IN THE INCOME TAX APPELLATE TRIBUNAL
COCHIN BENCH, COCHIN

ITA. No. 96/Coch/2009 & C.O. 18/Coch/09
(in I.T.A.No. 96/Coch/2009)
Assessment Year:2005-06

DY DIRECTOR OF INCOME TAX (EXEMPTION)
RANGE-II, ERNAKULAM

Vs

ADI SANKARA TRUST
SANKARA NAGAR, MATTOOR P O, KALADY
PAN: AABTA 0123D

Appellant Rep by: Shri S C Sonkar, CIT-DR
Respondent Rep by: Shri V Ramachandran, Sr. Counsel for Dr. Anitha Sumanth, Adv

ITA Nos. 259 Coch/2009
Assessment Year:2006-07

V N GANGADHARA PANICKER MEMORIAL CHARITABLE TRUST
RANI BHAVAN, KESTON RAOD, KOWDIAR, THIRUVANANTHAPURAM-03
PAN: AAATV 3928N

Vs

ASSTT DIRECTOR OF INCOME TAX (EXEMPTION)
TRIVANDRUM

Appellant Rep by: Dr. Anitha Sumanth, Adv
Respondent Rep by: Shri S C Sonkar, CIT-DR

N Vijayakumaran, JM and Sanjay Arora, AM

Dated: June 16, 2011

Income Tax - Sections 11, 12A, 32(1) - Whether when assessee, a charitable body, has already claimed deduction for acquisition of capital assets as application of money, the further claim of depreciation on the same assets would amount to double benefits.

Assessee is a charitable trust registered u/s 12A of the Act. In the return of income filed, it claimed depreciation on the assets, the cost of which were already claimed as application of money u/s 11(1). AO disallowed the depreciation claimed u/s 32 stating that the cost of asset/s having been allowed, its WDV was nil, so that there was no amount available on which depreciation could be claimed. The same would even otherwise amount to a double deduction, prohibited by law.

In appeal before ITAT, the assessee contended that the decision in the case of Escorts Ltd. & Othrs was not applicable as was held in the case of CIT vs. Marketing Committee, Pipli, 330 ITR 16 (P&H) and CIT v. Tiny Tots Education Society (2010-TIOL-550-HC-P&H-IT) which provided that there was no double deduction. Further, the law stood amended w.e.f. 1.4.1989 by co-option of clause (d) to s. 11(1) of the Act, so that there was no requirement in law for applying the said income, i.e., as covered by s. 11(1)(d), for claiming exemption in this respect. In view of the decision of the Lissie Medical Institutions, where the amount was voluntarily received with a direction that the same shall form part of the corpus, the assessee would stand to be allowed depreciation on the capital asset/s acquired out of the said funds. However, in case of no specific directions, it would not be though in both the cases, the amount was applied or utilised in the similar manner. A mere direction by the donor would alter the donee's assessable income, even as the same stood utilized by the donor in the same manner, and which was not comprehensible and, in any case, could not be the intent of law. In reply to the query raised by the Bench, that why could not the assessee take a specific direction from the donor(s) where it proposed to acquire capital asset(s) there-from, the assessee contended that it might not be practical always and secondly, the corpus was not for acquiring capital assets alone, and may well be maintained in the form of liquid assets. The two claims were different - the depreciation was a charge against the profits ‘an above-the-line item’ and the acquisition of capital asset(s) was an application of income, determined thus, ‘a below-the-line item’.

Revenue relied on the decision of Lissie Medical Institutions and contended that the assessee could not point out any infirmity in the said order, so that there was no ground or occasion for the Tribunal to review or re-visit the said order.

After hearing both the parties, the ITAT held that,

++ the argument that the allowance of depreciation and deduction qua the application of income (on the assets on which the same is claimed), does not amount to or result in a double deduction is not acceptable. If the capital asset/s is a part of the asset base of the charitable trust, used for its purposes, it only forms a part of the capital structure or the apparatus of the entity, and only on the strength of which the claim qua depreciation is maintainable, i.e., as a charge against profits/income thereof. Could the same expenditure be considered as being toward `income' and, at the same time, an application of it, or, to put it in the same graphical manner, could an expenditure be considered as both above and below the line, and simultaneously at that. The two are mutually exclusive. While an expenditure is necessarily incurred for the purposes of income, i.e., as a part of the income generating process, directly or indirectly, the other is an application of the income so generated, and has nothing to do with either income generation or the maintenance of the capital structure or the income generating apparatus;

++ even where the income arises only out of voluntary contributions, recognising the need to maintain corpus, as in the case of any business activity, the law provides therefor, so that the trust/institution is not required to apply the same to claim its exemption from tax u/ss. 11 & 12. That is, the very fact that the said contribution is toward capital or corpus, is by itself sufficient to accord it exclusion, and is, thus, not liable for, or is free from the requirement of, it's application toward the object/s of the trust. Income of a charitable trust, it may be noted, is not per se exempt from

tax, but only on its application toward its objects. The same, thus, is only in the nature of a deduction, i.e., required to a allowed for computing income subject to tax under the Act, which also finds support from the insertion of s. 11(1)(d). It is, as such, not a question of a mere direction, but of classifying the receipt of the trust into two distinct categories, i.e., `regular' and `toward capital'. The difference, i.e., depreciation being allowable in one case and not in the other, amount as it does to a double deduction, arises out of the very nature of the source of funding. The same rather than being prejudicial to a charitable trust, is beneficial thereto, inasmuch as the law `recognises' capital receipt as the principal source of funding of a charitable trust/institution not engaged in any business, i.e., voluntary contributions, or its need to maintain capital. In any normal case, While a capital asset acquired for and put to use for business purposes would entitle it to a claim for depreciation, i.e., whatever be the source of funding, and whether the same is acquired from `income' or from 'capital', it is only the `income' which is, where otherwise not exempt, liable to tax. Would that in any manner be considered as prejudicial or leading to a dichotomy with reference to the source of funding, as sought to be made out in respect of a charitable trust?

++ the income that is exempt is only that computed applying the normal principles of commercial accounting, i.e., net of expenses, which would thus stand to be deducted, even where the income of the trust is not from business, determined by applying the provisions of Chapter IV-D (refer s. 11 (4A)), and which expenses would include a charge toward depreciation on capital assets deployed or maintained by the trust as well. The differential treatment qua depreciation is only due to the difference in law attending the two scenarios, which rather seeks to bring the same (law) at par with that qua any other entity acquiring and using a capital asset for its purposes. No infirmity, thus, inflicts the tribunal's order qua the differential treatment of the claim for depreciation, i.e., w.r.t. the application or otherwise of the provision of s. 11(1)(d). The assessee's argument or contention for a uniform treatment (qua depreciation) seeks to eliminate the difference that the law itself specifically provides for, i.e., is contrary to the express provisions of law. The user of an asset for the intended purpose/s, a pre-requisite for a claim of depreciation in its respect, is also necessary to validate the claim (in respect of the capital expenditure) qua the application of income, as no charitable purpose would stand to be served where the capital asset acquired thus, and retained, is not used for the objects of the trust;

++ while the claim for depreciation arises following the accrual basis of accounting for determining `income', the cash method is applied for reckoning its application. Accordingly, the two claims amount to a double deduction is purely factual. The assessee/s has not been able to show, any infirmity in the said findings by the tribunal, which is affirmed;

++ without prejudice to the foregoing, both the assessee-trusts are not undertaking any business activity. As such, the claim of depreciation would be, if at all, exigible only with reference to the normative rate(s) of depreciation, i.e., as determined with reference to the useful lives of the relevant asset(s) under its given state of user. In fact, even if business activity was being undertaken, the claim for depreciation u/s. 32(1) would obtain only in respect of business asset(s). The assessee has, however, claimed depreciation in terms of the rate(s) prescribed under the Act and, as such, is not maintainable at the claimed amount/s;

++ no Legislation would have intended a double deduction in respect of the same business outgoing, and it was impossible to conceive otherwise, i.e., unless clearly so expressed. In other words, the intention of non double deduction is the given status, and is to be presumed, unless there is an express provision to the contrary in a particular case, and which was not so in the case(s) before it. The assessee's contention is, thus, not valid. Thus, the findings given in the case of Lissie Medical Institutions are endorsed.

Revenue's appeal allowed

ORDER

Per: Sanjay Arora:

These are a set of two Appeals *qua* two Assessees, arising out of separate Orders by the Commissioner of Income-tax (Appeals)-II & IV, Kochi ('CIT(A)' for short) dated 12.12.2008 and 18.2.2009 respectively. The issues arising in the appeals being common, the same were heard together and are being disposed of vide a common, consolidated order.

The Issue

2. The assessee in both the cases is a Charitable Trust registered u/s. 12A of the Income-tax Act, 1961 ('the Act' hereinafter). In both the cases, it returned Nil income, claiming depreciation at Rs. 96.83 lakhs and Rs. 146.75 lakhs respectively. The corresponding cost (of the capital assets) on which depreciation stood claimed, was, as in the past, claimed as application of income toward its objects at Rs. 372.99 lakhs and Rs. 126.15 lakhs respectively. That is, the cost of the relevant assets stood claimed as an application of income for a preceding and/or the current year. *The issue calling for consideration in the present set of appeals, therefore, is the maintainability in law of the deduction qua depreciation allowance, claimed by the assessee-trust u/s.32(1), in respect of assets, the entire cost of which stands allowed by way of application of income u/s. 11(1) of the Act*. The cost of asset/s having been allowed, its WDV was nil, so that there was no amount available on which depreciation could be claimed in its respect. The same would even otherwise amount to a double deduction, prohibited by law, as explained by the apex court in the case of *Escorts Ltd. & Othrs. vs. Union of India (1993) 199 ITR 43 (SC)*. The Assessing Officer (AO), accordingly, disallowed the depreciation claimed, while allowing the application of income, including *qua* the cost of the capital assets, at the claimed amount. The same stood deleted, or confirmed, in appeal by the ld. CIT(A), finding the decision in the case of *CIT vs. Institute of Banking, 264 ITR 110 (Bom.)*, cited before him, as governing, or not so, as the case may be, the assessee's case before him; distinguishing the said reliance with reference to the decision in the case of *CIT vs. Bhoruka Public Welfare Trust , 241 ITR 513 (Cal)*. Accordingly, both the parties, the assessee and the Revenue, are in appeal in the respective cases, with the assessee filing a cross objection where the Revenue is in appeal.

Arguments

3.1 Before us, the matter was argued at length by the ld. AR; the Tribunal (Cochin Bench) having passed an order taking a view upholding that by the Revenue [*Director of Income-tax (Exemption) vs. Lissie Medical Institutions* , in I.T.A. Nos.

1010/Coch/2008 and CO No. 6/Coch/2009 dated 26.10.2010 / refer PB pgs. 1 to 17] **=** ***(2010-TIOL-644-ITAT-COCHIN)***, relying on the decision in the case of *Escorts Ltd . & Othrs. v. Union of India* (supra). The tribunal had, it was averred, distinguished the several decisions by the higher courts of law cited before it, on two grounds. Firstly, that there has been no consideration of the decision by the apex court in the case of *Escorts Ltd. & Othrs.* (supra), i.e., in rendering the decisions being relied upon, having not been cited before the hon'ble courts, while the same formed the basis of the Revenue's case. Secondly, that the law stands amended w.e.f. 1.4.1989 by co-option of clause (d) to s. 11(1) of the Act, so that there is no requirement in law for applying the said income, i.e., as covered by s. 11(1)(d), for claiming exemption in its respect. As regards the first point of distinction, the decisions in the case *CIT vs. Marketing Committee, Pipli, 330 ITR 16 (P&H) and CIT v. Tiny Tots Education Society , 330 ITR 21 (P&H)* **=** ***(2010-TIOL-550-HC-P&H-IT)*** stand rendered by the hon'ble high court after considering the same, explicitly stating that there is no double deduction, so that the said decision by the apex court is not applicable in the facts and circumstances of the case. With regard to the second difference, the said decisions by the hon'ble P&H high court, being for the assessment years 2005-06 and 2006-07 respectively, are for subsequent years, whereat the amended sec. 11 is in force, so that the said distinction would also not obtain. *How would it matter, he posed, whether the voluntary contribution or donation received by the charitable trust is with or without a direction that the same shall form part of the corpus of the trust, where the same is in fact applied for the acquisition of a capital asset* ? So however, going by the tribunal's view (in the case of *Lissie Medical Institutions* (supra) - refer para 4.6 of the order), while in the case of former (i.e., with such a direction), the assessee would stand to be allowed depreciation on the capital asset/s acquired out of the said funds, it would not in the case of the latter, even as the contribution in both the cases stands applied similarly. In either case, the same having been applied or utilized thus, the non-allowance of depreciation in the latter case would lead to a difference in the income subject to tax to the extent of depreciation disallowed. That is, a mere direction by the donor would alter the donee's assessable income, even as the same stands utilized by the donor in the same manner, and which is not comprehensible and, in any case, could not be the intent of law. The provision of s. 11(1)(d) was necessitated by the omission of the words '*not being contributions made with a specific direction that they shall form part of the corpus of the trust or institution*' in s. 2(24)(iia) by Direct Tax Laws (Amendment) Act, 1987 w.e.f. 1.4.1989, so that the said concept was in force since the insertion of clause (iia) in s. 2(24) by Finance Act, 1972 w.e.f. 1973, which operated to remove from the sweep of `income' voluntary contributions where these formed a part of the corpus of the donee–institution. On a query by the Bench that if it is so, i.e., granting so for the moment, why could not, then, the assessee take pains to secure a specific direction from the donor(s) - which should rather be only a simple matter – and particularly where it proposed to acquire capital asset(s) there-from. It was submitted by him that the same may not always be practical and, secondly, the corpus is not for acquiring capital assets alone, and may well be maintained in the form of liquid assets. It needs to be appreciated, he continued, that the two claims are distinct and separate, even as sought to be explained by the hon'ble P&H high court in the cited cases; while that for depreciation is a charge against the profits – an above-the-line item – the acquisition of capital asset(s) is an application of income, determined thus, a below-the-line item. Provisions, as for tax, dividend, etc., are classically considered as below-the-line items, denoting the application of profits, also called the `Profit and Loss Appropriation Account'.

3.2 The ld. DR, on the other hand, relied on the tribunal's decision in the case of *Lissie Medical Institutions* (supra). The same is an extensive review of the law in the matter, dealing with the issue in all its relevant aspects, including by discussing the various judgments rendered in the matter and cited before it, and which are the same as being now relied upon. The assessee has not been able to point out any infirmity in the said order, so that there is no ground or occasion for the tribunal to review or re-visit its elaborate and well-considered order, which in any case could be challenged before the hon'ble jurisdictional high court.

Findings

4. We have heard the parties, and perused the material on record, including the case law relied upon.

4.1 The tribunal in the case of *Lissie Medical Institutions (supra)* has attempted to provide an answer to the various issues arising for consideration in the matter. We have given our careful consideration to the matter, and find no reason to depart from our earlier view. That being the case, we shall proceed on the basis that the said order by the tribunal (supra) has been read and, further, in the background and the backdrop of the tribunal's findings in that case, taking liberty to freely refer/advert to the same. Further on, we shall, as is incumbent on us, meet the two arguments raised before us by the ld. AR, which constitute the assessee's case before us.

4.2 The first argument is that the allowance of depreciation and deduction *qua* the application of income (on the assets on which the same is claimed), does not amount to or result in a double deduction, so as to be hit by the decision by the apex court in the case of *Escorts Ltd . & Othrs*. (supra). The said issue stands discussed at para 4.5 of the order by the tribunal in the case of *Lissie Medical Institutions* (supra). It, with reference to the decision in the case of *Escorts Ltd*. *& Othrs*. (supra), explained that the import and purport of the two claims, i.e., depreciation on capital asset/s as well as the deduction *qua* the cost of the said capital assets, is the same, and to the same effect, i.e., the write off of the underlying capital expenditure. The distinction sought to be drawn by the ld. AR, is, to our mind, non-existent. If the capital asset/s is a part of the asset base of the charitable trust, used for its purposes, it only forms a part of the capital structure or the apparatus of the entity, and only on the strength of which the claim *qua* depreciation is maintainable, i.e., as a charge against profits/income thereof. Though the same is trite law, reference in this context, for the sake of completeness of the discussion, is drawn to the decisions, *inter alia* , in the case of *CIT v. P.K. Badiani , 76 ITR 369 (Bom.)* **=** ***(2003-TIOL-284-HC-MUM-IT)*** *& CIT v. Society of Sisters of St. Anne, 146 ITR 28 (Kar),* as well as to para 4.4 of the order by the tribunal in the case of *Lissie Medical Institutions* (supra). *How could then, the very same asset(s), forming part of its capital structure, be considered as a application of income* ? The graphical representation of the above and below the line, i.e., speaking in an Accountant's terminology, with reference to which the ld. counsel sought to bring home his case, rather, brings to focus the inconsistency and the fallacy in the argument. Could the same expenditure be considered as being toward `income' and, at the same time, an application of it, or, to put it in the same graphical manner, could an expenditure be considered as both above and below the line, and simultaneously at that. *The two are mutually exclusive, and the argument advanced is internally inconsistent* . While an expenditure is necessarily incurred for the purposes of income, i.e., as a part of the income generating process, directly or indirectly, the other is an application of the income so generated, and has nothing to do with either income generation or the maintenance of the capital structure or the income generating apparatus.

Even where the income arises only out of voluntary contributions, recognising the need to maintain corpus, as in the case of any business activity, the law provides therefor, so that the trust/institution is not required to apply the same to claim its exemption from tax u/ss. 11 & 12. That is, the very fact that the said contribution is toward capital or corpus, is by itself sufficient to accord it exclusion, and is, thus, not liable for, or is free from the requirement of, it's application toward the object/s of the trust. *Income of a charitable trust, it may be noted, is not* per se *exempt from tax, but only on its application toward its objects.* The same, thus, is only in the nature of a deduction, i.e., required to a allowed for computing income subject to tax under the Act, which also finds support from the insertion of s. 11(1)(d). It is, as such, not a question of a mere direction, as the ld. AR would put it, but of classifying the receipt of the trust into two distinct categories, i.e., `regular' and `toward capital'. *How else, one may ask, could the law seek to distinguish the two, except on the basis of the application incidental and subject to which the same stands received* ? Further, if the said distinction is with reference to an earlier date, i.e., prior to 1.4.1989, as sought to be clarified before us, it does not detract from, rather, only reinforces the same; the law becoming more explicit from that date, removing any ambiguity that may have persisted in the matter. Continuing further, the resultant difference, i.e., depreciation being allowable in one case and not in the other, amount as it does to a double deduction, arises out of the very nature of the source of funding, and the difference in the law in relation there-to. The same rather than being prejudicial to a charitable trust, is beneficial thereto, inasmuch as the law `recognises' capital receipt as the principal source of funding of a charitable trust/institution not engaged in any business, i.e., voluntary contributions, or its need to maintain capital. We may only look at the corresponding case of any normal, business enterprise, to clarify this. While a capital asset acquired for and put to use for business purposes would entitle it to a claim for depreciation, i.e., whatever be the source of funding, and whether the same is acquired from `income' or from 'capital', it is only the `income' which is, where otherwise not exempt, liable to tax. *Would that in any manner be considered as prejudicial or leading to a dichotomy with reference to the source of funding, as sought to be made out in respect of a charitable trust* ?

In fact, the Revenue's argument in the case of *Lissie Medical Institutions* (supra), that a claim for depreciation is not allowable also for the reason of it being violative of s. 14A, which though did not find favour with the tribunal (refer para 4.7), was only on this basis: the income of a charitable trust being exempt, the corresponding claim for depreciation is not allowable u/s. 14A. The income that is exempt is only that computed applying the normal principles of commercial accounting, i.e., net of expenses, which would thus stand to be deducted, even where the income of the trust is not from business, determined by applying the provisions of Chapter IV-D (refer s. 11 (4A)), and which expenses would include a charge toward depreciation on capital assets deployed or maintained by the trust as well. Secondly, as noted earlier, the income of the charitable institution is not exempt *per se*, but only on its application.

Coming back to the point in issue, the differential treatment *qua* depreciation is only due to the difference in law attending the two scenarios, which rather seeks to bring the same (law) at par with that *qua* any other entity acquiring and using a capital asset for its purposes. No infirmity, thus, inflicts the tribunal's order *qua* the differential treatment of the claim for depreciation, i.e., w.r.t. the application or otherwise of the provision of s. 11(1)(d) in the facts of a case, and there is nothing incomprehensible about it. Rather, the assessee's argument or contention for a uniform treatment (*qua* depreciation), thereby, seeks to eliminate the difference that the law itself specifically provides for, i.e., is contrary to the express provisions of law. Further, the finding of the two claims as representing a deduction *qua* the same expenditure, which stands extensively discussed at para 4.5 of the tribunal's said order, meeting each of the arguments raised, is essentially a matter of fact. It points out that the user of an asset for the intended purpose/s, a pre-requisite for a claim of depreciation in its respect, is also necessary to validate the claim (in respect of the capital expenditure) *qua* the application of income, as no charitable purpose would stand to be served where the capital asset acquired thus, and retained, is not used for the objects of the trust; concluding as under:-

"4.5.5 *In our view, there is, as such, a clear case of double deduction, and not considering it as so would be a travesty of the concept of income. The proposition for non-double deduction (of the same expenditure), as also explained by the apex court, is basic and fundamental to the Act. It would be akin to taxing the same income twice."*

In other words, a complete congruence of identity and rationale marks or attends the two claims, being only the two facets of a coin. The tribunal further also dwells into what in its view is responsible for the confusion, i.e., the different methods or yardsticks employed for reckoning the two (claims) (refer para 4.5.2 of its order). While the claim for depreciation arises following the accrual basis of accounting for determining `income', the cash method is applied for reckoning its application. Accordingly, whether in the given facts, the two claims amount to a double deduction is purely factual. In a given case, the capital asset may be donated by the assessee-trust to a needy person, say, a mobile ambulance unit to a Government Hospital; the capital asset, not being retained by donor-trust, it would not be entitled to any depreciation thereon, and the only claim that would obtain in the case is toward application of income. We have also found endorsement of the said finding, i.e., apart from the legal aspect explained by the apex court, in the express terms of law, carving out an exception for non obligation toward application of income in the case of corpus donations. The assessee/s has not been able to show, as also contended by the ld. DR, any infirmity in the said findings by the tribunal, which we affirm.

