

HIGH COURT OF JUDICATURE AT ALLAHABAD, LUCKNOW BENCH
Reserved

Writ Petition No. 3957 of 2008 (M/B)

CITY MONTESSORI SCHOOL (Regd.) Petitioner

Versus

The Union of India & 2 othersOpp. parties

Hon'ble U.K.Dhaon, J.,

Hon'ble Dr. Satish Chandra, J.

(Delivered by Hon'ble Dr.Satish Chandra, J.)

Heard Sri Shanti Bhushan, Senior Advocate, assisted by Sri Ravi Prakash Gupta and Sri P.K.Sinha for the petitioner
and

Sri D.D.Chopra, learned Senior Standing Counsel for the opposite parties.

In the instant writ petition, the petitioner has challenged the order dated 11.4.2008 passed by the Chief Commissioner of Income Tax, Lucknow by which he has rejected the application dated 4.2.1999 moved by the petitioner for grant of approval of the prescribed authority under sub-clause (vi) of Clause (23C) of Section 10 of the Income Tax Act, 1961 (hereinafter referred to as the Act) for the Assessment Years 1999-2000, 2000-01 and 2001-02.

The brief facts of the case on the basis of material on record and as alleged in the writ petition are that the petitioner is a society registered under the Societies Registration Act, 1860 in the name and style "City Montessori School" (hereinafter referred to as C.M.S.) and registration to the petitioner was granted on 4.6.1963 bearing Registration no. 111 of 1963-64. The petitioner has 20 branches in different parts of Lucknow City. In the beginning, the income of the petitioner was not taxable; hence no Income Tax Returns were filed up to the assessment year 1991-92. The society has been running the school for classes from K.G. to XIIth. Over the years, the school has grown in size with thousands of boys and girls studying in its several branches in the city of Lucknow. It was only when the notice under Section 142 (1) of the I.T.Act, 1961 was issued to the petitioner for filing return of the income-tax for the assessment year 1991-92, the petitioner filed its return first time on 25.2.1992 by showing the income "nil" and also claimed exemption under erstwhile Section 10(22) of the Act. However, the Assessing Officer as well as C.I.T.(A) did not allow exemption on the interest income from fixed deposits received by the petitioner. The Income Tax Appellate Tribunal (hereinafter referred to as the Tribunal) vide its judgment and order dated 31.1.1996 observed that no tax could be levied as it is purely an educational institution and not existing for purposes of profit and after the judgment of the Tribunal, the petitioner applied under Section 12A for exemption from income tax under Sections 11 and 12 and also for approval under Section 80G of the Act.

The petitioner was registered under Section 12A of the Act on 1.4.1998 and approval for exemption under Section 80G was granted on 29.1.1999. Thereafter Section 10(22) of the Act was repealed and a new Section 10(23C) was incorporated w.e.f. 1.4.1999 wherein sub-clause (vi) provides that every educational institution having turn-over of more than one crore rupees within one financial year will have to seek the exemption under Section 10(23C)(vi) of the Act from the Central Board of Direct Taxes. The petitioner had moved an application on 4.2.1999 for the said exemption. In the meantime, on 10-11th May, 2000, a search was conducted at the business premises as well as residences of some officers including the Founder-Manager/Chairman and the Founder-Director of the petitioner. The petitioner has alleged that the validity of the said search was challenged in this Court by way of a Writ Petition which was registered as Writ Petition No. 2818 of 2000 (M/B) and during the pendency of the said writ petition, the assessee has also pursued its application dated 4.2.1999 and other applications for subsequent Assessment Years for exemption under Section 10 (23C) of the Act but according to the petitioner no action was taken by the Department in spite of correspondences made with the Central Board of Direct Taxes (hereinafter referred to as CBDT) on various dates.

The petitioner has further alleged that the CBDT through its Director(Investigation) vide letter dated 18.01.1999 asked the Chief Commissioner of Income Tax, Lucknow, to forward the application under Section 10 (23C) (vi) of the Act along with recommendation within one month of the receipt of the application, the Additional Commissioner of Income Tax, Range-I, Lucknow, recommended to the Commissioner of Income Tax vide letter dated 7.9.2000 for exemption to the petitioner from Income Tax under Section 10 (23C)(vi) of the Act, and the Commissioner of Income Tax, thereafter recommended for exemption to the Chief Commissioner of Income Tax vide letter dated 13.9.2000. The petitioner has further alleged that the recommendations were made by the Chief Commissioner of Income Tax, Lucknow to the CBDT, New Delhi on 25.9.2000, 25.10.2000, 16.2.2001 and 18.6.2001 and being prejudiced with the favourable recommendations in favour of the petitioner, the Director Investigation against whom a notice under Section 80 C.P.C. was issued passed an order of transfer dated 8.12.2000 under Section 127 (2) of the Income Tax Act, 1961. The petitioner thereafter challenged the said order dated 8.12.2000 by way of a writ petition, which was registered as Writ Petition No.2310 of 2000 and during the pendency of the writ petition, the period for seeking exemption under Section 10 (23C) (vi) expired and thereafter an application dated 27.3.2001 for the Assessment Years 2002-03, 2003-04 and 2004-05 and an application dated 16.3.2004 for the Assessment Years 2005-06, 2006-07 and 2007-08 were moved under Section 10 (23C) (vi) of the Act. The Writ Petition No.2818 of 2000 (M/B) and Writ Petition No.2310 of 2000 (M/B) challenging the search conducted at the business premises as well as residences of some officers of the petitioner and relating to the transfer order dated 8.12.2000 respectively were allowed by this Hon'ble Court by the two separate judgment and orders dated 23.05.2007 by which the search and seizure was declared as illegal and the order of transfer was also set-aside and a direction was issued that pending applications of the petitioner for grant of exemption be considered and disposed of expeditiously, say,

within a maximum period of three months from the date of receipt of a certified copy of the order in accordance with law.

The petitioner has further alleged that after service of certified copies of the judgment upon opposite parties no.2 and 3, the petitioner had received three separate letters each dated 19.9.2007 from the Deputy Commissioner of Income Tax, Range-V, Lucknow pertaining to three separate applications of the petitioner for exemption from income tax dated 4.2.1999, 27.3.2001 and 16.3.2004, through which the petitioner was asked to submit the copies of those applications filed by it, which were furnished again before the authority and thereafter the desired documents were also submitted by the petitioner.

The petitioner has also alleged that favourable recommendations by the Deputy Commissioner of Income Tax, Range-V, Lucknow, were made to the Chief Commissioner of Income Tax for exemption from income tax but no action was taken by the Chief Commissioner on the three applications of the petitioner filed under Section 10 (23C) (vi) of the Act and thereafter a contempt petition was filed in this Court, which was registered as Contempt Petition No.2390 of 2007 against Sri K.K. Pandey, Chief Commissioner of Income Tax, Lucknow as he was not deciding the applications of the petitioner seeking exemption from income tax wherein a contempt notice was issued by this Court on 16.11.2007 to Sri K.K. Pandey, Chief Commissioner of Income Tax and being prejudiced on account of contempt notice issued to the Chief Commissioner a notice was issued to the petitioner by the Chief Commissioner on 23.11.2007.

Sri Shanti Bhushan, Senior Advocate, appearing on behalf of the petitioner submitted that the petitioner is a society registered under the Societies Registration Act, 1860 and the Executive Committee of the society consists of 7 persons to whom the management of the society has been entrusted i.e. Founder Members, Patrons, Advisors and Life Members and the rules and regulations provide that the Founder Manager Sri Jagdish Gandhi and the Founder Director Smt. Bharati Gandhi will remain Founder Director for life and after them their nominees or heirs will be the Founder Members while other officers and members of the educational institution are elected for three years and since the Founder Manager and Founder Director are not subject to the election process, they continue in the Executive Committee of the society for life. He further submitted that Sri Jagdish Gandhi and Smt. Bharti Gandhi are living in a modest way in a small rented accommodation and maintain a very simple personal life and devoting all their energies to the growth of the institution and the assets do not vest in any private person and its constitution does not permit any profit of the institution to be diverted to any individual or organization. He further submitted that the petitioner was registered under Section 12A of the Income Tax Act on 01.8.1998 and approval for exemption under Section 80G was also granted on 29.1.1999 and thereafter the petitioner moved an application on 04.02.1999 for exemption of the educational institution before the Central Board of Direct Taxes, New Delhi and thereafter the recommendations were made by the Chief Commissioner of Income Tax, Lucknow to Central Board of Direct Taxes, Lucknow on three occasions for the grant of exemption to the petitioner and also appreciated the role of school in

