IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'B': NEW DELHI

BEFORE,
SHRI M. BALAGANESH, ACCOUNTANT MEMBER
AND
SHRI YOGESH KUMAR U.S., JUDICIAL MEMBER

ITA No.589/Del/2023
(ASSESSMENT YEAR 2016-17)

ITA No.305/Del/2023
(ASSESSMENT YEAR 2018-19)

M/s Ghaziabad Development Authority Vikas Path, Hapur Road Ghaziabad-201 001 PAN-AAALG 0072C	Vs.	Dy.CIT Exemption Circle, Ghaziabad
(Appellant)		**(Respondent)**

Appellant by	Dr. Rakesh Gupta, Sh. Somil Agrawal, Advocate and Sh. Deepesh Garg, Advocate
Respondent by	Ms. Ritu Sharma, CIT-DR

Date of Hearing	18/12/2023
Date of Pronouncement	07/02/2024

ORDER

PER YOGESH KUMAR U.S., JM:

The assessee preferred the instant appeals against the orders of Learned Commissioner of Income Tax (Appeals), National Faceless Appeal Centre (NFAC) Delhi ["Ld. CIT(A)", for short], dated 18/01/2023 &

04/01/2023 for Assessment Years 2016-17 & 2018-19 respectively. Grounds taken in ITA No.589/Del/2023 are as under:

> *"1. That having regard to the facts and circumstances of the case, Ld. CIT(A) has erred in law and on facts in confirming the action of Ld. AO in holding that the assessee authority is hit by the proviso to section 2(15) of the Act and the assessee authority is not entitled for the benefit of section 11,12 and 12A and assessee is not charitable entity and has further erred in holding that the assessee is engaged in the commercial activity.*
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> *2. That having regard to the facts and circumstances of the case, Ld. CIT(A) has erred in law and on facts in confirming the action of Ld. AO in not granting the benefit of exemption u/s 11 & 12 as claimed by the assessee authority and further erred in observing that the assessee authority is carrying activity with the motive to earn profit and further erred in treating the assessees income as taxable.*
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> *3. That having regard to the facts and circumstances of the case, Ld. CIT(A) has erred in law and on facts in confirming the action of Ld. AO in treating the income/loss earmarked as an amount of Rs.96,81,09,136/- relating to infrastructure fund as taxable and that too by recording incorrect facts and findings and without observing the principles of natural justice.*
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> *4. That having regard to the facts and circumstances of the case, Ld. CIT(A) has erred in law and on facts in not reversing the action of Ld. AO in charging interest u/s 234A, 234B, 234C and 234D of Income Tax Act, 1961.*
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> *5. That the appellant craves the leave to add, modify, amend or delete any of the grounds of appeal at the time of hearing and all the above grounds are without prejudice to each other."*

2. Since, the issue involved in the present appeals are identical, both the appeals are heard together and decided a common order.

ITA No.589/Del/2023 for AY 2016-17

3. The brief facts of the case as mentioned in the order of the Ld. CIT(A) for AY 2016-17 are that:

> *"the assessee filed its return of income for AY 2016-17 on 02/03/2017 declaring total loss of Rs.146,18,06,231/- on total income/ gross receipts of Rs.545,43,64,157/-. Notices u/s. 143(2) and 142(1) were issued and the assessee complied to the notices and furnished details/explanation. The issue wise decision of the AO is as under:*
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> *3.1 The business/commercial activities of Development Authority, invocation of sec. 2(15) of IT Act:*
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> *The assessee is an authority constituted under the UP Urban Planning and Development Act, 1973 to promote and secure the development of areas according to plan and for that purpose the authority has been empowered to acquire hold manage and dispose land and other properties, to carry out building activities engineering mining and other operations, to execute works in connection with the supply of electricity and water, to dispose off sewage and to provide and maintain other services and amenities and generally to do anything necessary or expedient for the purpose of such development. The income of the assessee authority was exempt u/s 10(20A) of the Act till 01/04/2003 but w.e.f. 31/03/2003, the aforesaid provision has been omitted in the statute and the income of the authority was brought to fax The intention of legislature is quite clear from this very change and the assessee authority no longer enjoyed any exemption of income.*

3.2 The assessee authority sought status of "charitable institution since by the omission of section 10(20A) with effect from 31/03/2003, the Parliament made it clear that the entire income of the assessee authority cannot be made exempt Therefore an application was made by the assessee authority under section 12A of the Act and the Commissioner of income tax, Meerut, had granted to the assessee authority, registration under section 12A of the Act. However, the registration u/s 12AA was withdrawn by the Ld. Commissioner of Income Tax, Meerut. The assessee went in appeal before the Hon'ble ITAT, The Hon'ble ITAT decided the appeal of the assessee vide order dated 29/08/2013 in favour of the assessee. The revenue has preferred an appeal before the Hon'ble High Court. The Hon'ble High Court vide order dated 29.08.2016 decided the appeal in favour of the assessee. The appeal of the revenue is pending before Hon'ble Supreme Court therefore the assessment order was passed subject to the outcome of the judgment of Hon,ble Supreme Court in this case in the issue of granting registration u/s. 12AA of IT Act. However, in this particular year, it was found by the AO that the assessee has indulged in the commercial activities since it has traded in the land and properties, therefore provisions of sec. 13(8) r.w.s. 2(15) were invoked.

3.3 The Finance Act 2008 had substituted the erstwhile subsection (15) of section 2 of the Act, with effect from 01. 04. 2009, with a new subsection. In the substituted provision, proviso to sub-section had been introduced which stated 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 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. Subsequently, the Finance Act 2010 introduced a second proviso with retrospective effect from 01.04.2009, which stated that the first proviso shall not apply if the aggregate value of the receipts from the activities referred to therein was Rs.10 lakh or less (later enhanced to Rs.25 Lakhs) in the previous year. Thus the changes in the definition of charitable purpose would be applicable from the AY 2009-10 The purpose of the amendment has been explained in Circular No 11 of 2008 dated 19 12 2008 It has been stated that an entity with a charitable object in the nature of the advancement of objects of general public utility, was eligible for exemption from tax under section 11 or alternatively under section 10(230) of the Act. However it was seen that the 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 publicity in terms of the fourth limb of the definition of "charitable purpose. The newly inserted proviso was to deny the benefit of exemption to such entities.

3.4 The AO held that on perusal of balance sheet of the assessee it is clear that the assessee has been carrying on development, purchase & sale and management of properties. These activities cannot be categorized as charitable activities. These activities of the assessee authority fall within the ambit of proviso to section 2(15) of the Act, making it ineligible for claiming exemption u/s. 11 of the Act. The AO further held that the decision of Hon'ble Supreme Court in case of Surat Cloth Manufacturer Association (121 ITR 1) wherein it was held that primary or dominant purpose of the trust/institution has to be examined to determine whether it was involved in carrying out any activity for profit, goes in favour of revenue. The AO has further mentioned various clauses of the Uttar Pradesh Urban Planning and Development Act, 1973.

3.5 The AO held that from the Income & Expenditure account, it was found that the assessee made sale of properties of Rs. 170,02,748/- crores against the total receipts of Rs.545,43,64,157/- crores. Moreover substantial part of the balance income was from the activities which are ancillary activities to purchase-sale, development and management of properties. From this, it is apparent that the assessee was engaged dominantly in the activity of purchase-sale, development and management of properties. Besides, it is also observed that the aggregate value of receipts from the activities referred to in the first proviso of section 2 (15) of the Act, in the case of the assessee, is much more than the prescribed limit and as such the assessee authority will not be entitled to the benefit of exemption under section 11 of the Act with effect from 01/04/2009 when the amended provision become operative, Further, on perusal of the accounts reveal that the activity of the assessee authority was in the nature of trade/business. The assessee authority is operating on commercial lines and the claim that it is engaged in the advancement of an object of general public utility and was therefore eligible to be considered as having a charitable purpose", notwithstanding the amended provisions of section 2(15) of the Act, is certainly not tenable. The predominant purpose of the assessee authority is to engage in trade/business in as much as land is acquired by it, through the state government, at low rates, such land is either developed or constructed upon with attendant infrastructure and is disposed off at higher prices generating profits. Besides the assessee has substantial income in the nature of rental/lease/ hiring income. It is also understood that the disposal of properties by the assessee authority is by several modes including draw of lots lottery and auction. The very nature of such disposal contemplates sale to the highest bidder presumably generating profits or to unidentified persons who

may not necessarily belong to weaker sections of the society. Therefore, the argument that the authorities providing housing to economically weaker sections of society is only partially correct. The authority has substantial income on sale of properties to sections of society who do not fall within the category of weaker sections. As regards the contention that the assessee authority is engaged in medical or educational activities, merely on the ground that some allotments properties had been made for such purposes cannot be sustained Medical and educational purpose may have been an unintended consequence of development of an area and even if it is treated as an intended purpose it was a subordinate object to the main object of sale of properties it has not been denied by the assessee authority that substantial sales of property are made by the assessee authority for a profit. The assessee authority has income from several other sources. While such profits/income may be partially deployed for meeting the requirements of needy sections of society or for providing land to educational medical institution at concessional rate, this amounts to only an application of the profits earned. The first proviso of section 2(15) makes it abundantly clear that in case there is activity in the nature of trade, commerce or business, the entity will not be considered to be engaged in charitable purpose, respective of the nature of use or application, or retention, of the income from such activity. Secondly, it is also noted that the authority is under no statutory obligation to incur expenditure only for charitable purposes.

3.6 .In order to find whether an organization is charitable, tests have been laid down by the Honorable Supreme Court in the cases of Surat Art Silk Cloth Manufacturer Association (121 ITR 001) and in the case of Andhra Pradesh State Road Transport Corporation (159 ITR 001). The first test is that of dominant

purpose. The authority loses on the first test since the dominant activity of the assessee is that of purchase sale, development and management of properties. The second test is utilization of funds and income of the assessee during their functioning and after being winded up. These authorities being controlled by Government statutes are more or less during and after being winded up following written statutes. The possibility of distribution of properties and funds among the specified persons is only in case of private trusts and not in case of organizations created by Government statutes, hence the tests in this regard cannot be applied in this case of the assessee. Still in the former judgment, it was held that since the income and the property of the assessee was liable to be applied solely or exclusively for the promotion of the object set out in the memorandum and no part of such income or property could be distributed amongst its members in any form or utilized for their benefit, either during its operational existence or on its winding up as such the object was a charitable one In the case under consideration as mentioned above, clause 58 of the U P Urban Planning and Development Act 1973 states that on dissolution all properties funds and use which are vested in or are realizable by the authority shall vest in or be realizable by the state government The assessee authority does not qualify the above test laid down by the Apex Court inasmuch as there was no obligation that the properties of the authority will be utilized only for the purpose for which the authority was set up.

3.7 The issue whether the assessee authority is entitled to be covered under the definition of charitable purpose can also be appreciated if the legislative history with regard to provisions entitling such entities to exemption is considered with reference to the Heydon's Rule or the Mischief Rule, which is an acknowledged principle of jurisprudence in the determination of legislative intent. This rule contemplates the position prevailing

anterior to any statutory amendment and the purpose of introducing the particular amendment with reference to such anterior position. By the Finance Act 2002, clause (204) of section 10 had been deleted so as to withdraw exemption available to the development authorities so as to clarify the intention of legislature that the income becomes taxable. However, such entities operating on commercial lines continued to claim exemption on their income by taking recourse to the provisions of section 11 of the Act on the ground that they are charitable institution. This is based on the argument that they are engaged in the "advancement of an object of general public utility as is included in the fourth limb of the current definition of "charitable purpose. Such a claim, when made in respect of an activity carried on commercial lines is contrary to the intention of the provisions. With a view of limiting the scope of the phrase "advancement of any other object of general public utility, sub-section (15) of section 2 had been amended to provide that advancement of any other object of general public utility shall not be charitable purpose if it involves the carrying on of any activity in the nature of trade, commerce or business or an activity of rendering any service in relation to any trade, commerce or business, for a cess or fee or for any other consideration, irrespective of the nature of use and application, or retention, of the income from such activity.

3.8 The AO relied on the decision of Hon'ble ITAT, Amritsar Bench, in the case of M/s. Jalandhar Development Authority (124 TTJ598) which relied upon the decision of the Hon'ble ITAT Chandigarh Bench, in the case of Punjab Urban Planning & Development Authority vs. CIT (103TTJ 988) and the decision of Hon'ble ITAT. Amritsar Bench dated 14.06.2012 in ITA No.30(Asr)/2011 in the case of Jammu Development Authority, Jammu has been upheld by the Hon'ble High Court of Jammu &

Kashmir in ITA No. 164/2012 dated 07 11 2013. This order of Hon'ble High Court of Jammu & Kashmir has been confirmed by Hon'ble Supreme Court in Special Leave to Appeal No. 4990/2014 vide order dated 24.07.2014. The facts in the aforesaid case laws are similar to the assessee.

3.9 Thus the AO contended that the assessee authority i.e. Ghaziabad Development Authority is an authority constituted under the UP Urban Planning and Development Act, 1973 and the activity of the assessee authority is hit by subsection 15 of section 2 of the Act. Therefore, the same is not entitled to benefits in terms of section 12A of the Act and is not at all a charitable entity. The authority is found to be engaged in activity in the nature of trade, commerce or business in as much as one of the dominant activities of the authority is purchase-sale, development and management of properties the receipts from which are in excess of Rs.25 lakh being the ceiling stipulated in the second proviso of section 2(15) of the Act. It is also observed that the activities of the authority, either wholly or partially are carried on with a motive for profit and in terms of the provision of section 2(15) of the Act, the nature of use or application of such profits is not relevant for the determination, whether or not the assessee is engaged in an activity having a "Charitable Purpose.

3.10 From the Intention of the Legislature, it is clear that the registration u/s 12A /12AA may be a necessary component but not sufficient condition for claiming exemption u/s. 11, which is permissible only when the assessee fulfils the conditions as laid down in section 11 & section 13. It is not able that the Assessing Officer has plenary powers to examine the allow-ability of exemption under section 11 where the proviso to section 2(15) is attracted, even if the assessee has got registration u/s 12A before considering the benefit of exemption.

As the assessee does not fulfill the criteria for 'charitable purpose, its activities, as discussed above cannot be regarded for charitable purposes, rather the same are in the nature of trade or commerce.

3.11 Even if it is considered that the assessee was partially engaged in the charitable activities and partially in the commercial activities, the assessee is required to prepare separate books of accounts in accordance to the provisions of section 11(4A) of IT Act. However, as per section 11(4A), no separate books of accounts have been maintained. Hence for all purposes, no exemption u/s. 11 is admissible to the assessee, as claimed by it.

3.12 With regard to the nature of commercial activities stated aforesaid, the decision of non-allowance of exemption further gets support from the provisions of section 13(8) of the Income-tax Act, 1961 which in express terms, debars the operation of section 11 or section 12 for exclusion of income earned as a result of activities in the nature of trade, commerce or business.

3. 13 Thus even the assessee claims that the authorities above have allowed t exemption us. 11 & 12, its claim needs to pass the best of sec. 2(15) every year and if in a particular year it is found engaged in the commercial activity & fails the best tote covered under exemption. Since in the year the assessee has dominantly engaged in the commercial activities it cannot be allowed exemption Moreover with effect tom AY 2014-15 it has also been become mandatory to upload audit report online m form 108. However, in the case of assessee audit report was fled on 30.03.2018 which is delay from the date of its filing as prescribed in Income Tax Act 1961. Thus, the income of the assessee is considered as taxable. The assessee has incurred loss of Rs. 145 18,06,231/-.

3.14 It was found by the AD that the assessee has not credited as income a sum of Rs. 479 94,88, 809/- and has earmarked the same as amount relating to infrastructure fund However, the expenditure to the tune of Rs. 576,75 97,545/- has also been made without passing in the P & L account, therefore the set off was sought by the assessee. The assessee submitted that it is working as a development agency to the State Government for collecting the funds and spending the same in development activities and it is only a custodian of funds which can be utilized only after approval of state authorities. Therefore, the reserve created by the assessee is diverted by over riding title and not chargeable to tax. The AD observed that no separate books of accounts are maintained for infrastructure development fund and the receipts are undoubtedly revenue receipts. As per AD, the assessee has claimed various development and maintenance expenses in the income & Expenditure account but receipts on account of infrastructure and FAR heads have been directly taken to the balance sheets without crediting the same to the profit and loss account. The assessee is not part of a State Govt. The so called infrastructure fund has no legal entity of its can. Finally, the AD treated income foss earmarked of Rs.96,81,09,136/-relating to infrastructure fund as taxable income from the above the appellant preferred the present appeal."

4. Aggrieved by the additions made by the AO, the assessee preferred an appeal before the Ld. CIT(A) and the Ld. CIT(A) vide order dated 18/01/2023 dismissed the appeal filed by the assessee by confirming the additions made by the AO. As against the order of

the Ld. CIT(A), the assessee preferred the present appeal on the ground mentioned above.

5. The ground No.1 & 2 are regarding denial of benefit of Section 11 and 12 of the Act on the ground that the assessee is hit by the proviso to Section 2(15) of the Act. The Ld. Counsel for the assessee submitted that the issue involved in ground No.1 & 2 is no more res-integra as the same has been decided in favour of the assessee by the Hon'ble Allahabad High Court in Assessee's own case in Assessment Year 2003-04, 2006-07, 2012-13 and 2013-14 dated 04/08/2022 (Allahabad), therefore, submitted that the issue involved in ground Nos.1 & 2 may be decided in favour of the assessee.

6. Per contra, the Ld. DR relying on the orders of the lower authorities sought for dismissal of the appeal.

7. We have heard the parties and perused the materials on record. The similar issue involved in ground No.1 & 2 of the present appeal has been decided in favour of the assessee by the Hon'ble Allahabad High Court in ITA No.48/2022, 67/2022, 33/2022, and

35/2022 for AYs.2003-04, 2006-07, 2012-13 and 2013-14 on 04/08/2023, wherein it is held as under:

> *"5. The impugned order of the Income Tax Appellate Tribunal shows that the order cancelling the registration under Section 12 AA of the Act, 1961 has been set aside by the Tribunal and the Tribunal has restored the registration of the respondent - assessee under Section 12 AA of the Act, 1961 by order dated 29.04.2019 in ITA No.2400/DEL/2014. In paragraph 5.1 the tribunal has recorded the findings of fact that the nature of activity of the respondent - assessee is charitable and it is not hit by proviso of Section 2(15) of the Act, 1961. The Tribunal has remanded the matter to the Assessing Officer to examine the activity of the respondent - assessee and if it is found to be inconsonance with the object the benefit of exemption under Section 11 has been directed to be allowed. The Tribunal has also considered the taxability of the amount transferred to the Infrastructure Development Fund and followed its decision dated 24.03.2021 in ITA No.4113/DEL/2017 and directed the Assessing Officer to adjudicate the issue afresh keeping in mind the ratio laid down by Co-ordinate benches of the Tribunal in Saharanpur Development Authorities case and Khurja Development Authorities'. Thus, the tribunal has remanded the matter to the assessing officer to examine the activities of the respondent assessee for allowing benefit of exemption under Section 11 of the Act. The assessing officer has also been directed to adjudicate the issue of transfer of fund to infrastructure development fund in terms of the ratio laid down by Co-ordinate benches of the Tribunal in the case of Saharanpur Development Authorities and Khurja Development Authority. That apart the question of grant of registration under Section 12 AA of the Act, 1961 to Development Authority like the present respondent assessee, was considered by Co-ordinate bench of this court in Income Tax Appeal No. 657 of 2007 and other connected appeals decided on 29.08.2016 in the matters of Hapur Pilkhuwa Development Authority, Ghaziabad Development Authority, Kanpur Development Authority, A.D.A. Allahabad, Alighar Development Authority, Jhansi Development Authority, Gorkahpur Development Authority and Banda Development Authority in various income Tax appeals and it was held in paragraphs 18, 19, 20, 21 and 22 as under :*
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> > *"18. We find it unnecessary to go for much research work and debate issue further for the reason that in respect to a similar authority, namely, "Lucknow Development Authority", which is also constituted under U.P. Act, 1973, a similar question, whether activities of Development Authority can be said to be 'charitable' as defined under Section 2(15) came up for consideration before a Division Bench in CIT Vs. Lucknow Development Authority 2014 (98) DTR (All) 183 and Court held as under:*
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> > *"21. We have heard learned counsel for the parties and gone through the material available on record.*
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> > *It is undisputed fact that the assessee is a "statutory authority" which was established under the provisions of the Uttar Pradesh Planning and*

Development Act, 1973. In the instant case, prior to 1st April, 2003, the assessee was enjoying exemption under Section 10(20A) and Section 10(29). When these provisions were amended w.e.f. 1st April, 2003, then the necessity arose to register these institutions under Section 12A. In view of the objects, there is no good reason for holding that statutory bodies could not be treated as "charitable" within the meaning of Section 2(15). The object of the "Authority" is to provide shelter to the homeless people, therefore, there is no objectionable material to treat these institutions as non-charitable. The registration under Section 12A is mandatory to claim exemption under Sections 11 7 & 13, but registration alone cannot be treated as conclusive. It is always open to Revenue Authorities, while processing return of income of these assessees, to examine the claim of the assessees under Sections 11 & 13 and give such treatment to these institutions as is warranted by the facts of the case. Revenue Authorities are always at liberty to cancel the registration under Section 12AA(3). Moreover, it may be mentioned that the benefit of Section 11 is not absolutse or conclusive. It is subject to control of Sections 60 to 63. If it is found by keeping in view the provisions of Sections 60 to 63 that it is not so includible then such income does not qualify for any relief."

"25. Further, it may be mentioned that Section 12AA of the Act lays down the procedure for registration in relation to the conditions for applicability of Sections 11 & 12 as provided in Section 12A. Therefore, once the procedure is complete as provided in sub-section (1) of Section 12AA and a certificate is issued granting registration to the trust or institution the certificate is a document evidencing satisfaction about (i) the genuineness of the activities of the trust or institution, and (ii) about the objects of the trust or institution. Section 12A stipulates that the provisions of Sections 11 & 12 shall not apply in relation to income of a trust or an institution unless the conditions stipulated therein are fulfilled. Thus, granting of registration under Section 12AA denotes that the conditions laid down in Section 12A stand fulfilled.

26. The effect of such a certificate of registration under Section 12AAA, therefore, cannot be ignored or wished away by the Assessing Officer by adopting a stand that the trust or institution is not fulfilling the conditions for applicability of Sections 11 & 12. In the case of Gestetner Duplicators P. Ltd. vs. CIT (1979) 8 CTR (SC) 371 : (1979) 117 ITR 1 (SC), the Apex Court was called upon to determine as to whether the contribution made by the employer should be treated as a business expenditure, the requirement being contribution should be made to a recognized provident fund.

27. Needless to mention that this Hon'ble Court in the case of CIT vs. M/s. U.P. Forest Corporation Ltd., in Income Tax Appeal No. 70 of 2009 observed that the Forest Corporation being an statutory entity is entitled for the registration under Section 12A of the Act. The said observations was upheld by the Hon'ble Apex Court vide its order dated 12th May, 2011 in Special Leave Petition (Civil) No. 2590 of 2011.

28. We may also like to refer a C.B.D.T. Circular No. 11 of 2008 dated 19th December, 2008 [(2009) 221 CTR (St) 1 : (2009) 17 DTR (St) 1] wherein the applicability of the commercial activities in respect of charitable purpose has been clarified. The said circular is reproduced as below: "2.2. 'Relief of the poor' encompasses a wide range of objects for the welfare of the economically and socially disadvantaged or needy. It will, therefore, include within its ambit purposes such as relief to destitute, orphans or the handicapped, disadvantaged women or children, small and marginal farmers, indigent artisans or senior citizens in need of aid. Entities who have these objects will continue to be eligible for exemption even if they incidentally carry on a commercial activity, subject, however, to the conditions stipulated under Section 11(4A) or the seventh proviso to Section 10(23C), which are that8 (i) the business should be incidental to the attainment of the objectives of the entity, and (ii) separate books of accounts should be maintained in respect of such business."

29. For the applicability of proviso to Section 2(15), the activities of the trust should be carried out on commercial lines with intention to make profit. Where the trust is carrying out its activities on noncommercial lines with no motive to earn profits, for fulfillment of its aims and objectives, which are charitable in nature and in the process earn some profits, the same would not be hit by proviso to section 2(15). The aims and objects of the assessee-trust are admittedly charitable in nature.

30. Mere selling some product at a profit will not ipso facto hit assessee by applying proviso to Section 2(15) and deny exemption available under Section 11. The intention of the trustees and the manner in which the activities of the charitable trust institution are undertaken are highly relevant to decide the issue of applicability of proviso to Section 2(15).

31. There is no material/evidence brought on record by the revenue which may suggest that the assessee was conducting its affairs on commercial lines with motive to earn profit or has deviated from its objects as detailed in the trust deed of the assessee. In these facts and circumstances of the case, the proviso to Section 2(15) is not applicable to the facts and circumstances of the case, and the assessee was entitled to exemption provided under Section 11 for the relevant assessment year.

32. From the record, it also appears that the "authority" had been maintaining infrastructure, development and reserve fund IDRF as per the notification dated 15th January, 1998, the money transferred to this funds is to be utilized for the purpose of project as specified by the committed having constituted by the State Government under the said notification and the same could not be treated to be belonging to the "authority" or the receipt of taxable nature in its hands. For this reason also, it appears that the funds are utilized for general utility."

19. The findings and observations in the aforesaid judgment are squarely applicable in the case in hand also.

20. We also find that another statutory body, namely, Krishi Utpadan Mandi Samiti constituted under U.P. Krishi Utpadan Mandi Adhiniyam, 1964 (hereinafter referred to as "Act, 1964") was also registered under Section 12AA of Act, 1961 and the question whether amount transferred to Mandi Parishad would constitute application of income for 'charitable purpose' under Section 11(1)(a) of Act, 1961 has been decided against Revenue by Supreme Court in Commissioner of Income Tax Vs. Krishi Utpadan Mandi Samiti 2012 (12) SCC 267 wherein Court has also confirmed this Court's judgment dated 04.12.2009 passed by this Court at Lucknow in I.T.A. No. 102 of 2009.

21. In view of above, we answer above question against Revenue and confirm judgment of Tribunal impugned in all these appeals.

22. All the appeals are, accordingly, dismissed."

6. The appellant herein has challenged the aforesaid judgment of this Court dated 29.8.2016 in Income Tax Appeal No.657 of 2007 (Commissioner of Income Tax Ghaziabad and another Vs. Hapur Pikhuwa Development Authority Preet Vihar) in Special Leave Petition (Civil) Diary No(s).26127 of 2018 which was dismissed by Hon'ble Supreme Court by order dated 27.08.2018 with cost of Rs.10 lacs. The aforesaid order of Hon'ble Supreme Court dated 27.08.2018 is reproduced below:

"This petition for special to leave has been filed by the Commissioner of Income Tax, Ghaziabad.

First of all this petition has been filed after a delay of 596 days. There is an inadequate and unconvincing explanation given for the delay in filing the petition.

