IN THE INCOME TAX APPELLATE TRIBUNAL

DELHI BENCH "SMC-3", NEW DELHI

BEFORE SHRI H.S. SIDHU, JUDICIAL MEMBER

	I.T.A. No. 1648/DEL/2015	
	A.Y. : 2010-11	
M/S LORD JESUS EDUCATION SOCIETY, VIJAY PARK, BEHIND LAXMI BAZAR, GURGAON, HARYANA (AAABL0007G)	VS.	ACIT, CIRCLE 1(1), GURGAON
(APPELLANT)		**(RESPONDENT)**

Assessee by : Sh. Hiren Mehta, CA
Department by : None

Date of Hearing : 14-07-2016

Date of Order : 02-08-2016

ORDER

PER H.S. SIDHU : JM

Assessee has filed this Appeal against the impugned Order dated 21.1.2015 passed by the Ld. CIT(A)-I, Gurgaon relevant to assessment year 2010-11 on the following grounds:-

1. That the order passed by the Commissioner of Income Tax (Appeals) - I, Gurgaon (hereinafter referred to as "CIT(A)") is bad in law in as much as it is arbitrary and based on surmises and conjectures and without considering the facts and

material on record and passed without application of mind.

2. That on the facts and circumstances of the case the Ld. CIT(A) was not justified in passing an ex-parte order without taking into consideration the appellant's submissions and also denying an opportunity of hearing by incorrectly stating in para 4.1 of the impugned order that no compliance was made to the notice of hearing dated 15.1.2015.

2.1 That authorized representative of the appellant duly appeared before the Ld. CIT(A) on the date of hearing i.e 15.1.2015 and filed a letter of even date seeking an adjournment which was not even acknowledged by the CIT(A) or his staff and therefore the said letter for adjournment alongwith a covering letter was duly communicated to the office of Ld. CIT(A) through Speed Post on 15.1.2015 itself.

3. That on the facts and circumstances of the case and in law the Ld. CIT(A) was not justified in upholding the action of the A.O. that the provision

for Gratuity aggregating Rs. 26,13,893/- was non application of income for charitable purpose.

3.1 That without prejudice to the above ground the Ld. CIT(A) grossly erred in not appreciating that the computation of assessable income determined in the assessment order is incorrect as even after making a disallowance of Rs. 26,13,863/-, from application of income, the assessable income of the appellant trust would remain at a loss.

4. That on the facts and circumstances of the case and in law the Ld. CIT(A) erred it. upholding the action of the A.O. in treating depreciation aggregating Rs. 36,03,503/- as non application of income uls 11 and 12 of the I.T. Act, 1961.

5. That on the facts and circumstances of the case and in law the Ld. CIT(A), was not justified in confirming the above action of the A.O. by holding that since this issue has not been discussed in the assessment order the same does not emanate from the assessment order and it implied that this issue was never raised by the appellant during the asses rent proceedings.

5. That the above grounds are independent and without prejudice to each other.

6. The appellant craves leave to add, amend, alter, abandon or substitute any of the above grounds at the time of hearing of the appeal or earlier

2. The brief facts of the case are that the assessee filed its return of income on 13.10.2010 declaring NIL income. Subsequently, the case was selected for scrutiny through CASS and statutory notices u/s. 142(1) and 143(2) of the Income Tax Act, 1961 (hereinafter referred as the Act) alongwith a detailed questionnaire were issued on 26.9.2011 and were duly served upon of the assessee company. In compliance of the notices, Ld. AR of the Assessee attended the assessment proceedings from time to time and furnished the records. Books of account were produced and test checked. In this case the assessee is a charitable society registered u/s 12A of the Income Act, 1961 vide order F.No. CITIFBDI05-06/12A195/11109 dated 7.04.2006 of Commissioner of Income Tax, Faridabad. Being a charitable society, the assessee is required to apply 85% of the total receipts during the relevant assessment year as provided in 11(I)(a) of the Income Tax Act, 1961. During A.Y 2010-11, the assessee society has debited "Provision for Gratuity" expenses

amounting to Rs. 26,13,893/- as revenue expenses in the Income and Expenditure account. The assessee has claimed this expenditure as part of application for charitable purpose. Vide order sheet entry dated 05.12.2012, assessee was asked to show cause why provision of gratuity should be treated as application of income for charitable-purposes. The assessee vide his letter dated 12.2.2013 which was considered by the AO and by following the judgment of the Hon'ble Supreme Court of India in the case of Nachimuthu Industrial Association vs. CIT 235 ITR 190, "Provision for Gratuity" expenses amounting to Rs. 26,13,893/- was treated as not being application for charitable purposes and made the addition of Rs. 26,13,893/- and assessed the taxable income of the assessee trust at Rs. 25,93,214.5 vide order dated 12.2.2013 passed u/s. 143(3) of the I.T. Act, 1961.

