आयकर अपीलीय अधिकरण, 'बी' न्यायपीठ, चेन्नई।
IN THE INCOME TAX APPELLATE TRIBUNAL
'B' BENCH: CHENNAI

श्री मनु कुमार गिरि, न्यायिक सदस्य एवं श्री एस. आर. रघुनाथा, लेखा सदस्य के समक्ष
BEFORE SHRI MANU KUMAR GIRI, JUDICIAL MEMBER AND
SHRI S.R. RAGHUNATHA, ACCOUNTANT MEMBER

आयकर अपील सं./ITA No. 611/Chny/2024
निर्धारण वर्ष /Assessment Year: 2009-10

The Dy. Commissioner of Income Tax (Exemptions), Chennai.	**Vs.**	Hindustan Institute of Technology and Science, 40, GST Road, ST Thomas Mount, Chennai – 600 016. **[PAN: AAATH-6508-A]**
(अपीलार्थी**/Appellant)**		**(**प्रत्यर्थी**/Respondent)**

अपीलार्थी की ओर से/ Assessee by	:	Shri R. Venkatesh, C.A
प्रत्यर्थी की ओर से /Revenue by	:	Shri D. Hema Bhupal, JCIT
सुनवाई की तारीख/Date of Hearing	:	26.06.2024
घोषणा की तारीख /Date of Pronouncement	:	04.09.2024

आदेश **/ O R D E R**

PER S.R. RAGHUNATHA, A.M :

This appeal by the Revenue is arising out of the order of the Commissioner of Income Tax (Appeals), [NFAC], Delhi [hereinafter "CIT(A)] in DIN & Order No. ITBA/NFAC/S/250/2023-24/1059507197(1), dated 09.01.2024. The assessment was framed by the Dy. Commissioner of Income Tax (Exemptions), Chennai for the Assessment Year 2008-09 u/s.143(3) r.w.s 147 of the Income Tax Act, 1961 (hereinafter the 'Act'), vide order dated 31.03.2015.

2. The grounds of appeal raised by the Revenue are as under:

1. The order of the learned CIT(A) is contrary to the law and facts of the case.

2.1 The Ld.CIT(A) failed in allowing the excess claim of capital expenditure even though it was not matching with audited books of accounts of the assessee.

2.2 The Ld.CIT(A) failed to give opportunity to Assessing Officer before admitting resolution as it was additional evidence not presented before the Assessing Officer during scrutiny proceedings dated 22/09/2009.

2.3 The Ld.CIT(A) erred in concluding that all the records were already present with AO and that this is a case of change of opinion.

2.4 The Ld.CIT(A) failed to appreciate that asset received on division from HCE was never disclosed by the assessee during 143(3) proceeding and hence re-opening is valid based on new material evidence.

3. For these and other grounds that may be adduced at the time of hearing, it is prayed that the order of the learned CIT (Appeals) may be set aside and that of the Assessing Officer may be restored.

3. The brief facts of the case that the Respondent is a deemed to be a university having campus at Padur, near Chennai and was notified u/s.3(1) of the UGC Act 1961 and constituted as a society registered on 28.03.2007 under the TN Societies Registration Act 1975. Earlier to the UGC notification, the Padur campus was an Engineering college named Hindustan College of Engineering (HCE) which society was sponsoring the university. The assessee is approved and registered u/s 12AA of the IT Act, 1961. The assessee filed its return of income within the due date as stipulated u/s 139(1) of the IT Act, 1961 for the impugned year on 30/09/2009 claiming

exemption u/s.11 of Income tax Act, 1961. The case was selected for scrutiny and the original assessment was completed u/s 143(3) of the IT Act 1961 on 24/11/2011 accepting the returned income and the claim of exemption u/s.11. This was after due enquiry and verification of records and books, the return of income and appreciation of the conditions for the claim of exemption u/s.11 of the IT Act, 1961. After considering the accumulation of income based upon the Form 10 filed along with annexure to the extent of Rs.2,24,00,000/- the Ld. AO clearly gives the findings in the Assessment Order in Paragraph 3 that the request of the Assessee is in order. Subsequently a notice u/s.148 dated 27/03/2014 was issued. In reply to which the Assessee filed a letter dated 15th April 2014, requesting to treat the return filed on 30/09/2009 as the return in compliance to the Notice u/s.148 while also stated therein that it had fully and truly furnished all the materials at the time of scrutiny proceedings and questioned the Jurisdiction for reopening the impugned assessment also seeking the reasons as recorded.

4. The Ld. AO replied to the above by his communication dated 23/09/2014 stating three reasons for issue of notice u/s.148 as under:

I. Additions to fixed assets.
II. Shortfall in application.
III. Accumulation not specified in Form 10.

5. The Assessee objected to the same by letter filed on 09/02/2015 pointing out with reference to the facts and materials on record that the three issues were supported with facts, enquired and looked into in the regular and original assessment and were accepted. (Copy of letter is enclosed in Paper book Page Nos. 37 to 46). Not looking the facts and evidences brought on record before him by letter dt. 09/02/2015 (Copy enclosed in Paper Book Pg. No. 37-46). The Ld. AO completed Assessment on 31/03/2015 by bringing to tax income of Rs.4,23,54,535/- on account of the following:

a) Not allowing the accumulation of income claimed in Form No.10 set apart U/s.11(2) of the Income Tax Act alleging accumulation not specified. Rs.2,24,00,000

b) Shortfall in application towards Capital Expenditure alleging as excess application Rs.1,99,54,535

It is apparent from the impugned Assessment order that the facts and evidences brought on record and which were already available were not even discussed.

6. Aggrieved against the addition, the respondent filed the appeal against the order passed by the Ld. AO and in the appeal, proceedings filed the written submissions before the NFAC, Delhi in support of the grounds raised in the Appeal before the CIT(A) along with copies of

the evidences and facts relied upon in the Paper Book. The submissions made and adjudicated in first appeal are reproduced hereunder:

It was submitted that the conclusion of the Ld. AO is erroneous and that the Assessee had correctly claimed the eligible exemption u/s.11. The Ld.AO also erred in law in reopening the assessment on issues already considered in the original assessment.

It is submitted that first proviso to section 147 of the Act is relevant which is reproduced as follows:

"Provided that where an assessment under sub-section (3) of section 143 or this section has been made for the relevant assessment year, no action shall be taken under this section after the expiry of four years from the end of the relevant assessment year, unless any income chargeable to tax has escaped assessment for such assessment year by reason of the failure on the part of the Assessee to make a return under section 139 or in response to a notice issued under sub-section (1) of section 142 or section 148 or to disclose fully and truly all material facts necessary for his assessment, for that assessment year:"

From the aforesaid proviso to section 147 of the Act, it is clear that where an assessment under section 143(3) or under section 147 of the Act has been made for the relevant assessment year (AY), no action shall be taken under section 147 of the Act, after the expiry of four years from the end of the relevant AY, unless any income chargeable to tax has escaped assessment for such AY by reason of failure on the part of the Assessee to make a return under section 139 or in response to notice under section 142(1) or section 148 or to disclose fully and truly all material facts necessary for the assessment for that AY.

It may be seen that the aforesaid first proviso places severe restriction on the power of the AO to reopen an assessment order passed under section 143 / 147, after the expiry of four years from the end of the relevant AY, except in cases where Assessee has failed to file a return of income under section 139, 142(1) or under section 148 and has failed to disclose fully and truly all material facts necessary for the assessment for that AY.

It is submitted that from the letter dt. 23/09/2014 of the Ld. AO that it is clear that the reasons furnished in the above referred letter under section 148(2) of the Act, are based on the documents which the Assessee Society had already furnished and were looked into the original assessment. There was nothing new that had come to the

notice of the AO. It was only a unilateral different analysis of the facts on record which was done and the conclusion was drawn from the revised analysis that income had escaped assessment. Therefore, as there was no failure on the part of the Assessee to make a true and full disclosure of the relevant facts, such reopening would not be permissible after the expiry of four years in view of the first proviso to section 147 of the Act. Hence the assessment lacks jurisdiction and is void ab initio.

