आयकर□□□□ अधकरण□□□□ □□□□□□, □□□□□
IN THE INCOME TAX APPELLATE TRIBUNAL
DIVISION BENCH, 'A', CHANDIGARH

BEFORE SHRI A.D. JAIN, VICE PRESIDENT &
SHRI VIKRAM SINGH YADAV, ACCOUNTANT MEMBER

आयकर□□□□ □□./ **ITA No. 273/CHD/2020**
□□□□□ वष/ Assessment Year : 2016-17

Improvement Trust, Sunam Road, Sangrur	Vs. □□□□	The ACIT, Exemption Circle, Chandigarh
□□□□ □□□□ □□./PAN NO: AAATI 6009F		
□□□□□□/Appellant		यथRespondent

□□□□□□ कओर□□/Assessee by : Sh. Y.K Sud, C.A.
□□□□ कओर□□/ Revenue by : Smt. Amanpreet Kaur, Sr.DR

□□□□□□ क□□□#खDate of Hearing : 22.05.2023
□□□□□□□ क□□□#खDate of Pronouncement : 25.05.2023

□□□□/**Order**

Per A.D. Jain, Vice President:

This is Assessee's appeal for assessment year 2016-17 against the order dated 04.03.2020, passed by ld. CIT(A), Patiala.

2. The following Grounds have been raised:-

A. That the CIT(A) was not justified in upholding the action of the Assessing Officer in denying the exemption claimed u/s 11.

B. That both CIT(A) and AO failed to appreciate that the exemption u/s 11 in the previous years had been allowed by the ITAT and approved by P&H High Court. Therefore,

CIT(A) ought to have allowed this exemption as a judicial discipline.

C. That the orders of the AO & CIT(A) are against the law and facts of the case.

3. There is a delay of 34 days in filing the appeal. The Assessee, vide its Application dated 15.07.2020, has submitted that the due date of filing of the Appeal fell in the Covid Lock Down Period, which started from 23.3.2020; and that the due date was extended finally upto 31.7.2020. The ld. Counsel for the assessee has submitted on record a copy of the Instructions issued in this regard by the Hd. Qrs. of the ITAT itself. It is submitted that hence, the delay of 34 days be condoned.

4. We have considered the facts and reasoning given in the Assessee's Application for condonation of delay. In view of the explanation given by the Assessee, which is found to be justified, the delay of 34 days in filing the Appeal is condoned, the Assessee having been prevented by a reasonable cause from filing the appeal in time.

5. The facts of the case are that during the assessment proceedings, the Assessing Officer asked the Assessee-trust to explain its activities during the year, which resulted in income, and to explain how

these activities were charitable in nature. The Assessee submitted that the objects / activities of the trust were to bring about improvement in the town of Sangrur by providing streets, housing facilities, development of parks, development of roads and other infrastructures, providing drinking water, etc., and that all these activities are charitable in nature. Vide notice dated 22.11.2018, issued u/s 143(1) of the Income Tax Act, 1961 (hereinafter called also 'the I.T. Act' or 'the Act'), the Assessee was asked to show cause as to why exemption under sections 11 and 12 of the I.T. Act be not disallowed. In the notice, it was stated that it had been observed that the Assessee had earned income from sale of land, non-construction fee, transfer fee, penal rent, compounding fee, etc.; that the trust was mainly doing the work of sale of plots, SCOs, SCFs, booths, other commercial and residential places, etc., at market rates, and of development of land; that the Assessee buys land at nominal cost, develops it, cuts it into small plots and sells it at a much higher price in order to earn profits; that these activities of the trust are in the nature of trade, commerce or business and are similar to the activities of a builder operating on commercial lines and cannot be construed as charitable activities; and that in order to qualify for claiming deduction u/ss 11 and 12 of the I.T. Act, for carrying out the charitable work of 'general public utility', the trust must fulfill the conditions laid down in the proviso to section 2(15) of the I.T. Act.

u

6. The Assessee, vide reply dated 1.12.2018, stated that for carrying out all this activity, the Assessee has to incur expenditure on advertisement, quoting tenders in newspapers for sale of land to the general public, and quoting tenders for civil contract works, and all these activities have to be done for fulfilling the main objects, which are charitable in nature; that in the case of Moga Improvement Trust, the Amritsar Bench of the ITAT had allowed exemption u/s 11 by considering all the activities of the trust to be charitable in nature; that further, for assessment year 2014-15, the appeal of the Department before the ITAT Amritsar, in the Assessee's own case, had been dismissed by the ITAT and exemption u/s 11 on the surplus of sale of land and building had been allowed to the Assessee.

7. The aforesaid reply of the Assessee did not find favour with the AO. While passing the assessment order, the AO observed that the aims and objects of the trust with regard to the improvement of the city and providing streets and roads and making provision for drinking water, etc., are covered under general public unity; that however, the activities of the trust with regard to the acquisition of land and development of the land and sale thereof in the shape of plots, flats and commercial booths at market rates, after calling for applications from the public with some registration fee cannot be

treated as charitable activities under 'general public utility'; that the question was whether the activities carried out by the Assessee involved carrying out any activity in the nature of trade, business or commerce or rendering services in relation to the same; that the dictionary definition of the term 'business' was 'activity of making, buying, selling or supplying goods or services for money'; that the legislature has consciously departed from restricting the import of the term 'business'; and that thus, the term 'business' also includes rendering services of a variegated character. Reference was made to the Hon'ble Supreme Court's decision in 'Laxminaryan Ram Gopal and Son Ltd. Vs. Govt. of Hyderabad', 25 ITR 449 (SC) and the decision of the Hon'ble Supreme Court in 'Sole Trustee, Lok Shikshana Trust Vs. CIT', 101 ITR 234 (SC). It was further observed by the AO that the trust is involved in business, like a builder, to earn money, i.e., it purchases / acquires property and divides the same into plots or builds the same and sell the plots or the buildings at a much higher price, in order to earn profits; that applications with certain amounts are called for and after public draw / auction, flats / plots and commercial booths are sold; that these activities are similar to those of a colonizer operating on commercial lines; that the income and expenditure account furnished by the Assessee shows the complete picture of the Assessee's activities; that the Assessee has earned income from

nonconstruction fee, transfer fee, penal interest, compounding fee, etc.; that this shows that the Assessee has been engaged in business and commercial activities like a colonizer or builder; that the test is to see if an organization is charitable under the limb 'advancement of general public utility', as has been laid down by the Hon'ble Supreme Court in the case of 'Indian Chamber of Commerce', 101 ITR 797 (SC); that as per this decision, the true test is to ask for answers to the following questions: (a) Is the object of the Assessee one of the general public utility? (b) Does the advancement of the object involve activity bringing in moneys? and (c) If so, are such activities taken (i) for profit or (ii) without profit; that even if (a) and (b) are answered in the affirmative, if (c) (i) is answered in the affirmative, the claim for exemption collapses; that in the present case, the Assessee has been undertaking activities with profit element included in the sale price, utility charges, etc.; that section 10(20A) of the I.T. Act has been omitted by the Finance Act, 2002, w.e.f. 1.4.2003; that as per section 10(20A) 'any income of an authority constituted in India by or under any law enacted either for the purpose of dealing with and satisfying the need for housing accommodation, or for the purpose of planning, development or improvement of cities, towns and villages, or for both', was not to be included in computing the total income of a previous year, of any person; and that by omission of section 10

(20A) of the I.T. Act, the clear intention of the legislature was not to give exemption on any income of an authority constituted in India by or under any law enacted for the purpose of dealing with and satisfying the need for housing accommodation, or for the purpose of planning, development or improvement of cities, towns and villages, or for both. Reference was made to 'Punjab Urban Development Authority Vs. CIT', 103 TTJ (Chd.) 988, 'Jalandhar Development Authority Vs. CIT', 35 SOT (Asr.) 15 and 'Jammu Development Authority Vs. CIT', 52 SOT (Asr.) 153. It was observed that 'Jammu Development Authority Vs. CIT' (supra) was upheld by the Hon'ble High Court, as well as by the Hon'ble Supreme Court. It was further observed that the proviso to section 2(15) of the I.T. Act, as amended w.e.f. A.Y. 2016-17, also goes against the Assessee; that in view of the said amended proviso to section 2(15), even if the Assessee claims that these business activities were undertaken in the course of actual carrying out of such advancement of 'general public utility', the Assessee cannot be said to be engaged in charitable activities, as the aggregate receipt from these activities exceeds 20% of the total receipts. Reference was made to the order dated 10.9.2015 passed by the Amritsar Bench of the Tribunal in eleven appeals, in the cases of Hoshiarpur, Pathankot, Bhatinda, Jalandhar, Amritsar and Moga Improvement Trusts. It was observed that according to section 13(8) of the I.T.

Act, nothing contained in section 11 or 12 shall operate so as to exclude any income from the total income of the previous year of the person in receipt thereof, if the provisions of the first proviso to section 2(15) become applicable in the case of such person in the said previous year. The AO concluded that the Assessee was covered by the proviso to section 2(15) of the I.T. Act and could not be held to be engaged in charitable activities; that therefore, the Assessee was not liable for exemption u/ss 11 and 12 of the I.T. Act, as per the provisions of section 13(8); and that during the year, the Assessee had incurred a loss, i.e., excess expenditure over income. The Assessee was, accordingly, assessed at 'NIL' income, as returned, and exemption under sections 11 and 12 of the I.T. Act was denied to it.

8. By virtue of the impugned order, the ld. CIT(A) dismissed the appeal filed by the Assessee trust against the aforesaid assessment order. It was observed, inter alia, rejecting the arguments of the Assessee, that section 13(8) of the I.T. Act speaks of non-exclusion of any income u/s 11 and 12 from total income, if the provisions of section 2(15) become applicable; that the AO had clearly mentioned that the aggregate receipts of the Assessee from its activities of sale of plots, flats and commercial booths and also income earned from nonconstruction fee, transfer fee, penal interest, compounding

fee, etc., exceeded 20% of the total receipts; that therefore, the amended provisions of section 2(15), effective w.e.f. 1.4.2016, were applicable to the Assessee's case; that the Assessee was involved in carrying out activities in the nature of trade, commerce and business, for fee and other consideration; and that hence, irrespective of the nature of use or application or retention of income from the Assessee's activities of acquisition of land, development thereof and sale thereof in the shape of plots, flats and commercial booths at market rate, after calling for applications from the public, with some registration fee, could not be said to be for charitable purposes, since the aggregate receipt from such activity during the previous year exceeded 20% of the total receipts of the trust during the previous year.

9. Aggrieved, the Assessee is in further appeal before us.

10. Challenging the impugned order, the ld. Counsel for the Assessee contended that the ld. CIT(A) has erred in confirming denial of exemption u/s 11 of the I.T. Act to the Assessee, failing to appreciate that under circumstances exactly similar to the ones attending the year under consideration, exemption u/s 11 of the Act had been allowed by the ITAT in the earlier years, which action stood approved by the Hon'ble High Court; that the Bench had required the Assessee to clarify as to how the decision of the

Hon'ble High Court in the Assessee's own case would apply, in view of the amended provisions of section 2(15) of the Act, as relevant to the year under consideration; that for assessment years 2007-08, 2011-12 and 201213, the ld. CIT(A) passed order dated 12.01.2016, allowing the appeal of the Assessee and granting exemption u/s 11; that the Department filed appeal before the ITAT for all these Assessment years; and that the ITAT, vide order dated 28.9.2017, passed in ITA Nos. 16 to 18/Chd/2016, dismissed the Department's appeals. A copy of the said ITAT order has been placed on record. It was further stated that for assessment year 2011-12, pertaining to the same issue of disallowance of exemption u/s 11, the ld. CIT(A) dismissed the appeal of the Assessee; that the ITAT, vide order dated 14.12.2015 (copy placed on record) in ITA No. 987/Chd/2014, allowed the exemption u/s 11 to the Assessee; that on appeal by the Department, the Hon'ble High Court, vide order dated 23.12.2016 (copy placed on record), dismissed the Department's appeal, relying on its own order in the case of 'Moga Improvement Trust', 390 ITR 547 (P&H); that for assessment year 2014-15, the issue of exemption u/s 11 of the Act attained finality, the department having not challenged the CIT(A)'s order grating such exemption; that for assessment years 2012-13 to

2015-16, no regular assessment was framed and the exemption u/s 11 of the Act was allowed by processing the return u/s 143(1) of the Act; that for the year under consideration, the ld. CIT(A), while confirming disallowance of exemption u/s 11 of the Act to the Assessee, has placed reliance on the order dated 26.7.2018 passed by the Chandigarh Bench of the Tribunal, in ITA No. 1382/Chd/2016, in the case of 'Chandigarh Lawn Tennis Association Vs. ITO (Exemptions), Chandigarh'; that this action of the ld. CIT(A) is unsustainable in law, in view of the fact that in the Assessee's own case, the Hon'ble High Court has granted exemption u/s 11 of the Act to the Assessee; that the Hon'ble High Court has held that the Assessee's activities are not commercial, even if plots have been sold at market price; that this decision of eh Hon'ble High Court has been confirmed by the Hon'ble Supreme Court in "Asstt. Commissioner of

Income Tax (Exemptions) Vs. Ahmedabad Urban Development Authority and Others", 449 ITR 1 (SC), wherein the decision of the Hon'ble Gujarat High Court, in the case of 'Ahmedabad Urban Development Authority Vs. Asstt. CIT', 396 ITR 323 (Gujarat), holding similar activities of the Ahmedabad Urban Development Authority to be non-commercial in nature and, therefore, the provisions of section

2 (15) of the I.T. Act to be not applicable.

11. The ld. counsel for the assessee has, thus, prayed that the order under appeal be quashed and exemption u/s 11 of the I.T. Act be granted to the Assessee, on allowing the Assessee's appeal.

12. On the other hand, the ld. Departmental Representative ('DR') has placed strong reliance on the impugned order. It has been contended that as rightly held by the ld. CIT(A), section 13(8) of the I.T. Act talks of non-exclusion of any income u/ss 11 and 12 of the Act from total income, if the provisions of section 2(15) become applicable; that the aggregate receipts of the Assessee from its activities of earning income from sale of plots, flats and commercial booths and also earning of income from non-construction fee, transfer fee, penal interest, compounding fee, etc., exceeds 20% of the total receipts; that as such, the amended provisions of section 2(15) of the Act, as brought in by the Finance Act, 2015 w.e.f. 1.4.2016, are clearly applicable to the case; that the Assessee was involved in activities in the nature of trade, commerce and business, for fees and other considerations; that therefore, irrespective of the nature of the use or application or retention of income from the activities of acquisition of land, development of land and sale thereof in the shape of plots, flats and commercial booths at market rate, after calling for applications from the public, with some registration fee, cannot be said to be for charitable

purposes, since the aggregate receipts form such activities during the year exceeded 20% of the total receipts of the Assessee trust during the year; and that hence, there being no error therein, the order under appeal is entitled to be confirmed, which be ordered to be so confirmed, on dismissing the appeal filed by the Assessee.

13. We have heard the rival contentions and have perused the material on record.

14. The question is as to whether the activities of the Assessee-Trust are charitable in nature, entitling the Assessee to exemption under section 11 of the Income Tax Act, and as whether the ld. CIT(A) has gone wrong in not granting such exemption to the Assessee, even though the same, as granted by the ITAT, stood approved by the

Hon'ble High Court.

15. It is seen that the Hon'ble High Court, in its Order dated 23.12.2016, in the Assessee's case, for assessment year 2011-12, in Income Tax Appeal No.203 of 2016, amongst others, dismissed the

Revenue's Appeal, following its order of even date, in Income Tax Appeal No.147 of 2016, 'Commissioner of Income Tax (Exemption) vs. Improvement Trust, Moga' 390 ITR 547 (P&H) (at page 594, placitum 63

onwards, more precisely, at page 601, placitum 68 onwards), again, for assessment year 2011-12.

16. In 'Improvement Trust, Moga', 390 ITR 547 (P&H) (supra), the assessee Moga Improvement Trust ('MIT', for short) declared nil income after claiming exemption of about Rs.1.46 crores, being surplus shown in the income and expenditure account. The exemption was claimed under section 12A of the Income Tax Act. The Assessee MIT contended before the Assessing Officer, inter alia, that the Amritsar Bench of the Tribunal had approved registration under section 12AA of the Act for the Assessee vide order dated 31.10.2008, signifying that the conditions contained in section 12A of the Act stood fulfilled; and that its activities had been, in Income Tax Appeal No.489 of 2007, been held to be charitable activities by the Hon'ble High

Court.

17. The Assessing Officer held that the Assessee MIT's income from construction and sale of residential apartments, commercial flats and booths, rent, interest and fees, etc., which was a regular income, cannot be considered to be income in relation to activities in the nature of advancement of any other object of general public utility; that the income was actually income similar to that derived

by a private builder or colonizer; that the facilities, or services, which the Assessee MIT was providing, originated from a desire to earn more profit from the sale of premises; that builders and colonizers also provided such facilities; that the Assessee MIT's main object was only to earn more profit; that the objects/activities of the Assessee MIT were commercial in nature, and not charitable; and that a charitable institution provides services for charitable purposes free of cost, or for symbolic/nominal costs and not for gain, which was not being done in the assessee MIT's case. The Assessing Officer thus added the amount of Rs.1.46 crores, which had been treated by the Assessee MIT as exempt income.

18. The ld. CIT(A) confirmed the Assessment order.

19. Reversing the ld. CIT(A)'s order, the Tribunal held that the activities of the Assessee MIT were carried out with the larger and predominant objective of general public utility, even assuming that there was a profit motive in such activities, as alleged by the Assessing Officer; that separate books of account were maintained for the business activities; that the Assessee MIT's activities fall within the category 'objects of general public utility'; that the profit on sale does not necessarily imply profit motive in the Assessee MIT's activities; that it is the main motive or the predominant object of the activities which is important; that plots are allotted by the

Assessee MIT's to the highest bidder of the bids invited, for subsidizing its business is not desirable for the state; that the bidding process is not a commercial venture, rather such a process ensures transparency in the functioning of the trusts; that further, the bids are invited only qua commercial units; and that the price is worked out as per the formula contained the Rules, in which formula itself, as per the Revenue, the profit motive is embedded, as shown by the adjustments for various charges.

20. The Department's Appeal against the aforesaid Tribunal order in MIT's case was dismissed by the Hon'ble High Court, by virtue of judgement dated 23.12.2016, rendered in ITA No. 147 of 2016, for assessment year 2011-12, decided along with the case of 'The Tribune Trust v. Commissioner of Income Tax and Another', in ITA No. 62 of

2015, for A.Y. 2009-10, both cases being reported as 390 ITR 547 (P&H), and the discussion with regard to the Moga Improvement Trust being at page 594, placitum 63 to page 608, placitum 88 of the Report.

21. The Hon'ble High Court was deciding the substantial question of law as to whether benefit of section 11 of the Income Tax Act should be granted to the Assessee Improvement Trust, Moga, for assessment year 2011-12, in view of the proviso to section 2(15) of the Act. Their Lordships made it clear (page 603, placitum 71 of

the Report), that it was not necessary in the appeals before them to decide the effect of the amendment to section 2(15) introduced with effect from 1.4.2016. It is this which is of paramount importance here, as the year under consideration before us is assessment year 2016-17. The Revenue has maintained that the proviso to section 2(15) of the I.T. Act specifically bars any activity of rendering any service for a cess or fee or any other consideration; that this, irrespective of the application and use of the income generated therefrom, meaning thereby, that such receipts, if any are being utilised for a charitable purpose, they would not come within the purview of exempt income; that in this regard, it is also pertinent that section 13(8) of the I.T. Act states that if the provisions of section 2(15) become applicable, any income u/ss 11 & 12 will not be excluded from the total income; that the aggregate receipts of the Assessee trust from the activities of sale of plots, commercial booths, transfer fee, non-construction fee and penal interest, etc., exceed 20% of the total receipts; that therefore, the proviso to section 2(15), as brought in w.e.f. 1.4.2016, is applicable to the year under consideration; that even if for the sake of argument, it were to be considered that the activities of the trust fall under the residuary clause of 'general public utility', the commercial income from such activities is not be excluded from the total income in the light of the second proviso to section 2(15), but is subjected to the

limit of the quantum of the proceeds, as prescribed, in keeping with the decision of the Chandigarh Bench of the Tribunal in the case of 'M/s Chandigarh Lawn Tennis Association' rendered in ITA No. 1382/Chd/2016, for assessment year 2013-14; that since the decision of the Hon'ble Punjab & Haryana High Court in the case of 'Moga Improvement Trust' 308 ITR 361 (P&H) (supra) was delivered on 31.10.2008 much after the amendment to section 2(15) and in view of the amended provisions, the said decision is not applicable; that the Finance Act, 2008, w.e.f. 1.4.2009, has excluded any trade, commerce or business related activities by any trust engaged in the advancement of any object of general public utility from the purview of the definition of 'charitable purpose' u/s 2(15) of the I.T. Act; that thus, the carrying on any activity in the nature of trade, commerce or business in pursuit to object (vi) cannot be considered as charitable in nature, if the receipt from such activity exceeds rupees ten lakhs per annum; that in 'Chandigarh Lawn Tennis Association', the Tribunal has held that whether the activity is in in the nature of trade, commerce or business will also depend on the volume of such activity and the nature and volume of receipts therefrom; that as per the submission of the Assessee trust, the Departmental appeal was dismissed by the Hon'ble High Court on 23.12.2016 relying on its own order in the case of 'Moga Improvement Trust'; that in that case, the

Hon'ble High Court followed the decision of the Hon'ble Supreme Court in the case of 'CIT Vs. Gujarat Maritime Board', 295 ITR 561 (SC), wherein, the expression 'any other object of general public utility' was explained to include all objects which promote welfare of the general public; that the Hon'ble High Court, vide order dated 31.10.2003, held that the Assessee was carrying out objects of general public utility; that the said decision is inapplicable since it was pronounced based on facts as existed and were presented before the Hon'ble High Court at that point of time, since there are findings that the Assessee was not doing any charitable activity, and since now there is an amendment to section 2(15), whereby all entities doing activity in the nature of business, trade or commerce, would be taxable; that further against judgement dated 23.12.2016, given by the Hon'ble High Court in ITA No. 147/2016, in the case of 'M/s Improvement Trust Moga' an SLP has been preferred by the Department, which is yet to be decided, meaning thereby, that the issue has not yet attained finality; and that the activities carried out by the Assessee trust, by way of construction of flats and commercial booths, sale of plots, construction of colonies, building of shops, etc., are not at all covered under 'charitable purpose' within the meaning of section 2(15) of the I.T. Act, and no such activity is related with public welfare.

