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.890/Bang/2016
(Assessment Year : 2011-12)

Dy. Commissioner of Income Tax (Exemptions),
Circle 1, Bangalore. …. Appellant.

Vs.

M/s. G M Education Trust,
No.98, Samrudhi, 3rd Main, 8th Cross,
BHBCS, Chandra Layout, Bangalore-560 040. ….. Respondent.
PAN AAATG 7892Q

C.O. No.29/Bang/2017
(In I.T. A. No.890/Bang/2016)
(Assessment Year : 2011-12)
(By Assessee)

Assessee/C.O. By : Shri B.T. Shetty, C.A.
Revenue By : Shri G. Kamaladhar, D.R.

Date of Hearing : 05.04.2017.
Date of Pronouncement : 19.05.2017.

O R D E R

Per Shri Vijay Pal Rao, J.M. :

This appeal by the assessee is directed against the order dt.22.02.2016 of Commissioner of Income Tax (Appeals)-14, LTU, 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.

Carry forward of excess application:

i). Whether, in the given facts and circumstances, the CIT(A) is correct without appreciating the fact that the normal computation of income under respective heads as envisaged u/s 15 to 59 are not applicable to the computation of income in respect of charitable trust/institution for the purpose of claiming exemption under section 11, 12 and 13 and, therefore, the provisions relating to set-off of loss from one source against the income from another source, set-off of loss from one head against income from another head and carry forward and set-off of loss against the income of subsequent years as envisaged u/s 70 to 79 are also not applicable to the charitable trusts/institutions.

ii). Whether, in the given facts and circumstances, the CIT(A) is correct in law without appreciating the fact that the issue of application of income more than the income computed does not arise, except in a case where the assessee has incurred huge amount of capital expenditure sourced out of borrowed or corpus donations or 15% of income set apart over a period of time. However, expenditure incurred out of the above sources cannot be termed as application of funds out of the income earned in a particular assessment year inasmuch as loan borrowed does not fall under the category of income earned by the assessee, corpus fund donation does not come under income by virtue of section 11(1)(d) and 15% of income set apart in earlier assessment year cannot be construed as income of the current year and 15% set apart out of the current year income is also excluded from income available for application. As such, the concept of application is only to show that the income is fully utilized rather than claiming excess expenditure either revenue or capital over and above the income so as to claim excess application or deficit/loss to be carried forward to subsequent assessment years. Even in the case of excess application by virtue of borrowed funds/corpus fund donations/15% set apart of earlier years, the income of the assessee cannot be converted to loss but at best it can be made Nil. Hence, the carry forward of excess application of income as claimed by the assessee cannot be allowed.

ii). Whether, in the given facts and circumstances, the CIT(A) is correct in law without appreciating the fact that the issue of application of income more than the income computed does not arise, except in a case where the assessee has incurred huge amount of capital expenditure sourced out of borrowed or corpus donations or 15% of income set apart over a period of time. However, expenditure incurred out of the above sources cannot be termed as application of funds out of the income earned in a particular assessment year inasmuch as loan borrowed does not fall under the category of income earned by the assessee, corpus fund donation does not come under income by virtue of section 11(1)(d) and 15% of income set apart in earlier assessment year cannot be construed as income of the current year and 15%

set apart out of the current year income is also excluded from income available for application. As such, the concept of application is only to show that the income is fully utilized rather than claiming excess expenditure either revenue or capital over and above the income so as to claim excess application or deficit/loss to be carried forward to subsequent assessment years. Even in the case of excess application by virtue of borrowed funds/corpus fund donations/15% set apart of earlier years, the income of the assessee cannot be converted to loss but at best it can be made Nil. Hence, the carry forward of excess application of income as claimed by the assessee cannot be allowed.

3. The first issue raised by the revenue in this appeal is regarding disallowance of depreciation which was allowed by the CIT (Appeals).

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 of the assessee-trust on the ground that when the capital expenditure itself was allowed as application of income then the allowance of depreciation would amount to double deduction. The CIT (Appeals) has allowed the claim of the assessee by following the decision of the Hon'ble jurisdictional High Court in the case of **CIT Vs. Society of Sisters of St. Anne** 146 ITR 28. We further note that this Tribunal has been taking a consistent view on this issue and in the case of **DCIT Vs. Manipal**

Academy of Higher Education 44 ITR (Trib) 18 (Bang), the Tribunal has decided this issue in paras 12 to 15 held as under :

" 12. A similar view has been taken by the Hon'ble Bombay High Court in the case of Institute of Banking 264 ITR 110(Supra) as well as by the Hon'ble P&H High Court and in case of CIT Vs Manav Mangal Society 328 ITR 421 (Supra). The view taken in the case of Institute of Banking (Supra) has been re-affirmed by the Hon'ble Bombay High Court in the recent decision dated 23-03-015 in case of DIT(Exemption), Mumbai Vs Ville Parle Kelavani Mandal, Mumbai by observing inpara-6 as under;

> "6. As far as question no.4 is concerned, this Court has repeatedly held that there is nothing like double deduction. When the assessee has acquired an asset from the income of the trust and thereafter the amount that is claimed is the depreciation on the use of the assets, such depreciation claim does not mean double deduction. The deduction earlier claimed is towards application of funds of the trust for acquiring assets. The latter is depreciation and it is permissible deduction considering the use of the assets. This has been clarified repeatedly by this Court. If any reference is required then the case of CIT Vs Institution of Banking Personnel Selection (IBPS) (2003) 264 ITR 110/131 Taxman.386(Bom.) is enough".

12.1 Therefore, in view of the judgment of the Hon'ble jurisdictional High Court in case of Society of the Sisters of St. Anne (Supra) as well as various decisions as relied upon by the learned AR, we have no reason to take a divergent view from the view taken by the co-ordinate bench of this Tribunal in case of Shri Adichunchunagiri Shikshana Trust (Supra) as well as in case of City Hospital Charitable Trust (Supra), wherein the co-ordinate bench of this Tribunal has decided an identical issue in para-7 to 9 as under;

> "7. We have heard the submissions of the ld. DR, who relied on the order of AO. We have considered the order of the AO. Identical issue ITA No.676/Bang/2014 Page 4 of 11 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:-
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> "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."

8. 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 sub-section (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."

9. 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) does not call for any interference. Consequently grounds No.2 to 2.5 raised by the Revenue are dismissed".

Following the judgment of the Hon'ble jurisdictional High Court in case of Society of the Sisters of St. Anne as well as the decision of the coordinate bench of this Tribunal, we do not find any error or any illegality in the order of the CIT(A), qua this issue.

13. Ground no.3 regarding carry forward of deficit. The assessee claimed a total deficit of Rs.933,27,87,598/- inclusive of current year deficit to be carry forward for setting up of the same as application of income in subsequent assessment years. The AO rejected the claim of the assessee on the ground that in the Income Tax Act, there is no provision of carry forward of excess of expenditure over income.

14. On appeal, the CIT(A) has allowed the claim of the assessee by following the decision of this Tribunal dated 16- 02-2010 in case of Dr. T.M.A Pai Foundation in ITA No.486 to 491(B)/2009. The CIT(A) has also taken note of the fact that in assessee's own case for the assessment year 2010-11 this issue was decided by the CIT(A) in favour of the assessee.

15. We have heard the learned DR as well as the learned AR and considered the relevant material on record. There is no dispute that an identical issue was considered and decided by this Tribunal in favour of the assessee in case of Dr.T.M.A Pai Foundation, Manipal. The learned AR of the assessee also relied upon the decision of this Tribunal in case of CIT Vs City Hospital Charitable Trust, Bangalore (Supra). We note that the Tribunal in case of City Hospital Charitable Trust, while dealing with the issue of carry forward of excess expenditure over income has held that in para-14 as under;

"14. We have considered his submission. Section 11(1)(a) does not contain any words of limitation to the effect that the income should have been applied for charitable or religious purpose only in the year in which the income has arisen. The application for charitable purposes as contemplated in section 11(1)(a) takes place in the year in which the income is adjusted to meet the expenses incurred for charitable or religious purposes. Hence, even if the expenses for such purposes have been incurred in the earlier years and the said expenses are adjusted against the income of a subsequent year, the income of such subsequent year can be said to be applied for charitable or religious purposes in the year in which such adjustment takes place. In other words, the set-off of excess of expenditure incurred over the income of earlier years against the income of a later year will amount to application of income of such later year. The above is the position of law as held in the case of CIT Vs. Maharana of Mewar Charitable Foundation 164 ITR 439 (Raj); CIT Vs. Shri Plot Swetamber Murti

Pujak Jain Mandal 211 ITR 293 (Guj.). In CIT Vs. Institute of Banking Personnel Selection 264 ITR 110 (Bom), it was held that in case of charitable trust whose income is exempt under s. 11, excess ITA No.676/Bang/2014 Page 9 of 11 of expenditure in the earlier years can be adjusted against income of subsequent years and such adjustment would be application of income for subsequent years and that depreciation is allowable on the assets the cost of which has been fully allowed as application of income under s. 11 in past years. In Govindu Naicker Estate VS. ADIT 248 ITR 368 (Mad), the Hon'ble Madras High Court held that the income of the trust has to be arrived at having due regard to the commercial principles, that s. 11 is a benevolent provision, and that the expenditure incurred on religious or charitable purposes in earlier year or years can be adjusted against the income of the subsequent year. The principle that the loss incurred under one head can only be set off against the income from the same head is not of any relevance, if the expenditure incurred was for religious or charitable purposes, and the expenditure adjusted against the income of the trust in a subsequent year, would not amount to an incidence of loss of an earlier year being set off against the profit of a subsequent year. The object of the religious and charitable trust can only be achieved by incurring expenditure and in order to incur that expenditure, the trust should have an income. So long as the expenditure incurred is on religious or charitable purposes, it is the expenditure properly incurred by the trust, and the income from out of which that expenditure is incurred, would not be liable to tax. The expenditure, if incurred in an earlier year is adjusted against the income of a later year, it has to be held that the trust had incurred expenditure on religious and charitable purposes from the income of the subsequent year, ITA No.676/Bang/2014 Page 10 of 11 even though the actual expenditure was in the earlier years, if in the books of account of the trust such earlier expenditure had been set off against the income of the subsequent year. The expenditure that can be so adjusted can only be expenditure on religious and charitable purposes and no other. The High Court relied on the decision in the case of CIT Vs. Society of Sisters of ST. Anne 146 ITR 28 (Kar.).

15.1 As it is clear from the above decision that the co-ordinate bench of this Tribunal has followed the decision of the Hon'ble Rajasthan High Court in case of CT Vs Maharana of Mewar Charitable Foundation 164 ITR 439(Raj.) as well as the decision of the Hon'ble Bombay High Court in case of CIT Vs Institute of Banking - 264 ITR 110 (Supra). Accordingly, following the decision of the co-ordinate bench in the case of City Hospital Charitable Trust, Bangalore(Supra), we uphold the order of the CIT(A) on this issue."

Accordingly, in view of the decision of Hon'ble jurisdictional High Court as well as co-ordinate bench of this Tribunal (supra), we do not find any

reason to interfere with the impugned order of the CIT (Appeals) qua this issue.

5. The next issue raised by the revenue is carry forward of excess application of income under Section 11(1)(a) of the Income Tax Act, 1961 (in short 'the Act').

6. We have heard the learned Departmental Representative as well as learned Authorised Representative and considered the relevant material on record. The CIT (Appeals) has decided this issue by following the decisions of this Tribunal including the decision in the case of **CIT Vs. Manipal Academy of Higher Education** (2015) 44 ITR (Trib) 18 (Bang). The co-ordinate bench of this Tribunal in the case of **CIT Vs. Karnataka Food and Civil Supplies Ltd** vide order dt.20.10.2015 in ITA No.124/Bang/2014 has held in paras 8 & 9 as under :

