आयकर अपीलीय अधिकरण "बी" न्यायपीठ मुंबई में।

IN THE INCOME TAX APPELLATE TRIBUNAL "B" BENCH, MUMBAI

श्री डी. मन्नमोहन, उपाध्यक्ष **एवं** श्री संजय अरोड़ा, लेखा सदस्य के समक्ष ।

BEFORE SHRI D. MANMOHAN, VP AND SHRI SANJAY ARORA, AM

विविध आवेदन सं./MA No. 126/Mum/2014

(Arising out of ITA No. 625/Mum/2012)

&

ITA No. 625/Mum/2012

(**निर्धारण वर्ष** / Assessment Years: 2009-10)

Mumbai Metropolitan Region Development Authority Plot No.C-14 and C-15, Bandra Kurla Complex, Bandra (E), Mumbai-400 051	**बनाम**/ Vs.	Director of Income Tax (Exemption), Mumbai
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. AAATIM 7016 R		
(**Applicant**)	:	(**Respondent**)

अपीलार्थी की ओर से / **Appellant by**	:	Shri S. E. Dastur & Shri Madhur Agarwal
प्रत्यर्थी की ओर से/**Respondent by**	:	Shri Rajiv Panth & Shri Neil Philip

सुनवाई की तारीख / **Date of Hearing**	:	08.08.2014 & 16.01.2015
घोषणा की तारीख / **Date of Pronouncement**	:	10.04.2015

आदेश / O R D E R

Per Sanjay Arora, A. M.:

This is a Miscellaneous Petition by the Assessee, i.e., for assessment year (A.Y.) 2009-10, in respect of the order by the Tribunal dated 31.12.2013 in it's case for the said year.

2. Vide its instant application the assessee seeks a recall of its order afore-referred by the Tribunal for deciding its appeal afresh in accordance with law. In the alternative, the tribunal can, where the parties consent thereto; it having already heard the parties at

length, proceed to decide assessee's Ground #1, which it refrained to while passing the impugned order.

3.1 The assessee's case, as projected by the ld. senior counsel, Sh. S.E. Dastur, before us, was that the sole and the only reason for the Revenue in withdrawing its registration u/s. 12A of the Act as a charitable institution, granted on – 22.07.2002 (PB pg.39), with effect from assessment year (AY) 2009-10, is the invocation of section 2(15), i.e., read with *proviso* thereto, effective from the said assessment year, contending that the *proviso* to section 2(15) is applicable to it and, therefore, it is no longer a charitable institution. The assessee appealed there-against, contesting the said withdrawal (u/s.12AA(3)) on both counts. Firstly, the proposition *per se* that informs the withdrawal under reference, so that an application of *proviso* section 2(15) would itself operate to be a ground for the withdrawal of registration (per Gd. #1). Vide Ground 2, the assessee, without prejudice, disputed the applicability of the *proviso* to section 2(15), i.e., on facts. This was for the reason that if the assessee's case is decided in its favour on the legal plea raised per Gd.1, there would be no necessity to decide its Gd. 2. The Tribunal, however, without deciding its ground no.1, proceeded to decide Gd. 2, i.e., the alternate ground. This, despite as many as six decisions being relied upon by the assessee in its favour on that ground (Gd. # 1), which though stand duly reported at para 3.1 of its order. In fact, it does not even decide the same (Gd.2), restoring the matter back to the file of ld. DIT(E) to decide the same. It was not permissible for the tribunal to do so, i.e., without deciding Gd.1.

Continuing further, making reference to the show cause notice dated 13.12.2011 (at PB pg. 40); the assessee's reply thereto in the proceedings before the ld. DIT(E) dtd. 26.12.2011 (PB pgs. 41-55), as well as his order u/s. 12AA(3) withdrawing registration, it was argued that the tribunal in requiring the ld. DIT(E) to examine the issue of the said withdrawal with reference to the conditions of section 12AA(3), i.e., that the activities of trust or institution are genuine or are being carried out in accordance with subjects, traveled outside the scope of the appeal and, thus, exceeded its jurisdiction. The power of the tribunal u/s.254(1), howsoever wide, is not absolute and is confined to the grounds

raised, and for which reliance was placed on decision of the hon'ble Bombay High Court in the case of *Pokhraj Hirachand v. CIT* [1963] 49 ITR 293 (Bom) and *J.B. Greaves IT v. CIT* [1963] 49 ITR 107 (Bom). On his attention being drawn to the rule 11 of the Appellate Tribunal Rules, 1963, which provides for the tribunal being not confined to the grounds raised before it per the memo of appeal, so that it can, where deemed fit and proper, consider a ground deemed relevant, of course after allowing parties opportunity to state their case reference thereto, it was explained by him that the cited decisions considered the ambit of the relevant rules, i.e., rules 11,12 and 27, which are *para materia* to rules 11 and 27 of the Appellate Tribunal Rules, 1963. Toward the same, copy of the relevant rules (being under the 1922 Act), were also placed on record. *The tribunal, he continued, can decide in the appellant's favour on any other ground*. Reference was further made by him to the decisions in the case of *Jasmine Commercials Ltd. vs. CIT* [2011] 56 DTR 159/200 Taxman 338 (Cal) (pages 5,6); *ACIT v. Saurashtra Kutch Stock Exchange Limited* [2008] 305 ITR 227 (SC); and *M. Visvesvaraya Industrial Research & Development Centre vs. ITAT & Others* [2001] 251 ITR 852 (Bom) (pages 855 and 856) and 54 SOT 74 (at page 85). Ground not considered is also a mistake apparent from record, for which reference was made by him to the decisions in the case of *CIT v. Keshav Fruit Mart* [1993] 199 ITR 771 (All); *Commissioner of Income Tax v. K.M. Sugar Mills (P.) Ltd.* [2005] 275 ITR 247 (All); *and CIT vs. Ramesh Chand Modi* [2001] 249 ITR 323 (Raj.). In *Kansai Nerolac Paint s. Dy. CIT* (in ITA No. 1030 of 2011 dated 06.05.2014/copy on record), the hon'ble jurisdictional court held that where there was the material before the tribunal to decide the issue, it would be justified in deciding the same, rather than setting it aside to the file of a lower authority/s to decide afresh.

3.2 The ld. DR, on the other hand, did not raise any specific objection, being content in relying on the impugned order, stating that it was a considered decision by the tribunal, not liable for any modification whatsoever.

