

**IN THE INCOME TAX APPELLATE TRIBUNAL
CHANDIGARH B BENCH**

Before Shri Pramod Kumar and Shri Joginder Singh

ITA No. 74/Chd/2009

Himachal Pradesh Environment
Protection and Pollution Control Board
Him Parivesh, Phase III New Shimla

.....Appellant

Vs.

Commissioner of Income Tax
Shimla,

..... Respondent

Appellant by: Shri Ashwani Kumar, and Shri R K Kaushal

Respondent by: Shri S P Khutan

ORDER

Per Pramod Kumar:

1. By way of this appeal, the assessee appellant has called into question correctness of learned Commissioner's decision dated 26th December 2008, withdrawing registration granted under section 12 AA of the Income Tax Act, 1961. Grievance of the assessee is that the learned Commissioner erred in so withdrawing or cancelling the registration.

2. To adjudicate upon assessee's grievance, it is necessary to take note of some material facts and developments leading to this litigation before us. The assessee before us is a State Board, constituted under law, for playing a key role in the prevention, control or abatement of pollution of streams and wells in the State and other allied activities. The assessee is also engaged in dealing with matters relating to prevention of air pollution.

3. On 11th October 2007, the assessee was granted registration under section 12AA of the Income Tax Act, 1961, with effect from 5th December 1974. It is an admitted position that "in (so) granting the registration, it was noted that the Board is concerned with the prevention and control of pollution, and, therefore, could be said to be engaged in the advanced of an object of general public utility", and that "having regard to the functions of the Board, as laid down in section 17 of the Water (Prevention and Control of Pollution) Act, 1974, and the definition of charitable objects as it then stood in section 2(15) of the Income Tax Act, the objects of the Board were considered to be charitable in nature".

4. On 27th October 2008, however, learned Commissioner served a notice on the assessee requiring him to show cause as to why, in view of the fact that the assessee was earning income form various kinds of fees and charges and in view of restricting the scope of 'an object of general public utility' by amending section 2(15), the registration granted to the assessee should not be withdrawn. It was pointed out that, with effect

from the assessment year 2009-2010 and by the virtue of amendment to Section 2(15) vide Finance Act 2008, 'advancement of any object of general public utility' cannot be treated as a charitable purpose if 'it involves the carrying out of any activity in the nature of trade, commerce or business, or any activity of rendering any service in relation to such trade, commerce or business, for a cess or fees or any other consideration, irrespective of nature of use or application of the income from such an activity'. Learned Commissioner's case was that since the assessee was "earning income over the years in the nature of licence fees, consent fees, testing charges etc" and "since the basic objective of the protection of environment pursued by the Board involves the carrying on of such activities and the earning of such income, the object pursued cannot be considered to be a charitable purpose with effect from the assessment year 2009-2010. In response to the show cause notice, and the proposition thus put to the assessee, it was, inter alia, submitted by the assessee that the assessee is neither carrying out any activity in the nature of trade, commerce or business, nor is it rendering any service in relation to such trade commerce or business. It was also submitted that the assessee is performing such regulatory functions as assigned to the assessee by legislation. It was also explained that the apart from the financial grants that the assessee receives, the assessee had also received the consent fees from industrial undertaking in consideration of grant of licence to establish and operate the undertaking, but, by no stretch of logic, this receipt could be said to be for the services rendered by the assessee. The consent fees so received, according to the assessee, were to meet the costs incurred by the assessee, including the costs incurred for supervising and monitoring the pollution emissions by the enlisted units. It was pointed out that there was no understand, express or implied, that the assessee will render any specific services to the enlisted units and, as such, the consent fees could not be said to be in consideration for any services to be rendered by the assessee. Learned Commissioner noted that the assessee had also moved an application for exemption under section 10(23C)(iv) before the Chief Commissioner of Income Tax and that the learned Chief Commissioner had rejected the same by holding that the assessee was carrying out a regulatory activity and not a charitable activity. In the light of this finding of his supervisory authority, i.e. the Chief Commissioner, learned Commissioner further required the assessee to show cause as to why the registration under section 12 AA not be withdrawn even for years priors to the assessment year 2009-10. It was submitted by the assessee that the findings of the learned Chief Commissioner, while dealing with assessee's application for exemption under section 10(23C)(iv), should not influence learned Commissioner's decision regarding registration under section 12 AA of the Act, as these are two independent provisions which should be considered on standalone basis. The assessee also made submissions on merits and submitted that the facts and circumstances of the case did not warrant or justify withdrawal of registration under section 12 AA, as the assessee was always engaged in, and continued to engage in, a charitable activity within meanings assigned to that expression under section 2(15) of the Act. It was also pointed out the powers of withdrawing registration under section 12 AA(3) could only be exercised when it is found that the activities of the assessee are not genuine or when the same are not being carried out in accordance with the objects of the institution. It was assessee's case that the objects and activities of the assessee were examined at the point of time when the assessee was granted registration and since there was no change in the situation as it prevailed at the time the registration was granted vis-à-vis the situation prevailing now, there was no cause of action for withdrawing the registration. The assessee also submitted that regulatory function being carried out by the assessee was only incidental to the main object which is prevention and control of pollution, which is certainly a an object of general public utility and, therefore, qualifies to

be termed as 'charitable activity' for the purposes of Section 2 (15). It was also pointed out that registration cannot be withdrawn with retrospective effect. The submissions made earlier were also reiterated.

5. None of these submissions, however, impressed the learned Commissioner. He proceeded to withdraw the registration under section 12 AA with effect from the date from which the same was granted. Without prejudice to the withdrawal from the date from which the registration was originally granted, the Commissioner further held that, in any event, due to amendment of definition of charitable activities under section 2(15) w.e.f. 1st April 2009, the registration is to be withdrawn with effect from 1st April 2009. The reasoning adopted by the learned Commissioner to support the above action can be summed up as follows:

I. The registration under section 12 AA was granted on the basis of the objects and functions stated by the assessee, which qualified to be treated as object of general public utility, but when on subsequent examination of its activities, the assessee has accepted that it was a regulatory agency, it is indeed a fit case for withdrawal of registration which was granted on wrong assumption of facts.

II. The functions of the assessee Board do indicate that the Board is engaged in advancement of objects of general public utility and that precisely was the reason of registration under section 12 AA having been granted. However, it is now found that the assessee is an inspecting and regulatory agency, and, therefore, it cannot be treated as engaged in a charitable activity.

III. The assessee is like a regulatory arm of the Government through which the Government seeks to execute its policies.

IV. The existence of surplus every year shows that "no efforts are made by the Board to apply the accumulated profits towards the objects of the Board".

V. There is no substance in the plea that registration cannot be withdrawn retrospectively. Since the expression used in Section 12AA(3) is 'cancelling' the registration, it would imply that the registration once cancelled would be deemed to have never been given.

VI. In view of the above, "it is held that that the HP Pollution Control Board is not carrying out the activities for which the registration under section 12AA was granted" and that "the Board has been functioning only as a regulatory authority and its actual activities carried out are essentially in the nature of monitoring and supervision of pollution control mechanism installed in various industrial units and projects". "The Board, therefore, cannot be said to be engaged in the pursuit of charitable purposes".

Accordingly, registration granted under section 12 AA (3) is cancelled.

VII. Without prejudice to the above, "the Board is actually carrying out activities in a commercial manner with a view to earn profits". "By inspecting and monitoring the pollution control systems installed at various units and projects, and by giving proper guidance and directions for modification to such systems,

the Board is actually rendering a service to the industrial units and helping them comply with the environmental norms necessary for running such units". "the facts on record prove that that the activities of the Board involve the rendering of services in relation to carrying on of a commerce or business, and the hence the case of the Board, even if considered to be engaged in advancement of a general public utility, is clearly covered by the new proviso to Section 2(15)." In any event, therefore, the assessee cannot be treated to be engaged in a charitable activity, with effect from 2009-10 onwards, and the registration is to be cancelled with effect from 2009 -10 at least.

6. Aggrieved by the stand so taken by the learned Commissioner, the assessee is in appeal before us.

7. We have heard the rival contentions, perused the material on record and duly considered factual matrix of the case as also the applicable legal position.

8. We have noted that the learned Commissioner has proceeded on the assumption that the scope and connotations of 'regulatory function' and 'charitable purposes under the Income Tax Act' are mutually exclusive. While holding that the assessee was not engaged in an activity for charitable purposes, learned Commissioner has held that since the assessee was engaged in a regulatory function, it could not be said that the assessee was engaged in an activity which could be said to be for charitable purposes.

We must, therefore, consider whether or not merely because an assessee is engaged in a regulatory activity, could it be said that the assessee is not involved in activity for charitable purposes.

9. We are unable to see any conflict in an assessee being a regulatory body and its pursuing an 'object of general public utility' which qualifies to be a charitable activity under section 2(15) of the Act. The scope of expression 'any other object of general public utility' is indeed very wide, though it would indeed exclude the object of private gain such as an undertaking for commercial profit even as the undertaking may subserve general public utility. Hon'ble Courts have taken a very broad view of the connotations of 'objects of general public utility'. In the case of CIT Vs Bar Council of Maharashtra (130 ITR 28), Hon'ble Supreme Court has held that a State Bar Council, which is clearly a regulatory body under the Advocate Act, is primarily and predominantly for the purposes of 'advancement of an object of general public utility within meanings of Section 2(15)'. It is not appropriate to proceed on the basis, as the learned Commissioner has chosen to proceed, that regulatory functions are not activities for charitable purposes, for the elementary reason that the expression 'charitable purposes', under section 2(15), includes 'any other objects of general public utility' which, as we have noted above, is an expression of wide import. In the scheme of things which operate in the contemporary society, many of these regulatory functions are entrusted to the bodies independent of the Government and the object of the bodies so entrusted with the regulatory functions are, in our humble understanding, clearly pursuing objects of general public utility. We must emphasize once again that the connotations of 'charitable purposes', in view of specific provisions of the Act, are significantly wider than connotations of this expression in common parlance.

10. Viewed in this perspective, and bearing in mind the fact that assessee is admittedly engaged in the activities for the purposes of "prevention, control or abatement of

pollution”, we are of the considered view that the objects of the assessee trust are of general public utility. We have already noted that the objections taken by the learned Commissioner that since assessee is performing regulatory functions, the assessee cannot be treated as pursuing objects of general public utility are devoid of any legally sustainable basis. In the light of these discussions, we hold that the assessee was indeed pursuing objects of general public utility.

11. The other aspect of the matter is the impact of amendment made by the Finance Act 2008, with effect from 1st April, 2009, in Section 2(15) which provides that ‘advancement of any object of general public utility’ cannot be treated as a charitable purpose if ‘it involves the carrying out of any activity in the nature of trade, commerce or business, or any activity of rendering any service in relation to such trade, commerce or business, for a cess or fees or any other consideration, irrespective of nature of use or application of the income from such an activity’. It is thus undisputed position that so far proviso to Section 2 (15) is concerned, it can be applied only to the entities whose purpose is ‘advancement of any other object of general public utility’.

12. No doubt until the assessment year 2009-2010, the assessee board was covered only by this residuary clause of definition of ‘charitable purposes’, but, as a result of the retrospective amendment introduced by the Finance Act, 2009, a new category of activity entitled to be treated as charitable activity under section 2(15) has been introduced which extends the definition of charitable purposes to “preservation of environment (including watershed, forest and wildlife) and preservation of monuments or places of artistic or historic interest”. In our considered view, the assessee is now covered by this specific category set out under section 2(15), and, therefore, residuary clause does not come into play. It is only elementary that a general provision has to give way to the specific provision, as aptly summed up in the maxim ‘*generalia specialibus non derogant*’. In the case of *South India Corp Pvt Ltd Vs Secretary, Board of Revenue* (1964 SC 205 @ 215), Hon’ble Supreme Court has observed that, “a special provision should be given effect to the extent of its scope, leaving general provisions to cover the cases where specific provisions do not apply”. A special provision thus normally excludes the operation of general provision, and the said principle will have application here as well. The assessee being covered by the specific clause set out above, and the residuary clause no longer being applicable, the proviso to Section 2(15) does not come into play at all. Therefore, it is wholly immaterial as to whether or not the assessee was rendering a service to the trade commerce or business. Given the present legal position, and on the facts of the present case, even this objection taken by the learned Commissioner is wholly irrelevant.

13. It is also important to bear in mind that the insertion of Proviso to Section 2(15) does not mean that in case an assessee is to receive any payment for anything done for trade, commerce or business, the assessee will be hit by the said proviso. It may be recalled that elaborating the scope of this amendment, Central Board of Direct Taxes, vide Circular No. 11 dated 19th December, 2008 (221 CTR Statutes 1), has observed as follows:

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

3.1 There are industry and trade associations who claim exemption from tax under section 11 or on the ground that their objects are for charitable purposes as these are covered under the 'any other object of public utility'. Under the principle of mutuality, if trading takes place between the persons who are associated together and contribute to a common fund for the financing of some venture or object, and in this respect have no dealings or relations with any outside body, then the surplus returned to such persons is not chargeable to tax. Therefore, where industry or trade association claims both to be charitable institutions as well as mutual members, these would not fall under the purview of Section 2(15) owing to the principle of mutuality. However, if such organizations have dealings with the non members, their claim for charitable institution would now be governed by the additional conditions stipulated in proviso to Section 2(15).

3.2 In the final analysis, 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 connection to trade, commerce or business, it would not be entitled to claim that its object is for charitable purposes. In such a case, the object of 'general public utility' will only be 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. Each case would, therefore, have to be decided on its own facts, and generalizations are not possible. An assessee who claims 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 rendering of any service in relation to any trade, commerce or business.

(Emphasis supplied by us)

14. As the above CBDT circular, which is binding on the Commissioner under section 119(1)(a) of the Act, aptly puts it, whether the assessee has, as its object, advancement of any other object of general public utility is essentially a question of to be decided on the facts of the assessee's own case and where object of general public activity is only a mask or device to hide the true purpose of trade, business or commerce, or rendering of any service in relation thereto, the assessee cannot be said to be engaged in a charitable activity within meanings of section 2(15) of the Act. As a corollary to this approach adopted by tax administration, in our considered view, it cannot be open to learned Commissioner to contend that where an object of general public utility is not merely a mask to hide true purpose or rendering of any service in relation thereto, and where such services are being rendered as purely incidental to or as subservient to the main objective of 'general public utility', the carrying on of bonafide activities in furtherance of such objectives of 'general public utility' will also be hit by the proviso to Section 2(15).

15. As CBDT rightly puts it, sweeping 'generalizations are not possible' and 'each case will have to be decided on its facts'. The question then arises whether on the present set of

facts it can be said that the assessee was engaged in trade, commerce or business or in rendering of a service to trade, commerce or business. As far as assessee being engaged in trade, commerce or business is concerned, it is not even learned Commissioner's case that running a organization, set up under the statute law, for controlling, preventing and abating pollution, is pursuing trade, commerce or business. Obviously, a trade, commerce or business implies an activity with profit motive even though public good may be a secondary benefit from such an activity. That is not the case before us. The legal framework under which the assessee is set up is quite clear and unambiguous and it reflects will of the lawmakers in no uncertain terms, which is to prevent pollution.

16. The next question is whether the learned Commissioner is justified in taking a stand that the assessee "earning income over the years in the nature of licence fees, consent fees, testing charges etc" and "since the basic objective of the protection of environment pursued by the Board involves the carrying on of such activities and the earning of such income", the assessee is hit by second limb of proviso to Section 2(15) i.e. "rendering of service to trade, commerce or business". It is important to bear in mind the fact the expressions 'rendering of any service to business, trade or commerce' are used in conjunction with the words 'business, trade or commerce' and, therefore, following the principles of *noscitur o sociis*, we must interpret these two expressions in their cognate sense and as if they take colour from each other. Broom's Legal Maxims (10th Edition) observes that " it is a rule laid down by Lord Bacon that copulation verborum indicat accepationem in eodem sensu i.e. the coupling of words that they are to be understood in the same sense". A profit motive is surely the essence of trade, commerce or business, and, therefore, in a situation in which services are rendered without a profit motive, such rendering of service will not have anything is common with trade, business or commerce. The application of the principle of *noscitur o sociis*, therefore, will require that in order to invoke second limb of Explanation to Section 2(15), 'rendering of service to trade, commerce or business' must be such that it has a profit motive. As a matter of fact, learned Commissioner has taken a stand that 'the basic objective of the protection of environment pursued by the Board involves the carrying on of such activities and the earning of such income', but then we are unable to approve this stand of the Commissioner. Let us not lose sight of the fact that the assessee is regulatory body, with statutory funding of the State Government and Central Government, and its activities, under Section 17 of the Act, are as follows:

- (1) Subject to the provisions of this Act, the functions of a State Board shall be
 - (a) to plan a comprehensive programme for the prevention, control or abatement of pollution of streams and wells in the State and to secure the execution thereof;
 - (b) to advise the State Government on any matter concerning the prevention, control or abatement of water pollution;
 - (c) to collect and disseminate information relating to water pollution and the prevention, control or abatement thereof;
 - (d) to encourage, conduct and participate in investigations and research relating to problems of water pollution and prevention, control or abatement of water pollution;

(e) to collaborate with the Central Board in organising the training of persons engaged or to be engaged in programmes relating to prevention, control or abatement of water pollution and to organise mass education programmes relating thereto;

(f) to inspect sewage or trade effluence, works and plants for the treatment of sewage and trade effluents and to review plans, specifications or other data relating to plants set up for the treatment of water, works for the purification thereof and the system for the disposal of sewage or trade effluents or in connection with the grant of any consent as required by this Act;

(g) to lay down, modify or annual effluent standards for the sewage and trade effluents and for the quality of receiving waters (not being water, in an inter-State stream) resulting from the discharge of effluents and to classify waters of the State;

(h) to evolve economical and reliable methods of treatment of sewage and trade effluents, having regard to the peculiar conditions of solids, climate and water resources of different regions and more especially the prevailing flow characteristics of water in streams and wells which render it impossible to attain even the minimum degree of dilution;

(i) to evolve methods of utilisation of sewage and suitable trade effluents in agriculture;

(j) to evolve efficient methods of disposal of sewage and trade effluents on land, as are necessary on account of the predominant conditions of scant stream flows that do not provide for major part of the year the minimum degree of dilution;

(k) to lay down standards of treatment of sewage and trade effluents to be discharged into any particular stream taking into account the minimum fair weather dilution available in that stream and the tolerance limits of pollution permissible in the water of the stream, after the discharge of such effluents;

(l) to make, vary or revoke any order

(i) for the prevention, control or abatement of discharges of waste into streams or wells;

(ii) requiring any person concerned to construct new systems for the disposal of sewage and trade effluents or to modify, alter or extend any such existing system or to adopt such remedial measures as are necessary to prevent, control or abate water pollution;

(m) to lay down effluent standards to be complied with by persons while causing discharge of sewage or sullage or both and to lay down, modify or annual effluent standards for the sewage and trade effluents;

(n) to advise the State Government with respect to the location of any industry the carrying on of which is likely to pollute a stream or well;

(o) to perform such other functions as may be prescribed or as may, from time to time, be entrusted to it by the Central Board or the State Government.

(2) The Board may establish or recognise a laboratory or laboratories to enable the Boards to perform its functions under this section efficiently, including the analysis of samples of water from any stream or well or of samples of any sewage or trade effluents.

17. On a perusal of these objectives, as sanctioned by the statute, it is obvious that the activities performed by the assessee trust are regulatory functions for the public good, and any collection for fees or charges, in the course of discharging these regulatory functions, cannot be viewed as a consideration of rendering these services of pollution control measures. We are unable to see any substance in learned Commissioner's stand that the income earned by assessee as licence fees, consent fees and testing charges are receipts in consideration of rendering the services to trade, commerce or business. What is termed as consent fees is in fact fees accompanying the application for obtaining consent (i.e. permission) of the assessee Board to set up a new unit. It cannot be anybody's case that the processing of applications by itself has a commercial motive, or that fees for processing of application is a fees collected for rendering of service of pollution control which is undisputed sole object of the assessee trust. Similarly, fees for testing charges and licence fees are not the also towards rendering of any services of pollution control either. These are not the services with a profit motive but essentially only to recoup the costs of getting the samples tested or processing of licences. In any event, these activities, if these can be at all be construed as rendering of services, these are wholly subservient to the public utility objective of pollution control, and, it cannot be anyone's case that even though the State Pollution Boards like the assessee before us are set up under an Act of the Parliament, but, to use the words employed in the CBDT circular (supra) "the object of 'general public utility' will only be 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".

18. In the case of K.P. Verghese Vs Income Tax Officer (131 ITR 597), Hon'ble Supreme Court has observed that the circulars issued by the Board, issued at the when relevant legislative provision is introduced, are a good guide to the scope of the legal provisions. As we have noted earlier in this order, based on our reading of circular, that the proviso to Explanation 2(15) can only be pressed into service when pursuing objects of 'general public utility' is only a mask to cover the "true purpose" of "trade, business or commerce, or rendering of any service in relation to such trade, business or commerce". Learned Commissioner has also followed this line of reasoning by suggesting that the activities of the assessee trust involved "earning income over the years in the nature of licence fees, consent fees, testing charges etc" and "the basic objective of the protection of environment pursued by the Board involves the carrying on of such activities and the earning of such income". However, as we have held earlier it was not an object, though it may have been incidental or subservient to the objects of the assessee trust, to earn money by regulatory functions set out above. We, therefore, see no substance in the stand of the learned Commissioner.

19. In any event, as a plain reading of Section 12AA(3) would indicate that a registration granted under Section 12 AA can only be withdrawn when the Commissioner is satisfied that (a) the activities of the trust or the institution are not 'genuine'; or (b) the activities of the assessee are not being carried out in accordance with the objects of the trust or the

institution. There cannot be any other legally sustainable reasons for cancelling or withdrawing the registration granted under Section 12 AA. By no stretch of logic, the activities of the assessee can be said to be not genuine and the assessee is admittedly pursuing the objects for which it was established. When the assessee is engaged in bonafide activities, with the framework of law, to pursue its objectives, it cannot be said that the activities of the assessee are not genuine. Learned Commissioner has also not brought on record any material to demonstrate activities of the assessee are not being carried out in accordance with the objects of the trust or the institution. Under these circumstances, the withdrawal of registration granted under section 12 AA cannot be sustained in law. Learned Commissioner has extensively referred to as to why the assessee is not eligible for exemption under section 11 as the activities of the assessee cannot be said to be for 'charitable purposes' defined under Section 2(15), but then this aspect of the matter is relevant for the assessment proceedings and not in the context of exercise of Commissioner's powers under Section 12AA(3). The impugned order passed by the learned Commissioner is thus vitiated in law on this count as well.

20. For the detailed reasons set out above, we quash the order of the learned Commissioner and hold that the learned Commissioner did not have any good reasons, sustainable in law, to withdraw the registration. The impugned order is accordingly set aside.

21. In the result, the appeal is allowed. Pronounced in the open court today on 28th day of August 2009.

Sd/xx

(Joginder Singh)
Judicial Member

Sd/xx

(Pramod Kumar)
Accountant Member

Dated the 28th day of August, 2009.

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT (Appeals).
4. CIT
5. Departmental Representative

True Copy

By Order

Asstt Registrar Income Tax Appellate Tribunal

Chandigarh benches, Chandigarh