IN THE INCOME TAX APPELLATE TRIBUNAL
BANGALORE BENCH ' A '

BEFORE SHRI VIJAY PAL RAO, JUDICIAL MEMBER AND
SHRI INTURI RAMA RAO, ACCOUNTANT MEMBER

I.T. A. No.1224/Bang/2015
(Assessment Year : 2011-12)

M/s. Moogambigai Charitable and
Educational Trust,
RR College of Management Studies,
Ramahalli Cross, Kumbalgode,
Bangalore-560 060. …. Appellant.

Vs.

The Addl. Director of Income Tax (Exemptions),
Range 17, Bangalore. ….. Respondent.

Appellant By : Shri M. Karunakaran, Advocate.
Respondent By : Shri Pramod Kumar Singh, CIT-II (D.R)

Date of Hearing : 10.5.2016.
Date of Pronouncement : 13.7.2016.

O R D E R

Per Shri Vijay Pal Rao, J.M. :

This appeal by the assessee is directed against the order dt.24.6.2015 of the Commissioner of Income Tax (Appeals) for the Assessment Year 2011-12.

2. There is a delay of 17 days in filing the present appeal by the assessee. The assessee has filed the petition for condonation of delay supported by an Affidavit of its Trustee Sri A.C. Shanmugam.

3. We have heard the learned Authorised Representative as well as learned Departmental Representative and considered the Affidavit filed by the assessee for delay of 17 days in filing the appeal. The assessee has stated in the Affidavit that the impugned order was received on 29.7.2015 and the appeal should have been filed by 20.8.2015 however, a search and seizure action under Section 132 of the Act was carried out in the premises of the assessee's trust on 6.8.2015. Therefore all the persons in-charge of the accounts section were completely involved in the post search proceedings. Since they were attending the income tax office every day to furnish verification and other details called for, the assessee could not take the necessary steps to file the appeal within the period of limitation. Therefore it is pleaded that the delay of 17 days was neither intentional nor wanton but due to circumstances which were beyond the control of the assessee.

4. The learned Departmental Representative has vehemently opposed the condonation of delay.

5. Having considered the rival submissions and the cause of delay explained by the assessee in the Affidavit, we find that the assessee had a reasonable cause for not presenting the present appeal within the period of limitation. We further note that there is nothing on record to suggest that by filing the appeal belatedly by 17 days, the assessee would have achieved any ulterior object or purpose. Accordingly, we are satisfied that the assessee has explained sufficient reason for the delay of 17 days in filing the appeal. Hence in the facts and circumstances of the case and in the interest of justice we condone the delay of 17 days in filing the appeal.

6. The assessee is a charitable and educational trust established in the year 1992 by Trust Deed Dt.20.5.1992. The assessee was granted a Registration under Section 12A of the Income Tax Act, 1961 (in short 'the Act') vide orderdt.16.9.1992. The assessee was also granted approval under Section 10(23C) of the Act by the Chief Commissioner of Income Tax, Bangalore-I vide order dt.26.3.2009. The assessee filed its

return of income on 11.7.2011 for the Assessment Year under consideration admitting NIL income after claiming revenue expenses including depreciation. The Assessing Officer while framing the assessment under Section 143(3) of the Act on 27.3.2014 determined the total income of the assessee at Rs.7,63,80,700. The Assessing Officer disallowed the claim of depreciation as well as made other additions towards advance fee, income from pharmacy and also denied the deduction towards accumulation of income allowed @ 15% on gross receipts. Apart from this, the Assessing Officer also denied the setting off of excess application of income for the Assessment Year 2010-11 against the income for the Assessment Year under consideration as well as the deduction of liability for capital expenditure. The assessee challenged the action of the Assessing Officer before the CIT (Appeals) but could not succeed. The assessee has filed the present appeal and raised the following grounds :

ñ 1. The Commissioner of Income-tax (Appeals) erred in not allowing the claim of depreciation of Rs. *10,73,00,1241-* to the appellants on the ground that the same amounted to double deduction.

2. The Commissioner of Income-tax (Appeals) erred in relying on the amendment made by Finance Act, 2014 as it was effective only from *1/4/2015* and the same is amendatory and prospective in nature as held by the Madras High Court in the case of V.R.Karpagam (54F) and in

the case of CIT vs. Coromandel Industries Ltd. (TCA No.443 of 2014 dated *16/12/14* uls 54EC) and therefore would not apply to the assessment year under consideration'.

3. The Commissioner of Income-tax (Appeals) erred in sustaining the addition of Rs. *1,27,67,5301-* being the advance fee received as income of the appellants- trust. .

4. The lower authorities ought to have seen that advance fee is only a liability of the appellants trust and they cannot considered as income of the appellant as long as the advance was taken to the fees accov-t in the subsequent years.

5. The Commissioner of Income-tax (Appeals) erred in sustaining the addition of *RS.1,10,25,8001-* representing the retention money as income of the appellants- trust.

6. The lower authorities ought to have seen that amount standing to the retention money account represent only opening balance and only a sum of RS.30.42.402 relate to the current assessment year and therefore the assessing officer was not justified in adding the entire sum of Rs. *1,10,25,8001-* as income of the appellants-trust.

