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

BEFORE SHRI BHAVNESH SAINI, JUDICIAL MEMBER
AND
SHRI R.K. PANDA, ACCOUNTANT MEMBER

ITA No.5293/Del/2016
Assessment Year: 2012-13

ITO(E), Trust Ward-1(1), New Delhi.	Vs	All India Fine Arts & Crafts Society, 1, Rafi Marg, New Delhi. PAN: AABAA3719N
(Appellant)		(Respondent)

Assessee by	:	Shri Rajan Malik, Advocate, & Shri Gulshan Gaba, CA
Revenue by	:	Shri S.L. Anuragi, Sr. DR
Date of Hearing	:	04.02.2020
Date of Pronouncement	:	26.02.2020

ORDER

PER R.K. PANDA, AM:

This appeal filed by the Revenue is directed against the order dated 4th July, 2016 of the CIT(A)-40 (Exemption), New Delhi, relating to assessment year 2012-13.

2. The grounds of appeal raised by the Revenue read as under:-

> "1. On the facts and in the circumstances of the case and in law, the ld.CIT(A) has erred in allowing the appeal of the assessee by not appreciating the fact that the activity of the assessee of letting out gallery frequently for a price does not qualify as being called in the nature of charity.

2. On the facts and in the circumstances of the case and in law, the ld.CIT(A) has erred in allowing accumulation of income u/s 11(2) of the Income Tax Act, amounting to Rs.1,53,50,000/- which the assessee has failed to utilize within prescribed time as per law.

3. the appellant craves leave to add, to alter or amend any ground of appeal raised above at the time of hearing."

3. Facts of the case, in brief, are that the assessee is a society and filed its return of income on 13th September, 2012 declaring the total income at Rs.2,25,00,000/-. The assessee is registered under the Societies Registration Act, 1860. The AO, during the course of assessment proceedings, observed that the aims and objects of the assessee are as under:-

(a) To foster and develop fine and applied arts in India and to promote appreciation by means of publications, lectures, conferences, demonstration, exhibition;

(b) To organize and establish a national art gallery in New Delhi;

(c) To organize art exhibitions and societies in India and abroad;

(d) To act as the Central Organizations of Arts and Crafts in India

(e) To do all such lawful things as are incidental or conductive to the attainment of above objects and any other objects of arts and literature not mentioned above.

4. He asked the assessee to explain as to why the benefit u/s 11 and 12 of the Act in respect of the income should be allowed in view of the amended section 2(15) introduced w.e.f. 01.04.2009 i.e., relevant to the A.Y. 2012-13 under

consideration because its activities fall in the category of 'advancement of object of general public utility' and its income including rental income is in the nature of business, trade or commerce and the said income exceeds Rs.10 lakhs. Rejecting the various explanations given by the assessee, distinguishing the various decisions cited before him and relying on the amended provisions of section 2(15) of the Act and CBDT Circular No.11/2008 dated 19th December, 2008, the AO held that the activities of the assessee society is not for charitable purposes and, therefore, the income of the assessee is taxable. While doing so, he noted that the assessee is letting out gallery at a frequency of seven days for a price which activity, according to him, is the nature of his business and is hit by the amended provisions of section 2(15) as amended w.e.f. 01.04.2009 that is applicable for A.Y. 2009-10 onwards. The arguments of the assessee that it is charging less than what other societies are charging for letting out their gallery was rejected by the AO. He also rejected the submission of the assessee that there is no profit motive in carrying out this activity. Rejecting the various explanations given by the assessee, the AO rejected the claim of deduction u/s 11 and 12 of the Act and determined the total income at Rs.8,10,44,651/-.

5. In appeal, the ld.CIT(A) allowed the claim of the assessee. While doing so, he held that the assessee should not be termed as a non-charitable organization under the first proviso to section 2(15) of the Act as it is not primarily driven by profit motive keeping in view the facts of the case. Therefore, the assessee shall be

entitled to exemption u/s 11 and 12 of the IT Act. So far as the receipts from gallery rent and sale of paintings are concerned, he noted that the receipts from these two activities is on a very lower side as compared to the overall expenditure incurred by the society and, therefore, no profit motive can be ascribed to the society in carrying out these activities.

6. Aggrieved with such order of the CIT(A), the Revenue is in appeal before the Tribunal.

7. The ld. DR submitted that the assessee during the impugned assessment year has received the following receipts:-

i. Receipts from renting of gallery	:	Rs.16,97,625/-
ii. Sale of paintings	:	Rs.21,43,000/-
iii. Rental Income	:	Rs.4,80,00,000/-

8. He submitted that the assessee, during the year has earned substantial rental income of Rs.4,80,00,000/- from GE group of companies, a big corporate entity engaged in purely commercial activities which has nothing to do with the aims and objects of the assessee trust and, therefore, cannot, by any stretch of imagination be a charitable activity u/s 2(15) of the Act eligible for deduction u/s 11 and 12 of the Act. He accordingly submitted that the decision relied on by the ld. Counsel for the assessee in assessee's own case for the preceding assessment years will not be applicable to the facts of the present case. He also relied on the decision of the Chennai Bench of the Tribunal in the case reported in 158 ITD 676.

