In the Income-Tax Appellate Tribunal,
Delhi Bench 'D', New Delhi

Before : Shri Bhavnesh Saini, Judicial Member And
Shri L.P. Sahu, Accountant Member

ITA No. 3302/Del./2015
Assessment Year: 2010-11

M/s. Krishna Charitable Society, 13th K.M. Stone, NH-58, Murad Nagar, Ghaziabad. PAN- AAATK2465P **(Appellant)**	**vs.**	Addl. CIT, Range-I, Ghaziabad. **(Respondent)**

Assessee by	S/Sh. Somil Agarwal & Deepesh Garg, Advocates
Revenue by	Sh. Amit Jain, Sr. DR

Date of Hearing	28.05.2018
Date of Pronouncement	30.05.2018

ORDER

Per L.P. Sahu, A.M.:

This is an appeal filed by the assessee against the order of ld. CIT(A), Muzaffarnagar dated 02.03.2015 for the assessment year 2010-11 on the following grounds :

1. That on the facts and circumstances of the case and in the law the learned commissioner of income-tax (Appeals) has grossly erred in confirming the additions made by Assessing Officer treating Hostel facility provided to college students as business of the appellant society considering the alleged surplus of Rs.4,05,65,348/- as business income in the hand of appellant society. The observation made and basis adopted are erroneous, unjustified, unwarranted, bad in law and are without sufficient material on records.

2. That the Learned Commissioner of Income-tax (Appeals) has grossly erred in confirming the additions made by A.O. holding that hostel/ mess facility for students is separate business activity in terms of section 11(4A) merely on irrelevant consideration like surplus should have been reimbursed to students or used to reduce fee or giving contents of some website about fall in demand for rooms at Meerut etc,

even after accepting that maintenance of such hostel is mandatory as per the concerned controlling Authority and it was an integral and inalienable part of educational activity. Thus finding is perverse.

3. That the learned assessing officer has failed to appreciate the fact that maintaining hostel/mess facility to students is an essential & integral part of "education" u/s 2(15) of the Act and not a separate business activity covered under section 11(4A) as also accepted in the past assessments and there is no change in law about the first three limbs of section 2(15) even after 01.04.2009, , hence overall surplus of the society as worked out in Income & Expenditure account of the society and consequently used and invested in the fulfillment of the main objectives of the society resulting into application of income and as such exempt under the provisions of section 11 to 13 of the Act and learned Commissioner of Income-tax (Appeals) has also confirmed the view taken by Assessing officer.

4. That the Learned Commissioner of Income-tax (Appeals) has also erred on facts and in law to confirm the disallowance made by Assessing officer Rs. 5,70,79,3397- being the deprecation as claimed by debiting the same to the Income & Expenditure Account of the Society for the purposes of working out the surplus in the hands of the society. The assessing officer has failed to bring any material on records to establish that the appellant has availed hundred percent application of the value of capital expenditure in the year of investment thereby inviting disallowance of the depreciation on such capital expenditure quoting double deduction. During the course of assessment proceedings, the Society's council has submitted details of Gross Income and its Application of income of relevant year and preceding five years to justify that addition in Fixed Assets could not be utilized as application of income in past years due to excess utilization in past years, hence the same could not be termed as double claim of depreciation. Hence the disallowance of the depreciation is not only unjustified but it is illegal and bad in the eyes of law.

2. The brief facts of the case are that the assessee society is running an engineering college and it is registered with Registrar of societies as well as under section 12AA of the IT Act. Assessee filed its return of income declaring nil income. The case was selected for scrutiny. In the assessment proceedings the Assessing Officer noticed that assessee, in addition to educational activities, also provide hostel and transport facilities to the students in its college. After seeking the explanation of the assessee, the Ld. AO was of the view that generating of surplus on account of transportation, hostel running or any other activity falls under business category, which is incidental to the business. Therefore

according to him the transportation and hostel running itself is not an educational activity and can at the most be said to be incidental to the object of the trust. Therefore, according to him the provisions of sub-section (4A) of section 11 would come into play to deal with these activities. He further held that educational activity and hostel in transportation activities are separable, for which separate books of accounts need to be maintained. He therefore relying on various decisions and examining the income and expenditure account of hostel recepts and expenses, determined the net surplus of the hostel activities at Rs.4,05,65,348/- and charged it to tax as business income of the assessee.

3. It was further observed by the Assessing Officer that the assessee trust has claimed a depreciation of Rs. 57079339/– , which was disallowed by him on the premise that hundred percent application of capital expenditure has already been allowed to the assessee in the year of investment and now the claim of the depreciation on the same assets again amounts to double deduction. He, therefore, following the decision of the Hon'ble Supreme Court in case of escorts Ltd and Querela High Court decision in case of Iessi medical institutions. Versus CIT, disallowed the depreciation of Rs. 5,70,79,339/–. Accordingly, total taxable income of the assessee was determined at Rs. 4,05,65,348/-. This order of assessment was challenged before the ld. CIT(A), where the first appellate authority, after considering the submissions of the assessee and various decisions, dismissed the appeal of the assessee. Aggrieved, the assessee is in appeal before the Tribunal.

4. Assailing the impugned order, the ld. AR submitted at the outset that identical issues came for consideration before the Tribunal in assessee's own

case for A.Y. 2011-12 (ITA No. 4639/Del./2015), wherein the co-ordinate Bench of Tribunal in the similar facts and circumstances, have deleted the addition vide order dated 15.09.2017. Therefore, the present issues are squarely covered in favour of the assessee by the aforesaid decision. The ld. DR, on the other hand, opposing the contention of assessee, relied on the orders of the authorities below.

5. Having considered the rival submissions and gone through the entire material on record, we find that the issues and additions involved in this appeal are squarely covered in favour of the assessee by the decision of Co-ordinate Bench in the case of assessee itself for A.Y. 2011-12 (supra). The relevant findings reached by the Tribunal are being reproduced for ready reference :

11. "We have carefully considered the rival contentions and perused the orders of the lower authorities and other judicial pronouncement placed before us. In the grounds No. 1 – 3 assessee is contesting that addition made by the Ld. assessing officer treating hostel places provided to college student as business of the society and text the alleged surplus of Rs. 9887873/– as business income of the appellant. It was not the case of the revenue that assessee has rented out these hostels to the students who are not parted education in the above institutes. It was also not the case of revenue that assessee is primarily engaged in the business of providing hostel facilities to the students. The above issue is no more res Integra in view of the decision of the Hon'ble Karnataka High Court in CIT versus Karnataka lingayat education society in ITA No. 5004/2012 dated 15/10/2014 wherein it has been held that providing hostel to the students/staff working for the society's incidental to achieve the object of providing education, namely the object of the society. In view of this we are of the opinion that providing of hostel facilities and transport facilities to the student and staff member of the educational Institute cannot be considered as business activity but is subservient to the object of educational activities performed by the society. We are also supported by our view by the decision of the Hon'ble Allahabad High Court in IIT versus state of UP, (1976) 38 STC 428 (All) wherein question arose in Indian Institute of Technology v. State of U.P. (1976) 38 STC 428 (All) with respect to the visitors' hostel maintained by the Indian Institute of Technology where lodging and boarding facilities were provided to persons who would come to the Institute in connection with education and the

