INCOME TAX APPELLATE TRIBUNAL

DELHI BENCH "C": NEW DELHI

BEFORE
SHRI ANIL CHATURVEDI, ACCOUNTANT MEMBER
AND
MS. ASTHA CHANDRA, JUDICIAL MEMBER

ITA No. 4172/Del/2017
Asstt. Year: 2012-13

ACIT (E), Circle-2(1), New Delhi.	Vs.	Software Technology Parks of India 9th Floor, NBCC-II, Jai Singh Marg, New Delhi – 110 001 PAN AAATS2468J
(Appellant)		(Respondent)

Assessee by:	Shri Atul Ninawat, Advocate
Department by :	Ms. Pramita M Viswas, CIT(DR)
Date of Hearing	29.11.2022
Date of pronouncement	07.12.2022

O R D E R

PER ASTHA CHANDRA, JM

The appeal by the Revenue is directed against the order dated 05.04.2017 of the Ld. Commissioner of Income Tax (Appeals) –40, Delhi **("CIT(A)")** pertaining to assessment year **("AY")** 2012-13.

2. The Revenue has taken the following grounds of appeal:-

"1. On the facts and in the circumstances of the case and in law, Ld. CIT(A) has erred in law in directing the AO to allow the amount of Rs. 38,80,27,604(being taxes paid and deposited) as application of income.

2. The Ld. CIT(A) has erred on facts and law in allowing exemption u/s 11 & 12 and accumulation u/s 111(2) of the Income Tax Act to assessee while the AO has clearly established that the / exemption was never

claimed by the assessee in the original ITR and the revised ROI filed by the assessee was defective.

3. *Whether the Ld. CIT(A) has erred in allowing the appeal of the assessee by ignoring almost the separate or independent provisions of section 11,12,12A,12AA & 13 and these provisions are independent code in itself in Chapter III of the Income Tax Act, 1961 and claim of depreciation u/s 32 comes under chapter IV of the Act under the head 'D' - Profit and Gains of Business or Profession and depreciation is allowed when capital assets are used for the purpose of business.*

4. *Whether the Ld. CIT(A) has erred in allowing the appeal of the assessee by ignoring the fact that the assessee is not eligible for any type of depreciation as the entire expenditure for the purchase of capital assets is allowed as a deduction and the same is treated as application of income u/s 11(1) and claiming depreciation on the same capital asset is a double deduction and is not as per law as these capital assets are not used for the purpose of business or profession as provided u/s 32(1).*

5. *On the facts and in the circumstances of the case and in law, Ld. CIT(A) has erred in law in allowing the benefit of section 1 l(l)(a) and section 11(2).*

6. *On the facts and in the circumstances of the case and in law, Ld. CIT(A) has erred in law in allowing Rs. 6,50,00,000/- the expenditure of earmarked fund."*

3. The assessee is a society registered under Societies Registration Act, 1860. It is also registered under section 12A of the Income Tax Act, 1961 **(the "Act")** as a charitable society offering services to the nation as the arm of the Government of India under Software Technology Park of India (STPI) Scheme.

3.1 The assessee filed its return for AY 2012-13 on 29.09.2012 electronically declaring total income of Rs. 1,04,10,61,097/-. The return was processed under section 143(1) of the Act on 24.12.2013. The assessee filed revised return on 31.03.2014 manually which the Ld. Assessing Officer **("AO")** treated as invalid.

3.2 The case was selected for scrutiny. During assessment proceeding requisite details were filed and examined by the Ld. AO. The books of accounts produced by the assessee were also examined by the Ld. AO on test

check basis. The Ld. AO allowed to the assessee exemption under section 11 of the Act but completed the assessment under section 143(3) of the Act on 30.03.2015 on total income of Rs. 1,63,91,74,414/- including therein disallowance of Rs. 14,50,85,713/- claimed on account of depreciation , disallowance of Rs. 38,80,27,604/- being the amount of taxes paid and disallowance of Rs. 6,50,00,000/- being earmarked fund spent during the year. The assessee challenged the aforesaid disallowances in appeal before the Ld. CIT(A).

4. It was submitted by the assessee before the Ld. CIT(A) that while computing income, benefit of exemption under section 11 has not been given even though the claim of the assessee has been accepted. The assessee had moved an application under section 154 before the Ld. AO stating therein that even though the assessment was made based on the revised return filed by the assesee on 31.03.2014, the computation of income was made based on the original return filed on 30.09.2013. The application was rejected for the reason that *"if the original return is e-filed return, revised return shall be filed through electronic mode only".*

5. The Ld. CIT(A) accepted the contention of the assessee and in para 4.2.4 of his appellate order gave the following direction to the Ld. AO:

"Since the claim of the assessee as a charitable society has been accepted, income has to be computed in accordance with the provisions of section 11 to 13 which would include accumulation as per section 11(1)(a) and section 11(2). The Assessing Officer is directed to re-compute the income after giving benefit of section 11 along with all the consequential benefits. Grounds of appeal nos. 5 to 7 are ***allowed***."

6. On the issue of disallowance of depreciation on fixed assets, the Ld. CIT(A) held that the same was allowable after recording the following observation and findings:

"4 3.1 The Assessing Officer has disallowed deprecation since as per the Assessing Officer, claiming of depreciation of fixed assets tantamount double deduction since the assessee as already claimed deduction of its capital expenditure being a trust. The assessee on the other hand has stated that deprecation is allowable as application of income and has relied on following decisions:

i) CIT v Society of the Sisters of St. Anne (1984) 146 ITR 28 (Karn)
ii) CIT v. Desh Bhagat Memorial Education Trust [2011] 12 taxmann.com 113 (Puny &
lii) Asstt. CIT v. Shri Adichunchanagiri Shikshana Trust [2013] 31 taxmann.com 157
iv) CIT v. Tiny Tots Education Society (2011) 11 taxmann.com 242 (P & H)/[2011] 330 ITR 21 (P & H).
v) CIT v. Market Committee, Pipli [2011] 330 ITR 16 (Punj. & Har.)
vi) CIT v. Sheth Manilal Ranchhoddas Vishram Bhavan Trust [1992] 198 ITR 598/ [1993]
vii) CIT v. Institute of Banking Personnel Selection (IBPS) [2003] 264 ITR 110/ [2003] 131 Taxman 386 (Bom)
viii) CIT v. Rao Bahadur CalavalaCunnanChetty Chanties [1982] 135 ITR485 (Mad)

The assessee has also relied on the judgment of Hon'ble Delhi High Court in the case of DIT (E) vs. Indraprastha Cancer Society[(2015) 53 taxmann.com 463(Delhi)].

4 3 2 1 have considered the assessment order and the submissions of the appellant. I have considered Ore order of the Assessing Officer and the submissions of tire appellant Provisions relating to allowability of depreciation under the Income-tax Act and provisions governing income from property held for charitable or religious purposes have not been referred. Charitable trusts or institutions are governed by the provisions of sections 11, 12. 12A, 12AA and 13 under Chapter III of the Income-tax Act. These sections constitute a complete code governing the grant, cancellation or withdrawal of registration, providing exemption of income and also conditions subject to which a charitable trust or institution is required to function in order to be eligible for exemption. Section 11(1)(a) provide exemption to the extent income derived from the property held under trust is applied for charitable purposes Subject to fulfilment of conditions laid down in section 11 exemption is available in respect of income irrespective of whether the expenditure incurred is revenue or capital in nature. Hence, exemption is available even when the income is applied for acquiring a capital asset. In view of this, charitable institutions were not eligible for depreciation.

4 3 3 This view has been clarified in Para 7.5 of the Explanatory Notes to the provisions of the Finance (No. 2) Act, 2014 issued vide Circular No. 1/2015 dated 21st]anuary, 2015. Section 11 was amended by the Finance (No. 2) Act, 2014 whereby a new sub-section has been inserted which provides that

under section 11, income for the purposes of its application 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 section 11 in the same or any other previous year. Para . of the said Explanatory Notes is reproduced as under.

"7 5 The second issue which had arisen was that the existing scheme of section 11 as well as section 10(23C) of the Income-tax Act provided exemption respect of income when it is applied to 'acquire a capital asset. Subsequently. while computing the income for purposes notional deduction by way of depreciation etc. was being claimed and such amount of notional deduction was not being applied for charitable purpose. As a result, double benefit was being claimed by the trusts and institutions. Therefore, these provisions were required to be rationalized to ensure that double benefit is not claimed and such notional amount does not get excluded from the condition of application of income for charitable purpose."

4.3.4 There are many conflicting judgments of various Hon'ble High Courts, including that of the jurisdictional High Court, both in favour and against allowability depreciation The Hon'ble Delhi, High Court, m the case of Director of Income Tax (Exemption) vs. Charanjiv Charitable Trust [2014] 267 CTR 305, have held that if the cost of the asset has been allowed as deduction by way of application of income then depreciation on the same asset cannot be allowed in computation of income of the trust (Para 30). However, in a subsequent decision, the Hon'ble Delhi High Court in the case of DIT(Exemption) vs. Indraprastha Cancer Society in ITA No. 240, 348, 406, 463 & 464/2014 vide the order dated 18.11.2014, have held that the assesee is eligible for depreciation in the case of charitable or religious institution also.

4.3. 5 A bare reading of the provisions relating to income from property held for charitable purposes shows that depreciation per se was not allowed as a deduction in the case of charitable or religious institutions. This issue has been laid to rest by amendment to section 11 by the Finance (No.2) Act, 2014 which is effective from the assessment year 2015-16 and subsequent years. However, relying on the latest decision of the Hon'ble Delhi High Court in the matter of DIT (Exemption) vs. Indraprastha Cancer Society (supra), the claim of depreciation of the appellant is allowed. Ground of appeal No. 2 is, hence, allowed."

7. As regard the disallowance of taxes paid and deposited by the assessee, the Ld. CIT(A) directed the Ld. AO to allow the amount of Rs. 38,80,27,604/- as application of income. His findings are contained in paras 4.4.1 to 4.4.3 of his appellate order which are reproduced below:

"4.4.1 The Assessing Officer, in the assessment order, has mentioned that since taxes are eventually refundable or are not deductible as per the provisions of the Income-tax Act, the same cannot be considered as application of income for the purpose of exemption under section 11. The appellant on the other hand has stated that tax paid is disallowable as expense only from the income from profit and gains of business or profession under section 40 Section 40 cannot be applied for charitable originations since section 40 is applicable for deduction under sections 30 to 38 only which are not applicable to the appellant. The appellant has also relied on the judgment of CIT vs. Janaki Ammal Ayya Nadar Trust [(1985) 153 ITR159 (Mad)] wherein the Hon'ble Court have held that expenditure by way of payment of tax out of current year's income has to be considered as application for charitable purposes because the payment has been made to preserve the corpus, the existence where of is essential for the trust itself.

4.4.2 I have considered the assessment order and also the submissions of the appellant. It is settled law now that the income of the trust or institution has to be computed m a commercial hence, therefore, outgoing on account of taxes has to be recognized as application on income. In the case of DIT (E) v National Association of Software and Service Companies [(2012) 345 ITR 362 (Del)], the Hon'ble Delhi High Court have held as under:

"If is true that payment of taxes is not allowable as a deduction in computing the profits of the business carried on by the assessee. There are several reasons for the prohibition. Firstly, taxes are paid after the income is earned. They, therefore, represent application of income and not expenditure incurred for the purposes of earning the income. Secondly, taxes represent the Crown's share in the profits of the businessman. Thirdly, taxes are considered as a personal obligation of the trader and, therefore, not allowable. Fourthly, there is a specific bar on taxes being allowed as a deduction in section 40(a)(ii) which says that any sum paid on account of any rate or tax levied on the profits or gains of any business or profession or assessed at the proportion of, or otherwise on the basis of any such profits or gains shall not be deducted in computing the income chargeable under the head 'profits and gains of business or profession'. [Para 10]

The question however, is not a simple question as to whether taxes on income are deductible in computing the taxable income of the assessee. The question is whether, while applying section 11(l)(a) and determining the income available to the trust for application to charitable purposes , the availability of the income should be considered in the light of the commercial principles or whether such income is also to be arrived at or determined as ordained in the Act. [Para11]

There is a consensus of judicial view on the question whether payment of taxes can be considered as a proper deduction while determining the income available to a trust for application to charitable purposes as required by section 11(1)(a). Vie question is not whether taxes are allowable while computing the business income of an assessee under the provisions of the Act.

Vie question is whether the word 'income' used in section 11(1)(a) must be assigned the same meaning as the words total 'income' as defined in section 2(45). The CBDT itself has opined in the circular No. 5 of 19-6-1968 that it would he incorrect to assign to the word 'income' used in section ll(l)(a) the same meaning as has been statutorily assigned to the expression 'total income' under section 2(45). Keeping in view the fact that the long-settled position, which has also been accepted by the CBDT, should not he upset, particularly where the statute which the Court is dealing with is an all India statute. Thus, it is to he held that the payment of taxes under the VDIS is to be deducted before arriving at the commercial income of the assessee-trust that is available for application to charitable purposes. The view taken by the Tribunal on this point is correct. [Para 12]"

4.4.3 In view of the decision of the Hon'ble Madras High Court in the case of CIT vs. Janaki Ammal Ayya Nadar Trust (supra) and DIT (E) v National Association of Software and Service Companies (supra), the Assessing Officer is directed to allow the amount of Rs.38,80,27,604/-as application of income. Ground No. 3 of the appeal is allowed."

