

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 23.01.2019

(Reserved on 11.09.2018)

CORAM :

THE HONOURABLE MRS.JUSTICE J.NISHA BANU

W.P(MD)Nos.12067 to 12070 of 2011 and 1104 of 2012

and

M.P(MD)Nos.1 of 2011(4 MPs) and 1 and 2 of 2012

M/s.Auro Lab,
rep.by its Managing Director,
Dr.P.Balakrishnan,
No.1, Anna Nagar,
Madurai-625 020.

... Petitioner in all W.Ps

vs.

Income Tax Officer,
Ward-II(4), Range-II,
No.2, C.R. Buildings,
V.P.Rathinasamy Nadar Road,
Bibikulam, Madurai-625 002.

... Respondent in all W.Ps

W.P(MD)Nos.12067 to 12070 of 2012:- Petitions filed under Article 226 of the Constitution of India, praying for issuance of a Writ of Certiorari, to call for the records in AAATA1142P dated 12.08.2011 relating to the assessment year 2004-2005, 2005-2006, 2006-2007, 2007-2008 on the file of the respondent and quash the same.

W.P(MD)No.1104 of 2012:- Petition filed under Article 226 of the Constitution of India, praying for issuance of a Writ of Certiorari, to call for the records in AAATA1142P dated 29.12.2011 on the file of the respondent and quash the same.

For Petitioner : Mr.S.Ravikannan

For Respondent : Mrs.S.Srimathy

Special Government Pleader

COMMON ORDER

Since the issue involved in all the Writ Petitions are one and the same, they are taken up together and decided by this common order.

2.Facts of the case projected by the petitioner in W.P(MD)Nos. 12067 to 12070 of 2011:-

2.1.The petitioner firm would inter alia aver that they are a Charitable Trust constituted under a Deed of Trust dated 06.07.1992 and their main object is to do 'medical relief' to the needy people and they were granted registration under Section 12A(a) of the Income Tax Act, by the Commissioner of Income-Tax, Madurai, vide its order dated

09.10.1992. On the strength of the Deed of Trust, they established manufacturing operations for the manufacture and sale of Ophthalmic Lens, instruments, medicines and other Eye care products. According to the petitioner firm, the income earned from the aforesaid activities was being fully utilised for the attainment of the objects of the Trust and this position was accepted by the first respondent Assessing Officer in the income tax assessments of the petitioner firm for many years.

2.2. It is further averred that the petitioner firm filed income tax returns in respect of the assessment years 2004-2005, 2005-2006, 2006-2007 and 2007-2008 on 25.10.2004, 25.10.2005, 31.10.2006 and 31.10.2007 respectively and after due verification, it was accepted by the Department. When that being the factual position, the Commissioner of Income Tax, Madurai, initiated action under Section 12AA(3) of the Income Tax Act and cancelled its registration vide his Order dated 30.12.2010 by holding that the petitioner firm is not doing charitable activities or 'medical relief' as claimed by them. Subsequently, the respondent took action against the petitioner firm with retrospective

effect and issued notices for the assessment years 2004-2005, 2005-2006, 2006-2007 and 2007-2008 and thereupon, the respondent has passed the impugned orders for the aforesaid years which is under challenge before this Court in W.P.Nos.12067 to 12070 of 2011. It is also the grievance of the petitioner that at the time of passing the reassessment proceedings, no opportunities were granted to the petitioner nor proper procedures were followed since the re-assessment proceedings would have to be initiated within four years from the end of the respective assessment year.

3.The respondent through their counter has stated that registration was granted to the petitioner's Trust under Section 12A of the Income Tax Act on 09.10.1992 erroneously and it was not based on any facts or materials. According to them, the Trust is manufacturing ophthalmic products as per objects clause (e) of the Trust Deed and profits generated year after year. Only a small portion of the surplus generated from the above activity got applied for charitable activity by way of donations mostly to organisations, in which, the same trustees

were the founders. As nothing was performed in regard to the object clauses (a) to (d), which speaks about 'medical relief', it was concluded that the object clause (e) fails together with the other four objects and therefore the registration granted to the petitioner's Trust under Section 12(A) of the Income Tax Act was cancelled by an order dated 09.10.1992 which was challenged before the Tribunal and it was dismissed stating that where the assessee has not carried on any charitable activities but only a business and even if a part of that business income is applied for charitable purposes, still the assessee could not be treated as an institution entitled for the benefit of Section 11 of the Act. But, in the present case, the assessee has converted the incidental objects as the main objects of the assessee being that of carrying on for full fledged business and chosen not to carry on the proclaimed main objects of the charitable activities and thus justified the cancellation of the registration of the petitioner company. According to them, such power of cancellation of registration is inherent and flows from the authority of granting registration. Section 12AA(3) of the Income Tax Act was amended only to provide clarity to the power of cancellation of the

authority concerned. Therefore, it was contended that the reopening of the assessment is in order and prays for the dismissal of the writ petitions.

4.1.The petitioner through their rejoinder to W.P(MD)Nos.12067 to 12070 of 2011, wherein, it is stated that the registration under Section 12(A) of the Income Tax Act was granted after due application of mind by the Commissioner of Income Tax and after verification of all the materials produced by the petitioner. Further, the respondent extracts the statutory provision inserted by the Finance Act No.2 of 2004 with effect from 01.10.2004. This provision is not relevant or material in the instant case insofar as it deals with registration granted under Clause (b) of Sub-Section 1 of Section 12AA. The material clause would be Section 12AA(3) subsequent to amendment by the Finance Act 2010 with effect from 01.06.2010.

4.2.The specific submission of the petitioner is that the operation of the provision, Section 12AA(3) as amended with effect from

01.06.2010 is prospective and would not affect assessments in respect of earlier assessment years. Accordingly, the order of the Commissioner of Income Tax dated 31.12.2010 will take effect only from the date of order and cannot apply to completed assessments of earlier assessment years. This submission has neither been addressed nor met by the respondent herein.

4.3.They also contended that the action of the respondent in initiating proceedings for reopening under Section 147 of the Act is illegal and contrary to law. It was submitted that the proceedings for reassessment in a case where an assessment under Section 143(3) has been completed, cannot be initiated after four years from the end of the relevant assessment year. And that can be done only in cases where the escapement has been occasioned by virtue of the failure of the assessee to make a full and true disclosure of all material particulars. In this case, all material particulars have been disclosed by the assessee. It was argued that neither the reasons for reopening mentioned that the conditions set out in the proviso are attracted in this case, nor an

avermment that a full and true disclosure has not been made by the petitioner.

4.4.The attempt to negate the benefit of the registration granted in 1992 to the petitioner would result in endowing the Assessing Officer with the power to cancel the registration granted by the Commissioner of Income Tax in 1992. Such power was not even available to the Commissioner of Income Tax at the relevant point of time. Therefore, it is reiterated that the present proceedings for reassessment are hit by the operation of the proviso to Section 147 and a mere change of the opinion on the part of the Assessing Officer. The basis of the proceedings is solely on the order of the Commissioner of Income Tax dated 31.12.2010 which cannot operate retrospectively and therefore, prayed for allowing W.P.Nos.12067 to 12070 of 2011.

5.Pending the above Writ Petitions, the petitioner has filed W.P(MD)No.1104 of 2012 questioning the assessment order for the year 2010-2011 reiterating the same points and contended that no

opportunity was granted before passing the order of assessment for the year 2010-2011 and the respondent in the impugned order of assessment merely proceeds on the basis of the details and facts in relation to assessment year 2009-2010. The deed of Trust of the petitioner contains a clause whereunder, one of the objects is to collaborate with institutions or entities with similar objects as itself. It was averred that the same has not been taken into account while passing the impugned order. While on the one hand the respondent denies the exemption sought by the petitioner under Section 11 on the ground that the petitioner performed no charitable activity the respondent had denied an opportunity of hearing specifically sought by the petitioner in this regard.

6.1. Learned counsel for the respondent through their counter in W.P(MD)No.1104 of 2012 has contended that the petitioner's firm has advertised itself in the website that Aurolab is manufacturing division of Aravind Eye Hospital, supplies high quality ophthalmic consumables at affordable prices to developing countries. Therefore, the petitioner Trust is carrying out manufacturing and trading of certain identified

products related to eye surgery. It is also contended in the course of scrutiny assessment that the assessee's Trust was involved in the manufacture and sale of intra colour lenses and other eye care products and has created huge surplus from their business operations but has applied very little amount of it for charitable activities. Further, the assessee records for the assessment year 2010-2011 exhibits gross receipts exceeds Rs.5 crores, therefore, notice under Section 143(2) was issued.

6.2. During the course of personal hearing, it was found that the income and expenditure account for the assessment year 2010-2011 reveals that they have claimed expenditure for marketing expenses, agency commission, advertisement, sales promotion, commission and incentive to dealers to the tune off Rs.1,87,28,724. If there is no manufacturing and sales of products, there is no need for paying commission and incentives to dealers and therefore contended that the Trust is doing more business activities than charity. The petitioner's firm has concealed their activities under the guise of doing charity and

assessment has been carried out after proper application of mind. Further, the allegation of the petitioner firm that no opportunity was granted while passing assessment order for the assessment year 2010-2011 is incorrect. The department decided to conduct scrutiny of the assessee's income on 16.09.2011. But, he did not appear on the said date and his authorised representative appeared on five different dates. i.e. 15.11.2011, 23.11.2011, 09.12.2011, 13.12.2011 and 23.12.2011 and filed various details called for. In all the hearings, opportunities were provided apart from issuing a specific questionnaire on 09.12.2011 and after considering all the factors, assessment order has been passed on 29.12.2011.

6.3. That apart, the petitioner's submission that the respondent merely proceeds on the basis of the details and facts in relation to assessment year 2009-2010 and has not considered the objections submitted is also incorrect. The order has been passed based on the principles of natural justice, equity and fair play and that the arguments of the earlier assessment year 2009-2010 have also been discussed in the

assessment order in addition to the arguments pertaining to the assessment year 2010-2011. During the relevant assessment year 2010-2011, the petitioner firm has given donations to five beneficiaries and out of which, two of them, are Trusts under the management of the same group of trustees of the assessment-Trust. Therefore, it was observed in the assessment order that apart from the five beneficiaries, no other charitable activity was undertaken by the assessee-Trust. Since its inception, the assessee-Trust has adopted the same method of accumulation of huge surplus after ear-marking very small amounts for charitable activity that too by way of making donations to other charitable institutions. In this regard, the respondent also draws attention of this Court through paragraph No.11 of their counter affidavit regarding the amount of Rs.10 crores given to M/s.Aravind Medical Research Foundation as a donation.

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6.4. According to them, the documents put forth by the assessee-Trust is not based upon the actual facts, figures and circumstances existing in their case. It was alleged that the petitioner shifted their

stands in hindsight based on the options available to them. The Tribunal after perusing voluminous records has eventually found that the petitioner is not eligible for exemption under Section 11 of the Act. The petitioner has also preferred a tax appeal before the Hon'ble High Court, Madras and the same is pending. Pendency of tax appeal cannot be a ground to grant exemption under Section 11 of the Act and prayed for dismissal of the Writ Petition.

7. The petitioner in the rejoinder filed in W.P.(MD).No.1104 of 2012 stoutly denied the opportunities allegedly provided to them. They claim that vide their submission dated 16.12.2011 they had specifically sought an opportunity of hearing on the merits of the claim. There was no opportunity granted to the petitioner and this constitutes a gross violation of the principles of natural justice. It was also reiterated that the respondent has passed the assessment in a slipshod fashion and in a hasty manner ignoring the major medical project engaged by the petitioner along with Aravind Medical Research Foundation. The question of exemption under Section 11 of the Act will have to be

examined by the respondent on the basis of the fact and figures obtaining in the petitioner's case. The respondent will have to adjudicate the matter on merits for each assessment year and cannot simply rely on the order passed earlier and reproduce the same for the current assessment year. The grant of deducting under Section 80G and weighted deduction does not mean that the petitioner is not entitled to relief under Section 11 of the Act that the assessment can be completed in violation of the principles of natural justice.

8.1. The learned counsel appearing for the petitioner firm would argue that though the assessments in respect of assessment years 2004-2005, 2005-2006, 2006-2007 and 2007-2008 have been completed under Section 143(3) by orders of assessment dated 30.11.2006, 11.12.2007, 31.12.2008 and 30.11.2009 under Section 143(3) of the Income Tax Act and attained finality as per Section 147 of the Income Tax Act, it was reopened only on account of the cancellation order dated 30.12.2010 passed by the Commissioner of Income Tax. In the absence of any finding by the assessing authority, the proceedings under challenge are

barred by limitation, illegal and liable to be quashed. The proviso to Section 147 requires that an assessment completed originally under Section 143(3) is liable to be reopened only in the event that the alleged escapement of income on account of the failure of the assessee to disclose fully and truly all material facts, relevant to the assessment. Such is not the case of the respondent herein.

8.2. Further, he would state that the Judgment of the Hon'ble Supreme Court in the case of *CIT Vs FICCI*, cited by the respondent does not apply to the facts and legal position of the present case. The Bench, in the case of *FICCI*, was dealing with the definition of 'charitable purpose' under Section 2(15) of the Income Tax Act with reference to the 4th limb of the Section concerning the carrying on of an activity directed towards 'advancement of general public utility'. This is not applicable in this case where the petitioner is covered under the 1st and 2nd limbs of Section 2(15) dealing with 'relief of the poor' and 'medical relief'. He also submits that Section 12A of the Income Tax Act which provides for grant of registration for seeking exemption under

Section 11 of the Act did not originally contain a provision for cancellation of registration. It was only with effect from 01.06.2010 that the Parliament has inserted Section 12AA(3) of the Income Tax Act granting the power to cancel registrations granted Section 12A as it stood prior to amendment in 1996. The averment of the respondent that the amendment was made only to provide clarity in this regard is unacceptable, apart from being contrary to law. The amendment to Section 12 AA(3) with effect from 01.06.2010 affects the substantial rights of the parties and it is for this reason that the Parliament has specifically rendered the amendment operative with effect from 01.06.2010 only.

8.3. He would further state that the Supreme Court has on several occasions reaffirmed the position that any amendment that affects the substantial rights of an assessee would operate only prospectively. He also points out that the Division Bench of the Allahabad Court in the case of Oxford Academy for Career Development Vs. Chief Commissioner of Income Tax, reported in **2009 (315) ITR 382**, has

specifically upheld the position that the operation of Section 12AA(3) of the Income Tax is prospective. He further submits that the settled position of law in respect of income tax assessments is that each assessment year constitutes an independent unit of assessment in relation to which the facts and legal position are to be separately addressed and dealt with. The Finance Act of every year effects modifications to the Income Tax Act based on the proposals contained in the Annual Budget. Thus, an assessment in relation to one assessment year cannot be completed on the basis of the position obtaining in respect of another assessment year. This is a fundamental error.

8.4. Therefore, the counsel for the petitioner contended that the impugned order of assessment dated 29.12.2011 is wholly illegal, arbitrary and contrary to law and liable to be quashed.

9. The learned counsel for the respondent submitted that after scrutiny of various records meticulously, the respondent has come to the conclusion that the petitioner does not involve in any charitable

activities or 'medical relief' as claimed by them and accordingly, passed the impugned orders in which there is no infirmity or illegality and therefore, they prayed for the dismissal of the Writ Petitions.

10. Heard the learned counsel for the petitioners and the learned counsel for the respondent and perused the materials available on record.

11. The petitioner is granted registration by the Commissioner of income Tax under Sec 12A of the Income Tax Act, 1961 as it stood prior to the year 1996 with Medical Relief as the main object of the Trust. The returns of income were assessed periodically by the Department and assessment orders passed year after year until the amendment to Section 12AA was introduced to specifically empower the proper officer to cancel the registration granted under erstwhile Sec 12A of the Income Tax Act, 1961. Subsequent to the amendment, vide an order dated 30.12.2010, the registration granted to the petitioner was cancelled on the allegation that the petitioner failed to fulfil the conditions required

for enjoying the exemption available to the Section 12A registered assessee. In the appeal preferred by the petitioner before the Income Tax Appellate Tribunal against the cancellation order dated 30.12.2010, the learned Tribunal had after concurring with the findings of the commissioner upheld the said cancellation order of the Commissioner. The petitioner had filed a TAX Appeal before this Court against the ITAT Order confirming the cancellation which is pending adjudication.

12. While so, the respondent had proceeded to reopen the assessment for the assessment years 2004-2005, 2005-2006, 2006-2007, 2007-2008 vide the impugned orders dated 12.08.2011 after rejecting the objections filed by the petitioners. The petitioner avers that there is no allegation of escapement of income on account of any act of commission or omission on the part of the petitioner. It is the contention of the petitioner that reopening of the completed assessment is not permissible under the law on a mere change of opinion of the assessing officer. They argued that completed assessment can be reopened only when there is material on record to show that the declarations made by the assessee

for the relevant assessment years are fraudulent or not truthful. They further submitted that each of the assessment year is a separate unit and shall be assessed independent of one another on the basis of the provisions for that relevant assessment year.

13. The petitioner alleges that the assessment was proposed to be reopened on the only ground that the registration enjoyed by the petitioner stood cancelled by the order dated 30.12.2010 of the Commissioner of Income Tax passed subsequent to the amendment to Sec 12 AA (3) of the Income Tax Act, 1961 by Finance Act 2010 effective from 01.06.2010. Evidently, the impugned orders start with the preamble that the certificate of registration granted to the petitioner is cancelled by the Order passed by the Commissioner in C.No. 464/57/CIT-I/92-93 dt 30.12.2010. It is the contention of the petitioners that the amendment to the Sec 12 AA (3) introduced by the Finance Act, 2010 is prospective and therefore reopening assessments on the basis of the cancellation order dated 30.12.2010 of the Commissioner seriously prejudice their substantive interests and burden them with serious civil consequences.

They also pointed that allowing the assessing officer to reopen the assessments for the past period on the ground of cancellation of the registration will amount to the assessing officer assuming the powers of cancellation which even the granting authority did not have during the relevant period of time until the amendment to Section 12AA(3) with effect from 01.06.2010. They had also alleged denial of principles of natural justice.

14. The respondents on the other hand argue that there was no illegality on the proposal to reopen the assessment for the periods in dispute. It was contended that the certificate of registration was granted erroneously and therefore rightly cancelled by the Commissioner. It was emphasised that the findings in the said order of cancellation of the Commissioner was also affirmed by the Tribunal. It was asserted that the power to cancel registration was inherent to the power to grant registration under the statute. It was also argued that once the registration is cancelled, the cancellation will operate retrospectively from the date the grant of registration. They had also resisted all

allegations of denial of the principles of natural justice in the proceedings.

15. From the submissions before this Court, it is seen that the Tax Appeal pending before this Court is agitated by the contesting parties on the question of facts as to whether the performance/activities of the petitioner fulfilled the conditions of grant of registration. Whereas, the matters agitated in these Writ Petitions are pure questions of law. The question whether the order cancelling the certificate of registration dated 30.12.2010 is correct and legal is the subject of the outcome of the tax appeal. Therefore, the correctness of the order dated 30.12.2010 is outside the purview of the present Writ petitions. Only the effect of the cancellation order dated 30.12.2010 on the petitioner which is purely a question of law is the subject of the present writ petitions. The threshold limit introduced vide provisos to the amended Sec 2(15) is also not a subject of these Writ Petitions as the grant of registration and the object of the petitioner Trust is not covered under this particular limb of the definition. Needless to mention that these Writ petitions are redundant

in the event the pending Tax Appeal is decided in favour of the petitioner.

16.The questions raised in these writ petitions are broadly summarised as under:-

- i . Whether the commissioner had the power to cancel the certificate of registration before he was specifically empowered to do so by the amendment dated 01.06.2010 to sec 12 AA (3)?
- ii .Whether the effect of the power of cancellation conferred to the commissioner vide amendment to Sec 12 AA (3) dated 01.06.2010 is prospective or retrospective?
- iii .What will be the effective date on which the petitioner will lose his registration and the entitlement to exemption on account of the cancellation order dated 30.12.2010?
- iv .Whether the completed assessment for the past years can be reopened on account of cancellation of the certificate of registration at a distant date?

17. On a cursory glance at the periodical amendments to the Income Tax Act regarding the exemptions granted to the charitable trusts, it is seen that until 2004, when the new Section 12AA was amended, there was no power under the Income Tax Act, 1961 to the Commissioner of Income Tax or any other authority to revoke/cancel the registration once granted for such Charitable Trusts. Later, on 01.06.2010 vide Finance Act, 2010, Section 12AA(3) was further amended to include specifically the registrations granted under erstwhile Section 12A of the Income Tax Act, 1961 also within the ambit of revocation/ cancellation as contemplated under the 2004 amendment.

18. On perusal of the case laws relied by the parties to these Writ Petitions, it is clear that the questions raised in these Writ petitions have become a matter res judicata and no more res integra owing to the various Judicial decisions. Following the amendments to Section 12AA(3) and the subsequent actions of the Department on Section 12AA Companies, numerous cases came to be filed before various judicial forums. The vires of the amended section also came to be challenged

and considered before the High Courts. The various questions raised in the litigations are settled by a series of pronouncements by various High Courts and later affirmed by the Hon'ble Supreme Court. The pronouncements that answers the questions raised in these writ petitions are summarised in the succeeding paragraphs.

19. On the question whether the Commissioner had inherent powers to cancel the certificate of registration flowing from his power to issue registration, it was held that without any express powers conferred under the statute, review or revocation is not permissible. On the question, the courts had further observed that the order passed by the Commissioner under Section 12AA is neither legislative and nor executive and essentially quasi judicial in nature and therefore went on to hold that Section 21 of the General Clauses Act is not applicable to the order passed by the commissioner under Sec 12 AA.

20. On the second question as to whether the cancellation will operate from a retrospective date, it was held that the amendment to

Section 12AA(3) is prospective and not retrospective in character. The courts reasoned that even when the parliament had plenary powers to enact retrospective legislation in matters of taxation, the amended section is not seen to have explicitly provided to have a retrospective character or intend. Therefore, without a specific mention of the amended provisions to operate retrospectively, the cancellation can not operate from a past date.

21. On the third question of the effective date of operation of the cancellation order, it was held that the cancellation will take effect only from the date of the order/notice of cancellation of registration. Since the act of cancellation of registration has serious civil consequences and the amended provision is held to have only a prospective effect the effect of cancellation, in the event the pending Tax Appeal is decided in favour of the Revenue, will operate only from the date of the cancellation order, that is 30.12.2010. In other words, the exemption cannot be denied to the petitioner for and up to the Assessment Year 2010-11 on the sole ground of cancellation of the certificate of registration.

22. On the fourth and last question as to whether the completed assessment can be reopened on the ground of cancellation of certificate of registration at a later/future date, what follows as a sequel to the decisions in the other three questions is an emphatic 'No'. Courts have categorically held that unless the assessee obtained registration by fraud, collusion or concealment of any material fact, the registration granted can never be alleged to be a nullity. In the case on hand, it is evident that fact of the cancellation of the registration triggered the proceedings and evidently forms the preamble of each of the impugned orders. And clearly, there is no allegation of fraud or misdeclaration on the part of the petitioners and the respondents were candid in confessing that the certificate was granted erroneously. Therefore, reopening the assessment for the past years on account of the cancellation order dated 30.12.2010 in the case of the petitioner by the assessing officer is not permissible under the law and the proceedings issued in AAATA1142P dated 12.08.2011 relating to the assessment year 2004-2005, 2005-2006, 2006-2007, 2007-2008 are liable to be quashed and accordingly quashed. Also, the the assessment order in AAATA1142P

dated 29.12.2011 relating to the assessment year 2010-11 disallowing exemptions on the basis of the cancellation order dated 30.10.2010 is liable to be quashed and accordingly quashed.

In the result, all the Writ Petitions are allowed. No costs. Consequently, connected miscellaneous petitions are closed.

Index : Yes/No

23.01.2019

Internet : Yes/No

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To

Income Tax Officer,
Ward-II(4), Range-II,
No.2, C.R. Buildings,
V.P.Rathinasamy Nadar Road,
Bibikulam, Madurai-625 002.

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J.NISHABANU, J.

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Pre-delivery orders made in
W.P(MD)Nos.12067 to 12070 and 1104 of 2012

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