

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**R/TAX APPEAL NO. 95 of 2020**

=====

THE COMMISSIONER OF INCOME TAX (EXEMPTIONS)

Versus

UNITED WAY OF BARODA

=====

Appearance:

MRS MAUNA M BHATT(174) for the Appellant(s) No. 1

MRS SWATI SOPARKAR(870) for the Opponent(s) No. 1

=====

CORAM: **HONOURABLE MR.JUSTICE J.B.PARDIWALA**

and

HONOURABLE MR. JUSTICE BHARGAV D. KARIA**Date : 25/02/2020****ORAL ORDER****(PER : HONOURABLE MR.JUSTICE J.B.PARDIWALA)**

1. This tax appeal under Section 260A of the Income Tax Act, 1961 (for short "the Act, 1961") is at the instance of the Revenue and is directed against the order passed by the Income Tax Appellate Tribunal, Ahmedabad, Bench "A" dated 25.06.2019 in the ITA No.2658/Ahd/2017 for the A.Y. 2014-15.

2. The facts, giving rise to this tax appeal, may be summarized as under;

2.1 The assessee is a charitable institution registered under Section 12A of the Act, 1961. The assessee filed its return of income declaring total income as Nil after claiming an exemption under Section 11 of the Act, 1961 of Rs.6,18,37,514/-. However, after the assessment, the total income was determined at Rs.4,53,97,808/-. The Assessing Officer came to the conclusion that the assessee had received

total income of Rs.5,48,04,054/- which included Rs.4,37,61,637/- as income received from organizing the event of Garba during the Navratri festival. According to the Assessing Officer, the assessee sold passes and gave food stalls on rent etc. which constitutes 79.85% of its total income. The assessee, during the year, had declared the gross receipts of Rs.5,27,40,432/- and showed surplus of Rs.26,27,243/-. The assessee thereby claimed Rs.4,42,59,665/- as the income for charitable purpose. The Assessing Officer held that the activities of the assessee as per the amended provision of Section 2(15) of the Act could not be said to be advancement of any other object of general public utility and, therefore, the assessee was not liable to claim the benefit under Sections 11 and 12 respectively of the Act, more particularly, in view of Section 13(8) of the Act. The Assessing Officer, having regard to the gross receipts of Rs.5,48,04,054/- made addition of Rs.58,90,500/- on account of the interest on FSF fund and Rs.1,67,90,118/- on account of anonymous donation.

2.2 The assessee, being dissatisfied with the assessment order, went in appeal before the CIT (A). The CIT (A), vide its order dated 15th September, 2017 allowed the appeal of the assessee taking the view that the activities of the assessee could be termed as charitable in nature and the assessee would be eligible for the benefit under Sections 11 and 12 respectively of the Act, 1961.

2.3 The Revenue, being dissatisfied with the order passed by the CIT (A), went in appeal before the Appellate Tribunal. The Tribunal, while dismissing the appeal of the Revenue, concurred with the findings recorded by the CIT (A). In such circumstances, referred to above, the Revenue is here before

this Court with the present appeal.

2.4 The Revenue has proposed the following questions of law for the consideration of this Court;

'(A) Whether, on the facts and in the circumstances of the case, the Hon'ble ITAT is justified in allowing the benefit of Section 11 and 12 when the Assessing Officer has clearly brought on record that assessee is covered under the proviso to Section 2(15) r.w.s. 13(8) of the Act.?

(B) Whether on the facts and in the circumstances of the case and in law, the Hon'ble Tribunal was justified in allowing the benefit of section 11 and 12 to the assessee by confirming the decision of Ld. CIT (A) without appreciating that the assessee is covered under the proviso to section 2(15) of the Act i.e., the advancement of any other object of general public utility?

(C) Whether on the facts and in the circumstances of the case and in law, the Hon'ble Tribunal was justified in allowing the expenses assistance to voluntary agencies, public education program, expenses for community service, doubtful loan provided as application of income?

(D) Whether on the facts and in the circumstances of the case and in law, the Hon'ble Tribunal is correct in deleting the additions relying on the decision of Coordinate Bench in ITA No.3565/Ahd/2016 for A.Y.2011-12 which has not been accepted, though further appeal was not preferred on account of the quantum of tax involved?

(E) Whether on facts and in the circumstances of the case and in law, the Hon'ble ITAT is justified in giving a decision in favour of assessee and against the revenue, though there is no nexus between the conclusion of the facts and the primary facts upon which the conclusion is based, thereby rendering the decision, which is perverse?

(F) Whether on the facts and circumstances of the case and in law, the findings of the Hon'ble ITAT are contrary to the evidence on record, thereby rendering the

decision, which is perverse.?”

3. Ms. Bhatt, the learned standing counsel appearing for the Revenue vehemently submitted that the CIT (A) as well as the Appellate Tribunal committed a serious error in holding that the activities of the assessee fall within Section 2(15) read with Section 13(8) of the Act. Ms. Bhatt laid much emphasis on the fact that although the assessee is a charitable trust registered under Section 12A of the Act, yet that by itself is not sufficient to bring the case within the ambit of Section 2(15) of the Act. According to Ms. Bhatt, for the relevant year, the actual activities of the assessee should be taken into consideration. Ms. Bhatt laid much emphasis on the fact that from one particular event, i.e., Garba a huge income has been derived by the assessee. According to Ms. Bhatt, the case on hand squarely falls within the proviso to Section 2(15) of the Act. It is argued that once the activity of the assessee falls within the ambit of trade, commerce or business, then it no longer remains a charitable activity and the assessee is not entitled to claim any exemption under Sections 11 and 12 respectively of the Act. Ms. Bhatt submitted that no income has been generated for the year under consideration from the activities which are said to be charitable in nature.

4. Ms. Bhatt seeks to rely on a decision of this Court in the case of ***N.N. Desai Charitable Trust vs Commissioner of Income Tax***, 2000 246 ITR 452 Guj.

5. Ms. Bhatt also pointed out that the decision of the Delhi High Court in the case of ***India Trade Promotion Organization vs. The DGIT***, 371 ITR 333 (D) may support the case of the assessee, or in other words, may fortify the

findings recorded by the CIT (A) and the Appellate Tribunal, but at the same time, the said decision is now under consideration before the Supreme Court. Ms. Bhatt pointed out that leave has been granted and the appeal has been admitted.

6. On the other hand, Mr. S.N. Soparkar, the learned senior counsel assisted by Mr. B.S. Soparkar, the learned counsel appearing for the assessee has vehemently opposed this appeal. Mr. Soparkar would submit that none of the questions, as proposed by the Revenue, could be termed as the substantial questions of law.

7. It is argued that all the questions, as proposed by the Revenue, are now no longer *res integra* in view of the two pronouncements of this High Court (i) ***The Principal Commissioner of Income Tax (Exemptions) vs. Naroda Enviro Projects Ltd.***, Tax Appeal No.189 of 2019 and (ii) ***Director of Income Tax (Exemption) vs. Gujarat Cricket Association***, Tax Appeal No.268 of 2012. Mr. Soparkar would submit that all the relevant aspects of the matter have been duly considered by the CIT (A) as well as by the Appellate Tribunal and, in such circumstances, no interference is warranted.

8. Having heard the learned counsel appearing for the parties and having gone through the materials on record, the only question that falls for our consideration is whether the questions of law as proposed by the Revenue could be termed as substantial questions of law.

9. The Assessing Officer recorded the following findings;

"4.6 At the outset, it is to mention here that the assessee is organizing Garba event on the eve of Navratri. Amongst total income of Rs.5,48,04,054/, Rs. 4,37,61,637/are generated from the said garba events. Thus, out of total income, 79.85% partakes from garba event only. As mentioned in foregoing para, the assessee is organizing Garba event on the eve of Navratri. Amongst therefore, it is beyond the pale of doubt that the, assessee's prime objective of garba organization. The activities of the assessee are aimed at earning profit as it is carrying on activity in the nature of trade, commerce or business. Further profit making by the assessee is not mere incidental. Section 13(8) of the Act states that section 11 and 12 benefits will not be available to the assessee if first proviso of section 2(15) is applicable. The relevant portion of the section 13(8) of the Act is reproduced as under:

"(8) Nothing contained in section 11 or section 12 shall operate so as to exclude any income from the total income of the previous year of the person in receipt thereof if the provisions of the first proviso to clause (15) of section 2 become applicable in the case of such person in the said previous year."

4.7 The sources of income of assessee clearly depict its commercial nature.

The income of assessee consists of selling of passes to boys/girls and leasing of stalls etc. Further, in the compact oxford English dictionary (South Asia Edition), the business is meant as "a person's regular occupation or trade, Commercial Activity". The word commerce is meant as "the activity of buying and selling especially on a large scale". The trade is defined as "buying and selling of goods or services". Thus, on the entirety of the facts and circumstances, the assessee's case falls within all the yardsticks in the amended provisions of the legislature. In the case, it is construed that the assessee's garba activity is commercial and do not partakes characteristics of Charitable Purpose within the meaning of amended provisions of section 2(15) of the Act.

4.8 Further, the assessee had relied upon the CBDT's circular No.11/2008 dated 19.12.2008. It is to mention

here that the said circular No.11/2008 is superseded by Circular No. 02/2012 [F.No.142/01/2012-SO(TPL)1, dated 225-2012, which inter alia explains as under:

5.1 To the purposes of the Act, "charitable purposes" has been defined in section 2(15) which, among others, include "the advancement of any other object of general public utility".

5.2 However, "the advancement of any other object of general public utility" is not considered as 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, if receipts from such activities is above the specified limit in the previous year.

5.3 Second proviso to section 2 (15) of the Act has been amended to provide that the specified monetary limit in respect of receipts from such activities shall be 25 lakh rupees instead of 10 lakh rupees."

One may argue that the assessee has been granted registration u/s 12A of the Act. The registration to the assessee was granted on 09.04.2010 i.e. well before the insertion of section 13(8) of the Act by Finance Act, 2012. Secondly, the provisions of section 12A and 12AA are material and relevant, for the purpose of granting registration u/s 12AA of the Act. Needless to say that it is well settled legal proposition that the registration proceedings u/s 12A read with section 12AA of the Act are not to be confused with the assessment proceedings wherein the provisions of section 11, 12 and 13 of the Act are applicable

Now let us examine whether garba activity by appellant involves carrying on of any activity in nature of trade, commerce, or business. It has been held by honorable ITAT Amritsar Bench in the case of "Jhalandar Development Authority" 124 TFJ 598, that the words used in the proviso "any activity in the nature of trade, commerce, or business are of wider import THEN activity of trade, commerce or business. It has been held in the case of Entertainment Society of Goa Vs. CIT 34, Taxman.

Com 210 (Panji-Tribunal) that activity being conducted by the assessee need not be a trade, commerce, or business activity. It is sufficient that it is similar to trade, commerce, or business activity."

10. The CIT (A), while allowing the appeal preferred by the Assessee held as under;

"5.2 I have carefully considered the rival contention as well as the observation of the A.O. It is observed from the remand report that the appellant has itself admitted to have received the amount of Rs.1,67,90,118/- as anonymous donations u/s. 115BBC at Schedule-VC of the return of income filed by the appellant. As it is a voluntary declaration made by the appellant in its return of income, there was no reason why the AO should have asked any further question during the assessment proceedings. However, during the appellate proceedings the appellant has submitted that the said amount was received as corpus donation in the form of foreign inward remittances from Stitching Fusion Study Foundation. It was by error and a clerical mistake in the return of income so filed was reflected under Schedule VC of ITR-7 as anonymous donations It also further submitted that the said amount as a corpus donation has not been declared as the income of the appellant from the property held by the trust in its computation of income. On the contrary the said amount is shown as a corpus donation in the balance sheet of the appellant trust. I have seen the computation of income as well as balance sheet submitted by the appellant. The contention of the appellant is correct. The income received by the appellant has been of Rs. 6,18,37,514/-. Nowhere in this it has offered the amount of Rs.1,67,90,118/- As the said amount is a capital receipt the appellant would be eligible for deduction u/s.11(1)(d). The perusal of the balance sheet also reflects that the appellant has reflected the said amount at Schedule-I of the Balance Sheet with remark that corpus donation received during the year. The appellant should have filed the revised return of income rectifying its own mistake in the return of income. As the amount received by the appellant is a capital receipt in the form of corpus donation it cannot be considered as its income from the property held by the trust. Therefore, notwithstanding the remand proceedings, I am of the considered opinion that the said

amount cannot be added to the income of the appellant as I have already held that the appellant is an exempted entity. Therefore, appellant would be eligible for all the benefits of sec. 11 & 12. The grounds of appeal nos. 4, 5, 6 & 7 are hereby allowed. "

11. The Appellate Tribunal, while dismissing the appeal of the Revenue held as under;

"4. There are thus two issues requiring our adjudication in this appeal- first, whether or not the CIT(A) was justified in holding that proviso to Section 2(15) will not have any application on the facts of this case and thus benefit of Section 11 cannot be declined to the assessee; and, second- whether or not the CIT(A) was justified the expenses, like assistance to voluntary agencies, management assistance and training, public education programme, research and publications and expenses for community service, as application of income for the purposes of Section 11 of the Act.

