आयकर अपीलीय अधिकरण, 'ए' न्यायपीठ, चेन्नई

IN THE INCOME TAX APPELLATE TRIBUNAL

"A" BENCH, CHENNAI

श्री एन.आर.एस. गणेशन, न्यायिक सदस्य एवं
श्री ए. मोहन अलंकामणी, लेखा सदस्य केसमक्ष

BEFORE SHRI N.R.S. GANESAN, JUDICIAL MEMBER AND
SHRI A. MOHAN ALANKAMONY, ACCOUNTANT MEMBER

आयकर अपील सं./**ITA No.1602/Mds/2014**
निर्धारण वर्ष **/** Assessment Year : 2009-10

The Deputy Director of Income Tax (Exemptions) – I, Chennai - 600 034.	v.	M/s The Booksellers & Publishers Association of South India, No.8, Sun Plaza, 2nd floor, G.N. Chetty Road, T. Nagar, Chennai - 600 006. PAN : AABTA 2098 R
(अपीलार्थी/Appellant)		(प्रत्यर्थी/Respondent)

अपीलार्थी की ओर से/Appellant by : Shri A.B. Koli, JCIT
प्रत्यर्थी की ओर से/Respondent by : Sh. N. Devanathan, Advocate
Sh. N. Muralidharan, CA
Sh. S. Sridhar, Advocate

सुनवाई की तारीख/Date of Hearing : 26.11.2015
घोषणा की तारीख/Date of Pronouncement : 18.12.2015

आदेश /O R D E R

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

This appeal of the Revenue is directed against the order of the Commissioner of Income Tax (Appeals)-VII, Chennai, dated 07.02.2014 and pertains to assessment year 2009-10.

2. The first issue arises for consideration is with regard to claim of exemption as charitable institution.

3. Shri A.B. Koli, the Ld. Departmental Representative, submitted that the assessee-trust was registered under Section 12AA of the Income-tax Act, 1961 (in short "the Act"). During the year under consideration, the assessee conducted book fairs at various places. The assessee has received income on letting out stalls and sale of tickets. The assessee has also collected service tax from the publishers of the books. According to the Ld. D.R., the object of the assessee-trust falls under the fourth limb of Section 2(15) of the Act, namely, advancement of any other object of general public utility. According to the Ld. D.R., collection on sale of tickets, rent on stalls, service tax, etc. are in the nature of trade, commerce, business, etc. Referring to proviso to Section 2(15) of the Act, the Ld. D.R. submitted that the activities of the assessee are commercial in nature, therefore, its object cannot be treated as charitable activities. Therefore, the Assessing Officer has rightly rejected the claim of the assessee for exemption under Sections 11 and 12 of the Act. However, on appeal by the assessee, the CIT(Appeals) found there was no element of profit making,

therefore, proviso to Section 2(15) of the Act is not applicable. According to the Ld. D.R., when the object of the assessee is general public utility, the assessee is engaged in trade, according to the Ld. D.R., the proviso to Section 2(15) would come into operation. Therefore, the assessee is not eligible for exemption under Section 11 of the Act.

4. The Ld. D.R. further submitted that the CIT(Appeals) has allowed the claim of the assessee for depreciation. According to the Ld. D.R., when the assessee claims that it is carrying on charitable activities, depreciation cannot be allowed under Section 32 of the Act. According to the Ld. D.R., depreciation under Section 32 of the Act is available only to business or profession and not for charitable activities. Furthermore, once the income is allowed as application of income under Section 11 of the Act, the same cannot be claimed as deduction under Section 32 of the Act. The Ld. D.R. placed his reliance on the decision of this Bench of the Tribunal in the Anjuman-E-Himayath-E-Islam v. ADIT (Exemption) in I.T.A. No.2271/Mds/2014 dated 02.06.2015. The Ld. D.R. also placed his reliance on the decision of Delhi Bench of this Tribunal in ITO v.

Delhi Bureau of Textbooks in I.T.A. Nos.2362-2363/Del/2010 dated 23.04.2015.

5. On the contrary, Shri S. Sridhar, the Ld. counsel for the assessee, submitted that admittedly the assessee was registered as charitable institution under Section 12AA of the Act. Subsequently, the registration was cancelled by an order dated 23.12.2011. The assessee challenged the order of cancellation before this Tribunal in I.T.A. No. 455/Mds/2012 dated 03.12.2013. The Tribunal found that when the assessee was granted registration as charitable institution and the object of the trust continues as it is, the registration cannot be cancelled. The Tribunal has also found that the receipt of cash through sale of tickets and rent on stalls, is incidental to the activity carried on by the assessee. The Ld. counsel clarified that the assessee is not doing any trading; the assessee is not selling any books; the assessee is providing facility to readers to come and see all the books at one place. Incidentally, to meet the expenditure, the assessee is collecting entrance fee on sale of tickets and also collecting rent on stalls put by the respective publishers of the books. Therefore, it would not be correct to say that the assessee is doing any trade or commerce. The assessee is not at all doing

any trade and activity of collection of rent on the stalls, sale of tickets and service tax is only incidental to the activities carried on by the assessee. Therefore, the CIT(Appeals) has rightly allowed the claim of the assessee.

6. Coming to the claim of depreciation, the Ld. counsel for the assessee submitted that the income of the assessee has to be computed on commercial basis. Therefore, depreciation has to be allowed on the capital asset of the assessee. To a query from the Bench, whether Section 32 of the Act is applicable for business activities or for charitable activities? The Ld. counsel without answering the query, simply submitted that in that case, the assessee may not claim depreciation. The Ld. counsel also clarified that the issue of depreciation is pending before the Madras High Court for consideration. Therefore, the issue may be remitted back to the file of the Assessing Officer for reconsideration.

7. We have considered the rival submissions on either side and perused the relevant material available on record. The object of the trust appears to be to promote the habit of reading among general public. In furtherance of this object, the assessee is organizing book fair at various places. The assessee is collecting entrance fee

on sale of tickets, rent on stalls and also service tax. The Revenue claims that the collection of entrance fee on sale of tickets, rent on stalls and service tax would amount to trade or commerce. Therefore, proviso to Section 2(15) of the Act would come into operation. In fact, on identical situation, the Director of Income Tax (Exemptions) cancelled the registration granted to the assessee by an order dated 23.12.2011. The assessee filed an appeal before this Tribunal. This Tribunal found that the object of the trust continues as such without any change. Therefore, the receipts in question are incidental to the activities carried on by the assessee. In fact, this Tribunal in the order dated 03.12.2013 has observed as follows:-

> "Taking cue from the aforesaid case law, we hold that since the DIT(E) had already considered the charitable nature of assessee's objects at the time of granting registration and there is no change in the said factual position, impugned cancellation of registration under challenge does not hold good. So far as receipts in question are concerned, they are incidental to the activities carried out as per assessee's objects of conducting book fairs etc."

In view of this finding of the Tribunal, the receipt in question is only incidental to the activity of the assessee. In fact, the registration granted to the assessee was cancelled on the ground that the

assessee is collecting sale of tickets on book fair, rent on stalls and service tax. For the very same assessment year under consideration, this Tribunal found that the cancellation of registration is not justified. In view of the decision of co-ordinate Bench of this Tribunal, to which the Ld. Accountant Member is a party, this Tribunal is of the considered opinion that the collection of sale of tickets, rent on stalls and service tax are incidental to the main activity of the assessee. Therefore, it cannot be construed as trade or commerce. Hence, this Tribunal is of the considered opinion that the CIT(Appeals) has rightly allowed the claim of the assessee under Section 11 of the Act.

8. Now coming to the claim of the assessee towards depreciation, Section 32 of the Act clearly says that depreciation has to be allowed on capital asset used for the business of the assessee. Once the assessee claims that it is a business, then proviso to Section 2(15) of the Act would come into operation. Therefore, the assessee's activity cannot be treated as charitable activity any more. Moreover, Section 32 of the Act is not applicable in respect of charitable activities. This Tribunal, while considering

an identical situation in the case of Tamil Nadu Cricket Association 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 acqired by the assessee after the 28th day of February, 1975 5but 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) 6or 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 sub-section 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) 6or 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, 10the 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 8an 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."

9. In view of the above, this Tribunal is unable to uphold the order of the CIT(Appeals) in respect of claim of depreciation. Accordingly, the order of the CIT(Appeals) is set aside and that of the Assessing Officer is restored.

10. In the result, the appeal of the Revenue is partly allowed.

Order pronounced on 18th December, 2015 at Chennai.

sd/-	sd/-
(ए. मोहन अलंकामणी)	(एन.आर.एस. गणेशन)
(A. Mohan Alankamony)	(N.R.S. Ganesan)
लेखा सदस्य/Accountant Member	न्यायिक सदस्य/Judicial Member

चेन्नई/Chennai,
दिनांक/Dated, the 18th December, 2015.

Kri.

आदेश की प्रतिलिपि अग्रेषित/Copy to:

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