THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 07.10.2015

\+ **ITA 705/2008**

DIRECTOR OF INCOME TAX (EXEMPTION) .....Appellant

versus

ALL INDIA PERSONALITY ENHANCEMENT & CULTURAL CENTRE FOR SCHOLARS AIPECCS SOCIETY ..... Respondent

Advocates who appeared in this case:

For the Appellant :Mr Kamal Sawhney, Senior Standing Counsel, Mr Raghvendra Singh, Junior Standing Counsel with Mr Shikhar Garg.

For the Respondent :Mr Ajay Vohra, Senior Advocate with Ms Kavita Jha and Mr Vaibhav Kulkarni.

AND

\+ **ITA 924/2009**

DIRECTOR OF INCOME TAX (EXEMPTION) .....Appellant

versus

ALL INDIA PERSONALITY ENHANCEMENT & CULTURAL CENTRE FOR SCHOLARS ..... Respondent

Advocates who appeared in this case:

For the Appellant :Mr Kamal Sawhney, Senior Standing Counsel, Mr Raghvendra Singh, Junior Standing Counsel with Mr Shikhar Garg.

For the Respondent :Mr Ajay Vohra, Senior Advocate with Ms Kavita Jha and Mr Vaibhav Kulkarni.

WITH

\+ **W.P.(C) 3797/2011**

ALL INDIA PERSONALITY ENHANCEMENT & CULTURAL CENTRE FOR SCHOLARS AIPECCS SOCIETY ..... Petitioner

versus

DIRECTOR GENERAL OF INCOME TAX (EXEMPTIONS) .....Respondent

Advocates who appeared in this case:

For the Petitioner :Mr Ajay Vohra, Senior Advocate with Ms Kavita Jha and Mr Vaibhav Kulkarni.

For the Respondent :Mr Kamal Sawhney, Senior Standing Counsel, Mr Raghvendra Singh, Junior Standing Counsel with Mr Shikhar Garg.

CORAM:
DR. JUSTICE S.MURALIDHAR
MR. JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

1. The substratal controversy involved in the above captioned appeals and the writ petition, relates to the question whether the income of All India Personality Enhancement and Cultural Centre for Scholars AIPECCS Society (hereafter the 'Assessee') is exigible to tax under the Act.

2. The principal issue involved in the above mentioned appeals filed by the Revenue under Section 260A of the Income Tax Act, 1961 (hereafter the 'Act'), is whether the surplus reflected by the Assessee in its Books of Accounts maintained in the normal course could be taxed under the

provisions of Chapter XIV-B of the Act; inasmuch as, it is contended that the same could not be considered as undisclosed income earned during the block period. Since the issues involved in the above captioned appeals and the writ petition are common and/or interlinked, the said matters were heard together.

3. ITA 705/2008 is an appeal preferred by the Revenue under Section 260A of the Act against an order dated 28th September, 2007 passed by the Income Tax Appellate Tribunal (hereafter the 'Tribunal') in IT(SS)A.No.300/Del/2001 whereby the Assessee's appeal directed against the order dated 29th November, 2001 passed by the Commissioner of Income Tax (Appeals) [hereafter 'CIT(A)'] in Appeal No. 60/2001-II, was allowed.

4. ITA 924/2009 is an appeal preferred by the Revenue under Section 260A of the Act impugning an order dated 6th June, 2008 passed by the Tribunal in IT(SS)A.No.36/Del/2008, allowing the appeal of the Assessee against an order dated 10th January, 2008 passed by CIT(A) upholding the levy of penalty imposed by the Assessing Officer (hereafter the 'AO') under Section 158BFA(2) of the Act. The said order was passed by the Tribunal as a consequence of the Assessee prevailing in its Appeal -

IT(SS)A.No.300/Del/2001, before the Tribunal.

5. W.P.(C) 3797/2011 is a petition filed by the Assessee under Article 226/227 of the Constitution of India, *inter alia*, impugning an order dated 29th December, 2010 passed by the Director General of Income Tax (Exemption) [hereafter 'DGIT(E)'] declining the petitioner's application for approval under Section 10(23C)(vi) of the Act. The Assessee further prays that an appropriate writ order or direction be issued to DGIT(E) for the grant of approval under Section 10(23C)(vi) of the Act for the Assessment Years 1999-2000 and onwards.

6. Briefly stated, the relevant facts necessary to address the issues involved in the above captioned matters are as under:

6.1 The Assessee is a Society and was registered under the Societies Registration Act, 1860 on 26th December, 1980. The aims and objects of the Assessee as specified in its memorandum of association read as under:-

> "a) To establish schools in India and provide good quality education to all without distinction of race or creed or caste or social status with a view to help the Government which is unable to cope with providing education to all.
>
> b) To organize special education for Gifted Children which does not exist in specific form anywhere in the country

and because of which, there is crisis of leadership in most walks of life.

c) To arrange and provide for scholarship for education to meritorious children of limited means.

d) To organize and conduct other activities, which further the cause of education, particularly at school level, and specifically for Gifted Children.

e) To promote progress, prosperity and welfare of the Gifted Children.

f) For the above purpose, the Society may raise funds by various means, acquire premises, buildings and other property on rent/lease, by way of gift/donation, by purchase, anywhere in India or abroad and all other things which it may consider in its opinion required for the furtherance of the above aims, objects and purposes.

g) To do all other acts, as are incidental and conducive to the attainment of the above aims and objects."

6.2 The Assessee is managing and running the following schools for imparting education to children:

S.No.	Name of the School
1.	C.S.K.M. Public School, Satbari Mehrauli, Delhi
2.	C.S.K.M. Public School, Navrangpur, Gurgaon, Haryana.
3.	C.S.K.M. Public School, Riico Industrial Area, Bhiwadi, Alwar, Rajasthan.

6.3 On 15th January, 1999 a search and seizure operation was conducted

under Section 132 of the Act on the premises of the school run by the Assessee at Mehrauli. The warrant of authorization for the search was not issued in the name of the Assessee but in the name of "Col. Satsangi Kiran Memorial, AIPECCS Education Complex". The residence of Col. Satsangi (the Chairman of the Assessee), the Manager and the Principal of the School were also searched.

6.4 A survey under Section 132A of the Act was also carried out at the Accounts Department within the premises of the school. During the course of the survey, the Books of Accounts which were regularly maintained by the Assessee were inventorised, however, the same were not seized. Certain cash was also found at the residence of the Chairman of the Assessee.

6.5 Thereafter, a notice under Section 158BC of the Act was issued on 22nd December, 1999. In response to the aforesaid notice, the Assessee filed a return for the block period 1st April, 1988 to 15th January, 1999 showing Nil income. In the note given below the computation of income, the Assessee claimed that its income was exempt under Section 10(22)/10(23C) of the Act. The Assessee claimed that it existed solely for the purpose of education and its receipts and payments were relatable to the said purpose only.

6.6 The AO examined the Books of Accounts of the Assessee and found that the account of receipts of payments maintained by the Assessee reflected a surplus in several years falling within the block period 1st April, 1988 to 15th January, 1999. The Assessing Officer concluded that substantial surpluses in all years except Previous Years relating to the Assessment Years 1991-92 and 1992-93 indicated that the Assessee was functioning with the motive to earn profit. The AO held that the Assessee was indulging in non-educational activities and making speculative investments. The AO also noticed that the Assessee had made advances to its office bearers, which included the chairman and his family and, thus, concluded that the Assessee was not entitled to exemption under Section 10(22) of the Act.

6.7 The AO proceeded to pass the assessment order dated 31st January, 2001 assessing a sum of ₹12,80,66,147/-, being the surpluses as recorded in the books of the Assessee, as 'undisclosed income' during the block period. Separate penalty proceedings under Section 158BFA(2) of the Act and under Section 271(B) of the Act were also initiated.

6.8 In the meantime, on 30th March, 1999, the Assessee filed an application in the prescribed form with DGIT(E) seeking approval under

Section 10(23C)(vi) & (via) for the year 1998-99.

6.9 Aggrieved by the assessment order dated 31st January, 2001, the Assessee preferred an appeal before CIT(A) urging several grounds. The Assessee claimed that the proceedings under Section 158BC of the Act were not maintainable. The Assessee contended that the surpluses reflected in the Books of Accounts could not be termed as undisclosed income under Chapter XIV-B and, therefore, the assessment order framed was unsustainable. The Assessee also challenged the validity of the search operations under Section 132 of the Act. According to the Assessee, a search under Section 132 of the Act could be authorized in respect of a person where the concerned Income Tax Authority had reason to believe that either of the conditions as specified under Section 132(1) of the Act were satisfied. It was urged that a warrant of authorization, which did not specify a person but only the premises to be searched was contrary to the provisions of Section 132 of the Act and, therefore, was illegal. The Assessee also argued that no search had been conducted on the Assessee and, therefore, an assessment under Section 158BC could not be framed.

6.10 The CIT(A) passed an order dated 29th November, 2001 upholding the assessment order. However, the quantum of undisclosed income was

reduced to ₹10,08,24,264/- as a consequence of allowance on account of depreciation.

7. Aggrieved by the order dated 29th November, 2001 passed by the CIT(A), the Assessee preferred an appeal before the Tribunal, which too was dismissed by an order dated 25th June, 2004. The Tribunal upheld the AO's finding that the Assessee was not functioning solely for the purposes of education and, therefore, was not eligible for exemption under Section 10(22) of the Act.