5. To adjudicate on these issues, only a few material facts need to be taken note of. The assessee before us is a society registered as a charitable institution registered under section 12AA of the Act. The assessee filed a return of income on 26.9.2011 showing NIL income. During the course of scrutiny assessment proceedings, the Assessing Officer noticed that the assessee has shown gross receipts of Rs 3,81,01,051, and a surplus of Rs 39,94,650. In the computation of income, the assessee had claimed application of funds for charitable purposes to the extent of Rs.3,81,16,559 and claimed exemption under section 11 of the Act. When the Assessing Officer probed the matter further, he found that out of total receipts of Rs.3,81,01,051, a sum of Rs.2,73,26,591 (i.e. 71.72% of revenues) is in respect of garba event only. The Assessing Officer also noted that the assessee organizes one of the most popular and prestigious garba event in Baroda in a highly professional manner, that the assessee charges entry fees from the participants as also the stall owners, and that it is in the nature of a business activity. It was in this backdrop that the assessee required the assessee to justify the eligibility for exemption of income under section 11, in the light of the provisions of Section 13(8) read with

proviso to Section 2(15). In response to this requisition, the assessee explained at length about the activities of the United Way of Baroda, which includes supporting 120 NGOs and volunteer driven activities that link, support and deliver health and human services to improve the quality of life in the society. Its mission was said to be to improve and make Baroda a better place to live in and its vision was stated to be to increase the organized capacities of people and to take care of one another. It was also pointed out that the objectives of the society include mobilizing resources from the local communities and the people having affiliation and concern for India in general, and Gujarat in particular, residing in India or abroad and to apply them for strengthening the services in education, health and human care and other social sectors existing in Baroda and State of Gujarat and assessing on a continuing basis the need for human service programs, to seek solution to human problems, to assist in the development of new or the expansion or modification of existing human services programs, and to foster cooperation among local, state and national agencies for providing service to the community. It was also pointed out that the assessee contributes by strengthening the services in education, by providing vocational training to the disabled, helping orphans, empowering women through various programs and providing mid meal to poor students. The details of the eye camp and thalassemia screening and detection camp conducted by the assessee were also furnished. The assessee also gave details of how the monies are spent to these ends. As regards the application of proviso to Section 2(15), it was pointed out that only when the institutions are carrying out activities on commercial lines with profit motive, this provision comes into play. It was pointed out that surplus funds are purely incidental and the institution is not run on the commercial lines at all. Elaborate legal submissions were made on the scope of proviso to Section 2(15) and its legislative history and background. A reference was also made to CBDT circular No. 11/2008 dated 29th December 2008 in support of the proposition the proviso to Section 2(15) will not apply in respect of activities involving relief to poor, education or medical relief, even if it incidentally involves the carrying on of commercial activities. It was then pointed out that main object of the trust is to mobilize the resources from local communities and the people having affiliation and

concern for India in general, and Gujarat in particular, residing in India or abroad, and to apply them for strengthening the services in education, health and human care and the other social sectors of the underprivileged. It was thus contended that the proviso to Section 2(15) will have no application in this case. The assessee also made elaborate submissions on the connotations of expressions business activities and made out a case as to how the activities of the assessee, even with respect to holding the garba event, do not constitute business activities.

7. The Assessing Officer was of the view that how the income is applied is one thing, but what is much more important is, what he termed as, gravity of generation of income. He referred to the provisions of Section 2(15), as amended with effect from 1st April 2009, and observed that after the insertion of the above proviso, the advancement of any other object of public utility shall not be a charitable purpose, if it involves carrying on of (i) any activity in the nature of trade, commerce or business; (ii) any activity of rendering any services in relation to any trade, commerce or business, for cess or fee or any other consideration, irrespective of the nature of use or application or retention of income from such activity. He then referred to the monetary threshold limits brought about by the Finance Act, 2010, with respect to revenues generated by such activities. The Assessing Officer then referred to, and relied upon, the memorandum explaining the provisions of Finance Act, 2008. He then noted that the main activity of the assessee is to organize garba event which generates more than 71% of its revenues and such a predominant object can at best be an object of general public utility. It was then noted that the application of earnings from this activity will not end the nature of prime activity. He then referred to the provisions of Section 13(8) and observed that the benefits of section 11 and 12 will not be applicable even in a case of registered charitable institution in a situation in which the provisions of Section 2(15) come into play as in this case. The Assessing Officer reiterated that sale of entry tickets and hiring out of stalls is clearly a commercial activity. The Assessing Officer thus rejected the claim of exemption under section 11. While he allowed deduction, in computation of income, of such expenses as were incidental to

earning of the income, the Assessing Officer disallowed the following expenses :

