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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
O.O.C.J.**

INCOME TAX APPEAL NO. 882 OF 2016

Pr. Commissioner of Income Tax (Central) ...Appellant
vs
M/s Ashoka Education Foundation ...Respondent.

**WITH
INCOME TAX APPEAL NO. 892 OF 2016**

Pr. Commissioner of Income Tax (Central) ...Appellant
vs
M/s Ashoka Education Foundation ...Respondent.

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Mr Sham Walve for the Appellant in both appeals.
Mr Mihir Naniwadekar a/w Mr Ruturaj Gurjar for the Respondent in
both appeals.

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**CORAM : AKIL KURESHI &
B.P.COLABAWALLA, JJ.
JANUARY 07, 2019.**

P.C. :

Leave to amend. The amendment to be carried out
forthwith. Re-verification is dispensed with.

2 These appeals arise on common background and concern
the same assessee which is a public charitable trust. Tax Appeal No.
892 of 2016 filed by the Revenue raise a question of correctness of the
decision of the Income Tax Appellate Tribunal (**“the Tribunal”** for
short) of reversing the order of the Commissioner cancelling the

registration of trust under Section 12AA of the Income Tax Act, 1961 (**“the Act”** for short). The Commissioner noted that the trust had parted with the possession of part of the immovable property in favour of one M/s Ashoka Buildcon Ltd. The Commissioner noted that the assessee trust and said M/s Ashoka Buildcon Ltd. would be the persons referred to in clause (c), sub-section (1) and sub-section (2) of Section 13 of the Act and as listed in sub-section 3 thereof on the premise that before entering into such an agreement, no permission from the Charity Commissioner was obtained by the trust, the Commissioner exercised powers under Section 12AA(3) of the Act and cancelled the registration of the trust. In such an order the Commissioner noted that the trust deed did not permit the trustees to deal the trust land in the manner in which it was done and that too without permission from the Charity Commissioner. He noted that the agreement under which the land was transferred was also not registered. *Inter alia* on such grounds the Commissioner passed the order of cancellation of registration.

3 The Tribunal, in an appeal by the assessee, reversed the decision of the Commissioner primarily holding that if there is any breach of the provisions of Section 13(1), the Assessing Officer can examine its effect at the time of passing of the Assessment Order. The Tribunal was of the opinion that for cancellation of registration of

the trust, the inquiry before the Commissioner would be, whether the trust activities are genuine or not, and the activities are being carried on to fulfill the object of the trust.

4 In Income Tax Appeal No. 882 of 2016 the similar issue arise in the context of continuity of exemption under Section 80G(5) of the Act. The section is contentment to the main consideration of cancellation of registration under Section 12AA of the Act and we therefore need not take note of detailed discussion in connection of the same in the orders passed by the Commissioner and the Tribunal.

5 Learned counsel for the Revenue submitted that the trust had parted with the immovable property of the trust in favour of a company which was connected with the trust. This was done without obtaining permission of the Charity Commissioner. The Commissioner, therefore, correctly exercised the powers and cancelled the registration of the trust. Learned counsel relied on a decision of the Division Bench of Kerala High Court in the case of **Commissioner of Income Tax, Kottayam Vs Annadan Trust** reported in **(2018) 258 Taxman 54 (Kerala)** in support of his contentions.

6 On the other hand, learned counsel Mr Naniwadekar for the assessee opposed the appeals containing that there are special reasons for parting with the possession of portion of the immovable

property of the trust. The activities of the trust are educational in nature and are being carried out to such purpose. The Tribunal, therefore, correctly reversed the decision of the Commissioner. Learned counsel relied on a decision of Division Bench of Gujrat High Court in the case of **Director of Income Tax Vs N H Kapadia Education Trust** dated 28/09-01/10/2018 in R/Tax Appeal No. 356 of 2012 and that of Division Bench of this Court in the case of **Director of Income Tax Vs Khar Gymkhana, (2016) 385 ITR 162 (Bom)**.

7 Sub-section 1 of Section 13 of the Act provides *inter alia* that nothing contained in Section 11 or 12 shall operate so as to exclude from the total income of the previous year of the person in respect thereof. The Division Bench of Gujrat High Court in case of **N H Kapadia Education Trust** (supra) had occasion to examine the effect of alleged breach of objects on the part of trust while carrying out its objects. The Court held and observed that in terms of sub-section 3 of Section 12AA of the Act, the registration of the trust be cancelled in case of trust or institution, if the Commissioner is satisfied that the activities of the trust or institution are not genuine or are not being carried out in accordance with the objects of the trust or institution. It was further observed as under-

- “16. Section 13 carries a title “Section 11 not to apply in certain cases”. Sub-section (1) of section 13 *inter alia* provides that nothing contained in section 11 or 12 shall operate so as to exclude from the

total income of the previous year of the person in respect thereof in case of a trust for charitable or religious purposes or a charitable or religious institution, any income thereof if any part of such income or property of the trust or institution is during the previous year unused or applied directly or indirectly for the benefit of any person referred to in sub-section (3).

17. From the above provisions, it can be immediately seen that the event of cancellation of registration of a Trust in exercise of powers under sub-section (3) of section 12AA of the Act would arise when the 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. Mere breach of the provisions contained in section 11(1)(d) or 13(1)(c) per se would not fall within either of the two grounds available to the Commissioner to cancel the registration viz. the activity of the Trust not being genuine or not being carried out in accordance with the objects of the Trust. The Tribunal was thus perfectly justified in coming to such a conclusion. Our view that we expressed gets force from the decision of Uttranchal High Court in case of **Welham Boy's School, Society Vs Central Board of Direct Taxes** and is reported in 285 ITR 74.”

8 Similarly, Division Bench of this Court in the case of **Khar Gymkhana** (supra) had occasion to examine the question of continuity of registration of the trust upon alleged breach of Section 2(16) of the Act. The Court held and observed as under-

- “10. We find that the Circular No. 21 of 2016 when read as a whole, specifically lists out in paragraphs 4 and 5 reproduced herein above that the registration granted under section 12AA could not be cancelled, only when the receipts on account of business exceeded

the cut off, specified in the proviso to section 2(15) of the Act. The jurisdiction to cancel the registration only arises if there is change in the nature of activities of the institution or the activities of the institution, are not genuine. The aforesaid Circular by placing reliance upon section 13(8) of the Act inter alia provides that the registration granted to the trust would continue even when the receipts on account of business is in excess of Rs. 25 lakhs. In such case, the Assessing Officer while framing the assessment for the subject assessment year would be entitled to deny the benefit of exemption to such a trust for that year.

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, with effect from April 1, 2016 is also not sustainable. The amendment in section 2(15) of the Act brought about by Finance Act, 2016, with effect from April 1, 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 of 20 per cent, 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 the 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 unlikely/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 May 27, 2016. Accordingly, the issue stands covered in favour of the Revenue by virtue of Circular No. 21 of 2016.”

9 In the present case, the Tribunal found that the assessee trust had entered into an agreement with said M/s Ashoka Buildcon Ltd. under which the assessee handed over the possession of land to the said concern for putting up a plant for manufacturing of Ready Mix Concrete. The said M/s Ashoka Buildcon Ltd. would supply Ready Mix Concrete required by the assessee for the construction of its school building on priority and at concessional rates. It was found that at the relevant time in the nearby area no such plant was there

from which the assessee could have procured the material to carry out its construction activities unhindered. It was noticed that the Ready Mix concrete was supplied with concessional rate.

10 Thus on law as well as on facts, we do not think that the Tribunal has committed any error. The decision of the Kerala High Court in the case of **Annadan Trust** (supra) was rendered in somewhat different facts. The case in which the assessee trust was engaged in implementing welfare schemes of various State Governments such as supplying food to poor school children in the disbursed areas. The registration was cancelled by the Commissioner on the ground that the assessee failed to substantiate that the same was done on charitable basis.

11 In the result no question of law arises on the facts of the case. Tax Appeals are dismissed. However, nothing stated in this order will prevent the department from carrying out the assessment in accordance with law.

(B.P.COLABAWALLA, J.)

(AKIL KURESHI, J.)