

**IN THE INCOME TAX APPELLATE TRIBUNAL
“A” BENCH, AHMEDABAD**

**BEFORE SMT. ANNAPURNA GUPTA, ACCOUNTANT MEMBER &
SHRI SIDDHARTHA NAUTIYAL, JUDICIAL MEMBER**

I.T.A. No.795/Ahd/2023
(Assessment Year: 2017-18)

Give Foundation, 15-19, Rigel Building, Doddanekkundi Extn. Marathahalli, Bangalore North, Bangalore-560037	Vs.	Deputy Commissioner of Income Tax, Circle-1(Exemption), Ahmedabad
[PAN No.AABCG2322D]		
(Appellant)	..	(Respondent)

Appellant by :	Ms. Urvashi Sodhan, A.R.
Respondent by:	Shri Ramesh Kumar, Sr. D.R.

Date of Hearing	18.01.2024
Date of Pronouncement	29.01.2024

ORDER

PER SIDDHARTHA NAUTIYAL - JUDICIAL MEMBER:

This appeal has been filed by the Assessee against the order passed by the Ld. Commissioner of Income Tax (Appeals), (in short “Ld. CIT(A)”), National Faceless Appeal Centre, (in short “NFAC”), Delhi in DIN & Order No. ITBA/NFAC/S/250/2023-24/1055491247(1) vide order dated 28.08.2023 passed for Assessment Year 2017-18.

2. The assessee has taken the following grounds of appeal:-

“1. The order passed by AO and confirmed by NFAC / CIT (A) is invalid, bad in law and required to be quashed.

Tax Effect: NIL, being technical ground.

2. Ld. NFAC erred in law and on facts in holding that appellant trust activity does not fall in any of the limb of Section 2(15) of the Act without doubting genuineness of activities merely on the mode of operation of the trust.

Tax Effect: NIL, being technical ground.

3. Ld. NFAC erred in law and on facts in treating appellant's activity in residuary limbs (i.e. advancement of any other object of general public utility) ignoring factual details which proves that appellant is covered under the main limb (i.e. charitable purpose, relief to poor and education) of section 2(15) of the Act.

Tax Effect: NIL, being technical ground.

4. Ld. NFAC erred in law and on facts in confirming action of AO for not granting benefits of Section 11 & 12 of the Act ignoring submissions merely relying on earlier years order.

Tax Effect: NIL, being technical ground.

5. Ld. NFAC erred in law and on facts that appellant trust is registered u/s 12AA/12AB/80G and granted status of section 8 or section 25 companies under the Companies Act and this itself proves that appellant activities are charitable in nature and covered under main limbs of section 2(15) of the Act.

Tax Effect: NIL, being technical ground.

6.(a) Ld. NFAC erred in law and on facts in ignoring submission that aggregate receipts of charity fees or Give India Listing Income does not exceed 20% of the total receipts and accordingly proviso to section 2(15) does not apply to the appellant.

(b) Ld. NFAC erred in law and on facts in confirming observation of AO that appellant trust is charging fees which falls under business & profession ignoring facts that appellant charges above fees only from 24 trust out of total 221 trusts listed / registered with the appellant.

(c) Ld. NFAC erred in law and on facts in ignoring facts that above charging of fees does not results into profit or with the intention to earn profit and accordingly, same is not covered by proviso to section 2(15) of the Act.

Tax Effect: NIL, being technical ground.

7. Without prejudice to the above and in alternative, both lower authorities ought to have computed net income after allowing expenditure incurred to raise the donations of Rs. 3,69,73,064/-while computing total income of the appellant.

Tax Effect: Rs. 1,68,23,652/-.

8.(a) Ld. NFAC erred in law and on facts in giving direction to tax income from investment under the head capital gain ignoring fact that income of the trust is required to tax by applying section 11 & 12 of the Act only.

(b) *Ld. NFAC also erred in law and on facts in giving above direction which results in enhancement of income without issuing show cause notice u/s 251(2) of the Act.*

Tax Effect: NIL, being technical ground.

9. *Initiation of penalty u/s 270A is not justified,*

10. *Charging of Interest u/s 234B, 234C, 234D are”*

3. Before us, the counsel for the assessee submitted that the issue is directly covered by the order of ITAT Ahmedabad in assessee’s own cases for previous assessment years in the case of **Give Foundation v Joint Director of Income Tax 156 taxmann.com 154 (Ahmedabad Tribunal)**. The counsel for the assessee submitted copy of the above Ruling for ready reference.

4. It would be useful to reproduce the relevant extracts of the ruling, which has been rendered in assessee’s own case for previous assessment years, for ready reference:

“13. We have heard the rival contentions and perused the material on record. We observe that in the case of Agarwal Shiksha Samiti Trust v. CIT [1988] 36 Taxman 165/[1987] 168 ITR 751 (Rajasthan), the High Court held that assessee-trust which was collecting donations with sole purpose of disbursing same for educational institutions run by a Shiksha Samiti, was an educational institution within meaning of Section 10(22) and was, therefore, entitled to exemption qua its income. The above case was approved by the Hon'ble Supreme Court in the case of Aditanar Educational Institution v. Addl. CIT [1997] 90 Taxman 528/224 ITR 310. In the case of Winsome Foundation v. CIT [2018] 89 taxmann.com 131/168 ITD 575 (Chandigarh - Trib.), the ITAT held that it is permissible under law for charitable trusts to donate for charitable or religious purpose and apply its income for said purpose but benefit of application cannot be claimed if it is found that funds are being diverted for non-charitable purposes. In the case of CIT v. Sarladevi Sarabhai Trust No. 2 [1988] 40 Taxman 388/172 ITR 698 (Guj), the High Court held that when a donor-trust which is itself a charitable and religious trust donates its income to another trust, provisions of Section 11(1)(a) can be said to have been met out by such donor-trust and the donor-

trust can be said to have applied its income for religious and charitable purposes, notwithstanding the fact that donation is subjected to any conditions that donee-trust will treat the donation as to its corpus and can only utilise the accrued income from the donated corpus for religious and charitable purposes, and that the question whether gifted income is to be utilised by donee-trust fully for its religious and charitable purposes or whether donee-trust has to keep intact the corpus of the donation and has to utilise only the income therefrom for its religious and charitable purposes would not make the slightest difference, so far as entitlement of the donor-trust for exemption under section 11(1) goes. In the case of All Saints School v. ITO (Exemption) [2019] 105 taxmann.com 149/176 ITD 632 (Delhi - Trib.), the Delhi ITAT held that exemption was available to donor charitable trust in respect of payment of sum to another charitable trust for utilisation towards charitable purpose of donee trust, such payment could be considered as proper application of income even if not spent in year of receipt itself. Therefore, from the above judicial precedents, it is clear that the fact that the assessee had further given the donation to other trusts for the purpose of carrying out charitable work itself would not disentitle the assessee from denial of exemption. Before us, we observe that it is not the case of the Department that the trusts/organisations to whom the assessee had given the donations for carrying out charitable activities had not in fact carried out any charitable activities in the first instance. Secondly, it would be useful to reproduce the relevant extracts of the decision rendered by Hon'ble Supreme Court in the case of the Ahmedabad Urban Development Authority (supra), while interpreting the impact of earning of incidental income, while carrying out charitable activities by the assessee trust:

"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."

.....

"166. What then is the interpretation of the expression "incidental" profits, from "business" being "incidental to the attainment of the objectives" of the GPU charity (which occurs in Section 11(4A))? As stated earlier, the interpretation of that expression in Thanthi Trust (supra) was in the context of a per se charity, i.e., where the trust's object was education. However, the restrictive or negative terms enjoining GPU charities from carrying on profitable activity had been deleted in 1983 (w.e.f. 1-4-1984). In Surat Art Silk (supra), the court had articulated the determinative test for defining whether a Trust was a GPU charity if its predominant object was to carry

out a charitable purpose and that if that was the case, the fact that it earned profit would not per se deprive it of tax exemption. This decision was interpreted in the context of Section 11(4A) by this court in *Thanthi Trust*, to hold that business can be incidental to attainment of the trust's objects."

.....

"170. Classically, the idea of charity was tied up with eleemosynary⁵¹. However, "charitable purpose" - and charity as defined in the Act have a wider meaning where it is the object of the institution which is in focus. Thus, the idea of providing services or goods at no consideration, cost or nominal consideration is not confined to the provision of services or goods without charging anything or charging a token or nominal amount. This is spelt out in *Indian Chamber of Commerce (supra)* where this Court held that certain GPUs can render services to the public with the condition that they would not charge "more than is actually needed for the rendering of the services, - may be it may not be an exact equivalent, such mathematical precision being impossible in the case of variables, - may be a little surplus is left over at the end of the year - the broad inhibition against making profit is a good guarantee that the carrying on of the activity is not for profit".

14. Accordingly, it is observed that the Hon'ble Supreme Court has held that while carrying out charitable activities, the assessee trust may also collect nominal cost/consideration with the objective to effectuate the carrying out of the charitable activities. However, this is subject to the condition that such charge is only confined to the extent the same is required for the purpose of carrying out charitable activities and should not take the colour of professional fees/business income. We observe that while rendering the decision, the ITAT in the assessee's own case for Assessment Year 2009-10 did not have the benefit of considering the impact of the aforesaid decision in the case of Ahmedabad Urban Development Authority (supra) on the activities carried out by the assessee Trust, having been rendered at a later date. It would be useful to reproduce the relevant extracts of the ITAT the ruling the assessee's own case for Assessment Year 2009-10 for ready reference:

"25. Thus, at best it can be said that in earlier year the activities of the assessee was treated as activity towards advancement of general public utility. However, we find that there was an amendment in proviso to Section 2(15) of the Act w.e.f. 1-4-2009 whereby two provisos were inserted in Section 2(15) which define charitable purpose as under:-

"Provided that the advancement of any other object of general public utility shall not be a charitable purpose, if it involves carrying on of any activity in the nature of trade, commerce or business, or any activity of 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:

[Provided further that the first proviso shall not apply if the aggregate value of the receipts from the activities referred to therein is [twenty five lakh rupees] or less in the previous year;]

26. *Therefore, in view of the above amendment in law the activities which were regarded as advancement of general public utility in earlier years cannot be regarded as activities for charitable purposes if the activities are hit by first proviso and is not covered by exemption provided in second proviso. In the instant case we find that the receipt of the assessee from advisory fee charged for rendering services exceeds the limit provided in Section 2(15) of the Act. Therefore, the activity of the assessee cannot be regarded as of charitable purpose. of advancement of general public utility during the Assessment Year 2009-10. Therefore the above decision is not applicable on facts of the case.*

27. *The second decision relied upon by the assessee is of Hon'ble Gujarat High Court in the case of Sabarmati Ashram Gaushala Trust (supra). In this case. Hon'ble High Court has held as under:-*

"that the main objectives of the Trust were to breed cattle and endeavour to improve the quality of the cows and oxen in view of the need of all India is prominently and agricultural country. All these were objects of general public utility and would squarely fall under Sec. 2(15) of the Act Profit making was neither the aim nor object of the trust. It was not the principal activity. Merely because while carrying out the activities for the purpose of achieving the object of the Trust, certain incidental surpluses were generated, would not render the activity in nature of trade, commerce or business, the assessee was entitled to exemption u/s. 11."

28. *We find that the facts of the instant case are distinguishable from the facts of the case before the Hon'ble High Court. In that case the assessee was engaged in the activities of breeding cattle in an endeavour to improve the quality of cows and oxen and as an incidental activity to that it sold milk and received surplus. The Hon'ble High Court held that breeding cattle was activity of public utility and merely because some incidental surplus arose to the charitable trust it cannot be held that the assessee trust was carrying out any activity in the nature of trade. In contradiction to the facts of that case in the instant case we find that the entire expenses incurred by the assessee company was for rendering advisory services for which it also received charges from the persons to whom advisory were given. The main activity of the assessee was of rendering services and for that activity it received charges which exceeded the limit specified in second proviso to Section 2(15) of the Act. Therefore, it cannot be held that the receipt generated was incidental to the attainment of the main object of the trust. Rather the receipt was generated in respect of main and only activity carried out by the assessee. Therefore this decision does not help the case of the assessee."*

15. Accordingly, on perusal of the decision rendered by ITAT the assessee's own case for Assessment Year 2009-10, it is observed that the relevant time, though this issue was discussed by the ITAT in its decision, however, the Tribunal did not have the benefit of the decision rendered by the Hon'ble Supreme Court in the case of AUDA supra.

16. Accordingly, in interest of justice, the matter is being restored to the file of the Assessing Officer to analyse the impact of the observations made by the Hon'ble Supreme Court in the decision of AUDA supra, more specifically on the observations made by the Hon'ble Supreme Court with regards to incidental earning of income, in the light of the assessee's set of facts. The Assessing Officer after considering of the facts of the assessee's case may then decide whether, looking into the assessee's facts, the assessee is engaged primarily in rendering of services for consideration (retained earnings) or whether looking into the totality of facts of the assessee's case, it could be inferred that such retained earnings are only kept by the assessee to the extent of facilitating the above activities. Further, the Assessing Officer may also analyse the impact of decisions which have held that the assessee acts as a bridge between the donor and the recipient, even then, looking into the particular facts of assessee's case, it may be inferred that the assessee is carrying out charitable activities within the meaning of Section 2(15) of the Act. Accordingly, looking into the totality of facts of the assessee's case, the Assessing Officer may also analyse whether the aforesaid decisions have a bearing on the assessee's set of facts. In the result, the primary matter involved in all the Assessment Years under consideration before us is restored to the file of the Assessing Officer for carrying out the analysis as directed above.

17. In the result, Issue No. 1 raised by the assessee for various Assessment Years is allowed for statistical purposes.

18. Issue Nos. 2 and 3 are concerned on whether the concurrent claims for depreciation and capital expenditure as application of income to charitable purposes would be permissible and whether the corpus donations are to be brought to tax.

19. With respect to Issue No. 3, the Counsel for the assessee submitted that in view of the assessee's submission on Issue No. 1 above, corpus donations would be exempt under section 11(1)(d) of the Act. However, since the primary issue i.e. Issue No. 1 involved for all the Assessment Years under consideration has been restored to the file of Assessing Officer for de novo consideration as per directions given above, in the interest of justice, the other issues i.e. Issues 2 and 3 are also restored to the file of the Assessing Officer for de novo consideration.”

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5. Accordingly, in light of the observation made by ITAT Ahmedabad, in assessee's own case, the appeal of the assessee is restored to the file of the Assessing Officer for de-novo consideration as per directions given by ITAT Ahmedabad, referred to above.

6. In the result, the appeal of the assessee is allowed for statistical purposes.

This Order pronounced in Open Court on	29/01/2024
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Sd/-
(ANNAPURNA GUPTA)
ACCOUNTANT MEMBER

Ahmedabad; Dated 29/01/2024

TANMAY, Sr. PS

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2. प्रत्यर्थी / The Respondent.
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त(अपील) / The CIT(A)-
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, अहमदाबाद / DR, ITAT, Ahmedabad
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt.Registrar)

आयकर अपीलीय अधिकरण, अहमदाबाद / ITAT, Ahmedabad