



ITA No.5133/Mum/2015
Gemmological Institute of India
Assessment Year-2011-12

आयकर अपीलीय अधिकरण "जी" न्यायपीठ मुंबई में।
IN THE INCOME TAX APPELLATE TRIBUNAL
"G" BENCH, MUMBAI

माननीय श्री संदीप गोसाई, न्यायिक सदस्य एवं
माननीय श्री मनोज कुमार अग्रवाल, लेखा सदस्य के समक्ष।
BEFORE HON'BLE SHRI SANDEEP GOSAIN, JM AND
HON'BLE SHRI MANOJ KUMAR AGGARWAL, AM

आयकर अपील सं./ I.T.A. No.5133/Mum/2015

(निर्धारणवर्ष / Assessment Year: 2011-12)

Gemmological Institute of India 29, Gurukul Chambers, 187-189 Mumbadevi Road Mumbai-400 002.	बनाम/ Vs.	Addl. Director of Income Tax [Exemption] Range-II Piramal Chambers, Lalbaug Mumbai-400 012.
स्थायी लेखासं./जीआइआरसं./PAN/GIR No. AAATG-0077-F		
(अपीलार्थी/ Appellant)	:	(प्रत्यर्थी / Respondent)
अपीलार्थी की ओर से/ Appellant by	:	Shri Hiro Rai- Ld.AR
प्रत्यर्थी की ओर से/ Respondent by	:	Chaudhary Arun Kumar Singh- Ld. DR
सुनवाई की तारीख/ Date of Hearing	:	03/07/2019
घोषणा की तारीख / Date of Pronouncement	:	15/07/2019

आदेश / O R D E R

Manoj Kumar Aggarwal (Accountant Member): -

1.1 Section 11 of the Income Tax Act, 1961 [in short "Act"] provides for exemption of income derived from properties held under a trust wholly for charitable or religious purposes. The expression 'charitable purpose' as



defined u/s. 2(15) (as it stood during AY 2008-09) would include relief of the poor, education, medical relief and the advancement of any other object of general public utility. The first proviso to Sec 2(15) as introduced by The Finance Act, 2008 w.e.f. 01/04/2009 provide that the last limb i.e. '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. The proviso has two limbs and provide that the advancement of any other object of general public utility shall not be a charitable purpose if it involves the carrying on of: -

- (i) 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,
- (ii) irrespective of the nature of use or application, or retention, of the income from such activity.

The Finance Act, 2010 added 2nd proviso to provide that 1st proviso shall not apply if the aggregate value of the receipts from the activities referred to therein was below Rs.10 Lacs in the previous year. The Hon'ble Supreme Court in **CIT v. Gujarat Maritime Board [2007 295 ITR 561]** observed that the expression 'any other object of general public utility' is of the widest connotation. This expression would *prima facie* include all objects which promote the welfare of the general public.

1.2 The CBDT, vide Circular No. 11 of 2008 dated 19/12/2008, clarified that the first proviso will apply only to those entities whose purpose was



'advancement of any other object of general public utility' and therefore, such entities would not be eligible to claim exemption u/s 11 if they carry on commercial activities. Whether the entity was carrying on an activity in the nature of trade, commerce or business would be a question of fact which will be decided based on the nature, scope, extent and frequency of the activity. Para 3.1 of the said circular restricted the application of 1st proviso to Charitable Institution and mutual organizations whose activities were restricted to contributions from and participation of only their members. Para 3.2 clarified that if the assessee having its object as 'advancement of any other object of general public utility' engages in any activity in the nature of trade, commerce or business or rendering of any service in relation to trade, commerce or business, it would not be entitled to claim that its object is charitable in nature. 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 rendering of any service in relation to trade, commerce or business.

1.3 Section 11(4A) provides that exemption provisions as contained in sub-sections (1),(2),(3),(3A) would not apply to Profits & Gains of business unless that business is incidental to the attainment of the objective of the trust and separate books are maintained by the trust in respect of such business. However, with the introduction of first proviso to Section 2(15), the exemption provided with respect to a business activity incidental to the objectives of the trust would no longer be available to those institutions carrying out the object of 'advancement of any other object of general public



utility' since these institutions have been barred to claim activity in the nature of trade, commerce or business or rendering of any services in relation to trade, commerce or business, to be charitable in nature. This bar would be irrespective of application of income from such commercial activity and it would be immaterial whether the income from the commercial activity is utilized or ploughed back to such activity serving object of public utility.

1.4 The Hon'ble Delhi High Court in assessee's Writ Petition No. 1872 of 2013 dated 22/01/2015 titled as **India Trade Promotion Organization vs. DGIT (Exemption) & Ors.**, while upholding the constitutional validity of the 1st proviso, has held that in both the activities i.e. (i) activity in the nature of trade, commerce or business or (ii) any activity of rendering any service in relation to any trade, commerce or business, dominant and prime objective is to be seen. If the dominant objective was 'profit motive', the trust would not be entitled to claim its objective to be charitable in nature. On the other hand, if the 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 would be an institution established for charitable purposes. The revenue's Special Leave Petition [SLP] against the same has already been admitted by Hon'ble Supreme Court reported at **84 Taxmann.com 283.**

1.5 The Hon'ble Gujarat High Court in the case of **Ahmedabad Urban Development Authority V/s ACIT [396 ITR 323 02/05/2017]** has observed that the expression trade, commerce and business must be read in the context of the intent and purpose of Section 2(15) of the act and the same



was not meant to exclude entities which are essentially for charitable purposes but conducting some activities for a consideration or a fees. The test which has to be applied is whether the predominant objective of the activity involved in carrying out the object of general public utility was to sub-serve 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 was to carry out the charitable purpose and not to earn profit, it would not lose its character of a charitable purpose merely because some profit arises from the activity.

1.6 Similarly, Hon'ble Allahabad High Court in **CIT V/s Lucknow Development Authority 265 CTR 433 16/09/2013** has held that where a trust is carrying on its activities for the fulfilment of its aims and objectives which are of charitable in nature with no motive to earn profit and in the process, earns some profit, the same would not be hit by proviso to Section 2(15).

1.7 The Hon'ble Delhi High Court in the case of **Institute of Chartered Accountants of India V/s DGIT [358 ITR 91 04/07/2013]** observed that the purpose and dominant object for which an institution carried on its activities is material to determine whether the same is business or not. The purport of the first proviso to Section 2(15) was not to exclude entities which are essentially for charitable purpose but are conducting some activities for a consideration or a fee. The objective to introduce the proviso was to exclude organizations which were carrying on regular business from the



scope of charitable purpose. The expression business, trade or commerce was to be interpreted restrictively and where the dominant objective was charitable any incidental activity for the furtherance of the said objective would not fall within the expression trade, business or commerce.

1.8 Similar is the view of Hon'ble Telangana and Andhra Pradesh High Court in **Pr.CIT V/s Institute of Development and research in Banking Technology 400 ITR 66 09/10/2017**. Similar view has been taken by various co-ordinates benches of the Tribunal in various decisions.

2.1 In the background of above legal propositions, the assessee before us, is a Trust registered u/s 12A since 1973 and claimed deduction u/s 11 in its return of income reflecting deficit of Rs.17.35 Lacs. The exemption u/s 11 was earlier denied to the assessee for AY 2008-09 wherein a view was taken that the assessee was not running a regular educational institute. Keeping in view the same, Ld. AO held that the assessee was not a regular educational institute and therefore, not entitled for exemption u/s 11.

