

आयकर अपीलीय अधिकरण, 'बी' न्यायपीठ, चेन्नई

IN THE INCOME TAX APPELLATE TRIBUNAL

'B' BENCH, CHENNAI

श्री एन.आर.एस. गणेशन, न्यायिक सदस्य एवं

श्री डि.एस. सुन्दर सिंह, लेखा सदस्य केसमक्ष

BEFORE SHRI N.R.S. GANESAN, JUDICIAL MEMBER AND
SHRI D.S. SUNDER SINGH, ACCOUNTANT MEMBER

आयकर अपील सं./ITA Nos.2556 & 2557/Mds/2016

&

C.O. Nos.158 & 159/Mds/2016

(in ITA Nos.2556 & 2557/Mds/2016)

निर्धारण वर्ष / Assessment Years : 2011-12 & 2012-13

The Deputy Commissioner of
Income Tax (Exemptions),
Chennai Circle,
Chennai - 600 034.

v. M/s Tamil Nadu Cricket
Association,
No.5, M.A. Chidambaram Stadium,
Hostel Road, Chepauk,
Chennai - 600 005.

(अपीलार्थी/Appellant)

PAN : AAAAT 0398 M

(Respondent & Cross-Objector)

अपीलार्थी की ओर से/Appellant by : Dr. Milind Madhukar Bhusari, CIT

प्रत्यर्थी की ओर से/Respondent by : Shri V. Ravichandran, CA

सुनवाई की तारीख/Date of Hearing : 14.03.2017

घोषणा की तारीख/Date of Pronouncement : 31.05.2017

आदेश / O R D E R

PER N.R.S. GANESAN, JUDICIAL MEMBER:

Both the appeals of the Revenue are directed against the common order passed by the Commissioner of Income Tax (Appeals)-17, Chennai, dated 30.03.2016, for the assessment years 2011-12 and 2012-13. The assessee has also filed cross-

objections against the very same order of the CIT(Appeals). Therefore, we heard both the appeals and the cross-objections together and disposing of the same by this common order.

2. The only issue arises for consideration in both the appeals of the Revenue is with regard to exemption claimed by the assessee under Section 11 of the Income-tax Act, 1961 (in short 'the Act').

3. Dr. Milind Madhukar Bhusari, the Ld. Departmental Representative, submitted that the assessee-society was established for promoting sports in the State of Tamil Nadu and Pondicherry. The assessee-society was affiliated to Board of Control for Cricket in India. The assessee derives income from subscription, rent for hiring cricket ground, sponsorship, fee for providing service to IPL, income from advertisement, subsidy / subvention from BCCI, sale of tickets for conducting matches, restaurant and catering income, etc. The Ld. D.R. further submitted that the assessee-society was registered under Section 12AA of the Act. The registration continued during the year under consideration also. The Assessing Officer disallowed the claim of the assessee mainly on the ground that activity of the assessee is commercial in

nature. This Tribunal, according to the Ld. D.R., examined the activities of the assessee on identical set of facts for assessment years 2008-09 to 2010-11 and found that the assessee is eligible for exemption.

4. We have heard Shri V. Ravichandran, the Ld. representative for the assessee also. The Assessing Officer disallowed the claim of the assessee under Section 11 of the Act on the ground that the activity of the assessee is commercial in nature. The Assessing Officer also found that proviso to Section 2(15) of the Act would come into operation since the gross receipts of the assessee exceeded the prescribed limit. On identical set of facts, this issue was examined by this Tribunal in the assessee's own case for assessment years 2008-09 to 2010-11 in I.T.A. Nos.1535, 1536 & 1537/Mds/2014 and this Tribunal found that the activity of the assessee cannot be considered to be business activity. It was further found that the assessee is not providing any services to any trade or commerce or industry. Therefore, the proviso to Section 2(15) of the Act is not applicable to the assessee. In fact, this Tribunal has observed as follows:-

“14. The next contention of the Ld. D.R. that the assessee is engaged in business activity. We have carefully gone through the provisions of Section 2(15) of the Act and the circular issued by the CBDT. In fact, the assessee has filed a copy of the said circular at page 1 of its paper-book. For the purpose of convenience, we are reproducing Section 2(15) of the Act hereunder:-

