

IN THE INCOME TAX APPELLATE TRIBUNAL "D" BENCH, MUMBAI

BEFORE SHRI PRASHANT MAHARISHI, AM
AND
SHRI SUNIL KUMAR SINGH, JM

ITA No. 39 & 457/Mum/2024

(Assessment Years: 2009-10 & 2017-18)

Maharashtra Housing & Area
Development Authority
Finance Controller, MHADA,
Griha Nirman Bhavan,
4th Floor, Kala Nagar,
Bandra (East)
Mumbai-400 051

Vs.

Asst. Commissioner of
Income Tax (Exemption),
Circle 2, R. No. 608,
6th floor, Cumballa Hill
Telephone Exchange
Building,
Mumbai-400 026

(Appellant)

(Respondent)

PAN No. AAAJM0344H

Assessee by : Shri Nishant Thakkar, AR
Revenue by : Smt. Sanyogita Nagpal, CIT DR

Date of hearing: 30.05.2024
Date of pronouncement : 05.08.2024

ORDER

PER PRASHANT MAHARISHI, AM:

01. ITA No. 39/Mum/2024 for A.Y. 2009-10, and ITA No. 4571/Mum/2023, for A.Y. 2017-18, is filed by Maharashtra Housing and Area Development Authority [Assessee/ Appellant] against Appellate orders of the National Faceless Appeal Centre, Delhi [the learned CIT (A)] dated 8th November 2023, and 17th October 2023, respectively.
02. For A.Y. 2009-10, fact shows that original appeal was filed by the assessee against the assessment order

passed under Section 143(3) of the Income-tax Act, 1961 (the Act) by the Asst. Director of Income Tax (Exemption), Circle 1(1), Mumbai [the Id. AO] on 27thDecember 2011. Appeal against that order reached ITAT, wherein the order was passed on 20thMarch 2018, setting aside the matter to the learned CIT (A), Mumbai. On migration of such appeal this appellate order was passed.

03. The assessee is aggrieved and has raised 8 different grounds of appeal in ITA No. 39/Mum/2024, as under:-

"1. Appellant denied exemption under s.11

The learned CIT(A) erred on facts and circumstances of the case and in law in upholding the Assessment Order appealed against denying exemption under s.11 of the Act.

Relief claimed: The appellant be granted exemption under s.11 of the Act.

Invocation of Proviso to Sec. 2(15):

The learned CIT(A) erred on facts and in law in invoking Proviso to s.2(15) of the Act, without appreciating that the activities of the appellant are not in the nature of trade, commerce or business or any activity of rendering any service in relation to any trade, commerce or business.

Relief claimed: The appellant be declared one to which Provisos to s.2(15) of the Act do not apply.

3. High Profit Margin

The learned CIT(A) erred on facts and in law in deciding that the Proviso to s.2(15) is applicable to the appellant because the profit margins are high and merely because the absolute number of surplus is high without bringing the fact on record that there is no profit making motive and that the surplus is non-commercial in nature.

Relief claimed: The appellant be declared one to which Provisos to s.2(15) of the Act do not apply.

Following are the Grounds of Appeal which were pleaded in the first round of appeal before the Ld. CIT(A) originating from the order passed by Ld. AO on 27th December 2011 U/s 143(3), but the led CIT(A) has erred in non-Adjudication of the grounds.

4. Addition based on notes to accounts towards Excess Capitalization of Interest- 8,55,43,351/-.

The Id. AO Erred on facts and in law by making an adding 28,55,43,351/- being interest credited in the books of accounts, which represents notional income as per para 4 of the Assessment Order passed on 27 December 2011, without giving any opportunity to the appellant to justify the appearance of the amounts in the notes to accounts and without appreciating that such amount had already formed part of book results and therefore forming part of surplus during the year amounting to double taxation thereof.

Relief claimed: Amount to the tune of ₹ 8,55,43,351/- towards Excess Capitalization of interest as per notes to accounts be allowed to be deducted for computation of Income of the Appellant.

5. Addition based on notes to accounts towards Excess Capitalization of Administrative Expenditure- 25,78,27,457/

The led AO Erred on facts and in law by making an adding 2 5,78,27,457/- being Expenditure credited in the books of accounts, which represents notional income as per para 6.2 (e) of the Assessment Order passed on 27th December 2011, without giving any opportunity to the appellant to justify the appearance of the amounts in the notes to accounts and without appreciating that such amount had already formed part of book results and therefore forming part of surplus during the year amounting to double taxation thereof.

Relief claimed: Amount to the tune of 25,78,27,457/- towards Excess Capitalization of Administrative Expenses as per notes to accounts be allowed to be deducted for computation of Income of the Appellant.

6. Addition based on notes to accounts towards Initial Down Payment in aggregate of 260,82,12,734/-

The Id. AO Erred on facts in making an addition of 57,99,74,366/- and ₹ 2,82,38,368/- aggregating to 60,82,12,734/ towards receipts on account of Initial Down Payment recovery under the Hire Purchase Scheme as per Para 6.2(c) of the assessment order

passed on 27th December 2011, without giving any opportunity to the appellant to justify the appearance of the amount in the notes to accounts.

Relief claimed: The addition of 60,82,12,734/- be directed to be deleted.

7. Addition based on notes to accounts towards subsidies received of 2 3,75,43,000/-

The led AO Erred on facts in making an addition of & 3,75,43,000/- towards receipts on account of Subsidies Received per Para 6.2(f) of the assessment order passed on 27 December 2011. without giving any opportunity to the appellant to justify the appearance of the amount in the notes to accounts

Relief claimed: The addition of 23,75,43,000/- be directed to be deleted.

8. Addition based on notes to accounts towards non materialization of liability amounting to 26,69.945/-

The Id. AO Erred on facts in making an addition of 2 6,69,945/- towards non materialization of liability per Para 6.2(h) of the assessment order passed on 27 December 2011, without giving any opportunity to the appellant to justify the appearance of the amount in the notes to accounts.

Relief claimed: The addition of ₹ 6,69,945/-be directed to be deleted.”

04. The appeal for A.Y. 2017-18, is against the appellate order, wherein the appeal filed by the assessee against

the assessment order dated 20th December 2019, passed under Section 143(3) of the Act by the Asst. Commissioner of Income Tax, Exemption, Circle 2, was partly allowed.

05. The assessee has raised eight grounds in this appeal as under:-

"1. Appellant denied exemption under s.11

The learned CIT(A) erred on facts and circumstances of the case and in law in upholding the Assessment Order appealed against denying exemption under s.11 of the Act.

Relief claimed: The appellant be granted exemption under s.11 of the Act.

2. Engaged in Business:

The learned CIT(A) erred on facts and in law in confirming the assessment order appealed against insofar as the assessment order holds that Proviso to s.2(15) of the Act applies to the appellant disentitling the appellant to the exemption under s.11 of the Act, without appreciating that the activities of the appellant are not in the nature of trade, commerce or business or any activity of rendering any service in relation to any trade, commerce or business.

The learned CIT(A) erred on facts and in law in not following the orders of the Hon ITAT Mumbai in the appellants own case for A.Y 2010-11 to A.Y 2015-16

specifically holding that Proviso to 5.2(15) is not applicable to the appellant.

Relief claimed: The appellant be declared one to which Provisos to s.2(15) of the Act do not apply.

3. High Profit Margin

The learned CIT(A) erred on facts and in law in deciding that the Proviso to s.2(15) is applicable to the appellant because the profit margins are high.

Relief claimed: The appellant be declared one to which Provisos to s.2(15) of the Act do not apply.

4. Erroneous Consideration of Surplus as per Income & Expenditure Account

The learned CIT(A) erred on facts in considering 2725,40,63,674/- as amount of Surplus as against the actual amount of Surplus at 2718,55,04,382/- as per Income and Expenditure Account for computation of Income of the appellant and holding that the numbers were not before the AO, which is factually incorrect, the AO had with him the correct numbers.

Relief claimed: Surplus of 2718,55,04,382/- as per Income & Expenditure Account for FY 2016-17 should be considered for the purposes of computation of Income of the Appellant.

5. Disallowance of Works Expenditure as Application of income

The learned CIT(A) erred on facts and in law in confirming the disallowance of application of income on account of Works Expenditure incurred during the year on the object of the Appellant to the extent of 212,75,49,95,967/-, without appreciating that it has not been deducted twice, as alleged by the learned AO.

