IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH.

Case No. : I. T. A. No. 602 of 2010

Reserved On : November 10, 2016

Pronounced On : December 23, 2016

Commissioner of Income Tax,
Jalandhar-I, Jalandhar .... Appellant

vs.

Gulab Devi Memorial Hospital
Trust, Jalandhar .... Respondent

CORAM : HON'BLE MR. JUSTICE S. J. VAZIFDAR, CHIEF JUSTICE.
HON'BLE MR. JUSTICE DEEPAK SIBAL.

* * *

Present : Mr. Denesh Goyal, Advocate
for the appellant.

Mr. Pankaj Jain, Senior Advocate
with Ms. Divya Suri, Advocate
and Mr. Sachin Bhardwaj, Advocate
for the respondent.

* * *

DEEPAK SIBAL, J. :

The present appeal under Section 260-A of the Income Tax Act, 1961 (for short – the Act) is at the instance of the Revenue to challenge therein the order of the Income Tax Appellate Tribunal, Amritsar Bench, Amritsar (for short – the Tribunal), through which, the Tribunal set aside the order of the Commissioner of Income Tax, Jalandhar-I, Jalandhar (for short – the Commissioner), which had rejected the claim of the respondent-assessee to renew the exemption granted to it under Section 80G of the Act.

Through the present appeal, the following substantial questions of law were sought to be raised :-

> ***"I.*** *Whether on the facts and circumstances of the case ITAT was justified in canceling the order dated 22.09.2009 of Commissioner of Income Tax, Jalandhar-I, Jalandhar wherein approval u/s 80G(5)(vi) of the Income Tax Act, 1961 was denied to the assessee for the period of five years commencing from 2010-11.*
>
> ***II.*** *Whether on the facts and circumstances of the case ITAT was justified in non recording of finding in respect of violation of the provisions of section 80G(5)(iii) read with explanation 3 to section 80G(5C) of the Income Tax Act, 1961 without appreciating the fact that the grant of approval u/s 80G (5)(vi) of the Income Tax Act, 1961, all the conditions as laid down u/s 80G(5)(i) to 80G(5)(v) are to be fulfilled.*
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> ***III.*** *Whether the Ld. ITAT was justified in cancelling the impugned order dated 22.09.2009 without taking into consideration the observations made by Commissioner of Income Tax, Jalandhar-I, Jalandhar in para 7.1 and 7.2 of his order.*
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> ***IV.*** *Whether the ITAT was justified in cancelling the impugned order dated 22.09.2009 granting approval u/s 80G(5)*

(vi) by referring to previous years of the Income Tax Act, 1961 when doctrine of res-judicata is not applicable to the provision of Income Tax Act.

V. *Whether the ITAT was right in law in not considering that the capital expenditure other than the various modes specified in section 11 of the Income Tax Act cannot be considered to be the right mode investing or depositing specified in section 11(5) of the Income Tax Act."*

It is agreed by learned counsel for the parties that the answer to Question no. 1 would answer all the above questions.

The record reveals that the respondent-assessee was constituted through a Trust Deed dated 26.04.1927. Through an application dated 19.04.1977, it claimed registration under Section 12A(a) of the Act, which was granted on 14/16.07.1977. Simultaneously, exemption under Section 80G of the Act was also granted. Thereafter, the exemption under Section 80G of the Act continued to be granted year after year till the Assessment Year 2009-10.

Seeking exemption for the Assessment Years 2010-11 to 2014-15, an application dated 23.03.2009 was made to the Commissioner of Income Tax, Jalandhar-I, Jalandhar, by the assessee, which through order dated 22.09.2009, was rejected. The Commissioner found that the assessee was generating substantial surplus and was spending only a small

percentage for charitable purposes. The Commissioner, was of the view that the assessee had disentitled itself for the grant of renewal of exemption under Section 80G of the Act as according to him, the assessee had deviated from its charitable objects.

The Commissioner's order was taken up in appeal by the assessee before the Tribunal, which was allowed after observing therein that there was no mis-utilization of funds by the assessee and that generating of surplus was not fatal to the grant of exemption under Section 80G of the Act as such surplus was found to have been utilized by the assessee in large scale expansion of its facilities which in turn were used for charitable purposes. The Tribunal further noted that the hospital charges of the assessee, as compared to other commercial establishments, were very nominal, which further threw light on its charitable character.

It is not disputed that the assessee is registered under Section 12A of the Act. Though the order of the Commissioner, through which the assessee was denied renewal of exemption under Section 80G of the Act, makes a reference with regard to initiation of proceedings for withdrawal of registration of the assessee under Section 12A of the Act, Mr. Pankaj Jain, learned senior counsel appearing on behalf of the assessee submits that no such proceedings were ever undertaken. This fact has not been controverted by Mr. Denesh Goyal, learned counsel appearing on behalf of the appellant.

The assessee has also been granted exemption under Section 10 (23C)(vi) and (via) of the Act.

Through order dated 23.03.2009, the Chief Commissioner of Income Tax, Ludhiana, had withdrawn the same. The basis for withdrawal was that during the course of assessment proceedings in respect of Assessment Year 2006-07, the Assessing Officer had noticed that the assessee was indulging in profiteering. Surplus to the tune of 18.59% to 28.66% for the last five years was found to have been generated, which was considered substantial.

The assessee challenged the above order before this Court through **C.W.P. No. 5562 of 2009** – **Gulab Devi Memorial Hospital Trust, Jalandhar vs. Central Board of Direct Taxes and others**, which was disposed of on 29.01.2010 in terms of the orders passed by this Court in **C.W.P. No. 6031 of 2009**, in which the orders passed by the Chief Commissioner of Income Tax, withdrawing the exemption, were quashed, by holding as under :-

> ***"8.14.*** *When the facts of the lead case are examined in the light of above discussion, it is evident that capital assets acquired/constructed by the educational institutions have been treated as income in a blanket manner without recording any finding whether the capital assets have been applied and utilised to advance the purpose of education. It is obligatory on the part of the prescribed authority while exercising power under un-numbered thirteenth proviso to consider whether expenditure incurred as capital*

investment is on the object of education or not. Therefore, the orders impugned in these petitions passed by the prescribed authority are liable to be quashed. It is appropriate to mention that in these cases the impugned orders passed by the Chief Commissioner of Income Tax, Chandigarh and those of by the Chief Commissioner of Income Tax, Ludhiana, are similar in substance and appear to have been inspired by the view taken by the Uttrakhand High Court in the case of M/s Queens Educational Society (supra), which we have not accepted.

8.15 *As a sequel to the aforesaid discussion, these petitions are allowed and the impugned orders passed by the Chief Commissioner of Income Tax withdrawing the exemption granted under Section 10(23C) (vi) of the Act are hereby quashed. However, the revenue is at liberty to pass any fresh orders, if such a necessity is felt after taking into consideration the various propositions of law culled out by us in para 8.13 and various other paras.***"**

The Revenue challenged the above said judgment of this Court before the Apex Court through a Special Leave Petition, which, after conversion into a Civil Appeal being **Civil Appeal No. 9606 of 2013**, through order dated 10.05.2016, was dismissed, by observing as under :-

"*In all those appeals which have come from the High Court of Punjab and Haryana*

and filed by the Department of Income Tax except one from Gujarat High Court, the High Court has followed its aforesaid judgment in ***Pinegrove International Charitable Trust****. Since this view stands approved, all these appeals are dismissed.***"**

Thus, the issue with regard to the grant of exemption to the assessee under Section 10(23C)(vi) and (via) of the Act was conclusively settled in its favour.

Does the registration under Section 12A and the exemption under Section 10(23C)(vi) and (via) of the Act, by itself, entitle the assessee to the grant of exemption under Section 80G of the Act ?

According to us, the answer to this question would be in the negative though the grant of exemption under Section 10(23C) and registration under Section 12A of the Act in favour of an institution would be essential and persuasive factors for the grant of exemption under Section 80G of the Act.

For seeking exemption under Section 80G of the Act, an application in terms of Rule 11AA of the Income Tax Rules, 1962 (for short – the Rules) is required to be made. Section 80G(5) and Rule 11AA read as under :-

"80 G. Deduction in respect of donations to certain funds, charitable institutions, etc.

(1)	***xx***	***xx***	***xx***
(2)	***xx***	***xx***	***xx***
(3)	***xx***	***xx***	***xx***

(4) ***xx*** ***xx*** ***xx***

(5) *This section applies to donations to any institution or fund referred to in sub-clause (iv) of clause (a) of sub-section (2), only if it is established in India for a charitable purpose and if it fulfils the following conditions, namely :—*

(i) *where the institution or fund derives any income, such income would not be liable to inclusion in its total income under the provisions of sections 11 and 12 or clause (23AA) or clause (23C) of section 10 :*

Provided *that where an institution or fund derives any income, being profits and gains of business, the condition that such income would not be liable to inclusion in its total income under the provisions of section 11 shall not apply in relation to such income, if—*

(a) *the institution or fund maintains separate books of account in respect of such business;*

(b) *the donations made to the institution or fund are not used by it, directly or indirectly, for the purposes of such business; and*

(c) *the institution or fund issues to a person making the donation a certificate to the effect that it maintains separate books of account in respect of such business and that the donations received by it will not be used, directly or indirectly, for the purposes of such business;*

(ii) *the instrument under which the institution or fund is constituted does not, or the*

rules governing the institution or fund do not, contain any provision for the transfer or application at any time of the whole or any part of the income or assets of the institution or fund for any purpose other than a charitable purpose;

(iii) *the institution or fund is not expressed to be for the benefit of any particular religious community or caste;*

(iv) *the institution or fund maintains regular accounts of its receipts and expenditure;*

(v) *the institution or fund is either constituted as a public charitable trust or is registered under the Societies Registration Act, 1860 (21 of 1860), or under any law corresponding to that Act in force in any part of India or under section 25 of the Companies Act, 1956 (1 of 1956), or is a University established by law, or is any other educational institution recognised by the Government or by a University established by law, or affiliated to any University established by law, or is an institution financed wholly or in part by the Government or a local authority;**and***

(vi) *in relation to donations made after the 31st day of March, 1992 , the institution or fund is for the time being approved by the Commissioner in accordance with the rules 3 made in this behalf: Provided that any approval shall have effect for such assessment year or years, not exceeding five assessment years, as may*

be specified in the approval.

"[Requirements for approval of an institution or fund under section 80G.

11AA . (1) *The application for approval of any institution or fund under clause (vi) of sub-section (5) of section 80G shall be in Form No. 10G and shall be made in triplicate.*

(2) *The application shall be accompanied by the following documents, namely :—*

> ***(i)*** *Copy of registration granted under section 12A or copy of notification issued under section 10(23) or 10(23C) ;*
>
> ***(ii)*** *Notes on activities of institution or fund since its inception or during the last three years, whichever is less ;*
>
> ***(iii)*** *Copies of accounts of the institution or fund since its inception or during the last three years, whichever is less.*

(3) *The Commissioner may call for such further documents or information from the institution or fund or cause such inquiries to be made as he may deem necessary in order to satisfy himself about the genuineness of the activities of such institution or fund.*

(4) *Where the Commissioner is satisfied that all the conditions laid down in clauses (i) to (v) of sub-section (5) of section 80G are fulfilled by the institution or fund, he shall record such satisfaction in writing and grant approval to the*

institution or fund specifying the assessment year or years for which the approval is valid.

(5) *Where the Commissioner is satisfied that one or more of the conditions laid down in clauses (i) to (v) of sub-section (5) of section 80G are not fulfilled, he shall reject the application for approval, after recording the reasons for such rejection in writing :*

Provided *that no order of rejection of an application shall be passed without giving the institution or fund an opportunity of being heard.*

(6) The time limit within which the Commissioner shall pass an order either granting the approval or rejecting the application shall not exceed six months from the ***[****end of the month in****]*** *which such application was made :*

Provided *that in computing the period of six months, any time taken by the applicant in not complying with the directions of the Commissioner under sub-rule (3) shall be excluded.]****"***

As per Rule 11 AA (2), the application for the grant of exemption under Section 80G of the Act is required to be accompanied by a copy of registration granted under Section 12A or a copy of the exemption granted under Section 10(23) or Section 10(23C), as the case may be, along with notes on the activities of the institution since its inception or during the last three years, whichever is less and copies of accounts of the institution since its inception or during the last three years, whichever is less. Thus,

the registration under Section 12A or the exemption under Section 10(23) and Section 10(23C) are only one of the factors, which make eligible an applicant for the grant of exemption under Section 80G of the Act.

Rule 11AA(3) further provides that in addition to the above information, which is required to be supplied by the applicant, the Commissioner may call for any further information as he deems necessary in order to satisfy himself about the genuineness of the activities of the applicant.

According to Rule 11AA(5), for the grant of exemption under Section 80G, the Commissioner has to satisfy himself that all the conditions laid down in clauses (i) to (v) of sub-section (5) of Section 80G are fulfilled.

A combined reading of Rule 11AA and clauses (i) to (v) of Section 80G (5) leave no room for doubt that in addition to the registration granted to an institution under Section 12A of the Act or exemption under Section 10(23C) of the Act, there are several other factors, which go on to determine the grant of exemption under Section 80G of the Act. These include the inquiry by the Commissioner into the genuineness of the activities of the institution and the fulfillment of the conditions referred to in clauses (i) to (v) of Section 80G(5) of the Act, which inter alia provide that for grant of exemption under Section 80G, where the institution derives an income, such income would not be liable to be included in its total income under provisions of Section 11 and 12 or clause (23AA) or clause (23C) of Section 10. However, where an institution derives any income,

being profits and gains of business, the condition that such income would not be liable to inclusion in its total income under the provisions of Section 11 shall not apply in relation to such income, if—

> (a) the institution or fund maintains separate books of account in respect of such business;
>
> (b) the donations made to the institution or fund are not used by it, directly or indirectly, for the purposes of such business; and
>
> (c) the institution or fund issues to a person making the donation a certificate to the effect that it maintains separate books of account in respect of such business and that the donations received by it will not be used, directly or indirectly, for the purposes of such business;

The other condition, which is required to be looked into is whether the instrument, under which the institution has been constituted or the rules governing the institution do not provide for transfer or application at any time of the whole or any part of its income or assets for any other purpose than a charitable purpose; whether the institution has not been created for the benefit of any particular religious community or caste; whether the institution maintains regular accounts of its receipts/ expenditure and whether the institution is either constituted as a public charitable trust or is registered under the Societies Registration Act, 1860 or under any law corresponding to that Act or under Section 25 of the Companies Act, 1956 or is a University established by law or is any other

institution recognized by the Government or by a University established by law or affiliated to any University established by law or is an institution financed wholly or in part by the Government or a Local Authority.

To assail the order of the Tribunal, Mr. Denesh Goyal, learned counsel appearing for the Revenue, relied upon the judgment of a Division Bench of Karnataka High Court in **Visvesvaraya Technological University vs. Assistant Commissioner of Income Tax – (2014) 362 ITR 279 (Karnataka)** and a judgment of the Apex Court in **Visvesvaraya Technological University vs. Assistant Commissioner of Income Tax – (2016) 384 ITR 37 (SC)**. According to him, the permissible extent of the surplus that could be generated by the respondent-assessee to retain its charitable character was between 6% to 15%. Since the generated surplus, in the case in hand, was much beyond the above percentage, the assessee would be deemed to have deviated from its charitable objects and thus disentitled itself for the grant of exemption under Section 80G of the Act. It was submitted that only a small percentage of the amount of donations received by the assessee was spent on free treatment as for the years ending 31.03.2006, 31.03.2007 and 31.03.2008, only 3.38%, 5.56% and 4.57% respectively of the received donations were spent by the assessee on charitable activities, and therefore, it was apparent that the assessee was not fully utilizing the donations for charitable purposes resulting in accumulation of surplus. According to Mr. Goyal, the large amount of surplus accumulated by the assessee could not be treated as "incidental

surplus", which alone was permissible.

The following paragraphs from the judgment of the Karnataka High Court in **Visvesvaraya Technological University** ***(supra)*** were relied upon by Mr. Goyal :-

> ***"32.*** *If the grants, which, according to the university, it is entitled for under the provisions of section 23 of the Act of 1994, are added to the receipts as per the income and expenditure account perhaps surplus figures would further enhance by about 20 per cent. Thus, the receipts as per the income and expenditure account, reflected in the tables would show that they are exorbitantly higher than the actual expenditure and in any case cannot be treated as "incidental surplus".It is also evident from the fact that even after incurring expenditure during all these years the university has at its disposal about 500 crore rupees as surplus.*
>
> ***33.*** *We make it clear that we are not expressing any opinion on the question whether the university should collect such huge sums from students under different heads. But the fact remains that the university collect huge sums, 3-4 times more than the requirement. Such "surplus," in our opinion, cannot be stated to be incidental. It is not in dispute that huge amounts are invested by the university in fixed deposits, which fetch huge interest thereon. In this backdrop, it will have to be considered that collection of the amounts*

under different heads or the receipts as per the income and expenditure account is sufficient to hold that the activities of the university would result in profit. In other words, though the university was not established for purposes of profit, whether income generated by it could be termed as profit so as to deny the exemption under section 10(23C)(iiiad) of the Act.

