

IN THE INCOME TAX APPELLATE TRIBUNAL "I" BENCH, MUMBAI

BEFORE SHRI R.C. SHARMA, AM  
AND SHRI MAHAVIR SINGH, JM

ITA No. 386/Mum/2013  
(Assessment Year: 2009-10)

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| Indo French Chamber of Commerce & Industry<br>French Bank Bldg., 4 <sup>th</sup> Flr. 62, Homji Street, Fort, Mumbai-400001. (PAN: AAATI2658A) | Vs. | Assistant Director of Income-tax, Exemption-11(1), Piramal chamber, Mumbai-400 012. |
| (Appellant)                                                                                                                                    |     | (Respondent)                                                                        |

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ITA No. 1122/Mum/2013  
(Assessment Year: 2009-10)

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| Assistant Director of Income-tax, Exemption-11(1), Piramal chamber, Mumbai-400 012. | Vs. | Indo French Chamber of Commerce & Industry<br>French Bank Bldg., 4 <sup>th</sup> Flr. 62, Homji Street, Fort, Mumbai-400001. |
| (Appellant)                                                                         |     | (Respondent)                                                                                                                 |

Assessee by : Shri Sanjiv M. Shah  
Revenue by : Shri vishwas Jadhav, DR

Date of hearing: 30.03.2016  
Date of Pronouncement 15.04.2016

O R D E R

PER MAHAVIR SINGH, JM:

Both these appeals by assessee and revenue are directed against the order of CIT(A)-1, Mumbai in Appeal No. CIT(A)-1/IT-E2(71)/2011-12 vide order dated 30.11.2012. Assessment was framed by Asst. DIT(E)-II(1), Mumbai u/s. 143(3) of

the Income Tax Act, 1961 (hereinafter referred to as “the Act”) for AY 2009-10 vide his order dated 26.12.2011.

2. First we take up ITA No. 386/Mum/2013 (assessee’s appeal). The first issue in this appeal of assessee is against the order of the CIT(A) in confirming the action of AO in rejecting the claim of assessee u/s. 11 of the Act.

3. Briefly stated facts relating to this issue are that the AO during the course of assessment proceedings held that the assessee Institution is predominantly a mutual association and non charitable objects and the object of mutual benefits are contradictory to each other. According to him u/s. 11 of the Act as a charitable trust and principles of mutuality are mutually exclusive of each other. In the mutual association the members subscribe for the primary purpose of benefiting themselves, while in a charitable institution people subscribe for charitable object without any expectation in return. In the case of the assessee, the members have contributed only for the purpose of their own benefit and for acquiring certain amenities. Therefore, the assessee is treated as mutual association and not as charitable institution. Accordingly, he denied exemption u/s. 11 of the Act in view of the proviso to section 2(15) of the Act as introduced w.e.f. 01.04.2009 by the Finance Act, 2008. Aggrieved, assessee preferred appeal before CIT(A), who also confirmed the action of AO and after considering the submissions of the assessee he held as under:

*“4.6. I have carefully considered the facts of the case, submissions of the appellant and the assessment order. I find that the appellant trust is basically engaged in running private commercial classes. The appellant has also arranged exhibitions and seminars. I find that the provisions of amended section 2(15) are applicable to the appellant. I also find that the activities of the appellant trust are based on consideration of charging fees and the activities have yielded substantial profit in a systematic and organized manner. It is also seen that the appellant has been deriving substantial income from holding seminars, training programme and commercial fees from technical services. All the activities are systematic and organized and continuous. It is clearly seen that the element of charity is lacking.*

*Section 2(15) of the Act has been amended by the Finance Act, 2008, with effect from April 1, 2009, and reads as under:*

*"Section 2(15) - "charitable purpose" includes relief of the poor, education, medical relief, preservation of environment (including watersheds, forests and wildlife) and preservation of monuments or places or objects of artistic or historic interest, and the advancement of any other object of general public utility:*

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

*4.7 The above proviso to Sec.2(15) is added w.e.f. 2009-10. Several activities of the appellant have been found to be organized, systematic activities bearing the nature of trade and business activity. Earning of substantial fees in organized manner cannot be considered as being charitable activity. Hence, the appellant is covered by the amendment to the proviso to Section 2(15) of the Act since these activities are nothing but an advancement of an object of general public utility in the nature of rendering any service in relation to any trade, commerce or business, for a cess, fee or any other considerations.*

*4.8 Further, Section 13(8) of the Act, which has been inserted by the Finance Act, 2012, with retrospective effect from April 1, 2009, reads as under:*

*"Nothing contained in section 11 or section 12 shall operate so as to exclude any income from the total income of the previous year of the person in receipt thereof if the provisions of the first proviso to clause (15) of section 2 become applicable in the case of such person in the said previous year. "*

*In view of the income of the appellant exceeding Rs.10 lacs as per the proviso to section 2(15), the appellant is covered by the quantum limit of section 2(15) and 13(8) of the Act. Since the activities of the appellant have been held to be business the provisions of Section 13(8) of the Act will also come into play and the income of the Appellant will not be eligible to any of the benefits of section 11 or 12 of the Act. On a combined reading of both the aforesaid sections, it is clear that the Appellant is not eligible to the benefits of Section 11 or 12 of the Act. I hold that the AO has rightly denied the exemption u/s 11 and confirm the order of the Assessing Officer that the Appellant is not entitled to the benefits of Section 11 of the Act. Ground No. 1 raised by the Appellant is accordingly dismissed."*

Aggrieved, now assessee is in second appeal before Tribunal.

4. We have heard rival submissions and gone through facts and circumstances of the case. Briefly stated and admitted facts are that the assessee is a Chamber of Commerce registered u/s. 12A of the Act. The assessee being a

company incorporated u/s. 25 of the Companies Act, 1956 without share capital and does not distribute any dividend to its members and also its entire receipts are expended for fulfillment of its objects as it is a charitable Association. The assessee is an Association of various Institutions formed in 1976 for development of trade, industry and commerce. The main objects of the Trust are as under:

*“1. To promote, study, extend and develop the home and foreign trade, commerce, and manufactures of the Indian Union and the Republic of France and their mutual commercial relations, and to represent and express the views of the mercantile and commercial communities of both countries on commercial and industrial questions.*

*2. To, collect, publish and disseminate, statistic relating to home and foreign trade and commerce and manufactures of the Indian Union and the Republic of France; to consider questions connected therewith, to make representations to Governments, legislative bodies, chamber of Commerce and other authorities thereon.*

*3. To assist in the setting up of joint Ventures in India and in third countries in association with individuals, firms, companies and corporations of Indian and French nationality and do such things as may be necessary.*

*4. To promote, study, extend and advance the special interest of Indian subjects carrying on any industry or business in or with the republic of France and also the special interest so France subjects carrying on any industry or business in or with the Indian Union.”*

5. The assessee explained before us that Chamber is not engaged in giving relief to the poor, education or medical relief but is covered by the last limb of definition of charitable purpose as defined u/s. 2(15) of the Act i.e. “the advancement of any other object of general public utility”. During the course of assessment proceedings, the AO called for the details and assessee filed all the details including income and expenditure made by Chamber. The source of income of the assessee has been verified by the AO and noted that it is from subscription of membership, advertisement, interest received, interest, translation fee, seminars or workshops and other receives includes exchange gains. This Trust is granted exemption since its inception till Asst. Year 2008-09. The exemption u/s. 11 of the Act was withdrawn w.e.f. Asst. Year 2009-10 i.e. the year under consideration for the reason that a proviso is added by the Finance

Act, 2008 w.e.f. 01.04.2009 i.e. for and from Asst. Year 2009-10 wherein the definition of charitable purpose was amended so as to provide that “the advancement of any other object of general public utility” would not be charitable purpose if it involves carrying on any activity in the nature of trade, commerce or business or any activity or 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”. Before us, ld. counsel for the assessee referred to para 3.1 and 3.2 of Circular No. 11 of 2008 vide F. No. 134/34/2008-TPL dated 19.12.2008. Ld. counsel for the assessee relied on the recent decision of Coordinate bench of ITAT, Chennai in the case of Japanese Chamber of Commerce & Industry Vs. director of Income Tax (exemptions) (2014) 99 DTR 145 (Tribunal orders) wherein it was interpreted the circular vide para 6, which reads as under:

*“6. A perusal of Board Circular No. 11 of 2008 (supra) would clarify the implications arising from the amendment. The relevant extract of the circular is reproduced hereinbelow :*

*1 . . . . .*

*2 . . . . .*

*3. The newly inserted proviso to s. 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 s. 2(15). Hence, such entities will not be eligible for exemption under s. 11 or under s. 10(23C) of the Act if they carry on commercial activities. Whether such an entity is carrying on an activity in the nature of trade, commerce or business is a question of fact which will be decided based on the nature, scope, extent and frequency of the activity.*

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

*from and participation of only their members, these would not fall under the purview of the proviso to s. 2(15) owing to the principle of mutuality. However, if such organizations have dealings with non-members, their claim to be charitable organizations would now be governed by the additional conditions stipulated in the proviso to s. 2(15).*

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

*A conjoint reading of the circular and the objects of the assessee-society would show that the aims and objects of the society are not hit by the newly introduced proviso to sub-so (15) of s. 2 of the Act. The assessee is charging admission fee and monthly subscription fee from its members. Apart from this, the assessee is also accepting grants and special contributions, admission/registration fee for seminars/conferences conducted by the society. The assessee is not charging any fee for the services rendered by it. The fees charged by way of admission fee, monthly subscription, admission and registration fee etc., are utilized only for the promotion of the aims and objects of the society. Clause 1 of the aims and objects put complete embargo on earning profit from any of the activities of the society. Profit is the essence of trade, commerce or business. When services are rendered without profit motive, the element of trade, commerce or business disappears from such activities. Therefore, it can be safely construed that the activities of the assessee are not hit by the newly added proviso to s. 2(15) of the Act.*

*So far as organising of seminars and conferences is concerned, the Delhi Bench or the Tribunal while referring to object No. 5 of the assessee's coordinate body's aims and objects which is identical to object No. 5 of the assessee's aims and object, held:*

*"..... So far as object No. 6 is concerned, there can be no doubt that it is a charitable object since inviting intellectuals, industrialists, scholars, tends to enlighten the faculties of the members which is to their ultimate benefit and may help them in becoming more evolved and better human beings. In fact, the Rajasthan High Court in CIT vs. Jodhpur Chartered Accountants Society (2002) 174 CTR (Raj) 504 : (2002) 258 ITR 548 (Raj) has held that organizing such seminars and conferences to educate people in different*

*fields of knowledge is a charitable object of general public utility without any profit motive."*

*Another objection raised in the-impugned order is that the benefit of the society would not be available to general public and are restricted to its members. The Delhi Bench of the Tribunal on this issue has held as under:*

*"6. The Director of IT (Exemptions) is also not right in his view that the activities of the society are restricted to Japanese companies and Japanese Government Institutions who alone can become members of the society and, therefore, the Indian public at large is not benefited by the activities. It has to be remembered that the society has been formed to promote development of trade and commerce between India and Japan and facilitate economic co-operation between the two countries. It cannot be denied that the industrial advancement or advancement in other connected fields, the benefits of which accrue to the members of the society would, by virtue of close interaction between the two countries, would also percolate to the public of India. Promotion of trade, commerce and industry between India and Japan will undoubtedly benefit the Indian public at large. Therefore, the Director of IT (Exemptions) is not justified in saying that the Indian public or a segment thereof will not be benefited by the activities of the society."*

*In view of this categorical findings of the Delhi Bench of the Tribunal, we hold that the benefits of the activities of the trust are not confined to select segment but would flow to larger section of society."*

6. Finally, Ld. counsel for the assessee relied on the coordinate bench decision of ITAT, Kolkata in the case of Indian Chamber of Commerce Vs. ITO in ITA No.1491 & 1284/K/2012 for AT 2008-09 & 2009-10 dated 02.12.2014, wherein it has been held as under:

*"33. From the Memo Explaining the provisions of Finance Bill 2008 & CBDT Circular dated 19-12-2008, what will be position of an entity engaged in the 'advancement of any other object of general public utility', whether the same will be hit by commercial activities in view of the newly inserted proviso to section 2(15) of the Act or not? The proviso was introduced with the sole aim of bringing into ambit of taxation such entities which were engaged in commercial activities. Here, we need to appreciate the concept of an "entity engaged in commercial activities". In very simple words, any entity whose main or dominant object is commercial can only be said to be a commercial entity. An entity whose main purpose is undoubtedly charitable in nature without an iota of commerciality in it cannot be said to be engaged in commercial activity. Also we need to note that another point that emerges from the above is that whether an entity is carrying on an activity in the nature of trade, commerce or business always remains a question of fact which will have to be determined on the basis of the facts of the individual case. No generalization for such determination is possible. In view of the above, it is seen that the proviso can be applied*

to fact based on the facts and the past history of the assessee, which is discussed in detail above. From the above facts, we are clear that the assessee has never been dominantly engaged in any commercial activities and is a Charitable Institution registered as such u/s 12A of the Act, set up for the promotion and protection of Indian business and industry. The main purpose of this Institution is promotion and protection of trade and commerce in the country and not to conduct any commercial activities. Further, it has also never been the contention of the revenue that the assessee is engaged in commercial activities but it is hit by the proviso to section 2(15) of the act and thus will be deemed to be engaged in commercial activities. What will be the position to an institution engaged in advancement of any other object of general public utility, which lays down that such an institute will be deemed to be not "charitable" if it is involved in carrying on "any activity in the nature of trade, commerce or business or any activity of rendering any service in relation to any trade, commerce or business." According to us, part of the proviso being "any activity of rendering any service in relation to any trade, commerce or business" intends to expand the scope of the proviso to include services, which are rendered in relation to any trade, commerce or business. The proviso further stipulates that the activity in relation to the trade commerce or business must be for a cess or fee or any other consideration. From the proviso, it is seen that the most material and relevant words in the proviso are "trade, business or commerce". The activities which are undertaken by the institute should be in the nature of trade, commerce or business or any activity of rendering any service in relation to any trade, commerce or business. We will analyse the term "business" from the definition of the term 'business' as defined in section 2(13) of the act and whether assessee's activities falls within the terminology of "business". The term "Business" read as under:-

**"2. Definitions:**

... ..

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

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

*"...No doubt, the definition of "business" given in Section 2(5-A) of the Act even without profit motive is wide enough to include any trade, commerce or manufacture or any adventure or concern in the nature of trade commerce or manufacture and any transaction in connection with or incidental or ancillary to the commencement or closure of such trade, commerce, manufacture, adventure or concern. If the main activity is not business, then any transaction incidental or ancillary would not normally amount to "business" unless an independent intention to carry on "business" in the incidental or ancillary activity is established. In such cases, the onus of proof of an independent intention to carry on "business" connected with or incidental or ancillary sales will rest on the Department. Thus, if the main activity of a person is not trade, commerce etc., ordinarily incidental or ancillary activity may not come within the meaning of "business". To put it differently, the inclusion of incidental or ancillary activity in the definition of "business" presupposes the existence of trade, commerce etc. The definition of "dealer" contained in Section 2(11) of the Act clearly indicates that in order to hold a person to be a "dealer" he must "carry on business" and then only he may also be deemed to be carrying on business in respect of transaction incidental or ancillary thereto. We have stated above that the main and dominant activity of the Trust in furtherance of its object is to spread message. Hence, such activity does not amount to "business". Publication for the purpose of spreading message is incidental to the main activity which the Trust does not carry on as business. In this view, the activity of the Trust in bringing out publications and selling them at cost price to spread message of Saibaba does not make it a dealer under Section 2(11) of the Act.*

*Further Hon'ble Supreme Court in para16 elaborated the term 'business' as under:-*

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

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

*"30. In our view, if the main activity was not 'business', then the connected, incidental or ancillary activities of sales would not normally amount to 'business' unless an independent intention to conduct 'business' in these connected, incidental or ancillary activities is established by the Revenue. It will then be necessary to find out whether the transactions which are connected, incidental or ancillary are only an infinitesimal or small part of the main activities. In other words, the presumption will be that these*

*connected, incidental or ancillary activities of sales are not 'business' and the onus of proof of an independent intention to do 'business' in these connected, incidental and ancillary sales will rest on the department. If, for example, these connected, incidental or ancillary transactions are so large as to render the main activity infinitesimal or very small, then of course the case would fall under the first category referred to earlier." (emphasis supplied.)*

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

*"... .. This decision is directly on the point supporting the case of the respondent after noticing number of decisions on the point including the decisions cited by the learned counsel before us. It may be stated that the question of profit motive or no-profit motive would be relevant only where a person carries on trade, commerce, manufacture or adventure in the nature of trade, commerce etc. On the facts and in the circumstances of the present case irrespective of the profit motive, it could not be said that the Trust either was "dealer" or was carrying on trade, commerce etc. The Trust is not carrying on trade, commerce etc., in the sense of occupation to be a "dealer" as its main object is to spread message of Saibaba of Shirdi as already noticed above. Having regard to all aspects of the matter, the High Court was right in answering the question referred by the Tribunal in the affirmative and in favour of the respondent-assessee. We must however add here that whether a particular person is a "dealer" and whether he carries on "business", are the matters to be decided on facts and in the circumstances of each case."*

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

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

*We have already discussed the case law of Hon'ble Delhi High Court in the case of PHD Chamber of Commerce & Industry(Supra), wherein very categorically held that activities and services performed for a fee or against a payment, by a trade, professional or similar association, such as a chamber of commerce and industry could not be held to be "business" in nature carried out with a profit motive. From all the above what thus transpires is that it is the primary or dominant purpose of the institution, which must be charitable. Where the main activity is "charitable" then the activities which are incidental or ancillary to the main activity, even if carried out for profit, would not mitigate or change the "charitable" character of the institution. Thus in the cases of many professional institution whose main activity is not "business", the connected incidental or ancillary activities of sales carried out in furtherance of and to accomplish their main objects would not, normally, amount to business, unless an independent intention to conduct 'business' in these connected, incidental or ancillary activities is established by the revenue. The test, therefore, to be applied is whether the activity which is pursued is ancillary to a dominant object or is independent to the main object and forms a separate object in itself. The issue whether a professional institution is not hit by the proviso to section 2(15) of the Act will essentially depend upon the individual facts of the case of the institutions wherein discussing the nature of the individual activities it will have to be decided whether the same form incidental, ancillary and connected activities and whether the same were carried out predominantly with a profit motive.*

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

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

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

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

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

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

*36. From facts in entirety, now the question arises is whether principle of consistency will apply or not? From AY 1985-86 to 2007-08 exemption u/s 11 of the Act was allowed. Now, having extensively with the newly amended section 2(15) of the Act and its absolute inapplicability to the case of assessee supported by various judicial decisions, we will discuss this issue. We find that CIT(A) without appreciating that the basis principle underlying the definition of “charitable purpose” remained unaltered, and on amendment in the section 2(15) of the Act w.e.f. 01/04/2009, whereby the restrictive first proviso was inserted therein, lower authorities held that the same substantially changed the position of law and thus the principle of consistency did not apply. But we are of the view that a detailed reading of the various judicial decisions through the years, interpreting the definition of “charitable purpose” as laid out in section 2(15) of the Act and also the definition of “business” in relation to the said section amply reveals that the theory of dominant purpose has always, all through the years, been upheld to be the determining factor laying down whether the Institution is Charitable in nature or not. Where the main object of the Institution was “charitable” in nature, then the activities carried out towards the achievement of the said, being incidental or ancillary to the main*

object, even if resulting in profit and even if carried out with non members, were all held to be "charitable" in nature. Hon'ble Apex Court in the earliest case of Andhra Chamber of Commerce (supra) had clearly laid out the principle that if the primary purpose of an Institution was advancement of objects of general public utility, it would remain charitable even if an incidental or ancillary activity or purpose, for achieving the main purpose, was profitable in nature. It was laid out by the Court that,

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

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

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

*The adding of the words "not involving the carrying on of any activity for profit: was introduced by the Income tax Act, 1961. Hon'ble Apex court in the earliest decision in the case of Surat Art Silk Cloth Manufacturers Association (Supra) held the theory of dominant or primary object of the trust to be the determining factor so as to take the carrying on of the business activity merely ancillary or incidental to the main object.*

*It was held as follows:-*

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

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

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

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

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

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

*In the recent decision which deals specifically with the newly amended section 2(15) of the Act, in the case of Institute of Chartered Accountants of India v. Director General of Income-tax (Exemptions) [2012] 347 ITR 0099 Del HC, laying down the very same principle it was again laid:*

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

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

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

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

*“.... (ii) That, in the absence of any material change justifying the Department to take a different view from that taken in earlier proceedings, the question of the exemption of the assessee appellant should not have been reopened. Strictly speaking, res judicata does not apply to income-tax proceedings. Though, each assessment year being a unit, what was decided in one year might not apply in the following year; where a fundamental aspect permeating through the different assessment years has been found as a fact one way or the other and parties have allowed that position to be sustained by not challenging the ordered, it would not be at all appropriate to allow the position to be changed in a subsequent year.”*

37. ....

38. *In view of the above discussion, we are of the considered view that in the given facts and detailed reading of the various judicial decisions through the years, interpreting the definition of “charitable purpose” as laid out in section 2(15) of the Act and also the definition of “business” in relation to the said section amply reveals that the theory of dominant purpose has always, all through the years, been upheld to be the determining factor laying down whether the Institution is Charitable in nature or not. Where the main object of the Institution was “charitable” in nature, then the activities carried out towards the achievement of the said, being incidental or ancillary to the main object, even if resulting in profit and even if carried out with non members, were all held to be “charitable” in nature. Hon’ble Apex Court in the earliest case of Andhra Chamber of Commerce (supra) had clearly laid out the principle that if the primary purpose of an Institution was advancement of objects of general public utility, it would remain charitable even if an incidental or ancillary activity or purpose, for achieving the main purpose, was profitable in nature. In our view the basic principle underlying the definition of “charitable purpose” remained unaltered even on amendment in the section 2(15) of the Act w.e.f. 01/04/2009, though the restrictive first proviso was inserted therein. Accordingly, in the given facts of the case as discussed above in detail, the assessee association’s primary purpose was advancement of objects of general public utility and it would remain charitable even if an incidental or ancillary activity or purpose, for achieving the main purpose was profitable in nature. Hence, assessee is not hit by newly inserted proviso to section 2(15) of the Act. This issue of assessee’s appeal is allowed.”*

7. On the other hand, when these were confronted to Ld. Sr. DR i.e. the coordinate bench decision of ITAT, Kolkata in the case of Indian Chamber of Commerce and ITAT Chennai bench decision in the case of Japanese Chamber of Commerce & Industry, supra, he could not bring any contrary decision before us and agreed that the issue is covered in favour of the assessee.

8. We have heard rival submissions and gone through facts and circumstances of the case. We find that the assessee trust is registered with the DIT(E), Mumbai u/s. 12A of the Act as charitable institution. The assessee falls under the definition of charitable purposes under the last limb of definition to charitable purposes u/s. 2(15) of the act i.e. “the advancement of any other object of general public utility”. We find that the case of assessee is covered by the orders of coordinate benches of the ITAT in the case of Japanese Chamber of Commerce & Industry of Chennai Bench and Indian Chamber of Commerce of Kolkata Bench, supra. In view of the above, we allow this ground of appeal of the assessee.

9. The assessee has also raised other grounds in respect to the claim of benefit of mutuality. Since we have adjudicated the main issue in its favour, we need not to go into the other aspects.

10. As regards to revenue’s appeal in ITA No. 1122/Mum/2013, the revenue has raised the grounds against the order of CIT(A) allowing carried forward and set off of income of current year. Since the main issue in the assessee’s appeal is allowed, this has become academic in nature. Accordingly, revenue’s appeal is dismissed.

11. In the result, appeal of assessee is allowed and that of revenue is dismissed.

Order pronounced in the open court on 15th April, 2016.

Sd/-  
(R.C. SHARMA)  
ACCOUNTANT MEMBER

Sd/-  
(MAHAVIR SINGH)  
JUDICIAL MEMBER

Mumbai, Dated 15th April, 2016

JD. Sr. P.S.

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. CIT(A) -1, Mumbai
4. CIT- , Mumbai
5. DR, "B" Bench ITAT, Mumbai
6. Guard file.

By Order

(Asstt. Registrar)  
ITAT, Mumbai