

*IN THE INCOME TAX APPELLATE TRIBUNAL
KOLKATA BENCH "C" KOLKATA*
Before **Shri Mahavir Singh, Judicial Member** and
Shri Shamim Yahya, Accountant Member

**ITA No.1491/Kol/2012 &
ITA No.1284/Kol/2012**
Assessment Years:2008-09 &
2009-10

Indian Chamber of Commerce, 4, India Exchange Place, Kolkata 6 700 001 [Pan No.AAATI 1141 G]	बनाम / V/s.	Income Tax Officer Exemption-I, 1-B, Middleton Row, Kolkata 6 700 071
अपीलाथ /Appellant	..	प्रत्यथ /Respondent

आवेदक क ओर से/By Assessee	Shri S.K.Tulsiyan, Advocate,
राजव क ओर से/By Revenue	Shri Snehopal Dutta, JCIT, SR-DR
सुनवाई क तारख/Date of Hearing	30.09.2014
घोषणा क तारख/Date of Pronouncement	02.12.2014

आदेश /ORDER

PER Mahavir Singh, Judicial Member:-

Both appeals by assessee are arising out of the order of Commissioner of Income Tax (Appeals)-XIV in appeals No.348, 847/CIT(A)[XIV/Kol/10-11/11-12 dated 07-09-12 and 09-08-2012. Assessments were framed by ITO (Exemption-I), Kolkata u/s 143(3) of the Income Tax Act, 1961 (hereinafter referred to as the Act) vide his orders dated 23-12-2010 and 09-12-2011 for the assessment years 2008-09 and 2009-10 respectively.

First ITA No 1491/Kol/2012 of assessee's appeal for AY 2008-09

2. Only issue in this appeal of assessee is against the order of CIT(A) in confirming the action of AO in denial of exemption u/s 11 of the Act. For this assessee has raised following ground no.1 to 7:-

“1. That on the acts and the circumstances of the case of the appellant the Ld. CIT(A) erred in confirming the denial of exemption u/s 11 of the IT Act, 1961 failing to observe that on the same provisions of law and on the same facts such exemption was consistently allowed to the appellant since the AY 1984-85.

2. That on the acts and the circumstances of the case of the appellant the Ld. CIT(A) erred in confirming the allegation of the Ld. AO that the appellant's activities of conducting the Environment Management Centers, meetings, conferences & seminars and the Issuance of Certificate of Origin were all in the nature of business carried on systematically and continuously with a motive to earn profit from the same.

3. That on the acts and the circumstances of the case of the appellant and in law, the Ld. CIT(A) erred in holding that decision of the Hon'ble Delhi HC dated 19th September, 2011, in the case of **DIT (Exemptions) Vs Institute of Chartered Accountants of India** and that the case of **The Institute of Chartered Accountants of India in Write Petition 1927 of 2010** are not applicable to the case of the appellant in as much the facts of the said case are different from the case of the appellant.

4. That on the acts and the circumstances of the case of the appellant the Ld. CIT(A) erred in holding that the appellant's activities of conducting the Environment Management Centers, meetings, conferences & seminars and the Issuance of Certificate of Origin were not incidental to the main object of the appellant which was charitable in nature.

5. That on the acts and the circumstances of the case of the appellant the Ld. CIT(A) erred in holding that the Ld. AO was right in invoking section 11(4A) of the Act and in thus denying exemption u/s 11 of the Act.

6. That on the acts and the circumstances of the case of the appellant the Ld. CIT(A) erred in holding that the reliance placed by the Ld. AO on the decision of the Hon'ble Supreme Court in the appellant's own case viz. **Indian Chamber of Commerce Vs CIT (101 ITR 796 SC)** was justified as the appellant did not get the said judgment reversed by filing a review petition before the Hon'ble SC.

7. That on the acts and the circumstances of the case of the appellant the Ld. CIT(A) erred in holding that decision of the Hon'ble SC vide its Constitutional Bench, in a five-judges Bench, by a majority of 4 to 1, in **Addl. CIT v. Surat Art Silk Cloth Manufacturers Association (121 ITR 1 SC)** and the majority decision of the Larger Bench in the case of **Commissioner of Income-tax v. Federation of Indian Chambers of Commerce & Industry (130 ITR 186 S.C)** was not applicable to the case of the appellant in view of the substantial change of law, due to substitution of sub-section (4A) as it had come into effect w.e.f. 01-04-1992 and which was thus not considered by the S.C in the said decisions.”

3. Brief facts relating to the issue are that the assessee association –The Indian Chamber of Commerce (in short ICC) being assessee Company is an association of

various industrialists formed in the year 1925 for development of trade, industries and commerce. The membership of the chamber comprises several largest corporate groups in the country, with operations all over country and abroad. It is a non-profit company incorporated under section 25 of the Companies Act, 1956 without share capital and does not distribute any dividends to its members and also its entire receipt being expended for fulfillment of its objects. It was claimed that assessee association being set up for the purpose of promotion and protection of Indian business and industry is registered u/s. 12A of the Act as "Charitable" Association. The main objects for which the association came into existence are set out in clause 3 of the Memorandum of Association which reads as under;

3(a) To promote and protect the trade, commerce and industries and in particular the trade, commerce and industries in or with which Indians are engaged or concerned."

It was further claimed that the objects of advancement of trade and commerce, being objects for "advancement of any other general public utility", the assessee falling within the ambit of definition "charitable purpose" as laid out u/s.2(15) of the Act. Accordingly, it claimed exemption from income arising out of its activities under the provisions of section 11 of the Act.

4. The assessee filed its return of income for the year under consideration i.e. A.Y. 2008-09 being a charitable institution eligible for exemption u/s. 11 of the Act on 13.10.2008 declaring NIL total income. During assessment proceedings AO noted that certain activities of the assessee were clearly in the nature of business activities and thus issued a show-cause notice, as to why the following receipts credited in the income and expenditure account were not to be treated as in the nature of business receipts?

Environment Management Centre (including sponsorship of Rs.33,37,328/-)	Rs. 44,63,456/-
Meeting, conference, & seminars (including sponsorship Rs.5,44,59,193/-)	Rs. 5,95,65,340
Fees for certificate of origin	Rs. 28,96,925/-

According to AO, assessee had violated the provisions of section 11(4A) of the Act, since the activities were in the nature of trading and business and separate books of accounts were purportedly not maintained. The assessee explained that the above activities were not in the nature of trade or business and same were all conducted for the empowerment, betterment and for creating awareness amongst industrialists in order to bring about development of trade and industries in India. But AO objected to exemption claimed by assessee u/s. 11 of the Act and assessed total income by disallowing claim vide assessment order u/s. 143(3) of the Act dated 23.12.2010. The AO stated that the activities incidental to the main object, being reflected above, were all in the nature of business and formed predominant activities, since there was no separation of such business activities inasmuch as no separate books of account were maintained in respect of such business in terms of Section 11(4A) of the Act. The AO held that assessee had thus violated provisions of section 11(4A) of the Act. The AO relied on the judgment of the Honøble Calcutta High Court in the case of *CIT v. Indian Chamber of Commerce* reported in (1971) 81 ITR 147 (Cal), and held that the assessee was earning income from business and was not engaged in activities for charitable purposes u/s. 11 r.w.s. 2(15) of the Act. The AO finally concluded as under:-

“business activities are the predominant activities of the assessee. But there is no separation of business activities. Hence, sec. 11 and 12 of the I.T. Act, 1961 ceased to operate in assessee’s own case. There is no altruism in thought and action, which are against mens legis. On the basis of materials gathered above, the income of the assessee to be calculated in normal commercial manner.”

Accordingly, AO assessed excess of gross receipts over expenses as total income. Aggrieved, assessee preferred appeal before CIT(A).

5. Ld. Counsel stated before CIT(A) that AO placed complete reliance on judgment of Honøble Calcutta High Court in the case of *Indian Chamber of Commerce* (supra), which was affirmed by Honøble Apex Court in the case of *Indian Chamber of Commerce v. CIT* (1975) 101 ITR 796 (SC). He stated that the said decision of the Divisional Bench of the Supreme Court in the case of assessee was reversed by Constitutional Bench of the Supreme Court by majority decision in the

case of *Addl.CIT v. Surat Art Silk Cloth Manufacturers Association* (1980) 121 ITR 1 (SC). He further stated that law laid down by Apex Court in the case of *Surat Art Silk Cloth Manufacturers Association* (supra), the Larger Bench of the Supreme Court in the case of *Commissioner of Income-tax v. Federation of Indian Chambers of Commerce & Industry* (1981)130 ITR 186 took the view that the activities of Chamber of Commerce, the assessee, was charitable in nature falling u/s 2(15) of the Act. He narrated facts that the aforesaid judgment of Honøble Supreme Court in the case of assessee pertained to A.Y 1964-65, wherein the definition of charitable purpose was different from the one applicable for AY 2008-09, Vide Finance Act, 1983 w.e.f. 1.4.1984 the words “**not involving the carrying on of any activity for profit**” were omitted. He argued that the decision in the case of assessee by Honøble Calcutta High Court and Honøble Supreme Court were rendered prior to the amendment brought in by Finance Act, 1984 when “*not carrying on any activity for profit*” was considered as qualifying expression “*the advancement of any other object of general public utility*”. He stated that pursuant to above decisions whereby decision of the Supreme Court in the case of the assessee was clearly reversed, the revenue itself had granted full exemption u/s. 11 of the Act through the years 1984-85 uptill 2007-08. On merits also, he stated before CIT(A) that activities of conducting Environment Management Centre, Meetings, Conferences & Seminar and issuance of Certificate of Origin, being activities alleged by AO to be ÷services in relation to trade, commerce or businessö were all connected, incidental and ancillary to main purpose of charity and were conducted solely for the empowerment, betterment and for creating awareness amongst the industrialists in order to bring about development of trade and industries in India. It was only for the purpose of securing its primary aims of proper development of business in India that assessee was taking this ancillary steps. The said activities were not carried out independent of the main purpose of the association of the institution being the development and protection of trade. There was no independent profit motive in any of the said activities. Before CIT(A), assessee placed reliance on the decision of Honøble Delhi High Court in the case of *DIT (Exemptions) v. Institute of chartered Accountants of India* (2011) 14 taxmann.com 5 dated 19.09.2011. He also referred Writ Petition, No.

1927 of 2010 filed in the case of The Institute of Chartered Accountants of India & Anr. V The Director General of Income Tax (Exemptions), Delhi & Ors, wherein specific issue of denying exemption in view of proviso to Section 2(15) as introduced with effect from 1st April, 2009 was discussed, judged upon and writ was allowed in favour of assessee. It was stated before CIT(A) that the purpose of Chamber of Commerce was undoubtedly a charitable purpose within the meaning of section 2(15) of the Act, as it was not engaged in any activity in the nature of business or trade and there was no motive to earn profit. The income arising to assessee is only incidental and ancillary to the dominant object for the welfare and common good of country's trade, commerce and industry. Section 2(15) of the Act nowhere requires that activities must be carried out in such a manner that it does not result in any profit. The object of the assessee is therefore covered under the definition of **charitable purpose** both under the old and new section 2(15) as amended by Finance Act, 1983 and applicable for A.Y. 2008-089. Thus, other conditions u/s. 11 being satisfied, the income of the assessee for A.Y. 2008-09 is exempt from tax under sec. 11 of the Act.

6. But CIT(A) held that AO was right in invoking provisions of section 11(4A) and in denying exemptions u/s 11 of the Act. CIT(A) held that since assessee is engaged in the systematic and continuous activities with a motive to earn profit and the activities involved were on commercial lines, thus the A.O was right in holding that assessee was engaged in carrying out activities, which were in the nature of business. CIT(A) dismissed the appeal of the assessee, even though reliance placed on the decisions of the Honøble Delhi High Court in the case of *Institute of Chartered Accountants of India* (supra) and in the case of *The Institute of Chartered Accountants of India & Anr.* (supra) on the ground that the facts of these cases were different from the facts of assessee. Further, CIT(A) noted that the assessee has not been able to show that the activities of environment management centre, meetings etc. and the collecting of fees for Certificate of origin are incidental to the main objects. In this view, CIT(A) upheld the view of AO that the activities, being business in nature, formed main predominant activities of the assessee. Thus based on

the above, observing that since there was no separation of such business activities inasmuch as no separate books of accounts were maintained in respect of such business in terms of section 11(4A) of the Act, the CIT(A) held that assessee had thus violated the provisions of the said section 11(4A) of the Act. CIT(A) also relied upon the remand report of the AO, which was quoted at para 5.3 of his order, wherein the A.O has made reference to the decision of the Honøble Supreme Court in the case of FICCI(supra) wherein, with reference to ancillary business activities, the Honøble Apex Court had laid out that *“for if the primary or dominant purpose of a trust or institution is charitable, any other object which is merely ancillary, would not prevent But, this does not preclude from maintenance of separate Books of Accounts, Audit u/s. 44AB, and filing of Form 3CD/3CB with the return, which the assessee failed to comply.”* With reference to fact that in earlier years exemption u/s. 11 of the Act was not denied to the assessee, CIT(A) pointed out that exemption was denied from 1964-65 to 1983-84 but CIT(A) very conveniently missed out on the status of the exemption u/s 11 of the Act, which was granted from A.Y 1984-85 to A.Y. 2007-08. CIT(A) also pointed out the decision of Apex Court in its own case in the case of *Indian Chamber of Commerce* (Supra) and held that since the said decision was not reversed in assessee’s own case, AO was justified in following the said judgment. Lastly, with reference to the decisions in the cases of *Surat Art Silk Cloth Manufacturers Association* (supra) and the case of *Commissioner of Income-tax v. Federation of Indian Chambers of Commerce & Industry* (supra), CIT(A) has pointed out that in the said cases the Honøble Apex Court did not have the benefit of the provision of the Section (4A) as it had come into effect only from 01-04-1992. Aggrieved, assessee preferred second appeal before tribunal.

7. Before us Ld. Counsel Sh. S.K.Tulsiyan on behalf of assessee and Ld. SR DR Sh Snehopal Dutta on behalf of revenue argued. Ld. Counsel for the assessee first of all started his arguments from inception of this association that assessee association since 1925 till A.Y. 1963-64 was incurring losses and loss returns were filed. In the year 1963 relating to the A.Y. 1964-65, assessee return surplus of Rs.1,58,690/-. And gross receipts comprised of arbitration fees of Rs.4,792/, fees from certificate of

origin Rs.4,552/, miscellaneous receipts Rs.208 and share of income from M/s Calcutta Licensed Measures. Assessee after deducting expenses of Rs.47,641/- net surplus of Rs.1,58,690 was arrived at. The assessee claimed that it was entitled to exemption u/s 11 of the Act. It was claimed that assessee was a company for a "Charitable purpose" within the meaning of section 2(15) of the Act and thus it was entitled to the exemption u/s. 11 of the Act. It was contended that the AO taking into consideration the definition of "Charitable Purpose" as provided in Sec. 2(15) of the Act, the words "not involving the carrying on of any activity of profit" held that the activities of the assessee constitutes activities for profit and hence the surplus received from these sources were taxable. On appeal before Appellate Assistant Commissioner (AAC), the assessee's appeal was dismissed. On second appeal, the Tribunal relying on the decision of Hon'ble Supreme Court in the case of *CIT v. Andhra Chamber of Commerce* (1965) 55 ITR 722 (SC) allowed the claim of the assessee. Department preferred appeal before Hon'ble jurisdictional High Court, wherein this issue was decided in favour of revenue. Further, Hon'ble Supreme Court also upheld the decision of Hon'ble Calcutta High Court in the case of assessee i.e. *Indian Chamber of Commerce v. CIT* (supra). Ld. counsel for the assessee stated that Hon'ble Supreme Court relied on its own decision in the case of *Sole Trustee, Loka Shikshana Trust. V. CIT* (1975) 101 ITR 234 (SC). But Ld. counsel for the assessee argued that the entire position changed with the constitution of Larger Bench by Hon'ble Supreme Court to consider the decision in the case of *Sole Trustee, Loka Shikshana Trust.* (supra). Hon'ble Supreme Court constituted Larger Bench of five Judges in the case of *Surat Art Silk Cloth Manufacturer Association* (supra). And in this case, Hon'ble Supreme Court by its majority view held that the condition that the purpose should not involve the carrying on for any activity for profit would be satisfied if profit making was not the real object. The theory of dominant or primary object of the trust had, therefore, been treated to be the determining factor, even in regard to the head of "charity" vis a vis the advancement of any other object of general public utility, so as to make the carrying on of business activity merely ancillary or incidental to the main object. Ld. counsel for the assessee stated that the Five judges Bench of Hon'ble Supreme Court has considered the decision of Hon'ble

Calcutta High Court in the case of *Indian Chamber of Commerce* (supra), which was confirmed by Honøble Supreme Court. And also considered the decision of Honøble Supreme Court in the case *CIT v. Federation of Indian Chambers of Commerce and Industries* (supra) and reversed these cases by a majority decision of 4:1 in the case of *Surat Art Silk Cloth Manufacturer Association* (supra). Ld. counsel for the assessee also relied on the decision of Honøble Delhi High Court in the case of *Institute of Chartered Accountants of India* (supra). According to Ld. counsel, Honøble Delhi High Court after taking into consideration large number of cases dealing with the questions as to what constitutes 'business', held that the DIT(Exemption) was not justifying in holding that ICAI was carrying on business by holding coaching classes and programmes for which fees were charges. It was held that the same was not like doing business and therefore, the appeal of Revenue was dismissed. In view of the above, Ld. counsel for the assessee stated that the issue now stands covered in favour of assessee by the decision of Honøble Supreme Court in the case of *Surat Art Silk Cloth Manufacturer Association* (supra) and also by the decision of Honøble Delhi High Court in the case of *Institute of Chartered Accountants of India* (supra). He also argued on other aspects also, which we will deal with.

8. On the other hand, Ld. SR-DR heavily relied on the orders of the lower authorities and also relied on the decision of Honøble Supreme Court in assessee's own case, i.e. *Indian Chambers of Commerce* (supra).

9. We have heard rival submissions and gone through facts and circumstances of the case. Facts narrated in para 2&3 are undisputed. Hence, we need not to repeat the same. We have noted the provision of section 2(15) of the Act, relevant to A.Y 1964-65, laying down the definition of 'Charitable purpose' read as follows:

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

(15) "Charitable purpose" includes relief of the poor, education, medical relief, and the advancement of any other object of general public utility not involving the carrying on of any activity for profit.;"

Provision of section 11 of the Act exempting income from property held for charitable or religious purposes from tax subject to fulfillment of conditions prescribed therein, which read as under:

“11. Income from property held for charitable or religious purposes.-

(1) Subject to the provisions of sections 60 to 63, the following income shall not be included in the total income of the previous year of the persons in receipt of the income--

- (a) income derived from property held under trust wholly for charitable or religious purposes, to the extent to which such income is applied to such purposes in India; and, where any such income is accumulated or set apart for application to such purposes in India, to the extent to which the income so accumulated or set apart is not in excess of fifteen per cent of the income from such property;*
- (b) income derived from property held under trust in part only for such purposes, the trust having been created before the commencement of this Act, to the extent to which such income is applied to such purposes in India; and where any such income is finally set apart for application to such purposes in India, to the extent to which the income so set apart is not in excess of fifteen per cent of the income from such property;*

The assessee explained before AO that during assessment proceedings for AY 1964-65 wherein Hon'ble Supreme Court decided the issue against assessee but in AY 2008-09 the definition of charitable purpose is different, that it stood covered by fourth limb of definition u/s 2(15) of the Act *“advancement of any other object of general public utility not involving the carrying on of any activity for profit”* as its objects, as laid down in the Memorandum and Articles of Association, were *“to promote and protect the trade, commerce, and industries of India, and, in particular, the trade, commerce and industries in or with which Indians are engaged or concerned ... and (e) to do all other things as may be conducive to the development of trade, commerce and industries or incidental to the attainment of the above objects or any of them.”* Thus, it being the case, it was an institution with *“charitable purpose”*, it was eligible for exemption of its income under the provisions of section 11 of the Act but AO held that in the definition of *“charitable purpose”* in section 2(15) of the Act, the words *“not involving the carrying on of any activity for profit”* had been introduced and as, the aforesaid activities of the assessee was for profit, the surplus received from these sources were taxable. On appeal before AAC, the order

of the AO was confirmed. On second appeal, Tribunal allowed relief by relying on the decision of Honøble Supreme Court in the case of *Andhra Chamber of Commerce* (supra), wherein it was held that advancement or promotion of trade, commerce and industry was an object of ògeneral public utilityö and also it was held that if the primary purpose of any association/body was the advancement of objects of general public utility, it would remain charitable even if an incidental or ancillary activity giving rise to income was carried on.

10. Revenue preferred appeal before Honøble Calcutta High Court wherein (decision in favour of revenue) held in its decision, *Indian Chamber of Commerce* (supra) as under: (from head note)

“The proper interpretation of the definition of “charitable purpose” in section 2(15) of the Income-tax Act, 1961, is to consider the expression “not involving the carrying on of any activity for profits” as qualifying the expression “the advancement of any other object of general public utility” and not the other classes of charitable purpose mentioned in that section like relief of the poor, education and medical relief.

In other words, the advancement of any other object of general public utility would be a charitable purpose provided that its advancement does not involve the carrying on of any activity for profit.

Parliament has thought it necessary to impose certain restrictions on the area of the object of general public utility and the area selected is that its advancement must not involve the carrying on of any activity for profit.

Therefore, though the normal objects of a chamber of commerce may be held to be objects of general public utility, any profit that may be derived from its activities in the form of (i) arbitration fees, (ii) fees for issuing certificates of origin, and (iii) fees for weighment and measurement for the benefit of traders in general are the result of activities carried on for profit within the meaning of section 2(15) of the Act and the income from such activities are not exempt from tax under section 11 of the Act.”

With reference to the decision of Honøble Supreme Court in the case of *Andhra Chamber of Commerce* (supra), Honøble Calcutta High Court as under:-

“This view of the interpretation of the expression the “advancement of any other object of general public utility not involving the carrying on of any activity for profit” under section 2(15) of the Income-tax Act, 1961, would be consistent with and not contrary to section 11(1)(a) and section 11(4) and also section 28(iii) of the Income-tax Act, 1961.

Sections or definitions in a statute should not be read in isolation but in the whole context of the statute.

The expression “any other object of general public utility” under section 2(15) does not expressly refer to trade or business, for a normal connotation of “general public utility” would not directly include trade or business.

But, after the decision of the Supreme Court in the Andhra Chamber of Commerce case (1), it was quite clear that the wide expression “any other object of general public utility” under section 2(15) would include objects for promotion of trade or commerce without any profit motive as coming well within charitable purpose.

The present amendment introduced by the Income-tax Act, 1961, by adding the words “not involving the carrying on of any activity for profit” was to put this wholesome limitation upon any and every object of general public utility of various description becoming a charitable purpose and thereby qualifying for exemption.

It is to be noticed that the word used in this new laws is “activity” and not trade or business. Normally, a trader or business is always with profit or with profit motive, though, no doubt, under some recent statutes as in the Sales Tax Act, the new concept of business without profit is being introduced.”

11. Honøble Supreme Court affirming the decision of the Calcutta High Court held in its decision *Indian Chamber of Commerce* (supra) that: (from head note)

“that the activities of the chamber being activities carried on for profit, in the absence of any restriction in its memorandum and articles of association against the making of profit from those activities, the income of the chamber from those activities was liable to income-tax.

Section 2(15) must be interpreted according to the language used therein and against the background of Indian life.

By the definition in section 2(15) the benefit of exclusion from total income is taken away when in accomplishing a charitable purpose the institution engages itself in activities for profit.

If there is a restrictive provision in the bye-laws of the charitable organization which requires that the charges levied for services of public utility rendered are to be on a “no profit” basis, it clearly earns the benefit of section 2(15). For instance, if an institution rendering service to the public incorporates a condition into its constitution that it shall not charge more than what is actually needed for the rendering of the services may be not an exact equivalent such mathematical precision being impossible in the case of variables-and a little surplus is left over at the end of the year the broad inhibition against making profit is good guarantee that the carrying on of the activity is not for profit.

An activity which yields a profit or gain in the ordinary course must be presumed to have been done for profit or gain.

To bring himself within section 2(15) the onus is on the assessee to show that his objects are of general public utility and that in the advancement of these objects there is no involvement in activities for profit.”

The above view of Supreme Court in the case of assessee was upheld by the Larger Bench in the case of *Sole Trustee, Loka Shikshana Trust v. Commissioner of Income-tax* [1975] 101 ITR 234, wherein above decision of Supreme Court in the case of assessee, it was held by the Supreme Court that: (from head note)

“(i) that the object of the trust was not “education” within the meaning of section 2(15) but an object of general public utility;

In re, Trustees of “The Tribune” [1939] 7 ITR 415 (PC) applied.

(ii) that, however, the publication of newspapers and journals involved the carrying on of an activity for profit and the income of the trust was, therefore, not exempt from tax.

It is not permissible to read the word “profit” in the expressions “not involving the carrying on of an activity for profit” as “private profit”: the words “general public utility” themselves exclude objects of private gain.

Per Khanna and Gupta JJ.-(i) The word “education” in section 2(15) of the Income-tax Act, 1961, connotes the process of training and developing the knowledge, skill, mind and character of students by normal schooling, and has not been used in the wide and extensive sense according to which every acquisition of further knowledge constitutes education.

(ii) Ordinarily, profit motive is a normal incident of business activity and if the activity of a trust consists of the carrying on of a business and there are no restrictions on its making profit, the court would be well justified in assuming, in the absence of some indicating to the contrary, that the object of the trust involves the carrying on of an activity for profit.

(iii) It would be contrary to all rules of construction to ignore the import of the newly added words “not involving the carrying on of an activity for profit” and construe the definition in section 2(15) of the Act of 1961, as if the newly added words merely qualify and affirm the position as it obtained under the definition given in the 1922 Act.

Per beg J.-(i) It is permissible to refer to the speech of the Finance Minister in moving the proposed amended definition as an aid to correct interpretation.

(ii) As a rule, if the terms of the trust permit its operation “for profit”, they become, prima facie, evidence of a purpose falling outside charity. They would

indicate the object of profit-making unless and until it is shown that the terms of the trust compel the trustee to utilize the profits of business also for charity. This means that the test introduced by the amendment is: Does the purpose of a trust restrict spending the income of a profitable activity exclusively or primarily upon what is “charity” in law? If the profits must necessarily feed a charitable purpose, under the terms of the trust, the mere fact that the activities of the trust yield profit will not alter the charitable character of the trust.

12. Thus based on the above decision of the Divisional Bench of the Supreme Court in assessee's case and also based on the decision of Larger Bench of Supreme Court in the case of *Loka Shikshana Trust*, (supra), both relating to A.Y. 1964-65, no exemption u/s. 11 of the Act was granted to the assessee till AY 1984-85 on the ground that incidental activities conducted in the advancement of objects of assessee were activities for profit. The Supreme Court, in both the cases in *Sole Trustee, Loka Shikshana Trust* (supra) and *Indian Chamber of Commerce* (supra) held that the words “not involving the carrying on of any activity for profit” governed the words “advancement” and observed that if the advancement or attainment of the object involved an activity for profit, tax exemption would not be available.

13. Before us, assessee contented that nowhere it had been stated that the assessee was engaged in “business” activities but Revenue upto Supreme Court contented that the activities being the incidental activities carried out for the attainment of the main object of the Association involved the generation of “profit” and thus, based on the specific wording of the section 2(15) of the Act, the exemption u/s 11 of the Act had to be denied to assessee.

14. As argued by assessee, Hon'ble Supreme Court vide its Constitutional Bench, Five-judges Bench, by a majority decision of 4 is to 1, in the case of *Surat Art Silk Cloth* (supra) reversed the above two decisions in the cases of *Loka Shikshana Trust* (supra) and the *Indian Chamber of Commerce* (supra). The majority view in the case of *Surat Art Silk* was that the condition that the purpose should not involve the carrying on of any activity for profit would be satisfied in profit-making was not the real object. The theory of dominant or primary object of the trust had, therefore, been treated to be the determining factor, even in regard to fourth head of charity i.e.

advancement of any other object of general public utility, so as to make the carrying on of the business activity merely ancillary or incidental to the main object. Facts in the case before Supreme Court were that assessee, a company incorporated under the Companies Act, 1913, after certain vital amendments in its memorandum of association, was registered under s. 25 of the Companies Act, 1956. Its objects as amended were:

“(a) to promote commerce and trade in art silks yarn, raw silk, cotton yarn, art silk cloth, silk cloth and cotton cloth;

(b) to carry on all and any of the business of art silks yarn, raw silk, cotton yarn, as well as art silk cloth, silk cloth and cotton cloth, belonging to and on behalf of its members;

(c) to obtain import licences for import of art silk yarn, raw silk, cotton yarn, and other raw materials as well as accessories required by its members for the manufacture of art silk, silk and cotton fabrics;

(d) to obtain export licences and export cloth manufactured by the members;

(e) to buy and sell and deal in all kinds of cloth and other goods and fabrics belonging to and on behalf of the members;

(n) to do all other lawful things as are incidental or conducive to the attainment of the above objects.”

The income and property of the assessee were liable to be applied solely and exclusively for the promotion of objects set out in the memorandum and no part of such income or property could be distributed amongst the members in any form or utilized for their benefit either during its operational existence or on its winding up or dissolution. The assessee carried on various activities for promotion of commerce and trade in art silk yarn, silk yarn, art silks cloth and silk cloth. The income of the assessee was derived primarily from two sources:

(i) An annual subscription collected from its members at the rate of Rs. 3 per power loom, in regard to which it was conceded by the department that it was exempt from tax; and

(ii) Commission of a certain percentage of the value of licences for import of foreign yarn and quotas for purchase of indigenous yarn obtained by the assessee for its members. This commission was credited separately in a building account and out of this amount the assessee constructed a building.

The assessee claimed for assessment year 1962-63 that it was an institution for a charitable purpose and its income was exempt from tax under s. 11, sub-s. (1) of the Act. But claim of assessee was rejected by ITO on the ground that objects of assessee were not charitable within the meaning of section 2 (15) of the Act. Matter went upto Hon'ble Supreme Court, on a reference, since there was a conflict of decisions between the Calcutta and Mysore High Court on the one hand and the Kerala and Andhra Pradesh High Court on the other, in regard to the true interpretation of the words *not involving the carrying on of any activity for profit*. The Tribunal referred the question whether, on the facts and in the circumstances of the case, the assessee is entitled to exemption under s. 11(1)(a) of the I.T. Act, 1961 directly to Hon'ble Supreme Court.

15. Hon'ble Supreme Court by a majority view of 4 is to 1,; by Bhagwati, Untwalia, Tulzapurkar and Pathak JJ. (Sen J. dissenting)) was as follows: (from head note)

(i) that the dominant or primary purpose of the assessee was to promote commerce and trade in art silk yarn, raw silk, cotton yarn, art silk cloth, silk cloth and cotton cloth as set out in clause (a) and the objects specified in clauses (b) to (e) were merely powers incidental to the carrying out of that dominant and primary purpose;

(ii) that the dominant or primary purpose of the promotion of commerce and trade in art silk, etc., was an object of public utility not involving the carrying on of any activity for profit within the meaning of s. 2(15); and that the assessee was entitled to exemption under s. 11(1)(a):

Per Bhagwati, Untwalia and Tulzapurkar JJ:

i .

(i) Where the main or primary objects are distributive, each and every one of the objects must be charitable in order that the trust or institution may be upheld as a valid charity. But if the primary or dominant purpose of a trust or institution is charitable, another object which by itself may not be charitable but which is merely ancillary or incidental to the primary or dominant purpose would not prevent the trust or institution from being a valid charity.

(iii) Though the objects specified in clauses (b) to (e) would benefit the members of the assessee, the benefit would be merely incidental in carrying out the main or primary purpose and if the primary purpose of the assessee were charitable, the subsidiary objects set out on those clauses would not militate

against its charitable character and the purpose of the assessee would not be any the less charitable.

(iv) The true meaning of the last ten words in s.2(15), viz., “not involving the carrying on of any activity for profit”, is that when the purpose of a trust or institution is the advancement of an object of general public utility, it is that object of general public utility and not its accomplishment or carrying out which must not involve the carrying on of any activity for profit. So long as the purpose does not involve the carrying on of any activity for profit, the requirement of the definition would be met and it is immaterial how the monies for achieving or implementing such purpose are found, whether by carrying on an activity for profit or not.

(v) If the language of a statutory provision is ambiguous and capable of two constructions, that construction must be adopted which will give meaning and effect to the other provisions of the enactment rather than that which will give more.

... ..

(vii) The test which has 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 carry out the charitable purpose and not to earn profit, it would not lose its character of a charitable purpose merely because some profit arises from the activity. The exclusionary clause does not require that the activity must be carried on in such a manner that it does not result in any profit. “If the profits must necessarily feed a charitable purpose under the terms of the trust, the mere fact that the activities of the trust yield profit will not alter the charitable character of the trust. The test now is, more clearly than in the past, the genuineness of the purpose tested by the obligation created to spend the money exclusively or essentially on charity.” The restrictive condition that the purpose should not involve the carrying on of any activity for profit would be satisfied if profit-making is not the real object.

*(viii) It is not at all necessary that there must be a provision in the constitution of the trust or institution that the activity shall be carried on **no-profit no-loss** basis or that profit shall be prescribed. Even if there is no such express provision, the nature of the charitable purpose, the manner in which the activity for advancing the charitable purpose is being arrived on and the surrounding circumstances may clearly indicate that the activity is not propelled by a dominant profit motive.*

(i) The restrictive clause in s. 2(15) must be read with “the advancement of any other object of general public utility” and not “object of general public utility”.

(ii) The requirement of s. 2(15) is satisfied where there is either a total absence of the purpose of profit-making or it is so insignificant compared to the purpose of advancement of the object of general public utility that the

dominating role of the latter renders the former unworthy of account. If the profit-making purpose holds a dominating role or even constitutes an equal component with the purpose of advancement of the general public utility, then clearly the definition in s. 2(15) is not satisfied.

(iii) If the purpose is charitable in reality, the mode adopted must be one which is directed to carrying out the charitable purpose. It would include a business engaged in for carrying out the charitable purpose of the trust or institution. The carrying on of such a business does not detract from the purpose which permeates it, the end result of the business activity being the effectuation of the charitable purpose.

(iv) The real question whether a trust is created or an institution is established for a charitable purpose falls to be determined by reference to the real purpose of the trust or the institution and not by the circumstance that the income derived can be measured by standards usually applicable to a commercial activity. The quantum of income is not test in itself. It may be the result of an activity permissible under a truly charitable purpose for a profitable activity in working out the charitable purpose is not excluded.

Per Sen J. (dissenting):

(i) The words "not involving the carrying on of an activity for profit" govern the words "object of general public utility" and if the advancement or attainment of the object involves an activity for profit, tax exemption would not be available.

(ii) Even assuming that the dominant object is the promotion or "advancement of any other object is general public utility", if it involves any activity for profit, i.e., any business or commercial activity, then it ceases to be a "charitable purpose" within the meaning of s. 2(15). In that event, the profits derived from such business are not liable to exemption under s. 11(1) read with s. 2(15). The concept of "profits to feed the charity" is of no avail.

Ibrahim Riza v. CIT [1930] LR 57 IA 260; AIR 1930 PC 226, East India Industries (Madras) P. Ltd. v. CIT [1967] 65 ITR 611 (SC), CIT v. Andhra Chamber of Commerce [1965] 55 ITR 722 (SC) and Dharmadeepti v. CIT [1978] 114 ITR 454 (SC) followed.

CIT v. Dharmodayam Co. [1977] 109 ITR 527 (SC), CIT v. Cochin Chamber of Commerce and Industry [1973] 87 ITR 83 (Ker) and Andhra Pradesh State Road Transport Corporation v. CIT [1975] 100 ITR 392 (AAP) approved.

Indian Chamber of Commerce v. CIT [1975] 101 ITR 796 (SC) overruled.

Observations of Khanna and Gupta JJ. In Sole Trustee, Loka Shikshana Trust v. CIT [1975] 101 ITR 234 (SC) disapproved.

Observations of Beg J. in Sole Trustee, Loka Shikshana Trust v. CIT [1975] 101 IT 234 (SC) approved.

Per Bhagwati, Untwalia and Tulzapuarkar JJ:

(i) *It is only the particular question of law on which there is a conflict of decisions in the High Courts that can referred by the Tribunal directly to the Supreme Court under s. 257 and the Supreme Court cannot travel beyond the particular question of law which has been referred to it on account of the conflict.*

The true meaning of the last ten words in s 2(15), viz., “not involving the carrying on of any activity for profit”, is that when the purpose of a trust or institution is the advancement of an object of general public utility, it is that object of general public utility and not its accomplishment or carrying out which must not involve the carrying on of any activity for profit. So long as the purpose does not involve the carrying on of any activity for profit, the requirement of the definition would be met and it is immaterial how the monies for achieving or implementing such purpose are found, whether by carrying on an activity for profit or not.

16. With particular reference to the decision in the case of assessee it was held as under:-

[The judgment of BHAGWATI, UNTWALIA and TULZAPURKAR JJ. was delivered by BHAGWATI J. PATHAKJ. And SEN J. delivered separate judgments] (page 10 of the order)

BHAGWATI J:

“We must, however, refer to the decision of this court in Indian Chamber of Commerce v. CIT [1975] 101 ITR 796 because that is the decision on which the strongest reliance was placed on behalf of the revenue.

The question which arose for decision in that case was whether income derived by the Indian chamber of Commerce from arbitration fees levied by the Chamber, fees collected for issuing certificates of origin and share of profit for issue of certificates of weighment and measurement was exempt from tax under s. 11, read with s. 2, cl.(15), of the Act.

The argument of the Indian Chamber of Commerce (hereinafter referred as “the assessee”) was that its objects were primarily promotional and protective of Indian trade interests and other allied service operations and they fell within the broad sweep of the expression “advancement of any other object of general public utility “and its purpose was, therefore, charitable within the meaning of s. 2, cl.(15), and its income was exempt from tax under s. 11.

The revenue, on the other hand, contended that though the objects of the assessee were covered by the expression "advancement of any other object of general public utility", the activities of the assessee which yielded income were carried on for profit and the advancement or accomplishment of these objects of the assessee, therefore, involved carrying on of activities for profit and hence the purpose could not be said to be charitable and the income from these activities could not be held to be exempt from tax.

These rival contentions raised the same question of interpretation of s. 2, cl. (15), which has arisen in the present case.

Krishna Iyer J., speaking on behalf of the court, lamented the obscurity and complexity of the language employed in s. 2, cl. (15)-a sentiment with which we completely agree and after referring to the history of the provision, the learned judge proceeded to explain what according to him was the true interpretation of the last concluding words in s. 2, cl. (15). The learned judge said : (pp. 803, 804) :

"So viewed, an institution which carries out charitable purposes out of income 'derived from property held under trust wholly for charitable purpose' may still forfeit the claim to exemption in respect of such takings or incomes as may come to it from pursuing any activity for profit. Notwithstanding the possibility of obscurity and of dual meanings when the emphasis is shifted from 'advancement' to 'object' used in section 2(15), we are clear in our minds that by the new definition the benefit of exclusion from total in is taken away where in accomplishing a charitable purpose the institution engages itself in activities for profit. The Calcutta decisions are right in linking activities for profit with advancement of the object. If you want immunity from taxation, your means of fulfilling charitable purposes must be unsullied by profit-making ventures. The advancement of the object of general public utility must not involve the carrying on of any activity for profit. If it does, you forfeit. The Kerala decisions fall into the fallacy of emphasizing the linkage between the objects of public utility and the activity carried on. According to that view, whatever the activity, if it is intertwined with, wrapped in or entangled with the object of charitable purpose even if profit results therefrom, the immunity from taxation is still available. This will result in absurd conclusions. Let us take this very case of a chamber of commerce which strives to promote the general interests of the trading community. If it runs certain special types of services for the benefit of manufacturers and charges remuneration from them, it is undoubtedly an activity which, if carried on by private agencies, would be taxable. Why should the Chamber be granted exemption for making income by methods which in the hands of other people would have been exigible to tax? This would end up in the conclusion that a chamber of commerce may run a printing press, advertisement business, market exploration activity or even export promotion business and levy huge sums from its customers whether they are members of the Organization or not and still claim a blanket exemption from tax on the score that the objects of general public utility which it has set for itself implied these

activities even though profits or surpluses may arise therefrom. Therefore, the emphasis is not on the object of public utility and the carrying on of related activity for profit. On the other hand, if in the advancement of these objects the chamber resorts to carrying on of activities for profit, then necessarily section 2(15) cannot confer cover. The advancement of charitable objects must not involve profit-making activities. That is the mandate of the new amendment.”

It will thus be seen that Krishna Iyer J. accepted the contention of the revenue that the means of accomplishing or carrying out an object of general public utility must not involve the carrying on of any activity for profit or to use the words of the learned judge “must be unsullied by profit-making ventures” and even if a business is carried on by a trust or institution for earning profit to be applied wholly for an object of general public utility, the trust or institution would forfeit the claim for exemption from tax.

The view taken by him was that the benefit of the exemption would be taken away where in accomplishing or carrying out an object of general public utility, the trust or institution engages itself in activity for profit or in other words, the trust or institution should not resort to carrying on of an activity for profit for the purpose of accomplishment or attainment of the object of general public utility This view clearly supports the construction canvassed on behalf of the revenue for our acceptance, but, with the greatest respect to the learned judges who decided the Indian Chamber of Commerce case [1975] 101 ITR 796 (SC), we think, for reasons already discussed, that this view is incorrect and we cannot accept the same. There is, however, one comment which is necessary to be made whilst we are on this point and that arises out of certain observations made by this court in Sole Trustee, Loka Shikshana Trust’s case [1975] 101 ITR 234 as well as Indian Chamber of Commerce’s case [1975] 101 ITR 796.

It was said by Khanna J. in Sole Trustee, Loka Shikshana Trust’s case : “ ... if the activity of a trust consists of carrying on a business and there are no restrictions on its making profit, the court would be well justified in assuming in the absence of some indication to the contrary that the object of the trust involves the carrying on of an activity for profit.”

And to the same effect, observed Krishna Iyer J. in Indian Chamber of Commerce’s case [1975] 101 ITR 796, 804 (SC) when he said :

‘An undertaking by a business organization is ordinarily assumed to be for profit unless expressly or by necessary implication or by eloquent surrounding circumstances the making of profit stands loudly negative ... a pragmatic condition, written or unwritten, proved by a proscription of profits or by long years of invariable practice or spelt from some strong surrounding circumstances indicative of anti-profit motivation such a condition will nullify for charitable purpose.’

Now, we entirely agree with the learned judges who decided these two cases that activity involved in carrying out the charitable purpose must not be motivated by a profit objective but it must be undertaken for the purpose of advancement or carrying out of the charitable purpose.

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

PATHAK J.-

(page 17 of order)

*At this stage, it will be appropriate to point out that the question whether a trust is created or an institution is established or a charitable purpose falls to be determined by reference to the real purpose of the trust or the institution and not by the circumstance that the income derived can be measured by standards usually applicable to a commercial activity. The quantum of income is not test in itself. It may be the result of an activity permissible under a truly charitable purpose for, as has been observed, a profitable activity in working out the charitable purpose is not excluded. I am unable to agree, with respect, with all that has fallen from H.R. Khanna and A.C. Gupta JJ. in **Sole Trustee, Loka Shikshana Trust v. CIT** [1975] 101 ITR 234 (SC) that the terms of the trust must impose restrictions on masking profits, otherwise the purpose of the trust must be regarded as involving the carrying on of a profit-making activity. On the contrary, I find myself in agreement with Beg J. to the extent that he says, in the same case, that it is the genuineness of the purpose, that it is truly charitable, which determines the issue. It seems necessary to me that a*

distinction must constantly be maintain between what is merely a definition of “charitable purpose” and the powers conferred or working out or fulfilling that purpose. While the purpose and the powers must correlate, they cannot be identified with each other. Reference may, of course, be made to the nature and with of the powers as evidence of the charitable or non-charitable nature of the purpose.

*For the same reason, I am compelled, with respect, to hold that the observations of Krishna Iyer J., speaking for the court, in **Indian Chamber of Commerce v. CIT** [1975] 101 ITR 796 (SC) do not accord with what I believe to be a true construction of s. 2(15). If that decision can be justified, it can be only on the basis that in the opinion of the court the true purpose of the trust or institution was not essentially charitable. I am unable to accept the proposition that if the purpose is truly charitable, the attainment of the purpose must rigorously exclude any activity for profit. I am also unable to endorse the position that by permitting the trust or institution to carry on an activity which brings in profit, although that activity is arrived on in the course of the working out of the purpose of the trust or institution, “businessmen have a highroad to tax avoidance”. It was apparently not brought to the notice of the learned judges that a carefully enacted scheme has been incorporated in the Act which closely controls the utilization of the trust income, and that the tax exemption is conditional on the observance of the statutory conditions stipulated in that scheme.*

17. Further, upholding the view of the Supreme Court in the case of **Surat Art Silk Cloth Manufactures Association** (supra), it was also held by a majority decision of Larger Bench in the case of **Federation of Indian Chambers of Commerce & Industry** (supra) that the income derived by respondent from the activities, such as holding the Indian Trade Fair and sponsoring Conference of Afro-Asian Organization, were for the advancement of dominant object and purpose of the Federation, viz., promotion, protection and development of trade, commerce and industry in India, and were exempt from tax under s. 11(1)(a) read with s. 2(15). In this case a direct reference u/s 257 of the Act was made by the ITAT, Delhi Bench at the instance of the CIT, New Delhi.

The said appeal raised the question as to whether the words *“not involving the carrying on of any activity for profit”* in the definition of *“charitable purpose”* contained in s. 2(15) of the Act, governed the word *“advancement”* and not the words *“object of general public utility”*. On direct reference to Hon'ble Supreme Court it

was held, by relying on the decision of Surat Art Silk Cloth Manufacturers Association (supra) that: (head note)

“that the income derived by the respondent from the activities, such as holding the Indian Trade Fair and sponsoring the Conference of the Afro-Asian Organisation, were for the advancement of the dominant object and purpose of the Federation, viz., promotion, protection and development of trade, commerce and industry in India, and were exempt from tax under s. 11(1)(a) read with s. 2(15).”

Surat Art Silk Cloth Manufactures Association (supra) applied.

Held also, that the clauses in the respondents memorandum enabling it

- (i) to establish and support or aid the establishment of associations, institutions, funds or trusts for the convenience of its employees,*
- (ii) to establish trusts of its surplus income or property, and*
- (iii) to undertake and execute trusts or undertakings which may seem to the Federation desirable, were merely powers incidental or ancillary to the main purpose of the Federation.*

Per Sen J:

ō(i) One should have thought that the correct was to approach the question of interpretation of s. 2(15) was to give the words used by Parliament the ordinary meaning in the English language and if, consistently with the ordinary meaning, there was a choice between two alternative interpretations, then to prefer the construction that maintains a reasonable and consistent scheme of taxation without distorting the language.

*When the Government did not accept the recommendation of the Direct Taxes Laws Committee in Ch. 2 (interim Report: December, 1977) for the deletion of the word “**not involving the carrying on of any activity for profit**” occurring in s. 2(15), the Supreme Court, in the Surat Art Silk Cloth Mfrs. Assn. case [1980] 121 ITR 1 has, by a process of judicial construction, achieved the same result.*

(ii) The majority decision in the Surat Art Silks case has the effect of neutralizing the radical changes brought about by Parliament in the system of taxation of income and profits of charities, with particular reference to “objects of general public utility” to prevent tax evasion by diversion of business profits to charities.

(dissenting) Per Venkataramiah J:

(i) The majority decision in Surat Art Silk Cloth Manufacturers Association [1980] 121 ITR 1 has virtually wiped off the restrictive words “not involving the carrying on of any activity for profit” occurring in s. 2(15), thereby defeating the very object and purpose of the legislation. It is not the function of a court of law to give the words a strained and unnatural meaning.

(ii) When the Government had not accepted the recommendation of the direct Taxes Laws Committee in Ch. 2 (Interim Report: December, 1977) for the deletion of the words “not involving the carrying on of any activity for profit”, by suitable legislation, it was impermissible for the Supreme Court by a process of judicial construction to achieve the same result. Judges, while responding to

general trends of law, but also reacting to the form of modern tax legislation, must be prepared to take account of the context and purposes of the change brought about.”

18. We find that following the above two decisions of Honøble Supreme Court in the case of Surat Art Silk Mills(supra) and case of FICCI and also following the amended definition of section 2(15) of the Act, from A.Y. 1985-86 onwards, exemption u/s.11 of the Act claimed and was granted. We have to refer the amended provision vide Finance Act 1984 the said section 2(15) of the Act, whereby the phrase ñnot involving the carrying on of any activity for profit;ö was omitted and amended section 2(15) of the Act read as follows:

“(15) “charitable purpose” includes relief of the poor, education, medical relief, and the advancement of any other object of general public utility ;”

The above situation, wherein exemption u/s 11 of the Act was granted and continued till AY 2007-08 but in the present AY 2008-09, AO denied exemption u/s 11 of the Act and CIT(A) upheld the action of the AO. In AY 2008-09, AO alleged that the income of the assessee from the said activities were ñbusiness incomeö and thus it was not entitled to exemption u/s 11 of the Act in view of the provisions of section 11(4A) not being fulfilled. Assessee before us filed copies of assessment orders from AY 1985-86 till AY 2007-08, which are as under:

- Assessment Order u/s. 143(3)/11/263/143(3)/13(1)(d) dated 30/03/1992 passed for the AY 1985-86 (copy enclosed at **pages 47-55** of assessee’s paper book)
- Assessment Order u/s 143(3)/11/13(1)(d)/254/143(3)/11 dated 30/03/94 passed for the AY 1986-87 (copy enclosed at **pages 56-58** of assessee’s paper book)
- Order of ITAT in assessee’s case for A.Y 1985-86, 1986-87, 87-88, 1988-89 and 1990-91(copies enclosed at pages 59-72 of assessee’s paper book)
- Assessment Order u/s 143(3)/11 dated 24/03/94 for AY 1991-92 (copy enclosed at pages 73-74 of assessee’s paper book)

We find from the facts of the case that the same are unchanged in the year of appeal before us. The assessee was a ñcharitableö association registered u/s.12A of the Act and carrying on its objects of advancement of trade and commerce. The activities being the environment management centre, meetings etc., and collecting of fees from

Certificate of origin were all conducted for the empowerment, betterment and for creating awareness amongst industrialists in order to bring about development of trade and industries in India. They were not in the least in the nature of trade or business whereby exemption u/s 11 of the Act could have been denied inasmuch as is visible from the past assessment that assessee consistently over past years enjoyed tax exemption u/s 12A of the Act. From reading of the history of case it will reveal that even though the years 1964-65 to AY 1984-85, when exemption u/s 11 of the Act was denied to the assessee, it was nowhere held by Courts that the assessee was engaged in *business* activities. The contention of the Revenue that the Apex Court ruling was that the activities being incidental activities carried out for the attainment of the main object of assessee involved the generation of *profit* and thus, based on the specific wording of the section 2(15) of the Act, the exemption u/s 11 of the Act had to be denied. In our view, it is nowhere held that the activities of assessee, be it the main activities or the incidental activities were *business* in nature. We further noted from facts that all through right from its inception, the facts remained the same whereby none of its activities were ever held to be *business* in nature except in this relevant AY 2008-09.

19. Now coming to legal position, we find that the definition of *charitable purpose* as laid down under section 2(15) of the Act (as relevant for assessment year, under consideration, 2008-09) was same as in earlier years from AY 1984-85 being as follows:

“2(15) “charitable purpose” includes relief of the poor, education, medical relief, and the advancement of any other object of general public utility.”

Further section 11 of the Act, exempting income from property held for charitable or religious purposes from tax subject to fulfillment of conditions prescribed therein remained unchanged. We find that in such a situation, it would be relevant to quote the decision of Honøble Apex Court in the case of *Radhasoami Satsang v. Commissioner of Income-tax* 193 ITR 321 (SC) wherein it was held that:

“... ... (ii) That, in the absence of any material change justifying the Department to take a different view from that taken in earlier proceedings, the

question of the exemption of the assessee appellant should not have been reopened.

Strictly speaking, res judicata does not apply to income-tax proceedings. Though, each assessment year being a unit, what was decided in one year might not apply in the following year; where a fundamental aspect permeating through the different assessment years has been found as a fact one way or the other and parties have allowed that position to be sustained by not challenging the order, it would not be at all appropriate to allow the position to be changed in a subsequent year.”

From the above said case, it is clear that in a situation where the factual and legal position remains unchanged, as in the case of an assessee, any action by revenue to the contrary to what was taken earlier, is not justified. Thus, concluding the above, in view of facts remaining same and also legal position being the same, in the face of the history, dominant object for which assessee association was constituted, being a charitable one i.e. promotion and protection of trade, commerce and industries and particularly trade, commerce and industries in or with which Indian are engaged or concerned, any income arising from such activity is exempt u/s 11 of the Act.

20. Alternative argument of revenue that activities being in the nature of business held by AO and CIT(A),vide said activities of environment management centre, meetings etc. and collecting of fees from Certificate of origin was engaged in the said systematic and continuous activities with a motive to earn profit and the activities involved being on commercial lines and thus holding that assessee was engaged in carrying out activities which were in the nature of business. In bringing the above activities within the purview of business CIT(A) has placed reliance upon the following judicial decisions which explain the underlying features of business:-

- *Barendra Prasad Ray v. Income-tax Officer (125 ITR 295) SC*
- *Commissioner of Income-tax v. Dharma Reddy (A) (73 ITR 751) SC*
- *Sole Trustee, Loka Shikshana Trust v. Commissioner of Income-tax (101 ITR 234) Supreme Court*

Further, CIT(A) has dismissed the reliance placed by assessee on the decisions of the Honøble Delhi High Court in the case of *The Institute of Chartered Accountants of India & Anr.* (supra) on the ground that the facts of the said cases were different from the case of assessee. The CIT(A) has further alleged in his order that assessee has not

been able to show that the activities of environment management centre, meetings etc. and collecting of fees from Certificate of origin are incidental to main objects. We have already discussed the provisions of section 2(15) of the Act whereby the definition of *charitable purpose*, as relevant for the assessment year under consideration. As already stated earlier, vide the Finance Act 1984, the said section 2(15) of the Act was amended whereby the phrase "not involving the carrying on of any activity for profit;" was omitted and section 11 of the Act exempted income from property held for charitable or religious purposes from tax subject to the fulfillment of the conditions prescribed therein. Hence, it is clear that it stood covered by fourth limb of definition of charitable purpose u/s 2(15) of the Act "advancement of any the object of general public utility" as its objects, as laid down in the Memorandum and Articles of Association, were "to promote and protect the trade, commerce, and industries of India, and, in particular, the trade, commerce and industries in or with which Indians are engaged or concerned" and (e) to do all other things as may be conducive to the development of trade, commerce and industries or incidental to the attainment of the above objects or any of them." The objects of assessee, for which the association came into existence, are clearly set out in clause 3 of the Memorandum of Association which reads as under:

3(a) To promote and protect the trade, commerce and industries and in particular the trade, commerce and industries in or with which Indians are engaged or concerned."

