

**IN THE INCOME TAX APPELLATE TRIBUNAL  
DELHI BENCH 'G', NEW DELHI**

**Before Sh. N. K. Saini, AM And Sh. A. T. Varkey, JM**

**ITA No. 4330/Del/2012 : Asstt. Year : 2009-10**

Income Tax Officer(E), Trust Ward-II, Delhi	Vs	Suvasini Charitable Trust, Swaminarayan Akshardham Mandir, NH-24, Delhi-110092
<b>(APPELLANT)</b>		<b>(RESPONDENT)</b>
<b>PAN No. AAFTS6497L</b>		

Assessee by : Sh. K. P. Garg, CA

Revenue by : Smt. Anima Barnwal, Sr. DR

<b>Date of Hearing : 07.01.2016</b>
-------------------------------------

<b>Date of Pronouncement : 17.03.2016</b>
---

**ORDER**

**Per N. K. Saini, AM:**

This is an appeal by the department against the order dated 17.05.2012 of Id. CIT(A)-XXI, New Delhi.

2. Following grounds have been raised in this appeal:

*“1. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in deleting the addition of Rs.46,43,003/- (made by the AO on a/c of surplus generated from Premwati Cafeteria) by holding that the case falls under 1<sup>st</sup> and 3<sup>rd</sup> limb of section 2(15) of the Act.*

*2. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) has failed to appreciate the amended provisions of section 2(15) of the Act, i.e. advancement of any other object of general public utility shall not be a charitable if it involves*

*the carrying on of rendering any service in relation of any trade, commerce or business for a cess or fee or any other consideration irrespective of the nature of use or applicable or retention of the income from such activity.*

*3. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in not making any decision that running of cafeteria is incidental to the main object of providing relief to the poor.*

*4. The appellant craves to add, to alter or amend any ground of appeal raised above at the time of hearing.”*

3. From the above grounds it is clear that the only grievance of the department relates to the deletion of addition of Rs.46,43,003/- made by the AO on account of surplus generated from Premwati Cafeteria.

4. Facts of the case in brief are that the assessee Trust is registered u/s 12A of the Income Tax Act, 1961 (hereinafter referred to as the Act) vide order dated 28.07.2006 of DIT(E), Delhi and also approved u/s 80G(5)(vi) of the Act vide order dated 27.09.2006. The assessee filed the return of income on 29.09.2009 declaring total income at Nil after claiming application of income as per the provisions of Section 11 of the Act. The said return was processed u/s 143(1) of the Act. Later on, the case was selected for

scrutiny. The AO during the course of assessment proceedings noticed that the assessee had declared a total sale of Rs.6.71 crores at its Cafeteria at Swaminarayan Akshardham Complex, NH-24, Opposite Nizamudin Bridge, Akshardham Setu, Delhi-110092. The AO asked the assessee vide letter dated 12.12.2011 to justify its activities as charitable in nature. In response, the assessee vide letter dated 21.12.2011 submitted as under:

*“Firstly, we would like to submit that our Trust Deed has duly been registered with the Income-tax department. While granting initial registration u/s. 12AA of the Income-tax Act, 1961, we were specifically asked by the department to introduce the following specific condition in the rules:-*

*“Rule (18) - The Trust may establish or carry out Cafeteria "Premwati" at Swaminarayan Akshardham Complex, NH-24, Opposite Nizamuddin Bridge, Akshardham Setu , Delhi-110092 to provide hygienic vegetarian dishes made without eggs/garlic/onion to thousands of people/tourists visiting the Akshardham everyday and the surplus generated from the activities will be utilized to fulfill and achieve the objects of the Trust only”*

*Sir, when this Rule (18) was submitted to the Department, only then the registration u/s 12AA was granted to the trust. In view of this it is submitted that:-*

*1. It is wrong and incorrect that the trust has declared total Commercial sales of Rs. 6.71 Crores in its income*

*and expenditure account. The sales are not in the nature of commercial receipts in the course of advancement of any other object of public utility as laid down in the proviso to Sec.2(15), but these are receipts within the meaning of Sec. 11(4A), as specifically provided in the conditions of registration, for the specific purpose of utilization of the net surplus for any of the first three limbs of Sec.2(15) as such this proviso does not apply to these receipts- During this year the entire income has been spent on "medical relief to the poor" as per clause (2) and (3) of the Objects of the trust. Nothing has been spent on advancement of any other object of public utility, to bring the same in the ambit of the amendment.*

2. ....

3. ....

4. ....

5 *Regarding our submission that this trust is duly covered in Sec.11(4A), your kind attention is once again invited to the conditions of Registration, clause (iv), clearly stating, "Separate accounts in respect of profits and gains of business incidental to the attainment of objects shall be maintained in compliance to Sec. 11 (4A) of the I.T, Act,1961.*

6. *We would further like to submit that Sec. 11 (4A) is still very much part of Sec. 11 to 13 of the Income-tax Act (provisions governing the taxation of trust) which authorizes the trust to apply the income received from the business held under trust for the objects of the trust. So the above distinction of law is very much borne out from the provisions of Sec. 11 (4A) i.e. the objects of the trust is one thing and the powers of the trustees is another thing.*

*7. your Honors neither of us can sit in judgment over the Will of the legislature, nor can we lay any insinuation on the legislature of any "naive" or fraudulent introduction of provisions in the Act, which contradict each other. The proviso to Sec. 2(15) has not been introduced to take away the exemption in Sec. 11 (4A). If this would have been the intention of the legislature, then this Sec.11(4A) would have been omitted and/or deleted, which has not been done. Thus it would be highly impudent to conclude, by any arbitrary or conjectural interpretation that the proviso having been inserted in the definition clause takes away the independent section 11 or any benefit or exemption mentioned therein, more specifically, as specified in sub-section (4A)."*

5. The AO after considering the submissions of the assessee observed that the assessee had tried to call its activity of its restaurant as activities incidental to main aims and objects of the trust. The AO referred to the definition of charitable purposes as contained in Section 2(15) of the Act which says that "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 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. The AO was of the view that the proviso to Section 2(15) of the Act is applicable to those charitable organizations which are engaged in carrying on any other object of general public utility but the activities of the assessee did not fall within the ambit of relief to poor, medical and education and if the assessee was carrying on activities which falls under the category any other objects of general public utility, then activities of running restaurant, whether the same is resulting in profit or loss was irrelevant. The AO held that the activities of the assessee are no longer charitable activities within the amended provisions to Section 2(15) of the Act. He referred to the following case laws:

- *Jalandhar Development Authority Vs CIT (ITAT Amritsar)*
- *Indian Chamber of Commerce Vs CIT (1975) CIT(SC) 271*
- *Punjab Urban Planning and Development Authority (ITAT Chandigarh)*

- *Small Medium Exporter Vs DIT(E) Delhi (ITAT Delhi)*
- *Sri Sathya Sai Nigamagamam Trust, in ITA No.247/Hyd/2009 (ITAT Hyderabad)*

6. The AO observed that the assessee was carrying on business by way of running of a restaurant with the object of making profit and the profit motive is not only the sole or relevant consideration that has to be kept in mind. According to the AO, even if a person/an organization is carrying on trading on the principle of no loss no profit, it may be liable to pay taxes or comply with the statute when the charge or incidence of tax is on the economic activity. The reference was made to the following decisions:

- *European Union and England Housing Association Ltd. Vs Revenue and Customs Commissioner (2006) EWHC 2383 (Ch)*
- *House of Lords in Town Investment Ltd. and Others Vs Department of the Environment (197) 1 All ER 813*

7. The AO pointed out that the assessee had declared sales of Rs.6.75 crores at restaurant run by it which is against the spirit of amended provisions of Section 2(15) of the Act. Hence, the benefit of Section 11/12 of the Act is not allowed to the assessee. The AO assessed the income of the assessee at Rs.46,43,003/- which was the surplus

declared during the year on running the restaurant. The reliance was placed on the following case laws:

- *State of Gujarat Vs Raipur Manufacturing Co. (1967) 19 STC 1 (SC)*
- *Director of Supplies and Disposal Vs Ember Board of Revenue (1967) 20 STC 398 (SC)*

8. Being aggrieved the assessee carried the matter to the Id. CIT(A) and furnished the written submissions vide letter dated 05.03.2012, which is incorporated in para 3.1 of the impugned order which is reproduced verbatim as under:

*"GOA.1:- The appellant denies his liability to tax and interest as determined and computed by the learned assessing officer and the manner in which it has been so determined or computed. The assessment made is arbitrary, contrary to law and without jurisdiction and without application of mind, against the principle of natural justice.*

*1A: Without prejudice to the above ground of appeal on merits of the case, the order and assumption of jurisdiction under the amended provisions of S. 2(15) is contrary to law and on this ground only the order needs to be declared as null and void, as the amended provisions are not applicable to the assessee, at all First of all the amendment is prospective and not retrospective. It is applicable to trusts formed and registered after the amendment and not to trusts formed and registered before the amendment of the act, even if the objects of such trusts or institutions include advancement of any other object of public utility.*

*1B: This trust was registered under the Income Tax Act in 2005 and assessments have been made up to AY 2008-09 in accordance with the objects of the trust being followed since inception, i.e. relief to the poor and exemption granted u/s. 11(a) accepting the application of the income having been applied to the objects of the trust, i.e. Medical Relief to the poor. Assuming while denying that the running of the cafeteria could be termed as an object, even then the amended provisions cannot be applied to the existing trusts. The amendments as per rule of law, unless specifically made retrospective, are applicable for subsequent events taking place after the amendment. In the context of this amendment subsequent events would mean trusts formed and to be registered after the amendment of the Act and with prohibited activities to be carried out as an object of the trust. So that the amendment shall not be applicable to the existing trusts, even if these are for the advancement of other objects of general public utility and they are continuing the same activity as in the past, irrespective of that any such object or activity would not be covered by the amendment. Your kind attention is invited to the provisions of the amendment and the amended section 2(15).*

*"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 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 receipt from the activities referred to therein is ten lakh rupees or less in the previous year.*

*1C. The negative words used are for future registration of the trust under S. 12AA of the Act as these are 'shall not be a charitable purpose, if it involves the carrying on of any activity. " The word 'shall' used here cannot be interpreted to mean that the registrations already granted prior to the insertion of these provisions in the Act to the existing trusts, duly registered under the existing provisions of the Act, shall be cancelled. There is no such amendment in S. 12A regarding conditions for applicability of S. 11 and 12 and S. 12AA providing for procedure for registration and cancellation of S. 13 providing for violations resulting in to withdrawal of exemption benefits u/s. 11.*

*1D: Secondly the amendment speaks of 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, etc. This means that the object itself should be such as to involve the carrying on of any activity. In the nature of trade, etc. "in the course of the actual carrying out of a primary purpose/object of the trust or institution." Your kind attention, in this regard is invited to Circular No. 11/2008- F.No. 134/34/2008-TPL issued by Government of India. Ministry of Finance, Department of Revenue, Central Board of Direct Taxes, ( Tax Policy & Legislation Division), New Delhi, the 19<sup>th</sup> December, 2008 as under:-*

*"Subject - Definition of 'Charitable purpose ' under section 2(15) of the Income Tax Act, 1961 -reg.*

*Section 2(15) of the Income Tax Act, 1961 (Act) defines "charitable purpose" to include the following: -*

- i) Relief of the poor*
- ii) Education*
- iii) Medical relief, and*
- iv) The advancement of any other object of general public utility.*

*1. An entity with a charitable object of the above nature was eligible for exemption from tax under section 11 or alternatively under section 10(23C) of the Act. However, it was seen that a number of entities who were engaged in commercial activities were also claiming exemption on the ground that such activities were for the advancement of objects of general public utility in terms of the fourth limb of the definition of 'charitable purpose'. Therefore, section 2(15) was amended vide Finance Act, 2008 by adding a proviso which states that the 'advancement of any other object of general public utility' shall not be a charitable purpose if it involves the carrying on of-*

- a) any activity in the nature of trade, commerce or business, or*
- b) 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 applicable, or retention of the income from such activity.*

*2. The following implications arise from this amendment –*

*2.1 The newly inserted proviso to section 2(15) will not apply in respect of the first three limbs of section 2(15) i.e., relief of the poor, education or medical relief. Consequently, where the purpose of a trust or institution is relief of the poor, education or medical relief, it will constitute 'charitable purpose' even if it incidentally involves the carrying on of commercial activities.*

*2.2 'Relief of the poor encompasses a wide range of objects for the welfare of the economically and socially disadvantage or needy. It will, therefore, include within its ambit purposes such as relief to destitute, orphans or the handicapped, disadvantaged women or children, small and marginal farmers, indigent artisans or senior citizens in need of aid. Entities who have these objects will continue to be eligible for exemption even if they incidentally carry on a commercial activity, subject, however, to the conditions stipulated under section 11 (4A) or the seventh proviso to section 10(23) which are that:*

- i) the business should be incidental to the attainment of the objectives of the entity, and*
- ii) separate books of account should be maintained in respect of such business.*

*Similar entities whose object is 'education' or 'medical relief' would also continue to be eligible for exemption as charitable institutions even if they incidentally carry on a commercial activity subject to the conditions mentioned above.*

*3. The newly inserted proviso to section 2(15) will apply only to entities whose purpose is 'advancement of any other object of general public utility' i.e. the fourth limb of the definition of 'charitable purpose' contained in section 2(15).*

*Hence, such entities will not be eligible for exemption under section 11 or under section 10(23C) of the Act if they carry on commercial activities. Whether such an entity is carrying on an activity in the nature of trade, commerce or business is a question of fact which will be decided based on the nature, scope, extent and frequency of the activity.*

*3.1 There are industry and trade associations who claim exemption from tax u/s. 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 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 S. 2(15).*

*3.2 In the final analysis, however, whether the assessee has for its object the advancement of any other object of general public utility is a question of fact. If such assessee is engaged in any activity in the nature of trade, commerce or business or renders any service in relation to trade, commerce or business, it would not be entitled to claim that its object is charitable purpose. In such a case, the object of 'general public utility' will be only a mask or a device to*

*hide the true purpose which is trade, commerce or business or the rendering of any service in relation to trade, commerce or business. Each case would, therefore, be decided on its own facts and no generalization is possible. Assessee, who claim that their object is 'charitable purpose' within the meaning of Section 2(15), would be well advised to eschew any activity which is in the nature of trade, commerce or business or the rendering of any service in relation to any trade, commerce or business. (Pradip Mehrotra) Director (TPL-1).'*

*IE: Thus the amendment does not effect any institution with any charitable object, if an independent business is carried on for resources to attain the objectives of the trust, as no amendment has been made in Sec. 11(4A).*

*IF: Further in view of the insertion of second proviso reading as 'Provided further that the first proviso shall not apply if the aggregate value of the receipts from the activities referred to therein is twenty five lakh rupees or less in the previous year', only a limit has been provided, which means that trusts even with such negative objects as are covered in the 1<sup>st</sup> proviso, cannot be refused registration. In other words only exemption would be denied, if the turnover exceeds the specified limits albeit the activities are carried on in the course of the advancement of other objects of general public utility. This amendment erodes the entire concept of refusal envisaged in the 1<sup>st</sup> proviso, more so for the existing trust. "*

9. The assessee further submitted vide letter dated 03.05.2012 as under:

*“This is further to the hearing on 20-4-2012 when your Honors directed us to produce the books of account along with the accountant to explain to establish that separate books of account has been maintained for the activity of Premwati Cafeteria, As such the books are being produced.*

*Further regarding running of the Premwati Cafeteria in Swaminarayan Akshardham Mandir Complex, it is humbly submitted that BAPS has provided the requisite space in the said premises to Suvasini Charitable Trust totally free of rent, for its use by Premwati Cafeteria, as the trust is engaged in the upliftment of poorer sections of the society/ by providing medical relief to the poorer sections of the society in far flung areas where even the govt. machinery has not been able to provide any medical facilities without any charge (totally free of cost). We enclose herewith copy of BAPS trustee board resolution dated 14.12.2005 permitting Suvasini Charitable Trust to carry out its activities, including running of the Premwati Cafeteria, from Swaminarayan Akshardham Mandir Complex at New Delhi, without payment of any rent for your records.*

*Sir, Suvasini Charitable Trust, a public charitable trust, as already explained, was registered with the Sub-registrar, Delhi on 17.9.2005 and is involved in charitable activities, as specified in its object clause in Trust Deed. The trust is providing medical relief to the poor sections of the society totally free of cost through its fleet of Mobile Van Dispensaries. The trust is also engaged in supporting other organizations having similar objects with direct donations from time to time to achieve its objects.*

*Sir, as already explained, in order to achieve and fulfill its objects, the trust runs a cafeteria at Swaminarayan*

*Aksharsham Mandir Complex (owned by BAPS Swaminarayan sanstha, a public charitable trust registered under Bombay Public Trust Act, 1950 and registered as per Regd. No.A/2500/AMDAVAD dated 2.2.1977 having PAN. AAATB1429J and assessed at Ward/Circle- DDIT (Exemtion) ABD, Ahmadabad), by catering to the needs of thousands of people/devotes visiting the Akshardham Mandir every day - by providing hygienic vegetarian food prepared without the use of garlic/onions/ eggs at reasonable rate.*

*The surplus generated from this activity of the trust is used exclusively for achieving the objects of the trust i.e. medical relief to the poor.*

*We would like to assert and reiterate that in case the trust has to pay any rent to BAPS for the use of their premises and infrastructure facilities provided at Swaminarayan Akshardham Mandir complex then running of cafeteria at such moderate rates would result into net loss and would not be able to generate any surplus for the trust and the trust will not be able to generate any surplus for the trust and the trust will not be able to do any charitable activities which presently is being done regularly with the surplus generated from the activity of running a cafeteria indirectly we can say that the rent free accommodation by BAPS, is itself a 'contribution to Suvasini for providing medical relief to the poor. "*

*1. Relief claimed as per grounds of appeal:- The assessment order be set aside as null and void, the additions made be deleted and/or such other relief as your Honors may deem fit, under the circumstances of the case be given.*

*2. Relief claimed as per written submissions dated 3.5.12: - The assessment order be set aside as null and void, the*

*exemption disallowed be allowed and/or such other relief as your Honors may deem fit under the circumstances of the case be given.*

*3. The legal issue in the entire appeal is that according to the assessee its main object is 'medical relief to the poor' and this is the only object being pursued during the year; as such amended provisions of Sec. 2(15), proviso, are not applicable to the assessee; whereas the learned assessing officer has treated one of the activities, i.e. 'running of Premvati Cafeteria' being carried on since inception, of the attainment/achievement of the Main Objects of the Trust, as the object itself, to cover the trust within the meaning of amended provisions of Sec. 2(15). Hence, the Id. AO disallowed the application of income from such an activity for the provision of medical relief. In view of this the relief claimed is that the assessment order is null and void ab initio, being based on misconception of law and the additions made to the returned income by disallowance of exemption be deleted."*

10. The Id. CIT(A) after considering the submissions of the assessee and the Circular No. 11/2008 dated 19.12.2008 issued by the CBDT, allowed the claim of the assessee by observing as under:

*"4. In this regard case of AO is that he has invoked the provisions of Sec. 2(15) of the IT Act. By doing so, the activity of running the Premwati Cafeteria has been brought under 4<sup>th</sup> limb of proviso to Sec, 2(15) of the IT Act, which is in other object of public utility. In this regard I have perused the assessment order and written submission of the appellant, wherein, appellant has brought full details of the*

*activity done by Suvasini Charitable Trust and the definition of the Sec. 2(15) which includes charitable purpose included as under;-*

- a) Relief to the poor*
- b) Education*
- c) Medical relief*
- d) Advancement of any other object of general public utility.*

*4.1 In the submission dated 5.3.2012 Id. AR of the appellant has explained that advancement of any other object of general public utility includes:-*

- a) Activity in the nature of trade, commerce or business*
- b) Any activity of rendering any service in relation to any trade, commerce or business for a cess or fee or any other consideration.*

*Furthermore, in the relevant paragraph No.2.2 of the above mentioned submission he has been 'v' able to demonstrate that activities done by the appellant come under the purview of the relief of the poor because appellant society is doing work for the welfare of the economically and socially disadvantaged people and they are maintaining separate books of accounts as required u/s. 11(4A) of the IT Act. The Id. AR of the appellant has been able to demonstrate that newly inserted proviso to Sec. 2(15) will apply only to entities whose purpose is 'advancement of any other object of general public utility'. The instant case does not fall under the 4<sup>th</sup> limb. In this regard I have seen the books of accounts of the appellant society, which were separately maintained for this purpose. Furthermore, appellant has also furnished certified copies of Gram Panchayat reports for free medical check ups for various Villages in the State*

*of Gujarat which are available at Annexure-D filed as on 4.4.2012, which are self explanatory so as to show that appellant society is doing charitable work. Furthermore, I have seen details of charity expenses which include medicine expenses and include vehicle running for medical and Mobile Van repair. In the written submissions Id. AR of the appellant has also shown that the Cafeteria receipts have been utilized for charity expenses on cost of medicines, mobile medical van and honorarium to charity staff and volunteers. These details are available in the Schedule XI of the Balance Sheet which was perused by me. There is full detail as per Annexure-C filed with the written submission dated 4.4.2012, wherein, names of the Villages have been mentioned which are in 9 Districts of the State of Gujarat and it has also been explained that more than 2,50,000 patients were served through Mobile Van Dispensary. Looking to the totality of the circumstances and work done by the appellant society, it is found that activities of the society come under 1st and 3<sup>rd</sup> limb of Sec. 2(15) of the IT Act and not in the 4<sup>th</sup> limb. The action of the AO treating the assessee society doing trade, commerce and business activity has no locus standi because Id. AR of the appellant was able to demonstrate that surplus received from the Cafeteria was fully utilized for relief of the poor and medical relief. In this regard I place my reliance on Circular No.11/2008 dated 19-12-2008, issued by Director (TPL-l), Central Board of Direct Taxes, wherein, in the relevant paragraph No.2.1 to 3.2 it has been explained that business should be incidental to the attainment of the objectives of the entity and separate books of accounts should be maintained in respect of such business. Furthermore, it has also been explained that newly inserted proviso to Sec. 2(15) will apply only to entities whose purpose is advancement of any other object of general public utility i.e. 4<sup>th</sup> limb of the definition of 'charitable*

*purpose'. The relevant paragraphs of the above Circular are reproduced hereunder-*

*"2.1. The newly inserted proviso to section 2(15) will not apply in respect of the first three limbs of section 2(15), i.e. relief of the poor, education or medical relief. Consequently, where the purpose of a trust or institution is relief of the poor, education or medical relief, it will constitute 'charitable purpose' even if it incidentally involves the carrying on of commercial activities.*

*2.2. 'Relief of the poor' encompasses a wide range of objects for the welfare of the economically and socially disadvantaged or needy. It will therefore, include within its ambit purposes such as relief to destitute, orphans or the handicapped, disadvantages women or children, small and marginal farmers, indigent artisans or senior citizens in need of aid. Entities who have these objects will continue to be eligible for exemption even if they incidentally carry on a commercial activity, subject, however, to the conditions stipulated under section 11(4A) or the seventh proviso to section 10(23C) which are that:-*

*i) the business should be incidental to the attainment of the objectives of the entity,*

*ii) separate books of account should be maintained in respect of such business. Similarly, entities whose object is 'education' or 'medical relief' would also continue to be eligible for exemption as charitable institutions even if they incidentally carry on a commercial activity subject to the conditions mentioned above.*

*3. The newly inserted proviso to section 2(15) will apply only to entities whose purpose is 'advancement of any other*

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

*3.1 There are industry and trade associations who claim exemption from tax u/s. 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).*

*3.2 In the final analysis, however, whether the assessee has for its object 'the advancement of any other object of general public utility' is a question of fact. If such assessee is engaged in any activity in the nature of trade, commerce*

*or business or renders any service in relation to trade, commerce or business, it would not be entitled to claim that its object is charitable purpose. In such a case, the object of 'general public utility' will be only a mask or a device to hide the true purpose which is trade, commerce or business or the rendering of any service in relation to trade, commerce or business. Each case would, therefore, be decided on its own facts and no generalization is possible. Assessee, who claim that their object is 'charitable purpose' within the meaning of Section 2(15), would be well advised to eschew any activity which is in the nature of trade, commerce or business or the rendering of any service in relation to any trade, commerce or business."*

*4. The instant case falls under 1<sup>st</sup> and 3<sup>rd</sup> limb of Sec. 2(15), so, action of AO applying 4<sup>th</sup> limb of Sec. 2(15) of the IT Act is found to be erroneous and misconceived. In view of above discussion, in my considered opinion, grounds No. 1 and 2 of the appellant are allowed."*

11. Now the department is in appeal. The ld. DR reiterated the observations made by the AO and strongly supported the assessment order dated 28.12.2011. She further submitted that running of cafeteria cannot be considered as charitable activities, although it may come under the general public utility. It was further submitted that Akshardham is a tourist place and cafeteria is used by the tourist who are paying the price for the eatables/goods purchased from there. Therefore, the running of cafeteria cannot be considered as charitable activities because it is run for the business

purposes and even the rates are not subsidized. Therefore, the AO rightly charged to tax the surplus of income from Premwati Cafeteria and Id. CIT(A) was not justified in deleting the addition made by the AO.

12. In his rival submissions the Id. Counsel for the assessee reiterated the submissions made before the authorities below and further submitted that running of cafeteria is an incidental activity for attaining the objects of the assessee trust which are charitable in nature. It was pointed out that the main object of the assessee is to provide medical relief to the poor and whatever income was generated that was utilized to attain the said object. It was submitted that the cafeteria is run by the trust not for earning profit but to promote vegetarianism. It was further submitted that the assessee trust is established to provide relief by giving medical treatment, medicines and surgical relief to the poor and to assist in maintaining and improving the standard of health of the people and to preserve the standard of public health. It was emphasized that the cafeteria was run to generate the funds to achieve the object and as such it is incidental to the attainment of main objects of providing medical relief to the poor. It was stated that the Premwati cafeteria was setup by the assessee trust, since

inception to provide hygienic vegetarian food to the visiting Akshardham Mandir with the object of promotion of vegetarianism and the funds generated are used only and only to achieve the objects of the assessee trust and as such as per the provisions of Section 11(4A) of the Act, such activity can be considered as incidental to the main object of the assessee. The reliance was placed on the following case laws:

- *Divya Yog Mandir Trust Vs JCIT, Haridwar (2013) 37 Taxman.com 227 (Delhi-Trib.)*
- *Asst. DIT(Exemption) Vs Sri Sri Radha Damodar Charitable Trust (2012) 24 Taxmann.com 141 (Mum)*

13. It was submitted that the AO made the arbitrary addition and the Id. CIT(A) was fully justified in deleting the same.

14. We have considered the submissions of both the parties and carefully gone through the material available on the record. In the present case, it is an admitted fact that the assessee is having the registration u/s 12A of the Act and also having the approval for exemption u/s 80G of the Act. The assessee is engaged in the charitable activities and having followings aims and objectives:

*“1. To establish and maintain schools, colleges, universities, gurukuls, balmandirs, study centers, research centers etc. for the spreads and advancement of different languages and knowledge of various faculties; engage, appoint and maintain teachers, professor lecturers and experts as may be necessary for the said purpose to grant awards, freeships, scholarships, fellowships, loans etc. to encourage deserving students in different educational faculties; to establish hostels and boardings and to provide facilities for residence and food to students; to provide monetary or other help to suitable educational institutions which are interested in building character of and promoting moral values amongst children, adolescents and youths; to establish and maintain libraries, reading halls, museums, etc. and to spread education in diverse other way to make Indian culture more lively and popular.*

*The word “education” should be constructed in its widest and comprehensive meaning and include knowledge in all its branches, such as literature, art, science, philosophy, economics, commerce, medicine and surgery, fine arts etc.*

*2. To establish and maintain hospitals, dispensary maternity homes, clinics, laboratory etc. to provide relief by giving medical treatment, medicines, and surgical relief to poors and to assist in maintaining and improving the standard of health of the people and to preserve and improve the standard of health.”*

15. The assessee vide supplementary trust deed dated 29.06.2006 inserted the following clause in its aims and objectives:

*“The trust may establish or carry out Cafeteria ‘Premwati’ at Swaminarayan Akshardham Complex, NH-24, Opposite Nizamudin Bridge, Akshardham Setu, Delhi-110092 to provide hygienic vegetarian dishes made without eggs/garlic/onion to thousands of people/tourists visiting the Akshardham everyday and the surplus generated from this activities will be utilized to achieve the objects only.”*

16. From the above aims and objectives, it is clear that the main objects of the assessee are to impart the education by establishing and maintaining schools, colleges, universities, gurukuls, balmandirs, study centers, research centers etc. and also to establish and maintain hospitals, dispensary maternity homes, clinics, laboratory etc. for providing relief to the poor and to assist in maintaining & improving the standard of health of the people. The assessee also established one Cafeteria known as ‘Premwati’ at Swaminarayan Akshardham Complex for providing hygienic vegetarian dishes in order to achieve its objective of improving the standard of health of the people. The main objects of the assessee i.e. imparting education and to provide relief by giving medical treatment and to improve

the standard of health are undoubtedly charitable in nature. However, the income generated by the assessee from the Cafeteria which was run to achieve the main objects, was not considered by the AO to be charitable in nature and the impugned addition has been made. To resolve this controversy, we have to analyze and considered the provisions contained u/s 2(15) of the Act which read 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 or 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 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.*

17. If the aforesaid provisions are considered in juxtaposition to the assessee's case, it can be said that the main objects of the assessee which relates to the imparting

of education and medical relief to the poor is undoubtedly charitable in nature. In the present case, establishment of Cafeteria to provide hygienic vegetarian foods to the people/tourist visiting Akshardham is claimed to be established for attaining the main object of improving the standard of health. In the instant case, the use of Cafeteria is not prohibited for any particular caste or creed. In other words, this Cafeteria is open to all and the income generated from the said Cafeteria is claimed to be utilized for the main objects of the assessee. The said claim of the assessee was not rebutted by bringing any cogent material on record.

18. On a similar issue the ITAT Delhi Bench :-BØ in the case of Divya Yog Mandir Trust Vs JCIT (supra) has held as under:

*“6.6.7 The first issue as to whether the appellant trust did fall within the purview of providing of 'medical relief 'imparting education' or 'relief to the poor' is thus decided in favour of the appellant. In view of the above finding on first issue the second and third issue have become infructuous. In these issues the questions are as to whether the activity of the appellant were in the nature of providing general public utility or of advancement of any other object of general public utility as contained in*

*section 2(15) of the Act. Relevant provisions u/s 2(15) are reproduced as under :—*

*"Section 2(15) of the Act defines "charitable purpose" as under:—*

*\*\*\* \*\* \*\**

*(15) "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:*

*\*\* \*\* \*\**

*The proviso inserted in section 2(15) of the Act by the Finance Act, 2008, with effect from 1.4.2009, reads 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;*

*\*\* "(Emphasis supplied)*

*Therefore, the aforesaid proviso does not apply to a trust/institution engaged in the charitable object of providing relief to the poor, imparting education and providing medical relief.*

*The vision with which the applicant trust has been set up and which is being followed over the years are as under:—*

- ' *To make a disease free world through a scientific approach to Yoga and Ayurveda and to fulfil the resolution of making a new world free from disease and medicine;*
- *To establish Pran as medicine for the treatment of all curable and incurable diseases by research on Pranayam /Yoga.*
- *To propagate Pranayam as a "free" medicine for treatment of diseases round the globe, through in-depth research in accordance with the parameters of modern medical science, so that the rich and poor may avail its benefits in order to attain sound health;*
- *To form a new integrated system of treatment, consisting mainly of the techniques of Yoga and Ayurveda, for Surgery and Emergency cases, Allopathy, Homoepathy, Unani and Acupressure to soothe patients suffering from unbearable pains and rid them of disease.*
- *To evaluate methods of treatment of Physical Body, Etheric Body , Astral Body, Mental Body and Casual Body beyond the present incomplete system of treatment for cure of physical body*

alone;

- *Imparting Yoga and health education and to begin degree and diploma courses for students in disciplines of Yoga and Ayurveda.'*

*As discussed above the proviso to section 2(15) of the Act applies only to trusts/institution falling in the last limb of the definition of charitable purpose; that too, if such trust/institution carry on commercial activities in the nature of business, trade or commerce. The said proviso does not apply to trust/institution engaged in the charitable object of providing relief to the poor, imparting education and providing medical relief. The last limb of the definition of charitable purpose u/s 2 (15) talks about the advancement of any other object of general public utility. The aforesaid predominant objects and the vision make it clear that the objects of the appellant are to provide 'medical relief 'impart education' to the society at large and 'relief to the poor' hence the proviso to section 2 (15) does not apply in the case of the assessee/appellant. The forth issue as to whether donation of Rs. 38.35 crores made to Patanjali Yog Peeth for the purpose of setting up Yog Bhawan and other yoga related activities these amounts to application of money for the purpose of medical relief has also been discussed and decided while adjudicating upon the first issue under the head medical relief or relief to the poor, following the same the fourth issue is also decided in favour of the appellant."*

19. In the present case also the assessee is mainly engaged in the charitable objects of providing relief to the poor by imparting education and providing medical help. Therefore, the pre-dominant objects and the vision make it clear that the main object of the assessee is to provide medical relief, impart education to the society at large and relief to the poor. Hence, the proviso to Section 2(15) does not apply to the facts of the assessee's case. In our opinion, the proviso is an exception to the main section, the definition of the charitable purpose has been given in sub-Section (15) of Section 2 of the Act, which is an inclusive definition and includes relief to the poor, education and medical relief. The assessee is also providing medical relief to the society at large and the registration u/s 12A of the Act has been allowed to the assessee vide order of DIT(E) Delhi dated 28.07.2006, the assessee trust is also having approval u/s 80G(5)(vi) of the Act vide order dated 27.09.2006. In the present case, the AO was of the view that the sales of the Cafeteria 'Premwati' were in the nature of commercial receipts in the course of advancement of any other objects of public utility as laid down in the proviso to Section 2(15) of the Act and not were the receipts within the meaning of Section 11(4A) of the Act. However, nothing is brought on

record to substantiate that the income generated from the said Cafeteria was not utilized by the assessee for achievement of the main objects i.e. to provide medical relief to the poor or to impart the education. To resolve this controversy, it is also relevant to discuss the provision contained in Section 11(4) & (4A) of the Act which reads as under:

*“(4) For the purposes of this section “property held under trust” includes a business undertaking so held, and where a claim is made that the income of any such undertaking shall not be included in the total income of the persons in receipt thereof, the [Assessing] Officer shall have power to determine the income of such undertaking in accordance with the provisions of this Act relating to assessment; and where any income so determined is in excess of the income as shown in the accounts of the undertaking, such excess shall be deemed to be applied to purposes other than charitable or religious purposes[\* \* \*].*

*[(4A) Sub-section (1) or sub-section (2) or sub-section (3) or sub-section (3A) shall not apply in relation to any income of a trust or an institution, being profits and gains of business, unless the business is incidental to the attainment of the objectives of the trust or, as the case may be, institution, and separate books of account are maintained by such trust or institution in respect of such business.]”*

20. From the combined reading of the above said provisions, it is clear that the property held under trust includes business undertaking, so held, and if the business is incidental to the attainment of the objectives of the trust and separate books of accounts are maintained by such trust or institution in respect of such business then also the income is exempt so long as the business carried on by the trust; is incidental to the attainment of main object which is charitable in nature. In the present case also nowhere it is established that the income earned by the assessee trust was not used for attainment of the main object or it was used elsewhere. Therefore, the addition made by the AO was not justified and the ld. CIT(A) rightly deleted the same. For the aforesaid view we are also fortified by the decision of the co-ordinate bench in the aforesaid case of Divya Yog Mandir Trust Vs JCIT (supra) wherein relevant findings have been given as under:

*“6.7.8 We find that the section deals with cases where the business itself is settled to take care of interest for a charitable purpose. Sub section (4A) of section 11 also exempts income tax of a business carried on by the trust so long as the business carried on by the trust is (a) incidental to the attainment of main objects (b) feeds the charitable objects (c) separate books of accounts are maintained in respect of the same, even on fulfillment of the aforesaid conditions profit from*

*such business are exempt u/s 11/12 of the Act. Thus it is clear that the charitable trust can carry on business and utilize its profits therefrom for the charitable purposes but a charitable trust cannot have its purpose, an activity that involves the buying and selling of goods and making profits. The business undertaking of the appellant as discussed above are thus the means for effectuating a charity, but not a charitable object itself. We find that in the case of appellant before us the activity of manufacturing and sale of ayurvedic preparations has been undertaken only for the purpose of effectuating the charitable objective of providing 'medical relief to the society at large on a genuine need was felt to provide superior quality ayurvedic preparations at economical prices in order to attain effective medical results. Only because the activity carried on yielded" profits a negative inference cannot drawn that the activity was undertaken with the sole intention of earning profits. It is also pertinent to note that the total donations/voluntary contributions received by the appellant trust during the assessment year under consideration amounted to Rs. 3,89,14,100/- only. Whereas the total revenue expenditure incurred by the appellant trust in the assessment year under consideration for undertaking its charitable activities amounted to Rs. 48,54,93,383/- (excluding depreciation). Further it is apparent from page 26 of the paper book i.e. income and expenditure account for the year ending 31st March, 2009 that substantial capital expenditure has also been incurred by the appellant trust in pursuing its charitable activities. We also find that the donations/contributions received by the appellant trust constituted only a minuscule portion of the heavy outlay of expenditure incurred in pursuing the charitable activities. The meaning of*

*expression not for purpose of profit is no longer res integra the test being what is the predominant object of the activity whether it is to carry out a charitable purpose or to earn profit ? If the predominant object is to carry out as charitable purpose and not to earn profit the organization would not lose its charitable character merely because some profits arises from the activity. The Hon'ble Supreme Court in the case of Surat Art Silk Cloth Manufacturers (supra) has been pleased to observe that the expression 'for the purpose of 'profit' implies that the predominant object should be to earn profit. Further to determine the predominant object, what is required to be examined is the objects of the society and not the quantum of surplus though such quantum may become relevant in certain circumstances. The same ratio has been laid down by the Supreme Court in the case of Andhra Pradesh State Road Transport Corpn. (supra), Victoria Technical Institute (supra), Thiagarajar Charities (supra), Aditanar Educational Institution (supra), Bar Council of Maharashtra (supra), American Hotel Lodging Association Education Institute (supra), Delhi Kannada Education Society (supra), Samaj Kalyan Parishad (supra).*

**6.7.9** *Thus we find that there is no bar in the charitable trust/institution carrying on business provided the conditions prescribed in section 11(4)/11(4A) of the Act are satisfied. The Hon'ble Supreme Court in the case of P. Krishna Warriors (supra) has been pleased to hold with reference to income tax Act 1922 that if the trust carried on business and the business itself is held in trust and the income from such business is applied or*

*accumulated for application for the charitable or religious purpose of the trust, the conditions prescribed in section 4(3)(i) and fulfilled and the income is exempt from taxation. In that case before the Hon'ble Supreme Court business of making and selling ayurvedic medicines was settled and held in trust and 60% of income from such business was applied for charitable purpose. The AO denied exemption on the ground that part of the income from business was not applied for charitable purposes, the Hon'ble Supreme Court held that where business is held for charitable purposes the conditions prescribed in proviso (b) to section 4(3) (i) of the Income Tax Act is not applicable and the assessee was held to be eligible for exemption. The decision of Delhi High Court in the case of Hamdard Dawakhana (Waqf) (supra) though rendered in the context of the pre amended law i.e. before insertion of section 11(4A) in the 1961 Act. But the Hon'ble Court held that it was immaterial how money which was obtained by running of an activity for profit did not make the objective non charitable. If that money was used for charitable purpose and not for the carrying on any business at a profit, then the object of the trust was charitable notwithstanding the source of the income. The Hon'ble Supreme Court again in the case of Thanthi Trust (supra) held that the trust was entitled to exemption when the business of the trust was incidental to the attainment of the objectives of the trust, namely the objectives of education and relief to the poor. Their lordships observed that after amendment of section 11(4A) in 1992, all that is required for the business income of the trust or institution to be exempt from tax is that the business should be incidental to the attainment of the objects of the trust or institution. The Hon'ble*

*Court further held that if business whose income is utilized by the trust or the institution for the purposes of achieving its objectives is a business which is incidental to the attainment of the objectives of the trust or institution. Respectfully following the ratio laid down in the above cited decisions we come to the conclusion that the authorities below have failed to appreciate that incomes from business undertaken by the appellant fulfills the aforesaid conditions in as much as (a) all the business, including the business of Divya Pharmacy, were incidental to the attainment of main objects: (b) profits from business are applied for charitable objects ; and (c) separate books of accounts are maintained. They were thus not justified in holding that the charitable objects was sub-serving the business, whereas as a matter of fact it was the other way round. We find that in the case of Bombay Keraleeya Samaj (supra) the objects of the assessee registered u/s 12A was inter alia propogation of the Kerala system of Ayurveda and for this purpose the assessee ran five dispensaries rendering free consultation by Ayurved physicians. The assessee was obtaining ayurvedic medicines from an institution (A) at a discount of 11 % which was sold to the patients at the dispensaries as per the prescription of the doctors. The amount of discount \_ which the assessee received from A was being used for running the dispensaries and for carrying out the other objects of the trust. The assessee also levied 11% service charge on the price of medicines from non-members and claimed to have utilized the amount so collected for running the dispensaries. In the preceding assessment years, benefit of section 11 was given to the assessee. The assessee claimed the benefit u/s 10(22A) which was refused by the assessing officer mainly on the basis that the dominant object of the*

*trust was to sell medicines and derive profit therefrom. The first appellate authority rejected the assessee's appeal. The Tribunal has however given relief with this finding that the mere fact that the assessee trust has objects other than medical relief was not a condition aliunde to which the exemption u/s 10(22A) could be denied to the assessee. The surplus derived from running the dispensaries was utilised for philanthropic purposes. CBDT circular No. 194/16-17-II(A-1) makes it clear that if a surplus is used for philanthropic purposes the income of the institution will be eligible for exemption u/s 10(22A). We are thus of the view that in the present case the authorities below have grossly erred in holding that the appellant's activities in relation to production and sale of ayurvedic preparations are not incidental to its main objective as the same are commercial in nature. Likewise in the case of Baun Foundation Trust v. Chief CIT [2013] 33 taxmann.com 677, the Hon'ble Bombay High Court has been pleased to hold that activity of running chemist shop within the premises of the hospital was incidental or ancillary to the dominant object of running a hospital. We thus hold that in the present case the authorities below have failed to appreciate that the business set up and held by the appellant under trust is to sub serve the predominant charitable objects of providing medical relief education and relief to poor. Furthermore, since separate books of accounts were maintained and the entire profits are for charitable objects, the conditions prescribed in section 11(4A) of the Act, too were fulfilled. The authorities below have also failed to appreciate that out of total sales of Rs. 168.12 crores of Divya Pharmacy medicines of Rs. 4.2 crores only were sold from the hospital sales counter (sic). As so far as ground No. 10 is concerned*

*it is rejected as having become infructuous in view of the order dated 3.6.2013 of the AO u/s 154 and the issues raised in ground Nos. 11 to 14 have become infructuous in view of our finding in favour of the appellant in ground Nos. 1 to 9, hence do not need adjudication. The issue of charging of interest under sections 234A, 234B, 234D and 244A of the Act raised in ground Nos. 15 and 16 are consequential in nature.”*

21. We, therefore, considering the totality of the facts as discussed hereinabove and respectfully following the aforesaid decision of the Co-ordinate Bench in the case of Divya Yog Mandir Trust Vs JCIT, Hardwar, are of the view that the Id. CIT(A) rightly deleted the addition made by the AO. In that view of the matter, we do not see any merit in this appeal of the department.

22. In the result, appeal of the department is dismissed.  
(Order Pronounced in the Court on 17/03/2016)

Sd/-  
**(A. T. Varkey)**  
**JUDICIAL MEMBER**

Sd/-  
**(N. K. Saini)**  
**ACCOUNTANT MEMBER**

**Dated: 17/03/2016**

\*Subodh\*

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

**ASSISTANT REGISTRAR**