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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Reserved on: 15.03.2018
Pronounced on: 03.04.2018

\+ **ITA 1086/2005**

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

versus

THE DELHI PUBLIC SCHOOL SOCIETY ..... Respondent

\+ **ITA 501/2008**

DIRECTOR OF INCOME TAX EXEMPTION ..... Appellant

versus

THE DELHI PUBLIC SCHOOL SOCIETY ..... Respondent

\+ **ITA 521/2008**

DIRECTOR OF INCOME TAX EXEMPTION ..... Appellant

versus

THE DELHI PUBLIC SCHOOL SOCIETY ..... Respondent

\+ **ITA 605/2008**

DIRECTOR OF INCOME TAX DELHI ..... Appellant

versus

THE DELHI PUBLIC SCHOOL SOCIETY ..... Respondent

\+ **W.P.(C) 5340/2008**

DELHI PUBLIC SCHOOL SOCIETY, DPS STAFF FLATS
..... Petitioner

versus

UOI & ORS. ..... Respondents

+ **ITA 609/2008**

DIRECTOR OF INCOME TAX EXEMPTION ..... Appellant

versus

THE DELHI PUBLIC SCHOOL SOCIETY ..... Respondent

+ **ITA 1432/2010**

COMMISSIONER OF INCOME TAX ..... Appellant

versus

THE DELHI PUBLIC SCHOOL SOCIETY ..... Respondent

Present : Ms.Vibhooti Malhotra, Adv. for appellant in ITA Nos.1086/2005, 501/2008, 521/2008, 5340/2008, 609/2008 & 1432/2010.
Mr.Puneet Rai, Adv. for appellant in ITA No.605/2008.
Mr.M.S.Syali, Sr.Adv. with Mr.Satyen Sethi, Mr.Arta Trana Panda, Mr.Mayank Nagi, Ms.Gargi Sethee and Mr.Mohit Jhamb, Advs. for respondent in ITA Nos.1086/2005, 501/2008, 521/2008, 605/2008, 609/2008 & 1432/2010 and for the petitioner in ITA No.5340/2008.
Mr.Anurag Ahluwalia, CGSC for UOI in ITA No.5340/2008.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE A. K. CHAWLA

S. RAVINDRA BHAT, J.

1. This judgment will dispose of Writ Petition (Civil) No. 5340/2008 ("the writ petition" and several appeals (ITA No. 605/2008 for assessment years ("AYs") 1998-1999, ITA No. 609/2008 for AY 1999-

2000, ITA 521/2008 for AY 2000-2001, ITA No. 1086/2005 for AY 2001-2002, ITA No. 501/2008 for AY 2003-2004 and ITA No. 1432/2010 for AY 2005-2006). The assessee Delhi Public School Society ("DPS Society" or "the Assessee") claims relief against the revenue's ruling dated 30.04.2008, rejecting its application under Section 10(23C)(vi) of the Income Tax Act, 1961 ("the Act" hereafter) for grant of exemption, in the writ petition; the appeals have been preferred by the the income tax department under Section 260A of the Act, (hereafter "the revenue") against orders of the Income Tax Appellate Tribunal ("ITAT").

Facts and Contentions

2. The assessee is aggrieved by the rejection by the DGIT of its application grant of exemption for assessment years 2008-09 onwards, as a charitable organization. The assessee is a society registered under the Societies Registration Act, 1860 with the Registrar of Societies, Delhi. It has established 11 schools and has also permitted societies/ organizations/ trusts with similar objects to open schools under the name of "Delhi Public School", in and outside India. As on date, 120 schools are functioning under that name in and outside India as on date. The arrangement for opening schools by other societies is through execution of an "education joint venture agreement" (hereinafter, also referred to as "agreement"). In terms of the agreement, the parties jointly agree to manage the school where the Assessee has a significant say and control in the management of these schools.

3. The main object of DPS Society as detailed in their memorandum of association is as follows:

"*(i) to establish progressive schools or other educational institutions in Delhi or outside Delhi, open to all without any distinction of race or creed or caste or special status with a view.*
(ii) to impart sound and liberal education to boys and girls during their impressionable years - a type of education that will lay stress on character building, team work, esprit de corps, physical development and will infuse in school children a spirit of adventure, fair play and justice.
(iii) to develop among its students a feeling of pride in Indian culture and to produce citizens who will be truly Indian and will rise above social, communal, religious or provincial prejudices."

4. The Assessee had been enjoying exemption, in respect of its income under section 10(22) of the Act since assessment year 1977-78 till assessment year 2007-08. In view of the change in law Section 10(22) of the Act was substituted by Section 10(23C)(vi) with effect from 1st April, 1999, the assessee applied in (Form 56D) requesting for approval of exemption, under Section 10(23C)(vi) on 16.4.2007 for AY 2008-09 onwards. The Additional Director of Income Tax (E) issued show cause notice to the assessee directing it to file requisite evidence in support of the claim for exemption under section 10(23C)(vi) of the Act. In response, the assessee stated that it received maintenance charges from the 120 functional schools it runs (also called the satellite schools)in terms of education joint venture agreements that it enters into with the satellite schools, for providing services to such schools. It also stated that the maintenance charges received by it were not *in lieu* of a franchise of its name and logo, but towards a number of obligations discharged by it which were all in the course of imparting education.

5. The Additional Director of Income Tax, by order dated 30.4.2008, rejected the assessee's application under Section 10(23C)(vi) of the Act seeking exemption, on the grounds that, *inter alia*, the franchisee fee received by it from the satellite schools *in lieu* of its name, logo and motto amounts to a "business activity" with a profit motive and certain clauses of the assessee's Memorandum of Association were not in conformity with its objectives. The Assessee contests this order in the writ petition.

6. Mr. Syali, learned senior counsel submitted that *arguendo*, even if the activity of entering into agreement were to be construed as business activity, it is incidental to the attainment of its object, and that it would be entitled to exemption under section 10(23C)(vi) of the Act. It is urged that considering that the receipts from such activity were ploughed back for pursuing the objects of the Assessee. This entitled it to claim the exemption. The decision of the Supreme Court, reported as *ACIT v. Thanthi Trust* 247 ITR 785 was cited in this regard. There it was held that:

> "*The substituted sub-section (4A) states that the income derived from a business held under trust wholly for charitable or religious purposes shall not be included in the total income of the previous year of the trust or institution if "the business is incidental to the attainment of the objective of the trust or, as the case may be, institution" and separate books of account are maintained in respect of such business. Clearly, the scope of sub-section (4A) is more beneficial to a trust or institution than was the scope of subsection (4A) as originally enacted. In fact, it seems to us that the substituted sub-section (4A) gives a trust or institution a greater benefit than was given by section 13(1)(bb).*
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> *...*

As it stands, all that it requires for the business income of a trust or institution to be exempt is that the business should be incidental to the attainment of objectives of the trust or institution. A business whose income is utilised by the trust or the institution for the purposes of achieving the objectives of the trust or the institution is, surely, a business which is incidental to the attainment of the objectives of the trust."

7. As far as the maintenance of separate books of account is concerned (as required by Section 10 (2) (vi)), Mr. Syali, learned counsel for the assessee argues that the such mandate was complied as it maintained a separate account styled the "Secretary's Office" in which the receipts towards reimbursement to the assessee for common expenses from various schools with which it had entered into agreement to provide services were duly accounted for and incorporated. This, the Assessee contended, was in sufficient compliance with the meaning of section 11(4A) of the Act. Similarly, clauses (c) and (g) of the memorandum of association, which were alleged to not be in conformity with the objects of the Assessee, were undertaken in furtherance of DPS Society's objectives.

8. The assessee also relied on the decision reported as *Commissioner of Income Tax v. Gujarat Maritime Board* 295 ITR 561 where the Supreme Court, while deciding on the issue of similar registration of charitable trusts under section 12A of the Act, held that if the objects are *per se* charitable, the Revenue was duty bound to register the assessee trust/ society in terms of section 12A of the Act. Likewise, the decision of *American Hotel & Lodging Association Educational lnstitute v. Central Board of Direct Taxes & Ors*(2008) 301 ITR 86 was relied on, where the

Supreme Court while allowing the appeal of the petitioner assessee and remanding the matter to the Central Board of Direct Taxes to reconsider afresh the assessee's application for approval under section 10(23)(C) of the Act, *inter alia*, observed that at the stage of granting approval, the compliance of threshold condition needs to be seen, *viz.*, actual existence of an educational institution etc.

9. It is argued that the DPS society's general objects relating to education and education related activities have to be construed in their natural manner and thus, would include its entering into arrangements to provide consultancy and other related services, that are entirely education centric, to schools which are established by other societies or entities, but are engaged in imparting education. The DPS society's role is to help those schools to maintain a level of proficiency in teaching and education, and enable them to be described as DPS schools. This would in fact be part of the DPS society's objective of imparting education and providing access to schools to a wider section of the population, not only those which are in Delhi or National Capital Territory, or those directly established and administered by the assessee, but others who follow its pattern of administration and imparting education. The proceeds of such maintenance charges received by the DPS society are used directly by it for the society's activities in imparting education in its schools.

10. In the appeals, the revenue primarily contended the impugned orders of the ITAT whereby, the ITAT deleted the additions of various amounts for the assessment years of 1998-1999, 1999-2000, 2000-2001, 2001-2002, 2003-2004 and 2005-2006, made respectively by the Assessing Officer, holding that the income received by the assessee in

each such case as a "franchisee fee" was exempt under section 10(23C)(vi) of the Act and that the provisions of section 11(4A) of the Act were not applicable to any of these cases. The generic facts that lead to filing of these appeals are that returns were filed by the assessee declaring income as "Nil", for the abovementioned assessment years, however assessment was framed by the AO under Section 143(3) at an income of varying values, for each of the assessment years. The CIT(A) allowed the assessee's appeals and deleted the sums brought to tax, by the Assessing Officer, against which the revenue went in appeal before the ITAT, which upheld the order passed by the CIT(A). Subsequently, a notice under section 148 was issued to the assessee on the ground that in the respective assessment year, the AO had treated the franchisee fee charged from the satellite schools as business activity and thus, a taxable business income; the CIT(A) had also upheld this addition.

11. In response to such notice, the Assessee filed the return declaring income at "Nil". During the assessment proceedings, the Assessing Officer noticed that the Assessee had received a certain amount towards franchisee fee from various schools. The Assessing Officer enquired the Assessee regarding why the receipts from the satellite schools were not to be treated as business income for profit motive so as to tax at maximum marginal rate as was held in previous assessment years. The Assessee contended that it was granted exemption under section 10(23C)(vi) of the Act by various notifications issued up to and including assessment year 2007-2008. It was also contended that the account maintained under the head "Society Maintenance Receipts" in Secretary's office ledger maybe treated as separate books of accounts maintained by the Assessee in

respect of business income from satellite schools.

12. However, on perusal of details, it was contended that the Assessing Officer observed that the assessee was engaged in a systematic business activity purely on commercial terms by charging varied amounts from different schools depending upon the place and the time of opening of such school and was not constant for all the satellite schools. These charges were received by the Assessee for using the name of "Delhi Public School" by the satellite schools in and outside India and no separate books of accounts were maintained by the assessee for this business activity as required under section 11(4A) of the Act. Accordingly, the Assessing Officer held that the activity carried out by the assessee was not incidental to attainment of the objects of the trust but for profit motive.

13. The AO held, for AY 2001-02 (which was decided first) that the activity charging franchisee fee could not be regarded as charitable activity within the meaning of section 2(15) of the Act and therefore, the Assessee was held to be not entitled to benefit under section 11 of the Act, also due to contraventions of provisions of section 11 (4A) of the Act. Accordingly, it was held that the amounts received by the Assessee as franchisee fee from various schools was held to be a business income chargeable to maximum marginal rate of tax. The relevant findings of the AO are extracted below:

> *"On a bare perusal of the provisions of the said section it is clear that profit and gains of the business shall not be eligible for exemption us 11(1), (2), (3) and (3A) unless such business is incidental to the attainment of the*

object of the trust and separate books of account are maintained by such trust in respect of such business.

A business can be described as a continuous exercise of an activity. It is done on a systematic basis with the object of making profit. It involves repletion of the activity done with some real, substantial, systematic and organized conduct with a set purpose. It is business activity which is capable of producing profit and deriving income. It involves commercial exploitation of the properties. No single factor is decisive as it is the overall circumstances which are important to define business. In the present case the society is engaged continuously in granting licenses to permit opening of school by other society bodies at various places. Consideration are being charged in lieu of permission use its name. There is a provision for increasing the same on an annual basis. Number of such satellite schools have increased to more than 100 upto FY 2002-03. The Society in its pursuit of granting such licenses has engaged into an organized systematic and continues activity with a profit motive. The name of Delhi Public School has been commercial used. These all are decisive in concluding that the said activity of the society is business in nature. The society on its part makes available, its expertise in running of school by providing know-how, educational material, training etc. All other functions are to be performed by the second parties. These are typical ingredients of a franchise agreement. In view of these facts it is concluded that the activity of the society of giving licenses to permit to run satellite schools in the name of Delhi Public School is in the nature of business activity. The submission of the assessee that in past years such receipts have not been treated as business receipts have no force as each year is a separate and independent year.

Further specific queries have been made to the AR to submit whether separate books of account are maintained for the income received on account of giving permission to open satellite schools and receiving of workshop fee. No specific reply was submitted. It was submitted that it would

be difficult to apportion the expenses pertaining to such activity. It shows that whatever expenses pertaining to the activity of providing licenses to open schools in the name of Delhi Public school have been mixed with other expenses. It means no separate books of account are maintained by the society in respect of business income from satellite schools. All the affairs of society are controlled through single books of account.

Further Memorandum of Association of the society has been gone through. In this regard, the relevant object clause of the society is reproduced as under:-

> *"To establish progressive schools or other educational institutions in Delhi or outside Delhi open to all without any distinction of race or creed or caste or special status with a view:*

On perusal of the said object clause, it is no where provided that grant of licenses on commercial basis to other societies bodies to open schools at other places is a stated object. It is only provided to establish school institute by the society by itself. The activity of the society to use its name commercially for permitting other entities to open schools cannot be considered as a falling within the sphere of incidental to attainment of objects of the society. This is purely a commercial pursuit. The act of giving licenses to use the name of Delhi Public School against financial consideration does not fall within the ambit of activity incidental to attainment the object of the society. It is purely a commercial and independent activity with profit motive and cannot be related with aims and objects of charitable nature.

In view of these facts it is clear that the society has itself engaged during the year into a business activity of earning maintenance charges and workshop fee in respect of which no separate books of account are maintained as is required u/s 11(4A) of the IT Act, 1961 and this activity is not incidental to attainment of the objects of the trust. Therefore, amount of Rs.1,49,92,288 being profit and gains

of such business activities is not covered under the exceptions provided u/s 11(4A) of IT Act and therefore is not found eligible for exemption us 11 of the IT Act."

Against this order, the assessee filed an appeal before the CIT(A) who confirmed the AO's order. The assessee approached the Income Tax Appellate Tribunal (ITAT), which accepted its contention and held that the activities (in providing services and collecting maintenance charges) were not business. The relevant observations of the ITAT for the earliest year decided by it, are as follows:

"13. The provisions of Section 10(23-C)(vi), refers to "any income" and is therefore larger in scope than the provisions of Section 11 of the Act. It is not the case of the AO that the Assessee did not exist solely for educational purposes. The prescribed authority before Issue of notification will be the sole judge on the question whether the assessee exists solely for educational purposes and that it does not exist for profit. The Revenue authorities seems to have proceeded by framing a question whether the activity of running satellite schools on a license basis charging a fee amounted to carrying on a business or not, This was not the right line of enquiry. Even a proviso u/s 10(23C)(vi) permits an institution referred to in the main section to carryon business, The said proviso reads as follows:

14. The real question for determination is therefore whether the education exists solely for the purpose of education and not for the purpose of profit. In this regard we have also perused the copy of the notification dt. 8.7.04 issued by the Director General of Income Tax (Exemption, New Delhi). The assessee has been duly approved as an Educational Institution for the purpose of sub. Clause (vi) of Clause 23C of Sec. 10 of the I.T Ace As already stated, any income of an educational institution notified u/s 10 (23C)(vi) is exempt. In view of the notification referred to above, there

can be no question of bringing to tax the amounts received from the collaborators school by terming the said receipts as business income. We also find that one of the objects of the assessee is to establish progressive schools or other educational institutions in Delhi or outside Delhi. Perusal of the agreement under which satellite schools were being set up by the assessee, also shows, that apart from allowing the satellite schools to use the name of Delhi Publish School and its Logo and Moto, the assessee also undertakes rendering of several services. These services include imparting of education and providing the necessary staff to impart education. By no stretch of imagination can it be said that the purpose sought to be achieved through this agreement for establishing satellite schools is not educational. Apart from the above, the prescribed authority having satisfied itself that the assessee exists for educational purposes and not for the purpose of profit, has thought it fit to approve the assessee for the purpose of applicability of provisions of sec. 10(23C)(vi) of the Act. The Hon'ble AP High Court in the case of Governing. Body of Rangaraya Medical College Vs ITO reported in 117 ITR 284 (AP) had anoccasion to consider the meaning of the expression, "for the purposes of profit", in the context of the applicability of exemption provisions. The Hon'ble High Court had held that where a society exists for educational purposes but some surplus arises from the societies operations, it cannot be said that the institution was run for the purpose of profit so long as no person or individual was entitled to any portion of the said profit and the said profit was utilized for the purposes and for the promotion of the objects of the institution. In the present case, it is not the complaint of the AO that the receipts from satellite schools had been utilized for distribution to any individual. So long as no person or individual is entitled to any portion of the profit, the profit can be said to be used only for the purposes of promotion of the objects of the institution. A useful reference can also be made to the case of ACIT vs Thanti Trust reported in 247 ITR 785 (SC)- The Hon'ble Supreme Court laid down that a

public charitable trust which holds a business, as a part of is corpus may carry on business. Even without the business being the part of the corpus of the trust it may carry on business. So long as the business carried on is in the course accomplishing the primary purposes of the trust and the income from such business is utilized for the purpose of achieving the objects of the trust or institution, the requirement of sec.11 are satisfied. The Hon'ble High court of Delhi in the case of CIT vs Delhi Kannada Education Society reported in 246 ITR 731 also held that if the income is from an educational institution, which exits solely for educational purposes and not for the purpose of profit then that income would be entitled to exemption, so long as the income is directly relatable to educational activity. We have already pointed out as to how the assessee had complied with all the various conditions that have been mentioned in the notification by the prescribed Authority u/s 10(23C)(vi) of the Act. For the reasons given above, we are of the view that the provisions of sec. 11(4A) of the Act were not applicable in the present case.

15. With regard to the separate Books of account, it is seen that the assessee had maintained a separate account under the heading "Secretary's office". In this account, the receipts towards reimbursement to the society for common expenses from various schools with which it had entered into agreement' to provide services have been duly incorporated. A complete set of accounts of the society had also been furnished before the AD. Apart from the above, The Chandigarh Bench of the Tribunal in the case of ITV vs Trilok Tirath Vidyavati Chuttani Charitable Trust has held that the purposes of maintaining separate books of account is only to enable the AO to find out true income and also whether the assessee fulfills the conditions laid down u/s 11 for exemption and also whether running of such undertakings is for profit motive or incidental to the object-to the trust. The Bench held that it is not mandatory and non-maintenance of separate books of account shall not prove fatal to the claim of the assessee for exemption u/s 11.

As already observed, a separate set of books of accounts were' maintained by the assessee showing the receipts towards reimbursement of the expenses from the various other schools.

16. In view of the above, we are of the view that revenue authorities were not justified in bringing to tax the amount received by the assessee from the satellite schools. The addition is therefore directed to be deleted."

In the case of the Assessee for some previous assessment years and later years, the revenue authorities had held that the amounts received were business income, and brought them to tax. The CIT (A) followed the ITAT's earliest order and held that the franchisee fees received by the Assessee was not liable to tax.

14. Aggrieved by these orders, the revenue filed an appeal before the ITAT which relied upon its previous order in the case of assessee for AY 2001-2002 and deleted the amounts brought to tax by the AO. The ITAT held that the said income amounts received by the assessee as franchisee fee was exempt 10(23C)(vi) of the Act, and provisions of section 11(4A) of the Act were not applicable in the present case.

15. The revenue appeals these orders of the ITAT whereby, amounts brought to tax by AO were deleted, holding that the amounts of income received by the Assessee as franchisee fee were exempt under section 10(23C)(vi) of the Act, and provisions of Section 11(4A) of the Act were not applicable to these cases. This batch of income tax appeals raise the following questions of law:

"a) Whether the ITAT was correct in law in holding that the franchisee fee received by the Assessee from satellite schools were exempt under section 10(23C)(vi) of the Act?

b) Whether income received by the Assessee from satellite schools was a business income so as to be hit by the provisions of section 11(4A) of the Act?

c) Whether orders passed by ITAT are perverse in law when it held that the provisions of Section 11 (4A) were not attracted when the Assessee itself had made claim under section 11 of the Act and that the provision similar to Section 11 (4A) are also incorporated in the 7th proviso to Section 10(23C) of the Act?"

16. Ms. Vibhooti Malhotra, learned counsel for the revenue, argued that clearly, the so called services provided by the DPS society to the other schools were not charitable but business. Whether it related to management of schools or provision for curricula or the system of administration, they were not "education" and amounted to a separate line of activity, which the lower revenue authorities correctly surmised, were purely for profit. She highlighted that the significant change introduced by the amendment to the provisions were the requirement of maintaining separate books of account. Not only was that requirement ignored, the assessee had created a separate revenue stream.

17. Ms. Malhotra submitted that the so called maintenance charges were in fact nothing more than a franchise fee, for use of the "DPS" trade mark and logo. Consequently, the amounts received were for name lending. She contested the submissions of the society with respect to education in the DPS pattern, provided by the satellite schools, by stating that the record nowhere showed that such schools were charitable in nature or their underlying objectives were not coloured by profit motive. In the absence of any such indication, there could be no conclusion,

except that the amounts were collected in furtherance of a business activity, without complying with the legislative requirement of maintaining separate books of account. It was lastly submitted that the assessee concededly was subjected to service tax and was paying it. She relied on the findings of the Customs Excise and Service tax Appellate Tribunal (CESTAT) in its order, in support of her submission.

18. Mr. Syali, for the assessee relied on the submissions made in support of the writ petition. He submitted that there was evidence to establish that the accounts relating to the Secretary's office was nothing but reflection of the separate audited books of account maintained by the DPS society. It was urged that the CIT (A) and the ITAT had taken note of these books, the accounts for which were separately audited and duly reflected in Schedule XIII of the Balance sheet filed along with the income tax returns. Therefore, the statutory requirements were fulfilled.

19. Learned counsel emphasized that even if it were assumed, for the sake of argument that the assessee was not maintaining books of account, nevertheless, the purpose for which it provided the service to the satellite schools could not be ignored. The underlying purpose was education and to improve its quality in schools that were not managed by the society. This assured the students and those availing of education provided by those schools, the same standard and quality or excellence assured in DPS schools, which did not merely represent "brand" value, but were known for the level of educational attainment of their pupils. Aware of that aspirational value, the DPS society entered into agreements whereby their teachers and education administrators trained teachers in the satellite schools and their management about the DPS methods. The services

provided therefore, had a direct nexus with education and fell within the dominant purpose of the DPS society's objects. Counsel relied on *Queens Educational Society v Commissioner of Income Tax* (2015)] 372 (ITR) 699 (SC), *Commissioner of Income Tax v. Pulikkal Medical Foundation (P) Ltd.* [1994] 210 ITR 299 and *Venu Charitable Society v Director Income Tax* in support of the contention that the dominant object test is applicable; if that were to be applied in this case, that incidentally the society collected charges for education related services provided to other schools would not rob it of the entitlement to be treated as a charitable trust or organization. He highlighted that besides, the arrangement with such outlying or satellite schools had existed since 1977 and the revenue consistently accepted the returns and never questioned the assessee or alleged that such activity amounted to business.

Analysis:

20. The relevant provisions of law involved in the writ petition and these appeals is discussed hereafter. Section 10(22) of the Act, prior to its omission by the Finance (No. 2) Act, 1998, w.e.f. 1.04.1999, is as follows:

> "*10. lncomes 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-*
> ************** *****************
>
> *(22) any income of a university or other educational*

institution, existing solely for educational purposes and nor for purposes of profit."

The subsequently introduced Section 10(23C)(iii) (ad) and (vi) of the Act, are as follows:

"*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—*

…any income received by any person on behalf of—
….
(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;

…

(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

…

Provided also that nothing contained in sub-clause (iv) or sub-clause (v) [or sub-clause (vi) or sub-clause (via)] shall apply in relation to any income of the fund or trust or institution [or any university or other educational institution or any hospital or other medical institution], being profits and gains of business, unless the business is incidental to the attainment of its objectives and separate books of account are maintained by it in respect of such business…

…

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) of section 288 and furnish along with 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:]"

Section 11(4A) of the Act, states as follows:

"*4A) Sub-section (1) or sub-section (2) or sub-section (3) or sub-section (3A) shall not apply in relation to any income of a trust or an institution, being profits and gains of business, unless the business is incidental to the attainment of the objectives of the trust or, as the case may be, institution, and separate books of account are maintained by such trust or institution in respect of such business.*"

21. What emerges from the statutory provisions above, is that when any university or other educational institution exists solely for educational purposes and not for purposes of profit, by virtue of the procedure prescribed, such institutions will be liable to apply for exemption in calculating the total income for the previous year. It is fundamental, such educational institutions have an overarching motive that is educational and not profit- making to fall within this exception. Further, the seventh proviso to Section 10(23C)(vi) incorporates a mandatory requirement that the accounts of such educational institutions ought to be audited in respect of that year and it should furnish the same

along with the return of income for the relevant year.

22. There is a multitude of authorities that have surveyed and analyzed the exemption permitted under Section 10(23C)(vi),which broadly conclude that if the educational institution merely acquires a profit surplus from running its institution, that alone would not belie its larger education purpose. For instance, in *Queen's Educational Society* (supra) the Supreme Court, by citing, *inter alia*, *Aditanar Educational Institution v. Additional Commissioner of Income Tax* (1997) 224 ITR 310, and *American Hotel and Lodging Assn. Educational Institute v. CBDT* (*supra*), focused on the requirements that were germane to qualify for exemption under the erstwhile section 10(22) and the subsequent section 10(23C)(vi) of the Act, namely that: the activities of the educational institution should be incidental to the attainment of its objectives and separate books of account should be maintained by it in respect of such business; primarily to highlight that even if an educational institution indulges in a profit making activity, that does not necessarily subsume the larger educational/ charitable purpose of the organization, in the following words:

> "*Now we entirely agree with the learned Judges who decided these two cases that activity involved in carrying out the charitable purpose must not be motivated by a profit objective but it must be undertaken for the purpose of advancement or carrying out of the charitable purpose. But we find it difficult to accept their thesis that whenever an activity is carried on which yields profit, the inference must necessarily be drawn, in the absence of some indication to the contrary, that the activity is for profit and the charitable purpose involves the carrying on of an activity for profit. We*

> *do not think the Court would be justified in drawing any such inference merely because the activity results in profit. It is in our opinion not at all necessary that there must be a provision in the constitution of the trust or institution that the activity shall be carried on no profit no loss basis or that profit shall be proscribed. Even if there is no such express provision, the nature of the charitable purpose, the manner in which the activity for advancing the charitable purpose is being carried on and the surrounding circumstances may clearly indicate that the activity is not propelled by a dominant profit motive. What is necessary to be considered is whether having regard to all the facts and circumstances of the case, the dominant object of the activity is profit making or carrying out a charitable purpose. If it is the former, the purpose would not be a charitable purpose, but, if it is the latter, the charitable character of the purpose would not be lost.*"

23. Likewise, the test to determine the predominant objective was highlighted earlier, in *ACIT v. Surat Silk Cloth Manufacturers Association* (1980) 121 ITR 1 (SC), by the application of which it was to be adjudged whether the institution existed solely for education and not for profit. This point was re-iterated in *Venu Charitable Society and Ors. v. Director General of Income Tax* (2017) 246 Taxman 396 (Delhi) as follows:

> "*18. The incidental carrying on of commercial activities is subject to certain conditions stipulated under the seventh proviso to Section 10 (23C). They are- (a) The business should be incidental to the attainment of the objectives of the entity and (b) Separate books of account should be maintained in respect of such business.*"

24. In *Queen's Educational Society* (*supra*), the Supreme Court went on to summarize the law that arises under Section 10(23C) as follows:

"*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."

The determining test to qualify for exemption under section 10(23C)(vi), hence, lies in the final motivation on which the institution functions, regardless of what extraneous profit it may accrue in the pursuit of the same. This was amply highlighted in *Aditanar Educational Institution* (*supra*) as follows:

"*We may state that the language of Section 10(22) of the Act is plain and clear and the availability of the exemption should be evaluated each year to find out whether the institution existed during the relevant year solely for educational purposes and not for the purposes of profit. <u>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</u>*

> *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.*"

25. This critical test therefore has a conspicuous qualitative value; the of the objectives of the organization are to be determined not merely by the memorandum of objectives of the institution, but, also from the design of how the profits are being directed and utilized and if such application of profits uphold the "charitable purpose" of the organization (as postulated in section 2(15) of the Act) or if the objectives are marred by a profit making motive that emerges more as a business activity rather than an educational purpose. Section 10(23C)(vi) of the Act while guiding the manner of this determination also, provides a certain amount of discretion to the authority assessing the compliance to these conditions for ascertaining whether the requirements of the provision are met with. Such scrutiny is to be carried out every year, irrespective of any preceding pattern in the assessment of the previous years. This point was highlighted in *American Hotel and Lodging Assn. Educational Institute* (*supra*) as follows:

> "*Therefore, in our view, it is always open to the PA to impose such terms and conditions as it deems fit. The interpretation we have given is based on harmonious construction of the provisos inserted in "Section 10(23C)(vi) by the Finance Act, 1998. Lastly, we may reiterate that there is a difference between stipulation by the Prescribed Authority (PA) of such terms and conditions, as it deems fit under the provisos, and the compliance of those conditions*

by the appellant. The compliance of the terms and conditions stipulated by the PA would be a matter of decision at the time of assessment as availability of exemption has to be evaluated every year in order to find out whether the institution existed during the relevant year solely for educational purposes and not for profit."

26. As can be seen from the present income tax appeals, the prescribed authority has examined the assessee's application for exemption under Section 10(23C)(vi) in light of the recent audits of the assessee's accounts. Although DPS Society, in the earlier years had been granted exemption under section 10(23C)(vi), that itself does not cause for a *res judicata* principle, as examination of the Assessee's audited accounts may be done afresh by the prescribed authority, corresponding to the specific assessment year, as prescribed in the second proviso to section 10(23C)(vi) as follows:

"*...Provided further that the prescribed authority, before approving any fund or trust or institution or any university or other educational institution or any hospital or other 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 such 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 prescribed authority may also make such inquiries as it deems necessary in this behalf.*"

27. Despite this stipulation, the prescribed authority will still have to apply the determinative test of assessing whether the business is incidental to the attainment of the objectives of the entity and whether separate books of account are being maintained in respect of such business, even if the profits received by the assessee as such increase exponentially, if the assessee qualifies this test, they will still be eligible for exemption under section 10(23C)(vi) of the Act.

28. In light of the decisive test for determining eligibility for exemption under section 10(23C)(vi) of the Act, it is apparent that the assertion of the DGIT that the Assessee's activities including charging a franchisee fee could not be regarded as a charitable activity within the meaning of section 2(15) of the Act, and thus, inapplicable for exemption under section 10(23C)(vi) of the Act, has not been adequately substantiated, despite examination of the assessee's audited accounts. The DGIT asserted that the Assessee is carrying out a business activity for profit motives by entering into franchise agreements, whereby, it has opened and is running around 120 schools, and that these charges were received by the Assessee for using the name of Delhi Public School by the satellite schools in and outside India and no separate books of accounts were maintained by the Assessee for the business activity as required under section 11(4A) of the Act. This is *prima facie* not correct, because the assessee has maintained, accounts audited in detail for financial years 2000-2001, 2003-04, 3004-05 and 2005-06. That aspect has been found by the ITAT for those assessment years. Such accounts have been maintained in compliance to what is required under the seventh proviso to Section 10(23C)(vi) and section 11(4A) of the Act.

29. Furthermore, the memorandum of association of DPS Society, as well as the joint venture agreements entered into by DPS Society with the satellite schools validate the motive of an educational purpose that the Assessee aims through its business activities and substantiate its contentions in that regard. On review of the assessee's audited accounts, it can be observed that the surpluses accrued by DPS Society are being fed back into the maintenance and management of the DPS schools themselves. This, reaffirms the Assessee's argument that the usage of the gains arising out of its agreements are incidental to its educational purpose outlined by its objective of the Assessee.

30. The interpretation of section 10(23C)(vi) is one that requires fulfillment of a two pronged test: firstly, that any business activity if carried out by the educational institution applying for exemption should be incidental to their educational purpose, and secondly, that proper accounts of such business activity ought to be maintained, as highlighted above in *Queen's Educational Society* (*supra*). This was also mentioned in *Venu Charitable Society and Ors* (*supra*) as follows:

> "*18. The incidental carrying on of commercial activities is subject to certain conditions stipulated under the seventh proviso to Section 10 (23C). They are- (a) The business should be incidental to the attainment of the objectives of the entity and (b) Separate books of account should be maintained in respect of such business. The memorandum of the petitioner's society clearly states its main objective is to render comprehensive eye care services inclusive of all forms of ophthalmic services. All other activities are incidental to carrying out of this purpose. The petitioner does not carry out any other business but only collaborates with other trusts and institutions. It has maintained its books*

of account as well. So the conditions have been met with. Exemption under the provisions mentioned above will be granted if the main objective of the society is relief of poor, education, medical relief and carrying on of a business with a view to fulfill these objects would not deprive them from such exemption. This was stated in CIT v. Rao Charitable Trust (1976) 102 ITR 474."

31. The authorities in the form of case law referred to above also reiterate that a mere incurrence of (surplus) profit does not automatically presuppose a business activity that invalidates the exemption under section 10(23C)(vi); the same has to be tested on whether such profits are being utilized within the meaning of the larger charitable purpose as defined in section 2(15) of the Act or not. On scrutiny, it can be observed that the accounts marked the heading "Secretary's Account", detail the heads of income and expenditure that cater to the various requirements of running and maintaining the satellite schools. Thus, *arguendo* if it were held that the objected activity were indeed commercial in nature, nevertheless, the realization of profit by the assessee is through an activity incidental to the dominant educational purpose that its memorandum of association sets out, and is in turn being channeled back into the maintenance and management of the same schools, thus, fulfilling the objectives the Assessee has set out in its memorandum of objectives.

32. This court also notices that after the Assessee filed an application for grant of exemption under section 10(23C)(vi) for assessment year 2008-09 onwards, that was rejected; in a notification, the DGIT under section 10(23C)(vi) issued certain conditions which were also duly

fulfilled by the Assessee, as follows:

Sl. No.	***CONDITIONS***	***COMPLIANCE***
I	*The assessee will apply its income or accumulate for application wholly and exclusively to the objects for which it is established.*	*The society as in the past has applied its income wholly and exclusively to the object for which it was established. Never in the past has there been violation in respect of application of income by the society.*
II	*The assessee will not invest or deposit its funds (other than voluntary contributions received and maintained in the form of jewellery, furniture etc.) for any period during the previous years relevant to the assessment years mentioned above otherwise than in any one or more of the forms or modes specified in subsection (5) of section 11.*	*Complied with*
III	*This order will not apply in relation to any income being profits and gains of business unless the business is incidental to the attainment of objectives of the assessee and separate books of accounts are maintained in respect of such business.*	*The society has not carried on or engaged itself in any business. It was only in furtherance of this object that the society had been and is assisting the other schools to set up their institutions to be run on the model of the schools run by the society. Imparting of education is not the business of the society. What the society receives is towards reimbursement of its expenses from such schools to whom the assistance has been given. This does not remotely amount to profit motive of the society. No members of the society get any monetary benefit from the society.*
IV	*The assesse will regularly file its Return of Income before the Income Tax Authority in accordance with the provisions of the Income Tax Act, 1961.*	*The society had been filing its return of income regularly since inception and continues to file its return and has filed its returns upto and including A. Y. 2007-08.*

V	*That in the event of dissolution, its surplus and the assets will be given to charitable organization with similar objective and no part of the same will to any of the trusts of The Delhi Public School Society, DPS Staff Flats, F Block, East of Kailash, New Delhi.*	*Though there is no possibility of the dissolution of the society, however, in the event of dissolution, the funds will be given to charitable organization(s) with similar objective and no part of the same will be distributed to any of the trustees.*

33. In view of the above analysis, it is concluded that the assessee fulfilled the requirements under section 10(23C)(vi) of the Act to qualify for exemption; DPS Society is maintaining its eleven schools and the 120 satellite schools in furtherance of the education joint venture agreements with an educational purpose that also qualifies as a "charitable purpose" within the meaning of section 2(15) of the Act and is not in contravention of section 11(4A) of the Act.

34. This court feels compelled to observe that Section 10(23C)(vi) ought to be interpreted meticulously, on a case-to-case basis. This is because, the larger objective of an educational/ charitable purpose of the institution and its manifestation can only be subjectively adjudged; for instance, in the present situation, the balance sheets of the assessee demonstrate how the profits are utilized for the growth and maintenance of the very schools they are accrued from, thus, subscribing to a charitable motive. However, the educational institutions may take more creative steps to qualify their objectives as an "educational purpose" that is more universal than the individual objectives set out in the memoranda of objectives of such institutions. For instance, a percentage of profits earned from a business activity indulged in by such an educational institution may be mandated towards fructifying the implementation the

provisions of the Right to Education Act, 2009, particularly, to create a more sensitive learning environment for children with disabilities in implementation of the provisions in the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995, or have a system to analyze the ratio of inflow of money over progressive assessment years as opposed to how much of this money is channeled back into the growth and maintenance of such educational purpose, in order to put in place a visible system of accountability. This is an observation, to ensure that the purpose for which section 10(23C)(vi) of the Act was introduced, is adequately fulfilled and not disadvantageously circumvented by vested parties.

35. For the foregoing reasons, the writ petition has to succeed. The questions of law framed for the appeals are answered in favour of the assessee and against the revenue. Accordingly, the assessee's writ petition (Writ Petition (Civil) No. 5340/2008) is allowed and all income tax appeals (ITA No. 605/2008; ITA No. 609/2008 ITA 521/2008; ITA No. 1086/2005; ITA No. 501/2008; and ITA No. 1432/2010) are dismissed. There shall be no order as to costs.

S. RAVINDRA BHAT, J

A. K. CHAWLA, J

APRIL 03, 2018