xx xx xx xx

37. *As observed earlier, an exemption under section 10(23C)(iiiab) cannot be either claimed or granted unless all the ingredients as reflected therein are satisfied/fulfilled. The expression "notfor purposes of profit"will have to be read in the light of the word "existing"used in sub-clause (iiiab). It is true that the university was set up and is existing for the educational purposes. That by itself is not sufficient. What is necessary is that it should not exist for profit. There could be surplus every year, but the word "surplus"will have to be read and understood in proper perspective. In our opinion, "surplus"cannot be more than 10 per cent. to 15 per cent. so as to meet contingencies or unforeseen expenditure.*

38. *The constant increase in surplus year after year by way of collection of fees under various heads, more than what is required, in our opinion, would not amount to "reasonable surplus" and it would indicate that the university is systematically making profit. As observed earlier*

and seen from different tables, it cannot be stated that fees collected by the university under different heads, is reasonable surplus and it is incidental. There cannot be any justification to collect the monies under different heads 3 to 4 times more than what they require to spend for the purpose for which they collect it. For instance, as seen in Table III, the university in the financial year 2009-10 collected Rs. 2,72,40,187 fees for convocation as against which the total expenditure incurred under this head was hardly Rs. 27,07,672. In 2010-11, under the same head the total collection was Rs. 3,41,31,667, whereas the total expenditure was hardly Rs. 4,22,595, i.e., hardly one-eighth of the total collection. Thus, the collection of fees under each head and the corresponding expenditure for the services rendered does not justify the claim of the university that the receipts are only in the nature of surplus and not profit. As observed earlier, surplus funds could be collected, or these could be incidental surplus, to meet contingencies or for spending during the subsequent year for specific purpose for which it was collected and not for investing the same in fixed deposits for earning income by way of interest.

39. *It is true that after meeting expenditure, a surplus results incidentally from activity lawfully carried on by the educational institution. As long as the surplus is*

reasonable, any University or an institution would not cease to be one existing solely for educational purposes with the object not to make profit. The Supreme Court, in Aditanar (supra), has observed that the decisive or acid test is whether on an overall view of the matter, the object is to make profit. If we apply the doctrine of "reasonable surplus" in one case it cannot be stated that the "surplus" with the University is reasonable. Indubitably an educational institution need to plan their investments and expenditure in such a manner and they may generate reasonable surplus taking into consideration, apart from salary/remuneration to be paid to teaching and non-teaching staff and other day to day expenditure, for future development of the institution as also expansion. But, in our case, it cannot be overlooked that the University is entitled for financial aid in the form of monies/lands from the State Government for its development/expansion. Further, it cannot be overlooked that despite huge expansion to cater the need of 194 colleges, the University has generated surplus of about 500 crores within a span of about 10 years. Whether such surplus could be treated as "reasonable surplus". Our answer is no.

40. *What is reasonable surplus, which, an educational institution such as the University can collect and still seek exemption under Section*

10(23C) (iiiab) claiming that they are existing solely for educational purpose and not for purposes of profit. It is true that each institution, such as the University, has a freedom to fix its own fee structure taking into consideration the need to generate funds to run the institution. They must also be able to generate reasonable surplus which must be used for the betterment and growth of the educational institution. Thus, while fixing the fee structure it must be fixed keeping in view the infrastructure and facilities available, the investments made, salaries paid to the teachers and staff, future plan for expansion and/or betterment of institution etc. In any case such institutions cannot make profit or charge exorbitantly more than what they need. The "surplus" can be generated for the benefit/use of the institution and not to the extent so as to keep it in fixed deposits to earn huge income by way of interest.

xx xx xx xx

49. *It is not in dispute that the university was established for educational purpose and not for purposes of profit. But that by itself, in our opinion, would not be sufficient to hold that the huge income generated from its day-to-day affairs cannot be treated as profit. In other words, whether huge income earned by the university, over a period of time, in our opinion, cannot be treated as reasonable surplus, having regard to*

the facts and figures noticed by us in the foregoing paragraphs.

50. *The Supreme Court in the Addl. CIT v. Surat Art Silk Cloth Manufacturers Association [1980] 121 ITR 1 (SC), while considering the expression "activity for profit" for the purposes of section 2(15) of the Income-tax Act, observed that the test that must be applied is not whether as a matter of fact an activity result in profit, but whether the activities carried on with the object of earning profit, merely because the predominant object of the activity involved in carrying out the object of education and if the institution is generating huge income, which could be avoided by giving substantial relief to the students studying in the affiliated colleges and registered with the university, such income cannot be termed as reasonable surplus. The observations of the Supreme Court in Aditanar (supra) were followed by several High Courts. Keeping an overall view of the matter, we are of the view that the university though not set up for the purposes of profit, is systematically making profit by receiving huge amounts under different heads though they are legitimately entitled for non-lapsable grants from the Government for all practical purposes.*

51. *The university claims that the main source of its income consists of grants received from the Government as contemplated by section 23 of the Act of 1994 and in addition thereto they*

are receiving funds under different heads from the students for pursuing their education and training at the colleges affiliated to it. The material which has been placed on record by the university and the Revenue consisting tabulated statements, all the details of the total receipts and the amount spent by them towards its object for the relevant financial years, it shows that they have earned huge income which could be and would have to be termed as profit, since it is far in excess of its expenditure. Over and above this if the Government also pay them the grants which they are entitled for under the provisions of the Act of 1994. That apart, we did not find the university giving any relief or benefit to the students in terms of monies. This being the position, it cannot be stated that though the university was set up for educational purpose, it is no more a profiteering institution. In other words, it is undoubtedly making profits which cannot be exempted under the provisions of section 10(23C)(iiiab) of the Income-tax Act. The fact that the university has unreasonable surplus of income over the expenditure during the years in question, it cannot, by any stretch of imagination, lead to the conclusion that it exists not for the purposes of profit, though the predominant nature of the activity is educational."

