

(2019) 12 OHC CK 0013

In the Orissa High Court

Case No : Writ petition (C) No. 4447 Of 2008

Board Of Secondary Education, Represented Through Its
Secretary, Odisha, Cuttack

APPELLANT

Vs

Chief Commissioner Of Income Tax, Odisha, Bhubaneswar
And Others

RESPONDENT

Date of Decision : 11-12-2019

Acts Referred:

Constitution Of India, 1950 — Article 21
Income-Tax Rules, 1962 — Rule 2BC, 2CA
Income Tax Act, 1961 — Section 2(15), 3, 10(22), 10 (23C), 10(23C)(VI), 10(23C)
(iiiab), 142(1), 143(2), 148
Companies Act, 1956 — Section 617

Citation : (2019) 12 OHC CK 0013

Hon'ble Judges : K.S. Jhaveri, CJ;K.R. Mohapatra, J

Bench : Division Bench

**Advocate : Bibek A. Mohanti, S.K. Jena, A.R. Mohanty, N.R. Mohanty, R.C.
Behera, C.R. Dash, Radheyshyam Chimanka**

Final Decision : Allowed

Judgement

K.S. Jhaveri, CJ

1. By way of this writ petition, the petitioner has challenged the order dated 18.01.2007 passed by the Chief Commissioner of Income Tax, Odisha,

Bhubaneswar under Section 10(23C)(VI) of the Income Tax Act, 1961 as well as demand notices under Annexures-2 and 3.

2. Brief facts of the case is that the petitioner is a body corporate constituted under the Board of Secondary Education Act and is an instrumentality of

the State for imparting secondary education. The petitioner-Board of Secondary Education, Odisha is constituted under the Board of Secondary

Education Act 10 of 1953 (for short "the Act"), inter alia, to provide

secondary education in the State of Odisha by preparing course for education in secondary pre-university stage and to conduct examination for those, who have completed prescribed courses of study and to award certificates to successful candidates and also performing other statutory duties incidental thereto. Therefore, establishment of Board is only for imparting secondary education throughout the State of Odisha under Section 3 of the Act to regulate control and develop secondary education in the State of Odisha.

3. The word "Education" has been used in Section-2(15) of the Income Tax Act in sense of systematic instruction, schooling or training and not in wide and extended sense according to which every acquisition of further knowledge. Imparting secondary education has never been treated as trade or business and the citizen of the country have a fundamental right of secondary education. Article 21 prescribes that every child/citizen of this country has a right to free education until he completes the age of 14. At the age of 14 one may complete Secondary Education and it is also a duty cast on a State to safeguard fundamental right of citizen which includes education up to the age of 14 years. Therefore, the sole existence of Board is to impart secondary education, which safeguards the duty cast on a State.

4. Previously, a notice was issued to the petitioner-Board by the Income Tax Department for assessment, which was under challenge before this Court in OJC No.305 of 1969. Said writ petition was disposed of quashing the notices and observing that the assessing authorities under Income Tax Act have no power to assess an account in which exemption is given under the Income Tax Act. At the relevant point of time, Section 10(22) under Income Tax Act was in force to achieve the aforesaid purpose. The same reads as under:

"10(22) any income of a university or other educational institution, existing solely for educational purpose and not for purpose of profit is exempted from Income Tax."

Section 10(22) has been deleted by the Finance Act (Act 21 of 1998) with effect from 1.4.1999. Thereafter, the legislature inserted a new section 10(23C), which came into effect from 1.4.1999. Relevant portion of the said provision is quoted as under:

"10(23C)(iiiab) any university or other educational institution existing solely

for educational purposes not for the purpose of profit and which is wholly or substantially financed by the Government.

10(23C) (iiiad) any university or other educational institutions existing solely for educational purposes and not for the purposes of profit if the aggregate annual receipt of such university or educational institution do not exceed the amount of annual receipts as may be prescribed.â??

The amount prescribed is Rs. 1 crore vide Rule 2BC.

â??10(23C) (Vi) any university or other educational institution existing solely for educational purposes not for the purposes of profit other than those mentioned in the Sub-clause (iiiab) and sub-clause (iiiad) and which may be approved by the prescribed authority.â??

The prescribed authority for enforcement of the aforesaid provision is the â?? Chief Commissionerâ?? or the â??Director Generalâ?? as provided under Rule 2CA of the Income Tax Rules.

5. In the instant case, the petitioner filed its return showing a taxable income â?? nilâ?? by claiming exemption u/s 10(23C) (iii ab) of the Income Tax

Act. The reason for filing of return, as usual, for claiming refunds TDS amount arising out of some incidental income i.e. interest accrued on deposits by petitioner from which Banks have deducted tax. Soon after filing of return, the Income Tax Authorities scrutinized the case and notices under

section 142(1) and 143(2) were issued for production of Books of Accounts.

6. In course of assessment proceeding, the assessing officer has also observed that the petitioner should have possessed exemption certificate from

the prescribed authority i.e. the Chief Commissioner of Income Tax, but the petitioner having not possessed such certificate, failed to satisfy the

requirement of the provision of Section 10(23C) (vi) of the I.T. Act. For that reason, on 28.12.2005, the petitioner without prejudice to its right in

appeal applied for approval of exemption u/s 10(23C) (vi) of the Income Tax Act. The Chief Commissioner simply slept over the matter and in the

meantime, the First Appeal filed by the petitioner before C.I.T. (A), Cuttack was disposed of and it filed a statutory second appeal before the Income

Tax Appellate Tribunal.

7. Learned Tribunal vide order dated 05.09.2006 directed the CCIT to dispose of the application on priority basis preferably within fifteen days. In

pursuance of the said order, the CCIT issued notices to the petitioner and it appeared before him through its authorized representative and filed

necessary documents with books of accounts as required by the CCIT.

8. The CCIT after hearing the petitioner rejected its application with the following findings:

(a) There are serious irregularities in the accounts from the extracts of local funds audit which have a direct bearing on the exemption.

(b) The decision of Honâ??ble Orissa High Court in the earlier case of the petitioner is not applicable.

(c) The petitioner running a Secondary High School and majority of activities of the petitioner was not running the school and not for solely for the purpose of running any educational institution.

(d) The expenditure on the school is only around two percent of the total receipt of the petitioner for each year. Therefore, major part of the activities of the petitioner cannot support the claim of exemption.

9. Learned counsel for the petitioner submits that the Chief Commissioner while deciding the application of the petitioner has not gone into the crux of

the issue whether the exemption certificate is necessary for an institution like Board, which has been established for imparting secondary education in the State.

10. Learned counsel for the petitioner has mainly relied upon the decisions of Calcutta High Court in the case of M/s. Investment Ltd. â??v- The

Commissioner of Income-Tax, Calcutta; reported in (1970) 3 SCC 333, Delhi High Court in the case of Commissioner of Income Tax, New Delhi

â??v- Federation of Indian Chambers of Commerce and Industries, New Delhi, reported in (1981) 3 SCC 156, High Court of Orissa in the case of

Padmanav Dehury and others â??v-State of Orissa and others, reported in 1998 SCC Online Ori 104 and Rajasthan High Court in the case of

Rajasthan Hindi Granth Academy â??v- Deputy Commissioner of Income Tax, reported in 2017 SCC Online Raj 3547.

11. Learned counsel for the opposite parties has supported the orders and contended that notices issued to the petitioner under Annexures-1 to 3 and

the order passed by the authority are just and proper. No inference is called for. He has taken us to the reply filed by the opposite parties more

particularly at paragraphs-3, 4, 5, 7 and 8, which read as under:

3. That in reply to the averments made in para-1 of the writ petition it is respectfully submitted that save and except what appears from the record nothing is admitted. The impugned order of the CCIT is a speaking order wherein a detained review of the activities, powers and functions of the Board have been brought out in the body of the order in paragraph-6 (page-2 to 4) and paragraph-16 (page-7) of the CCIT's order. In fact after considering the actual and the authorized activities of the Board CCIT has analyzed the total receipts and expenses of concerned financial year of the Board in paragraph-19 (page-8) of his order and has given a finding that the activities of the institution do not constitute activities solely for educational purpose as per the requirement of law in Sec.10(23C)(vi). In paragraph-20 and 21 the CCIT has referred to some of the decisions of Hon'ble Supreme Court in this regard and drawn support from them in terms of the facts of this case while drawing the conclusion that the activities are not solely for educational purpose.