“2(15) “charitable purpose” includes relief of the poor, education, medical relief, 79[preservation of environment (including watersheds, forests and wildlife) and preservation of monuments or places or objects of artistic or historic interest,] and the advancement of any other object of general public utility :

Provided that the advancement of any other object of general public utility shall not be a charitable purpose, if it involves the carrying on of any activity in the nature of trade, commerce or business, or any activity of rendering any service in relation to any trade, commerce or business, for a cess or fee or any other consideration, irrespective of the nature of use or application, or retention, of the income from such activity ;

Provided further that the first proviso shall not apply if the aggregate value of the receipts from the activities referred to therein is twenty-five lakh rupees or less in the previous year ;”

Advancement of any other object of general public utility is also one of the charitable purposes included in Section 2(15) of the Act. However, proviso to Section 2(15) of the Act clarifies that if the assessee involves in carrying on any activity in the nature of trade, commerce or business, or rendering any activity in relation to trade, commerce or business, the same shall not be treated as charitable

purpose. The question arises for consideration is whether the assessee involves itself in any activity in the nature of trade, commerce or business or its activity would amount to rendering any service in relation to trade, commerce or business. We have carefully gone through the object of the assessee-society, a copy of which is available at pages 62 to 65 of the paper-book. For the purpose of convenience, we are reproducing the object:-

- (a) To take over on registration under the Societies Registration Act XXI of 1860 and assume the affairs and activities of the Madras Cricket Association, as subsequently appellated as Tamil Nadu Cricket Association and continue and take over the dues to and assets, liabilities, commitments and undertakings of the said Madras Cricket Association.
- (b) To maintain a general control of the game of cricket in the State and the Union Territory of Pondicherry and give Its decision on all matters concerning the same either when referred to or suo moto. The activities would be confined to India.
- (c) To spread the game throughout the State by organizing tournaments, including Inter-University, Inter-School and Inter-Association matches, to educate youn sportsmen in the game generally and also in the field of physical culture and the spirit of sportsmanship. The benefits would be available to the General Public irrespective of caste, creed, religion or sex.
- (d) To maintain a library of books, publications and periodicals of interest of sportsmen and to difuse knowledge of Cricket and its ideals of sportsmanship.
- (e) To communicate with public authorities and various sports organizations in India and abroad and concert and promote measures for the development of the game and to provide social security safe guards for the p1ayers, officials such as

Managers, Coaches, Umpires,, Selectors and others who are directly connected with the game.

(f) To provide, acquire and maintain suitable places, playgrounds, buildings and club houses to afford required facilities for the cricketers, officials such as Managers, Coaches, Umpires, Selectors and others who are directly connected with the game, members to acquire by purchase, lease, hire or Otherwise suitable playgrounds, stadia and any other property, movable and immovable, rights or privileges to the same and to provide all amenities thereon for the promotion of the objects of the Association.

(g) To lay our any ground for playing the game and for other purposes and to provide pavilion, canteen and other conveniences and amenities in connection therewith and for such purpose purchase, lease or otherwise acquire the land at such price or rent for such period and upon such terms and conditions as may seem expedient.

(h) To establish promote or assist in establishing and promoting and to subscribe to and become a member of any other Association or Club whether incorporated or not whose objects are similar or in part to the objects of the Association, the establishment or promotion of which may be beneficial to the Association and in particular to subscribe to, finance, give or lend money to, and guarantee the contracts of the Board of Control for Cricket in India or any other body for the time being controlling the game in India or any part thereof and any state or Regional Association recognized by such body.

(i) To create, foster and maintain friendly relations with and among the population of the area under its control through sports, tournaments and competitions connected therewith, to create, develop and foster a healthy spirit of sportsmanship and a broad and generous outlook devoid of all prejudices and

to mould the character of citizen through the medium of sports in general and cricket in particular.

(j) To impart physical education through the medium of cricket and take all steps to assist the citizens to develop their physique and have a healthy mind and healthy body.

(k) To spread the ideals of cricket and all that it stands for throughout the length and breadth of its area by arranging schools for coaching, lectures, tournaments and run international matches between India and other leading foreign countries so as to develop mutual goodwill and better understanding between India and other countries.

(l)
time to run such matches for the achievement of the objects of the Association and to utilize the net proceeds thereof towards the implementation of the objects set out herein and to educate the public, the school boys, college students, clubs and cricketers, in cricket and all the ideals it stands for.

(m) To have as many classes of members with such rights as the General Body decide.

(n) To instill keenness for the game and to foster the spirit of sportsmanship in promising students of schools and colleges and members of affiliated Clubs / District Associations and Institutions and thus enable them to develop a good physique and a good standard of the game and to afford facilities to the poorer classes of citizens to attain efficiency in the game.

(o) To regulate and control sports in general and the game of cricket in particular.

(p) To give decisions on the relevant matters referred to the Association by affiliated clubs/district associations and institutions and, if necessary, to finance and conduct matches and tours of representative teams visiting its area on

invitation and to regulate and control the visits of the State's representative teams going out of Tamil Nadu.

(q) To encourage the formation of Zones in the City of Madras and District or regional clubs in every district or part of a district and playing facilities in all such centres.

(r) To select teams to represent the Association in tournaments, championships or fixtures, local or otherwise.

(s) To acquire by all lawful means of movable and immovable property on behalf of the Association and to sell, manage, mortgage lease and exchange, dispose off or otherwise deal with all or any of its properties and/or any income therefrom.

(t) To promote and to contribute to any enterprise conducted by individuals or Associations in conformity with the objects of the Association.

(u) To organize a proper coaching scheme for the benefit of cricketers in the City and in the Districts under the supervision of coaches from India and abroad.

(v) To collect funds and whenever necessary borrow with or without security for purposes of the Association and in particular by the issue of debentures or debenture stock perpetual or otherwise charged upon all or any of the Association's property both or future and to purchase, redeem or payoff any such securities and to utilize such funds in such manner as the General Body may consider desirable for the fulfillment of the objects of the Association.

(w) To invest monies and funds of the Association as per Section 11(5) of the Income-tax Act, 1961 and to reconvert in such manner as may be decided upon by the General Body of the Members of the Association from time to time.

(x) To carry out any other business or activity which may seem to the committee capable of being conveniently carried out in connection with and in conformity to the objects of the Association and which is connected directly or indirectly to enhance the value of or render more profitable any of the objects, rights or properties of the Association.

(y) To maintain a panel of approved cricket umpires and to do such acts as may be necessary for this purpose including holding of prescribed periodical tests with a view to enable them to qualify themselves as first class umpires.

(z) To add, delete, alter, maintain and enforce rules and regulations for the control and governance of the game in the State of Tamil Nadu and the union Territory of Pondicherry and to maintain discipline amongst players, officials, clubs and affiliated institutions.

The object of the assessee-society is to control game of cricket in the State of Tamil Nadu and in the Union Territory of Puducherry and also to organize tournaments, including inter-university, inter-school and inter-association matches, to educate young sportsmen in the game generally and also in the field of physical culture and the spirit of sportsmanship. Therefore, the sole object of the assessee-society is to promote sport of cricket in the State of Tamil Nadu and in the Union Territory of Puducherry.

15. *Now, let's examine whether the activity of conducting one-day matches, T-20 matches and Indian Premier League matches would amount to doing business or trade. It is the case of the Revenue that the assessee-society is conducting or organizing T-20, one-day matches or Indian Premier League matches. In fact, BCCI, the parent organization which is a national body in India, is organizing and conducting the matches. The assessee-society, being a member of BCCI, hosts the matches which are conducted by BCCI. For the purpose of meeting its expenditure, the BCCI allocates funds*

from the revenue it collected from advertisement and other sources. The assessee-society is allowed to sell tickets to the cricket viewers. No doubt, the players of Indian Premier League are sold in public auction for very huge amount. But the question is who is conducting and who is auctioning, whether the assessee-society or BCCI? In fact, BCCI conducts the public auction for selling premier players at a huge premium rate. In fact, the BCCI collects the money. The role of the assessee-society is only to provide stadium for conducting matches. Other than that, the assessee-society has no role in conducting the international matches and Indian Premier League matches.

16. *The other activity of the assessee-society is to conduct training programmes, coaching classes for college students at district level in the State of Tamil Nadu and in the Union Territory of Puducherry. The assessee is also conducting inter-university, inter-school and inter-association matches. Expenditures involved in such activities were met out of surplus funds remaining with the assessee-society. The Assessing Officer got confused himself with the activity carried on by the BCCI as that of the activity carried on by the assessee-society. The material available on record shows that one-day matches, T-20 matches and Indian Premier League matches are all conducted by the BCCI and the assessee, being the host in the State of Tamil Nadu, is only providing its stadium. The assessee has also received funds from BCCI for meeting the expenditure, being the host. Therefore, this Tribunal is of the considered opinion that at any stretch of imagination, it cannot be said that the assessee is conducting any business activity. The assessee is also not providing any service to any trade, commerce or industry. In those circumstances, this Tribunal is of the considered opinion that proviso to Section 2(15) of the Act is not applicable to the assessee. In view of the above discussion, the assessee is eligible for exemption under Section 11 of the Act for all the assessment years under consideration. Accordingly, the orders of the lower authorities for assessment years 2009-10*

and 2010-11 are set aside and the Assessing Officer is directed to grant exemption under Section 11 of the Act. The Assessing Officer is also directed to grant exemption under Section 11 of the Act for the assessment year 2008-09 also.”

5. In view of the above, this Tribunal is of the considered opinion that the assessee is entitled for exemption under Section 11 of the Act. Accordingly, the orders of the lower authorities are set aside and the Assessing Officer is directed to grant exemption under Section 11 of the Act.

6. Now coming to the cross-objections of the assessee, the only issue raised by the assessee is depreciation in respect of the assets, the cost of which was already allowed as application of income under Section 11 of the Act.

7. We have heard Shri V. Ravichandran, the Ld. representative for the assessee and Dr. Milind Madhukar Bhusari, the Ld. Departmental Representative. This issue was examined by this Tribunal for assessment years 2008-09 to 2010-11 and this Tribunal found that the assessee is not eligible for depreciation under Section 35 of the Act. In fact, this Tribunal has observed as follows:-

“11. We have considered the rival submissions on either side and perused the relevant material on record. Let's first take assessment year 2008-09. The assessee is claiming depreciation under Section 32 of the Act. For the purpose of convenience, we are reproducing Section 32 hereunder:-

“32 (1) In respect of depreciation of--

(i) buildings, machinery, plant or furniture being tangible assets ;

(ii) know-how, patents, copyrights, trade marks, licences, franchises or any other business or commercial rights of similar nature, being intangible assets acquired on or after the 1st day of April, 1998, owned, wholly or partly, by the assessee and used for the purposes of the business or profession the following deductions shall be allowed--

(i) in the case of assets of an undertaking engaged in generation or generation and distribution of power, such percentage on the actual cost thereof to the assessee as may be prescribed.

(ii) in the case of any block of assets, such percentage on the written down value thereof as may be prescribed:

Provided that no deduction shall be allowed under this clause in respect of--(a) any motor car manufactured outside India, where such motor car is acquired by the assessee after the 28th day of February, 1975 but before the 1st day of April, 2001, unless it is used--(i) in a business of running it on hire for tourists; or(ii) outside India in his business or profession in another country ; and(b) any machinery or plant if the actual cost thereof is allowed as a deduction in one or more years under an agreement entered into by the Central Government under section 42:

Provided further that where any asset referred to in clause (i) or clause (ii) or clause (iia), as the case may be, is acquired by the assessee during the previous year and is put to use for the purposes of business or profession for a period of less than one hundred and eighty days in that previous year, the deduction under this subsection in respect of such asset shall be restricted to fifty per cent. of the amount calculated at the percentage prescribed for an asset under clause (i) or clause (ii) or clause (iia), as the case may be:

Provided also that where an asset being commercial vehicle is acquired by the assessee on or after the 1st day of October, 1998, but before the 1st day of April, 1999, and is put to use before the 1st day of April, 1999, for the purposes of business or profession, the deduction in respect of such asset shall be allowed on such percentage on the written down value thereof as may be prescribed.

Explanation — For the purposes of this proviso,—
(a) the expression "commercial vehicle" means "heavy goods vehicle", "heavy passenger motor vehicle", "light motor vehicle", "medium goods vehicle" and "medium passenger motor vehicle" but does not include "maxi cab", "motor-cab", "tractor" and "road-roller"
;
(b) the expressions "heavy goods vehicle", "heavy passenger motor vehicle", "light motor vehicle", "medium goods vehicle", "medium passenger motor vehicle", "maxi-cab", "motor-cab", "tractor" and "road-roller" shall have the meanings respectively as assigned to them in section 2 of the Motor Vehicles Act, 1988 (59 of 1988).

