

**IN THE INCOME TAX APPELLATE TRIBUNAL
'A' BENCH : BANGALORE**

**BEFORE SHRI. B. R. BASKARAN, ACCOUNTANT MEMBER
AND
SMT. BEENA PILLAI, JUDICIAL MEMBER**

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| ITA No.951/BANG/2017 |
| Assessment Year : 2012 - 13 |

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| The Asst. Commissioner of Income-tax, Circle-1, Bengaluru. | Vs. | Karnataka Industrial Areas Development Board, No.49, 4 th & 5 th Floors, Khanija Bhavan, Race Course Road, Bengaluru-560 001. |
| APPELLANT | | PAN - AAATK 1305 J RESPONDENT |

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| ITA No.903/BANG/2017 |
| Assessment Year : 2012 - 13 |

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| Karnataka Industrial Areas Development Board, No.49, 4 th & 5 th Floors, Khanija Bhavan, Race Course Road, Bengaluru-560 001. | Vs. | The Asst. Commissioner of Income-tax, Circle-1, Bengaluru. |
| PAN - AAATK 1305 J APPELLANT | | RESPONDENT |

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| Appellant by | : | Ms. Neera Malhotra, CIT (DR) |
| Respondent by | : | Shri Padamchand Khincha, CA |

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| Date of Hearing | : | 25-06-2020 |
| Date of Pronouncement | : | 03-07-2020 |

ORDER

PER BEENA PILLAI, JUDICIAL MEMBER

Present cross appeals has been filed by assessee as well as revenue against order dated 24 raised 12,015 passed by Ld. CIT (A)-14, Bangalore for assessment year 2012-13 on following grounds of appeal:

ITA No.951/Bang/2017

1. *Whether in the facts and circumstances of the case and in law, the learned CIT(A) erred in allowing depreciation in respect of assets which have already been allowed as application of income in its entirety in earlier years.*
2. *Whether in the facts and circumstances of the case and in law, the learned CIT(A) is correct in allowing depreciation which amounts to double deduction when already full expenditure has been allowed in earlier years.*

ITA No.903/Bang/2017

1. *The order passed by the Hon'ble Commissioner of Income tax (Appeals) - 14, Bangalore to the extent prejudicial to appellant is bad in law and liable to be quashed.*
2. *The Hon'ble Commissioner of Income tax (Appeals) - 14, Bangalore has erred in concluding that the appellant is assessable in the status of 'Association of Persons'. The assessment made and the order passed on a wrong person i.e., under a different status, is bad in law and liable to be quashed.*
3. *The Hon'ble Commissioner of Income tax (Appeals) - 14, Bangalore has erred in concluding that the appellant is not eligible for exemption under section 11 of the Income Tax Act, 1961.*
 - 3.1 *The Hon'ble Commissioner of Income tax (Appeals) - 14, Bangalore has erred in*
 - (a) *concluding that the activities carried on by the appellant are commercial in nature with an intention to make profits;*
 - (b) *concluding that the appellant is hit by the proviso to section 2(15) read with section 13(8) of the Act.*
 - (c) *not appreciating that performance audit report is not an appropriate basis to judge commercial nature or otherwise of the appellant's activities*
 - (d) *not appreciating that the appellant, a statutory body of Government of Karnataka is a special entity to achieve the objectives set out in the KIAD Act and no activity is carried on with a view to earn profits.*
 - (e) *Not appreciating that the surplus generated out of operations, if any, is ploughed back for further industrialization in the state.*

(f) ignoring, disregarding and not following the ITAT orders in appellant's own case for the earlier years on an identical issue.

3.2 On facts and in the circumstances of the case and law applicable, proviso to section 2(15) and section 13(8) are inapplicable and consequently exemption under section 11 is to be allowed as claimed by the appellant.

4. The learned Assessing Officer has erred in making and the learned CIT(A) has erred in confirming the additions in respect of amounts under slum improvement cess amounting to Rs. 1,86,71,384/-, Labour welfare fund amounting to Rs. 13,62,04,251/- and KST tender / application amounting to Rs. 14,056/- reckoning that these amounts ought to have been paid to the authorities concerned before the due date for filing the return of income.

4.1 The learned Assessing Officer and the learned CIT(A) have erred in not appreciating that the amount of slum improvement cess, labour welfare fund and KST tender / application has not been claimed as deductions / application of income and therefore the question of making addition under section 43B does not arise. On proper appreciation of law, the aforesaid expenses cannot be added as income of the appellant. The conclusion drawn by Assessing Officer and CIT(A) being erroneous on facts and law is to be deleted.

5. The learned Assessing Officer and the CIT(A) have erred in treating EMD/Security Deposit of Rs 2,73,500/- as income of the appellant holding that as per the method of accounting followed the EMD/SD had not been shown as income in 'income and expenditure a/c' nor had been kept in separate bank account. On the facts and circumstances of the case and law, EMD/SD is in the nature of a capital receipt. The conclusion drawn by Assessing Officer being erroneous on facts and law is to be deleted.

6. The learned assessing officer and the CIT(A) have erred in making addition of Rs. 15,16,633/- as 'unaccounted water supply charges'. The addition towards water charges of Rs. 15,16,633/- made by the learned Assessing Officer for the reason that the same have been wrongly credited to KST tender / application account should be allowed as deduction in the year in which accounting entry has been rectified by the appellant.

7. The learned Assessing Officer and the CIT(A) have erred in making addition of Rs.26,06,141/- under section 69A for the reason that the amounts have not been accounted in the books of account.

7.1 The learned Assessing Officer and the CIT(A) have erred in not appreciating that:

- (i) the appellant explained the nature of credits of Rs 26,06,141;
- (ii) section 69A cannot be invoked if the nature of credits has been explained by the appellant;
- (ii) the amount of Rs 26,06,141/- has been accounted as revenue items in the subsequent accounting period.

7.2 On facts and circumstances of the case, the addition of Rs 26,06,141/- under section 69A is bad in law and should be deleted. If for any reason, the addition is sustained, the learned Assessing Officer should be directed to exclude the same from income / allow it as deduction in the year in which the same has been accounted as revenue item.

8. The learned Assessing Officer and the CIT(A) have erred in making addition of Rs.9,50,93,431/- [Rs 35,61,782/- plus Rs. 9,15,31,649/-] under section 69A of Act holding that the appellant failed in explaining the nature and source of amounts credited in the bank accounts.

9. The learned Assessing Officer has erred in not appreciating that the appellant during the assessment proceedings has explained that the majority of the amounts are in the nature of consideration for allotment of land and hence constitute capital receipt in the hands of the appellant. The addition made under section 69A without proper appreciation of the explanation offered by the appellant is bad in law and should be deleted.

10. The Hon'ble Commissioner of Income tax (Appeals) - 14, Bangalore has erred in confirming the levy of interest under section 234A, 234B and 234D of the Act. On facts and circumstances of the case and law applicable, interest under section 234A, 234B and 234D is not leviable. The appellant denies its liability to pay interest under section 234A, 234B and 234D.

11. In view of the above and other grounds to be adduced at the time of hearing, the appellant prays that the order passed by the Hon'ble Commissioner of Income tax (Appeals) 14, Bangalore be quashed or in the alternative, the relief as prayed for be kindly allowed. [he appellant prays accordingly.]”

Brief facts of the case are as under:

2. Assessee filed its return of income for year under consideration on 30/09/2012. Return was processed under section 143 (1) of the act resulting in a refund of Rs.4,75,18,960/-which was agreed adjusted against demand due for assessment year 2009-10. Subsequently, case was selected for scrutiny and statutory notices were issued to assessee, in response to which representative of assessee appeared before Ld. AO and filed requisite details as called for.

3. Ld. AO noted that, assessee is a statutory body, constituted under section 5 of Karnataka Industrial Areas Development Act,

1966 (KIADA) and assessee has been provided with special powers for expedition, acquisition of land for industrial and infrastructure purposes in the state of Karnataka. Ld.AO noted that, assessee besides forming layouts with all infrastructure facilities for promotion of industries, acquired land on behalf of various State Government organisations for implementing their schemes.

4. Ld.AO observed that assessee has been engaged in advancement of any other object, but of general public utility, which involves carrying on any activity in the nature of trade, commerce or business, and accordingly amended definition of 'charitable purpose' inserted under section 2(15) was invoked to deny exemption under section 11 and 12, read with section 13(8) of the Act. Ld.AO noted that, assessee claimed exemption under Section 10 (20A) of the Act up to assessment year 2002-03. And subsequent to omission of section 10(20A), assessee obtained registration under section 12 A of the Act, and has been claiming exemption under Section 11 of the Act. Ld.AO treated Rs.261,47,58,631/- as profits, in the hands of assessee, being excess of receipt over expenditure. Ld.AO also made further disallowances under various provisions of the Act. Assessment was completed at total income of Rs.289,08,24,577/-, as against returned income at 'nil' by considering assessee as AOP.

5. At the outset, Ld.AR Submitted that, this issue stands settled in favour of assessee by order of this *Tribunal* in assessee's own case for assessment year 2009-10 and 2010-11 by order dated 04/09/2015 and 20/04/2016 respectively, wherein this *Tribunal* after considering objects and functions of

assessee, as well as, analysing applicability of proviso to section 2 (15) of the Act, held that proviso is not applicable in case of assessee.

6. Ld.AR submitted that, there is no change in facts and circumstances of the case, as it was for assessment year 2009-10 and 2010-11.

7. On the contrary, Ld.CIT DR submitted that, exemption under section 11 is to be examined for every year as per the terms and conditions under the act. She relied upon orders passed by authorities below.

8. We have perused submissions advanced by both sides in light of records placed before us.

9. Assessee was granted registration under section 12AA by order dated 20/06/1988 and the said registration still holds good in view of the order passed by this *Tribunal* dated 31/01/2013, which has been subsequently upheld by *Hon'ble Karnataka High Court* in ITA No.261/2013 by order dated 07/12/2014. This (*Tribunal*) while considering the issue for assessment year 2010-11 being preceding assessment years and subsequent assessment years being 2013-14 and 2014-15 by order dated 17/06/2019 relied upon following observations of this Tribunal for assessment year 2009-10 regarding non applicability of provisions of sec.2(15) of the Act:

"18. Our attention was drawn to the preamble of The Karnataka Industrial Areas Development Act, 1966 (hereinafter referred to as KIAD) under which the Assessee was established as a body corporate, which reads thus: An Act to make special provisions for securing the establishment of industrial areas in the State of Karnataka and generally to promote the establishment and orderly development of industries therein, and for that purpose to establish an Industrial Areas Development Board and for

purposes connected with the matters aforesaid. WHEREAS it is expedient to make special provisions for securing the establishment of industrial areas in the State of Karnataka and generally to promote the establishment and the orderly development of industries in such industrial areas, and for that purpose to establish an Industrial Areas Development Board and for purposes connected with the matters aforesaid;"

19. He brought to our notice that in pursuance of the power vested under section 5 of the KIAD Act, the State Government has notified a Board called as the 'Karnataka industrial Area Development Board (Board in short) to achieve the objectives of the KIAD Act. The purpose of establishing the Board is provided under section 5(1) of the KIAD Act, which provides: "Establishment and incorporation." - For the purposes of securing the establishment of industrial areas in the State of Karnataka and generally for promoting the rapid and orderly establishment and development of industries and for providing industrial infrastructural facilities and amenity in industrial areas in the State of Karnataka, there shall be established by the State Government by notification a Board by the name of the Karnataka Industrial Area Development Board."

20. Karnataka Industrial Areas Development Board (KIADB) is a wholly owned infrastructure agency of Government of Karnataka. set up under Karnataka Industrial Areas Development Act of 1966. It is established through a State Government notification. The assessee is a creation of law. The law was enacted with certain specific objectives. Thus, the objectives for which the assessee is constituted was laid out even prior to its incorporation. The assessee and its activities are therefore ring fenced to this special Act, namely KIAD Act,

21. The State Government can give directions to the assessee, as in its opinion, are necessary or expedient for carrying out the purposes of the Act and it is the duty of the assessee to comply with such directions [section 17 of KIAD Act].

22. It was next highlighted that the assessee carries on its activities in accordance with the provisions of KIAD Act. It does not have the unfettered power to carry on its activities. It functions within the broad framework of the objectives laid down in the KIAD Act.

23. The website of the assessee which outlines its Aims and objectives and Functions. it states: "Aims & Objectives: (a) Promote rapid and orderly development of industries in the state. (h) Assist in implementation of policies of Government within the purview of KIAD Act. (c) Facilitate in establishing infrastructure projects. (d) Function on "No Profit No Loss" basis. Functions: (a) Acquire land and form industrial areas in the state. (b) Provide basic infrastructure in the industrial areas. (c) Acquire land for Single Unit Complexes. (d) Acquire land for Government agencies for their schemes and infrastructure projects. Application of Appellant's funds & property.

