

**IN THE INCOME TAX APPELLATE TRIBUNAL
AHMEDABAD 'D' BENCH, AHMEDABAD**

[Coram: Justice P P Bhatt, President and Pramod Kumar, Vice President]

ITA No. 3297/Ahd/2016
Assessment Year: 2012-13

Gujarat Housing Board (GHB)Appellant
*Pragtinagar, Naranpura,
Ahmedabad-380 013
[PAN : AAALG 0206 E]*

Vs.

DCIT (Exemption) Respondent
Circle-1, Ahmedabad

Appearances by:

*Vijay Ranjan, for the appellant
Anshu Prakash, for the respondent*

Date of concluding the hearing : 31.10.2018
Date of pronouncing the order : 16.11.2018

O R D E R

1. By way of this appeal, the assessee-appellant has challenged correctness of the order dated 14th September 2016, passed by the learned CIT(A)-9, Ahmedabad, in the matter of assessment under section 143(3) of the Income-tax Act, 1961, for the assessment year 2012-13.
2. Grievances raised by the appellant are as follows:-
 - “1. *In law and in the facts and circumstances of the appellant’s case, the Ld. CIT(A) has erred in not holding that the order passed by the A.O. u/s.143(3) of the I.T. Act is bad in law and liable to be quashed.*
 2. *In law and in the facts and circumstances of the appellant’s case, the Ld. CIT(A) has grossly erred in upholding the learned Assessing Officer’s view (in the assessment order passed u/s.143(3) impugned before him) of denying exemption to the appellant’s income u/s.11 & 12 of the Income Tax Act, 1961 as claimed in the appellant’s return, on the ground that the appellant’s case attracted the First Proviso to Section 2(15) and in turn, sub-section(8) of Section 13 of the Act.*
 3. *In law and in the facts and circumstances of the appellant’s case, the Ld. CIT(A) has erred in upholding the learned Assessing Officer’s action in denying the benefit of deduction as claimed by the appellant u/s.11 and 12 of the I.T. Act 1961.*

4. *In law and in the facts and circumstances of the appellant's case, the Ld. CIT(A) has erred in upholding the learned Assessing Officer's action in denying the benefit of deduction amounting to Rs.4,93,37,661/- for accumulation at 15% of income u/s.11(1)(a) of the Act.*
5. *In law and in the facts and circumstances of the appellant's case, the Ld. CIT(A) has erred in upholding the learned Assessing Officer's action in denying the benefit of deduction amounting to Rs.6,30,00,000/- for accumulation u/s.11(2) of the Act."*

3. Briefly stated, the relevant material facts are like this. The assessee before us is a trust constituted, by Government of Gujarat, under the Gujarat Housing Board Act, 1961. It is formed by the State Government so as to deal with, and satisfy, the housing accommodation needs of general public – particularly with a view to provide shelter to economically weaker sections of society. The trust is registered under section 12AA of the Act. The assessee had filed its return of income on 28.03.2013, claiming exemption of Rs.11,23,37,661/- under section 11. During the course of ensuring scrutiny assessment proceedings, the Assessing Officer noted that, since its inception, the assessee had constructed 1,76,830 dwelling units, including 23,364 slum clearance and Integrated Housing Scheme Units, 49,083 Economically Weaker Section Units, 55,656 Lower Income Group Units, 42,191 Middle Income Group Units, and 6,271 High Income Group Units. The Assessing Officer was of the view that “*houses constructed by the Gujarat Housing Board are sold to all types of income groups, including the high net worth individuals and large chunk of middle income group*”. The Assessing Officer was of the view that such an activity pursued by the assessee cannot be treated as a charitable activity. He referred to, and relied upon, decisions of this Tribunal in the cases of Jalandhar Development Authority Vs. CIT [(2010) 35 SOT 15 (Asr)], Punjab Urban Planning & Development Authority Vs. CIT [(2006) 156 Taxman 37 (Mag)], Jammu Development Authority Vs. CIT [(2012) 23 taxmann.com 343 (Asr)] and Entertainment Society of Goa vs. CIT [(2013) 34 taxmann.com 210 (Panjim)]. He was thus of the view as follows:-

“6. Thus, the submission of the assessee that, the assessee is carrying on the same nature of activity and same nature of income and therefore, the income should be computed as per provisions of Section 11 to 13 of the I.T Act is not acceptable since it is clearly evident that the assessee is engaged in the activity of earning profit from sale of plots/land, charging various fees for rendering services to the general public. The submission of the assessee is not relevant since the income earned is business income and the application of the said income is irrelevant in view of the first proviso to section 2(15) of the IT Act which is as under:-

Provided that the advancement of any other object of general public utility shall not be a charitable purpose, if it involves the carrying on of 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 other consideration, irrespective of the nature of use or application, or retention, of the income from such activity:

[Provided further that the first proviso shall not apply if the aggregate value of the receipts from the activities referred to therein is [twenty five lakhs rupees] or less in the previous year;]

Therefore, as discussed in preceding paras, the assessee is not carrying out any charitable activity and is squarely covered by the proviso 1 & 2 of the Section 2(15) of the I.T. Act.”

4. The Assessing Officer thus disallowed exemption under section 11(1)(a) amounting to Rs.4,93,37,661/- and exemption under section 11(2) amounting to Rs.6,30,00,000/-. Aggrieved by the stand so taken by the Assessing Officer, assessee carried the matter in appeal before the CIT(A) but without any success. Learned CIT(A) was, inter alia, of the view that the assessee was carrying on activities in the nature of trade, commerce or business. In support of this stand, his observations include the following:-

“15.1 It can be seen from the various definitions as well as other regulations quoted above that GHB is undertaking activities which are in the nature of trade, commerce or business or activities of rendering service in relation to any trade, commerce or business, for a cess or fee. Further, it is apparent from these regulations that GHB is recovering document charges, ground rent, service charges, penalties, premium on land etc., from the beneficiary of the scheme. It is making the beneficiary and the Registered Agency pay for the repairs and maintenance of common services, rates, taxes, electricity charges etc. and at the same time recovering penalties on default of payment by the beneficiary. This reflects all activities undertaken by the GHB are commercial in nature and are in the nature of trade, commerce or business or activities of rendering service in relation to any trade, commerce or business, for a cess or fee. GHB is not taking the responsibility of any cost on itself and is making the beneficiary of the housing unit to incur that cost. At the same time it is charging certain costs on the beneficiary in order to recover its own expenses. As discussed earlier at para 14 above the cost itself is inclusive of element of profit. Hence, GHB is not undertaking any charitable activities under the GHB Act.

16.1 There are many sections in the GHB Act that support the activities of GHB which are in the nature of trade, commerce or business or activities of rendering service in relation to any trade, commerce or business, for a cess or fee. U/s.65 of the GHB Act, GHB can borrow any sum from the market for the purpose of implementing housing scheme. It is a different matter that the GHB needs the permission of the State Government being an instrumentality of the State. Yet it cannot be denied that for undertaking its activity the GHB Act itself has given GHB freedom to borrow money. Borrowing money involves interest cost and all these costs are recovered by GHB from the beneficiary of its housing units. It is a matter of fact that GHB has in the past issued debentures for housing activity.

16.2 U/s.15 of the GHB Act, GHB is required to establish a provident fund for its employees and also contribute to the said provident fund for the subscriber of the fund. The corporate sector is also required to undertake such steps irrespective of the fact that they are undertaking charitable activities or not.

16.3 Under rule-6 of GHB Rules 1977, GHB sets up tender committees. The process of tendering is the means of procuring goods or services in a transparent manner at lowest cost available. Section-25(3) empowers GHB to execute in all the matters provided u/s.25(1) (see para 12.3 above) through any independent agency. This section is directly linked with rules-6 which enables GHB to procure best services or goods at lowest cost. This itself reflects the nature of activities of GHB that are in the nature of trade, commerce and business.

16.4 The State Government wants GHB to function in a professional manner and through GHB Act it has supported GHB through various sections. For e.g. u/s.24A, even the areas other than urban areas in the scheme can be declared as the part of the scheme.

U/s.25(1)(e) the adjoining of areas of the scheme can be part of the scheme for the purpose of the efficiency of the scheme. U/s.36 GHB is required to make compensatory payments in respect of land or building vested by a scheme in the Board either to the Municipality or to general public. U/s.49 GHB has been given power to dispose off land by retaining/leasing, selling or exchanging it with other property in the area of the scheme. Sec-56 of the Act empowers GHB to recover the unpaid lease or rent from tenant/lessee. It has authorized GHB to evict the occupant in case of failure to make payment to GHB. All these sections go on to prove beyond doubt that the State Government wants GHB to function in a professional, businesslike manner. As an instrumentality of the State Government, rules have been made for GHB to function in a transparent and predictable manner i.e. to say to develop uniformity of approach to various situations. It is a fact that no activity can be carried on efficiently, and properly unless and until it is carried out on business principle but it does not mean that the provisions made through various sections of the GHB Act are misused in any manner under the garb of charity by making it a non tax payable organization.

16.5 The GHB Act has further stated that no suit can be filed against the decision taken for the actions of the GHB which has the approval of the State Government in Civil Courts. U/s.60 such powers of bar on jurisdiction of civil courts has been referred to. Further u/s.70 GHB has been given wide powers of entry for inspection, survey, measurement, valuation, digging etc. This provides GHB added advantage to carry out its activities that are in the nature of trade, commerce or business or activities of rendering service in relation to any trade, commerce or business, for a cess or fee. These powers have been given to GHB because the Govt. desires it to function in professional manner, increase its efficiency and should not be lagging behind in fulfilling its mandate under the GHB Act. Such authority has not been given to GHB because it is undertaking charitable work.

16.6 Throughout its submissions, the GHB has been mentioning that it is undertaking statutory functions. It is correct that GHB is undertaking activity as per the GHB Act but in its submission, the GHB has compared itself with local authorities. Section-3 has mentioned that GHB shall be deemed to be a local authority but it is only for the purpose of GHB Act and for the land acquisition law. It cannot be said that GHB is a local authority under the Income-tax Act. Further, various sections of the GHB Act such as Sec-35(4), Sec-36, 37, 39 clearly differentiate between the local authority under the State Government and the GHB.

17. Thus it is a 'matter of fact' that the legal framework itself mandates, authorises and compels GHB to qualify for the first proviso to section 2(15) of the Act. If it is not followed by GHB then it would amount to violation of law by GHB."

5. Learned CIT(A) also referred to, and relied upon, various decisions of the co-ordinate benches in the cases of Jalandhar Development Authority (supra) and others. He also relied upon the findings in assessee's case for the assessment year 2011-12, and confirmed the action of the Assessing Officer. The assessee is not satisfied and is in further appeal before us.

6. We have heard the rival contentions, perused the material on record and duly considered facts of the case in the light of applicable legal position.