4. We have heard the parties and perused the relevant material on record.

4.1 We may, to begin with, reproduce the relevant grounds, as under:

'**GROUND I**:

1. On the facts and circumstances of the case and in law, the Director of Income tax (Exemption) ("DIT(E)") erred in withdrawing the registration granted u/s. 12A with retrospective effect from A.Y. 2009-10 on the alleged ground that the activities of the assessee were not for "charitable purpose" considering the proviso to section 2(15) of the Income Tax Act, 1961("the Act").

2. He failed to appreciate and ought to have held that the power of withdrawal u/s. 12AA(3) could only be on violation of two conditions stipulated under the said section and not otherwise.

3. The Appellant therefore, prays that in absence of such violation, the withdrawal of registration granted u/s. 12A of the Act by invoking powers u/s. 12AA(3) be held as ab-initio void and bad-in-law.

WITHOUT PREJUDICE TO GROUND I:

GROUND II:

1. On the facts and circumstances of the case and in law, the DIT(E) erred in holding that the income from the activities of the Appellant of granting loans to public bodies and the leasing activities of the Appellant are business activities and accordingly, proviso to section 2(15) applies.

2. He failed to appreciate and ought to have held that the activities carried out by the Appellant are in fulfillment of its objects as required by the statute (Mumbai Metropolitan Region Development Authority Act, 1974) and hence cannot be held that such activities amount to carrying on of business activities. .

3. The Appellant therefore prays that it be held that the provision of section 2(15) does not apply to the Appellant and accordingly the activities per se does not amount to carrying on any nature of trade, commerce or business, or any activity of rendering any service in relation to any trade, commerce or business.

WITHOUT PREJUDICE TO GROUND I & II
GROUND III

1. On the facts and circumstances of the case and in law, the DIT(E) erred in withdrawing the registration granted u/s 12A retrospectively from A.Y. 2009-10.

> 2. The Appellant prays that even if it is held that the DIT(E) has validly withdrawn the registration granted u/s 12A of the Act, such order of Withdrawal should be applicable prospectively and not retrospectively with effect from April 1, 2009.'

4.2 The assessee's case has, in our view, two parts to it. Vide the first, the assessee makes out a case that the tribunal could not have traveled to Ground 2, the without prejudice ground, without first answering its Gd.1. It was not open for it to do so, is the assessee's case. This is for the simple reason that being a legal ground, where decided in its favour, there shall be no necessity to decide Ground 2, challenging the application of the *proviso* to section 2(15), i.e., on facts. It was even otherwise incumbent on the assessee to assume the said ground, lest it be argued that the assessee admits the application of *proviso* and, thus, section 2(15), to it. The arguments by the assessee during the hearing (of the appeal) *qua* this ground were toward this end, even as it was impermissible for the tribunal to proceed to decide Gd.2 without first adjudicating Gd. 1. This also broadly defines the assessee's case.

The second limb of the assessee's argument is that the tribunal has in taking up the issue of withdrawal of registration u/s.12AA(3), on the ground of either non-genuineness of its activities or not being carried out in accordance with its objects, traveled outside the scope of the appeal and, thus, acted without jurisdiction.

4.3 The decision of the tribunal is contained at para 5 of its order, which reads as under:

> '5. The issue of applicability or otherwise of section 12AA(3) in the instant case being factually indeterminate, we only consider it fit and proper in the facts and circumstances of the case to restore this matter back to the ld. DIT(E) for allowing the assessee a reasonable opportunity to present its case in this regard before him, to be decided per a speaking order and in accordance with law. The ld. DIT(E), though not restricted to the facts and figures for a particular year, shall restrict his inquiry to the factual aspect of the case, i.e., *qua* the satisfaction of the condition/s of section 12AA(3) on facts. That is, the fact that the first *proviso* to section 2(15) gets attracted shall not influence or colour the ld. DIT(E)'s factual findings nor by itself be considered as a ground for considering the assessee's activities as not

> genuine or not in accordance with its objects; the same being the subject matter of the legal aspect afore-noted. We do so as the assessee's case would require being examined by the tribunal thereon only if the same survives an examination on facts, i.e., satisfies the test of s. 12AA(3) on facts. We decide accordingly.'

The tribunal has, as apparent, not decided Gd.1 for the reason that in its view the question as to whether the conditions for the withdrawal of registration u/s.12AA(3) stands satisfied are not, i.e., *de hors* section 2(15), needs to be determined first. Finding the facts on record as not leading to the said determination, it restored the matter back to file of the ld. DIT(E). *It is this decision that is sought to be impugned as without jurisdiction*. Firstly, therefore, it is incorrect to say that the tribunal proceeded to decide the Gd.2 without first addressing Ground 1. Both Gd. 1 & 2 relate to different aspects of section 2(15), and have not been decided by the tribunal, albeit for different reasons. It clearly states that the issue of application (or otherwise) of section 2(15) shall not influence the determination of the issue as to whether the precedent conditions of section 12AA(3) are, in facts and circumstances of the case, met or not. The assessee's first charge is, thus, without basis.

4.4 We, next, come to the second aspect of the matter, whereby with reference to scope of the powers of the tribunal, its' decision is challenged as incompetent. The tribunal's power is, again with reference to case law, pleaded as confined to the grounds of appeal before it, so that the tribunal's action in the present case in traveling outside the specific grounds raised before it, exceeded its jurisdiction. These being rectification proceedings, so that any contentious issue is precluded, we shall, even as indicated during the course of hearing, state the position of law in the matter with reference to the decisions by the apex court, settling the same. In the case of *Hukumchand Mills Ltd. vs. CIT* [1967] 63 ITR 232 (SC), the subject matter of appeal, in the opinion of the hon'ble apex court, was rightly discerned by the tribunal as the WDV of the building, machinery, etc. of the assessee for calculating the depreciation allowance u/s.10(2)(vi) of the Act (Income Tax Act, 1922). It was clarified that it was open for the Revenue to raise a

contention in this regard before the tribunal for the first time, supporting the finding of the Appellate Assistant Commissioner (AAC) on any ground decided against it. Even assuming rules 12 and 27 of the Appellate Tribunal Rules were not strictly applicable, the same are procedural in character and not exhaustive of the powers of the tribunal, so that they do not in any way circumscribe or control its power u/s.33(4). The tribunal was accordingly within its jurisdiction to entertain the argument as to depreciation and direct the ITO to find whether any depreciation was actually allowed under the Industrial Tax Rules and, further, whether such depreciation should be taken in the consideration for computing the WDV under the Act.