24. The funds of the assessee can only be used as per the provisions and for the purposes of the KIAD Act, Section 8 of the Act provides that all property and all other assets vesting in the assessee shall be held and applied by it, subject to the provisions and for the purposes of this Act. The

purpose of application is outlined. The funds cannot be distributed or appropriated to any person unless the same is in accordance with the assessee's objectives. The employment utilization and channelizing of funds can be done within the broad framework of the assessee's objectives. Acquisition and development of lands

25. The Acquisition section (one of the wings of the assessee) conducts the proceedings for acquisition of land as per KIAD Act and hands these lands to KIADB. Special Deputy Commissioner heads acquisition wing. He is assisted by Special Land Acquisition officers at zonal level. The Board does not have the power to acquire land of its choice; develop it and then sell it: Under section 3 of KIAD Act, it is only the State Government which can declare any area as an Industrial area by a notification, and specify the limits of such area. Thus, the Board's acquisition powers are ring fenced by the State Government's authority. As per section 28 of KIAD Act, the State Government can acquire land, for the purpose of development, and pay compensation for such compulsory acquisition. The Board cannot decide what land to acquire and how much to compensate the land owners. It is only when an area is declared as an industrial area and the land is acquired under section 28 of MAD Act or transferred by the Government under section 32 of the KIAD Act, that the role of the Board begins.

Restraint on expenditure from funds of the assessee

26. Section 23 stipulates that the assessee shall have the authority to spend such sums as it thinks fit for the purposes authorised under this Act from out of Board's funds, Every expense has to therefore pass the 'purpose test'.

27. It was argued by Id. counsel for the assessee that in the present case, the assessee is primarily engaged in 'promotion of industrial growth in Karnataka'. It is not covered within any of the specific categories enlisted in section 2(15). The question therefore is whether the assessee's objective is covered within the phrase 'advancement of any other object of general public utility'?

28. The objectives of the assessee are explicit and cannot be circumvented. The assessee is a creation of law, It is not formed or set-up by any person(s) for any pecuniary benefit or commercial motive. The assessee owes its genesis to KIAD Act, a State Government legislation. The assessee's incorporation. Functioning, powers and scope are set out in the KIAD Act. Being a creation of a special law, compliance with the provisions therein is mandatory. The statute repeatedly emphasizes the need to carry on activities having regard to the objects of the Act. The object is promotion of Industries. It assists in implementation of policies of Government within the purview of KIAD Act. There is establishment of Infrastructure projects. Above all, it is under direct surveillance of State Government.

29. Industrialization is an initiation of social reform and economic development. It boasts the production and manufacturing segments. Employment would scale up; efficiencies stand enhanced and standardization becomes achievable. All these transformations translate into overall amelioration of the society and country as a whole. An

institution with such a far sighted and development oriented objective is certainly one which benefits the public at large. The assessee serves the cause of general public utility and is therefore covered within the gamut of "Charitable purpose" as defined by section 2(15) of the I.T. Act.

30. In the course of carrying on its activities, the benefit arising from such promotion may be shared by those engaged in the industrial sector. The benefit to these cannot deter the claim of the assessee to be a 'Charitable institution', in the words of the Apex Court in the case of CIT v Andhra Chamber of Commerce (1965) 55 1TR 722 (SC): "The principal objects of the assessee are to protect, trade, commerce and industries and to aid, stimulate and promote the development of trade, commerce and industries in India or any part thereof. By the achievement of these objects, it is not intended to serve merely the interests of the members of the assessee. Advancement or promotion of trade, commerce and industry leading to economic prosperity ensures the benefit of the entire community. That prosperity would be shared also by those: who engage in trade, commerce and industry but on that account the purpose is not rendered any the less an object of general public utility. It may be remembered that promotion and protection of trade, commerce and industry cannot be equated with promotion and protection of activities and interests merely of persons engaged in trade, commerce and industry."

31. It was submitted that the AO in his order has observed that the assessee has carried out the activities/rendered services to industrialists/entrepreneurs in lieu of which it collected/received consideration towards sale of industrial sites and fees for various services rendered thereof. These are not services rendered to specific industrialists/entrepreneurs. The objective is not 'service of individual industrial houses' but promotion of overall industrialization of Karnataka. An incidental benefit to some industrialists/entrepreneurs would not dilute the progressive and charitable objective of the assessee.

32. To summarize, the ld. counsel submitted that the assessee plays a vital role in supplementing the governmental efforts in boosting industrialization. The assessee is a creation of law constituted for the purpose of development of industries and exists for public good. Its control and management is vested with the State Government. The benefit arising from its activities may be shared by persons engaged in the industrial sector. This however does not detract from its charitable character. The object of the assessee is clear; the functions are ring fenced and powers are frame all with a view to achieve industrial development in Karnataka. Development of industries has been construed to be 'advancement of general public utility' by the Apex Court, Activities of the assessee are therefore to be regarded as covered within the operative provisions of section 2(15).

