

**IN THE INCOME TAX APPELLATE TRIBUNAL
BANGALORE BENCH ' B '**

**BEFORE SHRI VIJAY PAL RAO, JUDICIAL MEMBER AND
SHRI INTURI RAMA RAO, ACCOUNTANT MEMBER**

I.T. A. No.896/Bang/2016
(Assessment Year : 2011-12)

Income Tax Officer (Exemptions),
Ward 3, Bangalore.

.... Appellant.

Vs.

M/s. Shanthi Charitable Trust,
Kaggadasapura Main Road,
Vignanagar, New Thippasandra Post,
Bangalore-560 075.
PAN AAFTS 7870M

..... Respondent.

Appellant By : Shri G. Kamaladhar, DR.

Respondent By : Shri Narendra Sharma, Advocate.

Date of Hearing : 6.4.2017.

Date of Pronouncement : 18.04.2017.

O R D E R

Per Shri Vijay Pal Rao, J.M. :

This appeal by the revenue is directed against the order dt.8.3.2016 of Commissioner of Income Tax (Appeals)-14, Bangalore for the Assessment Year 2011-12.

2. The revenue has raised the following grounds :

Disallowance of depreciation:

(i). The CIT(A) has failed to appreciate the fact that the Hon'ble Kerala High Court in the case of *Lissie Medical Intuitions Vs. CIT (348 ITR 344)* has held that depreciation cannot be allowed on assets, where cost of such assets has already been allowed as application of income in the year of acquisition/ purchase of asset.

(ii). The CIT(A) has failed to appreciate that the Hon'ble Supreme Court in the case of *Escorts Ltd. & another Vs. Union of India (199 ITR 43)*, while dealing with the issue of allowance of expenditure on scientific research u/s 35(1)(iv) [corresponding to section 10(2) (xiv) of the I.T. Act, 1922] held that any expenditure of a capital nature (or incurred towards purchase of capital assets) on scientific research allowed as deduction u/s 35(1)(iv) cannot be allowed once again as deduction in the form of depreciation on such capital assets. While doing so, it was observed by the Hon'ble Supreme Court that no legislature could have at all intended a double deduction in regard to the same business outgoing and if it is intended, it would be clearly expressed in the statute itself. Accordingly, it was held that even in absence of clear statutory indication to contrary, statute should not be read so as to permit an assessee two deductions i.e. once in the form of expenditure incurred towards purchase of capital assets and secondly, in the form of depreciation on such capital assets. It was also held that even before the amendment of the Act in the form of insertion of clause (iv) of sub section (2) of section 35 by Finance Act, 1980, prohibiting allowance of depreciation, the Act did not permit a deduction for depreciation in respect of cost of capital asset acquired for the purpose of scientific research to the extent such cost had been written off/ claimed as deduction u/s 35(1)(iv) on the ground that the amendment only set out more clearly and categorically what the provision intended even earlier.

iii). The CIT(A) has failed to appreciate the fact that the issue involved in respect of capital expenditure on scientific research u/s 35(1)(iv) is similar to that of issue involved in respect of allowance of expenditure incurred towards purchase of capital assets for charitable purposes as application of income u/s 11(1)(a). Accordingly, the Law laid down by the Hon'ble Supreme Court is squarely applicable to taxation of charitable/religious trust or institution u/s 11, 12 and 13 of the I.T. Act.

(iv). Though the Finance Act, 2014 has amended the Income Tax Act, 1961 with regard to non-allowance of depreciation to charitable/religious trust or institution on the value of assets which has already been allowed as application of income u/s 11(1) by inserting sub-section (6) of Section 11, w.e.f 01.04.2015, such amendment cannot be construed as effective prospectively inasmuch as in accordance with the ratio laid down by the Hon'ble Supreme Court in the case of *Escorts Ltd. & another Vs. Union of India* (Supra), the amendment only set out more clearly and categorically what the legislature had intended and conveyed u/s 11(1) even earlier to the said amendment. As such, the amendment shall be considered as clarificatory in nature making it clear that the assessee is not entitled to claim double deduction in respect of same expenditure u/s 11(1) as application of income and also depreciation simultaneously.

