IN THE INCOME TAX APPELLATE TRIBUNAL
BANGALORE BENCHES "B", BANGALORE

Before Shri George George K, JM & Shri B.R.Baskaran, AM

ITA No.718/Bang/2013 : Asst.Year 2009-2010

M/s.Karnataka State Road Transport Corporation Shanthinagar Bangalore – 560 027. **PAN : AAACV6497R.**	v.	The Asst.Director of Income-tax (Exemption) Circle 17(1), Bangalore.
(Appellant)		(Respondent)

Appellant by : Sri.Annamalai S., Advocate
Respondent by : Sri.Muzaffar Hussain, CIT-DR

Date of Hearing : 14.10.2021		**Date of Pronouncement : 14.10.2021**

O R D E R

Per George George K, JM

This appeal at the instance of the assessee is directed against CIT(A)'s order dated 18.03.2013. The relevant assessment year is 2009-2010.

2. The assessee has raised several grounds and an additional ground. However, during the course of hearing, the learned AR limited his submission only to the following two issues, namely –

(i) whether the CIT(A) is justified in law in holding that the assessee is hit by proviso to section 2(15) of the I.T.Act and consequently confirming the excess of income over expenditure of Rs.57,70,52,000, as taxable income of the assessee.

(ii) whether the CIT(A) is justified in confirming the addition made by the Assessing Officer in respect of disallowance of depreciation amounting to Rs.113,36,48,093 for the reason that the cost of assets on which the depreciation is claimed had already been allowed as application of income.

3. At the very outset, the learned AR submitted that the above two issues are covered in favour of the assessee. The learned AR submitted that as regards the first issue mentioned above, the Tribunal in assessee's own case in ITA No.720/Bang/2018 and other connected cases for assessment years 2010-2011 to 2014-2015, had held that proviso to section 2(15) of the I.T.Act would not have application to the assessee-society, hence, was entitled to deduction u/s 11 of the I.T.Act. As regards the second issue is concerned, the learned AR submitted that it is covered by the order of the Tribunal in the case of Bangalore Metropolitan Transport Corporation in ITA No.599/Bang/2014 (order dated 21.08.2019), wherein the Tribunal by following the judgment of the Hon'ble Apex Court in the case of CIT v. Rajasthan & Gujarati Charitable Foundation Poona reported in 89 txmann.com 127 (SC) had held that the assessee is entitled to depreciation on assets though the capital cost of the same has been allowed as application of income. It was further submitted by the learned AR that ITAT held that the amendment to section 11(6) of the I.T.Act by the Finance No.2 Act, 2014 is applicable only with effect for and from assessment year 2015-2016.

4. The learned Departmental Representative was duly heard.

5. We have heard rival submissions and perused the material on record. As regards the first issue is concerned, the Tribunal in assessee's own case in ITA No.720/Bang/2018 and other connected cases concerning assessment years 2010-2011 to 2014-2015 had held that the assessee is a charitable society and is not primarily driven by profit motive, therefore, the proviso to section 2(15) of the I.T.Act does not have application to the assessee. The relevant finding of the Tribunal in assessee's own case, reads as follow:-

> *"11. We have given careful consideration to the rival submissions. As we have already seen, the assessee is formed under the RTC Act, 1950 to provide economic and efficient transport system to the public. It cannot be denied that this purpose is charitable in nature i.e., "advancement of any other object of public utility". The only ground on which the revenue authorities came to the conclusion that the assessee was not existing for charitable purpose is on the basis of source of revenue derived from renting of space and advertisements and giving on hire buses for excursion etc. besides existence of non-operational revenue. It is not the case of the revenue that there has been any private profit earned from the activities carried out by the assessee. The Bengaluru Bench of Tribunal in the case of Bangalore Industrial Area Devl.Corpn.(supra), has taken the view that the predominant object of charitable organization has to be examined before coming to a conclusion regarding application of the proviso to section 2(15) of the Act. This aspect has been highlighted by the Hon'ble Delhi High Court in the case of India Trade Promotion Organization vs. DGIT(Exemption) (371 ITR 333)(Del). The facts of the case before the Hon'ble Delhi High Court in the case of India Trade Promotion Organization (supra) were that the Assessee in that case enjoyed the benefit of exemption u/s.10(23C)(iv) of the Act. Sec.10(23C)(iv) provides any income received by any person on behalf of any other fund or institution established for charitable purposes which may be approved by the prescribed authority, having regard to the objects of the fund or institution and its importance throughout India or throughout any State or States, shall not form part of the total income under the Act. The prescribed authority withdrew the approval granted to the Assessee consequent to the insertion of the proviso to Sec.2(15) of the*

Act, on the ground that the Assessee was deriving rental income from letting out space for rent during trade fairs and exhibitions, was deriving income from sale of tickets and income from food and beverage outlets. The said withdrawal was challenged by the Assessee before the Hon'ble Delhi High Court. The Hon'ble Delhi High Court had to go into the question as to the scope of the proviso to Sec.2(15) of the Act. The Hon'ble Delhi High Court has laid down the following very important principles as to how the proviso to Sec.2(15) of the Act has to be interpreted:

(i) The proviso to Sec.2(15) of the Act introduced by virtue of the Finance Act, 2008 with effect from 01.04.2009 has two parts. The first part has reference to the carrying on of any activity in the nature of trade, commerce or business. The second part has reference to any activity of rendering any service —in relation to any trade, commerce or business. Both these parts are further subject to the condition that the activities so carried out are for a cess or fee or any other consideration, irrespective of the nature or use or application or retention of the income from such activities. In other words, if, by virtue of a cess or 'fee' or any other consideration, income is generated by any of the two sets of activities referred to above, the nature of use of such income or application or retention of such income is irrelevant for the purposes of construing the activities as charitable or not.

(ii) If an activity in the nature of trade, commerce or business is carried on and it generates income, the fact that such income is applied for charitable purposes, would not make any difference and the activity would nonetheless not be regarded as being carried on for a charitable purpose. If a literal interpretation is to be given to the proviso, then it may be concluded that this fact would have no bearing on determining the nature of the activity carried on by the petitioner. But, in deciding whether any activity is in the nature of trade, commerce or business, it has to be examined whether there is an element of profit making or not. Similarly, while considering whether any activity is one of rendering any service in relation to any trade, commerce or business, the element of profit making is also very important.

(iii) The meaning of the expression "charitable purposes" has to be examined in the context of "income", because, it is only when there is income the question of not including that income in the total income would arise. Therefore, merely because an institution, which otherwise is established for a charitable purpose, receives income would not make it any less a charitable institution. Whether that institution, which is established for charitable purposes, will get the exemption would have to be determined having regard to the objects of the institution and its importance throughout India or throughout any State or States.

(iv) Merely, because an institution derives income out of activities which may be commercial, that does, in any way, affect the nature of the Institution as a charitable institution if it otherwise qualifies for such a character.

(v) Merely because a fee or some other consideration is collected or received by an institution, it would not lose its character of having been established for a charitable purpose. If the dominant activity of the institution was not business, trade or commerce, then any such incidental or ancillary activity would also not fall within the categories of trade, commerce or business. If the driving force is not the desire to earn profits but to do charity, the exception carved out in the first proviso to Section 2(15) of the said Act would not apply.

(vi) If a literal interpretation were to be given to the said proviso, then it would risk being hit by Article 14 (the equality clause enshrined in Article 14 of the Constitution). Courts should always endeavour to uphold the Constitutional validity of a provision and, in doing so, the provision in question may have to be read down, as pointed out above.

(vii) Section 2(15) is only a definition clause. Section 2 begins with the words, ―in this Act, unless the context otherwise requires. The expression "charitable purpose" appearing in Section 2(15) of the said Act has to be seen in the context of Section 10(23C)(iv). When the expression "charitable purpose", as defined in Section 2(15) of the said Act, is read in the context of Section 10(23C)(iv) of the said Act, we would have to give up the strict and literal interpretation sought to be given to the expression "charitable purpose" by the revenue.

(viii) The expression "charitable purpose", as defined in Section 2(15) cannot be construed literally and in absolute terms. The correct interpretation of the proviso to Section 2(15) of the said Act would be that it carves out an exception from the charitable purpose of advancement of any other object of general public utility and that exception is limited to activities in the nature of trade, commerce or business or any activity of rendering any service in relation to any trade, commerce or business for a cess or fee or any other consideration. In both the activities, in the nature of trade, commerce or business or the activity of rendering any service in relation to any trade, commerce or business, the dominant and the prime objective has to be seen. If the dominant and prime objective of the institution, which claims to have been established for charitable purposes, is profit making, whether its activities are directly in the nature of trade, commerce or business or indirectly in the rendering of any service in relation to any trade, commerce or business, then it would not be entitled to claim its object to be a 'charitable purpose'. On the flip side, where an institution is not driven primarily by a desire or motive to earn

> profits, but to do charity through the advancement of an object of general public utility, it cannot but be regarded as an institution established for charitable purposes. (emphasis supplied).

