IN THE INCOME TAX APPELLATE TRIBUNAL
"A" BENCH : BANGALORE

BEFORE SHRI GEORGE GEORGE K, JUDICIAL MEMBER AND
SHRI B.R BASKARAN, ACCOUNTANT MEMBER

ITA No.1129/Bang/2017
Assessment year : 2011-12

Sri Sathya Sai Central Trust, Brindavan, Kadugodi, Bengaluru-560 067. PAN – AABTS 4384 C	Vs.	The Addl. Director of Income-tax (Exemption), Range 17, Bengaluru.
APPELLANT		RESPONDENT

Assessee by	:	Shri V Chandrashekar, Advocate
Revenue by	:	Shri Sunil Kumar Singh, CIT (DR)

Date of hearing	:	08.12.2021
Date of Pronouncement	:	.12.2021

O R D E R

PER B.R BASKARAN, ACCOUNTANT MEMBER :

The assessee has filed this appeal challenging the order dated 27/2/2017 passed by ld.CIT(A)-14, Large Taxpayers Unit, Bengaluru and it relates to the assessment year 2011-12.

2. The grounds of appeal urged by the assessee give raise to the following issues:-

a) Disallowance of loss on sale of investment (ground No.2-7)
b) Addition of capital gains arising on sale of assets (ground No.8-10)
c) Allowing deduction of 15% on net surplus instead of gross receipt (ground 11)

d) Incorrect determination of unspent accumulated amount (ground No.12 & 13)
e) Not considering depreciation as application of income (ground No.14-15).

3. The assessee is a public charitable trust registered u/s 12A of the Act. The assessee also has got approval u/s 10(23C)(iv) of the Act. The Ld A.R submitted that the assessee filed its return of income for the year under consideration declaring Nil total income after claiming exemption u/s 10(23C)(iv) of the Act. The Assessing Officer completed the assessment by making certain disallowances. We notice that the AO has examined the return of income by considering the provisions of sec.11 as well as sec.10(23C)(vi) of the Act. The appeal filed by the assessee before ld.CIT(A) was partly allowed. Still, aggrieved by this, assessee filed appeal before us.

4. The first issue relates to disallowance of claim of loss of Rs.1,81,13,102/- arising on sale of investments as application of income. During the year under consideration, the assessee has made investment in the month of August 2010 in 9.05% perpetual bond series of Indian Corpus Fund and Prefectural Bond Series of Canara Bank. The assessee sold these bonds in the month of March 2011, which resulted in a loss of Rs.1,81,13,102/-. The assessee claimed a loss as application of income.

4.1 The AO took the view that there is no nexus between the activities of the trust and the loss incurred on sale of bonds. Accordingly, he disallowed this claim of the assessee and added the

above said sum of Rs.1,81,13,102/- to the total income of the assessee.

4.2 The ld.CIT(A) upheld the view taken by the AO. He further held that the assessee is entitled to make investment only in those assets mentioned in sec.11(5) of the Act (hereinafter referred to as "eligible investments"). The list of eligible investments listed out in sec.11(5) included "investment of deposit in public sector company" under clause (vii). The ld.CIT(A) took the view that Canara Bank is not a public company since it is regulated by Banking Regulation Act 1949. Accordingly, the ld.CIT(A) took the view that any deposit made in Canara Bank cannot be considered as an eligible investment u/s 11(5) of the Act. Accordingly, he directed the AO to re-compute the claim of the assessee in r/o sec.11(5) of the Act.

4.3 We heard the parties on this issue and perused the record. We noticed that the investment made in perpetual bond shall constitute "capital asset" in the hands of the assessee. Hence, sale of capital assets would give raise to either capital gains or capital loss. Hence the loss incurred by the assessee would be a "capital loss" in the hands of the assessee. On these reasoning, we are of the view that the tax authorities are justified in holding that the loss cannot be considered as a case of application of income.

4.4 When this view was pointed to the ld.AR, even though he did not accept the same, yet he submitted that the AO may be directed to allow the assessee to claim set off of capital loss in terms of sec. 70 to 72 of the Act. We find merit in the alternative claim mentioned above and the same needs to be examined. Accordingly,

we restore this issue to the file of the AO to examine the above said claim of the assessee.

