

IN THE INCOME TAX APPELLATE TRIBUNAL  
JAIPUR BENCH 'A' JAIPUR

(BEFORE SHRI R.K.GUPTA AND SHRI N.L.KALRA)

ITA No.424 & 425/ JP/2011  
Assessment year 2004-05 & 2006-06  
PAN: AAALKS 0404 E

The ITO  
Ward- Bundi  
(Appellant )

vs.

M/s. Krishi Upaj Mandi Samiti  
Bundi  
(Respondent)

Department by : Shri Sunil Mathur  
Assessee by : Shri Tanuj Agarwal

Date of hearing: 23-01-2012  
Date of Pronouncement: 25-01-2012

ORDER

PER N.L. KALRA, AM:-

The Revenue has filed the appeals against two different orders of the Id. CIT(A), Kota dated 28-02-2011 for the assessment year 2004-05 and 2005-06.

2.1 The ground of appeal raised by the Revenue in both the appeals is as under:-

“On the facts and in the circumstances of the case, the Id. CIT(A) has erred in directing to delete depreciation on assets of Rs. 24,61,686/- (for the assessment year 2004-05) and Rs. 20,81,920 (for the assessment year 2005-06) especially when the same was already allowed as application of income with the grant of registration u/s 12AA(1) of I.T. Act, 1961

2.2 We have heard both the parties. This issue has been considered in the case of the Krishi Upaj Mandi Samiti, Baran for the assessment year 2005-06 and 2006-07 in ITA No. 560 & 561/ JP/2010 vide order dated 06-01-2011. After considering various

decisions, we hold that the depreciation is allowable. It will be useful to reproduce paras 11 to 23 of the above order. The depreciation as debited in the books will be allowable.

“11. The Hon’ble Karnataka High Court in the case of CIT V Society of the Sisters of St.Anne 146 ITR 28 had an occasion to consider the following question of law:

*“Whether the Tribunal is correct in holding that the amount of depreciation debited to accounts of a charitable institution is to be deducted to arrive at the income available for application to charitable and religious purposes.”*

12. Before the Hon’ble High Court, the contention of the revenue is that depreciation allowance being a notional expenditure and hence it can not be allowed to be debited to the expenditure of account of the trust. According to the Hon’ble High Court such assumption is on the basis that expenditure should necessarily involve actual delivery of or parting with the money. The expenditure should be understood as necessary outgoings. Depreciation is a necessary outgoing. The depreciation, if it is not allowed as a necessary deduction for computing the income from the charitable institutions, then there is no way to preserve the corpus of the trust for deriving the income. The Hon’ble High Court referred to the Circular No.5-P dated July 19, 1968 in which it was stated as under :-

*“Where the trust derives income house property, interest on securities, capital gains, or other sources, the word ‘income’ should be understood in its commercial sense, i.e., book income, after adding back any appropriations or applications thereof towards the purpose of the trust or otherwise, and also after adding back any debits made for capital expenditure incurred for the purposes of the trust or otherwise. It should be noted, in this connection, that the amounts so added back will become chargeable to tax u/s. 11(3) to the extent that they represent outgoings for purposes other than those of the trust. The amounts spent or applied for the purposes of the trust from out of the income computed in the aforesaid manner, should be not less than 75 per cent. Of the latter, if the trust is to get the full benefit of the exemption u/s. 11(1).”*

“The Hon’ble High Court after considering the decisions of Hon’ble Andhra Pradesh High Court and Madras High Court answered the question against the revenue.”

13. The Hon’ble Gujrat High Court in the case of CIT V Ganga Charity Trust Fund 162 ITR 612 has an occasion to consider as to whether income tax liability is to be allowed as deduction under section 11(1)(a) of the I.T.Act. The Hon’ble High Court took the view that determining the income which could be actually applied or accumulated for the purpose of the trust under section 11(1)(a) of the Act, all outgoings including the outgoing in the nature of payment of Income Tax must be deducted. For this the Hon’ble High Court referred to the decisions of Hon’ble Andhra Pradesh High Court and Madras High Court in which it has been held that profit is to be ascertained on commercial manner.

14. The Hon’ble Madhya Pradesh High Court in the case of CIT V Raipur Pollottine Society 180 ITR 579 held tht depreciation is allowable in respect of assets owned by the trust. “Reference was made to the decision of Hon’ble Karnataka High Court in CIT V Society of the Sisters of St.Anne (supra).”

15. The Hon’ble Gujrat High Court in the case of CIT V Sheth Manilal Ranchoddas Vishram Bhavan Trust 198 ITR 598 had an occasion to consider the allowability of depreciation and the difference between total income charged and income to be computed under Chapter-III. The Hon’ble High Court observed as under :-

*“Whether depreciation has to be allowed as a necessary deduction for computing the income of a charitable institution was the question which came up before the Karnataka High Court in CIT v. Society of the Sisters of St.Anne [1984] 146 ITR 28. Noticing the difference between the word “income” and the expression “total income” and the necessity for providing depreciation in order to maintain correct accounts, the High Court held that the amount of depreciation debited to the accounts of the charitable institution has to be deducted to arrive at the income available for application to charitable and religious purposes. Same view has been taken by the Madhya Pradesh High Court in CIT v. Raipur Pallottine Society [1989] 180 ITR 579.*

*In CIT v. Rao Bahadur Calavala Cunnan Chetty Charities [1992] 135 ITR 485, the Madras High Court was required to consider whether,*

*for the purpose of computing accumulation in excess of 25 per cent, as laid down in section 11(i)(a) of the Act, "income" has to be computed under the various heads enumerated in the Income-tax Act. It held that the income from the properties held under trust would have to be arrived at in the normal commercial manner without classification under the various heads set out in section 14. It held that the expression "income" has to be understood in the popular or general sense and not in the sense in which the income is arrived at for the purpose of assessment to tax by application of some artificial provisions either giving or denying deduction. It observed that the computation under the different categories or heads arises only for the purposes of ascertaining the total income for the purposes of charge. Those provisions cannot be introduced to find out what the income derived from the property held under trust to be excluded from the total income is, for the purpose of the exemptions under Chapter III.*

*We are in respectful agreement with the view taken by the Karnataka, Madhya Pradesh and Madras High Courts. We, therefore, answer both the questions referred to us in the affirmative and against the Revenue.*

16. The Hon'ble Kerala High Court in the case of CIT v Programme for community organization 228 ITR 620 held that 25% as mentioned in section 11(1)(c) should be amounts disclosed in accounts of assessee and not total income computed u/s 2(45) of the I.T.Act.

17. The Hon'ble Calcutta High Court in the case of CIT v Bhoruka Public welfare trust 240 ITR 513 had on occasion to consider the issue as to whether depreciation debited in accounts is an outgoing. The Hon'ble Calcutta High Court observed that no purpose will be served to take a different view as taken in the case of Jaya Shree Charity Trust because tax effect is less than Rs.7,000/- and the year involved is 83-84. However the Hon'ble High Court made the following observation :-

*"Though there is a Board circular and some decisions of the various High Courts and even this High Court in CIT v. Jayashree Charity Trust [1986] 159 ITR 280 has followed the decision of the Madras High Court in CIT V. Rao Bahadur Calavala Cunnan Chetty Charities [1982] 135 ITR 485 and held that while computing the income of the charitable trust, income to be arrived at in the commercial manner.*

*It is true that the view has been taken by various High Courts including this court in the cases referred to above that in the case of a charitable trust income should be computed and arrived at in the commercial manner but nowhere in the Act it prohibits to calculate or compute the income as per the provisions of the Act. Section 11(1) refers*

*to income and not total income defined in section 2(45) but income itself has been defined in the Act in section 2(24) why the meaning of income given in section 2(24) should not be taken for income referred in section 11(1) of the Act. Therefore the decision referred to also requires reconsideration. But in the case in hand the assessment year involved is 1983-84, even if we differ from the view taken by this court it will take another five years to conclude. The tax effect is only Rs.7,000/-. Therefore, no purpose will be served to differ on this issue with the view taken by this court in Jayashree Charity Trust's case [1986] 159 ITR 280 and we leave the issue open to consider this issue in the appropriate case in future.*

18. The Bombay High Court in the case of CIT v Institute of Banking 264 ITR 110 had on occasion to consider as to whether Tribunal has rightly directed the A.O. to allow depreciation on assets received on transfer and for which the assessee has not incurred any cost. Furniture and Fixtures were received on transfer from another Trust. Since cost was already allowed as deduction & hence depreciation claimed will result in double deduction was the objection of the revenue before the Hon'ble High Court. The Hon'ble High Court gave the following finding :-

*“As stated above, the first question which requires consideration by this court is:(1) 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 LR 1084 (Bom), 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 temple property which was a trust property. During the course of assessment proceedings for the assessment years 1977-78, 1978-79 and 1979-80, the assessee claimed depreciation on the value of the building at 2½ per cent. And they also claimed depreciation on furniture at 5 per cent. 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 a provision in respect of computation of income of the trust from property held for charitable or religious purpose 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 shall 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 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 32 of 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 from building, plant and machinery and furniture was liable to be computed in a 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 aforesaid judgment of the Bombay High Court, we answer question No. 1 in the affirmative, i.e., in favour of the assessee and against the Department.”*

19. The Hon’ble Bombay High Court in the case of Director of Income Tax (exemption) v Framjee Caswasjee Institute 109 CTR 463(Bom) had an occasion to consider the following question of law.

*“Whether on the facts and in the circumstances of the case, the Tribunal was right in law in directing the ITO to take depreciation into account in computing the income from depreciable assets when in fact the full capital expenditure had been allowed in the year of acquisition of these assets.”*

The Hon’ble High Court observed as under :

2. *The assessee is a trust. Its income is derived 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 has been allowed in the year of acquisition of the assets. The assessee went in appeal before the AAC who rejected the Appeal. The Tribunal has however, allowed the Appeal. The Tribunal has explained the position by stating that when the ITO says that full expenditure has been allowed in the year of the acquisition of the assets, what he really means is that the amount*

*spent on acquiring these assets had been treated as application of income of the trust in the year in which the income was spent in acquiring these assets. This does not mean that in computing income from those assets in subsequent years, depreciation in respect of those assets cannot be taken into account.*

3. *The respondents have drawn our attention to a Circular dt. 26<sup>th</sup> Nov., 1968 issued by the CBDT under which it has clarified that in the case of a business undertaking held under trust its income will be income as shown in the accounts of the undertaking and that where the trust derive income from house property, interest on securities, capital gains or other sources, the income should be understood in its commercial sense.*
4. *We are also informed that in the earlier years when a similar question arose in respect of an assessee known as Laxmi Charitable Trust, an application under s. 256(2) was rejected by this High Court. In our view, therefore, the answer to the question is obvious.”*

20. It is true that Ld.D/R has placed reliance on the decision of the Cochin Bench in the case of Deputy Director of Income Tax (Exemption) v Lissie Medical Institutions in ITA No.1010/Coch/2008 dated 26.10.2010. The Ld.Cochin Bench has held that no double deduction can be allowed in view of decision of Hon'ble Apex Court in the case of Escorts Ltd & others v Vol 199 ITR 43. In case depreciation is allowed when cost has already been allowed then it will mean double deduction and funds will be available for non-charitable work without paying tax. We respectfully differ with the view of Ld.Cochin Bench as the matter has been considered by various High Courts and it has been held that depreciation is allowable even if list of asset is treated as application of income..

21. We also draw attention to section 11(1A) which provides for computation of capital gain on transfer of assets being property held under trust. It is mentioned that in case whole of net consideration is utilized in acquiring new capital asset then no capital gain of part of net consideration is utilized for acquiring the new capital asset then so much

of the capital gain as is equal to the amount, any, by which the amount so utilized exceeds the cost of transferred asset. Let us illustrate it

Cost of transferred asset	=	Rs.100/-
Net Consideration	=	Rs.250/-
Consideration utilized for New capital asset	=	Rs.125
Capital gain	=	Rs.150

22. Hence Rs.25 which is the difference between the consideration utilized and of transferred asset is to be treated as applied for charitable purpose. The capital asset while acquired was allowed as expenditure but the same has not been taken Zero for the purpose of computing capital gain to be treated as applied for charitable purpose. Hon'ble Bombay High Court in the case of Director of Income Tax (exemp) v. Girdhari Lal Shewnarain Tanta Trust 199 ITR 215 held that no deduction u/s 80T is available for computing capital gain in the case of Trust.

23. The C.B.D.T. vide Circular No.72 dated 06.01.72 explained as to why section 11(A) has been inserted retrospectively by Finance (No.2) Act 1971 with retrospective effect from 01.04.1962. A trust can claim exemption provided a specific position of income is applied for purposes of the Trust. Income includes capital gain and hence trust will lose exemption if such income is not applied. The requirement that the capital gain arising to be utilized for charitable purpose will have unintended effect of progressively reducing the corpus of the trust and the income yielded by it. Hence the capital gain is to be considered as applied for charitable purpose if the net consideration is utilized for acquiring another capital Asset. If part of the net consideration is utilized then capital gain to the extent of amount, which is in excess of new capital asset and cost of capital asset transferred, is to be considered as used for charitable purpose. Board also advised that net consideration in fixed



deposit with bank for a period of 6 months or above would be regarded as utilization of the net consideration for acquiring another capital asset within meaning of section 11(1A) of the Act. Cost of the transferred asset means the cost of acquisition of the capital asset. The Net consideration is not regarded as capital gain and cost of acquisition of capital asset transferred is not treated as Nil if the asset is a property held under trust. It is not mentioned that a capital asset acquired by application of income is to be treated differently while ascertaining the capital gain. Hence cost must have been treated as application of income but the capital gain is to be ascertained on the basis of normal commercial principles. Hence in the case of trust the income which is required to be considered applied in excess of 85% receipts is to be ascertained on commercial principles and depreciation is to be allowed. In case without depreciation, the receipts applied are in excess of statutory percentage then issue of allowability of depreciation is academic. In absence of details not filed before us, we are unable to see as in what case of Samiti and in which year, the issue of depreciation is academic.’’

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

The order is pronounced in the open Court on 25-01-2012.

Sd/-  
(R.K. GUPTA)  
JUDICIAL MEMBER

Sd/-  
(N.L. KALRA)  
ACCOUNTANT MEMBER

Jaipur  
Dated; 25 /01/2012  
\*Mishra

Copy forwarded to :-

1. The ITO , Ward- Bundi
2. M/s Krishi Upaj Mandi Samiti, Bundi
3. The Id. CIT
4. The Id. CIT(A)
5. The Id.DR
6. The Guard file (ITA No.424/JP /11)

By Order

A.R, ITAT, JAIPUR



