आयकर अपीलीय अधिकरण, जयपुर न्यायपीठ, जयपुर
IN THE INCOME TAX APPELLATE TRIBUNAL,
JAIPUR BENCHES,"A" JAIPUR

श्री संदीप गोसाई, न्यायिक सदस्य एवं डा0 मीठा लाल मीना, लेखा सदस्य के समक्ष
BEFORE: SHRI SANDEEP GOSAIN, JM & DR MITHA LAL MEENA, AM

आयकर अपील सं./ITA No. 57 to 60/JP/2024
निर्धारण वर्ष/Assessment Year : 2009-10, 2012-13 to 2015-16

Om Kothari Foundation O, Om Tower, M.I. Road Jaipur	बनाम Vs.	ITO (Exemption) Ward-1 Jaipur
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No.: AAATO 06161		
अपीलार्थी/Appellant		प्रत्यर्थी/Respondent

निर्धारिती की ओर से/Assessee by : Shri Anish Maheshwari, CA
राजस्व की ओर से/Revenue by: Shri A.S. Nehra, Addl.CIT

सुनवाई की तारीख/Date of Hearing : 13/03/2024
उदघोषणा की तारीख/Date of Pronouncement: 04 /06/2024

आदेश/ORDER

PER: SANDEEP GOSAIN, JM

These are four appeals filed by the assessee against four different orders of the Ld. CIT (A)-4, Jaipur dated 28.11.2023 for the assessment years 2009-10, 2012-13, 2014-15 and 2015-16 raising therein following grounds of appeal respectively.

ITA No.57/JP/2024 – A.Y. 2009-10

1. That the Ld. A.O. grossly erred in taking section u/s 147/148 of 1.T. Act, 1961 & reopened the case. That the Ld. CIT(A) also erred in upholding the action of Ld. A.O. for reopening of Assessment.

2. That the Ld. A.O. grossly erred on Law and Facts in not accepting the order of Higher Authorities on the same issues which got finality and on which he again made the additions, hence the order is null and void which should be quashed. That the Ld. CIT(A) erred in non adjudication the Ground in proper way. That the order of higher Authorities not taken seriously.

3. That the Ld. A.O. grossly erred in invoking provision of sec. 13(1)(d)(iii) on investment in Shares and assessed the trust under normal provision of I.T. Act, 1961, when the law/judicial view is to tax only the income earned from said investments. That the Ld. CIT(A) also erred in not considering the order of Ld. CIT(A) & Hon. ITAT, Hon. High Court on this legal issue & upheld the order of Ld. A.O. & also erred in not allowing the exemption u/s 12A/12AA.

4. That the Ld. CIT(A) grossly erred in not considering the appeal in the right spirit & not taken the basis of order of Ld. CIT(A), Hon. ITAT & Hon. High Court, though in this case the A. filed return on the basis of Registration u/s 12A/12AA in the order which has not been considered.

5. That the Ld. A.O. grossly erred in making the addition of Rs. 16,53,637.00 by disallowing depreciation, stating that this is out of corpus of the Trust. That the Ld. CIT(A) also erred in not allowing the depreciation & did different interpretation which is not based on earlier order of Higher Authorities.

6. That the Ld. A.O. grossly erred in making the addition of Donation Expenses of Rs. 6,15,522.00. The Ld. CIT(A) also erred in not allowing the ground.

7. That the Ld. A.O. grossly erred in making the addition on A/c of Building Fund Rs. 50,00,000/- which was transferred from Income and Expenditure A/c being the amount invested in Building construction. The Ld. CIT(A) also erred in not considering the grounds & dismissed in limini.

8. That the Ld. A.O. grossly erred in making addition of Trust fund Rs. 5,93,304.00. That the Ld. CIT(A) also erred in not considering the ground of the Assessee.

9. That the Ld. A.O. grossly erred in making addition of corpus fund Rs. 35,29,000.00. That the Ld. CIT(A) also erred in not considering the ground of the Assessee.

10. That the Ld. A.O. grossly erred in Charging the tax on Surplus as per I and E A/c Rs. 21,12,358.00 though the surplus was under the limit of 15% as per Law. That the Ld. CIT(A) erred in not considering the grounds dismissed.''

ITA No.58/JP/2024 – A.Y. 2012-13

1. That the Id A.O grossly erred in completing the assessment u/s 143(3) after 31.3.2015 hence it is time barred. That the Ld. CIT(A) erred in not allowing the ground.

2. That the Id A..O. have grossly erred in not allowing the exemption u/s 10 (23C) (vi) though matter is pending in appeal before ITAT. That the Ld. CIT(A) also erred in not allowing the ground.

3. That the Id. A.O. grossly erred in deciding that the trust lost exemption of sec. 11 of I.T. Act. 1961 and also held that the 'A' has made investment in violation of Sec. 13(1) (d) and thereby taxed the income u/s. 164(2) and(3). That the Ld. CIT(A) also erred in not allowing the ground.

4. That the Id A.O. grossly erred disallowing the donation Expenses Rs. 29,5100.00. The Ld. CIT(A) also erred not allowing the ground.

5. That the Id. A.O. grossly erred in disallowing the depreciation on eligible assets Rs. 37,53,097.00. That the Ld. CIT(A) also erred in not allowing the ground.

6. That the Id. A.O.. grossly erred in charging tax on surplus declared during the year Rs. 1989496/.-That the Ld. CIT(A) also erred in not allowing the ground.

7. That the Id. A.O. grossly erred in disallowing the development fees Exp. Rs. 83500/-. That the Ld. CIT(A) also erred in not allowing the ground.

8. That the Id. A.O. grossly erred in disallowing the food for poor person Exp. Rs. 200555/-That the Ld. CIT(A) also erred in not allowing the ground.

9. That the Id. A.O. grossly erred in making addition of corpus fund Rs. 283000/- That the Ld. CIT(A) also erred in not considering the ground of the Assessee.''

ITA No.59/JP/2024 – A.Y. 2014-15

1. That the Ld. A.O. grossly erred on Law and Facts in not accepting the order of Higher Authorities on the same issues which got finality and on which he again made the additions, hence the order is null and void. Should be quashed. That the Ld. CIT(A) erred in non adjudication the Ground in proper way. That the order of higher Authorities not taken seriously.

2. That the Ld. A.O. grossly erred in invoking provision of sec. 13(1)(d)(iii) on investment in Shares and assessed the trust under normal provision of I.T. Act, 1961, when the law/judicial view is to tax only the income earned from said investments. That the Ld. CIT(A) also erred in not considering the order of Ld. CIT(A) & Hon. ITAT, Hon. High Court on this legal issue & upheld the order of Ld. A.O. & also erred in not allowing the exemption u/s 12A/12AA.

That without prejudice to above legal issues, we also take the following grounds.

3. That the Ld. A.O. grossly erred in making the addition of Donation Expenses of Rs. 4,70,630.00. The Ld. CIT(A) also erred in not allowing the ground.

4. That the Ld. A.O. grossly erred in making the addition of Rs. 29,08,455.00 by disallowing depreciation, stating that this is out of corpus of the Trust. That the Ld. CIT(A) also erred in not allowing the depreciation & did different interpretation which is not based on earlier order of Higher Authorities.

5. That the Ld. A.O. grossly erred by disallowance of expenses on Food for Poor Rs. 18,785.00

6. That the Ld. A.O. grossly erred in making the addition on A/c of Corpus Fund Rs. 5,84,000/- which was transferred from. Income and Expenditure A/c being the amount invested in Building construction. That the Ld. CIT(A) also erred in not considring the ground of the Assessee.

7. That the Ld. A.O. grossly erred by disallowance of ESI and PF expenses Rs. 23,834.00. the Ld. CIT(A) also not considered the ground.

8. That the Ld. A.O. grossly erred in Charging the tax on Surplus as per I and E A/c Rs. 18,58,615.00 though the surplus was under the limit of 15% as per Law. That the Ld. CIT(A) also erred in not adjudicating the ground.

ITA No.60/JP/2024 – A.Y. 2015-16

1. That the Ld. A.O. grossly erred on Law and Facts in not accepting the order of Higher Authorities on the same issues which has got finality and on which A.O. again made the additions, hence the order is null and void. should be quashed. That the Ld. CIT(A) erred in non adjudicating the Ground in proper way. That the order of higher Authorities not taken seriously.

2. That the Ld. A.O. grossly erred in invoking provision of sec. 13(1)(d)(iii) on investment in Shares and assessed the trust under normal provision of I.T. Act, 1961, when the law/judicial view is to tax only the income earned from said investments. That the Ld. CIT(A) also erred in not considering the order of Ld. CIT(A) & Hon. ITAT, Hon. High Court on this legal issue & upheld the order of Ld. A.O. & also erred in not allowing the exemption w/s 12A/12AA..

3. That the Ld. A.O. grossly erred on Law and facts in assessing the trust income as a business income under the wrong status of A.O.P. though the trust is registered u/s sec. 12A and 10(23) of I.T. Act. 1961. That the Ld. CIT(A) also erred in not considering the ground

4. That the Ld. A.O. grossly erred in making the addition of Donation Expenses of Rs. 323355.00 by treating the status as A.O.P. The Ld. CIT(A) also erred in not allowing the ground.

5. That the Ld. A.O. grossly erred in making the addition of Rs. 27,67,977.00 by disallowing depreciation, stating that this is out of corpus of the Trust. That the Ld. CIT(A) also erred in not allowing the depreciation & did different interpretation which is not based on earlier order of Higher Authorities.

6. That the Ld. A.O. grossly erred in charging tax on Charitable expenditure i.e. Food for hunger Rs. 3,52,338.00. The Ld. CIT(A) also erred in not considering the ground.

7. That the Ld. A.O. grossly erred in disallowing the P.F. Expenses 10,135.00

8. That the Ld. A.O. grossly erred in making the addition on A/c of Building Fund Rs. 35,50,000.00 which has been transferred from, Income and Expenditure A/c being the amount invested in Building construction That the Ld. CIT(A) also erred in not considering the ground & Submission of Appellant.

9. That the Ld. A.O. grossly erred in making addition of corpus fund Rs. 1,03,80,000.00 That the Id. CIT(A) also erred in not considering the ground.

10. That the Ld. A.O. grossly erred in Charging the tax on Surplus as per I and E. A/c Rs. 28,15,545.00 though the surplus was under the limit of 15% as per Law as provided w/s 12A. That the Ld. CIT(A) erred in not considering the ground and dismissed the same.''

2.0 First of all, we take up the appeal of the assessee in ITA No.57/JP/2024 for adjudication hereunder.

2.1 Apropos Ground No. 1 of the assessee, the facts as emerges from the order of the ld. CIT(A)at para 4.2 to 4.6 are as under:-

> ''4.2 I have considered the facts of the case and written submissions of the appellant as against the observations/findings of the AO in the assessment order for the year under consideration. The contentions/submissions of the appellant are being discussed and decided as under:-

4.3 The appellant has challenged the validity of the notice u/s 148 of the Act, it is to be noted that the AO had material before him for formation of reasonable belief of escapement which had live nexus with the material in his possession for assuming the valid jurisdiction for reopening u/s. 147. There is difference between reason to believe and reason to suspect. The former is based on some tangible material which has some nexus on the basis of which a prudent person can have a belief wherein in latter case there would be no tangible material at all.

When the action was taken by the learning assessing officer the exemption of the appellant stood withdrawn by Id. CIT(Exemption), Jaipur. So far as the sufficiency of reasons is concerned, what is to be seen at the stage of recording the reasons is existence of belief based on faithful appreciation of material which has live link to an income escaping assessment, but not the established fact of escapement of income by detailed investigation or legal analysis. In other words, at the point of time of initiating the reassessment proceedings existence, and not adequacy of reasons, is material. This view is supported by the decision in case of Rajesh Jhaveri Stock Brokers (P) Ltd. 291 ITR 500 (SC), CARTIER SHIPPING CO. LTD. 40 DTR 459 (Mumbai Trib), Praful Chunilal Putel 148 CTR (Guj.). The sufficiency of reasons cannot be looked into by courts and there must be recording of prima facie belief has also been held in cases of Raymond woollen mills 236 ITR 34 (SC), Phool Chand Bjaranglal 203 ITR 456 (SC), K. R Sadayappan 63 ITR 219 (SC). In case of Multi Screen Media (P) Ltd. 324 ITR 54 (Bom) the Bombay High Court after considering the decision in case of CIT vs. Kelvinator of India Ltd. (2010) 320 ITR 561 (SC) has observed as under:

> "where the AO purports to exercise power under 1.147 within a period of four years from the end of the relevant assessment year, the condition precedent to the exercise of the power is the

> existence of a reason to believe that any income chargeable to tax has escaped assessment. The expression 'reason to believe' must obviously be that of a prudent person and it is on the basis of the reasons recorded by the AD that the question as to whether there was o reason to believe that income has escaped assessment, has to be determined. At the same time, the sufficiency of the reasons for reopening on assessment does not fall for determination at the stage of a reopening of assessment. When the Court is concerned with a challenge to a notice under s.148, the issue is not as to whether it can be conclusively demonstrated that income had escaped assessment, but whether as a matter of fact, there was a reason to believe that this was so, to justify a recourse to the power under s.147

The requirement, thus for reopening of assessment, is "reasonable belief. This expression is not synonymous with Assessing Officer having finally ascertained the fact by any legal evidence or conclusion. In this context, the Supreme Court in the case of Rajesh Jhaveri Stock Brokers Private Limited [Supra] had observed as under:

"Section 147 authorizes and permits the Assessing Officer to assess or reassess income chargeable to tax if he has reason to believe that income for any assessment. . The word reason in the phrase reason to believe would mean cause or justification. If the Assessing Officer has cause or justification to know or suppose that income had escaped assessment. It can be to have reason to believe that an income had escaped assessment. The expression cannot be read to mean that the Assessing Officer should have finally ascertained the fact by legal evidence or conclusion. The function of the Assessing Officer is to administer the statute with solicitude for the public exchequer with an inbuilt idea of fairness 10 taxpayers.

As observed by the Della High Court in Central Provinces Manganese Ore Co. Ltd.. ITO 11991 (191) ITR 662), for initiation of action under section 147 (a) [as the provision stood at the relevant time) fulfillment of the two requisite conditions in that regard is essential. At that stage, the final outcome of the proceeding is not relevant b other words, at the initiation stage, what is required is reason to believe, but not the established fact of escapement of income. At the stage of issue of notice, the only question is whether there was relevant material on which a reasonable person could have formed a requisite belief. Whether the materials would conclusively prove the escapement is not the concem at that stage. This is so because the formatics of belief by the Assessing Officer is uithin the realm of subjective satisfaction (see O Selected Dalurband Coal Co. Pvt. Ltd. (1996 (217) ITR 597 (SC; Raymand Woollen Mills Ltd. ITO (236) ITR 34 (SC

In the case of Raymond Woollen Mills Limited v. Income Tax Officer & Ors. [Supra). the Apex Court held and observed as under:

"In this case, we do not have to give a final decision as to whether there is suppression of material facts by the assessen or not. We have only to see whether there was prima facie some material on the basis of which the Department could reopen the case sufficiency or correctness of the material is not a thing to be considered at thus stage. We are of the view that the court cannot strike drum the reopening of the cave in the facts of this case. It will be open to the assessee to prove that the assumption of fact made in the notice was erroneous. The assessee may also prove that in facts came to the knowledge of the Income tax Officer after completion of the assessment proceeding. We are not expressing any opinion on the merits of the ease. The questions of fact

and law are left open to be investigated and decided by the assessing authority The appellant will be entitled to make all the points before the assessing authority. The appeals are dismissed. There will be no order as to costs.'' 12. Lastly it will be settled that the validity solidity of the notice of reopening would be judged on the basis of reasons recorded by the Assessing Officer for Issuance of such notice. It would be not be permissible for the Assessing Officer to improve upon such reasons or to rely upon some extraneous material to support his action. Reference in this respect can be made to the decision of this Court in the case of Aayojan Developers vs Income Tax Officer, reported in (2011) 335 ITR 234 (Guj).''

4.4 It is observed that the AO has provided all the details, the appellant has attended the re-assessment proceedings from time to time and has filed the details as sought by the AO. It is also observed that the appellant has never pursued the alleged objection filed against the notice u/s 148 of the Act before the AO. Therefore once the appellant has participated in the proceedings and allowed the AO to pass the re-assessment order, the contention raised by the appellant now, is not found acceptable. In the present proceedings the appellant has not filed the copies of the reasons of reopening and objections filed before the learned assessing officer if any and the order of the learned assessing officer disposing of the objections if any. In the assessment order there is no reference to the objections or the order disposing objections It is clear that the appellant did not object to the reopening within reasonable time.

4.5 In this case, the Id. Commissioner of Income-tax (Exemption), Jaipur has passed an order of withdrawal of the approval granted u/s 10(23C)(vi) of the L.T. Act, 1961 on 10.03.2016 endorsed vide letter no. F.No.01/CIT(E)/JPR/Withdwl-10(23C)(vi)/2015- 16/5208

dated 10/11.03.2016 as stated in the assessment order. Vide this order, the approval granted vide notification no. 12/2010-11 endorsed vide letter dated 22.09.2010 has been withdrawn from A.Y. 2009-10 and onwards. The learned Commissioner of income tax (Exemption) has held that The appellant is not entitled to the exemption under this section with effect the A.Y. 2009-10 and onwards. The assessing officer has incomequence to that order taken further action. The action of The learned assessing officer is consequential upon the order of the learned Commissioner of Income-tax (Exemption). When the action was taken by the learned assessing officer the exemption of the appellant stood withdrawn.

46 As per the law, the assesse has the option of challenging the reasons of reopening by filing of objections and if not satisfied with the order disposing objection then he could go before the Hon'ble High Court in Writ Petition as per the judgement of Hon'ble Supreme Court in the case of GKN Driveshafts (India) Ltd. [2003] 259 ITR 19 and the judgement of Hon'ble Gujarat High Court in the case of Garden Finance Limited reported in 268 ITR 48. Relevant para of the judgement is extracted below:-

‘’12. What the Supreme Court has now done in the GKN's case (supra) is not to whittle down the principle laid down by the Constitution Bench of the Apex Court in Calcutta Discount Co. Ltd's case (supra) but to require the assessee first to lodge preliminary objection before the Assessing Officer who is bound to decide the preliminary abjections to issuance of the reassessment notice by passing a speaking order and, therefore, if such order on the preliminary objection against the assessee, the assessee will get on opportunity to challenge the same by filing a writ petition so that he does not have to wait till completion of the ve assessment proceedings which

would have entailed the liability to pay tax and interest on re assessment and also to go through the gamut of appeal, second appeal before income-tax Appellate Tribunal and then reference/tax appeal to the High Court"

…….