3. Against the order of the Ld. AO, assessee appealed before the Ld. CIT(A), who vide impugned order dated 21.1.2015 has dismissed the appeal of the assessee.

4. Aggrieved with the aforesaid finding of the Ld. CIT(A), Assessee is in appeal before the Tribunal.

5. Ld. Counsel of the Assessee with regard to disallowance Rs. 26,13,893/- pertaining to provision for gratuity, as "application

of income" has stated that both the lower authorities have wrongly followed the Hon'ble Supreme Court judgment delivered in the case of Nachimuthu Industrial Association vs. CIT 235 ITR 190, however this judgment is not applicable in the present case because the facts are distinguished. He stated that in the present case a provision for gratuity liability has to be created as per law. The said gratuity liability is paid at the time of retirement or at the time of leaving the job and does not remain in the books of account of the assessee as book entry. Hence, he stated that the aforesaid judgment is not applicable and accordingly, the addition in dispute may be deleted.

6. In this case, Notice of hearing for 14.7.2016 was sent to both the parties and in response to the same, assessee's Authorised Representative appeared, but none appeared on behalf of the Department, nor filed any application for adjournment from the Department side. Keeping in view the facts and circumstances of the present case and the issue involved in the present Appeal, I am of the view that no useful purpose would be served to issue notice again, therefore, I am deciding the present appeal exparte qua Revenue, after hearing the Ld. A.R. of the assessee and perusing the records.

7. I have heard the Ld. AR of the Assessee and perused the records available with me. I find that the assessee is running a school in Gurgaon by the name of Lord Jesus School and it has been

granted registration under the Societies Registration Act on 10.4.1990. The society was also granted registration u/s. 12AA of the I.T. Act, 1961 vide order dated 7.4.2006 and the accounts of the are duly audited and audit report in Form 10BB issued as prescribed under the I.T. Act. On perusing the records, it reveals that the assessee society is making a provision for gratuity payable to its staff every year and debiting the same to the income and expenditure account. As per the Payment of Gratuity Act, gratuity is a sum payable to employees, provided certain conditions are fulfilled, primarily, that the employee has completed continuous service of more than five years. The gratuity amount is payable to employee at the time of his retirement or at the time he leaves the employment subject to fulfillment of the condition i.e. five continuous service years. Since the gratuity liability is an expenditure to be paid at the time of retirement of employee or at the time he leaves the job, the gratuity liability is appearing as provision in the Balance Sheet. The yearly expenditure of gratuity is debited to the income & expenditure account on the matching concept of accounting so as to derive true and fair view for each financial year. It is undisputed that the said gratuity provision is actually paid to the employee at the time of his retirement or leaving the job. The Assessing Officer has disregarded the amount

of Rs. 26,13,893/- for the purpose of computing the amount applied towards charitable purposes and thereby made an addition of an equivalent amount. The reason adopted by the Assessing Officer was that in the case of charitable trust the test is of actual spending towards charity and therefore provision made in accounts qualifies to be treated as "accumulation or setting apart" and not as an "application". AO has placed reliance in the case of Nachimuthu Industrial Association vs. CIT 235 ITR 190. I note that the ld. CIT(A) has also upheld the aforesaid action of the Assessing Officer by simply relying upon the decision of Nachimuthu Industrial Association vs. CIT (supra). However, on going through the copy of the decision of the Hon'ble Supreme Court in the case of Nachimuthu Industrial Association vs. CIT (supra), I find that the facts of the case are clearly distinguishable to the present case. The Hon'ble Supreme Court has affirmed the decision of Madras High Court in the case of Nachimuthu Industrial Association vs. CIT 123 ITR 611. Moreover, the facts as emanate from the order of Hon'ble Madras High Court, were that the amount of Rs. 3,00,000/- had been appropriated out of profit of the year and credited to "Reserve for Donation Account". On these facts, it was held that the sum of Rs. 3,00,000/- remained only as transfer entry in assessee's own book and there had not been divesting on its part with reference to

this sum in favour of anyone else. However, the facts of the assessee's case are totally different. In the assessee's case a provision for gratuity liability has to be created as per law. The said gratuity liability is paid at the time of retirement or at the time of leaving the job and does not remain in the books of account of the assessee as book entry. Therefore, the ratio of the decision of Hon'ble Supreme Court, referred above, is not applicable in the present case. It needs to be appreciated that the word "applied" does not necessarily imply "spent". Even an entry for salary payable for the month of March at the year end is actually paid in the subsequent financial year. Going by the logic adopted by Assessing Officer and the Ld. CIT (A), the term "application" if restricted to actual cash outflow would negate the meaning & purpose of accountancy. Therefore, the interpretation sought to be derived by lower authorities to the term "application" is misconstrued and needs to be rejected. Hence, the same is rejected and accordingly, the addition in dispute is deleted and this ground of appeal is allowed in favour of the assessee.

