income of subsequent years and such adjustment would be application of income for subsequent years and that depreciation is allowable on the assets the cost of which has been fully allowed as application of income

> under s. 11 in past years. In Govindu Naicker Estate v. Asstt. DIT [2001] 248 ITR 368/[1999] 105 Taxman 719 (Mad.), the Hon'ble Madras High Court held that the income of the trust has to be arrived at having due regard to the commercial principles, that s. 11 is a benevolent provision, and that the expenditure incurred on religious or charitable purposes in earlier year or years can be adjusted against the income of the subsequent year. The principle that the loss incurred under one head can only be set off against the income from the same head is not of any relevance, if the expenditure incurred was for religious or charitable purposes, and the expenditure adjusted against the income of the trust in a subsequent year, would not amount to an incidence of loss of an earlier year being set off against the profit of a subsequent year. The object of the religious and charitable trust can only be achieved by incurring expenditure and in order to incur that expenditure, the trust should have an income. So long as the expenditure incurred is on religious or charitable purposes, it is the expenditure properly incurred by the trust, and the income from out of which that expenditure is incurred, would not be liable to tax. The expenditure, if incurred in an earlier year is adjusted against the income of a later year, it has to be held that the trust had incurred expenditure on religious and charitable purposes from the income of the subsequent year, even though the actual expenditure was in the earlier years, if in the books of account of the trust such earlier expenditure had been set off against the income of the subsequent year. The expenditure that can be so adjusted can only be expenditure on religious and charitable purposes and no other. The High Court relied on the decision in the case of Society of Sisters of ST. Anne (supra)."
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> Respectfully following the ratio laid down in the above decision we dismiss the ground of appeal raised by the revenue."

5. Since the Tribunal has adjudicated identical issues in the aforesaid order, we find no justification to take a contrary view in this appeal.

Accordingly, following the same, we decide all the three isues in favour of assessee and accordingly the order of CIT(Appeals) is hereby confirmed.

6. In the result, the appeal of revenue is dismissed.

Pronounced in the open court on this 7th day of July, 2017.

Sd/- Sd/-

(INTURI RAMA RAO) (SUNIL KUMAR YADAV)
Accountant Member Judicial Member

Bangalore,
Dated, the 7th July, 2017.

/ Desai Smurthy /

Copy to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR, ITAT, Bangalore.
6. Guard file

By order

Assistant Registrar,
ITAT, Bangalore.