

आयकर अपीलीय अधिकरण, विशाखापटणम पीठ, विशाखापटणम

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

**श्री एन के चौधरी, न्यायिक सदस्य एवं श्री डि.एस. सुन्दर सिंह, लेखा सदस्य के समक्ष
BEFORE SHRI N.K.CHOUDHRY, HON'BLE JUDICIAL MEMBER &
SHRI D.S. SUNDER SINGH, HON'BLE ACCOUNTANT MEMBER**

**आयकर अपीलसं./I.T.A.No.418/Viz/2012
(निर्धारण वर्ष/Assessment Year: -NA-)**

M/s Visakhapatnam Port Trust
Port Area
Visakhapatnam
[PAN : AAALV0035K]

Vs. Commissioner of Income Tax-1
Visakhapatnam

(अपीलार्थी/ Appellant)

(प्रत्यर्थी/ Respondent)

अपीलार्थी की ओर से/ Appellant by
प्रत्यर्थी की ओर से / Respondent by

: Shri G.V.N.Hari, AR
: Shri T.S.N.Murthy, CIT(DR)

सुनवाई की तारीख / Date of Hearing : 01.02.2021
घोषणा की तारीख/Date of Pronouncement : 12.03.2021

आदेश /ORDER

Per D.S.Sunder Singh, Accountant Member :

This appeal is filed by the assessee against the order of the Commissioner of Income Tax [CIT]-1, Visakhapatnam in F.No.CIT-1/VSP/12AA/VPT/12-13 dated 11.09.2012.

2. The assessee is a Port Trust, granted registration u/s 12A of the Income Tax Act, 1961 (in short 'Act') w.e.f. 01.04.2002 i.e. from the Assessment Year (A.Y.) 2003-04 onwards, pursuant to the order of the

ITAT, Visakhapatnam wherein the ITAT viewed that the assessee is entitled to registration u/s 12A of the Act, as the assessee was pursuing the objects of general public utility which are considered to be charitable in nature. Subsequently, after the amendment made in sub-section 15 of section 2, by Finance Act, 2008, the charitable activity was redefined in the first proviso to section 2(15) of the Act, hence, the Ld.CIT had issued the notice proposing to cancel the registration already granted to the assessee Trust, vide show cause letter No.CIT-1/VSP/12AA/VPT/12-13 dated 09.08.2012, observing that the assessee Trust is carrying on its activities on commercial principles and generating huge income from operations with the turnover exceeding the threshold limit of Rs.10 lakhs as envisaged in proviso to Sec.2(15) of the Act. In response to the show cause notice issued by the Ld.CIT, the assessee filed its reply stating that the activities of the assessee are genuine and it is carrying on the activities in accordance with the objects of the Trust, therefore submitted that there is no case for cancellation of the registration already granted to it u/s 12A of the Act. The assessee further submitted that the issue with regard to taxation of income that was not exempt in case of trusts was addressed in section 13(8) of the Act which was inserted by Finance Act, 2012 with

retrospective effect from 01.04.2009 and as per which 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. Thus, submitted that section 11 and 12 of the Act do not apply for any of the previous year, if, proviso to section 2(15) are applicable in such year. Therefore, submitted that the Act itself has taken care not to extend the benefits of registration in any of the year in which the income of the institution registered u/s 12A exceeds the amounts mentioned in section 2(15) of the Act.

2.1. Not being convinced with the explanation of the assessee, the Ld.CIT held that by virtue of second proviso to section 2(15) of the Act that, since, the assessee's threshold limit of turnover exceeded the sum of Rs.10,00,000/- or (Rs.25,00,000/- w.e.f. 01.04.2012), the assessee is hit by the provisions of section 2(15) of the Act, and thus, held that the objects of the assessee are no longer charitable as per the amended provisions of the Act. The Ld.CIT further observed that assessee is doing full-fledged business activity, therefore, held that it is a commercial enterprise. The Ld.CIT further viewed that if the objects of the institution are no longer

charitable such institution cannot be said to be exist genuinely for charitable purposes and registration u/s 12A is available only to the charitable institutions. The Ld.CIT relied on the decision of ITAT Chandigarh Bench (103 ITA 988) in the case of Punjab Urban Planning & Development Authority and held that the assessee is no longer charitable institution and accordingly cancelled the registration granted to it w.e.f.01.04.2009. For the sake of clarity and convenience, we extract relevant part of the order of the Ld.CIT in para No.8.6 to 9 which reads as under :

"8.6. I have given my anxious consideration to the above contention. The Hon'ble ITAT has directed for granting of registration u/s 12AA of the Act since it took the view that the assessee's objects are charitable in nature. However, in the changed position of law in terms of amendment to Section 2(15) of the Act with effect from 1.4.2009 the definition of charitable purpose has undergone change. In this light of the position of law the activities of the assessee are no longer charitable in nature. Therefore, in my view, the above argument of the assessee is not correct. Once it is established that either by the conduct of the Institution or by way of legal requirement, the activities are not charitable, in my view Sec.12-AA(3) can be invoked on the ground that the activities of the Trust are not genuinely charitable.

8.7. Therefore, even if activities are carried out in accordance with trust deed but the activities are no longer charitable in nature, it will be hit by genuineness clause. Hence, in my view the word 'genuineness' is used only to look into the character of the institution as to whether it is charitable or not. Hence, once it is established that the institution is not for charitable purpose as per the definition of the word "charitable purpose", the activity can be termed as not genuine for the Purpose of Sec.12AA of the Act.

8.8. The last contention of the assessee is that it has taken note of the amendment to Section 2(15) of the Act (by Finance Act, 2008) which has been brought out to give restrictive meaning to "any other object of general public utility" as appearing in the above section. Accordingly, it filed Returns of Income for the Asst. Year 2009-10 onwards admitting its income under the head "Business Income" Therefore, as per assessee, no purpose is served by withdrawing registration granted to it under Section 12AA of IT Act.

8.9. *I have carefully considered the above contention Admittedly, the assessee recognized the new position of law that it is not eligible for exemption u/s 11 of the Act. This is also confirmed by the fact that the assessee admitted income under the head "Business income" without claiming exemption u/s 11 of the Act read with Section 12AA of the Act. In view of the above, I do not find any merit in the above contention of the assessee.*

9. *In view of the facts and circumstances of the case as discussed above, it is beyond doubt that the objects and activity of the assessee trust are no longer charitable as per the Sec 2(15) of the IT Act with effect from 01.04.2009 Accordingly, the registration granted to the assessee trust viz., Visakhapatnam Port Trust is hereby cancelled u/s 12AA (3) of the IT Act -with effect from 1.4. 2009."*

3. Against the order of the Ld.CIT, the assessee filed appeal before this Tribunal and raised the following grounds :

1. *Appellant submits that the Commissioner of Income Tax is not justified in cancelling the registration granted under section 12AA of the Income Tax act, 1961 with effect from 01.04.2009 under the provisions of sub section (3) of the said section.*

2. *Appellant submits that the Commissioner of Income Tax is not justified in cancelling the registration granted under section 12AA of the Income Tax Act, 1961 with effect from 01.04.2009 under the provisions of sub-section (3) of the said section on the ground of modification of the definition of "charitable purpose" vide amendment to section 2(15) of the Income Tax Act, 1961, whereas, as per the provisions of sub section (3) of section 12AA, registration granted under that section can be cancelled only when there is satisfaction that the activities of the Trust are not genuine or are not being carried out in accordance with the objects of the Trust, but not in any other case and accordingly appellant submits that the action of Commissioner of Income Tax not falling within the purview of sub-section (3) of section 12AA is invalid.*

3.1. During the appeal hearing, the Ld.AR submitted that cancellation of registration u/s 12AA, which was already granted to the assessee is illegal and bad in law. The Ld.AR further submitted that once the registration is granted, the Ld.CIT(A) is not permitted to cancel the registration unless it is found that the activities of the assessee are not genuine or not being

carried out in accordance with the objects of the Trust or the institution. In the instant case, the Ld.AR argued that the activities of the assessee are genuine and carried out in accordance with the objects of the Trust, therefore, cancellation of registration which was already granted is bad in law, hence requested to set aside the order of the Ld.CIT and restore the registration. It is further submitted by the Ld.AR that merely on account of amendment to section 2(15) of the Act, there is no requirement of cancellation of registration. The provisions of section 13(8) of the Act clearly restrict the application of provisions of section 11 and 12 in respect of any previous year to which the amended provisions are applicable. The assessee further submitted that the assessee's activities are genuine and carried out in accordance with the objects as regulated by provisions of Major Port Trust, Act, 1963 and the accounts are being audited by C&AG. The Ld.AR relied on the decision of Hon'ble High Court of Kerala in CIT Vs. Cochin Port Trust (2019) 178 DTR (Kerala) 248, DIT(E) & Anr Vs. Karnataka Badminton Association 92 CCH 363 (Kar) and the Central Board of Direct Taxes (CBDT) Circular No.21 of 2016 dated 27.05.2016 and the CIT Vs Kandla Port Trust (2014) 364 ITR 0164 (Guj).

4. Per contra, the Ld.DR submitted that the Ld.CIT has rightly cancelled the registration granted u/s 12AA(3), since, there was change in the definition of charitable purpose and the assessee has exceeded the threshold limit of turnover mentioned in the section 2(15) of the Act i.e. Rs.10,00,000/- (Rs.25,00,000/- w.e.f. 01.04.2012). The Ld.DR further submitted that the Ld.CIT rightly held that by the conduct of the institution or by way of legal requirement, the activities are not charitable and it is incumbent up on the Ld.CIT to cancel the registration. The Ld.DR heavily placed reliance on the findings of the Ld.CIT in para No.8.6 to 9 (supra). The Ld.DR distinguished the facts of the assessee's case with the case of Cochin Port Trust relied upon by the Ld.AR stating that the issue before the Hon'ble High Court was the delay in making application for registration u/s 12AA, but not the cancellation of registration u/s 12AA(3). Thus, argued that the decision of Hon'ble Kerala High Court has no application in the assessee's case. Accordingly submitted that the Ld.CIT has rightly cancelled the registration, hence, requested to uphold the order of the Ld.CIT and dismiss the appeal of the assessee.

5. We have heard both the parties and perused the material placed on record. The grounds / issues raised by the assessee in this case relates to

the question as to whether the Ld.CIT is under mandatory obligation to cancel the registration u/s 12AA to the Trust which was already granted earlier, consequent upon amendment to the Act or not. The answer to this question is found in clarificatory circular issued by CBDT in Circular No.21/2016 dated 27.05.2016, wherein CBDT has clarified that it is not mandatory to cancel the registration already granted u/s 12AA to a charitable institution merely on the ground that the cut-off specified in the proviso to section 2(15) of the Act is exceeded in a particular year. For the sake of clarity and convenience, we extract relevant para No.3 and 4 of the Circular cited which reads as under :

"3. The temporary excess of receipts beyond the specified cut-off in one year may not necessarily be the outcome of alteration in the very nature of the activities of the trust or institution required cancellation of registration already granted to the Trust or institution. Hence, section 13 of the Act has been amended vide Finance Act, 2012 by inserting a new sub-section (8) therein to provide that such organization would not get benefit of tax exemption in the particular year in which its receipts from commercial activities exceed the threshold whether or not the registration granted is cancelled. This amendment has taken effect retrospectively from 1st April, 2009 and accordingly applies in relation to the assessment year 2009-10 onwards.

4. In view of the aforesaid position, it is clarified that it shall not be mandatory to cancel the registration already granted u/s 12AA to a charitable institution merely on the ground that the cut-off specified in the proviso to section 2(15) of the Act is exceeded in a particular year without there being any change in the nature of activities of the institution. If in any particular year, the specified cut-off is exceeded, the tax exemption would be deemed to the institution in that year and cancellation of registration would not be mandatory unless such cancellation becomes necessary on the ground(s) prescribed under the Act."

5.1. Identical issue was considered by Hon'ble High Court of Karnataka in the case of DIT(E) & Anr Vs. Karnataka Badminton Association , 92 CCH 363 (Kar) and the Hon'ble High Court held as under :

"9. A plain reading of the aforesaid provision makes it very clear that a registration granted under Section 12A of the Act can be cancelled under two circumstances e., (I) If the activities of such trust or institution are not genuine and (ii) The activities of trust or institution not being carried out in accordance with the object of the trust or institution. Only on these two conditions/grounds being satisfied, the registration granted under the provisions of Section 12A of the Act could be cancelled by the authorities.

10. It is not in dispute that the Director of Income Tax (Exemption) has not recorded any such finding about the violation of the two conditions stated above, The Tribunal while deciding the matter has rightly recorded a finding that a perusal of impugned order shows that Director of Income Tax (Exemptions) has not arrived at any such finding. The fact that the receipts from commercial activities are more compared to the overall receipts of the charitable organization can neither lead to the conclusion that the activities of the trust or institution are not genuine nor it can be said that the activities of the trust or institution are not being carried out in accordance with the objects of the trust or institution and therefore the two conditions stipulated under the provisions of Sub-section (3) of Section 12AA of the Act, which empowers the authority to cancel the registration, do not exist in the present case. The registration granted is cancelled in view of the amendment of first proviso to Section 2(15) of the Act. That is not a ground specified in the statute for cancellation of the registration. In fact, Sub-section (8) of Section 13 of the Act which is Introduced by Financial Act, 2012 which came into effect from 1.4.2009 categorically provides that, nothing contained in Section 11 or 12 shall operate so as to exclude any income from the total income of the previous year or any receipt thereof. If the provisions of the first proviso to clause (15) of section 2 becomes applicable in the case of such person in the said previous year, the statute has protected the interest of the revenue. Notwithstanding the fact that the assessee is conferred registration under the provisions of Section 12A of the Act, unless the assessee falls within the provisions of Section 2(15) of the Act, excluding the first proviso, the assessee would not be entitled to the benefit of exemption from the tax. If the case of the assessee falls in the first proviso to Section 2(15) of the Act, the benefit of registration which flow from Section 12A of the Act is not available. Anyhow, that is a matter to be considered by the Assessing Authority. But on that ground, the registration cannot be cancelled, which is precisely the Tribunal has held by allowing the appeal in the present impugned order."

5.2. This Tribunal also had occasion to consider the issue in the case of Visakhapatnam Metropolitan Region Development Authority in I.T.A. No. 295/Viz/2012 dated 20.03.2020 and held that the once the registration is granted, it is not permissible to the Ld.CIT to cancel the registration u/s 12AA(3) of the Act at any stage unless it is found that the assessee is not carrying on the activity as per the objects or the activities of the assessee are not charitable. Though the assessee relied on the decision of Cochin Port Trust, the case is distinguishable by facts, since, the issue before the Hon'ble High Court was the condonation of delay, but not the cancellation of registration u/s 12AA of the Act. Similarly, the assessee also relied on the decision of Gujarat Maritime Board. The facts of the case law relied upon by the assessee are distinguishable as the Maritime Board takes care of small ports but it is not itself a port.

5.3. In the instant case, the registration was already granted by the Ld.CIT vide order dated 20.03.2008 w.e.f. 01.04.2002. There is no dispute with regard to genuineness of the activities and there is no finding of the Ld.CIT with regard to not carrying on the activities as per the objects of the trust. Therefore, as per Circular No.21/2016, there is no case for cancellation of registration. Though the Circular was issued on 27.05.2016, the same is

clarificatory circular which has retrospective effect. In the circular, itself, it is mentioned that it has retrospective effect. By Finance Act, 2012, by inserting new sub section 8 in section 13, it has provided sufficient care not to get benefit of exemption in such year in which its receipts or commercial activities exceeds the threshold limit. Though the assessee continued to have the registration, the AO is not barred in examining the benefits of exemption claimed by the assessee u/s 11 and 12 as provided to u/s 13(8) or section 2(15) of the Act. Thus, the cancellation of registration is not mandatory as envisaged in Circular No.21/2016. The decision of Hon'ble Karnataka High Court and the decision of this Tribunal in the case of VMRDA and the decision of Kandla Port Trust which was discussed supra support our view. Therefore, taking into consideration all the above facts, case laws, judicial precedents and the circular of CBDT, we hold that cancellation of registration u/s 12AA(3) by the Ld,CIT is bad in law, hence, we set aside the order of the Ld.CIT and restore the registration already granted to the assessee. Accordingly, the appeal of the assessee is allowed.

6. In the result, appeal filed by the assessee is allowed.

I.T.A. No.418/Viz/2012
M/s Visakhapatnam Port Trust, Visakhapatnam

Order pronounced in the open court on 12th March, 2021.

Sd/-

(एन के चौधरी)
(N.K.CHOUDHRY)

न्यायिक सदस्य/ JUDICIAL MEMBER

Dated : 12 .03.2021

L.Rama, SPS

Sd/-

(डि.एस.सुन्दर सिंह)
(D.S.SUNDER SINGH)

लेखा सदस्य/ACCOUNTANT MEMBER

आदेश की प्रतिलिपि अग्रेषित/Copy of the order forwarded to:-

1. निर्धारिती/ The Assessee-M/s Visakhapatnam Port Trust, Port Area
Visakhapatnam
2. राजस्व/The Revenue –Commissioner of Income Tax-1, Visakhapatnam
3. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, विशाखापटणम/DR, ITAT, Visakhapatnam
- 4.गार्डफ़ाईल / Guard file

आदेशानुसार / BY ORDER

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Sr. Private Secretary
 ITAT, Visakhapatnam