A different finding in the matter by the hon'ble P& H high court, *given the law* qua *double deduction, as pronounced by the apex court in the case of Escorts Ltd. & Othrs. (supra), also discussing the nature of the two claims being made, being again in respect of `depreciation' and the 'capital expenditure on the assets put to scientific research'*, would, most respectfully, not operate to bind this tribunal to arrive at a different finding of fact. We may also add that there is no reference in the cited decisions by the hon'ble court as to the reasons that inform its decision. Further, reference in this context may also be made to the decision in the case of *CIT vs. Thane Electricity Supply Ltd ., 206 ITR 727 (Bom.)*, wherein the hon'ble court has abundantly clarified, on the issue being raised before it, *inter alia* , that the decision by the non-jurisdictional high court, though of persuasive value, is not binding on the tribunal, explaining that the said status could be accorded only to the decision by the apex court under Art. 141 of the constitution of India .

4.3 Further, we observe that in the present case, both the assesses are not engaged in any business activity, so that the depreciation claimed cannot be with reference to s. 32, but only as applicable under general principles. However, that would not detract from or impact the said finding in any manner, as the nature of the depreciation, either way, remains the same; the only difference being in the rate/s of depreciation, even as discussed by the tribunal at para 4.4 of its order in the case of *Lissie Medical Institutions* (supra).

4.4 We next state our reasons as to why the decisions additionally brought to our notice in the present appeals, i.e., in addition to those cited and considered by us in the case of *Lissie Medical Institutions* (supra), which we have gone through, have not been able to persuade us to change our view in the matter.

a). The first decision is in the case of *CIT vs. Rao Bahadur Calavala Cunnan Chetty Charities* , *135 ITR 485 (Mad.)* (PB pgs. 18 to 29). The said decision, as apparent from the questions referred by the tribunal to the hon'ble court, as well as what stands held by it, is the manner in which the accumulation of income u/s. 11(1)(a) of the Act is to be computed. The hon'ble court held that the same has to be arrived in the normal commercial manner, without classifying the income under the various heads thereof set out u/s. 14 of the Act and, further, that income of the two Schools run by the assessee-trust, being exempt u/s. 10(22), would not be subject to aggregation and, thus, is not to be taken into account. The language of s. 11, it was explained, made no reference to the income being computed in accordance with the provisions of the Act, and which, therefore, is to be arrived at on the basis of the normal commercial accounting, keeping in view the purpose for which the conditions of s. 11(1)(a) are imposed. The charitable trust could only apply what was available with it, subject of course to any adjustment in respect of extraneous expenses.

We are unable to see as to how the said decision supports the assessee's case in any manner. Whatever be the position of law at the relevant time, the same can be taken as since settled, and except where the property held under trust is itself a 'business', the income whereof has to be computed under Chapter IV-D, in terms of s. 11 (4A), the same is to be computed following the principles of normal commercial accounting, and which would include a charge toward depreciation as well. In fact, the number of other decisions cited and considered by the hon'ble court, are also to the same effect. The same has no bearing on the issue of double deduction, which only is relevant, and to be seen, for our purposes. *The question, it may be emphasized, is not whether the depreciation is allowable or not? But whether, allowing it, would still entitle a charitable trust to consider the said capital assets, i.e., on which the depreciation stands claimed and allowed, as toward application of income, amount as it would to a total deduction.* Reference to the concluding part (para 4.8 of the order) in the case of *Lissie Medical Institutions* (supra) would be relevant in this regard. We have sought to illustrate by way of an example (refer para 4.2 above) that in a particular case the claim for depreciation may not obtain, i.e., as where the relevant capital asset is not retained and used by the trust for its purposes. However, where it is retained and so used, the next question would be if it is sourced from corpus funds, in which case a claim for depreciation would definitely obtain; the donee-entity being not obliged to apply the same to claim exemption in its respect, being exempt *per se* . Where, however, the same is from regular (as distinct from corpus) funds, the entity is not obliged to maintain the same as a part of its capital structure, so that its utilisation for its purposes – whether by way of capital or revenue expenditure – would merit exemption u/s. 11 to the extent so applied. No tax liability, thus, is attracted *qua* the said income. It is in fact immaterial whether the application is toward revenue or capital expenditure, and the two are equivalent; the only relevant consideration being that the expenditure is toward the objects of the trust. In fact, realistically speaking, a continued user of the asset for the intended purpose/s, i.e., where the capital expenditure results in one, is the underlying presumption essential to satisfy the condition of the application of the income for the stated object(s). That, however, would be the end of the matter, as in the case of revenue expenditure, and no further claim *qua* depreciation would arise. On the other hand, where the charitable institution – at its option – wishes that the said capital asset(s) is reflected in its accounts (capital structure), forming a part thereof, it may well choose to claim depreciation thereon. *The entity has, thus, effectively capitalized the income* . The same would, over time, secure it deduction - by way of depreciation - for the entire capital cost incurred, so that the same is not considered as a part of income and, consequently, not subject to tax to that extent. *How, then, can another claim for application of the said capitalized income, and with reference to the same capital asset(s), arise*? The question, it may be appreciated, and as would be apparent from the foregoing, or the point in issue, is not whether the income is to be determined following the principles of commercial accounting, so that the same would include an allowance toward depreciation on capital assets as well, but whether, given the import and purport of the said deductions, and the claims in their respect, the same amounts to a double deduction in the facts and circumstance of the case. The apex court has in the case of *Escorts Ltd. & Othrs. v. Union of India* (supra) confirmed that the claim for depreciation *qua* a capital expenditure and its claim as such under the provisions of the Act, are *pari materia* , the purpose of the two being the same. In fact, as also explained in the case of *Lissie Medical Institutions* (supra) (refer para 4.5.3 thereof) , while a claim could possibly be made, as indeed was done before the apex court in the said case, that the two claims represent different deductions, under separate sections, serving different objects, so that one would not limit or influence the other; the concept of taxable income being a legal one, which may not correspond to the accounting income, which though stood rejected by it, finding the two deductions as representing the same claim, i.e., the write off of the capital expenditure, and toward the same purpose, no such claim can possibly be raised in the instant case. That is, the two simultaneous claims, and the case supporting them, is on a still weaker footing, with there being a distinct dichotomy between the two – a capital expenditure as being toward income (so that it has to be allowed proportionately over the period of utility of the expenditure), and at the same time – out of it. The `income' to be applied is only one determined following the principles of commercial accounting, i.e., to arrive at what can be said to be available `for application' with it, so that there is no overlap between the two. That the user (of the asset) for the stated purpose is an implicit requirement to satisfy the essential condition for a claim toward the application of income for the stated object, completes the case of a complete identity between the two claims, deduction for which it is being simultaneously sought, even as found in the case of *Escorts Ltd. & Othrs. v. UOI* (supra).

In fact, the cited decision supports the Revenue's case. Firstly, it explains, even as stated by us at para 4.2 above, that determination of income and its application are different concepts, and are not to be mixed up. Further, the application of income, if any, would have to be excluded in arriving at the income which is subject to application in any year. Secondly, it clarifies even as the tribunal does, at para 4.5.3 of its order in the case of *Lissie Medical Institutions* (supra), that the trust can apply only what is available with it, i.e., no more or no less, subject to any extraneous expenditure, i.e., which is not for the purpose of the trust.

b). In the case of *S.Rm. M.Ct.M. Tiruppani Trust vs. CIT (1998) 230 ITR 636 (SC)* (PB pg. 43 – 50), the controversy concerned as to whether the appellant-trust had applied the income in terms of sec.11, so as to be entitled for exemption there-under. It was explained by the apex court that the need for accumulation of income, and its concomitant investment in Government securities, would apply only if the claim for exemption extends beyond 25% of its total income. The assessee had already applied ` 8 lakhs for charitable purposes in India by purchasing a building and utilising it as a hospital. The balance income amounted to Rs. 1.64 lakhs, which constituted less than 25% of its income for the relevant assessment year (A.Y. 1970-71). As such, the same did not require investment in government securities, and the assessee was entitled to exemption of its entire income from tax u/s. 11(1)(a) of the Act. The same, as would be apparent, has no bearing in the facts and circumstances on the issue arising for adjudication in the present case. The next decision cited is an order dismissing a SLP moved by the Revenue in the case of *CIT vs. Bonanza Pvt. Ltd . (in SLP (Civil) No. 21890 of 2010/ PB pg. 57)*. Per the same, leave there-to is declined by the apex court to appeal against a decision by the hon'ble Delhi high court holding of the brokerage payable by the assessee-broker's clients thereto as a debt, taken into account in computing income, which satisfied the condition of ss. 36(1)(vii) and 36(2). We are unable to see as to how the same is relevant for our purpose.

c). The decision in the case of *CIT vs. Manav Mangal Society, 328 ITR 421 (P&H) (PB pg. 58-62),* as a reference to the question of law posed to the hon'ble court would show, is not concerned with the issue before us. The Revenue's case in that case was that the assessee had not applied 25% of the profits as required by s.11 (4A) r/w s. 11(2). We have also gone through the tribunal's findings in the matter, which stand approved by the hon'be court, to find no question or issue of double deduction, or with regard to the simultaneous deduction in respect of depreciation as well as of the capital expenditure on which the same is claimed.

