

**IN THE INCOME TAX APPELLATE TRIBUNAL "H" BENCH,  
MUMBAI**

BEFORE SHRI KULDIP SINGH JM  
AND  
SHRI PRASHANT MAHARISHI, AM

**ITA No. 6766/Mum/2019**  
(Assessment Year 2018-19)

Sharda Mandir High school Harishchandra Goregaonkar Marg Gamdevi Grant Road Mumbai 400007 PAN No. AAQAS4552A (Appellant)	Vs	The Commissioner of Income tax ( Exemption) Room No 617, Piramal Chambers Parel Mumbai (Respondent)
Assessee represented by		Shri Vimal Punamiya, CA
Department Represented by		Shri Dr. Jayant Jhaveri , CIT DR
Date of Hearing		24/01/2022
Date of Pronouncement		15/02/2022

**ORDER**

PER PRASHANT MAHARISHI, AM:

1. This appeal is filed by Sharda Mandir High School, (the appellant/assessee) , an Association of person (AOP), against order passed by The Commissioner Of Income Tax (Exemption), Mumbai (The CIT) for assessment year 2018 – 19 u/s 10 (23C) (vi) of The Income Tax Act [ The Act] on 30 September 2019. Per that order, application made by the assessee on 22/9/2018 seeking exemption under that Section was rejected. Therefore, aggrieved assessee has preferred this appeal.
2. The assessee has raised in all nine grounds of appeals as Under:-

- i. On the facts and circumstances of the case and in law the order passed by the Commissioner of income tax (exemption) Mumbai is not justified in refusing to grant approval for exemption u/s 10 (23C) (vi) of The Income Tax Act, 1961, as it is against the facts of the case and untenable in law
- ii. On the facts and circumstances of the case and in law, the CIT (E) did not provide proper and reasonable opportunity of being heard before refusing to grant approval for exemption u/s 10 (23C) (vi) of The Income Tax Act 1961. As such, the order passed is bad in law and the same is liable to be cancelled
- iii. on the facts and circumstances of the case and in law, the CIT (E), Mumbai erred in not accepting the order passed by the Asst Charity Commissioner, Greater Mumbai region regarding merger of trust to replace as member in association of persons
- iv. on the facts and circumstances of the case and in law the learned CIT (E), Mumbai refused the registration on flimsy grounds without appreciating the facts of the case and without applying his mind
- v. on the facts and circumstances of the case and in law, the CIT (E) erred in not appreciating that names of members of AOP or part of application filed on 31/10/2018 for grant of minority status
- vi. On the facts and circumstances of the case and in law, the CIT (A) erred in not appreciating that the AOP is only existed for imparting education to all poor and middle-class families at nominal amount irrespective of caste and

creed and not for the purpose of profit as observed by the CIT (E). Thus the approval for grant of exemption u/s 10 (23C) (vi) of the income tax act, 1961, as claimed should have been allowed as all the conditions therein were completely fulfilled

- vii. on the facts and circumstances of the case and in law, the learned CIT (E) was only required to see if the objects of AOP are charitable and whether the AOP is genuine or not
  - viii. on the facts and circumstances of the case and in law, the learned CIT (E) erred in stating that the definition of person u/s 2 (31) of the income tax act, 1961 is not relevant as in Section 10 (23C) the word person is not used in the AOP cannot be termed as it an educational institution whereas the word person has been specifically used in the Section 10 (23C)
  - ix. on the facts and circumstances of the case and in law, the learned CIT (E) erred in not appreciating that the AOP only existed for educational purposes and was clearly entitled for deduction is claimed u/s 10 (23C) (vi) of the income tax act, 1961.
3. The facts of the case shows that assessee, Sharda Mandir High School, filed an application on 30/9/2018 seeking approval for claiming of exemption u/s 10 (23C) (vi) of The Act for assessment year 2018 – 19. It was formed as an Association of person by way of an agreement dated 23/11/2016 comprising of two members namely (1) Sharda Sikhshna Seva Samiti and (2) Lodha Charitable Trust.
4. Sharda Shikshan Seva Samiti was running a Marathi medium school and a junior college in the name of Sharda Mandir high school for 36

years at Mumbai. It had a piece of land admeasuring 1294 m<sup>2</sup> at Girgaon division Mumbai As the need of an English medium school was found, it entered into a management agreement on 12 August 2014 with Lodha Charitable Trust for an initial period of 20 years to set up an English medium school on the premises owned by Sharda Shikshan Seva Samiti.

