



**IN THE INCOME TAX APPELLATE TRIBUNAL**

**"C" BENCH, MUMBAI**

**BEFORE SHRI SAKTIJIT DEY, JUDICIAL MEMBER AND**

**SHRI MANOJ KUMAR AGGARWAL, ACCOUNTANT MEMBER**

ITA no.648/Mum./2013  
(Assessment Year: 2009-10)

ITA no.1551/Mum./2015  
(Assessment Year: 2010-11)

ITA no.1552/Mum./2015  
(Assessment Year: 2011-12)

ITA no.6913/Mum./2016  
(Assessment Year: 2012-13)

ITA no.6914/Mum./2016  
(Assessment Year: 2013-14)

Otters Club  
Carter Road  
Mumbai 400 050  
PAN – AAATO0013F

..... Appellant

v/s

Income Tax Officer (Exemp.)  
Ward-2(2), Mumbai

..... Respondent

Revenue by: Shri Abirama Kartikeyan  
Assessee by: Shri Porus Kaka a/w  
Shri Nitesh Joshi

Date of Hearing – 09.05.2019

Date of Order – 07.08.2019

**ORDER**

**PER BENCH**

Captioned appeals by the assessee arise out of separate orders of learned Commissioner of Income Tax (Appeals)-1, Mumbai, pertaining to the assessment years 2009-10, 2010-11, 2011-12, 2012-13 and 2013-14.

2. Since all these appeals pertain to the same assessee involving common issue arising out of identical set of facts and circumstances, therefore, as a matter of convenience, these appeals were heard together and are being disposed of by way of this consolidated order.

3. The only common dispute in the present appeals is confined to disallowance of exemption claimed under section 11 of the Income Tax Act, 1961 (for short "*the Act*"). Since, the facts relating to the aforesaid disputed is more or less common in all the appeals, for the sake of brevity, we are narrating the facts involved in the appeal in ITA no. 648/Mum./2013, for assessment year 2009–10, which is taken up as the lead appeal.

4. Brief facts are, the assessee is a public charitable trust providing swimming pool facilities for training and for other aquatic events. It also provides facilities for other sports such as Squash, Billiards, etc. The assessee is not only registered with the Charity Commissioner, Mumbai, but has also been granted registration under section 12A of the Act. For the assessment year under dispute, the assessee filed its return of income on 15<sup>th</sup> September 2009, declaring loss of ₹ 22,19,047. In the course of assessment proceedings, the Assessing Officer, on verifying materials on record, found that the assessee is also providing facilities of playing Cards and also having Permit Room, Bar and Restaurants for Catering and Soft Drinks. Noticing this, the Assessing Officer called upon the assessee to explain how providing

facilities of playing Cards at stake, Permit Room, Bar and Restaurants, constitute charitable activities and why it should not be treated as business activity as provided in section 11(4A) of the Act. Further, he observed, as per income and expenditure statement, the activities of the assessee are clearly different from the object of the trust. He observed, the benefit of the Trust is not utilized for all the persons of the Society, but is limited to the members of the Club only. In response, it was submitted by the assessee, in the preceding assessment years, claim of exemption under section 11 of the Act was allowed by the Tribunal. Further, the assessee relied upon the Special Bench decision of the Tribunal in Breach Candy Swimming Bath Trust. However, the Assessing Officer was not impressed with the submissions of the assessee. He observed, against the decision of the Tribunal in assessee's own case for the assessment year 2004-05, the Revenue has filed special leave petition (SLP) before the Hon'ble Supreme Court which is pending. Further, he observed, the assessee is a club and entry to club is not open to general public. In this context, he referred to local enquiries made by him revealing that entry to the club is restricted to members, their family members and guests accompanying them. He observed, non-members are admitted by charging coaching fee for the games in which they are interested. On perusing the details of coaching fees charged from the members and non-members, the Assessing Officer observed that for admitting

members the club charges huge fees. Thus, he observed, the assessee is not carrying on any activity which is of charitable nature. Referring to different categories of members and membership fees charged, the Assessing Officer observed, though, the membership of the club is open to public, it is restricted in many ways and it is not easy to get membership of the club. Thus, he observed, the assessee is a mutual concern governed by the principles of mutuality. Therefore, he held that it cannot be considered to be a charitable institution. The Assessing Officer observed, the predominant object of the assessee is to provide services to its members. Though, he observed, various facilities, such as, restaurant and sports related facilities are also to some extent provided to the non-members, however, the membership to the club is extremely difficult and expensive, thereby, making it exclusive. Thus, he held that the assessee is not a trust created/established for charitable purpose within the meaning of section 2(15) of the Act read with its proviso. Accordingly, the Assessing Officer held that the assessee is not entitled to exemption under section 11 of the Act and its income has to be computed as normal business income. However, treating the assessee as a mutual concern, the Assessing Officer proceeded to tax the receipts from non-members and other sources such as dividend, interest, etc., and accordingly determined the taxable income at ₹ 3,89,29,816. The

assessee challenged the aforesaid decision of the Assessing Officer by filing appeal before the first appellate authority.

5. However, learned Commissioner (Appeals) also concurred with the view expressed by the Assessing Officer.

6. Shri Porus Kaka, the learned Sr. Counsel for the assessee submitted, the assessee is a premier institution providing facilities for swimming. He submitted, many swimmers trained in the swimming facilities provided by the assessee have represented the Country and their respective States in national and international events and won several medals. Drawing our attention to the trust deed, a copy of which is placed at Page-1 of the paper book, the learned Sr. Counsel submitted, the trust was created in the year 1970 as a public trust for the benefit of persons of all castes and communities. Drawing our attention to the objects of the trust, he submitted, the main object of the assessee is to construct, establish, operate and maintain swimming pools and other sports facilities for the benefit of persons of all communities and castes. He submitted, looking at the charitable nature of the object and the purpose for which the trust was created, not only it was granted registration by the Charity Commissioner, Mumbai, but the Commissioner of Income Tax also granted registration under section 12A of the Act. In this context, he drew our attention to the copy of the registration certificate granted under

section 12A of the Act on 16<sup>th</sup> March 1974. The learned Sr. Counsel submitted, in a span of 46 years, the assessee has produced Swimmers and Squash Champions who have achieved highest National sports awards such as Arjuna, Shiv Chatrapati Award, Asian Record Holder of the English Channel, Asian Age Group Gold, Silver, Bronzemedalists, Senior National Champions, Age Group National Champions and scores of winners at state level aquatic meets, Junior and Senior School, College and University. Contesting the observations of the Departmental Authorities that the Club is a mutual concern providing services to its members only, the learned Sr. Counsel submitted, the Club hosts learn to swim camps for non-members round the year. He submitted, the camps are open to the members of public regardless of caste and creed. The life time and life saving scheme of swimming is taught by efficient swimming staff to over 600 participants in camps held during summer, autumn and winter vacations. He submitted, competitive camp is hosted during Christmas vacation and competitions are held in Water Polo, Diving, Swimming and Synchronized Swimming throughout the year. He submitted, during the academic year School students are given free swimming coaching and on an average 100 students are taught swimming every day. In this context, he drew our attention to the details of swimming camps held throughout the year. He also drew our attention to various competitions held by the assessee for Schools in its Swimming Pools.

Further, drawing our attention to a list of individuals who won medals/laurels at state, National and International level, learned Sr. Counsel submitted, swimmers trained at the swimming facilities of the Club have won a number of medals in different categories and he also drew our attention to the individuals who excelled in such events. As regards the observation of the Assessing Officer that the assessee provides facilities of playing Cards at stake, the learned Sr. Counsel submitted, the assessee does not provide any facility of playing Cards for stakes. He submitted, the assessee has a Bridge Room where only Bridge Tournaments are held twice a year and there is no playing of Cards for stakes. The learned Sr. Counsel submitted, from the very inception, the assessee is carrying on the same activity in furtherance of the objects mentioned in the trust deed. He submitted, in the return of income filed for the assessment year 1975-76, the assessee claimed exemption under section 11 of the Act which was denied by the Assessing Officer. He submitted, when the issue again came back to the Assessing Officer after being set aside by the Tribunal, he granted exemption to the assessee under section 11 of the Act which continued continuously for ten years. In this context, he drew our attention to the order dated 29<sup>th</sup> September 1982, passed in ITA no.1918/Bom./1981. He submitted, assessee's claim of exemption under section 11 of the Act was again rejected by the Assessing Officer in the assessment year 1985-86 and 1991-92. He submitted, while

deciding assessee's appeal in ITA no.5576/Bom./ 1993 and ITA no.6413/Bom./1994, dated 23<sup>rd</sup> August 2001, the Tribunal relying upon the Special Bench decision in Breach Candy Swimming Bath Club held that assessee's income from Swimming Pool, other sports activities, Bar and Restaurants, etc. are from the activities carried out towards the object of the trust, except, income from facilities provided for playing Cards for stakes. Thus, the Tribunal ultimately concluded that the assessee is entitled for exemption under section 11 of the Act in respect of all its income except the income from providing facilities of play cards. He submitted, similar view was expressed by the Tribunal in the subsequent assessment years as well. In this context, he drew our attention to the orders of the Tribunal in other assessment years till the assessment year 2008-09. The learned Sr. Counsel submitted, the decision of the Tribunal in assessment years 2004-05, 2006-07 and 2007-08, have also been upheld by the Hon'ble Jurisdictional High Court. In this context, he drew our attention to the orders of the Hon'ble Jurisdictional High Court while dismissing the appeals filed by the Revenue. The learned Sr. Counsel for the assessee submitted, even the SLP filed by the Revenue against the decision of the Hon'ble Jurisdictional High Court in assessment year 2004-05 has been dismissed, though, due to low tax effect. The learned Sr. Counsel submitted, merely because of amendment to section 2(15) of the Act, by Finance Act, 2010, with retrospective

effect from 1<sup>st</sup> April 2009, the object of the assessee does not cease to be charitable and cannot be treated as commercial activity. The learned Sr. Counsel submitted, when the object of the assessee over the years has remained unchanged, merely because of insertion of proviso to section 2(15) of the Act, assessee cannot lose its charitable character. He submitted, the main object of the assessee still remains charitable as it is for general public utility. He submitted, the other activities like running a Bar and Restaurant or giving Room on rent are only incidental and ancillary to the main object of the assessee which still remains charitable in nature. Rebutting the allegation of the Departmental Authorities that the facilities of Bar and Restaurants, renting of Room, etc., are provided only to the members which is a mutual activity, learned Sr. Counsel submitted, the money received from these activities subsidize and supplement the main objects and activities of the assessee in maintaining and running swimming and other sports facilities and providing them for the training and competition of the public at large. The learned Sr. Counsel submitted, after the insertion of proviso to section 2(15) of the Act, assessee's registration granted under section 12A of the Act was also cancelled for the very same reason on which the Assessing Officer rejected assessee's claim of exemption. He submitted, while deciding assessee's appeal against the cancellation of registration under section 12A of the Act, the Tribunal vide order dated 15<sup>th</sup> June 2018, passed in

ITA no.2658/Mum./2012, restored the registration granted under section 12A of the Act. While doing so, he submitted, the Tribunal held that merely because of insertion of proviso to section 2(15) of the Act, the nature of assessee's activity does not change. The learned Sr. Counsel submitted, even the observations of the Assessing Officer that assessee's activity are of business nature and comes under section 11(4A) of the Act, cannot be accepted as while deciding assessee's appeal in preceding assessment years, the Tribunal has held that the activities of the assessee does not come within section 11(4A) of the Act. The learned Sr. Counsel submitted, the proviso to section 2(15) of the Act has to be applied on the basis of predominant object. He submitted, if the predominant object of the assessee is charitable in nature, any income or profit generated through other activities would be incidental and ancillary to the predominant object, hence, would not vitiate the charitable character of the trust. In support of such contention, he relied upon the following decisions:—

- i) *DIT(E) v/s Shree Nashik PanchavatiPanjrapole, [2017] 81 taxmann.com 375 (Bom.);*
- ii) *Institute of Chartered Accountants of India v/s DGIT(E), [2013] 35 taxmann.com 140 (Del.);*
- iii) *GS1 India v/s DGIT(E), [2013] 38 taxmann.com 364 (Del.);*
- iv) *The Indian Merchants Chambers v/s DDIT(E), ITA no.4076/Mum./2013, dated 29.06.2016;*
- v) *ADIT(E) v/s Jeevan Vidya Mission, [2015] 64 taxmann.com 62 (Mum.) (Trib.); and*

- vi) *ITO v/s Kalinga Cultural Trust, ITA no.332/Hyd./ 2017, dated 10.11.2017.*

7. He submitted, even after introduction of proviso to section 2(15) of the Act, exemption u/s 11 of the Act has been allowed by the Tribunal in case of various other Clubs on the reasoning that the predominant object of the Clubs is of charitable nature. In this context, he relied upon the following decisions:—

- i) *ITO(E) v/s Chambur Gymkhana, [2017] 80 taxmann.com 354 (Mum. Trib.);*
- ii) *Andheri Recreation Club v/s ITO, [2017] 86 taxmann.com 36 (Mum. Trib.);*
- iii) *Dahisar Sports Foundation v/s ITO, [2017] 87 taxmann.com 313 (Mum. Trib.); and*
- iv) *The Pransukhlal Mafatlal Hindu Swimming Bath & Boat Club Trust, ITA no.511/Mum./2017, dated 30.07.2018.*

8. Further, learned Sr. Counsel for the assessee submitted, income received from specific activity like sale of liquor, providing food in restaurants, etc., or interest received would not detract from the fact that they are incidental and ancillary to the main object of the assessee, hence, would also come within the purview of charitable purpose as defined under section 2(15) of the Act. For such proposition, he relied upon the following decisions:—

- i) *Delhi & District Cricket Association v/s DIT(E), [2015] 58 taxmann.com 292 (Del.)(Trib.);*

- ii) *DDIT(E) v/s Matunga Gymkhana, ITA no.1809/Mum./ 2010, etc., dated 30.11.2016;*
- iii) *DIT(E) v/s Chambur Gymkhana, [2013] 33 taxmann.com 526 (Bom.);*
- iv) *DIT(E) v/s Shri Vile Parle Kelavani Mandal, [2015] 58 taxmann.com 288 (Bom.);*
- v) *DIT(E) v/s Goregaon Sports Club, [2012] 21 taxmann.com 479 (Bom.);*
- vi) *Calcutta Cricket & Football Club v/s ITO, [2017] 88 taxmann.com 384 (Kol.) (Trib.); and*
- vii) *PHD Chamber of Commerce & Industry v/s DIT(E), [2012] 28 taxmann.com 161 (Del.).*

9. Thus, he submitted, assessee's claim of exemption under section 11 of the Act should be allowed.

10. Shri Abirama Kartikeyan, the learned Departmental Representative strongly relying upon the observations of learned Commissioner (Appeals) and the Assessing Officer submitted, the activities relating to sale of liquor, food, etc., cannot be considered to be activities of charitable nature, hence, are commercial activities coming within the proviso to section 2(15) of the Act. If the assessee claims that it is providing sporting facilities like Swimming Pools, Squash, Billiard, etc., it is not necessary for the assessee to run a Bar and Restaurant near to such facilities. Therefore, facilities Bar and restaurant near Swimming Pools, makes it clear that the assessee was carrying on business of selling liquor and food which is a commercial activity. That being the case, assessee cannot be treated as a

charitable trust. The learned Departmental Representative, though, agreed that the assessee provides swimming pool and sports facilities and by using them various international standard swimmers and players have been produced, however, the predominant object of the assessee has to be seen. He submitted, the Departmental Authorities have clearly demonstrated that the facilities of the assessee are exclusively for the use of members and not open to general public. Therefore, it has to be treated as a mutual concern. Thus, he submitted, assessee's claim of exemption under section 11 of the Act was rightly rejected by the Assessing Officer and learned Commissioner (Appeals).

11. We have considered rival submissions and perused the material on record. We have also applied our mind to the decisions relied upon. Factual matrix of the case reveals that the assessee trust was created with the charitable object to construct, establish, operate and maintain swimming pools and other sports facilities for the benefit of all communities and castes. In addition to the aforesaid objects, the trust deed also provided for maintaining a Club House in the name of "the Otters Club". The charitable nature of the assessee can be appreciated from the fact that not only it is registered with Charity Commissioner, Mumbai, but was also granted registration as a Charitable Institution under section 12A of the Act immediately after its creation in the year 1974. It is also a fact that after being granted registration under section

12A of the Act, the assessee started claiming exemption under section 11 of the Act. However, assessee's claim of exemption under section 11 was rejected by the Assessing Officer while framing assessment for the assessment year 1975-76. The denial of exemption under section 11 of the Act was primarily for the reason that the activities of the assessee in providing services to members cannot be considered to be for charitable purpose. However, while deciding Revenue's appeal, the Tribunal directed the Assessing Officer to decide assessee's claim of exemption under section 11 of the Act afresh. In pursuance to the directions of the Tribunal, the Assessing Officer allowed assessee's claim of exemption under section 11 of the Act.

