

आयकर अपीलीय अधिकरण, इंदौर न्यायपीठ, इंदौर
**IN THE INCOME TAX APPELLATE TRIBUNAL, INDORE
BENCH, INDORE**

श्री सी.एम.गर्ग, न्यायिक सदस्य तथा श्री ओ.पी.मीना, लेखा सदस्य के समक्ष
**BEFORE SHRI C.M.GARG, JUDICIAL MEMBER
AND SHRI O.P.MEENA, ACCOUNTANT MEMBER**

1.आ.अ.सं./ I.T.A. No. 139/Ind/2015 2. I.T.A. No. 150/Ind/2015
निर्धारण वर्ष /Assessment Year:2011-12

1. N.T. Thomas Memorial Educational and Development Society, Indore. 2. ACIT- 1(2)	v.	1. ACIT- 1(2) 2. N.T. Thomas Memorial Educational and Development Society, Indore.
अपीलार्थी /Appellant		प्रत्यर्थी /Respondent
स्था.ले.सं./PAN:AAAN-5198F		

अपीलार्थी की ओर से/Appellant by	Shri S.S. Deshpande, C.A.
प्रत्यर्थी की ओर से/Respondent by	Shri Md. Javed, D.R.

सुनवाई की तारीख/Date of hearing	27.03.2017
उद्घोषणा की तारीख/Date of pronouncement	29.03.2017

आदेश /O R D E R

PER O.P. MEENA, ACCOUTANT MEMEBR.

These are cross appeals filed by the assessee as well as Revenue are directed against the order of the CIT(A)-1, Indore, dated 9.10.2014 for the assessment year 2011-12 which in turn

has been arisen out of the order u/s 14(3) dated 7.2.2014 passed by the ACIT-1(2) (hereinafter referred to as the AO). The Grounds of appeal as taken by the assessee in I.T.A. No. 139/Ind/2015.

- 1. The Ld. CIT(A) has erred in not allowing the benefit of carry forward of loss.*
- 2. The Ld. CIT(A) has erred in not accepting the claim of the assessee u/s 11 since the application registration was made and all the necessary compliances were also made. On this account it should be presumed that the Institution be deemed to be treated as a registered institution u/s 12A/12AA and the loss be carry forward.*

The Revenue has taken following grounds of appeal in ITA No. 150/IND/2015 as under:

- 1. On the facts and circumstances of the case, the Ld. CIT(A)-1, erred in deleting the addition of Rs. 40,00,000/- made u/s 68 of the I.T. Act, 1961 being unexplained credit especially when at the time of completing the assessment the assessee failed to explain the nature and source up-to the satisfaction of the Assessing Officer?*
- 2. On the facts and circumstances of the case, whether the Ld. CIT(A) has erred in deleting the addition of Rs. 3,98,892/- made by the AO on account of excess depreciation holding that the assessee is entitled for allowing depreciation on the higher rate 30% as against 15% allowable as per Rule 5 of Income-tax Rules.*

Now we will take up I.T.A.No. 139/IND/2015.

3. Ground No. 1 relates to not allowing the benefit of carry forward of losses.

4. Briefly stated the facts of the case are that the assessee has furnished its return of income on 27.09.2011 declaring the total loss of Rs. 1,17,97,731/- which was assessed u/s 143(3) at total loss of Rs. 54,25,934/-. The assessee is an registered educational trust. The CIT(A) observed that the entire income is held to be exempt , there is no provision for any carry forward of loss, because if income of any kind in such cases is held as exempt in these cases, no purpose could be served by carry forward of losses from one year to another year, because they could not be set off against any income as, entire income has been made exempt under this Section, without any limitation or restriction . Therefore, carry forward of losses, which are not provided under the provision of Section 10(23C)(vi) of the I.T. Act, for the reasons mentioned above, would be an exercise in futility. The case law referred to by appellant in cases of Gujrati Samaj 204 Taxman 151 [MP] and judgment of Bombay High Court reported in 264 ITR 110 [Bomb.], are with reference to Section 11 of the Act and are not applicable to the provision of Section 10(23C)(vi) of I.T. Act. Accordingly, the action of the AO was upheld.

5. Being aggrieved, the assessee has filed an appeal before us. The Ld. Counsel for the assessee submitted that the lower authorities has disallowed the carry forward of loss by holding that the assessee's income is exempt u/s 10(23C)(vi) and there is no provision in the Act for any carry forward of loss from one year to another year because they could not be set off against any income at the income in succeeding year is also exempt. The Ld. CIT(A) as also distinguished the case laws relied by the assessee in the case of Gujrati Samaj of Hon'ble MP High Court 204 Taxman 151 by observing that these cases were decided with reference to Section 11 of the Act, hence not applicable to the provision of Section 10(23C)(vi) of the Act. However, the provisions of Section 11 are also applicable to charitable trust, where the income of the assessee is held to be exempt. Similarly the provisions of Section 10(23C)(vi) is also akin to the Section 11 of the I.T. Act. Therefore, the ratio of decision of Hon'ble Jurisdictional High Court in the case of Gujrati Samaj (Supra) is duly applicable to the present case of the assessee.

6. On the other hand the Ld. DR relied on the orders of the lower authorities.

7. We have considered the facts, rival submissions and perused the material available on record. We find that the Ld. Counsel for the assessee has relied on the decision of the Hon'ble Jurisdictional High Court in the case of CIT v. Gujrati Samaj [2012] 349 ITR 559 (MP) wherein para 8 of the said decision the Hon'ble High Court has observed as under:

“Coming to the next question as to whether the order of the Tribunal holding that the assessee is entitled for carry forward and set off excess of expenditure incurred during the year over its income. We find that in view of Section 11(1)(a) of the Act, it cannot be said that the expenditure incurred in the earlier year cannot be met out of the income of the subsequent year and utilization of such income for meeting the expenditure of the earlier year would not amount to such income being applied for charitable or religious purposes. Having regard to Section 11(1)(a) of the Act, in our view, when the income of the trust is used or put to use to meet the charitable or religious purposes, it is applied for charitable purpose and the said application of the income for charitable or religious purposes takes place in the year in which the income for charitable and religious purposes have been incurred in the earlier year and the said expenses are adjusted against the income of a subsequent year, the income of that year can be said to have been applied for charitable and religious purposes in the year in which expenses incurred for charitable and religious purposes had been adjusted. There are no words of limitation in Section 11(1)(a) of the Act explaining that the income should have been applied for charitable or religious purposes only in the year in which the income had arisen [see CIT v. Maharana of Mewar Charitable Foundation, [1987] 164 ITR 439 (Raj.)]. In our considered view, the Tribunal has rightly applied the ratio of the judgment and order passed by the Division Bench of the Rajasthan High Court in CIT v. Maharana

of Mewar Charitable Foundation, [1987] 164 ITR 439 (Raj.) and committed no error in holding this issue in favour of the assessee.”

8. We are of the view that excess expenditure incurred for charitable purposes in the year is liable to be adjusted against the income of the succeeding year which computing taxable income of the succeeding year. Since, the provision of Section 10(23C)(vi) and Section 11 are appearing on the chapter 3 under the head “exempt income” similarly the provision of Section 10(23C)(vi) falls under that Chapter 3 and both Section allow exemption of income, and deals with charitable trusts, hence, provision has the similarity. Further, the Hon'ble High Court in above case has held that the expenditure of the earlier year can be set off against the income of subsequent year. Therefore, respectfully following decision of the Hon'ble Jurisdictional High Court in the case of Gujrati Samaj (Supra), the claim of excess expenditure of the assessee is directed to be allowed in subsequent year subject to actual expenditure/deficit against the receipts of succeeding year, if remained available after determining the final assessed income and giving appeal effect. This grounds of appeal, is accordingly allowed.

9. Ground No. 2 relates to not accepting the claim of assessee u/s 11 of the Act.

10. The Ld. Counsel for the assessee has not pressed this ground, therefore, the same is treated as dismissed as not pressed.

11. In the result, the appeal of the assessee is partly allowed.

I.T.A. No. 150/IND/2015 revenue's appeal.:

12. Ground no. 1 relates to deletion of addition of Rs. 40,00,000/- made u/s 68 of the Act.

13. Briefly stated the facts are that, the AO made an addition of Rs. 40,00,000/- on the ground that the assessee has shown M/s Nitin & Company as its sundry creditor for Rs. 40,00,000/-, but M/s Nitin & Company has denied of any such credit balance. However, during the course of appellate proceedings it was explained that M/s Nitin & Company has carried out the construction of school as a contractor for Rs. 84,00,000/- for the assessee. A part of this bill is paid in the year under consideration as advance on which TDS was also deducted in the year 2011. For that reason alone a part of this amount of Rs. 40,00,000/- was shown by the assessee as outstanding credit balance in the name of Nitin & Company in assessment year

2011 itself. The CIT(A) after examining the facts, deleted the addition of Rs. 40,00,000/- made u/s 68 of the Act.

14. The ld. DR relied on the order of the AO.

15. The Ld. Counsel submitted that M/s Nitin & Company has carried out the construction work for the assessee for the total amount of Rs. 84,00,000/-. The bill received on 4.4.2011. It was submitted that a journal entry by debiting to the building account and crediting the contractor's account was passed. The bill has been received on 4.4.2011 which clearly shows that the building was completed up to 31.03.2011 to the tune of Rs. 85,00,000/-. The assessee has made the payment for this bill by DD issued directly by the bank from the loan account on 11.04.2011 and the T.D.S. payment is made on 15.4.2011. Therefore, the credit to the contractor was correctly given as per his bill and there is no question of making any addition as a cash credit. Even otherwise, this was merely a journal entry and there is no question of making such addition.

16. We have considered the facts, rival submissions and perused the material available on record. We find that the assessee had paid a sum of Rs. 44,00,000/- as advance for the contract work done for Rs.84,00,000/- and has provided an

amount of Rs. 40,00,000/- by debiting the building account and crediting the contractor's account. The bill of Rs. 84,00,000/- was received on 4.4.2011. We find that this is a journal entry of payment of Rs. 40,00,000/- which was made through banking channel. Therefore, we do not find any infirmity in the order of the CIT(A). Accordingly, this grounds of appeal of the Revenue is rejected.

17. Ground no. 2 of Revenue relates to deletion of Rs. 3,98,892/- made on account of excess depreciation holding that the assessee is entitled for allowing the depreciation of higher rate of 30% as against 15% allowable.

18. Facts from the assessment order and appellate order reveals that the AO found that the assessee has claimed depreciation of Rs. 7,97,786/- being @ 30% on buses owned and used by the assessee as convenience to and from the students of the institution, whereas higher rate of depreciation is allowed to buses which are used for transport business, hence, depreciation so claim was restricted to 15% rate as applicable for machinery. This resulted in disallowance of Rs. 3,98,892/-.

19. Being, not satisfied, the assessee filed an appeal before the Ld. CIT(A). The Ld. CIT(A) deleted the disallowance so made by

holding the buses were used as profession line for safety and security of children, on which higher rate of depreciation is eligible.

20. Being aggrieved the Revenue filed this appeal before the Tribunal. The Ld. Senior DR relied on the order of the AO, and submitted that buses are used as conveyance of students of institution, hence, the AO was correct in making such disallowance.

21. Per contra, the Ld. AR supported the order of the Ld. CIT(A) and submitted that buses were used in a profession, hence, Ld. CIT(A) was right in deleting the disallowance.

22. We have heard the rival submissions and have gone through the orders of the lower authorities, and perused the material available on record. We find that the assessee is owner of the buses. These buses are being used for transport of the students of institution to and fro residence of children to the classroom only which cannot be said as being used for business transport business or running them on higher. We find that higher depreciation will also be admissible on motor Lorries used in the assessee's business of transportation of goods on hire. The higher rate of depreciation however will not apply if the motor buses,

motor lorries etc. are used in some other non-hiring business of the assessee. Therefore, the assessee is not entitled to claim of higher rate of depreciation. Accordingly, this grounds of appeal is allowed in favour of revenue and order of Ld. CIT(A) on this issue is set aside.

23. In the result the appeal of the Revenue is partly allowed.

24. In the result, the appeal of the Assessee as well as Revenue is partly allowed.

25. The order pronounced in the open court on 29 .03. 2017.

Sd/-

Sd/-

(सी.एम.गर्ग)/(C.M. GARG)

(ओ.पी.मीना) /(O.P.MEENA)

न्यायिक सदस्य /JUDICIAL MEMBER

लेखा सदस्य /ACCOUNTANT MEMBER

Dated: 29th March,2017.

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