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IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on: 18.03.2015
Pronounced on: 18.09.2015

- + **W.P.(C) 3599/2012 & C.M. NO.7569/2012**
- + **W.P.(C) 5715/2013**
- + **W.P.(C) 5716/2013**
- + **W.P.(C) 5718/2013**
- + **W.P.(C) 5729/2013**

HAMDARD LABORATORIES INDIA AND ANR..... Petitioners

Through : Sh. Parag. P. Tripathi, Sr. Advocate
with Sh. Simran Mehta, Advocate.

versus

ASSISTANT DIRECTOR OF INCOME TAX (EXEMPTION)

..... Respondent

Through : Sh. Rohit Madan with Sh. Ruchir
Bhatia, Advocates.

- + **W.P.(C) 5711/2013 & C.M. NO.12626/2013**
HAMDARD LABORATORIES (INDIA) AND ANR..... Petitioners

Through : Sh. Parag. P. Tripathi, Sr. Advocate
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versus

DIRECTOR GENERAL OF INCOME TAX (EXEMPTIONS)

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CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE R.K. GAUBA

MR. JUSTICE S. RAVINDRA BHAT

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1. This judgment disposes of six writ petitions, primarily concerning the charitable status of Hamdard Laboratories (India) (hereafter referred to as “Hamdard” the first Petitioner in the six writ petitions) – under Section 10(23C)(iv) of the Income Tax Act, 1961 (hereafter “the Act”). The Director General of Income Tax (Exemptions) (“DGIT(E)”) – Respondent in W.P.(C) 5711 of 2013 – by order dated 21.08.2013 retrospectively withdrew the exemption granted to Hamdard under Section 10(23C)(iv) of the Act with effect from assessment year (AY) 2004-05.

2. In W.P.(C) 5711 of 2013, Hamdard has impugned the said order of the DGIT(E). In W.P.(C) 3599 of 2012, Hamdard challenges reopening of its assessment for AY (assessment year) 2005-06, and impugns the notice of reopening dated 27.03.2012 issued under Section 148 of the Act as well as the order dated 25.05.2012 rejecting Hamdard’s preliminary objections pertaining to the reopening of assessment proceedings. Hamdard contends that the reopening of assessment by Assistant Director of Income Tax (Exemptions) (“ADIT(E)”) is based on a mere change of opinion on the same set of facts. In WP (C) Nos. 5715 of 2013, 5716 of 2013, 5718 of 2013 and 5729 of 2013, Hamdard has challenged separate but identical orders dated 10.07.2013 passed by the Commissioner of Income Tax (Appeals) (“CIT(A)”) for AYs 2006-07, 2007-08, 2008-09 and 2009-2010, holding that Hamdard was not entitled to the benefit of exemption under Section 11

of the Act. Since the focal point of the dispute involves the withdrawal of Hamdard's exemption under Section 10(23C)(iv) of the Act, the Court would first discuss the facts in W.P.(C) 5711 of 2013 before proceeding to discuss the facts of the other writ petitions. The Income-tax department has hereinafter been referred to as "Revenue", except in instances where the concerned officer is addressed specifically for contextual clarity.

W.P.(C) 5711 of 2013

3. Hamdard is governed by its constitution dated 28.08.1948 (hereafter referred to as "the Deed"), under which the partners of a business known as the "Hamdard Dawakhana" dedicated the said business to charity. Hamdard – like its predecessor in interest - generates income from the manufacture and sale of Unani medicines and other allied products. The original Deed provided for "Qaumi Income" (charity) and "Khandani Income (family income)". However, the concept of family income was abolished by a declaration of the Settlor/ Founder-Wakif Mutawalli dated 10.10.1985, with retrospective effect from 01.01.1973. The principal objects of Hamdard, as set out in the Deed dated 28.08.1948 are as under:-

"44. The 'Qaumi Income' of the Wakf, shall be spent only within the territories of the Union of India and only on objects of public charity, which satisfy the following two cumulative tests:

(a) They must be objects of public charity for the benefit of all persons irrespective of caste, colour or creed, such as 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 of profit, and

(b) They must be consistent with the principles of the true

teachings of Islam.

Provided, however, that in spending the income on objects of public charity, priority shall be given to the collective needs of the country or to such needs as may benefit the largest number of persons or their generations.

45. Priority may be given to the following:

(1) To establish and run an Institute for the promotion of medical education and research with emphasis on indigenous systems of medicine.

(2) To establish and successfully conduct a Tibbia College in conformity with the recognised standards.

(3) To establish and run charitable hospitals and clinics where poor patients are given free treatment.

46. Qaumi Income may also be spent on the following:

(1) To establish and run educational institutions, and/or to aid those which are already in existence.

(2) To build schools, laboratories, wells, or such other buildings of a public nature as may benefit the largest number of people in the country.

(3) To publish books, pictures, maps or literature or to aid in publication of the same by the publication of which the object of Wakf are fulfilled or achieved.

47. Help may also be given to needy orphans, needy widows or helpless persons, needy authors and research scholars and victims of unforeseen calamities without restriction of caste, colour or creed.”

4. Following its objectives, Hamdard claims that it is involved in various

secular, charitable, nation building activities and humanitarian objectives; and it is not guided by factors relating to caste, creed or religion. It asserts that it is a pioneer in the development and growth of the Unani system of medicine. Hamdard has set up around 25 medical, educational, literary, scientific and cultural organisations including, *inter alia*, the All India Unani Tibbi Conference, Institute of History of Medicine and Medical Research, Indian Institute of Islamic Studies, Ghalib Academy, Rabea Girls Public School, Hamdard Education Society, Majeedia Hospital, Jamia Hamdard (University), Rufaida Nursing School, Hamdard Study Circle, Hamdard Coaching Centre, Hamdard Primary School, Hamdard College of Pharmacy etc.

5. To carry out its charitable activities, Hamdard created a special purpose vehicle, a registered society for philanthropic purposes, i.e Hamdard National Foundation (HNF) on 12.05.1964. HNF's objects and functions are as follows:

“The objects for which the Society is established are as follows:-

1. To receive, control and supervise proper utilisation of the income of the Foundation received from Hamdard Dawakhana (Wakf), Delhi, as Qaumi Income and from any other body, person or concern, Indian and foreign, in any form as aid, grant or bequests, with or without any condition, to protect and promote the interests of the Society, and to safeguard the rights, privileges and interests of all those who derive benefit from the Society.

2. To spend the income of the Foundation only within the territories of India and only on objects of public charity which satisfy the following two cumulative tests:

(a) They must be objects of public charity for the benefit of all persons irrespective of caste, colour or creed such as 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; and

(b) they must be consistent with the principles of the true teachings of Islam.

Provided, however, that in spending the income on objects of public charity, priority shall be given to the collective, needs of the country or to such needs as may benefit the largest number of persons or their future generations.

3. To collaborate and cooperate with institutions having similar objects.

Functions

1. Priority may be given to the following:-

(a) To establish and run an Institute for the promotion of medical education and research with emphasis on indigenous systems of medicines.

(b) To establish and successfully conduct a Tibbia college in conformity with the recognised standards.

(c) To establish and run charitable hospitals and clinics where poor patients are given free treatment.

2. Income of the Foundation may also be spent on the following:-

(a) To establish and run education institutions, and/or to aid those which are already in existence.

(b) To build schools, laboratories, libraries, or such other buildings of a public nature as may benefit the largest number of people in the country.

(c) To publish books, pictures, maps or literature or to add in publications of the same by the publication of which the objects

of the wakf are fulfilled or achieved.

3. Help may also be given to needy orphans, needy widows or helpless persons, needy authors, scholars research scholars and students and victims of unforeseen calamities without restriction of castes, colour or creed.”

6. Both Hamdard and HNF are registered under Section 12A read with 12AA of the Act. In *Additional Commissioner of Income Tax v. Hamdard Dawakhana (Wakf)*, (1986) 157 ITR 639, this Court examined Hamdard's objects and activities and held them to be charitable. Hamdard had been enjoying exemption under Section 10(23C)(iv) of the Act since AY 1984-85. For renewal of the said exemption for AY 2004-2005, Hamdard submitted its application in the prescribed form. The Revenue sought clarifications from Hamdard and upon an examination of the objects, activities and financial records, renewed the exemption under Section 10(23C)(iv) of the Act on 28.12.2007, with effect from AY 2004-2005, subject to certain conditions stipulated in the order dated 28.12.2007.

7. On 14.01.2009, the DGIT(E) issued a show cause notice to Hamdard, for 03.02.2009, for rescinding the exemption order dated 28.12.2007 on the ground that Hamdard had violated terms (a) and (c) of the exemption order. Hamdard responded to the said show cause notice on 30.01.2009 and alleged that the notice was vague and pre-mediated. The DGIT(E) sought several clarifications and responses from Hamdard, which were provided. While these proceedings were pending, on 24.12.2010, the DGIT(E) issued another notice for withdrawal of the exemption under Section 10(23C)(iv) of the Act, stating that conditions (a) and (c) imposed in the exemption order dated 28.12.2007 had been violated.

8. Rejecting the submissions made by Hamdard, on 22.02.2012, the DGIT(E) passed an order withdrawing the exemption granted to Hamdard under Section 10(23C)(iv) of the Act. Relying on this order, on 19.04.2012, the Assessing Officer (“AO”) raised a demand of ₹ 112 crores against Hamdard for AYs 2006-2007 to 2009-2010 and re-opened the assessment proceedings for the AY 2005-2006. Hamdard challenged the order dated 22.02.2012 before this Court in W.P.(C) 3598 of 2012. The said writ petition was allowed by this Court on 11.04.2013 and the order dated 22.02.2012 was quashed. The Court remanded the matter to the DGIT(E) to decide the issue afresh. Thereafter, Hamdard made detailed written submissions before the DGIT(E) on the issue of exemption under Section 10(23C)(iv) of the Act. The DGIT(E), vide its impugned order dated 21.08.2013, again held that Hamdard was not entitled to exemption under the said provision and withdrew it with effect from AY 2004-05.

W.P.(C) 3599 of 2012

9. In the course of assessment proceedings for AY 2005-2006, the Revenue raised several queries in its questionnaire dated 17.01.2007 regarding the objects and activities of Hamdard. Hamdard answered those queries vide letters dated 01.02.2007, 20.02.2007 and 12.03.2007. On 21.03.2007, an order of assessment in Hamdard’s case was passed under Section 143(3) of the Act for AY 2005-2006. In the said order, Hamdard’s surplus from manufacture and sale of unani medicines was held to be exempt under Section 11 of the Act. The relevant part of the order reads as under:

“The assessee is registered u/s 12A of the Income Tax Act vide registration dated 20-07-1998. The assessee was also notified u/s 10(23C)(iv) of the Income Tax Act vide notification dated 15-04-2002 which was effective for the assessment years 2001-02 to 2003-04 and renewal of notification for subsequent years has also been applied for by the assessee which is pending. The main activity of the assessee is to provide healthcare in the field of Unani medicine, production, sale and marketing of unani and ayurvedic medicines, the proceeds of which are governed by the Wakf Deed, and applied for charitable purposes. The activities of the assessee are within the meaning of section 2(15) of the Income Tax Act. As such, exemption is allowed to the assessee u/s 11 of the Income Tax Act, as claimed.”

10. On 27.03.2012, the Revenue issued a notice to Hamdard under Section 148 of the Act, seeking to re-open its assessment proceedings for AY 2005-2006. The Revenue supplied the reasons for reopening assessment proceedings for AY 2005-06 to Hamdard on 16.04.2012. The said letter highlighted the sales and expenditure figures of Hamdard and based on such figures, concluded that Hamdard's activities were commercial in nature. It further stated that Hamdard had made huge surpluses and had made accumulations over the years for expansion of manufacturing units. Though Hamdard's objects are charitable, its activities were held to be not charitable in nature. Revenue also stated that Hamdard had violated Section 11(4A) of the Act by not maintaining separate books of accounts for incidental business activities, had not utilised the accumulations made during the relevant assessment year (AY 2005-06) in line with its objects and that it was giving donations to HNF, which was not in furtherance of its charitable activities.

11. According to Hamdard, all the material issues raised in the said

reasons were disclosed and were known to the Revenue. Hamdard urged preliminary objections to the reopening of assessment proceedings on the ground that it was based merely on change of opinion. However, those objections were rejected by the Revenue on 25.05.2012.

12. In W.P.(C) 3599 of 2012, Hamdard impugns the notice dated 27.03.2012 issued under Section 148 of the Act and the order dated 25.05.2012 rejecting Hamdard's preliminary objections pertaining to the reopening of assessment proceedings. Hamdard contends that the Revenue has sought to reopen Hamdard's assessment proceedings for the AY 2005-2006, based on a mere change of opinion on the same set of facts.

WP (C) NOS. 5715, 5716, 5718 AND 5729 OF 2013

13. In these writ petitions, Hamdard impugns four separate orders, all dated 10.07.2013, passed by the CIT(A), in Appeal Nos. 27-30/2012-13 for AYs 2006-07 to 2009-10. Hamdard submits that based on the order dated 22.02.2012 passed by the DGIT(E) withdrawing the approval granted to Hamdard under Section 10(23C)(iv) with retrospective effect from 2004-05, the ADIT(E) denied its claim for charitable status. Thus, the ADIT(E) by orders dated 19.04.2012 brought Hamdard's income to tax for AYs 2006-07 to 2009-10. The orders dated 19.04.2012 were confirmed by the CIT(A) in its impugned orders dated 10.07.2013.

14. According to Hamdard, the proceedings before CIT(A) commenced in January 2013, and the matter was heard on several occasions. Hamdard filed written submissions dated 04.03.2013 and 06.05.2013 before the CIT(A). On 28.06.2013, Hamdard's representative – the second Petitioner in the four

writ petitions - reached the office of CIT(A) for hearing of the appeal and was awaiting the presence of the counsel for Hamdard. However, he was informed by the CIT(A) that he was under transfer and that he had already handed over charge to a new incumbent – the second Respondent in the writ petitions; and thus would not hear the appeal. The second Petitioner accordingly informed Hamdard's counsel and waited for second Respondent's arrival. It is further submitted that as the second Respondent did not attend office for two hours and no firm time for this purpose was indicated by his staff, the second Petitioner returned to his own office.

15. In the four writ petitions, Hamdard states that on 29.06.2013, the second Petitioner received a call from the second respondent, asking him to come to his office. Upon reaching there, he was informed by the said Respondent that he was to go abroad for some official work and that he would take up the appeal after returning; he further expressed his inclination to await the passing of a fresh order by the DGIT(E), on the issue of exemption under Section 10(23C) (iv) of the Act. However, Hamdard in its rejoinder affidavit submits that these events transpired on 01.07.2013 and not on 29.06.2013, and that the reference to 29.06.2013 was an inadvertent error as the events described hereinabove had occurred on the 'next working day', which had been incorrectly stated as 29.06.2013.

16. Hamdard further states that on 08.07.2013, the second Respondent again called up the second petitioner asking him to go to his office. There, it is alleged, he made the second petitioner sign two order sheets, one for 28.06.2013 and the other for 08.07.2013. The same read as under:

“28/06/2013 Shri Javed Naseem, C.A. (Corporate head finance)

appeared for hearing and requested for adjournment. Shri V.K. Tiwari CIT (A) XXI was hearing this case and he has been transferred out in AGT-2013. order of CBDT, and in his place, I Md. Mohsin Alam CIT has taken over the charge on 28/6/2013. The case is adjourned to 8/7/2013 at 11.30 A.M. 8/7/2013 Shri Javed Naseem, CA appeared and the case was heard.”

17. Hamdard alleges that the second Petitioner’s signatures were obtained on the said order sheets under the pretext of “*just completing the record*”, and that nothing was heard by the second Respondent on the merits of the matter on 08.07.2013. Hamdard’s counsel, it is alleged, who was authorized to argue the matter was not present and second petitioner, who was present, was not competent or equipped to argue the matter. Apparently, he was not even carrying the file of the case with him. It is alleged that the second Respondent informed the second Petitioner that it was not certain he would resume his official duties, after his foreign visit. Thus, no further date was given on the order sheet and fresh intimation was to be sent to Hamdard. It is alleged that however, on 11.07.2013, the second Petitioner was informed by the second respondent’s office that Hamdard’s appeal against the ADIT(E)’s orders dated 19.04.2012 had been dismissed by orders dated 10.07.2013.

Submissions on Behalf of Hamdard

I Withdrawal of Exemption Under Section 10(23C)(iv)

18. Mr. Parag Tripathi, Hamdard’s Senior Counsel urges that the order withdrawing Hamdard’s exemption under Section 10(23C)(iv) of the Act is erroneous and legally untenable. Hamdard is an established public charity enjoying exemption from tax for the last six decades; including under the

1922 Act. The nature of its activities has remained unchanged since its inception. Hamdard is a business held under trust for charitable purposes, which business is only the corpus of the trust and its source of income and not its object. It has not effected any change in its avowed activities and objects and has not violated any condition of the grant of exemption dated 28.12.2007; the present being merely a case where the Revenue seeks to take a different view on the same set of facts. The manufacture and sale of unani medicines is the Hamdard's business since its inception and this pre-existing business was dedicated to the cause of public charity by the founder-Wakif Mutawalli in 1948. Hamdard submits that comparing it with a commercial private pharmaceutical company is ill-founded and perverse as in the case of commercial companies the profits and gains are free for distribution amongst shareholders and there is no obligation to apply the same for charitable objects. On the other hand, no part of its income is distributed or is capable of distribution for the private benefit of the mutawallis.

19. Considerable reliance is placed on the fact that Hamdard has been enjoying exemption from tax for a considerable period of time. Specifically, Hamdard cites this Court's decision in *Additional Commissioner of Income Tax v. Hamdard Dawakhana (Wakf)*, [1986] 157 ITR 639, where its objects and the exact nature of its activities have been examined by this Court in detail in light of the Supreme Court's decision in *ACIT v. Surat Art Silk Cloth Manufacturers Association* (1980) 121 ITR 1, and were held to be charitable. It is submitted that this Court in the said decision had also held that Hamdard's objects fall within the ambit of the first three heads of charity under Section 2(15) of the Act, viz. 'medical relief', 'education' and

‘relief of the poor’. It is emphasised that the decision in *Hamdard Dawakhana (Wakf)* has been consistently applied, followed and affirmed by this Court in a catena of judgments; including the case of Hamdard itself as also in the case of other parties.

20. As regards HNF, it is submitted that the Assessment order in its case for AY 2007-2008 - by which the AO had rescinded its charitable status was reversed by the CIT(A) on 31.01.2012 and was thus *non-est* on the date of passing of the impugned order. HNF is a mechanism having the same objects as that of Hamdard and is a beneficiary of donations made by Hamdard, for effectuating the charitable mandate of the the Trust Deed. The grant of a donation by one charitable institution to another, for the purpose of carrying on charitable activities amounts to an application of income for charitable purposes. Hamdard relies on the UK Court of Appeal’s decision in *Inland Revenue Commissioners v. Helen Slater Charitable Trust Ltd.*, [1980] 3 WLR 157, to say that this view has been followed and relied upon by the Courts in India in, *inter alia*, *CIT v. Sarladevi Sarabhai Trust*, [1988] 172 ITR 698 (Guj); *CIT v. Nirmala Bakubhai Foundation*, [1997] 226 ITR 394 (Guj), *CIT v. Hindustan Charity Trust* [1983] 139 ITR 913 (Cal), *CIT v. M. Ct. Muthiah Chettiar Family Trust*, [2000] 245 ITR 400 (Mad.), *CIT v. Trustees of the Jadi Trust*, [1982] 133 ITR 494 (Bom), *CIT v. Shri Ram Memorial Foundation* [2004] 26 ITR 35 (Del).

21. Hamdard relies upon Instruction No. 1132 dated 05.01.1978, issued by the CBDT, which states that a charitable trust will not lose exemption under the Act if it passes a sum of money to another charitable trust for utilization by the donee trust towards its charitable purposes, and that it shall

be proper utilization of money by the donor trust for charitable purposes. It is further submitted that, since the formation of HNF in 1964, Hamdard has been carrying out its charitable activities through HNF. This has been undisputedly accepted by the Revenue for all these years in granting registration under Section 12A, according approval under Section 10(23C)(iv) and making assessments under Section 143(3) of the Act.

22. It is urged that the DGIT(E) erroneously surmised that Hamdard did not apply/accumulate its surplus towards its objects in violation of condition (a) of the order of exemption dated 28.12.2007. As correctly observed by the DGIT(E), the manufacture and sale of medicinal products is not the object of Hamdard in terms its Trust Deed. Not only are Hamdard's objects charitable but the activities are also charitable, the business being an asset dedicated to charity, and Hamdard utilizes the income generated from the manufacture and sale of Unani and Ayurvedic medicines for the attainment of the charitable objects. The details of accumulation and purpose thereof are a part of the return of income. Accumulation of income for the capital expansion of the asset is indispensable and incidental to put into effect the charitable purpose. No part of the surplus of Hamdard is distributable amongst the sons and grandsons of the Wakif Mutawallis, who are the current mutawallis. Like other employees of Hamdard, the mutawallis are also drawing nominal, fixed salaries.

23. As regards the investment in the Okhla and Manesar projects, Hamdard submits that the purpose and nature of the accumulations for these projects has been consistent since long and has been disclosed to and accepted by the Revenue at every stage. To support this contention,

Hamdard relies upon the audited accounts filed by it with the Revenue for the Financial Years 2003-2004, 2004-2005, 2006-2007 and 2007-2008.

24. Mr. Tripathi submits that the accumulation of income for legitimate expansion of the activities of Hamard is merely ancillary to the predominant charitable purpose. Further, details of the same have been specifically stated in the documents accompanying the return of income and have been accepted by the Revenue.

25. Hamdard submits that a genuine, unintentional inability to spend the accumulated amount in a particular assessment year, for reasons beyond its control, cannot result in a permanent and retrospective withdrawal of the approval under Section 10(23C)(iv) of the Act.

26. Based on the Supreme Court's decision in *ACIT v. Surat Art Silk Cloth Manufacturers Association* (1980) 121 ITR 1, Hamdard urges as follows:-

1) If the real, principal, predominant purpose of an entity is charitable then the said charitable intent will not stand vitiated merely because the activities of the entity result in profit or income which can be measured by standards applicable to commercial activity.

2) A clear distinction has to be drawn between a charitable object and the incidental and ancillary means employed to feed the same, which may result in profit.

3) Surplus, if any accruing from the activities of such an entity has to be applied for the charitable purpose, which also includes expansion of the activities of the entity and the said surplus should not be capable of distribution in the hands of the trustees.

27. Mr. Tripathi relies on the concurring judgment of Pathak J, in *Surat*

Art Silk (supra), stating that it drew a clear distinction between a charitable purpose on the one hand and the method, mode and powers applied and adopted for the fulfillment of that purpose. Any application/permitted accumulation of the income of Hamdard for the capital expansion and maintenance of the charitable assets is ex-facie indispensable and incidental to the effectuation of the charitable purpose.

28. Furthermore, the period of accumulation provided in clause (a) of the third proviso to Section 10 (23C) of the Act is only five years and the Revenue had no jurisdiction to embark upon an enquiry into accumulations prior to AY 2002-2003; which were incidentally old details not in the possession of Hamdard. Mr. Tripathi submits that DGIT(E) fell into error in determining that Hamdard violated clause (b) of the third proviso to Section 10(23C) of the Act by reinvesting in its on going projects; as the said projects are an application of monies for charitable purposes. Further, Mr. Tripathi submits that Hamdard has made all investments in the specified modes, therefore, the Revenue's finding to the contrary is unfounded. No query or show cause, was raised in regard to this aspect of the matter. If the Revenue had issued a show cause regarding the violation of clause (b) of the third proviso to Section 10(23C) of the Act, Hamdard would have relied upon the details of its fixed deposits, being investments in specified modes, to show that the same had increased from ₹ 134.45 Crores in AY 2004-2005 to ₹ 419.56 Crores in AY 2012-2013.

29. Mr. Tripathi argues that the law laid down by the Supreme Court in *CIT v. Thanti Trust*, [2001] 247 ITR 985 has been misconstrued by the DGIT(E) in its application to Hamdard's case. Hamdard submits that the

principle that a business undertaking can also be in the nature of a “*property held under a trust*”, entitling it to tax exemptions, finds statutory recognition in section 11(4) of the Act. In light of this Court’s decision in *CIT v. Mehta Charitable Prajnalay Trust*, (2013) 357 ITR 560 (Del), it is urged that Section 11(4A) is not applicable to Hamdard’s case, and thus, the DGIT(E) erred in concluding that condition (c) of the order of exemption had been violated.

30. Relying upon Section 11 (4A), the DGIT(E) accepted that the business of Hamdard is *incidental* to the attainment of the objectives of the Trust since separate books are required to be maintained for such a business. As a matter of fact such books of accounts are being maintained all along and have never been a focal point of dispute between the assessee and the department. The principle that a business undertaking can also be in the nature of “*a property held under a trust*” thereby entitling it to tax exemptions finds statutory recognition in Section 11(4) of the Act.

31. As regards the amendment in definition of ‘*charitable purpose*’ in Section 2(15) of the Act with effect from 01.04.2009, it is submitted that the said amendment does not extend to the first three heads of charity in Section 2(15). Hamdard relies upon CBDT’s Circular No. 11/2008 dated 19.12.2008, which clarified that the newly inserted proviso to Section 2(15) does not apply in respect of ‘relief of the poor’, ‘education’ or ‘medical relief’.

“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."

...

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(23 C) of the Act if they carry on commercial activities."

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."

Reliance is also placed on the speech of the Finance Minister relating to the amended definition of 'charitable purpose', wherein he had stated that it is not meant to apply to genuine charitable organisations.

32. Thus, Hamdard submits that the scope, ambit and mischief of the newly introduced proviso is confined only to organisations which come under the fourth category of the definition of "charitable purpose", namely "advancement of any other object of general public utility" and it is not the intention of the legislature to target institutions engaged in genuine charitable activities. Further, it is contended that this Court in *Hamdard Dawakhana (Wakf) (supra)* has held that Hamdard's objects and activities are specifically relatable to and identifiable with the first three heads of charity; and that Hamdard's business is a business held under trust and is merely incidental to the effectuation and fulfillment of the charitable

purpose. Therefore, given the decision in *Dharmadeepti v. CIT*, (1978) 3 SCC 499, Hamdard's objects cannot be said to fall outside the scope of definition of 'charitable purpose' in Section 2(15).

Reopening of Assessment Proceedings

33. Hamdard contends that the reopening of assessment proceedings is based merely on a change of opinion on the same set of facts, and thus, the notice of reopening of proceedings and order dismissing Hamdard's preliminary objections to such reopening ought to be quashed.

34. The AO in the assessment order of HNF for Assessment Year 2005-06 observed as under:

"The main source of income is derived from Hamdard Dawakhana (Wakf). The income of the assessee is also stated to be applied on public charity as relief to the poor, education, medical relief and advancement of other objects of general utility. The activities of the assessee are charitable within the meaning of section 2(15) of the Income-tax Act. As such, exemption is allowed to the assessee u/s 11 of the Income-tax Act, as claimed."

It is submitted that there is no change in the objects and activities of Hamdard since AY 2004-2005. For AY 2005-06, it has duly declared a sum of ₹25,63,40,455/- as profits and gains of business or profession, leaving no doubt about the disclosure made by it. Further, the fact that Hamdard was donating its income to HNF was known to the Revenue even at the time of passing of the original assessment order and has been so since 1964. This does not, in law, denude Hamdard of its charitable character. Hamdard also highlights that HNF's charitable nature has been affirmed by the Revenue.

35. Hamdard further submits that the proviso to Section 147 is squarely applicable, disabling the Revenue from issuing the notice of reopening after the expiry of 4 years from the end of the concerned assessment year. Further, it is a change of opinion on the part of the AO on the same facts as had been examined by his predecessor and the AO is not empowered to review the order passed by his predecessor by invoking the provisions of section 147/148 of the Act. Reliance is placed on the decisions in *CIT v. Kelvinator of India Ltd.*, (2002) 256 ITR 1, approved by the Supreme Court in (2010) 320 ITR 561 (SC); *BLB Limited v. ACIT*, (2012) 343 ITR 129 (Delhi); *Atma Ram Properties Pvt. Ltd. v. DCIT*, (2012) 343 ITR 141; *CIT v. Purolator India Ltd.*, (2012) 343 ITR 155; *Titanor Components Ltd. v. ACIT*, (2012) 343 ITR 183; *CIT v. Cray Research India Ltd.*, (2012) 343 ITR 212; and *Artech Infosystems (P) Ltd. v. CIT*, 206 Taxman 432. Finally, it is stated that the reference to the withdrawal of the notification under Section 10(23C)(iv) of the Act does not justify the reopening and exemption can still be examined under Section 11 of the Act.

Orders dated 10.07.2013 passed by the CIT(A)

36. Hamdard submits that the orders dated 10.07.2013 wrongly record the presence of the authorized counsel for Hamdard, who never attended any proceedings before the second respondent. No such presence is recorded in the order sheets of 28.06.2013 and 08.07.2013. The presence recorded in the order dated 10.07.2013 is contrary to the order sheets dated 28.06.2013 and 08.07.2013. Prior to 28.06.2013, the second Respondent had not even assumed charge of the office of CIT(A). Accordingly, on 19.07.2013, the counsel for Hamdard wrote to the second respondent, categorically refuting

the factum of his presence, even once, in the appellate proceedings before the said officer.

37. Hamdard further contends that the orders dated 10.07.2013 do not deal with any submission or authority contained in the detailed written submissions dated 04.03.2013 and 06.05.2013, filed by it or the submissions made by Hamdard's counsel before Respondent No. 2's predecessor. They are a replica of the order dated 22.02.2012 passed by the DGIT(E), which was set aside by this Court in WP No. 3598 of 2012.

38. According to Hamdard, a valuable right of oral hearing available to it has been rendered nugatory by the second respondent. It is incomprehensible that an appeal which was heard at length by the predecessor of the second Respondent over several months was allegedly "heard" by the second Respondent on one day, and that too in the absence of the counsel for Hamdard. The appeals filed by Hamdard were heard in part by Mr. V.K. Tiwari, the erstwhile CIT(A), and were never heard by the second respondent, who passed the appellate (impugned) orders. In a judicial or a *quasi*-judicial proceeding, the passing of a final order by an officer who has not himself heard the matter is violative of the principles of natural justice. Without having heard the matter personally, the second Respondent could not have drawn sustenance from presence of the counsel for Hamdard in the proceedings before his predecessor, as admittedly the said counsel has never appeared and argued the matter before him. Hamdard relies upon the decisions in *G. Nageswara Rao v. APSRTC*, AIR 1959 SC 308; *R. Jagdishchand v. Dy. Collector of Customs*, AIR 1963 Cal 331; *Amir Singh v. Government of India*, AIR 1965 Punjab 84 and *Chatro Devi v. Union of*

India, 137 (2007) DLT 14.

39. Further, it argued that the second Respondent abused his position and power as a senior appellate authority, and exercised undue influence over the second Petitioner by making him sign backdated order sheets, under the pretext of completing the record. The second Respondent did not indicate to the second Petitioner that the matter was being concluded and that he was on the verge of passing an order. The right of first appeal before the CIT(A) is a valuable remedy, available to an assessee, and the same cannot be set at naught by the adoption of such an improper and *mala fide* approach. Thus, it is submitted that the orders dated 10.07.2013 have been rendered in the exercise of a colourable procedure and in gross violation of the principles of natural justice, and are thus, void and *non-est*.

Submissions on Behalf of Revenue

Withdrawal of Exemption Under Section 10(23C)(iv)

40. Mr. Rohit Madan, learned Counsel for the Revenue, justifies the withdrawal of exemption under Section 10(23C)(iv) of the Act, stating that the impugned order comprehensively deals with all the facts in light of the prevalent position of law. It is stated that Hamdard is engaged purely in business activities and accordingly notification dated 28.12.2007 under Section 10(23C)(iv) for AY 2004-05 onwards has been withdrawn. The assessment records for AY 2006-07 to 2009-10 show that Hamdard is carrying on the business of manufacturing and sale of medicine on commercial scale and donating a part of its surplus to its sister organization – HNF. Revenue has relied on the following chart in support of its contention:

	AY 2006-07	AY 2007-08	AY 2008-09	AY 2009-10
<i>Gross Surplus</i>	352001618	390139031	650201108	842529235
<i>Less:-15% as General reserve</i>	-52800243	58520855	97530166	126379385
<i>Donations and Corpus Funds to HNF</i>	-158400000	294381000	292600000	348000000
<i>Applied to Fixed Asseets</i>	-19311271	13604038	13230941	25342372
<i>Applied for ongoing projects</i>	19817621	23109268	5597738	0
<i>Utilization of accumulation of previous year</i>	19817621	23109268	5597738	0
<i>Accumulation</i>	124901014	23633138	246840001	342806088

41. The Revenue argues that a bare reading of Section 2(15) reveals that Hamdard's purposes are not covered by the definition of 'charitable purpose' because it engages only in manufacture and sale of Ayurvedic and Unani Medicines like any other organization manufacturing pharmaceutical products. The revenue also urges that Hamdard has enjoyed huge profit margins year after year and generates huge surplus. Therefore, by no stretch of imagination, it contends, can this activity be equated with any charitable organisation.

42. Revenue disputes that the objects of Hamdard and HNF are identical. While both Hamdard and HNF are registered under Sections 12A read with 12AA of the Act, the objects of Hamdard are commercial in nature, i.e. manufacture and sale of Ayurvedic and Unani Medicines on commercial basis like any other pharmaceutical organization manufacturing medicines - with the sole intention of earning profit. The revenue submits that although Hamdard's objects are charitable, its entire activity is of manufacturing and selling medicines, which implies that it is a commercial organization. Transfer of a part of the surplus generated from such activity to a charitable organization (HNF) would not mean that the assessee is also a charitable

institution.

43. In response to Hamdard's reliance on this Court's decision in *Hamdard Dawakhana (Wakf) (supra)*, the Revenue submits that this Court did not minutely analyse Hamdard's activities in that case. Since this was done for the first time, it cannot be said that the Revenue has attempted to dislodge a settled position of law. Further, it is submitted that the Court in *Hamdard Dawakhana (Wakf) (supra)* did not find Hamdard's activities to be falling within the first three heads of charity under Section 2(15) of the Act; in fact, Hamdard's activities fall within the residual category under Section 2(15).

44. Mr. Madan urges that the DGIT(E) has correctly held that Hamdard violated conditions (a), (b) and (c) of the order granting exemption dated 28.12.2007. Hamdard has accumulated and applied its income towards its business activities – involving manufacture and sale of unani medicines and other allied products. This does not constitute application/accumulation of income towards its objects. Further, Hamdard has accumulated its income in excess of five years, in violation of the second part of condition (a) in the order of exemption.

45. Mr. Madan reiterates that Hamdard has not invested its surplus in accordance with the provisions of Section 11(5) of the Act, as the said provision does not permit investment in business activities. He submits that none of the decisions relied upon by Hamdard deal with a case of investment in business.

46. As regards condition (c), it is stated that it is an admitted fact that

Hamdard has not been maintaining separate books of accounts for its income applied to charitable activities. Hence, there is a blatant violation of condition (c) imposed in the order of exemption as well seventh proviso to Section 10(23C), which disentitles it for the exemption granted by the revenue under the law. Hamdard's contention that Section 11(4A) does not apply to businesses held in trust does not hold good in light of the Supreme Court's decision in *Thanthi Trust*.

47. It is further submitted on behalf of the revenue that Hamdard ceases to be a charitable institution in light of the amended definition of 'charitable purpose' with effect from 01.04.2009. The first proviso extends to institutions falling within the residual category of 'charitable purpose' in Section 2(15), including Hamdard, and does away with the test laid down in *Surat Art Silk (supra)*. Therefore, it is immaterial that Hamdard applies its surplus towards charitable activities. Since it carries on an activity of trade, commerce and business, it ceases to be a charitable organisation with effect from 01.04.2009.

Reopening of Assessment Proceedings

48. The Revenue's justification for reopening the assessment proceedings for AY 2005-06 is premised primarily on the withdrawal of Hamdard's exemption under Section 10(23C)(iv) of the Act. In addition, it is contended that there was no procedural irregularity in reopening the assessment under Sections 147/148 of the Act.

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49. It is urged that the second Respondent stated that Hamdard was

afforded opportunity of hearing and lists the various dates on which hearings were scheduled. It is argued that the hearing in this case commenced on 18.01.2013, and Hamdard requested for adjournment on 30.01.2013, 25.02.2013, 26.03.2013, 11.04.2013 and 28.06.2013. Further, there was no compliance by Hamdard for the hearings scheduled on 30.04.2013 and 28.05.2013. The case was heard only on 04.03.2013 and 07.05.2013 and 08.07.2013. It is incorrect that Hamdard's counsel never appeared in the appellate proceedings, as he appeared on 07.05.2013 when the matter was discussed with him. On 28.06.2013, Shri Javed Naseem, CA & Corporate Head (Finance) of Hamdard attended office and requested for adjournment and the case was adjourned to 08.07.2013. Shri Javed Naseem attended office on this date and the case was heard.

50. It is contended that that since Hamdard's written submissions dated 04.03.2013 and 06.05.2013 were already on record, they were good enough for the said respondent to understand Hamdard's submissions, keeping in mind the oral submissions made on the respective hearings. Further, it is incorrect that the orders dated 10.07.2013 do not deal with Hamdard's submissions.

51. The second Respondent, while denying allegation that the second Petitioner met him on 29.06.2013 as it was not a working day, states that on 28.06.2013, the said petitioner attended the said respondent's office and requested for adjournment. Accordingly, the case was adjourned to 08.07.2013 for hearing. The second Respondent denies having called the second Petitioner on 08.07.2013, or that he was asked to sign the order sheets for 28.06.2013 on 08.07.2013.

Analysis and Conclusions

52. As noted at the outset of this Court's judgment, the focal point of the six writ petitions involved here is the nature of the objects and activities carried out by Hamdard. Indeed, this Court's determination as regards Hamdard's entitlement to exemption under Section 10(23C)(iv) of the Act has a direct bearing on the outcome in W.P.(C) 3599 of 2013 (reopening of assessment for AY 2005-06) and WP (C) Nos. 5715, 5716, 5718 and 5729 of 2013 (validity of CIT(A)'s orders dated 10.07.2013). Therefore, this Court proceeds to examine this issue first.

Grounds for withdrawal of exemption under Section 10(23C)(iv)

53. In the order dated 28.12.2007, the DGIT(E), while granting exemption to Hamdard under Section 10 (23C)(iv) of the Act with retrospective effect from AY 2004-05, had imposed the following conditions on Hamdard, which were to be continuously complied with to seek exemption:

“(a) the assessee will apply its income, or accumulate for application wholly and exclusively to the objects for which it is established and in a case where more than fifteen per cent of its income is accumulated on or after 1st day of April, 2002, the period of the accumulation of the amount exceeding fifteen per cent of its income shall in no case exceed five years:

(b) the assessee will not invest or deposit its funds (other than voluntary contributions received and maintained in the form of jewellery, furniture etc.) for any period during the previous year relevant to the assessment years mentioned above otherwise than in any one or more of the forms or modes specified in sub-section (5) of Section 11;

c) this order will not apply in relation to any income being profits and gains of business unless the business is incidental to the

attainment of the objectives of the assessee and separate books of accounts are maintained in respect of such business;

(d) the assessee will regularly file its return of income before the Income tax authority in accordance with the provisions of the Income Tax Act. 1961;

(e) that in the event of dissolution, its surplus and the assets will be given to a charitable organisation with similar objectives.

(f) The assessee will get its accounts audited by an accountant as defined in explanation below sub-section (2) of section 288 and furnish them along with the return of income. The report of such audit in the prescribed form duly signed and verified by such accountant and setting forth such particulars as may be prescribed.”

54. In the impugned order dated 21.08.2013, the DGIT(E) examined Hamdard's compliance with the above conditions. The DGIT (E) held that Hamdard's objects fell within the purview of the residual class under Section 2(15) (viz. 'advancement of any other object of general public utility'), and not just within the first three categories (i.e. relief of the poor, education and medical relief). He then cited the following grounds for withdrawal of exemption under Section 10 (23C) (iv):

- a. Hamdard had applied as well as accumulated its income not in terms of its objects but towards its business activities, which was not its object.
- b. Hamdard had accumulated beyond 5 years, contrary to the second part of condition (a) stipulated in the order dated 28.12.2007.
- c. Hamdard made investment in business contrary to

condition (b) stipulated in the said order.

d. Hamdard's business is not incidental to the attainment of its objects and it did not maintain separate books of accounts (violation of condition (c)).

e. In view of the amendment to Section 2(15) with effect from 01.04.2009, Hamdard cannot be held to be existing for 'charitable purpose'.

The DGIT(E) relied upon the Supreme Court's decision in *Thanthi Trust (supra)*, and held that the decision in *Surat Art Silk (supra)* which was relied upon by this Court in *Hamdard Dawakhana (Wakf) (supra)* was no longer applicable on account of change of law. This court proceeds to examine the legality of each of the reasons, contained in the impugned order, for the withdrawal of exemption under Section 10(23C)(iv).

55. A clarification is called for at this stage, regarding the scope of applicability of previous decisions of this Court *vis-à-vis* the Hamdard itself. Hamdard underlines that it enjoyed exemption under the Act for these past decades, and that this Court in several cases- for previous assessment years had approved the charitable purpose of the organisation. Further, it underscores that the Revenue had thoroughly examined almost all relevant facts concerning the assessment years in question at the time of granting the exemption. Therefore, it cannot withdraw the exemption under Section 10(23C)(iv), and that too, retrospectively. This contention, however, is not sound, because the Revenue is entitled to continuously monitor an assessee's activities and its compliance with the conditions for grant of exemption,

statutory or otherwise. This has been affirmed by the Supreme Court recently in *Queen's Educational Society v. CIT*, (2015) 372 ITR 699, where Court held:

“...the 13th proviso to Section 10(23C) is of great importance in that assessing authorities must continuously monitor from assessment year to assessment year whether such institutions continue to apply their income and invest or deposit their funds in accordance with the law laid down. Further, it is of great importance that the activities of such institutions be looked at carefully. If they are not genuine, or are not being carried out in accordance with all or any of the conditions subject to which approval has been given, such approval and exemption must forthwith be withdrawn.”

At the same time, this court recognizes that to the extent there is no change in the facts and circumstances of the case- or the law applicable, the Revenue is bound to follow the principle of consistency (see *Radhaswami Satsang v. CIT*, (1992) 193 ITR 321 (SC) and *DIT v. Escorts Cardiac Diseases Hospital Society*, (2008) 300 ITR 75 (Delhi)).

What is the nature of Hamdard's objects?

56. Clauses 44 to 47 of the Trust Deed dated 28.08.1948 stipulate Hamdard's objects. This is undisputed so far as the charitable nature of Hamdard's objects prior to 01.04.2009 is concerned. In light of the amendment to Section 2(15) introduced by Finance Act, 2008, the revenue argues that Hamdard ceases to be a charitable organisation with effect from 01.04.2009 and cites it as an additional ground for withdrawal of exemption from the said date.

57. This Court in *Hamdard Dawakhana (Wakf)* (*supra*) examined

Hamdard's objects and held them to be charitable within the meaning of Section 2(15) of the Act. The clauses enumerating Hamdard's objects continue to remain the same and since the definition of '*charitable purpose*' applicable for the period prior to 01.04.2009 is identical to the one applied by this Court in *Hamdard Dawakhana (Wakf)*, the issue concerning charitable nature of the organization prior to 01.04.2009 is no longer *res integra*. The court would examine the charitable nature of the organisation from 01.04.2009 onwards in the relevant section below.

58. That brings the court to the crucial issue to be considered i.e. whether Hamdard's objects fall within either or all of first three heads of 'charitable purpose' stated in Section 2(15) or within the residual category. While examining Hamdard's objects, the DGIT(E) noted that its primary mode of expenditure on charitable activities is through HNF, and that its direct expenditure on charitable objects is negligible. Further, it was stated that HNF carries out its charity through four Section 12A registered entities, viz. Jamia Hamdard University (education), Hamdard Education Society (HES) (education and residual category), Business and Employment Bureau (BEB) (residual category), All India Unani Tibbi Conference (AIUTC) (residual category) and through Saeda Hospital. It was held that since Hamdard does not have control over the charitable activity of HNF, as it may choose to spend on activities falling within the residual category as opposed to the first three categories of charitable purpose in Section 2(15), Hamdard ought to be classified under the residual category. Hamdard's direct charitable activities were held to be insignificant to have a bearing on the determination of its objects. As regards HNF's direct charitable activities (which constituted

3.6% of HNF's total charity), it was held that 64% of direct charity outlay was for scholarship schemes and the remaining 36% was held to be on 'core charity', i.e., falling within the first three heads of 'charitable purpose' under Section 2(15).

59. Hamdard's contention, both before the DGIT(E) and this Court, is that this Court in *Hamdard Dawakhana (Wakf)* (*supra*) had held the objects of Hamdard to be falling within the first three categories of Section 2(15). However, the DGIT(E), in our opinion, rightly rejected this contention. Although the revenue in that case had urged that the objects fell within the residual category, the Court did not render a finding on this issue. The Court, while applying the test laid down in *Surat Art Silk* (*supra*), held that Hamdard applied the surplus generated from its business for charitable purposes, and therefore, it was not '*involved in carrying an activity for profit*'. If anything, it *may be* contended that the Court considered Hamdard's objects to be falling within the residual category, for, if the objects fell within the first three heads of charitable purpose, Hamdard would have been entitled to exemption from tax "*even if an activity for profit [was] carried on in the course of the actual carrying out of the primary purpose of the trust*" (Ref. *Surat Art Silk*) and the Court would not have been required to delve into the issue of whether Hamdard was involved in carrying an activity for profit. However, this Court does deem it appropriate to go so far as to infer this from the said decision.

60. A preliminary issue to be decided here is whether the nature of objects/activities of HNF, as well as the third set of trusts (i.e. Jamia Hamdard University, HES, AIUTC, BEB) has a bearing on the classification

of Hamdard's objects. The DGIT(E)'s approach on this aspect is perplexing. On the one hand, it held that the nature of activity of third set of trusts, i.e. Jamia Hamdard University, HES, BEB and AIUTC would not impact the determination of nature of Hamdard's objects. On the other hand, the DGIT(E) relies on the fact the Hamdard does not carry out its charitable activities directly, and since its donees may choose to apply the donations to charitable activities falling in the residual category, Hamdard ought to be within the residual category. In the opinion of this Court, while the activities of 'donee trusts' may have *some* relevance for determining the nature of Hamdard's objects for the purposes of Section 2(15), the primary basis for such determination must needs be Hamdard's trust deed containing its objects.

61. Now, coming to an examination of Hamdard's objects, Clause 44 (a) of the Deed dated 28.08.1948 lists out objects of public charity to include '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 of profit'. At first look, it would appear that the object is to promote charity generally, as opposed to limiting to any specific class of charitable objects. However, clause 45 of the Deed specifies the heads of charity, which may be classified under 'education' (sub-clauses 45(1) and 45(2)) and 'medical relief' (sub-clause 45(3)). Clauses 46 and 47 permit Hamdard to engage in other activities which would qualify under the head of '*relief for the poor*'. While Hamdard may pursue charitable activities for the advancement of objects of general public utility (owing to the generality of clause 44), clauses 45, 46 and 47 indicates that Hamdard's objects fall

within the first three categories of ‘charitable purpose’ spelt out in Section 2(15), and not in the residual category. Here, this Court relies on the Supreme Court’s ruling in *Dharmadeepti* (supra), where the Court construed a general provision concerning charitable object in the trust deed in light of a specific clause. The Court observed:

“Having regard to the language used and the context in which the two main objects are set forth, it would be reasonable to identify the expression ‘to give charity’ and ‘to promote education’ with the first two heads ‘relief of the poor’ and ‘education’ in the definition of ‘charitable purpose’ in Section 2(15) of the Income Tax Act. If the Memorandum of Association had referred to ‘charity’ as the sole object without any limitations, including those prescribed by the context, it may have been possible to extend it to all the four heads mentioned in Section 2(15), as was done in Chaturbhuj Vallabhdas v. Commissioner of Income-Tax 14 I.T.R. 144. But the words are ‘to give charity’; and then ‘to promote education’ is also specified. Obviously, the former must, bear a limited meaning. To our mind, the most appropriate seems to be ‘relief of the poor’. That being so, neither of the main objects can be classed under the residual general head ‘the advancement of any other object of general public utility’.”

62. Turning now, to examine the nature of HNF’s objects, this Court finds that they are identical to those of Hamdard, and the Revenue’s contention to the contrary is without any merit. Textually, HNF’s objects and ‘functions’ would indicate that HNF only has the additional objective of receiving, controlling and supervising the income received from Hamdard and any other body and applying it for the purposes enumerated thereafter, which are identical to clauses 44 to 47 of Hamdard’s Trust Deed. The fact that they have been classified under two different heads, viz. ‘objects’ and ‘functions’ is immaterial, as it is only a matter of form and does not alter the manner of

application of donations received by HNF.

63. The DGIT(E) in the impugned order dated 21.08.2013 as well as in the affidavit on record admits that HNF's main activity is donation to Jamia Hamdard University – which qualifies under 'education' in Section 2(15). Further, it was noted that HNF is making 'relatively small donations' to HES, BEB and AIUTC. It was held that HES is carrying out charitable activities falling in the first three categories as well as the residual category, whereas BEB and AIUTC are carrying out charitable activities under the residual category. This Court does not deem it necessary to examine the activities of HES, BEB and AIUTC in detail, for it has already found that Hamdard's and HNF's objects fall within the first three categories of 'charitable purpose' under Section 2(15), and the fact that HNF's charitable activity carried out through Jamia Hamdard University - admittedly comprising of bulk of HNF's charity – also falls under one of the first three categories ('education'). Further, the DGIT(E) itself has held that 36% of HNF's direct charity falls within the first three heads of 'charitable purpose'. As regards the balance 64%, the DGIT(E) erroneously classified scholarship schemes under the head 'object of general public utility'. However, this Court holds that since scholarship schemes are directed towards incentivising students to pursue education, it must fall under the category of 'education' as opposed the residual category. This determination sufficiently establish that Hamdard's objects fall within the head of 'education', 'medical relief' and 'relief of the poor', and not the residual category under Section 2(15).

64. The DGIT(E) held that while running an educational institution is

‘core charity’ – falling within the head of ‘education’ under Section 2(15), donating the surplus to an educational institution would not qualify Hamdard under the category of ‘education’. Hamdard submits that the funding of activities falling within the first three categories is by itself a charitable purpose within the same categories, and relies upon the Supreme Court’s decision in *Aditanar Educational Institution v. Additional CIT*, (1997) 3 SCC 346. This Court does not find any support for Hamdard’s contention in *Aditanar*, since in that case, the Court relied upon the fact that the object of the assessee was to establish, run, manage or assist colleges or schools, as opposed to merely financing the same. However, the Revenue’s plea fails for another reason. In light of the decisions in *Sarladevi Sarabhai Trust* (*supra*) and *Shri Ram Memorial Foundation* (*supra*), it is well established that an entity carrying out its charitable activities through another charitable institution is entitled to exemption under the Act. For instance, a trust may donate its surplus to another trust, which runs and manages an educational institution, or transfers the surplus received to another educational institution.

65. *Sarladevi* (*supra*) held as follows:

"We respectfully agree with the view expressed by the Bombay High Court on the point. Our attention was also invited by Mr. Patel for the assessed to a decision of the Calcutta High Court in the case of [CIT v. Hindusthan Charity Trust](#) [1983] 139 ITR 913. In that case, a Division Bench of the Calcutta High Court consisting of Sabyasachi Mukharji J. (as he then was) and Suhas Chandra Sen J. had to consider the question whether donation given by one charitable trust to another trust under the bona fide belief that the donee was a charitable trust would be covered by the provisions of [Section 4\(3\)](#) of the Indian Income-tax Act, 1922,

which is the forerunner of [Section 11](#) of the Income-tax Act, 1961. The Calcutta High Court, speaking through Sabyasachi Mukharji J., in terms, held that the assessed donor trust was entitled to exemption under [Section 4\(3\)](#) of the Income-tax Act. It must, therefore, be held that when a donor trust which is itself a charitable and religious trust donates its income to another trust, the provisions of [Section 11\(1\)\(a\)](#) can be said to have been met by such donor trust and the donor trust can be said to have applied its income for religious and charitable purposes, notwithstanding the fact that the donation is subjected to any conditions that the donee trust will treat the donation as towards its corpus and can only utilise the accruing income from the donated corpus for religious and charitable purposes, and that the question whether the gifted income is to be utilised by the donee trust fully for its religious and charitable purposes or whether the donee trust had to keep intact the corpus of the donation and has to utilise only the income there from for its religious and charitable purposes, would not make the slightest difference, so far as entitlement of the donor trust for exemption under [Section 11\(1\)](#) goes."

66. The above decision of the Gujarat High Court was concurred in *Shriram Memorial Foundation (supra)* by a Division Bench of this Court. It is settled, therefore, that the trust which donates the surplus at the first instance would be qualified for exemption under Act, for its activities would be charitable in nature. While determining the head of 'charitable purpose' under which the said trust falls, it would be inharmonious to not relate it to the nature of activity carried out by the donee trust, or the third set of trust/institution to which the donee trust transfers its surplus. Therefore, if the donee trust is engaged in managing an educational institution, the first trust's charitable activity would also fall under the category of 'education'. The Revenue's contention that donation of surplus by Hamdard to HNF,

which transfers its surplus primarily to Jamia Hamdard University, does not come within the head of ‘education’ is rejected.

67. Hamdard had been carrying out its since charitable activities through HNF since the latter was set up, and HNF enjoyed the benefit of exemption under Section 11 of the Act since its inception on 12.05.1964. HNF’s charitable status was further approved by the CIT(A) in its order dated 31.01.2012. However, the DGIT(E) has drawn a distinction between corpus and non-corpus donations of Hamdard to HNF, the non-corpus fund – which is the source of HNF’s charity – comprises of a small proportion of Hamdard’s total donation to HNF. In other words, the DGIT(E) held that the predominant portion of donation is applied towards building HNF’s corpus as opposed to being applied for charitable purposes and the extent of actual charity carried out by HNF is not significant. However, in this Court’s opinion, Hamdard rightly contends that the DGIT(E) erroneously drew a distinction between corpus and non-corpus donations made by it to HNF. The resolutions of Hamdard placed on record clearly mandate that the interest income generated from corpus donations was to be utilized for charitable purposes.

Whether Hamdard accumulated and applied its income towards its objects?

68. The DGIT(E) held that Hamdard accumulated and applied its income towards expansion of its business – and since Hamdard’s business does not form a part of its objects, it was in violation of condition (a) imposed in the order of exemption dated 28.12.2007. Hamdard submits that the application of its current and accumulated surplus for sustaining and augmenting the income generating capacity of its charitable corpus constitutes an application

for charitable purpose. It relies on the decisions in *DIT v. Abul Kalam Azad Islamic Awakening* 2013 VAD (Delhi) 44; *DIT v. Govindan Naicker Estate*, (2009) 315 ITR 237; *CIT v. St. George Forana Church*, (1988) 170 ITR 63. It is submitted that the application/permitted accumulation of its income for capital expansion and maintenance of charitable assets is indispensable and incidental to the effectuation of its charitable purpose. It would, therefore, be appropriate to first examine the objects of Hamdard, prior to determining whether its application and accumulation of income is in accordance with the same.

69. The starting point for discussion is this Court's decision in *Hamdard Dawakhana (Wakf)* (*supra*), where, upon an examination of Hamdard's objects and its activities, the dominant object of the trust was to held be charitable and not carrying out a business activity. The Revenue's contention that this Court in that case did not have the opportunity to examine the actual nature of the activity carried out by Hamdard is unfounded. The revenue had then contended that Hamdard's objects also included running commercial institutions, laboratories, schools, inns, publication of books etc. and therefore, it should be denied exemption under the Act. However, the Court rejected this contention, and held that the objective of the trust was to apply the income for charitable purposes, and therefore, exemption could not be denied. The relevant observations of this Court merit reproduction herein, as follows:

“16. Thus, the emphasis [of the Revenue] is on the fact that this charity is carrying on a business, namely, the Hamdard Dawakhana. In fact, the dedication is of a business because the dedicated property is neither any building, nor any

trade mark, but the business of the Hamdard Dawakhana. It is, therefore, urged that this is not a charitable purpose at all and hence no exemption can be granted...

17. We find that on a proper construction of the Act, this is not the meaning to be given to the definition. In order to have a charity, you must have a source of income. The income may come from gifts, or it may come from running a business. In this case, the trust is of a portion of the income of the Hamdard Dawakhana. Although the source of the income is a business, the object of the trust is not to run that business, but to utilise the income of that business for a charitable purpose...

18. In our view, the entire point is now covered by the Supreme Court's judgment in Addl. CIT v. Surat Art Silk Cloth Manufacturers Association [1980] 121 ITR 1 (SC). The court pointed out in that case that when the object of a trust was the carrying on of an object of general public utility, it is that object of general public utility which must not involve the carrying on of an activity for profit. It was pointed out that it was immaterial how the money for achieving or implementing such purpose was found. Whether that money was obtained by the running of an activity for profit or not, did not make the charity not charitable. Thus, in the present case, no doubt, the trust earns the money from the Hamdard Dawakhana. If that money is used for charitable purpose and not for the carrying on of any business at a profit, then the object of the trust is charitable, notwithstanding the source of the income.

19. It is hardly possible for a charitable trust to work with no source of income. So, the makers of the trust in the present case, dedicated a portion of the income of the business for being used for charitable purpose As long as the user of that money is charitable, then the exemption has to be granted.

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26. It was submitted before us that clause 46 shows that it is possible to use the trust even for running profitable businesses such as commercial institutions, schools, laboratories, inns and

also by publication of books. Thus, a non-charitable purpose was visualised by this trust.

27. No doubt, the words actually used do suggest that conceivably the trust income could be used for non-charitable purposes. At the same time, we think that the object of the trust was not to use the income for non-charitable purposes. When one visualises that education and medical relief are themselves charitable purposes within the meaning of section 2(15), we do not see why the charitable income cannot be used for running such educational and commercial institutions. What is visualised is the running of institutions for the employment of the poor. Similarly, the inns referred to in clause 46 are really not hotels run for commercial purposes, but sera is for the housing of the poor. The context in which the objects have been specified shows that the income has to be used for charitable purposes. The enumeration of charitable purposes, if not read in the context in which they are used, can give rise to an inference that the money is to be used for non-charitable purposes. The proper way to construe the document is to visualise the fact that the executants wanted to make a charitable trust and they also specified in what way the charitable income was to be used. You can use income to set up a factory at a profit and you can also use the income to set up a poor house for employment of poor people. The effect may be the same, i.e., the setting up of a commercial establishment, but the object is different. One is to run an institution for profit and the other is to provide employment to the poor by giving them work and income. Similarly, in making a graveyard or a mosque or an inn, the money is used for charitable purposes or it may be used for profit by selling the space, e.g., by making income from the inn. If you read it in the context in which the utilisation of the charitable money is being indicated, then you can infer that the real purpose is not to run a charitable institution, but one which results in a charity. The ambiguity of reading one or the other meaning has been removed by the clarification dated March 24, 1964, made by the executants, to the effect that the money will only be used for charitable purposes and clauses 45 to 49 will be read as denoting only a charitable utilisation of the money of the trust.”

(emphasis supplied)

70. Hamdard's objects, as laid down in its Trust Deed, continue to remain the same as those considered in *Hamdard Dawakhana (Wakf)* (*supra*). However, the DGIT(E) in its impugned order did not follow the ruling in *Hamdard Dawakhana (Wakf)*, stating that the latter relied upon *Surat Art Silk* (*supra*), which is no longer applicable in light of the Supreme Court's decision in *ACIT v. Thanthi Trust*, (2001) 247 ITR 785 and Section 11(4A), which was introduced subsequent to the decision in *Surat Art Silk* (*supra*).

71. The Supreme Court in *Thanthi Trust* did not discuss the issue of applicability of the test laid down in *Surat Art Silk* (*supra*) in light of the insertion of Section 11(4A). The DGIT(E)'s ruling – that *Surat Art Silk* (*supra*) is no longer applicable in light of the decision in *Thanthi Trust* – presupposes, at the least, the applicability of Section 11(4A) to instances of businesses held in trust, such as the instant case (and it was so held by the DGIT(E), in its impugned order). However, this Court (for reasons explained in the section concerning violation of condition (c) below) holds that in light of the decision in *CIT v. Mehta Charitable Prajnalay Trust*, (2013) 357 ITR 560, Section 11(4A) is not applicable to Hamdard's case. Further, the Supreme Court in *CIT v. Gujarat Maritime Board*, (2007) 295 ITR 561 as well as in its recent decision in *Queen's Educational Society* (*supra*) has also applied the *Surat Art Silk* (*supra*) test to determine the dominant object of the respective assessee, notwithstanding its earlier pronouncement in *Thanthi Trust* (*supra*) and the insertion of Section 11(4A). This Court in *Institute of Chartered Accountants of India v. DGIT*, [2013] 358 ITR 91 has also held that the dominant object test of *Surat Art Silk*

(*supra*) continues to apply for determining whether an entity carries on business. The reliance placed by the DGIT(E) on *CIT v. Dharmodayam*, (2001) 116 Taxman 204 is out of place, as the Supreme Court in that case did not hold that the *Surat Art Silk (supra)* test had been rendered obsolete in light of the insertion of Section 11(4A). In light of this overwhelming authority in favour of Hamdard on this issue, this Court has no hesitation in holding that the DGIT(E) erred in holding that the dominant purpose test laid down in *Surat Art Silk (supra)* does not apply in light of the decision in *Thanthi Trust* and insertion of Section 11(4A). As a result, the DGIT(E)'s basis for rejecting this Court's determination in *Hamdard Dawakhana (Wakf) (supra)*, on the nature of Hamdard's objects, does not survive.

72. To construe Hamdard's objects, the Supreme Court's decision in *Thiagarajan Charities (supra)* is instructive. In that case, the objects of the trust in question contained a clause (Clause 1(g)) which allowed the trust to "engage in, carry on, help, aid and assist and promote rural reconstruction work, cottage industry and all other matters incidental thereto in India". Further, clause 7(e) of the trust deed therein allowed the trust to invest in any business undertaking to be carried on by the trust. The trust carried on business of purchase and sale of cotton yarn. Based on Clause 1(g), the revenue contended that the object of the trust was to carry on activity for profit and therefore, the object of the trust was not charitable within the meaning of Section 2(15) of the Act. While holding that the business of the trust was carried out under clause 7(e) of the trust deed, the Court held that clause 1(g) of the trust deed did not mean that the object of the trust was to carry on a business with the motive of earning profits. Instead, as in

Hamdard's case, it provided the trust with the means of achieving the objects of the trust – which was education, medical relief and relief for the poor. The Court further ruled that the business run by the trust was a part of its corpus, and thus a business held under trust.

73. This Court in a series of decisions has considered the absence of profit motive to be a vital factor in determining the charitable nature of an entity (see *M/s. GSI India v. DGIT*, [2014] 360 ITR 138; *Institute of Chartered Accountants of India v. DGIT*, [2013] 358 ITR 91; *PHD Chamber of Commerce & Industry v. DIT*, (2013) 357 ITR 296). A look at Hamdard's Trust Deed and its activities unequivocally establish that they are not guided by profit motive. Indeed, in furtherance of the charitable purpose, Hamdard's Trust Deed dated 28.08.1948 was amended on 10.10.1985 with effect from 01.01.1973 to abolish the concept of family income; and all proceeds generated from Hamdard's activities are solely in furtherance of its charitable objectives. The relevant declaration reads as follows:

“6. That the words ‘Khandani Income’ and all provisions and references relating thereto, wherever they appear in the Wakf Deed and/or in the subsequent declarations, modifications and amendments thereto, or elsewhere, are abrogated, annulled and deleted therefrom and the Hamdard Dawakhana (Wakf) is 64/64 or 100% Charitable Wakf and there is no Khandani Income whatsoever and no private beneficiary whomsoever.”

74. The Revenue urges that Hamdard had been enjoying enormous profit margins year after year, generating considerable surplus and consequently, its activities cannot be considered as those of a charitable organisation. However, this submission runs afoul a plethora of Supreme Court decisions, the most recent being *Queen's Educational Society (supra)*, where,

following the law laid down in *Surat Art Silk (supra)*, *Aditanar Educational Society (supra)* and *American Hotel and Lodging Association v. CBDT*, (2008) 301 ITR 86, the Court held that merely because an educational institution is generating surplus does not imply that it ceases to enjoy the benefit of exemption under Section 10(23C)(iii-ad) of the Act.

75. The next issue to be examined is whether Hamdard applied and accumulated its surplus towards its objects. The DGIT(E) found that Hamdard had been applying its surplus and accumulated income towards fixed assets and ongoing projects relating to Hamdard's business. These included Hamdard's new factories at Okhla and Manesar, Herbs and Medicinal Plants Cultivating Project, Muffadarat Plant Ghaziabad and Multi Speciality Hospital and Medical College (Jamia Hamdard University's project). The DGIT(E) held that only the Multi Speciality Hospital and Medical College project was charitable in nature, while the others were in furtherance of Hamdard's business and not its objects. Insofar as the former was concerned, since it was a project of Jamia Hamdard University, the DGIT(E) held that Hamdard could not claim application of funds towards that project as application for charitable purposes.

76. Hamdard relies on this Court's decision in *Abul Kalam Azad Islamic Awakening (supra)* to contend that application of current as well as accumulated surplus for the purposes of augmenting the income of a charitable institution is permissible, and does not lead to cessation of charitable nature of the institution. Specifically, the following observations have been cited:

“7.2 Clause (x) of Sub sec. (5) to sec. 11 prescribes one of the

modes of investment as "investment in immovable property". Thus, the surplus income can be applied to investment in immovable property. The charitable purposes will include the educational activities and acquiring the income yielding assets to promote the educational objects of the Society. Consequently, combined reading of these provisions make it clear that the assessee can set apart or invest its income in an "immovable property". The word "immovable property" by natural reading, will include any type of land, residential or commercial property or any other form of property, which can be termed as immovable property as defined in the Transfer of Property Act. Thus, the society/ management is allowed to invest its surplus in immovable property, including commercial property. Thus, there cannot be a bar on management of Society to invest its surplus funds in acquisition of a commercial property as the law does not mandate any extra bar.

7.3 Coming to the other aspect that because the assessee is not carrying out any educational activity in this commercial property, therefore, the investment becomes for non-charitable purposes and the assessee has endeavored to enter into business operations. In our view the assessee's charitable objects include spreading education and opening of schools; investment even in commercial property assets remains charitable purposes so long as the income generated by it is applied to charitable objects. It has not been demonstrated that the assessee applied rent received from these properties to any non-charitable purposes. Besides, it has not been demonstrated that the assessee's intention was to enter in business of purchase and sale of commercial property inasmuch as we are in year 2012, the property was purchased in FY 2004-05 and the Trust still retains this property. In these circumstances, we are unable to hold that the assessee's investment can be held non-charitable in nature."

However, the DGIT(E) refused to apply the above observations to

Hamdard's case, drawing a distinction between investment in immovable property and investment in business. The DGIT(E) held as follows:

“The assessee is relying on this decision to argue that it is permissible to even buy business assets or engage in business with the accumulated funds as long as the surplus of business is utilised for charity. To my mind, this proposition does not find support from the decision. There is a vast difference between investing in an immovable property and investing in business. In fact Hon'ble Court has approved the investment in immovable property only after taking note of the fact that the assessee was not involved in business of purchase & sale of property as can be seen from the concluding part of para 7.3 quoted above.”

Similarly, the DGIT(E) refused to rely upon *Govinda Naicker Estate (supra)* on the ground that it did not concern investment in business. In *Govinda Naicker Estate*, the Madras High Court had approved exploitation of property for the purposes of augmenting the charitable institution's business.

77. This Court finds that the DGIT(E) misconstrued the nature of Hamdard's activities, inasmuch as it held them to be in the nature of business. This Court has already held above that Hamdard's objects are charitable in nature, and its activities relating to manufacture and sale of unani medicines and other allied businesses are only meant to act as a source of funds for its charitable activities. It is undisputedly a case of a business held in trust, and Hamdard has been consistently applying the proceeds of its activities for charitable purposes.

78. A Full Bench of this Court in *Hakim Abdul Hamid v. CIT*, (1973) 90 ITR 203, concerning Hamdard, held that the amount transferred by Hamdard

to its Reserve Funds would be exempt from tax under Section 11 if it is applied or finally set apart for charitable or religious purposes. The DGIT(E) refused to rely on this decision on the ground that the clauses pertaining to the application of amounts in Reserve Fund no longer exist; and the introduction of Section 13(1)(d) and Section 11(5), which preclude reinvestment of funds into business.

79. This Court does not find either of the aforesaid reasons for non-applicability of *Hakim Abdul Hamid (supra)* to be tenable. *First*, as regards the introduction of new statutory provisions, Section 13(1)(d) merely states that funds not invested or deposited in accordance with the provisions of Section 11(5) would not be available for exemption under Section 11 of the Act. The guiding provision for application of funds of a charitable institution, therefore, is Section 11(5). Section 11(5) does not in any manner precludes the application of funds of a charitable institution for its objects. This Court in *Abul Kalam Azad Islamic Awakening* has held that “*investment even in commercial property assets remains charitable purposes so long as the income generated by it is applied to charitable objects*”. As a result, the insertion of Section 11(5) or Section 13(1)(d) does not negative the applicability of this Court’s decision in *Hakim Abdul Hameed (supra)* to the facts of this case. *Secondly*, the deletion of clauses from the Trust Deed prescribing the mode of utilisation of Reserve Funds is not relevant, as the principle on which this Court held the amounts in Reserve Fund to be exempt from tax would continue to apply. According to the Court, “[f]rom a perusal of the above clauses it would be clear that the Reserve Fund has to be applied primarily for either presenting the Wakf business or for

expanding or developing the said business and as such it retains the character of the Wakf business itself'. The Court further held:

“The creation of the Reserve Fund was necessary in the interest of the Trust itself. If the Trust business has to continue to yield profits which are to be utilised for the purposes for which the Trust was created then it was necessary that a portion of the profit should be transferred to a Reserve Fund. The purpose of the Reserve Fund, therefore, is the same as the purpose of the Trust itself. The trust has a two-fold purpose, namely, benefit to the community at large and maintenance of the family of the Mutawalli. The Reserve Fund also has the same two-fold purpose. To the extent that the Reserve Fund is ultimately utilised for the benefit of the community at large it is exempt from assessment under Section 4(3) (i) of the Act just as the portion of the income from the Wakf business which is set apart for charities has been exempted from assessment by the department itself.”

80. Hamdard continues to apply its income from its ‘business’ activities for charitable purposes in accordance with its Trust Deed. It is baffling that the DGIT(E), on one hand, justified the ruling in *Hakim Abdul Hamid (supra)* on the ground that the reserve fund was to be utilized for Hamdard’s business whereas on the other hand, withdrew the exemption under Section 10(23C)(iv) of the Act for the reason that Hamdard was applying and accumulating its income for business purposes. The DGIT(E) fell into error in reasoning that in light of the deletion of clauses in the Trust Deed – which obligated Hamdard to utilize the Reserve Fund for business purposes – this Court’s decision in *Hakim Abdul Hamid (supra)* does not hold any relevance. This Court also notes that the Revenue granted exemption to Hamdard under Section 10(23C)(iv) of the Act vide its order dated 28.12.2007, with complete knowledge of Hamdard’s activities. It is obvious

that Hamdard would be required to invest funds in such activities in order to sustain its charitable purpose. In such circumstances, it is incomprehensible that the DGIT(E) would construe Hamdard's application or accumulation of funds towards its activities, which constitute a part of its objects, as a violation of any of the statutory conditions imposed under Section 10 or Section 11 or those imposed by the order dated 28.12.2007.

81. In light of the above, this Court holds that the decision in *Abul Kalam Azad Islamic Awakening (supra)*, where it was held the application of income derived from investment in commercial property to be the determining factor, is squarely applicable. Here, too, Hamdard, in accordance with its Trust Deed, has been applying and accumulating its income from business activities for charitable purposes. Hamdard has rightly placed reliance on this Court's decision in *DIT v. Eternal Science of Man's Society*, (2007) 290 ITR 535, where the Court allowed acquisition of moveable and immoveable property if it achieved the objects of a charitable trust. Therefore, this Court holds that Hamdard did not fail to apply or accumulate its income/surplus towards its objects.

Whether Hamdard accumulated its income in excess of five years?

82. The DGIT(E) in his impugned order held that Hamdard accumulated its income beyond five years in respect of accumulations made upto AY 2005-06. It also held that Hamdard had admitted a sum of ₹ 17.21 crores as amount deemed to be income as per Section 11(3) for AY 2010-11, which was not offered to tax in the return filed for the said assessment year.

83. This Court finds that the DGIT(E) has misinterpreted the provision

concerning accumulation of income, third proviso to Section 10(23C) (a), which forms condition (a) in the order granting exemption under Section 10(23C)(iv) dated 28.12.2007. That provision mandates that income accumulated in excess of 15% of the total income should be utilized within five years of the period of accumulation. It does not bar all forms of accumulation. The DGIT(E) has nowhere concluded that Hamdard accumulated in excess of 15% of the income, much less concluding that any amount in excess of 15% accumulated by Hamdard was not utilised within a period of five years of its accumulation. Further, Revenue's contention that Hamdard had admitted a certain amount to be deemed income within the meaning of Section 11(3) of the Act does not conclusively determine the issue. It is settled that estoppel does not apply under the Act and the assessee can resile from an incorrect position it had adopted earlier (see *CIT v. Bharat General Reinsurance*, 81 ITR 303).

Did Hamdard invest its funds in violation of condition (b) stipulated in the order dated 21.08.2013?

84. Condition (b) of the order granting exemption, sourced from sub-clause (b) of third proviso to Section 10(23C), requires Hamdard to invest or deposit its funds in accordance with the provisions of Section 11(5). The DGIT(E) held that Hamdard had failed to comply with this condition, as it has invested its funds in business and not in the modes specified in Section 11(5), beyond 31.03.1993, which is the grace period provided in the 4th

proviso to Section 10(23C) for exemption from the applicability of the 3rd proviso. Hamdard contended that no query was raised by the DGIT(E) on this issue and therefore, it could not present its case. Were Hamdard granted an opportunity, it would have demonstrated that it has fixed deposits of ₹ 419.56 crores, which constitutes investment in the modes specified in Section 11(5). In response to this contention, the Revenue submits that this issue was raised in the DGIT(E)'s order dated 22.02.2012, which had been quashed by this Court in its order dated 11.04.2012. In other words, since all issues raised in the order dated 22.02.2012 were remanded by the Court for fresh determination, specific show cause for each individual violation/query was not required. Further, the Revenue submits that this was raised during the hearings, and Hamdard also made written submissions on the same on 21.05.2013. Since Hamdard has admittedly made investments in ongoing business activities, condition (b) of the order of exemption read with Section 11(5) of the Act has not been complied with.

85. A perusal of the order dated 22.02.2012 indicates that the Revenue had alleged violation of third proviso to Section 10(23C) of the Act. However, there was no finding on the same. Further, the written submissions filed by Hamdard, including the submissions dated 21.05.2013 relied upon by the Revenue, also do not deal with such allegation. Given these facts, this Court does not have any basis to accept the Revenue's contention that this issue was the subject matter of hearing before the DGIT(E). Therefore, the Revenue's submission that Hamdard was aware of allegations of violation of this condition does not have any merit. In such circumstances, Revenue cannot rely upon this purported non-compliance for withdrawal of

exemption under Section 10(23C)(iv).

86. Hamdard has contended that its accumulated surplus is invested in fixed deposits with nationalized banks and therefore, there is no violation of condition (b) imposed in the order of exemption dated 28.12.2007. However, in the absence of this fact having been examined by the DGIT(E), this Court cannot determine the veracity of the same at first instance.

Did Hamdard violate condition (c) of the order of exemption

87. The DGIT(E)'s determination that Hamdard violated condition (c) of the order of exemption is premised on its finding that Section 11(4A) of the Act applies to an entity in the nature of Hamdard. It is apparent that condition (c) has been sourced from the seventh proviso to Section 10(23C), and is identical to Section 11(4A) of the Act (insofar as its applicability to Hamdard is concerned). The three provisions are quoted below for ease of reference:

Condition (c)

“c) this order will not apply in relation to any income being profits and gains of business unless the business is incidental to the attainment of the objectives of the assessee and separate books of accounts are maintained in respect of such business”

Seventh proviso to Section 10(23C) reads as follows:

“Provided also that nothing contained in sub-clause (iv) or sub-clause (v) or sub-clause (vi) or sub-clause (via) shall apply in relation to any income of the fund or trust or institution or any university or other educational institution or any hospital or other medical institution, being profits and gains of business, unless the business is incidental to the attainment of its objectives and separate books of account are maintained by it in respect of such business”

Section 11(4A) reads as follows:

“Sub-section (1) or sub-section (2) or sub-section (3) or sub-section (3A) shall not apply in relation to any income of a trust or an institution, being profits and gains of business, unless the business is incidental to the attainment of the objectives of the trust or, as the case may be, institution, and separate books of account are maintained by such trust or institution in respect of such business.”

88. Given the similarity in the phraseology of Section 11(4A) and the seventh proviso to Section 10(23C)/condition (c), the DGIT(E)’s approach of applying the principles of interpretation of the former provision for interpreting the applicability of the latter cannot be faulted with. Therefore, if Section 11(4A) were held to be applicable to Hamdard, so would condition (c)/seventh proviso, and vice-versa. As a corollary, if the nature of Hamdard’s activities were such that no compliance with Section 11(4A) was required, the issue of violation of Section 11(4A) or condition (c) or the seventh proviso to Section 10(23C)(iv) would not arise.

89. The DGIT(E) concluded that Section 11(4A) is applicable to Hamdard, even though it is admittedly a business held in trust. In so holding, the DGIT(E) relied on the Supreme Court’s decision in *ACIT v. Thanthi*

Trust (2001) 247 ITR 785, and ruled that the Court therein had rejected the distinction between a business held in trust and a business carried on by the trust insofar as the applicability of Section 11(4A) was concerned. Hamdard relied upon this Court's decision in *CIT v. Mehta Charitable Prajnalay Trust*, (2013) 357 ITR 560, where it was held that Section 11(4A) of the Act would not apply to a business held under trust. However, the DGIT(E) refused to follow *Mehta Charitable Prajnalay Trust (supra)* since it was a case of a trust doing business, as opposed to business held in trust; since both *Thanthi Trust (supra)* and the instant case involve the latter, the decision in *Thanthi Trust (supra)* was held to be applicable.

90. This Court in *Mehta Charitable Prajnalay Trust (supra)* categorically held that Section 11(4A) of the Act is not applicable to a business held under trust, for such a case is governed by Section 11(4), to the exclusion of Section 11(4A). The issue that arises is whether this ruling is contrary to the Supreme Court's decision in *Thanthi Trust (supra)*, and consequently, whether the DGIT(E) could have refused to follow this Court's decision. For this purpose, it would be necessary to closely examine the two decisions.

91. The Supreme Court in *Thanthi Trust (supra)* was concerned with a trust engaged in newspaper publishing activity. The object of the trust was to educate the Tamil public and disseminate news. The Court had to determine whether the trust was entitled to exemption under Section 11 for three different periods: (a) AY 1979-80 to AY 1983-84, in light of Section 13(1)(bb) of the Act; (b) AY 1984-84 to AY 1991-92, in light of Section 11(4A) of the Act as originally enacted; (c) AY 1992-93 onwards in light of amended Section 11(4A) (which continues to apply till date). The distinction

sought to be drawn between a business held under trust and a trust carrying on business was rejected by the Court only insofar as Section 13(1)(bb) was concerned. This would be evident from the following discussion:

“13. Dr. Pal, learned counsel for the Trust, drew a distinction between a business that was held under Trust and a business that was carried on by a Trust. He submitted that there was a difference between income derived from a business that was a property or part of the corpus of a Public Charitable Trust and income derived from a business which was carried on by such a Trust but which was not held under Trust. In other words, there was a legal obligation to use the income for the public charitable purpose of the Trust in the first case and not in the latter...”

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15. A Public Charitable Trust may hold a business as part of its corpus. It may carry on a business which it does not hold as a part of its corpus. But it seems to us that the distinction has no consequence insofar as section 13(1)(bb) is concerned. Section 13(1)(bb) provides, so far as is relevant to this case, that the provisions of section 11 shall not operate so as to include in the total income of the previous year of a Public Charitable Trust for the relief of the poor, education or medical relief which carries on any business, any income derived from such business unless the business is carried on in the course of the actual carrying out of a primary purpose of the Trust. Section 13(1)(bb), therefore, will apply to a Public Charitable Trust for the relief of the poor, education or medical relief that carries on a business, regardless of whether or not that business is held by the Trust in Trust, that is, as a part of its corpus. Even a business that is held by such a Trust as a part of its corpus is carried on by the Trust and, therefore, section 13(1)(bb) will apply to such Trust.”

(emphasis supplied)

Although a similar contention was raised by the assessee’s counsel in the

context of Section 11(4A) (as it originally stood), the Court did not give any unequivocal finding on the same. This is evident from the following excerpts:

“21. Learned counsel for the Trust laid emphasis on the fact that in the Bill to introduce sub-section (4A) into section 11, sub-section (4) thereof had been proposed to be deleted, but it had been retained when the Bill was passed. A business held under Trust had, therefore, not been intended to be excluded from the benefit of section 11 by reason of the enactment of sub-section (4A). This was also evident from the fact that sub-section (4A) did not mention in its non obstante clause sub-section (4).

22. Sub-section (4) of section 11 remains on the statute book, and it defines property held under Trust for the purposes of that section to include a business so held. It then states how such income is to be determined. In other words, if such income is not to be included in the income of the Trust, its quantum is to be determined in the manner set out in sub-section (4).

23. Sub-section (1)(a) of section 11 says that income derived from property held under Trust only for charitable or religious purposes, to the extent it is used in the manner indicated therein, shall not be included in the total income of the previous year of the Trust. Sub-section (4) defines the words "property held under Trust" for the purposes of section 11 to include a business held under Trust. Sub-section (4A) restricts the benefit under section 11 so that it is not available for income derived from business unless (a) the business is carried on by a Trust only for public religious purposes and it is of printing and publishing books or any other notified kind or (b) it is carried on by an institution wholly for charitable purposes and the work in connection with the business is mainly carried on by the beneficiaries of the institution, provided, in both cases, that separate books of account are maintained by the Trust or the institution in respect of such business. Trusts and institutions are separately dealt with in the Act (Section 11 itself and sections 12, 12A and 13, for example). The expressions refer to entities differently constituted.

It is thus clear that the newspaper business that is carried on by the Trust does not fall within sub-section (4A). The Trust is not only for public religious purposes so it does not fall within clause (a). It is a Trust not an institution, so it does not fall within clause (b). It must, therefore, be held that for the assessment years in question the Trust was not entitled to the exemption contained in section 11 in respect of the income of its newspaper.

92. There is nothing to indicate that the Court rejected the distinction between a business held under trust and a trust carrying on business for the purposes of Section 11(4A). On the other hand, this Court in *Mehta Charitable Prajnalay Trust (supra)* was categorical in its ruling that Section 11(4A) of the Act does not apply to a business held under trust. The Court arrived at the said conclusion based on an elaborate discussion of the historical background of Section 11(4A), and the interpretation given by the Supreme Court to an analogous provision (Section 4(3)(ia)) under the 1922 Act. The Court held:

*“15. The question whether sub-section (4A) would apply even to a case where a business was held under trust was answered in the negative in several authoritative pronouncements starting from the judgment of the Lahore High Court in *Gadodia Swadeshi Stores v. Commissioner of Income Tax, Punjab*, (1944) 12 ITR 385. The general provision under Section 4(3)(i) of the 1922 Act exempted income derived from property held under trust from taxation. However, section 4(3)(ia) provided that any income derived from a business carried on behalf of a religious or charitable trust would be entitled to exemption only if the business was carried on in the course of carrying out of a primary purpose of the trust or the work in connection with the business is mainly carried on by the beneficiaries of the trust. The contention of the revenue in that case was that since clause (ia) was a special provision dealing with the topic of exemption*

in respect of a business carried on for and on behalf of a trust, any claim for exemption as regards the profits of such business can be made only under that provision, and when the conditions laid down therein are not satisfied, it is not open to the assessee to fall back upon the general provision contained in Section 4(3)(i) and claim exemption thereunder on the ground that business is property. The Lahore High Court held that the fact that the business carried on behalf of the trust failed to satisfy the two conditions laid down in Section 4(3)(ia) was no reason why it should not be exempted from taxation if it fell within Section 4(3)(i) and the main ground of the decision is that the two categories mentioned in the two clauses having been enacted as two different clauses, it must be taken that the one did not exclude the other. This judgment of the Lahore High Court was approvingly referred to by the Supreme Court in J.K. Trust v. Commissioner of Income-tax, (1957) 32 ITR 535. The judgment of the Supreme Court in J.K. Trust v. CIT (supra) was followed by the Supreme Court (a Bench of equal strength) in Commissioner of Income-tax v. Krishna Warriar (P.), (1964) 53 ITR 176. By that time clause (ia) of Section 4(3) had been enacted as a proviso to clause (i) of Section 4(3), by an amending Act of 1953. After referring to the judgment of the Lahore High Court (supra) and rejecting the argument of the revenue that a proviso in a statute be always read as limitation upon the effect of the main enactment Subbarao, J. (as he then was) observed as under:-

.....But it is not an inflexible rule of construction that a proviso in a statute should always be read as a limitation upon the effect of the main enactment. Generally the natural presumption is that but for the proviso the enacting part of the section would have included the subject-matter of the proviso; but the clear language of the substantive provision as well as the proviso may establish that the proviso is not a qualifying clause of the main provision, but is in itself a substantive provision. In the words of Maxwell, "the true principle is that the sound view of the enacting clause, the saving clause and the proviso taken and construed together is to prevail". So construed we find no difficulty, as we will indicate later in our judgment, in holding that the said clause (b) of the

proviso deals with a case of business which is not vested in trust for religious or charitable purposes within the meaning of the substantive clause of section 4(3)(i).

16. Thus, if a property is held under trust, and such property is a business, the case would fall under Section 11(4) and not under Section 11(4A) of the Act. Section 11(4A) of the Act, would apply only to a case where the business is not held under trust.

17. In view of the above settled legal position, we are unable to accept the contention urged on behalf of the revenue before us that the provisions of Section 11(4A) are sweeping and would also take in a case of business held under trust.”

93. This Court rendered a clear finding in the above terms regarding the exclusion of a business held under trust from the scope of Section 11(4A), that too upon an overall consideration of the decision in *Thanthi Trust*. In such circumstances, we hold that the DGIT(E)’s refusal to follow *Mehta Charitable Prajnalay Trust (supra)* is erroneous. The distinction drawn by the DGIT(E) on facts, viz. that in *Mehta Charitable Prajnalay Trust (supra)* the business was not held in trust, which is admittedly the case herein, is immaterial, given that the Court’s ruling therein was on the precise issue which fell for determination before the DGIT(E) in the instant case. Therefore, Section 11(4A), and consequently, condition (c) and the seventh proviso to Section 10(23C) are not applicable in Hamdard’s case.

94. Given the above finding, Hamdard’s failure to maintain separate books of accounts is not fatal to its case, since such an obligation would have existed only in the event of applicability of condition (c). This Court’s ruling in *PHD Chamber of Commerce & Industry (supra)* also supports this conclusion. In that case, the Court held that the services performed by a trade, professional or similar association, such as a chamber of commerce

and industry, could not be held to be in pursuit of a business or trade with a profit motive and would not qualify as a business activity. Thus, Section 11(4A) of the Act would be inapplicable to such associations and they are not required to maintain separate books of accounts to avail exemption from tax. This Court, upon an examination of Hamdard's objects, has already concluded that it is not carrying on a business of the nature envisaged in condition (c) of the order of exemption/seventh proviso to Section 10(23C). Consequently, it is not required to maintain separate books of accounts. The banality of adopting this ground for withdrawal of exemption by the DGIT(E) is best explained by the following observations of this Court in *GS1 (supra)*:

“The statement and submission of the respondents that the petitioner was not maintaining separate books of account for commercial activity and, therefore, denied registration/notification, has to be rejected as fallacious and devoid of any merit. Similar allegation is often made in cases of charitable organization/association without taking into account the activity undertaken by the assessee and the primary objective and purpose i.e. the activity and charity activity are one and the same... The 'business' activity undertaken by the petitioner is integral to the charity/charitable activities. As noted above, the petitioner is not carrying on any independent, separate or incidental activity, which can be classified as business to feed and promote charitable activities. The act or activity of the petitioner being one, thus a single set of books of account is maintained, as what is treated and regarded by the Revenue as the 'business' is nothing but intrinsically connected with acts for attainment of the objects and goals of the petitioner. We fail to understand when the petitioner is maintaining the books of accounts with regard to their receipts/income as well as the expenses incurred for their entire activity then how it can be held that separate books of accounts have not been maintained for

'business' activities. The "business" activities are intrinsically woven into and part of the charitable activity undertaken. The "business" activity is not feeding charitable activities. In any case, when we hold that the petitioner is not carrying on any business, trade or commerce, question of requirement of separate books of accounts for the business, trade or commerce is redundant."

(emphasis supplied)

Did Hamdard cease to be a charitable institution with effect from 01.04.2009?

95. The Finance Act 2008 altered the scope of definition of 'charitable purpose' with effect from 01.04.2009 by inserting the first proviso to Section 2(15) of the Act. The said proviso reads as follows:

"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."

96. Facially, this proviso sought to do away with the test of application of surplus of charitable organisations generated from business activities laid down in *Surat Art Silk (supra)*. Thus, an entity whose charitable purpose falls within the residual category would not be said to be having a 'charitable purpose' within the meaning of Section 2(15) if it, *inter alia*, carried on an activity in the nature of trade, commerce or business for a cess or fee or any other consideration. The fact that the said entity's surplus generated from such activity was being applied for charitable purposes

became immaterial. A second proviso to Section 2(15) was inserted by Finance Act, 2010 with retrospective effect from 01.04.2009, which excludes the applicability of the first proviso where the total receipts of the entity are less than the limit prescribed therein. However, this is not relevant for the purposes of this case.

97. The DGIT(E) held that the first proviso to Section 2(15) squarely applies in Hamdard's case, as Hamdard's objects fall within the residual category and its activities are in the nature of business. However, in light of this Court's determination above, viz. Hamdard's charitable activities fall within the heads of 'education', 'medical relief' and 'relief of the poor', the first proviso is not applicable. The DGIT(E) in his impugned order accepts that the said proviso would not be applicable to entities doing 'core charity' – i.e. those falling in the non-residual category of Section 2(15). Indeed, the DGIT(E) could not have held the contrary in light of the unambiguous phrasing of the first proviso and this Court's decision dated 11.04.2013 in Hamdard's case in W.P.(C) 3598 of 2012, whereby it quashed the order dated 22.02.2012. On the applicability of the first proviso to Section 2(15), the Court noted:

“We may note here that the first proviso to sub Section was amended by Finance (No.2) Act, 2009 with retrospective effect from 01.04.2009. The said proviso is applicable in cases where an assessee claims that it is carrying on charitable purpose covered by the residuary clause i.e. ‘advancement of any other object of public utility’. The proviso is not applicable in case an assessee or institution claims that it is carrying on charitable purpose like relief to poor, education, medical relief etc., i.e. purposes which have been specifically enumerated and stated in the earlier part of Section 2(15).”

98. This Court holds that *arguendo* if Hamdard's objects were to be construed to be falling within the residual category of 'charitable purpose' with the result of attracting the applicability of the first proviso, it would not cease to be a charitable organisation with effect from 01.04.2009. The interpretation of first proviso put forward by the DGIT(E) would exclude all entities advancing an object of general public utility from the definition of 'charitable purpose' if such entities carry on *any* activity of trade, commerce or business, irrespective of the nature of application of surplus generated from such activity. This unduly broad interpretation has been rejected by this Court in *Institute of Chartered Accountants of India (supra)*, where the Court held that while determining whether an assessee is carrying on business, the dominant purpose test laid down in *Surat Art Silk (supra)*, albeit in a different context, would continue to apply. The Court noted:

"The expressions 'trade', 'commerce' and 'business' as occurring in the first proviso to section 2(15) of the Act must be read in the context of the intent and purport of section 2(15) of the Act and cannot be interpreted to mean any activity which is carried on in an organised manner. The purpose and the dominant object for which an institution carries on its activities is material to determine whether the same is business or not. The purport of the first proviso to section 2(15) of the Act is not to exclude entities which are essentially for charitable purpose but are conducting some activities for a consideration or a fee. The object of introducing the first proviso is to exclude organizations which are carrying on regular business from the scope of 'charitable purpose'. The purpose of introducing the proviso to Section 2(15) of the Act can be understood from the Budget Speech of the Finance Minister while introducing the Finance Bill 2008. The relevant extract to the Speech is as under:-

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

The expressions "business", "trade" or "commerce" as used in the first proviso must, thus, be interpreted restrictively and where the dominant object of an organisation is charitable any incidental activity for furtherance of the object would not fall within the expressions "business", "trade" or "commerce".

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70. Although in [Surat Art Silk] the statutory provisions being considered by the Supreme Court were different and the utilisation of income earned is, now, not a relevant consideration in view of the express words of the first proviso to section 2(15) of the Act, nonetheless the test of dominant object of an entity would be relevant to determine whether the entity is carrying on business or not."

99. More recently, this Court in *India Trade Promotion Organization v. Director General of Income-tax (Exemptions)*, [2015] 371 ITR 333, while adjudicating upon the constitutional validity of the first proviso to Section 2(15), read down the said proviso when applied in the context of Section 10(23C)(iv) and reiterated the dominant purpose test discussed in *Institute of Chartered Accountants of India (supra)*. The objects of the assessee therein fell under the residual category of Section 2(15), and the Revenue withdrew the exemption granted to the assessee under Section 10(23C)(iv) with effect from 01.04.2009 in light of the insertion of the first proviso. The Court held

that the assessee's activities could not be said to be within the nature of a business, for:

“...merely because the petitioner derives rental income, income out of sale of tickets and sale of publications or income out of leasing out food and beverages outlets in the exhibition grounds, does not, in any way, affect the nature of the petitioner as a charitable institution if it otherwise qualifies for such a character.”

Affirming the dominant purpose test applied in *Institute of Chartered Accountants of India (supra)* in the context of first proviso to Section 2(15), the Court noted:

“From the said decision, it is apparent that merely because a fee or some other consideration is collected or received by an institution, it would not lose its character of having been established for a charitable purpose. It is also important to note that we must examine as to what is the dominant activity of the institution in question. If the dominant activity of the institution was not business, trade or commerce, then any such incidental or ancillary activity would also not fall within the categories of trade, commerce or business...”

100. Finally, the Court rejected the broad ambit of first proviso sought to be urged by the Revenue, specifically in the context of Section 10(23C)(iv), and held as follows:

“58. In conclusion, we may say that the expression "charitable purpose", as defined in Section 2(15) cannot be construed literally and in absolute terms. It has to take colour and be considered in the context of Section 10(23C)(iv) of the said Act. It is also clear that if the literal interpretation is given to the proviso to Section 2(15) of the said Act, then the proviso would be at risk of running fowl of the principle of equality enshrined in Article 14 of the Constitution of India. In order to save the

Constitutional validity of the proviso, the same would have to be read down and interpreted in the context of Section 10(23C)(iv) because, in our view, the context requires such an interpretation. The correct interpretation of the proviso to Section 2(15) of the said Act would be that it carves out an exception from the charitable purpose of advancement of any other object of general public utility and that exception is limited to activities in the nature of trade, commerce or business or any activity of rendering any service in relation to any trade, commerce or business for a cess or fee or any other consideration. In both the activities, in the nature of trade, commerce or business or the activity of rendering any service in relation to any trade, commerce or business, the dominant and the prime objective has to be seen. If the dominant and prime objective of the institution, which claims to have been established for charitable purposes, is profit making, whether its activities are directly in the nature of trade, commerce or business or indirectly in the rendering of any service in relation to any trade, commerce or business, then it would not be entitled to claim its object to be a 'charitable purpose'. On the flip side, where an institution is not driven primarily by a desire or motive to earn profits, but to do charity through the advancement of an object of general public utility, it cannot but be regarded as an institution established for charitable purposes.”

101. This Court has already held above that Hamdard’s dominant purpose is charitable in nature, and it is not guided by the motive of profit-making. Therefore, the first proviso to Section 2(15) does not alter the charitable status of the organisation. This outcome is also in consonance with the rationale for the insertion of first proviso to Section 2(15), which was noted by this Court in *M/s. GSI India v. DGIT*, [2014] 360 ITR 138, citing a CBDT Circular of 2008, as follows:

“It is, evident from the Circular no. 11 of 2008 that the new proviso of Section 2(15) of the Act is applicable to the assesseees who are engaged in commercial activities, i.e. carrying on

business, trade or commerce, in the garb of 'public utility' to avoid tax liability as it was noticed that object of 'general public utility' was sometimes only a mask or device to hide the true purpose which was 'trade, commerce or business.'”

102. It has thus been established that Hamdard is by no means a mask or a device to conceal any income generated from any of its activities.

W.P.(C) 3599 of 2012

103. The ADIT(E) re-opened assessment proceedings for Hamdard for AY 2005-06 through its notice dated 27.03.2012 issued under Section 148 of the Act. The following reasons for re-opening the assessment were provided by the ADIT(E) in its letter dated 16.04.2012:

- a. Hamdard was carrying out activities which were commercial and business in nature. Furthermore, the manufacture and sale of medical products did not form a part of Hamdard's objects as per its Trust Deed;
- b. Hamdard had made huge surpluses for the assessment year in question, i.e. 2005-06, and had also made accumulations over the years for expansion of its manufacturing units and allied objects. Though Hamdard's objects were charitable, its activities were not;
- c. Hamdard had violated Section 11(4A) of the Act by not maintaining separate books of accounts for incidental business activities;
- d. Hamdard had not utilised the assessments made during

the concerned assessment year in line with its objects;

e. Hamdard was giving donations to HNF, which was not for furtherance of its business activities;

f. DGIT(E) had withdrawn the approval granted under Section 10(23C)(iv) of the Act with effect from AY 2004-05.

104. Hamdard's preliminary objections dated 14.05.2012 against the re-opening of assessment were dismissed by the ADIT(E) on 25.05.2012. The said order provided the following reasons for Hamdard's preliminary objections against the reopening of assessment for AY 2005-06:

"The Notice u/s 148/147 has been issued to you in case of A.Y. 2005-06 based on the reasons recorded before issuance of such notice and upon cancellation of Sec. 10(23C)(iv) Registration by Ld. DGIT(E). The facts brought in your return for A.Y. 2005-06 have not been disclosed all the facts properly (sic) which could lead to assessment. Even, when an Organization has lost its charitable status retrospectively, claim of exemption by that organization tantamount to furnishing of false particulars and failure on part of assessee to disclose fully and truly all material facts necessary for assessment.

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The AO in this case has not changed its opinion but based on the exemption status of the assessee and changed facts & circumstances of the case has re-opened it u/s 147/148 of the I.T. Act. When assessee's exemption has been withdrawn by a higher authority, AO has to give effect to that Order as assessee now falls under the non-exempt category. The various case laws quoted by the assessee can be distinguished from the facts stated above."

105. Hamdard contends that the proviso to Section 147 is squarely applicable herein, as the notice of reopening has been issued after the expiry of four years from the end of the relevant assessment year (AY 2005-06). Further, it is contended that the reopening of assessment is based on a mere change of opinion, as the AO's predecessor had examined the same set of facts.

106. It is not disputed that an order of assessment under Section 143(3) of the Act was passed for AY 2005-06 on 21.03.2007 and the assessment proceedings for AY 2005-06 have been re-opened after the expiry of four years prescribed in the first proviso to Section 147. According to the first proviso, re-opening of assessment beyond this stipulated time-period is permissible only if: a) the assessee has failed to file a return under Section 139 or in response to a notice issued under sub-section (1) of section 142 or section 148; or b) to disclose fully and truly all material facts necessary for assessment. The former does not concern this case. As regards the latter, the ADIT(E) in the order dated 25.05.2012 dismissed Hamdard's preliminary objections to reopening of assessment on account of its failure to disclose all material facts, besides the withdrawal of exemption under Section 10(23C)(iv) of the Act. The order dated 16.04.2012, while noting that Hamdard's surplus to the tune of ₹ 25,23,36,930/- may have escaped assessment, does not state that the said conclusion was being arrived at based on new facts discovered by the ADIT(E). Indeed, the letters dated 01.02.2007, 20.02.2007 and 12.03.2007 placed on record by Hamdard demonstrate that all information sought by the ADIT(E) in the letter dated 17.01.2007 was provided by it, specifically details regarding the surplus for

past 10 years, along with the audited balance sheet and profit and loss account for FYs 2002-03 and 2003-04. In the order dated 25.05.2012, besides a general reference to Hamdard's alleged failure to disclose all material facts, there is no reference to the particular facts which have not been disclosed. In such circumstances, this Court holds that the pre-condition for reopening of assessment after the expiry of four years has not been met in this case.

107. Even on the merits of the reasons provided by the ADIT(E) for the reopening of assessment proceedings, contained in the orders dated 16.04.2012 and 25.05.2012, the Revenue's case does not succeed. It is evident from these orders that the reopening of assessment was premised on the withdrawal of Hamdard's exemption under Section 10(23C)(iv) of the Act by the CIT(A)'s order dated 22.02.2012. Indeed, owing to withdrawal of exemption the ADIT(E) refused to rely on the precedent cited by Hamdard. The order dated 22.02.2012 withdrawing the exemption has been set aside by this Court on 11.04.2012 in W.P.(C) 3598/2012. Even the subsequent order dated 28.07.2013, withdrawing the exemption under Section 10(23C)(iv), has been set aside in W.P.(C) 5711 of 2013 above. The reasons for reopening of assessment stated in the orders dated 16.04.2012 and 25.05.2012 are identical to those contained in the order dated 28.07.2013. Therefore, in light of this Court's order in W.P.(C) 5711 of 2013, the basis for re-opening of assessment proceedings for AY 2005-06 does not survive. Consequently, the notice of reopening dated 27.03.2012 and orders dated 16.04.2012 and 25.05.2012 passed by the ADIT(E) are hereby quashed.

WP (C) Nos. 5715, 5716, 5718 and 5729 of 2013

108. The CIT(A) through separate but identical orders dated 10.07.2013 for AY 2006-07 to AY 2009-10 dismissed Hamdard's appeal against the AO's orders denying exemption under Section 11 of the Act. Hamdard contends that the CIT(A) passed the said orders dated 10.07.2013 without providing an opportunity of oral hearing to Hamdard. It is contended that the CIT(A) has passed the order without taking into consideration its submissions. The Revenue, on the other hand, defends the impugned orders on the ground that the CIT(A)'s predecessor had given several opportunities of hearing to Hamdard, and that the case was heard on 08.07.2013 by the CIT(A) who passed the impugned orders.

109. This Court holds that the second Respondent, acting as the CIT(A), has passed the impugned orders dated 10.07.2013 in violation of the principles of the natural justice, without having given Hamdard an opportunity of presenting its case and having failed to consider Hamdard's written submissions in the impugned orders. The Supreme Court in *G. Nageswara Rao (supra)* held in unequivocal terms and dismissed the notion that an authority that decides a dispute may be different from the one that heard the same. The material on record establishes that the CIT(A), the second Respondent in the four writ petitions herein, assumed charge on 28.06.2013 and the submissions by Hamdard were made prior to the said date before the second Respondent's predecessor. There is no dispute regarding the fact that second Respondent did not hear the matter on 28.06.2013. As regards the scheduled hearing on 08.07.2013, Hamdard contends that no such hearing took place on the said date whereas the second Respondent contends that Hamdard's counsel – Mr. R.M. Mehta – made

submissions on that date. Hamdard has placed on record letters dated 19.07.2013 and 04.09.2013 wherein the second Respondent was urged to clarify that Hamdard's counsel did not appear before the second Respondent on 08.07.2013. Further, a perusal of the impugned orders dated 10.07.2013 would indicate that the second Respondent has omitted to consider Hamdard's submissions filed before the second Respondent's predecessor on 04.03.2013 and 06.05.2013. Indeed, this Court's order dated 11.04.2012 in W.P.(C) 3598 of 2012, whereby it set aside the order of withdrawal of Hamdard's exemption under Section 10 (23C)(iv) dated 22.02.2012, does not even find mention in the four impugned orders, notwithstanding that this fact was highlighted by Hamdard in its written submissions dated 06.05.2013. The case law cited by Hamdard in its written submissions of the said date also do not find any mention in the impugned orders. This Court cannot go into the propriety of Hamdard's submission that the second Respondent got orders dated 28.06.2013 and 08.07.2013 signed by Hamdard's representative on a false pretext. However, the other facts discussed above are sufficient to establish that the second Respondent violated principles of natural justice in passing the impugned orders. Even on merits, it is apparent that the ground for denial of exemption under Section 11 is that Hamdard is not engaged in charitable activities within the meaning of Section 2(15) of the Act. The CIT(A) held in this regard as follows:

“4.9 I have considered the order of the AO and the submissions of the assessee and I do not find any merit in the submissions of the assessee. There is no dispute and it is in fact admitted by the assessee that the assessee is engaged in business activities of manufacturing and sale of Hamdard medicines. The assessee

itself is wholly and solely engaged in business activity and the assessee by itself is not engaged in any charitable activity except the donations made to HNF, which the assessee considers as a charitable organization. But it is seen that even the activities of HNF is not charitable as no free treatment or free medicines are distributed to the poor. The exemption u/s. 11 is available when the assessee is engaged in charitable activities, but in the present case it is an admitted fact that the assessee is engaged in business and is not directly involved in any charitable activity as provided u/s. 2(15). After considering all the facts and circumstances of the case, I am of the view that the assessee is not a charitable organization as provided u/s. 2(15) and as such assessee is eligible for exemption u/s. 11 and accordingly, the action of the AO in denying the exemption u/s.11 is confirmed.”

110. The charitable status of Hamdard under Section 2(15) has been affirmed in W.P.(C) 5711 of 2013 above. For this reason as well, the impugned orders dated 10.07.2013 concerning AYs 2006-07 to 2009-10 are set aside.

Conclusion

111. The DGIT(E)'s order dated 21.08.2013 withdrawing Hamdard's exemption under Section 10(23C)(iv) with effect from AY 2004-05 of the Act is hereby quashed. Hamdard is entitled to refund of any amount collected by the Revenue pursuant to the order dated 21.08.2013 with interest @ 6% per annum from the date such amount was paid was income-tax. W.P.(C) 5711 of 2013 is disposed of in the said terms.

112. The ADIT(E)'s notice of reopening of assessment for AY 2005-06 dated 27.03.2012 and orders dated 16.04.2012 and 25.05.2012 are hereby quashed. W.P.(C) 3599 of 2012 is thus allowed.

113. The orders dated 10.07.2013 passed by the CIT(A) for AYs 2006-07 to 2009-10 denying exemption to Hamdard under Section 11 of the Act are quashed. Resultantly, W.P.(C) 5715 of 2013, 5716 of 2013, 5718 of 2013 and 5729 of 2013 are allowed.

114. There shall be no order as to costs in the six writ petitions disposed hereinabove.

S. RAVINDRA BHAT
(JUDGE)

R.K. GAUBA
(JUDGE)

SEPTEMBER 18, 2015

