

**आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ 'आई', मुंबई ।**

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

BEFORE SHRI R.C.SHARMA, AM

&

SHRI MAHAVIR SINGH, JM

आयकर अपील सं./ITA No.4076/Mum/2013

(निर्धारण वर्ष / Assessment Year :2009-2010)

|                                                                            |     |                                                              |
|----------------------------------------------------------------------------|-----|--------------------------------------------------------------|
| The Indian Merchants Chambers,<br>IMC Building, IMC Marg,<br>Mumbai-400020 | Vs. | DDIT(Exemption)-II(1),<br>Piramal Chambers,<br>Parel, Mumbai |
| स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : <b>AAATI 00047 H</b>              |     |                                                              |
| (अपीलार्थी /Appellant)                                                     | ..  | (प्रत्यर्थी / Respondent)                                    |

निर्धारिती की ओर से /Assessee by : Shri Arvind Sonde

राजस्व की ओर से /Revenue by : Shri V.S.Jadhav

सुनवाई की तारीख / **Date of Hearing** : **31/03/2016**

घोषणा की तारीख/**Date of Pronouncement** **29/ 06/2016**

**आदेश / O R D E R**

**PER R.C.SHARMA (A.M):**

This is an appeal filed by the assessee against the order of CIT(A)-Mumbai, for the assessment year 2009-2010.

2. In this appeal, the assessee is basically aggrieved for decline of exemption u/s.11 on the plea that proviso to section 2(15) was applicable to the assessee which was introduced w.e.f. assessment year 2009-2010.

3. Rival contentions have been heard and record perused. Facts in brief are that the assessee is registered as a company u/s.25 of the Companies Act, 1956. The main objects of the assessee trust *inter alia* are to promote, advance and protect trade, commerce and industry in India. The AO held that the assessee was not imparting education in pursuance of its objects. He held that the activity of organizing seminars,

training courses and holding commercial examinations do not fall within the definition of education. The assessee was running certain seminars and training programmes on account of which it collected Rs.31401915/- and conducted examinations for which it collected fees of Rs1224751/-. These two activities were classified as activities to promote education. The AO relying on the Hon. Supreme Court decision in the case of Loka Shikshana Trust 101 ITR 234 and Bihar Institute of Mining 208 ITR 104 Patna, Saurashtra Education Foundation Vs. CIT 273 ITR 139 (Guj), Gujarat State Co. op. Union Vs. CIT 195 ITR 279 (Guj) held that the activity of holding commerce classes, arranging seminars and lectures and the activity of running of private commercial courses and consequent conducting of examinations would not come under the head education. He held that the assessee's activities would fall under the sixth category of charitable purpose that is the advancement of any other object 'of general public utility .. He further held that in view of amendment to section 2(15) by insertion of proviso w.e.f. 1.4.2009 for AY:2009-10 onwards the assessee would not be entitled to exemption as it is conducting activities in the nature of business earning huge profits in a systematic and organized manner. He also held that earning such huge profit in a systematic and organized manner would not make it an entity existing for charitable purpose.

4. In view of the above discussion, he declined assessee's claim of exemption by observing that in view of amendment to Section 2(15) by insertion of proviso w.e.f.1-4-2009, assessee would not be entitled to

exemption as it is conducting activities in the nature of business earning huge profits. By the impugned order the CIT(A) confirmed the action of AO, against which assessee is in further appeal before us.

5. It was contended by Id. AR that none of the activities of the assessee was in the nature of business trade or profession. He placed on record decision of coordinate bench in the case of Indian Chamber of Commerce, ITA No.1491/Kol/2012 and ITA No.1284/Kol/2012, order dated 2-12-2014, wherein amendment brought in section 2(15) has been elaborately discussed and it was held that assessee being engaged in main object of the institution was “charitable” in nature then the activities carried out towards achievement of the said object being incidental or ancillary to the main activity, even if carried out for profit, would not mitigate or change the “charitable” in nature. Reliance was placed on the decision of Hon’ble Supreme Court in the case of Andhra Chamber of Commerce (1965) 55 ITR 722 (SC), wherein principle was laid down to the effect that if the primary purpose be advancement of objects of general public utility, it would remain charitable even if an incidental entry into the political domain for achieving the main purpose, was profitable in nature. It was further observed that basic principle underlying the definition of “charitable purpose” remained unaltered even on amendment in the section 2(15) of the Act w.e.f.01-04-2009, though the restrictive first proviso was inserted therein. The precise observation of the Tribunal was as under :-

*Now ITA NO 1284/Kol/2012 of the assessee’s appeal for AY 2009-10 31. The only issue in this appeal of assessee is against the order*

of CIT(A) confirming denial of exemption u/s11 of the Act for the reason that the activities of assessee association is hit by the newly inserted proviso by the Finance (No.2)Act in section 2(15) of the Act w.r.e.f. 01.04.2009 and thereby falling u/s 28(iii) of the Act being profit of business. For this assessee association has raised following seven grounds. .

“1. That on the acts and the circumstances of the case of the appellant the Ld. CIT(A) erred in confirming the denial of exemption u/s 11 of the IT Act, 1961 failing to observe that on the same facts such exemption was consistently allowed to the appellant since the AY 1984-85.

2. That on the acts and the circumstances of the case of the appellant the Ld. CIT(A) erred in confirming the allegation of the Ld. AO that the appellant's case was covered within clause (iii) of section 28 of the I.T Act, 1961 whereby income derived by a trade, professional or similar association from its specific performance for its members was held to be taxable under the head profits and gains of business or profession.

3. That on the acts and the circumstances of the case of the appellant the Ld. CIT(A) erred in confirming the allegation of the Ld. AO that the appellant was hit by the first proviso to section 2(15) of the Income Tax Act inserted w.e.f. 01/04/2009, inasmuch as the appellant was allegedly involved in the rendering of service in relation to any trade, commerce or business, for cess or fee or any other consideration.

4. That on the acts and the circumstances of the case of the appellant the Ld. CIT(A) erred in confirming the allegation of the Ld. AO that the appellant's activities of conducting the Environment Management Centres, meetings, conferences & seminars and the Issuance of Certificate of Origin were all in the nature of business carried on systematically and continuously with a motive to earn profit from the same.

5. That on the acts and the circumstances of the case of the appellant the Ld. CIT(A) erred in holding that the reliance placed by the Ld. AO on the decision of the Hon'ble Supreme Court in the appellant's own case viz. Indian Chamber of Commerce Vs CIT (191 ITR 796 S.C) was justified as the appellant did not get the said judgment reversed by filing a review petition before the Hon'ble S.C.

6. That on the acts and the circumstances of the case of the appellant the Ld. CIT(A) erred in holding that decision of the Hon'ble S.C vide its Constitutional Bench, in a five-judges Bench, by a majority of 4 to 1, in Addl. CIT v. Surat Art Silk Cloth Manufacturers Association (121 ITR 1 S.C) and the majority decision of the Larger Bench in the case of Commissioner of Income-tax v. Federation of Indian Chambers

*of Commerce & Industry (130 ITR 186 S.C) was not applicable to the case of the appellant in view of the amendment in the said section 2(15) of the Act without appreciating the basic principle laid down by the Court based on the facts of the case.*

*7. That on the acts and the circumstances of the case of the appellant the Ld. CIT(A) erred in confirming the TDS disallowance of Rs.2,50,874/-“.*

*32. We have already discussed the facts above in ITA No1491/Kol/2012 for AY 2008-09, which are unchanged in this appeal also i.e. for AY 2009-10 but in view of amendment in Section 2(15) of the Act vide Finance Act 2008, w.e.f. 01/04/2009, whereby new proviso was inserted and according to lower authorities the activities of assessee association of conducting Environment Management Centres, meetings, conferences & seminars and issuance of certificate of origin were all in the nature of “rendering of service in relation to business, for consideration” and falling under the last limb of charitable purpose, i.e. “advancement of any other object of general public utility”, thus covered by the proviso to section 2(15) of the Act. In connection to the above it would be relevant to know the amended section 2(15) of the Act in view of legislative intent behind such amendment. We have gone through section 2(15) of the Act, which is relevant for assessment year 2009-10 year under consideration, which lays down the definition of “charitable purpose” as under:*

*“(15) “charitable purpose” includes relief of the poor, education, medical relief, 79 [preservation of environment (including watersheds, forests and wildlife) and preservation of monuments or places or objects of artistic or historic interest,] and the advancement of any other object of general public utility:*

*Provided that the advancement of any other object of general public utility shall not be a charitable purpose, if it involves the carrying on of any activity in the nature of trade, commerce or business, or any activity of rendering any service in relation to any trade, commerce or business, for a cess or fee or any other consideration, irrespective of the nature of use or application, or retention, of the income from such activity;”*

*The rationale for bringing this proviso can be understood by referring to the relevant portion of the Memorandum explaining the provisions in the Finance Bill, 2008 reported in 298 ITR (St) 2000-01 which reads as under: (Clause 3)*

*“It has been noticed that a number of entities operating on commercial lines are claiming exemption on their income either under section 10(23C) or section 11 of the Act on the ground that they were charitable institutions. This is based on the argument that they are engaged in the “advancement of an object of general public utility” as is included in the fourth limb of the current definition*

of “charitable purpose”. Such a claim when made in respect of an activity carried out on commercial lines is contrary to the intention of the proviso. With a view to limiting the scope of the phrase “advancement of any other object of general public utility”, it is proposed to amend section 2(15) so as to provide that “the advancement of any other object of general public utility” shall not be a charitable purpose if it involves the carrying on of following activities:

- (a) Any activity in the nature of trade, commerce or business or,
- (b) Any activity or rendering of any service in relation to any trade, commerce or business, for a fee or cess or any other consideration, irrespective of the nature of use or application of the income from such activity, or the retention of such income, by the concerned entity.”

Further CBDT explained this proviso vide its Circular No. 11 of 2008, dt. 19th Dec., 2008 (2009) 308 ITR (St) 5 on the issue which reads as under:

“CBDT Circular No. 11/2008  
19th December, 2008

Subject:- Definition of ‘Charitable purpose’ under section 2(15) of the Income Tax Act, 1961-reg.

Section 2(15) of the Income Tax Act, 1961 (‘Act’) defines “charitable purpose” to include the following:-

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

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.*

*33. From the Memo Explaining the provisions of Finance Bill 2008 & CBDT Circular dated 19-12-2008, what will be position of an entity engaged in the 'advancement of any other object of general public utility', whether the same will be hit by commercial activities in view of the newly inserted proviso to section 2(15) of the Act or not? The proviso was introduced with the sole aim of bringing into ambit of taxation such entities which were engaged in commercial activities. Here, we need to appreciate the concept of an "entity engaged in commercial activities". In very simple words, any entity whose main or dominant object is commercial can only be said to be a commercial entity. An entity whose main purpose is undoubtedly charitable in nature without an iota of commerciality in it cannot be said to be engaged in commercial activity. Also we need to note that another point that emerges from the above is that whether an entity is carrying on an activity in the nature of trade, commerce or business always remains a question of fact which will have to be determined on the basis of the facts of the individual case. No generalization for such determination is possible. In view of the above, it is seen that the proviso can be applied to fact based on the facts and the past history of the assessee, which is discussed in detail above. From the above facts, we are clear that the assessee has never been dominantly engaged in any commercial activities and is a Charitable Institution registered as such u/s 12A of the Act, set up for the promotion and protection of Indian business and industry. The main purpose of this Institution is promotion and protection of trade and commerce in the country and not to conduct any commercial activities. Further, it has also never been the contention of the revenue that the assessee is engaged in commercial activities but it is hit by the proviso to section 2(15) of the act and thus will be deemed to be engaged in commercial activities. What will be the position to an institution engaged in advancement of any other object of general public utility, which lays down that such an institute will be deemed to be not "charitable" if it is involved in carrying on "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." According to us, part of the proviso being "any activity of rendering any service in relation to any trade, commerce or business" intends to expand the scope*

of the proviso to include services, which are rendered in relation to any trade, commerce or business. The proviso further stipulates that the activity in relation to the trade commerce or business must be for a cess or fee or any other consideration. From the proviso, it is seen that the most material and relevant words in the proviso are "trade, business or commerce". The activities which are undertaken by the institute should be in the nature of trade, commerce or business or any activity of rendering any service in relation to any trade, commerce or business. We will analyse the term "business" from the definition of the term 'business' as defined in section 2(13) of the act and whether assessee's activities falls within the terminology of "business". The term "Business" read as under:-

**"2. Definitions:**

... ..

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

The word "Business" is of large and infinite import. 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. The intention of the legislature is to make the definition extensive as the term "includes" has been used. The legislature has deliberately departed from giving a definite import to the term "business" but has made reference to several other general terms like "trade", "commerce", "manufacture" and "adventure or concern in the nature of trade, commerce and manufacture". The term "business" has been explained by various judicial decisions and the landmark decision of the Hon'ble Supreme Court of India in the case of *CST v. Sai Publication Fund* [2002] 258 ITR 70 interpreted the word 'business' under section 2(5-A) of the Bombay Sales Tax Act, 1959 as follows:-

"... No doubt, the definition of "business" given in Section 2(5-A) of the Act even without profit motive is wide enough to include any trade, commerce or manufacture or any adventure or concern in the nature of trade commerce or manufacture and any transaction in connection with or incidental or ancillary to the commencement or closure of such trade, commerce, manufacture, adventure or concern. If the main activity is not business, then any transaction incidental or ancillary would not normally amount to "business" unless an independent intention to carry on "business" in the incidental or ancillary activity is established. In such cases, the onus of proof of an independent intention to carry on "business" connected with or incidental or ancillary sales will rest on the Department. Thus, if the main activity of a person is not trade, commerce etc., ordinarily incidental or ancillary activity may not come within the meaning of "business". To put it differently, the inclusion of incidental or ancillary activity in the definition of "business" presupposes the existence of trade, commerce etc.

*The definition of “dealer” contained in Section 2(11) of the Act clearly indicates that in order to hold a person to be a “dealer” he must “carry on business” and then only he may also be deemed to be carrying on business in respect of transaction incidental or ancillary thereto. We have stated above that the main and dominant activity of the Trust in furtherance of its object is to spread message. Hence, such activity does not amount to “business”. Publication for the purpose of spreading message is incidental to the main activity which the Trust does not carry on as business. In this view, the activity of the Trust in bringing out publications and selling them at cost price to spread message of Saibaba does not make it a dealer under Section 2(11) of the Act.*

*Further Hon'ble Supreme Court in para16 elaborated the term 'business' as under:-*

*“16. The words ‘carrying on business’ require something more than merely selling or buying, etc. Whether a person ‘carries on a business’ in a particular commodity must depend upon the volume, frequency, continuity and regularity of transactions of purchase and sale in a class of goods and the transactions must ordinarily be entered into with a profit motive (Board of Revenue v. A. M. Ansari (1976) 38 STC 577 (Supreme Court); (1976) 3 scc 512). Such profit motive may, however, be statutorily excluded from the definition of ‘business’ but still the person may be ‘carrying on business.” Further in para 30 of the same judgment, it is stated thus:*

*“30. In our view, if the main activity was not ‘business’, then the connected, incidental or ancillary activities of sales would not normally amount to ‘business’ unless an independent intention to conduct ‘business’ in these connected, incidental or ancillary activities is established by the Revenue. It will then be necessary to find out whether the transactions which are connected, incidental or ancillary are only an infinitesimal or small part of the main activities. In other words, the presumption will be that these connected, incidental or ancillary activities of sales are not ‘business’ and the onus of proof of an independent intention to do ‘business’ in these connected, incidental and ancillary sales will rest on the department. If, for example, these connected, incidental or ancillary transactions are so large as to render the main activity infinitesimal or very small, then of course the case would fall under the first category referred to earlier.” (emphasis supplied.)*

*Further, Hon'ble Supreme Court in this very same case held as under:*

*“... This decision is directly on the point supporting the case of the respondent after noticing number of decisions on the point including the decisions cited by the learned counsel before us. It may be stated that the question of profit motive or no-profit motive would be relevant only where a person carries on trade, commerce, manufacture or adventure in the nature of trade, commerce etc. On*

*the facts and in the circumstances of the present case irrespective of the profit motive, it could not be said that the Trust either was “dealer” or was carrying on trade, commerce etc. The Trust is not carrying on trade, commerce etc., in the sense of occupation to be a “dealer” as its main object is to spread message of Saibaba of Shirdi as already noticed above. Having regard to all aspects of the matter, the High Court was right in answering the question referred by the Tribunal in the affirmative and in favour of the respondent-assessee. We must however add here that whether a particular person is a “dealer” and whether he carries on “business”, are the matters to be decided on facts and in the circumstances of each case.”*

*34. Thus from the above, the logical corollary which inexorably flows from a careful perusal of the above laid decision is that in the cases of many institutions / associations whose main activity is not ‘business’ the connected incidental or ancillary activities of sales carried out in furtherance of and to accomplish their main objects would not, normally, amount to business, unless an independent intention to conduct ‘business’ in these connected, incidental or ancillary activities is established by the revenue. Therefore, the issue whether a professional institution is or is not hit by the proviso to section 2(15) of the Act will essentially depend upon the individual facts of the case of the institutions wherein discussing the nature of the individual activities it will have to be decided whether the same form incidental, ancillary and connected activities and whether the same were carried out predominantly with a profit motive. The AO and CIT(A) in their orders relied upon the following judicial decisions:*

*\* Barendra Prasad Ray v. Income-tax Officer (129 ITR 295) SC \*  
Commissioner of Income-tax v. Dharma Reddy (A) (73 ITR 751) SC  
\* Sole Trustee, Loka Shikshana Trust v. Commissioner of Income-tax (101 ITR 234 SC)*

*We have already discussed the case law of Hon'ble Delhi High Court in the case of PHD Chamber of Commerce & Industry(Supra), wherein very categorically held that activities and services performed for a fee or against a payment, by a trade, professional or similar association, such as a chamber of commerce and industry could not be held to be “business” in nature carried out with a profit motive. From all the above what thus transpires is that it is the primary or dominant purpose of the institution, which must be charitable. Where the main activity is “charitable” then the activities which are incidental or ancillary to the main activity, even if carried out for profit, would not mitigate or change the “charitable” character of the institution. Thus in the cases of many professional institution whose main activity is not “business”, the connected incidental or ancillary activities of sales carried out in furtherance of and to accomplish their main objects would not, normally, amount to business, unless an independent intention to conduct ‘business’ in*

*these connected, incidental or ancillary activities is established by the revenue. The test, therefore, to be applied is whether the activity which is pursued is ancillary to a dominant object or is independent to the main object and forms a separate object in itself. The issue whether a professional institution is not hit by the proviso to section 2(15) of the Act will essentially depend upon the individual facts of the case of the institutions wherein discussing the nature of the individual activities it will have to be decided whether the same form incidental, ancillary and connected activities and whether the same were carried out predominantly with a profit motive.*

*35. In view of the above, we thus now turn to examine and analyse in full details the particular facts of the present case. That the assessee association is a Charitable Institution, duly registered as such u/s. 12A of the Act, carrying on its main object of development of trade, industries and commerce. The main objects for which the association came into existence, are clearly set out in clause 3 of the Memorandum of Association which duly records and reads as under:*

*“3(a) To promote and protect the trade, commerce and industries and in particular the trade, commerce and industries in or with which Indians are engaged or concerned.”*

*The activities of conducting Environment Management Centre, Meetings, Conferences & Seminar and issuance of Certificate of Origin, being the activities stated to be “services in relation to trade, commerce or business” were all well covered by the main object being fully connected, incidental and ancillary to the main purpose and were conducted solely for the empowerment, betterment and for creating awareness amongst the industrialists in order to bring about the development of trade and industries in India. Further it is to be noticed that the Memorandum has also specifically authorized the Chamber “to do all other things as may be conducive to the development of trade, commerce and industries, or incidental to attainment of the above objectives or any of them.” Thus it was only for the purpose of securing its primary aims of proper development of business in India that the assessee was taking the said ancillary steps. The said activities were not carried out independent of the main purpose of the association of the institution being the development and protection of trade. There was no independent profit motive in any of the said activities. The surplus arising out of the same was merely incidental to the main object to charity. The majority of the receipts in the said activities were out of the sponsorships and donations. The expenses incurred on the said activities as and when incurred were all separately debited to the said accounts and the balance was shown as surplus over receipts. Thus in view of the above it is clear that the alleged activities were all merely incidental to the main object of the assessee and the predominant object of the association being the promotion*

development and protection of trade and commerce which is an object of general public utility, it can never be the case that it is engaged in “business, trade or commerce” or in any “service in relation to business, trade or commerce.” The individual nature and purpose of the specific activities, it is stated that the activities held by AO and the (A) to be business in nature, were as follows:

- (a) Meetings, Conferences & Seminars
- (b) Environment Management Centre
- © Fees for Certificate of origin

Facts relating to these activities are discussed in detail in para 23 to 25 of this order above, which need not be repeated.

36. From facts in entirety, now the question arises is whether principle of consistency will apply or not? From AY 1985-86 to 2007-08 exemption u/s 11 of the Act was allowed. Now, having extensively with the newly amended section 2(15) of the Act and its absolute inapplicability to the case of assessee supported by various judicial decisions, we will discuss this issue. We find that CIT(A) without appreciating that the basis principle underlying the definition of “charitable purpose” remained unaltered, and on amendment in the section 2(15) of the Act w.e.f. 01/04/2009, whereby the restrictive first proviso was inserted therein, lower authorities held that the same substantially changed the position of law and thus the principle of consistency did not apply. But we are of the view that a detailed reading of the various judicial decisions through the years, interpreting the definition of “charitable purpose” as laid out in section 2(15) of the Act and also the definition of “business” in relation to the said section amply reveals that the theory of dominant purpose has always, all through the years, been upheld to be the determining factor laying down whether the Institution is Charitable in nature or not. Where the main object of the Institution was “charitable” in nature, then the activities carried out towards the achievement of the said, being incidental or ancillary to the main object, even if resulting in profit and even if carried out with non members, were all held to be “charitable” in nature. Hon'ble Apex Court in the earliest case of Andhra Chamber of Commerce (supra) had clearly laid out the principle that if the primary purpose of an Institution was advancement of objects of general public utility, it would remain charitable even if an incidental or ancillary activity or purpose, for achieving the main purpose, was profitable in nature. It was laid out by the Court that,

“That if the primary purpose be advancement of objects of general public utility, it would remain charitable even if an incidental entry into the political domain for achieving that purpose, e.g. promotion of or opposition to legislation concerning that purpose, was contemplated.”

It was only for the purpose of securing its primary aims that it was mentioned in the memorandum of association that the Chamber

*might take steps to urge or oppose legislative or other measures affecting trade, commerce or manufactures. Such an object ought to be regarded as purely ancillary or subsidiary and not the primary object.” In connection to the above case it is laid out the said case dealt with the assessment of the assessee in the A.Ys 1948-49 to wherein relevant to the said AYs 1948-49 to 1952-53, by the last paragraph of sub-section (3) of the IT Act, 1922”, charitable purposes” was defined as*

*“... .. In this sub-section “Charitable purpose” includes relief of the poor, education, medical relief and the advancement of any other object of general public utility, but nothing contained in clause (i) or clause (ii) shall operate to exempt from the provisions of this Act part of the income from property held under a trust or other legal obligation for private religious purposes which does not enure for the benefit of the public.”*

*The adding of the words “not involving the carrying on of any activity for profit: was introduced by the Income tax Act, 1961. Hon'ble Apex court in the earliest decision in the case of Surat Art Silk Cloth Manufacturers Association (Supra) held the theory of dominant or primary object of the trust to be the determining factor so as to take the carrying on of the business activity merely ancillary or incidental to the main object.*

*It was held as follows:-*

*(i) That the dominant or primary purpose of the assessee was to promote commerce and trade in art silk yarn, raw silk, cotton yarn, art silk cloth, silk cloth and cotton cloth as set out in clause (a) and the objects specified in clauses (b) to (e) were merely powers incidental to the carrying out of that dominant and primary purpose;*  
*(ii) That the dominant or primary purpose of the promotion of commerce and trade in art silk, etc., was an object of public utility not involving the carrying on of any activity for profit within the meaning of s.2(15) and that the assessee was entitled to exemption under s 11(1)(a)”*

*Again the Hon'ble Apex Court in the case of Federation of Indian Chambers of Commerce & Industry (supra) held that*

*“that the dominant object with which the Federation was constituted being a charitable purpose viz. promotion, protection and development of trade, commerce and industry, there being no motive to earn profits, the respondent was not engaged in any activity in the nature of business or trade, and, if any income arose from such activity, it was only incidental or ancillary to the dominant object for the welfare and common good of the country's trade, commerce and industry, and its income was, therefore, exempt from tax under s.11 of the IT Act, 1961”*

*Again reiterating the dominant purpose theory, the Hon'ble SC in the case of Sai Publication Fund (supra) laid out as follows:*

*"... If the main activity is not business, then any transaction incidental or ancillary would not normally amount to "business" unless an independent intention to carry on "business" in the incidental or ancillary activity is established. In such cases, the onus of proof of an independent intention to carry on "business": connected with or incidental or ancillary sales will rest on the Department.*

*Thus, if the main activity of a person is not trade, commerce etc., ordinarily incidental or ancillary activity may not come within the meaning of "business".*

*In the recent decision which deals specifically with the newly amended section 2(15) of the Act, in the case of Institute of Chartered Accountants of India v. Director General of Income-tax (Exemptions) [2012] 347 ITR 0099 Del HC, laying down the very same principle it was again laid:*

*"that the fundamental or dominant function of the Institute was to exercise overall control and regulate the activities of the members/enrolled chartered accountants. A very narrow view had been taken that the Institute was holding coaching classes and that this amounted to business."*

*Again, Hon'ble Bombay High Court in the WP of Baun Foundation Trust (Writ Petition No. 1206 of 2010 in the High Court of judicature At Bombay 27 March 2012) it was held that*

*"4... It is a well settled position in law that the dominant nature of the purpose for which the trust exists has to be considered. The Chief Commissioner has not doubted the genuineness of the trust or the fact that it is conducting a hospital."*

*Thus from all the above it is seen that though the definition of "charitable" purpose under section 2(15) has undergone changes, the principle underlying the same has remained the same. In context of the above, with regard to the "principle of consistency" it would be of relevance here to quote the decision of the Apex Court in the case of Radhasoami Satsang v. Commissioner of Income-tax (193 ITR 321 SC) wherein it was held that:*

*".... (ii) That, in the absence of any material change justifying the Department to take a different view from that taken in earlier proceedings, the question of the exemption of the assessee appellant should not have been reopened.*

*Strictly speaking, res judicata does not apply to income-tax proceedings. Though, each assessment year being a unit, what was decided in one year might not apply in the following year; where a fundamental aspect permeating through the different assessment years has been found as a fact one way or the other*

*and parties have allowed that position to be sustained by not challenging the ordered, it would not be at all appropriate to allow the position to be changed in a subsequent year.”*

*37. Now coming to application of section 28(iii) of the Act. We find that section 28(iii) of the Act provides that the income derived by a trade, professional or similar association from specific services performed for its members will be brought to charge under the head “profits and gains of business or profession”. The underlying idea behind s. 28(iii) is that there must be a business from which income is derived and that in the course of such business specific services must be rendered for its members. The concept behind s.28(iii) is to cut at the mutuality principle being relied on in support of a claim for exemption, when the assessee was actually deriving income or making profits as a result of rendering specific services for its members in a commercial way. The reason for the introduction of Section 28(iii) of Act, to ignore the principle of mutuality and reach the surplus arising to the mutual association and this is clear from the fact that these provisions are confined to services performed by the association “for its members”. Such income would either be charged as business income or under the residual head, depending upon the question whether the activities of the association with the non-members amount to a business or otherwise. Section 28(iii) constitutes certain income of the association to be business income without affecting the scope of the exemption under Section 11. Section 2(15) which incorporates the definition of “charitable purposes” simply shows that several mutual associations may also fall within the definition. The receipts derived by a chamber of commerce and industry for performing specific services to its members, though treated as business income under Section 28(iii) would still be entitled to the exemption under Section 11 r.w.s. 2(15) of the Act, provided there is no profit motive. Thus, assessee being a charitable Institution carrying on the object of promotion and development of trade and commerce and which is not involved in the carrying on of any activity in the nature of “business”, the said section 28(iii) of the Act does not apply.*

*38. In view of the above discussion, we are of the considered view that in the given facts and detailed reading of the various judicial decisions through the years, interpreting the definition of “charitable purpose” as laid out in section 2(15) of the Act and also the definition of “business” in relation to the said section amply reveals that the theory of dominant purpose has always, all through the years, been upheld to be the determining factor laying down whether the Institution is Charitable in nature or not. Where the main object of the Institution was “charitable” in nature, then the activities carried out towards the achievement of the said, being incidental or ancillary to the main object, even if resulting in profit and even if carried out with non members, were all held to be “charitable” in nature. Hon'ble Apex Court in the earliest case of Andhra Chamber of Commerce (supra) had clearly laid out the principle that if the primary purpose of an Institution was*

*advancement of objects of general public utility, it would remain charitable even if an incidental or ancillary activity or purpose, for achieving the main purpose, was profitable in nature. In our view the basic principle underlying the definition of "charitable purpose" remained unaltered even on amendment in the section 2(15) of the Act w.e.f. 01/04/2009, though the restrictive first proviso was inserted therein. Accordingly, in the given facts of the case as discussed above in detail, the assessee association's primary purpose was advancement of objects of general public utility and it would remain charitable even if an incidental or ancillary activity or purpose, for achieving the main purpose was profitable in nature. Hence, assessee is not hit by newly inserted proviso to section 2(15) of the Act. This issue of assessee's appeal is allowed."*

6. Facts and circumstances in the instant case before us are exactly similar vis.a.vis nature of activity being carried out by the assessee. Respectfully following the decision of co-ordinate bench in the case of Indian Chambers of Commerce & Industry, wherein after discussing various High Court and Supreme Court judgement the Tribunal reached to the conclusion that even of amendment of section 2(15) of the Act w.e.f. 01.04.2009, assessee association's having primary purpose of advancement of objects of general public utility and it would remain charitable even if an incidental or ancillary activity or purpose, for achieving the main purpose was profitable in nature. Hence, assessee is not hit by newly inserted proviso to section 2(15) of the Act.

**6. In the result, appeal of the assessee is allowed.**

Order pronounced in the open court on this 29 /06 / 2016.

Sd/-

**(MAHAVIR SINGH)**

न्यायिक सदस्य / JUDICIAL MEMBER

Sd/-

**(R.C.SHARMA)**

लेखा सदस्य / ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated 29 / 06 /2016

प्र.कु.मि/pkm, नि.स/ PS

**आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :**

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A), Mumbai.
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार

(Asstt. Registrar)

आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai