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

INCOME TAX APPEAL NO. 231 OF 2013

Director of Income Tax (Exemption)	**}**	**Appellant**
versus		
Society of Congregation of Franciscan	**}**	
Brothers Mount Poinsur, Borivali (West)	**}**	**Respondent**

Mr. A. R. Malhotra with Mr. Mr. N. A. Kazi for the Appellant.

Mr. Atul R. Jasani for the Respondent.

CORAM :- S.C.DHARMADHIKARI &
S.P.DESHMUKH, JJ.
DATED :- JANUARY 15, 2015

P.C. :-

This Appeal of the Revenue challenges the order dated 20th July, 2012. Mr. Malhotra submits that the questions of law, which have been formulated by the Revenue, at pages 4 and 5 of the paper book, are identical to an Appeal, which has been admitted by this Court, namely Income Tax Appeal No. 1413 of 2012, admitted on 5th March, 2014. The question of law is identical. The facts are also more or less identical and have been derived from the case of the other Assessee, namely, Sri Shanmukhananda Fine Arts and Sangeetha Sabha, in which, the question has been admitted. The only difficulty is the wording of the substantial question of law. Therefore, the Appeal deserves to be admitted.

2) On the other hand, Mr. Jasani appearing on behalf of the Assessee placed on record a compilation of following orders, which have been passed by this Court:

1. *Director of Income Tax (Exemption) vs. Framjee Cawasji Institute* ***(1993) 109 CTR (Bom) 463.***
2. *CIT vs. Institute of Banking* ***(2003) 264 ITR 110 (Bom).***
3. *DIT(E) vs. GKR Charitees,* ***ITXA (L) No. 2060/2012,*** *Dated-8.3.2013.*
4. *DIT vs. Parmeshwari Gordhandas Garodia Charitable Trust,****ITXA/822/2012****, Dated 12.9.2014.*
5. *CIT vs. Sanjeewan Vidyalaya Trust* ***ITXA/797/2012****, Dated 26.9.2014.*
6. *CIT vs. Lilavati Kirtilal Mehta Medical Trust,* ***ITXA/1305/2012****, Dated 20.11.2014.*
7. *DIT(E) vs. The Watch Tower Bible and Tract Society,* ***ITXA/1548/2012****, Dated 10.12.2014.*

3) With the assistance of Mr. Malhotra and Mr. Jasani, we have perused the Memo of Appeal, including the orders passed by the Assessing Officer, the first Appellate Authority and the Tribunal. In the assessment order, the Assessing Officer, in relation to the only question, which has been raised, held that in the return of income, it has been claimed that the sum of Rs.76,13,012/- had been on account of depreciation. The Trust argued that the said be allowed. The Assessing Officer concluded that this sum is the depreciation in respect of the assets, the capital expenditure incurred on which has already been claimed and allowed as application of income in the current or earlier years. He then concluded as under:

"4.2 Prima facie, it is seen that the claim of depreciation of Rs.76,13,012/- as application of income U/s. 11(1)(a), against the income of the current A.Y. amounts to claiming a double deduction, as the Capital expenditure incurred on these assets, as discussed above, has already been allowed as application of income. During the course of assessment proceedings the amount incurred for the object of the trust has also been examined and verified. On verification, it is found that the assessee trust has been debited Rs.76,13,012/- on account of depreciation and the same has been claimed as application of income.

4.3 During the course of assessment proceedings, the assessee was asked to file the explanation for allowability of the claim of depreciation to the extent Rs.6,900/-. In response to the query raised, the assessee's representative argued that depreciation is an allowable expenditure in view of the judgment of the Hon'ble Bombay High Court in the case of CIT V/s. Institute of Banking 264 ITR 110 (Bom).

4.4 The contention of the assessee has been duly considered however the same is not accepted for the following reasons:-

The Assessee in support of its claim has placed reliance upon the judgment in the case of CIT v/s. Institute of Banking 264 ITR 110 (Bom) wherein the issue of allowability of Depreciation has been decided in favour of the assessee. The Hon'ble Jurisdictional High Court has held that depreciation should be allowed even on asset, the cost of which had been fully allowed as application of income under section 11 in the past years.

It is seen that the Department did not file SLP in Hon'ble Supreme Court in the above referred case in 264 ITR 110 on account of Tax effect below the prescribed monetary limit in compliance of CBDT Circular and the said judgment has not been accepted on merit. Therefore, the issue has not attained finally and it cannot be said to be the law decided on the issue. The view is supported by section 268A(3) of the IT Act'61 where it is stated that it cannot be contended that the income tax authority has acquiesced in the decision on the disputed issue by not filing an appeal or application for reference in any case.

It is pertinent to mention here that Supreme Court in the case of Escorts Ltd. v/s Union of India 199 ITR 43 has dealt in details on similar issue of depreciation. The Supreme Court has held that double deduction cannot be presumed if the same is not specifically provided by Law in addition of normal deduction. <u>It is pertinent to mention here that the decision of Bombay High Court in the case of CIT v/s Institute of Banking Personnel Selection (Supra) was pronounced without taking the judicial notice of the ratio of judgment in the case of Escorts Ltd. v/s Union of India 199 ITR 43</u>.

The decision of the Hon'ble Bombay High Court which has been cited by the assessee is not in conformity with the intention of the legislation of not allowing ***Multiple benefits****.*

Therefore, the submissions of the Assessee along with the documentary evidence submitted need to be examined in light of the provisions of section 11 and section 32 of the Income Tax Act, 1961.

The various Courts have held that income of a trust or institution eligible for exemption should be calculated applying commercial concept of income. Therefore, depreciation as an indirect expenditure should legally be allowed to such institutions.

However, in cases where Trusts get 100% exemption on any amount spent for purchase of a capital asset as they have been held to be expenditure towards attainment of the object (subject to the objects of the trust), ***Multiple claim of exemption and depreciation on same amount of sum received and subsequently applied for acquisition of capital asset is not permissible as it amounts to double deduction.****"*

4) The Assessing Officer referred to some other decisions of the Supreme Court as well and in disallowing the claim. The matter was carried to the first Appellate Authority and the first Appellate Authority had before him a ground of the Assessee that the Assessing Officer, while passing the order, disallowed depreciation of Rs.76,13,012/- claimed by the Assessee as income applied to the object of the Trust. In relation to that claim, from para 4 onwards, the Commissioner considered the rival contentions and case law. He held that once there is a Judgment of this Court in the field, wherein it was held that the depreciation can be considered as legitimate deduction for computing the amount available for application of income, then, that Judgment will have to be followed. It will have to be followed and applied also because the Judgment of the Hon'ble Supreme Court in the

case of *M/s. Escorts Ltd. vs. union of India* ***199 ITR 43*** is distinguishable on facts. Further, for the assessment year 2007-08, the predecessor of this first Appellate Authority had taken an identical view. In such circumstances, he directed the Assessing Officer to allow exemption under section 11 in respect of depreciation claimed.

5) The correctness of this view was assailed before the Tribunal, by the Revenue. The attempt of the Revenue, as commented by the Tribunal, appears to be to contest the binding Judgment of this Court. The attempt to question it was not upheld when the Tribunal found that the facts in the present case were identical to those, based on which, the Judgment in the case of *CIT vs. Institute of Banking Personnel* ***(2003) 264 ITR 110*** has been rendered by this Court. The consistent view of this Court is that the Trust derives its income from depreciable assets. The Assesse therein took into account depreciation in computing the income of the Trust. The Income Tax Officer had held that the depreciation could not be taken into account because full capital expenditure has been allowed in the year of acquisition of the assets. The first Appellate Authority there as well in that case rejected the Appeal. The Tribunal allowed it by explaining the position that once full expenditure has been allowed in the year of the acquisition of the asset really means 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. That does not mean that in computing income from those assets in subsequent years, depreciation in respect of those assets cannot be taken into account [see *Director of Income Tax (Exemption) vs. Framjee Cawasjee Institute* ***(1993) 109 CTR (Bom) 463****]*. This Judgment has been followed in the later cases including *Institute of Banking* (supra).

6) We are not in agreement with Mr. Malhotra that this Court having admitted Income Tax Appeal No. 1413 of 2012, even the present Appeal deserves admission.

7) We have called for the files in Income Tax Appeal No. 1413 of 2012. There, the Assessing Officer had taken a view relying upon the Judgment in the case of *Escorts Ltd. vs. Union of India and Ors.* ***(1999) ITR 43*** that the double deduction in respect of same expenditure is being incurred. That is on the footing that the Trust had in that case claimed an amount of Rs.1,02,52,100/- on account of depreciation. The explanation provided by the Trust indicated that the ratio in the cases of *Framjee Cawasjee Institute* (supra) and *Institute of Banking* (supra) could not be straight away applied. The percentage which the Assessing Officer derived in that case and which is explained in internal pages 4 and 5 of his order enabled this Court to then admit the Appeal.

Further, the Appeal appears to have been admitted because the Tribunal did not assigned any reason, save and except reproducing the findings of the Commissioner.

8) In the above circumstances, no advantage can be derived by the Revenue by an order of admission of a question of law in a solitary case by this Court. For the reasons aforeindicated, we do not find that the Appeal raises any substantial question of law. It is accordingly dismissed. No costs.

(S.P.DESHMUKH, J.) **(S.C.DHARMADHIKARI, J.)**