In the above quoted judgment, the assessee was issued notice

under Section 148 of the Act as according to the Revenue, certain income of the assessee for several preceding Assessment Years had escaped notice. When the assessee did not respond, notices under Section 142(1) were issued, but even then no returns were filed. This led to the issuance of summons under Section 131 of the Act, in pursuance to which, returns of income declaring `Nil Income' were filed. Declaration of Nil income was claimed on the basis of exemption sought by the assessee therein under Section 10(23C)(iii)(ab) of the Act. The claim for exemption was rejected by the Assessing Officer on two counts. Firstly, that the assessee therein was not a University `not existing for purpose of profit' and secondly, that it was not `wholly or substantially financed' by the Government.

At this stage, we would like to refer to Section 10(23C)(iii)(ab), which reads as under :-

> ***"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*
>
> ***(iiiab)*** *any university or other educational institution existing solely for educational purposes and not for purposes of profit, and which is wholly or substantially financed by the Government;"*

The assessment order was challenged by the University by way of an appeal filed before the Appellate Authority, which was dismissed. Against that order, the assessee preferred an appeal before the Tribunal, which also met the same fate, leading to the filing of an appeal under Section 260-A of the Act before the Karnataka High Court.

As noticed above, there were primarily two grounds, on which the assessee therein had been denied exemption under Section 10(23C)(iii)(ab), which were that the University was indulging in profiteering and that it was not wholly or substantially financed by the Government.

While considering the first issue, the Karnataka High Court held that since the surplus generated by the University was substantial, not incidental, was being accumulated year after year and had not resulted in lowering of fee in the subsequent years, the assessee therein was indulging in profiteering and had thus deviated from its charitable character. On the other issue also, the High Court was of the opinion that the University was not financed wholly or substantially by the Government. Therefore, the assessee was held to be not covered under Section 10(23C)(iii)(ab). Having returned findings against the University on both the counts, its appeal was dismissed.

The judgment of the Karnataka High Court in **Visvesvaraya's** case ***(supra)*** does support the case of the appellant but the same was taken up in appeal before the Apex Court, which found that huge surplus had been accumulated by the University and that the difference between the fees

collected and the actual expenditure incurred for the purposes, for which fee was collected, was significant. It was further noted by the Apex Court that the expenditure incurred represented only a minuscule part of the fees collected and that no remission, rebate or concession in the amount of fees charged under different heads for the next academic year had been granted by the University to the students. The surplus generated was also found to be far in excess of 6% to 15%, as held permissible by the Apex Court in **Islamic Academy of Education v. State of Karnataka – (2003) 6 SCC 697**. Having held so, the Apex Court further deciphered from the records produced before it as also before the High Court that the surplus accumulated by the University had already been or was intended to be spent on building infrastructure of the University. It was thus found that the accumulated surplus had been ploughed back for educational purposes and having found so, following its earlier judgment in **Queen's Educational Society vs. Commissioner of Income Tax – (2015) 8 SCC 47**, the Apex Court held that the University existed solely for educational purpose and not for the purpose of profit. While returning such finding, the exemption granted to the University under Section 80G was also held to have evidentiary value. The following paragraphs of the judgment, which are relevant in this regard, are set out as under :-

> ***"8.*** *In the present case, we find that during a short period of a decade i.e. from the year 1999 to 2010 the appellant University had*

generated a surplus of about Rs.500 crores. There is no doubt that the huge surplus has been collected/accumulated by realizing fees under different heads in consonance with the powers vested in the University under Section 23 of the VTU Act. The difference between the fees collected and the actual expenditure incurred for the purposes for which fees were collected is significant. In fact the expenditure incurred represents only a minuscule part of the fees collected. No remission, rebate or concession in the amount of fees charged under the different heads for the next Academic Year(s) had been granted to the students. The surplus generated is far in excess of what has been held by this Court to be permissible (6 to 15%) in Islamic Academy of Education and another vs. State of Karnataka and others4 though the percentage of surplus in Islamic Academy of Education (supra) was in the context of the determination of the reasonable fees to be charged by private educational bodies.

9. *As against the above, the amount of direct grant from the Government has been meager, details of which are being noticed separately later in a different context. The University nevertheless has grown and the number of private engineering colleges affiliated to it had increased from about 64 to presently about 194. The infrastructure of the University has also increased offering educational avenues to an*

increasing number of students in different and varied subjects. Materials have been brought on record before the High Court as well as before this Court to show the several number of work orders/tenders issued by the University for infrastructure expansion. It is emphatically contended by the appellant in the written submissions filed that between 1994 and 2009 the University had actually spent about Rs.504 crores on infrastructure and the available surplus in the year 2010 which was in the range of Rs.440 crores was also intended to be applied for different infrastructural work, details of which have also been brought on record. However, the said amount was attached by the Revenue pursuant to the demands raised in terms of the assessments made. Even in a situation where direct government grants have not been forthcoming and allocation against permissible heads like salary, etc. had not been made the University has thrived and prospered. There can, however, be no manner of doubt that the surplus accumulated over the years has been ploughed back for educational purposes. In such a situation, following the consistent principles laid down by this Court referred to earlier and specifically what has been said in paragraph 19 in Queen's Educational Society (supra), extracted above, it must be held that the first requirement of Section 10(23C)(iiiab), namely, that the appellant

> *University exists "solely for educational purposes and not for purposes of profit" is satisfied. The exemption granted in respect of the University under Section 80G of the Act, qua the donations made to it also cannot be ignored in view of an inbuilt recognition in such exemption with regard to the charitable nature of the institution i.e. the appellant University. **[Emphasis supplied]"***

As noticed above, the Apex Court followed its earlier judgment in **Queen's Educational Society** ***(supra)***. Paragraphs 11 and 19 of the judgment in **Queen's Educational Society** ***(supra)***, which sum up the law laid down thereunder read as under :-

> ***"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.*

xx xx xx xx

19. *It is clear, therefore, that the Uttarakhand High Court has erred by quoting a non existent passage from an applicable judgment, namely, Aditanar and quoting a portion of a property tax judgment which expressly stated that rulings arising out of the Income Tax Act would not be applicable. Quite apart from this, it also went on to further quote from a portion of the said property tax judgment which was rendered in the context of whether an educational society is supported wholly or in part by voluntary contributions, something which is completely foreign to Section 10(23C) (iiiad). The final conclusion that if a surplus is made by an educational society and ploughed back to construct its own premises would fall foul of Section 10(23C) is to ignore the language of the Section and to ignore the tests laid down in the Surat Art Silk Cloth case, Aditanar case and the American Hotel and Lodging case. It is clear that*

when a surplus is ploughed back for educational purposes, the educational institution exists solely for educational purposes and not for purposes of profit. In fact, in S.RM.M.CT.M. Tiruppani Trust v. Commissioner of Income Tax, (1998) 2 SCC 584, this Court in the context of benefit claimed under Section 11 of the Act held:

> *"9. In the present case, the assessee is not claiming any benefit under Section 11(2) as it cannot; because in respect of this assessment year,the assessee has not complied with the conditions laid down in Section 11(2). The assessee, however, is entitled to claim the benefit of Section 11(1)(a). In the present case, the assessee has applied Rs 8 lakhs for charitable purposes in India by purchasing a building which is to be utilised as a hospital. This income, therefore, is entitled to an exemption under Section 11(1). In addition, under Section 11 (1)(a), the assessee can accumulate 25% of its total income pertaining to the relevant assessment year and claim exemption in respect thereof. Section 11(1)(a) does not require investment of this limited accumulation in government securities. The balance income of Rs 1,64,210.03 constitutes less than 25% of the income for Assessment Year 1970-71. Therefore, the assessee is entitled to accumulate this*

> *income and claim exemption from income tax under Section 11(1)(a).***"**
>
> *We set aside the judgment of the Uttarakhand High Court dated 24th September, 2007. The reasoning of the ITAT (set aside by the High Court) is more in consonance with the law laid down by this Court, and we approve its decision.* ***[Emphasis supplied]"***

The observations of the Karnataka High Court, especially in paragraphs 37, 38 and 39 including that surplus cannot be more than 10 to 15 per cent irrespective of anything, are contrary to the judgments of the Supreme Court in **Visvesvaraya Technological University's** case ***(supra)*** and **Queen's Educational Society's** case ***(supra)***. It would depend inter-alia on how the surplus is utilized.

However, on the second issue, which was whether the University was directly or substantially financed by the Government, to bring it under Section 10 (23C) (iiiab), the Apex Court held against the University, and therefore, on this count, dismissed the assessee's appeal by holding as under :-

> ***"14.*** *Reliance has been placed on the judgment of the High Court of Karnataka in Commissioner of Income-tax, Bangalore vs. Indian Institute of Management , particularly, the view expressed that the expression "wholly or substantially financed by the Government" as appearing in Section 10(23C) cannot be confined*

to annual grants and must include the value of the land made available by the Government. In the present case the High Court in paragraph 53 of the impugned judgment has recorded that even if the value of the land allotted to the University (114 acres) is taken into account the total funding of the University by the Government would be around 4%-5% of its total receipt. That apart what was held by the High Court in the above case, while repelling the contention of the Revenue that the exemption under Section 10 (23C)(iiiab) of the Act for a particular assessment year must be judged in the context of receipt of annual grants from the Government in that particular year, is that apart from annual grants the value of the land made available; the investment by the Government in the buildings and other infrastructure and the expenses incurred in running the institution must all be taken together while deciding whether the institution is wholly or substantially financed by the Government. The situation before us, on facts, is different leading to the irresistible conclusion that the appellant University does not satisfy the second requirement spelt out by Section 10 (23C) (iiiab) of the Act. The appellant University is neither directly nor even substantially financed by the Government so as to be entitled to exemption from payment of tax under the Act. ***[Emphasis supplied]"***

Thus, on the first issue, the Apex Court held that if the surplus accumulated over the years is ploughed back for educational purposes, the institution would continue to exist solely for educational purposes and not for the purpose of profit. However, on the second issue, on facts, the Apex Court came to the conclusion that the assessee therein was neither directly nor substantially financed by the Government and thus, not coming under the expression "wholly or substantially financed by the Government", as appearing in Section 10(23C)(iiiab). Having not agreed with the assessee on the second issue, the appeal was dismissed.

In view of the findings of the Apex Court in paragraphs 8 and 9 of its judgment in **Visvesvaraya's** case ***(supra)***, as reproduced earlier, we unhesitantly conclude that even if substantial surplus is generated, but the same is found to have been ploughed back for building infrastructure/assets, which in turn are used for educational/charitable purposes, the institution would not lose its charitable character.

