

IN THE INCOME TAX APPELLATE TRIBUNAL "G" BENCH, MUMBAI
BEFORE SHRI SHAMIM YAHYA, AM AND SHRI AMARJIT SINGH, JM

I.T.A. No.5549/M/2017
(Assessment Year: 2012-13)

ITO(E) 2(3) Room No. 513, 5 th Floor, Piramal Chambers, LalBaug, Lowr Parel, Mumbai- 400012.	Vs.	M/s. Society of Franciscan Brothers of Mount Poincur Borivali (W), Mumbai- 400103.
स्थायीलेखासं. / जीआइआरसं. / PAN/GIR No. : AAATS1005K		
(Appellant)	..	(Respondent)

Assessee by:	Ms.Ruchi Tamhankar
Department by:	Shri Chaudhary Arum Kumar Singh

Date of Hearing: 09.01.2019
Date of Pronouncement: 30.01.2019

ORDER

PER AMARJIT SINGH, JM:

The present appeal has been filed by the revenue against the order dated 27.06.2017 passed by the Commissioner of Income Tax (Appeals)-1, Mumbai [hereinafter referred to as the "CIT(A)"] relevant to the assessment year 2012-13.

2. The revenue has raised the following grounds: -

"1. Whether on the facts of the case and in law the Ld. CIT(A) erred in allowing the appeal of the assessee on account of disallowing depreciation of Rs.1,72,32,765/- in contravention of the decision of Escort Ltd. Vs. UOI 199 ITR 43 wherein it was held that since Section 11 of the Income tax act provides for deduction of capital expenditure

incurred on assets acquired for the object of the trust as application and does not specifically & expressly provide for double deduction on account of depreciation on the same very assets acquired from such capital expenditure no deduction shall be allowed u/s 32 for the same or any other previous year in respect of that asset as it amounts to claiming a double deduction.

2. Whether, on the facts and in the circumstances of the case and in law the id. CIT(A) erred in allowing the appeal, when the Delhi High Court in the case of Charanjiv Charitable Trust and Kerala High Court in the case of Lissie Medical Institutions Vs CIT 76 DTR (Ker) 372 has decided the issue in the favour of the department after considering the decision of Hon'ble Supreme Court in the case of Escorts Ltd (199 ITR 43)."

3. Whether, on the facts and in the circumstances of the case and in, the Ld. CIT(A) erred in allowing the depreciation claim of the assessee by relying upon the judgment of Hon'ble Bombay High Court in the case of Institute of Banking Personnel Selection, ignoring the fact that the Department has not accepted the said decision of the jurisdictional High Court on merit of the case, but due to smallness of tax effect appeal was not filed before Hon'ble Supreme Court. Also, the Ld CIT(A) erred in relying upon the judgment of Hon'ble high Court in the case of CIT vs. Shri Vile-Pane Kelvani Mandal, without appreciating the fact that Department has not accepted the decision on merit and filed SLP, but subsequently withdrawn the same as there was no claim of depreciation on exempted assets. Moreover, the Revenue has filed SLPs on this issue in other cases inclusive the case of G.D. Birla Medical Research & Educational Foundation (S.L.P.(C) No. 24904 of 2016(C.A.No.8294 of 2016) and in this case leave has been granted by the Hon'ble Apex Court and in all cases issue is pending for adjudication before the Hon'ble Apex Court.

4. Whether on the facts of the case and in law the Ld.CIT(A) erred in allowing the carry forward of deficit of earlier years and allowing set off against the income of the succeeding years."

5. Whether, on the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in allowing the claim of the assessee for carry forward of the said deficit, ignoring the fact that there was no express provision in the I T Act, 1961 permitting allowance of such Claim.

6. Whether, on the facts and in the circumstances of the case and in law the id. CIT(A) erred in allowing of the assessee for carry forward of the said deficit by relying upon the judgment of Hon'ble Bombay High Court

in the case of Institution of Banking Personnel Selection, ignoring the fact that the Department has not accepted the said decision of the jurisdictional High court on merit of the case, but due to smallness of tax effect appeal was not filed before Hon'ble Supreme Court. However, on this issue the Department has filed SLPs in the other case before the Hon'ble Apex Court inclusive the case of MIDC (SLP (Civil) 9891 of 2014), in which leave has been granted and the issue is pending for adjudication before the Hon'ble Supreme Court and the case has not reached finality.

