

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 14.07.2016

CORAM:

THE HONOURABLE MR.JUSTICE S.MANIKUMAR
and
THE HONOURABLE MR.JUSTICE D.KRISHNA KUMAR

T.C.A.Nos.451 and 452 of 2016
C.M.P.No.9327 of 2016

Commissioner of Income-Tax,
Chennai.

.. Appellant in both TCAs.

versus

Sri Magunta Raghava Reddy Charitable Trust,
New No.17/1, Old No.9,
Bazullah Road, T.Nagar,
Chennai 600 017.

.. Respondent in both TCAs.

Prayer: Tax Case Appeals filed under Section 260A of the Income Tax Act, 1961, against the orders made in I.T.A.Nos.2251 and 2252/Mds/2014, dated 29.09.2015.

For Appellant

:Mr.J.Narayanasamy,
Senior Standing Counsel for Income-Tax

COMMON ORDER

(Order of the Court was made by **S.MANIKUMAR, J.**)

Tax Case Appeals arise out of a common order made in I.T.A.Nos.2251 and 2252/Mds/2014, dated 29.09.2015, for the assessment years 2010-11 and 2011-12 respectively.

2. Short facts leading to the appeals are that the assessee, a trust, is running educational institutions, in the name of M/s.M.S.R.Junior Colleges at Ammanabrolu, Chinnaganjam, C.S.Puram, Gudlur, J.Panguluru, Kandukuru, Kanigiri, Kavali, Kurichedu, Lingasamudram, Ravinuthala, Santhanutana Padu and Valaparla and MSR degree colleges at Kavali, Kondepi and Vinjamuru, registered under Section 12A(a) of the Income-Tax Act, filed return of income for the assessment year 2010-11 on 21.09.2010, admitting Nil income.

3. Return for the year 2010-11, was processed under Section 143(1) of the Income-Tax Act, on 20.09.2011. On the same day, the case was taken up for scrutiny and notice under Section 143(2) was issued. In response to the notice, representative of the assessee appeared and filed the details called for, from time to time. On verification of the return of the income and other details, for

the assessment year 2010-11, the assessing officer noticed that the assessee had disclosed an amount of Rs.1,62,76,519/-, as profit on sale of land. Vide order, dated 04.09.2012, the assessee was required to submit computation, as per the provisions of Section 11(1A) of the Act. In response to the above, the assessee, vide letter, dated 28.01.2013, has stated as under:

“2... in pursuance of its objectives, the assessee purchased 71.89 Acres of land in survey No.601,607,611 and 598 in Nellore Bit-II, Nellore during the years 1986-87 for starting medical college and old age homes) However, enormous delay crept in obtaining necessary permission for starting these institutions. In the meantime, attempts at encroachment of the land began being made by various elements. Therefore, the Assessing Officer decided to abandon the idea of medical college and old age home and decided to confine to running junior and egree colleges, drinking water and mortuary vans in the district of Nellore and Prakasam, in A.P. Consequently, when the above referred land was proposed to be disposed off, there were no buyers in view of the huge stretch of land. Therefore the assessee obtained permission from town planning authorities, converted the land into small plots and started selling the land in the layout from the F.Y 1994-95 and utilized the same for the charitable activities of the Trust. It is therefore submitted that (there were no business motive when the assessee acquired the land and sale of land in the form of plots is only to make the land better saleable and also to realize better

price. It may not be out of context to submit that this aspect had been thoroughly scrutinized in the assessment of earlier years and the assessee passed the test convincingly.

3. Section 11A of the income tax Act refers to Capital Asset being property held under trust wholly for charitable or religious purposes. As explained in the para 2 above, the land originally purchased for setting up medical colleges and old age homes ceased to be a property held under trust wholly for charitable purposes since the assessee abandoned the plan of setting up medical college and old age homes. Since then the assessee endeavored to dispose of the property and utilize the proceeds in the charitable activities of the assessee and true to the plan has been applying the sale proceeds from sale of plots to the charitable activities every year.

It is therefore submitted that “sale of plots of land” was not out of the property held under trust wholly for charitable activities nor was it treated as capital asset by the assessee. Kind attention is invited to the Balance Sheet wherein the “Land for Sale” has been shown separately and not as part of Fixed Assets.

For the reasons it is submitted that Section 11A is not applicable to the facts of the assessee’s case.”

4. After considering the above explanation, for the assessment year 2010-11, the Assessing Officer found that the assessee has bought 71.89 acres of

land and at the time of disposing of the said land, obtained necessary permission from the town planning authority to divide the land into small plots and sold the same, by entering into sale agreements, obtained sale consideration, registered the documents, etc. Though the assessee has purchased the said land at Rs.49/- per Sq. Yard., sold the same at Rs.5,500/- per Sq.Yard, by making bumper profits, during the previous year 2009-10. The above activity of the trust carrying on business activity, was with a profit motive. The above activity of the assessee is an organized activity of carrying on business with profit motive. The assessee has been engaging in this activity from the year 2004-05, with profit motive. Thus, the activity of the assessee is only a commercial activity, not falling under any of the charitable activities, as per the objects of the Trust. Further, the said activity does not fall under any of the limbs defined in Section 2(15) of the act, viz., relief to poor, education, medical relief and not even under the category, “any other object of general public utility”. So saying, for the assessment year 2010-11, the Assessing Officer passed an order on 31.03.2013 and brought to tax, a sum of Rs.1,62,76,519/-, under the head, “income from business”.

5. For the assessment year 2011-12, the assessee filed the return of income on 12.09.2012, admitting Nil income. Return was processed under Section 143(1) of the Income-Tax Act. The case was taken up for scrutiny and notice under Section 143(2) was issued on 03.08.2012. In response to the notice issued, representative of the assessee appeared and furnished the details, called for. On verification of the return of the income and other details, the assessing officer noticed that a sum of 44,23,266/- was earned as profit on sale of land. On the above, the assessee, vide letter, dated 09.01.2014, has stated as under:

“4. During the relevant year the assessee sold two plots of land for a consideration of Rs. 44.60 lakhs. Copies of the sale deeds 5/01/2010 and 15/12/2010 are enclosed. A statement showing computation of Capital gains is enclosed. As regards the corresponding cost of land it is submitted that the assessee had purchased 71.89 Acres of land in Nellore during the years 1986-87 for setting up a medical college and old age homes. When these objectives could not be materialized and faced with a threat of encroachments, the assessee obtained permission from the town planning authorities and commenced selling the land in small plots since then...”

6. Referring to Section 2(13) of the Income-Tax Act, which defined the term, “business” and citing the very same reasons, for bringing a sum of Rs.1,62,76,519/-, under the head, “business income”, for the assessment year 2010-11, vide order, dated 24.02.2014, the Assessing Officer brought a sum of Rs.44,23,266/-, under the head, “income from business” for the assessment year 2011-12.

7. Being aggrieved by the orders of assessment, dated 31.03.2013 (for the assessment year 2010-11) and 24.02.2014 (for the assessment year 2011-12) respectively, the assessee filed appeals in I.T.A.No.169 and 1304/2013-14, before the Commissioner of Income-Tax (Appeals)-VII, Chennai. Before the appellate authority, the assessee contended that they had purchased 71.89 acres of land, during the year 1986-87, for starting a medical college and old age homes. There was a delay in obtaining necessary permission for starting the institutions. In the mean time, attempts were made to encroach upon the land. Therefore, for the reasons, stated supra, the assessee decided to abandon the idea of a starting medical college and old age homes, and to sell the land. As there were no takers, in view of the huge stretch of land, the assessee decided to convert the land into plots and accordingly, obtained permission from the

Town Planning authorities. The assessee started selling the plots from the assessment year 1995-96 onwards and utilised the sale proceeds for charitable activities of the trust for all these years, including the assessment years 2010-11 and 2011-12. After perusing the trust deed, dated 25.06.1986, the Commissioner of Income-Tax (Appeals), the appellate authority, has recorded the objects of the trust, as hereunder:

“(a)

(b) For the above purpose, to construct, establish and maintain schools, colleges, technical colleges, technical institutions, medical colleges and other educational institution.....

(c) To establish and maintain old age homes for the aged, infirm, disabled and destitute persons;”

8. Going through the details of income and expenditure incurred for the assessment years 2010-11 and 2011-12, the Commissioner of Income-Tax (Appeals), appellate authority, recorded as hereunder:

“Perusal of the income and expenditure a/c for AY 2010-11 reveals that a sum of Rs.1,62,76,519/- was credited to income account as profit on sale of land. Similarly, a sum of Rs.44,23,266/- was credited to income account as profit on sale of land for AY 2011-12. Perusal of expenditure a/c for both the assessment years

also reveals that there is no diversion of funds for non-charitable activity. Similar is the case of earlier assessment years also. Therefore, I am of the considered view that the assessee's activities are covered by one of the main limbs of the definition of charitable purpose as defined under Section 2(15) of the Act, viz., education and no other activities are being carried on by the assessee.”

9. On the objections of the assessing officer that the land was laid out and sold as plots and profit was earned in a systematic manner over a period of time and that the activity constituted business activity, the appellate authority has referred to a Circular No.11 of 2008, dated 19.12.2008. Taking note of the observations of the assessing officer, recognising the character of the trust (charitable), the appellate authority held as follows:

“If the predominant object is to carry out a charitable purpose and not to earn profit, the purpose would not lose its charitable character merely because some profit arises from the activity. In this case, the lands in question are no longer required by the trust and the trust was forced to sell the land by forming plots because there is no taker to purchase the land en-bloc. Hence, the trust had been selling them over a period of years and the profit earned out of it had been utilized towards the objects of the trust. The AO did not record any finding that the profits are diverted for non-charitable purpose/activity. As long as the trust

carries out charitable purpose, the exemption cannot be denied to the trust. Therefore, I am of the considered view that the decision of the assessing officer cannot be countenanced.”

10. The Commissioner of Income-Tax (Appeals), vide common order, dated 13.05.2014 in I.T.A.Nos.169 and 1304/13-14, held that,

“...the assessee is not liable to tax on the profit arising out of sale of land as the proceeds are utilized for charitable activities of the trust. The AO was under the wrong impression that the sale of plot of land is a business activity overlooking the Circular No.11/2008 of the Act.”

11. Not satisfied with the orders of the Commissioner of Income-Tax (Appeals), dated 13.05.2014, the Income Tax Officer (OSD) (Exemptions-IV), Chennai, has filed appeals in I.T.A.Nos.2251 and 2252/Mds/2014, before the Income Tax Appellate Tribunal, “B” Bench, Chennai. Before the Tribunal, contentions have been made that the promotion of residential layout and sale of lands, by plotting into plots and thereby deriving gain from the real estate transactions, cannot be construed as a charitable activity and therefore, any income derived out of the same, should be taxed in the hands of the assessee trust, under the head “income from business”. After hearing both the parties,

vide common order, dated 29.09.2015, in I.T.A.Nos.2251 and 2252/Mds./2014, the Tribunal ordered as hereunder:

“We have heard both the parties and carefully perused the materials available on record. It is apparent from the facts of the case that the assessee had sold its unutilized land for pursuing its main objects viz., education. In order to secure maximum revenue, the assessee has indulged in commercial transactions. It must be kept in mind that such transactions were made only for the purpose of extending its charitable activities with more resources. Retaining land which is not required for the purpose of the assessee’s trust will not help the assessee to comply with its objects in a constructive manner. Therefore, prudently the assessee trust has realized maximum revenue from the sale of the excess land, and utilized the same for complying with the main objects of the assessee trust viz., Education. Hence as held by the Ld. CIT (A), the transaction of the sale of the land by the assessee in a wise manner by applying commercial prudence is only an activity which is incidental to the main objects of the assessee. Therefore, the view of the Ld. CIT (A) that the proviso of Section-2(15) will not be applicable to the facts of the assessee’s case is appropriate and justified considering the facts and circumstances of the case. Therefore, we hereby confirm the order of the Ld. CIT (A). In the result, the appeals of the Revenue are dismissed.”

12. Being aggrieved by the common order of the Commissioner of Income-Tax (Appeals), instant Tax Case (Appeal), has been filed, on the following substantial questions of law,

“(1) Whether on the facts and in the circumstances of the case, the Tribunal was right in holding that profit from the sale of the land owned by the assessee cannot be treated as business income and the same is eligible for exemption under Section 11 r/w. Section 2(15) even though the Tribunal had admitted the assessee's commercial intention to venture into real estate business.

(2) Whether on the facts and in the circumstances of the case, the Tribunal was right in holding that profit from the sale of the land owned by the assessee cannot be treated as business income and the same is eligible for exemption under Section 11 on the grounds that activity of sale of land is incidental to the educational objects of the trust and the said profit was applied for the objects of the trust.”

13. Praying for an answer, in favour of the Revenue, on the above substantial questions of law, Mr.J.Narayanasamy, learned Senior Standing Counsel for the Income-Tax Department submitted that the Tribunal has erred in holding that the profit from the sale of land owned by the assessee cannot be

treated as business income and that the same is eligible for exemption, on the grounds that activity of sale of land is incidental to the objects of the trust and the said profit was applied for the objects of the trust. He further submitted that the assessee had originally treated the land as fixed asset and later on, converted the land, as stock in trade, in classifying the land in the balance sheet as “land for sale” in the year 2001-03 itself, which reveals the assessee’s intention was to do business of real estate. He also submitted that the assessee had booked the profit on the sale of the land from 2004-05 onwards, continuously by venturing into business activity and converted the land into plots, by applying to the town planning authority and thereafter, sold the lands by way of separate sale deeds, in frequent intervals, over a period of years. He further submitted that once the assessee had ventured into a business activity, profits from the sale of plots cannot be treated exempted, by holding that the said business activity was incidental to the objects of the trust. He also submitted that the object of education, has nothing to do with the profit motive of real estate business activity and therefore, the profit derived from the sale has to be taxed.

14. Placing reliance on a decision of a Karnataka High Court in **Commissioner of Income-Tax v. R.Ramaiah** reported in (1984) 146 ITR 39,

Mr.J.Narayanasamy, learned Senior Standing Counsel appearing for the appellant further submitted that purchase of lands and sale of the same, by converting into plots, is in the nature of business. He further submitted that the continuous activity of the assessee, in dividing the land, into plots and selling the same and thereby, earning profits, squarely falls under the definition of business. According to him, Circular No.11 of 2008, dated 19.12.2008, is not applicable to the case of the assessee. He further submitted that the Commissioner of Income-Tax (Appeals), Chennai, and the Income-Tax Appellate Tribunal, “B” Bench, Chennai, have failed to consider the abovesaid aspects, in proper perspective and therefore, prayed that the substantial questions of law raised, require to be answered in the affirmative, in favour of the Revenue.

15. Heard the learned counsel appearing for the parties and perused the materials available on record.

16. Before amendment by Finance Act, 2008, Section 2(15) of the Income-Tax Act, was as under:

“2(15) “Charitable purpose” includes relief of the poor,

education, medical relief, and the advancement of any other object of general public utility.”

By Finance Act, 2008, with effect from 1.4.2009, the following proviso has been added:-

“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? Second proviso inserted to Section 2(15) by Finance Act, Section 2(15) by Finance Act, 2010 with retrospective effect from 1.4.2009, reads as under:-

Provided further that the first proviso shall not apply if the aggregate value of the receipts from the activities referred to therein is ten lacs or less in the previous year Rupees Ten lacs mentioned in the second proviso stands enhanced to Rupees twenty five lacs by Finance Act, 2011 with effect from 1.4.2012.

Section 2(15) of the Act has also undergone amendments and the same is extracted hereunder:

“2. In this Act, unless the context otherwise requires,--

(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 receipts from the activities referred to therein is twenty-five lakh rupees or less in the previous year; Period prior to the amendment vide Finance Act, 2008 w.e.f 1.4.2009.”

With further amendments, now Section 2(15) of the Income-Tax Act, is as follows:

“(15) "charitable purpose" includes relief of the poor, education, yoga, 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, unless—

(i) such activity is undertaken in the course of actual carrying out of such advancement of any other object of general public utility; and

(ii) the aggregate receipts from such activity or activities during the previous year, do not exceed twenty per cent of the total receipts, of the trust or institution undertaking such activity or activities, of that previous year;”

17. Circular No.11/2008, dated 19.12.2008, issued by the Central Board of Direct Taxes, considered by the Commissioner of Income-Tax (Appeals) as well as by the Income-Tax Appellate Tribunal, is extracted hereunder:

“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.

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 application, 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 disadvantaged 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(23C) 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. 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."

18. The word "business" is a broader term and it encompasses trade, commerce and other activities. Section 2(13) of the Income-tax Act defines the term "business" as under :

"2(13) 'business' includes any trade, commerce or manufacture or any adventure or concern in the nature of trade, commerce or manufacture."

19. The word "business" in Section 2(13) defines business to include any

trade, commerce or manufacture or any adventure or concern in the nature of trade, commerce or manufacture. Thus, the legislative intent is to make the definition, wider to cover the above activities and that the word "inclusive" has been used.

20. In Black's Law Dictionary, Sixth Edition, the word "business" has been defined as under:

"Employment, occupation, profession or commercial activity engaged in for gain or livelihood."

21. Though the department has not questioned the status of the assessee, it is worthwhile to consider that in **Additional CIT v. Surat Art Silk Cloth Manufactures Association** reported in (1980) 121 ITR 1(SC), the Hon'ble Supreme held that the primary or dominant purpose of the trust or institution has to be examined to determine whether the said institution/trust was involved in carrying on any activity for profit. If the primary/dominant purpose or object of the trust or institution was to carry out object of general public utility and not any activity for profit, then the same would satisfy the requirements of Section 2(15) of the Act. Money earned from business held under trust or otherwise, to feed the charity would not disentitle or negate the

claim of engagement in charitable purpose, defined under Section 2(15) of the Act. The Hon'ble Apex Court further held that,

"The test which has, therefore, now to be applied is whether the predominant object of the activity involved in carrying out the object of general public utility is to subserve the charitable purpose or to earn profit. Where profit-making is the predominant object of the activity, the purpose, though an object of general public utility would cease to be a charitable purpose. But where the predominant object of the activity is to carry out the charitable purpose and not to earn profit, it would not lose its character of a charitable purpose merely because some profit arises from the activity. The exclusionary clause does not require that the activity must be carried on in such a manner that it does not result in any profit. It would indeed be difficult for persons in charge of a trust or institution to so carry on the activity that the expenditure balances the income and there is no resulting profit. That would not only be difficult of practical realization but would also reflect unsound principle of management."

22. Though the above reported case deals with a case of claiming exemption under Section 11(1) of the Income-Tax Act, of a trust, formed with an object of general utility, the dictum laid by the Hon'ble Apex Court that,

“Where the predominant object of the activity is to carry out the charitable purpose and not to earn profit, it would not lose its character of a charitable purpose merely because some profit arises from the activity.”, cannot be lost sight of.

23. In **Institute of Chartered Accountants of India & Anr. Vs. Director General of Income Tax (Exemptions) Delhi & Ors.**, reported in [2012] 347 ITR 99 (Del.), the words, “trade, commerce and business” have been explained as hereunder:

“Trade, as per the Webster's New Twentieth Century Dictionary (2nd edition), means, amongst others, "a means of earning one's living, occupation or work. In Black's Law Dictionary, "trade" means a business which a person has learnt or he carries on for procuring subsistence or profit ; occupation or employment, etc. The meaning of "commerce" as given by the Concise Oxford Dictionary is "exchange of merchandise, specially on large scale". In ordinary parlance, trade, and commerce carry with them the idea of purchase and sale with a view to make profit. If a person buys goods with a view to sell them for profit, it is an ordinary case of trade. If the transactions are on a large scale it is called commerce. Nobody can define the volume, which would convert a trade into commerce. For the purpose of the first proviso to Section

2(15), trade is sufficient, therefore, this aspect is not required to be examined in detail.”

24. In **Commissioner of Income-Tax v. R.Ramaiah** reported in (1984) 146 ITR 39, relied on by the learned counsel for the Department, the assessee therein, purchased agricultural lands at the outskirts of the city. The assessee therein cultivated the lands for some years. But later on, the assessee formed a layout and started selling the site, as building sites. Question therein was, whether the assessee therein, did any business in purchasing and disposing of the lands by forming house sites. After considering the definition of "Business", under Section 2(13) of the Income-Tax Act, to include any trade, commerce or manufacture or any adventure in the nature of trade, commerce or manufacture and decisions in **G.Venkataswami Naidu & Co., v. CIT** reported in [1959] 35 ITR 594, **Raja J. Rameshwar Rao v. CIT** reported in [1961] 42 ITR 179 and **Janki Ram Bhadur Ram v. CIT** reported in [1965] 57 ITR 21, the Andhra Pradesh High Court held as follows:

“12. Bearing in mind these principles we may now turn to the facts before us. The assessee in each case purchased the agricultural land lying at the outskirts of Bangalore City. They no doubt used the lands for agricultural purpose for some years. But

later, almost simultaneously, they converted the lands after paying conversion fees. They did not use the converted lands for their own purposes. They formed layouts for building sites. They divided the lands into small plots, making it more attractive and marketable. They, in other words, developed the lands and sold them as house sites. These activities clearly fall within the ratio of the decision of the Supreme Court in Rameshwar Rao's case [1961] 42 ITR 179.

13. The assessees did not sell any land in the condition in which they bought it. They made convenient building sites and sold the same. They did not even dispose of all the sites in one year. They went on selling the sites year after year realising more and more profits. The fact that all the assessees started converting their lands into building sites almost simultaneously in 1967 itself is an indication of their intention to trade in the lands as a venture. They made it commercially more attractive by converting and dividing into plots. The inevitable inference is that they had no intention to hold the lands as an investment. They dealt with the lands as their stock-in-trade. We are, therefore, unable to uphold the view taken by the Tribunal.”

25. In **R.Ramaiah's** case (cited supra), the intention of the assessee was clear that he wanted to make profits, by selling the land. Activity of the assessee therein was purely commercial. Whereas, in the case on hand, the objects of the assessee-trust are charitable and they are as follows:

“(i) The principle object of the Assessee trust is to provide Medical relief for the needy, running of educational institution, supply of drinking water and other charitable activities. The assessee has been running educational institution in the backward areas of Prakasam and Nellore District of Andhra Pradesh in the form of Junior college in 14 places and degree colleges in 3 places in the name and style of M/s.MSR Junior Colleges.

(ii) In pursuance of its objects, the assessee had purchased 71.89 acres of land in the town of Nellore during the A.Y.1986-87 for establish medical college and old age homes. However assessee had to abandon the aforesaid since there was enormous delay in obtaining permission. The assessee therefore confined itself to activity of running colleges, providing drinking water to rural areas and mortuary vans.”

26. In **R.Ramaiah's** case (cited supra), relied on by the Revenue, the intention of the assessee therein, who purchased the land for agricultural purpose, was to form a layout and sell the plots. In the instant case, the assessee is running educational institutions, engaged in charitable purpose and granted permission under Section 12A(a) of the Income-Tax Act.

27. The assessee has purchased the lands to an extent of 71.89 Acres,

in the year 1986-87, for the purpose of setting up a medical college and old age home. According to the assessee, permission could not be obtained from the competent authorities and thus, the lands purchased for the abovesaid purposes, in the year 1986-87, which fell within the ambit of Section 2(15) of the Income-Tax Act, could not be utilised and thus, they were constrained to sell the same.

28. Merely because the lands were sold from 1994 onwards, which fetched a higher value, it cannot be said that it was only for profit motive. Bumper profit, as held by the Assessing Officer, depends upon the value of the land, sold in the year 2009-10. Though the assessee has started selling the bulk land into plots from 1994-95 onwards, it is not the case of the revenue that there was no bona fide on the part of the assessee, as to why, the assessee was constrained to sell the same.

29. Market value of the land purchased in the year 1986-87, cannot be expected to be static. Naturally, when it is sold after many years, it would fetch a higher value. Law also does not prohibit an assessee to sell the lands, less than the market value. Merely because, lands are sold at a higher rate,

after a considerable period of time, that alone cannot be the sole criteria to contend that the activity of the assessee was business activity, not incidental to the principal activity of the trust, which is, otherwise charitable in nature.

30. As stated supra, it was a large extent of land, measuring 71.89 Acres. As there were no takers to purchase the large extent of land en-bloc, there was a necessity to plot out the lands, to smaller extent and thus, the assessee has sold the same. When there is no prohibition in the Income-Tax Act, 1961, restraining unutilized lands to be sold in smaller extent, such activity of the assessee, cannot be construed as predominant business activity of the assessee, engaged continuously, with the sole object of making profits and that therefore, the sale proceeds should be brought under the head, “business income”. Case of the assessee that, sale of land, even before the assessment years 2010-11 and 2011-12 respectively, has been thoroughly scrutinized in the earlier years, and that the assessee had passed the test, convincingly, has not been refuted by the revenue. The assessee is not bound to retain the lands, unutilised forever, when the object for purchasing such lands, could not be achieved.

31. Added further, material on record further discloses that the sale proceeds of the lands were utilised only for charitable purposes and not diverted. Even going by the subsequent conduct of the assessee in utilising the profits earned, only for charitable purposes, it is evident that the intention of the assessee, is not to engage continuously, in business or trade or commerce, as the case may be. When the business activity is incidental to attain the objectives of the trust or institution, as the case may be, and if separate books of accounts are maintained, in respect of such business, then the assessee is entitled to exemption under Section 11 r/w. Section 2(15) of the Act. When the value of the land is enhanced by passage of time, and sold subsequently, it cannot be simply held that such sale was only for profit motive, dehors the predominant objectives of the trust or institution, as the case may be.

32. On the contention of Mr.J.Narayanasamy, learned Standing Counsel for the appellant that Circular No.11 of 2008, dated 09.12.2008, is not applicable to the case of the assessee, firstly, the said Circular clearly excludes the first three limbs of Section 2(15) of the Act. At the risk of repetition, we extract Paragraph 2 of the Circular No.11 of 2008, dated 19.12.2008,

“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 disadvantaged 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(23C) 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. 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.”

33. There is a clear exclusion of the words, (i) Relief of the poor, (ii) Education, and (iii) Medical relief, in Circular No.11 of 2008 and it makes it abundantly clear that the newly inserted proviso to Section 2(15) will apply only to the 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 alone will not be eligible for exemption under Section 11 or under Section 10(23C) of the Act, if they carry on commercial activities. Circular No.11 of 2008 also states that 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.

34. Contention of Mr.J.Narayanasamy, learned Senior Standing Counsel for the Income-Tax Department that Circular No.11 of 2008, is not applicable to the case of the assessee, cannot be countenanced, for the reason that it was not the stand of the revenue, at any point of time, before the appellate authority or the Tribunal, as the case may be. Whereas, the only contention of

the revenue was that the assessee continuously engaged in the business activity, and that the profit earned should be treated as business income.

35. A close scrutiny of the Circular No.11 of 2008, makes it manifestly clear that if the assessee incidentally carries on a commercial activity, it would fall within the ambit of the Circular No.11 of 2008. Reading of the Circular also makes it clear that the Central Board of District Taxes has clearly manifested that industries and trade associations, engaged in activities, with an object, advancement of any other object of general public utility, should not misuse the exemption facilities, under Section 12A of the Income-Tax Act and claim entitlement for exemption under Section 11 or Section 10(23C) of the Income-Tax Act, as the case may be. On the above aspect, we have already extracted the orders of the appellate authority and the appellate Tribunal.

36. What is the predominant intent of the assessee? Whether to gain profit by sale and utilise the sale proceeds, for any other purpose or engage in continuous activity of business or trade or commerce, as the case may be, and to divert the gain, for any other purpose or to spend the same for charitable purpose? Findings recorded and extracted supra that the amount is utilised for

charitable purpose, is undisputed. Activities for a span of considerable period, may reflect business or commercial activity, but the question to be decided, is whether, it is incidental to carry on the main purpose, “charitable”, which includes, (i) Relief of the poor, (ii) Education, (iii) Medical relief.

37. What emerges from the reading of the provisions and the Circular is that a trust or institution, whose purpose is advancement of any other object of general public utility, and recognised as charitable, under the fourth limb of Section 2(15) of the Income-Tax Act, and predominantly engages in activities in the nature of trade, commerce or business, should not be permitted to escape from taxability, with the mask, “charitable”. In the case on hand, the glaring omission on the part of the revenue is to consider, as to whether, sale of lands was necessitated? Whether it was incidental towards attainment of the objectives of the trust?, and more particularly, when the income was wholly utilised only for achieving the objectives of charitable purpose of the trust. Therefore, mere sale of an immovable property of the trust alone, cannot be the sole factor, to arrive at a conclusion that the income earned should be brought under the head, “business income”. In the case of trust or institution, whose predominant activity is not business, incidental activity of sales, carried

out, in furtherance of and to achieve the main objectives of the trust or institution, should not be construed as business activity, solely with an intention to earn profit, and consequently, to bring the income, under the head, business income.

38. Going through the material on record and in the light of the discussion, we are unable to accept the contention of the Revenue that the substantial questions of law, raised by the revenue, deserve to be answered, affirmatively, in favour of the revenue. Both on facts and law, the revenue has failed to substantiate the contentions raised in the instant appeals.

39. In the light of the above discussions, the substantial questions of law, raised by the Revenue, are answered against them. In the results, the Tax Case Appeals are dismissed.

(S.M.K., J.) (D.K.K., J.)
14.07.2016

Index: Yes

Internet: Yes

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S.MANIKUMAR, J.
AND
D.KRISHNAKUMAR, J.

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To

The Income Tax Appellate Tribunal,
“B” Bench, Chennai.

T.C.A.Nos.451 and 452 of 2016

14.07.2016