

**IN THE INCOME TAX APPELLATE TRIBUNAL  
“ D ” BENCH, AHMEDABAD**

**BEFORE SHRI WASEEM AHMED, ACCOUNTANT MEMBER And  
Ms. MADHUMITA ROY, JUDICIAL MEMBER**

Sl. Nos.	ITA No(s)/CO No(s)	Assessment Year (s)	Appeal(s) by	
			Appellant vs. Respondent	Appellant Respondent
1.	1071/Ahd/2013	-	Chamunda Foundation 8/182, Sun Drive Park Nr.Asia School Drive in Road Ahmedabad (Assessee) PAN: AAATC8826G	CIT Gandhinagar
2.	1072/Ahd/2013	2009-10	-do- Assessee	ACIT, Gandhinagar Circle, Gandhinagar
3.	CO 82/Ahd/2015 (in ITA 828/Ahd/2015)	2010-11	-do- Assessee	ITO (Exemption) Ward-1 Ahmedabad
4.	ITA No.829/Ahd/2015	2011-12	ITO (Exemption) Ward-1, Ahmedabad	Assessee
5.	CO 83/Ahd/2015 (in ITA 829/Ahd/2015)	2011-12	Assessee	ITO (Exemption) Ward-1, Ahmedabad

<b>Assessee by :</b>	Shri M.S. Chhajed, AR
<b>Revenue by :</b>	Shri Jagdish, CIT-DR & Shri Nilamdas Gupta, Sr.DR

सुनवाई की तारीख/ <b>Date of Hearing</b>	07/05/2019
घोषणा की तारीख/ <b>Date of Pronouncement</b>	31/05/2019

**आदेश / ORDER**

**PER BENCH:**

The captioned appeals and Cross Objections have been filed at the instance of the Assessee and Revenue against the separate orders of the

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Commissioner of Income Tax and Commissioner of Income Tax (Appeals), Gandhinagar [CIT(A) in short] vide appeal no.CIT(A)/GNR/164 & 463/2011-12 & 2013-14 dated 28/03/2013 15/02/2013 & 06/01/2015 relevant to Assessment Years (AYs) 2009-10, 2010-11 & 2011-12.

First, we take up ITA No1071/Ahd/2013 an appeal by the assessee. In this appeal, the assessee has raised the following grounds of appeal:

- 1) The order passed by the Ld. CIT Gandhinagar is against law, equity and justice.*
- 2) The Ld. CIT, Gandhinagar has erred in law and on facts in cancelling registration of appellant trust granted U/S 12AA of the Act with retrospective effect from 27/04/2007.*
- 3) The Ld.CIT Gandhinagar has erred in law and on facts in considering that appellant trust is not carrying charitable activities defined U/S 2(15) of the Act.*
- 4) The appellant craves leave to add, alter, modify or amend any or all ground of appeal before final hearing.*

The assessee in this appeal has challenged the cancellation order of the Id. CIT for the registration certificate granted under section 12AA of the Act.

2. Briefly stated facts are that the assessee is a registered charitable trust u/s 12AA of the Income Tax Act, 1961 (here-in-after referred to as “the Act”) having the primary object of providing education. The assessee-trust is providing an education facility, particularly degree

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courses of MBA. The assessee-trust is affiliated with the Manipal University.

During the assessment proceedings for AY 2009-10, the AO found that the assessee is not doing any charitable activity under the trust. Accordingly, the AO issued a letter for rejection of registration of Trust u/s 12AA of the Act to the Ld. CIT Gandhi Nagar.

Further, the Ld. CIT issued a show-cause notice to the assessee for the cancelation of the registration granted u/s 12AA of the Act by recording the reasons as detailed under:

- 1) During the assessment proceeding for the AY 2009-10, the AO noticed that the assessee collected the fees from the students amounting to Rs. 5,06,55,100/-.
- 2) During the academic years 2007-09, 2008-10, 2009-11, 2010-12, the assessee neither provided any free education nor any concession in the fees even to the downtrodden of the society or any other deserving section of the society. Therefore the assessee is engaged in the business activity.
- 3) In AY 2009-10 the assessee has shown a profit in the profit & loss account at Rs. 1,88,26,808/- against the gross receipt of Rs.

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5,92,48,759/- which also reflects that the assessee is doing business activities. In spite of the huge profit, the assessee neither reduced the fees nor provided concession to the students.

- 4) Assessee purchased a plot of land in Bangalore amounting to Rs. 6 crores to expand the business activities.
- 5) The assessee has not filed its return of Income and audit report for AY 2010-11 & 2011-12.

In view of the above, it is clear that the assessee trust was carrying out the commercial activity which does not fall within the meaning of the charity as defined under section 2(15) of the Act. As such, the assessee trust ceases to be a charitable organization as per the provision of section 2(15) of the Act as amended by Finance Act 2010.

However, the assessee on the question by the Id. CIT submitted as under:

- 1) Presently the assessee-trust is running college from rented premises. The assessee-trust for providing a better environment to the student purchased land to construct its campus for the education.
- 2) The assessee-trust filed the return of Income up to the AY 2011-12.

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- 3) The assessee further submitted that there no provision under the Act which denies availing the benefit of the section 12AA of the Act in the case it has the surplus income. Further section 11(2) of the Act, provide the facility of accumulation of income for 5 years.
- 4) As per section 12AA(3) of the Act, the Ld. CIT can exercise the power of cancellation in the following two situation
  - a) The activities of the trust are not genuine.
  - b) The activities of the trust are not by the object of the Trust.

But, the Assessee trust does not fall in the above two situations. So the question of the cancellation of the certificate does not arise.

However, the Ld. CIT after considering the submission made by the assessee observed as under:

- 1) The provision of section 12AA(3) of the Act empowers to examine whether the activities are carried out by the trust/institution in accordance with the objects of such trust. In case, he (the CIT) is satisfied that the activities of the trust are not charitable in nature, he has the power to cancel it.
- 2) The AO has to apply the provisions of section 11, 12, & 13 of the Act, though the assessee is registered u/s 12AA of the Act.
- 3) The huge profit generated by the trust establishes the fact that the motive of the trust is to earn profit and not the charity as defined

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u/s 2(15) of the Act. The details of profit earned by the assessee-trust are as under:

a) FY 2009-10	Rs. 2,22,94,074/-
b) FY 2008-09	Rs. 1,88,26,808/-
c) FY 2007-08	Rs. 38,12,635/-

- 4) The assessee-trust has provided an interest-free loan to the trustees violating the provisions of section 13(1)(c) of the Act.

In view of the above, the CIT held that the activities of the trust are not genuine and also not conducted in accordance with its object. As per amendment by the Finance Act, 2010 the trust lost its character as a charitable institution and therefore registration cancelled AY 2008-09 onwards.

Being aggrieved by the order of the Ld. CIT the assessee is in appeal before us.

3. The Ld.AR before us filed two paper books running from pages 1 to 93 and 1 to 21 and submitted that the activity education is a charitable activity within the meaning of the section 2(15) of the Act.

The learned AR also submitted that there was the deficit of income computed as per the provisions of section 11 of the Act. The learned AR in support of his claim filed the chart showing the deficit in different assessment years which is placed on record.

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Similarly, the advance shown in the name of the trustee is nothing but the reimbursement trustee for the expenses incurred by the trustee on behalf of the trust.

4. On the other hand, the learned DR before us submitted that the assessee is doing commercial activity by providing education. Similarly, the trust has extended to benefit to the trustee by providing interest-free loan. Accordingly, the learned DR was of the view that the assessee is not eligible for exemption under section 11 of the Act. Thus, the learned DR vehemently supported the order of the authority.

5. We have heard the rival contentions of both the parties and perused the materials available on record. From the preceding discussion, we note that the assessee is engaged in providing education to the students. The assessee in the course of its activities has shown huge surplus as well as the investment in the land. Accordingly, the AO was of the view that the assessee is engaged in commercial activities. Subsequently, a proposal was made by the AO to the Ld. CIT for cancellation the registration certificate granted to the Trust under section 12AA of the Act. The Ld. CIT subsequently cancelled the registration certificate after giving the due opportunity to the assessee.

On perusal of the object of the trust as submitted before the Ld. CIT, we note that the object of the assessee was to provide the education. As such, the assessee was providing education to the MBA students, and it was

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also affiliated with Manipal University. The Ld. CIT did not dispute these facts. There is no dispute that the charitable activity includes the education, and this is not governed by the proviso attached to section 2(15) of the Act. Accordingly, we hold that the assessee is very much engaged in the activities of education, which is charitable. In this regard, we find support and guidance from the judgment of Hon'ble Gujarat High Court in the case of DIT Vs N H Kapadia Education Trust in appeal no. 356 of 2012 wherein it was held as under:

*“20. The Revenue's reliance on the amended section 2(15) is also of no avail. Section 2(15) of the Act defines charitable purpose as to include any relief for the poor, education, yoga, medical relief, preservation of environment including water sheds, forests and wildlife and preservation of monuments or places or objects of artistic or historic interest and the advancement of any other object of general public utility. Provisio to sub-section (15) to section 2 of the Act was added C/TAXAP/356/2012 JUDGMENT by the Finance Act, 2010 providing that the advancement of any other object of general public utility shall not be a charitable purpose, if it involves the carrying on of any activity in the nature of trade, commerce or business or any activity of rendering any service in relation to any trade, commerce or business for cess or fee or any other consideration irrespective of the nature of use or application, or retention of the income from such activity. This proviso therefore applies to activity for the advancement of any other object of general public utility. Such activity would be excluded from the definition of charitable purpose if it involves carrying on any activity in the nature of trade, commerce or business or for cess or fee or any other consideration. Clearly, the legislature did not desire this condition or restriction to be attached to the remaining activities which were defined or categorized as charitable purpose under sub-section (15) which includes the education.”*

We further note that the assessee in all the years has shown a deficit in the computation of income made as per the provisions of section 11 of

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the Act. A chart to this effect is available on record. As such, the assessee in its income & expenditure has shown the surplus income, but in the statement of income filed with the return of income, it has shown a deficit. Thus the allegation of the Ld. CIT that the assessee has shown surplus is devoid of any merit.

Furthermore, the activities carried out by the assessee cannot be held as non-genuine merely on the ground that there is surplus available to the assessee and the assessee is neither providing free education nor concession in the fees to the students.

We also note that there was no change in the objects of the trust since the inception. As such on the same objects the trust was granted the registration certificate under section 12AA of the Act vide order dated 14-12-2007.

We also find support and guidance from the judgment of Hon'ble Bombay High Court in the case of DIT Vs. Khar Gymkhana reported in 70 taxmann.com 181 wherein it was held as under:

*“The jurisdiction to cancel the registration only arises if there is change in the nature of activities of the trust or the activities of the trust are not genuine.”*

Similarly, we also note that the registration certificate under section 12 AA of the Act cannot be rejected merely on the ground that the assessee

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has extended the benefit to the trustees. In such a situation, the disallowance can be made to the extent of such benefit extended the trustees.

In support of the aforesaid view, we find guidance from the judgment of Hon'ble Gujarat High Court in the case of CIT versus Orpart charitable trust reported in 55 taxmann.com 211 wherein it was held as under:

*“7. Heard, learned Counsel for the parties and perused the material on record as well as the orders passed by the learned CIT(A) and the Tribunal. As stated by Mr. Patel, herein above, the issues involved in this matter are no more res integra and we have already decided the same in favour of the assessee and against the revenue by observing and holding as under in Paras-5 and 6 of the aforesaid decision;*

*"5. Having heard learned advocates for the parties we are of the opinion that the Tribunal was justified in upholding the order passed by CIT(A). The CIT(A) has very clearly observed that the provisions of Section 11(1)(a) are very clear and provide that the income derived from the property held under trust shall not be included in the income to the extent it is applied for the charitable or religious purposes (expenses incurred during the year) or accumulated/set apart to be applied for that purpose in future out of 75% to which the restriction u/s 11(5) applies. The Tribunal has relied upon its own decision on a similar issue rendered in ITA No. 644 to 646/Rjt/2003 dated 22.12.2003. We are in complete agreement with the reasonings adopted by the CIT(A) as well as Tribunal.*

*6. Even otherwise, the law on the subject is also well settled. In the case of Fr. Mullers Charitable Institutions (supra) the Karnataka High Court has held that a perusal of section 13(1)(d) of the Income-tax Act, 1961 makes it clear that it is only the income from such investment or deposit which has been made in violation of section 11(5) of the Act that is liable to be taxed and violation under section 13(1)(d) does not result in denial of exemption under section 11 to the total income of the assessee and that where the whole or part of the relevant income is not exempted under section 11 by virtue of violation of section 13(1) (d) of the Act, tax shall be levied on the relevant income or*

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*part of the relevant income at the maximum marginal rate. Therefore, we do not see any reason in interfering with the impugned orders."*

*8. In the result, all the appeals fail and are DISMISSED. The questions raised in these appeals are answered against the appellant-revenue and in favour of the respondent-assessee, accordingly. No order as to costs."*

In view of the above, we hold that the activities carried out by the assessee are not contrary to the objects for which the trust was established. Accordingly, we direct the Ld.CIT to restore the registration certificate granted to the assessee under section 12AA of the Act. Hence the ground of appeal of the assessee is allowed.

6. In the result, the appeal of the assessee in ITA No.1071/Ahd/2013 is allowed.

ITA No.1072/Ahd/2013 for A.Y. 2009-10

7. In this appeal, the assessee has raised the following ground of appeal:

- 1) The order passed by the Learned CIT(A) is against law, equity and justice.*
- 2) The CIT(A) has erred in law and on facts in considering that appellant trust is not eligible for getting deduction U/S 11.*
- 3) The CIT(A) has erred in law and on facts in considering that appellant trust is not eligible for getting deduction U/S 11 by considering that appellant trust has violated the conditions of Sec.13(3) of the Act.*

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- 4) *The ld. CIT(A) has erred in law and on facts in spite of admitting that appellant is eligible for deduction U/S 11 of the Act has not given direction to the Ld.A.O. to allow deduction for application of fund for capital expenditure incurred of Rs.1,05,12,798/-.*
- 5) *The CIT(A) has erred in law and on facts in upholding the order of the Ld.A.O. of not allowing deduction for amount set apart for application to charitable/religious purpose to the extent of 15% of the income derived from the property held under trust of Rs.8887314/-.*
- 6) *The CIT(A) has erred in law and on facts in upholding the order of the Ld.A.O. for making disallowance for computer of Rs.17,55,000/-.*
- 7) *The CIT(A) has erred in law and facts on in considering the reimbursement to the trustee as advance and thus charging interest on it.*
- 8) *The appellant craves leave to add, alter, modify or amend any or all ground of appeal before final hearing.*

The issue raised by the assessee in the ground no. 1 to 5 is that the Ld. CIT-A erred in not granting the exemption under 11 of the Act.

8. During the assessment proceedings for the year under consideration, the AO found that the registration granted to the assessee u/s 12AA of the Act is liable to be cancelled due to the following reasons.

- 1) The assessee has given interest-free loan to the trustee without any consideration which is prohibited u/s 13(1)(c) of the Act.
- 2) The assessee failed to provide the list of the visiting faculty to whom the laptops were given. Thus it is clear that the laptops were sold out by the trustee out of books of accounts.

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- 3) The assessee is not doing any charitable activities in pursuance to the provisions of section 2(15) of the Act.
- 4) During the academic year 2007-09, 2008-10, 2009-11, 2010-12, neither any free education was provided, nor the concession was granted by the assessee even to the downtrodden of the society or any other deserving section of the society. The details of the fees received by the trust per student per year stand as under:

Academic Year	Fees collected In 1 <sup>st</sup> year	Fees collected in 2 <sup>nd</sup> year
2007-09	Rs.1,76,000/-	Rs.1,76,000/-
2008-10	Rs.2,05,000/-	Rs.2,00,000/-
2009-11	Rs.2,35,000/-	Rs.2,25,000/-
2010-12	Rs.2,35,000/-	Rs.2,25,000/-

The details of income earned by the assessee are as under:

FY 2009-10	Rs. 2,22,94,074/-
FY 2008-09	Rs. 1,88,26,808/-
FY 2007-08	Rs. 38,12,635/-

The AO also noticed that the assessee collected the fees from all students amounting to Rs. 5,06,55,100/- only in the year under consideration. Therefore, the assessee was engaged in the business activity.

- 5) The assessee did not file return of Income and audit report for AY 2010-11 & 2011-12.
- 6) The assessee purchased a plot of land in Bangalore amounting to Rs. 6 crores to expand its business activities.

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- 7) The activities of the assessee trust are also covered in the proviso inserted in section 2(15) by Finance Act 2010.

In view of the above, it is clear that the assessee-trust has not carried out any charitable activities. Since assessee failed to fulfill the condition laid down in 12AA certificate, therefore, the certificate u/s 12AA of the Act automatically got cancelled.

On the question by the AO, the assessee submitted that the trust is a registered trust and its objects are charitable.

However, the AO disregarded the contention of the assessee by observing that the assessee failed to bring on record any evidencing that the trust is engaged in charitable activities as defined u/s 2(15) of the Act. The AO also observed that had the assessee been doing educational activities for the nonprofit motive, then it must have applied for the registration certificate u/s 10(23C) of the Act.

In view of the above, the exemption claimed by the assessee was denied under section 11 of the Act. Accordingly, the AO added the sum of Rs. 1,88,26,808.00 to the total income of the assessee.

The aggrieved assessee preferred an appeal before the Ld.CIT (A) the assessee before the Ld. CIT (A) submitted as under:

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- 1) The AO has neither given any opportunity nor show cause notice before denying the exemption u/s 11 & 12 of the Act.
- 2) There is no provision under the Act empowering the AO to cancel the registration u/s 12AA of the Act. As such, the certificate is granted by the higher authority, i.e. Id. CIT. Thus the AO cannot cancel the same.
- 3) The AO has not rebutted the explanation given by the assessee during the assessment proceeding.
- 4) As per section 12AA(3) of the Act, the Ld. CIT can exercise the power of cancellation in the following two situations as given under:
  - (i) The activity of trust is not genuine.
  - (ii) The activity of the trust is not in accordance with the object of the Trust.
- 5) The AO has not brought on record any evidence that the trust carried out its activity in violation of the object of the trust and the activities of the trust are not genuine.
- 6) Presently the assessee-trust is running a college from rented premises. The assessee-trust for providing a better environment to the student purchased land to construct its campus. The activity of

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the education is duly covered under the definition of charitable purpose u/s 2(15) of the Act.

- 7) There is no provision under the income tax Act, which denies availing the benefit of the section 12AA of the Act if the trust has surplus income. Further, the provisions of section 11(2) of the Act provide the facility of accumulation of income for 5 years.
- 8) Once the trust has fulfilled the all requisite requirements of section 11, then the trust is entitled to the benefit of exemption, even the conditions of section 10(23C) of the Act have not complied.
- 9) During the year under consideration, the assessee applied the income of Rs. 1,05,21,798/- on purchase of capital assets. All the voucher related to the purchase were filed before the AO, and no defect was pointed therein. As such, the deduction for the capital expenditure is covered u/s 11 of the Act as the application of income.

The Ld. CIT, after considering the submission made by the assessee, accepted the submission of the assessee for the following:

- 1) The registration under section 12AA of the Act was duly granted to the assessee, and the same was not withdrawn.

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- 2) The activities of the education fall under the definition of the charitable purpose u/s 2(15) of the Act.
- 3) As per the judgment Hon'ble Punjab & Haryana high court in case of Mahasabha Gurukul Vidyapeeth reported in 326 ITR 25 where in it was held that Once the all requisite requirement of section 11 to avail the benefit of the exemption fulfilled by the trust, the trust entitled is to the benefit of exemption even the condition of the section 10(23C) of the Act not complied.

In view of the above, the Ld. CIT-A held that the benefit of section 11 cannot be denied on the above basis.

However, the ld. CIT-A further observed that the assessee had violated the provisions of section 13(1)© for extending the interest-free loan to the trustee and misappropriation of laptops. Therefore the benefit of exemption under section 11 of the Act is not available to the assessee.

Being aggrieved by the order of the learned CIT (A), the assessee is in appeal before us.

9. The ld. AR before us submitted that there was no benefit extent to the trustee of the trust, therefore the question of not allowing the exemption under section 11 of the Act does not arise.

10. On the other hand, the ld. DR vehemently supported the order of the authorities below.

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11. We have heard the rival contentions of both the parties and perused the materials available on record. At the outset we note that the impugned issue has been decided in favour of assessee by us in the appeal filed by the assessee bearing ITA No. 1071/Ahd/2013 vide paragraph number 5 of this order. For a detailed discussion, please refer the relevant Para as discussed above. Accordingly, we direct the AO allow the deduction of the capital expenditure incurred by the assessee as the application of income under 11 of the Act as per the provision of the law. Therefore respectfully following the same, the ground of appeal raised by the assessee is allowed.

12. The issue raised by the assessee in the ground no. 6 is that the Ld. CIT (A) erred in confirming the addition made by the AO for Rs. 17,55,000/- on account of computer expenses.

