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

Reserved on : 01.02.2011

% Date of decision : 10.02.2011

\+ **ITA No. 93 / 1999**

DEPUTY DIRECTOR OF INCOME TAX... ... ... APPELLANT

Through : Mr.Sanjeev Sabharwal, Advocate

- V E R S U S -

SHANTI DEVI PROGRESSIVE EDUCATION SOCIETY

... ... RESPONDENT

Through : Mr.Anoop Sharma and Mr.Manu K.Giri, Advocates.

CORAM :

HON'BLE MR. JUSTICE SANJAY KISHAN KAUL

HON'BLE MR. JUSTICE RAJIV SHAKDHER

1. Whether the Reporters of local papers may be allowed to see the judgment? YES
2. To be referred to Reporter or not? YES
3. Whether the judgment should be reported in the Digest? YES

SANJAY KISHAN KAUL, J.

1. The denial of exemption to the respondent/assessee under Section 10(22) of the Income Tax Act, 1961 ('IT Act' for short) for the Assessment Year 1993-94 has

given rise to the present proceedings where the order of the Assessing Authority and Commissioner of Income Tax (Appeals) {'CIT(A)' for short} went against the respondent/assessee while the majority view of the Income Tax Appellate Tribunal ('ITAT' for short) members favoured the respondent/assessee. The question of law framed by this Court vide order dated 11.05.2000 is as under:

> "Whether the claim of the respondent for exemption under Section 10(22) of the Income Tax Act, 1961 was allowable?"

ASSESSMENT ORDER

2. It appears that when the assessment proceedings were going on in respect of the Assessment Year 1993-94, a question came to be raised in the Parliament regarding taking money from parents of wards of the school on one pretext or the other which in turn led to an investigation in the case relating to the assessment year. This is apparent from the assessment order for the relevant year dated 29.03.1996.

3. There were three components which were closely scrutinized by the Assessing Officer:

i) Admission Fee of Rs.7,12,000/-.

ii) Corpus Fund of Rs.17,24,085/-.

iii) Loan from parents amounting to Rs.10,85,000/-.

4. The assessment order dated 29.03.1996 records that the Society had shown school fees, bus fees, magazine

income and other income in the Income & Expenditure Account, but the admission fee of Rs.7,12,000/- was taken to the balance sheet and it had not been explained as to why this amount was being treated differently from other amounts. The Corpus Fund had come from students and there was no confirmation from the assessee as to who were the donors regarding this fund and thus a conclusion was reached that this could also not be taken to the balance sheet. This Corpus Fund in turn had two parts. One part is as received from parents while the other part was stated to be collected by the staff members by issuance of coupons amounting to Rs.2,55,000/-. The loan amount is also stated to have been taken from the parents on interest. The confirmation was filed only from the parents to whom money was refunded in the subsequent period amounting to Rs.90,000/- and thus the remaining amount of Rs.9,95,000/- remained unconfirmed which was treated as income of the assessee. The assessment order makes strong observations about the factum of the Society no doubt carrying on education activity, but public good being lost sight of on account of funds being raised making it a 'money making machinery rather than a charitable institution'.

ORDER OF CIT(A)

5. The respondent/assessee, faced with this assessment order, preferred an appeal to the CIT(A). This appeal has

been dismissed vide order dated 30.09.1996 qua the finding that the respondent/assessee was not entitled to exemption under Section 10(22) of the said Act. The CIT(A) took note of the funds having been collected at the time of fresh admissions during the period 04.03.1993 to 16.03.1993 and the loans were taken during the period December, 1992 to 31.03.1993. It was found that both the Corpus Fund and the Loan Amount were received from parents when admitting their children and were thus forced on the parents in the name of education. This was stated to be despite the fact that there were funds available with the respondent/assessee as it had fixed deposits with the banks amounting to Rs.17,38,048/- as on 31.03.1993 apart from the bank balance of Rs.3,05,520/-, loan and advances of Rs.38,802/- and cash balance of Rs.15,483/- totaling to Rs.20,50,000/-. A further fact taken note of by the CIT(A) is the analysis of the plea of the assessee that loans and donations were taken to make an additional structure.

6. In para (9), CIT(A) has somehow given a number of findings, which in our considered view are not based on evidence, relating to the person who was running the school being Mr.R.S.Lugani, the then Principal of DPS, who was a member of the managing committee and was allegedly ‘a member who was known for making money through educational institutions’. The school building was constructed by Ahluwalia Construction Co.(Pvt.) Ltd which

was stated to be a family concern of Ahluwalia who was the President and a Member in the Society. No tenders had been called for construction of the building. The third aspect considered was that while the loans had been taken from nationalized banks, deposits were maintained with Nainital Bank, which is not a nationalized bank and thus there was a possibility of members of the Executive Body getting direct or indirect benefit from investment in the private bank (the possibility of this 'cannot be ruled out'). The educational institute was thus stated to be running for profit motive and thus not entitled to exemption under Section 10(22) of the IT Act.

7. The result was that Admission Fee of Rs.7,12,000/-, Corpus Fund of Rs.17,24,005/- and loan raised of Rs.9,95,000/- were treated as income of the respondent/assessee.

ITAT PROCEEDINGS

8. The respondent/assessee thereafter filed an appeal before the ITAT under Section 253 of the IT Act. This gave rise to divergence of views between the Judicial Member and the Accounting Member of the ITAT. The opinion of the Judicial Member is dated 29.08.1997 holding that the Society existed for profit and thus the case of the assessee was beyond the ambit of Section 10(22) of the said Act while the opinion of the Accounting Member dated 25.03.1998 was to the contrary. On the

difference of opinion between the members, the following point was referred to the President of the ITAT under Section 255(4) of the IT Act.

> "Whether, on the facts of the case and in accordance with the provisions of law, the assessee's claim for exemption under Section 10(22) of the I.T.Act, 1961 was tenable as held by the Vice President or the claim under the said section as not allowable as per the view of the Judicial Member?"

9. The President concurred with the opinion of the Accounting Member and thus the respondent/assessee succeeded.

10. The appellant/Department has filed the present appeal under Section 260(A) of the IT Act arising from the order dated 30.11.1998 passed in favour of the assessee as per the majority opinion and the question of law, as noticed above, was framed to be answered by this Court vide order dated 11.05.2000.

11. It would be appropriate to first reproduce the relevant provision under Section 10(22) of the IT Act as it stood for the relevant Assessment Year in question:

> "**SECTION 10 INCOMES WHICH DO NOT FORM PART OF TOTAL INCOME**
> .. ..
>
> (22) Any income of a university or other educational institution, existing solely for educational purposes and not for purposes of profit;"

OPINION OF JUDICIAL MEMBER ITAT/DEPT. STAND

12. Learned counsel for the appellant/Department sought to adopt the opinion of the Judicial Member as his

submissions. Learned counsel for the appellant could not dispute that exemption was granted under Section 10(22) of the IT Act to the respondent/assessee for the preceding years and learned counsel for the respondent/assessee submitted that it was so even for the subsequent years, but sought to contend that neither the principle of *res judicata* nor the rule of estoppel is applicable to the assessment proceedings in view of the observations in Dhansiram Agarwalla v. Commissioner of Income-Tax; 217 ITR 4 (Gauhati). It was, however, held that the rule of consistency does apply to the proceedings. The basic principle advanced was that the tax concessions afforded to the Institutions like the respondent/assessee involved sacrifice of public revenue and thus the concessions should not be abused. If the donations received by the respondent/assessee are not voluntary, the dominant intent is to earn profit and merely non distribution of profits to members or applying the profits to the educational activity would not be sufficient to claim exemption by relying upon the observations in Safdarjung Enclave Education Society v. Municipal Corporation of Delhi; AIR 1992 SC 1456. It was not disputed by learned counsel that if certain surplus results on the working of the Society, it cannot be said that the institution run by it is for the purpose of profit so long as no person or individual was entitled to any portion of the said profit and the said profit was utilized