12. Keeping in mind the principles laid down as above, let us examine the case of the Assessee. The Assessee is a statutory corporation established under the RTC Act, 1950. It is not driven b profit motive but is for providing transportation facilities to members of the public. The State Government fixes fares for travel by public. Buses ply in areas even where it is not economically viable. Sec.18 of the RTC Act, 1950 lays down duties of the corporation which is to provide, secure and promote efficient, adequate, economical and properly coordinated system of road transport services in the State of Karnataka. Sec.22 of the RTC Act, 1950 lays down that the corporation should act on business principles in the sense it has to recover the cost of services rendered to the public which means that it cannot provide service free of cost. Sec.30 of the RTC Act, 1950 provides how profits of the corporation shall be disposed and it lays down that the same shall be used only for road development.

13. It can be seen from the various provisions of the RTC Act, 1950 which we have set out in the earlier part of the order that the dominant and prime objective of the Assessee is not profit making. Prior to the introduction of the proviso to Section 2(15) of the Act, there was no dispute that the Assessee was established for charitable purposes. The stream of traffic revenue and non traffic revenue by itself would demonstrate that the Assessee does not exist for profit.

14. Keeping in mind the above factual aspects and the provisions of the RTC, Act, 1950 and principle laid down in the aforesaid decision of the Hon'ble Delhi High Court in the case of India Promotion Organization (supra), in our view, will clearly show that the Assessee does not driven primarily by desire or motive to earn profits but to do charity through advancement of an object of general public utility. The proviso to Sec.2(15) of the Act is therefore not applicable to the case of the Assessee. We therefore concur with the view of the CIT(A) and hold that the Assessee is entitled to the benefits of Sec.11 of the Act. The AO has not disputed the conditions necessary for allowing exemption u/s.11 of the Act, except the applicability of proviso to Sec.2(15) of the Act. In view of our conclusions that the said proviso is not applicable to the case of the Assessee, we hold that the Assessee's income is entitled to the benefits of Sec.11 of the Act.

15. With regard to the arguments of the learned DR, we are of the view that the same are without any merit. The proviso to Sec.2(15) of the Act has been discussed by the Hon'ble Delhi High Court in the case of India Trade Promotion Organization vs. DGIT(Exemption) (supra) and the dominant motive is the criteria as laid down therein. Therefore the answer to the arguments put forth by the learned DR are found in the aforesaid decision. As we have already seen, the profit of the Assessee have to be used only for road development, as in the case of the decision in the case

of APSRTC (supra) where the revenues have to be utilized only for the purpose of road development."

5.1 In view of the above order of the Tribunal in assessee's own case, we hold that the assessee is not hit by proviso to section 2(15) of the I.T.Act. Accordingly, the A.O. is directed to grant benefit of exemption u/s 11 of the I.T.Act for the relevant assessment year.

6. As regards the issue of disallowance of depreciation, an identical issue was decided in favour of the assessee by the order of the Tribunal in the case of Bangalore Metropolitan Transport Corporation (supra). The relevant finding of the Tribunal reads as follow:-

15. We have heard the submissions of the ld. DR, who relied on the order of AO. The learned counsel for the Assessee relied on the order of the CIT(A). We have considered the order of the AO. Identical issue came up for consideration before ITAT Bangalore Bench in the case of DDIT(E) v. Cutchi Memon Union (2013) 60 SOT 260 Bangalore ITAT, wherein similar issue has been dealt with by this Tribunal. In the aforesaid case, the assessee claimed depreciation and the AO denied depreciation on the ground that at the time of acquiring the relevant capital asset, cost of acquisition was considered as application of income in the year of its acquisition. The AO took the view that allowing depreciation would amount to allowing double deduction and placed reliance on the decision of Hon'ble Supreme Court in Escorts Ltd. (supra). The CIT(A), however, allowed the claim of assessee. On further appeal by the Revenue, the Tribunal held as follows:-

