IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH : C : NEW DELHI

BEFORE SHRI R.K. PANDA, ACCOUNTANT MEMBER
AND
MS SUCHITRA KAMBLE, JUDICIAL MEMBER

ITA No.3110/Del/2015
Assessment Year: 2010-11

India International Centre, 40, Max Muller Marg, Lodhi Estate, New Delhi. PAN: AAATI0660C	Vs.	CIT (E), Room No.2620, Civic Centre, JL Nehru Marg, New Delhi.
(Appellant)		(Respondent)

Assessee by	:	Shri Angadh, Advocate
Revenue by	:	Shri Sandeep Kumar, CIT, DR
Date of Hearing	:	11.12.2018
Date of Pronouncement	:	14.01.2019

ORDER

PER R.K. PANDA, AM:

This appeal filed by the assessee is directed against the order dated 31st March, 2015 passed by the CIT(E), New Delhi, u/s 263 of the IT Act, 1961 for assessment year 2010-11.

2. The facts of the case, in brief, are that the assessee is a Trust and filed its return of income on 27th September, 2010 declaring nil income. The Assessing Officer completed the assessment u/s 143(3), vide order dated 7th March, 2013 accepting the

income returned by the assessee. Subsequently, the ld.CIT while going through the records noted that out of total income/receipts shown at Rs.31.21 crore, Rs.8.07 crore has been claimed exempt u/s 10(23C)(iv) and the remaining amount has been claimed exempt on the principle of mutuality. He observed that as per the MoA of the Society, the following are its main objectives:-

> "(a) To promote understanding and amity between the different communities of the world by undertaking or promoting the study of their past and present cultures, by disseminating or exchanging knowledge thereof, and by providing such facilities as would lead to their universal application;
>
> (b) To organize and maintain, as far as possible, on a no-profit/no loss basis, limited residential accommodation, with cultural and educational amenities for the members of the society as well as non-members specially invited to participate in the activities of the Centre."

3. On perusal of accumulation chart and Income & Expenditure Account, he observed that the major activities of the assessee revolve around accommodation and catering facilities and these activities are not on no profit/no loss basis since there is continuous surplus being reflected in the account for many previous years. Profiteering negates the character of the Trust of being charitable. He further noted that the second objective mentioned is not charitable in itself and it becomes charitable only when it is read with first objective. But, beneficiary in the first category is general citizens of the world whereas beneficiary in the second category is exclusive selected members of the Trust and their few invited guests. Therefore, according to him, this trust cannot be called as serving the general public. He further noted that the entire activities of the assessee also include providing of services such as accommodation, food and beverages, etc., for payment of charges which is caught within the mischief proviso 1 and 2 to section 2(15) read with 3rd proviso to section

143(3) of the IT Act. In view fo the above, he issued a show cause notice asking the assessee to explain as to why the order passed u/s 143(3) dated 7th March, 2013 be not treated as erroneous and prejudicial to the interests of the Revenue.

4. In response to the notice issued by the ld.CIT(E), the assessee appeared and made its submissions. It was argued that:

(i) Jurisdiction u/s 263 of the Act could be exercised by the CIT if and only if the order passed by the assessing officer is found to be 'erroneous' as well as 'prejudicial to the interests of the Revenue'. In the present case, the twin conditions, are not satisfied qua that issue in as much as there was no error in the assessment order allowing the claim of the assessee and no prejudice has been caused to Revenue, as a consequence of the stand., taken by the assessing officer in the assessment order; and

(ii) The assesses had at the time of filing return of income, as well as during the course of original assessment proceedings, duly submitted all relevant facts and material before the assessing officer with respect to its claim of exemption u/s 10(23C)(iv) as well as on the principle of mutuality. The Assessing officer also looked into the applicability of section 2(15) read with proviso 1 & 2 as is evident from the questionnaire and queries raised during the course of assessment proceedings. Details/documents available in the record pertaining to original assessment, clearly establishes that all necessary facts/ information were available before assessing officer. Based on appreciation of the details/ documents, the assessing officer passed the original assessment order accepting the claim of the assessee after due application of mind. It cannot, therefore be contended that the assessment has been framed without due application of mind.

(iii) It is not a case where the AO has not made enquiries regarding the activities being undertaken by the assessee. That activities pertaining to accommodation, food and beverages is also one of the activities of the assessee, is neither hidden or is not something new that has been undertaken by the assessee for the first time and in any case, was glaringly visible and known to AO while passing the assessment order. It was perhaps in the background of these activities that AO has raised a specific query as to whether assessee is carrying out any business. On being satisfied based on the information filed that AO after due application of his mind, had passed the order. The latest amendment u/s.2(15) were also in the mind of the AO and thereon also he made a specific query which was also replied to. These activities are very much part and parcel of overall objectives contained in the Memorandum of Association of the assessee. It is the same Memorandum of Association and Rules & Regulations which are continuing ever since the assessee has been formed and there is no change in the rules and regulations or in the Memorandum of Association of the assessee. It is the same Memorandum of Association of the assessee based on which assessee has been granted registration u/s.l2A(a) of the Income-tax Act, or the assessee has been notified as a charitable institute u/s.80G or the assessee has been notified by the CBDT as an eligible institute for the purpose of section 10(23C)(iv) of the I.T. Act. All these notifications/registrations are valid till date and there is no violation of any sort that has been alleged by any of the authorities who have granted these registrations. To allege or hold it to otherwise without any basis are contrary to the facts that assessee is violating any of the conditions which are stipulated in these sections.

(iv) The total gross income of the Society for the year ended 31st March, 2010 is Rs.31.24 crores, which includes interest income of Rs.6.25 crores. As against this, the

total expenditure is Rs.26.44 crores. The overall, surplus, as also stated by your honour is Rs.4.79 crores. Therefore, no activity whatsoever of the Society can be said or alleged to be generating any surplus. The surplus, if any, has resulted only because of interest income being earned by the Society on the accumulated funds of earlier years.