2.2 Another reason to deny the exemption was 1st proviso to Section 2(15). The Ld. AO, invoking 1st proviso to Sec 2(15), observed that the assessee was in receipt of testing fees of Rs.187.01 Lacs during the year. The assessee elaborated the testing procedure carried out by it, the perusal of which revealed that it offered valuation, certification and testing of diamond, jewellery and gemstones to various persons including retailers, companies dealing in such goods and to general public. The assessee maintain separate premises for Testing Lab and for educational activities. The Ld. AO formed an opinion that the testing activity was independent of



ITA No.5133/Mum/2015
Gemmological Institute of India
Assessment Year-2011-12

the educational facility and a separate business activity of the assessee. Therefore, the rendering of these services against fees, in the opinion of Ld. AO, were hit by the 1st proviso to Section 2(15) and the testing activity could not be termed as charitable activity. Another fact noted by Ld. AO was that that the assessee was not maintaining any separate books for testing activity and therefore, even if the assessee was to be held as educational institution, the above income would still be taxed as business income. Accordingly, denying exemption u/s 11, the income of the assessee was computed at Rs.54.06 Lacs.

3.1 Before Ld. first appellate authority, the attention was drawn to the fact that the registration u/s 12A was granted to the assessee which was valid and continuing. It was submitted that the assessee was conducting courses of formal education / training which has been accepted to be a Charitable Activity as supported by the decision of this Tribunal for AY 2008-09 wherein it was held that the assessee was entitled for the benefit of exemption u/s 11. In the alternative, it was submitted that if the activities of the trust could not be termed as educational, its objects would certainly fall within the expression 'advancement of any other object of general public utility'. It was further pleaded that the testing activity was merely incidental to the research and development activity which was dominant and primary activity along with the activity of running educational courses. It was submitted that the main aim of the assessee was to help the gem and jewellery trade and spread specific knowledge about gemstones. The research provide data which would be useful to identify imitation stones



from genuine ones and for this testing, the assessee charges a nominal fee which was very low as compared to charges of other testing institutes. This facility helps general public as they are not cheated into buying fake ones. The charges for services being provided by the assessee were placed on record. Another submission made was the fact that the organization was not being run in a commercial or business-like manner since the testing fees was far lower than charged by other commercial organizations. An alternative submission was made in support of the fact that donations of Rs.31.11 Lacs received from various donors were capital in nature and would not be taxable as business income. In the final plea, the assessee submitted that it was to be taxed as slab rates applicable to an Association of Persons [AOP].

3.2 The Ld. first appellate authority opined that registration u/s 12A would not *ipso facto* entitle the assessee to claim exemption u/s 11 unless the conditions stipulated by Sec.11 were fulfilled. The Ld. AO was duty bound to look into the facts in each year so as to examine that whether the prescribed conditions to claim the exemption was fulfilled by the assessee or not. Proceeding further, it was noted that there were hardly 10 students in one batch which could not be said to be any educational activity in the structured manner. The course fees received by the assessee was Rs.37.15 Lacs as against testing fees of Rs.187 Lacs which was 6 times the course fees received by the assessee during the year. Thus, the dominant activity was activity of rendering of services in relation to the business, trade or commerce. The Ld. first appellate authority, at *para (vi)*



of his order, on sample basis, rebutted assessee's claim that it was providing service at a low cost to the general public. Proceeding further, Ld. first appellate authority, opined that the assessee was hit by 1st proviso to Sec. 2(15) as well as by the provisions of Sec.11(4A). The alternative claim of exemption u/s 11(1)(d) or reduction of specific donations from capital expenditure was not admitted since the assessee did not make out a case for additional evidence in terms of Rule 46A. Regarding the plea that the net income was to be taxed as per slab rates as applicable to Association of Persons [AOP], directions were issued to Ld. AO to dispose-off assessee's rectification application filed u/s 154, in this regard.