8. As regards another issue i.e. upholding the action of the AO in treating depreciation aggregating Rs. 36,03,503/- as non application of income u/s. 11 and 12 of the I.T. Act. The Assessee's A.R. has filed the written submissions on this issue which reads as under:-

"It is the submission of the assessee that depreciation aggregating Rs. 36,03,503/- is allowable as application and does not amount to double deduction. This addition is not discussed in the assessment order, however, in the final computation depreciation has been denied. The settled legal position on this issue is discussed in subsequent paragraphs.

> *In the case of err Vs. MIs Tiny Tots Education Society 11 Taxmann.com 242 (P8tH) , the Hon'ble Punjab & Haryana High Court vide its order dated 28.7.2010 have upheld the view that allowing depreciation does not amount to double deduction. It may be pointed out that the effect of the decision of Supreme Court in the case of Escorts Ltd. Vs. UOI 199 ITR 43 has been considered and after which it has been held that allowing depreciation as application does not amount to double deduction. It was observed by the High Court in Para 9 of its order as under:-*
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> > *"9. In the present case, the assessee is not claiming double deduction on account of*

> *depreciation as has been suggested by learned counsel for the Revenue. The income of the assessee being exempt, the assessee is only claiming that depreciation should be reduced from the income for determining the percentage of funds which have to be applied for the purpose of the trust There is no double deduction claimed by the 'assessee as canvassed by the revenue. Judgment of the Hon'ble Supreme Court in Escorts Ltd. and another (supra) is distinguishable for the above reasons. It cannot be held that double benefit is given aI/owing claim for depreciation for computing income for purposes of section 11. The question proposed have, thus to be answered against the revenue and in favour of the assessee."*

In the case of DIT Vs. VishwaJagriti Mission 2012 -TIOL-271-HC-DEL-IT, the Delhi High Court while dealing with the issue of double depreciation has held as under :-

14. Having regard to the consensus of judicial opinion on the precise question that has arisen in the present appeal, we are not inclined to admit the appeal and frame any substantial question of law. There does not appear to be any contrary view plausible on the question raised before us and at any rate no judgment taking a contrary view has been brought to our notice. In the circumstances, we decline to admit the present appeal and dismiss the same with no order as to costs.

12. The entire controversy on this issue was dealt with by the Delhi High Court in the case of DIT Vs. Indraprastha Cancer Society 52 Taxmann.com 463(Del). Findings of the court in this decision are as under:-

A. Where a charitable institution has purchased a capital asset and treated amount spent on said

asset as application of income, is entitled to claim depreciation on said asset utilized for business.

B. View taken by Delhi High Court in DIT Vs. VishwaJagriti Mission 47 taxmann.com 56 (Del.) holding that claim for depreciation should be allowed as per principles relating to commercial accountancy is correct. In this order the reliance placed by revenue on the decision of Supreme Court in Escorts Ltd. Vs. UOI 199 ITR 43 was dispelled and distinguished. Decisions of other High Courts in:-

a) CIT Vs. Sheth Manilal Ranchodd as Vishram Bhavan Trust 198 ITR 598 (Guj.);

b) CIT Vs. Raipur Pallettive Society 180 ITR 579 (M.P.);

c) CIT Vs. Society of the Sisters of St. Anne 146 ITR 28 (Kar.);

d) CIT Vs. Trustee of H.E.H. the Nizam's Supplemental Religious Endowment Trust 127 ITR 378 (A.P.);

e) CIT Vs. Rao Bahadur CalavalaCunnanChetty charities 135 ITR 485 (Mad.)

were referred to in affirmation.

C. The High Court of Kerala in Lissie Medical Institutions Vs. CIT 348 ITR 344 (Kar.) has taken a different view. Noticing the said judgment as well as circular/ clarification dated 02.02.2012 issued by CBDT, Division Bench of Delhi High Court re-examined the entire issue in DIT (E) Vs. Indian Trade Promotion Organization in ITA No. 7/2013 decided on 27.11.2013. The court did not refer the matter to larger bench and followed the ratio accepted in Vishwa Jagriti Mission (supra).

D. Decisions of other High Courts in CIT Vs. Tiny Tots Education Society 330 ITR 21 (P&H) and CIT Vs. Institute of Banking Personal Selection 264 ITR 110 (Bom.) were noticed.

E. Since the issue had been examined by Delhi High Court in depth & detail twice there is no error in impugned orders passed by the Tribunal by holding that claim for depreciation will be allowable

where purchase of assets has been claimed as application.

F. Decision of Delhi High Court in DIT Vs. Chiranjiv Charitable Trust 223 Taxmann.com 71 (Del)" stands distinguished in Para 10, 11 & 12 of the order in the case of Indraprastha Cancer Society which is reproduced below:-

The aforesaid paragraph refers to the decision in the case of VishwaJagriti Mission (supra) but ratio was distinguished on the ground that in the said case the Court was concerned with computation of income of a charitable trust/institution on commercial principles and if so whether depreciation on fixed assets used for charitable purposes should be allowed as a deduction. The consensus of judicial opinion on the said aspect was referred to. It is noticeable that in Charanjiv Charitable Trust (supra) it stands observed that the Tribunal overlooked the fact that the cost of asset had been allowed as a ''deduction'' and thereafter depreciation was being claimed. The said case, therefore, appears to be a peculiar one wherein deduction as expenditure and

depreciation was being claimed simultaneously, while computing the taxable income under the head "profits and gains from business". The said decision dated 18th March, 2014 does not refer to the decision in Indian Trade Promotion Organisation (supra)which was decided on 27th November, 2013. The judgment in the case of Indian Trade Promotion Organisation (supra) was not cited and referred to. The judgment in the case of Charanjiv Charitable Trust (supra) is authored by the same Judge, who has also authored the decision in the case of VishwaJagriti Mission (supra). It is obvious that in Charanjiv Charitable Trust (supra), the Division Bench could not have taken a different view on the legal ratio as interpreted in VishwaJagriti Mission (supra). Further, the decisions in the case of VishwaJagriti Mission and Indian Trade Promotion Organisation (supra) being prior in point of time would act as binding precedents and could not have been overruled or dissented from by a coordinate Division Bench.(Para 10)

By Finance (No.2) Act of 2014, sub-section (6) to Section 11 stands inserted with effect from 1st April, 2015 to the effect that where any income is required to

be applied, 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 an asset, the acquisition of which has been claimed as application of income under this Section in the same or any other previous year. The legal position, therefore" would undergo a change in terms of Section 11(6), which has been inserted and applicable with effect from 1st April, 2015 and not to the assessment years in question. The newly enacted sub-section relates to application of income. (Para 11)

In these circumstances, we do not find any merit in the appeals in the case of Indraprastha Cancer. Society, AbulKalam Azad Islamic Awakening and in the case of M/s Sanskriti Educational Society (ITA M .348/2014). Similarly, we do not think it is necessary and required that we should Issue notice In the application for condonation of delay filed in the case of M/s Sanskrltl Educational Society (ITA Nos. 463 and 464/2014) as on merits the Revenue is not entitled to succeed. In these appeals, the applications for condonation of delay shall

be treated as dismissed and as a sequitur the appeals will be treated as dismlssed.(Para 12)

Moreover reliance is placed on the amendment made by Finance (No. 2) Act 2014 by insertion of sub-section (6) and (7) to section 11 of the Income Tax Act. BY way of this amendment it has been provided in the Income Tax Act that claim for depreciation shall not be allowed in respect of any asset where acquisition has already been claimed as application. This amendment reinforces the contention of the assessee that prior to this amendment effective from A.Y. 2015-16 claim for depreciation was allowable on normal commercial principles. Had it not been so, there was no need for making the above referred amendment in the Act."

9. On this issue of depreciation of Rs. 36,03,503/-, I find that Ld. CIT(A) in his impugned order vide para no. 5 has adjudicated the issue and dismiss the same by observing as under:-

"5. Ground No. 4 is against in considering an amount of Rs. 36,03,503/- on account of depreciation as an application of income u/s. 11 & 12 of the Income Tax Act. The facts are that the AO has not discussed the issue of allowability of depreciation under the provision of Section 11 & 12 of the Income Tax Act in his assessment order. This

> *implies that the appellant never raised this issue during the course of assessment proceedings. Since, this issue is not emanating from the assessment order Ground No. 4 is hereby dismissed."*

9.1 After perusing the aforesaid finding of the Ld. CIT(A), I am of the considered view that the issue of depreciation was not emanating from the assessment order, hence, the Ld. CIT(A), has dismissed the same. However, in the interest of justice, I remit back the issue in dispute to the file of the AO to consider the same afresh, after giving adequate opportunity of being heard to the assessee.

10. In the result, the Appeal filed by the Assessee stands allowed for statistical purposes.

Order pronounced in the Open Court on 02/08/2016.

SD/-
[H.S. SIDHU]
JUDICIAL MEMBER

Date 02/08/2016

"SRBHATNAGAR"

<u>Copy forwarded to: -</u>

1. Appellant -
2. Respondent -
3. CIT
4. CIT (A)
5. DR, ITAT

Assistant Registrar, ITAT, Delhi Benches