7. The Commissioner of Income-tax (Appeals) erred in sustaining the addition of Rs. 50,66,973/- as income from pharmacy as business income of the appellants- trust.

8. The lower authorities ought to have seen tl~at the running of the pharmacy was incidental to the running of the medical college and hospital and therefore the income from pharmacy cannot be considered as business undertaking of the appellants-trust.

9. The Commissioner of Income-tax (Appeals) erred in sustaining the order of the assessing officer in allowing 15% accumulation on the net income of the appellant against gross receipts as claimed by the appellant.

10. The appellants submit that the findings of the lower authorities are contradictory to the decision of the Supreme Court in the case of ***CIT* v. *Programme for Community Organisation*** **[2001] 248 ITR *1/116* Taxman 608 (Se)** and also Board's Circulars and other case laws on the subject.

11. The Commissioner of Income Tax (Appeals) erred in not allowing set off of excess application of the assessment year 2010-11 against the income of the appellants trust for the assessment year 2011-12.

12. The Commissioner of Income-tax (Appeals) erred in deducting Rs.7,58,8,285 being the liability for capital expenditure on the grQund that the amounts were not spent for capital expenditure.

13. The lower authorities erred in misinterpreting the word "applied" for the word "spent". The appellants submit that even if the amount has been earmarked and allocated for the purpose of the institution, it will be deemed to have been applied for its purposes as laid down by the Allahabad High Court in the case of CIT Vs. Radhaswami Satsang Sabha (25 ITR 472).

14. The lower authorities ought to have seer, rhat the appellants had offered the income on mercantile basis and part of the receipts are not at all received by the appellants-trust during the year and therefore the assessing officer should have allowed deduction on such income which was not received during the year while computing the quantum of application of income when he has not allowed the expenses on due basis.

15. The appellants therefore pray that the Hon'ble Income-tax Appellate Tribunal may be pleased to

a) To allow depreciation of Rs. ·10,73,00,124/-

b) To delete the addition of Rs. 1,27,67,530/- being the advance fee received treated as income of the appellants-trust;

c) To delete the addition made towards retention money of Rs.*1,10,25,8001-*

d) Not to treat the pharmacy income as business income of the trust;

e) To allow accumulation of income at 15% on the gross receipts and not to restrict the same to the net inco.Åe of the appellants-trust;

f) To allow set off of excess application for the assessment year 2010-11 against the income computed for the assessment year 2011-12;

g) To allow the liability for capital expenditure of Rs.7,58,82,285 as application of income for capital expenditure;

h) To direct the assessing officer to allow deduction of the fees receivable while computing the income of the appellants for application of income as the income was not received during the yearò

7. Ground No.1 is general in nature and does not require any adjudication.

8. Ground No.2 is regarding claim of depreciation.

8.1 The assessee claimed depreciation of Rs.10,73,00,124. The Assessing Officer held that the assessee has claimed double deduction by first showing the outlay for capital asset as application of income and thereafter claiming depreciation on the capital asset as well. The Assessing Officer relied upon the decision of Hon'ble Supreme Court in the case of **Escorts & Another Vs. UOI & Others** 199 ITR 43 (SC). The CIT (Appeals) confirmed the disallowance of depreciation made by the Assessing Officer by holding that the claim of depreciation along with application of money of capital expenditure amounts double deduction which is not envisaged under the Income Tax Act, 1961. The CIT (Appeals) has also referred to the amended provisions of Section 11(6) by Finance Act, 2014 w.e.f. 1.4.2015.

9. Before us, the learned Authorised Representative of the assessee has submitted that this issue is covered by the various decisions of this Tribunal as well as Hon'ble High Court. He has relied upon the following decisions :

(i) ITA No.686/Bang/2015 Dt.8.1.2016. CMR Janardhana Trust Vs. Asst. Director of Income Tax.

(ii) ITA No.676/Bang/2014 Dt.20.3.2015 ACIT Vs. City Hospital Charitable Trust.

10. On the other hand, the learned Departmental Representative has submitted that the depreciation on the expenditure already claimed as exemption under Section 11 of the Act being application of income is not provided under the provisions of the IT Act. He has relied upon the orders of the Assessing Officer and CIT (Appeals).

11. We have considered the rival submissions as well as the relevant material on record. At the outset, we note that this issue has been considered by this Tribunal in a series of decisions. In the case of M/s. CMR Janardhana Trust (supra), the Tribunal has again considered and decided this issue in paras 15 to 17 as under :

" 15. We have heard the submissions of the ld. DR, who relied on the order of CIT(A) and the decision of the Hon'ble Delhi High Court in the case of DIT(E) Vs. Charanjiv Charitable Trust (2014) 43 taxmann.com 300 (Delhi). We have considered the order of the CIT(A). Identical issue came up for consideration before ITAT Bangalore Bench in the case of DDIT(E) v. Cutchi Memon Union (2013) 60 SOT 260 Bangalore ITAT, wherein similar issue has been dealt with by this Tribunal. In the aforesaid case, the assessee claimed depreciation and the AO denied depreciation on the ground that at the time of acquiring the relevant capital asset, cost of acquisition was considered as application of income in the year of its acquisition. The AO took the view that allowing depreciation would amount to allowing double deduction and

placed reliance on the decision of Hon'ble Supreme Court in Escorts Ltd. (supra). The CIT(A), however, allowed the claim of assessee. On further appeal by the Revenue, the Tribunal held as follows:-

"20. We have considered the rival submissions. If depreciation is not allowed as a necessary deduction for computing income of charitable instituitions, then there is no way to preserve the corpus of the trust for deriving the income as it is nothing but a decrease in the value of property through wear, deterioration, or obsolescence. Since income for the purposes of section 11(1) has to be computed in normal commercial manner, the amount of depreciation debited in the books is deductible while computing such income. It was so held by the Hon'ble Karnataka High Court in the case of CIT Vs. Society of Sisters of St. Anne 146 ITR 28 (Kar). It was held in CIT vs. Tiny Tots Education Society (2011) 330 ITR 21 (P&H) , following CIT vs. Market Committee, Pipli (2011) 330 ITR 16 (P&H) : (2011) 238 CTR (P&H) 103 that depreciation can be claimed by a charitable institution in determining percentage of funds applied for the purpose of charitable objects. Claim for depreciation will not amount to double benefit. The decision of the Hon'ble Supreme Court in the case of Escorts Ltd. 199 ITR 43 (SC) have been referred to and distinguished by the Hon'ble Court in the aforesaid decisions.

21. The issue raised by the revenue in the ground of appeal is thus no longer res integra and has been decided by the Hon'ble Punjab & Haryana High Court in the case of CIT v. Market Committee, Pipli, 330 ITR 16 (P&H). The Hon'ble Punjab & Haryana High Court after considering several decisions on that issue and also the decision of the Hon'ble Supreme Court in the case of Escorts Ltd. (supra), came to the conclusion that depreciation is allowable on capital assets on the income of the charitable trust for determining the quantum of funds which have to be applied for the purpose of trusts in terms of section 11 of the Act. The Hon'ble Punjab & Haryana High Court made a reference to the decision of the Hon'ble Supreme Court in the case of Escorts Ltd. (supra) and observed that the Hon'ble Supreme Court was dealing with a case of two deductions under different provisions of the Act, one u/s. 32 for depreciation and the other on account of expenditure of a capital nature incurred on scientific research u/s. 35(1)(iv) of the Act. The Hon'ble Court thereafter held that a trust claiming depreciation cannot be equated with a claim for double deduction. The Hon'ble Punjab & Haryana High Court has also made a reference to the decision of the Hon'ble Karnataka High Court in the case of CIT v. Society of Sisters of Anne, 146 ITR 28 (Kar), wherein it was held that u/s. 11(1) of the Act, income has to be computed in normal commercial manner and the amount of depreciation debited in the books is deductible while computing such income. In view of the aforesaid decision on the issue, we are of the view that the order of the CIT(A) on the above issue does not call for any interference.

22. Consequently, ground No.5 raised by the revenue is dismissed."

16. It is no doubt true that the Hon'ble Delhi High Court in the case of Charanjiv Charitable Trust (supra) has taken a contrary view but then when two views are possible on an issue, the view favourable to the Assessee has to be followed. The decision of the Hon'ble Punjab & Haryana High Court is in favour of the Assessee and has followed the decision of the Hon'ble Karnataka High Court in the case of Society of Sisters of Anne (supra). The interpretation to the contrary given by the CIT(A) on the decision of the Hon'ble Karnataka High Court in the case of Society of Sisters of Anne (supra) cannot therefore be accepted. We may also add that the legal position has since been amended by a prospective amendment by the Finance (No.2) Act, 2014 w.e.f. 1.4.2015 by insertion of subsection (6) to section 11 of the Act, which 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."

17. As already stated, the aforesaid amendment is prospective and will apply only from A.Y. 2015-16. In view of the above legal position, we are of the view that the order of the CIT(A) has to be reversed. Consequently grounds No.4 & 5 raised by the Assessee are allowed."

There is no dispute that the amendment of section 11(6) of the Act by the Finance Act, 2014 is prospective w.e.f. 1.4.2015 and therefore the said amended provision is not applicable for the assessment year under consideration. Following the earlier decisions of this Tribunal, we decide this issue in favour of the assessee and against the revenue.

12. Ground No.3 is regarding the addition on account of advance fee received treated as income of the assessee for the year under consideration.

12.1 The assessee has claimed advance receipt of Rs2,24,27,130 in its Balance Sheet in respect of collection from the students of medical

college, dental college and hospital. The Assessing Officer treated the same as income of the assessee on the ground that this receipt is an additional fees named as development fees received from the students in the first year itself apart from the regular tuition fees fixed by the Government which was received from the students on the year to year basis. The Assessing Officer has supported its finding by the statement recorded during the survey under Section 133A of the Act on 2.7.2010. The assessee challenged the action of the Assessing Officer before the CIT (Appeals) and contended that the document obtained during the survey did not pertain to the impugned assessment year. The CIT (Appeals) did not impress with the contention of the assessee and confirmed the addition made by the Assessing Officer on this account.

12.2 Before us, the learned A.R. of the assessee has submitted that the actual amount during the year was only Rs.1,27,67,530 out of the total sum shown in the Balance Sheet of Rs.2,24,27,130 and the balance represents the opening balance which cannot be considered as income of the assessee. He has submitted that this fact was pointed out to the authorities below but they have completely ignored the same. The

Assessing Officer has given more stress to the fact that the assessee has used the advances for its capital and revenue expenditure and therefore it was treated as income. He has further submitted that the CIT (Appeals) has observed that the assessee has not deposited the advance fees in a separate account however there is no requirement for deposit advance fees in a separate bank account. He has further contended that the assessee produced sufficient evidence in support of the fact that the amount was only advance fees with full details from the persons whom the advance was received and the ledger copy of advance fees were also produced to establish the transfer of the part of such advance as income of the year. Thus the learned Authorised Representative has referred to page 11 of the paper book and submitted that the assessee produced ledger account to show that the details including the opening balance and the tuition fees received in advance as well as the closing balance. Thus when the fees does not pertain to the assessment year under consideration the same cannot be considered as income of the assessee for the year under consideration.

12.3 On the other hand, the ld. D.R. has relied upon the orders of the authorities below and submitted that when the assessee has not maintained a separate bank account for the advance fees and it was also admitted during the survey that the assessee has received this amount as development fees from the students of the first year apart from the tuition fees fixed by the Government then the A.O. is justified to add this amount in the income of the assessee.

12.4 We have considered the rival submissions as well as the relevant material on record. The Assessing Officer has made the addition of this amount as income of the year on the ground that the assessee has used this amount for revenue as well as capital expenditure during the year. Further the Assessing Officer has placed reliance on the statement recorded under Section 133A of the Act. It is pertinent to note that neither the Assessing Officer nor the CIT (Appeals) has disputed this fact that this amount has been duly recorded in the books of accounts as advance tuition fees. The assessee filed the ledger account wherein the details of the opening balance, the advance tuition fees received during the year as well as closing balance has been shown. The correctness of

the accounts has not been examined or disputed by the Assessing Officer or the CIT (Appeals). It is pertinent to note that if an advance fees is received by the assessee for a particular academic year spread over more than one financial year then the part of the fees received by the assessee which relates to the academic year falling in next financial year cannot be treated as income of the assessee for the year under consideration. It is well settled law that the statement recorded under Section 133A cannot be sole basis for making an addition or disallowance without corroborating evidence. In this case, the authorities below have not shown in their findings that any corroborating evidence was found to support this statement recorded under Section 133A of the Act. In view of the above facts and circumstances, we find that the addition made by the Assessing Officer based on the statement recorded under Section 133A and further by giving a reason that the assessee has used the advance fees received for revenue as well as capital expenditure is not justified and accordingly we set aside the orders of authorities below qua this issue and remit the same to the record of the Assessing Officer to re-

examine the issue from the record produced by the assessee and then decide the same as per law.

15. Ground Nos. 4 to 6 is regarding the addition on account of "retention money".

15.1 The Assessing Officer noted that at the time of passing the contract bill, the assessee retained certain portion of the bill amount captioned as "Retention Money" and such amount would be paid to the contractor after completion of the project under construction. Till then the said amount would be reflected in the Balance Sheet as liability. The Assessing Officer made addition of the said amount on the ground that the amount was mixed with the other funds of the assessee and used for the purpose of meeting both revenue and capital expenditure. It was noted that the retention money was used for the purpose of purchasing other assets. Accordingly, the Assessing Officer held that the retention money held by the assessee of Rs.1,10,25,800 would form part of income for the purpose of application under section 11(1)(a) of the Act. The assessee challenged the action of the Assessing Officer but could not

succeed as the CIT (Appeals) has concurred with the view of the Assessing Officer.

15.2 Before us, the learned Authorised Representative of the assessee has submitted that the retention money cannot be treated as income as held in various decisions of the Hon'ble High Courts. He has further contended that the retention money retained by the assessee was paid subsequently to the contractors in the subsequent year whenever the contract is completed and it is a clear liability of the assessee to repay the amount. Such amount due to others cannot be treated as income of the assessee. Alternatively the ld. AR has submitted that the amount of Rs.1,10,25,800 standing in the retention money account and the assessed as income mainly represent the amount lying as opening balance of Rs.79,83,398 in the said account and only a sum of Rs.30,42,402 relates to the current assessment year. Thus the Assessing Officer was not justified in adding the entire amount of Rs.1,10,25,800 even if the addition is warranted.

15.3 On the other hand, the learned Departmental Representative has submitted that the Assessing Officer as well as the CIT (Appeals) has

given the finding that the assessee has claimed the use of said amount as application of money under Section 11(1)(a) and therefore the Assessing Officer correspondingly treated the said amount as income of the assessee. He has relied upon the orders of the authorities below.

