

**IN THE INCOME TAX APPELLATE TRIBUNAL
SMC "B" BENCH: BANGALORE**

SHRI LAXMI PRASAD SAHU, ACCOUNTANT MEMBER

ITA No.1114/Bang/2022
Assessment Year : 2017-18

Muwahhid Educational Foundation 22-11-1544-5, LEEwell Post Office, Bolar, Mangaluru. PAN NO : AAETM 1658 C	Vs.	The Commissioner of Income- tax, NFAC Delhi.
APPELLANT		RESPONDENT

Appellant by	:	Shri Sanketh S Nayak, C.A
Respondent by	:	Shri Ganesh R Ghale, Standing Counsel

Date of Hearing	:	16.02.2022
Date of Pronouncement	:	21.02.2023

ORDER

PER LAXMI PRASAD SAHU, ACCOUNTANT MEMBER:

This is an appeal filed by the assessee against order passed by the Commissioner, NFC Delhi, DIN & Order NO. ITBA/NFAC/S/250/2022-23/1046322070(1) order dated 14/10/2022 .

2. The sole issue involved in this appeal is not allowing depreciation on Fixed Assets as claimed by the assessee in its grounds of appeal.

3. The brief facts of the case are that the assessee is a trust engaged in solely providing educational services to students at Montessori, primary and high school level under the name and style of Red Caramels. It is formed as a public charitable trust and registered with Registrar of the State Government in the year 2012. Trust was granted registration u/s 12A w.e.f the asst. year 2020-21. The trust was not registered u/s 12A for the impugned assessment year under appeal.

4. The assessee filed return of income 29.12.2017 declaring "income from other source" of Rs. 5,59,551/- and the same was processed u/s 143(1)(a) of the I. T. Act. 1961 by disallowing of depreciation of Rs. 18,08,848/- .Against this order the assessee filed rectification application u/s 154 before the Assessing Officer(AO). Based on the above rectification application, the AO did not allow depreciation by observing that the assessee is not eligible for getting exemption u/s 10(23C)(iii)(ad) of the Act since the gross receipt of the trust is Rs.1,42,71,529/- which is more than Rs. one crore and he further observed that there is no provision for allowance of depreciation under the head 'income from other sources' unless the income earned is from let out/leased assets. Since the assessee has not declared in such income, the depreciation claimed is not allowable and rejected the rectification application filed by the assessee.

5. Aggrieved from the order of the AO, the assessee filed appeal before the CIT(A). The Id.CIT further discussed the provision of

sec. 32 of the Act relying on the judgment of Hon'ble Supreme Court and Hon'ble High Court. He noticed that disallowance u/s 143(1) does not come within the purview of sec. 154 of the Act for the reason that as per provisions of sec. 154 of the Act, the mistake apparent from record can only be rectified but he noted that in the impugned case allowing depreciation is not mistake apparent from record and this is debatable issue which needs elaborate enquiry as per the discussion in his order.

6. Aggrieved from the above order, the assessee filed appeal before the ITAT.

7. The Id.AR reiterated the submission made before the lower authorities and he also filed written synopsis relying on some case law which is as under:-

- 1) Poona Club Ltd., Vs. ACIT [2018] 90 taxmann.com 422 (Pune Trib.)
- 2) Sports Authority of Gujarat Vs. DICT [2022] 139 taxmann.com 514 (Ahmedabad Trib.)
- 3) Saurashtra Kutch Stock Civil Appeal No.1171 of 2004
- 4) CIT Vs. Society of the Sisters of St. Anne [1981] 146 ITR 28 Kar

8. The Id.DR relied on the order of the lower authorities and submitted that there is no provision in the Income Tax Act for granting deprecation except specified in sec. 57 of the Act. The

receipt of the trust is more than Rs. One crore, accordingly it is not eligible for exemption as per section 10(23C)(iiiad).

9. After hearing both the sides and perusing the entire materials on record I noted that the assessee is a trust and running school, on perusal of income and expenditure the only source of income is fee collected of Rs.1,42,70,680/- and interest of banking deposits of Rs.849/- and the net income from running a school is Rs.5,58,701/-. While filling the return of income the assessee declared the entire income under the head "income from other sources" and the CPC did not give benefit of depreciation on the Fixed Assets. The assessee filed rectification application u/s 154 of the Act but AO rejected the same and the CIT(A) also rejected on observing that it is debatable issue after relying on certain judgments. On going through the income and expenditure account and the entire submissions of the assessee, the assessee wrongly offered the income from under the "income from other sources" u/s 56 of the Act. After going through the sec.56, I observe that the income earned by the assessee does not fall under the head of "income from other sources". The sole purpose as per submission of the assessee is to running a school for educational purposes to students, therefore, if any income received by the assessee will not fall under the head "income from other sources". The income of the assessee should be computed under the head profit and gains of business & profession as per under Chapter IV D , therefore the income should be computed as per Chapter IV D of the I.T. Act. .

10. Chapter XIV described the procedure for assessment. The section 139 of the Act as specified the filing of return of income as per the Act. The income should be computed in the manner provided as per chapter IV, computation of total income. I want to reproduce the section 14 of the Act which is as under:-

Heads of income.

³⁷ **14.** *Save as otherwise provided by this Act, all income shall, for the purposes of charge of income-tax and computation of total income, be classified under the following heads of income :—*

A.—Salaries.

*B.—³⁸[***]*

C.—Income from house property.

D.—Profits and gains of business or profession.

E.—Capital gains.

F.—Income from other sources.

The above heads of income has specified the manner & procedure for calculating the total income after considering the relevant sections/provisions of the Act. Since the assessee's activities falls under the head *D - Profits and gains of business or profession*, therefore the assessee is eligible for depreciation on Fixed assets as per section 32 of the Act.

11. On going through the case law filed by the Id.AR of the assessee in the case of Shivganga Drillers Private Ltd. vs CPC Income Tax Bangalore in ITA No.174/IND/2021 in assessment year 2017-19 in which it has been held that the rectification u/s 154 can be filed against the order passed u/s 143(1). The relevant part of the judgment is as under:-

“9. We have considered the rival submissions of both sides and also perused the record. We are very much aware of the recent decision of ITAT, Jodhpur Bench in the case of Akbar Mohammad, Nagaur Vs. ACIT, CPC, Bangalore ITA No. 108 & 109/Jodh/2021 order dated 31.01.2012 in which the Hon’ble Co-ordinate Bench had resolved an identical controversy by holding as under:

“6.1 Of course, it is a case in point that the assessee did not file any appeal against the intimations passed u/s 143(1) of the Act and the Ld. Sr. DR is right to the extent that the assessee cannot be given relief for that reason. However, it is also a settled law that the assessee cannot be taxed on an amount on which tax is not legally imposable. Although, the assessee might have chosen a wrong channel for redressal of his grievance, all the same, it is incumbent upon the Tax authorities to burden the assessee only with correct amount of tax and not to unjustly benefit at the cost of tax payer. Therefore, in the interest of substantial justice, we deem it expedient to restore the issue to the file of the Assessing officer with a direction to pass appropriate orders deleting the addition / disallowance after duly considering the settled judicial position in this regard, which have been decided in the three cases as enumerated above in Para 5.” During hearing, we have apprised both sides about this recent decision of the Hon’ble Co-ordinate Bench.

10. Therefore, respectfully following the decision of Hon’ble Co-ordinate Bench, we are inclined to accept the request of assessee. Therefore, Ground No. 2 is allowed.”

12. Since the issue before me is also the same as decided by the coordinate bench of the Tribunal, the CIT(A) as dismissed appeal of the assessee on wrong footings. Even in the order passed u/s 143(1) , the CPC gives opportunity the for filling the rectification application by directing as “ *If you consider that any part of this intimation/order requires amendment, you may request the same as per section 154 of the Income Tax Act. 1961 by filling an online application for rectification. For any assistance on procedures to be followed, please refer to www.incometaxindiaefiling.gov.in/eFiling/Portal/staticPDF/Rectification Mannual. To file rectification request, please log in to <http://incometaxindiaefiling.gov.in> with your User ID and Password and choose Rectification Request under My Account section. It is*

clear that not granting depreciation on Fixed Assets were mistake apparent from the record which could have rectified by the authorities below.

13. The CIT(A) should have corrected the mistake which are done by the AO/CPC whereas the CIT(A) has decided only the issue that it is debatable issue and it cannot be rectified u/s 154 of the Act. In this case, the assessee himself wrongly declared its income under the head 'income from other sources. The income should be computed as per manner prescribed in the Act under the head *D.— Profits and gains of business or profession*. The depreciation is notional expenditure and it is statutory incentive to the assessee if the assessee has satisfied all the conditions for getting depreciation. Since the lower authorities have not examined the preliminary requirement for getting depreciation allowances as per sec. 32 of the Act and computation of depreciation also. Considering the entire facts noted above, I remit this issue to the file of the AO for the eligibility of the depreciation claimed. The AO is directed to decide the issue as per law. The assessee is directed to provide necessary documents as required by him for substantiating its claim of depreciation.

14. In the result, the appeal of the assessee is allowed for statistical purposes.

Order pronounced in the court on 21st February, 2023.

Sd/-
(Laxmi Prasad Sahu)
Accountant Member

Bangalore
Dated 21st February, 2023

Vms

Copy to:

1. The Applicant
2. The Respondent
3. The CIT
4. The CIT(A)
5. The DR, ITAT, Bangalore.
6. Guard file

By order

Asst. Registrar, ITAT, Bangalore.

1. Date of Dictation
2. Date on which the typed draft is placed before the dictating Member
3. Date on which the approved draft comes to Sr. P. S
4. Date on which the fair order is placed before the dictating Member
5. Date on which the fair order comes back to the Sr. P.S.
6. Date of uploading the order on website.....
7. If not uploaded, furnish the reason for doing so
8. Date on which the file goes to the Bench Clerk
9. Date on which order goes for Xerox & endorsement.....
10. Date on which the file goes to the Head Clerk
11. The date on which the file goes to the Assistant Registrar for signature on the order
12. The date on which the file goes to dispatch section for dispatch of the Tribunal Order
13. Date of Despatch of Order.
14. Dictation note enclosed.....