4.5 We have noticed earlier that the ld.CIT(A) has taken the view that the perpetual bond purchased from Canara Bank cannot be considered as an eligible investment u/s 11(5) of the Act on the reasoning that Canara bank is not a public company. The ld.AR invited our attention to copy of the Banking Companies (Acquisition and Transfer of Undertakings) Act 1970 which is placed from pages 47 to 67 of the Act. The ld.AR invited our attention to sec.11 of the above said Act which reads as under:-

> *"Corresponding new bank deemed to be an Indian company— for the purposes of the Income-tax Act, 1961 (43 of 1961), every corresponding new bank shall be deemed to be an Indian company and a company in the public are substantially interested."*

Inviting our attention to above said sec.11, the ld.AR submitted that the Canara Bank should be considered as a Indian Company and a company in which public are substantially interested for the purpose of Income tax Act. He further submitted that Canara Bank is a public sector bank and hence, the same would fall under the category of public sector company u/s 11(5)(vii) of the Act. Accordingly, he submitted that the ld.CIT(A) was not justified in holding that the investment made in Canara Bank does not satisfy the requirement of sec.11(5) of the Act and further issuing directions to the AO.

4.6 We heard the ld.DR on this issue and perused the record. We notice that the assessee has brought section 11 of the Banking Companies (Acquisition and Undertakings) Act 1970 to the notice of Ld CIT(A), but the Ld CIT(A) has rejected the same by observing that it is a deeming provision and further Canara Bank is regulated under Banking Regulations Act. However, we find merit in the contention of the assessee and hence we are unable to agree with the view expressed by Ld CIT(A). We noticed that sec.11 of the Banking Companies (Acquisition and Undertakings)Act 1970 specifically states that the new banks shall be deemed to be an Indian Company and a company in which public are substantially interested for the purpose of Income-tax Act 1961. Thus a legal fiction has been introduced by the Parliament, as per which, for the purposes of Income tax Act, Canara Bank has to be considered as a public company in which public are substantially interested. In our view, there is no scope for the tax authorities to ignore the provision of sec.11 of Banking Companies (Acquisition and Undertakings) Act 1970 and to take a different view. Accordingly, we set aside the observations made by the ld.CIT(A) on the status of Canara Bank. Accordingly, we hold the perpetual bond purchased from the above said bank would fall under the category of eligible investment u/s 11(5)(vii) of the Act.

4.7 In an earlier paragraph, we have already restored this issue to the file of AO for examining the claim of the assessee.

5. The next issue contested by the assessee relates to addition of capital gains arising on sale of assets received by way of gift. During the year under consideration, the assessee has sold

following fixed assets and the same has resulted in long term capital gain of Rs.5,42,28,370/- and short term capital gains of Rs.65,38,803/-.

Sl.No.	Details of donation	Name of the Donor
1	Mercedes Benz – SLK 350 AP-02-N-0909	Prema Foundation, 15827, River Roads Dr, Houston, TX 77079
2	Toyota Carina AP-02-D-909	Mrs Mahtani Sweeta Vishindas, Hongkong, Passport No.W318851 issued at Hongkong
3	Mercedes Benz AP-02-B-8100	M/s. Granite India Ltd, Bangalore
4	Land at Jamnagar	As per the Probate issued vide petition No.1088 of 1998 issued on 21.05.1999

The AO noticed that these assets have been received by the assessee by way of gifts, i.e., no cost was incurred for acquiring these assets. Accordingly, he took the view that the assessee cannot claim deduction for cost of acquisition, as it has not incurred any expenditure for acquiring these assets. Accordingly, he reworked the capital gain by disallowing the benefit of cost of acquisition and indexed cost of acquisition and accordingly determined short term capital gain and long term capital gain.. The working so made by the AO resulted in additional capital gain of Rs.99,47,827/- and the same was added to the total income of the assessee. The ld.CIT(A) also confirmed the same.

5.1 We heard the parties on this issue and perused the record. At the time of hearing, the Bench asked the ld.AR, on the manner of accounting the assets received by way of gifts in the books of accounts. The ld.AR submitted that the market value of above said assets would have been declared as “income” in its books of accounts in the year in which they were received as gift and the corresponding debit would have been made to the Fixed asset account. As per the submission of Ld A.R, which requires verification at the end of AO, the assessee has offered the value of

assets received by way of gift as its income in the year in which it was received. When the value of assets was offered as income, in our view, the same would constitute cost of acquisition in the hands of the assessee. We noticed that these factual aspects have not been examined by the tax authorities and hence it requires verification. Accordingly, we restore this issue to the file of the AO for examining the above said claim of the assessee. If the AO finds that the assessee has offered the value of assets received by way of gift as its income in the year in which they were received, then we direct the AO to adopt the same value, as cost of acquisition for the respective asset and accordingly work out the capital gains. If it is not found to be so, then the AO may take appropriate decision in accordance with law.

6. The next issue relates to allowing deduction of accumulation of income to the extent of 15% prescribed u/s 11(1)(a)/ under third proviso to10(23)(vi) of the Act on net income, as against the claim of the assessee to allow the same on "gross receipts".

6.1 The AO noticed that the assessee has claimed deduction towards accumulation @ 15% of income to the tune of Rs.18,63,47,469/-. The AO noticed that the assessee has worked out above said accumulation by applying 15% on the amount of "gross receipts". The AO took the view that the word "income" for the purpose of sec.11 & 12 of the Act should be understood in commercial sense. Hence expenses incurred in earning income should be deducted from the gross receipts and accordingly, the net income should be arrived. Accordingly he expressed the view that the accumulation of 15% should be allowed on "net income" and

not on "gross receipts". The AO also gave an example, i.e., in the case of a hospital, the "net income" arrived at, after deducting all expenses relating to doctors fee, staff salaries, cost of medicines etc from the fees collected, should alone be considered for allowing accumulation to the extent of 15%, i.e., the accumulation of 15% cannot be allowed on gross fee receipts. The AO also referred to various case laws to buttress his view. Accordingly, he allowed deduction towards accumulation @ 15% to the extent of Rs.15,28,71,783/-.

6.2 The Ld CIT(A) gave partial relief to the assessee with the following observations:-

> "12.9 I find from the AO's order that he has computed the accumulation at 15% of net surplus i.e., Rs.101,91,45,221. This does not seem to be in order since, going by the logic of AO's arguments and the discussions in the paras supra, the net surplus should result from the consideration charging services of the appellant. In the FY 2010-11, the hospital and medical units constituted such services for which some consideration was charged. As far as the income from donation is concerned, the 15% accumulation is to be calculated on the gross amount as held in the case of CIT vs. Programme for Community Organisation 248 ITR 1(SC). The AO is directed to recomputed accordingly. This ground, therefore, partly succeeds."

6.3 Before us, the Ld A.R placed heavy reliance on the decision rendered by the co-ordinate bench in the case of Jyothy Charitable Trust vs. DCIT (ITA No.662/Bang/2015 dated 14-08-2015) and contended that the deduction for accumulation @ 15% is to be allowed on gross receipts only. On the contrary, the Ld D.R supported the order passed by Ld CIT(A) on this issue.

6.4 We notice that the assessee had also placed reliance on the decision rendered by the co-ordinate bench in the case of Jyothy Charitable Trust (supra) before Ld CIT(A). However, the Ld CIT(A) has distinguished the same according to his understanding. However, we prefer to follow the decision rendered by the co-ordinate bench in the case of Jyothy Charitable Trust (supra), as no contrary decision of any High Court/Supreme Court was cited by the revenue before us. We notice that the co-ordinate bench has followed the decision rendered by the Special bench of Mumbai in the case of Bai Sonabai Hirji Agiary Trust vs. ITO (93 ITD 0070) in order to hold that the accumulation @ 25% (later reduced to 15%) should be allowed on gross income.

6.5 We also examined the Income and Expenditure account of the assessee. The gross receipts declared therein are as under:-

Donations	536,467,252
Government Grant in Aid	48,675
Interest	638,188,687
Income from Properties	66,083,408
Other Income	1,599,784
Income relating to earlier years	(157,384)
Net profit on sale of fixed assets	61,614,803

Above said receipts do not contain any of the receipts relating to hospital or college. Only expenditure relating to maintenance of properties could be related to the income from properties, but the question whether the maintenance of properties can be considered as an expenditure incurred for earning rental income is a debatable one. Accordingly, following the decision rendered by the co-

ordinate bench in the case of Jyothy Charitable Trust (supra), we hold that the accumulation of income @ 15% should be computed on the gross income only. Accordingly, we set aside the order passed by Ld CIT(A) on this issue and direct the AO to allow accumulation on gross income.

7. The next issue relates to incorrect determination of income accumulated /s 11(2)/third proviso to sec.10(23C)(iv) of the Act. The AO's case is stated by him as under:-

> "8.1 In the computation of total income, the assessee has claimed application of accumulated income of earlier years even before claiming set off of current year expenditure/application of income. In view of this while computing the total income of the assessee, the expenditure incurred both on revenue account and capital account pertaining to current financial year will be adjusted against current year income and balance, if any, will be considered for adjustment against earlier years accumulation."

According to AO, the assessee has failed to prove direct nexus between current year's expenditure and the accumulated income. Referring to the provisions of sec. 11(2), the AO also observed that the assessee has to show that the accumulated income was used for the objects for which it was accumulated and till the time it was spent, the accumulated income has been kept in specified modes and forms of investments mentioned in sec.11(5) of the Act. Accordingly, the AO recomputed the amount accumulated u/s 11(2)/third proviso to sec.10(23C)(iv) of the Act. The Ld CIT(A) also confirmed the same.

7.1 We heard the parties on this issue and perused the record. There should not be any dispute that it is the responsibility of the assessee to segregate the sources of expenditure incurred during the year, i.e., to split the expenditure incurred out of current year's income and that incurred out of accumulated income in accordance with the objects for which it was accumulated. Another question that arises and in fact, raised by the AO is to identify the sources of accumulated income with the investments made u/s 11(5)/proviso to sec.10(23C)(iv).

7.2. With regard to the investments, the Ld A.R submitted that so long as the aggregate amount of investments is more than the aggregate amount of income accumulated over the years and remaining un-utilised, the requirements of sec. 11(5) should be deemed to have been complied with, i.e., it is the contention of the Ld A.R that there need not be strict one to one nexus between the money spent for objects for which it was accumulated and the investment. In this regard, he placed reliance on the decision rendered by Cochin bench of Tribunal in the case of Dharmodayam Co. Vs. ITO (2015)(154 ITD 574), where in it was held as under:-

> "13. It is also pertinent to note that the provisions of sec. 11(2)(a) talks about "income", where as the provisions of sec. 11(2)(b) talks about the "money" so accumulated. The "money" available with the assessee may be pertaining to the current year's income or earlier year's income. Further, if the view taken by the tax authorities that the deposit should have been made out of current year's income is accepted as correct for a moment, then the assessee trust shall be forced to foreclose the existing

> deposit and thereafter make a new deposit, thus losing considerable amount towards loss of interest/penalty. The same would be very much technical in nature. Hence, in our considered view, the earmarking of existing bank fixed deposits, which is free from any lien, towards the income accumulated u/s 11(2) of the Act during the year under consideration would be sufficient compliance with the provisions of sec. 11(2)(b) of the Act, since the accumulated income is represented by the corresponding deposit/investment."

We notice that the assessee has cited the decision rendered by the Cochin bench of Tribunal (cited above), before Ld CIT(A). However, the Ld CIT(A) has refused to follow the same by giving some other interpretation. Since the above said decision has been rendered by the co-ordinate bench, we prefer to follow the same.

7.3 In view of the foregoing discussions, we are of the view that this issue requires fresh examination at the end of AO in the light of principles discussed above. Accordingly, we set aside the order passed by Ld CIT(A) on this issue and restore the same to the file of the AO.

8. The last issue relates to the disallowance of depreciation claimed by the assessee. The assessee had claimed depreciation of Rs.14,30,80,730/- as application of income. The AO disallowed the same. The Ld CIT(A) also upheld the disallowance.

8.1 The question as to whether depreciation can be allowed as application of income in respect of assets whose cost has already

been allowed as application has since been answered in favour of the assessee for the periods prior to 1.4.2015 by Hon'ble Supreme Court in the case of CIT vs. Rajasthan & Gujarati Charitable Foundation Poona (2018)(89 taxmann.com 127)(SC). Accordingly, we set aside the order passed by LD CIT(A) on this issue and direct the AO to allow the depreciation claimed by the assessee as application of income.

9. In the result, the appeal filed by the assessee is treated as allowed for statistical purposes.

Order pronounced in the open court on 20th December 2021.

Sd/- Sd/-

(George George K)
Judicial Member

(B.R Baskaran)
Accountant Member

Bangalore,
Dated, 20th December 2021

/ vms /

Copy to:
1. The Applicant
2. The Respondent
3. The CIT
4. The CIT(A)
5. The DR, ITAT, Bangalore.
6. Guard file

By order

Asst. Registrar, ITAT, Bangalore

1. Date of Dictation ……

2. Date on which the typed draft is placed before the dictating Member …….
3. Date on which the approved draft comes to Sr.P.S …….
4. Date on which the fair order is placed before the dictating Member ……..
5. Date on which the fair order comes back to the Sr. P.S. ……..
6. Date of uploading the order on website……..
7. If not uploaded, furnish the reason for doing so ……..
8. Date on which the file goes to the Bench Clerk ……..
9. Date on which order goes for Xerox & endorsement……
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11. The date on which the file goes to the Assistant Registrar for signature on the order …….
12. The date on which the file goes to dispatch section for dispatch of the Tribunal Order …….
13. Date of Despatch of Order. ……..