5. Later on, an agreement for association of persons on 23<sup>rd</sup> of November 2016 was entered into between both the members, which shall be known as 'Sharda mandir High school'. This agreement was executed on a non judicial stamp paper of ₹ 500 however; it was not registered with any authority or even agreement was not notarized.

6. Main object of the Association of person was

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(i) for running and to manage an English medium school and allied activities as mutually decided, Under the joint name or in the name of AOP with its principal place of business shall be at Harsihchandra Goregaonkar Road , Gamdevi, Mumbai 400007.

(ii) That the AOP shall run, organize and conduct activities of English medium school from preprimary to standard 10<sup>th</sup> and activities may be extended to other activities with the mutual consent of all the parties Under the joint name or in the name of AOP Sharda mandir High school “

7. The learned CIT examined the application and noted down to mandatory conditions for registration under section 10 (23C) (vi) of The Act stating that (1) the applicant should be a University or an educational institution and, (2) it should exist solely for educational purposes and not for the purposes of the profit.

8. Assessee made following submissions in support of its application and answering queries raised by the learned CIT:-
- i. assessee submitted a copy of the application filed to the education Department on 31/10/2018 and also the copy of the letter issued from the desk officer, government of Maharashtra on 28/2/2019 to Divisional Deputy Director Of Education Mumbai forwarding herewith the application of the sharda mandir High school for granting minority status. Assessee also submitted a copy of letter dated 7/3/2019 issued by the Divisional Deputy Director Of Education, Mumbai to education Inspector of South division, Mumbai granting Sharda Mandir High School minority school managed and run by minority trust named as Sitaben Shah Memorial Trust
  - ii. Assessee also explained that the above approval has been received in the name of school run by Sitaben Shah Memorial Trust. It was further explained that Sitaben Shah Memorial Trust by order passed by the Asst Charity Commissioner, greater Mumbai dated 23/1/2018, three different charitable trusts namely (1) Laxmiben Cheda charitable trust, (2) Lodha charitable trust, and (3) Business Concern For Better Maharashtra have merged in the above trust and therefore the approval are in the name of the entity Sitaben Shah Memorial trust. Assessee also submitted copies of trust deed of merged entity along with the merging trust along with chronology of events beginning from formation of the Association of person.
  - iii. Assessee also submitted copy of deed of association of person. It was further stated that as 'any person' is eligible for exemption u/s 10 (23C) (iv) of the act, the Association of person cannot be debarred from getting exemption. It was also

stated that Association of person is not required to register with any government agency Under any law. It was further stated that the AOP is not required to be registered u/s 12 AA of The Income Tax Act to get the exemption u/s 10 (23C) (vi) of the act.

iv. The assessee also submitted that clause 6 of the Association of person agreement earlier provided that profit or loss of Association of person shall be distributed amongst the members and the Association of person shall pay income tax at the maximum marginal rate. It was further stated that the above clause entered into the Association of person agreement by mistake and there was a rectification of the Association of person made by the both the members on 23/8/2018 by entering in to a supplementary Deed wherein the above clause was amended to provide that any surplus will not be taken by any of the member and the funds will be utilized for the purpose of up gradation of school and educational facilities. Therefore, it was submitted that it was a mistake, which has been rectified by making a supplementary deed. It is also submitted that there is no distribution of the profit during the year to any of the members and the entire surplus has been invested/used for the purpose of education.

