

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO.8518 OF 2009

1)	Laura Entwistle	]	
2)	Deborah Williams	]	
3)	James Brunner	]	
4)	Rena Patel	]	
5)	Chris Giallongo	]	
6)	Orna Sagiv	]	
7)	Chetan Dave	]	
8)	Paul Folmsbee	]	
9)	Vivek Vig	]	
	The Trustees of American School	]	
	Bombay Education Trust having	]	
	their office at SF2, G-Block,	]	
	Bandra Kurla Complex Road,	]	
	Bandra East, Mumbai - 400 051.	]	.. Petitioners

v/s.

1)	The Union of India	]	
	through the Secretary,	]	
	Ministry of Finance,	]	
	Government of India, North Block,	]	
	New Delhi - 110 101.	]	
2)	The Central Board of Direct Taxes,	]	
	Government of India,	]	
	Ministry of Finance, Department of	]	
	Revenue, New Delhi.	]	
3)	The Director-General of Income Tax	]	
	(Exemption), having his office at	]	
	5 th floor, Piramal Chambers	]	
	Lalbaug, Mumbai-400 012.	]	

- 4) The Chief Commissioner of]
Income Taxation]
Mumbai, having her office at]
Room No.322, 3rd Floor,]
Aaykar Bhavan, M.K. Road,]
Mumbai - 400 020.]
- 5) Mr. Neeraj Bhargava]
The Trustee of American School of]
Bombay Education Trust having]
their office at SF2, G-Block, Bandra]
Kurla Complex Road, Bandra East]
Mumbai - 400 051.] ..Respondents

WITH

WRIT PETITION NO.9265 OF 2009

- 1) Laura Entwistle]
2) Deborah Williams]
3) James Brunner]
4) Rena Patel]
5) Chris Giallongo]
6) Orna Sagiv]
7) Chetan Dave]
8) Neeraj Bhargava]
9) Paul Folmsbee]
10) Vivek Vig]
The Trustees of American School]
Bombay Education Trust having]
their office at SF2, G-Block,]
Bandra Kurla Complex Road,]
Bandra East, Mumbai - 400 051.] .. Petitioners
v/s.
- 1) The Union of India]
through the Secretary,]
Ministry of Finance,]
Government of India, North Block,]
New Delhi - 110 101.]
- 2) The Central Board of Direct Taxes,]

- | | | | |
|----|---|---|----------------|
| | Government of India, |] | |
| | Ministry of Finance, Department of |] | |
| | Revenue, New Delhi. |] | |
| 3) | The Director-General of Income Tax |] | |
| | (Exemption), having his office at |] | |
| | 5 th floor, Piramal Chambers |] | |
| | Lalbaug, Mumbai-400 012. |] | |
| 4) | The Chief Commissioner of |] | |
| | Income Taxation |] | |
| | Mumbai, having her office at |] | |
| | Room No.322, 3 rd Floor, |] | |
| | Aaykar Bhavan, M.K. Road, |] | |
| | Mumbai - 400 020. |] | .. Respondents |

...

Mr. P.F. Kaka, Senior Advocate, a/w Mr. Divesh Chawla, Jas Sanghavi & Ms. Revati S. Nansi i/b. PDS Legal for the petitioners.

Mr. Suresh Kumar for the respondents.

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**CORAM : DHIRAJ SINGH THAKUR AND
KAMAL KHATA, JJ.**

RESERVED ON : 19TH JANUARY 2023.

PRONOUNCED ON : 8TH MARCH 2023.

J U D G M E N T

[PER KAMAL KHATA, J.]

1. These two Writ Petitions are filed by the same petitioners for different assessment years. The Writ Petition No. 8518 of 2009 pertains to Assessment Year (AY) 2002 - 03 and AY 2003 - 04 and the Writ Petition No. 9265 of 2009 pertains to AY 2004 - 05 and AY 2005 - 06. Since the facts and the issue arising in both these petitions is common we shall dispose of the same with a common order by adverting to facts from the Writ Petition No. 8518 of 2009 for brevity.

2. The petitioners, the present trustees of the American School of Bombay Education Trust, ('ASB' for short) have filed the present petition to set aside the impugned order dated 27th February 2009 passed by respondent no.4 and to direct the respondents to grant them the exemption to the income that was rejected by the impugned order under Section (u/s) 10(23C)(vi) of the Income Tax Act, 1961 (the Act) in relation to Assessment Year (A.Y.) 2002-03 to A.Y. 2005-06.

3. The ASB is constituted under the Indian Trusts Act, 1882, vide the trust deed, as amended in July-1995 and August-2008. The ASB was set up after the embassy of the United States of America was granted specific permission by the Ministry of

External Affairs, New Delhi. The Trust is set-up solely for the purpose of education and not for the purpose of profit. The relevant extract of the recital of the Trust Deed is reiterated as under-

“A. The Settlor is desirous of establishing and / or conducting a school or other institution to provide education training and discipline to the beneficiaries under these presents and for providing financial and other assistance in connection therewith.

B. The Settlor is further desirous that the school or other institutions shall be an institution existing solely for education purpose and not for the purpose of profit.” (emphasis applied)

4. Further, the Trustees hold the Trust Fund solely for the purpose of education as is set out by clause 3, which provides as under-

“3. The trustees shall henceforth hold and possessed of the said sum (hereinafter for brevity's) sake referred to as the Trust Fund which expression shall unless repugnant to the subject or context, also include, any other property and investments on any kinds whatsoever into which the same or any part thereof may be converted invested or varied from time to time and those which may be acquired by the Trustees or come to their hands under, pursuant to or by virtue of these presents or by operation of law or testamentary disposition or legacies or otherwise howsoever in relation to these presents including all donations, gifts, bequests and legacies either in case or other properties, movable or immovable, or otherwise howsoever, which may be received by the Trustees from time to time for the purpose of these presents as also including any income, dividend, interest and accumulation of income including all rights and / or bonus shares and other rights, benefits or advantages acquiring or arising time to time or to the trust fund upon the trusts and with an subject

to the powers, provisions, agreements and declaration hereinafter declared and contained of or concerning the same.”

5. During the years under consideration, ASB was supported by the South Asia International and Educational Services Foundation (SAIESF). SAIESF was set-up in 1996 in the United State of America wholly and exclusively for charitable and educational purposes within the meaning of section 501(c)(3) of the Internal Revenue Code of the United States of America, and the primary purpose is to provide financial assistance to educational institution as provided in its constitution. SAIESF was a non profit organization, subject to scrutiny by the US Government and exempted from tax payment by US Federal Government u/s. 501(c)(3) of the Internal Revenue Code. The accounts of SAIESF were subject to detailed scrutiny by the IRS. By an order based on the said scrutiny, the IRS continued to approve SAIESF as a non-for-profit foundation u/s. 501(c)(3) of the Internal Revenue Code.

6. SAIESF would incur various expenses in support of ASB, i.e. school material and freight, salaries of teachers and administrators, education grants, etc. The surplus if any, arising from time to time was entirely repatriated to the Petitioners in India and, thereafter, invested by the Petitioners in accordance

with the provisions of section 11(5) of the Act. The fact SAIESF was formed for the sole purpose of assisting and supporting ASB and the entire expenses incurred by SAIESF were towards the educational purpose of ASB has been certified by the Consulate General of the United States, Mumbai, vide his letter dated April 3, 2007. Copy of the accounts of SAIESF and vouchers (along with bank statements) have been furnished to the Tax Authorities during the Assessment / Appellate proceedings.

7. ASB had applied for an exemption under Section 10(23C)(vi) and had been granted u/s 10(22) of the Act for assessment years for the years 1998-99 to 2001-02 and 2006-07 to 2026-27.

Sr. No.	A.Y.	Particulars
1	1998-99	Exemption under section 10(22) of the Act upheld by the ITAT, Mumbai, vide order dated 28 November 2018
2	1999-00	Exemption under section 10(23C)(vi) of the Act granted by the Delhi High Court vide order dated 13 August 2015. SLP of the income-tax department to the Supreme Court against the same was dismissed.
3	2000-01	
4	2001-02	
5	2006-07	Exemption granted by the CCIT; Mumbai vide order dated 1 September 2009.
6	2007-08 to 2021-22	Exemption granted by the CCIT; Mumbai vide order dated 31 March 2008 for A.Y. 2007-08 until specifically withdrawn. Exemption under section 10(23C)(vi) of the Act also accepted during the course of assessment proceedings, wherever applicable.
7	2022-23 to 2026-27	Approval granted by the Centralized Processing Centre, vide order dated 28 May 2021, pursuant to amendment in section 10(23C)(vi) of the Act, valid until A.Y. 2026-27.

The exemption sought by the petitioners is, therefore, for the intermediate years 2002-03 to 2005-2006.

8. Initially, the petitioner's application u/s 10(23C)(vi) of the Act for the A.Y. 1999-2000, A.Y. 2000-01 and A.Y. 2001-02 were rejected by the Central Board of Direct Taxes ("CBDT") and for A.Y. 2002-03, A.Y. 2003-04, A.Y. 2004-05 and A.Y. 2005-06 were rejected by the Commissioner of Income Tax ("CIT") on the following grounds;

(a) The assessments have been made by the Assessing Officer already in the said case (placed reliance despite these having been set aside);

(b) The account of SAIESF have not been audited, and in the absence of them being audited, it is difficult to verify the same;

(c) The Apex Court's judgment in American Hotel & Lodging Association, Educational Institute v/s. CBDT [2008] 170 Taxman 306 (SC) was peculiar to its facts and did not apply to ASB;

(d) The funds held by SAIESF have not been invested in the modes prescribed under Section 11(5) of the Act

9. It is submitted that the main condition for claiming exemption u/s. 10(22) and section 10(23C)(vi) of the Act is that

the institution shall exist solely for the purpose of providing education and not for the purpose of profit.

10. Mr. Kaka, Learned Senior counsel for the petitioner submitted that the main condition for claiming exemption u/s. 10(23C)(vi) of the Act is that the institution shall exist solely for the purpose of providing education and not for the purpose of profit. Learned senior counsel submitted that the present matter is covered by the decision of the Delhi High Court in the petitioner's case for A.Y.1999-2000 to A.Y. 2001-02 in [Writ Petition No.2186 of 2014 and CM No.4561 of 2015] wherein the petitioner challenged the CBDT order dated 29th October 2013. This was pursuant to the directions of the Delhi High Court in Writ Petition No.10579 of 2009 dated 20th January 2011, to adjudicate the petitioner's application for exemption u/s 10(23C)(vi) of the Act, afresh based on the principles that have been laid down by the Hon'ble Supreme Court in the case of American Hotel (supra).

11. Learned Senior Counsel further submitted that once it is established that ASB / the petitioners exists to provide education and not for profit, the exemption u/s 10(22) (omitted w.e.f. 1.4.1999) and section 10(23C)(vi) (inserted w.e.f. 1.4.1999) of the Act cannot be denied.

12. It is submitted at the time of the application for exemption under section 10(23C)(vi) of the Act, the scope of verification at the stage of registration is limited, as observed by the Hon'ble Supreme Court, in the case of ***American Hotel & Lodging Association, Educational Institute v/s. CBDT¹***. The Court noted that the threshold condition for granting approval u/s. 10(23C)(vi) of the Act is to ascertain the institution exists solely for education purposes and not for profit. The conditions as stipulated in the 3rd & 13th Proviso to section 10(23C) of the Act are the monitoring conditions which may be looked at by the Tax Authority at a later stage. The relevant extract of the decision of the Supreme Court in American Hotel (supra) is reiterated as under -

“28. The moot question in section 10(22) was – whether the activities of the applicant came within the definition of “income of educational institution”. Under section 10(22), one had to closely analyze the activities of the institute; the objects of the institute; and its source of income and its utilization. Even if one of the objects enabled the institute to undertake commercial activity, the institute would not be entitled to approval under section 10(22). The said section, inter alia, excludes the income of the educational institute from the total income.

30. In deciding the character of the recipient, it is not necessary to look at the profits of each year,

¹ (2008) 170 Taxman 306(SC)

but to consider the nature of the activities undertaken in India. If the Indian activity has no correlation to education, exemption has to be denied (see judgment of this Court in Oxford University Press case (supra). **Therefore, the character of the recipient of income must have the character of educational institution in India to be ascertained from the nature of the activities, if after meeting expenditure, surplus remains incidentally from the activity carried on by the educational, it will not cease to be one existing solely for educational purposes.** In other words, existence of surplus from the activity will not mean absence of educational purpose (see judgment of this Court in Aditanar Educational Institution v. Addl. CIT [1997] 224 ITR 310. The test is the nature of activity. If the activity like running a printing press takes place it is not educational. But whether the income/profit has been applied for non-educational purpose has to be decided only at the end of the financial year.

31. In Oxford University Press case (supra) this Court found that the applicant was a branch of Oxford Press which was part of the Oxford University but its activity in India was restricted to publishing books, journals, periodicals etc. The Tribunal held that because Oxford Press is part of the University its income was exempt under section 10(22) as it stood at the relevant time. **It is in this context that the ‘words’ existing solely for educational purposes and not for the purposes of profit” in section 10(22) , which words also find place in section 10(23C)(vi), came for consideration.** This Court held that the location of the University is not relevant, what is relevant is – whether there is imparting of education in India. Therefore, the **test formulated by this Court to decide the character of the recipient of income under section 10(22) is whether there is in fact existence of an activity which is the nature of “imparting of education in India”.** This is how the ‘words’ in India” have come into judgment and not

by incorporation from section 11(1)(a) of 1961 Act as contended on behalf of the Department.

32. We shall now consider the effect of insertion of provisos to section 10(23C)(vi) vide Finance Act, 1998. section 10(23C)(vi) is analogous to section 10(22). To that extent, **the judgments of this Court as applicable to section 10(22) would equally apply to section 10(23C)(vi)**. The problem arises with the insertion of the provisos to section 10(23C)(vi) with the insertion of the provisos to section 10(23C)(vi) the applicant **who seeks approval has not only to show that it is an institution existing solely for educational purposes** [which was also the requirement under section 10(22)] but it has now to obtain initial approval from the prescribed authority, in terms of Section 10(23C)(vi) by making an application in the standardize form as mentioned in the first proviso to that section. That condition of obtaining approval from the prescribed authority came to be inserted because section 10(22) was abused by some educational institutions / universities. This proviso was inserted along with other provisos because there was no monitoring mechanism to check abuse of exemption provision. With the insertion of the first proviso, the prescribed authority is required to vet the application. This vetting process is stipulated by the second proviso. It is important to note that the second proviso also indicates the powers and duties of the prescribed authority. While considering the approval application in the second proviso, the prescribed authority is empowered before giving approval to call for such documents including annual accounts or information from the applicant to check the genuineness of the activities of the applicant institution. Earlier that power was not three with the prescribed authority. Under the third proviso, the prescribed authority has to ascertain while judging in genuineness of the activities of the applicant institution as to whether the applicant applies its income wholly and exclusively to the objects for which it is

constituted / established. Under the 12th proviso, the prescribed authority is required to examine cases where an applicant does not apply its income during the year of receipt and accumulates it but makes payment therefrom to any trust or institution registered under section 12AA or to any fund or trusts or institution or university or other educational institution and to that extent the proviso states that such payment shall not be treated as application of income to the objects for which such trust or fund or educational institution is established. The idea underlying the 12th proviso is to provide guidance to the prescribed authority as to the meaning of the 'words' application of income to the objects for which the institution is established". Therefore, the twelfth proviso is the matter of detail. The most relevant proviso for deciding this appeal is the thirteenth proviso. Under that proviso, the circumstances are given under which the prescribed authority is empowered to withdraw the approval earlier granted. **Under that proviso, if the prescribed authority is satisfied that the trust, fund, university or other educational institution etc. has not applied its income in accordance with the third proviso or if it finds that such institution, trust or fund etc. has not invested / deposited its funds in accordance with the third proviso or that the activities of such funds or institution or trust etc., are not genuine or that its activities are not being carried out in accordance with the conditions subject to while approval is granted then the prescribed authority is empowered to withdraw the approval earlier granted after complying with the procedure mentioned therein.**

33. Having analyzed the provisos to section 10(23C)(vi) one finds that there is a difference between stipulation of conditions and compliance thereof. 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

standardize 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 of requirements in the provisos would arise.....”(emphasis applied)

The CBDT, in its Circular 14 of 2015, dated 17 August 2015, has stated that the principles as laid down by the Supreme Court in the case of American Hotels (supra) shall be followed as regards the scope of enquiry to be undertaken at the approval stage.

13. There is no denial either in the impugned order or by the Department Representative that the petitioner only exists for educational purposes and not for profit. The same can be evinced by the Trust Deed.

14. The learned counsel submitted that the Delhi High Court has allowed the exemption u/s 10(23C) (vi) of the Act and also observed that the Tax Authority had not followed the direction given by the Court and not decided the case in terms of the decision of the Supreme Court in the case of American Hotel (supra). There was a specific observation by the Delhi High Court that the petitioner exists solely for the education purpose and not for profit which according to the Delhi High Court, is the only requirement for the grant of an approval. It was on this basis that the Delhi High Court had issued the direction to the tax

authorities to grant an approval to the petitioners under Section 10(23C)(vi) of the Act. The Special Leave petition preferred by the respondents against the said order of the Delhi High Court has been dismissed by the Hon'ble Supreme Court. The learned counsel submitted that the reasons for rejection of the petitioner's application under Section 10(23C)(vi) of the Act, are the same in the present matter, as was, in the Writ Petition filed by the petitioner in the Delhi High Court for A.Y. 1999-2000 to A.Y. 2001-02.

15. The learned counsel submitted that the CBDT by its Circular No.14 of 2005 has clarified that the mere generation of surplus by educational institutions year on year cannot be a basis for rejection of an application u/s 10(23C)(vi) of the Act, if it is used for an educational purposes and the accumulation is not contrary to the manner prescribed in law. The learned counsel distinguished the judgment by the decision of the Supreme Court in the case of New Noble Education Society v/s. CCIT² and contended that the same is not applicable to the present case as the decision would be applied prospectively and not retrospectively.

16. The learned counsel for the petitioner submitted that at the

² TS-809-SC-2022

time of granting exemption u/s 10(23C)(vi) of the Act, the scope of verification is confined to ascertaining the trust or institution's existence solely for education purpose and not for profit; and that the monitoring conditions pertaining to the application of income; investment of surplus in prescribed modes are to be verified only at a later stage. The learned counsel also submitted as under:

(i) SAIESF, which exists as a separate trust in the USA, has had its accounts compiled by the Certified Public Accountant ("CPA") in accordance with the statements on standards for accounting and review services issued by the American Institute of Certified Public Accountants. Further, SAIESF was not required to get its accounts audited under the domestic tax laws of the USA.

(ii) The accounts of SAIESF were subjected to detailed scrutiny by the Internal Revenue Services ("IRS"), Government of USA. By an order dated 1st February 2001, based on the said scrutiny, IRS has approved SAIESF as a not for profit foundation under Section 501(c)(3) of the Internal Revenue Code of the USA.

(iii) The fact that all the expenses incurred by SAIESF were for educational purposes of the petitioner in India had been certified by the Consulate General of the United States, Mumbai, vide his letter dated 3rd April 2007. This is not disputed nor any efforts have been made to contradict the same.

(iv) Difficulty in verifying SAIESF's income and expenditure cannot be used to deny the petitioner's

exemption, especially as the petitioner undisputedly satisfies the fact that it is a genuine educational institution, existing solely for education and not for the purpose of profit.

(v) It is further submitted that the requirement to get the audit of accounts of even Indian institutes governed by the provisions of Section 10(23C)(vi) itself was inserted by the Taxation Laws (Amendment) Act, 2006, with effect from 1st April 2006 by inserting the tenth proviso to Section 10(23C)(vi).

17. It is submitted that even before the introduction of section 10(23C)(vi) of the Act, the petitioner claimed the exemption u/s. 10(22) of the Act prevailing in A.Y. 1998-99, that stated “*any income of university or other educational institution, existing solely for educational purpose and not for purposes of profit*” was exempt from income-tax. The provisions of section 10(22) of the Act and section 10(23C)(vi) of the Act are analogous, except that the provision of section 10(22) of the Act did not contain any monitoring conditions as have been stipulated in the third Proviso to section 10(23C) of the Act.

18. The learned counsel for the petitioner submitted that the respondents have not challenged the petitioner’s existence solely for educational purposes and not for profit for the A.Y. 2006-07

onwards till date and have accepted the petitioners claim for exemption u/s 10(23C)(vi) of the Act. The learned counsel for the petitioners in support of his contentions relied upon the following decisions;

- 1) *American Hotel & Lodging Association, Educational Institute v/s. CBDT*³
- 2) *Digamber Jain Society for Child Welfare v/s. DGIT*⁴
- 3) *Pinegrove International Charitable Trust v/s. Union of India*⁵
- 4) *Tolani Education Society v/s. DDIT (Exemptions)*⁶
- 5) *St. Lawrence Educational Society (Regd.) v/s. CIT*⁷
- 6) *DIT (Exemption) v/s. Delhi Public School Society*⁸

19. The Petitioner was held to be an educational institution and existing solely for education purposes and not for profit was examined in detail by the Income-tax Appellate Tribunal (hereinafter referred to as “Tribunal”), Mumbai, vide order dated 28 November 2018. The revenue raised similar contention: the Petitioner has not produced the books of accounts; the Petitioner is unable to produce any evidence retaining to correctness of its accounts of SAISEF and the books of accounts of SAISEF have not been audited by the Revenue. The Hon’ble Tribunal, following the

³ (2008) 170 Taxman 306(SC)

⁴ (2009) 185 Taxman 255 (Delhi)

⁵ (2010) 188 Taxman 402 (P&H)

⁶ (2013) 30 Taxman.com 165 (Bombay)

⁷ (2011) 197 Taxman 504 (Delhi)

⁸ (2018) 92 Taxmann.com 132 (Delhi)

decision of the Hon'ble Supreme Court in the case of American Hotel (supra), has observed that ASB is an educational institution existing solely for educational purposes and not for profit. The order of the Hon'ble Tribunal, Mumbai, has been accepted by the Tax Authorities, and no appeal has been filed till date against the same before this Hon'ble High Court by the Tax Authorities. Hence, the Department has accepted that the Petitioner is wholly and exclusively for educational purposes and not for profit. The Tax Authorities, till date, have not challenged the petitioner's existence solely for education purposes and not for profit. A.Y. 2006-07 onwards, and to date, the Tax Authorities have accepted the Petitioner's claim for exemption u/s. 10(23C)(vi) of the Act. In each assessment proceeding concluded by the Tax Authorities A.Y. 2006-07 and onwards, the Tax Authorities have not questioned ASB's existence for education and not for profit.

In view of the aforesaid, he submitted that the petition be made absolute.

20. Per contra, the learned counsel for the respondents submitted that the part of the receipts/fees of the petitioners were received by SAIESF in the USA and expenses were also incurred there. He submitted that the amounts had not been invested in accordance with the provisions of Section 11(5) r.w.s. 10(23C)

(vi) of the Act and consequently was in violation of those provisions. He submitted that it is settled law that exemption provisions are to be strictly construed and the person claiming exemption has to comply with the conditions specified. He submitted that one such condition had not been complied with by the petitioner i.e. the surplus had not been invested in the modes specified in Section 11(5) of the Act r.w.s. 10(23C)(vi) of the Act. He submitted that the exemption under Section 10(23C)(vi) applies to institutions where it is possible to examine the accounts properly to ensure that the income is properly applied for educational purposes and the funds are invested in the prescribed manner. According to him, in the present case, it is impossible to conduct verification since it involved examination of law and practice of another country and consequently it was not possible to check what amounts were received outside India and how they were spent. In this background, the respondents had rightly denied the exemption to the petitioners. He submitted that the petitioners had been granted exemption for the year 2006-07 since there were no transactions with SAIESF. In view of the aforesaid, the learned counsel for the respondents submitted that the petition deserves to be dismissed.

Conclusion:

21. In light of what is argued, let's now examine the impugned order:

“7. A part of the receipts of the institution was being received in the US by SAIESF. Some expenditure has been incurred out of those receipts and balance was being repatriated to India. It is pertinent to note that this arrangement continued till mid 2004. Thereafter, the entire receipts were received in India. But before that date, the special arrangement whereby a part of the receipts were being received abroad has led to the present complication for various reasons.”

“8. ... In the case of American Hotel Lodging Association Education Institution, ... the entire receipts were being first received in India. Part of this was being spent in India and the balance was being repatriated abroad. The Hon'ble Supreme Court rejected the argument of the Department that all the expenses should be incurred in India. The Hon'ble Court held that the Department is not correct to introduce the word “India” into the third proviso to section 10(23C) of the IT Act. The plain words of the said proviso do not require the application of the entire income to be in India. According to the Hon'ble Court, it is open to the prescribed authority to stipulate, while granting approval, that the approval is given subject to utilization of a certain percentage of income in the accounts for imparting education in India. Secondly, the Court has stated that the compliance of the terms and conditions stipulated by the Prescribed Authority would be a matter of examination at the time of assessment as availability of exemption has to be evaluated every year in order to find out whether it existed during the year solely for educational purpose and not for profit.”

“9. The facts in the present case are distinguishable.

Here, the situation is converse. Unlike in the case dealt by the Hon'ble Supreme Court where income has been received in India and the surplus was being repatriated abroad, here a part of the receipts purported to be of the applicant institution has been received outside India. Out of that, certain expenditure has been incurred outside India and balance has been repatriated to India. Since the facts are different, it would be correct to say that the judgments of the Hon'ble Supreme Court is not applicable to the facts of the present case.”

22. In our view, the respondent no. 4 ought to have taken a simple view of this matter. The IT Act is concerned about the income coming into India and/or being repatriated out of India. Therefore, income earned and expenditure incurred outside India by any person or entity does not concern the Income Tax Department inasmuch as Income tax Act is not attracted. In the present case, SAIESF was an entity which repatriated money into India and did not receive any repatriation from India. Therefore, the money earned and expenses made by SAIESF in the USA should not and not ought to concern the Income Tax Department in India. The Supreme Court in the case of American Hotel (supra) whilst rejecting the argument of the department that all expenses should be incurred in India had held that:

“.....The Hon'ble Court held that the Department is not correct to introduce the word “India” into the third proviso to Section 10(23C) of the IT Act. The plain words of the said proviso do not require the application of the entire income to be in India.”

23. In our view, the provisions of section 10(23C)(vi) therefore have excluded the receipts and expenses outside India.

24. We agree with the view of respondent no. 4 that:

“A plain reading of the section clearly shows that this provision is meant for institutions where it is possible to examine the accounts properly to ensure that the income are properly applied for educational purposes and the funds are invested in the prescribed manner.”

“... Secondly, a situation like this where a part of the receipts are received outside India and a portion of that is also spent outside India has never been envisaged in the provisions of section 10(23C) (vi) of the Act. A plain reading of the section would clearly show that this provision is meant for institutions where it is possible to examine the accounts properly to ensure that income is properly applied for educational purposes and the funds are invested in the prescribed manner.”

We disagree with the respondent no.4 on the following observation:

“A complicated situation like that of the applicant where a portion is received outside India and expenditure is incurred outside and then a substantial amount is repatriated to India as mentioned in paragraph 4(iii) was never contemplated in law. In this case, it is impossible to conduct transnational verification, examine law and practice of other countries and then to check what amounts are received outside and how they have been spent etc. The record shows the serious problem faced by the assessing officer. In the return then by the assessee the fee revealed in dollar terms at USA had not been disclosed.”

In our view, the present case was simple and not complicated as there was no requirement to conduct transnational verification of transactions and examine the law and practices of other countries to complete an assessment.

25. In our view, once it is established that the ASB/the petitioners exist to provide education and not for profit, the exemption cannot be denied. The Supreme Court in the aforesaid judgment has held that at the time of granting approval u/s. 10(23C)(vi) of the Act, the prescribed authority should not go into the examination of monitoring provision. That is the job of the assessing officer. In our view, in the present case there was absolutely no requirement to certify the correctness of the accounts of SAIESF as held by respondent no. 4 as being impossible and therefore, being led to believe that the conditions of clause (a) of the 3rd proviso to Section 10(23C)(vi) are not satisfied.

26. As a matter of record, the department has granted ASB/the petitioners exemption under sections 10(22) and 10(23C)(vi) of the Act since AY 1999-2000 to 2002-03 and AY 2006-07 to AY 2026-27. It is therefore substantiated that the petitioner only exists for educational purposes and not for profit.

27. The current matters under the writ petitions are covered by the petitioner's own case for A.Y. 1999-00, A.Y. 2000-01 and A.Y. 2001-02 by the decision of the Hon'ble Delhi High Court. Special Leave Petition of the Tax Authorities against the said order of the Delhi High Court has been dismissed by the Supreme Court. The principles as laid down in the decision of the Supreme Court in the case of American Hotel (*supra*) apply to the current matters under the petition.

28. We are unable to agree with the respondents that the law laid down by the Supreme Court in the case of New Noble Education Society (*supra*), would be applicable to the present case in as much as it is held in paragraph 78 of the said judgment as under:

“78..... it would be in the larger interests of the society that the present *judgments* operate hereafter. As a result, it is hereby declared that the law declared in the present judgment shall operate prospectively.”

Consequently, since the judgment itself held that it was prospective and not retrospective, it would not be applicable to the present case.

29. Besides, the Supreme Court in the said case has held that at

the time of considering the application for approval under Section 10(23C)(vi) of the Act, the Commissioner should confine the enquiry ordinarily to the nature of income earned and whether it is for education or education related objects of the society or the trust. There is no doubt that even after the ruling in the New Noble Education Society's (supra) case, verification of expenditure is contemplated at the initial stage of approval.

30. In our view, the respondents can be concerned only with the application of income in the hands of ASB/the petitioners once received in India. This is because in the present case, ASB/the Petitioners are not transferring/repatriating any money outside India to any person or entity. Therefore, in our view the respondents can have absolutely no concern about the receipts and expenses made by an entity outside the country merely because it is transferring its surplus or even a portion thereof to an entity in India. In this case, the petitioners inasmuch as it would strictly be the concern between the person or entity transferring the surplus and the authorities of that country. Furthermore, it is not the case of the respondents that having received the monies in India, ASB/the petitioners have not utilized the funds in accordance with the objects for which it was founded. The respondents have not substantiated their bald statement that

ASB/the petitioners have not invested the surplus money in accordance with law which in any event would not be a criteria at the initial stage of approval as held by the Apex Court in New Noble Society (supra).

31. The respondents can certainly monitor the funds and take necessary action in accordance with law if not invested as per Section 11(5) of the Act. Under the twelfth proviso, the prescribed authority is required to examine cases where the applicant does not apply its income during the year of receipt and accumulates it but makes payment therefrom to any trust or institution registered u/s. 12AA or to any fund or trust or institution or university or other education institution and to that extent the proviso states that such payment shall not be treated as application of income to the objects for which such trust or fund or educational institution is established. The idea underlying the twelfth proviso is to provide guidance to the prescribed authority as to the meaning of the words 'application of income to the objects for which the institution is established'. Therefore, the twelfth proviso is the matter of detail. The most relevant proviso for deciding this appeal is the thirteenth proviso. Under that proviso, the circumstances are given under which the prescribed authority is empowered to withdraw the approval earlier granted. Under

that proviso, if the prescribed authority is satisfied that the trust, fund, university or other educational institution etc. has not applied its income in accordance with the third proviso or if it finds that such institution, trust or fund etc. has not invested / deposited its funds in accordance with the third proviso or that the activities of such funds or institution or trust etc., are not genuine or that its activities are not being carried out in accordance with the conditions subject to which approval is granted that the prescribed authority is empowered to withdraw the approval earlier granted after complying with the procedure mentioned therein.

32. Be that as it may, we find no merit in the contentions of the respondents and consequently allow the petition in terms of prayer clause (a) and (b). Petition is accordingly disposed of with no order as to costs.

33. No orders as to costs.

(KAMAL KHATA, J.)

(DHIRAJ SINGH THAKUR, J.)