15. The upshot of the above discussion is that while the GKN's case (supra) does not purport to divest the Court of its constitutional power to issue a writ of prohibition or any other appropriate writ in a fit case to restrain the assessing authority from proceeding with the notice under section 148, the GKN's case (supra) does lay down that ordinarily the procedure to be followed would be as indicated in the GKN case, that is, after receiving reasons, the assessee shall lodge his preliminary objections before the Assessing Officer against the nation for reassessment and the Assessing Officer will decide the objections by a speaking order to that an aggrieved assessee can challenge the order in a writ petition.''

As per the judgements the challenge to the reassessment is to be done in two different stages challenging the reasons of reopening and (i) challenging the assessment order. Assessee's challenge to the order of the assessing officer rejecting the objection against the reasons of reopening and assessce's challenge to the assessment order are two separate proceedings. Assessee cannot challenge order of the assessing officer disposing objections before the Ld. CIT(Appeals) as the same is not on appealable. Once the assessee has accepted the reasons of reopening either by not filing objections to reasons OR by accepting the order disposing objections and assessee kept on cooperating in the assessment proceedings, the assessee cannot raise his grievance against the "reasons of reopening in his appeal against the order assessing income.

In view of the above detailed discussion, this ground of appeal is hereby dismissed.

2.2 During the course of hearing the ld.A.R. of the assssee submitted that that the A.O. reopened the case u/s 147/148 on the premises that the assessee trust has violated the provision of sec. 13(1)(d)(III) by making investment in the shares of a company. He further submitted that on this issue the similar additions was made in A.Y. 2006-07, 2007-08, 2008-09 & the case's were decided in its favour by the following judicial authorities.

S. No.	Particulars	Authority	A.Y.	Remark
1	ITAT order ITAT Jaipur Dtd. 13.07.2017	ITAT	2009-10	Exemption allowed u/s 12A (a) of I.T. Act. 1961.
2	High Court order DBIT No. 251/2017 dtd. 30.09.2017	High Court	2008-09	ITAT Appeal is on 12 (1)(d)(III), ITAT was in favour of Assessee Trust, High Court up held the order of ITAT.
3	ITAT A.Y. 2008-10 ITA No. 967/JP/16 order dtd. 27.02.2017	ITAT	2008-09	ITAT allowed the appeal of the assessee on the issue of investment in shares & some other issues.
4	CIT(A) orders	CIT(A)	2006-07 on wards	The relief is allowed in case of Shares hold by Trust.

He further submitted that as such the issue raised in reopening about violation of sec. 13(1) (d) has already been decided in favour of assessee by the High Court & there is no further appeal on this issue, hence the action taken for reopening of case u/s. 148 on the decided issue is wrong and assessment done on this basis is in

fructuous. The ld. AR of the assessee submitted that the Ld. CIT(A) upheld the order of A.O. though he had orders of earlier year in his file and the same are being filed by copy of paper book.

2.3 On the other hand, the ld. DR supported the order of the ld CIT(A).

2.4 We have heard both the parties and perused the materials available on record. The Bench noted that The case of appellant was reopened u/s 148 of the Income Tax Act, 1961 vide notice dated 23/03/2017 for the verification of investment made by appellant in shares of M/s Om Infra-Projects Limited which is not specified mode of investment within the provision of section 11(5) of the Income Tax Act, 1961 and it attracts the provision of section 13(1)(d)(iii). It is also noted that previously the assessment of the appellant for the assessment year for the A.Y. 2006-07 and 2007-08, 2008-09 completed and additions were made on similar reasons by the A.O and all these additions were deleted by the Ld. CIT (A) vide order dated. 11.01.2016 and further the department had filed the appeal before Hon'ble ITAT Jaipur Bench against the Order passed by Ld. CIT(A) for A.Y. 2006-07 and 2007-08 and Hon'ble ITAT dismissed the appeal filed by revenue vide order dated 28.09.2016 and for AY 2008-09 vide order dated 27/02/2017. Department filed appeal before Hon'ble Rajasthan High Court where Hon'ble High Court dismissed the appeal of the Department in DB Income Tax Appeal No. 251/2017 vide order dated 13/09/2017. The Bench noted that the

validity of reasons recorded for the AY 2009-10 was previously nullified by the order of Hon'ble ITAT Jaipur Bench vide order dated 28/09/2016 and 27/02/2017 which was before issuance of notice u/s 148 of the Act 1961, thus, the AO erred in ignoring the previous settled issue in the appellant own case and reopened the case of appellant on same set of reasons which does not have legal validity and does not constitute a valid reasons to belief to reopen the case of appellant u/s 148 of the Act, 1961 as the issue was settled by courts. Hon'ble ITAT Mumbai bench in the case of DCIT vs Speco Infrastructure in ITA 2324/Mum/2023 vide order dated 22/01/2024 held that the tribunal's decision reinforces the principle that once additions made by the Assessing Officer (AO) are deleted by the appellate authority with a reasoned order, the merits of the case warrant maintaining the status quo in identical situations. Hence, in view of the above deliberation, the Bench finds that the order passed u/s 147 r.w.s. 143(3) of Income Tax Act, 1961 is bad in law, *void-ab initio* and deserve to be annulled. Hence, the Ground No. 1 of the assessee is allowed .

3.0 The Ground No. 2 to 4 of the assessee is regarding invoking the provisions of Section 13(1)(d) of the Act for Investment made in past financial years in shares thereby not allowing the exemption u/s 11/10(23C)(vi) of the Act and taxing the receipt of the trust by considering it as AOP. The AO grossly erred in ignoring the

jdugement of ITAT and High Court on same issue in assessee's own case in preceding assessment years.

3.1 Apropos Ground No. 2 to 4 of the assessee, the facts as emerges from the order of the ld. CIT(A) are as under:-

> ''5.2 I have considered the facts of the case and written submissions of the appellant as against the observations/findings of the AO in the assessment order for the year under consideration. The contentions/submissions of the appellant are being discussed and decided as under:-
>
> The learner assessing officer disallowed the benefit of exemption to the appellant in the assessment order on the ground that the appellant has violated the investment norms as provided under the law for the trust. It is an undisputed fact that the appellant is having investment in equity shares of a group company. As per the section 11 investment in equity shares is prohibited and on this legal ground the learned assessing officer disallowed the exemption to the appellant in the assessment order.
>
> 5.3 The learned Assessing Officer has observed that in this case it has been noticed that in the Audit Report furnished u/s 12A(b) in form no. 10B as per Rule 17B, the assessce has shown investment in shares of M/s Om Metal Infra Project Ltd. of Rs. 23,35,000/- (in the balance sheet shown at Rs. 23,35,562/-). The shares of M/s Om Metals Infra Project Ltd not an eligible asses within the meaning of provisions of section 11(5) as such it attracts provisions of section 13(1)(d)(iii) of the I.T. Act. Furthermore mere holding of shares in a company is sufficient to invoke provisions of section 13(1)(d)(iii) which makes the assessee ineligible to claim exemption u/s 11/10(23C) of the LT. Act. And further given the finding that it is a fit case to attract the 13th proviso to sec 10(23C) of the Act r.w. 6th proviso to sec. 10(23C) of the Act for the reason of holding the shares of M/s Om Metals Infra-projects Ltd. and also not invested its funds in

accordance with the provisions contained in clause (b) of the third proviso to sec, 10(23C) of the Act.

5.4 In the case of the appellant, the Id. Commissioner of Income-tax (Exemption), Jaipur has passed an order of withdrawal of the approval granted u/s 10/23C)(vi) of the 1.T. Act, 1961 on 10.03.2016 endorsed vide letter no. F.No.01/CIT(E)/JPR/ Withdwl-10(230)(vi)/2015-16/5208 dated 10/11.03.2016 as stated in the assessment order. Vide this order, the approval granted vide notification no. 12/2010-11 endorsed vide letter dated 22.09.2010 has been withdrawn from A.Y. 2009-10 and onwards. The learned Commissioner of Income tax (Exemption) has held that The appellant is not entitled to the exemption under this section with effect the A.Y. 2009-10 and onwards. The assessing officer has inconsequence to that order taken further action. The action of the learned assessing officer is consequential upon the order of the learned Commissioner of Income-tax (Exemption). The order of the Learned Commissioner of Income-tax (Exemption) was also challenged by the appellant before the honorable Tribunal and the honorable Tribunal has in principle upheld the findings of the id Commissioner of Income-tax (Exemption) however has given partial relief to the appellant. The relevant pars 5.2 and 5.3 of the order of Hon'ble ITAT as noted in the judgement of Hon'ble High Court are as under:-

"5.2 The contention of the assessee is that the objection of the Ld. CIT(E) was that the assesser had not filed any evidence with regard to receipt of shares and donation in the year 2006-07 The observation of the Ld. CIT(E) is not correct. The assessee had filed the details, he submitted that even if it is presumed that investment in the modes which are not as per Sec. 11(5) of the Act. then the entire exemption of the Trust shall not go, and only the income from said investiment should be made llable for charging tax at the maximum marginal rate. The Lud. Counsel placed reliance on the decision of the Tribunal in the case of M/s Santoba Durlabhji v ITO in ITA No. 241 & 242/JP/2014, also placed reliance on the Judgment of the Hon ble Delhi High Court in the case of Director of Income Tax Vs. Shri Radha Krishan Charitable Trust The Hon'ble High Court affirmed the view of the Tribunal, that the assessee was allowed to hold the investment contrary to provisions of Section 11(5) of the Act under an

obligation to disinvest on or before 31/03/1993 without losing the benefit of Section 11 & 12of the Act. This is not the fact of the present case The Contention of the assessee is that the assessee had not made investment, in fact, the shares were received under the donation and such shares were received for charitable purpose There is no dispute with regard to the fact that if the assessee has not made investment as per the provisions of Section 13 of the Act, the authorities can withdraw exemption u/s 11 & 12 of the Act. In the present case the assessee has not disputed the fact that the shares of M/s Om Metal Infra Project Ltd. would not fall in the category of shares in a public sector company.

5.3 Ld. Counsel for the assessee placed reliance on the judgment of the Hon'ble Karnataka High Court in the case of Commissioner of Income-Tex Vs. Muller's Charitable Institutions this resets related to denial of exemption, but not on the issue of rescinding exemption granted u/s 10(23C)(vi). The decision of the Tribunal in the case of M/s Santokba Durlabhji in ITA No. 241 & 242/JP/2014 is also related with the taxability of income arising from the investment which are not specified under the provisions of Section 13(1)(d). The issue in the present case, is whether the Ld. CIT(A) is justified in rescinding the notification granted u/s 10(23C)(vi) of the Act, under the facts of the present case. The Ld. Counsel for the assessee has placed on record the order of CITIA) pertaining to the AY 2008-09 dated 12-8-2016 in assessee's own case. In that year the issue of rescinding the notification u/s 10(23C)(vi) was not under consideration. The only issue which requires to be considered whether the Ld. CIT(E) was justified in withdrawing the notification and benefit a/s 10(23C) (vi) of the Act, on the basis that the assessee has not made investment in the specified assets. There is no dispute with regard to the fact that the assesee kept this investment as it is without converting into the same in the mode specified under the Act despite elapse of several years, the proviso of Section 10(23C)(vi) empowers the prescribed authority under the Act to withdraw the approval granted u/s 10(23C) (vi). It is borne out of records that the Revenue chose not to rescind the approval in earlier years. The Ld. Counsel for the assessee urged that withdrawal of exemption is very harsh step as the assessee has been enjoying the benefit of exemption, for several years. After considering the totality of the fact, we deem it proper to restore this

issue to the file of the CIT(E) to reconsider the submissions of the assessee, and give last opportunity to convert the shares into specified assets within a specified period, and meantime withdraw exemption u/s 11 & 12 in respect of income earned from the investment made in non-specified assets. This ground of assessee's appeal is allowed for statistical purpose."

The above directions of the honorable Tribunal is to be complied with at the level of the learned Commissioner of Income tax (Exemption). This order of the honourable Tribunal was challenged by the appellant before the Hon'ble High Court. In D.B. Income Tax Appeal No. 354/2017 in order dated 13-12-2017 the Hon'ble High Court as upheld the order of Hon'ble ITAT whereby the matter was restored to the CIT(E) to allow opportunity to convert the shares in specified asset within a specified period and in the meantime withdraw exemption u/s 11 & 12 in respect of income earned from the investment made in non-specified assets.

5.5 The appellant has relied upon the orders of higher applied authorities in his own case on the issue whereby it has been held that in such a scenario where the trust is having investment in shares in such a case the exemption is not to be disallowed in entirety but only with respect to the income received from such investments

5.6 Submission on the similar lines was also made by the appellant before the honorable tribunal in the appeal proceedings whereby the order of the withdrawal, of exemption was chalenged before the honorable Tribunal and also made submission on the issue of section 13(1)(d) of the Act in his grounds of appeal and facts of the case and submissions in support of the grounds of appeal before Hon'ble ITAT

Honorable Tribunal has passed the order after considering the submissions of the appellant including the judgments referred and such order has been upheld as the honorable High Court. The undersigned is bound to follow the orders of higher appellate authorities in the case of the appellant himself pertaining to the waTH: assessment years.

5.7 The present assessment order passed by the Id. AU cannot be viewed completely independent of the order of the withdrawal of exemption under section 101200, by his higher authority, Such order of withdrawal of exemption has been modified by the honourable ITAT in terms of the directions given in the appeal and accordingly order will be passed by the learned Commissioner of Income tax (Exemption). Thus order of the honourable Tribunal was challenged by the appellant before the Hon The High Court. In D.B. Income Tax Appeal No. 354/2017 in order dated 13-12-2017 the Han ble High Court has upheld the order of Hon'ble ITAT whereby the matter wus restored to the CIT(E). Accordingly, as per the order of the Id. CIT(E) in the restored proceedings the learned assessing officer in to pass necessary order modifying if required) the assessment order passed by him. Needless to say, the appellant will be entitled to come in first appeal against such order of the learned assessing officer if the same is not as per the orders of the higher authorities. The action of the learned assessing officer in passing the impugned assessment order is consequential upon the order of the learned Commissioner of Income-tax (Exemption) and is in the nature of give effect to the order of higher authority. In view of the discussion the challenge of the appellant to the impugned assessment order of the learned assessing officer is found to be devoid of merit

5.8 It may not be out of place to note that in the order of the Hon'ble ITAT whereby the matter was restored to the CIT(E) to allow opportunity to convert the shares in specified asset within a specified period and in the meantime withdraw exemption u/s 11 & 12 in respect of income earned from the investment made in non-specified assets much of the grievance of the appellant as raised in the present appeal has already been addressed and as such no cause of action arises for the appellant to raise the similar grounds in appeal before the undersigned. At the same time it is observed that the compliance of the directions of the honourable Tribunal (extract) "we deem it proper to restore this issue to the file of the CIT(E) to reconsider the submissions of the assessee, and give last opportunity to convert the shores into specified assets within a specified period which were subsequently approved by honourable High Court has not been done at the same is pending. Hypothetically, in case a decision is given in this appeal allowing this ground of appeal without the compliance of

these directions such decision may fall in teeth of the or contempt of the judgment of honourable High Court whereby the judgment of hanourable Tribunal was approved. The appellant is hereby advised to approach and make appropriate submissions before the id. CIT(E) for the compliance of the said directions.

Accordingly, these grounds of appeal of the appellant are dismissed.''

3.2 During the course of hearing, the ld. AR of the assessee filed following detailed written submission that the provision of Section 13(1)(d) is not applicable to the assessee and exemption on whole income should not be disallowed to the assessee.

''2.2 Submission of Appellant:-

The provision of Section 13(1)(d) of the Income Tax Act, 1961 is reproduced as under:-

(d) in the case of a trust for charitable or religious purposes or a charitable or religious institution, any income thereof, if for any period during the previous year—

(i) any funds of the trust or institution are invested or deposited after the 28th day of February, 1983 otherwise than in any one or more of the forms or modes specified in sub-section (5) of section 11; or

(ii) any funds of the trust or institution invested or deposited before the 1st day of March, 1983 otherwise than in any one or more of the forms or modes specified in sub-section (5) of section 11 continue to remain so invested or deposited after the 30th day of November, 1983"

Section 11(5) :- *The forms and modes of investing or depositing the money referred to in clause (b) of sub-section (2) shall be the following..*

Section 11(2)-

Where [eighty-five] per cent of the income referred to in clause (a) or clause (b) of sub-section (1) read with the Explanation to that sub-section is not applied, or is not deemed to have been applied, to charitable or religious purposes in India during the previous year but is accumulated or set apart, either in whole or in part, for application to such purposes in India, such income so accumulated or set apart shall not be included in the total income of the previous year of the person in receipt of the income, provided the following conditions are complied with, namely:—

a. *such person specifies, by notice in writing given to the Assessing Officer in the prescribed manner, the purpose for which the income is being accumulated or set apart and the period for which the income is to be accumulated or set apart, which shall in no case exceed ten years;*
b. *the money so accumulated or set apart is invested or deposited in the forms or modes specified in sub-section (5)*

From the interpretation of above section which provide that:-
A. Above provisions are applicable for the year in which investment was made by the trust.
B. Investment/deposit of money in specified mode is referred to surplus money which was accumulated with the trust after applying the same for charitable or religious purposes in India. Therefore, the money applied by the trust for charitable or religious purposes in India are not to be considered for investment in specified mode above the threshold limit of 15%

In the case of appellant, the investment in shares was not made in the current assessment year, thus the provision of section 13(1)(d) of the Act was not applicable in the case of appellant for current assessment year.

Further the if the provision of section is 13(1)(d) is contravene then provision of section 164(2) of the Act is applicable which is reproduced as under:-

164(2) In the case of relevant income which is derived from property held under trust wholly for charitable or religious purposes, [or which is of the nature referred to in sub-clause (iia) of clause (24) of section 2,] [or which is of the nature referred to in sub-section (4A) of section 11,] tax shall be charged on so much of the relevant income as is not exempt under section 11 [or section 12], as if the relevant income not so exempt were the income of an association of persons :

[Provided that in a case where the whole or any part of the relevant income is not exempt under section 11 or section 12 by virtue of the provisions contained in clause (c) or clause (d) of sub-section (1) of section 13, tax shall be charged on the relevant income or part of relevant income at the maximum marginal rate.]