In the case before us, it has not been disputed that the respondent-assessee is registered under Section 12A and that it has been held entitled to the grant of exemption under Section 10 (23C)(vi) of the Act as per orders of this Court passed in **C.W.P. No. 6031 of 2009**, upheld by the Apex Court in **Civil Appeal No. 9606 of 2013**. It has further come on record that the respondent-assessee was granted exemption under Section 80G of the Act from the year 1997 till the passing of the impugned order. Further, the finding of the Tribunal, that the assessee has never mis-utilized

its funds, has not been assailed before us. The generated surplus having been ploughed back for expansion purposes also remains undisputed by the Revenue as no challenge to the same has been made. In this regard, the following observations of the Tribunal, which are relevant, are as under :-

> ***"...*** *The learned CIT-I, Jalandhar has not properly appreciated the utilisation of the funds by the assessee. As per record produced by the assessee before us in the assessee's paper book, which clearly shows that the funds of the institution have been almost fully utilised or in fact, utilised even out of earlier savings. The learned CIT-I, Jalandhar has not taken thoroughly to consider the issue about the application of incomes which as per record has fully been utilised by the assessee as capital expenditure. Detail at page 7 of the assessee's paper book showing receipts, expenditure (not including capital expenditure), capital expenditure, income/surplus of receipts over expenditure, income applied for the charitable purposes and percentage of the income applied and the same are reproduced as under :-*

GULAB DEVI MEMORIAL HOSPITAL TRUST, JALANDHAR						
Asstt.Year	***Receipts***	***Expenditure (not including capital expenditure)***	***Capital Expenditure***	***Income/ Surplus of receipts over expenditure***	***Income applied for charitable purposes***	***% of income applied (5/4 100)***
2004-05	***19,439,010***	***13,866,921***	***10,718,054***	***-5,145,965***	***24,584,975***	***126.47***
2005-06	***23,249,776***	***16,752,591***	***5,157,093***	***1,340,092***	***21,909,684***	***94.24***
2006-07	***27,335,430***	***20,782,115***	***6,509,794***	***43,521***	***27,291,909***	***99.81***
2007-08	***34,623,674***	***28,462,973***	***10,226,358***	***-4,065,657***	***38,689,331***	***111.74***
2008-09	***32,846,384***	***28,014,153***	***9,000,648***	***-4,168,417***	***37,014,801***	***112.69***

11. *Keeping in view the above detail submitted by the assessee at page no. 7 of the assessee's paper book, we are of the considered opinion that the assessee trust has applied its surplus on capital expenditure and the view taken by the learned CIT-I, Jalandhar is not tenable mainly because there is a revenue surplus and to doubt the charitable nature of activities carried out by the trust. The view of the assessee is supported by the decision of the Hon'ble Gujarat High Court in the case of Satya Vijay Patel Hindu Dharamshala Trust Vs. CIT, Gujarat-I, reported at 86 ITR 683 wherein while dealing with section 11 of the Income Tax Act, 1961 it was held that the capital expenditure has also been considered as application of income. The view has been affirmed by the Hon'ble Supreme Court of India in the case of S.RM.M.CT.M. Tiruppani Trust Vs. CIT, reported at 230 ITR 636. There is thus no doubt on the issue that as far as exemption under section 12A is concerned,the capital expenditure has to be considered as application of funds. Having a surplus that not fatal to the exemption unless the conditions prescribed in the section are not met. Keeping in view the facts and circumstances discussed above, we are of the considered opinion that the application for capital purposes shall also be considered as application of funds. <u>The learned CIT-I, Jalandhar has not mentioned even a single word in the impugned</u>*

order that the assessee trust has been mis-utilisation of the funds. The law anticipated that service would be generated and it is for this reason that the provision of section 11 and 12 were incurred in the Income Tax Act, 1961. Exemption contemplates profits/surplus. If an institution is not expected to make any surplus or generate any income there was no need for providing for any exemption. Therefore, the view taken by the learned CIT-I, Jalandhar regarding the assessee having generated surplus even for claim of depreciation is not tenable in the eye of law and keeping in view the aforesaid discussion, with the support of the decision rendered by the Hon'ble Karnataka High Court in the case of CIT Vs. Society of Sisters of St.Anne, reported at 146 ITR 28 and the decision of the Hon'ble Gujarat High Court in the case of Satya Vijay Patel Hindu Dharmashala trust Vs. CIT, Gujarat-I, reported at 86 ITR 683. Now we want to discuss the intention of the assessee trust whether the assessee trust is running for making the profit or not. As the learned CIT-I, Jalandhar in the impugned order at page No.2 para No.3 is of the opinion that the trust appeared to be engaged in profiteering rather than in charitable and philanthropic activities as contemplated in the objects of the trust. By reading these words of the learned CIT-I, Jalandhar in the impugned order, we are of the considered opinion that he has not himself clear

> *whether the assessee trust is engaged in the profiteering rather than in charitable or not. As per the arguments advanced by the learned counsel for the assessee on the treatment of T.B. Patients in the assessee trust hospital as presently the assessee is charging Rs.100/- per day from a T.B. Patient and this includes the charges for his stay, medicine, food, doctor's fee, nursing fee and even the cost of washing of linen.* ***[Emphasis supplied]"***

In fact, the utilization of surplus for large scale expansion at the behest of the respondent-assessee was also acknowledged by the Commissioner. In this regard, the following observations by the Commissioner may be set out :-

> ***"8.2*** *On the other hand, the major focus of the trust is reflected in the large scale expansion, incurring capital expenditure to expand the capacity and running the nursing colleges. In the process, the trust appears to have lost the purpose, mission and the vision as enshrined in the trust deed for the welfare of the public while seeking exemption for charitable purposes. The direction of the trust has shifted by intent and actual conduct to its operations for profit making thereby defeating the charitable objects.* ***[Emphasis supplied]"***

The Tribunal had further detailed in its order the receipts, expenditure, capital expenditure, income/surplus of receipts over

expenditure, income applied for the charitable purposes and percentage of the income applied in a tabulated form, which clearly depicted utilization of surplus by the respondent-assessee for only charitable purposes. The said table is reproduced below :-

