A.F.R.

HIGH COURT OF ORISSA: CUTTACK

W.P.(C) No. 2444 of 2011

In the matter of an application under Articles 226 and 227 of the Constitution of India.

Orissa Trust of Technical Education and Training,
At: Prasnagarbha,
S-3, 68, 69 and 83,
Sector-A, Zone-B, Mancheswar Industrial Estate,
Bhubaneswar,
Dist: Khurda ... Petitioner

-Versus-

Chief Commissioner of Income Tax, Orissa
and another ... Opp. Parties

For Petitioner : M/s. R.P.Kar, A.N. Ray, P.K. Mishra, M.S. Raman & K.K. Sahoo

For Opp. Parties : Mr. A.K. Mohapatra, Standing Counsel [Income Tax]

P R E S E N T:

THE HONOURABLE THE CHIEF JUSTICE SHRI V.GOPALA GOWDA
AND
THE HONOURABLE SHRI JUSTICE B.N.MAHAPATRA

Date of Judgment: 31.07.2012

B.N.Mahapatra,J. This writ petition has been filed with a prayer to quash order dated 30.09.2010 (Annexure-5) passed by opposite party No.1-Chief Commissioner of Income Tax (for short, "Chief Commissioner") by

which the application of the petitioner made in Form 56-D for grant of approval for exemption under Section 10(23C)(vi) of the Income Tax Act, 1961 (for short, "Act, 1961") for the financial year 2008-09 has been rejected on the ground that the fees collected by the petitioner under head "Placement and Training" are well within the scope of law as has been prescribed and published through notification in Official Gazette by the Government of Orissa, Industry Department.

2. Petitioner's case in a nutshell is that the petitioner is a Trust registered under the Indian Trust Act and in consonance with one of its objectives, it has established two Educational Institutions i.e. Bhubaneswar Institute of Management and Information Technology and Indian Institute of Science and Information Technology for imparting Higher Education in MBA and MCA courses respectively. The aforesaid two institutions have been established with the sole intention to provide higher education only without having any profit motive. These institutions are running to impart world class environment and training to enable the youth of India belonging to all sections and strata of the society to give a foot hold and place in the international market. Therefore, these institutions come within the scope and ambit of Section 10(23C)(vi) of the Act, 1961. As per the said provision, the petitioner filed an application vide Annexure-2 in Form No.56-D with the Chief Commissioner for grant of exemption under Section 10(23C)(vi) of the

Act, 1961 for the financial year 2008-09. While adjudicating the petitioner's claim, the Chief Commissioner directed opposite party No.2-Commisisoner of Income Tax to make an inquiry and submit a report on the actual activity of the petitioner. Accordingly, an inquiry was conducted by opposite party No.2, records were examined and finally being satisfied a report regarding the two institutions of the petitioner was submitted. After receipt of the report from opposite party No.2, the Chief Commissioner issued notice to the petitioner for hearing and during the course of hearing the petitioner produced various documents as directed by opposite party No.1. Those documents are;

(a) The manner of receipt of fees and heads of receipt from the students and the Books of Accounts,

(b) Copies of the Notification of the Government of Orissa, Industry Department prescribing fees to be charged under different heads,

(c) Copy of the audit report showing details of receipt and expenditure made for educational activities, and

(d) Letter of Approval granted by the AICTE

Before the Commissioner, the petitioner has also explained the details of activities which are in consonance with the law governing the field and which make it eligible to be granted exemption under Section 10(23C)(vi) of the Act, 1961. However, the Chief Commissioner has rejected the

application of the petitioner for approval of exemption under Section 10(23C)(vi) of the Act, 1961. Hence, the present writ petition.

3. Mr. R.P. Kar, learned counsel appearing on behalf of the petitioner submitted that the aforesaid two institutions have been duly approved by the All India Council for Technical Education (for short, (AICTE) for conducting MBA and MCA Courses. The Chief Commissioner without appreciating and analyzing the law in its proper perspective and the documents produced before him, rejected the application for approval of exemption under Section 10(23C)(vi) of the Act, 1961. The rejection order passed by the Chief Commissioner is wholly untenable. The petitioner has collected placement and training fees in accordance with the notification of the Government of Orissa, Industries Department. The said notification as would be evident is in pursuance of exercise of power of the State under the provisions of the Orissa Professional Educational Institutions (Regulation of Admission and Fixation of Fee) Act, 2007 and consequent upon the interim order dated 01.06.2007 passed by the Hon'ble Supreme Court in S.L.P.(Civil) No.10318 of 2007 and in three others and interim order of the Hon'ble Supreme Court dated 18.06.2007 in Civil (Appeal) No.2872 of 2007 envisaging a Fee Structure Committee to be constituted for determination of fee. The Committee so constituted recommended the fees under different heads which would be charged for the Academic Session 2007-08. Under Clause (1), a ceiling limit was fixed

for certain costs which could be levied including placement fee by the institutions. The Legislature of the State of Orissa enacted the Orissa Professional Educational Institutions (Regulation of Admission and Fixation of Fee) Act, 2007 (for short, "Act, 2007") to provide for the regulation of admission and fixation of fee, prohibition of capitation fee, reservation in admission and for other measures to ensure equity and excellence in professional educational institutions and for the matters connected therewith or incidental thereto.

4. Mr. Kar, further argued that in *Islamic Academic of Education and others vs. State of Karnataka, AIR 2003 SC 3724,* it was held that two Committees for monitoring the admission procedure and determining fee structure in professional Educational Institutions are permissible as regulating measures. Thereafter, the Hon'ble Supreme Court in *P.A. Inamdar and others vs. State of Maharashtra, AIR 2005 SC 3226,* held that it is for the Central Government or for the State Governments, in absence of a central legislation, to come out with detailed thought out legislation on the subject. Thus, the State of Orissa has enacted the Act, 2007 in line with the observations of the Hon'ble Supreme Court in the cases referred to supra. The Act, 2007 was challenged before this Court in W.P.(C) No.3689 of 2007 and this Court by judgment dated 18.05.2007 declared it unconstitutional. The said judgment of this Court dated 18.05.2007 was challenged by the State

before the Hon'ble Supreme Court in S.L.P.(Civil) No.10318 of 2007 and by order dated 01.06.2007, the Hon'ble Supreme Court constituted the policy planning body and so also the "Fee Structure Committee" and directed that other provisions of the Act shall continue to be in force. In the aforesaid background the notifications of the Government of Orissa Industries Department vide Annexure-4 was published for the Academic Session 2007-08. The said notification is holding the field and is the law insofar as the collection of fees under different heads is concerned. The Chief Commissioner has relied on the Government of India Resolution for fee structure, 1997 and the Government of Orissa Industries Department Resolution dated 17.09.1998, to come to a conclusion that fees collected towards placement and training is in excess of what was prescribed by the said resolutions. Thus, the resolution relied upon by the Chief Commissioner no more holds the field in view of the Act, 2007 and the order of the Hon'ble Supreme Court dated 01.06.2007 and subsequent notification vide Annexure-4 issued by the Industries Department. The resolution of 1997 and dated 17.09.1998 relied upon by the Chief Commissioner as aforesaid has become redundant and non-est. The concept and recommendation for charging a "placement and training fee" came with effect from 2007 vide Annexure-4 and is very much for educational purpose and cannot be held otherwise and in the least can ever be considered as a profit earning by the petitioner's institution.

Therefore, the said fee collection is for educational purpose only as envisaged under Section 10(23C)(vi) of the Act, 1961.

5. It was argued that the institutions are obliged to see the placements of its students as per the AICTE Guidelines and train them accordingly. The fee for the same has been permitted to be collected which is for educational purpose. The subsequent notification dated 20.09.2010 is also in similar lines with a ceiling on optional cost to be collected from the students and also provided for collecting "placement and training fee". The Notification vide Annexure-4 also provides that Colleges are not allowed to charge any other optional costs in any other name other than prescribed and if any institution has collected any other fee in any name guise, the same will entail in withdrawal of NOC by the AICTE and levy of penalties as per the Act, 2007. The placement and preplacement training is a part of the curriculum and has been recognized by the AICTE. A perusal of the approval letter of the AICTE and Clause (4) of the General Conditions thereof would go to show that other fees shall be charged as prescribed by the competent authority. The placement fee comes within the category of "other fee" collection of which has the approval of the Fee Structure Committee which is the competent authority. Therefore, placement and training is a mandatory condition for grant of approval and collection of the fee for it is a part of the curriculum and an educational activity of the Institution.

6. Mr. Kar further submitted that the case laws relied upon by the Chief Commissioner have been misinterpreted by him. He has held that a legally prescribed mandatory educational activity is not to be prescribed by relying on the resolutions which no more hold the field. Therefore, the case needs reconsideration by the said authority in the interest of justice. The observation of the Chief Commissioner is that the petitioner is engaged in non-educational activity like horticulture and generating income from the same is a misunderstanding of facts. There were standing Coconut and mango trees in the land acquired by the petitioner for establishment of the Educational Institutions. In order to maintain a salubrious and green environment the trees were not cut down but maintained. The petitioner has reflected the receipt in its income and expenditure Account and the amount of Rs.15,000/- received has been utilized in the educational activities of the Institutions and for infrastructural development and the same cannot be termed as a profit earned to deny the benefits of Section 10(23C)(vi) of the Act, 1961. It is also submitted that the income earned by the Trust has been applied wholly and exclusively for educational activities of the Institution itself and not otherwise. The Chief Commissioner has recorded observations that the petitioner is having one non educational objective i.e. item No.16 at page 13 of the Trust Deed. The petitioner has drawn out different objectives but for the present it is only involved in one of the

objectives i.e. establishment of Educational Institutions and running them on a no profit basis. The present activity for which the exemption is sought for is the educational institutions established and for nonelse. Concluding his argument Mr. Kar, submitted that the case of the petitioner requires for reconsideration in its proper perspective.

7. Per contra, Mr. A.K. Mohapatra, learned Standing Counsel appearing for the Income Tax Department vehemently argued that there is no illegality and infirmity in the order of the Chief Commissioner. The order passed by the Chief Commissioner is a reasoned order as per Section 10(23C)(vi) of the Act, 1961. It was submitted that the institutions must exist solely for educational purposes. Since the petitioner has other objectives, which are not connected with education, the Chief Commissioner is justified in not granting approval under Section 10(23C)(vi) of the Act, 1961. The very fact of collection of fees under the head other than educational purpose, disentitles the petitioner to avail exemption under Section 10(23C)(vi) of the Act, 1961.

8. On the rival, factual and legal contentions advanced by the parties, the questions which fall for consideration by this Court are as follows:

(i) Whether the petitioner Trust is existing solely for educational purpose and not for the purpose of profit so that the income received by it shall not be included in

computing its total income for the financial year 2008-09 ?

(ii) Whether opposite party No.1-Chief Commissioner is justified in not granting approval under Section 10(23C)(vi) of the Act, 1961 for the financial year 2008-09 ?

9. Since both the aforesaid questions are interlinked, they are dealt with together.

10. To deal with the aforesaid two questions, it is necessary to know what is contemplated in Section 10(23C)(vi) of the I.T. Act. The same is extracted below:

> "**10. Incomes not included in total income**
> In computing the total income of a previous year of any person, any income falling within any of the following clauses shall not be included —
> xx xx xx
>
> (23C) any income received by any person on behalf of —
> xx xx xx
>
> (vi) any university or <u>other educational institution existing solely for educational purposes and not for purposes of profit</u>, other than those mentioned in sub-clause (iiiab) or sub-clause (iiiad) and which may be approved by the prescribed authority".
> xx xx xx
>
> (Underlined for emphasis)

A plain reading of Section 10(23C)(vi) of the I.T. Act makes it amply clear that in order to be eligible for exemption under Section 10(23C)(vi) of the I.T. Act, the following conditions are to be satisfied:

(i) there must be an educational institution,

(ii) such university or other educational institution must exist solely for educational purposes,

(iii) it should not exist for the purposes of profit, and

(iv) approval by the prescribed authority.

The prescribed authority as per Rule 2CA(1) of the Income Tax Rules, under sub-clause (vi) of Section 10(23C) shall be the Chief Commissioner or Director General, to whom application shall be made.

11. At this juncture, it is necessary to know some of the relevant provisos of Section 10(23C)(vi) of the I.T. Act for our present purpose.

The first proviso provides that the other educational institution shall make an application in the prescribed form and manner to the prescribed authority for the purpose of grant of exemption or continuance thereof.

The second proviso provides that the prescribed authority before approving the other educational institution may call for such documents including audited annual account or information from the educational institution as it thinks necessary in order to satisfy itself about genuineness of the activities of other educational institution. The

prescribed authority may also make such inquiries as it deems necessary in that behalf.

The third proviso provides that the income of a university or educational institution should be applied or accumulated for application wholly and exclusively to the objects for which it is established. Clause (b) of the third proviso states that the cash must be invested or deposited in one or more of the forms or modes specified in sub-section (5) of Section 11.

The seventh proviso to Section 10(23C) provides that nothing contained in sub-clause (vi) shall apply in relation to any income of the university or educational 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.

The 12th proviso provides that where the other educational institution does not apply its income during the year of receipt and accumulates it, any payment or credit out of such accumulation to any trust or institution registered under Section 12AA or to any fund or trust or institutions or any university or other educational institution or hospital or other medical institutions shall not be treated as application of income to the objects for which such fund or trust or institution or

university or other educational institution or hospital or other medical institutions as the case may be is established.

12. The Hon'ble Supreme Court referring to its earlier decision in the case of *Surat Art Silk, (1980) 2 SCC 31,* considered the provision of Section 10(23C)(vi) in *American Hotel & Lodging Association Educational Institute vs. CBDT*, (2008) 301 ITR 86 (SC) and made the following observations:

> "With the insertion of the first proviso, the prescribed authority is required to vet the application. This vetting process is stipulated by the second proviso. It is important to note that the second proviso also indicates the powers and duties of the prescribed authority. While considering the approval application in the second proviso, the prescribed authority is empowered, before giving approval, to call for such documents including annual accounts or information from the applicant to check the genuineness of the activities of the applicant-institution. Earlier that power was not there with the prescribed authority.
>
> Under the third proviso, the prescribed authority has to ascertain while judging the genuineness of the activities of the applicant-institution, as to whether the applicant applies its income wholly and exclusively to the objects for which it is constituted/ established.
>
> Under the 12th proviso, the prescribed authority is required to examine cases where an applicant does not apply its income during the year of receipt and accumulate it but makes payment there from to any trust or institution registered under section 12AA or to any fund or trust or institution or University or other educational institution and to that extent the proviso states that such payment shall not be treated as

> application of income to the objects for which such trust or fund or educational institution is established. The idea underlying the 12th proviso is to provide guidelines to the prescribed authority as to the meaning of the words "application of income to the objects for which the institution is established". Therefore, the 12th proviso is the matter of detail. The most relevant proviso for deciding this appeal is 13th proviso. Under that proviso the circumstances are given under which the prescribed authority is empowered to withdraw the approval earlier granted. Under that proviso, if the authority is satisfied that the trust, fund, University or other educational institution etc. had not applied its income in accordance with the 3rd proviso or if it finds that such institution, trust or fund etc. has not invested/deposited its funds in accordance with the 3rd proviso or that the activities of such fund or institution or trust etc. are not genuine or that its activities are not being carried out in accordance with the conditions subject to which approval is granted then the prescribed authority is empowered to withdraw the approval earlier granted after applying with the procedure mentioned therein."