In *CIT vs. S. Nelliappan* [1967] 66 ITR 722 (SC), the apex court again has clarified that in deciding the appeal, the tribunal has not restricted to the grounds said forth in the memorandum of appeal or taken by the leave of the tribunal. Following the said decision, the apex court in *CIT vs. Assam Travels Shipping Service* [1993] 199 ITR 1 (SC) confirmed the decision of the tribunal in remanding the matter back to the file of the AAC to levy penalty in accordance with law, which the said authority found to have been levied by the AO at below the statutory minimum amount prescribed. Though the tribunal did not have power to enhance, it was certainly competent for it to remand the matter back for the purpose to the file of the AAC, who had the necessary power but had declined to exercise it on the mistaken ground that he had no such power. *The penalty leviable in accordance with law was, thus, confirmed by the apex court to be issue before the tribunal*.

In *Martin Burn Ltd. vs. CIT* [1993] 199 ITR 606 (SC), the action of the tribunal in remanding the matter back to the ACIT for passing order u/s.263 after making further investigation was upheld. The question arising before the tribunal was perceived as not limited to what had been considered by the CIT, but as also what had not been, but ought to have been, in the exercise of his power in the matter. In *CIT vs. National Taj Traders* [1980] 121 ITR 535 (SC), the apex court clarified that the time limit of two years prescribed for passing an order u/s.33B by the CIT (corresponding to section 263 of the

Act), is only for *suo motu* revision orders passed by the said authority, and not applicable to that passed on the direction by the tribunal.

The hon'ble jurisdictional high court in *Ugar Sugar Works Ltd.* [1983] 141 ITR 326 (Bom) explained that *the power of the tribunal is not confined to the grounds of appeal raised before it but to the subject matter of the appeal*. The decision, express or implied, of the AAC, is the subject matter of appeal, and to which therefore the power of the tribunal is restricted to. Subsequently, the hon'ble court, vide its full bench decision in the case of *Ahmedabad Electricity Co. Ltd. vs. CIT* [1993] 199 ITR 351 (Bom) (FB), upon an extensive review of precedents, clarified that the power or purview of the tribunal shall, as in the case of first appellate authority, extend to the whole assessment, and is not confined to matters raised by the assessee; the whole premise of the appellate procedure under the Act being ascertainment of the correct tax liability of the assessee, i.e., in accordance with the law. The subject matter of appeal was, in its view, to be construed as the subject matter of the assessment. Reference in this context may also be made to its decision in the case of *CIT vs. Parthasarathy* [1995] 125 CTR 174 (Mad).

The tribunal is, thus, fully empowered in law to frame issue/s raising different aspect/s of the matter before it, decided expressly or impliedly by the authorities below, whose orders are under challenge before it, i.e., is the subject matter of the tax proceedings.

4.5 The next question before us is whether the withdrawal u/s.12AA(3), i.e., *de hors* section 2(15), was or could be considered as arising out of the order under appeal before the tribunal. Toward this, we have perused the assessee's reply, to the show cause notice; the order u/s. 12AA(3), and the assessee's arguments before us; the show cause notice issued by the ld. DIT(E) (PB page 40) being not referred to during the course of hearing (of the appeal) and, thus, not a part of the tribunal's record (refer rule 18(6) of the Appellate Tribunal Rules). A fair reading of the said order; we being acutely conscious that these are rectification proceedings, reveals that the only issue arising before the tribunal was the invocation of section 12AA(3) consequent to the finding of the

application of *proviso* to section 2(15). *The issue, which the tribunal considered as the second limb of the matter before it, i.e., the application of s. 12AA(3) independent of s. 2(15), was thus not a subject matter of appeal, and the tribunal had wrongly assumed jurisdiction in its respect*. The tribunal, as it appears to us, was moved by the assessee's reply before the ld. DIT(E), stating its activities as genuine and carried out in accordance with it objects (PB pgs. 41-55) as well as its argument before it to the same effect (refer para 3.2 of the impugned order). However, notwithstanding the assessee's arguments and pleadings, the subject matter of appeal cannot exceed the very basis on which section 12AA(3) is sought to be invoked by the Revenue in the present case, i.e., *attraction of section 2(15), and which shall comprise the subject matter of appeal, or the controversy attending it.* Whether the same is, in fact, attracted or not, is again a part thereof - the said basis - specifically covered by the assessee's Gd. 2. No doubt, the Revenue is not barred in law from raising, and is at liberty to raise, the said issue in another proceedings, even as argued before us by the ld. AR; there being even otherwise no estoppel against law. But, on a fair look at the order u/s. 12AA(3), doing so in the instant proceedings, i.e., the appellate proceedings before the tribunal, would amount to extending the scope thereof inasmuch as the same not contemplated by the said order. *The tribunal had clearly exceeded its jurisdiction in directing in the manner it does per para 5 of its order. The said directions are therefore, mistaken, and are hereby withdrawn*. The impugned order is accordingly recalled for deciding the assessee's Gds. I & II. We decide accordingly.

5. The next question that confronts is as to how to proceed in the matter to decide the present appeal, i.e., given our admission of a mistake apparent from record and, consequently, the withdrawal afore-stated, which in fact constituted the Tribunals' decision, so that it is also incorrect to state that the same did not constitute a decision. Though of no consequence in view of our acceptance of a mistake by the tribunal in inferring the subject matter of appeal, the assessee having relied on *Kansai Nerolac Paint* (supra) toward the same, we may meet the said reliance. The said decision is distinguishable inasmuch as in that case the tribunal decided likewise, restoring the

matter back to the file of the first appellate authority, merely for the reason of the relevant issue having not been decided by the authorities below. It is in those circumstances that the hon'ble court held that the issue before the tribunal being only a legal issue, with all the facts on record, it ought to have decided the same itself rather than by restoring the matter back. By implication, even if, therefore, the two documents on which reliance was placed by the assessee in that case remained to be verified, the tribunal could have made its decision in the said case as subject to the validity, i.e., the veracity of the said documents, by the Revenue. In the present case, on the contrary, restoration by the tribunal was after consideration the facts of the case, finding the facts on record as indeterminate, so that it cannot be said that all the facts are on record or established. The said decision would thus by itself by of no consequence in the instant case.