(v) The assessee also relied upon the submission made before the CBDT at the time of seeking approval u/s 10 (23C)(iv) of I.T. Act, vide letter dated 12.12.2006. It is contended that the CBDT was satisfied that the predominant objective of the Trust remains charitable; and therefore, ,the assessee was notified u/s. 10(23C)(iv) of the Income-tax Act.

(vi) The assessee has also relied on a Board Circular No.11 of 2008, stating that it has been clarified that an assessee or a trade organization can have both the activities i.e. charitable as well as mutual, therefore your honour's observations to the contrary is also not correct in view of this Board Circular.

(vii) It is contended that as there is no change in the objects or in the activities of the centre for last 5 decades or more, there is no reason to change the status of taxability of the assessee.

(viii) The assessee relied upon various Court decisions in support of its contention.

Some of the decisions referred by the assessee are:-

- Hon'ble Delhi High Court in the case of India Trade Promotion Organization vs. D.G. of Income Tax (Exemptions).
- The Delhi High Court in CIT vs. Delhi Gymkhana Club Ltd. [2011] 339 ITR 525, 527 (Del)
- CIT vs. Executors of Estate of Late H.H. Raj kuverba Dowager 115 ITR 301,

305 (Karn.)

- Jagadhary Electricity Supply Co., 166 ITR 143 (Punjab)
- 163 ITR 129,137 (Mad.) - Venkata Krishna Rice Co. Vs. CIT.
- 160 ITR 123 (Karnataka) - Shivaputrappa Chanappa Mangoli
- 189 ITR, 772 (Allahabad)-K.N.Agarwal Vs. CIT
- 243 ITR 83, 87 (S.C.) - Malabar Industrial Co. Ltd. Vs. CIT
- 243 ITR 490, 500 (Madras) - CIT Vs. Seshasiyas Paper

5. However, the ld.CIT (E) was not satisfied with the arguments advanced by the assessee and held that the order passed u/s 143(3) dated 7th March, 2013 is erroneous and prejudicial to the interests of the Revenue. He, therefore, set aside the order passed by the Assessing Officer with a direction to examine the issues discussed and frame the assessment afresh. The relevant observations of the CIT(E) from para 3 onwards read as under:-

> "3. I have carefully considered the submissions made by the assessee and gone through the facts of the case. It is seen that the assessee is a Society registered under Society Registration Act, 1860 on 09.04.1959 and is also registered u/s 12A of I.T. Act. It is also approved u/s 10(23C)(iv) of the IT Act. From the details submitted by the assessee, as also from its Memorandum of Association (MOA) / Rules & Regulation (& R), it is seen that the assessee society is engaged in cultural and intellectual activities. During the year under consideration, it has continued to conduct seminars , talks, discussions and cultural activities as in the past. Rule 3 of MOA of the assessee comprises of its objects. Rules && Regulations (R&R) of the assessee mainly deal with the qualifications for becoming member of the assessee, types of membership, privileges of members, subscription, etc. As per Rule 4(A) of R&R, individual membership of the assessee is open to persons of India or foreign origin. Besides, there are corporation Foundation Members/ Corporate Members, which are Universities, national Laboratories, National Academies, etc. As per the assessee while its cultural and intellectual activities are open to general public, hostel and restaurant facilities are limited to its members and their guests only.
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> 3.1. It is seen that though the assessee is notified u/s 10(23)(c) (iv), of the ITAct, 1961 for the Assessment Year 2006-07 and onwards vide Notification No.13/ 2007 dated 19.1.2007, however, the assessee in its audit Report in form

No. 10 BB has shown only part of its income and expenditure attributable to activities in terms of section 10(23)(c) (iv). The details of income / expenditure / accumulation of the assessee as given in the form No. 10 BB are as under,

(i) Income Rs.8,07,18,905/-
(ii) Income applied for charitable purpose Rs.4,07,53,620/-
(iii) Income allowed to be accumulated to the extent of 15% Rs.1,21,07,836/-
(iv) Amount above 15% accumulated Rs.2,78,57,449/-

Thus, the taxable income as per the Audit Report in Form no.10BB works out to Nil. However, the total income / expenditure / surplus ,etc. as per the Income & Expenditure a/c of the assessee for the current assessment year are Rs 3,123.95 lacs/ 2,644.20 lacs /Rs.479.75 lacs respectively. In its return filed in ITR 7, the assessee has shown only income of Rs. 8,07,18,905/- from other sources and claimed the same to be exempt u/s 10(23)(c) (iv). So far as the surplus / deficit in respect of Income / Expenditure other than that reported in Form no. 10 BB is concerned, both the return of income as well as the form No. 10 BB are silent on it.

3.2 The AO, however, accepted the Nil income filed by the assessee in assessment order dated 07.03.2013 passed u/s 143 (3) observing as under :-

"The assessee is registered u/s 12A(a) of the I.T. Act, since 18.06.1973 and also approved u/s 80G(5)(vi) of the I.T. Act, valid from 2010-11 to 2012-13. The assessee is notified exempt u/s 10(23) (c)(iv), of the I. T. Act, 1961 for the assessment year 2006-07 and onwards vide notice No. 13 /2007 dated 19.1.2007 from the detail submitted the assessee, it is seen that the assessee the society is engaged in cultural, educational and intellectual activities. During the year under consideration, it conducted many seminars, talks, discussions and cultural activities. After examining the details and explanations and the books of accounts, which were examined on test check basis, the assessee is appears be carrying out its activities as per provisions of section 11 to 12 of the Income Tax Act, 1961. Hence the total income of the assessee returned at Rs. Nil is accepted."

3.3 As regards the claim of the assessee that its entire income is exempt u/*s* 10(23)*(c)*(iv), it is to be noted that the exemption u/s 10(23)(c) (iv), is subject to fulfillment of conditions laid down in the order notifying the assessee u/s 10(23)(c) (iv). It is, however, seen that assessee has claimed only part of its income as exempt and compliance of condition laid down u/s *10(23)(c)*(iv), is limited to extent of income of Rs. 8,07,18,905/-. Thus, the claim of the assessee that *its* entire income is exempt u/s 10(23C) (iv) is rejected.

3.4 Further, on taking into consideration, the entire activities of the assessee, it is noticed that these also include providing of services, such as accommodation, food & beverages, etc. for payment of charges, which is caught within the mischief of proviso 1 & 2 to section 2(15) read with 3rd proviso to Section 143(3) of the Income Tax Act, 1961. These provisions are reproduced here under:-

Section 2(15):-

“Charitable purpose" includes relief of the poor, education medical relief, [preservation of environment (including watersheds, forests and wildlife) and preservation of monuments or places or objects of artistic or historic interest and the advancement of any other object of general public utility:

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 that the first proviso shall not apply if the aggregate value of the receipts from the activities referred to therein is ten lacs rupees or less in the previous year.

3rd proviso to section 143(3) (w.e.r.f. 1.4.2009):-

Provided also that notwithstanding anything contained in the first and the second proviso, no effect shall be given by the Assessing officer to the provisions of clauses (23C) of section 10 in the case of a trust or institution for a previous year, if the provisions of the first proviso to clause (15) of section 2 become applicable in the case of such person in such previous year, whether or not the approval granted to such trust or institution or notification issued in respect of such trust or institution has been withdrawn or rescinded.”

3.5 The assessee has submitted that its activities are not driven by profit making which is an essential ingredient to hold the activity as being in pursuance of a business or trade with a profit motive. It is contended the activities of the assessee for the AY 2009-10 & 2010-11 after insertion of proviso to section 2(15) have not been hit by these provisions. As the Activities of the assessee are on no profit no loss basis, it is not having any commercial activity. However, as per the Income and Expenditure account of the assessee, the surplus generated in assessee’s case os...... Rs.292.17 lacs as against Rs. 230.08 lacs in the preceding assessment year. Therefore, the claim of the assessee that its activities are not on commercial lines is not tenable and provisions of proviso 1 & 2 to section 2(15) r/w 3rd proviso to section 143(3) of the Income Tax Act are applicable to the assessee as such exemption u/s 10(23C)(iv) is not allowable to assessee. Its income was to be computed under chapter IV of the Income Tax Act. The AO has, however, failed to look into this aspect too.

3.6 As regards the assessee's claim that its income is exempt u/s 11 of IT Act, it being a trust, registered u/s 12A of the Income Tax Act, 1961. The same rejected on following accounts:-

(i) Exemptions u/s 11,12 and 13 are allowable subject to fulfillment of conditions laid down under the respective section. As already observed the assessee has shown the compliance to conditions only with respect to income amounting to Rs. 807.19 lacs.

(ii) Further, as already stated in Para 3.6 above, the assessee activities are hit by proviso to section 2(15). Therefore, the exemption u/s 11 top is not admissible in view of provisions 2(15) read with section 13(8).

(iii) In any case, the claim of the assessee has not been examined by the AO during the assessment proceedings.

3.7 As regards the assessee's claim that its income is not taxable being income derived from mutual concern, it is seen that activities of the assessee are claimed to be hybrid, partly covered by provisions of section 10(23C)(iv) read with section 2(15) and partly by principle of mutuality. An assessee can have income from different heads or income from difference sources, but it cannot have its income and expenditure for the same sources apportioned on the basis of different principles, as claimed-by the assessee. Therefore, the assessee cannot be allowed to compartmentalize its activities and income arising therefrom, under charitable activities and mutual activities. All the activities have to be seen in its totality. While cultural and intellectual activities of the assessee are open to general public the accommodation and related activities are restricted only to its members as well non members specially invited to participate in the activities of the society. Thus, there is not complete identity between the contributors and participators thus assessee cannot be considered to be covered by principle, of mutuality.

4. In view of the detailed discussion as above, I find no merit in the submissions made by the assessee. It is seen that the assessing officer while framing the assessment has not at all discussed about the nature of receipts and claim of exemption of the applicant Society. Therefore, the assessee's contention that the exemption has been allowed by the assessing officer after due application of mind is not correct. Seeking information, getting the same and placing it on record does not by itself prove the application of mind by the assessing officer. It is not a case where the argument of two opinions or the argument of due application of mind by the assessing officer holds good. Therefore, both these lines of argument by the assessee is rejected.

4.1 Reliance is also placed on the decision of Hon'ble High Court of Rajasthan in the case of Smt. Renu Gupta 301 ITR 45 wherein it was held as under:-

"Where Commissioner set aside assessment order on ground that though Assessing Officer seemed to hold deep investigation by selecting case for scrutiny, but, on otherhand, submissions of assessee were accepted without obtaining details and without considering further inquiry/investigation, as assessment had been completed in routine manner without applying his mind. Commissioner was

justified in holding that assessment order was erroneous and prejudicial to interest of revenue."

4.2 This is a clear case of non application of mind and non application of law. The asstt. order by mere reading of it is erroneous as it has treated the whole of income of the assessee as exempt with reference to section 11,12 and 13 though the assessee had submitted report in form No. 10 BB only with respect of part income of Rs Rs.807.19 lacs.. The Assessee's claim of exemption with respect to balance income has thus not been examined at all. Further, in view of the discussion as above, assessee's claim of exemption either u/s 10(23) (c) (iv), u/s 11 or under the principle of mutuality do not appear to be tenable. Therefore, entire surplus of Rs.479.75 lacs to be exempt was to be brought to tax, which the AO has failed to do. Thus, the order is both erroneous and prejudicial to the interest of revenue.