The AO during the assessment proceedings found that the assessee purchased 400 laptops @45000/- per laptop. On verification of books of account and audit report, it is found that the 39 laptops are missing out of 400 laptops.

On the question, the assessee admitted that 39 laptops are missing and also submitted that these were given to visiting faculty & others. But the assessee did not provide the list of them. Accordingly, the AO was of the

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view that the laptops have been sold out by the trustee outside the books of accounts.

Therefore, the AO treated the purchase value missing laptop amounting to Rs 17,55,000/- ( 39\* 45000/-) as income of the assessee.

The aggrieved assessee preferred an appeal before the Ld.CIT (A). The assessee before the Ld. CIT (A) submitted that Assessee had given laptops to the visiting faculties as a matter of Honour, but no signature on the receipt was taken. Therefore it could not produce the necessary details in support of such laptops.

The assessee further submitted that the AO made addition based on a presumption that the trustee sold the laptops out of the books without any cogent material.

However, the Ld. CIT confirmed the addition made by the AO by observing that the assessee failed to provide the list of faculties to whom the laptops were given.

Being aggrieved by the order of the Ld. CIT (A) the assessee is in appeal before us.

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13. The Ld.AR before us submitted that the laptops were purchased by the trust which were given to the visiting faculties. But there was no acknowledgement receipt was signed from such visiting faculties. As the purchases of the laptop have not been doubted, therefore the assessee is eligible for deduction for such expenses.

14. On the other hand the Ld. DR submitted that the assessee is under the obligation to justify based on cogent documentary evidence that the laptops was utilized for the activities of the assessee. But the assessee has failed to do so. The learned DR vehemently supported the order of the authorities below.

15. We have heard the rival contentions of both the parties and perused the materials available on record. The issue in the present case relates to the disallowances of the expenses claimed by the assessee for Rs. 17,55,000/- on account of non-availability of supporting documents. Therefore the AO made the disallowance which was subsequently confirmed by the Ld.CIT (A).

Indeed, the onus lies on the assessee to furnish the sufficient details in support of the expenses claimed by it. In the absence of documentary evidence, the deduction of such expenses cannot be allowed to the assessee. Thus in the absence of sufficient documentary evidence, we are

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not inclined to disturb the finding of the authorities below. Hence the ground of appeal of the assessee is dismissed.

16. The issue raised by the assessee in the ground no. 7 is that the Ld. CIT (A) considered the reimbursement to the trustee as advance free of interest.

The AO during the assessment proceedings observed that the trust had given loan to the trustee without interest, which is against the provision of section 13(1)© of the Act. Accordingly, the AO disallowed the proportionate amount of interest on interest-free loan given to the trustee by withdrawing the exemption u/s 11 of the Act.

The aggrieved assessee preferred an appeal before the Ld.CIT (A). The assessee before the Ld. CIT (A) submitted as under:

The AO assumes that the trust has provided an interest-free loan to the trustee. As, such, it is the only reimbursement of the deposit paid by the trustee to book the hostel for the students. But the corresponding entry was not passed in the books of accounts during the year under consideration. Therefore, due to the non-settlement of the account of the trustee, the amount was shown as an advance in the name of the trustee. However, the effect in the books of accounts has been passed in the subsequent year.

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The AO made an addition on account of interest on an ad-hoc basis. The advance was given only for one day, but the AO charged the interest @ 12% for the whole of the year.

The Ld. CIT (A) after considering the submission of the assessee partly allowed the appeal by observing as under:

The advance of Rs. 1,80,000/- without interest was reflected in the balance sheet in the name of Shri Kishore Jain. But the submission of the assessee is not acceptable because as the assessee filed the belated return on 31-03-2010. Thus the relevant entry could have been updated with the correct entry.

In view of the above, the Ld. CIT held that income of the trust has been directly applied for the benefit of the trustee u/s 13(1)© of the Act. Therefore the assessee is not eligible for benefit u/s 11 of the Act as it is hit by section 13(1)(c) of the Act.

Accordingly, the Id. CIT-A directed the AO to disallow the interest only for one day as the advance was given only for one day.

Being aggrieved by the order of the Ld. CIT (A) the assessee is in appeal before us.

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17. The Ld. AR before us submitted that the amount shown as advance in the name of the trustee is representing the reimbursement of the cost incurred by the trustee on behalf of the trust. The same was adjusted in the books of accounts in the subsequent assessment year.

18. On the other hand, the Ld. DR vehemently supported the order of the authorities below.

19. We have heard the rival contentions of both the parties and perused the materials available on record. The issue in the instant case relates to the interest-free advances given by the assessee for Rs. 1.80 lakhs to the trustee. Therefore the AO made the disallowance of the interest expenses of Rs. 21,600 being 12% of such advances. However, the Ld.CIT (A) found that the assessee provided such advance for one day only. Accordingly, he directed to make the disallowance of the interest expenses proportionately i.e. only for one day.

Now, the issue before us arises whether the advance was given by the assessee is for the purpose of its activities in the given facts and circumstances. At the outset, we note that the Ld. Counsel for the assessee has not substantiated his argument based on any documentary evidence that such advances to the trustee were given in the course of its activities. Thus in the absence of such documentary evidence, we do not

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find any reason to interfere in the finding of the authorities below. Hence, the ground of appeal of the assessee is dismissed.

20. In the result, the appeal of the assessee is partly allowed.

CO No. 82/Ahd/2015 (in ITA No.828/Ahd/2015) for AY 2010-11.

21. In this Cross Objection, the assessee has raised following grounds in its CO:

- 1. The Ld.CIT(A) has erred in law and on facts in considering the assessment valid in absence of no valid notice was served by the Jurisdiction Assessing Officer.*
- 2. The Ld.CIT(A) has erred in law and on facts in not allowing the deduction claimed by application of Fund of Rs.2,65,00,000/-.*
- 3. The appellant craves liberty to add, amend, alter or modify all or any grounds of appeal before final hearing.*

The assessee in its 1<sup>st</sup> ground of appeal has challenged the assessment proceedings framed under section 143(3) of the Act on the ground that no valid notice was served upon the assessee.

22. At the outset, we note that the assessee has been filing its return of income with the DCIT/ACIT Gandhi Nagar having jurisdiction over the assessee. Accordingly, the assessee for the year under consideration filed

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its return of income in Gandhinagar as evident from the acknowledgment of the income tax return placed on page 1 of the paper book.

However, the ITO ward 10(1) of Ahmedabad has issued a statutory notice under section 143(2) of the Act vide dated 27-9-2012 for making the assessment under section 143(3) of the Act.

The assessee against the issuance of the notice under section 143(2) has also filed the objection vide letter dated 8-2-2013 to the officer having jurisdiction at Gandhi Nagar. The copy of such objection is placed on page 19 of the paper book.

23. In view of the above, the Ld. AR before us contended that non-issuance of the notice under section 143(2) of the Act by the AO having jurisdiction over the assessee renders the assessment *void ab initio*.

24. On the other hand, the Ld. DR submitted that the statutory notices are generated through the computer system. Therefore, there is no role of the officer having jurisdiction over the assessee for issuing such notice. The Ld. DR vehemently supported the order of the authorities below.

25. We have heard the rival contentions of both the parties and perused the materials available on record. There is no dispute to the fact that the notice under section 143(2) of the Act was not issued by the officer

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having jurisdiction over the assessee. As such the statutory notice was issued under section 143(2) of the Act by the AO of Ward 10(1) who doesn't have jurisdiction over the assessee. It is also pertinent to note that the assessee has objected before the officer having jurisdiction over it regarding the issuance of such notice as discussed above.

Now to resolve the controversy, as discussed above, we find important to refer the judgment of the Hon'ble Gujarat High Court in the case of Shirishbhai Hargovandas Sanjanwala Vs. ACIT reported in 88 taxmann.com 578 wherein it was held as under:

*“Held that the Assistant Commissioner Circle 5(2) had no jurisdiction to assess the petitioner. She could not have issued notice for reassessment. This was not a mere irregularity or a defect which could be cured, but question of jurisdiction of the authority to reopen the assessment. Therefore, the notice was liable to be quashed.”*

We also note that the assessee before the learned CIT (A) has also objected the validity of the notice issued under section 143(2) of the Act. The submission of the assessee reasons under:

*“The appellant trust has filed its return of income for the year under reference physically showing total deficit of Rs.1,40,71,711/- on 29.03.2012 in the office of the Ld.A.O. The jurisdiction of the appellant trust falls within the ambit of the Ld.A.O. only. The appellant trust has filed all its returns before the Ld.A.O. having jurisdiction over appellant. All earlier notices, scrutiny, assessment etc. had been dealt out by the Ld.A.O. having valid jurisdiction.*

*The appellant trust had received notice u/s.143(2) of the Act from the Income Tax Officer, Ward 10(1) Ahmedabad on 27.09.2012 who has no valid jurisdiction over the appellant trust.*

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*Appellant trust is registered as Public Trust by the Charity Commissioner, Gandhinagar and registration U/S 12AA of the Act & 80-G are given by the Commissioner of Income Tax Gandhinagar.*

*In no case, the jurisdiction of the appellant trust falls with ITO Ward 10(1) Ahmedabad. There is not a single instance which shows that the jurisdiction of the appellant trust falls with the ITO Ward 10(1), Ahmedabad.*

*There was no order passed U/s.127 of the Act to transfer the jurisdiction of the appellant from the Ld.A.O. to ITO ward 10(1), Ahmedabad.*

*The notice u/s.143(2) of the Act was issued by the Income Tax Officer Ward 10(1), Ahmedabad having no jurisdiction over appellant, hence said notice is illegal and bad in the eyes of law. All the proceedings conducted on the basis of said illegal notice is illegal and void ab initio. Even Assessment order passed on the basis of said notice is bad and required to be quashed.*

*Appellant has drawn the attention of the Ld.A.O. that no valid notice U/S. 143(2) of the Act is issued by him. Appellant also objected that in absence legal and valid notice U/S 143(2) of the Act, assessment proceedings are illegal.”*

The Ld. DR at the time of the hearing has not brought anything on record against the submission of the assessee as discussed above.

In view of the above, we hold that the notice issued by the AO having no jurisdiction over the assessee is invalid notice which cannot be cured even under section 292BB of the Act. Accordingly, we quash the assessment order as the same is not sustainable in the eyes of the law. Hence the ground of appeal of the assessee is allowed.

The other ground raised by the assessee does not require any separate adjudication in view of the fact that the order passed by the AO was not

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sustainable as elaborated in the preceding paragraph. Accordingly, we are not inclined to adjudicate the issue raised by the assessee on merit. Hence we dismiss the same.