> "20. We have considered the rival submissions. If depreciation is not allowed as a necessary deduction for computing income of charitable institutions, then there is no way to preserve the corpus of the trust for deriving the income as it is nothing but a decrease in the value of property through wear, deterioration, or obsolescence. Since income for the purposes of section 11(1) has to be computed in normal commercial manner, the amount of depreciation debited in the books is deductible while computing such income. It was so held by the Hon'ble Karnataka High Court in the case of CIT Vs. Society of Sisters of St. Anne 146 ITR 28 (Kar). It was held in CIT vs. Tiny Tots Education Society (2011) 330 ITR 21 (P&H) , following CIT vs. Market Committee, Pipli

(2011) 330 ITR 16 (P&H) : (2011) 238 CTR (P&H) 103 that depreciation can be claimed by a charitable institution in determining percentage of funds applied for the purpose of charitable objects. Claim for depreciation will not amount to double benefit. The decision of the Hon'ble Supreme Court in the case of Escorts Ltd. 199 ITR 43 (SC) have been referred to and distinguished by the Hon'ble Court in the aforesaid decisions.

21. The issue raised by the revenue in the ground of appeal is thus no longer res integra and has been decided by the Hon'ble Punjab & Haryana High Court in the case of CIT v. Market Committee, Pipli, 330 ITR 16 (P&H). The Hon'ble Punjab & Haryana High Court after considering several decisions on that issue and also the decision of the Hon'ble Supreme Court in the case of Escorts Ltd. (supra), came to the conclusion that depreciation is allowable on capital assets on the income of the charitable trust for determining the quantum of funds which have to be applied for the purpose of trusts in terms of section 11 of the Act. The Hon'ble Punjab & Haryana High Court made a reference to the decision of the Hon'ble Supreme Court in the case of Escorts Ltd. (supra) and observed that the Hon'ble Supreme Court was dealing with a case of two deductions under different provisions of the Act, one u/s. 32 for depreciation and the other on account of expenditure of a capital nature incurred on scientific research u/s. 35(1)(iv) of the Act. The Hon'ble Court thereafter held that a trust claiming depreciation cannot be equated with a claim for double deduction. The Hon'ble Punjab & Haryana High Court has also made a reference to the decision of the Hon'ble Karnataka High Court in the case of CIT v. Society of Sisters of Anne, 146 ITR 28 (Kar), wherein it was held that u/s. 11(1) of the Act, income has to be computed in normal commercial manner and the amount of depreciation debited in the books is deductible while computing such income. In view of the aforesaid decision on the issue, we are of the view that the order of the CIT(A) on the above issue does not call for any interference.

22. Consequently, ground No.5 raised by the revenue is dismissed."

16. The Hon'ble Supreme Court in the case of CIT Vs. Rajasthan & Gujarati Charitable Foundation Poona, (2018) 89 taxmann.com 127(SC) has since confirmed the view that depreciation has to be allowed as a deduction even when the cost of acquisition of the depreciable asset has been treated as application of income in the year of its acquisition. We may also add that the legal position has since been amended by a prospective amendment by the Finance (No.2) Act, 2014 w.e.f. 1.4.2015 by insertion of sub-section (6) to section 11 of the Act, which 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. As already stated, the aforesaid amendment is prospective and will apply only from A.Y. 2015-16. In view of the above legal position, we are of the view that the order of the CIT(A) has to be confirmed and the appeal of the revenue dismissed. There is no merit in this appeal of the revenue."

6.1 In the instant case, the concerned assessment year being 2009-2010, the amendment to section 11(6) of the I.T.Act by the Finance (No.2) Act, 2014 will not have application. Accordingly, we direct the A.O. to grant depreciation on the assets irrespective of the fact that the cost of assets is claimed as application of income. It is ordered accordingly.

7. In the result, the appeal filed by the assessee is partly allowed.

Order pronounced on this 14th day of October, 2021.

Sd/-	**Sd/-**
(B.R.Baskaran)	**(George George K)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Bangalore; Dated : 14th October, 2021.
Devadas G*

Copy to :
1. The Appellant.
2. The Respondent.
3. The CIT(A)-V, Bengaluru.
4. The Director of Income Tax (Exemption), Bengaluru.
5. The DR, ITAT, Bengaluru.
6. Guard File.

Asst.Registrar/ITAT, Bangalore