The above section provides that as such investment or deposit were made in violation of section 13(1)(d) or 11(5), the only that part of income is not considered as exempt. It does not tantamount to denial of exemption u/s 11 of the Act of the total income of the assessee. It is settled law that even for violations under section 13(1)(d), the entire income of the organization will not lose exemption and only the income from such prohibited investments will be subject to tax.

Reliance is place on decision:-
a. Hon'ble Supreme Court in the case of COMMISSIONER OF INCOME TAX VERSUS M/S. DAWOODI BOHARA JAMAT [2014] 364 ITR 31 (SC)

Claim of benefit of exemption u/s 11 and 12 r.w.s. 13 of the Act – Public religious trust – Whether the Courts were justified in coming to the conclusion that the respondent- trust is a public religious trust and is outside the purview of Section 13(1)(b) and eligible for

exemption under Section 11 of the Act – Held that:- Determination of nature of trust as wholly religious or wholly charitable or both charitable and religious under the Act is not a question of fact - It is but a question which requires examination of legal effects of the proven facts and documents, that is, the legal implication of the objects of the respondent-trust as contained in the trust deed - It is only the objects of a trust as declared in the trust deed which would govern its right of exemption u/s 11 or 12 – thus, the High Court has erred in refusing to interfere with the observations of the Tribunal in respect of the character of the trust.

The objects of the trust exhibit the dual tenor of religious and charitable purposes and activities - Section 11 of the Act shelters such trust with composite objects to claim exemption from tax as a religious and charitable trust subject to provisions of Section 13 - The activities of the trust under such objects would therefore are entitled to exemption accordingly.

Whether the respondent-trust is a charitable and religious trust only for the purposes of a particular community and therefore, not eligible for exemption under Section 11 of the Act in view of provisions of Section 13(1)(b) of the Act – Held that:- The Section requires it to be established that such charitable purpose is not for the benefit of a particular religious community or caste - it needs to be examined whether such religious-charitable activity carried on by the trust only benefits a certain particular religious community or class or serves across the communities and for society at large.

Relying upon Sole Trustee, Loka Shikshana Trust v. CIT [1975 (8) TMI 1 - SUPREME Court] - The objects of the respondent-trust are based on religious tenets under Quran according to religious faith of Islam - the objects and purposes of the respondent-trust would clearly demonstrate that the activities of the trust though both charitable and religious are not exclusively meant for a particular religious community - The objects do not channel the benefits to any community if not the Dawoodi Bohra Community and thus, would not fall under the provisions of Section 13(1)(b) of the Act – thus, the respondent-trust is a charitable and religious trust which does not benefit any specific religious community - it cannot be held that Section 13(1)(b) of the Act would be attracted to the respondent-trusts and it would be eligible to claim exemption under Section 11 of the Act – Decided against Revenue.

b. In Gurdaya Berlia Charitable Trust v (Fifth ITO) [1990] 34 ITD 489 (Bombay)[11-06-1990] the Tribunal observed that only the income from unapproved investment would be taxable at the 'maximum marginal rate while the rest of the income would be exempt.

c. In DCIT vs. Sheth Waded Gagalbhai Foundation Trust (249 1TR 533) Hon’ble Bombay High court also held that the maximum marginal rate of income-tax would apply only to that part of the income which had forfeited exemption.

d. COMMISSIONER OF INCOME TAX AND INCOME TAX OFFICER VERSUS FR MULLERS CHARITABLE INSTITUTIONS (2014) 363 ITR 230 (Kar)
Interpretation of section 13(1)(d) of the Act - Whether the Tribunal is correct in holding that when a part of income is held to be violative of the provisions of Section 13(1)(d) only to the said extent maximum marginal rate of tax is to be levied and not for the whole income more particularly when there is violation of provisions of Section 11(5) of the Act – Held that:- It is only the income from such investment or deposit which has been made in violation of Section 11(5) of the Act that is liable to be taxed and that violation under Section 13(1)(d) does not tantamount to denial of exemption under Section 11 on the total income of the assessee – the decision in Director Of Income-Tax (Exemptions) Versus Sheth Mafatlal Gagalbhai Foundation Trust [2000 (10) TMI 26 - BOMBAY High Court] followed - in case of contravention of Section 13(1)(d), maximum marginal rate of tax under Section 164(2), proviso is applicable only to that part of income of the Trust which has forfeited exemption and not the entire income – thus, the entire income of the respondent-Trust cannot be assessed for the tax – Decided against Revenue.

e. Hon'ble ITAT Jaipur Bench in the case of M/S. SANTOKBA DURLABHJI TRUST FUND JAIPUR VERSUS THE ITO WARD- 2(2), JAIPUR
Violation of section 13(1)(d) r/w Section 111(2) and 11(5) - Benefits on the portion of the income attributable to impermissible securities to be taxed at maximum marginal rates - Whether the trust was obliged to convert its TISCO share holding into specified securities by the due date or thereafter – Held that:- The trust should had converted the TISCO share into investment of permissible securities in this behalf - the provisions of secs. 11, 12, 13 and 16(2) are to be conjointly read and the CBDT circular referred to above being a beneficial circular is to be also applied - A combined reading leads to a harmonious construction, proviso to section 164(2) is very important, Legislature has clearly contemplated that in a case where the whole or part of the relevant income is not exempt under section 11, by virtue of violation of section 13 (1) (d), tax shall be charged on the relevant income or part of the relevant income at the maximum marginal rate - Section 164 (2) refers to the relevant income which is derived from property held under trust wholly for charitable or religious purposes - This is subject to application of other provisions of Act like exemptions, deduction etc. - a proviso was inserted by the Finance Act, 1984, with effect from April 1, 1985, under which in cases where the whole or any part of the relevant income is not exempt u/s 11 or section 12, because of the contravention of section 13(1)(d), then tax shall be charged on such income or part at the maximum marginal rate - only non-exempt income portion would fall in the net of tax, as if it was the income of an association of persons.

The dividend income being exempt from income by express provisions of sec 10(34), the dividend income is exempt from Income Tax - This being so, in the result there remains no tax liability on the trust - even department has not been taking any particular stand and allowing the benefits of sec 11 and 12 in some of the years, then rethinking and refusing

the benefits by reopening the assessments - even the department has its own share of interpretations, leading to repetitive proceedings – Decided in favour of assessee.

f. Hon'ble High Court of Rajasthan in the case of COMMISSIONER OF INCOME-TAX, (EXEMPTIONS) VERSUS SANTOKBA DURLABHJI TRUST FUND
Exemption u/s 11 - Contravention of Section 13(1)(d) - Dividend income - Tax at margin rate u/s 164 - trust received gift of TISCO Ltd. shares which were subsequently written off. - Whether tax at margin rate u/s 164(2) is to be levied on the income earned from non-exempt asset - whether holding of ineligible assets is sufficient to attract the provisions of Section 13(1)(d)(iii) - Held that:- When the shares are forming part of corpus after 1st June, 1973, question of accretion does not even arise thus the investment in right-issue cannot, by any stretch of imagination, by equated with the phrase accretion by way of bonus shares.

Since dividend income is exempt, no income remains taxable at Maximum Marginal rate - Decision of tribunal [2014 (11) TMI 444 - ITAT JAIPUR] confirmed - Decided in favor of assessee.

Decision in the Appellant own case in past assessment years for similar issue:-

a. Hon'ble ITAT Jaipur Bench allowed the appeal of appellant for 2006-07 and 2007-08 vide order dated 28/09/2016
b. Hon'ble ITAT Jaipur Bench allowed the appeal of appellant for 2008-09 vide order dated 27/02/2017
c. Hon'ble ITAT Jaipur Bench allowed the appeal of appellant for 2009-10 in ITA No. 264/JP/2016 vide order dated 13/07/2017
d. Hon'ble Rajasthan High Court where Hon'ble High Court dismissed the appeal of the Department for AY 2008-09 in DB Income Tax Appeal No. 251/2017 vide order dated 13/09/2017.
e. Hon'ble Rajasthan High Court has dismissed the appeal of department for 2009-10 in DB Income Tax Appeal No. 354/2017 vide order dated 13/12/2017.
f. Hon'ble Supreme Court dismissed the appeal of Department for 2009-10 in Special Leave Petition (Civil) Diary No(s). 22657/2018 dated 10/07/2018

It is settled law the order of appellate forum and courts are binding on the lower authority but ld. AO grossly erred in not considering the above orders while passing the assessment order.

In view of above judgement and submission we submit that:-
i) There should be income which should be above 15% of total receipt but in the case assessee no such situation is arising,
ii) there is no investment out of current year income and the investment in shares was made in the preceding financial years,

iii) Even if the investment was made in other than mode other than section 11(5) then the income from said investments can be taxed at the maximum marginal rate but in year under consideration, there is no income from the said investment,

Therefore, the provision of section 13(1)(d) is not applicable to the assessee and exemption on whole income should not be disallowed to appellant.''

3.3 On the other hand, the ld. DR supported the order of the ld. CIT(A).

3.4 We have heard both the parties and perused the materials available on record including the case laws. The Bench noted that the cases by the ld. AR suggest that even for violation of sec. 13(1)(d), the entire income of the trust will not lead to loss of total exemption but only the income from such prohibited investment will be subject to tax. This view is also supported by the decision Hon'ble ITAT Jaipur bench in case of Santokba Durlabh Ji Trust Hon,ble ITAT, Jaipur Bench, Jaipur reversed the order of CIT(A) for A.Y. 2004-05 (ITA No. 241/JP/14 order dated 24.02.2015) following its order in case of assessee Trust for A.Y. 2008-09 (ITA No. 169/JP/2012 order dated 05.11.2014). The relevant extracts of the reads as under.

> ''Respectfully following the above decision of ITAT, I find that since there is no income from these prohibited investment, no amount will be charged to tax at Maximum Marginal Rate. The action of the AO in denying the exemption u/s 11 is deleted.

The Bench noted that the written submission made by the ld. AR of the assessee alongwith the case laws (supra) has merit and in this view of the matter, the Ground No. 2 to 4 of the assessee are allowed.

4.0 Ground No. 5 of the assessee is that the A.O. grossly erred in making the addition of Rs. 16,53,637.00 by disallowing depreciation, stating that this is out of corpus of the Trust. That the Ld. CIT(A) also erred in not allowing the depreciation & did different interpretation which is not based on earlier order of Higher Authorities.

4.1 Apropos Ground No. 5 of the assessee, the facts as emerges from the order of the ld. CIT(A) are as under:-

> 6.2 I have considered the facts of the case and written submissions of the appellant as against the observations/findings of the AO in the assessment order for the year under consideration. The contentions/submissions of the appellant are being discussed and decided as under:-
>
> The Ld. AO has made addition on account of depreciation claimed by the assessee amounting to Rs. 16,53,637/-. The appellant has submitted that the Trust has claimed the depreciation on plant & machinery furniture, computers which is used in the educational institutions; it has not claimed the depreciation on land & building created with the donation of corpus and claimed depreciation only w.r.t. assets created out of its own income and that therefore, in view the various decisions of Hon'ble High Court and Hon'ble Supreme Court of India, the depreciation claim is to be allowed.

Ld. AR has argued that Sub-section (6) has been inserted in section 11 with effect from 2015-16 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 esset, acquisition of which has been claimed as an application of incame under this section in the same or any other previous year.

Sub-section (6) expressly provides for disallowance of the depreciation however this sub-section has been introduced w.e.f. A.Y. 2015-16.

Ld. AR has further argued that in the case of the appellant in earlier years, the issue has also been discussed in detail by my learned predecessor in order in Appeal No. 759/JPR/2015-16 dt. 12.08.2016 for A.Y. 2008-09, whereby the appeal of the appellant on the issue has been allowed and argued that the deduction on account of depreciation is not allowable to a trust eligible for section 10(23C)/11 with effect from A.Y. 2015-16 and is allowable for the earlier years.

Without going into the merits of the claim of the appellant, it is noted that the approval of the appellant under section 10(230) has been withdrawn by the Id. CIT(E) and the present assessment under appeal has been made treating the appellant as AOP.

Accordingly the judgements relied upon by the appellant are not applicable to the facts of the case. In view of the applicable facts of the case, deduction an account of the depreciation is not allowable if the cost of the asset has been allowed as deduction by way of application of income in any year and then depreciation on the same asset cannot be allowed in the computation of the income. Referance in this regard is also made to the judgement of Hon'ble Delhi High Court in the case of Director of Income tax (Exemption) v. Charanjiv Charitable Trust [2014] 43 tamenn.com 300 (Delhi)/(2014) 223 Taxman 71 (Delhi)/[2014] 267 CTR 305 (Delhi) 18-03-2014)

Accordingly this ground of appeal is hereby partly allowed.''

4.2 During the course of hearing, the ld. AR of the submitted that the depreciation is a statutory allowance and it is given since the value of assets are diminishing according to the age of the asset and it is charged so that the financial statements at the yearend can give a true and clear picture. The Trust has claimed the depreciation on plant & machinery furniture, computers which is used in the educational institutions; it has not claimed the depreciation on land & building created with the donation of corpus and, therefore, in view the various decisions of Hon'ble High Court and Supreme Court of India, the depreciation claimed is to be allowed, which have been upheld by the Ld. CIT(A) in Appeal No. 759/JPR/15-16 order dtd. 12.08.2016 hence the learned A.O. has wrongly made addition which may kindly be deleted. The ld. AR of the assessee has submitted that the allowbility of depreciation is the settled issue and the A.O. as well as Ld. CIT(A), are wrong in not allowing the depreciation on those Assets which were not acquired by corpus donation or the Capital Assets claimed. To this effect, the ld AR of the assessee relied upon following decisions

1. 18 Taxman.com (104) Delhi ITAT.
2. GRR charities V/s. DDIT (2012) 21 Tax man.com45 (Chennai)

4.3 On the other hand, the ld. DR supported the order of the ld. CIT(A).

4.4 We have heard both the parties and perused the materials available on record. The AO during the assessment observed assessee has claimed depreciation on various fixed assets. Further AO alleges that assessee has taken purchase of assets as application of income in earlier years and claiming of depreciation tantamount to double benefit. In first appeal, the exemption of the assessee has been withdrawn u/s 10(23C) and the status of assessee is considered as AOP by the ld.CIT(A) and noted that deduction on account of depreciation is not allowable if the cost of assets allowed as deduction by way of application of income in any year. We find from the records that the depreciation is a statutory allowance and it is given since the value of assets are diminishing according to the age of the asset and it is charged so that the financial statements at the year-end can give a true and clear picture. The Trust has claimed the depreciation on plant & machinery furniture, computers which is used in the educational institutions; it has not claimed the depreciation on land & building created with the donation of corpus. Further the AO erred in alleging that the appellant has claimed purchase of assets as application on income in the earlier years but the actual fact is that assets which were purchased in previous financial years were never claimed as application of income in relevant purchase year on which deprecation were claim during the year, therefore, there is no tantamount to double benefit of same assets. Further in view the various decisions of Hon'ble High Court and Supreme Court of

India, the depreciation claimed is to be allowed, further in the previous appellant case depreciation was allowed by Hon'ble Court and Hon'ble ITAT. We rely following Cases on this issue

1. Escorts Cardiac Diseases Hospital Society v/s Assistant Director of Income-tax (Exemption), Trust Circle 2, New Delhi 18 Taxman.com (104) Delhi ITAT.

Under section 11(1)(a) income derived from property held under trust wholly for charitable or religious purposes to the extent to which such income is applied to such purposes in India and, where any such income is accumulated or set apart for application to such purposes in India, to the extent to which the income so accumulated or set apart is not in excess of 15 per cent of the income from such property, shall not be included in the total income of the previous year of the person in receipt of the income. Under section 11(2) the trust or institution can accumulate income for specific purpose for a specific period subject to fulfilment of certain conditions prescribed under the law. The legislature has employed the word 'applied' in section 11(1)(a). The Apex Court in the case of H.E.H. Nizam's Religious Endowment Trust v. CIT [1966] 59 ITR 582 held that the word 'applied' in the context of section 11 means the income is 'actually applied' for the charitable or religious purposes of the trust.

Therefore, in view of decision of the Apex Court, income of the current year 'actually applied' for charitable or religious purposes subject to fulfilment of other conditions will be exempt under section 11(1)(a). It means the notional expenditure cannot be treated as application of income within the meaning of section 11. [Para 11]

Further the only requirement under section 11(1)(a) is that the income of trust must be actually applied to the charitable or religious purposes for which the properties are held on the trust by trustees etc. It does not say that application of income should be such that it may necessarily result in revenue expenditure. The charitable purpose may, in a given case, require for its fulfilment purchase of a capital asset and where income is applied for purchase of such a capital asset, it would be still be application of income to the charitable purpose. [Para 12]

Chapter-III of the Act deals with the incomes which do not form part of the total income. The income of a charitable or religious institution has to be computed in accordance with the provisions of sections 11, 12 and 13 Chapter-VI of the Act deals with computation of total income under the heads (i) 'salaries'; (ii) 'income from house property'; (iii) 'profit and gains of business or profession'; (iv) 'capital gains'; and (v) 'income from other sources'. In case of income derived under the head salaries, income from house property, capital gains and other sources, the provisions of section 32 are not applicable. Provisions of section 32, i.e., deprecation are, therefore, applicable in case of income earned under the head 'profit and gains of business or profession'. Depreciation under section 32(1) is allowable in respect of both tangible and intangible assets which are

owned wholly or partly by the assessee and used for the purposes of business or profession. Thus, for the purpose of claim of depreciation two conditions are to be satisfied, i.e., the assets are owned wholly or partly by the assessee and used for the purposes of business or profession. Therefore, the depreciation is allowable in the case where the assessee carries on the business or profession. Accordingly, the provisions of section 32 which have applicability to head of income in Chapter IV particularly profits and gains of business or profession, cannot be imported to Chapter III under which income which does not form part of total income is to be computed. [Para 13.1]

Under section 11(1)(a) when income is applied for acquisition of capital asset which is treated as applied, the claim of depreciation on same income will amount to double deduction. Moreover, as held by the Apex Court that expansion 'applied' means actual application. In other words in a particular year, if the income has actually been applied for the charitable or religious purposes to the extent of 85 per cent or is accumulated for specific purpose under section 11(2), the exemption of whole of the income will be allowable. In a case where capital asset was acquired in earlier year and depreciation is claimed in same year or in subsequent year, the claim of depreciation on that asset is notional expenditure and not an actual application of current year's income. The above can be explained in different words. In case of an assessee carrying on business or profession, the expenditure incurred on acquisition of capital asset is not allowable as deduction as revenue expenditure. If capital expenditure has been incurred on acquisition of an asset, and that asset is used for the purpose of business or profession, depreciation will be available. The only difference between the revenue expenditure and capital expenditure is that revenue expenditure is allowed in the year in which it is incurred whereas the depreciation is allowed on the life of asset on a specified rate in several years. In case of charitable or religious institution there is no difference between the revenue expenditure and capital expenditure. In case of a charitable institution, if the assessee acquires an asset being a building, the value thereof will be treated as application of income in the year of acquisition. If the assessee is allowed depreciation at the rate of 10 per cent, the assessee will be eligible for the benefit of another Rs. 1,00,000 by way of depreciation over the period of the life of the building without application of actual income but by way of notional expenditure. Therefore, the assessee will not be eligible for depreciation on assets which have been acquired by application of the income. Moreover, there is no provision under sections 11, 12 & 13 to allow depreciation. In the absence of any statutory provision under sections 11, 12 and 13 under which income of a charitable or religious institution is computed, allowance of depreciation under section 32(1) would mean double deduction, which is not permissible in view of the decision of the Apex Court in the case of Escorts Ltd. v. Union of India [1993] 199 ITR 43/[1992] 65 Taxman 420. The depreciation being notional expenditure will not fall under the expression 'actually applied' as held by the Apex Court in the case of HEH Nizam's Religious Endowment Trust (supra). Therefore, depreciation is not allowable in respect of an asset acquired by charitable institution where the cost of acquisition was treated as application of income. [Para 13.2]

However, Punjab and Haryana High Court in the case of CIT v. Tiny Tots Education Society [2011] 330 ITR 21/11 taxmann.com 242 has held that depreciation is allowable in the case of charitable institutions. Though, allowance of depreciation on an amount which was treated as application of income in the year in which capital asset was acquired is not permissible, but since Punjab and Haryana High Court has held that depreciation will be allowable in the case of charitable institutions and the decision of the High Court in the absence of any contrary decision of jurisdictional High Court or the Apex Court on the issue, has to be followed by the Tribunal being lower in herarchy. Respectfully following the decision of Punjab and Haryana High Court, depreciation will be allowable on the assets acquired by the assessee by application of income of the trust or institution. Therefore, the order of the Commissioner (Appeals) is to be set aside and the order of Commissioner (Appeals) the Assessing Officer is directed to allow depreciation. [Para 14]

2. Hon'ble ITAT Chennai in the case of GRR charities V/s. DDIT (2012) 21 Taxman.com 45 (Chennai)

It is also noted that in the assessee's own case in previous assessment year, ld. CIT(A) and ITAT allowed the deduction to the assessee. Therefore, in view of above facts, submission and case laws mentioned hereinabove, the depreciation is allowed to the assessee. Thus Ground No. 5 is allowed.

