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

Reserved on: 01.12.2016
Pronounced on: 08.03.2017

\+ **W.P.(C) 7147/2012**

VENU CHARITABLE SOCIETY AND ANR. ..... Petitioners

Through: Sh. Ajay Vohra, Sr. Advocate with Ms. Kavita Jha and Sh. Vaibhav Kulkarni, Advocates.

Versus

DIRECTOR GENERAL OF INCOME TAX ..... Respondent

Through: Sh. P. Roychoudhuri with Ms. Vibhooti Malhotra, Advocates.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MS. JUSTICE DEEPA SHARMA

MR. JUSTICE S. RAVINDRA BHAT

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1. The petitioner is registered under the Societies Registration Act, 1860 and formed with the objective of rendering comprehensive eye care services, inclusive of all forms of ophthalmic services. To further its objects, it established the "Venu Eye Institute and Research Centre in Delhi", with five satellite hospitals and seven vision centers in Haryana, Uttar Pradesh, Uttarakhand and Rajasthan. Its claim is that its objects, for assessment years 2005-2006to 2009-2010 were charitable in terms of Section 2(15) of the Act. However, for 2011-2012 its application in Form 56D for grant of exemption under Section 10(23C)(via) of the Act was rejected by the respondent by its impugned order, dated 27 April, 2012. It, therefore, seeks quashing of the order and appropriate consequential directions.

2. The petitioner, to promote its objectives categorized its patients into three - Charity, Subsidized and Private. It argued, before the

respondent/Revenue in its application for exemption, that treatment of the same quality is provided to all patients and that the fee charged is reasonable and does not involve any profit element. Its objects and activities were, therefore, wholly philanthropic and for the benefit of the public at large. The petitioner argued that the expression, “not for purposes of profit” under Section10 (23C) cannot mean that a hospital or institution cannot or should not charge any fees from its patients. It only means that one cannot reap profits on commercial lines. It is submitted that philanthropy not only means free treatment but also means concessional treatment and the petitioner charges a nominal fee from the patients to cover running expenses of the hospital. It was also stated that the petitioner imparts training, which too is a charitable object, covered by its memorandum and that the fees and charges recovered by it are entirely reasonable, aimed at meeting the expenses for such activity.

3. The Director General of Income Tax (DGIT) for exemption by the impugned order, noticed that the petitioner had not applied for exemption in the immediately preceding two years. The impugned order then went on to analyze the nature of the charges recovered by the petitioner from its patients and concluded that,

> *"From the above chart it is seen that the so called subsidized rates charged by the applicant forms almost 42% to 100% of the private charges which clearly shows that the same is beyond the reach of poor people, and cannot be termed as charity as envisaged in. sec. 2(15) of the I.T. Act, 1961.Although the society is also having the facility of free treatment to the patients on the basis of payment of one time normal charges, however it is also not disputed; that the treatment are provided to the patients on payment basis which*

itself proved that the, society is existing not solely for philanthropic purposes but for the purposes of profit."

The provision of medical services in the satellite centres was also viewed as a profit driven motive:

"6. It is seen that the applicant society is running a base hospital at Delhi and 5 satellite hospitals. On 14/03/2011 the applicant society has made a collaboration agreement with Sant Bhagat Singhji Maharaj Charitable Hospital with regard to satellite hospital at Faridabad. The society has also made collaboration agreement with Om Indu Jain Charitable Trust with regard to satellite hospital at Dhankot. As per the terms and conditions of the agreement with Om Indu Jain Charitable Trust the applicant society had to invest Rs. 10 lakh for construction of the ground floor of the premise at Dhankot and had to provide complete infrastructure facilities for establishment of an eye hospital including equipment and other resources including man power. The period of both these agreements was 20 years. One of the conditions in these agreements is that the applicant society can also treat the patients at these satellite hospitals on payment basis. The inclusion of this clause itself proved the profit motive of the applicant society."

4. The DGIT then discussed the teaching and training aspect of the petitioner's activities and after noticing the fees charged as well as the facilities provided (on the basis of what was listed in the petitioner's website as well as the details provided by it) held as follows:

"11. From the above it is clear that the applicant society besides running the Hospital and doing charitable activity is also engaged in imparting educational training on regular basis for which various facilities are provided to the students and fee is charged. Although, education may be a good activity but this is not in consonance with the provisions of section 10(23C)(via) of the IT Act, 1961. Further, the society has

categorized their patients in 3categories viz.- (i) Charity patients (ii) Subsidized patients and (iii) Private patients which show that besides charity the society is also working on commercial lines. The society has made collaboration agreements with other Trusts and one of the conditions made in the agreements is that the eye centre of the society running from the premise of other Trusts can also treat the patients on payment basis which proves that the society is also running on commercial lines. All these facts clearly prove that the applicant society is existing not solely for philanthropic purposes but existing for purposes of profit also as against the spirit of the provisions of section 10(23C)(via) of the Income Tax Act, 1961."

5. The petitioner argues that as a charitable activity, it is not expected to completely eschew profits or surpluses. It urges that what the Revenue has to examine is if the objects upon which a trust or society seeks exemption fall within the scope of the definition under Section 2 (15). It relies on the decision in *Commissioner of Income Tax v. Pulikkal Medical Foundation (P) Ltd.* [1994] 210 ITR 299 (Ker) where it was held that:-

> *"...merely because the assessee is running the hospital on commercial lines, it will not be disentitled to the exemption under section 10(22A) of the Act. As long as the dominant purpose is a philanthropic one, the mere circumstance that the managing director or director gets some advantages or exercises some patronage while running the institution, that will not be a ground to hold that the main purpose of the institution is not philanthropic."*

6. Likewise the decision of the Bombay High Court in *Breach Candy Hospital Trust v. Chief CIT, ITO and UOI*[2010] 322 ITR 246 (Bom) is relied on. It was held that there may be surplus in some areas and deficit in others. It further stated:

> "*A hospital has many units and ultimately all receipts are used for treatment. In the absence of any material to show that generally there was a profit, it cannot be said that the petitioner does not exist solely for the philanthropic purpose but exists for the purpose of profit.*"

7. It is pointed out that the petitioner society was also granted exemption under Section 80G and 35AC of the Act and the Assessing Officer (AO) for the years 2005-06 to 2009-10 held its activities to fall within the purview of Section 2(15) of the Act, i.e., charitable purpose. It is contended that the satellite hospitals run by the petitioner have no profit element in them. The petitioner entered into an arrangement with the Indira Gandhi National Open University (IGNOU) to provide training courses for para-medicals and nursing staff. IGNOU charges a fee of which a nominal amount is given to the petitioner. This activity is incidental and in furtherance of achieving the main objective. Again, there is no profit element involved and the expenditure incurred is way more than the amount collected by way of fees. The petitioner points out that it has other objectives too, but the presence of incidental objectives in the memorandum does not preclude it from claiming exemption under Section 10 (23C) of the Act. For this point, it relies on *Baun Foundation Trust v. CCIT &Anr*(2012) 251 CTR (Bom.) 237 in which it was held that one has to consider whether the overall object is to make profit. If after meeting the expenditure any surplus results incidentally from the activity lawfully carried on by the institution, it will not cease to be one existing solely for the statutorily stipulated purpose so long as the object is not to make a profit. The dominant nature of the purpose has to be considered.

It is argued that the petitioner had claimed exemption under Section 11 and therefore omitted to claim exemption under Section 10 (23C) for AYs 2007-08 to 2009-10.

8. Counsel for the Revenue relies on the order denying exemption and submits that during the proceedings under Section10(23C)(via), information was obtained from the petitioner's website which was reproduced in the impugned order. These details clearly indicated that the petitioner is also engaged in the field of imparting education and training for which it charges fee. Even separate training programmes for foreign students are provided for a fee. These foreign students are also provided hostel and other facilities on a paid basis. Furthermore, fees for various courses are paid to the petitioner society. All these belie the petitioner's submission that the students pay their fees to IGNOU and a nominal amount is given by IGNOU to it.

9. The Revenue argues that during the AY 2008-09 to 2010-11 the receipts of the petitioner under the head Training & Tuition fees was ₹39,51,657/-and ₹44,90,276/- which further prove that the organization exists not solely for philanthropic purposes but for purposes of profit too. The petitioner society was notified under Section 10(23C)(via) for AY 2004-05 to 2006-07. It, however did not file any application for renewal of notification for AY 2007-08 to 2010-11. However, on perusal of the return of income for the AY 2009-10 it was seen that the petitioner had claimed income amounting to ₹19,85,337/- to be exempt u/s 10(23C)(vi) of the Income Tax Act, 1961. Further, during the AY 2008-09 the petitioner itself accepted the activity of the hospital including Vision by Venu as deemed business and has shown the net profit/loss for hospital activity and Vision by

Venu amounting to ₹89,06,243/ and (-) ₹14,91,647/- respectively. All these, according to the Revenue, clearly show that the petitioner is engaged in business activities.

10. The Revenue highlights that the petitioner claimed exemption under Section 11 in respect of part of its income, i.e., Grants and in respect of income/receipts from Hospital and Vision by Venu it claimed the benefit of exemption under Section 10(23C)(vi) during the same year. It was also seen that in respect of grants, it claimed the benefit of accumulation or set apart for future use under Section 11(2) of the Income Tax Act, 1961. The petitioner did not have the exemption under Section 10(23C)(vi) in AY 2008-09 to 2010-11 but it claimed that under Section 10(23C)(vi) for these years.

11. From these facts, submitted the Revenue, it is clear that besides running the hospital and doing charitable activity, the petitioner was also engaged in imparting education/training on regular basis. It provided various facilities to the students and charged fees. Although, education may be a charitable activity yet that is not in consonance with the petitioner's objective to attract the provisions of Section 10(23).Also, the society categorized their patients into three, i.e.(1) Charity patients (2) Subsidized patients and(iii) Private patients which show that besides charity it works on commercial lines. The society has made collaboration agreements with other Trusts and one of the conditions in those agreements is that the eye centres in the said third parties' premises can also treat the patients on payment basis, which proves that the petitioner functions on commercial lines. All these facts clearly prove that the petitioner does not exist solely for philanthropic purposes but for profit purposes too, contrary to the provisions of Section

10(23C)(via) of the Income Tax Act,1961. Therefore application of the petitioner society for notification under Section 10(23C)(via) for the AY 2011-12 and onwards was correctly rejected by the respondent.

Analysis and Findings

12. The record reveals that the petitioner was registered under Section 12A of the Act by order dated 16.11.1987 passed by the CIT and it also obtained approval under Section 80G of the Act, after satisfying the conditions prescribed. It was also notified for exemption under Section 35AC of the Act by the National Committee for Promotion of Social and Economic Welfare. The petitioner was notified under Section 10(23C)(via) of the Act for AYs 2005-06 to 2007-08. However, it filed no application for renewal of exemption for AYs 2008-09 to 2010-11.

13. In the return of income filed for those years, the petitioner claimed exemption under Section 11 of the Act in respect of income earned and applied for charitable purposes. The AO while completing the assessment for assessment years 2005-06 to 2009-10,held that the activities of the Society fell within the ambit of Section 2(15) of the Act, i.e., charitable purpose. It thereafter applied through Form 56D for grant of exemption under Section 10(23C)(via) of the Act for assessment years 2011-12 onwards. In support of its claim for exemption, the petitioner filed the following documents:

(i) Details of patients treated for free by Venu Eye Institute &Research Centre during the period October 2008 to March2010 as per the report submitted with Directorate of Health Services.

(ii) Quarterly details of patients treated free (in accordance with the terms

and conditions of allotment of land) during the period April, 2007 to March, 2010.

(iii) Copies of Annual Activity Reports for the period April, 2005to March, 2011 containing details and report on activities carried out by the Society.

(iv) Newspaper cutting from the Times of India dated 24.09.2009, containing report on survey by Health Department which clearly mentioned that the hospital run by the petitioner society was the only hospital with maximum occupancy of free beds (63 beds) against the quota of 42 beds specified by the Delhi Government.

14. The respondents rejected the exemption application by order dated 27.4.2012 under Section 10(23C)(via) of the Act, *inter alia*, on the grounds that firstly, the petitioner did not exist solely for philanthropic purposes but for purpose of profit; secondly, it had entered into collaboration agreements with Sant Bhagat Singhji Maharaj Charitable Hospital and Om Indu Jain Charitable Trust for running satellite hospitals with profit motive; thirdly, that it provided educational courses such as Medical Training Programmes, long term super specialty medical programme in ophthalmology, etc. and was earning profit from those activities; fourthly, the memorandum of the petitioner society contains objects other than health care; and lastly that it made no application for renewal of exemption under Section10(23C)(via) for AY 2007-08 to 2010-11.

15. The provision, i.e. Section 10(23)(vi) reads as follows:

> *"10. Incomes not included in total income.- In computing the total income of a previous year of any person, any income falling within any of the following clauses shall not be included --*
>
> *(23C) any income received by any person on behalf of-*

(vi) any university or other educational institution existing solely for educational purposes and not for purposes of profit, other than those mentioned in sub-clause (iiiab) or sub-clause (iiiad) and which may be approved by the prescribed authority; or Provided that the fund or trust or institution or any university or other educational institution or any hospital or other medical institution referred to in sub- clause (iv) or sub-clause (v) or sub-clause (vi) or sub- clause (via) shall make an application in the prescribed form and manner to the prescribed authority for the purpose of grant of the exemption, or continuance thereof, under sub-clause (iv) or sub-clause (v) or sub- clause (vi) or sub-clause (via):

Provided further that the Central Government, before notifying the fund or trust or institution, or the prescribed authority, before approving 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 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, and the Central Government or the prescribed authority, as the case may be, 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 twenty-five per cent of its

> *income is accumulated on or after the 1st day of April, 2001, the period of the accumulation of the amount exceeding twenty-five per cent of its income shall in no case exceed five years; and]*

Section 10 (22) exempts receipts and income of universities and educational institutions, in the following terms:

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

16. *ACIT v. Surat Art Silk Cloth Manufacturers Association* (1980) 121 ITR 1 (SC) held that the test of predominant object of the activity is to be seen to determine whether it exists solely for education and not to earn profit. However, the purpose would not lose its character merely because some profit arises from the activity. To carry on educational activity in such a way that the expenditure exactly balances the income and there is no resultant profit, would not only be difficult for practical realization, but would reflect unsound principles of management. In order to ascertain whether the Institute is carried on with the object of making profit or not, it is the duty of the prescribed authority to ascertain whether the balance of income is applied wholly and exclusively to the objects for which the applicant is established. The decisions of the Supreme Court in *Queens Educational Society v Commissioner of Income Tax* (2015)] 372 (ITR) 699 (SC); *Indian Chamber of Commerce v Commissioner of Income Tax* (1975) 101 ITR 796 (SC); *Aditanar Educational Society v Commissioner of Income Tax* (1997) 224 ITR 310 (SC)and *Oxford University Press v CIT* (2001) 247 ITR 658 (SC) also talk of the predominant purpose test as determinative of

whether an assessee existed solely for educational purposes.

17. Section 10 (23C) of the Act exempts any hospital or other institution for treatment of illness or mental deficiencies or treatment during convalescence requiring medical attention or rehabilitation solely for philanthropic purposes and not for purposes of profit. If the government does not fund it, then, its annual receipts should not exceed the prescribed limit. Section 2 (15) defines "Charitable Purpose" and includes the following- i) Relief of the poor; ii) Education; iii) Medical relief and iv) advancement of any other object of general public utility. An entity with such a purpose is eligible for exemption from tax under Section 11 or alternatively under Section 10 (23C) of the Act. There was a proviso inserted in 2008 which prescribed that *"Advancement of any other object of general public utility shall not be a charitable purpose if it involves the carrying on of- a) any activity in the nature of trade, commerce or business; b) any activity of rendering any service in relation to trade, commerce or business; for a cess or fee or any other consideration."* However, this proviso was inapplicable to the first three limbs of the Section 2 (15) and they continue constitute a charitable purpose even if incidentally involved the carrying on of commercial activities.

18. The incidental carrying on of commercial activities is subject to certain conditions stipulated under the seventh proviso to Section 10 (23C). They are- (a) The business should be incidental to the attainment of the objectives of the entity and (b) Separate books of account should be maintained in respect of such business. The memorandum of the petitioner's society clearly states its main objective is to render comprehensive eye care

services inclusive of all forms of ophthalmic services. All other activities are incidental to carrying out of this purpose. The petitioner does not carry out any other business but only collaborates with other trusts and institutions. It has maintained its books of account as well. So the conditions have been met with. Exemption under the provisions mentioned above will be granted if the main objective of the society is relief of poor, education, medical relief and carrying on of a business with a view to fulfill these objects would not deprive them from such exemption. This was stated in *CIT v. Rao Charitable Trust* (1976) 102 ITR 474.

19. As to the Revenue's contention that the petitioner's collaboration with other institutions and for profit goes, clearly the dominant object or purpose test is applicable. In *New Noble Educational Society & Ors. Vs. Chief Commissioner of Income tax &Anr.* (2011) 334 ITR 303 (AP)it was held that if there are several objects of a society some of which relate to education, and others which do not, and the trustees or the managers, in their discretion, are entitled to apply the income or property to any of those objects, the institution would not be eligible to be regarded as one existing solely for educational purposes, and no part of its income would be exempt from tax. But if the primary or dominant purpose of an institution is "educational", another object, which is merely ancillary or incidental to the primary or dominant purpose, would not dis-entitle the institution from the benefit. In *American Hotel and Lodging Association Educational Institute vs. CBDT* [2008]301 ITR 86(SC), the Supreme Court held that at the time of granting approval under Section 10(23C)(vi), the prescribed authority is to be satisfied that the institution existed during the relevant year solely for

educational purposes and not for profit. Once the prescribed authority is satisfied about fulfillment of this criteria i.e., the threshold precondition of actual existence of an educational institution under Section10 (23C)(vi), it would not be justifiable, in denying approval on other grounds.

20. The Revenue's other contention was that the petitioner had applied for exemption under Section 11 as well as Section 10(23C) in the same year. Section 10(23C) does not prescribe any stipulation, which makes registration u/s 12AA a mandatory condition. The provisions of Section 11 and 10(23C) are two parallel regimes and operate independently in their respective realms. In order to avail exemption u/s 11, 12 and 13, the entity should be registered u/s 12AA. The Sections 11, 12, 12A, 12AA and 13 of the Income Tax Act constitute a complete code governing the grant, cancellation or withdrawal of registration, providing exemption to income, and also the conditions subject to which a charitable trust or institution is required to function in order to be eligible for exemption. The primary objective of providing exemption in case of charitable institution is that income derived from the property held under trust should be applied and utilized for the object or purpose for which the institution or trust has been established. In many cases it had been noted that trusts or institutions, which are registered and have been availing benefits of the exemption regime do not apply their income, which is derived from property held under trust, for charitable purposes. In such circumstances, when the income becomes taxable, a claim of exemption under general provisions of Section 10 in respect of such income is preferred and tax on such income is avoided. This defeats the very objective and purpose of placing the conditions of application of income etc.

in respect of income derived from property held under trust in the first place. The provision of Section 10(23C) also has similar conditions of accumulation and application of income, investment of funds in prescribed modes etc. Therefore, the Act was amended to provide specifically that where a trust or an institution has been granted registration for purposes of availing exemption under Section 11, and the registration is in force for a previous year, then such trust or institution cannot claim any exemption under any provision of Section 10 [other than that relating to exemption of agricultural income and income exempt under Section 10(23C)] of the Income Tax Act. Similarly, entities which have been approved or notified for claiming benefit of exemption under Section 10(23C) of the Income Tax Act would not be entitled to claim any benefit of exemption under other provisions of Section 10 of the Act; which means that one can claim exemption under Section 11 and Section 10 (23C).

21. Coming back to what a charitable purpose is, an educational institution may qualify for relief under Section 10 (23C) of the Act, as well as, Section 11. In the present case, the petitioner provides training courses to students and nursing staff, which qualify for exemption. The main objective of the program must be the availability of such a training to the public at large and imparting some kind of knowledge through it. The fact that some of the beneficiaries pay for the benefits they get from the institution would not be fatal to the charitable character of the institution. Accordingly, where an association, which was in charge of a nursing home and hospital, charged its patients for the services rendered, it was held it would not cease to be charitable. In *IRC v. Peebleshire Nursing Assn* 11 TC 335, it was held that

where a hospital runs a private ward where patients pay in full for the services rendered to them, it would not make the hospital inconsistent with its charitable objects. Likewise, the petitioner's providing medical facilities on wholly charitable, or partly subsidized basis to some patients and charging others at rates par with other institutions *per se* cannot debar it from the benefit of being treated as charitable. The dominant purpose test presupposes that as long as the activity answers the description of charity and conforms to the objects of the trust or society, that profits or surpluses are generated, incidentally cannot rob it of the benefits. If the profits from business feed charitable objects, then it is not an activity for profit, so the exemption need not be lost. Therefore, total charity to some poor and deserving patients, partial subsidization of some others and charging of full rates from some, does not rob the essential and dominant object of the society, i.e. medical service and education. Indeed, in the case of medical facilities, a nuanced subsidization through a cross subsidization scheme (i.e. charging market rates from some and subsidizing some entirely and a few partly) would fit with the purpose of the petitioner society, which might be able to thus provide greater service to a larger number of people. It renders its existence economically viable and expands its reach and scope.

