* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ **W.P. (C) 1872/2013**

% Judgment delivered on: 22.01.2015

INDIA TRADE PROMOTION ORGANIZATION … Petitioner

versus

DIRECTOR GENERAL OF INCOME TAX (EXEMPTIONS) & OTHERS … Respondents

Advocates who appeared in this case:-

For the Petitioner : Mr M.S. Syali, Senior Advocate with Mr Mayank Nagi, Ms Husnal Syali and Mr Harkunal Singh

For the Respondents : Ms Suruchi Aggarwal, Sr Standing Counsel with Mr Joginder Sukhija and Mr Shobit Saxena.

CORAM:
HON'BLE MR JUSTICE BADAR DURREZ AHMED
HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

BADAR DURREZ AHMED, J.

1. By way of this writ petition (as amended), the petitioner seeks the quashing of the First Proviso to Section 2(15) of the Income-tax Act, 1961 (hereinafter referred to as 'the said Act') as amended by the Finance Act, 2008, on the ground that it is arbitrary and unreasonable and has no rational nexus with the object sought to be achieved and is thus violative of Article 14 of the Constitution of India. The petitioner also seeks the quashing of the order dated 23.01.2013, which was passed by the respondent under Section 154 of the said Act in connection with the earlier order dated 23.02.2012,

whereby exemption earlier granted under Section 10 (23C) (iv) of the said Act had been withdrawn. The petitioner also seeks a writ of *mandamus* or any other appropriate writ, order or direction in the nature of *mandamus* directing the respondent to grant exemption to the petitioner under Section 10(23C)(iv) of the said Act.

2. On 01.05.2008, by a notification No. DGIT(E)/10(23C)(iv)/2008/143, approval had been granted under Section 10(23C)(iv) of the said Act to the petitioner for the assessment year 2007-08 onwards. During the assessment proceedings for the assessment year 2009-10, a proposal for withdrawal of the exemption was received from the Assessing Officer through the Director of Income-tax (Exemptions), Delhi on 21.12.2011. The proposal was moved for considering the case for withdrawal of exemption on the ground that the main object of the petitioner being advancement of objects of general public utility, the proviso to Section 2(15), which had been introduced with effect from 01.04.2009 was applicable. This led to an order dated 23.02.2012 passed by the respondent withdrawing the exemption, which had earlier been granted under Section 10(23C)(iv) from the assessment year 2009-10 onwards.

3. It is not disputed that the petitioner was engaged in socially and economically desirable activities relating to the promotion of Indian trade and that the activities of the petitioner fell within the ambit of the expression "the advancement of any other object of general public utility" as appearing in Section 2(15) of the said Act. But, because of the new proviso to Section 2(15), the petitioner's objects were not regarded as charitable purposes. It

was observed in the said order dated 23.02.2012 that the petitioner, *inter alia*, had huge surpluses in banks, it had given its space for rent during Trade Fairs and Exhibitions, it had received income by way of sale of tickets and income from food and beverage outlets in Pragati Maidan, etc. The respondent, by virtue of the said order dated 23.02.2012, held that even if the petitioner's contention that it by itself was not involved in trade, commerce and business was accepted, it was definitely rendering service to a large number of traders and industrialists in relation to trade, commerce and business and was, therefore, hit by the expanded list of activities contained in the proviso to Section 2(15) of the said Act. It was further observed that the petitioner provides the service of allotting space and other amenities like water, electricity and security, etc. to the traders to conduct their exhibitions. The respondent rejected the petitioner's plea that its activities did not fall within the ambit of trade, commerce and business as also the contention that they did not fall within the ambit of any activity of rendering any service in relation to trade, commerce or business. The respondent held that even the CBDT Circular No.11/2008 dated 19.12.2008 did not come to the rescue of the petitioner as it had been clearly noted in the circular itself that each case has to be judged by the facts peculiar to such case and no generalization should be made by the Assessing Officer. The respondent concluded by holding that the objects of the petitioner being advancement of general public utility, the proviso to Section 2(15) of the said Act was clearly applicable and as the petitioner was engaged in the activities of trade, commerce and business and was engaged in the activities of rendering services in relation to trade, commerce and business for

consideration, it loses its status as a public charitable institution. Consequently, the respondent withdrew the exemption earlier granted under Section 10(23C)(iv) from the assessment year 2009-10 and onwards.

4. Being aggrieved by the said order of withdrawal of exemption dated 23.02.2012, the petitioner filed a writ petition being WP(C) No.3142/2012 before this court. That writ petition was dismissed as withdrawn on 23.05.2012 with the liberty that the petitioner may file an application under Section 154 of the said Act before the respondent seeking rectification of mistakes, which, according to the petitioner, had crept into the order dated 23.02.2012 on account of factual inaccuracies. The court, while dismissing the writ petition and granting the said liberty, also clarified that it had not expressed any opinion regarding the maintainability of the application under Section 154 of the said Act and that such an application, if filed, would be examined and considered in accordance with law. Thereafter, the petitioner filed the rectification application under Section 154 of the said Act before the respondent seeking rectification of the alleged mistakes which were apparent on the record, which resulted in the order dated 23.02.2012.

5. The petitioner gave a detailed explanation regarding the nature of its activities. With regard to space rent, it was pointed out that in order to enable the petitioner to fulfill its objectives, the Union Cabinet in its meeting held on 27.04.1976, deemed it fit to allot the Pragati Maidan Complex to the petitioner, which was spread over an area of 123.50 acres at a nominal ground rent of Re 1 per annum for the initial 5 years, which was

subsequently revised to Rs 6 lakhs (approximately) per annum and the same ground rent continues till date. The Central Government did not change the market rate or commercial rate of the premium land. It was pointed out that this special nature of the government lease, as compared to the commercial rates that could have been charged by the government, had enabled the petitioner to provide space for exhibitions, seminars, conferences and other trade promotion activities to various participants at economically viable rates. It is because of this that the petitioner was generating surplus even after providing space to the trade and industry at much lower rates than the prevailing market rates. Furthermore, it was pointed out that, although the intent behind establishing the petitioner as a company under Section 25 of the Companies Act, 1956 was to apply its surplus in furtherance of its objectives, the surplus generated by the company over the years got accumulated as the petitioner could not undertake major infrastructural additions and improvements in Pragati Maidan Complex due to non-execution of the lease deed in its name. This was a condition precedent before which the various government authorities could approve renovation projects. It was further pointed out that the lease deed in respect of Pragati Maidan Complex came to be executed in favour of the petitioner only in March 2011. There was, however, yet another impediment in undertaking the renovation projects of Pragati Maidan Complex and that was the requirement of change in land use in the records of DDA to be formally notified. It was also pointed out that only recently, the government had issued directives to the petitioners to construct a state of the art convention-cum-exhibition centre in Pragati Maidan in place of the old infrastructure

which was constructed about four (4) decades back. According to the petitioner, the corpus of funds available with the petitioner may not be sufficient to meet the cost of the new project.

6. As regards income from hoardings, the petitioner submitted that such income depicted in the income and expenditure statement had a different connotation than what was commonly understood where hoardings are put up on the roadsides for advertisement purposes. It was pointed out that, in the case of the petitioner, the large sized banners / boards are temporarily put up by the participants / organizers at the gates of Pragati Maidan Complex and / or within the Pragati Maidan Complex to attract the attention of the visitors about the events as well as to serve as directional guides for the events organized in Pragati Maidan.

7. As regards sale of publications, it was pointed out that the petitioner publishes a 'fair guide' for each trade fair / exhibition and these guides contain the names, product profiles and stall numbers of the participating companies for guidance of the visitors and the receipts generated therefrom is treated under the head "Sale of Publications". The income received on this account is only a few lakhs of rupees each year. It was contended that the receipt of this amount on account of sale of the guides is not in the nature of profit and is merely incidental to achieving the main object of the petitioner, which is promotion of trade through the medium of trade fairs and exhibitions.

8. On the aspect of income derived from sale of tickets, the petitioner pointed out that the sale of tickets is not done to earn profit, but only for the purposes of controlling the number of people who visit the trade fair. It was also clarified that no entry fee is charged from visitors for majority of the fairs organized by the petitioner. The main component of the revenue from sale of entry tickets pertains to the annual event of the India International Trade Fair organized in Pragati Maidan in November. It was further pointed out by the petitioner that even for this event, the intention behind charging the entry fee was not to earn profit, but the same was charged only from a crowd management point of view and to restrict the number of visitors to Pragati Maidan. It was also pointed out by the petitioner that this fact was further corroborated from the directives received from the Commissioner of Police by his letters dated 03.09.2008 and 24.08.2009 requesting the petitioner to restrict the number of visitors to Pragati Maidan to one lakh visitors per day.

