



ITA No.5431/Mum/2015 &  
ITA No.3382/Mum/2016  
Assessment Years:2010-11 & 2012-13  
National Payments Corporation of India

**आयकर अपीलीय अधिकरण “बी” न्यायपीठ मुंबई में।**  
**IN THE INCOME TAX APPELLATE TRIBUNAL**  
**“B” BENCH, MUMBAI**

**माननीय श्री महावीर सिंह, उपाध्यक्ष एवं**  
**माननीय श्री मनोज कुमार अग्रवाल, लेखा सदस्य के समक्ष।**  
**BEFORE HON’BLE SHRI MAHAVIR SINGH, VP AND**  
**HON’BLE SHRI MANOJ KUMAR AGGARWAL, AM**

आयकर अपील सं./ I.T.A. No.5431/Mum/2015  
(निर्धारण वर्ष / Assessment Year: 2010-11)

&

आयकर अपील सं./ I.T.A. No.3382/Mum/2016  
(निर्धारण वर्ष / Assessment Year: 2012-13)

<b>National Payments Corporation of India</b> 1001-A, B-Wing, 10 <sup>th</sup> Floor The Capital, Bandra-Kurla Complex Bandra (E), Mumbai- 400 051.	<b>बनाम/</b> <b>Vs.</b>	<b>DCIT(E)-2(1)</b> Room No.510, 5 <sup>th</sup> Floor Piramal Chambers Lalbaug, Mumbai- 400 012.
स्थायी लेखासं./जी आइ आर सं./PAN/GIR No. <b>AACCN-9852-G</b>		
(पीलार्थी/ <b>Appellant</b> )	:	(प्रत्यर्थी/ <b>Respondent</b> )

<b>Assessee by</b>	:	S/Shri Soli E.Dastur (Ld. Sr. Counsel), Niraj Sheth & Rajesh V.Shah-Ld. ARs
<b>Revenue by</b>	:	Shri Rahul Raman-CIT- DR

सुनवाई की तारीख/ <b>Date of Hearing</b>	:	21/01/2020
घोषणा की तारीख / <b>Date of Pronouncement</b>	:	06/07/2020

**आदेश / ORDER**

**Manoj Kumar Aggarwal (Accountant Member)**

1. Aforesaid appeals by assessee for Assessment Years [in short referred to as ‘AY’] 2010-11 and 2012-13 contest separate orders of learned first appellate authority on certain common grounds of appeal.



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Since common issues were involved, the appeals were heard together and are now being disposed-off by way of this common order for the sake of convenience and brevity. It is admitted position that adjudication in any of the years would apply to other year also. First, we take up appeal for AY 2010-11.

### **ITA No.5431/Mum/2015, AY 2010-11**

2.1 Aggrieved by the order of Ld. Commissioner of Income-Tax (Appeals)-1, Mumbai, [in short referred to as 'CIT(A)'], Appeal No. CIT(A)-I/IT/E-2(68)/2013-14 dated 04/09/2015, the assessee is under appeal with following grounds of appeal: -

The following grounds are without prejudice to each other:

- 1) The Commissioner of Income Tax (Appeals) ["the CIT(A)"] erred in confirming the action of the Assessing Officer ("the AO") in rejecting the appellant's claim for exemption under section 11 and section 12 of the Income Tax Act, 1961 ("the Act") on the ground that its activities were not charitable and on the ground that the first proviso to section 2(15) of the Act was applicable.
- 2) The CIT(A) overlooked that the appellant was formed as a "Not for Profit Company" under section 25 of the Companies Act, 1956 and was prohibited by its object clause from carrying on any activity on commercial basis.
- 3) The AO and the CIT(A) ought to have held that the entire history / genesis behind the formation of the appellant, the manner of and purpose behind the formation of the appellant, the fact that the appellant had been licensed by the Central Government under section 25 of the Companies Act and the tact of involvement of the Ministry of Finance and Reserve Bank of India in the formation of the appellant clearly showed that the appellant's case did not come within the scope of the proviso to section 2(15) of the Act.
- 4) The CIT(A) erred in holding that Re.1 per transaction charged by the appellant to banks was consideration for services rendered by the appellant even though admittedly the appellant had merely provided an infrastructure facility to banks and recovered costs thereof. He failed to appreciate that provision of an infrastructure facility to banks cannot be equated with rendering of a service.
- 5) The CIT(A) erred in holding that profit motive is not required to be proved for the applicability of the first proviso to section 2(15). He failed to appreciate that the first proviso to section 2(15) is attracted only in cases of activities which are carried on with profit motive.
- 6) The CIT(A) overlooked that the total expenditure / application by the appellant was Rs. 14.25 crores (including capital expenditure of Rs.6.82 crores) and that Rs.7.50 crores was accumulated under section 11(2) specifically for capital projects,



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thus, leaving no surplus on account of its application of income and permitted accumulations far exceeding its income.

7) The CIT(A) failed to appreciate that the activities of the Appellant could neither be regarded as being in the nature of trade, commerce or business per se nor in the nature of activities in relation to trade, commerce or business.

8) The CIT(A) erred in confirming the view of the AO that income of the appellant is applied directly or indirectly for the benefit of persons referred to in section 13 (3) of the Act,

9) The CIT(A) failed to appreciate that the banks which had invested in the share capital of the Appellant could not be regarded as persons who had made a contribution to the Appellant and, therefore, they were not covered under section 13(3) of the Act.

10) The CIT(A) failed to appreciate that the Appellant's income or property was not applied for the benefit of any bank since uniform rates were charged by the Appellant to all banks.

11) The CIT(A) erred in confirming the levy of interest under section 234B of the Act.

12) The CIT (A) erred in confirming the levy of interest under section 234D of the Act.”

Ground Nos. 11 & 12 being consequential in nature, would not require any specific adjudication on our part. The assessee has filed revised Form 36 reflecting change of address which has been placed on record.

2.2 As evident from grounds of appeal, the assessee is primarily aggrieved by denial of exemption u/s 11 & 12 by Ld. Assessing Officer by invoking proviso to Sec. 2(15) as introduced by Finance Act, 2008 w.e.f. 01/04/2009.

The provisions of Section 11 provide for exemption to certain income derived from property held under trust wholly for charitable or religious purposes. The expression ‘Charitable Purpose’ as defined u/s. 2(15) would include relief of the poor, education, medical relief, preservation of environment & monuments, objects / places of historic interest and advancement of any other object of general public utility. The first proviso to Sec 2(15) as introduced by The Finance Act, 2008 w.e.f. 01/04/2009 provide that the last limb i.e. ‘advancement of any other



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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 for any other consideration, irrespective of the nature of use or application, or retention, of the income from such activity. The proviso has two limbs and provide that the advancement of any other object of general public utility shall not be a charitable purpose if it involves the carrying on of: -

- (i) 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,
- (ii) irrespective of the nature of use or application, or retention, of the income from such activity.

The Finance Act, 2010 added 2<sup>nd</sup> proviso to provide that 1<sup>st</sup> proviso shall not apply if the aggregate value of the receipts from the activities referred to therein was below Rs.10 Lacs in the previous year. The Hon'ble Supreme Court in **CIT v. Gujarat Maritime Board [2007 295 ITR 561]** observed that the expression 'any other object of general public utility' is of the widest connotation. This expression would *prima facie* include all objects which promote the welfare of the general public.

The CBDT, vide Circular No. 11 of 2008 dated 19/12/2008, clarified that the first proviso will apply only to those entities whose purpose was 'advancement of any other object of general public utility' and therefore, such entities would not be eligible to claim exemption u/s 11 if they carry on commercial activities. Whether the entity was carrying on an activity in the nature of trade, commerce or business would be a question of fact which will be decided based on the nature, scope, extent and frequency



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of the activity. Para 3.2 of the circular clarified that if the assessee having its object as 'advancement of any other object of general public utility' engages in any activity in the nature of trade, commerce or business or rendering of any service in relation to trade, commerce or business, it would not be entitled to claim that its object is charitable in nature. In such a case, the object of general public utility will be only a mask or a device to hide the true purpose which is trade, commerce or business or rendering of any service in relation to trade, commerce or business.

