

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 16234 of 2010

For Approval and Signature:

**HONOURABLE MS.JUSTICE HARSHA DEVANI
HONOURABLE MR.JUSTICE H.B.ANTANI**

=====

AGRICULTURAL PRODUCE MARKET COMMITTEE - Petitioner(s)

Versus

INCOME TAX OFFICER, WARD - 2 - Respondent(s)

=====

Appearance :

MR JP SHAH with MR MANISH J SHAH for Petitioner

MR MR BHATT, SR. ADVOCATE with MRS MAUNA M BHATT for Respondent

=====

**CORAM : HONOURABLE MS.JUSTICE HARSHA DEVANI
and
HONOURABLE MR.JUSTICE H.B.ANTANI**

Date : 24/01/2011

ORAL JUDGMENT (Per : HONOURABLE MS. JUSTICE HARSHA DEVANI)

1. By this petition under Article 226 of the Constitution of India, the

petitioner has challenged the notice dated 29.3.2010 issued by the respondent under section 148 of the Income Tax Act, 1961 (the Act) reopening the assessment of the petitioner for the assessment year 2006-07.

2. The petitioner, an Agricultural Produce Market Committee, has been granted registration under section 12AA of the Income Tax Act, 1961 by the Commissioner of Income Tax as an institution carrying out charitable activities. The petitioner submitted a return of income for the assessment year 2006-07 in the status of "Association of Persons" showing income of Rs.74,57,427/- and claiming deduction of Rs.77,40,212/- (Rs.32,40,212/- + Rs.45,00,000/-) and thus, showing loss of Rs.2,82,785/-. Pursuant to notice issued under section 142(1) of the Act, the petitioner by a reply filed in July 2008, stated that its activities were previously exempt under section 10(20) of the Act (before its amendment by Finance Act, 2002 with effect from 1.4.2003) as local authority because of its object of "advancement of any other object of the general public utility". It was also stated that the Commissioner of Income Tax had granted registration under section 12AA of the Act and that its activities are covered under section 2(15) of the Act defining "charitable purpose" and that the registration granted under section 12AA was in order and as such there was no question of rejecting the petitioner's claim of being assessed under sections 11 to 13 of the Act. The Assessing officer framed assessment under section 143(3) of the Act vide order dated 31.7.2008 wherein he referred to the above referred letter and recorded in paragraph 2 thereof that, "The assessee carries on charitable activities registered under 12A of the I.T. Act, 1961", and

computed the total income giving the specific deduction of Rs.32,40,212/- and Rs.45,00,000/-, totalling to Rs.77,40,212/-. Later on, after about more than a year, vide letter dated 15.9.2009, the Assessing Officer informed the petitioner that the revenue audit had raised various objections as regards the eligibility of the petitioner for exemption/deduction under section 11 of the Act. The petitioner gave a detailed reply dated 21.12.2009 in respect of the objections raised by the audit party. Thereafter, by the impugned notice dated 29.3.2010, the assessment of the petitioner is sought to be reopened for assessment year 2006-07. The petitioner, thereafter, addressed a letter dated 29.4.2010 to the respondent stating that it had filed return on 24.7.2010 in response to the notice under section 148 of the Act and asked for copy of the reasons. Upon the reasons being furnished, the petitioner filed its objection by a letter dated 12.10.2010. The respondent vide his order dated 6.12.2010, rejected the objections submitted by the petitioner. Being aggrieved, the petitioner has moved the present petition challenging the notice issued under section 148 of the Act.

3. Mr. J. P. Shah, learned advocate appearing on behalf of the petitioner invited attention to the objections raised by the audit party as well as to the reasons recorded to point out that the same are based upon the objections raised by the revenue audit party. It was submitted that the main reason for reopening the assessment is that in the opinion of the revenue audit party, in the case of the petitioner, no trust deed had been executed and registered setting out its objectives, trustees etc. and that the petitioner had not been registered with the Charity Commissioner and that the property of the petitioner is also not held under the

petitioner-Trust. That even if the petitioner had obtained registration under section 12AA of the Act as an institution carrying out charitable activities, the petitioner is not entitled to the status of a “Trust” carrying out the charitable activities since the petitioner is conducting the business as “Association of Persons” and not as a “Trust”. That the exemption/deduction under section 11 of the Act are meant for income derived from the property under trust and that in view of the observations of the revenue audit party, the assessee was not eligible to exemption to the tune of Rs.77,40,212/- for the year under reference and that, since the Assessing Officer had not disallowed the exemption while finalizing the assessment under section 143(3) of the Act, the income to the aforesaid extent had escaped assessment.

4. Inviting attention to the order made under section 143(3) of the Act as well as to the notice issued under section 142(1) of the Act, it was pointed out that the petitioner had specifically claimed deduction of Rs.32,40,212/- and 45,00,000/- totalling 77,40,212/- as charitable trust registered under section 12AA of the Act by the Commissioner. The Assessing Officer had thereafter issued notice, in response to which the petitioner had given explanation as to what were its activities, what were its objectives, the rules of the institution, the fact of registration by the Commissioner under section 12AA of the Act, that its activities were covered under the definition of charitable purpose under section 2(15) of the Act and that, it is, therefore, entitled to be assessed as a Trust and to the above deductions. That on considering the elaborate reply, the Assessing Officer, after due application of mind, had passed the order under section 143(3) of the Act allowing the deductions in question. It

was urged that in the circumstances, the reopening is based on a mere change of opinion without there being any tangible material on record to indicate that any income has escaped assessment.

5. Inviting attention to the reasons recorded, it was submitted that there is absence of opinion of the Assessing Officer and that the reasons clearly show that the reopening of assessment is based solely on the observations of the revenue audit party. That if the reasons are read as a whole, the Assessing Officer seems to be almost apologetic because he does not seem to be agreeing with the revenue audit party, but appears to have given the notice under section 148 of the Act out of helplessness. It was further submitted that once the Commissioner of Income Tax gives the certificate of registration to the petitioner as a charitable trust under section 12AA of the Act, it is not open for the Assessing Officer who is a subordinate to him to take up a contradictory stand and issue a notice under section 148 of the Act in respect of such contradictory stand. It was, accordingly, submitted that the impugned notice being based upon a wrong legal premise as well as being based on a mere change of opinion, the assumption of jurisdiction under section 147 of the Act is invalid and as such, the impugned notice is required to be quashed and set aside.

6. Resisting the petition Mr. M. R. Bhatt, learned Senior Advocate appearing on behalf of the respondent invited attention to the averments made in the affidavit in-reply, to submit that in the original assessment under section 143(3) of the Act, there is no discussion worth the name

with regard to the subject matter for which the impugned notice has been issued. It was submitted that in the reasons recorded, it has been clearly recorded that no trust deed has been executed and registered in terms of the Bombay Public Trust Act, setting out its objectives, trustees, etc., nor was the petitioner registered with the Charity Commissioner. Since, these aspects have not been deliberated or debated in the original order, there is no question of change of opinion, as is sought to be contended on behalf of the petitioner. It was submitted that in the circumstances, the reopening of the assessment which is within a period of four years from the end of the relevant assessment year is valid and as such, there is no warrant for any intervention by this Court.

7. In the background of the aforesaid facts and contentions, it may be germane to refer to the reasons recorded which read as under:

“The assessee has filed his return of income for A.Y. 2006-07 showing the total income of Rs.2,82,785/-. The assessment u/s 143(3) of I.T. Act finalized on 31.7.2008 accepting the returned income.

From the assessment order, it is observed that the assessee was allowed the following deductions / exemption u/s 11 & 11(2) of I.T. Act:

[i] Amount accumulated or set apart/

finally set apart for application to

Charitable or religious purpose

(max. 15% of the income of the

trust) Rs.32,40,212/-

[ii] Amount accumulated or set apart

for specified purposes as per

section 11(2) Rs.45,00,000/-

=====

Total :: Rs.77,40,212/-

=====

The Revenue Audit Party has observed that in the case of the assessee, no trust deed has been executed and registered setting out its objectives, the property of the assessee is also not held under assessee-Trust. In the light of the above, even if the assessee has obtained registration u/s 12AA of I.T. Act as an institution carrying out charitable activities, the assessee is not entitled to the status of a "Trust" carrying out charitable activities since the assessee is conducting the business as an "Association of Persons" and not as a "Trust". Further, the exemption/deduction u/s 11 of the Act are only meant for income derived from property held under Trust. In view of the above observations of the Revenue Audit Party, the assessee is not eligible for the exemption to the tune of rs.77,40,212/- for the year under reference. Since, the A.O. has not disallowed the exemption while finalizing the assessment u/s 143(3) of the I.T. Act.

Rs.77,40,212/- has escaped assessment.”

8. From the facts emerging on record, it is an undisputed position the petitioner has been registered under section 12AA of the Act by the Commissioner of Income Tax, Gandhinagar vide order dated 22.9.2004 (Exhibit E-1 to the petition). In this regard, it may be pertinent to refer to the decision of this High Court in the case of ***Hiralal Bhagwati v. Commissioner of Income Tax***, [2000] 161 CTR (Guj) 401, wherein the Court has held as under:

“The registration of a charitable trust under section 12A is not an empty formality. This is apparent from the tenor of the provisions of section 12A. It requires that not only an application should be filed in the prescribed form, setting the details of the origin of the trust, but also names and addresses of the trustees and/or managers should be furnished. The CIT has to examine the objects of creation as well as an empirical study of the past activities of the applicant. The CIT has to examine that it is really a charitable trust or institution eligible for registration. The Court further held that once the registration under section 12A(a) of the Act is granted, the Income Tax Officer is not justified in refusing the benefit which would, otherwise, accrue under the registration.”

9. In the case of ***Assistant Commissioner of Income Tax v. Surat City Gymkhana***, (2008) 300 ITR 214 (SC), the Supreme Court was called upon to deal with the question as to whether on the facts and circumstances of the said case, Income Tax Appellate Tribunal was justified in law in holding that registration under section 12A was a *fiat accompli* to hold the Assessing Officer back from further probe into the

objects of the trust. On a perusal of the judgment of the Gujarat High Court in the case of ***Hiralal Bhagwati***, the Supreme Court held that the question stands concluded by the said judgment, which has attained finality since the revenue did not challenge the decision in the said case.

10. This High Court in the case of ***Ahmedabad Urban Development Authority v. Deputy Director of Income Tax (Exemption)***, (supra), has held thus:

“9. Section 12AA of the Act lays down the procedure for registration in relation to the conditions for applicability of sections 11 & 12 as provided in section 12A of the Act. Therefore, once the procedure is complete as provided in sub-section (1) of section 12AA of the Act and a Certificate is issued granting registration to the Trust or Institution it is apparent that the same is a document evidencing satisfaction about : (1) genuineness of the activities of the Trust or institution, (2) about the objects of the Trust or Institution. Section 12A of the Act stipulates that provisions of sections 11 & 12 shall not apply in relation to income of a Trust or an Institution unless conditions stipulated therein are fulfilled. Thus granting of registration under section 12AA of the Act denotes, as per legislative scheme, that conditions laid down in section 12A of the Act stand fulfilled.”

Applying the principles laid down by the Apex Court in the case of

Gestetner Duplicators v Commissioner of Income Tax, (1979) 117 ITR 1 (SC), the Court held that while framing assessment order, it was not open to the Assessing Officer to ignore the certificate of registration granted under section 12AA of the Act by the Director of Income Tax [Exemption].

11. A perusal of the reasons recorded shows that the assessment is sought to be reopened on the ground that even if the petitioner has obtained registration under section 12AA of the Act as an institution carrying on charitable activities, the petitioner is not entitled to the status of trust carrying out charitable activities since the petitioner is conducting the business as an “Association of Persons” and not as a “Trust”. Thus, though the petitioner has been granted registration under section 12AA of the Act by the Commissioner of Income-tax, the assessment is sought to be reopened on the basis of revenue audit objection that the petitioner is not eligible for exemption for the aforesaid reasons. The grounds for reopening the assessment are clearly contrary to the settled legal position as laid down by this Court in the case of *Hiralal Bhagwati v. Commissioner of Income Tax*, (supra) as well as in the case of *Ahmedabad Urban Development Authority v. Deputy Director of Income Tax (Exemption)*, wherein the Court has held that section 12AA of the Act lays down the procedure for registration in relation to the conditions for applicability of sections 11 and 12 as provided in section 12A of the Act. Therefore, once the procedure is complete as provided under sub-section (1) of section 12AA of the Act and a certificate is issued granting registration to the Trust or Institution, it is apparent that the same is a document evidencing satisfaction about: (1) genuineness of

the activities of the trust or Institution, and (2) about the objects of the Trust or Institution. While framing the assessment order, it is not open to the Assessing Officer to ignore the certificate of registration granted under section 12AA of the Act by the Director of Income Tax (Exemption).

12. In the facts of the present case, the Assessing Officer while framing the original assessment under section 143(3) of the Act, has taken into consideration the certificate granted by the Commissioner of Income Tax under section 12AA of the Act, and has found that the petitioner carries on charitable activities. In the return of income filed by it, the petitioner had specifically claimed deduction of Rs.32,40,212/- and Rs.45,00,000/- totalling to Rs.77,40,212/- as a Charitable Trust registered under section 12AA of the Act by the Commissioner of Income Tax. During the course of assessment proceedings the Assessing Officer had issued notice pursuant to which the petitioner had given its reply explaining as to why it was entitled to the said deductions. The Assessing Officer after considering the explanation given by the petitioner had passed a scrutiny assessment order under section 143(3) of the Act specifically allowing the above deductions. From the reasons recorded, it is evident that the Assessing Officer has not recorded any independent opinion regarding income having escaped assessment for the reasons stated therein. The sole ground for reopening the assessment appears to be the observations of the Revenue Audit Party that the assessee is not eligible for exemption to the tune of Rs.77,40,212/- for the year under reference since, the Assessing Officer has not disallowed the exemption while finalizing the assessment under section 143(3) of the Act. Thus, it

appears that the belief that income chargeable to tax escaped assessment is that of the Revenue Audit Party and not of the Assessing Officer. In the circumstances, the condition precedent for exercise of powers under section 147 of the Act, namely, that the Assessing Officer should have reason to believe that income chargeable to tax has escaped assessment, does not appear to be fulfilled in the present case.

13. Besides, in the light of the above referred decisions of this Court, it is not permissible for the Assessing Officer to go behind the registration obtained by the assessee under section 12AA of the Act. The Assessing Officer while framing original assessment having taking into consideration the registration under section 12AA of the Act as well as having examined the admissibility of the claims made by the petitioner, has allowed the deduction under section 11 of the Act. Under the circumstances, the reopening of assessment appears to be based on a mere change of opinion, that too, the opinion of the Revenue Audit Party and not that of the Assessing Officer. The Supreme Court in the case of *Commissioner of Income Tax v. Kelvinator of India Ltd.*, (2010) 320 ITR 561, has held that one needs to give a schematic interpretation to the words “reason to believe” failing which section 147 would give arbitrary powers to the Assessing Officer to reopen assessments on the basis of “mere change of opinion”, which cannot be per se reason to reopen. One must treat the concept of “change of opinion” as an inbuilt test to check abuse of power by the Assessing Officer. Viewed in the light of the aforesaid decision, the reopening of assessment based on a mere change of opinion is bad in law and as such, the impugned notice issued under section 148 of the Act, cannot be sustained.

14. For the foregoing reasons, the petition succeeds and is, accordingly, allowed. The impugned notice dated 29.03.2010 issued under section 148 of the Act (Exhibit “F” to the petition) is hereby quashed and set aside. Rule is made absolute accordingly with no order as to costs.

[HARSHA DEVANI, J.]

[H.B.ANTANI, J.]

parmar*