INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "G": NEW DELHI

BEFORE
SHRI G.S. PANNU, HON'BLE VICE PRESIDENT
AND
MS. ASTHA CHANDRA, JUDICIAL MEMBER

ITA No. 2415/Del/2016
Asstt. Year: 2011-12

M/s. Software Technology Parks of India, 9th Floor, NDCC-II Bldg. Opposite Jantar Mantar, New Delhi. PAN AAATS2468J	Vs.	DCIT Circle-31(1) New Delhi.
(Appellant)		**(Respondent)**

ITA No. 2516/Del/2016
Asstt. Year: 2011-12

DCIT (E) Circle-2(1) New Delhi.	Vs.	M/s. Software Technology Parks of India, 9th Floor, NDCC-II Bldg. Jai Singh Marg, New Delhi-110 001 PAN AAATS2468J
(Appellant)		**(Respondent)**

Assessee by:	Ms. Sangeeta Singh, CA
Department by:	Shri Dharamvir Singh, CIT-DR
Date of Hearing:	01.04.2024
Date of pronouncement:	10.04.2024

O R D E R

PER ASTHA CHANDRA, JM

The appeals filed by the assessee and the Revenue are directed against the order dated 19.02.2016 of the Ld. Commissioner of Income Tax

(Appeals)-18, New Delhi **("CIT(A")** pertaining to the Assessment Year **("AY")** 2011-12.

2. The assessee has raised the following solitary ground:-

> *"The CIT(A) is unjust in denying the claim of depreciation to the assessee and enhancing the income of the assessee."*

3. The Revenue has taken the following grounds:-

> *"1. On the facts and circumstances of the case and in law, Ld. CIT(A) has erred in ignoring that assessee's activities fall under the last limb of section 2(15) of the I.T. Act as assessee is generating income from commercial activities.*
>
> *2. On the facts and circumstances of the case and in law, Ld. CIT(A) has erred in ignoring the fact that though the objects of the assessee may seem to be charitable, but activities carried out by the society which yielded income to the society are commercial in nature.*

4. We take up the appeal of the assessee first.

5. The solitary ground of the assessee relates to denial of depreciation. The Ld. Representative of the parties agreed that the issue is covered in favour of the assessee and against the Revenue by the order dated 07.12.2022 of the Tribunal for AY 2012-13 in ITA No. 4172/Del/2017 wherein the assessee's claim of depreciation was negatived by the Ld. AO but on appeal filed by the assessee before the Ld. CIT(A), the assessee's claim of depreciation was allowed against which the Revenue filed appeal before the Tribunal. The Tribunal vide order (supra) decided the issue against the Revenue by observing and recording the following findings:-

> *"13. Ground No. 3 and 4 relate to denial of depreciation by the Ld. AO which had been allowed by the Ld. CIT(A). The solitary reason given by the Ld. AO is that the assessee's claim of depreciation tantamount to a double deduction since the assessee has already claimed deduction of its capital expenditure being a trust. The Ld. CIT(A) relied upon numerous decisions wherein it has*

been held that in the case of a charitable trust whose income is exempt under section 11, its claim of depreciation cannot be said to be double benefit. Moreover, the decision of Hon'ble Supreme Court in Escorts Ltd. 199 ITR 43 relied upon by the Ld. AO is inapplicable to a situation where, depreciation is claimed by a charitable trust in determining percentage of funds applied for the purposes of charitable objects as held by the Hon'ble P & H High Court in CIT vs. Market Committee, Pipli (2011) 330 ITR 16 relied upon by the Ld. CIT(A). The Ld. CIT(A) has taken notice of sub- section(6) of section 11 inserted by the Finance Act, 2014 w.e.f. 1.4.2015 which has now put restriction on claim of depreciation. The amendment is only prospective applicable to AY 2015-16 and subsequent years and not to case of the assessee in which AY involved is 2012-13. We endorse the findings of the Ld. CIT(A) and hold that the grievance of the Revenue is not sustainable in so far as the present appeal of the Revenue is concerned, the amended law being inapplicable. Accordingly, we decide ground No. 3 and 4 against the Revenue."

6. Following the order (supra) of the Tribunal we decline to concur with the view of Ld. CIT(A) which is not in consonance with the order (supra) of the Tribunal for AY 2012-13 in assessee's own case. We therefore set aside the order of the Ld. CIT(A) on the issue and direct the Ld. AO to allow the assessee's claim of depreciation.

7. Resultantly, the appeal of the assessee is allowed.

8. We now take up the Revenue's appeal.

9. Ground No. 1 and 2 both relate to the findings of the Ld. CIT(A) that the assessee STPI is established for charitable purposes and that the assessee is eligible for the benefit of exemption under section 11 to 13 of the Income Tax Act, 1961 **(the "Act")**. The Revenue is dissatisfied.