5.0 Ground No. 6 is that the Ld. A.O. grossly erred in making the addition of Donation Expenses of Rs. 6,15,522.00. The Ld. CIT(A) also erred in not allowing the ground.

5.1 Apropos Ground No. 6, the facts as emerges from the order of the ld. CIT(A) are as under:-

> ''7.2 1 have considered the facts of the case and written submissions of the appellant as against the observations/findings of the AO in the assessment order for the

year under consideration. The contentions/submissions of the appellant are being discussed and decided as under:-

The fact remains that the Ld. AO made addition of Rs 6,15,522/- after disallowing of donation expenses claimed by the assessee amounting as the assessment in this case is being completed in the status of AOP. The appellant has claimed that the appellant assessee first claimed donation expenses on the premises that, where ever philanthropic work is done, the expenses are debited in donation expenses and all these are reasonable charity work. The Id. AO has observed in the assessment order that

"The assessment in this case is to be completed by denying exemption u/s 11 as well as exemption u/s 10(23C)(vd) of the LT. Act, 1961 by treating the assessee an AOP. Thus the donation expenses of Rs. 6,15,522/-claimed by the assessee is not allowable.

……
……

The assessment in this case is to be completed by denying exemption u/s 11 as well as exemption u/s 10(23C)(vi) of the IT. Act, 1961 by treating the assessee as AOP. Thus the donation expenses of Rs. 6,15,522/-claimed by the assessee is not allowable and added in the total income of the assessee."

The disallowance done by the Id. AO is consequential in nature. In this order, the grounds of appeal number 2 and 3, pertaining to the withdrawal of exemption of the appellant has been dismissed. The disallowance being consequential to denial of exemption, no fault is found in the same. It is not the position of the appellant that this disallowance needs to be reversed even in the case grounds of appeal number 2 and 3 are dismissed i.e.

denial of the exemption is upheld. It is not the case of the appellant that Ld. CIT(Exemption) has passed order restoring the approval u/s 10(23C) of the Act in compliance of the directions of Hunble ITAT as discussed in pre-paragraph. It appears that steps have not been taken by the appellant for the appeal effect order of the order of Hon'ble ITAT as no submission in this regard is made whereas much of the grievance in present appeal could be addressed through the same. Accordingly, the addition done by the learned assessing officer is hereby upheld und this ground of appeal is dismissed.''

5.2 During the course of hearing, the ld AR submitted that the asssessee Trust claimed donation expenses on the premises that, wherever philanthropic work is done, the expenses are debited in Donation expenses and all these are reasonable charity work hence it is to be allowed fully. He submitted that the A.O. disallowed stating that the Trust lost exemption u/s 10(23)(C) as well as sec. 12A, whereas the Trust is exempt u/s 10(23)(c) as well as sec. 12A of I.T. Act. 1961. He further submitted that the exemption u/s 12A is valid and thus on wrong notion the Ld. A.O. & Ld. CIT(A) disallowed the donation expenses.

5.3 On the other hand, the ld. DR supported the order of the ld CIT(A).

5.4 We have heard both the parties and perused the materials available on record. In this case, the AO while perusing the income and expenditure account noted that the assessee had claimed donation of Rs.6,15,522/- as expenditure. Subsequently he noted that the assessment in this case is to be completed by

denying exemption u/s 11 as well as exemption u/s 10(23C)(vi) of the Act by treating the assessee as AOP. Thus the donation expenses of Rs.6,15,52/- claimed by the assessee is not allowable and added to the total income of the assessee and the ld. CIT(A) has confirmed the action of the AO. The Bench in this case noted that the assessee being a charitable trust duly registered u/s 12A is having objects for donations etc. to poor persons for welfare, education & medical relief as such the donation expense is the part of application of money. Further It is noteworthy to mention that in view of submission on ground no 2 to 4 above, the exemption u/s 11/10(23C) of the Act should be allowable to the appellant and therefore deduction of donation given should be allowed as application of income to the appellant. Hence, in view of the above deliberation, the Ground No. 6 of the assessee is allowed.

6.0 The Ground No. 7 is that the Ld. A.O. grossly erred in making the addition on A/c of Building Fund Rs. 50,00,000/- which was transferred from Income and Expenditure A/c being the amount invested in Building construction. The Ld. CIT(A) also erred in not considering the grounds & dismissed in limini.

6.1 Apropos Ground No. 7 of the assessee, the facts as emerges from the order of the ld. CIT(A) are hereunder wherein the ld.CIT(A) dismissed this ground of the assessee.

‘’8.2 1 have considered the facts of the case and written submissions of the appellant against the observations/findings of the AO in the assessment order for the year under consideration. The contentions/submissions of the appellant are being discussed and decided as under:

The fact remains that the Id AO has made addition on account of Building Fund Ra 50,00,000/- which was transferred from Income & Expenditure A/c being the amount invested in Building construction. The appellant has submitted that the transfer of amount from Building fund is an appropriation for Building the Trust spent on construction Rs. 5873865/- during the year hence for accounting purpose the building find is created, however on calculation of income & application of income the actual amount spert on building is considered not the fund as such there is no question of any disallowance on A / c of building fund.

The ld. AO in the assessment order has stated as under:-

"On perusal of Income and Expenditure account it is noticed that the assessee has claimed expenses of Ra.50,00,000/-as building fund and transferred the same in the balance sheet in building fund during the year under consideration. The assessment in this case is to be completed by denying exemption u/s 11 as well as exemption u/s 10(23C) (vi) of the IT, Act 1961 by treating the assessee as AOP. Thus the building fund expenses of Rs. 50 ,00,000/ -claimed is not allowable. Vide notice u/s 142(1) alongwith query letter no. 1454 dated 20.12.2016 the assessee was asked as under:

"You are required to explain as to why expenses of Rs. 50,00,000/-claimed as building funds by you as application should not be denied and added to the total income as you are not eligible to claim exemption u/s 10/23C)(vi)/11 of the Act."

> In response thereto the assessee has not furnished any explanation. It means the assessee has nothing to say on his part in this regard. The assessment in this case is to be completed by denying exemption u/s 11 as well as exemption u/s 10/23C)(vi) of the IT. Act, 1961 by treating the assessee as AOP, Thus the building funds of Rs. 50,00,000/-claimed as application of income by the assesser is not allowable and added to the total income of the assesse".
>
> The disallowance done by the ld. AO is consequential in nature. In this order, the grounds of appeal number 2 and 3 pertaining to the withdrawal of exemption of the appellant has been dismissed. The disallowance being consequential to denial of exemption, no fault is found in the same. It is not the position of the appellant that this disallowance needs to be reversed even in the case grounds of appeal number 2 and 3 are dismissed i.e. denial of the exemption is upheld. It is not the case of the appellant that Ld. CIT(Exemption) has passed order restoring the approval u/s 10(23C) of the Act in compliance of the directions of Hon'ble ITAT as discussed in pre-paragraph. It appears that steps have not been taken by the appellant for the appeal effect order of the order of Ho'ble ITAT as no submission in this regard is made whereas much of the grievance in present appeal could not be addressed through the same. Accordingly, the addition made by the learned assessing officer is hereby upheld and this ground of appeal is dismissed.''

6.2 During the course of hearing, the ld. AR of the assessee submitted that the transfer of amount for Building Fund is an appropriation of Building the Trust spent on construction amounting to Rs.58,73,865/- during the year and thus for accounting purpose the building fund is created , however on calculation of

income and application of income the actual amount spent on building is considered and not the fund as such, there is no question of any disallowance on account of building fund. Further, the trust is having exemption u/s 11 & 10(23C)(vi) of the Act as such and nothing these type of additions are warranted. The ld. AR further submitted that the lower authorities dismissed the ground stating it to be consequential of registration although the registration u/s 12A is valid. Hence, this ground should be allowed.

6.3 On the other hand, the ld. DR supported the order of the ld. CIT(A).

6.4 We have heard both the parties and perused the material available on record. The Bench noticed from the records that the transfer of amount to Building fund is an appropriated for the construction work on the building. During the year, appellant had spent on construction Rs. 58,73,865/- hence for accounting purpose the building fund is created, however for the calculation of income & application of income the actual amount spent on building is to be considered not the fund as such there is no question of any disallowance on A/c of building fund as the appellant has incurred more building expenses/investment than the amount appropriated to this fund. Hence, in view of the above submissions, the exemption u/s 11/10(23C) of the Act should be allowable to the appellant and therefore deduction of building fund should is allowed as application of income to the appellant. Thus the Ground No. 7 of the assessee is allowed.

7.0 The Ground No. 8 is that the Ld. A.O. grossly erred in making addition of Trust fund Rs. 5,93,304.00. That the Ld. CIT(A) also erred in not considering the ground of the Assessee.

7.1 Apropos Ground No. 8, the facts as emerges from the order of the ld.CIT(A) who dismissed the ground of appeal of the assessee by observing as under:-

> ‘’9.2 I have considered the facts of the case and written submissions of the appellant as against the observations/findings of the AO in the assessment order for the year under consideration. The contentions/submissions of the appellant are being discussed and decided as under:-
>
> In the assessment proceedings the ld. AO noticed that during the year the appellant had added a sum of Rs,5,93,304/- as Trust fund and since the appellant was not entitled to the exemption u/s 11/10 (23C) of the Act, the Id. AO made addition on this account. The id. AO in the assessment order has stated as under:-
>
> *"On perusal of balance sheet it is noticed that the assessee has added a sum of Rs.5,93,304/-as Trust fund during the year under consideration. The assessment in this case is to be completed by denying exemption.1/a 11 as well as exemption u/s 10/23C)(vi) of the LT. Act, 1961 by treating the assessor na AOP. Thus the trust fund of Rs. 5,93,304/-claimed as exempt is not allowable. Vide notice u/s 142(1) alongwith query letter no. 145(4) dated 20.12.2016 the assessee was asked as under:-*

You are required to explain as to why a sum of Rs.5,93,304/ in respect of trust fund claimed by you as exempt receipts should not be denied and added to the total income by treating it as revenue receipts as you are not eligible to claim exemption u/s 10(23C)(vi)/11 of the Act."

In response thereto the assessee hus neither furnished any explanation nor any details filed. It means the assessee has nothing to say on his part in this regard. The assessment in this case is to be completed by denying exemption u/s 11 as well as exemption u/s 10(23C)(vi) of the IT, Act 1961 by treating the assessee as AOP. Thus the building funds of Rs. 5 ,93,304/ -elaimed as application of income by the assessee is not allowable and added to the total income of the assessee."

The disallowance done by the ld. AO is consequential in nature. In this order, the grounds of appeal number 2 and 3, pertaining to the withdrawal of exemption of the appellant has been dismissed. The disallowance being consequential to denial of exemption, ne fault is found in the same. It is not the position of the appellant that this disallowance needs to be reversed even in the case grounds of appeal number 2 and 3 are dismissed ie. denial of the exemption is upheld. It is not the case of the appellant that Ld. CIT (Exemption) has passed order restoring the approval u/s 10(23C) of the Act in compliance of the directions of Hon'ble ITAT as discussed in pre-paragraph. It appears that steps have not been taken by the appellant for the appeal effect order of the order of Hon'ble ITAT as no submission in this regard is made whereas much of the grievance in present appeal could be addressed through the same. Accordingly, the addition done by the learned assessing officer is hereby upheld and this ground of appeal is dismissed.’’

7.2 During the course of hearing, the ld. AR of the assessee submitted that the Trust Fund is neither a part of income nor it is the part of income & expenditure A/c or P/L A/c. The Trust fund is for the development of College Building (education) and it is utilized for the same purpose. The income of education is exempt u/s. 10(23)(vi) of I.T. Act, 1961 and the Trust is also registered u/s 12A (a). Thus, income is exempt u/s 11 also. It is further submitted that the A.O. by mentioning in his order that the trust lost benefit of sec. 13(1)(d) and the receipt in the form of Corpus donation was made taxable which is totally wrong and thus the addition is without any discussion which may kindly be deleted. However, the ld CIT(A) upheld the action of the AO

7.3 On the other hand, the ld. DR supported the order of the ld. CIT(A).

7.4 We have heard both the parties and perused the materials available on record. In this case, it is noted from the records available before the Bench that the trust fund is not a part of income nor it is the part of income and expenditure a/c. It is found that the trust fund is utilized for the development of college building for imparting the education to the students. From the submissions of the assesee (supra), the Bench feels that in view of submission on ground no 1 to 3 above, the exemption u/s 11/10(23C) of the Act should be allowable to the appellant and therefore deduction of building fund should be allowed as application of income to

the appellant. Conclusively, the Bench feels that there is merit in the submissions of the ld AR of the assessee. Hence, the Ground No. 8 of the assessee is allowed.

8.0 The Ground No. 9 is that the A.O. grossly erred in making addition of corpus fund Rs. 35,29,000.00 and the Ld. CIT(A) also erred in not considering the ground of the Assessee.

8.1 Apropos Ground No. 9 of the assessee, the facts as emerges from the order of the ld. CIT(A) who dismissed the ground of appeal of the assessee by observing as under:-

> ‘’10.2 I have considered the facts of the case and written submissions of the appellant as against the observations/findings of the AO in the assessment order for the year under consideration. The contentions/submissions of the appellant are being discussed and decided as under:-
>
> In the assessment proceedings the Id. AO noticed that during the year the appellant had added of Rs.35,29,000/- as corpus fund and since the appellant was not entitled to the exemption u/s 11/10(230) of the Act, the ld. AO made addition on this account. The ld AO in the assessment order has stated as under:-
>
> On perusal of balance sheet it is noticed that the assessee has added a sum of Rs 35,259,000/-. During the year under consideration in the corpus fund. The assessment in this case is to be completed by denying exemption u/s 11 as well as exemption u/s 10(23C)(vi)of the IT. Act, 1961 by treating the assessee as AOP. Thus

the corpus fund of Rs. 35,29,000/-claimed as exempt u/s 11(1)(d) is not allowable. Vide notice u/s 142(1) alongwith query letter No. 1454 dated 20-12-2016, the assessee was asked as under:-

. "You are required to explain as to why a sum of Rs.35,29,000 in respect of corpus fund claimed by you as exempt u/s 11(1)(d) should not be denied and added to the total Income as you are not eligible to claim exemption u/s 10(23C)(vi)/11 of the Act.

In response thereto, the assesee has submitted as under:-

Again we inform you that there cannot be denial of exemption u/s 11, therefore, there is nothing to treat the corpus donation as income.

Details produced during assessment proceedings as well as reply filed by the assessee has been considered. The reply of the assessee is general in nature. The assessment in this case is to be completed by denying exemption u/s 11 as well as exemption u/s 10(23C)(vi) of the I.T. Act, 1961 by treating the assessee as AOP. Thus the Corpus fund of Rs. 35,29,000/- claimed as exempt by the assesse is nor allowable and added to the total income of the assessee.''

The allowance done by the ld. AO is consequential in nature. In this order, the ground of appeal number 2 and 3, pertaining to the withdrawal of exemption of the appellant has been dismissed. The disallowance being consequential to denial of exemption no fault is found in the same. It is not the position of the appellant that this disallowance needs to be reversed even in the case grounds of appeal number 2 and 3 are dismissed .i.e. denial of the exemption is upheld. It is not the case of the appellant that ld. CIT(Exemption) has passed order

restoring the approval u/s 10(23C) of the Act in compliance of the directions of Hon'ble ITAT as discussed in pre-paragraph. It appears that steps have not been taken by the appellant for the appeal effect order of the artier of Hone ITAT as no submission in this regard is made whereas much of the grievance in present appeal would be addressed through the same.

Accordingly, the addition done by the learned assessing officer is hereby upheld and is dismissed.''

8.2 During the course of hearing the ld. AR of the assesse of the assessee submitted that the lower authorities have wrongly made addition of Corpus Fund amounting to Rs.35,29,000/- in the hands of the assessee trust which should be allowed. The ld. AR also submitted that t the basis of disallowance was not allowing exemption u/s. 11 and 10 (23c)(vi) at that time. Now as per the order of Hon. ITAT and Ld. CIT(A) and High Court in earlier years, the trust is to be assessed keeping in view of sec. 11 and sec. 10(23)(c) (vi) of IT Act. 1961. Similarly the Trust fund is also created for particular work and this is the capital receipt it is not the income of the assessee and thus addition is not warranted in view of the registration u/s 11 & 20(23)(C) of the Act. He further submitted that A.O. disallowed the amount of Corpus Fund & the ld.. CIT(A) sustained the addition stating to be non registered whereas the Trust is registered u/s 12A. Hence, it is requested to delete the addition so confirmed by the ld CIT(A).

8.3 On the other hand, the ld. DR supported the order of the ld. CIT(A).

8.4 We have heard both the parties and perused the materials available on record. In this case, it is noted from the above facts and circumstances of the case that the Appellant Trust is registered u/s 12A and hence the Trust can call corpus fund for its requirements i.e. investment in Trust properties or for its charitable objects the donors have given for specific purpose, as such in case of charitable Trust registered u/s 12A the corpus donations received are fully exempt. Further in view of submission on ground no 2 to 4 above, the exemption u/s 11/10(23C) of the Act should be allowable to the appellant and therefore corpus donation should not be added to the income of the appellant. Hence, in view of the above deliberation and facts and circumstances of the case, we do not concur with the findings of the ld. CIT(A). Thus the Ground No. 9 of the assessee is allowed.

9.0 The Ground No. 10 of the assessee is that the Ld. A.O. grossly erred in Charging the tax on Surplus as per I and E A/c Rs. 21,12,358.00 though the surplus was under the limit of 15% as per Law. That the Ld. CIT(A) erred in not considering the grounds dismissed.

9.1 Apropos Ground No. 10, the facts as emerges from the order of the ld. CIT(A) who dismissed the ground of appeal of the assessee by observing as under:-

> *''11.2 1 have considered the facts of the case and written submissions of the appellant as against the observations/findings of the AO in the assessment order*

for the year under consideration. The contentions/submissions of the appellant are being discussed and decided as under:-

In the case of the appellant, the Id. Commissioner of Income-tax (Exemption) has passed an order of withdrawal of the approval granted u/s 10/230v of the LT. Act, 1961 on 10.03.2016 endorsed vide letter no. F.No.01/CIT/B/JPR/ Withdrew 10(23C)(vi)/2015-16/5208 dated 10/11.03.2016 as stated in the assessment order Vide this order, the approval granted vide notification no. 12/2010-11 endorsed vide letter 209.2010 has been withdrawn from A.Y. 2000-10 and onwards. The learned Commissioner of Income tax (Exemption) has held that The appellant is not entitled to the exemption under this section with effect the A.Y. 2009-10 and onwards. The learned assessing officer disallowed the benefit of exemption to the appellant in the assessment order on the ground that the appellant has violated the investment norms as provided under the four for the trust. It is an undisputed fact that the appellant is having investment in equity shares of a group company. As per the section 11, investment in equity shares is prohibited and on this legal ground the learned assessing officer disallowed the exemption to the appellant in the assessment order. The learned Assessing Officer has observed that in this case it has been noticed that in the Audit Report furnished u/s 12A(b) in form no. 10B as per Rule 17B, the assessee has shown investment in shares of M/s Om Metal Infra Project Ltd. of Rs. 23,35,000/- (in the balance sheet shown at Rs. 23,35,562/-). The shares of M / s Om Metals Infra Project Ltd is not an eligible asset within the meaning of provisions of section 11(5) as such it attracts provisions of section 13(1)(d)(iii) of the 1.T. Act. Furthermore mere holding of shares in a company is sufficient to invoke provisions of section 13(1)(d)(iii) which makes the assessee ineligible to claim exemption u/s 11/10(23C) of the I.T. Act. And further given the finding that it is a fit case to attract the 13th proviso to sec 10(23C) of the Act r.w, 6th proviso to sec. 10(23C) of the Act for the reason of holding the shares of M / s

Om Metals Infra-projects Ltd. and also not invested its funds in accordance with the provisions contained in clause (b) of the third proviso to sec. 10/23C) of the Act. Having denied the exemption the Id. AO made addition to the income regarding the surplus of Rs. 21,12,358 generated as per Income & Expenditure account of the appellant during the year which was otherwise claimed exempt under section 11. In this regard, the Id. AO in the assessment order has stated as under:-

‘’3.8 is a fit case to attract the 13th proviso to sec 10/23C) of the Act r.w. 6th proviso to see. 10(23C) of the Act for the reason of holding the shares of M/s Om Metals Infra-projects Ltd, and also not invested its finds in accordance with the provisions contained in clause (b) of the third proviso to sec. 10/230) of the Act. From the aforementioned provisions of law it is imperative to mention that the only requirement for attracting the provisions of section 13(i)(d)(iii) is share holding and nothing more than that.

3.9. In net of the above discussion and legal position it is held that the assessee's case is squarely covered within the provisions of section 13(1)(d)(iii) of the Act as such the assessee is not eligible for claiming exemption u/s 11 and 12 of the act. Accordingly assessee's exemption 11 is rejected and the surplus shown in the Income and Expenditure account is assessed us income from profession in the hands of the trust. Therefore, the entire surplus generated during the year amounting to Ra. 21,12,358/ is to be treated as taxable income for the assessment year 2009-10 and no exemption under section 11/12 is allowed to assessee und other additions are also made as discussed in subsequent paras"

The disallowance done by the ld. AO is consequential in nature. In this order, the grounds of appeal number 2 and 3, pertaining to the withdrawal of exemption of the appellant has been dismissed. The disallowance being consequential to denial of exemption, no fault is found in the same. It is not the position of the appellant that this disallowance needs to be reversed even in the case grounds of appeal number 2 and 3 are dismissed i.e. denial of the exemption is upheld. It

is not the case of the appellant that Ld. CIT(Exemption) has passed order restoring the approval u/s 10(23C) of the Act in compliance of the directions of Hon'ble ITAT as discussed in pre paragraph appears that steps have not been taken by the appellant for the appeal effect order of the order of Hon'ble ITAT as no submission in this regard is made whereas much of the grievance in present appeal could be addressed through the same. Accordingly, the addition done by the learned assessing officer is hereby upheld and this ground of appeal is dismissed.''

9.2 During the course of hearing, the ld.AR of the assessee submitted that the lower authorities have erred in charging the tax on surplus as per I & E A/c Rs.21,12,358/- though the surplus was under the limit of 15% as per law. The ld. AR further submitted that t when the Trust is having exemption u/s. 12A, then the provision of sec. 11 to 13 are made applicable as such the surplus is to be looked on the basis of limit of 15%. Since the surplus is within the prescribed limit of 15% then no tax is chargeable on this income. The Ld. A.O. wrongly charged tax there on. The Ld. A.O. as well as Ld. CIT(A) treated the trust as A.O.P. ignored the registration granted u/s 12A and when the Trust is validly regd. u/s 12A, then the surplus with in the limit of 15% is to b considered. The Ld. A.O. as well as Ld. CIT (A) treated the Trust as A.O.P. ignored the registration granted u/s 12A and when the Trust is validly regd. u/s 12A then the surplus with in the limit of 15% is to be considered.

9.3 On the other hand, the ld. DR supported the order of the ld. CIT(A).

9.4 We have heard both the parties and perused the materials available on records. From the records available before the Bench it is noted that the appellant trust is having registration u/s 12A of the Act then the exemption and provisions of Section 11 to 13 are applicable as such the surplus as per Income and Expenditure Account are within the threshold limit of 15%. Since the surplus is within the prescribed limit of 15% then no tax is chargeable on this income The Bench also take into consideration that in view of the submission of the assessee, on ground No. 2 to 4 above, the exemption u/s 11/10(23C) of the Act is allowable to the appellant and thus this surplus should not be added to the income of the appellant. Hence, in view of the above deliberation, the ground No. 10 of the assessee is allowed.

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

11.0 Now we take up the appeal of the assessee in **ITA No. 58/JP/2024** for the assessment year 2013-13 for adjudication

12.0 Ground No. 1 to 3:- Regarding the invoking provision of section 13(1)(d) of the Act for investment made in past financial years in shares thereby not allowing the exemption u/s 11/10(23C)(vi) of the Act and taxing the receipt of the trust by considering it as AOP. A.O. grossly erred in ignoring the judgement of Hon'ble ITAT and High Court on same issue in appellant own case in preceding assessment years.

12.1 During the course of hearing, the Bench noted that it is not required to repeat the facts as the facts are similar to the facts of the appeal of the assessee in ITA No. 57/JP/2024 wherein the Bench observed as under:-

> ‘’We have heard both the parties and perused the materials available on record including the case laws. The Bench noted that the cases by the ld. AR suggest that even for violation of sec. 13(1)(d), the entire income of the trust will not lead to loss of total exemption but only the income from such prohibited investment will be subject to tax. This view is also supported by the decision Hon’ble ITAT Jaipur bench in case of Santokba Durlabh Ji Trust Hon,ble ITAT, Jaipur Bench, Jaipur reversed the order of CIT(A) for A.Y. 2004-05 (ITA No. 241/JP/14 order dated 24.02.2015) following its order in case of assessee Trust for A.Y. 2008-09 (ITA No. 169/JP/2012 order dated 05.11.2014). The relevant extracts of the reads as under.
>
> ‘’Respectfully following the above decision of ITAT, I find that since there is no income from these prohibited investment, no amount will be charged to tax at Maximum Marginal Rate. The action of the AO in denying the exemption u/s 11 is deleted.
>
> The Bench noted that the written submission made by the ld. AR of the assessee alongwith the case laws (supra) has merit and in this view of the matter, the Ground No. 2 to 4 of the assessee are allowed.’’

Since the Bench feels that the ground No. 1 to 3 raised hereinabove by the assessee (supra) are similar to the facts of grounds of appeal in ITA No. 57/JP/2024, therefore the decision taken by us shall apply mutatis mutandis in Ground No. 1 to 3 (ITA No. 58/JP/2024). Thus Ground No.1 to3 are allowed.

13.0 Ground No. 4:- The A.O. grossly erred disallowing the donation Expenses Rs. 2,95,100.00. The Ld. CIT(A) also erred not allowing the ground.

13.1 Apropos Ground No. 4, the facts as emerges from the order of the ld. CIT(A) are as under:-

> ''6.2 I have considered the facts of the case and written submissions of the appellant as against the observations/findings of the AO in the assessment order for the year under consideration. The contentions/submissions of the appellant are being discussed and decided as under:-
>
> I have carefully considered submission of the appellant and orders passed by the Assessing officer. I have found that that learned assessing officer made an addition amounting to Rs. 2,95,100/- on account of donation expenses. I have decided the similar issue in the case of the appellant for the assessment year 2009-10 wherein this ground of appeal has been dismissed. Submissions of the appellant in the present appeal are on similar lines as in the submissions of the assessment year 2009-10. Relevant facts of the present appeal being pari-materia with the facts of the appeal in the assessment year 2009-10 the findings of the appeal order in the case of ussessment year 2009-10 will apply mutatis mutandis to the present appeal for the assessment year 2012-13 and is held accordingly.''

13.2 During the course of hearing, the ld. AR of the assessee submitted that the appellant being a charitable trust duly registered 12A is having objects for donations etc. to poor persons for welfare, education & medical relief as such the donation expense is the part of application of money and thus the exemption u/s

11/10(23C) of the Act should be allowable to the appellant and therefore deduction of donation given should be allowed as application of income to the appellant.

13.3 On the other hand, the ld. DR supported the order of the ld. CIT(A).

13.4 We have heard both the parties and peruse the materials available on record. This is the ground taken against donation expenses. The Trust has given donation to various needy people and like minded institutions and since the Trust is registered U/s 12A, therefore, it is entitled to do such activities which are given in its objects. The donations are given based on its objects, therefore, there is nothing to disallow out of the expenses incurred by the Charitable Trust. It is noted that in A.Y. 2008-09 the similar addition has been deleted by the Ld. CIT(A)-3, Jaipur. It is also noteworthy to mention that when the Trust is registered u/s 12A then all the expenses of charitable nature are allowable. Hence, in view of the above deliberation, the Ground No. 4 of the assessee is allowed.

14.0 Ground No. 5:- That the ld. A.O. grossly erred in disallowing the depreciation on eligible assets Rs. 3753097.00. That the Ld. CIT(A) also erred in not allowing the ground.

14.1 Apropos Ground No. 5, the facts as emerges from the order of the ld.CIT(A) are as under:-

> ''7.2 I have considered the facts of the case and written submissions of the appellant as against the observations/findings of the AO in the assessment order for the year under consideration. The contentions/submissions of the appellant are being discussed and decided as under:-
>
> 1 have carefully considered submission of the appellant and orders passed by the Assessing officer. I have found that that learned assessing office disallowedf etfiore depreciation amounting to Rs. 37,53,097/-1 have decided the similar of the appellant for the assessment year 2009-10 wherein this ground of been partly allowed. Submissions of the appellant in the present appeal are lines as in the submissions of the assessment year 2009-10. Relevant forts of the present appeal being pari-materia with the facts of the appeal in the assessment year 2009-10 the findings of the appeal order in the case of assessment year 2009-10 apply mutatis-mutandis to the present appeal for the assessment year 2012- 13 is held accordingly.
>
> Accordingly this ground of appeal is hereby partly allowed.''

14.2 After hearing both the parties and perusing the materials available on record, the Bench noted that the similar issues has been decided by the Bench in the case of the assessee in ITA No. 57/JP/2024 for the assessment year 2009-10. Hence, the decision taken by the Bench in the case of the assessee for the assessment year 2009-10 shall apply mutatis mutandis in the assessment year. Thus Ground No. 5 of the assessee is allowed.

15.0 Ground No. 6:- That the ld. A.O. . grossly erred in charging tax on surplus declared during the year Rs. 1989496/.-That the Ld. CIT(A) also erred in not allowing the ground.

15.1 Apropos Ground No. 6, the facts as emerges from the order of the ld. CIT(A) are asunder who dismissed the ground of appeal of the assessee.

> ‘’8.2 1 have considered the facts of the case and written submissions of the appellant as against the observations/findings of the AO in the assessment order for the year under consideration. The contentions/submissions of the appellant are being discussed and decided as under:-
>
> I have carefully considered submission of the appellant and orders passed by the Assessing officer. I have found that that learned assessing officer made addition on account of excess of Income over Expenditure amounting to Rs. 19,89,496/-I have decided the similar issue in the case of the appellant for the assessment year 2009-10 wherein this ground of appeal has been dismissed. Submissions of the appellant in the present appeal are on similar lines as in the submissions of the assessment year 2009- 10. Relevant facts of the present appeal being pari-materia with the facts of the appeal in the assessment year 2009-10 the findings of the appeal order in the case of assessment year 2009-10 will apply mutatis mutandis to the present appeal for the assessment year 2012-13 and it is held accordingly.
>
> Accordingly, the addition done by the learned assessing officer is hereby upheld and this ground of appeal is dismissed.’’

15.2 During the course of hearing, the ld. AR of the assessee submitted that The Appellant Trust is having registration u/s. 12A, then the exemption and

provisions of sec. 11 to 13 are applicable as such the surplus as per Income and Expenditure account are within the threshold limit of 15%. Since the surplus is within the prescribed limit of 15% then no tax is chargeable on this income. Further, the ld. AR of the assessee submitted that the exemption u/s 11/10(23C) of the Act should be allowable to the appellant and therefore this surplus should not be added to the income of the appellant.

15.3 On the other hand, the ld. DR supported the order of the ld. CIT(A).

15.4 After hearing both the parties and perusing the materials available on record, the Bench noted that the similar issues has been decided by the Bench in the case of the assessee in ITA No. 57/JP/2024 for the assessment year 2009-10. Hence, the decision taken by the Bench in the case of the assessee for the assessment year 2009-10 shall apply mutatis mutandis in the assessment year. Thus Ground No. 6 of the assessee is allowed.

16.0 Ground No. 7:- That the ld. A.O. grossly erred in disallowing the development fees Exp. Rs. 83,500/-. That the Ld CIT(A) also erred in not allowing the ground.

16.1 Apropos Ground No. 7, the facts as emerges from the order of the ld. CIT(A) who has dismissed this ground of the assessee by observing as under:-

’9.2 I have considered the facts of the case and written submissions of the appellant as against the observations/findings of the AO in the assessment order for the year under consideration. The contentions/submissions of the appellant are being discussed and decided as under:-

In the assessment proceedings the ld. AO noticed that during the year the appellant had claimed expenditure of Rs. 83,500/-on account of development fee expenses, and since the appellant was not entitled to the exemption u/s 11/10 (23 C) of the Act, the ld. AO made addition on this account. The ld. AO in the assessment order has stated as under:-

On perusal of Income & Expenditure A/e AO has gathered that the assessee has claimed expenditure of Rs. 83,500/-on account of development fee expenses which is not allowable in his case. So, vide letter no. 32 dated 26.04.2016 the assessee was asked as to why it should not be disallowed and added to his total income.

In response thereto, the assessee has submitted as under:

The development fee is to be payable to the university in relation to 40 student hence, we are not aware why it is not allowed, when we are running the Education Institution then the charges, levy or fees payable to university is the expenses & allowable."

The reply of the assessee has been considered vis-a-vis details available on records. The reply of the assessee is not found acceptable as the assessee itself accepted that the expenditure is payable and was not made during the year under consideration. Thus, the same is disallowed and Rs. 83,500/- is added to the total income of the assessee."

The disallowance done by the Id. AQ is consequential in nature. In this order, the grounds of appeal number 2 and 3, pertaining to the withdrawal of exemption of the appellant b dismissed. The disallowance being consequential to dental of exemption, no fault is found in the same. It is not the position of the appellant that this disallowance needs to be reversed even in the case grounds of appeal number 2 and 3 are dismissed Le denial of the exemption is upheld. It

appears that steps have not been taken by the appellant for the appeal effect order of the order of Hon'ble ITAT as no submission in this regard is made whereas much of the grievance in present appeal could be addressed through the same. Accordingly, the addition done by the learned assessing officer is hereby upheld and this ground of appeal is dismissed.''

16.2 During the course of hearing, the ld. AR of the assessee submitted that the development fees have been paid to university as per affiliation system and its receipt was submitted before the A.O. that development fees is directly connected with the educational institution which should be allowed.

16.3 On the other hand, the ld. DR supported the order of the ld. CIT(A).

16.4 We have heard both the parties and perused the materials available on record. In this case, it is noted that the appellant being a charitable trust duly registered 12A is having objects for donations etc. to poor persons for welfare, education & medical relief as such development fees was paid to university as per affiliation system which is directly related to education to students and thus it is the part of application of money. It is noted that the AO erred in taxing the income of trust under the head of Business and profession and denial of exemption u/s 11 of the Act. However, the Bench feels that the exemption u/s 11/10(23C) of the Act should be allowable to the appellant and therefore deduction of development fees expenses for education should be allowed as application of income to the

appellant. Hence, in view of the above deliberation, the ground No. 7 of the assessee is allowed.

17.0 Ground No. 8:- That the ld. A.O. grossly erred in disallowing the food for poor person Exp. Rs. 200555./- That the Ld. CIT(A) also erred in not allowing the ground.

17.1 Apropos Ground No. 8, the facts as emerges from the order of the ld. CIT(A) who dismissed this ground of the assessee by observing as under:-

> 10.2 I have considered the facts of the case and written submissions of the appellant as against the observations/findings of the AO in the assessment order for the year under consideration. The contentions/submissions of the appellant are being discussed and decided as under:
>
> In the assessment proceedings the ld. AO noticed that during the year the appellant expenditure of Rs. 2,00,555/- on account of food for poor persons and since the appellant was not entitled to the exemption u/s 11/10/23C) of the Act, the 16. AO made addition on this account. The Id. AO in the assessment orrier has stated as under:-
>
> ‘’On going through the income and expenditure account it has been gathered that the assassree claimed expenditure of Rs. 2,00,555/- on account of food for poor persons which is not allowable in his case. So, vide letter no. 32 dated 26.04.2016 the assessee was asked as to why it should not be disallowed and added to his total income.
>
> In response thereto the assessee has submitted as under:

"The expenses are incurred to provide food to different person on the marriage of daughters of Poor person. The trust is for charity/ charitable work, hence the holy work is done under the head general public utility. You are stating that which is not allowable that too without reason. Hence kindly allow the same.

The reply of the assessee has been considered vis-a-vis details available on records. The reply of the assessee is not found acceptable as the assensee's income is computed under the head business and profession without allowing any exemption in the status of AOP and that case this type of expenditure is not allowable. Thus, the same is disallowed and Rs. 2,00,538 is added to the total income of the assessée."

The disallowance done by the d. AO is consequential in nature. in this order, the grounds of appeal number 2 and 3, pertaining to the withdrawal of exemption of the appellant has been dismissed. The disallowance being consequential to denial of exemption, no fault is found in the same. It is not the position of the appellant that this disallowance needs to be reversed even in the case grounds of appeal number 2 and 3 are dismissed i.e, denial of the exemption is upheld. It appears that steps have not been taken by the appellant for the appeal effect order of the order of Hon'ble ITAT as no submission in this regard is made whereas much of the grievance in present appeal could be addressed through the same. Accordingly, the addition done by the learned assessing officer is hereby upheld and this ground of appeal is dismissed.''

17.2 During the course of hearing, the ld. AR of the assessee submitted that this expenses was disallowed treating the computation income alike income from business & profession, but now the trusts income is to be assessed in view of the provisions of Sec. 11 & 12 then all the expenses of Charitable nature are to be allowed.

17.3 On the other hand, the ld. DR supported the order of the ld. CIT(A).

17.4 We have heard both the parties and perused the materials available on record. It is noted from the records that the appellant being a charitable trust duly registered u/s 12A is having objects for donations etc. to poor persons for welfare, education & medical relief as such the food for hunger is the part of application of money. The ld AO erred in taxing the income of trust under the head of Business and profession and denial of exemption u/s 11 of the Act. Thus the exemption u/s 11/10(23C) of the Act should be allowable to the appellant and therefore deduction of food for hunger should be allowed as application of income to the appellant. Hence, in view of the above deliberation, the Ground No. 8 of the assessee is allowed.

18.0 Ground No. 9:- That the ld. A.O. grossly erred in making addition of corpus fund Rs. 283000/- That the Ld. CIT(A) also erred in not considering the ground of the Assessee.

18.1 Apropos Ground No. 9, the facts as emerges from the order of the ld. CIT(A) wherein the ld. CIT(A) has dismissed this ground of appeal by observing as under:-

> ‘’11.2 1 have considered the facts of the case and written submissions of the appellant as against the observations/findings of the AO in the assessment order for the year under consideration. The contentions/submissions of the appellant are being discussed and decided as under:-
>
> I have carefully considered submission of the appellant and orders passed by the Assessing officer I have found that that learned assessing officer made addition on account of god amounting to Rs. 2,83,000/-. I have decided the similar issue in the case of the appellant for the assessment year 2009-10 wherein this ground of appeal has been dismissed. Submissions of the appellant in the present appeal are on the similar lines as in the submissions of the assessment year 2009-10. Relevant facts of the present appeal being pari-materia with the facts of the appeal is the assessment year 2009-10 the findings of the appeal order in the case of assessment 2006-10 will apply mutatis mutandis to the present appeal for the assessment year 2012-13 and it is held accordingly. Accordingly, the addition done by the learned assessing officer is upheld and this ground of appeal is dismissed.’’

18.2 During the course of hearing, the ld. AR of the assessee submitted that the Appellant Trust is registered u/s 12A hence the Trust can call corpus fund for its requirements i.e. investment in Trust properties or for its charitable objects the donors have given for specific purpose, as such in case of charitable Trust registered u/s 12A the corpus donations received are fully exempt. Hence, the

exemption u/s 11/10(23C) of the Act should be allowable to the appellant and therefore corpus donation should not be added to the income of the appellant.

18.3 On the other hand, the ld. DR supported the order of the ld CIT(A).

18.4 After hearing both the parties and perusing the materials available on record, the Bench noted that the similar issues has been decided by the Bench in the case of the assessee in ITA No. 57/JP/2024 for the assessment year 2009-10. Hence, the decision taken by the Bench in the case of the assessee for the assessment year 2009-10 shall apply mutatis mutandis in the assessment year. Thus Ground No. 9 of the assessee is allowed.

19.0 Now we take up the appeal of the assessee in **ITA No. 59/JP/2024** for the assessment year 2013-13 for adjudication.

20.0 Ground No. 1 to 2:- Regarding the invoking provision of section 13(1)(d) of the Act for investment made in past financial years in shares thereby not allowing the exemption u/s 11/10(23C)(vi) of the Act and taxing the receipt of the trust by considering it as AOP. A.O. grossly erred in ignoring the judgement of Hon'ble ITAT and High Court on same issue in appellant own case in preceding assessment years.

20.1 During the course of hearing, the Bench noted that it is not required to repeat the facts as the facts are similar to the facts of the appeal of the assessee in ITA No. 57/JP/2024 wherein the Bench observed as under:-

> ‘’We have heard both the parties and perused the materials available on record including the case laws. The Bench noted that the cases by the ld. AR suggest that even for violation of sec. 13(1)(d), the entire income of the trust will not lead to loss of total exemption but only the income from such prohibited investment will be subject to tax. This view is also supported by the decision Hon’ble ITAT Jaipur bench in case of Santokba Durlabh Ji Trust Hon,ble ITAT, Jaipur Bench, Jaipur reversed the order of CIT(A) for A.Y. 2004-05 (ITA No. 241/JP/14 order dated 24.02.2015) following its order in case of assessee Trust for A.Y. 2008-09 (ITA No. 169/JP/2012 order dated 05.11.2014). The relevant extracts of the reads as under.
>
> ‘’Respectfully following the above decision of ITAT, I find that since there is no income from these prohibited investment, no amount will be charged to tax at Maximum Marginal Rate. The action of the AO in denying the exemption u/s 11 is deleted.
>
> The Bench noted that the written submission made by the ld. AR of the assessee alongwith the case laws (supra) has merit and in this view of the matter, the Ground No. 2 to 4 of the assessee are allowed.’’

Since the Bench feels that the ground No. 1 to 2 raised hereinabove by the assessee (supra) are similar to the facts of grounds of appeal in ITA No. 57/JP/2024, therefore the decision taken by us shall apply mutatis mutandis in Ground No. 1 to 2 (ITA No. 59/JP/2024). Thus Ground No.1 to2 are allowed.

21.0 Ground No. 3:- That the Ld. A.O. grossly erred in making the addition of Donation Expenses of Rs. 4,70,630.00. The Ld. CIT(A) also erred in not allowing the ground.

21.1 During the course of hearing, the Bench noted that it is not required to repeat the facts as the facts are similar to the facts of the appeal of the assessee in ITA No. 57/JP/2024 wherein the Bench observed as under:-

> ''We have heard both the parties and perused the materials available on record. In this case, the AO while perusing the income and expenditure account noted that the assessee had claimed donation of Rs.6,15,522/- as expenditure. Subsequently he noted that the assessment in this case is to be completed by denying exemption u/s 11 as well as exemption u/s 10(23C)(vi) of the Act by treating the assessee as AOP. Thus the donation expenses of Rs.6,15,52/- claimed by the assessee is not allowable and added to the total income of the assessee and the ld. CIT(A) has confirmed the action of the AO. The Bench in this case noted that the assessee being a charitable trust duly registered u/s 12A is having objects for donations etc. to poor persons for welfare, education & medical relief as such the donation expense is the part of application of money. Further It is noteworthy to mention that in view of submission on ground no 2 to 4 above, the exemption u/s 11/10(23C) of the Act should be allowable to the appellant and therefore deduction of donation given should be allowed as application of income to the appellant. Hence, in view of the above deliberation, the Ground No. 6 of the assessee is allowed.''

Since the Bench feels that the ground No. 3 raised hereinabove by the assessee (supra) are similar to the facts of grounds of appeal in ITA No.

57/JP/2024, therefore the decision taken by us shall apply mutatis mutandis in Ground No. 3 (ITA No. 59/JP/2024). Thus Ground No.3 is allowed.

22.0 Ground No. 4:- That the Ld. A.O. grossly erred in making the addition of Rs. 29,08,455.00 by disallowing depreciation, stating that this is out of corpus of the Trust. That the Ld. CIT(A) also erred in not allowing the depreciation & did different interpretation which is not based on earlier order of Higher Authorities.

22.1 During the course of hearing, the Bench noted that it is not required to repeat the facts as the facts are similar to the facts of the appeal of the assessee in ITA No. 57/JP/2024 wherein the Bench observed as under:-

> ‘’We have heard both the parties and perused the materials available on record. The AO during the assessment observed assessee has claimed depreciation on various fixed assets. Further AO alleges that assessee has taken purchase of assets as application of income in earlier years and claiming of depreciation tantamount to double benefit. In first appeal, the exemption of the assessee has been withdrawn u/s 10(23C) and the status of assessee is considered as AOP by the ld.CIT(A) and noted that deduction on account of depreciation is not allowable if the cost of assets allowed as deduction by way of application of income in any year. We find from the records that the depreciation is a statutory allowance and it is given since the value of assets are diminishing according to the age of the asset and it is charged so that the financial statements at the year-end can give a true and clear picture. The Trust has claimed the depreciation on plant & machinery furniture, computers which is used in the educational institutions; it has not claimed the depreciation on land & building created with the donation of corpus. Further the AO erred in alleging that the appellant has claimed purchase of assets as application on income in the earlier years but the actual fact is that assets which were purchased in previous financial years were never claimed as application of income in relevant purchase year on which deprecation

were claim during the year, therefore, there is no tantamount to double benefit of same assets. Further in view the various decisions of Hon'ble High Court and Supreme Court of India, the depreciation claimed is to be allowed, further in the previous appellant case depreciation was allowed by Hon'ble Court and Hon'ble ITAT. We rely following Cases on this issue

1. Escorts Cardiac Diseases Hospital Society v/s Assistant Director of Income-tax (Exemption), Trust Circle 2, New Delhi 18 Taxman.com (104) Delhi ITAT.

Under section 11(1)(a) income derived from property held under trust wholly for charitable or religious purposes to the extent to which such income is applied to such purposes in India and, where any such income is accumulated or set apart for application to such purposes in India, to the extent to which the income so accumulated or set apart is not in excess of 15 per cent of the income from such property, shall not be included in the total income of the previous year of the person in receipt of the income. Under section 11(2) the trust or institution can accumulate income for specific purpose for a specific period subject to fulfilment of certain conditions prescribed under the law. The legislature has employed the word 'applied' in section 11(1)(a). The Apex Court in the case of H.E.H. Nizam's Religious Endowment Trust v. CIT [1966] 59 ITR 582 held that the word 'applied' in the context of section 11 means the income is 'actually applied' for the charitable or religious purposes of the trust.

Therefore, in view of decision of the Apex Court, income of the current year 'actually applied' for charitable or religious purposes subject to fulfilment of other conditions will be exempt under section 11(1)(a). It means the notional expenditure cannot be treated as application of income within the meaning of section 11. [Para 11]

Further the only requirement under section 11(1)(a) is that the income of trust must be actually applied to the charitable or religious purposes for which the properties are held on the trust by trustees etc. It does not say that application of income should be such that it may necessarily result in revenue expenditure. The charitable purpose may, in a given case, require for its fulfilment purchase of a capital asset and where income is applied for purchase of such a capital asset, it would be still be application of income to the charitable purpose. [Para 12]

Chapter-III of the Act deals with the incomes which do not form part of the total income. The income of a charitable or religious institution has to be computed in accordance with the provisions of sections 11, 12 and 13 Chapter-VI of the Act deals with computation of total income under the heads (i) 'salaries'; (ii) 'income from house property'; (iii) 'profit and gains of business or profession'; (iv) 'capital gains'; and (v) 'income from other sources'. In case of income derived under the

head salaries, income from house property, capital gains and other sources, the provisions of section 32 are not applicable. Provisions of section 32, i.e., deprecation are, therefore, applicable in case of income earned under the head 'profit and gains of business or profession'. Depreciation under section 32(1) is allowable in respect of both tangible and intangible assets which are owned wholly or partly by the assessee and used for the purposes of business or profession. Thus, for the purpose of claim of depreciation two conditions are to be satisfied, i.e., the assets are owned wholly or partly by the assessee and used for the purposes of business or profession. Therefore, the depreciation is allowable in the case where the assessee carries on the business or profession. Accordingly, the provisions of section 32 which have applicability to head of income in Chapter IV particularly profits and gains of business or profession, cannot be imported to Chapter III under which income which does not form part of total income is to be computed. [Para 13.1]

Under section 11(1)(a) when income is applied for acquisition of capital asset which is treated as applied, the claim of depreciation on same income will amount to double deduction. Moreover, as held by the Apex Court that expansion 'applied' means actual application. In other words in a particular year, if the income has actually been applied for the charitable or religious purposes to the extent of 85 per cent or is accumulated for specific purpose under section 11(2), the exemption of whole of the income will be allowable. In a case where capital asset was acquired in earlier year and depreciation is claimed in same year or in subsequent year, the claim of depreciation on that asset is notional expenditure and not an actual application of current year's income. The above can be explained in different words. In case of an assessee carrying on business or profession, the expenditure incurred on acquisition of capital asset is not allowable as deduction as revenue expenditure. If capital expenditure has been incurred on acquisition of an asset, and that asset is used for the purpose of business or profession, depreciation will be available. The only difference between the revenue expenditure and capital expenditure is that revenue expenditure is allowed in the year in which it is incurred whereas the depreciation is allowed on the life of asset on a specified rate in several years. In case of charitable or religious institution there is no difference between the revenue expenditure and capital expenditure. In case of a charitable institution, if the assessee acquires an asset being a building, the value thereof will be treated as application of income in the year of acquisition. If the assessee is allowed depreciation at the rate of 10 per cent, the assessee will be eligible for the benefit of another Rs. 1,00,000 by way of depreciation over the period of the life of the building without application of actual income but by way of notional expenditure. Therefore, the assessee will not be eligible for depreciation on assets which have been acquired by application of the income. Moreover, there is no provision under sections 11, 12 & 13 to allow depreciation. In the absence of any statutory provision under sections 11, 12 and 13 under which income of a charitable or religious institution is computed, allowance of depreciation under section 32(1)

would mean double deduction, which is not permissible in view of the decision of the Apex Court in the case of Escorts Ltd. v. Union of India [1993] 199 ITR 43/[1992] 65 Taxman 420. The depreciation being notional expenditure will not fall under the expression 'actually applied' as held by the Apex Court in the case of HEH Nizam's Religious Endowment Trust (supra). Therefore, depreciation is not allowable in respect of an asset acquired by charitable institution where the cost of acquisition was treated as application of income. [Para 13.2]

However, Punjab and Haryana High Court in the case of CIT v. Tiny Tots Education Society [2011] 330 ITR 21/11 taxmann.com 242 has held that depreciation is allowable in the case of charitable institutions. Though, allowance of depreciation on an amount which was treated as application of income in the year in which capital asset was acquired is not permissible, but since Punjab and Haryana High Court has held that depreciation will be allowable in the case of charitable institutions and the decision of the High Court in the absence of any contrary decision of jurisdictional High Court or the Apex Court on the issue, has to be followed by the Tribunal being lower in herarchy. Respectfully following the decision of Punjab and Haryana High Court, depreciation will be allowable on the assets acquired by the assessee by application of income of the trust or institution. Therefore, the order of the Commissioner (Appeals) is to be set aside and the order of Commissioner (Appeals) the Assessing Officer is directed to allow depreciation. [Para 14]

2. Hon'ble ITAT Chennai in the case of GRR charities V/s. DDIT (2012) 21 Taxman.com 45 (Chennai)

It is also noted that in the assessee's own case in previous assessment year, ld. CIT(A) and ITAT allowed the deduction to the assessee. Therefore, in view of above facts, submission and case laws mentioned hereinabove, the depreciation is allowed to the assessee. Thus Ground No. 5 is allowed.''

Since the Bench feels that the ground No. 4 raised hereinabove by the assessee (supra) are similar to the facts of grounds of appeal in ITA No. 57/JP/2024, therefore the decision taken by us shall apply mutatis mutandis in Ground No. 4 (ITA No. 59/JP/2024). Thus Ground No.4 is allowed.

23.0 Ground No. 5:- That the Ld. A.O. grossly erred by disallowance of expenses on Food for Poor Rs. 18,785.00

23.1 During the course of hearing, the Bench noted that it is not required to repeat the facts as the facts are similar to the facts of the appeal of the assessee in ITA No. 58/JP/2024 wherein the Bench observed as under:-

> ‘’We have heard both the parties and perused the materials available on record. It is noted from the records that the appellant being a charitable trust duly registered u/s 12A is having objects for donations etc. to poor persons for welfare, education & medical relief as such the food for hunger is the part of application of money. The ld AO erred in taxing the income of trust under the head of Business and profession and denial of exemption u/s 11 of the Act. Thus the exemption u/s 11/10(23C) of the Act should be allowable to the appellant and therefore deduction of food for hunger should be allowed as application of income to the appellant. Hence, in view of the above deliberation, the Ground No. 8 of the assessee is allowed. ‘’

Since the Bench feels that the ground No. 5 raised hereinabove by the assessee (supra) are similar to the facts of grounds of appeal in ITA No. 58/JP/2024, therefore the decision taken by us shall apply mutatis mutandis in Ground No. 5 (ITA No. 59/JP/2024). Thus Ground No.5 is allowed.

24.0 Ground No. 6:- That the Ld. A.O. grossly erred in making addition of corpus fund Rs. 5,84,000/- .That the ld. CIT(A) also erred in not considering the ground.

24.1 During the course of hearing, the Bench noted that it is not required to repeat the facts as the facts are similar to the facts of the appeal of the assessee in ITA No. 57/JP/2024 wherein the Bench observed as under:-

> ‘’We have heard both the parties and perused the materials available on record. In this case, it is noted from the above facts and circumstances of the case that the Appellant Trust is registered u/s 12A and hence the Trust can call corpus fund for its requirements i.e. investment in Trust properties or for its charitable objects the donors have given for specific purpose, as such in case of charitable Trust registered u/s 12A the corpus donations received are fully exempt. Further in view of submission on ground no 2 to 4 above, the exemption u/s 11/10(23C) of the Act should be allowable to the appellant and therefore corpus donation should not be added to the income of the appellant. Hence, in view of the above deliberation and facts and circumstances of the case, we do not concur with the findings of the ld. CIT(A). Thus the Ground No. 9 of the assessee is allowed.’’

Since the Bench feels that the ground No. 6 raised hereinabove by the assessee (supra) are similar to the facts of grounds of appeal in ITA No. 57/JP/2024, therefore the decision taken by us shall apply mutatis mutandis in Ground No. 6 (ITA No. 59/JP/2024). Thus Ground No.6 is allowed.

25.0 Ground No. 7:- That the Ld. A.O. grossly erred by disallowance of ESI and PF expenses Rs. 23,834.00. the Ld. CIT(A) also not considered the ground

25.1 Brief facts of the case are that the AO while making the assessment proceedings noticed that the assessee has violated the provision of section 36(1)(va) r.w.s 2(24)(x) of the Act, therefore, contribution is disallowed. The ld CIT(A) relied upon decision of Hon’ble Supreme Court in the case of Checkmate Services Private Limited and confirmed the addition made by ld AO.

25.2 During the course of hearing, the ld. AR of the assessee filed the following written submission alongwith case laws.

5.4 Submission of Appellant:-

In this relation we submit that appellant has deposited the EPF before the due date of filing of return of income u/s 139(1). In view of settled legal position by Hon'ble Rajasthan High Court in the case of Commissioner of Income Tax Versus M/s. State Bank of Bikaner & Jaipur and Jaipur Vidyut Vitaran Nigam Ltd [2014] 363 ITR 70 has allowed delay in deposit of challan but before due date of filing of ITR u/s 139(1). Hon'ble Rajasthan High Court Held as under:-

Relying upon Allied Motors (P) Ltd. vs. CIT [1997 (3) TMI 9 - SUPREME Court] - the legislature brought in the statute Section 43(B)(b) to curb the activities of such tax payers who did not discharge their statutory liability of payment of dues - to put a check on the claims/deductions having been made, the provision was brought in to curb the activities - the explanation appended to Section 36(1)(va) of the Act further envisage that the amount actually paid by the assessee on or before the due date admissible at the time of submitting return of the income u/s 139 of the Act in respect of the previous year can be claimed by the assessee for deduction out of their gross total income - Sec.43B starts with a notwithstanding clause & would thus override Sec.36(1) (va) and if read in isolation Sec. 43B would become obsolete.

Till the provision was brought in as the due amounts on one pretext or the other were not being deposited by the assessees though substantial benefits had been obtained by them in the shape of the amount having been claimed as a deduction but the amounts were not deposited - the amounts can be paid later on subject to payment of interest and other consequences and to get benefit under the Income Tax Act, an assessee ought to have actually deposited the entire amount as also to adduce evidence regarding such deposit on or before the return of income u/s 139(1) of the Act – thus, where the PF and/or EPF, CPF, GPF etc., if paid after the due date under respective Act but before filing of the return of income u/s 139(1), cannot be disallowed u/s 43B or u/s 36(1)(va) of the IT Act – Decided against Revenue.

Regarding the recent amendment to 36(1)(va) by the finance act 2021 we have relied on decision of Hon'ble ITAT Delhi bench in the case ANUP SERVICE STATION VERSUS DCIT, CPC, BENGALURU. No.- ITA No.74 And 75/Del/2022 vide order dated 05/04/2022

Delayed deposit of employee shares of ESI/PF - assessee is not entitled to claim deduction u/s. 36(1)(va) - HELD THAT:- It is an undisputed fact that the

assessee in the instant cases has deposited the employee's contribution to PF & ESI before the due date of filing of return, although the same has been paid after the dates specified in the relevant Act.

If the assessee has deposited the employees' share of contribution to PF & ESI before the due date of filing of return u/s.139(1) then no disallowance u/s. 36(1)(va) can be made. It has further been held that the amendment to the provisions of section 43B and 36(1)(va) of the Act by the Finance Act, 2021 has to be construed as prospective and applicable for the period after 01.04.2021. It is held that this provision imposes a liability on the assessee and therefore, cannot be construed as applicable with retrospective effect since the legislature has not specifically said so. Since the assessee in the instant case has admittedly deposited the employee's contribution to PF & ESI before the due date of filing of return of income, therefore, we are of the considered opinion that the ld. CIT(A) is not justified in sustaining the disallowance made by the CPC. We, therefore, direct the Assessing Officer to delete the disallowances in the hands of the assessee. - Decided in favour of assessee.

25.3 After hearing both the parties and perusing the materials available on record. In this case, it is noted that the AO disallowed the amount of Rs.23,834/- u/s 36(1)(va) of the Act on the ground that payments of employees contribution towards EPF and PF had not been made on or before the due date by the employer as per respective Acts which has been confirmed by the ld. CIT(A). It is not imperative to repeat the facts of the case and the case laws cited by both the parties. The Bench has observed that the recently the Hon'ble Supreme Court has opined in the case of Checkmate Services Pvt. Ltd. vs CIT-1, 143 Taxmann.com 178 (SC)/Civil Appeal No. 2833 of 2016 held that the provision of Section 43B of the Act shall not apply to employee's contribution to PF/ESI and the due date specified u/s 36(1)(va) of the Act shall apply for determination of deductibility of employee's contribution to PF/ESI. The relevant portion of the Judgement of

Hon'ble Supreme Court in the case of Checkmate Services Pvt. Ltd. vs CIT-1 (supra) is reproduced as under:-

> ''53. The distinction between an employer's contribution which is its primary liability under law – in terms of Section 36(1)(iv), and its liability to deposit amounts received by it or deducted by it (Section 36(1)(va)) is, thus crucial. The former forms part of the employers' income, and the later retains its character as an income (albeit deemed), by virtue of Section 2(24)(x) - unless the conditions spelt by Explanation to Section 36(1)(va) are satisfied i.e., depositing such amount received or deducted from the employee on or before the due date. In other words, there is a marked distinction between the nature and character of the two amounts – the employer's liability is to be paid out of its income whereas the second is deemed an income, by definition, since it is the deduction from the employees' income and held in trust by the employer. This marked distinction has to be borne while interpreting the obligation of every assessee under Section 43B.
>
> 54. In the opinion of this Court, the reasoning in the impugned judgment that the non-obstante clause would not in any manner dilute or override the employer's obligation to deposit the amounts retained by it or deducted by it from the employee's income, unless the condition that it is deposited on or before the due date, is correct and justified. The non-obstante clause has to be understood in the context of the entire provision of Section 43B which is to ensure timely payment before the returns are filed, of certain liabilities which are to be borne by the assessee in the form of tax, interest payment and other statutory liability. In the case of these liabilities, what constitutes the due date is defined by the statute. Nevertheless, the assessees are given some leeway in that as long as deposits

are made beyond the due date, but before the date of filing the return, the deduction is allowed. That, however, cannot apply in the case of amounts which are held in trust, as it is in the case of employees' contributions- which are deducted from their income. They are not part of the assessee employer's income, nor are they heads of deduction per se in the form of statutory pay out. They are others' income, monies, only deemed to be income, with the object of ensuring that they are paid within the due date specified in the particular law. They have to be deposited in terms of such welfare enactments. It is upon deposit, in terms of those enactments and on or before the due dates mandated by such concerned law, that the amount which is otherwise retained, and deemed an income, is treated as a deduction. Thus, it is an essential condition for the deduction that such amounts are deposited on or before the due date. If such interpretation were to be adopted, the non-obstante clause under Section 43B or anything contained in that provision would not absolve the assessee from its liability to deposit the employee's contribution on or before the due date as a condition for deduction.

55. In the light of the above reasoning, this court is of the opinion that there is no infirmity in the approach of the impugned judgment. The decisions of the other High Courts, holding to the contrary, do not lay down the correct law. For these reasons, this court does not find any reason to interfere with the impugned judgment. The appeals are accordingly dismissed.''

In view of the above deliberations and the decision taken by the Hon'ble Supreme Court in the case of Checkmate Services (P) Ltd. vs CIT-1(supra), the Bench

sustains the addition confirmed by the ld. CIT(A) and the Ground of Appeal No. 7 of the assessee is dismissed.

26.0 Ground No. 8:- That the Ld. A.O. grossly erred in Charging the tax on Surplus as per I and E A/c Rs. 18,58,615.00 through the surplus was under the limit of 15% as per Law. That the Ld. CIT(A) also erred in not adjudicating the ground.

26.1 During the course of hearing, the Bench noted that it is not required to repeat the facts as the facts are similar to the facts of the appeal of the assessee in ITA No. 57/JP/2024 wherein the Bench observed as under:-

> ''We have heard both the parties and perused the materials available on records. From the records available before the Bench it is noted that the appellant trust is having registration u/s 12A of the Act then the exemption and provisions of Section 11 to 13 are applicable as such the surplus as per Income and Expenditure Account are within the threshold limit of 15%. Since the surplus is within the prescribed limit of 15% then no tax is chargeable on this income The Bench also take into consideration that in view of the submission of the assessee, on ground No. 2 to 4 above, the exemption u/s 11/10(23C) of the Act is allowable to the appellant and thus this surplus should not be added to the income of the appellant. Hence, in view of the above deliberation, the ground No. 10 of the assessee is allowed.''

Since the Bench feels that the ground No. 8 raised hereinabove by the assessee (supra) are similar to the facts of grounds of appeal in ITA No. 57/JP/2024, therefore the decision taken by us shall apply mutatis mutandis in Ground No. 8 (ITA No. 59/JP/2024). Thus Ground No.8 is allowed.

27.0 Now we take up the appeal of the assessee in **ITA No. 460/JP/2024** for the assessment year 2015-16 for adjudication.

28.0 Ground No. 1 to 3:- Regarding the invoking provision of section 13(1)(d) of the Act for investment made in past financial years in shares thereby not allowing the exemption u/s 11/10(23C)(vi) of the Act and taxing the receipt of the trust by considering it as AOP. A.O. grossly erred in ignoring the judgement of Hon'ble ITAT and High Court on same issue in appellant own case in preceding assessment years.

28.1 During the course of hearing, the Bench noted that it is not required to repeat the facts as the facts are similar to the facts of the appeal of the assessee in ITA No. 57/JP/2024 wherein the Bench observed as under:-

> ''We have heard both the parties and perused the materials available on record including the case laws. The Bench noted that the cases by the ld. AR suggest that even for violation of sec. 13(1)(d), the entire income of the trust will not lead to loss of total exemption but only the income from such prohibited investment will be subject to tax. This view is also supported by the decision Hon'ble ITAT Jaipur bench in case of Santokba Durlabh Ji Trust Hon,ble ITAT, Jaipur Bench, Jaipur reversed the order of CIT(A) for A.Y. 2004-05 (ITA No. 241/JP/14 order dated 24.02.2015) following its order in case of assessee Trust for A.Y. 2008-09 (ITA No. 169/JP/2012 order dated 05.11.2014). The relevant extracts of the reads as under.
>
> ''Respectfully following the above decision of ITAT, I find that since there is no income from these prohibited investment, no amount will be charged to tax at Maximum Marginal Rate. The action of the AO in denying the exemption u/s 11 is deleted.

The Bench noted that the written submission made by the ld. AR of the assessee alongwith the case laws (supra) has merit and in this view of the matter, the Ground No. 2 to 4 of the assessee are allowed.''

Since the Bench feels that the ground No. 1 to 3 raised hereinabove by the assessee (supra) are similar to the facts of grounds of appeal in ITA No. 57/JP/2024, therefore the decision taken by us shall apply mutatis mutandis in Ground No. 1 to 3 (ITA No. 60/JP/2024). Thus Ground No.1 to 3 are allowed.

29.0 Ground No. 4:- That the Ld. A.O. grossly erred in making the addition of Donation Expenses of Rs. 323355.00 by treating the status as A.O.P. The Ld. CIT(A) also erred in not allowing the ground. That the Ld. CIT(A) also erred in not considering the ground.

29.1 During the course of hearing, the Bench noted that it is not required to repeat the facts as the facts are similar to the facts of the appeal of the assessee in ITA No. 57/JP/2024 wherein the Bench observed as under:-

''We have heard both the parties and perused the materials available on record. In this case, the AO while perusing the income and expenditure account noted that the assessee had claimed donation of Rs.6,15,522/- as expenditure. Subsequently he noted that the assessment in this case is to be completed by denying exemption u/s 11 as well as exemption u/s 10(23C)(vi) of the Act by treating the assessee as AOP. Thus the donation expenses of Rs.6,15,52/- claimed by the assessee is not allowable and added to the total income of the assessee and the ld. CIT(A) has confirmed the action of the AO. The Bench in this case noted that the assessee being a charitable trust

> duly registered u/s 12A is having objects for donations etc. to poor persons for welfare, education & medical relief as such the donation expense is the part of application of money. Further It is noteworthy to mention that in view of submission on ground no 2 to 4 above, the exemption u/s 11/10(23C) of the Act should be allowable to the appellant and therefore deduction of donation given should be allowed as application of income to the appellant. Hence, in view of the above deliberation, the Ground No. 6 of the assessee is allowed.''

Since the Bench feels that the ground No. 4 raised hereinabove by the assessee (supra) are similar to the facts of grounds of appeal in ITA No. 57/JP/2024, therefore the decision taken by us shall apply mutatis mutandis in Ground No. 4 (ITA No. 60/JP/2024). Thus Ground No.4 is allowed.

30.0 Ground No. 5:- That the Ld. A.O. grossly erred in making the addition of Rs. 27,67,977.00 by disallowing depreciation, stating that this is out of corpus of the Trust. That the Ld. CIT(A) also erred in not allowing the depreciation & did different interpretation which is not based on earlier order of Higher Authorities.

30.1 During the course of hearing, the Bench noted that it is not required to repeat the facts as the facts are similar to the facts of the appeal of the assessee in ITA No. 57/JP/2024 wherein the Bench observed as under:-

> ''We have heard both the parties and perused the materials available on record. The AO during the assessment observed assessee has claimed depreciation on various fixed assets. Further AO alleges that assessee has taken purchase of assets as application of income in earlier years and claiming of depreciation tantamount to double benefit. In first appeal, the exemption of the assessee has been withdrawn u/s 10(23C) and the status of assessee is considered as

AOP by the ld.CIT(A) and noted that deduction on account of depreciation is not allowable if the cost of assets allowed as deduction by way of application of income in any year. We find from the records that the depreciation is a statutory allowance and it is given since the value of assets are diminishing according to the age of the asset and it is charged so that the financial statements at the year-end can give a true and clear picture. The Trust has claimed the depreciation on plant & machinery furniture, computers which is used in the educational institutions; it has not claimed the depreciation on land & building created with the donation of corpus. Further the AO erred in alleging that the appellant has claimed purchase of assets as application on income in the earlier years but the actual fact is that assets which were purchased in previous financial years were never claimed as application of income in relevant purchase year on which deprecation were claim during the year, therefore, there is no tantamount to double benefit of same assets. Further in view the various decisions of Hon'ble High Court and Supreme Court of India, the depreciation claimed is to be allowed, further in the previous appellant case depreciation was allowed by Hon'ble Court and Hon'ble ITAT. We rely following Cases on this issue

1. **Escorts Cardiac Diseases Hospital Society v/s Assistant Director of Income-tax (Exemption), Trust Circle 2, New Delhi 18 Taxman.com (104) Delhi ITAT.**

Under section 11(1)(a) income derived from property held under trust wholly for charitable or religious purposes to the extent to which such income is applied to such purposes in India and, where any such income is accumulated or set apart for application to such purposes in India, to the extent to which the income so accumulated or set apart is not in excess of 15 per cent of the income from such property, shall not be included in the total income of the previous year of the person in receipt of the income. Under section 11(2) the trust or institution can accumulate income for specific purpose for a specific period subject to fulfilment of certain conditions prescribed under the law. The legislature has employed the word 'applied' in section 11(1)(a). The Apex Court in the case of H.E.H. Nizam's Religious Endowment Trust v. CIT [1966] 59 ITR 582 held that the word 'applied' in the context of section 11 means the income is 'actually applied' for the charitable or religious purposes of the trust.

Therefore, in view of decision of the Apex Court, income of the current year 'actually applied' for charitable or religious purposes subject to fulfilment of other conditions will be exempt under section 11(1)(a). It means the notional

expenditure cannot be treated as application of income within the meaning of section 11. [Para 11]

Further the only requirement under section 11(1)(a) is that the income of trust must be actually applied to the charitable or religious purposes for which the properties are held on the trust by trustees etc. It does not say that application of income should be such that it may necessarily result in revenue expenditure. The charitable purpose may, in a given case, require for its fulfilment purchase of a capital asset and where income is applied for purchase of such a capital asset, it would be still be application of income to the charitable purpose. [Para 12]

Chapter-III of the Act deals with the incomes which do not form part of the total income. The income of a charitable or religious institution has to be computed in accordance with the provisions of sections 11, 12 and 13 Chapter-VI of the Act deals with computation of total income under the heads (i) 'salaries'; (ii) 'income from house property'; (iii) 'profit and gains of business or profession'; (iv) 'capital gains'; and (v) 'income from other sources'. In case of income derived under the head salaries, income from house property, capital gains and other sources, the provisions of section 32 are not applicable. Provisions of section 32, i.e., deprecation are, therefore, applicable in case of income earned under the head 'profit and gains of business or profession'. Depreciation under section 32(1) is allowable in respect of both tangible and intangible assets which are owned wholly or partly by the assessee and used for the purposes of business or profession. Thus, for the purpose of claim of depreciation two conditions are to be satisfied, i.e., the assets are owned wholly or partly by the assessee and used for the purposes of business or profession. Therefore, the depreciation is allowable in the case where the assessee carries on the business or profession. Accordingly, the provisions of section 32 which have applicability to head of income in Chapter IV particularly profits and gains of business or profession, cannot be imported to Chapter III under which income which does not form part of total income is to be computed. [Para 13.1]

Under section 11(1)(a) when income is applied for acquisition of capital asset which is treated as applied, the claim of depreciation on same income will amount to double deduction. Moreover, as held by the Apex Court that expansion 'applied' means actual application. In other words in a particular year, if the income has actually been applied for the charitable or religious purposes to the extent of 85 per cent or is accumulated for specific purpose under section 11(2), the exemption of whole of the income will be allowable. In a case where capital asset was acquired in earlier year and depreciation is claimed in same year or in subsequent year, the claim of depreciation on that asset is notional expenditure and not an actual application of current year's income. The above can be explained in different words. In case of an assessee carrying on business or profession, the expenditure incurred on acquisition of capital asset is not allowable as deduction as revenue expenditure. If capital expenditure has been

incurred on acquisition of an asset, and that asset is used for the purpose of business or profession, depreciation will be available. The only difference between the revenue expenditure and capital expenditure is that revenue expenditure is allowed in the year in which it is incurred whereas the depreciation is allowed on the life of asset on a specified rate in several years. In case of charitable or religious institution there is no difference between the revenue expenditure and capital expenditure. In case of a charitable institution, if the assessee acquires an asset being a building, the value thereof will be treated as application of income in the year of acquisition. If the assessee is allowed depreciation at the rate of 10 per cent, the assessee will be eligible for the benefit of another Rs. 1,00,000 by way of depreciation over the period of the life of the building without application of actual income but by way of notional expenditure. Therefore, the assessee will not be eligible for depreciation on assets which have been acquired by application of the income. Moreover, there is no provision under sections 11, 12 & 13 to allow depreciation. In the absence of any statutory provision under sections 11, 12 and 13 under which income of a charitable or religious institution is computed, allowance of depreciation under section 32(1) would mean double deduction, which is not permissible in view of the decision of the Apex Court in the case of Escorts Ltd. v. Union of India [1993] 199 ITR 43/[1992] 65 Taxman 420. The depreciation being notional expenditure will not fall under the expression 'actually applied' as held by the Apex Court in the case of HEH Nizam's Religious Endowment Trust (supra). Therefore, depreciation is not allowable in respect of an asset acquired by charitable institution where the cost of acquisition was treated as application of income. [Para 13.2]

However, Punjab and Haryana High Court in the case of CIT v. Tiny Tots Education Society [2011] 330 ITR 21/11 taxmann.com 242 has held that depreciation is allowable in the case of charitable institutions. Though, allowance of depreciation on an amount which was treated as application of income in the year in which capital asset was acquired is not permissible, but since Punjab and Haryana High Court has held that depreciation will be allowable in the case of charitable institutions and the decision of the High Court in the absence of any contrary decision of jurisdictional High Court or the Apex Court on the issue, has to be followed by the Tribunal being lower in herarchy. Respectfully following the decision of Punjab and Haryana High Court, depreciation will be allowable on the assets acquired by the assessee by application of income of the trust or institution. Therefore, the order of the Commissioner (Appeals) is to be set aside and the order of Commissioner (Appeals) the Assessing Officer is directed to allow depreciation. [Para 14]

2. Hon’ble ITAT Chennai in the case of GRR charities V/s. DDIT (2012) 21 Taxman.com 45 (Chennai)

> It is also noted that in the assessee's own case in previous assessment year, ld. CIT(A) and ITAT allowed the deduction to the assessee. Therefore, in view of above facts, submission and case laws mentioned hereinabove, the depreciation is allowed to the assessee. Thus Ground No. 5 is allowed.''

Since the Bench feels that the ground No. 5 raised hereinabove by the assessee (supra) are similar to the facts of grounds of appeal in ITA No. 57/JP/2024, therefore the decision taken by us shall apply mutatis mutandis in Ground No. 5 (ITA No. 60/JP/2024). Thus Ground No.5 is allowed.

31.0 Ground No. 6:- That the Ld. A.O. grossly erred in charging tax on Charitable expenditure i.e. Food for hunger Rs. 3,52,338.00. The Ld. CIT(A) also erred in not considering the ground.

31.1 During the course of hearing, the Bench noted that it is not required to repeat the facts as the facts are similar to the facts of the appeal of the assessee in ITA No. 58/JP/2024 wherein the Bench observed as under:-

> ''We have heard both the parties and perused the materials available on record. It is noted from the records that the appellant being a charitable trust duly registered u/s 12A is having objects for donations etc. to poor persons for welfare, education & medical relief as such the food for hunger is the part of application of money. The ld AO erred in taxing the income of trust under the head of Business and profession and denial of exemption u/s 11 of the Act. Thus the exemption u/s 11/10(23C) of the Act should be allowable to the appellant and therefore deduction of food for hunger should be allowed as application of income to the appellant. Hence, in view of the above deliberation, the Ground No. 8 of the assessee is allowed. ''

Since the Bench feels that the ground No. 6 raised hereinabove by the assessee (supra) are similar to the facts of grounds of appeal in ITA No. 58/JP/2024, therefore the decision taken by us shall apply mutatis mutandis in Ground No.6 (ITA No. 59/JP/2024). Thus Ground No.6 is allowed.

32.0 Ground No. 7:- That the Ld. A.O. grossly erred in disallowing the P.F. Expenses 10,135.00 That the ld. CIT(A) also erred in not considering the ground.

32.1 Brief facts of the case are that the AO while making the assessment proceedings noticed that the assessee has violated the provision of section 36(1)(va) r.w.s 2(24)(x) of the Act, therefore, contribution is disallowed. The ld CIT(A) relied upon decision of Hon'ble Supreme Court in the case of Checkmate Services Private Limited and confirmed the addition made by ld AO.

32.2 During the course of hearing, the ld. AR of the assessee filed the following written submission alongwith case laws.

5.4 Submission of Appellant:-

In this relation we submit that appellant has deposited the EPF before the due date of filing of return of income u/s 139(1). In view of settled legal position by Hon'ble Rajasthan High Court in the case of Commissioner of Income Tax Versus M/s. State Bank of Bikaner & Jaipur and Jaipur Vidyut Vitaran Nigam Ltd [2014] 363 ITR 70 has allowed delay in deposit of challan but before due date of filing of ITR u/s 139(1). Hon'ble Rajasthan High Court Held as under:-

Relying upon Allied Motors (P) Ltd. vs. CIT [1997 (3) TMI 9 - SUPREME Court] - the legislature brought in the statute Section 43(B)(b) to curb the activities of such tax payers who did not discharge their statutory liability of payment of dues - to put a check on the claims/deductions having been made, the provision was brought in to curb the activities - the explanation appended to Section 36(1)(va) of the Act further envisage that the amount actually paid by the assessee on or before the due date admissible at the

time of submitting return of the income u/s 139 of the Act in respect of the previous year can be claimed by the assessee for deduction out of their gross total income - Sec.43B starts with a notwithstanding clause & would thus override Sec.36(1) (va) and if read in isolation Sec. 43B would become obsolete.

Till the provision was brought in as the due amounts on one pretext or the other were not being deposited by the assessees though substantial benefits had been obtained by them in the shape of the amount having been claimed as a deduction but the amounts were not deposited - the amounts can be paid later on subject to payment of interest and other consequences and to get benefit under the Income Tax Act, an assessee ought to have actually deposited the entire amount as also to adduce evidence regarding such deposit on or before the return of income u/s 139(1) of the Act – thus, where the PF and/or EPF, CPF, GPF etc., if paid after the due date under respective Act but before filing of the return of income u/s 139(1), cannot be disallowed u/s 43B or u/s 36(1)(va) of the IT Act – Decided against Revenue.

Regarding the recent amendment to 36(1)(va) by the finance act 2021 we have relied on decision of Hon'ble ITAT Delhi bench in the case ANUP SERVICE STATION VERSUS DCIT, CPC, BENGALURU. No.- ITA No.74 And 75/Del/2022 vide order dated 05/04/2022

Delayed deposit of employee shares of ESI/PF - assessee is not entitled to claim deduction u/s. 36(1)(va) - HELD THAT:- It is an undisputed fact that the assessee in the instant cases has deposited the employee's contribution to PF & ESI before the due date of filing of return, although the same has been paid after the dates specified in the relevant Act.

If the assessee has deposited the employees' share of contribution to PF & ESI before the due date of filing of return u/s.139(1) then no disallowance u/s. 36(1)(va) can be made. It has further been held that the amendment to the provisions of section 43B and 36(1)(va) of the Act by the Finance Act, 2021 has to be construed as prospective and applicable for the period after 01.04.2021. It is held that this provision imposes a liability on the assessee and therefore, cannot be construed as applicable with retrospective effect since the legislature has not specifically said so. Since the assessee in the instant case has admittedly deposited the employee's contribution to PF & ESI before the due date of filing of return of income, therefore, we are of the considered opinion that the ld. CIT(A) is not justified in sustaining the disallowance made by the CPC. We, therefore, direct the Assessing Officer to delete the disallowances in the hands of the assessee. - Decided in favour of assessee.

32.3 After hearing both the parties and perusing the materials available on record.

In this case, it is noted that the AO disallowed the amount of Rs.10,135/-/- u/s 36(1)(va) of the Act on the ground that payments of employees contribution towards EPF and PF had not been made on or before the due date by the employer as per respective Acts which has been confirmed by the ld. CIT(A). It is not imperative to repeat the facts of the case and the case laws cited by both the parties. The Bench has observed that the recently the Hon'ble Supreme Court has opined in the case of Checkmate Services Pvt. Ltd. vs CIT-1, 143 Taxmann.com 178 (SC)/Civil Appeal No. 2833 of 2016 held that the provision of Section 43B of the Act shall not apply to employee's contribution to PF/ESI and the due date specified u/s 36(1)(va) of the Act shall apply for determination of deductibility of employee's contribution to PF/ESI. The relevant portion of the Judgement of Hon'ble Supreme Court in the case of Checkmate Services Pvt. Ltd. vs CIT-1 (supra) is reproduced as under:-

> ''53. The distinction between an employer's contribution which is its primary liability under law – in terms of Section 36(1)(iv), and its liability to deposit amounts received by it or deducted by it (Section 36(1)(va)) is, thus crucial. The former forms part of the employers' income, and the later retains its character as an income (albeit deemed), by virtue of Section 2(24)(x) - unless the conditions spelt by Explanation to Section 36(1)(va) are satisfied i.e., depositing such amount received or deducted from the employee on or before the due date. In other words, there is a marked distinction between the nature and

character of the two amounts – the employer's liability is to be paid out of its income whereas the second is deemed an income, by definition, since it is the deduction from the employees' income and held in trust by the employer. This marked distinction has to be borne while interpreting the obligation of every assessee under Section 43B.

54. In the opinion of this Court, the reasoning in the impugned judgment that the non-obstante clause would not in any manner dilute or override the employer's obligation to deposit the amounts retained by it or deducted by it from the employee's income, unless the condition that it is deposited on or before the due date, is correct and justified. The non-obstante clause has to be understood in the context of the entire provision of Section 43B which is to ensure timely payment before the returns are filed, of certain liabilities which are to be borne by the assessee in the form of tax, interest payment and other statutory liability. In the case of these liabilities, what constitutes the due date is defined by the statute. Nevertheless, the assessees are given some leeway in that as long as deposits are made beyond the due date, but before the date of filing the return, the deduction is allowed. That, however, cannot apply in the case of amounts which are held in trust, as it is in the case of employees' contributions- which are deducted from their income. They are not part of the assessee employer's income, nor are they heads of deduction per se in the form of statutory pay out. They are others' income, monies, only deemed to be income, with the object of ensuring that they are paid within the due date specified in the particular law. They have to be deposited in terms of such welfare enactments. It is upon deposit, in terms of those enactments and on or before the due dates mandated by such concerned law, that the amount which is otherwise retained, and deemed an income, is treated as a deduction. Thus, it is an essential condition for the deduction that such amounts are deposited on or before the due

> date. If such interpretation were to be adopted, the non-obstante clause under Section 43B or anything contained in that provision would not absolve the assessee from its liability to deposit the employee's contribution on or before the due date as a condition for deduction.
>
> 55. In the light of the above reasoning, this court is of the opinion that there is no infirmity in the approach of the impugned judgment. The decisions of the other High Courts, holding to the contrary, do not lay down the correct law. For these reasons, this court does not find any reason to interfere with the impugned judgment. The appeals are accordingly dismissed.''

In view of the above deliberations and the decision taken by the Hon'ble Supreme Court in the case of Checkmate Services (P) Ltd. vs CIT-1(supra), the Bench sustains the addition confirmed by the ld. CIT(A) and the Ground of Appeal No. 7 of the assessee is dismissed.

33.0 Ground No. 8:- That the Ld. A.O. grossly erred in making the addition on A/c of Building Fund Rs. 35,50,000.00 which has been transferred from, Income and Expenditure A/c being the amount invested in Building construction That the Ld. CIT(A) also erred in not considering the ground & Submission of Appellant.

33.1 During the course of hearing, the Bench noted that it is not required to repeat the facts as the facts are similar to the facts of the appeal of the assessee in ITA No. 57/JP/2024 wherein the Bench observed as under:-

> ‘’We have heard both the parties and perused the material available on record. The Bench noticed from the records that the transfer of amount to Building fund is an appropriated for the construction work on the building. During the year, appellant had spent on construction Rs. 58,73,865/- hence for accounting purpose the building fund is created, however for the calculation of income & application of income the actual amount spent on building is to be considered not the fund as such there is no question of any disallowance on A/c of building fund as the appellant has incurred more building expenses/investment than the amount appropriated to this fund. Hence, in view of the above submissions, the exemption u/s 11/10(23C) of the Act should be allowable to the appellant and therefore deduction of building fund should is allowed as application of income to the appellant. Thus the Ground No. 7 of the assessee is allowed.

Since the Bench feels that the ground No. 8 raised hereinabove by the assessee (supra) are similar to the facts of grounds of appeal in ITA No. 57/JP/2024, therefore the decision taken by us shall apply mutatis mutandis in Ground No. 8 (ITA No. 60/JP/2024). Thus Ground No.8 is allowed.

34.0 Ground No. 9:- That the Ld. A.O. grossly erred in making addition of corpus fund Rs. 1,03,80,000.00 That the ld. CIT(A) also erred in not considering the ground.

34.1 During the course of hearing, the Bench noted that it is not required to repeat the facts as the facts are similar to the facts of the appeal of the assessee in ITA No. 57/JP/2024 wherein the Bench observed as under:-

''We have heard both the parties and perused the materials available on record. In this case, it is noted from the above facts and circumstances of the case that the Appellant Trust is registered u/s 12A and hence the Trust can call corpus fund for its requirements i.e. investment in Trust properties or for its charitable objects the donors have given for specific purpose, as such in case of charitable Trust registered u/s 12A the corpus donations received are fully exempt. Further in view of submission on ground no 2 to 4 above, the exemption u/s 11/10(23C) of the Act should be allowable to the appellant and therefore corpus donation should not be added to the income of the appellant. Hence, in view of the above deliberation and facts and circumstances of the case, we do not concur with the findings of the ld. CIT(A). Thus the Ground No. 9 of the assessee is allowed.''

Since the Bench feels that the ground No. 9 raised hereinabove by the assessee (supra) are similar to the facts of grounds of appeal in ITA No. 57/JP/2024, therefore the decision taken by us shall apply mutatis mutandis in Ground No. 9 (ITA No. 60/JP/2024). Thus Ground No.9 is allowed.

35.0 Ground No. 10:- That the Ld. A.O. grossly erred in Charging the tax on Surplus as per I and E A/c Rs. 28,15,545.00 though the surplus was under the limit of 15% as per Law as provided u/s 12A. That the Ld. CIT(A) erred in not considering the ground and dismissed the same.

35.1 During the course of hearing, the Bench noted that it is not required to repeat the facts as the facts are similar to the facts of the appeal of the assessee in ITA No. 57/JP/2024 wherein the Bench observed as under:-

> ''We have heard both the parties and perused the materials available on records. From the records available before the Bench it is noted that the appellant trust is having registration u/s 12A of the Act then the exemption and provisions of Section 11 to 13 are applicable as such the surplus as per Income and Expenditure Account are within the threshold limit of 15%. Since the surplus is within the prescribed limit of 15% then no tax is chargeable on this income The Bench also take into consideration that in view of the submission of the assessee, on ground No. 2 to 4 above, the exemption u/s 11/10(23C) of the Act is allowable to the appellant and thus this surplus should not be added to the income of the appellant. Hence, in view of the above deliberation, the ground No. 10 of the assessee is allowed.''

Since the Bench feels that the ground No. 10 raised hereinabove by the assessee (supra) are similar to the facts of grounds of appeal in ITA No. 57/JP/2024, therefore the decision taken by us shall apply mutatis mutandis in Ground No.10 (ITA No. 60/JP/2024). Thus Ground No.10 is allowed.

36.0 In the result, the appeals of the assessee in ITA No. 57 & 58/JP/2024 are allowed and ITA No. 59 & 60/JP/2024 are partly allowed.

Order pronounced in the open court on 04/06/2024.

Sd/-	Sd/-
(डा॰ मीठा लाल मीना)	(संदीप गोसाई)
(Dr. Mitha Lal Meena)	(Sandeep Gosain)
लेखा सदस्य / Accountant Member	न्यायिक सदस्य / Judicial Member

जयपुर / Jaipur

दिनांक / Dated:- 04/06/2024

*Mishra

आदेश की प्रतिलिपि अग्रेशित / Copy of the order forwarded to:

1. The Appellant- M/s. Om Kothari Foundation, Jaipur
2. प्रत्यर्थी / The Respondent- The ITO(E), Jaipur
3. आयकर आयुक्त / The ld CIT
4. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, जयपुर / DR, ITAT, Jaipur
5. गार्ड फाईल / Guard File (ITA No. 57 to 60/JP/2023)

आदेशानुसार / By order,

सहायक पंजीकार / Asstt. Registrar