Chief Justice's Court **AFR**

Case :- INCOME TAX APPEAL No. - 348 of 2008

Appellant :- Commissioner Income Tax
Respondent :- Muzafar Nagar Development Authority
Counsel for Appellant :- A.N.Mahajan
Counsel for Respondent :- Shubham Agarwal

Hon'ble Dr. Dhananjaya Yeshwant Chandrachud,Chief Justice
Hon'ble Dilip Gupta,J.
Hon'ble Suneet Kumar,J.

Oral Judgment
(Per: Dr D Y Chandrachud,C.J.)

This reference to the Full Bench has been occasioned by a referring order of a Division Bench of this Court dated 5 August 2013 and turns upon the interpretation of the provisions of Section 12AA(2) of the Income Tax Act 1961[1]. The questions which have been formulated for decision are as follows:

(i) Whether the non disposal of an application for registration, by granting or refusing registration, before the expiry of six months as provided under Section 12AA(2) of the Income Tax Act, 1961 would result in deemed grant of registration; and

(ii) Whether the Division Bench judgment of this Court in the case of **Society for the Promotion of Education, Adventure Sport & Conservation of Environment vs. Commissioner of Income Tax**[2] holding that the effect of non consideration of the application for registration within the time fixed by Section 12AA(2) would be deemed grant of registration, is legally correct.

1 the Act
2 (2008) 216 CTR (All) 167

The Division Bench has *prima facie* doubted the correctness of an earlier judgment of a Division Bench in **Society for the Promotion of Education Adventure Sport & Conservation of Environment vs. Commissioner of Income Tax & Ors. (supra).**

Section 11 of the Act provides that certain categories of income of charitable and religious trusts shall not be included in the total income of the assessee. Section 12A stipulates that Sections 11 and 12 of the Act shall not apply in relation to the income of any trust or institution unless certain conditions are fulfilled. Amongst the other conditions in clause (a) of Section 12A, the conditions are that (i) the person in receipt of the income has made an application for registration of the trust or institution in the prescribed form and manner to the Commissioner within one year of the creation of the trust or the establishment of the institution; and (ii) such trust or institution is registered under Section 12AA. The procedure for registration is enunciated in Section 12AA.

Section 12AA provides as follows:

"**12AA** (1) The Commissioner, on receipt of an application for registration of a trust or institution made under clause (a) [or clause (aa) of sub-section (1)] of section 12A, shall—

(a) call for such documents or information from the trust or institution as he thinks necessary in order to satisfy himself about the genuineness of activities of the trust or institution and may also make such inquiries as he may deem necessary in this behalf; and

(b) after satisfying himself about the objects of the trust or institution and the genuineness of its activities, he—

(i) shall pass an order in writing registering the trust or institution;

(ii) shall, if he is not so satisfied, pass an order in writing refusing to register the trust or institution,

and a copy of such order shall be sent to the applicant :

Provided that no order under sub-clause (ii) shall be passed unless the applicant has been given a reasonable opportunity of being heard.

[(1A) All applications, pending before the Chief Commissioner on which no order has been passed under clause (b) of sub-section (1) before the 1st day of June, 1999, shall stand transferred on that day to the Commissioner and the Commissioner may proceed with such applications under that sub-section from the stage at which they were on that day.]

(2) Every order granting or refusing registration under clause (b) of sub-section (1) shall be passed before the expiry of six months from the end of the month in which the application was received under clause (a) [or clause (aa) of sub-section (1)] of section 12A.]

[(3) Where a trust or an institution has been granted registration under clause (b) of sub-section (1) [or has obtained registration at any time under section 12A [as it stood before its amendment by the Finance (No. 2) Act, 1996 (33 of 1996)]] and subsequently the Commissioner is satisfied that the activities of such trust or institution are not

genuine or are not being carried out in accordance with the objects of the trust or institution, as the case may be, he shall pass an order in writing canceling the registration of such trust or institution:

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

Clause (a) of sub-section (1) of Section 12AA provides that the Commissioner, upon receipt of an application for registration of a trust or institution, shall call for documents or information in order to satisfy himself about the genuineness of the activities of the trust or institution. The Commissioner is also empowered to make such inquiry as he deems necessary. Thereupon, after satisfying himself of the objects of the trust or institution and the genuineness of its activities, the Commissioner shall pass an order in writing registering the trust or institution or, if he is not so satisfied, pass an order in writing refusing to register it. Sub-section (2), upon which the dispute of interpretation revolves, provides that every order granting or refusing registration "shall be passed before the expiry of six months" from the end of the month in which the application was received. An order passed by a Commissioner under Section 12AA is subject to an appeal to the appellate tribunal under Section 253 (1) (c).

A Division Bench of this Court in **Society for the Promotion of Education Adventure Sport & Conservation of Environment (supra)** held that where the Commissioner fails to consider an application for registration within the time fixed by Section 12AA(2), there would be a deemed grant of registration. The Division Bench held as follows:

> "Considering the pros and cons of the two views, we are of the opinion that by far the better interpretation would be to hold that the effect of non-consideration of the application for registration within the time fixed by section 12AA(2) would be a deemed grant of registration. We do not find any good reason to make the assessee suffer merely because the IT Department is not able to keep its officers under check and control, so as to take timely decisions in such simple matters such as consideration of applications for registration even within the large six month period provided by s. 12AA(2) of the Act"

When this judgement was cited before the Division Bench in the appeal by the revenue, *prima facie*, the Division Bench doubted the correctness of this decision on the following grounds:

(i) There is nothing in Section 12AA(2) which provides for a deemed grant of registration, if the application for registration is not decided within six months;

(ii) In the absence of a statutory provision stipulating that the consequence of non consideration would be a deemed grant of permission, the Court cannot hold that an application would be deemed to be granted after the expiry of the period; and

(iii) The legislature has not contemplated that the authority would not be entitled to pass an order beyond a period six months.

On behalf of the assessee, learned counsel has submitted that (i) whereas Sections 11 and 12 of the Act provide for certain incomes of

religious and charitable trusts not being included in the total income of the assessee, the pre condition is registration under Section 12AA. Section 12AA provides for the procedure for recognition; (ii) the procedure for recognition was introduced by Finance Act (No.2) 1996 and the memorandum explaining its provisions indicates that an order granting or refusing permission has to be passed within six months from the end of the month in which the application for registration is received; (iii) the intention of the legislature was that the period of six months is mandatory and must be strictly observed; (vi) the legislature has used the expression 'may' as well as 'shall' in Section 12AA(1) which is an indicative of the fact that the expression 'shall' was regarded as mandatory wherever it has been used; (v) in other provisions of the Act, such as Sections 250 (6A) and 254 (2A), the legislature, by using the expression 'may' has indicated that the period within which an appeal has to be decided by the Commissioner (Appeals) or by the Tribunal is directory. In contrast, the period which is prescribed in Section 12AA(2) must be regarded as mandatory; and (vi) the period of six months in Section 12AA(2) should be treated as mandatory, otherwise the assessee would be subject to grave prejudice by an inordinate delay on the part of the Commissioner in disposing of such applications. Otherwise, the period which has been prescribed would be rendered redundant.

On the other hand, learned counsel appearing on behalf of the revenue has submitted that the period of six months is clearly directory and the legislature has not provided any consequence, such as a deeming fiction to the effect that the application would be treated as being granted, if it is not disposed of within six months. The learned counsel submitted even if this is

regarded as a *casus omissus*, the Court in pursuance of well settled principles of law has no jurisdiction to supplant it and it must adopt a plain and literal meaning of the statute.

Sections 11 and 12 are substantive provisions under which certain categories of incomes of religious or charitable trusts, incomes derived from property held by a trust as well as voluntary contributions are not to be included in the total income of the assessee. Section 12A and Section 12AA lay down the procedural requirements before a claim under Section 11 or Section 12 can be made. Registration under Section 12AA is made a condition precedent for availing of the exemption under Section 11 and Section 12 by virtue of the provisions of clause (a) of Section 12A (1). This position in law is settled in view of the judgement of the Supreme Court in **Commissioner of Income Tax vs. Dawoodi Bohara Jamat**[3] which holds thus:

> "...under the scheme of the Act, ss. 11 and 12 are substantive provisions which provide for exemptions available to a religious or charitable trust. Income derived from property held by such public trust as well as voluntary contributions received by the said trust are the subject-matter of exemptions from the taxation under the Act. Secs. 12A and 12AA detail the procedural requirements for making an application to claim exemption under ss. 11 and 12 by the assessee and the grant or rejection of such application by the CIT. A conjoint reading of ss.11, 12, 12A and 12AA makes it clear that registration under ss. 12A and 12AA is a condition precedent for availing benefit

3 (2014) 268 CTR (SC) 1

under ss. 11 and 12. Unless an institution is registered under the aforesaid provisions, it cannot claim the benefit of ss. 11 and 12. Sec. 13 enlists the circumstances wherein the exemption would not be available to a religious or charitable trust otherwise falling under s. 11 or 12 and therefore, requires to be read in conjunction with the provisions of ss. 11 and 12 towards determination of eligibility of a trust to claim exemption under the aforesaid provisions."

Section 12AA(1) requires the Commissioner to whom an application is made for the registration of a trust or institution to satisfy himself about the genuineness of the activities of the trust or institution as well as about the objects of the trust or institution. For that purpose, the Commissioner has been vested with a power to call for documents or information and is empowered to make such inquiries as he may deem necessary in that behalf. The Commissioner is thereupon empowered to pass an order in writing either registering an institution or, if he is not satisfied about the objects of the trust or institution and of the genuineness of its activities, to pass an order in writing refusing to register the trust or institution. An order of refusal has to be preceded by a reasonable opportunity of being heard and is subject to an appellate remedy under Section 253(1)(c).

Sub-section (2) of Section 12AA requires that every such order granting or refusing permission under clause (b) of sub-section(1) shall be passed before the expiry of six months from the end of the month in which the application was received. The use of the expression 'shall' in sub-section (2) is, by itself, not dispositive of whether the period of six months is mandatory. The legislature has not imposed a stipulation to the effect that

after the expiry of a period of six months, the Commissioner would be rendered *functus officio* or that he would be disabled from exercising his powers. Similarly, the legislature has not made any provision to the effect that the application for registration should be deemed to have been granted, if it is not disposed of within a period of six months with an order in writing either allowing registration or refusing to grant it. The submission of the assessee essentially requires the Court to read into sub-section (2) a fiction by which an application for registration should be regarded as deemed to be granted, if it is not disposed of within six months. Providing that an application should be disposed of within a period of six months is distinct from stipulating the consequence of a failure to do so. Laying down a consequence that an application would be deemed to be granted upon the expiry of six months can only be by way of a legislative fiction or a deeming definition which the Court, in its interpretative capacity, cannot create. That would be to rewrite the law and to introduce a provision which advisedly the legislature has not adopted.

The submission which was urged on behalf of the assessee was that the Memorandum explaining the provisions of Finance (No.2) Bill 1996 indicates that "the order granting or refusing registration has to be passed" within six months from the end of the month in which the application is received by the Commissioner. The period of six months, it is urged, is mandatory. A legislative provision cannot be rewritten by referring to the notes on clauses which, at the highest, would constitute background material to amplify the meaning and purport of a legislative provision. In the present case, what the Court has been called upon to do is to introduce a legislative

fiction which would not be permissible.

In **Chet Ram Vashist vs. Municipal Corporation of Delhi and another**[4]**,** the Supreme Court construed the provisions of Section 313(3) of the Delhi Municipal Corporation Act 1957 under which it was stipulated that within sixty days after the receipt of an application under sub-section (1), the Standing Committee shall either accord sanction to a lay-out plan on such conditions as it may think fit or disallow it or ask for further information. The proviso to sub-section (5) similarly stipulated that the passing of such orders shall not, in any case, be delayed for more than sixty days after the Standing Committee had received information which it considers necessary to deal with the application. The Supreme Court held that neither sub-section (3) nor sub-section (5) provided that an application which is not dealt with within the prescribed period would be deemed to have been allowed or that sanction would be deemed to have been accorded. The observations of the Supreme Court in that regard were as follows:

> "Sub-secs. (3) and (5) of S 313 prescribe a period within which the Standing Committee is expected to deal with the application made under sub-s. (1). But neither sub-section declares that if the Standing Committee does not deal with the application within the prescribed period of sixty days it will be deemed that sanction has been accorded. The statute merely requires the Standing Committee to consider the application within sixty days. It stops short of indicating what will be the result if the Standing Committee fails to do so. If it intended that the failure of the Standing Committee to deal with the

4 AIR 1981 SC 653

matter within the prescribed period should imply a deemed sanction it would have said so. They are two distinct things, the failure of the Standing Committee to deal with the application within sixty days and that the failure should give rise to a right in the applicant to claim that sanction has been accorded. The second does not necessarily follow from the first. A right created by legal fiction is ordinarily the product of express legislation. It seems to us that when sub-sec (3) declares that the Standing Committee shall within sixty days of receipt of the application deal with it, and when the proviso to sub-sec. (5) declares that the Standing Committee shall not in any case delay the passing of orders for more than sixty days the statute merely prescribes a standard of time within which it expects the Standing Committee to dispose of the matter. It is a standard which the statute considers to be reasonable. But non-compliance does not result in a deemed sanction to the lay-out plan."

The mere fact that in sub-section (1) of Section 12AA, the legislature has used the expression 'may' while providing that the Commissioner may make such inquiry as he may deem necessary to satisfy himself about the genuineness of the activities of the trust or institution, is not by itself reason enough to hold that the use of the expression 'shall' in sub-section(2) must, as a necessary consequence or corollary, be regarded as mandatory in nature. In **Ganesh Prasad Sah Kesari and another vs. Lakshmi Narayan Gupta**[5], the Supreme Court held as follows:

"....Obviously where the legislature uses two words 'may' and 'shall' in

5 AIR 1985 SC 964

two different parts of the same provision prima facie it would appear that the legislature manifested its intention to make one part directory and another mandatory. But that by itself is not decisive. The power of the court still to ascertain the real intention of the Legislature by carefully examining the scope of the statute to find out whether the provision is directory or mandatory remains unimpaired even where both the words are used in the same provision. In Govindlal Chagganlal Patel v. Agricultural Produce Market Committee Godhra (1976) 1 SCR 451: (AIR 1976 SC 263) Chandrachud, C.J., speaking for the Court approved the following passage in Crawford on 'Statutory Construction' (Ed. 1940 Art. 261, p. 516):

> "The question as to whether a statute is mandatory or directory depends upon the intent of the legislature and not upon the language in which the intent is clothed. The meaning and intention of the legislature must govern, and these are to be ascertained, not only from the phraseology of the provision, but also while considering its nature, its design and the consequences which would follow from construing it the one way or the other."

Applying this well-recognised canon of construction the conclusion is inescapable that the word 'shall' used in the provision is directory and not mandatory and must be read as 'may'.”

In that case, the Supreme Court was construing the provisions of Section 11A of the Bihar Buildings (Lease, Rent and Eviction) Control Act 1947 relating to the deposit of rent by a tenant in a suit for ejectment. The

Supreme Court observed that the expression 'shall' must be construed as being directory and not mandatory having due regard to the legislative intent.

We are unable to accept the line of reasoning which weighed with the Division Bench of this Court in **Society for the Promotion of Education Adventure Sport & Conservation of Environment (supra).** The Division Bench, in holding that the consequence of the non-consideration of an application for registration within the time fixed by Section 12AA(2), would be a deemed grant of registration, placed reliance on the following considerations:

(i) Unlike the decision of the Supreme Court in **Chet Ram Vashist (supra)** which dealt with the sanctioning of a lay-out plan where an element of public interest is involved, no such public element or public interest is involved and reading a breach of Section 12AA(2) as leading to a deemed grant of registration may, “at the worst”, cause some loss of revenue to the department;

(ii) On the other hand, taking a contrary view and, if a deemed grant of registration is not read into the statute, the assessee would be left at the mercy of the income tax authorities since no remedy has been provided in the Act against a failure to decide;

(iii) An irreversible situation is not created by the grant of a deemed registration because it is always open to the revenue to cancel the registration under sub-section (3) of Section 12AA prospectively. The only adverse consequence is a loss of revenue if the deemed registration is cancelled

subsequently with prospective effect; and

(iv) a purposive interpretation of the statute should be adopted.

We are not inclined to accept this line of reasoning which has found favour with the Division Bench. For one thing, it would be inappropriate for the Court to accept, as a first principle of law, a proposition that there is no public element involved in the collection of revenue as legislated upon by Parliament or by the State Legislature. Proper collection of the revenues of the State is a matter of public interest since public revenues are utilized for public purposes. But such general considerations cannot override the duty of the Court to give plain meaning and effect to the language used in a taxing statute. The duty of the Court first and foremost is to construe the words of the taxing statute in question as they stand and the intention of the legislature has to be construed with reference to the language of the words used. While interpreting the provision, the Court cannot legislate a new provision or introduce a deeming fiction where none has been provided. Similarly, even as a matter of first principle, a *casus omissus* cannot be supplied by the Court unless there is a case of clear necessity and when reason is found within the statute itself (**Padmasundara Rao (Dead) and others vs. State of T.N. and others[6], Union of India vs. Rajiv Kumar[7] and Unique Butyle Tube Industries (P) Ltd. vs. U.P. Financial Corporation and others[8]**)

A similar view to that of the Division Bench was adopted in a judgement of the Delhi Bench of the Income Tax Appellate Tribunal in **Bhgwad Swarup Shri Shri Devraha Baba Memorial Shri Hari**

6 AIR 2002 SC 1334, paragraphs 8A and 14
7 AIR 2003 SC 2917, paragraph 23
8 (2003) 2 SCC 455, paragraph 14

Parmarth Dham Trust vs. Commissioner of Income-tax, Dehradun[9]. The Tribunal, as indeed the Division Bench of this Court, in the earlier decision, observed that on the balance and though the questions presented some difficulty, it was inclined to take the view supporting the plea of deemed registration, otherwise the assessee would be left without a remedy. The assessee, in our view, is not without a remedy since a delay on the part of the Commissioner to consider an application can be remedied by recourse to the jurisdiction under Article 226 of the Constitution. If the Commissioner has delayed in passing an order on an application for registration under Section 12AA, recourse to the remedy under Article 226 is always available to order an expeditious decision thereon.

A considerable amount of reliance was placed on behalf of the assessee in the present case on a judgement of the Supreme Court in **Commissioner of Income-Tax vs. Ajanta Electricals[10].** In that case, the Supreme Court construed the provisions of Section 139(2) of the Act prior to its deletion with effect from 1989. The proviso to Section 139(2) conferred a discretion on the Income Tax Officer to extend the date for the furnishing of a return. The revenue had relied upon a judgement of the Andhra Pradesh High Court in which it had been held that there was no provision in the Act or the Rules requiring an Income Tax Officer to pass an order on an application filed by the assessee subsequent to the time given to him for filing his return pursuant to a notice under sub-section (2) of Section 139. The Supreme Court held that merely because a specific provision was absent for authorising an Income Tax Officer to entertain an application made

9 [2007] 17 SOT 281 (Delhi) (SB)
10 215 ITR 114 (1995)

beyond time, it was not proper to hold that it was not open to the assessee to make an application under Section 139(2) for extension of time, after the time allowed had expired. In consequence, the Supreme Court held that the application made by the assessee under Section 139(2) for extension of time after the expiry of the time allowed was maintainable and therefore valid. That was the point which was decided by the Supreme Court. This decision would be of no assistance to the assessee.

We may also note at this stage, that the provisions of sub-section (2) of Section 12AA of the Act have been construed in a judgment of a Division Bench of the Madras High Court in **Commissioner of Income-tax-I Salem vs. Sheela Christian Charitable Trust**[11]. The Division Bench in that case has held that the Tribunal was not right in holding that the failure to pass an order in an application under Section 12AA within the stipulated period of six months would automatically result in granting registration to the trust. The same view has been reiterated by a Division Bench of the Madras High Court in **Commissioner of Income-tax vs. Karimangalam Onriya Pengal Semipu Amaipu Ltd.**[12]**.**

There can be no dispute about the basic principle of law that where a legal fiction has been created, it must be given full force and effect. As Lord Asquith,J observed in **East End Dwellings Co. Ltd. vs. Finsbury Borough Council**[13]**, "**where the statute says that you must imagine a certain state of affairs; it does not say that having done so, you must cause or permit your imagination to boggle when it comes to the inevitable corollaries of that

11 [2013] 32 taxman.com 242 (MADRAS)
12 [2013] 32 taxman.com 292 (MADRAS)
13 (1951) 2 All ER 587 p. 599 B-D : 1952 AC 109 (HL)

state of affairs". The point, however, in this matter is that Section 12AA(2) does not provide for a legal fiction at all. Parliament has carefully and advisedly not provided for a deeming fiction to the effect that an application for registration would be deemed to have been granted, if it is not disposed of within six months. Legislative fictions are what they purport to be : acts of the legislating body. The Court cannot create one, where the legislature has not provided a deeming fiction.

In **Bhavnagar University vs. Palitana Sugar Mill (P) Ltd. and others**[14]**,** the Apex Court held as follows:

> "We are not oblivious of the law that when a public functionary is required to do a certain thing within a specified time, the same is ordinarily directory but it is equally when settled that when consequence for inaction on the part of the statutory authorities within such specified time is expressly provided, it must be held to be imperative."

Significantly, in the present case, Parliament has not legislated a consequence of a failure to decide an application within a period of six months.

In the circumstances, we answer the questions referred to the Full Bench for reference in the following terms:

> (i) Non disposal of an application for registration, by granting or refusing registration, before the expiry of six months as provided under Section 12AA (2) of the Income Tax Act 1961 would not result

14 (2003) 2 SCC 111

in a deemed grant of registration; and

(ii) the judgment of the Division Bench of this Court in **Society for the Promotion of Education Adventure Sport & Conservation of Environment (supra)** does not lay down the correct position of law.

The reference is, accordingly, answered. The appeal shall now be placed before the regular bench in accordance with the roster for final disposal in terms of the questions so answered.

There shall be no order as to costs.

Order Date :- 5.2.2015
RK

(Dr.D.Y.Chandrachud,C.J.)

(Dilip Gupta,J.)

(Suneet Kumar,J.)