10. Briefly stated, the assessee is a society registered under the Societies Registration Act, 1860. It is also registered under section 12A of the Act as a charitable society offering services to the nation as the arm of the Govt. of India under Software Technology Park of India (STPI) scheme.

11. For AY 2011-12, the assessee filed return on 30.09.2011 declaring income of Rs. 87,09,21,980/-. Subsequently, the case was selected for scrutiny. Notice under section 143(2) dated 14.09.2012 was issued and served upon the assessee. Thereafter, the assessee filed revised return on 28.03.2013 declaring income of Rs. 126,07,02,604/-. Statutory notices along with questionnaire were issued and served upon the assessee.

12. During the course of assessment proceedings vide letter dated 18.10.2013 the assessee sought relief from tax under section 11 to 13 of the Act. The Ld. AO did not consider the relief sought by the assessee as acceptable vide his order dated 01.11.2013 reproduced in para 3.1 of the assessment order. On being asked the reasons for filing revised income, the assessee made submission vide reply dated 20.02.2014 reproduced by the Ld. AO in para 4 of the assessment order. Further, vide letter dated 25.03.2014 the assessee submitted that in the original return the assessee had considered income from statutory charges (Rs. 89,25,29,214/-); income from other misc. activities (Rs. 1,36,85,223/-) and income from interest (Rs. 35,44,88,168/-) under the head "income from business" whereas in the revised return the said incomes have been considered under the head "income from other sources". This was not acceptable to the Ld. AO for the reasons given by him in para 4.1 to 4.5 of the assessment order. Hence in para 4.6 the Ld. AO concluded that the plea of the assessee that it is not indulging in business activities is not maintainable and all income except interest income is treated as income from business or profession. Accordingly, the Ld. AO completed the assessment on 30.03.2014 on total income of Rs. 87,35,69,830/- under section 143(3) of the Act.

13. Before the Ld. CIT(A) the issue for consideration was whether the income of the assessee society is to be assessed under section 11 of the Act or under the head 'business'. The Ld. CIT(A) noticed the facts in brief, history and objectives of the assessee (STPI); the reasons assigned by the Ld.

AO for treating all income except interest income as 'income from business' and the decision of Hon'ble Delhi High Court in Bureau of Indian Standards vs. DGIT (Exemption) (2012) 27 taxmann.com 127 (Delhi) relied upon by the assessee wherein the Hon'ble Delhi High Court held that the activities of the sovereign nature and that are executed as the arm and on the direct direction and control of the Govt. of the country cannot be classified as the business activity as they are for the general public utility. The activity though related to the trade and commerce of the assessee cannot be taken under the proviso to the section 2(15) defining the charitable activities.

14. During the appellate proceedings, it was explained by the assessee that the STPI scheme has been notified by the Govt. of India vide Notification No. 33/(RE)/92-97 dated 22.03.1994 under sub-section (1) of section 3 of the Foreign Trade (Development and Regulation) Act 1992. It is a 100% export oriented scheme for undertaking software development for export using data communication link or in the form of physical exports including export of professional services. The STPI scheme is administered by the Deptt. of Electronics & Information Technology, Govt. of India through an Inter Ministerial Standing Committee (IMSC) by Govt. of India in 1991. The charges recovered as the statutory charges are cost recovery charges for the services given under the scheme of Govt. of India. Number of precedents were relied upon.

15. The Ld. CIT(A) recorded his observations and findings in para 5.1.5.1 to 5.1.5.4 as under:-

> *"5.1.5.1 Going by the ratio of this decision, amply elucidated in para 58 of that order, the expression 'charitable purpose', as defined in section 2(15) cannot be construed literally and in absolute terms and it has to take colour and be considered in context of the provision of the Act. If the dominant and prime objective of institution is not a desire to earn profits but, object of promoting trade and commerce is not for itself, but for nation, it is clearly a charitable purpose.*

5.1.5.1.1 Applying the above principle to the factual canvass of the case, it is found that the contentions of the AR has substantial merit. The setting up of the entity under the STPI scheme, the Memorandum of Association (2004), the legal status as a society under society registration act 1860, Objectives, Functions, Utilisation of surplus, Restraint on distribution of profits as discussed supra are neither reflective of business attitude nor indicative of the profit oriented intent & thus undeniably indicate towards a public/charitable purpose.

5.1.5.1.2 Here to recapitulate, the assessee society, registered as an autonomous society under the Societies Registration Act 1860, was formed under the then Department of Electronics (the present Department of Information Technology), Ministry of Communications and Information Technology, Government of India on 5th June, 1991 with an objective to implement STP/EHTP scheme, set-up and manage infrastructure facilities and provide other services like technology assessment and professional training.

5.1.5.1.3 The objectives of the Software Technology Parks of India are: to promote the development and export of software and software services including Information Technology (IT) enabled services/ Bio- IT (b)to provide statutory and other promotional services to the exporters by implementing Software Technology Parks (STP > Electronics and Hardware Technology Parks (EHTP) Schemes and other such schemes which may be formulated and entrusted by the Government from time to time (c) to provide data communication services including value added services to IT/IT enabled Services (ITFS) related industries (d) to promote micro, small and medium entrepreneurs by creating conducive environment for entrepreneur ship in the field of IT/ITES.

In particular, Cl.6 of the MOA reads:

> ***6. Title to the properties and Restraint on distribution of profits:***
>
> *(a) Title to the properties of the Society shall be vested in the Society,*
>
> *(b) All the income, moveable/immovable properties of the STPI shall be solely utilized and applied towards the promotion of its objectives as set forth in the Memorandum of Association and no profit shall be paid or transferred directly or indirectly by way of dividends, bonds, profits or in any other manner whatsoever to the present or past Members of the STPI or to any person claiming through anyone or more of the present or the past members. No member of the STPI shall have any personal claim in any properties of the STPI or make any profits, whatsoever, by virtue of his membership.*

5.1.5.2 In financial statement and the workings given by the AR reflects it is clear that these activities do not take colour of trade or business activity but are merely for facilitating in achievement of dominant object of assessee, which is the test.

Mere surplus from any activity, which undisputedly has been undertaken to achieve the dominant object, does not imply that the same is run with profit motive. Hon'ble Delhi High court in the said case of India Trade Promotion Organization (supra) has explained that the primary object of insertion of proviso to section 2(15) is to curb the practice of earning income by way of carrying on of trade or commerce and claiming the same as exempt in the garb of pursuing the alleged charitable object of general public utility. This proviso is never meant to deny the exemption to those institutions, where the predominant object is undeniably a charitable object and a public cause and in order to achieve the same incidental activities, essential in the given circumstances, are carried on.

5.1.5.3 In the aforesaid premises, the reasoning of the AO for his conclusion that all income except interest income is to be treated as 'income from business or profession are incorrect.

5.1.5.3.1 Moreover, as has been brought to my notice, the AO in the subsequent assessment year 12-13 has considered the same assessee as a charitable organization and given benefit of the Section 11 to 13. To take relevant excerpt from that order:

> *"I have carefully examined the reply and submission of the assessee to the show cause notice and also referred the assessment order of the previous assessment year 2011-12 where in paragraph 4.2 the Assessing Officer quoting various decisions on the business activity and defining the business u/s 2(13) of the IT act 1961 has stated that the assessee scanning on the activity of business. The assessee to counter the discussion has quoted the decision in the case of Institute of chartered accountant of India (supra) wherein the Hon'ble court has concluded that an activity incidental and ancillary to the attainment of the main objective of the Society cannot be considered as business for the purpose of proviso to section 2 (15) of the IT act, 1961. Further the assessee has also mentioned the decision in the case of Indian Trade Promotion Organisation (supra) wherein the Hon'ble court again has concluded in para 48 of the decision:*
>
> > *"An activity would be considered "business' if it is undertaken with a profit motive, but in some cases, this may not be determinative. Normally, the profit motive test should be satisfied, but in a given case activity may be*

regarded as a business even when profit motive cannot be established/proved. In such cases, there should be evidence and material to show that the activity has continued on sound and recognized business principles and pursued with reasonable continuity. There should be facts and other circumstances which justify and show that the activity undertaken is in fact in the nature of business."

53. From the said decision, it is apparent that 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. It is also important to note that we must examine as to what is the dominant activity of the institution in question. 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. It is clear from the facts of the present case that the driving force is not the desire to earn profits but, the object of promoting trade and commerce not for itself, but for the nation both within India and outside India. Clearly, this is a charitable purpose, which has as its motive the advancement of an object of general public utility to which the exception carved out in the first proviso to Section 2(15) of the said Act would not apply. We say so, because, 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). It is well-settled that the 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, in Arun Kumar case (supra).

58. In conclusion, we may say that the expression "charitable purpose", as defined in Section 2(15) cannot be construed literally and in absolute terms. It has to take colour and he considered in the context of Section 10(23C) (iv) of the said Act. It is also clear that if the literal interpretation is given to the proviso to Section 2(15) of the said Act, then the proviso would be at risk of running fowl of the principle of equality enshrined in Article 14 of the Constitution of India. In order to save the Constitutional validity of the proviso, the same would have to be read down and interpreted in the context of Section 10(23C) (iv) because, In our view, the context requires such an interpretation. 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."*
>
> *The contention carved from the given decisions have driving course and it is established in the reply of the assessee that the prime objective of the society is to encourage information technology in the country and the charges received for certification of the entity carrying on activities related to information technology are not directly in the nature of business. Further the assessee has established that the income generated from the activity is not applied for any individual benefit or transfer to the benefit of any particular person, entity or group of persons but the application is for the benefit of public at large.*

5.1.5.4 In the above contextual & legal background, I find that there is no warrant for the conclusion drawn by the AO at para 4.6 of the asst. Order, denying exemption and benefit of Sec 11 to 13 of the Act. The same is directed to be withdrawn and income to be computed as per law & in accordance with the said provisions of the Act."

16. It is against the above findings of the Ld. CIT(A) that the Revenue is in appeal and both the grounds relate thereto.

17. The Ld. CIT-DR supported the order of the Ld. AO and laid stress upon the finding of the Ld. AO that the assessee is indulging in business activities and therefore all income except interest income is assessable as business income. The Ld. AR defended the order of the Ld. CIT(A) and pointed out that in the immediately succeeding AY 2012-13, the Ld. CIT(A) had allowed to the assessee the benefit of section 11(1)(a) and section 11(2)

against which the Revenue went in appeal before the Tribunal. The appeal of the Revenue has since been decided against the Revenue and in favour of the assessee. A copy thereof is placed in the Paper Book at pages 349-359. The Ld. AR made statement at the bar that the Revenue has not filed appeal against the order of the Tribunal in Hon'ble Delhi High Court.

18. We have considered the submission of the parties and perused the records. We observe that in the AY 2012-13 the Revenue had come up in appeal before the Tribunal against acceptance of the assessee's claim of being a charitable society and direction of the Ld. CIT(A) to the Ld. AO to compute the income of the assessee in accordance with the provisions of section 11 to 13 which would include accumulation as per section 11(1)(a) and section 11(2) of the Act. The Tribunal in its order in ITA No. 4172/Del/2017 dated 07.12.2022 gave the following findings in para 11 thereof which is reproduced below:-

> *"11. We have given our careful thought to the rival submissions and perused the material available in the records. The grievance of the Revenue contained in ground 2 and 5 relate to assessee's claim of exemption under section 11 of the Act. It is an undisputed fact that the assessce is a registered society under section 12A of the Act since past more than 25 years. During assessment proceedings the Ld. AO required the assessee to explain under which limb of the section 2(15) of the Act, the case of the assessee falls and to show cause why income be not treated as business income. The assessee made a lengthy submission dated 13.3.2015, relying therein, interalia on the decision of Hon'ble Delhi High Court in India Trade Promotion Organisation vs. D.G.I.T (Exemptions) (2015) 53 taxmann.com 404 (Delhi). On consideration of the above submission of the assessee the Ld. AO recorded the finding at page 14 of the order that it is established in the reply of the assessee that the prime objective of the society is to encourage Information Technology in the country and the charges received for certification of the entities carrying on activities related to information technology are not directly in the nature of business. Further, the assessee has established that the income generated from this activity is not applied for any individual benefit or transfer to the benefit of any particular person, entity or group of persons but the application is for the benefit of public at large. This amply proves that the Ld. AO accepted the claim of the assessee that the assessee is a charitable society. It was in the backdrop of such a finding of the Ld. AO that the Ld. CIT(A) arrived at the*

conclusion that the income of the assessee has to be computed in accordance with the provisions of section 11 to 13 which would include accumulations as per section 11(1)(a) and section 11(2). He, then directed the Ld. AO to re-compute the income after giving benefit of section 11 along with all the consequential benefit. We do not find any infirmity in the order of the Ld. CIT(A) in giving the above direction to the Ld. AO. Hence these grounds of the Revenue are decided against it."

19. Following the decision (supra) of the Tribunal in assessee's own case for AY 2012-13 we do not find any substance in the grounds taken by the Revenue before the Tribunal which we hereby reject.

20. In the result, appeal of the assessee is allowed and the appeal of the Revenue is dismissed.

Order pronounced in the open court on 10th April, 2024.

sd/- **sd/-**

(G.S. PANNU)
VICE PRESIDENT

(ASTHA CHANDRA)
JUDICIAL MEMBER

Dated: 10/04/2024
Veena
Copy forwarded to -
1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi

Date of dictation	
Date on which the typed draft is placed before the dictating Member	
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	
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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	