

**IN THE INCOME TAX APPELLATE TRIBUNAL**

**"SMC" BENCH, MUMBAI**

**BEFORE SHRI OM PRAKASH KANT, ACCOUNTANT MEMBER AND**  
**SHRI SANDEEP SINGH KARHAIL, JUDICIAL MEMBER**

**ITA No.1332/Mum./2021**  
(Assessment Year : 2014-15)

**ITA No.1467/Mum./2021**  
(Assessment Year : 2014-15)

M/s. The Hunger Project  
Flat no.504, 5<sup>th</sup> Floor  
Shanti Vihar, Building no.A-9  
Mira Road (East), Thane 401 107  
PAN - AAATT0359B

..... Appellant

v/s

Income Tax Officer (Exemp.)  
Ward-2(4), Mumbai

.....Respondent

Assessee by : Shri Vinod Garg a/w  
Shri Jatin Proothi

Revenue by : Shri Ajeya Kumar Ojha

Date of Hearing - 30/06/2022

Date of Order - 05/09/2022

**ORDER**

**PER SANDEEP SINGH KARHAIL, J.M.**

The aforesaid appeals (one by post being ITA No. 1332/Mum/2021 and one by hand being ITA No.1467/Mum/2021) have been filed by the assessee challenging the impugned order dated 09/03/2021, passed under section 250 of the Income Tax Act, 1961 ("*the Act*") by learned Commissioner of Income Tax (Appeals), National Faceless Appeal Centre, Delhi, [*learned CIT(A)*], for the assessment year 2014-15.

2. As, one of the appeal was filed by hand and other by post for the very same assessment year against the very same impugned order, learned Authorised Representative (*'learned AR'*), during the course of hearing, at the outset, sought permission to withdraw ITA No. 1467/Mum/2021 being a duplicate appeal. The submission of the learned AR were verified from the record and found to be correct. Accordingly, assessee's appeal being ITA No. 1467/Mum/2021 is dismissed as withdrawn.

3. In its appeal, the assessee has raised following grounds:

*1. That on the facts and law involved the Ld. Commissioner of Income Tax (Appeals), National Faceless Appeal Centre [Ld. CIT(A)] erred in confirming the disallowance of Rs 8,00,019/- made by Ld. Assessing officer [Ld. AO] for alleged disallowance on account of provision for gratuity expenditure, being ascertained liability, provided in the books of accounts by the appellant.*

*1.1 That the Ld. CIT(A) erred in confirming the disallowance by relying on judgement of Hon'ble Cochin Tribunal in the case of Malankara Orthodox Syrian Church Medical Mission Hospital vs Deputy Director of Income tax, (Exemption), Kochi [2017] 80 taxmann.com 361 (Cochin - Trib.). In the said judgement, the disallowance was made by invoking provisions of Section 40A(7) of the Act whereas Section 40A(7) of the Act is not applicable in case of the appellant being the charitable trust registered u/s 12AA of the Act and not having any income from Business & Profession. The facts in the case law relied upon by Ld. CIT(A) are distinguishable.*

*1.2 That on the facts and law involved, the Ld. AO erred in disallowing provision for gratuity by equating the word "applied" as provided in Section 11(1)(a) of the Act with the word "spent which is contrary to the scheme of taxation provided in the Act for charitable trust.*

*1.3 That on the facts and law involved the Ld. CIT(A) erred in confirming the disallowance made by Ld. AO on making wrong presumption that appellant has not spent the provision made in the books of account towards gratuity which is contrary to the facts involved in the present appeal. The provision for gratuity was*

*actually paid to the employees in the year of their resignation / termination of employment.*

*1.4 That on the facts and law involved the Ld. CIT(A) erred in confirming the disallowance made by Ld. AO towards provision for gratuity when such provision was consistently made in the books of accounts by following mercantile system of accounting in the earlier years and no such disallowance was made.*

*1.5 That the disallowance as made by Ld. AO and confirmed by Ld. CIT(A) is based on erroneous views and / or non-appreciation of the facts and law involved and without properly considering the submissions and material on record. As such too the disallowance is unwarranted and not capable of being sustained.*

*2. That the assessment as made and the order of the Ld. CIT(A) are against law and facts of the case involved.*

*3. That the grounds of appeal as herein are without prejudice to each other."*

4. The only grievance of the assessee, in the present appeal, is against disallowance of provision of gratuity of Rs. 8,00,019 made in the books of account.

