

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH: 'C' NEW DELHI**

**BEFORE SH. ANIL CHATURVEDI, ACCOUNTANT MEMBER
AND
MS. SUCHITRA KAMBLE, JUDICIAL MEMBER**

I.T.A. No. 5370/DEL/2017 (A.Y 2011-12)

(THROUGH VIDEO CONFERENCING)

Ideal Institute of Technology Society, 46, 1 st Floor, Navyug Market, Ghaziabad, Uttar Pradesh AAAP13380F (APPELLANT)	Vs	JCIT Range-2 Ghaziabad (RESPONDENT)
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Appellant by	Sh. C. S. Aggarwal, Sr. Adv, Sh. Ravi Pratap Mall, Adv
Respondent by	Ms. Sunita Singh, CIT DR

Date of Hearing	12.10.2021
Date of Pronouncement	03.11.2021

ORDER

PER SUCHITRA KAMBLE, JM

This appeal is filed by the assessee against order dated 12/05/2017 passed by CIT(A)-Ghaziabad for assessment year 2011-12.

2. The grounds of appeal are as under:-

“1. That the learned CIT(A) has erred in confirming the findings of the learned AO and has failed to appreciate that the income of the educational institution is not to be included in the total income of the assessee society.

2. That the learned CIT(A) has further erred in failing to appreciate that the only source of income of assessee society is receipt by imparting education and for such students it has to necessarily under law, maintain a hostel and provide such facilities and such an activity is not an independent activity and

as such any excess of receipt over expenditure for providing hostel facility but is only an integral part of activity of providing education is also part of education and is not an independent source of an income.

3. That the learned CIT(A) has further failed to appreciate that the assessee institution came into existence in the AY 1998-99 and till the AY 2009-10 such an income was not included in the total income of the assessee, it being integral part of the total income of the society running an educational institution.

4. That the learned CIT(A) has failed to appreciate that the AO has grossly erred in holding that the assessee had not produced the books of accounts despite the fact they were duly produced before him on 20.02.2014 and 04.03.2014, as is evident from the submissions made and is on record.

5. The learned CIT(A) has further failed to appreciate that despite the remand made by him to the AO, the AO had failed to provide any opportunity (before submitting the report) and CIT(A) has also erred in not considering such books of accounts which were also produced before him on 20/08/2015.

5.1 That the learned CIT(A) has failed to appreciate that the assessee by way of abundant precaution and to comply with the requirement of section 11 (4A) of the Act had maintained separate books of accounts of the hostel activity despite the fact that such hostel activity was incidental to attain the object of the society i.e. to run educational institution.

6. That the learned CIT(A) has further failed to appreciate that the excess of income over expenditure in respect of hostel activity aggregated to Rs. 1,64,884/- only and as such in the alternative the income computed by the AO and sustained by the CIT(A) is entirely erroneous both on facts and in law.

7. The learned CIT(A) has further erred in failing to comprehend that excess of income over expenditure was of Rs. 1,64,884/- which was not only supported by the books of accounts but were also supported by the vouchers which were provided before the AO.

8. That the learned CIT(A) has further failed to appreciate that the assessee had not debited any depreciation in the income and expenditure account on account of depreciation of the hostel block.

9. That in any case and without prejudice the determination of income by the

AO of the hostel at Rs. 93,00,088/- is based on no material and is highly arbitrary.

10. *That the finding of the learned CIT(A) in para 7.2.1 in the order impugned “thus AO is directed to disallow depreciation after taking into account already disallowed Rs. 73,01,748/- while computing income of Rs. 93,00,088/- resulting in only balance amount of Rs. 2,53,09,707/- separately” is apparently erroneous.*

11. *That the learned CIT(A) has further erred in failing to appreciate that the assessee cannot be said to have claim double deduction and otherwise too the depreciation is allowable to it as provided u/s 32(l)(ii) of the Act as has been held by the Hon’ble High Court of Delhi in the case of DIT Vs. Vishwa Jagriti Mission reported in 262 CTR 558. The claim of depreciation of Rs. 2,53,09,707/- is liable to be allowed as deduction.*

It is therefore, prayed that it be held that the entire income of the society running an education institution is not liable to be included in the total income and that it be further held that the assessee is entitled to claim depreciation as held by the Hon'ble High Court of Delhi in the case of DIT Vs. Vishwa Jagriti Mission reported in 262 CTR 558.

3. The assessee society is duly registered with the Registrar of Society, Uttar Pradesh and the renewal was granted vide letter dated 6/2/2012 for the period from 4/1/2012 to five years. The Society has been granted registration u/s 12AA of the Income Tax Act, 1961 on 23/6/1998. The Society was granted exemption u/s 10(23C) (vi) of Income Tax Act, 1961 on 20/7/2005. The Society is running an Engineering College under the name and style of M/s Ideal Institute of Technology, situated at Govindpuram, Ghaziabad for which courses of Be.tech and MCA are being provided. The return of income was filed on 30/9/2011 declaring NIL income. The Assessing Officer made addition of Rs. 93,88,000/- towards net surplus from hostel activity and also disallowed Rs. 3,26,11,455/- as regards claim of depreciation made by the assessee.