### **Rival Arguments & Submissions**

3.1 The learned Sr. Counsel, Shri Soli E. Dastur, referring to the background in which the assessee entity was formed, advanced argument to submit that the objective of the assessee could never be treated to be profit motive and the assessee's activities would squarely fall within the meaning of *charitable purpose* and therefore, the assessee was eligible to claim the benefit of Sec.11 & 12 of the Act.

3.2 Another pleadings are that the assessee continue to have valid registration as Trust u/s 12AA of the Act which was granted post-insertion of proviso to Sec.2(15). The registration is subsisting and the same is never been revoked by the revenue authorities. Therefore, the assessee would be entitled to claim the exemption.

3.3 Our attention has been drawn to various documentary evidences as placed on record, to support all these arguments. A chart has been placed before us to dispel the observations of lower authorities that the assessee was charging fees with a view to earn profit while rendering



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certain services and therefore, it was not eligible to claim the stated benefit. As per the chart, the fees charged by the assessee has drastically been reduced by 70% from Re.1/- per transaction in AY 2010-11 to Re.0.30 per transaction in AY 2020-21 as tabulated below: -

Date of Resolution	Period		Rate per transaction (INR)	Reduction (%)
	From	To		
	From 1st January, 2010 (i.e from commencement of activity	31 <sup>st</sup> March 2010	1	—
23rd March 2010	1 <sup>st</sup> April 2010	8 <sup>th</sup> August 2010	0.8	20%
30 <sup>th</sup> July 2010	9 <sup>th</sup> August 2010	30 <sup>th</sup> April 2015	0.5	50%
20 <sup>th</sup> May 201 5	1 <sup>st</sup> May 2015	30 <sup>th</sup> September 201 7	0.45	55%
11 th August 201 7	1 <sup>st</sup> October 2017	30 <sup>th</sup> September 2018	0.4	60%
25 September 2018	1 <sup>st</sup> October 2018	31 <sup>st</sup> March 2019	0.35	65%
25 <sup>th</sup> September 2018	1 <sup>st</sup> April 2019	-	0.3	70%

3.4 The Ld. Sr. Counsel, also assailed the violation of the provisions of Sec.13(1)(c)(ii) as alleged by Ld. AO by submitting that there was no contributor in the assessee entity and no benefit was provided to any of the contributors. The Ld. Sr. Counsel, on the strength of the language of various statutory provisions as well as in the light of various judicial pronouncement, sought to draw the distinction between subscription of



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shares vis-à-vis contributions. The arguments were also raised to draw the distinction between 'facility' and 'services'.

3.5 Reliance has been placed on various judicial pronouncements, the copies of which have been placed on record. The written submissions have been filed in due course. We have duly considered the pleadings / arguments as well as written submissions made before us by Ld. Sr. Counsel.

3.6 Another pertinent argument made before us is that the assessee took over existing activities of *National Finance Switch (NFS)* from Institute for Development & Research in Banking Technology (IDRBT), Hyderabad. Similar exemption was denied by revenue authorities to IDRBT for AYs 2010-11 & 2011-12. The assessee agitated the same successfully before Hyderabad Tribunal which is reported at **63 Taxmann.com 297**. The revenue contested the said order before Hon'ble High Court of Andhra Pradesh & Telangana wherein by judgment dated 09/10/2017 (400 ITR 66), the revenue's appeals were dismissed for both the years. The Special Leave Petition preferred by the revenue against the same has subsequently been dismissed by Hon'ble Supreme Court vide SLP No. 19564/2018 dated 20/07/2018. The copies of orders / judgements have been placed on record. The Ld. Sr. Counsel submitted that the assessee's took over existing activities of IDRBT and the same were pari-materia the same as carried out by IDRBT and therefore, the issue of exemption u/s 11& 12 would be covered in assessee's favor by the aforesaid decisions. Hence, the assessee would be eligible to claim the benefit of Sec. 11 & 12.



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4. *Au Contraire*, Ld. CIT-DR supported the stand of lower authorities by submitting that the assessee's case was hit by proviso to Sec.2(15) since it was carrying out systematic commercial activities for the benefit of participating banks which led to huge value additions for these banks. There was no element of charity in assessee's activities. The Ld. CIT-DR also assailed the submissions that the assessee was created by an act of parliament and it was submitted that RBI was not its promoter. It was also submitted that core principle of forming the assessee was to assist public and private sector banks in carrying out their commercial activities involving receipts and payments by charging a fee. At the best, the activities could be for general public good and India being a welfare state, such mechanism only advances the economic activity and supports the payment system leading to economic buoyancy. However, there was no element of charity in the domain of the governance. The Ld. CIT-DR drew attention to the fact that the assessee reflected surplus of Rs.11.50 Crores against revenue of Rs.17.58 Crores which was in the shape of commercial fees. The Ld. CIT-DR also submitted that any person desirous of commencing the payment system may apply to RBI for an authorization under the Act. The assessee has no monopoly since there are other prominent players like *paytm* operating in the market. In the said background, Ld. CIT-DR supported the denial of benefit of Sec. 11 & 12. The written submissions were filed in due course which have duly been considered by us.

5. We have carefully heard the arguments advanced by both the representatives. We have gone through material placed before us. We



have also deliberated on various judicial pronouncements as cited before us during the course of hearing. Our adjudication to the subject matter of appeal would be as given in succeeding paragraphs.

### **Factual Matrix and Summary of Proceedings before lower authorities**

6.1 Facts on record would reveal that assessee being resident corporate assessee stated to be an entity registered u/s 25 of The Companies Act, 1956 was assessed for year under consideration u/s 143(3) on 25/03/2013 wherein the income of the assessee was determined at Rs.1000.85 Lacs as against 'Nil' return filed by assessee on 24/09/2010. The income was so assessed in view of the fact that the exemption claimed by the assessee u/s 11 & 12 was denied by Ld. AO. The return was subsequently revised on 23/03/2011 due to non-deduction of capital expenditure in the original return and due to revision in the amount of depreciation.

6.2 The material on record would further reveal that the assessee had applied for registration as trust u/s 12AA on 22/09/2009 and it has been granted registration u/s 12AA of the Act w.e.f. 01/04/2009 vide certificate dated 18/03/2010. The assessee was incorporated on 19/12/2008 as Section 25 company vide certificate of incorporation issued by The Asstt. Registrar of Companies, Maharashtra, Mumbai. The certificate of commencement of business has been issued to it on 20/04/2009.

6.3 The perusal of copy of Memorandum and Articles of Association would establish that the main objects to be perused by the assessee is, *inter-alia*, to promote the activities of banker's clearing house, owning,



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establishing, operating, maintaining and consolidating payment systems for settlement of funds through electronic and paper-based clearing systems. It proposes to develop a secure, dedicated and robust communication system for banking and financial sector and other participants and gateways for communication including providing network for participation by all categories of banks and financial institution. No objects of the company would be carried out without permission of the competent authorities and no objects were to be carried out on commercial basis. The income of the company was to be applied solely for the promotion of stated objects. No portion of income could be paid as dividend, bonus or otherwise by way of profit to its members. As per clause-XI of the Memorandum, in case of winding up or dissolution of the company, the residual surplus was not to be distributed amongst the members but were to be transferred to specified entity having similar objects. The 9 subscribers are the participating bankers who agree to subscribe one share each in the entity. The authorized share capital of the assessee has been set at Rs.300 Crores consisting of 3 crores equity shares of Rs.100/-each. As per Article-191, The company is specifically prohibited from distributing profits, in any manner, including payment of any dividend or remuneration to its members.

6.4 Section 25 of The Companies Act, 1956 is a special provision for registration of companies which are set up for promoting commerce, art, science, charity or any other similar useful object to promote public good and which do not intend to distribute their profits by way of dividend to its



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members. The assessee has been registered as Section 25 Company under The Companies Act, 1956.

6.5 The genesis of assessee company, as aptly noted by Ld. AO in the quantum assessment order, stem from the fact that Reserve Bank of India (RBI) formed a committee on technology upgradation in payment systems. The committee recommended a variety of payment applications which could be implemented with appropriate technology upgradation and development of a reliable communication network. The committee suggested setting up of an information technology institute for the purpose of research and development as well as consultancy in the application of technology to the banking and financial sector of the country. As per recommendations, the Institute for Development & Research in Banking Technology (IDRBT) was established by the RBI in March 1996 as an Autonomous Centre for Development and Research in Banking Technology. The Institute of Development and Research in Banking Technology (IDRBT), Hyderabad had been providing Automated Teller Machines (ATM) switching service to banks in India through mechanism of National Financial Switch (NFS). With a view to inter-connect the ATMs in the country and facilitate convenience banking for the common man, the institute conceptualized, developed and implemented the National Financial Switch (NFS). The NFS facilitates routing of ATM transactions through inter-connectivity between bank's switches, thereby enabling the citizens of the country to utilize any ATM of a connected bank to carry out various banking transactions. Later on, IDRBT decided to hive-off its operational role on ATM switching with a



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view to exclusively focus on research and development and accordingly, looked for suitable arrangement for shifting the business to national level payment system organization. The assessee i.e. National Payments Corporation of India (NPCI) considered this as an opportunity and started discussions with IDRBT on the feasibility of taking over. The Board for Regulation and Supervision of Payment and Settlement systems (BPSS), set up by Govt. of India vide Gazette notification dated 18/02/2005, granted in-principle authorization to NPCI for operating various retail payment systems in the country. The RBI granted authorization to NPCI to take over the operations of National Financial Switch (NFS) from the Institute of Development and Research in Banking Technology (IDRBT) on October, 15,2009. The assessee was incorporated in Dec. 2008 and it was incorporated as a Section 25 company under the Companies Act and aimed to operate for the benefit of all the member banks and their customers. Sufficient reserves were provided to assessee company so that the company could operate on high volume payment services. There were various core promoter banks for the assessee which include SBI, PNB, Canara Bank, Bank of Baroda, Union Bank of India, Bank of India, ICICI Bank, HDFC Bank, Citibank and HSBC.

6.6 The main objects of the assessee company, as noted by Ld.AO, in para 4.5, are as follows: -

1. To promote the activities of bankers clearinghouse, owning, establishing operating, maintaining and consolidating payment system is for local, regional and national settlement of funds through electronic and paper based clearing systems, and related arrangements for evolving standards and procedures necessary for promoting, sound,



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efficient and cost-effective clearing and payment system is and to do all such acts and deeds as are necessary to ensure deeper penetration into smaller places.

2. To develop a secure dedicated and robust communication backbone consisting of intranets for the banking and financial sector and the other participants and gateways for communication including providing network for participation by all categories of banks and financial institutions to benefit out of the uses of a closed user group network, to expand the network to become a combination of satellite and terrestrial modes of communication, and to initiate action for interconnectivity of the network to the network of banks to facilitate straight through processing and to design and develop and implement critical payment system projects to enable utilisation of the network by the banking industry through the development of intranets, intercity connectivity to the states and allotment of bank level gateways.

On the basis of aforesaid facts, it was noted by Ld. AO that the assessee's case would fall under the last limb of Sec.2(15) i.e. advancement of any other object of general public utility. The assessee has also not contested these findings. Therefore, there is no dispute on this fact.

6.7 At para 4.4, month-wise volume of NFS transactions since April, 2012 were tabulated wherein it was noted that total volume of transactions jumped from 16.92 Crores to 19.18 Crores with an overall increase in participating banks as well as number of ATMs covered under the switch. The assessee charged fee of Re.1/-, from participating banks, per transaction undertaken by the customers of the bank. Consequently, the assessee paid Service Tax of Rs.17 Crores on account of services rendered to participating banks which led Ld. AO to form a belief that the assessee has received payments in consideration of services in the nature of business and services rendered in relation to business of its clients i.e. various bank and therefore, it was hit by



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proviso to Sec. 2(15). Consequently, the assessee was show-caused as to the fact that it was hit by proviso to Sec. 2(15) and therefore, exemption was not available to it u/s 11 & 12.

6.8 The assessee, in defense, submitted that it did not have any profit motive and its activities could not be termed as business. It was also argued that it was part of government mechanism for acting on behalf of government and no other party could engage in the activity of the assessee. Lastly, the assessee argued that it was for benefit of people at large and eligible to claim the impugned benefit.

6.9 However, the said pleas were rejected in the background of the fact that the activities of NFS was service in relation to business of all banks involved. Banks are commercial entities and the facility so provided would be huge value addition to the services of any bank to their customers in order to increase volume, business and ultimate profits of the banks. The other pleas also could not find favor with Ld. AO.

6.10 The other arguments taken by assessee were summarized in para 4.8 of the order. The assessee, *inter-alia*, submitted that it was a non-profit company registered u/s 25 of The Companies Act and its income could not be distributed by way of dividend. It was granted registration u/s 12AA after seeing its no-profit activity. Further, it charges fee merely to meet the cost of operations and income so generated is incidental in nature and not with a view to generate profits.

6.11 However, the said arguments could not convince Ld. AO who opined that the assessee carried out systematic activity in the nature of business and its activities were hit by proviso to Sec.2(15). The Ld. AO



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also refused to accept the argument that the assessee was a part of RBI establishment. In fact, the assessee company was promoted by various commercial banks and it was not a regulatory authority having power of supervision, control like in the case of other regulatory authorities like BIS, IRDA etc. Further, the assessee was merely an operational and infrastructural part of whole retail payment systems. Therefore, in para 4.10, a conclusion was drawn that the assessee's activities were hit by proviso to Sec.2(15) and its income was not eligible for exemption u/s 11 & 12.

6.12 Another reason to deny the exemption was the belief of Ld.AO that the assessee was hit by the provisions of Sec.13(1)(c)(ii) of the Act. The said provisions deny exemption to the income of the trust if any part of income or any property of the trust was used / applied directly or indirectly for the benefit of any persons referred to in sub-section (3). The category would, *inter-alia*, include the author of the trust or any person who has made substantial contribution to the trust exceeding fifty thousand rupees. Since the promoter banks had made substantial contribution in the trust, the case was stated to be hit by the provisions of Sec.13(1)(c)(ii). The assessee rebutted the same by submitting that assessee charged same fees from promoter banks as well as non-promoter banks and there was no exclusive benefit to the promoter banks. But Ld. AO opined that existence of assessee company was primarily to benefit the business of promoter banks and to provide benefits to customers of the banks.



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6.13 Finally, the exemption u/s 11 & 12 as claimed by the assessee was denied to it and its income was brought to tax.

6.14 Although the assessee assailed the stand of Ld.AO before Ld. CIT(A), however the assessee's submissions could not find with Ld. CIT(A) who confirmed the stand of Ld. AO by observing as under: -

5.2 I have considered the facts and circumstances of the case, gone through the assessment order of the A.O and the submissions of the appellant and also discussed the case with the AR of the appellant. The contentions and submissions of the appellant are being discussed and decided here in under:

i. The appellant submitted that its benefits were available to general public at a very nominal cost and hence it is charitable in nature. In this regard it is mentioned that the appellant has charged Rs.1 per transaction from customer bank. There is nothing brought on record by the appellant that the cost to the appellant per transaction is more than Rs.1 and hence its submission regarding cost being nominal remains unsubstantiated.

ii. It was stated that there was no intention to make profit and hence its activities are charitable. In this regard it is mentioned that during the year under consideration it has received income of Rs.17.58 crores from the business transactions out of which surplus of Rs.11.50 crores has been generated which is nothing but profit only. Further as rightly mentioned by the assessing officer, for applicability of proviso to section 2(15), profit motive is not required to be proved. On perusal of the income and expenditure account for the year ended 31 March 2010 it is noted that the total expenditure booked is only Rs.6.22 crores against which the surplus generated is Rs.11.50 crores which is about 2 times. Thus, contention of the appellant that there is no profit is factually also not correct.

