

**IN THE INCOME TAX APPELLATE TRIBUNAL
AMRITSAR BENCH; AMRITSAR.**

**BEFORE SH. SANJAY ARORA, ACCOUNTANT MEMBER
AND SH. N. K. CHOUDHRY, JUDICIAL MEMBER**

I.T.A. No. 644/(Asr)/2013

Assessment Year: 2010-11

I.T.A. No. 592/(Asr)/2015

Assessment Year: 2009-10

Dr. Shyam Lal Thapar,
Foundation Moga,
C/o Dr. Shyam Lal Thapar
Nursing Home G.T. Road,
Moga-142001
[PAN: AAATD 9614P]

(Appellant)

Vs. Income Tax Officer-II
Moga.

(Respondent)

I.T.A. No. 586/(Asr)/2016

Assessment Year: 2010-11

Income Tax Officer (Exempt),
Moga.

(Appellant)

Vs. Dr. Shyam Lal Thapar,
Foundation Moga,
C/o Dr. Shyam Lal Thapar
Nursing Home G.T. Road,
Moga-142001
[PAN: AAATD 9614P]

(Respondent)

Appellant by : Sh. Jaswinder Singh (Adv.)

Respondent by: Sh. Sandeep Chauhan (D.R.)

Date of Hearing: 01.03.2018

Date of Pronouncement: 27.03.2018

ORDER

Per Bench:

This is a set of two Appeals by the Assessee in quantum proceedings, i.e., for Assessment Years (AYs.) 2009-10 & 2010-11, and one appeal by the Revenue in penalty proceedings (for AY 2010-11). The appeals raising common issues, were heard together, and are accordingly being disposed per a common, consolidated order.

Quantum Proceedings:

2. The assessee, a public trust running educational institutions, stands denied exemption u/s. 11 on its income for the relevant years for want of registration u/s. 12AA, i.e., in view of section 12A(1), which reads as under, providing for such registration as a condition precedent for the application of sections 11 and 12 of the Income Tax Act, 1961 ('the Act' hereinafter):

'Conditions for applicability of sections 11 and 12.'

12A. (1) The provisions of section 11 and section 12 shall *not* apply in relation to the income of any trust or institution *unless* the following conditions are fulfilled, namely:—

(a) the person in receipt of the income has made an application for registration of the trust or institution in the prescribed form and in the prescribed manner to the Commissioner before the 1st day of July, 1973, or before the expiry of a period of one year from the date of the creation of the trust or the establishment of the institution, whichever is later *and such trust or institution is registered under section 12AA:*

Provided that where an application for registration of the trust or institution is made after the expiry of the period aforesaid, the provisions of sections 11 and 12 shall apply in relation to the income of such trust or institution,—

- (i) from the date of the creation of the trust or the establishment of the institution if the Commissioner is, for reasons to be recorded in writing, satisfied that the person in receipt of the income was prevented from making the application before the expiry of the period aforesaid for sufficient reasons;
- (ii) from the 1st day of the financial year in which the application is made, if the Commissioner is not so satisfied:

Provided further *that the provisions of this clause shall not apply in relation to any application made on or after the 1st day of June, 2007;* (emphasis, ours)

The matter admits of no other view in view of the express provision of the Act and, in fact, stands settled by the Apex Court per its' decision in *UP Forest Corporation & Ors. v. CIT* [2008] 297 ITR 1 (SC), extensively relied upon by the Commissioner of Income Tax (Appeals)-4 Ludhiana ('CIT(A)', for short). The assessee's only prayer before us, relying on the decision in *Shree Bhanushali Mitra Mandal Trust v. ITO* [2016] 47 CCH 0197 (Ahd), is that as it has since been granted registration (i.e., on 20.01.2014 / copy on record), the assessment, setting aside the impugned order/s, be restored back to the file of the Assessing Officer (AO) to examine the application of sections 11 and 12 of the Act in view of section 12A(2), which reads as under:

'Conditions for applicability of sections 11 and 12.

12A. (1).....

(2) Where an application has been made on or after the 1st day of June, 2007, the provisions of sections 11 and 12 shall apply in relation to the income of such trust or institution from the assessment year immediately following the financial year in which such application is made:

Provided that where registration has been granted to the trust or institution under section 12AA, then, the provisions of sections 11 and 12 shall apply in respect of any income derived from property held under trust of any assessment year preceding the aforesaid

assessment year, for which assessment proceedings are pending before the Assessing Officer as on the date of such registration and the objects and activities of such trust or institution remain the same for such preceding assessment year:

Provided further that no action under section 147 shall be taken by the Assessing Officer in case of such trust or institution for any assessment year preceding the aforesaid assessment year only for non-registration of such trust or institution for the said assessment year:

Provided also that provisions contained in the first and second proviso shall not apply in case of any trust or institution which was refused registration or the registration granted to it was cancelled at any time under section 12AA.’

Though the assessment was pending before the ld. CIT(A) on 20.01.2014, the date of grant of registration u/s. 12AA, the Tribunal in the cited case has interpreted the words ‘*and the assessment proceedings are pending before the Assessing Officer*’ in the first *proviso* to s. 12A(2) to mean as pending before an appellate authority in-as-much as appellate proceedings are in continuation of the assessment proceedings. Similar view had been taken in *SNDP Yogam v. Asst. DIT(E)* [2016] 161 ITD 1 (Coch), as well as by the Amritsar Bench of the tribunal per its order in *St. Jude’s Convent School & Ors. v. Asst. CIT* (in ITA No. 749/Asr/2013, dated 26.09.2016/copy on record), following the afore-cited decisions by the tribunal. Though the *provisos* to the sub-section (2) were inserted by Finance (No. 2) Act, 2014, w.e.f. 01.10.2014, the tribunal in, also relied upon in *St. Jude’s Convent School* (supra), *Shree Ramkrishna Samiti v. Dy. CIT* [2014] 156 ITD 646 (Kol), has held the same to be retrospective, i.e., the date from which sub-section (2) to section 12A stood inserted on the statute, i.e., by Finance Act, 2007 w.e.f. 01.06.2007. There is no change in the objects and activities of the trust as obtaining for the relevant year/s, and on the basis of which the registration was subsequently

granted and, in any case, could be examined by the AO in the set aside proceedings.

The Revenue's case before us, on the other hand, is that an exception to the normative condition of the registration being applicable from the previous year in which the application there-for stands made, could only be in terms of the express language to the provision, which is plain and admits of no ambiguity. Appellate proceedings though regarded as a continuation of the assessment proceedings as thereby the assessment is impacted, are yet separate and distinct, being in pursuance of a specific right to appeal against the assessment (or the appellate orders arising in the appellate proceedings), which is thereby subject to review. Assessment marks the completion of the assessment proceedings. *How could an assessment under appeal be considered as pending before the AO?* No contrary decision - to that cited by the assessee, by the tribunal or a higher appellate forum, however, stands adduced before us.

3. We have heard the parties, and perused the material on record.

We, in principle, could not agree more with the stand of the Revenue. Even if, for argument sake, an assessment in appeal is regarded as a continuation of the assessment proceedings, it is not pending before the Assessing Officer but before an appellate authority, be it the first or the second appellate authority, extending right up to the Apex Court; the constitutional courts also exercising appellate jurisdiction over an assessment under the Act. An assessment in appeal cannot therefore be regarded as pending before the Assessing Officer (AO).

The moot question, however, is as to why has the Legislature restricted the retrospective application of the registration only to the year for which the assessment proceedings are pending, as on the date of grant of registration, before the AO? The answer is simple. It is the AO who has to examine if the conditions of

section 11 (providing an exemption on the application of the income by a charitable or religious trust for its' object/s) are satisfied and, accordingly, issue appropriate findings for the allowance or otherwise of the exemption u/s. 11 read with sections 12 and 13, including as to its' quantification. It has nothing to do with the time lag between the year for which the assessment proceedings are pending before the AO and the time (year) of the grant of registration u/s. 12AA. That is, there is no correlation, much less a linear relationship, between the two defined points of time. For example, the assessment for a preceding year, which is u/s. 147 or u/s. 153A/C, may be pending before the AO while that for a subsequent year may not be. As such, while the assessee shall be entitled by law for the benefit of registration u/s. 12AA for the earlier year, it shall not be for the subsequent year! The assessments in *Shree Ramkrishna Samiti* (supra) were also u/s. 147, so that the tribunal; an assessment including, by definition, reassessment, held the same to be covered within the purview of the first *proviso* to section 12A(2).

Coming back to our discussion as to the purpose/reason/s for the stipulation of the condition of the pendency of the assessment proceedings before the AO, i.e., which inform the same, it is again the AO who has to be given the notice as to accumulation (of income) for application, and who has to issue relevant findings impacting the assessment, including as to 15% (of income), application of which could (u/s. 11) be deferred without attracting any 'disallowance' or 'dilution' in the exemption u/s. 11(1); deferment on account of non-receipt of income, or for any other reason. Again, it is he who, as the assessing authority, assuming the functions of investigation as well as adjudication, would verify if there has been a change in the objects and activities of the assessee over the relevant period. Now, if an assessee whose assessment is pending (as on the date of registration) before the AO is eligible (for the benefit of registration) for the year/s for which its'

assessment proceedings are pending before the AO, there is no reason why the same assessee be denied the benefit of registration for other years, which are not so pending, but pending in appellate proceedings. *This is also what in effect the tribunal has opined in the cited cases.* Of course, we may add, this must be the sole ground/basis, as in the present case, on which the benefit of exemption u/s. 11 stands denied. This is particularly so as the Assessing Officer is precluded from initiating reassessment proceedings on the basis of non grant of registration (u/s. 12AA). As we understand, the whole purport of the *provisos* to s. 12A(2) is to mitigate the hardship, as far as possible, arising to an assessee, a charitable (or religious) trust or institution, on account of the delayed grant of registration u/s. 12AA, which is thus deemed as applicable even for prior years. This, as apparent from a reading of s. 12A, follows the withdrawal of the power of condonation of the delay in applying for the said registration, erstwhile vested with the competent authority w.e.f. 01.06.2007 (by insertion of the second *proviso* to section 12A(1)(a)). Clearly, therefore, there should be no other impediment - apart from non-registration, for the non allowance of the exemption u/s. 11 and, as a corollary, no change in the objects and activities of the trust/institution during the intervening period - a condition provided by the statute itself. Why, even in case of other impediments, where removed/deleted in appellate proceedings, so that only that *qua* registration obtains, the relevant assessment could similarly qualify for being considered for the satisfaction of the conditions of section 11 and 12 by the AO.

We, in view of the foregoing, while holding that appellate proceedings cannot be regarded as assessment proceedings before the Assessing Officer, or as an assessment pending before him, equating thus the appellate and the assessment proceedings, which are separate and distinct, find no reason not to accept the assessee's prayer. This is as an assessee registered u/s. 12AA of the Act is to be, in

view of s. 12A(2), deemed to be so registered for any other year for which the proceedings are pending at any (appellate) stage, provided of course that there is no change in the objects and activities of the entity during the intervening period. The Id. Authorized Representative (AR), the assessee's counsel, has shown us that there has been no change in the objects of the assessee's society, *qua* which we are *prima facie* satisfied, as section 12A(2) cannot be invoked otherwise. Further, no doubt the assessee stands refused approval u/s. 10(23C) and, in fact, twice. However, it is only the refusal (or subsequent cancellation) of registration u/s. 12A, that would attract the rigor of the third *proviso* to section 12A(2). We, accordingly, setting aside the impugned order/s, restore the assessments back to the file of the AO for consideration of the assessee's claim for exemption u/s. 11 without being influenced by the grant of registration subsequently, and complete the assessment in accordance with the law. This aspect; the provisions of section 11 & 12 being not applicable in the absence of registration, remain to be examined. The AO, needless to add, before proceeding in the matter, shall also examine the assessee's objects as obtaining for the relevant year/s – both on record and as being executed, with that on the basis of which the registration stands subsequently granted. We decide accordingly.

4. In the result, the assessee's appeals are allowed for statistical purposes.

Penalty Proceedings (in ITA No. 586/Asr/2016, for AY 2010-11)

5. Penalty u/s. 271(1)(c) in the instant case stands levied as the assessee had claimed exemption u/s. 10(23C)(vi) of the Act, even as no approval was available to it at the relevant time and, rather, was never granted in-as-much as the application for approval for the second time, furnished on 24.09.2010, stood also refused by the competent authority on 19.08.2011.

6. We have heard the parties, and perused the material on record.

In our considered view, in the facts and circumstance of the instant case, no case for penalty is made out. The application for approval u/s. 10(23C)(vi) was made to the competent authority for the first time on 29.09.2009. The same was refused vide order dated 15.09.2010. The assessee, after carrying out the necessary changes, made a fresh application for approval on 24.09.2010. It, therefore, while filing the return for AY 2010-11, i.e., on 30.09.2010, had a reasonable basis to believe that it shall be allowed approval, which, where so, would be applicable for the relevant year. That apart, we have, in the quantum proceedings for the relevant year, set aside the assessment back to the file of the AO, with directions, for fresh determination (in ITA No. 644/Asr/2013, of even date).

Under the circumstances, clearly, therefore, no case for levy of penalty u/s. 271(1)(c) is made out. We decide accordingly.

7. In the result, the Revenue's appeal is dismissed.

Order pronounced in the open court on March 27, 2018

Sd/-
(N. K. Choudhry)
Judicial Member

Sd/-
(Sanjay Arora)
Accountant Member

Date: 27.03.2018.

/GP/Sr. Ps.

Copy of the order forwarded to:

- (1) The Appellant: Shyam Lal Thapar Foundation Moga
- (2) The Respondent: ITO-II, Moga
- (3) The CIT(A)-II Ludhiana
- (4) The CIT, concerned.
- (5) The Sr. DR, I.T.A.T.

True Copy

By Order