8. Thereafter, the Assessee filed a miscellaneous application under Section 254(2) of the Act being MA No. 143/2005 dated 8th October, 2004 which was registered with the Tribunal on 22nd November, 2004. Subsequently MA No. 143/05 dated 27th December, 2005 was moved by the Assessee in substitution/addition to the earlier application. This application was allowed. The Tribunal accepted that it had not considered certain grounds urged by the Assessee and by an order dated 4th August, 2006, recalled its earlier order dated 25th June, 2004.

9. The Tribunal, thereafter, passed an order dated 28th September, 2007, which is impugned in ITA 705/2008, allowing the Assessee's appeal

principally on the ground that surpluses disclosed by the Assessee in the Books of Accounts maintained in the regular course could not be considered as 'undisclosed income' of the Assessee under Chapter XIV-B of the Act. The Tribunal further accepted the contention of the Assessee that it was not required to file its return as its income was exempt under Section 10(22) of the Act. The Tribunal, having allowed the appeal as aforesaid, did not decide the issue with respect to the validity of the search under Section 132 of the Act and the consequent initiation of proceedings under Chapter XIV-B of the Act.

10. In the meantime, the AO also passed an order dated 13th January, 2005 imposing penalty under Section 158BFA(2) of the Act. The Assessee's appeal against the said order was dismissed by the CIT(A) on 10th January, 2008. The Assessee preferred a second appeal before the Tribunal, which was allowed by an order dated 6th June, 2008. The said order is the subject matter of appeal in ITA 924/2009. In the meantime, by an order dated 27th March, 2002, the AO framed an assessment under Section 143(3) of the Act for the Assessment Year 1999-2000. The Assessee's claim for exemption under Section 10(23C) of the Act was rejected by the AO following an earlier decision in relation to the block

period.

11. The Assessee preferred an appeal against the assessment order dated 27th March, 2002 passed in respect of Assessment Year 1999-2000, which was partly allowed by CIT(A) on 10th July, 2003. The Assessee preferred a further appeal against the order dated 10th July, 2003 to the Tribunal which was disposed of by an order dated 15th May, 2009. The Tribunal restored the assessment to the file of the AO for fresh adjudication after ascertaining the outcome of the petitioner's application for approval under Section 10(23C) of the Act, which was at the material time pending before the prescribed authority.

12. On 29th December, 2010, the petitioner's application for grant of approval under Section 10(23C) of the Act was rejected. The Assessee has filed an application for rectification of the said order, which is stated to be pending.

13. The appeals (705/2008 and 924/2009) were, accordingly, heard on the following questions of law:

A. Whether the Revenue is entitled to challenge the order dated 4th August, 2006 passed by the Tribunal in this appeal?

B. If the answer to question (A) is in favour of the Revenue, whether on the facts of the present case, the Tribunal was correct in law in recalling its order dated 25th June, 2004?

C. Whether, in the given facts and circumstances, an assessment under section 158BC could be made in respect of the income of Assessee as recorded in its books maintained in the regular course treating the same as 'undisclosed income'?

D. Whether the Tribunal was correct in law in holding that the Assessee was entitled to the benefit of exemption under Section 10(22) of the Act?

E. Whether the Tribunal was correct in deleting the penalty imposed on the Assessee?

14. In addition, the parties were also heard on the question whether the order dated 29th December, 2010 passed by DGIT(E) - which is impugned in W.P.(C) 3797/2007 - rejecting the petitioner's application for approval under section 10(23C) of the Act, was erroneous and unjustified?

Submissions on behalf of the Revenue

15. At the outset, Mr Kamal Sawhney, learned Senior Standing counsel for the Revenue contended that the decision of the Tribunal to recall its earlier order dated 25th June, 2004 was patently erroneous. He pointed out that the only reason on account of which the Tribunal had recalled its earlier order dated 25th June, 2004 was non-consideration of certain grounds urged by the Assessee. He submitted that the said reason was patently erroneous as the grounds of appeal in question (i.e., Ground No. 6, 14.1, 14.2, 9, 10 & 17) had been specifically considered by the Tribunal in its order dated 25th June, 2004. He contended that the Tribunal had completely reheard the matter and had decided the appeal contrary to the earlier decision made on 25th June, 2004.

16. He referred to the decision of the Madras High Court in ***Vyline Glass Works Ltd. v. Assistant Commissioner of Wealth Tax*****: (2015) 371 ITR 355 (Mad.)** in support of his contention that where a Tribunal renders a judgment without dealing with the specific factual situation, the same would be an irregularity of procedure and would not warrant a recall of the order. He submitted that, therefore, the Tribunal's order dated 4th August, 2006 was erroneous and was liable to be set aside.

17. Mr Sawhney further submitted that the Tribunal's order dated 4th August, 2006 recalling its earlier order dated 25th June, 2004 had not been challenged at the material time as an appeal against the said order was not maintainable under Section 260A of the Act. He, however, submitted that notwithstanding the fact that the Tribunal's decision dated 4th August, 2006 had not been challenged at the material time, the Revenue could, nonetheless, challenge the same along with the final order. He referred to the Full Bench decision of this Court in ***Lachman Dass Bhatia v. Assistant Commissioner of Income Tax*****: ITA 724/2010, decided on 6th August, 2010** and drew the attention of this Court to paragraphs 21 to 24 of the said decision in support of his contention that where an order under Section 254(2) of the Act is passed recalling the earlier order and the main order under Section 254(1) is passed thereafter, both the said orders could be challenged in an appeal preferred against the later order under Section 254(1) of the Act.

18. It was next contended by Mr Sawhney that the Tribunal had erred in accepting the Assessee's contention that the surpluses recorded in its books of accounts maintained in the normal course could not be considered as 'undisclosed income'. He contended that since the Assessee had not filed

its return of income, it was not open for the Assessee to urge that the surplus recorded in its books was disclosed. He contended that it was incumbent upon an Assessee claiming exemption under Section 10(22) of the Act to file its return of income if the same exceeded the maximum amount not chargeable to tax ignoring the provisions of Section 11 and 12 of the Act.

19. He submitted that it was not open for the Assessee to consider its income as not chargeable to tax under Section 10(22) of the Act and avoid filing a return of income. He argued, empathetically, that the question whether the Assessee's income was not taxable by virtue of Section 10(22) of the Act would arise only when the Assessee disclosed the same by filing a return. He referred to the decision of the Bombay High Court in ***Director of Income Tax v. Malad Jain Yuvak Mandal Medical Relief Centre***: **(2001) 250 ITR 488 (Bom.)** in support of his contention that the Assessee was obliged to file its return even though it claimed its income was not chargeable to tax by virtue of Section 10(22) of the Act.

20. In addition to the non disclosure of surpluses recorded in the books, Mr Sawhney submitted that the unaccounted cash of ₹44 Lacs was found in

the residence of Col. Satsangi and the same would warrant making an assessment under Chapter XIV-B of the Act.

21. Mr Sawhney also contested the Assessee's claim that it was entitled to exemption under Section 10(22)/10(23C) of the Act. He argued that the Assessee had consistently generated surpluses after meeting its revenue and capital expenditure and this indicated that the pre-dominant object of the Assessee was not to impart education but to generate profits and the activity of running and managing educational institutions was carried on, pre-dominantly, with the object of generating profits. In addition, he referred to the findings recorded by the Tribunal in its order dated 25th June, 2004 where it was held that non-educational activities were being conducted by the Assessee which included sale and purchase of immovable properties; investment of ₹4,33,620/- made with BVR Plantations and ₹2 lacs investment made with Consortium Finance; uncontrolled utilisation of funds by the Chairman of the Assessee; purchase of farm by the daughter of the Chairman of the Assessee; and advances made to the wife of the Chairman of the Assessee. He submitted that the instances noted by the Tribunal clearly indicated that the Assessee was not carrying on its activities solely for the purposes of education but was also indulging in

other commercial activities in addition to benefiting the Chairman of the Assessee and his family members.

22. Mr Sawhney referred to the following decisions in support of his contention that the Assessee was not eligible for claiming the benefit of Section 10(22) /10(23C) of the Act:

(1) ***Aditanar Educational Institution v. ACIT*: (1997) 224 ITR 310 (SC)**

(2) ***ACIT v. Surat Art Silk Cloth Manufactures Association*: (1978) 121 ITR 1 (SC).**

(3) ***American Hotel & Lodging Association, Educational Institute v. CBDT*: (2008) 301 ITR 86 (SC).**

(4) ***Vishvesvaraya Technological University v. ACIT*: (2014) 362 ITR 279 (Karnataka).**

Submissions on behalf of the Assessee

23. Countering the arguments advanced on behalf of the Revenue, Mr Ajay Vohra, learned Senior Counsel appearing for the Assessee submitted that since Revenue had not challenged the order dated 4th August, 2006

passed by the Tribunal under Section 254(2) of the Act, it was not open for the Revenue to impugn the same in the present appeal.

24. Mr Vohra next contended that by virtue of Section 10(22) of the Act, the income of the Assessee was not chargeable to tax and, therefore, the Assessee was also not liable to file its return of income under Section 139 of the Act.

25. Mr Vohra pointed out that during the period in question, the Assessee was not claiming any benefit under Section 11 or 12 of the Act, which related to exempting income derived from property held wholly for charitable or religious purposes; but was claiming benefit of section 10(22) of the Act, which provided a specific exemption to certain educational institutions. Therefore, the provisions of Section 139(4A) of the Act, which required an Assessee claiming benefit under sections 11 and 12 of the Act to file a return if its income exceeded the maximum amount not chargeable to tax, was inapplicable. He also referred to Section 158BB(1)(c)(B) of the Act and contended that the entries recorded in the books of accounts and other documents maintained in the normal course on or before the date of search would not be assessed as undisclosed income if the income did not exceed the maximum amount not chargeable to tax. Mr Vohra relied upon

the decision of this Court in ***L.R. Gupta v. Union of India*****: (1992) 194 ITR 32 (Delhi)** in support of his contention that the surpluses as disclosed in the regular books of accounts could not be considered as undisclosed income only for the reason that the Assessee, claiming the same to be not chargeable to tax under the provisions of the Act, had not disclosed the same in its return.