4.3. Support is drawn from the decision of Hon'ble Karnataka High Court, in the case of Infosys Technologies Ltd. reported in 341 ITR 293 (Kar) wherein the Hon'ble High Court observed that *'The provision is intended to plug leakages to the revenue by erroneous orders passed by the lower authorities, whether by mistake or in ignorance or even by design'*

The decision of the Hon'ble Full Bench of the Hon'ble Gauhati High Court in the case of Jawahar Bhattacharjee reported in 341 ITR 434 (Gauhati) (F B), also supports the stand of revenue. The Hon'ble'High Court observed that '*Not holding such inquiry as is normal and not applying the mind to relevant material in making, an assessment would be erroneous assessment warranting exercise of revisional jurisdiction.'* It has been further held as under:-

> *The object of the provision is to correct an erroneous order prejudicial to the interests of Revenue, as the Department has no right to file an appeal against the order of the Assessing Officer. While the power is not meant to be substituted for the power of the Assessing Officer to make assessment, the same can certainly be exercised when the order of the Assessing Officer is erroneous and prejudicial to the interests of the Revenue. Whether or not the order is erroneous has to be decided from case to case. Interpretation of section 263 has been the subject-matter of consideration in various decisions. In Malabar Industrial Co. vs. CIT [2000] 243 ITR 83 (SC), it was observed (pages 87 and 88):*
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> *"There can be no doubt that the provision cannot be invoked to correct each and every type of mistake or error committed by the Assessing Officer, it is only, when an order is erroneous that the section will be attracted. An incorrect assumption of facts or an incorrect application of law will satisfy the requirement of the order being erroneous. In the same category fall orders passed without applying the principles of natural justice or without application of mind....*

The scheme of the Act is to levy and collect tax in accordance with the provisions of the Act and this task is entrusted to the Revenue if due to an erroneous order of the Income-tax Officer, the Revenue is losing tax lawfully payable by a person, it will certainly be prejudicial to the interests of the Revenue."

5 In view of the detailed discussion as above it is held that the order u/s 143 (3) dated 07.03.2013, is erroneous and prejudicial to the interest of revenue. The assessment order is, therefore, set aside with the directions to the AO to examine the issues discussed above and frame the asstt. afresh. The AO shall frame the assessment after properly examining for necessary supporting details / evidences and after giving the assessee due opportunity of being heard."

5.1 Aggrieved with such order of the CIT(E), the assessee is in appeal before the Tribunal by raising the following grounds:-

1. "That the Ld. CIT (Exemption) has grossly erred in law and on the facts of the appellant's case in holding that the order passed by the A.O. u/s 143(3) is erroneous and prejudicial to the interests of revenue.

2. That the order passed u/s 263 dated 31.03.2015 is bad in law and the revision order u/s.263 deserves to be cancelled.

3. That the Ld. CIT (Exemption) has erred in law in holding that the A.O. failed to examine the applicability of amended provisions of Section 2(15) of the Income Tax Act in spite of the fact that the AO made specific enquiries at the stage of original assessment in the light of amendments.

4. That the Ld. CIT (Exemption) has grossly erred in holding that provisions of Sections 11, 12, 13 and Section 10(23C)(iv) of the Income Tax Act are not applicable to the facts of the appellant in spite of the fact that registration u/s 12A, 80G and 10(23C)(iv) remain intact.

5. That the Ld. CIT (Exemption) grossly erred in law in holding that the activities such as accommodation, food and beverages to the members of the appellant represent trade and business irrespective of the fact that "dominant object" of the appellant remains charitable not driven by "profit motive".

6. That the Ld. CIT (Exemption) grossly erred in law in invoking provisions of Section 263 although it was not a case of "no enquiry" by the A.O. on the applicability of provisions of Section 2(15) with its latest amendment.

7. That the Director of Income-tax (Exemptions) has erred in holding that all the activities of the assessee had to be seen in totality and the assessee cannot be

allowed to compartmentalize its activities and income arising there from under charitable activities and mutual activities.

8. That the learned CIT (Exemptions) grossly erred in concluding that the surplus has arisen to assessee from the activities of accommodation, food and beverages to the members, in spite of demonstrating that in the absence of interest income from the past accumulation no surplus would have arisen.

9. That the learned CIT (Exemptions) failed to appreciate that appropriate disclosures had been made about the mutual activities and assessment order passed by the AO was neither erroneous nor prejudicial to the interest of revenue.
10. That each ground is independent of and without prejudice to the other grounds raised herein.

PRAYER

The appellant-assessee prays that the relief as per grounds of appeal above may kindly be allowed to it and the appellant may also be allowed to add, delete, amend or substitute any ground(s) of appeal either at or before the date of hearing."

6. The ld. counsel for the assessee referred to the order of the Tribunal in assessee's own case for the immediately preceding assessment year i.e., assessment year 2009-10 and submitted that under identical circumstances the order passed u/s 263 by the DIT(E), New Delhi was quashed. The ground raised by the Revenue challenging the order of the CIT(A) allowing the benefit of section 11 and 12 of the IT Act ignoring that the activities of the trust were not within the purview of section 2(15) of the Act during the year was upheld by the Tribunal, vide ITA No.5228/Del/2015, order dated 9th October, 2017 for assessment year 2011-12, and the ground raised by the Revenue was dismissed and on a further appeal by the Revenue the Hon'ble High Court has dismissed the appeal filed by the Revenue. He accordingly submitted that this being a covered matter in favour of the assessee where all the issues raised by the present CIT(E) have been considered, therefore, the order

passed by the CIT(E) should be set aside and the grounds raised by the assessee should be allowed.

7. The ld. DR, on the other hand, heavily relied on the order of the CIT(E). He submitted that the Assessing Officer in a very summary manner has accepted the nil return filed by the assessee without going through the various issues as has been pointed out by the ld. CIT(E). He submitted that although the third proviso to section 143(3) which was inserted by the Finance Act, 2012 with retrospective effect from 01.04.2009 was available in the statute book while passing order, however, the Assessing Officer has not considered the same. So far as the argument of the ld. counsel for the assessee that the Tribunal has considered all the issues is concerned, he submitted that the proviso was not there when the order was passed for the preceding assessment year. Therefore, the same cannot be followed in the instant case. So far as the order of the Tribunal for assessment year 2011-12 is concerned, he submitted that the issue of section 10(23C) was not there and the decision was only in respect of section 11 and 12 read with section 2(15). Therefore, the order of the High Court in assessee's own case for assessment year 2011-12 also cannot be followed. Since the Assessing Officer in the instant case, without verification of the relevant details has granted relief to the assessee, therefore, the order has become erroneous and prejudicial to the interests of the Revenue. Therefore, the ld.CIT(E) was fully justified in invoking the jurisdiction u/s 263 of the IT Act. He also relied on the decision of