26. In the result, the cross-objection No.82/Ahd/15 filed by the assessee is partly allowed.

**Coming to Revenue's appeal in ITA 829/AHD/2015 for AY 2011-12**

27. The revenue has raised the following grounds of appeal:

- 1) The Ld. Commissioner of Income-Tax (Appeals) has erred in law and on facts in holding that the assessee's activities are in the nature of 'education' and not General Public Utility.*
- ii) The Ld. Commissioner of Income-Tax (Appeals) has erred in law and on facts in holding that the appellant trust is eligible for getting deduction u/s.11.*
- iii) The Ld. Commissioner of Income-Tax (Appeals) has erred in law and on facts in allowing depreciation on the assets, the cost of which has already been allowed as a deduction on account of application of income as this would amount to double deduction.*
- iv) On the facts and circumstances of the case, the Ld. Commissioner of Income-Tax (Appeals) ought to have upheld the order of the assessing Officer.*
- v) It is, therefore, prayed that the order of the Ld. Commissioner of Income-Tax (Appeals) may be set aside and that of the Assessing Officer be restored.*

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The 1<sup>st</sup> issue raised by the Revenue is that Ld. CIT (A) erred in holding that the activities of the assessee are in the nature of education activities.

28. At the outset, we note that we have decided the identical issue in favor of the assessee in ITA 1071/AHD/2013 vide Para number of 5 this order. Respectfully following the same, we do not find any reason to disturb the finding of the Ld. CIT (A). Hence the ground of appeal of the Revenue is dismissed.

29. The 2<sup>nd</sup> issue raised by the Revenue is that the Ld.CIT (A) erred in deleting the addition made by the AO by disallowing the depreciation on the assets in respect of which the assessee has already claimed the deduction as the application of income.

The AO during the assessment proceedings found that the assessee has claimed depreciation in its profit & loss accounts amounting to Rs. 19,30,011/-

However, the AO observed that in case of a trust, the entire benefit of capital expenditure is given in the very first year in which the asset was purchased. Therefore further deduction by way of depreciation is not allowable. If the depreciation is also allowed, then deduction shall exceed the cost of the asset, which is not the intention/purpose of the Law.

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The aggrieved assessee preferred an appeal before the Ld.CIT (A) who deleted the addition made by the AO by placing reliance on the Judgment of Hon'ble ITAT Ahmedabad in case of ITO (Exemption) Vs. Sardar Public Charitable Trust in ITA no 285 & 286/AHD/2013 vide order dated 19/07/2013 where the Hon'ble ITAT allowed the depreciation.

Being aggrieved by the order of the Ld. CIT (A) the Revenue is in appeal before us.

Both the Ld. DR and the Ld. AR before us relied on the orders of the authorities below as favourable to them.

30. At the outset, we note that the assessee is entitled to claim the entire amount of capital expenditure as the application of income as well as it can also claim the depreciation on such capital expenditure. Regarding this we find support and guidance from the judgment of Hon'ble Supreme Court in the case of *CIT v. Rajasthan & Gujarati Charitable Foundation* [2018] 89 taxmann.com 127/253 Taxman 165/402 ITR 441 (SC) wherein Their Lordships have, inter alia, observed as follows:

*“..... It is a matter of record that all the assesseees are charitable institutions registered under Section 12A of the Income Tax Act (hereinafter referred to as 'Act'). For this reason, in the previous year to the year with which we are concerned and in which year the depreciation was claimed, the entire expenditure incurred for acquisition of capital assets was treated as application of income for charitable purposes under Section 11(1)(a) of the Act. The view*

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taken by the Assessing Officer in disallowing the depreciation which was claimed under Section 32 of the Act was that once the capital expenditure is treated as application of income for charitable purposes, the assessee had virtually enjoyed a 100 per cent write off of the cost of assets and, therefore, the grant of depreciation would amount to giving double benefit to the assessee. Though it appears that in most of these cases, the CIT (Appeals) had affirmed the view, but the ITAT reversed the same and the High Courts have accepted the decision of the ITAT thereby dismissing the appeals of the Income Tax Department. From the judgments of the High Courts, it can be discerned that the High Courts have primarily followed the judgment of the Bombay High Court in 'CIT v. Institute of Banking Personnel Selection (IBPS)' [\[2003\] 131 Taxman 386](#). In the said judgment, the contention of the Department predicated on double benefit was turned down in the following manner:

"3. As stated above, the first question which requires consideration by this Court is: whether depreciation was allowable on the assets, the cost of which has been fully allowed as application of income under section 11 in the past years? In the case of CIT v. Munisuvrat Jain 1994 Tax Law Reporter, 1084 the facts were as follows. The assessee was a Charitable Trust. It was registered as a Public Charitable Trust. It was also registered with the Commissioner of Income Tax, Pune. The assessee derived income from the temple property which was a Trust property. During the course of assessment proceedings for assessment years 1977-78, 1978-79 and 1979-80, the assessee claimed depreciation on the value of the building @ 2½% and they also claimed depreciation on furniture @ 5%. The question which arose before the Court for determination was : whether depreciation could be denied to the assessee, as expenditure on acquisition of the assets had been treated as application of income in the year of acquisition? It was held by the Bombay High Court that section 11 of the Income-tax Act makes provision in respect of computation of income of the Trust from the property held for charitable or religious purposes and it also provides for application and accumulation of income. On the other hand, section 28 of the Income-tax Act deals with chargeability of income from profits and gains of business and section 29 provides that income from profits and gains of business shall be computed in accordance with section 30 to section 43C. That, section 32(1) of the Act provides for depreciation in respect of building, plant and machinery owned by the assessee and used for business purposes. It further provides for deduction subject to section 34. In that matter also, a similar argument, as in the present case, was advanced on behalf of the revenue, namely, that depreciation can be allowed as deduction only under section 32 of the Income-tax Act and not under general principles. The Court rejected this argument. It was held that 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. The Court rejected the argument on behalf of the revenue that

