

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

INCOME TAX APPEAL NO. 1695 OF 2014

Director of Income Tax (Exemptions),
Mumbai .. Appellant
v/s.

Shree Nashik Panchvati Panjrapole ..Respondent

Mr. A.R. Malhotra a/w Ms. Padma Divakar, Mr. N.A. Kazi for the
appellant
Mr. N.S. Joshi a/w Ms. Chhaya Asher, Ms.Namrata Shah i/b K. Ashar &
Co. for the respondent

**CORAM : M.S. SANKLECHA &
A.K. MENON, J.J.
DATED : 20th MARCH, 2017.**

P.C.

1. This Appeal under Section 260-A of the Income Tax Act, 1961 (the Act) challenges the order dated 26th March, 2014 passed by the Income Tax Appellate Tribunal (the Tribunal). The impugned order is in respect of Assessment Year 2009-10.

2. The Revenue urges the only following question of law :-

(i) Whether on the facts and circumstances of the case and in law, the Tribunal was justified in holding that the assessee is entitled for continued registration u/s 12A of the I.T. Act, 1961 without appreciating the fact that in view of the amendment to Section 2(15), activities carried by the assessee were commercial

in nature and therefore, cannot be considered as for a “charitable purpose” under Section 2(15) of I.T. Act, 1961?

3. The respondent assessee Trust is over 130 years old and registered with the Charity Commissioner since 1953. The respondent assessee was granted Certificate of Registration under Section 12A of the Act on 4th August, 1975. The objects of the Trust as summarized (accepted by both parties) in the impugned order of the Tribunal are as under:-

- “(i) Panjrapole and Gaushalas*
- (ii) Agriculture, rural development and preservation of natural resources.*
- (iii) Scientific Research*
- (iv) Education*
- (v) Medical relief*
- (vi) Relief of poor*
- (vii) General Public Utility”*

4. By Finance (No.2) Act, 2009, the definition of “Charitable Purpose” under Section 2(15) of the Act was amended w.e.f. 12th April, 2009 to read as under :-

“Charitable Purpose” includes relief of the poor, education, medical relief [preservation of environment (including watersheds, forests and wildlife) and preservation of monuments or places or objects of artistic interest] and the advancement of any other object of general public utility.
Provided *that the advancement of any other object of general public utility shall not be a charitable purpose, if it involves the carrying out 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 any other*

consideration, irrespective of the nature of use or application, or retention of the income from such activity.

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

Therefore, in view of the newly added proviso, charitable purpose would not include advancement of any other object of general purpose utility, if it involves carrying out activities in the nature of trade, commerce or business, with receipts in excess of Rs.10 lakhs.

5. In view of the above amendment, the Director of Income Tax (Exemption) issued a show-cause notice on 3rd November, 2011 calling upon the respondent assessee to show-cause as to why its registration under Section 12A of the Act should not be withdrawn under Section 12AA(3) of the Act. The basis of the above notice was that the income and expenditure account of the respondent assessee, revealed income on account of sale of milk at Rs.1.57 crores and income from interest and dividend at Rs.58.34 lakhs. Thus, indicating that the activities carried out by the respondent assessee of selling milk was in the nature of trade, commerce or business. Thus, not entitled to registration under Section 12A of the Act.

6. The respondent assessee responded to the show-cause notice by

its communication dated 29th November, 2011. In its reply, the respondent assessee pointed out that it is running a Panjrapole i.e. protection of cows and oxen for over last 130 years. The activity of selling milk was incidental to its Panjrapole activity and in any case did not involve any trade, commerce or business, so as to be hit by the newly added proviso to Section 2(15) of the Act.

7. By an order dated 12th December, 2011, the Director of Income Tax (Exemption) cancelled the respondent's registration under the Act by invoking Section 12AA(3) of the Act. The basis for cancellation of the registration was that in view of the newly added proviso to Section 2(15) of the Act, its income by way of sale of milk, interest and dividend being in excess of Rs.10 lakhs the assessee would cease to be a trust for charitable purpose. The Director of Income Tax (Exemption) further records in his order the fact that the respondent assessee was earning only Rs.3.76 lakhs from its aforesaid activity of selling milk would not detract from the application of the newly added proviso to Section 2(15) of the Act. This for the reason that the proviso as applicable is receipt based and not profit / income based.

8. Being aggrieved, the respondent assessee filed an appeal to the

Tribunal. The impugned order of the Tribunal records the following facts :-

- (a) the fundamental / dominant function of the Trust is to provide asylum to old, maimed, sick, weak, disabled and stray animals and birds particularly cows;
- (b) that only 25% of the cows being looked after yield milk and it is these milk yielding cows which support the balance 75% of the cows which are non-milk yielding;
- (c) that the milk needs to be procured from the cows otherwise it will be detrimental to the health of the cows, if not fatal;
- (d) the milk so procured is distributed free of charge to children, schools, hospitals etc. and the balance amount of milk remaining after such free distribution is sold to the general public at nominal rate;
- (e) the respondent assessee is selling milk at subsidized rates; and
- (f) nothing has been brought on record to suggest that the respondent Trust conducted its affairs solely on commercial basis.