for the promotion of the objects of the institution. However, the test which was stated to apply was whether the predominant object of the activity involved is to subserve the charitable purpose or to earn profit by referring to the judgment in the case of Additional Commissioner of Income Tax, Gujarat v. Surat Art Silk Cloth Manufacturers Association; (1980) 121 ITR 1 (SC). As contra to this, where the 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. Thus, the pre-dominant object of the activity is the key factor as canvassed by the learned counsel. Similarly, reliance placed on Aditnar Educational Institution v. Additional Commissioner of Income Tax; 224 ITR 310 (SC) was for canvassing an interpretation of Section 10(22) of the IT Act that the availability of the exemption should be evaluated each year to find out whether the institution existed during the relevant year solely for educational purpose and not for the purpose of profit. Any incidental surplus would, of course, not make it a profit making object, but the acid test is whether on overall view of the matter, the object is to make the profit. In such an appraisal, the distinction between the corpus, the object and the powers of the concerned entity have to be borne in mind. The minority view has strongly relied upon the provisions of Sections 146 and 155 of the Delhi School Education Act, 1973

{‘DSC Act’ for short) which prohibit charging or collection of any admission fee or compulsory donations. It is not in dispute that these provisions apply to an aided institution and the respondent/assessee is an unaided institution. However, learned counsel emphasized that the Judicial Member took a cue from the provisions relating to aided institutions for applying to the respondent/assessee. Another distinction which is sought to be made by the minority view is between carrying on an education activity and carrying on the said activity with a charitable object. Thus, every educational activity is not with a charitable object as observed in Safdarjung Enclave Education Society v. Municipal Corporation of Delhi’s case (supra). Thus, if there is apprehension that but for the contribution some adverse consequence would follow, it ceases to be a voluntary act.

13. The minority view thereafter proceeds on the premise that non distribution of profits or applying the profits to education is not enough to claim exemption and a charitable purpose is necessary with absence of *quid pro quo*. The surplus was stated not to be arising incidentally, but on a calculated basis.

14. The aforesaid is the sum and substance of the pleas advanced on behalf of the appellant/Department.

OPINION OF THE ACCOUNTING MEMBER/STAND OF ASSESSEE

15. On the other hand, learned counsel for the respondent/assessee *inter alia* sought to rely upon the opinion of the Accounting Member and the opinion of the President both of which went in its favour. The Society was stated to be existing solely for educational purpose, as was apparent from its objects, and not for profit making. Reliance was also placed on the Circular F.No.194/16-17-IT (AI) issued in respect of the educational institutions which show some surplus. If the educational institutions are owned by the trusts of societies and such surplus is used for educational purposes only, it could be held that the institution is existing for educational purpose and not for the purpose as observed in the circular. The profit motive would come into the picture if the surplus can be used for non educational purpose.

16. The Accounting Member referred to the view of the Supreme Court in Aditnar Educational Institution v. Additional Commissioner of Income Tax's case (supra) to come to the conclusion that the Supreme Court had not disapproved the proactive approach of collecting funds through donations, gifts, etc. so long as they were ploughed back into the system itself i.e. for imparting education. Thus, if the overall object is not to make

profit, the benefit under Section 10(22) of the IT Act should be available to the assessee.

17. An important aspect taken note of is that there was nothing on record to show any calculated move on the part of the assessee to earn profit or surplus since audited accounts of the previous assessment year 1992-93 reflected a surplus as was the position in the assessment year 1993-94 and the surplus has resulted only from the educational activities. The facts existing in the assessment year 1993-94 were also present in the assessment year 1992-93 and thus there was no change in the facts so as to take a different view breaching the rule of consistency. The provisions of DSC Act have been observed to be not applicable as they pertain to an aided institution while the respondent/assessee undisputedly was an unaided institution. The opinion of the Assessing Officer and the CIT(A) has been observed to be based more on suspicion and doubt with absence of hard facts and evidence. Observations have been made about comments on the persons constituting the Managing Committee which were expunged as there was no material. There was no material placed to show that Ahluwalia Construction Co.(Pvt.) Ltd had carried out construction at rates above the market rates or there had been any diversion of funds to the said Company. Undisputedly, the school building was under construction since earlier years. Similarly, observations on deposits

being made with a non-nationalized bank resulting in possibility of diversion of funds were based on whims and fancies of the tax authorities. The loans and deposits taken from the parents were mainly for liquidating liabilities of the bank loans, creditors and refurbishing funds of the school as at the beginning of the year, the Society had over Rs.21.41 lakhs as bank loans resulting in interest burden. The loans were thus availed of from the parents on interest at the rate of 8 per cent per annum for three years or earlier if the student leaves the school before the date of maturity.

18. The opinion of the Accounting Member takes note of the nominees of the Education Directorate of the Delhi Government being on the Managing Committee as also representatives of the parents, teachers and educationists, etc.

19. In the end, it was emphasized that an educational institution which wants to give upgraded facilities for education, sports, auditorium, swimming pool etc. should not be compelled to reduce the standards of education by preventing funds being raised for such upgradation of infrastructure and facilities.

OPINION OF THE SR. VICE PRESIDENT, ITAT/STAND OF ASSESSEE

20. Now coming to the opinion of the Senior Vice President of the ITAT to whom the reference was made by the President in view of divergence of views between

the members, the same proceeds on the premise that exemption under Section 10(22) of the IT Act has to be calculated each year to find out whether the institution existed during the relevant assessment year solely for educational purpose and not for the purpose of profit making. The acid test laid down and adopted is stated to be whether in an overall view of the matter, the object of the institution is to make profit and for the said purpose, the distinction between the corpus, the object and powers of the concerned entity has to be maintained. The Memorandum of Association of the respondent/assessee set out the objects, scope and powers of the Society; it is in view of these objects, which are charitable in character, that the respondent/assessee claimed and was permitted registration under Section 12A of the IT Act and was allowed exemption under Section 10(22) of the IT Act till the immediate preceding year i.e. the assessment year 1992-93. There had been no change in the Memorandum of Association and rules and regulations during the relevant year and thus the conclusion was reached that there was no change in the predominant object of the activity, which is solely for educational purposes, or that the Society had started running for profit motive. The Governing Body of the Society had been authorized to raise funds for promotion of objects of the Society and the monies collected towards admission fees, donations and loans were within

the power given under the Memorandum of Association. The Sr.Vice President agreed with the view of the Accounting Member that the provisions of the DSC Act could not apply as the provisions themselves stated that they would be applicable to aided institutions and the DSC Act clearly carved out a distinction between the aided and unaided institutions (the respondent/assessee being an unaided institution)

21. It was found that the respondent/assessee had incurred expenses for infrastructure, for establishing and maintaining schools and was intending to open new branches over and above the existing two schools applying these funds for the said purpose and thus it was found that the assesssee could not be stated to have collected funds beyond its legitimate needs. Merely because there was accumulation of funds, no part of the profit/income had been diverted for the purposes other than the educational purpose. The provisions of Section 10(22) of the IT Act require that there should be no profit motive which is a narrower distinction than saying that there should be a charitable purpose.

ADDITOINAL CASE LAW REFERRED TO ON BEHALF OF THE ASSESSEE

22. Learned counsel for the respondent/assessee strongly emphasized on the principle of consistency which was said to be breached by the Assessing Authority for the relevant assessment year and referred

to certain judgments in respect of the educational institutions. The Division Bench of this Court in Commissioner of Income Tax v. Lagan Kala Upvan; 259 ITR 489 (Delhi) emphasized that the conditions laid down in Sections 11 and 13 of the IT Act were not relevant for purposes of Section 10(22) of the IT Act and where an educational institution was running for the last number of years and the assessee was being granted exemption in prior years, the assessee was entitled to exemption for the relevant year.

23. Explaining the principles of *res judicata*, which were not strictly applicable, it was observed that where a fundamental aspect continuing during the different assessment years has been found as a fact one way or the other and the parties have allowed that position to be sustained by not challenging the order, it would not at all be appropriate to allow the position to be changed in the subsequent years. A similar view has been taken in Director of Income Tax v. Lovely Bal Shiksha Parishad; 266 ITR 349 (Delhi), Director of Income Tax (Exemption) v. Moti Bagh Mutual Aid Education; 298 ITR 190 (Delhi) and Director of Income Tax (Exemption) v. Manav Bharti Institute of Child Education; 163 Taxman 50 (Delhi).

24. Learned counsel for the respondent/assessee also strongly relied upon the judgment of the Division Bench of this Court in Director of Income Tax (Exemption) v. Raunaq Education Foundation; 294 ITR 76 (Delhi)

wherein It was held that the word ‘income’ occurring in Section 10(22) of the IT Act cannot be given a restrictive meaning as the words ‘derived from’ do not occur in Section 10(22) of the IT Act and thus the word ‘income’ must be given its natural meaning or the meaning ascribed to it in Section 2(24) of the said Act.

25. In Commissioner of Income Tax v. Delhi Kannada Education Society; 246 ITR 731 (Delhi), it was held that the condition precedent for exemption for an educational institution under Section 10(22) of the IT Act requires that the income to be used for educational purpose and not for profit. Merely because there is surplus, it could not be said that the educational institution existed for profit making. The entity may have income from different sources, but if a particular income is from educational institution which existed solely for educational purpose and not for the purpose of profit, then the income would be entitled to exemption and the income should be directly relatable to educational activity. If profit is made and such profit is applied only for spread of education, it was entitled to exemption under Section 10(22) of the IT Act. In Director of Income Tax v. Sir Shri Ram Education Foundation;262 ITR 164 (Delhi), it was held that the exemption under Section 10(22) of the said Act could not be denied only on the ground that it was merely providing financial assistance to the educational

institutions, but was not running those institutions by itself.

CONCLUSION

26. We have considered all these opinions as well as the submissions made by learned counsel for the parties. We must at the inception itself note that the three components scrutinized by the Assessing Officer are the Admission Fee, Corpus Fund and the Loans taken from parents. Thus it really can't be disputed that even the source of funds is relatable to the activity of education. It may be noticed that there are factual findings on the loans having been availed of by the assessee from a nationalized bank for the purpose of creating additional infrastructure/schools and the three sets of amounts have been addressed only towards the object of creating additional infrastructure and easing the liability of the assessee towards the interest burden of loan repayment. What is pertinent to be taken note of is that there is no finding or allegation of any diversion of these funds for the purpose other than carrying on educational activity. There is no diversion of funds to the individual members or taking away of profits for some other activity. It does appear to us that the Assessing Authority appears to have been weighed down by the factum of some questions being raised in the Parliament about the manner of collection of funds by the institutions. That alone, would not suffice to deny the exemption under

Section 10(22) of the IT Act. There is in fact no material to show or a complaint that there has even been any coercive process to recover these amounts.

27. It cannot be lost sight of that if an institution has to expand, additional infrastructure has to be created, quality education has to be imparted, all these activities require funds. There may be an original corpus of the Society but thereafter the corpus for such activity can be created only through voluntary donations either from any philanthropist or through collection of funds in the process of admission. We are not concerned with the morality of the issue while deciding whether exemption has to be granted under Section 10(22) of the IT Act as all that is required is the absence of profit motive. There is nothing brought on record to show such a profit motive. The opinion of the CIT(A) seems to have traversed a completely divergent path which had no co-relation with the issue of exemption under Section 10(22) of the IT Act. Personal prejudices seem to have stepped in when allegations were made without any material against certain members (which have rightly been struck off by the majority opinion of ITAT) alleging that these members were well known for making profit through educational institutions. We also fail to appreciate the doubts cast or the possibilities expressed about there being something more to it in view of the funds being deposited in private banks. The opinion is completely

based on surmises and conjectures as it seems to suggest that merely because funds were in a private bank, there may have been divergence of funds to the members of the Society. Similarly, the factum of construction being carried out by Ahluwalia Construction Co.(Pvt.) Ltd, stated to be a family concern of the President, was not material as there was no allegation of any inflated cost of construction or unreasonable profits being derived from the same by third parties as a mode of divergence of funds.

28. The reliance on the provisions of DSC Act is clearly misplaced. A bare reading of the Sections relied upon show that Sections 146 and 155 of the DSC Act are applicable only to aided institutions. Thus prohibition against taking donations etc. is clearly applicable to these aided institutions where Government is giving finances for running of the institutions. They have no application to the unaided institutions. The majority view consisting of the Accounting Member of the ITAT and the Senior Vice President, in our considered view, correctly appreciates the legal position and applies it to the facts of the present case. The institution/Society is existing only for educational purpose and not for the purpose of profit making.

29. The legal position in this behalf has been succinctly culled out in a number of judgments both of this Court and the Supreme Court. In this behalf,

guidance can be taken from the expression of opinion by the Supreme Court in Aditnar Educational Institution v. Additional CIT's case (supra). It is clear that any incidental surplus could not convert the object to profit making. Similarly, observations in Safdarjung Enclave Education Society v. Municipal Corporation of Delhi's case (supra)'s case (supra) also emphasize that so long as the profits are utilized for promotion of objects of the institution, the benefit of exemption would be available. It certainly can't be said that the object has turned into profit motive in the present case. A number of judgments referred to in support of this line of reasoning have been discussed aforesaid as cited by the assessee including Safdarjung Enclave Education Society v. Municipal Corporation of Delhi's case (supra), Additional Commissioner of Income Tax, Gujarat v. Surat Art Silk Cloth Manufacturers Association's case (supra), Commissioner of Income Tax v. Delhi Kannada Education Society's case (supra) & Director of Income Tax v. Sir Shri Ram Education Foundation's case (supra). All that is necessary to state is that a common thread runs through them and consequently, in our opinion, Section 10(22) of the IT Act should not be given a restrictive meaning and so long as the income is used for fulfilling educational purpose, the exemption should be available. The educational institutions should exist solely for educational purpose and not for making profit.

30. There is also a second aspect to the present case arising from the principles of consistency. It is not in dispute that the Society was duly registered under Section 12A of the said Act on the basis of its Memorandum of Association. There has been no change in the Memorandum of Association. The Society continues to run the schools which is the object with which the Society was set up. The exemption under Section 10(22) of the IT Act has been available to the respondent/assessee for a number of years prior to the assessment years in question and even for the subsequent years as stated by learned counsel for the assessee. It is in these circumstances that the legal position set out on the principle of consistency would come into play as observed in Commissioner of Income Tax v. Lagan Kala Upvan's case (supra) and Director of Income Tax v. Lovely Bal Shiksha Parishad's case (supra).

31. We are thus of the unequivocal view that the respondent/assessee is entitled to exemption under Section 10(22) of the IT Act as per the majority opinion of the ITAT and thus answer the question in favour of the respondent/assessee and accordingly dismiss the appeal of the appellant/Department.

SANJAY KISHAN KAUL, J.

FEBRUARY 10, 2011 RAJIV SHAKDHER, J.
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