12. Further, the Department allowed assessee's claim of exemption continuously for succeeding 10 years and again in the year 1985-86, the Department rejected assessee's claim of exemption primarily on the ground that the activity of providing food and liquor in the Club premises and the facilities for playing Cards at stake are not activities which can be said to be objects of general public utility. Further, the Assessing Officer observed, such activities amount to carrying on business as per section 11(4A) of the Act. While deciding assessee's appeal for assessment years 1985-86 and 1991-92, the Tribunal in ITA no.5576/Bom./1993 and ITA no.6413/Bom./1994, dated 23<sup>rd</sup> August 2001, after following the Special Bench decision of the Tribunal in *Breach Candy Swimming Bath Trust v/s ITO*, concluded that except

the income derived from the activity of providing facilities for playing Cards at stake, all other income from Swimming Pool and other sport activities, Bar and Restaurants, etc., will be from the activities of carrying out the object of general public utility, hence, entitled to exemption under section 11 of the Act. It is relevant to observe, while dealing with the identical issue relating to assessee's claim of exemption in the subsequent assessment years till the assessment year 2008-09, the Tribunal allowed assessee's claim of exemption under section 11 of the Act. The latest order of the Tribunal for the assessment year 2008-09, was vide ITA no.2250/Mum./ 2012, dated 13<sup>th</sup> September 2013. It is also relevant to observe, the decision of the Tribunal allowing assessee's claim of exemption under section 11 of the Act in the assessment years 2004-05, 2006-07 and 2007-08, have also been upheld by the Hon'ble Jurisdictional High Court. In fact, while deciding Revenue's appeal for the assessment year 2007-08 in Income Tax Appeal no.200 of 2013, dated 19<sup>th</sup> January 2015, the Hon'ble Jurisdictional High Court expressed its displeasure with the approach of the Department in repeatedly filing appeals when the issue has been decided in favour of the assessee not only by the Tribunal, but by the Hon'ble Jurisdictional High Court in the preceding assessment years. It has also been brought to our notice by the learned Sr. Counsel for the assessee that the SLP filed by the Department against the decision of the Hon'ble High Court in the

assessment year 2004–05 in the meantime has been dismissed due to low tax effect.

13. Thus, from the aforesaid facts, it is evident that all along till the assessment year 2008–09, assessee's claim of exemption under section 11 of the Act has been allowed not only by the Tribunal but by the Hon'ble Jurisdictional High Court, thereby, acknowledging that the assessee is a Charitable Institution having charitable objects and also is carrying on charitable activities in accordance with its object. There is no dispute between the parties that the objects on the basis of which the assessee trust was created remained unchanged even in the impugned assessment year. Even, the activities carried on by the assessee are in similar lines and there is no major change in the activities of the assessee. The Departmental Authorities have rejected assessee's claim of exemption under section 11 of the Act, broadly on the reasoning that the assessee is a mutual concern providing services/facilities exclusively to its members. Further, it is carrying on commercial activities by letting out rooms, selling liquor, food stuff, etc. The Club premises are not open to general public and it charges huge membership fees for admitting different categories of members. Thus, it has been concluded by the Departmental Authorities that with the introduction of proviso to section 2(15) of the Act, activities carried on by the assessee are of commercial/business nature, hence, it cannot be considered to be for charitable purpose. As discussed

earlier, till the assessment year 2008–09 assessee's claim of exemption under section 11 of the Act has been accepted by the Tribunal and in some other assessment years, the Hon'ble Jurisdictional High Court has approved the view expressed by the Tribunal.

14. At the cost of repetition, it needs to be reiterated, the objects and activities carried on by the assessee in the impugned assessment year remained unchanged. The only distinguishing feature in the impugned assessment year which needs examination is, the applicability of proviso to section 2(15) of the Act.