The CCIT's order is elaborate and speaking wherein all the facts of the case have been considered and relying on the interpretation of the statute by the Apex Court of the land, the finding has been given.

4. That in reply to the averments made in para-1(b) of the writ petition it is respectfully submitted that save and except what appears from the record nothing is admitted. The allegation is totally false as the notice u/s.148 of the I.T. Act for reopening of the case by the Assessing Officer for Assessment Years 1990-2000 and 2000-01 was issued on 22.03.2006 and for the asst. year 2001-02 was issued on 21.03.2006 whereas the CCIT passed the order rejecting approval u/s. 10(23C)(vi) on 18.01.2007.

5. That in reply to the averments made in para-1(c) of the writ petition it is respectfully submitted that save and except what appears from the record nothing is admitted. There is no illegality in the order of the Assessing Officer while passing Assessment order u/s.147 of the I.T. Act as Assessing Officer has also relied on the findings given by the CCIT on 18.01.2007 in his impugned order.

7. That in reply to the averments made in para-8 of the writ petition it is respectfully submitted that save and except what appears from the record nothing is admitted. The petitioner had made an application u/s 10(23C)(vi) for these years, which required approval by the prescribed authority. It

was bound to do so, since there is no longer any automatic exemption mandated under the Income Tax Act, which earlier existed in terms of

provisions of Section 10(22) of the Income Tax Act. The impugned order of the CCIT is a speaking order wherein a detailed review of the activities,

powers and functions of the Board have been brought out in the body of the order in paragraph-6 (page-2 to 4) and paragraph-16 (page-7) of the

CCIT's order. In fact after considering the actual and the authorized activities of the Board the CCIT has analyzed the total receipts and

expenses of concerned financial year of the Board in paragraph-19 (page-8) of his order and has given a findings that the activities of the institution do

not constitute activities solely for educational purpose as per the requirement of the law in Sec. 10(23C)(vi) of the I.T. Act. The CCIT has given his

findings in his order on the basis of application filed by the assessee in the prescribed form no.56D in his office on 28.12.2005 for the years 2001-02 to

2003-04.

8. That in reply to the averments made in para-9 of the writ petition it is respectfully submitted that save and except what appears from the record

nothing is admitted. The CCIT has passed the impugned order while disposing of the application in form no.56D filed in his office. Against the

Assessing Officer's orders for Assessment Years 1999-2000 to 2001-02 the assessee had filed appeal before the CIT(A) who did not given any

relief to the assessee vide his order in ITA No.0299/07-08/on 31.3.2008.

12. Taking into consideration the activities taken by the petitioner's institution, which is responsible for education up to secondary education in the

State while carrying out its statutory liability and obligation, the notices issued as at Annexures-1, 2 and 3 describing it to be commercial activities, in

our considered opinion, are not sustainable as the issue is covered by the decision of Rajasthan High Court in the case of Rajasthan Hindi Granth

Academy v-Deputy Commissioner of Income Tax, reported in 2017 SCC Online 3547, more particularly at paragraphs-16 onwards which is quoted

as under:

16. He also relied upon the decision of Supreme Court in Assam State Text Book Production & Publication Corpn. v. CIT, Gauhati (2009) 319

ITR 317 (SC) wherein it has been held as under:

3. On going through the records, we find that the High Court has not taken into

account the prior history of the case, particularly in the context of incorporation of the Corporation under the Companies Act, 1956, as a Government Company. Initially, as stated above, the assessee was a State-controlled Committee and Board, which were attached to the office of the Director of Public Instruction, State of Assam. It is only in the year 1972 that the Government Company got constituted under Section 617 of the Companies Act, 1956. That, prior to 1972, the entire funding for the working of the Committee/Board was done by the State of Assam and that even the ownership of the assets remained vested in the State of Assam which stood transferred to the Corporation in 1972 when it got incorporated under Companies Act, 1956. It is important to note that the assessee is a Government Company. It is controlled by the State of Assam. The aim of the said Corporation is to implement the State's policy on Education. That, Clause 21 of the Memorandum and Articles of Association provides a Return on Investment to the State of Assam. That, in the year 1975, in a similar situation, Central Board of Direct Taxes [for short, 'C.B.D.T.'] had granted exemption under Section 10(22) of the Act vide letter dated 19th August, 1975, to Tamil Nadu Text Books Society, which performed activities similar to those of the assessee. The letter dated 19th August, 1975, is referred to in the judgment of the Rajasthan High Court in the case of Commissioner of Income Tax v. Rajasthan State Text Book Board reported in 244 I.T.R. 667. As can be seen from the facts of that case, a similar question came up for consideration before the Rajasthan High Court, namely, whether Rajasthan State Text Book Board was entitled to exemption under Section 10(22) of the Income Tax Act, 1961? One of the arguments advanced in that case on behalf of the Revenue was that the assessee was making profit on account of publishing and sale of text books and, consequently, it was not entitled to the benefit of exemption under Section 10(22) of the Act. However, the High Court noticed the letter issued by C.B.D.T. on 19th August, 1975 in the case of Tamil Nadu Text Book Society which, as stated above, in similar circumstances had granted exemption to the Tamil Nadu Text Book Society as an Educational Institution within the meaning of Section 10(22) of the Act. The judgment of the High Court further recites that, under a similar situation, the C.B.D.T. had also extended benefit of exemption under Section 10(22) of the Act to the Orissa

Secondary Board Education, as reported in *Secondary Board of Education v. Income Tax Officer*, 86 I.T.R. 408. Following these circulars/letters

issued by C.B.D.T., the Rajasthan High Court came to the conclusion that the assessee in that case, namely, Rajasthan State Text Book Board, was

entitled to claim the benefit of exemption under Section 10(22) of the Act. The operative part of the Rajasthan High Court's judgment reads as under:

It is not disputed before us that the aims and objects of the Tamil Nadu Text Book Society and those of the respondent-assessee are almost identical.

It is also not shown to us that the surplus amount, if any, of the respondent-assessee, is used for any other purpose or distributed to other members.

The Commissioner of Income-tax (Appeals) as well as the Tribunal have noticed that even if some amount remains surplus, that is utilised only for the

purposes of education. Thus, having regard to the concurrent findings of fact recorded by the Commissioner of Income-tax (Appeals) and the Tribunal

and also taking note of the letter of the Central Board of Direct Taxes itself, it is not possible for us to say that the order of the Tribunal is erroneous in

any way. In this way, no question of law arises for consideration much less a substantial question of law.

17. He also relied upon the decision of Rajasthan High Court in *CIT v. Rajasthan State Text Book Board* (2000)

113 Taxman 204 (Raj.) wherein it has been held as under:â?

â??It could be seen from the orders of the Commissioner (Appeals) as well as the tribunal that, in a similar situation, in the case of Tamil Nadu Text

Book Society, the CBDT, as per the letter dt. 19.8.1975 and F. No. 184/26 of 1975, stated that the Tamil Nadu Text Book Society was an educational

institution, existing solely for the purpose of education, within the meaning of Sec.10(22).

It was not disputed that the aims and objects of the Tamil Nadu Text Book Society and those of the assessee were almost identical. It was also not

shown that the surplus amount, if any, of the assessee, was used for any other purpose or distributed to other members. The Commissioner (Appeals)

as well as the Tribunal had noticed that even if some amount remained surplus, that was utilised only for the purposes of education. Thus, having

regard to the concurrent finding of act recorded by the Commissioner(Appeals) and the tribunal has also taking note of the letter of the CBDT itself, it

was not possible to say that the order of the tribunal was erroneous in any way. In this way, no question of law arose for consideration, much less a substantial question of law.

18. He also relied upon the decision of Orissa High Court in Secondary Board of Education v. ITO (1972) 86 ITR 408 (Orissa) wherein it has been held as under:â?

â??Under the Orissa Secondary Education Act, 1953, the Board has a fund. There were various sources of income constituting the fund. One of the

sources of income was earning profits by compilation, publication, printing and sale of text books. The profits so earned entered into the Board fund.

The income and expenditure of the Board was controlled and the entire expenditure was to be directed towards development and expansion of

educational purposes. Even if, there was some surplus it was not appropriated by others remained as as part of the sinking fund to be devoted to the

cause of education as and when necessary. Thus the object did not involve the carrying on the activity for the purpose of profit. The object was to

carry on the activity of advancement of education which incidentally resulted in profits which in their return were devoted to the cause of education.

This being the objection and there being various way of control of the income and expenditure, the Board of Secondary Education could not be said to

be existing for purposes of profits. It existed solely for purposes of education. The income of the Board could not, therefore, be computed in the total

income of the previous year u/s 10(22). The ITO exercised his

19. He also relied upon the decision of Madhya Pradesh High Court in CIT v. Madhya Pradesh Rajya Pathya Pustak Nigam (2009) 318 ITR 497

(MP) wherein it has been held as under:â?

19. From a perusal of the aforesaid decisions, it is lucid that for the entitlement for getting exemption for the assessment year, it is required to see the

activities of the assessee. That is the acid test. If the income/profit is applied for non-educational purposes, it is decided only at the end of the financial

year. It is to be seen whether the assessee is engaged in any kind of educational activities. The authorities which we have referred to above have laid

down the criteria under what circumstances, an assessee can claim exemption being involved in educational purposes and how the income is spent.

We have already referred to the memorandum of association and also stated

about reasonings assigned by the CIT (Appeals) to deny the exemption and the analysis made by the Tribunal to dislodge the finding of the first appellate authority. It is worth noting that the Assessing Officer has not ascribed any reason.

20. He also relied upon the decision of Karnataka High Court in DIT v. Dhampakasha Rajakarya Prasakta B.M. Sreenivasiah Educational Trust

(2015) 372 ITR 307 (Karnataka) wherein it has been held as under:â?

â??Section 10(23C) of the income tax act, 1961-Educational institutions (institutions substantially financed by Government) Assessment years 2003-

4 and 2005-06-Assessee was running a number of educational institutions-Assessing Officer declined to grant relief claimed by assessee u/s 10(23C)

(iiiab)-material on record disclosed that Government had financed assessee-institutions and its share was 25 per cent. Further, it was not existing for

fake of profit making-whether when 25 per cent of finance to assessee-institutions flowed from Government, it constituted substantial finance and it

satisfied all legal requirement provided u/s 10(23C)(iiiab)-whether, therefore, assessee would be entitled to benefit provided u/s 10(23C)(iiiab).â??

21. However, counsel for the respondent Mr. Jain strongly contended that while considering the matter, the CIT(A) has he matter and observed as

under:â?

â??3.3 The submission of the appellant was forwarded to the AO for his comments. The AO has stated in the remand report dt. 23.12.2013, which is

as under:â?

â??In this connection it is submitted that the assessee â??Rajasthan Hindi Granth Academyâ? is claiming exemption u/s 10(23C)(iiiab) of the Income

Tax Act, 1961. The assessee has produced various documents and material before you in support of his claim. The same have been duly verified and

considered by the office of the undersigned. However, the assessee could not produce any material in support of his claim which may reverse the

decision of the AO. The AO in his order dt. 30.12.2012 for the A.Y. 2010-11 has mentioned that the objects and activities of the assessee does not

fall under the ambit of education and it is covered under general public utility as per 2(15) of the IT Act, 1961. As the objects of the assessee are not

covered under the definition of education, no benefit of exemption u/s 10(23C)(iiiab) can be granted to the assessee. Section 10(23C)(iiiab) clearly

says that 10. In computing the total income of a previous year of any income falling within any of the following clauses shall not be included-

[(23C) any 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

Hence in light of the above the undersigned and the opinion of the then AO it is reported that no exemption u/s 10(23C)(iiiab) should be allowed to

the assessee.

In continuation with the letter dt. 23.12.2013, it is further clarified that the assessee's submission that it should be allowed exemption u/s 10(23C)(iiiab)

and 10(23C)(iv) and addition so made by the AO may also be deleted is not correct on the basis of following issues:

1. The assessee in its return of income has nowhere claimed exemption u/s 10(23C)(iv) rather it has claimed exemption u/s 10(23C)(iiiab). (copy of

computation enclosed). Hence, the assessee cannot be granted such exemption without claiming it.

2. The assessee is also not eligible for exemption u/s 10(23C)(iiiab) as discussed in letter dt.23.12.2013.

3. The assessee is not eligible for exemption u/s 10(23C)(iv) because for that following two requirements should not be complied with.

i. The assessee should be existing solely for education purpose.

ii. Such university and educational institution should be approved by the Hon'ble Chief Commissioner of Income Tax.

As rightly discussed in the assessment order dt. 30.12.2012, the assessee does not fulfill any of the above conditions. It cannot be allowed exemption

u/s 10(23C)(iiiab)(iv) r.w.s. 2(15) of the IT Act, 1961.

Hence, in view of the above discussion, it is reported that the assessee is not eligible for any exemption claimed by it u/s 10(23C)(iiiab) and 10(23C)

(iv).

22. He further contended that by no stretch of imagination, the activities carried by the appellant assessee cannot be considered as educational

institutions and publication of educational books is not educational activity and, therefore, they will not be covered under the provisions of 10(23C)

(iiiab)/10(23C)(iv) of the Income Tax Act.

23. Counsel for the respondent has relied upon the decision of The Supreme Court in *The Sole Trustee Loka Shikshana Trust v. The Commissioner of Income Tax, Mysore* reported in 1975 (101) ITR 234 wherein Supreme Court held as under:â?

5. The sense in which the word â??educationâ? has been used in section 2(15) is the systematic instruction, schooling or training given to the young in

preparation for the work of life. It also connotes the whole course of scholastic instruction which a person has received. The word â??educationâ?

has not been used in that wide and extended sense, according to which every acquisition of further knowledge constitutes education. According to this

wide and extended sense, travelling is education, because as a result of travelling you acquire fresh knowledge. Like wise, if you read newspapers and

magazines, see pictures, visit art galleries, museums and zoos, you thereby add to your knowledge. Again, when you grow up and have dealings with

other people, some of whom are not straight you learn by experience and thus add to your knowledge of the ways of the world. If you are not careful,

your wallet is liable to be stolen or you are liable to be cheated by some unscrupulous person. The thief who removes your wallet and the swindler

who cheats you teach you a lesson and in the process make you wiser though poorer. If you visit a night club, you get acquainted with and add to

your knowledge about some of the not much revealed realities and mysteries of life. All this in a way is education in the great school of life. But that is

not the sense in which the word â??educationâ? is used in clause (15) of section 2. What education connotes in that clause is the process of training

and developing the knowledge, skill, mind and character of students by formal schooling.

24. He also relied upon the decision of Rajasthan High Court in *Commissioner of Income Tax v. Maharaja Sawai Mansinghji Museum Trust* reported

in 1988 (169) ITR 379 wherein it has been held as under:â?

7. It is amply clear from a bare reading of it that the â??educational institutionâ? must exist â??solelyâ? for educational purposes. â??Solelyâ??

means exclusively and not primarily. Simply because certain persons may add something to their knowledge by visiting the museum, it cannot be said

that the museum exists â??solelyâ?? for educational purposes. The emphasis in Section 10(22) is on the word â??solelyâ??.

25. He contended that the appeal deserves to be dismissed.

26. We have heard counsel for the parties.

27. Before proceeding with the matter, it will not be out of place to mention that Rajasthan Hindi Granth Academy is established by the State

Government to see that the books are available to the students of the educational institutions at the grass root level, therefore, while considering the

matter, we have considered that mainly the substantive amount out of receipts of Rs. 1,81,44,567/-, Rs. 1,24,10,000/- is received by the assessee from

State Government by way of subsidy. Even if, name of the institution i.e. Rajasthan Hindi Granth Academy is considered, it is established that it is for

the purpose of publication of Hindi Granth i.e. for education. In that view of the matter, in our considered opinion in view of decisions referred by Mr.

Ranka, this is an educational institution activity.

28. In that view the matter, we are of the opinion that this academy is running only with a view to publish educational books and we have no hesitation

in accepting the submissions of Mr. Ranka that this is only for the purpose of academy which is educational in nature.

29. In that view of the matter, the assessee will be entitled for the benefit u/s 10(23)(iiiab). Even from the table, looking to the turnover, the profit is

negligible, therefore, it is clear that the institution has no profit motive.

30. In view of the above, the issue is required to be answered in favour of the assessee and against the department.

31. The appeal stands allowed.â??

13. In that view of the matter, the notices issued under Annexures-1, 2 and 3 are quashed.

14. This writ petition is allowed to the aforesaid extent.