

**IN THE INCOME TAX APPELLATE TRIBUNAL  
MUMBAI BENCHES "D", MUMBAI**

**Before Shri Shamim Yahya, Accountant Member and  
Shri Amarjit Singh, Judicial Member and**

**ITA No.2336/Mum/2018  
Assessment Year-2013-14**

JCIT(E)1(1), Room No.506, 5 <sup>th</sup> Floor, Piramal Chambers, Lalbaug, Mumbai-400012	<b>बनाम/</b> Vs.	Dawat-E-Hadiyah Badri Mahal, 03 <sup>rd</sup> Floor, Dr. D. N. Road, Fort, Mumbai-400001
		PAN No. <b>AAATD1489N</b>
(राजस्व /Revenue)		(निर्धारिती /Assessee)

राजस्व की ओर से / Revenue by	Shri S. K. Mishra
निर्धारिती की ओर से / Assessee by	Shri Firuze B. Andhyarujina

सुनवाई की तारीख / <b>Date of Hearing :</b>	<b>06/05/2019</b>
देश की तारीख / <b>Date of Order:</b>	<b>08/05/2019</b>

**देश / O R D E R**

**Per Shamim Yahya (Accountant Member)**

This appeal by Revenue is directed against order of the Ld. CIT(A)-1, Mumbai, dated 24/01/2018 and pertains to Assessment Year 2013-14. The ground of appeal raised by the Revenue is as under:-

2. The grounds of appeal read as under:-

1. Whether, on the facts and in the circumstances of the case and in law, the Ld. CIT(A) was erred to allow carry forward of deficit

*of Rs. 171,52,25,676/-, and directing the Assessing Officer to allow carry forward of deficit on account of excess expenditure without appreciating the fact that this would have the effect of granting double benefit to the assessee, first as 'accumulation' of income u/s. 1 1(1)(a) or as corpus donation u/s 1 1(1)(d) in earlier years/current year and then as 'application' of income u/s 1 1(1)(a) in the subsequent years which was legally not permissible.?*

*2. "Whether, on the facts and in the circumstances of the case and in law, the Ld. 1T(A) was erred in allowing the claim 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 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. However, on this issue the department has filed SLP before the Apex Court in the case of MIDC(SLP (Civil) 9891 of 2014) in which leave has been granted by the Hon'ble Apex Court and the case has not reached finality.*

*3. Whether, on the facts and in the circumstances of the case and in law, the Hon'ble Tribunal was right 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.*

*4. The appellant prays that the order of the Commissioner of Income Tax (Appeals)-I, Mumbai be set aside and that of the Assessing Officer be restored.*

3. The assessee in this case is a trust. There are two issues arising out of the above grounds of appeal. First issue relates to disallowance of the depreciation.

4. The second issue relates to the disallowance of carry forward of deficit to be set off against the income of the subsequent years.

5. We have carefully considered the submission perused the records. It transpires that upon Assessing Officers disallowance on the above said to issues, learned CIT(A) has allowed the assessee's appeal by following ITAT decision in assessee's own case wherein Honourable jurisdictional High Court direct decision on these issues were followed.

6. In the regard, we may gainfully refer to the conclusion arrived at by the Ld. CIT(A).

7. First issue: Disallowance of depreciation, the Ld. CIT (A) has held as under:-

4.3. I have considered the facts and circumstances of the case, the assessment order of the A.O and the submissions of the appellant. The decision of the Hon. Jurisdictional High Court on the issue of allowance of depreciation is in favour of the appellant. The AO has not given any other reason for disallowance of depreciation and relied on the decision of the **Hon. Apex Court in Escorts Limited case (199 ITR)**. However, the appellant has further relied on decision in the case of **DIT(E) vs. Jem and Jewelry Export Promotion Council 384 ITR 412** besides the decision of the **Hon. Jurisdiction Court in CIT Vs. Institute of Banking Personnel Selection (2003) 185 CTR 492 (Born)** is applicable in this case. As per decision of the Hon. Higher judicial authorities on this issue, depreciation is allowable as claimed by the appellant. Further, Hon'ble Apex Court very recently, has settled this issue

4.3.1. Furthermore, my Id predecessor has decided

the issue in favor of the appellant for the AY 2012-13. I have also perused the order of the Hon'ble ITAT in ITA Nos. 3421 & 3422/Mum/2015 in appellant's own case for AYs 2010-11 and 2011-12 where on similar issue, the Hon'ble ITAT gave a ruling in favor of the appellant.

4.3.2. In addition to above observation, this ground of appeal on depreciation is now directly covered by the recent decision of the Honorable **Supreme Court in the case of ' CIT III Pune vs. Rajasthan and Gujarat Ch. Foundation'** in the **Civil Appeal No. 7186 of 2014 dated 13th Dec. 2017**. The observation of the Hon'ble Apex Court is reproduced 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.'*

*After hearing, learned counsel for the parties, we are of the opinion that the aforesaid view taken by the Bombay High Court correctly states the principles of law and there is no need to interfere with the same.*

*It may be mentioned that most of the High Courts have taken the aforesaid view with only exception thereto by the High Court of Kerala which has taken a contrary view in 'Lissie Medical Institutions v. Commissioner of Income Tax'.*

*It may also be mentioned at this stage that the legislature, realizing that there was no specific provision in this behalf in the Income Tax Act, has made amendment in Section 11(6) of the Act*

*vide Finance Act No. 212014 which became effective from the Assessment Year 2015-2016, The Delhi High Court has taken the view and rightly so, that the said amendment is prospective in nature.*

*It also follows that once assessee is allowed depreciation, he shall be entitled to carry forward the depreciation as well,*

*For the aforesaid reasons, we affirm the view taken by the High Courts in these cases and dismiss these matters."*

**4.3.3.** In view of the above, respectfully following the above decisions of the Hon'ble Supreme Courts and Higher judicial authorities on this issue, the AO is directed to allow the claim of depreciation as application of income u/s 11 of the IT Act after due verification of the facts.

8. The second issue: Disallowance of carry forward of deficit to be set off against the income of the subsequent year.

The Ld. CIT(A) has held as under:-

"5.3. I have considered the facts and circumstances of the case, gone through the assessment order of the AO 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:

**5.3.1** 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 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 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. Shri Plot Swetamber Murti Pujak Jain Mandal (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."

**5.3.2.** Respectfully following the ratio laid down by the Hon. High Court as above and also the rulings of the Hon'ble ITAT in appellant's own case , the AO is directed to allow the carry forward of deficit in the succeeding years after due verification of facts.

9. We further note that Hon'ble Apex Court in a recent decision has also upheld the view taken by the Hon'ble jurisdictional High Court in CIT vs Rajasthan and Gujarat Ch. Foundation in the Civil Appeal No. 7186 of 2014. The issue also stand covered by ITAT decision in assessee's own case reported in 43 ITR (Trib.) 476(Mum.).

10. Since, the issues involved now stand covered in favour of the assessee by the latest decision of Hon'ble Apex Court, we uphold the order of the Ld. CIT(A).

11. In the result, appeal filed by the revenue stands dismissed.

Order pronounced in the Open Court on 08/05/2019

**Sd/-  
(Amarjit Singh)**

न्यायिक सदस्य / JUDICIAL MEMBER

मुंबई Mumbai; दिनांक Dated : 08/05/2019

*Shekhar, P.S.* नि.स.

**Sd/-  
(Shamim Yahya)**

लेखा सदस्य / ACCOUNTANT MEMBER

**आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :**

1. अपीलार्थी / The Appellant (Respective assessee)
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT, Mumbai.
4. आयकर आयुक्त / CIT(A)- , Mumbai,
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

**आदेशानुसार/ BY ORDER,**

**उप/सहायक पंजीकार (Dy./Asstt. Registrar)  
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai**