

**IN THE INCOME TAX APPELLATE TRIBUNAL  
DELHI BENCHES: Bench 'C', NEW DELHI**

**BEFORE SHRI G.D. AGRAWAL, VICE PRESIDENT  
AND**

**SMT. SUCHITRA KAMBLE, JUDICIAL MEMBER**

**ITA No. 3550/Del/2015**

**AY: 2010-11**

Ideal Education Society SD- 522, Shastri Nagar Ghaziabad, Pin: 201206	Vs.	Addl. CIT Range- 1 Ghaziabad
<b>PAN No:</b> AAABI0038E		
<b>APPELLANT</b>		<b>RESPONDENT</b>

**Assessee by** : Shri Ajay Wadhwa, Adv.  
**Revenue by** : Shri Amit Katoch, Sr. DR

**Date of Hearing** : 29/05/2019  
**Date of Pronouncement** : 12/06/2019

**ORDER**

**PER SUCHITRA KAMBLE, JUDICIAL MEMBER**

This appeal is filed against the order dated 23.02.2015 passed by CIT(Appeals)-Muzaffarnagar for AY 2010-11.

2. Grounds of appeal read as under:

*"1. That the order of the Ld. Commissioner of Income Tax (Appeals), New Delhi, [the Ld. CIT(A)], dated 23.02.2015 is bad in law and on facts.*

*2. That the Ld. CIT(A) has erred in law and on facts in not appreciating the fact that the hostel/transport facilities provided to the students by the appellant society is an activity incidental to the attainment of the main objective of the society.*

2.1. That the Ld. CIT(A) has erred in law and on facts in upholding the action of the Assessing Officer of making an addition/disallowance of Rs. 29,25,986/- out of the expenses incurred on running of the hostel/transport facility.

2.2. That the Ld. CIT(A) has erred in law and on facts in treating the hostel/transport facility provided to the students of institution as a business undertaking and thus upholding the action of AO as to the requirement of maintenance of separate books of accounts as required as required by Sec. 11(4A) of the Income Tax Act, 1961.

3. That the Ld. CIT(A) has erred in law and on facts in upholding the action of Assessing Officer to disallow depreciation claimed by the appellant society by debiting the same in Income & Expenditure Account which amounted to Rs. 2,52,75,353/-.

3.1 That the Ld. CIT(A) has erred in law and on facts in upholding the claim of Assessing Officer that the appellant society has availed 100% application of the value of the capital expenditure in the year of purchase of fixed assets out of gross receipts.

4. That the appellant craves leave to add, alter, amend, substitute, delete and modify any or all the grounds of appeal, which are without prejudice to one another, before or at the time of hearing of the appeal.”

3. The assessee is a society registered with the Registrar of Societies and enjoys registration u/s 12AA of the Income Tax Act, 1961. The assessee is running an Institute for professional courses. The assessee is also running hostel and transport facility for its students for which separate fee is charged. The Assessing Officer held that hostel and transport facility provided to the students are separate businesses and are not covered in the definition of charitable purpose u/s 2(15) of the Act. The Assessing Officer further held that since no separate books of accounts are maintained for this business, the assessee is not entitled for exemption u/s 11(4A) of the Act and income generated from surplus of the above activities are taxable. The Assessing Officer also disallowed depreciation of Rs. 252,75,253/- by observing that allowance will amount to double deduction since 100% application of value of

capital expenditure had already been availed by the assessee in the year of investment and on the same value the assessee has claimed depreciation.

4. Being aggrieved by the assessment order, the assessee filed appeal before the CIT(A). The CIT(A) dismissed the appeal of the assessee.