d). The decisions in the case of *Marketing Committee, Pipli* (supra) and *Tiny Tots Educational Society* (supra) (PB pgs. 63 to 71) stand already discussed while considering the assessee's case as made before us with reference there-to (refer para 3.1, 4.2). The decision in the case of *CIT vs. Bhoruka Public Welfare Trust, 157 CTR (Cal.) 40 (PB pg. 72 to 78)*, upholds the assessee's claim on the basis of principles of commercial accounting, even as no business was being carried on by it, and which stood allowed by the hon'ble court with reference to the decision, among others, in the case of *CIT vs. Society of the Sisters of St. Anne , 146 ITR 28 (Kar.)*. The decision in the case of *CIT vs. Munisuvrat Jain (1994), Tax. L.R. 1084 (Bom.) (PB pgs. 79-84)* is also to the same effect. The proposition is not disputed, and nowhere impinges on the issue at large, as sought to be explained vide paras 2, 4.2, as well as the foregoing part (a) of this para (4.4). In addition, both these decisions, i.e., by the hon'ble high courts of Calcutta and Bombay, as also in the case of *Rao Bahadur Calavala Cunnan Chetty Charities* (supra), are for years prior to A.Y. 1989-90, where-from the need for maintenance of corpus by the charitable institutions has since been specifically recognised by law, de-linking it from the requirement of application, only subject to which the income of a charitable trust/institution is liable for exemption.

The cited case law would, thus, be of no assistance to the assessee/s's case.

4.5 Before parting with the order, we may, without prejudice to the foregoing, advert to another aspect of the matter. Even as noted earlier (refer para 4.3 above), both the assessee-trusts are not undertaking any business activity. As such, the claim of depreciation would be, if at all, exigible only with reference to the normative rate(s) of depreciation, i.e., as determined with reference to the useful lives of the relevant asset(s) under its given state of user. In fact, even if business activity was being undertaken, the claim for depreciation u/s. 32(1) would obtain only in respect of business asset(s). The assessee has, however, claimed depreciation in terms of the rate(s) prescribed under the Act and, as such, is not maintainable at the claimed amount/s. One of the assesses, i.e., *Adi Sankara Trust* , has also filed a Cross Objection, though with a marginal delay of four days. The delay has been suitably explained by way of condonation petition, supported by an affidavit dated 22.5.2009, and which is, thus, condoned. The same we find is supportive of the assessee's case; its appeal having been allowed by the first appellate authority. It nevertheless raises a legal contention which we may address. The assessee states that in the case of *Escorts Ltd . & Othrs*. (supra), s. 35(2)(iv) itself contains an embargo for non allowance of deduction u/s. 32(1)(ii), i.e., where the claim for deduction u/s. 35 is being claimed and allowed, so that a double deduction stood excluded by the relevant provisions of the Act itself, while no such prohibition attends the present case. As also explained in the case of *Lissie Medical Institutions* (supra) (refer para 4.2), on a similar argument being advanced, that the said embargo u/s. 35(2)(iv) stood provided for by Finance (No. 2) Act, 1980 w.r.e.f. 1.4.1962. It was the retrospective application thereof; the same being contended to be taking away a vested right; it being trite that no new levy could be imposed retrospectively, that led to a bunch of 33 writ petitions before the apex court, which stood disposed of by it in the case of *Escorts Ltd. & Othrs. v. Union of India* (supra). Per its elaborate decision, the apex court upheld the retrospectivity, as the same did not, in its view, amount to or result in either a new levy or taking away or divestment of any existing right. There is a fundamental, though unwritten, axiom, it stood explained by it, that no Legislation would have intended a double deduction in respect of the same business outgoing, and it was impossible to conceive otherwise, i.e., unless clearly so expressed. In other words, the intention of non double deduction is the given status, and is to be presumed, unless there is an express provision to the contrary in a particular case, and which was not so in the case(s) before it. The retrospective amendment was, therefore, held to be only clarificatory, and valid. The assessee's contention is, thus, not valid. In fact, the ld. CIT(A) has allowed its claim, relying on the decision in the case of *CIT vs. Institute of Banking* (supra), and wherein no claim (of double deduction) was raised and there is no reference to the decision in the case of *Escorts Ltd. & Othrs.* (supra), therein. The ld. first appellate authority has, in fact, therefore, not met the Revenue's case in the said case in any manner.

Conclusion

5. In view of the afore-said findings in the matter, which, in effect, endorse our findings in the case of *Lissie Medical Institutions* (supra), we do not find any merit in the assessee's case and, consequently, uphold that of the Revenue. We decide accordingly.

Result

6. In the result, the Revenue's appeal is allowed, and the appeal as well as the Cross Objection by the Assessee, are dismissed.