

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 26-04-2021

CORAM

THE HONOURABLE MR.JUSTICE S.M.SUBRAMANIAM

WP NO.7110 OF 2008

AND

MP NO.1 OF 2008

AND

MP NO.1 OF 2012

Vellore Institute of Technology,
Represented by Chairman and
Managing Trustee, Mr.G.Viswanathan,
No.54, Thennamaram Street,
Kosapet, Vellore-632 001.

.. Petitioner

.vs.

Commissioner of Income Tax (Central-I),
New Building (III Floor),
No.46, Nungambakkam High Road,
Chennai-600 034.

.. Respondent

Prayer:

Writ Petition is filed under Article 226 of the Constitution of India, praying for the issuance of a Writ of Certiorarified Mandamus, calling for the records of the case and quash the impugned order No.PAN: AAATN 0569 M dated 13.03.2008 passed by the respondent herein and to forbear the respondent from cancelling the registration of the petitioner Trust under Section 12AA(3) of the Income Tax Act, 1961.

For Petitioner : Mr.R.V.Easwar, Senior Counsel
assisted by Ms.Rubal Bansal and
Mr.Suhrith Parthasarathy.

For Respondent : Mr.A.P.Srinivas,
Senior Standing Counsel for
Income Tax.

O R D E R

The proceedings dated 13.03.2008, cancelling the registration made under Section 12AA(3) of the Income Tax Act is under challenge in the present writ petition.

2. The reasons furnished for cancellation of registration is sought to be assailed on the ground that Section 12AA(3) of the Income Tax Act, 1961 (hereinafter referred to as the 'Act', in short), was amended by Finance Act 2010 with effect from 01.06.2010 inserting a clause.

3. In view of the fact that the amendment came into force with effect from 01.06.2010, the same cannot be invoked for the purpose of cancellation of registration made prior to 01.06.2010 retrospectively, which is impermissible.

4. The learned Senior Counsel, appearing on behalf of the writ petitioner, mainly contended that the writ on hand rest on the jurisdiction with reference to the amended Finance Act of the year 2010, which was given effect to from 01.06.2010. The learned Senior Counsel solicited the attention of this Court with reference to Section 12A of the Act regarding conditions for applicability of Sections 11 and 12 of the Act.

5. The writ petitioner-Institution was registered on 09.07.1984 under Section 12A(a) of the Act, vide C.No.2039(18)/84. Accordingly, the petitioner-Institution was extended certain benefits as permissible under the provisions of the Act. While-so, Section 12AA of the Act deals with "procedure for registration". Sub clause (3) contemplates the "procedure to be followed for cancellation of registration under Section 12A of the Act".

6. Learned Senior Counsel for the petitioner distinguished Section 12AA(3) of the Act by stating that a specific clause has been inserted through Finance Act 2010, which came into force with effect from 01.06.2010.

7. As far as the case of the petitioner is concerned, the registration was granted on 09.07.1984 and accordingly the benefit of exemptions were granted. The impugned order of cancellation was issued on 13.03.2008 and the amendment in Finance Act 2010 came into force with effect from 01.06.2010. The insertion made in Finance Act 2010 is that "or has obtained registration and at any time under Section 12A [as it stood before its amendment by the Finance (No.2) Act, 1996 (33 of 1996)]".

8. In view of the fact that the insertion conferring power on the Commissioner to cancel the registration was granted with reference to the registration done under Section 12-A of the Act with effect from 01.06.2010 vide the Finance Act, 2010, the order impugned passed during the year 2008, cancelling the registration done under Section 12A of the Act is untenable and without jurisdiction. In other words, on the date of passing of the impugned order, the respondent is not vested with any power or jurisdiction to cancel the registration made under Section 12A of the Act, granting exemption to the writ petitioner-Institution.

9. In this regard, the learned Senior Counsel for the petitioner, in nutshell, contended the facts by stating that Section 12A of the Act, provides for compulsory registration of a Charitable Trust under the Act as a condition for enjoying exemption from taxation under Sections 11 and 12 of the Act with effect from 01.04.1973.