5. The brief facts of the case pertaining to this issue, as emanating from the record, are: The assessee is a trust and is registered with Charity Commissioner and DIT(E), Mumbai under section 12A vide Registration No. INS/24134 dated 10/10/1984. For the year under consideration, the assessee filed its return of income on 21/09/2014 along with income and expenditure account, balance sheet and audit report in Form No. 10 B declaring total income at Rs. Nil. During the course of assessment proceedings upon perusal of income and expenditure account, it was observed that assessee has made provision for gratuity of Rs. 8,00,019. Since, it was only a provision, the assessee

was asked to explain as to why the said amount should not be disallowed. In reply, assessee submitted that the provision for gratuity was provided in the books of accounts as per the method of accounting i.e. accrual basis of accounting, regularly followed by the assessee. The assessee further submitted that as per section 11 (1) of the Act the income of the trust which is applied to charitable purpose shall not form part of the total income and the word 'applied' does not mean 'spent' by the assessee. The Assessing Officer ('AO') vide order dated 07/10/2016 passed under section 143(3) of the Act did not agree with the submissions of the assessee and held that the assessee has made a provision only, which is different than applied. The AO further held that provision can be withdrawn at any point of time in future, which is not expended and thus, the assessee has not spent the amount of provision for gratuity of Rs. 8,00,019. Accordingly, the said amount was added to the total income of the assessee. In appeal, learned CIT(A) vide impugned order dismissed the appeal filed by the assessee. Being aggrieved, the assessee is in appeal before us.

6. During the course of hearing, learned AR submitted that assessee was required to make provision based on statutory provisions in accordance with provisions of Payment of Gratuity Act, 1972 and in compliance of AS-15 issued by ICAI. The learned AR further submitted that the provision made in the books of account is for the period of service already provided by the employees and the charge for gratuity has already been crystalised and liability has been incurred by the

assessee by 31/03/2014. The learned AR submitted that the provision was required to be maintained in the books of accounts as the same are consistently maintained on accrual basis of accounting to arrive at the income of the trust. The learned AR further submitted that the assessee has opened a separate bank account for the purpose of depositing the amount of provision for gratuity charged to income and expenditure account and the amount of provision which is charged to the income and expenditure account is transferred to such earmarked account. It is only from such earmarked account, the assessee actually paid gratuity to the employees in the year of the retirement. The learned AR submitted that for the purpose of section 11 of the Act, the income is only required to be 'applied' and not actually 'spent'. Therefore, even if the funds, which have been allocated for the purposes as required under the aforesaid section, same will be deemed to have been applied by the assessee. In support of its submissions, the learned AR placed reliance upon the decision of the coordinate bench of the Tribunal in Anandlal & Ganesh Podar Society vs DCIT, in ITA No. 5962/Mum/2019.

7. On the other hand, learned Departmental Representative vehemently relied upon the orders passed by the lower authorities.

8. We have considered the rival submissions and perused the material available on record. As per provisions of section 11 (1) (a) of the Act, the income derived from the property held under the trust shall not be included in total income of the previous year to the extent such income is

applied for charitable purposes in India. While dealing with the issue whether provision for gratuity and leave encashment would tantamount to application of income in the case of a trust, the coordinate bench of the Tribunal in Anandlal & Ganesh Podar Society vs DCIT (supra), vide order dated 03/08/2021, observed as under:

*"12. Considered the rival submissions and material on record. We are of the view that the provision for gratuity and leave encashment has been made by the assessee based on the actuarial valuation report and although these disallowances are purely provision in nature and not actual expenditure but such provisions are required to be made as per mandate of Law and the books of accounts will not reveal the true and fair picture without making provision for these expenses. For e.g., the depreciation is also a book entry and no actual flow of money takes place but provision for depreciation in books of accounts is mandated by law in order to reflect the true and correct profit of the entity. Like depreciation, the provision for gratuity and leave encashment has necessarily be provided in the books of accounts and although there are no direct judicial precedents regarding allowability of provision for gratuity and leave encashment in case of Trust. However, there are various judicial precedents which allows the claim of depreciation while computing the taxable income of the trust.*

*13. The contention of the Ld. CIT(DR) appears to be on the assumption that the expenditure should necessarily involve actual delivery of or parting with the money. It seems to us that it need not necessarily be so. The expenditure should be understood as necessary outgoings. The provisions are necessary to be made for certain purposes like, provision for depreciation is to be made in respect of decrease in value of property through wear and tear, deterioration or obsolescence and allowance is made for this purpose in book-keeping, accountancy, etc. It is the provision made for the loss or expenses incurred through using the asset for earning profits, and should, therefore, be charged against those profits as they are earned.*

*14. If depreciation is not provided for, the books will not contain a true record of revenue or capital. If the asset were hired instead of purchased, the hiring fee would be charged against the profits, having been purchased, the asset is, in effect, then hired by capital to revenue, and the true profit cannot be ascertained until a suitable charge for the use of the asset has been made. Likewise, the provision for gratuity and leave encashment also required to be provided as mandated by Law. Without being such provisions made, the balance sheet will not present a true and fair view of the state of affairs.*

*15. In CIT v. Indian Jute Mills Association[1982] 134 ITR 68 the Calcutta High Court while constructing the expression 'expenditure incurred' in*

section 44(A) of the Act observed: "depreciation claim shall include the expenditure incurred."

16. Thus, In our considered view, in case of trust, the meaning 'applied' need not be construed as 'spent'. It includes the necessary provisions required to be made as per statutory requirement. Therefore, we direct the AO to allow the provision for gratuity and leave encashment as applied for the object of the trust. Accordingly the ground raised by the assessee is hereby allowed."

9. We further find that the Hon'ble Andhra Pradesh High Court in CIT vs Trustees of H.E.H. the Nizam's Charitable Trust, [1981] 7 Taxmann 178 (AP), observed as under:

*"We agree with the Tribunal that it is not correct to equate the word "applied" with the word "spent". If the Legislature intended that the amounts should actually be spent, there was nothing preventing it from using that word. There cannot be any doubt that the money which was sanctioned was applied for a specific purpose as there was nothing else to be done except the actual payment. The Tribunal was right in holding that the actual payment is irrelevant for purposes of finding out whether there has been an application of the funds."*

10. In the present case, it has not been disputed that assessee has paid gratuity to its employees in the year of their retirement. Further, it is also not in dispute that the provision for gratuity complies with required statutory provisions and accounting standards. It is also the fact that assessee has consistently prepared its accounts following mercantile system of accounting and made provision for gratuity in the similar manner, as is made in the year under consideration. Thus, respectfully following the aforesaid judicial precedents, we direct the AO to delete the impugned addition by allowing the provision for gratuity made by the assessee in its books of account. Accordingly, grounds raised by the assessee in the present appeal are allowed.

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

12. To sum up, appeal by the assessee being ITA No. 1332/Mum/2021 is allowed, while appeal by the assessee being ITA No. 1467/Mum/2021 is dismissed as withdrawn.

Order pronounced in the open court on 05/09/2022

**Sd/-**  
**OM PRAKASH KANT**  
**ACCOUNTANT MEMBER**

**Sd/-**  
**SANDEEP SINGH KARHAIL**  
**JUDICIAL MEMBER**

**MUMBAI, DATED: 05/09/2022**

Copy of the order forwarded to:

- (1) The Assessee;
- (2) The Revenue;
- (3) The CIT(A);
- (4) The CIT, Mumbai City concerned;
- (5) The DR, ITAT, Mumbai;
- (6) Guard file.

*Pradeep J. Chowdhury*  
*Sr. Private Secretary*

True Copy  
By Order

Assistant Registrar  
ITAT, Mumbai