IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI 'D' BENCH, MUMBAI

[Coram: Pramod Kumar (Vice President),
and Pavan Kumar Gadale (Judicial Member)]

ITA No. 2883/Mum/19
Assessment year: 2015-16

Deputy Commissioner of Income Tax
Exemptions 2(1), Mumbai **…….……Appellant**

Vs.

Mumbai Railway Vikas Nigam Limited **……Respondent**
2nd floor, Churchgate Station Building
Churchgate, Mumbai 400 00 [PAN: AACCM1284B]

CO No 45/Mum/20
In ITA No. 2883/Mum/19
Assessment year: 2015-16

Mumbai Railway Vikas Nigam Limited **……..…Cross objector**
2nd floor, Churchgate Station Building
Churchgate, Mumbai 400 00 [PAN: AACCM1284B]

Vs.

Deputy Commissioner of Income Tax
Exemptions 2(1), Mumbai **……Respondent**

Appearances by
Ashima Gupta *for the appellant*
Vipul Joshi *for the respondent*

Date of concluding the hearing : December 14, 2020
Date of pronouncement : January 05, 2021

O R D E R

Per Pramod Kumar, VP:

1. By way of this appeal, the Assessing Officer has challenged correctness of the order dated 4th February 2019, passed by the learned CIT(A), in the matter of assessment under section 143(3) of the Income Tax Act, 1961, for the assessment year 2015-16.

2. Grievances raised by the appellant are as follows:

1. "Whether on the facts and circumstances of the case and in law, the Ld.CIT(A) is right in allowing the exemption u/s 11 of the IT. Act in view of proviso to section 2(15) of the I.T. Act, when the receipts from the business of developing, coordinating plants and implementing the rail infrastructure projects, etc. for Indian Railways, exceeded the limit provided in proviso to section 2(15), ignoring the detailed discussion made in assessment order in Para B & C of 6.3".

2. "Whether on the facts and circumstances of the case and in law, the Ld.CIT(A) is right in allowing the exemption u/s 11 of the I.T. Act in view of proviso to section 2(15) of the I.T. Act, by holding that the assessee is a Government organization especially formed to implement Rail components of MUTP and has taken projects funded fully by the Government and using all its funds without any profit markup, ignoring the fact that not only the nature of activities of assessee such as that of consultancy and of implementing projects for the government, are in the nature of business but also that substantial surplus is being generated from the same,"

3. "Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) is right in directing the AO to allow exemption u/s 11 of the I.T. Act to the assessee ignoring the decisions of various Judicial Authorities in following cases relied upon by the A.O. while applying the amended proviso to section 2(25) of the I.T. Act:-

(a) Decision of Hon'ble ITAT, Amritsar in the case of Jammu Development Authority Vs. CIT (ITA No.30(Asr).2011 (52 SOT 153)

(b) Hon'ble ITAT Amritsar in the case of Jalandhar Development Authority Vs. CIT (35 SOT 15).

(c) Chandigarh Bench in the case of Punjab Urban Planning and Development Authority (156 Taxmann 37).

(d) Goa Industrial Development Corporation Vs. CIT, Panaji dated 22.06.2012.

(e) ITAT Cochin Bench in the case of Greater Cochin Development Authority Vs. Jt. DIT(OSD)(E), Range-4, Kochi.

(f) ADIT(E), Trivandrum Vs. Kerala Industrial Development Corporation (2015) (54 taxmann.com 110)(Cochin Truib).

4. "Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) is right in directing the AO to allow the assessee exemption u/s 11 of the Act relying on the decision of Hon'ble Mumbai Tribunal in the case of Shanmukhanand Fine Arts VS. DDIT(E)-1(2), ITA No.l975/Mum/2016 dated 02.03.2018 wherein the Hon'ble ITAT has set aside the order of the AO ignoring the fact not only facts of this case are different but otherwise also the department has accepted the decision of the Hon'ble ITAT and filed appeal before the Hon'ble High Court which is pending for adjudication.

5. "Whether on the facts and circumstances of the case and in law, the ld. CIT(A) is right in directing the AO to allow the assessee exempt u/s. 11 of the Act ignoring the decision of Hon'ble ITAT, Mumbai in the case of Maharashtra Industrial Development Corporation in ITA No. 6552/Mum/2014 dated 27.03.2015 for AY 2011-12 wherein it was held that the activities of the assessee are of commercial in nature and hence are hit by the proviso to section 2(15) of the Act."

3. Learned representatives fairly agree that whatever we decide in ITA No 2880/Mum/19 and CO No. 42/Mum/20, which were heard alongwith this set of appeal and cross-objection, will apply mutatis mutandis for this assessment year as well. Vide our order of even date, we have decided the said appeal and cross objection as follows:

3. The assessee before us is a public sector undertaking, working under Ministry of Railways in the Government of India, and a company registered under section 617 of the Companies Act, 1956. The assessee is engaged in the business of, as the Assessing Officer puts it, 'developing plans and implementation of rail infrastructure projects'. During the course of the assessment proceedings, the Assessing Officer noticed that the registration granted to the assessee under section 12AA as a 'charitable institution' has been cancelled by the Director of Exemptions with effect from 29th October 2001. It was in this backdrop and for the reasons that (a) the assessee was a company registered under section 617, and not as a not for profit company under section 25, of the Companies Act; and that (b) the registration under section 12 AA was cancelled by the learned Director of Exemptions, the Assessing Officer declined benefit of exemption under section 11 of the Act. The Assessing Officer further noted that in view of proviso to Section 2(15), the nature of activity of the assessee and the receipts of the assessee being more than Rs 25 lakhs, the assessee is not entitled to the benefit of section 11. He further noted that in the light of the provisions of Section 13(8), even if the assessee was to be granted registration under section 12AA, he will not be eligible to the benefit of Section 11. He thus declined to treat the excess of income over expenditure as exempt under section 11, and proceeded to bring this amount of Rs 22,82,23,850 to tax. Aggrieved, assessee carried the matter in appeal before the CIT(A). Learned CIT(A), in a detailed order, reversed the action of the Assessing Officer and observed as follows:

10. Having considered the assessment order of the AO, written submissions and case laws submitted by the assessee, I find that the Hon'ble Mumbai ITAT decision in assessee's own case in ITA No. 1057/Mum/2014 & ITA No.2626/Mum/2014, dated 03.08.2016, suprahas restored the cancellation of registration U/S.12A of the Act by the DIT (E) vide his office order dated 10.01.2014. In the said order the hon'ble ITAT has summed up the assessee's status, nature of activities, share holding, objects, funding etc. in the following words:

> *"6.1 in the above background, we may now examine the impugned order of the Director as to whether the conditions prescribed in section 12AA (3) of the Act are satisfied. Before we proceed further, we find it appropriate to*

briefly touch upon the peculiar features of the appellant before us. As noted earlier, the appellant before us is a Government Company incorporated on 12/07/1999 under section 617 of the Companies Act,1956.It's shareholding is owned by the Ministry of Railways (Government of India) and the State Government of Maharashtra. At certain point of time, before appellant company was incorporated, certain projects relating to the transport needs of Mumbai Metropolitan Region (MMR) commuters were identified under MUTP. Such projects related to the urban transport infrastructure in MMR, which included the Sub-urban Rail Net Work of Mumbai also. Such projects involved huge financial resources, and the Railways were already facing severe operational problems in MMR, the Government at the Centre and in the State of Maharashtra found a resolution by setting-up a Special Purpose Vehicle (SPV) for speedy and efficient implementation of railway component of MUTP. Accordingly, assessee company was set-up as a SPV for taking up projects concerning Mumbai Sub-urban Rail Network. In fact, a perusal of the Main Objects clause in the Memorandum and Articles of Association of the assessee- company bears testimony to the above, and it reads as under:-

> *"A. MAIN OBJECTS OF THE COMPANY TO BE PURSUED ON ITS INCORPORATION:*
>
> *(i) To develop coordinated plans and implement the rail infrastructure projects, integrate urban development plan for Mumbai with rail capacity and purpose investments, undertake commercial development Railway land and air space, coordinate and facilitate improvements of track, drainage and removal of encroachments and trespassers and coordinate with organizations operating the train services and responsible for protection of Railway's right of way and urban development for purposeful resolution of allied issues and problems, and discharge its liabilities arising due to such projects and action."*

Before us, it has been elaborately brought out that under the first phase of MUTP (at cost of Rs.4501 crores) 101 EMU rakes have been procured, which have made 418 additional train services possible-and generated an additional 33% carrying capacity in local trains in Mumbai. It has also been pointed out that a state of the art EMU maintenance car shed has been set up at Virar and additional 93 track kilometres have been added, which has facilitated segregating mainline operations from suburban operations. It was extended further to network expansion, service efficiency improvement, rolling stock procurement, institutional strengthening and R&R is under progress under MUTP-II at approximate cost of Rs. 7000 crore. Although detailed written submissions have been filed pointing out various activities undertaken, but we do not dilate further on it:, ***it would suffice to notice that the projects which are being undertaken by the assessee company are in public interest with the ultimate aim of improving transportation infrastructure in MMR****. It was also emphasised before us, with reference to the material on record, that* ***the projects undertaken by the assessee company were being earlier executed***

by Ministry of Railways itself departmentally**. It has also been pointed out that the work undertaken by the assessee company is treated at par with Railways and reference has been made to the Memorandum of Understanding between the Government of India (Ministry of Railways) and assessee in this regard, a copy of which is placed in the Paper Book at pages 13-18. It is also clear that **the funds for such projects are disbursed to the assessee out of budgetary allocation of Indian Railways, including the specific funds received from the World Bank.** The Ld. Representative for the assessee had emphasized **that all opearting assets created under MUTP. through assessee are transferred to / retained by the railways for operations maintenance and replacement.

*6.2 It was also pointed out that **the Direction & General (D&G) charges being received by the assessee are nothing but interdepartmental allocations to cover administrative overheads**. It has been explained that the D&G charges for work under MUTP is based on the quantum of work to be carried out by the assessee and are determined in terms of a standard policy of the Railways. It is also clear that assessee company functions under complete superintendence and control of Government of India, exercised through the Ministry of Railways. It is also asserted before us, and without any contravention, that **assessee has not undertaken any activity for any partv other than the Government of India, and that the projects being undertaken by the assessee company are funded by the World Bank and/or by the budgetary support provided by the State Exchequer and no funds are received from any outside party**. All the aforesaid features do show that the task of **the assessee is to act as an overall co-ordination and implementing agency for the railway component of MUTP works.***

*6.3 Be that as it may, in the background of the aforesaid features of assessee company, we now refer to the specific points raised by the Director to say that activities of the assessee are not being carried, out in accordance with its objects in order to justify his invoking of section 12AA(3) of the Act. As per the Director, the activities carried on by the assessee are not in accordance with the objects because - (i) assessee is only leveraging its funds to earn interest income and the same is not applied for its object; and (ii) the expenses are incurred for establishment, administrative functions and not for any charitable or general public utility purpose. On both the aspects, ld. Representative **for the assessee pointed out that the activities of assessee are totally controlled/managed by Government of India and subject to review by the Comptroller and Auditor General of India.** It has also been pointed out that **the activities of the assessee have been scrutinized by the Assessing Officer in the course of scrutiny assessments made under section 143(3) of the Act for various assessment years starting from 2003-04 to 2010-11 without any adverse findings** and copies of such assessment orders have been placed in the Paper Book at pages 399 to 472. Id. Representative for the assessee explained that no profits are earned from the activity of executing projects, of MUTP and **the inflow by way of D&G charges is an inter-departmental allocation to meet the administrative costs**. It was pointed out that such*

*charges are not even sufficient to cover the entire administrative cost, and the only other source of income is interest earnings on bank deposits, which is being earned from a permitted mode of investment. It was pointed out **that even interest income is utilized towards the objects of the assessee company and in support reference has been made to a communication from Railway Board**, a copy of which is placed at page 53 of the Paper Book titled 'INDEX of NOTES' filed before us. **It is also prescribed therein that any surplus with the assessee is also to be ploughed for funding of the MUTP projects.** It is also pointed out **that no commercial activity has been carried out and that all its activities are for the purpose for which assessee was set-up.** In this context, we have carefully perused the impugned order of the Director and find that his averment in the concluding paragraph "that the activities of the trust are not in accordance with the objects" is only a bald assertion, devoid of any factual support. In fact, the main object of the assessee, as reproduced earlier, is to develop coordinated plans and the railway infrastructure projects, integrate urban development plan for Mumbai with rail capacity, etc. In order to, achieve the aforesaid, assessee company is an SPV tasked to execute the Sub-urban rail projects identified under MUTP. In our considered opinion, the Director has completely misdirected himself in construing the activities of the assessee. The various projects being undertaken by the assessee have been completely lost sight of and rather much has been made of the items of receipts by way of D&G charges, interest incomes and expenses on administrative t and establishment overheads. Quite clearly, any organization would require to spend on administrative overheads in order to carry out its objectives. So however, the function of maintaining an administrative set-up cannot be confused with the objects for which the assessee company has been set up and which it has been undertaking ever since namely, the execution of the railway component of the MUTP. **In fact, at no stage has Revenue disputed the fact that the assessee company is executing rail projects identified under the MUTP.** In our considered opinion, the Director erred in not appreciating the difference between the functioning of administrative set-up, which is essential to execute the object entrusted to the assessee and, the activity of executing the railway component of the MUTP. The administrative set-up and its functions cannot be viewed in isolation to say that assessee company is not carrying out the activities in accordance with its objectives, which in the present case is quite clearly being undertaken by the assessee by executing the railway component of the project under MUTP---------- " (emphasis supplied)*

10.1 In the back drop of the above findings of the hon'ble ITAT, perusal of the aforesaid assessment order of the AO is made and I find that the AO, vide para 4 of his assessment order has denied the exemption u/s.11 of the Act to the assessee on the strength of the following two reasons:

i) Assessee is a company incorporated under section 617 of the Companies Act, 1956 and not a non-profit organization under section 25 of the Companies Act, 1956 or a Trust.

ii) Registration u/s.12AA of the Income Tax Act, 1961 has been, cancelled by the Ld. DIT(E), Mumbai vide order bearing No.DIT(E)/Registration 12-AA/2013-14/2 dated 10.01.2014.

*10.1.1 The above stated first reason for denial of exemption u/s 11 of the Act by the AO is that the assessee company is not a non-profit organization under section 25 of the Companies Act, 1956 or a Trust. However, while holding so, the AO has not mentioned in his order as to under which provisions of the Act, the requirement of registration under section 25 of the Companies Act, 1956 and the requirement of applicant being a Trust is mandatory for grant of exemption u/s 11 of the Act and nor has the AO cited any judicial precedents to buttress his decision. Further, I find myself in agreement with the applicant that registration under section 25 of Companies Act is not a prerequisite for claiming deduction u/s 11 of the Act. The only requirement for claiming exemption u/s.11 of the Act is that the income should be derived from a property held for charitable or religious purpose. The assessee, MRVC is duly registered u/s. 12A of the Act as a charitable institution and the said registration is in force as on today. Even if assessee is not a Company registered u/s.25 of Companies Act, 1956 it is still eligible for exemption u/s.11 as in the case of Delhi Stock Exchange Association limited, a company registered u/s 25 of the Companies Act, it was held to be eligible for exemption u/s 11 of the Act by the Hon'ble High Court, Delhi in the case **Commissioner of Income-tax v/s. Delhi Stock Exchange Association Limited [2001] 119 TAXMAN 91 (DELHI) is under:***

> *"7. In the instant case, as noticed above, exemption under section 11 was disallowed in the past and in the present year only on the ground that the articles of association do not expressly prohibit declaration of dividend, etc., to the shareholders and not for any other reason. In our opinion, the flaw in the memorandum and articles of association which, according to the revenue, disentitled the assessee for claim under section 11, having been rectified during the previous year relevant to the assessment year/ 1974-75, the exemption under section 11 has to be allowed for the whole of the assessment year irrespective of the fact that the amendment took place in the midst of the previous year. We are of the view that after the said amendment had been carried out in December, 1973 the decisions of the Tribunal in respect of earlier assessment years could not be applied in respect of the present assessment year. We are, therefore, in agreement with the Tribunal that the income of the assessee for the whole of the previous year relevant to the assessment year 1974-75 is entitled to exemption under section 11. We accordingly answer the question referrer in the affirmative, i.e., in favour of the assessee and against revenue. There will, however, be no order as to costs."*

10.1.1.1 Similar ruling has been made by Hon'ble High Court of Rajasthan in the case of Commissioner of Income-tax, Jaipur II v. Jaipur Stock Exchange Ltd. [2017] 79 taxmann.com 388 (Rajasthan). The Jaipur Stock Exchange limited was registered as Public Limited Company under the Companies Act 1956 and was also registered as a Charitable Institution u/s.12A of the Hon'ble High Court of Rajasthan has ruled as:

"We have gone through the objects of the Jaipur Stock Exchange Limited in the Memorandum of Association. The Jaipur Stock Exchange Limited is a Company, registered by the Income Tax Department is Charitable Trust under Section 12A of the Income Tax Act. The object of the stock exchange is not only to further the interests both of the brokers and dealers, but also the public interested in securities, to assist, regulate and control the trade or business in securities, to maintain high standards of commercial honor and integrity, to promote and inculcate honorable practices, and just and equitable principles of trade and business, to discourage and to suppress malpractices, to settle disputes and to decide all questions of usage, custom or courtesy in the conduct'-of trade and business. The Memorandum of Association does not permit the profits to be distributed between the members. The profits are provided to be utilized for services of the public utility, would thus clearly fall and will qualify for exemption within the meaning of "charitable purpose", as defined in Section 2(15) of the Act."

10.1.1.2 Further, the issue; whether an assessee not being a trust, was entitled to registration u/s 12A of the Act, came up before the Hon'ble Supreme Court of India the case of CIT vs. Gujarat Maritime Board (2007) 75 CCH 1223 ISCC(2008) 1 DTK 0001, (2008) 214 CTR 0081, (2007) 295 1TR 0561, (2008) 166 TAXMAN 0058, when the Hon'ble apex court held as under:

"8. <u>One of the objections raised on behalf of the Devartment was that Guiarat Maritime Board is not entitled to the benefit of s. 11 of the 1961 Act as the said Board was not a trust under Public Trust Act and, therefore, it was not entitled to claim registration under s. 12A of the 1961 Act.</u> The Department's case was that the Maritime Board was a statutory authority. It was not a trust. Its business was not held under a trust. Its property was not held under trust. Therefore, the Board was not entitled to be registered as a charitable institution. It was the case of the Department that the Board was performing statutory functions. Development of minor ports in the State of Gujarat .cannot be termed as the work undertaking for charitable purposes and in the circumstances the CIT rejected the Board's application under s. 12A of the 1961 Act. In the light of the above case of the Department we are required to consider the expression <u>"any other object of general vublic utility" in s. 2(15) of the 1961 Act.</u>

9. At the outset, we may point out that s. 10(20) and s. 11 of the 1961 Act operate in totally different spheres. Even if the Board has ceased to be a "local authority", it is not precluded from claiming exemption under s. 11(1) of the 1961 Act, therefore, we have to read s. 11(1) in the light of the definition of the words "charitable purposes" as defined under s. 2(15) of the 1961 Act.

10. We have perused number of decisions of this Court which have interpreted the words, in s. 2(15), namely, "any other object of generally public utility". From, the said decisions it emerges that the said expression is of the widest connotation. The word "general" in the said expression means pertaining to a whole class. Therefore, advancement of any object of benefit to the public or a

section of the public as distinguished from benefit to an individual or a group of individuals would be a charitable purpose [CIT vs. Ahmedabad Rana Caste Association (1993) 140 ITR 1 (SC) The said expression would prima facie include all objects which promote the welfare of the general public. It cannot be said that a purpose would cease to be charitable even if public welfare is intended to be served. If the primary purpose and the predominant object are to promote the welfare of the general public the purpose would be charitable purpose. When an object is to promote or protect the interest of a particular trade industry that object becomes an object of public utility, but not s if it seeks to promote the interest of those who conduct the said trade or industry [CIT vs. Andhra Chamber of Commerce (1985) 55 ITR 722 (SC)]. If the primary or predominant object of an institution is charitable, any other object which might not charitable but which is ancillary or incidental to the dominant purpose, would not prevent the institution from being a valid charity [Addl CIT vs. Surat Art Silk Cloth Manufacturers Association (1979) 13 CTR (SC) 378 :(1980) 121 ITR 1 (SC)].

11. The present case in our view is squarely covered by the judgment of Ms Court in the case of CIT vs. Andhra Pradesh State Road Transport Corporation (1986) 52 CTR (SC) 75 : (1986) 159 ITR 1 (SC) in which it has been held that since the Corporation was established for the purpose of providing efficient transport system, having no profit motive, though it earns income in the process, it is not liable to income-tax.

12. Applying the ratio of the said judgment in the case of Andhra Pradesh State Road Transport Corporation (supra), we find that, in the present case, Gujarat Maritime Board is established for the predominant purpose of development of minor ports within the State of Gujarat; the management and contra of the Board is essentially with the State Government and there is no profit motive, as indicated by the provisions of ss. 73, 74 and 7L of the 1981 Act. The income earned by the Board is deployed for he development of minor ports in India. In the circumstances, in c ur view the judgment of this Court in Andhra Pradesh State Ro id Transport Corporation (supra) squarely applies to the facts of the present case.

13. Before concluding we may mention that under the scheme of s. 11(1) of the 1961 Act, the source of income must be held under trust or under other legal obligation. Applying the said test it is clear, that Gujarat Maritime Board is under legal obligation to apply the income which arises directly and substantially from the business held under trust for development of minor ports in the State of Gujarat. Therefore they are entitled to be registered as "charitable trust[11] under 12A of the 1961 Act.

14. For the afore stated reasons, we see no infirmity in f/je impugned judgments of the High Court and Tribunal and consequently civil appeal stand dismissed with no order as to costs." (emphasis supplied)

10.1.1.3 In view of the above discussion, factual matrix and binding judicial precedents, I am of the view that the assessee, MRVC, cannot be denied exemption

U/s.11 of the Act merely on the ground that the assessee is not a Trust or a Company incorporated U/s.25 of the Companies Act, 1956.

10.1.2 The second reason for denial of the exemption is the cancellation of registration U/S.12A of the Act by the DIT (E) vide order dated 10.01.2014. This ground does not exist as on date as the registration u/s. 12A has been restored by the Hon'ble Mumbai ITAT in ITA No. 105?'/Mum/2014 & ITA No.2626/Mum/2014, dated 03.08.2016, supra while holding as under:

> *"6.3 Be that as it may, in the background of the aforesaid features of assessee company, we now refer to the specific points raised by the Director to say that activities of the assessee are not being carried out in accordance with its objects in order to justify his invoking of section 12AA(3) of the Act. ……..in our considered opinion, the Director erred in not appreciating the difference between the functioning of administrative set-up, which is essential to execute the object entrusted to the assessee and, the activity, of executing the railway component of the MUTP. The administrative set-up and its functions cannot be viewed in isolation to say that assessee company is not carrying out the activities in accordance with its objectives, which in the present case is quite clearly being undertaken by the assessee by executing the railway component of the project under MUTP, Therefore, in our considered opinion, the Director has clearly misdirected himself in coming to conclude that assessee has carried out 'activities that are not in accordance with its objects. Thus, factually speaking, we find no reason to uphold the inference of the Director that the activities are not in accordance with its objects."*

10.1.3 In view of the above discussion, factual matrix and binding judicial precedents, I am of the view that the assessee, MRVC, cannot be denied exemption U/s.11 of the Act merely on the ground that the assessee is not a Trust or a Company incorporated U/s.25 of the Companies Act, 1956 and the 'second ground for denial of exemption u/s 11 of the Act being cancellation of registration u/s!2A by the DIT(E) being not in existence as on date by virtue of Hon'ble Mumbai ITAT decision in assessee's own case in ITA No. 1057/Mum/2014 & ITA No,2626/Mum/2014, dated 03.08.2016. Therefore, the AO is directed not to deny exemption u/s 11 of the Act to the assessee on, the grounds mentioned in para 4 of his aforesaid assessment order.

Provisio to section 2(15) of the Act:

10.2 As discussed in para 8.3 above, the AO, in addition to the aforesaid two grounds invoked by the AO to deny the assessee deduction u/s 11 of the Act, vide para 6 of his aforesaid assessment order also denied exemption u/s.11 of the Act invoking the newly inserted provisions of provisio to section 2(15) and section 13(8) of the Act by the Finance Act of 2009 w.e.f. 01.04.2009.The AO has held that the purpose of the assessee trust was 'the advancement of any other object of general public utility' and since assessee was engaged in commercial activities for a fees or cess either directly or indirectly and also the receipts from such .commercial activity is more than Rs.25 lakhs, the provisions of proviso to Section 2(15) of the Act are attracted. It is,

therefore, a undisputed fact that the purpose of the assessee trust was 'the advancement of any other of general public utility'. Therefore, the only issue for decision is that whether the activities of the assessee constitute 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. For the sake of convenience, the provisions of section 2(15)

> *"(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 business56, 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:]*
>
> *[Provided further that the first proviso shall not appfy if the aggregate value of the receipts from the activities referred to therein is [twenty five lakh rupees] or less in the previous year;]"*

It may also be useful to reproduce the Main Objects clause in the Memorandum and Articles of Association of the assessee- company which reads as under:

> *"A. MAIN OBJECTS OF THE COMPANY TO BF <u>PURSUED ON ITS INCORPORATION:</u>*
> *(ii) To develop coordinated plans and implement the rail infrastructure projects, integrate urban development plan for Mumbai with rail capacity and purpose investments, undertake commercial development Railway land and air space, coordinate and facilitate Improvements of track, drainage and removal of encroachments and trespassers and coordinate with organizations operating the train services and responsible for protection of Railsway's right of way and urban development for purposeful resolution of ailed issues and problems, and discharge its liabilities arising due to such projects and action."*

10.2.1 I find that the appellant is a Government Company incorporated on 12/07/1999 under section 617 of the Companies Act 1956. It's shareholding is owned by the Ministry of Railways (Government of India) and the State Government of Maharashtra. The appellant company was especially formed to 'implement railway component of MUTP (Mumbai Urban Transport Project) to cater to the transport

needs of commuters of Mumbai Metropolitan Region (MMR) as the Railways were already facing severe operational problems and scarcity of funds in MMR. The above reproduced Main Objects clause in the Memorandum and Articles of Association of the assessee- company bears testimony to this fact. In the first phase of MUTP (at cost of Rs.4501 crores) 101 EMU rakes have been procured, which have made 418 additional train services possible and generated an additional 33% carrying capacity in local trains in Mumbai. It has also been pointed out that a state of the art EMU maintenance car shed has been set up at Virar and additional 93 track kilometres have been added, which has facilitated segregating mainline operations from suburban operations. It was extended further to network expansion, service efficiency improvement, rolling stock procurement, institutional strengthening and R&R is under progress under MUTP-II at approximate cost of Rs.7000 crore. It leaves no doubt in my mind that the projects which are being undertaken by the -assessee company are in public interest with the ultimate aim of improving transportation infrastructure in MMR. It is also clear that the funds for projects are disbursed to the assessee out of budgetary allocation of Indian Railways and Government of Maharashtra, including-the specific funds received from the World Bank. It has been assessee's uncontroverted submission that all operating assets created under MUTP, through assessee are transferred to / retained by the railways for operations, maintenance and replacement. In addition to funds that the assessee receives from the Indian Railways and the' Government of Maharashtra, the assessee receives the Direction & General (D&G) charges which are nothing but interdepartmental allocations to cover administrative overheads. It has been explained that the D&G charges for work under MUTP is based on the quantum of work to be carried out by the assessee and are determined in terms of a standard policy of the Railways. It is also clear that assessee company functions under complete superintendence and control of Government of India, exercised through the Ministry of Railways. It has also been uncontroverted contention of the assessee that assessee does not deal in any sale and purchase of goods and it does not receive any consideration from any source other than the Ministry of railway and the Government of Maharashtra and indirectly funded by the World bank. All the aforesaid features go to show that the task of the assessee is to act as an overall coordination and implementing agency for the railway's component of MUTP works.

10.2.1.1 Further, I also find that the funds received by the assessee company are parked with the banks in the form of Fixed deposits till the time are actually expended on MUTP Projects. Such fixed deposits yield interest which is again ploughed back to achieve the objectives of the assessee company to fund the MUTP projects. The activities of assessee are totally controlled/managed by Government of India and subject to review by the Comptroller and Auditor General of India. I also find that the activities of the assessee have been scrutinized by the Assessing Officer in the course of scrutiny assessments made under section 143(3) of the Act for various assessment years starting from 2003-04 to 2010-11 without any adverse findings and copies of such assessment orders have been placed in the Paper Book at pages 399 to 472. It is also an uncontroverted fact that that no profits are earned from the activity of executing projects of MUTP and the inflow by way of D&G charges is an inter-departmental allocation to meet the administrative costs. From a perusal of details filed, I find that such charges are not even sufficient to cover the entire

administrative cost, and the only other source of income is .interest earnings on bank deposits, which is being earned from a permitted mode of investment. It can be seen that even interest income is utilized towards the objects of the assessee company and in support reference has been made to a communication from Railway Board, a copy of which is placed at page 53 of the Paper Book titled 'INDEX of NOTES' filed before the ITAT and a copy submitted during the appellate proceedings. It is .also prescribed therein that any surplus with the assessee is also to be ploughed for funding of the MUTP projects. It has been the assessee's contention that no commercial activity has been carried out and that all its activities are for the purpose for which assessee was set-up. In this context, the contention of the AO made in his the assessment order that the assessee is carrying on commercial activities with profit motive are only a bald assertions, devoid of any factual support. In fact, the main object of the assessee, as reproduced earlier, is to develop coordinated plans and the railway infrastructure projects, integrate urban development plan for Mumbai with rail capacity, etc. In order to achieve the aforesaid, assessee company is an SPY tasked to execute the Sub-urban rail projects identified under MUTP. The various projects being undertaken by the assessee have been completely lost sight of by the AO and rather much has been made of the items of receipts by way of D&G charges, interest incomes etc. Quite clearly, any organization would require to spend on administrative overheads in order to carry out its objectives. So however, the function of maintaining an administrative set-up cannot be confused with the objects for which the assessee company has been set up and which it has been undertaking ever since namely, the execution of the railway component of the MUTP. The AO has even termed the funds received by the assessee from the Government of Maharashtra and Ministry of Railways as surpluses generated. These funds are not received by MVRC as its income. These funds are received by MVRC to create assets/infrastructure projects which on completion are handed over back to the Government/Railways. In fact, at no stage the AO has disputed the fact that the assessee company is executing rail projects identified under the MUTP.

10.2.1.2 The AO, in his assessment order has observed that there is a huge surplus / income being earned by MRVC which is mainly interest income from bank fixed deposits made out of funds made available by the Government lending their utilization towards specific government railway infrastructure projects by depositing them into the bank. Even this surplus, in the form of interest, is to be ploughed back into government infrastructure projects. An Annexure E (paper book) was attached showing Chart of summarized position of utilization of surplus. The interest income from bank deposits out of funds of the government, pending their deployment towards specific railway project cannot qualify as ,an activity in nature of trade, commerce or business as held by the Honorable Mumbai Tribunal in the case of Bombay Presidency Golf Club Ltd. v/s. ITO - [(2016) 159 ITD 1050 (Mum - Trib] In which case it was clearly held that "...the investments made with banks is not an activity in the nature of trade, commerce or business but is income earned on application of moneys mandated under section 11(5)(iii). Thus, as per the provisions of section 11(5), the assessee is permitted to deposit in any account with a schedule bank on the deposits made therein and hence it cannot be said that interest received from the bank is in the nature of trade, commerce or business."

10.2.3 In recent years, a number of decisions of the various High courts and ITATs have come which have held that where objects of the assessees demonstrated that they existed and operated purely for purpose of achieving an object of general public utility and these objects had nothing to do with any trade, commerce or business and profit earning was not predominant purpose of assessee, the proviso to section 2(15) could not have been invoked to decline benefit of sections 11. One such land mark judgment has been delivered by the Hon'ble Gujarat High court in Ahmedabad Urban Development Authority v/s, Assist. Comm. of IT, (E) [2017] 83 taxmann.com 78 (Gujarat) where the hon'ble High Court has considered the various case laws relied upon by the AO in the present case and also various decisions of the Supreme court and the High courts on issues of definition of trade and business, interpretation of section 2(15) and its provisio, CBDT Circular No. 11 of 2008 dated 19th December 2008 explaining the purpose of introduction of provisio to section 2(15) and the Finance Minister's speech. While reversing the decisions of the[1] 1TAT and deciding the issue in favour of the appellant, the Hon'ble High court has held as under:

> *"12.2 Whether the activities of the appellant AUDA can be said to be in the nature of trade, commerce or business as occurring in the first proviso to Section 2(15) of the Act, few decisions of the Hon'ble Supreme Court as well as other High Courts are required to be referred to at this stage.*
> *12.3 In the case of Khoday Distilleries Ltd. v. State of Karnataka [1995] 1 SCC 574, the Hon'ble Supreme Court had an occasion to consider the word "trade". In the said decision, the Hon'ble Supreme Court has held that "the primary meaning of the word "trade" is the exchange of goods for goods or goods for money".*
> *12.4 In the case of State of Andhra Pradesh v. Abdul Bakhi and Bros. [1964] 5 STC 644 (SO while considering the word "business" the Hon'ble Supreme Court has held that "the word "business" was of indefinite import and in a taxing statute, it is used in sense of an occupation, or profession which occupies time, attention or labour of a person, and is clearly associated with the object of marking profit".*
>
> *12.5 In the case of Institute of Chartered Accountants of India (supra) while considering the whether activities of Indian Trade promotion organization can be said to be in the nature of "business", despite the fact that the said organization - was collecting rent for providing the space at trade, fair and exhibitions and though was receiving income by way of sale of tickets and income from tickets and sale in Pragati Maidan etc., after considering the various decisions of the Hon'ble Supreme Court as well as decisions of the other High Courts, it is held that activities of the said organization cannot be considered as "business". While holding so, Delhi High Court has observed and held as under:*
>
> *"An activity would be considered 'business' if it is undertaken with profit motive, but in some cases, this may not be determinative, Normally, the profit motive test should be satisfied, but in a given case 1 Activity may be regarded as a business even when profit motive cannot 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."

12.6 In the aforesaid decision, after considering the decision of the Hon'ble Supreme Court in the case of CST v. Sai Publication Fund! [2002] 258 ITR 70/122 Taxman 437, it is held by the Delhi High Cow that "thus, if the dominant activity of the assessee was not business, the] anv incidental or ancillary activity would also not fall within M definition of business." In para 64, 67, 69, 70, 71 and 72 the Delhi Hie Court has observed and held as under:

"64. It is not necessary that a person should give something for free on at a concessional rate to qualify as being established for a charitable purpose. If the object and purpose of the institution is charitable, the fact that the institution collects certain charges, does not alter the character of the institution.

67. 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 organized manner. The purpose and the dominant object for which an institution carries on its activities is material to determine whether the scone is business or not. The purport of the first proviso to section 2(15) of me 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 vroviso is to exclude organizations which are carrying on regular business from the scove of charitable purpose. The purpose of introducing the proviso to Section 2(15) of the Act lean 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, propose to amend the law to exclude the aforesaid cases. Genuine charitable organizations will not in any way be affected.[1] The expressions business, trade or commerce as used in the first proviso must, thus, be interpreted restrictively and where the dominant object of an organization is charitable any incidental activity for furtherance of the organization is charitable any incidental activity for furtherance of the object would not fall within the expressions business, trade or commerce.

*69. In the case of **Addl Commissioner of Income Tax v. Surai Art Silk Cloth Manufacturers Association: [1980] 121 ITR 1** (SC), the Supreme Court held as*

*under:-The test which has, therefore, now to be applied is whether the **predominant object** of the activity involved in carrying out the object of general public utility is to sub serve the charitable purpose or to earn profit Where profit-making is the predominant object of the activity, the purpose, though an object of general public utility would cease to be a charitable purpose.*

But where the predominant object of the activity is to carry out the charitable purpose and not to earn profit, it would not lose its character of a charitable purpose merely because some profit arises from the activity.'

70. Although in that case 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. In the present case, there is little doubt that the objects of the activities of the petitioner are entirely for charitable purposes. WP(C) 1872/13 Page 48 of 55 Finally in ICAI(II) (supra), this court, with reference to H. Abdul Bakhi and Bros (supra) observed as under:-

71. Although, it is not essential that an activity be carried on for profit motive in order to be considered as business, but existence of profit motive would be a vital indicator in determining whether an organization is carrying on business or not. In the present case, the petitioner has submitted figures to indicate that expenditure on salaries and depreciation exceeds the surplus as generated from holding coaching classes. In addition, the petitioner institute provides study material and other academic support such as facilities of a library without any material additional costs. The Supreme Court in the case of State of Andhra Pradesh v. H. Abdul Balkhi and Bros, (supra) held as under:

> *The expression "business" though extensively used a word of indefinite import, in taxing statutes it is used in the sense of an occupation, or profession which occupies the time, attention and labour of a person, normally with the object of making profit. To regard an activity as business there must be a course of dealings, either actually continued or contemplated to be continued with a profit motive, and not for sport or pleasure, (Underlining added)*
>
> *72. There is nothing on record to indicate the assertion of the petitioner that ts activities are not fuelled by profit motive is incorrect. Absence of profit motive, though not conclusive, does indicate that the petitioner is not carrying on any business."*

12.7 Identical question came to be considered by the Delhi High Court in the case of Bureau of India Standard v. DGIT (Exemptions) [2013] 212 Taxman 210/[2012] 27 taxmann.com 127. In the said decision, the Delhi High Court was considering whether the activities of the Bureau of Indian Standards (supra) in granting licenses and trading certificates and charging amounted to carrying on business, trade or commerce and e considering the said question, it is observed as under:

"In these circumstances, rendering any service in relation to trade, commerce or business cannot, in the opinion of the Court, receive such a 'wide construction as to enfold regulatory and sovereign authorities, set up under statutory enactments, and tasked to act as agencies of the State in public^ duties which cannot be discharged by private bodies. Often, apart from the controlling or parent statutes, like the BIS Act, these statutory bodies (including BIS) are empowered to frame rules or regulations, exercise coercive powers, including inspection, raids; they possess search and seizure powers and are invariably subjected to Parliamentary or legislative oversight. The primary object for setting up such regulatory bodies would be to ensure general public utility. The prescribing of standards, and enforcing those standards, through accreditation and continuing supervision through inspection etc., cannot be considered as trade, business or commercial activity, merely because the testing procedures, or accreditation involves charging of such fees. It cannot be said that the public utility activity of evolving, prescribing and enforcing standards, involves the carrying on of trade or commercial activity."

12.8 Circular No. 11 of 2008 issued by the CBDT fell for consideration by the Delhi High Court in the case of G.S.L India (supra). It is held that even as per the said circular, proviso to Section 2(15) of the Act is applicable to assessee, who are engaged in commercial activities i.e. carrying on business, trade or commerce, in the garb of 'public utilities' to avoid tax liability as it was noticed that the object 'general public utility' was sometimes used as a mask or device to hide the true purpose, which was 'trade, commerce or business[1]. Thus, it is evident that introduction of proviso to Section 2(15) by virtue of the Finance Act, 2008 was directed to prevent the unholy practice of pure trade, commerce and business entities from masking their activities and portraying them in the garb of an activity with the object of a general public utility. It is not designed to hit at those institutions, which had the advancement of the objects of general public utility at their hearts and were charity institutions, The attempt was to remove the masks from the entities, which were purely trade, commerce or business entities, and to expose their true identities.

In the case of G.S.I India (supra), in paras 21, 22 and 27, the Delhi High Court has observed and held as under:

"21. ... <u>As observed above, legal terms, trade, commerce or business in Section 2(15). mean activity undertaken with a view to make or earn profit. Profit motive is determinative and a critical factor to discern whether an activity is business, trade or commerce.</u> The court further held:-

22. Business activity has an important pervading element of self-interest, though fair dealing should and can be present, whilst charity or charitable activity is anti-thesis of activity undertaken with profit motive or activity undertaken on sound or recognized business principles. <u>Charity is driven by altruism and desire to serve others, though element of self-preservation may be present.</u> For charity, benevolence should be omnipresent and demonstrable but it is not equivalent to self-sacrifice and abnegation. The antiquated

definition of charity, which entails giving and receiving nothing in return is outdated. A mandatory feature would be; charitable activity should be devoid of selfishness or illiberal spirit. Enrichment of oneself or self-gain should be missing and the predominant purpose of the activity WP(C) 1872/13 Page 52 of 55 should be to serve and benefit others. A small contribution by wav of fee that the beneficiary pays would not convert charitable activity into business, commerce or trade in the absence of contrary evidence. Quantum of fee charged, economic status of the beneficiaries who pay, commercial value of benefits in comparison to the fee, purpose and object behind the fee etc. are several factors which will decide the seminal question, is it business?

27. As observed above, fee charged and quantum of income earned can be indicative of the fact that the person is carrying on business or commerce and not charity, but we must keep in mind that charitable activities require operational/running expenses as well as capital expenses to be able to sustain and continue in long run. The petitioner has to be substantially self-sustaining in long-term and should not depend upon government, in other words taxpayers should not subsidize the said activities, which nevertheless are charitable and fall under WP(C) 1872/13 Pages 53 of 55 the residuary clause - general public utility. The impugned order does not refer to any statutory mandate that a charitable institution falling under the last clause should be wholly, substantially or in part must be funded by voluntary contributions. No such requirement has been pointed out or argued. A practical and pragmatic view is required when we examine the data, which should be analyzed objectively and a narrow and coloured view will be counter-productive and contrary to the language of Section 2(15) of the Act "

12.9 While, upholding the constitutional validity of the proviso to Section 2(15) of the Act, the Division Bench of the Delhi High Court in the case of Indian Trade Promotion Organization (supra) has observed in para 58 as under:

"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 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 WP(C) 1872/13 Page 54 of 55[vlf] 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[1]. 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."

13. Applying the aforesaid decisions to the facts of the case on hand and with respect to the activities of the AUDA - Ahmedabad Urban Development Authority under the provisions of the Gujarat Tow Planning Act by no stretch of imagination, it can be said that the activities of the assessee (AUDA) can be said to be in the nature of trade commerce or business and/or its object and purpose is profiteering Merely because under the statutory provisions and to meet with the expenditure of Town Planning Scheme and/or providing various service under the Town Planning Scheme, such as road, drainage, electricity water supply etc. if the assessee is permitted to sale the plots (land) to the extent of 15% of the total area under the Town Planning Scheme an while selling the said plots they are sold by holding the public auction, h cannot be said that activities of the assessee is profiteering, to be in tl\e nature of trade, commerce and business.

13.1 In the case of Lucknow Development Authority, Gomti Nagar (supra), it is held by the Allahabad High Court that the activities of the authority cannot be said to be in the nature of trade, commerce c business and/or profiteering and therefore, proviso to Section 2(15) of the Act shall not be applicable.

13.2 Similar, view has been expressed by the Rajasthan High Court in the case of Commissioner of Income Tax-I, Jodhpur vs. Jodhpur Development Authority, Jodhpur -Tax Appeal No. 63 of 2012 decide on 5.7.2016.

14. Considering the aforesaid facts and circumstances and more particularly, considering the fact that the assessee is a statutory body - Urban Development Authority constituted under the provisions of the Act, constituted to carry out the object and purpose of Town Planning Act and collects regulatory fees for the object of the Acts; no services are rendered to any particular trade, commerce or business; whatever me income is earned/received by the assessee even while selling the plots to the extent of 15% of the total area covered under the Town Planning Scheme) is required to be used only for the purpose to carry out the object and purpose of Town Planning Act and to meet with expenditure while providing general utility service to the public such as electrical road, drainage, water etc. and even the entire control is no element of profiteering at all, the activities of the assessee cannot be said to be in the nature of trade, commerce and business and therefore, proviso to Section 2(15)of the Act shall not be applicable so far as assessee is concerned and therefore, the assessee is entitled to exemption under Section 11 of the Income Tax Act. Therefore, the question no.1 is to be held in favour of the assessee and against the revenue.

15. Now, so far as another question which is posed for the consideration of this Court i.e. whether while collecting the cess or fees, activities of the assessee can be said to be rendering any services in relation to any trade, commerce or business is concerned, for the reasons stated above, merely because the assessee is collecting cess or fees which is regulatory in nature, the proviso to Section 2(15) of the Act shall not be applicable. As observed herein above neither there is element of profiteering nor the same can be said to be in the nature of trade, commerce or business. At this stage, decision of the Division Bench of this Court in the case of Sabarmati Ashram Gaushala Trust (supra) is required to be referred to. In the case before the Division Bench, the assessee Trust-Sabarmati Ashram Gaushala Trust was engaged in the activity of breeding milk cattle; to improve the quality of cows and oxen and other related activities. The Assessing Officer denied the exemption to the trust under Section 11 of the Act on the ground that considerable income was generated from the activities of milk production and sale and therefore, considering the proviso to Section 2(15) of the Act, the said Trust-assessee was denied the exemption under Section 11 of the Act. While holding that the activities of the assessee trust still can be said to be for charitable purpose within the meaning of Section 2(15) of the Act and same cannot be said to be in the nature of trade, commerce or business for which proviso to Section 2(15) of the Act is required to be applied. In paras 6, 7, 8 and 12, it is observed and held as under:

> *"6. The legal controversy in the present Tax Appeal centers around the first proviso. In the plain terms, the proviso provides for exclusion from the main object of the definition of the term Charitable purposes and applies only to cases of advancement of any other of general general public utility. If the conditions provided under the proviso are satisfied, any entity, even if involved in advancement of any other object of general public utility by virtue to proviso, would be excluded from the definition of charitable trust. However, for the application of the proviso, what is necessary is that the entity should be involved in carrying on activities in the nature of trade, commerce or business, or any activity of rendering services in relation to any trade, commerce or business, for a cess or fee or any other consideration. In such a situation, the nature, use or application, or retention of income from such activities would not be relevant. Under the circumstances, the important elements of application of proviso are that the entity should be involved in carrying on the activities of any trade, commerce or business or any activities of rendering service in relation to any trade, commerce or business, for a cess or fee or any other consideration. Such statutory amendment was explained by the Finance Ministers speech in the Parliament. Relevant portion of which reads as under:*
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> *I once again assure the House that genuine charitable organizations will not in any way be affected. The CBDT will, following the usual practice, issue an explanatory circular containing guidelines for determining whether any entity is 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. Whether the purpose is a charitable purpose will depend on the totality of the facts of the case. Ordinarily, Chambers of Commerce and similar organizations rendering services to their members*

would not be affected by the amendment and their activities would continue to be regarded as advancement of any other object of general public utility.

*7. In consonance with such assurance given by the Finance Minister on the floor of the House, **CBDT issued a Circular No. 11 of** 2008 **dated** 19th **December** 2008 explaining the amendment as under :-*

> *3. The newly inserted proviso to section 2 (15) will apply only to entities whose purpose is advancement of any other object of genera! public utility ie., the fourth limb of the definition of charitable purpose contained in section 2 (15). Hence, such entities will not be eligible for exemption under section 11 or under section 10 (23C) of the Act if they carry on commercial activities. Whether such an entity is carrying on any 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 section 11 on the ground that their objects are for charitable purpose as these are covered under any other object of general public utility. Under the principle of mutuality, if trading takes place between persons who are associated together and contribute to a common fund for the financing of some venture or object and in this respect have no dealings or relations with any outside body, then any surplus returned to the persons forming such association is not chargeable to tax. In such cases, there must be complete identity between the contributors and the participants. Therefore, where industry or trade associations claim both to be charitable institutions as well as mutual organizations and their activities are restricted to contributions from and participation of only 'their members, these would not fall under the purview of the proviso to section 2 (15) owing to the principle of mutuality. However, if such organizations have dealings 'with non-members, their claim to be chargeable organizations would now be governed by the additional conditions stipulated in the proviso to section 2 (15).*
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> *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. Assessees, who claim that their object is charitable purpose within the meaning of section 2(15), would be well advised to eschew any activity which is in the nature of trade, commerce or business or*

> *the rendering of any. service in relation to any trade, commerce or business.* A
>
> *8. What thus emerges from the statutory provisions, as explained in the would be excluded from the term charitable purpose if it is engaged in any activity in the nature of trade, commerce or business or renders any service in relation to trade, commerce or business for a cess, fee and/or any other consideration. 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 masked as charitable purpose.*
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> *12. All these were the objects of the general public utility and would squarely fall under section 2 (15) of the Act. Profit making was neither the aim nor object of the Trust. It was not the principal activity. 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."*

15.1 Applying the aforesaid decision to the facts of the case on hand and the object and purpose for which the assessee is established/constituted under, the provisions of the Gujarat Town Planning Act and collection of fees and cess is incidental to the object and purpose of the Act, even the case would not fall under second part of proviso to Section 2(15) of the Act.

15.2 Considering the aforesaid facts and circumstances of the case, we are of opinion that the learned Tribunal has committed a grave error in holding the activities of the assessee in the nature of trade, commerce or business and consequently holding that the proviso to Section 2(15) of the Act shall be applicable and therefore, the assessee is not entitled to exemption under Section 11 of the Act. For the reasons stated above, it is held that the proviso to Section 2(15) of the Act shall not be applicable far as assessee- AUDA is concerned and as the activities of the assessee can be said to be providing general public utility services, the assessee is entitled to exemption under Section 11 of the Act. Both the questions are therefore, answered in favour of the assessee and against the revenue.

16. In view of the above and for the reasons stated above, the impugned order passed order passed by the learned Tribunal in respective appeal for different assessment year are hereby quashed and set-aside. Accordingly, all these appeals are allowed and questions in favour of assessee and against the replied)

10.2.4 The Hon'ble Mumbai Tribunal has followed the Ahmedabad Urban Development Authority, (supra) in its recent decision in the case of Shanmukhananda Fine Arts &.. Vs. DDIT (E) 1(2), ITA No.l975/Mum./2Q16, dated:02-03-2018. In this case during the assessment proceedings, the AO observed that the objective of the assessee were primarily in the nature of advancement of any

other object of general public utility. He issued a notice to the assessee mentioning that majority of the receipts were from renting of auditorium for various programmes, that receipts from auditorium worked out to 87.90 percent of gross receipts, that the hall maintained by the assessee trust i.e. Shanmukhananda Hall (SH)was primarily used for ticketing shows and was given to various event managers, that it made commercial exploitation o the hall for 245 days in the year under consideration, that it was collecting entertainment tax, and service tax for the events organized in the hall, that the activities carried out by it did not entail any benefit to the general public, that it was earning huge profit which was primarily commercial in nature. Accordingly he after issuing the show cause to the assessee to this effect, the AO, after invoking the provisions of provisio to section 2(15) of the Act held that me • activities of the assessee were commercial in nature, denied exemption u/s.11 of the Act. The order of the AO was upheld by the CIT(A). The hon'ble IT while setting aside the order of the AO and quoting various recent decision is of the High courts/ITATs on the issue decided the issue in favour of tie assessee while holding as under:

> *6. We have heard the rival submissions and perused the material before us. We find that as per the predominant objects of the assessee, as per the memorandum of association(Pg, A1-A25 of the PB)are to impart Education in music, dance, drama, culture and other fine arts, to provide medical relief, health services and yoga to general public, to establish medical centers/ hospitals for providing medical services Clause (3),that DIT(E),Mumbai had withdrawn the registration granted to it, that the Tribunal reversed the order of the DIT that the Hon'ble Bombay High Court confirmed the order of the Tribunal. In our opinion, during the continuation of registration^ is not permissible to the departmental authorities to challenge the charitable nature of the objects of a Trust. We would like to refer to the case of Ahmedabad Urban **Development** Authority (335 ITR 575)wherein the Hon'ble Gujarat High Court has held as under:*
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> > *"Section 12AA of the Income-tax Act, 1961, lays down the procedure for registration in relation to the conditions .for applicability of sections 11 and 12 as provided in section 12A . Therefore, once the procedure is complete as pro-vided in sub-section (1) of section 12AA and a certificate is issued granting registration to the trust or institution the certificate is a document evidencing satisfaction about : (i) the genuineness of the activities of the trust or institution, and (ii) about the objects of The trust or institution. Section 12A stipulates that the provisions of sections 11 and 12 shall not apply in relation to income of a trust or an institution unless the conditions stipulated therein are fulfilled. Thus, granting of registration under section 12AA denotes that the conditions laid down in section 12A stand fulfilled. The effect of such a certificate of registration under section 12AA , therefore, cannot be ignored or wished away by the Assessing Officer by adopting a stand that the trust or institution is not fulfilling the conditions for applicability of sections 11 and 12."*

We find that the main objection of the departmental authorities was that the SH was rented out most of the time and that it was a commercial activity. In our opinion, act of letting out of hall cannot be and should not be considered in isolation. Eligibility or otherwise of benefit u/s. 11 of the Act cannot depend solely on one factor. What has to be seen is as to whether the trust is incurring the expenditure for the objects and purposes for which it was established. We find that the issue of letting out of a hall by a charitable institute was deliberated upon by the Hon'ble Madras High Court in the case of Madras Stock Exchange Ltd(supra) and Women's India Trust (supra).We would like to reproduce the relevant portion of the judgment of the Hon'ble Bombay High Court in the case of Women's India Trust and it reads as under:

> *the assessee is a trust formed to carry out the object of education and development of natural talents of the people having special skills, more particularly the women in the society. The assessee trains them to earn while learning. It educates them in the field of catering, stitching, toy making, etc. While giving them training, the assessee uses related material which it buys from the open market. This is essential for carrying out the assessee's object. In the process, some finished product such as pickles, jam, etc. are produced and which the assessee sells through the shops, exhibitions and personal contacts. The motive of the assessee is not the generation of profit but to provide training to the needy women in order to equip or train them in these fields and make them self-confident and self- reliant. There was nursing training, which was also being managed and administered by the assessee. The details of income and expenditure showed that the assessee had received donations of Rs. 36,8$,634 and nursing school fees of Rs. 4,46,088. The assessee pointed out that this nursing training provided at the centre of the assessee at Panvel was free of cost. The charge was levied for the mess but accommodation and other facilities were free of cost and apart from community development programmes, which were undertaken to educate rural women, they were taught various skills and made aware of how to live honourably. The Tribunal found that this was not an activity which would fall within the proviso to section 2(15). The Tribunal referred to two letters addressed by the trustees of the assessee-trust clarifying that in the past, such activities had been found to be incidental to the objects of the trust. Secondly, the donation received during the year had been utilised in the assessment year 2009-10 for achieving the object of the trust However, the bank interest received was continued and, then, there was a deficit. It was in these circumstances that the argument was canvassed that the fees collected for training women were only to meet the cost of expenses for providing them food items. Their accommodation and other facilities were free of cost. The Tribunal found that the trust may be set up for advancement of any other object of general public utility but that would not cease to be charitable purposes because the activities in which the trust was involved could not be termed as carrying on of trade, commerce or business, that the activity undertaken did not partake of the character of trade, commerce or business nor of rendering of any service in relation thereto but was only to teach or impart skills and to instill confidence that the produced goods or articles were sold. To that extent also deficit had occurred. The Tribunal took a view that*

> *occasional sales or the trust's own fund generation were for furthering the objects but not indicative of trade, commerce or business. The proviso did not apply. ..... considering the fact that the trust had been set up and was functional for the past several decades and it had not deviated or departed from any of its stated objects and purpose, utilisation of the income, if at all generated, did not indicate the carrying on of any trade, commerce or business. The Tribunal's view was to be upheld. It was a possible view and could not be termed perverse. The view was taken on an overall consideration and bearing in mind the functions and activities of the trust. In such circumstances, it was not vitiated by any error of law apparent on the face of the record."*

6.1 We also find that the assessee had suffered loss in the various activities, carried out by it, to the tune of Rs.32 lakhs (app.) except for eye care department and interest on investment (Pg. 50,52, 56-57 of the PB).A perusal of Pg.s 82-84 reveal that expenditure incurred by it during the year under appeal pertained to overall administration and activities. In other words the said expenditure would have to be incurred even if the SH was not let out.SH was rented out when it was not required by the assessee for its own purpose. Here, one important factor to be remembered is that the it could continue to carry out various charitable activities and could achieve the objects at concessional rates due to income received by it from letting out of SH.

6.2. It is also a fact that the departmental authorities have, in the past, admitted that activities carried out by it were of charitable nature. No new fact has been brought on record to prove that during the year some different incidents had taken place as compared to the earlier year to change the nature of the activities. The letting out of SH, during the period when it was not required by the trust, was not considered a commercial activity in the earlier years.lt is true that principles of res judicata are not applicable to the income tax proceedings. But at the same time it is also true that principles of consistency have to be followed while deciding the tax matters. In the case of International tractors Ltd., the Hon'ble Delhi High Court(397 ITR 696)has held that deductions allowed in the earlier assessment years should not be withdrawn unless the circumstances have changed. The Hon'ble Allahabad High Court in the matter of Zazsons export Ltd.(397 ITR 400) has held as under:

> *"In order to maintain consistency, a view, which had been accepted in an earlier order ought not to be disturbed unless there was any material to justify the Department to take a different view of the matter."*

While deciding the appeal, the Hon'ble Court had taken note of the proceedings of the earlier AY.s. As the rule of consistency has not followed without bringing distinguishing features of the year under appeal, as compared to the facts of the earlier years, so, in our opinion the order of the FAA cannot be endorsed on this count.

6.3. We also find that one of the object of the assessee was to impart training in music and that training of music has been considered education by the Hon'ble Court. In that regard we would like to rely upon the cases of Delhi Music Society(supra)

Jeevan Vidya Mission(supra) and hold that imparting training of music was an educational activity.

6.4. Finally, we would like to address the argument of the FAA about applicability of proviso to section 2(15) of the Act. We find that the AO as well as the FAA has empasised the fact that the provisions of the proviso to the section 2(15)the assessee was not entitled to claim the benefit of section 11 of the Act. We would like to reproduce the proviso and it reads as under:

> *(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."*

If we consider the various activities carried out by the assessee, as evident from the various pages of the PB it is clear that it was incurring expenditure in the fields of education and medical relief. Therefore in our opinion, the assesses, cannot be denied the benefit of section 11.Here, we would like to refer to the case of Ahmedabad Urban Development Authority (396 ITR 323)of the Hon'ble Gujarat High Court wherein the court has held as under:

> *"The introduction of the proviso to section 2(15) of the Income-tax Act, 1961, by virtue of the Finance Act, 2008 was directed to prevent the unholy practice of pure trade, commerce and business entities from masking their activities and portraying them in the garb of an activity with the object of a general public utility. It is not designed to hit at those institutions, which had the advancement of the objects of general public utility at their hearts and were charity institutions. The expressions trade, commerce and business as occurring in the first proviso to section 2(15) 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 purport of the first proviso to section 2(15) of the Act is not to exclude entities which are essentially for charitable purposes but are conducting some activities for a consideration or a fee. The test which has, therefore, now to be applied is whether the predominant object of the activity involved in carrying out the object of general public utility is to subserve the charitable purpose or to earn profit. Where profit making is the predominant object of the activity, the purpose, though an object of general public utility would cease to be a charitable purpose. But where the predominant object of the activity is to carry out the charitable purpose and not to earn profit, it would not lose its character of a charitable purpose merely because some profit arises from the activity."*

Considering the above, we hold that the assessee is running music school and providing medical services and it is utilising SH for augmenting its funds. In these circumstances in our opinion, it cannot be held that the it is carrying out business activities and the charitable activities are by product, as alleged by the departmental authorities. What has to seen in such cases is a holistic view of the things and not a narrower view. We would like to refer to the matter of Institute of Chartered Accountants of lndia (358 ITR 91),wherein the Hon'ble Delhi High Court has held as under:

> *"A plain reading of section 2(15) of the Income-tax Act, 1961, indicates that the expression "charitable purpose" has been divided into six categories, namely, (i) relief to poor, (ii) education, iii) medical relief, (iv) preservation of environment including watersheds (forest and wildlife), (v) preservation of monuments and places or objects of artistic or historical importance, and (vi)advancement of any other object of general public utility. The first proviso to section 2(15) of the Act carves out an exception which excludes advancement of any other object of general public utility from the scope of charitable purpose to the extent that it involves carrying on any activity in the nature of trade, commerce, or business or any activity of rendering certain services in relation to any trade, commerce, or business, for a cess or fee or any other consideration is irrespective of the nature of the use or obligation, or retention of the income from such activity. 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 carried 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 organisations which are carrying on regular business from the scope of "charitable purpose". 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 expression "business", "trade" or "commerce".*

In light of the above discussion, we decide the first ground of appeal in favour of the assessee. As we have allowed first ground of appeal, so, we hold that Gs.AO 2.4 and 5 have become infructuous. Hence we are not adjudicating them."(emphasis supplied)

10.2 In view of the above discussion, factual matrix and the judicial precedents, I am of the view that the assessee, being a government company especially formed to implement railway component of MUTP (Mumbai Urban Transport Project) to cater to the transport needs of commuters of Mumbai Metropolitan Region (MMR) has under taken projects funded fully by the government

and using all its funds for its objectives without any profit mark up, existed and operated purely for purpose of achieving an object of general public utility and these objects had nothing to do with any trade, commerce or and profit earning was not predominant purpose of assessee, the proviso to section 2(15) could not have been invoked to decline benefit of sections 11. The A.O. is therefore, directed to allow the assessee exemption u/s. 11 of the Act.

4. The Assessing Officer is not satisfied and is in appeal before us.

5. We have heard the rival contentions, perused the material on record and duly considered facts of the case in the light of the applicable legal position.

6. We find that, in the meantime, the action of the learned Director of Exemptions, in cancellation of registration under section 12 AA, has been reversed by a coordinate bench of this Tribunal. Learned representatives have fairly agreed that the core issue in this appeal is covered, by a coordinate bench decision dated 8th August 2019, in assessee's own case, wherein the coordinate bench has, inter alia, observed as follows:

29. We have carefully considered the submissions and perused the records. As noted above the assessee is a State Corporation engaged in the business of public transportation. The objects of the corporation are development and growth of public, trade and industry of the development of road transport, facilities of road transport in any area and providing an efficient economical system of road transport services and coordination between any form and road transport or any other form of road transport. Surplus of receipts over expenses after payment of interest/dividend on capital as provided by Central/State Government and providing for depreciation and reserves etc. Is to be applied for amenities to the passenger, welfare of labour employed, financing the expansion programme etc., as approved by the Government and remainder, if any, is to be handed over to the State Government for the purpose of development. It is noted that there is no change in the activity of the assessee since beginning and it is all along providing road transportation facility to the general public for a ticket as a token contribution. Prior to introduction of proviso to section 2(15), there was no dispute that the assessee was established for charitable purpose and assessee has all along been granted relief u/s. 2(15) and exemption under section 11 of the Act. Now the Revenue's plea is that amendment to section 2(15) of the Act shall take assessee's activity subject to denial of exemption u/s. 11 of the Act. In this regard we note that such a plea of the Revenue that introduction of proviso to section 2(15) shall lead to denial of exemption to Karnataka State Road Transport Corporation has been rejected by Hon'ble Karnataka High Court in the case of Karnataka State Road Transport Corporation in ITA No. 302 of 2015 vide order dated 12.2.2015. We further note that import of incorporation of proviso to section 2(15) was considered by Hon'ble Kerala High Court in the case of Info Parks (supra) and Hon'ble Court have expounded as under :-

"15. Yet another important aspect to be noted in this context is that, after the amendment by incorporating proviso to section 2(15), the 4th limb as to the advancement of "any other object of general public utility" will no longer remain as charitable purpose, if it involves carrying on of :-

(a) any activity in the nature of trade, commerce or business.

(b) any activity of rendering any service in relation to any trade, commerce or business for a cess or a fee or any other consideration, irrespective of the nature of use or application-or retention of the income from such activity.

The first limb of exclusion from charitable purpose under clause (a) will be attracted, if the activity pursued by the institution involves any trade, commerce or business. But the situation contemplated under the second Limb [clause (b)l stands entirely on a different pedestal, with regard to the service in relation to the trade, commerce or business mentioned therein. To out it more clear, when the matter comes to the service in relation to the trade, commerce or business, it has to be examined whether the words "any trade, commerce or business" as they appear in the second limb of clause (b) are in connection with the service referred to the trade, commerce or business pursued by the institutions to which the service is given by the assessee. If the said words are actually in respect of the trade, commerce or business of the assessee itself, the said clause (second limb of the stipulation under clause (b) is rather otiose. Since the activity of the assessee involving any trade, commerce or business, is already excluded from the charitable purpose by virtue of the first limb [clause (a) itself, there is no necessity to stipulate further, by way of clause (b), adding the words 'or any activity of rendering any service in relation to any trade, commerce or business...". As it stands so, giving a purposive interpretation to the statute, it may have to be read and understood that the second limb of exclusion under clause (b) in relation to the service rendered by the assessee the terms "any trade, commerce or business" refer to the trade, commerce or business pursued by the recipient to whom the service is rendered (as there may be a situation involving letting out the premise? for purposes other than involving trade, commerce or business as well). Since the petitioners have not chosen to implead the Union Government in the party array, to consider and finalise the scope and amendment in this regard, this Court is not in a position to lay down the law on this aspect for the time being and hence it is left open. "[Emphasis Supplied."

30. This view of Hon'ble Kerala High Court was endorsed by Hon'ble Andhra Pradesh High Court in the Judgment dated 17.12.2012 in the case of Andhra Pradesh State Seed Certification Agency (28 Taxman.com 218). From the above decision it is amply clear that adverse view taken by the authorities below that the assessee should be denied exemption u/s. 11 simply because of amendment to section 2(15) is not sustainable.

31. In this regard, we also note that this Tribunal in the case of National Institute of Bank Management Vs. ACIT in ITA No. 2913 & Others vide order dated 25.1.2018 has elaborately considered the significance of the provision of section 2(15) in similar case of denial of exemption by invoking provision of section 2(15) of the Act. We may gainfully refer to the Tribunal's adjudication in this case as under :-

> *8. We have carefully considered the rival submissions. Sec. 2(15) of the Act defines the expression 'charitable purpose'. So far as it is relevant for our purpose, the expression 'charitable purpose' seeks to include 'education'. The case of the assessee is that its activities fall within the scope of the expression 'education' and, therefore, it is covered within the meaning of 'charitable purpose' contained in Sec. 2(15) of the Act. The stand of the Revenue is to the contrary as, according to it, the activities of the assessee are merely to carry out training, seminars, post-graduate training and, that too, against collection of fees and, therefore, cannot be considered as 'education'. Further, the expression 'charitable purpose' also includes the activity of 'advancement of any other object of general public utility'. According to the Revenue, even if the activities are to be considered as falling within the scope of Sec. 2(15) of the Act, it fits into the said expression 'advancement of any other object of general public utility'. The proviso to Sec. 2(15) of the Act was added w.e.f. 01.04.2009, which 9 National Institute of Bank Management ITA Nos. 2913 to 2915/M/16, 2506/M/14 & CO 182/M/15 prescribes that the activity of 'advancement of any other object of general public utility' shall not be construed to be for 'charitable purpose' if it involves 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. By relying on such proviso, the Revenue contends that since assessee is carrying out its programme of training, etc. against charging of fee, therefore, its activities lose the character of being for 'charitable purpose'. 9. The first and the foremost point that is required to be addressed is whether the assessee is an institution involved in education or not? In order to address this controversy, we may briefly touch upon the objects of the assessee as appearing in the Memorandum of Association and also the activities that are being carried out by the assessee over the years. The main objects of the assessee have been reproduced by us in the earlier part of this order and a perusal thereof clearly shows that the main object of the assessee is to promote and provide training in operation and management of banking and financial institutions, besides organising and facilitating seminars, study courses, lectures and similar other activities for the said purpose. Considering the stated objects, we are not inclined to accept the plea of the Revenue that the main objects of the assessee is not 'education'. Besides the stated objects, the written submissions which have been filed by the assessee before the lower authorities also give an insight to the activities being actually pursued by the assessee. It emerges that the assessee is recognised by the University of Pune as an approved centre for post-graduate research and also by the Department of Scientific and Industrial Research, Ministry of Science and Technology, Government of India. It is*

pointed out that assessee is conducting postgraduate Diploma courses and many Ph.D students are also registered with it for their Doctorial dissertation under the supervision of assessee's faculty members. It has also been pointed out that assessee has thirty full-time faculty of academicians from a wide range of disciplines, viz., Economics, Finance, Commerce, Business Management, Computer Science, Agricultural Science, etc. At the time of hearing, the learned representative has also emphasised that assessee has class rooms to conduct regular classes and the library in the educational campus has more than 60,000 books. It was also pointed out that assessee offers programmes in collaboration with Kellogg School of Management, Northwestern University USA, The London School of Economics and Political (LSC), UK and CME Group, Chicago, etc. All these assertions of the assessee have not found any negation by the assessing authority or even by the Revenue before us.

10. Before us, it was argued by the ld. DR that fee is being charged and subscriptions are received from the member-banks which generates surplus in the course of activities, and thus, the activities are not for education. It is well understood that educational institutions are also required to generate funds for carrying out its activities, and the fact that assessee is collecting fees, by itself, will not make it a non-educational activity so as to go out of the definition of 'education' contained in Sec. 2(15) of the Act. In this context, we may refer to the judgment of the Hon'ble Supreme Court in the case of T.M.A. Pai Foundation vs State of Karnataka, (2002) 8 SCC 481, wherein the Hon'ble Supreme Court has also recognised the necessity for the educational institution to generate funds for its betterment and growth. In the case of American Hotel & Lodging Association, 301 ITR 86 (SC), the Hon'ble Supreme Court was dealing with an entity engaged in providing world-recognised curriculum for all hospitality education programs in India by making them available through text, course material and other software programmes in India. Apart from accepting this activity to be in the realm of education, the Hon'ble Court also observed that merely because some profit was arising from such activity, it would not distract from holding that such an entity was existing solely for education purposes. The Hon'ble Court also explained that in order to ascertain whether an entity is being run with the object of making profit or not, the existence of profit is not paramount, but what is of importance is whether or not the resultant income is being applied wholly and exclusively for the objects for which the entity has been set-up. In the context of the assessee before us, there is no repudiation to the fact-situation that the surplus, if any, is being applied only in furtherance of its stated objects.

11. The learned representative before us referred to the judgment of the Hon'ble Supreme Court in the case of text books was also held to be an activity falling within the scope of 'education'. Similarly, the judgment of the Hon'ble Gujarat High Court in the case of Gujarat State Co-operative Union vs CIT, 195 ITR 279 (Guj.) has also been relied upon. In the case of Gujarat State Co-operative Union (supra), assessee was engaged in conducting

courses for Higher Diploma in Co-operation, Diploma in Land Development Banking, Certificate Course in Co-operative Credit and Banking and Specialised Short-term Courses/ Orientation Courses. The assessee therein was also conducting seminars and running training centres for employees of Urban Co-operative Banks, District Co-operative Banks, etc. The Hon'ble Gujarat High Court understood such activities to be falling within the expression 'education'. In coming to such a conclusion, the Hon'ble Court referred to the judgment of the Hon'ble Supreme Court in the case of Sole Trustee, Loka Shikshana Trust vs. CIT, 101 ITR 234 (SC) to contend that the word 'education' should not be confined only to scholastic instructions, but other forms of education are also included in the expression 'education'. Though the decision of the Hon'ble Gujarat High Court is in the context of Sec. 10(22) of the Act, yet, it is of relevance for us since it has explained the meaning of the expression 'education' which, in our view, is germane to decide the controversy before us. The assessee before us is indisputably engaged in conducting higher education training, coaching and research in the field of banking and finance, and the ratio of the judgment of the Hon'ble Gujarat High Court certainly goes to show that its activities are in the field of 'education' for the purposes of Sec. 2(15) of the Act.

12. Similarly, the decision of the Mumbai Bench of the Tribunal in the case of Indian Institute of Bankers vs DCIT (Exemption), (2002) 74 TTJ 523 (Mum) was also relied upon. The assessee before the Mumbai Bench of the Tribunal, i.e. Indian Institute of Bankers, was engaged in the activity of promoting the study of theory of banking and, for that purpose, it was conducting exams, lectures, etc. Notably, the activities of the assessee before us are also on the same lines and the Tribunal in the case of Indian Institute of Bankers (supra) accepted those activities to be in the nature of 'education'.

13. In view of our aforesaid discussion, we do not find any merit in the stand of the Assessing Officer that the activities of the assessee are not in the field of 'education'. What has been emphasised by the Assessing Officer is that the assessee is conducting coaching classes in the field of banking and finance and, therefore, following the decision of the Hon'ble Patna High Court in the case of Bihar Institute of Mining & Mine Surveying vs CIT, 208 ITR 608 (Pat), it could not be said that the assessee was carrying out any 'education' activity. In this context, we may refer to the judgment of the Hon'ble Gujarat High Court in the case of DIT(E) vs Ahmedabad Management Association, [2014] 47 taxmann.com 162 (Gujarat), wherein the association undertook multifaceted activity, viz. conducting continuing education, Diploma & Certificate programme, Management Development programmes, public talks, seminars, workshops, etc. Such like activities were also held to be in the nature of 'education' eligible for the benefit of Sections 11 & 12 of the Act. In fact, the Hon'ble Delhi High Court in the case of Council for the Indian School Certificate Examinations vs DGIT(E), 362 ITR 436 (Delhi) was considering the activities of an assessee who was neither conducting any classes and nor was directly engaged in teaching students, but was only affiliating schools, prescribing syllabus and conducting examinations. The institution carrying out

such activities was also understood by the Hon'ble Court to be an educational institution.
14. When we apply the aforesaid principles to the admitted nature of activities in the present case, we have no hesitation in holding that assessee is an educational institution and, therefore, it falls within the scope of the expression 'charitable purpose' contained in Sec. 2(15) of the Act.

15. Now, we may deal with the reference to proviso to Sec. 2(15) of the Act made by the Assessing Officer. Pertinently, the proviso to Sec. 2(15) of the Act is relevant qua the activity of 'advancement of any other object of general public utility' contained in Sec. 2(15) of the Act and not in relation to other limbs of activities contained therein. While in the earlier paras we have already held that the assessee is engaged in 'education', therefore, on this basis, it will be in the fitness of things to deduce that assessee is not ousted from Sec. 2(15) of the Act because the proviso is not applicable to it. In any case, if one is to examine the applicability of the proviso on merit, even then we find that the same does not come into operation in the present case. Firstly, the CBDT in its Circular no. 11/2008 dated 19.12.2008 clarified that the proviso would apply only in situations where there is a profit motive in the activities undertaken. Secondly, the phraseology of the proviso itself lends credence to a premise that it comes into operation only in situations where profit is the motive in the activities undertaken. Pertinently, the proviso applies in a situation "if it involves carrying on of any activity in the nature of trade, commerce or business or any activity of rendering any services in relation to any trade, commerce or business.....". Ostensibly, the three expressions used therein, i.e., 'trade', 'commerce' or 'business' are to be understood as activities which are undertaken with a motive of earning profits. Therefore, the moot question to be examined is as to whether or not the activities of the assessee can be construed to be intended for a profit motive or for a commercial intent, as sought to be made out by the Assessing Officer. In order to address the said point, we may touch upon the manner and purport for which assessee has been set- up. As noted by us briefly in the earlier part of this order, assessee has been 15 National Institute of Bank Management ITA Nos. 2913 to 2915/M/16, 2506/M/14 & CO 182/M/15 established by the Government of India through the Reserve Bank of India. In the Paper Book filed before us, apart from other things, a report of a Committee appointed by the RBI on "The Training and Development of Higher Banking Personnel" of 1969 has been placed. In 1969, nationalisation of banks undertaken by the Government of India brought in the policy of social control over banking which intended to provide a new direction to the banking industry in India. Since banking was made a more effective instrument of national development, it was recognised that appropriate personnel policies had to be evolved in order to encourage the right attitudes to development of management skills, capabilities and also to impart new technological skills. The Committee appointed by the RBI in this direction made a major recommendation for establishment of the National Institute of Bank Management. This was a precursor to the establishment of the assessee by the RBI in consultation with the Government of India in 1969 as an autonomous non-profit institution in

the area of banking and finance. The Committee on Training and Development of Higher Banking Personnel carved out the role of assessee as being an entity to "translate national policies relating to the banking sector into meaningful training programmes at the level of individual bank and help the implementation of those policies by creating a climate of intellectual appreciation and emotional dedication". Therefore, looking at the background of the formation of the assessee and its stated objects, which we have reproduced in the earlier part of this order, the assessee-institute was to act as a catalyst for the new banking policy of the Government of India towards evolving appropriate guidelines for banks in the areas of management capabilities and improving the technical expertise of banking and awareness of national priorities in the banking profession. The stated objects clearly bring out that the activities of the assessee are exclusively in the field of education and research in the field of banking and finance. Not elaborating further on this aspect, as we have already inferred earlier that assessee is in the field of education, at this stage it would suffice for us to note that there is no commercial intent behind setting-up of the assessee. In fact, the Assessing Officer has sought to draw a parallel with the case before the Hon'ble Patna High Court in Bihar Institute of Mining & Mine Surveying (supra) which, in our view, is wholly inappropriate. The Hon'ble Patna High Court was dealing with the claim of an entity for registration u/s 12A of the Act on the ground that its activity of coaching of students for particular examinations was to be viewed as imparting education. The Hon'ble Court noted that "the running of a private coaching institute for the purpose of training the students to appear at some specified examinations upon taking specified sum from the trainees would not bring the petitioner within the provisions of section 2(15) of the Act." The aforesaid observation of the Hon'ble Court clearly bring out the distinction between the entity before us and that was before the Hon'ble Patna High Court, which was a case of a private coaching institute whereas, as we have seen earlier, the complexion of the entity before us is on a completely different footing; the entity before us has been established by the Government of India through RBI as a means to further the national policy relating to banking sector consequent to nationalisation of banks in 1969. In our considered opinion, the objectives for which the assessee is set-up and the manner in which it is managed, i.e., through a Governing Board consisting, inter-alia, of nominees of the Government and member- nationalised banks, it can hardly be said that there is any profit motive in carrying out its activities. No doubt, there may remain some surplus in the course of carrying on activities since assessee is undertaking programmes by charging fee and/or subscription from its member nationalised banks, etc., but that by itself will not mean that the motive is to earn profit. In fact, the Hon'ble Supreme Court in the case of American Hotel & Lodging Association (supra) noted that it may not be possible to carry on activities in such a way that the expenditure exactly matches the income and there is no resultant profit. As per the Hon'ble Supreme Court, such an objective is not only difficult to achieve for practical considerations, but also reflects unsound principles of management. To reiterate what we have noted earlier, in such a situation, the test to examine the existence or otherwise of profit motive is to find out the purpose for which

> *the resultant surplus is being applied for. Factually speaking, in the present case, there is no allegation, much less any evidence, brought out by the Revenue to say that any amount has been applied by the assessee for purposes other than its stated objects, which ostensibly is in the field of education. Pertinently, upto Assessment Year 2008-09, assessee was accepted to be an entity engaged in education and in even in the captioned years there is no charge against the assessee that any of its activities have undergone any change. Therefore, merely because of insertion of the proviso, the nature of activities do not undergo a change unless it can be made out that profit motive is dominant all-pervading in the activities, an aspect which is absolutely absent in the present case. Therefore, even if we were to go along with the stand of the Assessing Officer that the activities of assessee fall within the expression 'advancement of any other object of general public utility' contained in Sec. 2(15) of the Act, even then, from Assessment Year 2009-10 onwards, the insertion of proviso does not take away the benefits of Sections 11 & 12 of the Act from the assessee inasmuch as the proviso does not disentitle the assessee's activities from being considered as for charitable purpose because of the above discussion. Thus, on this aspect also, we uphold the stand of the assessee.*

The above precedent and case law are fully applicable in the present case. Upto A.Y. 2011-12, there was no dispute that the assessee was entitled to exemption u/s. 11 of the Act. The dispute has only arisen pursuant to introduction of proviso to section 2(15) of the Act. Considering the objects for which the assessee is set up and manner in which it is managed and the manner in which funds generated are utilized, there is no doubt that there is no profit motive in carrying out the activity of the assessee. No doubt there may remain some surplus but that by itself does not mean that the motive is to earn profit. Hon'ble Apex Court in the case of American Hotel and Lodging Association (supra) has expounded that it may not be possible to carrying on activities in such a way that expenditure exactly matches income and there is no resultant profit. There is no case made out by the Revenue that the surplus is not applied for the purpose of company stated objects. When the assessee was accepted to be entitled to exemption upto preceding assessment year there is no case that the activities of the assessee have undergone a change which warrant denial of exemption. Hence, to quote from the aforesaid precedent even if we were to go along with the stand of the Assessing Officer that the activities of the assessee falls within the expression "advancement of any other object of general public utility" contained in section 2(15) then introduction of proviso does not disentitle the assessee's activities from being considered as for charitable purposes because the aforesaid discussion. Accordingly, in our considered opinion there is no merit in the orders of the authorities below denying the assessee's exemption on the plank that the assessee is not entitled to exemption in view of introduction of the proviso to section 2(15).

32. Yet another limb of Revenue's adverse inference in this case is that the assessee is engaged in commercial activity and that also in large scale. This so called large scale has been observed from the data of buses operated by the assessee. Out of 15500 buses, from the website data gathered by the Assessing Officer himself this includes Deluxe buses-48, air conditioned buses-46 and midi-10. From the above how can the

Assessing Officer make a deduction that the assessee is running luxury buses in large scale defers all sense of proportionality. To state the obvious assumption of the Assessing Officer is absurd.

33. Another limb of Assessing Officer's inference that assessee is engaging into profit oriented activities is that the assessee is arranging tour and travel packages on commercial basis for fees/charges. For this he has noted eight trips from the website. How will these eight trips stand against thousands of trips undertaken by the assessee for transporting ordinary passengers is beyond comprehension. The Assessing Officer's inference is totally unjustified. Details of other income which has been considered by the Revenue to be of a large scale pale into absolute insignificance when the same is considered as percentage to the non-operative revenue to operating revenue, which bring them to be lesser than 1% to the operating revenue. The same is emanating from the following chart submitted by learned Counsel of the assessee.

Sr. No	*Particulars*	*Amount in Rs.*	*Percentage to Non- operating Revenue to Operating Revenue*
1.	*Adverting*	*52122184*	*0.095%*
2.	*Rent*	*20786834*	*0.05%*
3.	*Interest*	*14213788*	*0.025%*
4.	*Publication*	*3986*	
5.	*Excess Receipt*	*3958812*	*0.007%*
6.	*Licence Fees*	*171405862*	*0.031%*
7.	*Miscellaneous Receipt*	*310766685*	*0.57%*
8.	*Work done for outside parties*	*810320*	*0.0014%*
9.	*Total Non-operating revenue*	*574068471*	*1.05%*

34. Hence figures quoted by the Assessing Officer for inferring that the assessee is engaged in profit motive activity in large scale is totally absurd in light of the above said figures. Hence, in our considered opinion the finding given by the Assessing Officer that assessee is engaged commercial and profit motive activity is totally unsustainable.

35. It may not be out of place to mention here that to remove/prevent the mischief which can be caused to the assessee such as the present large State, the present proviso No. (ii) to section 2(15) provides that if the aggregate receipt from such activity or activities during the previous year do not exceed 25% of the total receipts of the entity, the exclusion provision will not apply.

7. Learned counsel for the assessee made supplementary submissions on merits, and also a comprehensive written note supporting the conclusions arrived at by the learned CIT(A). He fairly pointed out that the above decision was in the context of cancellation of registration granted to the assessee under section 12AA, even though

> *the ratio of this decision squarely covers the core issue before us i.e. whether or not proviso to Section 12(5) will apply to the facts of this case. That issue, learned counsel states, has been comprehensively decided in favour of the assessee in the above decision. Learned Departmental Representative does not dispute the said proposition. In any event, having carefully perused the impugned order of the learned CIT(A) which deals with all the points raised by the Assessing Officer in a fair and comprehensive manner, we are inclined to endorse the well-reasoned findings and conclusions arrived at by the learned CIT(A).In view of these discussions, bearing in mind entirety of the case, and respectfully following decision of the coordinate bench- as referred to above, we uphold the conclusions arrived at by the learned CIT(A) and decline to interfere in the matter.*
>
> *8. The appeal of is, therefore, dismissed.*

4. We see no reasons to take any other view of the matter than the view so taken by the coordinate bench in assessee's own case. Respectfully following the same, we approve the conclusions arrived at by the CIT(A) and decline to interfere in the matter.

5. The appeal is thus dismissed.

6. As regards the cross objection filed by the assessee also, we find that the issue is squarely covered by our order of even date for the assessment year 2012-13 wherein we have dismissed the same by observing as follows:

> The assessee has also filed a cross objection claiming that the assessee, being State/ an instrumentality of the State, cannot be imposed the income tax, but given the fact that the departmental appeal has been dismissed, and given the fact that the learned counsel has stated that in the event of the departmental appeal being dismissed, the cross objection may be treated as not pressed, we see no need to deal with the same. We may, however, take on record learned counsel's statement that he may not press the issue raised in the cross objection at this stage, he would like to keep the issues raised therein alive, so that, if required, this issue be pursued in future.

8. We see no reasons to take any other view of the matter than the view so taken by us in assessee's own case. Respectfully following the same, the cross objection must also be dismissed as such.

9. The cross objection is, therefore, dismissed as not pressed.

10. To sum up, the appeal filed by the Assessing Officer, as also the cross objection filed by the assessee, are dismissed. Pronounced in the open court today on the 05th day of January, 2021

Sd/-	Sd/-
Pavan Kumar Gadale	**Pramod Kumar**
(Judicial Member)	(Vice President)

Mumbai, dated the 05th day of January, 2021

Copies to:	*(1)*	*The appellant*	*(2)*	*The respondent*
	(3)	*CIT*	*(4)*	*CIT(A)*
	(5)	*DR*	*(6)*	*Guard File*

By order

Assistant Registrar
Income Tax Appellate Tribunal
Mumbai benches, Mumbai