3.3 Aggrieved, the assessee is in further appeal before us with following grounds of appeal: -

1. The learned Commissioner of Income Tax (Appeals) has erred in upholding the denial of exemption u/s 11 of the Income Tax Act, 1961 ('Act'), and in confirming that the first proviso to section 2(15) was applicable to the appellant.
2. The learned Commissioner of Income Tax (Appeals) erred in upholding the assessing officer's view that the activities of your appellant were not charitable in nature despite the valid and subsisting registration u/s 12A granted by the Commissioner of Income Tax.
3. The learned Commissioner of Income Tax (Appeals) erred in upholding that the activities carried on by your appellant did not fall within the meaning of the term 'Education' as contemplated in section 2(15) of Income Tax Act, 1961, but amounted to advancement of any other object of general public utility.
4. The learned Commissioner of Income Tax (Appeals) has erred in confirming that the testing activity carried on by the appellant is in the nature of business, with consequent violation of the provisions of section 11(4A).
5. The learned Commissioner of Income Tax (Appeals) failed to appreciate that the testing charges levied by the appellant are not on a commercial basis, being lower as compared to other organizations.
6. The comparison of charges made by the Commissioner of Income Tax (Appeals) was erroneous, and of uncomparable sizes.
7. Without prejudice to the foregoing, the learned Commissioner of Income tax (Appeals) erred in upholding of taxing the donations of Rs.31,11,000 received specifically for acquisition of capital assets, as income of the appellant, and in not allowing reduction of this amount from cost of the capital assets acquired during the year under appeal



ITA No.5133/Mum/2015
Gemmological Institute of India
Assessment Year-2011-12

8. The learned Commissioner of Income Tax (Appeals) erred in rejecting the letters received from donors as additional evidence, and in stating that these were not submitted to the Assessing Officer.
9. The learned Commissioner [Appeals) erred in not deciding the ground of appeal raised by your appellant regarding the rate of tax levied on your appellant, and in merely directing the Assessing Officer to dispose of the application for rectification.

Relief Sought

10. Your appellants pray that the order of the learned Assessing Officer may be modified by:
allowing exemption u/s 11 of the Act, and accordingly allowing accumulation of 15% of income, as well as claim of capital expenditure incurred towards the objects of the appellant as an application of income
Or alternatively
excluding donations received for acquisition of R & D equipment from income, reducing it from the cost of R & D equipment and levying income tax on the income at the slab rates of tax applicable to an Association of Persons.

4.1 We have carefully perused the arguments advanced by both the representatives and deliberated on judicial pronouncements as cited before us. The material facts as enumerated in preceding paragraphs are not in dispute. The plea of Ld. AR primarily revolves around the fact the profit motive would be an essential ingredient so as to adjudge the applicability of 1st proviso to Sec. 2(15). The Ld. Departmental Representative [DR], on the other hand, has placed reliance on the stand of lower authorities to submit that the assessee was hit by the 1st proviso to Section 2(15) as well as Section 11(4A) as invoked by Ld. AO.

4.2 So far as the decision of Tribunal for AY 2008-09, ITA No. 5781/Mum/2011 dated 22/03/2013 is concerned, the perusal of the same would reveal that in that year, Ld.AO had disputed assessee's claim of carrying out of educational activities and denied the exemption u/s 11. Before first appellate authority, the assessee contended that it was conducting specialized courses for many years and the claim of exemption



was accepted by revenue for so many years. Upon being satisfied, first appellate authority concurred with assessee's claim. Aggrieved, the revenue preferred further appeal before Tribunal. The Tribunal, observing that the registration u/s 12A was subsisting and therefore, the role of Ld. AO was limited to see whether the assessee followed its objects and there were no statutory violations, held that Ld. AO could not examine the objects of the Trust so long as there was valid registration u/s 12A. Therefore, the said decision, in our considered opinion, would not have much relevance to the facts of this year since the issue before us is related with determining the nature as well as treatment of testing fees received by the assessee during the year.

4.3 Upon perusal of Income & Expenditure Account, as placed on record, the broad break up of assessee's receipts would be as under: -

No.	Nature of Receipts	Amount (Rs.)
1.	Interest Income	17.61 Lacs
2.	Fees from educational activities	37.18 Lacs
3.	Testing Fees	187.01 Lacs
4.	Donations for purchase of Equipments	11.11 Lacs
5.	Misc. Income	0.09 Lacs
	Total	252.98 Lacs

A perusal of the same would reveal that the approx. 74% of receipts are on account of testing fees. The assessee has earned surplus of Rs.34.06 Lacs as evident from Income & Expenditure Account, as placed on record. The Ld. Authorized Representative for Assessee [AR] has pleaded that surplus arises out of the fact that the assessee received interest income and donations during the year and if the same are removed from gross receipts,



only nominal surplus would accrue to the assessee. The said fact would establish that the activities of testing fees were merely incidental activities and the same were not carried out with any profit motive. Another fact to be noted is that the assessee's receipts from testing fees have increased considerably over the years which is evident upon perusal of orders of lower authorities.

4.4 So far as the object of the assessee are concerned, our attention has been drawn to the fact that the trust was established for charitable purpose of education and for encouraging and promoting theoretical and practical education in gemology and scientific study of precious stones of all types and the assessee was established to impart education. Another plea raised is that the assessee was engaged in carrying out Research & Development Activities during the year and as a part of the same, carried out testing activities with a view to address the problem of imitation being faced by the Gem industry and therefore, the said activities would merely be an incidental activity carried out in furtherance to achieve pre-dominant objective of Research & Development.

4.5 On the facts and circumstances of the case as discussed above, we are of the considered opinion that the issue would require reappraisal by Ld. AO in view of the fact that the main objects of the assessee trust as well as the connection of testing activities vis-à-vis main objects, has not been brought on record by lower authorities. The perusal of order for AY 2008-09 would, *prima-facie*, would reveal that the assessee was engaged in the field of education. If that is so, Section 11(4A) would become applicable to the



facts of the case, as observed by us in para 1.3 in the initial part of the order. In such a case, the onus would be on assessee to establish that the testing activities were merely incidental to the attainment of the prime objective of the trust i.e. education and separate books were maintained by the assessee in respect of such business. On the other hand, if the objects of the assessee are found to be covered by last limb i.e. advancement of any other object of general public utility, the 1st proviso of Section 2(15) would squarely apply to the case of the assessee since the assessee is providing service in relation to any trade, business or commerce. In that case, the case has to be adjudicated in the light of the binding judicial pronouncements from the point of view of 'profit motive' as cited by us in the opening paragraphs. Needless to add that, in the event of activity of 'testing fees' found to be having no connection with assessee's primary objectives, the same would be a separate line of business activity for the assessee and no deduction would be available to the assessee u/s 11 on account of this activity. With these directions & observations, the matter would stand reverted back to the file of Ld. AO for re-adjudication after providing reasonable opportunity of being heard to the assessee, who in turn, is directed to substantiate his claim, in this regard.

4.6 The alternative submissions i.e. donations received for specific purposes and application of correct rate of tax etc. would also be adjudicated in the light of the aforesaid adjudication, if required. The assessee is directed to substantiate the same.

5. In result, the appeal stands allowed for statistical purposes.



ITA No.5133/Mum/2015
Gemmological Institute of India
Assessment Year-2011-12

Order pronounced in the open court on 15th July, 2019.

Sd/-

(Sandeep Gosain)

न्यायिक सदस्य / **Judicial Member**

Sd/-

(Manoj Kumar Aggarwal)

लेखा सदस्य / **Accountant Member**

मुंबई Mumbai; दिनांक Dated : 15/07/2019
Sr.PS:-Jaisy Varghese

आदेश की प्रतिलिपि ँ ग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent
3. आयकरआयुक्त(अपील) / The CIT(A)
4. आयकरआयुक्त/ CIT– concerned
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, मुंबई/ DR, ITAT, Mumbai
6. गार्डफाईल / Guard File

आदेशानुसार/ BY ORDER,

उप/सहायकपंजीकार (Dy./Asstt.Registrar)
आयकरअपीलीयअधिकरण, मुंबई / ITAT, Mumbai.