

**IN THE INCOME TAX APPELLATE TRIBUNAL  
DELHI BENCH "E": NEW DELHI**

**BEFORE SHRI KUL BHARAT, JUDICIAL MEMBER  
AND  
SHRI BRAJESH KUMAR SINGH, ACCOUNTANT MEMBER**

**ITA no. 911/Del/2020**

**A.Y. 2016-17**

**ITA no. 1250/Del/2022**

**A.Y. 2017-18**

ACIT(E), Circle-2(1)/ DCIT(E), Circle-2(1), New Delhi.	<u>Vs</u>	National Internet Exchange of India, Flat no. 6C, 6D and 6E, 6 <sup>th</sup> Floor, Hansalaya Building, Barakhamba Road, New Delhi-110001.  PAN: AABCN 9308 A
<b>APPELLANT</b>		<b>RESPONDENT</b>
<b>Appellant by</b>	<b>Shri R.P. Mall, Adv.</b>	
<b>Respondent by</b>	<b>Shri Subra Jyoti Chakraborty, CIT( DR)</b>	
<b>Date of hearing</b>	<b>06.08.2024</b>	
<b>Date of pronouncement</b>	<b>14.08.2024</b>	

**ORDER**

**PER KUL BHARAT, JM:**

These two appeals by the Revenue, pertaining to the assessment years 2016-17 and 2017-18, are directed against two separate orders of the learned Commissioner of Income-tax (Appeals)-40, New Delhi dated 12.12.2019 and CIT(Appeals) National Faceless Appeal Centre (NFAC), Delhi, dated 22.12.2021

respectively. Since identical grounds have been raised by the Revenue in both the appeals, the same were taken up together for hearing and are being disposed of by a common order for the sake of convenience.

2. First we take up the Revenue's appeal in ITA no. 911/Del/2020 for A.Y. 2016-17. Revenue has raised following grounds of appeal:

*"1. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in holding that the activities of assessee are charitable in nature ignoring the fact that the activities are commercial in nature and cannot be regarded as charitable in view of the proviso to Section 2(15) of the Income Tax Act, 1961.*

*2. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in holding that the activities of the assessee are charitable in nature ignoring the fact that the activities are in the nature of trade, Commerce & business and hence exemption cannot be granted under sections 11 & 12 of the Act."*

3. It is noticed that the appeal filed by the Revenue is barred by 11 days. The Revenue has filed application seeking condonation of delay in filing the appeal. Learned DR reiterated the submissions made in the application. Having considered the reasons we are of the considered view that there was sufficient cause for delay in filing the appeal. Hence the delay of 11 days is hereby condoned and the appeal is admitted for adjudication.

4. Apropos to the grounds of appeal learned counsel for the assessee pointed out that the issue is squarely covered in favour of the assessee in assessee's own

case. He submitted that the issue is of recurring nature and the assessee has been succeeding in appellate proceedings.

5. Learned DR fairly conceded that the issue is covered by the decision of the coordinate Bench of this Tribunal and the Hon'ble Apex Court in assessee's own case pertaining to different assessment years.

6. We have heard learned authorized representatives of the parties and perused the material available on record. We find that the coordinate Bench of this Tribunal in ITA no. 188/Del/2023 for assessment year 2020-21 has taken note of the fact that the issues raised by the Revenue are covered against the Revenue by the decision of the coordinate Benches of this Tribunal and the judgment of the Hon'ble Supreme Court. The coordinate Bench after taking note of the grounds raised by the Revenue dismissed the appeal. For the sake of clarity the relevant contents of the decision of the coordinate Bench are reproduced hereunder:

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

*"1. Whether on the facts and circumstances of the case, Ld. CIT(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 Judgment, 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 and absence 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 of various fees charged by the assessee during the FY 2019-20 relevant to the 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'ble Supreme 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 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 filled 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 AD 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.”*

7. Admittedly there are no change in facts and circumstances of the case for the assessment year under consideration. The order of learned CIT(A) for A.Y. 2016-17 is in consonance with earlier decision of the Tribunal. Moreover, The Hon'ble Apex Court in the case of ACIT (Exemptions) v. Ahmedabad Urban Development Authority 2022 LiveLaw (SC) 865 has categorically held that 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. Thus, we do not see any infirmity into the order of learned CIT(Appeals). Consequently, grounds taken by the Revenue are dismissed.

8. Appeal of the Revenue is dismissed.

9. Now we take up ITA no. 1250/Del/2022. The Revenue has raised following grounds of appeal:

*“(i) Whether on the facts and circumstances of the case, Ld. CIT(A) is right in law in allowing exemption u/s 11 of the I.T. Act, 1961.*

*(ii) 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).*

*(iii) 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.*

*(iv) The appellant craves leave to add, alter, amend, append or delete any of above grounds.*

10. Learned counsel for the assessee at the outset submitted that the facts of the case for both the assessment years under consideration are identical and therefore same decision should be taken in A.Y. 2017-18 also. Learned DR fairly conceded that the facts of the case in both the assessment years under consideration are identical. Therefore, following our order for A.Y. 2016-17 mutatis mutandis for

assessment year 2017-18, we uphold the order of learned CIT(A). Grounds taken by the Revenue are dismissed. Appeal of the Revenue is dismissed.

11. In the result, appeals of the Revenue being ITA no. 911/Del/2020 for A.Y. 2016-17 and ITA no. 1250/Del/2022 for A.Y. 2017-18 are dismissed.

Order pronounced in open court on 14<sup>th</sup> August, 2024.

**Sd/-**  
**(BRAJESH KUMAR SINGH)**  
**ACCOUNTANT MEMBER**

**Sd/-**  
**(KUL BHARAT)**  
**JUDICIAL MEMBER**

Dated: 14.08.2024.

\*MP\*

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

**ASSISTANT REGISTRAR**  
**ITAT, NEW DELHI**