Reportable

* IN THE HIGH COURT OF DELHI AT NEW DELHI

\+ WP (C) No. 5311 of 2008

% *Reserved on : September 07, 2009*
Pronounced on : October 09, 2009

Digember Jain Society for Child Welfare . . . Petitioner

through : Mr. Anil Sharma, Advocate

VERSUS

Director General of Income Tax (Exemptions) . . . Respondent

through : Ms. Prem Lata Bansal, Advocate

CORAM :-
THE HON'BLE MR. JUSTICE A.K. SIKRI
THE HON'BLE MR. JUSTICE VALMIKI J. MEHTA

1. Whether Reporters of Local newspapers may be allowed to see the Judgment?
2. To be referred to the Reporter or not?
3. Whether the Judgment should be reported in the Digest?

A.K. SIKRI, J.

1. This petition is filed by Digember Jain Society for Child Welfare (Regd.), with the following prayers :-

> "(i) Writ of Certiorari or Writ, Order of direction in the nature of Certiorari or any other appropriate Writ order or direction under Articles 226/227 of the Constitution of India quashing the impugned order dated 28.4.2008;
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> (ii) Writ of Certiorari or Writ, Order or direction in the nature of Certiorari or any other appropriate Writ order or direction under Articles 226/227 of the Constitution of India declaring the order dated 28.4.2008 as illegal and directing the stay of operation of the order dated 28.4.2008 and all consequential proceedings arising out of the aforesaid order;

of India directing the respondent to allow exemption 10(23C)(vi) of the Act to the petitioner society;

(iv) Writ of Mandamus directing the respondent to allow exemption u/s 10(23C)(vi) of the Act of the petitioner society;

(v) To pass ad interim orders in terms of prayer above; and

(vi) such further or other relied as this Hon'ble Court may deem fit and proper in the facts and circumstances of the case."

2. As is clear from the reading of the prayers itself, the petitioner claims that it is a charitable society and is, thus, entitled to exemption under Section 10(23C)(vi) of the Income Tax Act, 1961 (hereinafter referred to as the 'Act'). But this contention of the petitioner has not been accepted by the respondent, who has rejected the application of the petitioner seeking exemption under the aforesaid provision, by impugned order dated 28.4.2008. Therefore, the issue which arises in this petition is as to whether the petitioner qualifies to be exempted under Section 10(23C)(vi) of the Act. To appreciate the circumstances under which this controversy has arisen, we may traverse through the facts appearing on the record of this case.

3. The petitioner society was established in the year 1969 and is duly registered under the Societies Registration Act, 1860 vide Certificate No. 4050 of 1968-69 dated 24.2.1969 under the name and Style of *"Digamber Jain Society for Child Welfare (Regd.)"*. Since its inception, the petitioner is imparting education to the public at large by running schools under the name *Modern School* in various cities

International Happy School" at Jangpura, New Delhi. The p caters to the educational needs of about 5800 students from class Nursery till class 12th. The petitioner society is also duly registered under Section 12A(a) of the Act vide F.No. CIT-II/TE(13g)/70/5257-58 dated 26.12.1975 as well as also u/s 80G of the Act.

4. The income of the petitioner was exempt under Section 10(22) of the Act which was naturally given on satisfying that it was running educational institutions for educational purposes and not for the purposes of profit. The petitioner society had been regularly allowed exemption under Section 80G of the Act, though the same was not required under the statute.

5. The petitioner had also been granted exemption under Section 10(23C)(vi) of the Act upto the assessment year 2001-02 by the Central Board of Direct Taxes, New Delhi vide order dated 18.5.2001. However, with effect from 1.6.2007, the new provisions of Section 10(23C)(vi) read with Rules 2BC and 2CA of the Income Tax Rules, 1962 were introduced, whereunder necessary approval of the educational institution had to be taken from the prescribed authority, namely, the Chief Commissioner or the Director General. The petitioner had filed an application for continuation of exemption for the assessment years 2002-03 to 2004-05 before the Director General of Income Tax (Exemptions), Kolkata, who was the

of Direct Taxes on 26.12.2003. However, in view amendment, the application was transferred to the Director General. The petitioner filed an application for renewal of exemption under Section 10(23C)(vi) of the Act for the assessment years 2005-06 to 2007-08 on 18.1.2005 before the Director General (Exemptions), New Delhi. The petitioner, however, is not aware about the fate of the aforesaid applications as no order till date, either allowing renewal of exemption or refusing to grant continuation of exemption, had been served upon the petitioner. The petitioner, having failed to get any response, again applied on 5.4.2007 for further necessary approval for the assessment years 2008-09 to 2010-11 before the Director General of Income Tax (Exemptions), New Delhi, which has since been refused by the impugned order.

6. Perusal of the impugned order would reveal that the respondent has refused to grant continuation of exemption on the following reasons:-

(i) As per sub-clause (d), (e), (f), (m) and (o) of clause (3) of the Memorandum of Association, the petitioner society does not exist solely for educational purposes.

(ii) The petitioner is having multiple objects, of which education is only one of them. Each object is independent of the other.

(iii) As the petitioner is having multiple objects, it would mean that the petitioner can pursue even the non-educational objects in

(iv) Due to amendments brought about in the Act an approval under Section 10(23C)(vi) of the Act is no longer limited to periodical approval of three years. The approval is now given from a particular assessment year onwards, hence, it is a prospective approval, which has to take into care even the future activities of the petitioner.

(v) At the time of approval it has to be ensured that a society, by virtue of its objects, exists only for educational purposes for which it is claiming approval.

(vi) By leaving such non-educational objects loose ended, the petitioner will always be at liberty to apply its income towards these objects.

(vii) The word 'solely' means 'exclusive', which shows that the objects primary or ancillary must be solely for education and not for any other purpose.

Though, as of today, the petitioner society is running schools and, thus, the only activity of the petitioner pertains to 'education', it is clear from the perusal of the order of the respondent that in view of some other objectives, which are not educational, the respondent is apprehensive that there is a possibility of pursuing non-educational objects by the petitioner and, thus, it cannot be said that the petitioner exists solely for educational purposes. It is also clear from the aforesaid narration that though the petitioner was enjoying such

of the proviso to Section 10(23C)(vi) vide the Finance (No 1998. Before the insertion of Section 10(23C)(vi), such cases were covered by Section 10(22) and that provision was couched in the following language :-

> "**Sec. 10(22)** – any income of an university or other educational institution, existing solely for educational purposes and not for purposes of profit."

7. The provision, as amended, reads as under :-

> "Sec. 10(23C)
>
> (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….."

8. It is not in dispute that even with the insertion of Section 10(23C)(vi), position remained the same, which existed under Section 10(22) of the Act. Thus, effect of the insertion of the 3rd proviso is to be examined, which is to the following effect:

> "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 278a , wholly and exclusively to the objects for which it is established; 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 of institution or any university or other educational institution or any hospital or other medical institution. as on the 1st day of June, 1973;
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> (ii) Any assets (being debentures issued by, or on behalf of, any company or corporation), acquired by the fund, trust or

(iii) Any accretion to the shares, forming part of the co fund, trust mentioned in sub-clause (i), by way of bonus sh allotted to the association 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, 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."

9. We are not treading virgin area inasmuch as the Supreme Court has already undertaken this exercise in its recent judgment in the case of *American Hotel & Lodging Association Educational Institute* v. *CBDT & Ors.*, 301 ITR 86. Following observations at page 104 thereof are significant :-

"We shall now consider the effect of insertion of the provisos to section 10(23C)(vi) vide ht Finance (No.2) 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 standardized 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 the exemption provision. With the insertion of the first proviso, the prescribed authority is required to vet the application."

10. The Supreme Court has also clarified that the amended provisions of Section 10(23C)(vi) are analogous to Section 10(22) of the Act. The

extent, scope and effect of the proviso added by amend

explained by the Supreme Court in the following words :-

> "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 fund in accordance with the third proviso or that the activities of such fund 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 then the prescribed authority is empowered to withdraw the approval earlier granted after complying with the procedure mentioned therein.
>
> Having analysed the provisos to Section 10(23C)(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 standardized form in terms of the first proviso. It is only if the pre-requisite condition of actual existence of the educational institution is fulfilled that the question of compliance with the 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.
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> To make the section with the proviso workable we are of the view that the monitoring conditions in the third proviso like application/utilization of income, pattern of investments to be made, etc., could be stipulated as conditions by the prescribed authority subject to which the approval could be granted. For example, in marginal cases like the present case, where the appellant institute was given exemption upto the financial year ending March 31, 1998 (assessment year 1998-99) and where a application is made on April 7, 1999, within seven days of the new dispensation coming into force, the prescribed authority can grant approval subject to such terms and conditions as it deems fit provided they are not in conflict with the provisions of the 1961 Act (including the abovementioned monitoring conditions). While imposing stipulations subject to

> activities in India which the applicant has undertaken ir constitution, memoranda of understanding and agreem with the Government of India/National Council. In this case, broadly the activities undertaken by the appellant are conducting classical education by providing course materials, designing courses, conducting exams, granting diplomas, supervising exams, all under the terms of an agreement entered into with institutions of the Government of India. Similarly, the prescribed authority may grant approvals on such terms and conditions as it deems fit in case where the institute applies for initial approval for the first time. The prescribed authority must give an opportunity to the applicant institute to comply with the monitoring conditions which have been stipulated for the first time by the third proviso. Therefore, cases where earlier the applicant has obtained exemptions(s), as in this case, need not be reopened on the ground that the third proviso has not been complied with. However, after grant of approval, if it is brought to the notice of the prescribed authority that conditions on which approval was given are breached or that the circumstances mentioned in the third proviso exist then the prescribed authority can withdraw the approval earlier given by following the procedure mentioned in that proviso."

11. It follows from the aforesaid judgment that when an application for exemption is to be moved by any trust, fund, university or other educational institution, the threshold conditions which are to be examined at that stage are actually existence of an educational institution and approval of the prescribed authority, for which every applicant has to move an application in the standardized form in terms of the first proviso. Insofar as newly added third proviso is concerned, which relates to application of funds, namely to see whether such institution etc. has not invested/deposited its funds, in accordance with the third proviso or that the activities of such institution, etc. are not genuine or that its activities are not being carried out in accordance with the conditions subject to which the approval is granted, would be a matter that would arise for

conditions/ requirements. It is only in the event that such co are not fulfilled, after the grant of exemption, the prescribed authority is empowered to withdraw the approval earlier granted after complying with the procedure mentioned therein.

12. In order to bind the institutions etc. to properly implemented the rigours contained in the third proviso, the Supreme Court provided the solution also in the aforesaid judgment, which is this: on fulfilling the threshold conditions, approval could be granted with the stipulation that conditions mentioned in the third proviso would be carried by the applicant. The Supreme Court also was of the view that while imposing such stipulation, subject to the approval as granted, the prescribed authority may insist on certain percentage of accounting income to be utilized/applied for imparting education in India, as it was a case of a foreign educational institutions.

13. Significantly, the Supreme Court also drew distinction between those institutions applying for initial approval for the first time and the institutes who had already obtained exemption and their cases were to be examined after the introduction of third proviso. In respect of former category of cases, it was held that the prescribed authority may grant exemption on such terms and conditions as it deems fit. In respect of cases falling in the the latter category, the Supreme Court categorically observed that those cases where exemption had

if it is brought to the notice of the prescribed author conditions on which approval is given are breached or that the circumstances mentioned in the third proviso exist, the prescribed authority could withdraw the approval given earlier by following the procedure mentioned in the proviso.

14. The Supreme Court in ***Aditanar Educational Foundation*** v. ***Additional Commissioner of Income Tax,*** 224 ITR 310, has held that a society or a trust or other similar body running educational institutions solely for educational purposes and having the overall object of not to make any profit can be regarded as 'other educational institution' even if some surplus arises from its activities.

15. When we apply the principles laid down by the Apex Court in the aforesaid judgments, it becomes clear that the petitioner society has mainly been formed with the objective of carrying out educational activity. There is no the purpose of profit. As of today, its only activity is education, namely, running of various schools and no other activity. It is not the allegation against the petitioner that it has deviated from its aforesaid object, namely, the *'education'*. The petitioner society had been granted exemption till assessment years 2001-02 and the application for and upto the assessment years 2007-08 were pending. The respondent has denied exemption to the petitioner society merely on suspicion that it may deviate from it in future. The income of the petitioner society had been assessed at

the assessment year 2003-04 and 2004-05, the assessment h completed under Section 143(3) of the Act vide assessment order dated 28.2.2006 and 24.11.2006 respectively and the total income has been assessed at NIL under Section 11 of the Act. Though for the assessment year 2002-03 the AO had passed orders dated 22.3.2005, denying exemption under Section 11 of the Act to the petitioner, this order was set aside by CIT(A) in appeal holding that the petitioner was entitled to exemption under Section 11 of the Act.

The Revenue accepted that order. Since the CIT(A) had granted certain reliefs also, the Revenue filed appeal thereagainst to the Tribunal and the Tribunal maintained the order of CIT(A). Further, as noted above, the petitioner has been granted approval under Section 80G(5)(vi) of the Act for the period from 1.4.2008 to 31.3.2011 by the Director of Income Tax (Exemptions), New Delhi.

16. We may also note that the petitioner had stated before the respondent (and his counsel also made a statement before us during arguments) that even if the petitioner society states some other activities as per its object clause, the surplus arising from the educational activity will not be utilized for any other purpose, but solely for educational purpose. This would take case of the apprehension nurtured in the mind of the respondent.

17. In these circumstances, we make the rule absolute and allow this writ petition by quashing the impugned order dated 28.4.2008 and issue

the petitioner society under Section 10(23C)(vi) of the Act. H while doing so, the respondent shall be free to incorporate stipulations and conditions in terms of third proviso. It will also be subject to an affidavit of undertaking given by the petitioner society that it would not breach any of those conditions and further that surplus funds shall be utilized only for educational purposes and will not be diverted to other non-educational objectives.

No costs.

(A.K. SIKRI)
JUDGE

(VALMIKI J. MEHTA)
JUDGE

October 09, 2009
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