GULAB DEVI MEMORIAL HOSPITAL TRUST JALANDHAR						
Asstt. Year	***Receipts***	***Expenditure (not including capital expenditure***	***Capital Expenditure***	***Income/ Surplus of receipts over expenditure***	***Income applied for charitable purposes***	***% of income applied (5/4 100)***
2004-05	*19,439,010*	*13,866,921*	*10,718,054*	*-5,145,965*	*24,584,975*	*126.47*
2005-06	*23,249,776*	*16,752,591*	*5,157,093*	*1,340,092*	*21,909,684*	*94.24*
2006-07	*27,335,430*	*20,782,115*	*6,509,794*	*43,521*	*27,291,909*	*99.81*
2007-08	*34,623,674*	*28,462,973*	*10,226,358*	*-4,065,657*	*38,689,331*	*111.74*
2008-09	*32,846,384*	*28,014,153*	*9,000,648*	*-4,168,417*	*37,014,801*	*112.69*

The above table needs to be corrected. The percentage of income applied shown in Column No. 6, though shown to be after applying the formula of the figure arrived at under Column No. 5 divided by the figure arrived at in Column No. 4 x 100, actually and factually should be the figure arrived at in Column No. 5 divided by the receipts shown in Column No. 1 x 100.

The above table clearly shows that the respondent-assessee has utilized its surplus only for charitable purposes. Mr. Goyal has also neither argued nor drawn our attention to any material on record to the contrary.

The charges for its services were also considered by the

Tribunal and were found to be extremely reasonable. The same are reproduced below :-

"GULABDEVI MEMORIAL HOSPITAL TRUST JALANDHAR

List of Hospital Charges with effect from 01.03.2008

1.	***Registration Fee***	*20.00*
	Re Visting Fee	*10.00*
2.	***Admission Fee***	
	General Ward	*60.00*
	Private Ward	*70.00*
3.	***Ward Charges***	
	General Ward	*100.00*
	Emergency	*200.00*
	Private Ward	*600.00*
	ICU	*1500.00*
4.	***Operation Charges***	
	A) Major Operations	
	Nephrectomy (Removal of Kidney)	*3000.00*
	Phefofithotomy (Removal of Kidney stone)	*3000.00*
	Nephrolithatomy (Removal of Kidney stone)	*3000.00*
	Gholycystectomy (Removal of gall bladder)	*3000.00*
	Meningomyelocele (Gytictumor of spinal cord)	*3000.00*
	Pnenmonectomy (Removal of lung)	*3000.00*
	Thyroidectomy (Removal of thyroid)	*3000.00*
	Leparotomy (Opening of abdomen & Exploration)	*3000.00*
	Hysteromy (Removal of uterus)	*3000.00*
	Choleystojeinostomy (Intestinal bye pass)	*3000.00*
	Hysteratomy (Opening of uterus with removal of contents)	*3000.00*
	Ovarian Cyst (Removal of cyst of ovary)	*3000.00*
	B) Minor Operations	
	Appendectomy (Removal of Aependix)	*1800.00*
	Harnia (Hernia Operation)	*1800.00*
	Vericocal (Swelling of Scrotum)	*1800.00*
	Thyroid Nodule (Thyroid swelling)	*1800.00*
	Fistula in ano (Disease of ano-rectal region)	*1800.00*
	Hydropcele (Fluid in scrotal sac)	*1800.00*
	C) Other Charges	
	Advance Laparoscopic Surgery	

(Operation by Lapropscopy)	*5500.00*
Chest inutubation insertion of tube in chest)	*600+60*
Biopsy	*600+60*
Abscess Major	*600+60*
OT Charges for minor/major operations	*650.00*
Minor Dressing	*40.00*
Major Dressing	*100.00*
Gynaecology Charges Procedures	
Normal Delivery	*900.00*
Normal Delivery with Episotomy	*1000.00*
Breach Delivery	*1300.00*
Forcepts Delivery	*1350.00*
Face Presentation	*1050.00*
1. Twins Delivery	*1500.00*
Plancepta Manual Removal	*660.00*
2. Pre-Mature Delivery/Aborted	*1000.00*
Abortion/Emcredyal	*2100.00*
3. Resuturing	*660.00*
Major Operation	
Cessaerian Sections (L.S.C.S.)	*2600.00*
Abdominal or Vaginal Hystractomy (Removal of Uterus)	*2600.00*
Tubectomy (Tubal figation)	*660.00*
Cloporrhaphy Simple (P.F.R.) (repair pelvic floor)	*1550.00*
Manchestor Operation (Major surgery for uterine cancer)	*1750.00*
Ostighting Operation (M.C. Donalds) (Repair Surgery)	*1650.00*
Hysteromy	*2100.00*
3rd Degree Tear Stiches	*1050.00*
Lapretomy (Ectopic Rupture) (Opening & Exploration of abdomen)	*2650.00*
Tubal Recanalisation (Rejoining of rube in female)	*2600.00*
Operation Theatre Charges	*450.00*
CPT	*1300.00*
Orthopaedic Procesures	
Bipolar Replacement (Hip Surgery)	*3300+550*
Total Hip Replacement (replacement of Hip bone)	*5300+100*

Total Knee replacement (replacement of Knee joint)	*5400+1100*
Arthroscopy	*2650+220*
Discectomy/Cervical	*5300+100"*

On perusal of the above charges, while concurring with the findings of the Tribunal, we also find them to be extremely concessional, highlighting the charitable character of the respondent assessee.

In view of the above, finding no merit in the present appeal, the same is hereby dismissed with no order as to costs.

(S. J. VAZIFDAR)
CHIEF JUSTICE

(DEEPAK SIBAL)
JUDGE

December 23, 2016
monika

Whether speaking/reasoned ?	*Yes.*
Whether reportable ?	*Yes.*