10. The writ petitioner-Vellore Institution of Technology was created as a Charitable Trust by a registered document No.94/84 in the Office of SRO, Vellore on 08.05.1984. On 09.07.1984, the petitioner-Institution obtained registration under Section 12A(a) of the Act vide C.No.2039(18)/84. Section

11. Section 12AA was inserted by Finance (No.2) Act, 1996 with effect from 01.04.1997 to provide for a "procedure for registration" of Charitable Trusts under the Act. The said Section 12AA provides for the procedure for registration of a Trust or an Institution where an application for registration is made under Section 12A(1)(a) or 12A(1)(aa) or 12A(1)(ab) of the Act.

12. On 01.10.2004, sub-section (3) was inserted into Section 12AA by Finance (No.2) Act, 2004 to provide for power to cancel registration granted to a Charitable Trust under Section 12AA(1)(b), on two grounds viz., (a) activities of the Trust are not genuine; or (b) activities of the Trust are not being carried out in accordance with the objects of the Trust.

13. On 08.01.2008, first show cause notice was issued to the petitioner-Institution under Section 12AA(3) of the Act, to show cause as to why registration under Section 12A should not be cancelled by invoking Section 12AA(3) of the Act.

14. The writ petitioner-Institution submitted their reply on 29.01.2008, inter alia, stating that Section 12AA(3) can be invoked only where Trust has been granted registration after 01.04.1997 under Section 12AA(1)(b) of the Act, and cannot be invoked where the Trust was granted registration under Section

12A prior to 01.04.1997. Thereafter, the respondent sent a second show cause notice on 06.02.2008 to the writ petitioner under Section 12AA(3) of the Act.

15. The petitioner-Institution again submitted their reply on 25.02.2008. The third show cause notice was issued to the writ petitioner on 03.03.2008 under Section 12AA(3) of the Act. For the said show cause notice also the petitioner submitted their reply on 06.03.2008. Thereafter, on 13.03.2008, the impugned order of cancellation of registration was issued by the respondent under Section 12AA(3) of the Act, by overruling the objections raised with reference to the power/jurisdiction to cancel the registration granted to the writ petitioner with effect from 09.07.1984, which is prior to 01.04.1997.

16. The learned Senior Counsel, appearing on behalf of the petitioner, contended that sub-section (3) to Section 12AA was inserted with effect from 01.10.2004 conferring power to the Principal Commissioner or to the Commissioner for the first time to cancel registration granted to any Trust or Institution under Section 12AA(1)(b) of the Act. However, there was no provision to cancel the registration made under Section 12A of the Act in the Finance Act 2004, which came into force from 01.10.2004. Subsequently, sub-section (3) to Section 12AA was amended and insertion was made, which came into force with effect from 01.06.2010 with new words "or has obtained registration at any time under Section 12A [as it stood before its amendment by the Finance (No.2) Act, 1996 (33 of 1996)]", was inserted in Finance Act 2010, which came into force with effect from 01.06.2010.

17. Circular No.1 of 2011 dated 06.04.2011, issued by the Central Board of Direct Taxes (hereinafter referred to as "CBDT", in short), which contains 'Explanatory Notes to the provisions of the Finance Act, 2010, wherein paragraph-7 reveals that the amendment made by the Finance Act 2010 and paragraph 7.4 states that the amendment came into effect from 01.06.2010 and is applicable for the assessment year 2011-2012 and subsequent assessment years. The said proposition was considered by the Hon'ble Supreme Court in the case of K.P. Varghese vs. Income Tax Officer [(1981) 131 ITR 597], wherein in paragraph-11, it has been held as under:-

"11. There is also one other circumstance which strongly reinforces the view we are taking in regard to the construction of sub-section (2). Soon after the introduction of sub-section (2), the Central Board of Direct Taxes, in exercise of the power conferred under Section 119 of the Act, issued a circular dated July 7, 1964

explaining the scope and object of sub-section (2) in the following words:

"Section 13 of the Finance Act has introduced a new sub-section (2) in Section 52 of the Income Tax Act with a view to countering evasion of tax on capital gains through the device of an understatement of the full value of the consideration received or receivable on the transfer of a capital asset.

The provision existing in Section 52 of the Income Tax Act before the amendment [which has now been re-numbered as sub-section (2)] enables the computation of capital gains arising on transfer of a capital asset with reference to its fair market value as on the date of its transfer, ignoring the amount of the consideration shown by the assessee, only if the following two conditions are satisfied:

(a) the transferee is a person who is directly or indirectly connected with assessee, and

(b) the Income Tax Officer has reason to believe that the transfer was effected with object of avoidance or reduction of the liability of assessee to tax on capital gains.

In view of these conditions, this provision has a limited operation and does not apply to other cases where the tax liability on capital gains arising on transfer of capital assets between parties not connected with each other, is sought to be avoided or reduced by an understatement of the consideration paid for the transfer of the asset."

The circular also drew the attention of the Income Tax authorities to the assurance given by the Finance Minister in his speech that sub-section (2) was not aimed at perfectly honest and bona fide transactions

where the consideration in respect of the transfer was correctly disclosed or declared by the assessee, but was intended to deal only with cases where the consideration for the transfer was understated by the assessee and was shown at a lesser figure than that actually received by him. It appears that despite this circular, the Income Tax authorities in several cases levied tax by invoking the provision in sub-section (2) even in cases where the transaction was perfectly, honest and bona fide and there was no understatement of the consideration. This was quite contrary to the instructions issued in the Circular which was binding on the Tax Department and the Central Board of Direct Taxes was, therefore, constrained to issue another circular on January 14, 1974 whereby the Central Board, after reiterating the assurance given by the Finance Minister in the course of his speech, pointed out:

"It has come to the notice of the Board that in some cases the Income Tax Officers have invoked the provisions of Section 52(2) even when the transactions were bona fide. In this context reference is invited to the decision of the Supreme Court in *Navnitlal C. Javeri v. K.K. Sen* [AIR 1965 SC 1375 : (1965) 1 SCR 909 : 56 ITR 198] and *Ellerman Lines Ltd. v. C.I.T.* [(1972) 4 SCC 474 : 1974 SCC (Tax) 304 : 82 ITR 913], wherein it was held that the Circular issued by the Board would be binding on all officers and persons employed in the execution of the Income Tax Act. Thus, the Income Tax Officers are bound to follow the instructions issued by the Board."

and instructed the Income Tax Officers that

"while completing the assessments they should keep in mind the assurance given by the Minister of Finance and the provisions of Section 52(2) of the Income Tax Act may not be invoked in cases of bona fide transactions".

These two circulars of the Central Board of Direct Taxes are, as we shall presently point out, binding on the Tax Department in administering or executing the provision enacted in sub-section (2), but quite apart from their binding character, they are clearly in the nature of contemporanea expositio furnishing legitimate aid in the construction of sub-section (2). The rule of construction by reference to contemporanea expositio is a well-established rule for interpreting a statute by reference to the exposition it has received from contemporary authority, though it must give way where the language of the statute is plain and unambiguous. This rule has been succinctly and felicitously expressed in Crawford on Statutory Construction, (1940 Edn.) where it is stated in para 219 that

"administrative construction (i.e. contemporaneous construction placed by administrative or executive officers charged with executing a statute) generally should be clearly wrong before it is overturned; such a construction, commonly referred to as practical construction, although non-controlling, is nevertheless entitled to considerable weight; it is highly persuasive".

The validity of this rule was also recognised in *Baleshwar Bagarti v. Bhagirathi Dass* [ILR 35 Cal. 701] where Mookerjee, J., stated the rule in these terms:

"It is a well-settled principle of interpretation that courts in construing a statute will give much weight to the interpretation put upon it, at the time of its enactment and since, by those whose duty it has been to construe, execute and apply it."

and this statement of the rule was quoted with approval by this Court in *Deshbandhu Gupta & Co. vs. Delhi Stock Exchange Association Ltd.* [(1979) 4 SCC 565] It is clear from these two circulars that the Central Board of Direct Taxes, which is the highest authority entrusted with the

execution of the provisions of the Act, understood sub-section (2) as limited to cases where the consideration for the transfer has been understated by the assessee and this must be regarded as a strong circumstance supporting the construction which we are placing on that sub-section."

18. The learned Senior Counsel for the petitioner relied on the judgment of the Hon'ble Supreme Court of India in the case of Director of Income Tax (Exemptions) vs. Mool Chand Khairati Ram Trust [(2011) 339 ITR 622]. The learned Senior Counsel is of the opinion that the said case also deals with the registration granted under Section 12A of the Act. In the said case, the registration granted on 04.12.1974 under Section 12A was cancelled by order dated 23.03.2008, which was prior to conferment of cancellation of registration by Finance Act 2010 with effect from 01.06.2010. Thus, the very same point was decided by the High Court of Delhi also.

19. The facts as stated by the petitioner are not seriously disputed with reference to the registration done by the petitioner under Section 12A(a) of the Act on 09.07.1984. The power of cancellation under the Income Tax Act, 1961 is the only point which is disputed between the parties to the lis on hand. Thus, it is suffice to consider the provisions as it is with reference to the powers conferred to the Commissioner under the Act for cancellation of registration made under Section 12A of the Act.

20. The learned Senior Standing Counsel, appearing on behalf of the respondent, disputed the contentions raised on behalf of the petitioner, by stating that de hors the amendment made in Finance Act 2010, which came into force with effect from 01.06.2010, the Commissioner of Income Tax is vested with the power for cancellation. Admittedly, sub-clause (3) to Section 12A of the Act was inserted by Finance (No.2) Act 2004 with effect from 01.10.2004. The provision existed at that point of time confers power on the Commissioner to cancel the registration made under Section 12A of the Act and in the present case, the impugned cancellation order was issued by the Commissioner on 13.03.2008 well after the amendment made in Finance (No.2) Act 2004 with effect from 01.10.2004. Thus, the order passed by the Competent Authority is having jurisdiction and there is no infirmity as such.

21. The learned Senior Standing Counsel, appearing on behalf of the respondent, reiterated by stating that the insertion by the Finance Act 2010 with effect from 01.10.2010 inserting new words "or has obtained registration and at any time under

Section 12A [as it stood before its amendment by the Finance (No.2) Act, 1996 (33 of 1996)]" is only a clarificatory amendment and cannot be construed as an amendment made conferring power on the Commissioner for the first time. The Commissioner was vested with the power to cancel the registration granted under Section 12A of the Act in Finance Act 2004, which came into force from 01.10.2004. Thus, it is clarificatory amendment and therefore, such clarificatory amendment issued would not take away the power originally conferred on the Commissioner to cancel the registration under Finance (No.2) Act 2004 with effect from 01.10.2004. Thus, the Commissioner gets power to cancel the registration on the ground stipulated under the provisions with effect from 01.10.2004 and the 2010 insertion is clarificatory in nature. Thus, the clarificatory amendment would not take away the powers already conferred on the Commissioner to cancel the registration through Finance (No.2) Act 2004 with effect from 01.10.2004.

22. This Court is of the considered opinion that sub-clause (3) if read before Finance Act 2010 and after Finance Act 2010 would throw light with reference to the powers conferred on the Commissioner. In order to get clarity, this Court is inclined to extract sub-clause (3) to Section 12A of the Act, prevailing prior to Finance Act 2010, which reads as follows:-

"Where a Trust or an Institution has been granted registration under clause (b) of sub-section (1) and subsequently the Principal Commissioner or Commissioner is satisfied that the activities of such Trust or Institution are not genuine or are not being carried out in accordance with the objects of the Trust or Institution, as the case may be, he shall pass an order in writing cancelling the registration of such Trust or Institution.

Provided that no order under this sub-section shall be passed unless such Trust or Institution has been given a reasonable opportunity of being heard."

23. The amended Section 12AA(3) of the Act after Finance Act 2010 with effect from 01.06.2010 reads as follows:-

"(3) Where a Trust or an Institution has been granted registration under clause (b) of sub-section (1) or has obtained registration at any time under Section 12A [as it stood before its amendment by the Finance (No.2) Act, 1996 (33 of 1996)] and subsequently the

Principal Commissioner or Commissioner is satisfied that the activities of such Trust or Institution are not genuine or are not being carried out in accordance with the objects of the Trust or Institution, as the case may be, he shall pass an order in writing cancelling the registration of such Trust or Institution.

Provided that no order under this sub-section shall be passed unless such Trust or Institution has been given a reasonable opportunity of being heard."

24. Let us now consider the provisions existing prior to 01.06.2010, which reveals that registration granted under clause (b) of sub-section (1). Thus, the same indicates with reference to the registration granted under clause (b) of sub-section (1) to Section 12AA of the Act. The said sub-clause (b) of section (1) denotes that "after satisfying himself with the objects of the Trust or Institution and the genuineness of its activities as required under sub-clause (b) to sub-section (1) of Section 12AA of the Act comply with the requirements under sub-clause (1) shall pass order in writing registration of Trust or Institution (2) shall if he is not so satisfied shall pass order with reference to Registration of Trust or Institution and a copy of the order shall be sent to the applicant".

25. Cogent reading of Section 12A along with clause (b) of sub-section (1) to Section 12AA would reveal that Section 12A deals with conditions for applicability of Sections 11 and 12 and sub-clause (b) of sub-section (1) to Section 12AA "procedure for registration". Thus, Section 12AA sub-clause (b) first portion denotes procedures under which the registration is made and the same shall include the conditions for applicability of Sections 11 and 12 with reference to the registration made under Section 12A of the Act. In other words, Sections 11 and 12, 12A and 12AA are to be read cogently and each Section cannot be dissected for the purpose of diluting the purpose and object of the amendments providing power of cancellation to the Commissioner with effect from 01.10.2004. Accordingly, in respect of the registration granted and after such registration if the Principal Commissioner or Commissioner is satisfied that the activities of the Trust or Institution are not genuine or are not being carried out in accordance with the objects of the Trust, as the case may be, he shall pass an order in cancelling the registration of such Trust or Institution. The provisions are unambiguous even prior to the Finance Act 2010 introduced with effect from 01.06.2010.

26. Even before the said insertion, the Commissioner was empowered to cancel the registration on such circumstances as narrated in the provision. The question arises whether there is any other provision for registration. The answer is no.

27. In the absence of any other provision for registration which is traceable under the provisions of the Income Tax Act, 1961, it is to be construed that the registration made under Section 12A of the Act alone is referred in the provisions under Section 12AA (3) of the Act, even prior to the insertion of Finance Act 2010 with effect from 01.06.2010. Thus, it is made clear that even prior to the Finance Act, 2010, the Principal Commissioner or Commissioner is empowered to exercise the power of cancellation by invoking sub-clause (3) to Section 12AA of the Act and the insertion made in Finance Act 2010 is only to clarify the provisions under which the registration is made i.e. under Section 12A and the said insertion would not affect the power of the Commissioner already existing. The insertion would have been made, since several Trusts or Institutions raised the ground of jurisdiction and the Legislators thought fit to clarify the same and accordingly, the provision was further clarified by way of insertion by the Finance Act, 2010 stating that the registration obtained at any time under Section 12A is also amenable to Section 12AA(3) of the Act. Thus, it is unambiguous that the insertion in Finance Act 2010 is only clarificatory in respect of the powers already existing under sub-clause (3) to Section 12AA of the Act.

28. In view of the fact that all registrations are done under Section 12A of the Act, sub-clause (3) to Section 12AA existing prior to 01.06.2010 conferred powers on the Commissioner as the subsequent portion of the pre-amended sub-clause (3) itself clarifies that the Principal Commissioner or Commissioner is empowered to cancel the registration if they are satisfied that the activities of such Trusts or Institutions are not genuine or are not being carried out in accordance with the objects of the Trust or Institution, as the case may be.

29. Section 11 of the Act enumerates "income from property held for charitable or religious purposes". Section 12 deals with "income of Trusts or Institutions from contributions". Section 12A provides "conditions for applicability of Sections 11 and 12".

30. Section 12A contemplates conditions for applicability of Sections 11 and 12.

31. It is pertinent to note that the last insertion made to sub-clause (a) of sub-section (1) to Section 12A is substituted by the Finance (No.2) Act 1996 with effect from 01.04.1997). The

said insertion "whichever is later" and such Trust or Institution registered under Section 12AA also denotes that Section 12A is to be read cogently along with Section 12AA of the Act.

32. These provisions cannot be read in isolation as all the registrations are done under Section 12A of the Act. The said provision contemplates the conditions for applicability of Sections 11 and 12 regarding exemptions. Thus, the provisions are unambiguous with regard to the powers conferred on the Principal Commissioner or Commissioner to cancel the registration of such Trust or Institution, as the case may be, by invoking sub-clause (3) to Section 12AA of the Act.

33. Constructive interpretation of the above provisions dealt with in the aforementioned paragraphs would clarify that the judgments cited by the petitioner as well as the respondents, which all are closely relatable to those facts and circumstances of those cases need not be applied with reference to the case on hand. The cases cited reveal that few are in favour of the petitioner and others are in favour of the respondents. Thus, the facts and circumstances dealt with in those cases cannot be related to the facts and circumstances of the present case and thus, this Court has independently considered the facts and circumstances with reference to the provisions of the Income Tax Act.

34. The provisions of law, effect and implications of amendments are to be dealt independently with reference to the facts and circumstances of each case. Thus, the judgments relied upon by the parties in the present writ petition need not be applied with reference to the facts and circumstances of the present case.

35. In view of the elaborate discussions made with reference to the scope of Sections 11, 12, 12A and 12AA of sub-clause (3) in the aforementioned paragraphs, the Principal Commissioner or Commissioner was vested with the power even prior to 01.06.2010 to cancel the registraion made under Section 12A of the Act, if the Commissioner is satisfied that the activities of such Trust or Institution are not genuine or are not being carried out in accordance with the objects of the Trust or Institution, as the case may be, and he shall pass an order in writing cancelling the registration of such Trust or Institution.

36. In the present case, the Commissioner of Income Tax in impugned proceedings dated 13.03.2008 considered the merits and demerits of the case and assigned reason for cancellation of registration, which reads as under:-

"3. Coming to the merits, search and seizure operations on 06.06.2007 at your premises, inter alia, have brought to light the following violations:

a) Capitation Fee was collected by the assessee Trust.

b) The funds of the Trust at least to the tune of Rs.22 crores have been misused by the Trustees.

c) The provisions of Tamil Nadu Educational Institutions [Prohibition of Capitation Fee] Act, 1992 have been grossly violated.

d) The provisions of Section 11(2) of the I.T. Act, 1961, have not been adhered to."

37. The reasons assigned for the purpose of cancellation are undoubtedly in consonance with the powers conferred on the Commissioner under sub-clause (3) to Section 12AA of the Act and therefore, the order of cancellation can at any stretch of time be stated as infirm or perverse.

38. Accordingly, the writ petition fails and it stands dismissed. However, there shall be no order as to costs. Consequently, connected miscellaneous petitions are also dismissed.

Sd/-

Assistant Registrar(CS IV)

//True Copy//

Sub Assistant Registrar

Svn

To

Commissioner of Income Tax (Central-I),
New Building (III Floor),
No.46, Nungambakkam High Road, Chennai-600 034.

+1cc to Mr.A.P.Srinivas, Senior Standing Counsel, S.R.No.25395

+1cc to Mr.Arunkarthik, Advocate, S.R.No.25152

WP.No.7110 of 2008

KV(CO)
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