

Suchitra

***IN THE HIGH COURT OF BOMBAY AT GOA***

***TAX APPEAL NO. 2 OF 2013***

GOA INDUSTRIAL DEVELOPMENT  
CORPORATION, through its  
Managing Director,  
Shri Faizi O. Hashmi,  
major in age, having office  
Plot No.13A-2, EDC Complex,  
Patto Plaza, Panaji-Goa-403 001.  
PAN NO. AAATG7792F

.... Appellant

Versus

1. Commissioner of Income Tax, Panaji  
Aaykar Bhavan, EDC Complex,  
Panaji, Goa 403 001.

2. Assistant Commissioner of Income Tax  
/Assessing Officer,  
Aaykar Bhavan, EDC Complex,  
Panaji, Goa 403 001.

.... Respondents

Mr. Pramod Vaidya and Mr. H.D. Naik, Advocates for the Appellant.  
Mr. Tulajappa Kalburgi, Junior Standing Counsel for the Respondents.

Coram:- M.S. SONAK &  
SMT. M. S. JAWALKER, JJ.

Date:- 4<sup>th</sup> February, 2020

**ORAL JUDGMENT** (Per M. S. Sonak, J.)

The learned counsel for the parties state that there is no objection for this Bench to take up this appeal.

2. Heard Mr. Pramod Vaidhya along with Mr. H. D. Naik who appear for the appellant and Mr. Tulajappa Kalburgi, learned Junior Standing Counsel for the respondents.

3. This Tax Appeal was admitted by order dated 24.09.2013 on the following substantial questions of law:-

*(a) Whether on the facts and in the circumstances of the case and in law, the Tribunal was justified in comparing the appellant with a private builder and developer and in holding that the appellant was carrying on business for profit so as to attract proviso to Section 2(15) ?*

*(b) Whether the Appellate Tribunal was justified on facts and in law in sustaining the order under Section 12AA(3) particularly on grounds alien to Section 12AA(3) ?*

4. According to us, if the substantial question of law at (b) above is decided in favour of the appellant, then, there will arise no necessity of deciding the substantial question of law at (a) as above. This is because if we are satisfied that the Commissioner of Income Tax (CIT) lacked jurisdiction to exercise powers under Section 12AA(3) on the sole

ground that the definition of charitable purpose in Section 2(15) of the Income Tax Act, 1961 (said Act) had been amended, then, on the said ground alone, the impugned order made by the CIT on 27.12.2011 and confirmed by the Income Tax Appellate Tribunal (ITAT) on 22.06.2012 will have to be set aside. Accordingly, we proceed to deal with the substantial question of law at (b), in the present appeal.

5. The appellant in the present case is a Statutory Corporation established under the Goa, Daman and Diu Industrial Development Corporation Act, 1965 (GIDC Act) with the object of securing orderly establishment in industrial areas and industrial estates and industries so that it results in the rapid and orderly establishment, growth and development of industries in Goa.

6. The appellant, was granted registration under Section 12A of the said Act, which registration, is necessary where exemptions are to be claimed on the ground that the income is expended for charitable purposes. Such registration was in fact granted to the appellant way back on 16.12.1983 and the same continued until the making of the impugned orders in these appeals.

7. On 12.12.2011 a show cause notice was issued to the appellant to show cause as to why such registration should not be cancelled by

invoking the provisions under Section 12AA(3) on the ground that the appellant has not fulfilled the conditions laid down under Section 2(15) of the said Act. This show cause notice was obviously, in the context of the proviso to Section 2(15) of the said Act which was introduced with effect from 01.04.2009.

8. The appellant furnished a detailed response to the show cause notice, wherein, the appellant raised several grounds in order to urge that the show cause notice be discharged. Amongst other grounds, the appellant urged that the two pre-conditions for invoking the provisions of Section 12AA(3) being absent in the present case, the CIT, lacked jurisdiction to proceed to cancel the registration.

9. The CIT, by order dated 27.12.2011 however rejected the appellant's contentions and withdrew the registration granted to the appellant by observing that it is crystal clear that the activities of the appellant are interconnected and interwoven with commerce or business. On the perusal of the CIT's order dated 27.12.2011 it is very clear that the CIT has based its decision almost entirely on the proviso to Section 2(15) of the Income Tax Act which defines "charitable purpose". As noted earlier, this proviso was introduced with effect from 01.04.2009.

10. The appellant appealed against the order dated 27.12.2011 of the ITAT and ITR, vide impugned order dated 26.12.2012 dismissed appellant's appeal. Hence the present appeal on the aforesaid substantial questions of law.

11. Section 12AA(3) of the said Act reads as follows:

*“12AA(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.*

12. From the plain reading of the aforesaid provision, it is clear that the power of cancellation of registration can be exercised by the CIT where 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.

13. In the present case there are really no categorical findings to the effect that the activities of the appellant are not genuine or are not

being carried out in accordance with the objects, which objects, have been set out in the GIDC Act, 1965.

14. In fact, Mr. Kalburgi, learned Junior Standing Counsel did not even urge that the activities of the appellant are not being carried out in accordance with the objectives spelt out under the GIDC Act. He however urged that the activities of the appellant are not genuine because such activities do not partake any charitable purpose as defined in Section 2(15) of the said Act, particularly, if the provisions in the proviso are to be taken into account. Mr. Kalburgi submitted that there are findings of fact recorded by both the CIT as well as the ITAT that the activities undertaken by GIDC are in the nature of trade, commerce or business or in any case, the activities for rendering services in terms of trade, commerce or business and that too for a fee and other consideration. Mr. Kalburgi therefore submits that the activities undertaken by GIDC can hardly be styled as genuine activities. He submits that since this is one of the grounds to invoke the provisions of Section 12AA(3), there is absolutely no error in the view taken by the CIT and ITAT.

15. Mr. Vaidhya contests the aforesaid submissions made by Mr. Kalburgi. He points out that the GIDC is a statutory corporation and there is absolutely nothing non-genuine about the activities undertaken

by it. He points out that the impugned orders almost entirely proceed on the basis of the amendment to Section 2(15) by which the proviso came to be introduced. He submits that on the basis of such amendment, there is no question of styling the activities of the appellant as non-genuine and on such ground invoking the provisions of Section 12AA(3), which, are required to be strictly construed.

16. Mr. Vaidhya relies upon several decisions to submit that the powers under Section 12AA(3) can be exercised only when the Commissioner is satisfied that the activities of the institution are non-genuine or are not being carried out according to the objects of the institution. He points out that these decisions specifically lay down that the powers under Section 12AA(3) cannot be exercised merely because the institution in question may be covered under the proviso to Section 2(15) after the amendment or that income limit specified in the proviso is exceeded. He points out that the CBDT, has in fact issued a Circular No.21/2016 dated 27.05.2016 making explicit this position, which was even otherwise quite implicit. The decisions are as follows:-

- (i) Director of Income-tax (Exemptions) v. Khar Gymkhana – [2016] 70 taxmann.com 181 (Bombay).*
- (ii) Director of Income-tax (Exemptions) v. Maharashtra Housing & Area Development Authority – 392 ITR 240 (Bombay).*

*(iii) Director of Income-tax (Exemption), Bangalore v. Karnataka Industrial Area Development Board – [2015] 55 taxmann.com 34 (Karnataka).*

*(iv) Tamil Nadu Cricket Association v. Director of Income-tax (Exemptions) – [2013] 40 taxmann.com 250 (Madras).*

17. According to us, all the aforesaid judgments support the contentions now raised by Mr. Vaidhya in this appeal on the substantial question of law at (b) above.

18. In *Khar Gymkhana (supra)*, the Division Bench of this Court, has in fact taken cognizance of the Circular No.21/2016 and held that merely because, in a given year, an institution, by carrying on any trade, commerce and business is in receipt of an amount in excess of ₹25 lakhs, would not entitle the Director of Income Tax to cancel the registration under Section 12AA(3). It is further held that the jurisdiction to cancel registration would only arise if there is any change in the nature of the activities of the institution or the activities of the institution are not genuine. In the absence of fulfillment of either of these pre-conditions, the CIT or the Director, as the case may be, will not have any jurisdiction to invoke the provisions of Section 12AA(3) of the said Act.

19. The relevant discussion on the aforesaid aspects is to be found in paragraphs 8 and 11 which read as follows:-

*“8. The jurisdiction to cancel the Registration would only arise if there is any change in the nature of activities of the institution. The above Circular clearly directs the authorities not to cancel the Registration of the charitable institution just because the proviso to section 2(15) of the Act comes into play as receipts are in excess of Rs.25 lakhs in a year. It also refers to Section 13(8) of the Act which provides that where the receipts on account of commercial activities is in excess of the limit of R.25 lacs provided in second proviso to section 2(15) of the Act, then the Assessing Officer would deny the benefit of registration as a Trust for the subject Assessment Year while framing the Assessment.*

