

Sec. 12AA application couldn't be rejected merely on ground that all trustees were non-residents

Summary – The Delhi ITAT in a recent case of Global Academy of Emergency Medicine., (the Assessee) held that where Commissioner rejected assessee's application under section 12AA on ground that all initial trustees had taken citizenship of foreign country and thus there was violation of provisions of section 73 of Indian Trust Act, 1882, in view of fact that section 73 of 1882 Act per se cannot invalidate a trust, but rather provides bar for appointment of non-resident as a trustee, impugned order passed by Commissioner was to be set aside

Facts

- The assessee-trust was formed with object of promoting and improving emergency medicine and care on a global basis through advocacy, training and education of physicians and allied health care personnel internationally. It applied for registration under section 12AA and also for exemption under section 80G.
- The Commissioner (Exemptions) on the perusal of the trust deed noted that there were five trustees, and all were non-resident Indian, *i.e.*, who had taken the citizenship of the foreign country. According to the Commissioner (Exemptions) in terms of *Explanation 1* to section 60 and section 73 of the "The Indian Trust Act" a non-resident could not be a trustee of an Indian resident trust unless he was domiciled in India. Based on said reasoning, he rejected the assessee's application for grant of registration under section 12AA and application for exemption under section 80G.
- On appeal:

Held

- The sole reason for denying the registration under section 12AA by the Commissioner (Exemptions) is that the trustees are the non-resident and therefore, under the provisions of 'Indian Trust Act, 1882' they cannot be held to be a valid trustee; and when the trust and its structure itself is not proper, therefore, the condition precedent for grant of registration is not fulfilled.
- Section 10 of the Indian Trust Act clearly provides that every person capable of holding property may be a trustee, but where trust involves the exercise of discretion, he (trustee) cannot execute it unless he is competent to contract. Thus, a person who may be trustee must be capable of holding a property of which the Trust is declared and must be competent to deal with the property as required by the Trust or as directed by the beneficiaries. The Commissioner (Exemptions) in his order has also mentioned that under the Indian exchange control regime, it is not possible for a trust holding immovable property to have a non-resident trustee. However, he has not specified under which Indian control regime there is such a bar. On the contrary, provision of section 6(5) of FEMA 1999, a person resident outside India can hold, own, transfer or invest in Indian currency, security or any immovable property situated in India, if such currency, security or property was

acquired, held or owned by such person when he was resident in India or inherited from a person who was resident in India. Thus, there is no specific bar under section 10 of the Trust Act for an appointment of NRI as trustee of an Indian Trust.

- Section 73 of the Trust Act, deals with the appointment of a new trustee on death, or is absent from India for the period of more than 6 months or domiciled outside India, etc. This section merely provides that a new trustee may be unfit to be appointed in case the said person is domiciled abroad for a period of six months continuously; or leaves India for the purpose of residing abroad, etc. In such a case, it is considered that there is a personal incapacity to act in a Trust by such person. This *inter alia* means that he is considered to be unfit for the office of the trustee and the said section presumes that vacancy has occurred and the provision authorizes the appointment of a new trustee in his/her place. This provision also does not forbid the appointment of NRI, *albeit* acts as an impediment to their appointment. Section 73 *per se* cannot invalidate a trust, but rather provides bar for appointment of non-resident as a trustee.
- Further, section 60 of the Trust Act provides that beneficiary has a right to proper trustees. This section is based on a principle that the trust whose property depends for its continuance upon the faith and integrity of the trustee should be allowed for all practical means to secure himself against the occurrence of any act of misconduct. The first of the right of a beneficiary securing himself against the occurrence of any act of misconduct is his right to have the custody and administration of the estate confided to the care of proper persons. The 'proper persons' have been defined whereby a person domicile abroad, etc. have been held to be not a proper person. This section provides for removal of the trustee by the beneficiary of the trust if he is not a proper person as given in *Explanation-I*. However, this section again does not in any way impose restriction on the author as he may very well appoint a person who is considered not proper under this Act. Beneficiary may first choose to have not a 'proper person' as long as the condition precedent in Section 10 is not violated. This section only provides a right of the beneficiary to have proper trustees, but it does not impinge upon the validity of the trust and nowhere the Indian Trust Act provides that if the trustee is not a 'proper person', then the entire trust can be declared as invalid.
- In view of provisions of sections 60 and 73 of the 'Indian Trust Act, 1882' as relied upon by the Commissioner (Exemption) to hold that assessee-trust is not a valid Trust, and therefore, cannot be granted registration under section 12AA cannot be held to be a valid reason. As pointed out by the Commissioner (Exemption) in the application filed in 'Form 10A', assessee-applicant Trust has already given the list of the trustees and one of the trustee was citizen of India and domiciled in India, and therefore, it cannot be held that simply because other four trustees were non-resident and the assessee trust is not a valid trust. It is accordingly, held that assessee is a valid trust under the Indian Trust Act, 1882.
- Coming to the 'objects' as given in the 'Trust Deed', *prima facie*, it appears that all the objects are ostensibly for the charitable purposes. However, the Commissioner (Exemptions) has not examined the objects and the genuineness of the activities of the assessee-trust which is required to be

examined while considering the registration under section 12AA, and therefore, in all fitness of mater, it is deemed proper that this matter of registration should be restored back to the file of the Commissioner (Exemptions) who would examine the 'objects' of the Trust as well as genuineness of its activities; and if the assessee trust's 'objects' are charitable and is actually carrying out charitable activities for the benefit of public at large, then registration under section 12AA should be granted. Consequently, the application for exemption under section 80G should also be examined in that light. With this direction, appeal of the assessee is treated as allowed for statistical purpose.