The activities of conducting Environment Management Centre, Meetings, Conferences & Seminar and issuance of the Certificate of Origin, were all connected, incidental and ancillary to the main purpose of charity and were conducted solely for empowerment, betterment and for creating awareness amongst industrialists in order to bring about development of trade and industries in India. The assessee has also drawn our attention to Memorandum, wherein it is specifically authorized the Chamber "to do all other things as may be conducive to the development of trade, commerce and industries, or incidental to attainment of the above objectives or any of them." There was no profit motive in any of the said activities. The surplus arising out of the same was merely incidental to the main object to charity. The majority of

the receipts in the said activities were out of the sponsorships and donations. The expenses incurred on said activities as and when incurred were all separately debited to the said accounts and balance was shown as surplus over receipts. Thus, in view of the above, assessee association is a Charitable Institution carrying on as its main object of development of trade, industries and commerce. The other activities were all merely incidental to the main object and predominant object of the association being the promotion development and protection of trade and commerce which is an object of general public utility, it can never be the case that assessee is predominantly engaged in business.

21. We have also to examine the term **business**, which was discussed by CIT(A) and the same is said to be very broad and it encompasses within itself, trade, commerce and other activities. We have to examine section 2(13) of the Act, which defines the term **Business** as under:-

*“(13) “**business**” includes any trade, commerce or manufacture or any adventure or concern in the nature of trade, commerce or manufacture”*

According to **Sampath Iyengar’s Law of Income Tax (9th edition)**, a business activity has four essential characteristics.

Firstly, a business must be a continuous and systematic exercise of activity. Business is defined as an active occupation continuously carried on. Business vocation connotes some real, substantive and systematic course of activity or conduct with a set purpose.

Secondly essential characteristic is **profit motive or capable of producing profit**.

To regard an activity as business, there must be a course of dealings continued, or contemplated to be continued, normally with an object of making profit and not for support or pleasure [Bharat Development (P) Ltd. v. CIT (1982) 133 ITR 470 (Del)]

The third essential characteristic is that a business transaction must be between two persons. Business is not as unilateral act. It is brought about by a transaction between two or more persons.

And lastly, the business activity usually involves a twin activity. There is usually an element of reciprocity involved in a business transaction.

Thus a continuous activity with profit motive or capable of producing profits, gains, benefits, advantages or livelihood was held to be one of the main criterions of **business**.

Further the concept of *profit motive* was examined by Hon^{ble} Supreme Court, in the *State of Gujarat versus Raipur Manufacturing Company* (1967) 19 STC 1 (SC), wherein it was stated that business is normally with the object of making profit. An activity as business, there must be a course of dealings either actually continued or contemplated to be continued with profit motive and not for sport or pleasure. The expression *profit motive* does not postulate or intends that profit must, in fact, be earned. Nor does the expression cover a mere desire to make some monetary gain out of transaction or a series of transactions. It predicates a motive which pervades the transaction(s) effected by the person in the course of his activity. The *profit motive* was not only the sole or relevant consideration that was to be kept in mind. It was one of the aspects. Normally intention to earn profit was required. At this, we place reliance on of the judgment of Hon^{ble} Supreme Court of India in the case of **CST v Sai Publication Fund** [2002] 258 ITR 70/122 Taxman 437 in which the Supreme Court interpreting the word **business** under section 2(5A) of the Bombay Sales Tax Act, 1959 had clearly laid out that where main activity is not *business*, the connected incidental or ancillary activities of sales carried out in furtherance of and to accomplish their main objects would not, normally, amount to business, unless an independent intention to conduct *business* in these connected, incidental or ancillary activities is established by the revenue.

Hon^{ble} Supreme Court in the case of **Sai Publication Fund**, held as under:-

“... No doubt, the definition of “business”: given in Section 2(5-A) of the Act even without profit motive is wide enough to include any trade, commerce or manufacture or any adventure or concern in the nature of trade, commerce or manufacture and any transaction in connection with or incidental or ancillary to the commencement or closure of such trade, commerce, manufacture, adventure or concern.

If the main activity is not business, then any transaction incidental or ancillary would not normally amount to “business” unless an independent intention to carry on “business” in the incidental or ancillary activity is established. In such cases, the onus of proof of an independent intention to carry on “business” connected with or incidental or ancillary sales will rest on the Department.

Thus, if the main activity of a person is not trade, commerce etc., ordinarily incidental or ancillary activity may not come within the meaning of "business".

22. Further, issue regarding ancillary transactions constituting **“business”** no longer stood disputed in view of decisions of the Courts being the decisions of the Honøble Delhi High Court in the case of **Institute of Chartered Accountants of India** (supra) and of **The Institute of Chartered Accountants of India & Anr.** (supra) wherein it was clearly held that in the cases of many professional institutions whose main activity is not **“business”**, the connected incidental or ancillary activities of sales carried out in furtherance of and to accomplish their main objects would not, normally, amount to business, unless an independent intention to conduct **“business”** in these connected, incidental or ancillary activities is established by the revenue.

In view of the above, we are of the view what clearly transpires in the case of the assessee is that the main object being a charitable activity and not an activity carried out for the purposes of profit, the incidental activities being the activities which were carried out solely for furtherance of and to accomplish the main objects of development of trade and commerce, which would not in any case amount to **“business”**.

23. The assessee before us explained individual nature and purpose of the specific activities, it is stated that the activities held by AO and CIT(A) to be business in nature, were as follows:

- (a) Meetings, Conferences & Seminars
- (b) Environment Management Centre
- © Fees for Certificate of origin

Firstly, discussing **Seminars and Conferences** held by assessee association it is stated that the pursuit of its objectives of development of trade and commerce, is to organize and conduct various conferences, seminars and workshops for the benefit of business and industry in particular and the Indian economy in general.

The Chamber for the development of trade, industries and commerce in general, conducts the said seminars, conferences, conventions, interactive business meets in national and international sphere where eminent people from the society are called

upon to give lectures and share their experiences with their members of the association and also the general public at large. Also various workshops are conducted. To state a few examples of the important initiatives undertaken by assessee association in this direction, it is stated that the Chamber organized the Summit Meetings like the India International Water Summit in New Delhi, the Travel India Summit in Kolkata the ICC Entertainment Conclave in Kolkata, the BIMSTEC Summit 2010 in Guwahati, the Sustainable Citycon Summit in Kolkata, the Chamber 21st Century Kolkata. KalloliniEbong Tilottama Kolkata Conference in Kolkata, the Summit on India Future Sustainability Vision in New Delhi, Summit on India Public Sector Agenda, Vision 2015 Summit in New Delhi, the Indian Supply Chain and Logistics Summit in New Delhi, India Invest trade Delegation cum Exhibition in Bangladesh, etc. All these notable initiatives, as is clearly evident, were organized in close association with the Corporate Sector, the Governments at the International, National and State Levels, the Municipal Corporations and the Development Agencies. The assessee association is working continuously towards ensuring that the recommendations related to the reform initiatives are placed before the Government from time to time and it also tries to assist the Government in implementing the said reforms through the necessary intellectual support and inputs. To conduct all these activities, the association is sponsored by various industrial houses and some of them are the members of the association. Many times as is evident from the nature of the activities listed above, it receives sponsorship from Ministry of DOER, Ministry of External Affairs, Ministry of Food Processing, Ministry of Alternative and Renewable Energy, State Pollution Control Board for carrying on its activities, they being the associate partners in the conducting of the said seminars, workshops and interactive sessions. As per the object of the association, conducting said seminars, conventions etc. for general public, no entry fees is collected. The sponsorships provided are utilized towards meeting the costs of the seminars and the surplus generated out of such activities is retained by the Association for purposes of meeting its charitable objects.

24. Now coming to the **Environment Management Centre**, it was stated by assessee that the same is a chapter to look after all the areas related to industrial safety, environment friendliness and hazard management. The **Indian Chamber of Commerce Environment Management Centre** (ICC-EMC), set up with the prime objective of facilitating business and industry to meet their environmental responsibilities has one major goal:

“to promote environment management for enhancing competitiveness and efficiency in business and industry in order to ensure a cleaner, safer and healthier environment for the society at large.”

While facilitating the above, the ICC-EMC has been enabling industry to work towards implementing effective energy conservation practices, managing environmental hazards and mitigating risks related to their day to day operation. This is essential taking into consideration the damage to the Environment done by unregulated/ill informal industries. As also the requirement of reducing the carbon foot print of industries as also the advices required for assisting industries to earn from carbon credits. The activities through which the same are realized are :

- **Awareness Sessions:** Organising programs to create awareness on profitability through energy efficiency, hazard identification and risk analysis, sharing of environmental best practices etc.
- **Corporate Training Programs:** ICC-EMC regularly organizes need-specific training programs on topics related to environment management, sustainable water management, energy management, quality management etc.
- **Publication:** ICC-EMC recognizes that lack of information is one of the major impediments to implementing environmental best practices. Providing key information is one of the EMCs goals. The “Environment Watch’ which is the quarterly newsletter of the Center keeps the Industry updated on the Environment Management issues, carbon markets etc. The new letter highlights subjects like Environment Management for Competitiveness, Law Update, Trade and Environment, Green Business Opportunities, Environmental Success Stories and Regional Environment Issues.
- **Environment Partnership Summit:** The Environment Partnership Summit which is organized every year is the meeting ground of professional and stakeholders in the areas of sustainable environment management, green business, renewable energy, water management, waste management, etc. The Summit discusses issues related to the above mentioned topics and is a forum for B2B interactions amongst the participants.

The above mentioned programs, summits, awareness sessions are conducted in various parts of India to share the knowledge about the above mentioned areas. They are conducted as and when desired and when requested by the general public without

any specific time pattern. For the said program the association receives sponsorship and general donations and the related expenses are duly debited in the Income & Expenditure Account.

25. Regarding the **Certificate of Origin** it was explained that the same is a document used in international trade. It is a printed form, completed by the exporter or its agent and certified by an issuing body, attesting that the goods in a particular export shipment have been wholly produced, manufactured or processed in a particular country. As per international norms and equipments the said Certificate or Origin is required to accompany each export of physical goods. Due to the widespread network of the Chamber of Commerce community, in most countries, Chambers of Commerce were seen as the organizations which could be allowed to issue certificates of origin. As such, seen as competent authorities, Chambers began to more wide spread issue non-preferential certificates of origin. Thus in India the assessee association, the Indian Chamber of Commerce was duly authorized by the Directorate General of Foreign Trade and Ministry of Commerce, Govt. of India to issue Non-preferential Certificate of Origin to the exporters. Exporters are required to submit formal application attaching with the same, copies of the relevant Bills, Challan and LCs. The assessee has been efficiently providing this service at a nominal charge and with utmost efficiency to improve their efficiency in serving their business community at the instance of the Government and as directed by the Government. This is not an activity by choice but by compulsions of the Government. The charges are simply to cover the expenses relating to such issue of the certificates and for covering the maintenance of the related infrastructure for such services including the man-power involved in the said services. The charges are entirely to cover costs and not with any profit motive. Thus, in view of above, it is clear that activities were all merely incidental to main object and the predominant object of the association being the promotion development and protection of trade and commerce which is an object of general public utility, it can never be the case of the assessee that it is predominantly engaged in business.

26. Now coming on to the decisions of the Honøble Delhi High Court in the case of **Institute of Chartered Accountants of India** (supra) and **Institute of Chartered Accountants of India & Anr. (supra)**. Which, CIT(A) distinguished on the ground that the facts of the same were different from the case of assessee, it is stated that the same clearly apply to the case of the assessee inasmuch they lay down the principle and concept of *õbusinessö* in relation to the incidental activities in cases of professional and charitable institutions whose main activity is not business. Briefly stated, the facts (Before Honøble Delhi High Court) in that case were that for assessment year 2005-06, the ICAI filed its return of income declaring its income as *Nil* and this was accepted in an assessment framed under section 143(3) of the Act. Later on, on the grounds, *inter alia* that coaching activity undertaken by the ICAI amounted to *õbusinessö* and not a charitable activity and, therefore, the ICAI was required to maintain separate books of account and, thus, there was a violation of section 11(4A) of the Act, the Director of Income-tax (Exemptions) (hereinafter called DI) set aside the assessment order under section 263 of the Act. The Income-tax Appellate Tribunal examined the provisions of the Chartered Accountants Act, 1949 and found as follows:

- (i) *That ICAI was created to regulate the provisions of Chartered Accountancy and for this purpose the Institute was required to provide education, training and monitor professional skills of the members and to provide education and training to students/article clerks,*
- (ii) *The fees charged from students/articles clerks were not excessive. Expenditure was incurred for preparation of the study package, CD, etc., salary of the faculty and other professionals, printing and stationery, research and development. Study package included large question bank for which no separate cost was charged. "The students registered for chartered accountancy are also provided on-line guidance through institute's own Website. At a very nominal cost, these services are provided to the students. The institute also provides computer training to the students registered with it, at a very low fee"*

ITAT, therefore, held that the ICAI was not doing any *õbusiness*: by running coaching classes. Accordingly, the order passed by the DI under section 263 of the Act was cancelled. The DI filed an appeal before the Honøble Delhi High Court where one of the questions of law arose for consideration before the Delhi High Court was:-

“Whether the ITAT was justified in the eyes of law in the facts and circumstances of the present case in passing the impugned order that running of the coaching classes is a business activity and, therefore, is in violation of the provisions of Income-tax Act as also supported by judgment of the Patna High Court cited in 208 ITR 608?”

The Court held that

- *the purpose and object to do business is normally to earn and is carried out with a profit motive; in some cases the absence of profit motive may not be determinative. The appellant has given no such finding as far as the activities of the institute are concerned.*
- *The appellant without examining the concept of business has held that the institute was carrying on business as coaching and programmes were held by them and a fee is being charged for the same.*
- *On the basis of the findings recorded in the order dated 29th March 2010, under section 263 of the Act, it is not sufficient to hold that the institute is carrying on business.*
- *The Court held that in these circumstances, the order passed by the appellant under section 263 of the 1961 Act cannot be sustained and was, therefore, rightly upset and set aside by the Tribunal*
- *In view of the facts and circumstances stated above, the Court held that no question of law arises in the present appeal and dismissed the same accordingly without costs.*

27. Even the similar issue was before Honøble Delhi High Court in the case of *PHD Chambers of Commerce and Industry v DIT(E)* (2013)212 TAXMAN 194 (Del), wherein the following substantial question of law was framed as under:

“Whether on the facts and in the circumstances of the case, the Tribunal was right in law in holding that the provisions of Section 11(4A) of the Act were attracted to the assessee’s case and consequently in remanding the case to the Assessing Officer with directions.”

Honøble Delhi High Court on the facts of the case and on numerous decisions of the Apex Court and High Courts held as follows (at para 8 onwards)

“8. The nice question as to whether by rendering specific services to members and non-members for a fee a trade, professional or similar association can be said to be carrying on a business activity needs to be examined.

The further question to be addressed, with reference to Section 11(4A) would be whether such activities (which amount to a business) were incidental to the attainment of the objectives of trust or institution and whether separate books of account were maintained in respect of such activities.

There can be no doubt that the activities of the nature described above, in the case of an assessee such as the present one, which is as trade association-

Chamber of Commerce and Industry, established to protect the interests of trade and industry in Punjab, Haryana and Delhi were activities which are incidental to the attainment of the objects of the chamber. We do not think that the Tribunal is justified in taking the view that the assessee, which is a chamber of commerce and industry, is carrying on business activities which require compliance with the conditions of Section 114A).

In *CIT, Madras v. Andhra Chamber of Commerce (1965) 55 ITR 722*, it was held by the Supreme Court that advancement or promotion of trade, commerce and industry leading to economic prosperity enured for the benefit of the entire community; that prosperity would be shared also by those who engaged in trade commerce and industry, but on that account the purpose was not rendered any the less an object of general public utility.

Echoing these sentiments another Bench of equal strength of the Supreme Court in *Commissioner of Income Tax, New Delhi v. Federation of Indian Chambers of Commerce and Industries, New Delhi (1981) 130 ITR 186* held that where the main objet of the assessee was the promotion, protection and development of trade, commerce and industry in India, its income from conducting a trade fair, rent for space allotted and sale of entry and gate tickets, fees for arbitration etc. would be exempted from tax under Section 11 read with Section 2(15) of the Act
... ..

It would, therefore, appear that judicial thinking was never in favour of the view that the services performed by a trade, professional or similar association such as a chamber of commerce and industry, were in pursuit of a business or trade with a profit motive.

9. In *Delhi Stock Exchange Association Ltd. v. CIT (1997) 225 ITR 235 (SC)*, the approach adopted in the case of a stock exchange was that if there is no obligation that the income from the properties held by the assessee was to be exclusively used for charitable purposes and if it was open to the assessee, under its constitution, to distribute the whole or part of the income as dividend amongst its shareholders, then there would be no exemption under Section 11 of the Act.

In *Additional Commissioner of Income-tax v. Delhi Brick Kiln Owners Association (1981) 130 ITR 55* a Division Bench of this Court, applying the judgment of the Supreme Court in *CIT v. Surat Art Silk Cloth Manufactures Association (supra)* ad *CIT v. Andhra Chamber of Commerce (supra)* applied the “**dominant intention**” theory and held that an association formed to promote brick kiln trade, which did not involve the carrying on of any activity for profit, was entitled to the exemption under Section 11(1) of the Act.

10.

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Section 28(iii) appears to have been enacted, as in the case of its predecessor, to bring to charge the surplus of a mutual association which would not otherwise be chargeable. The trade professional or similar association, including a chamber of commerce and industry has no separate existence apart from the members constituting it and when the members pay fees for services

*rendered by the association and a surplus arises to the association, it actually belongs to the members who had availed of the service. Thus there is identity between the contributors to and participators in the surplus and under general principles of mutuality the surplus ought not to be taxed. However, the clause has been enacted to ensure that such surplus does not enjoy any exemption. Since the surplus had to be brought to tax under a particular head, it was thought by the legislature that the head “**profit and gains of business**” would be the most appropriate head under which the surplus can be brought to tax. This does not, however, mean that a business is carried on by the association in the sense that there is a profit motive which drives the carrying on of the activity.*

... ..

*12. In most of the cases, the services are performed in the true spirit of service to the members of the association (such as a chamber of commerce) and the fees charged are so calculated or fixed that it merely covers the costs incurred by the association in rendering the service. Since accuracy in matching the costs and the fees charged cannot be maintained consistently, there can arise a surplus. The mere arising of a surplus does not clothe the activity of performing the services for the members with a profit motive, which is essential in business. It has been observed by the Supreme Court in **Surat Art Silk** (supra) that 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 it was held as follows:-*

‘But where the predominant object of the activity is to carry out the charitable purpose and not to earn profit, it would not lose its character of a charitable purpose merely because some profit arises from the activity. The exclusionary clause does not require that the activity must be carried on in such a manner that it does not result in any profit. It would indeed be difficult for persons in charge of a trust or institution to so carry on the activity that the expenditure balances the in and there is no resulting profit. That would not only be difficult of practical realization but would also reflect unsound principle of management.’

*13. The judgment of the Supreme Court in the case of **Surat Art Silk** (supra) is significant also for the reason that the earlier judgment in **Indian Chamber of Commerce v. CIT (1975) 101 ITR 796** was overruled. It was held that the Court would not be justified in drawing the inference that the activity is driven by a profit motive merely because the activity resulted in profit. It was also held that “it was not at all necessary that there must be a provision in the constitution of the trust or institution that the activity shall be carried on, on profit no loss basis or that profit shall be proscribed.”*

Thus we note from the judgment of Delhi High Court, which very categorically and vehemently observed and held, that activities and services performed for a fee or against a payment, by a trade, professional or similar association, such as a

chamber of commerce and industry could not be held to be *business* in nature carried out with a profit motive.

28 Further, coming back to the decision of the Honøble Calcutta High Court while passing the adverse order in assessee's own case reported in 81 ITR 147 held as under:-

“This view of the interpretation of the expression the “advancement of any other object of general public utility not involving the carrying on of any activity for profit” under section 2(15) of the Income-tax Act, 1961, would be consistent with and not contrary to section 11(1)(a) and section 11(4) and also section 28(iii) of the Income-tax Act, 1961. Sections or definitions in a statute should not be read in isolation but in the whole context of the statute. The expression “any other object of general public utility” under section 2(15) does not expressly refer to trade or business, for a normal connotation of “general public utility” would not directly include trade or business. But, after the decision of the Supreme Court in the Andhra Chamber of Commerce case (1), it was quite clear that the wide expression “any other object of general public utility” under section 2(15) would include objects for promotion of trade or commerce without any profit motive as coming well within charitable purpose. The present amendment introduced by the Income-tax Act, 1961, by adding the words “not involving the carrying on of any activity for profit” was to put this wholesome limitation upon any and every object of general public utility of various description becoming a charitable purpose and thereby qualifying for exemption. It is to be noticed that the word used in this new law is “activity” and not trade or business. Normally, a trade or business is always with profit or with profit motive, though no doubt, under some recent statutes as in the Sales Tax Act, the new concept of business without profit is being introduced.”

Further, Honøble Supreme Court while echoing Calcutta High Court, referred to these activities generating surplus in the context of Calcutta High Court judgment. So neither Calcutta High Court nor Supreme Court ever said that the Chamber is carrying on any business for the purpose of earning profit in an organized manner. What they said was in view of definition of charitable purpose as defined in section 2(15) post amendment in 1961 Act that *“activity not involving profits”* hits the case of assessee. Thus, the CIT clearly went against the accepted judicial opinion. The aforesaid finding recorded by Calcutta High Court and Supreme Court as discussed (supra) has been reversed by Supreme Court in the case of **Surat Art Silk Cloth Manufacturers Association (supra)**. As already explained the amendment made in the Act redefining section 2(15) wherefrom the word *not involving an activity or*

profit was deleted from 01.04.1984. Pursuant whereof the revenue itself has accepted the factum that the activities were activities in the domain of public utility and thus the finding of CIT(A) cannot be accepted.

29. In respect the allegations of AO in the Remand Report, which has been quoted at para 5.3 of CIT(A)'s order, wherein the A.O has made reference to the decision of the Hon'ble Supreme Court in the case of FICCI wherein, with reference to ancillary business activities, the Hon'ble Apex Court had laid out that:

'for if the primary or dominant purpose of a trust or institution is charitable, any other object which is merely ancillary, would not prevent. But, this does not preclude from maintenance of separate Books of Account, Audit u/s 44AB, and filing of Form 3CD/3CB with the return, which the assessee failed to comply.'

The provision contained in section 11(4A) is clear to the effect that various exemptions u/s 11 shall not be admissible in relation to any income, being profits and gains of business. Thereafter, a concession is also given that if

- (i) *the business is incidental to attainment of objectives of the institution and*
- (ii) *separate books of account are maintained in respect of such business, the assessee will become entitled to other deductions u/s 11.*

Thus it is seen that sub-section (4A) of Section 11 makes the sub-sections (1), (2), (3) and (3A) inapplicable to the income of a trust or an institution, being profits and gains of business, unless

- (a) *the business is incidental to the attainment of the objectives of the trust and;*
- (b) *the trust or institution maintains separate books of accounts in respect of such business.*

The pre-assumption in section 11(4) is that the activities which may be incidental to the main objects are however business in nature. Applying the above to the case of the assessee, it is very much clear that as explained in full details above, none of the activities undertaken by assessee were business activity carried on with a profit motive and therefore, there was no need to maintain separate books of account for such activities. The generation of income is not conclusive test for determining the charitable nature of the activities. Further, in connection to the reference made by the A.O in his Remand Report to the decision of the Supreme Court in the case of FICCI, it is stated here that here that in FICCI, the Supreme Court had clearly laid out that

'the income derived by the respondent from the activities, such as holding the Indian Trade Fair and sponsoring the Conference of the Afro-Asian Organization, were for the advancement of the dominant objet and purpose of the Federation, viz., promotion, protection and development of trade, commerce and industry in India, and were exempt from tax under s. 11(1)(a) read with s. 2(15)'

Thus, it was clearly held that the incidental activities were well covered by the section 2(15) of the Act and were thus õcharitableö in nature. In such an eventuality, the application of the section 11(4A) which applies only to business activities stands absolutely negated.

30. Hence in view of all the above, concluding this issue, we hold that the purpose for which the assessee association, i.e. The Indian Chamber of Commerce, was established is a charitable purpose within the meaning of S.2(15) of the Act. The assessee is carrying out the said activities which are incidental to the main object of the Association and which are conducted only for the purpose of securing the main objet which is the advancement and development of trade and commerce and industry in India. The activities are not in the nature of business and there is no motive to earn profit. The income arising to the assessee is only incidental and ancillary to the dominant object for the welfare and common good of the county's trade, commerce and industry. The profits earned are utilized only for the purpose of feeding its dominant object and no part of such profit is distributed amongst its members. Profit making is not the object of the assessee. Profit is merely a by-product which resulted incidentally in the process of carrying out the charitable purpose. Thus the income of the assessee for AY 2008-09 is exempt from tax u/s 11 of the Act. Accordingly, this appeal of assessee is allowed.

Now ITA NO 1284/Kol/2012 of the assessee's appeal for AY 2009-10

31. The only issue in this appeal of assessee is against the order of CIT(A) confirming denial of exemption u/s11 of the Act for the reason that the activities of assessee association is hit by the newly inserted proviso by the Finance (No.2)Act in section 2(15) of the Act w.r.e.f. 01.04.2009 and thereby falling u/s 28(iii) of the Act

being profit of business. For this assessee association has raised following seven grounds.

1. That on the acts and the circumstances of the case of the appellant the Ld. CIT(A) erred in confirming the denial of exemption u/s 11 of the IT Act, 1961 failing to observe that on the same facts such exemption was consistently allowed to the appellant since the AY 1984-85.

2. That on the acts and the circumstances of the case of the appellant the Ld. CIT(A) erred in confirming the allegation of the Ld. AO that the appellant's case was covered within clause (iii) of section 28 of the I.T Act, 1961 whereby income derived by a trade, professional or similar association from its specific performance for its members was held to be taxable under the head profits and gains of business or profession.

3. That on the acts and the circumstances of the case of the appellant the Ld. CIT(A) erred in confirming the allegation of the Ld. AO that the appellant was hit by the first proviso to section 2(15) of the Income Tax Act inserted w.e.f. 01/04/2009, inasmuch as the appellant was allegedly involved in the rendering of service in relation to any trade, commerce or business, for cess or fee or any other consideration.

4. That on the acts and the circumstances of the case of the appellant the Ld. CIT(A) erred in confirming the allegation of the Ld. AO that the appellant's activities of conducting the Environment Management Centres, meetings, conferences & seminars and the Issuance of Certificate of Origin were all in the nature of business carried on systematically and continuously with a motive to earn profit from the same.

5. That on the acts and the circumstances of the case of the appellant the Ld. CIT(A) erred in holding that the reliance placed by the Ld. AO on the decision of the Hon'ble Supreme Court in the appellant's own case viz. **Indian Chamber of Commerce Vs CIT (191 ITR 796 S.C)** was justified as the appellant did not get the said judgment reversed by filing a review petition before the Hon'ble S.C.

6. That on the acts and the circumstances of the case of the appellant the Ld. CIT(A) erred in holding that decision of the Hon'ble S.C vide its Constitutional Bench, in a five-judges Bench, by a majority of 4 to 1, in **Addl. CIT v. Surat Art Silk Cloth Manufacturers Association (121 ITR 1 S.C)** and the majority decision of the Larger Bench in the case of **Commissioner of Income-tax v. Federation of Indian Chambers of Commerce & Industry (130 ITR 186 S.C)** was not applicable to the case of the appellant in view of the amendment in the said section 2(15) of the Act without appreciating the basic principle laid down by the Court based on the facts of the case.

7. That on the acts and the circumstances of the case of the appellant the Ld. CIT(A) erred in confirming the TDS disallowance of Rs.2,50,874/-“.

32. We have already discussed the facts above in ITA No1491/Kol/2012 for AY 2008-09, which are unchanged in this appeal also i.e. for AY 2009-10 but in view of amendment in Section 2(15) of the Act vide Finance Act 2008, w.e.f. 01/04/2009, whereby new proviso was inserted and according to lower authorities the activities of assessee association of conducting Environment Management Centres, meetings, conferences & seminars and issuance of certificate of origin were all in the nature of *rendering of service in relation to business, for consideration* and falling under the last limb of charitable purpose, i.e. *advancement of any other object of general public utility*, thus covered by the proviso to section 2(15) of the Act. In connection to the above it would be relevant to know the amended section 2(15) of the Act in view of legislative intent behind such amendment. We have gone through section 2(15) of the Act, which is relevant for assessment year 2009-10 year under consideration, which lays down the definition of *charitable purpose* as under:

“(15) “charitable purpose” includes relief of the poor, education, medical relief, 79 [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;”

The rationale for bringing this proviso can be understood by referring to the relevant portion of the **Memorandum explaining the provisions in the Finance Bill, 2008 reported in 298 ITR (St) 2000-01** which reads as under: (Clause 3)

“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 were 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 proviso. 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 a charitable purpose if it involves the carrying on of following activities:

- (a) Any activity in the nature of trade, commerce or business or,*
- (b) Any activity or 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.”*

Further CBDT explained this proviso vide its Circular No. 11 of 2008, dt. 19th Dec., 2008 (2009) 308 ITR (St) 5 on the issue which reads as under:

*“CBDT Circular No. 11/2008
19th December, 2008*

Subject:- Definition of ‘Charitable purpose’ under section 2(15) of the Income Tax Act, 1961-reg.

Section 2(15) of the Income Tax Act, 1961 (‘Act’) defines “charitable purpose” to include the following:-

- i) Relief of the poor*
- ii) Education*
- iii) Medical relief, and*
- iv) The advancement of any other object of general public utility.*

An entity with a charitable object of the above nature was eligible for exemption from tax under section 11 or alternatively under section 10(23C) of the Act. However, it was seen that a number of entities who were engaged in commercial activities were also claiming exemption on the ground that such activities were for the advancement of objects of general public utility in terms of the fourth limb of the definition of ‘charitable purpose’.

Therefore, section 2(15) was amended vide Finance Act, 2008 by adding a proviso which states 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 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.

2. The following implications arise from this amendment –

2.1 The newly inserted proviso to section 2(15) will not apply in respect of the first three limbs of section 2(15), i.e., relief of the poor, education or medical relief. Consequently, where the purpose of a trust or institution is relief of the poor, education or medical relief, it will constitute ‘charitable purpose’ even if it incidentally involves the carrying on of commercial activities.

2.2 ‘Relief of the poor’ encompasses a wide range of objects for the welfare of the economically and socially disadvantaged or needy. It will, therefore, include within its ambit purposes such as relief to destitute, orphans or the handicapped, disadvantaged women or children, small and marginal farmers, indigent artisans or senior citizens in need of aid. Entities who have these objects will continue to be eligible for exemption even if they incidentally carry

on a commercial activity, subject, however, to the conditions stipulated under section 11(4A) or the seventh proviso to section 10(23C) which are that

- i) the business should be incidental to the attainment of the objectives of the entity, and*

- ii) separate books of account should be maintained in respect of such business. Similarly, entities whose object is 'education' or 'medical relief' would also continue to be eligible for exemption as charitable institutions even if they incidentally carry on a commercial activity subject to the conditions mentioned above.*

3. The newly inserted proviso to section 2(15) will apply only to entities whose purpose is 'advancement of any other object of general public utility' i.e, the fourth limb of the definition of 'charitable purpose' contained in section 2(15). Hence, such entities will not be eligible for exemption under section 11 or under section 10(23C) of the Act if they carry on commercial activities. Whether such an entity is carrying on an activity in the nature of trade, commerce or business is a question of fact which will be decided based on the nature, scope, extent and frequency of the activity.

3.1 There are industry and trade associations who claim exemption from tax u/s 11 on the ground that their objects are for charitable purpose as these are covered under 'any other object of general public utility'. Under the principle of mutuality, if trading takes place between persons who are associated together and contribute to a common fund for the financing of some venture or object and in this respect have no dealings or relations with any outside body, then any surplus returned to the persons forming such association is not chargeable to tax. In such cases, there must be complete identity between the contributors and the participants.

Therefore, where industry or trade associations claim both to be charitable institutions as well as mutual organizations and their activities are restricted to contributions from and participation of only their members, these would not fall under the purview of the proviso to section 2(15) owing to the principle of mutuality. However, if such organizations have dealings with non-members, their claim to be charitable organizations would now be governed by the additional conditions stipulated in the proviso to section 2(15).

3.2 In the final analysis, however, whether the assessee has for its object 'the advancement of any other object of general public utility' is a question of fact. If such assessee is engaged in any activity in the nature of trade, commerce or business or renders any service in relation to trade, commerce or business, it would not be entitled to claim that its object is charitable purpose. In such a case, the object of 'general public utility' will be only a mask or a device to hide the true purpose which is trade, commerce or business or the rendering of any service in relation to trade, commerce or business. Each case would, therefore, be decided on its own facts and no generalization is possible. Assessee, who claim that their object is 'charitable purpose' within the meaning of Section 2(15), would be well advised to eschew any activity which is in the nature of trade, commerce or business or the rendering of any service in relation to any trade, commerce or business.

33. From the Memo Explaining the provisions of Finance Bill 2008 & CBDT Circular dated 19-12-2008, what will be position of an entity engaged in the

advancement of any other object of general public utility, whether the same will be hit by commercial activities in view of the newly inserted proviso to section 2(15) of the Act or not? The proviso was introduced with the sole aim of bringing into ambit of taxation such entities which were engaged in commercial activities. Here, we need to appreciate the concept of an **entity engaged in commercial activities**. In very simple words, any entity whose main or dominant object is commercial can only be said to be a commercial entity. An entity whose main purpose is undoubtedly charitable in nature without an iota of commerciality in it cannot be said to be engaged in commercial activity. Also we need to note that another point that emerges from the above is that whether an entity is carrying on an activity in the nature of trade, commerce or business always remains a question of fact which will have to be determined on the basis of the facts of the individual case. No generalization for such determination is possible. In view of the above, it is seen that the proviso can be applied to fact based on the facts and the past history of the assessee, which is discussed in detail above. From the above facts, we are clear that the assessee has never been dominantly engaged in any commercial activities and is a Charitable Institution registered as such u/s 12A of the Act, set up for the promotion and protection of Indian business and industry. The main purpose of this Institution is promotion and protection of trade and commerce in the country and not to conduct any commercial activities. Further, it has also never been the contention of the revenue that the assessee is engaged in commercial activities but it is hit by the proviso to section 2(15) of the act and thus will be deemed to be engaged in commercial activities. What will be the position to an institution engaged in advancement of any other object of general public utility, which lays down that such an institute will be deemed to be 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.** According to us, part of the proviso being **any activity of rendering any service in relation to any trade, commerce or business** 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 in relation to the trade commerce or business must

be for a cess or fee or any other consideration. From the proviso, it is seen that the most material and relevant words in the proviso are **trade, business or commerce**. The activities which are undertaken by the institute should be in the nature of trade, commerce or business or any activity of rendering any service in relation to any trade, commerce or business. We will analyse the term **business** from the definition of the term **business** as defined in section 2(13) of the act and whether assessee's activities falls within the terminology of **business**. The term **Business** read as under:-

"2. Definitions:

... ..

(13) "business" includes any trade, commerce or manufacture or any adventure or concern in the nature of trade, commerce or manufacture

The word **Business** is of large and infinite import. Section 2(13) defines business to include any trade, commerce or manufacture or any adventure or concern in the nature of trade, commerce or manufacture. The intention of the legislature is to make the definition extensive as the term **includes** has been used. The legislature has deliberately departed from giving a definite import to the term **business** but has made reference to several other general terms like **trade**, **commerce**, **manufacture** and **adventure or concern in the nature of trade, commerce and manufacture**. The term **business** has been explained by various judicial decisions and the landmark decision of the Hon'ble Supreme Court of India in the case of **CST v. Sai Publication Fund** [2002] 258 ITR 70 interpreted the word **business** under section 2(5-A) of the Bombay Sales Tax Act, 1959 as follows:-

"... No doubt, the definition of "business" given in Section 2(5-A) of the Act even without profit motive is wide enough to include any trade, commerce or manufacture or any adventure or concern in the nature of trade commerce or manufacture and any transaction in connection with or incidental or ancillary to the commencement or closure of such trade, commerce, manufacture, adventure or concern. If the main activity is not business, then any transaction incidental or ancillary would not normally amount to "business" unless an independent intention to carry on "business" in the incidental or ancillary activity is established. In such cases, the onus of proof of an independent intention to carry on "business" connected with or incidental or ancillary sales will rest on the Department. Thus, if the main activity of a person is not trade, commerce etc., ordinarily incidental or ancillary activity may not come within the meaning of "business". To put it differently, the inclusion of incidental or ancillary activity in the definition of "business" presupposes the existence of trade, commerce etc.

The definition of “dealer” contained in Section 2(11) of the Act clearly indicates that in order to hold a person to be a “dealer” he must “carry on business” and then only he may also be deemed to be carrying on business in respect of transaction incidental or ancillary thereto. We have stated above that the main and dominant activity of the Trust in furtherance of its object is to spread message. Hence, such activity does not amount to “business”. Publication for the purpose of spreading message is incidental to the main activity which the Trust does not carry on as business. In this view, the activity of the Trust in bringing out publications and selling them at cost price to spread message of Saibaba does not make it a dealer under Section 2(11) of the Act.

Further Hon'ble Supreme Court in para 16 elaborated the term “business” as under:-

“16. The words ‘carrying on business’ require something more than merely selling or buying, etc. Whether a person ‘carries on a business’ in a particular commodity must depend upon the volume, frequency, continuity and regularity of transactions of purchase and sale in a class of goods and the transactions must ordinarily be entered into with a profit motive (Board of Revenue v. A. M. Ansari (1976) 38 STC 577 (Supreme Court); (1976) 3 SCC 512). Such profit motive may, however, be statutorily excluded from the definition of ‘business’ but still the person may be ‘carrying on business.’”

Further in para 30 of the same judgment, it is stated thus:

“30. In our view, if the main activity was not ‘business’, then the connected, incidental or ancillary activities of sales would not normally amount to ‘business’ unless an independent intention to conduct ‘business’ in these connected, incidental or ancillary activities is established by the Revenue. It will then be necessary to find out whether the transactions which are connected, incidental or ancillary are only an infinitesimal or small part of the main activities. In other words, the presumption will be that these connected, incidental or ancillary activities of sales are not ‘business’ and the onus of proof of an independent intention to do ‘business’ in these connected, incidental and ancillary sales will rest on the department. If, for example, these connected, incidental or ancillary transactions are so large as to render the main activity infinitesimal or very small, then of course the case would fall under the first category referred to earlier.” (emphasis supplied.)”

Further, Hon'ble Supreme Court in this very same case held as under:

“... .. This decision is directly on the point supporting the case of the respondent after noticing number of decisions on the point including the decisions cited by the learned counsel before us. It may be stated that the question of profit motive or no-profit motive would be relevant only where a person carries on trade, commerce, manufacture or adventure in the nature of trade, commerce etc. On the facts and in the circumstances of the present case irrespective of the profit motive, it could not be said that the Trust either was “dealer” or was carrying on trade, commerce etc. The Trust is not carrying on trade, commerce etc., in the sense of occupation to be a “dealer” as its main object is to spread message of Saibaba of Shirdi as

already noticed above. Having regard to all aspects of the matter, the High Court was right in answering the question referred by the Tribunal in the affirmative and in favour of the respondent-assessee. We must however add here that whether a particular person is a "dealer" and whether he carries on "business", are the matters to be decided on facts and in the circumstances of each case."

34. Thus from the above, the logical corollary which inexorably flows from a careful perusal of the above laid decision is that in the cases of many institutions / associations whose main activity is not ~~business~~ the connected incidental or ancillary activities of sales carried out in furtherance of and to accomplish their main objects would not, normally, amount to business, unless an independent intention to conduct ~~business~~ in these connected, incidental or ancillary activities is established by the revenue. Therefore, the issue whether a professional institution is or is not hit by the proviso to section 2(15) of the Act will essentially depend upon the individual facts of the case of the institutions wherein discussing the nature of the individual activities it will have to be decided whether the same form incidental, ancillary and connected activities and whether the same were carried out predominantly with a profit motive. The AO and CIT(A) in their orders relied upon the following judicial decisions:

- * *Barendra Prasad Ray v. Income-tax Officer (129 ITR 295) SC*
- * *Commissioner of Income-tax v. Dharma Reddy (A) (73 ITR 751) SC*
- * *Sole Trustee, Loka Shikshana Trust v. Commissioner of Income-tax (101 ITR 234 SC)*

We have already discussed the case law of Hon'ble Delhi High Court in the case of PHD Chamber of Commerce & Industry(Supra), wherein very categorically held that activities and services performed for a fee or against a payment, by a trade, professional or similar association, such as a chamber of commerce and industry could not be held to be ~~business~~ in nature carried out with a profit motive. From all the above what thus transpires is that it is the primary or dominant purpose of the institution, which must be charitable. Where the main activity is ~~charitable~~ then the activities which are incidental or ancillary to the main activity, even if carried out for profit, would not mitigate or change the ~~charitable~~ character of the institution. Thus in the cases of many professional institution whose main activity is not

business, the connected incidental or ancillary activities of sales carried out in furtherance of and to accomplish their main objects would not, normally, amount to business, unless an independent intention to conduct *business* in these connected, incidental or ancillary activities is established by the revenue. The test, therefore, to be applied is whether the activity which is pursued is ancillary to a dominant object or is independent to the main object and forms a separate object in itself. The issue whether a professional institution is not hit by the proviso to section 2(15) of the Act will essentially depend upon the individual facts of the case of the institutions wherein discussing the nature of the individual activities it will have to be decided whether the same form incidental, ancillary and connected activities and whether the same were carried out predominantly with a profit motive.

35. In view of the above, we thus now turn to examine and analyse in full details the particular facts of the present case. That the assessee association is a Charitable Institution, duly registered as such u/s. 12A of the Act, carrying on its main object of development of trade, industries and commerce. The main objects for which the association came into existence, are clearly set out in clause 3 of the Memorandum of Association which duly records and reads as under:

3(a) To promote and protect the trade, commerce and industries and in particular the trade, commerce and industries in or with which Indians are engaged or concerned.

The activities of conducting Environment Management Centre, Meetings, Conferences & Seminar and issuance of Certificate of Origin, being the activities stated to be *services in relation to trade, commerce or business* were all well covered by the main object being fully connected, incidental and ancillary to the main purpose and were conducted solely for the empowerment, betterment and for creating awareness amongst the industrialists in order to bring about the development of trade and industries in India. Further it is to be noticed that the Memorandum has also specifically authorized the Chamber *to do all other things as may be conducive to the development of trade, commerce and industries, or incidental to attainment of the above objectives or any of them.* Thus it was only for the purpose of securing its primary aims of proper development of business in India that the assessee was taking

the said ancillary steps. The said activities were not carried out independent of the main purpose of the association of the institution being the development and protection of trade. There was no independent profit motive in any of the said activities. The surplus arising out of the same was merely incidental to the main object to charity. The majority of the receipts in the said activities were out of the sponsorships and donations. The expenses incurred on the said activities as and when incurred were all separately debited to the said accounts and the balance was shown as surplus over receipts. Thus in view of the above it is clear that the alleged activities were all merely incidental to the main object of the assessee and the predominant object of the association being the promotion development and protection of trade and commerce which is an object of general public utility, it can never be the case that it is engaged in *business, trade or commerce* or in any *service in relation to business, trade or commerce*. The individual nature and purpose of the specific activities, it is stated that the activities held by AO and the (A) to be business in nature, were as follows:

- (a) Meetings, Conferences & Seminars
- (b) Environment Management Centre
- © Fees for Certificate of origin

Facts relating to these activities are discussed in detail in para 23 to 25 of this order above, which need not be repeated.

36. From facts in entirety, now the question arises is whether principle of consistency will apply or not? From AY 1985-86 to 2007-08 exemption u/s 11 of the Act was allowed. Now, having extensively with the newly amended section 2(15) of the Act and its absolute inapplicability to the case of assessee supported by various judicial decisions, we will discuss this issue. We find that CIT(A) without appreciating that the basis principle underlying the definition of *charitable purpose* remained unaltered, and on amendment in the section 2(15) of the Act w.e.f. 01/04/2009, whereby the restrictive first proviso was inserted therein, lower authorities held that the same substantially changed the position of law and thus the principle of consistency did not apply. But we are of the view that a detailed reading

of the various judicial decisions through the years, interpreting the definition of "charitable purpose" as laid out in section 2(15) of the Act and also the definition of "business" in relation to the said section amply reveals that the theory of dominant purpose has always, all through the years, been upheld to be the determining factor laying down whether the Institution is Charitable in nature or not. Where the main object of the Institution was "charitable" in nature, then the activities carried out towards the achievement of the said, being incidental or ancillary to the main object, even if resulting in profit and even if carried out with non members, were all held to be "charitable" in nature. Hon'ble Apex Court in the earliest case of Andhra Chamber of Commerce (supra) had clearly laid out the principle that if the primary purpose of an Institution was advancement of objects of general public utility, it would remain charitable even if an incidental or ancillary activity or purpose, for achieving the main purpose, was profitable in nature. It was laid out by the Court that,

"That if the primary purpose be advancement of objects of general public utility, it would remain charitable even if an incidental entry into the political domain for achieving that purpose, e.g. promotion of or opposition to legislation concerning that purpose, was contemplated."

It was only for the purpose of securing its primary aims that it was mentioned in the memorandum of association that the Chamber might take steps to urge or oppose legislative or other measures affecting trade, commerce or manufactures. Such an object ought to be regarded as purely ancillary or subsidiary and not the primary object. In connection to the above case it is laid out the said case dealt with the assessment of the assessee in the A.Ys 1948-49 to wherein relevant to the said AYs 1948-49 to 1952-53, by the last paragraph of sub-section (3) of the IT Act, 1922, "charitable purposes" was defined as

"... .. In this sub-section "Charitable purpose" includes relief of the poor, education, medical relief and the advancement of any other object of general public utility, but nothing contained in clause (i) or clause (ii) shall operate to exempt from the provisions of this Act part of the income from property held under a trust or other legal obligation for private religious purposes which does not enure for the benefit of the public."

The adding of the words "not involving the carrying on of any activity for profit": was introduced by the Income tax Act, 1961. Hon'ble Apex court in the earliest decision

in the case of Surat Art Silk Cloth Manufacturers Association (Supra) held the theory of dominant or primary object of the trust to be the determining factor so as to take the carrying on of the business activity merely ancillary or incidental to the main object.

It was held as follows:-

- (i) *That the dominant or primary purpose of the assessee was to promote commerce and trade in art silk yarn, raw silk, cotton yarn, art silk cloth, silk cloth and cotton cloth as set out in clause (a) and the objects specified in clauses (b) to (e) were merely powers incidental to the carrying out of that dominant and primary purpose;*
- (ii) *That the dominant or primary purpose of the promotion of commerce and trade in art silk, etc., was an object of public utility not involving the carrying on of any activity for profit within the meaning of s.2(15) and that the assessee was entitled to exemption under s 11(1)(a) ”*

Again the Hon'ble Apex Court in the case of Federation of Indian Chambers of Commerce & Industry (supra) held that

“that the dominant object with which the Federation was constituted being a charitable purpose viz. promotion, protection and development of trade, commerce and industry, there being no motive to earn profits, the respondent was not engaged in any activity in the nature of business or trade, and, if any income arose from such activity, it was only incidental or ancillary to the dominant object for the welfare and common good of the country's trade, commerce and industry, and its income was, therefore, exempt from tax under s.11 of the IT Act, 1961 ”

Again reiterating the dominant purpose theory, the Hon'ble SC in the case of Sai Publication Fund (supra) laid out as follows:

“... If the main activity is not business, then any transaction incidental or ancillary would not normally amount to “business” unless an independent intention to carry on “business” in the incidental or ancillary activity is established. In such cases, the onus of proof of an independent intention to carry on “business”: connected with or incidental or ancillary sales will rest on the Department.

Thus, if the main activity of a person is not trade, commerce etc., ordinarily incidental or ancillary activity may not come within the meaning of “business”.

In the recent decision which deals specifically with the newly amended section 2(15) of the Act, in the case of Institute of Chartered Accountants of India v. Director

General of Income-tax (Exemptions) [2012] 347 ITR 0099 Del HC, laying down the very same principle it was again laid:

“that the fundamental or dominant function of the Institute was to exercise overall control and regulate the activities of the members/enrolled chartered accountants. A very narrow view had been taken that the Institute was holding coaching classes and that this amounted to business.”

Again, Hon'ble Bombay High Court in the WP of Baun Foundation Trust (Writ Petition No. 1206 of 2010 in the High Court of judicature At Bombay 27 March 2012) it was held that

“4... It is a well settled position in law that the dominant nature of the purpose for which the trust exists has to be considered. The Chief Commissioner has not doubted the genuineness of the trust or the fact that it is conducting a hospital.”

Thus from all the above it is seen that though the definition of 'charitable' purpose under section 2(15) has undergone changes, the principle underlying the same has remained the same. In context of the above, with regard to the 'principle of consistency' it would be of relevance here to quote the decision of the Apex Court in the case of Radhasoami Satsang v. Commissioner of Income-tax (193 ITR 321 SC) wherein it was held that:

“... (ii) That, in the absence of any material change justifying the Department to take a different view from that taken in earlier proceedings, the question of the exemption of the assessee appellant should not have been reopened.”

Strictly speaking, res judicata does not apply to income-tax proceedings. Though, each assessment year being a unit, what was decided in one year might not apply in the following year; where a fundamental aspect permeating through the different assessment years has been found as a fact one way or the other and parties have allowed that position to be sustained by not challenging the order, it would not be at all appropriate to allow the position to be changed in a subsequent year.”

37. Now coming to application of section 28(iii) of the Act. We find that section 28(iii) of the Act provides that the income derived by a trade, professional or similar association from specific services performed for its members will be brought to charge under the head 'profits and gains of business or profession'. The underlying idea behind s. 28(iii) is that there must be a business from which income is derived and that in the course of such business specific services must be rendered for its

members. The concept behind s.28(iii) is to cut at the mutuality principle being relied on in support of a claim for exemption, when the assessee was actually deriving income or making profits as a result of rendering specific services for its members in a commercial way. The reason for the introduction of Section 28(iii) of Act, to ignore the principle of mutuality and reach the surplus arising to the mutual association and this is clear from the fact that these provisions are confined to services performed by the association for its members. Such income would either be charged as business income or under the residual head, depending upon the question whether the activities of the association with the non-members amount to a business or otherwise. Section 28(iii) constitutes certain income of the association to be business income without affecting the scope of the exemption under Section 11. Section 2(15) which incorporates the definition of "charitable purposes" simply shows that several mutual associations may also fall within the definition. The receipts derived by a chamber of commerce and industry for performing specific services to its members, though treated as business income under Section 28(iii) would still be entitled to the exemption under Section 11 r.w.s. 2(15) of the Act, provided there is no profit motive. Thus, assessee being a charitable Institution carrying on the object of promotion and development of trade and commerce and which is not involved in the carrying on of any activity in the nature of "business", the said section 28(iii) of the Act does not apply.

38. In view of the above discussion, we are of the considered view that in the given facts and detailed reading of the various judicial decisions through the years, interpreting the definition of "charitable purpose" as laid out in section 2(15) of the Act and also the definition of "business" in relation to the said section amply reveals that the theory of dominant purpose has always, all through the years, been upheld to be the determining factor laying down whether the Institution is Charitable in nature or not. Where the main object of the Institution was "charitable" in nature, then the activities carried out towards the achievement of the said, being incidental or ancillary to the main object, even if resulting in profit and even if carried out with non members, were all held to be "charitable" in nature. Hon'ble Apex Court in the

earliest case of Andhra Chamber of Commerce (supra) had clearly laid out the principle that if the primary purpose of an Institution was advancement of objects of general public utility, it would remain charitable even if an incidental or ancillary activity or purpose, for achieving the main purpose, was profitable in nature. In our view the basic principle underlying the definition of 'charitable purpose' remained unaltered even on amendment in the section 2(15) of the Act w.e.f. 01/04/2009, though the restrictive first proviso was inserted therein. Accordingly, in the given facts of the case as discussed above in detail, the assessee association's primary purpose was advancement of objects of general public utility and it would remain charitable even if an incidental or ancillary activity or purpose, for achieving the main purpose was profitable in nature. Hence, assessee is not hit by newly inserted proviso to section 2(15) of the Act. This issue of assessee's appeal is allowed.

39. In the result, both appeals of assessee are allowed.

Order pronounced in open court on 02/12/2014

Sd/-
(Shamim Yahya)
Accountant Member
Kolkata,

Sd/-
(Mahavir Singh)
Judicial Member

*Dkp

दिनांक:- 02/12/2014 कोलकाता

आदेश कक्षा तालम अपेक्षत / Copy of Order Forwarded to:-

1. अपीलार्थी/ Appellant ó Indian Chamber of Commerce, 4 Indian Exchange Place
Kolkata-01
2. प्रत्यर्थी/ Respondent ó ITO, Exemption-I, Kolkata 10 B Middleton Row, Kol-71
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त- अपील / CIT (A)
5. व्रभागीय प्रतिलिपि, आयकर अपील प्र अधिकरण कोलकाता / DR, ITAT, Kolkata
6. गार्डफाइल / Guard file.

By order/आदेश से,

/True Copy/

उप/सहायक पंजीकार
आयकर अपील प्र अधिकरण, कोलकाता