Hon'ble Allahabad High Court in the case of *ACIT vs. Agra Development Authority reported in 407 ITR 562.*

8. We have considered the rival arguments and perused the material available on record. We have also considered the various decisions cited before us. We find the assessee, in the instant case is registered u/s 12A(a) of the IT Act since 18th June, 1973 and is also approved u/s 80G of the IT Act which is valid from assessment years 2010-11 to 2012-13. The assessee is also notified as exempt u/s 10(23)(c)(iv) of the IT Act for assessment year 2006-07 onwards. The assessee, in the instant case, filed return of income declaring nil income which was accepted by the Assessing Officer in the order passed u/s 143(3) dated 7th March, 2013. As per Form No.10BB out of total income of Rs.8,07,18,905/-, the assessee has applied income for charitable purposes of Rs.4,07,53,620/-, income allowed to be accumulated to the extent of 15% of Rs.1,21,07,836/- and the assessee has accumulated an amount of Rs.2,78,57,449/-. According to the ld.CIT(E), the total income/expenditure/surplus, etc., as per the Income & Expenditure Account for the current assessment year are Rs.3,123.95 lakhs/Rs.2,644.20 lakhs/Rs.479.75 lakhs, respectively. According to him, the assessee has claimed only part of its income as exempt and compliance of condition laid down u/s 10(23)(c)(iv) is limited to the extent of income of Rs.8,07,18,905/-. It is also his observation that the Assessing Officer has failed to examine as to whether the activities of the assessee are exempt in nature. In view of the same, he has invoked the

provisions of Section 263 of the IT Act and restored the matter to the file of the Assessing Officer for fresh examination.

8.1 We find identical issue had come up before the Tribunal in assessee's own case for the immediately preceding assessment year. We find the Tribunal in ITA No.3124/Del/2014, order dated 11th May, 2015, has thoroughly discussed all the issues including the insertion of third proviso to section 143(3) and has decided the issue in favour of the assessee by observing as under:-

> 6. We have considered the rival submissions and have perused the record of the case. At the outset we may point out that as far as the objection of ld. DIT(E) as regards the income not being returned by assessee in its income-tax return or in form 10BB is concerned, the same was claimed as exempt on account of concept of mutuality, as in earlier years and, therefore, there was no basis for the AO to take any contrary view on the same. Accordingly, the proceedings u/s 263 initiated by ld. DIT(E) on this count is not at all tenable in law, particularly when this view has been taken by the department since inception.
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> 6.1. Now coming to the main ground regarding applicability of proviso to section 2(15) by the ld. DIT(E). This proviso has been made applicable to institutions notified u/s 10(23C)(iv) w.e.f. 1-4-2009 by inserting 17 th proviso to section 10(23C)(iv) by Finance Act 2012, as reproduced below:
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> > "Provided also that the income of a trust or institution referred to in sub-clause (iv) or sub-clause (v) shall be included in its total income of the previous year if the provisions of the first proviso to clause (15) of section 2 become applicable to such trust or institution in the said previous year, whether or not any approval granted or notification issued in respect of such trust or institution has been withdrawn or rescinded."
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> 6.2. Prior to such insertion, the position of law was like this. Section 2(15) defined the 'charitable purpose'. This is an inclusive definition and, therefore, in view of the opening phrase of section 2, which reads as "unless the context otherwise requires", the said definition could not be imported to institutions notified u/s 10(23C)(iv) by Competent Authority. Here approval entitled the institution, subject to fulfilment of conditions laid down in notification read with conditions laid down in section 10(23C). In view of 7th proviso to section 10(23C), the Competent Authority was required to examine that if the institution was deriving any income from profits and gains, then the said business was only incidental to the attainment of its main object. However, after application of proviso to section 2(15), by insertion of 17 th proviso

to section 10(23C) by Finance Act, 2012 with retrospective effect from 1-4-2009, the ambit has considerably been widened and if an assessee is carrying on any activity which is in the nature of trade, commerce or business then the assessee cannot be said to be carrying on charitable activities. In view of changed legal position, ld. DIT(E) concluded that since AO had not considered the applicability of proviso to section 2(15), the assessment order was erroneous as well as prejudicial to the interest of Revenue.

6.3. Admittedly, the third proviso to section 143(3), requiring the AO to examine the applicability of proviso to section 2(15) in case of institutions notified u/s 10(23C)(iv) in view of insertion of 17th proviso to section 10(23C), was not on statute book at the time when assessment order was passed and since the notification remained in force, in any view of the matter, the invocation of section 263 by ld. DIT(E) was not justified in view of the decision of Hon'ble Supreme Court in the case of Max India Ltd.
(supra), wherein it has been held as under:-

> "We find no merit in the said contentions. Firstly, it is not in dispute that when the order of the Commissioner was passed there were two views on the word "profits" in that section. The problem with section 80HHC is that it has been amended eleven times. Different views existed on the day when the Commissioner passed the above order. Moreover, the mechanics of the section have become so complicated over the years that two views were inherently possible. Therefore, subsequent amendment in 2005 even though retrospective will not attract the provision of section 263 particularly when as stated above we have to take into account the position of law as it stood on the date when the Commissioner passed the order dated March 5, 1997, in purported exercise of his powers under section 263 of the Income-tax Act.

6.4. Further we find that 263 proceedings initiated by ld. DIT(E) on the ground that there was no application of mind by AO cannot be sustained because vide questionnaire dated 23-8-2011, the AO had issued notice u/s 142(1) and had required the assessee as under:

> "2. Note on the activities of the trust in AY 2009-10, Explanation along with documentary proof to justify that these activities were charitable as per Section 11,12,13 read with Section 2(15) in light of the recent amendment. Show computation as to how 85% is applied for objects of the trust.

6.5. Further in question no. 13 the assessee was required as under:

> "13. Whether any business is carried out by the Trust/Society/Institution. If yes, please produce the complete books of accounts along with bills/ vouchers in respect of such business activities."

