

आयकर अपीलीय अधिकरण, 'डी' न्यायपीठ, चेन्नई
IN THE INCOME TAX APPELLATE TRIBUNAL
'D' BENCH : CHENNAI

श्री एन.आर.एस. गणेशन, न्यायिक सदस्य एवं
श्री अब्राहम पी. जॉर्ज, लेखा सदस्य के समक्ष।
[BEFORE SHRI N.R.S. GANESAN, JUDICIAL MEMBER AND
SHRI ABRAHAM P. GEORGE, ACCOUNTANT MEMBER]

आयकर अपील सं./I.T.A. No.449/Mds/2013
निर्धारण वर्ष /Assessment year : 2009-2010

Deputy Director of Income Tax
(Exemptions –I)
Aayakar Bhavan Annexure
Building, III floor,
M.G. Road,
Chennai 600 034

Vs. M/s. South Indian Film
Chamber of Commerce,
No.606, Anna Salai,
Chennai 600 006.

(अपीलार्थी/Appellant)

**[PAN AAAAT 2561N]
(प्रत्यर्थी/Respondent)**

अपीलार्थी की ओर से/ Appellant by

: Smt. Sumathi Venkatraman,
JCIT.

प्रत्यर्थी की ओर से /Respondent by

: Shri. Vijayaraghavan, Advocate

सुनवाई की तारीख/Date of Hearing

: 28-03-2017

घोषणा की तारीख /Date of Pronouncement

: 05-04-2017

आदेश / O R D E R

PER ABRAHAM P. GEORGE, ACCOUNTANT MEMBER

In this appeal filed by the Revenue, it is aggrieved that Id. Commissioner of Income Tax (Appeals) allowed the assessee claim for its exemption u/s.11 of the Income Tax Act, 1961 (in short "the Act").

Appeal has been filed with a delay of ten days. Condonation petition has been filed. Delay is condoned and appeal admitted.

2. Facts apropos are that assessee a trust registered u/s.12AA of the Act had filed its return of income for the impugned assessment year declaring income of Rs.12,85,860/-. Assessee had admitted following income in its income and expenditure account.

<i>(a) Subscription received</i>	<i>Rs.8,24,950/-</i>
<i>(b) Entrance fees</i>	<i>Rs. 79,000/-</i>
<i>(c) Title registration fees</i>	<i>Rs. 98,000/-</i>
<i>(d) Chamber Journal subscription</i>	<i>Rs. 95,970/-</i>
<i>(e) Sales</i>	<i>Rs. 1,400/-</i>
<i>(f) Advertisement</i>	<i>Rs. 5,59,000/-</i>
<i>(g) Share income from preview theatre</i>	<i>Rs.17,42,455/-</i>

3. Ld. Assessing Officer was of the opinion that the above receipts were in the nature of income from trade, business, commerce or by providing services in relation to any trade/business/commerce. He required the assessee to explain why it should not be denied exemption claimed by it u/s.11 of the Act. As per Ld. Assessing Officer, assessee was hit by first proviso to Sec.2(15) of the Act. According to him, the object of the assessee was to encourage and develop film industry in Southern States. As per the Ld. Commissioner of Income Tax (Appeals) it was formed to encourage and facilitate film production, distribution, exhibition and activities incidental to film

industry. However, as per the Ld. Assessing Officer, it was registering film titles for a fee and was having its own theatre for preview of movies again on a fee. Further, per Ld. Assessing Officer, assessee could also not claim such income as exempt on the principle of mutuality, since there was no complete identity between contributors and participators. Relying on Circular No.11/2008, dated 19.12.2008, Ld. Assessing Officer came to a conclusion that an industry or trade association could claim benefit of mutuality only where there was no dealings with non members. He denied the claim of exemption u/s.11 of the Act and completed the assessment considering income as per its profit and loss as the total income, after adding back the claim for depreciation.

4. Aggrieved, assessee moved in appeal before Ld. Commissioner of Income Tax (Appeals). Argument of the assessee was that it was a registered society committed for the cause and betterment of the South Indian film industry. Contention of the assessee was that its sole objective was to promote trade and commerce in South Indian film industry. As per assessee it did not itself carry on any trade or commerce. Reliance was placed by the assessee on the judgment of Hon'ble Jurisdictional High Court in the

case of *CIT vs Madras Stock Exchange Ltd. 105 ITR 546* in which case, assessee was also tagged as one of the many respondents.

