THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 23.05.2014

\+ **W.P.(C) 2184/2013**

COUNCIL FOR THE INDIAN SCHOOL, CERTIFICATE EXAMINATIONS ..... Petitioner

versus

DIRECTOR GENERAL OF INCOME TAX ..... Respondent

Advocates who appeared in this case:
For the Petitioner : Mr M.P. Rastogi with Mr K.N. Ahuja.
For the Respondent : Mr Sanjeev Sabharwal, Sr. Standing Counsel with Ms Ruchi Bhatia, Jr. Standing Counsel.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

1. The present writ petition has been filed under Article 226/227 of the Constitution of India, by the Council for the Indian School Certificate Examinations. The petitioner has challenged the order dated 07.06.2012 (hereinafter referred to as "impugned order") passed by the Director General of Income Tax (Exemptions), (hereinafter referred to as "DGIT(E)"), refusing to grant exemption under Section 10(23C)(vi) of the Income Tax Act, 1961 (hereinafter referred to as "the Act") for the AY 2008-09 onwards, to the petitioner.

2. The Petitioner is a society registered under the Societies Registration Act XXI of 1860, (Punjab Amendment) Act, 1957 as extended to the Union Territory of Delhi. The petitioner is recognised and listed as a body conducting public examinations under the Delhi School Education Act, 1973.

3. The Petitioner had applied for the approval under Section 10(23C)(vi) of the Act for AY 1999-2000 to 2001-02 to Central Board of Direct Taxes (hereinafter referred to as "CBDT"). The CBDT, by order dated 31.10.2006, rejected the Petitioner's application holding that the Petitioner was not an educational institution but was an examination body which conducts examinations for ICSC and ISC and therefore, could not be granted the exemption as an educational institution under Section 10(23C)(vi) of the Act.

4. The Petitioner states that it had also filed applications for approval under Section 10(23C)(vi) of the Act for AY 2002-03 to 2004-05 and 2005-06 to 2007-08 which have not been disposed of so far.

5. The Petitioner had filed an application for approval under Section 10(23C)(vi) of the Act, for the AY 2008-09 to 2010-11, with the Respondent on 23.11.2007. By an order dated 08.10.2008, the respondent dismissed the application on the ground that the Petitioner is not an educational institution but an examination body conducting examinations for ISCE and ISC.

6. The petitioner filed a writ petition being W.P.(C) No. 4716/2010 in this court challenging the said order dated 08.10.2008. The said writ

petition was disposed of by an order dated 20.03.2012, passed by a division bench of this court, whereby it was held that the petitioner is an educational institution as contemplated under Section 10(23C)(vi) of the Act and the matter was remanded to the respondent to pass an order in accordance with law.

7. In compliance of the order of this Court dated 20.03.2012, the Respondent considered the matter and passed the impugned order dated 07.06.2012, whereby the respondent declined to grant the approval under section 10(23C)(vi) of the Act, *inter alia*, on the ground that the petitioner had failed to justify its claim that it did not exist for the purposes of profit. The respondent further held that the petitioner had conducted its affairs in a systematic manner to earn profits and the same were diverted in a clandestine manner. The Respondent further noticed that the Auditor had in its report, in respect of the Balance sheet of the petitioner relevant for the Financial Year 2008-09 (AY 2009-10), pointed out that there were lapses while awarding the contract to M/s Ratan J. Batliboi – Architects Pvt. Ltd. (hereinafter referred to as "RJB-APL") for installing IT enabled services and was thus unable to form an opinion on whether the accounts showed a true and fair view.

Submissions of the Petitioner

8. The Petitioner submits that it is a society established to promote education which includes the promotion of science, literature, the fine arts and the diffusion of useful knowledge by conducting school examinations.

9. Petitioner stated that up to the AY 1998-99, the income of the Petitioner was exempt under Section 10(22) of the Act, which fact was within the knowledge of the Revenue (Income Tax Officer) as intimated by the petitioner by letter dated 31.05.1999 in compliance to query letter dated 21.05.1999, during the registration proceedings under Section 12A of the Act. No assessments were made and/or no demands for income tax were raised for any of the years prior to the AY 1999-2000. The petitioner further submitted that the criteria for exemption under Section 10(22) of the Act, as existing prior to 01.04.1999 was identical to the criteria for exemption under section 10(23C) of the Act. Therefore, the petitioner ought to be granted the said exemption.

10. Petitioner stated that Rule 3 of the Rules and Regulations of the Petitioner allows the application of the income solely for the promotion of its object as set-forth in the Memorandum and also prohibits the transfer of income and property of the petitioner society, directly or indirectly, by way of profit, dividend and bonus to the persons, who at any time are or have been members of the petitioner society and also prohibits the payment of remuneration to its members. Petitioner further stated that none of the portion of its income was spent for other than its objects.

11. Petitioner contended that the Petitioner is an unaided organization and for the purpose of development and expansion, it has to create its own resources. Prior to the Financial Year 2008-09, i.e. AY 2009-10, there was a constant fee charged for some years, but from AY 2009-10, in order to create the resources as required for future expansion, modernization, development and construction of the building, the Petitioner increased the

fee and the fee remained constant till the Financial Year 2011-12, i.e. AY 2012-13, but after considering the sufficiency of available resources and the future requirement of funds, the Petitioner from April 2012 had reduced the fee to a great extent and the surplus in various years cannot be made basis for refusal of approval under Section 10(23C)(vi) of the Act.

12. The Petitioner further contended that awarding the contract to RJB-APL in the financial year 2008-09 by agreement dated 05.09.2008, for installing IT enabled services was a commercial transaction and the work was awarded for development, implementation and maintenance of e-enabled system for registration, examination of answer sheets, development of software for facilities management services etc. RJB-APL had maintained their website, collated and disseminated the results of ICSC and ISC for 2009 and had started e-registration and development of related software but on account of various complaints received from school principals about the system not working properly, further payments were not released and RJB-APL also stopped working on development of software with effect from December 2009. The petitioner thereafter demanded a refund of the amount paid to RJB-APL and ultimately succeeded in receiving back ₹8,24,50,000/-, on 31.08.2012, in full and final settlement of its claims.

Submissions of the Respondent

13. The respondent supported the impugned order dated 07.06.2012 and contended that the petitioner was functioning for profit purposes in the garb of education and, therefore, was not entitled to any exemption. The

activities of the petitioner were not genuine and the same were purely on commercial basis. According to the revenue, the surplus of income over expenditure in the range of 24% to 28% for AY 2005-06 to AY 2008-09, and thereafter 67.87% in AY 2009-10, 71.56% in AY 2010-11 and 69.56% in AY 2011-12, showed that the Petitioner was being run for generation of profit in a systematic and calculated manner year after year and the huge surplus of the petitioner has not been applied towards the achievement of the objectives of the petitioner, which are merely paper clauses. It was submitted that the main object of the Petitioner was to conduct examinations and to award certificates and the petitioner was charging fees as "Registration & Affiliation charges", "Examination charges", "Eligibility Charges Class XI", "Recheck Charges", etc. for the same.

14. The respondent asserted that the steep hike in the examination fee from ₹ 460/- to ₹2100/- per student, further indicated that the petitioner was only a profit making organisation and the subsequent roll back of the fee was an afterthought to get the continued exemption. The learned counsel for the revenue also referred to following table:

A.Y.	Gross Receipts	Expenditures after Depreciation	Capital Expenditures	Capital Expenditures (Out of Accumulation of earlier years)	Total expenditure for the year	Surplus	% Surplus over total receipts
2005-06	116683397	80262907	2599265	0	82862172	33821225	28.99
2006-07	123250764	92591390	521783	0	93113173	30137591	24.45
2007-08	129095657	91641050	4273554	0	95914604	33181053	25.70
2008-09	141636868	98157116	3472575	0	101629691	40007177	28.25
2009-10	426161552	136933674	0	6220613	136933674	289227878	67.87
2010-11	539294674	153385804	0	21233060	153385804	385908870	71.56
2011-12	589269733	179346521	0	26669123	179346521	409923212	69.56

It was contended that the above table had been prepared after excluding the component of depreciation and including the capital expenditure incurred over the years. This according to the learned counsel indicated the cash flows for the relevant assessment years and substantiated the view of the Prescribed Authority (respondent) that the petitioner was being run to generate surplus and not for the object for which it was established.

15. The respondent also contended that the auditor of the petitioner in his report for the Financial Year 2008-09, had advised investigation of the petitioner's financial affairs. He also contended that the petitioner entering into agreement with RJB-APL without enquiry reflected its recklessness, as RJB-APL was an architect and not competent to undertake the assignment of software development, which fact has not been disputed by the Petitioner.

16. The respondent further contended that, the fact that the Petitioner had been previously granted exemption under Section 10(22) or 10(23C)(vi) of the Act, does not guarantee that the exemption will apply mechanically for all subsequent assessment years. All proceedings under the Act are independent of each other. According to the procedure provided by the second proviso to the Section 10(23C) of the Act, the Prescribed Authority, after examining the objects and genuineness of the activities of such trust/society, has to satisfy himself as to whether the applicant deserves the approval under Section 10(23C) of the Act.

17. We have heard the learned counsel for the parties.

18. The approval under Section 10(23C)(vi) of the Act has been denied to the petitioner for two reasons. First of all, the respondent has concluded that the surplus generated by the petitioner from its activities indicates that the activities of the petitioner are in the nature of business and for the purposes of generating profit. Accordingly, the respondent has held that the petitioner did not qualify the test of existing only for the purpose of education and not for profit. Secondly, the respondent has concluded that the activities of the petitioner were not genuine in view of the fact that the petitioner had released payments amounting to ₹1838.67 lacs to RJB-APL. The respondent also took note of the observations of the auditor whereby the auditors had concluded that the petitioner had not followed the "General Business Practices" in awarding the contract to RJB-APL. The auditor had also found various lapses in monitoring the execution of the contract by RJB-APL and had concluded that in view of the said lapses as well as in view of the fact that the work done by RJB-APL had not been verified and certified by an IT expert, they were unable to form an opinion as to whether the accounts of the petitioner reflected a true and fair picture. In view of the observations made by the auditor, the respondent concluded that the activities of the petitioner were not genuine. The relevant extract of the impugned order indicating the aforesaid reasons for rejection of the application filed by the petitioner are quoted below:-

> **"9. In view of the discussion held in forgoing paragraph of this order, the applicant's claim for exemption u/s 10(23C)(vi) for the AY 2008-09 and onwards is rejected on the following grounds:-**

(i) The generation of huge surplus year after year clearly established that the applicant is in the business of education like any other entrepreneurs and service providers by collecting huge fees from their clients who in this particular case are students of the schools affiliated with the applicant Council. Therefore it is held that the applicant Council is existing for the purpose of profits.

(ii) Activities of the applicant Council are not genuine as the Statutory Auditors of the Council have raised various objections and pointed out various irregularities, as stated above, in their Audit report for the A Y 2009-10 and 2010-11 on the Agreement amount to Rs *3980.65 lacs* made by the Council with Ratan J. Batliboi Architects P Ltd., Mumbai and releasing of payments amounting to Rs. 1838.67 lacs to RJB-APL. The objection raised and irregularities pointed out by the Auditors' clearly establishes that the funds of the Council are not being used prudently for the purpose of its Objects."

19. The principal controversy that needs to be considered is, whether in the facts of the present case the generation of surplus by the petitioner would indicate that the petitioner was also existing for the purposes of profit. The second question that needs to be addressed is whether the lapses on the part of the petitioner in awarding the contract for IT services to RJB-APL would amount to not applying the funds exclusively for the object for which the petitioner was established as contemplated under third proviso to Section 10(23C) of the Act.

20. Before proceeding further it would be necessary to refer to the provisions of Section 10(23C) of the Act. The relevant extract of the said provisions are quoted below:-

"(23C) any income received by any person on behalf of—

xxxx xxxx xxxx xxxx xxxx

(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

xxxx xxxx xxxx xxxx xxxx

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 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

xxxx xxxx xxxx xxxx xxxx

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 section 288 and furnish along with the return of income for the relevant assessment year, 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 earth quake 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 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,

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;"

21. A plain reading of Clause (vi) of Section 10(23C) of the Act indicates that exemption under the said clause would be available to any educational institution "existing solely for educational purposes and not for purposes of profit.". The question whether the petitioner is an educational institution is no longer *res integra*. This Court by order dated 20.03.2012 in W.P.(C) No.4716/2010 has already held that the petitioner is an educational institution for the purposes of Section 10(23C) of the Act. Therefore, the essential question that arises is whether the petitioner exists solely for educational purposes or also for the purposes of profit. In order to answer this question, it would be necessary to consider the activities carried on by the petitioner.

22. The petitioner is a registered society and is engaged in ensuring high standards of education imparted through the medium of schools. The petitioner has 1750 schools which are affiliated to it and provide education from nursery to twelfth standard. It selects the courses, syllabus, books and

literature for different standards to be studied by the students in order to maintain a uniform standard throughout India. The petitioner is recognized and listed as a body conducting public examinations under the Delhi School Education Act, 1973. It conducts examinations (ICSE and ISC) of the students who have completed their studies and awards certificates to the successful students. The petitioner, in order to maintain the standard of education and to make the teachers aware of the latest developments in the education field, from time to time undertakes, supports and promotes study and research and also holds training conferences and seminars for the teachers.

23. The petitioner owes its genesis to Inter-State Board for Anglo Indian Education which was set up in 1935. The said Board looked after the work and standard of Anglo Indian schools preparing the students for "Overseas School Certificate" examination conducted by the University of Cambridge. In 1958, the Inter-State Board for Anglo Indian Education set up a council for the Indian School Certificate Examination and on 19.12.1967, the council was registered as a society under the Societies Registration Act XXI of 1860, (Punjab Amendment) Act, 1957 as extended to the Union Territory of Delhi.

24. It is also necessary to advert to the objects of the petitioner society. The aims and objects of the Petitioner contained in Clause 3 of its Memorandum of Association are as under:

> "3. The object of the Society is educational, and includes the promotion of science, literature, the fine arts and the diffusion of useful knowledge by conducting School examinations

through the medium of English. The Society exists solely for educational purposes and not for purposes of profit.

(a) For the object aforesaid or in furtherance thereof:

(i) to conduct examinations and award certificates for the time being in co-operation with the University of Cambridge, Local Examinations Syndicate and to frame regulations for the conduct of its examinations and to modify, alter or cancel such regulations.

(ii) to publish books, periodicals, magazines and any other literature.

(iii) to hold seminars, courses, educational workshops, for in-service training of teachers.

(iv) to enter into arrangements with any Government or authority whether Union, State, Municipal, Local or otherwise that may seem to be conducive to the object of the Society or to obtain from any such Government or authority such rights, concessions, and privileges as the society may thing desirable and to obtain and carry out, exercise and comply with any such arrangements, rights, privileges, and concessions.

(v) to accept donations, gifts movable and immovable and to raise money fees or otherwise.

(vi) to borrow and raise funds, with or without security in any manner the Society may think fit and to repay the same.

(vii) to purchase, take on lease for exchange, hire or otherwise acquire, for and on behalf of the Society, properties movable and immovable and rights or privileges as they may think fit.

(viii) to sell, exchange, lease, borrow by mortgaging properties of the Society, mortgage, gift, dispose of, turn to account, or otherwise deal with, all or any part of the properties and rights of the Society as they may think necessary and convenient.

(ix) to hire and to employ secretaries, clerks, servants, examiners and moderators and others and to pay

them such salaries, wages and fees and honoraria as the Society may decide from time to time.

(x) to frame and establish Provident Fund, Gratuity and Pension Schemes for the employees of the Society, as the Society may decide from time to time.

(b) To do or cause to be done all such lawful things which are incidental or conducive to the attainment of the above object."

25. The rules and by laws of the petitioner also proscribe distribution of any surplus and it is specified that funds/surpluses of the petitioner would be utilised solely for its objects. The relevant clause of the Rules and Regulations is as under:

> "3. The income and property of the Society, whencesoever derived, shall be applied solely for the promotion of its object as set forth in the Memorandum.
>
> No portion of the income or property aforesaid shall be paid or transferred, directly or indirectly, by way of dividend, bonus or otherwise by way of profit, to persons who at any time are, or have been members of the Society or to any one or more of them or to any persons claiming through any one or more of them provided that:
>
> (a) No remuneration or other benefit in money or money's worth shall be given by the Society to any of its members whether officers or servants of the Society or not, except payment of out-of-pocket expenses, reasonable and proper interest on money lent, or reasonable and proper rent on premises lent to the society.
>
> (b) No member shall be appointed to any office, under the Society, which is remunerated by salary, fees or in any other manner not accepted by clause (a).

(c) Nothing in this clause shall prevent the payment by the Society in good faith of reasonable remuneration to any of its officers or servants (not being members) or to any persons (not being members), in return for any services actually rendered to the Society."

26. It is apparent from the above narrative that the aims and objects, as well as the activities undertaken by the petitioner, fall within the definition of "charitable purposes" under section 2(15) of the Act. Even though, the objects and by laws of the petitioner are clear and unambiguous, the respondent has come to a conclusion that the petitioner is being run for generation of profit. This conclusion has been arrived at only for the reason that the petitioner has been generating surplus from its activities. Petitioner's main source of funds is from charging fees from schools for registration and affiliation and fees charged from the students who are enrolled to take the exams conducted by the petitioner. The petitioner had been charging a uniform fee for several years prior to the Financial Year 2008-09. It is contended by the petitioner that it increased the fees in the Financial Year 2008-09 in order to create resources for construction of the petitioner's office building at Saket, New Delhi, introducing computer technology (which entailed purchases of computer and development of software) and purchase of other assets. The petitioner submitted that it was also required to incur expenditure for renovation and repair, as well as requisition of other movable and immovable properties. The petitioner envisaged that substantial expenditure would be required to modernise the activities of the petitioner. The petitioner also pointed out that in the subsequent years i.e. from Financial Year 2012-13, the petitioner has

reduced the examination fee, since it had accumulated the necessary funds for its purposes.

27. In the above facts, the issue to be addressed is whether generation of surplus by the petitioner can be construed to mean that the petitioner is not existing solely for educational purposes but also for the purposes of profit.

28. In our view, the fact that the petitioner had generated certain profits would not dilute the purposes for which the petitioner has been established. There is no dispute that the activity carried on by the petitioner is solely in the field of education. It is also important to note that there is no distribution of the surplus accumulated by the petitioner. It is now well settled that a provision of service in the nature of charity would not cease to be charitable only because it entails receiving a charge for the same. The nature of the activity carried on by an entity would be the predominant factor to determine whether the purpose of the organization is charitable. It is not necessary that a charitable activity entails giving or providing a service and receiving nothing in return. Collection of a charge for providing education would, nonetheless, be charitable provided, the funds collected are also utilised for the preservation of the charitable organization or for furtherance of its objects. In the present case, the petitioner has provided an explanation for the surpluses being accumulated. In our view, if the surpluses have been generated for the purposes of modernising the activities and building of the necessary infrastructure to serve the object of the organisation, it would be erroneous to construe that the generation of surpluses have in any manner negated or diluted the object of the organization. In the present case, the petitioner has been existing solely for educational purposes. Generation of profit and its distribution is not the

object of the petitioner society. The fact, that surpluses have been generated in order to build the infrastructure for modernising the operation, is clearly in the nature of furthering the objects of the society rather than diluting them. In our view, the conclusion of the respondent that the increase in the fees for generating surplus would by itself exclude the petitioner from the ambit of Section 10(23C)(vi) of the Act is clearly erroneous. Generation of profit or surplus by an organization cannot be construed to mean that the purpose of the organization is generation of profit/surplus, as long as the surpluses generated are accumulated/utilized only for educational purposes. The same would not disable the petitioner from claiming exemption under Section 10(23C)(vi) of the Act.

29. As stated earlier, the predominant object of the activity conducted by the petitioner would be the determinative test, merely because profit is generated, it would not dilute the object for which the petitioner has been established. The Supreme Court in the case of ***Addl. Commissioner of Income Tax v. Surat Art Silk Cloth Manufacturers Association***: **(1980) 121 ITR (SC)** applied the test of predominant object while considering whether any surplus generated by an organisation established for charitable purposes, would disable the said organisation from claiming that it was established for charitable purposes. The relevant extract of the decision reads as under:-

> "The test which has, therefore, now to be applied is whether the predominant object of the activity involved in carrying out the object of general public utility is to subserve the charitable purpose or to earn profit. Where profit-making is the predominant object of the activity, the purpose, though an

object of general public utility would cease to be a charitable purpose. But where the predominant object of the activity is to carry out the charitable purpose and not to earn profit, it would not lose its character of a charitable purpose merely because some profit arises from the activity. The exclusionary clause does not require that the activity must be carried on in such a manner that it does not result in any profit. It would indeed be difficult for persons in charge of a trust or institution to so carry on the activity that the expenditure balances the income and there is no resulting profit. That would not only be difficult of practical realization but would also reflect unsound principle of management."

30. In the case of ***Aditanar Educational Institution v. Addl. CIT*****: (1997) 224 ITR 310 (SC)** the Supreme Court has observed as under:-

> "After meeting the expenditure, if any surplus results incidentally from the activity lawfully carried on by the educational institution, it will not cease to be one existing solely for educational purposes since the object is not one to make profit. The decisive or acid test is whether on an overall view of the matter, the object is to make profit. In evaluating or appraising the above, one should also bear in mind the distinction/difference between the corpus, the objects and the powers of the concerned entity."

31. The predominant object test as explained in ***Surat Art Silk Cloth Manufacturers Association*** *(supra)* has also been applied by the Supreme Court in ***American Hotel and Lodging Association vs CBDT*****: [2008] 301 ITR 86** with respect to exemption under Section 10(23C)(vi) of the Act. The Court reiterated the said principle as under:

> "In deciding the character of the recipient, it is not necessary to look at the profits of each year, but to consider the nature of the activities undertaken in

> India. If the Indian activity has no co-relation to education, exemption has to be denied (see the judgment of this court in Oxford University Press [2001] 247 ITR 658 [supra]). Therefore, the character of the recipient of income must have character of educational institution in India to be ascertained from the nature of activities. If after meeting expenditure, surplus remains incidentally from the activity carried on by the educational institution, 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 the judgment of this court in Aditanar Educational Institution v. Addl. CIT [1997] 224 ITR 310."

32. The respondent has relied upon the decision of the High Court of Uttrakhand in ***Commissioner of Income Tax v. Queens' Educational Society***: **(2009) 319 ITR 160 (Uttaranchal),** whereby the Court had set aside the decision of the ITAT by holding that the assesee was not entitled to exemption under Section 10(23C)(iiiad) of the Act. The Court held that the surplus generated by the educational society would become income of the society which was exigible to tax.

33. In our opinion, this view would not be applicable in the present case. The Punjab and Haryana High Court in the case of ***Pinegrove International Charitable Trust v. Union of India***: **(2010) 327 ITR 73 (P&H)** had considered the above mentioned decision of the Uttarakhand High Court and held as under:-

> "(2) The provisions of Section 10(23C)(vi) of the Act are analogues to the erstwhile Section 10(22) of the Act, as has been laid down by Hon'ble the Supreme Court in the case of American Hotel and Lodging Association [2008] 301 ITR 86.

To decide the entitlement of an institution for exemption under Section 10(23C)(vi) of the Act, the test of predominant object of the activity has to be applied by posing the question whether it exists solely for education and not to earn profit (See 5-Judges Constitution Bench judgment in the case of Surat Art Silk Cloth Manufacturers Association [1980] 121 ITR 1(SC)). It has to be borne in mind that merely because profits have resulted from the activity of imparting education would not result in change of character of the institution that it exists solely for educational purpose. A workable solution has been provided by Hon'ble the Supreme Court in para 33 of its judgment in American Hotel and Lodging Association's case [2008] 301 ITR 86. Thus, on an application made by an institution, the prescribed authority can grant approval subject to such terms and conditions as it may deems fit provided that they are not in conflict with the provisions of the Act. The parameters of earning profit beyond 15% and its investment wholly for educational purposes may be expressly stipulated as per the statutory requirement. Thereafter, the Assessing Authority may ensure compliance with those conditions. The cases where exemption has been granted earlier and the assessments are complete with the finding that there is no contravention of the statutory provisions, need not be reopened. However, after grant of approval if it comes to the notice of the prescribed authority that the conditions on which approval was given, have been violated or the circumstances mentioned in 13th proviso exists, then by following the procedure envisaged in 13th proviso, the prescribed authority can withdraw the approval.

(3) The capital expenditure wholly and exclusively to the objects of education is entitled to exemption and would not constitute part of the total income.

(4) The educational institutions, which are registered as a Society, would continue to retain their character as such and would be eligible to apply for exemption under Section 10(23C)(vi) of the Act. (See para 8.7 of the judgment -

Aditanar Educational Institution case [1997] 224 ITR 310 (SC))

(5) Where more than 15% of income of an educational institution is accumulated on or after April 1, 2002, the period of accumulation of the amount exceeding 15% is not permissible beyond five years, provided the excess income has been applied or accumulated for application wholly and exclusively for the purpose of education.

(6) The judgment of Uttrakhand High Court rendered in the case of Queens' Educational Society [2009] 319 ITR 160 and the connected matters, is not applicable to cases fall within the provisions of Section 10(23C)(vi) of the Act. There are various reasons, which have been discussed in para 8.8 of the judgment, and the judgment of Allahabad High Court rendered in the case of City Montessori School [2009] 315 ITR 48 lays down the correct law."

34. This Court in the case of ***St. Lawrence Educational Society v. Commissioner of Income Tax***: **(2013) 353 ITR 325 (Del.)** referred to the above decisions and accepted the view of the Punjab and Haryana High Court in ***Pinegrove International Charitable Trust*** *(supra).* This Court concluded held as under:-

"8. In view of the aforesaid decisions, the opinion expressed by the respondent that the educational institutions seeking exemption should not generate any quantitative surplus is legally untenable and incorrect. The Chief Commissioner has erred in assuming that for exemption there should not be any surplus, otherwise the institution society exists for profit and not charity i.e. education in the present case. In view of the aforesaid judgments of the Supreme Court, Bombay High Court and Punjab and Haryana High Court, reasoning inscribed by the competent authority solely on the foundation that there has been some surplus profit is unjustified.

> 9. In the result, we allow the writ petition and set aside the order passed by the competent authority and remit the matter to the said authority for fresh adjudication in accordance with law in the light of the aforesaid decisions."

35. In view of the above, the conclusion of the respondent that the petitioner was not entitled to exemption under Section 10(23C)(vi) of the Act since it had generated a surplus is not sustainable.

36. The next question that needs to be considered is, whether the finding of the respondent that the activities of the petitioner are not genuine is erroneous. By virtue of the second proviso of Section 10(23C) of the Act, the Prescribed Authority (the respondent) is entitled to call for such information as it thinks necessary to satisfy itself that the activities of the fund or an institution are genuine. The respondent had called for information, including the financial records of the petitioner and had discovered that Auditor had expressed reservations with respect to the final accounts of the petitioner for the Financial Year 2008-09 and 2009-10. The controversy relates to a contract entered into by the petitioner with RJB-APL for modernising and installing IT enabled services for conduct of the activities of the petitioner. The petitioner had entered into an agreement, on 26.09.2008, with RJB-APL for that purpose. The total cost for the project was agreed at ₹3980.65/- lacs and aggregate amount paid to RJB-APL on account of invoices raised was ₹16,36,41,250/-. The auditors had raised serious objections with respect to this contract. A perusal of the observations made by auditors indicates that the objections were, essentially, three fold. First of all, the auditors had made observations to the effect that the petitioner had not specified in detail the list of deliverables

and schedule of works which were required to be performed by RJB-APL. Secondly, the auditor had pointed out procedural lapses with respect to obtaining the authority for entering into the contract with RJB-APL and thirdly, the auditor had stated that they were unable to ascertain the nature and quantum of work since the same had not been verified and certified by an independent IT expert. On the basis of these observations, the respondent had held that the activities of the petitioner were not genuine.

37. In the present case, the fact that the petitioner conducts the examination for class 10th and 12th students with respect to schools that are affiliated with the petitioner is indisputable. The nature of the predominant activity, therefore, cannot be questioned. There is no doubt about the genuineness of this activity of the petitioner, thus the conclusion drawn by the respondent that the activities of the petitioner were not genuine merely because a contract entered into by the petitioner has been brought into question, is not warranted. It is also not the respondent's case that the petitioner carries on any activity other than for educational purpose. However, the observations made by the auditor raise a separate question with respect to the application of the funds of the petitioner company.

38. In view of the above, the question that needs to be addressed is whether the petitioner would be disentitled to the exemption under Section 10(23C)(vi) of the Act on account of falling foul of the third proviso to Section 10(23C). In order to address this controversy, it is necessary to consider whether the amounts released by the petitioner to RJB-APL can be construed to have been applied for the purposes other than its objects. And if so, whether the same would disentitle the petitioner from claiming

exemption under Section 10(23C)(vi) of the Act altogether or whether the same would disqualify the petitioner for claiming exemption for AY 2009-10 i.e. the year in which the payments had been made to RJB-APL.

39. The petitioner explained that the work of modernization was allotted to RJB-APL after the petitioner had obtained quotations from three parties, viz., M/s Wipro, M/s TYC World Softinfrastructure Pvt. Ltd. and RJB-APL. The scope of work to be carried out by the parties was evaluated and RJB-APL was found to be more suitable. Thereafter, a formal agreement was entered into on 05.09.2008. It was pointed out that RJB-APL had commenced the work and also submitted monthly status reports. Initially, RJB-APL had made presentations and based on the demonstrations an interactive website had been developed. It is stated that there were several modules that had been worked on by RJB-APL. The petitioner has also drawn our attention to a letter dated 30.10.2009 addressed by RJB-APL to the executive committee of the petitioner, wherein the overview of work performed from the date of execution of the agreement had been summarized. The work claimed to be done by the RJB-APL is quoted below:-.

> "
> - ❖ Development of general scope and concept of the project under the direction of Mr. Guil Vaz through an iterative process of demonstration through multiple presentations by us to Mr. Vaz. Select presentations were then made by Mr. Vaz to the Executive Committee. Areas discussed, researched and worked on to concept stage include the following.
>   - ▪ Design of the portal presentation and user interface
>   - ▪ Determination of user profiles and access rights for each category of users

- Interactive statistical analysis of results across various parameters and user category
- Rights management
- E-training and tutorials
- On-line submission of school projects
- Document management
- School affiliation and appraisals
- Archival of school affiliation documents
- Examination papers
- Anonymity process for examinations
- Student registration process — on-line, off-line and physical forms
- Question bank
- Examiner's registration and appraisal
- Intelligent off-line forms for all portal interactions
- ERP for Council employees through portal
- Calendar and news events

➢ Duration: September 2008 to February 28, 2009

❖ Development of Mister Plan

- Detailed development for modules where information available from CISCE
- Scope of works as detailed on May 26, 2009
- Infrastructure requirements
- Requirements of various stakeholders
- Regulatory and compliance requirements
- Data security processes
- Time lines
- Training requirements for Council staff and other stakeholders
- Escalation and resolution processes

➢ Duration: On-going from November 2008

➢ Security management structuring for user management, audit trail, archiving, overall system. Database design initially on "Oracle" and subsequent transfer to MS SQL under the guidance of Mr. Guil Vaz. The change was recommended because Mr. Vaz did not approve the purchase of "Oracle" by the

Council on account of its high price and after considering that MS SQL was available on lease and rent.

- Design and selection of infrastructure:
  - Definition of process
  - Determination of parameters
    - Peak and average loads
    - Up-time
    - Response time
    - Security
    - Integrity
  - Determination of hardware and third-party software requirements based on above parameters
  - Vendor selection and commercial negotiations
    - Recommendations to CISCE
- Duration: First exercise in March 2009; second exercise in May 2009

- Results dissemination for 2009 ICSE and ISC examinations through channels as instructed by the Council.
  - Leased and set up hardware infrastructure for results dissemination
  - Manner of results dissemination as follows
    - CISCE web portal
      - 10.6 million hits in first hour
      - 25 million hits on the full day
      - No down time on any of the 6 servers deployed
    - Automated SMS system
      - 42,080 results disseminated by SMS on the day of the results
    - Automated e-mail system to pre-registered students
    - Duration: March 2009 to May 2009

- Results and data information dissemination to all school Principals including selection of and contracting with e-mail system vendor
  - Created accounts of 1,494 Principals

- Generated letters containing the log-in details for all above Principals
- 886 Principals activated their e-mail account
- Supported the Principals on call for log-in issues
- 4452 reports comprising tabulation sheet, comparison tables and Council annual statistics 2009 were delivered to the Principals on the day of the results

➢ Duration: On an expedited basis from April 17, 2009 to May 19, 2009

❖ Readied on-line, interactive statistical analysis module for Council and Principals based on various parameters:
- Geographical distribution
- School
- Subject
- Year

➢ Duration: April 2009

❖ Conversion of the static website to an interactive web portal with capabilities of addressing all areas and activities as determined in the general scope and concept detailed above

➢ Duration: From February 2009 and April 2009

❖ E-registration of students by schools
- Based on analysis of existing work flows as provided by CISCE and directions from Mr. Guil Vaz
- Demonstration of working prototype in March 2009
- Modified in June 2009 for transfer from "Oracle" to "MS SQL"
- Process modified in August 2009; broken in to 5 stages to enable use without continuous connectivity, thereby easing use in remote areas
- Designed to permit administration staff with only limited computer knowledge to operate the system

- Simultaneously deployed at over 1,600 ICSE schools and over 750 ISC schools on August 20, 2009
  - Deployment on leased infrastructure continues in the absence of required investments by CISCE
- Patratu School of Economics in Jharkhand reported full completion as early September 1, 2009
- Support provided to schools through e-mail and telephone
  - About 1500 e-mails received directly from schools
  - About 1500 calls received by a team of up to 5 persons at our offices
- Statistics of data successfully registered
  - First month 1,76,158 students data
  - Within two months 1,88,782 students data was uploaded and 98% of the schools (1611 ICSE schools) had completed the process

➢ Duration: November 2008 and continuing pending transfer to CISCE."

40. The petitioner submitted that RJB-APL had raised invoices aggregating a sum of ₹16,36,41,250/- which were paid by the petitioner. The petitioner had also paid service tax and the payments made to RJB-APL were subject to Tax Deducted at Source. In view of the objections raised by the auditor as well as several complaints received from affiliated schools, further payments to RJB-APL were withheld. This resulted in disputes arising between the petitioner and RJB-APL which were subsequently settled and in terms of the same RJB-APL had refunded a sum of ₹8,24,50,000/- to the petitioner.

41. Indisputably, any expenditure incurred by an assessee for computerisation and developing an IT enabled system for carrying on its

activities would be application of its resources wholly and exclusively for its purposes. The exemption under Section 10(23C) of the Act is available provided that the income of the assessee is applied "wholly and exclusively to the objects for which it is established". And, it cannot be disputed that the contract entered into with the RJB-APL was for furthering the object for which the petitioner was established. Introducing computerization in the functioning of the petitioner, including providing an interface with the schools which are affiliated with the petitioner, as well as the students enrolled with the petitioner, was considered necessary and it cannot be contended that any sum spent towards the modernising and computerization would not be towards the object of the petitioner society. The problem essentially arises on account of the apprehension that the contract awarded to RJB-APL entailed payments in excess of the value received by the petitioner. It is also suggested that RJB-APL had been chosen in a non-transparent manner and the concerned persons who were in charge of the affairs of the petitioner society were derelict in not evaluating the work performed by RJB-APL. In our opinion, clear distinction must be drawn between inefficient utilization of funds and utilization of funds for objects other than that for which a society has been established. Merely, because the funds of the petitioner may not have been utilized in the best possible manner cannot lead to a conclusion that they have not been applied to the object for which the petitioner has been established. It is not essential that all decisions made by the management of a society yield optimum results. A management of a society which is either negligent or has not performed its functions diligently with the requisite skill may be guilty of mismanaging the affairs of the society. But it would be quite another thing

to state that the funds have not been deployed wholly and exclusively for its objects. A well managed society may use its funds optimally, while a society that it is not as well managed may deploy its funds inefficiently but the same would not be synonymous with the funds been deployed for purposes other than its objects. There is no other stated object for which the funds of the petitioner society have been deployed. The contract entered into with RJB-APL may not be the best decision from the standpoint of the Prescribed Authority and perhaps in the opinion of the Prescribed Authority, the petitioner society may have ended up paying more than the value of services received. But the same cannot be read to mean that the resources of the petitioner have been deployed for purposes other than for its objects. The words "wholly and exclusively to the object for which it has been established" must be read to mean that the income should not be applied for any purpose other than the object for which the institution has been established. Thus, the application of funds must be for carrying on the purpose for which the petitioner has been established and not for any other purpose. In the present case, the assessee entered into the contract with RJB-APL for development, implementation and maintenance of an e-enabled system for managing registration of schools/students, examination of answer sheets, collating of results etc. RJB-APL had, undisputedly, developed and maintained a website of the petitioner, developed software for assisting in the activities carried on by the petitioner. The results of ICSC and ISC for the year 2009 was collated and disseminated by use of the e-enabled services developed and implemented by RJB-APL. The registration of schools/students was carried out, during the relevant period, through the system developed and implemented by RJB-APL. However, in

view of the complaints received, the contract with RJB-APL was terminated and the amount payable to it for the work already done was determined and agreed between the assessee and RJB-APL and the balance was refunded by RJB-APL. The amount incurred by the petitioner for modernization and computerization cannot be stated to be for the purposes other than the object as specified in the petitioner's charter. The same cannot be mistaken to be deployed for any other purpose. Thus, in our view, any irregularity in the manner in which the contract had been entered into with RJB-APL would not be sufficient for a conclusion that the respondent had not deployed its funds for the purposes of its objects.

42. As noticed earlier, the assessee has along with RJB-APL amicably determined the amount payable for the work done and recovered the balance. The question whether the decision to set up an e-enabled system was necessary or the amount settled between the assessee and the service provider is reasonable, is not required to be considered by the Prescribed Authority. The reasonableness of the amount spent and the quality of the decisions of the management are not the subject matter in respect of which the satisfaction of the Prescribed Authority is required. Although, the Prescribed Authority can examine whether the expenditure is real, the question whether the same was necessary or should have been incurred is not within the scope of the subjective satisfaction of the Prescribed Authority. The manner in which the affairs of the assessee are conducted, including determining which expenditure to incur and to what extent, is entirely within the discretion of the assessee. The Supreme Court in the case of ***Sassoon J. David & Co. Pvt. Ltd. v Commissioner of Income Tax:***

[1979] 118 ITR 261 considered the expression "wholly and exclusively" in the context of Section 10(2)(xv) of the Indian Income Tax Act 1922 (corresponding to section 37 of the Act) and held as under:

> "It has to be observed here that the expression "wholly and exclusively" used in s. 10(2)(xv) of the Act does not mean "necessarily". Ordinarily, it is for the assesee to decide whether any expenditure should be incurred in the course of his or its business. Such expenditure may be incurred voluntarily and without any necessity and if it is incurred for promoting the business and to earn profits, the assessee can claim deduction under s. 10(2)(xv) of the Act even though there was no compelling necessity to incur such expenditure."

43. The expression used in Section 37 of the Act: "wholly or exclusively for the purposes of business and profession" is similar in its import as the expression "applied wholly and exclusively to the object for which it is established" as occurring in Section 10(23C)(vi) of the Act. Therefore, the tests as laid down by various decisions for determining whether an amount is expended wholly and exclusively for the purposes of the business would apply equally in determining whether the income is applied by the assessee wholly and exclusively for its objects.

44. We may also observe that although, it has been suggested that the contract with RJB-APLL was only a conduit for diverting the funds of the petitioner, the same is not borne out by the material on record. In order to sustain an allegation of this nature, the respondent would also have to go a step further to show that the funds paid by the petitioner to RJB-APL found their way to any member/members or in their benefit. This would indicate that RJB-APL had been used as a conduit by the petitioner for distributing

its surplus and the income of the petitioner was not applied for its objects. However, in absence of any such evidence, it would not be possible to conclude that the income of the petitioner was not applied "wholly and exclsusively" to the objects for which it was established.

45. In view of the above discussion, it is not necessary to consider whether the exemption under section 10(23C)(vi) of the Act could be denied to the petitioner only for the relevant year during which payments were released to RJB-APL and could not be denied altogether. However, as we have heard the learned counsel on the issue, we consider it appropriate to examine the position where an assesse is found to be non compliant with the provisos to Section 10(23C) of the Act.

46. Section 10(22) of the Act, which was the applicable provision for the exemptions prior to introduction of Section 10(23C)(vi) of the Act, provided for exemption in respect of income of a university or other educational institution, existing solely for educational purpose and not for purpose of profit. Under Section 10(22) of the Act, if the income of the institution was derived in the course of carrying out an activity for educational purposes, the same was exempt and the assesse was not required to prove the application of income so derived. By virtue of the Finance (No.2) Act, 1998, Section 10(22) was omitted with effect from 01.04.1999 and the said provision was replaced by Section 10(23C)(vi). The CBDT in its circular No. 772 dated 23.12.1998 [(1999) 235 ITR (St.) 35], explained the object for insertion of clause (vi) to Section 10(23C) of the Act. The circular explained that Section 10(23C) of the Act was introduced, as the earlier provision (Section 10(22)) did not contain any

mechanism for monitoring and in absence of the same, the exemption provision was being misused. With the introduction of 10(23C), prior approval is required from the prescribed authority by making an application for the same and the assesse would have to comply with the conditions imposed by the provisos to Section 10(23C) of the Act. The Supreme Court considered the scheme of Section 10(22) and Section 10(23C) of the Act in the case of ***American Hotel & Lodging Association*** *(supra)* and explained that under Section 10(22) of the Act, once an approval had been granted the exemption was automatic and Section 11 and Section 13 of the Act did not apply. Thus, there would be neither assessment nor demand in cases where approval under Section 10(22) of the Act had been granted to an assessee. In the event an institution fell within the expression: "*exists solely for educational purposes and not for profit*", the institution was entitled to avail the exemption under Section 10(22) of the Act and there were no other conditions that were required to be complied with. The Supreme Court observed that:

> "The mere existence of profit/surplus did not disqualify the institution if the sole purpose of its existence was not profit-making but educational activities as section 10(22) by its very nature contemplated income of such institution to be exempted. Under section 10(22) the test was restricted to the character of the recipient of income, viz., whether it had the character of educational institution in India, its character outside India was irrelevant for deciding whether its income would be exempt under section 10(22)."

47. The Court further held that Section 10(23)(vi) of the Act was analogous to Section 10(22) and to that extent the law laid down with respect to the eligibility condition under Section 10(22) of the Act would be

equally applicable in cases under Section 10(23)(vi). The Court further analyzed the scheme of Section 10(23)(vi) of the Act and provisos thereto and held as under:-

> "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."

48. If one applies the above principle to the facts of the present case then the petitioner would be entitled to an approval under Section 10(23C)(vi) of the Act at the threshold. However, that would not absolve the petitioner from complying with the provisos to Section 10(23C) of the Act. The petitioner would be obliged to apply the funds solely for its objects and if the third proviso to Section 10(23C) of the Act was violated then the approval granted to the petitioner would be liable to be revoked. The stage of grant of approval and the stage for examining whether the third proviso to Section 10(23C) of the Act are complied with are different. Whereas, the exemption is liable to be granted at the beginning of the relevant year, the question whether the third proviso has been complied with would have to be viewed at the end of the relevant year. In ***American Hotel & Lodging***

Association *(supra)* the Supreme Court evolved a mechanism whereby the scheme of Section 10(23C) of the Act could be fully implemented: the Prescribed Authority, would issue an approval to the eligible institution, albeit with a condition that the institution would comply with the third proviso to Section 10(23C) of the Act. In the event it was found that the assesse was non compliant with the third proviso to Section 10(23C) of the Act, the approval would be revoked under the thirteenth proviso to Section 10(23C) of the Act.

49. Following the aforesaid principle, the assesse would be entitled to the approval under section 10(23C)(vi) of the Act, however if it was found that the funds of the assesse had not been utilized for its objects during the relevant year or had otherwise not complied with the provisos to the Section 10(23C) of the Act, the approval would be revoked at the end of the relevant year. Since, by virtue of its nature, the petitioner is entitled to an exemption, the same would also be available to the petitioner for the subsequent year(s). However the question whether the exemption is liable to be revoked would have to be considered at the end of the year after reviewing whether the petitioner had complied with the conditions imposed, inter alia, by the third proviso to Section 10(23C) of the Act. It is obvious from the aforesaid scheme that denial of exemption under section 10(23C)(vi) of the Act to an Institution which *exists solely for educational purposes and not for profit*, on account of non compliance with the third proviso would be limited to the relevant years during which the proviso has been violated.

50. In view of the above, even if it is assumed that payment to RJB-APL violated the third proviso for Section 10(23C) of the Act, the exemption under section 10(23C)(vi) of the Act can be denied only for the for the year(s) during which payments had been made by the petitioner to RJB-APL. Since the assessee by its nature of activity is otherwise entitled to exemption under Section 10(23C)(vi) of the Act, the same is liable to be granted by the respondent for future years subject to conditions as contained in the third proviso to Section 10(23C) of the Act.

51. The writ petition is allowed in the aforesaid terms.

VIBHU BAKHRU, J

S. RAVINDRA BHAT, J

MAY 23, 2014
RK