6.7. The assessee had given detailed reply, the contents from which have been reproduced in later part this order. Therefore, this cannot be said that there was non application of mind by AO. We further find considerable force in the submission of ld. counsel for the assessee that AO had taken one of the possible views after considering the assessee's reply and, therefore, 263 proceedings could not be initiated against the assessee. Therefore, it cannot be said that AO's order was in any manner erroneous or prejudicial to the interests of revenue.

6.8. However, since detailed arguments have been advanced before us with respect to applicability of proviso to section 2(15), we proceed to examine the same. First objection of revenue is with regard to the amounts realized out of catering facilities provided at the centre. Catering facilities were provided in the centre for members who came to the centre or stayed in the centre and attended discourses, conferences, seminars, lectures etc. We reproduce the following note filed by assessee on catering facilities at the centre:

> "INDIA INTERNATIONAL CENTRE
> Note on Catering Facilities at the Centre
>
> Catering facilities are provided in the Centre for members who come to the Centre or stay in the Centre and attend the discourses, conferences, seminars, lectures. The Centre has two dining halls and two Lounges. The dining hall operates for breakfast, lunch and dinner. The lounge provides variety of snacks, tea coffee and soft drinks. In the Dining Hall of the Main Centre, a Member can book a table for maximum of 8 persons including guests. It may be stated that it is only the Members who can hold conferences, seminars and the centre is also providing catering services to them. The Rules relating to the booking and cancellation of IIC conferencing and catering facilities:
>
> 1. Outside catering or food items brought from outside are not permitted.
> 2. Cell phones should be switched of before entering into conferencing venues and the noise outside the conference rooms and auditorium must be avoided.
> 3. Sale of ticket, books, collection of donation or any commercial activity is not permitted.
> 4. Live band, Marriage Ceremonies, Children's parties or any another function where rituals involving pendit, phera, havan etc. are not permitted.
> 5. Meeting or political, Religious nature and AGM are not permitted.
> 6. It may not be out of place to mention here that the notice has also been granted exemption from income tax under sub clause (iv) of clause (23C) of Section 10 of Income Tax Act.
>
> **The Kitchen and the dining hall are operated by IIC's own staff members and no outsourcing is done for the said facilities.**

Rules and Regulations

Booking of Tables:

1. In the Dining Hall of the Main Centre, a Member can book a table for maximum of 8 persons and in the Dining Hall, Annexe for 10 persons.
2. There is no provision for reserving of table in the Lounge.
3. Children below 8 year of age are not allowed in the Dining Hall of both the Main Centre and Annexe. Members accompanied by children who visit the Lounge may use the outer Verandah of the Lounge in the Main Centre. In the Annexe Lounge, children below 8 years of age accompanying members are allowed to avail of catering facilities only during lunch hours on Saturday, Sunday and other Public Holidays between 12.30pm to 2.30 pm.
4. Tables are not allowed to be joined in any catering outlets.
5. Use of Cell Phones is not permitted in the Dining Hall, Lounge. Cell Phone may kindly be kept in Vibration mode.
6. Members are requested to speak in a manner that does not disturb those seated at the neighboring table."

6.9. The second objection is with respect to hostel accommodation provided on rent. On this aspect the assessee has given the following note:

Note on Activities Carried on by India International Centre

India International Centre (IIC) is a Society registered under the Societies Act of 1860 and is strictly governed by its Memorandum of Association and Rules & Regulations. The objects of the Society are wholly charitable in nature and it has been so held right from its inception year after year. There is absolutely no change in the objects or the activities of the Centre right from its inception.

Hostel services are predominant to sub-serve the main objective of the Centre i.e. organizing a very large number of programmes throughout the year which are open to the general public, free of cost, the price of which is inestimable. The activity of hostel provides basic amenities to all the invitees in the seminars, cultural and other functions and to research scholars free of cost and only guests of members are allowed to avail of facilities in case surplus accommodation is available at times. Your kind attention is invited to Art.VII of Memorandum of the Centre which states "to organize and maintain, as far as possible, on no-profit no-loss basis, limited residential accommodation, with cultural and educational amenities, for the members of the Society coming to participate in the activities of the Society and of other bodies with cognate objectives, as well as, non-members, specially invited to participate in the activities of the Society", We give herein below a resume of the activities of the Centre.

The Centre organizes very large number of programmes throughout the year, which included seminars, talks, discussions, music, dance, dance dramas, documentary films, art exhibitions, feature films etc. Of these roughly 50% can stated to be in the domain of academic and intellectual activities in terms of seminars, talks, discussions and the balance 50% in terms of cultural programmes, such as dance, music etc. All these programmes are open to the general public free of cost, the price of which is inestimable. The entire nerve centres of the institution revolve around these programmes.

A very significant number of members I their guests come to the Centre or stay in the Centre and attend the discourses, conferences, seminars, lectures etc. sponsored by the IIC on its own initiative or in collaboration with number of cultural, academic, intellectual institution in the country,
In addition to what the IIC and our collaborator organize, the Centre also makes its facilities available to members and their guests for conducting programmes of only academic, intellectual or cultural category of functions. 1500 programmes in a year are organized by members and their guests providing academic discussion contributing to the inteJ!ectual thought in the country and also organizing number of cultural programmes benefiting the citizens of Delhi. These programmes are organized in the Auditorium, Conference Halls, Rooms and Lecture Halls.

There are also numbers of other seminars, large and small, where numbers of people were provided hospitality by IIC for stay in the hostel. In addition there are large numbers of smaller programmes spread throughout the year. For these programmes a very large number of members and their guests stay for varying periods of time. It is difficult to build information system or reflect in the accounts as to which or how many members attend which programmes like seminars or cultural events. The programmes always need not necessarily be in the IIC, like nominees of Universities attending conference in a number of institutions in Delhi. As per the rules these members are entitled to stay.

That IIC is a centre for promotion of intellectual and cultural activities can be seen when we compare it with other institutions. This is because the Centre is geared to be only an institution of not only for promoting culture and academic thought. but also in inducting members ensures that the Members fulfill the objects of the Centre.

Annual Subscription is charged from the members.

6.10. In the backdrop of aforementioned factual background, we proceed to examine whether these activities take colour of trade or business activity or merely facilitating in achievement of dominant object of assessee, which is the test.

6.11. The assessee society was formed to promote, understanding and amity between different communities of the world by undertaking or promoting study of their past and present culture, by disseminating or exchanging knowledge thereof, and to provide facilities for undertaking, organizing and facilitating study courses, conferences, seminars, lectures and research on various matters in order to achieve these objects and to provide facilities and also for establishing and maintaining libraries and undertaking such publications the assessee had to earn income to incur expenditure on the activities. At this juncture we may observe that unless there is profit motive in carrying out an activity, it cannot take colour of trade or commerce.

6.12. The predominant activities of the centre was not to earn income but to provide facilities for disseminating or exchanging knowledge as per the object of the society. There is no gainsaying that without creating a proper platform the primary object of dissemination and exchanging of knowledge could not be achieved. Therefore, merely because incidental income was earned by assessee society for achieving its dominant object from providing hostel and catering activities, it cannot be said that the assessee was doing trade or business as contemplated under proviso to section 2(15). The centre had to necessarily charge for the hostel, catering and use of such facilities from members/ participants since it had to recover cost and at the same time have enough funds to carry out the charitable activities. We are reminded at this juncture of an old saying – “Everything comes at a price”. It is incomprehensible that an institution which is carrying out charitable objects will provide the essential facilities free of charge. It is not the allegation of ld. DIT(E) that the main object of asessee, in any manner, did not fulfill the criteria of charitable activity. On the contrary she herself has observed that the first category does fulfill the charitable purpose/ criteria and it is only the second category i.e. giving of hostel, catering etc. that the assessee’s activities are caught within the mischief of second proviso to section 2(15). It is also not the case of ld. DIT(E) that there was no free access to the general public for programmes such as dance, music, seminars etc. In its reply the assessee had also pointed out that there were number of occasions when the centre did not charge institutions for holding their programmes such as lectures, discussions or seminars etc. Admittedly there is no funding from government or any other outside bodies to sustain activities of promotion of cultural and intellectual activities and, therefore, the assessee had to be totally self supporting and self financing and for this purpose, in
order to achieve its main objective, it had to charge and earn receipts from members so that the activities could be carried out. Admittedly, the assessee is disseminating knowledge to general public on subjects ranging from art, dance, urban development means etc. through conferences, lectures etc. It was further pointed out before AO that even while charging the members, there was no commercial motive in fixing the rates. The rates were nowhere near the commercial rates and were generally fixed to recover the cost and cost of activities to run the centre. These activities could not be treated in the nature of trade or commerce.

6.13. As regards hostel accommodation, there were number of rooms and guidelines for hiring of the accommodation and also there were restrictions. It was also pointed out that, as could be seen from the list of programmes, the assessee conducted very large number of programmes during the year which covered discussions, music, dances, exhibitions and also certain special programmes such as festivals during the course of the year. These programmes were published through the newspapers and website. Further e-mails were sent to members as well as non-members. Periodical articles also appeared in the various newspapers highlighting some of the special programmes conducted by the centre.

6.14. As regards ld. DIT(E)'s objection with regard to the membership of the centre, the assessee had pointed out before the AO itself that individual membership was open to all persons of India or foreign origin. Rule 4(A) of Rules & Regulations provides qualification for membership. There are several categories for members, as reproduced below:

"4. Qualification for Membership

A. Individual membership of the following classes, open to persons of Indian or foreign origin, shall be subject to the provisions set out below:

(a) Honorary Members

(i) Subject to their consent, the President of India, the Vice-President of India and the Prime Minister of India will be Honorary Members of the Centre.

(ii) The Board may invite such other persons, as it may deem fit, to be Honorary Members.

(b) Foundation Members

Foundation Members are those persons who took an active interest or part in the establishment of the Centre and were enrolled as such.

(c) Life Members

Life Members are persons of high attainment in education, science, culture, art or other areas of public activity who are admitted as such.

(d) Members

Members are persons in the fields of academia, art, culture, science, technology, sports or those engaged in public or professional functions and activities and are admitted as such in accordance with the decisions taken by the Board in this behalf.

(e) Associate Members

Associate Members are persons who are admitted as such in accordance with the decisions taken by the Board in this behalf.

(f) Overseas Associate Members

Overseas Associate Members are persons who are admitted as such in accordance with the decisions taken by the Board in this behalf.

(g) Temporary Members

Temporary Members are persons who are admitted as such in accordance with the decisions taken by the Board in this behalf.

(h) Short Term Associate Members
Short Term Associate Members are persons who are admitted as such in accordance with the decisions taken by the Board in this behalf Provided always that no person shall be eligible for admission under Rule 4(c) to (f) unless he/she has completed 25* years of age at the time of applying for enrolment.

Provided further that an applicant for individual membership, other than Temporary membership, should be duly proposed and seconded by two individual members (other than an Associate, Overseas Associate, Short Term Associate and Temporary Member), one of them certifying that the applicant is personally known to him or her and is, in his opinion, a person fit to be admitted as a member of the Centre.

6.15. From the rule, it is evident that members are persons in the field of academic, art, culture, science, technology, sports or those engaged in public or professional functions and activities and are admitted as such in accordance with the decisions taken by the Board in this behalf, in order to achieve the main object of assessee of disseminating knowledge in various fields to public at large.

6.16. The assessee also pointed out that the members are presently from all over the world and about 30% of members are outside the Delhi NCR region.

6.17. From the detailed submissions of assessee, reproduced earlier, which have not been controverted by department, we fail to understand as to how these activities can be said to have an iota of commercial/ trade colour. The dominant object of the assessee is definitely for the well being of public at large by organizing various seminars for the welfare of people by disseminating knowledge in various fields in order to uplift the social consciousness of the society at large. (The composition of membership clearly exemplifies the real intention of assessee. We fail to understand as to how the hostel accommodation provided to various invitees could be

considered as a commercial activity. Before any activity can be branded as being in the nature of trade or commerce, the AO has to demonstrate the intention of parties Backed with facts and figures of carrying out activities with profit motive. Mere surplus from any activity, which undisputedly has been undertaken to achieve the dominant object, does not imply that the same is run with profit motive. The intention has to be gathered from circumstances which compelled the carrying on an activity. In the present case, ld. counsel has clearly demonstrated that surplus was generated from interest income and not from catering or hostel activities. Therefore, the objection of ld. DIT(E) does not survive on this count also.

