IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION NO. 5963 of 2012

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR.JUSTICE AKIL KURESHI
and
HONOURABLE MR.JUSTICE A.J. SHASTRI

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?	
2	To be referred to the Reporter or not ?	
3	Whether their Lordships wish to see the fair copy of the judgment ?	
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	

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GANPAT UNIVERSITY....Petitioner(s)
Versus
ARVIND SHANKAR....Respondent(s)

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Appearance:
MR SN DIVATIA, ADVOCATE for the Petitioner(s) No. 1
MR SUDHIR M MEHTA, ADVOCATE for the Respondent(s) No. 1

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CORAM: **HONOURABLE MR.JUSTICE AKIL KURESHI**
and
HONOURABLE MR.JUSTICE A.J. SHASTRI

Date : 20/09/2016

ORAL JUDGMENT

(PER : HONOURABLE MR.JUSTICE AKIL KURESHI)

1. The petitioner has challenged an order dated 28.12.2011 passed by the respondent-Chief Commissioner of Income Tax under which, he rejected the petitioner's application for approval under section 10(23C) of the Income Tax Act, 1961 ['the Act' for short].

2. Brief facts are as under:

   The petitioner is a University established under the Gujarat Act No. 19 of 2005. The petitioner is a trust registered under the Bombay Public Trust Act and enjoys registration under section 12AA of the Act and approval under section 80G(5) of the Act. Later on, the petitioner was also declared as a "Deemed University" by the University Grants Commission vide notification dated 05.02.2007. The University is engaged in imparting eduction in various courses. Under the University, various colleges are functioning, imparting eduction in various fields such as engineering, management, pharmacy, computer etc. The trust also runs secondary and higher secondary schools. One of the objects of the Trust is to develop the knowledge of science, technology, dental, medical, pharmaceutical, physiotherapy, pharmacy, commerce, management and humanistic, for advancement of mankind.

3. On 27.05.2011, the petitioner filed an application seeking exemption under section 10(23C)(vi) of the Act under the prescribed format. The Chief Commissioner-the competent

authority had some *prima facie* doubt about granting such application. He, therefore, issued a letter dated 30.11.2011 seeking clarification on certain points from the petitioner. He conveyed to the petitioner that the accounts of the University showed profit of extremely high percentage which was 80.35%, 67.37% and 58.91% for assessment years 2008-09, 200-10 and 2010-11 respectively. In section 10 (23C)(vi) of the Act, the emphasis is on the institution existing solely for educational purposes and not for the purposes of profit. This condition was therefore not satisfied. He called upon the petitioner to provide the details of fees charged to the students, and copies of income tax returns for the assessment year 2009-10 to 2011-12. He also confronted the petitioner with the non-filing of the audited accounts which was a requirement as per 10th proviso to section 10(23C) of the Act and asked to explain why on such ground also the application should not be rejected.

4. In response to such communication, the petitioner replied under a letter dated 14.12.2011 and contended inter alia that the University is not established for profit motive. The return of income included gross receipts and huge expenses from all units of the University. Major portion of the income was on account of accepting donations for creating infrastructure such as college building, library, hostel building etc. The entire amount of accumulation of profit was spent for education. No fees, in excess of what was authorized by the R.J.Shah Fee Regulatory

Committee, was charged. Regarding filing of the audit report, it was contended that such requirement would arise in case the institution is approved by the prescribed authority and not at the stage of filing application of the approval.

5. The Chief Commissioner of Income Tax considered such reply. In the impugned order, he held that the figures represented by the petitioner regarding accumulation of the profit were not correct. The petitioner had accumulated sizeable profit of Rs. 1.14 crores, 47.35 lacs and 44.74 lacs for the assessment years 2009-10, 2010-11 and 2011-12 respectively. The institution had charged fees in excess of what was fixed by the fee regulatory committee. The trust was required to file audit report in terms of the 10th proviso to section 10(23C) which it failed. On such grounds, the application came to be rejected.

6. Appearing for the petitioner, learned advocate Shri S.N.Divetiya submitted that the Chief Commissioner took into account consolidated figures of all the institutions under the University for deriving at the surplus which gave a distorted picture. In any case, merely because some surplus was generated out of educational activity by itself would not mean that the institution existed for profit making. He relied on the Supreme Court judgement in case of ***Queen's Educational Society vs. Commissioner of Income Tax*** reported in ***372 ITR 699***. He further submitted that the entire surplus was used for

the purpose of education. No fee in excess of what was prescribed by the fee regulatory committee was charged. The small amount was charged for allotment of forms which was mistakenly treated as fees. He lastly contended that the requirement of the proviso under section 10(23C) of filing audit report would arise at the stage of filing of the return. The application under section 10(23C) has to be filed well in advance. This requirement, therefore, cannot be attached at the stage of filing of the application.

7. On the other hand, learned counsel for the Revenue opposed the petition contending that the Chief Commissioner has given elaborate reasons for rejecting the application of the petitioner. He had put the petitioner to notice on the tentative grounds on which the application was liable to be rejected. After considering such representation of the petitioner, he passed the impugned order which calls for no interference. He further submitted that the further requirements under the third proviso to section 10(23C) could not be verified since the petitioner did not supply necessary information in this regard. Counsel relied on the decision of Bombay High Court in case of **Yash Society vs. Chief Commissioner of Income Tax and ors** reported in **375 ITR 152** in which, the Court finding that the institution, which claimed to be existing for philanthropic purposes, had generated large surpluses, confirmed the decision of the Revenue authority that the institution did not exist solely for

philanthropic purposes and not for profit.

8. Section 10(23C) of the Act pertains to income received on behalf of various institutions specified in different clauses contained therein to be exempt. Clause(vi) thereof which is relevant for our purpose reads as under:

"(vi) any university or other educational institution existing solely for educational purposes and not for purposes of profit, other than those mentioned in sub clause (iiiab) or sub clause (iiiad) and which may be approved by the prescribed authority, or"

9. Section 10(23C) contains various provisos. Relevant provisos for our purpose read as under:

"**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 the 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,

10. 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 where the total income, of the fund or trust or institution or any university or other educational institution or any hospital or other medical institution referred to in sub clause (iv) or sub clause (v) or sub clause (vi) or sub clause (via), without giving effect to the provisions of the said sub clauses, exceeds the maximum amount which is not chargeable to tax in any previous year, such trust or institution or any university or other educational institution or any hospital or other medical institution shall get its accounts audited in respect of that year by an accountant as defined in the Explanation below sub section (2) or section 288 and furnish alongwith the return of income for the relevant assessment year, the report of such audit in the prescribed form duly signed and verified by such accountant and setting forth such particulars as may be prescribed:"

10. In terms of clause (vi) of section 10(23C), any income received by university or other educational institution existing solely for educational purposes and not for the purposes of profit other than those mentioned in sub clause (iiiab) or (iiiad) and which may be approved by the prescribed authority. Clause (iiiad) of section 10(23C) also grants exemption to the income received by any university or the educational institution existing solely for educational purposes and not for the purposes of profit but limits its eligibility by providing that if the aggregate annual receipts of such university or educational institution do not exceed the amount of annual receipts as may be prescribed. Therefore, any university or educational institution claiming to be existing solely for educational purposes and not for purposes of profit but whose aggregate annual receipts exceed the amount of annual receipts which may have been prescribed, would have to apply for approval under clause (vi) of section 10(23C), if it is desired of seeking exemption for the income received by it.

11. In this background, we may examine the objections of the Revenue. These were three in number: (i) that the petitioner had sizeable accumulated surplus which would show that it did not

exist solely for educational purposes and not for purposes of profit; (ii) that the university charged fees in excess of what was prescribed by the fee regulatory committee and; (iii) that it had not filed the audit report as required under the proviso to section 10(23C).

12. The question of surplus generated by the educational institution which is otherwise existing for the purposes of education has been considered by the Supreme Court in numerous occasions. In one of the later judgements in case of *Queen's Educational Society* (supra) all previous judgements on the point were considered. Reference was made to the decision of Supreme Court in case of ***Commissioner of Income Tax vs Surat Art Silk Cloth Manufacturers Association [1980]*** reported in ***121 ITR 1 (SC)***, in which, the question arose as to what is the meaning of expression activity for profit. Reference was made to the decision of Supreme Court in case of ***Aditanar Educational Institution vs. Addl. Commissioner of Income Tax*** reported in ***[1997] 224 ITR 310 (SC)*** in which, it is observed that after meeting the expenditure when any surplus results incidentally from the activity lawfully carried on by the educational institution, it will not cease to be one existing solely for the purposes, since the object is not one to make profit. After referring to such and other decisions, the Court held and observed as under:

"25. We approve the judgments of the Punjab and Haryana, Delhi and Bombay High Courts. Since we have set aside the judgment of the Uttarakhand High Court and since the Chief Commissioner of Income Tax's orders cancelling exemption which were set aside by the Punjab and Haryana High Court were passed almost solely upon the law declared by the Uttarakhand High Court, it is clear that these orders cannot stand. Consequently, Revenue's appeals from the Punjab and Haryana High Court's judgment dated 29.1.2010 and the judgments following it are dismissed. We reiterate that the correct tests which have been culled out in the three Supreme Court judgments stated above, namely, Surat Art Silk Cloth, Aditanar, and American Hotel and Lodging, would all apply to determine whether an educational institution exists solely for educational purposes and not for purposes of profit. In addition, we hasten to add that the 13th proviso to section 10(23C) is of great importance in that assessing authorities must continuously monitor from assessment year to assessment year whether such institutions continue to apply their income and invest or deposit their funds in accordance with the law laid down. Further, it is of great importance that the activities of such institutions be looked at carefully. If they are not genuine, or are not being carried out in accordance with all or any of the conditions subject to which approval has been given, such approval and exemption must forthwith be withdrawn. All these cases are disposed of making it clear that the Revenue is at liberty to pass fresh orders if such necessity is felt after taking into consideration the various provisions of law contained in section 10(23C) read with section 11 of the Income Tax Act."

13. It can thus be seen that generating certain surplus after carrying out educational activities by itself would not indicate that the institution did not exist for educational purposes but for the purposes of making profit. Whether the surplus so generated was utilized for the purposes of educational activities also would be a relevant consideration. Be that as it may, when the

petitioner contends that the Commissioner had not taken into account correct figures and was thus misguided into coming to the conclusion that the petitioner had generated sizeable profit, it would be appropriate to request the Commissioner to reconsider the issue with the assistance of the petitioner.

14. Before doing so, we may dispose of two peripheral grounds. First is regarding charging of fees higher than what was prescribed by the fee regulatory committee. On this issue also, the petitioner's stand has been that no excess fee was charged. It was only collection of form application money which gave a wrong picture. Even this aspect, it would be open for the petitioner to point out to the Commissioner upon remand.

15. The last objection of the Commissioner is regarding non-filing of the audit report as required under the 10th Proviso to section 10(23C). This proviso provides that where the total income of the trust or institution referred to in clause (vi) besides others without giving effect to the exemption clauses exceeds the tax exemption limit such trust or the institution shall get its accounts audited and furnish the same alongwith return of income. This requirement obviously would arise at the time of filing of the return and not at the time of filing of application for approval and was therefore, wrongly invoked by the Commissioner for rejecting the application. In case of

American Hotel and Lodging Association Educational Institute vs. Central Board of Direct Taxes and others reported in ***301 ITR 86,*** the Supreme Court had occasion to examine these provisions and held that the threshold conditions are actually existence of an educational institution and approval of the prescribed authority for which every applicant has to move an application. Various provisos under section 10(23C) for requirements and the same of the provisos were seen as laying down monitoring conditions in order to make the section workable. In case of *Queen's Educational Society (*supra) it was observed that if the activities of the institution are not genuine or are not being carried in accordance with the conditions subject to approval, the exemption must forthwith be withdrawn.

16. If the case of the Commissioner was that the petitioner did not fulfill the requirements of the third proviso, it has not been elaborated in the impugned order. However, we leave this question also open.

17. In view of above discussion, the impugned order is set aside. The proceedings are placed back before the Commissioner for fresh consideration and disposal in accordance with law. The petitioner will have opportunity to place additional material and made submissions before the Commissioner before final order is passed, which shall be done

bearing in mind the observations made by the Supreme Court in case of *Queen's Educational Society (*supra) and other decisions cited therein preferably by 31.12.2016.

The petition is disposed of accordingly.

(AKIL KURESHI, J.)

(A.J. SHASTRI, J.)

Jyoti