7. We find that the core issue that is really required to be adjudicated by us is whether construction and sale of dwelling units by the assessee, on the given facts, is an activity in the nature of trade, commerce or business or service thereto. As we have

noted earlier, from the observations made by the Assessing Officer in the assessment order, the assessee has constructed 1,76,830 units out of which 23,364 are for slum dwellers, 49, 083 for economically weaker sections, 55,656 for lower income groups and 42,191 for middle income groups. Even the 6,271 dwelling units meant for, what is termed as High Income Groups, are small dwelling units is more of a glorification for slightly better off middle class people, rather than the rich people. The assessee is a trust set up under the State Government legislation and is doing commendable work in the field of providing affordable accommodation. On these facts, we may refer to the observations made by Hon'ble Punjab & Haryana High Court, in the case of CIT Vs Moga Improvement Trust [(2017) 390 ITR 547 (P&H)] wherein the Tribunal had held that such activities donot constitute business activities taking it out of ambit of Section 2(15), as follows:

.....The Tribunal by the impugned order held that the stand of the authorities was unsustainable as even assuming that all the allegations of the Assessing Officer with respect to the profit motive in the activities of the assessee are correct, the same were carried out with the larger and predominant objective of general public utility. Relying upon the CBDT circular the Tribunal observed that it is only when the Assessing Officer finds that "the income is from any other business which is not incidental to the attainment of the objectives of the trust or institution", that such an income will "not be exempt from tax". The Tribunal noted that there is no finding to that effect by any of the authorities and that it is not even the case of the revenue that the activities of the trusts do not serve the objects of the general public utility. The Tribunal held that the activities of the trust fall within the category "objects of general public utility". It was also held that separate books of account for the business activities were maintained. This was not challenged before us. It is not necessary in these appeals to decide the effect of the amendment to Section 2(15) introduced with effect from 01.04.2016.

The Tribunal then dealt with the main contention of the revenue that the assessee was involved in the activities of developing and selling the residential and commercial units with the sole aim of making profits. The conclusions of the Tribunal in this regard are as follows; the profit on sale does not necessarily imply profit motive in the activities of the assessee. What is important is the motive or the predominant object of the activities. The bids are invited by the assessee who allots the plots to the highest bidders. This, however, is because it is not desirable for the State to subsidise its businesses. A bidding process ensures transparency in the functioning of the trusts and therefore, it does not make the bidding process a commercial venture. Further the bids are invited only in the context of commercial units. Under the Rules there is a formula on the basis of which the price is worked out. The revenue did not deny the same but alleged that the profit motive is embedded in this formula as shown by the adjustments for various charges.

72. The Tribunal rightly rejected the contention that to fall within the ambit of the words "advancement of any other object of general public utility" the trust must necessarily be involved only in implementing poverty alleviation programs or doing other acts of charity. It is sufficient if it does precisely what the last category in Section 2(15) states namely being involved in activities for the advancement of an object of general public utility. They include a proper systematic development of certain areas. These activities are by virtue of the PTI Act undertaken by this assessee.

73. The Tribunal also rightly held that an object of general public utility does not necessarily require the activities to be funded or subsidized by the State. So long as the objects fall within the ambit of the words "object of general public utility", it is sufficient. The achievements of those objects do not have to be as a result of State funding or State subsidy. The Tribunal accordingly rightly held that the authorities were not justified in denying the benefit of section 11 and holding that the assessee was not covered by the words "advancement of any other object of general public utility" in Section 2(15). The Tribunal, therefore, rightly directed the Assessing Officer to delete disallowance of exemption.

74. It cannot possibly be suggested that the Government of Punjab formed the trusts under the Punjab Town Improvement Act, 1922 because it wanted to carry on the business as colonizers or developers under the mask of the category "objects of general public utility".

75. Section 28(2)(iii) of the Punjab Town Improvement Act, 1922 permits a scheme under this Act to provide *inter alia* for the disposal of the land vested in or acquired by the trust including by lease, sale and exchange thereof. This, however, is not the predominant activity or responsibility of the trust. Nor for this assessee is making profits from this activity its predominant motive.

76. The power of the assessee to dispose of land conferred by Section 28(2)(iii) is not an absolute or independent power. It is conferred upon the assessee in the discharge of its statutory duties imposed on it by the PTI Act of framing schemes. Sub-section (1) of Section 28 entitles the assessee to combine the various schemes referred to in Chapter-IV. Sub-section (2) stipulates that the scheme under the Act may provide for a variety of things including the disposal of land belonging to the assessee. This power is, therefore, in furtherance of, connected with and in relation to a scheme in Chapter-IV. It is not an absolute power independent of and unconnected with the assessee's statutory functions under the PTI Act.

77. The predominant activity of and the purpose for the establishment of the assessee is summed up in two words "town improvement" in the title "Punjab Town Improvement Act, 1922". The preamble is titled "An Act for the improvement of Certain Areas". The preamble states "whereas it is expedient to make provision for the improvement and expansion of towns in Punjab". The Act in general and Chapter-IV thereof in particular indicates the reason for and the basis of the establishment of the trust. Almost every section in the Chapter indicates clearly that the trust is established for the purpose of "advancement of the object of general public utility". This is the predominant purpose of the trust.

78. The language of the provisions of the Act are self-explanatory in this regard. The trust must deal with the buildings unfit for human habitation, the danger caused or likely to be caused to the health of the inhabitants of the area on account of the congested conditions of streets or buildings or want of light, air, ventilation or proper conveniences in an area and sanitary defects. The trust is required to frame the street schemes to lay out new streets, thoroughfares and open spaces or alter existing streets whenever it appears to the trust that it is necessary to do so for the purpose of providing building sites or remedying defective ventilation or creating new or improving existing means of communication and facilities for traffic.

79. The trust must also prepare development schemes. This duty contained in Section 24 is not akin to that of a private developer or a colonizer as wrongly

suggested by the Assessing Officer and confirmed by the CIT(A). The development scheme under section 24 is prepared for the purpose of development of a locality. Sub-section (2) of Section 24 provides that the trust may if it is of the opinion that it is expedient and for the public advantage to promote and control the development of and to provide for the expansion of a municipality in any locality adjacent thereto within the local area of such trust prepare "an expansion scheme". The development scheme, therefore, is for the public purpose of development of any locality and an expansion scheme is also prepared when it is expedient and for the public advantage as opposed to a mere personal advantage as in the case of private developers or the colonizers. The two cannot possibly be compared. These schemes do not contemplate mere development of the plots and the construction of the premises for sale. The Trust must under the Act adopt a holistic approach for the betterment and advantage of the entire area within its jurisdiction.

80. Section 25 which provides for a housing accommodation scheme to be framed is similar. The trust is required to frame such a scheme if it is of the opinion that it is expedient and for the public advantage to provide housing accommodation for any class of inhabitants within its local area. The trust is, therefore, to be motivated not by personal but by public benefit. Such activities clearly fall within the last category of cases in the proviso to Section 2(15) as it stood at the relevant time, namely, "advancement of an object of general public utility".

81. It can hardly be suggested that the Government of Punjab established the assessee's trust and conferred upon it public responsibilities and duties of the nature specified in the PTI Act as a camouflage for its commercial, trade and business ventures. The creation and incorporation of the trust under section 3 is for a public purpose. We have no doubt whatsoever that the activities of the trust fall within the meaning of the words "charitable purpose" in Section 2(15).

82. Whether the mandate of the Act is followed by such a trust is a different matter. The facts in that regard are relevant in examining whether the activities of the trust of a given year entitled it to the benefit of the Income Tax Act. Mere profit making on account of certain incidental or ancillary activities of the trust do not disentitle it to the exemptions. The Trust constituted under the PTI Act is likely to make profit on account of its commercial or business activities such as when it acts pursuant to the power under section 28(2)(iii) by disposing off its lands. That, however, does not take it out of the definition of 'charitable purpose' in Section 2(15). As we held earlier, trade, commerce and business in Section 2(15) must be such as to involve an element of profit. Profit, however, is not the predominant motive of such trusts. In our view considering the nature of the Act, selling of plots and premises by the trust is only incidental and ancillary to its main purpose which at the cost of repetition is "town improvement" in almost every respect. Even where the plots are developed and premises are constructed and sold at the market price, the activity is not commercial or business venture per se but one necessitated on account of the implementation of the provisions of the trust through statutory schemes. The main purpose of such schemes is driven by public requirements and not as a commercial venture per se. They are incidental to the main object of the trust

[Emphasis, by underlining, supplied by us now]

8. Viewed thus, merely the fact that the assessee has constructed and sold the dwelling units does not make it a business venture as long as predominant object, which is what the trust set up by the State Government is pursuing, is implementation of the provisions of the trust through various schemes. What has been said in the context of the aforesaid case is equally applicable on the present set of facts. There is no dispute that the objects of the Trust are covered by the objects of general public utility and the registration granted to the assessee trust is still valid. Clearly, therefore, pursuing these valid objects of general public utility through lawful statutory schemes cannot be considered as business activity, and, as a corollary thereto, exemption under section 11(2) cannot be declined by invoking proviso to Section 2(15) which can only come into play in the event of the assessee pursuing the activities in the nature of trade, commerce or business or services thereto. The case of the revenue does not, therefore, derive any strength from the judicial precedents relied upon, in view of subsequent rulings by higher judicial forums. The action of the authorities below cannot, therefore, meet our judicial approval.

9. While on the issue, we may also refer to Hon'ble jurisdictional High Court's judgment in the case of Ahmedabad Urban Development Authority Vs PCIT [(2017) 396 ITR 323 (Guj)] wherein, in materially similar circumstances, Their Lordships have, inter alia, observed as follows:

“.....The purpose and object of constitution of the Urban Development Authority is proper development or re development of urban area. Even Urban Development Authority consists of (i) a Chairman to be appointed by the State Government; (ii) such persons, not exceeding [four in number] who are members of the local authority or authorities functioning in the urban development area, as may be nominated by the State Government; (iii) Three officials of the State Government, to be nominated by that Government, ex-officio; (iv) the Presidents of the district panchayats functioning in the urban development area, or, as the case may be, part thereof, ex-officio; (v) the Chief Town planner or his representative, ex-officio; (vi) the Chief Engineer or Engineers (Public Health) of the local authority or authorities functioning in the urban development area or his or their nominee or nominees, ex-officio; 5[(vi-a) the Municipal Commissioner of the Municipal Corporation, if any, functioning in the urban development area, ex-officio;] (vii) a member secretary to be appointed by the State Government who shall also be designated as the Chief Executive Authority of the Urban Development Authority. Thus, the constitution of the Urban Development Authority is subject to the control of the State Government. The powers and functions of the Urban Development Authority as contained in Section 23 are reproduced herein above. Considering Section 40 of the Town Planning Act, the Town Planning Scheme prepared by the Urban Development Authority which has been prepared subject to sanction by the State Government for development of the Urban Development Area, also provide for roads, open spaces, gardens, recreation grounds, schools, markets, green-belts, dairies, transport facilities, public purposes of all kinds; drainage, inclusive of sewerage, surface or sub-soil drainage and sewage disposal; Lighting; Water supply etc. The Town Planning Scheme also provide for historical or national interest or natural beauty, and of buildings actually used for religious purposes. The Scheme are also provide for reservation of land to the extent of ten percent, or such percentage as near thereto as possible of the total area covered under the scheme, for the purpose of providing housing accommodation to the members of socially and economically backward classes of people. As per Section 40(i)(jj) for the aforesaid purposes certain percentage of total area covered under the scheme are allotted earmarked. Fifteen percent of total area is allotted

for the purpose of roads, five percent for parks, play grounds, gardens and open space, five percent for social infrastructure such as school, dispensary, fire brigade, public utility place as earmarked in the Draft Town Planning Scheme and Fifteen percent for sale by appropriate authority for residential, commercial or industrial use depending upon the nature of development. Last Fifteen percent is earmarked under the Town Planning Scheme for sale, by appropriate authority for residential, commercial or industrial use. The appropriate authority/Urban Development Authority is permitted to sale the said plots/lands to the extent of 15% of the total area to meet with the expenditure towards drainage, roads, gardens, schools, markets, water supply etc. So that maximum price can be fetched and the same can be utilized for the development of the Urban Development Area and so as to avoid any allegation of favoritism and nepotism, the plots are sold by public auction. It is required to be noted the entire amount realized by the assessee being Urban Development Authority either by selling plots or by recovery of some fees/charges, Urban Authority is required to use only for the purpose of development in the Urban Development Area and not for any other purpose. The learned Tribunal has observed and held that as the assessee is selling the plots, to the extent of 15% of total area, by public auction and gets maximum amount, it amounts to profiting and therefore, the activities of the Assessee can be said to be in the nature of business. However, while holding so, learned Tribunal has not properly appreciated the object and purpose of permitting the Urban Development Authority to sale the plots, maximum to the extent of 15% of the total area i.e. to meet with the expenditure for providing them infrastructural facilities like gardens, roads, lighting, water supply, drainage system etc. The learned Tribunal has also not properly appreciated the reasons for selling the plot by holding public auction i.e.; (1) to avoid any further allegation of favoritism and nepotism and (2) so that maximum market price can be fetched, which can be used for the development of the Urban Development Area.

12.1 At this stage decision of the Hon'ble Supreme Court in the case of Ahmedabad Green Belt Khedut Mandal (supra) is required to be referred to. Before the Hon'ble Supreme Court, it was contended on behalf of original land owners whose lands were included in the TP Scheme that by permitting the Area Development Authority/Urban Development Authority to sell 15% of the total area, by that the Urban Development Authority will be making profit, the Hon'ble Supreme Court has negated the aforesaid and has observed that the activities of the Urban Development Authority/Area Development Authority while selling the land to the extent of 15% to the total area covered under the scheme cannot be said to be profiting. It is observed and held that sale upto 15% is from total area covered under the scheme and not in respect of every plot of land. In order to generate financial resources for the development of infrastructure, the salable plot for residential, commercial and industrial use are allotted by the appropriate authority. It is further observed that the provision of the Act have to be read as a whole and therefore, the provision of Section 40(3)(jj)(a)(iv) for sale is to be in consonance/conjointly with other statutory provisions and not in isolation. Under the circumstances, the learned Tribunal has committed gross error in considering the activities of the appellant Urban Development Authority for profiler by selling 15% of the total area and thereby has committed gross error in holding the activities of the assessee in the nature of trade, commerce or business.

12.2 Whether the activities of the appellant AUDA can be said to be in the nature of trade, commerce or business as occurring in the first proviso to Section 2(15) of the Act, few decisions of the Hon'ble Supreme Court as well as other High Courts are required to be referred to at this stage.

12.3 *In the case of Khoday Distilleries Ltd. v. State of Karnataka [1995] 1 SCC 574, the Hon'ble Supreme Court had an occasion to consider the word "trade". In the said decision, the Hon'ble Supreme Court has held that "the primary meaning of the word "trade" is the exchange of goods for goods or goods for money".*

12.4 *In the case of State of Andhra Pradesh v. Abdul Bakhi and Bros. [1964] 5 STC 644 (SC) while considering the word "business", the Hon'ble Supreme Court has held that "the word "business" was of indefinite import and in a taxing statute, it is used in sense of an occupation, or profession which occupies time, attention or labour of a person, and is clearly associated with the object of making profit".*

12.5 *In the case of Institute of Chartered Accountants of India (supra) while considering the whether activities of Indian Trade promotion organization can be said to be in the nature of "business", despite the fact that the said organization was collecting rent for providing the space at trade, fair and exhibitions and though was receiving income by way of sale of tickets and income from tickets and sale in Pragati Maidan etc., after considering the various decisions of the Hon'ble Supreme Court as well as decisions of the other High Courts, it is held that activities of the said organization cannot be considered as "business". While holding so, Delhi High Court has observed and held as under:*

"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 a 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."

12.6 *In the aforesaid decision, after considering the decision of the Hon'ble Supreme Court in the case of CST v. Sai Publication Fund [2002] 258 ITR 70/122 Taxman 437, it is held by the Delhi High Court that "thus, if the dominant activity of the assessee was not business, then any incidental or ancillary activity would also not fall within the definition of business." In para 64, 67, 69, 70, 71 and 72 the Delhi High Court has observed and held as under:*

"64. It is not necessary that a person should give something for free or at a concessional rate to qualify as being established for a charitable purpose. If the object and purpose of the institution is charitable, the fact that the institution collects certain charges, does not alter the character of the institution.

67. The expressions trade, commerce and —business as occurring in the first proviso to section 2(15) of the Act must be read in the context of the intent and purport of section 2(15) of the Act and cannot be interpreted to mean any activity which is carried on in an organised manner. The purpose and the dominant object for which an institution carries on its activities is material to determine whether the same is business or not. The purport of the first proviso to section 2(15) of the Act is not to exclude entities which are essentially for charitable purpose but are conducting some activities for a consideration or a fee. The object of introducing the first proviso is to exclude organizations which are carrying on regular business from the scope of charitable purpose. The purpose of introducing the proviso to Section 2(15) of the Act can be understood from the Budget Speech of the Finance Minister

while introducing the Finance Bill 2008. The relevant extract to the Speech is as under:-

Charitable purpose includes relief of the poor, education, medical relief and any other object of general public utility. These activities are tax exempt, as they should be. However, some entities carrying on regular trade, commerce or business or providing services in relation to any trade, commerce or business and earning incomes have sought to claim that their purposes would also fall under charitable purpose. Obviously, this was not the intention of Parliament and, hence, I propose to amend the law to exclude the aforesaid cases. Genuine charitable organizations will not in any way be affected.' The expressions business, trade or commerce as used in the first proviso must, thus, be interpreted restrictively and where the dominant object of an organisation is charitable any incidental activity for furtherance of the object would not fall within the expressions business, trade or commerce.

69. *In the case of Addl. Commissioner of Income Tax v. Surat Art Silk Cloth Manufacturers Association: [\[1980\] 121 ITR 1 \(SC\)](#), the Supreme Court held as under:-The test which has, therefore, now to be applied is whether the predominant object of the activity involved in carrying out the object of general public utility is to subserve the charitable purpose or to earn profit. Where profit-making is the predominant object of the activity, the purpose, though an object of general public utility would cease to be a charitable purpose.*

But where the predominant object of the activity is to any out the charitable purpose and not to earn profit, it would not lose its character of a charitable purpose merely be cause some profit arises from the activity.'

70. *Although in that case the statutory provisions being considered by the Supreme Court were different and the utilisation of income earned is, now, not a relevant consideration in view of the express words of the first proviso to section 2(15) of the Act, nonetheless the test of dominant object of an entity would be relevant to determine whether the entity is carrying on business or not. In the present case, there is little doubt that the objects of the activities of the petitioner are entirely for charitable purposes. WP(C) 1872/13 Page 48 of 55 Finally in ICAI(II) (supra), this court, with reference to H. Abdul Bakhi and Bros (supra) observed as under:-*

71. *Although, it is not essential that an activity be carried on for profit motive in order to be considered as business, but existence of profit motive would be a vital indicator in determining whether an organisation is carrying on business or not. In the present case, the petitioner has submitted figures to indicate that expenditure on salaries and depreciation exceeds the surplus as generated from holding coaching classes. In addition, the petitioner institute provides study material and other academic support such as facilities of a library without any material additional costs. The Supreme Court in the case of State of Andhra Pradesh v. H. Abdul Bakhi and Bros. (supra) held as under:*

The expression "business" though extensively used a word of indefinite import, in taxing statutes it is used in the sense of an occupation, or profession which occupies the time, attention and labour of a person, normally with the object of making profit. To regard an activity as business there must be a course of dealings, either actually continued or contemplated to be continued with a profit motive, and not for sport or pleasure. (Underlining added)

72. There is nothing on record to indicate the assertion of the petitioner that its activities are not fuelled by profit motive is incorrect. Absence of profit motive, though not conclusive, does indicate that the petitioner is not carrying on any business."

12.7 Identical question came to be considered by the Delhi High Court in the case of Bureau of India Standard v. DGIT (Exemptions) [\[2013\] 212 Taxman 210/\[2012\] 27 taxmann.com 127](#). In the said decision, the Delhi High Court was considering whether the activities of the Bureau of Indian Standards (supra) in granting licenses and trading certificates and charging amounted to carrying on business, trade or commerce and while considering the said question, it is observed as under:

"In these circumstances, rendering any service in relation to trade, commerce or business cannot, in the opinion of the Court, receive such a wide construction as to enfold regulatory and sovereign authorities, set up under statutory enactments, and tasked to act as agencies of the State in public duties which cannot be discharged by private bodies. Often, apart from the controlling or parent statutes, like the BIS Act, these statutory bodies (including BIS) are empowered to frame rules or regulations, exercise coercive powers, including inspection, raids; they possess search and seizure powers and are invariably subjected to Parliamentary or legislative oversight. The primary object for setting up such regulatory bodies would be to ensure general public utility. The prescribing of standards, and enforcing those standards, through accreditation and continuing supervision through inspection etc., cannot be considered as trade, business or commercial activity, merely because the testing procedures, or accreditation involves charging of such fees. It cannot be said that the public utility activity of evolving, prescribing and enforcing standards, involves the carrying on of trade or commercial activity."

12.8 Circular No.11 of 2008 issued by the CBDT fell for consideration by the Delhi High Court in the case of G.S.I. India (supra). It is held that even as per the said circular, proviso to Section 2(15) of the Act is applicable to assessee, who are engaged in commercial activities i.e. carrying on business, trade or commerce, in the garb of 'public utilities' to avoid tax liability as it was noticed that the object 'general public utility' was sometimes used as a mask or device to hide the true purpose, which was 'trade, commerce or business'. Thus, it is evident that introduction of proviso to Section 2(15) by virtue of the Finance Act, 2008 was directed to prevent the unholy practice of pure trade, commerce and business entities from masking their activities and portraying them in the garb of an activity with the object of a general public utility. It is not designed to hit at those institutions, which had the advancement of the objects of general public utility at their hearts and were charity institutions. The attempt was to remove the masks from the entities, which were purely trade, commerce or business entities, and to expose their true identities.

In the case of G.S.I India (supra), in paras 21, 22 and 27, the Delhi High Court has observed and held as under:

"21. ... As observed above, legal terms, trade, commerce or business in Section 2(15), mean activity undertaken with a view to make or earn profit. Profit motive is determinative and a critical factor to discern whether an activity is business, trade or commerce. The court further held:-

22. Business activity has an important pervading element of self-interest, though fair dealing should and can be present, whilst charity or charitable activity is anti-thesis

of activity undertaken with profit motive or activity undertaken on sound or recognized business principles. Charity is driven by altruism and desire to serve others, though element of self-preservation may be present. For charity, benevolence should be omnipresent and demonstrable but it is not equivalent to self-sacrifice and abnegation. The antiquated definition of charity, which entails giving and receiving nothing in return is outdated. A mandatory feature would be; charitable activity should be devoid of selfishness or illiberal spirit. Enrichment of oneself or self-gain should be missing and the predominant purpose of the activity WP(C) 1872/13 Page 52 of 55 should be to serve and benefit others. A small contribution by way of fee that the beneficiary pays would not convert charitable activity into business, commerce or trade in the absence of contrary evidence. Quantum of fee charged, economic status of the beneficiaries who pay, commercial value of benefits in comparison to the fee, purpose and object behind the fee etc. are several factors which will decide the seminal question, is it business?