academic activities of the Institute. It was observed that the statutory obligation of maintenance of the hostel, which involved supply, and sale of food was an integral part of the objects of the Institute nor could the running of the hostel be treated as the principal activity of the Institute. The Institute could not be held to be doing business. Further meals being supplied in a hostel to the scholars, visitors, guest faculty etc. can not be exigible to sales tax where main activity is academics as held in Scholars home Senior Secondary School 42 VST 530. Further, the reliance placed by the lower authorities on the decision of the Hon'ble Madras High Court in case of DCIT versus Wellington charitable trust is also misplaced because in that case, the only activity of that particular trust was renting out of the property and not education. We are also not averse to considering the latest legal developments too where in the recently introduced new legislation of Goods and service tax it is provided that no GST would be chargeable on the hostel fees etc recovered from the Students , faculties and other staff for lodging and boarding as they are engaged in education activities . Therefore we reverse the finding of the lower authorities and held that transport and hostel facilities surplus cannot be considered as business income of the assessee society which is mainly engaged in business activities and these activities are subservient to the main object of education of the trust. In the result 1 – 3 of the appeal of the assessee are allowed.

12. Ground No. 4 of the appeal of the assessee is against disallowance made by the assessing officer of depreciation on the assets which have already been claimed and allowed to the assessee as application of funds. Hon'ble Delhi high court's decision in the case of DDIT versus Indraprastha Cancer Society in ITA number 240 /2014 dated 18/11/2014 squarely covered is issue in favour of the assessee where the Hon'ble Delhi High Court after considering all the cases relied upon by the revenue. In this particular case, including the case of Hon'ble Supreme Court in escorts Ltd versus union of India, was considered and after that it was held as under:-

> "2. The respondent-assessees are charitable institutions to whom Sections 11 to 13 and other relevant provisions of the Income Tax Act, 1961 (Act, for short) apply. The issue raised in the present appeals is whether a charitable institution, which has purchased capital assets and treated the amount spent Director Of Income Tax ... vs M/S Indraprastha Cancer Society on 18 November, 2014 on purchase of the capital asset as application of income, is entitled to claim depreciation on the same capital asset utilised for business. Revenue submits that this would amount to double deduction. 3. This High Court in Director of Income Tax versus Vishwa Jagriti Mission (2013) 262 CTR 558 has held that the claim for depreciation should be allowed as per principles relating to commercial accountancy, when computing business income. Reliance placed by the Revenue on the decision of the Supreme Court in Escorts Limited versus Union of India, (1993) 199 ITR 43 (SC), was dispelled and distinguished. In

Escorts Limited (supra) the claim for depreciation under Section 32 of the Act was denied as the entire expenditure on the capital asset had been allowed under Section 35(2)(iv) of the Act while computing business profit and loss. Secondly, the Supreme Court was not concerned with the case of a charitable trust/institution, and the question as to whether income under the head "profits and gains of business" should be computed on commercial principles in order to determine the amount of income available for application for charitable purposes. Decisions of other High Courts in CIT versus Sheth Manilal Ranchhoddas Vishram Bhavan Trust, (1992) 198 ITR 598 (Guj.), CIT versus Raipur Pallottine Society, (1989) 180 ITR 579 (MP), CIT versus Society of the Sisters of ST. Anne, (1984) 146 ITR 28 (Kar.), CIT versus Trustee of H.E.H. the Nizam's Supplemental Religious Endowment Trust, (1981) 127 ITR 378 (AP) and CIT versus Rao Bahadur Calavala Cunnan Chetty Charities, (1982) 135 ITR 485 (Mad.) were referred to in affirmation of the legal ratio. It was, inter alia, held:

"11. .....The only question is whether the income of the assessee should be computed on commercial principles and in doing so whether depreciation on fixed assets utilised for the charitable purposes should be allowed. On this issue, there seems to be a consensus of judicial thinking as is seen from the authorities relied upon by the CIT(Appeals) as well as the Tribunal. In CIT vs. The Society of the Sisters of St. Anme (Supra), an identical question arose before the Karnataka High Court. There the society was running a school in Bangalore and was allowed exemption under Section 11. The question arose as to how the income available for application to charitable and religious purposes should be computed. Jagannatha Setty, J. speaking for the Division Bench of the Court held that income derived from property held under trust cannot be the "total income" as defined in Section 2(45) of the Act and that the word "income" is a wider term than the expression "profits and gains of business or profession". Reference was made to the nature of depreciation and it was pointed out that depreciation was nothing but decrease in the value of property through wear, deterioration or obsolescence. It was observed that depreciation, if not allowed as a necessary deduction for computing the income of charitable institutions, then there is no way to preserve the corpus of the trust for deriving the income. The circular No.5-P (LXX6) of 1968, dated July 19,1968 was reproduced in the judgment in which the Board has taken the view that the income of the trust should be understood in its commercial sense. The circular is as under: "Where the trust derives income from house property, interest on securities, capital gains, or other sources, the word income should be understood in its commercial sense, i.e., book income, after adding back any appropriations or applications thereof towards the purpose of the trust or otherwise, and also after adding back any debits made for capital expenditure incurred for the

purposes of the trust or otherwise. It should be noted, in this connection, that the amounts so added back will become chargeable to tax u/s. 11(3) to the extent that they represent outgoings for purposes other than those of the trust. The amounts spent or applied for the purposes of the trust from out of the income computed in the aforesaid manner, should be not less than 75 per cent. Of the latter, if the trust is to get the full benefit of the exemption u/s. 11(1)." 4. Accordingly, the appeal was dismissed after observing that no contrary judgment has been brought to the notice of this Court. 5. The High Court of Kerala in Lissie Medical Institutions versus Commissioner of Income Tax, (2012) 348 ITR 344 (Ker) has taken a different view, inter alia, holding as under: "5. It is settled position through several decisions of High Courts and Supreme Courts that when business is held in trust by charitable institutions income from business has to be computed by granting deductions provided u/s 30 to 43D as provided under S.29 of the Income Tax Act.

6. Senior counsel Sri.A.K.J.Nambiar appearing for the assessee submitted that the assessee has been filing income tax returns for several years including the assessment year 2005-2006, and disallowance is made only for this year. Since business income has to be as stated in S.29 by granting all deductions provided u/s 30 to 43D which includes depreciation u/s 32, assessee is entitled is the case pressed before us by the Senior counsel appearing for the assessee. We have no doubt in our mind that business income of charitable trust also has to be computed in the same manner as provided u/s 29 of the Income Tax Act. However, the issue that requires consideration is when the expenditure incurred for acquisition of depreciable assets itself is treated as application of income for charitable purposes u/s 11(1)(a) of the Act, should not the cost of such assets to be treated as nil for the assessee and in that situation depreciation to be granted turns out to be nil. However, if depreciation provided is claimed on notional cost after the assessee claims 100% of the cost incurred for it as application of income for charitable purposes, the depreciation so claimed has to be written back as income available. In fact, going by the several decisions of the various High Courts, we are sure that based on these decisions all the charitable institutions will be generating unaccounted income equal to the depreciation amount claimed on an year to year basis which is nothing but black money. This aspect is not seen considered in any of these decisions. We, therefore, sought the views from the Central Board of Direct Taxes. Senior Standing counsel Sri.P.K.R.Menon, appearing for the Revenue produced clarification obtained from the Central Board wherein they have stated as follows: "The Central Board of Direct Taxes is of the considered view that where an assessee has acquired an asset through application of income and has also claimed this amount as expenditure in its income expenditure account, depreciation on such asset would not be allowable

to the assessee. Such notional statutory deductions like depreciation, if claimed as deduction while computing the income of the 'the property held under trust' under the relevant head of income, is required to be added back while computing the income for the purpose of application in the income expenditure account. This would imply that a correct figure of surplus from the trust property is reflected in the Income & Expenditure account of the trust to determine the income for the purpose of application under section 11 of the Income Tax Act. This would reduce the possibility of revenue leakage which may be a cause for generation of black money." 6. Noticing the aforesaid judgment as well as circular/clarification dated 2nd Feb, 2012 issued by the Central Board of Direct Taxes, a Division Bench of this Court re-examined the entire issue in ITA No. 7/2013, Director of Income Tax (Exemption) versus Indian Trade Promotion Organisation, and other connected matters, decided on 27th November, 2013. The said order records that the Bench was initially inclined to accept the submission made of the Revenue, but for several reasons mentioned and recorded, declined to interfere and refer the question/ ratio accepted in Vishwa Jagriti Mission (supra), to a larger bench. This Court referred to the following example to explain the controversy in question:

"5. ... In order to appreciate the contention raised by the Revenue, we would like to give one example which would clarify the contention or the issue raised before us. An assessee, a charitable institution, say has income from property held under Trust of Rs.1,00,000/-. As per mandate of clause a, 85% of the said amount i.e. Rs.85,000/should be spent in the said financial year. The said assessee spends and acquires a capital asset for Rs.50,000/-. The purchase price for acquisition of the capital asset i.e. Rs.50,000/- is treated as application of income for the purpose of clause a to Section 11(1). On the capital asset, the assessee also claims depreciation say @ 20%. Accordingly, the assessee claims that the application of income would include Rs.10,000/- which is to be allowed as depreciation as to this extent, the asset purchased has depreciated. In other words, Rs.60,000/- is to be treated as application of money for the purpose of clause a to Section 11(1)." Thereafter, reference was made to the following quotation from the judgment of the Karnataka High Court in Society of the Sisters of St. Anne (supra) : "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). 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. "

"At the end of its effective life, the assets ceases to earn revenue, i.e., the capital value has expired and the asset will have to be replaced or a substitute found provision for depreciation is the setting aside, out of the revenue of an accounting period, the estimated amount by which the capital invested in the asset has expired during that period. It is the provision made for the loss or expense incurred through rising the asset for earning profits, and should, therefore, be charged against those profits as they are earned. " "If depreciation is not provided for, the books will not contain a true record of revenue or capital. If the asset were hired instead of purchased, the hiring fee would be charged against the profits; having been purchased the asset is, in effect, then hired by capital to revenue, and the true profit cannot be ascertained until a suitable charge for the use of the asset has been made. Moreover, unless provision is made for depreciation, the balance- sheet will not present a true and fair view of the state of affairs ; assets should be shown at a figure which represent that part of their value on acquisition, which has not yet expired. " In CIT v Indian Jute Mills Association [1982] 134 ITR 68, the Calcutta High Court, while constructing the expression " expenditure incurred " in s. 44A of the Act, observed : "depreciation claimed shall include the expenditure incurred." There are only two recognised methods of accounting : (1) cash basis, and (ii) mercantile basis. Under the cash basis only cash transactions are recorded. It is only cash receipts and cash payments which find entries in the books of

account. Mercantile system of accounting was explained by the Supreme Court in Keshav Mills Ltd. v. CIT [1953]23 ITR 230 at 230 in the following words : "The mercantile system of accounting or what is otherwise known as the double entry system is opposed to the cash system of book keeping under which a record is kept of actual cash receipts and actual cash payments, entries being made only when money is actually collected or disbursed. That system brings into credit what is due, immediately it becomes legally due and before it, is actually received and it brings into debit expenditure the amount for which a legal liability has been incurred before it is actually disbursed. It is not in dispute that if the mercantile system is followed, the depreciation allowance in respect of the trust property should be allowed. xxxxxxxxxxxxxxx The depreciation if it is not allowed as a necessary deduction for computing the income from the charitable institutions, then there is no way to preserve the corpus of the trust for deriving the income. The Board also appears to have understood the " income " u/s. 11(1) in its commercial sense. The relevant portion of the Circular No. 5-P (LXX-6) of 1968, dated July 19, 1968, reads: "Where the trust derives income from house property, interest on securities, capital gains, or other sources, the word 'income' should be understood in its commercial sense, i.e., book income, after adding back any appropriations or applications thereof towards the purpose of the trust or otherwise, and also after adding back any debits made for capital expenditure incurred for the purposes of the trust or otherwise.It should be noted, in this connection, that the amounts so added back will become chargeable to tax u/s. 11(3) to the extent that they represent outgoings for purposes other than those of the trust. The amounts spent or applied for the purposes of the trust from out of the income computed in the aforesaid manner, should be not less than 75 per cent. of the latter, if the trust is to get the full benefit of the exemption u/s. 11(1). "

This court thereafter referred to the circular/clarification dated 2nd February, 2012 by the CBDT, issued after decision of Kerala High Court in Lisse Medical (supra) and has expounded as under: "9. After the decision of the Kerala High Court in Lissie Medical Institution vs. CIT (supra), the Board issued a fresh circular or clarification dated 02.02.2012 and has observed: "The view of the CBDT to be conveyed to the Court in this regard is as under: The Central Board of Direct Taxes is of the considered view that where an assessee has acquired an asset through application of income and has also claimed this amount as expenditure in its income expenditure account, depreciation on such asset would not be allowable to the assessee. Such notional statutory deductions like depreciation, if claimed as deduction while computing the income of "the property held under trust" under the relevant head of income, is required to be added back while computing the income for the purpose of application in the income expenditure account. This would imply that a correct figure of surplus

from the trust property is reflected in the Income and Expenditure account of the trust to determine the income for the purpose of application under section 11 of the Income Tax Act. This would reduce the possibility of revenue leakage which may be a cause for generation of black money." 10. We also note that the Kerala High Court, in fact, has noted the clarifications which were earlier issued by the Board in respect of 1968 circular. It is clear from the reasoning given by the Kerala High Court that they have not gone by the express language of Section 11(a) and have purposively interpreted the provision." 7. Reference was once again made to the decision of the Supreme Court in Escorts Limited (supra) and provisions of Section 35(2B)(c) were quoted and it was observed that the language of the sub-clause (c) was clear and lucid but conspicuously different from section 11(1) of the Act. It has been observed in Indian Trade Promotion Organisation (supra) : 11. Clause a of Section 11(1) stipulates that income derived from property held under trust wholly for charitable or religious purposes is to be applied for such purposes in India and where such income is set aside or accumulated, it should not be in excess of 15% of the income from such property. Thus, there is an embargo and probation from accumulating or setting apart income derived from property held under trust beyond 15% of income from such property. If there is a violation of the said provision, proportionate income is deemed to be taxable and not exempt under Section 11(1). The language of the Section is peculiar and proceeds on its own wording. This aspect has been highlighted and pointed out in the judgment of Commissioner of Income Tax vs. Society of The Sisters of St. Anne (supra). Decision in the case of Escorts Ltd. (supra) was considered by the Delhi High Court in DIT vs. Vishwa Jagriti Mission (supra) decided on 29th March, 2012 and was distinguished for the following reasons.