15.4 We have considered the rival submissions as well as the relevant material on record. As regards the question of treating the retention money as income of the assessee is concerned, on principle, we are of the view that when the retention money is retained by the assessee for refund in future on completion of project then it is only a liability in the hand of the assessee and therefore the same cannot be treated as income. However at the same time the assessee cannot be allowed to take the benefit of the said amount being used for expenses and investment being application of income. Therefore if the assessee is having sufficient fund to cover this amount then the claim of the assessee under Section 11(1)(a) on account of application of income would not be effected otherwise to the extent of the amount used from the retention money the claim would be reduced. Accordingly, we direct the Assessing Officer to verify all the relevant facts on this issue and then

decide the same only on question of allowing the deduction of application of income and not treating the retention money as income.

16.1 Ground Nos.7 & 8 are regarding addition of Rs.50,66,973 as income from pharmacy. The assessee runs pharmacy for the purpose of medical college and hospital attached to the medical college. The assessee does not maintain separate books of accounts for pharmacy and the transactions pertaining to it are recorded in the books of accounts maintained in the name of college and hospital. The Assessing Officer accordingly treated the said income as business income of the assessee from pharmacy. The assessee challenged the action of the Assessing Officer is before the CIT (Appeals) and contended that since the assessee is also running the pharmacy in the hospital premises itself, it cannot be treated as business activity but it is incidental to running a hospital and would constitute an integral part of the hospital run by the assessee. Thus the assessee contended that it is an incidental to the objectives of the trust. It was also contended that sales of the pharmacy is duly considered for the purpose of application of income. The CIT (Appeals) did not agree with the contention of the assessee and

observed that the assessee has not furnished any evidence regarding the break up of the medicines purchased from the pharmacy by different categories of the patients and outside public. Accordingly, the CIT (Appeals) has confirmed the action of the Assessing Officer.

16.2 Before us, the learned Authorised Representative of the assessee has submitted that the assessee is running a pharmacy from the hospital attached to the medical college which has not been disputed by the Assessing Officer however the addition is made by the Assessing Officer because of the reason that no separate books of accounts were maintained by the assessee. The learned Authorised Representative has submitted that it is having a separate trading account for the pharmacy wherein all the charges and sales are duly accounted for and separate stock register was also maintained. Once the pharmacy attached to the medical college/hospital is not a business undertaking, the provisions of section 11(4) and 11(4A) are not applicable. He has referred the trading account maintained in respect of the pharmacy at page 16 of the paper book and submitted that though separate books are not maintained however separate accounts are maintained in respect of the pharmacy.

The learned Authorised Representative has further submitted that the Assessing Officer has wrongly added Rs.15,35,009 with the closing stock of Rs.35,31,964 instead of deducting the same for computing the gross profit from the pharmacy. He has submitted that the correct gross profit from the pharmacy would be Rs.19,96,955 as it is clear from the trading account at page 16 of the paper book. He has relied upon the decision of Chennai Bench of the Tribunal in the case of Franciscan Sisters of St. Joseph Society Vs. JCIT Dt.6.1.2014 in ITA No.1897/Ch/2013.

16.3 On the other hand, the learned Departmental Representative has submitted that the activity of the pharmacy is business in the nature and the Assessing Officer and CIT (Appeals) have rightly treated the same as business income of the assessee.

16.4 We have considered the rival submissions and the relevant material on record. The CIT (Appeals) has rejected the claim of the assessee on the ground that the assessee has not furnished the details regarding the sales made to the indoor and outdoor patients of the hospital of the assessee as well as outside public. In such a case, the entire amount cannot be treated as the income earned by the assessee

from the sale of medicines to the outside public when the pharmacy is within the premises of the hospital and attached to the hospital. It is pertinent to note that a dispensary/pharmacy is inevitable and indispensable facility for the hospital. The necessity of the pharmacy cannot be ruled out as there are regular emergency situation requiring immediate medicines and other supply of pharmacy for emergency treatment as well as operation/surgery purposes. The Chennai Benches of the Tribunal in case of Franciscan Sisters of St. Joseph Society (supra) has held in paras 7 to 15 as under :

" 7. In the light of above observation, the Assessing Officer treated the above receipts accounted by the assessee as relating to business activities and accordingly denied exemption under Section 11 of the Income-tax Act, 1961. In respect of receipts arising out of other activities, such as running of hospital, schools, etc., the assessing authority has granted the benefit of Section 11 to the assessee-society. A portion of the income of the assessee-society has been brought to tax on the ground that certain activities involve carrying on of activities in the nature of business.

8. When the matter was taken in first appeal before CIT(Appeals), he confirmed the order of the assessing authority and dismissed the appeal filed by the assessee. The assessee is aggrieved and therefore, the second appeal before the Tribunal.

9. The relevant grounds raised in the present appeal read as below:-

"(1.1) The Commissioner of Income Tax (Appeals) erred in confirming the order of assessment denying exemption u/s.11 of the Income-tax Act.

(1.2) The Commissioner of Income Tax (Appeals) erred in observing that the assessee does not deny the carrying on activities of typewriting institute, women's hostel, crèche and pharmacy on a profitable basis.

(1.3) The finding of the Commissioner of Income Tax (Appeals) that the appellant did not deny selling of medicines to outsiders. Even assuming so, sale of medicines is only an object of providing medical relief to the poor virtually at cost and would not make it an object of profit.

(1.4) The Commissioner of Income Tax (Appeals) went wrong in holding that the appellant runs dispensaries in two places in a commercial manner, which finding is perverse; and in any event providing medical relief is covered in the first two limbs of Sec.2(15).

(2.1) The Commissioner of Income Tax (Appeals) went confirming the disallowance of depreciation and that it amounts to double deduction.

(2.2) The Commissioner of Income Tax (Appeals) failed to follow the various authorities cited before him and went wrong in relying on a decision which is not applicable to the facts of the case."

10. We heard Shri G. Baskar, the Advocate, appearing for the assessee-society and Shri Shaji P. Jacob, the Additional Commissioner of Income Tax, appearing for the Revenue.

11. The crucial question to be answered in the present appeal is whether certain activities pointed out by the assessing authority are in fact carried out in the nature of business/commercial activities.

12. The first item so considered by the assessing authority is the receipts from pharmacy section. It is to be seen that assessee is running a full-fledged general hospital at St. Thomas Mount. The assessing authority has, no doubt, accepted the charitable nature of activities carried on by the assessee-society in respect of that hospital. The assessee is also running a dispensary. Number of patients are visiting the hospital and dispensary on a daily basis. Patients are admitted as in-patients and they are also treated as out-patients. For all the in-patients undergoing treatment in the hospital, medicines are delivered from the pharmacy run by the assessee-society. In respect of out-patients also, most of the patients purchase medicine from the pharmacy run by the assessee. A few of the out-patients might purchase medicines from outside. Likewise, few from the public living nearby to the hospital may purchase medicines from the pharmacy run by the assessee-society. The purchase of medicines by the public is absolutely negligible. That negligible amount of sales, if any, cannot decide the nature of activities carried on by the assessee in running the pharmacy in its hospital premises. The pharmacy is not situated in any commercial area or outside the hospital compound with the intention to invite the public at large to purchase medicines from the pharmacy run by the assessee-society. The assessee-society is running the pharmacy within the premises of the hospital and as part of the hospital itself. It is clear that the pharmacy is run by the assessee-society only for the purpose of running the hospital. The hospital cannot be run without a pharmacy attached to it. If an assessee wants to run a

hospital, running of the pharmacy is also a must. Therefore, running of the pharmacy by the assessee-society is not an activity carried on by the assessee incidental to the running of the hospital; but, on the other hand, it is an integral part of the hospital run by the assessee.

13. In these circumstances, the assessing authority has erred both on facts and in law in holding that the pharmacy run by the assessee-society is a separate unit, running as a business. The Assessing Officer has observed that the assessee-society has maintained separate accounts for the pharmacy section. Maintaining accounts separately for pharmacy section does not decide the nature of the activities carried on by the assessee through running of the pharmacy. Separate accounts are maintained by the assessee for the purpose of proper accounting and internal control. Even in the case of charitable hospital, it is not possible to provide medicines to every patient, free of cost. It is only in very deserving cases, a charitable institution could provide medicines free of cost. Therefore, running of a pharmacy set up as part of the hospital, involves purchase and sale of medicines. Therefore, not much discussion is necessary to come to a conclusion that in the case of a full-fledged hospital, pharmacy is an essential part thereof and as such, the pharmacy is run as part of the hospital establishment.

14. In the facts and circumstances, we find that the collection received by the assessee from its pharmacy section cannot be excluded from computing the income eligible for exemption under Section 11 of the Income-tax Act, 1961. The pharmacy collection also forms part of the collections accounted by the assessee from its charitable activities. Therefore, Assessing Officer is directed to give exemption under Section 11 in respect of the pharmacy collection as well.

15. Once the pharmacy collection is treated as part of its charitable activities, the total of the remaining items work out to less than Rs. 10 lakhs. The law has provided as on date an exclusion of Rs. 10 lakhs from the rigours of denying exemption under Section 11, in respect of activities involving carrying on business or similar activities. The total of collection from typewriting institute, working women's hostel and crèche work out to less than Rs. 10 lakhs and therefore, by virtue of the exclusion clause, those amounts also cannot be considered for disallowing exemption under Section 11."

In view of the above discussion as well as the decision of the Chennai Benches of the Tribunal (supra), we decide this issue in favour of the assessee.

17.1 Ground Nos.9 & 10 are regarding allowing the 15% accumulation on net income of the assessee instead of gross receipts as claimed by the assessee.

17.2 We have heard the ld. A.R. as well as the ld. D.R. and considered the relevant material on record. The ld. A.R. of the assessee has submitted that this issue is covered by the decision of the Tribunal in the case of Capuchin Friar Services of Society Vs. DCIT Dt.9.10.2015 in ITA No.367/Bang/2015.

17.3 On the other hand, the learned Departmental Representative has relied upon the orders of the authorities below.

17.4 We find that the Tribunal in the case of Capuchin Friar Services of Society (supra) has dealt with an identical issue in paras 10 & 11 as under :

" 10. We find that the issue is covered by the Co-ordinate Bench decision in the case of Jyothy Charitable Trust in ITA No.662/Bang/2015. The relevant extract is reproduced below:-

"15. The third issue that arises for consideration in this appeal is as to whether 15% accumulation for application in future has to be calculated on gross receipts or net receipts after deduction of revenue expenditure. The Assessee claimed accumulation of income for application for charitable purpose at 15% of the gross receipts. The AO was of the view that accumulation will be allowed only to the extent of 15% of the income after revenue expenditure. In other words income to be set apart u/s.1 1(1)(a) of the Act has to be

computed at 15% of the net income i.e., gross receipts minus revenue expenditure and not on the gross receipts as claimed by the Assessee. Since in the case of the Assessee, the gross receipts after revenue expenditure was nil, the AO denied the benefit of accumulation to the Assessee.

16. On appeal by the Assessee, the CIT(A) confirmed the order of the AO. Hence ground No-4 raised by the Assessee before the Tribunal. 17. The issue to be decided is therefore as to whether for the purpose of computing accumulation of income of 15% under section 11(1)(a) of the Act, one has to take the gross receipts or gross receipts after expenditure for charitable purpose i.e., the net receipts. This is issue is no longer res integra and has been decided by the Special Bench Mumbai in the case of Bai Sonabai Hirji Agiary Trust Vs. ITO 93 lTD 0070 (SB). The facts in the aforesaid case were that the assessee was a public charitable trust enjoying exemption under s. 11 of the IT Act. As per the requirement of s. 11(1) of the IT Act, as it prevailed at that point of time, the assessee had to apply 75 per cent of its income for the objects and purposes of the trust and the assessee was permitted to accumulate or set apart up to 25 per cent of its income, which was subject to fulfillment of other conditions. While calculating the aforesaid 25 per cent, the important question which arose was as to whether for this purpose, the gross income earned by the assessee is relevant or the income as computed in accordance with the provisions of IT Act. In other words, whether outgoings from out of gross income which are in the nature of application of income, should be first deducted from the gross income and 25 per cent of only the remaining amount should be allowed to be accumulated or set apart. The Special Bench of the ITAT on the issue held as follows:-

9. Coming to the merits of the issue, we are of the view that the same is clearly covered by the decision of the Hon'ble Supreme Court in the case of CIT vs. Programme for Community Organization (supra). In the decision, their Lordships, after taking note of provisions of sec. 11(l)(a), have held as under: "Having regard to the plain language of the above provision, it is clear that a charitable or religious trust is entitled to accumulate twenty-five per cent of its income derived from property held under trust. For the present purposes, the donations the assessee received, in the sum of Rs. 2,57,376, would constitute its property and it is entitled to accumulate twenty-five per cent thereout. It is unclear on what basis the Revenue contended that it was entitled to accumulate only twenty five per cent of Rs.87,010. For the aforesaid reasons, the civil appeal is dismissed." It is clear from the above that deduction of twenty-five per cent was held to be allowable not on total income as computed under the IT Act. Any amount or expenditure, which was application of income, is not to be considered for determining twenty five per cent to be accumulated. Their Lordships, as noted earlier, affirmed the decision of Kerala High Court in (1997) 141 CTR (Ker) 502 : (1997) 228 ITR 620 (Ker) (supra) wherein it is held as under: "At the outset, the statutory language of s. u(i)(a) of the IT Act, 1961, relates to the income derived by the trust from property. The trust is required to be wholly for charitable or religious purposes, and the income is expected to

have relation to the extent to which such income is applied to such purposes in India. It is thereafter the statutory provision proceeds further that such income is not to be understood to be in excess of 25 per cent of the income from such properties. In other words, the very language of the statutory provision under consideration sets apart 25 per cent of the income from the source of property with reference to the extent to which such income is applied for such purposes, charitable or religious. In other words, for the purpose of s. ii(i)(a) of the Act, the income in terms of relevance would be the income of the trust from and out of which 25 per cent is set apart in accordance with the spirit of the statutory provision." This means that, when it is established that trust is entitled to full benefit of exemption under s. 11(1), the said trust is to get the benefit of twenty-five per cent and this twenty-five per cent has to be understood as income of the trust under the relevant head of s. 11(1). In other words, income that is not to be included for the purpose of computing the total income would be the amount expended for purposes of trust in India. Their Lordships in the above case have emphasized on the clear and unambiguous language of s. 11(1)(a) and decided the matter on the basis of the same. It has been held that as per the statutory language of the above section the income which is to be taken for purpose of accumulation is the income derived by the trust from property. If both the decisions are carefully read, it becomes evident that any expenditure which is in the shape of application of income is not to be taken into account. Having found that trust is entitled to exemption under s. 11(1), we are to go to the stage of income before application thereof and take into account 25 per cent of such income. Their Lordships have pointed that the same has to be taken on "commercial" basis and not "total income" as computed under the IT Act. Their Lordships in the decided case rejected the contention of the Revenue that the sum of Rs 1,70,369 which was spent and applied by the assessee for charitable purposes was required to be excluded for purpose of taking amount to be accumulated. Having regard to the clear pronouncement of their Lordships of the Supreme Court, it is difficult to accept that outgoings which are in the nature of application of income are to be excluded. The income available to the assessee before it was applied is directed to be taken and the same in the present case is Rs. 3,42,174. Twenty five per cent of the above income is to be allowed as a deduction. Similar view has also been taken by the Hon'ble Madhya Pradesh High Court in Parsi Zorastrian Anjuman Trust vs. CIT (supra). No reason whatsoever has been given by the Revenue authorities for deducting Rs. 2,17,126 in this case for purposes of s. I 1(1)(a). The decision cited on behalf of the Revenue did not take into account the decision of the Supreme ITA No.367/Bang/2015 Page 10 of 11 Court referred to above. The circular of CBDT has also been considered by the Hon'ble Kerala High Court in its decision referred to above. Accordingly, the question referred to is answered in the affirmative and in favour of the assessee."

18. The aforesaid decision clearly supports the plea of the Assessee. Following the same, we hold that the accumulation u/s 11(1)(a) of the Act should be allowed as claimed by the Assessee. Ground No.4 raised by the Assessee is accordingly allowed."

11. Following the decision of the co-ordinate bench of the Tribunal, we set aside the order of the CIT(A)."

Following the decision of the co-ordinate bench of this Tribunal, we decide this issue in favour of the assessee and direct the Assessing Officer to consider the allowable accumulation of income at 15% of the gross receipts.

18.1 Ground No.11 is regarding setting off excess application of income of assessment year 2010-11 against the income of the assessment year 2011-12.

18.2 At the time of hearing, the learned Authorised Representative stated that the assessee does not press this ground and the same may be dismissed.

18.3 On the other hand, the learned Departmental Representative has not objected to dismissal of the ground.

18.4 Accordingly, we dismiss the ground No.11 as not pressed.

19.1 Ground Nos.12 & 13 are regarding disallowance of deduction of Rs.7,58,82,285 being the liability for capital expenditure. The Assessing Officer has made disallowance of claim of capital expenditure to the tune

of Rs.7,58,82,285 which shown as increase in the liability for the capital expenditure on the ground that this was not an actual expenditure incurred by the assessee. The assessee submitted that the debt balance of the various party accounts included in the sundry creditors account to the tune of Rs.1,07,58,875 representing the advance payment made to the parties to be reduced from the loan funds. The authorities below did not accept the claim of the assessee on the ground that no evidence was submitted by way of details of those parties to whom advances have been given by the assessee. Further the purpose of advances and nature of transaction was also not supported by the evidence. Accordingly, they doubted the genuineness of the claim.

19.2 Before us, the learned Authorised Representative has submitted that even if the amount has been ear marked and allocated for the purpose of Institution, it will be deemed to have been applied for its purpose as held by the Hon'ble Allahabad High Court in the case of CIT Vs. Radhaswami Satsung 25 ITR 472. He has further contended that the actual payment is irrelevant for the purpose of finding out whether there has been an application of fund and if the liability for expenditure has

been incurred it would be sufficient as held by the Hon'ble Andhra Pradesh High Court in the case of CIT Vs. Trustees of HEH The Nizam's Charitable Trust 131 ITR 497. The learned Authorised Representative has further contended that the assessee has offered the income on mercantile basis and part of receipts are not still received by the assessee trust during the year then the deduction aginst such income which was not received during the year should have been allowed in respect of computing the quantum of application of income on account of expenses on due basis.

19.3 On the other hand, the learned Departmental Representative has relied upon the orders of the authorities below and submitted that the assessee has failed to prove the purpose of amount to be incurred by the assessee and further the details of the parties to whom it was to be paid against the said expenses were not furnished. Therefore, in the absence of necessary details, the claim of the assessee cannot be accepted.

19.4 We have considered the rival submissions and the relevant material on record. The dispute is regarding the claim of capital expenditure which was shown as a liability and not actually paid during the year under consideration. The assessee also claimed that the advances have been made to the parties in respect of the prospective expenditure. However, the authorities below have given the finding that the nature of transaction and the details of the parties to whom the advances have been claimed to have been given has not been furnished by the assessee. So far as the actual payment is concerned, the issue is settled by the judgment of Hon'ble Allahabad High Court as well as Hon'ble Andhra Pradesh High Court as referred above. However in the case of the assessee, the Assessing Officer as well as the CIT (Appeals) has doubted the expenditure laid out by the assessee whether by the payment or of credit. Therefore we are of the considered opinion that this issue require a proper verification on production of the relevant evidence and details by the assessee. Accordingly, this issue is set aside to the record of the Assessing Officer for proper verification and

examination of the record to be produced by the assessee and then decide the same as per law.

20. In the result, the appeal of the assessee is partly allowed.

Order pronounced in the open court on the 13th day of July, 2016.

Sd/-	Sd/-
(INTURI RAMA RAO)	**(VIJAY PAL RAO)**
Accountant Member	Judicial Member

*Reddy gp

Copy to :

1. Appellant
2. Respondent
3. C.I.T.
4. CIT(A)
5. DR, ITAT, Bangalore.
6. Guard File.

By Order

Asst. Registrar, ITAT, Bangalore