9. The impugned order after recording the above facts *inter alia* placed reliance on a decision of the Tribunal in the case of ***Sabarmati Ashram Gaushala Trust Vs. ADIT (Exem) 25 ITR 701*** on an identical facts situation wherein it has been held that the activities of selling milk

by a Panjrapole will not by itself make the newly added proviso to Section 2(15) of the Act applicable. Further, reliance was also placed in the impugned order upon the decision of the Delhi High Court in ***ICAI Vs. Director General of Income Tax (Exemption) 347 ITR 99*** to hold that the activities of selling milk by the respondent assessee would be incidental in running a Panjrapole in view of the proviso to Section 2(15) of the Act. Thus, the appeal of the respondent assessee was allowed.

10. The basic grievance of Mr. Malhotra, learned Counsel appearing for the Revenue is that as the respondent had receipts of Rs.1.57 crores on account of sale of milk, it would cease to be an Institution for charitable purposes as the proviso to Section 2(15) of the Act would be applicable. Therefore, according to him the activity of selling milk by the respondent assessee was an activity of trade, commerce or business with the intent of earning profits, as the major percentage of milk is sold by them at market price and a very small percentage is distributed at subsidized rate or free of charge. In particular, Mr. Malhotra submitted that there is no restriction on the respondent Trust making profit and placed reliance upon the decision of the Supreme Court in ***Sole Trustee Lok Shikshana Trust Vs. Commissioner of Income Tax,***

101 ITR 234. Thus, it is submitted that the impugned order holding that the newly added proviso to Section 2(15) of the Act is inapplicable in the present facts, is not correct / justified.

11. As pointed out by Mr. Joshi, the learned Counsel for the respondent Trust, the Apex Court's decision in *Sole Trustee Lok Shikshana Trust* (supra) was subject of consideration by a five bench of the Apex Court in *CIT(Addl.) Vs. Surat Art Silk Cloth Manufacturers' Association 1980 (2) SCC 31*. With regard to the absence of any restriction on profit making, converting the activity into business, it did not agree with the view in *Sole Trustee Lok Shikshana Trust* (supra) and after referring to it, observed as under :-

“But we find it difficult to accept their thesis that whenever an activity is carried on which yields profit, the inference must necessarily be drawn, in the absence of some indication to the contrary, that the activity is for profit and the charitable purpose involves the carrying on of an activity for profit. We do not think the Court would be justified in drawing any such inference merely because the activity results in profit. It is in our opinion not at all necessary that there must be a provision in the constitution of the trust or institution that the activity shall be carried on on no profit no loss basis or that profit shall be proscribed. Even if there is no such express provision, the nature of the charitable purpose, the manner in which the activity for advancing the charitable purpose is being carried on and the

surrounding circumstances may clearly indicate that the activity is not propelled by a dominant profit motive. What is necessary to be considered is whether having regard to all the facts and circumstances of the case, the dominant object of the activity is profit making or carrying out a charitable purpose. If it is the former, the purpose would not be a charitable purpose, but, if it is the latter, the charitable character of the purpose would not be lost.”

Thus, the test is dominant activity.

12. In support of his submission that large percentage of milk is sold at market price, Mr. Malhotra sought to rely upon order dated 26th December, 2011 passed by the Assessing Officer and order dated 1st March, 2013 passed by the Commissioner of Income Tax (Appeals) [CIT(A)] in regular assessment proceedings, denying the benefit of Section 11 of the Act for the Assessment Year 2009-10. This for the reason that it is only in the order of the CIT(A), is it recorded that the milk is sold at market rate. This on the ground that the Tribunal had heard both the appeals i.e. one emanating from Section 12AA(3) of the Act (present Appeal) and the other arising from an order under Section 143(3) of the Act for A.Y. 2009-10, denying exemption under Section 11 of the Act were heard together and disposed of by one order. We

did not permit him to refer to the record as found in the other appeal (arising from Section 143(3) of the Act) so as to decide the present appeal which emanates from the order dated 12th December, 2011 passed by the Director of Income Tax (Exemption) withdrawing the registration under Section 12AA(3) of the Act. This is particularly so as the order of the Director of Income Tax (Exemption) has to be decided only on factors which have caused the Director of Income Tax (Exemption) to withdraw the exemption. This is particularly so as the order of Director of Income Tax (Exemption) being impugned before the Tribunal is not on the basis of milk being sold at market price but is on the basis that the receipts on the sale of milk and on interest / dividend were in excess of Rs.10 lakhs as provided in the proviso to Section 2(15) of the Act. The fact that the respondent sold milk at a subsidized rate was not disputed by the Director of Income Tax (Exemption) in his order dated 12th December, 2011. Further, the scope of enquiry while cancelling / withdrawing the registration under Section 12A of the Act, is entirely different and / distinct from the scope of enquiry while granting of an exemption under Section 11 of the Act.

