

IN THE INCOME TAX APPELLATE TRIBUNAL
AHMEDABAD "C" BENCH

(Virtual Court)

**Before: Shri Amarjit Singh, Accountant Member
And Ms. Madhumita Roy, Judicial Member**

**ITA Nos. 1255 & 1256/Ahd/2018
Assessment Year 2013-14**

The Deputy CIT(Exemption), Circle-2, Ahmedabad (Appellant)	Vs	Ahmedabad Urban Development Authority, Sardar Vallabhbhai Patel Sankul, Ashram Road, Usmanpura, Ahmedabad PAN:AAALA0233B (Respondent)
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Revenue by: Shri O.P. Sharma, CIT-D.R.
**Assessee by: Shri S.N. Soparkar, Sr. A.R. with
Ms. Urvashi Shodan, A.R.**

Date of hearing : 16-07-2020
Date of pronouncement : 30-07-2020

आदेश/ORDER

PER : AMARJIT SINGH, ACCOUNTANT MEMBER:-

These two appeals filed by revenue for A.Y. 2013-14, arise from order of the CIT(A)-9, Ahmedabad dated 01-03-2018, in proceedings under section 143(3) r.w.s. 250 & 154 of the Income Tax Act, 1961; in short "the Act".

2. Both the appeals are pertained to assessment year 2013-14 on identical issue and similar facts, therefore, for the sake of convenience, these appeals are adjudicated together in the succeeding paras as under:-

ITA No. 1255/Ahd/2018

3. In this case, assessment order u/s. 143(3) of the act was passed on 22nd March, 2016 and total income was assessed at Rs. 1,39,42,01,346/- by disallowing the exemptions claimed u/s. 11 of the Act. The assessee trust was engaged in urban development and town planning. The Assessing Officer was of the view that the assessee was carrying out the activities of “advancement of other general public utility” in the nature of trade/commerce/business, therefore, the provision of section 2(15) r.w. proviso 1 & 2 were applied to the case. The assessee has contended that object of the trust was not to make profit. It is stated that object of the assessee trust was clearly defined under the provision of the Gujarat Town Planning and Urban Development Act. The receipt on account of lease of plots has to be spent for providing infrastructural facilities. The assessee had explained at the time of assessment that activity of the assessee trust of purchase and sale of land was not of the nature of commercial activity and profit making was neither the aim nor object of the trust.

The Assessing Officer has not accepted the explanation of the assessee trust and stated that assessee charged various types of fees from the public for providing certain amenities i.e. roads, bridges, development charges, registration fee etc. The Assessing Officer was of the view that these receipts received from the general public/beneficiaries for the services rendered have to be considered as income of the trust. Therefore, the Assessing Officer stated that assessee was engaged in the activity of earning profit from sale of

plots/land, charging fees for rendering services to the general public and attracted provision of section 13(8) of the Act. Accordingly, the claim of exemptions available u/s. 11 and 12 of the Act was rejected. The assessee has filed appeal before the Id. CIT(A). The Id. CIT(A) vide order dated 13-06-2017 has directed the Assessing Officer to make various additions of various items of receipts which resulted in enhancement of income. Subsequently, the assessee has filed application for rectification u/s. 154 of the Act for incorrectly computing total income of the assessee after giving appeal effect to the order of the Id. CIT(A) dated 12/04/2017. Accordingly, the Assessing Officer has rectified the mistake and total income was revised to Rs. 13,29,88,496/- from Rs. 1,52,71,89,842/- at the time of giving appeal effect to CIT(A)'s order dated 12-04-2017.

4. Against the order u/s. 143(3) r.w.s. 250 of the Act, the assessee had filed appeal before the Id. CIT(A). The Id. CIT(A) has placed reliance on the judgment of Hon'ble Gujarat High Court in the case of the assessee itself vide ITA No. 423, 424, 425 of 2016 dated 02-05-2017 holding that the assessee is eligible to claim deduction u/s. 11 of the Act as proviso of section 2(15) is not applicable in the case of the assessee. The Id. CIT(A) has elaborated the decision of Hon'ble Gujarat High Court at para 4.3 from page no. 5 to 21 of his order.

The Id. CIT(A) stated that above cited order of the Hon'ble Gujarat High Court was not there before his predecessor CIT(A) who had passed order on 12-04-2017. Accordingly the Id. CIT(A) after following the above referred decision of the Hon'ble Gujarat High Court has held that assessee trust has to be treated as exempt entity during the year under consideration. Therefore, both the appeal of the assessee on this issue against the order of the Assessing

Officer u/s. 143(3) r.w.s. 250 of the Act and against the order u/s. 154 of the Act were allowed.