iii. The appellant in its submissions has agreed that its objects fall in the category "*advancement of any other object of general public utility*". It has however been disputed that there is no activity of rendering any service in relation to any trade, commerce and business. In this regard it is mentioned that the payment received from the banks as mentioned by AO in Para 4.6 of his assessment order, is against the services rendered by the appellant. "*Rendering any service in relation to trade, commerce or business to the parties from whom consideration is due thereof is received*" is directly covered by first proviso to section 2(15), Its activity of National Financial Switch -ATM Switch is in the nature of rendering services in relation to business of all banks involved that are commercial entities and the facility provided by the appellant, that is to be used by customers of the banks, is a huge value addition to the services provided by the bank to their customers. If a charitable organization carrying out objects of '*advancement of general public utility*' is involved in carrying on *any activity in the nature of trade/ commerce, business* or is charging fees for services *in relation to any trade, commerce, business*, is excluded from being "*charitable*". The case of the appellant is excluded from being charitable also because the charitable activity claimed by it is in the domain of '*advancement of*



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general public utility' only. The profit motive behind such business, commerce or trade activity is not required to be separately examined and proved for applicability of proviso to section 2(15). The specific amendment by way of proviso to section 2(15) w.e.f. A.Y. 2009-10 does not provide for carrying out business trade or commerce *per se* for applicability of proviso, rather the stipulation in the proviso is 'in relation to' which is to be interpreted and applied in that context - in a wider term and not to be confined to carrying out trade, business and profession. It was held in the case of **Subhram Trust vs. DIT (E) (2009) 317 2TR (AT)(Bang.)** that '*the term in relation to should be broadly interpreted i.e. to say if any activity which directly or indirectly facilitates the rendering of any service in relation to any trade, commerce or business, is carried on by trust, then it will be covered under proviso to section 2(15)*'. Accordingly, contention of the appellant is not acceptable.

iv. The appellant contended that it is functioning on behalf of Govt. i.e. RBI and hence the activity is not for profit. In this regard it is mentioned that the Company has not been created by any Act of Parliament. There are several banks that are under the control of RBI but they are not exempt from tax. Even otherwise in the case of **Entertainment Society of Goa Vs. CIT (2013) 23 ITR 549 (Mum)(Trib)** it was held that '*the proviso to section 2(15) will also apply to a regulatory body or a body incorporated by Government as the section does not provide any exception under the proviso*'. The contention of the appellant is therefore not acceptable.

v. The appellant also stated that under section 13(2)(d), there should be inadequate remuneration or other compensation which is not the case of the appellant. In this regard it is mentioned that the AO has invoked provisions of section 13(1)(c)(ii) which says that *sec. 11 shall not apply in the case of a trust if any part of its income is applied directly or indirectly for the benefit of any person referred to in subsection (3)*. It is not disputed that the banks to whom services have been rendered are falling within the category of persons referred to in Section 13(3). Accordingly, I agree with the AO that the appellant has applied its income directly as well as indirectly for the benefit of persons mentioned in section 13(3) and consequently hit by the provisions of section 13(1)(c)(ii). The judgement of Hon. Delhi High Court in the case of Maruti Centre for Excellence 21 taxmann.com 474 relied upon by the A.O is squarely applicable to the facts of the appellant's case relevant part of which reads as under:

*"Section 13(1)(c)(ii) deals with actual functioning and activities undertaken during the assessment year in question. The said section has to be read along with section 13(3). Section 13(1)(c)(ii) states that no part of the income or any property of the institution should be used or applied directly or indirectly for the benefit of any person referred to in sub-section (3). **The words "directly or indirectly" are important and reflect the intention of the Legislature that income or property should not be even indirectly used for benefit of a member. The word 'indirectly' used in section 13(3)(c)(iii) shows the expansive and comprehensive scope and intention behind incorporation of the said provision. The - provision postulates and states that charity for self or closely related/associated persons as defined in section 13(3) is an anathema and not acceptable. Income and the property of the charitable institution should be used for***



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*charitable activities which benefit third persons and **should not directly or indirectly benefit the persons covered under section 13(3).** [para 11]*

*Under section 13(1)(c)(ii) the purpose of the society must be to benefit the public or subserve the object of general public. Thus, **where the dominant motive of the application of income or property is to help the members of the society, and remotely and indirectly to benefit the public, it cannot be said that the institution meets the requirements of the said section. Again where the primary purpose is to benefit the private interests of persons under section 13(3) provisions of section 13(1)(c)(ii) are attracted.** Thus the general purpose or as stated in the memorandum may be a beneficial one, but it would violate section 13(1)(c)(ii) read with section 13(3) where the benefit is primarily confined to the members of the institution itself or employees of a particular firm or company covered under the ambit of section 13(3), however large the number of beneficiaries may be."*

Also in the case of **Chamber of Commerce Vs. CIT (1936) 4 ITR 397**, Hon'ble Allahabad High Court, discussing the test for "charity", observed that element of 'altruism' must be present i.e. to say "Before an institution can be held to be charitable there must be an element of altruism, that is to say, the beneficiaries must not be able to claim the benefit. Thus as discussed above, the appellant has failed this test also.

vi. In view of the facts and legal position as discussed above, I am of the considered opinion that that the AO has rightly denied the exemption u/s. 11.

It is evident that Ld. CIT(A) has, *inter-alia*, observed that for the applicability of proviso to Sec. 2(15), profit motive is not required to be proved. Further, the activity of NFS-ATM switch would be in the nature of rendering services in relation to business of all banks involved and facilities provided by the assessee would lead to huge value addition to the services provided by the bank to its customers. The profit motive behind such business, commerce or trade activity is not required to be separately examined and proved for applicability of proviso to Sec. 2(15). This proviso would apply to any regulatory body or body incorporated by Government since no exception is provided under the proviso. Further the provisions of Sec 13(1)(c)(ii) were applicable to the assessee. Therefore, the stand of Ld. AO in denying the exemption was upheld.



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Aggrieved as aforesaid, the assessee is under further appeal before us.

7. In the written note furnished on behalf of the assessee, the manner in which the assessee entity was incorporated and the nature of activities being carried out by it has been elaborated. Since the appraisal of these facts would be vital for determination of the subject matter of appeal, we deem it to fit to bring the same on record. It has been submitted that the assessee is an umbrella organization operating the retail payment systems in India. The payment and settlement systems were earlier operated in India by the Reserve Bank of India (RBI). Retail payment systems typically handle transactions which are low in value, but very large in number, relating to individuals, firms and corporate, such as cheque clearance, online fund transfer, credit card payments, etc. The broad framework of NPCI as the national entity for retail payment systems was envisaged in the RBI's vision document (2005-08) titled as "Payment Systems in India". NPCI was set up to provide a robust and technologically intensive centralized system offering Electronic Clearing Services (ECS), Electronic Funds Transfer (EFT) and National Electronic Fund Transfer (NEFT) services covering the entire country and to take initiatives on ATM-switching, multi-application smart card, e-commerce and m-commerce based payment systems.

The operation of payment systems in India was transferred to NPCI (assessee) through enactment of the Payment and Settlement Systems Act, 2007 (PSS Act). The PSS Bill, 2006 as introduced in Lok Sabha on 25/07/2006 was referred to the Standing Committee on Finance for examination and report thereon. The Committee submitted its 56<sup>th</sup>



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Report after obtaining information from Finance Ministry and views of various concerned parties. The copy of the report has been placed in the paper-book. In paras 27-43 of the report, the Committee referred to the background and framework of NPCI and discussed issues raised by officers of RBI on NPCI being given the task of implementing the PSS. At para-29, the Report quotes Finance Ministry as stating that NPCI would be a Section 25 company owned and operated by banks and that no bank or bank group can have shareholding of more than 10% and shares would be held by as many banks as possible and it was also decided that RBI would have representation on the Board.

Para-32 of the Report take note of RBI's reply that RBI has not been operating the clearing system to generate income. Income generation was only incidental. RBI started the cheques processing center as a part of its initiative to build a sound cheque clearing system. A need was felt to consolidate all clearing centers under an umbrella organization to bring efficiency and standardization of procedures and practices. Further, the profits to be generated by the new company were not to be paid to the shareholders as dividend but would be used only for further development of payment system.

