IN THE INCOME TAX APPELLATE TRIBUNAL
"A" BENCH : BANGALORE

BEFORE SHRI N.V. VASUDEVAN, VICE-PRESIDENT AND
SHRI ARUN KUMAR GARODIA, ACCOUNTANT MEMBER

ITA No. 1668/Bang/2017
Assessment Year : 2012-13

The Assistant Commissioner of Income tax (Exemptions), Circle – 1, Mangaluru.	Vs.	M/s. Hubli Dharwad Urban Development Authority, Navanagar, Hubbali. **PAN: AAALH0053J**
APPELLANT		RESPONDENT

Assessee by	:	Shri Gangadhar .J.M, Advocate
Revenue by	:	Shri C.H. Sundar Rao, CIT (DR)

Date of hearing	:	04.11.2019
Date of Pronouncement	:	08.11.2019

O R D E R

Per Shri A.K. Garodia, Accountant Member

This appeal is filed by the revenue and the same is directed against the order of ld. CIT(A)-Hubli dated 25.05.2017 for Assessment Year 2012-13.

2. The grounds raised by the revenue are as under.

> "*1. Whether the Ld. CIT(A), Hubli has, in ordering the Assessing Officer to reconsider the issue as to whether the assessee is eligible to claim deduction u/s.11 in the light of ITAT's order resorting 12A registration, has exceeded the powers granted u/s.251(1)(a), which only allows for confirming, reducing, enhancing or annulling of an assessment?"*
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> *2. Whether the Ld. CIT(A), Hubli has failed to appreciate the fact that the Assessing Officer, has already disallowed the claim of the assessee as per the provisions of Section 13(8) r.w.s.2(15) of the Act, and said disallowance, is irrespective of the assessee having registration u/s.12AA or not"*
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> *3. Whether the Ld.CIT(A), Hublli has in ordering the Assessing Officer to reconsider the issue as to whether the assessee is eligible to claim carry forward of earlier year expenditure at the time of giving effect, has exceeded the powers granted u/s.251(1)(a) which only allows for confirming, reducing, enhancing or annulling of an assessment"*
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> *4. Whether the Ld.CIT(A), Hubli was right in law in directing the*

Assessing Officer to verify the issue of repayment of EMD to be allowed as an expense, when the receipts of such deposits were not offered to tax as income"

5. On Disallowance of depreciation:
(a)Whether in the facts and circumstances of the case and in law, the learned CIT(A) erred in allowing depreciation in respect of assets which have already been allowed as application of income in its entirety in earlier years.

(b) Whether in the facts and circumstances of the case and in law, the learned CIT(A) is correct in allowing depreciation which amounts to double deduction when already full expenditure has been allowed in earlier years.

(c) The CIT(A) has failed to appreciate the fact that the Hon'ble Kerala High Court in the case of Lissie Medical Intuitions Vs. CIT (348 ITR 344) has held that depreciation cannot be allowed on assets, where cost of such assets has already been allowed as application of income in the year of acquisition/ purchase of asset.

(d) The CIT(A) has failed to appreciate that the Hon'ble Supreme Court in the case of Escorts Ltd. & another Vs. Union of India (199 ITR 43), while dealing with the issue of allowance of expenditure on scientific research u/s 35(1)(iv) [corresponding to section 10(2) (xiv) of the I.T. Act, 1922] held that any expenditure of a capital nature (or incurred towards purchase of capital assets) on scientific research allowed as deduction u/s.35(1)(iv), cannot be allowed once again as deduction in the form of depreciation on such capital assets. While doing so, it was observed by the Hon'ble Supreme Court that no legislature could have at all intended a double deduction in regard to the same business outgoing and if it is intended, it would be clearly expressed in the statute itself. Accordingly, it was held that even in absence of clear statutory indication to contrary, statute should not be read so as to permit an assessee two deductions i.e. once in the form of expenditure incurred towards purchase of capital assets and secondly, in the form of depreciation on such capital assets. It was also held that even before the amendment of the Act ,in the form of insertion of clause (iv) of sub section (2) of section 35 by Finance Act, 1980, prohibiting allowance of depreciation, the Act did not permit a deduction for depreciation in respect of cost of capital asset acquired for the purpose of scientific research to the extent such cost had been written off/ claimed as deduction u/s 35(1)(iv) on the ground that the amendment only set out more clearly and categorically what the provision intended even earlier."

3. Regarding ground nos. 1 to 4 of the revenue's appeal, it was submitted by ld. DR of revenue that the AO has rejected the claim of the assessee for exemption u/s. 11 of the IT Act as per para no. 3 of the assessment order in which it is stated by the AO that the activities of the assessee cannot be said to be for

charitable purposes within the meaning of section 2(15) r.w. first proviso to section 2(15) of the IT Act and on this basis, the assessee's claim for exemption u/s. 11 was rejected by the AO in view of the provisions of section 13(8) of the IT Act. But ld. CIT(A) in the impugned order has proceeded on this basis that assessee's claim for exemption u/s. 11 was rejected by the AO on this basis that registration granted to the assessee on 06.03.2008 has been withdrawn by ld. CIT, Hubli w.e.f. 01.04.2009. In this regard, he drawn our attention to para no. 9 of the order of ld. CIT(A). He submitted that since ld. CIT(A) has proceeded on wrong premise, the entire issue in respect of exemption u/s. 11 should be restored back to the file of ld. CIT(A) for a fresh decision. Regarding ground no. 5 of the revenue's appeal, he supported the order of AO.

4. As against this, the ld. AR of assessee supported the order of ld. CIT(A) on all the issues.

5. We have considered the rival submissions. First of all, we decide ground nos. 1 to 4 raised by the revenue. In these grounds, this is the grievance of the revenue that the assessee is not eligible for exemption u/s. 11 of the IT Act because as per the assessment order, the AO has held that the assessee is not eligible for exemption u/s. 11 of the IT Act in view of the provisions of section 13(8) of the IT Act r.w.s. 2(15) of the IT Act and such disallowance is irrespective of the assessee having registration u/s. 12AA of the IT Act or not. Hence, we feel it proper to reproduce para no. 3 from the assessment order in which the AO has decided the issue regarding the eligibility of the assessee for exemption u/s. 11 of the IT Act. This para is as under.

> "*3. The assessee is engaged in acquiring lands for development and allotting of Lands and houses to public for a consideration. Further, HDUDA is doing supervisory role for orderly development of cities and for which supervision fees from the developers are collected. Hence the activities carried on by the assessee are in the nature of advancement of general public utility rendering service in relation to trade, commerce or business for consideration. The receipts of the assessee during the year under consideration exceeds Rs. 10 lakhs. Hence the said activities cannot be said to be for charitable purpose within the meaning of section 2(15) r. w. first proviso to section 2(15) of the Income-tax Act. It was therefore proposed to disallow the assessee's claim u/s 11 in view of the provisions of section 13(8) of the Act and proposed to assess the income for the year at the rate of tax applicable to the status of AOP.*
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> *The assessee vide letter dated 19/03/2015 stated as under:*

"…….As regards status of the assessee (HDUDA) we wish to state that u/s 2(31) 'Person' concept is including a 'Local Authority' HDUDA is a Local Authority u/s 2(31) r. w. section 10(20). We do object for taking AOP status due to HDUDA is governed under the State Act and person include Local Authority clearly in section 2(31). For any ambiguity the status of the assessee can be taken either as AOP/B01 or every artificial judicial person, not falling within any of the preceding clauses. In case of HDUDA being a state governed entity under the authority of State Law cannot be categorized as AOP. The word Local Authority is clear in section 2(31). Hence, our claim on status is correct as per Income-tax Act, 1961"

The assessee's explanation that since it is Local authority, income from the activities, which are in the nature of trade and commerce, cannot be assessed to tax as AOP. In view of the provisions of section 2(15), income of the assessee is not exempt u/s 11 and hence income of the assessee has to be assessed to tax at the rate applicable to AOP. Further it is to be noted that the registration granted by the CIT, Hubli vide order No. 118/655/CIT- HBL/2007-08 dated: 06'/03/2008 u/s 12A of the Act has been withdrawn w.e. f. 01/04/2009 for the reasons that the activity of rendering of services by the Authority in exchange of consideration cannot be said to be advancement of any other object of general public utility as per the amended provisions of section 2(15) by the Finance Act 2008 w.e.f. 01/04/2009. It clearly transpires from the amended provisions of the definition of `Charitable purpose' that the activity carried out by the HDUDA are outside the ambit of charitable purpose, in as much as that the activity of rendering services by HDUDA are in the nature of trade, commerce or business as the Authority charges fee in Lieu of rendering such services to the public. Hence income of the assessee is assessed to tax at the rate of tax applicable to the status of AOP by, denying exemption u/s 11 of the Act."

6. Now we reproduce para nos. 9 and 10 from the order of ld. CIT(A) in which he decided the issue regarding assessee's eligibility for exemption u/s. 11 of the IT Act.

"*9. The main issue involved in this case is about not giving the benefit of exemption u/s. 11 by the AO on the ground that, the registration granted on 06/03/2008 has been withdrawn by the CIT, Hubli, with effect from 01/04/2009. It is seen that, for the earlier assessment, years, the assessee's income was computed after providing exemption u/s. 11. The fact that, the assessee has filed an appeal against the order of the CIT before the ITAT was known to the AO. But, the ITAT's decision was not there as on the date of passing the assessment order for assessment year 2012-13. The AO passed the order without giving the benefit of exemption u/s. 11. The assessee has filed a copy of ITAT's order stated to have been pronounced on 15/05/2014 but received by the assessee on 18/06/2015, wherein the ITAT has reinstated registration granted to the assessee u/s. 12AA of the IT Act 1961.*

10. On this order of the ITAT, whether the department has accepted the same or filed appeal before the High Court, by the CIT is not known. However, effect has to be given to the order of ITAT which requires passing of fresh order by the AO by recomputing the income holding that, the assessee is entitled to exemption u/s. 11 consequent on reinstatement of registration u/s. 12AA of the Act. Unless this is done assessee's appeal can't be decided because after giving exemption there will be substantial reduction in the income. Therefore, the AO is hereby directed to consider the claim of the assessee after going through the ITATs order. While doing so he has to examine the following aspects also.

1. The assessee has claimed an expenditure of Rs 1 99 02,787/- in the assessment order. The AO has disallowed this and also EMD of Rs.9.35.074/- on the ground that. these payments were made out of EMD deposits which are not considered as income and the assessee has not filed any objections. The assessee has filed now complete details about EMD payments. According to assessee. as per income and expenditure account. it has shown sales of plots at Rs.4.91.00,819/- and open spaces (sites) at Rs.4,83,81,280/- as gross income. It is customary to refund EMD of sites to the non-allottees as well as to the allottees after collecting full sale proceeds of sites. While accounting the assessee followed such method of accounting, where gross collection was shown as income and refund of EMD of sites as expenditure. Therefore. the expenditure claimed has to be allowed.
I have gone through the income and expenditure account. The assessee has shown receipts from sale of plots at Rs.9,74,82,099/- and expenditure towards refund of EMD of Rs.1,99,02 787/- and refund of site EMD of rs.9.35.704/- It is not known, whether the gross receipts shown are inclusive of EMD collected at the time of receiving applications for allotment of plots and open sites. The AO is directed to examine this aspect while passing order giving effect to the appellate order.

2. In the return of income. the assessee has cl2med set off of brought forward losses. The AO has only allowed set off of losses i.e. expenditures for the assessment 2009-10 and 2010-11 and has not considered set off of losses up to the assessment year 2008-09. The AO will consider it while giving appeal effect appellate order."

7. From the above paras reproduced from the order of ld. CIT(A), it is seen that as per these paras, the ld. CIT(A) has proceeded on this basis that the main issue involved in this case is about denial of exemption u/s 11 on the ground that the registration granted on 06.03.2008 has been withdrawn by CIT, Hubli w.e.f. 01.04.2009. But as per para no. 3 of the assessment order as reproduced above, it comes out that this is not the basis of the AO to reject the assessee's claim for exemption u/s. 11 of the IT Act that the registration granted

to the assessee u/s. 12AA has been withdrawn by CIT, Hubli. The basis of the assessment order for rejecting the assessee's claim for exemption u/s. 11 is this that the activities of the assessee cannot be said to be for charitable purposes within the meaning of section 2(15) r.w. first proviso to section 2(15) of the IT Act and the AO has also referred to provisions of section 13(8) of the IT Act but there is no mention regarding the cancellation of the registration granted to the assessee u/s. 12AA of the IT Act. Hence it is apparent that ld. CIT(A) has proceed on wrong premise. He should have decided this issue as to whether the assessee is eligible for exemption u/s. 11 or not in view of the provisions of section 2(15) and section 13(8) of the IT Act. Since this has not been done by ld. CIT(A), we feel it proper to restore back the entire issue in respect of assessee's eligibility for exemption u/s. 11 to the file of ld. CIT(A) for fresh decision by way of a speaking and reasoned order as per law after providing adequate opportunity of being heard to both sides. We hold accordingly. In view of this decision, no further adjudication is called for in this regard at the present stage and we express no opinion on this issue. Ground nos. 1 to 4 are allowed for statistical purposes.

8. Regarding ground no. 5, we find that the issue involved is regarding allowing of depreciation to the assessee. This issue has been decided by ld. CIT(A) as per para nos. 13 to 17 of his order and for ready reference, these paras are reproduced hereinbelow.

> "*13. In assessment the AO has restricted the depreciation claimed to Rs.5,99,848/- from Rs.18,19,753/-. This came to be disallowed in view of the decision in the case of ESCORTS Ltd., (SC) (199 ITR 43). This has been objected in this appeal. Various courts have held that, allowing depreciation on assets used in business will not amount to double deduction. The aforesaid judgment of the Apex Court was distinguished by the Punjab and Haryana High Court in the case of CIT Vs Market Committee, Pip [2011] 330 ITR 16 (P&H). The Hon. High Court observed that :-*
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> *"In the present case, the assessee is not claiming double deduction on account of depreciation as has been suggested by learned counsel for the Revenue. The income of the assessee being exempt, the assessee is only claiming that depreciation should be reduced from the income for determining the percentage of funds which have to be applied for the purposes of the trust. There is no double deduction claimed by the assessee as canvassed by the Revenue. The judgment of the hon'ble Supreme Court in Escorts Ltd. case [1993] 199 ITR 43 is distinguished for the above reasons. It cannot be held that double benefit is given in*

allowing claim for depreciation for computing income for purposes of section 11. The questions proposed have, thus, to be answered against the Revenue and in favour of the assessee".

14. Similar views have been taken by different High Courts as under:
CIT Vs Institute of Banking Personnel Selection [2003] 264 ITR 110 (Bom)-
DIT (E) Vs Framjee Cawasjee Institute [1993] 109 CTR 463 (Bom)-
CIT Vs Tiny Tots Education Society [2011] 330 ITR 21 (P&H)

15. As held by the Hon'ble HC of Punjab and Haryana in the case of Market Committee, Pipli, the assessee has not claimed double deduction on account of depreciation. The income of assessee being exempt, the assessee has only claimed that, deprecation should be reduced from the income for determining the percentage of fund which has to be applied for the purpose of the trust. Section 11 deals with application of income different from revenue expenditure or allowances. The judgment in the case of ESCORTS Ltd., and another is therefore, is distinguishable.

16. Section 11(6) inserted w.e.f. 01/04/2015 by finance Act, No.2/2014 reads as under.
`(6) in this section where any income is required to be applied or accumulated or set apart for application, then, for such purposes the income shall be determined without any deduction or allowance by way of depreciation or otherwise in respect of any asset, acquisition of which has been claimed as an application of income under this section in the same or any other previous year'.

17. From a plain reading of the provisions, one could see that, this is only with effect from 01/04/2015 that, depreciation on assets, acquisition of which is claimed on application, can be denied. In other words depreciation could not be denied for the years prior to 01/04/2014. Accordingly, I hold that, the AO has not done a thing which is authorized by law. The AO is directed to allow depreciation. The ground is allowed."

9. From the above paras reproduced from the order of ld. CIT(A), it is seen that ld. CIT(A) has followed the judgment of Hon'ble Punjab and Haryana High Court rendered in the case of CIT Vs. Market Committee, Pipli as reported in [2011] 330 ITR 16 (P&H). He has also referred to some other judgments of various other High Courts. He has also considered the amendment in the Act by Finance Act No. 2/2014 w.e.f. 01.04.2015 by way of insertion of sub-section (6) in section 11 of the IT Act. He has also given a finding that assessee has not claimed double deduction on account of depreciation. Considering all these

factual and legal position, we find no reason to interfere in the order of ld. CIT(A) on this issue. Accordingly ground no. 5 is rejected.

10. In the result, the appeal filed by the revenue stands partly allowed for statistical purposes in the terms indicated above.

Order pronounced in the open court on the date mentioned on the caption page.

Sd/-	Sd/-
(N.V. VASUDEVAN)	(ARUN KUMAR GARODIA)
Vice-President	Accountant Member

Bangalore,
Dated, the 08th November, 2019.
/MS/

Copy to:

1. Appellant	4. CIT(A)
2. Respondent	5. DR, ITAT, Bangalore
3. CIT	6. Guard file

By order

Assistant Registrar,
Income Tax Appellate Tribunal,
Bangalore.