26. Mr Vohra also pointed out that notice under Section 148 of the Act had been issued to the Assessee but the same had not been proceeded with. He submitted that the pre-condition for issuance of notice under Section 148 of the Act is a belief that the income of an Assessee had escaped assessment and as the AO had decided not pursue the matter under Section 147 and 148 of the Act, it was not open for the AO to claim that the surpluses generated by the Assessee were 'undisclosed income'. Mr Vohra further emphasized that the question whether the Assessee was entitled to the benefit under Section 10(22) of the Act could not be a subject matter of determination in assessment for the block period under Section 158BC of the Act.

27. It was next urged by Mr Vohra that the Assessee had existed solely for educational purposes and not for the purpose of profit. He submitted

that merely because the Assessee had generated surpluses in certain years, the same would not indicate that the Assessee was not existing solely for educational purposes. He referred to the decisions of the Supreme Court in ***Queens Educational Society v. CIT*: (2015)] 372 (ITR) 699 (SC)**; ***Indian Chamber of Commerce v. CIT*: (1975) 101 ITR 796 (SC)**; ***Aditanar Educational Institution v. CIT*: (1997) 224 ITR 310 (SC)** and ***Oxford University Press v. CIT*: (2001) 247 ITR 658 (SC)** in support of his contention that the pre-dominant purpose test must be used to determine whether the Assessee was existing only for educational purposes. He submitted that if the aforesaid test is applied, it would be apparent that the Assessee was existing solely for educational purposes and not for the purposes of profit. He further submitted that the institutions managed and run by the Assessee were affiliated to the Central Board of Secondary Education (CBSE) and as per the prevalent rules, affiliation could be granted only to non-profit institutions/societies. Mr Vohra also referred to the objects of the Assessee Society and also drew the attention of this Court to clause 21 and 22 of the Rules and Regulations of the Society, which provided that on dissolution of the society, its properties both movable and immovable would not be distributed amongst the members but would be

given to another society having similar aims and objects. He urged that the objects of the society and the Rules and Regulations prohibited distribution of any surplus and, therefore, it could not be disputed that the Assessee existed only for the purposes of education and not for profit.

28. Insofar as the instances relating to the funds of the Assessee being made available to the Chairman and his family members were concerned, Mr Vohra submitted that the same were in the nature of advances to employees. He contended that the Chairman and his wife as well as other persons mentioned by the AO were also employees of the School/Assessee and were also given advances similar to other employees. Regarding the investments made by the Assessee in FDRs, BVR Plantation, Consortium Finance and other assets were concerned, Mr Vohra submitted that at the material time there was no restriction as to the investments that could be made by an educational institution claiming benefit under Section 10(22) and 10(23C) of the Act. He submitted that the restrictions to make investments other than in the form as specified under Section 11(5) of the Act were not applicable to institutions claiming exemption under Section 10(22) of the Act. Similar restrictions were imposed by proviso to Section 10(23C)(vi) of the Act by virtue of the Finance Act, 1998 w.e.f. 1st April,

1999; however, by virtue of the fifth Proviso to Section 10(23C)(vi) of the Act, exemption would not be denied to an Assessee if the investments were made prior to 1st June, 1998 and that the funds did not continue to remain so invested after 30th March, 2001. The effect of the aforesaid proviso was to grant the Assessees time till 30th March, 2001 to ensure that non-conforming investments were disinvested and funds were invested in conformity with Section 11(5) of the Act.

29. Mr Vohra submitted that all investments had been returned/liquidated by the Assessee prior to the specified date, except the investment in BVR Plantation Ltd., which was not recoverable as the said company was under liquidation. He contended that in the given circumstances the exemption under Section 10(22)/10(23C) of the Act could not be denied for the reason that the Assessee had invested its funds in real estate and other investments.

30. Mr Vohra also advanced contentions to assail the order dated 29th December, 2010 passed by the DGIT(E) rejecting the Assessee's application for approval under section 10(23C) of the Act. He canvassed that the scope of examination for the purposes of granting (or refusing) approval under Section 10(23C)(vi) was limited to considering whether the

objects and the nature of an Assessee fell within the scope of Section 10(23C)(vi) of the Act and whether the university or institution actually existed. Mr Vohra submitted that the approval contemplated under Section 10(23C)(vi) is to be granted at the beginning of the assessment year and, therefore, compliance of provisos to Section 10(23C), which also included the manner of utilization of funds by the Assessee, was outside the jurisdiction of DGIT(E). He referred to the decision of ***American Hotel & Lodging Association, Educational Institute vs. CBDT***: **(2008) 301 ITR 86 (SC)** in support of its contention.

31. In addition, it was submitted that the Assessee's application for approval could not be rejected on account of failure on the part of the Assessee to furnish the audit report along with the application. Mr Vohra contended that prescribed form for making an application for approval under Section 10(23C)(vi), Form-56D, only required that the same be accompanied by audited accounts and it was not mandatory to enclose the audit report of the Chartered Accountant. Further, the Assessee had furnished the audit report when called upon to do so and, therefore, its application for approval under Section 10(23C)(vi) of the Act could not be rejected for the reason that it was not accompanied with an audit report.

Reasoning and Conclusions

Whether the Revenue can impugn the Tribunal's order dated 4th August, 2006

32. The first and foremost issue that needs to be addressed is whether the Revenue can, in this appeal (i.e. ITA 705/2008), assail the order dated 4th August, 2006 passed by the Tribunal recalling its earlier order dated 25th June, 2004.

33. At the outset, it is relevant to note that the Assessee had, by way of an appeal (being ITA No.275/2005) filed in this court, impugned the order dated 25th May, 2004 passed by the Tribunal. The Assessee had also filed an application before the Tribunal under Section 254(2) of the Act for recall of the said order, in which the Assessee succeeded resulting in the order dated 4th August 2006; the same was also informed to this Court. On 6th November, 2013, in proceedings relating to the appeal filed by the Assessee i.e. ITA No. 275/2005, the counsel for the Revenue informed this court that the Revenue was likely to file an appeal against the Tribunal's order of 4th August, 2006 and the hearing was adjourned. However, the Revenue neither filed any appeal against the order dated 4th August, 2006 nor filed any other proceedings to challenge the said order. In the circumstances, the

Assessee's appeal (ITA No. 275/2005) against an order dated 25th June, 2004 was disposed of by this Court on 13th February, 2014, as being infructuous. The only inescapable conclusion that can be drawn is that the Revenue had accepted the order dated 4th August, 2006 passed by the Tribunal and, thus, it would not be open for the Revenue to challenge the same in the present proceedings. The contention advanced by the Revenue that the Tribunal's decision of 4th August 2006 could be challenged in this appeal (ITA 705/2008) filed against the Tribunal's order of 28th September, 2007, is without merit. The reliance placed by the learned counsel for the Revenue on the decision of a Full Bench of this Court in ***Lachman Dass Bhatia*** *(supra)* is also entirely misplaced; the ratio of that decision is quite to the contrary. In that case, the Full bench of this Court had summarised its conclusion in the following words:-

> "23. In view of our foregoing analysis, we proceed to record our conclusions in seriatim:
>
> (i) An order passed under Section 254(2) recalling an order in entirety would not be amenable to appeal under Section 260A of the Act.
>
> (ii) An order rejecting the application under Section 254(2) is not appealable.
>
> (iii) If an order is passed under Section 254(2) amending the order passed in appeal, the same can

be assailed in further appeal on substantial question of law."

34. The Court had further clarified that in cases where an appeal was not maintainable against an order under section 254(2) of the Act, the same could be challenged by way of a writ petition under Article 226 and 227 of the Constitution of India.

35. In the given circumstances, it was always open for the Revenue to challenge the Tribunal's order dated 4th August, 2006 by filing an appeal on a substantial question of law, if it considered that the order dated 4th August, 2006 had partly amended the order dated 25th June, 2004. It was also open for the Revenue to challenge the said order by filing a writ petition as observed by the Full Bench of this Court in the aforementioned decision. However, the Revenue did neither. In the circumstances, it would not be open for the Revenue to assail the order dated 4th August, 2006 in the present appeals in the manner as is sought to be argued on behalf of the Revenue.

36. Accordingly, the first question – question A, is answered in the negative; that is, against the Revenue and in favour of the Assessee. Consequently, there is no need to consider the second question.

Whether block assessment under section 158BC could be made in respect of surpluses disclosed in the books maintained in the normal course.

37. The next question that needs to be addressed is whether, in the given facts, an assessment could be made by the AO under Section 158BC of the Act. It is not disputed that the AO would have jurisdiction to make an assessment under Section 158BC only if the search and seizure operations carried out by the income tax authorities revealed any 'undisclosed income'. Admittedly, other than the surpluses as disclosed by the Assessee in the books maintained by it in the normal course of its activities, the AO has not made any addition or bought to tax any income in the hands of the Assessee. Thus, the point in issue is whether the surpluses as disclosed in the books of accounts could be considered as 'undisclosed income' of the Assessee.

38. Section 158B(b) defines undisclosed income as under:-

> "(b) "undisclosed income" includes any money, bullion, jewellery or other valuable article or thing or any income based on any entry in the books of account or other documents or transactions, where such money, bullion, jewellery, valuable article, thing, entry in the books of account or other document or transaction represents wholly or partly income or property

> which has not been or would not have been disclosed for the purposes of this Act [or any expense, deduction or allowance claimed under this Act which is found to be false."

39. A plain reading of the definition of 'undisclosed income' as quoted above indicates that undisclosed income would include income based on the entries in the books of accounts, which has not been or would not have been disclosed for the purposes of the Act. The Assessee has been maintaining records in its normal course and there is no allegation that the said books had ever been asked for and not produced by the Assessee or that the Assessee was maintaining separate/parallel books of accounts with a view to conceal its receipts and payments. The Assessee has been operating its bank accounts in the normal course and there is no material, which would give rise to any apprehension that the Assessee would not have produced his books of accounts or disclosed the same if called upon to do so. Thus, a conclusion that the Assessee would not have disclosed the surpluses as recorded in its books cannot be drawn. The only aspect that remains to be considered is whether the surpluses recorded in the books could be considered as undisclosed income of the Assessee solely for the reason that the Assessee had not filed a return disclosing the same.

40. The expression 'undisclosed income' would connote assets or income, which the Assessee believes to be taxable and seeks to conceal the same from the Income Tax Authorities. The surpluses, which are recorded by the Assessee in its books maintained in the normal course and which according to the Assessee are not chargeable to tax cannot be assumed to be 'undisclosed income' only for the reason that a return of income surrendering the said surpluses to tax has not been filed; particularly, where the Assessee, for *bona fide* reason, subscribes to the view that he is not required to file his return of income.

41. At this stage, it is also necessary to mention that the AO had issued a notice under Section 148 of the Act to tax the income of the Assessee on the ground that it had escaped assessment. These proceedings were abandoned and not pursued by the AO. Clearly, the only inference that can be drawn is that either the AO was satisfied that the income of the Assessee had not escaped assessment and/or that the proceedings under Section 147/148 of the Act were not maintainable. It is also apparent that the AO was in knowledge of the activities carried on by the Assessee.

42. This Court in the case of ***L.R. Gupta*** *(supra)* had considered the expression 'undisclosed income or property' in the context of Section 132

of the Act. In that case, the Assessee had received compensation against acquisition of land in and around Delhi. The said amount had not been disclosed by the Assessee in its return because, according to the Assessee, the said amount was not taxable as an appeal had been filed against the quantum of compensation by the Union of India, which was pending consideration in the Court and another appeal had also been filed by the Gram Sabha and the owners of the property challenging the right of the Assessee to receive such compensation. However, the said compensation had been dealt with through normal banking channels and the Income Tax Authorities were aware of the same. Nonetheless, warrant of authorisation for search under section 132 of the Act in respect of the Assessee was issued and the fact that the compensation received by the Assessee had not been disclosed by the Assessee in its Income Tax Return or in his Wealth Tax Return was recorded as one of the reasons for issuing such authorization to conduct search and seizure operation in respect of the Assessee. This Court repelled the arguments that non-disclosure of receipt of compensation in the return filed by the Assessee could be considered as undisclosed income. The Court explained that non-disclosure of assets and funds, which the Assessee believed to be not chargeable to tax, in his

returns would not render the same to be treated as undisclosed income; even if the Assessee's opinion may be incorrect in law, but if the income tax department is aware of such income, the same could not be considered as undisclosed. The Court observed that the department would be justified in issuing notice under Section 148 of the Act but search and seizure operation on the basis that the Assessee was in possession of undisclosed income would not be warranted. The relevant extract of the said decision is quoted as under:-

> "32. Sub-clause (b) of Section 132(1) refers to cases where there is reason to believe that if any summons or notice, as specified in the said sub clause (a) has been issued or will be issued then that person will not produce or cause to be produced the books of accounts etc. In other words, the said provision refers to the belief which may be formed by the Appropriate Authority to the effect that the person concerned is not likely to voluntarily or even after notice produce documents before the Income Tax authorities. Where, for example, there is information that a person is hiding or likely to hide or destroy documents or books of accounts which are required or are relevant for the purposes of the Act then in such a case it can be said that unless and until search is conducted the said books of account or documents will not be recovered. The belief of the authority must be that the only way in which the Income Tax Department will be in a position to obtain books of accounts and documents from a person is by the conduct of a search and consequent seizure of the documents thereof. In our opinion some facts or circumstances must exit on the basis of which such a belief can be formed. For example, if the Department has information that a person

has duplicate sets of account books or documents where havala transactions are recorded then the Department can legitimately come to the conclusion that if a notice is sent then that person is not likely to produce the said documents etc. Duplicate books of accounts and such like documents are maintained primarily for the reason that they are not to be produced before the Income Tax authorities. To put it differently, the nature of the documents may be such which are not, in the normal course, likely to be produced before the Income Tax authorities either voluntarily or on requisition being sent. It may also happen that the documents may exist and be in the custody of a person which would show the existence of immoveable property which he may have acquired from money or income which has been hidden from the Income Tax Department. The past record of the assessed, his status or position in life are also relevant circumstances in this regard. Where, however, documents exist which are not secretly maintained by an assessed, for example pass books, sale deeds which are registered and about the existence of which the Department is aware, then in such a case it will be difficult to believe that an assessed will not produce those documents.

33. Sub-clause (c) refers to money, bullion or jewellery or other valuable articles which either wholly or partly should have been income of an assessed which has not been disclosed for the purpose of the Act. The said sub-clause pertains only to moveable and not immoveable assets. Secondly it pertains to those assets which wholly or partly represent what should have been income. The expression "which has not been or would not be, disclosed for the purposes of Income Tax Act" would mean that income which is liable to tax, but which the assessed his not returned in his Income Tax return or made known to the Income-Tax Department. The sub Clause itself refers to this as "undisclosed income or property". In our opinion the words "undisclosed", in that context, must mean income which is hidden from the Department. Clause (c) would refer to cases where the assessed knows that the

moveable asset is or represents income which is taxable but which asset is not disclosed to the Department for the purpose of taxation. Those assets must be or represent hidden or secreted funds or assets. Where, however, existence of the money or asset is known to the Income Tax Department and where the case of the assessed is that the said money or the valuable asset is not liable to be taxed, then, in our opinion, the provisions of sub-Clause (c) of Section 132(1) would not be attracted. An assessed is under no obligation to disclose in his return of income all the moneys which are received by him which do not partake of the character of income or income liable to tax. If an assessed receives, admittedly, a gift from a relation or earns agricultural income which is not subject to tax, then he would not be liable to show the receipt of that money in his Income Tax return. Non-disclosure of the same would not attract the provisions of Section 132(c). It may be that the opinion of the assessed that the receipt of such amount is not taxable, may be incorrect and, in law, the same may be taxable but where, the Department is aware of the existence of such an asset or the receipt of such an Income by the assessed then the Department may be fully Justified in issuing a notice under Section 148 of the Act, but no action can be taken under Section 132(1)(C). Authorisation under Section 132(1) can be issued if there is a reasonable belief that the assessed does not want the Income Tax Department to know about the existence of such Income or asset in an effort to escape, assessment. Section 132(1)(c) has been incorporated in order to enable the Department to take physical possession of those moveable properties or articles which are or represent undisclosed income or property. The words "undisclosed income" must mean income which is liable to be taxed under the provisions of the Income Tax Act but which has not been disclosed by an assessed in an effort to escape assessment. Not disclosed must mean the intention of the assessed to hide the existence of the income or the asset from the Income Tax Department while being aware that the same is rightly taxable."

43. Although, the aforesaid judgment was rendered in the context of Section 132 of the Act the same would be equally applicable to the issue involved in this case - whether the surpluses recorded by the Assessee in its books of accounts could be considered as undisclosed income. This is so, because the search and seizure operations under Section 132 of the Act and the assessment that follows constitute an integral part of the scheme to tax undisclosed income. Further, by virtue of clause (c) of Section 132(1) of the Act, the expression 'undisclosed income' for the purposes of Section 132 of the Act also includes *"income of property, which has not been, or would not be disclosed for the purposes of the Indian Income Tax Act, 1922 (11 of 1922) or this Act*" and this condition is similar to that as specified in Clause 158B(b) of the Act.

44. Mr Sawhney's contention that the fact that the Assessee had not filed its return would render the entire surpluses as disclosed in its books as undisclosed income is not sustainable. According to the Assessee its income was entirely exempt under Section 10(22) of the Act and hence it was not required to file a return. Section 139(1) of the Act enjoins every person to file a return of income if the income for which the person is assessable under the Act exceeds the maximum amount, which is not

chargeable to income tax. The relevant portions of Section 139 of the Act as applicable for Assessment Year 1989-90 reads as under:-

> **"139.** (1) Every person, if his total income or the total income of any other person in respect of which he is assessable under this Act during the previous year exceeded the maximum amount which is not chargeable to income-tax, shall, on or before the due date, furnish a return of his income or the income of such other person during the previous year in the prescribed form and verified in the prescribed manner and setting forth such other particulars as may be prescribed
>
> Explanation: In this sub-section, "due date" means—
>
> (a) where the assessee is a company, the 31st day of December of the assessment year;
>
> (b) where the assessee is a person, other than a company,—
>
> (i) in a case where the accounts of the assessee are required under this Act or any other law to be audited or in the case of a co-operative society, the 31st day of October of the assessment year;
>
> (ii) in a case where the total income referred to in this sub-section includes any income from business or profession, not being a case falling under sub-clause (i), the 31st day of August of the assessment year;
>
> (iii) in any other case, the 30th day of June of the assessment year.]
>
> xxxxx xxxxx xxxxx xxxxx

(3) If any person who has sustained a loss in any previous year under the head "Profits and gains of business or profession" or under the head "Capital gains" and claims that the loss or any part thereof should be carried forward under sub-section (1) of section 72, or sub-section (2) of section 73, or sub-section (1) [or sub-section (3)] of section 74, [or sub-section (3) of section 74A], he may furnish, within the time allowed under sub-section (1), a return or loss in the prescribed form and verified in the prescribed manner and containing such other particulars as may be prescribed, and all the provisions of this Act shall apply as if it were a return under sub-section (1).

xxxxx xxxxx xxxxx xxxxx

[(4A) Every person in receipt of income derived from property held under trust or other legal obligation wholly for charitable or religious purposes or in part only for such purposes, or of income being voluntary contributions referred to in sub-clause (iia) of clause (24)of section 2, shall if the total income in respect of which he is assessable as a representative assessee (the total income for this purpose, being computed under this Act without giving effect to the provisions of sections 11 and 12)exceeds the maximum amount which is not chargeable to income-tax, furnish a return of such income of the previous year in the prescribed form and verified in the prescribed manner and setting forth such other particulars as may be prescribed and all the provisions of this Act shall, so far as may be, apply as if it were a return required to be furnished under sub-section (1).]]"

45. Although, Section 139 of the Act was further amended during the period 1st April, 1989 to 31st March, 1999, however, the said amendments

were not material to the issue concerned as none of those amendments required an Assessee, whose income was below the maximum amount not chargeable to tax, to file his return of Income.

46. Indisputably, the income of an Assessee falling within the scope of Section 10(22) of the Act is not to be included in the total income of the Assessee. Thus, if such exemption was available, the Assessee was not obliged to file its return of income as its income would fall below the maximum amount which was not chargeable to income-tax. It is relevant to note that Section 10 of the Act provides for exclusions from the total income of an Assessee at the threshold. Such exclusions are qualitatively different from the exemptions, allowances or deductions from the total income of an Assessee which may otherwise be available under other provisions of the Act such as Chapter VI-A. This is so because incomes exempt under Section 10 of the Act are not considered a part of total income of an Assessee. It was urged on behalf of the Revenue that whether an Assessee is entitled to exemption under Section 10(22) of the Act could only be assessed once the Assessee files a return and, therefore, it was necessary for the Assessee to do so in the present case. We are unable to accept this contention. The language of Section 139(1) of the Act is

unambiguous and a person is required to file a return only if his income exceeds the maximum amount not chargeable to tax under the Act. We, respectfully, are unable to concur with the views of the Bombay High Court in ***Malad Jain Yuvak Mandal Medical Relief Centre*** (*supra*); if the reasoning as canvassed on behalf of the Revenue is accepted, all Assessees whose incomes are below the taxable limit would also necessarily have to file a return for verification of their respective incomes. In our view, this view is not supported by the plain language of Section 139 of the Act.

47. It is relevant to note that Section 139(4A) of the Act was amended by virtue of the Direct Tax Laws (Amendment) Act, 1989 to make it mandatory for persons holding property under Trust or other legal obligation for charitable and religious purpose to file the return of income if their income exceeded the maximum amount not chargeable to tax without giving effect to the provisions of Section 11 & 12 of the Act. As pointed out by the Assessee, it was not claiming exemption under Section 11 & 12 of the Act but under Section 10(22) of the Act. Section 10(22) of the Act was omitted by virtue of the Finance (No. 2) Act, 1998 and the exemption available to a university or an educational institution existing solely for educational purposes was included under Section 10(23C) of the Act w.e.f.

1st April, 1999. At the material time, even institutions claiming exemption under Section 10(23C) of the Act were not liable to furnish a return of income if by virtue of the aforesaid provision their income was below the maximum amount not chargeable to tax. This position changed w.e.f. 1st April, 2003 consequent to the insertion of Sub-section (4C) of Section 139 of the Act by virtue of Finance Act, 2002. Sub-section (4C) to Section 139 is quoted below:-

"(4C) Every—

(a) research association referred to in clause (21) of section 10;

(b) news agency referred to in clause (22B) of section 10;

(c) association or institution referred to in clause (23A) of section 10;

(d) institution referred to in clause (23B) of section 10;

(e) fund or institution referred to in sub-clause (iv) or trust or institution referred to in sub-clause (v) or any university or other educational institution referred to in sub-clause (iiiad) or sub-clause (vi) or any hospital or other medical institution referred to in sub-clause (iiiae) or sub-clause (via) of clause (23C) of section 10;

(f) trade union referred to in sub-clause (a) or association referred to in sub-clause (b) of clause (24) of section 10;

(g) body or authority or Board or Trust or Commission (by whatever name called) referred to in clause (46) of section 10;

(h) infrastructure debt fund referred to in clause (47) of section 10,]

shall, if the total income in respect of which such research association, news agency, association or institution, fund or trust or university or other educational institution or any hospital or other medical institution or trade union or body or authority or Board or Trust or Commission or infrastructure debt fund is assessable, without giving effect to the provisions of section 10, exceeds the maximum amount which is not chargeable to income-tax, furnish a return of such income of the previous year in the prescribed form and verified in the prescribed manner and setting forth such other particulars as may be prescribed and all the provisions of this Act shall, so far as may be, apply as if it were a return required to be furnished under sub-section (1)."

48. It is relevant to note that even after the insertion of Sub-section 4C of Section 139 of the Act, university and educational institutions, which were covered under clause (iiiab) and (iiiad) of Section 10(23C) of the Act were excluded from the obligation to furnish their returns. The Memorandum explaining the provisions of Finance Bill, 2002 also expressly indicated that Sub-section 4C was proposed to be inserted in Section 139 because certain institutions claiming exemption under Section 10 were not obliged to file their returns and such amendment was, therefore, necessary to ascertain

whether such institutions were complying with the conditions of the exemption claimed by them. The relevant extract from the Memorandum explaining the provisions in the Finance Bill is quoted below:-

> "Under the existing provisions, scientific research association referred to in clause (21), news agency referred to in clause (22B), association or institution referred to in clause (23A), institution referred to in clause (23B), fund or institution referred to in sub-clause (iv) or trust or institution referred to in sub-clause (v) or any university or other educational institution referred to in sub-clause (vi) or any hospital or other institution referred to in sub-clause (via) of clause (23C), trade union referred to in sub-clause (a) or association of trade unions referred to in sub-clause (b) of clause (24) of section 10 are not obliged to file return of income in respect of which they are assessable. It is, therefore, not possible to ascertain as to whether these bodies are complying with the conditions specified in those clauses.
>
> It is proposed to insert a new sub-section (4C) in section 139 to provide that every such person mentioned above, shall, if the total income in respect of which person, is assessable without giving effect to the provisions of section 10, exceeds the maximum amount which is not chargeable to income-tax, furnish a return of such income of the previous year."

49. Even if the Assessee's view that it was exempt under Section 10(22) of the Act is found to be erroneous in law, nonetheless, the same cannot lead to the conclusion that the surpluses recorded by the Assessee in its books were undisclosed income. The expression 'undisclosed income'

would have to be given a schematic interpretation. The provisions regarding search and seizure and assessing undisclosed income are draconian provisions; the assessment and penalties that follow the discovery of undisclosed income are also harsh. Thus, the expression 'undisclosed income' would have to be viewed from the stand point of an Assessee and unless it is manifest from the conduct of the Assessee that he consciously intended to conceal his income, which he otherwise believed to be taxable; the same would not to be liable to be treated as undisclosed income of an Assessee. As indicated earlier, there is no material to conclude that the Assessee acted in a manner to conceal its income or activities from the Authorities. Thus, in the facts of the present case, even if it is found that the Assessee was not entitled to benefit of Section 10(22)/10(23C) of the Act, its income as recorded in its regular books of accounts, nonetheless could not be treated as 'undisclosed income'.

50. In view of the aforesaid, the assessment order made by the AO under Section 158BC of the Act is not sustainable as in the absence of any undisclosed income, the question of framing a block assessment does not arise. We find no infirmity with the decision of the Tribunal in setting aside the block assessment order dated 31st January, 2001. We accept the

contention advanced on behalf of the Assessee that the question whether the income of the Assessee was liable to be excluded from its total income by virtue of Section 10(22) of the Act was an issue which could not be made the subject matter of block assessment under Section 158BC, as the same is concerned only with the assessment of 'undisclosed income'.

51. The third question, question C, is answered in the negative; that is, against the Revenue and in favour of the Assessee.

Whether the Assessee is entitled to benefit under section 10(22)/10(23C) of the Act.

52. The next issue to be considered is whether the Assessee was entitled to exemption under Section 10(22)/10(23C) of the Act. The AO had made a block assessment for the period from 1st April, 1988 to 15th January, 1999. As we have upheld the decision of the Tribunal to set aside the block assessment order for that period, therefore, it is not necessary to decide this issue insofar as the block period – that is, period from 1st April, 1988 to 15th January, 1999 – is concerned. We were also informed during the course of the hearing that the Assessee has been granted registration under Section 12A of the Act for the assessment year 2000-01 onwards. However, rival contentions have been heard. Further, the Assessee has been denied the

approval under Section 10(23C) of the Act by DGIT(E) for the AY 1999-2000 and this denial has been impugned by the Assessee in its writ petition - W.P.(C) 3797/2011. In the circumstances, we consider it appropriate to consider the question

53. It was, *inter alia,* contended before us that the Assessee was not entitled to exemption under Section 10(22)/10(23C) of the Act as it was not *"existing solely for educational purposes and not for purposes of profit"*. According to the Revenue, this was evident from the fact that the Assessee has earned surpluses during most of the years falling within the block period. In addition, it was urged that the Assessee had advanced sums to the Chairman of the Assessee; the Chairman's wife; the Chairman's daughter; Chairman's son-in law; and the Manager of the Assessee. According to the Revenue, the Assessee had also indulged in dealing in real estate and making investments, which were not in conformity with Section 11(5) of the Act and, therefore, the Assessee was disentitled to the exemption under Section 10(23C)(vi) by virtue of the provisos to Section 10(23)(vi) of the Act.