13. In the above case the Hon'ble Supreme Court further held that it is only if the prerequisite condition of actual existence of the educational institution is fulfilled, the question of compliance with requirements in the provisos would arise. To make the section with the proviso workable, monitoring conditions in the third proviso like application/utilization of income, pattern of investments to be made, etc., could be stipulated as conditions by the prescribed authority subject to which approval could be granted. While imposing stipulations subject to which approval is granted, the prescribed authority may insist on certain

percentage of accounting income to be utilized/applied for imparting education in India.

However, the prescribed authority must give an opportunity to the petitioner-institution to comply with the monitoring conditions which are stipulated for the first time as mentioned in the third proviso to Section 10(23C) of the I.T.Act. After grant of approval, if it is brought to the notice of the prescribed authority that conditions on which approval was given have been breached or that circumstances mentioned in the thirteenth proviso exist, then the prescribed authority can withdraw the approval earlier given by following the procedure mentioned in that proviso.

The Hon'ble Supreme Court further held that on the issue of deciding whether an institution is existing for profit or not, the mere excess of income over expenditure cannot be decisive. An institution cannot be considered to be existing for profit, if some surplus is generated over expenditure. According to the Hon'ble Supreme Court, 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.

14. The Hon'ble Supreme Court in the case of *Oxford University Press vs. CIT, (2001) 247 ITR 658 (SC),* has held that non profit qualification in Section 10(23C)(vi) of the I.T. Act has to be tested against Indian activities.

15. In Section 10(23C)(vi) of the I.T. Act, emphasis has been given on the word "solely" for educational purposes. Solely means exclusively. Thus, the expression "solely" appearing in Section 10(23C)(vi) makes it clear that only the income of the institution established solely for educational purposes and not for commercial activities is entitled for exemption. Therefore, the Hon'ble Supreme Court in the case of *American Hotel & Lodging Association Educational Institute (supra),* held that even when one of the objects enables the institution to undertake the commercial activities, it will not be entitled to approval under Section 10(23C)(vi) of the I.T. Act.

16. The Hon'ble Supreme Court in the case of *Aditanar Educational Society (supra),* held that in deciding the character of the recipient of the income, it is necessary to consider the nature of the activities undertaken. If the activity has no co-relation to education, exemption has to be denied. The recipient of the income must have the character of an educational institution to be ascertained from its objects.

17. The Chief Commissioner in his order dated 30.09.2010 under Annexure-5 has quoted the following objective of the petitioner-Trust:

> "One of the non educational objectives (i.e. item no-16 at page-13 of the trust deed) of the assessee trust is:

> "the Managing Trustee or with the consent of the Managing Trustee the trustees may manage or supervise the **management of any lands,** hereditaments, and premises of the Trust Estate or any part thereof with power to erect, pull down, rebuild, add to, alter and repair houses and other buildings and to build drains and make roads and fences and otherwise **to improve and develop and to cultivate or cause to be cultivated all or any of the said lands,** hereditaments and premises and to insure houses and buildings against loss or damage by fire and/or other risks or to let, lease, make allowances to any agreements with tenants, agriculturists and generally to deal with the said lands, hereditaments and premises as they may deem fit in their absolute discretion."

18. The Chief Commissioner further held that the petitioner trust is not existing solely for educational purposes. The trust has been created with other aims and objectives which are clearly in the nature of business. However, from the impugned order under Annexure-5, it does not reveal whether the petitioner trust has carried on any activities enumerated against item No.16 at page 13 of the Trust deed.

19. The Chief Commissioner, in paragraph 5 of his order under Annexure-5, has observed that on verification of the audited income and expenditure statements for financial years 2008-09 and 2007-08 it is seen that the assessee was engaged in non-educational activities like horticulture and generating income from the same. But the said order is totally silent as to what is the nature and magnitude of horticultural activities carried on by the assessee and what is its annual income and

how it is utilized by the assessee. With regard to horticultural income, the contention of the assessee is that there were standing coconut and mango trees in the land acquired by the petitioner for establishment of the educational institution. In order to maintain a salubrious and green environment the trees were not cut down but maintained. The petitioner has reflected the receipt in its income and expenditure account. Amount of Rs.15,000/- received has been utilized in the educational activities of the institutions and for infrastructural development. Therefore, it cannot be treated that the profit was earned for non-educational activities. The stand of the petitioner needs examination by opposite parties with regard to quantum of income and utilization of the same.

20. The other reason given by the Chief Commissioner for refusing to grant exemption under Section 10(23C)(vi) of the Act, 1961 is that the petitioner has collected fees under the head "placement and training" from the students which is not in conformity with the fees prescribed. Referring to the judgment of the Hon'ble Supreme Court in the case of ***Islamic Academic of Education*** *(supra)* , learned Chief Commissioner has held that if any amount is charged other than the fee prescribed by the Committee under any head or guise, the same would amount to capitation fee.

21. As it appears from the impugned order under Annexure-5, the Chief Commissioner has relied on the Government of India resolution providing for fee structure, 1997 and the Government of Orissa Industries Department Resolution dated 17.09.1998 to come to a conclusion that the fees collected towards "placement and training" is in excess of what was prescribed by the said resolutions.

Petitioner's case is that the resolution relied upon by the Chief Commissioner no more holds the field in view of the Act, 2007 and the order of the Hon'ble Supreme Court dated 01.06.2007 and subsequent notification vide Annexure-4 issued by the Industries Department. The resolution of 1997 and 17.09.1998 relied upon by the Chief Commissioner as aforesaid has become redundant and non-est. The concept and recommendation for charging a "placement and training fee" came with effect from 2007 vide Annexure-4 and is very much for educational purpose and cannot be held otherwise and in the least can ever be considered as a profit earning by the petitioner's institution. Therefore, the said fee collection is for educational purpose only as envisaged under Section 10(23C)(vi) of the Act, 1961. The institutions are obliged to see the placements of their students as per the AICTE Guidelines and train them accordingly. The fee for the same has been permitted to be collected which is for educational purpose.

22. The Chief Commissioner, therefore, is required to see whether the fees collected under head “placement and training” is in consonance with the Act, 2007, order of the Hon’ble Supreme Court dated 01.06.2007 and subsequent notification vide Annexure-4 as claimed by the petitioner. If the collection is in consonance with the Act, 2007, order of the Hon’ble Supreme Court dated 01.06.2007 and subsequent notification vide Annexure-4, then it cannot be said that the collection is without any authority of law.

23. The next question that arises and needs to be determined is as to whether the collection of money made under the head “placement and training” is for educational purposes. It is to be further examined by the Chief Commissioner that how the income earned under head “placement and training” is utilized, i.e., whether for educational purpose or non-educational purpose. Recording of findings on the above issues by the Chief Commissioner is very much necessary to decide as to whether the petitioner is entitled to the grant of exemption in terms of Section 10(23C)(vi) of the Act, 1961.

24. In view of the above, the order of the Chief Commissioner under Annexure-5 is set aside and the matter is remitted back to the said authority to re-examine the case of the petitioner in the light of the

observations made above and pass appropriate order in accordance with law within a period of six weeks from the date of receipt of a copy of this judgment.

25. With the aforesaid observations and direction, the writ petition is disposed of.

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B.N.Mahapatra, J.

V. Gopala Gowda, C.J. I agree.

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Chief Justice

Orissa High Court, Cuttack
Dated 31st July, 2012/ssd/ss/skj