

(2010) 03 SHI CK 0110
In the High Court Of Himachal Pradesh
Case No : C.W.P. No. 1321 of 2009

Maa Saraswati Educational Trust	Vs	APPELLANT
Union of India (UOI) and Another		RESPONDENT

Date of Decision : 16-03-2010

Acts Referred:

Income Tax Act, 1961 — Section 10(23C)
Income Tax Rules, 1962 — Rule 2(CA)

Citation : (2010) 236 CTR 400 : (2010) 2 ShimLC 141

Hon'ble Judges : Kurian Joseph, C.J; R.B. Misra, J

Bench : Division Bench

Judgement

Kurian Joseph, C.J.—The guiding principles u/s 10(23-C)(vi) of the Income Tax Act, 1961 governing the approval of educational institution prescribed by the authority, namely, Chief Commissioner of Income Tax, fall for consideration in this case. The petitioner is a registered Trust. The object of the Trust, for which it is established, reads as follows:

(A) Advancement and propagation of education and learning including establishment, maintenance and support of school and other educational institutions;

(B) To make provision to advance the cause of, and impart nursery, primary, secondary, higher, commercial, industrial, technical, physical and all or any other type or kind of education;

(C) To establish, maintain take over management, administer or run any institutions, colleges, university engaged in the imparting of education to students up to any level that may be found necessary and/or desirable;

(D) To generally impart education to children and for the purpose to do all acts that may be necessary;

(E) To establish, run, manage administer any institution or university or college

or school to train persons to be teachers who will impart education to children and/or students in school, colleges, university and other similar institutions;

(F) To promote adult education;

(G) To hold, arrange and organize meeting, lectures, talks, discussions, seminars, symposia, conferences, competitions, research and study visits, tours, excursions, exhibitions, debates, cinema, audio-visual programmes, the artistic performances and other cultural activities supports the games;

(H) Establishment, maintenance and support of libraries, museums and reading rooms and distribution of books etc., for advancement of education and knowledge in general;

(I) To provide and meet all expenses of the schools, colleges, university and other educational institution;

(J) Advancement and propagation of education and learning including establishment, maintenance and support of Schools, Colleges, Universities, Pathashalas and other educational institutions, auditorium, professorship, lectureship, scholarship and prizes etc.;

(K) Advancement of any other object of general public utility and relief like conducting seminars on educational advancement, providing necessary assistance during natural calamities and such other assistance as may be required from time to time provided:

(i) That none of the objects of this Trust shall at any time involve carrying on of any activity for profits;

(ii) That the income or the assets of the Trust fund shall not be applied or transferred in whole or in part for any purpose other than charitable and/or educational purpose;

(iii) That the income or assets of the Trust shall not be applied or used for the benefit of the authors of the Trust, or any person who makes substantial contribution or donations to the trust or any trustee or manager of this Trust.

(iv) That in the event of dissolution of the Trust the trust fund or surplus of the funds shall not be transferred to the trustees in any manner. However, the same shall be transferred to a like minded trust duly approved by not less than 2/3 of trustees present at the meeting.

2. A perusal of the objects, as above, and it is not in dispute also that the same is established only for educational purposes. u/s 10(23-C)(vi) of the Income Tax Act, any income of such educational institution satisfying the parameters of the provisions is liable to be exempted. The department has declined to approve the petitioner u/s 10(23-C)(vi) of the Income Tax Act and hence the writ petition.

3. A perusal of the impugned order would show that the Commissioner was not satisfied as to the explanation for accumulation of income by the petitioner/

institution and also some of the financial transactions. It is stated in the order that the Trust had accumulated huge income during the financial years 2003-2004 to 2006-2007 and according to the Commissioner, the institution has been generating profit.

4. It is true that in the impugned order the word "accumulation" as such is not discussed. The Commissioner has been swayed by the income and the same has been treated as profit only. According to the learned Counsel for the petitioner, the finding is without taking into consideration the capital expenditure of the Trust. The question is whether the accumulation of income would disentitle the petitioner for the benefit u/s 10(23-C)(vi) of the Income Tax Act.

Section 10(23-C)(vi) reads as follows:

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

5. It is further conditioned by several provisos. The relevant provisos for the purpose of this case are the second and third. The second proviso as it should at the relevant time and the third proviso to the extent relevant read as follows:

Provided further that the Central Government, before notifying the fund or trust or institution, or the prescribed authority, before approving any University or other educational institution or any hospital or medical institution, under Sub-clause (iv) or Sub-clause (v) or Sub-clause (vi) or Sub-clause (via), may call for such documents (including audited annual accounts) or information from the fund or trust or institution or any university or other educational institution or any hospital or other medical institution, as the case may be, as it thinks necessary in order to satisfy itself about the genuineness of the activities of the fund or trust or institution or any university or other educational institution or any hospital or other medical institution, as the case may be, and the Central Government or the prescribed authority, as the case may be, may also make such enquiries as it deems necessary in this behalf:

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 15% of its income is accumulated on or after the 1st day of April, 2002, the period of accumulation of the amount exceeding fifteen per cent of its income shall in no case exceed five years;]

6. The provision should indicate that the requirements are (1) the educational institution should exist solely for educational purpose and not for the purpose of profit; (2) it should not be an educational institution wholly or substantially financed by the Government; (3) it should be an educational institution genuinely

existing for educational purpose and not for the purpose of profit; (4) its aggregate annual income exceeds Rs. one crore; (5) it should be approved by the prescribed authority. The prescribed authority under Rule 2(CA) of the Income Tax Rules, 1962 for the purpose of Sub-clause (vi) is the Chief Commissioner of Income Tax.

7. Under the second proviso, guidelines are prescribed as to the application of mind by the prescribed authority while considering the application for approval. Authority is entitled to call for the documents including audit and annual accounts or any information from the institution for satisfying itself about the genuineness of the activities of the institution and the authority is also competent to make such inquiries as it deems necessary in that behalf. Under the third proviso, it is further made clear that the educational institution is entitled to apply its income or accumulate it for application wholly or exclusively to the objects for which it is established and in a case where more than 15% of its income is accumulated on or after the first day of April, 2002, the period of the accumulation of the amount exceeding 15% of the income shall in no case exceed 5 years. Therefore, it is not as if the educational institution cannot generate any surplus. Generating surplus and accumulation of income will not disqualify an institution to the benefits of Section 10(23-C). Surplus is to be understood in contra-distinction to generation of income with the sole motive of profit if one has to properly understand the legislative intent of Section 10(23-C) (vi). Merely because an educational institution accumulates income, it does not go out of consideration of Section 10(23-C)(vi). It goes out only if application of income is for the purposes other than education since the institution is to be established and maintained solely with the object of imparting education.

8. Going through the impugned order, it appears that the authority has been slightly confused by the decision of the Uttarakhand High Court in the case of CIT, Haldwani v. Queens' Education Society, Rani Kothi, Haldwani and CIT Haldwani v. St. Pauls Sr. Secondary School, Kathgodam. In fact, the Uttarakhand High Court in the said judgment has referred to the decision of the Apex Court in Aditanar Educational Institution Vs. Additional Commissioner of Income Tax, wherein the Apex Court has made it clear that if surplus is utilized for the educational institution itself, it will not cease to be one existing solely for educational proposes. The object is the relevant factor in the sense that the object for which the educational institution is established and maintained should not be for profit and should only be for education. In American Hotel and Lodging Association Educational Institute Vs. Central Board of Direct Taxes and Others, Supreme Court has succinctly dealt with this aspect at paragraph 28, which reads as follows:

28. In Additional Commissioner of Income Tax, Gujarat Vs. Surat Art Silk Cloth Manufacturers Association, it has been held by this Court that test of predominant object of the activity is to be seen whether it exists solely for education and not to earn profit. However, the purpose would not lose its

character merely because some profit arises from the activity. That, it is not possible to carry on educational activity in such a way that the expenditure exactly balances the income and there is no resultant profit, for, to achieve this, would not only be difficult of practical realization but would reflect unsound principles of management. In order to ascertain whether the institute is carried on with the object of making profit or not it is duty of the prescribed authority to ascertain whether the balance of income is applied wholly and exclusively to the objects for which the applicant is established.

9. In *TMA Pai Foundation v. State of Karnataka* reported in (2002) 8 SC 481, 11-Judge Constitution Bench has reiterated the position holding that private educational institutions have to generate funds for betterment and growth of the institutions since they are not aided by the State and unless they generate funds, the growth of the institutions will be impeded. We also find that Division Bench of the Punjab & Haryana High Court in its decision 29.1.2010 in CWP No. 6031/09 has dealt with all these aspects and it will be profitable to refer to paragraph 8.5 of the judgment, which read's as follows:

...The determination of the existence of educational institution solely for educational purposes is required to be done on the basis of its objects including the utilization of its income in accordance with the conditions laid down in the third proviso to Section 10(23-C)(vi) of the Act. Merely because there are surplus in the hands of the educational institution would not ipso fact lead to an inevitable conclusion that such an educational institution is existing for making profits and not solely for educational purposes. Therefore, the interpretation put forth by the Chief Commissioner that there has to be reasonable profit only and then only an institution can be said to be not existing solely for the purposes of profit, is totally a misconception of law. There is a definite purpose behind the allowing of setting up educational institutions at the hands of private entrepreneurs including Trusts/Societies by the Government. Various other educational colleges like Engineering and Pharmacy etc. could not have been established for want of funds. The Government with a definite idea and object purportedly opened this area of education for the private sector. The Government, who is lacking funds appears to have thought that private sector could do this job very well. Once the very intention of the Government, is to promote education in the private sector such an action like that of the Chief Commissioner would seriously discourage those activities and the avowed object could never be achieved.

Therefore, question is whether the object of the institution is to make profit and whether the activities of the institution are in terms of the purpose for which it is established, education and education only.

10. The Chief Commissioner has taken the view that ratio of the decision of the Uttarakhand High Court would apply to the facts of the case. We are afraid the same cannot apply for more than one reason. Section 10(23-C)(vi) has nothing to do with charity. Though charity is a laudable object, that consideration is

irrelevant under the said provision. What is relevant is purpose and administration of the institution only for education and nothing more or nothing less or else. It has to be noted that on the facts of the case before the Uttarakhand High Court, it was a case falling u/s 10(23-C)(iii) where annual receipt does not exceed One crore. Secondly, going by the accounts, prima facie, we are of the view that there is no question of generation of profit though there is accumulation of surplus, but in case the accumulation of surplus is within the parameters, the petitioner is entitled to succeed. In this context, the contention of the learned Counsel for the petitioner that going by Annexure P-6, there is no accumulation of income has also to be considered. Still further, the contention that the amount of Rs. 15,45,000/- which is paid to Ganesh Rice Mill is only return of loan availed and not distribution of profit to the author of the Trust, has also to be examined.

11. According to the petitioner, M/s. Ganesh Rice Mill is not an author of the trust or a contributor to the trust, but only is an unsecured creditor. As has been rightly pointed out by the learned Standing Counsel, these are the questions of fact which are to be gone into by the Commissioner since according to the learned Standing Counsel, there appears to be a situation of manipulation of accounts, whereby the loan has been credited as the capital initially and thereafter on return has been shown as repayment of loan.

12. Thus, on an overall view of the situation both on facts and law, we are of the view that the matter requires re-consideration by the Chief Commissioner of Income Tax. Accordingly, we set aside Annexure P-4 and remit the matter to the Chief Commissioner for consideration afresh in accordance with law with notice to the petitioner. The needful as above, shall be done within a period of four months from the receipt of the copy of the judgment along with the copy of the writ petition.