INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "F": NEW DELHI

(THROUGH VIDEO CONFERENCING)

BEFORE SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER
AND
SHRI PAWAN SINGH, JUDICIAL MEMBER

ITA No. 2557/Del/2018
Asstt. Year: 2014-15

DCIT (Exemption) Ghaziabad	Vs.	Ram Nath Memorial Trust Society Ram Bagh Colony, Shastri Nagar, Meerut Uttar Pradesh PAN AAATT6054B
(Appellant)		**(Respondent)**

Department by:	Ms. Mrinalini Sapra, Sr. DR
Assessee by :	Shri Rohit Agarwal, Advocate
Date of Hearing	17/08/2021
Date of Pronouncement	19/08/2021

O R D E R

PER **PAWAN SINGH, JUDICIAL MEMBER**:

This appeal filed by the Revenue is directed against the order of Ld. CIT(A) Meerut dated 16.1.2018 for assessment year 2014-15. The revenue has raised following grounds of appeal:-

1. "The Ld. CIT(A) has erred in law and facts in deleting the additions of Rs. 1,36,83,100/- made by the AO against excess fees charged from the students.

2. The Ld. CIT(A) has erred in law and facts in deleting the addition of Rs. 1,79,42,159/-. made by the AO regarding depreciation.

3. The order of Ld. CIT(A) has erred in law and facts in deleting the addition of Rs. 47,00,850/-made by the AO regarding cash credits.

4. The order of Ld. CIT(A) be cancelled and the order of the AO be restored."

2. Brief facts of the case are that assessee is a society and is registered under the provision of Society Registration Act. The assessee is also having registration under section 12AA. The assessee is running an educational institution. For assessment year 2014-15, the assessee filed its return of income declaring NIL income. The case was selected for scrutiny. During the assessment the assessing officer (AO) noted that assessee has charged excess fees in addition to the fees prescribed by State Government. The AO treated the said excess fees as capitation fee as income of the assessee and treated it as business receipt. The AO also noted that assessee has availed unsecured loan from two creditor and included share premium. The AO treated the said loan amount as unexplained cash credit by treating that loan as accommodation entry and added the same under section 68. Further, the AO did not allow depreciation on the usage of fixed assets by taking a view it is a double deduction.

3. On appeal before Ld. CIT(A), all the additions / disallowances were deleted.

4. Aggrieved by the order of ld CIT(A), the revenue has filed present

appeal before this Tribunal.

5. We have heard the submission of Ld. the Departmental Representative for Revenue and Ld. Authorised Representative for assessee. Ground No. 1 relates to deleting the addition of Rs. 1.38 crore on account of excess fees. The Ld. DR for the Revenue supported the order of AO. The Ld. DR for the revenue submits this during the assessment, the AO brought on record sufficient material to show that assessee had collected excess fees, in addition to the fees fixed by State Government. The AO worked out the figure of excess fees charged by assessee during the relevant financial year. Charging of excess fees is nothing but the capitation fees. The capitation fee is nothing but the business income of the assessee. The Ld. DR for the revenue prayed for restoring the order of the AO by reversing the order of Ld. CIT(A).

On the other hand Ld. AR of the assessee submits that assessee is a Society registered under the provision of Society Registration Act. The assessee is also having registration under section 12AA. The assessee charged the excess fee for giving extra classes to the students. The AO has not doubted the charitable activities of the assessee. The assessee utilized the excess fees charged for the object of the assessee. The Ld. CIT(A) appreciated the facts of the case and held that the assessee utilized the excess receipt for creation of fixed assets. To support his submission the Ld. AR also relied upon the

decision of Hon'ble Apex Court in the case of Queen's Educational Society vs. CIT (2015) 372 ITR 0699.

6. We have considered the rival submissions of both the parties and perused the order of lower authorities. We have also perused the various documents placed on record. We have also deliberated on the case laws relied upon by the Ld. AR of the assessee. As noted above, the AO treated the excess fees as a business receipt. Before Ld. CIT(A) the assessee filed its detailed submission. In the submission the assessee stated that AO committed calculation mistake of excess fees, the correct figure is Rs. 1,31,79,560/-. The assessee also relied upon the decision of Queen's Educational Society Vs CIT (supra). The Ld. CIT(A), after considering the facts of the case and the decision of Hon'ble Supreme Court in Queen's Educational Society vs. CIT (supra) held that assessee has claimed application of more than 85% of total receipt. The total receipt of the assessee were of Rs. 5.67 crore against which the assessee has made application on revenue account including depreciation of Rs. 1.79 crore. The assessee further applied Rs. 90.08 lacs for creation of fixed assets, thereby made a total application at Rs. 6,65,05,627.53 (i.e. 90,08,265,00 + 5,74,97,362.53). We find that the AO has not doubted the charitable activities of the assessee. Further the ld CIT(A) has clearly held that the assessee has applied more than 85% of total receipt for its object. Thus, the predominant object of the assessee has been fulfilled. Hon'ble

