IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'B' : NEW DELHI

BEFORE SHRI G.C. GUPTA, VICE PRESIDENT AND
SHRI TARVINDER SINGH KAPOOR, ACCOUNTANT MEMBER

ITA No.1027/Del/2012
Assessment Year : N.A.

M/s Devki Devi Foundation, 2, Press Enclave Road, Saket, New Delhi. PAN : AAATD5283G.	Vs.	Director of Income Tax (Exemptions), Plot No.15, 3rd Floor, Aaykar Bhawan, Laxmi Nagar, District Centre, Delhi – 110 092.
(Appellant)		(Respondent)

Appellant by	:	Shri M.S. Syali, Senior Advocate with Shri Tarandeep Singh & Shri Harkunal Singh, Advocates.
Respondent by	:	Smt. Poonam Khaira Sidhu, CIT-DR and Smt. Parminder Kaur, Sr.DR.
Date of hearing	:	09.03.2015
Date of pronouncement	:	31.03.2015

ORDER

PER G.C. GUPTA, VP :

This appeal by the assessee is directed against the order passed by the Director of Income Tax (Exemptions), Delhi dated 28th December, 2011 cancelling the registration granted to the assessee under Section 12A of the Income-tax Act, 1961 since the inception of the trust.

2. The grounds of appeal of the assessee are as under:-

"1. That the Director of Income Tax (Exemptions), New Delhi ['DIT(E)'] erred on facts and in law in passing order, dated 28/12/2011, under section 12AA(3) withdrawing the approval/registration granted to the Appellant Society under section 12A of the Income-tax Act, 1961 ("the Act").

2. That the DIT(E) erred on facts in law in alleging holding that Appellant Society was not a charitable organization, as the property/hospital of the Appellant-Society were taken over by Max Group, by creating various financial and legal obligations on the Appellant Society and the Max Group was running the hospital with a profit motive.

2.1 That the DIT(E) erred on facts in law in observing that the Appellant Society undertook huge/adverse financial obligations by entering into agreements for construction and maintenance of hospital building, supply of medical equipments, provisions of medical staff/services with companies belonging to Max Group, which was a colourable device to transfer profits to such companies.

2.2 That the DIT(E) erred on facts in law in observing that the Assessee Society was merely a "special purpose vehicle" to take advantage of concessional land allotted by the State Government and to pass off profit earned from operating hospital to companies belonging to Max Group.

3. That the DIT(E) erred on facts in law in holding that the Appellant Society was not for 'charitable purpose', alleging that the appellant did not fulfill the minimum criteria of providing concessional/free treatment to patients from Economically Weaker Sections ('EWS') category, as per the criteria notified by the Delhi High Court to be implemented by the Health Department of Delhi.

3.1 That the DIT(E) erred on facts in law in not appreciating that the non-fulfillment of aforesaid criteria was beyond the control of the Appellant Society and, in any case, not a valid ground to hold that the Appellant-

Society was not carrying on 'charitable purpose' as referred to in section 2(15) and for withdrawing registration under section 12A of the Act on that basis."

3. The learned senior counsel for the assessee submitted that the assessee was granted registration under Section 12A on 23.06.1994 by the DIT(Exemptions) vide order dated 23.06.1994 with effect from 01.03.1994. The DIT(E), vide its impugned order dated 28.12.2011, has cancelled the registration granted under Section 12A since 01.03.1994 by holding that the assessee was not entitled to the exemption under Section 11 as its activities would not be classified as charitable activities since inception, against which, the present appeal has been preferred by the assessee before the Tribunal. The learned senior counsel submitted that the Revenue has sought to reopen the assessment in the three completed assessments of the assessee and the main issue on the basis of which the Revenue has sought to reopen the assessment in these three cases was withdrawal of registration under Section 12A of the Act, against which, the present appeal is pending before the ITAT. He submitted that the assessee has challenged the legality of reopening of the three assessments of the assessee before the Hon'ble Delhi High Court by way of writ petitions and the hearing of the writ petitions was sought to be adjourned by the assessee on the ground that the main issue on the basis of which the Revenue sought to reopen the assessment in these three cases was withdrawal of registration under Section 12A of the Act which is pending examination by the Tribunal. The Hon'ble Jurisdictional High Court, vide its order dated 04.12.2014, has directed the Tribunal to decide the issue in the appeal pending before it at the earliest convenience and preferably within eight weeks from the date of the order.

4. The learned senior counsel submitted that the provisions of Section 12AA(3) gives power to the CIT/DIT(E) to cancel registration where activities of the trust were not genuine or the activities were not in accordance with the objects of the trust. However, if a trust has allowed use of its property in violation of provision of Section 13, the cancellation after 01.10.2014 would be under Section 12AA(4) and not under Section 12AA(3) of the Act. He submitted that in case of violation of provision of Section 13 in the case of a charitable trust, the same would not be stretched by the CIT/DIT(E) to say that there was a violation of the provision of Section 12AA(3) of the Act. He referred to the show cause notice under Section 12AA(3) for withdrawal of registration under Section 12A dated 18.11.2011 issued by the DIT(E), a copy of which has been filed in the compilation filed before us. He submitted that the DIT(E) has wrongly taken the area allotted to M/s Max Health Care Ltd. (hereinafter referred to as 'M/s MHC') as 1500 sq.mtrs. although the same was only 1500 sq.ft. for the exclusive use of MHC and its personnel. He submitted that M/s MHC is not a group company of the assessee trust. The learned senior counsel argued that the assessee filed its submissions on 27.12.2011 running in about 4300 pages before the DIT(E) and the DIT(E) passed the order on the next date i.e. 28.12.2011. He referred to the contents of the memorandum of association of the assessee wherein the various charitable objects were detailed along with the rules and regulations of the trust, copy of which has been filed in the compilation before the Tribunal. He referred to copies of various documents filed in the compilation before the Tribunal i.e. the agreement between the assessee and M/s MMK Investments Pvt.Ltd. dated 10.12.2001, another agreement dated 10.12.2001 between the assessee and M/s MMK

Investments Pvt.Ltd., supplementary agreement dated 21.02.2009 between the assessee and M/s Max Medical Services Limited (formerly known as MMK Investments Pvt.Ltd.), another supplementary agreement dated 21.02.2009 between the assessee and M/s Max Medical Services Limited (formerly known as MMK Investments Pvt.Ltd.), services agreement dated 30.06.2004 between the assessee and Max Healthcare Institute Limited and supplementary agreement dated 21.02.2009 between the assessee and Max Healthcare Institute Limited. He submitted that the assessee has incurred loss after giving about ₹40 crores to M/s MHC and the expenses on charitable purposes incurred by the assessee. He referred to pages 1073 to 1082 of the compilation filed before the Tribunal, wherein the index of about 4300 pages filed before the DIT(E) has been given. He submitted that Max Group is not a connected party of the assessee and, therefore, the provisions of Section 13(3) were not attracted even if the assessee has allowed property to some parties, not connected with the assessee. He submitted that the DIT(E) has not mentioned in his order that the activities of the assessee were not genuine. The learned senior counsel submitted that the name of the assessee's hospital at Saket is "Max Super Speciality Hospital, a unit of Devki Devi Foundation", Saket but, the mere mention of the name "Max" shall not alter the charitable activities of the assessee. He submitted that there were factual mistakes in the order of DIT(E). He submitted that the assessee was legally as well as commercially in charge of the hospital and the activities of the trust and its financial affairs. He referred to the agreements dated 10.12.2001 between the assessee and M/s MMK Investments Pvt.Ltd. that the contractor (M/s MMK Investments Pvt.Ltd.) was to complete the construction of the building as per the project site including the civil construction, finishing work, plumbing,

electrical works etc. in conformity with the specifications or any amendments thereto as may be agreed upon between the assessee and the contractor. The agreement further provides that the contractor shall perform and execute its obligations under this agreement as an independent contractor and none of its officers, directors, employees or agents shall be deemed to be the agents, representatives, employees or servants of the owner (the assessee). It further provides for performance guarantee on the part of the contractor who shall deposit ₹3,91,50,000/- with the owner as guarantee for the performance of its obligations under the agreement. The agreement dated 10.12.2001 between the assessee and M/s MMK Investments Pvt.Ltd. provides that the agreement may be terminated at any time solely at the option of the company by giving 30 days' notice to the user in terms of clause 13.3 of the agreement. Clause 18 of the said agreement provides for the performance guarantee. Clause 20 of the agreement provides for indemnification by the user to the company against any loss or damage to the equipment or any part thereof due to negligence or willful misconduct of the user. The learned senior counsel for the assessee further referred to the services agreement dated 30.06.2004 between the assessee and M/s MHC which provides that the assessee agrees to engage M/s MHC to render medical services subject to its overall control and supervision by the management of the hospital by the assessee. He referred to clause 2(c) of this agreement wherein the assessee has agreed to provide an area of at least 1500 sq.ft. for the hospital for the exclusive use of MHC and its personnel and not 1500 sq.mtr. as mentioned by the DIT(E). The learned senior counsel for the assessee submitted that clause (6) of the said services agreement shows that the assessee has expressly agreed and undertaken that it shall apply and obtain and renew all

necessary permissions, sanctions, license, permits etc. from the appropriate authorities, governmental, municipal or otherwise as the case may be and MHC shall not at any time and in any way be responsible for any consequences arising out of the delay or failure to obtain such permissions, sanctions, license, permits etc. It further provides that the assessee shall not attempt to solicit or source the services for the hospital from any third party during the term of the agreement and M/s MHC shall have the exclusive right to provide the services to the assessee during the term. However, M/s MHC shall have the option to provide the services/arrangement to any other person etc. in India or abroad. The sub-clause (f) of clause (6) of the said agreement provides that the assessee has agreed to utilize the funds of the hospital including all its receipts of whatever nature only for the purpose of the management and operations of the hospital and shall not be diverted to or used by the assessee for any other purpose. Sub-clause (c) of clause (7) of this agreement provides that all properties in the hospital including the land comprised in the project site shall continue to absolutely vest in the assessee and MHC shall have no right, title and interest therein. Clause (8) of the said agreement provides that the assessee has agreed to undertake the sole liability for any action that may be initiated against the assessee or MHC with regard to services being provided at the hospital and MHC shall have no liability whatsoever to any third party. The learned senior counsel referred to the minutes of the meeting of the governing body of the assessee dated 06.09.2008 to show that the affairs of the hospital were conducted by the assessee only. He referred to the written submissions filed before the DIT(E) by the assessee dated 27.12.2011, copy of which has been filed in the compilation filed before the Tribunal.

5. The learned senior counsel for the assessee submitted that the reasoning of the Revenue that the assessee was not providing free beds to poor sections of the society was unsustainable for the simple reason that the assessee has made provision for free beds but if the poor people do not come forward and avail the facility of free medical services, the assessee could not be blamed. He submitted that on monthly basis, the details of the free beds have to be filed before the Health Department and the authorities appointed under the statute have checked the same and the Income-tax Department could not sit over their judgment. He relied on the decision of Delhi Tribunal in the case of Civil Services Society Vs. DIT(E), Delhi – [2013] 143 ITD 408 (Delhi-Trib.). He referred to the copy of the assessment order for the assessment year 2005-06 in the case of the assessee wherein assessment was framed in scrutiny assessment under Section 143(3) and inspite of similar allegations against the assessee, no adverse view was taken by the Department. He referred to the copy of the map of the hospital building, as filed in the compilation before the Tribunal and submitted that the assessee has about 880 employees of its own and the number of employees of the assessee in the hospital was 88.18% in FY 2007-08, 90.99% in FY 2008-09 and 98.14% in FY 2009-10. He submitted that the provisions of Section 12AA(4) could not be applied to deny exemption under Section 12AA(3) of the Act. He relied on the decisions of the Tribunal in the case of St. Joseph Academy Vs. DIT(E), Hyderabad – [2014] 50 taxmann.com 216 (Hyderabad-Trib.) and Chaudhary Bishambher Singh Education Society Vs. CIT, Noida – [2014] 48 taxmann.com 152 (Delhi-Trib.).

6. The learned CIT-DR has opposed the submissions of the learned senior counsel for the assessee. She submitted that the assessee-society was registered under The Societies Registration Act, 1860 and its memorandum of association was filed at page 1 to 16 of the compilation filed by the Revenue. She submitted that as per the memorandum of association of the assessee-society, the main object of the society was to engage in medical, biological, social, environmental and allied sciences "**research**" so as to enhance human understanding regarding the epidemiological basis of health and disease through acquisition, dissemination and sharing of new knowledge concerned with initiation, causation, diagnosis, treatment and rehabilitation of disease and disability in humans in general and with reference to cardiac speciality, cancer detection and care, communicable diseases, nutritional and deficiency disease, diseases of pregnancy & newborn, diseases of poverty and illiteracy. She submitted that the other objects were incidental or ancillary **to the attainment of the main object**, i.e., **research** only. She submitted that for the grant of exemption under Section 12A, it is necessary to adjudicate whether the assessee-society was run as per the main objects of the society. She submitted that the assessee has failed to do any research work and has not spent any expenditure on the research work, which was the main object of the assessee-society. She submitted that since the assessee has admittedly not undertaken any research work, it could not be said that the assessee was running its affairs as per the main objects of the society, as detailed in its memorandum of association and, accordingly, since the assessee was not running as per the main objects of the society, the assessee was rightly denied the exemption under Section 12A/12AA of the Act. She submitted that the issue is covered in favour of the Revenue with the

decision of Bangalore Tribunal in D.R. Ranka Charitable Trust Vs. Director of Income-tax (Exemptions) – [2010] 3 ITR (Trib) 151 (Bangalore). She submitted that on this ground alone, the assessee was not entitled to exemption under Section 12A and the order of the DIT(E) denying the exemption should be confirmed.

7. Learned CIT-DR submitted that the land on which the hospital of the assessee-society is situated was allotted to them by the Government of India vide perpetual lease deed dated 5th June, 1996 executed between on behalf of President of India and the assessee-society and the terms of the perpetual lease deed was to provide 10% totally free indoor treatment and 20% free OPD for the weaker sections of the society respectively was violated by the assessee-society. She submitted that the title deeds of the assessee-society were hypothecated to the bank to raise loans to the benefit of M/s MHC, which is not a charitable trust and was admittedly a profit-making concern. She submitted that the act of giving securities of its properties given by the assessee to a commercial entity i.e. M/s MHC, could not be called an activity charitable in nature.

8. The learned CIT-DR submitted that as per the agreement between the assessee-society and M/s MMK Investments Pvt.Ltd. (Max Group) dated 10.12.2001, the owner, i.e., the assessee, could not terminate the contract and the contractor, i.e., M/s MMK Investments Pvt.Ltd. could terminate the contract. She submitted that all the agreements between the assessee-trust and the companies of Max Group were highly tilted towards the Max group of companies, which is a commercial concern. She referred to clause 4.04 of the said agreement dated 10.12.2001 which provides that in case the

contractor M/s MMK Investments Pvt.Ltd. terminates this agreement before the expiry of the term or the extended term in accordance with certain provisions mentioned in the agreement or the assessee trust terminates the agreement otherwise in accordance with clause 4.02 of the said agreement, the assessee-trust shall be liable to pay the contractors i.e. M/s MMK Investments Pvt.Ltd. liquidated damages amounting to the sum of ₹12 crores together with interest at the rate of 2% per annum over the short term prime lending rate of State Bank of India payable from the date of such termination till the date of actual payment, less the amounts already paid by the owner towards construction of the building. She submitted that it is strange that the contractor M/s MMK Investments Pvt.Ltd. was entitled to terminate the contract agreement and the assessee was made liable for liquidated damages of a very high amount of ₹12 crores along with interest thereon. She submitted that the amount of construction incurred by the Max group of companies was to be paid by the assessee-society. The total construction cost of the hospital building etc. was ₹24.51 crores which was to be repaid in a period of 26.5 years along with 2% of the annual turnover of the assessee-trust's hospital and, the turnover in this case is over ₹100 crores. Further, the assessee-society was to pay 6% of its annual turnover on account of repairs and maintenance to the Max Group. The repayment schedule of the construction cost of the hospital building was designed by the assessee-trust in a way to give maximum benefit to the Max group of companies. She submitted that the assessee was not doing any charitable activities and its employees were only of the lower category and the doctors and technicians etc. were all belonging to the Max Group. She referred to clause 8.03 of the said agreement wherein the term 'Gross Annual Turnover' of the hospital for any particular financial

year has been defined to include every receipt from whatever source of income. She referred to supplementary agreement between the assessee-society and M/s Max Medical Services Limited (formerly known as MMK Investments Private Limited) dated 21.02.2009 wherein the "Adjusted Turnover" has been defined. She referred to the agreement between the assessee-trust and M/s MMK Investments Pvt.Ltd. dated 10.12.2001 wherein the term 'Use of Equipment' by the hospital has been detailed and it specifically provides that M/s MMK Investments Pvt.Ltd. could terminate the agreement at any time solely at its option by giving a 30 days' written notice to the assessee. It is further provided in clause 13.2 thereof that the assessee-trust **shall have no right** to terminate this agreement, save and except in the case of material breach by M/s MMK Investments Pvt.Ltd. of its obligation etc. The payment mechanism is defined in clause 17.2 thereof which provides that the assessee-trust shall pay to M/s MMK Investments Pvt.Ltd. a sum equivalent to 10% of the gross annual turnover of the hospital. She referred to the services agreement between the assessee and M/s MHC dated 30th June, 2004 whereby M/s MHC was engaged by the assessee-society to render medical services. This services agreement provides that M/s MHC shall make available senior consultants, doctors, medical superintendent, senior OT staff and related personnel and other non-medical staff for the services in the hospital and the assessee has agreed to provide an area of at least 1500 sq.ft. in the hospital for the exclusive use of MHC and its personnel. She submitted that the mention of 1500 sq.mtr. instead of 1500 sq.ft. of area provided by the assessee to M/s MHC is merely a typographical mistake and much should not be read out of it. The clause (6) of the services agreement provides that the assessee trust shall apply and obtain and renew all necessary permissions, sanctions,

license, permits etc. from the government and other appropriate authorities and MHC shall not at any time and in any way be responsible for any consequences arising out of the delay to obtain such permissions. Clause 6(c) of this agreement provides that the assessee trust shall not make any attempt to solicit or source the services for the hospital from any third party during the term of the agreement and MHC shall be exclusively providing the services as contained in the agreement. However, MHC shall have the option to provide the services of any kind to any other person/institute/body corporate/entity in India or abroad. She referred to clause 6(f) of the service agreement which provides that the assessee trust has agreed to utilize the funds of the hospital including all its receipts of whatever nature only for the purposes of the management and operations of the hospital and shall not be diverted to or used by the assessee-society for any other purposes. The learned CIT-DR submitted that it is not understandable that how the assessee has undertaken any research work as provided in its main object in the memorandum of association when there is a specific bar to utilize the funds of the hospital including all its receipts of whatever nature only for the purpose of the management and operations of the hospital. She submitted that the agreement is so drafted in favour of M/s MHC that clause 8(a) of this agreement provides that the assessee-society undertakes that it shall be responsible and solely liable for any action that may be initiated against the assessee or even M/s MHC with respect to the services being provided at the hospital and that MHC shall have no liability whatsoever in respect of the claim asserted against the assessee or MHC by any third party including government or bodies for any act of omission whatsoever. The Annexure-1 to the said services agreement provides that MHC shall be paid services fees at ₹12 crores in each of

the first three years and ₹15 crores in each year from the fourth year up to the ninth year and ₹20 crores in each year from the ninth year onwards from the effective date, if the invoiced amount net of all taxes falls below the specified amount of ₹12 crores to ₹20 crores as detailed above. It further provides that in addition to the fees as detailed above, the assessee-society shall reimburse to MHC all expenses incurred by MHC on behalf of assessee-trust on monthly basis. She submitted that the totally free OPD to weaker sections of the society was raised from 20% of the total OPD to 25% by the Government of India on the direction issued by the Hon'ble Delhi High Court in a writ petition and still, the said direction was violated by the assessee-trust. She submitted that the number of free beds provided were merely 2.47% in April, 2007 and not 81.3% as shown by the assessee in the chart filed in the compilation before the Tribunal. She submitted that the rates for medical services charged from indoor patients as well as OPD patients are on the higher side as compared to the other hospitals in the city and the hospital is charging exorbitant charges from the patients and, therefore, the activities of the trust are far away from charitable in nature. She submitted that the hospital was being run on commercial lines as the assessee has spent over ₹1 crore on advertisement alone every year. She relied on a series of decisions which are as under:-

(i) Municipal Corporation of Delhi Vs. Children Book Trust and Safdarjung Enclave Education Society Vs. Municipal Corporation of Delhi – [1992] 3 Supreme Court Cases 390.

(ii) Society for the Small & Medium Exporters Vs. Director of Income-tax (Exemptions) – [2011] 139 TTJ 218 (Delhi).

(iii) M. Visvesvaraya Industrial Research & Development Centre Vs. DCIT – [2002] 83 ITD 511 (Mum).

(iv) Allahabad Agricultural Institute Vs. Union of India – [2007] 291 ITR 116 (Allahabad).

(v) Madhya Pradesh Madhyam Vs. CIT – [2002] 256 ITR 277 (Madhya Pradesh).

(vi) Kamma Sangham Vs. DIT (E) – [2014] 362 ITR 30 (Andhra Pradesh).

(vii) Prabodhan Prakashan Vs. ITO (Exemptions) – [2014] 61 SOT 167 (Mumbai-Trib.).

(viii) Sree Anjaneya Medical Trust Vs. CIT, Kozhikode – [2014] 66 SOT 272 (Cochin-Trib.).

(ix) Rajah Sir Annamalai Chettiar Foundation Vs. DIT(E) – [2011] 48 SOT 502 (Chennai).

(x) Aurolab Trust Vs. CIT, Madurai – [2011] 46 SOT 125 (Chennai)(URO).

(xi) Hardayal Charitable and Educational Trust Vs. CIT, Agra – [2012] 150 TTJ 384 (Agra).

(xii) Indian Nutritional Medical Association Vs. CIT-1, Kochi – [2013] 59 SOT 39 (Cochin-Trib.)(URO).

(xiii) Tamil Nadu Cricket Association Vs. DIT(E) – [2013] 57 SOT 439 (Chennai-Trib.).

(xiv) Daulat Ram Public Trust Vs. CIT – [2000] 244 ITR 514 (Delhi).

(xv) DDIT(E) Vs. Mool Chand Kharaiti Ram Trust – [2012] 52 SOT 42 (Delhi).

(xvi) Board of Control for Cricket in India Vs. ITO – [2012] 136 ITD 301 (Mumbai).

(xvii) Ideal Publications Trust Vs. CIT, Calicut – [2008] 305 ITR 143 (Kerala).

9. The learned CIT-DR referred to the minutes of the meeting of the members of the governing body of the assessee-society on 06.09.2008 resolving that the society do provide and create charge by way of hypothecation over its current assets on *pari passu* basis with working banking capital and exclusive charge over its fixed assets in favour of IIBL to secure its obligation etc. She referred to the agreement dated 15.12.2005 between the assessee-trust and M/s Vascard Healthcare and Services Limited (hereinafter referred to as 'M/s Vascard') whereby M/s Vascard was to provide doctors who have specialized knowledge and experience in the heart and vascular field. It further provides that on execution of the agreement, the assessee-society shall pay M/s Vascard on a Sign on Bonus of ₹2 crores over and above the payments

contained in items 4, 5 and 6 of the agreement that will accrue to M/s Vascard after the signing of the agreement. It further provides that in the event of termination of this agreement for any reason whatsoever, the assessee-society shall compensate M/s Vascard by paying ₹2.5 crores if the termination takes place within one year of the agreement and by paying ₹2 crores if the termination is after the end of the one year but within two years of the agreement and so on and by ₹0.50 crore if the termination takes place after four years but within five years of the agreement. She submitted that it was not correct that the Assessing Officer has accepted the activities of the assessee as charitable in nature as is clear from the copy of the reasons recorded for reopening of the case under Section 147 for the assessment year 2005-06 and the assessment order passed under Section 143(3) in scrutiny assessment for the assessment year 2007-08, copy filed in the compilation before the Tribunal. The learned CIT-DR submitted that even the movable assets of the assessee were hypothecated for the benefit of M/s MHC to secure loans on commercial lines. She referred to the resolution of the governing body of the assessee-society passed on 21.03.2011 where the society resolved that they will provide and create charge by way of hypothecation over its current assets on *pari passu* basis, with working capital banker and exclusive charge over its movable fixed assets. She referred to the relevant portion of the order passed by the DIT(E) refusing exemption under Section 12A in support of the case of the Revenue. She submitted that the main objects of the assessee-society remained the same and the changes were there in the ancillary objects of the assessee-trust. She submitted that the decisions relied upon by the learned senior counsel for the assessee were in the peculiar facts and circumstances of each case and are not applicable to the facts of the case of the assessee and are clearly

distinguishable. In the case of the assessee, the assessee has not conducted its activities in a charitable nature and has run the hospital on commercial lines and has not spent anything on its main object of research and, therefore, is not entitled to exemption under Section 12A of the Act. Therefore, the order of DIT(E) refusing exemption under Section 12A may be confirmed.

10. The learned senior counsel for the assessee, in his rejoinder, submitted that the assessee is running a hospital and how running a hospital for public at large was not a charitable activity. He referred to Circular No.11 of 2008 dated 19th December, 2008 issued by the CBDT, copy filed in the compilation before the Tribunal which lays down that for the purpose of "charitable purpose" under Section 2(15) of the Act, the words "charitable purpose" shall include amongst others the medical relief and it further provides that 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 certain conditions. The learned senior counsel argued that whether the assessee charged ₹100/- or ₹1,000/- for a particular service does not make the service rendered for medical relief as not charitable. He submitted that the hospital may not cut the cost to compromise the quality of medical aid to the public. He submitted that the assessee has never earned profit in any year and has in fact incurred losses. He argued that does an assessee loses its charitable tag merely because ₹40/- out of ₹100/- were paid to Max Group, when there is no dispute that the other ₹60/- were spent for charitable purposes only by the assessee-society. He submitted that the provision of Section 12AA(3) applies to the case of the assessee and not Section 12AA(4) of the Act.

11. He submitted that the assessee-trust has taken permission of equitable mortgage of land allotted by DDA and, therefore, had accordingly mortgaged its movable and immovable properties to facilitate Max Healthcare Services Pvt.Ltd. for availing amount of loans. He submitted that mortgaging of land or other assets of the assessee-society to facilitate Max Healthcare Services Pvt.Ltd. to raise loans from banks etc. was not made a reason by DIT(E) to refuse exemption us/ 12A of the Act and, hence, this plea of the learned CIT-DR could not be considered by the Tribunal now at the appellate stage. For this proposition, he relied on the following decisions :-

(i) CIT Vs. Ashish Rajpal – [2010] 320 ITR 674 (Delhi).
(ii) Pinegrove International Charitable Trust Vs. Union of India and Others – [2010] 327 ITR 73 (P&H).
(iii) Deep Malhotra and Others Vs. Chief Commissioner of Income-tax and Others – [2011] 334 ITR 232 (P&H).
(iv) Mrs. Usha A. Kalwani Vs. S.N. Soni and Another – [2005] 272 ITR 67 (Bombay).

12. The learned senior counsel also relied on the decision of Hon'ble Supreme Court in the case of Rashmi Metaliks Limited and Another Vs. Kolkata Metropolitan Development Authority and others – [2013] 10 Supreme Court Cases 95 (paragraph 14 & 15). Regarding the plea of the learned CIT-DR that the assessee has spent about ₹1 crore for advertisement on commercial lines and the name of ‘Max’ is added in the hospital’s name, the learned senior counsel submitted that no such ground was taken by the DIT(E). He submitted that there is no allegation of the Revenue that Max Group of Companies is connected

to the assessee-society. He submitted that the Max is a high class medical services provider and one of the largest private healthcare companies in the country and has a network of five hospitals and has pioneered the concept of chronic disease management and its diabetic chronics care program is rated amongst the best in Delhi. He submitted that the agreement between the assessee-society and M/s Vascard, copy filed by the Revenue in its compilation before the Tribunal, has no bearing on the case of the assessee as M/s Vascard is an independent service provider. He submitted that the legal, financial and management control of the hospital is with the assessee only. He submitted that the assessee's employees were 88.18% in FY 2007-08, 90.99% in FY 2008-09 and 98.14% in FY 2009-10 of the total employees of the hospital. He submitted that the DIT(E) has not referred to the reasons recorded under Section 147 read with Section 143(3) for the assessment year 2005-06 by the Assessing Officer and, therefore, this plea should not have been taken by the learned CIT-DR. He submitted that in fact with the engagement of MHC, it was the assessee who had benefitted due to specialized medical services. He submitted that regarding the free beds not availed by the weaker sections of the society, the relevant authorities of the Delhi Government have not objected and, therefore, the department could not sit over the judgments of the concerned authorities appointed under the law. He submitted that on the same facts, the Delhi Tribunal has decided the issue in favour of the assessee in ADIT(E) Vs. RB Seth Jassa Ram Charitable Hospital vide ITA No.1721/Del/2008. He referred to the assessment order framed in scrutiny assessment under Section 143(3) for the assessment year 2008-09 wherein the Assessing Officer held that the assessee has not carried out charitable activities and that huge payments were made to Max Group and were assessed in the

status of AOP and charged to tax at the maximum marginal rate and, therefore, he argued that there is no power to DIT(E) to deny exemption under Section 12A since there is alternate mechanism by way of appeal etc. against the assessment order framed by the Assessing Officer. He submitted that for the research in the advancement of medical care, the person concerned had to take samples from different hospitals at different places to test the credibility of the new medicine being introduced for the public at large. He submitted that the order of learned DIT(E) deserves to be cancelled.

13. We have considered the rival submissions carefully and have perused the order of learned DIT(E) cancelling the registration granted to the assessee under Section 12A of the Act and also the copies of various documents filed in the voluminous compilation by the assessee and the Revenue. The brief facts of the case are that the assessee was registered under The Societies Registration Act, 1860 by the Registrar of Societies vide order dated 1st day of March, 1994. The assessee was also granted registration under Section 12A of the Act by the DIT(E) vide order dated 23.06.1994 with effect from 01.03.1994. Thereafter, the DIT(E) has sought to cancel the registration granted under Section 12A and issued show cause notices to the assessee on 18.11.2011 and also on 02.12.2011. The assessee complied with the notices and filed its submissions before the DIT(E). The DIT(E), after considering the submissions of the assessee, has passed the impugned order dated 28.12.2011 cancelling the registration granted to the assessee under Section 12A of the Act since the inception of the trust, against which the present appeal preferred by the assessee before the Tribunal.

14. In order to arrive at the correct conclusion, it is necessary to reproduce the objects of the assessee-trust as detailed in the memorandum of association as the main objects as well as objects incidental or ancillary to the attainment of the main object as under :-

"III. OBJECTS

The objects for which the Society is established shall be :

A. MAIN OBJECT OF THE SOCIETY TO BE PERSUED ON REGISTRATION :

To engage in medical, biological, social, environmental and allied sciences research so as to enhance human understanding regarding the epidemiological basis of health & disease through acquisition, dissemination and sharing of new knowledge concerned with initiation, causation, diagnosis, treatment and rehabilitation of disease and disability in humans in general and with reference to :

- *Cardiac Speciality*
- *Cancer detection and care*
- *Communicable diseases*
- *Nutritional and Deficiency disease*
- *Diseases of Pregnancy & Newborn*
- *Diseases of Poverty and illiteracy*

B. OBJECTS INCIDENTAL OR ANCILLARY TO THE ATTAINMENT OF THE MAIN OBJECT :

1. In consonance with the main object, to engage in management sciences research with special reference to methods of organization methods of financing and choice of technology in delivery of health care.

2. In consonance with the main object, to engage in population science research with special reference to contraception and other scientific methods of population control.

3. To promote, establish, maintain and manage Centres/Institutions of Health/Medical Sciences to provider necessary infrastructure with required physical facilities, equipment, staff, labourers and other inputs including scientific work environment and logistics support for the design, conduct and evaluation of research programs for the accomplishment of the objects of the Society.

3(a) To provider financial assistance and/or to provide security, tangible and intangible, including inter alia hypothecation, mortgage, guarantees and such other securities as may be deemed necessary for and on behalf of any other entities/bodies corporate, having similar objects/purposes as that of the Society in connection with financial facilities that may be availed by such entities/bodies corporate.

4. To establish collaborative linkages with national and international philanthropic, benevolent and other organizations, to share experience and expertise through joint activities/ventures/partnership etc., to provide for the reception and treatment of persons suffering from any illness or defectiveness or for the reception and treatment of persons during convalescence or of the persons requiring medical attention or rehabilitation and for this purpose to do all acts, deeds, things and steps as are necessary for the attainment of the said objects, such as :

- To set-up comprehensive Care and Research Centre.
- Establishing, taking over, running, maintaining and or managing hospitals, nursing homes, medical dispensaries, medical advisory centres, blood banks, clinical laboratories and Orthopedic Centres.
- To conduct research programmes in basic and clinical sciences on various aspects of epidemiology, clinical presentation, pathology, patho-genesis, etiology and treatment of cancer.
- To develop and test newer modes of treatment, stenting videoscopic surgery, early detection and

prevention of cancer including immunotherapy, tumor markers etc.
- Ultrasound facilities in high risk obstetric cases.
- To impart training in various aspects of cancer care and videoscopic surgery to nurses, technicians and other paramedical personnel.
- To conduct prospective and retrospective studies and compilation of diseases pattern as is prevalent in northern India.
- To offer facilities of highest order for palliative interventional procedures like tumor embolisation, bypass obstructions by stent introduction etc.
- To offer diagnostic facilities of highest order over and above the existing facilities.
- To offer cancer surgery in specialized of oral and malignancies which are most prevalent in northern India.

5. To disseminate, the acquired knowledge through publications, conferences, seminars, workshops, courses, presentations, demonstrations and exhibitions organized at regional, national and international levels and to share such knowledge with other institutions for an agreed consideration.

6. All the income earnings from movable or immovable properties of the society shall be solely utilized and applied towards the promotion of its aims and objects as set forth in the Memorandum of Association and no portion thereof shall be paid or transferred directly or indirectly or by way of dividends, bonus, profit, etc., to the present or past member of the Society or to any person claiming through any one or more of the present or the past members."

15. The learned CIT-DR has emphasized on the fact that the assessee has not carried out its activities as per the main object of the society. The main object of the society as reproduced above was to engage in medical, biological, social, environment and allied sciences research so as to enhance human understanding regarding the epidemiological basis of health and disease through acquisition etc. in

humans in general and with reference to certain identified diseases mentioned therein. The opening words of other objects were "objects incidental or ancillary to the attainment of the main object" had to be "in consonance with the main object". The learned CIT-DR submitted that the assessee has not undertaken any research work and has not carried out any activity in accordance with the objects of the assessee-society and, therefore, the exemption under Section 12A should be cancelled on this ground alone. The learned senior counsel for the assessee has argued that it could not be said that the running a hospital was not a charitable activity. He submitted that there is no evidence that the assessee was running the charitable activity of running a hospital on commercial lines. He has strongly argued that the facts of the case lead to the only conclusion that the assessee was running a hospital on charitable lines and, therefore, the exemption granted under Section 12A could not be cancelled by the DIT(E).

16. We have carefully considered the submissions of both the parties on this issue that whether the assessee-society has undertaken its activities in accordance with the objects of the society. We find that the exemption granted under Section 12A to the assessee-society could validly be cancelled on this short issue as the assessee has not undertaken its activities in consonance with the objects of the society as detailed in the memorandum of association reproduced above. The main object of the assessee-society was to engage in medical, biological, social, environment and allied sciences research so as to enhance human understanding regarding the epidemiological basis of health and disease through acquisition etc. in humans in general and with reference to particular diseases detailed therein. The assessee could not demonstrate before us that it has undertaken any research

work as per the main object of the assessee-society. The assessee could not even establish that it has undertaken activities in consonance with the objects incidental or ancillary to the attainment of the main object as detailed in the memorandum of association of the assessee-society. The plea of the learned senior counsel, that in new medicine system, samples from different hospitals are taken including from the hospital run by the assessee-society and, therefore, is a research in advancement of medical care, is not acceptable since collecting the samples from the patients by commercial companies for testing the desirability of introducing the new drug for public at large is not a research undertaken by the assessee-society in accordance with its objects but in fact is a commercial activity of testing the drug on humans by the pharmaceutical companies for its commercial application at large. In this case, the facts of the case lead to the only conclusion that the assessee has not undertaken any research activity in accordance with the objects of the assessee-society. It is well-established that the registration for exemption under Section 12A is granted by the DIT(E) on the basis of objects of the assessee-society as detailed in the memorandum of association and if the DIT(E) finds that the objects of the assessee are charitable in nature, and that other legal formalities are fulfilled by the assessee, DIT(E) has no other choice but to grant registration under Section 12A of the Act. However, the assessee is bound to carry on its activities in accordance with the objects of the society which were submitted to the Department for grant of exemption under Section 12A of the Act. In case the assessee, at a later date, after the registration granted to it, considers it expedient to undertake some other activity which is charitable in nature, it is obliged under the law to amend its objects clause in accordance with law and to submit the same before the

DIT(E). No such exercise was undertaken by the assessee of amending its main object by the assessee-society. In these facts of the case, we hold that the assessee has not undertaken its activities in accordance with the objects of the assessee-society as detailed in the memorandum of association and, accordingly, we hold that the assessee-society is not entitled to the benefit of exemption under Section 12A of the Act and the exemption under Section 12A was rightly cancelled by the DIT(E). We hold accordingly.

17. As regards the merits of the case, we find that the assessee-society has not undertaken any activity worth the name, which can be said to be charitable activity on the part of the assessee. The assessee has obtained the plot of land on perpetual lease from 05.06.1996 vide registered perpetual lease deed from the Government of India at a nominal rent with certain conditions which, inter alia, include the condition of providing 10% totally free indoor treatment and 20% free OPD for the weaker sections of the society. This limit of 20% free OPD was later on raised to 25% by the Delhi Government on directive from the Hon'ble Jurisdictional High Court. However, admittedly, the assessee could not comply with this condition of the very allotment of the land to the assessee-society and has not provided the required number of beds to the poor and weaker sections of the society. The assessee was allotted prime land in the heart of most expensive South Delhi area of “Saket” by the Government with the condition that it shall provide medical relief up to a certain percentage of patients totally free. The plea of the learned senior counsel, that the assessee has made provision for free beds but if the poor people do not come forward and avail free medical services, the assessee could not be blamed, is not sustainable. It is a matter of common knowledge that

the poor patients are not given admission for treatment by private hospitals as they cater to only the elite class of the society. These private hospitals have been made in a five star style and they do not allow even the entry to the poor people in its corridors. In the government hospitals, the poor patients are lying in verandahs and in open space in wait for their turn for admission for days together and it is not believable that they will not come forward for treatment in the hospital providing all modern facilities free of cost. The plea of the learned senior counsel for the assessee that on monthly basis, the details of free beds have to be filed with the Health Department and the authorities appointed under the statute have checked the same and the Income-tax Department could not sit over their judgement, seems to be not relevant to the issue before the Tribunal. The issue before us is not that whether any legal action should have been taken by the Health Department and the authorities appointed under the statute to check the details of free beds provided by the assessee and, in our view, any failure on the part of the authorities of the Health Department to take action, would not immune the assessee for violating the condition of allotment of land itself to it at a nominal price. The issue before us is whether the assessee is conducting its affairs in a charitable manner or whether on commercial lines.

18. In our view, the plea of the learned senior counsel that Max group of companies is not connected to the assessee-society is also of no consequence since the assessee, a charitable society, could not make charity to a commercial organisation, although not connected with it, by paying exorbitant amounts totalling to about ₹40 crores in a year and should have spent the amount in a charitable manner for the deserving sections of the society. We find that a survey operation was

conducted at the premises of the assessee on 23.08.2005 and during the course of survey operations, some facts were noted by the DIT(E), New Delhi. It was found during the course of survey operations that Max group of companies were in full control of the hospital run by the assessee-society. No trustee or assessee-society's office was found or noticed in the hospital. There was no name plate to suggest the trustees names/presence, or any office of the trust in the hospital. The DIT(E) noted that no charitable activities were noticed and no free treatment of patients was found and it was found that there was no free OPD. No records/no register in this regard were found in the hospital. We find that the conduct of affairs of the assessee-society are not on charitable lines and were clearly on commercial lines. The rate schedule of its charges from the patients for diagnosis, treatment or indoor facilities including surgery etc. are exorbitant and one of the highest in the metro capital city of New Delhi. We have to see the overall conduct of the assessee and, in this case, the overall conduct of the assessee leads to the only conclusion that the assessee-society is not running its affairs in a charitable manner.

19. The assessee-society has entrusted the construction of the hospital building, supply of equipment, engagement of the doctors and surgeons etc. to Max Group of Companies, which is admittedly a profit-making concern and not a charitable institution. We find that all the agreements entered into by the assessee-society with the Max Group of Companies were highly tilted to give due and undue benefits to the Max Group. The title deeds of the immovable properties were hypothecated to the bank to raise loans to the benefit of Max Group of Companies. The assessee-society having been allotted prime land at a nominal price from the Government could not hypothecate its title

deeds in favour of the bank to raise loans for the benefit of a profit-making Max Group of Companies. The assessee has even hypothecated its movable assets in favour of the bank for the benefit of the Max Group of Companies. We find that in agreement dated 10.12.2001 between the assessee-society and M/s MMK Investments Pvt.Ltd. (Max Group), the owner, i.e., the assessee could not terminate the contract and the contractor i.e. M/s MMK Investments Pvt.Ltd. could terminate the contract. Clause 4.04 of this agreement dated 10.12.2001 provides that in case the contractor M/s MMK Investments Pvt.Ltd. terminates the agreement before the expiry of the term or the extended term in accordance with certain provisions mentioned in the agreement or the assessee society terminates the agreement otherwise in accordance with clause 4.02 of the said agreement, the assessee trust shall be liable to pay the contractor i.e. M/s MMK Investments Pvt.Ltd. liquidated damages amounting to the sum of ₹12 crores together with interest at the rate of 2% per annum over the short term prime lending rate of SBI payable from the date of such termination till the date of actual payment, less the amounts already paid by the owner towards construction of the building. It is not understandable that the contractor M/s MMK Investments Pvt.Ltd. was entitled to terminate the agreement and the assessee was made liable for liquidated damages of a very high amount of ₹12 crores along with interest thereon. As per the agreement, the cost of construction of the hospital which was ₹24.51 crores incurred by Max Group of companies was to be paid by the assessee trust in a period of 26.5 years along with 2% of the annual turnover of the assessee-society hospital and the turnover in this case is over ₹100 crores in a year. Further, the assessee-society was to pay 6% of its annual turnover on account of repair and maintenance to the Max Group. The repayment schedule to

the Max Group has been designed in a way to give maximum benefit to the Max group of companies. We find that the assessee was not doing any charitable activities directly and its employees were only of lower category and doctors and technicians were all belonging to the Max Group. Clause 8.03 of the said agreement defines "Gross Annual Turnover" of the hospital for any particular financial year to include every receipt from whatever source of income. In the agreement between the assessee-society and M/s MMK Investments Pvt.Ltd. dated 10.12.2001, the term "use of equipment" by the hospital has been defined and it is specifically provided that M/s MMK Investments Pvt.Ltd. could terminate the agreement at any time solely at its option by giving a 30 day's written notice to the assessee. Clause 13.2 of the said agreement provides that the assessee trust shall have no right to terminate this agreement, save and except in the case of material breach by M/s MMK Investments Pvt.Ltd. of its obligation etc. The payment mechanism is defined in clause 17.2 thereof which provides that the assessee-society shall pay to M/s MMK Investments Pvt.Ltd. a sum equivalent to 10% of the gross annual turnover. The services agreement between the assessee and M/s MHC dated 30th June, 2004 provides that the medical services shall be provided by M/s MHC which shall make available senior consultants, doctors, medical superintendent and other personnel and the assessee has agreed to provide an area of at least 1500 sq.ft. for the exclusive use of M/s MHC and its personnel. Clause (6) of the services agreement provides that the assessee-trust shall apply and obtain and renew all necessary permissions, sanctions, license, permits etc. from the government and other appropriate authorities and that M/s MHC shall not at any time and in any way be responsible for any consequences arising out of the delay to obtain such permissions. Clause 6(c) of this agreement

provides that the assessee-trust shall not make any attempt to solicit or source the services for the hospital from any third party during the term of the agreement. However, M/s MHC shall have the option to provide the services of any kind to any other person etc. Clause 6(f) of the services agreement provides that assessee-trust has agreed to utilize the funds of the hospital including all its receipts of whatever nature only for the purpose of management and operations of the hospital and shall not be diverted to or used by the assessee-society for any other purposes. We find that it is not understandable that how the contractor M/s MHC could impose such a condition which binds the assessee-society to utilize its funds in a particular manner. We find that in view of this condition of utilizing the receipts of the hospital in a particular manner, it is not understandable that how the assessee could undertake any research work as provided in its main object in the memorandum of association in view of the specific bar to utilize the funds of the hospital for the purpose of management and operations of the hospital. Clause 8(a) of this agreement makes the assessee-society responsible and solely liable for any action that may be initiated against the assessee with respect to the services provided at the hospital and that M/s MHC shall have no liability whatsoever in respect of the claim asserted against the assessee or MHC by any third party including government or bodies for any act of omission whatsoever. Annexure-1 to the said services agreement provides that M/s MHC shall be paid services fees at ₹12 crores in each of the first three years and ₹15 crores in each year from the fourth year up to the ninth year and ₹20 crores in each year from the ninth year onwards from the effective date. It further provides that in addition to the fees as detailed above, the assessee-society shall reimburse to MHC all expenses incurred by MHC on behalf of assessee-trust on monthly

basis. The hospital is being run on commercial lines as the assessee has spent about ₹1 crore on advertisement alone in a year. We find that the governing body of the assessee-society had passed a resolution on 21.03.2011 whereby the society resolved that they will provide and create charge by way of hypothecation over its current assets on *pari passu* basis, with working capital banker and exclusive charge over its movable fixed assets. A bare reading of the above agreements entered into by the assessee with Max Group of companies shows that the agreements were drafted in a way to give maximum benefit to the commercial Max Group of companies and could not be said to be in advancement of any charitable activity of the assessee-society.

20. We find that the assessee-society has even changed the name of the hospital run by it and the name of "Max Super Speciality Hospital – a unit of Devki Devi Foundation", Saket. The assessee is spending a very heavy amount of ₹1 crore on advertisement alone. The learned senior counsel for the assessee has relied on the Circular No.11 of 2008 dated 19th December, 2008 issued by the CBDT, copy filed in the compilation, defining the provisions of Section 2(15) of "charitable purpose". It provides that the charitable purpose shall include the medical relief and that the entities whose objects is "education" or "medical relief" would continue to be eligible for exemption as charitable institutions even if they incidentally carry on a commercial activity subject to certain conditions. We find that the reliance on the contents of this Circular issued by the CBDT is misplaced firstly because the assessee is not running its activities in accordance with the objects of the assessee-society and, secondly, in this case, the issue is not that whether the assessee has incidentally carried on any

commercial activity. In this case, the activity of the assessee in providing medical relief itself is not conducted in a charitable manner and, therefore, the ratio of the Circular issued by the CBDT does not apply to the facts of the case of the assessee. The assessee is running its affairs of running a hospital totally on commercial lines to extract the maximum revenue from its patients and, therefore, could not be said to be charitable in nature. The plea of the learned senior counsel for the assessee, that if the assessee receives ₹100/- from its activities and passed ₹40/- to the Max Group of companies and spent the balance ₹60/- in running the hospital, it could not be said that the assessee is not running its affairs in a charitable manner, does not have any merit. We find that the assessee has managed its affairs in a way that after paying exorbitant amount to the Max group of companies, the balance is spent for running the hospital activities and there remains no profit for taxation to the government.

21. The plea of the learned senior counsel for the assessee, that the argument of the learned CIT-DR that the assessee has mortgaged its properties in favour of the bank to facilitate the loan to the Max group of companies could not be raised since that was not made a reason by the DIT(E) and, therefore, could not be considered now, is not sustainable. The Tribunal is the final fact finding body and in order to come to a right conclusion, it may consider a fact brought on record, which could not be controverted by the other party and which may be found to be relevant for deciding the issue before the Tribunal.

22. The plea of the assessee that the legal, financial and management control of the hospital was with the assessee only is devoid of any merit as, in fact, the assessee has entrusted right from

the building of the hospital to enrolment of the doctors and technicians and also the running and maintenance of the hospital to the Max Group of companies and, in fact, the management of the hospital and its financial control is in the hands of Max Group only. Merely because the lower level of employees which form the substantial majority of the total number of employees were recruited and are employees of the assessee-society, is not decisive of the issue. The plea of the learned senior counsel, that the DIT(E) has wrongly mentioned that the assessee as per the agreement was to provide 1500 sq.mtr. covered space to Max group and was in fact 1500 sq.ft., is of no consequence as it is apparently a typographical error only. The plea of the learned senior counsel, that in the assessment order for the assessment year 2008-09, the Assessing Officer while framing assessment under Section 143(3) in scrutiny assessment has assessed the assessee in the status of an AOP at the maximum marginal rate of tax and has held that no charitable activities worth the name are being provided by the assessee and huge payments are being made to Max group under different heads and therefore, the DIT(E) has no power to withdraw the exemption under Section 12A separately, is not sustainable in law. The assessment order of the Assessing Officer was passed in scrutiny assessment under Section 143(3) of the act and the registration under Section 12A of the Act is altogether separate and whose jurisdiction lies with DIT(E) and not with the Assessing Officer.

23. The learned senior counsel for the assessee has relied upon the decision of Hyderabad Bench of the Tribunal in the case of St. Joseph Academy (supra). We find that the ratio of this decision of the Tribunal is not applicable to the facts of the case of the assessee as the main issue in this case before the Hyderabad Tribunal was that where the

assessee-society was formed with the object of establishing schools, colleges, training institutions, hospitals, orphanages, hostels etc. for the benefit of Christian minority community in particular and others in general. The CIT rejected the assessee's application for registration under Section 12AA that the society was formed for the benefit of a particular community. The Tribunal decided the issue in favour of the assessee and granted the registration to the assessee. In the case of the present assessee before us, there is no such issue and, therefore, the decision cited has no application to the facts of the case of the assessee.

24. The learned senior counsel has relied upon the decision of Delhi Tribunal in the case of Chaudhary Bishambher Singh Education Society (supra). In this case, the issue was that the assessee was charging fees from the students as approved by the prescribed relevant authorities of the state government every year and there was no material on record to suggest that the assessee was charging fees similar to commercial colleges. In these facts, the Delhi Tribunal allowed the appeal of the assessee and held that the activities of the assessee fall within the ambit of charitable activities as defined in Section 2(15) of the Act. This decision of the Delhi Tribunal, in our view, is not applicable to the facts of the case, rather, it goes against the case of the assessee for the simple reason that it is not the case of the assessee that it was charging fees from the patients as prevailing in the government hospitals.

25. The learned senior counsel for the assessee has also relied upon the decision of Delhi Tribunal in the case of Civil Services Society (supra). In this case, the registration was granted to the assessee

under Section 12AA by the Tribunal. We find that the ratio of the decision of Delhi Tribunal in this case is distinguishable as the Tribunal in this case has found as a matter of fact that there was no whisper of allegation by the Revenue in regard to any violation of the terms and conditions set out either in the allotment letter issued by Ministry of Urban Development and nor by the monitoring authority in regard to the government policy namely by the Department of Education, Government of National Capital Territory of Delhi. The Tribunal has also noted in this case that the assessee was offering admission of economically weaker section category students on free ship and as such, requirement of Section 2(15) was fulfilled in this case.

26. The learned senior counsel has relied on the decision of Hon'ble Punjab & Haryana High Court in the case of CIT Vs. Jagadhri Electric Supply & Industrial Co. – [1981] 7 Taxman 56 (P&H). In this case, the Tribunal has set aside the order of the CIT passed under Section 263 on the plea that the Tribunal could not uphold the order appealed against on the grounds other than those taken by the Commissioner in his order. In our view, there is no such issue in the case of the assessee before us.

27. The learned senior counsel has relied on the decision of Hon'ble Supreme Court in the case of Rashmi Metaliks Limited and Another (supra) which has followed the decision of Hon'ble Supreme Court in Mohinder Singh Gill Vs. Chief Election Commissioner – [1978] 1 SCC 405. We find that these decisions shall not help the case of the assessee as it was held by the Hon’ble Apex Court in Mohinder Singh Gill’s case cited supra that when the validity of an order by a statutory functionary is judged, it could not be supplemented by fresh reasons in

the shape of an affidavit or otherwise. It was further observed by the Hon'ble Apex Court that otherwise an order bad in the beginning may, by the time it comes to court on account of a challenge, get validated by additional grounds later brought out. We find that no such exercise was undertaken by the Revenue in this case and, therefore, this decision of the Hon'ble Supreme Court does not help the case of the assessee.

28. The learned senior counsel has also relied on the decision of Delhi Tribunal in the case of RB Seth Jassa Ram Charitable Hospital (supra), wherein the exemption under Section 11 was denied to the assessee on various grounds including that the running of the hospital was given to M/s Fortis. The Delhi Tribunal in this case has dismissed the Revenue's appeal on the ground that in the immediately preceding assessment year 2003-04, the decision of the CIT(A) was accepted by the department and no appeal was preferred by the Revenue to the Tribunal. The Tribunal recorded that the Revenue has not pointed out any fact indicating the misuse of the funds by the management or that the activities were not carried out for the objects of such trust. The Tribunal further held that the decisions taken by M/s Fortis were subject to approval and consent of the trustees of the assessee-society. We find that this decision of Delhi Tribunal is distinguishable since, in the case before us, there is an excessive payment of funds by the assessee-society to M/s Max Group of Companies and the activities of the assessee-society were not in accordance with the objects of the assessee-society as detailed in the memorandum of association. There is no evidence brought on record by the assessee that all the decisions taken by Max group of companies were subject to approval and consent of the trustees of the assessee-society.

29. The series of decisions cited at the bar by the learned senior counsel for the assessee have to be applied in the light of the facts and circumstances of each case. In the facts of this case, we have already recorded a finding that the assessee was not running its affairs on charitable lines in accordance with its objects as mentioned in the memorandum of association and, therefore, the assessee-trust is not entitled to the benefit of exemption under Section 12A of the Act. The soul of charity is benevolence and generosity towards others and the community at large. Of course, it is important as to what are the activities of a charitable institution but what is even more important is what is the predominant motivation for such activities. No activity, by itself, could be charitable in nature when it is dominated and triggered by economic greed. There is no difference in what a soldier and a mercenary does, both use bullets to defend their interests, but while a soldier does it out of patriotism, a mercenary does it for monetary gain. The action is the same, and yet motivation for the actions are so materially different that the character of activity is altogether changed. Clearly, underlying motive and trigger for doing what a person does is, is important for determining whether such an action is in the course of business or charity. What is really, therefore, required to be carefully examined, in order to find whether an act of the institution is charitable or not, is not only to assess the work being done by the institutions, which claim to be pursuing charitable activities, but also the economic dynamics and motivations of such activities.