Net receipts Vs. Gross receipts

i) Whether, in the given facts and circumstances, the CIT(A) is correct in law in not considering the Board Circular on this issue i.e. *Board Circular no. 12-(PXX-7 of 1968) dated 26.11.1968*, on which the AO placed reliance for disallowance of accumulation /set apart of income u/s 11(1)(a), wherein it is clearly explained that if a trust fails to comply with accumulation provisions u/s 11(2), then the entire income accumulated would be liable to assessment u/s 11(3), including 15% of income set apart or accumulated u/s 11(1)(a), and, therefore, rendered a perverse decision.

ii) Whether, in the given facts and circumstances, the CIT(A) is correct in law in holding that the provisions of sub-section (1) and (2) of section 11 operate independently, and, therefore, disallowance of accumulation u/s 11(2) has no effect on allowance of set apart/accumulation u/s 11(1)(a).

iii) Whether, in the given facts and circumstances, the CIT(A) is correct in law in ignoring the fact that in case the assessee is claiming 15% of income set-apart/accumulation on the basis of gross receipts, the assessee shall produce evidence that such amount is invested in the modes specified u/s 11(5) r.w.s. 13(1)(d)(i). However, as the net surplus available in the hands is less than 15% of gross receipts, the assessee will not be in a position to invest higher amount/more than net surplus in the modes specified u/s 11(5).

iv) Whether, in the given facts and circumstances, the CIT(A) is correct in law in not considering the fact that if the gross receipts are considered as income within the meaning of Section 11(1)(a), then in the event of assessee losing the exemption due to violation of conditions stipulated u/s 13, then the entire gross receipts being the income is liable to be taxed, which is grossly unjustified and unviable and beyond the purview of Section 11(1)(a). On the other hand, it is not the case of the assessee to argue that for the purpose of claiming 15% of income set-apart/accumulation, income to be reckoned on the basis of gross receipts, but in the event of assessee losing the exemption, the income will be recognized on the basis of net surplus/book profits rather than gross receipts.

3. The first issue raised by the revenue is regarding disallowance of depreciation.

4. We have heard the learned Departmental Representative as well as learned Authorised Representative and considered the relevant material

on record. The Assessing Officer has disallowed the claim of depreciation to the assessee-trust on the ground that when the capital expenditure itself was allowed as application of income under Section 11(1)(a) then the allowance of depreciation would amount to double deduction. The CIT (Appeals) has allowed the claim of the assessee by following various decisions of this Tribunal as well as High Courts. At the outset we note that an identical issue has been considered by the co-ordinate bench of this Tribunal in the case of **Moogambigai Charitable and Education Trust Vs. ADIT (Exemptions)** vide order dt.13.7.2016 in ITA No.1224/Bang/2015 in para 11 as under :

“ 11. We have considered the rival submissions as well as the relevant material on record. At the outset, we note that this issue has been considered by this Tribunal in a series of decisions. In the case of M/s. CMR Janardhana Trust (supra), the Tribunal has again considered and decided this issue in paras 15 to 17 as under :

“ 15. We have heard the submissions of the Id. DR, who relied on the order of CIT(A) and the decision of the Hon'ble Delhi High Court in the case of DIT(E) Vs. Charanjiv Charitable Trust (2014) 43 taxmann.com 300 (Delhi). We have considered the order of the CIT(A). Identical issue came up for consideration before ITAT Bangalore Bench in the case of DDIT(E) v. Cutchi Memon Union (2013) 60 SOT 260 Bangalore ITAT, wherein similar issue has been dealt with by this Tribunal. In the aforesaid case, the assessee claimed depreciation and the AO denied depreciation on the ground that at the time of acquiring the relevant capital asset, cost of acquisition was considered as application of income in the year of its acquisition. The AO took the view that allowing depreciation would amount to allowing double deduction and placed reliance on the decision of Hon'ble Supreme Court in Escorts Ltd. (supra). The CIT(A), however, allowed the claim of assessee. On further appeal by the Revenue, the Tribunal held as follows:-

“20. We have considered the rival submissions. If depreciation is not allowed as a necessary deduction for computing income of charitable institutions, then there is no way to preserve

the corpus of the trust for deriving the income as it is nothing but a decrease in the value of property through wear, deterioration, or obsolescence. Since income for the purposes of section 11(1) has to be computed in normal commercial manner, the amount of depreciation debited in the books is deductible while computing such income. It was so held by the Hon'ble Karnataka High Court in the case of CIT Vs. Society of Sisters of St. Anne 146 ITR 28 (Kar). It was held in CIT vs. Tiny Tots Education Society (2011) 330 ITR 21 (P&H) , following CIT vs. Market Committee, Pipli (2011) 330 ITR 16 (P&H) : (2011) 238 CTR (P&H) 103 that depreciation can be claimed by a charitable institution in determining percentage of funds applied for the purpose of charitable objects. Claim for depreciation will not amount to double benefit. The decision of the Hon'ble Supreme Court in the case of Escorts Ltd. 199 ITR 43 (SC) have been referred to and distinguished by the Hon'ble Court in the aforesaid decisions.

21. The issue raised by the revenue in the ground of appeal is thus no longer res integra and has been decided by the Hon'ble Punjab & Haryana High Court in the case of CIT v. Market Committee, Pipli, 330 ITR 16 (P&H). The Hon'ble Punjab & Haryana High Court after considering several decisions on that issue and also the decision of the Hon'ble Supreme Court in the case of Escorts Ltd. (supra), came to the conclusion that depreciation is allowable on capital assets on the income of the charitable trust for determining the quantum of funds which have to be applied for the purpose of trusts in terms of section 11 of the Act. The Hon'ble Punjab & Haryana High Court made a reference to the decision of the Hon'ble Supreme Court in the case of Escorts Ltd. (supra) and observed that the Hon'ble Supreme Court was dealing with a case of two deductions under different provisions of the Act, one u/s. 32 for depreciation and the other on account of expenditure of a capital nature incurred on scientific research u/s. 35(1)(iv) of the Act. The Hon'ble Court thereafter held that a trust claiming depreciation cannot be equated with a claim for double deduction. The Hon'ble Punjab & Haryana High Court has also made a reference to the decision of the Hon'ble Karnataka High Court in the case of CIT v. Society of Sisters of Anne, 146 ITR 28 (Kar), wherein it was held that u/s. 11(1) of the Act, income has to be computed in normal commercial manner and the amount of depreciation debited in the books is deductible while computing such income. In view of the aforesaid decision on the issue, we are of the view that the order of the CIT(A) on the above issue does not call for any interference.

22. Consequently, ground No.5 raised by the revenue is dismissed.”

16. It is no doubt true that the Hon'ble Delhi High Court in the case of Charanjiv Charitable Trust (supra) has taken a contrary view but then when two views are possible on an issue, the view favourable to the Assessee has to be followed. The decision of the Hon'ble Punjab & Haryana High Court is in favour of the Assessee and has followed the decision of the Hon'ble Karnataka High Court in the case of Society of Sisters of Anne (supra). The interpretation to the contrary given by the CIT(A) on the decision of the Hon'ble Karnataka High Court in the case of Society of Sisters of Anne (supra) cannot therefore be accepted. We may also add that the legal position has since been amended by a prospective amendment by the Finance (No.2) Act, 2014 w.e.f. 1.4.2015 by insertion of subsection (6) to section 11 of the Act, which reads as under:- “(6) In this section where any income is required to be applied or accumulated or set apart for application, then, for such purposes the income shall be determined without any deduction or allowance by way of depreciation or otherwise in respect of any asset, acquisition of which has been claimed as an application of income under this section in the same or any other previous year.”

17. As already stated, the aforesaid amendment is prospective and will apply only from A.Y. 2015-16. In view of the above legal position, we are of the view that the order of the CIT(A) has to be reversed. Consequently grounds No.4 & 5 raised by the Assessee are allowed.”

There is no dispute that the amendment of section 11(6) of the Act by the Finance Act, 2014 is prospective w.e.f. 1.4.2015 and therefore the said amended provision is not applicable for the assessment year under consideration. Following the earlier decisions of this Tribunal, we decide this issue in favour of the assessee and against the revenue.”

In view of the decision of the co-ordinate bench as well as various decisions as referred in above cited case, we decide this issue in favour of the assessee and against the revenue.

5. Ground No.2 is regarding allowable accumulation of income at 15% of net receipts or gross receipts.

6. We have heard the learned Departmental Representative as well as learned Authorised Representative and considered the relevant material on record. At the outset, we note that an identical issue has been considered by the co-ordinate bench of this Tribunal in the case of

Moogambigai Charitable and Education Trust Vs. ADIT (Exemptions)

(supra) in paras 17.1 to 17.4 as under :

“ 17.1 Ground Nos.9 & 10 are regarding allowing the 15% accumulation on net income of the assessee instead of gross receipts as claimed by the assessee.

17.2 We have heard the Id. A.R. as well as the Id. D.R. and considered the relevant material on record. The Id. A.R. of the assessee has

submitted that this issue is covered by the decision of the Tribunal in the case of Capuchin Friar Services of Society Vs. DCIT Dt.9.10.2015 in ITA No.367/Bang/2015.

17.3 On the other hand, the learned Departmental Representative has relied upon the orders of the authorities below.

17.4 We find that the Tribunal in the case of Capuchin Friar Services of Society (supra) has dealt with an identical issue in paras 10 & 11 as under :

“ 10. We find that the issue is covered by the Co-ordinate Bench decision in the case of Jyothy Charitable Trust in ITA No.662/Bang/2015. The relevant extract is reproduced below:-

“15. The third issue that arises for consideration in this appeal is as to whether 15% accumulation for application in future has to be calculated on gross receipts or net receipts after deduction of revenue expenditure. The Assessee claimed accumulation of income for application for charitable purpose at 15% of the gross receipts. The AO was of the view that accumulation will be allowed only to the extent of 15% of the income after revenue expenditure. In other words income to be set apart u/s.1 1(1)(a) of the Act has to be computed at 15% of the net income i.e., gross receipts minus revenue expenditure and not on the gross receipts as claimed by the Assessee. Since in the case of the Assessee, the gross receipts after revenue expenditure was nil, the AO denied the benefit of accumulation to the Assessee.

16. On appeal by the Assessee, the CIT(A) confirmed the order of the AO. Hence ground No-4 raised by the Assessee before the Tribunal. 17. The issue to be decided is therefore as to whether for the purpose of computing accumulation of income of 15% under section 11(1)(a) of the Act, one has to take the gross receipts or gross receipts after expenditure for charitable purpose i.e., the net receipts. This issue is no longer res integra and has been decided by the Special Bench Mumbai in the case of Bai Sonabai Hirji Agiary Trust Vs. ITO 93 ITD 0070 (SB). The facts in the aforesaid case were that the assessee was a public charitable trust enjoying exemption under s. 11 of the IT Act. As per the requirement of s. 11(1) of the IT Act, as it prevailed at that point of time, the assessee had to apply 75 per cent of its income for the objects and purposes of the trust and the assessee was permitted to accumulate or set apart up to 25 per cent of its income, which was subject to fulfillment of other conditions. While calculating the aforesaid 25 per cent, the important question which arose was as to whether for this purpose, the gross income earned by the assessee is relevant or the income as computed in accordance with the provisions of IT Act. In other words, whether outgoings from out of gross income which are in the nature of application of income, should be first deducted from the gross income and 25 per cent of only the remaining amount should be allowed to be accumulated or set apart. The Special Bench of the ITAT on the issue held as follows:-

9. Coming to the merits of the issue, we are of the view that the same is clearly covered by the decision of the Hon'ble Supreme Court in the case of CIT vs. Programme for Community Organization (supra). In the decision, their Lordships, after taking note of provisions of sec.

