IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCHES : E : NEW DELHI

BEFORE SHRI G.S. PANNU, HON'BLE VICE PRESIDENT
AND
SHRI ANUBHAV SHARMA, JUDICIAL MEMBER

ITA No.188/Del/2023
Assessment Year: 2020-21

JCIT (OSD) (E), Circle-2(1), New Delhi.	Vs	National Internet Exchange of India, 6C, 6D & 6E, 6th Floor, Hansalaya Building, 15, Barakhamba Road, New Delhi. PAN: AABCN9308A
(Appellant)		(Respondent)

Assessee by : Shri Ravi Pratap Mall, Advocate
Revenue by : Shri Subhra Jyoti Chakraborty, CIT-DR

Date of Hearing : 13.06.2024
Date of Pronouncement : 27.06.2024

ORDER

PER ANUBHAV SHARMA, JM:

This appeal is preferred by the Revenue against the order dated 23.11.2022 of the Commissioner of Income Tax (Appeals), NFAC, Delhi (hereinafter referred as Ld. First Appellate Authority or in short Ld. 'FAA') in Appeal No.NFAC/2019-20/10186183 arising out of the appeal before it against the order dated 27.09.2022 passed u/s 143(3) R.W.S. 144B of the Income Tax

Act, 1961 (hereinafter referred to as 'the Act'), by the JCIT (OSD) (Exemptions), Circle 2(1), New Delhi (hereinafter referred to as the Ld. AO).

2. The assessee's return declaring nil income was selected for complete scrutiny and after examining the objects and activities of the assessee company, the AO concluded that the assessee is doing an activity on commercial lines. The exemption claimed by the assessee u/s 11 of the Act was denied and surplus was treated as business income. In appeal, the CIT(A) took into consideration the fact that from AY 2009-10 onwards, the AOs have denied the assessee's claim for exemption u/s 11 of the Act by treating the assessee as not existing for charitable purposes as envisaged under the Proviso to section 2(15) of the Act. The CIT(A) observed that consistently in the first appeal the assessee was given relief upto AY 2018-19, however, the Department carried the matter in further appeal before the Tribunal and was unsuccessful. The CIT(A) also observes that the Revenue's appeal before the Hon'ble Delhi High Court for various years were dismissed with the observation that no question of law arises. The CIT(A) also took into consideration the contention of the appellant that the Hon'ble Supreme Court in assessee's own case for earlier years has held the issue against the Department by dismissing the SLP filed by the Department vide order dated 19.10.2022 in Civil Appeal No.21762 of 2017. The CIT(A) observed that having perused the judgement of the Hon'ble Supreme Court in the case of ***ACIT (E) vs. Ahmedabad Urban Development Authority (2022)***

143 taxmann.com 278 (SC), order dated 19.10.2022, in which the case of the assessee was also clubbed, the issue is no longer *res integra* and allowed the appeal of the assessee.

3. We consider it necessary to reproduce the relevant findings of the CIT(A) in this regard in paras 7.17 & 7.8 as below:-

> *"7.17 In view of the above, prima facie, there is no difference in various charges collected by the assessee in the impugned AY 2020-21 vis-a-vis charges collected in the AY 2009-10. Accordingly, I am of the considered opinion that by following the rule of consistency and principle of judicial discipline and in the absence of any change in underlying fact-situation and circumstances or finding of any fresh facts tinkering with or deviating from the decisions arrived at in the earlier AYs by the Hon'ble ITAT, New Delhi and Hon'ble High Court of Delhi (supra) and by virtue of the decision of the Hon'ble Supreme Court in the assessee's own case for the AY 2009-10 (supra), the issue under dispute is no longer res integra.*
>
> *7.18 Accordingly,I am of the considered view that the decision of the Hon'ble High Court of Delhi in the assessee's own case for AYs 2009-10, 2010-11 and 2011-12 and the decision of the Hon'ble Supreme Court for the AY 2009-10 as cited in [2022] 143 taxmann.com 278 (SC) [19- 10-2022] are squarely applicable mutatis mutandis to the impugned AY 2020-21. Therefore, the AO is directed to delete the addition and allow the exemption claimed by the assessee u/s. 11 rws 12AA of the Act to the extent of Rs.86,64,69,753/-. Thus, the grounds of appeal raised by the assessee on this issue are allowed."*

4. The Revenue is in appeal raising the following grounds:-

> *"1. Whether on the facts and circumstances of the case, Ld. ClT(A) is right in law in allowing exemption u/s 11 of the I.T. Act, 1961.*
>
> *2. Whether on the facts and circumstances of the case CIT(A) is justified in not treating the activities of the assessee as advancement*

of any other object of general public utility and the same is hit by amended proviso to Section 2(15).

3. Whether on the facts and circumstances of the case CIT(A) is right in law in not considering the activities of the assessee as rendering any service in relation to any trade, commerce or business.

4. Whether the case deserves to be set aside to the Assessing Officer for fresh adjudication in compliance with the Law laid down by Hon'ble Supreme Court in the case of Assistant Commissioner of Income Tax (Exemptions) v. Ahmedabad Urban Development Authority?

5. The Appellant craves leave to add, alter, amend, append or delete any of above grounds."

5. At the time of hearing, in the light of observations of CIT(A), that issue is no more res integra after Hon'ble Supreme Court Judgement, this Bench, on 06.05.2024 has passed the following order:-

"In this case, the learned counsel for the Respondent-assessee pointed out that the CIT(A) has adjudicated the dispute following the judgment of the Hon'ble Supreme Court in assessee's own case for A.Y. 2009-10 and therefore, the same is unassailable. The learned CIT-DR appearing for the Revenue does not dispute the said factual matrix but attempted to defend the Grounds of appeal raised. Be that as it may, considering that the decision of the CIT (A) is in line with the judgment of the Hon'ble Supreme Court in assessee's own case, the learned CIT-DR was required to justify the reasons for- filing the instant appeal, as the absence of any justifiable reason would only contribute to unnecessary litigation. The learned DR has sought time to take instructions on the said issue. Considering the request, the Registry is' directed to notify the case for further hearing on 6th June, 2024 as part-heard.

Above was announced in the open Court in -the presence of both sides."

6. At the time of hearing on 13.06.2024, the query of the Bench raised vide order dated 06.05.2024 was replied by the AO through office of the CIT(E), New Delhi in the following manner:-

"

The order of Ld.CIT(A) was based on following the rule of consistency andabsence of any change in underlying fact-situation. The Ld.CIT(A) in his order in para 7.15 has held that there is no change in the amount ofvarious fees charged by the assessee during the FY 2019-20 relevant tothe AY 2020-21 vis-à-vis FY 2008-09 relevant to AY 2009-10,being the AY which was subject matter of SLP before the Hon'bleSupreme Court. However, the Ld.CIT(A) has not commented over the application of the said fees charged by the assessee and the services provided by the assessee to its members. Whether the amounts charged are on cost-basis, or significantly higher than the cost incurred (with a nominal mark-up).

It is not out of place to mention here that the Hon'ble Supreme Court in its aforesaid order had also held that "**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."**

Therefore, to decide upon the nominal mark-up, the cost to the assessee to provide the services rendered by it needs to be verified as per Hon'ble Supreme Court Judgement on year to year basis. The Ld.CIT(A) has not looked into this issue. The nominal mark-up & cost to the assessee may be determined only if the case is set aside to the file of the Assessing Officer as requested earlier vide ground no.4 of the appeal filed before the Hon'ble ITAT.

Therefore, based on the above Hon'ble Supreme Court order, the appeal was recommended and filed in the instant case before the Hon'ble ITAT. Thus, Hon'ble ITAT may be requested to set aside the case to the file of the AO for fresh adjudication(Grounds of appeal No.4). Also find enclosed report of A. O. for your kind perusal. "

7. After taking into consideration the aforesaid, we are of the considered view that the appeal filed by the Revenue is not only devoid of merit, but, is in the nature of vexatious litigation. The AO is trying to justify the appeal on the basis that CIT(A) should have considered the observations of the Hon'ble Supreme Court to examine the nominal mark up and cost to the assessee and for that purpose, it was necessary to set aside the assessment to the files of the AO. Apparently, the AO has taken note of the observations of the CIT(A) in para

7.17 that there is no change in the amount of various fees charged by the assessee during the F.Y. vis-à-vis F.Y. 2008-09 which was subject matter of SLP before the Hon'ble Supreme Court, but, has tried to justify the appeal before the Tribunal on the pretext that CIT(A) has not commented over the application of the said fees charged by the assessee and the services provided by the assessee to its members.

8. We are of the considered view that when CIT(A) has considered the facts of the case and specifically that there is no difference of various charges collected by the assessee in the impugned assessment year vis-à-vis charges collected in A.Y. 2009-10 in regard to which the Hon'ble Supreme Court has dismissed the appeal of the Revenue, then, there was no question of examining the charges to question if the amounts charged are on cost basis or significantly higher than the cost incurred. The AO had denied the exemption to the assessee on the basis that allegedly the assessee was doing an activity on commercial lines and such activities are in the nature of business. Thus, at no stage thereafter, the question as to the amounts are charged on cost basis or significantly higher than the cost incurred with a nominal mark up could have been examined. The ground No.4 relied by the AO, in fact, does not allege any error or question of fact or law while this Bench is required to restrict its findings on the question of facts or law, as emanating from the impugned order. Thus, we are of the considered view that the appeal filed was vexatious and in

spite of giving opportunity, the Revenue has failed to withdraw the same and requiring this Tribunal to enter into the controversy at the cost of time which could have been used otherwise for disposal of other appeals on merits.

9. Consequently, we hold that the grounds raised are devoid of any merit. The appeal of the Revenue is dismissed.

Order pronounced in the open court on 27.06.2024.

Sd/-	Sd/-
(G.S. PANNU) VICE PRESIDENT	(ANUBHAV SHARMA) JUDICIAL MEMBER

Dated: 27th June, 2024

dk

Copy forwarded to:
1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asstt. Registrar, ITAT, New Delhi