Secondly, it is mentioned in the proforma for first listing that a similar matter being C.A. No. 7096/2012 is pending in this Court. However, the office has given a report stating that C.A. No. 7096/2012 was decided by this Court as far back as on 27.09.2012. In other words, the petitioners have given a totally misleading statement before this Court.

We are shocked that the Union of India through the Commissioner of Income Tax has taken the matter so casually.

As we have noted, there is an inadequate explanation of delay of 596 days in filing the petition and a misleading statement about pendency of a similar civil appeal. Under the circumstances, we dismiss the petition with costs of Rs.10 lacs to be paid to the Supreme Court Legal Services Committee within four weeks from today. The amount be utilized for juvenile justice issues.

List the matter for compliance after four weeks."

7. In view of the facts and circumstances and legal position as noted above, we find that no substantial question of law is involved in the impugned order of the Tribunal. The controversy is concluded by findings of fact and the judgments of this Court as affirmed by the Hon'ble Supreme Court."

8. The Co-ordinate Bench of the Tribunal for the AYs 2009-10 and 2012-13 & 2013-14 decided the similar issue in favour of the assessee by following the above Judgment of the Hon'ble High Court of Allahabad High Court (supra). By respectfully following the ratio laid down by the above Judgment of the High Court and the order of the Co-ordinate Bench of the Tribunal, we allow the Ground No.2 of the Assessee.

9. Ground No.3 is regarding treating the income/loss earmarked as an amount of Rs.2,68,73,22,000/- relating to infrastructure fund as taxable. The Ld. Counsel for the assessee submitted that issue involved in ground No.3 in the appeal is squarely covered in assessee's own case for AY 2003-04, 2006-07, 2012-13 and 2013-14 vide order dated 04/08/2022 passed by the Hon'ble Allahabad High Court in ITA Nos.48/2012, 67/2022, 33/2022 and 35/2022 and further submitted that ratio laid down by the Hon'ble High Court has been followed by the Co-ordinate Bench of the Tribunal for AY 2012-13, 2013-14 in assessee's own case in ITA No.2038/2017 and 5355/2017 wherein the issue has been remanded to the file of the AO for fresh adjudication.

10. Per contra, the Ld. DR relied on the orders of the lower authorities and sough for dismissal of the appeal.

11. The issue involved in ground No.3 has been dealt by the Tribunal in ITA No.2038/2017 and 5355/2017 in assessee's own case for AY 2012-13 and 2013-14 by following the order of the Hon'ble High Court for AY 2003-04, 2006-07, 2012-13 & 2013-14, wherein held as under:

> *"8.0 We have considered the arguments of both the parties with respect to Ground Nos. 7 & 8 and have also gone through the material on record. We note that the issue of nature and taxability of amount transferred to the Infrastructure Development Fund was considered by the Co-ordinate Bench of this Tribunal in the case of Saharanpur Development Authority in ITA No.4113/Del/2017 vide order dated 24.03.2021 wherein it was held as under:*
>
> > *"6. It is noted from the material on record that in the case, similar issue has been decided in the case of the assessee for the assessment years 2004-05 to 2007-08 by the Co-ordinate Bench of ITAT "G" Bench, Delhi where in it was held that, "the appellant has received in fra structure funds under the orders o f Govt. o f U.P. and it was required to use such funds as per the direction of the High Powered Committee and has no control over the said funds. There fore, the interest income from such funds is not the income o f the appellant."*
> >
> > *7. This observation has been given consistently by the ITAT in favour of the assessee for the Assessment years 2004-05 to 2007-08. Further , the Hon'ble Allahabad High Court in the case of Lucknow Development Authority has held that the money transferred to the Infra structure fund account is to be utilized for the purpose of the pro jects as specified by the Committee having constituted by the State Government and cannot be treated as belonging to the authority or receipt is taxable nature in its hand."*
>
> *8.1 Identical issue was also considered by the Co-ordinate Bench in the case of Khurja Development Authority vs. ACIT in ITA No.5103/Del/2016 vide order dated 03.04.2019. The relevant observations of the Co-ordinate Bench are reproduced herein under:*
>
> > *"12. As regards, the addition made on account of infrastructure fund, Ld. Counsel for assessee relied upon the judgment of Allahabad High Court in*

the case of CIT vs. Lucknow Development Authority 265 CTR 433 in which it was held as under:
"Where the trust is carrying out its activities on noncommercial lines with no motive to earn profits, or fulfillment of its aims and objectives, which are charitable in nature and in the process earn some profits, the same would not be hit by proviso to section 2(15)."
13. Ld. Counsel for assessee submitted that this issue is related to exemption u/s 11 of the Act and that assessee is custodian of the amount in question and this amount can be used by the assessee as per directions of the State Authorities. Therefore, it can never be the income of the assessee.
14. Ld. DR, however, submitted that this issue has been decided in detail by the CIT(Appeals), therefore, the order may be maintained.

15. After considering the rival submissions, we are of the view that this issue also requires reconsideration at the level of the AO. The assessee has now been granted registration u/s 12AA of the Act and thus, assessee is entitled for exemption from income u/s 11 of the Act as per law. Even if the infrastructure reserve fund may be treated as income of assessee, it will have to be examined, whether, assessee is entitled for exemption u/s 11 of the Act on the same income. Therefore, it would depend upon fundings with regard to exemption u/s 11 of the Act. We have already restored the issue of exemption u/s 11 of the Act to the AO for fresh decision as per law. Further, the authorities below have not appreciated the fact that assessee claimed that infrastructure fund was received for development activities from the State Authorities, the assessee has to spend the amount on the same as per approval of the State Authorities. Thus, there may not be any profit element out of the same sources. It may also be noted here that whatever amount has been spent by assessee on the same issue, the AO has accepted that assessee spent the same amount as per the directions of the State Authorities. Then in that event it is difficult to believe that part amount is capital receipt and part would be Revenue in nature. Therefore, there was no justification for Ld. CIT(A) to hold that the impugned receipt is Revenue in nature. This issue also requires reconsideration in view of the fact that assessee is entitled for exemption u/s 11 of the Act. We, accordingly, set aside the orders of the authorities below on the issue of infrastructure fund as well and restore the issue to the file of AO with direction to redecide the issue as per law by giving reasonable opportunity of being heard to the assessee."

8.2 In the light of the orders of the Co-ordinate Bench as reproduced in the preceding paragraphs in the case of Saharanpur Development Authority (supra) and Khurja Development Authority (supra), we are of the view that source of funds transferred to Infrastructure Development Fund, control over the same and obligation of its utilization is required to be examined to ascertain the real nature of Infrastructure Development Fund. Accordingly, we direct the Assessing Officer to adjudicate the issue afresh keeping in mind the ratio laid down by the Co-ordinate Benches of this Tribunal in Saharanpur Development Authority (supra)

and Khurja Development Authority (supra). Accordingly, ground Nos.7 & 8 are also allowed for statistical purposes."

12. By respectfully following the orders of the Hon'ble High Court, the Tribunal in Assessee's own case (supra) we remand the matter to the file of the AO to decide the issue afresh keeping the ratio laid down by the Co-ordinate Bench of the Tribunal in Saharanpur Development Authorities in ITA No.4113/Del/2017 vide order dated 24/03/2021 and Khurja Development Authorities vs. ACIT in ITA No.5103/Del/2016 vide order dated 03/04/2019 and decided the issue in accordance with law. Accordingly, ground No.3 of the assessee is partly allowed for statistical purposes.

13. Ground No.4 being consequential and ground No.5 being general which requires no adjudication. Accordingly, the appeal of the assessee in ITA No.589/Del/2023 is partly allowed for statistical purposes.

ITA No.305/Del/2023 for AY 2018-19

14. Ground No. 1 to 4 are regarding denial of benefit of Section 11 & 12 of the Act on the ground that the Assessee is hit by proviso to section 2(15) of the Act. The issue involved in ground Nos. 1 to 4 are already decided in ITA No.589/Del/2023 for AY 2016-17.

Considering the facts and circumstances of the case and finding the parity, we allow Ground No. 1 to 4 of the Assessee.

15. Ground No.5 & 6 for AY 2018-19 are regarding treating the income/loss earmarked as an amount of Rs.2,68,73,22,000/- relating to infrastructure fund as taxable. The above said issue has been decided by remanding the matter to the file of the Assessing Officer for *de-novo* adjudication in ITA No.589/Del/2023 for AY 2016-17. Considering the facts of the case and finding the parity, we remand the issue involved in ground Nos.5 & 6 to the file of AO to decide the same afresh. Keeping in mind the ratio laid down by the Co-ordinate Bench of the Tribunal in the case of Saharanpur Development Authority (supra) and Khurja Development Authorities (supra). Accordingly, ground No.5 & 6 of the assessee are partly allowed for statistical purposes.

16. Ground No.7 has been not pressed by the Assessee and Ground No.8 being consequential which requires no adjudication.

17. In the result, the appeal of the assessee in ITA No.305/Del/2023 is partly allowed for statistical purposes.

Order pronounced in the open Court on 7th February, 2024.

Sd/-	Sd/-
(M. BALAGANESH)	**(YOGESH KUMAR U.S.)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Dated: 07/02/2024
Pk/sps
Copy forwarded to:
1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT, NEW DELHI

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