IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX APPEAL NO. 1429 OF 2014

Director of Income Tax (Exemption) .. Appellant

v/s.

The North Indian Association .. Respondent

Mr. Ashok Kotangle a/w Ms. Padma Divakar, Mr. Arun Nagarjun for the appellant
None for the respondent despite service

CORAM : M.S. SANKLECHA &
A.K. MENON, J.J.

DATED : 14th FEBRUARY, 2017.

P.C.

1. This Appeal under Section 260-A of the Income Tax Act, 1961 (the Act) challenges an order dated 21st February, 2014 passed by the Income Tax Appellate Tribunal (the Tribunal). The impugned order is in respect of Assessment Year 2009-10.

2. The Revenue has urged the following substantial question of law for our consideration :-

> *"Whether on the facts and in the circumstances of the case and in law, the Tribunal was justified in holding that the Registration u/s 12A of the Income Tax Act,1961, once*

granted could not be reviewed or withdrawn in the absence of stipulation to the effect in Section 12AA(3) of the Act?

3. The respondent assessee is a Trust registered under Section 12 of the Act since 27th November, 1995. The Director of Income Tax (Exemption) by an order dated 8th December, 2011 cancelled the registration of the Trust under Section 12 of the Act in exercise of powers under Section 12AA(3) of the Act. The basis of the cancellation was the introduction of provisos to Section 2(15) w.e.f. 1st April, 2009. The first proviso clarified that advancement of any other object for 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. However, the second proviso excluded the application of the first proviso, if the aggregate value of receipts from such trading / commercial / business activities is Rs.10 lakhs or less, in the previous year relevant to the assessment year. The Director of Income Tax (Exemption) by order dated 8th December, 2011 held that as the income earned on account of trade, commerce and / or business for the subject assessment year was in excess of the limits of Rs.10 lakhs, specified in the second proviso to Section 2(15) of the Act, the respondent assessee ceases to be a Trust for charitable purposes. Consequently, the Trust is not a genuine Trust. This resulting in the

cancellation of the registration by order dated 8th December, 2011.

4. Being aggrieved, the respondent assessee carried the issue in appeal to the Tribunal. The Tribunal by the impugned order allowed the appeal of the respondent assessee by holding that Section 12AA(3) of the Act does not empower the Director of Income Tax (Exemption) to cancel registration of a Trust registered prior to 1st June, 2010. This by following a decision of its co-ordinate bench at Lucknow in ***Kapoor Education Society (15 Taxmann.com 40)***. The impugned order does not give any finding on the issue of the Trust not being a genuine Trust.

5. The basis of the impugned order *prima facie* appears to be contrary to the decision of this Court in ***Sinhagad Technical Education Society Vs. Commissioner of Income Tax 343 ITR 23***. In the above case, this Court negatived the Constitutional challenge to the amendment made in Section 12AA(3) of the Act w.e.f. 1st June, 2010 by Finance Act, 2010. Thus, refusing to quash and / or stay the notice issued after 1st June, 2010 for cancelling a registration of a Trust, registered prior to 2010. However, admitting this appeal may be an academic exercise, as even if the registration of a Trust registered prior to 2010, can be cancelled / revoked post 2010, yet the jurisdiction to

issue a notice under Section 12AA(3) of the Act would only arise if one of the two conditions for its exercise is satisfied i.e. either the Trust should not be genuine or the activities of the Trust are not carried out in accordance with its objects. In fact, we have so held in ***Commissioner of Income Tax Vs. Institute Management Committee of Industrial Training Institute–Kolhapur (ITA No.1334 of 2014)*** decided on 17th January, 2017. In this case, it appeared to us that neither of the two conditions were satisfied for exercising jurisdiction to cancel the registration.

6. In response, Mr. Kotangle, learned Counsel appearing for the appellant Revenue points out that in the facts of this case, the decision of this Court in Institute Management Committee of Industrial Training Institute (supra) will not apply. This for the reason that exercise of jurisdiction under Section 12AA(3) of the Act by the Director of Income Tax (Exemption) in this case was proper, as he had come to a finding that the respondent assessee was not a genuine Trust / Institution. Thus, not running for charitable purpose. In the above view, it is submitted that the Tribunal ought not to have set aside the order dated 8th December, 2011 of Director of Income Tax (Exemption).

7. We note that the Director of Income Tax (Exemption) in his order dated 8th December, 2011 cancelling the registration of the Trust records as under :-

> *"As discussed above, the receipts as shown by the assessee in its Income & Expenditure account from club at Rs.22,83,551/- and from premises contractors and services at Rs.48,48,023/-, makes it amply clear that the assessee is doing regular activities which are in the nature of business in a systematic manner and also by exploiting its assets commercially and as such I am of the considered view that after discussing the issue as discussed above, the assessee trust is directly hit by the proviso to Section 2(15) which has been introduced from A.Y. 2009-10. Once a charitable Trust / Institution hit by aforesaid proviso, then there is deeming provision that such entity shall not be for a charitable purpose. Hence, once the assessee Trust / Institution looses its charitable character then obviously there is change in the status of such assessee and it is no longer can be hold to be for charitable purpose. Once it is held that the assessee is not for charitable purpose then the trust itself becomes non genuine for the purpose of Section 11 of the I.T. Act, as it looses its public charitable status and accordingly the provision of Section 12AA(3) of the Act gets attracted. Thus, in view of the facts and circumstances as discussed above, I therefore, accordingly hold that the assessee trust has become non genuine and the registration as allowed to it in earlier years u/s 12AA is hereby cancelled / withdrawn w.e.f. A.Y. 2009-10 and the assessee trust is accordingly held as non charitable Trust / Institution."*

Thus, holding the respondent assessee Trust is not genuine in view of the fact that during the subject assessment year, the income earned on account of the trade, commerce or business etc. was in excess of the limits of Rs.10 lakhs, provided in the second proviso to Section 2(15) of the Act. In the above view, the Director of Income Tax

(Exemption) holds that the Trust ceases to be a genuine Trust.

8. We must not lose sight of the fact that there is a difference between Registration and Exemption. This understanding of ours is fortified by virtue of Section 13(8) of the Act. In fact, Section 13(8) of the Act was introduced into the Act w.e.f. 1st April, 2009 by the Finance Act, 2012. It provides that where the receipts are hit by the proviso to Section 2(15) of the Act, the benefit of exemption to its income for the previous year relevant to the subject assessment year will not be available. Thus, income is brought to tax to secure the Revenue's interest but it does not necessarily result in automatic cancellation of Registration. Therefore, the mere fact that in one particular year, the respondent assessee may have income receipts in excess of Rs.10 lakhs or such other limit as provided in the proviso to Section 2(15) of the Act, that by itself would not warrant cancellation of the registration under Section 12AA(3) of the Act. A similar issue had arisen before us in ***Director of Income Tax (Exemption) Vs. Khar Gymkhana, 382 ITR 62*** where we had rejected the Revenue's appeal. In the above decision, we relied upon the CBDT Circular No.21 of 2016 dated 27th May, 2016 to conclude that the amendment to the definition of 'charitable purpose" by addition of the proviso w.e.f. 12th April, 2009 would not

ipso facto give jurisdiction to the Commissioner of Income Tax to cancel the registration. The Circular No.21 of 2016 in terms directed the Authorities not to cancel the registration of the Charitable Institution only because the proviso to Section 2(15) of the Act comes into play as the receipts are in excess of the specified limits therein. It also refers to Section 13(8) of the Act to support the view of the non cancellation. In fact, we may usefully reproduce the relevant extract of Circular No.21 of 2016 dated 27th May, 2016, which reads as under :-

> *"(3) Temporary excess of receipts beyond the specified cut off in one year may not necessarily be the outcome of alteration in the very nature of the activities of the trust or institution requiring cancellation of registration already granted to the trust or institution. Hence, section 13 of the Act has been amended vide Finance Act, 2012 by inserting a new sub-section (8) therein to provide that such organization would not get benefit of tax exemption in the particular year in which its receipts from commercial activities exceed the threshold whether or not the registration granted is cancelled. This amendment has taken effect retrospectively from April 1, 2009 and accordingly, applies in relation to the assessment year 2009-10 onwards.*
>
> (4) *In view of the aforesaid position, it is clarified that it shall not be mandatory to cancel the registration already granted under section 12AA of a charitable institution merely on the ground that the cut off specified in the provision to section 2(15) of the Act is exercised in a particular year without there being any change in the nature of activities of the institution. If in any particular year, the specified cut off is exceeded, the tax exemption would be denied to the institution in that year and cancellation of registration would not be mandatory unless such cancellation becomes necessary on the ground(s) prescribed under the Act.*

> (5) *With the introduction of Chapter XII-EB in the Act vide Finance Act, 2016, prescribing special provisions relating to tax on accreted income of certain trusts and institutions, cancellation of registration granted under section 12AA may lead to a charitable institution getting hit by sub-section (3) of section 115TD and becoming liable to tax on accreted income. The cancellation of registration without justifiable reasons may, therefore, cause additional hardship on an assessee institution due to attraction of tax liability on accreted income. The field authorities are, therefore, advised not to cancel the registration of a charitable institution granted under section 12AA just because the proviso to section 2(15) comes into play. The process for cancellation of registration is to be initiated strictly in accordance with section 12AA(3) and 12AA(4) after carefully examining the applicability of these provisions." (emphasis supplied)."*

9. However, the issue of the trust not being genuine cannot be concluded by merely giving a finding in one year that income earned from activities of trade, business or commerce are in excess of the limit specified in the proviso to Section 2(15) of the Act. This is so held by us in Khar Gymkhana (supra). However, if this happens on continuous / regular basis, it could justify further probe / inquiry before concluding that the trust is not genuine.

10. In fact, the Karnataka High Court in ***Director of Income Tax (Exemption) & Anr. Vs. Karnataka Badminton Association, 378 ITR 700*** had on similar facts, viz. cancellation of registration under Section 12AA(3) of the Act in view of amendment to Section 2(15) of the Act,

had not accepted an identical submission on behalf of the Revenue. In appeal, the High Court while upholding the view of the Tribunal that registration cannot be cancelled, observed as under :-

> *"The fact that the receipts from commercial activities are more compared to the overall receipts of the charitable activities can neither lead to the conclusion that the activities of the trust or Institution are not genuine nor can it be said that the activities of the Trust or Institution are not being carried in accordance with objects of the Trust or Institution and, therefore, the two conditions stipulated under the provisions of sub-section (3) of Section 12AA of the Act which empowers the authority to cancel the registration, do not exist in the present case."*

Further we note that the Madras High Court in ***Tamil Nadu Cricket Association Vs. Director of Income Tax (Exemption) 360 ITR 633*** has also taken a similar view.

11. Mr. Kotangle, learned Counsel for the Revenue is not able to show any reason as to why decision taken by this Court in Khar Gymkhana (supra) and Institute Management Committee of Industrial Training Institute (supra) should not be followed. Nor has the Revenue pointed out any reason to take a different view from that taken by the Karnataka High Court in Karnataka Badminton Association (supra) and of the Madras High Court in Tamil Nadu Cricket Association (supra). Therefore, question as formulated in the present facts, being academic,

does not give rise to any substantial question of law.

12. Accordingly, the appeal is dismissed. No order as to costs.

(A.K. MENON, J.) **(M.S. SANKLECHA, J.)**