

**IN THE INCOME TAX APPELLATE TRIBUNAL,
MUMBAI BENCH "F", MUMBAI**

**BEFORE D.T. GARASIA, JUDICIAL MEMBER AND
SHRI SHAMIM YAHYA, ACCOUNTANT MEMBER**

**ITA No.2266/M/2015
Assessment Year: 2010-11**

M/s. Builders Association of India, 7 th Floor, Commerce Centre, Tardeo Road, Mumbai – 400 034 PAN: AAATB0212F	Vs.	Income Tax Officer (Exemptions) – I(1), Piramal Chambers, Lalbaug, Parel, Mumbai - 400012
(Appellant)		(Respondent)

**ITA No.4694/M/2015
Assessment Year: 2011-12**

Income Tax Officer (Exemptions) – I(1), Room No.508, 5 th Floor, Piramal Chambers, Lalbaug, Mumbai - 400012	Vs.	M/s. Builders Association of India, 7 th Floor, Commerce Centre, Tardeo Road, Mumbai – 400 034 PAN: AAATB0212F
(Appellant)		(Respondent)

Present for:

Assessee by : Shri Vipul Joshi, A.R.
Revenue by : Ms. Pooja Swaroop, D.R.

Date of Hearing : 18.05.2017
Date of Pronouncement : 10.08.2017

ORDER

Per D.T. GARASIA, Judicial Member:

The above titled appeals one by the assessee and the other by the Revenue have been preferred against the order dated 05.02.2015 and 31.01.2014 of the Commissioner of Income Tax (Appeals) [hereinafter referred to as the CIT(A)] relevant to assessment years 2010-11 & 2011-12 respectively. Since the facts and issues involved in both the appeals are identical in nature, the same are taken together for disposal by this common order.

2. The assessee's main ground of appeal is in relation to denial of exemption under section 11 of the Act.

Brief facts of the case are that the assessee has filed its return of income at Nil for assessment year 2010-11 in the status of charitable trust. However, the Assessing Officer (hereinafter referred to as the AO) had completed the assessment at total income of Rs.1,11,18,546/- vide order dated 11.3.2013 under section 143(3)(ii) of the I.T. Act, 1961. The assessee was registered under section 12A of the I.T. Act, 1961 vide Registration No.25048 dated 24.04.1989. However, it was withdrawn by DIT (E), Mumbai vide his order dated 08.12.2011. Subsequently, the said order was set aside by the ITAT in ITA No.550/Mum/2012 and appeal was allowed against the said cancellation order. The AO while completing the assessment for A.Y. 2010-11 denied the exemption claimed by the assessee under section 11 of the I.T. Act and completed the assessment by holding that the assessee is not engaged in charitable activities in reference to proviso to section 2(15) of the I.T. Act, 1961.

3. Matter carried to the Ld. CIT(A) and the Ld. CIT(A) has dismissed the appeal of the assessee.

4. Before us, the Ld. A.R., at the outset, has submitted that the issue in controversy is already decided by the Tribunal in favour of the assessee in the own case of the assessee in ITA No.550/M/2012 for A.Y. 2009-10, hence, this appeal may be allowed.

5. The Ld. D.R. has relied upon the orders of the Revenue Authorities.

6. We have heard the rival contentions and have also gone through the order submitted by the Ld. A.R. We find that the Tribunal, in the own case of the assessee in ITA No.550/M/2012 for A.Y. 2009-10, has held as under:

"8. The effect of proviso to [section 2\(15\)](#) inserted w.e.f. 01.04.2009 has been subject matter of judicial scrutiny by various Tribunals. The Hon'ble Delhi High Court in the case of Institute of Chartered Accountants of India Vs. DGIT (E) reported in (2011) 245 CTR (Del) 541 has discussed and analyzed the effect of proviso to [section 2\(15\)](#) in great detail, wherein it was held and observed as under:-

"2. As the first proviso was introduced with effect from 1st April, 2009, the scope and ambit of the said proviso to [section 2\(15\)](#) of the Act has to be examined and considered. Earlier orders under [section 10\(23C\)\(iv\)](#) are not relevant and are inconsequential, as they have not examined the scope and ambit of the first proviso. The proviso applies only if an institution is engaged in advancement of any other object of general public utility and postulates that such an institute is not "charitable" if it is involved in carrying on any activity in the nature of trade, commerce or business or any activity of rendering any service in relation to any trade, commerce or business. The second part, "any activity of rendering any service in relation to any trade, commerce or business" obviously intends to expand the scope of the proviso to include services, which are rendered in relation to any trade, commerce or business. The proviso further stipulates that the activity must be for a cess or fee or any other consideration. The last part states that the proviso will apply even if the cess or fee or any other consideration is applied for a charitable activity/purpose. The proviso has to be given full effect to. Thus, even if cess, fee or consideration is used or utilized for charitable purposes the proviso and the bar will apply. An institution not be regarded as established for charitable purpose/activity under the last limb, if cess, fee or consideration is received for carrying on any activity in nature of trade, commerce or business or for any activity of rendering of any service in relation to any trade, commerce or business, even if the consideration or the money received is used in furtherance of the charitable purposes/activities. In view of the first proviso, the decisions that the application of money/profit is relevant for determining whether or not a person is carrying on' charitable activity, are no longer relevant and apposite. Even if the profits earned are used for charitable purposes, but fee, cess or consideration is charged by a person for carrying on any activity in the nature of trade, commerce or business or any activity of rendering of any service in addition to any trade, commerce or business, it would be covered under the proviso and the bar/prohibition will apply.

14. The most material and relevant words in the proviso are 'trade, business or commerce ". The activities which are undertaken by the an activity of rendering any service in relation to any trade, commerce or business. "

Thereafter the Hon'ble High Court referred and analyzed the meaning of trade, business, commerce which have been elaborated by the Constitutional Bench of Hon'ble Supreme Court in the case of Addl. [CIT vs. Surat Art and Silk Manufacturers Association](#) 121 ITR 1, and other Supreme Court decisions; Sole Trustee Loka Shikshan Trust 101. ITR 234, [State of Punjab vs. Bajaj Electrical Ltd.](#) (1968) 2 see 536, [Khodey Distillery Ltd. vs.](#)

State of Kerala (1975) 1 see 574 and CST vs. Sai Publication Fund (2002) 4 see 57 and also referred to various other dictionary meaning and commentary and held that:

"18. The word "business" is the broadest term and it encompasses trade, commerce and other activities. Sec. 2(13) of the [IT Act](#) defines the term 'business' as under

"2 Definition-

"(13) 'business' includes any trade, commerce or manufacture or any adventure or concern in the nature of trade, commerce or manufacture. "

19. The word "business" is a word of large and indefinite import. Sec. 2(13) defines business to include any trade, commerce or manufacture or any adventure or concern in the nature of trade commerce or manufacture. The intention of the legislature is to make the definition extensive as the term "inclusive" has been used. The legislature has deliberately departed from giving a definite import to the term "business" but made reference to several other general terms like 'trade'. "commerce". "manufacture" and "adventure or concern in the nature of trade, commerce and manufacture. "

29. It may be, however, pointed out that the term "profit motive" is not only the sole or relevant consideration that has to be kept in mind. It is one of the aspects. Normally intention to earn profit is required. Emphasis, however, it does appear, has shifted and the concept and principle of "economic activity" has gained acceptability. The definition of the term "business" may also vary when we are examining taxability under Sales-tax, Excise Duty, Value Added Tax, etc. because these are not taxes on income but the taxable event occurs because of the "economic activity" involved. Even if a person/an organization is carrying on trading on the principle of "no loss no profit", it may be liable to pay taxes or comply with the statute when the charge and incidence of tax, is on the economic activity". This concept is today well recognized in European Union and England [see *Riverside Housing Association Ltd. vs. Revenue Customs Commr.* (2006) EWHC 2383 (Ch) and the case law cited therein). It may also be appropriate here to refer the decision of the House of Lords in *town Investments Ltd. & Ors. Vs. Department of the Environment* (1977) 1 All ER 813. In this case, a Government Department was claiming benefit under a legislation that protected "business tenancies" from increase in rent. The term 'business' in the said case by a majority decision was held to include anything which is an occupation, as distinguished from pleasure-anything which is an occupation or a duty which requires attention is business. It was also observed that business conveys in ordinary meaning the notion of a distinct enterprise (not necessarily for profit) having its distinct object, distinct management and distinct assets and liabilities.

[Section 2\(15\)](#) defines the term 'charitable purpose ', Therefore, while construing the term 'business' for the said section, the object and purpose of the section has to be kept in mind. We do not think that a very broad and extended definition of the term 'business' is intended for the purpose of interpreting and applying the first proviso to [section 2\(15\)](#) of the Act to include any transaction for a fee or money. An activity would be considered "business" if it is undertaken with a profit motive, but in some cases this may not be determinative. Normally the profit motive test should be satisfied but in a given case activity may be regarded as business even when profit motive cannot be established/proved. In such cases, there should be evidence and material to show that the activity has continued on sound and recognized business principles, and pursued with reasonable continuity. There should be facts and other circumstances which justify and show that the activity undertaken is in fact in the nature of business. The test as prescribe in Raipur Mfrs. Co. 's case (supra) and Sai Publications Fund's case (supra) can be applied. The six indicia stipulated in Lord Fish; Each case, therefore, has to be examined on its own facts.

If the principle and ratio laid down by the Hon'ble High Court is applied in the instant case, it would be seen that none of its receipts can be said to be arising or accruing from the activities which can be said to be for the purpose of business or in the nature of trade or commerce. Here in this case all the activities are carried out in accordance with the objects and none of its activities have been found to be non genuine. The assessee's explanation before the DIT regarding nature of receipts clearly shows that they have been received from the members while pursuing objects of the society, specifically mentioned in the "objects" for which it was granted registration u/s 12A.

9. Otherwise also, if any transaction of the trust which are incidental or ancillary towards fulfillment of the objects of other general public utility, will not normally amount to business trade or commerce, unless there is some intention to carry out business, trade or commerce on a permanent basis or for a reasonable continuity. The LD. DIT has not brought any evidence or material on record to show that the assessee was carrying out the activities on business or commercial principle or outside its objects. Thus on the facts of the present case it cannot be held that assessee's case is hit by proviso to [section 2\(15\)](#) or the registration granted earlier can be canceled within the ambit of [section 12AA\(3\)](#). In view of our aforesaid findings, we are not adjudicating the alternative plea raised by the assessee. Thus, the appeal of the assessee is allowed."

7. In view of the above, we find that the assessee's appeal is for A.Y. 2010-11 but the assessee was granted the registration in A.Y. 2009-10 itself by the Tribunal. Therefore, assessee's appeal is allowed. In A.Y. 2011-12, the Ld.

CIT(A) has followed the order of 2009-10. Therefore, Revenue's appeal is dismissed.

8. In the result, appeal of the assessee is allowed and the appeal of the Revenue is dismissed.

Order pronounced in the open court on 10.08.2017.

Sd/-
(Shamim Yahya)
ACCOUNTANT MEMBER

Sd/-
(D.T. Garasia)
JUDICIAL MEMBER

Mumbai, Dated: 10.08.2017.

* Kishore, Sr. P.S.

Copy to: The Appellant
The Respondent
The CIT, Concerned, Mumbai
The CIT (A) Concerned, Mumbai
The DR Concerned Bench

//True Copy//

By Order

Dy/Asstt. Registrar, ITAT, Mumbai.