

**IN THE INCOME TAX APPELLATE TRIBUNAL
'C' BENCH, BENGALURU**

**BEFORE SHRI JASON P BOAZ, ACCOUNTANT MEMBER
and
SHRI PAVAN KUMAR GADALE, JUDICIAL MEMBER**

ITA No.254 & 255/Bang/2019
(Assessment year: 2013-14 & 2014-15)

Karnataka Industrial Areas Development
Board,
No.49, 4th & 5th floor, Khanija Bhavan,
Race Course Road,
Bengaluru-56001.
PAN:AAATK 1305 J

... Appellant

Vs.

Deputy Commissioner of Income-tax
(Exemptions)
Bengaluru.

... Respondent

Appellant by : Shri P.C.Khincha, CA
Respondent by : Shri Pradeep Kumar, CIT(DR)

Date of hearing: 14/05/2019
Date of pronouncement: 17/06/2019

O R D E R

Per PAVAN KUMAR GADALE, JM:

The assessee has filed the appeals against different orders of the CIT(A)-14 for the assessment years 2013-14 and 2014-15 where issues are identical and similar. Therefore, for the sake of convenience, they were heard together and common consolidated order is being passed.

2. For the sake of convenience, we shall take up ITA No.254/Bang/2019. At the time of hearing, learned AR has

not pressed ground No.3 and also raised additional grounds of appeal which are admitted. The Id. AR argued only on the ground of denial of exemption u/s 11 of the Act whereas the other grounds of appeal are on the additions made by the AO by denying the exemption. and restricted his submissions on the denial of exemption

3. Brief facts of the case are that the assessee is an Association of Persons and filed the Return of income belatedly on 5/12/2013 and the Return of income was processed u/s 143(1) of the Income-tax Act,1961 ['the Act' for short]. Subsequently the case was selected for scrutiny under CASS and notices u/s 143(2) and 142(1) of the Act were issued. The case was referred for special audit u/s 142(2A) of the Act. Writ petition was filed by the assessee before the jurisdictional High Court. The Hon'ble Court passed interim order dated 5/7/2016 staying the proceedings initiated by the AO u/s 142(2A). Subsequently, the Hon'ble High Court has quashed 142(2A) proceedings for both the assessment years by order dated 02/01/2018. Writ appeal was filed by the Revenue before the Division Bench of the Hon'ble Karnataka High Court. AO, subject to outcome of the writ appeal, has proceeded in the assessment proceedings and

AO has denied the claim of exemption u/s 11 and made addition and assessed the total income of Rs.36,802,75,496/- by order u/s 143(3) of the Act dated 28/2/2018.

4. Aggrieved by the order, the assessee has filed an appeal with the CIT(A). The CIT(A) has dismissed the appeal.

5. Aggrieved by the order of the CIT(A), the assessee has filed an appeal before the Tribunal. The learned AR has argued that the CIT(A) erred in confirming denial of exemption u/s 11 by applying the provisions of 2(15) of the Act. The learned AR further submitted that a similar issue was considered by the Tribunal in assessee's own case for assessment years 2009-10 and 2010-11 and filed copies of the orders and material for allowing the claim. Contra, learned DR filed written submissions and supported the order of the CIT(A).

6. We heard the rival submissions and perused material on record. Prima facie, as envisaged by the learned AR, we found that the issue before us is identical to the earlier years viz.,2009-10 and 2010-11 where AO has denied exemption u/s 11 and made the additions. The Id.AR rightly brought to the knowledge of the Tribunal, in the assessee's own case for assessment year 2009-10 in ITA No.378/Bang/2013, dated

04/09/2015, the Tribunal has considered the facts and circumstances and the disputed issue and made observations that the assessee is entitled for benefits of exemption u/s 11 at paras.44 to 49:

44. *“We have given a very careful consideration to the rival submissions. The purpose for which the Assessee exists is for the ‘advancement of any other object of general public utility’”. The fact that the Assessee enjoyed registration u/s.12AA of the Act in the past is itself sufficient to come to this conclusion. The withdrawn of registration u/s.12AA of the Act was only consequent to the introduction of the proviso to Sec.2(15) of the Act by the Finance Act, 2008. Therefore, the question that we need to be answered is as to whether the proviso to Sec.2(15) of the Act would be applicable to the case of the Assessee.*

45. *We shall now understand the approach to be adopted in coming to the conclusion as to whether the proviso to Sec.2(15) of the Act will be applicable to the Assessee in the light of the decision of the Hon’ble Delhi High Court in the case of India Trade Promotion Organization Vs. DGIT(Exemption) and others 371 ITR 333 (Delhi). The learned counsel for the Assessee has placed strong reliance on this decision to support his plea that the proviso to Sec.2(15) of the Act is not applicable to Assessee. The facts of the case before the Hon’ble Delhi High Court in the case of India Trade Promotion Organization (supra) was that the Assessee in that case enjoyed the benefit of exemption u/s.10(23C)(iv) of the Act. Sec.10(23C)(iv) provides any income received by any person on behalf of any other fund or institution established for charitable purposes which may be approved by the prescribed authority, having regard to the objects of the fund or institution and its importance throughout India or throughout any State or States, shall not form part of the total income under the Act. The prescribed authority withdrew the approval granted to the Assessee consequent to the insertion of the proviso to Sec.2(15) of the Act, on the ground that the Assessee was deriving rental income from letting out space for rent during trade fairs and exhibitions,*

was deriving income from sale of tickets and income from food and beverage outlets. The said withdrawal was challenged by the Assessee before the Hon'ble Delhi High Court. The Hon'ble Delhi High Court had to go into the question as to the scope of the proviso to Sec.2(15) of the Act. The Hon'ble Delhi High Court has laid down the following very important principles as to how the proviso to Sec.2(15) of the Act has to be interpreted:-

(i) The proviso to Sec.2(15) of the Act introduced by virtue of the Finance Act, 2008 with effect from 01.04.2009 has two parts. The first part has reference to the carrying on of any activity in the nature of trade, commerce or business. The second part has reference to any activity of rendering any service —in relation to any trade, commerce or business. Both these parts are further subject to the condition that the activities so carried out are for a cess or fee or any other consideration, irrespective of the nature or use or application or retention of the income from such activities. In other words, if, by virtue of a cess 'or fee' or any other consideration, income is generated by any of the two sets of activities referred to above, the nature of use of such income or application or retention of such income is irrelevant for the purposes of construing the activities as charitable or not.

(ii) If an activity in the nature of trade, commerce or business is carried on and it generates income, the fact that such income is applied for charitable purposes, would not make any difference and the activity would nonetheless not be regarded as being carried on for a charitable purpose. If a literal interpretation is to be given to the proviso, then it may be concluded that this fact would have no bearing on determining the nature of the activity carried on by the petitioner. But, in deciding whether any activity is in the nature of trade, commerce or business, it has to be examined whether there is an element of profit making or not. Similarly, while considering whether any activity is one of rendering any service in relation to any trade, commerce or business, the element of profit making is also very important.

(iii) *The meaning of the expression "charitable purposes" has to be examined in the context of "income", because, it is only when there is income the question of not including that income in the total income would arise. Therefore, merely because an institution, which otherwise is established for a charitable purpose, receives income would not make it any less a charitable institution. Whether that institution, which is established for charitable purposes, will get the exemption would have to be determined having regard to the objects of the institution and its importance throughout India or throughout any State or States.*

(iv) *Merely, because an institution derives income out of activities which may be commercial, that does, in any way, affect the nature of the Institution as a charitable institution if it otherwise qualifies for such a character.*

(v) *Merely because a fee or some other consideration is collected or received by an institution, it would not lose its character of having been established for a charitable purpose. 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. If the driving force is not the desire to earn profits but to do charity, the exception carved out in the first proviso to Section 2(15) of the said Act would not apply.*

(vi) *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). Courts should always endeavour to uphold the Constitutional validity of a provision and, in doing so, the provision in question may have to be read down, as pointed out above.*

(vii) *Section 2(15) is only a definition clause. Section 2 begins with the words, —in this Act, unless the context otherwise requires. The expression "charitable purpose" appearing in Section 2(15) of the said Act has to be seen in the context of Section 10(23C)(iv). When the expression "charitable*

purpose", as defined in Section 2(15) of the said Act, is read in the context of Section 10(23C)(iv) of the said Act, we would have to give up the strict and literal interpretation sought to be given to the expression "charitable purpose" by the revenue.

(viii) The expression "charitable purpose", as defined in Section 2(15) cannot be construed literally and in absolute terms. 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 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.

(emphasis supplied)

46. *It can be seen from the various provisions of the KIAD Act which we have set out in the earlier part of the order that the dominant and prime objective of the Assessee is not profit making. Prior to the introduction of the proviso to Section 2(15) of the Act, there was no dispute that the assessee was established for charitable purposes. We shall now take a look at the Income and Expenditure Account for the year ended 31.3.2009 of the*

Assessee. The income side of the Account shows that the main component of income of the Assessee is derived in the form of interest of Rs.131.17 crores. Schedule "P" to the Income and Expenditure Account shows the break-up of the interest receipt by the Assessee. The interest on Fixed deposits is Rs.120.90 Crores. The Earnest Money Deposit given by the allottees are parked by the Assessee in fixed deposit and those deposits has earned the aforesaid interest income. Therefore there can be no profit element in earning this interest income. Besides the above, the other components of interest are interest from Allottees, penal interest from Allottees, interest on staff loan, interest from SB and others, interest on seed money, dividend received and interest on income tax refund. The other component of income is gain on disposal of land, sale of application forms, recoveries of fines and penalties, interest, other receipts, rent, forfeiture of deposits, water supply charges. The income from sale of land is Rs.18.69 Crores. The expenditure incurred by the Assessee comprises of repairs and maintenance, administrative expenses, water and electricity charges, special and other charges, Depreciation. If the gain on disposal of land of Rs.18.69 Crores which is the primarily object of the Assessee and expenditure in the form of administrative expenses of Rs.15.42 Crores and 10.61 Crores which are fixed expenses and necessary to carry on the primary object alone are considered than there would be loss. This by itself would demonstrate that the Assessee does not exist for profit.

47. The main aim and object for which the Assessee was established is to (a) Promote rapid and orderly development of industries in the state. (b) Assist in implementation of policies of Government within the purview of KIAD Act. (c) Facilitate in establishing infrastructure projects. (d) Function on "No Profit - No Loss" basis. For the above purpose, the Assessee (a) Acquire land and form industrial areas in the state. (b) Provide basic infrastructure in the industrial areas. (c) Acquire land for Single Unit Complexes. (d) Acquire land for Government agencies for their schemes and infrastructure projects. The dominant and main object of the Assessee is charitable and not for making profits.

48. *A look at the income stream of the Assessee clearly reveals that all the activities from which the Assessee derives income are an inherent part of the main object of the Assessee. It is clear from the facts of the case that profit making is not the driving force or objective of the Assessee. Rather the purpose for which the Assessee was created is to regulate and develop drinking water and drainage facilities in the urban areas of the State of Karnataka and for matters connected therewith. This makes it clear that any income generated by the Assessee does not find its way into the pockets of any individuals or entities. It is to be utilized fully for the purposes of the objects of the petitioner.*

49. *Keeping in mind the above factual aspects and the provisions of the KIDA Act, and principle laid down in the aforesaid decision of the Hon'ble Delhi High Court in the case of India Promotion Organization (supra), in our view, will clearly show that the Assessee does not driven primarily by desire or motive to earn profits but to do charity through advancement of an object of general public utility. The assessee is operating on no profit basis. This is substantiated by the actual income received on operations of the Assessee and the expenditure incurred set out in the earlier paragraphs of this order. The proviso to Sec.2(15) of the Act is therefore not applicable to the case of the Assessee. We therefore hold that the Assessee is entitled to the benefits of Sec.11 of the Act. The AO has not disputed the conditions necessary for allowing exemption u/s.11 of the Act, except the applicability of proviso to Sec.2(15) of the Act. In view of our conclusions that the said proviso is not applicable to the case of the Assessee, we hold that the Assessee's income is not includible in the total income and therefore the income returned by the Assessee is directed to be accepted."*

We find there is no change in facts and circumstances of the present case and apply the decision and set aside order of the CIT(A) and we hold that the provisions of section 2(15) are not applicable to the case of the assessee and follow the

judicial discipline and direct the Assessing Officer to allow the benefit of exemption u/s 11 of the Act to the assessee and allow the grounds of appeal of the assessee.

7. Since the facts of the case for assessment year 2014-15 are identical to the assessment year 2013-14. Hence, the decision taken by us for assessment year 2013-13 will equally apply to assessment year 2014-15 with *mutatis mutandis* and allow the exemption u/s 11 of the Act and allow the grounds of appeal of the assessee.

8. In the result, assessee's appeals for the assessment years 2013-14 and 2014-15 are allowed.

Order pronounced in the open court on 17th June, 2019.

Sd/-
(JASON P BOAZ)
ACCOUNTANT MEMBER

Place : Bengaluru
Date : 17/06/2019.
srinivasulu, sps

Sd/-
(PAVAN KUMAR GADALE)
JUDICIAL MEMBER

Copy to :

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

By order

Assistant Registrar
Income-tax Appellate Tribunal
Bangalore