

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **Writ Petition (Civil) No. 7797/2009**

% **Reserved on: 18th July, 2013**
Date of Decision: 26th September, 2013

M/S GS1 INDIA ...Petitioner
Through Mr. Vivek Tankha, Sr. Advocate with
Mr. Rishabh Sancheti and Ms. Rani Kiyala,
Advocates.
Versus

DIRECTOR GENERAL OF INCOME TAX
(EXEMPTION) AND ANR. ...Respondents
Through Mr. Kamal Sawhney, Advocate.

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE SANJEEV SACHDEVA

SANJIV KHANNA, J.

The petitioner GS1 India it is claimed is a “Not-for-Profit” Society promoted by the Ministry of Commerce and Indian Industry, duly registered under the Societies Registration Act, 1860.

2. The petitioner has prayed for quashing of the order dated 17th November, 2008 passed by Director General of Income Tax (Exemptions) denying them registration under Section 10(23C)(iv) of the Income Tax Act, 1961 (Act, for short) and for issue of mandamus directing that registration/approval under the said Section should be granted.

3. Respondent in reply/counter affidavit have not disputed the identity of the petitioner society founded and promoted by Department of Commerce, Ministry of Commerce and Industry, Government of India, Indian Institute of Packaging, Federation of Indian Export Organizations, Agricultural and Processing Food Products Export Development Authority, Federation of Indian Chamber of Commerce and Industry (FICCI), Associated Chambers of Commerce and Industry of India (ASSOCHAM), Bureau of Indian Standards (BIS), Confederation of Indian Industry (CII), Spices Board and Indian Merchants' Chambers.

4. It is not disputed by the respondents that the object of the petitioner inter-alia includes creating awareness and promoting study of Global Standards regarding Company Prefix Number (GS1 standards), location numbering, EDI, ECR, automatic data collection and related services and technologies; research and development into these Global Standards; and providing education in universities and colleges regarding these standards. We shall refer and elucidate upon GS1 standard subsequently in the judgment.

5. At this stage, it would be suffice to notice and record that the impugned order dated 17th November, 2008 elucidates that the objective and activities of the petitioner fall under the residuary clause of Section 2(15) of the Act. In other words, the respondent accepts that the petitioner were/are carrying on charitable activity under the residuary heading "any other object of general public utility".

6. The petitioner society was registered as a charitable society in the year 1996 under the residuary clause of Section 2(15) of the Act. Income Tax Department had granted exemption to the petitioner under Section 12A vide Certificate No. IT (E)/98-99/E.106/98/360 dated 24th September, 1998 w.e.f. 9th March, 1998 and under Section 10(23C)(iv) received for assessment year 1996-97 onwards vide income tax exemption certificates as under:

1. 1996-1997 to 1998-1999 – Notification No. 11187 dated 29th Dec'99.
2. 1999-2000 to 2001-2002–Notification No.243/2001 dated 14th Aug'01.
3. 2002-2003to 2004-2005 – Notification No.270/2003 dated 30th Oct'03.
4. 2005-06 to 2007-2008- Notification No. 310/2006 dated 3rd Nov.'06.

Thus, there cannot be any dispute and the respondent accepts that the object and purpose of the petitioner society was/is charitable i.e. advancement of object of general public utility.

Reasons for Denial of Registration under Section 10(23C)(iv) by the Respondent

7. Nevertheless the petitioner have been denied approval/registration under Section 10(23C)(iv) on two grounds:-

- a) Petitioner has acquired intellectual property rights qua bar coding system from GS1 Global Office, Belgium and permits use of these intellectual property rights by third parties under licence agreements for initial registration fee of Rs 20,000 and subsequent annual registration fee of Rs 4000, enhanced to Rs 5000 from financial year 2006-07 onwards. No charitable

activity was involved in permitting use of intellectual property right for consideration which is nothing but earning royalty income. This activity of the petitioner was/is in the nature of trade, commerce or business. According to the respondent, the petitioner earns substantial net profits from business of coding system as the fee/income earned was significantly higher than the direct costs. The following table of fee earned from registration and renewal and direct expenses incurred is highlighted.