Order u/s. 254(1)

6. Continuing further, this, therefore, leaves us to decide the assessee's, i.e., appeal grounds 1 and 2, both without prejudice to the other. The parties having during the course of the having accorded consent to our deciding the same, i.e., rather than being heard again; the appeal having been heard at length in the first instance, we proceed to decide the said grounds. The assessee in this regard claims that its Ground #1 would fall to be decided first inasmuch as if decided in its favour, Ground # 2 shall become redundant. True, but then, equally, Ground # 1 shall arise for consideration only it is found as a fact that section 2(15) is applicable thereto. It is pointless to decide Ground 1, i.e., the impact of section 2(15) on registration of an entity as a charitable institution, without first considering if section 2(15), including *proviso* thereto, is at all attracted in the facts of the case. We shall, therefore, proceed to decide Ground #2 first. Section 2(15) reads as under:

> '**Definitions.**
> **2**. In this Act, unless the context otherwise requires, -
> (1) ……..
> (2) ……
> (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 purose, 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;'

7. The assessee's principal object is the development of the Mumbai Metropolitan Region according to the Regional Plan. The same involves a number of interrelated activities, viz. review of plans – physical, economic and financial; projects or schemes of development (including preparation thereof); their execution, supervision, financing, as well as co-coordinating the execution amongst, and rendering advise to, different authorities engaged in formulation and undertaking such schemes in different areas, viz. agricultural, horticultural, diary, fishery, cattle breeding, etc. *If this is not an economic activity, carried on in an organized manner, what we wonder it is*? It is also not the case that the assessee does not charge any sum for its activities. That is, generates revenue there-from.

The expression 'business' is well known in the income-tax law, being in fact defined u/s.2(13) thereof to include trade, commerce or manufacture or any adventure or concern in relation thereto. As observed by the apex court as far back as in *Narain Swadeshi Weaving Mills vs. Commissioner of Excess Profits Tax* [1954] 26 ITR 765 (SC), the word 'business' connotes some real, substantial and systematic or organized course of activity or conduct with a set purpose. It goes on to explain that even a single and isolated transaction is conceivably capable of falling within the definition of business as being an adventure in the nature of trade provided the transactions bears clear indicia of trade (pg. 773). The principle/s of law being clear, the determination rests on the finding/s of fact, which is to be arrived at by taking the totality of the facts and circumstances into account. As explained, 'business' is a term of wide import,

encompassing within it the different forms and shades of transactions, viz. trade, commerce, etc., which are again terms of considerable amplitude. The import or even the common parlance meaning of all these terms is not in dispute or in doubt. Reference in this context may be made *inter alia* to decisions in the case of *Bengal & Assam Investors Ltd. v. CIT* [1966] 59 ITR 547 (SC); *Khan Bahadur Ahmed Alladin & Sons v. CIT* [1968] 68 ITR 573 (SC); *P.M. Mohammed Meera Khan v. CIT* [1969] 73 ITR 735 (SC); *Karam Chand Thapar & Bros. (P) Ltd. vs. CIT* [1971] 82 ITR 899); *Dalmai Cement Ltd. v. CIT* [1976] 105 ITR 633 (SC), besides several by the high courts, as recently in *Institute of Chartered Accountants of India (ICAI) v. Director General of IT* [2012] 347 ITR 99 (Del), where the term has been elucidated by the hon'ble courts.

The language of *proviso* to section 2(15) extends to any activity that may be in the nature of trade, commerce or business – all terms of wide amplitude, or any activity of rendering any services in relation to the same. We, accordingly, have no hesitation in holding that the assessee's activities are covered by the *proviso* to section 2(15); the gross receipt for the current year exceeding the minimum threshold limit which exceeds the application of the first *proviso*. Ground 2 of the assessee is, thus, stand decided against it.

8. We may next proceed to decide the assessee's Ground #1, raising the issue of the legal consequence/s of the applicability of *proviso* to section 2(15) on the registration of an entity as a charitable institution. The arguments of both the parties stand listed in detail at paras 3.1 to 3.4 of the order dated 31.12.2013, which would continue to hold, and shall therefore form part of this order, as indeed shall the other parts of this order, save as not specifically modified or withdrawn per this order. Both the parties have, as shall be evident there-from (refer paras 3.1 & 3.4) relied on several decisions by the tribunal. No doubt, the assessee has relied on one decision by the hon'ble high court [*CIT v. Sarvyodaya Ilakkiya Pannai* [2012] 343 ITR 300 (Mad)], but then the said decision stands also considered by the tribunal in the case of *Entertainment Society of Goa v. CIT* [2013] 23 ITR (Trib) 636 (Panaji), relied upon by the Revenue, holding, with reference to decision by the hon'ble jurisdictional high court in *CIT v. Thane Electricity Supply Ltd*.

[1994] 206 ITR 727 (Bom), the decision by the non-jurisdictional high court as not binding. The rule of precedence, in case of conflicting views by the high courts, none of which is jurisdictional, is for the tribunal to follow that which appeals to its conscious

In our considered opinion, therefore, the appropriate course under the circumstances, even as indicated during the hearing in the instant proceedings – to no objection by either party, is that the matter be referred to the hon'ble President of the Tribunal for constituting a larger bench of the tribunal to decide the highly contentious issue raised by the assessee's Ground No.1, decided differently by different coordinate benches of this tribunal, for uniform application across the tribunal, of course after hearing the parties. The statement of the case for the purpose of the said reference, is in our view as listed per para 3 of the Tribunal's order dated 31.12.2013, delineating the respective cases of both the sides. The larger bench of the tribunal, in the case the reference made hereby is accepted by the hon'ble President, shall, apart from the other arguments and case law as may be canvassed before it by the parties, consider the same. We support our decision for the reference aforesaid, apart from the clear provision of section 255(4) of the Act, on the settled law on precedence as explained by several celebrated decisions in the higher courts of law, as for example in the case of *CIT v. B.R. Constructions* [1993] 202 ITR 222 (AP)(FB).

9. We are unable to understand the import of the assessee's Ground III, raised without prejudice to its Grounds I & II, in-as-much as the competent authority had withdrawn the approval u/s.12AA(3) only with effect from A.Y. 2009-10, the current year. As regards the retrospective application of the said provision, the same stands decided by the tribunal vide para 4.1 of its order dated 31.12.2013 with reference to the binding decision by the hon'ble jurisdictional high court, and *qua* which the assessee has not raised any objection per its MA. The same shall, therefore, obtain. No ground *qua* the non-adjudication of its Gd. III has been taken by the assessee either per its MA or during the course of its arguments both in the appellate as well as the rectification proceedings. We hold accordingly.

10. The matter is accordingly referred to the Hon'ble President for constituting a larger bench to decide the assessee's Ground I. We decide accordingly.

11. In the result, the assessee's miscellaneous application is allowed, while the assessee's appeal is disposed of on the afore-said terms.

Order pronounced in the open court on April 10, 2015

Sd/-	Sd/-
(D. Manmohan)	(Sanjay Arora)
उपाध्यक्ष / Vice President	लेखा सदस्य / Accountant Member

मुंबई Mumbai; दिनांक Dated : 10.04.2015

व.नि.स./Roshani, Sr. PS

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Applicant
2. प्रत्यर्थी / The Respondent
3. आयकर आयुक्त(अपील) / The CIT(A)
4. आयकर आयुक्त / CIT - concerned
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard File

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई **/ ITAT, Mumbai**

आयकर अपीलीय अधिकरण "बी" न्यायपीठ मुंबई में।
IN THE INCOME TAX APPELLATE TRIBUNAL "B" BENCH, MUMBAI

श्री डी. मन्नमोहन, उपाध्यक्ष **एवं** श्री संजय अरोड़ा, लेखा सदस्य के समक्ष ।
BEFORE SHRI D. MANMOHAN, VP AND SHRI SANJAY ARORA, AM

आयकर अपील सं./I.T.A. No.625/Mum/2012
&
(Along with SA No.228/Mum/2013)
(Arising out of ITA No. 625/Mum/2012)

(**निर्धारण वर्ष /** Assessment Year: 2009-10)

Mumbai Metropolitan Region Development Authority Plot No.C-14 and C-15, Bandra Kurla Complex, Bandra (E), Mumbai-400 051	**बनाम**/ Vs.	Director of Income Tax (Exemption), Mumbai
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. AAATIM 7016 R		
(अपीलार्थी /**Appellant**)	:	(प्रत्यर्थी / **Respondent**)

अपीलार्थी ओर से / **Appellant by**	:	Shri S. E. Dastur & Shri Madhur Agarwal
प्रत्यर्थी की ओर से/**Respondent by**	:	Shri Pritam Singh

सुनवाई की तारीख / **Date of Hearing**	:	09.10.2013
घोषणा की तारीख / **Date of Pronouncement**	:	31.12.2013

आदेश / O R D E R

Per Sanjay Arora, A. M.:

This is an Appeal by the Assessee agitating the Order u/s. 12AA(3) of the Income Tax Act, 1961 ('the Act' hereinafter) by the Director of Income Tax (Exemptions), Mumbai ('DIT(E)' for short) dated 27.12.2011, withdrawing/cancelling the registration u/s.12A w.e.f. 01.04.2009, i.e., the assessment year (A.Y.) 2009-10, onwards.

2. The instant appeal by the assessee raises both legal and factual issues. The legal issue arising for consideration in this appeal is a subsisting one between the assessee-applicants and the Revenue, i.e., whether the registration u/s.12A/12AA of the Act could be cancelled or withdrawn u/s.12AA(3) in view of the amendment in law by way of substitution of section 2(15) by Finance Act, 2008 w.e.f. 01.04.2009, which reads as under:

> '**Definitions.**
> **2.** In this Act, unless the context otherwise requires,—
>
> (1) ……
> (2) …….
> (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 ten lakh rupees or less in the previous year;'
>
> [emphasis, by underlining, ours]

The factual aspect of the controversy is if the assessee's activities, in view of interest and rent receipt, are to be regarded as arising in the course of and in furtherance of the objects for which it is established, or is it by way of a commercial exploitation of its resources.

Arguments/The respective cases

3. We begin by listing the respective cases of both the litigants, based on the arguments as advanced before us, as also those adopted in the decisions relied upon by them:

The assessee's case

3.1 The assessee-appellant's stand is that registration under the Act, once granted, could be reviewed only in the terms provided by law itself, i.e., section 12AA(3). The same postulates a satisfaction as to the activities of the trust or institution being not genuine or being not carried out in accordance with its objects. As long as, therefore, the activities are not found to be either not genuine or as being not carried out in accordance with the objects, there is no scope for the competent authority to visit the registration. The inference of non-genuineness of the assessee's activities by the ld. DIT(E) in-so-far as the same involves an activity that may be considered to be in nature of trade or commerce or business, or rendering any service in relation thereto, would not by itself make the activity as not genuine, which (activity) continues to be the same, i.e., both prior and after to the amendment to s.2(15). The said inference is only an attempt by the Revenue to fit the assessee's activity/s into the clear provision of law, even if it involves straining its clear language beyond all reasonable limits.

There is no amendment in law, i.e., s. 12AA(3) (co-opted on the statue by Finance (No.2) Act, 2004, w.e.f. 01.10.2004), even after the amended s. 2(15) comes into force. The provision of section 13(8), inserted on the statute by Finance Act, 2012 w.r.e.f. 01.04.2009, i.e., simultaneous with the substitution of section 2(15), makes the intent of the law maker patently clear, i.e., that the registration under the Act for persons hit by the first *proviso* to section 2(15) is to continue, though would stand disentitled to exemption from the total income under law. The obligation to file a return of income consistent with and in accordance with the law, which w.e.f. 01.04.2009 includes section 13(8), is only on the tax payer. The legislative intent is, thus, clearly in favour of the impact of the *provisos* to section 2(15) being allowed or being given effect to in determination of the total income for a particular year, being a variable phenomenon (refer para 8 in *Maharashtra Housing & Area Development Authority vs. Addl. DIT(E)* [2013] 58 SOT 196 (Mum.)).

Reliance was placed on the following decisions:

i. *CIT vs. Sarvodaya Ilakkiya Pannai* [2012] 343 ITR 300 (Mad.);

ii. *Maharashtra Housing & Area Development Authority vs. ADIT(E)* (supra);

iii. *Khar Gymkhana vs. DIT(E)* (in ITA No.373/Mum/2012 dated 10.07.2013);

iv. *Mahatma Gandhi Charitable Society vs. CIT* [2013] 142 ITD 565 (Cochin-Trib.);

v. *Rajasthan Housing Board vs. CIT* [2012] 19 ITR (Trib) 524 (Jp.);

vi. *Asst. CIT vs. Aurangabad Holiday Resorts (P.) Ltd.* [2009] 118 ITD 01 (Pune); and

vii. *Gujarat Cricket Association vs. DIT (E)* [2012] 19 ITR (Trib) 520 (Ahbd).

3.2 On facts, the assessee is an Authority established under an Act passed by the State Legislature, namely, the Mumbai Metropolitan Region Development Act, 1974 ('MMRD Act' hereinafter/PB pgs.1-38), with the main object to secure the development of the Mumbai Metropolitan Region according to the regional plan. It is thus an agency of the State Government, or a form of Government itself. How could the same, by any score, be regarded as not genuine, which would only imply as not acting or actually doing what one purports to be doing or is seeming to do. Its accounts are regularly audited by the Comptroller and Auditor General of India (C & AG), and which authority has not commented adversely upon its activities. The interest and the rent receipts for the current year, the previous year relevant to A.Y. 2009-10 (the registration having been proposed for withdrawal w.e.f. 01.04.2009), at Rs.174.12 crores and Rs.63.52 crores respectively, arise out of loans to various organizations and renting out of the assessee's property respectively. The same are only activities undertaken by it in furtherance of the objects for which it is established. Reference was made by the ld. AR to sections 12, 17, 20, 21, 21A, 46A and 47 of the MMRD Act.

The revenue's case

3.3 The Revenue's stand, on the other hand, is that when the object/s of the registered entity is no longer regarded as for a charitable purpose in view of the first *proviso* to section 2(15), the registration could not obtain inasmuch as the same becomes inconsistent with and defeative of the law, i.e., ss. 2(15) and 12AA (refer, inter alia,

Tamil Nadu Cricket Association v. DIT(E)(infra)). It may be noted that there is no reference to section 2(15) either in section 12A or s.12AA, so that the same has to be considered as a condition precedent in view of the object and purpose of the registration under the Act (refer *Maharashtra Housing & Area Development Authority* (supra) – para 7.1). The registration confers the entity the status of a public charitable institution under and for the purposes of the Act, and which therefore cannot subsist when the object/s stands disqualified as charitable by the Act itself. In other words, the change in law would cause the removal of the fundamental basis on which the assessee's claim as a public charitable institution rests, and which is no longer available to it. The same operates on a perennial basis, warranting withdrawal of registration, while the purview of the Assessing Officer (A.O.) in assessment proceedings is to verify the application of income *of a charitable institution* for charitable purposes and the satisfaction of other conditions, as spelled out in sections 11 to 13 of the Act, subject to which the exemption to the said income as not forming part of the total income is granted. It is to be noted that per the amended law, applicable w.e.f. 01.04.2009 (i.e., A.Y. 2009-10 onwards), the law links the manner in which the object, *per se* charitable, is achieved or accomplished, with it being so or regarded as so under the Act, in-so-far as it is toward the advancement of an object of general public utility (*Maharashtra Housing & Area Development Authority* (supra) - para 8). In other words, the only course available in law is for the cancellation of the said registration where the first *proviso* to section 2(15) is attracted. As regards the application of the second *proviso* to section 2(15), which limits the operation of the first *proviso* to an extant threshold limit *qua* the receipts of the institution from its activities (presently at Rs.25 lacs), the same, where so, could be reviewed inasmuch as the withdrawal of registration in the first instance had been occasioned or caused only by the invocation of first *proviso* to section 2(15), to which an exception is made by the second *proviso* to the section. The competent authority does not become *functus officio* after the grant of registration and has an inherent power to interfere, of course in accordance with law, where the terms of registration obtain no longer; a power since specifically conferred by sections 12AA(3) and 293C of the Act. That is, no benefit solely on the basis of the

second *proviso* to section 2(15), i.e., independent of the first *proviso*, could be extended to the assessee as, as would be apparent from a mere reading thereof, thereby the Act only seeks to provide a window of exclusion or exception (from the operation of first *proviso*) for small assessees.

Section 13(8) of the Act, which supersedes sections 11 and 12, so that notwithstanding the application of income for the objects of the trust/institution, the said sections shall not operate to exclude any income from the total income of a person if the first *proviso* to section 2(15) becomes applicable, is only an enabling provision. This is as otherwise it may well be open for such a person to contend that being a charitable trust under the Act, exemption u/s.11 could not be denied to it where the conditions of sections 11 to 13 are satisfied. The same by itself does not preclude the Revenue to withdraw registration; the provision only confirming what is otherwise apparent, *lest one argues of an absence of a legal basis for non-grant of exemption u/s.11 in such a case*, where registration has not been cancelled or withdrawn.

3.4 The assessee has during the relevant previous year earned interest income at Rs.174.12 crores and income by way of lease rent and rent at Rs.63.52 crores. The same is only a systematic, commercial exploitation of its assets, amounting to a regular, business activity, and which if anything only reinforces the invocation of the first *proviso* to section 2(15), so that the assessee is not undertaking any charitable activity, i.e., in terms of the extant law, further justifying the withdrawal of registration. Reference was made to sections 24 and 24A of MMRD Act; the latter constraining the assessee from operating at a loss. Further, reliance stood placed on the following decisions:

i. *Entertainment Society of Goa vs. CIT* [2013] 23 ITR (Trib) 635 (Panaji);

ii. *Mumbai Metropolitan Region Development Authority* (in ITA Nos.5584 & 5062/Mum/2009 dated 29.06.2012);

iii. *Jalandhar Development Authority vs. CIT* [2009] 124 TTJ (Asr) 598;

iv. *Tamil Nadu Cricket Association vs. Director of Income-tax (Exemptions)*

[2013] 57 SOT 439 (Chennai);

v. *Punjab Urban Planning & Development Authority vs. CIT* [2006] 103 TTJ (Chd.) 988;

vi. *Jammu Development Authority vs. CIT* [2012] 52 SOT 153 (Asr.)(URO);

vii. *Improvement Trust vs. CIT* [2013] 30 taxmann.com 58 (Asr.);

Findings

4. Having heard both the parties at length, and given our careful consideration to the matter, we proceed with our analysis/decision.

4.1 At the outset, however, it would be relevant to clarify an aspect of the matter having a direct bearing on its adjudication. There is no scope to say of the Revenue's action as being in excess of the jurisdiction of the competent authority on account of the registration withdrawn having been granted u/s.12A of the Act on 22.07.2002 (PB pg.39); the registrations under which provision stood included for withdrawal u/s.12AA(3) only by Finance Act, 2009 w.e.f. 01.06.2010. This is as the registration in the instant case, granted in July, 2002, is in substance; rather, in fact, only a registration u/s. 12AA(1)(b) inasmuch as a registration u/s. 12A could be granted only up to 1/4/1997, i.e., prior to the coming into force of s.12AA. Two, the hon'ble jurisdictional high court in *Sinhagad Technical Education Society vs. CIT* [2012] 343 ITR 23 (Bom), relied upon by the ld. Departmental Representative (DR) before us, explained the import of the said amendment to section 12AA(3) to mean that registration u/s.12A (as also u/s.12AA) granted at any time could be withdrawn by the competent authority on or after 01.06.2010. The impugned cancellation has been made vide order dated 27.12.2011. The matter stands also discussed in some detail by the tribunal in *Maharashtra Housing & Area Development Authority* (supra), relied upon by the assessee.

As regards the legal issue, we have delineated the cases of both the parties, also drawing on the decisions relied upon by them. The moot point that emerges is whether an object/s which is not, or better, can no longer be regarded as, charitable, in view of the amended law, would yet entitle an entity for the continuation of its registration, or not so,

under the Act. In legal terms, whether the condition of the object/s being charitable, an implied condition for the grant of registration, is also so for its continuation.

Before, however, we may proceed with the matter, in our view the factual aspect of the controversy, afore-stated, would need to be determined first. That is, whether or not the activities being undertaken by the assessee-authority are in accordance with and in furtherance of its objects or not. This is as unless this aspect of the matter is clarified by issuing a finding of fact, one way or the other, it would neither be proper nor relevant to discuss the broader, legal issue afore-said.

4.2 The assessee is incorporated with the main object of securing the development of the Mumbai Metropolitan Region according to the regional plan. Chapter IV of the said Act contains the Powers and Functions of the Authority. Section 12(1) of the Act lists the functions as the following:

"CHAPTER IV
POWERS AND FUCTIONS OF THE AUTHORITY

Functions of the Metropolitan Authority.

12.(1) The main object of the Authority shall be to secure the development of the Bombay Metropolitan Region according to the Regional Plan, and for that purpose the functions of the Authority shall be-

a) review any physical, financial and economical plan;
b) review any project or scheme for development which may be proposed or may be in the course of execution or may be completed in the Metropolitan Region;
c) formulate and sanction for the development of the Metropolitan Region or any part thereof;
d) execute projects and schemes;
e) recommend to the State Government any matter or proposal requiring action by the State Government or any other authority for the overall development of the Metropolitan Region;
f) participate with any other authority for inter-regional development;
g) finance any project or scheme for the development of the Metropolitan Region;
h) co-ordinate execution of the project or schemes for the development of the Metropolitan Region;

i) supervise or otherwise ensure adequate supervision over the planning and execution of any project or scheme, the expenses of which, in whole or in part, are to be met from the Mumbai Metropolitan Region Development Fund;

j) prepare schemes and advise the concerned authorities in formulating and undertaking schemes for development of agriculture, horticulture, floriculture, forestry, dairy development, poultry farming, piggery, cattle breeding, fisheries and other similar activities;

k) prepare and implement schemes for providing alternative accommodation and for rehabilitation of persons displaced by projects and schemes which provide for such requirements;

l) do all such other acts and things as may be necessary for or incidental or conducive to any, matters which arise on account of its activity and which are necessary for furtherance of the objects for which the Authority is established."

Any entity needs funds on a regular and sustainable basis to carry out its activities. *The assessee authority has not specified its' revenue model*, i.e., as to how the funds are generated in the normal, regular course of its business and activities for their financing as well as sustaining itself, i.e., meeting the establishment costs. There is no balance-sheet or statement of sources and application of funds on record. Chapter V of the said Act is titled 'Finance, Budget and Accounts'. Section 18(1), falling there-under, provides for various sources of funds. The same includes contributions and moneys paid to the Authority by the State Government, including the sums placed at its disposal by the State Government out of the proceeds of any cess levied under Chapter VI of the Act; the proceeds of any betterment charges levied under Chapter IV; all fees, costs and charges received by the authority under the Act or any other law for the time being in force; moneys received by way of rents and profits or any other manner or from any other source; moneys received from the disposal of the lands, buildings or other property, moveable or immovable, or other transactions.

The interest and rent, received at an aggregate of Rs.237.64 crores for the previous year relevant to A.Y. 2009-10, would form part of the gross receipt. As such, there is undoubtedly no question of application of second *proviso*, nor is so contended at any

stage. During hearing, the ld. AR would explain us as to how the said receipts are integral to the functioning of the authority, and for which it has the requisite mandate under its charter, referring to sections 12(1)(g) and 21A of the MMRD Act for the purpose, as we observe was also done before the ld. DIT(E). Section 12(1) stands reproduced above. Section 18 (1)(j) is relevant in this regard. The same, as also s. 21A, read as under:

"CHAPTER V
FINANCE, BUDGET AND ACCOUNTS

Funds of the Metropolitan Authority.

'18. (1) There shall be a fund for the Metropolitan Authority to be called Mumbai Metropolitan Region Development Fund to which shall be credited all moneys received by the Authority, including-
(j) all moneys borrowed by the Authority.'

Bom. III of 1888.

'21A. The Metropolitan Authority shall be Competent to give grants, advances or loans to, or to share expenses with, any local authority or other authority in the Metropolitan Region, for any of the purposes of time being in force, but subject to the restrictions (if any) contained in the Mumbai Municipal Corporation Act, it shall be lawful for such other authority to accept such grants, advances or loans or share in the expenses, subject to such terms and conditions as the Metropolitan Authority may, from time to time, in consultation with such other authority, specify."

Power to Metropolitan Authority to finance projects and schemes and impose conditions therefor.

The ld. DIT(E), on the other hand, contends of all such activities as only toward a systematic, commercial exploitation of its property, movable and immovable, by the assesse-authority.

4.3 Both the assessee and the Revenue have made their contrary claims *de hors* and without any reference to any material on record. In fact, for all we may know, there may well be truth in both the statements, so that both of them are true, albeit partly. What we are concerned here with, we may clarify, is not the legal aspect of the matter, but of the applicability of section 12AA(3), invoked by the Revenue, on the facts of the case. In-so-far as and to the extent, therefore, the interest income arises on the financing of any project or scheme for development in the Metropolitan Region or on any advance or loan to any local authority therein for the purpose of section 12, the same would fall to be

covered under its regular functioning and, thus, though a receipt of its business or trade, cannot by any score be said as not in accordance with its objects. The assessee, however, has not specified the projects (in the Metropolitan Region) on the financing of which, whether directly or indirectly (i.e., through a local authority or other authority in the Metropolitan Region), the interest receipt arises to it. All it says is of the said income as arising on loans to various organizations (refer para 3A(1) of its letter dated 26.12.2011 to the ld. DIT(E)/PB pgs.41-55), without specifying the details, so that it cannot by itself lead to the conclusion or the finding of being in relation to the stated projects. Rather, as we see it, the financing of the projects could only be incidental and/or secondary to the assessee's principal activity, and cannot by itself be the assessee's principal activity, if it is to be regarded as toward advancement of an object of general public utility. That is, financing as an aspect of business is an entirely different proposition from being the core or the principal activity, or business by itself, as in the case of a bank or a term lending institution. We are not for a moment advocating a strict meaning to its activity of financing, but only seek to emphasize that in order to be considered as a part of the assessee's regular business or functional activity, it has to be firstly in compliance of the objective of s. 12 of its governing act, *qua* projects that fall within its purview as a part of the regional plan, being reviewed and supervised by it. Secondly, that the assessee cannot be only or even predominantly a financing organization, and as such earning its revenue primarily or predominantly by way of interest, as financing itself could not be considered as an advancing an object of general public utility. True, financing is a vital input for execution of projects, but then so are other goods and services that go into undertaking the same. Their supply, as also that of funds, as by banks and financial institutions engaged in providing long term finance to public or infrastructure projects, cannot be considered as *per se* charitable. Again, the terms of lending (e.g. whether as soft loans over long gestation period, or at regular, prevailing rates of interest, etc.) have not been specified, and which would also be relevant. What is a ratio of the interest revenue from that of the assessee's other, principal activity/s has not been clarified. In sum, the

financing function has to be considered as a part of and together with other services being provided by the assessee.

Similarly, *qua* the rent receipt also the assessee's clarification is vague and general, only stating, by adverting to section 12(1)(*l*) of the MMRD Act, of the same being an activity incidental to an activity necessary for and in furtherance of its objects. That is, without linking it to any of its main activity/s under any clause of s. 12(1). Rather, the same cannot be a matter of presumption and has to be established as a fact, for it to be considered as so, or else it cannot not be regarded as integral to its functioning, but only as a normal or regular transaction of letting out or leasing of property. Thereby giving credence to the inference as drawn and the observations made by the ld. DIT(E) and, thus, be regarded as not in accordance with its objects. The ratio of the said sum (Rs. 63.52 crores), i.e., to the assessee's gross receipts for the year, or on a year to year basis, is also not clear, considering that the same has been claimed as only incidental to its principal activities.

Also, the fact that the said incomes go to constitute or form part of the Fund (called the Mumbai Metropolitan Region Development Fund), to which in fact its borrowings also stand to be credited, for being applied for its activities is not a relevant consideration or determinative of the matter.

4.4 We are, therefore, on the basis of the material on record, clearly unable to issue any positive finding, one way or the other, as to the interest and rent receipt, aggregating to Rs.237.64 crores (for the current year), as arising on the carrying out of activities integral to the assessee's functioning or its principal objects, so as to be considered as arising on account of activities which are necessary for the furtherance of the objects for which it is established, and thus falling under section 12(1)(*l*) of the MMRD Act. In fact, we have also noted that there must be some principal activity/s being pursued for the financing and rental activity to be at all considered as necessary and incidental thereto. The physical and/or functional correlation between the two would decide on this aspect of the matter. Such a finding/s, as would be patently clear, is necessary to arrive at a

finding as to the satisfaction or otherwise of any of the two conditions of section 12AA(3), i.e., on facts. The primary onus to establish its case in this regard is on the assessee.

Conclusion

5. The issue of applicability or otherwise of section 12AA(3) in the instant case being factually indeterminate, we only consider it fit and proper in the facts and circumstances of the case to restore this matter back to the ld. DIT(E) for allowing the assessee a reasonable opportunity to present its case in this regard before him, to be decided per a speaking order and in accordance with law. The ld. DIT(E), though not restricted to the facts and figures for a particular year, shall restrict his inquiry to the factual aspect of the case, i.e., *qua* the satisfaction of the condition/s of section 12AA(3) on facts. That is, the fact that the first *proviso* to section 2(15) gets attracted shall not influence or colour the ld. DIT(E)'s factual findings nor by itself be considered as a ground for considering the assessee's activities as not genuine or not in accordance with its objects; the same being the subject matter of the legal aspect afore-noted. We do so as the assessee's case would require being examined by the tribunal thereon only if the same survives an examination on facts, i.e., satisfies the test of s. 12AA(3) on facts. We decide accordingly.

6. As regards the assessee's stay petition, the prayer was limited to, drawing reference to the decisions in the case of *ITO vs. M. K. Mohammed Kunhi* [1969] 71 ITR 815 (SC) and *ITO vs. Khalid Mehdi Khan* [1977] 110 ITR 79 (AP) *qua* the inherent power of an appellate authority to grant stay, to stay the demand for a period of 3 months, by which time the tribunal's order in the instant case would ensue. We having heard the appeal on merits, were disinclined to, even as observed during hearing, interfere in the matter; no case for financial hardship having been even otherwise made out. In fact, in view of our disposal of its appeal, the assessee's application becomes infructuous.

Result

7. In the result, the assessee's appeal is allowed for statistical purposes and its stay petition is dismissed.

Order pronounced in the open court on December 31, 2013

Sd/-	Sd/-
(D. MANMOHAN)	(SANJAY ARORA)
उपाध्यक्ष/VICE PRESIDENT	लेखा सदस्य/ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांकDated : 31.12.2013

व.नि.स./Roshani, Sr. PS

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent
3. आयकर आयुक्त(अपील) / The CIT(A)
4. आयकर आयुक्त / CIT - concerned
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard File

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई **/ ITAT, Mumbai**