33. It was also submitted that assessee has continuously devoted itself to the promotion of industries in the State of Karnataka. It has not been formed and is not carrying on activities with a motive to distribute its surplus. There is no intention to make profits. The objects are to carry out Industrial and infrastructure promotion. The surplus, if any, arising from

the activities are solely utilized for the achievement of its objects and no portion is utilized for distribution of any income or profits. In substance, the assessee neither earns any profits nor is it involved in the activities of trade, commerce or business. The activities of assessee are therefore charitable in nature.

34. As already mentioned, assessee operates on a no profit or no loss basis. This is evident from their pricing mechanism. The assessee acquires agricultural land from the farmers by paying compensation to the farmers. Such compensation is determined by Deputy Commissioner of District. Such land would be developed into plots for the purposes of projects approved by State High level Clearance Committee (headed by Chief Minister). State Level Single Window Clearance Committee is headed by Chief Secretary. Govt. of Karnataka and District Level Single Window Clearance Committee is headed by the Deputy Commissioners of the Districts.

35. The assessee prepares a budget for compensation payable for land acquisition and development expenditure thereon. Total pricing of land would primarily include cost of land acquisition and total development cost and 12.75% interest for one year along with Establishment & Board Service Charges towards maintenance of the Board. The computation of total cost of acquisition and development is tabulated below:

| Computation of total cost of acquisition and development | |
|---|---|
| <i>(A)</i> | <i>Land compensation payable to owners</i> |
| <i>(B)</i> | <i>Compensation for cost of structures, wells etc on the land</i> |
| <i>(A+B)</i> | <i>Cost of land</i> |
| <i>(C)</i> | <i>Establishment charges at 11% on (A+B)</i> |
| <i>(D)</i> | <i>Interest at 12.75% p.a on (A+B)</i> |
| <i>(E)</i> | <i>Total cost of acquisition (A+B+C+D)</i> |
| <i>(F)</i> | <i>Development cost for formation of layout (road, drainage, water supply, parks etc)</i> |
| <i>(G)</i> | <i>Board service charges at 10% on (F)</i> |
| <i>(I)</i> | <i>Interest charged by the Board at 12.75% p.a on (F)</i> |
| <i>(J)</i> | <i>Total cost of development (F+G+I)</i> |
| <i>(K)</i> | <i>Total cost of acquisition and development [(E)+(J)]</i> |

36. Once the total cost is so computed, it is allocated to the allotable extent of the land (generally around 65 to 70% of land). Thereafter allotment of plots is carried on to the entrepreneurs for the State / District approved projects at the same price. There is no margin included. The objective is not to earn profits on allotment of such plot of land. The excess of income over expenditure or the surplus remaining in the financial statements of the Board primarily arises on account of bank interests. These are excess funds available with the Board which are housed with the banks to generate passive interest income. Thus, the core activity of industrialization of lands (the alleged business activity) does not fetch profits; the source of income which generates surplus is from bank

interests and thereby not generated on account of Boards normal course of activities.

37. In view of all the above, it was submitted by the Id. counsel for the assessee that the action of the AD affirmed by CIT(A) that the activities of the assessee are commercial in nature thereby attracting the proviso to section 2(15) is incorrect, contrary to facts, bad in law and liable to be quashed.

38. Without prejudice, the assessee submits that eleemosynary element is not essential element of charity. It is also not a necessary element in a charitable purpose that it should provide something for nothing or for less than it costs or for less than the ordinary price. The surplus generated, if it is held and applied for charitable purpose, the assessee has to be considered as existing for a charitable purpose. The decisions in *Krupanidhi Educational Trust v DIT(E)*, ITA No. 86/2012 dt. 14.9.2012 - Bangalore ITAT; *Loka Shikshana Trust v CIT* [1975] 101 ITR 234 (SC), *Cricket Association of Bengal v CIT* [1959] 37 ITR 277 (Cal), *CIT v. Breach Candy Swimming Bath Trust* (1955) 27 ITR 279 (Born), *The Trustees of the Tribune, In re* (1939) 7 hR 423 (PC) and para No, 19 Page No. 528 - Volume I of *The Law and Practice of Income tax* by Kanga, Palkhivala and Vyas was relied upon in support of the above principle. Difference between 'business activity' and 'activity with business principles'

39. There is a subtle difference between the phrase 'carrying on activities in the nature of business' and 'carrying on activities on business principles'. The former refers to activity itself assuming character of business and the latter refers to activity carried on for a different purpose but with the acumen of business world. The latter indicates the import of business kind efficiency in carrying out activities. It is an evidence of being organized and carrying on activities in a structured and efficient manner, 40. Mere adoption of 'business principles' does not transform a charitable institution into a business entity. The Apex Court has echoed similar view in the case of *CIT v Andhra Pradesh State Road Transport* (1986) 159 ITR 1 (SC) wherein the Court observed as under:

"No activity can be carried on efficiently, properly, adequately or economically unless it is carried on business principles. If an activity is carried on business principles, it would usually result in profit, but, as pointed out by this court in *Surat Art Silk Cloth Manufacturers Associations case* (1980) 120 ITR ('SC'), it is not possible so to carry on a charitable activity in such a way that the expenditure balances the income and there is no resultant profit, for, to achieve this, would not only be difficult of practical realisation but would reflect unsound principles of management." (emphasis supplied)

41 In the present case, the assessee has carried on its activities on business principles and sound principles of management. As a result, the assessee has been able to repeatedly generate surplus funds. This fact by itself does not render the assessee a 'non-charitable entity; but only is an execution of sound management principles by a charitable organisation. The assessee undertakes development of industries and infrastructure in the state of Karnataka. It is not carrying on business; but executing the

tasks assigned by the State Government under the KIAD legislation. There is no occasion for the office bearers to take the 'profit making' route as the funds and their deployment is under the surveillance of the State Government (through its office bearers/public servants). To conclude, the activities of the assessee do not constitute business.

42. The learned counsel for the Assessee referred to several judicial pronouncements. We will make a reference to those decisions at the appropriate place, to the extent it is necessary to dispose this appeal.

43. The learned DR placed strong reliance on the findings of the AO in the order of assessment and the order of the CIT(A).

44. We have given a very careful consideration to the rival submissions. The purpose for which the Assessee exists is for the 'advancement of any other object of general public utility'. The fact that the Assessee enjoyed registration u/s.12AA of the Act in the past is itself sufficient to come to this conclusion. The withdrawn of registration u/s.12AA of the Act was only consequent to the introduction of the proviso to Sec.2(15) of the Act by the Finance Act, 2008. Therefore the question that we need to be answered is as to whether the proviso to Sec.2(15) of the Act would be applicable to the case of the Assessee.

45. We shall now understand the approach to be adopted in coming to the conclusion as to whether the proviso to Sec.2(15) of the Act will be applicable to the Assessee in the light of the decision of the Hon'ble Delhi High Court in the case of India Trade Promotion Organization Vs. DGFT(Exemption) and others 371 ITR 333 (Delhi). The learned counsel for the Assessee has placed strong reliance on this decision to support his plea that the proviso to Sec.2(15) of the Act is not applicable to Assessee. The facts of the case before the Hon'ble Delhi High Court in the case of India Trade Promotion Organization (supra) was that the Assessee in that case enjoyed the benefit of exemption u/s.10(23C)(iv) of the Act. Sec.10(23C)(iv) provides any income received by any person on behalf of any other fund or institution established for charitable purposes which may be approved by the prescribed authority, having regard to the objects of the fund or institution and its importance throughout India or throughout any State or States, shall not form part of the total income under the Act. The prescribed authority withdrew the approval granted to the Assessee consequent to the insertion of the proviso to Sec.2(15) of the Act., on the ground that the Assessee was deriving rental income from letting out space for rent during trade fairs and exhibitions, was deriving income from sale of tickets and income from food and beverage outlets. The said withdrawal was challenged by the Assessee before the Hon'ble Delhi High Court. The Hon'ble Delhi High Court had to go into the question as to the scope of the proviso to Sec.2(15) of the Act, The Hon'ble Delhi High Court has laid down the following very important principles as to how the proviso to Sec.2(15) of the Act has to be interpreted-

(i) The proviso to Sec.2(15) of the Act introduced by virtue of the Finance Act, 2008 with effect from 01.04.2009 has two parts, The first part has reference to the carrying on of any activity in the nature of trade, commerce or business. The second part has reference to any activity of rendering any

service '—in relation to any trade, commerce or business. Both these parts are further subject to the condition that the activities so carried out are for a cess or fee or any other consideration, irrespective of the nature or use or application or retention of the income from such activities. In other words, if, by virtue of a cess' or fee' or any other consideration, income is generated by any of the two sets of activities referred to above, the nature of use of such income or application or retention of such income is irrelevant for the purposes of construing the activities as charitable or not.

