IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX APPEAL NO. 968 OF 2013
WITH
INCOME TAX APPEAL NO. 1043 OF 2013

The Commissioner of Income Tax-II, Thane ..Appellant

Vs.

M/s Jawaharlal Nehru Port Trust ..Respondent

....

Mr. Suresh Kumar, Advocate for Appellants.
Mr. P.J. Pardiwalla, Sr. Advocate a/w Mr. S.G. Dalal and Mr. S.G. Lakhani, Advocates for Respondents.

....

CORAM : M.S. SANKLECHA &
N.M. JAMDAR, JJ.
DATED : 8th JUNE 2015

P.C.:

These two appeals filed by the Revenue under Section 260A of the Income Tax Act, 1961 (the 'Act') challenges a common order dated 21 November 2012 passed by the Income Tax Appellate Tribunal (the 'Tribunal'). The common impugned order disposes of the respondent-assessee's appeals for the Assessment Year 2006-07 and 2007-08.

2. The appellant raises the following identical questions of law in the two appeals for our consideration, as under:

> *"(i) Whether, on the facts and in the circumstances of the case, and in law the Tribunal in setting aside the order of the CIT(A) confirming the disallowance made by the AO u/s 14A read with Rule 8D of the I.T. Rules 1962 out of expenses relating to investment in tax free bonds. It failed to appreciate that the order of the Bombay High Court in the case of M/s Godrej & Boyce Mfg. Co. Ltd. Vs. DCIT has been contested by way of SLP before the Supreme Court?*
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> *(ii) Whether, on the facts and in the circumstances of the case, and in law the Tribunal in setting aside the order of the CIT(A) confirming the order of the AO denying exclusion of income exempt u/s 10(35) of the I.T. Act from the total income of the assessee for the purpose of calculating whether 85% of the income had been applied for the objects of the trust or not as per the provisions of section 11(1)(a) of the I.T. Act 1961. It failed to appreciate that section 11 of the I.T. Act does not allow any such exclusion from the total income of the assessee.*
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> *(iii) Whether, on the facts and in the circumstances of the case, and in law the Tribunal in allowing the assessee to claim depreciation also on the capital expenditure which was already allowed as deduction being application of income. In doing so, it has failed to correctly appreciate the*

decisions in case of (a) Escorts India Ltd. Vs. UOI 199 ITR 43 (SC) and (b) Lissie Medical Institutions Vs. CIT 348 ITR 344 (Ker)?

(iv) Whether, on the facts and in the circumstances of the case, and in law the Tribunal in setting aside the order of the CIT(A) confirming the order of the AO disallowing carry forward of excess application of income of the earlier years against the income of the year under consideration. It failed to appreciate that application of income in a given year cannot exceed the income of that year and that there cannot be "carry forward of excess application of income" under any provisions of the I.T. Act, 1961?"

3. Regarding Question No.(i):

The Counsel are agreed that Question No.(i) stands concluded in favour of the respondent-assessee and against the appellant/revenue by the decision of this Court in ***M/s Godrej & Boyce Mfg. Co. Ltd. Vs. DCIT*** reported in ***(2010) 328 ITR 81***. We are informed at the bar that the SLP filed by the revenue against the decision of this Court in the M/s Godrej & Boyce Mfg. Co. Ltd. (supra) has also been dismissed. Accordingly, Question No.(i) does not raise any substantial question of law and is thus not entertained.

4. Regarding Question No.(ii):

(a) The respondent-assessee had income from bonds which were not forming a part of total income under Section 10(35) of the Act. Thus, according to the respondent-assessee, the above amounts was not to be considered as part of the income for the purpose of it's application in terms of Section 11 of the Act. However the Assessing Officer did not accept the assessee's contention and held that such income will form part of the total income while examining the application of income under Section 11 of the Act.

(b) On appeal to the CIT (Appeals), the respondent-assessee placed reliance upon the decision of this Court in ***CIT (Appeals) Vs. Silk & Art Silk Mills Association Ltd.*** reported in ***(1990) 182 ITR 38 (Bom.)*** and in ***His Holiness Silasri Kasivasi Muthukumaraswami Thambiran & Ors. Vs. Agricultural ITO*** reported in ***(1978) 113 ITR 889 (Mad.)*** in support of its contention that income excluded under Section 10 of the Act is not to be considered for purpose of Section 11 of the Act. However, the CIT (Appeals) while disposing the appeal disregarded the two decision by merely holding that they are not relevant to the case of the appellant without pointing out in what manner the two cases were not relevant to the issue under consideration.

(c) On further appeal, the Tribunal by the impugned order set aside the order of CIT (Appeals) and restored this issue to the CIT (Appeals) as there was no discussion as of the appellant's submissions to pass a fresh order in accordance with law.

(d) The grievance of the appellant/revenue is that there was no need for the Tribunal by the impugned order to set aside the order of CIT (Appeals) and restore the issue to CIT (Appeals) for fresh decision. This on the ground that order passed by the CIT (Appeals) was an order which upheld the view of the Assessing Officer.

(e) We find that the order passed by the CIT (Appeals) has not dealt with the decisions cited by the respondent-assessee at the time of hearing before it and merely stating that the same are not relevant does not meet the requirement of natural justice viz. An order supported by reasons. In the above view of the matter, the impugned order of the Tribunal setting aside order of CIT (Appeals) and restoring it to him for fresh consideration cannot be found fault with. Accordingly, Question No.(ii) does not raise any substantial question of law and is accordingly not entertained.

5. Regarding Question No.(iii):

(a) The respondent-assessee had claimed depreciation in respect of fixed assets. In the year of purchase of the fixed assets, the entire amount attributable to its purchase was shown as application of income for the objects of the respondent-assessee and thus exempt in terms of Section 11. The Assessing Officer disallowed the claim for depreciation on the ground that the same would amount to double deduction in as much as the entire amount attributable to purchase of fixed assets was not subject to tax as being applied for the object of the respondent-assessee and on the same amount, the respondent-assessee was claiming depreciation.

(b) On appeal, the CIT (Appeals) upheld the decision of the Assessing Officer on the ground that allowing deduction on account of depreciation would amount to double deduction as the amount on which depreciation is claimed was already exempted under Section 11 of the Act.

(c) On further appeal, the Tribunal allowed it by following the decision rendered by it on similar issues in the case of ***Director of Income Tax (Exemptions) Vs. Ville Parle Kelavani Mandal*** in ***Income Tax Appeal No. 693/2013*** for the Assessment Year 2008-09 rendered on 5 October 2012 and held that there is no question of double deduction as the assessee is only claiming that depreciation should be reduced while determining the percentage of funds applied for the purpose of Section 11 of the Act. In the decision of the Punjab and Haryana High Court in the case of ***CIT Vs. Market Committee*** reported in ***330 ITR 16*** relied upon by the Tribunal in Ville Parle Kelavani Mandal (supra) the decisions of the Apex Court in ***Escorts Vs. UOI*** reported in ***100 ITR 43*** and of Kerala High Court in ***Lessie Medias Infotech Vs. CIT*** reported in ***348 ITR 344*** were also considered.

(d) The grievance of the revenue is that allowing of depreciation in respect of the amount which is already exempt under Section 11 of the Act as application of income for objects of the institution and thereafter granting depreciation as the same would amount to grant of double deduction. Mr. Suresh Kumar, the learned Counsel for the revenue submits that a similar issue arising in the case of ***Director of Income Tax (Exemption) Vs. Shanmukhanand Fine Arts and Sangitha Sabha*** in ***Income Tax Appeal No. 1413/2012*** has been admitted by this issue for consideration by its order dated 5 March 2014. Thus it is commended that this issue also be admitted for consideration.

(e) We find that the decision of the Tribunal in the case of Ville Parle Kelavani Mandal (supra) rendered on 5 October 2012 had been challenged by the revenue before this Court in the Income Tax Appeal No. 693/2010. This Court by order dated 23 March 2015 dismissed the revenue's appeal on the ground that claims the deduction on account of depreciation would not amount to double deduction. In fact, the Tribunal in its order in Ville Parle Kelavani Mandal (supra) had followed the decision of this Court in ***CIT Vs. Institute of Banking Personal Selection*** reported in ***(2003) 264 ITR 110***. Further this Court in the case of ***Director of Income Tax (Exemption) Vs. The Watch Tower Bible and Tract Society of***

India in ***Income Tax Appeal No. 1548/2012*** rendered on 10 December 2014 had occasion to also consider the issue in the context of identical submission being made by the revenue before us and after considering it's earlier decision including the order dated 5 March 2014 in Shanmukhanand Fine Arts and Sangitha Sabha (supra) admitting the appeal, came to the conclusion that there is no question of double deduction. This on the ground that amount spent on acquiring assets are taken as application of income for the purposes of Section 11 of the Act and the depreciation claimed thereafter on the same amount i.e. the value of fixed assets during the subsequent years is being granted on the user of the same. Accordingly, in view of the decision of this Court in Institute of Banking (supra) and Ville Parle Kelavani Mandal (supra) rendered on 23 March 2015 and an earlier decision in The Watch Tower Bible and Tract Society of India rendered on 10 December 2014, the Question No.(iii) stands concluded in favour of the respondent/assessee and against the revenue. Accordingly, Question No.(iii) does not give rise to any substantial question of law and is thus not entertained.

6. Regarding Question No. (iv):

(a) The respondent-assessee had positive income for subject assessment years. The income in the two assessment years was sought to be set off against the excess application of income in the earlier years by the respondent-assessee. The Assessing Officer disallowed the set off/adjustment for earlier years on the ground that the respondent-assessee had not claimed exemption under Section 11 of the Act i.e. Assessment Year 2003-04, 2004-05 and 2005-06 and the returns filed for earlier years were also barred by limitation. Therefore the Assessing Officer held that the question of setting off the excess application of earlier years from the income of subject assessment year would not arise.

(b) On appeal, the CIT (Appeals) upheld the order of Assessing Officer. On further appeal, the Tribunal by the impugned order held that for the earlier assessment years, the Tribunal had in its order dated 30 September 2010 restored the issue to the Assessing Officer to examine the merits of the respondent claim for exemption under Section 11 of the Act. This was on account of the fact that at the time of hearing before the

Tribunal, the respondent was in possession of its Registration under Section 12 (1)(A) of the Act. In the light of the above, the Tribunal had restored the issue for the earlier years to the Assessing Officer to decide the matter afresh and to determine the application of income in terms of Section 11 of the Act. Consequently, the Tribunal set for the subject assessment year aside the order of CIT (Appeals) and restored the issue to the Assessing Officer to consider the same afresh in the light of the decision taken by the Assessing Officer in respect of the orders passed for the earlier assessment years. Thus, the question as framed by the revenue does not give rise to any substantial question of law. Accordingly, Question No. (iv) is not entertained.

7. Accordingly, for the above reasons, both the appeals filed by the revenue are dismissed. No order as to costs.

[N.M. JAMDAR, J] **[M.S. SANKLECHA, J.]**