Supreme Court while discussing the scope of section 10(23C)(iiiad) and (iv) as under :-

> *"(1)Where an educational institution carries on the activity of education primarily for educating persons, the fact that it makes a surplus does not lead to the conclusion that it ceases to exist solely for educational purposes and becomes an institution for the purpose of making profit.*
> *(2) The predominant object test must be applied - the purpose of education should not be submerged by a profit making motive.*
> *(3) A distinction must be drawn between the making of a surplus and an institution being carried on "for profit". No inference arises that merely because imparting education results in making a profit, it becomes an activity for profit.*
> *(4) If after meeting expenditure, a surplus arises incidentally from the activity carried on by the educational institution, it will not be cease to be one existing solely for educational purposes.*
> *(5) The ultimate test is whether on an overall view of the matter in the concerned assessment year the object make profit as opposed to educating persons."*

7. Considering the facts the assessee has applied more than 85% of the total receipt on charitable purpose and there is no expressed finding of AO that assessee is not carrying the charitable activities. Therefore, we do not find any merit in the grounds of appeal raised by the revenue. Thus we have heard the order of Ld. CIT(A).

8. In the result ground No. 1 of the appeal is dismissed.

9. Ground No. 2 relates to deleting the addition of Rs. 1,79,42,159/- regarding depreciation. The Ld. DR for the Revenue supported the order of the AO. The Ld. DR for the revenue submits that the AO

rightly disallowed depreciation of Rs. 1.79 Crores by taking view that same is not allowable as capital expenditure as the assessee has already taken benefits of application of fund in previous year out of available surplus under section 11. Hence no benefit of depreciation is allowable.

10. On the other hand Ld. AR of the assessee supported the order of the AO. The Ld. AR of the assessee submits this ground of appeal is covered in favour of assessee by the decision of Tribunal in assessee's own case for assessment year 2013-14 in ITA No. 2284/Del/2017 dated 18.11.2019. Ld. AR also relied upon the decision of Hon'ble Supreme Court in the case of CIT Vs Rajasthan and Gujarati Charitable Foundation Poona in Civil Appeal No. 7186 of 2014.

11. We have considered the rival submissions and perused the record. We find that the AO disallowed the depreciation on fixed assets by holding that it amounts to double deduction as the assessee has already obtained the benefit under section 11 of the Act. Before us Ld. AR of the assessee submits that this ground of appeal is covered in favour of the assessee by the order of the Tribunal in assessment year 2013-14 wherein on similar disallowance the assessee was allegedly granted relief. On perusal of order of Tribunal in AY 2013-14, we find that similar disallowance on depreciation was made in assessment year 2013-14, on appeal before the Ld. CIT(A), the assessee was allowed depreciation. Further aggrieved the revenue filed appeal before

Tribunal vide ITA No. 2284/Del/2017. However due to inadvertent omissions, the grounds of appeal remain unadjudicated. We find that no further miscellaneous application (MA) is filed by any of the parties for bringing the mistake apparent on record to the notice of Tribunal. However we find that on similar question of law the Hon'ble Bombay High Court in CIT Vs Institute of Banking Personnel Selection (IBPS) (2003) 131 Taxman 386 (Bom) passed the following order.

> *"3. As stated above, the first question which requires consideration by this Court is; whether depreciation was allowable on the assets, the cost of which has been fully allowed as application of income under section 11 in the past years? In the case of CIT v. Munisuvrat Jain 1994 Tax Law Reporter, 1084 the facts were as follows. The assessee was a Charitable Trust. It was registered as a Public Charitable Trust. It was also registered with the Commissioner of Income Tax, Pune. The assessee derived income from the temple property which was a Trust property. During the course of assessment :'proceedings for■ assessment years 1977-78,1978-79 and 1979-80, the assessee claimed depreciation on the value of the building @2H% and they also claimed depreciation on furniture @ 5%. The question which arose before the Court for determination was ; whether depreciation could be denied to the assessee, as expenditure on acquisition of the assets had been treated as application of income in the year of acquisition? It was held by the Bombay High Court that section 11 of the Income Tax Act makes provision in respect of computation of income of the Trust from the property held for charitable or religious purposes and it also provides for application and accumulation of income.*
> *On the other hand, section 28 of the Income Tax Act deals with chargeability of income from profits and gains of business and*

