

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE K.VINOD CHANDRAN

&

THE HONOURABLE MR. JUSTICE ASHOK MENON

FRIDAY, THE 20TH DAY OF JULY 2018 / 29TH ASHADHA, 1940

ITA.No. 54 of 2009

AGAINST THE ORDER/JUDGMENT IN ITA 238/2008 of I.T.A.TRIBUNAL, COCHIN BENCH DATED
10-09-2008

APPELLANT (S) /APPELLANT

THE COMMISSINER OF INCOME TAX, COCHIN

BY ADVS.SRI.P.K.R.MENON, SR.COUNSEL,
GOI (TAXES)
SRI.JOSE JOSEPH, SC, FOR INCOME TAX

RESPONDENTS:

TBI EDUCATION TRUST
ENANALLOOR, MUVATTUPUZHA.

R1 BY ADV. SRI.N.J.MATHEWS
R1 BY ADV. SRI.SHYSON P.MANGUZHA

THIS INCOME TAX APPEAL HAVING BEEN FINALLY HEARD ON 20-07-2018,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

ITA NO. 54/2009

APPENDIX

APPELLANT'S ANNEXURES:

ANNEXURE A: TRUE COPY OF THE ORDER OF THE COMMISSIONER DT 29.11.2007

ANNEXURE B: TRUE COPY OF THE ORDER OF THE INCOME-TAX APPELLATE
TRIBUNAL DT 10.09.2008

RESPONDENTS ANNEXURES: NIL

TRUE COPY

P.A TO JUDGE

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K. VINOD CHANDRAN & ASHOK MENON, JJ

I.T Appeal No. 54 of 2009

Dated this the 20th day of July, 2018

J U D G M E N T

Vinod Chandran, J

The only issue arising in the aforesaid case is whether there could be a deemed registration under Section 12A of the Income Tax Act, 1961. The question of law framed in the memorandum is as follows:

Whether, on the facts and in the circumstances of the case the Tribunal is right in law and with jurisdiction in deeming the application as being condoned and in directing the CIT to condone delay and to grant registration under Section 12A of the I.T Act?

2. The learned Standing Counsel, Government of India, (Taxes) points out that there was a detailed consideration in Annexure A as to the respondent being not a charitable trust especially with reference to the clause in the trust deed which enabled collection of fee, deposits, contributions etc., from the students and their parents. Though the trust was essentially for setting up of an educational institution, there was no charity involved is the specific finding. The applicant had constituted a trust in the year 2002, the creation of the deed being on 27.05.2002 and filed an application only on 10.10.2006. There was considerable delay in filing such application and there were not sufficient reasons stated for condoning such delay. Challenging the order of the Tribunal, it is also pointed out that though a period of six months is provided under Section 12AA(2), there is no deeming provision as such in the statute and in such

circumstance, there could not be a deemed registration under Section 12A.

3. The learned Counsel appearing for the respondent submits that the very same Commissioner, who filed the appeal has given effect to the order of the Tribunal and in such circumstance, the Income Tax Appeal is infructuous. It is also submitted that the Tribunal had relied on the decision of the Special Bench of the Income Tax Appellate Tribunal, Delhi reported in *[2008] 111 ITD 175 (Delhi) (SB) (Bhagwad Swarup Shri Shri Devraha Baba Memorial Shri Hari Parmarth Dham Trust v. Commissioner of Income-tax, Dehradun)* which found the limitation as provided under sub-section (2) of Section 12AA to be a mandatory provision; failure to comply with which would result in there being a deeming registration under the Act. The learned Counsel would also refer to the circular of the CBDT

which again mandated that the application should be considered and either allowed or rejected within the period of six months, as provided under Section 12AA. Reliance is placed on the decision of the Hon'ble Supreme Court reported in ***(2017) 11 SCC 480 (Commissioner of Income-Tax v. Society for the promotion of Education, Adventure Sport & Conservation of Environment)***

4. The learned Standing Counsel, Government of India(Taxes), in counter has referred to the decision of the Full Bench of the Allahabad High Court reported in ***[2015] 372 ITR 209 (All)(FB) (Commissioner of Income-Tax v. Muzafar Nagar Development Authority)***, wherein it is specifically held that there could be no deemed registration merely for reason of non-disposal, within six months, of an application for registration filed under Section 12AA. On a reading of the Full Bench decision, which has a persuasive power and also the decision of

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the Special Bench of the Tribunal, we are inclined to follow the Full Bench decision of the Allahabad High Court. Without a specific deeming provision there can be no grant of deemed registration under Section 12AA *(2002) 9 SCC 1 [Appollo Tyres v. CIT, Kochi]*. There can be no fiction created by mere inference, in the absence of a specific provision deeming something to be other than what actually it is. Then, the fact assume significance as to what was the view of the Department insofar as the mandatory provision of consideration of application and an order being issued within a period of six months.

5. It cannot but be noticed that Section 12AA(2) specifically provides that on an application, an order granting or refusing registration ***shall be*** passed before the expiry of the six months of the date on which the application was received. We also directed the revenue to produce the files, which are before

us. We see from the files that the application was filed on 10.10.2006. A report was called for from the Income-Tax officer which was submitted only on 24.07.2007, after almost nine months. The communication of the Commissioner of Income-Tax based on which such report was made also is seen to be dated 12.01.2006 referred to in the report of the Income-Tax Officer. The Income-Tax Officer has recommended the registration under Section 12AA(2). However an adverse report is seen authored by the Joint Commissioner of Income-Tax dated 31.07.2007 addressed to the Commissioner of Income-Tax. There has been some adjournments later and eventually the order impugned before the Tribunal dated 29.11.2007 was passed. We cannot but notice that there was unreasonable delay insofar as complying with the mandatory provision under Section 12AA(2).

6. In this context, we have to notice the directions of

the CBDT issued as Instruction No.16/2015(F.No.197/38/2015-ita-

1) DATED 06.11.2015 which we extract hereunder:-

“Sub-section (2) of Section 12AA of the Income-Tax Act, 1961 prescribes that every order granting or refusing registration under clause (b) of sub-section (1) of that section 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 the sub-section (1) thereof. Thus while processing the application under Section 12 AA of the Act, the time limit of six months has to be adhered to by the Commissioner of Income Tax(Exemptions). However, it has been brought to the notice of the Board that the said time limit has not been observed in some cases.

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2.The undersigned is directed to convey that the aforesaid time limit of six months is to be strictly followed by the Commissioner of Income Tax (Exemptions) while passing order under section 12AA. The CCIT(Exemptions) may monitor the adherence of prescribed time limit and initiate suitable administrative action in case any laxity in adhering to the same is noticed.”

7. The CBDT has thought it fit, obviously from experience of dealing with delayed applications, that the mandatory provision has to be complied with in letter and spirit. The officers of the Department are necessarily bound by the directions so issued by the CBDT; which in the present case is a reiteration of the mandate statutorily prescribed. In the present case, we see failure to comply with the mandatory provision as

provided under section 12AA(2); the circular having come later to the impugned order.

8. The instruction by CBDT gives us a clear picture of how the Board expected the Officers to treat the mandatory provision under section 12AA(2) as being scrupulously relevant and significant insofar as a consideration of an application filed under section 12AA within the time stipulated in sub-section (2). We have to look at the present case also in the light of the Supreme Court decision in **(2017) 11 SCC 480**. The learned Standing Counsel, Government of India, (Taxes) would take serious objection insofar as pointing out that there is no declaration of law as found in the decision of the Hon'ble Supreme Court and a mere concession made by the learned Counsel appearing for the Department. It cannot be taken as a concession on behalf of the Department or being the opinion of

the Department is the argument. It is also urged that this Court should be concerned with the interpretation of the provision to advance the course of law and not a mere concession by a Counsel before the Hon'ble Supreme Court in a solitary instance.

9. On a reading of the order passed in **(2017) 11 SCC 480**, we are not convinced that there was any concession made by the learned Additional Solicitor General who appeared in the matter for the Income-Tax Department. As we discern from the order, the Commissioner of Income-Tax, Kanpur had filed an appeal from the deemed registration granted under Section 12A for reason solely of an application under Section 12AA of the Act having not been acted upon for six months. The appeal arose from the judgment dated 03.04.2008 of the High Court of Judicature, Allahabad. When the matter was considered by the Hon'ble Supreme Court, the Full Bench decision of the Allahabad

High Court cited, herein above, by the Revenue was passed and we do not see the said decision having been placed before the Hon'ble Supreme Court. Rather than a concession, the learned Additional Solicitor General specifically informed the Hon'ble Supreme Court that the only apprehension of the Department was regarding the date on which the said deemed registration, would be effected; whether it is on the date of application or on the expiry of six months. The Civil Appeal before the Hon'ble Supreme Court was disposed of expressing the apprehension to be unfounded, but all the same clarifying that the registration of the application under Section 12AA would only take effect from the date of expiry of six months from the date of application. The effect of disposal of a Civil Appeal as has been laid down in ***Kunhayammed v. State of Kerala [(2000)245 ITR 360 (SC)]*** hence assumes significance. The Hon'ble Supreme Court in ***2017(11)***

SCC 480; in a Civil Appeal, approved the judgment of the Allahabad High Court allowing deemed registration under Section 12AA; but applicable only from the date of expiry of the six month period as mandated in sub-section(2) of Section 12AA. The judgment of the High Court merges in the judgment of the Hon'ble Supreme Court. The opinion as expressed by the Allahabad High Court, regarding deemed registration under Section 12A for reason only of non consideration of an application under Section 12AA within a period of six months from the date of filing, having not been differed from by the Hon'ble Supreme Court in the Civil Appeal; the declaration by the High Court assumes the authority of a precedent by the Hon'ble Supreme Court on the principles of doctrine of merger. Despite the compelling persuasion of the learned Senior Counsel to interpret the provision as has been interpreted by the Full

Bench of the High Court of Allahabad we find ourselves, incapacitated so to do and obliged to respectfully follow **(2017) 11 SCC 480**.

In such circumstance, respectfully following the decision of the Hon'ble Supreme Court we answer the question in favour of the assessee and against the revenue and reject the appeal. The registration however is applicable only from the date of expiry of the six months from the date of application. There shall be no order as to costs.

Sd/-
K. Vinod Chandran, Judge

Sd/-
Ashok Menon, Judge