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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

DECIDED ON: 16.08.2012

+ ITA 1687/2010

DIRECTOR OF INCOME TAX Appellant

Through: Mr. Abhishek Maratha,
Sr. Standing Counsel with
Ms. Anshul Sharma, Advocate.

versus

FOUNDATION OF OPHTHALMIC & OPTOMETRY
RESEARCH EDUCATION CENTRE Respondent

Through: Mr. Ved Jain, Advocate.

CORAM:

MR. JUSTICE S. RAVINDRA BHAT

MR. JUSTICE R.V. EASWAR

MR. JUSTICE S.RAVINDRA BHAT (OPEN COURT)

% 1. The Revenue claims to be aggrieved by the decision of the Income Tax Appellate Tribunal (ITAT) in ITA No.202/DL/2009. By the impugned judgment, the ITAT had allowed the assessee's claim for registration as charitable trust under Section-12AA (1) (B) of the Act. The substantial question of law framed in this case is: -

“Whether the Income Tax Appellant Tribunal was right in holding that while examining the application under Section 12AA (1) (b) read with Section 12A of the Income Tax Act, 1961, the concerned Commissioner/Director is not required to examine the question whether the Trust has actually

commenced and has, in fact, carried on charitable activities?”

2. The assessee is a society incorporated under the Society Registration Act on 30.05.2008. Its objects as set out in its Memorandum of Association are as follows: -

- I. Arranging and formulation of courses for Optometry and Ophthalmic Education and implement the same by establishing the university, college or other study or work centers on its own or by taking over other established society or institutions.*
- II. To take up the common problems those are being faced by the individual Research Training & Services organization.*
- III. Arranging and conducting seminars, symposia, workshops.*
- IV. Exchange of personnel for training.*
- V. Development of sub-specialties in Basic Ophthalmic Science.*
- VII. Publish newspapers, periodicals, journals atlases, proceedings and books in Ophthalmology and allied disciplines.*
- VIII. Advise on consultation and equipping of new units.*
- IX. Create a Federation college of Ophthalmologists and optometry.*
- X. Creating new hospitals institutes either as co-operative enterprises.*
- XI. Any other problem of common interest that may be decided by the Federation units.*

XII. The object give above may be achieved by creating on its own or by looking over the other society or institution.”

3. The assessee applied for registration under Section 12AA on 10.07.2008. The DIT (Exemption) elicited certain additional particulars from the assessee by his letter dated 3.10.2008. This was responded to on 6.10.2008 and the necessary particulars were furnished. The DIT (Exemption) refused to grant registration on the short ground that no charitable activity had in fact taken place since the society was a newly established one. The DIT (Exemption) relied upon the judgment of the Kerala High Court in *Self Employers Service Society v. Commissioner of Income Tax*, (2001) 247 ITR 18 (Kerala). The assessee's appeal was allowed by the Tribunal. The core of the Tribunal's reasoning is to be found from the following extracts of the impugned order: -

“10. We have carefully considered the rival submissions in the light of the material placed before us. The clause governing the main objects of the assessee society has already been reproduced in the above part of this order. We have also gone through the order of DIT (Exemption). It is also not the case of DIT (Exemption) that any of the objects of the assessee society is not charitable in nature. At the time of submitting the application for registration the corpus of the society was only Rs.2,000/- which was received from Dr. Nabin Kumar Patanaik who is Secretary of the Society and apart from that no other activity was carried out. But, according to the decision of the Hon'ble Allahabad High Court in the case of Fifth Generation Education Society (supra), non-commencement of charitable activity cannot be a

ground for rejection of application filed by the assessee. Their Lordships in that case, after considering the provisions of Section 12A have observed that application of income need not be considered by the CIT while considering the application for grant of registration and their Lordships also observed that the objects being general in nature also cannot be a ground to reject the application of the assessee and the reason that no activity has been carried out also cannot be a ground for rejection of application. The observations of their Lordships from the said decision are reproduced below: -

“2. A reading of the section shows that the registration under S.12A is a pre-condition for availing of the benefit under ss.11 and 12, Sec.11 provides for exemption of income which is applied for charitable purpose. Section 12 is in the nature of an explanation to s.11. Before a person can claim the benefit of s.11, or s.12, as the case may be, he must obtain registration under s.12A. The application for registration under s.12A has to be made in Form No.10A prescribed by r.17A before the expiry of one year from the date of creation of the trust or the establishment of the institution, whichever is later. It has to be made by the person in receipt of the income of the trust.

3. It is evident that, at this stage, the CIT is not to examine the application of income. All that he may examine is whether the application is made in accordance with the requirements of s.12A with r.17A and whether Form No.10A has been properly filled up. He may also see whether the objects of the trust are charitable or not. At this stage, it is not proper to

examine the application of income.

4. The order impugned does not say that that the objects of the society are not charitable in nature; it merely says that they are general in nature. Just because they are general, they do not cease to be charitable. The CIT has also observed that no activity has been carried on by the society. It is also not the requirement of s.12A of the Act. Nor has s.80G any relevance at this stage. The impugned order cannot, therefore, be sustained and it is quashed.”

4. The Tribunal followed its own decision in *Dharma Sansthapak Sangh (Niyas)* (supra) and proceeded to hold as follows: -

“12. The decision relied upon by Ld. DIT (E) and Ld. DR has no application on the facts of the assessee’s case as in that case whatever activities carried out by the society was only for the purpose of generating income for its members and Single Judge of the Hon’ble High Court had given the opportunity to the society to file fresh application after actually starting charitable work and the department was directed to consider such application on merits. Therefore, the facts in that case do not match with the present case and the said case could not be applied to the case of the assessee.”

13. In this view of the situation, as the sole reason given by the DIT (E) is non-commencement of charitable activity, we find no justification in rejecting the claim of the assessee. DIT (Exemption) is directed to grant registration to the society.”

5. Learned counsel for the Revenue faulted the Tribunal’s order

saying that in the absence of actual functioning, without any activity, it is not open for a Society or any Organization to claim to be charitable. Thus, the organization in this case as a society could not have claimed the benefit of Section-12AA from inception itself.

6. Learned counsel for the assessee, on the other hand, submitted that in the absence of any bar in the statute denying the benefit, the Court or the tax authority ought not to impose restrictions. It was also submitted that this issue was considered in recent decision of the Karnataka High Court reported as *Director of Income Tax (Exemptions) v. Meenakshi Amma Endowment Trust*, (2011) 50 DTR (Kar) 243. In that case, the Trust was formed on 23.01.2008 and had applied for approval within nine months of its registration. Like in the present case the tax administrators refused to register it as a charitable trust. The Karnataka High Court reasoned as follows: -

“4. The Tribunal taking into consideration the law laid down by the Division Bench of this Court in Sanjeevamma Hanumanthe Gowda Charitable Trust vs. Director of IT (Exemption) (2006) 203 CTR (Kar) 533 : (2006) 285 ITR 327 (Kar) held that depending upon the facts and circumstances, the concerned authority has to look to the objects and also the activities of the trust in order to consider the application for registration under s.12A of the Act and accordingly allowed the appeal by order dt.20th Nov., 2009 and directed the Director of IT (Exemptions) to grant recognition to the trust if other conditions are satisfied.

5. On perusal of records we note that the trust was formed on 23rd Jan., 2008 and within a period of nine months they had filed an application under s.12A for issuance of the registration claiming exemption. The fact that the corpus of the trust is nothing but the contribution of Rs.1,000 by each of the trustees as corpus fund goes to show that the trustees were contributing the **funds** by themselves in a humble way and were intending to commence charitable activities. It is not even the case of the Revenue that by the time the application of the assessee came to the considered by them, the assessee had collected lots of donations for the activities of the trust. On the other hand the grievance of the concerned authorities seems to be that there was no activity which could be termed as charitable as per the details furnished by the assessee, therefore, such registration could not be granted. When the trust itself was formed in January 2008 with the money available with the trust, one cannot expect them to do activity of charity immediately and because of that situation the authority cannot come to a conclusion that trust was not intending to do any activity of charity. In such a situation the objects of the trust have to be taken into consideration by the authority and the objects of the trust could be read from the trust deed itself. In the subsequent returns filed by the trust, if the Revenue comes across that factually trust has not conducted any charitable activities, it is always open to the authorities concerned to withdraw the registration already granted or cancel the said registration under s.12AA (3) of the Act.”

7. This Court has considered the judgment in *Self Employers Service Society* (supra). The facts situation there and the grounds for refusal of registration were not that the Trust was newly registered but that its activities were not charitable. The Kerala

High Court held in this context as follows: -

“On the enquiry made by the CIT it was found that members of the society are mainly merchants. Its activity is accepting recurring deposits from its members and fixed deposits from the public. Loan is being given to its members at 21 per cent interest. The officer found that in spite of the reference to large number of charitable objects in its bye laws, the activity carried on by the society is confined to its members numbering about 150. The activities, as mentioned above, cannot be treated as charitable in nature. It was on this basis the CIT came to the conclusion that it is not entitled to registration under s.12A.

8. Counsel for the Revenue had relied upon the decision of the Punjab and Haryana High Court in *Aman Shiv Mandir Trust (Regd.) v. Commisisoner of Income Tax*, (2008) 296 ITR 415 (P&H). In that case, the assessee had applied for registration under Section-12A almost in a defensive manner. It was carrying on its activity for more than three years and after some discrepancies were noticed by the Revenue and after notice had been issued, the assessee then applied for registration by filing form-15H. The Court found that the substantial amounts collected were kept in bank in the form of fixed deposits and there was no charitable activity.

9. The provision in this case i.e. Section-12A states that when a Trust is desirous of getting itself registered as charitable, it has to approach the Commissioner under Section-12AA. The powers of the Commissioner to register or refuse the application are expressly

spelt out in Section-12AA itself. Rule-12AA (b) reads as follows:

Section 12AA. PROCEDURE FOR REGISTRATION

(1) The Commissioner, on receipt of an application for registration of a trust or institution made under clause (a) of section 12A, shall - (a) Call for such documents or information from the trust or institution as he thinks necessary in order to satisfy himself about the genuineness of activities of the trust or institution and may also make such a inquiries as he may deem necessary in this behalf; and

(b) After satisfying himself about the objects of the trust or institution genuineness of its activities, he - (i) shall pass an order in writing registering the trust or institution;

(ii) Shall, if he is not so satisfied, pass an order in writing refusing to register the trust or institution, and a copy of such order shall be sent to the applicant :

Provided that no order under sub-clause (ii) shall be passed unless the applicant has been given a reasonable opportunity of being heard.

(1A) All applications, pending before the Chief Commissioner on which no order has been passed under clause (b) of sub-section (1) before the 1st day of June, 1999, shall stand transferred on that day to the Commissioner and the Commissioner may proceed with such applications under that sub-section from the stage at which they were on that day.

(2) Every order granting or refusing registration under clause (b) of sub-section (1) shall be passed before the expiry of six months from the end of the month in which the application was received under clause (a) of section 12A.”

10. Facially, the above provision would suggest that there are no

restrictions of the kind which the Revenue is reading into in this case. In other words, the statute does not prohibit or enjoin the Commissioner from registering Trust solely based on its objects, without any activity, in the case of a newly registered Trust. The statute does not prescribe a waiting period, for a trust to qualify itself for registration.

11. If the Revenue's contentions are correct then, necessarily, a condition would have to be read in to the provision that the Commissioner should be satisfied that the Trust is in fact engaged in charitable activities which would in turn inject considerable deal of subjectivity. It is quite possible that if such flexibility is introduced, it would be susceptible to varied interpretation by the different authorities, in that some would be satisfied with activity of few months, while others may wish to examine the activities of the organization for longer time. In this view of the matter, this Court is persuaded to follow the interpretation given to Section-12AA by the Karnataka High Court in *Director of Income Tax (Exemptions) v. Meenakshi Amma Endowment Trust (supra)*.

12. For the above reasons, the Court answers the question of law in favour of the assessee and against the Revenue. The Appeal is accordingly dismissed.

S. RAVINDRA BHAT, J

AUGUST 16, 2012/vks/

R.V.EASWAR, J