section 29 provides that income from profits and gains of business ahll be computed in accordance with section 30 to section 43C. That, section 32(1) of the Act provides for depreciation in respect of building, plant and machinery owned by the assessee and used for business purposes. It further provides for deduction subject to section 34. In that matter also, a similar argument, as in the present case, was advanced on behalf of the revenue, namely, that depreciation can be allowed as deduction only under section 32 of the Income Tax Act and not under general principles. The Court rejected this argument. It was held that normal depreciation can be considered as a legitimate deduction in computing the real income of the assessee on general principles or under section 11(1)(a) of the Income Tax Act The Court rejected the argument on behalf of the revenue that section 32of the Income Tax Act was the only section granting benefit of deduction on account of depreciation. It was held that income of a Charitable Trust derived form building, plant and machinery and furniture was liable to be computed in normal commercial manner although the Trust may not be carrying on any business and the assets in respect whereof depreciation is claimed may not be business assets. In all such cases, section 32 of the Income Tax Act providing for depreciation for computation of income derived from business or profession is not applicable. However, the income of the Trust is required to be computed under section 11 on commercial principles after providing for allowance for normal depreciation and deduction thereof from gross income of the Trust. In view of the aforesatated judgment of the Bombay High Curt, we answer question No. 1 in the affirmative i.e., in favour of the assessee and against the Department.

4. Question No. 2 herein is identical to the question which was raised before the Bombay High Court in the case of Director of Income-tax (Exemption) v. Framjee Cawasjee Institute [1993) 109

CTR 463. In that case, the facts were as follows:The assessee was the Trust. It derived its income from depreciable assets. The assessee took into account depreciation on those assets in computing the income of the Trust.The ITO held that depreciation could not be taken into account because, full capital expenditure had been allowed in the year of acquisition of the assets. The assessee went in appeal before the Assistant Appellate Commissioner. The Appeal was rejected. The Tribunal, however, took the view that when the ITO stated that full expenditure had been allowed in the year of acquisition of the assets, what he really meant was that the amount spent on acquiring those assets had been treated as 'application of income1 of the Trust in the year in which the income was spent in acquiring those assets. This did not mean that in computing income from those assets in subsequent years, depreciation in respect of those assets cannot be taken into account. This view of the Tribunal has been confirmed by the Bombay High Court in the above judgment. Hence, Question No. 2 is covered by the decision of the Bombay High Court in the above Judgment. Consequently, Question No. 2 is answered in the Affirmative i.e., in favour of the assessee and against the Department."

12. Considering the decision of Hon'ble Bombay High Court, which has been affirmed by Hon'ble Apex Court in CIT Vs Rajasthan and Gujarati Charitable Foundation Poona (supra), we do not find any merit in the ground of appeal raised by the revenue.

13. In the result the appeal of the revenue is dismissed.

14. Ground No. 3 relates to deleting the addition of Rs.47,00,850/-. The Ld. DR for the revenue supported the order of the assessing officer.

On the other hand the ld AR for the assessee submits that that this ground of appeal is covered by the decision of Tribunal in assessee's own case in assessment year 2013-14 in "ITA No. 2284/Del/2017.

15. We have considered the contention of both the parties and find that on similar addition was made by AO in AY 2013-14 and on appeal before CIT(A), the additions were deleted. And on further appeal by the revenue before Tribunal, the order of ld CIT(A) was upheld. We find that on similar grounds of appeal the coordinate bench of Tribunal after considering the contention of both the parties passed in following order :-

> " *7. We have heard both the parties and perused all the materials available on records. The CIT(A) held as under :*
>
> > *"Respectfully following the above cited judgments, 1 hold that the action of the A.O, to make addition in the hands of the appellant, without issuing summons or letters to the lenders as requested for by the appellant and . without making any further enquiries at her own, is unlawful. The appellant has discharged the primary onus casted upon it to prove the identity of depositors, genuineness of transactions and credit worthiness of the depositors and therefore the unsecured loans accepted by the appellant from 5 persons during the year under appeal are treated as explained and substantiated. ifitae non production of the depositors by the' appellant Has wrongly been made a ground to make addition to make,, addition u/s 68 of the Act. Further the action of the A.O. to treat the deposits under reference as*

anonymous donations u/s 115BBC is completely unlawful since all the loan creditors had opening balances and had also filed copies of ITRs, Thus, by no stretch of imagination could the AO treat these loans as anonymous donation u/s 115BBC. Now coming u the failure to produce the depositor for the personal deposition the same cannot be treated as a ground so as to make the addition of the loans accepted from them during the year as anonymous donations u/s 115BBC. I therefore, delete the addition of Rs.3,20,00,000/- and direct the AO accordingly. "

16. Considering the decision of coordinate bench of the Tribunal in assessee's own case on similar grounds of appeal wherein similar grounds of appeal raised by the revenue in appeal for AY 2013-14 was dismissed. Respectfully following the decision of coordinate bench we affirm the order passed by the Ld. CIT(A). Hence ground No. 3 is dismissed.

17. In the result appeal filed by the revenue is dismissed.

Order pronounced on 19th August, 2021 by placing result on notice board.

Sd/-	**sd/-**
(N.K.BILLAIYA)	**(PAWAN SINGH)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Dated: 19/08/2021

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1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi