(2013) 08 AHC CK 0233

In the Allahabad High Court

Case No : IT Appeal No. 348 of 2008

Commissioner of Income Tax APPELLANT

Vs

Muzafar Nagar Development Authority RESPONDENT

Date of Decision : 05-08-2013

Acts Referred:

Citation : (2013) 219 TAXMAN 318

Hon'ble Judges : Surya Prakash Kesarwani, J;Sunil Ambwani, J

Bench : Division Bench

Advocate : A.N. Mahajan, for the Appellant; Shubham Agarwal, for the Respondent

Judgement

1. In this appeal the following substantial question of law has been made in the memorandum of appeal:-

(1) Whether on the facts and in the circumstances of the case, the Tribunal is justified in law in directing the Assessing Authority to assess the assessee Development Authority as having been registered u/s 12-A of the Act in light of the judgment of the Special Bench of the I.T.A.T., Delhi in the case of (2008) 111 ITD 175 ?

(2) Whether any exemption could be allowed to the assessee u/s 11, 12 and 13 of the Act in view of the omission of Section 10(20-A) of the Act w.e.f. 01-04-03 from the statute by the Finance Act, 2002?

(3) Whether the Assessing Authority was justified in assessing the assessee Development Authority as Artificial Juridical Person instead of a Local Authority?

Briefly stated the facts of the present case are that the assessee, Muzaffarnagar Development Authority (hereinafter referred to as ''MDA'') was created by an enactment of Uttar Pradesh Urban Planning and Development Act, 1973 vide notification (G.O.) No. 4521/9 Awas-5-96-1-Gathan-96, dated 21.11.1996 for the objects of planning, Development and Improvement of cities, towns and villages for general public utility. The assessee had applied for registration u/s 12A(a) of the income tax Act, 1961 on 31.3.2003 but the same has not been disposed of within the time prescribed u/s 12AA(2) of the income tax Act, 1961 (hereinafter referred to as the ''Act''). The assessee claimed exemption under Sections 11 and 12 of the Act and exercised the option available under clause (2) of the Explanation to Section 11(1) of the Act for the receipts/income remained unutilized during the previous year relevant to the Assessment Year 2004-05. The assessee filed the return of income in the status of "Local Authority" on 30.10.2004 declaring the total income of Rs. Nil. The assessment u/s 143(3) of the Act was completed assessing income of Rs. 27,78,060/- in the status of "Artificial Juridical Person". In the process, the assessing authority denied all the benefits of Registration. The assessee being aggrieved with the assessment order and the order passed by the Commissioner of income tax (Appeals) on the issue of CIT''s failure to dispose of the application of the assessee u/s 12A(A) preferred the I.T.A. No. 981/Del. 2007 before the Income Tax Appellate Tribunal, Delhi Bench "I", New Delhi. Before the I.T.A.T. The counsel for the assessee submitted that when the Commissioner has not passed an order granting or refusing the registration u/s 12AA(2) within six months from the end of the month in which the application for registration u/s 12A was filed, the registration would be deemed to have been granted to the trust or institution automatically on the expiry of period specified in Section 12AA(2) of the Act. He relied on the special appeal decision in the case of (2008) 111 ITD 175 . The I.T.A.T. Considered the submissions of the parties and directed the assessing officer to assess the assessee as having been registered u/s 12A of the Act in the light of said Special Bench judgment and allow the claims/benefits of Sections 11, 12 and 13 of the Act, subject to satisfaction of other conditions laid down in these section. Aggrieved with the aforesaid decision of the ITAT dated 19.2.2008 the Revenue has preferred the present appeal.

2. We have heard Sri Dhanajnay Awasthi, learned Standing Counsel for the Income Tax Department and Sri Subham Agarwal, Advocate appearing for the Respondent-Assessee.

Submission on behalf of Appellant Income Tax Department

3. Sri Sri Dhanajnay Awasthi, learned counsel for the appellant submits that Section 12AA of the Act provides for procedure for registration so as to avail the benefits of exemption under Sections 11 and 12 of the Act. Section 12A of the Act provides the condition for applicability of Sections 11 and 12 of the Act. Section 12A provides that the person in receipt of income has to make an application for registration in the prescribed form and manner to the Commissioner. He submits that Section 12AA(2) of the Act merely provides that order granting or refusing to registration shall be passed before the expiry of six month from the end of the month in which the application was received but it does not mean that if the order granting or refusing to grant registration could not be passed then the registration shall be deemed to have been granted. He

submits that the aforesaid Special Bench judgment as well as the Division Bench judgment of this Court in the case of Society for the Promotion of Education Adventure Sport and Conservation of Environment Vs. Commissioner of Income Tax, Central and Others, does not lay down the correct law. He submits that such provision are directory and not passing the order within the time specified shall not result in deemed grant of registration. He submits that there is nothing in Section 12AA of the Act which provides for deemed grant of registration and as such the aforesaid two judgments holding that when an order u/s 12AA is not passed within the period specified under sub-section (2), then the registration shall be deemed to have been granted, would amount to legislation by the Court which power is not conferred on the Court. He submits that this question of deemed grant of registration u/s 12AA(2) of the Act after expiry of the period of six months of filing of the application, requires reconsideration. Sri Dhanajnay Awasthi has also submitted that the Hon''ble Madras High Court has held that non-disposal of application within the time prescribed u/s 12AA(2) of the Act would not result in deemed grant of registration. He relied on the following judgment:--

(i) Commissioner of Income Tax Vs. Sheela Christian Charitable Trust,

(ii) Commissioner of Income Tax Vs. Karimangalam Onriya Pengal Semipu Amaipu Ltd., Kamraj Nagar, Keregodana Halli, Karimangalam,

(iii) Director of Income Tax (Exemption), Chennai Vs. Anjuman-e-Khyrkhah-e-Aam,

(iv) AIR 2003 SC 2103 .

(v) Padmasundara Rao and Others Vs. State of Tamil Nadu and Others,

(vi) Union of India and another Vs. Deoki Nandan Aggarwal,

(vii) Union of India (UOI) Vs. Rajiv Kumar, .

(viii) Shri. Chet Ram Vashist Vs. Municipal Corporation of Delhi and Another, .

(ix) Dhoom Singh Vs. Prakash Chandra Sethi and Others, .

(x) paras 5 and 6 C.A. Abraham, Uppoottil, Kottayam Vs. The Income Tax Officer, Kottayam and Another, .

(xi) Hotel Balaji and others, Vs. State of Andhra Pradesh and others, etc. etc., .

(xii) Sukanya Holdings Pvt. Ltd. Vs. Jayesh H. Pandya and Another, .

(xiii) His Highness Yeshwant Rao Ghorpade Vs. Commissioner of Wealth-tax, Bangalore, .

(xiv) The State of Tamil Nadu Vs. M.K. Kandaswami and Others, .

(xv) State of Gujarat and Others Vs. Dilipbhai Nathjibhai Patel and Another, .

Submission on behalf of Respondent

4. Sri Subham Agarwal, learned counsel for the Respondent-Assessee submits that the question of deemed grant of registration after expiry of the period provided in sub-section (2) of Section 12AA of the Act is concluded by the Division Bench of this Court in the case of Society for the Promotion of Education, Adventure Sport & Conservation of Environment (supra). He referred to paragraph Nos. 9, 10, 13 and 18 of this judgment. He further submits that in these circumstances the substantial question of law as framed in the memorandum of appeal is squarely covered by aforesaid Division Bench judgment of this Court and therefore this question deserves to be answered in favour of the assessee and against the revenue.

Discussion

5. We have considered the submission of learned counsel for the department and the assessee. Presently we confine ourselves to the question No. 1 as quoted above. The relevant provisions to consider this question are the provisions of Section 12A and 12AA of the Act which are reproduced below:--

12A. Conditions for applicability of sections 11 and 12:-- The provisions of section 11 and Section 12 shall not apply in relation to the income of any trust or institution unless the following conditions are fulfilled, namely:--

(a) the person in receipt of the income has made an application for registration of the trust or institution in the prescribed form and in the prescribed manner to the Commissioner before the 1st day of July, 1973 or before the expiry of a period of one year from the date of the creation of the trust or the establishment of the institution whichever is later and such trust or institution is registered u/s 12AA:

Provided that where an application for registration of the trust or institution is made after the expiry of the period aforesaid, the provisions of sections 11 and 12 shall apply in relation to the income of such trust or institution,--

(i) from the date of the creation of the trust or the establishment of the institution if the Commissioner is, for reasons to be recorded in writing, satisfied that the person in receipt of the income was prevented from making the application before the expiry of the period aforesaid for sufficient reasons;

(ii) from the 1st day of the financial year in which the application is made, if the Commissioner is not so satisfied:

Provided further that the provisions of this clause shall not apply in relation to any application made on or after the 1st day of June, 2007;

(aa) the person in receipt of the income has made an application for registration of the trust or institution on or after the 1st day of June, 2007 in the prescribed form and manner to the Commissioner and such trust or institution is registered u/s 12AA;

(b) where the total income of the trust or institution as computed under this Act without giving effect to the provisions of section 11 and section 12 exceeds the maximum amount which is not chargeable to income tax in pay previous year, the accounts of the trust or institution for that year have been audited by an accountant as defined in the Explanation below sub-section (2) of section 288 and the person in receipt of the income furnishes alongwith the return of income for the relevant assessment year the report of such audit in the prescribed form duly signed and verified by such accountant and setting forth such particulars as may be prescribed.

(c)** ** **

(2) Where an application has been made on or after the 1st day of June, 2007, the provisions of sections 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.

12AA. Procedure for registration.--(1) The Commissioner, 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 inquires 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 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 ere 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) 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 u/s 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.

6. We find that prima facie the question No. 1 i.e. deemed grant of registration is covered by the Division Bench judgment of this Court in the case of Society for the Promotion of Education, Adventure Sport & Conservation of Environment (supra). We find that applying the principles of purposive construction this Court has held in paragraph 18 as under:--

Considering the pros and cons of the two views, we are of the opinion that by far the better interpretation would be to hold that the effect of non-consideration of the application for registration within the time fixed by section 12AA(2) would be a deemed grant of registration. We do not find any good reason to make the assessee surfer merely because the Income Tax Department is not able to keep its officers under check and control, so as to take timely decisions in such simple matters such as consideration of applications for registration even within the large six month period provided by section 12AA(2) of the Act.

7. Respectfully we do not agree with the law laid down by the Division Bench of this Court in the case of Society for the Promotion of Education, Adventure Sport & Conservation of Environment (supra) for the following reasons:--

(i) There is nothing in Section 12AA(2) of the Act which provides for deemed grant of registration, if the application for registration is not decided within six months.

(ii) This sub-section provides that every order granting or refusing registration shall be passed before expiry of six months from the end of the month in which the application was received. Thus, this provision prescribes the period of six months to pass an order either granting or refusing registration. Therefore, if an order is not passed within the period of six months, the grant cannot be deemed leaving the words ''refusing registration''.

(iii) One of the most important condition for availing the exemption u/s 11 and 12 of the Act is the grant of registration u/s 12AA of the Act and as such an order is necessarily required to be passed by the Commissioner either granting or refusing the registration. In case after considering the facts and circumstances the C.I.T. Comes to the conclusion that the person applying for registration is not entitled to registration u/s 12A of the Act then he may refuse registration and the consequence would be that such a person shall not be entitled to the benefits provided in Section 11 and 12 of the Act. Thus no presumption of grant of registration can be inferred from the plain words of Section 12AA(2) of the Act which requires the order to be passed in writing by the competent authority either granting or refusing the registration.

(iv) Construing Section 12AA(2) of the Act to mean deemed grant of registration on the expiry of period of six months would attribute redundancy to the words "refusing registration" and therefore such a construction can not be accepted as per settled principle of law.

(v) The principles of purposive construction or mischief rule cannot be applied so as to re-write the language in a way different from that in which it is framed. When the public officer is directed by statute to perform duty within a specified time, the provision as to time are directory as held by Hon''ble Supreme Court in the case of P.T. Rajan Vs. T.P.M. Sahir and Others, .

(vi) The principles of law laid down by the Division Bench of this Court in the case of Society for the Promotion of Education, Adventure Sport & Conservation of Environment (supra) appears to be in conflict with the law laid down by the Division Bench of this Court in the case of Sanjay Kumar v. State of U.P. [2004 (54) ALR 39]. The relevant paragraph Nos. 10, 11, 13, 14 and 15 of the judgment in the case of Sanjay Kumar (supra) are reproduced below:--

10. It is settled legal proposition of law that unless that statute provides for a deeming clause, the Court should be very slow in accepting such a contention, as laid down by a Constitution Bench of the Allahabad High Court in Rana Pratap Singh v. State of U.P. The Court held that had the intention fiction/deeming sanction/refusal, specific in the Act or the Rules. In absence of any statutory provision/rule, it should not be construed as to provide for a fiction in such an eventuality.

11. Moreso, creating a fiction by judicial interpretation may amount to legislation, a field exclusively within the domain of the legislature. (Vide State of Jammu & Kashmir v. Triloki Nath Khosa and Ajaib Singh v. Sirhind Coop. Marketing-cum-processing Service Society Ltd.

13. Even if the statute provides for a legal fiction/deeming provision, it must be limited to the purposes indicted by the context and can not be given a larger effect. (Vide Radhakissen Chamria and others v. Durga Prasad Chamria and another, State of Travancore-Cochin v. S.V. Cashewnut Factory Quilon, and Bengal Immunity Co. Ltd. v. State of Bihar and others. In Modi Cement Ltd. v. Kuchil Kumar Nandi, the Hon''ble Apex Court explained the distinction between the deeming provisions, and presumption and held that the distinction was well discernible.

14. Similar view has been taken by the Hon''ble Apex Court in State of Kerala and others v. Dr. S.G. Sarvothama Prabhu, Commissioner of income tax v. Mysodet (P) Ltd. and Garden Silk Mills Ltd. and another v. Union of India and others.

15. Rule 165 of the Explosive Rules, 1983, provide that if an application for renewal has been filed within time and it is not being disposed of by the licensing authority, the licence shall be deemed to be in force until such date as the licensing authority renews the licence or until an intimation that the renewal of the licence is refused and is communicated to the applicant. The rules provide for a fiction only for the transitory period, but neither the Explosive Act nor the rules framed thereunder envisage deemed renewal of a licence, thus the authorities have been passing the order without complying the requirement of the statutory provisions which cannot be held to be a sign of good governance.

(vii) In the case of Rana Pratap Singh Vs. State of Uttar Pradesh, a Full Bench of this Court, while considering the provision of Section 13 and 14 of the Arms Act regarding grant of Arms Licence has held in paragraph 34 as under:--

34. A reading of the relevant statutory provisions of the Arms Act would show that no time limit has been prescribed therein for the consideration of an application for the grant of an arms licence, nor is there any provision to the effect that if the application is not finally decided within a particular time frame, the licensing authority shall be bound to grant the licence, or that the licence shall be deemed to have been granted. We, therefore, cannot but concur with the view of Vijay Bahuguna, J. that had the intention of the Legislature been such, specific provisions would undoubtedly have been made for it in the Act. On the face of it, therefore, the provisions of the Arms Act cannot be so construed as to provide for a deeming provisions for the grant of a licence merely on the expiry of a particular period of time. There can, of course, be no manner of doubt that where undue delay takes place in the licensing authority considering and deciding an application for an arms licence the Court is competent and empowered to direct that the consideration may be completed within the time to be stipulated by it. In dealing with this matter, it is not to be forgotten that there can be many reasons and circumstances to account for an application for an arms licence not having been decided within a particular period. No hard and fast rule can, therefore, be laid down. What be an appropriate order to be passed, with regard to an application for the grant of an arms licence, would clearly depend upon the facts and circumstances of each particular case.

(viii) The provision fixing a time in which a public officer or authority has to act in performance of a duty considers it reasonable for the officer or the authority to act within the said period. The expiry of the period without more confers no right unless the statute by legal fixation or otherwise confers a right. Thus Section 12AA(2) of the Act providing for grant or refusing registration within a period of six months does not mean that the application must have been granted after expiry of the said period, unless there is a provision to the said effect made in the Act itself. The above points supported by the law laid down by Hon''ble Supreme Court in the case of Chet Ram Vashist (supra).

(ix) The performance of duty required to be done by the competent authority u/s 12AA(2) of the Act within the period specified therein and related to a right which may accrue to a person on grant of registration, the provision of time will be directory and not passing the order within the period specified shall not automatically result in deemed grant of registration.

(x) In the case of Nasiruddin and Others Vs. Sita Ram Agarwal, the Hon''ble Supreme Court has laid down the law that "it is a well settled principle that if an act is required to be performed by a private person within the specified time, the same would ordinarily be mandatory but when the public functionary is required to perform the public function within time frame, the same shall be held directory unless consequence therefor are specified." Similar view has been taken by Hon''ble Supreme Court in the case of Balwant Singh and Others Vs. Anand Kumar Sharma and Others, para 7.

(xi) There is nothing in Section 12AA(2) of the Act which provides that the authority concerned shall have no power to pass order either granting or refusing registration after expiry of six months. Thus, when the legislature itself has not provided so and the authority concerned has not been made functus officio on expiry of the prescribed period then it is not within the powers of the Court to legislate and provide for deemed grant of registration. In the case of Bhavnagar University Vs. Palitana Sugar Mill Pvt. Ltd. and Others, para 42, 43, 44 and 45 the Hon''ble Supreme Court has observed as under:--

42. We are not oblivious of the law that when a public functionary is required to do a certain thing within a specified time, the same is ordinarily directory but it is equally well settled that when consequence for inaction on the part of the Statutory authorities within such specified time is expressly provided, it must be held to be imperative.

43. In Sutherland, Statutory Construction, 3rd edition, Vol. 3 at p. 102 the law is stated as follows:--

.......unless the nature of the act to be performed, or the phraseology of the statute is such that the designation of time must be considered a limitation of the power of the Officer.

At p. 107 it is pointed out that a statutory direction to private individuals should generally be considered as mandatory and that the rule is just the opposite to that which obtains with respect to public officers. Again, at p. 109, it is pointed out that often the question as to whether a mandatory or directory construction should be given to a statutory provision may be determined by an expression in the statute itself of the result that shall follow non-compliance with the provision. At p. 111 it is stated as follows:

As a corollary of the rule outlined above, the fact that no consequences of noncompliance are stated in the statute, has been considered as a factor tending towards a directory construction. But this is only an element to be considered, and is by no means conclusive.

44. In Dattatreya Moreshwar Pangarkar Vs. The State of Bombay and Others, , it

was held as under:--

Generally speaking the provisions of a statute creating public duties are directory and those conferring private rights are imperative. When the provisions of statute relate to the performance of a public duty and the case is such that to hold null and void acts done in neglect of this duty would work serious general inconvenience or injustice to persons who have no control over those entrusted with the duty and at the same time would not promote the main object of the Legislature, it has been the practice of the courts to hold such provisions to be directory only, the neglect of them not affecting the validity of the acts done.

45. In Craies on Statute Law VIII Edn. at page 262, it is stated thus:--

It is the duty of courts of justice to try to get at the real intention of the Legislature by carefully attending to the whole scope of the statute to be construed That is each case you must look to the subject-matter, consider the importance of the provision and the relation of that provision to the general object intended to be secured by the Act, and upon a review of the case in that aspect decide whether the enactment is what is called imperative or only directory.

8. In the following three judgments in the case of Sheela Christian Charitable Trust (supra), Karimangalam Onriya Pengal Semipu Amaipu Ltd. (supra) Anjuman-e-Khyrkhah-e-Aam (supra) the Madras High Court has held that non-disposal of application for registration within the time prescribed u/s 12AA(2) of the Act would not automatically result in granting registration to the trust and such a provision is directory.

9. In view of the discussion made above we refer the following questions for opinion of the Larger Bench:--

(i) whether non-disposal of application for registration by granting or refusing registration before the expiry of six months as provided u/s 12AA(2) of the Income Tax Act, 1961 would result in deemed grant of registration.

(ii) Whether the Division Bench judgment of this Court in the case of Society for the Promotion of Education, Adventure Sport & Conservation of Environment (supra) holding that the effect of non consideration of the application for registration within the time fixed by Section 12AA(2) would be deemed grant of registration, is legally correct.

Let the record of this appeal be placed before Hon''ble the Chief Justice for constituting a Larger Bench for authoritative pronouncement on the above referred two questions.