Provided also that, in respect of the previous year relevant to the assessment year commencing on the 1st day of April, 1991, the deduction in relation to any block of assets under this clause shall, in the case of a company, be restricted to seventy-five per cent. of the amount calculated at the percentage, on the written down value of such assets, prescribed under this Act immediately before the commencement of the Taxation Laws (Amendment) Act, 1991.

Provided also that the aggregate deduction, in respect of depreciation of buildings, machinery, plant or furniture, being tangible assets or know-how, patents, copyrights, trademarks, licences, franchises or any other business or commercial rights of similar nature, being intangible assets allowable to the predecessor and the successor in the case of succession referred to in clause (xiii), clause (xiiib) and clause (xiv) of section 47 or section 170 or to the amalgamating company and the amalgamated company in the case of amalgamation, or to the demerged company and the resulting company in the case of demerger, as the case may be, shall not exceed in any previous year the deduction calculated at the prescribed rates as if the succession or the amalgamation or the demerger, as the case may be, had not taken place, and such deduction shall be apportioned between the predecessor and the successor, or the amalgamating company and the amalgamated company, or the demerged company and the resulting company, as the case may be, in the ratio of the number of days for which the assets were used by them.

Explanation — 1. Where the business or profession of the assessee is carried on in a building not owned by him but in respect of which the assessee holds a lease or other right of occupancy and any capital expenditure is incurred by the assessee for the purposes of the business or profession on the construction of any structure or doing of any work, in or in relation to, and by way of renovation or extension of, or improvement to, the building, then, the provisions of this clause shall apply as if the said structure or work is a building owned by the assessee.

Explanation — 2. For the purposes of this sub-section "written down value of the block of assets" shall have the same meaning as in clause (c) of sub-section (6) of section 43;

Explanation — 3. For the purposes of this sub-section, the expressions "assets" shall mean--
(a) tangible assets, being buildings, machinery, plant or furniture ;
(b) intangible assets, being know-how, patents, copyrights, trade marks, licences, franchises or any other business or commercial rights of similar nature.

Explanation — 4. For the purposes of this sub-section, the expression "know-how" means any industrial information or technique likely to assist in the manufacture or processing of goods or in the working of a mine, oil-well or other sources of mineral deposits (including searching for discovery or testing of deposits for the winning of access thereto) ;

Explanation — 5. For the removal of doubts, it is hereby declared that the provisions of this sub-section shall apply whether or not the assessee has claimed the deduction in respect of depreciation in computing his total income ;

(iia) in the case of any new machinery or plant (other than ships and aircraft), which has been acquired and installed after the 31st day of March, 2005, by an assessee engaged in the business of manufacture or production of any article or thing, a further sum equal to twenty per cent. of the actual cost of such machinery or plant shall be allowed as deduction under clause (ii) :

Provided that no deduction shall be allowed in respect of--(A) any machinery or plant which, before its installation by the assessee, was used either within or outside India by any other person ; or(B) any machinery or plant installed in any office premises or any residential accommodation, including accommodation in the nature of a guest-house ; or(C) any office appliances or road transport vehicles ; or(D) any machinery or plant, the whole of the actual cost of which is allowed as a deduction (whether by way of depreciation or otherwise) in computing the income chargeable under the head "Profits and gains of business or profession" of any one previous year ;

(iii) in the case of any building, machinery, plant or furniture in respect of which depreciation is claimed and allowed under clause (i) and which is sold, discarded, demolished or destroyed in the previous year (other than the previous year in which it is first brought into use), the amount by which the moneys payable in respect of such building, machinery, plant or furniture, together with the amount of scrap value, if any, fall short of the written down value thereof :

Provided that such deficiency is actually written off in the books of the assessee.

