

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

INCOME TAX APPEAL NO.1764 OF 2017

Commissioner of Income
Tax-(Exemption), Mumbai. ... Appellant
V/s.
Matunga Gymkhana ... Respondent

Mr.Sham Walve with Mr.Pritesh Chatterjee, Advocate for
the Appellant.
Mr.Nitesh Joshi with Mr.A.K.Jasanni, Advocate for the
Respondent.

**CORAM : UJJAL BHUYAN &
MILIND N. JADHAV, JJ.
DATE : JANUARY 22, 2020**

P.C.:-

1. Heard Mr.Sham Walve, learned standing counsel,
Revenue for the appellant; and Mr.Nitesh Joshi, learned
counsel for the respondent/assessee.
2. This appeal has been preferred by the Revenue
under Section 260A of the Income Tax Act, 1961 (briefly
"the Act" hereinafter) assailing the order dated 30th
November, 2016 passed by the Income Tax Appellate
Tribunal, "B" Bench, Mumbai (briefly "the Tribunal"
hereinafter) in Income Tax Appeal No.4468/Mum/2013 for
the assessment year 2009-10.

3. The appeal has been filed on the following questions stated to be substantial questions of law:-

“(a) Whether, on the facts and in the circumstances of the case and in law, the ITAT was right in deleting the orders of A.O. without acknowledging the fact that once the trust loses its character being hit by the proviso to section 2(15) of the Act, the only blanket available to it, was principle of mutuality. Further the ITAT also failed to appreciate the fact that interest income earned from non-members could neither be exempted from tax u/s 11 of the Act, as it had lost its charitable character being hit by proviso to section 2(15) nor could be exempted under the principle of mutuality as the interest income was earned from non-members?

(b) Whether on the facts of the case and in law the ITAT erred in not appreciating the fact that in the case of Escorts Ltd. Vs. UOI 199 ITR 43 it was held that since section 11 of the Income Tax Act provides for deduction of capital expenditure incurred on assets acquired for the objects of the trust and does not specifically & expressly provide for double deduction on account of depreciation on the same very assets acquired from such capital expenditure, no deduction shall be allowed u/s.32 for the same or any other previous year in respect of that asset as it amounts to claiming a double deduction?

(c) Whether, on the facts and in the circumstances of the case and in law the ITAT erred in relying upon the judgment of Institute of Banking Personnel Selection without appreciating the fact that Department has not accepted the said decision on merit, but due to smallness of tax effect appeal was not filed

before Supreme Court. Moreover, Department has filed SLP on the issue of depreciation in the case of G.D.Birla Medical Research & Educational Foundation in which leave has been granted by the Apex Court- S.L.P.(C) No.24904 of 2016 (C.A. No.8294 of 2016) and is pending for adjudication?

(d) Whether, on the facts and in the circumstances of the case and in law, the ITAT erred in relying upon the judgment of Bombay High Court in the case of Institute of Banking Personnel Selection, ignoring the fact that the Department has not accepted the said decision of the jurisdictional High Court on merit of the case, but due to smallness of tax effect appeal was not filed before Supreme Court. However, on this issue the Department has filed SLP before the Apex Court in the case of MIDC(SLP) (Civil) 9891 of 2014 in which leave has been granted by the Apex Court after considering the fact that the SLP on this issue in the case of Gem & Jewellery Export Promotion Council was dismissed by the Apex Court without discussion?"

4. Assessee is a Trust having registration under Section 12 of the Act. Object of the assessee is to promote, organize and popularize various outdoor and indoor games like cricket, tennis etc., besides providing coaching and training facilities and organizing tournaments for the members as well as schools in the vicinity of the assessee.

5. By the assessment order dated 28th December, 2011 passed under Section 143(3) of the Act, the Assessing Officer added the following to the total income of the assessee:-

| | |
|-------------------------------------|---------------------|
| (1) Interest income | - Rs.2,36,07,023.00 |
| (2) Compensation from Caterer | - Rs.16,23,656.00 |
| (3) Miscellaneous income | - Rs.20,074.00 |
| (4) Compensation from Decorator | - Rs.1,65,630.00 |
| Thus total income worked out was | - Rs.2,54,16,380.00 |

6. Aggrieved by the said additions, respondent preferred appeal before the first appellate authority i.e. Commissioner of Income Tax (Appeals), Mumbai. However, by the order dated 31st March, 2013, the first appellate authority dismissed the appeal of the assessee.

7. Thereafter, assessee preferred further appeal before the Tribunal. Tribunal by the order dated 30th November, 2016, allowed the appeal of the assessee and deleted the additions made by the Assessing Officer as affirmed by the Commissioner of Income Tax (Appeals).

8. Aggrieved, revenue has preferred the present appeal before us raising the above questions.

9. Submissions made have been considered.

10. In so far addition of interest income of Rs.2,36,07,023.00 is concerned, Tribunal found no merit in the stand taken by the lower revenue authorities.

Relevant portion of the order passed by the Tribunal is as under :-

12.6 We have considered the rival submissions. Sections 11 to 13 of the Act deal with the provisions relating to income derived properties held for charitable or religious purposes. The assessee before us is a trust registered under the Bombay Public Trust Act, 1950 and also continues to hold the registration granted to it by the Commissioner of Income Tax under section 12A of the Act since 5/12/1997 as a charitable trust. Notably, the main objects of the assessee trust are stated to be the promotion of sports, games and recreation facilities to the public at large and for the physical development and healthy life style as well as promotion of other charitable objects. The factum of the promotion of sports and games being a 'charitable purpose' within the meaning of section 2(15) of the Act is not in dispute. In fact, the Assessing Officer also does not dispute the fact that the activities of the promotion of sports and games carried out by the assessee fall within the meaning of 'charitable purpose'. The assessee trust derives income by way of receipts from its

members viz. Membership fee, entrance fee, identity card fee, locker rent, reservation charges etc. The assessee trust is also earning incomes by way of compensation from caterer from rent/leasing of premises and such receipts in the instant year are of a sum of Rs.16,23,656/-. Further, it has also received compensation from Decorator of Rs.1,65,630/- and Miscellaneous income of Rs.20,074/-. Apart therefrom, assessee has earned interest income of Rs.2,36,07,023/- on RBI Bonds and other permitted investments as per section 11(5) of the Act. The aforesaid incomes, totaling to Rs.2,54,16,380/- have been brought to tax by the Assessing Officer as according to him the same are not eligible for the benefits of section 11 & 12 of the Act and since, they had been derived from transactions from non-members, the same are also not exempt under the principle of mutuality.”

11. From a reading of the order passed by the Tribunal as extracted above, it is seen that Tribunal has held that the interest income was earned from investments made by the assessee in terms of the prescription contained in Section 11(5) of the Act. Stand of the lower revenue authorities that benefit of such income cannot be granted to the assessee in view of the proviso to Section 2(15) of the Act was not accepted by the Tribunal. Tribunal rightly posed the question to itself as to whether the activity of keeping funds deposited in the manner mandated

by Section 11(5) of the Act can be construed as an activity in the nature of commerce or business so as to fall within the ambit of the proviso to Section 2(15) of the Act.

12. On appreciation of the provisions contained in Section 13 of the Act, Tribunal held that earning from such deposits cannot be viewed as an activity in the nature of trade, commerce or business within the meaning of the proviso to Section 2(15) of the Act. Tribunal also relied upon a decision of its coordinate bench in the case of Bombay Presidency Golf Club Limited and thereafter, allowed the contention of the assessee by deleting the said addition.

13. In the course of hearing it has been brought to our notice that against the order passed by the Tribunal in the case of Bombay Presidency Golf Club Limited, Revenue had preferred an appeal before this court being Income Tax Appeal No.235 of 2017. This court by order dated 2nd April, 2019, dismissed the appeal of the Revenue by upholding the finding of the Tribunal holding that no question of law arose therefrom.

