

**IN THE INCOME TAX APPELLATE TRIBUNAL  
COCHIN BENCH, COCHIN**

Before Shri Sanjay Arora, AM & Shri Aby T. Varkey, JM

ITA No.75/Coch/2015: Asst.Year:2009-2010

ITA No.76/Coch/2015: Asst.Year:2010-2011

ITA No.77/Coch/2015: Asst.Year:2011-2012

Infoparks Kerala Athulya, Kusumagiri PO Kakkanad PO Kochi – 682030 [PAN:AAAAl1094D]	vs.	The Joint Director of Income-tax (OSD) (Exemptions) Range-4 Kochi.
(Appellant)		(Respondent)

Appellant by: Sri. Rajakannan, Advocate  
Respondent by: Smt. J.M. Jamuna Devi, Sr.AR

Date of Hearing: 15.5.2023	Date of Pronouncement: 11.8.2023
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**ORDER**

Per Sanjay Arora, AM:

This is a set of three Appeals, for three consecutive years, being assessment years (AYs.) 2009-2010 to 2011-2012, by the Assessee, contesting the confirmation of it's assessments under section 143(3) of the Income-tax Act, 1961 ('the Act' hereinafter) for the relevant years in first appeal by the Commissioner of Income-tax (Appeals)-2, Kochi ['CIT(A)' for short], vide his separate orders of even date (30.5.2014). The appeals raising the same issues; also decided likewise, were heard together, and are being disposed per a common order for the sake of convenience.

2. The principal issue in the instant appeals is if the assessee, a society constituted under the Travancore-Cochin Literary, Scientific and Charitable Societies Registration Act, 1955 (on 27.10.2004) and registered u/s.12AA of the Act as a charitable trust, is entitled to exemption u/s.11 thereof in view of the amended section 2(15), i.e., by Finance Act, 2010 w.r.e.f. 01.4.2009, which reads asunder:

## "Definitions

2. In this Act, unless context otherwise requires,—

(15) “Charitable purpose” includes relief of the poor, education, medical relief, and the advancement of any other object of general public utility:

**Provided** that the advancement of any other object of general public utility shall not be a charitable purpose, if it involves the carrying on of any activity in the nature of trade, commerce or business, or any activity of rendering any services in relation to any trade, commerce or business, for a cess or fee or any other consideration, irrespective of the nature of use or application, or retention, of the income from such activity;

**Provided further** that the first *proviso* shall not apply if the aggregate value of the receipts from the activities referred to therein is ten lakh rupees (\*) or less in the previous year;”

[(\*)] enhanced to twenty-five lakh rupees from AY 2012-13 onwards]

The *proviso* stands substituted by Finance Act, 2015, w.e.f. 01.4.2016, as under:

“**Provided** that the advancement of any other object of general public utility shall not be a charitable purpose, if it involves the carrying on of any activity in the nature of trade, commerce or business, or any activity of rendering any service in relation to any trade, commerce or business, for a cess or fee or any other consideration, irrespective of the nature of use or application, or retention, of the income from such activity, unless –

(i) such activity is undertaken in the course of actual carrying out of such advancement of any other object of general public utility; and

(ii) the aggregate receipts from such activity or activities during the previous year, do not exceed twenty per cent of the total receipts, of the trust or institution undertaking such activity or activities, of that previous year;”

In other words, advancement of an object of general public utility (GPU) shall, AY2009-2010 onwards, be not a charitable purpose for the purposes of the Act, where the same involves any activity in the nature of trade, commerce or business, if the gross receipt thereof is in excess of the threshold limit defined therein.

3.1 The assessee has for the relevant years claimed exemption u/s.11(1) on the entirety of it’s surplus as per the Income and Expenditure account (I&E A/c) on account of application thereof on capital assets/expenditure, admissible in view of, *inter alia*, *S.R.M.CT.M Tiruppani Trust v. CIT*[1998] 230 ITR 636 (SC). The assessee, for the purpose, relies principally on it’s antecedents; it being set-up by Government of Kerala (GoK) as an independent entity to provide professional and

managerial support to it's initiatives for the development of infrastructure for IT and IT-enabled and support industries in pursuance to it's IT policy, whereby Kochi is to be promoted as an IT Hub (GO dtd. 30.6.2004/PB pg.88). High-tech parks were to be, accordingly, developed in Kochi, as elsewhere in Kerala. 200 acres of land at Kochi was to be provided by it, of which 80 acres, at Kakkanad, District Ernakulam, belonging to Kinfra was transferred to the assessee-society on 18.9.2003. Built-up space for IT and ITES was to be set-up thereat, targeted at 7.5 lakh sq.ft. annually for the first two years, increasing upto an additional 15 lakh sq.ft. per annum for the next three years. The additional capacity was envisaged to be created *by enjoining private sector participation, including through joint ventures*. Further, Infopark area, Kochi was declared as an industrial area by GoK in April, 2010. The basis of the denial of it's claim for exemption by the Revenue is that the activity of letting built-up space and provision of amenities, the principal activity undertaken by the assessee in pursuance of it's objects, though otherwise qualifying as 'advancement of an object of general public utility' and, thus, a charitable purpose, is no longer so in view of the *proviso to sec.2(15)*.

3.2 The second issue arising in the instant appeals is if depreciation is to be deducted in computing income liable for application for charitable purpose inasmuch as the cost of the capital assets, on which the same stands claimed, had already been allowed in full by way of application of income on the deployment of funds on their acquisition. The same, though a part of the statute w.e.f. AY 2015-2016 [s.11(6)] inasmuch as it amounts to a double relief, stands disapproved by the Hon'ble Apex Court in *CIT v. Rajasthan and Gujarathi Charitable Foundation* [2018] 402 ITR 441 (SC), so that no disallowance thereof would obtain for years prior to AY 2015-2016.

4. We have heard the parties, and perused the material on record.

4.1 Taking the first issue, the Revenue's understanding of the amended s. 2(15) stands endorsed by the Apex Court in *Ahmedabad Urban Development Authority*

(infra), wherein it explains that in view of the paradigm change in sec. 2(15) after its amendment w.e.f. AY 2009-10, a charity engaged in advancement of an object of general public utility cannot engage in any activity in the nature of trade, commerce or business, or any service in relation thereto, for any consideration. The idea of a predominant object, among several, is discarded. In it's words:

'16. To sum up, section 2(15) excludes from exemption the carrying on of activities for profit even if they are linked with the objectives of general public utility, because the statute interdicts, for purposes of tax relief, the advancement of such objects by involvement in the carrying on of activities for profit. We appreciate the involved language we use, but when legislative draftsmanship declines to be simple, interpretative complexity becomes a judicial necessity.'

4.2 The assessee's case before the Revenue authorities was along the following lines:

- (a) It is a fully owned and controlled by the GoK with the avowed object of development of IT parks in the State of Kerala.
- (b) As apparent from its Memorandum of Association (MoA), Rules and Byelaws – which remain the same post-amendment to sec.2(15), it is not formed for either earning profit or for carrying an activity in the nature of trade, commerce or business.
- (c) Its funds, on it's dissolution, cannot be paid or distributed amongst its members, but are to be, subject of course to the provisions of the Societies Act, dealt with in such manner as the GoK may determine.
- (d) Without prejudice, the activity of letting building and vacant lands falls under the head of income 'income from house property' (IFHP), and cannot be treated as business income.

Reliance stood also placed by it on the decisions in *Addl.CIT v. Surat Art and Silk Mfrs. Assn.* [1980] 121 ITR 1 (SC); *CIT v. Gujarat Maritime Board* [2007] 295 ITR 561 (SC); *CIT v. Dawoodi Bohra Jamat* [2014] 364 ITR 31 (SC); and *DIT(E) v. Sabarmati Ashram Gaushala Trust* [2014] 362 ITR 539 (Guj).

4.3 Before us, it was a common contention of the parties that the issue is squarely covered by the recent decision by the Hon'ble Apex Court in *Asst. CIT v. Ahmedabad Urban Development Authority* [2022] 449 ITR 1(SC), placing a copy thereof on record. No assistance, however, from the parties, i.e., as to how the given activity/s

and the assessee's *modus operandi* would stand to be considered, or require being understood, in light of the said decision, was forthcoming from the parties. This, despite this being precisely the reason the instant appeals, heard initially by the Tribunal on 31/01/2023, were released for hearing on the applicability of the said detailed judgment. The Hon'ble Apex Court having however held, in relation to a class/category of assesseees, that provision of goods or services at cost or on a nominal mark-up basis, would not *ipso facto* amount to a consideration within the meaning of *proviso* to sec.2(15), the assessee was called upon by the Bench to place on record the statement of its gross receipts and income from year to year, and which was accordingly done, and the hearing, accordingly, closed.

4.4 The Hon'ble Apex Court has in *Ahmedabad Urban Development Authority* (supra), upon analyzing the words "cess, fee, or other consideration" in *proviso* to sec.2(15), classified the assesseees between those providing essential services, viz., providing water, electricity, distribution of food grains, medicines, maintenance of roads and parks, etc. by Corporations, Boards or Trusts or Authorities set-up under different enactments. The charges raised by them, it explains, would not stand to be characterized as 'commercial receipts', so as to be regarded as receipts of any trade, commerce, or business. Then, is the case of other statutory corporations, or other bodies, involved in advancement of an object of general public utility, and which in the course of carrying the said object, are also involved in an activity/s in the nature of trade, commerce or business, providing determinative tests in respect thereof, reproduced as under:

"190. In light of the above discussion, this court is of the opinion that:

(i) The fact that bodies which carry on statutory functions whose income was eligible to be considered for exemption under section 10(20A) ceased to enjoy that benefit after deletion of that provision w.e.f. 01.04.2003, does not *ipso facto* preclude their claim for consideration for benefit as GPU category charities, under section 11 read with section 2(15) of the Act.

(ii) Statutory Corporations, Boards, Authorities, Commissions, etc. (by whatsoever names called) in the housing development, town planning, industrial development sectors are involved

in the advancement of objects of general public utility, therefore are entitled to be considered as charities in the GPU categories.

(iii) Such statutory corporations, boards, trusts authorities, etc. may be involved in promoting public objects and also in the course of their pursuing their objects, involved or engaged in activities in the nature of trade, commerce or business.

(iv) The determinative tests to consider when determining whether such statutory bodies, boards, authorities, corporations, autonomous or *self-governing government sponsored bodies*, are GPU category charities:

(a) Does the state or central law, or the memorandum of association, constitution, etc. advance any GPU object, such as development of housing, town planning, development of industrial areas, or regulation of any activity in the general public interest, supply of essential goods or services - such as water supply, sewage service, distributing medicines, of food grains (PDS entities), etc.;

(b) While carrying on of such activities to achieve such objects (which are to be discerned from the objects and policy of the enactment; or in terms of the controlling instrument, such as memorandum of association etc.), the purpose for which such public GPU charity, is set-up - whether for furthering the development or a charitable object or for carrying on trade, business or commerce or service in relation to such trade, etc.;

(c) Rendition of service or providing any article or goods, by such boards, authority, corporation, etc., on cost or nominal mark-up basis would ipso facto not be activities in the nature of business, trade or commerce or service in relation to such business, trade or commerce;

(d) where the controlling instrument, particularly a statute imposes certain responsibilities or duties upon the concerned body, such as fixation of rates on pre-determined statutory basis, or based on formulae regulated by law, or rules having the force of law, setting apart amenities for the purposes of development, charging fixed rates towards supply of water, providing sewage services, providing food-grains, medicines, and/or retaining monies in deposits or government securities and drawing interest therefrom or charging lease rent, ground rent, etc., per se, recovery of such charges, fee, interest, etc. cannot be characterized as “fee, cess or other consideration” for engaging in activities in the nature of trade, commerce, or business, or for providing service in relation in relation thereto;

(e) Does the statute or controlling instrument set out the policy or scheme, for how the goods and services are to be distributed; in what proportion the surpluses, or profits, can be permissively garnered; are there are limits within which plots, rates or costs are to be worked out; whether the function in which the body is engaged in, is normally something a government or state is expected to engage in, having regard to provisions of the Constitution and the enacted laws, and the observations of this court in NDMC; whether in case surplus or gains accrue, the corporation, body or authority is permitted to distribute it, and if so, only to the government or state; the extent to which the state or its instrumentalities have control over the corporation or its bodies, and whether it is subject to directions by the concerned government, etc.;

(f) As long as the concerned statutory body, corporation, authority, etc. while actually furthering a GPU object, carries out activities that entail some trade, commerce or business, which generates profit (i.e., amounts that are significantly higher than the cost), and the quantum of such receipts are within the prescribed limit (20% as mandated by the second proviso to section 2(15)) – the concerned statutory or government organisations can be characterized as GPU charities. It goes without saying that the other conditions imposed by the seventh proviso to section 10(23C) and by section 11 have to necessarily be fulfilled.

(v) As a consequence, it is necessary in each case, having regard to the first proviso and seventeenth proviso (the latter introduced in 2012, w.r.e.f 01.04.2009) to section 10(23C), that the authority considering granting exemption, takes into account the objects of the enactment or instrument concerned, its underlying policy, and the nature of the functions, and activities, of the entity claiming to be a GPU charity. If in the course of its functioning it collects fees, or any consideration that merely cover its expenditure (including administrative and other costs plus a small proportion for provision) - such amounts are not consideration towards trade, commerce or business, or service in relation thereto. However, amounts which are significantly higher than recovery of costs, have to be treated as receipts from trade, commerce or business. It is for those amounts, that the quantitative limit in proviso (ii) to section 2(15) applies, and for which separate books of account will have to be maintained under other provisions of the IT Act.

*(emphasis, supplied)*

4.5 The assessee's – a self-governing body, case, quite clearly, falls under the latter category of cases, i.e., of entities engaged in providing other than essential services. The assessee's sole activity, and inspite lapse of a number of years, continues to be restricted to provision, in a systematic and organized manner though – *being in fact not feasible otherwise*, i.e., on the scale and in the manner it is to be pursued, of built-up space for housing IT/ITES units at the park developed (or being developed) by it, including provision for incidental services, viz., water, electricity, etc. -- the consumption cost of which though is met by the unit concerned, air conditioning, parking space, etc., all at a cost. Not only does the same qualify to be a 'business', or at the very least an activity in the nature thereof, the same attracts the second limb of the *proviso*, i.e., of being a service in relation to trade, commerce or business. It is said that letting is not 'service'. *If provision of built-up space, along with back-up and ancillary amenities, is not 'service', what we wonder is?*

Being envisaged to be run as an independent body, there is no Government interference in its functioning, apparent also from its constitution, which clearly defines it's mandate. There is no fixation of rentals by the Government, or otherwise

formula prescribed, on the basis of which the same is fixed or arrived at. There is no claim to the contrary. Designating park/s as an industrial area, and providing for single window clearance for the units set-up therein, are the administrative steps GoK has taken, on it's part, in the matter. Though providing built-up space is not the only manner to attract investment in IT sector in the State, or to promote it as an IT hub, is yet surely one. The word 'involves' in *proviso* to sec.2(15) is not preceded by the word 'necessarily', and neither is there anything in the language of the provision, or the decision in *Ahmedabad Urban Development Authority* (supra), which is being sought to be scrupulously followed in deciding these appeals, for it being so read. The adopted business model, however, necessarily involves letting the said space to the industry for a consideration, and which is pegged at market rates. Any other basis, as we shall presently see, would be inconsistent with sound business practice and economic rationale. It is by and through the carrying on of this business of providing built-up space or making available vacant land, on leasehold basis, i.e., even if at a charge, that the assessee-society fulfills its object of promotion of IT/ITES industry in the State of Kerala. The same is thus incidental to its object/s.

4.6 We, next, consider the aspect of whether the charges levied by it, including the lease rentals, are with a view to recover it's costs, or at best with a nominal margin, or this is not the case, with it, as alleged, operating on commercial basis, *charging lease rentals at market rates*. It would be relevant to, before we undertake this examination, refer to the specific adjudication by the Hon'ble Apex Court; the bunch of appeals decided in *Ahmedabad Urban Development Authority* (supra) including some similar cases, which we reproduce as under:

**253.....D. Trade promotion bodies**

Bodies involved in trade promotion (such as AEPC), or set up with the objects of purely advocating for, coordinating and assisting trading organisations, can be said to be involved in advancement of objects of general public utility. However, if such organisations provide additional services such as courses meant to skill personnel, providing private rental spaces in fairs or trade shows, consulting services, etc. then income or receipts from such activities, would be business or commercial in nature. In that event, the claim for tax exemption would have to be again subjected to the rigors of the proviso to Section 2(15) of the IT Act.

E. Non-statutory bodies

E.1. In the present batch of cases, non-statutory bodies performing public functions, such as ERNET and NIXI are engaged in important public purposes. The materials on record show that fees or consideration charged by them for the purposes provided are nominal. In the circumstances, it is held that the said two assesseees are driven by charitable purposes. However, the claims of such non-statutory organisations performing public functions, will have to be ascertained on a yearly basis, and the tax authorities must discern from the records, *whether the fees charged are nominally above the cost, or have been increased to much higher levels.*

E.2. It is held that though GS1 India is in fact, involved in advancement of general public utility, its services are for the benefit of trade and business, from which they receive significantly high receipts. In the circumstances, its claim for exemption cannot succeed having regard to amended section 2(15). However, the Court does not rule out any future claim made and being independently assessed, if GS1 is able to satisfy that what it provides to its *customers is charged on cost-basis with at the most, a nominal mark-up.*

The foregoing neatly sums up the adjudication *qua* entities as the assessee, which is accordingly to be followed. It is the entire factual matrix that falls to be considered. The caveat *qua* non-profit motive would though stand out inasmuch as, notwithstanding any other consideration, if the operations are being carried out in a commercial manner, the same would oust the assessee's case from being a charitable entity at the threshold where the quantitative limit set forth per the *proviso* to sec.2(15) is, as is the case, met. Coming to the assessee's case, even as it's MoA lists a number of objects, all toward promotion of IT/ITES industry in Kerala, it is essentially engaged in, firstly, setting-up and, then, managing industrial park by the name 'Infopark Kerala' at Kochi, which houses such units on leasehold basis. That, in any case, is the only activity being pursued. Sec.2(15) being a definition provision, where its terms are not satisfied, the assessee's claim of a charitable institution shall be ousted even if its activities are not hit by the provision or are in relation to objects other than GPU. As informed, built up space is leased thereto for 7-8 year term. The other format followed is 99-year lease of vacant land. The assessee has vide letter dated 16.05.2023, as afore-noted, provided the summary of it's financial results over the years, as under:

Table A

Financial Year	Assessment year	Turnover	Interest Income	Total Turnover	Depreciation	Surplus/ (Deficit) including interest	% to turnover	Cash surplus	% to turnover
2008-09	2009-10	8,91,68,222	9,76,547	9,01,44,769	5,25,76,865	79,14,551	8.88	6,04,91,416	67.10
2009-10	2010-11	9,86,57,022	17,80,875	10,04,37,897	5,02,78,032	1,48,39,831	15.0	6,51,17,863	64.83
2010-11	2011-12	11,32,29,712	25,68,017	11,57,97,729	4,91,85,724	1,79,63,217	15.8	6,71,48,941	57.98
2011-12	2012-13	20,26,25,731	22,00,466	20,48,26,197	11,98,34,273	45,73,086	2.26	12,44,07,359	60.73
2012-13	2013-14	29,05,64,628	17,30,364	29,22,94,992	13,20,16,767	2,46,44,599	8.48	15,66,61,366	53.59
2013-14	2014-15	33,34,15,598	12,46,945	33,46,62,543	13,96,44,898	2,07,39,685	6.22	16,03,84,583	47.92
2014-15	2015-16	38,12,38,355	18,97,255	38,31,35,610	14,66,71,112	78,10,586	2.05	15,44,81,698	40.32
2015-16	2016-17	44,81,58,011	33,64,195	45,15,22,206	17,54,42,421	(44,22,577)	(0.99)	17,10,19,844	37.87
2016-17	2017-18	47,76,13,029	97,45,036	48,73,58,065	25,55,35,337	(8,49,29,663)	(17.7)	17,06,05,674	35.00
2017-18	2018-19	53,11,16,585	15,31,32,588	68,42,49,173	31,08,69,716	63,81,782	1.20	31,72,51,498	46.36
2018-19	2019-20	61,54,48,892	18,10,97,975	79,65,46,867	30,12,19,545	9,73,80,445	15.8	39,85,99,990	50.04
2019-20	2020-21	64,65,82,728	16,71,30,761	81,37,13,489	28,62,75,362	10,70,44,944	16.5	39,33,20,306	48.33
2020-21	2021-22	51,84,83,877	10,22,24,322	62,07,08,199	27,92,30,450	(66,35,766)	(1.28)	27,25,94,684	43.91
2021-22	2022-23	55,16,44,516	9,00,84,694	64,17,29,210	25,41,88,335	1,01,21,226	1.83	26,43,09,561	41.18

It is clear that there is no uniformity in the profit percentage from year to year. Two inferences, equally plausible, arise from the said data. One, notwithstanding that the assessee has, finding its cost to be below the revenue, adjusted the latter downward for the later years. This is in fact impractical as the lease rent would be fixed for the period of the lease term, if not providing for a nominal increase over the said term. It is even otherwise, i.e., *qua* the new leases, impractical, as a rent cannot be revised downwards, implying different units being charged differently for the same services. Further, the charges would have to be again increased on the nearly inevitable increase in cost over time, which would give incoherent and unhealthy signal to the industry, besides speaking poorly of the organization – a *quasi* Government body, and its management. Why, the profit rate climbs again. A stable base rate is crucial, which could at best exhibit a secular, albeit marginal, increase with time. This rate can though be subject to a nominal per annum increase over the lease term to account for inflation. The first inference gets, thus, ousted. The other is that the profit for the later years is, on account of increase in costs, even as it continues charge the same lease rent, is even higher, i.e., the cost increase is at a rate higher than the revenue. This appears to be the case. In fact, much of the problem in raising revenue emanates from non-stability of cost. The output price, the rent rate in the instant case, cannot though be pegged on the basis of cost, which would be specific to each individual organization, but are, and can only be, market driven. The operating statement may

thus exhibit either a surplus or deficit, i.e., depending on whether the cost increase has been contained or not. Then, there is also the question of volume. A lower off-take in quantitative terms may yield a lower profit, or even loss, as indirect cost, as, for example, establishment costs, are generally fixed or, atleast, largely so. This, to us, appears to be the case in the instant case. The Revenue states of the assessee charging lease rent at the market rate. Though this has been it's consistent stand, there has been no rebuttal thereof by the assessee at any stage. The assessee before us per its argument notes states that it is not so. This is however not supported by any facts and figures. The assessee has in fact during hearing admitted to charging rent even for parking space and, further, interest on delayed payment of rent. It is, thus, clearly operating on a commercial basis. Lower profit for a particular year could thus have its reasons specific to that year, viz. low off-take, increased costs, etc., and would not detract from the fact that the assessee is operating on a commercial basis. Though extremely relevant, we, in view of the foregoing, are not solely moved by the profit rate for a particular year, but, in view of the inconsistent behavior and unexplained variation therein, guided more by the fact of the assessee operating in a commercial environment, on commercial lines, charging lease rent to the industrial units at the going market rate/s. If that does not translate into profit for a particular year/s, which could be for a variety of reasons, is another matter. Why, even businesses suffer losses, which by no means implies them not operating on commercial basis. The same, though relevant, may thus not furnish a conclusive basis or guidepost. This explains a proper examination, even as held by the Apex Court.

When it, in *Ahmedabad UDA* (supra), states of reimbursement of cost or, at best, with a nominal mark-up, it means just that, i.e., an organization not operating on commercial basis, but the charge for it's goods or services being aimed at reimbursement of the cost of providing the same. The issue, thus, is principally factual. We have already explained, in some detail, the practical aspects impinging on operating on that basis, which has in any case not been demonstrated, with, on the

contrary, there being no effective contradiction of the charge of lease rent at market rate, buttressed by the fact of lease of parking space; interest for delayed payment, etc. all borne out by its balance-sheets on record, which also bears 'civic and campus maintenance charge' at Rs.65.83 lakhs (for f.y.2008-2009), which is besides the 'other income' at Rs.18.25 lakhs. In fact, it is on account of it, given the ground reality of uncertainty of cost, besides its irrelevance in the market place, impractical to state a precise figure that the Apex Court has stated of a nominal mark-up. Profit rates vary intrinsically, due to demand and supply factors, both across different spheres of human activity, as indeed over time. We have, rather, and on the contrary, found that the price charged is not cost-based or with reference to cost at all, with the result that there could be, as indeed obtains, a wide variation in profit – for which there could be, as afore noted, a number of disparate reasons from year to year. It is, again, for this reason, i.e., of profit intent or motive or commerciality, being unable to be captured by a profit rate, which would vary from trade to trade, as indeed from time to time, that the statute also falls shy of providing profit as a criterion, and it suffices its purpose where the activity engaged in is in the nature of trade, commerce, or business – all terms of very wide import, i.e., on a commercial basis, even as explained in *Ahmedabad UDA* (supra) in the context of s.10(46). Why, we have found that a lease, which envisages charge of consideration over an extended time in future, on cost basis is inconsistent with the imperatives of such an activity. And to think that the assessee is providing lease even on 99 year lease basis!

We may further add that the profit reported is after depreciation, which we observe as material. Sure, capital to the extent deployed in fixed assets, is subject to depreciation on their user, so that a capital allowance by way of depreciation is justified from an accounting standpoint; the income of a charitable trust being liable to be computed following the principles of commercial accounting. However, funds generated from operations are, to this extent, though not reported as profit in view of this charge, are yet available for growth. This is particularly so as capital infusion,

which is by GoI and GoK, is toward capital and corpus, both of which are to be retained as part of the capital base of the assessee. Loans from financial institutions, being liable to be repaid, so that they may not continue to be a part of its capital structure indefinitely, constitute an insignificant part thereof. In fact, such loans are usually on soft terms, and for an extended period of time. That apart, being not consistent, depreciation adds to the variability of cost and, thus, of profit, from year to year. For instance, for AY 2009-2010, the first year, out of the total expense of Rs.822.30 lakh, depreciation is at Rs.525.77 lakh, i.e., at *64% of the total cost and 58% of the turnover* (gross receipt), with the balance aggregate cost being at— a much lower figure in comparison, 33% of the turnover. True, depreciation is an actual cost. The same, however, being charged on WDV basis, at the rates specified under the Companies Act, 1956, is highly skewed in favour of recovery of capital at the earliest. Depreciation charge is thus not evenly spread over the useful life of the asset, depressing income for the initial years. A uniform charge, as against an accelerated one, would present a much healthier state of affairs, particularly in the instant case of it constituting a significant expense. In fact, the charge of depreciation thus itself demonstrates the assessee as being run as a commercial organization, driven by profit. Infact, all other indica, i.e., of it being managed by a Chief Executive Officer (CEO); having an independent finance department headed by a senior executive; enjoying private participation, are toward the same.

There is no restrictive element in the scope of the term “business” to exclude an activity. The Apex Court in *Sultan Brothers (P.) Ltd. v. CIT* [1964] 51 ITR 353 (SC), on an argument of rental income being a business, as what was being let was a commercial asset, clarified that a thing can not by its very nature be a commercial asset. A commercial asset is only an asset used in a business and nothing else, and business may be carried on with practically all things. Whenever the matter, arising on account of the differential computation of income under the two heads of income, i.e., of business, and from house property, travelled to the higher courts, it has been

unequivocally clarified for being decided in the conspectus of the case, so that decisions both ways, i.e., as business income, as indeed from house property, from the Hon'ble Apex Court obtain. The determinative test, as explained by it, being that the letting is being undertaken in an organized manner to turn the house property, i.e., land and building, into account. *The test is satisfied in the instant case.* The lease rentals are deployed to finance both creation of more built-up space, as per it's mandate, and which we observe to be at, besides Cochin, Thrissur, Ambalapuzha and Cherthala, as well as through charge of depreciation, sustain that existing. Further, we may clarify that this business is not a property held under trust, but one carried on the basis or by virtue of such property, being, for instance, 80 acres of land transferred from KINFRA; the capital infusion by GoI and GoK, etc. The income generated from it's business by the assessee, or, more precisely, the assets representing the same, again, is property held under trust inasmuch as there is no other activity, at least for the present, by the assessee-society. The same qualifies as an eligible business u/s.11(4A), and it's income assessable as business income. The head of income under which the income of a charitable institution, where taxable, would stand to be assessed under the Act, cannot even otherwise be determinative of the matter.

Vetting the financial summary provided by the assessee, which finds reproduction as Table A above, reveals it to have excluded, in arriving at the surplus, the interest earned by it on it's capital/corpus parked with banks in the form of term deposits. The same may be as a matter of policy or, as it appears to us, the same being idle for the time being, i.e., till they are deployed toward further investment – an ongoing process, for its activities. We see no reason for its exclusion, being as much a part of it's income as any other, being in fact duly reported to the Revenue per it's returns for the relevant years and, further, *as subject to application u/s. 11(1)(a)*. The surplus for the relevant years, which thus stands revised upwards, both in absolute terms and in ratio to the turnover, is presented below: TABLE-B

(Amt. in Rs. lakhs)

Particulars/AY	2009-2010	2010-2011	2011-12	Remarks
Surplus	86.09 (1)	148.40	179.63	Interest on fixed deposits with banks credited directly to the corpus fund, duly reported to the Revenue per the returns of income (PB pages 47, 65, 85)
Interest	760.32	738.81	523.33	
Total surplus (2)	846.41	887.21	702.96	
Stated turnover	901.45	1004.38	1157.98	
Interest	760.32	738.81	523.33	
Total turnover (2)	1661.77	1743.19	1681.31	
(% age)	50.93	50.90	41.81	

(1) inclusive of prior year adjustments at rs. 6.94 lacs.

(2) computed by adding interest to the figures of 'surplus' and 'turnover' (see Table A)

The above, thus, are the actual state of affairs, enhancing appreciably the reported, i.e., after depreciation, profit scenario. It may be stated that interest does not represent operational income, justifying its exclusion on that basis. We can hardly agree. The reason is simple. The monies have not been provided for safe-keeping, but, representing property held under trust, for being deployed for charitable purposes. Their deployment would in fact generate additional revenue, i.e., in sums higher than that fetched on bank deposits, as apparent from Table A above, and which also puts the cash profit, i.e., prior to depreciation, in perspective. Reference here may be made to the decision of *UOI v. Baba Banda Singh Bahadur Education Trust* [2023] 454 ITR 273 (SC), wherein the Apex Court was moved solely by the profit figures, i.e., before and after depreciation, themselves, in holding the assessee-respondent as not entitled to exemption u/s.10(23C)(vi) of the Act.

4.7 In view of the foregoing, the assessee is, in our clear view, not entitled to any exemption u/s.11 *qua* its surplus on its application for the relevant years, and its income is liable to assessed as business income. This decides the first issue. As regards the second, as afore-stated (para 3.2), the controversy obtains no longer. The assessee shall be entitled to claim depreciation up to AY 2014-15 at the rates specified under the Act read with IT Rules. This would be irrespective of whether it has already

claimed and been allowed exemption u/s. 11(1) on application of income on the cost of relevant capital assets. This is as s. 11(6) is operative only AY 2015-16 onwards.

4.8 We decide accordingly.

5. In the result, the assessee's appeals are partly allowed.

*Order pronounced on August 11, 2023 under Rule 34 of The Income Tax (Appellate Tribunal) Rules, 1963*

Sd/-  
(Aby T. Varkey)  
Judicial Member

Sd/-  
(Sanjay Arora)  
Accountant Member

Cochin; Dated: August 11, 2023  
Devadas G\*

Copy to:

1. The Appellant.
2. The Respondent.
3. The Pr. CIT concerned.
4. The Sr. DR, ITAT, Cochin.
- . Guard File.

Assistant Registrar  
ITAT/Cochin

		Date	Initial	
1.	Draft dictated on	07.08.2023		Sr.PS
2.	Draft placed before author	07.08.2023		Sr.PS
3.	Draft proposed & placed before the second member	09/8/2023, 10/8/2023		JM/AM
4.	Draft discussed/approved by Second Member.	10/8/2023		JM/AM
5.	Approved Draft comes to the Sr.PS/PS			Sr.PS/PS
6.	Kept for pronouncement on			Sr.PS
7.	Date of uploading the order on website			
8.	If not uploaded, furnish the reason			
8.	File sent to the Bench Clerk			Sr.PS
9.	Date on which file goes to the AR			
10.	Date on which file goes to the Head Clerk.			
11.	Date of dispatch of Order.			
12.	Draft dictation sheets are attached			Sr.PS

**IN THE INCOME TAX APPELLATE TRIBUNAL  
COCHIN BENCH, COCHIN**

Before Shri Sanjay Arora, AM & Shri Aby T. Varkey, JM

ITA No.75/Coch/2015: Asst.Year:2009-2010  
ITA No.76/Coch/2015: Asst.Year:2010-2011  
ITA No.77/Coch/2015: Asst.Year:2011-2012

Infoparks Kerala Athulya, Kusumagiri PO Kakkanad PO Kochi – 682030 [PAN:AAAAl1094D]	vs.	The Joint Director of Income-tax (OSD) (Exemptions) Range-4 Kochi.
(Appellant)		(Respondent)

**CORRIGENDUM**

Per: Sanjay Arora, AM

Order under section 254(1) of the Income Tax Act, 1961 ('the Act') in the captioned appeals was passed on 11/08/2023. It is, however, found that there have occurred certain typing errors and omissions in the said order, which are, therefore, sought to be rectified through this corrigendum order. The same being only correction of those errors, do not therefore *per se* cause any prejudice to either party. The details are as under:

1. Para 4.6 (pages: 8 – 15)
  - (a) The word 'thereto' occurring after the words "builtup space is leased" in the sentence beginning with the words 'As informed,.....' in para 4.6 (pg. 9), be deleted.
  - (b) In the following sentence, the word 'provided' before the words "the summary" be instead read as after the words "dated 16.05.2023," followed by a coma.
  - (c) The word "to" be read between the words "continues" and "charge" in the sentence beginning with the words 'The other is that .....' in para 4.6 (pg. 10).
  - (d) The word "being" be read before the word "impractical" in the sentence beginning with the words 'In fact, it is on account of .....' in para 4.6 (pg. 12).

(e) A comma be read after the words “on cost basis” in the sentence beginning with the words ‘Why, we have found that a lease.....’ in para 4.6 (pg. 12).

(f) The word “envisaging” be read before the words “enjoining private participation” in the sentence beginning with the words ‘In fact, all other indica,....’ in para 4.6 (pg. 13).

(g) The words “(a) after depreciation” and “(b)before depreciation”, be read in the last are row of Table B, at para 4.6 (pg. 15), with the following figures noted corresponding to ‘(b)’: 82.57, 79.74 & 71.06, in the three columns.

(h) The word “are” be read as “is” the first sentence after the Table B, at para 4.6 (pg 15).

2. In the header of the Order, the word ‘Infopark’ be read as ‘Infoparks’.

Sd/-  
(Aby T. Varkey)  
Judicial Member

Sd/-  
(Sanjay Arora)  
Accountant Member

Cochin; Dated: August28, 2023  
Devadas G\*

Copy to:

1. The Appellant.
2. The Respondent.
3. The Pr. CIT concerned.
4. The Sr. DR, ITAT, Cochin.
5. Guard File.

Assistant Registrar  
ITAT, Cochin

**IN THE INCOME TAX APPELLATE TRIBUNAL  
COCHIN BENCH, COCHIN**

**CORRECTED**

Before Shri Sanjay Arora, AM & Shri Aby T. Varkey, JM

ITA No.75/Coch/2015: Asst.Year:2009-2010

ITA No.76/Coch/2015: Asst.Year:2010-2011

ITA No.77/Coch/2015: Asst.Year:2011-2012

InfoparksKerala Athulya, Kusumagiri PO Kakkanad PO Kochi – 682030 [PAN:AAAAl1094D]	vs.	The Joint Director of Income-tax (OSD) (Exemptions) Range-4 Kochi.
(Appellant)		(Respondent)

Appellant by: Sri.Rajakannan, Advocate  
Respondent by:Smt.J.M.Jamuna Devi, Sr.AR

Date of Hearing: 15.5.2023	Date of Pronouncement: 11.8.2023
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**ORDER**

Per Sanjay Arora, AM:

This is a set of three Appeals, for three consecutive years, being assessment years (AYs.) 2009-2010 to 2011-2012, by the Assessee, contesting the confirmation of it's assessments under section 143(3) of the Income-tax Act, 1961 ('the Act' hereinafter) for the relevant years in first appeal by the Commissioner of Income-tax (Appeals)-2, Kochi ['CIT(A)' for short], vide his separate orders of even date (30.5.2014). The appeals raising the same issues; also decided likewise, were heard together, and are being disposed per a common order for the sake of convenience.

2. The principal issue in the instant appeals is if the assessee, a society constituted under the Travancore-Cochin Literary, Scientific and Charitable Societies Registration Act, 1955 (on 27.10.2004) and registered u/s.12AA of the Act as a

charitable trust, is entitled to exemption u/s.11 thereof in view of the amended section 2(15), i.e., by Finance Act, 2010 w.r.e.f. 01.4.2009, which reads asunder:

**"Definitions**

2. In this Act, unless context otherwise requires,—

(15) “Charitable purpose” includes relief of the poor, education, medical relief, and the advancement of any other object of general public utility:

**Provided** that the advancement of any other object of general public utility shall not be a charitable purpose, if it involves the carrying on of any activity in the nature of trade, commerce or business, or any activity of rendering any services in relation to any trade, commerce or business, for a cess or fee or any other consideration, irrespective of the nature of use or application, or retention, of the income from such activity;

**Provided further** that the first *proviso* shall not apply if the aggregate value of the receipts from the activities referred to therein is ten lakh rupees (\*) or less in the previous year;”

[(\*)]enhanced to twenty-five lakh rupees from AY 2012-13 onwards]

The *proviso* stands substituted by Finance Act, 2015, w.e.f. 01.4.2016, as under:

**“Provided** that the advancement of any other object of general public utility shall not be a charitable purpose, if it involves the carrying on of any activity in the nature of trade, commerce or business, or any activity of rendering any service in relation to any trade, commerce or business, for a cess or fee or any other consideration, irrespective of the nature of use or application, or retention, of the income from such activity, unless –

(i) such activity is undertaken in the course of actual carrying out of such advancement of any other object of general public utility; and

(ii) the aggregate receipts from such activity or activities during the previous year, do not exceed twenty per cent of the total receipts, of the trust or institution undertaking such activity or activities, of that previous year;”

In other words, advancement of an object of general public utility (GPU) shall, AY2009-2010 onwards, be not a charitable purpose for the purposes of the Act, where the same involves any activity in the nature of trade, commerce or business, if the gross receipt thereof is in excess of the threshold limit defined therein.

3.1 The assessee has for the relevant years claimed exemption u/s.11(1) on the entirety of it’s surplus as per the Income and Expenditure account (I&E A/c) on account of application thereof on capital assets/expenditure, admissible in view of, *inter alia*, *S.R.M.C.T.M Tiruppani Trust v. CIT*[1998] 230 ITR 636 (SC). The

assessee, for the purpose, relies principally on its antecedents; it being set-up by Government of Kerala (GoK) as an independent entity to provide professional and managerial support to its initiatives for the development of infrastructure for IT and IT-enabled and support industries in pursuance to its IT policy, whereby Kochi is to be promoted as an IT Hub (GO dtd. 30.6.2004/PB pg.88). High-tech parks were to be, accordingly, developed in Kochi, as elsewhere in Kerala. 200 acres of land at Kochi was to be provided by it, of which 80 acres, at Kakkanad, District Ernakulam, belonging to Kinfra was transferred to the assessee-society on 18.9.2003. Built-up space for IT and ITES was to be set-up thereat, targeted at 7.5 lakh sq.ft. annually for the first two years, increasing upto an additional 15 lakh sq.ft. per annum for the next three years. The additional capacity was envisaged to be created *by enjoining private sector participation, including through joint ventures*. Further, Infopark area, Kochi was declared as an industrial area by GoK in April, 2010. The basis of the denial of its claim for exemption by the Revenue is that the activity of letting built-up space and provision of amenities, the principal activity undertaken by the assessee in pursuance of its objects, though otherwise qualifying as 'advancement of an object of general public utility' and, thus, a charitable purpose, is no longer so in view of the *proviso to sec.2(15)*.

3.2 The second issue arising in the instant appeals is if depreciation is to be deducted in computing income liable for application for charitable purpose inasmuch as the cost of the capital assets, on which the same stands claimed, had already been allowed in full by way of application of income on the deployment of funds on their acquisition. The same, though a part of the statute w.e.f. AY 2015-2016 [s.11(6)] inasmuch as it amounts to a double relief, stands disapproved by the Hon'ble Apex Court in *CIT v. Rajasthan and Gujarathi Charitable Foundation* [2018] 402 ITR 441 (SC), so that no disallowance thereof would obtain for years prior to AY 2015-2016.

4. We have heard the parties, and perused the material on record.

4.1 Taking the first issue, the Revenue's understanding of the amended s. 2(15) stands endorsed by the Apex Court in *Ahmedabad Urban Development Authority* (infra), wherein it explains that in view of the paradigm change in sec. 2(15) after its amendment w.e.f. AY 2009-10, a charity engaged in advancement of an object of general public utility cannot engage in any activity in the nature of trade, commerce or business, or any service in relation thereto, for any consideration. The idea of a predominant object, among several, is discarded. In its words:

'16. To sum up, section 2(15) excludes from exemption the carrying on of activities for profit even if they are linked with the objectives of general public utility, because the statute interdicts, for purposes of tax relief, the advancement of such objects by involvement in the carrying on of activities for profit. We appreciate the involved language we use, but when legislative draftsmanship declines to be simple, interpretative complexity becomes a judicial necessity.'

4.2 The assessee's case before the Revenue authorities was along the following lines:

- (e) It is a fully owned and controlled by the GoK with the avowed object of development of IT parks in the State of Kerala.
- (f) As apparent from its Memorandum of Association (MoA), Rules and Byelaws – which remain the same post-amendment to sec.2(15), it is not formed for either earning profit or for carrying an activity in the nature of trade, commerce or business.
- (g) Its funds, on its dissolution, cannot be paid or distributed amongst its members, but are to be, subject of course to the provisions of the Societies Act, dealt with in such manner as the GoK may determine.
- (h) Without prejudice, the activity of letting building and vacant lands falls under the head of income 'income from house property' (IFHP), and cannot be treated as business income.

Reliance stood also placed by it on the decisions in *Addl.CIT v. Surat Art and Silk Mfrs. Assn.* [1980] 121 ITR 1 (SC); *CIT v. Gujarat Maritime Board* [2007] 295 ITR 561 (SC); *CIT v. Dawoodi Bohra Jamat* [2014] 364 ITR 31 (SC); and *DIT(E) v. Sabarmati Ashram Gaushala Trust* [2014] 362 ITR 539 (Guj).

4.3 Before us, it was a common contention of the parties that the issue is squarely covered by the recent decision by the Hon'ble Apex Court in *Asst. CIT v. Ahmedabad*

*Urban Development Authority*[2022] 449 ITR 1(SC), placing a copy thereof on record. No assistance, however, from the parties, i.e., as to how the given activity/s and the assessee's *modus operandi* would stand to be considered, or require being understood, in light of the said decision, was forthcoming from the parties. This, despite this being precisely the reason the instant appeals, heard initially by the Tribunal on 31/01/2023, were released for hearing on the applicability of the said detailed judgment. The Hon'ble Apex Court having however held, in relation to a class/category of assessees, that provision of goods or services at cost or on a nominal mark-up basis, would not *ipso facto* amount to a consideration within the meaning of *proviso* to sec.2(15), the assessee was called upon by the Bench to place on record the statement of its gross receipts and income from year to year, and which was accordingly done, and the hearing, accordingly, closed.

4.4 The Hon'ble Apex Court has in *Ahmedabad Urban Development Authority* (supra), upon analyzing the words “cess, fee, or other consideration” in *proviso* to sec.2(15), classified the assessees between those providing essential services, viz., providing water, electricity, distribution of food grains, medicines, maintenance of roads and parks, etc. by Corporations, Boards or Trusts or Authorities set-up under different enactments. The charges raised by them, it explains, would not stand to be characterized as ‘commercial receipts’, so as to be regarded as receipts of any trade, commerce, or business. Then, is the case of other statutory corporations, or other bodies, involved in advancement of an object of general public utility, and which in the course of carrying the said object, are also involved in an activity/s in the nature of trade, commerce or business, providing determinative tests in respect thereof, reproduced as under:

“190. In light of the above discussion, this court is of the opinion that:

(i) The fact that bodies which carry on statutory functions whose income was eligible to be considered for exemption under section 10(20A) ceased to enjoy that benefit after deletion of that provision w.e.f. 01.04.2003, does not *ipso facto* preclude their claim for consideration for benefit as GPU category charities, under section 11 read with section 2(15) of the Act.

(ii) Statutory Corporations, Boards, Authorities, Commissions, etc. (by whatsoever names called) in the housing development, town planning, industrial development sectors are involved in the advancement of objects of general public utility, therefore are entitled to be considered as charities in the GPU categories.

(iii) Such statutory corporations, boards, trusts authorities, etc. may be involved in promoting public objects and also in the course of their pursuing their objects, involved or engaged in activities in the nature of trade, commerce or business.

(iv) The determinative tests to consider when determining whether such statutory bodies, boards, authorities, corporations, autonomous or *self-governing government sponsored bodies*, are GPU category charities:

(a) Does the state or central law, or the memorandum of association, constitution, etc. advance any GPU object, such as development of housing, town planning, development of industrial areas, or regulation of any activity in the general public interest, supply of essential goods or services - such as water supply, sewage service, distributing medicines, of food grains (PDS entities), etc.;

(b) While carrying on of such activities to achieve such objects (which are to be discerned from the objects and policy of the enactment; or in terms of the controlling instrument, such as memorandum of association etc.), the purpose for which such public GPU charity, is set-up - whether for furthering the development or a charitable object or for carrying on trade, business or commerce or service in relation to such trade, etc.;

(c) Rendition of service or providing any article or goods, by such boards, authority, corporation, etc., on cost or nominal mark-up basis would ipso facto not be activities in the nature of business, trade or commerce or service in relation to such business, trade or commerce;

(d) where the controlling instrument, particularly a statute imposes certain responsibilities or duties upon the concerned body, such as fixation of rates on pre-determined statutory basis, or based on formulae regulated by law, or rules having the force of law, setting apart amenities for the purposes of development, charging fixed rates towards supply of water, providing sewage services, providing food-grains, medicines, and/or retaining monies in deposits or government securities and drawing interest therefrom or charging lease rent, ground rent, etc., per se, recovery of such charges, fee, interest, etc. cannot be characterized as “fee, cess or other consideration” for engaging in activities in the nature of trade, commerce, or business, or for providing service in relation in relation thereto;

(e) Does the statute or controlling instrument set out the policy or scheme, for how the goods and services are to be distributed; in what proportion the surpluses, or profits, can be permissively garnered; are there are limits within which plots, rates or costs are to be worked out; whether the function in which the body is engaged in, is normally something a government or state is expected to engage in, having regard to provisions of the Constitution and the enacted laws, and the observations of this court in NDMC; whether in case surplus or gains accrue, the corporation, body or authority is permitted to distribute it, and if so, only to the government or state; the extent to which the state or its instrumentalities have control over the corporation or its bodies, and whether it is subject to directions by the concerned government, etc.;

(f) As long as the concerned statutory body, corporation, authority, etc. while actually furthering a GPU object, carries out activities that entail some trade, commerce or business, which generates profit (i.e., amounts that are significantly higher than the cost), and the quantum of such receipts are within the prescribed limit (20% as mandated by the second proviso to section 2(15)) – the concerned statutory or government organisations can be characterized as GPU charities. It goes without saying that the other conditions imposed by the seventh proviso to section 10(23C) and by section 11 have to necessarily be fulfilled.

(v) As a consequence, it is necessary in each case, having regard to the first proviso and seventeenth proviso (the latter introduced in 2012, w.r.e.f 01.04.2009) to section 10(23C), that the authority considering granting exemption, takes into account the objects of the enactment or instrument concerned, its underlying policy, and the nature of the functions, and activities, of the entity claiming to be a GPU charity. If in the course of its functioning it collects fees, or any consideration that merely cover its expenditure (including administrative and other costs plus a small proportion for provision) - such amounts are not consideration towards trade, commerce or business, or service in relation thereto. However, amounts which are significantly higher than recovery of costs, have to be treated as receipts from trade, commerce or business. It is for those amounts, that the quantitative limit in proviso (ii) to section 2(15) applies, and for which separate books of account will have to be maintained under other provisions of the IT Act.

*(emphasis, supplied)*

4.5 The assessee's – a self-governing body, case, quite clearly, falls under the latter category of cases, i.e., of entities engaged in providing other than essential services. The assessee's sole activity, and in spite lapse of a number of years, continues to be restricted to provision, in a systematic and organized manner though – *being in fact not feasible otherwise*, i.e., on the scale and in the manner it is to be pursued, of built-up space for housing IT/ITES units at the park developed (or being developed) by it, including provision for incidental services, viz., water, electricity, etc. – the consumption cost of which though is met by the unit concerned, air conditioning, parking space, etc., all at a cost. Not only does the same qualify to be a 'business', or at the very least an activity in the nature thereof, the same attracts the second limb of the *proviso*, i.e., of being a service in relation to trade, commerce or business. It is said that letting is not 'service'. *If provision of built-up space, along with back-up and ancillary amenities, is not 'service', what we wonder is?*

Being envisaged to be run as an independent body, there is no Government interference in its functioning, apparent also from its constitution, which clearly defines its mandate. There is no fixation of rentals by the Government, or otherwise

formula prescribed, on the basis of which the same is fixed or arrived at. There is no claim to the contrary. Designating park/s as an industrial area, and providing for single window clearance for the units set-up therein, are the administrative steps GoK has taken, on its part, in the matter. Though providing built-up space is not the only manner to attract investment in IT sector in the State, or to promote it as an IT hub, is yet surely one. The word 'involves' in *proviso* to sec.2(15) is not preceded by the word 'necessarily', and neither is there anything in the language of the provision, or the decision in *Ahmedabad Urban Development Authority* (supra), which is being sought to be scrupulously followed in deciding these appeals, for it being so read. The adopted business model, however, necessarily involves letting the said space to the industry for a consideration, and which is pegged at market rates. Any other basis, as we shall presently see, would be inconsistent with sound business practice and economic rationale. It is by and through the carrying on of this business of providing built-up space or making available vacant land, on leasehold basis, i.e., even if at a charge, that the assessee-society fulfills its object of promotion of IT/ITES industry in the State of Kerala. The same is thus incidental to its object/s.

4.6 We, next, consider the aspect of whether the charges levied by it, including the lease rentals, are with a view to recover its costs, or at best with a nominal margin, or this is not the case, with it, as alleged, operating on commercial basis, *charging lease rentals at market rates*. It would be relevant to, before we undertake this examination, refer to the specific adjudication by the Hon'ble Apex Court; the bunch of appeals decided in *Ahmedabad Urban Development Authority* (supra) including some similar cases, which we reproduce as under:

**253.....D. Trade promotion bodies**

Bodies involved in trade promotion (such as AEPC), or set up with the objects of purely advocating for, coordinating and assisting trading organisations, can be said to be involved in advancement of objects of general public utility. However, if such organisations provide additional services such as courses meant to skill personnel, providing private rental spaces in fairs or trade shows, consulting services, etc. then income or receipts from such activities, would be business or commercial in nature. In that event, the claim for tax exemption would have to be again subjected to the rigors of the proviso to Section 2(15) of the IT Act.

E. Non-statutory bodies

E.1. In the present batch of cases, non-statutory bodies performing public functions, such as ERNET and NIXI are engaged in important public purposes. The materials on record show that fees or consideration charged by them for the purposes provided are nominal. In the circumstances, it is held that the said two assesseees are driven by charitable purposes. However, the claims of such non-statutory organisations performing public functions, will have to be ascertained on a yearly basis, and the tax authorities must discern from the records, *whether the fees charged are nominally above the cost, or have been increased to much higher levels.*

E.2. It is held that though GS1 India is in fact, involved in advancement of general public utility, its services are for the benefit of trade and business, from which they receive significantly high receipts. In the circumstances, its claim for exemption cannot succeed having regard to amended section 2(15). However, the Court does not rule out any future claim made and being independently assessed, if GS1 is able to satisfy that what it provides to its *customers is charged on cost-basis with at the most, a nominal mark-up.* (emphasis, supplied)

The foregoing neatly sums up the adjudication *qua* entities as the assessee, which is accordingly to be followed. It is the entire factual matrix that falls to be considered. The caveat *qua* non-profit motive would though stand out inasmuch as, notwithstanding any other consideration, if the operations are being carried out in a commercial manner, the same would oust the assessee's case from being a charitable entity at the threshold where the quantitative limit set forth per the *proviso* to sec.2(15) is, as is the case, met. Coming to the assessee's case, even as its MoA lists a number of objects, all toward promotion of IT/ITES industry in Kerala, it is essentially engaged in, firstly, setting-up and, then, managing industrial park by the name 'Infopark Kerala' at Kochi, which houses such units on leasehold basis. That, in any case, is the only activity being pursued. Sec.2(15) being a definition provision, where its terms are not satisfied, the assessee's claim of a charitable institution shall be ousted even if its activities are not hit by the provision or are in relation to objects other than GPU. As informed, built-up space is leased for 7-8 year term. The other format followed is 99-year lease of vacant land. The assessee has vide letter dated 16.05.2023, provided, as afore-noted, the summary of its financial results over the years, as under: Table A

Financial Year	Assessment year	Turnover	Interest Income	Total Turnover	Depreciation	Surplus/ (Deficit) including interest	% to turnover	Cash surplus	% to turnover
2008-09	2009-10	8,91,68,222	9,76,547	9,01,44,769	5,25,76,865	79,14,551	8.88	6,04,91,416	67.10
2009-10	2010-11	9,86,57,022	17,80,875	10,04,37,897	5,02,78,032	1,48,39,831	15.0	6,51,17,863	64.83
2010-11	2011-12	11,32,29,712	25,68,017	11,57,97,729	4,91,85,724	1,79,63,217	15.8	6,71,48,941	57.98
2011-12	2012-13	20,26,25,731	22,00,466	20,48,26,197	11,98,34,273	45,73,086	2.26	12,44,07,359	60.73
2012-13	2013-14	29,05,64,628	17,30,364	29,22,94,992	13,20,16,767	2,46,44,599	8.48	15,66,61,366	53.59
2013-14	2014-15	33,34,15,598	12,46,945	33,46,62,543	13,96,44,898	2,07,39,685	6.22	16,03,84,583	47.92
2014-15	2015-16	38,12,38,355	18,97,255	38,31,35,610	14,66,71,112	78,10,586	2.05	15,44,81,698	40.32
2015-16	2016-17	44,81,58,011	33,64,195	45,15,22,206	17,54,42,421	(44,22,577)	(0.99)	17,10,19,844	37.87
2016-17	2017-18	47,76,13,029	97,45,036	48,73,58,065	25,55,35,337	(8,49,29,663)	(17.7)	17,06,05,674	35.00
2017-18	2018-19	53,11,16,585	15,31,32,588	68,42,49,173	31,08,69,716	63,81,782	1.20	31,72,51,498	46.36
2018-19	2019-20	61,54,48,892	18,10,97,975	79,65,46,867	30,12,19,545	9,73,80,445	15.8	39,85,99,990	50.04
2019-20	2020-21	64,65,82,728	16,71,30,761	81,37,13,489	28,62,75,362	10,70,44,944	16.5	39,33,20,306	48.33
2020-21	2021-22	51,84,83,877	10,22,24,322	62,07,08,199	27,92,30,450	(66,35,766)	(1.28)	27,25,94,684	43.91
2021-22	2022-23	55,16,44,516	9,00,84,694	64,17,29,210	25,41,88,335	1,01,21,226	1.83	26,43,09,561	41.18

It is clear that there is no uniformity in the profit percentage from year to year. Two inferences, equally plausible, arise from the said data. One, notwithstanding that the assessee has, finding its cost to be below the revenue, adjusted the latter downward for the later years. This is in fact impractical as the lease rent would be fixed for the period of the lease term, if not providing for a nominal increase over the said term. It is even otherwise, i.e., *qua* the new leases, impractical, as a rent cannot be revised downwards, implying different units being charged differently for the same services. Further, the charges would have to be again increased on the nearly inevitable increase in cost over time, which would give incoherent and unhealthy signal to the industry, besides speaking poorly of the organization – a *quasi* Government body, and its management. Why, the profit rate climbs again. A stable base rate is crucial, which could at best exhibit a secular, albeit marginal, increase with time. This rate can though be subject to a nominal per annum increase over the lease term to account for inflation. The first inference gets, thus, ousted. The other is that the profit for the later years is, on account of increase in costs, even as it continues to charge the same lease rent, is even higher, i.e., the cost increase is at a rate higher than the revenue. This appears to be the case. In fact, much of the problem in raising revenue emanates from non-stability of cost. The output price, the rent rate in the instant case, cannot though be pegged on the basis of cost, which would be specific to each individual organization, but are, and can only be, market driven. The operating statement may

thus exhibit either a surplus or deficit, i.e., depending on whether the cost increase has been contained or not. Then, there is also the question of volume. A lower off-take in quantitative terms may yield a lower profit, or even loss, as indirect cost, as, for example, establishment costs, are generally fixed or, atleast, largely so. This, to us, appears to be the case in the instant case. The Revenue states of the assessee charging lease rent at the market rate. Though this has been it's consistent stand, there has been no rebuttal thereof by the assessee at any stage. The assessee before us per its argument notes states that it is not so. This is however not supported by any facts and figures. The assessee has in fact during hearing admitted to charging rent even for parking space and, further, interest on delayed payment of rent. It is, thus, clearly operating on a commercial basis. Lower profit for a particular year could thus have its reasons specific to that year, viz. low off-take, increased costs, etc., and would not detract from the fact that the assessee is operating on a commercial basis. Though extremely relevant, we, in view of the foregoing, are not solely moved by the profit rate for a particular year, but, in view of the inconsistent behavior and unexplained variation therein, guided more by the fact of the assessee operating in a commercial environment, on commercial lines, charging lease rent to the industrial units at the going market rate/s. If that does not translate into profit for a particular year/s, which could be for a variety of reasons, is another matter. Why, even businesses suffer losses, which by no means implies them not operating on commercial basis. The same, though relevant, may thus not furnish a conclusive basis or guidepost. This explains a proper examination, even as held by the Apex Court.

When it, in *Ahmedabad UDA* (supra), states of reimbursement of cost or, at best, with a nominal mark-up, it means just that, i.e., an organization not operating on commercial basis, but the charge for it's goods or services being aimed at reimbursement of the cost of providing the same. The issue, thus, is principally factual. We have already explained, in some detail, the practical aspects impinging on operating on that basis, which has in any case not been demonstrated, with, on the

contrary, there being no effective contradiction of the charge of lease rent at market rate, buttressed by the fact of lease of parking space; interest for delayed payment, etc. all borne out by its balance-sheet on record, which also bears 'civic and campus maintenance charge' at Rs.65.83 lakhs (for f.y.2008-2009), which is besides the 'other income' at Rs.18.25 lakhs. In fact, it is on account of it, given the ground reality of uncertainty of cost, besides its irrelevance in the market place, being impractical to state a precise figure that the Apex Court has stated of a nominal mark-up. Profit rates vary intrinsically, due to demand and supply factors, both across different spheres of human activity, as indeed over time. We have, rather, and on the contrary, found that the price charged is not cost-based or with reference to cost at all, with the result that there could be, as indeed obtains, a wide variation in profit – for which there could be, as afore noted, a number of disparate reasons from year to year. It is, again, for this reason, i.e., of profit intent or motive or commerciality, being unable to be captured by a profit rate, which would vary from trade to trade, as indeed from time to time, that the statute also falls shy of providing profit as a criterion, and it suffices its purpose where the activity engaged in is in the nature of trade, commerce, or business – all terms of very wide import, i.e., on a commercial basis, even as explained in *Ahmedabad UDA* (supra) in the context of s.10(46). Why, we have found that a lease, which envisages charge of consideration over an extended time in future, on cost basis, is inconsistent with the imperatives of such an activity. And to think that the assessee is providing lease even on 99 year lease basis!

We may further add that the profit reported is after depreciation, which we observe as material. Sure, capital to the extent deployed in fixed assets, is subject to depreciation on their user, so that a capital allowance by way of depreciation is justified from an accounting standpoint; the income of a charitable trust being liable to be computed following the principles of commercial accounting. However, funds generated from operations are, to this extent, though not reported as profit in view of this charge, are yet available for growth. This is particularly so as capital infusion,

which is by GoI and GoK, is toward capital and corpus, both of which are to be retained as part of the capital base of the assessee. Loans from financial institutions, being liable to be repaid, so that they may not continue to be a part of its capital structure indefinitely, constitute an insignificant part thereof. In fact, such loans are usually on soft terms, and for an extended period of time. That apart, being not consistent, depreciation adds to the variability of cost and, thus, of profit, from year to year. For instance, for AY 2009-2010, the first year, out of the total expense of Rs.822.30 lakh, depreciation is at Rs.525.77 lakh, i.e., at 64% of the total cost and 58% of the turnover (gross receipt), with the balance aggregate cost being at a much lower figure in comparison, 33% of the turnover. True, depreciation is an actual cost. The same, however, being charged on WDV basis, at the rates specified under the Companies Act, 1956, is highly skewed in favour of recovery of capital at the earliest. Depreciation charge is thus not evenly spread over the useful life of the asset, depressing income for the initial years. A uniform charge, as against an accelerated one, would present a much healthier state of affairs, particularly in the instant case of it constituting a significant expense. In fact, the charge of depreciation thus itself demonstrates the assessee as being run as a commercial organization, driven by profit. In fact, all other indications, i.e., of it being managed by a Chief Executive Officer (CEO); having an independent finance department headed by a senior executive; envisaging joining private participation, are toward the same.

There is no restrictive element in the scope of the term “business” to exclude an activity. The Apex Court in *Sultan Brothers (P.) Ltd. v. CIT* [1964] 51 ITR 353 (SC), on an argument of rental income being a business, as what was being let was a commercial asset, clarified that a thing cannot by its very nature be a commercial asset. A commercial asset is only an asset used in a business and nothing else, and business may be carried on with practically all things. Whenever the matter, arising on account of the differential computation of income under the two heads of income, i.e., of business, and from house property, travelled to the higher courts, it has been

unequivocally clarified for being decided in the conspectus of the case, so that decisions both ways, i.e., as business income, as indeed from house property, from the Hon'ble Apex Court obtain. The determinative test, as explained by it, being that the letting is being undertaken in an organized manner to turn the house property, i.e., land and building, into account. *The test is satisfied in the instant case.* The lease rentals are deployed to finance both creation of more built-up space, as per its mandate, and which we observe to be at, besides Cochin, Thrissur, Ambalapuzha and Cherthala, as well as through charge of depreciation, sustain that existing. Further, we may clarify that this business is not a property held under trust, but one carried on the basis or by virtue of such property, being, for instance, 80 acres of land transferred from KINFRA; the capital infusion by GoI and GoK, etc. The income generated from its business by the assessee, or, more precisely, the assets representing the same, again, is property held under trust inasmuch as there is no other activity, at least for the present, by the assessee-society. The same qualifies as an eligible business u/s.11(4A), and its income assessable as business income. The head of income under which the income of a charitable institution, where taxable, would stand to be assessed under the Act, cannot even otherwise be determinative of the matter.

Vetting the financial summary provided by the assessee, which finds reproduction as Table A above, reveals it to have excluded, in arriving at the surplus, the interest earned by it on its capital/corpus parked with banks in the form of term deposits. The same may be as a matter of policy or, as it appears to us, the same being idle for the time being, i.e., till they are deployed toward further investment – an ongoing process, for its activities. We see no reason for its exclusion, being as much a part of its income as any other, being in fact duly reported to the Revenue per its returns for the relevant years and, further, *assubject to application u/s. 11(1)(a)*. The surplus for the relevant years, which thus stands revised upwards, both in absolute terms and in ratio to the turnover, is presented below: TABLE-B

(Amt. in Rs. lakhs)

Particulars/AY	2009-2010	2010-2011	2011-12	Remarks
Surplus	(1) 86.09	148.40	179.63	Interest on fixed deposits with banks credited directly to the corpus fund, duly reported to the Revenue per the returns of income (PB pages 47, 65, 85)
Interest	760.32	738.81	523.33	
Total surplus (2)	846.41	887.21	702.96	
Stated turnover	901.45	1004.38	1157.98	
Interest	760.32	738.81	523.33	
Total turnover (2)	1661.77	1743.19	1681.31	
(% age)				
(a) after depreciation	50.93	50.90	41.81	
(b) before depreciation	82.57	79.74	71.06	

(3) inclusive of prior year adjustments at rs. 6.94 lacs.

(4) computed by adding interest to the figures of 'surplus' and 'turnover' (see Table A)

The above, thus, is the actual state of affairs, enhancing appreciably the reported, i.e., after depreciation, profit scenario. It may be stated that interest does not represent operational income, justifying its exclusion on that basis. We can hardly agree. The reason is simple. The monies have not been provided for safe-keeping, but, representing property held under trust, for being deployed for charitable purposes. Their deployment would in fact generate additional revenue, i.e., in sums higher than that fetched on bank deposits, as apparent from Table A above, and which also puts the cash profit, i.e., prior to depreciation, in perspective. Reference here may be made to the decision of *UOI v. Baba Banda Singh Bahadur Education Trust* [2023] 454 ITR 273 (SC), wherein the Apex Court was moved solely by the profit figures, i.e., before and after depreciation, themselves, in holding the assessee-respondent as not entitled to exemption u/s.10(23C)(vi) of the Act.

4.7 In view of the foregoing, the assessee is, in our clear view, not entitled to any exemption u/s.11 *quaints* surplus on its application for the relevant years, and its income is liable to be assessed as business income. This decides the first issue. As regards the second, as afore-stated (para 3.2), the controversy obtains no longer. The assessee shall be entitled to claim depreciation up to AY 2014-15 at the rates specified under the Act read with IT Rules. This would be irrespective of whether it has already

claimed and been allowed exemption u/s. 11(1) on application of income on the cost of relevant capital assets. This is as s. 11(6) is operative only AY 2015-16 onwards.

4.8 We decide accordingly.

5. In the result, the assessee's appeals are partly allowed.

*Order pronounced on August 11, 2023 under Rule 34 of The Income Tax (Appellate Tribunal) Rules, 1963*

Sd/-  
(Aby T. Varkey)  
Judicial Member

Sd/-  
(Sanjay Arora)  
Accountant Member

Cochin; Dated: August 11, 2023  
Devadas G\*

**NB:** This is the copy of the order dated 11/8/2023, duly corrected for the errors listed in corrigendum order dated 28/8/2023, uploaded on 04/9/2023.

Copy to:

1. The Appellant.
2. The Respondent.
3. The Pr. CIT concerned.
4. The Sr. DR, ITAT, Cochin.
5. Guard File.

Assistant Registrar  
ITAT/Cochin