

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved On	31.03.2021
Pronounced On	16.06.2021

CORAM

THE HONOURABLE MR.JUSTICE C.SARAVANAN

W.P. No. 11828 of 2014

and

M.P.No. 1 of 2014

Bosco Educational Academy Pvt. Ltd.,
New No.174, Old No.383,
Madhavaram High Road,
Madhavaram, Chennai - 600 060. Petitioner

Vs

- 1.The Chief Commissioner of Income Tax-III,
The Income Tax Department,
121, Mahatma Gandhi Road,
Chennai - 600 034.
- 2.The Director of Income Tax (Exemptions),
The Income Tax Department,
121, Mahatma Gandhi Road,
Chennai - 600 034.
- 3.The Deputy Director of Income Tax (Exemptions) III,
The Income Tax Department,
121, Mahatma Gandhi Road,
Chennai - 600 034. ... Respondents

Prayer: Petition filed under Article 226 of the Constitution of India to issue a Writ of Certiorarified Mandamus, to call for the records of the petitioner on the file of the first respondent to quash the impugned order dated 31.12.2013 issued in C.No.CCIT III/10(23C)/13-14 in refusing/rejecting the plea for recognition sought for in terms of Section 10 (23C)(vi) of the Income Tax Act, 1961 from the assessment year 2010-11 and consequently direct the second respondent to grant such recognition as prayed for.

For Petitioner : Mr.S.Sridhar
For Respondents : Ms.Hema Muralikrishnan
Senior Standing Counsel

ORDER

The petitioner has challenged the impugned order dated 31.12.2013 passed by the 1st respondent/Chief Commissioner of Income Tax III, Chennai -34.

2. By the impugned order, the 1st respondent has rejected the application filed by the petitioner on 16.09.2010 before the Chief Commissioner of Income Tax I, claiming approval for the purpose of Section 10 (23C)(vi) of the Income Tax Act, 1961. The application was filed before the Chief Commissioner of Income Tax-I, Chennai, on the strength of Notification No.S.O.852 (E) dated 30.05.2007.

3. The petitioner claims that it was under a bonafide impression that the application was to be filed in terms of Clause 8 of the said notification as Clause 3 to Notification No.S.O.852 (E) dated 30.05.2007 applied only to Charitable Institutions. The application was eventually transferred to the 1st respondent/Chief Commissioner of Income Tax-III, Chennai pursuant to which a Show Cause Notice dated 20.12.2013 was issued to the petitioner. The aforesaid Show Cause Notice called upon the petitioner to show cause as to why the application filed by the petitioner should not be rejected for the following five reasons:-

"Whereas during the course of consideration of your application seeking exemption u/s 10 (23C)(vi) of the Income-tax Act, 1961, for the year 31.03.2010, filed in Form No.56 D on 16.9.2010 before the Commissioner of Income tax-I, Chennai and transferred and received in the office of Director of Income tax(Exemptions) Chennai on 21.12.2012, as well as the report dated 18.12.2013 of Director of Income tax(Exemptions) Chennai, you are required to show cause as to why the application may not be rejected for the following reasons:

1. The application in form No.56D was not filed on 16.09.2010 before the prescribed authority Chief Commissioner of Income tax-III, Chennai through the Director of Income tax(Exemptions) Chennai;

2. A perusal of the objects clause (including main objects, objects incidental or ancillary to the attainment of the main objects and other objects) shows that the institution is not existing solely for educational purposes

and not for purposes of profit.

3. The institution cannot be said to be existing not for purposes of profit since the clauses 55 and 56 of the Memorandum of Association provide that in case of winding up, the excess shall be distributed among the members in proportion to the capital paid up on the equity shares held by them.

4. On a perusal of annual accounts for the financial years 2009-10 and 2010-11, it was noticed by the Deputy Director of Income tax (Exemptions)-III, Chennai that the institution has advanced an amount of Rs.70,43,005/- as building advance for accommodating trustees and therefore, the investment or deposit of the funds of the institution is not in accordance with the third proviso to section 10(23C).

5. It was noticed by the Deputy Director of Income tax(Exemptions)-III, Chennai that there was a fall in gross receipts of the institution from Rs.1,17,90,705/- in A.Y 2010-11 to Rs.86,10,083/- in A.Y 2011-12 even though the student strength had increased and for A.Y 2011-12, differences were noticed in the fees charges

as per computation of gross fees received and fee receipts submitted and the institution failed to explain the same.

2. In view of the above discussion you are requested to file your reply for this show cause notice either by written representation or in person/by the authorized representative for which purpose an opportunity is given by way of hearing on 27.12.2013(Friday) at 11.30 a.m at Room No.316, 3rd Floor, Aayakar Bhavan (Main Building), Mahatma Gandhi Road, Nungambakkam, Chennai - 600034."

4. The petitioner replied to the above Show Cause Notice which has culminated in the impugned order dated 31.12.2013.

<https://hcservices.ecourts.gov.in/hcservices/> in the impugned order, the 1st respondent/Chief Commissioner of

Income Tax-III, Chennai has accepted the reply of the petitioner insofar as the reasons stated at Sl.Nos.4 & 5 are concerned. The impugned order passed by the 1st respondent is now sought to be assailed by the petitioner on the following ground and case laws.

5. As far as the first reason stated in the Show Cause Notice that application was not filed on 16.09.2010 before the prescribed authority within the meaning of Notification No.S.O.852 (E) dated 30.05.2007 is concerned, it is submitted that the application was based on the understanding of the aforesaid notification and therefore there is no justification in not considering the application in time by the authorities under the Act.

6. It is submitted by the learned counsel for the petitioner that even if the application had been wrongly filed, it was an internal issue to be sorted out by either calling upon the petitioner to re-present the application before the appropriate authority or in the alternative to transfer it to the jurisdictional officer for disposing the application filed by the petitioner on 16.09.2010. However, the respondents took three precious years to transfer application only to issue Show Cause Notice on 20.12.2013.

