IN THE INCOME TAX APPELLATE TRIBUNAL,
CUTTACK BENCH, CUTTACK

BEFORE S/SHRI N.S SAINI, ACCOUNTANT MEMBER
AND PAVAN KUMAR GADALE, JUDICIAL MEMBER

ITA No.265/CTK/2017
Assessment Year : 2009-2010

Income Tax Officer, Ward-2(1), Bhubaneswar.	Vs.	Adhikar, Plot No.-113/2524, Khandagiri Vihar, Khandagiri, Bhubaneswar
PAN/GIR No.AAATA 3160 D		
	..	(**Respondent**)

Assessee by : Shri S.C.Bhadra, AR
Revenue by : Shri Subhendu Datta, DR

Date of Hearing : 05/09/ 2018
Date of Pronouncement : 24 /09/ 2018

ORDER

Per N.S.Saini, AM

The appeal filed by the revenue is directed against the order of the CIT(A)-3, Bhubaneswar dated 9.3.2017 for the assessment year 2009-2010.

2. The revenue has raised the following grounds:

> "The CIT(A) erred in allowing exemption u/s.11 claimed by "the assessee, without appreciating the fact that if an amount is collected as interest on commercial principle, the end use is not relevant as per proviso to section 2(15) and also unless the assessee satisfies the conditions which are relevant, AO can refuse exemption u/s.11 of the Act.

3. The Assessing Officer observed that in the income and expenditure account, the assessee has shown income from Micro Finance project of Rs.7,22,42,784/- and corresponding expenditure on this project at Rs.6,58,94,988/-. Thus, there was surplus income of Rs.63,47,796/- from this activity. He observed that no separate books of account have been kept and maintained in respect of this activity. Further, he observed that the assessee obtained loan from financial institutions with interest and advanced loans to self help groups at a higher rate of 0.5% than the rate at which the loan is obtained from the bank/financial institutions. Hence, the above activities are nothing but a business activity. He observed that according to the provisions of section 2(15) of the Income tax Act, the charitable purpose includes relief of the poor, education, medical relief, preservation of environment (including watersheds, forest and wildlife) and preservation of monuments or places or objects of artistic or historic interest, and the advancement of any other object of general public utility. From the activities of the institution in the Memorandum of Association, it is observed that it is falling under the fourth limb of the above definition of charitable purpose as stated above, i.e. 'any other object of general public utility'. According to the proviso to section 2(15) of the Act, advancement

of any other object of general public utility shall not be a charitable purpose, if it involves the carrying on of any activity in the nature of trade, commerce or business, or any activity of rendering any service in relation to any trade, commerce or business, for a cess or fee or any other consideration, irrespective of the nature of use or application, or retention, of the income from such activity. He, therefore held that the activity of micro finance squarely falls under the definition of trade, commerce or business which shall not be regarded as a 'charitable purpose'. Accordingly, he held that the income of Rs.63,47,796/- has to be assessed as business profit of the assessee.

4. Being aggrieved by this order, the assessee went in appeal before the CIT(A).

5. The CIT(A) observed as under:

> The proviso to section 2(15) which restricts incidental business activities to Rs.25 lakh per year, in Asst. Year 2011-12, gets attracted if the organisation is engaged in business activities or the charitable activities are masked commercial activities. The explanatory Circular No. 11/2008 [F.No.l34/34//2008-TPL on proviso to Section 2(15) has provided the clarification regarding its applicability. It provides that the entities which run commercial activities under the mask of charitable activities are also covered. The relevant extract from the circular is as under :
>
> However, it was seen that a number of entities who were engaged in commercial activities were also claiming exemption on the ground that such activities were for the advancement of objects of general public utility in terms of the fourth limb of the definition of charitable purpose.

> In the final analysis, however, whether the assessee has for its object the advancement of any other object of general public utility is a question of fact. If such assessee is engaged in any activity in the nature of trade, commerce or business or renders any service In relation to trade, commerce or business, it would not be entitled to claim that its object is charitable purpose. In such a case, the object of general public utility will be only a mask or a device to hide the true purpose which is trade, commerce or business or the rendering of any service in relation to trade, commerce or business. Each case would, therefore, be decided on its own facts and no generalization is possible. Assessees, who claim that their object are charitable purpose within the meaning of section 2(15), would be well advised to eschew any activity which is in the nature of trade, commerce or business or the rendering of any service in relation to any trade, commerce or business.
>
> In the light of the above Circular, the AO is required to see whether the assessee eligible to claim application under section 11 and whether the proviso to section 2(15) gets attracted in the light of commercial nature of activities. Particularly, if the primary activity of the organization is in the nature of trade or business, then it is important to ensure that there is no dominant profit motive involved and it is not used as a mask for commercial activities and benefitting at the hands of the beneficiaries. If an organisation which has no source of generating surplus from its activity other than the beneficiary then existence of consistent and substantial surplus does raise a question regarding the commercial nature of the activity. If this question is not successfully defended and justified by the appellant then the invocation of the proviso to section 2(15) by the AO cannot be questioned.

6. The CIT(A) further observed that the assessee has relied on the ruling Visakhapatnam, Income Tax Appellate Tribunal in the case of *Spandana (Rural & Urban Development Organisation) v-ACIT [2010] 40 DTR 153 (Visakha-Trib.)* which held that micro finance activity is a charitable activity as it alleviates poverty and also benefits socio-economically weaker sections of the

society. The Hon'ble Tribunal held that the Micro finance activity was charitable in nature because of the following reasons :

(i) The loan is advanced to weaker sections of the society to meet their urgent needs.
(ii) Even if reasonable or slightly higher interest is charged, it cannot be held uncharitable because the cost of recovery is very high and the possibility of bad debt is also high.
(iii) The funds are given without any surety or guarantee.

The relevant extract from the case are provided as under;

"Micro finance activity requires an organised sector for procuring a loan from the banks or other financial institutions for its disbursement/advancement of loan to poor or weaker sections of the society in which the assessee has to incur a lot of expenditure. Moreover, when a loan was given to the poor women, they do not have any surety or guarantee to stand and most of the times the loan could not be recovered from them and that aspect Is also to be taken into account by the assessee while granting a loan to the poor woman. Suppose a loan was given to some of the poor women and they would not be in a position to repay the loans what the assessee will do. He cannot enforce the recovery of the loan by other means and ultimately he has to write off the loan. Meaning hereby, in these types of micro finance activities most of the times the assessee could not recover the loans granted to the poor women as no one stood as the guarantor for them at the time of advancement of the loan. No doubt assessee is that charging higher rate of interest from the poor women or the downtrodden or socio-economically weaker section of the society. The reason behind is that most of the time the assessee could not recover the loan from these poor and weaker sections of the society, besides incurring heavy expenditure In maintaining the organised sector. These poor and weaker sections happily agreed with the assessee for loan at higher rate, because they could not get advancement of certain funds by the assessee to other organisations who were also engaged in similar type of activities are concerned, by advancing a fund on interest to other organisations, assessee has accomplished its of microfinance to the socio-economically weaker sections of the society and to alleviate poverty beside collecting the interest on the advancement loan. Moreover, this fund was advanced for a shorter period and the assessee has also earned an interest thereon which was utilised in micro financing activity to the poor people. By joining hands with the banks or financial institutions for procuring funds/loans for its advancement to poor or needy people exemption under section 11 cannot be denied.

> While rejecting the claim of the assessee, the Revenue has not taken into account these factors that by doing this activity, assessee is helping the needy people or the socio-economically weaker sections of the society as no one is going to finance them to meet their requirements. By doing this, the assessee is at least helping the poor and weaker sections of the society in meeting their urgent needs."
>
> It is evident that the society was facing non-recovery of loan and therefore the Hon'ble ITAT in its wisdom rightly held that only high rate of interest was not enough to deny the charitable nature. The ratio of the case clearly exemplifies the absence of profit motive, as the assessee was not making any real surplus or profit due to high cost and NPAs. Therefore, the rate of interest in itself could not have been the determining factor to pass a judgement on the charitable character of the institution. The case in fact casts a greater responsibility on the AO to study the Income and expenditure to ensure that the assessee is not benefiting at the cost of the beneficiaries. In the present case in hand, the appellant is making huge profits on a consistent basis. Therefore, the facts and circumstances of this case do not provide any credible support to the appellant regarding the charitable character of activities.

7. The CIT(A) further observed that similarly, the Bangalore Bench of the Tribunal in the case of ADIT(E) v. Bharatha Swamukhi Samsthe [2009] 28 DTR 13 (Bangalore - Tribunal) has held that the work of lending money to poor women for income generating activities was charitable in nature as there was nothing on record to show that the interest charged by the assessee was exorbitant. The following extract from the case is crucial to understand the statutory and judicial interpretations in this regard:

> "It is not in dispute that the assessee's work is lending money to the poor women for income generating activities. The loan given to project members are borrowed from bank; the beneficiaries are

poor families. If the women in the assessee's project have to borrow money from the money lenders they have to pay many times higher interest than what the assessee has charged. It is also not in dispute that the assessee incurs financial costs for ling loans from banks. The assessees also have to make payment towards salaries and other administrative activities of the Trust. There is nothing on record to suggest that the assets and income of the trust were available for the personal benefit of the trustee and the board members, are only used for micro credit to poor women for their poverty alleviation and for the benefit of the socio-economically weaker sections of the society. The AO has not substantiated its findings that the work of the trust is not charitable and the interest charged by the assessee is exorbitant. The AO placed nothing on record to show that the assessee is charging exorbitant interest. The AO may justify the exorbitant rate of Interest charged, in case the poor ladies in question have option to avail credit at lower Interest from other sources. In case, the credits are available at lower interest to the poor women in question then they were free to avail the same. There was no compulsion over parties to avail credit at higher rate of Interest. In case they have option to avail loan at lower rate of interest. The assessee can carry out its activities on or after charging marginal higher rate of interest to run its activities. The assessee is running seminar in rural area to make the poor ladies aware of the scheme and to encourage their participation. All these things need some expenditure. Initially, the assessee was in loss and it is only in the year under consideration some surplus is with the assessee trust. The facts and circumstances show that the assessee is carrying out its charitable activities and the surplus funds are used for charitable purposes. So, the CIT (A) was justified in holding that the assessee is engaged in charitable activities and qualify for exemption under section 11."

It was noted that in the above case the assessee was sustaining losses in all the previous years and therefore the, Hon'ble ITAT rightly upheld the charitable character of the appellant as there was no reason to believe that the appellant was benefiting at the cost of the beneficiaries and there was profit intent. Again, the fact and circumstances of this case do not provide any credible support to the claim of the appellant regarding the charitable character of activities due to its high profit margin maintained consistently for several years.

8. Further, the CIT(A) relied on the decision of the Delhi Bench of the Tribunal in the case of *Disha India Micro Credit v. CIT*

120111 Tax Pub (DT) 873 (Del-Trib)/38(II) ITCL 301, where the assessee was a micro finance company registered under section 25 of the Companies Act, 1956. It had applied for registration under section 12A in Form No. 10A. The assessee's application for registration under section 12A was rejected by the CIT. The CIT had observed that the various clauses of the Memorandum of the company would clearly show that the assessee had a motive of profit also, along with the stated motive of service to the poor and needy people as claimed by the assessee. He further observed that such profit even if to be ploughed back as claimed by the assessee, liable to income-tax under IT Act. It was held that merely because there was a surplus from the activity of micro financing, that by itself, cannot be a ground to say that the assessee did, not exist for charitable purpose particularly when under the Memorandum of Association and Articles of Association, it had been clearly provided that the profit shall not be distributed amongst the members but shall be utilized towards its objects, and in the case of dissolution, any property remaining after meeting out the liability shall be transferred to the association having similar object. Therefore, the rejection of the registration of trust on this score was also found by the Hon'ble Tribunal as unjustified. This case Disha India Micro Credit also

does not help the appellant as it is about treating micro finance a charitable activity at the time of 12A registration, which in any case is not disputed. At the assessment stage only the application and charitable nature is seen."

9. The CIT(A) further referred to the decision of the Cuttack Bench of the Tribunal in the case of *Bharat Integrated Social v. CIT, Sambalpur [ITA NO.115/CTK/2011], wherein,* it was held that the micro finance activity are per se charitable in nature and earning of interest was incidental in nature. The interest earned was also within permissible market rates, therefore, could not be treated as business of earning interest. The relevant extract is as under :

> "CIT has interpolated the activities of the charitable nature carried on by the assessee trust with that of the income resulting in interest earning against which he has not been able to establish whether he was trying to hold the activities as non-charitable on the basis of surplus identifiable as interest only. Obviously the assessee is said to have borrowed the amounts from banks and gives to the ultimate borrower by becoming a co-borrower, stands guarantee, surety concerned they have not given money for charitable purpose which the assessee has identified itself of carrying out the charitable activities. Earning of interest becomes Incidental for governing and controlling all the funds as utilized cannot be Isolated to derive a trading or commercial activity therein. We find merit in the contention of the learned Counsel for the assessee that having received various grants for the charitable purposes from the Government and semi-Government concerns, the interest received is not beyond the permissible market rates in order to render surplus to the assessee to hold a view that the assessee is conducting the business of earning Interest."

> It was again noted that the Hon'ble ITAT, Cuttack Bench, Cuttack again has been consistent with the various other rulings, in both the above cases the facts and circumstances did not reflect surpluses made from MFI activity to justify profit intent. The observation, "the interest received is not beyond the permissible market rates in order to render surplus to the assessee to hold a view that the assessee is conducting the business of earning interest" The Judgment of the Hon"ble ITAT, Cuttack in these two cases makes it clear that two conditions should be complied with; firstly, the rate should be comparable with the market and secondly, it should not be such that it generates profit at the cost of the beneficiaries. "']
>
> The appellant has cited the Supreme Court ruling in *CIT v. Thanthi Trust [2001J 247 ITR 785*. In this case the Hon'ble Apex Court held that income from incidental business was permissible if the amount was applied for charitable purposes. The appellant has totally misunderstood the ruling and nowhere it suggests that the primary charitable activity can be run for profit on commercial principles. The ruling was specifically confined to sub section (4A) of section 11 *which* regulates incidental businesses and therefore not relevant..

10. Further, the CIT(A) has also observed that the appellant has also quoted the High Court of Bombay ruling in the case *Commissioner of Income-tax v. Agricultural Produce and Market Committee [2007] TAXMAN 359 (BOM.).* In this ruling, it was held that even if there was some profit in activity carried on by trust/institution, so long as dominant object was of general public utility, it cannot be said that said trust/ institution is not established for charitable purposes. The case was at the stage of 12AA registration where it was held that existence of some profit or charging of fees could not be a reason for denying 12AA registration as long as the dominant objects remained charitable.

In this case the court relied on the Supreme court decision in Addl. CIT v. Surat Art Silk Cloth Mfrs. Association [1980] 121 ITR 1 (SC) where held that the main test to find out whether an institution is run for charitable purposes is to find out what Is the dominant or primary purpose of the assessee—whether the purpose was to promote commerce and trade in art silk, etc., or the advancement of an object of general public utility. It was also held if the primary or dominant purpose of an institution is charitable, another object which by it may not be charitable but which is merely ancillary or incidental to the dominant purpose would not prevent the institution from being a charitable institution. It was further held that if the purpose of an institution is the advancement of an object of general public utility, it is that object and not its accomplishment which must not involve the carrying on of any activity for profit. So long as the dominant purpose of the institution does not involve the carrying on of any activity for profit, it is immaterial how the money for achieving that purpose is found, whether by carrying on an activity for profit or not. The Hon'ble Supreme Court has emphatically clarified that the primary activity cannot be run for profit, once the primary activity is not run with profit motive the organization can have other activities which may generate profit. There is a fundamental

difference between running the primary activity for profit and having incidental profit-making activities. In appellant's case, micro finance is the primary activity under which profits are generated continuously and throughout the years.

11. Further, the CIT(A) has observed as under;

> **The dominant activity should not be in the nature of business:** The Hon'ble Supreme Court decision in the case of *Commissioner of Sales Tax v. Sai Publication Fund (2002) 258 ITR 70 (SC) held :*
>
> *"Thus, 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."*
> The above ruling again re-affirms the law that a charitable organization cannot be allowed to run its primary activity on commercial principles with profit intent. The incidental activity may generate income and feed the primary activity but if the primary activity is with profit intent then there will be no primary purpose left for the organization. The primary activity may have profit but cannot have profit intent to benefit out of the beneficiaries.
>
> (vii) The Ld. A.R. has placed reliance in the case of "Peoples Forum" decided by my predecessor in office in ITA No.0139/2011-12 for A.Y.2009-10. In the above case, the assessee claims its activities of micro financing as falling within the limb of "relief of poor" and therefore, eminently eligible for tax exemption u/s.2(15) read with section 11 of the Act. The CIT(Appeals) negated the activity of the assessee as relief to the poor after discussing the issue at length. However, the CIT(Appeals) held that the activity of the assessee falls within the definition of "advancement of general public utility" and by applying the Annual Percentage Rates (APRs) and the National Average Rate of Interest, he held that Interest rates offered by the assessee to its target segment that ranges between*10.5%* to 14% can be held as not given by commercial motivations and calculation and directed the A.O. to allow exemption u/s.11 of the Act. But, a complaint registered u/s.25 of the Companies Act is legally barred from distributing the dividends. That does not mean that there is no profit motive. Likewise it is difficult to accept universal application of findings of report on APRs and National Average Rate of Interest. The A.O. was not given an

opportunity to rebut the findings on report of APRs in above case. The applicability of APRs is not appreciated in the case discussed below.

In the case of *ITO (Exemption), Madurai Vrs. Kalanjiam Development Financial Services reported in [2015] 64 taxmann.com 255,* the assessee is a micro finance company registered u/s.25 of Company Act and also u/s.l2AA of IT. Act, 1961 operating as a financial Intermediary between the banks and SHGs. The main objective of the company Is to bridge the gap in microfinance to SHGs. The A.O. observed that the assesses company took credit facilities from different banks at interest rate up to 11% and charged interest from SHGs at much higher rate so much so that net profit out of the above operations was 20.4% in the F.Y.2009-10. The assessment was completed by assessing the income at Rs.30,33,950/- by denying exemption u/s.11 and 12 and by invoking provisions of sec.2(15) on the ground that the assessee was doing business of banking which fail under 4th Limb of Proviso to Sec.2(15) i.e. any other object of public utility. The CIT(Appeals) granted exemption u/s.11 & 12 of the Act by holding that the assess is carrying on charitable activities u/s.2(15) of the Act. The Revenue was in Appeal before Hon'ble Tribunal, Chennai Bench-C, and Chennai. The Hon'ble Tribunal set aside the order of the CIT(Appeals) and decided the issue in favour of the Revenue by following thus:-

"8. We have heard both the parties and perused the material on record. Sec. 11 of the Act stipulates that the income from property held for charitable or religious purpose shall not be included in the total income of the previous year of the person in receipt of the income to be given effect in the manner as specified therein: The term 'charitable purpose' has not been defined under the statute; but for the inclusive nature of the term as specified under s. 2(15) of the Act, which as existed before the amendment is as follows :

'Sec. 2(15): "Charitable purpose" includes relief of the poor, education, medical relief and the advancement of any other object of general public utility.'

As per Finance Act, 2008, the said provision was amended adding a 'proviso' w.e.f 1st April, 2009 as follows :

Provided that the advancement of any other object of general public utility shall not be a charitable purpose, if it involves the carrying on of any activity in the nature of trade, commerce or business or any activity of rendering any service in relation to any trade, commerce or business for a cess or fee or any other

consideration irrespective of the nature of use or application or retention of the income from such activity."

The AO has taken a stand that by virtue of the amendment as above, the assessee is not entitled to exemption u/s.11 of the Act.

8.1 The Id. AR submitted that, the idea and understanding of the AO with regard to the scope of amendment to sec.2(15) is thoroughly wrong and misconceived. There is no trade or business in the activities pursued by the assessee in running of micro finance business and will not take it outside the purview of charity and hence, that the "proviso" added to sec 2(15) of the Act, is not at attracted to the case in hand. He also submitted that the statute, as it stood earlier, had clarified the charitable purpose mentioned in sec.2(15) of the Act, had clarified the charitable purpose mentioned in s. 2(15) by the words "not involving the carrying on of any activity for profit". By virtue of the existence of these clarifying words, if there was any element of profit it was enough liable to be reckoned as charitable purpose right from the inception of the Act in 1961 till 1st April, 1984, when the words "not involving the carrying on of any activity for profit" were deleted. Thus the contention is that after 1st April, 1984, there is no allergy to profit and if the profit feeds charity, it stands cleared for exemption under s. 11 of the Act.

8.2 To analyse the scope and object of the amendment, we have gone through the "Budget Speech" of the Minister for Finance in the Finance Bill 2008, reported in (298 ITR (St.) 33 at page 65

"180 'Charitable purpose' includes relief of the poor, education, medical relief and any other object of general public utility. These activities are tax exempt, as they should be. However, some entities carrying on regular trade, commerce or business or providing services in relation to any trade, commerce or business and earning incomes have sought to claim that their purposes would also fall under 'charitable purpose'. Obviously, this was not the intention of Parliament and hence I propose to amend the Law to exclude the aforesaid cases. Genuine charitable organizations will not in any way is affected (Emphasis supplied).

8.3 The learned *counsel points out that, the amendment was brought about as a measure of rationalization and simplification, streamlining the definition of charitable purpose and not* as *a measure of taxation. It is also stated that the concept of charity in India is wider, simultaneously adding that, by virtue of the amendment, the position that existed prior to 1st Feb., 1984 has been brought back and that is all. This however will not tilt the*

balance in any manner in the case of the assessee so as to take the activities outside the charitable purpose, particularly in view of the fact that micro finance business will not constitute any trade or business. According to the Id. AR, to perform charity, income is inevitable and contended that the activities being pursued by the assessee may constitute a trade or business, if it is not applied for the purposes of charity. Contrary to this, the Id. DR submitted that though the object of the assessee is to carry on charitable activities, but it does not carry those charitable activities, and it was only carrying on micro finance business in a commercial manner, which cannot be construed as charitable activity. In other words, it was contended by the Id, OR that the assessee carried on activities in a business oriented manner, it will definitely come within the fourth limb of the amended sec.2(15) of the Act, where the prohibition of activity in the nature of trade, commerce or business for any activity of rendering service or any other consideration, irrespective of the nature of the use or application or retention of the income of such activity is specified and hence, not entitled to any exemption.

8.4 To analyse the activities carried on by the assessee, we have to go through the nature of activities pursued by the assessee and perusal of that activities carried on by the assessee, cannot be oust the involvement of "trade, commerce or business" or "any service in connection with trade, commerce or business" as contemplated under the statute. Further, we note that there is substantial variation in the statutory position as it existed earlier to 1st April, 2009, where the assessee has been given exemption under section 11 of the Act and the position available after amendment to section 2(15) of the Act, brought into effect from 1st April, 2009. Yet another important aspect to be noted in this context is that, after the amendment by incorporating proviso to section 2(15), the 4th limb as to the advancement of "any other object of general public utility" will no longer remain as charitable purpose, if it involves carrying on of:

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

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

8.5 The first limb of exclusion from charitable purpose under cl. (a) will be attracted, if the activity pursued by the institution involves any trade, commerce or business. But the Situation contemplated under the second limb [cl. (b)J stands entirely on a different pedestal, with regard to the service in relation to the

trade, commerce or business mentioned therein. To put it more clear, when the matter comes to the service in relation to the trade, commerce or business, it has to be examined whether the words "any trade, commerce or business" as they appear in the second limb of cl. (b) are in connection with the service referred to the trade, commerce or business pursued by the institutions to which the service is given by the assessee. If the said words are actually in respect of the trade, commerce or business of the assessee itself, the said clause [second limb of the stipulation under cl. (b)J is rather otiose. Since the activity of the assessee involving any trade commerce or business, is already excluded from the charitable purpose by virtue of the first limb [cl. (a)] itself, there is no necessity to stipulate further, by way of cl. (b), adding the words "or any activity of rendering any service in relation to any trade, commerce or business.....", As it Stands so, giving a purposive interpretation to the statute, it may have to be read and understood that the second limb of exclusion under cl. (b) in relation to the service rendered by the assessee, the terms "any trade, commerce or business" refers to the trade, commerce or business pursued by the recipient to whom the service is rendered and in such circumstances, the activities carried on by the assessee cannot be considered as charitable activities,

8.6 The activities carried on by the assessee cannot be considered as activities of medical relief or education or relief of the poor. It is true that the activities carried on by the assessee take care of the poor people also. But those activities cannot be classified under any of the specific activities of relief of the poor; education or medical relief. The correct way to express the nature of the activities carried on by the assessee is to say that the assessee is carrying on 'advancement of any other object of general public utility'. When that is the case, the assessee is hit by the proviso given under section 2(15). The proviso reads that 'advancement of any other object of general public utility' shall not be a charitable purpose, if it involves 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 for consideration, irrespective of the application of the money. Therefore, the case of the assessee is hit by proviso to section 2(15) and the assessee is not entitled for the benefit *of section 11 for that part of income generated in the hands of the assessee Running its micro finance business. Alternatively, one has to look into section 11(4A).. Sub-section (4A) provides that exemption shall not apply in relation to any income of a trust or an institution, being profits and gains of business, unless the business is incidental to the attainment of the objectives of the assessee and separate books of account are maintained by such*

trust or institution in respect of such business. In the present case, there is no dispute on the fact that the assessee is carrying on the business of micro finance. The assessee is maintaining separate accounts for the above business activities. But, the crucial question is whether running of micro finance is a business incidental to the attainment of the objectives of the trust or not.. By any stretch of imagination, it is not possible to hold that the business of micro finance is incidental to the above stated objectives of the assessee-trust. Incidental" means offshoot of the main activities, inherent by-product of principal activities. Activities to compliment and support the main objectives are not in the nature of incidental to the business. They are supporting activities, at the maximum. The genesis of incidental activities must be from the principal activities themselves. There cannot be one source for the principal activities and another source for incidental activities. In the present case, even if activities of the assessee were stated to be relief of poor, it was not possible to conclude that running of business in the form of micro finance is incidental to carrying on of main objective of the assessee-trust and it is the main business of the assessee. Therefore, the assessee is not protected by the provision stated in section 11(4A), either."

8.7 In the present case, the assessee is having reserves and surplus at Rs. 50,89,576/-. Contrary to this, the assessee is having revolving fund at Rs. 66,33,800/-, which was availed by hypothecation of their debt to various necessary banks. Further, the assessee raised secured loans and unsecured loans @ 11%, totalling to Rs. 16,35,54,090/-. Thus, it means that it has raised loans to advance to the customers by paying interest and the assessee is not having own corpus in a formal capital so as to advance the loan. The assessee is providing loans by association with various commercial banks by raising loans from them. Such kind of micro finance activity cannot be termed as charitable activity rather than it is business activity. In order to become a charitable activity, the institution must have advanced loans at a subsidised rate of interest. The assessee is availing loans from banks and advances the same and admitted that it has advanced the loans to the customers at 13%. It is a commercial rate prevailing in the market. By advancing loans at that rate of interest cannot be considered as an activity carried on by the assessee as charitable and for the benefit of the public. When the assessee carried on micro finance activity in a commercial line, then it is not a charitable activity but an activity to expand the finance business by contracting weaker section of the public and it does not involve any charitable activity. Therefore, looking into the activities carried on by the assessee, we fully agree with the findings of the AO and this view of ours is

squarely covered by the decision of the Tribunal in the case of Janalakshmi Social Services (supra). The assessee relied on various Judgments, which cannot be applied to the facts of the present case, as the assessee is carrying on micro finance business in a commercial manner so as to earn profit and there is no iota of charity carried on by the assessee so as to grant exemption under sec.11 of the Act . Accordingly, we are inclined to uphold the order of the AO and reverse the order of the CIT(A).

9. In the result, the appeal of the revenue is allowed.

In the above case, the Hon'ble Tribunal discussed about the argument of the Ld. Counsel of the assessee regarding APR (Average Annual Percentage Rate) of SIDBI Report, applicability of RBI Notification No. DNBS 138/CGM(VSNM)-2000, dt.13.01.2000, CBDT Circular No.II of 19.12.2008 etc. as well.

To sum up, in the light of the above discussion, it is apparent that the appellant has been running the micro finance activity on commercial principles which is amplified by the existence of profits year on year. Appellant's activities appear to have an idea of benefitting others but whether the same overrides the converse idea of benefiting oneself is unclear. The loans/payments are made to the target population but whether the latter have actually benefited and whether the intention of the appellant was to only "let the latter benefit" is unclear. Nevertheless, it is a settled law that existence of profit or surplus itself is not a determining factor for denying the benefits under section 11 as long as the registration under section 12AA is not withdrawn as held in the case *Asstt. CIT v. Surat City Gymkhana [20081 300 ITR 214/170 Taxman 612 (SC)*

Therefore, the contention of the AO that the appellant is not eligible for the benefits of section 11 is found to be unsustainable and hence, addition of Rs.63,47,796/- on account of excess of income over the expenditure is hereby deleted."

12. Ld D.R. relied on the order of the Assessing Officer whereas ld A.R. relied on the order of the CIT(A).

13. We have heard the rival submissions, perused the orders of lower authorities and materials available on record. In the instant

case, it is not in dispute that the assessee is engaged in the activity of Micro Finance. The Assessing Officer considered the same as non-charitable activity within the meaning of section 2(15) of the Act on the ground that the activities were carried out on commercial lines.

14. On the other hand, ld CIT(A) has held that the said activity of micro financing constituted charitable activity.

15. The assessee explained before us that in the activity of micro financing, the assessee obtained loan from banks and or financial institutions and advanced the same to self help group and poor persons. Above submissions of the assessee could not be controverted by the department. No material could be brought on record to show that the loan was advanced of any big amount or loan was advanced to any economically affluent persons. Thus, we find merit in the contention of the assessee that the activity was carried out with the object of providing relief to the poor. In the circumstances, we find no error in the order of the CIT(A), which was passed following the decisions of Visakhapatnam Bench of the Tribunal in the case of Spandana (Rural & Urban Development Organisation) (supra), Bangalore Bench of the Tribunal n the case of ADIT (E) vs Bharatha Swamukhi Samsthe (supra), Delhi Bench of the Tribunal in the case of Disha India

Micro Credit (supra), Cuttack Bench of the Tribunal in the case of Bharat Integrated Social (supra), Hon'ble High Court of Bombay in the case of CIT vs. Agricultural Produce and Market Committee (supra), Hon'ble Supreme Court in the case of CIT vs. Sales Tax vs Sai Publication Fund (supra). Therefore, we confirm the findings of the CIT(A).

16. In the result, appeal of the revenue is dismissed.

Order pronounced on 24 /09/2018.

Sd/- sd/-

(**Pavan Kumar Gadale**) **(N.S Saini)**
JUDICIALMEMBER **ACCOUNTANT MEMBER**

Cuttack; Dated 24 /09/2018
B.K.Parida, SPS

Copy of the Order forwarded to :

1. The Appellant : /Revenue: ITO, Ward 2(1), Bhubaneswar.
2. The Respondent. -Assessee: Adhikar, Bhubaneswar.
3. The CIT(A)-3, Bhubaneswar
4. Pr.CIT-3, Bhubaneswar
5. DR, ITAT, Cuttack
6. Guard file.

//True Copy//

By order

Sr. Pvt. Secretary,
ITAT, Cuttack