<i>Sr. No.</i>	<i>Particulars</i>	<i>Amount (Rs.)</i>
<i>1</i>	<i>FSF Doubtful Loan Provided</i>	<i>2205000</i>
<i>2</i>	<i>Assistance to Voluntary Agencies</i>	<i>10822700</i>
<i>3</i>	<i>Management Assistance & Training</i>	<i>120317</i>
<i>4</i>	<i>Public Education Programme</i>	<i>468116</i>
<i>5</i>	<i>Research & Publications</i>	<i>37179</i>
<i>6</i>	<i>Expenses for community services</i>	<i>898840</i>

13. In pursuance of these objects, even if the assessee performs some activities, which can be alleged to be on commercial lines, are performed, the charitable nature of the objects will not be vitiated as proviso to Section 2(15) comes into play only in respect of any other object of general public utility and is not covered by the specific objects pointed out earlier- including relief to poor, education and medical relief. Nothing, therefore, really turns on the garba event being organized on the basis of, what can be termed as, commercial principles. That aspect of the matter is not relevant in the present case. As we have noted earlier, one of the major object of the assessee society is mobilizing resources from the local communities and the people having affiliation and concern for India in general, and Gujarat in particular, residing in India or abroad and to apply them for strengthening the services in education, health and human care and other social sectors existing in Baroda and State of Gujarat, and there is also no dispute that considerable work in this area has been carried out in this area as evident from the material produced before the Assessing Officer, copies of which have been filed before us as well. The genuineness of this object, and furtherance of this object, cannot even be doubted. We are satisfied that the activities carried out by the assessee are in the nature of education, medical relief and help to poor which are specifically covered by section 2(15) and not by its residuary segment. The proviso to Section 2(15) thus indeed has no application in the matter. As for the denial of deduction in respect of

expenses like assistance to voluntary agencies, management assistance and training, public education programme, research and publications and expenses for community service, that is only consequential in nature inasmuch as the deductions were declined in computation of business income from garba event but then once the proviso to Section 2(15) is held to be inapplicable on the facts of this case, these expenses are to be treated as application of income. Learned representatives do not dispute this position."

12. Section 2(15) of the Act, 1961 reads thus;

"2(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;"

13. Prior to the introduction of the Proviso to Section 2(15) of the Act, there was no dispute that the assessee herein was established for charitable purposes and, therefore, its income was not to be included in the total income and was, therefore,

granted the benefit of exemption. The income received by the assessee is from organizing the event of Garba by sale of tickets and also leasing out food and beverages outlets at the venue of the event. However, the dominant and main object of the assessee cannot be said to be organizing the event of Garba. The charitable activities which the assessee has been undertaking has been discussed by the Appellate Tribunal. We take notice of the fact that the assessee has been supporting 120 non-government organizations. The assessee is into health and human services for the purpose of improving the quality of life in the society. The objectives of the Society includes mobilizing resources from the local communities. It organizes medical camps for thalassemia affected children. It also provides vocational training to the disabled orphans, undertakes various program for empowering women including providing midday meal to the poor students. The activities like organizing the event of Garba including the sale of tickets and issue of passes etc. cannot be termed as business. The two authorities have taken the view that the profit making is not the driving force or the objective of the assessee. This is indicative of the fact that any income generated by the assessee from events like Garba does not find its way into the pockets of any individual or entities. It is to be utilized fully for the purposes of the objects of the assessee. As held in many pronouncements, the expression "trade", "commerce" and "business" as occurring in the first Proviso to Section 2(15) of the Act must be read in the context of the intent and purport of [section 2\(15\)](#) of the Act and cannot be interpreted to mean any activity which is carried on in an organized manner. The purpose and the dominant object for which an institution carries on its activities is material to determine whether the

same is business or not. The object of introducing the first proviso is to exclude the organizations which are carrying on regular business from the scope of "charitable purpose". An activity would be considered 'business' if it is undertaken with a profit motive, but in some cases, this may not be determinative. Normally, the profit motive test should be satisfied, but in a given case the activity may be regarded as a business even when the profit motive cannot be established/proved. In such cases, there should be evidence and material to show that the activity has continued on sound and recognized business principles and pursued with reasonable continuity. There should be facts and other circumstances which justify and show that the activity undertaken is in fact in the nature of business.

14. In the overall view of the matter, more particularly, having regard to the concurrent findings recorded by the two authorities, we are of the view that we should not interfere with the order passed by the Appellate Tribunal.

15. In the result, this appeal fails and is hereby dismissed.

(J. B. PARDIWALA, J)

(BHARGAV D. KARIA, J)

Vahid