

आयकर अपीलीय अधिकरण, जयपुर न्यायपीठ, जयपुर
IN THE INCOME TAX APPELLATE TRIBUNAL,
JAIPUR BENCHES (SMC), JAIPUR

श्री भागचन्द, लेखा सदस्य के समक्ष
BEFORE: SHRI BHAGCHAND, ACCOUNTANT MEMBER

आयकर अपील सं./ITA No. 1092/JP/2016
निर्धारण वर्ष/Assessment Year : 2012-13

The ITO (E) Ward- 1 Jaipur	बनाम Vs.	M/s. Mayura Shiksha Samiti Naila House, Moti Doongri Road, Jaipur
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No.: AAATM 1725 G		
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

राजस्व की ओर से / Revenue by : Smt. Poonam Rai, DCIT - DR
निर्धारिती की ओर से / Assessee by: Shri S.S. Shekhawat, CA

सुनवाई की तारीख / Date of Hearing : 23/10/2017
घोषणा की तारीख / Date of Pronouncement : 27 /10/2017

आदेश / ORDER

PER BHAGCHAND, AM

The Revenue has filed an appeal against the order of the Id.
CIT(A)-III, Jaipur dated 27-09-2016 for the assessment year 2012-13
raising therein following grounds:-

“1. On the facts and in the circumstances of the case and in law the Id. CIT(A) has erred in allowing excessive salary to the persons specified u/s 13(3) of the I.T. Act and consequently benefit of sec 11 and 12 of the I.T. Act, 1961.

2. On the facts and in the circumstances of the case and in law the Id. CIT(A) has erred in allowing claim of depreciation on fixed

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assets in spite of the fact that the same was allowed as application of income u/s 11 at the time of purchase.

3. On the facts and in the circumstances of the case and in law the Id. CIT(A) has erred in allowing depreciation without appreciating the fact that the application of 100% expenditure of the capital asset is already allowed as capital expenditure hence further allowance of depreciation on the same capital asset would amount to double allowance.

4. On the facts and in the circumstances of the case and in law the Id. CIT(A) has erred in allowing depreciation without appreciating the fact that the assessee has not carried out the business activities but the receipts utilized for charity. As there was no business activity the claim of depreciation was not allowable, the depreciation is allowable only in the case of business or profession or in the case of 'income from other sources'.

5. On the facts and in the circumstances of the case and in law the Id. CIT(A) has erred in allowing Rs. 17,56,092/- as rent paid in spite of the fact that the payment is more than reasonable as well as the rent paid to the persons covered u/s 13(3) of the I.T. Act, 1961.'''

2.1 Apropos Ground No. 1 of the Revenue, it is noted that the AO has disallowed the salary amount of Rs. 2.00 lacs and Rs. 4.00 lacs given to Shri Dushyant Singh and Smt.Usha Singh respectively by observing as under:-

“The submission of the assessee on this account is not acceptable for the reasons that as per reply of the assessee both the persons namely Sh. DushYant Singh and his wife Smt. Usha Singh are rendering general services like care taker etc which needs no extra qualification or skill. They are also not providing any teaching services in the school. Likewise, the salary payments to the other staff members including teaching staff and non .teaching staff is also lower than the payments made to above two persons covered under sec.

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13(3) of the IT. Act, 1961. -The assessee has also not justified the salary to these persons with any corroborative and concrete evidences to support their claim. In view of these facts the payments of salary made to these persons are treated unreasonable within the meaning of sec. 13(2)(c) of the IT. Act and as such 50% of the salary to Shri Dushyant Singh and 100% of the salary given to Smt. Usha Singh is disallowed which works out to Rs.2,00,000 & Rs.4,00,000/- respectively which is taxed as per the provisions of law.”

2.2 In first appeal, the Id. CIT(A) has deleted the disallowance of salary payment in respect of Shri Dushyant Singh and Smt. Usha Singh made by the AO by observing as under:-

“7.3 I have carefully considered the facts of the case, findings of the AO and submission of the appellant. AO held that salary paid to Dushyant Singh at Rs. 4 lacs is excessive and therefore he made disallowance of 50% of salary. Similarly payment of salary to Usha Singh who is rendering general service like caretaker and has no extra qualification/skill and therefore he made disallowance of entire salary of Rs. 4,00,000/-.

Considering observation of AO & A/R submission regarding. I find that salary paid to dushyant Singh and Usha Singh are reasonable considering their qualification/services rendered and details of work carried out by them. Payment of salary to Dushyant Singh is Rs. 6,00,000/- giving monthly salary of Rs. 50,000/- and salary to Usha Singh is Rs. 4,00,000/- giving monthly salary Rs. 33,333/-. The AO has not given any comparable case where salary to persons doing similar work is less than payment to these persons. Moreover AO in A.Y. 2014-15 also accepted the payment of salary to these persons as reasonable. Therefore disallowance made by AO is deleted.

2.3 During the course of hearing, the Id. DR supported the order of the AO.

2.4 On the other hand, the ld.AR of the assessee supported the order of the ld. CIT(A) for which the ld.AR of the assessee filed the following written submission.

‘Ground No. 1: Hon’ble CIT(A) was right in deleting addition made Rs. 600000 out of salary paid Rs. 800000 as reasonable salary paid to persons covered u/s 13(3) of IT Act, 1961. That learned assessing officer has wrongly disallowed Rs. 6,00,000/- out of Salary Rs. 8,00,000/- to persons covered u/s 13(3):- (i) Rs. 2,00,000 being 50% of Rs. 4,00,000 of salary paid to Shri Dushyant Singh full time Director of school and (ii) Rs. 4,00,000 being 100% out of salary paid Rs. 4,00,000/- to Smt. Usha Singh full time consultant and coordinator of school treating excess salary paid than reasonable u/s 13(2)(c) to persons covered u/s 13(3) of Income Tax Act, 1961 by simply saying that they are care taker while section 13(2)(c) uses the words **“the amount so paid is in excess of what may be reasonably paid for such services”**.

As per facts Shri Dushyant Singh full time director finance and planning and is graduate from the year 1972 from Maharaj Sayaji Rao University of Baroda in faculty of fine arts and painting and also did two years course in fine arts and painting and had awards from Lalit Kala Academy of Rajasthan and Gujrat for Arts and Paintings and was also teacher in vidhyashram school, Jaipur and has experience of teaching and he has been looking full time sports activities, administrative activities, bank work i.e. signing of all cheques, correspondence and day to day work of bank, and he takes drawing, painting, designing, architectural and art classes for students and also look after curricular activities and also doing architectural designing and repair work of building of school. Copy of his degree in painting and art is attached.

Smt. Usha Singh is working as full time consultant and co-ordinator of school for quality education to students. She has been principal of school run by society since 1989 and graduate and B.ED. and has experience in various participations into inter school activities, tournaments, school meets and also carried classes for underprivileged students, who have been handicapped, to get their admissions into schools run for handicapped children. She has taking training classes for teachers of school running by the assessee society to maintain quality of education by school. Copies of her graduation degree, B.Ed. degree, certificate for diploma in special education for disabled from

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Disha and letters for her achievements for school and contributions toward rehabilitation and teaching and helping disable children attached. She is full time devotee at present and during the year under assessment and since beginning school and regarding reasonability one has to see prevailing rates of salary/remuneration in similar institutions but assessing officer has not gone into facts because salary comes @33,333 per month to each person while salary of state government or central government teachers and office employees of their experience and age is more than Rs. 50,000/Rs.60,000 per month and even of private educational institution (school) is more than Rs. 40,000/Rs.50,000 and even senior clerk is having salary of Rs. 40,000/Rs.50,000 per month, therefore, assessing officer has not gone into facts and disallowed Rs. 6,00,000 out of salary Rs.8,00,000 paid to both of them on basis of assumptions, therefore, Hon'ble CIT (A) was right in deleting disallowance of Rs. 600000 out of salary paid Rs.800000 to persons covered u/s 13(3) of IT Act,1961. As per above facts produced to assessing officer at the time of scrutiny assessment u/s 143(3) for assessment years 2014-15 and 2015-16 and he has allowed 100% of salary paid to them i.e. persons covered u/s 13(3).”

2.5 The Bench has heard the rival contentions and perused the materials available on record. It is noted that the AO disallowed the salary of Rs. 2.00 lacs and Rs. 4.00 lacs in respect of Shri Dushyant Singh and Smt. Usha Singh respectively and made the addition in the hands of assessee. In first appeal, the ld. CIT(A) has deleted the addition made by the AO with following observations.

“Considering observation of AO & A/R submission regarding. I find that salary paid to dushyant Singh and Usha Singh are reasonable considering their qualification/services rendered and details of work carried out by them. Payment of salary to Dushyant Singh is Rs. 6,00,000/- giving monthly salary of Rs. 50,000/- and salary to Usha Singh is Rs. 4,00,000/- giving monthly salary Rs. 33,333/-. The AO has not given any comparable case where salary to persons doing similar work is less than payment to these persons. Moreover

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AO in A.Y. 2014-15 also accepted the payment of salary to these persons as reasonable. Therefore disallowance made by AO is deleted.

In this case, it is also noted that the AO has accepted that payment of salary to these persons as reasonable in A.Y. 2014-15. Taking into consideration the facts and circumstances of the case, the Bench concurs with the views of the Id. CIT(A) on the issue in question. Hence, the Ground No. 1 of the Revenue is dismissed.

3.1 Apropos Ground No. 2,3 and 4 of the Revenue , it is noted that the AO disallowed the deduction claimed by the assessee trust on account of depreciation amounting to Rs. 3,09,169/-. The relevant observation of the AO as to the issue in question is as under:-

“4. I have considered the reply of the assessee to reach any conclusion, the provisions of sec. 32 of the I.T. Act are re-produced as under:-

"Depreciation-

32(l) In respect of depreciation of-

(i) Buildings, machinery, plant or furniture, being tangible assets,

(ii) Know-how, patents, copyrights, trademarks,...

Owned, wholly or partly, by the assessee and used for the purposes of the business or profession, the following deductions shall be allowed.....”

5..

6..

7...

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8. Therefore, in the light of the Apex court decision, though in a different context, it can be held that depreciation is not admissible on those assets against which 100% deduction has already been taken e.g. in the cases of trusts where Assets has been acquired by way of application of funds. This is also clear because wherever any investment in of assets is allowed as revenue expenditure, depreciation on the same cannot be again be allowed treating the same asset as capital expenditure.

9. Moreover the "depreciation" is only a notional expenditure and there is no outgo of any money. The accounts of the trust are required to be maintained in the receipt and payment form. Depreciation being only notional expenses it cannot be held to be any payment for the purpose of receipt and payment account.

10. Hence, keeping in view the facts of the case and provisions of the Act deduction claimed by the assessee trust on account of depreciation amounting to Rs. 3,09,169/ is hereby disallowed"

3.2 In first appeal, the ld. CIT(A) has deleted the disallowance made by the AO by observing as under:-

6.3 I have carefully considered the facts of the case, findings of the AO and submission of the appellant. It is seen that the Rajasthan High court in case of CIT vs Krishi Upaj Mandi samiti and other High courts also held that depreciation on fixed assets is separately allowable even though entire fixed assets were allowed as application of income. Respectfully following the same, the disallowance made by AO is deleted.’’

3.3 During the course of hearing, the ld. DR supported the order of the AO.

3.4 On the other hand, the ld.AR of the assessee supported the order of the ld. CIT(A) for which the ld.AR of the assessee filed the following written submission.

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“Ground No. 2, 3 and 4 are related to each other regarding allowability of depreciation by Hon’ble CIT (A) and Hon’ble CIT (A) was right in allowing depreciation as application of income u/s 11 and 12 and allowing 100% of capital expenditure in earlier years and also depreciation and depreciation allowable even there is no business activity:-

That learned assessing officer has not gone into facts and law but on basis of assumption included depreciation into taxable income and while Hon’ble Rajasthan High Court in case of CIT-II Jodhpur VS Krishi Upaj Mandi Samiti Jaisalmer reported at 388 ITR 605 (Raj) and copy enclosed also held that depreciation on fixed assets is separately allowable even though entire fixed assets were allowed as application of income.

Hon’ble Rajasthan High Court decided in favour of assessee considering following arguments and submissions of learned counsel for the assessee and assessee (respondent) also submits as under before your honour:-

As Section 32 of the Act of 1961 nowhere makes any distinction in the charitable trust or any other body or person so far as the application of depreciation is concerned, thus, normal depreciation is required to be considered as a legitimate deduction in computing the real income of the assessee as per provisions of Section 11(1)(a) of the Act of 1961. It is asserted that deduction of depreciation in case of charitable institution is permissible in order to preserve the corpus of the trust and, therefore, it does not amount to double benefit or double deduction. To substantiate the contention reliance is placed upon the judgment of Bombay Court in Director of Income Tax v. Framjee Cawasjee Institute, reported in (1993) 109 CTR 463 (Bombay), concluding that the depreciation on depreciable assets had to be taken into account in computing income of a religious trust although the amount spent of acquiring such assets has been treated as application of income of the trust in the year in which assets were acquired. In CIT v. Institute of Banking Personnel, reported in 2003 131 TAXMAN 386, the High Court of Bombay held that when the full expenditure had been allowed to a charitable institution in the year of acquisition of assessment, the amount spent on acquiring the assets are required to be 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.

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Honorable Rajasthan High Court at last Para of their judgment in D.B. Income Tax Appeal No.32/2010 decided as under.

We have considered the arguments advanced.

The assessee is a charitable institution registered under Section 12-A of the Act of 1961 and 100% Capital expenditure was availed by it against the asset concerned i.e. a building. Section 32(1) of the Act of 1961 provides for depreciation in respect of building, plant and machinery owned by the assessee and used for business purposes. Income of a charitable trust like the present assessee derived from the depreciable heads is also liable to be computed on commercial basis, however, while doing so it is to be kept in mind that ultimately assessee is a charitable institution and its income for tax purposes is required to be determined by taking into consideration provisions of Section 11 of the Act of 1961 after extending normal depreciation and deductions from its gross income. In computing the income of a charitable institution/trust depreciation of assets owned by such institution is a necessary deduction on commercial principles, hence, the amount of depreciation has to be deducted to arrive at the income available.

In view of the discussions made above, we find ourselves in agreement with the view taken by Bombay High Court in Director of Income Tax v. Framjee Cawasjee Institute (Supra) and in CIT v. Institute of Banking personnel (Supra). The substantial question framed in the instant matter, thus, is answered in the terms that the Income Tax Appellate Tribunal rightly allowed depreciation claimed by the assessee on capital assets for which capital expenditure was already given in the year under consideration.

The appeal stands dismissed accordingly.

Also evident that Finance (No.2) Act, 2014 inserted sub section (6) into section 11 made effective w.e.f. assessment year 2015-16 inserting that where any **“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”**. Thus it is clear from section 11(6) of IT Act, 1961 that subsection (6) of section 11 not applicable retrospectively and not

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applicable for assessment years prior to assessment year 2015-16 and therefore, not applicable for assessment year 2012-13 and prior to assessment year 2015-16 depreciation on fixed assets can be claimed as application of income even acquisition of such asset claimed as an application of income in the same or any other previous year and Hon'ble CIT(A) was also right and as per section 11(1)(a) 15% of income Rs. 1,32,80,838 i.e. Rs. 19,92,125 is allowed to be accumulated and set apart for application to charitable purposes and without prejudice to appellants claim of treating depreciation as application of income, even not treating depreciation as application of income for charitable purposes, if depreciation Rs. 3,09,169 +surplus (Excess of income over expenditures) Rs. 11,45,269. — Rs. 8,60,390 capital expenditure (addition to fixed assets) during the year and balance comes Rs. 5,94,048 which is lower than Rs. 19,92,125 being 15% of income Rs. 1,32,80,838 of which is allowed to be set apart / accumulated for charitable purposes to appellant society which is allowed as exempt u/s 11(1)(a) of Income Tax Act, 1961, therefore, the learned assessing officer has wrongly taken depreciation Rs. 3,09,169 as taxable income and deserve to be deleted Hon'ble CIT(A) was right in deleting the addition of depreciation Rs.3,09,169 as taxable income.”

3.5 The Bench has heard the rival contentions and perused the materials available on record. It is noted that the AO disallowed the amount of Rs. 3,09,169/- on account of depreciation claimed by the assessee which in first appeal has been deleted by the Id. CIT(A) by relying on the decision of Hon'ble Rajasthan High Court in the case of CIT vs Krishi Upaj Mandi Samiti by observing as under:-

“...It is seen that the Rajasthan High court in case of CIT vs Krishi Upaj Mandi samiti and other High courts also held that depreciation on fixed assets is separately allowable even though entire fixed assets were allowed as application of income. Respectfully following the same, the disallowance made by AO is deleted.”

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Taking into consideration the facts and circumstances of the case and also the decision of Hon'ble Rajasthan High Court in the case of CIT vs Krishi Upaj Mandi Samiti (supra), the Bench finds no reason to interfere with the order of the Id. CIT(A) on the issue in question. Thus Ground No. 2, 3 and 4 of the Revenue are dismissed.

4.1 Apropos Ground No. 5 of the Revenue, it is noted that the AO disallowed Rs. 17,56,092/- on account of rent by observing as under:-

“11 (b) Rent. ...From the copies of lease deeds filed it appears that only ground floor of the building has been given to the assessee trust for which heavy rent has been claimed. Since the rent payment is to the specified persons under sec. 13(3) and total amount of 23,56,092/- (Rs. 7,57,996/-+ 7,99,048/-+7,99,048/-) appears to be unreasonable keeping in view of the total area of the building and other factors. I, therefore treat Rs. 50,000/- per month i.e. Rs. 6,00,000/- per annum quite adequate and reasonable and as such remaining amount of Rs. 17,56,092/- (Rs. 23,56,092 - 6,00,000/-) is treated unreasonable within the meaning of sc. 13(2) (c) of the IT. Act, 1961. Accordingly amount of Rs. 17,56,092/- is taxed as per the provisions of law.”

4.2 In first appeal, the Id. CIT(A) has deleted the addition of Rs. 17,56,092/- by observing as under:-

“8.3 I have carefully considered the facts of the case, findings of the AO and submission of the appellant. AO made disallowance of Rs. 17,56,092/- out of rental expenses by treating the same as excessive. On perusal of detail, I find that the school is located on Moti Goongri Road. The area of property is 6000 square meter and rent paid is Rs. 196341/- per month which gives rate of 3.04 per square feet. This rent appear reasonable looking to the central location and rent

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prevailing in that area. Moreover, AO also in A.Y. 2014-15, accepted rent payment as reasonable. Therefore the disallowance made by the AO is uncalled for and is being deleted.”

4.3 During the course of hearing, the Id. DR relied on the order of the AO.

4.4 On the other hand, the Id.AR of the assessee supported the order of the Id. CIT(A) for which the Id.AR of the assessee filed the following written submission.