7. It is further submitted that the application was filed as early as 16.09.2010 and therefore it was incumbent on the part of the Department to have transferred the file to the jurisdictional office of the 1st respondent even if the petitioner had wrongly filed the same before the Chief Commissioner of Income Tax I, Chennai under a bona fide belief that the application was to be filed as per clause (viii) of Notification No.S.O.852(E) [No. 196/2007 (F No. 153/41/2007-TPL) dated 30.05.2007. Therefore, legitimate benefits available to an assessee cannot be denied merely because the respondents took their own sweet will and time to adjudicate the claim of the petitioner.

8. As far as the merits of the case is concerned, it is submitted that exemption under Section 10 (23 C) (vi) of the Income Tax Act, 1961, falls within chapter III of the said Act which is titled as "Income Which Do Not Form Part of Total Income". It is therefore submitted that under section 10, while computing the "total income" as defined in Section 2 (40) of the Income Tax Act, 1961, certain categories of "income" as defined in section 2 (24) of a "person" as defined in section 2 (3) of the Income Tax Act, 1961 cannot be included. It is submitted that the petitioner was engaged only in providing educational service and was not engaged generally in making profit, even if the Memorandum of Association contains several clauses which may allow an it to engage in business to make profit, the benefit cannot be denied. While computing the total income of the previous year

of any person, certain categories of incomes have been excluded for the purpose by way of grant of relief under section 10 of the Income Tax Act, 1961.

9. It is submitted that in terms of Section 10(23C) (vi) of the Income Tax Act, 1961, if there is a failure on the part of the respondents to dispose the application within a period of one year, there is a Deemed approval and therefore the petitioner is entitled for such approval for a period of three years as per the provision as it stood then. It is submitted that as per the amendment to Section 10(23C) (vi) of the Income Tax Act, 1961, once an approval is granted, the approval is to operate in perpetuity and unless circumstances warranting the cancellation of approval arise, it cannot be disturbed. In this connection, a reference is made to the decision of the Allahabad High Court in Society for the Promotion of Education, Allahabad Vs Commissioner of Income-tax, Central, Kanpur, 372 ITR 222, wherein, the Court revised the concept of deemed registration.

10. It is submitted that though the said decision of the Allahabad High Court in Society for the Promotion of Education, Allahabad

(Referred to supra) was questioned and a reference was made to the Division Bench of the Allahabad High Court by an order dated 05.08.2013 and the Full Bench of the Allahabad High Court has answered the issue against the assessee by its order in Commissioner of Income-tax Vs Muzafar Nagar Development Authority, 372 ITR 209 on 05.02.2015, the decision of the Division Bench of the Allahabad High Court rendered on 03.04.2008 in Society for the Promotion of Education, Allahabad Vs Commissioner of Income-tax, Central, Kanpur, 372 ITR 222 was upheld by the Hon'ble Supreme Court in Commissioner of Income-tax, Kanpur Vs Society for Promotion of Education, Allahabad by its order dated 16.02.2016, 382 ITR 6.

11. The learned counsel for the petitioner further submits that the Karnataka High Court in Director of Income-tax (Exemptions) Vs ST. Ann's Education Society, 425 ITR 642 and Kerala High Court in Commissioner of Income-tax, Cochin Vs TBI Education Trust, 96 Taxmann.Com 356 have also discussed the implication of the above development and has granted relief to the institutions and therefore it is submitted that the petitioner is entitled to deemed approval in terms of Section 10(23C) (vi) of the Income Tax Act, 1961.

12. As far the issue No.2 is concerned, the learned counsel for the petitioner relied on the following decisions:-

" (i) Queen's Educational Society Vs
Commissioner of Income-tax, 372 ITR 699
SC.

(ii) Pinegrove International Charitable Trust Vs Union of India, 327 ITR 73.

(iii) Tolani Education Society Vs Deputy Director of Income-tax (Exemptions)-I(2), Mumbai, 351 ITR 184.

(iv) Hindustan Engineering Training Centre Vs CCIT in W.P.Nos.9510 & 9511 of 2011.

(v) Tamil Nadu Kalvi Kapu Arakkattalai Vs CCIT in W.P.No.4320 of 2011.

(vi) Tamil Nadu Kalvi Kapu Arakkattalai Vs CCIT in W.A.No.18 of 2015.

(vii) Allahabad Young Mens Christian Association Vs Chief Commissioner of Income-tax, 371 ITR 23.

(viii) New Noble Educational Society Vs Chief Commissioner of Income-tax, 334 ITR 303.

(ix) C.P.Vidya Niketan Inter College Shikshan Society Vs Union of India, 359 ITR 322.

(x) Geetanjali Education Society Vs Assistant Director of Income-tax, (Exemptions), [2014] 45 Taxmann.com 206.

(xi) Neeraj Janhitkari Gramin Sewa Sansthan Vs Chief Commissioner of Income-tax, 360 ITR 168.

(xii) Maa Saraswati Educational Trust Vs Union of India, 353 ITR 312.

(xiii) Vanita Vishram Trust Vs Chief Commissioner of Income-tax, 327 ITR 121.

(xiv) Commissioner of Income-tax Vs A.M.M.Arunachalam Educational Society, 243 ITR 229.

(xv) Commissioner of Income-Tax Vs Vidya Vikas Vihar, 265 ITR 489.

(xvi) Digember Jain Society for Child Welfare Vs Director General of Income-tax (Exemptions), 329 ITR 459."

13. The learned counsel for the petitioner submitted that the approval cannot be rejected merely on the ground of certain clause from the Memorandum of Articles of Association. He submits that the approval only can be denied if any activity carried out by an educational institutions was contrary to Section 10 (23C)(vi) of the Income Tax Act, 1961. It has to be examined by the Assessing Officer only while scrutinizing the returns whether the approval has to be continued or rejected and therefore prays for allowing the writ petition.

14. The learned counsel for the petitioner further submitted that the object clause in the Memorandum of Association by itself will not determine whether the Educational Institutions is entitled or dis-entitled for

approval under the aforesaid provision of the Income Tax Act, 1961. It is further submitted that surplus generated by educational institutions like the petitioner was only incidental and such surplus cannot be construed as profit.

15. It is further submitted that clause 51 & 52 of the Articles of Association of the petitioner's company clearly prohibited the petitioner's company from distributing surplus generated in any year by way of dividend or bonus shares implying surplus generated by the educational institutions was to be only ploughed back for educational purpose and therefore the petitioner was entitled to approval under the aforesaid provisions.

16. As far as the 3rd objection in the Show Cause Notice dated 20.12.2013 is concerned, it is submitted that the petitioner cannot be said to be existing for education purpose of making profit based on clause 55 & 56 of the Memorandum of Association. It is submitted that the petitioner has given an undertaking before the 1st respondent that both the clauses would be amended and therefore the presence of such clauses need not be considered to draw an inference that the petitioner existed to make profit as there is not a single instance of any diversion of the fund for any other business.

17. On facts it is submitted that even if the Memorandum of Association of the company deals with any other business activity for profit, exemption to an educational institution established for educational purpose cannot be denied in absence of profit and it has to be proved.

18. It is further submitted that under Section 10 (23 C) (vi) of the Income Tax Act, 1961, any income generated by a University or other educational institutions existing solely for educational purposes and not for purposes of profit, other than those mentioned in sub-clause (iii ab) or sub-clause (iii ad) is to be proved by the prescribed authority.

19. Countering the arguments advanced by the learned counsel for the petitioner, the learned senior standing counsel for the respondents submits that the decision of the Society for the Promotion of Education, Allahabad Vs Commissioner of Income-tax, Central, Kanpur, 372 ITR 222 had been impliedly overruled after the Full Bench of the Allahabad High Court which took a difference view on 05.02.2015 pursuant to a reference made on 05.08.2013 in Commissioner of Income-tax Vs Muzafar Nagar Development Authority, 372 ITR 209 and therefore the petitioner cannot place reliance on the said decision of the Allahabad High Court in the above case. She further submits that the subsequent disposal of the appeal by the Hon'ble Supreme Court against the decision of the Division Bench of the Allahabad High Court in Society for the Promotion of Education, Allahabad Vs Commissioner of Income-tax, 372 ITR

222 vide its order dated 16.02.2016 in Commissioner of Income-tax, Kanpur Vs Society for Promotion of Education, Allahabad by its order dated 16.02.2016, 382 ITR 6 cannot be said to be a binding proceedings inasmuch as there is no discussion on the law by the Hon'ble Supreme Court.

20. It is further submitted that, since the petitioner failed to file application before the appropriate authority in time, the petitioner was not entitled to claim deemed approval. Coming to the 2nd issue, it was submitted that the petitioner was having several verticals and only one of the vertical was for providing education. It showed that the petitioner was not existing solely for the educational purposes and was incorporated for the purposes of profit and therefore did not satisfy the requirements of Section 10(23C) (vi) of the Income Tax Act, 1961.

21. Rebutting the other submission of the learned counsel for the petitioner, the learned senior standing counsel for the respondents/Income Tax Department further submitted that the petitioner has several verticals and the object clause of the petitioner's company was decisive to whether the petitioner was entitled to approval under Section 10(23C) (vi) of the Income Tax Act, 1961. In this connection, the learned counsel for the petitioner places reliance on the following three decisions:-

" (i) Sir Shadilal Sugar & General Mills Ltd and another Vs CIT, (1987) 168 ITR 705 (SC)

(ii) Sheila Christian Charitable Trust, (2013) 32 Taxman.com 242.

(iii) CIT Vs Karimangalam Onriya Pengal Amaipu, (2013) 32 Taxman.com

(iv) B.S.Abdur Rahman Institute Vs The Chief Commissioner of Income Tax in W.P.No.34102 of 2015, 787 Taxman 336. "

22. She further submits that undertaking to delete the clauses from the Articles Association is not sufficient and therefore the relevant clause as it stood at the time of filing of the application was to be looked into and therefore submits that the impugned order passed by the 1st respondent was liable to be sustained and the writ petition filed by the petitioner has to be rejected.

23. It is submitted that the application dated 16.09.2010 ought to have been filed with the Chief Commissioner of Income Tax, Chennai III in the 1st instance as per Notification No.S.O.852(E) [No. 196/2007 (F.No.153/41/2007-TPL) dated 30.05.2007 Notification No.S.O.880(E) dated 14.09.2001.

24. The learned counsel submitted that there was no error in the impugned order passed by the 1st respondent as the petitioner failed to file the application before the prescribed authority namely the 1st respondent in the 1st instance and instead filed it before the Chief Commissioner of Income Tax-I, Chennai merely because the petitioner was assessed under the jurisdiction of the 1st respondent.

25. The learned Senior standing counsel for the respondents also placed reliance on the decision of this Court in Raja Sir Annamalai Chettiar Trust Vs K.Mahadevan, 160 Taxman 128.

26. Heard the learned counsel for the petitioner and the learned senior standing counsel for the respondents/Income Tax Department. I have perused the decisions of the courts which were cited during the course of hearing.

27. The facts in brief for a fair disposal of the case is narrated hereinafter. The petitioner is the company incorporated in the year 1992 and is primarily engaged in running school. The main objects of the petitioner as per the Memorandum of Association are varied. They are reproduced below:-

"III. (A) The main objects to be pursued by the Company on its incorporation are:

1. To plan, organize, establish, get recognized, administer, run, maintain, supervise, incorporate, amalgamate, take over and manage educational institutions of all levels, all types and all categories whether formal or informal and to use various methods and systems.

2. To carry on research and development, to offer consultancy services, and to educate and offer training in all fields"

28. The other objects of the petitioner as per the Memorandum of Association are as follows:-

"III.(C) other objects:

1. To impart training to students in various hobbies like music, singing, dancing, carpentry, pottery, sculpturing, stitching, tailoring, embroidery and doll making.

2. To establish and run all types of recreational centres for all round development of students and others.

3. To carry on the business of forwarding agents, establishing and maintain transport services and so on and make transport facilities available to all those connected with any of our institutions/projects/company.

4. To establish, erect, build, manage canteen, refreshment stalls and fast food centres.

5. To impart education and training in acting, direction, photography and music related to film industry and video industry.

6. To buy, sell act as marketing Agents for the products produced by the training centres, educational institutions, employment-related projects, social welfare agencies.

7. To carry on the business of printers, engravers, publishers, book-printers and book-sellers, stationers, art journalists, manufacturers and distributors of and dealers in engravings, prints, pictures, drawings, painting, journals, magazines and any written, engraved, painted or printed production in all their branches and aspects.

8. To carry on and do the business as land developers, township developers, satellite town promoters, developers of housing colonies, real estate dealers by developing and taking into account any land acquired by the Company or in which it is interested or may get interested and in particular by laying out, providing conveniences like roads, drainages, playgrounds, recreation facilities, cinema theatres, constructing residential or commercial accommodations and selling them on ownership basis, hire purchase basis or letting them out on lease or rental basis.

9. To carry on the business of engineers, builders, contractors, consulting engineers, architects and designers, fabrication engineers, moulders, mechanical engineers and electrical engineers in relation to the objects mentioned above."

29. For the purpose of implementing the requirement of sub-clauses (vi) and (vi-a) of clause (23-C) of Section 10 Section, Rule 2-CA of the Income Tax Rules, 1962, has been provided. It reads as follows:-

"2-CA. Guidelines for approval under sub-clauses (vi) and (vi-a) of clause (23-C) of Section 10.—

(1) The prescribed authority under sub-clauses (vi) and (vi-a) of clause (23-C) of Section 10 shall be the Chief Commissioner or Director General, to whom the application shall be made as provided in sub-rule (2).

(1-A) The prescribed authority under sub-clauses (vi) and (vi-a) of clause (23-C) of Section 10 shall be the Central Board of Direct Taxes constituted under the Central Boards of Revenue Act, 1963 (54 of 1963) for applications received prior to the 3rd day of April, 2001:

Provided that in case of applications received prior to the 3rd day of April, 2001 where no order has been passed granting approval or rejecting the applications as on the 31st day of May, 2007, the prescribed authority under sub-clauses (vi) and (vi-a) of clause (23-C) of Section 10 shall be the Chief Commissioner or Director General.

(2) An application for approval shall be made in Form No. 56-D by any university or other educational institution or any hospital or other medical institution referred to in sub-clause (vi) or sub-clause (vi-a) of clause (23-C) of Section 10.

(3) The approval of the Central Board of Direct Taxes or Chief Commissioner or Director General, as the case may be, granted before the 1st day of December, 2006 shall at any one time have effect for a period not exceeding three assessment years.

Explanation.—For the purposes of this rule, 'Chief Commissioner or Director General' means the Chief Commissioner or Director General whom the Central Board of Direct Taxes may, authorise to act as prescribed authority, for the purposes of sub-clause (vi) or sub-clause (vi-a) of clause (23-C) of Section 10, in relation to any university or other educational institution or any hospital or other medical institution."

30. The petitioner had earlier approached the Chief Commissioner of Income Tax-I on a mis-reading of the content of Notification No. S.O.852 (E) dated 20.5.2007 on 16.9.2010 for grant of recognition/approval under Section 10(23C) (vi) of the Income Tax Act, 1961.

31. The application was thereafter transferred to the 1st respondent belatedly. The 1st respondent who is the jurisdictional authority as far as the petitioner is concerned for grant of recognition/approval under Section 10(23C) (vi) of the Income Tax Act, 1961. The 1st respondent thereafter issued show cause notice dated 20.12.2013. The 1st respondent has rejected the application of the petitioner vide impugned order which is now put to test before this Court.

32. Relevant part of Section 10(23 C) (vi) of the Income Tax Act, 1961 which reads as under:-

CHAPTER III

INCOMES WHICH DO NOT FORM PART OF TOTAL INCOME

Incomes not included in total income.

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).....

ii)

iii)

(iiiab) any university or other educational institution existing solely for educational purposes and not for purposes of profit, and which is wholly or substantially financed by the Government; or

(iiiad) any university or other educational institution existing solely for educational purposes and not for purposes of profit if the aggregate annual receipts of such university or educational institution do not exceed the amount of annual receipts as may be prescribed; or

..... .

(vi) any university or other educational institution existing solely for educational purposes and not for purposes of profit, other than those mentioned in sub-clause (iiiab) or sub-clause (iiiad) and which may be approved by the prescribed authority; or

Provided that the fund or trust or institution or any university or other educational institution or any hospital or other medical institution referred to in sub-clause (iv) or sub-clause (v) or sub-clause (vi) or sub-clause (via) shall make an application in the prescribed form and manner to the prescribed authority for the purpose of grant of the exemption, or continuance thereof, under sub-clause (iv) or sub-clause (v) or sub-clause (vi) or sub-clause (via) :

Provided further that the prescribed authority, before approving any fund or trust or institution or any university or other educational institution or any hospital or other medical institution, under sub-clause (iv) or sub-clause (v) or sub-clause (vi) or sub-clause (via), may call for such documents (including audited annual accounts) or information from the fund or trust or institution or any university or other educational institution or any hospital or other medical institution, as the case may be, as it thinks necessary in order to satisfy itself about the genuineness of the activities of such fund or trust or institution or any university or other educational institution or any hospital or other medical institution, as the case may be, and the compliance of such requirements under any other law for the time being in force by such fund or trust or institution or any university or other educational institution or any hospital or other medical institution, as the case may be, as the material for the purpose of achieving

its objects and the prescribed authority may also make such inquiries as it deems necessary in this behalf:

Provided also that the fund or trust or institution or any university or other educational institution or any hospital or other medical institution referred to in sub-clause (iv) or sub-clause (v) or sub-clause (vi) or sub-clause (via)–