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*section 32 of the Income-tax Act was the only section granting benefit of deduction on account of depreciation. It was held that income of a Charitable Trust derived from building, plant and machinery and furniture was liable to be computed in 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 Income-tax Act providing for depreciation for computation of income derived from business or profession is not applicable. However, the income of the Trust is required to be computed under section 11 on commercial principles after providing for allowance for normal depreciation and deduction thereof from gross income of the Trust. In view of the aforesatated judgment of the Bombay High Court, we answer question No. 1 in the affirmative i.e., in favour of the assessee and against the Department.*

*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](#). 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 ITO 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 ITO 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."*

*2. 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.*

*3. 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. CIT [\[2012\] 24 taxmann.com 9/209 Taxman 19 \(Mag.\)/348 ITR 344](#)'.*

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4. It may also be mentioned at this stage that the legislature, realising 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. 2/2014 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.

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

Respectfully following the esteemed views of Hon'ble Supreme Court, we approve the conclusions arrived at by the Ld. CIT(A), which are in consonance with the aforesaid decision, and decline to interfere in the matter. Hence the ground of appeal of the revenue is dismissed.

31. In the result, the appeal filed by the Revenue is dismissed.

**Coming to the CO 83/AHD/ 2015 for AY 2011-12 filed by the assessee**

32. The assessee has raised the following grounds in its Cross Objection:

1. The Ld.CIT(A) has erred in law and on facts upholding disallowance U/s.40a(ia) of the Act for consultancy expenses of Rs.3,14,666/-.

2. The appellant craves liberty to add, amend, alter or modify all or any grounds of appeal before final hearing.

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The only issue raised by the assessee is that the Ld. CIT (A) erred in confirming the disallowance made by the AO for Rs. 3,14,666/- on account of non-deduction of TDS under section 40(a)(ia) of the Act in respect of consultancy expenses.

The AO during the assessment proceedings observed that the assessee had not deducted the TDS in respect of certain expenses, including consultancy expenses. Therefore the same was disallowed by the AO and added to the total income of the assessee amounting to Rs. 1,01,16,942/- including consultancy expense of Rs. 3,14,666/- only.

The assessee carried the matter to the Ld.CIT (A) who dismissed the appeal of the assessee in part except for the consultancy fees amounting to Rs. 3,14,666.00 by observing that the assessee has not raised ground of appeal qua the amount of non-deduction of TDS on consultancy charges.

Being aggrieved by the order of the Ld.CIT (A) the assessee is in CO before us.

33. The Ld. AR before us placed the paper book running from pages 1 to 37 and submitted that the issue of non-deduction of TDS is arising from the order of the AO. However, the assessee inadvertently mentioned

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in the ground of appeal, the amount of Rs. 98,02,276/- instead of Rs. 1,01,16,942/- disallowed by the AO in the appeal filed before the Ld.CIT (A). Accordingly, the Ld. AR prayed before us to restore the issue to the file of the AO for fresh adjudication.

34. On the other hand, the Ld. DR did not raise any objection if the matter is set aside to the file of the Id. CIT(A) for fresh adjudication.

35. Heard the rival contentions and perused the materials available on record. At the outset, we note that the AO alleges that the assessee has not deducted the TDS on certain expenses. Therefore the disallowance is warranted. However, on perusal of page 28 of the paper book, we note that the assessee has deducted the TDS. However, this fact has not been verified by the Id. CIT-A. Therefore in the interest of justice and fair play, we are inclined to restore this issue to the file of the Id. CIT-A for fresh adjudication as per the provisions of law. Hence, the ground of appeal of the assessee is allowed for statistical purposes.

36. In the result, the CO No.83/Ahd/2015 filed by the assessee is allowed for statistical purposes.

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37. We summarize the result is as under:

1. ITA No.1071/Ahd/2013 filed by the assessee is allowed.
2. ITA No.1072/Ahd/2013 for AY 2009-10 filed by the assessee is partly allowed.
3. ITA No.829/Ahd/2015 for AY 2011-12 filed by the Revenue is dismissed.
4. CO No.82/Ahd/2015 for AY 2010-11 filed by the assessee is partly allowed.
5. CO No.83/Ahd/2015 for AY 2011-12 filed by the assessee is allowed for statistical purposes.

<b>This Order pronounced in Open Court on</b>	<b>31/05/2019</b>
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Sd/  
(Ms. MADHUMITA ROY)  
JUDICIAL MEMBER

Sd/-  
(WASEEM AHMED)  
ACCOUNTANT MEMBER

Ahmedabad; Dated 31/05/2019

*टी.सी.नायर, व.नि.स./T.C. NAIR, Sr. PS*

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त(अपील) / The CIT(A)-Gandhinagar
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, अहमदाबाद / DR, ITAT, Ahmedabad
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

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आयकर अपीलीय अधिकरण, अहमदाबाद / ITAT, Ahmedabad