22. Here, it would be appropriate to reproduce the relevant portion of the written submissions dated 7.6.2021 filed before us by the

Department:

"12. Further, the contention of the assesse that all the activities of the trust are charitable in nature and exemption is available under section 2(15) of the Income Tax Act, 1961 and his case is squarely covered by the decision of jurisdictional Punjab & Haryana High Court given in the case of Moga Improvement Trust dated 31st October, 2008 and reported in (2009) 308 ITR 361 is not correctly acceptable. The judgement of Hon'ble Punjab & Haryana High Court was delivered much after amendment to section 2(15) has taken place and in view of amended provisions the same is inapplicable.

13. The Finance Act, 2008 w.e.f 01.04.2009 has excluded any trade, commerce or business related activities by any trust or NGO engaged in the sixth category i.e. advancement of any other object of general public utility from the purview of definition of "charitable purpose" u/s 2(15) of the I.T.Act,1961. Thus, the carrying out of any activities in the nature of trade, commerce or business in pursuit of object (vi) cannot be considered as charitable in nature, if the receipt from such activate exceed rupees ten lakhs per annum.

The Hon'ble ITAT have in the case of Chandigarh Lawn Tennis Association specifically held that whether an activity is in the nature of trade, commerce or business will also depend the volume of such activity and the nature and volume of receipts thereof.

Relevant portion of the said order in ITA No. 1382/Chd/2016 is again reproduced for your kind reference

> *"Whether a particular activity is in the nature of trade, commerce or business is to be examined taking into consideration the nature of activity, the object and purpose of such activity, the volume of such activity and the nature and volume of the receipts*
> *and further the application thereof also."*

17. *The nature of income earned clearly shows that the assesse is engaged in the activity in the nature of 'trade, commerce and business'. The charging of fine and penalties, transfer fee, non-construction fee & compound fee etc. implies that there is an element of forcible acceptance of money and conditionality to avail of any benefit. Such ways cannot be termed as charitable but are purely in the nature of business. Actually the assesse is charging for each and every service just like any other business establishment.*

18. *As per the Ld. AR's Submissions the Department's appeal filed before the Hon'ble Punjab & Haryana High Court was dismissed by the High Court vide order at 23.12.2016 replying on its own order of Moga Improvement Trust. In this context, it is submitted that the Hon'ble High Court followed the decision of Hon'ble Supreme Court in the case of CIT vs. Gujarat Maritime Board, 295 ITR 561 where expression" "any other object of general public utility was explained to include all objects which promote welfare of general public." The Hon'ble High Court vide order dated 31.10.2003 held that the assesse is carrying out objects of general public utility i.e 5th limb of section 2(15). The said case law is now inapplicable for the following reasons: -*

    I. *The decision was pronounced based on facts as existed and presented before the Hon'ble High Court at that point of time. There are findings that the assesse is not doing any charitable activity but is doing a commercial activity.*

    II. *Without prejudice to the above, now there is an amendment in the Act in section 2(15) wherein all entities which are doing activity in the nature of business etc. would be taxable.*

B. It is also submitted in this respect that SLP has been filed against the judgment of Hon'ble Punjab 8s High Court dated

23.12.2016 in ITA No 147/2016 in case of M/s Improvement Trust Moga, decision of which is pending till date but leave has been granted by the Hon'ble Apex Court, which means that the issue has not attained finality

19. .....

The activity carried out by way of construction of flats, commercial booths, sale of plots, construction of colonies and building of shops etc. were not at all covered under the ambit of "charitable" within the meaning of section 2(15) of the Income Tax Act, 1961 and no such activity is related with the public welfare."

23. Now reverting to the observations of the Hon'ble High Court in 'Improvement Trust, Moga', 390 ITR 547 (P&H) (supra), which was followed by their Lordships in the Assessee's case for A.Y. 2011-12, the Hon'ble High Court held that the Tribunal had rightly rejected the Revenue's contention that to fall within the expression "advancement of any other object of general public utility", the trust must necessarily be involved only in implementing poverty alleviation programs, or doing other acts of charity. It was held that it is sufficient if the trust does precisely what the last category in section 2(15) states, that is, being involved in activities for the advancement of an object of general public utility; that these activities, which are undertaken by the assessee by virtue of the Punjab Town Improvement Act, 1922 (hereinafter, also referred to as 'the PTI Act'), include a proper systematic development of certain areas.

24. It was held that the Tribunal had also rightly held that an object of general public utility does not necessarily require the activities to be funded or subsidized by the State; that it is sufficient if the objects of the trust fall within the ambit of the expression "object of general public utility"; and that the achievements of these objects does not have to be as a result of State funding or State subsidy.

25. It was held that it could not possibly be suggested that the trust had been formed under the Punjab Town Improvement Act by the Punjab Government because it wanted to carry on business as colonizers or developers under the garb of the category of objects of general public utility; that section 28(2) (iii) of the Punjab Town Improvement Act permits a scheme, amongst other things, to provide for the disposal of the land vested in, or acquired by, the trust, including, by lease, sale and exchange thereof; that however, neither is the disposal of such land the predominant activity or responsibility of the trust, nor is making profit from this activity the predominant motive of the assessee Trust; that the power conferred by section 28(2)(iii) on the assessee to dispose of land is not an absolute or independent power; that it is a power to be exercised by the assessee in the discharge of the statutory duties imposed on it by the Punjab Town Improvement Act; that section 28(2) stipulates

that the scheme under the Act may provide for a variety of things including the disposal of land belonging to the assessee; that the power of disposal of land is, therefore, in furtherance of, connected with and in relation

to a scheme under the PTI Act, and not an absolute power independent of and unconnected with the assessee's statutory functions under the Act.

26. It was held that advancement of the object of general public utility is the predominant purpose of the assessee; that "town improvement" in the title "Punjab Town Improvement Act, 1922" sums up the predominant activity of the assessee, as well as the purpose for its establishment; that the preamble of the Act, titled "An Act for the improvement of certain areas", states "whereas it is expedient to make provision for the improvement and expansion of towns in Punjab…."; that almost every section in Chapter IV of the PTI Act clearly indicates that the assessee trust is established for the purpose of advancement of the object of general public utility; and that not only that, the entire Act in general indicates this to be the reason for and the basis of the establishment of the trust.

27. It was held that the trust must deal with buildings which are unsafe for human habitation; that the trust must deal with the danger

caused or likely to be caused to the health of the inhabitants of the area on account of the congested conditions of streets or buildings or want of light, air ventilation or proper conveniences in an area and sanitary defects; that the trust is required to frame street schemes to lay out new streets, thoroughfares and open spaces, or alter existing streets whenever it appears necessary to do so for the purpose of providing building sites, or remedying defective ventilation, or creating new, or improving existing, means of communication and facilities for

traffic.

28. It was held that the trust must also prepare development schemes, which duty, contained in section 24 of the Punjab Town Improvement Act, is a duty not akin to that of a private developer or a colonizer, as wrongly observed by the taxing authorities; that the development scheme is prepared for the purpose of development of a locality; that as per section 24(2), the trust may prepare an expansion scheme if, in the opinion of the trust, it is expedient and for public advantage to promote and control the development of, and to provide for the expansion of, a municipality in any locality adjacent to it, within the local area of such trust; that this is in opposition to a mere personal advantage as in the case of private developers or colonizers; that these schemes do no

contemplate mere development of the plots and the construction of the premises for sale; and that under the PTI Act, the trust must adopt a holistic approach for the betterment and advantage of the entire area within its jurisdiction.

29. It was held that if the trust is of the opinion that it is expedient and for the public advantage to provide housing accommodation for any class of inhabitants within its local area, it is required to frame a housing accommodation scheme under section 25 of the Punjab Town Improvement Act; that the trust is, as such, to be motivated by public benefit rather than by personal benefit; and that such activities clearly amount to advancement of an object of general public utility, as envisaged by the proviso to section 2(15) of the Income Tax Act, as applicable to the year under consideration.

30. It was held that the Government of Punjab cannot be said to have established the assessee trust and conferred upon it public responsibilities and duties of the nature specified in the Punjab Town Improvement Act as a camouflage for its commercial, trade and business ventures; that the trust has been created and incorporated under section 3 of the PTI Act for a public purpose; and that the activities of the trust doubtlessly fall within the meaning of the words

"charitable purpose" in section 2(15) of the Income Tax Act.

31. It was held that mere profit making on account of certain incidental or ancillary activities of the trust does not disentitle it to the exemptions; that the trust, which is constituted under the Punjab Town Improvement Act, is likely to make profit on account of its commercial or business activities, such as when it disposes of its land, as required by section 28(2)(iii) of the PTI Act; that this, however, does not take it out of the definition of 'charitable purpose' in section 2(15) of the I.T. Act; that though trade, commerce and business in section 2(15) must be such as to involve an element of profit, making profit is not the predominant motive of the trusts; that the main purpose of the trusts under the Act is improvement of towns, and disposing of properties is only incidental and ancillary to such main purpose; that even where plots are developed and premises are constructed and sold at market price, such sale is necessitated to implement the provisions of the PTI Act through statutory schemes; that such sale is, therefore, driven by the public requirement; that it is not a commercial or business venture per se; and that the schemes are incidental to the main object of town improvement.

32. The question is that since the aforesaid High Court order, followed in the assessee's own case was for assessment year 2011-12, whether the same needs to be followed for the year under

consideration too or not, since section 2(15) of the I.T. Act has been amended by the Finance Act, 2015, w.e.f. 1.4.2016.

33. In this regard, it has been contended on behalf of the assessee, that the above decision of the Hon'ble High Court in the assessee's own case, has been upheld by the Hon'ble Supreme Court in 'ACIT (Exemptions) vs. Ahmedabad Urban Development Authority and Others', 449 ITR 1 (SC), rejecting the Department's Appeal in C.A No. 17527/2017, the activities of the Ahmedabad Urban Development Authority being akin to those of the Assessee Trust; that therein, it has been, inter alia, held that if fee or cess or such consideration is collected for the purposes of an activity by a State Department or entity, which is set up by the Statute, its mandate to collect such amounts, cannot be treated as consideration towards trade or business; that therefore, regulatory activity, necessitating fee or cess collection in terms of enacted law, are per se not business or commercial in nature; that what section 2(15) emphasizes is that so long as a general public utility charity's object involves activities which also generate incidental profits, it can be granted exemption, provided the cumulative limit of not exceeding 20% under the second proviso to section 2(15) of the Act for receipts for such profits is adhered to.

34. Here, it is seen that there is no dispute raised that the activities of the Assessee trust and the Ahmedabad Urban Development Authority, i.e., 'AUDA' are akin to each other. Both are creatures of statute. Whereas the Assessee trust has been established under the Punjab Town Improvement Act, 1922, the latter body was formed under the Gujarat Town Planning and Urban Development Act, 1976 (the 'Gujarat Town Planning Act', for short). The purpose, duties and functions of the Assessee Improvement Trust have been discussed in extenso in the preceding paras. Yet, to reiterate succinctly, the trust has been set up for the public purpose of town improvement. The AUDA, as mandated by the Gujarat Town Planning Act, has to carry out development of the urban area, as an Urban Development

Authority, having jurisdiction as per the Notification issued by the State Government.

35. The following are the functions of the AUDA:

(i) To undertake the preparation of development plans under the provisions of GTP Act, for the urban development area;

(ii) To undertake the preparation and execution of town planning schemes under the provisions of this Act, if so directed by the State Government;

(iii) To carry out surveys in the urban development area for the preparation of development plans or town planning schemes;

(iv) To guide, direct and assist the local authority or authorities and other statutory authorities functioning in the urban development area in matters pertaining to the planning, development and use of urban land;

(v) To control the development activities in accordance with the development plan in the urban development area;

(v-a) to levy and collect such security fees for scrutiny of documents submitted to the appropriate authority for permission for development as may be prescribed by regulations;

(vi) To execute works in connection with supply of water, disposal of sewerage and provision of other services and amenities;

(via) to levy and collect such fees for the execution of works referred to in clause (vi) and for provision of other services and amenities as may be prescribed by regulations;

(vii) To acquire, hold, manage and dispose of property, movable or immovable, as it may deem necessary;

(viii) To enter into contracts, agreements or arrangements, with any local authority, person or organisation as the urban development authority may consider necessary for performing its functions;

(ix) To carry out any development works in the urban development area as may be assigned to it by the State Government from time to time;

(x) To exercise such other powers and perform such other functions as are supplemental, incidental or consequential to any of the foregoing powers and functions or as may be directed by the State Government.

36. It is, thus, seen that juxtaposed with each other, the purpose for setting up both the bodies is a public purpose.

37. It is in this backdrop that the decision of the Hon'ble Gujarat High Court in the case of 'Ahmedabad Urban Development Authority' (supra) and that of the Hon'ble Supreme Court in 'Ahmedabad Development Authority' (supra) need to be considered qua the present Assessee with regard to the issue at hand.

38. In 'Ahmedabad Urban Development Authority Vs. Asstt. Commissioner of Income Tax (Exemptions)' 396 ITR 323 (Guj.)(supra), the Tribunal held the AUDA not entitled to deduction under section 11 of the I.T. Act for the reason that the AUDA's activities could not be said to be for a 'charitable purpose' within the meaning of section 2(15) of the I.T. Act.

39. The following questions of law were raised by the AUDA in appeal before the Hon'ble High Court:

(1) Whether the Income-tax Appellate Tribunal has erred in law and on facts in holding that the activity of the appellant was in the nature of trade, commerce or business and hence it cannot be regarded as activity for charitable purpose in view of the proviso to section 2(15) of the Income-tax Act, 1961?

(2) Whether the Income-tax Appellate Tribunal has erred in law and on facts in disallowing the claim of exemption of the appellant under section 11 of the Income-tax Act, 1961, and assessing the income of the appellant under sections 28 to 44 of the Income-tax Act, 1961.

40. It was observed by the Hon'ble High Court that the AUDA, Ahmedabad is constituted as an Urban Development Authority, constituted by the State Government, in the exercise of powers vested under section 22 of the Gujarat Town Planning and Urban

Development Act; that the powers and functions of the AUDA as Urban Development Authority are as per section 23 of the Gujarat Town Planning Act; that the AUDA as an Urban Development Authority is required to undertake the development of the urban area having jurisdiction as per the Notification issued by the State Government. It

was observed that prior to Assessment year 2002-03, the AUDA was enjoying the exemption u/s 10(20A) of the Income-tax Act; that however, subsequently, section 10(20A) of the Income-tax Act came to be deleted by the Finance Act 2002 w.e.f. April 1, 2003; and that simultaneously, the exemption granted u/s 10(20A) also came to be withdrawn by the Finance Act, 2002.

41. Their Lordships observed that the first question posed was as to whether the activities of the AUDA can be said to be in the nature of trade, commerce or business so as to deny to it the status of a charitable institution within the meaning of section 2(15) of the I.T. Act; that the second question was whether the activity of the AUDA can be said to be an activity of rendering any service in relation to any trade, commerce or business, for cess or fees or any other consideration, as the AUDA is collecting / recovering fees by performing duty under the provision of the Gujarat Town Planning Act and, therefore, whether the second part of the proviso to section 2(15) of the Act shall be applicable so as to deny the exemption claimed by the AUDA under section 11 of the I.T. Act.

42. It would be appropriate to remark at this juncture, that thus, the issue in both the cases, i.e., that of the Assessee trust and the AUDA is exactly the same.

43. It was observed that from the aforesaid provisions of the Gujarat Town Planning Act, it can be gathered that the AUDA has been constituted as an Urban Development Authority under the provisions of Section 22 of the Gujarat Town Planning Act; that the purpose and object of constitution of the Urban Development Authority is proper development or redevelopment of an urban area; that the Urban Development Authority consists of (i) a Chairman to be appointed by the State Government (ii) such persons, not exceeding four in number who are members of the local authority or authorities functioning in the urban development area, as may be nominated by the State Government (iii) three officials of the State Government, to be nominated by that Government, ex-officio (iv) the Presidents of the district panchayats functioning in the urban development area, or, as the case may be, part thereof, ex-officio (v) the Chief Town planner or his representative, ex-officio (vi) the Chief Engineer or Engineers (Public Health) of the local authority or authorities functioning in the urban development area or his or their nominee or nominees, exofficio (vi-a) the Municipal Commissioner of the Municipal Corporation, if any, functioning in the urban development area, exofficio (vii) a member secretary to be appointed by the State Government who shall also be designated as the Chief Executive Authority of the Urban Development Authority; that thus, the

constitution of the Urban Development Authority is subject to the control of the State Government; that the powers and functions of the Urban Development Authority are contained in Section 23; that considering Section 40 of the Gujarat Town Planning Act, the Town Planning Scheme prepared by the Urban Development Authority, which has been prepared subject to sanction by the State Government for development of the Urban Development Area, also provides for roads, open spaces, gardens, recreation grounds, schools, markets, greenbelts, dairies, transport facilities, public purposes of all kinds, drainage, inclusive of sewerage, surface or subsoil drainage and sewage disposal, lighting; water supply, etc.; that the Town Planning Schemes also provide for historical or national interest or natural beauty, and of buildings actually used for religious purposes; that the Schemes also provide for reservation of land to the extent of ten percent, or such percentage as near thereto as possible of the total area covered under the scheme, for the purpose of providing housing accommodation to the members of socially and economically backward classes of people; that as per Section 40(i)(jj) for the aforesaid purposes certain percentage of total area covered under the scheme is allotted earmarked; that fifteen percent of the total area is allotted for the purpose of roads, five percent for parks, play grounds, gardens and open space, five percent for social infrastructure such

as school, dispensary, fire brigade, public utility place as earmarked in the Draft Town Planning Scheme and fifteen percent for sale by the appropriate authority for residential, commercial or industrial use depending upon the nature of development; that the last fifteen percent is earmarked under the Town Planning Scheme for sale, by the appropriate authority for residential, commercial or industrial use; that the appropriate authority / Urban Development Authority is permitted to sell the said plots / lands to the extent of fifteen per cent of the total area to meet the expenditure towards drainage, roads, gardens, schools, markets, water supply, etc.; that so that maximum price can be fetched and the same can be utilized for the development of the Urban Development Area and so as to avoid any allegation of

favouritism and nepotism, the plots are sold by public auction; that it is required to be noted that the entire amount realized by the AUDA being an Urban Development Authority, either by selling plots or by recovery of some fees / charges, is required to be used only for the purpose of development in the Urban Development Area and not for any other purpose; that the Tribunal has held that as the AUDA is selling the plots, to the extent of fifteen per cent of the total area, by public auction and gets maximum amount, it amounts to profiteering and therefore, the activities of the AUDA can be said to be in the nature of business; that, however, while holding so, the Tribunal has not properly appreciated the

object and purpose of permitting the Urban Development Authority to sell the plots, maximum to the extent of fifteen per cent of the total area, i.e., to meet the expenditure for providing them infrastructural facilities like gardens, roads, lighting, water supply, drainage system, etc.; and that the Tribunal has also not properly appreciated the reasons for selling the plots by holding public auction, i.e., (1) to avoid any further allegation of favouritism and nepotism and (2) so that maximum market price can be fetched, which can be used for the development of the Urban Development

Area.

44. It was taken note of that in 'Khoday Distilleries Ltd. v. State of Karnataka', 1 SCC 574, the Hon'ble Supreme Court has held that the primary meaning of word 'trade' is the exchange of goods for goods or goods for money.

45. It was noted in the case of 'Andhra Pradesh v. Abdul Bakshi and Bros.', 15 STC 644 (SC), the Hon'ble Supreme Court has held that the word 'business' is of indefinite import and in a taxing statute, it is used in the sense of an occupation or profession which occupies time, attention or labour of a person, and is clearly associated with the object of making profit.

46. It was noted that in the case of 'Institute of Chartered Accountants of India Vs. DGIT (Exemptions)', 347 ITR 99 (Del.), the Hon'ble Delhi

High Court has held that an activity would be considered 'business' if it is undertaken with a profit motive, but in some cases, this may not be determinative; that normally, the profit motive test should be satisfied, but in a given case, an activity may be regarded as a business even when profit motive cannot be established or proved; that in such cases, there should be evidence and material to show that the activity has continued on sound and recognised business principles and pursued with reasonable continuity; that there should be facts and other circumstances which justify and show that the activity undertaken is in fact in the nature of 'business'; that in view of the decision of the Hon'ble Supreme Court in the case of 'CST Vs. Sai Publication Fund', 258 ITR 70 (SC), if the dominant activity of the Assessee was not business, then any incidental or ancillary activity would also not fall within the definition of 'business'; that it is not necessary that a person should give something for free or at a concessional rate to qualify as being established for a charitable purpose; that 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 institution; that the expressions 'trade', 'commerce' and 'business', as occurring in the first proviso to section 2(15) of the I.T. Act, must be read in the context of the intent and purport of section 2(15) of the I.T. Act and cannot be interpreted to mean any activity which is carried on in

an organised manner; that the purpose and the dominant object for which an institution carries on its activities is material to determine whether the same is business or not; that the purport of the first proviso to section 2(15) of the I.T. Act is not to exclude entities which are essentially for charitable purpose but are conducting some activities for a consideration or a fee; that the object of introducing the first proviso is to exclude organizations which are carrying on regular business from the scope of 'charitable purpose'; that the purpose of introducing the proviso to section 2(15) of the Act can be understood from the Budget Speech of the Finance Minister while introducing the Finance Bill, 2008 [298 ITR (St.) 33, 65]; that therein, it was stated that 'charitable purpose' includes relief to the poor, education, medical relief and any other object of general public utility; that these activities are tax exempt, as they should be; that 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'; that obviously, this was not the intention of the Parliament and, hence, it was proposed to amend the law to exclude the aforesaid cases; that genuine charitable organizations will not be affected in any way; and that the expressions 'business', 'trade' or 'commerce', as used in the first proviso to section 2(15) thus must be interpreted

restrictively and where the dominant object of an organisation is charitable, any incidental activity for furtherance of the object would not fall within the expressions 'business', 'trade' or 'commerce'.

47. It was noted that in 'Addl. CIT v. Surat Art Silk Cloth Manufacturers Association' 121 ITR 1 (SC), the Hon'ble Supreme Court has held: that the test 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; that 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 and not to earn profit, it would lose its character of a charitable purpose merely because some profit arises from the activity; that the test of dominant object of an entity would be relevant to determine whether the entity is carrying on business or not; and that 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 organisation is carrying on business or not.

48. It was noted that in State of 'Andhra Pradesh v. H. Abdul Bakshi and Bros.' (supra), the Hon'ble Supreme Court held: that the expression 'business', though extensively used as 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; that to regard an activity as business, there must be a course of dealings, either actually continued or contemplated to be continue with a profit motive, and not for sport of pleasure; and that absence of profit motive, though not conclusive, does indicate non carrying of on any business.

49. It was noted that an identical question had been considered in

'Bureau of Indian Standards v. DGIT (Exemptions)', 358 ITR 78 (Del.), that therein, it was being considered whether the activities of the Bureau of Indian Standards in granting licenses and trading services and charging amounted to carrying on business, trade or commerce; that, it was observed: that rendering any service in relation to trade, commerce of business cannot receive such a wide construction as to enfold regulatory and sovereign authorities, set up under statutory enactments, and tasked to act as private bodies; that often, apart from the controlling or parent statutes, like the BIS Act, these statutory bodies, including the Bureau of Indian Standards, are empowered to frame rules or regulations and, exercise coercive powers, including inspection and raids; that they possess search and seizure powers and are invariably subjected to parliamentary or legislative oversight; that the primary object for setting up such regulatory bodies would be to ensure general public utility; that 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 test procedure, or accreditation involves charging of such

fees; and that it cannot be said that the public utility activity of evolving, prescribing and enforcing standards, 'involves' the carrying on of trade and commercial activity.

50. It was noted that in 'GS1 India Vs. DGIT (Exemptions)' 360 ITR 138 (Delhi), it was held: that the legal terms, 'trade', 'commerce' or 'business' in section 2(15) mean activity undertaken with a view to make or earn profit; that profit motive is determinative and a critical factor to discern whether an activity is business, trade or commerce; that business activity has an important pervading element of selfinterest, though fair dealing should and can be present, whilst charity or charitable activity is the anti-thesis of activity undertaken with profit motive or activity undertaken on sound or recognized business principles; that charity is driven by altruism and desire to serve others, though element of self-preservation may be present; that for charity, benevolence should be omnipresent and demonstrable but it is not equivalent to self-sacrifice and abnegation; that the antiquated definition of charity, which entails giving and receiving nothing in return is outdated; that a mandatory feature would be that the charitable activity should be devoid of selfishness or illiberal spirit; that enrichment of oneself or self-gain should be missing and the predominant purpose of the activity should be to serve and benefit others; that a small contribution by way of fee that the beneficiary pays would not convert the charitable activity into business, commerce or trade in

> the absence of contrary evidence; that 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 as to whether it is business; that the 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 the long run; that the claimant (petitioner therein) has to be substantially self-sustaining in the long term and should not depend upon the Government: that in other words, taxpayers should not sub-sidize the said activities, which nevertheless are charitable and fall under the residuary clause of 'general public utility'; that there is no statutory mandate that a charitable institution falling under the last clause must be wholly, substantially or in part funded by voluntary contributions; and that a practical and pragmatic view is required while examining the data, which should be analyzed objectively and a narrow and coloured view will be counterproductive and contrary to the language of section 2(15) of the I.T. Act.

51. It was noted that in 'India Trade Promotion Organisation v. DGIT (Exemptions)' , 371 ITR 333 (Delhi), while upholding the constitutional validity of the proviso to section 2(15) of the I.T. Act, it was held: that the correct interpretation of the proviso to Section 2(15) of the I.T. 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; that in both the activities, i.e., the activity 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 prime objective has to be seen; that if the dominant and prime objective of the institution, which claims to have been established for charitable purposes, is profit making, whether its activities are directly in the nature of trade, commerce or business, or indirectly in the rendering of any service in relation to any trade, commerce or business, then it would not be entitled to claim its object to be a 'charitable purpose'; and that on the other hand, 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.

52. Their Lordships held that applying the said decisions to the facts of the case and with respect to the activities of the AUDA under the provisions of the Gujarat Town Planning Act, it cannot be said that the activities of the AUDA are in the nature of trade, commerce or business and / or its object and purpose is profiteering; that merely because under the statutory provisions and to meet with the expenses of the Town Planning Scheme and / or providing various services under the Town Planning Scheme, such as road, drainage, electricity, water supply, etc., if the AUDA is permitted to sell the plots and while selling the said plots, they are sold by holding a public auction, it cannot be said that the activity of the AUDA is profiteering, to be in the nature of trade, commerce and business.

53. It was noted that in the case of 'CIT Vs. Lucknow Development Authority', 38 Taxmann.com 246 (All.), it has been held that the activities of the authority cannot be said to be in the nature of trade, commerce or business and / or profiteering and, therefore, the proviso to section 2(15) of the I.T. Act shall not be applicable.

54. It was held that a similar view has been expressed in 'CIT Vs. Jodhpur Development Authority', 9 ITR-OL 591 (Raj.).

55. It was held that the Urban Development Authority constituted under the provisions of the Gujarat Town Planning Act, constituted to carry out the object and purpose of the Gujarat Town Planning Act, is a statutory body and it collects regulatory fees for the object of the Act; that no services are rendered to any particular trade, commerce or business; that whatever income is earned / received by the AUDA while selling the plots is required to be used only for carrying out the object and purpose of the Gujarat Town Planning Act and to meet the expenditure while providing general public utility services to the public, such as electricity, road, drainage, water, etc.; that the entire control is with the State Government and even accounts are also subjected to audit and there is no element of profiteering at all; that so, the activities of the AUDA cannot be said to be in the nature of trade, commerce or business; and that therefore, the proviso to section 2(15) of the I.T. Act shall not be applicable and the AUDA is, thus, entitled to exemption u/s 11 of the I.T. Act.

56. It was held that, therefore, the question as to whether the Tribunal has erred in holding that the activity of the AUDA was in the nature of trade, commerce or business and, hence, it cannot be regarded

as an activity for charitable purpose in view of the proviso to section 2(15) of the I.T. Act, is to be held in favour of the Assessee

AUDA and against the Revenue.

57. It was observed that so far as regards the other question, i.e., whether while collecting the cess or fees, the activities of the AUDA can be said to be rendering any services in relation to any trade, commerce or business, for the reasons stated while discussing the first issue, merely because the AUDA is collecting cess or fees which is regulatory in nature, the provisions of section 2(15) of the I.T. Act shall not be applicable; and that as observed, neither there is any element of profiteering, nor can the same be said to be in the nature of trade, commerce or business.

58. It was noted that in 'DIT (Exemptions) v. Sabarmati Ashram Gaushala Trust', 362 ITR 539 (Guj.), the Gaushala Trust was engaged in breeding milch cattle and improving the quality of cows and oxen and other related activities; that the AO denied exemption u/s 11 of the I.T. Act to the Trust on the ground that considerable income was generated from the activities of milk production and, therefore, considering the proviso to section 2(15) of the I.T. Act, the Trust was entitled to exemption u/s 11 of the Act; that it was held

by the Hon'ble High Court 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 I.T. Act and the same cannot be said to be in the nature of trade, commerce or business for which the proviso to section 2(15) to the Act is required to be applied; that it was held that the legal controversy centers around the first proviso; that it was held that in plain terms, the proviso provides for exclusion from the main object of the definition of the term 'charitable purpose' and applies only to the cases of advancement of any other object of general public utility; that it was held that if the conditions provided under the proviso are satisfied, any entity, even if involved in the advancement of any other object of general public utility by virtue of the proviso, would be excluded from the definition of 'charitable trust'; that it was held that 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; that it was held that in such a situation, the nature, use or application, or retention of income from such activities would be relevant; and that it was held that under the circumstances, the important elements of application of the proviso are that the entity should be involved in carrying on activities of

any trade, commerce or business or any activities of rendering services in relation to any trade, commerce or business, for a cess or fee or any other consideration.

59. It was stated that the Finance Minister, in their Speech in Parliament, had explained the statutory amendment in section 2(15) of the I.T. Act; that therein, it had been stated that genuine charitable organisations would not be affected in any way; that it had been stated that the CBDT will follow the usual practice, and 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; that it had been stated that whether the purpose is a chartable purpose will depend on the totality of the facts of the case; and that it had been stated that ordinarily, Chambers of Commerce and similar organisations 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.

60. It was noted that in consonance with such assurance given by the Finance Minister on the floor of the House, the Central Board of Direct Taxes issued Circular No. 11 of 2008, dated 19.12.2008 [308 ITR (St.) 5] explaining the amendment, stating that the newly inserted proviso to section 2(15) will apply only to entities whose purpose is 'advancement of any other object of general public utility', i.e., the fourth limb of the definition of 'charitable purpose' contained in section 2(15), that hence, the said entities will not be eligible for exemption u/s 11 or under section 10 (23C) of the Act if they carry on commercial activity, and that 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.

61. It was noted that it was stated in the Circular that there are Industry and trade associations who claim exemption from tax u/s 11 on the ground that their objects are for charitable purpose as these are covered under 'any other object of general public utility'; that 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; that in such cases, there must be complete identity between the contributions and the participants; that therefore, where the industry or trade associations claim both to be charitable as well as mutual organisations and their activities are restricted to contributions from and participation of only their own members, this would not fall within the purview of the provisions of section 2(15) owing to the principle of mutuality; and that, however, if such organisations have dealings with non-members, their claim to be charitable organisations would not be covered by the additional conditions stipulated in the proviso to section 2(15) of the Act.

62. It was noted that it was stated in the Circular that whether an assessee has 'advancement of any other object of general public utility' as its object is, however, a question of fact; that if such assessee is engaged in any activity in the nature of trade, commerce or business or renders any service in relation to any trade, commerce or business, it would not be entitled to claim that its object is a charitable purpose; that 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 any trade, commerce or business; that each case would, therefore, be decided on its own facts and no

generalization is possible; and that assessees, who claim that their object is a charitable purpose within the meaning of section 2(15), should 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.

63. Their Lordships observed that as emerges from the statutory provisions, as explained in the speech of the Finance Minister and the CBDT Circular, the activity of a trust 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 any trade, commerce or business for a cess, fee and / or any other consideration; and that 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.

64. It was further observed that in the case of the AUDA Gaushala Trust, all these were the objects of general public utility and would squarely fall under section 2 (15) of the Act; that profit making was neither the aim, nor the object of the Trust; that it was not its principal activity; that merely because while carrying out the

activities for the purpose of achieving the objects of the Trust, certain incidental surpluses were generated, this would not render the activity to be in the nature of trade, commerce or business; and that as clarified by the CBDT in its Circular No. 11/2008, the proviso to section 2(15) 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.

65. Thus, having taken note of the observations made by the Hon'ble High Court in 'DIT (Exemptions) v. Sabarmati Ashram Gaushala Trust', (supra), their Lordships observed that applying the same to the facts of the case of the AUDA, considering the (i) object and purpose for which the assessee AUDA is established / constituted under the provisions of the Gujarat Town Planning Act, and (ii) that the collection of fees and cess is incidental to the object and purpose of the Gujarat Town Planning Act, even the AUDA's case would not fall under the second part of the proviso to Section 2(15) of the Act.

66. It was thus concluded that the Tribunal had erred in holding the activities of the AUDA to be in the nature of trade, commerce or business, and that so, the proviso to Section 2(15) of the Act shall be applicable, and that therefore, the AUDA is not entitled to

exemption under Section 11 of the Act. It was held that the proviso to Section 2(15) of the Act shall not be applicable to the AUDA and that since the activities of the AUDA can be said to be providing general public utility services, the AUDA is entitled to exemption under Section 11 of the Act. The second question was also, hence, answered in favour of the AUDA and against the Revenue. All the three appeals for assessment years 2009-10, 2010-11 and 2011-12 were, in this manner, allowed by the Hon'ble High Court.

67. Succinctly put, in 'Ahmedabad Urban Development Authority' (supra), the Hon'ble Gujarat High Court held, inter alia, that where the predominant object of the activity of the claimant who claims exemption u/s 11 of the I.T. Act, is to carry out a 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; that considering the fact that the AUDA is a statutory body, an authority constituted under the provisions of the Gujarat Town Planning Act, to carry out the object and purpose of the Gujarat Town Planning Act and to meet the expenditure of providing general public utility to the public such as electricity, road, drainage, water, etc., and the entire control is with the State Government and the accounts are also subjected to audit and there is no element of profiteering at all, the activities of the AUDA can-

not be said to be in the nature of trade, commerce or business, and that, therefore, the proviso to section 2 (15) of the Act is not applicable and, hence, the AUDA is entitled to exemption u/s 11 of the I.T. Act.

68. The matter was carried before the Hon'ble Supreme Court by way of appeal by the Department. We will note here, briefly, the rival contentions relevant to the case of the present Assessee as raised before the Hon'ble Supreme Court.

69. It was contended on behalf of the Department that statutory corporations, agencies, boards and authorities may trace their origins to specific Central or State laws; that however, if their activities are akin to or "in the nature of" business, or trade, or they provide services to businesses or trade, for consideration, fee or even cess (since they may be enabled to do so by law), they have to fulfill the mandate and restrictions under Section 2(15), especially proviso (ii); that as per the decision of the Hon'ble Supreme Court in 'New Delhi Municipal Council v. State of Punjab', ["NDMC", for short], (1997) 7 SCC 339, state entities are not exempt from Union taxation, if they engage in trade or business; that the effect of proviso (i) to Section 2 (15) is that there can be no question of any

incidental activity, nor can the proceeds of trade claim to be exempt merely because they are ploughed back to feed the charitable object; that in keeping with

'Adityapur Industrial Area Development Authority v. Union of India', [2006] 283 ITR 97 (SC), there is no constitutional immunity from taxation for the State, because by Article 289(2) of the Constitution, even State or its instrumentalities/agencies are not immune from taxation if they carry on trade or business; that in the light of Article 289(2), there is no constitutional bar for the States (or the Union) to engage or carry on trade or business, and Article 289 allows the Parliament to impose taxes on such trade or business; that the ratio in 'NDMC' (supra) has to be read in the light of the provisions, and the judgment of the Hon'ble Supreme Court, rendered in 'Shri Ramtanu Cooperative Housing Society Ltd. Vs. State of Maharashtra', [1970] 3 SCC 323 should, in turn, be read in the light of 'NDMC'; that the decisive factor, therefore, is not the status of the entity, but the nature of activity carried on by it; that if the nature of the activity is trade or business with a profit motive, then the same can be taxed even if it is carried on by the State or its instrumentalities; and that Article 289 of the Constitution does not grant absolute immunity from taxation. It was contended that the validity of the amendment can be tested especially in the case of exclusions or exemptions on limited grounds, i.e., invalidity, arbitrariness, unreasonableness and

discrimination; and in no case under any such ground stood made out by the

Assessees; that referring to 'Trustees of the Tribune, In re v. CIT', [1939] 7 ITR 415 (PC) and 'All India Spinners' Association v. CIT', [1944] 12 ITR 482 (PC), "general public utility" is only a statutory creation so as to form part of charitable purposes and it can always be given a statutory import by subjecting it to conditions and limitations prescribed under section 2(15), at different points of time; that in other words, "general public utility" can always be regulated or modulated through statutory prescriptions, conditions, and limitations while granting an exemption from taxation; that exclusions are not based on mere objects of a trust, but on whether the purpose of the trust is "advancement of any other object of general public utility"; that therefore, it cannot be said that one has to look only at the objects to determine if it constitutes charitable purposes for section

2(15) of the I.T. Act. It was contended that the reference to the terms "business, trade or commerce" and "service in relation to" such activities are meant to imply that profit motive should be completely absent.

70. On behalf of the Assessees, it was contended that in the case of a trust, which is a statutory corporation, it is obligatory on the part of the assessee to use the monies received for public utility purpose and the price fixation of lands/plots sold by them is also regulated through statutory regulations, due to which, such activities qualify the test of general public utility; that in keeping with the decision of the Delhi High Court in 'Greater Noida Industrial Development Authority', [2018] 406 ITR 418 (Delhi), there is need to distinguish commercial activity and charging and payment of fee, service

charges, reimbursement of costs or consideration for transfer of rights for performing and undertaking regulatory or administrative duties for general public interest, when these are not guided and undertaken with profit motive or intent. It was contended that like the 'AUDA', the 'Gujarat Industrial Development Corporation' and the 'Gujarat Housing Board', the trust was established under a statute enacted by the State Legislature; that it was treated as a local authority u/s 10(2) of the I.T. Act, as it existed till 2003; that thereafter it was treated as a 'charitable institution' engaged in activities involved in the advancement of public utility till the amendment of 2008; that it was created purely for the development and redevelopment as well as for augmentation of roads and allotment of lands after redevelopment, in the areas under its control; that the mandate of the Punjab Trust Act is to control development activities, execution of works and dispersal of sewage, provisions of such other facilities and generally engage in urban development in the areas under its jurisdiction; that the nature of activities, especially disposal of properties developed by the trust are entirely regulated; that whereas the major portion of the properties developed are to be allotted for housing and residence, and earmarked specifically for public amenities, roads etc., a small percentage can be sold by public auction; that the disposal of plots through allotment and especially by public auction are the main

modes through which it can generate revenue; that the entire revenue or income so generated is to be kept in a fund; that its accounts were mandatorily audited by the State's Accountant General; that the Audit Report is to be laid before the State Legislature; that the land developed by the trust could be dealt with only in accordance with law, i.e., regulations framed under the Act; that like the three corporations, the trust does not carry on any business activity and its functions are controlled by the parent enactment under which it was created; that if any surpluses are generated, they were used for furthering the objectives of law, i.e, they are to be kept in a separate fund to be utilised for further development, expansion and development activities by the trust; that so, the trust cannot be construed as carrying on any trade, business or commerce; that as long as the activities involved are mainly charitable and for advancement of public utility, its purposes are deemed to be charitable even if it carries on some business or tradelike activities for the purpose of generating income; that what is important is whether the main or dominant purpose of business or activity is motivated by profit, where it is so, the entity is debarred from claiming that it is a charity and cannot claim the benefit of tax exemption; that in keeping with 'CIT (Add.) v. Surat Art Silk Cloth Manufacturers Association', [1980] 121 ITR 1 (SC), that the main purpose or principal objective or motivation

for the activity should not be to carry on trade or business, rather it should be to advance the purpose of general public utility; that if such a purpose is fulfilled, the carrying on of some activity which might result in surplus, would not disentitle the entity from the benefit of tax exemption.

71. It was submitted that in the absence of profit motive, the activity is not trade, commerce or business within the meaning of the first proviso to Section 2 (15) of the IT Act, 1961; that in the present context, the activities do not amount to "trade", "commerce" or "business" and the first proviso to Section 2 (15) is attracted only if the primary/dominant objects are (a) in the nature of trade, commerce or business, or (b) rendering any service in relation to any trade, commerce or business; that hence, if the main activity is **'**business**'**, the connected, incidental or ancillary activities of sales carried out in furtherance of and to accomplish their main objects would not, normally, amount to business, unless an independent intention to conduct 'business' in these connected, incidental or ancillary activities is established by the Revenue.

72. It was submitted that any statutory cess, or, or fee, authorized or compelled by law, which is within the domain of the State

Legislature, cannot be construed as taxable, having regard to the principles indicated in the judgment of the Hon'ble Supreme Court, in 'NDMC' (supra); that as per Article 289 of the Constitution of India, it is only if a State engages, by itself, or through an agency, directly in trading activity, that the immunity from Union taxation is lifted; that agencies set up by the State, essentially through law, to carry out welfare activities, such as regulation and housing, cannot per se be characterized as trading concerns.

73. It was contended that if the proscribed activities, i.e., business, commerce or trade or service in relation to such activities is not the main or dominant object of the general public utility charity, any incidental involvement in such activities is permissible; that some of the assessees are statutory corporations charged with developing the housing infrastructure sector; that such corporations are agencies of the State, recognized as "State" under Article 12 of the Constitution, and carry out the essential purposes for which they were set up, which otherwise State Departments would have been expected to carry out; and that the activities of such corporations cannot be characterized as motivated by profit, rather, their essential purposes are to achieve objects of general public utility.

74. The Hon'ble Supreme Court went into the history of the Legislative changes and the Supreme Court's interpretations thereof. Their Lordships delved into the provisions (as amended from time to time) of the Income Tax Act, 1961, as examined by the Privy Council, the Lahore High Court and the Supreme Court, which provisions enabled tax exemptions claimed by trusts for their income from business activities, provided the trusts were created thereon. Their Lordships then examined the relevant provisions of the Income Tax

Act, 1961, as amended from time to time, as interpreted by the Supreme Court. Specifically, the provisions of sections 2 (15), 10, 11, 12, 12A, 12AA and 13 were gone into in extenso. Section 2(15) was interpreted in much detail.

75. The question as to what kinds of income or receipts of the following categories of assessees may not be characterized as derived from trade, commerce, or business, or in relation to such activities, for a consideration, was decided:

(i) Statutory corporations, authorities or bodies

(ii) Statutory regulatory bodies/authorities

(iii) Trade Promotion bodies, councils, associations or

organizations

(iv) Non-statutory bodies - ERNET, NIXI and GS1 India

(v) State cricket associations

(vi) Private trusts

76. We will now reiterate, briefly, the interpretation and conclusion of the Hon'ble Supreme Court, as held applicable to the category of Statutory corporations, authorities or bodies established by Statutes, to which category the present Assessee belongs.

77. The Hon'ble Supreme Court examined the question of the scope of the term “of any other object of general public utility” not being 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.”

78. While summing up their interpretation of section 2 (15), their Lordships observed as follows:

"Section 2(15) - in the wake of its several amendments between 2008 and 2015 - can be juxtaposed with the interpretation of the unamended Section 2(15) by this Court. In 'Surat Art Silk' (supra), the principle enunciated was that so long as the predominant object of GPU category charity is charitable, its engagement in a non-charitable object resulting in profits that are incidental, is permissible. The court also declared that profits and gains from such activities which were non-charitable had to be deployed or "fed" back to achieve the dominant charitable object.

The paradigm change achieved by Section 2(15) after its amendment in 2008 and as it stands today, is that firstly a GPU charity cannot engage in any activity in the nature of trade, commerce, business or any service in relation to such activities for any consideration (including a statutory fee, etc.). This is emphasized in the negative language employed by the main part of Section 2(15). Therefore, the idea of a predominant object among several other objects, is discarded. The prohibition is relieved to a limited extent, by the proviso which carves out the condition by which otherwise prohibited activities can be engaged in by GPU charities. The conditions are:

(a) That such activities in the nature of trade, commerce, business or service (in relation to trade, commerce or business for consideration) should be in the course of "actual carrying on" of the GPU object and

(b) The quantum of receipts from such activities should be exceed 20 per cent of the total receipts.

(c) Both parts of the proviso: (i) and (ii) (to Section 2 (15)) have to be read conjunctively-given the conscious use of "or" connecting the two of them. This means that if a charitable trust carries on any activity in the nature of business, trade or commerce, in the actual course of fulfilling its objectives, the income from such business, should not exceed the limit defined in subclause (ii) to the proviso.

79. It was observed as follows:-

Classically, the idea of charity was tied up with eleemosynary. However, "charitable purpose" and charity as defined in the Act have a wider meaning where it is the object of the institution which is in focus. Thus, the idea of providing services or goods at no consideration, cost or nominal consideration is not confined to the provision of services or goods without charging anything or charging a token or nominal amount. This is spelt out in 'Indian Chamber of Commerce' (supra) where this court held that certain GPUs can render services to the public with the condition that they would not charge "more than is actually needed for the rendering of the services may be it may not be an exact equivalent, such mathematical precision being impossible in the case of variables, - may be a little surplus is left over at the end of the year – the broad inhibition against making profit is a good guarantee that the carrying on of the activity is not for profit".

Therefore, pure charity in the sense that the performance of an activity without any consideration is

> *not envisioned under the Act. If one keeps this in mind, what Section 2 (15) emphasizes is that so long as a GPU's charity's object involves activities which also generates profits (incidental, or in other words, while actually carrying out the objectives of GPU, if some profit is generated), it can be granted exemption provided the quantitative limit (of not exceeding 20 per cent) under second proviso to Section 2 (15) for receipts from such profits, is adhered to.*

80. While answering what is the true meaning of the expression 'fee, cess or consideration', the Hon'ble Supreme court has held that 'fee, cess and any other consideration' has to receive a purposive interpretation, in the present context. If fee or cess or such consideration is collected for the purpose of an activity, by a State Department or entity, which is set up by statute, its mandate to collect such amounts cannot be treated as consideration towards trade or business. Therefore, regulatory activity, necessitating fee or cess collection in terms of enacted law, or collection of amounts in furtherance of activities such as education, regulation of profession, etc., are per se not business or commercial in nature. Likewise, statutory boards and authorities, who are under mandate to develop housing, industrial and other estates, including development of residential housing at reasonable or subsidized costs, which might entail charging higher amounts from some section of the beneficiaries, to cross-subsidize the main activity,

cannot be characterized as engaging in business. The character of being 'State', and such corporations or bodies set up under specific laws (whether by States or the Centre) would, therefore, not mean that the amounts are 'fee' or 'cess' to provide some commercial or business service.

81. Further, while answering the question as to what kinds of income or receipts may not be characterized as derived from trade, commerce, business or in relation to such activities, for a consideration, with regard to the State corporations, authorities or bodies, i.e., the category to which the Assessee belongs, it was observed that it would be essential to deal with certain kinds of receipts which GPU charities, typically, statutory housing boards, regulatory authorities and corporations may be entitled to, if mandated to collect or receive; that during the course of hearing, the Counsel had highlighted that statutory boards and corporations have to recover the cost of providing essential goods and services in public interest, and also fund large scale development and maintain public property; that these would entail recovering charges or fees, interest and also receiving interest for holding deposits; that it had been further pointed out that in some cases, income in the form of rents – having regard to the nature of the schemes which the concerned board, trust or corporation may be mandated or

permitted to carry on, has to be received; that for instance, in some situations, for certain kinds of properties, the boards may be permitted only to lease out their assets and receive rents; that the answers to these are that the definition ipso facto does not spell out whether certain kinds of income can be excluded; that however, the reference to specific provisions enabling or mandating collection of certain rates, tariffs or costs would have to be examined; that generically, going by statutory models in enactments (under which corporations boards or trust or authority by whatsoever name, are set up), the mere fact that these bodies have to charge amounts towards supplying goods or articles, or rendering services, i.e., for fees for providing typical essential services like providing water, distribution of food grains, distribution of medicines, maintenance of roads, parks, etc., ought not to be characterized as "commercial receipts"; that the rationale for such exclusion would be that if such rates, fees, tariffs, etc., determined by statutes and collected for essential services, are included in the overall income as receipts as part of trade, commerce or business, the quantitative limit of 20 per cent imposed by the second proviso to section 2(15) would be attracted, thereby negating the essential general public utility object and thus driving up the costs to be borne by the ultimate user or consumer which is the general public; that by way of illustration, if a corporation supplies essential food grains at cost,

or a marginal mark up, another supplies essential medicines, and a third, water, the characterization of these, as activities in the nature of business, would be self-defeating, because the overall receipts in some given cases may exceed the quantitative limit resulting in taxation and the consequent higher consideration charged from the user or consumer.

82. Summing up their conclusions regarding the interpretation of the changed definition of "charitable purpose" (w.e.f. 01.04.2009) and the later amendments, and other related provisions of the Income Tax

Act, the Hon'ble Supreme Court held as under:-

"In view of the foregoing discussion and analysis, the following conclusions are recorded regarding the interpretation of the changed definition of "charitable purpose" (w.e.f. 01.04.2009), as well as the later amendments, and other related provisions of the IT Act.

A. General test under Section 2(15)

A.1. It is clarified that an assessee advancing general public utility cannot engage itself in any trade, commerce or business, or provide service in relation thereto for any consideration ("cess, or fee, or any other consideration");

A.2. However, in the course of achieving the object of general public utility, the concerned trust, society, or other such organization, can carry on trade, commerce or business

or provide services in relation thereto for consideration, provided that (i) the activities of trade, commerce or business are connected ("actual carrying out…" inserted w.e.f. 01.04.2016) to the achievement of its objects of GPU; and (ii) the receipt from such business or commercial activity or service in relation thereto, does not exceed the quantified limit, as amended over the years (Rs. 10 lakhs w.e.f. 01.04.2009; then Rs. 25 lakhs w.e.f. 01.04.2012; and now 20% of total receipts of the previous year, w.e.f. 01.04.2016);

A.3. Generally, the charging of any amount towards consideration for such an activity (advancing general public utility), which is on cost-basis or nominally above cost, cannot be considered to be "trade, commerce, or business" or any services in relation thereto. It is only when the charges are markedly or significantly above the cost incurred by the assessee in question, that they would fall within the mischief of "cess, or fee, or any other consideration" towards "trade, commerce or business". In this regard, the Court has clarified through illustrations what kind of services or goods provided on cost or nominal basis would normally be excluded from the mischief of trade, commerce, or business, in the body of the judgment.

A.4. Section 11(4A) must be interpreted harmoniously with Section 2(15), with which there is no conflict. Carrying out activity in the nature of trade, commerce or business, or service in relation to such activities, should be conducted in the course of achieving the GPU object, and the income, profit or surplus or gains must, therefore, be incidental. The requirement in Section 11(4A) of maintaining separate books

of account is also in line with the necessity of demonstrating that the quantitative limit prescribed in the proviso to Section 2(15), has not been breached. Similarly, the insertion of Section 13(8), seventeenth proviso to Section 10(23C) and third proviso to Section 143(3) (all w.r.e.f. 01.04.2009), reaffirm this interpretation and bring uniformity across the statutory provisions.

B. Authorities, corporations, or bodies established by statute

B.1. The amounts or any money whatsoever charged by a statutory corporation, board or any other body set up by the state government or central Governments, for achieving what are essentially 'public functions/services' (such as housing, industrial development, supply of water, sewage management, supply of food grain, development and town planning, etc.) may resemble trade, commercial, or business activities. However, since their objects are essential for advancement of public purposes/functions (and are accordingly restrained by way of statutory provisions), such receipts are prima facie to be excluded from the mischief of business or commercial receipts. This is in line with the Larger Bench judgments of this court in 'Ramtanu Cooperative Housing Society' and 'NDMC' (supra).

B.2. However, at the same time, in every case, the assessing authorities would have to apply their minds and scrutinize the records, to determine if, and to what extent, the consideration or amounts charged are significantly higher than the cost and a nominal mark-up. If such is the case, then the receipts would indicate that the activities are

in fact in the nature of "trade, commerce or business" and as a result, would have to comply with the quantified limit (as amended from time to time) in the proviso to Section 2(15) of the IT Act.

B.3. In clause (b) of Section 10(46) of the IT Act, "commercial" has the same meaning as "trade, commerce, business" in Section 2(15) of the IT Act. Therefore, sums charged by such notified body, authority, Board, Trust or Commission (by whatever name called) will require similar consideration – i.e., whether it is at cost with a nominal mark-up or significantly higher, to determine if it falls within the mischief of "commercial activity". However, in the case of such notified bodies, there is no quantified limit in Section 10(46). Therefore, the Central Government would have to decide on a case-by-case basis whether and to what extent, exemption can be awarded to bodies that are notified under Section 10(46).

B.4. For the period 01.04.2003 to 01.04.2011, a statutory corporation could claim the benefit of Section 2(15) having regard to the judgment of this Court in the 'Gujarat Maritime Board' case (supra). Likewise, the denial of benefit under Section 10(46) after 01.04.2011 does not preclude a statutory corporation, board, or whatever such body may be called, from claiming that it is set up for a charitable purpose and seeking exemption under Section

10(23C) or other provisions of the Act."

83. As for the application of the interpretation, it was reiterated by the Hon'ble Supreme Court that:

> *"At the cost of repetition, it may be noted that the conclusions arrived at by way of this judgment, neither preclude any of the assessees (whether statutory, or non-statutory) advancing objects of general public utility, from claiming exemption, nor the taxing authorities from denying exemption, in the future, if the receipts of the relevant year exceed the quantitative limit. The assessing authorities must on a yearly basis, scrutinize the record to discern whether the nature of the assessee's activities amount to "trade, commerce or business" based on its receipts and income (i.e., whether the amounts charged are on cost-basis, or significantly higher). If it is found that they are in the nature of "trade, commerce or business", then it must be examined whether the quantified limit (as amended from time to time) in proviso to Section 2(15), has been breached, thus disentitling them to exemption".*

84. In the result, the Departmental Appeals against the various Improvement Trusts (17 C.A.s and 02 Diary Nos.) were rejected.

85. From the above discussion made by the Hon'ble Supreme Court while ascertaining what kinds of income or receipts of corporations, authorities or bodies established by statutes (that is, the category to whichtheAssessee trust belongs) may not be characterized as

derived from trade, commerce or business or in relation to such activities, for a consideration, the following conclusions are evident:

(a) In future, every year, to determine the allowability /exemptability of receipts which statutory trusts like the Assessee trust are mandated to collect or receive, the reference to specific provisions enabling such mandatory collection would have to be examined by the assessing authorities.

(b) Recognising and honouring the essential public utility object of such trusts, amounts charged by such trusts will not be taken as commercial receipts, foreclosing the quantitative limit of 20 per cent imposed by the second proviso to section 2 (15), thereby obviating taxation and ensuring that the costs to be borne by the ultimate user or consumer, that is, the general public, are kept at a minimum.

(c) In case the receipts are significantly higher than the cost and a nominal mark up, the trust would have to comply with the quantified limit of 20 per cent.

(d) Where the receipts are found to be in the nature of "trade, commerce or business", in those cases, it would have to be examined whether the quantitative limit has been breached.

86. The question is whether the parameters laid down by the Hon'ble Supreme Court are met in the present case. In the case of the Assessee trust, for A.Y. 2011-12, the High Court has followed its own judgement in the case of 'Moga Improvement Trust', wherein the specific provisions of the Punjab Town Improvement Act, 1922,that is, the provisions enabling the mandatory collection stipulated by the Act, were examined. It was held that almost every section in Chapter IV of the PTI Act clearly indicates that the AssesseeMoga Improvement Trust is established for the purpose of advancement of the object of general public utility, and that not only that, the entire Act in general indicates this to be the reason for and the basis of the establishment of the trust (Page 605, placitum 77 of the Report).

87. It is not the case of the Department that the above position has undergone any change whatsoever post A.Y. 2011-12, upto A.Y. 201617, i.e., the year under consideration, or beyond. This position is in full compliance of the Supreme Court directive of the receipts being in accordance with the mandate of the provisions of the PTI Act, 1922, in every year.

88. The findings of the Hon'ble High Court thus squarely meet the stipulation of the Hon'ble Supreme Court regarding determination

of the exemptability of receipts which the Assessee trust is mandated by the PTI Act to collect.

89. The Hon'ble High Court also held (page 606, placitum 82 of the Report) that considering the nature of the PTI Act, selling of plots and premises by the trust is only incidental and ancillary to its main purpose of "town improvement"; that mere profit making on account of such incidental or ancillary activity does not disentitle the trust to the exemptions under the Income Tax Act; that the trust is likely to make profit on account of its commercial or business activities of disposing of its lands pursuant to the power under section 28(2) (iii) of the PTI Act; that, however, does not take it out of the definition of 'charitable purpose' in section 2(15); that 'trade', 'commerce' and 'business' in section2(15) must be such as to involve an element of profit; thatprofit, however, is not the predominant motive of such trusts; *that even where the plots are developed and premises are constructed and sold at market price, the activity is not a commercial or business venture per se, but one necessitated on account of implementation of the provisions of the trust, through statutory schemes, the main purpose of which schemes is driven by public requirements and not as a commercial venture per se, and which schemes are incidental to the main object*

of the trust. (Emphasis supplied to stress the crucial finding of the High Court, as confirmed by the Hon'ble Supreme Court).

90. These findings of the Hon'ble High Court, thus, directly meet the mandate of the Hon'ble Supreme Court that in case the receipts are not found to be in the nature of 'trade, commerce or business', breach of the quantitative limit would not have to be examined. Herein, the Hon'ble High Court has held that even where the plots and premises are sold at market price, the activity is not a commercial or business venture. This finding has been confirmed by the Hon'ble Supreme Court while rejecting the Department's appeal in C.A.No. 17527/2017, rendering the quantitative limit of 20 per cent under the second proviso to section 2(15) of the I.T. Act to be inapplicable, shutting out taxation pro bono publico by ascertaining minimum cost to the end consumer.

91. It is also seen that as per the Budget Speech of the Hon'ble Finance Minister, for A.Y. 2023-24, pursuant to the aforementioned Supreme Court judgement in 'Ahmedabad Urban Development Authority',w.e.f. 1.4.2004, a new section, i.e., section 10 (46A) is slated to be incorporatedin the Income Tax Act, so as to exempt any income arising to abody or authority, or Board or Trust or Commission, notbeing a company, which has been established or

constituted by or under a Central of State Act with one or more of the

following purposes, namely:-

(i) dealing with and satisfying the need for housing accommodation;

(ii) planning, development or improvement of cities, towns and villages;

(iii) regulating, or regulating and developing, any activity for the benefit of the general public; or

(iv) regulating any matter, for the benefit of the general public, arising out of the object for which it has been created.

[source : 330 CTR (Statutes) 257]

92. Further, we find that our aforesaid view is supported by the decision of the Hon'ble Gujarat High Court in the case of 'CIT (Exemptions) vs. Gujarat Industrial Development Corporation', (2023) 452 ITR 27 (Guj.) wherein, the Hon'ble Gujarat High Court, following the decision of the Hon'ble Supreme Court in the case of 'Ahmedabad Urban Development Authority' (supra) has dismissed the appeal filed by the Revenue, holding that the matter is squarely covered by the decision of the Hon'ble Supreme Court and no question of law, much less any substantial question of law arises

for consideration. It is relevant to note that in the said case, the Senior Standing Counsel appearing for the Revenue fairly submitted that the decision rendered by the Hon'ble Supreme Court in the case of 'Ahmadabad Urban Development Authority' (supra) would govern the case of the assessee. We, therefore, find that the Revenue has also accepted the decision of the Hon'ble Supreme Court as applicable in the case of Gujarat Industrial Development Corporation, which is also a statutory corporation constituted under the Gujarat Industrial Development Act for the purpose of securing and assisting rapid and orderly establishment and organisation of industrial areas and industrial

estates in the State of Gujarat.

93. In view of the forgoing discussion, we conclude as follows:

(a) For A.Y. 2011-12, the Hon'ble High Court has granted exemption to the Assessee trust under section 11 of the Income Tax Act.

(b) The Civil Appeal of the Department against the said High Court judgement has been rejected by the Hon'ble Supreme Court.

(c) The Hon'ble High Court has held the Assessee's activity of sale of plots and premises, even at market price, not to be a commercial or business venture per se, but to be necessitated by

the statutory mandate of the Punjab Town Improvement Act, 1922, i.e., the mother statute qua the Assessee trust.

(d) Facts for the year under consideration, i.e., A.Y. 2016-17, not having undergone any change at all from the facts in A.Y. 2011-12, the judgement of the Hon'ble High Court for A.Y.

2011-12, as approved by the Hon'ble Supreme Court in 'Ahmedabad Urban Development Authority', 449 ITR 1 (SC) (supra), is squarely applicable to the year under consideration, that is, A.Y. 2016-17.

(e) Therefore, the second proviso to section 2 (15) and, consequently, section 13 (8) of the Income Tax Act are held not applicable to the Assessee's case, and so, the aggregate receipts of the Assessee trust from its activities of sale of plots, flats and commercial booths and also its income earned form nonconstruction fee, transfer fee, penal interest and compounding fee, etc., are held to be entitled for exemption under section 11 of the I.T. Act. Such exemption is allowed to the Assessee.

(f) The Order under appeal is, thus, reversed and cancelled on accepting the grievance of the Assessee.

94. In the result, the appeal is allowed.

Order pronounced on 25.05.2023.

Sd/- **Sd/-**

(VIKRAM SINGH YADAV) **(A.D. JAIN)**

Accountant Member **Vice President**

Dated :. 25.05.2023

"आर□□."

□□□□□□)ल*पअ□*षत/ Copy of the order forwarded to :

1. □□□□□□/ The Appellant
2. यथ The Respondent
3. आयकरआयत/ CIT
4. आयकरआयत(□□□□)/ The CIT(A)
5. *□□□□□□□□□5ध, □□□□□□□□□#यअधकरण,च7□□□□/ DR, ITAT, CHANDIGARH
6. □□□□□□□/ Guard File

□□□□□□□□□□/ By order,

□□□□□□□□□□□□/ Assistant Registrar