IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCHE 'F', NEW DELHI

Before Sh. H. S. Sidhu, Judicial Member
And
Sh. R. K. Panda, Accountant Member

ITA No. 1806/Del/2016 : Asstt. Year: 2011-12

Income Tax Officer(E), Trust Ward-1(1), Delhi	Vs	All India Fine Arts & Crafts Society, 1, Rafi Marg, New Delhi-110001
(APPELLANT)		**(RESPONDENT)**
PAN No. AAATA7840E		

Assessee by : Sh. Rajan Malik, Adv.
Revenue by : Sh. Surendra Pal, Sr. DR

Date of Hearing :29.05.2019		**Date of Pronouncement : 19.06.2019**

ORDER

Per R. K. Panda, Accountant Member:

This appeal filed by the Revenue is directed against the order dated 12.01.2016 of ld. Commissioner of Income Tax (Appeals), New Delhi relating to assessment year 2011-12.

2. The only effective ground raised by the Revenue reads as under:

> *"1. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in ignoring the fact that the activities of the assessee does not fall under the definition of charitable purpose as defined in Section 2(15) of the Income Tax Act, 1961."*

3. Facts of the case, in brief, are that the assessee is a society and filed its return of income on 28.09.2011 declaring total income of Rs.1,30,00,000/-. The assessee is registered under the Societies Registration Act, 1860. The Assessing

Officer during the course of assessment proceedings observed that the aims and objects of the assessee society are as under:

> *"(a) To foster and Develop fine and applied arts in India and to promote appreciation by means of publications, lectures, conferences, demonstration, exhibition;*
>
> *(b) To organize and establish a national art gallery in New Delhi;*
>
> *(c) To organize art exhibitions and societies in India and abroad;*
>
> *(d) To act as the Central Organizations of Arts and Crafts in India;*
>
> *(e) To do all such law full things as are incidental or conducive to the attainment of above objects and any other objects of arts and literature not mentioned above."*

4. The Assessing Officer asked the assessee to explain as to why the benefit u/s 11 & 12 of the Act in respect of the income should be allowed in view of the amended Section 2(15) of the Act introduced w.e.f. 01.04.2009 i.e. relevant to assessment year 2011-12 under consideration, since its activities fall in the category of "advancement of object of general public utility" and its income including rental income is in the nature of business, trade or commerce and the same income exceeds Rs.10,00,000/-. Rejecting the various explanation given by the assessee and relying on the amended provisions of Section 2(15) of the Act and CBDT Circular No. 11/2008 dated 19.12.2008, the Assessing Officer held that the activities of the assessee society is not for charitable purpose and therefore, the income of the assessee is taxable. He noted that

the assessee during the year under consideration has derived income under the following heads:

"a. Rental Income	*4,80,00,000/-*
b. Interest Income	*2,10,45,261/-*
c. Income from Gallery Maintenance	*5,11,400/-*
d. Misc. Income	*3,01,587/-*
Total	*6,98,58,248/-"*

5. Relying on various decisions, the Assessing Officer denied the benefit of exemption u/s 11 of the Act and determined the total income of the assessee at Rs.4,73,15,960/-. While computing income so determined, he further disallowed the depreciation claimed by the assessee on the ground that the cost of assets had already been treated as application of income while assessing the income of the assessee u/s 11 & 12 of the Act. Therefore, the depreciation cannot be allowed again which will amount to double deduction of the same.

6. In appeal, the ld. Commissioner of Income Tax (Appeals) allowed the claim of benefit u/s 11 of the Act. So far as the amount of Rs.8,12,987/- being the income from galleries and miscellaneous income is concerned, he held the same to be the activities of the assessee trust by observing as under:

> *"In view of the discussions made above and argument advanced by the ARs as well as case laws cited by them, in view of the facts present in the case, I am inclined to agree with their proposition that as held in various cases, their overall objective/dominant purposes is not to do business or earn income.*
>
> *Further, in any case since the receipts are only to the extent of Rs.8,12,987/- (barring the fixed rental income of Rs.4,80,00,000/- and interest earned of Rs.2,10,45,261/-, which cannot be said from/towards "involving any activity in the nature of*

trade, commerce or business at all, vis-a-vis the objects for which the society has been established"). Further, since I have also dealt separately under ground no.3 that the fixed rental income earned by the assessee cannot be considered activities in the nature of trade, commerce or business, I hold that the appellant cannot be considered to be a non-charitable organisation/society because of the saving provided under second proviso to section 2(15) of the Income Tax Act. Therefore, the AO is directed to consider only Rs.8,12,987/- towards its activities though I am of the considered view that even this amount should not be construed as receipts involving any activity in the nature of trade, commerce or business due to the overall objective of the society not to earn income or to do business."

7. So far as the rental income of Rs.4,80,00,000/- is concerned, the ld. Commissioner of Income Tax (Appeals) directed the Assessing Officer to allow benefit of Sections 11 & 12 of the Act as claimed by the assessee. The ld. Commissioner of Income Tax (Appeals) further held that the case of the assessee falls under the second proviso to Section 2(15) of the Act i.e. total receipts being less than Rs.10,00,000/-, the assessee is fully entitled to all the benefits u/s 11 & 12 of the Act.

8. Aggrieved with such order of the ld. Commissioner of Income Tax (Appeals), the Revenue is in appeal before the Tribunal.

8.1 The ld. Departmental Representative heavily relied on the order of the Assessing Officer.

9. The ld. Counsel for the assessee, on the other hand, placed reliance on the assessment orders for various

assessment years and submitted that in earlier years, the rental income have always been taken as income from the property held under the society and allowed application of rent therefrom to the objects of the society. Referring to the copy of the memorandum of the assessee society, he submitted that the society is authorized to let out the property and doing all lawful activities for the furtherance of the object of the society. He submitted that the Revenue in the past has never considered such rental income as business income. Referring to the order of the Tribunal in assessee's own case for assessment years 2009-10 and 2010-11, he submitted that under identical circumstances the exemption denied by the Assessing Officer and upheld by the ld. Commissioner of Income Tax (Appeals) was allowed by the Tribunal. He accordingly submitted that this being a covered matter in favour of the assessee, the ground raised by the Revenue should be dismissed.

10. We have considered the rival arguments made by both the sides and perused the orders of the authorities below. We have also perused the paper book filed on behalf of the assessee. We find the Assessing Officer applying the amended provision to Section 2(15) of the Act and CBDT Circular No. 11/2008 denied the exemption claimed u/s 11 of the Act to the assessee on the ground that the activities of the assessee trust are not charitable. According to the Assessing Officer, the activities of renting out the property has no nexus with the promotion of Fine Arts & Crafts objective and the receipts therefrom are not given as a quid pro quo for the business of Fine Art & Crafts or rendering any services. According to the

Assessing Officer, the rent being received by the society is subject to TDS is a pure rent. Further, the rent from the property has never been considered or linked with the main activities of the assessee i.e. promotion of Fine Arts & Crafts under the first proviso to Section 2(15) of the Act. We find that the ld. Commissioner of Income Tax (Appeals) allowed the claim of exemption u/s 11 & 12 of the Act for which the Revenue is in appeal before the Tribunal. We find for the past assessment years, the rental income was always taken as income from property held under society and allowed application of rent therefrom to the objects of the society. A perusal of the memorandum of association of the society *inter alia* shows the following objects:

> *"(j) To purchase or acquire on lease, or in exchange, or on hire, or otherwise, any real or personal property, and any rights or privileges necessary or convenient for the purposes of the Society.*
>
> *(l) To sell, improve, manage and develop all or any part of the property of the Society.*
>
> *(m) To do all such lawful things as are incidental or conducive to the attainment of the above objects and any other objects of Arts and literature not mentioned above."*

11. We further find the Revenue has always accepted the rental income from the property held under society and never considered the same as business income.

12. We find identical issue had come up before the Tribunal in assessee's own case for assessment years 2009-10 and 2010-11. We find the Tribunal vide ITA Nos. 1448/Del/2015 & 1449/Del/2013, order dated 14.02.2019 while allowing the

benefit of exemption u/s 11 & 12 of the Act to the assessee society has observed as under:

> *"5.0 We have heard the rival submissions and have also perused the material on record. We agree with the averment of the Ld. Authorised Representative that the assessee's case is favourably covered for the assessee by the ratio of the judgment of the Hon'ble Delhi High Court in the case of India Trade Promotion Organisation vs. DGIT (E) (supra), wherein vide judgment dated 22.01.2015, the Hon'ble Delhi High Court, while upholding the constitutional validity of proviso to Section 2(15) of the Act, has laid down the strict and literal interpretation of the proviso to Section 2(15) of the Act. The Hon'ble Delhi High Court has held that mere receipt of fee or charge will not mean that the assessee is involved in any trade, commerce or business. In the case of India Trade Promotion Organisation, the Ld. DGIT (E) had passed an order stating that though the assessee was engaged in "the advancement of any other object of general public utility", as per s. 2(15) of the Act, its object could not be regarded as "charitable purposes" due to the new proviso to s. 2(15) and further that it was not eligible for exemption u/s 10(23C)(iv). It was held by the Ld. DGIT (E) that as the assessee had huge surpluses in banks, it had given its space for rent during Trade Fairs and Exhibitions, it had received income by way of sale of tickets and income from food and beverage outlets in Pragati Maidan, etc, the assessee was rendering service to a large number of traders and industrialists in relation to trade, commerce and business and was, therefore, hit by the expanded list of activities contained in the proviso to Section 2(15). It was further observed by the Ld. DGIT (E) that the service of allotting space and other amenities like water, electricity and security, etc. to the traders to conduct their exhibitions fell within the ambit of any activity of rendering any service in relation to trade, commerce or business. The assessee filed a writ petition before the Hon'ble Delhi High Court claiming that the First Proviso to section 2(15), as amended by the Finance*

Act, 2008, was arbitrary and unreasonable and violative of Article 14 of the Constitution of India. The Hon'ble Delhi High Court held in the favour of the assessee. The relevant observations of the Hon'ble High Court are as under:

(i) It is apparent that merely because a fee or some other consideration is collected or received by an institution, it would not lose its character of having been established for a charitable purpose. It is also important to note as to what is the dominant activity of the institution in question. If the dominant activity of the institution was not business, trade or commerce, then any such incidental or ancillary activity would also not fall within the categories of trade, commerce or business. It is clear from the facts of the present case that the driving force is not the desire to earn profits but, the object of promoting trade and commerce not for itself, but for the nation – both within India and outside India. Clearly, this is a charitable purpose, which has as its motive the advancement of an object of general public utility to which the exception carved out in the first proviso to Section 2(15) of the said Act would not apply;

(ii) If a literal interpretation were to be given to the said proviso, then it would risk being hit by Article 14 (the equality clause enshrined in Article 14 of the Constitution). It is well settled that the courts should always endeavour to uphold the Constitutional validity of a provision, and in doing so, the provision in question may have to be read down;

(iii) Section 2(15) is only a definition clause. The expression "charitable purpose" appearing in Section 2 (15) of the said Act has to be seen in the context of Section 10(23C)(iv). When the expression "Charitable Purpose", as defined in Section 2(15) of the Act, is read in the context of Section 10(23C)(iv) of the said Act, we would have to give up the strict and literal interpretation

sought to be given to the expression "charitable purpose" by the revenue.

In conclusion, we may say that the expression "charitable purpose", as defined in Section 2(15) cannot be construed literally and in absolute terms.

It has to take colour and be considered in the context of Section 10(23C)(iv) of the said Act. It is also clear that if the literal interpretation is given to the proviso to Section 2(15) of the said Act, then the proviso would be at risk of running fowl of the principle of equality enshrined in Article 14 of the Constitution India. In order to save the Constitutional validity of the proviso, the same would have to be read down and interpreted in the context of Section 10(23C)(iv) because, in our view, the context requires such an interpretation. The correct interpretation of the proviso to Section 2(15) of the said Act would be that it carves out an exception from the charitable purpose of advancement of any other object of general public utility and that exception is limited to activities in the nature of trade, commerce or business or any activity of rendering any service in relation to any trade, commerce or business for a cess or fee or any other consideration. In both the activities, in the nature of trade, commerce or business or the activity of rendering any service in relation to any trade, commerce or business, the dominant and the prime objective has to be seen. If the dominant and prime objective of the institution, which claims to have been established for charitable purposes, is profit making, whether its activities are directly in the nature of trade, commerce or business or indirectly in the rendering of any service in relation to any trade, commerce or business, then it would not be entitled to claim its object to be a 'charitable purpose'. On the flip side, where an institution is not driven primarily by a desire or motive to earn profits, but to do charity through the advancement of an object of general public utility, it cannot but

be regarded as an institution established for charitable purposes.

Thus, while we uphold the Constitutional validity of the proviso to Section 2(15) of the said Act, it has to be read down in the manner indicated by us."

5.1 Thus, the Hon'ble Delhi High Court has held that merely because a fee or some other consideration is collected or received by an institution, it would not loose its character of having been established for a charitable purpose. Undisputedly, in the present case the dominant activity of the assessee society is not business trade or commerce but its activities are for the promotion of art, craft and culture for the Indian artists in India. The Assessing Officer has himself reproduced the main objectives of the assessee society as per the Memorandum of Association in his assessment order and they are: (i) fostering and developing fine and applied arts in India to promote appreciation by means of publications, lectures, Conferences, Demonstration, Exhibition etc.;(ii) organizing and establishing a national art gallery in New Delhi; (iii) organizing art exhibitions and societies in India and abroad; (iv) acting as Central Organization of Arts and Crafts in India etc. It is also undisputed that the assessee society has carried out activities in the form of annual art exhibitions, camps for senior and junior artists, providing maintenance to aged artists etc. It is also not the department's case that any part of surplus was diverted from the society and applied for any personal benefit of any member or office bearer of the society. Therefore, it can be safely concluded that the dominant activity of the assessee society is not business, trade or commerce and, accordingly, any incidental or ancillary activity like hiring out of art gallery or selling paintings would not also fall within the categories of trade, commerce or business.

5.2 We also note that the Hon'ble Delhi High Court in the case of India Trade Promotion

Organisation vs. DGIT (Exemption) (supra) has also duly considered Circular No. 11 of 2008 issued by the CBDT and has observed that the proviso to Section 2(15) of the Act, which was inserted by Finance Act, 2008, was directed to prevent the unholy practice of pure trade, commerce and business entities from masking their activities and portraying them in the garb of an activity in the object of a general public utility but was not designed to hit at those institutions, which had the advancement of the objects of general public utility at their hearts and were charity institutions.

5.3 Therefore, after duly considering the objects of the assessee society, the settled legal position with respect to interpretation of proviso of Section 2(15) of the Act and respectfully following the ratio of the judgment of the Hon'ble Delhi High Court in the case of India Trade Promotion Organisation vs. DGIT (Exemption) (supra) we are unable to concur with the observations and findings of both the lower authorities and while setting aside the orders of the Ld. CIT (Appeals), we direct the AO to allow the assessee the benefit of exemption u/s 11 & 12 of the Act for assessment year 2009-10.

6.0 Since the issue in assessment year 2010-11 is identical, therefore, for the same reasoning as given by us in assessee's appeal for assessment year 2009-10 while allowing the assessee's appeal, we allow assessee's appeal for assessment year 2010-11 also. In this year also the order of the Ld. CIT (Appeals) is set aside and the AO is directed to allow the assessee the benefit of exemption u/s 11 & 12 of the Act to the assessee."

13. In view of the decision of the Tribunal in assessee's own case cited (supra), we do not find any infirmity in the order of the ld. Commissioner of Income Tax (Appeals) allowing the claim of exemption u/s 11 & 12 of the Act of the assessee. We accordingly uphold the same. The ground raised by the Revenue is accordingly dismissed.

14. In the result, the appeal of the Revenue is dismissed.

(Order Pronounced in the Open Court on 19/06/2019)

Sd/-	Sd/-
(H. S. Sidhu)	**(R. K. Panda)**
Judicial Member	**Accountant Member**

Dated: 19/06/2019
Subodh
Copy forwarded to:
1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR