



* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ W.P.(C) 5467/2010

% **Date of Decision : 2nd February, 2012.**

ANAND EDUCATION SOCIETY Petitioner
Through: Mr.Kanan Kapur, Advocate

versus

DIRECTOR GENERAL OF INCOME TAX (EXEMPTIONS), DELHI
..... Respondent
Through: Mr.Abhishek Maratha Sr.Standing
Counsel with Mr.Anshul Sharma,
Advocate.

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE R.V.EASWAR

SANJIV KHANNA,J: (ORAL)

1. Anand Education Society has filed the present writ petition impugning the order dated 29.04.2010 passed by the Director General of Income Tax (Exemption) respondent No.1 rejecting the application filed by the petitioner in Form No.56D for grant of registration u/s 10(23C) (vi) of the Income Tax Act, 1961 (Act for short) for the assessment year 2008-09 onwards.
2. The petitioner society was set up vide certificate of registration dated 4.11.1982. It has been managing and running a school in Delhi



since 1988. The petitioner was registered u/s 12A of the Act on 04.04.2005.

3. The impugned order dated 29.04.2010 refers to the balance sheet/profit & loss account of the petitioner society for the assessment year 2006-07 to 2009-10. The respondent No.1 in the impugned order has pointed out discrepancies with regard to sale of buses, vehicles maintenance, maintenance of furniture and sale of furniture/fixed assets. It appears that these discrepancies have been culled out on the basis of the records/accounts which were produced by the petitioner during the course of proceedings u/s 10(23C) (vi) of the Act. The final analysis and reasoning of the respondent No.1 in the impugned order reads:-

“I have carefully considered the submissions and other clarifications offered by the applicant. The discrepancies, both procedural and factual, as discussed above go to show that the applicant has debited bogus and exaggerated expenses. Accounts have not been maintained in a proper and transparent manner which is becoming of a public charitable institution. The huge diversion of funds on the ground of repairs and maintenance and the curious case of buying back the same old vehicles sold at an earlier date lead to situation where funds are being applied for non-educational purposes. The materials on record clearly lead to a reasonable conclusion that the funds collected from the students and others have not been applied solely for educational purpose. Under the circumstances, its application u/s 10(23C) (vi) for A.Y. 2009-10 onwards is rejected.”



4. Learned counsel for the petitioner has drawn our attention to the jurisdiction, scope and ambit of the power exercised by respondent No.1, while adjudicating an application u/s 10(23C) (vi) of the Act. The Supreme Court of India in *American Hotel and Lodging Association Education Institute Vs. Central Board of Direct Taxes and Ors. (2008) 301 ITR 86 (SC)* had examined the provisos to the aforesaid section and the scope and ambit of the jurisdiction and power exercised by the prescribed authority to whom an application for registration is made. After referring to provisions and the reasons for inserting Section 10(23C)(vi) it was held:-

“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 PA, 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 PA 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 PA 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 PA. While considering the approval application in the second proviso, the PA 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 there with the PA. Under the third proviso, the PA has to ascertain while judging the 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 twelfth proviso, the PA 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 trust 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 twelfth proviso is to provide guidance to the PA 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 PA is empowered to withdraw the approval earlier granted. Under that proviso, if the PA 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 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 PA is empowered to withdraw the approval earlier granted after complying with the procedure mentioned therein.

33. Having analysed 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 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 of 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.

34. 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 PA subject to which approval could be granted. For example, in marginal cases like the present case, where appellant-Institute was given exemption up to financial year ending 31.3.1998 (assessment year 1998-99) and where an application is made on 7.4.1999, within seven days of the new dispensation coming into force, the PA 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 which approval is granted, the PA may insist on certain percentage of accounting Income to be utilized/applied for imparting education in India. While making such stipulations, the PA has to examine the activities in India which the applicant has undertaken in its Constitution, MoUs. and Agreement with 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 PA 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 PA 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 exemption(s), as in this case, need not be re-opened 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 PA that conditions on which approval was given are breached or that circumstances mentioned in the thirteenth proviso exists then the PA can withdraw the



approval earlier given by following the procedure mentioned in that proviso. The view we have taken, namely, that the PA can stipulate conditions subject to which approval may be granted finds support from sub-clause (ii)(B) in the thirteenth proviso.”

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39. 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/utilization of income and outward remittance of income out of India. As discussed above, with the insertion of the provisos in Section 10(23C)(vi) of the 1961 Act, it is open to the PA to stipulate, while granting approval, that the approval is being given subject to utilization/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 utilized 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(23C)(vi) by the Finance 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 of those conditions by the appellant. The compliance of 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."

5. We have already quoted above the operative portion of the impugned order passed by the respondent No.1. We have also referred briefly to reasons given by the respondent No.1 for rejecting the application for registration under Section 10(23C)(vi) of the Act. It is clear that the respondent No.1 has not taken consideration of the ratio and



observations of the Supreme Court in *American Hotel and Lodging Association Education Institute (supra)*. In terms of the said decision, the respondent No.1 as the prescribed authority is required to examine various aspects and thereafter issue directions/stipulations and impose conditions. On violation of the said conditions and stipulations, it is open to the prescribed authority to cancel the registration. The distinction between assessment proceedings and proceeding under Section 10(23C)(vi) has been explained and elucidated by the Supreme Court. With regard to the past conduct, and allegations, learned counsel for the petitioner has submitted that regular assessment proceedings were conducted u/s 143(3) of the Act for the assessment year 2008-09 and vide order dated 09.09.2010, return filed by the assessee declaring NIL annual income was accepted. No addition has been made. It is noticed that this order was passed five months after the impugned order of respondent No.1 dated 29.04.2010. Learned counsel for the petitioner has also submitted that the allegations are not correct and the respondent No.1 has not taken several aspects and contentions into consideration. We would not like to comment on the said aspect as an order of remit is being passed to ask respondent No.1 to decide the application for registration u/s 10(23C) (vi) of the Act afresh. The respondent No.1 while deciding the application will keep in mind the decision of the Supreme Court in *American Hotel and Lodging Association Education Institute (supra)*. It is also open to the respondent No.1 or the authorities to take appropriate action in accordance with law in case they find or observe discrepancies in the



accounts for the assessment years 2006-07 to 2009-10. We have not expressed any opinion on the merit of the allegations or on whether or not any grant for exemption is appropriate or required.

6. Accordingly, a writ of certiorari is issued quashing the order dated 29.04.2010 with a direction to respondent No.1 to pass an order afresh on the application in Form No.56D filed on 30.04.2009 for registration u/s 10(23C) (vi) of the Act for assessment year 2008-09.

7. In view of the aforesaid order, the interim order passed on 28.11.2011 staying the reassessment proceedings u/s 148 of the Act for the assessment year 2009-10, is vacated and comes to an end. It will be open to the Assessing Officer to proceed in accordance with law. It will also be open to the petitioner to challenge the reassessment proceedings if deemed appropriate in accordance with law. It will be also open to the tax authorities to proceed in accordance with law on the notice dated 24.04.2011 for withdrawal of exemption u/s 12A of the Act.

8. The writ petition is disposed of. No costs.


SANJIV KHANNA, J


R.V.EASWAR, J

FEBRUARY 02, 2012
mr/Bisht