

**IN THE INCOME TAX APPELLATE TRIBUNAL
'C' BENCH : BANGALORE**

**BEFORE SHRI ABRAHAM P GEORGE, ACCOUNTANT MEMBER
and
SHRI VIJAY PAL RAO, JUDICIAL MEMBER**

1. ITA No.1022/Bang/2014
(Assessment years: 2010-10)
2. ITA No.1023/Bang/2014
(Assessment years: 2010-11)

1. Podar Education & Sports Trust,
103/1, Basavanpur,
Off.Bannerghatta Road,
Bangalore.
PAN: AAATP9243N

2. Podar Education Trust,
103/1, Basavanpur,
Off.Bannerghatta Road,
Bangalore.
PAN: AAATP9243N

... Appellant

Vs.

Asst. Director of Income-tax (Exemptions)-
17(2)
Bangalore.

... Respondent

Assessee by: Shri R.S.Samria, CA.
Respondent by: Shri Sunil Kumar Agarwala, JCIT(DR)

Date of hearing : 27/08/2015
Date of pronouncement: 30/09/2015.

O R D E R

Per VIJAY PAL RAO, JM:

These two appeals by two assesseees are directed against two separate orders dated 5/12/2013 and 6/1/2014 of the

CIT(A)-V, Bangalore, respectively for the assessment years 2010-11.

2. Common grounds have been raised in these appeals. The grounds raised in ITA No.1023/Bang/2014 are as under:

1. *"On the facts and in the circumstances of the case, the Ld. Commissioner of Income Tax (Appeals) - V. Bangalore, has erred in confirming the order of the Ld. Assessing Officer [Ld. Assistant Director of Income-tax (Exemption), Circle 17(2), Bangalore], which has disallowed the claim of depreciation of Rs.74,96,186/- (vide his assessment order dated 25-04-2012 for the Assessment Year 2010-11), vide his order dated 06-01-2014, which is quite illegal, arbitrary, unjustified, unreasonable, factually incorrect, contrary to the provisions of law, bad in law and as such the same should be allowed, the said disallowance be deleted and the said assessment order be directed to be rectified accordingly.*
2. *On the facts and in the circumstances of the case, the learned Commissioner of Income Tax (Appeals) -V, Bangalore, has erred in considering advance fee received k for subsequent year (previous year 2010-11) relevant to assessment year 2011-12 from students at Rs.2,81,90,128/- as the income of previous year 2009-10 itself and directing AO to recompute the income of appellant trust, application of income for exemption and surplus, if any, vide his order dated 06-01-2014 for the Assessment Year 2010-11 which, in view of the facts, Audited Balance Sheet and Accounting Standards, Accepted Accounting Principles and the provisions of section 11 and that too, without giving any opportunity to your appellants and as such the same is quite illegal, arbitrary, unjustified. Unreasonable, factually incorrect, contrary to the provisions of law, bad in law and as such the same should not be considered as income and should be cancelled or deleted and rectified accordingly.*
3. *Any other grounds of appeal which your appellant may raise with the permission of the Hon'ble Income Tax Appellate Tribunal, Bangalore.*
4. *Your appellant reserves the right to add, delete, alter*

and/or amend all or any of the grounds of appeal.”

3. Since the issues involved in these two appeals are common, the facts giving rise to the dispute/issues are common, the finding of the CIT(A) in the impugned orders are also identical, therefore, for the sake of convenience, these two appeals are clubbed together for the purpose of hearing and are being disposed of by this consolidated order.

4. The facts in the case of Podar Education Trust are considered for adjudication of the common issues. The assessee is a charitable trust and registered u/s 12AA of the Income-tax Act, 1961. The assessee was carrying on the education activity and during the previous year relevant to the assessment year under consideration, the assessee received gross receipts of Rs.14,57,81,212/- out of which Rs.14,27,88,081/- was applied towards the object of educational activities of the assessee and the same was claimed as exempt u/s 11. While completing the assessment u/s 143(3) on 25/4/2012, the AO disallowed depreciation on school fixed assets on the ground that the assessee had already claimed exemption in respect of expenditure on the fixed assets being application of income u/s 11 of the ITA ct.

5. The assessee challenged the action of the AO before the CIT(A). The CIT(A) while adjudicating the issue being the claim

of depreciation on the asset of the trust, directed the AO that depreciation on the assets where cost/expenses has been claimed as application of income during the year shall be excluded. The CIT(A) has further proposed to treat the amount received by the assessee on account of advance fee as income of the assessee for the year under consideration. Accordingly, the CIT(A) directed the AO to recomputed the income of the assessee trust application of income for exemption and the surplus if any, by treating the advance fee received relating to future period of academic session as income for the year under consideration.

Ground No.1 regarding disallowance of depreciation:

6. Before us, learned AR of the assessee has submitted that though the CIT(A), on principle, has accepted the claim of depreciation, however, while giving direction to the AO, he has held that addition to the fixed assets during the year shall be excluded for the purpose of depreciation. The learned AR of the assessee has relied upon the judgment of the Hon'ble Bombay High Court in the case of *CIT vs. Institute of Banking Personnel Selection* (264 ITR 110) and submitted that the Hon'ble High Court has taken a view that depreciation was allowable even on those assets whose actual cost has been allowed as deduction being application of income u/s 11 in computing income of the earlier years. The learned AR of the assessee has then relied upon the judgment of the Hon'ble jurisdictional High Court in the case of *CIT vs. Society of Sisters of St.Anne* (146 ITR 28) and submitted that the Hon'ble High Court has held that depreciation

is a necessary deduction for preserving the corpus of the trust for deriving the income. Therefore, the amount of depreciation debited to the accounts of the charitable institution is to be deducted to arrive at the income available for application to charitable and religious purpose. The learned AR of the assessee has also relied upon the following decisions:

- i. *CIT vs. Market committee* (330 ITR 16) (P&H)
- ii. *CIT vs. Tiny Tots Education Society* (330 ITR 21) (P&H)

The learned AR of the assessee then submitted that by following the above decisions, co-ordinate bench of this Tribunal in the case of *ACIT vs. Adichunchangiri Sikshana Trust* in ITA Nos.774 & 775/Bang/2011 dated 3/8/2012 has decided this issue in favour of the assessee. He has pointed out that a similar view has been taken by the Chennai Bench of the Tribunal and Delhi Bench of the Tribunal in a series of decisions. Thus, the learned AR of the assessee has submitted that the authorities below have committed an error by disallowing the claim of depreciation.

7. On the other hand, the learned departmental representative has relied upon the orders of the authorities below and submitted that the AO has relied upon the judgment of the Hon'ble Supreme Court in the case of *Escort Ltd. & another vs. Union of India & Others* (199 ITR 43).

8. We have considered the rival submissions as well as the relevant material on record. At the outset, we note that this issue

is covered in favour of the assessee by the judgment of the Hon'ble Bombay High Court in the case of *Institute of Banking Personnel Selection* (supra) as under:

"4. Question No. 2 herein is identical to the question which was raised before the Bombay High Court in the case of *Director of Income Tax (Exemption) v. Framjee Cawasjee Institute* (1993) 109 CTR 463 (Bom). In that case, the facts were as follows: The assessee was the Trust. It derived its income from depreciable assets. The assessee took into account depreciation on those assets in computing the income of the Trust. The Income Tax Officer held that depreciation could not be taken into account because, full capital expenditure had been allowed in the year of acquisition of the assets. The assessee went in appeal before the Assistant Appellate Commissioner. The appeal was rejected. The Tribunal, however, took the view that when the Income Tax Officer stated that full expenditure had been allowed in the year of acquisition of the assets, what he really meant was that the amount spent on acquiring those assets had been treated as 'application of income' of the Trust in the year in which the income was spent in acquiring those assets. This did not mean that in computing income from those assets in subsequent years, depreciation in respect of those assets cannot be taken into account. This view of the Tribunal has been confirmed by, the Bombay High Court in the above judgment. Hence, Question No. 2 is covered by the decision of the Bombay High Court in the above judgment. Consequently, Question No. 2 is answered in the affirmative i.e., in favour of the assessee and against, the department."

We further note that this view has been reiterated by the Hon'ble High Court in the case of *Lilavathi Kirthilal Mehta Medical Trust &*

others (229 Taxman 276) wherein it has been held that prior to amendment vide Finance Act,2014 w.e.f.1/4/2015 depreciation on capital asset would be allowed as deduction in computing income under section 11.

9. We further note that the co-ordinate bench of this Tribunal in the case of *Adichunchangiri Sikshana Trust* (supra) has held in paragraphs 13 & 14 as under:

"13. We have heard the rival submissions and perused the materials on record. The Tribunal in the assessee's own case for the assessment year 2006-07 at paragraph 7 of its order has decided the issue in favour of the assessee. The relevant finding of the Tribunal reads as follows:

'7. We have heard both the parties. We have in the earlier para referred to the findings of the Hon'ble Bombay High Court in the case of Institute of Banking [2003] 264 ITR 110 (Bom). We have also gone through the decision of the jurisdictional High Court. The Hon'ble jurisdictional High Court held that the amount of depreciation debited to the account of charitable institutions is to be deducted to arrive at an available income from charitable or religious purposes. Following the decision of the jurisdictional High Court, we therefore, hold that the depreciation is to be deducted to arrive at an income available to charitable and religious purposes.'

14. The above order of the Tribunal has not been reversed by the Hon'ble jurisdictional High Court. The facts for the assessment year 2007-08 and 2008-09 being identical to the facts considered by the Tribunal for the assessment year 2006-07, (I.T.A. No. 775/Bang/2009 dated January 29, 2010), we follow the co-ordinate Bench order of the Tribunal in the

assessee's own case for the assessment year 2006-07 and hold that the Commissioner of Income-tax (Appeals) is justified in directing the Assessing Officer to grant depreciation in respect of the assessment years 2007-08 and 2008-09. "

Following the judgment of the Hon'ble Bombay High Court as well as the decision of the co-ordinate bench of the Tribunal (Bangalore), we hold that the assessee is entitled for depreciation u/s 32 of the IT Act on the assets cost of which has already been claimed as application of income.

10. Ground No.2 regarding treating advance fee received from the students for the future academic year as income for the accounting year under consideration. The learned AR of the assessee submitted that the assessee is following accounting policy wherein income is recognized only when it becomes due and therefore, the tuition fee and other charges received as curriculum, laboratory fee, science fee etc., is recognized over the period of instruction. Any fee received in advance for the next academic/accounting year has not been recognized as income for the year in which it is received but the same is shown as liability in the balance sheet. Such fee is recognized as income in the accounts of the next accounting year to which it relates. Similarly, the fee relating to current year, if any, due from students at the end of the accounting year is also recognized as income of the year though the same has not been received during the year. The learned AR of the assessee has referred to the

accounting standard 9 issued by the Institute of Chartered Accountants of India and submitted that as per appendix 2 to, the accounting standard 9, the revenue arising from the tuition fee should be recognized over the period of instruction. If the academic year of the school and the accounting years are different then, it is possible that some fees may be received in advance or is outstanding at the end of the accounting year. The assessee is showing the advance fee received from students in the balance-sheet. Similarly, the expenses that arise in the course of ordinary activities of the school are debited only to the extent of the financial year relevant to the assessment year on the basis of the criteria and principle of accrual. Thus, under the accrual basis of accounting, the expenses are recognized on the basis of identification of the revenue transaction where the cost directly associated with the revenue recognized during the relevant period are considered as expenses and charged to the income for the period. The learned AR of the assessee has submitted that both revenue as well as expenses is recognized on accrual basis as well as on the basis of matching concept. When the assessee is following accrual principle of accounting as per the accounting standard, then advance fee received by the assessee for the future academic year which is outside the accounting/previous year relevant to assessment year under consideration cannot be treated as income of the assessee for the year under consideration. The learned AR of the assessee has referred to para.15.3 of the impugned order of the CIT(A) and

submitted that the assessee has shown Rs.2,81,90,128/- on account of advance fee in the balance sheet as on 31/3/2010 therefore, the assessee is consistently following accrual basis of accounting. The learned AR of the assessee has also referred to the notes forming part of the accounts and submitted that the accounts of the assessee have been prepared in accordance with generally accepted principle as a going concern and on mercantile system. As the assessee is recognising the fee pertaining to the financial year on accrual basis as income of the year under consideration, fee received in advance for the following financial year/term have been recorded in the books of account and are disclosed as advance fee under funds and liabilities. The authorities below have not disputed the consistent accounting method and policy adopted by the assessee. The taxing authorities cannot disturb the consistent accounting policy and method when there is nothing on record to warrant a departure from the consistently accepted account method and policy.

Alternatively, learned AR of the assessee has submitted that the order of the CIT(A) enhancing the assessment is not sustainable as no show cause notice was given to the assessee prior to making enhancement of the assessment.

11. On the other hand, learned departmental representative has relied upon the orders of the CIT(A) and submitted that advance fee received by the assessee is in the nature of income from use of the asset of the trust and therefore, the said income

was available with the assessee for application for charitable purpose and if the assessee has failed to apply the said income for charitable purpose, then the same is to be taxed as income of the assessee as per provisions of sec.11 of the Act.

12. There is no dispute that the assessee has shown the gross receipt/income at Rs.14,57,81,212/- for the year under consideration. Apart from this amount of receipt, the assessee has also shown a sum of Rs.2,81,90,128/- on account of advance fee in the balance-sheet as on 31/3/2010. While completing the assessment u/s 143(3), the AO has accepted this amount of advance fee being a balance-sheet item as pertaining to the future period being the next academic session. The CIT(A), while deciding the appeal of the assessee, has also enhanced the assessment by directing the AO to treat this advance fee received by the assessee pertaining to the next academic session which is outside the previous year relevant to assessment year under consideration as income of the year under consideration. The findings of the CIT(A) are given in para.15.3 as under:

"15.3 The balance sheet as on 31.3.2010 clearly shows that the appellant received Rs.281,90,128/- on account of advance fee, which has not been treated as income of the trust. In my considered view, the advance fees (relating to future periods/terms or academic session) should be treated as income of the appellant from property held under trust, when the trustees have charged the students and are free to spend/apply the same for the educational purposes of the trust, during the year itself. The Assessing Officer is accordingly directed to re-compute the income' of the appellant trust, application of income for exemption, and surplus if any, which may be exempt u/s 11(1)(a) or 11(2) as the case may be. While computing the application (which is different from expenditure) the amount relating

to expenses out of loans and unpaid bills shall be excluded. It is directed accordingly. "

Thus it is clear from the relevant part of the impugned order that the CIT(A) has enhanced the assessment without giving any show cause notice to the assessee and therefore, the order of the CIT(A) is not sustainable under the provisions of se.251(1)(a) and 251(2). There is no quarrel on the point that the powers of the CIT(A) are co-terminus with that of the AO and while disposing of the appeal, the CIT(A) can enhance assessment. However, this power of the CIT(A) can be exercised subject to compliance of sub-sec.(2) of sec.251 which reads as under:

"251(2) The Commissioner (Appeals) shall not enhance an assessment or a penalty or reduce the amount of refund unless the appellant has had a reasonable opportunity of showing cause against such enhancement or reduction."

Therefore, it is a mandatory condition that the CIT(A) shall grant a reasonable opportunity of showing cause against such enhancement to the assessee before enhancing assessment in the appellate proceedings. In the case in hand, the CIT(A) has not complied with the provisions of sub-section (2) of section 251 and therefore, the order of the CIT(A) on this issue is not sustainable. Even otherwise, we note that the assessee is following mercantile system of accounting which is based on accrual. The AO has not disputed the accounting policy and method of accounting adopted by the assessee consistently. The assessee has been showing the advance fee received for the next academic session which is outside the previous year in which such advance fee is received.

Similarly, the assessee is also not claiming any expenditure which has been paid by the assessee during the year but pertains to next academic session which is outside the previous year in which such expenditure is paid. Therefore, the assessee is following a uniform accounting policy based on accrual and arising of income and expenditure. There is no dispute that even in the case of trust the income has to be understood in its commercial sense and there can be no computation of such income until the expenditure which is necessary for the purpose of earning the receipt is deducted there-from. This concept of accounting is well recognised by the accounting standard as well as by the judicial precedents of Hon'ble Supreme Court as well as High Court. Accordingly, on merits also, we do not subscribe the view taken by the CIT(A) on this issue when the assessee is consistently following mercantile/accrual basis of accounting both for the income as well as for expenditure recorded in the books of account. Therefore, we set aside the impugned order of the CIT(A) qua this issue.

13. Since the facts as well as the issue involved in both the appeals are identical, therefore, our finding on these issues though based on the facts of the appeal in ITA No.1023 also dispose of the appeal in ITA No.1022/Bang/2014 in the same terms.

14. In the result, the appeals of the assessee are allowed.

Pronounced in the open court on 30th September, 2015.

sd/-
(Abraham P George)
ACCOUNTANT MEMBER
eksrinivasulu

sd/-
(Vijay Pal Rao)
JUDICIAL MEMBER

Copy to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR, ITAT, Bangalore.
6. Guard file

By order

Assistant Registrar
Income-tax Appellate Tribunal
Bangalore