

आयकर अपीलीय अधिकरण "C" न्यायपीठ मुंबई मे ।

IN THE INCOME TAX APPELLATE TRIBUNAL "C" BENCH, MUMBAI
BEFORE SRI MAHAVIR SINGH, JM AND SRI G MANJUNATHA, AM

आयकर अपील सं./ ITA No. 2658/Mum/2012

(निर्धारण वर्ष / Assessment Year 2009-10)

Otters Club Carter Road, Bandra, Mumbai-400 050	Vs.	DIT(E), Mumbai Piramal Chambers, 6th Floor, Lalbaug, Mumbai-400 013
(अपीलार्थी / Appellant)	..	(प्रत्यर्थी / Respondent)
PAN No. AAATO0013F		

Assessee by : Shri Nitesh Joshi, AR

Revenue by : Shri H.N. Singh, DR

Date of hearing: 22-05-2018 Date of pronouncement : 15-06-2018

आदेश / ORDER

PER MAHAVIR SINGH, JM:

This appeal by the assessee is arising out of the order of Director of Income Tax (Exemptions), Mumbai [in short DIT (E)] vide order dated 01.03.2012 for AY 2009-10.

2. The only issue in this appeal of assessee is against the order of DIT(Exemptions) in cancelling the registration already grated under



section 12AA(3) of the Act. For this assessee has raised the following five grounds: -

- “1. The learned DIT(E) erred in holding that he had jurisdiction to cancel the registration Under section. 12AA(3), as the aforesaid section applies only if, the activities of the Trust are not genuine or are not being carried out in accordance with the objects of the Trust and neither of these conditions applies because for the last over 35 years the Appellant has been held to be entitled to exemption from tax under section 11.*
- 2. The DIT(E) erred in holding that the Appellant is hit by the proviso to Sec.2(15) and the Appellant will not be for a charitable purpose and the trust itself becomes non-genuine for the purpose of Sec.11 and therefore, the registration allowed to the appellant was cancelled /withdrawn as non-charitable trust.*
- 3. The Director of Income Tax (Exemption) erred in holding that the activities of the trust providing swimming pool facilities for aquatic events and training and facilities for other sports like – squash, billiards, table tennis, etc. are not charitable the Govt. Of Maharashtra gave the lease of the land and the activities relating to canteen for sale of food and drinks are implement its objects contrary to the orders of the Tribunal from AY 1991-92 to 2006-07 and upheld by the High Court in Assessment Year 2004-05.*



4. *The DIT(E) erred in holding that the proviso to sec. 2(15) applied to the Appellant as main object of the trust is for advancement of any other object of general public utility which are in the nature of trade, commerce, business for a cess or fee or any other consideration irrespective of the nature of use or application or retention of the income form such activities and accordingly, receipts from sports activities and social functions and canteen are in the nature of the business income. "*

3. The assessee has also filed additional ground and urged that DIT(E) erred in cancelling/ withdrawing the registration earlier granted under section 12A of the Act vide his order dated 01.03.2012, urging that the said cancellation withdrawal cannot be with retrospective effect. For this assessee has raised the following additional grounds: -

"6. The DIT(E) by his impugned order dated 01.03.2012 erred in holding that the Appellant lost its charitable character from assessment year 2009-10 and hence the registration grand under section 12A stands cancelled and withdrawn with effect from assessment year 2009-10. He failed to appreciate that the cancellation/ withdrawal of registration cannot be made with retrospective effect."

