IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "C" NEW DELHI
BEFORE SHRI S.V. MEHROTRA : ACCOUNTANT MEMBER
AND
SHRI C.M. GARG: JUDICIAL MEMBER

ITA no. 3124/Del/2014
A.Y. 2009-10

India International Centre, 40, Max Muller Marg, Lodhi Estate, New Delhi. PAN: AAATI 0660 C	Vs.	Asstt. Director of Income-tax,(E), Inv. Cir.(1), New Delhi.
(Appellant)		(Respondent)

Appellant by : Shri Pradeep D00000000000000000000000000inodia FCA &
Shri R.K. Kapoor CA
Respondent by : Shri R.I.S. Gill CIT(DR)

Date of hearing : 10-03-2015
Date of order : 11-05-2015.

O R D E R

PER S.V. MEHROTRA, A.M:-

This appeal, by the assessee, is directed against the order dated 31-03-2014 u/s 263of the Income-tax Act, 1961, passed by the Director of Income-tax (Exemptions), New Delhi, relating to A.Y. 2009-10.

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2. Brief facts of the case are that the assessee had filed its return of income on 29-9-2009 declaring Nil income for AY 2009-10. The AO completed the assessment u/s 143(3) after examining the details and explanations and the books of accounts at Nil income. Subsequently, ld. Director of Income-tax (Exemptions) ("DIT(E)" in short), examined the records and noticed that as per income and expenditure account, total income of the assessee had been shown at Rs. 2640.96 lakhs. Out of this, Rs. 783.18 lakh had been considered for computation of income for charitable activity u/s 10(23C)(iv) and remaining amount had been claimed exempt on the principle of mutuality. Ld. DIT(E) examined the accumulation chart and income and expenditure account and concluded that major activities of the assessee revolved around accommodation and catering facilities and these activities were not on no-profit/loss basis, since there was continuous surplus being reflected in the account for many previous years. He further observed that the second objective, as per memorandum of association viz. "to undertake, organize and facilitate study courses, conferences, seminars, lectures and research in matters relating to different cultural patterns of the world", was not charitable in itself but becomes charitable only when it is read with first objective viz. "to promote understanding and amity between the different communities of the world by undertaking or promoting the study of their past and present cultures, by

disseminating or exchanging knowledge thereof, and by providing such other facilities as would lead to their universal appreciation". He pointed out that in the first category there were general citizen of the world whereas beneficiaries in the second category were exclusive selected members of the society and their few invited guests. She, therefore, concluded that the trust could not be called as serving the general public. She further observed that since the trust itself was applying the principle of mutuality in respect of admission fee, subscription, income from hostel rooms, food and beverage, sale and expenses thereof, it could be concluded that nature of the trust was to serve its members to their benefits.

2.1. Ld. DIT(E) further examined the bye laws of the society and concluded that they did not fulfill the criteria to come under the principle of mutuality. She, accordingly, issued a notice u/s 263 on 11-3-2014, which was further amended by notice dated 28-3-2014, requiring the assessee to show cause as to why the order passed by the AO may not be treated as erroneous and prejudicial to the interests of revenue and accordingly be set aside.

2.2. The assessee filed detailed replies vide its letter dated 24-3-2014, 29-3-2014 and 31-3-2014, which have been reproduced extensively in para 2 of ld. DIT(E)'s order. After considering the asessee's reply, the ld. DIT(E), after detailed discussion, held that AO failed to examine the application of section 2(15) read

with third proviso to section 143(3) and also read with section 13(8) of the Income-tax Act, 1961. She further observed as under:

> *"This is a clear case of non application of mind and non application of law. The asstt. order by mere reading of it is erroneous as it has treated the whole of income of the assessee as exempt with reference to section 11,12 and 13 though the assessee had submitted report in form no. 10BB only with respect of part income of Rs. 7,90,08,192/- The assessee's claim of exemption with respect to balance income has thus not been examined at all. Further, in view of the discussion as above, assessee's claim of exemption either u/s 10(23C)(iv), u/s 11 or under the principle of mutuality do not appear to be tenable. Therefore, entire surplus of Rs. 290.70 lacs to be exempt was to be brought to tax, which the AO has failed to do. Thus, the order is both erroneous and prejudicial to the interest of revenue."*

2.3. The main reasons for arriving at the aforementioned conclusion were as under:

(a) The assessee society in its audit report in form no. 10BB had shown only part of its income and expenditure attributable to activities in terms of section 10(23C)(iv), whereas the total income/expenditure/ surplus etc. as per the Income & Expenditure a/c of the assessee for the current assessment year were Rs. 2640.96 lacs/ 2348.19 lacs/ Rs. 292.17 lacs respectively. In its return filed in ITR 7, the assessee had shown only income of Rs. 7,90,08,192/- from other sources and claimed the same to be exempt u/s 10(23C)(iv). Both the return of income as well as the form no. 10BB were silent on balance income.

(b) The exemption u/s 10(23C)(iv) was subject to fulfillment of conditions laid down in the order notifying the assessee u/s

10(23C)(iv). The assessee's activities included providing of services i.e. accommodation, food & beverages etc., for payment of charges, which comes within the mischief of proviso 1 & 2 to section 2(15) read with third proviso to section 143(3).

(c) She also pointed out that as per Income & Expenditure A/c of the assessee, the surplus generated in assessee's case was Rs. 292.17 lacs as against Rs. 230.08 lacs in the preceding year. Therefore, the assessee's claim that the activities were not on commercial line, was not tenable.

(d) As regards the assessere's claim that income was not taxable income, being derived from mutual concern, she observed that assessee had claimed that partly income was covered by the provisions of section 10(23C)(iv) read with sec. 2(15) and partly by principle of mutuality. She observed that an assessee could have income from different heads or income from different sources, but it could not have its income and expenditure for the same sources apportioned on the basis of different principles, as claimed by the assessee. She, accordingly, held that the assessee could not be allowed to compartmentalize its activities and income arising therefrom under charitable activities and mutual activities. All the activities had to be seen in its totality.

(e) While cultural and intellectual activities of the assessee were open to general public, the accommodation and related activities were restricted only to its members as well non members specially invited to participate in the activities of the society. Thus, there was no complete identity between the contributors and participators and,

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therefore, the assessee could not be considered to be covered by principle of mutuality.

3. Ld. counsel for the assessee referred to the condensed grounds of appeal and submitted that the assessee has assailed the order of ld. DIT(E) on following grounds:

> "1. That the Ld. DIT (Exemption) has grossly erred in law and on the facts of the appellant's case in holding that the order passed by the AO u/s 143(3) is erroneous and prejudicial to the interests of revenue. .
>
> 2. That the order passed u/s 263 dated 31.03.2014 is bad in law and the revision order uls.263 deserves to be cancelled.
>
> 3. That the Ld. DIT (Exemption) has erred in law in holding that the AO failed to examine the applicability of 1st and 2nd proviso of Section 2(15) of the Income Tax Act read with 3rd proviso to Section 143(3) and provisions of Section 13(8) although neither 3rd proviso to Section 143(3) nor Section 13(8) were on statute book when AO. passed the assessment order.
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> 4. That the Ld. DIT (Exemption) has grossly erred in holding that provisions of Sections 11, 12, 13 and Section 10(23C)(iv) of the Income Tax Act are not applicable to the facts of the appellant in spite of the fact that registration u/s 12A, 80G and 10(23C)(iv) remain intact.
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> 5. That the Ld. DIT (Exemption) grossly erred in law in holding that the activities such as accommodation, food and beverages to the members of the appellant represent trade and business irrespective of the fact that "dominant object" of the appellant remains charitable not driven by "profit motive".
>
> 6. That the Ld. DIT (Exemption) grossly erred in law in invoking provisions of Section 263 although it was not a case of

"no enquiry" by the AO on the applicability of provisions of Section 2(15) with its latest amendment.

7. That the Director of Income-tax (Exemptions) has erred in holding that all the activities of the assessee had to be seen in totality and the assessee cannot be allowed to compartmentalize its activities and income arising there from under charitable activities and mutual activities.

8. That the learned Director of Income-tax (Exemptions) has erred in holding that the AO has failed to bring to tax the entire surplus of Rs.292.70 lakhs.

9. That each ground is independent of and without prejudice to the other grounds raised herein".

3.1. Ld. counsel submitted that the assessee is registered u/s 12A since 18-6-1973 and also approved u/s 80G(5) and further notified u/s 10(23C)(iv) for the AY 2006-07 onwards vide notification no. 13/2007 dated 19-1-2007. He submitted that all these registrations are still subsisting. Ld. counsel submitted that since the inception till date, the assessment has been completed u/s 143(3). He pointed out that the main allegation and the findings given in the order u/s 263 by the DIT(Exemption) are that activities undertaken by the assessee included providing of services such as accommodation, food and beverages on chargeable basis and, therefore, such activities were caught within the mischief of proviso 1 & 2 to section

2(15) read with third proviso to section 143(3) and section 13(8) of the I.T. Act.

