



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

BEFORE SHRI R.C.SHARMA, AM

&

SHRI SANDEEP GOSAIN, JM

ITA No.511/Mum/2017

(Assessment Year :2012-13)

The Pransukhlal Mafatlal Hindu Swimming Bath & Boat Club Trust, Netaji Subhash Road Chowpatty, Mumbai-400007	Vs.	ITO (Exemp)-2(4) Mumbai
PAN/GIR No.AAATT9571H		
Appellant)	..	Respondent)

Assessee by	Shri Nishant Thakkar
Revenue by	Shri V. Justin
Date of Hearing	23/07/2018
Date of Pronouncement	30/07/2018

आदेश / ORDER

PER R.C.SHARMA (A.M):

This is an appeal filed by the assessee against the order of CIT(A)-1, Mumbai dated 02/11/2016 for A.Y.2012-13 in the matter of order passed u/s.143(3) of the IT Act.

2. Grievance of the assessee relates to confirming the action of the AO to the effect that proviso to Section 2(15) of the Act is applicable, accordingly declining benefit of exemption u/s.11 of the IT Act.

3. At the outset, learned AR placed on record the order of the Tribunal in assessee's own case for the A.Y.2009-10 dated 21/03/2018, wherein

under similar facts and circumstances, the issue was decided in favour of the assessee.

4. We have heard rival contentions and carefully gone through the orders of the authorities below and found that assessee is a public charitable trust registered under Bombay Public Trust Act, 1950 in the year 1953. The Trust operates separate swimming pool for the gents and ladies. Assessee is also registered u/s.12A of the Act and allowed exemption u/s.11 upto A.Y.2008-09. The registration was cancelled by DIT(E) w.e.f. A.Y.2009-10 vide order dated 16/12/2011. By following the order of earlier year on the same ground, the AO declined benefit of exemption u/s.11.

5. By the impugned order, CIT(A) confirmed the action of the AO against which assessee is in further appeal before us.

6. We had carefully gone through the order of the Tribunal in assessee's own case dated 21/03/2018 wherein benefit of Section 11 was allowed in assessee's favour after having the following observation:-

"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 Pransukhlal Mafatlal Hindu Swimming Bath & Boat Club Trust 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(l)(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 Pransukhlal Mafatlal Hindu Swimming Bath & Boat Club Trust 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 Pransukhlal Mafatlal Hindu Swimming Bath & Boat Club Trust 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 Pransukhlal Mafatlal Hindu Swimming Bath & Boat Club Trust 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.”

7. The facts and circumstances during the year under consideration are same. Respectfully following the order of the Tribunal in assessee's own case, we do not find any merit for the decline of exemption u/s.11. Accordingly, we set aside the order of the lower authorities and assessee is allowed exemption u/s.11.

8. In the result, appeal of the assessee is allowed.

Order pronounced in the open court on this 30/07/2018

Sd/-
(SANDEEP GOSAIN)
JUDICIAL MEMBER

Sd/-
(R.C.SHARMA)
ACCOUNTANT MEMBER

Mumbai; Dated 30/07/2018

Karuna Sr.PS

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

BY ORDER,

सत्यापित प्रति //True Copy//

(Asstt. Registrar)
ITAT, Mumbai