It is further submitted that as per the reasons recorded, it emerges that there is no allegation that the Assessee Society had failed to disclose material facts necessary for assessment, all that was alleged is reconsideration of the figures from the available facts and materials. Moreover, the return of income and the material placed on record by the Assessee together with the return would make it abundantly clear that the Assessee had set forth the basis of its claim with all materials and there was no suppression of material facts. The fundamental condition for reopening the assessment beyond a period of four years had thus not been fulfilled. Therefore, the notice is liable to be dropped and assessment annulled.

It is also submitted that the impugned notice under section 148 was issued merely on account of change of opinion as no fresh tangible material unearthed based on which notice is issued. As there is no new material referred to in the reasons recorded as they are only pointing to Financial Statement filed and which were looked into and reviewed in the Regular Assessment proceedings earlier.

The Full bench order of the Hon'ble ITAT, New Delhi , reported in 348 ITR 485 in the case of CIT v Usha International Ltd, has decided on the ratio wherein re assessment proceedings cannot be reopened u/s 147 even within four years if an Assessee had furnished full and true particulars at the time of original assessment, which in the instant case, the findings in the original assessment order dt. 24/11/2011 establishes.

Thus, it is humbly prayed that the entire reassessment proceedings are invalid as the Assessee had filed the same details filed in original proceedings and Notice u/s.148 amounts to mere change of opinion. The Assessee relies on the ratio of the decision reported in CIT v. Kelvinator of India reported in 320 ITR 561

Board's Circular No.549, dt.31.10.1989 [182 ITR (St) 1, 29], clarifies that a mere change of opinion cannot form the basis for reopening the completed assessment.

The aforesaid views are further strengthened by the following legal precedents:

a) ACIT Vs ICICI Securities Primary Dealership Ltd. [2012] 348 ITR 299 (SC): 78 DTR 153 (SC)
b) CIT Vs Simplex Concrete Piles (I) Ltd. [2013] 358 ITR 129 (SC): [2012] 79 DTR 82 (SC)
c) Voltas Ltd. Vs ACIT [2012] 349 ITR 656 (Bom)
d) Ranbaxy Laboratories Ltd. Vs Dy.CIT [2013] 351 ITR 23 (Del)
e) Bhor Industries Ltd. Vs ACIT [2004] 267 ITR 161(Bom) No new Material
f) CIT Vs Kelvinator of India Ltd. [2010] 320 ITR 561 (SC)
g) CIT Vs Usha International Ltd.[2012] 348 ITR 485 (Del)(FB): 77 DTR 396 (Del)(FB)

On merits
Ground No.3: Issue related to claim of accumulation of income u/s 11(2)

a) *In the original assessment order enclosed in PB in Pages 1 & 2, the then Ld AO had accepted the Form No.10 which is filed along with the Return of Income and gave a finding that the Form 10 is in order.*
b) *It is submitted that the Assessee society filed the Form No.10 along with copy of requisite Resolution dated 22.09.2009, with the Return of Income, clearly mentioning the amount set apart u/s 11(2) and the purpose of accumulation.*
c) *It is submitted that the purpose of accumulation was for construction of building, ongoing and in future for expansion and improvement of existing facilities at the university Campus at Padur and these were applied in the succeeding AY 2010-11.*
d) *This was looked into during the course of the Regular Assessment proceedings by the then Ld. AO and after consideration of the Form No.10 along with Copy of the resolution and facts relating to utilization in AY 2010-11. The Assessment order was thus passed duly recording the issue in this year and as well as in the AY 2010-11 as regards utilization.*
e) *It is submitted that it is evident that the Appellant had duly availed the accumulation u/s 11(2) and had filed the Form No.10 along with the Return of income and utilization details which were verified and were found correct as they are.*
f) *It is further submitted that even on facts the accumulation has been duly utilized for the ongoing and in future for expansion and improvement of existing facilities at the university Campus, of the Society, which is substantive material.*

Therefore, it is prayed that both in law and on facts it is humbly prayed that the addition on the issue related to Form No.10 made in the impugned reassessment be deleted and the appeal of the appellant be allowed.

