(2014) 02 CAL CK 0118

Calcutta High Court

Case No: I.T.A.T. No. 172 of 2013 and G.A. No. 3199 of 2013

Commissioner of Income Tax		APPELLANT
	Vs	
Siliguri Regulated Market Committee		RESPONDENT

Date of Decision: Feb. 13, 2014

Acts Referred:

- Income Tax Act, 1961 - Section 11, 11(1), 11(1)(a), 11(3), 12A

Citation: (2014) 366 ITR 51 : (2015) 230 TAXMAN 159

Hon'ble Judges: Tapash Mookherjee, J; G.C. Gupta, J

Bench: Division Bench

Advocate: P.K. Bhowmick, Advocate for the Appellant; J.P. Khaitan, Senior Advocate for Pradip Kumar Roy, Debasish Kumar Kar and Joydeep Roy, Advocate for the Respondent

Judgement

1. The appeal is directed against a judgment and order dated June 19, 2013, by which the learned Tribunal held that "The Hon''ble Jurisdictional High Court of Calcutta as in the case of Bhorukha Public Welfare Trust categorically held that the depreciation claimed in the accounts by the assessee was an outgoing for the purpose of determination of income in terms of section 11(1) of the Act. When the learned Commissioner of income tax (Appeals) directed the Assessing Officer to amend the assessment in the light of the registration granted to it u/s 12A of the Act it is an automatic direction that such deductions of depreciation is available to the assessee must be given. The non-granting of the depreciation is a mistake apparent from record. In the circumstances, respectfully following the decision of the jurisdictional High Court in the case of Bhorukha Public Welfare Trust referred to supra the Assessing Officer is directed to grant the assessee the benefit of depreciation in respect of the investment in the fixed assets".

Aggrieved by the order of the learned Tribunal, the Revenue has come up in appeal. The following questions of law were suggested by the Revenue:

"(i) Whether, on the facts and in the circumstances of the case, the learned Tribunal was justified in law in allowing depreciation u/s 32 of the income tax Act 1961, to the assessee being a charitable organization and whose income does not include income from business and profession without considering the fact that depreciation as a deduction is allowable against income from business and profession?

(ii) Whether, on the facts and in the circumstances of the case, the learned Tribunal was justified in law in allowing depreciation on assets without considering the facts that the cost of which has already been treated as application of income for charitable purpose and hence allowing depreciation on such investment would effectively be allowing double deduction from income?"

2. Mr. Bhowmick, learned advocate appearing for the appellant, submitted that the learned Tribunal was wrong in allowing the deduction on account of depreciation on the basis of the judgment in the case of Commissioner of Income Tax Vs. Bhoruka Public Welfare Trust, He drew our attention to the following two paragraphs from the judgment in the case of Bhoruka Public Welfare Trust (page 518):

"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 Commissioner of Income Tax, Central-I Vs. Jayashree Charity Trust, and we leave the issue open to consider this issue in the appropriate case in future."

3. He contended that the Division Bench in that case expressed reservations and the claim for depreciation was allowed only because the amount involved was a meagre sum of Rs. 7,000. He contended that on the basis of the said judgment, the Tribunal was not justified in allowing the deduction on account of depreciation which really amounts to double deduction because the assessee has already got 100 per cent deduction for the acquisition of the property in question. Allowing deduction on account of depreciation would, therefore, mean a double deduction. He in support of his submission relied on the judgment in the case Escorts Limited and Others Vs. Union of India and others, He, therefore, contended that both the questions formulated and quoted above should be answered in favour of the Revenue.

4. We requested Mr. Khaitan, learned senior advocate to assist us in resolving the issue. Mr. Khaitan drew our attention to a judgment of the Punjab and Haryana High Court in the case of The Commissioner of Income Tax Vs. Market Committee, wherein the second question formulated above was considered and answered in favour of the assessee. To be precise, the Punjab and Haryana High Court opined as follows (page 20):

"In the present case, the assessee is not claiming double deduction on account of depreciation as has been suggested by learned counsel for the Revenue. The income of the assessee being exempt, the assessee is only claiming that depreciation should be reduced from the income for determining the percentage of funds which have to be applied for the purposes of the trust. There is no double deduction claimed by the assessee as canvassed by the Revenue. The judgment of the Hon''ble Supreme Court in Escorts Limited and Others Vs. Union of India and others, is distinguishable for the above reasons. It cannot be held that double benefit is given in allowing claim for depreciation for computing income for purposes of section 11. The questions proposed have, thus, to be answered against the Revenue and in favour of the assessee."

5. Mr. Khaitan also drew our attention to a judgment of the Bombay High Court in the case of Commissioner of Income Tax Vs. Institute of Banking Personnel Selection (IBPS), wherein an identical view was taken. The question which fell for decision by the Division Bench of the Bombay High Court is as follows (page 112):

"1. Whether, on the facts and in the circumstances of the case, the Tribunal was right in law in directing the Assessing Officer to allow depreciation on the assets the cost of which has-been fully allowed as application of income u/s 11 of the past years?"

6. The aforesaid question was answered in favour of the assessee holding as follows (page 113):

"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 u/s 11 in the past years? In the case of CIT v. Munisuvarat 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 2  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 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 shall be computed in accordance with section 32 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 u/s 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 u/s 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 u/s 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."

7. Mr. Khaitan, also drew our attention to a Division Bench judgment of this court in the case of Commissioner of Income Tax, Central-I Vs. Jayashree Charity Trust, wherein the following view was taken (page 285):

"The Madras High Court, in the case of Commissioner of Income Tax Vs. Rao Bahadur Calavala Cunnan Chetty Charities, held that taking into account the purposes for which the conditions of section 11(1)(a) were imposed, it would be clear that the income to be considered will be that which is arrived at in the context of what is available in the hands of the assessee subject to an adjustment of any expenses extraneous to the trust. It was held that the income from properties held under trust would have to be calculated in the commercial manner. It was observed that section 11 contemplates an application of the income for charitable purposes. The charity can accumulate 25 per cent of the income. The application as well as the accumulation has necessarily to be of the income as accounted for in the accounts and not as computed under the income tax Act, subject, of course, to what is provided in sub-section (4) of section 11.

We are in respectful agreement with the view expressed by the Madras High Court. This judgment is also in consonance with the view taken by the Andhra Pradesh High Court in the case of Commissioner of Income Tax Vs. Trustee of H.E.H. The Nizam''s Supplemental Religious Endowment Trust,

It also appears that the view we have taken has also been adopted by the Central Board of District Taxes in Board''s Circular No. 5-P (LXX-6) dated May 19, 1968. It was stated in that circular, inter alia (see [1969] Indian Tax Laws, Appx. II, p. Ixxxv):

"2. Section 11(1) provides that subject to the provisions of sections 60 to 63 the following income shall not be included in the total income of the previous year ... The reference in sub-section (1)(a) is invariably to "income" and not to "total income". The expression "total income" has been specifically defined in section 2(45) of the Act as "the total amount of income ... computed in the manner laid down in this Act". It would, accordingly, be incorrect to assign to the word "income", used in section 11(1)(a), the same meaning as has been specifically assigned to the expression "total income", vide section 2(45) . . .

4. Where the trust derives income from 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 purposes 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).

5. To sum up, the business income of the trust as disclosed by the accounts plus its other income computed as above, will be the "income" of the trust for purposes of section 11(1). Further, the trust must spend at least 75 per cent, of this income and not accumulate more than 25 per cent, thereof. The excess accumulation, if any, will become taxable u/s 11(1)."

This circular makes it clear that the word "income" in section 11(1)(a) must be understood in a commercial sense. The entire income of the trust in the commercial sense, has been spent for the purpose of charity. There is no reason to deny the benefit of exemption granted by section 11 to that portion of the income which has been taken away by deduction at source on the ground that the amount has not been spent or accumulated for the purpose of charily."

8. Mr. Khaitan submitted that this court has already expressed the opinion that the income from properties held under a trust would have to be calculated in the commercial manner. He submitted that once the aforesaid process of computation

is permitted, the claim for depreciation has to be allowed.

9. Mr. Bhowmick, learned advocate replied by stating, that in the case of CIT v. Bhoruka Public Welfare Trust, a Division Bench of this court has expressed some reservations with regard to the aforesaid view as regards computation of income in a commercial manner, and, therefore, the matter should be referred to a larger Bench.

10. We have considered the submissions and perused the judgments of the Punjab and Haryana High Court and the Bombay High Court as also the judgment of this court in the case of CIT v. Jayashree Charity Trust and in the case of CIT v. Bhoruka Public Welfare Trust. We are of the opinion that the views expressed in the case of CIT v. Jayashree Charity Trust are logical and in consonance with common sense. The object of section 11 of the income tax Act, 1961, is to feed the public charity. By permitting computation of income in a commercial manner, the object of feeding the public charity is achieved. The amount deducted by way of depreciation is in that case is ploughed back for user on account of charity. It cannot be disputed that a building used for the purpose of charity diminishes in value over the time like any other building. Therefore, providing for such diminution of value would keep the corpus of the trust intact otherwise the corpus of the trust itself in course of time may get dissipated.

11. We are, as such, in agreement with the views expressed in the case of CIT v. Jayashree Charity Trust. There is, as such, no reason why the matter should be referred to any larger Bench, as submitted by Mr. Bhowmick. In the result, the appeal fails. Both the questions are answered in the affirmative and in favour of the assessee. The appeal is thus disposed of. We record our deep sense of appreciation for the assistance rendered by Mr. J.P. Khaitan, learned senior advocate in resolving the questions of law raised in this matter.