7. The appellant craves leave to amend or alter any ground or add a new ground which may be necessary."

3. The brief facts of the case are that the assessee is a trust registered with DIT(E), Mumbai u/s 12A of the Act and also with Charity Commissioner. The appellant filed its return of income on 14.09.2012 along with the Income & Expenditure Account, Balance-Sheet and Audit Report in Form No. 10B declaring total deficit at Rs.4,21,24,190/-. However, the AO completed the assessment vide order dated 19.03.2015 u/s 143(3) of the I.T. Act, 1961` at taxable income of Rs. Nil. The AO disallowed the claim of the depreciation as well as claim of carry forward of earlier years and its allowing set off against the income of the succeeding years. Feeling aggrieved, the assessee filed an appeal before the CIT(A) who allowed the claim of the assessee, therefore, the revenue has filed the present appeal before us.

ISSUE NOS. 1 TO 3

4. Under these issues the revenue has claimed the allowance of claim of depreciation of Rs.1,72,32,765/-.The Ld. Representative of

the revenue has argued that the CIT(A) has allowed the claim of the assessee in contravention of the decision of Hon'ble Supreme Court in the case of **Escorts Ltd. Vs. UOI 199 ITR 43** and in the case of **Lissie Medical Institutions VS. CIT 76 DTR (Ker) 372**, therefore, in the said circumstances, the finding of the CIT(A) is wrong against law and fact and is liable to be set aside. However, on the other hand, the Ld. Representative of the assessee has strongly relied upon the order passed by the CIT(A) in question. It is required to be seen in which circumstances, the CIT(A) has allowed the claim of the assessee in connection with the depreciation. Before going further, we deemed it necessary to advert the finding of the CIT(A) on record.: -

“7.2.1 have considered the facts and circumstances of the case, gone through the assessment order of the A.O and the submissions of the appellant and also discussed the case with the AR of the appellant. The contentions and submissions of the appellant are being discussed and decided here in under:

i. The Assessing Officer has not treated the depreciation as application of income on the ground that it amounts to double deduction. Appellant has submitted that in a number of judgments, depreciation had been allowed as application of income u/s. 11. In this regard I find that the issue. Is directly covered in appellant's favour by the judgment of Hon'ble Bombay High Court in the case of CIT Vs. Institute of Banking Personnel 264 ITR 110 wherein the Hon'ble Court has observed as under:

"4. Question No. 2 herein is identical to the question which was raised before the Bombay High Court in the case of Director of Income Tax (Exemption) V. Framjee Cawasjee Institute (1993) 109 CTR 463 (Born). In that case, the facts were as follows: The assessee was the Trust. It derived its income from depreciable assets. The assessee took into account depreciation on those assets in computing the income of the

Trust. The Income Tax Officer held that depreciation could not be taken into account because; full capital expenditure had been allowed in the year of acquisition of the assets. The assessee went in appeal before the Assistant Appellate Commissioner, The appeal was rejected. The Tribunal, however, took the view that when the Income Tax Officer stated that full expenditure had been allowed in the year of acquisition of the assets, what he really meant was that the amount spent on acquiring those assets had been treated as 'application of income' of the Trust in the year in which the income was spent in acquiring those assets. This did not mean that in computing income from those assets in subsequent years, depreciation in respect of those assets cannot be taken into account. This view of the Tribunal has been confirmed by, the Bombay High Court in the above judgment. Hence, Question No. 2 is covered by the decision of the Bombay High Court in the above judgment. Consequently, Question No. 2 is answered in the affirmative i.e., in favour of the assessee and against, the department,"

ii. In a recent judgement in case of Director of Income-tax (Exemptions), Mumbai v. Shri Vile Pane Kelavani Mandal [2015] 58 taxmann.com 288 Hon'ble Bombay High Court held

"As far as quest/on No.4 is concerned, this Court has repeatedly held that there is nothing like double deduction. When the assessee has acquired an asset from the income of the trust and thereafter the amount that is claimed is the depreciation on the use of the assets, such depreciation claim does not mean double deduction. The deduction earlier claimed is towards application of funds of the trust for acquiring assets. The latter is depreciation and it is permissible deduction considering the use of the assets. This has been clarified repeatedly by this court. If any reference is required, then the case of CIT v. Institution of Banking Personnel Selection (IBPS) (2003) 264 ITR 110/132 Taxman 386 (Bom) is enough.

iii Respectfully following the above observations of Hon'ble Jurisdictional High Court the AO is directed to allow the claim of depreciation as application of income u/s 11 of the I.T. Act, after due verification of facts.

Iv Accordingly, ground of appeal No. 3 is allowed."

5. On appraisal of the above said finding, we noticed that the CIT(A) has decided the matter of controversy and allowed the claim of the depreciation on the basis of the decision of jurisdictional High Court in the case of **CIT Vs. Institution of Banking Personnel 264 ITR 110 and Director of Income tax (Exemptions), Mumbai Vs. Shri Vile Parle Kelavani Mandal (2015) 58 taxmann.com 288**. The relevant para has been produced by CIT(A) in his order which has been mentioned above while reproducing the finding of the CIT(A) on these issues. Further, we also noticed that the issue is also covered by the decision of Hon'ble ITAT in the assessee's own case for the **A.Y. 2010-11 to 20110-12 titled as DCIT(Exemption) Vs. Society of the Congregation of Franciscan Brothers in ITA. Nos. 3311 to 3313/M/2017 dated 01.09.2017**.The relevant finding has been given in para no. 5 which is hereby reproduced as under.: -

"5. I have heard both the counsel and perused the records. It transpires that upon AO disallowance on the above said two issues, Ld. CIT(A) has allowed the assessee's appeal by following Hon'ble jurisdictional High Court direct decision on the issues. Both the Counsel fairly agreed that the issues are covered in favour of the assessee by the decision of the Hon'ble jurisdictional High Court relied upon by the learned O11(A). The Revenue has also agreed to this in the grounds for appeal raised as above as it is mentioned that Department has not accepted the Hon'ble High Court's decision on these issues. Be as it may the jurisdictional High Court decision is binding. In this regard, I may gainfully refer to the order of learned OIT(A) on both the issues as under.

5.1 First Issue -

6.2. I have considered the facts and circumstances of the case, gone through the assessment order of the A.O and the submissions of the appellant and also discussed the case with the AR of the appellant. The contentions and submissions of the appellant are being discussed and decided here in under:

L The Assessing Officer has not treated the depreciation as application of income on the ground that it amounts to double deduction. Appellant has submitted that in a number of judgments, depreciation had been allowed as application of income u/s. 11. Case laws relied upon by the assessing officer have also been distinguished. In this regard / find that the issue is directly covered in appellant's favour by the judgment of Hon'ble Bombay High Court in the case of CIT Vs. Institute of Banking Personnel 264 ITR 110 wherein the Hon'ble Court has observed as under:

04 Question No. 2 herein is identical to the question which was raised before the Bombay High Court in the case of Director of Income Tax (Exemption) v. Framjee Cawasjee Institute (1993) 1C9 CTR 463 (Born). In that case, the facts were as follows: The assessee was the Trust. It derived its income from depreciable assets. The assessee took into account depreciation on those assets in computing the income of the Trust, The Income Tax Officer held that depreciation could not be taken into account because, full capital expenditure had been allowed in the year of acquisition of the assets. The assessee went in appeal before the Assistant Appellate Commissioner. The appeal was rejected. The Tribunal, however, took the view that when the Income Tax Officer stated that full expenditure had been allowed in the year of acquisition of the assets, what he really meant was that the amount spent on acquiring those assets had been treated as 'application of income' of the Trust in the year in which the income was spent in acquiring those assets. This did not mean that in computing income from those assets in subsequent years, depreciation in respect of those assets cannot be taken into account. This view of the Tribunal has been confirmed by, the Bombay High Court in the above judgment. Hence, Question No. 2 is covered by the decision of the Bombay High Court in the above judgment. Consequently, Question No. 2/s answered in the affirmative i.e., in favour of the assessee and against, the department.

it in a recent judgement in case of Director of Income-tax (Exemptions), Mumbai v. Shri Vile Pane Kelavani Mandal [2015] 58 taxmann.com 288 Hon'ble Bombay High Court held:

"As far as question No.4 is concerned, this Court has repeatedly held that there is nothing like double deduction. When the assessee has acquired an asset from the income of the trust and thereafter the amount that is claimed is the depreciation on the use of the assets, such depreciation claim does not mean double deduction. The deduction earlier claimed is towards application of funds of the trust for acquiring assets. The latter is depreciation and it is permissible deduction considering the use of the assets. This has been clarified repeatedly by this Court. If any reference is required, then the case of CIT v. Institution of Banking Personnel Selection (1BPS) [2003] 264 /TR 1101131 Taxman 386 (Bom.) is enough.

ill. Respectfully following the above observations of Hon'ble jurisdictional High Court, the Assessing Officer is directed to allow the claim of depreciation as application of income u/s. 11 of the IT. Act after due verification of facts."

5.2 Second issue -

"8.2 I have considered the facts and circumstances of the case, gone through the assessment order of the A.O and the submissions of the appellant and also discussed the case with the AR of the appellant The contentions and submissions of the appellant are being discussed and decided here in under:

i. Relying upon several case laws the appellant stated that deficit of the preceding and current year is required to be carried forward to the subsequent years. On perusal of the facts, I find that the case of appellant is squarely covered by the judgement of Hon'ble Bombay High Court in the case of Institute of Banking Personnel 264 ITR 110 wherein the Hon. Jurisdictional High Court has observed as under-

"5. Now coming to question No. 3, the point which arises for consideration is: whether excess of expenditure in the earlier years can be adjusted against the income of the subsequent year and whether such adjustment should be treated as application of income in subsequent year for charitable purposes? It was argued on behalf of the department that expenditure incurred in the earlier years cannot be met out of the income of the subsequent year and that utilization of such income for meeting the expenditure of earlier years would not amount to application of income for charitable or religious purposes. In the present case, the assessing officer did not allow carry forward of the excess of expenditure to be set off against the surplus of the subsequent years on the ground that in the case of a Charitable Trust, their income was assessable under self-contained code mentioned in section 11 to section 13 of the Income

Tax Act and that the income of the Charitable Trust was not assessable under the head "profits and gains of business" under section 28 in which the provision for carry forward of losses was relevant That, in the case of a Charitable Trust, there was no provision for carry forward of the excess of expenditure of earlier years to be adjusted against income of subsequent years. We do not find any merit in this argument of the department. 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 has been made having regard to the benevolent provisions contained in section 11 of the Act and that such adjustment will have to be excluded from the income of the Trust under sect/on 11(0(a) of the Act. Our view is also supported by the judgment of the Gujarat High Court in the case of CIT v. Shree Plot Swetamber Murti Pujak Jain Mandel (1995) 211 ITR 293 (Guj). Accordingly, we answer question No. 3 in the affirmative i.e., in favour of the assessee and against the department."

li Respectfully following the ratio laid down by the Hon. Jurisdictional High Court as above, the AO is directed to allow the carry forward of deficit in the succeeding years after due verification of facts.

iii. Ground of appeal No. 5 is, therefore, allowed."

6. There is no doubt in connection with the law relied by the Ld. Representative of the revenue is concerned but in view of the latest decision of the jurisdictional High Court, the matter of controversy has been adjudicated in favour of the assessee. The Hon'ble ITAT has also decided the matter of controversy in view of the decision of the jurisdictional High Court in the case of **CIT Vs. Institution of Banking Personnel 264 ITR 110 and Director of Income tax (Exemptions), Mumbai Vs. Shri Vile Parle Kelavani Mandal (2015) 58 taxmann.com 288.** Taking into account, all the facts and

circumstances, we are of the view that the CIT(A) has decided the matter of controversy judiciously and correctly which is not liable to be interfere with at this appellate stage. Accordingly, these issues are decided in favour of the assessee against the revenue.

ISSUE NOS. 4 TO 6

7. Under these issues the revenue has challenged the allowing of claim of the assessee in connection with the carry forward of deficit of earlier years and allowing set off against the income of the succeeding years. Ld. Representative of the revenue has argued that the CIT(A) has wrongly allowed the claim of the assessee, therefore, the finding of the CIT(A) is wrong against law and facts. However, on the other hand, the Ld. Representative of the assessee has refuted the said contention. Before going further, we deemed it necessary to advert the finding of the CIT(A) on record.: -

“5.2 I have considered the facts and circumstances of the case, gone through the assessment order of the A.O and the submissions of the appellant and also discussed the case with the AR of the appellant. The contentions and submissions of the appellant are being discussed and decided here in under:

1. Relying upon several case laws the appellant stated that deficit of the current year is required to be carried forward to the subsequent years. On perusal of the facts I find that the case of appellant is squarely covered by the judgement of Hon'ble Bombay High Court in the case of Institute of Banking Personnel 264 ITR 110 wherein the Hon. Jurisdictional High Court has observed as under -

."5, Now coming to question No. 3, the point which arises for consideration is whether excess of expenditure in the earlier years can

be adjusted against the income of the subsequent year and whether such adjustment should be treated as application of income in subsequent year for charitable purposes? It was argued on behalf of department that expenditure incurred in the earlier years cannot be met out of the income of the subsequent year and that utilization of such income for meeting the expenditure of earlier years. would not amount to application of income for charitable or religious purposes. In the present case, the assessing officer did not allow carry forward of the excess of expenditure to be set off against the surplus of the subsequent years on the ground that in the case of a Charitable Trust, their income was assessable under self-contained code mentioned in section 11 to section 13 of the Income Tax Act and that the income of the Charitable Trust was not assessable under the head "profits and gains of business" under section 28 in which the provision for carry forward of losses was relevant. That, in the case of a Charitable Trust, there was no provision for carry forward of the excess of expenditure of earlier years to be adjusted against income of subsequent years. We do not find any merit in this argument of the department. 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 has been made having regard to the benevolent provisions contained in section 11 of the Act and that such adjustment will have to be excluded from the income of the Trust under section 11(1)(a) of the Act. Our view is also supported by the judgment of the Gujarat High Court in the case of CIT V. Shree Plot Swetamber Murti Pujak Jain Mandal (1995) 211 ITR 293 (Gul). Accordingly, we answer question No. 3 in the affirmative i.e., in favour of the assessee and against the department."

Respectfully following the ratio laid down by the Hon. High Court as above, the AO is directed to allow the carry forward of deficit in the succeeding years after due verification of facts.

l ii Ground of appeal No. III is therefore allowed."

8. On appraisal of the above said finding, we noticed that the issue has been squarely covered by the decision of the Bombay High Court in the case of **CIT Vs. Institution of Banking Personnel 264 ITR**

110. The CIT(A) has passed the order on the basis of the decision of Bombay High Court in the above mentioned case. The necessary finding has been reproduced by the CIT(A) in his order mentioned above. The facts are not distinguishable at this stage also. This issue has been covered by the decision of Bombay High Court in the case of **CIT Vs. Institution of Banking Personnel 264 ITR 110 (supra)**. Therefore, in the said circumstances, we are of the view that the CIT(A) has decided the matter of controversy judiciously and correctly which is not liable to be interfere with at this appellate stage. Accordingly, we decide these issues in favour of the assessee against the revenue.

9. In result, appeal filed by the revenue is hereby ordered to be dismissed.

Order pronounced in the open court on 30. 01.2019.

Sd/-

(SHAMIM YAHYA)

लेखासदस्य / ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated : 30.01.2019

Sd/-

(AMARJIT SINGH)

न्यायिकसदस्य/JUDICIAL MEMBER

Vijay

आदेशकीप्रतिलिपिअग्रेषित / Copy of the Order forwarded to :

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent.
3. आयकरआयुक्त (अपील) / The CIT(A)-
4. आयकरआयुक्त/ CIT
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, मुंबई/ DR, ITAT, Mumbai
6. गार्डफाईल /Guard file.

आदेशानुसार/ BY ORDER,

सत्यापितप्रति //True Copy//

उप/सहायकपंजीकार (Dy./Asstt.Registrar)
आयकरअपीलीयअधिकरण, मुंबई/ ITAT, Mumbai