8.18. The primary object of insertion of proviso to section 2(15) was to curb the practice of earning income by way of carrying on of trade or commerce and claiming the same as exempt in the garb of pursuing the alleged charitable object of general public utility. This proviso never meant to deny the exemption to those institutions, where the predominant object is undeniably a charitable object and in order to achieve the same incidental activities, essential in the given circumstances, are carried on.

6.19. In view of the above discussion we hold that the proviso to section 2(15) is not at all applicable in the present case and, therefore, ld. DIT(E) was not at all justified in invoking the proceedings u/s 263. 6.20. Further we find that the assessee's case is squarely covered by the decision of Hon'ble Delhi High court in the case of India Trade Promotion Organization Vs. Director General of incomew Tax (Exemptions) & Others (WP(C) no. 1872/2013 dated 22-1-2015) 2015-TIOL-227-HC-DEL-IT, held
as under:

"Having heard the matter, the High Court held that,

if a meaning is given to the expression "charitable purpose" so as to suggest that in case /1/ en institution, having an objective of advancement of general public utility, derives an income, it would be falling within the exception carved out in the first proviso to Section 2(15) of the Act, then there would be no institution whatsoever which would qualify for the exemption u/s 10(23C)(iv) of the Act. And, the said provision would be rendered redundant. This is so, because, if the institution had no income, recourse to Section 10(23C)(iv) would not be necessary. And, if such an institution had an income, it would not, on the interpretation sought to be given by the revenue, be qualified for being considered as an institution established for charitable purposes. So, either way, the provisions of Section 10 (23C)(iv) would not be available, either because it is not necessary or because it is blocked. The intention behind If introducing the proviso to Section 2(15) of the Act could certainly not have been to render the provisions of Section 10 (23 C)(iv) redundant;

++ it is apparent that merely because a fee or some other consideration is collected 01 received by an institution, it would not lose its character of having been established for c charitable purpose. It is also important to note that we must

examine as to what is the dominant activity of the institution in question. If the dominant activity of the institution was 'not business, trade or commerce, then any such incidental or ancillary activity would also not fall within the categories of trade, commerce or business. It is clear from the facts of the present case that the driving force is not the desire to earn profits but, the object of promoting trade and commerce not for itself, but for the nation - both within India and outside India. Clearly, this is a charitable purpose, which has as its motive the advancement of an object 0, general public utility to which the exception carved out in the first proviso to Section 2(15) 0, the Act would not apply. It is so said, because, if a literal interpretation were to be given to the said proviso, then it would risk being hit by Article 14 (the equality clause enshrined in Article 14 of the Constitution). It is well-settled that the courts should' always endeavour to uphold the Constitutional validity of a provision and, in doing 50, the provision in' question may never to be read down;

++ the introduction of the 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 e general public utility. It was 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. The object was not to hurt genuine charitable organizations. And, this was also the assurance given by the Finance Minister while introducing the Finance Bill 2008;

++ the expression "charitable purpose", 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 o. Section 10(23C)(iv) of the Act. It is also clear that if the literal interpretation is given to the proviso to Section 2(15) of the Act, then the proviso would be at risk of running fowl 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 it the context of Section 10(23C)(iv) because, the context requires such an interpretation. The correct interpretation of the proviso to Section 2(15) of the 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 institution, which claims to have been established for charitable purposes, i: 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;

++ thus, while this Court upholds the Constitutional validity of the proviso' to Section 2(15) 0, the Act, it has to be read down in the manner indicated. As a consequence, the impugned order dated 23.01.2013 was set aside and a mandamus was issued to the respondent to gram approval to the petitioner u/s 10(23C)(iv) of the Act within six weeks from the date of this judgment."

6.21. In view of above discussion we hold that, in the facts and circumstances of the present case, the ld. DIT(E) was not justified in initiating revisionary proceedings u/s 263 of the Act. According order passed by the DIT(E) u/s 263 of the Act is quashed and the assessment order passed by the AO is restored.

7. In the result, assessee's appeal is allowed."

9. Further, the Tribunal in assessee's own case for assessment year 2011-12, while deciding the issue of allowing benefit of section 11 and 12 read with section 2(15) of the IT Act, following the decision of the Tribunal for assessment year 2009-10, has decided the issue in favour of the assessee. We find, on further appeal by the Revenue, the Hon'ble High Court vide ITA No.300 of 2018, Order dated 14th March, 2018, dismissed the appeal filed by the Revenue by observing as under:-

"The question of law urged by the Revenue is the applicability of Section 11(23) of the Income Tax Act, 1961 (hereafter referred to as "the Act") read with Section 2(15) of the Act. The Court is of the opinion that both the CIT(A) and ITAT correctly relied upon previous ruling s of this Court in Directorate of Income Tax v. Chiranjeev Charitable Trust (decided on 18.03.2015). The ITAT had also relied upon its previous order in the assessee's own case to hold that it was carrying on charitable activities within the meaning of Section 2(15) of the Act. Consequently, no substantial question of law arises. The appeal is, accordingly, dismissed."

10. Since the issues raised by the ld.CIT(E) in his 263 order has already been considered by the Tribunal in assessee's own case for the immediately preceding

assessment year, therefore, respectfully following the same, we set aside the order passed by the CIT(E) u/s 263 of the IT Act. The grounds raised by the assessee are accordingly allowed.

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

The decision was pronounced in the open court on 14.01.2019.

Sd/-	Sd/-
(SUCHITRA KAMBLE) JUDICIAL MEMBER	(R.K. PANDA) ACCOUNTANT MEMFBER

Dated: 14th January, 2019

dk

Copy forwarded to

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

Asstt. Registrar, ITAT, New Delhi