

IN THE INCOME TAX APPELLATE TRIBUNAL

“B” BENCH : BANGALORE

BEFORE SHRI N.V. VASUDEVAN, VICE-PRESIDENT AND
SHRI ARUN KUMAR GARODIA, ACCOUNTANT MEMBER

ITA No.758/Bang/2018
Assessment Year : 2010-11

The Assistant Commissioner of Income Tax (Exemptions), Circle – 1, Mangaluru.	Vs.	M/s. Mangalore Jesuit Educational Society, PB No. 720, St. Aloysius College, Fathers Residence, L H H Road, Mangaluru – 575 003. PAN: AAATM4057D
APPELLANT		RESPONDENT
Assessee by	:	Smt. Sheetal Borkar, Advocate
Revenue by	:	Ms. Neera Malhotra, CIT (DR)
Date of hearing	:	10.10.2018
Date of Pronouncement	:	17.10.2018

ORDER

Per Shri A.K. Garodia, Accountant Member

This appeal is filed by the revenue and the same is directed against the order of Id. CIT (A), Mangaluru dated 13.12.2017 for Assessment Year 2010-11.

2. The grounds raised by the revenue are as under.

“I. Whether on the facts and in the circumstances of the case and in law, the CIT(A) is right in not appreciating the fact that the normal computation of income under respective heads as envisaged u/s 15 to 59 are not applicable to the computation of income in respect of charitable trust/institution for the purpose of claiming exemption under section 11, 12 and 13 and, therefore, the provisions relating to set-off of loss from one source against the income from another source, set-off of loss from one head against income from another head and carry forward and setoff of loss against the income of subsequent years as envisaged u/s70 to 79 are also not applicable to the charitable trusts/institutions.

II. Whether on the facts and in the circumstances of the case and in law, the CIT(A) is right in not appreciating the fact that the issue of application of income more than the income computed does not arise except in a case where the assessee has incurred huge amount of capital expenditure sourced out of borrowed or corpus donations or 15% of income set apart over a period of time? (Expenditure incurred out of the above sources however cannot be termed as application of

funds out of the income earned in a particular assessment year inasmuch as loan borrowed does not fall under the category of income earned by the assessee, corpus fund donation does not come under income by virtue of section 11(1)(d) and 15% of income set apart in earlier assessment year cannot be construed as income of the current year and 15% set apart out of the current year income is also excluded from income available for application. As such, the concept of application is only to show that the income is fully utilized rather than claiming excess expenditure either revenue or capital over and above the income so as to claim excess application or deficit/loss to be carried forward to subsequent assessment years. Even in the case of excess application by virtue of borrowed funds/corpus fund donations/ 15% set apart of earlier years, the income of the assessee cannot be converted to loss but at best it can be made Nil. Hence, the carry forward of excess application of income as claimed by the assessee cannot be allowed)?”

3. The Id. DR of revenue supported the assessment order whereas the Id. AR of assessee supported the order of CIT(A). She also submitted that both the issues involved in present appeal are covered in favour of the assessee by the judgement of Hon'ble Karnataka High Court rendered in the case of PCIT vs. Mangalore Jesuit Education Society in ITA No. 552 of 2017 dated 14.08.2018. She submitted a copy of this judgement of Hon'ble Karnataka High Court. She pointed out that this was a substantial question of law raised before Hon'ble Karnataka High Court as per question no. 2 that Whether the Tribunal is right in law in holding that the assessee is entitled to claim for carry forward and set-off of unabsorbed deficit without appreciating that the provisions of sections 70 to 80 of IT Act are not applicable to trusts as they only deal with carry forward and set off of loss and not excess expenditure or deficit. Thereafter she further pointed out that as per para 17 of this judgement of Hon'ble Karnataka High Court, it was held that the issue is squarely covered in favour of the assessee by the decision of cognate bench of Hon'ble Karnataka High Court rendered in the case of CIT Vs. Society of the Sisters of St. Anne as reported in 146 ITR 28. Thereafter she drawn our attention to para 18 of this judgement and pointed out that in this Para, Hon'ble Karnataka High Court has also considered the judgment of Hon'ble Bombay High Court also rendered in the case of CIT Vs. Institute of Banking as reported in 264 ITR 110.

4. We have considered the rival submissions. We find that the first issue in dispute is regarding disallowance of depreciation of Rs. 4,26,58,424/- made by the AO and it is noted by CIT(A) in para 5.4 of its order that this issue is squarely covered in favour of the assessee by the various Tribunal orders as noted in this para. For the sake of ready reference, Para 5.4 from the order of CIT(A) is reproduced hereinbelow.

“5.4 The jurisdictional Hon'ble ITAT, Bangalore, decided the issue of depreciation in favour of the appellant in the following cases:

<i>Name</i>	<i>ITA No</i>	<i>Date</i>
<i>ACIT Vs Shri Adichunchanagiri Shikshana Trust</i>	<i>774 & 775/ 2011</i>	<i>03.08.2012</i>
<i>Karnataka Reddy Janasangha, Vs DIT(E)</i>	<i>220/2011</i>	<i>07.09.2012</i>
<i>DDIT (E) Vs CutchiMemon Union</i>	<i>878/2012</i>	<i>14.08.2013</i>
<i>Karnataka State Muslim Federation Vs DIT(E)</i>	<i>37/2013</i>	<i>09.10.2013</i>
<i>ACIT Vs Medical Relief Society of South Canara</i>	<i>1713/2013</i>	<i>10.12.2014</i>
<i>ACIT Vs City Hospital Charitable Trust</i>	<i>6762014</i>	<i>20.03.2015</i>
<i>Sadvidya Educational Institution Vs Addl CIT</i>	<i>604,605&324/2011</i>	<i>28.03.2014</i>
<i>Sunnah Educational & Charitable Trust Vs CIT</i>	<i>1794 /2013</i>	<i>31.10.2014</i>
<i>ITO (E) Ward — 1, Mangaluru Vs Our Lady of Milagres Church</i>	<i>138/ 2015</i>	<i>11.06.2015</i>
<i>Krupanidhi Education Trust Vs DIT (E)</i>	<i>495/ 2014</i>	<i>20.02.2015</i>

5. This is also noted by CIT(A) in Para 5.3 of his order that this issue is covered in favour of the assessee by the judgement of Hon'ble Karnataka High Court rendered in the case of DIT(Exemption) vs. Al-Ameen Charitable Fund Trust as reported in (2016) 67 taxmann.com 160 (kar). Before us, the Id. AR of assessee placed reliance on a recent judgement of Hon'ble Karnataka High Court rendered in the case of PCIT Vs. Mangalore Jesuit Education Society (supra) wherein it was held that in the decision of the cognate bench of Hon'ble Karnataka High Court in the case of CIT Vs. Society of the Sisters of St. Anne (supra), it was held that even the depreciation not involving any cash outflow is also in the character of expenditure and therefore, such depreciation is nothing but decrease in the value of property through wear and tear, deterioration or obsolescence and the allowance made for that purpose in the books of accounts were deemed to be the application of funds for the purpose of Section 11 of IT Act.

6. The second issue involved in the present case is regarding carry forward of unabsorbed deficit of Rs. 6,34,578/- for current year along with brought forward deficit of Rs. 4,23,80,704/- pertaining to earlier years aggregating to Rs. 4,30,15,282/-. While deciding this issue in favour of the assessee, the CIT(A) has relied upon various judicial pronouncements as noted by him in Para 5.8 of his order. Hence this para from the order of CIT(A) is also reproduced hereinbelow for ready reference.

“5.8 The AR filed copies of computation of income and assessment orders u/s 143(3) for AY 2008-09 and AY 2009-10. I have verified the same. The assessment was completed by accepting the income returned in both AY 2008-09 and AY 2009-10 and the loss was not disallowed to be carried forward to subsequent years by the AO. The loss as per the computation of income for AY 2009-10 was Rs.4,23,80,704/-. The assessments attained finality. The claim of the appellant to carry forward the deficit is found to be correct. The Hon’ble Income tax Appellate Tribunal, Bangalore Bench in the following cases allowed the carry forward of excess application to be set off against the income in the subsequent years as application of income.

a) ACIT V Manipal Hotel & Restaurant Management College Trust (ITA No.1142/Bang/2013), dated 31.10.2014 AY 2010-2011.

b) DCIT V Manipal Academy of Higher Education, Manipal (ITA. No.658(B)/2014, dated 24.7.2015 (AY 2011-2012)

c) ACIT V Dr.T.M.A. Pai Foundation, (ITA No.1140/Bang/2013, vide its order dated 21.3.2014 (AY 2010-2011)

d) ACIT V City Hospital Charitable Trust in ITA 676/ 2014 dated 20.03.2015

e) ACITV Medical Relief society of South Canara in ITA 1713/2013 dated 10.12.2014.”

7. As per Para 4 of the judgement of Hon'ble Karnataka High Court rendered in the case of PCIT Vs. Mangalore Jesuit Education Society (supra), it is noted by Hon'ble Karnataka High Court that this issue is covered in favour of the assessee by another judgement of Hon'ble Karnataka High Court rendered in the case of CIT(Exemptions) and another vs. Ohio University Christ College in ITA Nos. 312 & 313/2016 dated 17.07.2018. The relevant paras of this judgement being paras 16 to 18 are reproduced by Hon'ble

Karnataka High Court and the same are reproduced herein below for ready reference.

“16. in so far as the second question proposed by the Revenue, quoted above is concerned also, we find that the Tribunal's findings in this regard do not give rise to any substantial question of law. The said findings are quoted below for ready reference:

"5.1 In the course of assessment proceedings, the Assessing Officer observed that the assessee had claimed application of income on account of expenditure of earlier years, which has been brought forward and set off in the year under consideration. The Assessing Officer disallowed the same on the ground that there is no express provision in the Act permitting the adjustment of earlier years brought forward expenses as application of income in the current year. According to the Assessing Officer, the application of income for charitable purposes must be during the relevant previous year. Since the income of the trust is exempt from tax, the question of deficit does not arise and also the trust is required to utilize 85% of the income of the previous year for charitable purposes during the year. In this view of the matter and for the above reasons, the Assessing Officer disallowed the assessee's claim of expenditure of earlier years being brought forward and set off during the year.

5.2 On appeal, the learned CIT (Appeals) allowed the amortization of the expenditure as claimed by the assessee and deleted the disallowance made by the Assessing Officer by placing reliance on the decision of the Hon'ble Karnataka High Court in the case of CIT V. Society of the Sisters of St. Anne reported in 146 ITR 28 (1984) and CBDT Circular No. 5-P(LXX)-6 of 1968.

5.3.1 We have heard the rival contentions of both the learned Departmental Representatives for Revenue and the learned Authorised Representative for the assessee and perused and carefully considered the material on record, including the judicial pronouncements cited. The facts of the issue before us is that the assessee had incurred certain preliminary expenditure in the year of setting up of the trust. The same is amortised by the assessee trust over a period of 5 years from the year of incurring of expenditure. The fact of amortization was not disputed by the Assessing Officer in the assessment proceedings for Assessment Year 2007-08 where the entire amount was added back claiming 1/ 5th of the expenditure. The un-amortized expenditure has been brought forward and set off as application of income in subsequent years, including the assessment years 2008-09 and 2009-10 which are under consideration.

5.3.2 We find that the issue before us is directly related to the issue decided by the Hon'ble Karnataka High Court in the case of Sisters of St. Anne (supra) cited by the assessee. In the said case, the

Hon'ble Karnataka High Court at paras 8 to 10 thereof has held as under : -

Xxxxxxx.....

5.3.3 Further, the CBDT Circular No.5-P (LXX)-6 of 1968 cited by the assessee makes it clear that income should be understood in its commercial sense : in the case of trusts also and therefore the commercial principle enunciated by the Hon'ble Karnataka High Court in the above referred case of Sisters of St. Anne (supra) applies to trusts as well. In view of the factual and legal matrix of this issue in the case on hand as discussed above, we concur with the decision of the learned CIT (Appeals) in cancelling the disallowance made by the Assessing Officer and in allowing the amortization of expenses. Consequently, Ground No.B (1 to 6) of the Revenue's appeal for Assessment Year 2008-09 and Ground No.0 for Assessment Year 2009-10 are dismissed."

17. In our opinion, the matter is squarely covered by a decision of the cognate Bench of this Court in the case of CIT vs. Society of the Sisters of St. Anne (1984) 16 Taxman 400 (Kar.) and (1984) 146 ITR 28, wherein the cognate Bench of this Court held that even. the depreciation not involving any cash outflow is also in the character of expenditure and therefore such depreciation is nothing but decrease in the value of property through wear and tear, deterioration or obsolescence and the allowance made for that purpose in the books of accounts were deemed to be the application of funds for the purpose of Sec. 11 of the Act. The relevant portion of the said judgment is also quoted below for ready reference:

"11. Mr. Srinivasan, however, urged that there are enough indications in Section 11 to exclude the mercantile system of accounting. The learned counsel relied upon sections 11(1)(a) and 11(4) in support of his contention. We do not think that there is anything in these sub-sections to support the contention of Mr. Srinivasan. Explanation to section 11(1)(a) on the contrary takes note of the income not received in a particular year. It lends support to the contention of the assessee that accounting need not only be on cash basis. Section 11(4) is not intended to explain how the accounts of the business undertaking should be maintained. It is intended only to bring to tax the excess income computed under the provisions of the Act in respect of business undertaking.

12. The depreciation if it is not allowed as 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' under section 11(1) in its commercial sense. The relevant portion of the Circular No.5XX-6 of 1968, dated 19.6.1968 (See Taxmann's Direct Taxes Circulars, Vol. 1, 1980 edn. P.85) 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 purposes 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 under section 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 not be less than 75 per cent of the latter, if the trust is to get the full benefit of the exemption under section 11(1)."

13. In CIT v. Trustee of H.E.H. The Nizam's Supplemental Religious Endowment Trust (1981) 127 ITR 378, the Andhra Pradesh High Court has accepted the accounts maintained in respect of the trust in conformity with the principles of accountancy for the purposes of determining the income derived from the property held in trust."

18. In view of the aforesaid findings of the learned Tribunal, allowing any expenditure of the earlier year which has been brought forward and set off in the year under consideration, is a justified finding of fact based on the correct interpretation of law and the judgment relied upon by it rendered by the cognate Bench. Therefore, the same does not call for interference. A similar view was also taken by the Division Bench of Bombay High Court in Commissioner of Income-tax v. Institute of Banking (2003) 264 ITR 110, wherein the Division Bench of Bombay High Court held that the income derived from the trust property has also got to be computed on commercial principles and if commercial principles are applied, then adjustment of expenses incurred by the trust for charitable and religious purposes in the earlier years against the income earned by the trust in the subsequent year will have to be regarded as application. of income of the trust for charitable and religious purposes in the subsequent year. The relevant portion of the said judgment of Bombay High Court is also quoted below for ready reference :

"Normal depreciation can be considered as a legitimate deduction in computing the real income of the assessee on general principles or under section 11(1)(a) of the Income-tax Act, 1961. Income of a charitable trust derived from building, plant and machinery and furniture is liable to be computed in a normal commercial manner although the trust may not be carrying on any business and the assets in respect whereof depreciation is claimed may not be business assets. In all such cases, section 32 of the Act providing for depreciation, for computation of income derived from business or profession is not applicable. However, the income of the trust Ls required to be computed under section 11 on commercial principles after providing for allowance for normal depreciation and deduction thereof from the gross income of the trust.

Income derived from the trust property has also got to be computed on

commercial principles and if commercial principles are applied, then adjustment of expenses incurred by the trust for charitable and religious purposes in the earlier years against the income earned by the trust in the subsequent year will have to be regarded as application of income of the trust for charitable and religious purposes in the subsequent year in which adjustment had been made having regard to the benevolent provisions contained in section 11 of the Act and such adjustment will have to be excluded from the income of the trust under section 11(1)(a).”

8. Respectfully following these various judicial pronouncements including that of Hon'ble Karnataka High Court, we hold that there is no infirmity in the order of CIT(A) in any of the issues which are raised by the revenue before us.

9. In the result, the appeal filed by the revenue is dismissed.

Order pronounced in the open court on the date mentioned on the caption page.

Sd/-
(N.V. VASUDEVAN)
Vice-President

Sd/-
(ARUN KUMAR GARODIA)
Accountant Member

Bangalore,
Dated, the 17th October, 2018.
/MS/

Copy to:

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

By order

Assistant Registrar,
Income Tax Appellate Tribunal,
Bangalore.