the field of education and when the application of the petitioner for exemption was not decided the petitioner was compelled to file a writ petition in this Hon'ble Court seeking mandamus against the authorities to decide the application of the petitioner and the said writ petition was allowed by the judgment and order dated 23.5.2007 and the prescribed authority was directed to decide the application of the petitioner within a period of three months. He further submitted that in spite of the order passed by this Hon'ble Court when the application of the petitioner moved under Section 10(23C) (vi) was not considered, the petitioner filed a contempt petition on which notices were issued to Sri K.K. Pandey, Chief Commissioner, Income Tax, Lucknow, who in a most arbitrary and illegal manner has rejected the application of the petitioner dated 4.2.1999. He further submitted that in the impugned order the Chief Commissioner has referred to the receipt and expenditure of the institution for the three Assessment Years 1996-97, 1997-98 and 1998-99 as also the excess of income over expenditure before depreciation and it is clear from those figures that even if the depreciation is disregarded, the entire excess of income over expenditure has been utilized for the addition in capital assets, viz. in the construction of the building required for expansion of the school and its branches and so long as the entire income of the educational institution is utilized for educational purposes, whether it is by way of revenue expenditure or by way of capital expenditure, it has to be regarded as an institution existing solely for educational purposes and not for purposes of profit. Learned counsel for the petitioner has relied upon the decisions of Hon'ble the Supreme Court in the cases of Aditanar Educational Institution v. Additional CIT, reported in (1977) 224 ITR 310 (318), Governing Body of Ranga Raya Medical College v. ITO, reported in (1979) 117 ITR 284 (AP) and Secondary Board of Education v. ITO, reported in (1972) 86 ITR 408 (Orissa).

He further submitted that the Constitution of City Montessori School does not permit any profit of the institution to be diverted to any individual or organization and the learned Chief Commissioner of Income Tax has wrongly held that excess of income over expenditure has to be worked out after disregarding depreciation and even in the case of Charitable Institution, depreciation has to be allowed as a necessary deduction and the excess has to be worked out only after taking the depreciation into consideration. Learned counsel for the petitioner has relied upon the decisions of the Karnataka High Court in CIT v. Society of Sisters of St., reported in (1984) 146 ITR 28, CIT v. Raipur Palloyyine Society, reported in (1989) 180 ITR 579 and CIT v. Sheth Manilal Ranchhoddas Vishram Bhavan Trust, reported in (1992) 198 ITR 593. He further submitted that the Chief Commissioner was under a delusion that the Societies Registration Act, 1860 prohibits the concept of some members being Life Members of managing committee of the society and unless rules and regulations of the society provide for a periodic election of all the members of its governing body, it will be contrary to the Act and the assets of the society will vest in some members who will become proprietors thereto. He further submitted that the life long association of Sri Jagdish Gandhi and Smt. Bharti Gandhi who are the founders of the society and who have nourished it since inception with their blood and sweat has made a small institution grow to astronomical heights finding a place in the Guinness Book of World Record and doing excellent work without deriving any profit for themselves beyond a

small honorarium far below the value of the time and energy which they spend on the activities of City Montessori School.

