

IN THE INCOME TAX APPELLATE TRIBUNAL
AHMEDABAD "B" BENCH

**Before: Shri Waseem Ahmed, Accountant Member
And Shri T.R. Senthil Kumar, Judicial Member**

**ITA No. 370/Ahd/2019
Assessment Year 2015-16**

The Dy. Commissioner of Income-tax (Exemptions), Circle-2, Ahmedabad (Appellant)	Vs	Ahmedabad Urban Development Authority (AUDA), Ahmedabad Sardar Vallabhbhai Patel Sankul, Ashram Road, Usmanpura, Ahmedabad-380014 PAN: AAALA0233B (Respondent)
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**ITA No. 221/Ahd/2019
Assessment Year 2015-16**

Ahmedabad Urban Development Authority (AUDA), Ahmedabad Sardar Vallabhbhai Patel Sankul, Ashram Road, Usmanpura, Ahmedabad-380014 PAN: AAALA0233B (Appellant)	Vs	The Dy. Commissioner of Income-tax (Exemptions), Circle-2, Ahmedabad (Respondent)
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**Assessee Represented: Shri S.N. Soparkar, Sr. Adv. &
Shri Parin S Shah, A.R.**

Revenue Represented: Shri Sudhendu Das, CIT-DR

Date of hearing : 06-06-2023
Date of pronouncement : 23-06-2023

आदेश/ORDER

PER : WASEEM AHMED, ACCOUNTANT MEMBER:-

The above captioned cross appeals are filed by the Revenue and Assessee as against the appellate order dated 07.12.2018 passed by the Commissioner of Income Tax (Appeals)-9, Ahmedabad arising out of the assessment order passed under section 143(3) of the Income Tax Act, 1961 (hereinafter referred to as 'the Act') relating to the Assessment Year (A.Y) 2015-16.

2. At the outset of hearing of the above appeals, both the parties namely Ld. Senior Counsel Shri S.N. Soparkar appearing for the assessee and Shri Sudhendu Das Ld. CIT-DR appearing for the Revenue submitted the above appeal is fully covered by the order of the Hon'ble Supreme Court of India which is followed in assessee's own case by the Co-ordinate Bench of this Tribunal in ITA Nos. 2434 and 2378/Ahd/2017 vide order dated 16-06-2023 relating to the Assessment Year 2014-15. Further there is no change in facts of the present case, therefore the above decision is squarely applicable to the present case.

3. The Grounds of Appeal raised by the Revenue in ITA No.370/Ahd/2019 for A.Y. 2015-16 reads as under:

1. "Whether, on the facts and in the circumstances of the case, the CIT(A) is justified in allowing the assessee's appeal, negating the finding of the Assessing officer denying the benefits of section 11 and 12 of the I.T. Act."

2. "Whether, on the facts and in the circumstances of the case the CIT(A) is justified in giving the benefit of Section 11 and 12 which the Assessing Officer disallowed by invoking the provision of Section 2(15) r.w.s 13(8) of the Act."
3. "The Revenue craves to add, alter amend modify, substitute delete and/or rescind all or any Grounds of appeal on or before the final hearing if necessary so arises."
4. We have given our thoughtful consideration and perused the materials available on record. The Ld. CIT(A) has followed Gujarat High Court judgment in assessee's own case and thereby held that the assessee cannot be considered to cover by the proviso to section 2(15) of the Act and cannot withdraw the claim of exemption u/s. 11 of the Act to the assessee. The Hon'ble Supreme Court Judgment in Civil Appeal No. 21762 of 2017 in assessee's own case reported in 449 ITR 1 (SC) which has settled the issue by dismissing the Revenue's appeal vide Para 254(ii) of the judgment as follows:

"...254. In accordance with the foregoing discussion, and summary of conclusions the numerous appeals are disposed of as follows:

(i) The revenue's appeals against the Improvement Trust, Moga, the Hoshiarpur Improvement Trust, Bathinda Improvement Trust, Fazilka Improvement Trust Sangrur Improvement Trust Patiala Improvement Trust Jalandhar Improvement Trust Kapurthala Improvement Trust, Pathankot Improvement Trust Improvement Trust, Hansi, and the Special Leave Petitions filed against the Gujarat Maritime Board and Karnataka Water Supply and Drainage Board are rejected.

(ii) **The revenue's appeals against Ahmedabad Urban Development Authority**, the Gujarat Housing Board, the Gandhinagar Urban Development Authority, Rajkot Urban Development Authority, Surat Urban Development Development Authority, Jamnagar Area Development Authority, and the Gujarat Industrial Development Corporation **are rejected**. Likewise, the revenue's appeals against Agra Development Trust, UP Awas Evam Vikas Parishad, Raebarel, Development Authority, Rajasthan Housing Board, Mangalore Urban Development Authority; Mathura Vrindavan Development Authority, Meerut Development Authority, Belgaum Development Authority". Moradabad Urban Development Authority, Yamuna Expressway Industrial Development Authority, Greater Noida Industrial Development Authority, New Okhla Industrial

Development Authority and Karnataka Industrial Areas Development Board are rejected.”

4.1. It is further clarified by the Hon'ble Supreme Court in the very same case of ACIT vs. Ahmedabad Urban Development Authority reported in [2022] 144 taxmann.com 78 (SC) wherein it has been clearly held that the Revenues Appeals are dismissed as far as statutory Corporations/Boards observing as follows:

“...3. It was urged on behalf of the revenue, that the clarification it seeks is necessary, because in Para 253H and in Para 254, it has been precluded from examining the facts and assessing the concerned assessment years, in relation to the assesses in these appeals. It was urged that the conclusions recorded in the judgment and those in the said two paragraphs, preclude it from dealing with the assessments of parties before this court and furthermore, the dismissal of the revenue's appeals will preclude an examination of the merits for these assesses in future, as well.

4. A plain reading of the conclusions recorded in Para 253(A), (B), (C), (D) and (E) would disclose that this court consciously recorded its findings, with the intent of finally deciding the issues, for various organizations- Sh in relation to the assessment years in question, whereas in Para 253 (F), the court remitted the matter for examination and orders by the assessing officer. Similarly, the conclusion in Para 253 G. was conclusive with respect to the claim of private trusts, the appeals were dismissed. These conclusions are accurately reflected in the final, operative directions in Para 254. In Para 254 (i) to (iv), the conclusions recorded are against the revenue. However, in Para 254 (v), (vi), (vii) and (viii), the conclusions, are in favour of the revenue.

5. The reference to application of the law declared by this court's judgment, therefore, has to be understood in the context, which is that they apply for the assessment years in question, which were before this court and were decided; wherever the appeals were decided against the revenue, they are to be treated as final. However, the reference to future application has to be understood in this context, which is that for the assessment years which this court was not called upon to decide, the concerned authorities will apply the law declared in the judgment, having regard to the facts of each such assessment year. In view of this discussion, no further clarification is necessary or called for.”

5. Thus it is seen from the above judgment of the Hon'ble Supreme Court in Miscellaneous Application, wherever the Revenue's

appeals are dismissed, they are to be treated as Final. Respectfully following the same, we hereby dismiss the appeal filed by the Revenue.

6. In the result, the appeal filed by the Revenue in ITA No. 370/Ahd/2019 is hereby dismissed.

ITA No. 221/Ahd/2019 for Assessee's appeal for A.Y. 2015-16

7. Now we take assessee appeal, the Grounds of Appeal filed by the Assessee in ITA No. 221/Ahd/2019 reads as under:

"1. Ld. CIT (A) erred in law and on facts directing AO to verify & compute the income of appellant as per guidelines narrated by him though holding the activities of assessee authority not covered by proviso to Sec. 2(15) of the Act following judgment of Hon'ble Gujarat High Court.

2. Ld. CIT (A) erred in law and on facts holding that grants given for generic purpose or which are not project specific then to consider the same in the nature of voluntary donation to be included as the income of the appellant ws 12 (1) of the Act.

3. Ld. CIT (A) erred in law and on facts holding the appellant not entitled to claim (i) accumulation @ 15% on amount of grants u/s 11(1)(a) of the Act (ii) claim capital expenditure out of these grants as application of income & (iii) claim depreciation on fixed assets created out of such grants

4. Ld. CIT (A) erred in law and on facts directing AO to treat funds received under provisions of GTPUD Act like Development charges, Betterment charges, Impact fees, Amenities fees, Scrutiny fees, Zoning fees etc. as the income of appellant irrespective of their treatment as balance sheet item.

5. Ld. CIT (A) erred in law and on facts directing AO to treat income from premium on lease of plots of land and receipts from sale of land shops as income of the appellant irrespective of its treatment as balance sheet item

6. Ld. CIT (A) erred in law and on facts holding the appellant not entitled to claim from various funds received as per provisions of GTPUD Act (i) accumulation @ 15% u/s 11(1)(a) of the Act (ii) claim capital expenditure as application of income (iii) claim depreciation on fixed assets created out of such funds.

7 Ld. CIT (A) erred in law and on facts holding the appellant not entitled to claim from receipts as premium on plots, sale of plots (i) accumulation @ 15% u/s 11(1)(a) of the Act (ii) claim capital expenditure as application of income (iii) claim depreciation on fixed assets created out of such funds.

8 Ld. CIT (A) erred in law and on facts directing AO to verify & apply rate of depreciation on the basis of normal commercial principles & not as per section 32 of the Act not applicable to exempt person.

9 In view of the judgment of Hon'ble Gujarat High Court in appellant's case, ld. CIT (A) ought to have granted exemption in toto as claimed u/s 11/12 of the Act & ought to have directed AO to allow accumulation at 15% of gross receipts permissible as per law.

10 Levy of interest u/s 234B & 234C of the Act is not justified

11 Initiation of penalty proceedings u/s 271(1)(c) of the Act is not justified.”

8. At the outset the Ld. Senior Counsel Shri S.N. Soparkar appearing for the assessee submits that ground no. 1 is covered in favour of the assessee by the Hon'ble Supreme Court judgment in assessee's own case reported in 449 ITR 1 (SC). Regarding Ground Nos. 2 to 6, the same are consequential and covered in favour of the assessee pursuant to the Supreme Court Judgment in assessee's own case (cited supra), hence the same are not pressed. Ld. D.R. could not dispute the above submission thus the Ground No. 1 is allowed in favour of the assessee and Ground Nos. 2 to 6 are dismissed as not pressed.

9. Regarding Ground No. 8, Ld. CIT(A) directed A.O. to verify and apply rate of depreciation on the basis of normal commercial principles and not as per section 32 of the I.T. Act. In this connection, Ld. Senior Counsel drawn our attention to the decision of the Cuttack Bench in the case of Paradip Port Trust Vs. Additional Commissioner of Income-tax reported in 20 taxmann.com 311 (Cuttack) wherein the Co-ordinate Bench of this

Tribunal held that permanent way, wharves, roads and boundaries which were serving some special purpose of working of assessee-port were to be treated as 'plant and machinery' and depreciation on the same was to be allowed at rate of 15% on those fixed assets. Thus the Ld. CIT(A) is not correct in holding that the rates of depreciation as per Section 32 of the I.T. Act will not be applicable to the assessee case.

10. The Ld. D.R. appearing for the Revenue could not bring any contra decision, thereby supported the order passed by the Ld. CIT(A).

11. We have given our thoughtful consideration and perused the materials available on record. The Co-ordinate Bench of the Tribunal held that the fixed assets served some special purpose of the working of the assessee and thereby considered as 'plant and machinery' in the working process of the assessee. The Ld. CIT(A) has not justified in holding that the income of exempt person has to be calculated on the basis of normal commercial principles and by Rule of accountancy.

11.1. Respectfully following the above judicial precedent, we hold that the assessee is entitled to claim the depreciation as 'plant and machinery' as the assessee in promoting public objects which are activities in the nature of trade, commerce or business but without commercial motive. Thus the ground no. 8 raised by the Assessee is hereby allowed.

12. Ground no. 9 namely the application of income shall precede accumulation by directing A.O. to allow accumulation u/s. 11(1)(a) of the Act, from income remaining after deducting amount applied for the objects of the assessee trust.

12.1. In this connection, Ld. Counsel drawn our attention to the decision of the Co-ordinate Bench in the case of Gnyan Dham Vapi Charitable Trust Vs. DCIT (Exemptions) in ITA No. 2208/Ahd/2018 dated 19-08-2020 observing as follows:

“...8.1 Under s.11 of the Act, income derived from property held under trust wholly for charitable or relates purposes shall not be included in the total income subject to certain conditions. On a combined reading of Section 11(1)(a) and Section 11(2) of the Act, it emerges that the trust is allowed to accumulate 15% of its income without any time limit and balance 85% can be set apart for specified period to five years. In the instant case, the assessee in the assessment year in question as well as in some other assessment years have made spendings in excess of its receipts resulting in certain deficit. Owing to excess spending over receipts, a peculiar situation has arisen in the present case towards the manner of computation of quantum of deficit eligible to be carried forward for set off in subsequent assessment years having regard to statutory permission towards 15% accumulation under s.11(1)(a)/ 11(1)(b) of the Act without any time limit.

8.2 To delineate on the issue, it may be pertinent to note that in order to be eligible for claiming exemption, it is essential that the income of the trust is applied for charitable objects. A charitable trust or institution is required to apply at least 85% of income derived from trust property towards charitable purposes. If the income spent on charitable or religious purposes during the previous year falls short of 85% of the income derived during the year, such shortfall may be subjected to tax in certain circumstances. Hence, a statutory obligation has been cast on beneficiary trusts to utilize at least 85% of the income derived from the trust property unless accumulated or set apart for application in subsequent years subject to certain stipulated conditions. Section 11(1)(a) & (b) r.w.s. 11(2) of the Act however grants an entitlement to a charitable trust to retain or accumulate 15% of income derived from property held in trust without any time limit and is thus benevolent in nature. In this backdrop, it is noticed that the situation herein is quite opposite. The assessee in the instant case has, in fact, utilized its income for charitable purposes in excess of its receipts without any accumulations resulting in certain ‘deficits’. The CIT(A) has applied the governing principles of Section 11(1)(a) of the Act to a totally converse situation of excess spending rather than accumulation and has brought down the entitlement of deficits carry forward.

8.3 Ostensibly, the assessee has not availed the entitlement of accumulation of 15% of income in the instant case. Needless to say, the statutory postulations towards accumulation of 15% of income for indefinite period is an entitlement or a right of absolute nature vested upon the assessee but, however, cannot be regarded as an obligation envisaged in law. The law applicable to accumulation of

income cannot be extended to application thereof. Where an assessee trust has made excess application of its income, the option or entitlement vested upon an assessee to accumulate 15% for indefinite period in our view cannot operate as an obligation enforceable against it in the absence of accumulation. The method of computation of deficit to be truncated artificially 15% based on an entitlement (opposed to an obligation) as suggested by first appellate authority is totally devoid of any logic. This would tantamount to application of concession conferred on assessee in a reverse manner and thus put the assessee in a worser position in the event of accelerated application of receipts for salutary purposes. The action directed by CIT(A) has the effect of deprivation of concession granted and is repugnant to the intended outcome. The Pune Bench of Tribunal in Maharshi Karve Stree Shikshan Samstha Karvenagar vs. ITO 174 ITD 591 (Pune) has also essentially held that relaxations conferred under s. 11(1)(a)/(b) r.w. Section 11(2) of the Act to the extent of 15% of income would not nullify the entitlement of such absolute nature by way of reduction in quantum of deficit. We thus have no hesitations to quash the observations of the first appellate authority towards exclusion of 15% of income for the purposes of determination of quantum of deficit to be carried forward for set off in ensuing years in accordance with law.”

12. 2. Ld. Senior Counsel further relied upon Pune Bench decision in the case of Maharshi Karve Stree Shikshan Samstha Karvenagar Vs. ITO wherein it has been held as follows:

“IT: Exemption under section 11(1)(a) i.e... 15 per cent of income, is absolute exemption and application of section 11(2) does not extend to nullify said absolute exemption

IT: Where in relevant assessment year application of income, is more than receipts of year, excess application of income i.e., expenditure in hands of assessee, can be carried forward to succeeding year”

13. Respectfully following the above ratio of the decisions of the Coordinate Benches of the Tribunals, we hereby set aside the order passed by the Ld. CIT(A) and held that when application of income is more than receipts of year, excess application of income i.e., expenditure in the hands of the assessee can be carried forward to succeeding Year. Thus the ground no. 9 raised by the assessee is hereby allowed.

14. Regarding ground nos. 10 & 11 namely levy of interest u/s. 234B & 234C and initiation of penalty proceedings which are

consequential in nature and the same does not require any adjudication as the main appeal is allowed in favour of the assessee.

15. In the result, the appeal filed by the Assessee is partly allowed.

Order pronounced in the open court on 23 -06-2023

Sd/-
(T.R. SENTHIL KUMAR)
JUDICIAL MEMBER
Ahmedabad : Dated 23/06/2023

Sd/-
(WASEEM AHMED)
ACCOUNTANT MEMBER

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आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-

1. Assessee
2. Revenue
3. Concerned CIT
4. CIT (A)
5. DR, ITAT, Ahmedabad
6. Guard file.

By order/आदेश से,

उप/सहायक पंजीकार
आयकर अपीलीय अधिकरण,
अहमदाबाद