IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI E BENCH, NEW DELHI

[Coram: Pramod Kumar AM and A. T. Varkey JM]

I.T.A. No.: 4521/Del/12
Assessment year: 2009-10

National Horticulture Board ***……Appellant***
85, Institutional Area
Sector 18, Gurgaon [PAN: AAATN0804F]

Vs.

Assistant Commissioner of Income Tax
Circle 2, Gurgaon ***……Respondent***

Appearances by:
Ved Jain and **Rano Jain**, *for the appellant*
J P Chandrakar, *for the respondent*

O R D E R

Per Pramod Kumar:

1. By way of this appeal, the assessee appellant has challenged correctness of the order dated 10th July 2012 passed by the learned Commissioner (Appeals), in the matter of assessment under section 143(3) of the Income Tax Act, 1961 for the assessment year 2009-10, on the following ground:

> **"On the facts and in the circumstances of the case, the learned Commissioner (Appeals) has erred on facts and in law in confirming the addition of Rs 2,20,57,530 made by the Assessing Officer, considering the incidental receipts on account of "cost of application fees and scheme brochure" in the nature of trade or commerce".**

2. The assessee before us, National Horticulture Board (NHB, in short), was set up by the Government of India in 1984 as an autonomous society under the Societies Registration Act 1860. Its objectives include *inter alia,* (i) promote, encourage and develop horticultural activities in the country; (ii) to stimulate

and support the growth of the diverse activities of the horticulture industry; (iii) to advance the economic and social well-being of the farmers or the growers in in need of such advancement; (iv) to assist the establishment and maintenance of the growers and farmers' societies and other similar institutions as part of the development of horticulture industry; (v) to coordinate the activities of different departments and organizations at the Central and the State level, engaged in activities pertaining to horticulture industry. As a part of pursuing these objectives, one of the activities that the assessee is involved in is disbursement of subsidy received from the Ministry of Agriculture in respect of qualified horticulture projects. The assessee had filed its income tax return for the assessment year 2009-10, disclosing no taxable income, on 22.9.2009. In the course of the scrutiny assessment proceedings, in respect of this return, the Assessing Officer noticed that the assessee has received a sum of Rs 2,20,57,529 on account of cost of application form and the brochure from the applicants subsidy seekers. The Assessing Officer noted that until the immediately preceding assessment year, these amounts were accounted for as 'processing fees' and 'service charges' respectively. The Assessing Officer was of the view that the amounts so received were for services rendered to the customers, which is in the nature of business, commerce and trade, and, therefore, the activities of the assessee cannot be treated as charitable activities in nature. In support of this stand, the assessee also relied upon the stand of the Chief Commissioner of Income Tax, as set out while withdrawing approval under section 10(23C)(iv). When the views of the Assessing Officer were put to the assessee, it was explained by the assessee that a careful reading of second proviso to Section 2(15) would show that as long as an assessee was not engaged in "any trade, commerce or business", the fees or any other consideration received by the assessee cannot be outside the ambit of receipts in the course of pursuing charitable activities. The Assessing Officer, however, did not approve this argument and concluded as follows:

> **The submissions of the assessee applicant have been pursued and carefully considered. Since the assessee applicant is earning income**

from rendering of services, in relation to many activities which are in the nature of business or commerce, by charging 'processing fees' and 'service charges' in the shape of 'cost of application form' and 'scheme brochure'. As the rendering of services after charging fees/ remuneration from customers does not fulfil the condition to qualify for charitable purposes, as held by the CCIT, Panchakula, in the detailed order passed in the case of the assessee. The society has not maintained separate books of accounts for this business. The objects and activities of the assessee as discussed above, are not covered within the meanings of advancement of an object of general public utility applicable with effect from the assessment year 2009-10, and are, therefore, not 'charitable purposes' as contemplated by section 2(15) and 10(23C)(iv) of the Income Tax Act, 1961. Thus, the society is not entitled to exemption under section 10(23C)(iv) of the Act on the receipt/income earned on account of processing fees and service charges at Rs 2,20,57,529. Therefore, the same are treated as taxable income of the assessee and is added to the income of the assessee.

3. Aggrieved, assessee carried the matter in appeal before the CIT(A) but without any success. Learned CIT(A) observed that as the assessee is registered under section 12A(a), the assessee is eligible to claim exemption under section 11 of the Act but such an exemption is confined to the income derived from the property held in trust and income arising from any charitable activity. It was further observed that the assessee's claim for exemption rests on the claim that the income is derived in the course of pursuing charitable objects, which includes objects of general public utility, but this claim is untenable in law as the case of the assessee is hit by second limb of first proviso to Section 2(15) which provides that even advancement of an object of general public utility shall not be considered to an activity for charitable purposes in a situation in which the assessee is engaged in "any activity of rendering any service in relation to any trade, commerce or business, for a cess or fee or any other consideration". It was a case in which the assessee has rendered a service to the subsidy seekers and charged a fees for the same, and, for this reason, the assessee is hit by the second limb of first proviso to Section 2(15). It was on the basis of this conclusion arrived at by the CIT(A) that he upheld the action of the Assessing Officer and declined to interfere in the matter.

4. The assessee is not satisfied by the order of the learned CIT(A) as well, and is in further appeal before us.

5. We have heard the rival contentions, perused the material on record and duly considered facts of the case in the light of the applicable legal position.

6. The short question that we are really required to adjudicate is whether or not, on the facts and in the circumstances of the case, the fact that the assessee is receiving *de facto* service charges and processing fees from the subsidy applicants would render the activities of the assessee as non-charitable activities.

7. Section 2 (15), which defines 'charitable purposes', as it stood at the relevant point of time, is reproduced below for ready reference:

> **Section 2 (15)**
>
> **"charitable purpose" includes relief of the poor, education, medical relief, preservation of environment (including watersheds, forests and wildlife) and preservation of monuments or places or objects of artistic or historic interest and the advancement of any other object of general public utility:**
>
> **Provided 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, or any activity of rendering any service in relation to any 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;**
>
> **Provided further that the first proviso shall not apply if the aggregate value of the receipts from the activities referred to therein is ten lakh rupees or less in the previous year;**

8. A plain reading of the above statutory provision would show that there is no dispute that even an object of general public utility could be a charitable purpose, and, as the revenue authorities have accepted all along, the objects of the assessee are objects of general public utility. As regards the scope of first proviso to the above definition, it is clear that where an assessee is involved in

"carrying on an activity in the nature of trade, commerce or business" or where the assessee is involved in **"rendering any services in relation to any trade, commerce or business, for a cess or a fee or any other consideration, irrespective of the nature or use or application, or retention of the income from such activity"**, even pursuing an object of general public utility will cease to be for charitable purposes.

9. There is no dispute that the first limb of first proviso is not attracted on the facts of this case, inasmuch as it is not even revenue's case that the assessee is engaged in an activity in the nature of trade commerce or business. However, the stand of the Assessing Officer, which has also found favour with the first appellate authority, is that the assessee has rendered services "in relation to trade, commerce or business" for a consideration, and it is for this reason that the first proviso to Section 2(15) is attracted on the facts of this case. Undoubtedly once an assessee is found to be **"rendering any services in relation to any trade, commerce or business, for a cess or a fee or any other consideration",** and irrespective of what he does to the income generated by such an activity, the assessee cannot be said to be pursuing charitable activities.

10. While dealing with this issue, it is important to bear in mind the fact that Hon'ble jurisdictional High Court, while dealing with the scope of this provision and in the case of **GS1 Vs Director General of Income Tax (Exemptions) [(2013) 360 ITR 138]**, has observed as follows:

> *……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.***

[Emphasis by underlining supplied by us]

11. Hon'ble Delhi High Court has thus unambiguously held that the proviso to second limb will not apply in the case of a rendition of a service *per se*, for a

cess, fee or any other consideration, or to a trade, commerce or business, but that this clause can come into play for the purpose of excluding an assessee **"who carries on business, trade or commerce to feed the charitable activities".** In other words, the scope of second limb, as held by Hon'ble jurisdictional High Court, extends only to such cases in which a business is carried out to feed the charitable activities. It would thus follow that even for invoking second limb of first proviso to Section 2(15), it is *sine qua non* that the assessee has extended services to business, trade or commerce and such services have been extended in the course of business carried on by the assessee. This inference is on the basis of Their Lordships' observation, in the context of second limb of first proviso, to the effect that, "**(t)he proviso applies when business was/is conducted and the quantum of receipts exceeds the specified sum"** and that **"(t)he 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".** It is thus clear that, in the esteemed views of Hon'ble jurisdictional High Court- which are binding on us, even in a situation in which an assessee receives a fees or consideration for rendition of a service to the business, trade or commerce, as long as such a service is subservient to the charitable cause and is not in the nature of business itself, the disability under second limb of first proviso to Section 2(15) will not come into play.

12. Similarly, in the case of **The Institute of Chartered Accountants of India Vs DGIT (Exemptions) [(2013) 358 ITR 91],** Hon'ble jurisdictional High Court has held that, **"even though fees are charged by the petitioner institute for providing coaching classes and for holding interviews with respect to campus placement, the said activities cannot be stated to be rendering service in relation to any trade, commerce or business as such activities are undertaken by the petitioner institute in furtherance of its main object which as held earlier are not trade, commerce or business"**. In

this case also, the rendition of services by the assessee is viewed in conjunction with the overall objectives of the assesse and once it is seen that these services are not in the nature of trade, commerce or business *per se*, the mere charging of fees for services so rendered, which were held to subservient to the charitable objectives, is held to have no effect on the overall charitable objects of the assessee.

13. Learned Departmental Representative has, however, relied upon Hon'ble Andhra Pradesh High Court in the case of **Andhra Pradesh State Seed Certification Agency Vs Chief Commissioner of Income Tax [(2013) 356 ITR 360]** and contended that as long as services are rendered to a business, trade or commerce, and irrespective of the motives of the person rendering such services, the services so rendered vitiate the charitable character of the assessee rendering such services.

14. Undoubtedly, as mentioned by Hon'ble Delhi High Court in the case of **GS1 *(supra)*** in so many words, **"The matter** *(the interpretation before Their Lordships)* **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."** It was thus a considered decision of Hon'ble Delhi High Court to choose an interpretation in furtherance to the overall legislative scheme of taxation of charitable institutions and an interpretation, which, in our humble understanding, is a very pragmatic interpretation in accordance with the purpose of the legislation. The views so expressed by Hon'ble Delhi High Court bind this bench of the Tribunal. However, even as we hold so, we are alive to the fact, as pointed out by the learned departmental representative, that Hon'ble Karnataka High Court, in the case of **Andhra Pradesh State Seed Certification Agency *(supra),*** has indeed taken a contrary view and has held that what is to be seen is the activity of the beneficiary and not the activity of the assessee. That was a case in which Hon'ble High Court has, following the footsteps of Kerala High Court in the

unreported case of Info Parks Kerala Vs DCIT, subscribed to the view that, so far as the scope of second limb of first proviso to Section 2(15) is concerned, "**the terms "any trade, commerce or business refer to the trade, commerce or business pursued by the recipient to whom the service is rendered (as there may be a situation involving letting out the premises for purposes other than involving trade, commerce or business as well)"** rather than the trade, commerce of business being pursued by the assessee. Therefore, in the esteemed views of Hon'ble Karnataka High Court and Hon'ble Kerala High Court, as long as services are rendered to business, trade or commerce and the services are so rendered in consideration of a fees, cess or any other consideration, the disability under second limb of first proviso to Section 2(15) will be attracted. The views so expressed by Hon'ble Karnataka High Court and Hon'ble Kerala High Court, however, have no bearing on our decision in the present case since Hon'ble Delhi High Court, which is jurisdictional High Court in this case, has taken a contrary view and a view which is in favour of the assessee.