He further submitted that the observation made by the Chief Commissioner of Income Tax, Lucknow in the impugned order to the effect that the assessee did not produce the books of accounts in pursuance of the letter dated 23.11.2007 is also incorrect and baseless as the letter of 23.11.2007 was the composite notice about which department's counsel had stated before this Hon'ble Court in Writ Petition No.2310 (M/B) of 2003 that nothing stated in the notice will be taken into consideration and it was agreed between the parties before this Hon'ble Court that only specific documents would be asked for as City Montessori School has 20 branches in Lucknow and its accounts are huge, the Chief Commissioner of Income tax, Lucknow had not asked for particular books of accounts or documents to be produced by the petitioner. He has also referred to the observations of this Hon'ble Court in the judgment and order dated 23.05.2007 passed in Writ Petition No.2310 (M/B) of 2003. He further submitted that for about eight years the applications for approval remained pending before the authorities and from time to time on various occasions, specific documents were required to be produced and each and every document so required to be produced was submitted by the City Montessori School to the Income Tax Authorities but even then the Chief Commissioner of Income Tax in a most arbitrary and illegal manner has rejected the application dated 4.2.1999 by the impugned order dated 11.4.2008. Sri D.D. Chopra, learned Senior Standing Counsel appearing on behalf of respondents no.2 and 3 submitted that the application of the petitioner was rightly rejected by the Chief Commissioner of Income Tax by the order dated 11.04.2008 as the books of accounts were not produced by the petitioner in spite of repeated demands and no efforts were made by the petitioner to show that profits/surpluses were exclusively used for the educational purposes. He further submitted that the Chief Commissioner of Income Tax in para 22 of his order dated 11.4.2008 has explained that the contention put forward by the assessee that the profits/surpluses have been exclusively used for educational purposes could not be examined because the assessee did not produce the books of accounts as asked for by him in his letter dated 23.11.2007 and in the absence of necessary books of accounts the Chief Commissioner of Income Tax has rightly rejected the application of the petitioner. He further submitted that the Rules of the Society provide for total control of the affairs of the Society in the hands of Sri Jagdish Gandhi along with his wife Smt. Bharti Gandhi who have ensured that after their death the affairs/profits/assets of the City Montessori School pass on to their nominees/heirs. He further submitted that from the impugned order, it is evident that the petitioner was avoiding to appear before the Chief Commissioner of Income Tax along with the books of accounts and he was filing number of writ petitions before this Hon'ble Court with an object to stall the proceedings pending before the Chief Commissioner of Income Tax and seek time again and again for filing the desired details before the Chief Commissioner of Income Tax and in the absence of books of accounts, it was not possible for the Chief Commissioner of Income Tax to have asked for the specific details/books. He further submitted that the grant of exemption under Section 10 (23C) is subject to the conditions stipulated in the proviso to Section 10 (23C) under which the authority has to check genuineness of the activities of the petitioner and various letters were

written by the Chief Commissioner of Income Tax for producing the books of accounts and other relevant materials. He has relied upon the decision of Hon'ble the Supreme Court in the case of American Hotel and Lodging Association Educational Institute v. Central Board of Direct Taxes and others, reported in (2008) 301 ITR 86 (SC). He further submitted that the Chief Commissioner of Income Tax after considering the material on record and in view of the law declared by Hon'ble the Supreme Court in the case of Oxford University Press v. Commissioner of Income Tax, reported in (2001) 3 S.C.C. 359 has rightly rejected the application of the petitioner and the Chief Commissioner of Income Tax in his order has rightly mentioned that the profits/surpluses have been exclusively used for educational purposes could not be examined because the assessee did not produce the books of accounts as called for in the letter dated 23.11.2007 and the petitioner could not produce any material to show that the Society exists only for educational purposes and not for the purposes of profits. He has also drawn our attention to para-19 of the impugned order, where addition in the capital assets were shown more than 7.00 crore during three assessment years under consideration and that the assessee has fixed deposits of Rs.3.93 crore with Banks and has taken loans of Rs.7.24 crore from Banks/Financial Institutions etc.