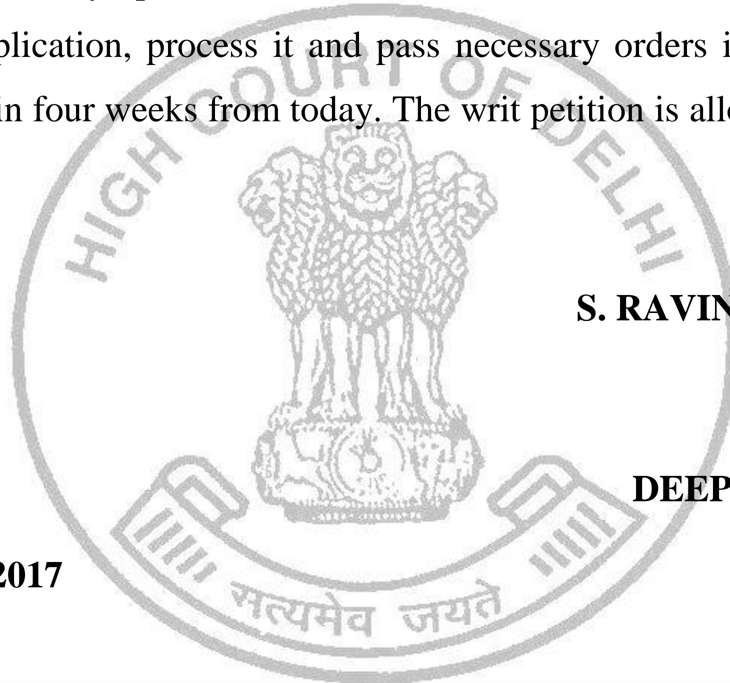
22. In *Director of Income Tax v. All India Personality Enhancement & Cultural Centre for Scholars Aipeccs Society*[2015] 281 CTR (Del) 1 it was held that insofar as the question whether the university or educational institution exists solely for educational purposes could be denied the benefit of Section 10(22)/10(23C) (vi) on the ground that its receipts exceeded its expenditure is concerned, such question is no longer relevant. It is now well

established that an educational institution existing solely for educational purposes would not cease to be so only for the reason that some of its activities have yielded surpluses. In the present case, it is observed that profit earned is incidental to the main objective of charity. It earns profit after carrying out activities which are to achieve the main purpose. Hence, the petitioner should be entitled to the exemption. *Queen's Educational Society* (supra) summarized the law on the issue as under:--

> *1) "Where an educational institution carries on the activity of education primarily for educating persons, the fact that it makes a surplus does not lead to the conclusion that it ceases to exist solely for educational purposes and becomes an institution for the purpose of making profit.*
> *2) The predominant object test must be applied - the purpose of education should not be submerged by a profit making motive.*
> *3) A distinction must be drawn between the making of a surplus and an institution being carried on "for profit". No inference arises that merely because imparting education results in making a profit; it becomes an activity for profit.*
> *4) If after meeting expenditure, a surplus arises incidentally from the activity carried on by the educational institution, it will not be cease to be one existing solely for educational purposes.*
> *5) The ultimate test is whether on an overall view of the matter in the concerned assessment year the object is to make profit as opposed to educating persons."*

23. In the facts of the present case, it is seen that the objects of the assessee society are solely for the purposes of education and medical care and not for purpose of profit. It is only if it is found that the assessee has been carrying on its activities for the purposes of profit, contrary to its objects, the prescribed authority would be justified in rejecting the

application for approval under Section 10(23C)(vi) of the Act. Merely because it charges fees for educational courses (as in the case of any school or college) or that it entered into arrangements with other institutions (again charitable) to set up satellite centers, to give medical treatment, or that its treatment involves a layered subsidization programme, would not justify rejection of its application. For these reasons, the impugned order, denying exemption under Section 10(23) was not justified; the order dated 27 April,2012 is hereby quashed. The Revenue is directed to consider the petitioner's application, process it and pass necessary orders in accordance with law, within four weeks from today. The writ petition is allowed in these terms.



S. RAVINDRA BHAT
(JUDGE)

DEEPA SHARMA
(JUDGE)

MARCH 08, 2017