15. In any case, Hon'ble Delhi High Court having taken a view in favour of the assessee on this issue, the views so expressed by Hon'ble Andhra Pradesh High Court and Hon'ble Kerala High Court bind only the benches in the jurisdiction of Hon'ble Kerala and Karnataka High Courts.

16. In view of these discussions, in our considered view, the authorities below were clearly in error in invoking first proviso to Section 2(15), particularly as it has not even been their case that the assessee was carrying out any business activity in charging the processing fees or service fees, even if receipts on account of application forms can be construed as such, from the applicants for the subsidy.

17. We have also noted that the assessee has received grant and subsidies aggregating to Rs 122,47,00,000 and, as against this amount, the receipts on

account of what is said to be service charges and processing fees aggregate to Rs. 2,20,57,529. These figures donot suggest that the service charges or processing fees constitute a source of business activity which is, in the light of law laid down by Hon'ble Delhi High Court as elaborated above, a condition precedent for invoking any part of first proviso to Section 2(15). The mere fact that service charges have been received by the assessee donot vitiate the charitable nature of assessee's activities and, as observed by Hon'ble Delhi High Court in the case of **GS 1 *(supra)*,** that "**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**" and that "**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**". There is nothing on the record to even suggest that the fees charged by the assessee is such that it suggests that it is in nature of a business, nor is it even the case of the Assessing Officer. It was, therefore, not a fit case for holding that merely because the assessee has charged a fees, even if that be so, for processing the subsidy applications, the assessee's activities cease to be charitable activities under section 2(15).

18. As regards the Assessing Officer's frequent references to the findings of the Chief Commissioner in denying approval under section 10(23C)(iv) to the assessee, we may usefully refer to a decision of the coordinate bench in the case of **DCIT Vs General Electric Co plc [(2001) 71 TTJ 973]**. As evident from the observations to the effect that **" ……it is not in dispute that the no objection certificate was issued at the instance of the Chief CIT and the AO did not even have the liberty of applying his independent mind to the taxability of capital gains arising from the transfer of shares in question",** that was also a case in which the impact of stand taken by the Chief Commissioner on the assessment being framed by the Assessing Officer came up for consideration of the bench. It was in this backdrop that the bench observed that **"such an**

issuance of NOC cannot fetter AO's exclusive domain of powers of framing the assessment order; there is no scope for any administrative interference in AOs quasi-judicial powers to assess the income of the assessee". The same is the position in this case. The observations of the Chief Commissioner of Income Tax, for this reason alone, cannot have a decisive impact on the exercise of quasi-judicial powers by the Assessing Officer.

19. The observations made by the Chief Commissioner have been held, by us earlier in this order, to be contrary to the correct legal position. The mere fact that the Chief Commissioner of Income Tax also held this view should not have influenced the decision of the Assessing Officer. There is no scope for any administrative interference in Assessing Officer's exclusive domain of quasi-judicial powers to assessee income of the assessee.

20. For the reasons set out above, we uphold the grievance of the assessee. The Assessing Officer is, accordingly, directed to delete the impugned addition of Rs 2,20,57,530. The assessee gets the relief accordingly.

21. In the result, the appeal is allowed. Pronounced in the open court today on 16th day of January, 2015.

Sd/xx
A. T. Varkey
(Judicial Member)

Sd/xx
Pramod Kumar
(Accountant Member)

New Delhi, the 16th day of January, 2015.

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

By order etc

Assistant Registrar
Income Tax Appellate Tribunal
Delhi benches, New Delhi