We have considered the rival submissions made by the learned counsel for the parties and gone through the record. The petitioner is a society registered under the Societies Registration Act, 1860 in the name and style "City Montessori School" and registration to the petitioner was granted on 4.6.1963 bearing Registration no. 111 of 1963-64. The petitioner has 20 branches in different parts of Lucknow City. In the beginning, the income of the petitioner was not taxable; hence no Income Tax Returns were filed up to the assessment year 1991-92. The society has been running the school for classes from K.G. to XIIth. Over the years, the school has grown in size with thousands of boys and girls studying in its several branches in the city of Lucknow. It was only when the notice under Section 142 (1) of the I.T.Act, 1961 was issued to the petitioner for filing return of the income-tax for the assessment year 1991-92, the petitioner filed its return first time on 25.2.1992 by showing the income "nil" and also claimed exemption under erstwhile Section 10(22) of the Act. However, the Assessing Officer as well as C.I.T (A) did not allow exemption on the interest income from fixed deposits received by the petitioner. The Income Tax Appellate Tribunal vide its judgment and order dated 31.1.1996 observed that no tax could be levied as it is purely an educational institution and not existing for purposes of profit. The petitioner was granted exemption under Section 12A of the Act on 18.12.1998 whereby any donation to the institution was exempted from Income Tax. The petitioner was also granted a certificate under Section 80G of the Act by the order dated 29.01.1999. The petitioner on 04.02.1999 moved an application for exemption before the CBDT. It is relevant to mention here that with effect from 01.04.1999 all educational institutions having an aggregate annual receipts of more than Rs. one crore are required to seek approval under Section 10(23C)(vi) from the prescribed authority which was the Central Board of Direct Taxes. The Additional Commissioner of Income Tax on a query being made by the Commissioner recommended vide his letter dated 07.09.2000 for exemption to the petitioner from income tax under Section 10(23C)(vi) with the following observations : "The institution is not running for profit. In fact it is doing great service to the nation.

About 24,000 students are studying at present. The institution finds place in the Guinness Book of World Record."

On 13th September 2000, on the basis of this report, the Commissioner of Income Tax recommended for exemption to the Chief Commissioner of Income Tax, stating that: "The applicant institution is an educational institution of repute. It is one of the leading schools of Lucknow with its branches spread over the city and about 24,000 students are studying at present. A search under section 132 of the I.T. Act, 1961 was carried on the organization in May, 2000. The appraisal report has just been received. The report of Dy. CIT (Inv. Cir) alongwith comments of Addl. CIT, Range I regarding exemption is also enclosed. The institute fulfills the conditions for the grant of exemption u/s 10(23C) of the I.T. Act, 1961."

The recommendations were made by the Chief Commissioner of Income Tax, Lucknow to the CBDT, New Delhi on 25.9.2000, 25.10.2000, 16.2.2001 and 18.6.2001 and being prejudiced with the favourable recommendations in favour of the petitioner, the Director General of Investigation against whom a notice under Section 80 C.P.C. was issued passed an order of transfer dated 8.12.2000 under Section 127 (2) of the Income Tax Act, 1961. The petitioner thereafter challenged the said order dated 8.12.2000 by way of a writ petition, which was registered as Writ Petition No.2310 of 2000 and during the pendency of the writ petition, the period for seeking exemption under Section 10(23C)(vi) expired and thereafter an application dated 27.3.2001 for the Assessment Years 2002-03, 2003-04 and 2004-05 and an application dated 16.3.2004 for the Assessment Years 2005-06, 2006-07 and 2007-08 were moved under Section 10(23C)(vi) of the Act.

Writ Petition No. 2310 of 2000 preferred by the petitioner was allowed by this Court by the judgment and order dated 23.05.2007 and a direction was issued that the pending applications of the petitioner for grant of exemption be considered and disposed of expeditiously, say, within a period of three months from the date of receipt of a certified copy of the order, in accordance with law. The order of transfer of the assessment cases by the order dated 08.12.2000 was also quashed by this Court. Writ Petition No. 2818 of 2000 in which the search conducted by the Income Tax Department on the business premises and residence of the petitioner had been challenged was also allowed and the search and seizure were declared as illegal. Since the Chief Commissioner of Income Tax was taking no interest in disposal of the applications moved by the petitioner under Section 10(23C)(vi) of the Act, the petitioner filed a contempt petition in this Court against Sri K.K. Pandey, Chief Commissioner of Income Tax, Lucknow in which notice was issued to the Chief Commissioner of Income Tax.

The petitioner in paragraph 12 of the writ petition has stated that there were as many as three enquiries at the level of the Chief Commissioner who vide five separate letters recommended the case of the petitioner for exemption. The relevant extracts of the recommendations of the Chief Commissioner of Income Tax are quoted as under: "FIRST LETTER OF RECOMMENDATION DATED 25.09.2000: This recommendation has been made vide report dated 22.09.2000 which has been sent vide speed post on

25.09.2000."

"SECOND LETTER OF RECOMMENDATION DATED 25.10.2000: The recommendation dated 22.09.2000 has been again sent to CBDT, New Delhi vide letter no. C.No. 285 dated 25.10.2000 which reads as under:

1. I am directed to enclose herewith a copy of report of even no. dated 22.09.2000 with reference to your telephonic reference with Chief Commissioner of Income Tax, Lucknow on 24.10.2000 for Board's kind perusal.

2. The required report alongwith various enclosures was sent by Speed Post on 25.09.2000 vide letter dated 22.09.2000. However, as desired a copy of the entire set is sent again by Speed Post.

3. For the reasons given by the CIT, Lucknow, in his letter dated 13.09.2000, addressed to CCIT, Lucknow endorses the views/recommendations of the CIT, Lucknow that the Institute fulfils the condition for the grant of exemptions u/s 10(23C) of the I.T. Act, 1961."

"THIRD LETTER OF RECOMMENDATION DATED 16.02.2001: By this letter dated 16.02.2001, fresh recommendation has been sent to CBDT, New Delhi which reads as under:

Kindly find enclosed herewith a report submitted by C.I.T. Addl. C.I.T. and Dy. C.I.T., Investigation Circle, Lucknow.

It is a case of institution running a school. The requirement of section under Section 10(23C)(vi) are fulfilled. If the Board thinks, it may consult the D.G. Income Tax for exemption. Otherwise the City Montessori School, Lucknow may be given exemption by CBDT U/s 10(23C)(vi) of the I.T. ACT, 1961. Keeping in view of the above, the institution is entitled to the exemption under Section 10(23C)(vi) of the I.T. Act, 1961"

FOURTH LETTER OF RECOMMENDATION DATED 18.06.2001:

"This recommendation has been mentioned in letter dated 06.04.2004 sent by Chief Commissioner to CBDT, New Delhi."

FIFTH LETTER OF RECOMMENDATION DATED 06.04.2004:

"This letter of recommendation has been sent by Chief Commissioner to CBDT, New Delhi in response to letter of CBDT, New Delhi dated 12.03.2001 by which certain clarifications had been sought by the CBDT, New Delhi which reads as under: "Your kind attention is drawn to the Board's letter F.No.197/85/2000-ITA-I dated 12th March, 2001 through which certain clarifications was sought in the above matter. The clarification and complete report has already been forwarded vide this office letter even no. dated 18th June, 2001. No communication in the matter has been received so far.

I am directed to request you to kindly communicate the Board's decision in the matter at the earliest convenience."

It is submitted that this decision has been formally communicated to the CBDT, New Delhi by the Chief Commissioner vide letter dated 08.06.2004 which reads as under:

"Please refer to your letter dated 7th June, 2004 on the above subject.

2. I am directed to inform you that your application has already been forwarded to the Board vide this office dated 22nd September, 2000 along with the recommendation for exemption u/s 10(23C)(vi) of I.T. Act. The matter is pending at the level of the CBDT, which is being followed up."

In *Commissioners for Special Purposes of Income-tax v. John. Frederick Pemsel* [(1891) A.C., 531, 583 = T.C. 53 (H.L.)], Lord Macnaghten laid down that charitable purposes could be put under the four heads, viz: (1) for the relief of poverty, (2) for the advancement of education (3) for the advancement of religion and (4) for other purposes beneficial to the community not falling under any of the preceding heads. In *re White: White v. White* [(1893) 2 Ch. 42 (CA)] the base of definition was broadened and it was laid down that in general terms 'any mode of promoting the welfare of mankind' would be charitable object. "Charitable purpose", according to the last paragraph of section 4(3) of the 1922 Act, was defined so as to include "relief of the poor, education, medical relief, and the advancement of any other object of general public utility". As the Income Tax Act 1922 was repealed and replaced by the 1961 Act, section 2(15) thereof adopted the 1922 Act definition with a modification, namely by enacting that, "charitable purpose' includes relief of the poor, education, medical relief and the advancement of any other object of general public utility not involving the carrying on of any activity for profit." Thus, the scope of the definition was changed by the Income Tax Act, 1961, especially after an amendment in Section 2(15) by the Finance Act, 1983 w.e.f. 1st April, 1984. In the instant case, the assessee is not only providing traditional education but also preparing students by providing guidelines to get admissions in professional institutions to pursue their higher studies. The sense in which the word "Education" has been used in Section 2(15) of the Act is the systematic instruction, schooling or training given to the young in preparation for the work of life. Similarly, extending financial assistance/scholarship etc. to students for their educational purpose would squarely fall within the connotation of "education" as per the ratio laid down in the case of *CIT v. Saraswath Poor Students Fund* 150 ITR 142, 147 (Kart). Thus, the assessee is engaged in "Educational Activities" which falls under charitable purpose. It is also admitted fact that in the earlier assessment year, the assessee was enjoying the exemption under erstwhile Section 10(22) of the I.T. Act. The exemption in the said Section at the relevant time was of "any income of University and other educational institution existing solely for the educational purposes and not for the purposes of profit." The said Section was substituted with effect from 1.4.1999. Now the educational institution will have to seek exemption under Section 10(23C) which reads as under:-

Sub-clause-(vi):-

"..... any university or 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"

(iiiab):- "any university or other educational institution existing solely for educational purposes and not for purposes of profit, and which is wholly or substantially financed by the Government"

(iiiad):- "any university or other educational institution existing solely for educational purposes and not for the purposes of profit if the aggregate annual receipts of such university or educational institution do not exceed the amount of annual receipts as may be prescribed."

Income Tax Rule 2BC prescribed the limit of only Rs. 1 crore. It means that if the turnover is more than one crore, then exemption will have to be asked under Section 10(23C)(vi) otherwise it will be taxable. Needless to mention that the proviso of Section 10(23C) permits the investment and deposits of its surplus fund. It means that the institution can make some deposits and the same is permissible for earning interest income. In the instant case, the assessee petitioner is undoubtedly an educational institution which might have some deposits which are permissible as per the proviso to Section 10(23C). It has been held in the cases of Director of Income-Tax (Exemption) v. Eternal Science of Man's Society, [2007] 290 ITR 535 (Delhi) and Director of Income-Tax (Exemption) v. Prakash Education Society, [2006] 286 ITR 288 (Delhi) that surplus can be deposited for earning the interest.

It may also be mentioned that for seeking the exemption under Section 10(23C), the assessee will have to follow the guidelines mentioned in Form No.56D (Rule 2CA). One of the conditions in Form 56-D is that assessee will have to submit the audited accounts and balance sheets for the last three years along with a note on the examination of accounts and on the activities as reflected in the accounts and in the annual reports with special reference to the appropriation of income towards objects of the university or other educational institution. From the audited accounts, one can easily see whether the funds were utilized for the expansion of educational institution/activity or for personal profits. In the present case, the opposite-parties have not brought any material on record to prove that the surplus earned by the assessee petitioner was utilized for personal profit/gain on anyone including the Founder-Manager/Director. Whatever fund was acquired, the same was utilised for the expansion of educational activities of institution. Initially there were five students and now the institution is imparting education to more than 34,000 students as pointed out during the course of arguments. Thus, the assessee is fully satisfying all the statutory requirements for getting exemption under Section 10(23C)(vi) of the Income Tax Act. Apart from it, it may be mentioned that the Hon'ble Supreme Court has observed in the case of CIT v. Surat Art Silk Cloth Manufacturers Association, 121 ITR SC, p.1 that the institution must be for general public utility and certainly not for profit, then it can be treated as charitable institution. In the instant case, no adverse material was brought on record by the opposite-parties to reject the application dated 4.2.1999 for seeking said exemption. In American Hotel & Lodging Association Educational Institute v. Central Board of

Direct Taxes and others, reported in (2008) 10 SCC 509, Hon'ble the Supreme Court has held that-

"While granting approval under s. 10(23C)(vi), the prescribed authority has only to see that the applicant fulfils the threshold precondition of actual existence of an educational institution and can impose stipulations that certain percentage of accounting income would be utilized for impartation of education in India, although there is no requirement in the third proviso to s. 10(23C)(vi) that the application of income must be made in India: order passed by CBDT rejecting the appellant's application for approval on the ground that it has not applied its income for the purpose of education in India is set aside and the matter is remitted to CBDT for fresh consideration in accordance with law."

In the said judgment Hon'ble the Supreme Court has further observed - "On the ground of approval, sections 11 and 13 did not apply. Once an applicant institution came within the phrase "exists solely for educational purpose and not for profit" no other condition like application of income was required to be complied with. The prescribed authority was only required to examine the nature, activities and genuineness of the institution. The mere existence of profit/surplus did not disqualify the institution."

It may also be mentioned that in the case of Director of Income Tax (Exemption) v. Escorts Cardiac diseases Hospital Society, (2008) 300 ITR 75 (Delhi) it was observed that-

"since there was no change in the facts and circumstances from the assessment year 1988-89 till the assessment year 1997-98, the Revenue had to follow a consistent pattern and when it had granted the benefit of exemption under sections 10(22A) and 11 of the Act, it could not be permitted to change its opinion without any noticeable change in circumstances."

We agree with the submissions of the counsel of the opposite-parties that the principle of res judicata is not applicable in the income tax matter. But finding of earlier years on the same matter are relevant as per the ratio laid down in Sardar Kehar Singh v. CIT, 195 ITR 769 (Rajasthan), Taraban Raman Bhai Patel v. ITO, 215 ITR, 323 (Gujarat) and CIT v. Hindustan Motors Ltd. 192 ITR, 619 (Calcutta).

Where all fundamental facts permeating through different assessment year has been found as a fact one way or the other and parties have allowed that position to be sustained by not challenging the order, it would not be at all appropriate to allow the position to be changed in a subsequent year as per the ratio laid down by Hon'ble the Supreme Court in the case of Radha Soami Satsang v. CIT 193 ITR 321, 329 Supreme Court.

The contention of Sri Shanti Bhushan, Senior Advocate to the effect that all details/information which are statutory requirement for making an application under Section 10(23C)(vi) of the Act were supplied to the Chief Commissioner of Income Tax

has force as thrice recommendations were made earlier by the Chief Commissioners of Income Tax to the CBDT, New Delhi on various dates and averments made by the petitioner in paragraph 12 of the writ petition have not been denied in the counter affidavit. The Chief Commissioner of Income Tax has rejected the applications on the ground that the assessee did not produced the books of account in pursuance of the letter dated 23.11.2007. From the above it appears that the Chief Commissioner of Income Tax has rejected the application dated 04.02.1999 for exemption as he was summoned by this Court in the contempt proceedings initiated by the petitioner. It was not open for Chief Commissioner of Income Tax to go into the constitutional validity of the society as the society is registered under the Societies Registration Act, 1860, which is a self code. The Executive Committee of the society consists of 7 persons to whom the management of the society has been entrusted i.e. Founder Members, Patrons, Advisors and Life Members and the rules and regulations specifically provide that the Founder Manager Sri Jagdish Gandhi and the Founder Director Smt.Bharati Gandhi will remain Founder Director for life and after them their nominees or heirs will be the Founder Members and the constitution of the society does not permit any profit of the institution to be diverted to any individual or organization. In the light of above discussions and by considering and analysing the totality of facts and circumstances of the case, we are of the view that the petitioner assessee is a charitable institution which is engaged wholly for the purposes of education, especially when no material has been brought to prove that there was any element of personal profit. The deposits/investments of surplus is permissible as per the proviso of Section 10(23C). Hence, we are of the view that the assessee is entitled for the exemption under Section 10(23C)(vi) of the Income Tax Act, 1961. In the result the writ petition succeeds and is allowed. The impugned order dated 11.4.2008 passed by the Chief Commissioner of Income Tax, Lucknow, a copy of which has been annexed as Annexure P-1 to the writ petition is hereby quashed and the application moved by the petitioner on 4.2.1999 for the grant of approval under Section 10(23C) (vi) of Income Tax Act, 1961 with respect to the assessment years 1999-2000, 2000-01 and 2001-02 stands allowed. The Chief Commissioner of Income Tax shall issue the certificate of approval to the petitioner under Section 10(23C) (vi) of Income Tax Act, 1961 within four weeks from the date a certified copy of this order is produced and shall consider and dispose of the applications of the petitioner dated 27.03.2001 and 16.03.2004 made under Section 10(23C) (vi) of Income Tax Act, 1961, in accordance with law, if the same have not already been disposed of. Under the circumstance, there shall be no order as to costs.

Dated : 29.05.2009