"13. The judgment of the Supreme Court in Escorts Limited Vs. Union of India (supra) has been rightly held to be inapplicable to the present case. There are two reasons as to why the judgment cannot be applied to the present case. Firstly, the Supreme Court was not concerned with the case of a charitable trust/institution involving the question as to whether its income should be computed on commercial principles in order to determine the amount of income available for application to charitable purposes. It was a case where the assessee was carrying on business and the statutory computation provisions of Chapter IV-D of the Act were applicable. In the present case, we are not concerned with the applicability of these provisions. We are concerned only with the concept of commercial income as understood from the accounting point of view. Even under normal commercial accounting principles, there is authority for the proposition that depreciation is a necessary charge in computing the net income. Secondly, the Supreme Court was concerned with the case where the assessee had claimed deduction of the cost of the asset

under Section 35(1) of the Act, which allowed deduction for capital expenditure incurred on scientific research. The question was whether after claiming deduction in respect of the cost of the asset under Section 35(1), can the assessee again claim deduction on account of depreciation in respect of the same asset. The Supreme Court ruled that, under general principles of taxation, double deduction in regard to the same business outgoing is not intended unless clearly expressed. The present case is not one of this type, as rightly distinguished by the CIT(Appeals)." 12. We would like to reproduce Section 35 (2B)(c). "Section 35(2B)(a) ..... (b)..... (c) Where a deduction allowed for any previous year under this sub-section in respect of expenditure represented wholly or partly by an asset, no deduction shall be allowed in respect of that asset under [clause (ii) of sub- section (1)] of section 32 for the same or any subsequent previous year."

13. The language of the sub-clause c to Section 35(2B) is conspicuous and entirely different and wordings are clear and lucid. The language of Section 11(1), as noticed above, is distinguished and not worded in a similar manner. In Escorts Ltd. (supra), the Supreme Court was considering the said specific provision and the wordings therein. While dealing with the term "expenditure" and noticing the language it was held that no duplication or double deduction should be allowed towards depreciation in the same or subsequent year. Thus, the issue was decided against the assessee. Language of Explanation 1 to Section 43(1) can also be referred to and we notice that the language of the said explanation is absolutely different from the language used in Clause (a) to Section 11(1). Section 11(1)(a) is a peculiar provision which postulates application of income and it is not dealing with expenditure as such. The legislative desire is that money should be applied for the purpose of charity. In Escorts Ltd.(supra), the Supreme Court had observed that they were concerned with expenditure and since the entire costs of the capital assets had been allowed and had been set off against the business profit in five years or in one previous year, it was unconceivable that the depreciation should be allowed again on the same asset." 8. Decisions of other High Courts in Commissioner of Income Tax versus Tiny Tots Education Society, (2011) 330 ITR 21 (P&H) and Commissioner of Income Tax versus Institute of Banking, (2003) 264 ITR 110 (Bom.) in which the ratio as expounded in the case of Vishwa Jagriti Mission (supra) was accepted and affirmed, were noticed. Referring to the decision of the Kerala High Court in Lissie Medical Institutions (supra) it was observed: 15. "Kerala High Court was also conscious of the said decisions and the fact that Section 11(1)(a) had been interpreted in a different manner. It was in these circumstances that the Kerala High Court in the last portion of paragraph 6, as quoted above, has stated that the assessee would be entitled to write back depreciation and if done, the Assessing Officer would modify the assessment

determining the higher income and allow recomputation of depreciation written back for the purpose of application of income for charitable purposes in future or subsequent years. This may lead to its own difficulties and problems as suddenly the entire depreciation written off would have to be added first and then in one year substantial application of income would be required. This may be impractical and would disturb the working of many a charitable institutions. The legal interpretation which has continued since 1984, if disturbed and implemented, would not appropriately resolved. Consistency and certainty is more appropriate. 16. The equally plausible and consistent interpretation of clause (a) of Section 11(1) of the Act is that income derived from property must be calculated as per the principles of the Act. The said clause is not a computation provision and does not disturb the "income" earned or available but postulates that the "income" as computed in accordance with the provisions of the Act to the extent of 86% must be applied. Application of income may include purchase of a capital asset. The said purchase is valid and taken into consideration for the purpose of ensuring compliance, i.e., application of money or funds and is not a factor which determines and decides the quantum of income derived from property held under trust. Computation of income is separate and distinct and has to be made on commercial basis by applying provisions of the Act." 9. To our mind, therefore, the issue has been examined in depth and detail twice and thus there is no error in the impugned orders passed by the Tribunal. However, learned counsel for the Revenue has drawn our attention to the decision dated 18th March, 2014 in ITA No. 322-323/2013 titled Director of Income Tax (Exemption) versus Charanjiv Charitable Trust, wherein it has been held:

"30. So far as the claim of depreciation is concerned the decision of the Tribunal cannot be countenanced. The Tribunal has overlooked that the cost of the assets has already been allowed as a deduction as application of income, as held by the CIT (Appeals) as well as the assessing officer. It was their view that allowing depreciation in respect of assets, the cost of which was earlier allowed as deduction as application of income of the trust, would actually amount to double deduction on the basis of the ruling of the Supreme Court in Escorts Ltd. vs. UOI (supra). In respect of the

additions to the fixed assets made during the previous year relevant to the assessment year 2006-07, the CIT (Appeals) held that since the cost of the assets was not allowed as a deduction by way of application of income, depreciation should be allow. The CIT (Appeals) has thus made a distinction between assets the cost of which was allowed as deduction as application of income and assets, the cost of which was not so allowed. The Tribunal has not kept this distinction in view, but has proceeded to rely upon a judgment of this

Court in DIT vs. Vishwa Jagrati Mission (supra). In the judgment of this Court the question was whether the income of the assessee, which was a charitable trust, should be computed on commercial principles and if so, whether depreciation on fixed assets used for charitable purposes should be allowed as a deduction. This Court noticed that there was a consensus of judicial opinion on this aspect and held, after referring to those authorities as well as a circular of the CBDT issued on 19.07.1968, that while computing the income of the trust available for application for charitable purposes, depreciation on assets used for charitable purposes should be allowed. The point to be noticed is that in this judgment, this Court referred to and distinguished the judgment of the Supreme Court in Escorts Ltd. (supra) on the ground that in Escorts (supra), the Supreme Court was concerned with a case where the deduction of the cost of the asset was allowed under Section 35(1) as capital expenditure incurred on scientific research and, therefore, no deduction for depreciation on the very same assets was held allowable under general principles of taxation, as it would amount to double deduction. The judgment of this Court in DIT vs. Vishwa jagrati Mission reinforces the principle that if the cost of the asset has been allowed as deduction by way of application of income then depreciation on the same asset cannot be allowed in the computation of the income of the trust. The distinction has not been kept in view by the Tribunal which seems to have erroneously relied on the judgment of this Court to direct allowance of depreciation even in respect of assets, the cost of which has already been allowed as application of income. We accordingly hold that the Tribunal was not justified in directing the allowance of depreciation in respect of such assets."

10. The aforesaid paragraph refers to the decision in the case of Vishwa Jagriti Mission (supra) but ratio was distinguished on the ground that in the said case the Court was concerned with computation of income of a charitable trust/institution on commercial principles and if so whether depreciation on fixed assets used for charitable purposes should be allowed as a deduction. The consensus of judicial opinion on the said aspect was referred to. It is noticeable that in Charanjiv Charitable Trust (supra) it stands observed that the Tribunal overlooked the fact that the cost of asset had been allowed as a "deduction" and thereafter depreciation was being claimed. The said case, therefore, appears to be a peculiar one wherein deduction as expenditure and depreciation was being claimed simultaneously, while computing the taxable income under the head "profits and gains from business". The said decision dated 18th March, 2014 does not refer to the decision in Indian Trade Promotion Organisation (supra) which was decided on 27th November, 2013. The judgment in the case of Indian Trade Promotion Organisation (supra) was not cited and referred to. The judgment in the case of Charanjiv Charitable Trust (supra) is authored by the same Judge, who has also authored the decision in the case of Vishwa Jagriti

Mission (supra). It is obvious that in Charanjiv Charitable Trust (supra), the Division Bench could not have taken a different view on the legal ratio as interpreted in Vishwa Jagriti Mission (supra). Further, the decisions in the case of Vishwa Jagriti Mission and Indian Trade Promotion Organisation (supra) being prior in point of time would act as binding precedents and could not have been overruled or dissented from by a coordinate Division Bench. 11. By Finance (No. 2) Act of 2014, sub-section (6) to Section 11 stands inserted with effect from 1st April, 2015 to the effect that where any income is required to be applied, 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 an asset, the acquisition of which has been claimed as application of income under this Section in the same or any other previous year. The legal position, therefore, would undergo a change in terms of Section 11(6), which has been inserted and applicable with effect from 1st April, 2015 and not to the assessment years in question. The newly enacted sub- section relates to application of income. 12. In these circumstances, we do not find any merit in the appeals in the case of Indraprastha Cancer Society, Abul Kalam Azad Islamic Awakening and in the case of M/s Sanskriti Educational Society (ITA No. 348/2014). Similarly, we do not think it is necessary and required that we should issue notice in the application for condonation of delay filed in the case of M/s Sanskriti Educational Society (ITA Nos. 463 and 464/2014) as on merits the Revenue is not entitled to succeed. In these appeals, the applications for condonation of delay shall be treated as dismissed and as a sequitur the appeals will be treated as dismissed."

13. On this issue , Hon madras High court recently in DIT V M/s MEDICAL TRUST OF THE SEVENTH DAY ADVENTISTS [2017-TIOL-1665-HC-MAD-IT] has held as under :-

"2. In so far as the issue is common across appeals, we set out below the question of law in T.C.A.No.475 to 478 of 2011 as representative of the issue involved in all appeals:- '(a) Whether on the facts and circumstances of the case, the Tribunal was right in allowing double deduction without considering the principles laid down in 199 ITR 43(SC)?' 3. The issue before us relates to the grant of depreciation to an entity seeking exemption in terms of section 11 of the Income Tax Act. (in short 'Act') which deals with the assessment of Income from property held for charitable or religious purposes. The relevant parts of Section 11 read as follows:- 1. (1) Subject to the provisions of sections 60 to 63, the following income shall not be included in the total income of the previous year of the person in receipt of the income- (a) income derived from property held under trust wholly for charitable or religious purposes, to the extent to which such income is applied to such purposes in India; and, where any such income is accumulated or set apart for application to such purposes in India, to the extent to which the income so accumulated or set apart is not in excess of fifteen per cent of the income from such property;

(4) For the purposes of this section "property held under trust" includes a business undertaking so held, and where a claim is made that the income of any such undertaking shall not be included in the total income of the persons in receipt thereof, the Assessing Officer shall have power to determine the income of such undertaking in accordance with the provisions of this Act relating to assessment; and where any income so determined is in excess of the income as shown in the accounts of the undertaking, such excess shall be deemed to be applied to purposes other than charitable or religious purposes. (4A) Sub-section (1) or sub-section (2) or sub-section (3) or sub-section (3A) shall not apply in relation to any income of a trust or an institution, being profits and gains of business, unless the business is incidental to the attainment of the objectives of the trust or, as the case may be, institution, and separate books of account are maintained by such trust or institution in respect of such business. (5) The forms and modes of investing or depositing the money referred to in clause (b) of sub-section (2) shall be the following, namely : - (i)..... (ii)..... ..... (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. 4. The various sub-sections of section 11 stipulate the methodology for computing the income applied to charitable and religious purposes and the 15% that may be accumulated or set apart. The section also envisages the inclusion of a business undertaking in the property held under trust and the determination of income therefrom. Sub Section 5 sets out the acceptable forms and modes of investment for the purposes of proper application. Sub-section 6, inserted by Finance II Act, 2014 with effect from 1.4.2015, states that the income to be determined for the purposes of application or accumulation shall not include a deduction or allowance by way of depreciation or otherwise in respect of any asset, the acquisition of which has been claimed as an application of an income under the provisions of section 11 in the same or any other previous year. The application of this sub-section retrospectively in regard to assessment years prior to 01.04.2015 is the subject matter of challenge in TCA.No.949 of 2015 to which we shall advert presently. 5. Section 11 was inserted in the Income Tax Act 1961 providing for an exemption in respect of income from property held under trust wholly for charitable and religious purposes. 'Charitable purposes' is defined in terms of section 2(15) of the Act to mean relief of the poor, education, medical relief and the advancement of any other object of general public utility. The clause has been modified over the years such that in its present form, it includes within its ambit yoga and the preservation of environment, monuments or places or objects of artistic or historic interest. The object of Section 11 is thus laudable and seeks to extend a benefit to entities engaging in activity of a specified nature. In the present batch of appeals there is no dispute in this regard. 6. We have heard Mr.J.Narayanaswamy appearing on behalf of the Revenue and several counsels appearing on behalf of the assesses and set out in brief the submissions advanced. 7. Mr. J.Narayanaswamy would contend that the provisions of section 32 granting depreciation have not been made specifically applicable to section 11. According to him, the provisions of Section 11 extend a benefit to an assessee by way of exemption and granting depreciation in addition would amount to a double benefit that has to be specifically conferred. He would rely on the judgment of the Supreme Court in the case of Escorts Limited and another Vs. Union of India and others (SC) (1999 ITR 43) which deals with the grant of depreciation to an assessee also claiming weighted

deduction under section 35(1) of the Act in respect of expenditure incurred on scientific research. 8. The provision, as it originally stood, placed no restriction on the claim of weighted deduction simultaneous with the claim of depreciation. While this is so, it was felt that such double claim was not the intention of Legislature and the provisions of Section 35(2) (iv) were amended to provide that where a deduction was allowed for any previous year in terms of Section 35(1), no depreciation was liable to be allowed for the same or any other previous year in respect of that asset. 10.The amendment was made to operate retrospectively with effect from 1.4.1962 and the Supreme Court, while upholding the retrospective application of the provision states thus:- 'We think that all misconception will vanish and all the provisions will fall into place, if we bear in mind a fundamental, though 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." .... '15.For the reasons discussed above, we are of the view that, even before the 1980-amendment, the Act did not permit a deduction for depreciation in respect of the cost of a capital asset acquired for purposes of scientific research to the extent such cost has been written off under S.10(2) (xiv)/35 (1) & (2). Prior to 1968, such assets qualified for an allowance of one-fifth of the cost of the asset in five previous years starting with that of its acquisition and during these years the assessee could not get any depreciation in relation thereto. In respect of assets acquired in previous year relevant to assessment year 1968-69 and thereafter, their cost was written off in the previous year of acquisition and no depreciation could be allowed in that year. This is clear from the statute. Equally, it is not envisaged, and indeed, it would be meaningless to say, that depreciation could be allowed on them thereafter with a further absurdity that it could be allowed starting with the original cost of the asset despite its user for scientific research and the allowances made under the 'scientific research' clause. In our view, there was no difficulty at all in the interpretation of the provisions. The mere fact that a baseless claim was raised by some over-enthusiastic assessees who sought a double allowance or that such claim may perhaps have been accepted by some authorities is not sufficient to attribute any ambiguity or doubt as to the true scope of the provisions as they stood earlier.' 10. Reliance was placed by Mr. Narayanaswamy on paragraph 7 of the judgment that reads as follows:-

I find it difficult to agree with the reasoning of the assessees. Acceding to it would amount to placing an unreasonable interpretation upon the relevant provisions and to negating the intention of Parliament. I find it difficult to agree that the Indian Legislature - as also the Parliament made a conscious departure from the English Amendment with the idea of providing an additional benefit to induce the Indian assessees to invest more in scientific research. I find the argument rather convoluted. If the intention of the Legislature/Parliament was to provide more than 100% deduction, they would have said so, as they have done in cases where they provided for what is called weighted deduction'. (For example, See section 35(B) of 1961 Act). A double deduction cannot be a matter of inference, it must be provided for in clear and express language regard having to its unusual nature and its serious impact on the Revenues of the State.' .... 'That the Parliament never intended to provide for a double deduction is also the opinion of the Direct Tax Law Committee. In its interim report, (December, 1977) the Committee

(popularly known as 'Choksi Committee') had this to say in para 3.29 of its report: "3.29.- Our attention has also been drawn to certain anomalous situations in the matter of allowance of depreciation. In certain cases where a full deduction has been allowed in relation to a capital asset under other sections (as for example, section 35 which permits a deduction in respect of capital expenditure for scientific research), the tax payers have contended that such deduction is independent of the allowance by way of depreciation. In our view, the intention of the legislature is not to allow a double deduction (of 20%) in respect of the same asset, once under section 35 and, again, by way of depreciation under section 35. If and to the extent that there is any anomaly or contrary view possible on a construction of section 35, we recommend that the law should be clarified to provide that no depreciation under section 35 shall be allowable in respect of capital expenditure for scientific research qualifying for deduction under section 35.' 11. He would argue that that granting depreciation simultaneous with exemption under section 11 would result in a relief over and above 100 % of the income which was not permissible under statute. 12. Our attention was drawn to the decision of the Kerala High Court in the case of Lissie Medical Institutions Vs. Commissioner of Income Tax, Kochi, (348 ITR 344) = 2012-TIOL-303-HC-KERALA-IT which had concluded the issue in favour of the Revenue. The Kerala High Court had this to say; 'In fact the net effect is that after writing off full value of the capital expenditure on acquisition of assets as application of income for charitable purposes and when the assessee again claims the same amount in the form of depreciation, such notional claim becomes cash surplus available with the assessee, which goes outside the books of accounts of the Trust unless it is written back which is not done." .... "We have no doubt in our mind that business income of charitable trust also has to be computed in the same manner as provided u/s 29 of the Income Tax Act. However, the issue that requires consideration is when the expenditure incurred for acquisition of depreciable assets itself is treated as application of income for charitable purposes u/s 11(1)(a) of the Act, should not the cost of such assets to be treated as nil for the assessee and in that situation depreciation to be granted turns out to be nil. However, if depreciation provided is claimed on notional cost after the assessee claims 100% of the cost incurred for it as application of income for charitable purposes, the depreciation so claimed has to be written back as income available. In fact, going by the several decisions of the various High Courts, we are sure that based on these decisions all the charitable institutions will be generating unaccounted income equal to the depreciation amount claimed on an year to year basis which is nothing but black money. This aspect is not seen considered in any of these decisions.' 13. The contentions of the learned counsels for the assessees are as follows: (i) Mr. Sridhar would state that in computing the income of an entity attracting the provisions of section 11, the principles of commercial accounting were liable to be followed. He would rely on the decision of the jurisdictional High Court in Commissioner of Income Tax Vs. Rao Bahadur Calavala Cunnan Chetty Charities (1982) (135 ITR 485) = 2003-TIOL-984-HC-MAD-IT and Bombay High Court in Commissioner of Income Tax Vs. Institute of Banking Personnel Selection (2003) (264 ITR 110). A distinction was sought to be made between computation in terms of Section 2(45) defining 'total income', and computation of 'income' in terms of section 11 of the Act. Referring to the scheme of section 11, he would contend that the provisions thereof constituted a complete code which took into account the application of depreciation as a commercial principle and not necessarily one of accountancy. 14. Mr. J. Balachander would refer to the decisions of the Kerala High Court in Catholic Diocese of Tiruvalla V.

State of Kerala (209 ITR 596) and Andhra Pradesh High Court in CIT v.Trustee of H.E.H.Nizamm's Supplemental Religious Endowment Trust (127 ITR 378), in support of his submission that commercial principles of accounting are to be applied in computing income for the purposes of section 11. He would refer to the Accounting Standards issued by the Institute of Chartered Accountants of India (in short ICAI) to the effect that depreciation was a mandatory charge in the computation of income of a Trust. 15. Mr.N. Devanathan would distinguish the facts of Escorts (supra) from the present case on the ground that by virtue of granting weighted deduction under section 35, the asset itself was effaced which is not the case in an assessment under section 11 of the Act. He would also point out that the Department had filed petitions for Special Leave challenging the decisions of the Punjab and Haryana High Court favouring the assessee that had been dismissed whereas, the Special Leave Petitions filed by the assessee challenging the decision of the Kerala High Court and other cases following the decision of the Kerala High Court in Lissie Medical Institutions (supra) had been admitted by the Supreme Court. Thus according to him, the Supreme Court had clearly recognized the error in the decision of the Kerala High Court. 16. Mr. R. Kumar, appearing for the assessee/respondent in TCA.No.993 of 2015 would point out that the orders of the Income Tax Appellate Tribunal in the same assessee's case for the previous years on the identical issue, had considered the judgment of the Supreme Court in Escorts and had distinguished the same. The aforesaid orders of the Tribunal dated 25.03.2011 have attained finality. Thus, while adopting the arguments of other counsels, he would add that the principle of consistency stood violated in his case. 17. Mr.N.V.Balaji, would address us specifically on Accounting Standard 6 dealing with Depreciation Accounting issued by the Institute of Chartered Accountants of India and made mandatory on or after 1.4.1995 in the following terms:

'The reference to commercial, industrial or business enterprises in the aforesaid paragraph is in the context of the nature of activities carried on by the enterprise rather than with reference to its objects. It is quite possible that an enterprise has charitable objects but it carries on, either wholly or in part, activities of a commercial, industrial or business nature in furtherance of its objects. The Board believes that Accounting Standards apply in respect of commercial, industrial or business activities of any enterprise, irrespective of whether it is profit oriented or is established for charitable or religious purposes. Accounting Standards will not, however, apply to those activities which are not of commercial, industrial or business nature, (e.g., an activity of collecting donations and giving them to flood affected people.) It is also clarified that exclusion of an entity from the applicability of the Accounting Standards would be permissible only if no part of the activity of such entity was commercial, industrial or business in nature. For the removal of doubts, it is clarified that even if a very small proportion of the activities of an entity was considered to be commercial, industrial or business in nature, then it could not claim exemption from the application of Accounting Standards. The Accounting Standards would apply to all its activities including those which were not commercial, industrial or business in nature." 18. This was clarified by the 'Technical Guide on Internal Audit for not-forprofit organizations' issued by the Internal Audit Standards Board of the ICAI recommending that the Accounting Standards setting out wholesome principles of accounting including depreciation should be followed by all non- profit organisations irrespective of whether any part of their activity might be commercial, industrial or business in nature. 19. We have heard the arguments in detail and carefully

perused the documents relied upon as well as case law cited. 20. Depreciation, as defined in Spicer and Pegler's Book-Keeping and Accounts is the measure of the exhaustion of the effective life of a fixed asset owing to use or obsolescence during a given period. It may be regarded as that part of the cost of the asset which will not be recoverable 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, and the amount of provision made in respect of an accounting period is extended to represent the proportion of such expenditure which has expired during that period. 21. The necessity of providing for depreciation emanates from the fact that once an asset ceases to be effective, it will have to be replaced. Providing for depreciation would ensure setting aside out of the revenue of an accounting period, the estimated amount by which the capital investment has expired during that period. This provision, incurred for the use of that asset for the purpose of earned profit should be charged against those profits as and when earned. Spicer, and Pegler, at page 45, states as follows:- 'If depreciation is not provided for, the books will not contain a true record of revenue or capital. If the asset were hired instead of purchased, the hiring fee would be charged against the profits; having been purchased, the asset is, in effect, then hired by capital to revenue, and the true profit cannot be ascertained until an analogous charge for the use of the asset has been made. Moreover, unless provision is made for depreciation, the Balance Sheet will not present a true and fair view of the state of affairs, since the assets will be shown at an amount which is in excess of the true amount of the unexpired expenditure incurred on their acquisition.' 22. The claim of depreciation is thus part of standard accounting practice which is required for fair presentation of a company's financials. The computation of income in the case of an entity to which section 11 is applicable would be in two stages. Firstly, the determination of the profit arrived at, which would be the total receipts net of expenditure and depreciation incurred in earning the receipts, and secondly the stage of application to Charitable/Religious objects. The two stages are distinct and are required to be complied with consecutively in order to determine the correct income and its application. 23. The question before the Supreme Court in the matter of Escorts related to duel claims under section 35 of the Act in relation to the same asset – the first, weighted deduction and the second, depreciation. Thus, two benefits were extended in respect of the very same asset. We are faced with an entirely different and distinct position in the present batch of appeals – one that involves a claim for exemption in respect of income earned from property held for charitable or religious purposes. We see no double benefit that is extended to the assessee in this regard. 24. Truth to tell, this Court in the matter of Calavala Cunnan Charities, has decided the question now under consideration in favour of the assessee and we could well have decided this Batch of appeals simply on the strength of the aforesaid decision. We are however persuaded to proceed further with the discussion since a conflicting view has been expressed by the Kerala High Court in the case of Lissie Medical Institutions (supra). Though the attention of the Division Bench of the Kerala High court was drawn to the decision in Rao Bahadur Calavala Cunnan Chetty Charities (supra) and several decisions along similar lines, the court was persuaded to take a contrary view preferring to follow the rationale of the judgment of the Supreme Court in the case of Escorts (supra). 25. As noted by us earlier, the judgment of the Supreme Court in Escorts turns on an entirely different position of law and would not impact the issue being discussed in the present case. 26. We are supported in our view by a plethora of decisions of various High Courts -

the Bombay High Court in the case of CIT v. Munisuvrat Jain (1994 Tax Law Reporter 1084) and DIT (Exem) Vs. Framjee Cawasjee Institute (109 CTR 463); Karnataka High Court in CIT Vs. Society of the Sisters of St.Anne (146 ITR 28); Madhyapradesh High Court in CIT Vs. Raipur Pallottine Society (180 ITR 579); Gujarath High Court in CIT Vs. Sheth Manilal rachhnoddas Vishram Bhavan Trust 198 ITR 598 = 2003-TIOL-944-HC-AHM-IT; Punjab and Haryana High court in CIT Vs. Market Committee Pipli (330 ITR 16) and CIT Vs. Tiny Tots Education Society (330 ITR 21) = 2010-TIOL-550-HC-P&H-IT; Madhyapradesh High Court in CIT Vs. Devi Sakuntala Tharal Charitable Foundation (358 ITR 452) and the Calcutta High Court in CIT Vs. Silluguri Regulated Market Committee (366 ITR 51). In addition, the Delhi High Court in DIT Vs. Vishwa Jagriti Mission 262 CTR 558 = 2012-TIOL-271-HC-DEL-IT and the Karnnataka High Court in DIT (Exem) Vs Al-Ameen Charitable Fund Trust (2016) 67 taxmann.com 160 = 2016-TIOL-463-HC-KAR-IThave accepted the claim of the assessee distinguishing both the judgment of the Supreme Court in Escorts as well as that of the Kerala High Court. 27.In view of the discussion above, the question of law is answered in favour of the assessee and against the revenue. TCA.No.949 of 2015 28. T.C.A.No.949 of 2015 has been filed by the assessee raising the following two substantial questions of law. '1. Whether on the facts and circumstances of the case, the Tribunal was right in disallowing the claim of depreciation on assets acquired by way of application of funds in the earlier years, contrary to judgments of several High Courts?

2. Whether on the facts and in the circumstances of the case, the Tribunal is right in law in holding that the excess application of the earlier year could not be set off against the income of the current year contrary to the judgment of this Honourable Court in the case of Matriseva Trust (2000) 242 ITR 20(Mad)?' 29. Learned senior counsel appearing for M/s.St. Thomas Orthodox Syrian Cathedral Parish Trust, the assessee, Mrs. Pushya Sitaraman would contend that the excess application of earlier years was liable to set off against the income of the current year and relied on the decision of the jurisdictional High Court in the case of Commissioner of Income Tax Vs. Matriseva Trust (242 ITR 20). While Sri.J.Narayanaswamy, learned counsel appearing for the Department does not seriously object to the argument advanced on merits, he would raise a technical objection to the effect that in the present case, the claim was made under a revised return. The original return of income was filed only on 31.10.2007 beyond 31.10.2006 when it was due and as such would debar the consideration of the claim made in the revised return. 30. Records reveal that the original return was filed on 31.10.2007 and a revised return was filed on 19.2.2008. Notice under Section 148 was issued on 13.9.2010, in response to which, the assessee filed the original return dated 31.10.2007. In the course of re-assessment, the assessing authority rejects the revised return on the ground that it is inadmissible in view of the provisions of section 139(5) requiring the original return to have been filed within time. He thus, does not take cognizance of the revised return and proceeds on the basis of the original return which had omitted to take into account the excess application of previous years as application for the present year and the assessment was completed on the basis of the original return alone. The Commissioner of Income Tax (Appeals), adjudicated the issue on merits, deciding the same against the assessee which order was confirmed by the Income Tax Appellate Tribunal. 31. A recent amendment to section 139(5) reads thus; 'Following sub-section (5) shall be substituted for the existing subsection(5) of section 139 by the Finance Act, 2016 w.e.f. 1.4.2017. (5) If any person, having furnished a return under sub-section (1) or sub-section (4),

discovers any omission or any wrong statement therein, he may furnish a revised return at any time before the expiry of one year form the end of the relevant assessment year or before the completion of the assessment, whichever is earlier.' 32. The import of the above amendment is that a return may be revised both in cases of original returns filed under sub section (1) or under sub section (4) within the extended period of one year from the end of the relevant assessment year or before completion of assessment, whichever is earlier. The amendment is intended to confer a benefit on an assessee and the retrospective application thereof has to be examined by the assessing authority. We remand this issue to the file of the assessing authority for the limited purpose of examining the applicability of the amendment extracted above. If the amendment is found applicable to the assessee, the rationale of the decision of this Court in Matriseva (supra) shall be applied on merits. 33. Adverting to question No.1, the Tribunal has, in denying the benefit of depreciation to the assessee, applied the provisions of sub section 6 of section 11 reading as follows; '(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.' .... 34.The short point that arises for decision is whether the provisions of Section 11(6) inserted by Finance (No.2) Act, 2014 w.e.f. 1.4.2015, operate prospectively with effect from assessment year 2015-16 or retrospectively with respect to earlier years as well. In this regard, M/s.Pushya Sitaraman, learned senior counsel and other learned counsels appearing for the assesses refer to the provisions of Circular 1 of 2015dated 21.1.2015 (371 ITR (St) 0022) containing explanatory notes to the provisions of Finance (No.2) Act, 2014. The relevant portion of the circular reads as follows; '7.3 Several issues had arisen in respect of the application of exemption regime to trusts or institutions in respect of which clarity in law was required. 7.4 The first issue was regarding the interplay of the general provision of exemptions which are contained in section 10 of the Income-tax Act vis-à-vis the specific and special exemption regime provided in sections 11 to 13 of the said Act. As indicated above, the primary objective of providing exemption in case of charitable institution is that income derived from the property held under trust should be applied and utilized for the object or purpose for which the institution or trust has been established. In many cases it had been noted that trusts or institutions which are registered and have been availing benefits of the exemption regime to not apply their income, which is derived from property held under trust, for charitable purposes. In such circumstances, when the income becomes taxable, a claim of exemption under general provisions of section 10 in respect of such income is preferred and tax on such income is avoided. This defeats the very objective and purpose of placing the conditions of application of income, etc., in respect of income derived from property held under trust in the first place. 7.4.1 Sections 11, 12 and 13of the income-tax Act are special provisions governing institutions which are being given benefit of tax exemption. It is therefore imperative that once a person voluntarily opts for the special dispensation it should be governed by these specific provisions and should not be allowed flexibility of being governed by other general provisions or specific provisions at will. Allowing such flexibility has undesirable effects on the objects of the regulations and leads to litigation. .... 7.6 Applicability. - These amendments take effect from 1st April, 2015 and will, accordingly, apply in relation to the assessment year 2015-2016 and subsequent

assessment years. 35. Para 7.6 of the Circular states that the amendment would apply to assessment year 2015-16 and subsequent assessment years. Reliance was placed on the judgment of the Supreme Court in CIT Vs. Alom Extrusions Ltd (2009) and CIT vs Vatika Township (367 ITR 466) = 2014-TIOL-78-SC-IT-CB for the proposition that an amendment that increases the liability of an assessee is liable to be applied only prospectively. Mr. Narayanaswamy would object stating that the amendment had been inserted to a correct an existing anomaly and thus was clearly clarificatory, and consequently retrospective in operation. 36. We do not agree with the Revenue. The amendment, inserted specifically with effect from Assessment Year 2015-2016 seeks to disturb a vested right that has accrued to the assesee. The amendment does not purport to be clarificatory, on the other hand the Explanatory Memorandum makes it applicable only w.e.f. A Y 2015-16 and application of the amendment retrospectively would certainly lead to a great deal of hardship to the assessee. We are thus of the view that the provisions of section 11(6) of the Act inserted with effect from 1.4.2015 shall operate prospectively with respect to assessment year 2015-2016 only."

14. Therefore in view of the above two decisions of the Hon'ble high courts, we reverse the finding of the lower authority and direct the Ld. assessing officer to delete the disallowance of these 5707 9339/– being the amount of depreciation claimed by the assessee on the assets on which deduction is application of income has already been granted. In the result ground No. 4 of the appeal of the assessee is allowed."

6. There being no change in the facts and circumstances and no contrary material on record, respectfully following the decision of Co-ordinate Bench of Tribunal, we decide these issues in favour of the assessee. The case of assessee further stands supported by the decision of Hon'ble Supreme Court in CIT vs. Rajasthan and Gujrati Charitable Foundation, Poona (Civil Appeal No. 7186 of 2014) relied by assessee (copy placed on record). Accordingly, the additions made by the ld. Authorities below deserve to be deleted and the appeal of the assessee to be allowed.

7. In the result, the appeal is allowed.

Order pronounced in the open court on 30th May, 2018.

Sd/-	**Sd/-**
(Bhavnesh Saini)	**(L.P. Sahu)**
Judicial member	**Accountant Member**

Dated: 30th May, 2018
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