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

WRIT PETITION (L) NO. 3496 OF 2017

G.D. Birla Medical Research & Educational Foundation, Mumbai .. Petitioners

v/s.

The Deputy Commissioner of Income Tax, Exemption 1(1), Mumbai & Ors. .. Respondents

Mr. Madhur Agarwal a/w Mr. Atul Jasani for the petitioners
Mr. Ashok Kotangle i/b Ms. Padma Divakar for the respondents

CORAM : M.S. SANKLECHA &
RIYAZ I. CHAGLA J.J.

DATED : 18th JANUARY, 2018.

P.C.

1. At the request of the parties, the petition itself is taken up for final disposal at the stage of admission.

2. This petition under Article 226 of the Constitution of India challenges the Notice dated 23rd March, 2017 issued by the respondent no.1 – Deputy Commissioner of Income Tax under Section 148 of the Income Tax Act, 1961 (the Act). The impugned notice dated 23rd March, 2017 seeks to reopen the assessment for A.Y. 2010-11.

3. The reasons in support of the impugned notice as furnished to

the petitioners, read as under :-

"The assessee filed Rol on 04.10.2010 declaring total income at Rs. Nil. The case was brought under scrutiny and an order u/s 143(3) was passed on 05.06.2012 assessing the total income at Rs. Nil.

On verification of records it is seen that the assessee had claimed depreciation of Rs.2,39,32,793/- on movable and immovable assets and has also claimed of the Income Tax Act, 1961, which amounts to double deduction. It is pertinent to note here that Hon'ble Apex Court in the case of ***Escorts Ltd. Vs. Union of India Ltd. (199 ITR 43)****, has held that in absence of clear statutory indication to the contrary, the statute should not be read as to permit an assessee two deductions on the same expenditure. Further, Kerla High Court in the case of* ***Lissie Medical Institution Vs. CIT, Kochi IT Appeal No.42 of 2011*** *dated 17.02.2012 has held that if assessee threats expenditure on acquisition of assets as application of income for a charitable purpose u/s 11(1)(a), assessee cannot claim depreciation on value of such assets. Recently Hon'ble Delhi High Court in the case of Chiranjiv Charitable Trust ITA No. 321/2013 vide its order dated 18/3/2014 too has given the same view i.e. depreciation is not to be allowed as application of income.*

In view of the above, it is clear that the assessee by way of claiming depreciation on assets the cost of which has already been claimed as capital expenditure, has attempted to avail of double deduction in contravention to the extent *laws and judicial pronouncements (supra). Thus, the assessee trust has failed to disclose fully and truly all the material facts relevant to the said claim consequent to which income chargeable to tax has escaped assessment. This has led to under assessment of the case of Rs.2,39,32,793/-.*

In view of the above facts, I have reason to believe that income of Rs.2,39,32,793/- has escaped assessment within the meaning of section 147 of the I.T. Act, 1961."

4. The petitioners objected to the reasons by letter dated 3rd October, 2017 wherein they relied upon the decision of this Court in ***Commissioner of Income Tax Vs. Institute of Banking Personnel Selection, 264 ITR 110*** dealing with an identical issue as raised for the reasons recorded in support of the impugned notice and holding that the Charitable Trust is entitled to claim depreciation on assets, the cost of which has already been claimed as a capital expenditure in an earlier assessment year. Further reliance was also placed upon the decision of this Court in the petitioners' own case being ***DIT V/s. G.D. Birla Medical Research & Education*** (Appeal Nos. 2294 and 2295 of 2013) rendered on 1st February, 2016. In the above case, this Court had dismissed the Revenue's appeal by observing as under :-

"4. … On appeal to the Tribunal, the Revenue contended that the decision of this Court in Institute of banking

Personnel Selection (supra) was rendered without noticing the decision of the Apex Court in the case of Escorts Ltd. Vs. Union of India (199 ITR 43) and therefore, not binding. However, the common impugned order dated 13th March, 2013 of the Tribunal negatives the aforesaid submission and records that in subsequent decision of this Court in the case of DIT(E) Vs. G.K.R. Charities (32 Taxmann.com 208) wherein an identical dispute as raised before it had been raised by the Revenue placing reliance on Escorts Ltd. (supra) was dismissed. In view of the fact that the imugned order of the Tribunal has followed the decision of the jurisdictional Court i.e. Bombay High Court, we were not inclined to entertain the appeal.

…....

6. *This by placing reliance upon the earlier decision of this Court dismissing the Revenue's appeal in the Director of Income Tax (Exemption) Vs. The Watch Tower Bible & Trust Society of India being Income Tax Appeal No.1548 of 2012 rendered on 10th December 2014 which had also considered identical issue including the admission of Revenue's appeal in Sri Shanmukhananda Fine Arts & Sangeetha Sabha (supra). Thus, both the aforesaid decisions M/s. Jawaharlal Nehru Port Trust (supra) and The Watch Tower Bible & Trust Society of India (supra) had come to the conclusion that there is no question of double deduction in allowing of depreciation in respect of assets acquired and used by the Trust.”*

5. Inspite of the above, the petitioners' objections were rejected by order dated 2nd November, 2017. It is an agreed position between the parties that the reasons recorded in support of the impugned notice dated 23rd March, 2017 now stands concluded against the Revenue and in favour of the petitioners by the decision of the Supreme Court in ***Commissioner of Income Tax Vs. Rajasthan and Gujarati Charitable Foundation Poona,*** *(Civil Appeal No.7186 of 2014)* decided on 13th December, 2017. In the above case, the Apex Court has upheld the decision of this Court in *Institute of Banking Personnel Selection (supra)* and negatived the contention of the Revenue that by granting benefit of depreciation, the assessee would be availing double benefit for the period prior to Assessment Year 2015-16.

6. In the above view, the impugned Notice dated 23rd March, 2017 is quashed and set aside. Petition disposed of in above terms.

(RIYAZ I. CHAGLA, J.) **(M.S. SANKLECHA, J.)**