Head	FY 2004-05	FY 2005-06	FY 2006-07
Registration Fee	Rs.1.55 crore	Rs. 1.26 crore	Rs.1.81 crore
Renewal Fee	Rs. 1.09 crores	Rs. 1.45 crore	Rs. 1.69 crore
Total	Rs. 2.64 crores	Rs. 2.71 crore	Rs. 3.5 crore
Less: Expenses as claimed by assessee	Rs. 1.10 crore	Rs. 1.42 crore	Rs. 1.95 crore
NET PROFIT	Rs. 1.54 crore	Rs. 1.29 crore	Rs. 1.55 crore
N.P. rate	58.33%	47.60%	44.28%

- b) Petitioner was not maintaining separate books of accounts for the business/commercial activity, i.e. licensing bar coding system, and did not intend to do so in future. Thus there was violation of Section 11(4) and (4A). Thereby, the petitioner had violated proviso to Section 10(23C)(iv) for assessment years 2007-08, 2006-07, 2005-06 and the petitioner does not meet the specified conditions of Section 10(23C)(iv) for assessment years 2008-09 onwards.

Nature and Character of Activity of GS1 namely the “Assessee”

8. We may now notice in some detail and put on record what is the exact nature and character of activities carried on by the petitioner society. GS1 codes have been developed and created by GS1 International, Belgium. GS1 coding system was/is used worldwide. The code promotes universal standard in Electronic Data Inter-exchanged (EDI) and other services. GS1 coding is extensively used globally and is even mandatory for some services/goods or adopted for significant advantages being a singular or one worldwide identification system, recognized and accepted all over the world. This system of coding has been accorded priority by the Government of India as it is a compulsory requirement on products exported from India. Government of India has set up non-profit organizations EAN India now known as GS1 India i.e. the petitioner.

9. GS1, Belgium has been granted legal status of International “Not-for-Profit” association under the Belgium Tax Law and is, therefore, not liable to pay corporation tax. The petitioner is affiliated and conferred exclusive rights relating to GS1 coding in India. Once GS1 code is used on a product it provides an unique identification to the said product with wide ranging benefits and advantages which facilitate track and trace the product, product recalls, counterfeit detection, patient safety because of accuracy, medicine identification, wastage control through accurate monitoring and stock levels for commodities, security and safety of supply chains including PDS and detection of illegal trade etc. Thus, this unique identification or coding system developed and operated by GS1 International or GS1 India i.e. the petitioner, as stated is recognized and accepted globally.

In addition to the codes, the unique identification code can be enabled with RFID chip and other electronic technology. Being one of its kinds globally, only a GS1 registered organization can set up and promote the said system/standard within a country. These can be used for several fields including public distribution system, agriculture, health products etc. and has been successfully used as product package labels. Usefulness and benefits of a universal coding system assessable by anyone across the globe, for the consumers, government, manufacturers, traders, exporters etc. are enormous and significant.

Not for Profit Organisation

10. Additionally clause 44 of the Memorandum of Association of the petitioner stipulates that it is “Not-for-Profit” Society and the funds/receipts are to be only used for promotion of objects of the society for which it is established including sustenance and expansion. There is no averment in the impugned order dated 17th November 2008 to the effect that the petitioner is acting contrary to or violating their Articles and Memorandum of Association.

Statutory Provisions

11. In the present case the period in question is both prior and subsequent to the amendments made applicable vide Finance Act 2008 with effect from 1.4.2009. Before deciding the contentions of the parties we would like to first reproduce Section 2(15) of the Act which defines the term ‘charitable purpose’ before and after its

amendment by Finance Act, 2008. Section 2(15) before amendment by Finance Act, 2008 was as under;

“2(15) “charitable purpose” includes relief of the poor, education, medical relief, and the advancement of any other object of general public utility.

By Finance Act, 2008 with effect from 1.4.2009 the following proviso was added;-

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”

Second proviso inserted to Section 2(15) by Finance Act, 2010 with retrospective effect from 1.4.2009, reads as under:-

Provided further that the first proviso shall not apply if the aggregate value of the receipts from the activities referred to therein is ten lacs or less in the previous year

Rupees Ten lacs mentioned in the second proviso stands enhanced to Rupees twenty five lacs by Finance Act, 2011 with effect from 1.4.2012.

Main Section 2(15) of the Act has also undergone amendments, now reads:-

“2. In this Act, unless the context otherwise requires,—

.....

(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 [twenty-five lakh rupees or less in the previous year;”

Period prior to the amendment vide Finance Act 2008 w.e.f 1.4.2009

12. With regards to the period prior to 1.4.2009 the controversy should not have been raised by the respondent with respect to the first reason (reason a) in view of the authoritative pronouncement of the Supreme Court in *Additional CIT v. Surat Cloth Manufacturers Association*, (1980) 121 ITR 1(SC). In the said decision, it was held that the primary or dominant purpose of the trust or institution has to be examined to determine whether the said institution/trust was involved in carrying on any activity for profit. If the primary/dominant purpose or object of the trust or institution was to

carry out object of “general public utility” and not “any activity for profit” then the same would satisfy the requirements of Section 2(15) of the Act. Money earned from business held under trust or otherwise, to feed the charity would not disentitle or negate the claim of engagement in charitable purpose defined under section 2(15) of the Act. The following quote from the said judgment is relevant;-

"The test which has, therefore, now to be applied is whether the predominant object of the activity involved in carrying out the object of general public utility is to subserve the charitable purpose or to earn profit. 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 is 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. The exclusionary clause does not require that the activity must be carried on in such a manner that it does not result in any profit. It would indeed be difficult for persons in charge of a trust or institution to so carry on the activity that the expenditure balances the income and there is no resulting profit. That would not only be difficult of practical realization but would also reflect unsound principle of management."

Period post the amendment vide Finance Act 2008 w.e.f 1.4.2009

13. A bare perusal of the main provision indicates that there are four main factors that need to be taken into consideration before classifying the activity of the assessee as “charitable” under the residuary category, i.e. “advancement of any other object of general public utility” under Section 2(15) of the Act. The four factors are (i) activity should be for advancement of general public utility (ii)

activity should not involve any activity in the nature of trade, commerce and business (iii) activity should not involve rendering any service in relation to any trade, commerce or business (iv) activities in clause (ii) and (iii) should not be for fee, cess or other consideration and if for fee, cess or consideration the aggregate value of the receipts from the activities under (ii) and (iii) should not exceed the amount specified in the second proviso. The earlier test of business feeding or application of income earned towards charity because of the statutory amendment is no longer relevant and apposite.

14. In *Institute of Chartered Accountants of India & Anr. Vs. Director General of Income Tax (Exemptions) Delhi & Ors.* [2012] 347 ITR 99 (Del.) “charitable purpose” under residuary clause of section 2(15) was discussed and explained in the following words:-

“The proviso applies only if an institution is engaged in advancement of any other object of general public utility and postulates that such an institute is not "charitable" if it is involved in carrying on 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. The second part, "any activity of rendering any service in relation to any trade, commerce or business" obviously intends to expand the scope of the proviso to include services, which are rendered in relation to any trade, commerce or business. The proviso further stipulates that the activity must be for a cess or fee or any other consideration. The last part states that the proviso will apply even if the cess or fee or any other consideration is applied for a charitable activity/purpose. The proviso has to be given full effect to. Thus, even if cess, fee or consideration is used or utilized for charitable

purposes, the proviso and the bar will apply. An institution will not be regarded as established for charitable purpose/activity under the last limb, if cess, fee or consideration is received for carrying on any activity in nature of trade, commerce or business or for any activity of rendering of any service in relation to any trade, commerce or business, even if the consideration or the money received is used in furtherance of the charitable purposes/activities. In view of the first proviso, the decisions that the application of money/profit is relevant for determining whether or not a person is carrying on charitable activity, are no longer relevant and apposite. Even if the profits earned are used for charitable purposes, but fee, cess or consideration is charged by a person for carrying on any activity in the nature of trade, commerce or business or any activity of rendering of any service in addition to any trade, commerce or business, it would be covered under the proviso and the bar/prohibition will apply.”

Scope of “Trade, Commerce or Business”

15. The key words, namely; trade, commerce and business were enumerate and elucidate in *Institute of Chartered Accountants of India & Anr. Vs. Director General of Income Tax (Exemptions) Delhi & Ors.(Supra)* as under:-

“Trade, as per the Webster's New Twentieth Century Dictionary (2nd edition), means, amongst others, "a means of earning one's living, occupation or work. In Black's Law Dictionary, "trade" means a business which a person has learnt or he carries on for procuring subsistence or profit ; occupation or employment, etc.

The meaning of "commerce" as given by the Concise Oxford Dictionary is "exchange of merchandise, specially on large scale". In ordinary parlance, trade, and commerce carry with them the idea of purchase and sale with a view to make profit. If a person buys goods with a view to sell

them for profit, it is an ordinary case of trade. If the transactions are on a large scale it is called commerce. Nobody can define the volume, which would convert a trade into commerce. For the purpose of the first proviso to section 2(15), trade is sufficient, therefore, this aspect is not required to be examined in detail.

The word "business" is the broadest term and is encompasses trade, commerce and other activities. Section 2(13) of the Income-tax Act defines the term "business" as under :

"2. Definitions.- . . (13) 'business' includes any trade, commerce or manufacture or any adventure or concern in the nature of trade, commerce or manufacture."

The word "business" is a word of large and indefinite import. Section 2(13) defines business to include any trade, commerce or manufacture or any adventure or concern in the nature of trade, commerce or manufacture. The intention of the Legislature is to make the definition extensive as the term "inclusive" has been used. The Legislature has deliberately departed from giving a definite import to the term "business" but made reference to several other general terms like "trade", "commerce", "manufacture" and "adventure or concern in the nature of trade, commerce and manufacture".

In Black's Law Dictionary, Sixth Edition, the word "business" has been defined as under :

"Employment, occupation, profession or commercial activity engaged in for gain or livelihood. Activity or enterprise for gain, benefit, advantage or livelihood. Union League Club v. Johnson 18 Cal 2d 275. Enterprise in which person engaged shows willingness to invest time and capital on future outcome. Doggett v. Burnet 62

App DC 103 ; 65 F. 2D 191. That which habitually busies or occupies or engages the time, attention, labour and effort of persons as a principal serious concern or interest or for livelihood or profit."

According to Sampath Iyengar's Law of Income Tax (9th edition), a business activity has four essential characteristics. Firstly, a business must be a continuous and systematic exercise of activity. Business is defined as an active occupation continuously carried on. Business vocation connotes some real, substantive and systematic course of activity or conduct with a set purpose. The second essential characteristic is profit motive or capable of producing profit. To regard an activity as business, there must be a course of dealings continued, or contemplated to be continued, normally with an object of making profit and not for sport or pleasure (*Bharat Development P. Ltd. v. CIT* [1982] 133 ITR 470 (Delhi)). The third essential characteristic is that a business transaction must be between two persons. Business is not a unilateral act. It is brought about by a transaction between two or more persons. And, lastly, the business activity usually involves a twin activity. There is usually an element of reciprocity involved in a business transaction."

In the said case reliance and reference was made to *State of Punjab v. Bajaj Electricals Ltd.* (1968) 2 SCR 536, *Khoday Distilleries Ltd. V. State of Karnataka* (1995) 1 SCC 574, *Bharat Development (P) Ltd. v. CIT* (1982) 133 ITR 470(Del), *Barendra Prasad Ray v. Income Tax Officer* (1981) 129 ITR 295 (SC), *State of Andhra Pradesh v. H. Abdul Bakhi and Bros.* (1964) 15 STC 664, *State of Gujarat Vs. Raipur Manufacturing Company* (1967) 19 STC 1(SC), *Director of Supplies and Disposal Vs. Member, Board of Revenue* (1967) 20

STC 398(SC) and *Sarojini Rajah Vs. CIT* (1969) 71 ITR 504 (Mad) to explain the terms “trade, commerce or business”.

