

IN THE INCOME TAX APPELLATE TRIBUNAL  
MUMBAI BENCH "C", MUMBAI

Before Shri Mahavir Singh (JUDICIAL MEMBER)

AND

Shri G Manjunatha (ACCOUNTANT MEMBER)

I.T.A No.1039 & 1040/Mum/2016  
(Assessment years: 2010-11 & 2011-12)

&

ITA No.510/Mum/2017  
(Assessment year : 2009-10)

The Pransukhlal Mafatlal Hindu Swimming Bath & Boat Club Trust, Netaji Subhash Road, Chowpatty, Mumbai-7 PAN : AAATT9571H	vs	ITO (Eemp.).II(1), Mumbai
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Appellant by	Shri Percy Pardiwala / Nishant Thakkar / Ms. Jasmin Amalsadvala
Revenue by	Shri Rajat Mittal

Date of hearing	12-03-2018
Date of pronouncement	21-03-2018

**ORDER**

Per G Manjunatha, AM :

These three appeals filed by the assessee are directed against separate, but identical orders of the CIT(A)-1, Mumbai dated 17-12-2015 and 02-11-2016. Since facts are identical and issues are common, these appeals were heard together and are disposed of by this common order, for the sake of convenience.

2. The assessee has raised more or less common grounds of appeal for all the three years. For the sake of brevity and convenience, grounds

of appeal raised for AY 2010-11 in ITA No.1039/Mum/2016 are extracted below:-

- “1. The learned CIT(A) erred in law and on facts by confirming the order of the assessing officer denying exemption u/s 11 of the Act.
2. The learned CIT(A) erred in law and on facts dismissing the contention of the appellant that, as per CBDT circular 1 1/.2008 proviso to S.2(15) is not applicable to them, as they are charitable as well and held to be a mutual concern by the assessing officer.
3. The learned CIT(A) erred in law and on facts by confirming that allowing the guests accompanied by members was an activity in the nature of trade, commerce or business and the fees received from guests amounting to Rs.35, 57,9607- was in the nature of business income, ignoring the facts that this activity is in furtherance to the objects of the trust and without any profit motive or even otherwise covered by principle of mutuality..
4. The learned CIT(A) erred in law and on facts by confirming that learn to swim camps conducted by the appellant was an activity in the nature of trade, commerce or business and the fees received from learn to swim amounting to Rs.5,10,136/- was in the nature of business income. , ignoring the facts that this activity is in furtherance to the objects of the trust and without any profit motive.
5. Without prejudice to above grounds of appeal, the learned CIT(A) erred in law and on facts in not allowing deduction for the entire expenses incurred by your appellant resulting in over assessment as the net surplus for the year is only Rs.17,16,877/-whereas the assessed income is Rs.1, 25,71, 700/-, ignoring that if he does not consider the appellant as a mutual concern then the computation of income ought to be made allowing the entire expenses against the income.”

3. The brief facts of the case are that the assessee is a public charitable trust registered under Bombay Public Trust Act, 1950 in the year 1953 and also registered u/s 12A of the Income-tax Act, 1961. The main object of the assessee trust is promotion of swimming and other allied sports on a no profit basis. The assessee has filed its return of income for the assessment year 2010-11 on 28-09-2010 declaring total income at Nil. The case has been selected for scrutiny and notices u/s 143(2) and 142(1) of the Act were issued. In response to notices, the

authorized representative of the assessee appeared from time to time and furnished the details, as called for. During the course of assessment proceedings, AO observed that on verification of income and expenditure account for the year 2010-11, it was seen that the assessee had earned income by way of guest fee of Rs.28,11,345 and learn to swim fee of Rs.1,84,154. The AO further observed that the DIT (Exemption) withdrew registration granted u/s 12A of the Act, to the assessee w.e.f. AY 2009-10 vide his order dated 16-12-2011 as the assessee's objects were in the nature of advancement of any other objects of general public utility and its activities are carried out in the nature of trade, commerce, business, etc. Since the assessee's registration u/s 12A has been withdrawn, the AO called upon the assessee to compute income on account of non mutuality ratio of mutual income to non mutual income and expenditure and vice versa to non mutual income. In response to show cause notice, assessee, vide letter dated 01-03-2013 submitted that it is engaged in the activity of promotion of sports and mainly focused on swimming. The assessee further contended that even if these activities had been considered as business activities, yet, the provisions of sub section (4A) of section 11 of the Act would not be attracted as the activities were incidental to the main object and that as regards the Proviso to section 2(15), none of the activities of the club were in the nature of trade, commerce or business

and as such, the Proviso was not applicable and since all the expenses were incurred for earning the income and also if the element of income had to be considered taxable, then the entire expense should be allowed against such income. The AO, after considering relevant submissions of the assessee rejected exemption claimed u/s 11 and computed income by applying the concept of mutuality and allowed benefit of mutuality to the extent of income received from its members; however, treated the activity of income generated from guests' fee and learn to swim fee as income generated from trade, commerce and business. Insofar as interest income, the AO held that even though the assessee has claimed the benefit of mutuality in respect of its core activity, yet, interest income earned from investments is taxable in view of law laid down by the Hon'ble Supreme Court in the case of Bangalore Club vs CIT & Ors in Civil Appeal No.124 of 2007 dated 14-01-2013 wherein it is held that income earned by the assessee from the banks would not fall within the ambit of the mutuality principle and will, therefore, exigible to income-tax in the hands of the assessee.

4. Aggrieved by the assessment order, assessee preferred appeal before the CIT(A). Before the CIT(A), assessee has reiterated its submissions made before the AO to argue that the assessee is a charitable trust engaged in the activity of promotion of sports and mainly focused on swimming. Therefore, merely because it has collected guest

fee from guests other than members, the activities of the trust cannot be brought within the ambit of Proviso to section 2(15) of the Income-tax Act, 1961. The assessee further argued that it has that the whole amount collected from its members and guests towards development of sports which is evident from the fact that in all the years its fees collection from the objects of the trust is less than its expenditure incurred towards object of the trust and assessee has incurred huge deficit from its core activity. The assessee further contended that the ITAT, Mumbai Bench "C" vide its order dated 30-10-2015 has set aside the order of DIT (Exemption) dated 16-10-2011 cancelling the registration u/s 12AA of the Act. With this order, the basis of denial of exemption u/s 11 by the AO stood resolved and the assessee continued to enjoy the benefit of exemption u/s 11. Therefore, there is no reason for the AO to deny benefit of exemption, merely because amount had been collected from guests.

5. The CIT(A), after considering submissions of the assessee and also relying upon the decision of ITAT, setting aside the order passed by the DIT (Exemption) cancelling registration u/s 12A observed that the ITAT has not decided the issue on merit with regard to the finding of the AO that the activities of the assessee are in the nature of trade, commerce or business and hence, objects are not charitable as per Proviso to section 2(15). The CIT(A) further observed that though the assessee

relied upon circular No.11/2005 dated 19-10-2008 to argue that the entity claiming both as charitable and mutual is outside the purview of provisions of section 2(15), on perusal of the assessment order it is noted that the AO has applied the principles of mutuality in respect of its core activity; however, the interest income was held to be taxable, relying upon the judgement of the Hon'ble Supreme Court in the case of Bangalore Club vs CIT & Ors (supra), therefore, there is no merit in the contention of the assessee. The CIT(A) further observed that though the assessee claims that it is charging nominal amount under 'guest fee and learned to swim fee' resulting into deficit. On perusal of the submissions of the assessee, it is noted that the working for the same involves assumptions and estimates and there is no exact working of the cost incurred has been provided by the assessee with reference to the services rendered by it to the members as well as non members. Further, there is no dispute that the assessee has rendered service for which the fee has been charged and hence, it is hit by the Proviso to section 2(15) and accordingly, the AO was right in denying exemption u/s 11 and computing income by applying the principle of mutuality. With these observations, the CIT(A) dismissed appeal filed by the assessee. Aggrieved by the order of CIT(A), the assessee is in appeal before us.

6. The Ld.AR for the assessee submitted that the Ld.CIT(A) erred in

law and on facts confirming the order of the AO denying exemption u/s 11 of the Act, without appreciating the fact that the assessee is a charitable trust engaged in the activity of promotion of swimming. The Ld.AR further submitted that though the assessee's activities are limited to its members, such membership is open to general public without limiting it to any caste, creed or community and any general public can become member of the swimming club. The Ld.AR further submitted that the assessee has collected guest fee from non members, who accompanied by the members to recover the cost of providing services which cannot be considered as activity of rendering services which is in the nature of trade, commerce or business which is hit by the Proviso to section 2(15) of the Act. The Ld.AR referring to the order of ITAT, setting aside order passed by the DIT (Exemptions) withdrawing exemption granted u/s 12A submitted that the ITAT has set aside the order of the DIT (Exemptions) which means the assessee's activity are charitable in nature and its activities are carried out in accordance with its objects. The AO, without appreciating the fact that assessee is a charitable trust and promoting sports, which is in the nature of third limb of the definition of 'charitable purpose' and also which comes under the clause of 'any other objects of general public utility', denied the benefit of exemption merely because the assessee has collected fees from guests and learn to swim programmes. In this regard, he relied upon the

decision of ITAT, Mumbai Bench “D” in the case of Chembur Gymkhana (2017) 80 Taxman.354 and the decision of ITAT, Mumbai Bench ‘SMC’ in the case of Dahisar Sports Foundation (2017) 87 Taxman.com 313.

7. On the other hand, the Ld.DR strongly supported order of the CIT(A) and submitted that the activities are squarely coming within the definition of Proviso to section 2(15) as it has collected fees from non members for rendering services which is in excess of the prescribed limit provided therein, therefore, the AO was right in denying the benefit of exemption u/s 11 of the Act. The Ld.DR further argued that though the assessee is a public charitable trust registered u/s 12A, its activities are limited to its members but not open to general public. Therefore, the assessee cannot claim the status of public charitable trust and its benefits are open to general public without any limitation to caste, creed or community. The assessee’s activities were in the nature of trade, commerce or business and as such, the Proviso is applicable and accordingly, the AO was right in computing income generated from the activity of trade, commerce or business.

8. We have heard both the parties, perused the material available on record and gone through the orders of authorities below. The assessee is a public charitable trust registered under Bombay Public Trust Act, 1950 in the year 1953 with the object of promoting sports activities. The trust is operating a separate swimming pool for gents and ladies. The

trust was registered u/s 12A of the Income-tax Act, 1961 and allowed the benefit of exemption u/s 11 upto AY 2008-09. The DIT(Exemption) withdrew registration granted u/s 12A by invoking provisions of section 12AA w.e.f. AY 2009-10 after newly inserted Proviso to section 21(15) on the ground that the assessee's activities are in the nature of trade, commerce or business, which is evident from the fact that the assessee is collecting fees from guests and learn to swim programmes which exceeds the limit prescribed in the Proviso to section 2(15) of the Act. The AO denied the benefit of exemption u/s 11, on the basis of withdrawal of registration granted earlier u/s 12A and also on the basis of Proviso to section 2(15). According to the AO, the assessee has collected fees from guests for rendering services which is in the nature of trade, commerce or business and which is hit by the Proviso to section 2(15) of the Act. The AO further observed that the activity of the assessee is limited to its members, but not open to general public without any caste, creed or community, therefore, the assessee cannot take the benefit of charity to claim the benefit of exemption u/s 11 of the Act; accordingly, denied the benefit u/s 11 and applied the principles of mutuality in respect of its core activity and computed income from business in respect of amount received from guests and fees collected from learn to swim programme. The AO also taxed interest income under the head, 'Income from other sources' by following the principles

of Hon'ble Supreme Court judgement in the case of Bangalore Club vs CIT & Ors (supra).

9. It is the contention of the assessee that it is a public charitable trust engaged in the activity of promotion of sports. The assessee further contended that its facilities are open to general public without any restriction to caste, creed or community and any general public can become member of the club. The assessee further contended that it is operating a swimming pool for development of swimming and also conducts training camps for which it has collected certain amount of fees; however, the assessee has not carried out its activity with an intention to earn profit which is evident from the fact that it has incurred deficit from its main activity. The assessee further contended that but for its income from investments, it has incurred deficit in all the years, which means that it has applied its total receipts generated from its core activity to the objects of the trust, therefore, the AO was incorrect in treating the assessee as has been engaged in the activity of providing services which is in the nature of trade, commerce or business which is hit by the Proviso to section 2(15) of the Act.

10. The assessee is a public charitable trust registered u/s 12A of the Income-tax Act, 1961. Its main objects are promotion of sports and focused on swimming. The assessee is carrying out its activities in accordance with its objects. The assessee is operating a separate

swimming pool for gents and ladies. There is no observation from the AO that the assessee's objects are not charitable in nature. The AO also not pointed out any activities which are not in the nature of charitable activities. The AO denied the benefit merely on the basis of collection of fees from non members on the allegation that the activities of the assessee are in the nature of trade, commerce or business which is hit by provisions to section 2(15) of the Act. The AOs action is based on the fact that the DIT (Exemption) has withdrawn registration granted u/s 12A of the Income-tax Act, 1961. The registration granted u/s 12A has been restored by the ITAT with the observations that there is no recording of satisfaction by the AO that the activities of the assessee are not genuine and are not being carried out in accordance with the objects of the trust. The assessee is continued to enjoy the benefit of registration 12A. Once the assessee continued to enjoy the benefit of registration , the benefit of exemption u/s 11 can be denied only when the objects of the assessee trust are not charitable in nature and its activities are not carried out in accordance with its objects. The Proviso to section 2(15) of the Income-tax Act is applicable to a case where the trusts are carrying out its activities on commercial basis with an intention to earn profit. In this case, on perusal of the details available on record, there is no finding from the lower authorities that the assessee is carrying out its activities for the purpose of earning profit. The allegation

of the lower authorities is only with its fees collections from guests and learn to swim programme which is in excess of the prescribed limit provided u/s 2(15) and which is hit by the Proviso, therefore, the activities of the assessee are in the nature of trade, commerce or business.

11. Having considered relevant facts, we do not find any merit in the findings of the lower authorities for the reason that providing sports facilities to general public without restriction to any caste, creed, religion or profession is squarely comes within the definition of charitable purpose as defined u/s 2(15) of the Income-tax Act, 1961 and hence, the assessee is eligible for exemption u/s 11 of the Act. In this case, on perusal of the facts, it is abundantly clear that the assessee is running its activities in accordance with its main object and continued to provide services to its members by collecting nominal fee. We further observe that the assessee has deficits from its core activity of promoting swimming for all the years. The assessee's collections from its members is less than the amount spent for its objects. But for income from investments, the assessee is always incurring deficit for all the years. Therefore, we are of the considered view that there is no merit in the findings of the AO that the assessee is carrying out its activities on commercial lines with an intention to earn profit.

12. Coming to the case laws relied upon by the assessee. The

assessee has relied upon the decision of ITAT, Mumbai Bench in the case of Chembur Gymkhana (supra). We find that the co-ordinate bench of ITAT, under similar set of facts has held that in order to invoke First Proviso to section 2(15), it is necessary and incumbent on the part of the AO to give a factual finding that assessee has derived income by engaging itself in trade, business or commercial activity. The relevant portion of the order is extracted below:-

*Undisputedly, the assessee has been registered as a charitable trust not only with the Charity Commissioner but also under section 12A. Though, the registration granted under section 12A was subsequently cancelled by the DIT(E) under section 12AA(3), however, the Tribunal, while setting aside the order of the DIT(E) restored the registration granted under section 12A. Thus, the grant of registration under section 12A to the assessee pre-supposes that the objects of the assessee are for charitable purpose.*

- *In other words, the assessee is a charitable trust. The Assessing Officer at the time of completion of assessment has not pointed out any change in the object of the assessee trust. As it appears, relying upon the assessment order passed in case of assessee for the assessment year 2007-08, the Assessing Officer concluded that the assessee is mutual concern, as it does not treat the members and non-members at par. He has also stated that since it extends benefit to the persons specified under section 13(1)(c), the conditions of the said provisions have been violated, hence, the assessee is not eligible for exemption under section 11.*

- *Thus, in sum and substance, the Assessing Officer has denied assessee's claim of exemption under section 11 by treating it as a mutual concern of the members. However, this is not the first time the revenue has treated the assessee as a mutual concern while denying claim of exemption under section 11. The dispute arose for the first time in assessment years 1996-97 and continued in the subsequent assessment years. It is necessary to observe, while completing assessment for those assessment years, the Assessing Officer took a completely identical view by holding that the assessee was a mutual concern, hence, receipts from non-members by way of canteen fee, interest, coaching, etc., is taxable. However, the Tribunal while deciding the appeals of the assessee for assessment years 1996-97 to 2000-01, held that as per the object of the trust, it is to be considered as a charitable organisation as the objects show that the assessee-trust was engaged in the broad areas of games and sports as well as in promotion and/or management of social intercourse or athletic sport and cultural and educational activities for its members. Considering the objects and activities of the assessee, the Tribunal held that it*

*is in the nature of general public utility as it is for the well being of a section of public at large. While dealing with the objection of the revenue that there is restriction on the membership admission, the Tribunal held that so long as members admission into the club is not arbitrary, the committee's discretion to restrict the membership does not interfere with the object of public utility. The Tribunal, while dealing with the allegation of the department that the assessee is a mutual concern, concluded that the object of the trust of providing for land and building as well as for promotion or management of social intercourse or athletic sports and cultural and educational activities for its members constitute object of general public utility. Hence, the trust is charitable organisation. The Tribunal further observed, the members of the trust represent a cross section of public at large and it is not for group of private families or private members alone. Hence, the principle of - mutuality will not apply to the assessee's case. With the aforesaid observation, the Tribunal allowed assessee's claim of exemption under section 11. The aforesaid decision of the Tribunal was upheld by the High Court. [Para 7]*

- *The Assessing Officer in the assessment order nor has not brought any material to demonstrate that there is any change in the object of the trust in the impugned assessment year as compared to earlier assessment years, wherein, the issue has been decided in favour of the assessee. That being the case, consistent with the view of the Tribunal and the High Court in assessee's own case it has to be held that the assessee is entitled to exemption under section 11 as a charitable trust. [Para 8]*

- *At this stage, it is necessary to deal with the submissions of the revenue that in view of the first proviso to section 2(15), as it existed in the statute book at the relevant time, the assessee cannot be considered to be existing for charitable purpose. Firstly, the Assessing Officer in the assessment order, has not recorded any factual finding that the assessee has derived income by engaging itself in any trade, business or commercial activity. The Assessing Officer has proceeded on the footing that the assessee being a mutual concern, the receipts derived from the members for user of facilities is not taxable, whereas, receipts from non-members for user or facilities is taxable. In this context, the Assessing Officer has passed the impugned assessment, order, thus, it has to be assumed that the Assessing Officer while completing the assessment was conscious of the first proviso to section 2(15), which has come to the statute book by that time. In spite of that the Assessing Officer has not recorded any finding that the objects of the assessee are not for charitable purpose in view of the first proviso to section 2(15). On the contrary, the Assessing Officer by treating the assessee as a mutual concern, has brought to tax the receipt from non-members only. For invoking the first proviso to section 2(15), it is necessary and incumbent on the part of the Assessing Officer to give a factual finding that the assessee has derived income by engaging itself in trade, business or commercial activity. In the absence of any such finding the first proviso to section 2(15) cannot be attracted. More so, when the Tribunal and the High Court in the preceding assessment years have held that the objects of the assessee qualify the object of general public utility, hence, is existing for charitable purpose as per section 2(15).*

- *In view of the aforesaid, the Commissioner (Appeals) was justified in allowing assessee's claim of exemption under section 11."*

13. The assessee also relied upon the decision of ITAT, Mumbai Bench in the case of Dahisar Sports Foundation vs ITO (supra) wherein it was

held that where main object or purpose of assessee's charitable trust was promotion of sports and games, merely because trust collected certain charges from coaching campus meant for promotion of sports and games, could not alter its character of being charitable. The relevant portion of the order is extracted below:-

*"Upon careful consideration I find that the main object of the Trust is to promote the sports and games. The authorities below have drawn adverse inference and invoked the amended provisions of section 2(15) by holding that by engaging into coaching camps and obtaining receipts therefrom, the assessee is engaging into activities of commercial nature. I find that this proposition is not at all sustainable. In the case of Tamil Nadu Cricket Association (Supra) in a case where the assessee is a Cricket Association was receiving income from holding of matches and was receiving sums therefrom was denied exemption on the ground that it was engaged in the activities in the nature of trade or commerce or business. The Hon'ble High Court reversed the order holding that substantial/regular surplus cannot taint receipts as arising from business/commerce. By the volume of receipt one cannot draw inference that the activity is commercial. I find that this case law applies to all fours to the present case. Here also the authorities below have drawn adverse inference on the ground that amount received from the coaching camp being less than the expenditure incurred. Similarly, in the case of ICAI v. DGIT(E) [2013] 358 ITR 91/217 Taxman 152/35 taxmann.com 140 (Delhi), the Hon'ble Delhi High Court has expounded as under:*

(a) *There was no finding that the predominant object in doing their activities was to generate profits.*

(b) *These activities were ancillary activities to the main activity/ object.*

(c) *The surplus generated out of these activities is utilised towards the infrastructure development and other student/ members related activities.*

(d) *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. There should be facts and other circumstances which justify and show that the activity undertaken is in fact in the nature of business. The expressions "business", "trade" or "commerce" as used in the first proviso must, thus, be interpreted restrictively and where the dominant object of an organization is charitable any incidental activity for furtherance of the object would not fall within the expressions "business", "trade" or "commerce".*

(e) *If the object or purpose of an institution is charitable, the fact that the institution collects certain charges does not alter the character of the institutions. It is not necessary that it should provide something for nothing or for less than it costs or for less than the ordinary price.*

*11.1 find that the above case law also supports the assessee's point of view. It is*

*undeniable that the object or purpose of this trust is promotion of sports and games and thus charitable. The fact that the trust collects certain charges from coaching camps meant for promotion of sports and games cannot alter the character of the institution. To repeat the proposition as expounded above, it is not necessary that the Trust should provide something for nothing or for less than it cause or for less than the ordinary Trust. Accordingly, in my considered opinion, in the background of the aforesaid discussion and precedent, the orders of the authorities below are set aside. Accordingly, I hold that the assessee trust should not be visited with denial of exemption. Hence, the orders of the authorities below is set aside and issue decided in favour of the assessee.*

14. The Hon'ble Bombay High Court in the case of DIT vs Goregaon Sports Club (2012) 347 ITR 338 (Bom) held that providing sports facilities to general public without restriction to any caste, creed, religion or profession is eligible for exemption u/s 11 of Income-tax Act, 1961.

15. In this view of the matter and respectfully following the ratios of the case laws discussed above, we are of the considered view that the assessee is eligible for exemption u/s 11 of the Income-tax Act, 1961. Therefore, we direct the AO to allow exemption u/s 11 of the Act.

16. In the result, appeal filed by the assessee is allowed.

**ITAs No.1040/Mum/2016 & 510/Mum/2017**

17. The grounds raised in these appeals are akin to grounds raised in appeal in ITA No.1039/Mum/2016 which has been decided by us above.

We have already found and held that the assessee is running its activities in accordance with its main object and continued to provide services to its members by collecting nominal fee. We further observe that the assessee has deficits from its core activity for promoting swimming for all the years. The assessee's collections from its

members is less than the amount spent for its objects. But for income from investments, the assessee is always incurring deficit for all the years. Therefore, consistent with our view, we direct the assessing officer to grant exemption u/s 11 of the Act. As a result, these appeals, too are allowed.

18. In the result, all the three appeals filed by the assessee are allowed.

Order pronounced in the open court on 21<sup>st</sup> March, 2018.

Sd/-

sd/-

(Mahavir Singh)	(G Manjunatha)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Mumbai, Dt : 21<sup>st</sup> March, 2018

Pk/-

Copy to :

1. Appellant
2. Respondent
3. CIT(A)
4. CIT
5. DR

/True copy/

By order

Sr.PS, ITAT, Mumbai