9. Based on the above submissions the assessee contested that assessee being an Association of person can be granted exemption u/s 10 (23C) (vi) of The Act as there is no requirement of getting itself registered u/s 12 A of the income tax act. Assessee is also running a school i.e. an educational institution and no part of the profit is distributed amongst the members or has been spent for non-

educational purposes hence, not existing for profit and therefore it is entitled for exemption Under that Section. Assessee also supported its case by citing various judicial precedents.

10. The learned CIT denied the exemption to the assessee vide order dated 30/9/2019 giving mainly the following reasons:-

- i. as the Association of person has made an application for the exemption, according to him the provision of the Section is applicable in case of a University or an educational institution. It is not for an AOP. Further, according to him the applicant itself shall be running an educational institution imparting formal education. He further held that as assessee is not registered with the board as well as educational department and having a permission to run a school, it cannot be said that assessee is running an educational institution. He further held that as permission to run the minorities school is in the name of Sitaben Shah Memorial trust and not the AOP, educational Institute is run by Sitaben Shah Memorial trust. He further held that in all the permissions obtained by the assessee the name of the Association of person is not mentioned but the name of Sitaben Shah memorable trust is mentioned. So assessee is not running an education institution.
- ii. He further held that the Association of person does not exist solely for educational purposes because of the reason that in the object clause the Association of person can also carry out activities, which may be extended to other activities with the mutual consent of all the parties. Therefore according to him it is not solely existing for the educational purposes
- iii. he also referred to the clause 6 wherein the profit or loss of the Association of person can be distributed as per the original deed

and held that prima facie it shows that the Association of person does not exist solely for charitable purposes and also does not fulfill the condition of not for the purposes of profit. He rejected the supplementary deed executed on 23/8/2018 for the reason that it was executed between Sharda Mandir Sikhsan Samiti and Lodha charitable trust. However, on 23/1/2018 he found that Lodha charitable trust along with two other charitable trusts amalgamated with Sitaben Shah Memorial trust; therefore, as on the execution of supplementary deed on 23/8/2018, Lodha charitable trust was not in existence.

iv. He further held that Association of person could not be termed as an educational institution as it has not been registered with any of the authorities; it has been formed by an agreement dated 23/11/2016. Thus, he stated that there is no control mechanism of supervision for maintaining the distinct identity of the Association of person and the Constitution of Association of person can be changed without any control mechanism. He also gave an example that by the supplementary deed the clause 6 of deed of AOP was amended. Thus the AOP cannot be registered u/s 10 (23C) (vi) of the income tax act

11. Therefore, for all these cumulative reasons, he rejected the application of the assessee vide order dated 30/9/2019.
12. The learned authorised representative referred to 3 paper books filed by him. He referred to various documents submitted there in as under :-
  - i. Agreement of association of persons, supplementary deed for association of persons, forms No 56D and form No 10 BB for assessment year 2018 – 19.



- ii. list of trustees and as well as the rules and regulations applicable in school.
- iii. object clause for school as well as the trust.
- iv. letter issued by the education Department and copy of circular issued dated 17/8/2015 for clarification on issue related to claim of exemption Under that Section.
- v. copy of the annual accounts of the association of persons stating that net profit of ₹ 1,254,386 has been kept as a reserve and surplus and has not at all been distributed in terms of the supplementary deed. He further stated that till to date there is no distribution of profits or any benefit to any of the members of the AOP and all the surplus has been used for the purposes of education. He referred to annual accounts of Assessee.
- vi. Various replies submitted during the course of examination of the application of the assessee as per letter dated 26/9/2019 wherein according to him all the clarifications were given to CIT (E).
- vii. Management agreement dated 12<sup>th</sup> day of August 2014.

13. On the basis of above documents ,

- i. He stated that the reason for denial of registration given by the learned CIT- E that agreement is neither registered with any authority nor notarized and the Association of person has not been registered with any of the government authorities like Charity Commissioner or the registrar of the companies cannot come into a way of granting exemption to the assessee. He relied on the board circular number 14/2015 dated 17/8/2015 and stated that the decision of the honourable Allahabad High Court in case of CIT versus Society of advanced management studies 352 ITR 269 as well as the decision of honourable

Madras High Court in CIT Trichy vs Sengunthar Matriculation Higher Secondary School (Appeal) number 467 of 2017 covers this issue in favour of the assessee.

