

**IN THE INCOME TAX APPELLATE TRIBUNAL
KOLKATA BENCH "C" KOLKATA**

Before **Shri Waseem Ahmed, Accountant Member** and
Shri S.S.Viswanethra Ravi, Judicial Member

ITA No.756/Kol/2010

Asansol Durgapur Development Authority 1 st Administrative Building, City Center, Durgapur, West Bengal [PAN No.AAALA 0733G]	V/s.	Commissioner of Income Tax, Durgapur, Urmila Bhawan, City Center
अपीलार्थी /Appellant		
..		
प्रत्यर्थी/Respondent		

अपीलार्थी की ओर से/By Appellant	Dr. Samcer Chakraborty, Sr. Advocate & Shri Abhijit Biswas, Advocate
प्रत्यर्थी की ओर से/By Respondent	Shri S.Srivastava, CIT-DR
सुनवाई की तारीख/Date of Hearing	18-05-2016
घोषणा की तारीख/Date of Pronouncement	24-06-2016

आदेश /ORDER

PER Waseem Ahmed, Accountant Member:-

This appeal by the assessee is against the order passed u/s 12AA of the Income Tax Act, 1961 (hereinafter referred to as 'the Act') dated 31.12.2009 of Commissioner of Income Tax, Durgapur dated 10.09.2009.

Dr. Samcere Chakraborty and Shri Abhijit Biswas, Ld. Authorized Representatives appeared on behalf of the assessee and Shri S. Srivastava, Ld. Departmental Representative appeared on behalf Revenue.

2. At the outset, Ld. AR of assessee-trust drew our attention that the appeal is barred by limitation for 152 days due to wrong advice and ill health of Id. advocate. We observe the delay in the filing of its appeal by assessee-

trust which though stands suitably explained as per accompanying condonation petition of delay. The Id. DR raised no objection if the delay of condonation is considered. Hence, we condone the delay and proceed for hearing the appeal.

3. Solitary ground raised by assessee in this appeal is that Ld. CIT erred in rejecting the registration application u/s 12AA of the Act on account of delay in filing the registration application and holding that the activities of the assessee are non charitable.

4. Facts in brief are that assessee-applicant is a Development Authority constituted u/s. 11 of the West Bengal Town and Country (Planning & Development) Act, 1979 and engaged in the activities of developing the public utilities. The assessee-trust upto including Assessment Year 2003-04 was claiming the exemption u/s. 10(20A) of the Act. However, the Section was omitted by Finance Act 2002 with effect from 01.04.2003. Thereafter assessee submitted the registration application u/s 12A of the Act on 19.03.2009. During the course registration proceedings, Ld. CIT observed that assessee has declared following income in the earlier years:-

	Items of income:	Year ended 31-03-2008	Year ended 31-03-2007	Year ended 31.03.2006
All figures are in Rupees crores				
		Rs.	Rs.	Rs.
a)	Relating to land	33.74	43.12	18.37
b)	From water distribution	3.96	3.17	2.18
c)	Contractual income from Public Private Partnership	15.19	8.27	NIL
d)	Ground rent/licence fee etc. as rental income	0.81	0.94	2.63
e)	Interest and dividend	11.22	5.64	3.49

On the basis of aforesaid income, the Ld. CIT observed that the activities of assessee are in the nature of trade, commerce or business or in relation to rendering of any services to any trade, commerce or business. Therefore, the

assessee is not eligible for registration u/s 12A of the Act in terms of amended provision of Sec. 2(15) of the Act. Besides above, the Ld. CIT observed that with effect from 01.06.2007 the power for condoning the delay has been withdrawn. Consequently, the Ld. CIT can grant the exemption only from the financial year in which the application is made. In the instant case the application was submitted by assessee for registration u/s 12A of the Act on dated 19.03.2009. In view of above the Ld. CIT rejected the application filed by assessee u/s 12A of the Act.

Being aggrieved by this order of L'd CIT(A) assessee preferred an appeal before us.

5. We have heard rival contentions and perused the materials available on record. Before us Ld. AR argued that the activity and source of income assumed by assessee-trust is erroneous on the ground that land does not belong to the assessee. The land is the property of Govt. of West Bengal. The appellant acts only as custodian of said land on behalf of State Government. So the appellant can claim immunity from union taxation under Article 289 of the Constitution of India as the income relating to land really belongs to State Government and not to appellant-assessee. The assessee is only the custodian of fund on behalf of State Government. The Ld. AR further submitted that after the amendment made in the Finance Act 2007, it is necessary for the trust / institution to file registration application u/s 12A of the Act within one year from the date of its creation or establishment, whichever is later. If it is filed on or after 01.06.2007 the exemption shall be available u/s. 11 and 12 of the Act on prospective basis. The Ld. counsel for the assessee further submitted that the expression incorporated u/s 2(15) of the Act that the object of public utility is not restricted to the objects beneficial to the whole mankind and object beneficial to the section of the public is an object of general public utility. It is sufficient if the intention is for the benefit of the

section of the public as distinguished from specific individuals. Finally the Id. AR requested the Bench that the issue may be decided on merit.

On the other hand, L'd DR submitted that the application for registration is filed delayed. The Id. DR further submitted that as per the proviso to Sec.2(15) of the Act the activities of the assessee-trust are in the nature of commerce and trade and therefore the assessee-trust is not to entitle for registration u/s. 12A of the Act and he vehemently relied on the order of L'd CIT.

6. From the facts of the case, we find that assessee-trust in the instant case, is the West Bengal Statutory Body. It was claiming exemption from its income tax u/s 10(20A) of the Act till the AY 2003-04. However, the same has been omitted by the Finance Act, 2002 with effect from 01.04.2003. Consequently as a result of omission the assessee-trust was not entitled to claim the exemption of its earned income under the provision of IT Act. Now to claim the exemption, assessee filed registration application on 19.03.2009 u/s 12A of the Act and same was rejected by L'd CIT on account of two reasons:-

- (a) The application was filed late and condonation of delay is beyond the power of L'd CIT.,
- (b) Activities of assessee-trust are in the nature of commerce and trade;

Now, the question before us arises so as to whether L'd CIT is right in rejecting the registration application in the aforesaid facts and circumstances of the present case. There is no doubt that the power of L'd CIT has been withdrawn for condoning the delay of registration application. The law of Income Tax Act clearly states that in terms of Sec. 12A(2) where the application made for registration u/s. 12A of the Act on or after the first day of June, 2007, the exemption of income would be available to the assessee from the Assessment Year immediately following the financial year in which such application is made. At this juncture, we find pertinent to reproduce the provision of the Act.

“12A [conditions for applicability of Sections 11 and 12]

[(1)]

[(2)] where an application has been made on or after the first day of June, 2007, the provisions of Sections 11 and 12 shall apply in relation to the income of such trust or institution from the assessment year, immediately following the financial year in such application is made:]

From a bare reading of the aforesaid proviso this is amply clear that exemption Sections 11 & 12 will be available from the first day of assessment year immediately following the financial year in which the application is made. Now in the instant case, since the application has been made on 19.03.2009 then the assessee-trust cannot claim the exemption for the earlier years but certainly entitle to claim the exemption benefit prospectively from the financial year in which the application has been made. In this connection, we are of the considered view that L'd CIT is not supposed to done the delay for registration application but should grant the registration on prospective basis. In our considered view, the action of L'd CIT for rejecting the registration application on the ground that it is filed late is not correct. It is because, L'd CIT has power to grant registration prospectively. Now coming to the issue that the activities of the assessee-trust are in the nature of trade, commerce or business, we find that various benches ITAT have decided this issue in favour of assessee. Reference in this connection is made to Chandigarh Bench in the case of *Punjab Cricket Asociation v. CIT* (2016) 65 taxmann.com 239 (Chandigarh –Trib) 157 ITD 227 (Chan) wherein the head note:-

IT: Commissioner is empowered to cancel registration granted to a society under section 12A from assessment year 2011-12 onwards, he cannot assume such power for earlier assessment years;

IT: Consideration of first proviso to section 2(15) has no role to play in matters relating to registration of a trust or institution under section 12A in respect of granting or declining or cancelling registration.

Further reference in Amritsar Bench in the case of *Kapurthala Improvement Trust v. CIT* (20115) 60 taxmann.com 301 (Amritsar –Trib.) wherein the Tribunal held in para 8 to 14, the extract content reproduced below:-

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

9. We find that, as learned counsel rightly points out, the scope of powers of the Commissioner under section 12AA(3) for cancellation of registration already granted is very limited in scope in as much as it can only be invoked only when (i) that the activities of the trust are not genuine, and (ii) that the activities of the trust or the institution are not being carried out in accordance with the objects of the trust or the institution. Section 12AA(3) specifically provides that when the CIT "is satisfied that the activities of such trust or institution are not genuine or are not being carried out in accordance with the objects of the trust or institution, as the case may be, he shall pass an order in writing cancelling the registration of such trust or institution". It is not even the case of the CIT that the activities of the assessee trust are "not genuine" or that the "activities of the assessee are not being carried out in accordance with the objects" of the assessee trust. The case of the CIT rests on the first proviso to Section 2(15) coming into play on the facts of this case but then such a factor cannot warrant or justify the powers under section 12AA(3) being invoked. We, therefore, uphold the grievance of the assessee that the action of the learned Commissioner, in withdrawing the registration under section 12AA(3), was well beyond the limited scope of the powers conferred on him by the statute. The assessee, therefore, must succeed in the appeal for this short reason alone.

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

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

(15) "charitable purpose" includes relief of the poor, education, medical relief, preservation of environment (including watersheds, forests and wildlife) and preservation of monuments or places or

objects of artistic or historic interest,] and the advancement of any other object of general public utility:

Provided that the advancement of any other object of general public utility shall not be a charitable purpose, if it involves the carrying on of any activity in the nature of trade, commerce or business, or any activity of rendering any service in relation to any trade, commerce or business, for a cess or fee or any other consideration, irrespective of the nature of use or application, or retention, of the income from such activity:

Provided further that the first proviso shall not apply if the aggregate value of the receipts from the activities referred to therein is twenty-five lakh rupees or less in the previous year:
(Emphasis supplied)

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

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

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

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

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

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

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

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

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

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

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

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

Respectfully following the above precedent of co-ordinate Benches of ITAT (supra) we reverse the order of the Ld. CIT and direct to grant registration under section 12AA of the Act. Hence the ground of appeal of the assessee is allowed.

7. In the result, assessee's appeal stands allowed.

Order pronounced in the open court 24/06/2016

Sd/-
(S.S.Viswanethra Ravi)
(Judicial Member)
Kolkata,
*Dkp

Sd/-
(Waseem Ahmed)
(Accountant Member)

दिनांक:- 24/06/2016 कोलकाता ।

आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-

1. अपीलार्थी/Appellant-Asansol Durgapur Dev. Authority, 1st Administrative Building
City Center, Durgapur, West Bengal, Pin 713 216
2. प्रत्यर्थी/Respondent-CIT, Durgapur, Urmila Bhawan, A-2, Nandalal Bithi City Centre,
Durgapur -713 216
3. संबंधित आयकर आयुक्त / Concerned CIT Kolkata
4. आयकर आयुक्त- अपील / CIT (A) Kolkata
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, कोलकाता / DR, ITAT, Kolkata
6. गार्ड फाइल / Guard file.

By order/आदेश से,
/True Copy/
उप/सहायक पंजीकार
आयकर अपीलीय अधिकरण,
कोलकाता ।