

**IN THE INCOME TAX APPELLATE TRIBUNAL
AMRITSAR BENCH, AMRITSAR**

[Coram: Pramod Kumar AM and A.D. Jain JM]

I.T.A. No. 732 (Asr) of 2013
Assessment year: 2009-10

Kapurthala Improvement Trust***Appellant***
Railway Road, Kapurthala, Punjab
[PAN: AALK0503E]

Vs.

Commissioner of Income Tax
Jalandhar***Respondent***

Appearances by:

Y K Sud for the appellant
Tarsem Lal for the respondent

Date of concluding the hearing: 3rd June, 2015.
Date of pronouncing the order: 11th June, 2015.

O R D E R

Per Pramod Kumar:

1. By way of this appeal, the assessee has challenged correctness of the learned Commissioner's order dated 18th November 2013 withdrawing registration under section 12AA(3) of the Income Tax Act, 1961.

2. Grievances raised by the assessee are as follows:

"1. That the CIT was not justified in cancelling the Registration of the trust granted u/s. 12AA on invoking the provisions of section 12AA(3).

2. That the CIT clearly ignored the submissions made by the assessee in response to his show cause notice and passed a mechanical order.

3. That the action of the CIT of cancellation of the registration amounts to contempt of the Punjab & Haryana High Court who have approved and declared the objects of the Improvement Trusts in Punjab as charitable and of General Public utility in the case of

Moga Improvement Trust. The CIT failed to appreciate that the order of the High Court was binding tooth and nail.

4. That the CIT has failed to record his satisfaction on the two conditions prescribed in section 12AA(3) regarding its violation and has clearly exceeded his powers in the cancellation of the registration.

5. That the CIT failed to appreciate the amendment in law in section 13(8) and 143(3) proviso made by the Finance Act 2012 w.e.f. 1.4.2009 and also the Board Circular No. 11 of 2880 dated 19.12.2008 which was binding upon him.

6. That CIT had no power to cancel the registration with retrospective effect of 1.4.2009.

7. That the order of the CIT is against the law and facts of the case.”

3. To adjudicate on this appeal, only a few material facts need to be taken note of. The assessee before us is a body set up under the Punjab Towns Improvement Act, 1922. On 22nd September 2005, the assessee filed an application seeking registration under section 12AA of the Act but the same was rejected by the then Commissioner vide order dated 18th May 2007. When the order so declining the registration was carried in appeal before this Tribunal, grievance of the assessee was upheld and he became entitled to the benefit of registration. This decision of the Tribunal was challenged before Hon'ble Punjab & Haryana High Court but Their Lordships declined to interfere in the matter.

4. The matter, however, did not rest at that.

5. On 20th September 2013, learned Commissioner required the assessee to show cause as to why the registration so granted to the assessee not be withdrawn. In this show cause notice, the Commissioner, *inter alia*, stated as follows:

“Sub:- Review of registration granted u/s 12(AA)- Regarding.

Please refer to the subject cited above.

2. In this connection, it is reported by the A.O. that as per records, the assessee trust applied for grant of registration under section 12AA of Income Tax Act, 1961 which was rejected by my predecessor on the ground that the activities of the trust as spelt out in Punjab Town Improvement Act 1922 are clearly in the nature of commercial activities, intended to earn profit and not of charitable nature. In appeal, the ITAT, Amritsar, decided in the favour of the trust and allowed the registration to the trust. Against the order of Ld. ITAT, the Hon'ble Punjab & Haryana High Court dismissed the appeal of the revenue. So the trust is enjoying registration u/s 12A of the Act.

3. The case was decided in your favour much before the insertion of first proviso to section 2(15) by the Finance Act, 2008 w.e.f. 01.04.2009 according to which **“the advancement of any other object of general public utility shall not be a charitable purpose, if it involves the carrying on 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.”**

3.1 Further, recently, the Hon'ble ITAT, Amritsar vide its order dated 23.07.2013 in ITA No. 274(Asr)/2013 in the case of Improvement Trust, Phagwara, decided the case in favour of revenue upholding the order passed by my predecessor vide which registration u/s 12AA was withdrawn. It is held by the Hon'ble ITAT in the above referred order that the Commissioner of Income Tax, Jalandhar-II has passed a well reasoned order by respectfully following the order of various Courts. It is worth mentioning that my predecessor while passing the order in the case of Improvement Trust, Phagwara followed the following decision of Hon'ble Courts/Tribunals :-

- (i). ITA No. 36(Asr)/2012 dated 18.12.2012 in the case of Improvement Trust, Bathinda vs. CIT, Bathinda.
- (ii). 103 TTJ-Chd-988 dated 01.06.2006 in the case of Puda vs. CIT
- (iii). 165 CTR (SC): (2001) 247 ITR 785 (SC) in the case of Asst. CIT vs. Thanthi Trust.

Aims/objects and activities of your trust are same as are in the case of Improvement Trust, Phagwara.

3. Keeping in view the above facts and amendment made to section 2(15) of the Income Tax Act, 1961 w.e.f. 01.04.2009 it is proposed to review registration granted to the trust u/s 12AA of the I.T. Act. You are therefore, afforded an opportunity to show cause as to why action suggested above may not be taken.”

6. So far as the present appeal is concerned, it is sufficient to note that the assessee, inter alia, pointed out that “Section 12AA(3) mandates cancellation of registration on satisfaction of the two conditions i.e. (i) that the activities of the trust are not genuine, and (ii) that the activities of the trust or the institution are not being carried out in accordance with the objects of the trust or the institution” and that “in the present case, none of these two conditions have been satisfied”. Without dealing with this contention of the assessee but holding that that, on merits, the assessee did not deserve registration under section 12AA, learned Commissioner withdrew the registration. While doing so, learned Commissioner observed as follows:

“9. As per amended definition of charitable purpose u/s. 2(15) of the Act with effect from 01.04.2009, the advancement of any other object of general public utility shall not be a charitable purpose, if it involves the carrying on any activity in the nature of trade, commerce or business or rendering any service in relation to any trade, commerce or

business for a cess of fee or any other consideration, **irrespective of the nature of use or application, or retention, of the income from such activity.** As discussed above since the applicant is engaged in the activity in the nature of trade, commerce and business and is engaged in the trade of real estate business with a profit motive, its engagement in any of the activities as stated above will not affect its character as such since the proviso provides that the advancement of any other object of general public utility shall not be regarded as charitable purpose if it involves the carrying on any activity in the nature of trade, commerce or business or 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.

The activities of the assessee are aimed at earning profit as it is carrying on activity in the nature of trade, commerce or business. Further profit making by the assessee is not mere incidental or by product of the activity of the assessee. The main pre-dominant purpose of assessee is making profit, it is real object of the assessee and also there is no spending of the income exclusively for the purpose of charitable activities and profits of the assessee not used for charitable purpose under the terms of the object and there is no obligation on the part of the assessee to spend on 'charitable purpose' only.

10. It is now pertinent to refer to the observations of the Hon'ble Income Tax Appellate Tribunal Chandigarh vide their judgment dated 01.06.2006 in the case of PUDA Vs. CIT (2006) 103 TTJ Chd 988 with regard to the provisions of section 2(15) of the Income Tax Act, 1961. It is held in the said order that this issue requires deliberation from a different angle whether the assessee was constituted to provide any charity to the public at large or to satisfy the needs for housing accommodation for the people of Punjab and also planning and development of the cities, towns and villages or whether the development in such a way is of charitable nature. A plea was raised by the learned counsel for the assessee that funds are provided by the Punjab Government or generated by the assessee itself. To generate its funds for carrying out its objects, the assessee is acquiring lands, developing them and selling the plots to the general public who apply for the same. Even the economically weaker strata of the society is generally applying. It is not the case that the assessee is allotting houses to the poor masses free of cost. While delivering the judgment in the case of PUDA, the Hon'ble Chandigarh Bench of Income-tax Appellate Tribunal has also referred to a case adjudicated by Hon'ble apex Court in the case of Asst. CIT v. Thanthi Trust (2001) 165 CTR (SC) 681 : (2001) 247 ITR 785 (SC) where the Honble Court has deliberated upon the issue of charitable purposes and held that where certain activities of an assessee claiming exemption u/s. 12AA of the Act are such where profit motive is involved and where no charity towards general public is being done, the applicability of section 2(15) is certainly established and benefits of exemption u/s 12AA are not allowable to such an assessee.

11. The reliance was also placed on the decision of Hon'ble ITAT, Amritsar Bench, Amritsar contained in their order dated 18.12.2012 passed in ITA No. 366(ASR)/2012 in the case of the Improvement Trust, Bathinda vs. CIT, Bathinda, wherein the order passed by the CIT, Bathinda u/s. 12AA(3) of the Act on 20.7.2012 has been upheld. In the order dated 20.7.2012 the CIT, Bathinda had withdrawn the exemption allowed to the Improvement Trust, Bathinda u/s 12AA of the Act on the exactly similar set of facts and circumstances of the case as brought out in the present case before me. The Hon'ble ITAT while upholding the order of the CIT, Bathinda has observed as under :

"7.2. After perusing the aforesaid activities, we are of the view that the Id. First appellate authority has rightly held that the land of the assessee trust is in the same category of other real estate products available in the market offered by the

private colonizers and real estate agents. Because the assessee advertised this value added product widely in print as well a electronic media so as to attract a large number of customers/clients from all the general public including the financially sound persons from the public.

7.3. It is a matter of record that the assessee-trust sells off all these plots by organizing a public auction, where through the bidding process and the competition generated in it, the prices of their land keep escalating and finally, the land is sold off to the highest bidder. The surplus income which is generated through the sale of land is again used for buying more land, developing it and selling it the same way, thereby generating more profit. On the facts and circumstances explained above, we are of the view that the assessee trust is not merely a mediator in buying and selling of land to the general public. Rather it operates in a business oriented way on the well known principles of profit generation. Therefore, the activities of the assessee trust clearly constitute activities in the nature of trade, commerce or business because no plots are reserved for any socio-economically lower society, there is no element of donation or support to any cause, none of the land is earmarked to be sold at no profit, no loss basis to any person whatsoever, which clearly establish that the element of charity is clearly absent from the activities of the trust, which is contrary to the provisions of section 2(15) of the Act amended w.e.f. 01.04.2009 and the Ld. CIT Bathinda has rightly issued show cause notice to the assessee trust for cancelling the registration already granted to the assessee-trust which the ld. CIT, Bathinda has the power under section 12A(3) of the Act.

7.4 After going through the aforesaid, we are of the considered opinion that the ld. CIT(A) has rightly cancelled the registration granted to the assessee trust w.e.f. 12.06.2003 in view of the amended provision of section 12AA(3) of the Act. In the resent case, the ld. CIT, Bathinda is fully satisfied that the activities of the assessee-trust are not genuine and not being carried out in accordance with the objects of the assessee-trust, as discussed above."

12. Further, recently, the Hon'ble ITAT, Amritsar vide its order ted 23.07.2013 in ITA No. 274(ASR)/2013 in the case of Improvement Trust, Phagwara, decided the case in favour of revenue upholding the order passed by Commissioner of Income Tax, Jalandhar-II, Jalandhar vide which registration u/s 12AA has been withdrawn. It is held by the Hon'ble ITAT in the above referred order that the Commissioner of Income Tax, Jalandhar-II, Jalandhar has passed a well reasoned order by respectfully following the order of various Courts. The ITAT relied upon the decision of Improvement Trust, Bathinda (supra).

13. As regards the reliance of the assessee on CBDT circular No. 11/2008 dated 19.12.2008 mentioned by the assessee's counsel in his arguments, it is significant to mention here that in this circular it is mentioned that what is the advancement of any other object of general public utility is **a question of fact and whether an entity is carrying on an activity in the nature of trade, commerce or business is a question of fact which will be decided on the nature, scope, extent and frequency of the activity. In para 3.2 of this circular it is further mentioned that each case would, therefore, be decided on its own facts and no generalization is possible.**

Thus this circular's context is not applicable in this case, since it is clearly mentioned that no generalization about the fact that whether an entity is involved in the trade, commerce or business. Moreover, this circular was issued by the CBDT prior to the enforcement of the amendment in the provisions of section 2(15) of the Act.

Further, the submissions made in para (6) of the reply to show cause notice, as reproduced earlier, are concerned, one at the best academic in nature. As per provisions of second proviso to section 2(15) section 13(8) and proviso to 143(3) of I.T. Act the assessee has to be treated as a taxable entity, as it is nowhere brought on records that in any of the A.Y.s its receipts are below Rs.25 Lacs. In any case when after amendments as referred above and in view of the decisions of Hon'ble ITAT, Amritsar (supra) the benefit of exemption u/s. 12AA of I.T. Act is not available to assessee.

14. *In view of the above stated facts and circumstances of the case, I am satisfied that the activities of the applicant authority are not charitable in nature within the meaning of proviso to section 2(15) of the Income Tax Act, 1961. Further in view of the facts on record, the applicant authority does not qualify to be treated as a charitable institution and registration deemed to have been granted to it is required to be withdrawn in view of the amended provisions of the Income Tax Act, 1961 and in view of the discussion made in the preceding paragraphs.*

15. ***Accordingly, in view of amendment in section 2(15) of Income Tax Act and relying on the decision of ITAT, Amritsar Bench, Amritsar in the case of Improvement Trust Phagwara dated 23.07.2013, the registration of the trust u/s 12AA of Income Tax Act, 1961 is hereby cancelled w.e.f. 01.04.2009."***

7. The assessee is aggrieved and is in appeal before us.

8. We have heard the rival contentions, perused the material on record and duly considered facts of the case in the light of the applicable legal position.

9. We find that, as learned counsel rightly points out, the scope of powers of the Commissioner under section 12AA(3) for cancellation of registration already granted is very limited in scope inasmuch as it can only be invoked only when (i) that the activities of the trust are not genuine, and (ii) that the activities of the trust or the institution are not being carried out in accordance with the objects of the trust or the institution. Section 12AA(3) specifically provides that when the CIT "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". It is not even the case of the CIT that the activities of the assessee trust are "not genuine" or that the "activities of the assessee are not being carried out in accordance with the objects" of the assessee trust. The case of the CIT rests on the first proviso to Section 2(15) coming into play on the facts of this case but then such a factor cannot warrant or justify the powers under section 12AA(3) being invoked. We, therefore, uphold the grievance of the assessee that

the action of the learned Commissioner, in withdrawing the registration under section 12AA(3), was well beyond the limited scope of the powers conferred on him by the statute. The assessee, therefore, must succeed in the appeal for this short reason alone.

10. There is, however, a much more fundamental a reason for the assessee succeeding in this appeal. In our considered view, the considerations with respect to the first proviso to Section 2(15) coming into the play and, for that reason, the objects of an assessee trust or institution being held to be not covered by the definition of 'charitable purposes', have no role to play in the matters relating to registration of a trust or institution under section 12A or 12AA- whether in respect of granting or declining of a registration or in respect of cancellation, even if otherwise permissible, of a registration. A closer look at the scheme of the Act would unambiguously show this aspect of the matter.

11. Let us begin by taking a look at Section 2(15) which defines charitable activities and first and second provisos thereto. These statutory provisions are as follows:

(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;

(Emphasis by underlining supplied by us)

12. What is clear from the riders in the above definition of 'charitable purposes' is that rider set out therein, under first proviso to Section 2(15), can only come into play

on year to year basis and not in absolute terms. The same activity can be hit by this rider in one year and thus the assessee trust or institution may not qualify to be existing for 'charitable purposes', and that very activity of the assessee trust or institution may remain unaffected by the same disabling provision for another year. The reason is that it is not only the nature of the activity but also the level of activity which, taken together, determine whether this disabling clause can come into play. The safeguard against the objects of the trust being vitiated insofar as their character of 'charitable activities' is concerned, is inbuilt in the provisions of Section 13(8) which was brought into effect with effect from the same point of time when proviso to Section 2(15) was introduced – i.e. with effect from 1st April 2009. Section 13(8) provides as follows:

Section 13- "Section 11 not to apply in certain cases.

.....

(8) Nothing contained in section 11 or section 12 shall operate so as to exclude any income from the total income of the previous year of the person in receipt thereof if the provisions of the first proviso to clause (15) of section 2 become applicable in the case of such person in the said previous year".

13. While introducing this amendment, Explanatory Memorandum to the Finance Bill 2012 (<http://indiabudget.nic.in/budget2012-2013/ub2012-13/mem/mem1.pdf>) explained the reasons and backdrop of this legislative amendment as follows:

Assessment of charitable organization in case commercial receipts exceed the specified threshold

Sections 11 and 12 of the Act exempt income of any charitable trust or institution, if such income is applied for charitable purposes in India and such institution is registered under section 12AA of the Act. Section 2(15) of the Act provides definition of charitable purpose. It includes "advancement of any other object of general public utility" as charitable purpose provided that it does not involve carrying on of any activity in the nature of trade, commerce or business.

2nd proviso to said section provides that in case where the activity of any trust or institution is of the nature of advancement of any other object of general public utility, and it involves carrying on of any activity in the nature of trade, commerce or business; but the aggregate value of receipts from the commercial activities does not exceed Rs. 25,00,000 in the previous year, then the purpose of such institution shall be considered as charitable, and accordingly, the benefits of exemption shall be available to it. **Thus, a**

charitable trust or institution pursuing advancement of object of general public utility may be a charitable trust in one year and not a charitable trust in another year depending on the aggregate value of receipts from commercial activities.

There is, therefore, need to expressly provide in law that no exemption would be available for a previous year, to a trust or institution to which first proviso of sub-section 2(15) become applicable for that particular previous year. However, this temporary excess in one year may not be treated as altering the very nature of the trust or institution so as to lead to cancellation of registration or withdrawal of approval or rescinding of notification issued in respect of trust or institution.

Therefore, there is need to ensure that if the purpose of a trust or institution does not remain charitable due to application of first proviso on account of commercial receipt threshold provided in second proviso in a previous year. Then, such trust or institution would not be entitled to get benefit of exemption in respect of its income for that previous year for which such proviso is applicable. **Such denial of exemption shall be mandatory by operation of law and would not be dependent on any withdrawal of approval or cancellation of registration or a notification being rescinded.**

It is, therefore, proposed to amend section 13..... of the Act to ensure that **such organization does not get benefit of tax exemption in the year in which it's receipts from commercial activities exceed the threshold whether or not the registration or approval granted or notification issued is cancelled, withdrawn or rescinded.**

This amendment will take effect retrospectively from 1st April, 2009 and will, accordingly, apply in relation to the assessment year 2009-10 and subsequent assessment years.

(Emphasis by underling supplied by us)

14. It is thus clear that the impact of the proviso to Section 2(15) being hit by the assessee will be that, to that extent, the assessee will not be eligible for exemption under section 11 of the Act. The mere fact that the assessee is granted registration under section 12 A or 12AA as a charitable institution will have no bearing on this denial of registration. As a corollary to this legal position, the fact that the objects of the assessee may be hit by the proviso to section 2(15) cannot have any bearing on the grant, denial or withdrawal of the registration under section 12AA.

15. It is also important to bear in mind the fact that in terms of the second proviso to Section 2(15), which was introduced by the Finance Act 2010 with retrospective effect from 1st April 2009, the legal prescription set out in first proviso to section 2(15) cannot come into play **“if the aggregate value of the receipts from the activities referred to therein is twenty-five lakh rupees or less in the previous year”**. Clearly, therefore, in order that the benefits under section 11 are declined to the assessee on the ground

that it is engaged in such activities as may be hit by the first proviso to Section 2(15), not only the assessee must be engaged in carrying out such activities as may hit the first proviso to Section 2(15) but also the receipts of the assessee from such activities must exceed a specified limit. The second limb of this disability clause needs to be satisfied with respect to each assessment year. Obviously, therefore, this aspect of the matter cannot be examined at the stage of the grant or withdrawal of registration since the registration exercise is a one time exercise and not something which must be done for each assessment year separately. That is precisely the reason, as noted in the Explanatory Memorandum, as to why the remedy for the activities being hit by the first proviso to Section 2(15) lies not in grant, decline or withdrawal of registration but in declining the benefits of exemption under section 11 on that count, on year to year basis, notwithstanding the status of registration.

16. The scheme of the Act, in this respect, is thus clear. The status of registration under section 12A or 12AA has no bearing, as recognized in Section 13(8), on the availability of exemption under section 11. To the extent income of the assessee arises from the activities hit by the first proviso to Section 2(15) in any assessment year, the assessee will be disentitled for exemption under section 11 to that extent. It is also important to bear in mind the fact that the disentitlement for exemption under section 11, as a result of the activities of an assessee being held to be not for charitable purposes under section 2(15) read with provisos thereto, is in respect of entire income of the assessee trust or institution but only for the assessment year in respect of which the first proviso to Section 2(15) is triggered.

17. If the status of registration is to be declined to an assessee only on the ground that some of the objects may be hit by the first proviso to Section 2(15) but the assessee's receipts from such activities do not exceed specified threshold in a particular assessment year, the assessee will be subjected to undue hardship in the sense that while the assessee will be disentitled to exemption under section 11 due to denial of registration under section 12 A or 12AA which is *sine qua non* for admissibility of exemption under section 11. On the other hand, if the status of registration is granted to the assessee even when some of the objects may be hit by the first proviso to Section 2(15) and the assessee's receipts from such activities do exceed specified threshold, no

prejudice will be caused to the legitimate interests of the revenue because, notwithstanding the status of registration and by the virtue of section 13(8), the assessee will not be eligible for exemption under section 11 in respect of such income. It is only elementary that a statutory provision is to be interpreted *ut res magis valeat quam pereat*, i.e., to make it workable rather than redundant.

18. The considerations about the possibilities of the first proviso to Section 2(15) coming into play affecting the grant, decline or withdrawal of registration under section 12AA will thus lead to wholly avoidable undue hardships to the assessee, will be unworkable in practice and be contrary to the scheme of the Act.

19. In view of the above discussions, in our considered view, the considerations about the possibilities of first proviso to Section 2(15) into play are wholly extraneous in the present context. As the withdrawal of registration is solely based on these considerations, the very foundation of the learned Commissioner's action is unsustainable in law and consists of reasons which are not at all relevant in the context of registration status under section 12A or 12AA of the Act. For this reason also, the action of the learned Commissioner is wholly devoid of any legally sustainable merits.

20. Having decided the issue in favour of the assessee on these issues, we see no need to address ourselves, at this stage, to the question whether the first proviso to Section 2(15) could indeed apply on the facts and in the circumstances of this case. That aspect of the matter is wholly academic as on now.

21. In the result, the appeal is allowed. Pronounced in the open court today on 11th day of June, 2015.

Sd/-
A D Jain
(Judicial Member)

Sd/-
Pramod Kumar
(Accountant Member)

Dated the 11th day of June 2015

Copies to:

- (1) The appellant*
- (2) The respondent*
- (3) Commissioner*
- (4) CIT(A)*
- (5) Departmental Representative*
- (6) Guard File*

By order etc.

*Assistant Registrar
Income Tax Appellate Tribunal
Amritsar bench, Amritsar*