11(l)(a), have held as under: "Having regard to the plain language of the above provision, it is clear that a charitable or religious trust is entitled to accumulate twenty-five per cent of its income derived from property held under trust. For the present purposes, the donations the assessee received, in the sum of Rs. 2,57,376, would constitute its property and it is entitled to accumulate twenty-five per cent thereof. It is unclear on what basis the Revenue contended that it was entitled to accumulate only twenty five per cent of Rs.87,010. For the aforesaid reasons, the civil appeal is dismissed." It is clear from the above that deduction of twenty-five per cent was held to be allowable not on total income as computed under the IT Act. Any amount or expenditure, which was application of income, is not to be considered for determining twenty five per cent to be accumulated. Their Lordships, as noted earlier, affirmed the decision of Kerala High Court in (1997) 141 CTR (Ker) 502 : (1997) 228 ITR 620 (Ker) (supra) wherein it is held as under: "At the outset, the statutory language of s. u(i)(a) of the IT Act, 1961, relates to the income derived by the trust from property. The trust is required to be wholly for charitable or religious purposes, and the income is expected to have relation to the extent to which such income is applied to such purposes in India. It is thereafter the statutory provision proceeds further that such income is not to be understood to be in excess of 25 per cent of the income from such properties. In other words, the very language of the statutory provision under consideration sets apart 25 per cent of the income from the source of property with reference to the extent to which such income is applied for such purposes, charitable or religious. In other words, for the purpose of s. ii(i)(a) of the Act, the income in terms of relevance would be the income of the trust from and out of which 25 per cent is set apart in accordance with the spirit of the statutory provision." This means that, when it is established that trust is entitled to full benefit of exemption under s. 11(1), the said trust is to get the benefit of twenty-five per cent and this twenty-five per cent has to be understood as income of the trust under the relevant head of s. 11(1). In other words, income that is not to be included for the purpose of computing the total income would be the amount expended for purposes of trust in India. Their Lordships in the above case have emphasized on the clear and unambiguous language of s. 11(1)(a) and decided the matter on the basis of the same. It has been held that as per the statutory language of the above section the income which is to be taken for purpose of accumulation is the income derived by the trust from property. If both the decisions are carefully read, it becomes evident that any expenditure which is in the shape of application of income is not to be taken into account. Having found that trust is entitled to exemption under s. 11(1), we are to go to the stage of income before application thereof and take into account 25 per cent of such income. Their Lordships have pointed that the same has to be taken on "commercial" basis and not "total income" as computed under the IT Act. Their Lordships in the decided case rejected the contention of the Revenue that the sum of Rs 1,70,369 which was spent and applied by the assessee for charitable purposes was required to be excluded for purpose of taking amount to be accumulated. Having regard to the clear pronouncement of their Lordships of the Supreme Court, it is difficult to accept that outgoings which are in the nature of application of income are to be excluded. The income available to the assessee before it was applied is directed to be taken and the same in the present case is Rs. 3,42,174. Twenty five per cent of the above income is to be allowed as a deduction. Similar view has also been taken by the Hon'ble Madhya Pradesh High Court in Parsi Zorastrian Anjuman Trust vs. CIT (supra). No reason whatsoever has been given by the Revenue authorities for deducting Rs. 2,17,126 in this case for purposes of s. 11(1)(a). The decision cited on behalf of the Revenue did not take into account the decision of the Supreme ITA No.367/Bang/2015 Page 10 of 11 Court referred to above. The circular of CBDT has also been considered by the Hon'ble Kerala

High Court in its decision referred to above. Accordingly, the question referred to is answered in the affirmative and in favour of the assessee."

18. The aforesaid decision clearly supports the plea of the Assessee. Following the same, we hold that the accumulation u/s 11(1)(a) of the Act should be allowed as claimed by the Assessee. Ground No.4 raised by the Assessee is accordingly allowed."

11. Following the decision of the co-ordinate bench of the Tribunal, we set aside the order of the CIT(A)."

Following the decision of the co-ordinate bench of this Tribunal, we decide this issue in favour of the assessee and direct the Assessing Officer to consider the allowable accumulation of income at 15% of the gross receipts."

In view of the decisions of this Tribunal as well as the decisions of Hon'ble Supreme Court and Hon'ble High Court as referred in the said decision of the co-ordinate bench of the Tribunal cited supra, we allow the accumulation of income at 15% of the gross receipts.

8. In the result, the appeal of revenue is dismissed.

Order pronounced in the open court on the 18th day of April, 2017.

Sd/-
(INTURI RAMA RAO)
Accountant Member

Sd/-
(VIJAY PAL RAO)
Judicial Member

Bangalore,
Dt.18.04.2017.

*Reddy gp