54. Insofar as the question whether the university or educational institution existing 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, the same is no longer *res integra*. 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 ***Sole Trustee, Loka Shikshana Trust v. CIT***: **(1975) 101 ITR 234 (SC)**; **(1976) 1 SCC 254**, the Supreme Court had observed that:

> "If the profits must necessarily feed a charitable purpose under the terms of the trust, the mere fact that the activities of the trust yield profit will not alter the charitable character of the trust. The test now is, more clearly than in the past, the genuineness of the purpose tested by the obligation created to spend the money exclusively or essentially on "charity"".

The learned Judge also added that the restrictive condition *"that the purpose should not involve the carrying on of any activity for profit would be satisfied if profit making is not the real object".*

55. The aforesaid view was reiterated by the Supreme Court in a later decision in ***Addl. Commissioner of Income Tax v. Surat Art Silk Cloth Manufacturers Association*: (1980) 121 ITR 1 (SC)**, wherein the Supreme Court applied the predominant object test for determining whether the

Assessee existed solely for charitable purposes or for making profit. The Supreme Court observed as under:-

> "The test which has, therefore, now to be applied is whether the predominant object of the activity involved in carrying out the object of general public utility is to subserve the charitable purpose or to earn profit. Where profit-making is the predominant object of the activity, the purpose, though an object of general public utility, would cease to be a charitable purpose. But where the predominant object of the activity is to carry out the charitable purpose and not to earn profit, it would not lose its character of a charitable purpose merely because some profit arises from the activity."

56. In ***Aditanar Educational Institution v. ACIT*****: (1997) 224 ITR 310 (SC)**, the Supreme Court reiterated that the predominant object test needs to be applied to determine whether the institution exists solely for educational purposes, in the following words:-

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

57. In a recent decision, the Supreme Court in ***Queen's Educational Society v. CIT***: (**2015) 372 ITR 699 (SC)** summarized the law on the issue as under:-

> "11. Thus, the law common to Section 10(23C)(iiiad) and (vi) may be summed up as follows:
>
> (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."

58. 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 not for purpose of profit. Distribution of surpluses is prohibited. Further, in the

event of dissolution of the Assessee society, its assets would have to be transferred to another institution carrying on similar activities and the same cannot be distributed to its members. The Assessee has been running three schools that are affiliated to CBSE; admittedly, this which would not be permissible in case the Assessee did not exist solely for educational purposes and/or if the Assessee was found to be pursuing the profit motive. The surpluses generated by the Assessee are necessarily to be applied towards its charitable objects.

59. In view of the aforesaid, the exemption under Section 10(22) of the Act cannot be denied to the Assessee only for the reason that it had been generating surpluses.

60. The next aspect to be considered is whether the investments made by the Assessee would disentitle the Assessee to the exemption under Section 10(22). Section 10(22) of the Act as it existed prior to 1st April, 1999 reads as under:-

> "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--
>
> xxxxx xxxxx xxxxx

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

61. Plainly, the exemption under Section 10(22) of the Act was not conditional on the funds of the institutions being invested in the form and manner as required under Section 11(5) of the Act. Thus, the university and the educational institution was free to apply and invest its funds in the manner as it deemed fit. This Court in the case of ***Director of Income Tax (Exemption) v. Prakash Education Society***: (**2006) 286 ITR 288 (Del.)** considered a case where an Assessee had deployed its funds to purchase rights and bonus shares of companies and upheld the Tribunal's decision that investments made by the Assessee therein did not disentitle the Assessee to exemption under Section 10(22) of the Act. The relevant extract of the said decision reads as under:-

> "We also are of the view that the surplus funds available with the assessee could be suitably invested whether by way of fixed deposit in a bank or financial institution or in stock market to earn profit which would in turn be available to the society for being utilised to pursue its educational purposes. Inasmuch as the assessee had in the instant case invested a part of its surplus funds for purchase of rights and bonus shares in companies wherein it had acquired some shares in the earlier years, it could not be said to have disagreed from its basic purpose of running the educational institution. It is noteworthy that the Tribunal has on a

> question of fact found that the assessee had applied funds to the extent of Rs.1,47,04,829 towards the running of the educational institution. It was not, therefore, a case where the society had received funds which it had entirely directed for investment purposes by neglecting its basic object of running the institution."

62. It is also relevant to note that Section 10(22) of the Act was omitted by virtue of Finance (No.2) Act, 1998 w.e.f. 1st April, 1999, and the provisions to exempt income of universities and educational institutions existing solely for educational purposes were introduced in Section 10(23C) of the Act by introduction of clauses (iiiab), (iiiad) and (vi) in that section. Clause (iiiab) excludes from the net of income tax, any income received by any university or educational institution existing solely for educational purposes which is wholly and substantially financed by the Government. Clause (iiiad) exempts educational institutions whose annual receipts do not exceed the prescribed limit. Clause (vi) extends the exemption to universities and educational institutions, existing solely for educational purposes and not for purposes of profit, which are approved by the prescribed authority. The relevant clauses of Section 10(23C) of the Act are quoted below:

> "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-

(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; or

…

(iiiad) any university or other educational institution existing solely for educational purposes and not for 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; or

...

(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) of sub-clause (iiiad) and which may be approved by the prescribed authority;

…

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-clabse (via):

…

Provided also that the fund or trust or institution or any university or other educational institution or any hospital or

other medical institution referred to in sub-clause (*iv*) or sub-clause (*v*) or sub-clause (*vi*) or sub-clause (*via*)—

(*a*) applies its income, or accumulates it for application, wholly and exclusively to the objects for which it is established and in a case where more than fifteen per cent of its income is accumulated on or after the 1st day of April, 2002, the period of the accumulation of the amount exceeding fifteen per cent of its income shall in no case exceed five years; and

(*b*) does not invest or deposit its funds, other than—

(*i*) any assets held by the fund, trust or institution or any university or other educational institution or any hospital or other medical institution where such assets form part of the corpus of the fund, trust or institution or any university or other educational institution or any hospital or other medical institution as on the 1st day of June, 1973;

(*ia*) any asset, being equity shares of a public company, held by any university or other educational institution or any hospital or other medical institution where such assets form part of the corpus of any university or other educational institution or any hospital or other medical institution as on the 1st day of June, 1998;

(*ii*) any assets (being debentures issued by, or on behalf of, any company or corporation), acquired by the fund, trust or institution or any university or other educational institution or any hospital or other medical institution before the 1st day of March, 1983;

(*iii*) any accretion to the shares, forming part of the corpus mentioned in sub-clause (*i*) and sub-clause (*ia*), by way of bonus shares allotted to the fund, trust or institution or any university or other educational institution or any hospital or other medical institution ;

(*iv*) voluntary contributions received and maintained in the form of jewellery, furniture or any other article as the Board may, by notification in the Official Gazette, specify,

for any period during the previous year otherwise than in any one or more of the forms or modes specified in sub-section (5) of section 11:

Provided also that the exemption under sub-clause (w) or sub-clause (via) shall not be denied in relation to any funds invested or deposited before the 1st day of June, 1998, otherwise than in any one or more of the forms or modes specified in sub-section (5) of section 11 if such funds do not continue to remain so invested or deposited after the 30th day of March, 2001:

…"

63. The provisos to Section 10(23C) provided for several restrictions and conditions including the extent of income that could be accumulated and the form and manner in which its funds have to be invested, to avail the exemption under Section 10(23C) of the Act. It is relevant to note that the aforesaid conditions do not apply to universities and educational institutions, which are covered under clause (iiiab) and (iiiad) of Section 10(23C) of the Act but only to those institutions, which seek exemption under clause (vi) of Section 10(23C) of the Act.

64. The Central Board of Direct Taxes, by a Circular No. 772, dated 23rd December, 1998 explained the object of the amendments to Section 10(22) and 10(23C) of the Act the relevant extracts of which are reproduced below:-

"8 Provisions relating to exempting the income of educational institutions, Universities, Hospitals and other medical institutions.

8.1 Under the provisions of clauses (*22*) and (*22A*) of section 10 of the Income-tax Act, before amendment, educational and medical institutions enjoyed a blanket exemption from income-tax if they existed solely for educational purposes and not for the purposes of profit. In the absence of any monitoring mechanism for checking the genuineness of their activities, these provisions have been misused.

8.2 The Act omits the aforesaid clause (*22*) and (*22A*) from the statute. The exemption would, however, continue in respect of any university or other educational institution, hospital or other medical institution which is wholly or substantially financed by Government, under the new sub-clause (*iiiab*) and (*iiiac*) inserted in section 10(*23C*) of the Income-tax Act by the Finance (No. 2) Act, 1998.

8.3 Further, under sub-clauses (*iiiad*) and (*iiiae*) in section 10(*23C*), the income of other educational and medical institutions would also be exempt if their annual receipts are below a limit to be prescribed. The limit has since been prescribed at Rs. one crore *vide* Notification No. SO 897(E) dated 12th October, 1998.

8.4 The income of the remaining educational and medical institutions would be exempt if they are approved by the prescribed authority on application made by them under sub-clauses (*vi*) and (*via*) of section 10(*23C*). This approval would be subject to their adherence of conditions similar to those specified for sub-clauses (*iv*) and (*v*) of section 10(*23C*) regarding maintenance of accounts, expenditure and accumulation of funds and investments of funds in specified assets. The accumulated income is required to be invested in the modes specified in section 11(5). These institutions are given time up to 30-03-2001 to transfer their investments to specified securities. The Rules and Forms in this regard have since been notified *vide* Notification No. S.O. 897(E) dated 12th October, 1998. By this notification the Central Board of Direct Taxes have been designated as the prescribed authority for the

purpose of approval under sub-clauses (*vi*) and (*via*) of section 10(*23C*).

8.5 These amendments will take effect from 1st April, 1999 and will, accordingly, apply in relation to assessment year 1999-2000 and subsequent years."

65. It is clear from the above that the restriction in accumulating surpluses generated by a university or an educational institution and investing the funds in a manner provided under Section 11(5) of the Act were introduced for the first time w.e.f. 1st April, 1999 and such conditions were not applicable for claiming exemption under Section 10(22) of the Act.

66. In view of the above, the exemption available under Section 10(22) and 10(23C) could not be denied to the Assessee on the ground that it had invested its funds contrary to Section 11(5) of the Act, as the said condition was introduced by the fifth proviso to Section 10(23C) only w.e.f. 1st April, 1999. More importantly, the Assessees who had made their investments which did not conform to Section 11(5) of the Act, were by virtue of the proviso to Section 10(23C) afforded time till 30th March, 2001 – a period of three years – to transfer their investments to permissible securities as specified under Section 11(5) of the Act.

67. It is not disputed that the investments made by the Assessee in Consortium Finance Pvt. Ltd. were released and the funds of the Assessee were invested in a manner as specified under the provisos to Section 10(23C) read with section 11(5) of the Act. It is not disputed that bulk of the investment in BVR Plantations Ltd. amounting to ₹3,64,520/- was made in the financial year 1995-96. The petitioner had paid only two installments of ₹34,550/- each in the year 1999-2000. The Assessee had claimed that the payments made in the year 1999-2000 were only further installments of the investment already made and could not be considered as fresh investments. It is also not disputed that the funds invested by the Assessee in BVR Plantations Ltd. were unrecoverable. Thus, in our view, it cannot be disputed that the Assessee had realigned all its investments in the manner as specified under provisos to Section 10(23C) read with Section 11(5) of the Act prior to 30th March, 2001 and had complied with the provisos of Section 10(23C) of the Act.

68. In our view, the contention of the Assessee that the investment in BVR Plantations Ltd. related to the financial year 1995-96, is merited. In any view of the matter, the two installments paid in the financial year 1998-99 cannot - in the overall perspective - be considered as significant for

determining the issue whether the Assessee is entitled to be considered as an institution existing solely for educational purposes and not for profit.

69. The AO noted that the Assessee had purchased and sold certain immovable properties and further had advanced funds to Col. Satsangi, the Chairman of the Assessee and his family members. He also observed that the Assessee had made certain investments for the purposes of earning profits. In view of the aforesaid, he concluded that the Assessee did not exist solely for the educational purposes, but was existing for the purposes of making profit.

70. Insofar as the sale and purchase of immovable properties is concerned, the Assessee had explained that the immovable properties were purchased for utilizing the same for educational purposes. A DDA Flat at Sheikh Sarai, New Delhi was purchased for commencing an admission centre, but was subsequently sold as it did not serve the purpose. Similarly, the property at Kalu Sarai, Sarvpriya Vihar was purchased as the Assessee intended to start an admission and information centre for convenience of the parents of students as the schools managed by the Assessee were situated at a considerable distance from the city. However, subsequently, the said venue was not found suitable and the property was sold. It was

further explained that farm land at Malbaro, Gurgaon and at Nainwal were purchased for starting schools. The Assessee also pointed out that an application for grant of an NOC for starting an educational institute at Malbaro, Gurgaon was filed and a school building was also constructed. The property at Lado Sarai, Mehrauli was stated to be purchased for an admission centre once it was decided that the admission centre at the DDA Flat at Sheikh Sarai was not convenient. In view of the aforesaid explanations, it cannot be concluded that the aforesaid transactions were not for furthering the objects of the Assessee.

71. The next aspect that needs to be considered is whether the Assessee could be denied the exemption under Section 10(22)/10(23C)(vi) of the Act for the reason that the Assessee had advanced certain sums to Col. Satsangi and some of his family members who were also involved in managing the affairs of the Assessee and/or the schools run and managed by the Assessee. The Assessee had explained that a sum of ₹3,50,000/- had been paid to Ms Shakuntala Jaiman (the daughter of Col. Satsangi), who was the Principal of CSKM Public School, Delhi. It was stated that she was highly qualified - she was an M.ed and a Ph.D. (from IIT, Delhi) - and had been advanced the aforesaid sum in the normal course as an employee. It is also

asserted that the said amount was received back along with interest of ₹83,527/-. Further, a sum of ₹9,34,899/- was advanced to one Mr Y. Sinha, who was the manager of CSKM School. This advance was reduced to ₹4,11,674/- in the financial year 1998-99 and was fully squared off before 30th March, 2000. Similarly, Dr. Rohit Jaiman (the son-in-law of Col. Satsangi) was the President of the Assessee society and was advanced a sum of ₹3,09,000/- which was also repaid before the end of the financial year 1998-99 along with interest of ₹28,227/-. It was contended that Dr. Jaiman was also highly qualified; was working for the Assessee; and was advanced the aforesaid sum in the normal course as was granted to other employees.

72. With regard to the advances made to Col. Satsangi, it was explained that it was for the purposes of acquiring land at Malbaro, Gurgaon for the purposes of the Assessee. It was further asserted that the land so purchased had been registered and mutated in the name of the society.

73. In the aforesaid facts, we find it difficult to accept that granting advances to persons involved in managing the schools and/or the affairs of the Assessee would disentitle the Assessee from the benefit of Section 10(22)/10(23C)(vi) of the Act.

74. As indicated hereinbefore, the activities of the Assessee must be viewed in the overall perspective of its nature and its principal object. It is not disputed that the surpluses generated by the Assessee could not be distributed to its members and there is also no allegation that the funds of the Assessee had been so distributed. The fact that certain advances had been made to Col. Satsangi and some of its family members who were also involved in running the school cannot be construed as diluting the predominant object of the Assessee. Seen from the overall perspective, it could hardly be disputed that the predominant activity of the Assessee was managing schools and the substratal purpose of its activities was education. Thus, in our view, the conclusion that the Assessee did not exist solely for educational purposes, but for the purposes of profit on the basis that it had advanced the aforesaid sums to Col. Satsangi and/or his family members who were involved in the affairs of the Assessee, is unwarranted.

75. Thus, in our view, the Assessee would qualify for exemption under Section 10(22)/10(23C) of the Act. Accordingly, the fourth question - question D, is answered in the affirmative, against the Revenue and in favour of the Assessee.

76. The next controversy that needs to be addressed relates to the Assessee's challenge to the order dated 29th December, 2010 passed by DGIT(E) rejecting the petitioner's application for approval under Section 10(23C) of the Act. A perusal of the order dated 29th December, 2010 indicates that DGIT(E) rejected the petitioner's application principally for the reasons that the Assessee had not filed an audit report in Form No.10BB along with its application; the Assessee had allegedly made investments which were in violation of Section 11(5) of the Act and in schemes, which were speculative in nature; and that the Assessee had advanced funds to its office bearers.

77. According to the Assessee, none of the aforesaid reasons would warrant denial of benefit under Section 10(23C)(vi) of the Act. In addition, it was also urged that the scope of examination for the purposes of granting or refusing approval under Section 10(23C)(vi) was limited to considering whether the objects and the nature of an Assessee fell within the scope of Section 10(23C)(vi) of the Act and whether the university or institution actually existed. It was pointed out that the approval contemplated under Section 10(23C)(vi) is to be granted at the beginning of the assessment year and, therefore, compliance of provisos to Section 10(23C), which also

included the manner of utilization of funds by the Assessee was outside the jurisdiction of DGIT(E). Although mis-utilization or misapplication of funds would disentitle the Assessee for benefit of Section 10(23C)(vi), but the same would have to be considered by the AO on a year to year basis.

78. The Assessee further contended that prescribed form for making an application for approval under Section 10(23C)(vi) (Form-56D) only required that the same be accompanied by audited accounts and it was not mandatory to enclose the audit report with the application; nonetheless, the Assessee had furnished the audit report when called upon to do so and, therefore, its application for approval under Section 10(23C)(vi) of the Act could not be rejected only on the ground that it was not accompanied with an audit report.

79. Before considering other issues, it would be appropriate to consider the Assessee's contention that the scope of inquiry for the purposes of granting approval under section 10(23C) of the Act is limited. We find considerable merit in the Assessee's contention that for purposes of granting approval under Section 10(23C)(vi) of the Act, the prescribed authority, i.e. DGIT(E), would not be concerned with the compliance of the provisos to Section 10(23C)(vi) of the Act, which prescribe the manner and

form in which the funds of the Assessee can be invested as well as the manner and extent to which application of income is necessary for availing the benefit of section 10(23C)(vi) of the Act. DGIT(E)'s primary function would be to satisfy himself that the threshold conditions for grant of exemption under section 10(23C) exist; that is, the educational institution exists solely for the purposes of education and not for profit. In this regard, the DGIT(E) has to examine the Charter of the Society/Trust including its objects as also the bye-laws, rules and regulations for conduct of affairs of the Society/Trust. The DGIT(E) also has to satisfy himself that an educational institution does, in fact, exist. The provisos to Section 10(23C) contain further requirements that need to be complied with - such as applying minimum of 75% of income in the relevant year and investing accumulated funds only in permissible securities - for availing the benefit under section 10(23C)(vi). However, the same can be examined by the AO only at the end of the relevant period and cannot be the subject matter of enquiry at the threshold while considering an Assessee's application for the requisite approval.

80. In ***American Hotel & Lodging Association Institute*** (*supra*), the Supreme Court had accepted the aforesaid view. The relevant extracts from the said judgment are quoted below:-

> "….In this connection, learned counsel placed reliance on the second proviso and submits that the said proviso clarifies that at the stage of approval what is required to be seen by CBDT is the nature and genuineness of the activities of the petitioner-Institution under consideration. According to learned counsel, the provisos to the said section sets out conditions which must be adhered, to by the Institution, and compliance therewith can never be tested at the stage of approval, since they require consideration of acts and events which will take place in the future. In this connection, learned counsel urged that application of income is the requirement mentioned in the third proviso to Section 10(23C)(vi) and that requirement can only be tested after the end of the previous year when "income is ascertained and thereafter applied. Similarly, according to learned counsel, the requirement of accumulation, if any, in that proviso can also only be examined at the end of any previous year after "income", if any, is determined and thereafter accumulated. One more example is given by the learned counsel. The requirement of investment/deposit of funds, referred to in the third proviso, can only be tested at the stage of investment which can only take place after profit/ surplus is established. Under the 13th proviso CBDT is empowered to withdraw the approval earlier granted. That proviso, according to learned counsel, also proceeds on the basis that the withdrawal will be for failure to comply with the terms of application or investment of funds or genuineness of activities and, therefore, implicit in that proviso is an alleged violation of application of surplus and/or investment which may result in a subsequent withdrawal. In short, according to learned counsel, at the stage of grant of approval the provisos dealing with items required to be monitored, as mentioned in the third proviso, are not to be considered by CBDT and in

fact it would be impossible to ascertain compliance at the stage of approval...

***** ***** *****

Having analysed the provisos to Section 10(23C)(vi) one finds that there is a difference between stipulation of conditions and compliance thereof. The threshold conditions are actual existence of an educational institution and approval of the prescribed authority for which every petitioner has to move an application in the standardized form in terms of the first proviso. It is only if the pre-requisite condition of actual existence of the educational institution is fulfilled that the question of compliance of requirements in the provisos would arise. We find merit in the contention advanced on behalf of the petitioner that the third proviso contains monitoring conditions/requirements like application, accumulation, deployment of income in specified assets whose compliance depends on events that have not taken place on the date of the application for initial approval.

To make the section with the proviso workable we are of the view that the monitoring conditions in the third proviso like application/utilization of income, pattern of investments to be made etc. could be stipulated as conditions by the PA, subject to which approval could be granted. For example, in marginal cases like the present case, where petitioner-Institute was given exemption up to financial year ending 31.3.1998 (assessment year 1998-99) and where an application is made on 7.4.1999, within seven days of the. new dispensation coming into force, the PA can grant approval subject to such terms and conditions as it deems" fit provided they are not in conflict with the provisions of the 1961 Act (including the abovementioned monitoring conditions). While imposing stipulations subject to which approval is granted, the PA may insist on certain percentage of accounting Income to be utilized/ applied for imparting education in India. While making such stipulations, the PA has to examine the activities in India which the petitioner has undertaken in its Constitution,

MoU's and Agreement with Government of India/ National Council. ..."

81. Having held that the prescribed authority is not required to examine whether the Assessee has complied with the provisos to section 10(23C) of the Act while granting approval under section 10(23C)(vi) of the Act, we must also add that the prescribed authority would also necessarily have to examine the manner in which the affairs of the university or an educational institution have been conducted in the past for the purposes of considering whether the Assessee qualifies the threshold requirement of Section 10(23C)(vi). 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. In such circumstances, it would not be open for an Assessee to claim that the approval be granted only because the objects prohibit pursuing any purpose other than as specified under Section 10(23C) of the Act. It would be well within the powers of the prescribed authority to take into account the actual nature of the functions and activities carried on by an Assessee.

82. However, in the facts of the present case, we are unable to accept that the Assessee was not pursuing a "charitable purpose" within the meaning of section 2(15) of the Act.

83. The next issue to be considered is whether the approval could be denied to the Assessee on account its failure to file the audit report along with its application in Form-56D.

84. Rule 2CA (2) of the Income Tax Rules, 1962 specifically mandates that an application for approval under Section 10(23C)(vi) of the Act would be made in Form-56D. The said form clearly requires the Assessee to *"enclose copies of audited accounts and balance sheet for 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 or hospital or other medical institution ....."*. In our view, the Assessee's contention that an audit report is not required to accompany the audited accounts is meritless. The auditor's report contains the auditor's view on the accounts audited by the auditor and without such report, the accounts would only indicate the accounts as furnished by the Assessee to its auditor. Therefore, the expression "audited accounts" would

necessarily have to include the auditor's report. Reading the expression "audited accounts" as suggested by the Assessee would defeat the purpose for requiring submission of the audited accounts. Thus, in our view, it was necessary for the Assessee to furnish a copy of the audit report along with its application in Form-56D. However, we are unable to accept that non furnishing of audit report along with application is an incurable defect. It would be erroneous to ignore the report if the same was supplied, albeit belatedly, and was available with the prescribed authority at the time of considering the grant of approval as sought for by the Assessee.

85. There are several provisions under the Act, including under Chapter VI-A of the Act, that require the Assessee to file audit reports/certificates for claiming benefit under those provisions. In that context, the Courts have held that the exemption/allowance claimed by the Assessee could not be denied if the audit report/certificates is not filed along with returns but is provided subsequently. At this stage reference may be made to the decision of the Full Bench of Punjab & Haryana High Court in ***Commissioner Income Tax v. Punjab Financial Corporation*: (2002) 254 ITR 6 (P&H)**. In that case the Court considered the question *"Whether section 32AB(5) of the Income-tax Act, 1961, is mandatory or directory and delayed filing of*

audit report would disentitle an assessee from claiming the benefit of deduction under section 32AB(1) ?" and held as under:

> "In view of the above discussion, we hold that section 32AB(5) is not mandatory and the Assessing Officer has the discretion to entertain the audit report even though the same has not been filed with the return and give benefit of the deduction to the assessee in terms of section 32AB(1)."

86. Mention may also be made of Circular No. 689 of 1994 issued by the Central Board of Direct Taxes in the context of section 143(1)(a) of the Act. The said circular, *inter alia*, provides that an adjustment under section 143(1)(a) could be made if there was an omission to furnish any information, which was required under a specific provision of the Act to be furnished along with the return, to substantiate any claim. The illustration provided in the circular is relevant and reads as under:

> "If the audit report specified under section 80HHC(4), which is required to be filed along with the return of income, is not so filed, the deduction claimed under that section can be disallowed as a *prima facie* adjustment. Some more examples in this regard are the non-filing of audit reports or other evidence along with the return of income as required under section 12A(*b*), 33AB(2), 35E(6), 43B (first proviso), 54(2), 54B(2), 54D(2), 54F(4), 54G(2), 80HH(5), 80HHA(4), 80HHB(3), 80HHD(6), 80HHE(4), 80-I(7), 80-IA(8) and the like. But if evidence is subsequently furnished, rectification under section 154 should be carried out to the extent permitted

> by Board's Circular No. 669, dated 25-10-1993. No *prima facie* disallowance shall however be made if any evidence, required to be filed along with the return of income only in pursuance of the non-statutory guidance notes for filling in the return of income, is not so filed."

87. It is apparent from the above that furnishing of report/certificate is necessary, if required under any provision of the Act; however, omission to furnish the same would not disentitle the Assessee to the benefit of the statutory provision, if the Assessee subsequently furnishes the report/certificate.

88. Taking a cue from the above, it is apparent that furnishing of audit report may be necessary for seeking approval under section 10(23C) of the Act; however, failure to file the same along with application would not be fatal to the application. And, in the event an Assessee furnishes the report/certificate, the approval as sought by the Assessee cannot be denied. Thus, in our view, DGIT(E) was not justified in denying the Assessee approval under Section 10(23C)(vi) on the ground that the audit report had not been furnished along with the application but had been furnished by the Assessee subsequently, prior to the rejection of the application.

89. Insofar as other reasons for rejection of the Assessee's application are concerned, in our considered view, the same are not sustainable for the reasons as discussed hereinbefore. Accordingly, the writ petition (i.e. W.P.(C) 3797/2011) preferred by the Assessee is allowed. The order dated 29th December, 2010 passed by DGIT(E) is set aside and the DGIT(E) is directed to consider the Assessee's application afresh in the light of our observations.

90. The appeal preferred by the Revenue being ITA 705/2008 is dismissed. Consequently, the Revenue's appeal being ITA 924/2009, directed against the Tribunal's order dated 6th June, 2008 setting aside the penalty imposed on the Assessee, is also dismissed. However, in the circumstances, the parties are left to bear their own costs.

VIBHU BAKHRU, J

S. MURALIDHAR, J

OCTOBER 07, 2015
RK/MK