3.2. Ld. counsel submitted that assessment was completed u/s 143(3) of the Act on 26-12-2011, whereas third proviso to section 143(3) as well as section 13(8) of the I.T. Act were introduced by the Finance Act, 2012 with retrospective effect from 1-4-2009. Therefore, when the assessment was framed by the AO, third proviso to section 143(3) as well as section 13(8) were not on the statute book and it was impossible for any assessing authority to envisage as to what provisions of law were going to be incorporated or changed in future. He relied on the decision of Hon'ble Supreme Court in the case of CIT Vs. Max India Ltd. 295 ITR 282 (SC) as also CIT Vs. Sasken Communication India Ltd. Taxsutra-538-HC-2014-Karnataka, for the proposition that when assessment order is passed based on the law prevalent at the time of assessment order, the same cannot be revised u/s 263.

3.3. Ld. counsel further submitted that the AO had issued a questionnaire in course of assessment proceedings dated 23.8.2011 and had raised specific queries vide question no.2 and question no.13 on the applicability of the provisions of section 11, 12 and 13 read with sec. 2(15), in view of the latest

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amendment. He pointed out that in the questionnaire, A.O. raised a specific query no.I3, whether any business activities were being carried out by the assessee. The assessee vide its submissions had specifically explained the nature of activities by highlighting that how the activities of the assessee remained charitable in nature. Therefore, this cannot be said to be a case of "no enquiry" by the AO. He relied on following decisions:

- Malabar Industrial Co. Ltd. vs. CIT, 243-ITR-83 (SC)
- CIT vs. Green World Corn., 181 Taxman -111 (SC)
- CIT vs. Sunbeam Auto Ltd., 332 ITR 167 (Del.)
- CIT vs. Ani! Kumar Sharma, 335 ITR 83 (Del.)
- CIT vs. Gabriel India Ltd., 203 ITR 108 (Born.)
- CIT v. Kanda Rice Mills, 178 ITR 446 (P&H)
2013- TIOL-761-HC-DEL

3.4. He further pointed out that similar enquiries were also made by the CBDT while notifying the Society u/s.10(23C)(iv) of the I.T. Act and on only being satisfied, it had notified the assessee society as an eligible entity u/s.10(23C)(iv) of the I.T. Act. Therefore, it cannot be said that the activities of the assessee were hit by the mischief of proviso to sec. 2(15).

3.5. Ld. counsel submitted that before the AO as well before the ld. DIT(E) detailed note on the activities and annual report was filed. The AO formed an opinion that the activities of the assessee society were charitable

in nature. Therefore, once the AO had taken a possible view, then, ld. DIT(E), under her power of revision u/s 263, could not impose her own view to give a different finding. He relied on following decisions:

- Malabar Industrial Co. Ltd. vs. CIT, 243-ITR-83 (SC)
- CIT vs. Green World Corn., 181 Taxman - 111 (SC)

3.6. Ld. counsel further submitted that in the initial notice or in the revised notice u/s 263, ld. DIT(E) never raised any issue on the applicability of third proviso to section 143(3) or section 13(8) or first proviso to section 2(15), but in her order, she relied upon these provisions only. Ld. counsel pointed out that the basis of order has to be the same as in the show cause notice. For this proposition he relied on following decisions:

- CIT v. Ashish Raj Pal 320 ITR 674;
- CIT vs. Software Consultants 341 ITR 240 (Del.).

3.7. Ld. counsel further submitted that even after insertion of proviso to section 2(15) of the 1.T. Act, various courts have held that merely charging a fee for some of the activities, which may result in surplus, does not ipso-facto means that the activities of the Society are commercial in nature. The trade or commerce in the normal course is different than what is required u/s. 2(15) of the I.T. Act. He relied on following judgments for this proposition –

- ICAI vs. DGIT(Exemptions), 347 ITR 99 (Del);
- DIT(Exemptions) vs. C.A. Study Circle, 347 ITR 321 (Mad.);
- Tolani Education Society vs. DIT(Exemptions), (2013) 259 CTR (Born.) 26
- Bureau of Indian Standards v. DGIT (Exemption), 358 ITR 78 (Del.);
- ICAI v. DGIT (Exemptions), 358 ITR 91 (Del.)
- DIT (Exemption) v. Sabarmati Ashram, 362 ITR 539 (Guj.)
- Council for the Indian School Certificate Examinations v. DGIT, 2014- TIOL-855-HC-DEL-IT

3.8. Ld. counsel further referred to the annual accounts and pointed out that the gross receipts of the Society for the year ended 31st March 2009 was Rs.26.40 crores, which included interest income of Rs.6.17 crores. As against this, the total expenditure was Rs.23.48 crores. The overall surplus, as also stated by the DIT(E), was Rs.2.92 crores. Therefore, no activity, whatsoever, of the Society could be said or alleged to be generating any surplus. The surplus, if any, had resulted only because of interest income being earned by the Society on the accumulated funds of earlier years.

3.9. Ld. counsel submitted that the assessee's case is squarely covered by the decision of Hon'ble Delhi High Court in the case of India Trade Promotion Organisation v. D.G. of Income Tax (Exemptions) and others, wherein the Hon'ble Delhi High Court, while upholding the constitutional validity of the first proviso to Section 2(15) introduced w.e.f. 01.04.2009,

has held that even after insertion of first proviso to Section 2(15), what is required to be seen is that what is the dominant and main object i.e. predominant object of society. So long as profit making was not the driving force and objective of the assessee, then merely charging some fee for some of the activities does not put it in the category of non- charitable entity in respect of the objects falling in the category of "advancement of any other object of general public utility".

3.10. Ld. counsel pointed out that there is no change in the objects or in the activities of the centre for the last five decades or more. Therefore, the rule of consistency has to be applied. For this proposition he relied on following decisions:

- Dy. Director of Income Tax Vs. Shanti Devi Progressive Educations Society [2012] 340 ITR 320 (Delhi).

- Excel Industries SC-2013- TIOL-52-SC-IT

3.11. As regards the objection raised by ld. CIT on account of principle of mutuality, ld. Counsel submitted that this has been accepted in the previous years in assessee's own case.

3.12. Ld. counsel for the assessee referred to pages 2 & 3 of the PB, wherein "Income & Expenditure A/c" is contained and pointed out that the interest income is Rs. 617.45 lacs and the surplus generated Rs. 292.17 lacs. No donations have been received by asessee. Therefore, it is evident that no surplus is generated from catering, hostel activities. Surplus is born from interest income earned on FDRs. He pointed out that assessee incurred loss from hostel activities. Therefore, there is no question of any trade or business being carried out by assessee. The whole object is to disseminate knowledge for uplifting the social consciousness of the society in general.

4. Ld. CIT(DR) referred to the assessment order and pointed out that there could not be any short/ non-speaking order as is the present one, which has been passed without any application of mind.

4.1. Ld. CIT(DR) further submitted that AO has to give specific finding as to how the surplus accrued to assessee i.e. whether from interest income, as claimed by assessee, or from the activities carried out by assessee.

5. Ld. counsel for the assessee in the rejoinder submitted that it is well settled law that how AO writes an order is not within assessee's control. The AO accepted the assessee's explanation after considering the annual report. He relied on 256 ITR 1.

6. We have considered the rival submissions and have perused the record of the case. At the outset we may point out that as far as the objection of ld. DIT(E) as regards the income not being returned by assessee in its income-tax return or in form 10BB is concerned, the same was claimed as exempt on account of concept of mutuality, as in earlier years and, therefore, there was no basis for the AO to take any contrary view on the same. Accordingly, the proceedings u/s 263 initiated by ld. DIT(E) on this count is not at all tenable in law, particularly when this view has been taken by the department since inception.

6.1. Now coming to the main ground regarding applicability of proviso to section 2(15) by the ld. DIT(E). This proviso has been made applicable to institutions notified u/s 10(23C)(iv) w.e.f. 1-4-2009 by inserting 17th proviso to section 10(23C)(iv) by Finance Act 2012, as reproduced below:

> *"Provided also that the income of a trust or institution referred to in sub-clause (iv) or sub-clause (v) shall be included in its total income of the previous year if the provisions of the first proviso to clause (15) of section 2 become applicable to such trust or institution in the said previous year, whether or not any approval granted or notification issued in respect of such trust or institution has been withdrawn or rescinded."*

6.2. Prior to such insertion, the position of law was like this. Section 2(15) defined the 'charitable purpose'. This is an inclusive definition and, therefore, in view of the opening phrase of section 2, which reads as "unless the context otherwise requires", the said definition could not be imported to institutions notified u/s 10(23C)(iv) by Competent Authority. Here approval entitled the institution, subject to fulfillment of conditions laid down in notification read with conditions laid down in section 10(23C). In view of 7th proviso to section 10(23C), the Competent Authority was required to examine that if the institution was deriving any income from profits and gains, then the said business was only incidental to the attainment of its main object. However, after application of proviso to section 2(15), by insertion of 17th proviso to section 10(23C) by Finance Act, 2012 with retrospective effect from 1-4-2009, the ambit has considerably been widened and if an assessee is carrying on any activity which is in the nature of trade, commerce or business then the assessee cannot be said to be carrying on charitable activities. In view of changed legal position, ld. DIT(E) concluded that since AO had not considered the applicability of proviso to section 2(15), the assessment order was erroneous as well as prejudicial to the interest of Revenue.

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6.3. Admittedly, the third proviso to section 143(3), requiring the AO to examine the applicability of proviso to section 2(15) in case of institutions notified u/s 10(23C)(iv) in view of insertion of 17th proviso to section 10(23C), was not on statute book at the time when assessment order was passed and since the notification remained in force, in any view of the matter, the invocation of section 263 by ld. DIT(E) was not justified in view of the decision of Hon'ble Supreme Court in the case of Max India Ltd. (supra), wherein it has been held as under:-

> "We find no merit in the said contentions. Firstly, it is not in dispute that when the order of the Commissioner was passed there were two views on the word "profits" in that section. The problem with section 80HHC is that it has been amended eleven times. Different views existed on the day when the Commissioner passed the above order. Moreover, the mechanics of the section have become so complicated over the years that two views were inherently possible. Therefore, subsequent amendment in 2005 even though retrospective will not attract the provision of section 263 particularly when as stated above we have to take into account the position of law as it stood on the date when the Commissioner passed the order dated March 5, 1997, in purported exercise of his powers under section 263 of the Income-tax Act.

6.4. Further we find that 263 proceedings initiated by ld. DIT(E) on the ground that there was no application of mind by AO cannot be sustained because vide questionnaire dated 23-8-2011, the AO had issued notice u/s 142(1) and had required the assessee as under:

"2. Note on the activities of the trust in AY 2009-10, Explanation along with documentary proof to justify that these activities were charitable as per Section 11,12,13 read with Section 2(15) in light of the recent amendment. Show computation as to how 85% is applied for objects of the trust.

6.5. Further in question no. 13 the assessee was required as under:

"13. Whether any business is carried out by the Trust/Society/Institution. If yes, please produce the complete books of accounts along with bills/ vouchers in respect of such business activities."

6.7. The assessee had given detailed reply, the contents from which have been reproduced in later part this order. Therefore, this cannot be said that there was non application of mind by AO. We further find considerable force in the submission of ld. counsel for the assessee that AO had taken one of the possible views after considering the assessee's reply and, therefore, 263 proceedings could not be initiated against the assessee. Therefore, it cannot be said that AO's order was in any manner erroneous or prejudicial to the interests of revenue.

6.8. However, since detailed arguments have been advanced before us with respect to applicability of proviso to section 2(15), we proceed to examine the same. First objection of revenue is with regard to the amounts realized out of catering facilities provided at the centre. Catering facilities were provided in the centre for members who came to the centre or stayed in the centre and attended discourses, conferences, seminars, lectures etc. We

reproduce the following note filed by assessee on catering facilities at the centre:

"**INDIA INTERNATIONAL CENTRE**

Note on Catering Facilities at the Centre

Catering facilities are provided in the Centre for members who come to the Centre or stay in the Centre and attend the discourses, conferences, seminars, lectures. The Centre has two dining halls and two Lounges. The dining hall operates for breakfast, lunch and dinner. The lounge provides variety of snacks, tea coffee and soft drinks. In the Dining Hall of the Main Centre, a Member can book a table for maximum of 8 persons including guests. It may be stated that it is only the Members who can hold conferences, seminars and the centre is also providing catering services to them. The Rules relating to the booking and cancellation of IIC conferencing and catering facilities:

1. Outside catering or food items brought from outside are not permitted.

2. Cell phones should be switched of before entering into conferencing venues and the noise outside the conference rooms and auditorium must be avoided.

3. Sale of ticket, books, collection of donation or any commercial activity is not permitted.

4. Live band, Marriage Ceremonies, Children's parties or any another function where rituals involving pendit, phera, havan etc. are not permitted.

5. Meeting or political, Religious nature and AGM are not permitted.

6. It may not be out of place to mention here that the notice has also been granted exemption from income tax under sub clause (iv) of clause (23C) of Section 10 of Income Tax Act.

The Kitchen and the dining hall are operated by IIC's own staff members and no outsourcing is done for the said facilities.

Rules and Regulations

Booking of Tables:

1. In the Dining Hall of the Main Centre, a Member can book a table for maximum of 8 persons and in the Dining Hall, Annexe for 10 persons.

2. There is no provision for reserving of table in the Lounge.

3. Children below 8 year of age are not allowed in the Dining Hall of both the Main Centre and Annexe. Members accompanied by children who visit the Lounge may use the outer Verandah of the Lounge in the Main Centre. In the Annexe Lounge, children below 8 years of age accompanying members are allowed to avail of catering facilities only during lunch hours on Saturday, Sunday and other Public Holidays between 12.30pm to 2.30 pm.

4. Tables are not allowed to be joined in any catering outlets.

5. Use of Cell Phones is not permitted in the Dining Hall, Lounge. Cell Phone may kindly be kept in Vibration mode.

6. Members are requested to speak in a manner that does not disturb those seated at the neighboring table."

6.9. The second objection is with respect to hostel accommodation provided on rent. On this aspect the assessee has given the following note:

Note on Activities Carried on by India International Centre

India International Centre (IIC) is a Society registered under the Societies Act of 1860 and is strictly governed by its Memorandum of Association and Rules & Regulations. The

objects of the Society are wholly charitable in nature and it has been so held right from its inception year after year. There is absolutely no change in the objects or the activities of the Centre right from its inception.

Hostel services are predominant to sub-serve the main objective of the Centre i.e. organizing a very large number of programmes throughout the year which are open to the general public, free of cost, the price of which is inestimable. The activity of hostel provides basic amenities to all the invitees in the seminars, cultural and other functions and to research scholars free of cost and only guests of members are allowed to avail of facilities in case surplus accommodation is available at times. Your kind attention is invited to Art.VII of Memorandum of the Centre which states "to organize and maintain, as far as possible, on no-profit no-loss basis, limited residential accommodation, with cultural and educational amenities, for the members of the Society coming to participate in the activities of the Society and of other bodies with cognate objectives, as well as, non- members, specially invited to participate in the activities of the Society", We give herein below a resume of the activities of the Centre.

The Centre organizes very large number of programmes throughout the year, which included seminars, talks, discussions, music, dance, dance dramas, documentary films, art exhibitions, feature films etc. Of these roughly 50% can stated to be in the domain of academic and intellectual activities in terms of seminars, talks, discussions and the balance 50% in terms of cultural programmes, such as dance, music etc. All these programmes are open to the general public free of cost, the price of which is inestimable. The entire nerve centres of the institution revolve around these programmes.

A very significant number of members I their guests come to the Centre or stay in the Centre and attend the discourses, conferences, seminars, lectures etc. sponsored by the IIC on its own initiative or in collaboration with number of cultural, academic, intellectual institution in the country,

In addition to what the IIC and our collaborator organize, the Centre also makes its facilities available to members and their guests for conducting programmes of only academic, intellectual or cultural category of functions. 1500 programmes in a year are organized by members and their guests providing academic discussion contributing to the inteJ!ectual thought in the country and also organizing number of cultural programmes benefiting the citizens of Delhi. These programmes are organized in the Auditorium, Conference Halls, Rooms and Lecture Halls.

There are also numbers of other seminars, large and small, where numbers of people were provided hospitality by IIC for stay in the hostel. In addition there are large numbers of smaller programmes spread throughout the year. For these programmes a very large number of members and their guests stay for varying periods of time. It is difficult to build information system or reflect in the accounts as to which or how many members attend which programmes like seminars or cultural events. The programmes always need not necessarily be in the IIC, like nominees of Universities attending conference in a number of institutions in Delhi. As per the rules these members are entitled to stay.

That IIC is a centre for promotion of intellectual and cultural activities can be seen when we compare it with other institutions. This is because the Centre is geared to be only an institution of not only for promoting culture and academic thought. but also in inducting members ensures that the Members fulfill the objects of the Centre.

Annual Subscription is charged from the members.

6.10. In the backdrop of aforementioned factual background, we proceed to examine whether these activities take colour of trade or business activity or merely facilitating in achievement of dominant object of assessee, which is the test.

6.11. The assessee society was formed to promote, understanding and amity between different communities of the world by undertaking or promoting study of their past and present culture, by disseminating or exchanging knowledge thereof, and to provide facilities for undertaking, organizing and facilitating study courses, conferences, seminars, lectures and research on various matters in order to achieve these objects and to provide facilities and also for establishing and maintaining libraries and undertaking such publications the assessee had to earn income to incur expenditure on the activities. At this juncture we may observe that unless there is profit motive in carrying out an activity, it cannot take colour of trade or commerce.

6.12. The predominant activities of the centre was not to earn income but to provide facilities for disseminating or exchanging knowledge as per the object of the society. There is no gainsaying that without creating a proper platform the primary object of dissemination and exchanging of knowledge could not be achieved. Therefore, merely because incidental income was earned by assessee society for achieving its dominant object from providing hostel and catering activities, it cannot be said that the assessee was doing trade or business as contemplated under proviso to section 2(15). The centre

had to necessarily charge for the hostel, catering and use of such facilities from members/ participants since it had to recover cost and at the same time have enough funds to carry out the charitable activities. We are reminded at this juncture of an old saying – "Everything comes at a price". It is incomprehensible that an institution which is carrying out charitable objects will provide the essential facilities free of charge. It is not the allegation of ld. DIT(E) that the main object of asessee, in any manner, did not fulfill the criteria of charitable activity. On the contrary she herself has observed that the first category does fulfill the charitable purpose/ criteria and it is only the second category i.e. giving of hostel, catering etc. that the assessee's activities are caught within the mischief of second proviso to section 2(15). It is also not the case of ld. DIT(E) that there was no free access to the general public for programmes such as dance, music, seminars etc. In its reply the assessee had also pointed out that there were number of occasions when the centre did not charge institutions for holding their programmes such as lectures, discussions or seminars etc. Admittedly there is no funding from government or any other outside bodies to sustain activities of promotion of cultural and intellectual activities and, therefore, the assessee had to be totally self supporting and self financing and for this purpose, in

order to achieve its main objective, it had to charge and earn receipts from members so that the activities could be carried out. Admittedly, the assessee is disseminating knowledge to general public on subjects ranging from art, dance, urban development means etc. through conferences, lectures etc. It was further pointed out before AO that even while charging the members, there was no commercial motive in fixing the rates. The rates were nowhere near the commercial rates and were generally fixed to recover the cost and cost of activities to run the centre. These activities could not be treated in the nature of trade or commerce.

6.13. As regards hostel accommodation, there were number of rooms and guidelines for hiring of the accommodation and also there were restrictions. It was also pointed out that, as could be seen from the list of programmes, the assessee conducted very large number of programmes during the year which covered discussions, music, dances, exhibitions and also certain special programmes such as festivals during the course of the year. These programmes were published through the newspapers and website. Further e-mails were sent to members as well as non-members. Periodical articles also appeared in the various newspapers highlighting some of the special programmes conducted by the centre.

6.14. As regards ld. DIT(E)'s objection with regard to the membership of the centre, the assessee had pointed out before the AO itself that individual membership was open to all persons of India or foreign origin. Rule 4(A) of Rules & Regulations provides qualification for membership. There are several categories for members, as reproduced below:

> "4. Qualification for Membership
>
> A. Individual membership of the following classes, open to persons of Indian or foreign origin, shall be subject to the provisions set out below:
>
> (a) Honorary Members
>
> (i) Subject to their consent, the President of India, the Vice-President of India and the Prime Minister of India will be Honorary Members of the Centre.
>
> (ii) The Board may invite such other persons, as it may deem fit, to be Honorary Members.
>
> (b) Foundation Members
>
> Foundation Members are those persons who took an active interest or part in the establishment of the Centre and were enrolled as such.
>
> (c) Life Members
>
> Life Members are persons of high attainment in education, science, culture, art or other areas of public activity who are admitted as such.
>
> (d) Members
>
> Members are persons in the fields of academia, art, culture, science, technology, sports or those engaged in public or

professional functions and activities and are admitted as such in accordance with the decisions taken by the Board in this behalf.

(e) Associate Members

Associate Members are persons who are admitted as such in accordance with the decisions taken by the Board in this behalf.

(f) Overseas Associate Members

Overseas Associate Members are persons who are admitted as such in accordance with the decisions taken by the Board in this behalf.

(g) Temporary Members

Temporary Members are persons who are admitted as such in accordance with the decisions taken by the Board in this behalf.

(h) Short Term Associate Members

Short Term Associate Members are persons who are admitted as such in accordance with the decisions taken by the Board in this behalf Provided always that no person shall be eligible for admission under Rule 4(c) to (f) unless he/she has completed 25* years of age at the time of applying for enrolment.

Provided further that an applicant for individual membership, other than Temporary membership, should be duly proposed and seconded by two individual members (other than an Associate, Overseas Associate, Short Term Associate and Temporary Member), one of them certifying that the applicant is personally known to him or her and is, in his opinion, a person fit to be admitted as a member of the Centre.

6.15. From the rule, it is evident that members are persons in the field of academic, art, culture, science, technology, sports or those engaged in public or professional functions and activities and are admitted as such in accordance with the decisions taken by the Board in this behalf, in order to

achieve the main object of assessee of disseminating knowledge in various fields to public at large.

6.16. The assessee also pointed out that the members are presently from all over the world and about 30% of members are outside the Delhi NCR region.

6.17. From the detailed submissions of assessee, reproduced earlier, which have not been controverted by department, we fail to understand as to how these activities can be said to have an iota of commercial/ trade colour. The dominant object of the assessee is definitely for the well being of public at large by organizing various seminars for the welfare of people by disseminating knowledge in various fields in order to uplift the social consciousness of the society at large. (The composition of membership clearly exemplifies the real intention of assessee. We fail to understand as to how the hostel accommodation provided to various invitees could be considered as a commercial activity. Before any activity can be branded as being in the nature of trade or commerce, the AO has to demonstrate the intention of parties Backed with facts and figures of carrying out activities with profit motive. Mere surplus from any activity, which undisputedly has been undertaken to achieve the dominant object, does not imply that the

same is run with profit motive. The intention has to be gathered from circumstances which compelled the carrying on an activity. In the present case, ld. counsel has clearly demonstrated that surplus was generated from interest income and not from catering or hostel activities. Therefore, the objection of ld. DIT(E) does not survive on this count also.

8.18. The primary object of insertion of proviso to section 2(15) was to curb the practice of earning income by way of carrying on of trade or commerce and claiming the same as exempt in the garb of pursuing the alleged charitable object of general public utility. This proviso never meant to deny the exemption to those institutions, where the predominant object is undeniably a charitable object and in order to achieve the same incidental activities, essential in the given circumstances, are carried on.

6.19. In view of the above discussion we hold that the proviso to section 2(15) is not at all applicable in the present case and, therefore, ld. DIT(E) was not at all justified in invoking the proceedings u/s 263.

6.20. Further we find that the assessee's case is squarely covered by the decision of Hon'ble Delhi High court in the case of India Trade Promotion Organization Vs. Director General of incomew Tax (Exemptions) & Others (WP(C) no. 1872/2013 dated 22-1-2015) 2015-TIOL-227-HC-DEL-IT, held as under:

> "Having heard the matter, the High Court held that,
>
> if a meaning is given to the expression "charitable purpose" so as to suggest that in case /1/ en 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 Act, then there would be no institution whatsoever which would qualify for the exemption u/s 10(23C)(iv) of the 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 If introducing the proviso to Section 2(15) of the Act could certainly not have been to render the provisions of Section 10 (23 C)(iv) redundant;

++ it is apparent that merely because a fee or some other consideration is collected 01 received by an institution, it would not lose its character of having been established for c 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 0, general public utility to which the exception carved out in the first proviso to Section 2(15) 0, the Act would not apply. It is so said, 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 50, the provision in' question may never to be read down;

++ 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 e 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;

++ 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 o. Section 10(23C)(iv) of the Act. It is also clear that if the literal interpretation is given to the proviso to Section 2(15) of the 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 it the context of Section 10(23C)(iv) because, the context requires such an interpretation. The correct interpretation of the proviso to Section 2(15) of the 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, i: 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;
>
> ++ thus, while this Court upholds the Constitutional validity of the proviso' to Section 2(15) 0, the Act, it has to be read down in the manner indicated. As a consequence, the impugned order dated 23.01.2013 was set aside and a mandamus was issued to the respondent to gram approval to the petitioner u/s 10(23C)(iv) of the Act within six weeks from the date of this *judgment."*

6.21. In view of above discussion we hold that, in the facts and circumstances of the present case, the ld. DIT(E) was not justified in initiating revisionary proceedings u/s 263 of the Act. According order passed by the DIT(E) u/s 263 of the Act is quashed and the assessment order passed by the AO is restored.

7. In the result, assessee's appeal is allowed.

Order pronounced in open court on 11-05-2015.

Sd/-	Sd/-
(C.M. GARG)	(S.V. MEHROTRA)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Dated: _____-05-2015.

MP: Copy to :

1. Assessee
2. AO
3. CIT
4. CIT(A)
5. DR