

**IN THE INCOME TAX APPELLATE TRIBUNAL, 'D' BENCH
MUMBAI**

**BEFORE: SHRI AMIT SHUKLA, JUDICIAL MEMBER
&
SHRI GAGAN GOYAL, ACCOUNTANT MEMBER**

**ITA No.2057/Mum/2015
(Assessment Year :2009-10)**

**ITA No.5001/Mum/2015
(Assessment Year :2010-11)**

**ITA No.5002/Mum/2015
(Assessment Year :2011-12)**

**ITA No.4373/Mum/2018
(Assessment Year :2012-13)**

&

**ITA No.4374/Mum/2018
(Assessment Year :2013-14)**

M/s. Media Research Users Council 128, T.V. Industrial Estate S.K.Ahira Marg Worli, Mumbai - 400 012	Vs.	Asst. Director of Income Tax (Exemp)-1(1) / DCIT(E)-2(1) Mumbai
PAN/GIR No.AAATM5433F		
(Appellant)	..	(Respondent)

Assessee by	Shri P. Pardiwala, Shri Niraj Sheth & Shri Gunjan Kakkad
Revenue by	Smt. Mahita Nair
Date of Hearing	25/10/2023
Date of Pronouncement	14/12/2023

आदेश / O R D E R**PER AMIT SHUKLA (J.M):**

All the aforesaid appeals have been filed by the assessee against separate impugned orders dated 16/01/2015, 17/08/2015, 09/03/2018 & 17/07/2015 passed by CIT(A) Mumbai-I, and CIT(A)-, Mumbai-3, respectively for the quantum of assessment years 2009-10; 2010-11; 2011-12; 2012-13 & 2013-14.

2. In all the years one common issue which has been raised is that ld. CIT(A) has erred in law and in facts in confirming the denial of exemption u/s.11 of the Act by the AO by invoking *proviso* to Section 2(15) and denying the exemption u/s11, despite assessee being registered u/s.12A.

3. We will first take up the appeal for A.Y.2009-10. Our finding therein will apply *mutatis mutandis* in all the years. The brief facts are that assessee is a company registered u/s.25 of the Companies Act, 1956. The main objects of the assessee as per its Memorandum of Association were as under:-

a. To determine the needs and frequencies of research and/or surveys required for the assessment of various media for advertising.

b. To conduct surveys and/or research into the readership, viewership and/or listenership of various media for advertising such as newspapers and periodicals, television, radio, outdoor hoardings and all other media which carry advertisements.

c. To maintain and propagate the highest possible standards of integrity, fairness and reliability in media research and to ensure that its output are not misused to convey a misleading impression by or to any party.

d. To disseminate the findings of such survey and/or research through any medium with or without charge.

4. Memorandum of Association clearly provide that income and property of the assessee shall be applied only for promotion of the objects of the assessee and no portion of income or property shall be paid or transferred directly or indirectly. Looking to its activities of general public utility, it was registered u/s.12A on 07/06/1994 and it continues to enjoy such registration during the years under consideration. It has also been informed that assessee's application for registration under the amended provisions of Section 12AB of the Act for the A. Yrs. 2022-23 to 2026-27 has also been accepted by the department and there is no dispute that the objects of the assessee fall within the category of "advancement of any other object of general public utility".

5. It has also been stated that benefit of Section 11 of the Act has been allowed in the past by the department and for the A.Yrs. 1998-99 to 2002-03, the Tribunal has held that its objects are charitbale in nature and benefits of Section 11 cannot be denied. It has filed its return of income on 30/09/2009 alongwith income expenditure account and audit report declaring total income at Nil. It has also got its accounts audited

u/s.44AB of the Act. The ld. AO noted that definition of charitable purpose has been amended from A.Y.2009-10 whereby proviso has been added which reads as under:-

“Charitable purpose” Includes relief of the poor, education, medical relief (preservation of environment (including watersheds, forests and wildlife) and preservation of monuments or places or objects of artistic or historic Interest, 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 service in relation to trade, commerce or business for a cess of 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;]”

6. Thus, AO held that the second proviso to Section 2(15) clearly provides that if the aggregate value of the receipts from the activities exceeds Rs.10 lakhs, then where the object is any other object of general public utility, shall not be a charitable purpose. Here, the gross receipts of the assessee is more than Rs.10 lakhs and therefore, assessee has to be considered as non-charitable organization and accordingly, he denied the benefit of exemption u/s.11. Thereafter, he computed the income under the normal provisions of the Act after adding amount of

Rs.45,936/- towards provision for gratuity and Rs.1,32,587/- towards leave encashment. The income assessed for Rs.1,22,24,260/- was computed in the following manner:-

	Excess Income over expenditure as per Income & Expenditure A/c.		79,13,414
Add:	Depreciation as per books	3,43,652	
	Loss on sale of Assets	205	
	Provision for tax	<u>41,50,000</u>	44,93,857
Add:	Provision for gratuity	45,936	
	Leave encashment	1,32,587	1,78,523
			1,25,85,794
	Depreciation as per I.T. Act		<u>3,61,536</u>
	Total Income		1,22,24,258
	Rounded off		1,22,24,260

7. The ld. CIT(A) has confirmed the said finding of the AO holding that its income from its activities are above Rs.10 lakhs which have been received by charging of fees, sale of dissemination of research and findings of survey / search reports relevant to advertisement business, etc. The dissemination of research report is not without any charge but assessee has realised huge revenues from such activity. Accordingly, he confirmed the said observation and finding of the AO. Before the ld. CIT (A), assessee has also raised that principle of mutuality is

applicable because most of the receipts are from the members and only marginal amount is from non-members. The said pleading has also been rejected by Id. CIT(A) holding that in A.Y. 2008-09, principle of mutuality was decided by the Id. CIT(A) and he also relied upon the decision of the Hon'ble Supreme Court in the case of Bangalore Club vs. CIT reported in (2013) 5 SCC 509.

8. Before us explaining the facts and activities of the assessee Mr. Pardiwala submitted that in pursuance of its main object of conducting surveys and research into the readership, etc. of various media and dissemination of the findings of such survey and/or research, the assessee enters into agreements with research agencies. The amounts payable to the research agencies as per the agreed terms is recovered by the assessee along with a mark-up by way of subscription revenues primarily from its members and also some non- members who subscribe to the research reports (Indian Readership Survey). This is the prime source of revenue for the assessee. During the year under consideration, IRS subscription revenue earned by the assessee was Rs. 7,81,94,084/- out of which a sum of Rs. 6,05,02,642/- was paid to research agencies. Out of the balance amount of Rs. 1,76,91,442/-, the assessee incurred expenditure of Rs. 1,02,69,656/- (excluding provision for taxation of Rs. 41,50,000/-) and, therefore, was left with a surplus of Rs. 74,21,786/- excluding other revenues. Similar is the position for the other years under consideration, where the surplus is even lower from IRS subscription. At the time of hearing a chart was

also given giving details of surplus of the assessee excluding interest income expenditure and submitted that it ranges from 5.53% to 12%. Further, details of IRS subscription revenues from members and non-members for the A.Yrs 2009-10 to 2013-14 was as under:-

Asst. Year	Members	Percentage	Non-members	Percentage
2009-10	7,31,14,419	93.50%	50,59,865	6.47%
2010-11	9,03,65,806	94.17%	55,92,014	5.83%
2011-12	10,17,67,919	91.91%	89,59,754	8.09%
2012-13	9,88,60,859	95.98%	41,39,777	4.02%
2013-14	11,00,91,082	97.55%	27,69,225	2.45%

9. Thus, it was submitted that revenues derived from members are more than 90% of the total revenue and from small percentage is from non-members.

10. Regarding the observation and the finding by the authorities below that activities carried out by the assessee is in the nature of trade, commerce or business and thus, proviso of Section 2(15) of the Act applies, Mr. Pardiwala submitted that for an activity to be regarded as trade, commerce or business or an activity in the nature of trade, commerce or business, it has to be carried on in a regular systemized manner with a profit motive. The memorandum of association of the assessee prohibits distribution of profits or surplus on winding up or otherwise.

Therefore, there can be no profit motive for the assessee to carry out its activities and pursue its objects. It is undisputed that the activity carried out by the assessee is in accordance with its main objects.

11. Further, he submitted that the *proviso* to section 2(15) of the Act was not intended to affect genuine charitable organisations. This is borne out from the speech of the Hon'ble Finance Minister at the time of introducing the *sais proviso*, where he had clearly stated that genuine charitable organisations and chambers of commerce and similar organisations rendering services to the members would not be affected by the *proviso* to section 2(15) of the Act and their activities would continue to be regarded as "advancement of any other object of general public utility. He also referred to clause 3 of the Finance Bill, 2008 that intention was to limit the benefit to the entities which are engaged in activities such as relief of the poor, education, medical relief and any other genuine charitable purpose and to deny it to purely commercial and business entities which wear the mask of a charity. In pursuance thereof CBDT had issued Circular 11 of 2008 dated 19/12/2008 where circular clarified in the following manner:-

“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 non-members, their claim to be charitable organizations would now be governed by the additional conditions stipulated in the proviso to section 2(15)".

12. Ld. Sr. Counsel submitted that activities carried out are substantially with its members who comprise a significant part of the advertising and media industry and, therefore, it must be regarded as a charitable as well as a mutual organization. Moreover, there is no allegation that its activities are not genuine or not carried out in accordance with the main objects. Regarding applicability of the *proviso*, Ld. Sr. Counsel submitted that the activity carried out by the assessee in the absence of any profit motive cannot be held to be in the nature of trade, commerce or business nor can it be said it is an activity of rendering any service in relation to any trade, commerce or business as a *sine qua non* for an activity to be considered as a business is the motive to earn profit. During the course of hearing, the **judgment of Hon'ble Supreme Court in the case of ACIT (Exmptions) vs. Ahmedabad Urban Development Authority (2022) 449 ITR 1(SC)** was also discussed in detail. After referring to para 141-143, he submitted that profit motive is necessary for an activity to be hit by the *proviso* to Section 2(15) of the Act. Then after referring to paras 170 to 173, he

submitted that the Hon'ble Supreme Court has categorically held that merely because there is a surplus/ profit from the activities carried out would not mean that the trust is not carrying out any charity (paragraph 170) and that pure charity in the sense of performance of an activity without consideration is not envisioned under the Act. The Court has held in paragraph 172 that if the charity involves itself in activities that entail charging amounts only at cost or marginal markup over cost, the prohibition against carrying on business or service relating to business is not attracted. In this context, it has been laid down that the quantum of such profits should not exceed 20% of the overall receipts. It is submitted that the surplus in the assessee's case for the assessment years 2009-10 to 2013-14 does not in any year exceed 20% of the receipts and, thus, the assessee satisfies the test laid down by the Hon'ble Supreme Court in paragraph 172. In paragraph 173, the Hon'ble Court has given certain examples as to what would mean charging a nominal markup for the activities carried out by GPU charity. Even going by those examples, the assessee's case would not be hit by the proviso since it does not charge significant amounts as subscription revenues but only recovers the research fees charged by the agencies along with a small mark-up to cover its administrative costs. It is no doubt true that some surplus remains after meeting costs but that has been held by the Hon'ble Supreme Court to not be relevant in determining applicability of the proviso. What is the material test is that the consideration charged by the assessee to its members for

disseminating information is actuated by the motive to earn profit. Thereafter, he drew our attention to para 200-205, wherein the Hon'ble Supreme Court has held that activities such as organizing meetings, disseminating information through publications, holding awareness camps and events, would be broadly covered by trade promotion. It may be noted that the main objects and activity of the assessee is dissemination of information through publications, which has been expressly held to be not affected by the proviso. Further, merely because some revenue is earned from non- members would not affect the above conclusion.

13. In this connection, the Hon'ble Supreme Court while discussing the case of Apparel Export Promotion Council (AEPC) found that some of the activities of AEPC were in the nature of trade, commerce or business and, therefore, the question of whether such activities fell within the limit prescribed under the second proviso to section 2(15) of the Act was gone into. Similarly in the case of the Tribune trust, the Hon'ble Court at paragraph 241 found that the receipt from advertisements exceeded the threshold limit provided under the proviso to section 2(15) of the Act and, therefore, in paragraph 245, it has been held that the proviso was applicable. Therefore, only in cases where the assessee carries on an activity other than the activity as per its main objects can the question of applying the limits laid down in the proviso to section 2(15) arise, In cases such as the assessee, since the only activity in question is the

activity carried on as per the main objects, the question of applying the limits would not arise.

14. He further submitted that the Hon'ble Supreme Court in the case of Ahmadabad Urban Development Authority particularly made observations in para 170-176 and para 200-211 has been considered in detail that ITAT Mumbai Bench in the case of, **The Gem & Jewellery Export Promotion Council vs. ACIT (Exemptions) Range 2(1) in ITA No.752/Mum/2017 and ITA No.989/Mum/2019**) and it was held that costs are recouped with a nominal markup, the activity will not be regarded as business.

15. Without prejudice, he submitted that here in this case more than 90% of the Revenue of the assessee is from its members, which cannot be regarded as in the nature of trade or business and the percentage of the revenue from non-members is only 6.47% in A.Y.2009-10 and in subsequent years it is ranging from 2.45% to 8.09%. Thus, if the revenue from non-members is regarded as business then such revenue does not exceed 20% of the total receipts from the IRS subscription, consequently, the *proviso* to Section 2(15) of the Act will not apply. Lastly, he submitted that without prejudice to the claim u/s.11, since assessee is dealing mostly with the members, therefore, principle of mutuality should be applied at least for the members. He further submitted that in A.Y.2008-09, Tribunal has restored the issue to the AO for *denovo* adjudication on the principle of mutuality in its order for A.Yrs. 2006-07 and 2008-09. Regarding

disallowance for provision of gratuity of Rs. 45,936/- and disallowed for leave encashment of Rs.1,32,557/- he submitted that same are consequential if the benefit of exemption u/s.11 is granted, then it would have to be deleted otherwise there is no proper finding by the authorities below on this issue.

16. On the other hand, ld. DR submitted this case needs to be decided in light of the judgment of Hon'ble Supreme Court whether the activity of the assessee is in the nature of trade, commerce or business. If it is in the nature of trade, commerce or business, then, the threshold provided in *second proviso* gets triggered that is if it exceeds the threshold, then for that year exemption u/s.11 would be denied. Here in this case, for all the assessment years 2009-10 to 2013-14, the threshold had exceeded the limit prescribed in the *second proviso*. She further submitted that the very activity of the assessee itself is in the nature of trade, commerce and business and therefore, it is clearly hit by the *proviso* to Section 2(15). She thus strongly relied upon the judgment of Hon'ble Supreme Court.

17. We have heard rival submissions and also perused the relevant finding given in the impugned orders as well as material referred to before us. As noted above, assessee is a company registered u/s.25 of the Companies Act and is primarily engaged in to conduct surveys / research into readership, viewership and listenership of various media and dissemination of research to various members and non-members who are basically industrial business entities. There are more than 165 members to whom

assessee has sold subscription for IRS reports. These IRS reports are prepared from outside agencies which are research agencies to whom research are outsourced and then sold to members and in some cases to non-members at slightly higher prices. The case of the Revenue is that since assessee's receipts from its activity even though it is for general public utility has exceeded the threshold of Rs.10 lakhs and Rs.20 lakhs, therefore, it is not entitled for exemption u/s.11 for these years.

18. This issue of *proviso* to Section 2(15) in the case of institutions carrying out object of general public utility has been discussed in detail by the Hon'ble Supreme Court in the case of **Ahmedabad Urban Development Authority (supra)**. Certain relevant paragraphs of the Hon'ble Supreme Court for the sake of ready reference are reproduced hereunder:-

"167. Thus, the journey which began with Surat Art Silk was interpreted in Thanthi Trust to mean that the carrying on of business by GPU charity was permissible as long as it inured to the benefit of the trust. The change brought about by the amendments in questions, however, place the focus on an entirely different perspective: that if at all any activity in the nature of trade, commerce or business, or a service in the nature of the same, for any form of consideration is permissible, that activity should be intrinsically linked to, or a part of the GPU category charity's object. Thus, the test of the charity being driven by a predominant object is no longer good law. Likewise, the ambiguity with respect to the kind of activities generating profit which could feed the main object and incidental profit-making also is not good law. What instead, the definition under section 2(15) through its proviso directs and thereby marks a departure from the previous law, is - firstly that if a GPU charity is to engage in any activity in the nature of trade, commerce or business, for consideration it should only be a part of this

actual function to attain the GPU objective and, secondly - and the equally important consideration is the imposition of a quantitative standard - i.e., income (fees, cess or other consideration) derived from activity in the nature of trade, business or commerce or service in relation to these three activities, should not exceed the quantitative limit of Rs. 10,00,000 (w.e.f. 1-4-2009), Rs. 25,00,000 (w.e.f. 1-4-2012), and 20% (w.e.f. 1-4-2016) of the total receipts. Lastly, the "ploughing" back of business income to "feed" charity is an irrelevant factor - again emphasizing the prohibition from engaging in trade, commerce or business.

168. If one understands the definition in the light of the above enunciation, the sequitur is that the reference to "income being profits and gains of business" with a further reference to its being incidental to the objects of the Trust, cannot and does not mean proceeds of activities incidental to the main object, incidental objects or income derived from incidental activities. The proper way of reading reference to the term "incidental" in section 11(4A) is to interpret it in the light of the sub-clause (i) of proviso to section 2(15), i.e., that the activity in the nature of business, trade, commerce or service in relation to such activities should be conducted actually in the course of achieving the GPU object, and the income, profit or surplus or gains can then, be logically incidental. The amendment of 2016, inserting sub clause (i) to proviso to section 2(15) was therefore clarificatory. Thus interpreted, there is no conflict between the definition of charitable purpose and the machinery part of section 11(4A). Further, the obligation under section 11(4A) to maintain separate books of account in respect of such receipts is to ensure that the quantitative limit imposed by sub-clause (ii) to section 2(15) can be computed and ascertained in an objective manner.

169. The conclusion recorded above is also supported by the language of seventh proviso to section 10(23C). Whereas section 2(15) is the definition clause, section 10 lists out what is not income. Section 10(23C) - by sub-clauses (iv) and (v) exempt incomes of charitable organisations. Such organisations and institutions are not limited to GPU category charities but rather extend to other types of charities (i.e. the per se kind as well). The controlling part of section 10(23C) along with the relevant clauses (iv) and (v) seek to exclude income received by the concerned charities. However, the provisos hedge such

exemption with conditions. The seventh proviso - much like section 11(4A) and the definition - carve out an exception, to the exemptions such that income derived by charities from business, are not exempt. The seventh proviso virtually echoes section 11(4A) in that business income derived by a charity (in the present case, the GPU charities) which arises from an activity incidental to the attainment of its objective is not per se excluded.

170. Classically, the idea of charity was tied up with eleemosynary. However, "charitable purpose" - and charity as defined in the Act have a wider meaning where it is the object of the institution which is in focus. Thus, the idea of providing services or goods at no consideration, cost or nominal consideration is not confined to the provision of services or goods without charging anything or charging a token or nominal amount. This is spelt out in Indian Chamber of Commerce (supra) where this Court held that certain GPUs can render services to the public with the condition that they would not charge "more than is actually needed for the rendering of the services, - may be it may not be an exact equivalent, such mathematical precision being impossible in the case of variables, - may be a little surplus is left over at the end of the year - the broad inhibition against making profit is a good guarantee that the carrying on of the activity is not for profit".

171. Therefore, pure charity in the sense that the performance of an activity without any consideration is not envisioned under the Act. If one keeps this in mind, what section 2(15) emphasizes is that so long as a GPU's charity's object involves activities which also generates profits (incidental, or in other words, while actually carrying out the objectives of GPU, if some profit is generated), it can be granted exemption provided the quantitative limit (of not exceeding 20%) under second proviso to section 2(15) for receipts from such profits, is adhered to.

172. Yet another manner of looking at the definition together with sections 10(23) and 11 is that for achieving a general public utility object, if the charity involves itself in activities, that entail charging amounts only at cost or marginal mark up over cost, and also derive some profit, the prohibition against carrying on business or service

relating to business is not attracted - if the quantum of such profits do not exceed 20% of its overall receipts.

173. It may be useful to conclude this section on interpretation with some illustrations. The example of Gandhi Peace Foundation disseminating Mahatma Gandhi's philosophy (in Surat Art Silk) through museums and exhibitions and publishing his works, for nominal cost, ipso facto is not business. Likewise, providing access to low-cost hostels to weaker segments of society, where the fee or charges recovered cover the costs (including administrative expenditure) plus nominal mark up; or renting marriage halls for low amounts, again with a fee meant to cover costs; or blood bank services, again with fee to cover costs, are not activities in the nature of business. Yet, when the entity concerned charges substantial amounts- over and above the cost it incurs for doing the same work, or work which is part of its object (i.e., publishing an expensive coffee table book on Gandhi, or in the case of the marriage hall, charging significant amounts from those who can afford to pay, by providing extra services, far above the cost-plus nominal markup) such activities are in the nature of trade, commerce, business or service in relation to them. In such case, the receipts from such latter kind of activities where higher amounts are charged, should not exceed the limit indicated by proviso (ii) to section 2(15).

200. Surat Art Silk (supra) and other decisions, had ruled that as long as the objects of trade promotion bodies were for general public utility wherein 'trade promotion in itself, was held to be a GPU - the fact that incidentally these bodies carried on some commercial activity, leading to profit, did not preclude them from claiming to be driven by charitable purpose. As observed earlier, the enunciation of those principles were in the context of the unamended section 2(15).

201. The question that arises is whether the change in definition impacts the claims of trade promotion bodies, federations of commerce, or such organizations, that they are GPU charities The judgment in Surat Art Silk (supra) proceeded on the assumption that trade promotion was the pre-dominant object of the GPU charity before the court, and that other objects - including procuring licences, trade etc. were incidental. The assessee in Surat Silk had clear trading objects:

"(b) To carry on all and any of the business of Art Silk Yarn, Raw Silk, Cotton Yarn as well as Art Silk floth, Silk Cloth and Cotton Cloth belonging to and on behalf of the members.

(e) To buy and sell and deal in all kinds of cloth and other goods and fabrics belonging to and on behalf of the Members."

This court, nevertheless, held that since the predominant object of the assessee was trade promotion, while furthering it, the fact that some trading occurred, leading to income, did not preclude the assessee from claiming tax exemption.

202. In the opinion of this court, the change in definition in section 2(15) and the negative phraseology- excluding from consideration, trusts or institutions which provide services in relation to trade, commerce or business, for fee or other consideration has made a difference. Organizing meetings, disseminating information through publications, holding awareness camps and events, would be broadly covered by trade promotion. However, when a trade promotion body provides individualized or specialized services - such as conducting paid workshops, training courses, skill development courses certified by it, and hires venues which are then let out to industrial, trading or business organizations, to promote and advertise their respective businesses, the claim for GPU status needs to be scrutinised more closely. Such activities are in the nature of services "in relation to trade, commerce or business. These activities, and the facility of consultation, or skill development courses, are meant to improve business activities, and make them more efficient. The receipts from such activities clearly are fee or other consideration for providing service "in relation to trade, commerce or business.

203. The revenue has appealed to this court, in respect of two assessment years, in the case of Apparel Export Promotion Council (AEPC). The objects of AEPC, which was set up in 1978- include promotion of ready- made garment export. To achieve that end, its objects include providing training to instil skills in the workforce, to improve skills in the industry, guide in sourcing machinery, to serve as

a body advising. providing information on market or technical intelligence, assisting the concerned industry in obtaining import licenses, showcase the best capabilities of Indian garment exports through the prestigious "India International Garment Fair" organised twice a year by AEPC, etc. These fairs host over 350 participants who exhibit their garment designs and patterns. Other functions are to provide information, and to provide market research. AEPC also assists in developing new design patterns and garments and to perform promotional activities in individual foreign markets. Further, AEPC sends missions and trade delegations abroad, who participate in international fairs, and conduct surveys to gather information on potential export of readymade garments.

204. As part of its functioning, it also books bulk space, which is then rented out to individual Indian exporters, who showcase their products and services, and ultimately secure export orders. Towards these services, ie booking and providing space, AEPC charges rentals. Now, these rents are not towards fixed assets owned by it. They are in fact charges, or Tees, towards services in relation to business; likewise, the skill development and diploma courses conducted by it, for which fees are charged, are to improve business functioning of garment exporters. Furthermore, market surveys and market intelligence, especially country specific activities, aimed at catering to specified exporters, or specified class of exporters, is also service in relation to trade, commerce or business.

205. In the circumstances, it cannot be said that AEPC's functioning does not involve any element of trade. commerce or business, or service in relation thereto. Though in some instances, the recipient may be an individual business house or exporter, there is no doubt that these activities, performed by a trade body continue to be trade promotion. Therefore, they are in the "actual course of carrying on the GPU activity. In such a Case, for each year, the question would be whether the quantum from these receipts, and other such receipts are within the limit prescribed by the sub-clause (ii) to proviso to section 2(15) If they are within the limits, AEPC would be for that year, entitled to claim benefit as a GPU charity.

19. The Hon'ble Supreme Court after analyzing the law which was prevalent and applicable prior to insertion of proviso w.e.f. 01/04/2009 and amendments made thereafter, have clarified the amended position of law in the following manner:-

- **if at all any activity in the nature of trade, commerce or business, or a service in the nature of the same, for any form of consideration is permissible, then activity should be intrinsically linked to, or is part of the GPU category charity's object.**
- the test of the charity being driven by a predominant object is no longer good law. Likewise, the ambiguity with respect to the kind of activities generating profit which could feed the main object and incidental profit-making also is not good law.
- What instead, the definition under section 2(15) through its *proviso* directs and thereby marks a departure from the previous law, that if a GPU charity is to engage in any activity in the nature of trade, commerce or business, for consideration it should only be a part of this actual function to attain the GPU objective; and equally important consideration is the imposition of a quantitative standard - i.e., income (fees, cess or other consideration) derived from activity in the nature of trade, business or commerce or service in relation to these three activities, should not exceed the quantitative limit.
- The Hon'ble Apex Court has further held that the idea of providing services or goods at no consideration or at cost may not be relevant factor as it has to be given a wider meaning. But now there is an inhibition against making

profit though there may be a little surplus left over the end of the year. Thus, concept of pure charity i.e. the performance of an activity without consideration is not envisioned under the Act, however, as long as GPUs object involves activities which also generates profits, it can be granted exemption provided the quantitative limit under second proviso to section 2(15) for receipts from such profits, is adhered to.

- In para 171, it has been stated that if the charity involves itself in activities that entail charging amounts only at cost or marginal markup over cost and also derives from profit, the prohibition against carrying on business or service relating to business is not attracted (if the quantum of such profits did not exceed 20% of its overall receipts) has been adhered to.

20. The ld. Sr. Counsel referring to para 172, submitted that Hon'ble Apex Court has observed that, if the profit do not exceed 20% then benefit of Section 11 cannot be denied. However, such an interpretation as stated by the ld. Senior Counsel cannot be accepted, because all through the judgment the Hon'ble Supreme Court while mentioning the limit of 20% have clarified that receipts from trade, commerce or business should not exceed 20% of overall receipts. It does not mean that up to 20% of the profit from the activities of trade, commerce and business is permissible.

21. Further, while analyzing the case of trade promotion bodies, councils, association, organization, Hon'ble Apex Court citing the example of Apparel Export Promotion Council (AEPC), held that the change of definition of Section 2(15) starts with negative phraseology, i.e., they exclude any activity which is in the nature of trade, commerce or business for fee or other consideration has made a difference. Their Lordships observed that, organizing meetings, disseminating information through publications holding awareness camps and events are broadly covered under trade promotion. However, when trade promotion provides individuals or specialized services like conducting trade workshops, training course, skill development courses certified by it and hires venue which are then let out to industrial, trading of business organisation to promote and advertise their respective business, then the claim for GPU status needs to be scrutinized more closely. Such activities are in the nature of services "in relation to" trade, commerce or business. Thus, receipt from such activity clearly are "fee or other consideration" for providing services "in relation to" trade, commerce or business. In para 202 (supra), after citing examples of activities of AEPC the Hon'ble Court held that these activities carried out cannot be held that it does not have any element of trade, commerce or business or service and the activities carried out by it, has to be examined, whether they are in the "actual course of carrying on" the GPU activity or not. In such a case, for each year, the question would be whether the quantum from these receipts, and other such receipts are within the limit prescribed

by the sub-clause (ii) to proviso to section 2(15). If they are within the limits, AEPC would be for that year, entitled to claim benefit as a GPU charity. Thus, judgment of the Hon'ble Supreme Court has clarified the law post insertion of the proviso to Section 2(15).

22. The sequitur of the judgment of the Hon'ble Apex Court interpreting the Section 2(15) read with first and second proviso is that, if an institution or a trust or a body has been recognised for carrying out charitable purposes for the object of general public utility, then benefit of Section 11 is available and if it carries out activity which is by nature of trade, commerce or business, then activity should be intrinsically linked to or part of the GPU. Further, if any consideration is received by way of fees, cess or any other consideration from such activity, then it should not exceed the quantitative limit. It has further held that though the consent of pure charity i.e. performance of activity without consideration is not envisioned under the Act. However, as long as GPU object involves activities which also generates profits, it can be granted exemption, provided it is within the quantitative limit fixed under the second proviso to Section 2(15).

23. Now, the question is that, if an institution has been granted registration u/s.12A for a particular object of GPU holding it to be charitable in nature, then, still it has to be seen, whether that activity per se for which it has been granted registration has some element of trade, commerce or business. If it has only one source of receipts from that activity only, then whether the

threshold of 20% of the total receipts would still be applicable. For example, if the entire receipts are from one activity only, for which it has been granted registration and it is solely carrying its activity for the same object for which it has been recognised for grant of exemption u/s.11, then how the 20% of the total receipts is to be calculated, i.e. in relation to which receipt 20% is to be calculated. For instance, if only from one activity (for which it has been granted registration u/s.12A) receipt is of Rs. 1 Crore and it has no other receipts then how 20% is to be calculated. Whether in such case it falls into the main provision of Section 2(15) or the first and second proviso gets triggered; or one has to see, whether in course of main GPU activity, it carries on other ancillary activity which is to feed the object of GPU, then receipts from those activities have to be examined under both the provisos and apply the threshold limits. In cases where an institution or a body or trade promotion carries out any other activity in the nature of trade, commerce or business for a consideration to fulfill its GPU objects, then the receipts from such activity should not cross the threshold limit of Rs.10 lakhs, Rs.20 lakhs or 20% of the total receipts. Now, if there is only one activity and there are no other receipts from any other activity, then the issue would arise is how to calculate the threshold limit of 20%. If activity carried out in pursuance of that object which is the only activity, then whether registration u/s.12A should at all be granted, because, ostensibly the receipts will always will fall in the scope of the proviso if the limit provided therein is crossed; or the mandate of law is that such institution or body

should not cross the threshold at all. If that is the purport, then activity per se does not qualify under main section 2(15). In our view, this cannot be the true purport of the section or the judgment of the Hon'ble Supreme Court. What needs to be examined, if there is any activity which is hit by proviso, then only benefit can be denied. Another view of looking into the proviso is that, during the course of carrying out activity of objects of GPU, it undertakes any activity which falls into the nature of trade and commerce and receipts from such activity should not cross the threshold, then perhaps it makes some sense. The law which has been explained by the Hon'ble Supreme Court, then can it be interpreted that the main activity per se has to be seen from the angle, whether it is in the nature of trade, commerce or business; and other factors of low margin or very low profit coupled with conditions provided in the proviso; or one has to see, is there any other activity falling into ambit of proviso and examine the benefit u/s.11.

24. If one takes a view that the very activity for which it has been granted registration for carrying out object of GPU, then also limit has to be adhered to, that is, in case the receipts from said activity of GPU exceeds Rs.10 lakhs or Rs.20 lakhs or 20%, then, no benefit of Section 11 is to be given and only in the year it is less than Rs.10 lakhs or Rs.20 lakhs then only exemption u/s.11 can be given. This interpretation, in our view will defeat the very intent of the section 2(15) for any trust or body carrying GPU as its main object. Here, in this case, the only activity which has

been carried out, has been recognized for the charitable purposes with the object of GPU. If the very activity was in the nature of trade, commerce or business, then why it was even granted registration u/s.12A for last 3 decades. Here one very important fact is that, even under the new law, it has been granted registration for the same object from A.Y.2023-24 onwards. Thus, the Income Tax department still considers the main activity of the assessee is charitable within the object of GPU. If from the same activity the receipts of the assessee exceeds the threshold, how can benefit be denied and the proviso will be invoked year after year, or if only when the assessee carries out any other activity to fulfil its GPU object which involves any element of trade, commerce or business, then only receipts from such activity has to be examined from the prospective of threshold provided in the proviso.

25. The Hon'ble Apex Court while explaining the true purport of proviso, as explained in para 167 to 172, clarified that; *firstly*, if GPU charity is engaged **in any** activity, the nature of trade, commerce or business for consideration it should only be part of its actual function to attain GPU objective, i.e., if at all there is any activity for GPU charity which involves any such activity which is in the nature of trade, commerce or business, then threshold imposed for the quantitative limit has to be adhered to. *Secondly*, if charity involves itself any activities that entail charging amounts only at cost or marginal markup over cost and it also derives profit, then such profit should not exceed 20% of

its overall receipts. That means the Court envisioned that if carrying out GPU objective or any other activity which has been carried out, then the receipts from such activity should not exceed 20%. This has been further clarified while explaining the case of trade promotion bodies in para 202 wherein they have held that if the trade promotion's main activity is organizing meetings, disseminating information through publication, holding awareness camps and events would be broadly covered by trade promotion for which it is recognized for GPU. However, only when trade promotion body provides individuals or specialized services which have been elaborated therein and if such receipts are in the nature of fee or other consideration, then it is reckoned to be providing service in relation to trade, commerce or business. The activities carried out in that case which were in the nature of individuals and specialized services, the Hon'ble Supreme Court held that its functioning involved element of trade, commerce or business and therefore, for such services whether the quantum for these receipts are within the limit prescribed has to be examined year to year.

26. While deciding the issue, whether the nature of receipts of income garnered by the trust in the course actually carrying out these activities of publishing newspaper can be characterized as in the nature of trade, commerce or business for the consideration, normally Apex Court observed and held as under:-

"245. The publication of advertisements for consideration, in the opinion of the court, by the newspaper, cannot but be termed as

an activity in the nature of carrying on business, trade or commerce for a fee or consideration. That the newspaper published by the trust ("the Tribune") in this case is funded mainly through advertisement is no basis for holding that publishing such advertisements by the Trust does not constitute business. The object of the trust to involve or engage in publication of newspapers. Publishing advertisements is obviously to garner receipts which are in the nature of profit. Now, by virtue of the amended definition of section 2(15), GPU charities can engage themselves in business or commercial activity or profit, only if the receipts from such activities do not exceed the quantitative limit of the overall receipts earned in a given year. While the assessee's contention that publication of advertisement is intrinsically linked with newspaper activity (thereby fulfilling sub-clause (1) of the proviso to section 2(15), e an activity in the course of actual carrying on of the activity towards advancement of the object) is acceptable, nevertheless, the condition imposed by sub-clause (if) of the proviso to section 2(15) has to also be fulfilled. In the present case, that percentage had been exceeded, as evident from the record."

27. Thus, the activity of the trust for publishing advertising in the newspaper is intrinsically linked for newspaper activity falls within the ambit of sub-clause (i) of Subsection 2(15) and conditions imposed in sub-clause (ii) of the proviso has to be fulfilled. The moot question is, whether the receipts from such activity itself is in the nature of trade, commerce or business or any activity of ranging in services in relation to any trade, commerce or business has to be examined. If the assessee is generating revenue from the activities for which it has been granted status of charitable nature, then whether it falls within the main section 2(15) itself or its activities are hit by proviso has not been discussed by the authorities below, both by the AO and Id. CIT(A) who have simply stated that since receipts of the

assessee had crossed the limit of Rs.10 lakhs, therefore, benefit of Section 11 cannot be granted. Before deciding this issue, it is incumbent whether its activity for which it has been granted registration u/s.12A itself *per se* falls in the category of carrying of any activity in the nature of trade, commerce or business. Only if it carries any other activity which falls in such nature, then only proviso to Section 2(15) would be applicable.

28. Accordingly, we remit this issue to the file of the AO to decide this issue in line with judgment of Hon'ble Supreme Court and the principles laid down therein, whether any activity carried out by the assessee falls in the nature of trade, commerce or business or service for which any fees or cess or consideration has been received.

29. In so far as assessee's contention, its activities from members alone should be treated as general public utility and only nominal revenue from non-members should be treated as activity in the nature of trade, commerce or business cannot be accepted. Because, even if it is with the members, what is to be seen is whether the activity *per se* is in the nature of trade, commerce or business or not. How a distinction can be made only for non-members and the subscription revenue from them alone has to be treated as in the nature of trade, commerce or business and for some activity and charging fees from the members, it is not. We are unable to appreciate such plea and is rejected.

30. Secondly, in so far as the issue of principle of mutuality also prima facie, once the revenues are from the non-members, even if they are marginal, that does not mean the entire activities of the assessee falls within the ambit of principle of mutuality. However, since in the earlier years this issue has been remanded back to the AO by the Tribunal with specific direction therefore, we are not deciding or adjudicating this issue and matter is remanded back to deal and decide the issue in line with the order of the Tribunal in the earlier years.

31. One of the contention raised that assessee is having a very nominal profit of margin for which chart has been submitted. However, the chart which has been submitted, the true picture of margin from main receipts from IRS subscription is not coming out. For example out of the gross receipts of Rs.7,81,94,084/- in A.Y.2009-10, the income from subscription IRS itself approximately 1.77 Crores; In A.Y.2010-11, the gross receipts is Rs.9,59,57,820/- and income is Rs.1,40,05,627; in A.Y. 2011-12 gross is Rs.11,07,27,673 and income is Rs.1,79,31,763/-,. Similarly, in A.Y.2012-13 out of the gross receipts of Rs.19.39 Crores, the income from subscription for IRS report is 10.30 Crores. In A.Y.2013-14 again it is Rs.20,88,44,490/- and income is Rs.11,28,60,307. Thus, it cannot be said that there is a nominal income from the main activity of the assessee. Hence, the calculation given before us at the threshold does not appear to be correct which needs to be

verified by the AO. Thus, the working which has been given, we find that it does not give the correct picture of margins from the sale of reports and therefore, this plea also needs to be examined by the AO in line with the judgment of the Supreme Court.

32. Accordingly, the entire issue is remanded back to the AO to examine,

- Firstly, to be decided in accordance with the judgment of the Hon'ble Supreme Court in the case of Ahmedabad Urban Development Authority (supra); and application of criteria of the threshold and the issue discussed in paras 23 to 27 of this order.
- Secondly, whether its main activities for which it has been granted the status of charitable entity u/s.12A who is carrying out one activity which is the object of general public utility then on what basis it has been held that it is in the nature of trade, commerce or business; or whether any activity is being carried out by the assessee other than the main activity which falls in the nature of trade, commerce or business or any activity of rendering any services in relation to trade, commerce or business; or which threshold is to be examined and
- thirdly, to examine the plea of assessee that it has a very nominal profit or margin from the main activity of selling of IRS report to members and non-members; and

- Lastly, to decide the issue on principle of mutuality in light of the decision earlier year orders of the Tribunal.

33. Other grounds raised in the appeals are also set aside to the file of the AO to decide accordingly.

34. Since in the other years also exactly same issue is involved with same reasoning given in the orders, therefore, aforesaid finding will apply in the appeals for A.Yrs.2010-11 to 2013-14 also. Accordingly, the appeals of all the years are allowed for statistical purposes.

35. In the result, all the appeals of assessee are allowed for statistical purposes.

Order pronounced on 14th Dec, 2023.

**Sd/-
(GAGAN GOYAL)
ACCOUNTANT MEMBER**

**Sd/-
(AMIT SHUKLA)
JUDICIAL MEMBER**

Mumbai; Dated 14/12/2023
KARUNA, *sr.ps*

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. CIT
4. DR, ITAT, Mumbai
5. Guard file.

//True Copy//

BY ORDER,

(Asstt. Registrar)
ITAT, Mumbai