

IN THE INCOME TAX APPELLATE TRIBUNAL  
MUMBAI BENCHES "G", MUMBAI

Before Justice (Retd.) C V Bhadang, Hon'ble President &  
Shri B R Baskaran, Hon'ble Accountant Member

ITA No. 3713/Mum/2023 for Assessment Year 2015-16

Smt. Sulochanadevi Singhania School Trust, 1 <sup>st</sup> Floor, New Hind House, N M Marg, Ballard Estate, Mumbai 400 001.  PAN AAATS2146P  (Appellant)	Vs.	DCIT (EXEM)-2(1), Mumbai      (Respondent)
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Appellant By : S/Shri Nitesh Joshi & Hitesh Trivedi  
Respondent By : Dr Kishore Dhule- CIT DR

Date of Hearing :04.03.2024	Date of Pronouncement : 10.04.2024
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**ORDER**

**Per Justice (Retd.) C V Bhadang:**

This appeal by the assessee - Smt. Sulochana Devi Singhania School Trust involves the following two issues:

- i) Disallowance of the claim for depreciation in view of sub section 6 of section 11 of the Income tax Act (as introduced w.e.f. A.Y. 2015-16).
- ii) Disallowance of the set off of deficit of expenditure over income of the earlier years.

2. The appellant is a trust registered under the Bombay Public Trust Act. It is also registered as a Charitable organization with the Deputy Commissioner of Income tax (Exemption), Mumbai u/s. 12A of the Income tax

Act ('Act' for short). The appellant is involved in the charitable activities in the field of education.

3. The appellant filed its return of income for A.Y. 2015-16 on 30.09.2015, along with Income & Expenditure Account, Balance-sheet and an Audit Report in Form No.10B, declaring income as 'NIL'. The case was selected for scrutiny and appellant filed relevant details as called for. The appellant, inter alia, sought deduction on account of depreciation amounting to Rs. 4,57,06,015/- as well as set off of deficit of expenditure over income of earlier period.

4. The Assessing Officer vide order dated 01.11.2017, refused to grant either of the claims. The Assessing Officer found that sub-section 6 of section 11 inserted w.e.f. A.Y. 2015-16, would not permit the claim of depreciation. In so far as claim of set off of deficit of expenditure over income is concerned, there is no discussion in the assessment order. Eventually, the Assessing Officer made necessary additions, which order was challenged by the appellant before the CIT(A). The CIT(A) vide order dated 21.08.2023 has dismissed the appeal, which brings the assessee to this Tribunal.

5. We have heard the parties. Perused record.

6. It is submitted by the learned counsel for the appellant that all that sub-section 6 of section 11 aims, is prohibition of double benefit, both on account of the application of the income for charitable purpose and the claim of depreciation on the capital asset so purchased. It is submitted that it has all along been the case of the appellant that the appellant had not made any claim of exemption on account of application of income in the earlier period from A.Y. 2008-09 to A.Y. 2013-14 except an amount of Rs 44,44,398/- in A.Y. 2014-15. It was therefore submitted that the disallowance on account of depreciation has to be restricted to Rs 6,66,660/- (being 15% of Rs 44,44,398/-). He submitted that the authorities below, without appreciating

the submission about the absence of any claim in the earlier period towards application of income, have made the disallowance, which is not sustainable. On behalf of the appellant reliance is placed on the decision of Hon'ble Supreme Court in the case of CIT vs. Rajasthan & Gujarati Charitable Foundation [402 ITR 441(SC)].

7. In so far as the second issue is concerned, it is submitted that the deficit of such expenditure over income can be allowed as held by Hon'ble Bombay High Court in CIT vs. Institute of Banking (264 ITR 110). It is submitted that the assessment order is silent on this aspect and the CIT(A) has also not appropriately dealt with the issue.

8. The learned CIT-DR has supported the impugned order. It is submitted that sub section 6 of section 11, as introduced w.e.f. A.Y. 2015-16, aims at doing away the claim of double benefit. It is pointed out that the said amendment speaks about any income which is "required to be applied or accumulated or set apart for application" and, therefore, the claim of depreciation has rightly been disallowed.

9. Even so far as the claim of set off of, the prior period deficit of expenditure over income is concerned, it is submitted that the provisions of section 11 to 13 of the Act which are applicable, are a code in themselves and the concept of section 28 of the Act cannot be imported in the scheme of provisions governing the taxation of income of Trusts.

10. We have carefully considered the rival circumstances and the submissions made.

11. Dealing with the first issue, it would be appropriate to reproduce sub-section 6 of section 11 of the Act, which has been introduced w.e.f. A.Y. 2015-16.

**Section 11**

(1) *Subject to the provisions of sections 60 to 63, the following income shall not be included in the total income of the previous year of the person in receipt of the income —*

.....

(2) .....

(3) .....

(4) .....

(5) .....

(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”.*

It can thus be seen that the claim of depreciation cannot be allowed where any income is required to be applied or accumulated or set apart for application for charitable purposes. The object of the section is to do away with double benefit i.e. towards a claim of exemption on account of application of income for charitable purposes as also a claim for depreciation. The entire basis of the submission on behalf of the appellant is that for the period A.Y. 2008-09 to A.Y. 2014-15 no such claim on account of application of income has been made except for an amount of Rs. 44,44,398/- in A.Y. 2014-15. A perusal of the order passed by the Assessing Officer shows that this issue has been considered in para 5.1 as under:

*"5.1. This section is very clear about the treatment of depreciation and the claim of depreciation made by the assessee clearly falls within the ambit of this section. As such the depreciation of Rs. \_\_\_\_ (The amount is kept blank in the original order) claimed by the assessee is disallowed. As the assessee was well aware of this amendment which came through the Finance Act 2014, this deliberate action of claim of depreciation led to furnishing of inaccurate particulars of income within the meaning of section*

*271(1)(c) r.w.s.274 of the Act thereby leading to concealment of income."*

Thus, in our view, the Assessing Officer has failed to appropriately consider about the absence of claim in the earlier years towards application of income. It is necessary to note that assessee would be entitled to benefit either on account of claim for application of income or a claim of depreciation. The order of the Assessing Officer also shows that there are certain blanks left, which would indicate non-application of mind.

12. Coming to the appellate order, the CIT(A) has dealt with the issue as under:

*"5.2. Depreciation Claims:*

*The appellant contends that a sum of Rs.6,66,660/- should be the only disallowed depreciation. However, the Assessing Officer (AO) has arrived at the figure of Rs.4,57,06,015/- based on a comprehensive examination of the financial documents. The appellant's mere assertion doesn't necessarily contradict or override the AO's detailed scrutiny.*

*5.3. Prior Years' Records:*

*-While the appellant has furnished records from 2008-09 to 2013-14 to show no asset was claimed as income application, this doesn't ipso facto validate the claims for 2014-15 and subsequent years. The AO's evaluation is based on the concerned assessment year and not strictly dependent on past claims.*

*5.4. Inconsistency in AO's Assessment:*

*- The AO's primary duty is to ensure the correct application of the Income-tax Act's provisions. Even if the AO acknowledged the appellant's claim, the final order was based on a comprehensive evaluation. It's not obligatory for the AO to align the final assessment strictly with the appellant's submissions.*

*5.5. Amendment's Applicability:*

*- The appellant's contention that the 2015 amendment should not apply to assets acquired before its commencement does not hold.*

*The law, once enacted, is applicable as per its stipulated date, regardless of past acquisitions or transactions."*

13. We find that the issue has not been dealt appropriately by the authorities below. A useful reference in this regard may be made to the decision of Hon'ble Supreme Court in the case of Rajasthan & Gujarat Charitable Foundation (supra), wherein the question no. 2 which fell for consideration was as under:

*"Whether on the facts and in the circumstances of the case and in law, the Income Tax Appellate Tribunal is justified in holding that the depreciation in respect of cost of the assets allowed to the assessee as expenditure is allowable as it gives rise to double deduction though such deduction is not specifically provided in the Income-tax Act, 1961 ?"*

The Hon'ble Supreme Court held as under:

*"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 [1993] 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.*

*It may be mentioned that most of the High Courts have taken the aforesaid view with only exception thereto by the High Court of Kerala which has taken a contrary view in 'Lissie Medical Institutions v. CIT [2012] 24 taxmann.com 9/209 Taxman 19 (Mag.)/348 ITR 344'.*

*It may also be mentioned at this stage that the legislature, realising that there was no specific provision in this behalf in the Income-tax Act, has made amendment in Section 11(6) of the Act vide Finance Act No. 2/2014 which became effective from the Assessment Year 2015-2016. The Delhi High Court has taken the view and rightly so, that the said amendment is prospective in nature.*

*It also follows that once assessee is allowed depreciation, he shall be entitled to carry forward the depreciation as well.*

*For the aforesaid reasons, we affirm the view taken by the High Courts in these cases and dismiss these matters."*

The authorities below have not gone through the records for A.Ys. 2008-09 to 2013-14. We, therefore, find that the matter in so far as the claim of depreciation is concerned, needs to be relegated to the file of the Assessing Officer, who shall verify the record as produced and shall allow the claim of depreciation in the event and to the extent it is found that there was no claim for application of income made by the appellant during the said period.

14. In so far as issue no.2 is concerned, we may not be required to dilate any further as the said issue is also covered by the decision of the Jurisdictional High Court in the case of CIT vs. Institute of Banking (supra). Question no.3 before the Hon'ble High Court was whether the assessee could carry forward the deficit of earlier year and set it off against the surplus of subsequent years when the same was not allowable in the case of the

assessee trust, in whose case the income was exempted u/s. 11 of the Income tax Act, 1961. Question no.3 before Hon'ble High Court was as under:

*"3. Whether, on the facts and in the circumstances of the case, the Tribunal was justified in law forward the deficit of earlier year and set it off against the surplus of subsequent years when the same was not allowable in the case of assessee trust in whose case income exempted under section 11 of the Income-tax Act, 1961?"*

The Hon'ble High Court as held as under:

*"Now coming to question No. 3, the point which arises for consideration is : whether excess of expenditure in the earlier years can be adjusted against the income of the subsequent year and whether such adjustment should be treated as application of income in subsequent year for charitable purposes? It was argued on behalf of the Department that expenditure incurred in the earlier years cannot be met out of the income of the subsequent year and that utilization of such income for meeting the expenditure of earlier years would not amount to application of income for charitable or religious purposes. In the present case, the Assessing Officer did not allow carry forward of the excess of expenditure to be set off against the surplus of the subsequent years on the ground that in the case of a Charitable Trust, their income was assessable under self-contained code mentioned in section 11 to section 13 of the Income-tax Act and that the income of the Charitable Trust was not assessable under the head "profits and gains of business" under section 28 in which the provision for carry forward of losses was relevant. That, in the case of a Charitable Trust, there was no provision for carry forward of the excess of expenditure of earlier years to be adjusted against income of subsequent years. We do not find any merit in this argument of the Department. Income derived from the trust property has also got to be computed on commercial principles and if commercial principles are applied then adjustment of expenses incurred by the Trust for charitable and religious purposes in the earlier years against the income earned by the Trust in the subsequent year will have to be regarded as application of income of the Trust for charitable and religious purposes in the subsequent year in which adjustment has been made having regard to the benevolent provisions contained in section 11 of the Act and*

*that such adjustment will have to be excluded from the income of the Trust under section 11(1)(a) of the Act. Our view is also supported by the Judgment of the Gujarat High Court in the case of CIT v. Shri Plot Swetamber Murti Pujak Jain Mandal [1995] 211 ITR 293. Accordingly, we answer question No. 3 in the affirmative i.e., in favour of the assessee and against the Department."*

*(Emphasis supplied)*

We, therefore, find that the claim towards set off deserves to be allowed.

15. In the result, the appeal is partly allowed. The impugned orders passed by the authorities below are hereby set aside. The claim of set off/carry forward of deficit of earlier years, against the surplus of subsequent years, shall be allowed by the Assessing Officer.

In so far as the claim for depreciation is concerned, the Assessing Officer is directed to verify the record for assessment years 2008-09 to 2013-14. The Assessing Officer shall allow the claim of depreciation to the extent there is no claim made by assessee for application of income during this period.

Order pronounced in the open court on 10<sup>th</sup> April, 2024.

Sd/-

[B R Baskaran]  
ACCOUNTANT MEMBER

Sd/-

[Justice (Retd.) C V Bhadang]  
PRESIDENT

Mumbai, Dated : 10<sup>th</sup> April, 2024  
SA

**Copy of the Order forwarded to :**

1. The Appellant.
2. The Respondent.
3. The PCIT, Mumbai.
4. The CIT
5. The DR, 'G' Bench, ITAT, Mumbai

BY ORDER

//True Copy//

(AssistantRegistrar)  
Income Tax Appellate Tribunal, Mumbai