At the time of passage of the PSS Bill, 2006 the then Hon'ble Finance Minister, *inter-alia*, reiterated that NPCI was a non-profit corporation and a Section 25 company and that its income would not be distributed as dividends but would be ploughed back for creation of infrastructure. He further stated that NPCI will be a public sector corporation owned by Public Sector Banks, who will own not less than 51% in NPCI. Section



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2(i) and section 2(n) of PSS Act, 2007 define "payment" and "settlement" whereas sections 3-9 of the said Act deal with authorization of payment systems by RBI. Accordingly, NPCI was incorporated as Section 25 Company and it was specifically provided in its Memorandum of Association that none of its objects shall be carried out on a commercial basis. The income and the property of NPCI shall be applied solely for the promotion of its objects and that no part thereof shall be paid or transferred by way of dividend, bonus or otherwise by way of profit.

The Board for Regulation and Supervision of Payment and Settlement Systems at its meeting held on 24/09/2009 granted in-principle authorization to NPCI for operating various retail payment systems in India and on 15/10/2009, RBI granted authorization to assessee to take over the operations of National Financial Switch (NFS) from IDRBT. The assessee took over NFS operations from 14/12/2009 and it charged a fee of Re.1 per transaction undertaken by customers of banks using the NPCI's infrastructure. The fee has gradually been reduced over the years notwithstanding the fact that the assessee was enjoying monopoly over the payment systems. As of today, the assessee is stated to have received authorization from RBI under the PSS Act to build a central infrastructure for payment systems like NFS. IMPS, CTS, National Automated Clearing House, AEPS and RuPay. The brief overview of important payment system being operated by the assessee is as follows:-



## National Financial Switch

With a view to connect the ATMs in the country and facilitating convenient banking, IDRBT conceptualized and operationalized a multilateral domestic ATM network referred to as National Financial Switch (NFS). NFS facilitates routing of ATM transactions through inter-connectivity between its member institutions thereby enabling citizens to utilize any ATM of a connected entity. In October 2009, IDRBT handed over NFS to NPCI. Since the takeover, NPCI has made various improvements in technology and usage of NFS. Since NFS facilitates interbank ATM transactions, it is also used as a backbone network infrastructure for other NPCI products like IMPS, AEPS, etc. With the inclusion of Scheduled Commercial Banks, Foreign Banks, Cooperative Banks, etc. as its members, NFS is the leading ATM network in the country.

To take an example, if a customer of Punjab National Bank (PNB) uses an ATM of State Bank of India (SBI) to withdraw Rs.10,000, then, SBI will claim Rs.10,000 from PNB through the payment mechanism provided by NPCI. NPCI will recover Rs. 10,001 from PNB (including its charge of Re.1) by debiting this amount to PNB and will credit Rs.10,000 to SBI. Certain other charges and government levies are also recovered on actual basis on these transactions, which are pass-through costs. In this transaction, Re.1 is the income of the Appellant, which has gradually been reduced over the years. In case a customer of SBI uses the ATM of SBI, then, NPCI does not come into the picture.



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### Immediate Payment Service (IMPS)

This facility is stated to be a 24X7, real time, cost effective, independent retail payment service introduced by NPCI empowering customers to transfer money instantly within banks and RBI authorized Prepaid Issuers (PPIs) across India. The underlying concept behind IMPS is to provide customers "any time, any place" real-time remittance access to meet their various payment needs. Using IMPS, a customer can transfer funds on real-time basis to another person or merchant for any personal or commercial purposes. IMPS is stated to be preferred mode for receiving inward cross border remittances by the banks.

### Cheque Truncation System (CTS)

This system is stated to have replaced physical movement of cheques from banks to clearing houses. This is done by electronic transmission of images of the cheques and the relevant data, which ensure faster clearing mechanism.

### RuPay

This facility is stated to be multilateral payment system with a view to create cash-less economy and make India a financial inclusive economy. This facility is meant to provide a safe, secured and low-cost payment mechanism to the public at large with a view to fulfill the objective of financial inclusion & economic development.

In the background of above facts, we proceed to adjudicate the subject matter of appeal in succeeding paragraphs.



## **Our findings and Adjudication**

8.1 For determination of issues, we find it imperative to appreciate the basic factual matrix in which the assessee entity has come into existence. It is undisputed fact that the assessee has been granted a valid registration u/s 12AA of the Act which has never been revoked by the revenue authorities. The registration has been granted post-insertion of proviso to Sec.2(15) obviously after looking into the object of the assessee. The assessee has been incorporated under special provisions of Sec.25 of The Companies Act, 1956 which provide for registration of entities which are set up for promoting commerce, art, science, charity of any other similar useful object to promote public good and which do not intend to distribute their profits by way of dividend. As per various clauses of Memorandum & Articles of Association, the assessee is prohibited from distributing its profits by way of dividend to its members. Even in case of dissolution or winding up, the residual surplus was not to be distributed amongst the members but were to be transferred to specified entity having similar objects.

8.2 The RBI in its vision document 2005-08 (issued during May, 2005) titled as '*Payment Systems in India*' take note of the fact that with a view to help with the payment settlement process, the facility of ATM-switch was set up and operated by IDRBT, Hyderabad. A need has been felt that Indian Retail Clearing function, in its entirety, could be entrusted to a separate legal entity at national level and RBI could provide settlement services for all the clearing systems, besides being regulator and supervisor of the payments systems. The Broad framework of the



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proposed new national entity was elaborated therein. The formation of national level entity would ensure uniformity of structure, operations and procedures. This entity would deploy professionally skilled competent personnel to manage and run clearing operations and pave the way for conducting all clearing functions at national level leading to better information dissemination and better customer education on various services and systems. The document also envisages drafting comprehensive legislation on payment system by way of a payment system bill. The main objective would be to establish safe, secure, sound and efficient payment system in India, matching international standards and best practices. This proposed entity would provide a robust and technologically intensive centralized system offering Electronic Clearing Services (ECS), Electronic Funds Transfer (EFT) and National Electronic Fund Transfer (NEFT) services covering the entire country and to take initiatives on ATM-switching, multi-application smart card, e-commerce and m-commerce based payment systems. This new entity would bring about efficiency enhancements and uniformity in the existing payment products and develop new products taking advantage of technology innovation. In this background, the document envisions setting up of an institution at national level which would own and operate all retail payment systems of the country. To achieve this, the document proposes enactment of Payments and Settlement Bills.

8.3 Subsequently, Govt. of India introduced 'The Payment and Settlement Systems Bill, 2006' in the year 2006 to facilitate the oversight of Payments and Settlement Systems in the country by RBI. After review



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of the bill by a standing committee set up by Parliament, the said bill was passed by the Parliament on 26/11/2007 and accordingly, it became an Act. As per Section 4 'The Payment and Settlement Systems Act, 2007' (in short 'PSS Act'), no person other than RBI could operate or commence a payment system unless authorized by RBI.

8.4 The standing committee on finance for examination and report on the bill, submitted its 56<sup>th</sup> Report after obtaining information from Finance Ministry and after incorporating the views of various concerned parties. The committee referred to the background and framework of NPCI and discussed issues raised by officers of RBI on NPCI being given the task of implementing the PSS. At para-29, the Report quotes Finance Ministry as stating that NPCI would be a Section 25 company owned and operated by banks and that no bank or bank group can have shareholding of more than 10% and shares would be held by as many banks as possible and it was also decided that RBI would have representation on the Board. Para-32 of the Report take note of RBI's reply that RBI has not been operating the clearing system to generate income. Income generation was only incidental. RBI started the cheques processing center as a part of its initiative to build a sound cheque clearing system. A need was felt to consolidate all clearing centers under an umbrella organization to bring efficiency and standardization of procedures and practices. Further, the profits to be generated by the new company were not to be paid to the shareholders as dividend but would be used only for further development of payment system.



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8.5 At the time of passage of the PSS Bill, 2006 the then Hon'ble Finance Minister, *inter-alia*, reiterated that NPCI was a non-profit corporation and a Section 25 company and that its income would not be distributed as dividends but would be ploughed back for creation of infrastructure. He further stated that NPCI will be a public sector corporation owned by Public Sector Banks, who will own not less than 51% in NPCI.

8.6 Accordingly, NPCI was incorporated as Section 25 Company and it was specifically provided in its Memorandum of Association that none of its objects shall be carried out on a commercial basis. The income and the property of NPCI shall be applied solely for the promotion of its objects and that no part thereof shall be paid or transferred by way of dividend, bonus or otherwise by way of profit.

8.7 The Board for Regulation and Supervision of Payment and Settlement Systems, at its meeting held on 24/09/2009, granted in-principle authorization to NPCI for operating various retail payment systems in India. The RBI on 15/10/2009, in exercise of powers conferred under the PSS Act, 2007, granted authorization to assessee to take over the operations of National Financial Switch (NFS) from IDRBT. The assessee took over NFS operations from 14/12/2009 and it started charging a fee of Re.1 per transaction undertaken by customers of banks using the NPCI's infrastructure. The fee has gradually been reduced over the years by as much as 70% notwithstanding the fact that the assessee was enjoying monopoly over the payment systems. As of today, the assessee is stated to have received authorization from RBI



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under the PSS Act to build a central infrastructure for payment systems like NFS. IMPS, CTS, National Automated Clearing House, AEPS and RuPay which has already been elaborated in preceding paragraphs.

8.8 Thus, from the perusal of chronology of these events, it is quite discernible that the assessee has sole authorization from RBI to operate the payment systems in India. The overall regulation as well as supervision was to be exercised by RBI in terms of PSS Act, 2007. Although the assessee was not created under PSS Act, 2007 but it was sole authorized arm of RBI to carry out payment settlement system in India in a professional manner by utilizing the latest technology. The overall purpose was to achieve broad-based social objective to bring efficiency in the clearing systems in India with a view to benefit society at large. Hence, it could be concluded that the assessee's objectives were to promote the welfare of general public.

8.9 The clearing functions of RBI were divested to the assessee with the emergence of PSS, Act 2007. The electronic payment infrastructure created by the assessee would enable a larger section of the society to enjoy unparalleled secure and convenient payment systems. The systems being developed by the assessee would bring down cost of clearing transactions which would ultimately benefit public at large availing the banking services. The greater penetration of e-payments would encourage larger participation of citizen in banking system and help in meeting the larger objective of cash-less economy. Therefore, it could safely be concluded that the primary objective of the assessee was to administer the payment settlement system for the



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larger benefit of general public and not to run the clearing system in a commercial manner or on a commercial basis.

8.10 So far as the issue of charging of fees is concerned, we find that the assessee was engaged in providing technology intensive infrastructure facilities at national level and would obviously require funds to meet the operational cost which would necessitate the charging of fees by the assessee. However, the said fact would not materially alter the primary objective for which the assessee entity was created. It is also evident that the fee charged by the assessee per transaction has drastically been reduced by as much as 70% over several years which would only bolster assessee's claim that it was not running as commercial organization and its primary motive was not to make profits.

8.11 The observation of Ld. AO that the assessee paid Service Tax of Rs.17 Crores, in our opinion, would not be determinative of assessee's primary objective. The liability to pay service tax arose to the assessee under separate enactment in view of the fact that the assessee's activities fell within the meaning of *Service* as defined in Service Tax Regulations. However, the payment thereof would not bring about material change in assessee's primary objective. The assessee would naturally be bound to follow the law of land as applicable to it.

8.12 The Ld. CIT-DR has sought to equate the activities of the assessee with that of e-commerce payment system *paytm*. However, no substance could be found in the same since the assessee was a national level entity envisioned by RBI to take over the clearing mechanism in a unified manner on PAN India basis. The activities of the assessee could



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not be equated with e-commerce payment system *paytm* which was merely facilitating e-payments to certain users and it would merely be using the infrastructure created by the assessee. Therefore, the said argument could not be accepted.

8.13 So far as the applicability of the provisions of Sec.13(1)(c)(ii) are concerned, we find that the facilities / services being provided by the assessee were uniformly available to the user of the system against same fee. No concession in fee was given to the promoter entities and it could not be said that the assessee directly or indirectly applied its income for the benefit of persons as specified in Sec.13(3). Another pertinent observation is that the promoter banks were mere subscriber to assessee's share capital and not entities who made substantial contribution of exceeding Rs.50,000/- in assessee entity. It is matter of common knowledge that there is clear distinction between subscribers to the shares vis-à-vis contributors.

8.14 Regarding Ld. Sr. Counsel's argument that there would be difference in facility and services and therefore, the assessee would not be covered by the proviso to Sec. 2(15), we are of the opinion that the assessee was engaged in creating infrastructure facilities to improve the clearing mechanism. However, by creation of this facility, the assessee would ultimately be rendering the services to various entities and therefore, the fine distinction between the expression *facility* and *services*, in such a case, would get blur. On the facts and circumstances, it would not be correct to say that the assessee was merely creating



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facility and not providing any services and not hit by proviso to Sec.2(15). We do not find much substance in this argument.

8.15 Another argument raised is that the assessee has been granted a valid registration u/s 12AA of the Act which has never been revoked by the revenue authorities. The registration has been granted post-insertion of proviso to Sec.2(15). Therefore, considering the said fact alone, the deduction could not be denied to the assessee. However, the said fact on standalone basis, in our considered opinion, would not entitle the assessee to claim the exemption u/s 11 & 12 which is evident from the terms of registration certificate itself. It has clearly been mentioned in clause-4 of the registration certificate that registration u/s 12AA does not automatically exempt the income of the Trust. The question of taxability of the income of the Trust has to be examined and decided by Ld. AO based on the activities, compliance with various statutory and other requirements etc. Further, the fact that whether the assessee has actually carried out its activities as per its objects or not, could only be determined on the basis of its financial statements which would be available only at the time of framing of assessment. At the time of registration, the only thing that was required to be seen by the registering authority was that whether the objects of the trust would fall within the expression *charitable purposes* as defined in Sec. 2(15) or not. Whether the assessee has actually carried out its objects could only be ascertained at the time of framing of assessment by Ld. AO. Therefore, the said plea also could not be accepted. In the case law of Hon'ble Gujarat High Court in **Hiralal Bhagwati V/s CIT (2000 246 ITR 188)**, as



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relied upon by the assessee, it was held that Ld. AO could not go into the re-examination of assessee's objects to determine whether it was charitable in nature or not. However, in the present case, Ld. AO has merely invoked proviso to Sec.2(15) to deny the exemption to the assessee. Therefore, the said case law as well as other case laws drawing strength from the same, is on different tangent and do not touch upon the issue of proviso to Sec.2(15) and hence, not applicable to the present case. In the present case, the fact that the assessee was registered with a charitable purpose has not been doubted by Ld. AO.

8.16 Another pertinent factor which goes in assessee's favor is that the assessee took over existing activities of *National Finance Switch (NFS)* from Institute for Development & Research in Banking Technology (IDRBT), Hyderabad. That entity is stated to be carrying out the activity of NFS since the year 1996. Similar exemption was denied by revenue authorities to IDRBT for AYs 2010-11 & 2011-12. The assessee agitated the same with success before Hyderabad Tribunal which is reported at **63 Taxmann.com 297**. The revenue contested the order of Tribunal before Hon'ble High Court of Andhra Pradesh & Telangana wherein by judgment dated 09/10/2017 (400 ITR 66), the revenue's appeals were dismissed for both the years. The Special Leave Petition preferred by the revenue against the same has subsequently been dismissed by Hon'ble Supreme Court vide SLP No. 19564/2018 dated 20/07/2018. It is quite evident that existing activity of NFS was taken over by the assessee from IDRBT and the same was continued. Therefore, in terms of the



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aforesaid decision also, the assessee would be entitled to claim the deduction u/s 11 & 12.

8.17 The Hon'ble Delhi High Court in assessee's Writ Petition No. 1872 of 2013 dated 22/01/2015 titled as **India Trade Promotion Organization vs. DGIT (Exemption) & Ors. (371 ITR 333)**, while upholding the constitutional validity of the 1<sup>st</sup> proviso, has held that in both the activities i.e. (i) activity in the nature of trade, commerce or business or (ii) any activity of rendering any service in relation to any trade, commerce or business, dominant and prime objective is to be seen. If the dominant objective was 'profit motive', the trust would not be entitled to claim its objective to be charitable in nature. On the other hand, if the institution is not driven primarily by a desire or motive to earn profits, but to do charity through the advancement of an object of general public utility, it would be an institution established for charitable purposes. It was also observed that merely because a fee or some other consideration is collected or received by the assessee, it would not lose its character of having been established for a charitable purpose. The dominant activity of the assessee was to be examined. If it was not business, trade or commerce then any such incidental or ancillary activity would also not fall within the categories of business, trade or commerce. Although the revenue's Special Leave Petition [SLP] against the same has been admitted by Hon'ble Supreme Court (**84 Taxmann.com 283**), however, there is no stay on the operation of this judgement and the same is very well applicable to the facts of present case.



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The Hon'ble Court, in the course of stated judgement, has elaborately considered its own decisions rendered in: -

- (i) Institute of Chartered Accountants of India V/s DGIT (347 ITR 99)
- (ii) Bureau of Indian Standards V/s DGIT (2013 212 Taxman 210)
- (iii) Institute of Chartered Accountants of India V/s DGIT [358 ITR 91 04/07/2013]
- (iv) M/s GSI India V/s DGIT (2013 219 Taxman 205)

In the case of **Institute of Chartered Accountants of India V/s DGIT [358 ITR 91 04/07/2013]**, it was observed by Hon'ble court that the purpose and dominant object for which an institution carried on its activities is material to determine whether the same is business or not. The purport of the first proviso to Section 2(15) was not to exclude entities which are essentially for charitable purpose but are conducting some activities for a consideration or a fee. The objective to introduce the proviso was to exclude organizations which were carrying on regular business from the scope of charitable purpose. The expression business, trade or commerce was to be interpreted restrictively and where the dominant objective was charitable any incidental activity for the furtherance of the said objective would not fall within the expression trade, business or commerce.

The ratio of aforesaid decisions i.e. dominant purpose test has been applied by co-ordinate bench of this Tribunal in **Maharashtra Housing & Area Development Authority V/s ADIT (ITA N. 6678/Mum/2013 04/06/2019)** and held that the profit motive is the determinative and critical factor to judge the activities which could be reckoned as in the nature of business, trade or commerce.



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The Hon'ble Bombay High Court, while refusing to admit revenue's substantial question of law, in its decision titled as **DIT(E) V/s Shree Nashik Panchvati Panjrapole (ITA NO. 1565 of 2014 dated 24/02/2017)**, observed that the presence of profit intent (even if it does not fructify) would normally be a *sine qua non* for the activity to be considered as trade, commerce or business. The Lordship chose to follow the ratio of decision of Hon'ble Gujarat High Court rendered in **Sabarmati Ashram Gaushala Trust (2014 362 ITR 539)** wherein it was held that the proviso to Sce.2(15) was not aimed at excluding the genuine charitable trusts of general public utility but was aimed at excluding activities in the nature of trade, commerce or business which were masked as charitable purpose. The decision of Hon'ble Delhi High Court in **Institute of Chartered Accountants of India V/s DGIT [358 ITR 91 04/07/2013]** was also referred to in the stated decision of Hon'ble Bombay High Court and ultimately the application of dominant activity test was upheld.

8.18 The Hon'ble Gujarat High Court in the case of **Ahmedabad Urban Development Authority V/s ACIT [396 ITR 323 02/05/2017]** has observed that the expression trade, commerce and business must be read in the context of the intent and purpose of Section 2(15) of the act and the same was not meant to exclude entities which are essentially for charitable purposes but conducting some activities for a consideration or a fees. The test which has to be applied is whether the predominant objective of the activity involved in carrying out the object of general public utility was to sub-serve the charitable purpose or to earn profit.



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Where profit making is the predominant object of the activity, the purpose, though an object of general public utility would cease to be a charitable purpose. But where the predominant object of the activity was to carry out the charitable purpose and not to earn profit, it would not lose its character of a charitable purpose merely because some profit arises from the activity.

8.19 Similarly, Hon'ble Allahabad High Court in **CIT V/s Lucknow Development Authority 265 CTR 433 16/09/2013** has held that where a trust is carrying on its activities for the fulfilment of its aims and objectives which are of charitable in nature with no motive to earn profit and in the process, earns some profit, the same would not be hit by proviso to Section 2(15).

8.20 Therefore, considering the entirety of facts and circumstances and applying the theory of dominant purpose test, the inevitable conclusion that could be drawn is that the assessee was entitled for exemption u/s 11 & 12. The mere fact that certain fee was charged by the assessee while rendering certain services and surplus was generated, the said fact alone, would not disentitle the assessee to claim the impugned exemption u/s 11 & 12 considering the fact that the primary objects of the assessee were charitable in nature. No substance could be found in the allegation of violation of Sec.13(1)(c)(ii). Accordingly, the lower authorities are directed the grant the exemption to the assessee u/s 11 & 12.

8.21 Resultantly, the appeal stands allowed in terms of our above order.



### **ITA No. 3382/Mum/2016, AY 2012-13**

9.1 In this year, the assessee has similarly been assessed u/s 143(3) on 20/02/2015. The Ld. AO, applying the proviso to Sec.2(15) as well as the provisions of Sec.13(1)(c)(ii), denied exemption u/s 11 & 12 and computed total income at Rs.3842.95 Lacs as against *Nil* return filed by the assessee on 28/09/2012. The stand of Ld. AO, upon confirmation by learned first appellate authority vide impugned order dated 03/02/2016, is under challenge before us. The assessee is under further appeal before us, with more or less, similar grounds of appeal.

9.2 Facts being *pari-materia* the same as in AY 2010-11, our adjudication, as contained therein, would *mutatis-mutandis* apply to this year also. Consequently, Ld. AO is directed to grant the exemption to the assessee u/s 11 & 12.

9.3 Resultantly, the appeal stands allowed, in similar manner.

### **Reasons for delay in pronouncement of order**

10.1 Before parting, we would like to enumerate the circumstances which have led to delay in pronouncement of this order. The hearing of the matter was concluded on 21/01/2020 and in terms of Rule 34(5) of Income Tax (Appellate Tribunal) Rules, 1963, the matter was required to be pronounced within a total period of 90 days. As per sub-clause (c) of Rule 34(5), every endeavor was to be made to pronounce the order within 60 days after conclusion of hearing. However, where it is not practicable to do so on the ground of exceptional and extraordinary circumstances, the bench could fix a future date of pronouncement of the order which shall not ordinarily be a day beyond a further period of 30



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days. Thus, a period of 60 days has been provided under the extant rule for pronouncement of the order. This period could be extended by the bench on the ground of exceptional and extraordinary circumstances. However, the extended period shall not **ordinarily** exceed a period of 30 days.

10.2 Although the order was well drafted before the expiry of 90 days, however, unfortunately, on 24/03/2020, a nationwide lockdown was imposed by the Government of India in view of adverse circumstances created by pandemic covid-19 in the country. The lockdown was extended from time to time which crippled the functioning of most of the government departments including Income Tax Appellate Tribunal (ITAT). The situation led to unprecedented disruption of judicial work all over the country and the order could not be pronounced despite lapse of considerable period of time. The situation created by pandemic covid-19 could be termed as unprecedented and beyond the control of any human being. The situation, thus created by this pandemic, could never be termed as ordinary circumstances and would warrant exclusion of lockdown period for the purpose of aforesaid rule governing the pronouncement of the order. Accordingly, the order is being pronounced now after the re-opening of the offices.

10.3 Faced with similar facts and circumstances, the co-ordinate bench of this Tribunal comprising-off of Hon'ble President and Hon'ble Vice President, in its recent decision titled as **DCIT V/s JSW Limited (ITA Nos. 6264 & 6103/Mum/2018)** order dated 14/05/2020 held as under: -

7. However, before we part with the matter, we must deal with one procedural issue as well. While hearing of these appeals was concluded on 7th January 2020,



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this order thereon is being pronounced today on 14th day of May, 2020, much after the expiry of 90 days from the date of conclusion of hearing. We are also alive to the fact that rule 34(5) of the Income Tax Appellate Tribunal Rules 1963, which deals with pronouncement of orders, provides as follows:

(5) The pronouncement may be in any of the following manners: —

(a) The Bench may pronounce the order immediately upon the conclusion of the hearing.

(b) In case where the order is not pronounced immediately on the conclusion of the hearing, the Bench shall give a date for pronouncement.

(c) In a case where no date of pronouncement is given by the Bench, every endeavour shall be made by the Bench to pronounce the order within 60 days from the date on which the hearing of the case was concluded but, where it is not practicable so to do on the ground of exceptional and extraordinary circumstances of the case, the Bench shall fix a future day for pronouncement of the order, and such date shall not ordinarily (emphasis supplied by us now) be a day beyond a further period of 30 days and due notice of the day so fixed shall be given on the notice board.

8. Quite clearly, “ordinarily” the order on an appeal should be pronounced by the bench within no more than 90 days from the date of concluding the hearing. It is, however, important to note that the expression “ordinarily” has been used in the said rule itself. This rule was inserted as a result of directions of Hon’ble jurisdictional High Court in the case of **Shivsagar Veg Restaurant Vs ACIT [(2009) 317 ITR 433 (Bom)]** wherein Their Lordships had, inter alia, directed that **“We, therefore, direct the President of the Appellate Tribunal to frame and lay down the guidelines in the similar lines as are laid down by the Apex Court in the case of Anil Rai (supra) and to issue appropriate administrative directions to all the benches of the Tribunal in that behalf. We hope and trust that suitable guidelines shall be framed and issued by the President of the Appellate Tribunal within shortest reasonable time and followed strictly by all the Benches of the Tribunal. In the meanwhile** (emphasis, by underlining, supplied by us now), **all the revisional and appellate authorities under the Income-tax Act are directed to decide matters heard by them within a period of three months from the date case is closed for judgment”**. In the ruled so framed, as a result of these directions, the expression “ordinarily” has been inserted in the requirement to pronounce the order within a period of 90 days. The question then arises whether the passing of this order, beyond ninety days, was necessitated by any “extraordinary” circumstances.

9. Let us in this light revert to the prevailing situation in the country. On 24th March, 2020, Hon’ble Prime Minister of India took the bold step of imposing a nationwide lockdown, for 21 days, to prevent the spread of Covid 19 epidemic, and this lockdown was extended from time to time. As a matter of fact, even before this formal nationwide lockdown, the functioning of the Income Tax Appellate Tribunal at Mumbai was severely restricted on account of lockdown by the Maharashtra Government, and on account of strict enforcement of health advisories with a view of checking spread of Covid 19. The epidemic situation in Mumbai being grave, there was not much of a relaxation in subsequent lockdowns also. In any case, there was unprecedented disruption of judicial work all over the country. As a matter of fact, it has been such an unprecedented situation, causing disruption in the



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functioning of judicial machinery, that Hon'ble Supreme Court of India, in an unprecedented order in the history of India and vide order dated 6.5.2020 read with order dated 23.3.2020, extended the limitation to exclude not only this lockdown period but also a few more days prior to, and after, the lockdown by observing that **“In case the limitation has expired after 15.03.2020 then the period from 15.03.2020 till the date on which the lockdown is lifted in the jurisdictional area where the dispute lies or where the cause of action arises shall be extended for a period of 15 days after the lifting of lockdown”**. Hon'ble Bombay High Court, in an order dated 15th April 2020, has, besides extending the validity of all interim orders, has also observed that, **“It is also clarified that while calculating time for disposal of matters made time-bound by this Court, the period for which the order dated 26th March 2020 continues to operate shall be added and time shall stand extended accordingly”**, and also observed that **“arrangement continued by an order dated 26th March 2020 till 30th April 2020 shall continue further till 15th June 2020”**. It has been an unprecedented situation not only in India but all over the world. Government of India has, vide notification dated 19th February 2020, taken the stand that, the coronavirus “should be considered a case of natural calamity and FMC (i.e. **force majeure** clause) maybe invoked, wherever considered appropriate, following the due procedure...”. The term ‘**force majeure**’ has been defined in Black’s Law Dictionary, as **‘an event or effect that can be neither anticipated nor controlled’** When such is the position, and it is officially so notified by the Government of India and the Covid-19 epidemic has been notified as a disaster under the National Disaster Management Act, 2005, and also in the light of the discussions above, the period during which lockdown was in force can be anything but an “ordinary” period.

10. In the light of the above discussions, we are of the considered view that rather than taking a pedantic view of the rule requiring pronouncement of orders within 90 days, disregarding the important fact that the entire country was in lockdown, we should compute the period of 90 days by excluding at least the period during which the lockdown was in force. We must factor ground realities in mind while interpreting the time limit for the pronouncement of the order. Law is not brooding omnipotence in the sky. It is a pragmatic tool of the social order. The tenets of law being enacted on the basis of pragmatism, and that is how the law is required to be interpreted. The interpretation so assigned by us is not only in consonance with the letter and spirit of rule 34(5) but is also a pragmatic approach at a time when a disaster, notified under the Disaster Management Act 2005, is causing unprecedented disruption in the functioning of our justice delivery system. Undoubtedly, in the case of **Otters Club Vs DIT [(2017) 392 ITR 244 (Bom)]**, Hon'ble Bombay High Court did not approve an order being passed by the Tribunal beyond a period of 90 days, but then in the present situation Hon'ble Bombay High Court itself has, vide judgment dated 15th April 2020, held that directed **“while calculating the time for disposal of matters made timebound by this Court, the period for which the order dated 26th March 2020 continues to operate shall be added and time shall stand extended accordingly”**. The extraordinary steps taken suo motu by Hon'ble jurisdictional High Court and Hon'ble Supreme Court also indicate that this period of lockdown cannot be treated as an ordinary period during which the normal time limits are to remain in force. In our considered view,



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even without the words “ordinarily”, in the light of the above analysis of the legal position, the period during which lockout was in force is to be excluded for the purpose of time limits set out in rule 34(5) of the Appellate Tribunal Rules, 1963. Viewed thus, the exception, to 90-day time-limit for pronouncement of orders, inherent in rule 34(5)(c), with respect to the pronouncement of orders within ninety days, clearly comes into play in the present case. Of course, there is no, and there cannot be any, bar on the discretion of the benches to refer the matters for clarifications because of considerable time lag between the point of time when the hearing is concluded and the point of time when the order thereon is being finalized, but then, in our considered view, no such exercise was required to be carried out on the facts of this case.

Deriving strength from the ratio of aforesaid decision, we exclude the period of lockdown while computing the limitation provided under Rule 34(5) and proceed with pronouncement of the order.

### **Conclusion**

11. Both the appeal stands allowed in terms of our above order.

This order is pronounced under Rule 34(4) of the Income Tax (Appellate Tribunal) Rules, 1962, by placing the details of the same on the notice board.

**Sd/-**  
**(Mahavir Singh)**

उपाध्यक्ष / **Vice President**

**Sd/-**  
**(Manoj Kumar Aggarwal)**

लेखा सदस्य / **Accountant Member**

मुंबई Mumbai; दिनांक Dated : 06/07/2020  
Sr.PS, Jaisy Varghese



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**आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to :**

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent
3. आयकरआयुक्त(अपील) / The CIT(A)
4. आयकरआयुक्त/ CIT– concerned
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, मुंबई/ DR, ITAT, Mumbai
6. गार्डफाईल / Guard File

**आदेशानुसार/ BY ORDER,**

**उप/सहायक पंजीकार (Dy./Asstt.Registrar)  
आयकरअपीलीयअधिकरण, मुंबई / ITAT, Mumbai.**