30. In the light of this fundamental position, let us take a look at what the assessee is doing and whether the manner in which activities of the assessee are being carried out indicate any compassion,

benevolence or generosity towards others or as a community as a whole. When object of an institution is to help the poor or sick, the working pattern of the institution must be shown as such in its approach, the way in which its charges are fixed and in its commitment towards underprivileged sections of society. Undoubtedly, the mere charging of a reasonable fees for services offered by a charitable institution does not vitiate its charitable character but that is as long as the charging of fees does not have scant regard for humane values. Similar is the position with regard to other operational policies adopted by an institution. An analysis of these operational policies can give us clear pointer to the predominant motivations and triggers for the activities carried on by that institution and whether such activities are truly charitable in nature or not.

31. The learned CIT-DR has relied on the decision of Hon'ble Supreme Court in the case of Municipal Corporation of Delhi Vs. Children Book Trust and Safdarjung Enclave Education Society Vs. Municipal Corporation of Delhi – [1992] 3 Supreme Court Cases 390, wherein it is held that the dominant object of the society must be charitable and not to earn profit and that running of school by the society generating positive income from the fees and donations received from the students/parent, activity of the school was not for charitable purpose but for commercial purpose. We find that the ratio of the decision of Hon'ble Supreme Court in this case applies to the facts of the case of the assessee. If we ignore the exorbitant amounts paid by the assessee to Max Group of companies and restrict them to a reasonable level, the result shall be that the assessee-society has generated huge positive income from the fees and other charges

received from the patients by running the hospital and, therefore, the hospital was not for charitable purpose but for commercial purpose.

32. The learned CIT-DR has also relied upon the decision of Bangalore Tribunal in D.R. Ranka Charitable Trust Vs. DIT(E) – [2010] 3 ITR (Trib) 151 (Bangalore), wherein the assessee-trust constructed building and let it out to educational institutions for carrying out its educational activities. The Bangalore Tribunal held that the activity of the assessee-trust did not amount to a charitable activity and not entitled to exemption.

33. The learned CIT-DR has also relied on the decision of Chennai Bench of the ITAT in Aurolab Trust Vs. CIT-I, Madurai – [2011] 46 SOT 125 (Chennai), wherein the Tribunal upheld the order of the Commissioner cancelling the registration of the assessee u/s 12A wherein the assessee carried out business incidental to charitable activities of the trust and had converted incidental objects as main objects of the assessee and did not carry on the proclaimed main object of charitable activities. We find that in the case of the assessee, the assessee-society has not carried out its main object of research in medical sciences and the activities carried out by it in the facts of the case could not be said to be charitable in nature and, therefore, the exemption u/s 12A was rightly cancelled by the DIT(E).

34. We find that the DIT(E) has passed a well-reasoned speaking order on the issue. He has recorded a finding that the assessee's foundation has not been in operation as a charitable institution as the trustees allowed the property as to be taken over by the Max group by creating various financial and legal obligations as detailed in the

foregoing paragraphs of his order. He has further recorded that the hospital is virtually run by the Max Group of concerns which are corporate bodies established with the clear intention of profit motive and this is against the basic principles of the charitable organization. The learned DIT(E) has recorded that huge payments to the Max group concerns were made under various agreements totalling to over ₹40 crores in assessment year 2008-09 which shows that the assessee was working only for the monetary benefit of certain corporate concerns and not working as a philanthropic organisation. The DIT(E) has recorded a finding that assessee-society is being used simply as a 'special purpose vehicle' to take advantage of facilities of concessional land etc. offered by the government while passing off unilaterally profits to corporate concerns. The assessee-society did not select the Max group of companies on the basis of any process where comparative advantage to the assessee-society from such multiple corporate entities was analysed and compared. He has given a finding that free treatment of indoor patients was 0.3% to 2.4% which was below the prescribed guidelines of the Delhi Government and the directions of Hon'ble Delhi High Court.

35. We find that imparting education and health services to the weaker sections of the society was one of the main charities in good old times. However, in recent times, imparting of education and running a hospital have become one of the main commercial activities. Under the guise of charity, the people are exploiting the charitable institutionally commercially. Although in this case of the assessee, there is no conclusive evidence or material on record to conclude that the hospital itself has been given away by the trustees of the assessee-society to Max group of companies to exploit the hospital

commercially, but, the facts of this case do raise a reasonable suspicion that the hospital itself has been given out by the assessee-society to Max group of companies to exploit the same commercially and, in a non-charitable manner for reasons best known to the trustees of the assessee-society only.

36. We find that whether a particular society or trust is running its affairs in a charitable manner or not depends on the facts and circumstances of each case. It is a matter of common knowledge that even educational institutions or hospitals are being sold like vegetables these days. It is not that none of the charitable institutions are doing services to the society, in fact, some of the charitable institutions are rendering exemplary services to the weaker sections of the society as charity is a part of Indian culture right from time immemorial. We are of the considered view that no hard and fast rule to distinguish between the societies/trusts rendering real service of charitable nature and the institutions being run on commercial lines could be laid down. The facts and circumstances of each case have to be evaluated in a judicial manner and in its entirety to come to a right conclusion that whether the assessee-society/trust is carrying on its activities for charitable purposes in accordance with the objects of the society. There could not be any exhaustive list of such tests but the following may be found relevant to decide the issue along with other tests that may be relevant :-

(i) Whether the society/trust was running its activities in accordance with the objects of the society/trust as has been given at the time of registration of the society/trust;

(ii) Whether the conditions provided in the lease deed of the land allotted or any other benefit derived by the society/trust from the government or semi-government or from any section of the society have been complied with in letter and spirit;

(iii) The element of profit earned by the society/trust whether reasonable with regard to the total volume of activities undertaken by it;

(iv) The activities whether they are charitable in nature or not;

(v) Whether any siphoning of funds is present in the payments made by the society/trust to any person whether connected with the assessee or not;

(vi) Whether the activities of such society/trust were genuine;

(vii) Whether the society/trust exists for the relief of the poor or the society at large or whether it exists for the benefit of its author/trustees or persons in whose favour it has created undue obligations against the interest of its own society/trust;

(viii) Whether the activities of the trust are being conducted on commercial lines by charging at a maximum amount by the society/trust from its constituents;

(ix) The dominant object of the society, whether charitable and not to earn profit;

(x) Whether society/trust was supported wholly or in part by voluntary contributions from the society or its members;

(xi) Whether charitable purpose has an element of public benefit or philanthropy;

37. We find that if the above tests for finding out whether the assessee is a genuine charitable society are applied in the present case, the assessee-society has failed in the tests laid down above.

38. It seems that the assessee-society was charitable to only one entity out of the whole planet, i.e., the corporate Max Group of companies. It was not charitable towards the society or public at large but, in fact, it was “uncharitable”. It conducted its affairs in such a way that inspite of charging the most exorbitant fees etc. from its patients in the capital city of the country, if not the highest rates so charged, siphoned off its receipts to commercial corporate companies by entering into a number of agreements with them, to make itself liable to the entire amount of its excess of income over expenditure and even more and after deducting allowable expenditure, the net income was negative i.e. a “loss”, year after year. The reason for such *modus-operandi* is best known to the assessee-society itself or to be investigated by the concerned agencies or the government allotting the prime land to the assessee-society on certain conditions, never fulfilled by the assessee-society.

39. In the case of the assessee, for the reasons recorded hereinabove in this order, we have no hesitation in holding that the assessee has conducted its activities in a non-charitable manner and

not in accordance with its object as detailed in its memorandum of association. Accordingly, we hold that there is no mistake in the impugned order dated 28th December, 2011 of learned DIT(E) in cancelling the registration of the assessee granted under Section 12A of the Act since its inception and, accordingly, the same is confirmed and, the grounds of appeal of the assessee are dismissed.

40. Before parting with the appeal, we bring on record our appreciation for the assistance given to us by the learned senior counsel for the assessee as well as by the learned CIT-DR.

41. In the result, the appeal of the assessee is dismissed.

Decision pronounced in the open Court on 31st March, 2015.

Sd/-	Sd/-
(TARVINDER SINGH KAPOOR)	**(G.C. GUPTA)**
ACCOUNTANT MEMBER	**VICE PRESIDENT**

VK.

Copy forwarded to: -

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2. Respondent : **Director of Income Tax (Exemptions),**
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District Centre, Delhi – 110 092.

3. CIT
4. CIT(A)
5. DR, ITAT

Assistant Registrar