27. As observed above, fee charged and quantum of income earned can be indicative of the fact that the person is carrying on business or commerce and not charity, but we must keep in mind that charitable activities require operational/running expenses as well as capital expenses to be able to sustain and continue in long run. The petitioner has to be substantially self-sustaining in long-term and should not depend upon government, in other words taxpayers should not subsidize the said activities, which nevertheless are charitable and fall under WP(C) 1872/13 Pages 53 of 55 the residuary clause - general public utility. The impugned order does not refer to any statutory mandate that a charitable institution falling under the last clause should be wholly, substantially or in part must be funded by voluntary contributions. No such requirement has been pointed out or argued. A practical and pragmatic view is required when we examine the data, which should be analyzed objectively and a narrow and coloured view will be counter-productive and contrary to the language of Section 2(15) of the Act. "

12.9 *While upholding the constitutional validity of the proviso to Section 2(15) of the Act, the Division Bench of the Delhi High Court in the case of Indian Trade Promotion Organization (supra) has observed in para 58 as under:*

"As defined in Section 2(15) cannot be construed literally and in absolute terms. It has to take colour and be considered in the context of Section 10(23C)(iv) of the said Act. It is also clear that if the literal interpretation is given to the proviso to Section 2(15) of the said Act, then the proviso would be at risk of running foul of the principle of equality enshrined in Article 14 of the Constitution India. In order to save the Constitutional validity of the proviso, the same would have to be read down and interpreted in the context of Section 10(23C)(iv) because, in our view, the context requires such an interpretation. The correct interpretation of the proviso to Section 2(15) of the said Act would be that it carves out an exception from the charitable purpose of advancement of any other object of general public utility and that exception is limited to activities 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 other consideration. In both the activities, in the nature of trade, commerce or business or the activity of rendering any service in relation to any trade, commerce or business, the dominant and the prime objective has to be seen. If the dominant and prime objective of the WP(C) 1872/13 Page 54 of 55 institution, which claims to have been established for charitable purposes, is profit

making, whether its activities are directly in the nature of trade, commerce or business or indirectly in the rendering of any service in relation to any trade, commerce or business, then it would not be entitled to claim its object to be a 'charitable purpose'. On the flip side, where an institution is not driven primarily by a desire or motive to earn profits, but to do charity through the advancement of an object of general public utility, it cannot but be regarded as an institution established for charitable purposes."

13. *Applying the aforesaid decisions to the facts of the case on hand and with respect to the activities of the AUDA - Ahmedabad Urban Development Authority under the provisions of the Gujarat Town Planning Act by no stretch of imagination, it can be said that the activities of the assessee (AUDA) can be said to be in the nature of trade, commerce or business and/or its object and purpose is profiteering. Merely because under the statutory provisions and to meet with the expenditure of Town Planning Scheme and/or providing various services under the Town Planning Scheme, such as road, drainage, electricity, water supply etc. if the assessee is permitted to sale the plots (land) to the extent of 15% of the total area under the Town Planning Scheme and while selling the said plots they are sold by holding the public auction, it cannot be said that activities of the assessee is profiteering, to be in the nature of trade, commerce and business.*

13.1 *In the case of Lucknow Development Authority, Gomti Nagar (supra), it is held by the Allahabad High Court that the activities of the authority cannot be said to be in the nature of trade, commerce or business and/or profiteering and therefore, proviso to Section 2(15) of the Act shall not be applicable.*

13.2 *Similar, view has been expressed by the Rajasthan High Court in the case of Commissioner of Income Tax-I, Jodhpur vs. Jodhpur Development Authority, Jodhpur - Tax Appeal No. 63 of 2012 decided on 5.7.2016.*

14. *Considering the aforesaid facts and circumstances and more particularly, considering the fact that the assessee is a statutory body - Urban Development Authority constituted under the provisions of the Act, constituted to carry out the object and purpose of Town Planning Act and collects regulatory fees for the object of the Acts; no services are rendered to any particular trade, commerce or business; whatever the income is earned/received by the assessee even while selling the plots (to the extent of 15% of the total area covered under the Town Planning Scheme) is required to be used only for the purpose to carry out the object and purpose of Town Planning Act and to meet with expenditure while providing general utility service to the public such as electricity, road, drainage, water etc. and even the entire control is with State Government and even accounts are also subjected to audit and there is no element of profiteering at all, the activities of the assessee cannot be said to be in the nature of trade, commerce and business and therefore, proviso to Section 2(15) of the Act shall not be applicable so far as assessee is concerned and therefore, the assessee is entitled to exemption under Section 11 of the Income Tax Act. Therefore, the question no.1 is to be held in favour of the assessee and against the revenue.*

15. *Now, so far as another question which is posed for the consideration of this Court i.e. whether while collecting the cess or fees, activities of the assessee can be said to be rendering any services in relation to any trade, commerce or business is concerned, for the reasons stated above, merely because the assessee is collecting cess or fees which is regulatory in nature, the proviso to Section 2(15) of the Act shall not be applicable. As*

observed herein above neither there is element of profiteering nor the same can be said to be in the nature of trade, commerce or business. At this stage, decision of the Division Bench of this Court in the case of Sabarmati Ashram Gaushala Trust (supra) is required to be referred to. In the case before the Division Bench, the assessee Trust-Sabarmati Ashram Gaushala Trust was engaged in the activity of breeding milk cattle; to improve the quality of cows and oxen and other related activities. The Assessing Officer denied the exemption to the trust under Section 11 of the Act on the ground that considerable income was generated from the activities of milk production and sale and therefore, considering the proviso to Section 2(15) of the Act, the said Trust- assessee was denied the exemption under Section 11 of the Act. While holding that the activities of the assessee trust still can be said to be for charitable purpose within the meaning of Section 2(15) of the Act and same cannot be said to be in the nature of trade, commerce or business for which proviso to Section 2(15) of the Act is required to be applied. In paras 6, 7, 8 and 12, it is observed and held as under:

- "6. The legal controversy in the present Tax Appeal centers around the first proviso. In the plain terms, the proviso provides for exclusion from the main object of the definition of the term Charitable purposes and applies only to cases of advancement of any other of general general public utility. If the conditions provided under the proviso are satisfied, any entity, even if involved in advancement of any other object of general public utility by virtue to proviso, would be excluded from the definition of charitable trust. However, for the application of the proviso, what is necessary is that the entity should be involved in carrying on activities in the nature of trade, commerce or business, or any activity of rendering services in relation to any trade, commerce or business, for a cess or fee or any other consideration. In such a situation, the nature, use or application, or retention of income from such activities would not be relevant. Under the circumstances, the important elements of application of proviso are that the entity should be involved in carrying on the activities of any trade, commerce or business or any activities of rendering service in relation to any trade, commerce or business, for a cess or fee or any other consideration. Such statutory amendment was explained by the Finance Ministers speech in the Parliament. Relevant portion of which reads as under :

I once again assure the House that genuine charitable organizations will not in any way be affected. The CBDT will, following the usual practice, issue an explanatory circular containing guidelines for determining whether any entity is 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. Whether the purpose is a charitable purpose will depend on the totality of the facts of the case. Ordinarily, Chambers of Commerce and similar organizations rendering services to their members would not be affected by the amendment and their activities would continue to be regarded as advancement of any other object of general public utility.

7. In consonance with such assurance given by the Finance Minister on the floor of the House, CBDT issued a Circular No. 11 of 2008 dated 19th December 2008 explaining the amendment as under :-

3. The newly inserted proviso to section 2 (15) will apply only to entities whose purpose is advancement of any other object of general public utility ie., the fourth limb of the definition of charitable purpose contained in section 2 (15). Hence, such entities will not be eligible for exemption under section 11 or under section 10 (23C) of the Act if they carry on commercial activities. Whether such an entity is carrying on any activity

in the nature of trade, commerce or business is a question of fact which will be decided based on the nature, scope, extent and frequency of the activity.

3.1 There are industry and trade associations who claim exemption from tax under section 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 chargeable organizations would now be governed by the additional conditions stipulated in the proviso to section 2 (15).

3.2 In the final analysis, however, whether the assessee has for its object the advancement of any other object of general public utility is a question of fact. If such assessee is engaged in any activity in the nature of trade, commerce or business or renders any service in relation to trade, commerce or business, it would not be entitled to claim that its object is charitable purpose. In such a case, the object of general public utility will be only a mask or a device to hide the true purpose which is trade, commerce or business or the rendering of any service in relation to trade, commerce or business. Each case would, therefore, be decided on its own facts and no generalization is possible. Assesseees, who claim that their object is charitable purpose within the meaning of section 2(15), would be well advised to eschew any activity which is in the nature of trade, commerce or business or the rendering of any service in relation to any trade, commerce or business.

- 8. What thus emerges from the statutory provisions, as explained in the speech of Finance Minister and the CBDT Circular, is that the activity of a trust would be excluded from the term charitable purpose if it is engaged in any activity in the nature of trade, commerce or business or renders any service in relation to trade, commerce or business for a cess, fee and/or any other consideration. It is not aimed at excluding the genuine charitable trusts of general public utility but is aimed at excluding activities in the nature of trade, commerce or business which are masked as charitable purpose.*
- 12. All these were the objects of the general public utility and would squarely fall under section 2 (15) of the Act. Profit making was neither the aim nor object of the Trust. It was not the principal activity. Merely because while carrying out the activities for the purpose of achieving the objects of the Trust, certain incidental surpluses were generated, would not render the activity in the nature of trade, commerce or business. As clarified by the CBDT in its Circular No. 11/2008 dated 19th December 2008 the proviso aims to attract those activities which are truly in the nature of trade, commerce or business but are carried out under the guise of activities in the nature of public utility."*

15.1 Applying the aforesaid decision to the facts of the case on hand and the object and purpose for which the assessee is established/constituted under the provisions of the Gujarat

Town Planning Act and collection of fees and cess is incidental to the object and purpose of the Act, even the case would not fall under second part of proviso to Section 2(15) of the Act.”

10. In view of the above discussions, as also bearing in mind entirety of the case, we deem it fit and proper to hold that the authorities below were in error in invoking proviso to Section 2(15) and declining the benefit of Section 11 to the assessee. We see no point in remitting the matter to the file of the Assessing Officer for examination de novo, in the light of the above legal position- as was the decision of the coordinate bench in immediately preceding assessment year, since all the related facts are on record and, unlike in the immediately preceding assessment year, it is not a case of ex parte best judgment assessment order. Such an exercise will unnecessarily delay the matter reaching finality. In any case, no specific points, on which further examination is required, were pointed out to us. The grievances of the assessee are thus upheld and the Assessing Officer is directed to allow the benefits of exemption under section 11 to the assessee. The assessee gets the relief accordingly.

11. In the result, the appeal is allowed in the terms indicated above. Pronounced in the open court today on the 16th day of November, 2018

Sd/-

Justice P P Bhatt
(President)

Ahmedabad, the 16th day of November, 2018

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Copies to: (1) *The appellant*
(2) *The respondent*
(3) *Commissioner*
(4) *CIT(A)*
(5) *Departmental Representative*
(6) *Guard File*

Sd/-

Pramod Kumar
(Vice President)

By order

TRUE COPY

*Assistant Registrar
Income Tax Appellate Tribunal
Ahmedabad benches, Ahmedabad*