(a) applies its income, or accumulates it for application, wholly and exclusively to the objects for which it is established and in a case where more than fifteen per cent of its income is accumulated on or after the 1st day

of April, 2002, the period of the accumulation of the amount exceeding fifteen per cent of its income shall in no case exceed five years; and

(b) does not invest or deposit its funds, other than–

(i) any assets held by the fund, trust or institution or any university or other educational institution or any hospital or other medical institution where such assets form part of the corpus of the fund, trust or institution or any university or other educational institution or any hospital or other medical institution as on the 1st day of June, 1973;

(ia) any asset, being equity shares of a public company, held by any university or other educational institution or any hospital or other medical institution where such assets form part of the corpus of any university or other educational institution or any hospital or other medical institution as on the 1st day of June, 1998;

(ii) any assets (being debentures issued by, or on behalf of, any company or corporation), acquired by the fund, trust or institution or any university or other educational institution or any hospital or other medical institution before the 1st day of March, 1983;

(iii) any accretion to the shares, forming part of the corpus mentioned in sub-clause (i)

and sub-clause (ia), by way of bonus shares allotted to the fund, trust or institution or any university or other educational institution or any hospital or other medical institution ;

(iv) voluntary contributions received and maintained in the form of jewellery, furniture or any other article as the Board may, by notification in the Official Gazette, specify,

(v) for any period during the previous year otherwise than in any one or more of the forms or modes specified in sub-section (5) of section 11.

Provided also that the exemption under sub-clause (iv) or sub-clause (v) shall not be denied in relation to any funds invested or deposited before the 1st day of April, 1989, otherwise than in any one or more of the forms or modes specified in sub-section (5) of section 11 if such funds do not continue to remain so invested or deposited after the 30th day of March, 1993 :

Provided also that the exemption under sub-clause (vi) or sub-clause (via) shall not be denied in relation to any funds invested or deposited before the 1st day of June, 1998, otherwise than in any one or more of the forms or modes specified in sub-section (5) of section 11 if such funds do not continue to remain so invested or deposited after the 30th day of March, 2001:

Provided also that the exemption under sub-clause (iv) or sub-clause (v) or sub-clause (vi) or sub-clause (via) shall not be denied in relation to voluntary contribution, other than voluntary contribution in cash or voluntary contribution of the nature referred to in clause (b) of the third proviso to this sub-clause, subject to the condition that such voluntary contribution is not held by the trust or institution or any university or other educational institution or any hospital or other medical institution, otherwise than in any one or more of the forms or modes specified in sub-section (5) of section 11,

after the expiry of one year from the end of the previous year in which such asset is acquired or the 31st day of March, 1992, whichever is later:

Provided also that nothing contained in sub-clause (iv) or sub-clause (v) or sub-clause (vi) or sub-clause (via) shall apply in relation to any income of the fund or trust or institution or any university or other educational institution or any hospital or other medical institution, being profits and gains of business, unless the business is incidental to the attainment of its objectives and separate books of account are maintained by it in respect of such business:

Provided also that any notification issued by the Central Government under sub-clause (iv) or sub-clause (v), before the date on which the Taxation Laws (Amendment) Bill, 2006 receives the assent of the President, shall, at any one time, have effect for such assessment year or years, not exceeding three assessment years (including an assessment year or years commencing before the date on which such notification is issued) as may be specified in the notification:

Provided also that where an application under the first proviso is made on or after the date on which the Taxation Laws (Amendment) Bill, 2006 receives the assent of the President, every notification under sub-clause (iv) or sub-clause (v) shall be issued or approval under sub-clause (iv) or sub-clause (v) or sub-clause (vi) or sub-clause (via) shall be granted or an order rejecting the application shall be passed within the period of twelve months from the end of the month in which such application was received:

Provided also that where the total income, of the fund or trust or institution or any university or other educational institution or any hospital or other medical institution referred to in sub-clause (iv) or sub-clause (v) or sub-clause (vi) or sub-clause (via), without giving effect to the provisions of the said sub-clauses, exceeds the maximum amount which is not chargeable to tax in any previous year, such trust or institution or any university or other educational institution or

any hospital or other medical institution shall get its accounts audited in respect of that year by an accountant as defined in the Explanation below sub-section (2) of ²⁴ [section 288 before the specified date referred to in section 44AB and furnish by that date], 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:

Provided also that any amount of donation received by the fund or institution in terms of clause (d) of sub-section (2) of section 80G in respect of which accounts of income and expenditure have not been rendered to the authority prescribed under clause (v) of sub-section (5C) of that section, in the manner specified in that clause, or which has been utilised for purposes other than providing relief to the victims of earthquake in Gujarat or which remains unutilised in terms of sub-section (5C) of section 80G and not transferred to the Prime Minister's National Relief Fund on or before the 31st day of March, 2004 shall be deemed to be the income of the previous year and shall accordingly be charged to tax:

Provided also that any amount credited or paid out of income of any fund or trust or institution or any university or other educational institution or any hospital or other medical institution referred to (iv) or sub-clause (v) or sub-clause (vi) or sub-clause (via), to any trust or institution registered under section 12AA, being voluntary contribution made with a specific direction that they shall form part of the corpus of the trust or institution shall not be treated as application of income to the objects for which such fund or trust or institution or university or educational institution or hospital or other medical institution, as the case may be, is established:

Provided also that for the purposes of determining the amount of application under item (a) of the third proviso, the provisions of sub-clause (ia) of clause (a) of section 40 and sub-sections (3) and (3A) of section 40A, shall, mutatis mutandis, apply as they apply in computing the income chargeable under the

head "Profits and gains of business or profession":

Provided also that where the fund or trust or institution or any university or other educational institution or any hospital or other medical institution referred to in sub-clause (iv) or sub-clause (v) or sub-clause (vi) or sub-clause (via) does not apply its income during the year of receipt and accumulates it, any payment or credit out of such accumulation to any trust or institution registered under section 12AA or to any fund or trust or institution or any university or other educational institution or any hospital or other medical institution referred to in sub-clause (iv) or sub-clause (v) or sub-clause (vi) or sub-clause (via) shall not be treated as application of income to the objects for which such fund or trust or institution or university or educational institution or hospital or other medical institution, as the case may be, is established :

Provided also that where the fund or institution referred to in sub-clause (iv) or trust or institution referred to in sub-clause (v) is notified by the Central Government or is approved by the prescribed authority, as the case may be, or any university or other educational institution referred to in sub-clause (vi) or any hospital or other medical institution referred to in sub-clause (via), is approved by the prescribed authority and subsequently that Government or the prescribed authority is satisfied that—

(i) such fund or institution or trust or any university or other educational institution or any hospital or other medical institution has not—

(A) applied its income in accordance with the provisions contained in clause (a) of the third proviso; or

(B) invested or deposited its funds in accordance with the provisions contained in clause (b) of the third proviso; or

(ii) the activities of such fund or institution or trust or any university or

other educational institution or any hospital or other medical institution—

(A) are not genuine; or

(B) are not being carried out in accordance with all or any of the conditions subject to which it was notified or approved; or

(iii) such fund or institution or trust or any university or other educational institution or any hospital or other medical institution has not complied with the requirement of any other law for the time being in force, and the order, direction or decree, by whatever name called, holding that such non-compliance has occurred, has either not been disputed or has attained finality,

it may, at any time after giving a reasonable opportunity of showing cause against the proposed action to the concerned fund or institution or trust or any university or other educational institution or any hospital or other medical institution, rescind the notification or, by order, withdraw the approval, as the case may be, and forward a copy of the order rescinding the notification or withdrawing the approval to such fund or institution or trust or any university or other educational institution or any hospital or other medical institution and to the Assessing Officer:

Provided also that in case the fund or trust or institution or any university or other educational institution or any hospital or other medical institution referred to in the first proviso makes an application on or after the 1st day of June, 2006 for the purposes of grant of exemption or continuance thereof, such application shall be made on or before the 30th day of

September of the relevant assessment year from which the exemption is sought :

Provided also that any anonymous donation referred to in section 115BBC on which tax is payable in accordance with the provisions of the said section shall be included in the total income :

Provided also that all pending applications, on which no notification has been issued under sub-clause (iv) or sub-clause (v) before the 1st day of June, 2007, shall stand transferred on that day to the prescribed authority and the prescribed authority may proceed with such applications under those sub-clauses from the stage at which they were on that day:

Provided also that the income of a trust or institution referred to in sub-clause (iv) or sub-clause (v) shall be included in its total income of the previous year if the provisions of the first proviso to clause (15) of section 2 become applicable to such trust or institution in the said previous year, whether or not any approval granted or notification issued in respect of such trust or institution has been withdrawn or rescinded :

Provided also that where the fund or institution referred to in sub-clause (iv) or the trust or institution referred to in sub-clause (v) has been notified by the Central Government or approved by the prescribed authority, as the case may be, or any university or other educational institution referred to in sub-clause (vi) or any hospital or other medical institution referred to in sub-clause (via), has been approved by the prescribed authority, and the notification or the approval is in force for any previous year, then, nothing contained in any other provision of this section [other than clause (1) thereof] shall operate to exclude any income received on behalf of such fund or trust or institution or university or other educational institution or hospital or other medical institution, as the case may be, from the total income of the person in receipt thereof for that previous year.

Explanation.—In this clause, where any income is required to be applied or accumulated, then, for such purpose the income shall be determined without any deduction or allowance by way of depreciation or otherwise in respect of any asset, acquisition of which has been claimed as an application of income under this clause in the same or any other previous year;”

33. The argument of the learned counsel for the petitioner that there has to be a deemed approval under section 10(23C)(vi) of the Income Tax Act, 1961 because the application was filed on 16.09.2010 but not disposed within 12 months and is to be rejected notwithstanding the fact that the Gujarat High Court in Society for Promotion of Education, Allahabad Vs CIT 372 ITR 222 and its affirmation by the Hon'ble Supreme Court.

34. The said decision was rendered in the context of Section 12AA (2) of the Income Tax Act, 1961 in Society for Promotion of Education, Allahabad Vs CIT 372 ITR 222.

35. Though the said decision has been upheld by the Hon'ble Supreme Court in CIT Vs Society for Promotion of Education, Allahabad [2016] 382 ITR 6, it has to be noted that the attention of the Hon'ble Supreme Court was not drawn to the reference made to the Full Bench of the Allahabad High Court wherein the ratio of the Allahabad High Court in Society for Promotion of Education, Allahabad Vs CIT 372 ITR 222 was doubted.

36. The attention of the Hon'ble Supreme Court was also not brought to the contra view of the Allahabad High Court in Commissioner of Income Tax Vs Muzfar Nagar Development Authority, [2015] 372 ITR 209 on a reference from a Full Bench of the Allahabad High Court, wherein it has answered as follows:-

- " i. Non disposal of an application for registration, by granting refusing, before the expiry of six months as provided under section 12 AA (2) of the Income Tax Act, 1961 would not result in in a deemed grant of registration; and
- ii. The judgement of the division bench of the court in Society for the Promotion Of Education Adventure Sport And Conservation of Environment (Supra) does not lay down the correct proposition of law."

37. If above view was brought to the attention of the Hon'ble Supreme Court in CIT Vs Society for Promotion of Education, Allahabad, [2016] 382 ITR 6 and if it had answered the issue one way or the other, argument advanced by the learned counsel for the Petitioner can be accepted. On the other, the decision of the Hon'ble Supreme Court in CIT Vs Society for Promotion of Education, Allahabad, merely reads as under:-

"5. Therefore, in order to disabuse any apprehension, we make it clear that the registration of the application under Section 12AA of the Income Tax Act in the case of the respondent shall take effect from 24.08.2003.

6. Subject to the above clarification and leaving all other questions of law open, the appeal is disposed of with no order as to costs."

38. For better understanding and comparison Sub-Section (2) to Section 12AA of the Income Tax Act, 1961 and 9th Proviso to Section 10(23C) of the Income Tax Act, 1961 are reproduced below.:-

Sub-Section (2) to Section 12AA of the Income Tax Act, 1961	9 th Proviso to Section 10(23C) of the Income Tax Act, 1961
(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.	Provided also that where an application under the first proviso is made on or after the date on which the Taxation Laws (Amendment) Bill, 2006 receives the assent of the President, every notification under sub-clause (iv) or sub-clause (v) shall be issued or approval under sub-clause (iv) or sub-clause (v) or sub-clause (vi) or sub-clause (via) shall be granted or an order rejecting the application shall be passed within the period of twelve months from the end of the month in which such application was received:

39. 9th proviso to Section 10 (23C)(vi) of the Income Tax Act, 1961 merely prescribes a period of 12 months within which an order granting or rejecting application for approval shall be passed by the prescribed authority.

40. Section 12 AA (2) of the Income Tax Act, 1961 prescribes a maximum period of six months for considering

application. Both the provisions merely prescribes the period within which these application for registration/recognition/approvals have to be considered and disposed.

41. Concept of deemed registration or recognition is absent in both these provision unlike in some of the other statutory enactments and the rules made thereunder. For instances, under Rule 174 of erstwhile Central Excise Rules, 1944 as it stood prior to Central Excise Rules, 2002, there was a concept of deemed registration. If an application for registration of a factory was not considered by the jurisdictional authority within a period of sixty days, registration was deemed to have been granted

42. A similar provision for a deemed registration is available under Rule 9(5)(b) of the respective Goods and Service Tax Rule 2017. Rule 9(5)(b) of the Central Goods & Service Tax Rules, 2017 which is pari-materia with Rule 9(5)(b) of Tamil Nadu Goods & Service Tax Rule, 2017 is reproduced below:-

CHAPTER III

Registration

8. Application for registration:

9. (1) -

(2) -

(3) -

(4) Where no reply is furnished by the applicant in response to the notice issued under sub-rule (2) or where the proper officer is not statisfied with the clarification, information or documents furnished, he shall , for reasons to be recorded in writing, reject such application and inform the applicant electronically in FORM GST REG-05.

(5) If the proper officer fails to take any action, -

a) within a period of three working days from the date of submission of the application ; or

b) within a period of seven working days from the date of the receipt of the clarification, information or documents furnished by the applicant under sub-rule (2),

the application for grant of registration shall be deemed to have been approved.

43. Both proviso to Section 10 (23C)(vi) of the Income Tax Act, 1961 and section 12 AA (2) of the Income Tax Act, 1961 do not stipulate that registration/recognition approval will be automatic if the application is not disposed within the period prescribed.

44. Therefore, the decision of the Gujarat High Court as upheld by the Hon'ble Supreme Court cannot be taken as a binding precedent.

45. Therefore, I am not inclined to allow the writ petition based on the first argument advanced by the learned counsel for the petitioner.

46. I shall therefore not proceed to examine whether the 1st respondent was justified in rejecting the application of the petitioner on the other two grounds namely by making a reference to the object clauses in the Memorandum of Association and the specific reference to clauses 55 and 56 of the Memorandum of Association.

47. In *American Hotel & Lodging Assn. Educational Institute Vs CBDT*, (2008) 10 SCC 509, it was held as under:-

"44. Having analysed the provisos to Section 10(23-C)(vi) one finds that there is a difference between stipulation of conditions and compliance therewith. The threshold conditions are actual existence of an educational institution and approval of the prescribed authority for which every applicant has to move an application in the standardised form in terms of the first proviso. It is only if the prerequisite condition of actual existence of the educational institution is fulfilled that the question of compliance with requirements in the provisos would arise. We find merit in the contention advanced on behalf of the appellant that the third proviso contains monitoring conditions/requirements like application, accumulation, deployment of income in specified assets whose compliance depends on events that have not taken place on the date of the application for initial

approval."

48. The Court in Para 51 further held as under:-

"51. For the sake of clarity, we may reiterate that items such as application of income or accumulation of income or investment in specified assets indicated in clauses (a) and (b) in the third proviso are a part of compliance/monitoring conditions. As stated, however, there is a difference between application/utilisation of income and outward remittance of income out of India. As discussed above, with the insertion of the provisos in Section 10(23-C)(vi) of the 1961 Act, it is open to the PA to stipulate, while granting approval, that the approval is being given subject to utilisation/application of certain percentage of income, in the accounting sense, towards impartation of education in India. Such exercise would be based on estimation. There is a difference between "accounting income" and "taxable income". At the stage of Section 10, we are concerned with the accounting income. Therefore, it is open to the PA, if it deems fit, to stipulate that certain percentage of accounting income would be utilised for impartation of education in India. Therefore, in our view, it is always open to the PA to impose such terms and conditions as it deems fit. The interpretation we have given is based on harmonious construction of the provisos inserted in Section 10(23-C)(vi) by the Finance (No. 2) Act, 1998. Lastly, we may reiterate that there is a difference between stipulation by the PA of such terms and conditions, as it deems fit under the provisos, and the compliance with those conditions by the appellant. The compliance with the terms and conditions stipulated by the PA would be a matter of decision at the time of assessment as availability of exemption has to be evaluated every year in order to find out whether the institution existed during the relevant year solely for educational purposes and not for profit."

49. Indian Chamber of Commerce case [(1976) 1 SCC 324 : 1976 SCC (Tax) 41 : (1975) 101 ITR 796], Hon'ble Mr. Justice Krishna Iyer, J. explained as follows:-

"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 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."

50. In *Sole Trustee, LokaShikshana Trust* case [(1976) 1 SCC 254 : 1976 SCC (Tax) 14 : (1975) 101 ITR 234], Hon'ble Mr. Justice Khanna, J observed as under:-

"[I]f the activity of a trust consists of carrying on 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."

51. In *CIT Vs Surat Art Silk Cloth Manufacturers' Assn.*, (1980) 2 SCC 31, the Hon'ble Supreme Court held the mere fact that the activity yielded profit did not alter the charitable character of the assessee. 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.

52. The Hon'ble Supreme Court in *Queen's Educational Society Vs CIT*, (2015) 8 SCC 47 summarised the law common to Sections 10(23-C) (iii-ad) and (vi) as follows:-

"(1) Where an educational institution carries 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) The predominant object test must be applied—the purpose of education should not be submerged by a profit-making motive.

(3) 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.

(4) If after meeting expenditure, a surplus arises incidentally from the activity carried on by the educational institution, it will not cease to be one existing solely for educational purposes.

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

53. The provision as it reads and the law as declared by the Hon'ble Supreme Court indicate that approval has to be granted if an educational institution satisfies the fundamental requirement of existence for educational purpose and does not exist solely for the purposes of the profit. Merely because an educational institution generates surplus is not a ground for disqualifying it from granting approval to it.

54. Once an approval is granted, it is to be in force for a period of three years. At the same time, it is open for the prescribed authority to stipulate the conditions for ensuring there is no misuse by such an educational institution of the approval.

55. Coming to the facts of the case, it may be pertinent to refer to Clause 51 and 52 of the Articles of Association of the petitioner's company read as under:-

"Clause 51

"As the Company's main object is to render Educational activities and not a profit motive, the Shares holders are not entitled to share the surplus of each year i.e., the excess of income over expenditure by way of dividend, Bonus Share".

Clause 52

"The Board of directors are entitled to use the excess of income over Expenditure surplus only for the fulfillment,

attainment of educational activities, and no portion of profit will be shared among Share holders.

No portion of the income or property shall be paid or transferred, directly or indirectly by way of dividend, bonus or otherwise by way of profit of persons who at any time are or have been, members of the Company or to any one or more of them or to any person claiming through any one or more of them.

Except with the previous approval of the Central Government no remuneration or other benefit in money or money's worth shall be given by the Company to any of its members, whether officers or servants of Company or not, except payment of out-of-pocket expenses, reasonable and proper interest on money lent, or reasonable and proper rent on premises let to the Company".

56. Clause 51 of the Articles of Association clearly states that shareholders are not entitled to share the surplus of each year i.e., the excess of the income over the expenditure by way of dividend, bonus share. Thus, it is clear that surplus generated is not available for being declared either dividend or as a bonus share to the shareholders. Thus, there is no scope for inferring profit motive. Similarly, clause 52 which has been extracted above also indicates that there is no profit motive.

57. Clauses 55 and 56 of the Articles of Association of the petitioner do not allow an interference of profit motive. These two clauses clearly indicate that the surplus generated by the petitioner is to be ploughed back. Thus, there is no profit motive. They read as under:-

WINDING UP

55. If the Company is wound up the surplus assets are more than sufficient to repay the whole of the paid-up capital the excess shall be distributed among the members in proportion to the capital paid up on the equity shares held by them, but this article is without prejudice to the right of preference share-holder or holders of any other shares issued upon special conditions.

56. If the Company is wound up, whether voluntarily or otherwise the liquidators may

with the sanction of the special resolution, divide among the contributors, in specie or kind, any part of the assets of the Company and may with a like sanction vest any part of the assets of the Company upon such trusts instituted for the benefit of the contributors.

58. The Memorandum of Association of the petitioner also does not indicate the profit motive. The main object of the petitioner indicates that it is in the field of education. There are also indication that the petitioner had not otherwise indulged in any other activity to make profit and it was engaged only in the field of education in all the years of its existence since 1992.

59. Therefore, denial of approval to the petitioner under Section 10 (23C) (iv) of the Income Tax Act, 1961 is not justified. The respondents ought to have granted approval but at the same time and laid down on strict conditions for the petitioner to comply with the said requirements. Therefore, I am of the view, the present writ petition deserves to be allowed.

60. Since the petitioner had applied for exemption as early as 15.09.2010, though approached the wrong forum, it was incumbent on the part of the office of the Chief Commissioner of Income Tax-I to have either returned the application to the petitioner for a proper presentation or transferred to the 1st respondent immediately. On the other hand, the Income Tax Department took about three years for the application to be jostled from the office of the Chief Commissioner of Income Tax-I to the office of the 1st respondent.

61. Be that as it may, since this Court has come to conclusion that the petitioner is entitled to approval, I direct the 1st respondent to issue Approval Certificate to the petitioner for the past period within a period of ninety (90) days from the date of receipt of this order. The 1st respondent may stipulate such stringent conditions in the approval as are necessary for an educational institution to operate so that the legitimate benefit of exemption under the aforesaid provision are not abused by the petitioner keeping the views expressed by the Hon'ble Supreme Court in American Hotel and Lodging Association Educational Institute Vs CBDT and the views expressed by the Hon'ble Supreme Court in Queens Educational Society Vs CIT referred to supra.

62. In case, it is found that the petitioner had deviated in any of the assessment years of the conditions that may be prescribed in the approval, the Assessing Officer may pass appropriate orders in respect of those assessments and complete the same within a period of ninety (90) days

thereafter. In case, the petitioner has complied with the requirements of such approval, appropriate orders may be passed to revise the assessment order by extending such benefits.

63. This Writ Petition stands allowed with the above observation. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar(CS VIII)

//True Copy//

Sub Assistant Registrar

arb

To:

1.The Chief Commissioner of Income Tax-III,
The Income Tax Department,
121, Mahatma Gandhi Road,
Chennai - 600 034.

2.The Director of Income Tax (Exemptions),
The Income Tax Department,
121, Mahatma Gandhi Road,
Chennai - 600 034.

3.The Deputy Director of Income Tax (Exemptions) III,
The Income Tax Department,
121, Mahatma Gandhi Road,
Chennai - 600 034.

+lcc to Mr. S.Sridhar, Advocate SR.No. 28265

+lcc to M/s. Hema Muralikrishnan, Advocate SR.No. 2831

Pre-delivery Order in
W.P. No. 11828 of 2014

CP(CO)
A.SK(13.07.2021)