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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **ITA 6/2022 & CM APPL.1971/2022**

COMMISSIONER OF INCOME TAX
(EXEMPTIONS) DELHI

..... Appellant

Through: Mr.Abhishek Maratha, Advocate.

versus

INDIA TRADE PROMOTION ORGANISATION Respondent

Through: Mr.Mayank Nagi, Advocate.

% Date of Decision: 12th January, 2022

CORAM:

HON'BLE MR. JUSTICE MANMOHAN

HON'BLE MR. JUSTICE NAVIN CHAWLA

J U D G M E N T

MANMOHAN, J. (Oral)

1. The appeal has been heard by way of video conferencing.
2. Present appeal has been filed challenging the order dated 13th September, 2019 passed by Income Tax Appellate Tribunal (hereinafter referred to as 'ITAT') in ITA No. 3359/Del/2016 for the assessment year 2009-10.
3. Learned Counsel for the Appellant states that the Tribunal erred in ignoring the fact that the activities of the respondent/assessee do not qualify for charitable purpose in view of the Proviso to Section 2(15) of the Income Tax Act, 1961 (hereinafter referred to as the 'Act') and hence the assessee does not qualify for the exemption under Section 10(23C)(iv)/11/12 of the Act.



4. It is pertinent to mention that in a writ petition being *India Trade Promotion Organization vs. Director General of Income Tax (Exemptions) & Others* in WP(C) 1872/2013, the learned predecessor Division Bench issued a Mandamus to the appellant herein to grant approval to the respondent herein under Section 10(23C)(iv) of the Act. The relevant portion of the said judgment passed by the learned predecessor Division Bench is reproduced hereinbelow:

“53. From the said decision, it is apparent that merely because a fee or some other consideration is collected or received by an institution, it would not lose its character of having been established for a charitable purpose. It is also important to note that we must examine as to what is the dominant activity of the institution in question. If the dominant activity of the institution was not business, trade or commerce, then any such incidental or ancillary activity would also not fall within the categories of trade, commerce or business. It is clear from the facts of the present case that the driving force is not the desire to earn profits but, the object of promoting trade and commerce not for itself, but for the nation - both within India and outside India. Clearly, this is a charitable purpose, which has as its motive the advancement of an object of general public utility to which the exception carved out in the first proviso to Section 2(15) of the said Act would not apply. We say so, because, if a literal interpretation were to be given to the said proviso, then it would risk being hit by Article 14 (the equality clause enshrined in Article 14 of the Constitution). It is well-settled that the courts should always endeavour to uphold the Constitutional validity of a provision and, in doing so, the provision in question may have to be read down, as pointed out above, in Arun Kumar (supra).

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58. In conclusion, we may say that the expression "charitable purpose", as defined in Section 2(15) cannot be construed literally and in absolute terms. It has to take colour and be considered in the context of Section 10(23C)(iv) of the said Act. It is also clear that if the literal interpretation is given to the



proviso to Section 2(15) of the said Act, then the proviso would be at risk of running foul of the principle of equality enshrined in Article 14 of the Constitution India. In order to save the Constitutional validity of the proviso, the same would have to be read down and interpreted in the context of Section 10(23C)(iv) because, in our view, the context requires such an interpretation. The correct interpretation of the proviso to Section 2(15) of the said Act would be that it carves out an exception from the charitable purpose of advancement of any other object of general public utility and that exception is limited to activities in the nature of trade, commerce or business or any activity of rendering any service in relation to any trade, commerce or business for a cess or fee or any other consideration. In both the activities, in the nature of trade, commerce or business or the activity of rendering any service in relation to any trade, commerce or business, the dominant and the prime objective has to be seen. If the dominant and prime objective of the 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'. On the flip side, where an institution is not driven primarily by a desire or motive to earn profits, but to do charity through the advancement of an object of general public utility, it cannot but be regarded as an institution established for charitable purposes.

59. Thus, while we uphold the Constitutional validity of the proviso to Section 2(15) of the said Act, it has to be read down in the manner indicated by us. As a consequence, the impugned order dated 23.01.2013 is set aside and a mandamus is issued to the respondent to grant approval to the petitioner under Section 10(23C)(iv) of the said Act within six weeks from the date of this judgment. The writ petition stands allowed as above. The parties are left to bear their own costs.”

5. Learned Counsel for the Appellant/revenue states that the revenue has preferred a Special Leave Petition being SLP(C) No.14674/2016 against the



judgment passed in WP(C) 1872/2013 which is pending consideration in the Supreme Court. In the said Special Leave Petition, Leave has been granted.

6. Admittedly, there is no stay of the judgment passed by the learned predecessor Division Bench. Consequently, in view of the judgment of the Supreme Court in *Kunhayammed and Others Vs. State of Kerala And Another*, (2000) 6 SCC 359 and *Shree Chamundi Mopeds Ltd. Vs. Church of South India Trust Association CSI Cinod Secretariat, Madras*, (1992) 3 SCC 1, the present appeal and pending application are dismissed being covered by the judgment passed by the learned predecessor Division Bench in WP(C) 1872/2013.

MANMOHAN, J

NAVIN CHAWLA, J

JANUARY 12, 2022
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