5. Ld. Commissioner of Income Tax (Appeals) after considering the submissions of the assessee and analyzing the Section 2(15) of the Act as it stood prior to its substitution with effect amendment from 01.04.2009 and after such amendment, held that first proviso was attracted only where an assessee was carrying in activities in the nature of trade, commerce or business rendering any services in relation to trade, commerce or business. As per Ld. Commissioner of Income Tax (Appeals), assessee could not be considered as carrying on any trade, commerce or trade or providing services in relation to a trade, business or commerce. Further, as per Ld. Commissioner of Income Tax (Appeals), there was a huge difference between the words "to promote" and to "carry on". Ld.CIT(A) reached a conclusion that assessee itself was not carrying on any trade, business or commerce or rendering any services in relation to a trade, business or commerce. According to him, assessee's prime objective was to promote trade and commerce. He also relied on the judgment of Hon'ble Apex Court in the case of *CIT vs. Andhra Chamber of Commerce 130 ITR 184* for arriving at a conclusion that predominant object of the assessee was promotion of trade and commerce, which was one general public utility, without any intention

for making profits. According to him, when profit making was not the predominant activity carried on by an assessee it could not be denied exemption u/s.11 of the Act, despite the proviso to sec. 2(15) of the Act. He directed the Id. Assessing Officer to grant the exemption claimed u/s.11 of the Act.

6. Now before us, Id. Departmental Representative strongly assailing the order of the Id. Commissioner of Income Tax (Appeals) submitted that circular No.11/2008, dated 19.12.2008 clearly stated the reasons for substituting Sec. 2(15) of the Act, through Finance Act, 2008. Relying on para 3.1 of the said circular, Id. Departmental Representative submitted that it was for roping in persons like assessee that the amendment was brought in. According to him, Id. Commissioner of Income Tax (Appeals) misunderstood the scope of the amendment and allowed the claim of the assessee.

7. Per contra, Id. Authorised Representative submitted that the scenario after the amendment to Sec. 2(15), through Finance Act, 2008 was considered by the Kolkata Bench of the Tribunal in the case of *Indian Chamber of Commerce vs. ITO (2015) 113 DTR 0153*. According to him, when the main activity was not business, connected incidental or ancillary activities which was only in furtherance of the main object would not amount to business, unless an independent

intention to conduct business could be established. As per Id. Authorised Representative Kolkata Bench had relied on the judgment of Hon'ble Delhi High Court in the case of *Institute of Chartered Accountants of India vs. Director General of Income Tax (Exemptions) 347 ITR 99* while holding that fundamental or dominant function alone was to be considered and not the ancillary objects. Thus according to him, Id. Commissioner of Income Tax (Appeals) was justified in allowing the claim of the assessee u/s. 11 of the Act.

8. We have heard the rival submissions and perused the material on record. Objects of the assessee as it appears in its Memorandum of Association (MOU) read as under:-

3. The objects for which the society is established are

- (a) To encourage and develop the film industry in all its branches in the whole of South India consisting of Tamil Nadu, Andhra Pradesh, Karnakata, Kerala and the Union Territory of Pondicherry and as far as possible to work in conjunction with other similar Associations.*
- (b) To watch, protect and extend the rights and privileges of its members and of film trade in general.*
- (c) To encourage and facilitate film production, distribution and exhibition, and also other incidental and allied activites directly connected with the film industry.*
- (d) To act as a clearing house for information on all matters pertaining to the production, distribution and exhibition of films.*
- (e) To advise on matters pertaining to the film industry and to extend to its members support in the exercise of their legitimate rights;*
- (f) To investigate problems peculiar to the film industry with a view to develop the industry;*
- (g) To conduct an organ for the spread of knowledge regarding the film*

regarding

(h) To educate, the public, in the utility of the film industry from a social, industrial and educational point of view.

(hh) To organise regional national or international festivals of films for the information and benefit of members and/or the cine-going public.

(i) To maintain, a library for the benefit of the members

(j) To establish institutions for, the development of film techniques and to institute awards or other forms of recognition. Which are considered by the society to be to the development of film techniques.

(k) To act, if required, To act, if required, as an advisory body to Government Departments concerned with the use and control of films.

(l) To conciliate, mediate and arbitrate in all disputes that may be submitted for Settlement by the members;

(m) To promote the film business interests.

(n) To study business prospects, fluctuations, dangers and opportunities and, to lay before the Legislature the views of the Society on matters affecting the film trade

(o) To obtain and furnish statistics regarding the various phases of the film industry and trade;

(p) To obtain by combination advantages which could not be obtained individual enterprise;

(q) To afford to its members amenities of a Social Club:

(r) To affiliate the Society to any other all-India Association or body, representing the production, distribution and exhibition sectors of the film industry and having objects wholly similar to those of the Society.