9. The ld. Counsel for the assessee, on the other hand, submitted that the Tribunal consistently has dismissed the appeal filed by the Revenue by upholding the order of the CIT(A) allowing the claim of exemption u/s 11 and 12 of the Act. He submitted that the order for A.Y. 2009-10 was challenged by the Revenue and the Hon'ble High Court, vide ITA No.754/2019 has dismissed the appeal filed by the Revenue. Therefore, this being a covered matter in favour of the assessee by the decision of the Tribunal for A.Ys 2009-10, 2010-11 and 2011-12 and the Hon'ble High Court has already dismissed the appeal filed by the Revenue for A.Y. 2009-10, therefore, this being a covered matter, the grounds raised by the Revenue should be dismissed.

10. We have considered the rival arguments made by both the sides, perused the orders of the AO and the CIT(A) and the paper book filed on behalf of the assessee. We have also considered the various decisions cited before us. We find the AO, applying the amended provisions of section 2(15) of the Act and CBDT Circular No.11/2008, denied the exemption claimed u/s 11 of the Act to the society on the ground that the activities of the assessee society are not charitable. According to the AO, the activities of renting out the property has no nexus with the objective of promotion of fine arts and crafts and the receipts therefrom are not given as *quid pro quo* for the business of fine arts and crafts or rendering any services. According to the AO, the rent being received by the society is subject to TDS as a pure rent. Further, the rent from the property has never been considered

or linked with the main activities of the assessee, i.e., promotion of fine arts and crafts under the first proviso to section 2(15) of the Act.

11. We find, the ld.CIT(A) allowed the claim of exemption u/s 11 of the Act. We find, identical issue had come up before the Tribunal in assessee's own case for the immediately preceding A.Y. We find, the Tribunal, vide ITA No.1806/Del/2016, order dated 19th June, 2019, has dismissed the appeal filed by the Revenue by observing as under:-

> "10. We have considered the rival arguments made by both the sides and perused the orders of the authorities below. We have also perused the paper book filed on behalf of the assessee. We find the Assessing Officer applying the amended provision to Section 2(15) of the Act and CBDT Circular No. 11/2008 denied the exemption claimed u/s 11 of the Act to the assessee on the ground that the activities of the assessee trust are not charitable. According to the Assessing Officer, the activities of renting out the property has no nexus with the promotion of Fine Arts & Crafts objective and the receipts therefrom are not given as a quid pro quo for the business of Fine Art & Crafts or rendering any services. According to the Assessing Officer, the rent being received by the society is subject to TDS is a pure rent. Further, the rent from the property has never been considered or linked with the main activities of the assessee i.e. promotion of Fine Arts & Crafts under the first proviso to Section 2(15) of the Act. We find that the ld. Commissioner of Income Tax (Appeals) allowed the claim of exemption u/s 11 & 12 of the Act for which the Revenue is in appeal before the Tribunal. We find for the past assessment years, the rental income was always taken as income from property held under society and allowed application of rent therefrom to the objects of the society. A perusal of the memorandum of association of the society *inter alia* shows the following objects:
>
> > *"(j) To purchase or acquire on lease, or in exchange, or on hire, or otherwise, any real or personal property, and any rights or privileges necessary or convenient for the purposes of the Society.*

(l) To sell, improve, manage and develop all or any part of the property of the Society.

(m) To do all such lawful things as are incidental or conducive to the attainment of the above objects and any other objects of Arts and literature not mentioned above."

11. We further find the Revenue has always accepted the rental income from the property held under society and never considered the same as business income.

12. We find identical issue had come up before the Tribunal in assessee's own case for assessment years 2009-10 and 2010-11. We find the Tribunal vide ITA Nos. 1448/Del/2015 & 1449/Del/2013, order dated 14.02.2019 while allowing the benefit of exemption u/s 11 & 12 of the Act to the assessee society has observed as under:

"5.0 We have heard the rival submissions and have also perused the material on record. We agree with the averment of the Ld. Authorised Representative that the assessee's case is favourably covered for the assessee by the ratio of the judgment of the Hon'ble Delhi High Court in the case of India Trade Promotion Organisation vs. DGIT (E) (supra), wherein vide judgment dated 22.01.2015, the Hon'ble Delhi High Court, while upholding the constitutional validity of proviso to Section 2(15) of the Act, has laid down the strict and literal interpretation of the proviso to Section 2(15) of the Act. The Hon'ble Delhi High Court has held that mere receipt of fee or charge will not mean that the assessee is involved in any trade, commerce or business. In the case of India Trade Promotion Organisation, the Ld. DGIT (E) had passed an order stating that though the assessee was engaged in "the advancement of any other object of general public utility", as per s. 2(15) of the Act, its object could not be regarded as "charitable purposes" due to the new proviso to s. 2(15) and further that it was not eligible for exemption u/s 10(23C)(iv). It was held by the Ld. DGIT (E) that as the assessee had huge surpluses in banks, it had given its space for rent during Trade Fairs and Exhibitions, it had received income by way of sale of tickets and income from food and beverage outlets in Pragati Maidan, etc, the assessee was rendering service to a large number of traders and industrialists in relation to trade, commerce and business and was, therefore, hit by

the expanded list of activities contained in the proviso to Section 2(15). It was further observed by the Ld. DGIT (E) that the service of allotting space and other amenities like water, electricity and security, etc. to the traders to conduct their exhibitions fell within the ambit of any activity of rendering any service in relation to trade, commerce or business. The assessee filed a writ petition before the Hon'ble Delhi High Court claiming that the First Proviso to section 2(15), as amended by the Finance Act, 2008, was arbitrary and unreasonable and violative of Article 14 of the Constitution of India. The Hon'ble Delhi High Court held in the favour of the assessee. The relevant observations of the Hon'ble High Court are as under:

(i) It is apparent that 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. It is also important to note as to what is the dominant activity of the institution in question. If the dominant activity of the institution was not business, trade or commerce, then any such incidental or ancillary activity would also not fall within the categories of trade, commerce or business. It is clear from the facts of the present case that the driving force is not the desire to earn profits but, the object of promoting trade and commerce not for itself, but for the nation – both within India and outside India. Clearly, this is a charitable purpose, which has as its motive the advancement of an object of general public utility to which the exception carved out in the first proviso to Section 2(15) of the said Act would not apply;

(ii) If a literal interpretation were to be given to the said proviso, then it would risk being hit by Article 14 (the equality clause enshrined in Article 14 of the Constitution). It is well settled that the courts should always endeavour to uphold the Constitutional validity of a provision, and in doing so, the provision in question may have to be read down;

(iii) Section 2(15) is only a definition clause. 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 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.

In conclusion, we may say that the expression "charitable purpose", as defined in Section 2(15) cannot be construed literally and in absolute terms.

It has to take colour and be considered in the context of Section 10(23C)(iv) of the said Act. It is also clear that if the literal interpretation is given to the proviso to Section 2(15) of the said Act, then the proviso would be at risk of running fowl of the principle of equality enshrined in Article 14 of the Constitution India. In order to save the Constitutional validity of the proviso, the same would have to be read down and interpreted in the context of Section 10(23C)(iv) because, in our view, the context requires such an interpretation. 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.

Thus, while we uphold the Constitutional validity of the proviso to Section 2(15) of the said Act, it has to be read down in the manner indicated by us."

5.1 Thus, the Hon'ble Delhi High Court has held that merely because a fee or some other consideration is collected or received by an institution, it would not loose its character of having been established for a charitable purpose. Undisputedly, in the present case the dominant activity of the assessee society is not business trade or commerce but its activities are for the promotion of art, craft and culture for the Indian artists in India. The Assessing Officer has himself reproduced the main objectives of the assessee society as per the Memorandum of Association in his assessment order and they are: (i) fostering and developing fine and applied arts in India to promote appreciation by means of publications, lectures, Conferences, Demonstration, Exhibition etc.;(ii) organizing and establishing a national art gallery in New Delhi; (iii) organizing art exhibitions and societies in India and abroad; (iv) acting as Central Organization of Arts and Crafts in India etc. It is also undisputed that the assessee society has carried out activities in the form of annual art exhibitions, camps for senior and junior artists, providing maintenance to aged artists etc. It is also not the department's case that any part of surplus was diverted from the society and applied for any personal benefit of any member or office bearer of the society. Therefore, it can be safely concluded that the dominant activity of the assessee society is not business, trade or commerce and, accordingly, any incidental or ancillary activity like hiring out of art gallery or selling paintings would not also fall within the categories of trade, commerce or business.

5.2 We also note that the Hon'ble Delhi High Court in the case of India Trade Promotion Organisation vs. DGIT (Exemption) (supra) has also duly considered Circular No. 11 of 2008 issued by the CBDT and has observed that the proviso to Section 2(15) of the Act, which was inserted by Finance Act, 2008, was directed to prevent the unholy practice of pure trade, commerce and business entities from masking their activities and portraying them in the garb of an activity in the object of a general public utility but was not designed to hit at those institutions, which

had the advancement of the objects of general public utility at their hearts and were charity institutions.

5.3 Therefore, after duly considering the objects of the assessee society, the settled legal position with respect to interpretation of proviso of Section 2(15) of the Act and respectfully following the ratio of the judgment of the Hon'ble Delhi High Court in the case of India Trade Promotion Organisation vs. DGIT (Exemption) (supra) we are unable to concur with the observations and findings of both the lower authorities and while setting aside the orders of the Ld. CIT (Appeals), we direct the AO to allow the assessee the benefit of exemption u/s 11 & 12 of the Act for assessment year 2009-10.

6.0 Since the issue in assessment year 2010-11 is identical, therefore, for the same reasoning as given by us in assessee's appeal for assessment year 2009-10 while allowing the assessee's appeal, we allow assessee's appeal for assessment year 2010-11 also. In this year also the order of the Ld. CIT (Appeals) is set aside and the AO is directed to allow the assessee the benefit of exemption u/s 11 & 12 of the Act to the assessee."

13. In view of the decision of the Tribunal in assessee's own case cited (supra), we do not find any infirmity in the order of the ld. Commissioner of Income Tax (Appeals) allowing the claim of exemption u/s 11 & 12 of the Act of the assessee. We accordingly uphold the same. The ground raised by the Revenue is accordingly dismissed."

12. We find the decision of the Tribunal for A.Y. 2009-10 was challenged by the Revenue and the Hon'ble High Court vide ITA No.754/2019, order dated 19th August, 2019, has dismissed the appeal filed by the Revenue by observing as under:-

"1. The Revenue is in appeal against an order dated 14th February, 2019 passed by the ITAT in ITA No.1449/Del/2013 for the Assessment Year („AY") 2009-10. 2. The question sought to be urged by the Revenue is whether the ITAT erred in allowing relief to the Assessee, following the decision of this Court in India Trade Promotion Organisation v. DGIT (E)

> (2015) 371 ITR 333 (Del) and holding that merely because a small percentage of the income of the Assessee is from letting out of its premises and sale of paintings, the essential activity of the Assessee would not cease to be charitable for the purposes of Sections 11 and 12 of the Income Tax Act, 1961. 3. Having heard learned counsel for the Revenue, and having examined the impugned order of the ITAT, this Court is of the view that the ITAT has committed no legal error in applying the law explained by this Court in the aforementioned decision. No substantial question of law arises."

13. Similarly, the order for A.Y. 2011-12 has also attained finality and the appeal filed by the Revenue was dismissed by the Hon'ble High Court by observing as under:-

> "At the outset, learned counsel for the appellant has fairly drawn our attention to the order dated 19.08.2019 passed in ITA No. 754/2019, whereby the Revenue's appeal from the order dated 14.02.2019 passed in ITA No. 1449/Del/2013 in relation to the respondent assessee for the assessment year 2009-10 was dismissed by this Court. The impugned order passed by the Tribunal relies on the said earlier order dated 14.02.2019 in relation to the assessment year 2009-10. Since this Court has already held that no substantial question arises for our consideration, we find no merit in this appeal and the same is dismissed."

14. The appeal filed by the Revenue against the order for A.Y. 2010-11 was dismissed by the Hon'ble High Court on account of low tax effect.

15. In view of the above discussion and in view of the consistent decision of the Tribunal in assessee's own case allowing the claim of exemption u/s 11, we find no infirmity in the order of the CIT(A) holding that the activities of the assessee of letting out gallery frequently for a price qualify as being called in the nature of charity and allowing the accumulation of income u/s 11(2) amounting to Rs.1,53,50,000/-. The grounds raised by the Revenue are accordingly dismissed.

16. In the result, the appeal filed by the Revenue is dismissed.

Order pronounced in the open court on 26.02.2020.

Sd/-	Sd/-
(BHAVNESH SAINI)	(R.K. PANDA)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Dated: 26 February, 2020.

dk

Copy forwarded to

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

Asstt. Registrar, ITAT, New Delhi

		Date
1.	Draft dictated on	20.02.2020
2.	Draft placed before the author	25.02.2020
3.	Draft placed before the other Member	26.02.2020
4.	Approved Draft comes to the Sr.PS/PS	26.02.2020
5.	Order uploaded on	26.02.2020
6.	File sent to the Bench Clerk	26.02.2020
7.	Date on which file goes to the Head Clerk.	
8.	Date on which file goes to the AR	
9.	Date of dispatch of Order.	