आयकर अपीलीय अधिकरण, इंदौर न्यायपीठ, इंदौर

IN THE INCOME TAX APPELLATE TRIBUNAL
INDORE BENCH, INDORE

BEFORE SHRI VIJAY PAL RAO, JUDICIAL MEMBER
AND
SHRI B.M. BIYANI, ACCOUNTANT MEMBER

ITA No. 422, 423, 425 & 427/Ind/2022
(Assessment Years:2011-12, 2013-14,2016-17 & 2017-18)

M.P. Madhyam 40, Jail Road Arera Hills Bhopal	Vs.	DCIT (CPC) Bangalore
(Appellant / Assessee)		(Respondent/ Revenue)
PAN: AAAJM 0294J		

Assessee by	Shri Sumit Nema Sr. Advocate and Shri Gagan Tiwari, Advocate
Revenue by	Shri Simran Bhullar, CIT-DR
Date of Hearing	29.08.2023
Date of Pronouncement	31.08.2023

O R D E R

Per Vijay Pal Rao, JM:

These four appeals by the assessee are directed against four separate orders of Commissioner of Income Tax (Appeal), National Faceless Appeal Centre (NFAC, Delhi all dated 18.10.2022 for A.Ys. 2011-12, 2013-14, 2016-17 & 2017-18 respectively. The assesse has raised common grounds in these four appeals except the quantum of addition/disallowance. Grounds raised for A.Y.2016-17 are reproduced as under:

"1.That on the facts and in the circumstances of the case and in law. The learned CIT (A) erred and not justified in his findings that the

provisions of section 13(8) are applicable and the assessee is not eligible for exemption u/s. 11 of the IT Act. Such findings be quashed and it be held that the assessee is eligible for exemption u/s. 11 of the IT Act and the provisions of section 13(8) are not applicable.

2.That on the facts and in the circumstances of the case and in law, the learned lower authorities wrongly invoked the provisions of section 13(8) of the Act. The findings of the CIT(A) /A.O. be quashed and it be held that the said provisions are not applicable.

3.That on the facts and in the circumstances of the case and in law, the learned A.O. erred and not justified in his findings that the operating receipts and the other receipts aggregating to Rs. 185207831 are in the nature of business receipts and treating the excess of income over expenditure shown at Rs. 13249653 as the business income. Such injudicious and unlawful findings, therefore, be quashed and it be held that the assessee is not doing any business and has no income from business or profession.

4.That on the facts and in the circumstances of the case and in law, the learned A.O. erred and not justified in not allowing the deduction of Rs. 5220388 as an application of income. The said deduction as claimed in the return, therefore, be kindly allowed.

5.That on the facts and in the circumstances of the case and in law, the learned A.O. erred and not justified in not allowing the deduction of Rs. 13008220 as an application of income. The said deduction as claimed in the return, therefore, kindly allowed.

6.That on the facts and in the circumstances of the case and in law, the learned A.O. erred and not justified in not allowing/not giving set off of deficit of earlier years against the income of current year which be kindly allowed.

7.That on the facts and in the circumstances of the case and in law, that the levy of interest u/s.234D at Rs. 183416 is unlawful, therefore, the said levy be kindly deleted.

2. The assesse is a society created by the State Government for the activities of publication of Rozgar Nirman Newspaper, production of documentary films, T.V. reports etc. for the State Government and public sector undertakings and also acting as an advertising agency for various State Government departments and PSUs. The assesse was also granted registration u/s 12A vide order dated 29.01.1986. During the course of assessment proceedings u/s 143(3) for A.Y.2014-15 the AO held that the activities of the assesse are in the nature of trade, commerce or business

and in view of the provisions of section 2(15) r.w proviso to the said section the nature of activity being 'advancement of any other object of general public utility are not charitable and further the receipts of the assessee are more than the limit prescribed in the proviso to section 2(15) and therefore, the assesse is not entitled for exemption u/s 11 of the Act. The AO reopened the assessment for A.Y.2011-12 & 2013-14 based on the assessment order passed u/s 143(3) for A.Y.2014-15. In the reassessment order passed u/s 143(3) r.w. section 147 the AO disallowed the benefit of section 11 & 12 and assessed the income of the assesse on commercial basis. Similar for A.Y.2016-17 & 2017-18 the AO while passing the assessment order u/s 143(3) has denied the claim of exemption u/s 11 & 12 and assessed the income of the assessee by taking gross receipt and allowing the revenue expenditure as deduction. The assesse challenged the action of the AO before the Ld. CIT(A) but could not succeed.

3. Before the Tribunal the Ld. Sr. Counsel for the assesse has submitted that an identical issue has been considered by this tribunal in assesse's own case for the assessment year 2009-10 & 2010-11 vide order dated 03.01.2019 in ITANo.280/Ind/2014 & ITANo.692/Ind/2013 as well as for A.Y.2012-13 vide order dated 21st September 2022 in ITANo.257/Ind/2019. The Ld. Sr. counsel has fairly submitted that the earlier orders were passed by the Tribunal in assesse's own case by following the judgment of Hon'ble Delhi High Court in case of *India Trade Promotion Organisation vs. DGIT(E) 53 taxmann.com 404* as well as judgment of Hon'ble Gujarat High Court in case of Director of Income- tax (Exemption) *vs. Ahmedabad Management Association* [2014] *366 ITR 85* (Guj.) However, thereafter this issue has been considered and decided by the Hon'ble Supreme Court in case of *ACIT(Exemption) vs. Ahmedabad Urban Development Authority 449 ITR 1*.

3.1. Ld. Sr. counsel has submitted that the Hon'ble Supreme Court has discussed this issue thoroughly and observed that certain kind of receipt which GPU charities, typically statutory housing boards, regulatory authorities and corporations may be entitled to, if mandated to collect or

receive. The definition of charitable activity provided u/s 2(15) ipso facto does not spell out whether certain kinds of income can be excluded however, the Hon'ble Supreme Court has held that 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 ought not to be characterized as "commercial receipts". 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% imposed by 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.

3.2 Ld. Sr. counsel has submitted that in such situation the Hon'ble Supreme Court has observed that for achieving a general public utility object, if the charity involves itself in activities, that entail charging amounts only at cost or marginal mark up over cost, and also derive some profit, the prohibition against carrying on business or service relating to business is not attracted - if the quantum of such profits do not exceed 20% of its overall receipts.Thus, the Ld. Sr. counsel has submitted that in cases of general public utility created by the Government and working for benefit of larger public, the the profit or fees charged by such institution/entity would not fall in the category of carrying on the business or services relating to business if the profit on such receipts do not exceed 20% of its overall receipts. He has submitted that in case of the assesse the percentage of the income over the expenditure is very nominal @ 2.64% for A.Y.2011-12, 5.72% for A.Y.2013-14, 7.15% for A.Y.2016-17 & 12.02% for A.Y.2017-18.

3.3 He has further submitted that even as per the judgment of Hon'ble Supreme Court the activity of the assessee does not fall in the ambit of trade, commerce or business. Hence the assesse is entitled for exemption u/s 11 & 12 of the Act. Thus, Ld. Sr. counsel for the assesse has

submitted that when identical issue has been considered by this Tribunal in assesse own case for A.Y.2009-10,2010-11 & 2012-13 and decided the same in favour of the assessee and against the revenue then this issue is covered by the earlier decision of this Tribunal.

4. On the other hand, Ld. DR has submitted that the activity of the assesse of publishing weekly employment newspaper, sale of newspaper, sale of books against the charges is clearly in the nature of trade, commerce and business as per provisions of section 2(15) of the Act. She has further submitted that the total receipts of the assesse are from these activities which are in the nature of trade, commerce, business and exceeding threshold limit provided in the proviso to section 2(15) and therefore, the assesse is not entitled for benefit of section 11 & 12 of the Act. Ld. DR has submitted that the AO as well as CIT(A) has considered this issue and found that the activities of the assesse of publication of newspaper, production of documentary films, T.V. reports etc. for the State Government against the charges are clearly falling in the proviso to section 2(15) being in the nature of trade, commerce and business and therefore, the assesse is not entitled for benefit of section 11& 12 of the Act. She has relied upon the orders of the authorities below.

5. We have considered the rival submissions as well as relevant material on record. At the outset, we note that an identical issue has been considered by this Tribunal in assesse's own case for A.Ys.2009-10 & 2010-11 vide order dated 03.01.2019 in ITANo.280/Ind/2014 and ITANo.692/Ind/2013 in para 8 & 9 as under:

> *"8. We have considered the rival submissions of both the parties and gone through the material available on the file. We find that the Hon'ble Delhi High Court in the case of India Trade Promotion Organization vs. DGIT(E) [2015] 53 taxmann.com 404 (Del) has held as under:*
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> *"54. It would be pertinent to reiterate that Section 2(15) is only a definition clause. Section 2 begins with the words, "in this Act, unless the context otherwise requires". The expression "charitable purpose"appearing in Section 2(15) of the said Act has to be seen in*

the context of Section 10(23C)(iv). When the expression "charitable purpose", as defined in Section 2(15) of the said Act, is read in the context of Section 10(23C)(iv) of the said Act, we would have to give up the strict and literal interpretation sought to be given to the expression "charitable purpose" by the revenue.

With respect, we do not agree with the views of the Kerala and Andhra Pradesh High Courts.

55. It would be appropriate to also examine the observations of another Division Bench of this court in G.S.1's case (supra). While considering Circular No.11 of 2008 issued by the CBDT, to which a reference has been made earlier in this judgment, the Division Bench held that it was evident from the said circular that the new proviso to Section 2(15) of the said Act was "applicable to assesses, who are engaged in commercial activities, i.e., carrying on business, trade or commerce, in the garb of 'public utilities' to avoid tax liability as it was noticed that the object 'general public utility' was sometimes used as a mask or device to hide the true purpose, which was 'trade, commerce or business'." From this, it is evident that the introduction of the proviso to Section 2(15) by virtue of the Finance Act, 2008 was directed to prevent the unholy practice of pure trade, commerce and business entities from masking their activities and portraying them in the garb of an activity with the object of a general public utility. It was not designed to hit at those institutions, which had the advancement of the objects of general public utility at their hearts and were charity institutions. The attempt was to remove the masks from the entities, which were purely trade, commerce or business entities, and to expose their true identities. The object was not to hurt genuine charitable organizations. And, this was also the assurance given by the Finance Minister while introducing the Finance Bill 2008.

56. In G.S. 1's case (supra) it was contended by the revenue that GS1 (India) had acquired intellectual property rights from GS1 (Belgium) and thereafter received registration fees from third parties in India. This was sought to be equated to royalty payments. It was also contended that GS1 (India) had huge surpluses of receipts over expenditure and that payments were made to GS1 (Belgium). According to the revenue, all this entailed that GS1 (India) was engaged in 'business, trade or commerce'. The petitioner herein refuted this. In this backdrop, this court asked the question - can it be said that the petitioner is engaged in activities which constitute business, commerce or trade ? While answering the said question, the court held as under:-- '21. ... As observed above, legal terms, "trade", "commerce" or "business" in Section 2(15), mean activity undertaken with a view to make or earn profit. Profit motive is determinative and a critical factor to discern whether an activity is business, trade or commerce.' The court further held:--

"22. Business activity has an important pervading element of self-interest, though fair dealing should and can be present, whilst charity or charitable activity is anti-thesis of activity undertaken with profit motive or activity undertaken on sound or recognized business principles. Charity is driven by altruism and desire to serve others, though element of self-preservation may be present. For charity, benevolence should be omnipresent and demonstrable but it is not equivalent to self-sacrifice and abnegation. The antiquated definition of charity, which entails giving and receiving nothing in return is outdated. A mandatory feature would be; charitable activity should be devoid of selfishness or illiberal spirit. Enrichment of oneself or self-gain should be missing and the predominant purpose of the activity should be to serve and benefit others. A small contribution by way of fee that the beneficiary pays would not convert charitable activity into business, commerce or trade in the absence of contrary evidence. Quantum of fee charged, economic status of the beneficiaries who pay, commercial value of benefits in comparison to the fee, purpose and object behind the fee etc. are several factors which will decide the seminal question, is it business?"

57. Ultimately, in the context of the factual matrix of that case, this court held that "charging a nominal fee to use the coding system and to avail the advantages and benefits therein is neither reflective of the business aptitude nor indicative of the profit oriented intent". The court further observed:--

"Thus the contention of the revenue that the petitioner charges fee and, therefore, is carrying on business, has to be rejected. The intention behind the entire activity is philanthropic and not to recoup or reimburse in monetary terms what is given to the beneficiaries. Element of give and take is missing, but decisive element of bequeathing is present. In the absence of "profit motive" and charity being the primary and sole purpose behind the activities of the petitioner is perspicuously discernible and perceptible."

The court also held:--

"27. As observed above, fee charged and quantum of income earned can be indicative of the fact that the person is carrying on business or commerce and not charity, but we must keep in mind that charitable activities require operational/running expenses as well as capital expenses to be able to sustain and continue in long run. The petitioner has to be substantially self-sustaining in long-term and should not depend upon government, in other words taxpayers should not subsidize the said activities, which nevertheless are charitable and fall under the residuary clause - general public utility. The impugned order does not refer to any statutory mandate that a charitable institution falling under the last clause should be wholly, substantially or in part must be funded by voluntary contributions. No

such requirement has been pointed out or argued. A practical and pragmatic view is required when we examine the data, which should be analyzed objectively and a narrow and coloured view will be counter-productive and contrary to the language of Section 2(15) of the Act."

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 fowl of the principle of equality enshrined in Article 14 of the Constitution of 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."

We find that Hon'ble Delhi High Court in the case of GS1 India vs. DGIT (E) [2013] 38 taxmann.com 365 (Del) has held has under:

"20. In the present case, ―the business‖ is not held in trust and neither is ―the business‖ feeding the charity. The very ―act or activity

of charity‖ as claimed by the petitioner is regarded by the revenue as nothing but business, trade or commerce. Money received, of course is used and utilized for the charitable activities. Four reasons are elucidated and propound in the impugned order to state that the petitioner is engaged in business, trade or commerce and aforesaid encapsulated in the impugned order. Petitioner has acquired intellectual property rights, receives fee from third parties, which is nothing but payment of royalty, there is huge surplus of receipts over expenditure (refer table reproduced in paragraph 7 above) and payment is made by the petitioner to GS1 Global Services, Belgium.

21. Can it be said that the petitioner is engaged in activities which constitute business, commerce or trade? As observed above, legal terms ―trade, commerce, or business‖ in Section 2(15), means activity undertaken with a view to make or earn profit. Profit motive is determinative and a critical factor to discern whether an activity is business, trade or commerce.

22. Business activity has an important pervading element of self-interest, though fair dealing should and can be present, whilst charity or charitable activity is anti-thesis of activity undertaken with profit motive or activity undertaken on sound or recognized business principles. Charity is driven by altruism and desire to serve others, though element of self- preservation may be present. For charity, benevolence should be omnipresent and demonstrable but it is not equivalent to self-sacrifice and abnegation. The antiquated definition of charity, which entails giving and receiving nothing in return is outdated. A mandatory feature would be; charitable activity should be devoid of selfishness or illiberal spirit. Enrichment of oneself or self- gain should be missing and the predominant purpose of the activity should be to serve and benefit others. A small contribution by way of fee that the beneficiary pays would not convert charitable activity into business, commerce or trade in the absence of contrary evidence. Quantum of fee charged, economic status of the beneficiaries who pay, commercial value of benefits in comparison to the fee, purpose and object behind the fee etc. are several factors which will decide the seminal question, is it business?

23. The petitioner charges an initial registration fee of Rs.20,000/- plus annual fee of Rs.4,000/-, enhanced to Rs.5,000/- from financial year 2006-07 onwards from third parties, who become subscribing members and are entitled to use the coding system, GS1. Revenue acknowledges that the petitioner enjoys monopoly and has exclusive rights to issue global bar coding system GS1 in India. However the petitioner is not dealing or treating the prized rights as a right, which is to be exploited commercially to earn or generate profits. A coding system of this nature if marketed on commercial lines with profit motive would amount to business but when the underlying and propelling motive is not to earn profits or commercially exploit the

rights but ―general public good‖ i.e. to promote and make GS1 coding system available to Indian traders, manufacturers, government etc, it will fail the test of business and meets the touchstone of charity. The petitioner is not directly or indirectly subjecting their activity to market mechanism/ dynamics (i.e. demand and supply), rather it is motivated and prompted to serve the beneficiaries. This is not a case of commercial exploitation of intellectual property rights to earn profits but rather a case where a token fee has been fixed and payable by the user of the global identification system.

24. The petitioner does not cater to the lowest or marginalized section of the society, but Government, public sector and private sector manufacturers and traders. No fee is charged from users and beneficiaries like stockiest, whole sellers, government department etc. while a nominal fee is only paid by the manufacturer or marketing agencies i.e. the first person who installs the coding system which is not at all exorbitant in view of the benefit and advantage which are overwhelming. Any one from any part of the world can access the database for identification of goods and services using global standard. The fee is fixed and not product specific or quantity related i.e. dependent upon quantum of production. Registration and annual fee entitles the person concerned to use GS1 identification on all their products. Non levy of fee in such cases may have its own disadvantages and problems. Charging a nominal fee to use the coding system and to avail the advantages and benefits therein is neither reflective of business aptitude nor indicative of profit oriented intent.

25. Having applied the test mentioned above, including the criteria for determining whether the fee is commensurate and is being charged on commercial or business principles, we find that the petitioner fulfills the charitable activity test. It is apparent to us that Revenue has taken a contradictory stand as they have submitted and accepted that the petitioner carries on charitable activity under the residuary head ―general public utility‖ but simultaneously regards the said activity as business. Thus the contention of the Revenue that the petitioner charges fee and, therefore, is carrying on business, has to be rejected. The intention behind the entire activity is philanthropic and not to recoup or reimburse in monetary terms what is given to the beneficiaries. Element of give and take is missing, but decisive element of bequeathing is present. In the absence of ―profit motive‖ and charity being the primary and sole purpose behind the activities of the petitioner is perspicuously discernible and perceptible.

26. Table relied on by the respondent and mentioned in paragraph 7 above tells a partial story. Only direct expenses incurred have been set off from the fee earned from registration and renewal. The activity of the petitioner involves promotion, propagation and spreading awareness and knowledge about global coding identification system

GS1. The entire expenditure of the petitioner has to be taken into consideration and cannot be ignored. There are stipulations in Sections 11, 13 etc. of the Act to prevent misuse of or siphoning of funds, bar/prohibit gains to related persons, stipulations of time limits for use of funds, which are effective checks and curtail and deny benefit in cases of abuse. There is no such allegation or contention of the Revenue in the present case.

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

28. Petitioner has indicated that they have recently purchased office space in HUDCO Complex, Bhikaji Cama Place and they have acquired plot at Noida. They require accumulated funds for running branch offices at Chennai and Mumbai. Office at Chennai is already operational and operations at Mumbai are contemplated shortly for which proposals are under consideration. Accumulation of money/funds over a period of 2-3 years may not be relevant in determining the nature and character of activity and whether the same should be treated as indicative of profit motive i.e. desire or intention to carry on business or commerce. In MCD vs. Children Book Trust's (1992) 3 SCC 390 a decision relating to property tax, the Supreme Court held that both qualitative and quantitative tests should be satisfied in view of specific language of Section 115(4)(a) of Delhi Municipal Corporation Act 1957. Nevertheless it negated and rejected the argument that data for one year should be taken into consideration. It was observed that data for block period for five years may and should be taken into consideration. It was held as under:

―It cannot be gainsaid that the municipal general tax is an annual tax. Therefore, normally speaking, the liability for taxation must be determined with reference to each year. In other words, the society claiming exemption will have to show that it fulfils the conditions for

exemption each year. If it shows, for example, that for its support it has to depend on, either wholly or in part, voluntary contributions, in that particular year, it may be exempt. But where in that year, for its support, it need not depend on voluntary contributions at all or again if the society produces surplus income and excludes the dependence on voluntary contributions, it may cease to be exempt. Of course, the word —support‖ will have to mean sustenance or maintenance. Only to get over this difficulty that the qualitative test is pressed into service. We would consider the reasonable way of giving effect to the exemption, will be to take each case and assess for a period of five years and find out whether the society or body depends on voluntary contributions. Of course, at the end of each five-year period the assessing authority could review the position.‖

29. Under the provisions of the Act, a charitable institution/ organization is to utilize specific percentage of their funds/income within the assessment year in question and carry forward is allowed subject to strict stipulations. There is no allegation or statement in the impugned order dated 17th November, 2008 that the petitioner has violated the said condition or requirements of the statute. No doubt that the petitioner has to make payment of part of fees collected to GS1 Global services, Belgium but this is natural as GS1 system is global and worldwide system. Petitioner has pointed out that during past years they have been receiving amounts from Government of India for furtherance of their objectives. A fact which is not denied and disputed. The petitioner is not only concerned with enrollment of members who are entitled to GS1 identification system but involved in promoting and spreading awareness about GS1 identification system and making it available to Indians for a small fee. Petitioner has to organize training camps, workshops and seminars all over India and as well as for Government departments/bodies and help them adopt the system. They have to publish material highlighting advantages of GS1 identification and how this can benefit the manufacturers and traders.

Maintenance of Books of Accounts

30. The statement and submission of the respondents that the petitioner was not maintaining separate books of account for commercial activity and, therefore, denied registration/ notification, has to be rejected as fallacious and devoid of any merit. Similar allegation is often made in cases of charitable organization/ association without taking into account the activity undertaken by the assessee and the primary objective and purpose i.e. the activity and charity activity are one and the same. The charitable activity undertaken and performed by the petitioner relates to promotion, dissemination of knowledge and issue of unique identification amongst third parties etc. The _business' activity undertaken by the petitioner is integral to the charity/charitable activities. As noted

above, the petitioner is not carrying on any independent, separate or incidental activity, which can be classified as business to feed and promote charitable activities. The act or activity of the petitioner being one, thus a single set of books of account is maintained, as what is treated and regarded by the Revenue as the _business' is nothing but intrinsically connected with acts for attainment of the objects and goals of the petitioner. We fail to understand when the petitioner is maintaining the books of accounts with regard to their receipts/income as well as the expenses incurred for their entire activity then how it can be held that separate books of accounts have not been maintained for _business' activities. The ―business‖ activities are intrinsically woven into and part of the charitable activity undertaken. The ―business‖ activity is not feeding charitable activities. In any case, when we hold that the petitioner is not carrying on any business, trade or commerce, question of requirement of separate books of accounts for the business, trade or commerce is redundant.

Other aspects

31. There is another challenge to the registration, which has neither been adverted to in the impugned order nor raised by the respondent during arguments. First proviso to Section 2(15) of the Act equally bars rendering of any service in relation to any trade, commerce or business when it generates receipts for an amount exceeding the figure mentioned in second proviso. The stipulation broadens and widens the negative stipulation [see The Institute of Chartered Accountants of India case (supra)].The petitioner is providing services to persons engaged in trade, commerce or business who are the beneficiaries. Question is whether the legislative intent is to exclude from definition of charitable purpose any activity which has the aim and object of providing services to trade, commerce or business. The matter is not free from doubt but there are good reasons to hold that the bar or probation is not with reference to activity of the beneficiary but the activity of the assessee under the residuary clause. The intent is to exclude an assessee who carries on business, trade or commerce to feed the charitable activities under the last limb. Application of income earned from business is no longer relevant and cannot help an assessee. Circular No.11 of 2008 is to the said effect and does not promote contrary interpretation. The said circular clearly stipulates that the object of ―general public utility‖ should not be a mask or a device to hide the true purpose, which is trade, commerce or business or rendering any service in relation to trade, commerce or business. Director General (Exemption) has not interpreted the first proviso in this manner in this case. Even in the case of Bureau of Indian Standards (supra) no such contention was raised. 7th proviso to Section 10(23C) of the Act supports our interpretation and the legislature has not omitted or suitably amended the said proviso to support the contrary interpretation. Even otherwise, the beneficiaries

of GS1 system are not confined or restricted to persons from trade, commerce or business. The beneficiaries are present everywhere and the advantages are permeating and universal and would include consumers, government, beneficiaries of PDS etc.

32. The second proviso, which refers to the aggregate value of receipt of activities of Rs.10 lacs (now enhanced Rs.25 lacs vide Finance Act 2011 with effect from 1.4.2012) or less in a previous year, cannot be invoked in the present case because the said provision will apply only if the institution covered by the last/residuary clause is involved or carrying on activity of rendering any service in relation to trade, commerce or business. Contention of the respondent, if accepted, would deny charitable status to a faintly moderate size institution under the last/residuary limb, when it charges even a token or insignificant amount from the beneficiaries, who gain significantly from the altruism and benevolence. A small charitable organization that receives token fee of more than Rs.80,000/- a month or now Rs.2,00,000/- per month approximately, would disqualify and lose their charitable status. The object of the proviso is to draw a distinction between charitable institutions covered by last limb which conduct business or otherwise business activities are undertaken by them to feed charity. The proviso applies when business was/is conducted and the quantum of receipts exceeds the specified sum. The proviso does not seek to disqualify charitable organization covered by the last limb, when a token fee is collected from the beneficiaries in the course of activity which is not a business but clearly charity for which they are established and they undertake.

33. On the basis of reasoning given in the impugned order, we do not think that the petitioner can be denied benefit of registration/notification under Section 10(23C)(iv).

34. In view of the aforesaid discussion, we allow the present writ petition and issue writ of certiorari quashing the order dated 17 th November, 2008 and mandamus is issued directing the respondents to grant approval under Section 10(23C)(iv) of the Act and the same shall be issued within six weeks from the date copy of this order is received. The writ petition stands disposed of. There will be no orders as to cost."

Further, learned Counsel for the assessee also relied on the ratio laid down in the cases of DIT (E) vs. Ahmedabad Management Association [2014] 366 ITR 85 (Guj H.C.); National Horticulture Board vs. ACIT [2015] 53 taxmann.com 343 (Delhi Trib.) and Institute for Development & Research in banking Technology vs. ADIT(E-1) [2015] 63 taxmann.com 297 (Hyderabad Tribunal.).

9. We have given our thoughtful consideration to the facts of the present case and the case-laws relied upon by the parties. We find

that assessee's activities have not been changed at all since the date of its inception and the assessee was fully eligible for exemption u/s 11 & 12 of the I.T. Act. The assessee society was constituted by the State Govt. for the benefit of General Public to provide them information regarding employments, education institutions and other information of the govt. schemes. The objectives of the assessee society are publication of weekly newspaper namely "Rozgar Aur Nirman" to supply the material related to advertisement of public welfare schemes of Government of Madhya Pradesh and its undertaking and do such all other acts that are necessary for achievement of the objectives of the society. Therefore, the Revenue Authorities are not justified in holding that the assessee was involved in carrying on the activity in the nature of trade, commerce or business. We find that prior to the introduction of the proviso to section 2(15), there was no dispute that the assessee was established for charitable purposes. The main object of the assessee is for the benefit of General Public to provide them information regarding employments, education institutions and other information of the govt. schemes, therefore, we find force in the contention of the assessee that profit making is not the driving force or objective of the assessee and income generated by the assessee does not find its way into the pockets of any individuals or entities. It is to be utilized fully for the purposes of the objects of the assessee. Further, the expression 'charitable purpose' should be construed not in a vacuum, but in the specific context of section 10(23C)(iv), which specifically deals with the income received by any person on behalf of, inter alia, an institution established for charitable purposes. Therefore, the meaning of the expression 'charitable purposes' has to be examined in the context of section 10(23C)(iv). We are of the view that since the object of promoting employments/educational institutions/govt. schemes for the general public is a charitable purpose, 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) as also held in the above judicial pronouncements. On consideration of these facts in the light of the aforesaid judgments, we are of the view that the authorities below are not justified in disallowing the entire exemption. We, therefore, direct the Assessing Officer to delete the disallowances. Thus, ground nos. 1 to 5 are allowed.

5.1 By following the said decision of the Tribunal the Coordinate Bench of this Tribunal for A.Y.2012-13 vide order dated 21.09.2022 has again decided this issue in favour of the assessee by holding that the assessee is charitable institute and eligible for exemption u/s 11 of the Act. These decisions passed by the tribunal for earlier assessment years are prior to the judgment of Hon'ble Supreme Court in case of ***ACIT(Exemption) vs.***

Ahmedabad Urban Development Authority (supra). The Hon'ble Supreme Court has given interpretation of section 2(15) r.w. proviso, section 11(4A) and section 13(8) of the Act and held that there is no conflict between these provisions of the Act so far as carrying out activity in the nature of trade, commerce or business, or service in relation to such activities. The relevant observation of the Hon'ble Supreme Court on this point is in paras 168 to 173 as under:

> ***"168.*** *If one understands the definition in the light of the above enunciation, the sequitur is that the reference to "income being profits and gains of business" with a further reference to its being incidental to the objects of the Trust, cannot and does not mean proceeds of activities incidental to the main object, incidental objects or income derived from incidental activities. The proper way of reading reference to the term "incidental" in section 11(4A) is to interpret it in the light of the sub-clause (i) of proviso to section 2(15), i.e., that the activity in the nature of business, trade, commerce or service in relation to such activities should be conducted actually in the course of achieving the GPU object, and the income, profit or surplus or gains can then, be logically incidental. The amendment of 2016, inserting sub clause (i) to proviso to section 2(15) was therefore clarificatory. Thus interpreted, there is no conflict between the definition of charitable purpose and the machinery part of section 11(4A). Further, the obligation under section 11(4A) to maintain separate books of account in respect of such receipts is to ensure that the quantitative limit imposed by sub-clause (ii) to section 2(15) can be computed and ascertained in an objective manner.*
>
> ***171.*** *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%) under second proviso to section 2(15) for receipts from such profits, is adhered to.*
>
> ***172.*** *Yet another manner of looking at the definition together with sections 10(23) and 11 is that for achieving a general public utility object, if the charity involves itself in activities, that entail charging amounts only at cost or marginal mark up over cost, and also derive some profit, the prohibition against carrying on business or service relating to business is not attracted - if the quantum of such profits do not exceed 20% of its overall receipts.*

> ***173.*** *It may be useful to conclude this section on interpretation with some illustrations. The example of Gandhi Peace Foundation disseminating Mahatma Gandhi's philosophy (in Surat Art Silk) through museums and exhibitions and publishing his works, for nominal cost, ipso facto is not business. Likewise, providing access to low-cost hostels to weaker segments of society, where the fee or charges recovered cover the costs (including administrative expenditure) plus nominal mark up; or renting marriage halls for low amounts, again with a fee meant to cover costs; or blood bank services, again with fee to cover costs, are not activities in the nature of business. Yet, when the entity concerned charges substantial amounts- over and above the cost it incurs for doing the same work, or work which is part of its object (i.e., publishing an expensive coffee table book on Gandhi, or in the case of the marriage hall, charging significant amounts from those who can afford to pay, by providing extra services, far above the cost-plus nominal markup) such activities are in the nature of trade, commerce, business or service in relation to them. In such case, the receipts from such latter kind of activities where higher amounts are charged, should not exceed the limit indicated by proviso (ii) to section 2(15).”*

5.2 Thus, it is held that the activity in the nature of business, trade, commerce or service in relation to such activities should be conducted actually in the course of achieving the general public utility object, and the income, profit or surplus or gains can then, be logically incidental. The Hon’ble Supreme Court further observed that so long the activities are carried out for achieving general public charity if the same also generate profits it can be granted exemption provided the quantitative limit is not exceeding as provided in proviso to section 2(15) of the Act. Further it was observed that for achieving general public utility object, if the charity involves itself in activities, that entail charging amounts only at cost or marginal mark up over cost, and also derive some profit, the mischief of proviso to section 2(15) is not attracted if the quantum of such profits do not exceed 20% of its overall receipts. It is pertinent to note that these observations are have been made by the Supreme Court in case of statutory bodies involved in providing general public utility services and other public development work mandated under statute. However, these observations and guidelines so far as a marginal mark up over all cost is concern are also applicable in the cases of non-statutory bodies/institutions/organizations. Further the Hon’ble Supreme Court

has observed while dealing the cases of non-statutory bodies in para 208 & 209 as under:

> ***"208.*** *Having regard to the nature of ERNET's activities, it cannot be said that they are in the nature of trade, commerce or business, or service, towards trade, commerce or business. It has to receive fees, to reimburse its costs. The materials on record nowhere suggest that its receipts (in the nature of membership fee, connectivity charges, data transfer differential charges, and registration charges) are of such nature as to be called as fees or consideration towards business, trade or commerce, or service in relation to it. The functions ERNET performs are vital to the development of online educational and research platforms. For these reasons, it is held that the impugned judgment, which upheld the ITAT's order, does not call for interference.*
>
> ***209.*** *The Revenue has appealed the decision of Delhi High Court in which the National Internet Exchange of India (NIXI) was held to be a GPU category charity. The materials on record show that NIXI was established in 2003 under the aegis of the Ministry of Information Technology of the Union Government for the promotion and growth of internet services in India, to regulate the internet traffic, act as an internet exchange, and undertake ".in" domain name registration. Concededly, NIXI, is a not for profit, and is barred from undertaking any commercial or business activity. Its object is to promote the interests of internet service providers and internet consumers in India, improve quality of internet service, save foreign exchange, and carry on domain name operations. It is bound by licensing conditions - which include the prohibition from altering its memorandum, without the prior consent of the Union Government. According to the submissions made on NIXI's behalf, it charges annual membership fee of Rs. 1000/- and registration of second and third level domain names at Rs. 500/- and Rs. 250/-. The finding of the ITAT and the High Court are that NIXI's objects and functioning are by way of general public utility and thus it is a GPU category charity."*

5.3 Therefore, the activities of some essential services provided by non-statutory bodies are held to be not in the nature of trade, commerce or business, or service, towards trade, commerce or business. In the case where the services rendered by the institutions/organizations to the state or its agencies at the cost or marginal mark up over cost and above cost then such activities may fall within the description of one advancing the general public utility as held in para 251 as under:

> ***"251.*** *The first consideration would be whether the activity concerned was or is in any manner covered by the objects clause. Secondly, the revenue authorities should also consider the express terms of the contract or contracts entered into by the assessee with the State or its agencies. If on the basis of such contracts, the accounts disclose that the amounts paid are nominal mark-up over and above the cost incurred towards supplying the services, the activity may fall within the description of one advancing the general public utility. If on the other hand, there is a significant mark-up over the actual cost of service, the next step would be ascertain whether the quantitative limit in the proviso to section 2(15) is adhered to. It is only in the event of the trust actually carrying on an activity in the course of achieving one of its objects, and earning income which should not exceed the quantitative limit prescribed at the relevant time, that it can be said to be driven by charitable purpose."*

5.4 This has been reiterated by the Hon'ble Supreme Court while summing up the conclusions in para 253 in clause A & E as under:

> *"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. 1-4-2016) 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. 1-4-2009; then Rs. 25 lakhs w.e.f. 1-4-2012; and now 20% of total receipts of the previous year, w.e.f. 1-4-2016);*
>
> *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. 1-4-2009), reaffirm this interpretation and bring uniformity across the statutory provisions.

E. Non-statutory bodies

E.1. In the present batch of cases, non-statutory bodies performing public functions, such as ERNET and NIXI are engaged in important public purposes. The materials on record show that fees or consideration charged by them for the purposes provided are nominal. In the circumstances, it is held that the said two assessees are driven by charitable purposes. However, the claims of such non-statutory organisations performing public functions, will have to be ascertained on a yearly basis, and the tax authorities must discern from the records, whether the fees charged are nominally above the cost, or have been increased to much higher levels.

E.2. It is held that though GS1 India is in fact, involved in advancement of general public utility, its services are for the benefit of trade and business, from which they receive significantly high receipts. In the circumstances, its claim for exemption cannot succeed having regard to amended section 2(15). However, the Court does not rule out any future claim made and being independently assessed, if GS1 is able to satisfy that what it provides to its customers is charged on cost-basis with at the most, a nominal markup."

5.5 The Hon'ble Supreme Court has set out certain parameters for different categories of charities/institutions/trusts and observed that if fee, rent or other charges are mandated under the statute for carrying out some essential public utility activities of development then the fee and charges for providing essential services or amenities for the purpose of public development work will not fall in the nature of business, trade or commerce or services in relation to such business, trade or commerce if the profit or markup is reasonable and not with motive to earn profit. The Ld. CIT(A) has passed an ex-parte order by observing that in spite of

adequate opportunity of proper delivery of notices assesse did not file any documentary evidence/proof in support of the grounds of appeal. Therefore, the appeals of the assesse were dismissed by the Ld. CIT(A) for want of proper representation and supporting evidence. Accordingly in the facts and circumstances of the case and in view of the judgment of Hon'ble Supreme Court in case of ***ACIT(Exemption) vs. Ahmedabad Urban Development Authority (supra***) the matter requires a proper verification about the profit margins/markup earned by the assessee for providing these services and activities of publication of newspaper and other contents as well as production of documentary film etc. for the State Government as well as PSUs. Therefore, these matters for A.Y.2011-12, 2013-14,2016-17 & 2017-18 are set aside to the record of the AO for fresh adjudication after proper verification and examination of the relevant facts and records and in view of the judgment of Hon'ble Supreme Court in case ***ACIT(Exemption) vs. Ahmedabad Urban Development Authority (supra)*** as well as clarification made by the Hon'ble Supreme court reported in 449 ITR 389. Needless to say the AO shall also consider the earlier decisions of this Tribunal in assesse's own case and provide appropriate opportunity of hearing to the assesse before passing fresh order.

6. In the result, appeals of assessee for A.Ys. 2011-12, 2013-14,2016-17 & 2017-18 are allowed for statistical purposes.

Order pronounced in the open court on 31.08.2023.

Sd/- **Sd/-**

(B.M. BIYANI) **(VIJAY PAL RAO)**
Accountant Member Judicial Member

Indore, 31.08.2023

Patel/Sr. PS

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

By order

Sr. Private Secretary
Income Tax Appellate Tribunal
Indore Bench, Indore