Explanation — For the purposes of this clause,--
(1) "moneys payable" in respect of any building, machinery, plant or furniture includes—

(a) any insurance, salvage or compensation moneys payable in respect thereof ;
 (b) where the building, machinery, plant or furniture is sold, the price for which it is sold, so, however, that where the actual cost of a motor car is, in accordance with the proviso to clause (1) of section 43, taken to be twenty-five thousand rupees, the moneys payable in respect of such motor car shall be taken to be a sum which bears to the amount for which the motor car is sold or, as the case may be, the amount of any insurance, salvage or compensation moneys payable in respect thereof (including the amount of scrap value, if any) the same proportion as the amount of twenty-five thousand rupees bears to the actual cost of the motor car to the assessee as it would have been computed before applying the said proviso ;

(2) "sold" includes a transfer by way of exchange or a compulsory acquisition under any law for the time being in force but does not include a transfer, in a scheme of amalgamation, of any asset by the amalgamating company to the amalgamated company where the amalgamated company is an Indian company or in a scheme of amalgamation of a banking company, as referred to in clause (c) of section 5 of the Banking Regulation Act, 1949 (10 of 1949), with a banking institution as referred to in sub-section (15) of section 45 of the said Act, sanctioned and brought into force by the Central Government under sub-section (7) of section 45 of that Act, of any asset by the banking company to the banking institution.

(2) Where, in the assessment of the assessee, full effect cannot be given to any allowance under sub-section (1) in any previous year, owing to there being no profits or gains chargeable for that previous year, or owing to the profits or gains chargeable being less than the allowance, then, subject to the provisions of sub-section (2) of section 72 and sub-section (3) of section 73, the allowance or the part of the allowance to which effect has not been given, as the case may be, shall be added to the amount of the allowance for depreciation for the following previous year and deemed to be part of that allowance, or if there is no such allowance for that previous year, be deemed to be the allowance for that previous year, and so on for the succeeding previous years.

In view of Section 32 of the Act, depreciation has to be allowed only in respect of an asset owned by the assessee and used for the purpose of business or profession. In this case, it is not a case of the assessee that they are not doing any business or profession. The assessee is categorically making a statement that they are charitable organization engaged itself in public utility service. Once the assessee claims that it is a charitable organization and not engaged in business or profession, this Tribunal is of the considered opinion that the

provisions of Section 32 have no application at all. The provisions of Section 32 in fact were not brought to the notice of this Tribunal while deciding the assessee's own case for assessment year 2007-08 and also the decision of Sri Mariamman Educational Health and Charitable Trust (supra). In fact, this Tribunal examined the issue elaborately in The Anjuman-E-Himayath-E-Islam v. ADIT in I.T.A. No.2271/Mds/2014 by order dated 2nd July, 2015 and found that when the assessee is eligible for exemption under Section 11 of the Act, it is not eligible for depreciation under Section 32 of the Act. For the purpose of convenience, we are reproducing the decision taken by the co-ordinate Bench of this Tribunal in The Anjuman-E-Himayath-E-Islam (supra):-

“5.2 We find this issue is elaborately discussed in the case of **Lissie Medical Institution Vs. CIT reported in [2012] 348 ITR 344(Ker.)** and held the issue against the assessee. While doing so, the Hon'ble Kerala High Court had considered the **Circular No.5P(LLX-6)** dated 19.06.1968 which has not been considered by the other decisions. The Circular No. 5P(LLX-6) is reproduced herein below for reference:-

1. Circular No. 5-P (LXX-6) of 1968, dated 19-6-1968.

Subject : Section 11—Charitable trusts—Income required to be applied for charitable purpose—Instructions regarding.

In Board's Circular No. 2-P(LXX-5) of 1963, dated the 15th May, 1963, it was explained that a religious or charitable trust claiming exemption under section 11(1) of the Income- tax Act, 1961, must spend at least 75 per cent of its total income, for religious or charitable purposes. In other words, it was not permitted to accumulate more than 25 per cent of its total income. The question has been reconsidered by the Board and the correct legal position is explained below.

2. Section 11(1) provides that subject to the provisions of sections 60 to 63 "the following income shall not be included in the total income of the previous year . . . ". The reference in sub-section (a) is invariably to "**income**" and not to "**total income**". The expression "**total income**" has been specifically defined in section 2(45) of the Act as "the total amount of income . . . computed in the manner laid down in this Act". **It would accordingly be incorrect to assign to the word "income" used in section 11(1)(a), the same meaning as has been specifically assigned to the expression "total income" vide section 2(45).**

3. In the case of a business undertaking held under trust, its "income" will be the income as shown in the accounts of the undertaking. Under section 11(4), any income of the business undertaking determined by the Income-tax Officer in accordance with the provisions of the Act, which is in excess of the income as shown in its accounts, is to be deemed to have been applied to purposes other than charitable or religious, and hence it will be charged to tax under sub-section (3). As only the income disclosed by the account will be eligible for exemption under section 11(1), the permitted accumulation of 25 per cent will also be calculated with reference to this income.

4. Where the trust derives income from house property, interest on securities, capital gains, or other sources, the word "income" should be understood in its commercial sense, i.e., **book income**, after adding back any appropriations or applications thereof towards the purposes of the trust or otherwise, and also after adding back any debits made for capital expenditure incurred for the purposes of the trust or otherwise. It should be noted, in this connection, that the amounts so added back will become chargeable to tax under section 11(3) to the extent that they represent outgoings for purposes other

than those of the trust. The amounts spent or applied for the purposes of the trust from out of the income computed in the aforesaid manner, should be not less than 75 per cent of the latter, if the trust is to get the full benefit of the exemption under section 11(1).

5. To sum up, the business income of the trust as disclosed by the accounts plus its other income computed above, will be the "income" of the trust for purposes of section 11(1). Further, the trust must spend at least 75 per cent of this income and not accumulate more than 25 per cent thereof. The excess accumulation, if any, will become taxable under section 11(1).

After considering the Circular, the Hon'ble Kerala High Court held as follows:-

"Held, that after writing off the full value of the capital expenditure on acquisition of assets as application of income for charitable purposes and when the assessee again claimed the same amount in the form of depreciation, such notional claim became a cash surplus available with the assessee, which was outside the books of account of the trust unless it was written back which was not done by the assessee. It was not permissible for a charitable institution to generate income outside the books in this fashion and there would be violation of section 11(1)(a). It was for the assessee to write back the depreciation and if that was done, the Assessing Officer would modify the assessment determining higher income and allow recomputed income with the depreciation written back by the assessee to be carried forward for subsequent years for application for charitable purposes."

Further Hon'ble Calcutta High Court has held in the case **DCIT VS. Girdharilal Shewnarain Tantia Trust** reported in [1993] 199 ITR 15(Cal.) that **"The "income" contemplated by the provisions of section 11 is the real income and not the income as assessed or assessable.** Respectfully following the decision of the Hon'ble Kerala High Court and taking cue from the decision of the Hon'ble Calcutta High Court, we do not find any hesitation to confirm the order of the Ld. CIT(A) and also the views expressed by him in his order. Accordingly this appeal is held in favour of the Revenue."

12. Apart from that, when the assessee claims the cost of the capital expenditure as exemption under Section 11 of the Act, then the cost of the capital asset becomes NIL. Admittedly, depreciation under Section 32 of the Act has to be allowed only on written down value of the asset. When the written down value of the asset becomes NIL since the entire cost was allowed as application of income under Section 11 of the Act, this Tribunal is of the considered opinion that there cannot be any further claim for deduction under Section 32 of the Act. In view of the above, this Tribunal is of the considered opinion that the assessee is not eligible for deduction under Section 32 of the Act towards depreciation. However, it is made clear that the assessee is eligible for exemption under Section 11 of the Act for all the assessment years under consideration.”

8. Apart from this, this Tribunal in the case of Music Academy Madras v. DDIT(E) in I.T.A. No. 1098/Mds/2015 dated 22/4/2016 examined this issue and found that depreciation under Section 32 of the Act falls under Chapter IV of the Act which provides for computation of total income. Section 11 of the Act falls under Chapter III of the Act which deals with income which does not form part of total income. Therefore, this Tribunal found that provisions of Section 32 of the Act cannot override the provisions of Section 11 of the Act. In other words, the provisions of Section 11 which falls under Chapter III would override the provisions of Section 32 of the Act which provides for depreciation which falls under Chapter IV of

the Act. In fact, this Tribunal observed in Music Academy Madras (supra) as follows:-

“9. Income-tax Act provides for procedure and method for computing income under different heads. Depreciation is provided under Section 32 of the Act when computing income under the head “Income from business or profession”. In respect of other heads, no depreciation is provided under the scheme of the Act. The income of the trust is exempted on application and accumulation as provided under the Act. If any violation, the income of the trust is liable for taxation, in such a case, if the income is assessed as income from business or profession, the assessee may be eligible for depreciation. The assessee is certainly not entitled for depreciation, when the income was exempted on application or accumulation as provided under the scheme of the Act. The charitable institution under the scheme of Income-tax Act is on a different footing. The entire income of the assessee-trust from the property held under trust do not form part of total income under Section 11 of the Act provided the same is applied for charitable object. Section 11 of the Act also provides for accumulation of 15% of income for future application for the object of the trust. Therefore, the business and charitable institution are two different categories in the scheme of Income-tax Act. This Tribunal is of the considered opinion that the customary way of computing income or the commercial principle of computing income cannot override the specific provision of Income-tax Act. The Income-tax Act does not provide for allowing depreciation other than the asset which was used for business or profession. There is no other provision in the Income-tax Act other than Section 32 of the Act for allowing depreciation. Therefore, the claim of the assessee that the depreciation has to be allowed on commercial principle or customary principle of

computation of income is contrary to the specific provision, namely, Section 32 of the Act.

10. *The next question arises for consideration is when there is a conflict between customary practice, commercial principle and provisions of Section 32, which one will prevail? The obvious answer to this question is the statutory provision, namely, Section 32 of the Act will prevail over the customary practice and commercial principle. Therefore, even on customary practice or commercial principle whereby the assessee claims depreciation while computing the income, Section 32 of the Act is a specific provision under Income-tax Act, which is contrary to commercial principle or customary practice. Therefore, this Tribunal is of the considered opinion that Section 32 will prevail over the customary practice or commercial principle. Hence, the assessee is not eligible for depreciation in respect of building, plant, machinery, etc. which are not used for the purpose of business or profession.*

11. *Even assuming for argument sake that the assessee was doing business, then the assessee is not eligible for exemption under Section 11 of the Act and as rightly submitted by the Ld. Departmental Representative, the registration under Section 12AA of the Act has to be cancelled under Section 12AA(3) of the Act. Moreover, the assessee will not be eligible for exemption under Section 11 of the Act if it is carrying on any business activity. Therefore, this Tribunal is of the considered opinion that the assessee is not eligible for depreciation.*

12. *As rightly submitted by the Ld. Departmental Representative, in view of Section 11(4) & (4A) of the Act, if the property held under trust is a business undertaking, then the income of the business undertaking, which was so held as property held under trust, has to be computed by applying the provisions of Income-tax Act under Chapter IV.*

While computing income of the business undertaking, all expenditure, including depreciation, has to be allowed and the income of such business undertaking which was held under Trust has to be allowed as exemption under Section 11 on application and accumulation. In this case, as rightly submitted by the Ld. D.R., no business undertaking was held under trust as provided under Section 11(4) & (4A) of the Act. The assessee is claiming depreciation in respect of asset which was used as tool for carrying out charitable object of the institution. When the asset was used as tool for carrying out the object of the charitable institution, such activity cannot be construed as a business or profession of the assessee. Therefore, Section 32 of the Act is not applicable in this case."

9. In view of the above, the assessee is not eligible for depreciation in respect of the assets, the cost of which has already been allowed as application of income under Section 11 of the Act. Therefore, this Tribunal do not find any reason to interfere with the order of the lower authority and accordingly the same is confirmed.

10. In the result, both the appeals of the Revenue as well as the cross-objections of the assessee are dismissed.

Order pronounced on 31st May, 2017 at Chennai.

sd/-

(डि.एस. सुन्दर सिंह)

(D.S. Sunder Singh)

लेखा सदस्य/Accountant Member

चेन्नई/Chennai,

दिनांक/Dated, the 31st May, 2017.

sd/-

(एन.आर.एस. गणेशन)

(N.R.S. Ganesan)

न्यायिक सदस्य/Judicial Member

Kri.

आदेश की प्रतिलिपि अग्रेषित/Copy to:

1. अपीलार्थी/Appellant
2. प्रत्यर्थी/Respondent
3. आयकर आयुक्त (अपील)/CIT(A)-17, Chennai-34
4. आयकर आयुक्त/CIT (Exemptions), Chennai
5. विभागीय प्रतिनिधि/DR
6. गार्ड फाईल/GF.