15. Referring to the concept and principle of “economic activity” that has gained some acceptability in European Union and England it was explained that the said principle is applicable to Sales Tax, Value added tax, Excise duty etc. because these are not taxes on income but the taxable event occurs because of the “economic activity” involved. Even if a person/organization is carrying on trading/business on “no loss no profit” principle, it may be liable to pay taxes or comply with the statute when the charge, or incident of tax, is on the “economic activity”. The words trade, commerce and business are etymological chameleon and suit their meanings to the context in which they are found. Five tests propounded in *Customs and Excise Commissioner Vs. Lord Fisher* (1981) S.T.C. 238 and decision in *Commissioner Of Sales Tax Vs. Sai Publication Fund*, (2002) 4 SCC 57 was quoted.

16. The final and determining factors, it was observed was consequential profit motive or purpose behind the activity and when an activity is trade, commerce or business was elucidated in *Institute of Chartered Accountants of India & Anr. Vs. Director General of Income Tax (Exemptions) Delhi & Ors. (Supra)* in the following words:

“33. Section [2\(15\)](#) defines the term charitable purpose. Therefore, while construing the term business for the said Section, the object and purpose of the Section has to be kept in mind. We do not think that a very broad and extended definition of the term business is intended for the

purpose of interpreting and applying the first proviso to Section [2\(15\)](#) of the Act to include any transaction for a fee or money. An activity would be considered "business" if it is undertaken with a profit motive, but in some cases this may not be determinative. Normally the profit motive test should be satisfied but in a given case activity may be regarded as business even when profit motive cannot be established/proved. In such cases, there should be evidence and material to show that the activity has continued on sound and recognized business principles, and pursued with reasonable continuity. There should be facts and other circumstances which justify and show that the activity undertaken is in fact in the nature of business. The test as prescribed in *Raipur Manufacturing Company* (supra) and *Sai Publications Fund* (supra) can be applied. The six indicia stipulated in *Lord Fisher* (supra) are also relevant. Each case, therefore, has to be examined on its own facts.”

17. Recently in another decision in WP(C) No. 1755/2012 titled ***Bureau of Indian Standards vs. Director General of Income Tax (Exemptions)*** dated 27th September, 2012, it was held that Bureau of Indian Standards (BIS) was carrying on charitable activities as described within the ambit of Section 2(15) and was entitled to registration/notification under Section 10(23C)(iv). We, however, note that there is one distinction between the present petitioner and BIS. BIS is a statutory authority created by Legislation and, therefore, their case and claim stands on a better footing but this does not imply that only statutory bodies can be treated as established for charitable purpose under Section 2(15) of the Act. Such contention has not been raised and cannot be sustained/accepted.

Circular No. 11 of 2008 by the Central Board of Direct Taxes

18. It may be relevant to reproduce extract from Circular No. 11 of 2008 issued by the Central Board of Direct Taxes explaining the amendments to Section 2(15) of the Act. The relevant portion of the circular reads as under:

“Section 2(15) of the Income Tax Act, 1961 (‘Act’) defines “charitable purpose” to include the following:-

- | | |
|---------------------------|---|
| (i) Relief of the poor | (ii) Education |
| (iii) Medical relief, and | (iv) the advancement of any other object of general public utility. |

2. An entity with a charitable object of the above nature was eligible for exemption from tax under section 11 or alternatively under section 10(23C) of the Act. However, it was seen that a number of entities who were engaged in commercial activities were also claiming exemption on the ground that such activities were for the advancement of objects of general public utility in terms of the fourth limb of the definition of ‘charitable purpose’. Therefore, section 2(15) was amended vide Finance Act, 2008 by adding a proviso

.....

3. The newly inserted proviso to section 2(15) will apply only to entities whose purpose is ‘advancement of any other object of general public utility’ i.e. the fourth limb of the definition of

‘charitable purpose’ contained in section 2(15). Hence, such entities will not be eligible for exemption under section 11 or under section 10(23C) of the Act if they carry on commercial activities. Whether such an entity is carrying on an activity in the nature of trade, commerce or business

is a question of fact which will be decided based on the nature, scope, extent and frequency of the activity.

.....

3.2. In the final analysis, however, whether the assessee has for its object 'the advancement of any other object of general public utility' is a question of fact. **If such assessee is engaged in any activity in the nature of trade, commerce or business or renders any service in relation to trade, commerce or business, it would not be entitled to claim that its object is charitable purpose. 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 the rendering of any service in relation to trade, commerce or business.** Each case would, therefore, be decided on its own facts and no generalization is possible. Assessee, who claim that their object is 'charitable purpose' within the meaning of Section 2(15), would be well advised to eschew any activity which is in the nature of trade, commerce or business or the rendering of any service in relation to any trade, commerce or business."

(Emphasis Supplied)

19. It is, evident from the Circular No. 11 of 2008 that the new proviso of Section 2(15) of the Act is applicable to the assessee who are engaged in commercial activities, i.e. carrying on business, trade or commerce, in the garb of "public utility" to avoid tax liability as it was noticed that object of "general public utility" was sometimes only a mask or device to hide the true purpose which was "trade, commerce or business."

Discussion; Activities of the Petitioner and difference between business and charity

20. In the present case, “the business” is not held in trust and neither is “the business” feeding the charity. The very “act or activity of charity” as claimed by the petitioner is regarded by the revenue as nothing but business, trade or commerce. Money received, of course is used and utilized for the charitable activities. Four reasons are elucidated and propound in the impugned order to state that the petitioner is engaged in business, trade or commerce and aforesaid encapsulated in the impugned order. Petitioner has acquired intellectual property rights, receives fee from third parties, which is nothing but payment of royalty, there is huge surplus of receipts over expenditure (refer table reproduced in paragraph 7 above) and payment is made by the petitioner to GS1 Global Services, Belgium.

21. Can it be said that the petitioner is engaged in activities which constitute business, commerce or trade? As observed above, legal terms “trade, commerce, or business” in Section 2(15), means activity undertaken with a view to make or earn profit. Profit motive is determinative and a critical factor to discern whether an activity is business, trade or commerce.

22. Business activity has an important pervading element of self-interest, though fair dealing should and can be present, whilst charity or charitable activity is anti-thesis of activity undertaken with profit motive or activity undertaken on sound or recognized business principles. Charity is driven by altruism and desire to serve others, though element of self-preservation may be present. For charity, benevolence should be omnipresent and demonstrable but it is not

equivalent to self-sacrifice and abnegation. The antiquated definition of charity, which entails giving and receiving nothing in return is outdated. A mandatory feature would be; charitable activity should be devoid of selfishness or illiberal spirit. Enrichment of oneself or self-gain should be missing and the predominant purpose of the activity should be to serve and benefit others. 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. 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?

23. The petitioner charges an initial registration fee of Rs.20,000/- plus annual fee of Rs.4,000/-, enhanced to Rs.5,000/- from financial year 2006-07 onwards from third parties, who become subscribing members and are entitled to use the coding system, GS1. Revenue acknowledges that the petitioner enjoys monopoly and has exclusive rights to issue global bar coding system GS1 in India. However the petitioner is not dealing or treating the prized rights as a right, which is to be exploited commercially to earn or generate profits. A coding system of this nature if marketed on commercial lines with profit motive would amount to business but when the underlying and propelling motive is not to earn profits or commercially exploit the rights but “general public good” i.e. to promote and make GS1 coding system available to Indian traders, manufacturers, government etc, it will fail the test of business and meets the touchstone of charity. The

petitioner is not directly or indirectly subjecting their activity to market mechanism/ dynamics (i.e. demand and supply), rather it is motivated and prompted to serve the beneficiaries. This is not a case of commercial exploitation of intellectual property rights to earn profits but rather a case where a token fee has been fixed and payable by the user of the global identification system.

24. The petitioner does not cater to the lowest or marginalized section of the society, but Government, public sector and private sector manufacturers and traders. No fee is charged from users and beneficiaries like stockiest, whole sellers, government department etc. while a nominal fee is only paid by the manufacturer or marketing agencies i.e. the first person who installs the coding system which is not at all exorbitant in view of the benefit and advantage which are overwhelming. Any one from any part of the world can access the database for identification of goods and services using global standard. The fee is fixed and not product specific or quantity related i.e. dependent upon quantum of production. Registration and annual fee entitles the person concerned to use GS1 identification on all their products. Non levy of fee in such cases may have its own disadvantages and problems. Charging a nominal fee to use the coding system and to avail the advantages and benefits therein is neither reflective of business aptitude nor indicative of profit oriented intent.

25. Having applied the test mentioned above, including the criteria for determining whether the fee is commensurate and is being

charged on commercial or business principles, we find that the petitioner fulfills the charitable activity test. It is apparent to us that Revenue has taken a contradictory stand as they have submitted and accepted that the petitioner carries on charitable activity under the residuary head “general public utility” but simultaneously regards the said activity as business. Thus the contention of the Revenue that the petitioner charges fee and, therefore, is carrying on business, has to be rejected. The intention behind the entire activity is philanthropic and not to recoup or reimburse in monetary terms what is given to the beneficiaries. Element of give and take is missing, but decisive element of bequeathing is present. In the absence of “profit motive” and charity being the primary and sole purpose behind the activities of the petitioner is perspicuously discernible and perceptible.

26. Table relied on by the respondent and mentioned in paragraph 7 above tells a partial story. Only direct expenses incurred have been set off from the fee earned from registration and renewal. The activity of the petitioner involves promotion, propagation and spreading awareness and knowledge about global coding identification system GS1. The entire expenditure of the petitioner has to be taken into consideration and cannot be ignored. There are stipulations in Sections 11, 13 etc. of the Act to prevent misuse of or siphoning of funds, bar/prohibit gains to related persons, stipulations of time limits for use of funds, which are effective checks and curtail and deny benefit in cases of abuse. There is no such allegation or contention of the Revenue in the present case.

27. As observed above, fee charged and quantum of income earned can be indicative of the fact that the person is carrying on business or commerce and not charity, but we must keep in mind that charitable activities require operational/running expenses as well as capital expenses to be able to sustain and continue in long run. The petitioner has to be substantially self-sustaining in long-term and should not depend upon government, in other words taxpayers should not subsidize the said activities, which nevertheless are charitable and fall under the residuary clause “general public utility”. The impugned order does not refer to any statutory mandate that a charitable institution falling under the last clause should be wholly, substantially or in part must be funded by voluntary contributions. No such requirement has been pointed out or argued. A practical and pragmatic view is required when we examine the data, which should be analyzed objectively and a narrow and coloured view will be counter-productive and contrary to the language of Section 2(15) of the Act.

28. Petitioner has indicated that they have recently purchased office space in HUDCO Complex, Bhikaji Cama Place and they have acquired plot at Noida. They require accumulated funds for running branch offices at Chennai and Mumbai. Office at Chennai is already operational and operations at Mumbai are contemplated shortly for which proposals are under consideration. Accumulation of money/funds over a period of 2-3 years may not be relevant in determining the nature and character of activity and whether the same should be treated as indicative of profit motive i.e. desire or intention

to carry on business or commerce. In *MCD vs. Children Book Trust's (1992) 3 SCC 390* a decision relating to property tax, the Supreme Court held that both qualitative and quantitative tests should be satisfied in view of specific language of Section 115(4)(a) of Delhi Municipal Corporation Act 1957. Nevertheless it negated and rejected the argument that data for one year should be taken into consideration. It was observed that data for block period for five years may and should be taken into consideration. It was held as under:

“It cannot be gainsaid that the municipal general tax is an annual tax. Therefore, normally speaking, the liability for taxation must be determined with reference to each year. In other words, the society claiming exemption will have to show that it fulfils the conditions for exemption each year. If it shows, for example, that for its support it has to depend on, either wholly or in part, voluntary contributions, in that particular year, it may be exempt. But where in that year, for its support, it need not depend on voluntary contributions at all or again if the society produces surplus income and excludes the dependence on voluntary contributions, it may cease to be exempt. Of course, the word “support” will have to mean sustenance or maintenance. Only to get over this difficulty that the qualitative test is pressed into service. We would consider the reasonable way of giving effect to the exemption, will be to take each case and assess for a period of five years and find out whether the society or body depends on voluntary contributions. Of course, at the end of each five-year period the assessing authority could review the position.”

29. Under the provisions of the Act, a charitable institution/ organization is to utilize specific percentage of their funds/income within the assessment year in question and carry forward is allowed

subject to strict stipulations. There is no allegation or statement in the impugned order dated 17th November, 2008 that the petitioner has violated the said condition or requirements of the statute. No doubt that the petitioner has to make payment of part of fees collected to GS1 Global services, Belgium but this is natural as GS1 system is global and worldwide system. Petitioner has pointed out that during past years they have been receiving amounts from Government of India for furtherance of their objectives. A fact which is not denied and disputed. The petitioner is not only concerned with enrollment of members who are entitled to GS1 identification system but involved in promoting and spreading awareness about GS1 identification system and making it available to Indians for a small fee. Petitioner has to organize training camps, workshops and seminars all over India and as well as for Government departments/bodies and help them adopt the system. They have to publish material highlighting advantages of GS1 identification and how this can benefit the manufacturers and traders.

Maintenance of Books of Accounts

30. The statement and submission of the respondents that the petitioner was not maintaining separate books of account for commercial activity and, therefore, denied registration/ notification, has to be rejected as fallacious and devoid of any merit. Similar allegation is often made in cases of charitable organization/ association without taking into account the activity undertaken by the assessee and the primary objective and purpose i.e. the activity and

charity activity are one and the same. The charitable activity undertaken and performed by the petitioner relates to promotion, dissemination of knowledge and issue of unique identification amongst third parties etc. The 'business' activity undertaken by the petitioner is integral to the charity/charitable activities. As noted above, the petitioner is not carrying on any independent, separate or incidental activity, which can be classified as business to feed and promote charitable activities. The act or activity of the petitioner being one, thus a single set of books of account is maintained, as what is treated and regarded by the Revenue as the 'business' is nothing but intrinsically connected with acts for attainment of the objects and goals of the petitioner. We fail to understand when the petitioner is maintaining the books of accounts with regard to their receipts/income as well as the expenses incurred for their entire activity then how it can be held that separate books of accounts have not been maintained for 'business' activities. The "business" activities are intrinsically woven into and part of the charitable activity undertaken. The "business" activity is not feeding charitable activities. In any case, when we hold that the petitioner is not carrying on any business, trade or commerce, question of requirement of separate books of accounts for the business, trade or commerce is redundant.

Other aspects

31. There is another challenge to the registration, which has neither been adverted to in the impugned order nor raised by the respondent

during arguments. 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.

33. On the basis of reasoning given in the impugned order, we do not think that the petitioner can be denied benefit of registration/notification under Section 10(23C)(iv).

34. In view of the aforesaid discussion, we allow the present writ petition and issue writ of certiorari quashing the order dated 17th November, 2008 and mandamus is issued directing the respondents to grant approval under Section 10(23C)(iv) of the Act and the same shall be issued within six weeks from the date copy of this order is received. The writ petition stands disposed of. There will be no orders as to cost

(SANJIV KHANNA)
JUDGE

(SANJEEV SACHDEVA)
JUDGE

SEPTEMBER 26th, 2013
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