“Ground No. 5 : Hon’ble CIT (A) was right in deleting disallowance of Rs. 1756092 out of rent paid Rs. 2356092 to persons covered u/s 13(3) taking as rent paid is reasonable. That learned assessing officer has wrongly disallowed Rs.17,56,092 out of rent paid Rs.23,56,092 p.a. to (i) Dushyant Singh HUF (ii) Trivikram Singh and (iii) Hameer Singh to persons covered u/s 13(3) by assuming excess of reasonability u/s 13(2)(C) of Income Tax Act, 1961 but while going by assessing officer through reasonability, he has not gone into facts about large size of area and location of premises being used by school run by society. Premises is located on main Motidoongari Road of Jaipur City and near to and surrounded by Sanganeri Gate, Rajapark, Gangwal Park, Tilak Marg, Jawahar Nagar and is on commercial road and in main market and is prime commercial location of Jaipur city and he has not enquired about rent in same locality and area being used by society is large i.e. 6000 square meter (approx) i.e. 64560 (approx) square feet and rent paid is Rs. 1,96,341/- p.m. and which comes Rs. 3.04 per square feet while fact is that commercial rent of shops and offices for similar location is Rs. 30,000/Rs.35,000/- P.M. for 150 square feet (15*10) which comes Rs. 200 per square feet P.M. and rent for residential area is Rs. 20 to 30 per SFT P.M. but society is running school, therefore, rent charged is nominal @ 3.04 per square feet and rent paid is much lower than reasonable as compared to market rates of rent in the same locality, hence, rent paid by society is

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less than reasonable and fully allowable and addition made by assessing officer is rightly deleted by Hon'ble CIT (A) –III Jaipur.

The above facts were put before assessing officer during scrutiny assessment u/s 143(3) of the IncomeTax Act, 1961 for assessment year 2014-15 and 2015-16 and he has allowed 100% salary paid to Smt. Usha Singh and Shri Dushyant Singh and also allowed 100% rent paid to persons covered u/s 13(3) as payments were reasonable looking into facts as abovesaid. Copy of assessment order for assessment years 2014-15 and 2015-16 attached. Therefore, Hon'ble CIT (A) was right in deleting additions / disallowance made by learned assessing officer for assessment year 2012-13 and it is submitted before your honour that relief allowed by Hon'ble CIT (A) – III Jaipur and allowed benefit of exemption u/s 11 and 12 of Income Tax Act,1961 is correct and right and as per facts and as per law.’

4.5 After hearing both the parties and perusing the materials available on record, it is noted that the AO disallowed the rental expenses of Rs. 17,56,092/- by treating the same as excessive which has been deleted by the ld. CIT(A) by observing as under:-

“...I find that the school is located on Moti Goongri Road. The area of property is 6000 square meter and rent paid is Rs. 196341/- per month which gives rate of 3.04 per square feet. This rent appear reasonable looking to the central location and rent prevailing in that area. Moreover, AO also in A.Y. 2014-15, accepted rent payment as reasonable. Therefore the disallowance made by the AO is uncalled for and is being deleted.”

From the above facts, it is noted that the AO has accepted the rent payment as reasonable in Assessment Year 2014-15. It is also noted that as per location of the school, the rent prevailing in that area is reasonable.

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In this view of the matter, the Bench concurs with the views of the Id. CIT(A) on the issue in question. Thus Ground No. 5 of the Revenue is dismissed.

5.0 In the result, the appeal of the Revenue is dismissed.

Order pronounced in the open court on 27 /10/2017

Sd/-

(भागचन्द)

(Bhagchand)

लेखा सदस्य / Accountant Member

जयपुर / Jaipur

दिनांक / Dated:- 27 /10/ 2017

*Mishra

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

1. अपीलार्थी / The Appellant- The ITO (E), Ward- 1, Jaipur
2. प्रत्यर्थी / The Respondent- M/s. Mayura Shiksha Samiti, Jaipur
3. आयकर आयुक्त(अपील) / CIT(A).
4. आयकर आयुक्त / CIT,
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, जयपुर / DR, ITAT, Jaipur
6. गार्ड फाईल / Guard File (ITA No. 1092/JP/2016)

आदेशानुसार / By order,

सहायक पंजीकार / Assistant. Registrar