Relief claimed: The addition of 212,75,49,95,967 be directed to be allowed u/s 11(1)(a) as application of income.

Non-Consideration of Form 10 filed in accordance with the provisions,

The learned CIT(A) erred on facts and in law in confirming the action of the led in not considering Form No.10 filed in accordance with s.11(2) of the Act read with Rule 17 of the IT.Rules, 1962 for accumulation of income.

Relief claimed: Application made in Form 10 duly submitted before the relevant due date be considered for the purposes of Accumulation.

Disallowance of claim of 21,22,44,93,995/- in computation on account of Expenditure not considered/Income wrongly considered in books of accounts

The learned CIT(A) erred on facts and in law in confirming the action of the Id. AO in disallowing a claim of 21,22,44,93,995/- being claim in

computation of income on account of Expenditure not considered/Income wrongly considered in accounts, without appreciating that such adjustments were carried out in computation as per auditors notes and without appreciating the fact that the notional interest and establishment expense capitalized on work-expenditure and thereby allegedly claimed twice, is in fact not claimed twice as alleged.

Relief claimed: The claim of 21,22,44,93,995/- be directed to be allowed.

7.1 The learned CIT(A) erred on facts and in law in confirming the action of the led AO of disallowance of 278,01,28,065/-, being interest credited in Income and Expenditure account as per appellants policy, which were notional income as opposed to real income, and therefore, further erred in not allowing its exclusion from the taxable income.

Relief claimed: The claim of ₹78,01,28,065/- be directed to be allowed.

7.2 The learned CTT(A) erred on facts and in law in confirming the action of the Id. AO of disallowance of 244,43,65,930, being Administrative Expenses credited in Income and Expenditure account as per appellants policy, which were notional income as opposed to real income, and therefore, further erred in not allowing its exclusion from the taxable income.

Relief claimed: The claim of 244,43,65,930/- be directed to be allowed

8. Levy of Interest u/s 2,348 of the Act

The learned CIT(A) erred in law and on facts in dismissing Ground of the appeal before him, challenging the charge of interest, on the ground that it was consequential, without appreciating that the appellant was denying the very application of s.234B of the Act to it, for the fact that the appellant was not under obligation to pay advance tax.

Relief claimed: Interest u/s 234B of the Act be directed to be deleted.

The appellant craves leave to add to, alter, amend or modify the ground(s) of appeal."

06. The fact shows that for A.Y. 2009-10, assessee filed return of income on 30thSeptember 2019, declaring total income at ₹Nil. The assessment under Section 143(3) of the Income-tax Act, 1961 (the Act) was passed on 27thDecember 2011, determining the total income of the assessee at ₹528,65,25,460/-. The learned CIT (A) dismissed the appeal of the assessee vide order dated 26thJune 2014, which was challenged before the ITAT and vide order dated 20thMarch 2018, restored the appeal back to the file of the learned CIT (A), to decide on merit.
07. The only issue involved in this appeal is with respect to the applicability of proviso to Section 2(15) of the Act. The learned CIT (A) after considering the decision of the Hon'ble Supreme Court in case of Ahmadabad Urban Development Authority, [2022-TIOL-88-SC-IT-LB](#), examined

the balance sheet and income and expenditure account of the assessee for assessment order dated 31st March, 2017, placed at page no.22-26, of the appellate order found that assessee is charging markup on cost of 161% in the head housing activities. The learned CIT (A) further found that assessee's markup on cost is 159% and therefore, assessee is charging significantly higher than the cost.

08. Similarly, for A.Y. 2009-10, he considered that for this year also the assessee has earned a huge markup on the cost.
09. According to him, if there is a nominal profit from the activities then only in the general public utility category the assessee can be allowed exemption. If the amount is charged significantly higher than the activity should be held as in the nature of trade, commerce or business. The learned CIT (A) held that any profit above 10% should be considered the activities in the nature of trade, commerce or business. Accordingly, he held that as the total receipt of the assessee is ₹483 crores from housing the assessee is hit by proviso to Section 2(15) and therefore, is not entitled to exemption as per decision of the Hon'ble Supreme Court. Accordingly, the assessee was denied the benefit of Proviso to Section 11 and 12 of the Act.
010. Similarly, for A.Y. 2017-18, assessee filed return of income on 29th October 2017, declaring total income at ₹ nil. The assessee claimed exemption under Section 11 of

the Act. The learned Assessing Officer questioned why proviso to Section 2(15) of the Act should not be applicable to the assessee. The assessee made detailed submission. The learned Assessing Officer after considering the decision of the Hon'ble Supreme Court has held that as the object of the assessee falls under the category of advancement of any other object of general public utility and gross receipt of the assessee is more than the specified amount. The assessee is hit by proviso to Section 2(15) of the Act and therefore, the assessee is entitled to the exemption under Section 11 and 12 of the Act. Accordingly, the total income of the assessee was determined at ₹860,47,93,292/-, by order dated 4th November 2019. The learned CIT (A) passed an appellate order holding that assessee is earning markup on cost of 47.32%. Thus, for both the assessment years, the assessee was denied benefit of the provisions of section 11 - 13 of the income tax act holding that assessee is acting under the charitable object of 'general public utility' for the profit and therefore it loses exemption.

011. The learned authorized representative submitted that first on merits in case of the assessee issue is decided by the coordinate bench wherein the aspect raised by the learned CIT - A has been considered at length. He further submits that even the decision of the honourable Supreme Court in case of Ahmedabad urban development authority (supra) is in favour of the assessee. He further submitted that at present there is

no contradiction between the decision of the coordinate bench decided in case of the assessee and the decision of the honourable Supreme Court. He further stated that assessee is engaged in the activity of general public utility where the land is provided by the governments, in this case by Maharashtra government or other specified government authorities, therefore there is no cost of land. If in the infrastructure development activity, the cost of land is excluded, naturally the cost base is not correctly taken, therefore, there would be unusual profit. If the cost of land which is contributed by the government is taken care of, or is accounted for, there would be nominal or no profit. He therefore submitted that the findings of the learned lower authorities are incorrect.

012. The learned departmental representative vehemently submitted that the honourable Supreme Court in case of CIT versus Hammer the bath urban development authority (2023) 4 Supreme Court cases 561 has clearly held that if the charitable trust which is carrying on the object of general public utility and is making profit then benefit of exemption under section 11 and 12 of the act cannot be availed by the assessee as it is hit by the proviso to section 2 (15) of the act. It was further stated that the decision of the coordinate bench in assessee's own case for earlier years does not have any relevance now in view of the decision of the honourable Supreme Court. Therefore, the order of the learned CIT - A deserves to be upheld.

013. We have carefully considered the rival contention and perused the orders of the learned lower authorities. We have also carefully considered the decision of coordinate bench in assessee's own case for earlier years [ITA No 6678/MUM/2013 Ay 2010-11 dated 4-06-2019] wherein it is claimed by the learned authorized representative that the issue is covered in favour of the assessee. We have also perused the order of the honourable Supreme Court in case of Ahmedabad Urban development authority (supra).
014. Honourable Gujarat High court in case of Ahmedabad Urban development Authority in 470 ITR 164 on 11-09-2023 considering decision of Honourable supreme court in assessee's own case has held that "-

"3. It is not in dispute that the issue has now been settled before the hon'ble Supreme Court in Civil Appeal No. 21762 of 2017 in the case of Asst. CIT (Exemptions) v. Ahmedabad Urban Development Authority [(2022) 449 ITR 1 (SC).] . The hon'ble Supreme Court in paras 185 to 190 has held as under (page 115 of 449 ITR.):

"As far as boards and corporations which are tasked with development of industrial areas, by statute, the judgments of this court, in Shri Ramtanu Co-operative Housing Society Ltd. v. State of Maharashtra [(1970) 3 SCC 323.] and Gujarat Industrial Development Corporation v. CIT [(1997) 227 ITR 414 (SC);

(1997) 7 SCC 17.] have declared that these bodies are involved in 'development' and are not essentially engaged in trading. In *Shri Ramtanu Co-operative Housing Society [Shri Ramtanu Co-operative Housing Society Ltd. v. State of Maharashtra, (1970) 3 SCC 323.]* this court, by a five-judge Bench, held that the Maharashtra Industrial Development Corporation is not a trading concern, and observed as follows:

'These features of transfer of land or borrowing of moneys or receipt of rents and profits will by themselves neither be the indicia nor the decisive attributes of the trading character of the corporation. Ordinarily, a corporation is established by shareholders with their capital. The shareholders have their directors for the regulation and management of the corporation. Such a corporation set up by the shareholders carries on business and is intended for making profits. When profits are earned by such a corporation they are distributed to shareholders by way of dividends or kept in reserve funds. In the present case, these attributes of a trading corporation are absent. The corporation is established by the Act for carrying out the purposes of the Act. The purposes of the Act are development of industries in the State. The corporation consists of nominees of the State

Government, the State Electricity Board and the Housing Board. The functions and powers of the corporation indicate that the corporation is acting as a wing of the State Government in establishing industrial estates and developing industrial areas, acquiring property for those purposes, constructing buildings, allotting buildings, factory sheds to industrialists or industrial undertakings. It is obvious that the corporation will receive moneys for disposal of land, buildings and other properties and also that the corporation would receive rents and profits in appropriate cases. Receipts of these moneys arise not out of any business or trade but out of sole purpose of establishment, growth and development of industries.

17. The corporation has to provide amenities and facilities in industrial estates and industrial areas. Amenities of road, electricity, sewerage and other facilities in industrial estates and industrial areas are within the programme of work of the corporation. The fund of the corporation consists of moneys received from the State Government, all fees, costs and charges received by the corporation, all moneys received by the corporation from the disposal of lands, buildings and other properties and all moneys received by the corporation by way of rents and profits or in any other manner. The



corporation shall have the authority to spend such sums out of the general funds of the corporation or from reserve and other funds. The corporation is to make provision for reserve and other specially denominated funds as the State Government may direct. The corporation accepts deposits from persons, authorities or institutions to whom allotment or sale of land, buildings, or sheds is made or is likely to be made in furtherance of the object of the Act. A budget is prepared showing the estimated receipts and expenditure. The accounts of the corporation are audited by an auditor appointed by the State Government. These provisions in regard to the finance of the Corporation indicate the real role of the corporation, viz., the agency of the Government in carrying out the purpose and object of the Act which is the development of industries. If in the ultimate analysis there is excess of income over expenditure that will not establish the trading character of the corporation. There are various departments of the Government which may have excess of income over expenditure....

20. The underlying concept of a trading corporation is buying and selling. There is no aspect of buying or selling by the corporation in the present case. The corporation carries out the purposes of the Act, namely, development

of industries in this State. The construction of buildings, the establishment of industries by letting buildings on hire or sale, the acquisition and transfer of land in relation to establishment of industrial estate or development of industrial areas and of setting-up of industries cannot be said to be dealing in land or buildings for the obvious reason that the State is carrying out the objects of the Act with the corporation as an agent in setting up industries in the State. The Act aims at building an industrial town and the corporation carries out the objects of the Act. The hard core of a trading corporation is its commercial character. Commerce connotes transactions of purchase and sale of commodities, dealing in goods. The forms of business transactions may be varied but the real character is buying and selling. The true character of the corporation in the present case is to act as an architectural agent of the development and growth of industrial towns by establishing and developing industrial estates and industrial areas. We are of the opinion that the Corporation is not a trading one.'

In Shri Ramtanu Co-operative Housing Society [Shri Ramtanu Co-operative Housing Society Ltd. v. State of Maharashtra, (1970) 3 SCC 323.] no doubt, this court did not have to decide whether the Maharashtra Industrial



Development Corporation was entitled to tax exemption. However, it examined the provisions of the Act, and the ratio, that such industrial development corporations are not engaged in trading, is binding. Like in that case, here too, the concerned State Acts (the Gujarat Industrial Development Act, 1962 and the Karnataka Industrial Areas Development Act, 1966) tasked the boards with planning and development of industrial areas. Their personnel are appointed under the enactments and are deemed to be public servants. The State Government is empowered to acquire land, in exercise of eminent domain power, for their purposes; their audits are by the Accountant General of the concerned State, or auditors appointed by the State. They are authorized by law, to levy rates and charges, for the services they provide, on predetermined basis. In the light of these provisions, clearly, these boards and authorities perform objects of general public utility; and they are not driven by profit motive.

There is a two-fold distinction between the now deleted section 10(20A) and the newly added section 10(46) (with effect from June 1, 2011). Firstly, that the erstwhile section 10(20A) applied to a limited class of undertaking, i. e., the bodies, or corporations, constituted by or under any law confined to the planning and



development of housing infrastructure. However, the newly added section 10(46) is wider in comparison and the activities of any body or authority or board constituted by or under any Central or State Act with 'the object of regulating or administering any activity for the benefit of the general public', has broader import. In a sense, the newly added section 10(46), resembles a GPU category charity classified under section 2(15). The second distinction is that section 10(20A) did not bar any board, or corporations, etc., from indulging in commercial activities. However, sub-clause (b) of section 10(46) imposes such a bar, and the concerned body cannot claim tax exemption if it engages in commercial activity.

The manner in which GPU charities has been dealt with under the definition clause, i. e., section 2(15), indicates that even though trading or commercial activity or service in relation to trade, commerce or business appears to be barred - nevertheless the ban is lifted some what by the proviso which enables such activities to be carried out if they are intrinsically part of the activity of achieving the object of general public utility. Furthermore, in the case of GPU charities there is a quantified limit of the overall receipts, which is permissible from such commercial activity. In the case of

local authorities and corporations covered by section 10(46) no such activities are seemingly permitted.

As was observed in the earlier part of this judgment—while considering whether for the period April 1, 2003 to May 31, 2011, statutory boards, corporations, etc., could have lawfully claimed to be GPU charities, this court has observed that the nature of such corporations is not to generate profit but to make available goods and other services for the benefit of public weal. If such corporations (falling within the description of section 10(46)) applied to the Central Government for exemption, the treatment of their receipts, should be no different than how such receipts can and should have been treated for the purposes of determining whether they are GPU charities, during the period when section 10(46) was not in existence. Furthermore, this court is of the opinion that having regard to the observations in CIT v. Gujarat Maritime Board [(2007) 295 ITR 561 (SC).] case, the denial of exemption under one category cannot debar such corporations from claiming income exempt status under another category.

(b) Summary in relation to statutory authorities/corporations

In the 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 with effect from April 1, 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 predetermined 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 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 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 New Delhi Municipal Council v. State of Punjab [(1997) 7 SCC 339.] 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 per cent. 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 be necessarily 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, with retrospective effect from April 1, 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 Income-tax Act.”

4. Reading the aforesaid paras would indicate that it is now concluded that the respondent is an authority involved in the advancement of objects of general public utility, and therefore, is not precluded from claiming exemption. The appeal is, accordingly, dismissed.”

015. This issue has also been considered by the coordinate bench in assessee's own case wherein it has been held that assessee is entitled to exemption under section 11 and 12 of the act.
016. It is also a fact that the learned CIT – A has considered the profitability aspect of the assessee without considering the cost of the land. Assessee is developing

an area on behalf of the government, state government and other government agencies. Therefore, it cannot be said that activity of the assessee has resulted in profit without considering what is the cost of land which has been provided by the government for development.

017. In view of the above facts, we do not agree with the finding of the learned CIT – A that assessee is existing for such a huge profit as determined by the learned CIT – A. Therefore, in view of the decision of the honourable Supreme Court, honourable Gujarat High Court considering the decision of the honourable Supreme Court and also the decision of the coordinate bench in assessee's own case for earlier years, we restore the whole issue back to the file of the learned assessing officer to decide the issue afresh. We also categorically state that it is for the assessee to establish before the assessing officer that assessee is not an entity providing general public utility services which is hit by the proviso to section 2 (15) of the act.
018. This is also for the reason that neither the assessee, nor the revenue could substantiate whether the assessee is existing for profit or not.
019. In view of these facts, we restore both these appeals before the learned assessing officer for consideration afresh, all 8 grounds of the appeal are restored back and allowed to that extent.



020. In the result, both these appeals are allowed for statistical purposes.

Order pronounced in the open court on 05.08.2024.

Sd/-

(SUNIL KUMAR SINGH)
(JUDICIAL MEMBER)

Sd/-

(PRASHANT MAHARISHI)
(ACCOUNTANT MEMBER)

Mumbai, Dated: 05.08.2024

Sudip Sarkar, Sr.PS

Copy of the Order forwarded to:

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

BY ORDER,

Sr. Private Secretary/ Asst. Registrar
Income Tax Appellate Tribunal, Mumbai