(rr) To grant, in its discretion, affiliation to or permit amalgamation with, it to any Registered Association or organisation which exclusively pertains to the film industry and has objects similar to those of the Society .

(s) Generally to purchase, take on lease or in exchange, hire, or otherwise acquire any immovable or movable property and any rights or privileges which the Society may think necessary . or convenient for any of the purposes for which .it is established;

(ss) .. To sell or otherwise dispose of movable- properties of the Society or the interests thereof;

(sss) To sell, assign. Mortgage, lease, hire or otherwise dispose of immovable properties of the Society or the interests thereof, for the purpose of acquiring or creating another immovable property or properties for the benefit of its members and, pending the acquisition .or creation Of such immovable. properties, to keep the sale proceeds of the immovable properties in any nationalised bank. or any of its. subsidiaries

A reading of the above objects clearly indicate that assessee was not formed with an intention to do any business or trade directly. The purpose for which assessee's society was formed was to encourage film industry production in South India. When viewed from this angle, the type of income listed by us at para 2 were in direct furtherance of its objects and were not arising from independent activities in the nature of trade, business or commerce. Even if we consider these receipts to be from rendering of service in relation to trade or commerce still such rendering of service was not an independent activity. Kolkata Bench of the Tribunal in the case of *Indian Chamber of Commerce (supra)* had after considering the restrictive proviso introduced into Sec. 2(15) of the Act through Finance Act, 2008 with effect from first April, 2009, digested various case laws in relation to definition of 'charitable purpose' and held as under at paragraphs 36 to 38 of its order.

'36. From facts in entirety, now the question arises is whether principle of consistency will apply or not ? From asst. yrs. 1985-86 to 2007-08 exemption under s. 11 of

the Act was allowed. Now, having extensively with the newly amended s. 2(15) of the Act and its absolute inapplicability to the case of assessee supported by various judicial decisions, we will discuss this issue. We find that CIT(A) without appreciating that the basis principle underlying the definition of "charitable purpose" remained unaltered, and on amendment in the s. 2(15) of the Act w.e.f. 1st April, 2009, whereby the restrictive first proviso was inserted therein, lower authorities held that the same substantially changed the position of law and thus the principle of consistency did not apply. But, we are of the view that a detailed reading of the various judicial decisions through the years, interpreting the definition of "charitable purpose" as laid out in s. 2(15) of the Act and also the definition of "business" in relation to the said section amply reveals that the theory of dominant purpose has always, all through the years, been upheld to be the determining factor laying down whether the institution is charitable in nature or not. Where the main object of the institution was "charitable" in nature, then the activities carried out towards the achievement of the said, being incidental or ancillary to the main object, even if resulting in profit and even if carried out with non-members, were all held to be "charitable" in nature. Hon'ble apex Court in the earliest case of Andhra Chamber of Commerce (supra) had clearly laid out the principle that if the primary purpose of an institution was advancement of objects of general public utility, it would remain charitable even if an incidental or ancillary activity or purpose, for achieving the main purpose, was profitable in nature. It was laid out by the Court that,

"That if the primary purpose be advancement of objects of general public utility, it would remain charitable even if an incidental entry into the political domain for achieving that purpose, e.g. promotion of or opposition to legislation concerning that purpose, was contemplated."

It was only for the purpose of securing its primary aims that it was mentioned in the Memorandum of Association that the chamber might take steps to urge or oppose legislative or other measures affecting trade, commerce or manufactures. Such an object ought to be regarded as purely ancillary or subsidiary and not the primary object. In connection to the above case it is laid out the said case dealt with the assessment of the assessee in the asst. yrs. 1948-49

wherein relevant to the said asst. yrs. 1948-49 to 1952-53, by the last para of sub-s. (3) of the IT Act, 1922, "charitable purposes" was defined as :

"... .. In this sub-section 'charitable purpose' includes relief of the poor, education, medical relief and the advancement of any other object of general public utility, but nothing contained in cl. (i) or cl. (ii) shall operate to exempt from the provisions of this Act part of the income from property held under a trust or other legal obligation for private religious purposes which does not enure for the benefit of the public."