*11. The submission made on behalf of the Revenue that the Circular No.21 of 2016 would have only prospective effect in respect of Assessment made subsequent to the amendment under Section 2(15) of the Act w.e.f. 1st April, 2016 is also not sustainable. The amendment in Section 2(15) of the Act brought about by Finance Act, 2016 w.e.f. 1st April, 2016, is essentially that where earlier the receipts in excess of Rs.25 lakhs on commercial activities would exclude it from the definition of 'charitable purpose' is now substituted by receipts from commercial activities in excess 20% of the total receipts of the institution. In the above view, Circular No.21 of 2016 directs the Officer of the Revenue not to cancel Registration only because the receipts on account of business are in excess of the limits in the proviso to Section 2(15) of the Act would also apply in the present case. The impugned order has held that cancellation of a Registration under Section 12AA(3) of the Act, can only take place in case where the activities of trust or institution are not genuine and/or not carried on in accordance with its objects. The aforesaid Circular No.21 of 2016 is in line of the finding of the Tribunal in the impugned order. The submission on behalf of the Revenue*

*that the Trust is not genuine because it is hit by proviso to Section 2(15) of the Act, is in fact, negated by Circular No.21 of 2016. In fact, the above Circular No.21 of 2016 clearly provides that mere receipts on account of business being in excess of the limits in the proviso would not result in cancellation of Registration granted under Section 12AA of the Act unless there is a change in nature of activities of the institution. Admittedly, there is no change in nature of activities of the institution during the subject Assessment Year. The further submission on behalf of the Revenue that looking at the quantum of receipts on account of commercial activities, it is un-likely/improbable that in the subsequent Assessment Years, the receipts would fall below Rs.25 lakhs and therefore, the Commissioner is entitled to cancel the Registration. The aforesaid submission made on behalf of the Revenue is based not on facts as existing but on probability of future events. We are unable to accept the submission based on clairvoyance. Further, we are unable to understand what prejudice is caused to the Revenue since whenever the receipts on account of commercial activities is in excess of the limits provided in proviso to Section 2(15) of the Act, the Assessing Officer is mandated/required to deny exemption under Section 11 of the Act as provided in Circular No.21 of 2016 dated 27th May, 2016. Accordingly, the issue stands covered in favour of the Revenue by virtue of Circular No.21 of 2016.”*

*(Emphasis supplied)*

20. In the case of *Maharashtra Housing & Area Development Authority (MHADA) (supra)*, yet another Division Bench of this Court upset the view taken by the Director in cancelling the

registration by reference to the amended provisions under Section 2(15) of the said Act. The Division Bench observed that since nothing was found to indicate that the assessee was undertaking any activities to demonstrate that it was not a genuine institution and further, there was nothing to indicate that the assessee or its affairs are not being carried out in accordance with the object of the institution, there was no reason for the Director to exercise the power to withdraw registration granted to the assessee.

21. The relevant discussion is to be found in paragraph 7 which reads as follows:-

*“7. We have referred to the order passed by the Director and impugned before the Tribunal in great detail with the assistance of Mr. Malhotra. We do not find anything in the matter referred by the Director which could be termed that the assessee was undertaking any activities which would demonstrate that it is not a genuine Trust or institution. We have also not found any material which would indicate that the assessee or its affairs are not being carried out in accordance with the object of the Trust or institution. If these are two aspects referred to in sub-section (3) of Section 12AA and the materials in that behalf were completely lacking, then, we do not find any reason for the Director to exercise the power which he purported to exercise in the present case. On this short ground alone the assessee's appeal should have been allowed by the Tribunal. Though the Tribunal has discussed the ambit and scope of the proviso to Clause 15 of Section 2 and sub-section (3) of*

*Section 12AA, we do not find that in the facts and circumstances of the present case, any such discussion was necessary and warranted, once the appeal could have been allowed on the above short ground. With this conclusion, we uphold the order of the Tribunal. We need not assign any other reason nor examine the contentions raised before us in further details. The questions, as are posed by Mr. Malhotra and in the backdrop of these proceedings can be decided in a proper case. With these observations, the appeal fails and it is dismissed.”*

*(Emphasis supplied)*

22. In *Karnataka Industrial Area Development Board (supra)*, the Division Bench of Karnataka High Court, in terms has held that the registration granted cannot be cancelled in view of the amendment of Section 2(15) as this is not a ground specified in the statute for cancellation of registration. In this case, the Division Bench rejected the contention that on account of the amendment to Section 2(15) of the said Act, the activities undertaken by the Karnataka Industrial Area Development Board could be styled as non-genuine activities.

23. The relevant discussion is to be found in paragraph 9 which reads as follows:-

*“ 9. It is not in dispute that there is no violation of the said two conditions by the assessee. The activities carried on by the assessee is a genuine one. As could be seen from the profits they have generated, the said profit is earned by carrying on the activities in accordance with the object of the trust.*

*Therefore, the two conditions stipulated in subsection (3) of Section 12AA of the Act, which empowers the authority to cancel registration, do not exist in this 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) to Section 13 which is introduced by Financial Act, 2012 which came into effect from 1.4.2009 categorically provides that, nothing contained in Section 11 or Section 12 shall operate so as to exclude any income from the total income of the previous year or any receipt there of. 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 revenue. Notwithstanding the fact that the assessee is conferred registration under Section 12A of the Act, unless the assessee falls within 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 with first proviso to Section 2(15) of the Act, the benefit of registration which flows 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, registration cannot be cancelled, which is precisely the Tribunal has held. In that view of the matter, we do not see any merit. The substantial questions of law are answered in favour of the assessee and against the revenue. Hence, the appeal is dismissed.”*

*(Emphasis supplied)*

24. Finally, in *Tamil Nadu Cricket Association (supra)*, the Division Bench of Madras High Court rejected the contention similar to that

raised by Mr. Kalburgi in the present case that post amendment to Section 2(15), the activities undertaken by the Tamil Nadu Cricket Association could not be styled as genuine activities and therefore, there was jurisdiction to exercise powers under Section 12AA(3) of the said Act.

25. The relevant discussion is to be found in paragraph 56 which reads as follows:-

*“ 56. The assessee is a member of Board of Control for Cricket in India (BCCI), which in turn is a member of ICC (International Cricket Council). BCCI allots test matches with visiting foreign team and one day international matches to various member cricket association which organise the matches in their stadia. The franchises conduct matches in the Stadia belonging to the State Cricket Association. The State Association is entitled to all in-stadia sponsorship advertisement and beverage revenue and it incurs expenses for the conduct of the matches. BCCI earns revenue by way of sponsorship and media rights as well as franchisee revenue for IPL and it distributes 70% of the revenue to the member cricket association. Thus the assessee is also the recipient of the revenue. Thus, for invoking Section 12AA read with Section 2(15) of the Act, Revenue has to show that the activities are not fitting with the objects of the Association and that the dominant activities are in the nature of trade, commerce and business. We do not think that by the volume of receipt one can draw the inference that the activity is commercial. The Income Tax Appellate Tribunal's view that it is an entertainment and hence offended Section 2(15) of the Act does not appear to be correct and the same is based on its own impression on free*

*ticket, payment of entertainment tax and presence of cheer group and given the irrelevant consideration. These considerations are not germane in considering the question as to whether the activities are genuine or carried on in accordance with the objects of the Association. We can only say that the Income Tax Appellate Tribunal rested its decision on consideration which are not relevant for considering the test specified under Section 12AA(3) to impose commercial character to the activity of the Association. In the circumstances, we agree with the assessee that the Revenue has not made out any ground to cancel the registration under Section 12AA(3) of the Act.”*

*(Emphasis supplied)*

26. Upon perusal of the impugned orders we find that there are no categorical findings that the activities of GIDC are not genuine or are not in accordance with the objects of the trust or the institution. Merely because, by reference to the amended provisions in Section 2(15), it may be possible to contend that the activities of GIDC are covered under the proviso, that, by itself, does not render the activities of GIDC as non-genuine activities so as to entitle the CIT to exercise powers under Section 12AA(3) of the said Act. We however clarify that we have really not gone into the question as to whether the activities of GIDC are indeed covered under the proviso to Section 2(15) of the said Act as amended. This is because we are satisfied that the substantial question of law at (b) is required to be answered in the

favour of the appellant and against the Respondent Revenue. Once this is done, there is really no necessity to go into the other issue as is reflected in the substantial question of law at (a).

27. We also add that the Circular No.21/2016 also, supports the contentions of Mr. Vaidya, inasmuch as it reiterates that the process of cancellation of registration has to be initiated strictly in accordance with the provisions under Section 12AA(3) and after carefully examining the application of the said provisions. The Circular, in the context of income limits under the proviso also explains that merely because in a particular year the limits may be exceeded is not a good ground to cancel the registration itself, though, all these aspects, can be taken into consideration at the stage of assessment. In fact in case of *Khar Gymkhana (supra)*, as also in *Karnataka Industrial Area Development Board (supra)*, the Division Benches of our Court have taken the view that such matters can be evaluated in the course of assessment but this shall not be a ground for cancellation of the registration itself.

28. For all the aforesaid reasons, we allow this appeal by answering the substantial question of law at (b) above in favour of the appellant and against the respondent Revenue.

29. As a result, the impugned orders made by the CIT and ITAT are

hereby quashed and the registration held by the GIDC is ordered to be revived.

30. In the facts and circumstances of the present case, there shall be no order as to costs.

***SMT. M. S. JAWALKAR, J.***

***M. S. SONAK, J.***

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