9. With regard to the income from alleged long term agreements with food and beverage outlets, the petitioner clarified that it is a worldwide practice to have food and beverage outlets within the exhibition complex so that the visitors do not have to leave the exhibition ground for this purpose. With this objective of providing quality food and beverage facilities to the trade fair visitors, the petitioner had to per force allot food and beverage outlets on long term basis to the operators as they invest substantial amounts in setting up, maintaining and carrying out the operations as and when

required. The petitioner pointed out that it was not practicable to have *ad hoc* arrangements with the food and beverages outlet. It was, therefore, necessary to enter into long term agreements with the allottees of these outlets. The petitioner submitted that the objective of these food and beverage outlets must not be lost sight of and should be seen as incidental to carrying out the main activity of organizing trade fairs and exhibitions for achieving the object of trade promotions. It was contended that the respondent was, therefore, unjustified to construe the object of having food and beverage outlets as being driven by commercial and business objectives.

10. It was also pointed out that the respondent, in its order dated 23.02.2012, had not taken into account the fact that the petitioner was a Government of India undertaking incorporated under Section 25 of the Companies Act, 1956 in accordance with the decision of the Cabinet. The petitioner functions under the administrative control of the Department of Commerce under the Ministry of Commerce and Industries and all the fairs of the petitioner are held by the Government of India or its nominees. The affairs of the petitioner are managed by the Board of Directors headed by the Chairman and Managing Directors nominated by Government of India on rotation basis from the pool of senior officers from the Civil Services. This ensures that the functions of the petitioner are managed in accordance with the rules and regulations and in consonance with the object for which the petitioner was constituted. The accounts of the petitioner are also subject to various audits – internal audit, statutory audit and audit by the Comptroller and Auditor General of India to ensure compliance of all the statutory

requirements. It was, therefore, submitted by the petitioner that there could be no denying that the petitioner was neither constituted nor was it permitted to indulge in any commercial activity with a profit motive. It was submitted that the contentions of the petitioner were rejected by the respondent in the order dated 23.02.2012 without ascribing any reasons and, therefore, the said order needed to be rectified.

11. However, all these submissions of the petitioner, which were made by it in its Section 154 Application, were rejected and the respondent passed the impugned order dated 23.01.2013 by holding that the exemption granted earlier under Section 10(23C)(iv) by notification dated 01.05.2008 had been correctly withdrawn by the order dated 23.02.2012 from the assessment year 2009-2010 and onwards. The respondent held that, if the objects of the petitioner were advancement of objects of general public utility, the proviso to Section 2(15) of the said Act was clearly applicable to the petitioner. Consequently, the respondent rejected the petitioner's application under Section 154 of the Income-tax Act, 1961, both on the point of rectification and also on merits.

12. In the impugned order dated 23.01.2013, the respondent observed as under:-

> "If a private operator charges rent from letting out its land for trade exhibitions and collects money from sale of tickets, advertisement etc. its trading receipts are subjected to tax. Similar treatment has to be given to a Public Sector Undertaking because the Income-tax Act does not discriminate between the activities of a private and a public entity so far as

commercial taxable activities are concerned. The claim of the applicant that its charges are much lesser than the market rate cannot benefit the applicant organization keeping in view of the facts that the applicant organization was earning huge surplus which clearly indicates conscious and full scale commercial exploitation of the property at Pragati Maidan which is in possession of the applicant organization. The huge surplus generated from year to year does not indicate that surplus has been earned casually or accidentally. There is a conscious planning and policy decision to earn such huge revenue.

Therefore, there is no mistake apparent on records with regard to the applicability of proviso to Section 2(15) of the Income-tax Act. Accordingly, the application u/s 154 of the Income-tax Act, 1961 on the issue of proviso to Section 2(15) of the Income-tax Act 1961 is not maintainable, hence rejected."

13. The respondent, in his order dated 23.01.2013 also held on merits as under:-

> "In view of the fact that providing of space on rent to the traders by the applicant organization facilitates these traders to explore various opportunities of expanding their business, the proviso to the Section 2(15) of the Income Tax Act, 1961 comes into operation. Thus, the applicant's activity assists the traders / exhibitors to explore various opportunities of expanding their business and is "in relation to any trade, commerce or business" and therefore its activity cannot be held to be a 'charitable purpose'."

The respondent also took support from the decision of the Kerala High Court in the case of ***Info Parks Kerala v. Deputy Commissioner of Income-tax*: (2010) 329 ITR 404**. Reliance was also placed by the respondent on a decision of the High Court of Andhra Pradesh in the case of ***Andhra***

***Pradesh State Seed Certification Agency v. Chief Commissioner of Income-tax-III, Hyderabad*: 256 CTR 380 (AP)**.

14. Being aggrieved by the said impugned order dated 23.01.2013, the petitioner is before us by way of the present writ petition. Mr Syali, the learned senior counsel, appearing for the petitioner, drew our attention to the note for the Cabinet prepared by the Secretary, Foreign Trade with regard to the creation of the petitioner as a company under Section 25 of the Companies Act, 1956. From the said note, it is, *inter alia*, evident that prior to the formation of the petitioner, the work of exhibitions and commercial business of the Government was distributed between the following three organizations:-

a) India International Trade Fair Organisation (IITFO) – a wing of the Ministry of Commerce;

b) Indian Council of Trade Fairs and Exhibitions – a registered society (ICTFE); and

c) Directorate of Exhibitions and Commercial Publicity – a wing of Commerce Ministry.

All these three organizations were merged into the petitioner company.

15. Our attention was next drawn to the notes on clauses in respect of the Finance Bill 2008 and, in particular, with regard to clause (15) of Section 2 which was to the following effect:-

"*Clause (15)* of the said section defines "charitable purpose" to include relief of the poor, education, medical relief, and the advancement of any other object of general public utility.

It is proposed to amend the said clause by inserting a proviso thereto so as to exclude from "advancement of any other object of general public utility"—

(i) any activity in the nature of trade, commerce or business, or

(ii) any activity of rendering any service in relation to any trade, commerce or business, for a cess or fee or any other consideration, irrespective of the nature of use or application, or retention, of the income from any such activity.

This amendment will take effect from 1st April, 2009 and will accordingly apply in relation to the assessment year 2009-10 and subsequent assessment years."

Furthermore, in the Memorandum regarding Delegated Legislation – Rationalisation and Simplification Measures, it has been noted as under:-

"**Streamlining the definition of "charitable purpose"**
Section 2(*15*) of the Act defines "charitable purpose" to include relief of the poor, education, medical relief, and the advancement of any other object of general public utility.

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

when made in respect of an activity carried out on commercial lines, is contrary to the intention of the provision.

With a view to limiting the scope of the phrase "advancement of any other object of general public utility", it is proposed to amend section 2(*15*) so as to provide that "the advancement of any other object of general public utility" shall not be a charitable purpose if it involves the carrying on of –

(a) any activity in the nature of trade, commerce or business; or

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

This amendment will take effect from the 1st day of April, 2009 and will accordingly apply in relation to the assessment year 2009-10 and subsequent assessment years."

16. A reference was also made to the following extract from the Speech of the Minister of Finance on 29.02.2008:-

"180. 'Charitable purpose' includes relief of the poor, education, medical relief and any other object of general public utility. These activities are tax exempt, as they should be. However, some entities carrying on regular trade, commerce or business or providing services in relation to any trade commerce or business and earning income have sought to claim that their purpose would also fall under 'charitable purpose'. Obviously, this way not the intention of Parliament and, hence, I propose to amend the law to exclude the aforesaid cases. Genuine charitable organizations will not in any way be affected."

17. Our attention was also drawn to the following extract from the reply of the Finance Minister to the Debate in the Lok Sabha on the Finance Bill, 2008:-

> "6. Clause 3 of the Finance Bill, 2008 seeks to amend the definition of 'charitable purpose' so as to exclude any activity in the nature of trade, commerce or business, or any activity of rendering any service in relation to any trade, commerce or business, for a cess or fee or any other consideration, irrespective of the nature or use of application, or retention, of the income from such activity. The intention is to limit the benefit to entities which are engaged in activities such as relief of the poor, education, medical relief and any other genuine charitable purpose, and to deny it to purely commercial and business entities which wear the mask of a charity. A number of Honourable Members have written to me expressing their concern on the possible impact of the proposal on Agricultural Produce Market Committees (APMC) or State Agricultural Marketing Boards (SAMB). Since there is no intention to tax such committees or boards, and in order to remove any doubts, I propose to insert a new clause (26AAB) in section 10 of the Income tax Act to provide exemption to any income of an APMC or SAMB constituted under any law for the time being in force for the purpose of regulating the marketing of agricultural produce. I once again assure the House that genuine charitable organisations will not in any way be affected. The CBDT will, following the usual practice, issue an explanatory circular containing guidelines for determining whether an entity is carrying on any activity in the nature of trade, commerce or business or any activity of rendering any service in relation to any trade, commerce or business. Whether the purpose is a charitable purpose will depend on the totality of the facts of the case. Ordinarily, Chambers of Commerce and similar organisations rendering services to their members would not be affected by the amendment and their activities would continue to be regarded as "advancement of any other object of general public utility."
>
> (underlining added)

18. In the context of the above, it was submitted by Mr Syali that the object of the introduction of the proviso to clause (15) of Section 2 of the said Act was to deny the benefit of Income-tax Act exemption to "purely" commercial and business entities which wear the mask of a charity. Genuine charitable organizations were not to be affected in any way. Mr Syali submitted that while this was the object, which is clearly discernible from the Speech of the Finance Minister, the proviso to Section 2 (15) of the said Act hits even genuine charitable organizations, such as the petitioner.

19. He submitted that unequals have been treated in a like manner. The unequals being purely commercial entities on the one hand and charitable organizations on the other. Since both these entities have been treated in the like fashion, discrimination is writ large on the proviso to Section 2(15) of the said Act. Mr Syali made a reference to the Supreme Court decision in the case of ***Venkateshwara Theatre v. State of Andhra Pradesh and Others*****: 1993 (3) SCC 677**. The relevant passages of the said decision are as under:-

> "20. Article 14 enjoins the State not to deny to any person equality before the law or the equal protection of the laws. The phrase "equality before the law" contains the declaration of equality of the civil rights of all persons within the territories of India. It is a basic principle of republicanism. The phrase "equal protection of laws" is adopted from the Fourteenth Amendment to the U.S. Constitution. The right conferred by Article 14 postulates that all persons similarly circumstances

shall be treated alike both in privileges conferred and liabilities imposed. Since the State, in exercise of its governmental power, has, of necessity, to make laws operating differently on different groups of persons within its territory to attain particular ends in giving effect to its policies, it is recognised that the State must possess the power of distinguishing and classifying persons or things to be subjected to such laws. It is, however, required that the classification must satisfy two conditions, namely, (i) it is founded on an intelligible differential which distinguishes those that are grouped together from others; and (ii) the differential must have a rational relation to the object sought to be achieved by the Act. It is not the requirement that the classification should be scientifically perfect of logically complete. Classification would be justified if it is not palpably arbitrary. [*See: See Special Courts Bill 1978: (1979) 2 SCR 476*]. If there is equality and uniformity within each group, the law will not be condemned as discriminative, though due to some fortuitous circumstance arising out of a peculiar situation some included in a class get an advantage over others, so long as they are not singled out for special treatment. [*See: Khandige Sham Bhat v. Agricultural Income-Tax Officer: (1963) 3 SCR 809*].

21. Since in the present case we are dealing with a taxation measure it is necessary to point out that in the field of taxation the decisions of this Court have permitted the legislature to exercise an extremely wide discretion in classifying items for tax purposes, so long as it refrains from clear and hostile discrimination against particular persons or classes. [*See: East India Tobacco Co. v. State of A.P.: (*1963) 1 SCR 404, *P.M. Ashwathanarayana Shetty v. State of Karnataka: 1989 Supp (1) SCC 696, Federation of Hotel and Restaurant Association of India v. Union of India: (1989) 3 SCC 634, Kerala Hotel & Restaurant Association v. State of Kerala: (1990) 1 SCR 516,* and: *Gannon Dunkerley and Co. v. State of Rajasthan (1993) 1 SCC 364.)*

22. xxxx xxxx xxxx xxxx

23. Just as a difference in the treatment of persons similarly situate leads to discrimination, so also discrimination can arise if persons who are unequals, i.e., differently placed, are treated similarly. In such a case failure on the part of the legislature to classify the persons who are dissimilar in separate categories and applying the same law, irrespective of the differences, brings about the same consequence as in a case where the law makes a distinction between persons who are similarly placed. A law providing for equal treatment of unequal objects, transactions or persons would be condemned as discriminatory if there is absence of rational relation to the object intended to be achieved by the law.

24. In *K.T. Moopil Nair v. State of Kerala* (supra), this Court was dealing with a law providing for imposition of uniform land tax at a flat rate without having regard to the quality of the land or its productive capacity. The law was held to be violative of Article 14 of the Constitution on the ground that lack of classification had created inequality.

25. The said decision in *K.T. Moopil Nair's case* (supra) has been explained by this Court in *Jalan Trading Co. (Pvt.) Ltd. v. Mill Mazdoor Union*: (1966) 2 LLJ 546, in the context of challenge to the validity of Section 10 of the Payment of Bonus Act, 1965 providing for payment of a minimum bonus of 4% by all industrial establishments irrespective of the fact whether they were making profit. This Court held that the judgment in Moopil Nair's case (supra) has not enunciated any broad proposition that when persons or objects which are unequals are treated in the same manner and are subjected to the same burden or liability discrimination inevitably results. It was observed:

> "It was not said by the Court in that case that imposition of uniform liability upon persons, objects or transactions which are unequal must of necessity lead to discrimination. Ordinarily it may be predicated of unproductive agricultural land that it is

> incapable of being put to profitable agricultural use at any time. But that cannot be so predicated of an industrial establishment which has suffered loss in the accounting year, or even over several years successively. Such an establishment may suffer loss in one year and make profit in another."

26. It was further observed:-

> "Equal treatment of unequal objects, transactions or persons is not liable to be struck down as discriminatory unless there is simultaneously absence of a rational relation to the object intended to be achieved by the law."

27. The limitations of the application of the principle that discrimination would result if unequals are treated as equal, in the field of taxation, have been pointed out by this Court in *Twyford Tea Co. Ltd. v. The State of Kerala:* (1970) 3 SCR 383, wherein tax at a uniform rate was imposed on plantations. Hidayatullah, CJ, speaking for the majority, while upholding the tax, has observed:

> "…It may also be conceded that the uniform tax falls more heavily on some plantations than on others because the profits are widely discrepant. But does that involve a discrimination? If the answer be in the affirmative hardly any tax direct or indirect would escape the same censure for taxes touch purses of different lengths and the very uniformity of the tax and its equal treatment would become its undoing. The rich and the poor pay the same taxes irrespective of their incomes in many instances such as the sales-tax and the profession tax etc."

28. It was further observed:

> "The burden is on a person complaining of discrimination. The burden is proving not possible

> ‘inequality' but hostile 'unequal' treatment. This is more so when uniform taxes are levied. It is not proved to us how the different plantations can be said to be hostilely or unequally' treated. A uniform wheel tax on cars does not take into account the value of the car, the mileage it runs, or in the case of taxis, the profits it makes and the miles per gallon it delivers. An Ámbassador taxi and a fiat taxi give different outturns in terms of money and mileage. Cinemas pay the same show fee. We do not take a doctrinaire view of equality.”

20. Mr Syali pointed out that, in the present case, not only is there discrimination because unequals have been treated in the same manner, but there is hostile discrimination insofar as the petitioner is concerned as it has resulted in the loss of charitable status of the petitioner for all times to come. Therefore, according to Mr Syali, the proviso to Section 2(15) of the said Act is hit by the principle of equality enshrined in Article 14 of the Constitution of India.

21. Mr Syali further emphasized that the reliance placed by the respondents in the impugned order dated 23.01.2013 on the decision of the Kerala High Court in ***Infoparks Kerala*** *(supra)* was misplaced. In that case, there was no challenge to the proviso to Section 2(15) of the said Act and, therefore, the decision of the Kerala High Court does not at all come in the way of the petitioner. Similarly in ***Andhra Pradesh State Seed Certification Agency*** *(supra)* also there was no challenge to the proviso to Section 2(15) of the said Act. As such, it was contended that this decision would also be of no help to the revenue.

22. Mr Syali submitted that the decision of the Kerala High Court in ***Infoparks*** *(supra)* and of the Andhra Pradesh High Court in ***Andhra Pradesh State Seed Certification Agency*** *(supra)* followed the literal interpretation of the proviso to Section 2(15) of the said Act. He submitted that they did so because the Constitutional validity of the proviso was not questioned before them. He further submitted that, in any event, this court in several decisions did not adopt the literal interpretation. The decisions being:-

(1) ***Institute of Chartered Accountants of India v. Director General of Income Tax (Exemptions)*****: 347 ITR 99 (Del)**;

(2) ***Bureau of Indian Standards v. Director General of Income-tax (Exemptions)*****: (2013) 212 Taxman 210 (Delhi)**;

(3) ***Institute of Chartered Accountants of India v. DGIT(E)*****: WP(C) 3147/2012*****, decided on 04.07.2013***;

(4) ***M/s G.S. 1 India v. Director General of Income-tax (Exemption) and Another: WP(C) 7797/2009*****, decided on 26.09.2013** ***(2013) 219 Taxman 205***.

23. He submitted that this court, while rendering the above decisions, was conscious of the wide net that the literal meaning of the proviso would cast and, therefore, held that this could not be in consonance with the object sought to be achieved. It was submitted that the petitioner, in any event, apart from the challenge to the Constitutional validity, deserves relief on the anvil of the said four decisions of this court by taking the "dominant object / activity" as the relevant criteria.

24. It was further contended that taxation law was not immune to the principle enshrined in Article 14 of the Constitution which strikes at arbitrariness in any form. A reference was made to the decision of the Supreme Court in ***E.P. Royappa v. State of Tamil Nadu*: 1974 (3) SCC 3**, wherein the Supreme Court observed as under:-

> "85. The last two grounds of challenge may be taken up together for consideration. Though we have formulated the third ground of challenge as a distinct and separate ground, it is really in substance and effect merely an aspect of the second ground based on violation of Articles 14 and 16. Article 16 embodies the fundamental guarantee that there shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State. Though enacted as a distinct and independent fundamental right because of its great importance as a principle ensuring equality of opportunity in public employment which is so vital to the building up of the new classless egalitarian society envisaged in the Constitution, Article 16 is only an instance of the application of the concept of equality enshrined in Article 14. In other words, Article 14 is the genus while Article 16 is a species, Article 16 gives effect to the doctrine or equality in all matters relating to public employment. The basic principle which, therefore, informs both Articles 14 and 16 is equality and inhibition against discrimination. Now, what is the content and reach of this great equalising principle? It is a founding faith, to use the words of Bose, J., "a way of life", and it must not be subjected to a narrow pedantic or lexicographic approach. We cannot countenance any attempt to truncate its all-embracing scope and meaning, for to do so would be to violate its activist magnitude. Equality is a dynamic concept with many aspects and

> dimensions and it cannot be "cribbed, cabined and confined" within traditional and doctrinaire limits. From a positivistic point of view, equality is antithetic to arbitrariness. In fact equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary it is implicit in it that it is unequal both according to political logic and Constitutional law and is therefore violative of Article 14, and if it affects any matter relating to public employment, it is also violative of Article 16. Articles 14 and 16 strike at arbitrariness in State action and ensure fairness and equality of treatment. They require that State action must be based on equivalent relevant principles applicable alike to all similarly situate and it must not be guided by any extraneous or irrelevant considerations because that would be denial of equality. Where the operative reason for State action, as distinguished from motive inducing from the antechamber of the mind, is not legitimate and relevant but is extraneous and outside the area of permissible considerations, it would amount to mala fide exercise of power and that is hit by Articles 14 and 16. Mala fide exercise of power and arbitrariness are different lethal radiations emanating from the same vice: in fact the latter comprehends the former. Both are inhibited by Articles 14 and 16."

25. It was further contended that classification should be based on an intelligible differentia that distinguishes persons or things that are grouped together from those left out of the group. Moreover, such a classification must have a rational nexus with the object sought to be achieved. If this is not done, then the classification would be violative of Article 14. Mr Syali

reiterated, after referring to the Budget Speech of the Finance Minister as well as to the reply of the Finance Minister in the debate in Lok Sabha with regard to the Finance Bill 2008 and the Circular No.11 dated 19.12.2008 that the object behind introduction of the proviso to Section 2(15) was to debar and prevent entities operating "purely" on commercial lines and those masquerading as charitable. The grouping of all entities, including those that are purely commercial and / or business entities and charitable organizations, which are not so, is in itself a faulty grouping as unequals have been grouped together. While the object is of debarring and preventing purely commercial or business entities from taking the benefit of the exemptions available to charitable organizations, the effect is that even charitable organizations, which have objects of general public utility and are not purely business or commercial entities, are being denied the benefit of exemption. By virtue of the amendment, an all pervasive legislation has been introduced, whereby benefit to genuine institutions carrying on charitable purposes of the advancement of any other object of general public utility have also been denied the benefit of exemption. In other words, those who masquerade or indulge in a device or a mask to hide their true commercial nature and purpose are classified or grouped together with entities which do not and, as such, this amounts to treatment of unequals as equals which is not permissible in law. Reliance was placed on ***Venkateshwara Theatre v. State of Andhra Pradesh & Others*****: 1993 (3) SCC 677,** to which we have already referred above. It was further contended by Mr Syali that though a larger discretion is available in matters of taxation, this does not mean that a go-by can be given to the fundamental

principles underlying the doctrine of equality enshrined in Article 14 of the Constitution. A rational classification based on an intelligible differentia and having a reasonable nexus with the object is a must. It was contended that in this case, the grouping of unequals together is by no means rational and has no nexus with the object and, therefore, the same is hit by Article 14 of the Constitution of India.

26. It was also contended by Mr Syali that the carrying on of business as such does not negate charity, at least insofar as an object other than the object of general public utility is concerned. The dominant object is yet a criteria and one that determines the status of whether an activity is charitable or not. Referring to the Supreme Court decision in ***Additional Commissioner of Income-tax, Gujarat v. Surat Art Silk Cloth Manufacturers Association*****: 121 ITR 1 (SC)**, Mr Syali submitted that it has been held that a business and charity could co-exist provided the former was subservient to the latter.

27. He finally contended that, in the recent decision of this court in ***G.S. 1 India*** *(supra)*, the issue has been dealt with threadbare and this court observed that the profit motive is a determinative and a critical factor to discern whether an activity is a business, trade or commerce. It was further submitted that in the said decision, this court held that the antiquated definition of charity, which entailed only giving and receiving nothing in return, was outdated. The court also observed that the question whether the legislative intent behind the amendment was to exclude from the definition of charitable purpose any activity, which has the aim and object of providing

services to trade, commerce or business, is not free from doubt. However, the court observed that there are good reasons to hold that the bar or prohibition was not with reference to the activity of the beneficiary, but the activity of the assessee under the residuary clause. It is intended to exclude an assessee who carries on business, trade or commerce to feed the charitable activity under the last limb.

28. In view of the above submissions, Mr Syali submitted that the prayers sought in this writ petition are liable to be granted and ought to be granted.

29. Ms Suruchi Aggarwal, appearing for the revenue, referred to para 12(d) of the respondent's order dated 23.02.2012 and submitted that, although the petitioner was engaged in socially and economically desirable activities relating to promotion of Indian trade and, as such, was an organization involved in the advancement of objects of general public utility, this does not make any difference insofar as the application of proviso in Section 2(15) of the said Act is concerned. She submitted that the amendment is reasonable inasmuch as a second proviso has also been provided by virtue of the Finance Act 2010 with retrospective effect from 01.04.2009, which stipulates that the first proviso would not apply if the aggregate value of receipts from the activities referred to in the first proviso was Rs 25 lakhs or less in a given previous year. According to her, the provisions of the first proviso cannot be considered to be arbitrary and unreasonable inasmuch as by introduction of the second proviso with retrospective effect from 01.04.2009, smaller organizations have been

exempted and this clearly entails that the two provisos taken together operate in a reasonable manner.

30. She then referred to the decision of the Supreme Court in the case of ***Arun Kumar and Others v. Union of India and Others*: 2007 (1) SCC 732** in the context of the doctrine of "reading down" in order to sustain the validity of the proviso to Section 2(15) of the said Act. In ***Arun Kumar** (supra)*, the court held as under:-

> "55. The doctrine of 'reading down' is well-known in the field of Constitutional Law. Colin Howard in his well- known work "Australian Federal Constitutional Law" states;
>
> > 'Reading down puts into operation the principle that so far as it is reasonably possible to do so, legislation should be construed as being within power. It has the practical effect that where an Act is expressed in language of a generality which makes it capable, if read literally, of applying to matters beyond the relevant legislative power, the Court will construe it in a more limited sense so as to keep it within power.'
>
> 56. As observed by this Court in *Commissioner of Sales Tax, Madhya Pradesh and Ors. v. Radhakrishnan and Ors.*: [1979] 2 SCC 249, in considering the validity of a statute the presumption is always in favour of constitutionality and the burden is upon the person who attacks it to show that there has been transgression of constitutional principles. For sustaining the constitutionality of an Act, a court may take into consideration matters of common knowledge, reports, preamble, history of the times, object of the legislation and all other facts which are relevant. It must always be presumed that the Legislature understands and correctly appreciates the need of its own people and that discrimination, if any, is based on

adequate grounds and considerations. It is also well-settled that courts will be justified in giving a liberal interpretation in order to avoid constitutional invalidity. A provision conferring very wide and expansive powers on authority can be construed in conformity with legislative intent of exercise of power within constitutional limitations. Where a statute is silent or is inarticulate, the court would attempt to transmutation the inarticulate and adopt a construction which would lean towards constitutionality albeit without departing from the material of which the law is woven. These principles have given rise to rule of 'reading down' the provisions if it becomes necessary to uphold the validity of the law.

57. In several cases, courts have invoked and applied the doctrine of 'reading down' and upheld the constitutional validity of the Act.

xxxx xxxx xxxx xxxx xxxx

61. But it is equally well settled that if the provision of law is explicitly clear, language unambiguous and interpretation leaves no room for more than one construction, it has to be read as it is. In that case, the provision of law has to be tested on the touchstone of the relevant provisions of law or of the Constitution and it is not open to a Court to invoke the doctrine of "reading down" with a view to save the statute from declaring it *ultra vires* by carrying it to the point of 'perverting the purposes of the statute'."

31. In ***Arun Kumar*** *(supra)*, the Supreme Court, while referring to its earlier decision ***Delhi Transport Corporation v. D.T.C. Mazdoor Congress and Ors.*****: 1991 Supp (1) SCC 600**, observed that in that case the Supreme Court held that the provision in question was *ultra vires* and unconstitutional and refused to apply the doctrine of reading down. The Supreme Court

observed that as the language of the regulation in question was clear, unambiguous and explicit, it was not permissible for the court to read down something not intended by the regulations. The court also observed that the doctrine of reading down may be applied if the statute is silent, ambiguous or allows more than one interpretation. But, where it is express and clearly mandates to take certain actions, the function of the court is to interpret it plainly and declare it *ultra vires* without adding, altering or subtracting anything therefrom.

32. Ms Aggarwal further contended that the present petitioner's case was not covered by the Delhi High Court decisions in the case of ***Institute of Chartered Accountants of India*** *(supra)*, ***Bureau of Indian Standards*** *(supra)* and ***G.S. 1*** *(supra)*. She referred to the second part of the proviso to Section 2(15) to submit that the petitioner was carrying on the activity of renting of space, etc which was an activity of rendering a service in relation to trade, commerce or business. Since it was charging a rent for the same, it is evident that the activity carried out by the petitioner could not be classified as a charitable purpose. She further submitted that by virtue of the proviso itself, it was irrelevant as to the nature or use or application or retention of the income derived from such activity. She submitted that there was a *quid pro quo* and, therefore, what the petitioner was doing was nothing but rendering a service. She referred to ***Dalmia Cement (Bharat) Limited v. Commissioner of Income-tax*****: 357 ITR 419** in the context of meanings of the words "cess" and "tax". She also referred to ***Dewan Chand Builders and Contractors v. Union of India & Others*****: 2012 (1) SCC 101**

in the context of differentiating between a 'tax' and a 'fee'. She further submitted that a fee would necessarily involve a service element.

33. Ms Aggarwal then referred to the decision of a Division Bench of this court in ***G.S. 1*** *(supra)* in some detail and attempted to interpret the same as a decision in favour of the revenue. She referred to ***Institute of Chartered Accountants (I)*** *(supra)* to emphasise that in finding out as to whether an activity is in the nature of trade, commerce or business, profit motive is not the sole consideration. She also emphasized that reference to the earlier decisions prior to the introduction of the proviso to Section 2(15) of the said Act for determining as to whether a particular activity, which entails the advancement of any other object of general public utility, can be termed as a charitable purpose or not, would not be relevant at all. In particular, she submitted that no reliance could be placed on the decision of the Supreme Court in the case of ***Surat Art Silk*** *(supra)* after the introduction of the first proviso to Section 2(15) of the said Act. She placed reliance on the following observations of the Division Bench in ***ICAI (I)*** *(supra)*:-

> "12. As the first proviso was introduced with effect from 1st April, 2009, the scope and ambit of the said proviso to Section 2(15) of the Act has to be examined and considered. Earlier orders under Section 10(23C)(iv) are not relevant and are inconsequential, as they have not examined the scope and ambit of the first proviso. The proviso applies only if an institution is engaged in advancement of any other object of general public utility and postulates that such an institute is not "charitable" if it is involved in carrying on any activity in the nature of trade, commerce or business or any activity of

rendering any service in relation to any trade, commerce or business. The second part, "any activity of rendering any service in relation to any trade, commerce or business" obviously intends to expand the scope of the proviso to include services, which are rendered in relation to any trade, commerce or business. The proviso further stipulates that the activity must be for a cess or fee or any other consideration. The last part states that the proviso will apply even if the cess or fee or any other consideration is applied for a charitable activity/purpose. The proviso has to be given full effect to. Thus, even if cess, fee or consideration is used or utilized for charitable purposes, the proviso and the bar will apply. An institution will not be regarded as established for charitable purpose/activity under the last limb, if cess, fee or consideration is received for carrying on any activity in nature of trade, commerce or business or for any activity of rendering of any service in relation to any trade, commerce or business, even if the consideration or the money received is used in furtherance of the charitable purposes / activities. In view of the first proviso, the decisions that the application of money/profit is relevant for determining whether or not a person is carrying on charitable activity, are no longer relevant and apposite. Even if the profits earned are used for charitable purposes, but fee, cess or consideration is charged by a person for carrying on any activity in the nature of trade, commerce or business or any activity of rendering of any service in addition to any trade, commerce or business, it would be covered under the proviso and the bar/prohibition will apply.

13. Reliance place by the Petitioners on Additional CIT v. Surat Art Silk Cloth Manufacturers Association: (1980) 121 ITR 1 (SC) may not be fully appropriate after introduction of the first proviso as the statutory requirements were then different. Utilization of the funds or income earned whether for charitable purpose or otherwise is not relevant now in view of

> the first proviso and cannot be a determining factor for deciding whether the Petitioner institute is covered by Section 2(15) of the Act. In the said decision, it was held that the primary or dominant purpose of the trust or institution has to be examined to determine whether the said trust/institution was involved in carrying out any activity for profit. If the "object" of the trust or institution was to carry out object of general public utility and this was the primary or dominant purpose and not carrying on any activity for profit, the same would satisfy the requirements of Section 2(15) as it existed. It was immaterial whether members had benefitted from some of the activities. The aforesaid observations of the Supreme Court in the said case and other cases will be relevant only for determining and deciding the question whether the trust or institution is carrying on any business. ..."

34. Ms Aggarwal then referred to ***ICAI (II)*** *(supra)* in an attempt to show that the same would not come in aid of the petitioner.

35. Ms Aggarwal then submitted that the proviso to Section 2(15) should be construed as carving out an exception to the main proviso to which it has been enacted as a proviso. For this proposition, she placed reliance on a Division Bench of this court in ***Haryana Acrylic Manufacturing Co. v. Commissioner of Income-tax and Another*****: 308 ITR 38 (Delhi)**. She referred to the following observations:-

> "25. Let us now examine the provisions of Section 147 as applicable to the present case. It has been pointed out above that the present case, being a case of re-opening of an assessment after four years (but before six years) from the end of the assessment year in question, would be governed by the proviso

to Section 147. Before we examine the proviso, it would be instructive to examine the scope and function of a proviso. In ***CIT v. Indo-Mercantile Bank Ltd.*****: 1959 Supp (2) SCR 256**, the Supreme Court held:

> 'The proper function of a proviso is that it qualifies the generality of the main enactment by providing an exception and taking out as it were, from the main enactment, a portion which, but for the proviso would fall within the main enactment. Ordinarily it is foreign to the proper function of a proviso to read it as providing something by way of an addendum or dealing with a subject which is foreign to the main enactment. It is a fundamental rule of construction that a proviso must be considered with relation to the principal matter to which it stands as a proviso. Therefore it is to be construed harmoniously with the main enactment. (Per Das, C.J.) in Abdul Jabar Butt v. State of Jammu & Kashmir: 1957 SCR 51, 59, Bhagwati, J., in Ram Narain Sons Ltd. v. Assistant Commissioner of Sales Tax: [1955] 2SCR 483, 493; 6 STC 627, 635 said:
>
> > 'It is a cardinal rule of interpretation that a proviso to a particular provision of a statute only embraces the field which is covered by the main provision. It carves out an exception to the main provision to which it has been enacted as a proviso and to no other.'

Lord Macmillan in *Madras & Southern Maharatta Railway Co. v. Bezwada Municipality* (1944) LR 71 IA 113 laid down the sphere of a proviso as follows:

> 'The proper function of a proviso is to except and deal with a case which would otherwise fall within the general language of the main enactment, and its effect is confined to that case. Where, as in the present case, the language of the main enactment is clear and unambiguous, a

> proviso can have no repercussion on the interpretation of the main enactment, so as to exclude from it by implication what clearly falls within its express terms.'

The territory of a proviso therefore is to carve out an exception to the main enactment and exclude something which otherwise would have been within the section. It has to operate in the same field and if the language of the main enactment is clear it cannot be used for the purpose of interpreting the main enactment or to exclude by implication what the enactment clearly says unless the words of the proviso are such that that is its necessary effect. (Vide also *Corporation of City of Toronto v. Attorney-General for Canada* (1946) AC 32, 37).

In ***Ali M.K. v. State of Kerala*: [2003] 11 SCC 632, 637,** the Supreme Court made similar observations:-

> '10. The normal function of a proviso is to except something out of the enactment or to qualify something enacted therein which but for the proviso would be within the purview of the enactment. As was stated in *Mullins v. Treasurer of Surrey* (1880) 5 QBD 170; 42 LT 128 (referred to in *Shah Bhojraj Kuverji Oil Mills and Ginning Factory v. Subhash Chandra Yograj Singh*: AIR 1961 SC 1596 and *Calcutta Tramways Co. Ltd. v. Corporation of Calcutta*: AIR 1965 SC 1728), when one finds a proviso to a section the natural presumption is that, but for the proviso, the enacting part of the section would have included the subject-matter of the proviso. The proper function of a proviso is to except and to deal with a case which would otherwise fall within the general language of the main enactment and its effect is confined to that case. It is a qualification of the preceding enactment which is expressed in terms too general to be quite accurate. As a general rule, a proviso is added to an enactment to qualify or create an exception to what is in

> the enactment and ordinarily, a proviso is not interpreted as stating a general rule'."

36. Ms Aggarwal then referred to the Supreme Court decision in the case of ***Commissioner of Income-tax, New Delhi v. Federation of Indian Chambers of Commerce and Industries, New Delhi*: 1981 (3) SCC 156** and, in particular, to certain observations in paragraph 14 thereof. It was observed in the said paragraph that "*the doctrine of dominant or primary object must, as laid down in the Surat Art Silk case, hold the field till there is a change in the law".* In this context, Ms Aggarwal submitted that the decision of the Supreme Court in ***Surat Art Silk*** *(supra)* would no longer apply in view of the change in law introduced by the amendment to Section 2(15), whereby the proviso to Section 2(15) of the said Act was brought in.

37. A reference was also made to the Calcutta High Court decision in the case of ***Bengal National Chamber of Commerce and Industry v. Commissioner of Income-tax, West Bengal I*: 111 ITR 514 (Cal.)**. In that case, a Division Bench of the Calcutta High Court observed as under:-

> "If we apply the tests laid down by Mr. Justice Krishna Iyer to the instant case, we find that the trustees have acquired land, they have constructed a house on the land and portions of the house have been let out by them. They derive rents regularly and 75 per cent. of the rents after meeting various expenses are handed over to the chamber for its objects of general public utility. On these facts, in view of Mr. Justice Krishna lyer's

tests, it cannot be said that the advancement of the object of general public utility does not involve activity for profit."

38. On the basis of the above observations, Ms Aggarwal submitted that even though the said decision was prior to the introduction of the proviso to Section 2(15) of the said Act, the Calcutta High Court had held that because the said trust derived rents regularly and 75% of the rents, after meeting various expenses, were handed over to the said chamber for its objects of general public utility, the same could not be regarded as an activity which did not involve an activity for profit. Therefore, according to her, inasmuch as the petitioner rents out space at Pragati Maidan, its activity would be an activity involving profits and, therefore, would be covered as a trade, commerce or business activity.

39. Mr Syali, in rejoinder, reiterated his submissions made in his opening arguments and emphasized once again that the object behind the introduction of the proviso to Section 2(15) of the said Act was to catch hold of persons / entities who were disguising their trade, commerce and business activities as charity. The object was not to deny the beneficial provisions of the Income-tax Act to genuine charities, whose incidental activities involved generation of income. He submitted that, in the first instance, the clubbing together of unequals – 'purely business and commercial entities' and 'charitable entities' – was violative of Article 14 of the Constitution of India. There is a clear intelligible differentia between trading, commercial and business entities and one determinative factor being

the desire to make profits in the former and lack of it in the latter. The object of introduction of the proviso, was to prevent such trading, commercial and business entities from masking their activities and taking advantage of the exemption. The object was not to deny the exemption to genuine charities. It was contended that had the intelligible differentia been applied, the proviso may not have been *ultra vires* the Constitution. But, since that was not done and unequals were treated in equal fashion, Article 14 has been violated and the proviso, therefore, on a literal interpretation would have to be struck down. In the alternative, it was argued by Mr Syali that, in any event, the said proviso should be read down in such a manner so as to exclude from its purview genuine charities which do not have profit making as the dominant object. In either eventuality, Mr Syali argued, the impugned order would have to be set aside and the petitioner would be entitled for the issuance of a writ of mandamus directing the respondents to grant exemption to the petitioner under Section 10(23C)(iv) of the said Act.

40. Before we examine the rival contentions, it would be necessary to set out the provisions of the said Act and the Income-tax Rules 1962, to the extent they are relevant. Section 10 reads as under:-

> **"10. Incomes not included in total income. –** In computing the total income of a previous year of any person, any income falling within any of the following clauses shall not be included-
>
> xxxx xxxx xxxx xxxx xxxx
>
> (23C) any income received by any person on behalf of –

xxxx xxxx xxxx xxxx xxxx

(iv) any other fund or institution established for charitable purposes which may be approved by the prescribed authority, having regard to the objects of the fund or institution and its importance throughout India or throughout any State or States; or

xxxx xxxx xxxx xxxx xxxx

"**2. Definitions.**–In this Act, unless the context otherwise requires,–

xxxx xxxx xxxx xxxx xxxx

(15) "charitable purpose" includes relief of the poor, education, medical relief, Preservation of environment (including watersheds, forests and wildlife) and preservation of monuments or places or objects of artistic or historic interest, and the advancement of any other object of general public utility;

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

Provided further that the first proviso shall not apply if the aggregate value of the receipts from the activities referred to therein is ten lakh rupees or less in the previous year;"

41. Rule 2 C of the Income-tax Rules, 1962:-

"2C. Guidelines for approval under sub-clauses (vi) and (v) of clause (23C) of section 10. – (1) The prescribed authority

> under sub-clauses (i*v*) and (*v*) of clause (*23C*) of section 10 shall be the Chief Commissioner or Director General, to whom the application shall be made as provided in sub-rule (2).
>
> (2) The application to be furnished under sub-clauses (iv) and (v) of clause (23C) of Section 10 by a fund, trust or institution shall be in Form No.56.
>
> *Explanation.* – For the purposes of this rule, "Chief Commissioner or Director General" means the Chief Commissioner or Director General whom the Central Board of Direct Taxes may, authorise to act as prescribed authority for the purposes of sub-clause (iv) or sub-clause (v) of clause (23C) of Section 10 in relation to any fund or trust or institution."

42. It is evident from Section 10(23C)(iv) of the said Act that if any income is received by any person on behalf of any other fund or institution established for "charitable purposes", which may be approved by the prescribed authority, having regard to the objects of the fund or institution and its importance throughout any State or States, such income shall not be included in the total income. Therefore, what is necessary in the first instance is to establish that the income is received on behalf of a fund or institution established for "charitable purposes". The first thing that needs to be satisfied, therefore, is that the institution must be established for 'charitable purposes'. Charitable purpose is defined in Section 2(15) as indicated above. It is an inclusive definition and includes relief of the poor, education, medical relief, advancement of any other object of general public utility and "preservation of environment (including watersheds, forests and wildlife) and preservation of monuments or places or objects of artistic or historic interest". Insofar as the present case is concerned, we are concerned

only with the advancement of any other object of general public utility, which has been regarded as a residuary object. Rule 2C specifies the "prescribed authority" as the Chief Commissioner or the Director General to whom an application is to be furnished under Section 10(23C)(iv) or (v) by a fund, trust or institution. The form of application has been specified as Form No.56. Once such an application is made, the prescribed authority [in this case, the Director General of Income-tax (Exemptions)] has to determine the eligibility for granting approval to an institution for the purposes of exemption stipulated in Section 10(23C)(iv). We have noted that prior to the introduction of the proviso to Section 2(15) of the said Act, the DGIT(E) had, in fact, granted such an exemption on 01.05.2008. But, subsequently, from assessment year 2009-10 onwards, by virtue of the order dated 23.02.2012, the exemption earlier granted was withdrawn. The said withdrawal of exemption was confirmed by the impugned order dated 23.01.2013 passed under Section 154 of the said Act by the respondent.

43. From this, it is clear that prior to the introduction of the proviso to Section 2(15) of the said Act, there was no dispute that the petitioner was established for charitable purposes and, therefore, its income was not to be included in the total income and was, therefore, granted the benefit of exemption. We have already noted above, while discussing the facts of the case that the income received by the petitioner is from the letting out of space, sale of publications, sale of tickets and leasing out food and beverages outlets in Pragati Maidan. The dominant and main object of the petitioner is to organise trade fairs / exhibitions in order to promote trade,

commerce and business not only within India, but internationally. This is done through the organisation of trade fairs, including the annual International Trade Fair and other exhibitions. It is for this purpose that the space is let out to various entities during the said fairs and exhibitions. All these activities, including the sale of tickets and sale of publications are an inherent part of the main object of the petitioner. It is clear from the facts of the case that profit making is not the driving force or objective of the petitioner. It is registered under Section 25 of the Companies Act, 1956, which specifically applies to entities which intend to apply their profits, if any, or other income in promoting their objects and prohibits, the payment of any dividend to its members. This makes it clear that any income generated by the petitioner does not find its way into the pockets of any individuals or entities. It is to be utilized fully for the purposes of the objects of the petitioner.

44. It is an admitted position that had the proviso not been introduced by virtue of the Finance Act, 2008 with effect from 01.04.2009, the petitioner would have been recognized as a charity and would have been recognized as an institution established for the charitable purpose of advancement of an object of general public utility. The difficulty that has arisen for the petitioner is because of the introduction of the proviso to Section 2(15). The said proviso has two parts. The first part has reference to the carrying on of any activity in the nature of trade, commerce or business. The second part has reference to any activity of rendering any service "in relation to" any trade, commerce or business. Both these parts are further subject to the

condition that the activities so carried out are for a cess or fee or any other consideration, irrespective of the nature or use or application or retention of the income from such activities. In other words, if, by virtue of a 'cess' or 'fee' or any other consideration, income is generated by any of the two sets of activities referred to above, the nature of use of such income or application or retention of such income is irrelevant for the purposes of construing the activities as charitable or not.

45. To be clear, if an activity in the nature of trade, commerce or business is carried on and it generates income, the fact that such income is applied for charitable purposes, would not make any difference and the activity would nonetheless not be regarded as being carried on for a charitable purpose. We have seen that by virtue of Section 25 of the Companies Act, the petitioner is enjoined to plough back its income in furtherance of its object and the declaration of dividends is prohibited. If a literal interpretation is to be given to the proviso, then it may be concluded that this fact would have no bearing on determining the nature of the activity carried on by the petitioner. But, we feel that in deciding whether any activity is in the nature of trade, commerce or business, it has to be examined whether there is an element of profit making or not. Similarly, while considering whether any activity is one of rendering any service in relation to any trade, commerce or business, the element of profit making is also very important.

46. At this juncture, we may point out that we are in agreement with the argument advanced by Mr Syali that the proviso to Section 2(15) does not make any distinction between entities carrying on regular trade, commerce or business or providing services in relation to any trade, commerce or business on the one hand and genuine charitable organizations on the other. It must be remembered that we are construing the expression "charitable purpose" not in a vacuum, but in the specific context of Section 10(23C)(iv) of the said Act. As pointed out above, Section 10 deals with the incomes not included in total income. And, Section 10(23C)(iv) specifically deals with the income received by any person on behalf of, *inter alia*, an institution established for charitable purposes. We have to, therefore, examine the meaning of the expression "charitable purposes" in the context of Section 10(23C)(iv). Looking at the said expression from this stand point, it becomes clear that it has a reference to income. Because, it is only when such an institution has an income that the question of not including that income in its total income would arise. Therefore, merely because an institution, which otherwise is established for a charitable purpose, receives income would not make it any less a charitable institution. Whether that institution, which is established for charitable purposes, will get the exemption under Section 10(23C)(iv) would have to be determined by the prescribed authority having regard to the objects of the institution and its importance throughout India or throughout any State or States. There is no denying that having regard to the objects of the petitioner and its importance throughout India in the field of advancement of promotion of trade and commerce, the petitioner would be entitled to be regarded as an institution

which would qualify for that exemption. The only thing that we have to examine is - whether the petitioner had been established for charitable purposes? The fact that it derives income does not, in any way, detract from the position that it is an institution established for charitable purposes. Therefore, in our view, merely because the petitioner derives rental income, income out of sale of tickets and sale of publications or income out of leasing out food and beverages outlets in the exhibition grounds, does not, in any way, affect the nature of the petitioner as a charitable institution if it otherwise qualifies for such a character.

47. We have already noted that prior to the amendment being introduced with effect from 01.04.2009, the petitioner had been recognized as an institution established for charitable purpose and this had been done having regard to the objects of the institution and its importance throughout India. It is only because of this that the petitioner had been granted the exemption by the respondent for the period prior to assessment year 2009-10. Therefore, insofar as the receiving of income is concerned, that cannot be taken as an instance to deny the petitioner its status as an institution established for charitable purposes. Because, if that were to be so, then there would be no necessity to take recourse to Section 10(23C)(iv) for the benefit of an exemption. To put it plainly, if an institution established for charitable purposes did not receive an income at all, then what would be the need for taking any benefit under Section 10(23C)(iv) of the said Act. Therefore, if a meaning is given to the expression "charitable purpose" so as to suggest that in case an institution, having an objective of advancement of

general public utility, derives an income, it would be falling within the exception carved out in the first proviso to Section 2(15) of the said Act, then there would be no institution whatsoever which would qualify for the exemption under Section 10(23C)(iv) of the said Act. And, the said provision would be rendered redundant. This is so, because, if the institution had no income, recourse to Section 10(23C)(iv) would not be necessary. And, if such an institution had an income, it would not, on the interpretation sought to be given by the revenue, be qualified for being considered as an institution established for charitable purposes. So, either way, the provisions of Section 10(23C)(iv) would not be available, either because it is not necessary or because it is blocked. The intention behind introducing the proviso to Section 2(15) of the said Act could certainly not have been to render the provisions of Section 10(23C)(iv) redundant.

48. With this in mind, it is to be seen as to what is meant by the expressions "trade", "commerce" or "business". The word "trade" was considered by the Supreme Court in its decision in the case of ***Khoday Distilleries Ltd and Others v. State of Karnataka and Others*****: 1995 (1) SCC 574**, whereby the Supreme Court held that "*the primary meaning of the word 'trade' is the exchange of goods for goods or goods for money*". Furthermore, in State of ***Andhra Pradesh v. H. Abdul Bakhi and Bros*****: 1964 (5) STC 644 (SC)**, the Supreme Court held that "*the word "business" was of indefinite import and in a taxing statute, it is used in the sense of an occupation, or profession which occupies time, attention or labour of a person, and is clearly associated with the object of making profit"*. This

court, in ***ICAI (I)*** *(supra)* held that, while construing the term "business" as appearing in the proviso to Section 2(15), the object and purpose of the Section has to be kept in mind. It was observed therein that a very broad and extended definition of the term "business" was not intended for the purpose of interpreting and applying the first proviso to Section 2(15) of the Act so as to include any transaction for a cess, fee or consideration. The Court specifically held that:-

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

49. In ***Bureau of Indian Standards*** *(supra)*, this court, while considering whether the activities of the ***Bureau of Indian Standards*** *(supra)* in granting licences and trading certificates and charging of fee amounted to carrying on business, trade or commerce, held as under:-

> "73. … In these circumstances, "rendering any service in relation to trade, commerce or business" cannot, in the opinion of the Court, receive such a wide construction as to enfold regulatory and sovereign authorities, set up under statutory enactments, and tasked to act as agencies of the State in public duties which cannot be discharged by private bodies. Often, apart from the controlling or parent statutes, like the BIS Act, these statutory bodies (including BIS) are empowered to frame

> rules or regulations, exercise co-ercive powers, including inspection, raids; they possess search and seizure powers and are invariably subjected to Parliamentary or legislative oversight. The primary object for setting up such regulatory bodies would be to ensure general public utility. The prescribing of standards, and enforcing those standards, through accreditation and continuing supervision through inspection etc., cannot be considered as trade, business or commercial activity, merely because the testing procedures, or accreditation involves charging of such fees. It cannot be said that the public utility activity of evolving, prescribing and enforcing standards, "involves" the carrying on of trade or commercial activity."

50. In ***ICAI(II)*** *(supra)*, while considering whether the activities of ICAI fell within the proviso to Section 2(15) as introduced with effect from 01.04.2009, this court, after considering the Supreme Court decision in the case of ***Commissioner of Sales Tax v. Sai Publication Fund*****: (2002) 258 ITR 70(SC)** held:-

> "Thus, if the dominant activity of the assessee was not business, then any incidental or ancillary activity would also not fall within the definition of business."

51. This court also observed in ***ICAI(II)*** *(supra)* that:-

> "64. … It is not necessary that a person should give something for free or at a concessional rate to qualify as being established for a charitable purpose. If the object and purpose of the institution is charitable, the fact that the institution collects certain charges, does not alter the character of the institution. …"

This court in ***ICAI (II)*** *(supra)* held:-

> "67. The expressions "trade", "commerce" and "business" as occurring in the first proviso to section 2(15) of the Act must be read in the context of the intent and purport of section 2(15) of the Act and cannot be interpreted to mean any activity which is carried on in an organised manner. The purpose and the dominant object for which an institution carries on its activities is material to determine whether the same is business or not. The purport of the first proviso to section 2(15) of the Act is not to exclude entities which are essentially for charitable purpose but are conducting some activities for a consideration or a fee.
> The object of introducing the first proviso is to exclude organizations which are carrying on regular business from the scope of "charitable purpose". The purpose of introducing the proviso to Section 2(15) of the Act can be understood from the Budget Speech of the Finance Minister while introducing the Finance Bill 2008. The relevant extract to the Speech is as under:-
>
> > '……. "Charitable purpose" includes relief of the poor, education, medical relief and any other object of general public utility. These activities are tax exempt, as they should be. However, some entities carrying on regular trade, commerce or business or providing services in relation to any trade, commerce or business and earning incomes have sought to claim that their purposes would also fall under "charitable purpose". Obviously, this was not the intention of Parliament and, hence, I propose to amend the law to exclude the aforesaid cases. Genuine charitable organizations will not in any way be affected.'
>
> The expressions "business", "trade" or "commerce" as used in the first proviso must, thus, be interpreted restrictively and where the dominant object of an organisation is charitable any incidental activity for furtherance of the object would not fall within the expressions " business", "trade" or "commerce"."

52. With regard to the ***Surat Art Silk*** case *(supra)*, this court, in ***ICAI (II)*** *(supra)* observed as under:-

> "69. In the case of Addl. Commissioner of Income Tax v. Surat Art Silk Cloth Manufacturers Association: [1980] 121 ITR 1 (SC), the Supreme Court held as under:-
>
> > 'The test which has, therefore, now to be applied is whether the predominant object of the activity involved in carrying out the object of general public utility is to subserve the charitable purpose or to earn profit. Where profit-making is the predominant object of the activity, the purpose, though an object of general public utility would cease to be a charitable purpose. But where the predominant object of the activity is to any out the charitable purpose and not to earn profit, it would not lose its character of a charitable purpose merely be cause some profit arises from the activity.'
>
> 70. Although in that case the statutory provisions being considered by the Supreme Court were different and the utilisation of income earned is, now, not a relevant consideration in view of the express words of the first proviso to section 2(15) of the Act, nonetheless the test of dominant object of an entity would be relevant to determine whether the entity is carrying on business or not. In the present case, there is little doubt that the objects of the activities of the petitioner are entirely for charitable purposes."

Finally in ***ICAI(II)*** *(supra),* this court, with reference to ***H. Abdul Bakhi and Bros*** *(supra)* observed as under:-

> "71. Although, it is not essential that an activity be carried on for profit motive in order to be considered as business, but existence of profit motive would be a vital indicator in determining whether an organisation is carrying on business or not. In the present case, the petitioner has submitted figures to indicate that expenditure on salaries and depreciation exceeds the surplus as generated from holding coaching classes. In addition, the petitioner institute provides study material and other academic support such as facilities of a library without any material additional costs. The Supreme Court in the case of State of Andhra Pradesh v. H. Abdul Bakhi and Bros. (supra) held as under:
>
> > "The expression "business" though extensively used a word of indefinite import, in taxing statutes it is used in the sense of an occupation, or profession which occupies the time, attention and labour of a person, normally with the object of making profit. To regard an activity as business there must be a course of dealings, either actually continued or contemplated to be continued with a profit motive, and not for sport or pleasure."
> >
> > (Underlining added)
>
> 72. There is nothing on record to indicate the assertion of the petitioner that its activities are not fuelled by profit motive is incorrect. Absence of profit motive, though not conclusive, does indicate that the petitioner is not carrying on any business."

53. From the said decision, it is apparent that merely because a fee or some other consideration is collected or received by an institution, it would not lose its character of having been established for a charitable purpose. It

is also important to note that we must examine as to what is the dominant activity of the institution in question. If the dominant activity of the institution was not business, trade or commerce, then any such incidental or ancillary activity would also not fall within the categories of trade, commerce or business. It is clear from the facts of the present case that the driving force is not the desire to earn profits but, the object of promoting trade and commerce not for itself, but for the nation - both within India and outside India. Clearly, this is a charitable purpose, which has as its motive the advancement of an object of general public utility to which the exception carved out in the first proviso to Section 2(15) of the said Act would not apply. We say so, because, if a literal interpretation were to be given to the said proviso, then it would risk being hit by Article 14 (the equality clause enshrined in Article 14 of the Constitution). It is well-settled that the courts should always endeavour to uphold the Constitutional validity of a provision and, in doing so, the provision in question may have to be read down, as pointed out above, in ***Arun Kumar*** *(supra)*.

54. It would be pertinent to reiterate that Section 2(15) is only a definition clause. Section 2 begins with the words, "in this Act, unless the context otherwise requires". The expression "charitable purpose" appearing in Section 2(15) of the said Act has to be seen in the context of Section 10(23C)(iv). When the expression "charitable purpose", as defined in Section 2(15) of the said Act, is read in the context of Section 10(23C)(iv) of the said Act, we would have to give up the strict and literal interpretation sought to be given to the expression "charitable purpose" by the revenue.

With respect, we do not agree with the views of the Kerala and Andhra Pradesh High Courts.

55. It would be appropriate to also examine the observations of another Division Bench of this court in ***G.S.1*** *(supra)*. While considering Circular No.11 of 2008 issued by the CBDT, to which a reference has been made earlier in this judgment, the Division Bench held that it was evident from the said circular that the new proviso to Section 2(15) of the said Act was "applicable to assesses, who are engaged in commercial activities, i.e., carrying on business, trade or commerce, in the garb of 'public utilities' to avoid tax liability as it was noticed that the object 'general public utility' was sometimes used as a mask or device to hide the true purpose, which was 'trade, commerce or business'." From this, it is evident that the introduction of the proviso to Section 2(15) by virtue of the Finance Act, 2008 was directed to prevent the unholy practice of pure trade, commerce and business entities from masking their activities and portraying them in the garb of an activity with the object of a general public utility. It was not designed to hit at those institutions, which had the advancement of the objects of general public utility at their hearts and were charity institutions. The attempt was to remove the masks from the entities, which were purely trade, commerce or business entities, and to expose their true identities. The object was not to hurt genuine charitable organizations. And, this was also the assurance given by the Finance Minister while introducing the Finance Bill 2008.

56. In ***G.S. 1*** *(supra)* it was contended by the revenue that GS1 (India) had acquired intellectual property rights from GS1 (Belgium) and thereafter received registration fees from third parties in India. This was sought to be equated to royalty payments. It was also contended that GS1 (India) had huge surpluses of receipts over expenditure and that payments were made to GS1 (Belgium). According to the revenue, all this entailed that GS1 (India) was engaged in 'business, trade or commerce'. The petitioner herein refuted this. In this backdrop, this court asked the question – can it be said that the petitioner is engaged in activities which constitute business, commerce or trade ? While answering the said question, the court held as under:-

> "21. … As observed above, legal terms, "trade", "commerce" or "business" in Section 2(15), mean activity undertaken with a view to make or earn profit. Profit motive is determinative and a critical factor to discern whether an activity is business, trade or commerce."

The court further held:-

> "22. Business activity has an important pervading element of self-interest, though fair dealing should and can be present, whilst charity or charitable activity is anti-thesis of activity undertaken with profit motive or activity undertaken on sound or recognized business principles. Charity is driven by altruism and desire to serve others, though element of self-preservation may be present. For charity, benevolence should be omnipresent and demonstrable but it is not equivalent to self-sacrifice and abnegation. The antiquated definition of charity, which entails giving and receiving nothing in return is outdated. A mandatory feature would be; charitable activity should be devoid of selfishness or illiberal spirit. Enrichment of oneself or self-gain should be missing and the predominant purpose of the activity

> should be to serve and benefit others. A small contribution by way of fee that the beneficiary pays would not convert charitable activity into business, commerce or trade in the absence of contrary evidence. Quantum of fee charged, economic status of the beneficiaries who pay, commercial value of benefits in comparison to the fee, purpose and object behind the fee etc. are several factors which will decide the seminal question, is it business?"

57. Ultimately, in the context of the factual matrix of that case, this court held that "*charging a nominal fee to use the coding system and to avail the advantages and benefits therein is neither reflective of the business aptitude nor indicative of the profit oriented intent*". The court further observed:-

> "Thus the contention of the revenue that the petitioner charges fee and, therefore, is carrying on business, has to be rejected. The intention behind the entire activity is philanthropic and not to recoup or reimburse in monetary terms what is given to the beneficiaries. Element of give and take is missing, but decisive element of bequeathing is present. In the absence of "profit motive" and charity being the primary and sole purpose behind the activities of the petitioner is perspicuously discernible and perceptible."

The court also held:-

> "27. As observed above, fee charged and quantum of income earned can be indicative of the fact that the person is carrying on business or commerce and not charity, but we must keep in mind that charitable activities require operational/running expenses as well as capital expenses to be able to sustain and continue in long run. The petitioner has to be substantially self-sustaining in long-term and should not depend upon government, in other words taxpayers should not subsidize the said activities, which nevertheless are charitable and fall under

> the residuary clause – general public utility. The impugned order does not refer to any statutory mandate that a charitable institution falling under the last clause should be wholly, substantially or in part must be funded by voluntary contributions. No such requirement has been pointed out or argued. A practical and pragmatic view is required when we examine the data, which should be analyzed objectively and a narrow and coloured view will be counter-productive and contrary to the language of Section 2(15) of the Act."

58. In conclusion, we may say that the expression "charitable purpose", as defined in Section 2(15) cannot be construed literally and in absolute terms. It has to take colour and be considered in the context of Section 10(23C)(iv) of the said Act. It is also clear that if the literal interpretation is given to the proviso to Section 2(15) of the said Act, then the proviso would be at risk of running fowl of the principle of equality enshrined in Article 14 of the Constitution India. In order to save the Constitutional validity of the proviso, the same would have to be read down and interpreted in the context of Section 10(23C)(iv) because, in our view, the context requires such an interpretation. The correct interpretation of the proviso to Section 2(15) of the said Act would be that it carves out an exception from the charitable purpose of advancement of any other object of general public utility and that exception is limited to activities in the nature of trade, commerce or business or any activity of rendering any service in relation to any trade, commerce or business for a cess or fee or any other consideration. In both the activities, in the nature of trade, commerce or business or the activity of rendering any service in relation to any trade, commerce or business, the dominant and the prime objective has to be seen. If the dominant and prime objective of the

institution, which claims to have been established for charitable purposes, is profit making, whether its activities are directly in the nature of trade, commerce or business or indirectly in the rendering of any service in relation to any trade, commerce or business, then it would not be entitled to claim its object to be a 'charitable purpose'. On the flip side, where an institution is not driven primarily by a desire or motive to earn profits, but to do charity through the advancement of an object of general public utility, it cannot but be regarded as an institution established for charitable purposes.

59. Thus, while we uphold the Constitutional validity of the proviso to Section 2(15) of the said Act, it has to be read down in the manner indicated by us. As a consequence, the impugned order dated 23.01.2013 is set aside and a mandamus is issued to the respondent to grant approval to the petitioner under Section 10(23C)(iv) of the said Act within six weeks from the date of this judgment. The writ petition stands allowed as above. The parties are left to bear their own costs.

BADAR DURREZ AHMED, J

VIBHU BAKHRU, J

JANUARY 22, 2014
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