

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

**BEFORE SHRI C.N. PRASAD, JUDICIAL MEMBER AND
SHRI RAJESH KUMAR, ACCOUNTANT MEMBER**

**ITA No.6706/M/2016
Assessment Year: 2012-13**

M/s. The Bombay Presidency Golf Club Ltd., Dr. Choitaram Gidwani Road, Chembur, Mumbai - 400 074 PAN: AADCT 9170A	Vs.	Income Tax Officer (E)- 2(4), 503, Piramal Chambers, 5 th Floor, Lalbaug, Parel, Mumbai - 400 012
(Appellant)		(Respondent)

**ITA No.6565/M/2016
Assessment Year: 2012-13**

Income Tax Officer of Income Tax(E)-2(4), 503, 5 th Floor, Piramal Chambers Lalbaug, Lower Parel, Mumbai - 400 077	Vs.	M/s. The Bombay Presidency Golf Club, Dr. Choitaram Gidwanit Rd., Chembur, Mumbai - 400 007 PAN: AADCT 9170A
(Appellant)		(Respondent)

Present for:

Assessee by : Shri S.M. Kapoor, A.R.
Revenue by : Shri V. Justin, D.R.

Date of Hearing : 18.06.2018
Date of Pronouncement : 22.06.2018

ORDER

Per Rajesh Kumar, Accountant Member:

The above titled appeals one by the assessee and the other by the Revenue have been preferred against the order dated 16.08.2016 of the Commissioner of Income Tax

(Appeals) [hereinafter referred to as the CIT(A)] relevant to assessment year 2012-13.

ITA No.6565/M/2016 (Revenue's appeal)

2. The various grounds raised by the Revenue are as under:

"1. Whether, on the facts and in the circumstances of the case and in law, the Ld.CIT(A) was right in directing the A.O to delete the addition, ignoring the ratio laid down by the Hon'ble Bombay High Court in the case of CIT v/s common Effluent Treatment Plant(Thane Belapur) Association (2010) 328 ITR 362.

2. Whether, on the facts and in the circumstances of the case and in law, the Ld.CIT(A) was right in deleting the order of A.O. without appreciating the fact that once the assessee trust got hit by proviso to section 2(15) it loses the character of charity therefore no exemption can be allowed to the trust u/s 11 of the Act.

3. Whether, on the facts and in the circumstances of the case and in law, the the Ld. CIT(A) was right in deleting the order of A.O. without acknowledging the fact that once the trust loses its character being hit by the proviso to section 2(15) of the Act, the only blanket available to it, was principle of mutuality. Further the Ld. CIT(A) also failed to appreciate the fact that interest income earned from non-members could neither be exempted from tax u/s 11 of the Act, as it had lost its charitable character being hit by proviso to section 2(75) nor could be exempted under the principle of mutuality as the interest income was earned from non-members.

4. Whether, on the facts and in the circumstances of the case and in law, the the Ld.CIT(A) was right in deleting the order of A.O. without considering the fact that the A.O. has brought on record that the assessee trust has been carrying out substantial percentage of activities with non members in various years and allegedly earning income from them which is covered by the proviso of section 2(15) of the Act.

5. Whether, on the facts and in the circumstances of the case and in law, the Ld. CIT(A) was right in relying upon the Order of Hon'ble ITAT in assessee's own case for A.Y. 2009-10, without appreciating the fact that the department has not accepted the decision on merit and filed appeal before Hon'ble High Court, which pending for adjudication.

6. The appellant prays that the order of the Commissioner of Income Tax (Appeals)-I, Mumbai be set aside and that of the Assessing Officer be restored.

7. The Appellant craves leave to amend or alter any ground or add a new ground which may be necessary."

3. At the outset, the Ld. A.R. submitted before the Bench that the issue raised by the Revenue in various grounds of appeal is qua the wrong deletion of addition of Rs.2,96,22,210/- on the basis that the proviso to section 2(15) is applicable to the assessee was totally wrong. The Ld. Counsel submitted that the Id. CIT(A) has rightly reversed the order of AO on this ground. The Ld. A.R. submitted that the issue is directly covered in favour of the assessee by the decision of the co-ordinate bench of the Tribunal in assessee's own case in ITA No.4843/M/2012 for A.Y. 2009-10 vide order dated 29.02.2016. The Ld. A.R. prayed before the Bench that in view of the said decision of the co-ordinate Bench the appeal of the Revenue be dismissed.

4. The Ld. D.R. appears to be fairly agreed to the contentions and arguments of the assessee.

5. We have heard the rival contentions of both the parties and perused the material on record including the decision cited by the Ld. A.R. A perusal of the order of the co-ordinate bench of the Tribunal in assessee's own case in ITA No.4843/M/2012 for A.Y. 2009-10 (supra) reveals that the issue has been decided by the Tribunal in favour of the assessee. The operative part whereof is as under:

"12. We found that the AO has taxed interest income on the following three reasonings :-

- (i) the proviso to Section 2(15) applies,
 - (ii) the registration under Section 12A has been withdrawn by the OIT (E),
- and

(iii) the decision of the Bombay High Court in Common Effluent Treatment Plant (2010) 328 ITR 362 hold that the interest received from non members is not exempt under the principle of mutuality.

First we take the first objection of AO to the effect that proviso to Section 2(15) applies to the case of assessee. As per our considered view, the proviso denies an entity carrying on 'advancement of any other objects of general public utility' the benefit of the regime prescribed under Sections 11 to 13 of the Act if the entity concerned 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 for a cess or fee or any consideration irrespective of the nature of use or application or retention of the income from such activity. The activity which according to the Assessing Officer has resulted in the application of the proviso and which is the subject matter of the assessment is the interest earned from banks. As per our considered view the investments made with banks is not an activity in the nature of trade, commerce or business but is income earned on application of moneys mandated under Section 11(5)(iii) of the Act which reads as follows :-

"The forms and modes of investing or depositing the money referred to in clause (b) of sub-section (2) shall be the following, namely:-

- (i) investment in savings certificates as defined in clause(c) of section 2 of the Government Savings Certificates Act, 1959 (46 of 1959), and any other securities or certificates issued by the Central Government under the Small Savings Scheme of the Government;
- (ii) deposit in any account with the Post Office Savings Bank;
- (iii) deposit in any account with a scheduled bank or a co-operative society engaged in carrying on the business of banking (including a society engaged in carrying on the business of banking (including a co-operative land mortgage bank or a co-operative land development bank).

Thus, as per the provisions of section 11(5), the assessee is permitted to deposit in any account with a scheduled bank on the deposits made therein and hence it cannot be said that interest received from the bank is in the nature of trade, commerce or business.

13. The investment in banks is not only authorised but mandated and is compulsory in so far as an entity carrying on charitable purposes concerned and in fact, under Section 13(1)(d)(ii), if the funds of a trust or institutions is invested in assets other than those specified in Section 11(5), the exemption under Sections 11 to 13 would be withdrawn. It is therefore not only inexplicable, but absurd as to why the Assessing Officer has taken the stand that interest received from deposits in banks falls foul of the proviso to Section 2(15). It is to be noted that all the other activities and income streams received by the assessee have been held to be not taxable by the Assessing Officer himself in making his order dated 30th December, 2012 on the grounds of mutuality and the only amount which has been assessed to tax as income of the assessee is income from interest of Rs.2,17,92,167. Thus according to the AO compliance by a entity set up for charitable purpose with the provisions of section 11 (5) of the Act would result in its status of 'charitable purposes' being denied on account of the proviso to section 2(15) of the Act. The direct consequence of such an interpretation would be that an otherwise 'charitable

institution' would lose its status as a 'charitable institution' if it complied with section 11 (5) of the Act and if it did not comply with section 11 (5) of the Act it would be denied the benefit on the grounds that the entity has not complied with section 11 (5) of the Act.

14. Several decisions have considered and interpreted the scope, purpose and limits of the proviso to Section 2(15). In *GS 1 India Vs. DGIT 360 ITR 138 (Del)*, the term trade, commerce or business was interpreted, and in that case even though the assessee was charging a fee having regard to the economic status of the beneficiaries, it was held that it was necessary for the operation and running expenses and the sustenance of charitable activities, that a fee could be charged. In the case of the assessee on the other hand, there is no fee whatsoever and in fact, it is passive income not involving any activity whatsoever. Therefore, the AO was not correct in holding that act of deposit of money in scheduled bank account and receipt of interest thereon an activity in the nature of trade, commerce or business. The same view was taken by the Delhi High Court in *Institute of Chartered Accountants of India Vs. DCIT 358 ITR 91 (Del)*, where the Institute was taxed by the Assessing Officer on the grounds that fees were charged by the Institute for providing coaching classes and for holding interviews with respect to campus placement. The Court held that such activities cannot be stated to be rendering service in relation to any trade, commerce or business at all. This was reiterated by the Delhi High Court in *Bureau of Indian Standards v. DGIT 358 ITR 78* and in *PHD Chamber of Commerce 357 ITR 296*. The Gujarat High Court in *DGIT Vs. Sabarmathi Ashram Gushala Trust 44 Taxman 141* took the view that a Trust registered with the objects of breeding cattle and cows and oxen cannot be said to be carrying on activities of trade, commerce or business merely because considerable income was generated on account of production and sale of milk. The same view was taken by the Tribunal in *DDIT Vs. All India Football 1 Federation 62 Taxmann.com 362 (Del Trib)* dealing with a case of an Association having as its object the promoting of the game of football, organising tournaments, training players, coaches etc. The Tribunal held that the receipts by way of sponsorship do not alter the character of the main objects and is not affected by the proviso as it cannot be said to be engaged in any activity which is in the nature of trade, commerce or business.

15. The second objection of AO was that the registration u/s.12A has been withdrawn by the DIT(E). At the time at which the Assessment Order was passed viz. 30th December, 2011, that fact was correct. However, the order withdrawing the registration under section 12A has been cancelled by the Tribunal and the Appeal of the assessee has been allowed by the Tribunal vide its order dated 30th May, 2012. Therefore, the second reason given by the Assessing Officer that the registration has been withdrawn is no longer valid as the registration, withdrawn by DIT(E) has been cancelled by the Tribunal vide its order dated 30-5-2012. Thus, the objection taken by the AO for declining of registration for exemption has been withdrawn has no legs to stand in view of the decision of the Tribunal in assessee's own case in *ITA No.311/Mum/2012*, dated 30-5-2012, wherein the order passed by DIT(E) u/s.12A(3) of the Act cancelling registration granted u/s.12AA was set aside and appeal of the assessee was allowed.

16. The last objection of AO was that decision of Hon'ble Bombay High Court in the case of Common Effluent Treatment Plant 328 ITR 362 was applicable and the interest received from non-members is not exempt under the principle of mutuality. From the record we found that the assessee has in fact complied and applied the decision of the Bombay High Court in Common Effluent in so far as in its return, the interest earned on fixed deposit with banks has not been claimed as exempt on the grounds of mutuality. That is the reason why the assessee offered income of Rs.2,17,92,167 as income in the computation of total income for Assessment Year 2009-10 and thereafter claimed various deductions under section 11 of the Act. Thus, the AO has wrongly applied the proposition of law laid down by Hon'ble Bombay High Court to the facts of the assessee which are quite distinguishable.

17. In view of the above, we can safely conclude that the activity of the assessee depositing money in the bank does not constitute trade, commerce or business. The Assessing Officer has in fact gone much beyond and held that the interest itself constitutes taxable income falling foul of the proviso to section 2(15). If the Assessing Officer's view is correct, it will militate against the mandate requirement and object of Section 11 (5) of the Act read with Section 13 of the Act. These Sections require an entity seeking the shelter of Sections 11 to 13 to deposit its surplus funds in specified assets and it cannot be that the mandate requirement and object of Section 11 (5) which serves to put in place a mechanism to regulate the funds of the charitable institutions are overcome, overridden and nullified by an interpretation so that the very mandate of Section 11 (5) if complied with results in the institutions being declared to be non-charitable. This is a contradiction in terms and therefore must be rejected. Accordingly, we hold that the interest earned on fixed deposit with banks complying with the provisions of Section 11 (5) is exempt and the proviso to Section 2(15) has no application to the facts of the assessee's case.

18. In view of the above, we set aside the order of both the lower authorities and direct the AO to delete the addition of interest so made which is exempt u/s.11(5) of the Act and the proviso to Section 2(15) has no application to the facts of instant case."

6. We, therefore, respectfully following the decision of the co-ordinate Bench and maintaining the consistency with the earlier year, dismiss the appeal of the Revenue by upholding the order of Ld. CIT(A).

ITA No.6706/M/2016 (assessee's appeal)

7. The ground raised by the assessee is as under:

"The learned CIT(Appeals) has erred in law and on the facts of the case in not allowing deduction of capital expenditure of Rs.2,18,50,357/-"

8. The only issue raised by the assessee is against the order of Ld. CIT(A) upholding the order of AO in not allowing the deduction of capital expenditure of Rs.2,18,50,357/-.

9. The Ld. A.R., at the outset, drew our attention to para 5.2(iv) of the appellate order and stated that the issue raised in this ground of appeal has not been adjudicated by the Ld. CIT(A) and dismissed the appeal by observing that the same does not arise from the assessment order. The Ld. A.R. submitted before us that the assessee is entitled to the deduction of capital expenditure of Rs.2,18,50,357/- and by relying on certain case laws as placed in the paper book and shown to the Bench during the course of hearing requested that the issue be restored to the file of the Ld. CIT(A) for adjudication of the same. The assessee also filed certain evidences qua the said advances during the course of hearing.

10. The Ld. D.R., on the other hand, strongly objected to the plea of the Ld. A.R. by submitting that all these documents /records as placed before the Tribunal were not placed before the AO or Ld. CIT(A) and therefore the issue could not be considered by the lower authorities. The Ld. DR strongly opposed the setting aside of the issue and prayed that the order of CIT(A) should be upheld on this issue.

11. Having heard both the parties and after perusing the material on record including the additional evidences as filed before the Bench in the form of confirmations, copies of ledger accounts and decision of the co-ordinate Benches of the

Tribunal, we are of the view that issue needs to be examined and verified at the level of the AO. We, therefore, restore the issue back to the file of the AO with the direction to decide the same as per facts and as per law by affording a reasonable opportunity of being heard to the assessee. Appeal is allowed for statistical purposes.

12. In the result, appeal of the Revenue is dismissed and the appeal of the assessee is allowed for statistical purpose.

Order pronounced in the open court on 22.06.2018.

**Sd/-
(C.N. Prasad)
JUDICIAL MEMBER**

**Sd/-
(Rajesh Kumar)
ACCOUNTANT MEMBER**

Mumbai, Dated: 22.06.2018.

* 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.