5. During the course of appellate proceedings before us, the Id. counsel has brought to our notice that the case of the assessee is covered by the decision of Hon'ble Gujarat High Court in the case of assessee itself vide Ahmedabad Urban Development Authority vs. ACIT (Exempt) (2017) 83 taxman 78 (Guj). The Id. departmental representative was fair enough not to controvert the same.

6. With the assistance of Id. representatives, we have gone through the findings of Hon'ble Jurisdictional High Court in the case of the assessee itself as supra. The relevant part of the findings is reported as under: -

"12.9. While upholding the constitutional validity of the proviso to Section 2(15) of the Act, the Division Bench of the Delhi High Court in the case of Indian Trade Promotion Organization vs. Director of Income Tax (Exemption) in WP(C) No. 1872 of 2013 decided on 22.01.2015 has observed in para 58 as under:

"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 foul 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 W(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 WP(C) 1872/13 Page 54 of 55 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 am' 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. " 13. Applying the aforesaid decisions to the facts of the case on hand and with respect to the activities of the ADDA Ahmedabad Urban Development Authority under the provisions of the Gujarat Town Planning Act by no stretch of imagination, it can be said that the activities of the assessee (AUDA) can be said to be in the nature of trade, commerce or business and / or its object and purpose is profiteering. Merely because under the statutory provisions and to meet with the expenditure of Town Planning Scheme and / or providing various services under the Town Planning Scheme,

such as road, drainage, electricity, water supply etc. if the assessee is permitted to sale the plots (land) to the extent of 15% of the total area under the Town Planning Scheme and while selling the said plots they are sold by holding the public auction, it cannot be said that activities of the assessee is profiteering, to be in the nature of trade, commerce and business.

13.1. In the case of Lucknow Development Authority, Gomli Nagar (supra), it is held by the Allahabad High Court that the activities of the authority cannot be said to be in the nature of trade, commerce or business and / or profiteering and therefore, proviso to Section 2(15) of the Act shall not be applicable.

13.2. Similar, view has been expressed by the Rajasthan High Court in the case of Commissioner of Income Tax, Jodhpur vs. Jodhpur Development Authority, Jodhpur Tax Appeal No. 63 of 2012 decided on 5. 7.2016.

14. Considering the aforesaid facts and circumstances and more particularly, considering the fact that the assessee is a statutory body Urban Development Authority constituted under the provisions of the Act, constituted to carry out the object and purpose of Town Planning Act and collects regulatory fees for the object of the Acts: no services are rendered to any particular trade, commerce or business: whatever the income is earned / received by the assessee even while selling the plots (to the extent of 15% of the total area covered under the Town Planning Scheme) is required to be used only for the purpose to carry out the object and purpose of Town Planning Act and to meet with expenditure while providing general utility service to the public such as electricity, road, drainage, water etc. and even the entire control is with State Government and even accounts are also subjected to audit and there is no element of profiteering at all, the activities of the assessee cannot be said to be in the nature of trade, commerce and business and therefore, proviso to Section 2(15) of the Act shall not be applicable so far as assessee is concerned and therefore, the assessee is entitled to exemption under Section II of the Income Tax Act. Therefore, the question no. 1 is to be held in favour of the assessee and against the revenue.

15. Now, so far as another question which is posed for the consideration of this Court i.e. whether while collecting the cess or fees, activities of the assessee can be said to be rendering any services in relation to any trade, commerce or business is concerned, for the reasons stated above, merely because the assessee is collecting cess or fees which is regulatory in nature, the proviso to Section 2(15) of the Act shall not be applicable. As observed herein above neither there is element of profiteering nor the same can be said to be in the nature of trade, commerce or business. At this stage, decision of the Division Bench of this Court in the case of Sabarmati Ashram Gaushala Trust (supra) is required to be referred to. In the case before the Division Bench, the assessee Trust Sabarmati Ashram Gattshala Trust was engaged in the activity of breeding milk cattle; to improve the quality of cows and, oxen and other related activities. The Assessing Officer denied the exemption to the trust under Section 11 of the Act on the ground that considerable income was generated from the activities of milk production and sale and therefore, considering the proviso to Section 2(15) of the Act, the said Trust assessee was denied the exemption under Section 11 of the Act. While holding that the activities of the assessee trust still can be said to be for charitable purpose within the meaning of Section 2(15) of the Act and same cannot be said to be in the nature of trade, commerce or business for which proviso to Section 2(15) of the Act is required to be applied. In para 6, 7, 8 and 12, it is observed and held as under:

6. The legal controversy in the present Tax Appeal centers around the first proviso, in the plain terms, the proviso provides nor exclusion from the main object of the definition of the term Charitable purposes and applies only to cases of advancement of any other of general public utility. If the conditions provided under the proviso are satisfied, any entity, even if involved in advancement of any other object of general public utility by virtue of proviso, would be excluded from the definition of charitable trust. However, for the application of the proviso, what is necessary is that the entity should be involved in carrying on activities in the nature of trade, commerce or business, or any activity of rendering services in relation to any trade, commerce or business, for a cess or fee or any other consideration. In such a situation, the nature, use or application, or retention of income from such activities would not be relevant. Under the circumstances, the

important elements of application of proviso are that the entity should be involved in carrying on the activities of any trade, commerce or business or any activities of rendering service in relation to any trade, commerce or business, for a cess or fee or any other consideration. Such statutory amendment was explained by the Finance Ministers speech in the Parliament. Relevant portion of which reads as under: I once again assure the House that genuine charitable organizations will not in any way be affected. The CBDT will, following the usual practice, issue an explanatory circular containing guidelines for determining whether any entity is carrying on 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. Whether the purpose is a charitable purpose will depend on the totality of the facts of the case. Ordinarily, Chambers of Commerce and similar organizations rendering services to their members would not be affected by the amendment and their activities would continue to be regarded as advancement of any other object of general public utility.

7. In consonance with such assurance given by the Finance Minister on the floor of the House, CBDT issued a Circular No. 11 of 2008 dated 19th December 2008 explaining the amendment as under:

3. The newly inserted proviso to section 2 (15) will apply only to entities whose purpose is advancement of any other object of general public utility i.e. the fourth limb of the definition of charitable purpose contained in section 2 (15). Hence, such entities will not be eligible for exemption under section 11 or under section 10 (23C) of the Act if they carry on commercial activities. Whether such an entity is carrying on any activity in the nature of trade, commerce or business is a question of fact which will be decided based on the nature, scope, extent and frequency of the activity.

3.1 There are industry and trade, associations who claim exemption from tax under section 11 on the ground that their objects are for charitable purpose as these are covered under any other object of general public utility. Under the principle of mutuality, if trading takes place between persons who are associated together and contribute to a common fund for the financing of some venture or object and in this respect have no dealings or relations with any outside body, then any surplus returned to the persons forming such association is not chargeable to tax. In such cases, there must be complete identity between the contributors and the participants. Therefore, where industry or trade associations claim both to be charitable institutions as well as mutual organizations and their activities are restricted to contributions from and participation of only their members, these would not fall under the purview of the proviso, to section 2 (15) owing to the principle of mutuality. However, if such organizations have dealings with nonmembers, their claim to be chargeable organizations would now be governed by the additional conditions stipulated in the proviso to section 2 (15).

3.2 In the final analysis, however, whether the assessee has for its object the advancement of any other object of general public utility is a question of fact. If such assessee is engaged in any activity in the nature of trade, commerce or business or renders any service in relation to trade, commerce or business, it would not be entitled to claim that its object is charitable purpose. 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 the rendering of any service in relation to trade, commerce or business. Each case would, therefore, be decided on its own facts and no generalization is possible. Assessee, who claim that their object is charitable purpose within the meaning of section 2(15), would be well advised to eschew any activity which is in the nature of trade, commerce or business or the rendering of any service in relation to any trade, commerce or business

8. What thus emerges from the statutory provisions, as explained in the speech of Finance Minister and the CBDT Circular, is that the activity of a trust would be excluded from the term charitable purpose if it is engaged in any activity in the nature of trade, commerce or business or renders any service in relation to trade, commerce or business for a cess, fee and/or any other consideration. It is not aimed at excluding the genuine charitable trusts of general public utility but is aimed at excluding activities in the nature of trade, commerce or business which are masked as charitable purpose.

12. All these were the objects of the general public utility and would squarely fall under section 2 (15) of the Act. Profit making was neither the aim nor object of the Trust. It was not the principal activity. Merely because while carrying out the activities for the purpose of achieving the objects of the Trust, certain incidental surpluses were generated, would not render the activity in the nature of trade, commerce or business. As clarified by the CBDT in its Circular No. 11/2008 dated 19th December 2008 the proviso aims to attract those activities which are truly in the nature of trade, commerce or business but are carried out under the guise of activities in the nature of public utility.

15.1. Applying the aforesaid decision to the facts of the case on hand and the object and purpose for which the assessee is established / constituted under the provisions of the Gujarat Town Planning Act and collection of fees and cess is incidental to the object and purpose of the Act, even the case would not fall under second part of proviso to Sect/on 2(15) of the Act.

15.2. Considering the aforesaid facts and circumstances of the case, we are of opinion that the learned Tribunal has committed a grave error in holding the activities of the assessee in the nature of trade, commerce or business and consequently holding that the proviso to Section 2(15) of the Act shall be applicable and therefore, the assessee is not entitled to exemption under Sect/on 11 of the Act. For the reasons stated above, it is held that the proviso to Section 2(15) of the Act shall not be applicable so far as assessee AUDA is concerned and as the activities of the assessee can be said to be providing general public utility services, the assessee is entitled to exemption under Section 11 of the Act. Both the questions are therefore, answered in favour of the assessee and against the revenue. "

After considering the finding of the Hon'ble High Court in the case of the assessee itself as supra we do not find any infirmity in the decision of Id. CIT(A) in holding that assessee is eligible to claim exemption/s. 11 of the Act as proviso of section 2(15) are not applicable in the case of the assessee. Accordingly, this ground of appeal of revenue is dismissed.

7. The other grounds of appeal vide ITA No. 1256/Ahd/2018 of the revenue is filed for the same assessment year against the decision of Id. CIT(A) on similar issue of allowing the benefit of exemption u/s. 11 against the order of assessing officer dated 30th June, 2017 passed u/s. 154 of the Act wherein the total income of the assessee was determined at Rs, 13,29,88,496/- after making rectification in respect of the order giving effect to the CIT(A)'s order. The assessee has filed appeal before the Id. CIT(A) against the order u/s. 154 of the Act and the Id. CIT(A) has allowed the appeal of the assessee after placing reliance on the judgment of Hon'ble

Gujarat High Court in the case of the assessee itself vide ITA No. 423, 424, 425 of 2016 dated 02-052017.

8. Without reiterating the facts after following the decision of Hon'ble Jurisdictional High Court in the case of assessee as supra, this ground of appeal of the revenue is also dismissed.

9. In both the appeals vide ITA nos. 1255/Ahd/2018 and 1256/Ahd/2018, the revenue has also filed similar grounds of appeal on identical facts against the decision of Id. CIT(A) of allowing the benefit of the carrying forward of excess capital expenditure of earlier years against the income of subsequent year in absence of any express provision in the act regarding the same. The Id. counsel has brought to our notice that this issue is fully covered in favour of the assessee by the decision of Hon'ble Supreme Court in the case of CIT vs. Subros Educational Society (2018) 101 CCH 0264 ISCC, (2018) 166 DTR 0257(SC), 2018 303 CTR 0001(SC) dated 16th April, 2018. The Id. Departmental Representative was fair enough not to controvert the same.

10. With the assistance of Id. representatives, we have gone through the material on record and it is noticed that Id. CIT(A) has placed reliance on decision of Hon'ble Gujarat High Court in the case of Shri Plot Shwetambar Murtipujak Jain Mandal 211 ITR 293 wherein it is held that excess of expenditure over the income would be allowed to be carried forward to be set off against the future income. The Id. CIT(A) has also placed reliance on the decision of the Hon'ble Supreme Court in Civil Appeal No 7186 of 2014

in the case of CIT vs. Rajathan Gujarat Charitable Trust, Pune in the order dated 13th December, 2017 wherein it is held that once the assessee is allowed depreciation, he shall be entitled to carry forward the depreciation as well. In the light of the above facts/findings of the Id. CIT(A) and the decision of Hon'ble Supreme Court in the Subros Education Society 303 CTR 1as referred by Id. counsel, we do not find any infirmity in the decision of Id. CIT(A). Accordingly, both the grounds of appeal filed separately in two appeals stand dismissed.

11. In the result, both the appeals of Revenue are dismissed.

Order pronounced in the open court on 30-07-2020

Sd/-
(MADHUMITA ROY)
JUDICIAL MEMBER
Ahmedabad : Dated 30/07/2020

Sd/-
(AMARJIT SINGH)
ACCOUNTANT MEMBER

आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-

1. Assessee
2. Revenue
3. Concerned CIT
4. CIT (A)
5. DR, ITAT, Ahmedabad
6. Guard file.

By order/आदेश से,

उप/सहायक पंजीकार
आयकर अपीलीय अधिकरण,
अहमदाबाद