

IN THE INCOME TAX APPELLATE TRIBUNAL
“C” BENCH : BANGALORE

BEFORE SHRI N.V. VASUDEVAN, JUDICIAL MEMBER
AND SHRI ABRAHAM P. GEORGE, ACCOUNTANT MEMBER

ITA No.662/Bang/2015
Assessment year : 2011-12

Jyothy Charitable Trust, No.31, Pampamahakavi Road, Shankarapuram, Bangalore – 560 004. PAN: AAATJ 2585R	Vs.	The Deputy Commissioner of Income Tax (Exemptions), Circle 17(1), Bangalore.
APPELLANT		RESPONDENT

Appellant by	:	Shri Babu Prasad, Advocate
Respondent by	:	Shri Sunil Kumar Agarwala, Jt. CIT(DR)

Date of hearing	:	10.08.2015
Date of Pronouncement	:	14.08.2015

ORDER

Per N.V. Vasudevan, Judicial Member

This appeal by the assessee is against the order dated 18.03.2015 of the CIT(Appeals), LTU, Bangalore relating to assessment year 2011-12.

2. The assessee is a charitable trust with objects to provide education by running several educational institutions. In the course of assessment

u/s. 143(3) of the Act for AY 2011-2012 the AO noticed from the details of depreciation claimed, that the depreciation was claimed on assets, the cost of acquisition of the said assets had been claimed by the assessee as capital expenditure towards application of funds towards the objects of the trust and allowed as such. According to the AO, allowing such a claim would amount to allowing double deduction. On the facts of the present case, he was of the view that the decision of the Hon'ble Supreme Court in the case of *Escorts Limited & another Vs. Union of India 199 ITR 43* is squarely applicable, wherein it has been categorically held that when deduction u/s 35(2)(iv) is allowed in respect of capital expenditure on scientific research, no depreciation is allowable u/s 32 on the same asset.

3. The assessee pointed out that Hon'ble High Court of Karnataka in the case of *All Saints Church, 148 ITR 786 (Kar)* and *Society of Sisters of St. Ann, 146 ITR 28 (Kar)* has taken the view that where capital expenditure on acquisition of depreciable asset is considered as application of income for charitable purpose, allowing depreciation on the very same capital asset would not amount to double allowance. The assessee also pointed out that the decision of *Escorts Ltd. (supra)* will not be applicable as it was rendered on a different set of facts.

4. The AO however, held that allowance of depreciation when the cost has already been recovered by way of exemption as application of income amounts to double deduction and double benefit on the same asset. The

AO referred to the decision of the Hon'ble High Court of Kerala in the case of *DDIT(E) v. Lissie Medical Institutions, 348 ITR 344 (Ker)* wherein it was held that allowing depreciation of a depreciable asset when the cost of acquisition of depreciable asset was allowed as application of income for charitable purpose amounts to double depreciation and therefore depreciation cannot be allowed. The AO also distinguished the cases cited by the Assessee.

5. On appeal by the Assessee, the CIT(A), confirmed the order of the AO.

6. Aggrieved by the order of the CIT(A), the Assessee has preferred the present appeal before the Tribunal. The relevant ground of appeal raised by the Assessee is ground No.2 relating to disallowance of depreciation.

7. We have heard the submissions of the Id. DR, who relied on the order of AO. We have considered the order of the AO. 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 institutions, 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."

8. 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 sub-section (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."

9. 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 ground No.2 raised by the Assessee is allowed.

10. The second issue that arises for consideration in this appeal which is projected by the Revenue in grounds of appeal, is as to whether the CIT(Appeals) was justified in holding that assessee, a trust, is entitled to carry forward expenditure incurred in excess of its income for setting off against income of the succeeding years? The assessee is a trust registered u/s. 12A of the Act. For the A.Y. 2011-12, the assessee filed a return of income claiming carry forward of excess application of income from earlier years to the tune of Rs.2,09,46,593/-. The assessee sought to carry forward the excess application for setting off as application of income in the subsequent assessment years. According to the AO there was no provision in the Act for carry forward of excess expenditure of earlier year to be adjusted against income of the subsequent year and he therefore denied the claim of the Assessee.

11. On appeal by the assessee, the CIT(A) confirmed the order of the AO. Aggrieved by the order of CIT(A), the Assessee has raised ground no.3 before the Tribunal.

12. The learned DR reiterated the stand of the AO that there is no provision in the Act to allow carry forward of excess application of income for set off as application of income in subsequent years. The Id. counsel for the Assessee relied on the order of the ITAT in Assessee's own case for AY 2010-11 in ITA No.522/Bang/2014 order dated 11.6.2015 wherein the

Tribunal accepted the claim of the Assessee on identical issue on identical facts.

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

of which has been fully allowed as application of income under s. 11 in past years. In Govindu Naicker Estate VS. ADIT 248 ITR 368 (Mad), the Hon'ble Madras High Court held that the income of the trust has to be arrived at having due regard to the commercial principles, that s. 11 is a benevolent provision, and that the expenditure incurred on religious or charitable purposes in earlier year or years can be adjusted against the income of the subsequent year. The principle that the loss incurred under one head can only be set off against the income from the same head is not of any relevance, if the expenditure incurred was for religious or charitable purposes, and the expenditure adjusted against the income of the trust in a subsequent year, would not amount to an incidence of loss of an earlier year being set off against the profit of a subsequent year. The object of the religious and charitable trust can only be achieved by incurring expenditure and in order to incur that expenditure, the trust should have an income. So long as the expenditure incurred is on religious or charitable purposes, it is the expenditure properly incurred by the trust, and the income from out of which that expenditure is incurred, would not be liable to tax. The expenditure, if incurred in an earlier year is adjusted against the income of a later year, it has to be held that the trust had incurred expenditure on religious and charitable purposes from the income of the subsequent year, even though the actual expenditure was in the earlier years, if in the books of account of the trust such earlier expenditure had been set off against the income of the subsequent year. The expenditure that can be so adjusted

can only be expenditure on religious and charitable purposes and no other. The High Court relied on the decision in the case of CIT Vs. Society of Sisters of ST. Anne 146 ITR 28 (Kar.).

14. We are therefore of the view that there is merit in ground No.3 raised by the Assessee. Accordingly, the same is allowed.

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.11(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 Sec.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 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 ITD 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 s. 11(1)(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 thereof. 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. 11(1)(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. 11(1)(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 Zoroastrian 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. 11(1)(a). The decision cited on behalf of the Revenue did not take into account the decision of the Supreme 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.

19. In the result, the appeal by the Assessee is allowed.

Pronounced in the open court on this 14th day of August, 2015.

Sd/-

(ABRAHAM P. GEORGE)
Accountant Member

Sd/-

(N.V. VASUDEVAN)
Judicial Member

Bangalore,
Dated, the 14th August, 2015.

/D S/

Copy to:

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

By order

Assistant Registrar /
Senior Private Secretary
ITAT, Bangalore.