13. We are of the view that merely because the impugned order of

the Tribunal is a common order disposing of the two appeals emanating from different authorities, would not mean that evidence available before one authority could be used to support an order passed by the another authority, even when the authority whose order is under challenge has not even remotely referred to the ground and / or evidence which is sought to be relied upon by the Revenue to support the order. If this is to be permitted, the order passed on the basis of ground (a) alone, would be upheld in appeal on ground (c) because it was applied in another order. This would lead to a complete chaos as sanctity of giving of reasons in support of the order would be given a go by. In any case, if a party wants to urge a new ground and / or bring on record new evidence, there is a method provided in the Tribunal Rules. That method ought to have been followed with a request to remand the proceedings to pass an order on a fresh ground and / or new evidence now obtained. This itself amounts to implicit acceptance by the Revenue that the order of the Director of Income Tax (Exemption) as passed is suspect. As the order withdrawing the exemption requires it to be supported by other grounds and / or evidence, which were admittedly not the basis of the order withdrawing the registration.

14. We may at this stage, also usefully refer to the decision of Punjab and Haryana High Court in the case of ***Commissioner of Income Tax Vs. Jagadhri Electric Supply and Industrial Co.*** 140 ITR 490 when in an appeal from the order of the Commissioner under Section 263 of the Act to Tribunal, the Revenue sought to rely upon orders passed by the Assessing Officer and the CIT(A) to support it. The Court held it is not permissible. The Court observed permitting this would in effect amount to allowing sharing of the exclusive jurisdiction vested in the Commissioner under Section 263 of the Act with the Assessing Officer who passed the order in assessment proceedings. The appeal has to be decided only on the grounds on the basis of which the Commissioner of Income Tax exercised his powers of revision under Section 263 of the Act. In the present facts also, the appeal from the order dated 12th December, 2011 of the Director of Income Tax (Exemption) should be decided only on the grounds mentioned in the impugned order for cancellation of registration and no other grounds / evidence not considered by the Director of Income Tax (supra) can be looked into, while deciding the validity / correctness of the same.

15. As noted above, we find that that impugned order of the Tribunal has recorded a finding of fact that the dominant function of the

respondent Trust is to provide an asylum to old, maimed, sick and stray cows. Further, only 25% of the cows being looked after yield milk and if the milk is not procured, it would be detrimental to the health of the cows. Therefore, the milk which is obtained and sold by the respondent assessee is an activity incidental to its primary / principal activity of providing asylum to old, maimed, sick and disabled cows. In the present facts, the activity of milking the cows and selling the milk is almost compelled upon the Trust, in the process of giving asylum to the cows. In our view, the activity to be considered in the nature of trade, commerce or business would in most cases have to be carried out on a regular basis with a view to earn the profit. The presence of the profit intent (even if it does not fructify) would normally be a *sine qua non* for the activity to be considered as trade, commerce or business. Therefore, in the present facts, it is not as though the keeping of the cows and milking them was with a view to carry out activity in the nature of trade, commerce or business to earn profits. The Revenue has not shown how even in the absence of profit motive, the activity of obtaining milk and selling the same would still be an activity of trade, commerce or business. In the alternative, Mr. Malhotra submitted that the proviso to Section 2(15) of the Act would apply even if it is not trade, commerce or business but only in its nature. However, how and

why the activity of selling milk obtained incidentally while taking care of the cows, is in the nature of trade, business or commerce is not shown. Admittedly, in the present facts, the dominant activity carried out by the respondent assessee's Trust for over 130 years is to take care of old, sick and disabled cows. In these circumstances, an incidental activity of selling milk which may result in receipt of money, by itself would not make it trade, commerce or business nor an activity in the nature of trade, commerce or business to be hit by the proviso to Section 2(15) of the Act.

16. In fact, the decision relied upon by the impugned order of the Tribunal in the case of *Sabarmati Ashram Gaushala Trust (supra)* was appealed to before the Hon'ble Gujarat High Court being Tax Appeal No.1162 of 2013. The question posed for consideration was whether the proviso to Section 2(15) of the Act would be applicable in case of the *Sabarmati Ashram Gaushala Trust (supra)* as it was selling milk which generated considerable revenue. This in the context of exemption under Section 11 of the Act. The Gujarat High Court disposed / dismissed on 15th January, 2014 after considering the statutory provisions, the speech of Finance Minister while introducing the proviso and the CBDT Circular issued in the context of newly added

proviso to Section 2(15) of the Act, observing as under :-

“It is not aimed at excluding the genuine charitable trusts of general public utility but is aimed at excluding activities in the nature of trade, commerce or business which are marked as “charitable purpose”.

Many activities of genuine charitable purposes which are not in the nature of trade, commerce or business may still generate marketable products. After setting off of the cost, for production of such marketable products from the sale consideration, the activity may leave a surplus. The law does not expect the Trust to dispose of its produce at any consideration less than the market value. If there is any surplus generated at the end of the year, that by itself would not be the sole consideration for judging whether any activity is trade, commerce or business – particularly if generating 'surplus' is wholly incidental to the principal activities of the trust; which is otherwise for general public utility, and therefore, of charitable nature.”

....."Merely because while carrying out the activities for the purpose of achieving the objects of the Trust, certain incidental surpluses were generated, would not render the activity in the nature of trade, commerce or business. As clarified by the CBDT in its Circular No.11/2008 dated 19th December, 2008 the proviso aims to attract those activities which are truly in the nature of trade, commerce or business but are carried out under the guise of activities in the nature of 'public utility'.

Delhi High Court in case of *Institute of Chartered Accountants of India & Anr. Vs. Director General of Income-*

Tax (Exemption) and Ors. reported in (2012) 347 ITR 99 (Delhi) considered these very provisions in the context of activities of the Institute of Chartered Accountants holding that the fundamental or dominant function of the Institute was to exercise overall control and regulate the activities of the members / enrolled chartered accountants and merely because the Institute was holding coaching classes which also generate income, the Court held that proviso to Section 2(15) of the Act would not be applicable. It thus held and observed as under :-

“Section 2(15) defines the term “Charitable purpose”. Therefore, while construing the term “business” for the said section, the object and purpose of the section has to be kept in mind. We do not think that a very broad and extended definition of the term “business’ is intended for the purpose of interpreting and applying the first proviso to Section 2(15) of the Act to include any transaction for a fee or money. An activity would be considered “business” if it is undertaken with a profit motive, but in some cases this may not be determinative. Normally, the profit motive test should be satisfied but in a give case activity may be regarded as business even when profit motive cannot be established / proved. In such cases, there should be evidence and material to show that the activity has continued on sound and recognized business principles, and pursued with reasonable continuity. There should be facts and other circumstances which justify and show that the activity undertaken is in fact in the nature of business. The test as prescribed in Raipur Manufacturing Company

(1967) 19 STC 1 (SC) and Sai Publication Fund (2002) 258 ITR 70 (SC); (2002) 126 STC 288 (SC) can be applied. The six indicia stipulated in Lord Fisher (1981) STC 238 (sic) are also relevant. Each case, therefore, has to be examined on its own facts.”

(emphasis supplied)

17. We find ourselves in complete agreement with the reasoning set out by the Gujarat High Court in its order dated 15th January, 2014 in Income Tax Appeal No.1162 of 2013 (supra). Although the same was rendered in the context of exemption being denied under Section 11 of the Act and it was not a case of withdrawal of registration. Nevertheless, the reasoning therein would be equally applicable to the present facts as it considered the applicability of the proviso to Section 2(15) of the Act as arising in this case. One more fact that may be noted is that Mr. Malhotra sought to rely upon the order passed by the CIT(A) in Section 11 proceedings to establish that the milk is sold at market price. However, it would make no difference as there is no bar in law to a Trust selling its produce at market price as observed above by the Gujarat High Court. In fact, the above factor alone will not make it an activity of trade, commerce or business or even in its nature.

18. We may also refer to another decision of the Delhi High Court in *Institute of Chartered Accountants of India & Anr. (ICAI) Vs. Director General of Income Tax (Exemption) & Ors. 358 ITR 91*, where the Court observed at para 67 thereof as under :-

“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 Budge Speech of the Finance Minister while introducing the Finance Bill, 2008.

.... The expression “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”.
(emphasis supplied)

19. In fact the Revenue has not been able to show that the view taken by the Apex Court in *Surat Art Silk Cloth Manufacturers' Association* (supra), Gujarat High Court in *Sabarmati Ashram Gaushala Trust* in Tax Appeal No.1162 of 2013 (supra) and the Delhi High Court

in ICAI 347 ITR 99 (supra) and ICAI and Anr. 358 ITR 91 (supra) laying down the dominant activity test should not commend to us. Therefore, the view taken by the Tribunal in the present facts cannot be found fault with.

20. In the above view, the question as proposed does not give rise to any substantial question of law. Thus, not entertained.

21. The appeal is dismissed. No order as to costs.

(A.K. MENON, J.)

(M.S. SANKLECHA, J.)