" 8. We are of the view that pendency of an appeal before the Hon'ble High Court of Karnataka cannot be the basis not to follow the decision on the issue already rendered in identical cases. Section 11(1)(a) does not contain any words of limitation to the effect that the income should have been applied for charitable or religious purpose only in the year in which the income has arisen. The application for charitable purposes as contemplated in section 11(1)(a) takes place in the year in which the income is adjusted to meet the expenses incurred for charitable or religious purposes. Hence, even if the expenses for such purposes have been incurred in the earlier years and the said expenses are adjusted against the income of a subsequent year, the income of such subsequent year can be said to be applied for charitable or religious purposes in the year in which such adjustment takes place. In other words, the set-off of excess of expenditure incurred over the income of earlier years against the income of a later year will amount to application of income of such later year. The above is the position of law as held in the case of CIT Vs. Maharana of Mewar Charitable Foundation 164 ITR 439 (Raj) CIT Vs. Shri Plot Swetamber Murti Pujak Jain Mandal 211 ITR 293 (Guj.). In

CIT Vs. Institute of Banking Personnel Selection 264 ITR 110 (Bom), it was held that in case of charitable trust whose income is exempt under s. 11, excess of expenditure in the earlier years can be adjusted against income of subsequent years and such adjustment would be application of income for subsequent years and that depreciation is allowable on the assets the cost of which has been fully allowed as application of income under s. 11 in past years. In Govindu Naicker Estate VS. ADIT 248 ITR 368 (Mad), the Hon'ble Madras High Court held that the income of the trust has to be arrived at having due regard to the commercial principles, that s. 11 is a benevolent provision, and that the expenditure incurred on religious or charitable purposes in earlier year or years can be adjusted against the income of the subsequent year. The principle that the loss incurred under one head can only be set off against the income from the same head is not of any relevance, if the expenditure incurred was for religious or charitable purposes, and the expenditure adjusted against the income of the trust in a subsequent year, would not amount to an incidence of loss of an earlier year being set off against the profit of a subsequent year. The object of the religious and charitable trust can only be achieved by incurring expenditure and in order to incur that expenditure, the trust should have an income. So long as the expenditure incurred is on religious or charitable purposes, it is the expenditure properly incurred by the trust, and the income from out of which that expenditure is incurred, would not be liable to tax. The expenditure, if incurred in an earlier year is adjusted against the income of a later year, it has to be held that the trust had incurred expenditure on religious and charitable purposes from the income of the subsequent year, even though the actual expenditure was in the earlier years, if in the books of account of the trust such earlier expenditure had been set off against the income of the subsequent year. The expenditure that can be so adjusted can only be expenditure on religious and charitable purposes and no other. The High Court relied on the decision in the case of CIT Vs. Society of Sisters of ST. Anne 146 ITR 28 (Kar)."

9.. We find that the above decision has considered the judgment of Hon'ble Madras High Court in the case of Govindu Naicker Estate (supra), relied on by the Ld. DR before us. In so far as the argument of the Ld. DR that only the deficit of immediately preceding assessment year can be considered, in our opinion, this issue also stands covered by the above mentioned decision of the coordinate bench in the case of Academy of Liberal Education (supra). Relevant para 3 is reproduced here under :

"3. The assessee is a trust registered u/s. 12A of the Act. For the A.Y. 2011-12, the assessee filed a return of income showing application of income by more than Rs.3,08,66,139 of its receipts. The assessee also had a carry forward unabsorbed deficit of Rs.25,78,08,575 from A.Ys. 2005-06 to 2010-11. The unabsorbed current deficit and unabsorbed deficit for the A.Ys. 2005-06 to 2010-11 were sought to be carried forward for setting off and on treatment as application of income in the subsequent assessment years. The income declared in the return of income was NIL."

Thus this Tribunal had allowed set off of losses even for years prior to the immediately preceding assessment year. We do not find any reason to differ from the view taken by the coordinate bench."

In view of the decision of the co-ordinate bench of this Tribunal, we do not find any merit or substance in the appeal of revenue.

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7. In the Cross Objection, the assessee has not raised any fresh ground which has supported the order of the CIT (Appeals) therefore in view of our finding on this issue in the revenue's appeal, the cross objection becomes infructuous.

8. In the result, the appeal of revenue and C.O. of the assessee are dismissed.

Order pronounced in the open court on the 19th day of May, 2017.

Sd/-	Sd/-
(INTURI RAMA RAO)	**(VIJAY PAL RAO)**
Accountant Member	Judicial Member

Bangalore,
Dt. 19.05.2017.

*Reddy gp