5. The Ld. AR submitted that as regards Ground nos. 2, 2.1 & 2.2 relating to hostel and transportation fees, there was no profit motive in carrying out these activities. The Ld. AR submitted that the facilities in the College/Institute are not carried with the profit motive. There were meant for promoting the main object of the Institute. In fact the assessee suffered a net loss of Rs. 1,64,023/- on account of providing hostel and transport facilities and it cannot be said that the Institute is engaged in the activities of earning profit. The Ld. AR further submitted that the hostel/transport facility is neither a luxury nor a means to earn profit by the society, rather the Society would travel extra mile to provide such facilities, even if, it has to suffer some loss on providing such desired facilities so to fulfill the main objective of the society. The Ld. AR further submitted that the Assessing Officer failed to bring any material evidence on record to prove that the society acted in a manner with a motive to earn profit out of the transport or hostel facility provided to its students. The Ld. AR relied upon the decision of the Hon'ble Delhi High Court in the case of Institute of Chartered Accountants of India 358 ITR 91. The Ld. AR further submitted that the college gives admission from far off places/towns on the precondition that hostel and transport facilities are available in the campus. Since the college is located on the outskirts of the town on the Meerut Delhi Highway where regular transport is not available, it is for this reason that this facility is provided as a prerequisite to the admission so as to fulfill the objective of the society to provide education to the students. It is the responsibility of the assessee to provide transport facility to the students for attending the school and for sending the students back to their respective homes with proper security and attachments. The Ld. AR further submitted

that these facilities were provided only to those students who were studying in Institute and were interested to avail the facility. The assessee is having only a small area build up for the use of hostel. The students are mostly accommodated in the rented buildings for which rent is paid by the society. The society owns only two buses which are run by the staff on the payroll of the college. The remaining buses are hired from the market and payment is made by the Society. Majority of the students commute through public transport system. The Ld. AR submitted that hostel and transport facilities are an integral part of education activity. Provision for hostel facility was only incidental to aims and objects of the society and there was no material on record showing that assessee was running hostel for business purpose. Since the task of providing education essentially involves institution and administration of facilities for housing the students in hostel, provision of timely food from the mess, provision of sports facilities for mental relaxation and recreation of the students and bus service facilities for picking up and dropping of the students to the institute for the purpose of securing education, it has to be construed as essentially related to the realization of the primary charitable objective of education itself. The Ld. AR further submitted that although no surplus is generated out of the facilities provided to the students in the form of hostel/transport, however, even if there is any surplus, it is used by the assessee for providing education to students. It is not the case that the surplus is drawn out by the trustees for their personal benefit. The Ld. AR submitted that the facility provided by the college is restricted only to the college students and cannot be availed by the public at large at their will and at any given hour of time. The provisions of section 11(4) of the Act are not applicable because the college is not running any business undertaking but is simply providing facility out of the assets owned by the college itself. The facility is being provided to a definite set of students connected with the institute and is open at specific timings on the specific routes and to specified student directly connected with the college and is not a commercial basis. The

Ld. AR further submitted that the assessee has maintained a separate ledger account under the head "hostel receipts and expenses". Requirement of maintaining separate books of accounts shall arise only if there is a business undertaking and the trust is engaged in the activity of earning profits. The Assessing Officer has treated the hostel facility as business alleging that surplus has been generated out of hostel facility. The Assessing Officer has taken comparable market price of Rs. 36,000/- to Rs. 40,000/- without even mentioning any base from where such market price was taken by him. If some surplus was generated out of hostel facility, even then the same cannot be treated as business itself. Even after insertion of proviso to section 2(15) of the Act, various courts have held that merely charging a fee for some of the activities, which may result in surplus, does not *ipso-facto* means that the activities of the Society are commercial in nature. The trade or commerce in the normal course is different then what is required u/s 2(15) of the Act. The Ld. AR relied upon the Hon'ble Apex Court decision in the case of Addl. CIT vs. Surat Art Silk Cloth Manufacturers Association (1978) 121 ITR 1 (SC). The Ld. AR also relied upon the decision of American Hotel and Lodging Association, Educational Institute vs. CBDT (2008) 301 ITR 86 (SC). The Ld. AR relied upon the decision of the SC in the case of Aditanar Educational Institute vs. Addl. CIT (1997) 224 ITR 310.

6. As regards disallowance of mess expenses, the Ld. AR submitted that the Assessing Officer estimated the mess expenses at Rs. 1,275/- per student per month as against the expenses of Rs. 2,401/- per student per month incurred by the assessee. The Ld. AR submitted that the Assessing Officer failed to appreciate the facts that the nature of foods and facilities provided by the assessee to its students is not the same in other Institute. The number of students at a given time availing the mess facility provided by the assessee, since, if there are large number of students, the per head expense would be on the lower side while if there are less number of students, the per head expense

would be on a higher side. No detail of the breakup of the food items provided, number of meals given, nature of foods such as vegetarian and non-vegetarian, nature of morning breakfast, evening tea, etc. The Ld. AR further submitted that the Assessing Officer ignored the fact that the risk and responsibility attached in providing hostel and transport facility to the students. The assessee society has provided tough security and staff. It is, thus, stated by the Ld. AR that apart from making payments to the contractor for hiring buses and for rent expenses, assessee society incurred other connected expenditure such as providing attendants for safety. All such expenses are merged with the expenses debited under different heads and they have not been considered by the Assessing Officer. The Assessing Officer has proceeded to complete the assessment by estimating the mess expenses without giving specific notice u/s 142(1) of the Act. The Assessing Officer acted in a most arbitrary manner to device its own formula so as to work out the disallowance of mess charges. Such disallowance made by the Assessing Officer without providing the comparable cases to the assessee is not only arbitrary and illegal but the same is based on surmises, conjectures and on hypothetical observation. The two cases referred to by the Assessing Officer have no relevance to make disallowance of expenses since every institute has its own system of providing food in the mess. The Ld. AR submitted that this issue is squarely covered by the decision of the Tribunal in the case of Laksh Educational Society vs. Addl. CIT (ITA No. 3549/Del/2015).

7. As regards ground no. 3 and 3.1 relating to disallowance of depreciation of Rs. 2,52,75,253/-, the Ld. AR submitted that depreciation is allowable as separate deduction apart from application of income. Depreciation has to be debited to determine the extent and usage of the capital asset in the course of conduct of activities and is available u/s 32 of the Act. However, the investment is considered as a system to measure the utilization of the charitable funds in the charitable activities in the form of development

infrastructure, to be used for the fulfillment of the main object of the trust. Computation of income is separate and distinct and has to be made on commercial basis by applying the provision of the Act. The depreciation is a charge on the wear and tear and use of the capital asset which suffers like that gets reduced year after year and with the passage of time. The depreciation has been provided in the income and expenditure in conformity with the Income Tax Rules applicable to the allowance of depreciation of fixed assets. The proposition that depreciation should be allowed, even if, the purchase of assets have been claimed by the trust towards application of income has been dealt by the various decisions by the Apex Court and the various High Courts. The Ld. AR relied upon following decisions:

- 1) CIT vs. Rajasthan and Gujarati Charitable Foundation Poona (2018) 402 ITR 441 (SC)
- 2) DIT (Exemption) vs. Indraprastha Cancer Society (2015) 53 taxmann.com 463 (Del.)

8. The Ld. DR relied upon the assessment order as well as the order of the CIT(A). The Ld. DR also relied upon the following decisions:

- 1) Indian Machine Tools and Manufacturers Associations vs. DIT (2018) 91 taxmann.com 465 (Bom.)
- 2) Dayanand Pushpadevi vs. Addl. CIT (2016)-TIOL-1810-ITAT-DELHI
- 3) Young Women Christian Association of Madras vs. JDIT (2014) 41 taxmann.com 142.

But the Ld. DR could not distinguish the ratio laid down by the Hon'ble Apex Court as well as various High Courts and Tribunal's decisions relied upon by the Ld. AR during the hearing.

9. We have heard both the parties and perused all the relevant material available on record. Ground No. 1 is general in nature hence dismissed. As regards to Ground No. 2, 2.1 and 2.2, the issues contested herein have been decided by the Tribunal in case of Delhi Public School, Ghaziabad vs. ACIT (ITA

No. 3593/Del/2015, AY 2010-11 order dated 08.05.2018). The Tribunal held as under:

“8. We have gone through the record in the light of the submissions on either side. At page No. 4 of the assessment order, the Ld. AO recorded that the assessee society has charged Rs. 3,00,42,296/- towards transport fee which is included in the income and expenditure account and corresponding expenses was debited to Rs. 3,09,33,029/-for providing transport facility to students. There is no dispute that the assessee has been running 37 school buses. The Ld. AO allowed the salary of 7 drivers. The contention of the assessee that 37 buses cannot be run by 7 drivers goes uncontradicted. Further AO did not bring on record as to the use of the vehicles for any other purpose than the conveyance of the children and further its repair and periodical maintenance. It is not the case of the revenue also that the assessee has been deriving any income from the use of these vehicles other than collecting the fees from the students for their transport facility. It is, therefore, clear that the material on record suggest that all the buses are being used only for providing facility to the students and staff that also only for transport to and from the school to the respective houses of the children in the given routes.

9. Ld. AR brought to our notice the guidelines and the bylaws which regulate the running of school buses issued from time to time by CBSE and NCPCR manual of safety standards in schools with reference to the staff, attendants, duty of school by way of a bus officer etc.

10. It is, therefore, clear that the entire dispute in this matter revolves around the question whether or not the acidity of running school buses exclusively for the facility of the students and staff, is an intrinsic part of the activity of running a school. Such a question is no longer *res Integra*. In the case of *Krishna Charitable Society vs. Addl. CIT* in ITA No. 4639/Del/2015 for AY 2011-12 dated 15.09.2017, a similar question had arisen. *Vide para no. 11*, a coordinate bench of this Tribunal held that transport and hostel facility surplus cannot be considered as business income of the society as these activities are incidental to the main object of the assessee society of education. Relevant observations on this aspect are as under:

“11. We have carefully considered the rival contentions and perused the orders of the lower authorities and other judicial pronouncement placed before us. In the grounds no. 1 to 3 assessee is contesting that addition made by the Ld. AO treating hostel places provided to college student as business of the society and text the alleged surplus of Rs. 98,87,873/- as business income of the assessee. It was not the case of the revenue that assessee has rented out these hostels to the students who are not parted

education in the above institutes. It was also not the case of revenue that assessee is primarily engaged in the business of providing hostel facilities to the students. The above issue is no more *res Integra* in view of the decision of the Hon'ble Karnataka High Court in *CIT vs. Karnataka Lingayat Education Society* in ITA No. 5004/2012 dated 15/10/2014 wherein it has been held that providing hostel to the students/staff working for the society's incidental to achieve the object of providing education, namely the object of the society. In view of this we are of the opinion that providing of hostel facilities and transport facilities to the student and staff member of the educational Institute cannot be considered as business activity but is subservient to the object of educational activities performed by the society. We are also supported by our view by the decision of the Hon'ble Allahabad High Court in *IT vs. State of UP (1976) 38 STC 428 (All)* wherein question arose in *Indian Institute of Technology vs. State of UP (1976) 38 STC 428 (All)* with respect to the visitors' hostel maintained by the Indian Institute of Technology where lodging and boarding facilities were provided to persons who would come to the Institute in connection with education and the academic activities of the Institute. It was observed that the statutory obligation of maintenance of the hostel, which involved supply, and sale of food was an integral part of the objects of the Institute nor could the running of the hostel be treated as the principal activity of the Institute. The Institute could not be held to be doing business. Further means being supplied in a hostel to the scholars, visitors, guest faculty etc. cannot be eligible to sales tax where main activity is academics as held in *scholars home Senior Secondary School 42 VST 530*. Further, the reliance placed by the lower authorities on the decision of the Hon'ble Madras High Court in case of *DCIT vs. Wellington Charitable Trust* is also misplaced because in that case, the only activity of that particular trust was renting out of the property and not education. We are also not averse to considering the latest legal developments too where in the recently introduced new legislation of Goods and service tax it is provided that no GST would be chargeable on the hostel fees etc. recovered from the students, faculties and other staff for lodging and boarding as they are engaged in education activities. Therefore, we reverse the finding of the lower authorities and held that transport and hostel facilities surplus cannot be considered as business income of the assessee society which is mainly engaged in business activities and these activities are subservient to the main object of education of the trust.

11. In *Kanha Charitable Trust vs. ACIT* ITA Nos. 3297 & 5987/Del/2015, while placing reliance on its earlier decision in the case of *Krishna Charitable Society vs. ACIT* it was held that in the absence of any clinching evidence to show that the hostel facilities and transport facilities

*were provided to anybody other than students and staff of the trust. The transport and Hostel facilities provided by the educational institution shall be construed to be the intrinsic part of the 'educational activities' of the assessee and they cannot be considered different than activities of the society of 'education'. The hostel and transport facilities are incidental to achieve the object of providing education as per object of the trust.*

12. Further, in *Mallikarjun School Society vs. CCIT (2018) 90 taxmann.com 160 (Uttarakhand)*, the Hon'ble High Court held that an educational institution will not cease to be one existing solely for educational purposes since the object is not to make profit and the decisive or as a test as observed by the Hon'ble Apex Court is whether on an overall view of the matter the object is to make profit and one should bear in mind the distinction between the corpus, the objects and the power of the concerned entity.

13. In the present case also, it is not the case of the revenue that the transport facility is also provided to the outsider. Hon'ble Karnataka High Court in the case of *Karnataka Lingayat Education Society in ITA No. 5004/2012 dated 15.10.2014* has held that providing the hostel to the students and the staff working for the society is incidental to achieve the object of providing education and i.e. the object of the society. Therefore, in view of the above decision of the Hon'ble Karnataka High Court as well as the decision of a coordinate bench of this Tribunal in *ITA No. 4639/Del/2015*, we are of the view that the transport activities of the assessee trust are not in the nature of business, inasmuch as the transport is also incidental to the attainment of the main object of the trust of the education. Therefore, the provisions of section 11(4A) of the Act do not apply to the assessee. With this view of the matter, we allow the grounds of appeal.

14. In the result, the appeal of the assessee is allowed.”

The Hon'ble High Court in case of *Mallikarjun School Society (supra)* held that an educational institute will not cease to be one existing solely for educational purposes since the object is not to make profit. In present case also the assessee society will not ceased to exist as educational institute because it is providing hostel facility or transportation facility or mess facility, as it is an incidental to the education purpose of the assessee society. Therefore, in view of the Hon'ble Uttarakhand High Court decision in case of *Mallikarjun School Society (supra)* and orders of the co-ordinate bench in case of *Delhi Public School Gaziabad*, the hostel facility provided by the assessee

society is not in the nature of business and is incidental to the attainment of the main object of the providing education to students. Therefore, provisions of Section 11(4A) will not be applicable to the assessee. Thus, Ground Nos. 2, 2.1 and 2.2 are allowed.

10. As regards to Ground No. 3 and 3.1, the contention of the Ld. AR that depreciation is allowable as separate deduction apart from application of income is acceptable as depreciation has to be debited to determine the extent and usage of the capital asset in the course of conduct of activities and is available u/s 32 of the Act. The assessee has provided the depreciation in the income and expenditure in conformity with the Income Tax Rules applicable to the allowance of depreciation of fixed assets. Various decision of the Hon'ble Apex Court and Hon'ble High Courts relied upon by the Ld. AR highlights the proposition that depreciation should be allowed, even if, the purchase of assets have been claimed by the trust towards application of income. Hence Ground No. 3 and 3.1 are allowed.

11. In result, the appeal of the assessee is allowed.

**Order pronounced in the open court on 12<sup>th</sup> June, 2019**

**Sd/-**  
**(G.D. AGRAWAL)**  
**VICE PRESIDENT**  
Dated: 12/06/2019  
\*Kavita Arora

**Sd/-**  
**(SUCHITRA KAMBLE)**  
**JUDICIAL MEMBER**

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR  
ITAT NEW DELHI

Date of dictation	11.06.2019
Date on which the typed draft is placed before the dictating Member	12.06.2019
Date on which the typed draft is placed before the Other Member	
Date on which the approved draft comes to the Sr. PS/PS	12.6.2019
Date on which the fair order is placed before the Dictating Member for pronouncement	12.6.2019
Date on which the fair order comes back to the Sr. PS/PS	12.6.2019
Date on which the final order is uploaded on the website of ITAT	12.6.2019
Date on which the file goes to the Bench Clerk	12.6.2019
Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the Order	