ssp/sbw

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
WRIT PETITION NO.949 OF 2011

Shushrusha Citizens Co-operative Hospital Limited,Mumbai ...Petitioner
vs.
Chief Commissioner of Income Tax, Mumbai and another ...Respondents

Mr.M.L.Naniwadekar a/w Mr.Rohan Deshpande and Mr.Ruturaj Gurjar for the Petitioner
Mr.Suresh Kumar for the respondents

CORAM : A.S.OKA, &
A.K.MENON,JJ.
DATE : DECEMBER 6 AND 7, 2017

ORAL JUDGMENT : (PER A.S.OKA,J.)

1 The submissions of the parties were heard on the earlier date. With a view to appreciate the submissions, the controversy which factually arises in this petition will have to be noted. The order impugned is passed by the first respondent by which the application made by the petitioner for continuation of exemption under section 10 (23C) (via) of the Income Tax Act,1961 (for short “the said Act”) has been rejected. According to the case of the petitioner, it is a non-profit society registered under the Maharashtra Co-operative Societies Act,1960. The object of the petitioner is of giving needy members of the public better medical facilities at free/subsidized rates, rendering medical aid etc. It is the case of the petitioner

that it is running a hospital providing medical facilities at subsidised rates. It is the case made out by the petitioner that the services provided are available to members of the general public. To poor and needy patients, services are being rendered free. The petitioner has been granted a certificate under section 12A of the said Act. There is no dispute about the fact that the certificate dated 28th December 1988 is still in force and it has not been revoked. The case made out in the petition is that earlier, the petitioner enjoyed the benefit of section 10 (22A) and in the past, applications made by the petitioner under section 10 (23C) have not been rejected.

2 The order impugned in this writ petition has been passed by the first respondent on an application made by the petitioner for grant/continuation of exemption under section 10 (23C) (vic) of the said Act on 4th March 2010, for the Assessment Year 2009-10. On the basis of the said application, the office of the first respondent called upon the petitioner to furnish certain information. Thereafter, a show cause notice dated 18th March 2011 was issued to the petitioner calling upon the petitioner to show as to how it satisfies the condition of existing solely for philanthropic purposes and not for the purpose of profit. The petitioner was also called upon to explain as to why the act of inclusion of non philanthropic objects should not make the petitioner disentitled for the benefit under section 10 (23A) (via). The petitioner

filed submissions on 16th March 2011 and 23rd March 2011. After giving an opportunity of being heard to the petitioner, the impugned order has been passed. It was observed that on an average, only 0.93% of the total receipts for four years have been applied for giving concessional medical treatment. A finding recorded by the first respondent is that it is not the primary object of the petitioner to exist exclusively for philanthropic purposes. Another aspect noted in the impugned order was that from the details filed by the petitioner, it appears that the petitioner has no control whatsoever on the fees charged to the patients referred by the consulting Doctors or the patients of the consultants who get admitted to the rooms as charges are negotiable between the patients and the consulting Doctors. It was observed that the petitioner has no control over the fees charged by the said Doctors. In fact there was no cap prescribed by the petitioner on the amount of fees charged by the Consultants. Further, it was observed that a percentage fees charged by the doctors is retained by the hospital as affiliation charge. This is the one of the main reasons given by the first respondent.

3 Moreover, it was held that in Bye-law 47(e) of the Bye-laws of the petitioner, there is a provision for payment of honourariam to members for rendering service and for payment of special bonus to the persons who are not members on the basis of the support and services rendered. Further, there is a clause in the Bye-Laws that 10% of the balance

profit shall be distributed as a bonus to the employees of the Society.

4 The learned counsel for the petitioner has taken us through the material on record. He invited our attention to the Bye-laws of the petitioner. He pointed out that exemption certificate granted under section 12-A of the said Act continues to remain in force and the same has not been revoked. Relying upon the decision of this Court in the case of Deccan Gymkhana (Oldest Trust) vs. Commissioner of Income Tax[1], he urged that there is a distinction between the objects and powers of the society. His submission is that only on the ground that the petitioner is having surplus, it is not disentitled to the benefit of exemption. He submitted that it is erroneous to hold that the petitioner was not engaged in philanthropic activities. He pointed out that in the past, the petitioner always enjoyed exemption under section 10(22A). All along the petitioner enjoyed exemption under 80G of the said Act. The contention is that even the applications for exemption under section 10 (23C)(via) made by the petitioner have never been rejected in the past. He invited our attention to various decisions of this Court and the Apex Court. He relied upon a decision of the Division Bench of this Court in the case of Breach Candy Hospital Trust vs. Chief Commissioner of Income Tax[2]. The learned counsel for the petitioner also invited our attention to the decision of the Apex Court in the case of Queen's

1 [2003]262 ITR 459 (Bombay)
2 [2010] 322 ITR 246 (Bombay)

Educational Society vs. Commissioner of Income Tax[3]. Our attention was also invited to the decision of Delhi High Court in the case of Venu Charitable Society vs. Director General of Income Tax[4]. The learned counsel for the petitioner submitted that no change is brought about in the activities of the petitioner during the relevant year for which application is made. He submitted that when benefit was continuously extended to the petitioner for the earlier years, there was no reason not to extend the benefit for the year in which application was made. His submission is that there was absolutely no reason for the first respondent to take a different view by ignoring registration under section 12-A. He also pointed out that even assuming that the members have better facilities available, any member of public can pay membership fees and get facilities which are available to the members of the petitioner.

5 The learned counsel for the respondent supported the impugned order by submitting that the petitioner is indulging in profiteering. He invited our attention to the findings recorded by the first respondent and in particular the finding recorded in paragraph 6.4 of the impugned order.

6 We have given careful consideration to the submissions. Firstly, it will be necessary to make a reference to relevant provisions of the said Act. What is invoked in the present case is section

3 [2015] 372 ITR 699 (SC)
4 [2017] 393 ITR 57 (delhi)

10 (23C)(via). For the sake of convenience, we are reproducing relevant portion of section 10 of the said Act which reads thus:

> **"10. In computing the total income of a previous year of any person, any income falling within any of the following clauses shall not be included—**
>
> (1)...
>
> (23C) any income received by any person on behalf of—
>
> (I)..
>
> (via) **any hospital or other institution for the reception and treatment of persons suffering from illness or mental defectiveness or for the reception and treatment of persons during convalescence or of persons requiring medical attention or rehabilitation, existing solely for philanthropic purposes and not for purposes of profit**, other than those mentioned in sub-clause (iiiac) or sub-clause (iiiae) and which may be approved63 by the prescribed authority."
>
> (emphasis added)

7 Firstly, it will be necessary for us to consider the scope of clause (via) of section 10(23C). Clause (via) provides for exclusion of income. It is applicable to any hospital or other institutions for reception and treatment of persons suffering from illness or mental defectiveness or for reception and treatment of persons during

convalensce. To attract the provision, hospitals or institutions must exist solely for the philanthropic purposes and not for the purpose of profit. Therefore, for the applicability of the provision, both the conditions must exist together. Hospitals or institutions must exist solely for philanthropic purpose and not for the purpose of profit. We may note here that merely because a hospital or institution is getting profit, that by itself will not attract disqualification. It will attract disqualification if a hospital or institution exists for the purpose of gaining profit. In the light of this discussion, firstly it will be necessary to advert to the decision of the Apex Court in the case of Queen's Educational Society (supra). In this case, the Apex Court was dealing with clause (iiiad) of section 10 (23C) of the said Act. This was a case where the application made by the appellant before the Apex Court (Queen's Educational Society) for grant of exemption under section 10 (23C) (vi) of the said Act was rejected. As the name indicates, the appellant before the Apex Court was a Educational Society. The Apex Court dealt with the definition of charitable purposes. The test laid down by the Apex Court reads thus:

> **"The test which has, therefore, now to be applied is whether the predominant object of the activity involved in carrying out the object of general public utility is to subserve the charitable purpose or to earn profit. Where profit-making is the predominant object of the activity, the purpose, though an object of general public utility, would cease to be a charitable purpose. But where the predominant object of the activity is to carry out the charitable purpose and not to earn profit, it would not lose its character of a charitable purpose merely because some profit arises from the activity.** ***The***

***exclusionary clause does not require that the activity must be carried on in such a manner that it does not result in any profit. It would indeed be difficult for persons in charge of a trust or institution to so carry on the activity that the expenditure balances the income and there is no resulting profit*.** That would not only be difficult of practical realisation but would also reflect unsound principle of management. We, therefore, agree with Beg, J., when he said in *Lok Shikshana Trust case* [*Lok Shikshana Trust* v. *CIT*, (1976) 1 SCC 254 : 1976 SCC (Tax) 14 : (1975) 101 ITR 234] that: (SCC pp. 274-75, para 41)

> '*41.* ... If the profits must necessarily feed a charitable purpose, under the terms of the trust, the mere fact that the activities of the trust yield profit will not alter the charitable character of the trust. The test now is, more clearly than in the past, the genuineness of the purpose tested by the obligation created to spend the money exclusively or essentially on "charity".'

The learned Judge also added that the restrictive condition 'that the purpose should not involve the carrying on of any activity for profit would be satisfied if [**Ed.**: The matter between asterisks has been emphasised in original.] *profit-making is not the real object* [**Ed.**: The matter between asterisks has been emphasised in original.] '. We wholly endorse these observations.

18. The application of this test may be illustrated by taking a simple example. Suppose the Gandhi Peace Foundation which has been established for propagation of Gandhian thought and philosophy, which would admittedly be an object of general public utility, undertakes publication of a monthly journal for the purpose of carrying out this charitable object and charges a small price which is more than the cost of the publication and leaves a little profit, would it deprive the Gandhi Peace Foundation of its charitable character? The pricing of the monthly journal would undoubtedly be made in such a manner that it leaves some profit for the Gandhi Peace Foundation, as, indeed, would be done by any prudent and wise management, but that cannot have the effect of polluting the charitable character of the purpose, because the predominant object of the activity of publication of the monthly journal would be to carry out the charitable purpose by propagating Gandhian thought and philosophy and not to make profit or in other words, profit-making would not be the driving force behind this activity. But it is possible that in a given case the degree or extent of profit-making may be of such a nature as to reasonably lead to the inference that the real object of the activity is profit-making and not serving the charitable purpose. If, for example, in the illustration given by us, it is found that the publication of the monthly journal is carried on wholly on commercial lines and the pricing of the monthly journal is made on the same basis on which it would be made by a commercial organisation leaving a large margin of profit, it might be difficult to resist the inference that the activity of publication of the journal is carried on *for* [From the Judgment and Order dated 24-9-2007 of the High Court of Uttarakhand at Nainital in Income Tax Appeal No. 103 of 2007] profit and the purpose is non-charitable. We may take by way of illustration another example given by Krishna Iyer, J., in *Indian Chamber of Commerce case* [*Indian Chamber of Commerce* v. *CIT*, (1976) 1 SCC 324 : 1976 SCC (Tax) 41 : (1975) 101 ITR 796] where a blood bank collects blood on payment and supplies blood for a higher price on commercial basis. Undoubtedly, in such a case, the blood bank would be serving an object of general public utility but since it advances the charitable object by sale of blood as an activity carried on with the object of making profit, it would be difficult to call its purpose charitable. Ordinarily there should be no difficulty in determining whether the predominant object of an activity is advancement of a charitable purpose or profit-making. But cases are bound to arise in practice which may be on the borderline and in such cases the solution of the problem whether the purpose is charitable or not may involve much refinement and present real difficulty.

19. There is, however, one comment which is necessary to be made whilst we are on this point and that arises out of certain observations made by this Court in *Lok Shikshana Trust case* [*Lok Shikshana Trust* v. *CIT*, (1976) 1 SCC 254 : 1976 SCC (Tax) 14 : (1975) 101 ITR 234] as well as *Indian Chamber of Commerce* *case* [*Indian Chamber of Commerce* v. *CIT*, (1976) 1 SCC 324 : 1976 SCC (Tax) 41 : (1975) 101 ITR 796] . It was said by Khanna, J. in *Lok Shikshana Trust case* [*Lok Shikshana Trust* v. *CIT*, (1976) 1 SCC 254 : 1976 SCC (Tax) 14 : (1975) 101 ITR 234] : (SCC p. 264, para 9)

'[I]f the activity of a trust consists of carrying on of a business and there are no restrictions on its making profit, the court would be well justified in assuming in the absence of some indication to the contrary that the object of the trust involves the carrying on of an activity for profit.'

And to the same effect, observed Krishna Iyer, J. in *Indian Chamber of Commerce case* [*Indian Chamber of Commerce* v. *CIT*, (1976) 1 SCC 324 : 1976 SCC (Tax) 41 : (1975) 101 ITR 796] when he said: (SCC pp. 332 & 335, paras 14 & 23)

'*14.* … An undertaking by a business organisation is ordinarily assumed to be for profit unless expressly or by necessary implication or by eloquent surrounding circumstances the making of profit stands loudly negatived.

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23. … A pragmatic condition, written or unwritten, proved by a prescription of profits or by long years of invariable practice or spelt from [some] strong surrounding circumstances indicative of anti-profit motivation — such a condition will qualify for "charitable purpose".'

Now we entirely agree with the learned Judges who decided these two cases that **activity involved in carrying out the charitable purpose must not be motivated by a profit objective but it must be undertaken for the purpose of advancement or carrying out of the charitable purpose. But we find it difficult to accept their thesis that whenever an activity is carried on which yields profit, the inference must necessarily be drawn, in the absence of some indication to the contrary, that the activity is *for* [From the Judgment and Order dated 24-9-2007 of the High Court of Uttarakhand at Nainital in Income Tax Appeal No. 103 of 2007] profit and the charitable purpose involves the carrying on of an activity for profit. We do not think the Court would be justified in drawing any such inference merely because the activity results in profit. It is in our opinion not at all necessary that there must be a provision in the constitution of the trust or institution that the activity shall be carried on no profit no loss basis or that profit shall be proscribed. Even if there is no such express provision, the nature of the charitable purpose, the manner in which the activity for advancing the charitable purpose is being carried on and the surrounding circumstances may clearly indicate that the activity is not propelled by a dominant profit motive. What is necessary to be considered is whether having regard to all the facts and circumstances of the case, the dominant object of the activity is profit-making or carrying out a charitable purpose. If it is the former, the purpose would not be a charitable purpose, but, if it is the latter, the charitable character of the purpose would not be lost.(emphasis supplied)"**

8 The test which has been applied is whether the predominant object of the activity involved in carrying out the object of general public utility is to subserve the charitable purpose or to earn profit. Where profit-making is the predominant object of the activity, though the purpose is an object of general public utility, it would cease to be a charitable purpose. But where the predominant object of the activity is to carry out the

charitable purpose and not to earn profit, it would not lose its character of existing for a charitable purpose merely because some profit is earned. As noted earlier, the Apex Court has given an example of Gandhi Peace Foundation. After considering entire gamut of law, the position of law is summed up by the Apex Court which read thus:

> "11 Thus, the law common to section 10(23C) (iiiad) and(vi) may be summed up as follows:
>
> (1) Where an educational institution carried on the activity of education primarily for educating persons, the fact that it makes a surplus does not lead to the conclusion that it ceases to exist solely for educational purposes and becomes an institution for the purpose of making profit.
>
> (2) <u>The predominant object test must be applied – the purpose of education should not be submerged by a profit-making motive</u>.
>
> (3) <u>A distinction must be drawn between the making of a surplus and an institution being carried on "for profit". No inference arises that merely because imparting education results in making a profit, it becomes an activity for profit</u>.
>
> (4) If after meeting expenditure, a surplus arises incidentally from the activity carried on by the educational institution, it will not be cease to be one existing solely for educational purposes.

> (5) The ultimate test is whether on an overall view of the matter in the concerned assessment year the object is to make profit as opposed to educating persons.”
>
> (emphasis added)

9 Thus, the emphasis laid by the Apex Court was on the application of predominent object test. The distinction has to be drawn between the institutions working 'for profit' and the institutions incidentally earning profit while carrying on an activity which is predominantly charitable.

10 Reliance was also placed on the decision of this Court in the case of Breach Candy Trust vs. Chief Commissioner of Income Tax (supra). This was also a case where an application was made by a the hospital for grant of exemption under section 10 (23C) of said Act for the assessment year 2003-2004 and 2002-2003. Various contentions were raised including the contention that there is a surplus generated by the assessee. The issue was whether it could be said that the assessee was not running the hospital for philanthropic purpose but for the purpose of profit. The issue was of applicability of section 10(23C) to the assessee. A Division bench of this Court held thus:

> **“5. As regards the second ground of the free or concessional treatment given by the petitioner to its own employees, it cannot be said that it is not philanthropy at all. Philanthropy is not restricted to give free treatment only to the extremely poor, but it would also be philanthropy to give treatment at a concessional rate to those who though not extremely poor**

> **cannot afford to pay the full and normal charges.** There was nothing on record to show that the staff members to whom the concessional treatment was provided were the affording lot not deserving any concession. In any event, that aspect has not been considered by respondent No. 1 at all.
>
> **6.** As regards the third ground mentioned in the order, it was the duty of the petitioner to pay not only the salary to the staff but to make contributions to the provident fund. It is a statutory obligation under the Employees' Provident Funds Act. On account of unfortunate event of the broker to whom money was paid for investments for the employees provident fund, the employees could not suffer. The petitioner and its directors/trustees could have been prosecuted and sued for non-payment of the provident fund contributions which was their statutory duty. In our view, this was wholly irrelevant for considering whether the petitioner was or was not established solely for philanthropic purpose.
>
> **7.** As regards the last ground regarding the fees received for medical examination of applicants for USA visa, undoubtedly there has been a surplus for seven out of nine years while there was a loss in the remaining two years. But it may be difficult to appropriate every receipt for every activity and medical treatment provided by the petitioner. **There may be some surplus in some areas and deficit in other areas. Cross subsidization is not unknown. Even in state function, cross subsidies are provided for. The hospital under the petitioner is one unit run at one place and it is not the case of the respondent there are multiple units and one unit is subsidizing the other. In the same unit, payment is collected for different services rendered which may result in some cross subsidy. Ultimately, the entire receipts are used for treatment of the patients and medical care. In the absence of any material to show that generally there was a profit, it cannot be said that the petitioner does not exist solely for the philanthropic purpose but exists for the purpose of profit."**

(emphasis added)

11 Before we deal with the other decisions, it will be necessary to come back to the factual aspects of the case. After having perused the impugned order, broadly there are 4 to 5 grounds on the basis of which the prayer made by the petitioner has been rejected. One ground is that the Bye-Laws provide for payment of certain amount to non-members on account of rendering services. The Bye-Laws also

allow payment of bonus to the employees of the petitioner. The other ground with which the first respondent was impressed is that the petitioner was having surplus during last 2 to 3 years. It was also found that in the Bye-Laws, certain objects have been incorporated regarding non-medical relief. One more ground taken against the petitioner was that there is no provision made for making available beds for indigent patients or patients belonging to economically weaker sections. Lastly, it was observed that in relation to large number of rooms in the hospital run by the petitioner, the consultants are entitled to charge any amount by way of fees at their discretion and there is no cap to the fees.

12 The learned counsel appearing for the petitioner relied upon a decision of Kerala High Court in the case of ***Commissioner of Income Tax v/s. Pulikkal Medical Foundation (P.) Ltd.***[5] The Division Bench of Kerala High Court dealt with the earlier provision of section 10 (22A) of the Act which is similar to the provision with which we are dealing with. Clause (22A) of Section 10 provided that any income of a hospital or other institution for the reception and treatment of persons suffering from illness or mental defectiveness or for the reception and treatment of persons during convalescence or of persons requiring medical attention or rehabilitation, existing solely for philanthropic purposes and not for the purposes of profit, is not

5 *(1994) 210 ITR 299*

to be included in the total income. In the context of the said provision, the Division Bench of the Kerala High Court considered the meaning of the words “philanthropic purposes”. Paragraph 16 of the said decision reads thus:-

> *“16. Now, we may advert to the meaning of the words "philanthropic purposes". Black's Law Dictionary, sixth edition--"charitable" :*
>
> > *"The word 'charitable', in a legal sense includes every gift for a general public use, to be applied consistent with existing laws, for benefit of an indefinite number of persons, and designed to benefit them from an educational, religious, moral, physical or social standpoint. This term is synonymous with 'beneficent', 'benevolent', and 'eleemosynary'."*
>
> *Ramanatha Aiyar's Law Lexicon, 1987 edition, explains the meaning of the word 'philanthropic' as follows :*
>
> > *". . . an act cannot be said to be philanthropic unless it indicates goodwill to mankind at large. Still, it seems to me that 'philanthropic' is wide enough to comprise purposes not technically charitable. (Stroud 1479)".*
>
> *This meaning is taken from the judgment of Dyitling J. Macduff, In re 1896, 2 Ch 451.*
>
> *Shorter Oxford English Dictionary, 3rd edition, "philanthropic" :*
>
> > *"Characterized by philanthropy ; benevolent, humane."*
>
> *Law Lexicon Cum Digest, Vol. III, by N.M. Mulchandani, "Philanthropic purpose" ;*
>
> > *"It is not always necessary that a 'philanthropic use' must be such as may be beneficial to the humanity at large but it could be limited to the welfare or benefit of fellow human beings belonging to a well defined class or community, who are joined together by common bonds of religion, race, social, or economic unity. After all, the purpose which is beneficial to a section of the public, is in the larger context beneficial to the human society,*

> *but an act solely for the benefit of a few individuals or group of persons would not fall within the purview of charitable or philanthropic use."*
>
> *Chambers' Dictionary:*
>
> *"Philanthropy - love of mankind esp. as shown in services to general welfare.*
>
> *'Philanthropic' - doing good to others, benevolent."*
>
> *Thus, on an understanding of the meaning of the words "philanthropic purposes", it is clear that the establishment and running of a hospital by the assessee is a philanthropic purpose. However, the main question is whether the hospital exists solely for philanthropic purposes and not for purposes of profit."*
>
> *(underline supplied)*

13 Thereafter, in paragraph 18, the Division Bench referred to a decision of Delhi High Court by quoting the same with the approval what is held by the Division Bench is that merely because the assessee is running a hospital on commercial lines, it will not be disentitled to the exemption under Section 10(22A). It was held that the dominant purpose is a philanthropic one and merely because the Managing Director or the Director getting some advantages while running the institution, it will not be a ground to hold that the purpose of the institution is not philanthropic. It was held that the benefits which are extended to the Managing Director or the Director would be merely incidental to carrying out of the main or primary purpose and so, such benefits would not militate against the philanthropic of character of the institution. Even on the aspect of earning profit, it was held that the philanthropic purpose does not cease to exist so

long as profit is being redeployed in the same institution or any other similar institution. Ultimately, in paragraph 28 it was held thus:-

> "28. Thus our main conclusions are as follows :
>
> *In case a hospital exists solely for philanthropic purposes, even if incidentally profit is earned, the hospital is entitled to the benefit under Section 10(22A) of the Act. In order to achieve the main philanthropic objects, the hospital may do some profit earning business provided such profit is appropriated towards the expansion and development of the hospital or to start another institution with the same philanthropic objectives. The real test to be applied is what is the dominant or primary purpose of the institution. If the primary purpose is philanthropic, the inclusion of some objects for earning profits for the implementation of the primary object would not alter the character of that primary object. In other words, this will not be a ground for holding that the hospital is not existing solely for philanthropic purposes. All cumulative factors will have to be taken into consideration in order to decide whether the institution exists for philanthropic purposes and not for purposes of profit. Neither the fortuitous factor of having a large surplus in any particular year, nor the fact of diverting some income to objects which are not philanthropic in itself would be decisive of the matter."*
>
> (underline supplied)

14 The main judgment was delivered by John Mathew,J. and there is a concurring judgment by Narayana Kurup,J. In paragraph 34 of his judgment, Kurup,J. observed that though the expression philanthropy is of a popular usage, its legal connotation is not properly understood. In the said decision, the learned Judge also considered the question whether it is synonymous with the word "charity" or is it something different from "charity"? The learned Judge proceeded to observe

that the said Act refers to charity as well as philanthropy and, therefore, a different meanings will have to be assigned to the word philanthropy.

15 In the impugned order, the first respondent appears to have been impressed by what is provided in the Bye-laws of the petitioner. Bye-laws provide for payment of honoraria to the persons who are not members. The activity undertaken by the petitioner is of running a hospital. The object of the petitioner is to provide the citizens better facilities for medical help at a reasonable charge by providing a decent hospital, dispensaries and other up-to-date scientific medical and surgical amenities. Another object is to provide members and their families medical facilities for prevention, diagnosis and treatment of disease at concessional charges. One more important object is to render medical aid to the needy and poor free of charge or at subsidised charges. If the object is to set up a decent hospital for providing medical facilities and medical help at a reasonable charge and for providing medical facilities to needy and poor free of charge or at subsidised rates, it is necessary for the petitioner to engage a trained staff and medical practitioners. For achieving the aforesaid objects, the professional or other persons who render services have to be paid honourariam. Bye-Law 46 provides that no part of the funds, of society shall be paid by way of bonus or dividend or otherwise distributed to the members. Though the petitioner society is registered under the said Act

of 1960, none of the members are entitled to dividend or distribution of profit in any form. This is one factor which ought to have been considered in favour of the petitioner. The first respondent was impressed by the petitioner pays bonus to its staff members. Apart from the contention of the petitioner that the bonus will be a part of wages or salary, the staff and other members as well as medical practitioners are not expected to work with the petitioner on charitable basis if a decent hospital is to be maintained and good facilities are to be provided to the patients. There is nothing wrong, if bonus is paid to the members of the staff. This aspect has been dealt with to some extent in the case of Breach Candy Hospital Trust (supra). The Division Bench considered this aspect in the context of contribution being made by the Breach Candy Hospital Trust to the provident fund of the members of the staff.

16 Relying upon the decision of Uttarakhand High Court in the case of ***CIT v/s. Queens Educational Society,*** the first respondent observed the fact that the petitioner is having surplus during last 2-3 years as factor against the petitioner. Apart from the fact that the correctness of the view taken by the said High Court is not accepted by this Court in

the case of ***Vanita Vishram Trust v/s. Chief***

Commissioner of Income Tax and another[6], considering the nature of the activity undertaken by the petitioner society, unless, some surplus is created, it will be difficult for the petitioner to maintain the medical facilities and to update the medical facilities. It is not the case of the first respondent that the surplus which is generated was diverted to any non-charitable activity. As observed earlier, the test will be for what purpose the surplus or the profits earned are being applied. Therefore, the said ground taken by the first respondent has no relevance at all in the facts of the case. It is true that there are various objects enumerated under clause (3) of the Bye-Laws of the petitioner. One of the objects is to establish, manage, continue, administer, maintain and conduct hospital which is named in sub-clause (c). The other object in sub-clause(d) is to purchase, take on lease or in exchange, hire or otherwise acquire any other property and in particular medical, surgical and all other allied plants, vehicles, etc. One clause provides for sale, lease, mortgage or disposal of the property. These two clauses are not the objects of the petitioner. The same are the powers of the petitioner. The relevant issue which was to be decided was; whether the petitioner is existing solely for philanthropic purposes and not for the purposes of profit. Clause (3) of the Bye-Laws enable the society to do several things. Merely because clause (3) enables the society to do several things, it will not militate against the

6 ***327 ITR 121***

existing status of the petitioner. We have already made a reference to a decision of the Division Bench of this Court in a case of Deccan Gymkhana wherein the Division Bench was considering the question whether the assesee Club was a charitable institution. In paragraphs 10 and 11 of the said decision, the Division Bench held thus:-

> *"10. As stated above, we are confining our judgment to the facts of this case, Section 2(15), as it stood at the relevant time, defines the words "charitable purpose" to include relief of the poor, education, medical relief and advancement of any other object of general public utility, not involving carrying on of any activity for profit. In the case of Thiagarajar Charities v. Addl. CIT (1997) 225 ITR 1010 (SC), it has been held that the correct test to be applied was whether the predominant object of the activity was to subserve the charitable purpose or to earn profit. Where profit-making was the predominant object of the activity, the purpose would cease to be charitable purpose. But, where the predominant object of the activity was to carry out the charitable purpose and not to earn profit, it would not lose the character of charitable purpose merely because some profit arises from the activity. <u>In that judgment, it has been further laid down that there is a difference between the objects of the trust and the power of the trustees</u>. In that matter, the Supreme Court had to construe two clauses in the constitution of the trust. In that matter, under clause 1(g) the words were as follows:-*
>
> *"To engage in and assist and promote rural reconstruction work, cottage industry and all other matters*

incidental thereto.

The other clause in the trust deed was clause 7(a) which reads as follows:-

"7(e) To invest in any business undertaking of whatever nature."

It was held by the Supreme Court that the above clause 1(g) was an object clause, whereas clause 7(e), referred to above, indicated the power of the trustees to invest in business. That, the predominant object was in clause 1(g). In the circumstances, it was held by the Supreme Court, applying the above test, that clause 1(g) came within the ambit of the words "relief of the poor, education and medical relief" under Section 2(15) of the IT Act, and not to earn profit and in the circumstances, the fourth limb of Section 2(15) stood excluded. According to us, the judgment of the Supreme Court squarely applies to the facts of our case.

11. Basically, one has to read the objects under the constitution in the light of the facts of the case. In this case also, as stated hereinabove, we have to keep in mind, the historical perspective behind the establishment of the institution and if one keeps the historical background in mind, then it is clear that sub-clauses A to E constituted the object whereas clauses F, G and H gave power to the trustee to plan a colony for the members so that those members could take part in the promotion of sports, gymnastics and sportsmanship. The colony was set up only 1923. Once the locality developed, the assessee has not put up any further colonies. In 1993, clause G has been deleted. Therefore, keeping in mind the peculiar historical facts of this case, we *are of the view that the majority view of the Tribunal was erroneous; that they erred in construing clause 3G as an object of the trust. We hold that there was no profit motive involved in this case vide the said clause and therefore, the assessee had fulfilled the requirement of Section 2(15) of IT Act and consequently, they were entitled to exemption under Section 11 for the assessment years 1973-74, 1974-75, 1976-77 upto 1979-80."*

(underline supplied)

Therefore, the ground taken by the first respondent based on the objects specified in the clause (3) of the Bye-Laws has no relevance at all.

17 There is one more adverse finding which is recorded against the petitioner. The said adverse finding is that there is no system prevailing of reserving beds for poor or indigent patients. The issue to be addressed was whether the petitioner is providing medical treatment or facilities at nominal charge or free of any charge to a patient belonging to economically weaker section visiting the hospital. Therefore, the test applied of keeping specific number of beds reserved for economically weaker section of the society is not correct at all. Another aspect which is considered by the first respondent is that the amounts spent by patients belonging to economically weaker societies was on an average only 0.93% of the total receipts for the last 4 years. In our view, this by itself is not sufficient to hold that the character of activities carried out by the petitioner indicates that thte

object was to earn profit. In fact it was necessary for the first respondent to look into the entire record for ascertaining the income received by the petitioner from the beds/rooms provided in the hospital. It was necessary for the first respondent to have ascertained as to how many patients, treatment was rendered either free of cost or at a concessional rate. One of the factors which ought to have to be considered is as to how many non-members were given treatment at a concessional rate.

18 The learned counsel appearing for the petitioner submitted that any non-member before taking treatment from the hospital is entitled to become a member. If there are cases where such non-members have become members and have received treatment at a concessional rate, it will be a factor to be considered in favour of the petitioner. Merely going by percentage of receipts spent on giving medical treatment to economically weaker section patients may not be a full proof test. On this aspect, we find that the petitioner has not produced relevant details before the first respondent. It is true that it was the duty of the petitioner to produce the details. However, it appears that virtually it is an admitted position that till the year for which the application was made, the petitioner was granted benefit of exemption. On this aspect, the case of the petitioner needs reconsideration at the hands of the first respondent.

19 Lastly, one factor which is considered against the petitioner is on the basis of letter dated 16th March, 2011 submitted by the petitioner to the Income Tax Officer. In paragraph 2 of the said letter, the petitioner has stated thus:-

> *"The hospital has provided small cabins with patient examination tables in the out patients department for consultants. The hospital has got control over the fees charged to the patients. Consultation fees and visits fees charged to patients are fixed by the hospital. Procedure Charges and Surgery Charges are negotiable to non-member patients admitted in Room Category only. These fees are collected by hospital and payable to doctors after deducting affiliation charges @ 10% p.m. through ECS. Negotiable fees are paid in the subsequent month and non-negotiable fees are paid after 3 months. Fees for the patients referred by institutions are paid in subsequent month from the date of collection from Institutions."*

20 Perhaps, the details such as number of patients including non-member patients admitted in the category of said rooms, the amounts charged to them by the doctors and the amounts received by the petitioner were not placed on record by the petitioner. Relying upon this statement, in paragraph 6.4, the first respondent has recorded the following finding:-

> *"From the details filed it is found that the total number of beds available in the hospital in the general ward is 55, neo nata 4,*

pediatric 4 and ICU 17. However, as submitted, there is no system of reserving beds for the indigent/economically weaker patients. There are 56 beds in different rooms, wherein the higher class of patients can get admitted. Although the hospital exercises control over the fees for patients in the ward, as mentioned above, there is no control whatsoever over patients referred by consulting doctors or patients who get admitted to rooms and the same is negotiable between the patient and the doctor. The same is the case in respect of surgeon fees also. The hospital has no control over such fees charged by the doctors. There is no cap prescribed by the hospital over the fees charged by the doctors. It is also an admitted fact that a percentage of fees is retained by the hospital from the doctors as affiliation charges. Where patients are compelled to negotiate with the doctors independently and the doctors are free to charge any amount as fees on which the hospital has no control and rather a percentage of such fees is received back by the hospital the trust cannot be said to be existing solely for the philanthropic purposes in a scenario where profits are systematic and continuous."

21 Firstly, we may note it is not the case of the petitioner that the room charges or bed charges are negotiable. What is set out by the petitioner in the said letter is that in case of non-member patients admitted to rooms, the consultants or doctors are permitted to negotiate with the patients for fixing the procedure/surgery charges. In paragraph 2 of the letter, the specific case of the petitioner was that liberty is granted to the

doctors to negotiate with the patients for fixing the procedure charges and surgery charges and not in respect of room charges. In fact 10% of the negotiated charges are taken by the petitioner. The negotiated amount of fees is collected by the petitioner. After deducting 10% affiliation charges, remaining amount is sent to the doctors through ECS. If in a particular year, very large number of such patients are treated, it is a different matter. If in a given year, only few such cases are entertained by the petitioner, it will not militate against the character of the activities of the petitioner. On this aspect neither the petitioner has placed details on record nor the first respondent called upon the petitioner to produce the details.

22 Therefore, in our view, all grounds which are held against the petitioner, except the two grounds held against the petitioner set out in paragraphs 17 to 22 above, have no basis and on those grounds, the claim of the petitioner could not have been rejected. However, on the two grounds set out in paragraphs 18 to 22 above, the case will have to be remitted to the first respondent for reconsideration with liberty to the petitioner to produce all the material before the first respondent as indicated in the body of the judgment.

23 Therefore, the petition must succeed in part and we pass the following order:-

(i) The impugned order dated 30th March, 2011 is quashed and set aside and the petitioner's application is remitted for fresh consideration to the first respondent confined to the aspects/findings referred in paragraphs 17 to 22 above;

(ii) It will be open for the petitioner to produce records/additional materials/ additional documents before the first respondent within a period of one month from the date of judgment and order be uploaded;

(iii) After considering the additional material and after giving an opportunity of being heard to the petitioner, the first respondent shall pass a fresh order within a period of 4 months from the date on which this order is uploaded;

(iv) All contentions of the parties on merits are kept open to the above extent;

(v) Rule is made absolute on above terms.

(vi) All concerned to act upon an authenticated copy of the judgment.

(A.K.MENON,J.) (A.S.OKA,J.)