

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

INCOME TAX APPEAL NO. 2349 OF 2013

DIT (Exemptions) .. Appellant.
v/s.
M/s. Khar Gymkhana .. Respondent.

Mr. A. R. Malhotra with Mr. N. A. Kazi, for the Appellant.
Mr. Nitesh Joshi with Mr. A. K. Jasani, for the Respondent.

**CORAM: M.S.SANKLECHA, &
A.K.MENON, JJ.
DATE : 6th JUNE, 2016.**

P.C:-

This Appeal under Section 260-A of the Income Tax Act, 1961 (the Act), challenges the order dated 10th July, 2013 passed by the Income Tax Appellate Tribunal (the Tribunal) for the Assessment Year 2009-10.

2 The Revenue urges the following questions of law for our consideration:

“(a) Whether on the facts and in the circumstance of the case and in law, the Tribunal was right in law in holding that the assessee is entitled for continued registration u/s. 12A of the I. T. Act, 1961 without appreciating the fact that in view of the Amendment to Section 2(15), the activities carried by the assessee were commercial in nature and therefore, cannot be considered as for a “charitable purpose” under Section 2(15) of Income Tax Act, 1961?

(b) Whether on the facts and in the circumstance of the case and in law, the Tribunal was right in law in holding that the assessee is entitled for continued registration u/s. 12A of the IT Act, 1961 brushing aside the nature of activities of the assessee viz. Sale of liquor, canteen compensation, guest fees, cards/daily games amounting to Rs.1,45,99,037/-,

Rs.20,67,806/-, Rs.31,50,078/- and Rs.81,883/- respectively and in the process ignoring the assessee's proven intention to make profit?

(c) Whether on the facts and in the circumstance of the case and in law, the Tribunal was right in not answering its own question as to whether the assessee is carrying on any trade, commerce or business as defined under first proviso to Section 2(15) of the Income Tax Act, 1961?.”

3 The Respondent-Assessee has been registered as a Trust w.e.f. 20th March, 1984 under the Act.

4 The basic dispute arising in this appeal is whether in view of amended Section 2(15) of the Act, restricting the definition “charitable purpose”, by excluding carrying on any trade, commerce and business in receipt of an amount in excess of Rs.25 lakhs would by itself entitle the Director of Income Tax to cancel a Registration under Section 12AA (3) of the Act.

5 The impugned order of the Tribunal allowed Respondent-Assessee's appeal by setting aside the cancellation of Registration under Section 12AA (3) of the Act done by the Director of Income Tax (Exemption). This by holding that cancellation of a registration under Section 12AA(3) of the Act is permissible only when the activities of the trust/ institution are not genuine or are not being carried out in accordance with its objects. Thus, holding that cancellation of Registration in the present facts, is not justified.

6 At the very out set, the learned Counsel for the Respondent-Assessee submitted that in view of the Central Board of Direct Taxes Circular having Circular No. 21 of 2016 dated 27th May, 2016, the Revenue cannot press this appeal. This submission is without prejudice to

its submission that it is not carrying on any trade, commerce or business. For the present, it is submitted that even if it is assumed to be carrying on trade, commerce or business, the appeal cannot be pressed by the Revenue in view of the binding Circular No.21 of 2016.

7 It would be appropriate to reproduce the above Circular No.21 of 2016 in its entirety as under:-

“(1) Sections 11 and 12 of the Income Tax Act, 1961 (‘Act’) exempt income of charitable trusts or institutions, if such income is applied for charitable purpose and such institution is registered under section 12AA of the Act.

(2) Section 2(15) of the Act provides definition of 'charitable purpose'. It includes 'advancement of any other object of general public utility' provided it does not involve carrying on of any activity in the nature of trade, commerce or business etc. for financial consideration. The 2nd proviso to said section, introduced w.e.f. 01-04-2009 vide Finance Act 2010, provides that in case where the activities 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 such commercial activities does not exceed Rs.25,00,000/- in the previous year, the purpose of such trust/ institution shall be deemed as 'charitable' despite it deriving consideration from such activities. However, if the aggregate value of these receipts exceeds the specified cut-off, the activity would no longer be considered as charitable and the income of the trust/ institution would not be eligible for tax exemption in that year. Thus, an entity, pursuing advancement of object of general public utility, could be treated as a charitable institution in one year and not a charitable institution in the other year depending on the aggregate value of receipts from commercial activities. The position remains similar when the first and second provisos of section 2(15) get substituted by the new proviso introduced w.e.f. 01-04-2016 vide Finance Act, 2015, changing the cut-off benchmark as 20% of the total receipts instead of the fixed limit of Rs.25,00,000/- as it existed earlier.

(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. 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 1st April, 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 u/s. 12AA to 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 u/s. 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 to 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 u/s. 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)

It is evident from the aforesaid Circular No.21 of 2016 that

the amendment to the definition of charitable purpose by adding of the proviso, would not ipso facto give jurisdiction to the Commissioner of Income Tax to cancel the Registration under Section 12AA (3) of the Act.

8 The jurisdiction to cancel the Registration would only arise if there is any change in the nature of activities of the institution. The above Circular clearly directs the authorities not to cancel the Registration of the charitable institution just because the proviso to section 2(15) of the Act comes into play as receipts are in excess of Rs.25 lakhs in a year. It also refers to Section 13(8) of the Act which provides that where the receipts on account of commercial activities is in excess of R.25 lacs provided in second proviso to section 2(15) of the Act, then the Assessing Officer would deny the benefit of registration as a Trust for the subject Assessment Year while framing the Assessment.

9 In response, Mr. Malhotra, learned Counsel appearing for the Revenue in respect of the appeal, submits that the aforesaid Circular dated 27th May, 2016 is to be read as a whole and on so reading, it would be evident that Income Tax Department has jurisdiction to cancel the registration whenever receipts from commercial activities have exceeded Rs.25 lakhs. Learned Counsel further submits that the aforesaid Circular would have application only prospectively as it was issued consequent to Finance Act, 2016 which changed the cut-off from Rs.25,00,000/- to 20% of the total receipts in respect of its commercial activities. It is also submitted that looking at the quantum of receipts on account of commercial activities it is unlikely/ improbable that in the subsequent Assessment Year, the receipts are to fall below Rs.25 lakhs. Therefore, the Commissioner is entitled to cancel the Registration under Section 12AA (3) of the Act.

10 We find that the Circular No.21 of 2016 when read as a whole, specifically lists out in paragraphs 4 and 5 reproduced herein above that the Registration granted under Section 12AA could not be cancelled, only when the receipts on account of business exceeded the cut-off, specified in the proviso to section 2(15) of the Act. The jurisdiction to cancel the Registration only arises if there is change in the nature of activities of the institution or the activities of the institution, are not genuine. The aforesaid Circular by placing reliance upon 13(8) of the Act inter alia provides that the Registration granted to the Trust would continue even when the receipts on account of business is in excess of Rs.25 lakhs. In such case, the Assessing Officer while framing the Assessment for the subject Assessment Year would be entitled to deny the benefit of exemption to such a Trust for that year.

11 The submission made on behalf of the Revenue that the Circular No.21 of 2016 would have only prospective effect in respect of Assessment made subsequent to the amendment under Section 2(15) of the Act w.e.f. 1st April, 2016 is also not sustainable. The amendment in Section 2(15) of the Act brought about by Finance Act, 2016 w.e.f. 1st April, 2016, is essentially that where earlier the receipts in excess of Rs.25 lakhs on commercial activities would exclude it from the definition of 'charitable purpose' is now substituted by receipts from commercial activities in excess 20% of the total receipts of the institution. In the above view, Circular No.21 of 2016 directs the Officer of the Revenue not to cancel Registration only because the receipts on account of business are in excess of the limits in the proviso to Section 2(15) of the Act would also apply in the present case. The impugned order has held that cancellation of a Registration under Section 12AA(3) of the Act, can only take place in

case where the activities of trust or institution are not genuine and/or not carried on in accordance with its objects. The aforesaid Circular No.21 of 2016 is in line of the finding of the Tribunal in the impugned order. The submission on behalf of the Revenue that the Trust is not genuine because it is hit by proviso to Section 2(15) of the Act, is in fact, negated by Circular No.21 of 2016. In fact, the above Circular No.21 of 2016 clearly provides that mere receipts on account of business being in excess of the limits in the proviso would not result in cancellation of Registration granted under Section 12AA of the Act unless there is a change in nature of activities of the institution. Admittedly, there is no change in nature of activities of the institution during the subject Assessment Year. The further submission on behalf of the Revenue that looking at the quantum of receipts on account of commercial activities, it is un-likely/ improbable that in the subsequent Assessment Years, the receipts would fall below Rs.25 lakhs and therefore, the Commissioner is entitled to cancel the Registration. The aforesaid submission made on behalf of the Revenue is based not on facts as existing but on probability of future events. We are unable to accept the submission based on clairvoyance. Further, we are unable to understand what prejudice is caused to the Revenue since whenever the receipts on account of commercial activities is in excess of the limits provided in proviso to Section 2(15) of the Act, the Assessing Officer is mandated/ required to deny exemption under Section 11 of the Act as provided in Circular No.21 of 2016 dated 27th May, 2016. Accordingly, the issue stands covered in favour of the Revenue by virtue of Circular No.21 of 2016.

12 In view of the issue being covered by the CBDT Circular No.21 of 2016, no grievance against the impugned order can be made by the Revenue. Therefore, the question as framed becomes academic and does not give rise to any substantial question of law.

13 Accordingly, **Appeal dismissed.** No order as to costs.

(A.K.MENON,J.)

(M.S.SANKLECHA,J.)