IN THE INCME TAX APPELLATE TRIBUNAL, "C" BENCH, KOLKATA

Before : **Shri Mahavir Singh,Judicial Member, and**
Shri M. Balaganesh, Accountant Member

ITA No. 1680 / 2012 – Asst Year 2003-04
ITA No. 1681 / 2012 – Asst Year 2004-05
ITA No. 1682 / 2012 – Asst Year 2005-06
ITA No. 1683 / 2012 – Asst Year 2006-07
ITA No. 1684 / 2012 – Asst Year 2007-08
ITA No. 1685 / 2012 – Asst Year 2008-09

Sree Sree Ramkrishna Samity **Vs.** **D.C.I.T, Cir-2, Siliguri**
PAN: AACAS 9103M
(Appellant) (Respondent)

For the Appellant/Assessee: Shri Ananda Sen, Advocate, ld.AR
For the Respondent/Department: Dr. Adhir kr. Bar, CIT, ld.DR

Date of Hearing: 07-09-2015

Date of Pronouncement: 9-10-2015

ORDER

SHRI M.BALAGANESH, AM

The order of assessment was framed by the Learned AO u/s 143(3) read with section 147 of the Income Tax Act (hereinafter referred to as the 'Act'). These appeals of the assessee arise out of the order of the Learned CITA in the following manner:-

Appeal No. 26/CIT(A)/Slg/10-11 dated 25.7.2012 for Asst Year 2003-04
Appeal No. 27/CIT(A)/Slg/10-11 dated 25.7.2012 for Asst Year 2004-05
Appeal No. 28/CIT(A)/Slg/10-11 dated 25.7.2012 for Asst Year 2005-06
Appeal No. 29/CIT(A)/Slg/10-11 dated 25.7.2012 for Asst Year 2006-07
Appeal No. 30/CIT(A)/Slg/10-11 dated 25.7.2012 for Asst Year 2007-08
Appeal No. 31/CIT(A)/Slg/10-11 dated 25.7.2012 for Asst Year 2008-09

2. As the issues involved are identical in nature, they are disposed off together by way of a common order for the sake of convenience.

3. The brief facts of these appeals are that Shree Shree Ramakrishna Samity is a society, registered under the West Bengal Society Registration Act, 1961 on 10.8.1986. The predominant object of the society includes promotion, development, preservation and rendering of social and cultural services in the matters of advancement of tenets and precepts of Lord Shree Shree Ram Krishna Paramhansa Dev irrespective of caste and creed of the humanity at large. The objects further include promotion of physical and mental development of youths, to make them worthy citizen for the service of the mother land, co-ordination of social, cultural and religious activities of allied organizations, organization of sevadal for rendering services to the suffering humanity, acquiring, establishment, starting, aiding, maintaining and management of schools, colleges, libraries, hospitals for the benefit of the public, helping needy students for prosecution of studies, helping the aged, sick and helpless and indigent persons, construction, maintenance, improvement, development, alteration of any building necessary by the Governing Body and to engage and assist such other philanthropic activities deemed appropriate by the Governing Body of the Society etc.

3.1. The assessee society took up the construction of an old age home since October 2000 with active financial support of the Siliguri Municipal Corporation for which contributions from the public were forthcoming and the same were duly accounted for in the audited accounts recording receipts and expenditures of the society. The said old age home was subsequently inaugurated by His Excellency the Governor of West Bengal.

3.2. The assessee society was in receipt of the following donations from various parties for the purpose of construction of old age home:-

Asst Year	Donation recd	Invt in old age home construction
2003-04	9,38,000	14,26,692
2004-05	6,26,100	15,16,247
2005-06	3,18,000	13,66,481
2006-07	1,89,000	9,55,158

The said donations were credited specifically to a bank account opened exclusively for the purpose of deposit of the receipts of donation and in the balance sheet, the receipt of donation was clearly accounted for as receipt of donation for the said purpose shown separately. These donations received were utilized for construction of old age home named "Shesh Basanta". The Learned AO held that the assessee society is not registered u/s 12AA of the Act and accordingly not eligible for exemption u/s 11 of the Act . Accordingly, the Learned AO brought to tax the rental income derived by the assessee society as income from house property, interest income and donations received from various donors under the head income from other sources. This action was upheld by the Learned CITA for the same reason. Aggrieved, the assessee is in appeal for the Asst Years 2003-04 to 2008-09 before us.

4. The Learned AR argued that the donations received by the assessee have been duly accepted as genuine by the Learned AO in the remand proceedings. The donations received *per se* is capital in nature as it was received for construction of an old age home which fact is also accepted by the Learned AO in the remand proceedings. Hence he argued that in any case, a capital receipt cannot be brought to tax as a revenue receipt. He also argued that the first proviso inserted in section 12A(2) by the Finnace (No.2) Act, 2014 with effect from 1.10.2014 clearly provides for deemed registration u/s 12AA of the Act for the earlier years and hence the same has to be construed as retrospective in operation. He further argued that on the date of granting registration u/s 12AA of the Act on 29.10.2010 with effect from 1.4.2010,

admittedly, the reassessment proceedings were pending before the Learned AO and admittedly, the assessee had carried on the same charitable objects in the earlier assessment years.

4.1. He further argued that the assessee society in the worst case could have been brought to tax only in the status of Association of Persons (AOP) as admittedly the assessee society was formed with a voluntary act of coming together of persons as per paragraph 5 of Memorandum of Association dated 9.8.1986 to pursue a common object as per paragraph 43 of Memorandum of Association to earn income from property held under trust. Reliance in this regard is placed on the decision of the Hon'ble Apex Court in the case of *CIT vs Indira Balkrishna reported in 39 ITR 546 (SC).* He further argued that, even assuming without conceding, that assessee society has to be taxed as an AOP by assessee not given exemption u/s 11 of the Act, it is required on the part of the Learned AO to consider the income of the society in its hands as on AOP and decide the surplus as non-taxable in view of its non – revenue nature, in as much as the donations were meant for utilization for creation of an asset which it was so utilized in the facts and circumstances of the case. He also argued that it is evident from the face of the assessment order, the Learned AO had mentioned the status of the assessee as a trust / society and not as AOP. The Learned AR further relied on the written submissions filed by him in support of his various contentions.

5. In response to this, the Learned DR vehemently supported the orders of the lower authorities and pleaded that the registration u/s 12AA of the Act is a pre-condition for claiming exemption u/s 11 of the Act. He also argued that in order to claim exemption u/s 11(1)(d) of the Act for donations received, the registration u/s 12AA of the Act is mandatory. He also argued that donations received by assessee falls under the definition of income u/s 2(24)(iia) of the Act and accordingly prayed for non-interference in the orders of the lower authorities.

6. We have heard the rival submissions and perused the materials available on record. We find that the first two grounds raised by the assessee is on jurisdiction and sanction for issue of notice u/s 148 of the Act and non supply of reasons recorded for reopening the assessment. On specific query from the Bench during the course of hearing, the Learned AR stated that those grounds are not pressed which is taken as a statement from the Bar. Accordingly, the ground nos. 1 & 2 raised by the assessee are dismissed as not pressed.

6.1. We find that the assessee trust was in receipt of donations from various philanthropists including Siliguri Municipal Corporation and these donations were admittedly utilized by the assessee trust towards construction of old age home under the name and style of "Shesh Basanta". On these facts, there is absolutely no dispute. All the donors had filed confirmations before the Learned AO and the genuinity of these donations are proved beyond doubt by the assessee. The Learned AO has accepted the same in the remand proceedings.

6.2. We find that the objects of the assessee society are charitable in nature within the meaning of section 2(15) of the Act on which fact there is absolutely no dispute. It is pertinent to note that the registration u/s 12AA of the Act was granted to the assessee on 29.10.2010 with effect from 1.4.2010. Admittedly, the notice u/s 148 of the Act was issued by the DCIT, Circle 2 Siliguri for the Asst Years 2003-04 to 2008-09 on 30.3.2010. Even for the earlier years , the assessee society was carrying on the same charitable objects as per the trust deed on which fact also there is absolutely no dispute. The receipts were brought to tax only on the pretext that the assessee society is not having registration u/s 12AA of the Act in the Asst Years 2003-04 to 2008-09.

6.3. It is relevant at this juncture to get into the amendment brought in section 12A by Finance Act 2014 with effect from 1.10.2014 by way of insertion of first proviso to section 12A(2) of the Act which is reproduced below for the sake of convenience :-

> *Section 12 A*
>
> *(2) Where an application has been made on or after the 1st day of June 2007, the provisions of section 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 assessement year preceding the aforesaid assessment year, for which assessment proceedings are pending before the Assessing Officer as on 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.*

6.4. Admittedly, the reassessment proceedings were pending before the Learned AO for the Asst Years 2003-04 to 2008-09 as on the date of granting registration u/s 12AA of the Act on 29.10.2010 with effect from 1.4.2010 as reassessment proceedings got commenced pursuant to issuance of notice u/s 148 on 30.3.2010 as stated supra. Admittedly, the objects and activities of the trust had remained the same in preceding assessment years also i.e Asst Years 2003-04 to 2008-09. Though this first proviso to

section 12A(2) talks about pendency of assessment proceedings, it is relevant to get into the definition of the term 'assessment' in section 2(8) of the Act, wherein it is defined as "assessment includes reassessment". Hence even reassessment proceedings that were pending would also come under the ambit of the first proviso to section 12A(2) of the Act.

6.5. The second proviso to section 12A(2) also provides that no action u/s 147 of the Act shall be taken merely for non-registration of trust or institution. Reading this proviso with the first proviso to section 12A(2) and applying the Rule of Harmonious Construction, it could safely be concluded that the legislature in its wisdom had only brought this proviso to prevent genuine hardship that could be caused on the assessee due to non-registration u/s 12AA of the Act and accordingly in our opinion, the provisos to section 12A(2) of the Act is to be construed as retrospective in operation.

6.6. The third proviso to section 12A(2) of the Act also provides that the first and second proviso shall not be applicable if the trust or institution had been refused registration earlier or the registration granted earlier is cancelled by the Commissioner u/s 12AA of the Act. This also goes to prove that the first and second proviso shall be made applicable for the trusts for earlier assessment years also who had not applied for registration u/s 12AA of the Act at all.

6.7. We hold that the registration of trust under section 12A of the Act once done is a *fait accompli* and the AO cannot thereafter make further probe into the objects of the trust. Reliance in this regard is placed on the decision of the Hon'ble Apex Court rendered in the case of *ACIT vs Surat City Gymkhana reported in (2008) 300 ITR 214 (SC)*. Drawing analogy from this judgement, the logical inference could be that as long as the objects were charitable in nature in the earlier years and in the year in which registration u/s 12AA was granted, the existence of trust for charitable purposes in the earlier years cannot be doubted with. Even otherwise, no adverse findings were

given by the revenue with regard to the existence of the assessee society for charitable purposes in the assessment years under appeal.

6.8. It will be relevant to get into the Explanatory Notes to the Provisions of the Finance (No. 2), 2014 as given in CBDT Circular No. 01 / 2015 dated 21.1.2015 in reference F.No. 142 / 13 /2014-TPL which is reproduced hereinbelow for the sake of convenience :-

Para 8 – Applicability of the registration granted to a trust or institution to earlier years

Para 8.2

> ***Non-application of registration for the period prior to the year of registration caused genuine hardship to charitable organizations. Due to absence of registration, tax liability is fastened even though they may otherwise be eligible for exemption and fulfill other substantive conditions. However, the power of condonation of delay in seeking registration was not available.***

This clearly goes to prove that the first proviso to section 12A(2) was brought in the statute only as a retrospective effect with a view not to affect genuine charitable trusts and societies carrying on genuine charitable objects in the earlier years and substantive conditions stipulated in section 11 to 13 have been duly fulfilled by the said trust. The benefit of retrospective application alone could be the intention of the legislature and this point is further strengthened by the Explanatory Notes to Finance (No. 2) Act, 2014 issued by the Central Board of Direct Taxes vide its Circular No. 01 / 2015 dated 21.1.2015.

Apparently the statute provides that registration once granted in subsequent year, the benefit of the same has to be applied in the earlier assessment years for which assessment proceedings are pending before the Learned AO, unless the registration granted earlier is cancelled or refused for specific reasons. The statute also goes on to

provide that no action u/s 147 could be taken by the AO merely for non-registration of trust for earlier years.

6.9. With regard to the arguments of the Learned DR that donations received by assessee falls under the definition of income u/s 2(24)(iia) of the Act, we would like to state that income definition is an inclusive definition. An inclusive definition extends the specific meaning given in the stated items by the general meaning as commonly understood by the said expression which is defined in a statute. The word income as is commonly understood does not include any donation specifically meant for utilization for acquiring, constructing a capital asset, as is the case here. Further section 2(24) had undergone amendment by way of insertion of clause (iia) by Finance Act, 1972 with effect from 1.4.1973. In this connection, it will be relevant to get into the Memorandum explaining the provisions in Finance Act 1972 reported in 83 ITR (St.) 173, wherein Paragraphs 24 and 25 clearly define the scope of the amendment wherein in paragraph 25(i) , the concluding sentence is as under:-

> ***"contributions received with a specific direction that they will form part of the corpus of the trust or distribution will, however, not be regarded as income."***

Thus the relevant clause defining income in section 2(24)(iia) as introduced with effect from 1.4.1973 was clearly not intended to cover contributions / donations received with a specific direction that they will form part of the corpus of the trust for utilization in acquisition / construction of a capital asset. Thus what is not income as per the definition of the word income in the Act cannot be brought to tax under any other provision of the Act. We find that the order of the Learned CITA failed to distinguish between a case where a receipt is not an income at the stage of its receipt and a case where it is not so but is claimed to be exempt because of any exemption provision granting exemption from taxation to receipts which are liable to taxation but for the provision granting exemption.

6.10. We hold that it is an established position in law that a proviso which is inserted to remedy unintended consequences and to make the provision workable, a proviso which supplies an obvious omission in the section and is required to be read into the section to give the section a reasonable interpretation, requires to be treated as retrospective in operation, so that a reasonable interpretation can be given to the section as a whole and accordingly the said insertion of first proviso to section 12A(2) of the Act with effect from 1.10.2014 should be read as retrospective in operation with effect from the date when the condition of eligibility for exemption under section 11 & 12 as mentioned in section 12A provided for registration u/s 12AA as a pre-condition for applicability of section 12A. Reliance in this regard is placed on the following decisions :-

Allied Motors P ltd vs CIT reported in (1997) 224 ITR 677 (SC) – Judgement by three judges of the Supreme Court

> *The departmental understanding also appears to be that section 43B, the proviso and Explanation 2 have to be read together as expressing the true intention of section 43B. Explanation 2 has been expressly made retrospective. The first proviso, however, cannot be isolated from Explanation 2 and the main body of section 43B. Without the first proviso, Explanation 2 would not obviate the hardship or the unintended consequences of section 43B. The proviso supplies an obvious omission. But for this proviso the ambit of section 43B become unduly wide bringing within its scope those payments, which were not intended to be prohibited from the category of permissible deductions.*
>
> *In the case of Goodyear India Ltd vs State of Haryana (1991) 188 ITR 402 , this court said that the rule of reasonable construction must be applied while construing a statute. Literal construction should be avoided if it defeats the manifest object and purpose of the Act.*
>
> *As observed by G.P.Singh in his Principles of Statutory Interpretation, 4th Edn., Page 291, "It is well settled that if a statute is curative or merely declaratory of the previous law, retrospective operation is generally intended". In fact the amendment would not serve its object in such a situation, unless it is construed*

as retrospective. The view, therefore, taken by the Delhi High Court cannot be sustained.

CIT vs Virgin Creations in ITAT No. 302 of 2011 in GA 3200 / 2011 dated 23.11.2011, the Hon'ble Calcutta High Court in the context of retrospective applicability of amendment to section 40(a)(ia) of the Act held as below:-

"The supreme court in the case of Allied Motors P ltd and also in the case of Alom Extrusions Ltd has already decided that the aforesaid provision has retrospective application. Again, in the case reported in 82 ITR 570, the Supreme Court held that the provision, which has inserted the remedy to make the provision workable, requires to be treated with retrospective operation so that reasonable deduction can be given to the section as well".

CIT vs Vatika Township P Ltd reported in (2014) 367 ITR 466 (SC) – Five Judges decision of the Supreme Court

"We would also like to point out, for the sake of completeness, that where a benefit is conferred by a legislation, the rule against a retrospective construction is different. If a legislation confers a benefit on some persons but without inflicting a corresponding detriment on some other person or on the public generally, and where to confer such benefit appears to have been the legislators object, then the presumption would be that such a legislation, giving it a purposive construction, would warrant it to be given a retrospective effect. This exactly is the justification to treat procedural provisions as retrospective. In Government of India vs Indian Tobacco Association reported in (2005) 7 SCC 396, the doctrine of fairness was held to be relevant factor to construe a statute conferring a benefit, in the context of it to be given a retrospective operation. The same doctrine of fairness, to hold that a statute was retrospective in nature, was applied in the case of Vijay vs State of Maharashtra reported in (2006) 6 SCC 289. It was held that where a law is enacted for the benefit of community as a whole, even in the absence of a provision the statute may be held to be retrospective in nature. However, we are confronted with any such situation here".

In such cases, retrospectivity is attached to benefit the persons in contradistinction to the provision imposing some burden or liability where the presumption attaches towards prospectivity. In the instant case, the proviso added to section 113 of the Act is not beneficial to the

assessee. On the contrary, it is a provision which is onerous to the assessee. Therefore, in a case like this, we have to proceed with the normal rule of presumption against retrospective operation. Thus, the rule against retrospective operation is a fundamental rule of law that no statute shall be construed to have a retrospective operation unless such a construction appears very clearly in the terms of the Act or arises by necessary and distinct implication. Dogmatically framed, the rule is no more than a presumption, and thus could be displaced by out weighing factors.

CIT vs J.H.Gotla reported in (1985) 156 ITR 323 (SC)

If the purpose of a particular provision is easily discernible from the whole of the scheme of the Act which in this case, is to counteract the effect of transfer of assets so far as computation of income of the assessee is concerned, then bearing that purpose in mind, we should find out the intention from the language used by the legislature and if strict literal construction leads to an absurd result, i.e., result not intended to be subserved by the object of the legislation found in the manner indicated before, then another construction is possible apart from strict literal construction then that construction should be preferred to the strict literal construction.

6.11. We also hold that though equity and taxation are often strangers , attempts should be made that these do not remain always so and if a construction results in equity rather than in injustice, then such construction should be preferred to the literal construction. It is only elementary that a statutory provision is to be interpreted *ut res magis valeat quam pereat, i.e* to make it workable rather than redundant. Applying this legal maxim, it would be just and fair to hold that the amendment in section 12A is brought in the statute to confer benefit of exemption u/s 11 of the Act on the genuine trusts which had not changed its objectives and had carried on the same charitable objects in the past as well as in the current year based on which the registration u/s 12AA is granted by the DIT(Exemptions).

6.12. We hold that the arguments of the Learned AR that, even assuming without conceding, in the worst scenario, the assessee society could only be taxed in the status

of an AOP does not require any adjudication as we hold that the assessee society to be construed as a public charitable trust and eligible to claim exemption u/s 11 of the Act for the earlier assessment years, more especially, Asst Years 2003-04 to 2008-09 , the donations received from various donors for construction of an old age home would take the character of corpus donations as they are meant for specific purposes and accordingly would be exempt u/s 11(1)(d) of the Act. Even otherwise, the said donation receipts are only capital in nature as it is received for construction of an old age home on which fact there is absolutely no dispute. The Learned AO also had duly accepted the nature of donations, genuinity of the donors and its utilization in the remand proceedings. Hence in any case, a receipt which is by birth, capital in nature, cannot change its character merely for want of registration of society u/s 12AA of the Act. It is not the case of the revenue that the donations received are meant for general functioning of the charitable objects of the society, in which event, the donations received thereon would take the character of revenue receipts requiring to be credited in the income and expenditure account for utilization towards charitable objects thereon. Hence we hold that in any case, the donations received by the assessee society cannot be brought to tax in the assessment.

6.13. We hold that since the only reason for denial of exemption u/s 11 was absence of registration u/s 12AA (which was granted to assessee society on 29.10.2010 with effect from 1.4.2010) for the relevant assessment years and on no other ground, the benefit of change in law as above by Finance Act 2014 should be available and for all the years, the benefit of exemption should be available on the date of registration as all the assessments were pending as shown above. In this connection, it requires mention specifically that all the receipts of the donation were proved on enquiry to have been received from the claimed donors and utilized for the specific purpose (construction of old age home) for which they were received.

In conclusion, we hold that the insertion of the proviso to section 12A(2) of the Act has to be construed as retrospective in operation.

Respectfully following the various judicial precedents relied upon and in the facts and circumstances of the case, we allow the ground nos. 3 to 8 raised by the assessee.

6.14. In view of the finding given by us hereinabove with regard to the status of the assessee society and its eligibility to claim exemption u/s 11 of the Act, the adjudication of ground no. 9 becomes infructuous. The expenditure incurred by the assessee society would anyway be treated as application of income for charitable objects as the incurrence of expenditure for charitable objects has not been disputed by the revenue in any of the assessment years under appeal. Hence the ground no. 9 of the assessee is dismissed as infructuous.

7. In the result, the appeals of the assessee are partly allowed.

THIS ORDER IS PRONOUNCED IN OPEN COURT ON 9/10/2015

Sd/- Sd/-

(Mahavir Singh, Judicial Member) (M. Balaganesh, Accountant Member)

Date 9/10/2015

FIT FOR PUBLICATION

Sd/- Sd/-

MS MBG

Copy of the order forwarded to:

1.. The Appellant/Assessee: Sree Sree Ramkrsihana Samity
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2 The Respondent- Deputy Commissioner of Income Tax, Cir-2, Siliguri

3 /The CIT,
/
The CIT(A)

4..

5. DR, Kolkata Bench

6. Guard file.

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