15. As could be seen from the language of the aforesaid proviso, it applies only to the 4<sup>th</sup> category of activity coming within the expression "*charitable purpose*" viz. advancement of any other object of general public utility. The proviso says, the object of general public utility cannot be considered to be a charitable purpose if it involves the carrying on of all/any activity in the nature of trade, commerce or business or any activity of rendering any services in relation to any trade, commerce or business for a cess or fee or any consideration. Before we examine the implication of proviso to section 2(15) of the Act qua assessee's claim of exemption, it is necessary to deal with the allegation of the Departmental Authorities that the facilities of the assessee are not easily accessible to general public. In our view, the aforesaid observation of the Departmental Authorities is contrary to

the facts brought on record. From the materials placed before us, we find that the assessee provides its swimming pools/sporting facilities for training and learning of students of different Schools, Colleges and Institutions and for that purpose not only it holds camps regularly, but holds various competitions even involving various Schools. It also provides swimming coaching to kids including mentally challenged kids for preparing them for participating in special Olympics and events. For this purpose, the assessee has created international standard infrastructure which has resulted in creating champion swimmers who have participated in State and National level as well as international events and won medals and awards. From the material placed before us, it is to be noted that between the period 1976 to 2016, swimmers trained in the facilities provided by the assessee have won the following medals.

Approximate tally of Medals - 1976-2016:-

	<i>Gold</i>	<i>Silver</i>	<i>Bronze</i>
<u><i>International</i></u>	14	9	10
<u><i>National</i></u> <i>Open, Jr. Sub Jr.</i>	432	341	248
<u><i>State Level</i></u> <i>Open, Jr. Sub Jr.</i>	945	503	402

16. The fact that the assessee is providing its infrastructure and training facilities to train and groom swimmers for competing at State, national and international level is evident from the fact that champion

swimmers like Anita Sood, Bijoy Jain, Reza Shirazi, Gaurav Kapoor, Pallavi Shetty, Kavita Sood, Milind Soman, amongst others have excelled at different levels of swimming competitions. Similarly, a number of world class players in Billiards and Squash have come up using the infrastructure and training facilities of the assessee. In these circumstances, it cannot be said that the services and facilities of the assessee are not accessible to the general public. On the contrary, the facts on record prove that the assessee had been carrying on its activities fully in conformity with the objects for which it was created. Having said so, it is now necessary to deal with the applicability of the proviso to section 2(15) of the Act to the assessee. Undisputedly, referring to the aforesaid proviso, the Departmental Authorities have held that assessee's activities of selling liquor, food stuff, letting out rooms for fees amounts to commercial activities not only as per the aforesaid provision, but also under section 11(4A) of the Act. The proviso to section 2(15) of the Act which was brought to the statute by Finance Act, 2010, with retrospective effect from 1<sup>st</sup> April 2009, came up for judicial scrutiny time and again. The Courts while interpreting the said provision have held while applying the proviso to section 2(15), the predominant object of the assessee has to be seen. If the predominant object of the assessee is of general public utility and while carrying out such object incidentally activity in the nature of trade, commerce or business is carried out generating some income,

the same would not make the activity of the assessee in the nature of trade, commerce or business. This view has been expressed by the Hon'ble Jurisdictional High Court in Shree Nashik Panchavati Panjrapole (supra). The Hon'ble Delhi High Court in Institute of Chartered Accountants of India (supra) while interpreting the proviso to section 2(15) of the Act held that the purport of the proviso to section 2(15) of the Act is not to exclude entities which are essentially for charitable purpose, but are conducting some activities for a consideration or fee. But to exclude organisations which are carrying on regular business and commercial activities in organized manner in the garb of object of general public utility. The same view was expressed by the Hon'ble Delhi High Court in GS1 India (supra). Even, the other decisions cited by the learned Sr. Counsel for the assessee also express similar view. Therefore, when the assessee till assessment year 2008-09 has been recognized as a Charitable Institution with charitable objects and its claim of exemption under section 11 of the Act was allowed consistently, even, by the Hon'ble Jurisdictional High Court, merely due to introduction of the proviso to section 2(15) of the Act, assessee cannot lose its nature and character of Charitable Institution overnight. Even, after introduction of proviso to section 2(15) of the Act, it is necessary to examine what is the predominant object of the assessee. On a perusal of the facts and material on record, there cannot be any doubt that predominant object

of the assessee is the object of general public utility and the activities carried on by the assessee are also for achieving that object. The income generated by the assessee from sale of liquor, food stuff and room rent are only incidental to the predominant object of general public utility. That being the case, in our view, the assessee satisfies the condition of charitable purpose under section 2(15) of the Act. More so, when the very same activities carried on by the assessee in the preceding assessment years have been found to be charitable in nature, hence, assessee's claim of exemption under section 11 of the Act was allowed. Since, there is no material change in the activity of the assessee in the impugned assessment year, merely due to introduction of proviso to section 2(15) of the Act, assessee's claim of exemption under section 11 of the Act cannot be denied. As regards the observations of the Departmental Authorities that the assessee is a mutual concern providing facilities/services to its members only, we do not find it acceptable. As per the discussions in the forgoing paragraphs, it is established that the assessee provides its infrastructure and facilities to a large section of public and many of them have benefited by utilizing the faculties and training provided by the assessee. Even, in case of various other Clubs the Tribunal has held that the claim of exemption under section 11 of the Act is allowable. The facts of assessee's case is more or less identical to the facts of the other Clubs in respect of whom the Tribunal has rendered

decisions allowing claim of exemption under section 11 of the Act. In various decisions cited before us, the Tribunal has also held that income derived from sale of liquor, food stuff, etc., cannot be considered to be a commercial activity without considering the predominant object of the assessee. It is not the case of the Department that the assessee is carrying on any business or commercial activity in organized manner. Rather the sale of liquor, food stuff, letting of rooms, etc., is incidental to its main activity of constructing, maintaining and providing facilities of swimming pool and other sports to general public at large. In fact, in case of Chembur Gymkhana (supra), the Hon'ble Jurisdictional High Court has approved the decision of the Tribunal that the assessee fulfills the condition of section 2(15) of the Act in spite of the fact that it provided for sale of alcohol in its restaurants which, according to the Tribunal, is an activity incidental to other main activity. Even, the observation of the Assessing Officer that the assessee is hit by section 11(4A) of the Act, is unacceptable, as identical issue was decided by the Tribunal in favour of the assessee in assessment years 1985-86 and 1991-92. Thus, on overall consideration of the facts and material on record and applying the ratio laid down in the decisions relied upon, including the decisions of the Tribunal in assessee's own case, we have no hesitation in holding that the assessee is carrying out objects of general public utility, hence, fulfils the condition of charitable purpose under section

2(15) of the Act. Therefore, the assessee is entitled for exemption under section 11 of the Act. It is worth mentioning, after introduction of proviso to section 2(15) of the Act, the DIT(E) cancelled the registration granted under section 12A of the Act by holding that as per the said proviso, the assessee is engaged in commercial activity. However, the Tribunal while deciding assessee's appeal in ITA no.2658/Mum./2012, dated 15<sup>th</sup> June 2018, reversed the decision of the DIT(E) and restored the registration granted to the assessee by holding that since there is no change in the activity of the assessee from the past assessment years, registration cannot be cancelled merely because of proviso to section 2(15) of the Act. Thus, on overall consideration of facts and material on record and keeping in view the ratio laid down in the decisions cited before us, including the decisions of the Tribunal and the Hon'ble Jurisdictional High Court in assessee's own case in the past assessment years, we hold that the assessee is entitled to exemption under section 11 of the Act in respect of income generated from all other activities except the income from playing Cards for stakes. As regards the income generated from playing Cards, it is the contention of the learned Sr. Counsel for the assessee before us that the assessee does not provide facilities for playing Card for stakes but it holds Bridge Tournaments. The aforesaid claim of the assessee has to be verified by the Assessing Officer and the nature of income derived from playing Cards and its entitlement to exemption

under section 11 of the Act can be decided after factually examining assessee's claim. Needless to say, the Assessing Officer shall provide adequate opportunity of being heard to the assessee before deciding the issue.

17. In the result, appeal is partly allowed in terms indicated above.

18. As regards other appeals under consideration, the facts being identical, our decision in Para-11 to 16 would apply mutatis mutandis to them.

19. In the result, appeals are partly allowed.

Order pronounced in the open Court on 07.08.2019

**Sd/-**  
**MANOJ KUMAR AGGARWAL**  
**ACCOUNTANT MEMBER**

**Sd/-**  
**SAKTIJIT DEY**  
**JUDICIAL MEMBER**

**MUMBAI, DATED: 07.08.2019**

Copy of the order forwarded to:

- (1) The Assessee;
- (2) The Revenue;
- (3) The CIT(A);
- (4) The CIT, Mumbai City concerned;
- (5) The DR, ITAT, Mumbai;
- (6) Guard file.

*Pradeep J. Chowdhury*  
*Sr. Private Secretary*

True Copy  
By Order

Assistant Registrar  
ITAT, Mumbai