

Power to cancel registration u/s 12AA(3): Whether Retrospective or Prospective?

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- **Ajit Education Trust vs. CIT (2010) 42 SOT 415 (Ahd.)**

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8. Next, we have to examine the impact of the introduction in the statute of section 12AA(3) of the Act. This was inserted by the Finance (No. 2) Act, 2004 with effect from 1-10-2004 and reads as follows :—

“Section 12AA(3) - Where a trust or an institution has been granted registration under clause (b) of sub-section (1) and subsequently 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, as the case may be, he shall pass an order in writing cancelling the registration of such trust or institution :

Provided that no order under this sub-section shall be passed unless such trust or institution has been given a reasonable opportunity of being heard.”

8.1 Therefore, on reading, it is apparent that this sub-section talks about the registration granted within this section, i.e., 12AA(1)(b).

8.2 Through this sections, thus, the Commissioner has categorically been granted power to cancel registration. A question has bothered us that whether section 12AA(3) is in a way a duplicity of an existing clause of refusal of registration as per section 12AA(1)(b)(ii)? The answer can be that vide section 12AA(1)(b)(ii), the CIT can refuse the registration application under section 12A; but vide section 12AA(3) the CIT is given powers to deal with a registration granted within this very section, i.e., under section 12AA(1)(b)(i). So as per our understanding, the said power of refusal of registration under section 12AA(1)(b)(ii) is restricted to the application moved under section 12A seeking the grant of registration. What we have noticed is that the necessity of the said introduction was that as per the already existed section 12A there was no specific provision for the refusal of a registration. On account of this reason, there was a doubt in the past and litigation had also cropped up that in the absence of any specific power not being provided in the said section 12A whether a registration once granted could ever be revoked by the Id. Commissioner. In the past quite often a question has been raked up by the revenue that whether a registration once granted, is it granted forever even if irregularities are noticed? Then, it had been argued in defence by the revenue that if the statute gives authority for grant of registration then the power of refusal of the said registration is always in-built. An authority to allow a facility to a person co-exists with the authority to withdraw that facility. Therefore, to remove this controversy or ambiguity it was thought by the Hon'ble Law makers to specifically prescribe the procedure of registration as also, if need be, it's refusal. It is now stream lined that an application for seeking registration is to be moved as prescribed in section 12A and thereafter the procedure of registration is to be followed as recommended in section 12AA. Due to this enactment at present, no ambiguity exists that if a registration is granted the same can be cancelled as well if necessitated. Thus, the scope of both the

section 12AA(1) and 12AA(3) are wide enough to cover all those registration so far been granted either under section 12A or under section 12AA(1)(b), i.e., by this very section. But the present controversy do not rest here and the legal question as addressed to us needs further discussion but within the ambits of the foregoing background.

9. The present controversy is because of an interesting turn took place vide an amendment in sub-section (3) of section 12AA of the Income-tax Act, 1961 and for ready reference; reproduced below :—

“Sub-section (3) of section 12AA of the Income-tax Act, 1961 - Where a trust or an institution has been granted registration under clause (b) of sub-section (1) or has obtained registration at any time under section 12A [as it stood before its amendment by the Finance (No. 2) Act, 1996 (33 of 1996)] and subsequently 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, as the case may be, he shall pass an order in writing/cancelling the registration of such trust or institution :

[Provided that no order under this sub-section shall be passed unless such trust or institution has been given a reasonable opportunity of being heard.]”

10. As pointed out by the learned Authorised Representative of the assessee, the aforesaid insertion as typed in italics is with effect from 1-6-2010. Mr. Shah has, thus, questioned that whether a Trust can have a registration under section 12A of the Income-tax Act, 1961 and simulta-neously a registration under section 12AA(1)(b) of the Income-tax Act, 1961. Because of the reference of two sections, namely, section 12AA(1)(b) and also section 12A, now this sub-section (3) of section 12AA has, henceforth raised this controversy. As per our humble understanding of law if a provision for the refusal of registration application under section 12A was already in existence vide section 12AA(1)(b)(ii) then still there was lawful requirement to again mention the same in the same statute by introducing the afore quoted phraseology, “(or has obtained registration at any time under section 12A [as it stood before its amendment by the Finance (No. 2) Act, 1996 (33 of 1996)]”. Now the anomaly is that whether for the purpose of refusal of a registration granted by section 12A is it to be dealt within two sub-sections i.e., 12AA(1)(b)(ii) and 12AA(3)? Because of this variance, the Id. AR has challenged that the refusal of a registration granted under section 12A can now be cancelled only by the latest amendment in section 12AA(3) that too with effect from 1-6-2010. Since the Id. CIT has passed the order prior to the amendment the same is void ab initio, it was argued and rightly so. The admitted factual position is that the impugned order was passed on 19-6-2008, when no such specific jurisdiction was granted to CIT, and the powers of cancellation of registration had come into the effect from 1-6-2010 only. Benefit of this ambiguity or because of an abnormal situation or it can be said to a glitch of overlapping; the advantage should go in favour of the taxpayer. The law is now clear from 1-6-2010, that a registration granted under section 12A can be cancelled by invoking section 12AA(3) of the Act. The law is also clear that a registration granted under section 12AA(1)(b) can also be revoked by invoking this very section, i.e., 12AA(3) of the Act; because the connotation “refusing to register” and “cancelling the registration” have distinct application.

11. Next we have to deal with the argument of Mr. Jindal, Id. CIT-DR that whether or not the introduction of, ‘or has obtained registration any time under section 12A as it stood before its amendment by Finance (No. 2) Act’ with effect from 1-6-2010 is retrospective in

nature? His main stress was that the said amendment is simply curative in nature and the procedure of cancellation was already in existence in the statute, therefore, it is wrong on the part of the Id. AR to argue that the powers of cancellation of registration had come later on when the registration was actually cancelled, hence, at that point of time Commissioner had acted beyond his jurisdiction. We have given our considerable thought over both the arguments and have found that the present controversy has to be decided in the light of few verdicts pronounced in the past. It is a matter of substance that the original section 12A had neither provided a specific clause prescribing registration nor it has prescribed refusal of registration. Now by prescribing both in section 12AA, it has the substantive effect over the rights of a taxpayer. Such an introduction cannot be termed merely a procedural introduction in the statute but this introduction has substantially made an impact on the sizeable rights of a Trust or Institution. Even otherwise if it is to be termed as a procedural amendment then also a procedural amendment cannot be held as retrospective in nature so as to be effective from an earlier date. There is no doubt that the said introduction in section 12AA(3) was procedural, because the notes on clauses on the Finance Bill have made it clear as vide [321 ITR 83 (St.), clause 7] as follows :—

“Clause 7 of the Bill seeks to amend section 12AA of the Income-tax Act relating to procedure for registration of a trust or institution.

Under the existing provision contained in sub-section (3) of the aforesaid sections, if the activities of the trust or institution referred to in sub-section (1), which has been granted registration under sub-section (1), are not genuine or are not being carried out in accordance with the objects of the trust or institution, the Commissioner shall, after giving a reasonable opportunity of being heard to the said trust or institution, pass an order in writing cancelling the registration granted under clause (b) of sub-section (1).

It is proposed to amend the said sub-section (3) so as to also provide for cancellation of registration where any trust or institution has obtained registration at any time under section 12A before its amendment.”

12. In this context and in support of this view, we deem it proper to place reliance on a landmark decision of Hon'ble Uttaranchal High Court, viz., *Welham Boys School Society v. CBDT* [2006] 285 ITR 74 wherein it was held that the section 12AA(3) was incorporated with effect from a future date, i.e., 1-10-2004 vide an amendment in Finance (No. 2) Bill, 2004, dated 8-7-2004, therefore, not a clarificatory or explanatory.

13. Likewise in the case of *Sri Chaitanya Educational Committee v. CIT* [2007] 106 ITD 256 (Hyd.), it was decided that the amendment of section 12AA by the then Finance Act (No. 2) of 2004 by the insertion of sub-section (3) therein with effect from 1-10-2004 was not procedural but was substantive law thereby conferring a judicial power of cancellation on the Commissioner.

14. Since the amendment in question is absolutely at parity with the earlier amendment as discussed by the Hon'ble High Court supra, therefore, we hereby hold that the insertion of the new clause with effect from 1-6-2010 should not be applicable retrospectively and its operation has to be effective from the date it was introduced and onwards. This is the one aspect for quashing the order of Id. Commissioner, however, there is one more legal aspect of this issue. It is an undisputed fact that an order under section 12A was passed by a Commissioner and that order was under consideration before the Id. Commissioner. Now the question is that whether an officer has power of

review of his order unless and until it is specifically provided in the statute on a particular date. It is a well-settled law that the power to review is not an inherent power of a judicial or quasi-judicial officer, unless specifically conferred on him by the statute. It must be delegated by law either specifically or by necessary implication. In the absence of such an authority, the action of the Id. Commissioner prior to the date of insertion of the said clause can be said to be beyond jurisdiction. Applying the principle of *noscitur a sociis* we hold that in the absence of a delegated authority to rescind or withdraw or review of a registration already granted under section 12A the order challenged before us is liable to be quashed.

15. On merits, we have examined the objects of the Trust which were placed in the compilation. The objects have explicitly stated that the trust was established for educational purposes. No where in the order of the Commissioner there was an allegation that the Trust was not running an educational institution. Therefore, we have to examine the correctness of the cancellation of the registration in terms of the language of section 12AA of the Act as prescribed in sub-section (1) and particularly in clauses (a) and (b) of the section already reproduced hereinabove in paragraph No. 6 of this order.

16. A Commissioner has to call for an information so as to satisfy himself (i) whether the objects of the trust have been fulfilled by running an institution and (ii) whether those activities are genuinely carried out by the Trust. So after satisfying himself an order in writing registering the trust can be passed. So far as the running of the educational institution is concerned, even the Assessing Officer while passing assessment orders for several years, as referred supra, has held that the Trust is entitled for deduction under section 10(23C)(iiiad) of the Income-tax Act, 1961. If the Revenue Officer himself is qualifying this Trust as an educational institution and then granting the said deduction, then as a result it was not justifiable on the part of the Id. Commissioner to hold such a conflicting view, which can be said to be altogether contrary to the facts of the case. The allegation was that the books of account were not found in a proper manner. Because of the absence of the books of account, it was also doubted whether the educational fees received from the students was ever applied for the purpose of education. A question has generally been raised in the past on several occasions, that while deciding under section 12AA, an application of registration filed under section 12A of the Income-tax Act, 1961, whether the assessee is subject to investigation about the application of its income. Several Courts have pronounced that the application of income or the utilization of the funds can be subject to scrutiny at the assessment proceedings as prescribed under sections 11 and 12 of the Income-tax Act, 1961. This is the view taken by the ITAT Pune Bench in the case of Maharashtra Academy of Engineering & Educational Research (Maer) (supra), wherein the Tribunal held as under :—

“In the recent past sub-section (3) was inserted in section 12AA with effect from 1st November, 2004 which gives power of cancellation of registration to the CIT, if he finds that the activities are not genuine or not being carried out in accordance with the object of the trust. These powers are conferred with a view to ensure that if once a registration has been granted under section 12AA, a trust or institution may not take any such liberty of misuse of the registration or the provisions by going haywire rather furthering the objects of the trust or genuinely not pursuing the activities for which it was established. The most important feature of section 12AA is as also referred in this appeal for adjudication, that this section has only laid down the procedure of registration and this section nowhere speaks that while considering the application of registration, the CIT shall also look into the procedure of earning of

income and sources from where receipts are derived. The power of enquiry, in respect of sources of receipts and the utilization of income is entrusted in separate sections. The language, thus, used in this section only confines to enquire about the activities of the trust and its genuineness, which means, in consonance with the objects for which created and those objects as also activities should not be a camouflage but pure, sincere, charitable and for public utility at large. What is implicit is that the CIT has to sincerely examine that the objects as also the activities should not be prima facie against the basic structure for which beneficial law is made and also be not in conflict with the general public utility. Naturally an institution if established to carry out an illegal activity or activities are causing any type of nuisance not in the interest of the public at large should definitely lead to cancellation of registration. The scheme of the Act otherwise do not subscribe and allow a trust to take the benefit of the provisions of sections 11 and 12 unless establish the prescribed utilization of the income, even if, at all the trust holds the registration in its hands. Therefore, at the stage of granting registration, the CIT is not expected to bother himself about the other provisions of the Act and supposed to confine himself to the procedure of registration as laid down therein.”

17. The proposition laid down therein has to be applied in the present appeal. That the Id. Commissioner has to comprehend the objects of the Trust whether they are meant for public utility [requirement of section 12AA(1)(b)] and secondly that the activities have actually as also genuinely been carried out to fulfil the aims of the Trust [requirement of section 12AA(1)(a)]. In the present case, the Trust being an educational institution and undisputedly imparting education, therefore, it was not justifiable on the part of the Id. Commissioner to deny the registration. Nevertheless, the application of income and the utilization of funds is always subject to scrutiny by the Assessing Officer while assessing the income of the Trust, for this legal proposition we can rely on Sanjeevamma Hanumathe Gowda Charitable Trust v. DIT (Exemptions)[2006] 285 ITR 327 (Kar.), CIT v. Red Rose School [2007] 163 Taxman 19 (All.), and Acharya Sewa Niyas Uttaranchal v. CIT [2007] 13 SOT 54 (Delhi). We may, therefore, clarify that merely by granting a registration under section 12A/12AA of the Income-tax Act, 1961, a trust ipso facto is not entitled for the exemptions prescribed under sections 11 and 12 of the Income-tax Act, 1961. Neither de jure nor de facto, i.e., neither in principle nor in practice, a trust can get exemption under sections 11 and 12 merely on getting a registration under section 12AA/(in the past 12A) of the Income-tax Act, 1961.

18. In the light of above discussion, we hereby hold that the cancellation of registration, on both the counts, i.e., on merits as also on the legality of jurisdiction, was not in accordance of law. As a result, ground raised by the assessee is allowed.

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

- **Bharati Vidyapeeth v. ITO [2009] 28 SOT 32 (PUNE)(URO)**

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8. The plea of the assessee meets our approval. In our considered view, a registration granted under section 12A of the Act cannot be withdrawn or cancelled by the CIT by invoking the provisions of section 12AA(3) of the Act. Section 12AA(3) provides that “where a trust or an institution has been granted registration under clause (b) of sub-section (1) and subsequently the CIT 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, as the case may be, he shall pass an order in writing cancelling the registration of such trust or institution". A plain reading of this provision shows that section 12AA empowers the CIT to grant the registration in those cases where the assessee applies for such registration under sub-section (1) of section 12AA. Section 12AA(1), on the other hand, provides that the CIT, on receipt of an application for registration of a trust or institution made under clause (a) [or clause (aa) of sub-section (1)] 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 inquiries as he may deem necessary in this behalf; and (b) after satisfying himself about the objects of the trust or institution and the genuineness of its activities, (i) he shall pass an order in writing registering the trust or institution, or (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. A registration under section 12AA(1)(b) is to be granted where CIT is satisfied about the objects and the genuineness of the activities carried on by the applicant. Section 12AA(3) empowers the CIT to cancel such registration if he is satisfied that activities of trust or institution are not genuine or are not being carried out in accordance with the objects of the trust or institution as the case may be. The combined reading of both the sections makes it clear that registration can be cancelled only in those cases where the registration has been granted under sub-section (1b) of section 12AA. This section nowhere empowers the CIT to cancel or withdraw the registration granted under section 12A. In the absence of such power, in our opinion, the registration granted under section 12A cannot be withdrawn or cancelled. This view is supported by the decision of the Tribunal in the case of *Kailashanand Mission Trust v. Asstt. CIT* (supra) wherein it was held that section 12A does not empower the CIT to withdraw or cancel the registration granted under the section. This view was again taken by the Tribunal in various cases relied upon by the learned counsel for the assessee. Hon'ble Uttarakhand High Court, in the case of *Welham Boys' School Society* (supra) has also held that the CIT cannot withdraw or cancel a registration granted under section 12A, as he cannot be inferred to have any implied or inherent power to cancel the registration. We may also add that provisions of sub-section (3) of section 12AA were brought on the statute book with effect from 1-10-2004 by Finance (No. 2) Act, 2004. The provisions of this section are substantive in nature since the same affect the valuable right of the assessee and therefore, in our opinion are prospective and cannot be given retrospective effect, in view of the decision of the Supreme Court in the case of *Sedco Forex International Drill Inc. v. CIT* [2005] 279 ITR 310 (Bharati Vidyapeeth v. ITO) (SC) wherein it has been held that even the provisions of an Explanation cannot be given retrospective effect unless specifically provided by the statute. It is not the case of the Revenue that legislature specifically provided the retrospective effect of such provision. Therefore, it is also to be held that even on this ground the provisions of section 12AA(3) cannot be applied to the registration granted under section 12A of the Act. We also find that the issue in appeal is squarely covered by a number of decisions on this issue by various Coordinate Benches and there is no contrary decision available, so far as this aspect of the matter is concerned.

9. Learned Departmental Representative has stated that such a view will make the provisions of the Act unworkable and that the only way to make these provisions workable is to construe the scope of section 12AA(3) in such a manner so as to extend its scope also to the registrations granted under section 12A. We are thus urged to supplant the law by supplying a *casus omissus*. We are not persuaded by this plea either. *Casus omissus*, which broadly refers to the principle that a matter which has not been provided

in the statute but should have been there, cannot be supplied by us, as, to do so will be clearly beyond the call and scope of our duty which is only to interpret the law as it exists. Hon'ble Supreme Court, in the case of Smt. Tarulata Shyam v. CIT [1977] 108 ITR 345 (SC) at p. 356 has observed as follows : "We have given anxious thought to the persuasive arguments..., (which) if accepted, will certainly soften the rigour of this extremely drastic provision and bring it more in conformity with logic and equity. But, the language of sections ... is clear and unambiguous. There is no scope for importing into the statute the words which are not there. Such interpretation would be, not to construe, but to amend the statute. Even if there be a casus omissus, the defect can be remedied only by legislation and not by judicial interpretation....". This was clearly a case in which supplying a casus omissus would have softened the rigour of law for the assessee, and yet Hon'ble Supreme Court declined to supply the casus omissus. In a situation like the one that we are in seisin of, where assessee would stand to a disadvantage as a result of casus omissus being supplied, at least the same, if not more stringent, yardsticks must apply. When the Hon'ble Supreme Court declines to supply casus omissus even in a case where their Lordships have noted that the provisions in question are extremely drastic and supplying a casus omissus will make these provisions more in conformity with logic and equity, it is indeed futile to suggest that such a casus omissus can be supplied by this Tribunal. We are not inclined to accept the plea canvassed by the learned Departmental Representative to the effect that we should interpret the scope of section 12AA(3) so as to give it an extended meaning beyond what is laid down by specific words of the statute.

10. For the reasons set out above, and respectfully following the decisions of various Co-ordinate Benches on the scope of powers under section 12AA(3), we hold that the impugned order was vitiated in law inasmuch as the learned CIT did not have powers to cancel the registration granted under section 12A. Accordingly, the impugned order is hereby vacated and, as a corollary thereto, the registration granted to the assessee under section 12A stands restored.

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- **Oxford Academy For Career Development v.CCIT [2009] 315 ITR 382 (ALL.)**

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21. Regarding cancellation of registration which was granted on April 1, 1999, under section 12A of the Act, it is true that there was no express provision in section 12A of the Act for cancellation of the registration. The applicability of section 21 of the General Clauses Act, 1897, was discussed by the Uttaranchal High Court in the case of Welham Boy's School Society [2006] 285 ITR 74 (Uttaranchal), where it was observed that any order passed by the Commissioner of Income-tax under section 12A is a quasi-judicial order, which does not fall in the category of "orders" mentioned in section 21 of the General Clauses Act, 1897, by relying the ratio laid down in the case of Ghaurul Hasan v. State of Rajasthan, AIR 1967 SC 107. The High Court observed that by virtue of section 21 of the General Clauses Act, the Commissioner of Income-tax had no power to rescind the order passed earlier by the Commissioner granting registration to the petitioner's society. It may be mentioned that section 12AA(3) was incorporated with effect from October 1, 2004, to empower the Commissioner to cancel the registration granted to a trust or institution. The same is not applicable retrospectively and in the assessee's case for the assessment years under consideration. The object of this provision is not clarificatory or explanatory, so prior to that date, the authorities granting registration

had no inherent power to withdraw or revoke the registration already granted. The order cancelling the registration granted to a trust or institution under section 12AA of the Act being a quasi-judicial order does not fall within the category of orders mentioned under section 21 of the General Clauses Act, 1897, which provides that the power conferred on an authority empowers to issue orders including the power to rescind such orders and the Commissioner would not have power to rescind the order passed by the Commissioner earlier granting the registration to a trust or institution. Even assuming, the Commissioner has power to rescind the order of registration on the ground that the registration had been obtained by practising fraud or forgery, there was nothing in the show-cause notice or in the impugned order dated March 9, 2004, alleging that the petitioner had obtained the registration by practising fraud or forgery.

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