

IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'G' : NEW DELHI

BEFORE SHRI G.D.AGRAWAL, VICE PRESIDENT AND
MS. SUCHITRA KAMBLE, JUDICIAL MEMBER

ITA No.4136/Del/2017
Assessment Year : 2011-12

M/s Urmila Devi Charitable
Trust,
R-9/42, Raj Nagar,
Ghaziabad,
Uttar Pradesh – 201 002.
PAN : AAAAU1715B.

(Appellant)

Vs. Commissioner of Income Tax
(Exemptions),
T.C. 46V, U.P. State Construction &
Infrastructure Development
Corporation, Vibhuti Khand,
Gomti Nagar, Lucknow,
Uttar Pradesh – 226 010.

(Respondent)

Appellant by : Shri Kapil Goel, Advocate.
Respondent by : Shri S.S. Rana, CIT-DR.

Date of hearing : 03.06.2019
Date of pronouncement : 13.06.2019

ORDER

PER G.D.AGRAWAL, VP :

This appeal by the assessee for the assessment year 2011-12 is directed against the order of learned Commissioner of Income Tax (Exemptions), Lucknow dated 22nd April, 2016.

2. The assessee has raised the following grounds of appeal :-

"1. The order dated 22.04.2016 passed by the Id. Commissioner of Income-tax (Exemptions) cancelling registration of the appellant u/s 12AA of the Income-tax Act, 1961 w.e.f. 01.04.2010 is bad in law and on facts.

2. (i) That the reasons given for cancellation of registration u/s 12AA(3) of the Act are contrary to law and facts since the appellant being a trust exists solely for

educational, medical aid and other charitable purposes and not for the purpose of profit.

(ii) The Id.CIT(Exemptions) has erred in challenging the genuineness of the activities of the trust by stating that the said activities are not being carried out in accordance of the object of the trust.

3. (i) The Id. Commissioner of Income-tax (Exemptions) has erred in cancelling the registration of the applicant on the ground that applicant has received voluntary donation in exchange of cash and was not justified in stating without any basis that the applicant is not doing any charity but it is making clear profits.

(ii) The Ld.CIT(Exemptions) has erred in cancelling the registration of the trust on the ground of unverifiable donation of Rs.85,00,000/- without confronting the assessee with the evidence he purportedly had and hence ignoring the principles of natural justice.

(iii) That the Id. Commissioner of Income-tax (Exemptions) was not justified in cancelling the registration without providing the opportunity of cross examination to the appellant.

4. The Ld. Commissioner of Income-tax (Exemptions) was not justified in cancelling the registration without giving any meaningful opportunity to the appellant to show cause.

5. The appellant craves leave to add, amend or modify any ground before or at the time of hearing of the appeal."

3. At the time of hearing before us, the learned counsel for the assessee argued at length which can be summarized as below.

4. That learned CIT(Exemptions) cancelled the registration granted under Section 12AA(3) on the allegation that the assessee had received the donation of ₹85 lakhs in lieu of cash from M/s Herbicare Healthcare Bio-Herbal Research Foundation (*hereinafter referred to as HHBRF*) of Kolkata during the assessment year 2011-12. The above

allegation is based upon some information claimed to have been received from CIT(Exemptions), Kolkata and also on the basis of alleged statement of the Director of HHBRF. However, despite the assessee's specific request, neither the material claimed to have been received from CIT(Exemptions), Kolkata nor the copy of statement of the Director of HHBRF was supplied to the assessee. It is a settled law that any evidence collected behind the back of the assessee cannot be utilized against the assessee unless the copy of the same is supplied to the assessee. Similarly, any statement recorded behind the back of the assessee cannot be used against the assessee unless the copy of such statement is supplied to the assessee and the assessee is also allowed an opportunity to cross-examine the said person. In support of this contention, he relied upon the decision of Hon'ble Apex Court in the case of M/s Andaman Timber Industries Vs. Commissioner of Central Excise, Kolkata-II - 281 CTR 241.

5. Learned counsel further stated that as per Section 12AA(3), where a trust has been granted registration, it can be revoked by this Section only when the Commissioner is satisfied that the activities of such trust or institution are not genuine or not being carried out in accordance with the objects of the trust or the institution. That in this case, none of these two conditions is satisfied. Learned CIT(Exemptions) first made an allegation that assessee has received donation of ₹85 lakhs by paying cash to HHBRF and then based upon the said allegation, further presumed that the assessee trust is carrying out some business outside the books and therefore, the activities of the assessee are not being carried out in accordance with the objects of the society. He stated that the entire order of learned CIT is based upon presumptions and suspicion without giving any specific finding or any specific instance where the assessee carried out any activity which is outside the purview of the trust or the institution.

6. Learned counsel further argued that learned CIT(Exemptions) issued notice for cancellation of registration on 25th January, 2016 but the registration was cancelled with retrospective effect from 1st April, 2010. This act of the Assessing Officer is contrary to the decision of Hon'ble Jurisdictional High Court in the case of ACIT Vs. Agra Development Authority – [2018] 407 ITR 562 (Allahabad). He, therefore, stated that the order of the CIT passed under Section 12AA(3) may be cancelled.

7. Learned CIT-DR, on the other hand, relied upon the order of learned CIT(Exemptions) and he stated that the CIT, after considering the evidences on record with him, has arrived at the conclusion that the assessee was earning income outside the books. Obviously, such income could have been earned from the activity which is not as per the object of the trust. Therefore, learned CIT(Exemptions) was fully justified in withdrawing the exemption granted to the assessee. He has also relied upon the decision of Hon'ble Apex Court in the case of ITO Vs. M. Pirai Choodi – [2011] 334 ITR 262 (SC). In addition to above, learned CIT-DR also filed written submissions, which read as under :-

“Sub : Written submission in the above case – reg.

In the above case, it is humbly submitted as follows :

1. As mentioned in para 2 of order u/s 12AA, vide letter dated 12.10.2015, M/s Herbicare Health Care Bio Herbal Research Foundation admitted that as per directions of brokers they received cash in lieu of donations given by cheque.

2. As mentioned in para 3 of order u/s 12AA, in response to question no 22, Sh. Swapan Ranjan Das Gupta, founder of M/s Herbicare Health Care Bio Herbal Research Foundation admitted that through Mr. Kishan Bhawasingka,

he was involved in giving accommodation entries in commission to different beneficiaries.

3. The above evidences clearly prove that activities of the trust are not genuine since it had received donation of Rs.85,00,000/- from M/s Herbicare Health Care Bio Herbal Research Foundation.

4. Despite being given adequate opportunity, assessee has not been able to refute the above evidences. Hence, cancellation of registration is perfectly justified.

In the above case, it is humbly submitted that the following decisions may kindly be considered with regard to Section 12AA of I.T. Act:

1. UP Distillers Association vs CIT (2017-TIOL-2253-HC-DEL-IT) (copy enclosed)

Where Hon'ble Delhi High Court held that registration granted to a trust can be cancelled u/s 12AA(3), by relying upon the statement of concerned person recorded u/s 132(4).

2. UP Distillers Association vs CIT (2018-TIOL-138-SC-IT)(copy enclosed)

Where Hon'ble Supreme Court dismissed SLP of the assessee holding that registration granted to a trust can be cancelled u/s 12AA(3), by relying upon the statement of concerned person recorded u/s 132(4).

3. *Scientific Educational Advancement Society Vs Union of India [2009] 179 Taxman 155 (Punjab & Haryana)/[2010] 323 ITR 84 (Punjab & Haryana)(copy enclosed).*

4. *M/s Joginpally BR Educational Society Vs CIT ITA No.585/Hyd/2012 (copy enclosed)."*

8. We have carefully considered the arguments of both the sides and perused the material placed before us. Section 12AA of the Act reads as under :-

"12AA. (1) The [Principal Commissioner or] Commissioner, on receipt of an application for registration of a trust or institution made under clause (a) [or clause

(aa) [or clause (ab)] of sub-section (1)] of section 12A, shall-

(a) call for such documents or information from the trust or institution as he things 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, 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 [Principal Chief Commissioner or] 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 [Principal Commissioner or] Commissioner and the [Principal Commissioner or] 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) [or clause (aa) [or clause (ab)] of sub-section (1)] of section 12A.]

[(3) 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 [Principal Commissioner or] 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.]

[(4) Without prejudice to the provisions of sub-section (3), 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 it is noticed that the activities of the trust or the institution are being carried out in a manner that the provisions of sections 11 and 12 do not apply to exclude either whole or any part of the income of such trust or institution due to operation of sub-section (1) of section 13, then, the Principal Commissioner or the Commissioner may by an order in writing cancel the registration of such trust or institution:

Provided that the registration shall not be cancelled under this sub-section, if the trust or institution proves that there was a reasonable cause for the activities to be carried out in the said manner.]”

9. From a plain reading of the above Section, it is evident that the Principal Commissioner or Commissioner registers the trust or institution under sub-section (1) and he has been given the power under sub-section (3) to cancel the registration granted under sub-section (1). However, under sub-section (3), he can cancel the registration granted under sub-section (1) only when he is satisfied –

- a. that the activities of such trust or institution are not genuine; and
- b. the activities of such trust or institution are not being carried out in accordance with the objects of the trust or institution.

10. In the case under appeal before us, the CIT has cancelled the registration granted under Section 12AA(1) on the alleged ground that the trust had received the donation of ₹85 lakhs from HHBRF in lieu of cash. The above finding of the CIT(Exemptions) is based upon the report received from CIT(Exemptions), Kolkata. On the basis of above, the CIT(Exemptions), Lucknow has held that the activities of the society cannot be said to be carried out in accordance with the objects of the society. At the same time, he further drew the inference that no genuine activities are being carried out by the assessee. The learned counsel for the assessee has stated before us that the assessee has repeatedly requested for the supply of any material in the possession of the Department on the basis of which the allegation has been made against the assessee. However, no such material was supplied to the assessee. Therefore, no adverse inference can be drawn against the assessee in this regard. Learned DR, on the other hand, stated that the exact charge against the assessee i.e., it has received a donation from HHBRF in lieu of cash has been mentioned in the show cause notice itself. We find that in the order under Section 12AA(3), the CIT(Exemptions) has reproduced the assessee's written submission from page 3 to 6 of his order. Paragraph 7 & 8 of such letter read as under :-

"7. The assessee has already requested your honour vide letter dated 29/02/2016 as under:

"If the Income Tax Department is in possession of any material on the basis of which impugned allegation has been made, please provide the copy of the same to us so that proper reply can be filed.

If there is any statement by any person alleging the involvement of cash, copy of the same may also kindly be provided. If so, an opportunity for cross examination of the concerned person may kindly be given."

8. Since, no information has been received by the assessee on the above request from your honor's office, this reply to the show cause notice under reference may kindly be considered as an interim reply only. It is again requested that the impugned information/documents may kindly be supplied to the assessee at the earliest so that a final reply can be filed."

11. Thus, the assessee made a specific request for the supply of material on the basis of which the allegation of receiving the donation in lieu of cash is levied against the assessee. The assessee has also requested for supply of the copy of the statement, if any, recorded by the Revenue of any person in this regard. He has also requested for allowing an opportunity of cross examination of the concerned person whose statement is recorded. The CIT has considered the assessee's written submission at pages 6 & 7 of his order. However, in the CIT's finding, it is nowhere mentioned that the material which is being used against the assessee has been supplied to him. In paragraph 9, the CIT has considered and relied upon the report of CIT(Exemptions), Kolkata. For ready reference, the same is reproduced below :-

"9. As per the detailed report of the Ld.CIT(Exemption) Kolkata and the Assessing Officer and Joint Commissioner of Income-tax (Exemption), Ghaziabad, M/s Herbicare Healthcare Bio-Herbal Research Foundation has admitted that this amount was paid by cheque to the assessee after payment of equal amount in cash and commission through brokers. Thus total amount of Rs.85,00,000/- has been received by cheque from M/s Herbicare Healthcare Bio-Herbal Research Foundation by the assessee after paying cash of Rs.85,00,000/- plus 5 to 10% of this amount also in cash as commission."

12. Similarly, in paragraph 13, which reads as under, he has relied upon the statement on oath and the letter signed by HHBRF :-

"13. Moreover, the statement on oath and the letter signed by M/s Herbicare Healthcare Bio-Herbal Research

Foundation have clearly demonstrated that the assessee trust has paid cash and commission to get donation in cheques from M/s Herbicare Healthcare Bio-Herbal Research Foundation. It has been clearly indicated in the statement and report send by the Ld. CIT(E), Kolkata that the assessee has paid cash in addition to commission to manage this donation by cheque from M/s Herbicare Healthcare Bio-Herbal Research Foundation. The assessee is apparently running a business and is generating huge amount of cash. This cash has been used to obtain or manage the donation from M/s Herbicare Healthcare Bio-Herbal Research Foundation by way of cheque after paying cash and commission to M/s Herbicare Healthcare Bio-Herbal Research Foundation.”

13. However, in the order of the CIT(Exemptions), it is nowhere mentioned whether the letter of CIT(Exemptions), Kolkata, letter of HHBRF and the copy of the statement referred in paragraph 13 was supplied to the assessee, much less the cross-examination of the person whose statement is being relied upon. It is settled law that any material collected behind the back of the assessee cannot be used against him unless he is supplied the copy of such material and is allowed an opportunity to rebut the same. Similarly, any statement recorded behind the back of the assessee cannot be used against him unless the assessee is supplied the copy of the statement and is allowed an opportunity to cross-examine. We find that under identical situation, Hon'ble Apex Court in the case of M/s Andaman Timber Industries (supra) held the order of the adjudicating authority which was based upon the statement of two witnesses relied upon by the adjudicating authority without allowing the cross-examination to the assessee. The relevant finding of the said decision reads as under :-

“According to us, not allowing the assessee to cross-examine the witnesses by the Adjudicating Authority though the statements of those witnesses were made the basis of the impugned order is a serious flaw which makes the order nullity inasmuch as it amounted to violation of principles of natural justice because of which the assessee

was adversely affected. It is to be borne in mind that the order of the Commissioner was based upon the statements given by the aforesaid two witnesses. Even when the assessee disputed the correctness of the statements and wanted to cross-examine, the Adjudicating Authority did not grant this opportunity to the assessee. It would be pertinent to note that in the impugned order passed by the Adjudicating Authority he has specifically mentioned that such an opportunity was sought by the assessee. However, no such opportunity was granted and the aforesaid plea is not even dealt with by the Adjudicating Authority. As far as the Tribunal is concerned, we find that rejection of this plea is totally untenable. The Tribunal has simply stated that cross-examination of the said dealers could not have brought out any material which would not be in possession of the appellant themselves to explain as to why their ex-factory prices remain static. It was not for the Tribunal to have guess work as to for what purposes the appellant wanted to cross-examine those dealers and what extraction the appellant wanted from them.

As mentioned above, the appellant had contested the truthfulness of the statements of these two witnesses and wanted to discredit their testimony for which purpose it wanted to avail the opportunity of cross-examination. That apart, the Adjudicating Authority simply relied upon the price list as maintained at the depot to determine the price for the purpose of levy of excise duty. Whether the goods were, in fact, sold to the said dealers/witnesses at the price which is mentioned in the price list itself could be the subject matter of cross-examination. Therefore, it was not for the Adjudicating Authority to presuppose as to what could be the subject matter of the cross-examination and make the remarks as mentioned above. We may also point out that on an earlier occasion when the matter came before this Court in Civil Appeal No. 2216 of 2000, order dated 17.03.2005 was passed remitting the case back to the Tribunal with the directions to decide the appeal on merits giving its reasons for accepting or rejecting the submissions.

In view the above, we are of the opinion that if the testimony of these two witnesses is discredited, there was no material with the Department on the basis of which it could justify its action, as the statement of the aforesaid two witnesses was the only basis of issuing the Show Cause Notice.

We, thus, set aside the impugned order as passed by the Tribunal and allow this appeal.”

14. We find that the facts of the assessee's case are identical. In this case also, the assessee before the CIT(Exemptions) requested for supply of the material, if any, which is proposed to be utilized against the assessee. He also requested for the cross-examination of the person whose statement is being relied upon by the Revenue. The CIT(Exemptions) has mentioned the request of the assessee in his order which has already been reproduced by us above. However, he adjudicated the matter relying upon the same material without supplying the copy to the assessee and also the said statement without allowing cross-examination to the assessee. As was pleaded before the Tribunal in the case of M/s Andaman Timber Industries (supra), in this case before us also, it is pleaded that the cross-examination of such witness was not essential because he is the person from whom the assessee received the donation and therefore, he is the witness of the assessee and not of the Revenue. We find that in the aforesaid case before the Hon'ble Apex Court, the Tribunal had accepted the request of the Revenue which was deprecated by the Hon'ble Apex Court. Hon'ble Apex Court came to the conclusion that if the testimony of these two witnesses is discredited, there was no material with the Department on the basis of which it could justify its action. Identical is the situation in the appeal before us. If the material collected behind the back of the assessee and the statement recorded behind the back of the assessee is discredited or ignored, there was no material with the Department on the basis of which it could justify its action. Therefore, in our opinion, the above decision of Hon'ble Apex Court would be squarely applicable.

15. Learned DR has also relied upon the decision of Hon'ble Jurisdictional High Court in the case of UP Distillers Association (supra) and has also pointed out that the SLP filed by the assessee against the above decision was dismissed by the Hon'ble Apex Court. From a perusal of the above decision, we find that the facts in the aforesaid case were altogether different. In the aforesaid case, there was search and seizure operation on the assessee i.e., UP Distillers Association and during the course of such search, the material was found as well as statement of Shri R.K. Miglani was recorded under Section 132(4). Thus, the facts in the aforesaid case were altogether different. In the case of the assessee, there is no search but the Department is relying upon some letter claimed to have been received from CIT(Exemptions) and the statement of some office bearers of HHBRF. Learned DR has also relied upon the decision of Hon'ble Punjab & Haryana High Court in the case of Scientific Educational Advancement Society (supra). We find that the facts in the above case were also altogether different. In the aforesaid case, a piece of land belonging to the assessee society was sold to a private builder. The builder built flats on the said land. Subsequently, the assessee society purchased two farm houses constructed by the same builder. The Chairman of the assessee society alongwith his family members used to visit farm houses on weekend and no permission from any prescribed authority had been obtained for operating any educational institution on the property purchased. The Chief Commissioner, therefore, took a view that there was nothing on record to show that the assessee society intended to carry out any educational activities on the land purchased and accordingly rejected the assessee's claim seeking exemption under Section 10(23C). Thus, clearly, the facts of the assessee's case are altogether different than the facts before the Hon'ble Punjab & Haryana High Court in the aforementioned case.

16. In view of the above, we are of the opinion that the decision of Hon'ble Apex Court in the case of M/s Andaman Timber Industries (supra) would be squarely applicable and, respectfully following the same, we hold that the material collected behind the back of the assessee cannot be utilized against the assessee unless the copy of the same is supplied to the assessee and he is given an opportunity to rebut the same. Similarly, the statement of office bearers of HHBRF cannot be utilized against the assessee because neither the copy of the statement was supplied to the assessee nor the assessee was allowed an opportunity to cross-examine such person whose statement is being sought to be relied upon by the CIT(Exemptions). Once these two documents are ignored, there remains no material for the Department to hold that the assessee received the donation from HHBRF in lieu of cash. The CIT(Exemption)'s finding, that the assessee was not carrying out activities in accordance with the objects of the society and no genuine activities are being carried out by the society, is solely based upon the allegation that the assessee received the donation of ₹85 lakhs in lieu of cash. As we have already stated, there is no basis for the Department to hold that the assessee received the donation of ₹85 lakhs from HHBRF in lieu of cash. Further, merely because the genuineness of one donation in one year is doubted, it cannot be a ground to draw the inference that the activities of the assessee society are not being carried out in accordance with the objects of the society or that no genuine activities are being carried out by the assessee. That if the genuineness of a donation in one year is doubted, the addition, if any, can be made in the assessment of the relevant assessment year in accordance with law. However, that, by itself, would not be sufficient to withdraw the registration under Section 12AA(3). If the genuineness of a donation is doubted, at the most, it can be a ground to examine deep into the activities of the society so as to ascertain whether the activities of the society are

being carried out in accordance with the objects of the society. However, a conclusion cannot be drawn that the activities of the society are not being carried out in accordance with the objects of the society or that no genuine activity is being carried out by the assessee merely because the genuineness of one donation in one year is doubted.

17. Learned counsel for the assessee has also relied upon the decision of Hon'ble Jurisdictional High Court in the case of Agra Development Authority (supra) to support his contention that Section 12AA(3) does not authorize the Commissioner to cancel charitable registration with retrospective effect. He pointed out that the show cause notice was given in this case by the CIT on 25th January, 2016 while the CIT cancelled the registration from 1st April, 2010, which is not permissible in view of the decision of Hon'ble Jurisdictional High Court in the case of Agra Development Authority (supra). We find the contention of the learned counsel to be justified. In the aforementioned case, Hon'ble Jurisdictional High Court in paragraph 51 & 52 held as under :-

“51. Clearly, the act of cancellation of registration has serious civil consequences. In absence of any legislative intent expressed to suggest that the legislature had empowered the Commissioner to cancel the assessee’s registration under Section 12-A of the Act with retrospective effect, such power could not be deemed to exist or arise or be exercised to unsettle closed/part transactions especially because in this case the ground for cancellation has not arisen out of allegation of fraud, collusion or misrepresentation.

52. Therefore, we are of the view that the cancellation of the assessee’s registration under Section 12-A of the Act, if at all, could be done only prospectively and not retrospectively as had been done by the Commissioner in this case. Thus, question no.1 is answered in the negative that is in favour of the assessee and against the revenue.”

18. In view of the above, we, respectfully following the decision of Hon'ble Apex Court in the case of M/s Andaman Timber Industries (supra) as well as of Hon'ble Jurisdictional High Court in the case of Agra Development Authority (supra), cancel the order passed under Section 12AA(3) dated 22nd April, 2016 cancelling the registration with effect from 1st April, 2010.

19. In the result, the appeal of the assessee is allowed.
Decision pronounced in the open Court on 13th June, 2019.

Sd/-
(SUCHITRA KAMBLE)
JUDICIAL MEMBER

Sd/-
(G.D.AGRAWAL)
VICE PRESIDENT

Dated : 13.06.2019
VK.

Copy forwarded to: -

1. Appellant : **M/s Urmila Devi Charitable Trust,
R-9/42, Raj Nagar, Ghaziabad,
Uttar Pradesh – 201 002.**
2. Respondent : **Commissioner of Income Tax (Exemptions),
T.C. 46V, U.P. State Construction & Infrastructure
Development Corporation, Vibhuti Khand,
Gomti Nagar, Lucknow, Uttar Pradesh – 226 010.**
3. CIT
4. CIT(A)
5. DR, ITAT

Assistant Registrar