(ii) if an activity in the nature of trade, commerce or business is carried on and it generates income, the fact that such income is applied for charitable purposes, would not make any difference and the activity would nonetheless not be regarded as being carried on for a charitable purpose. If a literal interpretation is to be given to the proviso, then it may be concluded that this fact would have no bearing on determining the nature of the activity carried on by the petitioner. But, in deciding whether any activity is in the nature of trade, commerce or business, it has to be examined whether there is an element of profit making or not. Similarly, while considering whether any activity is one of rendering any service in, relation to any trade, commerce or business, the element of profit making is also very important.

(iii) The meaning of the expression "charitable purposes" has to be examined in the context of "income", because, it is only when there is income the question of not including that income in the total income would arise. Therefore, merely because an institution, which otherwise is established for a charitable purpose, receives income would not make it any less a charitable institution. Whether that institution, which is established for charitable purposes, will get the exemption would have to be determined having regard to the objects of the institution and its importance throughout India or throughout any State or States.

(iv) Merely, because an institution derives income out of activities which may be commercial, that does, in any way, affect the nature of the Institution as a charitable institution if it otherwise qualifies for such a character.

(v) 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. 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. If the driving force is not the desire to earn profits but to do charity, the exception carved out in the first proviso to Section 2(15) of the said Act would not apply.

(vi) 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). 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, as pointed Out above.

(vii) Section 2(15) is only a definition clause. Section 2 begins with the words, —in this Act, unless the context otherwise requires. 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 said 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. (viii). The expression 'charitable purpose', as defined in Section 2(15) cannot be construed literally and in absolute terms. 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. (emphasis supplied)

46. It can be seen from the various provisions of the MAD Act which we have set out in the earlier part of the order that the dominant and prime objective of the Assessee is not profit making. Prior to the introduction of the proviso to Section 2(15) of the Act, there was no dispute that the Assessee was established for charitable purposes. We shall now take a look at the Income and Expenditure Account for the year ended 31.12.2009 of the Assessee. The income side of the Account shows that the main component of income of the Assessee is derived in the form of interest of Rs.13117 crores. Schedule "Pa to the Income and Expenditure Account shows the breakup of the interest receipt by the Assessee. The interest on Fixed deposits is Rs.120.90 Crores. The Earnest Money Deposit given by the allottees are parked by the Assessee in fixed deposit and those deposits has earned the aforesaid interest income. Therefore there can be no profit element in earning this interest income. Besides the above, the other components of interest are interest from Allottees, penal interest from Allottees, interest on staff loan, interest from SB and others, interest on seed money, dividend received and interest on income tax refund. The other component of income is gain on disposal of land, sale of application forms, recoveries of fines and penalties, interest, other receipts, rent, forfeiture of deposits, water supply charges. The income from sale of land is Rs.18.69 Crores. The expenditure incurred by the Assessee comprises of repairs and maintenance, administrative expenses, water and electricity charges, special and other charges, Depreciation. If the gain on disposal of

land of Rs.18.69 Crores which is the primarily object of the Assessee and expenditure in the form of administrative expenses of Rs.15.42 Crores and 10.61 Crores which are fixed expenses and necessary to carry on the primary object alone are considered than there would be loss. This by itself would demonstrate that the Assessee does not exist for profit.

47. The main aim and object for which the Assessee was established is to (a) Promote rapid and orderly development of industries in the state. (b) Assist in implementation of policies of Government within the purview of MAD Act. (c) Facilitate in establishing infrastructure projects. (d) Function on "No Profit - No Loss" basis, For the above purpose, the Assessee (a) Acquire land and form industrial areas in the state. (b) Provide basic infrastructure in the industrial areas. (c) Acquire land for Single Unit Complexes. (d) Acquire land for Government agencies for their schemes and infrastructure projects, The dominant and main object of the Assessee is charitable and not for making profits.

48. A look at the income stream of the Assessee clearly reveals that all the activities from which the Assessee derives income are an inherent part of the main object of the Assessee. It is clear from the facts of the case that profit making is not the driving force or objective of the assessee. Rather the purpose for which the Assessee was created is to regulate and develop drinking water and drainage facilities in the urban areas of the State of Karnataka and for matters connected therewith. This makes it clear that any income generated by the Assessee does not find its way into the pockets of any individuals or entities. It is to be utilized fully for the purposes of the objects of the petitioner.

