IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "C" MUMBAI

BEFORE SHRI M. BALAGANESH (ACCOUNTANT MEMBER) AND
SHRI RAVISH SOOD (JUDICIAL MEMBER)

ITA No.684/MUM/2019
(Assessment Year: 2013-14)

ITO (E)-2(4) Room No. 503, 5th Floor, Piramal Chambers, Lal Baug, Parel, Mumbai – 400 012	Vs.	The Pransukhlal Mafatlal Hindu, Swimmimg Bath and Boat Club Trust, Netaji Subhash Road, Chowpatty, Mumbai – 400 007

PAN No. AAATT9571H

(Revenue) (Assessee)

Assessee by : Shri Nishant Thakkar &
Ms. Jasmin Amalsadwala, A.Rs
Revenue by : Ms. Shreekala Pardeshi, D.R

Date of Hearing : 08/03/2021
Date of pronouncement : 23/03/2021

ORDER

PER RAVISH SOOD, J.M:

The present appeal filed by the revenue is directed against the order passed by the CIT(A)-1, Mumbai dated 20.11.2018, which in turn arises from the order passed by the A.O under Sec. 143(3) of the Income Tax Act,1961 (for short „Act"), dated 29.03.2016 for A.Y. 2013-14. The revenue has assailed the impugned order on the following grounds of appeal before us:

"1. Whether on the facts and circumstances of the case and in law, the Ld. CIT(A), Mumbai was right in directing the AO to grant exemption u/s. 11 of the I.T. Act ignoring the detailed reasoning given by the AO.

2. Whether on the facts and circumstances of the case and in law, the Ld.CIT(A) was right in holding that the assessee club is not covered by the principle of mutuality thereby violating provisions of section 13 which disentitles the trust from claiming exemption u/s. 11 .

3. Whether on the facts and circumstances of the case and in law, the Ld.CIT(A) was right in ignoring the ratio involved in the case of Bangalore Club vs. CIT & Anr. Being Civil Appeal No.124 of 2007 dated 14.01.2013 relied upon by the A.O., without even considering the same

wherein the Hon'ble Apex Court has held that the interest earned by the assessee from the banks will not fall within the ambit of the mutuality principle and will therefore eligible to Income tax in the hands of the assessee which is squarely applicable to this case.

4. Whether on the facts and circumstances of the case and in law, the Ld.CIT(A) was right in ignoring the ratio involved in the case of CIT V/s. Common Effluent Treatment Plant (Thane-Belapur) Association reported at (2010) 328 ITR 362 (Bom) relied upon by the A.O., without even considering the same wherein the Hon'ble Bombay High Court has held that interest on surplus fund invested in fixed deposits in Banks is not income from receipt from members of the assessee but was from third party and therefore principle of the mutuality does not apply which is squarely applicable to this case .

5. Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) was right in following the decision of Hon'ble ITAT in assessee's own case for A.Y.2012-13 in ITA No.511/Mum/2017 dated 30.07.2018 allowing the assessee exemption u/s 11 of the I.T. Act, 1961 ignoring the fact that the decision of the Hon'ble ITAT was not accepted by the department and appeal before the Hon'ble High Court has been filed on the similar grounds.

6. The appellant prays that the order of the Commissioner of Income Tax (Appeals)- 1, Mumbai be set aside and that of the Assessing Officer be restored.

7. The Appellant craves leave to amend or alter any ground or add a new ground which may be necessary."

2. Briefly stated, the assessee which is registered as a Charitable organisation with the Charity Commissioner, Mumbai had as on 30.09.2013 filed its return of income for A.Y. 2013-14 along with its Income and expenditure account, balance sheet and audit report in Form No. 10B, declaring a total income of Rs.1,37,18,722/-. Subsequently, the case of the assessee was selected for scrutiny assessment under Sec. 143(2) of the Act. During the course of the assessment proceedings it was observed by the A.O that the main object of the assessee trust was promotion of swimming and other allied sports on no profit basis. On a perusal of the financial statements, it was observed by the A.O that the assessee during the year in question had earned income by way of guest fee of Rs.47,27,014/- and learn to swim fee of Rs.2,77,261/-. Observing, that the assessee"s object were in the nature of "advancement of any other objects of general public utility" and its activities were in the nature of trade, commerce, business etc. the DIT(Exemption), Mumbai, vide his order dated 16.12.2011 withdrew the registration granted to the assessee trust under Sec. 12AA of the Act w.e.f A.Y. 2009-10, and had also stated that the activities of the assessee trust were covered by the provision of Sec. 2(15) of the Act. On being queried as to why its interest income would not be hit by Sec. 2(15) of the Act and its claim for exemption under Sec.11 may not be disallowed as per the provisions of Sec.13(8) of the Act, it was submitted by the assessee that its activity of earning interest income fell within the realm of Sec.2(15) of the Act and was not in the nature of business, trade