8. Regarding the disallowance of Rs.6,50,00,000/- being the expenditure of earmarked fund, the Ld. CIT(A) held that it was not sustainable by recording the following findings in paras 4.5.1 to 4.5.4:-

"4.5.1 The Assessing Officer has held that application of earmarked fund cannot be considered application for the current year since they have been made out of funds which have been received in earlier years. It has also been mentioned that as per the matching concept, the expenses should have been booked in the previous year and cannot be claimed against the application of the income of the current year.

4.5.2 The appellant has stated that application of income from earmarked fund for specific projects without any specific provision under the act. It has also been mentioned that the receipts on account of earmarked fund have been included in the returned income and expenses are made out of the accumulated income of the earlier years. It has also been submitted that no matching concept is applicable in the case of assessment of trust since taxation of income of the trust is based on actual expenditure from income or assets of the trust.

4.5.3 I have considered the assessment order and also the submission of the appellant section ll(l)(a) provides that income derived from property held under trust wholly for religious or charitable purpose, to the extent to which such income is applied to such purpose in India, shall not be included in the total income of the previous year of the person in receipt of the income. In the case of CIT vs. St. George Forane Church [(1988) 170ITR 62(Ker)], the Hon'ble Court held that the word 'applied' is wider in import than the word 'expenditure'. In the case of CIT vs Radhaswami Satsang Sabha [(1954) 25 ITR 472(All)], it has

been held that since the word applied is used in the broadest sense, it covers not only amounts spent but also the amount irretrievably earmarked and allocated for future spending.

4.5.4 In the case under consideration, it has been mentioned that the receipts were included in the retuned income in the year of receipt and the expenditure has been done out of income of the earlier years. Since application of income is out of accumulated income of earlier years and in case of charitable organizations where income is computed in accordance with the provisions of section 11, any application is to be allowed provided is same is for charitable or religious purposes. In view of this and the fact that the matching concept of income does not apply, the addition of Rs. 6,50,00,000/- is deleted. Ground No. 4 of the appeal is ***allowed****."*

9. It is the aforesaid findings of the Ld. CIT(A) that the Revenue is in appeal before the Tribunal and all the six grounds of appeal relate thereto.

10. We have heard the Ld. Representative of the parties. The Ld. CIT(DR) supported the order of the Ld. AO whereas the Ld. AR placed strong reliance on the order of the Ld. CIT(A).

11. We have given our careful thought to the rival submissions and perused the material available in the records. The grievance of the Revenue contained in ground 2 and 5 relate to assessee's claim of exemption under section 11 of the Act. It is an undisputed fact that the assessee is a registered society under section 12A of the Act since past more than 25 years. During assessment proceedings the Ld. AO required the assessee to explain under which limb of the section 2(15) of the Act, the case of the assessee falls and to show cause why income be not treated as business income. The assessee made a lengthy submission dated 13.3.2015, relying therein, interalia on the decision of Hon'ble Delhi High Court in India Trade Promotion Organisation vs. D.G.I.T (Exemptions) (2015) 53 taxmann.com 404 (Delhi). On consideration of the above submission of the assessee the Ld. AO recorded the finding at page 14 of the order that it is established in the reply of the assessee that the prime objective of the society is to encourage Information Technology in the country and the charges received for certification of the entities carrying on activities related to information technology are not directly in the nature of business. Further, the assessee

has established that the income generated from this activity is not applied for any individual benefit or transfer to the benefit of any particular person, entity or group of persons but the application is for the benefit of public at large. This amply proves that the Ld. AO accepted the claim of the assessee that the assessee is a charitable society. It was in the backdrop of such a finding of the Ld. AO that the Ld. CIT(A) arrived at the conclusion that the income of the assessee has to be computed in accordance with the provisions of section 11 to 13 which would include accumulations as per section 11(1)(a) and section 11(2). He, then directed the Ld. AO to re-compute the income after giving benefit of section 11 along with all the consequential benefit. We do not find any infirmity in the order of the Ld. CIT(A) in giving the above direction to the Ld. AO. Hence these grounds of the Revenue are decided against it.

12. There is yet another grievance of the Revenue relating to this issue which is that the exemption was never claimed by the assessee in the original ITR and the revised ROI filed by the assessee was defective. In our opinion, this is not a valid reason to deny the benefit of exemption, once the Revenue accepts that the assessee is a charitable society whose activities are not in the nature of business and its income is applied for the benefit of public at large . Admittedly, the claim of exemption was made in the revised return filed within the statutory time limit but was treated as defective only on flimsy ground that once the original return is e-filed, the revised return cannot be filed manually during assessment proceedings. Not claiming exemption in the original return, though otherwise legally admissible on facts cannot be fatal when the assessee did claim exemption in the revised return which was duly considered for the purposes of making assessment. We, therefore do not find any substance in this grievance of the Revenue.

13. Ground No. 3 and 4 relate to denial of depreciation by the Ld. AO which had been allowed by the Ld. CIT(A). The solitary reason given by the Ld.AO is that the assessee's claim of depreciation tantamount to a double deduction since the assessee has already claimed deduction of its capital expenditure being a trust. The Ld. CIT(A) relied upon numerous decisions

wherein it has been held that in the case of a charitable trust whose income is exempt under section 11, its claim of depreciation cannot be said to be double benefit. Moreover, the decision of Hon'ble Supreme Court in Escorts Ltd. 199 ITR 43 relied upon by the Ld. AO is inapplicable to a situation where, depreciation is claimed by a charitable trust in determining percentage of funds applied for the purposes of charitable objects as held by the Hon'ble P & H High Court in CIT vs. Market Committee, Pipli (2011) 330 ITR 16 relied upon by the Ld. CIT(A). The Ld. CIT(A) has taken notice of sub-section(6) of section 11 inserted by the Finance Act, 2014 w.e.f. 1.4.2015 which has now put restriction on claim of depreciation. The amendment is only prospective applicable to AY 2015-16 and subsequent years and not to case of the assessee in which AY involved is 2012-13. We endorse the findings of the Ld. CIT(A) and hold that the grievance of the Revenue is not sustainable in so far as the present appeal of the Revenue is concerned, the amended law being inapplicable. Accordingly, we decide ground No. 3 and 4 against the Revenue.

14. Ground No. 1 relates to taxes paid and deposited which the Ld. AO disallowed observing that the taxes are eventually refundable or are not deductable as per provisions of the Act and the same cannot be considered as application of income for the purpose of deduction under section 11 of the Act. Before the Ld. CIT(A), the assessee relying on the decision of CIT vs. Janki Ammal Ayya Nadar Trust (1985) 153 ITR 159 (Mad.) submitted that tax paid out of current year's income is application for charitable purposes. The submission was acceptable to the Ld. CIT(A) who found support from the decision of Hon'ble Delhi High Court in DIT(E) vs. National Association of Software and service companies (2012) 345 ITR 362 (Del) as well. We do not find any flaw in the direction of the Ld. CIT(A) to the Ld AO to allow the impugned amount as application of income by the assessee society. The ground, being bereft of any substance is rejected.

15. Ground No. 6 relates to disallowance of expenditure of earmarked fund by the Ld. AO which has been allowed by the Ld. CIT(A). On query raised by the Ld. AO, it was explained by the assessee that the assessee

receives the funds from Govt. of India for implementation of Govt. Of India projects. Funds received are adjusted against the expenditure made for the project to be implemented. The unused funds are shown as liability in the balance sheet and carried forward till they are used. The explanation was not acceptable to the Ld. AO. According to him, the application of earmarked fund cannot be considered as application for the current year whereas they are made out of funds received in the previous year. As per the matching concept, the expenses should have been booked in the previous year and cannot be claimed against the application of income in the current year. The Ld. CIT(A) did not agree with the view of the Ld. AO. Accordingly to him, matching concept do not apply. From schedule 3 of the Annual Accounts (copy at page 86 of Paper Book) for the period ended 31.03.2012 it is observed that during the year the assessee had received fund of 8,50,00,000/- out of which the assessee utilised Rs. 6,50,00,000/- only which means that the impugned expenditure was incurred from the fund received during the year itself and not out of accumulated income of earlier years. Since the basis of disallowance itself does not subsist, we agree with the finding of the Ld. CIT(A) that the impugned disallowance is not sustainable and reject this ground of the Revenue as well.

16. In the result, the appeal of the Revenue is dismissed.

Order pronounced in the open court on 7th December 2022.

Sd/-	Sd/
(ANIL CHATURVEDI)	**(ASTHA CHANDRA)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Dated: 07/12/2022

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4. CIT (A)
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