49. Keeping in mind the above factual aspects and the provisions of the KIDA Act, and principle laid down in the aforesaid decision of the Honble Delhi High Court in the case of India Promotion Organization (supra), in our view, will clearly show that the Assessee does not driven primarily by desire or motive to earn profits but to do charity through advancement of an object of general public utility. The assessee is operating on no profit basis. This is substantiated by the actual income received on operations of the Assessee and the expenditure incurred set out in the earlier paragraphs of this order. The proviso to Sec2(15) of the Act is therefore not applicable to the case of the Assessee. We therefore hold that the Assessee is entitled to the benefits of Sec.11 of the Act. The AO has not disputed the conditions necessary for allowing exemption u/s.11 of the Act, except the applicability of proviso to Sec.2(15) of the Act. In view of our conclusions that the said proviso is not applicable to the case of the Assessee, we hold that the Assessee's income is not includible in-the total income and therefore the income returned by the Assessee is directed to be accepted."

10. We find from the submissions of assessee recorded by Ld.CIT(A) in impugned order that, facts for year under consideration as well as preceding and succeeding assessment

years are same and therefore respectively following the reasoning of this Tribunal in asst. year 2009-10, we are of the opinion that, provisions of section 2 (15) of the Act are not applicable in the case before us. We therefore hold that income of assessee will be eligible to claim exemption under section 11.

Accordingly Ground 2-3 stands allowed.

Ground 4-9:

11. Admittedly, surplus arises due to interest income and other income in the nature of penalty and other charges, and not from activity of acquisition of land and providing infrastructure facilities for industrial development. However, we note that Ld.AO has not verified whether, assessee satisfies provisions of section 11 so far as application of income is concerned, for availing exemption under section 11 of the Act. We accordingly, direct Ld.AO to verify the same and to consider claim in accordance with law.

Accordingly, these grounds are allowed for statistical purposes.

12. Ground No. 10 is consequential in nature and therefore do not require any adjudication.

13. Ground No. 11 is general in nature.

In the result appeal filed by assessee stands allowed as indicated hereinabove.

Revenue's appeal

14. Only issue raised by revenue, is in respect of depreciation allowed by Ld.CIT (A), on assets which has been considered as application of income in its entirety in earlier years.

At the outset, both sides submits that this issue stands squarely settled in favour of assessee by decision of *Hon'ble Supreme Court* in case of *CIT vs Rajasthan and Gujarat Charitable Foundation Poona* reported in (2018) 89 *Taxmann.com* 127.

15. *Hon'ble Supreme Court* noted that, amendment to section 11 (6) of the Act introduced by Finance Act No.2/2014 is prospective in nature, and will be effective from assessment year 2015-16 onwards. *Hon'ble Supreme Court* upheld the observations of *ITAT Mumbai*, which was confirmed by *Hon'ble Bombay High Court* in case of *DIT (E) vs Framjee Cawasjee Institute* reported in (1993) 109 *CTR* 463, wherein it was held that if amount has been spent on acquiring assets and has been treated as application of income in the year in which such assets were acquired does not mean that in subsequent years depreciation cannot be taken into account.

16. Respectfully following the same, we do not find any infirmity in the observations of *Ld.CIT(A)*, and the same is upheld.

Accordingly grounds raised by revenue stands dismissed.

In the result appeal filed by revenue stands dismissed.

Order pronounced in the open court on 3rd July, 2020

Sd/-
(B. R. BASKARAN)
Accountant Member
Bangalore,
Dated, the 3rd July, 2020.

Sd/-
(BEENA PILLAI)
Judicial Member

/Vms/

Copy to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR, ITAT, Bangalore
6. Guard file

By order

Assistant Registrar, ITAT, Bangalore

| | | Date | Initial | |
|-----|--|-------------|----------------|----------|
| 1. | Draft dictated on | On Dragon | | Sr.PS |
| 2. | Draft placed before author | -06-2020 | | Sr.PS |
| 3. | Draft proposed & placed before the second member | -06-2020 | | JM/AM |
| 4. | Draft discussed/approved by Second Member. | -06-2020 | | JM/AM |
| 5. | Approved Draft comes to the Sr.PS/PS | -07-2020 | | Sr.PS/PS |
| 6. | Kept for pronouncement on | -07-2020 | | Sr.PS |
| 7. | Date of uploading the order on Website | -07-2020 | | Sr.PS |
| 8. | If not uploaded, furnish the reason | -- | | Sr.PS |
| 9. | File sent to the Bench Clerk | -07-2020 | | Sr.PS |
| 10. | Date on which file goes to the AR | | | |
| 11. | Date on which file goes to the Head Clerk. | | | |
| 12. | Date of dispatch of Order. | | | |
| 13. | Draft dictation sheets are attached | No | | Sr.PS |