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

5. The Ld. AR submitted that the income derived from the hostel facility, a property held under the trust, had been wholly utilised for charitable purposes for imparting education and hence the same has to be excluded from the total income. It is submitted that the providing hostel provided to the students being subservient to the main object of the education, the Assessing Officer has gravely erred in treating the same as business. The Ld. AR further submitted that the issue whether providing hostel facility to the students is in the nature of business u/s 11 (4A) of the Act has been decided by the coordinate Benches of the Tribunal, and it was held that hostel fee income is subservient to the main object of the education and not a business income. It was held that providing the hostel to the students and the staff working for the society is incidental to achieve the object of providing education. It was held that providing hostel facility is not a business activity u/s 11(4A) of the Act. The Ld. AR relied upon the following decisions:

- i. Harish Chand Ram Kali Charitable Trust vs. The Addl Commissioner of Income Tax Range-1 Ghaziabad (ITA No. 4240/Del/2015 dated 27/05/2020)
- ii. Seth Anandram Jaipuria Education Society vs ACIT, Exemption Circle Ghaziabad (ITA No. 250 & 251/Del/2017 dated 21.05.2019).
- iii. Krishna Charitable Society versus Addl. CIT, Range-1, Ghaziabad (ITA No. A639/ITA No. 4639/DEL/2015 dated 15.09.2017).
- iv. Krishna Charitable Society versus Addl. CIT, Range-1, Ghaziabad (ITA No. 3302/Del./2015 dated 30.05.2018) ,
- v. Ideal Education Society vs. Addl. CIT Range- 1 Ghaziabad (ITA No. 3550/Del/2015 dated 12.06.2019)

- vi. Daya Nand Pushpa Devi Charitable Trust vs. Addl. CIT [2021] 128 taxmann.com 118 (Allahabad)
- vii. CIT versus Karnataka Lingayata education society [2015] 371 ITR 249 Karnataka High Court
- viii. Dr KN Modi Institute of pharmaceutical educational and research trust versus JCIT ITA No. A23210Q\I20\5 dated 26/04/2017
- ix. Surajmal Memorial education society versus CIT, ITA No. 2136/del/2016 dated 30/05/2016

Thus, the Ld. AR submitted that activity of running hostel was not a separate business activity of assessee under section 11(4 A) of the Act. The Ld. AR further submitted that the assessee institution came into existence in the AY 1998-99 and till the AY 2009-10 such an income was not included in the total income of the assessee, as being integral part of the total income of the society running an educational institution. In fact, even in the subsequent assessment years i.e. 2012-13 onwards, hostel has not been treated as business u/s 11 (4A) of the Act. In view thereof, the Ld. AR submitted that action of the AO/CIT(A), in treating the providing the hostel facility to the students as business is against the principles of consistency, and hence the disallowance unsustainable in law. The Ld. AR relied upon the judgment of the Hon'ble Apex Court in the case of Commissioner of Income-tax v. Excel Industries Ltd. [2013] 358 ITR 295 (SC) has held that revenue cannot be allowed to flip-flop on the issue. The Ld. AR submitted that revenue having accepted that hostel receipts is not includible in the total income in preceding years as well as subsequent assessment years, revenue cannot be allowed to take a contrary view in this assessment year. Further, Constitution bench of the Hon'ble Apex Court in the case of CIT vs. J.K. Charitable Trust reported in 308 ITR 161(SC), wherein it has been held that, if the facts for the year under assessment are identical to the facts of the immediately preceding year then in such a situation, the revenue would not be permitted to deviate from the position it

had accepted in the preceding assessment year. The Hon'ble Apex Court has reiterated the principles of consistency in a very recent decision. It has been consistently decided time and again by the Hon'ble Apex Court and the Hon'ble High Courts that claims once allowed in any assessment year must be allowed in succeeding assessment years by following rules of consistency unless and until there is change in the position of law or change in facts of the case. There is neither change in facts of the case nor any change in the position of law. The Ld. AR further submitted that though the doctrine of res judicata does not apply to income-tax proceedings but where the revenue has taken a particular stand on an issue on similar/identical facts in the case of the assessee, for the sake of consistency the same view should continue to prevail in the case of assessee unless there is material difference in the facts. Without prejudice to the aforesaid submission, the Ld. AR submitted that by way of abundant caution, in respect of Hostel, the assessee has maintained separate books of account, and all such books of account were furnished before the Assessing Officer and again same was furnished before the CIT(A). The CIT(A) however has erroneously held in para 7.1.10 that the aforesaid expenses incurred under three heads were composite indirect expense in respect of which it had made no separate books of accounts. The aforesaid finding of the CIT(A) is highly erroneous as the assessee had furnished with supporting evidence the details of the indirect expenses under the head 'bank charges and interest' of Rs. 35,39,830/-. Similarly in respect of electricity and generator maintenance it had furnished similar details. In fact, the assessee made specific submissions in respect of each of the head of indirect expenses. In such circumstances, the Ld. AR submitted that the approach of the CIT(A) in upholding the order of the Assessing Officer is apparently erroneous both on facts and in law. The assessee had submitted that the findings recorded by the CIT(A) in para 7 is based on mis-appreciation of facts. Thus, the Ld. AR submitted that such findings are not only erroneous but are wholly arbitrary.

6. In so far as the disallowance of depreciation claimed, the Ld. AR

submitted that this issue has been settled by the Hon'ble Apex Court in the case of CIT vs. Rajasthan & Gujarati Charitable Foundation Poona reported in 402 ITR 441, wherein it was held that in case of charitable institution registered under section 12A, even though expenditure incurred for acquisition of capital assets was treated as application of income for charitable purposes under section 11(1)(a), yet depreciation would be allowed on assets so purchased. The relevant para of the aforesaid judgment is reproduced hereunder:

"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- assesseees. 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 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 assesseees 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 @ 214% 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(l)(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 149931 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."

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."

Further reliance is placed on the judgment of Hon'ble High Court of Delhi in the case of Director of Income Tax vs. Vishwa Jagriti Mission 262 CTR 558.. In view of the aforesaid judicial pronouncements, the Ld. AR submitted that disallowance of depreciation by the Assessing Officer and sustained by the CIT(A) is unsustainable in law and hence same is liable to be deleted. Thus, the Ld. AR prayed that it be held that the assessee was eligible to the claim of deduction as had been allowed in the preceding assessment years. It be further held that the assessee does not carry any business activity and is only engaged in an activity which is charitable in nature. It is well settled rule of law that any excess over expenditure in the course of providing education is not an income from the business. In fact, it would be seen that there have been no excess of receipts over expenditure. Needless to repeat here that even for the preceding assessment years, the assessee had been allowed an exemption when no adverse observation had been made by the Assessing Officer in respect of returns filed by it.

7. The Ld. DR relied upon the assessment order and the order of the CIT(A).

8. We have heard both the parties and perused the material available on record. The assessee is a Society running Engineering college. It is also undisputed that assessee is carrying educational activity. The income from these activities declared by the assessee was NIL and the assessee earned gross

receipt of Rs. 16,26,69,407/- on account of educational activity whereas the assessee is also running hostels for the students as per the UGC Guidelines which is an ancillary activity. In case of Krishna Charitable Society vs. Addl. CIT in ITA No. 4639/Del/2015 for AY 2011-12 dated 15.09.2017, the Tribunal held 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 - 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.”

In the absence of any evidence to show that the hostel facilities were provided to anybody other than students and staff of the trust, the 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’. Thus, the addition amounting to Rs. 93,00,088/- made by the Assessing Officer and sustained by the CIT(A) is not correct. The CIT(A) and the Assessing Officer failed to consider that the hostel facility is incidental to achieve the object of providing education as per object of the society and hence comes under the charitable purpose which is exempt under Section 11 of the Income Tax Act, 1961. Thus, Ground Nos. 1 to 9 are allowed.

9. It is pertinent to note that the as regards depreciation in respect of hostel facilities the same was granted to the assessee and was never disputed by the Revenue since 2009-10 till 2014-15 except for these years i.e. 2011-12. Thus, in light of the decision cited by the Ld. AR as well as the consistency in respect of the Revenue’s application of the said claim in earlier as well as subsequent years should have been taken into consideration by the CIT(A), but the CIT(A) failed to do so. The Hon’ble Supreme Court in case of CIT vs. Rajasthani & Gujarati Charitable Foundation Poona (supra) held that the depreciation in respect of cost of the assets allowed to the assessee as expenditure is allowable. Thus, the issue is squarely covered in favour of the assessee in light of the Hon’ble Supreme Court decision in case of Rajasthani & Gujarati Charitable Foundation Poona (supra). Therefore, Ground Nos. 10 and 11 are allowed.

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

Order pronounced in the Open Court on this 3rd Day of November, 2021

**Sd/-
(ANIL CHATURVEDI)
ACCOUNTANT MEMBER**

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

Dated: 03/11/2021

*R. Naheed **

Copy forwarded to:

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

ASSISTANT REGISTRAR
ITAT NEW DELHI

Date of dictation	12.10.2021
Date on which the typed draft is placed before the dictating Member	12.10.2021
Date on which the typed draft is placed before the Other Member	
Date on which the approved draft comes to the Sr. PS/PS	
Date on which the fair order is placed before the Dictating Member for pronouncement	
Date on which the fair order comes back to the Sr. PS/PS	
Date on which the final order is uploaded on the website of ITAT	03.11.2021
Date on which the file goes to the Bench Clerk	
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	