Ground No.4 Issue related to Expenditure on Fixed Assets

a. It is submitted that the above issue arises on the reason recorded by the Ld. AO that " On perusal of the Schedule "3" and '4" forming part of the Return of Income, the Assessee has made addition to fixed assets during

the first half of F.Y. 2008-2009 is Rs 3,42,29,217/- and during the second half of FY 2008-2009 is Rs 74,73,329/-. The total Addition on account of capital expenditure is only Rs 4,17,02,456/-. As against Rs 4,17,02,456/- the assessee has taken Rs 6,16,57,081/-as addition to Fixed Assets. Hence the Assessee has claimed excess application of Rs.1,99,54,435/-

b. The Appellant humbly submits that the observations in the reasons recorded by the Ld. AO noted in the impugned order are erroneous. The capital expenditure incurred during the year in the education campus of the Appellant at Padur, Chennai was Rs. 6,16,57,081/- and available on record from the date of filing of the return and this was explained at the time of original assessment and accordingly the that Ld AO had given his findings on the quantum of application in the original assessment order. In the impugned re-assessment, the Appellant had duly clarified this in their letter filed on 09/02/2015 stating that Rs 6,16,57,081/- was spent as addition to Fixed Assets in the education campus at Padur during the year.

c. The breakup of the additions to Fixed Assets were as under:
Under HITS Annual Accounts:

	Rs.
More than 6 months:	*74,73,330*
Less than 6 months:	*3,42,29,217*
Investment in Asset at the Padur campus which was Vested on Division from HCE unit of HETC from 01/06/2008 as per the notification of the Govt. of India Ministry of Higher Education	*1,99,54,535*
Gross Addition at the Padur campus of the University of the Appellant	***6,16,57,081***

The above were the submissions made before CIT(A) submission along with the enclosures with the letter.

d. The assets and liabilities of the unit HCE, Padur, were legally vested with your assessee society on 01/06/2008 as required by the UGC upon recognition of the Padur campus of Hindustan College of Engineering as deemed to be university. As per Audited Annual Accounts of M/s HCE unit of Hindustan Engineering Training Centre (HETC) Schedule No.3 Fixed Assets Schedule. The Fixed Assets legally vested with HITS as at the year ended 31/03/2009 upon division was Rs.27,41,21,802.75, which included Addition made during the year at the Padur campus. This fact has been stated in Note (1) and (2) of Schedule 6, Notes on Accounts of the Annual Accounts of the Appellant society. These are also reflected in the Padur Campus of HCE, as may be seen from the copy of the Fixed Assets Schedule of M/s HCE unit of HETC enclosed.

e. In the Schedule of the Fixed Assets in HCE for the year ended 31/03/2009, the amount of Rs 27,41,21,802/- is shown as Assets legally vested to the Appellant and the said amount included Addition to Fixed Asset made in the campus during the year and that the entire operations of

the academic year of HCE were vested with the Appellant as per the Gazette notification of the GOI.

f. In the Assessment proceedings, this query was raised by the then Assessing officer with reference to facts representing the Fixed Assets Schedule of HCE (unit of HETC) and your Appellant Society, as to how the expenditure made in the infrastructure of the university campus at Padur shown in the Application statement amounts to Rs.6,16,57,081/- for the purpose of utilisation.

Based on these submissions by the assessee both on law and on facts, CIT(A), NFAC, Delhi vide their order dt. 09/01/2024 have considered and allowed the appeal in full. Aggrieved by the order of the Ld.CIT(A), NFAC, Delhi, the revenue preferred an appeal before us.

7. The Ld. DR assailing the action of the Ld.CIT (A), NFAC, Delhi, stated that the impugned order is erroneous for the reason that the Ld.CIT(A) failed in allowing the excess claim of capital expenditure even though it was not matching with audited books of accounts of the assessee. The Ld.DR further argued that the Ld.CIT(A) failed to give opportunity to Assessing Officer before admitting resolution as it was additional evidence not presented before the Assessing Officer during scrutiny proceedings dated 22/09/2009. The Ld.AR submitted that the ld.CIT(A) erred in concluding that all the records were already present with AO and that this is a case of change of opinion and failed to appreciate that asset received on division from HCE was never

disclosed by the assessee during 143(3) proceeding and hence re-opening is valid based on new material evidence. Therefore, he stated that the order of the Ld.CIT(A) is erroneous and needs to be set aside and restore the AO's order U/s.143(3) r.w.s. 147 of the Act.

8. Per contra, the Ld. AR of the assessee submitted his arguments to the grounds raised in the appeal by the department.

9. This ground of revenue is ill-conceived there is no excess claim of expenditure, incorrect to say it was not matching with the audited books of accounts of the assessee. In this connection, the Ld.AR submits that the audited annual accounts giving details of assets addition made during the year (Paper Book Page Nos.1 to 22). These details were given in the original scrutiny proceedings and also given by letter dt 09/02/2015 along with the reference to the Audited Financial statement in the re-assessment proceedings. However, in the impugned reassessment the Ld.AO did not make any findings contrary to the facts & evidence brought out in Respondents representation in their letter dt 09/02/20215 (Enclosed in Pages 37-46 of PB) in making additions except repeating the reasons and on his unilateral conclusions. The findings of the then Ld.AO in the original assessment is clear.

10. Further the Ld.AR submitted that the Ld. DR has wrongly stated in the grounds of appeal that the resolution passed in Form 10 dt.22/09/2009 was not presented before the AO. In this connection, the Ld.AR submitted that these were part of assessment record from the day the Return of income was filed and clearly mentioned in the original Assessment Order u/s 143(3). It is evident that, in the impugned re-assessment the only ground taken by the Ld.AO is that the purpose of accumulation is not specified in Form No.10 and hence the accumulation u/s 11(2) was not allowed. The Ld.AR stated that there is no findings that Form No.10 along with the resolution was not filed or was not available on record.

11. The Ld. AR summirsed that it is clear from the facts on record and pointed out in the submissions before the Ld.AO dt 09/02/2015 that all the records were already available in the original assessment proceedings and the reasons recorded also indicate so and hence is evident that the impugned Assessment order is on account of change of opinion which is in conceived.

12. The details of additions to capital expenditure was already on record based on which the AO had allowed the application towards capital expenditure at Rs.6,16,57,081/-. This was explained with

reference to the financial statements filed in the impugned re-assessment by submission dt. 09/02/2015 and from the reading of the findings of the Ld. AO in the impugned assessment order, it is evident that Ld. AO did not retract the factual submission noted supra and neither brought on record any mistake in the submission dtd.09/02/2015 of the assessee.

13. The Ld.AR argued that after seeking a remand report which was submitted by Ld.AO on 08/07/2019 brought out in para 4 page 10 of the Ld.CIT(A) order and on the appreciation of facts, evidences and submissions of the assessee, the Ld.CIT(A), NFAC decided the appeal by quashing the re-assessment. The impugned assessment order which was quashed by the CIT(A), NFAC, was thus on valid, reasonable and substantive grounds of merit and in law. Therefore, the assessee humbly and respectfully prays to uphold the impugned order in appeal and dismiss the appeal of the revenue.

14. We have heard the rival contentions, orders of lower authorities and the relevant materials on record. The assessee is a charitable institution registered U/s.12AA of the Act and enjoying the exemption U/s.11 of the Act. We note that the case was selected for scrutiny for the impugned A.Y. 2009-10 and the original assessment was

completed u/s 143(3) of the IT Act 1961 on 24/11/2011 accepting the returned income and the claim of exemption u/s 11. This was after due enquiry and verification of records and books, the return of income and appreciation of the conditions for the claim of exemption u/s 11 of the IT Act, 1961. After considering the accumulation of income based upon the Form 10 filed along with annexure to the extent of Rs.2,24,00,000/- the Ld. AO clearly gives the findings in the Assessment Order in Paragraph 3 that the request of the assessee is in order. Further, the AO has allowed the accumulation of income to the tune of Rs.2.24 Crores by allowing reduction in the computation confirmed that the form 10 has been filed by the assesee. The extract of computation of Income as per Section 143(3) is given below:

Gross receipts		Rs.22,47,53,179
85% thereof		Rs.19,10,40,202
Application of Income		
1. Capital	Rs. 6,16,57,081	
2. Revenue	Rs.10,81,87,832	

		Rs.16,98,44,913

		Rs. 2,11,95,289
Less: Form 10 filed		Rs. 2,24,00,000

Total income		Nil
Tax there on		Nil
TDS		Rs. 44,067
Refundable		Rs. 44,067
Add: Int u/s. 244A		Rs. 6,615

	Total refund	Rs. 50,682
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15. Subsequently, the AO has reopened the assessment by issuing notice U/s.148 for the reasons, which have already been dealt in the original assessment order U/s.143(3) dated 24/11/2011:

I. Additions to fixed assets.
II. Shortfall in application.
III. Accumulation not specified in Form 10.

16. According the ld.AR, all these three reasons given by the AO for reopening of assessment and hence objected to the same by letter filed on 09/02/2015 pointing out with reference to the facts and materials on record that the three issues were supported with facts, enquired and looked into in the regular and original assessment and were accepted (Paper book Page Nos. 37 to 46). We note that the AO has passed an order U/s.143(3) r.w.s. 147 of the Act, without considering the reply filed by the Assessee furnishing the details sought for reassessment (PB page Nos.37 to 41) completed Assessment on 31/03/2015 by bringing to tax income of Rs 4,23,54,535/- on account of the following:

a) Not allowing the accumulation of income claimed in Form no. 10 set apart U/s 11(2) of the Income Tax Act alleging accumulation not specified. Rs.2,24,00,000
b) Shortfall in application towards Capital Expenditure alleging as excess application Rs.1,99,54,535

17. On perusal of the orders of the AO in original assessment, Reassessment and appellate order Ld.CIT(A), it is observed that, all

the three issues were subject matter of original assessment for the following reasons:

> *"In the present case, it has been noticed that the appellant has submitted the entire material required for the assessment during the course of original assessment proceedings completed on 24.11.2011. Thereafter, the case was reopened on the same materials which was available before the AO. From the reasons recorded for reopening of the assessment, it is seen that the AO perused the material available on record which is evident from the notings that "On perusal of the Annexure to Return of Income i.e. "Statement of income showing the application of income and Donation" the assessee has furnished the sources of income, application of income, additions to fixed assets and short fall in application of income. The details of statement are furnished as under: ..... ". The AO also referred to Form No. 10 and has stated that "The purpose of accumulation is not mentioned neither in the resolution passed by the trust not in Form No. 10.° The Annexure to Form No. 10 is the Extract of the Resolution of the Governing Body / Members / Trustees in the Meeting held on 22nd September 2009 at the Registered Office of Society. It states as under*
>
> > *"RESOLVED that in pursuance of the on going requirement to incur vast expenditure in the development of the infrastructure in the University Campus, Padur, an amount of Rs. Two crore and twenty four lakhs be earmarked from the Income of the Society in the Financial year ending 31st March 2009 relevant to Income tax Assessment year 2009-2010."*
> >
> > *"Further RESOLVED that the same amount is accumulated and set apart to be utilized on or before 31.03.2014, for the purposes of Construction buildings on going and in future for expansion and improvement of existing facilities at the University campus of the Society at Padur*
>
> *Form No. 10 and the resolution which is annexure to form no. 10 passed by the trust provided by the appellant during the course of original assessment proceedings."*

18. Therefore, in the present case it is relevant to consider the dictum given by the Hon'ble Apex court in the case of CIT Vs.Kelvinator India Ltd (320 ITR 561), wherein it has been held that **"Assessing officer has power to re-assess but not review".**

19. In the facts and circumstances of the case, we are of the considered view that the AO has exceeded the jurisdiction of provisions of Section 148 and by relying on the decision of the Hon'ble Apex court in the case of CIT Vs.Kelvinator India Ltd (320 ITR 561), we have no hesitation to uphold the order of the Ld.CIT(A) and dismiss the appeal of the revenue.

20. In the result the appeal of the Revenue is dismissed.

Order pronounced on 04th September, 2024.

Sd/-	**Sd/-**
(मनु कुमार गिरि)	**(एस. आर. रघुनाथा)**
(Manu Kumar Giri)	**(S.R. Raghunatha)**
न्यायिक सदस्य / Judicial Member	**लेखा सदस्य /Accountant Member**

चेन्नई/Chennai,
दिनांक/Dated: 04th September, 2024.
JPV
आदेश की प्रतिलिपि अग्रेषित/**Copy to:**
1. अपीलार्थी/Appellant
2. प्रत्यर्थी/Respondent
3. आयकर आयुक्त/CIT, Chennai
4. विभागीय प्रतिनिधि/DR
5. गार्ड फाईल/GF