INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "A": NEW DELHI
BEFORE SHRI H.S.SIDHU, JUDICIAL MEMBER
AND
SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER

ITA No. 2586/Del/2015
(Assessment Year: 2010-11)

Shree Ganpati Educational Society, Shree Ganpati Knowledge Park, NH-24, Parson, Masuri, Ghaziabad PAN: AAETS7326R	Vs.	JCIT, Range-2, Ghaziabad
(Appellant)		(Respondent)

Assessee by :	Shri Alok Gupta, CA
Revenue by:	Smt Naina Soin Kapil, Sr. DR
Date of Hearing	08/05/2019
Date of pronouncement	23/07/2019

O R D E R

PER PRASHANT MAHARISHI, A. M.

1. This appeal is filed by the assessee against the order of the Commissioner of income tax (appeals), Muzaffarnagar dated 27/2/2015 for assessment year 2010 – 11.

2. The assessee has raised the following grounds of appeal:-

"1. That on the facts and circumstances of the case, the CIT(A) was not justified in considering transport and hostel facilities to students which are incidental to and part of educational activities as in the nature of commercial activities in terms of proviso to sec. 2(15) of the Income Tax Act, 1961.

(ii) That finding and conclusion of the lower authorities is without proper appreciation of facts, legal principles and past history of the case.

(iii) That orders passed by the lower authorities is against the principle of rule of consistency as on the basis of the very same facts, the claim of the assessee was considered as part of educational activities and entitled to statutory benefit u/s. 11 of the Income Tax Act, 1961.

(iv) That the C1T(A) has considered provisions of sec. 11 (4A) on illegal and arbitrary basis without proper appreciation of facts and opportunity to the assessee.

2(i) That the claim of deprecation being in accordance with Income Tax Rules 1922 and as such lower authorities are not justified in not

accepting claim of deprecation while computing profit on commercial principles.

(ii) That disallowance of claim of the depreciation is without appreciation of facts, legal principles and past history of the case.

3. That orders of the lower authorities are not justified on facts and same are bad in law."

3. The assessee is a society, which is duly registered with the registrar of society and registered under section 12 AA of the income tax act as per certificate dated 2/12/2004. The assessee has also been granted recognition u/s 80 G of the act by order dated 9/6/2009. It is running 1 dental College at Ghaziabad. It filed its return of income on 28/9/2010 declaring nil income. The learned assessing officer, after issuing notice necessary notices u/s 143 (2) on 15/9/2011, passed an assessment order u/s 143 (3) of the income tax act, 1961 on 07/03/2013 wherein he computed the total income of the assessee at INR 1 1588217/– holding that bus transportation income of INR 4 65485/– and income from hostel of Rs. 11122732/– is a business income. He further disallowed the claim of the depreciation on the assets of the assessee holding that it amounts to double deduction. Therefore, he disallowed the depreciation of INR 1 3373196/–.

4. The assessee being aggrieved with the order of the learned assessing officer preferred an appeal before the learned CIT – A. He passed an order on 27/2/2015 wherein the appeal of the assessee was dismissed. Aggrieved with that assessee has preferred this appeal before us.

5. The learned authorised representative submitted that the ground number 1 of the appeal is with respect to transport and hostel facilities to students, which has been considered by the lower authorities as a business income of the assessee. He submitted that the assessee has provided the hostel facilities to the students of the educational Institute of the assessee. It is further stated that the transportation facilities are also provided to the staff as well as the students of the college. He further submitted that this issue is squarely covered in favour of the assessee by the decision of the coordinate bench in case of Delhi Public School Ghaziabad vs ACIT in ITA number 3593/del/2015 and several other judicial precedents. It was further submitted that the issue is identical and covered by the coordinate bench decision in case of Krishna charitable society vs Additional Commissioner Of Income Tax in ITA number 4639/del/2015 wherein it has

been held that the hostel facility and the transportation facility provided by the assessee to the students of the society is an object which is subservient to the main object of the education and therefore they cannot be considered as business of the assessee.

6. The learned departmental representative vehemently supported the order of the lower authorities and stated that the assessee is carrying on the business of hostel and the transportation facilities. He further referred to the fact of the excess surplus earned by the assessee from these activities. He therefore stated that these are the business activities of the assessee and therefore the benefit of section 11 and 12 of the income tax act cannot be granted to the assessee on this court.

7. We have carefully considered the rival contention and perused the orders of the lower authorities. The above issue is squarely covered in favour of the assessee by the decision of the coordinate bench in case of Krishna charitable society vs additional Commissioner of income tax in ITA number 4639/del/2015 where in it is held that :-

> *"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 – 3 assessee is contesting that addition made by the Ld. assessing officer treating hostel places provided to college student as business of the society and text the alleged surplus of ₹ 9887873/– as business income of the appellant. 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 versus 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 IIT versus state of UP, (1976) 38 STC 428 (All) wherein question arose in Indian Institute of Technology v. State of U.P. (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 meals being supplied in a hostel to the scholars, visitors, guest faculty etc. can not be exigible 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 versus 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. In the result 1 – 3 of the appeal of the assessee are allowed."*

8. It is not the case of the revenue that assessee has provided hostel facilities and transport facilities to the students of the other educational institutes. Therefore it cannot be said that the assessee is carrying on the business of providing hostel facilities and transportation facilities. Assessee is an educational Inst and it provides hostel facilities and transportation facilities to the students of the educational institutes of the assessee. Therefore, respectfully following the decision of the coordinate bench in Krishna charitable society (supra) we hold that these are the activities, which are subservient to the main object of the assessee of providing educational facilities, and therefore cannot be considered as business income of the assessee. Therefore, we reverse the orders of the lower authorities and direct the learned assessing officer to treat them as income eligible for computation according to the provisions of section 11 and 12 of the act. In view of this ground number 1 of the appeal is allowed.

9. Ground number 2 of the appeal is with respect to the claim of the depreciation on assets of INR 1 3373196/–. The learned assessing officer

noted that assessee has claimed application/deduction of the above sum in its income and expenditure account under the head depreciation. The learned assessing officer issued a show cause notice to the assessee to explain as to why the amount should not be considered as application of income and why depreciation may be disallowed as it will amount to double deduction/National application of the income. The assessee submitted that at the time of acquisition or purchase of the fixed assets the acquisition was neither treated nor claimed as application as it has not claimed the same as an expenditure in the accounts. During the year under consideration the assessee has acquired /purchase and used fixed assets of INR 4 7376310/– for which neither application on account of addition as application of the income was claimed. It is also not treated as an expense in the income and expenditure account. It was further stated that all the assessee been acquired for the charitable purposes of the assessee during the year under consideration. However, the learned assessing officer rejected the explanation of the assessee. According to him, the assessee had taken hundred percent application of the value against the fixed assets acquired by assessee in the year of investment and there is no provision under section 11 to allow double application on the same value in the form of depreciation subsequently. According to him, the written down value of the assets on which depreciation was claimed becomes nil after taking the full application in the year of investments. He therefore held that there is no question of allowing the depreciation to the assessee on the assets whose written down value has become nil. He further referred to the decision of the honourable Supreme Court in case of Escorts Ltd vs Union of India and the decision of the honourable Kerala High Court in Lissies medical institutions vs CIT. Therefore, he held that as the assessee is an educational society and running educational Institute , it enjoyed the exemption u/s 10 in the earlier years. The assets created are acquired out of exempt income which was enjoyed by the assessee since its inception. The assets which were created out of the exempt income shall have nil written down value since the assets were created as application on capital assets by society in the earlier years. Therefore, he held that since the written down value of those assets are nil therefore the depreciation on the

assessee having the written down value would also be nil. Therefore, he made the above disallowance. The assessee carried the matter before the learned CIT – A, he upheld the view of the learned assessing officer. Therefore as per ground number 2 of the appeal assessee challenged the same.

10. The learned authorised representative submitted that issue is now squarely covered in favour of the assessee by the decision of the honourable Supreme Court in case of CIT vs Rajasthan and Gujarati charitable foundation of India in civil appeal number 7186 of 2014.

11. The learned departmental representative supported the orders of the lower authorities.

12. We have carefully considered the rival contention and perused the orders of the lower authorities. This issue is now squarely covered in favour of the assessee by the decision of the honourable Supreme Court in case of CIT vs Rajasthan and Gujarati charitable foundation of India [2018] 89 taxmann.com 127 (SC)/[2018] 253 Taxman 165 (SC)/[2018] 402 ITR 441 (SC)/[2018] 300 CTR 1 (SC) wherein the decision of the honourable Bombay High Court is upheld. Honourable Supreme Court held as under:-

> **"1.** These are the petitions and appeals filed by the Income Tax Department against the orders passed by various High Courts granting benefit of depreciation on the assets acquired by the respondents-assessees. It is a matter of record that all the assessees 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 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 assessees 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 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'.

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."

13. In view of the above facts, the orders of the lower authorities cannot be sustained so far as the disallowance of depreciation of INR 1 3373196/– on the assets. Therefore, we reverse the orders of the lower authorities and direct the learned assessing officer to grant the above deduction. The ground number 2 of the appeal of the assessee is allowed.

14. The ground number 3 is supporting the ground number 1 and 2 of the appeal of the assessee. As we already allow ground number 1 and 2 of the appeal, ground number 3 is also allowed.

15. Accordingly appeal of the assessee are allowed.

Order pronounced in the open court on 23/07/2019.

-Sd/-	-Sd/-
(H.S.SIDHU)	(PRASHANT MAHARISHI)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Dated: 23/07/2019
A K Keot

Copy forwarded to

1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi