

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES "D", MUMBAI**

BEFORE SHRI RAJESH KUMAR (AM) AND SHRI RAM LAL NEGI (JM)

**ITA No. 2447/MUM/2017
Assessment Year: 2012-13**

The Income Tax Officer (Exemptions)-2(1), 512, 5 th Floor, Piramal Chambers, Lalbaug, Mumbai - 400012	Vs.	Matunga Gymkhana, 263/A Lakhamsey Napoo Road, Matunga, Mumbai - 400019 PAN: AAATM1035F
(Appellant)		(Respondent)

Revenue by : Shri D.G. Pansari (DR)

Assessee by : Shri Paresh Shaparia (AR)

Date of Hearing: 20/02/2019

Date of Pronouncement: 17/05/2019

ORDER

PER RAM LAL NEGI, JM

This appeal has been preferred by the revenue against the order dated 11.01.2017 passed by the Commissioner of Income Tax (Appeals)-1 (for short 'the CIT(A), Mumbai, pertaining to the Assessment Year (AY) 2012-13, whereby the Ld. CIT(A) has allowed the appeal filed by the assessee against the assessment order passed u/s 143 (3) of the Income Tax Act, 1961 (for short the 'Act').

2. Brief facts of the case are that the assessee trust is registered as Charitable organization with DITE, Mumbai u/s 12A of the Act. The objects of the trust are stated to be, to create and promote a linking of physical culture, to promote a feeling of mutual co-operation by bringing together persons of all caste and creeds to promote organize and popularize various outdoor and indoor games such as cricket, tennis, badminton, gymkhana etc. The assessee filed its return of income for the assessment year under consideration declaring Nil income. Since, the case was selected for scrutiny the AO issued notices u/s

143 (2) and 142 (1) to the assessee. In response to the said notices, the authorized representative (AR) of the assessee attended the proceedings from time to time and furnished the details called for and also discussed the case. During the course of assessment proceedings, the AO asked the assessee to explain as to why the exemption u/s 11 should not be disallowed. The assessee submitted the explanation, however, the AO rejecting the contention of the assessee held that the element of charity, if any is just incidental and not the other way round. The assessee club is catering benefit for its own members and therefore, the activities of the club cannot be considered as charitable in nature, rather it can be treated as a mutual concern. Accordingly, the AO determined the total income of the assessee at Rs. 3,61,90,068/- (rounded off), details of which are as under:-

1) Income from Interest	:	Rs. 3,43,36,552/-
2) Compensation from caterer	:	Rs. 15,42,433/-
3) Sale of application forms	:	Rs. 44,600/-
4) Miscellaneous Income	:	Rs. 62,357/-
5) Sponsorship	:	Rs. 32,500/-
6) Compensation from Decorator	:	Rs. 1,71,626/-

3. The assessee challenged the assessment order before the Ld. CIT (A). The Ld. CIT (A) after hearing the assessee allowed the appeal of the assessee by relying upon the decision of ITAT rendered in the assessee's own case ITA No. 4468/Mum/2013 for the AY 2009-10. The revenue is in appeal against the said order of the Ld. CIT (A). The revenue has challenged the impugned order passed by the Ld. CIT (A) on the following effective grounds:-

1. *"Whether on the facts and circumstances of the case and in law the ld. CIT(A) was right to allow the appeal by relying upon the decision of Hon'ble ITAT in assessee's own case*

(A.Y. 2009-10, without appreciating the fact that the decision of Hon'ble ITAT is not acceptable to the dept. and appeal is being filed before Hon'ble High court. Moreover, on the issue of denial of exemption u/s 11 and taxing the oilier income from ton-members on the basis of mutuality concept the Revenue has filed SLPs in the case of Otters Club, Goregaon Sports Club and in other cases which are pending for adjudication before the Hon'ble Supreme Court."

2. *"Whether on the facts and circumstances of flue case and in law the Id. CITA) was right to allow the appeal of the assessee by relying upon the decision of Hon 'ble ITAT in assessee's own case for A. Y. 2009-70, in which the Hon'ble ITAT was relied upon the decision of coordinate Bench of Hon'ble ITAT in the case of The Bombay Presidency Golf 'Club Ltd., without appreciating the fact that the Revenue has not accepted the said decision and filed appeal before Hon'ble High Court which is pending for adjudication."*
3. *"Whether, on the facts and in the circumstances of the case and in law, the Ld. CIT(A) was right in holding that the assessee performs a charitable purposes within the meaning of proviso to section 2(15) of tile Income Tax Act, 1961 and not covered by the principle Of mutuality though the assessee trust was violating Provisions of Section 13 of I.T. Act, 1961 and thereby ignored the ratio laid down in the judgment of the Apex Court n the case of Bankipur Club Ltd (226 ITR 97).*
4. *"Whether, on the facts and in the circumstances of the case and in law, the Ld CIT(A) was right in granting relief to the assessee on interest income, restaurant compensation, compensation from decorator, etc. ignoring the fact that such income are earned from non-members.*
5. *"Whether on the facts and circumstances of the case and in law the ld. CIT(A) was right to direct the A.O. to follow the findings of Hon'ble ITAT in assessee's own case for A.Y. 2009-10, in which the Hon'ble ITAT held that the assessee trust is eligible for exemption u/s. 11 and hence directed*

the A.O. to rework the claim of depreciation and deficit Without appreciating the fact that on these issues the Revenue has filed SLPs in other cases inclusive the case of G.D. Birla Medical Research & Educational Foundation (Depreciation) (S.L.P. (C) No. 24904 of 2016 (C.A.No.8294 of 2016) and M.1.D.C. (Deficit) (SLP (Civil) 9891 of 2014) and in both the cases leave has been granted by the Hon'ble Apex Court and the matter in all the cases is pending for adjudication.”

4. Before us, the Ld. Departmental Representative (DR) submitted that the Ld. CIT (A) has decided the issue regarding the eligibility of exemption u/s 11 by following the decision of ITAT in assessee's own case for the AY 2009-10 without appreciating the fact that the department has challenged the decision of the ITAT for the AY 2009-10 before the Hon'ble High Court. The Ld. DR further submitted that the Ld. CIT (A) has wrongly held that the activities are not covered by the principles of mutuality ignoring the fact that the assessee trust has violated the provisions of section 13 of the Act.

5. On the other hand, the Ld. counsel for the assessee pointed out that since the issues involved in this case are covered by the decision of the ITAT, Mumbai rendered in assessee's own case for the AY 2009-10 and 2010-11 and since the Ld. CIT (A) has allowed the appeal of the assessee by following the decision of the ITAT, there is no factual or legal infirmity in the order of the Ld. CIT (A). Therefore, the appeal filed by the revenue is liable to be dismissed.

6. We have heard the rival submissions and also perused the material on record in the light of the rival contentions of the parties. As pointed out by the Ld. counsel for the assessee the co-ordinate Bench has decided the identical issues in the assessee's own case for the AY 2009-10 (supra). The relevant paras of the order of the co-ordinate Bench read as under:-

“12.6 We have considered the rival submissions. Sections 11 to 13 of the Act deal with the provisions relating to income derived properties held for charitable or religious purposes. The assessee before us is a trust registered under the Bombay Public Trust Act, 1950 and also continues to hold the registration granted to it by the Commissioner of Income Tax under section 12A of the Act since 5/12/1997 as a charitable trust. Notably, the main objects of the assessee trust are stated to be the promotion of sports, games and recreation facilities to the public at large and for the physical development and healthy life style as well as promotion of other charitable objects. The factum of the promotion of sports and games being a ‘charitable purpose’ within the meaning of section 2(15) of the Act is not in dispute. In fact, the Assessing Officer also does not dispute the fact that the activities of the promotion of sports and games carried out by the assessee fall within the meaning of ‘charitable purpose’. The assessee trust derives income by way of receipts from its members viz. Membership fee, entrance fee, identity card fee, locker rent, reservation charges, etc. The assessee trust is also earning incomes by way of compensation from caterer for rent/leasing of premises and such receipts in the instant year are of a sum of Rs.16,23,656/-. Further, it has also received compensation from Decorator of Rs.1,65,630/- and Miscellaneous income of Rs.20,074/-. Apart therefrom, assessee has earned interest income of Rs.2,36,07,023/- on RBI Bonds and other permitted investments as per section 11(5) of the Act. The aforesaid incomes, totalling to Rs.2,54,16,380/- have been brought to tax by the Assessing Officer as according to him the same are not eligible for the benefits of section 11 & 12 of the Act and since, they had been derived from transactions from non-members, the same are also not exempt under the principle of mutuality.

12.7 Now, we may first take up the stand of the Assessing Officer with regard to the interest income earned of Rs.2,36,07,023/-. The said income has been earned from investments which have been made in terms of the prescription contained in section 11(5) of the Act. The CIT(A) has emphasized on the proviso to section 2(15) of the Act, which denies the entity carrying on advancement of any other objects of general public utility, the benefits of section 11 &

12 only if such activities involve carrying on of any activity in the nature of trade, commerce or business for a fee or cess or any other consideration irrespective of the nature of use or application or retention of such income from such activities. The moot question is, can the activity of keeping funds deposited in the manner mandated by the statute i.e. section 11(5) of the Act can be construed as an activity in the nature of trade, commerce or business so as to fall within the meaning of the proviso to section 2(15) of the Act. The answer is quite obvious because once an entity, which is governed by the regime of sections 11 to 13 of the Act is mandated to keep its funds in a prescribed manner, the earnings therefrom cannot be viewed as an activity of in the nature of trade, commerce or business within the meaning of the proviso to section 2(15) of the Act. Notably, in the present case, there is no charge made against the assessee at any stage that such earnings have not been spent towards the objects of the assessee i.e. promotion of sports, games and recreation facilities to the general public at large and physical development and healthy life style. The decision of the Co-ordinate Bench in the case of The Bombay Presidency Golf Club Ltd.(supra) is also directly on the point where bank interest earned by a Trust having an object of providing Golf course and allied facilities for the promotion of the sport of Golf was sought to be taxed by denying the exemption under sections 11 & 12 of the Act. The following discussion in the order of the Tribunal is 29/02/2016(supra) is relevant:-

13. The investment in banks is not only authorised but mandated and is compulsory in so far as an entity carrying on charitable purposes concerned and in fact, under Section 13(1)(d)(ii), if the funds of a trust or institutions is invested in assets other than those specified in Section 11(5), the exemption under Sections 11 to 13 would be withdrawn. It is therefore not only inexplicable, but absurd as to why the Assessing Officer has taken the stand that interest received from deposits in banks falls foul of the proviso to Section 2(15). It is to be noted that all the other activities and income streams received by the assessee have been held to be not taxable by the Assessing Officer himself in making his order dated 30th December, 2012 on the grounds of mutuality and

the only amount which has been assessed to tax as income of the assessee is income from interest of Rs.2,17,92,167. Thus according to the AO compliance by a entity set up for charitable purpose with the provisions of section 11 (5) of the Act would result in its status of 'charitable purposes' being denied on account of the proviso to section 2(15) of the Act. The direct consequence of such an interpretation would be that an otherwise 'charitable institution' would lose its status as a 'charitable institution' if it complied with section 11 (5) of the Act and if it did not comply with section 11 (5) of the Act it would be denied the benefit on the grounds that the entity has not complied with section 11 (5) of the Act.

14. Several decisions have considered and interpreted the scope, purpose and limits of the proviso to Section 2(15). In GS 1 India Vs. DGIT 360 ITR 138 (Del), the term trade, commerce or business was interpreted, and in that case even though the assessee was charging a fee having regard to the economic status of the beneficiaries, it was held that it was necessary for the operation and running expenses and the sustenance of charitable activities, that a fee could be charged. In the case of the assessee on the other hand, there is no fee whatsoever and in fact, it is passive income not involving any activity whatsoever. Therefore, the AO was not correct in holding that act of deposit of money in scheduled bank account and receipt of interest thereon an activity in the nature of trade, commerce or business. The same view was taken by the Delhi High Court in Institute of Chartered Accountants of India Vs. DCIT 358 ITR 91 (Del), where the Institute was taxed by the Assessing Officer on the grounds that fees were charged by the Institute for providing coaching classes and for holding interviews with respect to campus placement. The Court held that such activities cannot be stated to be rendering service in relation to any trade, commerce or business at all. This was reiterated by the Delhi High Court in Bureau of Indian Standards v. DGIT 358 ITR 78 and in PHD Chamber of Commerce 357 ITR 296. The Gujarat High Court in DGIT Vs. Sabarmathi Ashram Gaushala Trust 44 Taxman 141 took the

view that a Trust registered with the objects of breeding cattle and cows and oxen cannot be said to be carrying on activities of trade, commerce or business merely because considerable income was generated on account of production and sale of milk. The same view was taken by the Tribunal in DD!T Vs. All India Football 1 Federation 62 Taxmann.com 362 (Del Trib) dealing with a case of an Association having as its object the promoting of the game of footfall, organising tournaments, training players, coaches etc. The Tribunal held that the receipts by way of sponsorship do not alter the character of the main objects and is not affected by the proviso as it cannot be said to be engaged in any activity which is in the nature of trade, commerce or business.

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17. In view of the above, we can safely conclude that the activity of the assessee depositing money in the bank does not constitute trade, commerce or business. The Assessing Officer has in fact gone much beyond and held that the interest itself constitutes taxable income falling foul of the proviso to section 2(15). If the Assessing Officer's view is correct, it will militate against the mandate requirement and object of Section 11 (5) of the Act read with Section 13 of the Act. These Sections require an entity seeking the shelter of Sections 11 to 13 to deposit its surplus funds in specified assets and it cannot be that the mandate requirement and object of Section 11 (5) which serves to put in place a mechanism to regulate the funds of the charitable institutions are overcome, overridden and nullified by an interpretation so that the very mandate of Section 11 (5) if complied with results in the institutions being declared to be non-charitable. This is a contradiction in terms and therefore must be rejected. Accordingly, we hold that the interest earned on fixed deposit with banks complying with the provisions of Section 11 (5) is exempt and the proviso to Section 2(15) has no application to the facts of the assessee's case.

Following the aforesaid decision of the Tribunal, which has referred to the judgments of the Hon'ble Delhi High Court in the

case of GS 1 India (supra), Institute of Chartered Accountants of India (supra) and Bureau of Indian Standards (supra) in coming to conclude that the activity of depositing money in the bank and earning interest would not constitute trade, commerce or business within the meaning of section 2(15) r.w. proviso thereof. Thus, in so far as interest income of Rs.2,36,07,023/- is concerned, we find no merit in the stand of the lower authorities. 12.8 Likewise, the other three categories of income namely, compensation from the Caterer(restaurant), compensation from Decorator for gymkhana functions and Miscellaneous income are concerned, herein also it cannot be said that the same involve carrying on of any activity in the nature of trade, commerce or business. It is quite clear that the scope and ambit of the exemption envisaged in sections 11 & 12 of the Act relate to the receipt of income derived from the property held under trust for charitable or religious purposes to the extent to which such income is applied to such purposes in India. Before proceeding further, we may reiterate that there is no charge against the assessee at any stage that there is an application of income for any purpose other than the objects of the assessee trust. Much has been made out by the lower authorities to the fact that assessee has charged a fee for allowing use of its sports grounds, and therefore, it is asserted that such an activity is hit by the disability contained in the proviso to section 2 (15) of the Act. In our considered opinion, mere charging of fee ipso-facto would not enable an activity to be governed by the proviso to section 2(15) of the Act without establishing any profit-motive in the charging of fees. In this context, one may refer to the judgment of the Hon'ble Delhi High Court in the case of GS 1 India(supra), wherein the expression trade, commerce or business was being examined in the context of situation where assessee was charging a fee for rendering services. As per the Hon'ble High Court the charging of fee was necessary for carrying out the activities and the sustenance thereof, and, it would not reflect any profit-motive. The judgment of the Hon'ble Gujarat High Court in the case of Sabarmati Ashram Gaushala Trust (supra) is also relevant where the income earned on account of production and sale of milk was sought to be covered within the scope of the proviso to section 2(15) of the Act on the ground that it amounted to an activity in the

nature of trade, commerce or business. The Hon'ble High Court disagreed with the view of Revenue and held that generation of income by way of sale of milk could not be regarded as activity of trade, commerce or business, considering that the objects of the trust were breeding of cattle and cows and oxen. In fact, in the case of All India Football 1 Federation (supra), the Delhi Bench of the Tribunal was considering receipt by way of sponsorship in the context of the proviso to section 2(15) of the Act. The Tribunal held that the main object of the Trust being promotion of the game of football, organizing tournaments, training players, etc., it would not lose its character of being charitable in nature merely because there were receipts by way of sponsorship because the activity of receiving sponsorship fee could not be construed as an activity in the nature of trade, commerce or business. In the present case too, objects of the assessee are undoubtedly the promotion of sports, games and recreation facilities to the public at large and such like receipts on account of compensation from the Decorator against gymkhana function, miscellaneous income and compensation from caterer(restaurant) cannot be construed as activity in the nature of trade, commerce or business for the purposes of the proviso to section 2(15) of the Act. Therefore, having regard to the facts and circumstances of the case, in our view, the CIT(A) erred in departing from his stand in earlier years by wrongly relying on the proviso to section 2(15) of the Act in the instant year because the activities in question cannot be construed to be in the nature of trade, commerce or business so as to fall within the purview of the proviso to section 2(15) of the Act. Thus, on this aspect assessee succeeds. 13. As a consequence to our above decision, the issues raised by the assessee in Ground of appeal No. II to V are also covered and stand allowed.

14. In so far as Grounds No.VI & VII are concerned, which relate to the disallowance of depreciation as application of income and non-granting of set off- of and carry forward of deficit is concerned, the same are also allowed in principle following our decision in the earlier paras holding the assessee eligible for exemption under sections 11& 12 of the Act. The Assessing Officer is directed to rework the aforesaid claims of the assessee in accordance with law.

15. Resultantly, appeal of the assessee is allowed, as above.”

7. Further, the co-ordinate Bench has decided the identical issues in favour of the assessee in the assessee's own case ITA No. 48/Mum/2016 by following the decision of the co-ordinate Bench rendered in the assessee's case for the AY 2009-10. We further notice that the Ld. CIT (A) has decided the issues involved in the present case in accordance with the orders of the concerned Commissioners (Appeals) passed in assessee's own case for the AYs. 2004-05, 2005-06, 2007-08 and 2008-09. Further, the Ld. CIT (A) has relied on the decision of the co-ordinate Bench in the assessee's own case for the AY 2009-10. Since, the issues involved in the present case are squarely covered by the decision of the co-ordinate Bench rendered in the assessee's own case for the AY 2009-10 and 2010-11 (supra) and since there is no change of material fact in the present case, we do not find any reason to interfere with the decision of the Ld. CIT (A) in the present case. Hence, respectfully following the decisions of the co-ordinate Benches rendered in the assessee's own case discussed above, we uphold the findings of the Ld. CIT (A) and dismiss all the grounds of appeal of the revenue.

In the result, appeal filed by the revenue for assessment year 2012-2013 is dismissed.

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

Sd/-
(RAJESH KUMAR)
ACCOUNTANT MEMBER

Sd/-
(RAM LAL NEGI)
JUDICIAL MEMBER

मुंबई Mumbai; दिनांक Dated: 17/05/2019

Alindra, PS

आदेश प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.

3. आयकर आयुक्त(अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR,
ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai