

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
ORDINARY ORIGINAL CIVIL JURISDICTION**

**INCOME TAX APPEAL (IT) NO.2010 OF 2017**

Commissioner of Income Tax (Exemptions),  
Mumbai. ... Appellant  
V/s.  
Mumbai Metropolitan Region  
Development Authority ... Respondent

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Mr.Ashok Kotangle with Mr.Prabhakar Ranshur, Advocate  
for the Appellant.  
Mr.S.E.Dastur, Senior Advocate with Mr.Madhur Agarwal  
and Mr. A.K.Jasani for the Respondent.

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**CORAM : UJJAL BHUYAN &  
MILIND N. JADHAV, JJ.  
DATE : JANUARY 24, 2020**

**P.C.:-**

1. Heard Mr.Ashok Kotangle, learned standing counsel,  
Revenue for the appellant; and Mr.S.E.Dastur, learned  
senior counsel alongwith Mr.Madhur Agarwal and  
Mr.A.K.Jasani, learned counsel for the respondent/  
assessee.

2. This appeal has been preferred by the Revenue  
under Section 260A of the Income Tax Act, 1961 (briefly  
“the Act” hereinafter) against the order dated 5<sup>th</sup> April,

2017 passed by the Income Tax Appellate Tribunal, “B” Bench, Mumbai (briefly “the Tribunal” hereinafter) in Income Tax Appeal No.625/Mum/2012 for the assessment year 2009-10.

3. The appeal has been preferred on the following two questions stated to be substantial questions of law:-

“(I) Whether, on the facts and in the circumstances of the case and in law, the Tribunal was right in quashing the order passed by the Director of Income Tax (Exemptions) cancelling the registration under Section 12AA(3) of the Income Tax Act, 1961 despite the fact that activities undertaken by the assessee cannot be said to be charitable in nature in view of the proviso to section 2(15) of the said Act inserted w.e.f. 01.04.2009?

(II) Whether on the facts and in the circumstances of the case and in law, the Tribunal was right in its findings at para 9 of its order in ITA No.625/Mum/2012 dated 05.04.2017 i.e. “Since, the registration is already allowed consequently no disallowance can be made in respect to interest income and leasing activity income i.e. the rent and other fees, because these falls under the objects of the assessee’s institution and hence on merits also the assessee has a case” which is not in accordance with the provisions of section 13(8) of the Income Tax Act, 1961?”

4. From the above, what is discernible is that issue involved in this appeal is cancellation of registration of the respondent by the Director of Income Tax (Exemptions) under Section 12AA(3) of the Act, which order has been set aside by the Tribunal.

5. Though facts are not in dispute, however, for proper appreciation of the controversy in question it would be apposite to briefly narrate the facts of the case.

6. Respondent is an assessee under the Act. Respondent was granted registration as a Trust under Section 12AA(1) of the Act.

7. A proposal was received by the Director of Income Tax (Exemptions) that registration granted to the respondent under Section 12AA(1) of the Act should be cancelled.

8. Be it stated that, respondent-assessee is Mumbai Metropolitan Region Development Authority. As per the

proposal for cancellation of registration, it was mentioned that respondent was carrying on activities in the nature of trade, commerce or business etc. and gross receipts therefrom were in excess of Rs.10 lakhs. Therefore, proviso to Section 2(15) of the Act was attracted from the assessment year 2009-10.

9. Show cause notice was issued by the office of the Director to the respondent on 13<sup>th</sup> December, 2011 to show cause as to why registration granted to it should not be withdrawn by invoking the provisions of Section 12AA(3) of the Act.

10. Respondent filed written submission and was also represented by authorized representative.

11. By order dated 27<sup>th</sup> December, 2011 Director of Income Tax (Exemptions) took the view that respondent was directly hit by the proviso to Section 2(15) of the Act and in view of the deeming provision that when activities of the respondent were not for charitable

purpose, then the Trust (respondent) itself became non-genuine for the purpose of Section 11 of the Act as it had lost its public charitable status and thus provisions of Section 12AA(3) got attracted. Accordingly, the Director held that respondent had become non-genuine for the purpose of Section 11 of the Act and, therefore, registration allowed to it in earlier years under Section 12AA of the Act was cancelled/withdrawn with effect from the assessment year 2009-10. Accordingly respondent was held to be a non-charitable Trust / Institution.

12. Aggrieved by the cancellation of registration, respondent preferred appeal before the Tribunal. Tribunal after hearing the matter and following the decision of the Madras High Court in **Tamilnadu Cricket Association Vs. Director of Income Tax, 360 ITR 633** set aside the order passed by the Director of Income Tax (Exemptions) vide the order dated 5<sup>th</sup> April, 2017. Tribunal held that it did not find anything in the order of the Director which held that respondent was undertaking

any activity which was not genuine or that the Trust or Institution was not genuine. It was further held that there were no materials on record to show that the respondent Trust or its affairs were not being carried out in accordance with the objects of the respondent Trust. Accordingly, while setting aside the order of the Director, registration of the respondent was restored.

13. Aggrieved, present appeal has been preferred.

14. Learned counsel for the appellant has referred to the order passed by the Director and submits that the said order clearly indicated as to why registration of the respondent was required to be cancelled. He submits that in so far activity of the respondent is concerned, clearly the proviso to Section 2(15) of the Act was attracted, thereby rendering the respondent non-charitable. He submits that on similar issue, Supreme Court has granted leave to file appeal in **Principal Commissioner of Income-Tax Vs. JIS Foundation, (2018)96 taxmann.com 257(SC)**. Tribunal was not

justified in interfering with the reasoned order passed by the Director.

15. On the other hand, Mr.Dastur, learned senior counsel submits that since the impugned order was passed under Section 12AA(3) of the Act, Director of Income Tax (Exemptions) was required to record his satisfaction that the activities of the Trust were not genuine or that the activities of the Trust are not being carried out in accordance with the objects of the Trust. These two twin conditions would have to be satisfied before passing an order cancelling registration of the Trust under Section 12AA(3). He has taken us to the cancellation order as well as to the order of the Tribunal and submits that Director of Income Tax (Exemptions) was not at all justified in invoking section 12AA(3), in cancelling the registration of the petitioner. Tribunal had rightly interfered with the said order and therefore, no interference is called for.

16. Referring to the order passed by the Director of Income Tax (Exemptions), Mr.Dastur submits that identical grounds were given by the Director of Income Tax (Exemptions) in **Director of Income-Tax (Exemptions)**

**Vs. North Indian Association, 393 ITR 206.**

However, this court did not accept such reasoning given by the Director as not being within the ambit of Section 12AA(3).

17. His further submission is that there is difference between cancellation of registration and non-grant of exemptions. Where receipts of a Trust are hit by the proviso to Section 2(15) of the Act, benefit of exemptions may not be available to the Trust in assessment proceeding and income may be brought to tax, but that cannot be a ground for cancellation of registration. This was also the view of this court in **North Indian Association (supra)**. He has also placed reliance on other decisions of this court i.e. **Director of Income-Tax (Exemptions) Vs. Khar Gymkhana, 385 ITR 162; CIT Vs. Mumbai Metropolitan Regional**

**Iron & Steel Market Committee, ITA No.43 of 2015, decided on 17<sup>th</sup> July, 2017; Commissioner of Income-Tax Vs. Sadguru Narendra Maharaj Sansthan, 407 ITR 12; and Commissioner of Income-Tax vs. Builders Association of India, ITA No.92 of 2016, decided on 4<sup>th</sup> May, 2018.**

18. Responding to the submission of Mr.Kotangale that in respect of identical issue Supreme Court has granted leave to file appeal in the Special Leave Petition filed by the Department, Mr.Dastur submits that issue in the said case is different. Referring to the decision of the Calcutta High Court from where the Department had filed SLP i.e. **Principal Commissioner of Income-Tax Vs. JIS Foundation, 2018 (89) taxmann.com 226 (Calcutta)**, he submits that in the said case Commissioner had cancelled registration of the assessee-Trust on 31<sup>st</sup> December, 2008 when sub-section (3) of Section 12AA was introduced by the Finance Act, 2010 with effect from 1<sup>st</sup> June, 2010. Therefore, the question for consideration before the Supreme Court is whether Commissioner could

have cancelled the registration on 31<sup>st</sup> December, 2008, when the power to cancel registration was inserted in the statute book from 1<sup>st</sup> June, 2010. In other words, Commissioner had exercised a power which was not available to him on the date of exercise of power. That issue is not before the court in the present proceeding.

19. Submissions made by learned counsel for the parties have been considered.

20. At the outset, it would be apposite to advert to the relevant provisions of the Act dealing with Trust.

21. Section 11 provides that income from property held for charitable or religious purposes shall not be included in the total income of the previous year of the person in receipt of the income.

22. Section 12 deals with income of Trust or institutions from contributions. Sub-section (1) says that any voluntary contribution received by a Trust created wholly

for charitable or religious purposes or by an institution established wholly for such purposes shall for the purposes of Section 11 be deemed to be income derived from property held under the Trust wholly for charitable or religious purposes and thereafter, provisions of Sections 11 and 13 shall apply.

23. Section 12A lays down the conditions for applicability of Sections 11 and 12. Before advertng to Section 12AA, we may mention that Section 13 provides that Section 11 shall not apply in those cases mentioned in that Section. Sub-section (8) of Section 13 says that nothing contained in Sections 11 or 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 (It may be mentioned that w.e.f. 1<sup>st</sup> April, 2016, Section 2(15) has only one proviso).

24. Section 12AA lays down the procedure for registration of a Trust. Sub-sections (1), (1A) and (2) deal with order granting or refusing registration and the procedure to be followed. Sub-section (3) was inserted by the Finance Act, 2004 with effect from 1<sup>st</sup> October, 2004. Sub-section (3) is extracted hereunder :-

“(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 (Principal Commissioner or) 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 cancelling 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.”

25. Thus where a Trust or Institution has been granted registration and subsequently the Principal Commissioner or 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, he shall pass an order in writing cancelling the registration of such Trust or Institution. As per the proviso no order of cancellation of registration shall be passed unless such Trust or Institution has been given a reasonable opportunity of being heard. Therefore, two conditions are required to be satisfied before invocation of section 12AA (3) of the Act. Firstly, the activities of the Trust or Institution are not genuine and secondly, the activities are not being carried out in accordance with the objects of the Trust or Institution. The use of the word “or” between the two conditions is indicative of the disjunctive nature of the two conditions. In other words, it is enough if one of the two conditions are satisfied. The requirement therefore is that the authority competent under Section 12AA(3) to cancel registration must arrive at the satisfaction that one of the two conditions mentioned therein is attracted.

26. Before referring to the judgments cited at the Bar it would be apposite to advert to Section 2(15) of the Act. As is evident Section 2 is the definition section. Sub-section (15) defines “Charitable purpose”. However, it is the proviso thereto which is relevant which existed as on the date of passing of order by the Director of Income Tax (Exemptions) on 27<sup>th</sup> December, 2011. At that stage i.e., prior to 1<sup>st</sup> April, 2016, there were two provisos to Section 2(15) which were as under:-

“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.”

27. Thus, as per the first proviso it was held that advancement of any other object of general public utility would not be a charitable purpose if it involved

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. As per the second proviso, the first proviso would not apply if the aggregate value of the receipts from such activities is Rs.25 lakhs or less in the previous year.

28. In **North Indian Association (supra)** this court in similar circumstances observed that there is difference between registration and exemption. Referring to Section 13(8) of the Act which was introduced by the Finance Act, 2012 with retrospective effect from 1<sup>st</sup> April, 2009 this court held that where the receipts are hit by the proviso to Section 2(15) of the Act, the benefit of exemption to its income for the relevant previous year would not be available. Thus income would be brought to tax to secure the interest of the revenue but it does not necessarily result in automatic cancellation of registration.

29. In **Khar Gymkhana (supra)** this court held that jurisdiction to cancel registration would only arise if there is any change in the nature of activities of the institution.

30. Having noticed the above, objects of the respondent Trust may be adverted to. Objects of the Trust appear in clause 3 of the trust deed dated 5<sup>th</sup> July, 1978, which read as under:-

“(i) Affording medical relief and spread of medical science in such manner as the Trustees may think fit including:-

(a) Establishment and maintenance and support of Hospitals Health Centres and Dispensaries with or without Medical Schools and Nursing Institutions or any of them for treatment of patients suffering from diseases or accidents.

(b) Establishment acquisition and maintenance and support to Hospitals, Dispensaries, Maternity Homes, Homes Sanatoria, Research Centres, Laboratories. Preventive Health Centres, Hospice’s, Diagnostic Centres, Medical Colleges and Medical Schools.

(c) Grant of subscription and donation to Hospitals, Dispensaries, Convalescent Homes,

Asylums, Hospices, Health Centres, Baby Clinics, Nursing Homes and other Public Institutions for administering medical relief upon such terms and conditions and for such period as the Trustees may think fit.

(d) Grant of medical help during epidemic, famine, flood or any unforeseen calamity or war or war-like operations or civil commotion or riots

e) Establishment and/or acquisition and maintenance of and support of medical schools, medical colleges and other institutions carrying research in medicine and awarding scholarships and scholarship prizes or awards at any such schools, colleges and institutions.

(f) To undertake prosecute develop help or carry on all or any kind of basic or fundamental and/ or applied research and scientific work in connection with or relating to medical surgical and sociomedical research problems and to do all things necessary or incidental or conducive to the attainment of the same and to provide funds for research and for scholarships, stipends and/or other payment or aid to any person or persons engaged in research work.

(g) establish and maintain and to assist and encourage or promote as and when deemed proper and expedient for the purpose of medical relief in the form of Hospitals or in connection there with or attached thereto all or any of the following Institutions namely:

(1) Institutions for promoting medical research work;

(2) Medical College, Nursery and Midwifery Institutions for imparting medical education and training ;

(3) Convalescent Home;

(4) Creche and Children's Hospital.

(2) To incur any expenditure on any programme of rural development as provided for under Section 35-CC of the Income Tax Act or any other law relating to rural development for the time being in force and to undertake to carry out, promote and sponsor such programme as the Trustees may deem fit. ”

31. We may also refer to clause 4 of the trust deed which outlines the powers vested with the trustees in order to attain the objectives of the Trust. Clause 4 is as under:-

“4. The trustees shall have power to restrict or regulate from time to time the objects of this Trust so as to comply with any conditions or requirements of taxation laws of India relating to taxation of income or capital as they may think fit so as to obtain for this Trust or Donors to this Trust any relief or concession in respect of taxation subject however to the over-riding consideration that the object or objects of this Trust shall always be a public charitable object excluding (i.e. other than an object of a religious nature and shall be such as may be recognised as a public charitable object as

defined in Section 2(15) of the Income Tax Act, 1961 or any statutory modification or re-enactment or any other Act governing taxation of income for the time being in force in India. Without prejudice to the generality of the foregoing object or purposes but subject to the limitation and conditions as laid down in this Deed the Trustees may each year spend or apply the residue of the income of the Trust Fund and may at their discretion at any time and from time to time spend or apply also the corpus of the Trust Fund or any part of parts of the trust Fund in or towards any one or more of the objects or purposes (which according to law be public charitable objects or purposes) to the exclusion of the others or other of them and in such proportion and manner in all respects as the Trustees may think fit. ”

32. In the instant case Tribunal discussed the objects of the assessee i.e., the respondent and returned a finding of fact that the entire objects are charitable in nature having regard to the meaning of the expression “Charitable purpose” as defined in the Act. Tribunal referred to the decision of Madras High Court in **Tamilnadu Cricket Association Vs. Director of Income Tax, 260 ITR 633** wherein Madras High Court held that the act of granting registration under Section

12AA(1) is a result of satisfaction recorded by the Commissioner as regards genuineness of the objects as well as activities of the Trust and once such a satisfaction is arrived at by the Commissioner, cancellation could only be in terms of Section 12AA(3) of the Act. Thereafter, Tribunal recorded the finding that order of the Director of Income Tax (Exemptions) did not disclose which activity of the respondent was not genuine or that the respondent was not genuine. Tribunal also recorded that there was no material in the said order explaining that activities of the respondent are not being carried out in accordance with its objects.

33. On careful reading of the order passed by the Director of Income Tax (Exemptions) as well as the order passed by the Tribunal, we do not find any error or infirmity in the view taken by the Tribunal. In so far the view taken by the Director is concerned that respondent is directly hit by the proviso to Section 2(15) of the Act, we are of the view that such satisfaction may lead to denial of exemption to the respondent in the assessment

proceeding for the relevant assessment year but certainly cannot be a ground for cancellation of registration under Section 12AA(3). The competent authority under Section 12AA(3) must be satisfied that the activities of the Trust are not genuine or that the activities are not being carried out in accordance with the objects of the Trust or the Institution. Such satisfaction must be recorded as a matter of fact on the basis of specific materials on record. Merely saying that the activities of the respondent is hit by the proviso to Section 2(15) of the Act, would not lead to automatic cancellation of registration as that is not a ground provided under Section 12AA(3) of the Act for cancellation of registration.

34. A perusal of the order passed by the Director would go to show that no such finding was recorded by the Director that the activities of the respondent Trust are not genuine or that the activities are not being carried out in accordance with the objects of the respondent Trust. What the Director had done was that he took

the view that the respondent was hit by the proviso to Section 2(15) of the Act and therefore, it was deemed that respondent Trust had become non-genuine. Such a view is wholly untenable being contrary to the mandate of Section 12AA(3) of the Act and was rightly interfered with by the Tribunal.

35. In so far contention of learned standing counsel for the revenue that this issue is being considered by the Supreme Court, we are in agreement with the submission made by learned senior counsel for the respondent/ assessee that the question before the Supreme Court is whether at the time of cancellation of registration on 31<sup>st</sup> December, 2008 Commissioner had the power to cancel registration since sub-section (3) of Section 12AA was inserted by the Finance Act, 2010 with effect from 1<sup>st</sup> June, 2010. Therefore, the issue in **JIS Foundation (supra)** is materially different from the issue arising in the present appeal.

36. Therefore, on thorough consideration we are of the view that there is no error or infirmity in the order passed by the Tribunal. Consequently no question of law, much less any substantial question of law, arises therefrom.

37. In that view of the matter, the appeal is dismissed. However, there shall be no order as to cost.

**(MILIND N. JADHAV, J.)**

**(UJJAL BHUYAN, J.)**