14. Coming to the other three additions, Tribunal held as under :-

“12.8 Likewise, the other three categories of income namely, compensation from the caterer (restaurant), compensation from decorator for gymkhana functions and Miscellaneous income are concerned, herein also it cannot be said that the same involve carrying on of any activity in the nature of trade, commerce or business. It is quite clear that the scope and ambit of the exemption envisaged in sections 11 & 12 of the Act relate to the receipt of income derived from the property held under trust for charitable or religious purposes to the extent to which such income is applied to such purposes in India. Before proceeding further, we may reiterate that there is no charge against the assessee at any stage that there is an application of income for any purpose other than the objects of the assessee trust. Much has been made out by the lower authorities to the fact that assessee has charged a fee for allowing use of its spots grounds and therefore, it is asserted that such an activity is hit by the disability contained in the proviso to section 2(15) of the Act. In our considered opinion, mere charging of fee ipso-facto would not enable an activity to be governed by the proviso to section 2(15) of the Act without establishing any profit-motive in the charging of fees. In this context, one may refer to the judgment of the Hon'ble Delhi High Court in the case of GS 1 India (supra), wherein the expression trade, commerce or business was being examined in the context of situation where assessee was charging a fee for rendering services. As per the Hon'ble High Court the charging of fee was necessary for

carrying out the activities and the sustenance thereof, and, it would not reflect any profit-motive. The judgment of the Hon'ble Gujarat High Court in the case of Sabarmati Ashram Gaushala Trust (supra) is also relevant where the income earned on account of production and sale of milk was sought to be covered within the scope of the proviso to section 2(15) of the Act on the ground that it amounted to an activity in the nature of trade, commerce and business. The Hon'ble High Court disagreed with the view of Revenue and held that generation of income by way of sale of milk could not be regarded as activity of trade, commerce and business, considering that the object of the trust were breeding of cattle and cows and oxen. In fact, in the case of All India Football Federation (supra), the Delhi Bench of the Tribunal was considering receipt by way of sponsorship in the context of the proviso to section 2(15) of the Act. The Tribunal held that the main object of the trust being promotion of the game of football, organizing tournaments, training players etc. , it would not lose its character of being charitable in nature merely because there were receipts by way of sponsorship because the activity of receiving sponsorship fee could not be construed as an activity in the nature of trade, commerce and business. In the present case too, objects of the assessee are undoubtedly the promotion of sports, games and recreation facilities to the public at large and such like receipts on account of compensation from the Decorator against gymkhana function, miscellaneous income and compensation from caterer (restaurant) cannot be construed as activity in the nature of trade, commerce or business for the purposes of the proviso to section 2(15) of the Act. Therefore, having regard to the facts

and circumstances of the case, in our view, the CIT (A) erred in departing from his stand in earlier years by wrongly relying on the proviso to section 2(15) of the Act in the instant year because the activities in question cannot be construed to be in the nature of trade, commerce or business so as to fall within the purview of the proviso to section 2(15) of the Act. Thus, on this aspect assessee succeeds.”

15. Thus Tribunal held that there was no charge or allegation against the assessee at any stage that there was application of income for any purpose other than the object of the Trust. Tribunal opined that mere charging of fee *ipso-facto* would not enable an activity to be governed by the proviso to Section 2(15) of the Act. In the present case, Tribunal held that object of the assessee is undoubtedly promotion of sports, games and providing recreation facilities to the public at large and to the members in particular and therefore receipts on account of compensation from decorator against gymkhana function, miscellaneous income and compensation from caterer (restaurant) cannot be construed as activities in the nature of trade, commerce or business for the purpose of the proviso to Section 2(15) of the Act.

16. This court in the case of **Director of Income Tax (Exemptions) Vs. Shri Vile Parle Kelavani Mandal, (2015) 378 ITR 593 (Bom)** has held that educational institutions require funds; activity of letting out of halls for marriages, sale and advertisement rights is not a regular activity undertaken as part of business. Income is generated by giving various halls and properties of the institution on rental basis on holidays when those are not required for educational activities. Therefore, such activities cannot be construed to be business activities, such activity being an incidental activity; and thus income generated therefrom cannot be brought to tax.

17. This position has also been reiterated by this court in **Director of Income-Tax (Exemptions) Vs. Shree Nashik Panchvati Panjrapole, (2017) 397 ITR 501 (Bom)** wherein this court referred to the decision of the Supreme Court in **Additional CIT Vs. Surat Art Silk Cloth Manufacturers Association, (1980) 121 ITR 1 (SC)**. In **Surat Art Silk Cloth Manufacturers Association (supra)**, Supreme Court held as under :-

“But we find it difficult to accept their thesis that whenever an activity is carried on which yields profit, the inference must necessarily be drawn, in the absence of some indication to the contrary, that the activity is for profit and the charitable purpose involves the carrying on of an activity of profit. We do not think the court would be justified in drawing any such inference merely because the activity results in profit. It is in our opinion not at all necessary that there must be a provision in the constitution of the trust or institution that the activity shall be carried on no profit no loss basis or that profit shall be prescribed. Even if there is no such express provision, the nature of the charitable purpose, the manner in which the activity for advancing the charitable purpose is being carried on and the surrounding circumstances may clearly indicate that the activity is not propelled by a dominant profit motive. What is necessary to be considered is whether having regard to all the facts and circumstances of the case, the dominant object of the activity is profit making or carrying out a charitable purpose. If it is the former, the purpose would not be a charitable purpose, but, if it is the latter, the charitable character of the purpose would not be lost.”

18. Following the Supreme Court decision, this court in **Shree Nahsik Panchvati Panjrapole (supra)** emphasized that the test that should be applied whether it was income earned from business or income earned from incidental activity is the test of dominant object of the trust i.e., what is the dominant object of the activity.

If the dominant object of the activity is profit making, the purpose would not be charitable but if the dominant object of the activity is charitable then notwithstanding making of profit, the charitable character of the purpose would not be lost.

19. On careful consideration of the order of the Tribunal, we find that Tribunal has returned a finding of fact on all the counts to the effect that the income under the above heads were earned only as activity incidental to the dominant activity of the Trust and held as under :-

“Many activities of genuine charitable purposes which are not in the nature of trade, commerce or business may still generate marketable products. After setting off of the cost, for production of such marketable products from the sale consideration, the activity may leave a surplus. The law does not expect the trust to dispose of its produce at any consideration less than the market value. If there is any surplus generated at the end of the year, that by itself would not be the sole consideration for judging whether any activity is trade, commerce or business particularly if generating ‘surplus’ is wholly incidental to the principal activities of the trust; which is otherwise for general public utility, and therefore, of charitable nature....

Merely because while carrying out the activities for the purpose of achieving the objects of the trust, certain incidental surpluses were generated, would not render

the activity in the nature of trade, commerce or business. As clarified by the Central Board of Direct Taxes in its Circular No. 11 of 2008, dated December, 19, 2008(2009) 308 ITR (St.)5) the proviso aims to attract those activities which are truly in the nature of trade, commerce or business but are carried out under the guise of activities in the nature of 'public utility'.

20. Therefore, question No.(a) does not arise at all.

21. As to question Nos.(b),(c) and (d), those questions are covered by the decision of the Supreme Court in **Commissioner of Income Tax-III, Pune Vs. Rajasthan and Gujrat Charitable Foundation, Poona, 402 ITR 441**, whereby those questions have been answered in favour of the assessee and against the revenue.

22. Upon thorough consideration of the matter, we do not find any error or infirmity in the view taken by the Tribunal. No substantial question of law arises from the impugned order of the Tribunal.

23. Appeal is devoid of merit and is accordingly dismissed. No cost.

(MILIND N. JADHAV, J.)

(UJJAL BHUYAN, J.)

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