4. Briefly stated facts are that the assessee trust is a register public trust with the charity commissioner Bhirhanmumbai Division, Mumbai dated 11.05.1973. The Income Tax has also registered this Trust under section 12A of the Act vide registration No. BMY/TR/D(a)/12/70-74 dated 16.03.1974. This trust was granted registration and allowed the



exemption under section 11 of the Act till AY 2008-09. Subsequently, DIT(E) received a proposal from ADIT(E) 11(1), Mumbai for cancellation of registration granted to the assessee under section 12A of the Act on the ground that the assessee has been carrying on activity in the nature of trade, commerce and business etc. in term of the proviso to section 2(15) of the Act. The Proviso to section 2(15) of the Act, which came into effect from 01.04.2009, by an amendment by the Finance Act 2008 as the section has under gone change to the effect that advancement of any other object of general public utility shall not be a charitable purpose, if it involves the carrying out of any activity in the nature of trade, commerce or business. The relevant provision of section 2(15) of the Act reads as under : -

“charitable purpose” includes relief of the poor, education, yoga, medical relief, preservation of environment (including watersheds, forests and wildlife) and preservation of monuments or places or objects of artistic or historic interest, and the advancement of any other object of general public utility.

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 ten lac rupees or less in the previous year.”

5. In view of the above the DIT(Exemption) cancelled the registration with effect from AY 2009-10 by observing that the assessee club in view of the provision to section 2(15) of the Act is engaged in the commercial activity and receipts thereof are far and excess as prescribed in the proviso. The DIT(Exemption) after considering the relevant proviso cancelled the registration by observing as under: -

“The AR in its written submission has submitted that the above mentioned objects and activities were considered by the ITAT in the case of Breach Candy Swimming Pool Trust, following the Bombay High Court judgment in ITA 9039/Mum/92. The appellate authorities upto Hon'ble Bombay High Court had delivered the issue in favour of the above referred assessee. The above argument of the assessee does not advance its case as the proviso as referred to in earlier para have been brought to statute w.e.f. A.Y.2009-10. By insertion of proviso to sec. 2(15) the legal position stands changed and what has been decided in the earlier years when such provisions were not in existence has no significance as the issue involved is totally different. In the present circumstances, the eligibility of the Institution being charitable on the basis of objects is not under consideration. It is only when such Institution whose sole object is of advancement of general public utility gets involved in earning the



business income by way of trade, commerce or business, then by virtue of proviso the activities of such Trust / Institution shall not be charitable and the proviso has been made effective from A.Y.2009-10. Therefore, the argument of the assessee as taken above is devoid of any merits therein.

The proviso as brought in the section 2(15) of the Act, makes it very clear that once any Trust/ Institution is hit under the aforesaid proviso then the activities of such Institution / Trust shall not be charitable and the proviso has been made effective w.e.f. A.Y. 200910. Accordingly, once any Trust / Institute come under the mischief of the proviso then the Trust/ Institute loses its charitable character from A.Y. 2009-10 and onwards. Accordingly, the AR's above argument is also rejected.

Therefore, in the circumstances and factual position as discussed above clearly reveals that the assessee club is engaged in commercial activities and the receipts thereof are far and excess of the limit as laid down in the proviso to section 2(15) and accordingly it is held that the assessee club hit by the proviso to section 2(15) of the Act which has come to effect from A.Y. 2009-10.

Once a charitable Trust / Institution hit by aforesaid proviso, then there is deeming provision that such entity shall not be for a charitable purpose. Hence, once the assessee Trust / Institution loses its charitable character then obviously there is change in the status of such assessee and it is no longer



can be hold to be for charitable purpose. Once it is held that the assessee is not for charitable purpose then the trust itself becomes non genuine for the purpose of Section 11 of the I.T.Act, as it loses its public charitable status and accordingly the provision of Section 12AA(3) of the Act gets attracted. As discussed in earlier paragraph that Hon'ble I.T.A.T. in assessee's own case has held that some of the activities as carried out by the assessee cannot be said to be for the object of club. Hence the activities are not in accordance with the objects sought to be pursued by the Institution. Thus in view of the facts and circumstances as discussed above, I therefore, accordingly hold that the assessee trust has become non genuine for the purpose u/s.12AA(3) read with Section 11 of the I.T. Act, as for allowing exemption the Trust/ Institution should be for charitable / religious purpose, therefore, the registration as allowed to it is hereby cancelled/ withdrawn w.e.f. A.Y. 2009-10 and the assessee trust is accordingly held as non-charitable Trust / institution”

Aggrieved, assessee came in appeal before Tribunal against cancellation of registration.

6. We have heard the rival contentions and gone through the facts and circumstances of the case. We find that the main activities of the assessee's trust are providing swimming pool facilities for aquatic events and training facilities for other sports like squash, billiards, table tennis, etc. These activities are the object of the trust itself as settled by Govt. of Maharashtra while deciding to give a lease of land to the trusts for construction and operation of



swimming pool and other aquatic events. These have been considered as charitable activities for promoting swimming and aquatic sports are part of the object of the Trust for which Govt. of Maharashtra gave the lease of the land. Along with swimming and aquatic sports, there is training facility for other sports like squash, billiards, table tennis, etc. promoted by the Trust as a part of overall sports activities, which has been considered to a charitable activity as earlier while granting specific exemption under section 11 of the Act. these objects and activities were considered by the Dept. and finally upheld by the Tribunal in no. of decisions from AY 1985-86 to 2007-08 particularly following special bench decision in the case of Breach Candy Swimming Pool Trust in ITA no. 9039/Mum/1992. In similar circumstances, Hon'ble Bombay High Court in the case of DIT (Exemptions) vs. Khar Gymkhana (2016) 385 ITR 162 (Bom.), after considering the proviso to section 2(15) of the Act as amended, considered the definition of charitable purposes and decided the issue in favour of assessee by observing in Para 8 to 12 as under:-

“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 Rs. 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.



9. In response, Mr. Malhotra, learned Counsel appearing for the Revenue in respect of the appeal, submits that the aforesaid Circular dated 27th May, 2016 is to be read as a whole and on so reading, it would be evident that Income Tax Department has jurisdiction to cancel the registration whenever receipts from commercial activities have exceeded Rs. 25 lakhs. Learned Counsel further submits that the aforesaid Circular would have application only prospectively as it was issued consequent to Finance Act, 2016 which changed the cut-off from Rs. 25,00,000/- to 20% of the total receipts in respect of its commercial activities. It is also submitted that looking at the quantum of receipts on account of commercial activities it is unlikely/ improbable that in the subsequent Assessment Year, the receipts are to fall below Rs. 25 lakhs. Therefore, the Commissioner is entitled to cancel the Registration under Section 12AA (3) of the Act.

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 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 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.



12. In view of the issue being covered by the CBDT Circular No. 21 of 2016, no grievance against the impugned order can be made by the Revenue. Therefore, the question as framed becomes academic and does not give rise to any substantial question of law.”

7. In view of the above decision of Hon'ble Bombay High Court, we are of the view that in the present case before us there is no change in activity of the assessee's trust, what was in prior assessment years, and hence, the registration of assessee's trust cannot be disputed merely because the proviso to section 2(15) of the Act has come into play. The effect of section 11 can be considered while framing assessment but registration has to be granted. The issue is squarely covered by Hon'ble Bombay High Court decision in the case of Khar Gymkhana (supra), respectfully following the same, we direct the DIT(Exemption) to grant registration. Order Accordingly.

8. In the result, the appeal of assessee is allowed.

Order pronounced in the open court on 15-06-2018.

आदेश की घोषणा खुले में दिनांक 15-06-2018 को की गई ।

Sd/-
(G MANJUNATHA)
ACCOUNTANT MEMBER

Sd/-
(MAHAVIR SINGH)
JUDICIAL MEMBER

Mumbai, Dated: 15-06-2018
Sudip Sarkar /Sr.PS



ITA No. 2658/Mum/2012

Copy of the Order forwarded to:

1. The Appellant
2. The Respondent.
3. The CIT (A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.
//True Copy//

BY ORDER,

Assistant Registrar
ITAT, MUMBAI