The adding of the words "not involving the carrying on of any activity for profit" was introduced by the IT Act, 1961. Hon'ble apex Court in the earliest decision in the case of Surat Art Silk Cloth Manufacturers Association (supra) held the theory of dominant or primary object of the trust to be the determining factor so as to take the carrying on of the business activity merely ancillary or incidental to the main object. It was held as follows :

"(i) That the dominant or primary purpose of the assessee was to promote commerce and trade in art silk yarn, raw silk, cotton yarn, art silk cloth, silk cloth and cotton cloth as set out in cl. (a) and the objects specified in cls. (b) to (e) were merely powers incidental to the carrying out of that dominant and primary purpose;

(ii) That the dominant or primary purpose of the promotion of commerce and trade in art silk, etc., was an object of public utility not involving the carrying on of any activity for profit within the meaning of s. 2(15) and that the assessee was entitled to exemption under s. 11(1)(a)."

Again, the Hon'ble apex Court in the case of Federation of Indian Chambers of Commerce & Industry (supra) held that:

"The dominant object with which the Federation was constituted being a charitable purpose viz. promotion, protection and development of trade, commerce and industry, there being no motive to earn profits, the respondent was not engaged in any activity in the nature of business or trade, and, if any income arose from such activity, it

was only incidental or ancillary to the dominant object for the welfare and common good of the country's trade, commerce and industry, and its income was, therefore, exempt from tax under s. 11 of the IT Act, 1961."

Again, reiterating the dominant purpose theory, the Hon'ble Supreme Court in the case of Sai Publication Fund (supra) laid out as follows :

"... If the main activity is not business, then any transaction incidental or ancillary would not normally amount to 'business' unless an independent intention to carry on 'business' in the incidental or ancillary activity is established. In such cases, the onus of proof of an independent intention to carry on 'business' : connected with or incidental or ancillary sales will rest on the Department.

Thus, if the main activity of a person is not trade, commerce etc., ordinarily incidental or ancillary activity may not come within the meaning of 'business'."

In the recent decision which deals specifically with the newly amended s. 2(15) of the Act, in the case of ICAI & Anr. vs. Director General of IT (Exemptions) (2011) 245 CTR (Del) 541 : (2011) 64 DTR (Del) 226 : (2012) 347 ITR 99 (Del), laying down the very same principle it was again laid :

"that the fundamental or dominant function of the Institute was to exercise overall control and regulate the activities of the members/enrolled chartered accountants. A very narrow view had been taken that the Institute was holding coaching classes and that this amounted to business."

Again, Hon'ble Bombay High Court in the Writ Petition of Baun Foundation Trust (Writ Petn. No. 1206 of 2010 in the High Court of judicature at Bombay, 27th March 2012) [reported as Baun Foundation Trust vs. Chief CIT (2012) 251 CTR (Bom) 237: (2012) 73 DTR (Bom) 45— Ed.], it was held that

"4... It is a well-settled position in law that the dominant nature of the purpose for which the

trust exists has to be considered. The Chief CIT has not doubted the genuineness of the trust or the fact that it is conducting a hospital."

Thus from all the above it is seen that though the definition of "charitable" purpose under s. 2(15) has undergone changes, the principle underlying the same has remained the same. In context of the above, with regard to the "principle of consistency" it would be of relevance here to quote the decision of the apex Court in the case of Radhasoami Satsang vs. CIT (1991) 100 CTR (SC) 267: (1992) 193 ITR 321 (SC), wherein it was held that:

"... (ii) That, in the absence of any material change justifying the Department to take a different view from that taken in earlier proceedings, the question of the exemption of the assessee appellant should not have been reopened.

Strictly speaking, res judicata does not apply to IT proceedings. Though, each assessment year being a unit, what was decided in one year might not apply in the following year; where a fundamental aspect permeating through the different assessment years has been found as a fact one way or the other and parties have allowed that position to be sustained by not challenging the order, it would not be at all appropriate to allow the position to be changed in a subsequent year."

37. Now coming to application of s. 28(iii) of the Act, we find that s. 28(iii) of the Act provides that the income derived by a trade, professional or similar association from specific services performed for its members will be brought to charge under the head "profits and gains of business or profession". The underlying idea behind s. 28(iii) is that there must be a business from which income is derived and that in the course of such business specific services must be rendered for its members. The concept behind s. 28(iii) is to cut at the mutuality principle being relied on in support of a claim for exemption, when the assessee was actually deriving income or making profits as a result of rendering specific services for its members in a commercial way. The reason for the introduction of s. 28(iii) of Act, to ignore the principle of mutuality and reach the surplus arising to the mutual association and this is clear from the fact that these provisions are confirmed to services performed by the association "for its

members". Such income would either be charged as business income or under the residual head, depending upon the question whether the activities of the association with the non-members amount to a business or otherwise. Sec. 28(iii) constitutes certain income of the association to be business income without affecting the scope of the exemption under s. 11. Sec. 2(15) which incorporates the definition of "charitable purposes" simply shows that several mutual associations may also fall within the definition. The receipts derived by a chamber of commerce and industry for performing specific services to its members, though treated as business income under s. 28(iii) would still be entitled to the exemption under s. 11 r/w s. 2(15) of the Act, provided there is no profit motive. Thus, assessee being a charitable Institution carrying on the object of promotion and development of trade and commerce and which is not involved in the carrying on of any activity in the nature of "business", the said s. 28(iii) of the Act does not apply.

38. In view of the above discussion, we are of the considered view that in the given facts and detailed reading of the various judicial decisions through the years, interpreting the definition of "charitable purpose" as laid out in s. 2(15) of the Act and also the definition of "business" in relation to the said section amply reveals that the theory of dominant purpose has always, all through the years, been upheld to be the determining factor laying down whether the institution is charitable in nature or not. Where the main object of the institution was "charitable" in nature, then the activities carried out towards the achievement of the said, being incidental or ancillary to the main object, even if resulting in profit and even if carried out with non-members, were all held to be "charitable" in nature. Hon'ble apex Court in the earliest case of Andhra Chamber of Commerce (supra) had clearly laid out the principle that if the primary purpose of an institution was advancement of objects of general public utility, it would remain charitable even if an incidental or ancillary activity or purpose, for achieving the main purpose, was profitable in nature. In our view the basic principle underlying the definition of "charitable purpose" remained unaltered even on amendment in the s. 2(15) of the Act, w.e.f. 1st April, 2009, though the restrictive first proviso was inserted therein. Accordingly, in the given facts of the case as discussed above in detail, the assessee association's primary purpose was advancement

of objects of general public utility and it would remain charitable even if an incidental or ancillary activity or purpose, for achieving the main purpose was profitable in nature. Hence, assessee is not hit by newly inserted proviso to s. 2(15) of the Act. This issue of assessee's appeal is allowed".

9. Now coming to circular no.11/2008 (supra) on which reliance was placed by the Id. Departmental Representative what is stated at para 3.1 of the said circular is reproduced hereunder:-

'3.1. There are industry and trade associations who claim exemption from tax u/s 11 on the ground that their objects are for charitable purpose as these are covered under 'any other object of general public utility'. Under the principle of mutuality, if trading takes place between persons who are associated together and contribute to a common fund for the financing of some venture or object and in this respect have no dealings or relations with any outside body, then any surplus returned to the persons forming such association is not chargeable to tax. In such cases, there must be complete identity between the contributors and the participants.

Therefore, where industry or trade associations claim both to be charitable institutions as well as mutual organizations and their activities are restricted to contributions from and participation of only their members, these would not fall under the purview of the proviso to section 2(15) owing to the principle of mutuality. However, if such organizations have dealings with non-members, their claim to be charitable organizations would now be governed by the additional conditions stipulated in the proviso to section 2 (15)".

No doubt assessee for its receipts from non members could not claim benefit of mutuality. However, receipts from non members on account of its activities, as per the assessee, was less than Rs.10,00,000/-. Even if we consider the claim of mutuality as not as applicable for its

dealing with non members, still gross receipts therefrom was less than Rs.10,00,000/- and thus assessee was saved by second proviso to Sec.2(15) of the Act. For the above reasons, we are of the opinion that Id. Commissioner of Income Tax (Appeals) was justified in granting the deduction claimed by the assessee u/s.11 of the Act. We do not find any reason to interfere with the order of the Id. Commissioner of Income Tax (Appeals).

10. In the result, appeal of the Revenue stands dismissed.

Order pronounced on Wednesday, the 5th day of April, 2017, at Chennai.

Sd/-

(एन.आर.एस. गणेशन))

(N.R.S. GANESAN)

न्यायिक सदस्य/JUDICIAL MEMBER

चेन्नई/Chennai

दिनांक/Dated: 5th April, 2017

KV

Sd/-

(अब्राहम पी. जॉर्ज)

(ABRAHAM P. GEORGE)

लेखा सदस्य/ACCOUNTANT MEMBER

आदेश की प्रतिलिपि अग्रेषित/Copy to:

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|--------------------------|------------------------------|-------------------------|
| 1. अपीलार्थी/Appellant | 3. आयकर आयुक्त (अपील)/CIT(A) | 5. विभागीय प्रतिनिधि/DR |
| 2. प्रत्यर्थी/Respondent | 4. आयकर आयुक्त/CIT | 6. गार्ड फाईल/GF |