or commerce. Observing, that as per the post amended Sec.2(15) of the Act wherein the definition of the term „advancement of any other object and general public utility" was narrowed down a/w insertion of Sec.13(8) w.e.f 01.04.2009 as per which no exemption under Sec. 11 was to be allowed to such entities which were hit by the „first proviso" to Sec.2(15) of the Act, the A.O was of the view that though development of sports was a charitable object however, as in the case of the assessee the dominant, substantial or main object of the club was to provide services to its members thus, it cannot be said to have been created for a charitable purpose. Observing that the actual activities of the assessee revealed that its dominant or rather the predominant object was to provide services to its members, viz. facilities such as restaurant, residential rooms, swimming pool, card rooms, sport related facilities etc. which to some extent were also provided to the non-members, the A.O held a conviction that the assessee could not be held to be a charitable association within the meaning of Sec. 2(15) of the Act. Insofar the income by way of interest, house property, capital gains and income from other sources were concerned, the A.O was of the view that the same were clearly taxable. Backed by his aforesaid observations it was concluded by the A.O that the assessee club was not an organisation created for a charitable purpose within the meaning of the provisions of Sec. 2(15) of the Act. Accordingly, in the backdrop of his exhaustive deliberations in the assessment order, the A.O was of the view that as the assessee was a mutual association and not a charitable trust therefore, as per the doctrine of mutuality its receipts from non-members and other sources such as dividend, interest, etc, were to be brought to tax during the year in question.

Observing, that the assessee"s object were in the nature of advancement of any other objects of general public utility and its activities were in the nature of trade, commerce, business etc the A.O was of the view that the assessee would not be covered by the provisions of Sec. 2(15) and thus, as per Sec. 13(8) would not be entitled for exemption under Sec. 11 of the Act. Apart from that, it was observed by the A.O that the assessee"s registration under Sec. 12A had been cancelled by the DIT(E), Mumbai, w.e.f A.Y. 2009-10. Further, taking note of the CBDT Circular 11/2018, dated 19.12.2018 as per which the principle of mutuality was to be followed, the A.O worked out the ratio of mutual to non-mutual income by excluding the interest income from its total income. Observing, that the ratio of mutual to non-mutual income worked at 86:14, the A.O allowed the expenditure to the extent of Rs.71,41,764/-. It was further noticed by the A.O that the assessee during the year in question had earned interest income of Rs.1,51,72,750/-.

Observing, that the assessee was an organisation which was limited to its members and the principle of mutuality applied, the A.O was of the view that the interest income could by no stretch of reasoning be said to have been received by the assessee from its members. As such, the A.O was of the view that the interest earned by the assessee from the bank would not fall within the ambit of the principle of mutuality and thus would be exigible to tax in its hands. Accordingly, the A.O subjected the interest income to tax in the hands of the assessee. It was further observed by the A.O that the assessee was in receipt of an entrance fee of Rs.65,10,000/- during the year in question. On being queried, it was stated by the assessee that the aforesaid amount was received on account of entrance fee from new members during the year. Observing, that the fees raised by the assessee at the time of the entrance of new members was a receipt of a revenue nature and was chargeable to tax in its hands, the A.O brought the aforesaid amount to tax in the hands of the assessee. On the basis of his aforesaid deliberations the A.O vide his order passed under Sec. 143(3), dated 29.03.2016 assessed the income of the assessee trust at Rs.2,16,82,750/-.

3. Aggrieved, the assessee carried the matter in appeal before the CIT(A). It was observed by the CIT(A) that the facts and the issue involved in the case before him remained the same as were therein involved in the assessee"s own case for A.Y. 2012-13. It was noticed by the CIT(A) that the Tribunal in the assessee"s case for A.Y. 2010-11 to A.Y. 2012-13 had decided the issue of exemption under Sec. 11 in favour of the assessee. Accordingly, taking note of the fact that the issue involved in the year in question i.e A.Y. 2013-14 was identical to that as was there before the Tribunal in the assessee"s own case for A.Y. 2012-13 in ITA No. 511/Mum/2017, dated 30.07.2018, the CIT(A) followed the view therein taken by the Tribunal and allowed the assessee"s appeal.

4. The revenue being aggrieved with the order of the CIT(A) has carried the matter in appeal before us. At the very outset of the appeal it was submitted by the ld. A.R that the issue involved in the present appeal was squarely covered by the order of the Tribunal in the assessee"s own case for A.Y. 2010-11, A.Y. 2011-12 and A.Y. 2012-13. In order to fortify his aforesaid contention the ld. A.R took us through the respective orders of the Tribunal (copies placed on record). It was submitted by the ld. A.R that as the CIT(A) had followed the view taken by the Tribunal in the assessee"s own case for A.Y. 2010-11 to A.Y. 2012-13 thus, no

infirmity did emerge from his order. Ld. A.R. specifically drew our attention to the observations of the CIT(A) wherein he had observed that the conclusion reached by the A.O and also the reasoning adopted by him during the year in question was the same as was adopted by him in A.Y. 2012-13. It was submitted by the ld. A.R that now when the issue of exemption under Sec. 11 had been decided by the Tribunal in favour of the assessee while disposing off the appeal for A.Y. 2010-11 to A.Y. 2012-13 in ITA No. 1039 and 1040/Mum/2016, dated 21.03.2018 AND ITA No. 511/Mum/2017, dated 30.07.2018 thus, following the said view the declining of the assessee"s claim for exemption under Sec. 11 by the A.O had rightly been vacated by the CIT(A).

5. Per contra, the ld. Departmental Representative (for short „D.R") had relied on the assessment order.

6. We have deliberated at length on the issue under consideration and concur with the view taken by the CIT(A) that the issue as regards the assessee"s entitlement for exemption under Sec. 11 had been decided in its favour by the Tribunal while disposing off the appeals of the assessee for A.Y. 2010-11 and 2011-12 in ITA Nos. 1039 and 1040/Mum/2016, vide its order dated 21.03.2018. In fact, the Tribunal had thereafter followed the aforesaid order while disposing off the assessee"s appeal for A.Y. 2012-13 in ITA No.511/Mum/2017, dated 30.07.2018. For the sake of clarity, we herein cull out the observations that were recorded by the Tribunal while disposing off the assessee"s appeal for AYs. 2010-11, 2011-12 in ITA No. 1039 and 1040/Mum/2016, dated 21.03.2018, wherein the exemption under Sec.11 was restored to the assessee, as under:

> "11. Having considered relevant facts, we do not find any merit in the findings of the lower authorities for the reason that providing sports facilities to general public without restriction to any caste, creed, religion or profession is squarely comes within the definition of charitable purpose as defined u/s 2(15) of the Income-tax Act, 1961 and hence, the assessee is eligible for exemption u/s 11 of the Act. In this case, on perusal of the facts, it is abundantly clear that the assessee is running its activities in accordance with its main object and continued to provide services to its members by collecting nominal fee. We further observe that the assessee has deficits from its core activity of promoting swimming for all the years. The assessee's collections from its members is less than the amount spent for its objects. But for income from investments, the assessee is always incurring deficit for all the years. Therefore, we are of the considered view that there is no merit in the findings of the AO that the assessee is carrying out its activities on commercial lines with an intention to earn profit.
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> 12. Coming to the case laws relied upon by the assessee. The Pransukhlal Mafatlal Hindu Swimming Bath & Boat Club Trust assessee has relied upon the decision of ITAT, Mumbai Bench in the case of Chembur Gymkhana (supra). We find that the co-ordinate bench of ITAT, under similar set of facts has held that in order to invoke First Proviso to section 2(15), it is necessary and incumbent on the part of

the AO to give a factual finding that assessee has derived income by engaging itself in trade, business or commercial activity. The relevant portion of the order is extracted below:-

Undisputedly, the assessee has been registered as a charitable trust not only with the Charity Commissioner but also under section 12A. Though, the registration granted under section 12A was subsequently cancelled by the DIT(E) under section 12AA(3), however, the Tribunal, while setting aside the order of the DIT(E) restored the registration granted under section 12A. Thus, the grant of registration under section 12A to the assessee pre-supposes that the objects of the assessee are for charitable purpose.

• In other words, the assessee is a charitable trust. The Assessing Officer at the time of completion of assessment has not pointed out any change in the object of the assessee trust. As it appears, relying upon the assessment order passed in case of assessee for the assessment year 2007-08, the Assessing Officer concluded that the assessee is mutual concern, as it does not treat the members and non-members at par. He has also stated that since it extends benefit to the persons specified under section 13(1)(c), the conditions of the said provisions have been violated, hence, the assessee is not eligible for exemption under section 11.

• Thus, in sum and substance, the Assessing Officer has denied assessee's claim of exemption under section 11 by treating it as a mutual concern of the members. However, this is not the first time the revenue has treated the assessee as a mutual concern while denying claim of exemption under section 11.

The dispute arose for the first time in assessment years 1996-97 and continued in the subsequent assessment years. It is necessary to observe, while completing assessment for those assessment years, the Assessing Officer took a completely identical view by holding that the assessee was a mutual concern, hence, receipts from non-members by way of canteen fee, interest, coaching, etc., is taxable. However, the Tribunal while deciding the appeals of the assessee for assessment years 1996-97 to 2000-01, held that as per the object of the trust, it is to be considered as a charitable organisation as the objects show that the assessee-trust was engaged in the broad areas of games and sports as well as in promotion and/or management of social intercourse or athletic sport and cultural and educational activities for its members. Considering the objects and activities of the assessee, the Tribunal held that it Pransukhlal Mafatlal Hindu Swimming Bath & Boat Club Trust is in the nature of general public utility as it is for the well being of a section of public at large. While dealing with the objection of the revenue that there is restriction on the membership admission, the Tribunal held that so long as members admission into the club is not arbitrary, the committee's discretion to restrict the membership does not interfere with the object of public utility. The Tribunal, while dealing with the allegation of the department that the assessee is a mutual concern, concluded that the object of the trust of providing for land and building as well as for promotion or management of social intercourse or athletic sports and cultural and educational activities for its members constitute object of general public utility. Hence, the trust is charitable organisation. The Tribunal further observed, the members of the trust represent a cross section of public at large and it is not for group of private families or private members alone. Hence, the principle of - mutuality will not apply to the assessee's case. With the aforesaid observation, the Tribunal allowed assessee's claim of exemption under section 11. The aforesaid decision of the Tribunal was upheld by the High Court. [Para 7] • The Assessing Officer in the assessment order nor has not brought any material to demonstrate that there is any change in the object of the trust in the impugned assessment year as compared to earlier assessment years, wherein, the issue has been decided in favour of the assessee. That being the case, consistent with the view of the Tribunal and the High Court in assessee's own case it has to be held that the assessee is entitled to exemption under section 11 as a charitable trust. [Para 8] • At this stage, it is necessary to deal with the submissions of the revenue that in view of the first proviso to section 2(15), as it existed in the statute book at the relevant time, the assessee cannot be considered to be existing for charitable purpose. Firstly, the Assessing Officer in the assessment order, has not recorded any factual finding that the assessee has derived income by engaging itself in any trade, business or commercial activity. The Assessing Officer has proceeded on the footing that the assessee being a mutual concern, the receipts derived from the members for user of facilities is not taxable, whereas, receipts from non-members for user or facilities is taxable. In this context, the Assessing Officer has passed the impugned assessment, order, thus, it has to be assumed

that the Assessing Officer while completing the assessment was conscious of the first proviso to section 2(15), which has come to the statute book by that time. In spite of that the Assessing Officer has not recorded any finding that the objects of the assessee are not for charitable purpose in view of the first proviso to section 2(15). On the contrary, the Assessing Officer by treating the assessee as a mutual concern, has brought to tax the receipt from non-members only. For invoking the first proviso to section 2(15), it is necessary and incumbent on the part of the Assessing Officer to give a factual finding that the assessee has derived income by engaging itself in trade, business or commercial activity. In the absence of any such finding the first proviso to section 2(15) cannot be attracted. More so, when the Tribunal and the High Court in the preceding assessment years have held that the objects of the assessee qualify the object of general public utility, hence, is existing for charitable purpose as per section 2(15). • In view of the aforesaid, the Commissioner (Appeals) was justified in allowing assessee's claim of exemption under section 11."

13. The assessee also relied upon the decision of ITAT, Mumbai Bench in the case of Dahisar Sports Foundation vs ITO (supra) wherein it was Pransukhlal Mafatlal Hindu Swimming Bath & Boat Club Trust held that where main object or purpose of assessee's charitable trust was promotion of sports and games, merely because trust collected certain charges from coaching campus meant for promotion of sports and games, could not alter its character of being charitable. The relevant portion of the order is extracted below:-

"Upon careful consideration I find that the main object of the Trust is to promote the sports and games. The authorities below have drawn adverse inference and invoked the amended provisions of section 2(15) by holding that by engaging into coaching camps and obtaining receipts therefrom, the assessee is engaging into activities of commercial nature. I find that this proposition is not at all sustainable. In the case of Tamil Nadu Cricket Association (Supra) in a case where the assessee is a Cricket Association was receiving income from holding of matches and was receiving sums therefrom was denied exemption on the ground that it was engaged in the activities in the nature of trade or commerce or business. The Hon'ble High Court reversed the order holding that substantial/regular surplus cannot taint receipts as arising from business/commerce. By the volume of receipt one cannot draw inference that the activity is commercial. 1 find that this case law applies to all fours to the present case. Here also the authorities below have drawn adverse inference on the ground that amount received from the coaching camp being less than the expenditure incurred. Similarly, in the case of ICAI v. DGIT(E) [20131 358 ITR 91/217 Taxman 152/35 taxmann.com 140 (Delhi), the Hon'ble Delhi High Court has expounded as under:

(a) There was no finding that the predominant object in doing their activities was to generate profits.

(b) These activities were ancillary activities to the main activity/ object.

(c) The surplus generated out of these activities is utilised towards the infrastructure development and other student/ members related activities.

(d) Section 2 (15) defines the term "charitable purpose". Therefore, while construing the term "business" for the said section, the object and purpose of the section has to be kept in mind. We do not think that a very broad and extended definition of the term "business" is intended for the purpose of interpreting and applying the first proviso to section 2 (15) of the Act to include any transaction for a fee or money. An activity would be considered "business" if it is undertaken with a profit motive. There should be facts and other circumstances which justify and show that the activity undertaken is in fact in the nature of business. 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 object would not fall within the expressions "business", "trade" or "commerce".

(e) If the object or purpose of an institution is charitable, the fact that the institution collects certain charges does not alter the character of the institutions. It is not necessary that it should provide something for nothing or for less than it costs or for less than the ordinary price. 11.1 find that the above case law also supports the assessee's point of view. It isPransukhlal Mafatlal Hindu Swimming Bath & Boat Club Trust undeniable that the object or purpose of this trust is promotion of sports and games and thus charitable. The fact that the trust collects certain charges from coaching

camps meant for promotion of sports and games cannot alter the character of the institution. To repeat the proposition as expounded above, it is not necessary that the Trust should provide something for nothing or for less than it cause or for less than the ordinary Trust. Accordingly, in my considered opinion, in the background of the aforesaid discussion and precedent, the orders of the authorities below are set aside. Accordingly, I hold that the assessee trust should not be visited with denial of exemption. Hence, the orders of the authorities below is set aside and issue decided in favour of the assessee.

14. The Hon'ble Bombay High Court in the case of DIT vs Goregaon Sports Club (2012) 347 ITR 338 (Bom) held that providing sports facilities to general public without restriction to any caste, creed, religion or profession is eligible for exemption u/s 11 of Income-tax Act, 1961.

15. In this view of the matter and respectfully following the ratios of the case laws discussed above, we are of the considered view that the ITA No.511/Mum/2017 The Pransukhlal Mafatlal Hindu Swimming Bath & Boat Club Trust 7 assessee is eligible for exemption u/s 11 of the Income-tax Act, 1961. Therefore, we direct the AO to allow exemption u/s 11 of the Act.

16. In the result, appeal filed by the assessee is allowed."

As the facts and the issue involved in the assessee"s appeal for the year in question i.e A.Y. 2013-14 remains the same as was there before the Tribunal in its aforementioned order, we, thus, finding no reason to take a different view therein respectfully follow the same. Accordingly, finding no infirmity in the view taken by the CIT(A) who had rightly vacated the declining of the assessee"s claim for exemption under Sec.11 of the Act, we uphold the same.

7. Resultantly, the appeal of the revenue is dismissed.

Order pronounced in the open court on 23.03.2021

Sd/-	Sd/-
M. Balaganesh	Ravish Sood
(ACCOUNTANT MEMBER)	(JUDICIAL MEMBER)

Mumbai, Date: 23.03.2021
PS: Rohit

Copy of the Order forwarded to :

1. Assessee
2. Respondent
3. The concerned CIT(A)
4. The concerned CIT
5. DR "C" Bench, ITAT, Mumbai
6. Guard File

BY ORDER,

Dy./Asst. Registrar
ITAT, Mumbai