- ii. With respect to the objection with respect to clause 6 of the agreement, he submitted that there was an error originally in drafting of the deed of association of person which has been rectified by the supplementary deed and, based on the supplementary deed, there is no distribution of any profit to any of the members of the AOP till to date and all surplus has been utilized for the educational purposes. Therefore, educational institution exists solely for educational purposes and not for the purpose of profit.
- iii. He further stated that even in case of dissolution of a trust the surplus will go to another charitable trust for educational purposes only. He stated that such is the provisions of the Bombay Public Trust Act and such profit cannot be taken away by anybody, as it is a public charitable trust and vests in Charity Commissioner only.
- iv. He further stated that assessee is running an English medium school and charging a nominal fees per year compared to other English schools, there is no profit distributed by the assessee which can be verified from the annual accounts and further same is used for the educational purposes and therefore it cannot be said that assessee trust is existing for profit.
- v. He further submitted that identical issue has been decided by the coordinate bench in case of sardar Pratap Singh education society versus the Commissioner of income tax (exemptions) in ITA number 487//2021 on 11/6/2021 wherein on identical dates the order was passed by the CIT (E) rejecting the application

u/s 10 (23C) (vi ) stating that the trust is existing for the profit wherein the coordinate bench recorded the finding that when the surplus in the income and expenditure account has not been distributed by the assessee to any trustees or the relatives as profit or as a dividend and said surplus has been redeployed regularly for the object of educational objects of the trust it can be stated that the assessee trust is existing solely for the purpose of education and not for the purposes of the profit. He referred to the income and expenditure account and stated that in of the surplus has been distributed and in fact, it has been applied for the educational activities. Accordingly, he submitted that as the funds are used for the purposes of education solely, assessee does not exist for profit at all.

vi. He also referred to the communication of Education department where the names of the members of AOP is mentioned and as one of the member also got merged with another trust , name of that trust is also mentioned. He submitted that all fees are received by AOP, All expenses incurred by Assessee, surplus earned by assessee, he referred to balance sheet to show the capital expenditure of the assessee on school. Therefore, it was unreasonable for CIT E to hold that assessee does not run educational institution.

vii. With respect to the objection of the learned CIT E that the educational activities are carried out in the name of Sitaben Shah Memorial Trust and not the assessee, he referred to the paper book page number 71 of the paper book and submitted that the certificate dated 7 March 2019 clearly shows that it is in the name of Sharda Mandir school which has been granted the registration. He further referred to that certificate and

submitted that in the same letter the reference is with respect to Sitaben Shah Memorial Trust wherein it is also mentioned that earlier it was Lodha charitable trust. Therefore, the above certificate clearly shows that that recognition has been granted to the assessee. He also referred to certificate at page number 72 of the paper book dated 28 February 2019 wherein also the name of the assessee is mentioned. He therefore submitted that the learned CIT – E has incorrectly interpreted the above certificates and held that the assessee does not run the school. The above certificates clearly show that the schools are run by the assessee only. He also stated that there is no activity carried on by the assessee other than educational activities.

viii. He further referred to circular number 14/2015 dated 17 August 2015 wherein at paragraph number [2 ] it is categorically stated that there is no necessity of registration u/s 12 AA of the act by the educational institution while seeking approval/claiming exemption u/s 10 (23C) (vi) of the act. He stated that the registration u/s 12 AA which is necessary for claiming exemption u/s 11 and 12 of the act and exemption u/s 10 (23C) of the act are two parallel regimes and operate independently in their respective regions.

ix. With respect to the generation of the profit he referred to para number [3] of that circular where it has been stated that mere generation of surplus cannot be a basis for rejection of application u/s 10 (23C) of the act. He therefore submitted that the learned CIT – E has acted in contravention of the above circular.

x. He further referred to the object clause and stated that he has per paragraph number [4] of the order of the learned CIT

exception has been taken that the activities may be extended to other activities, which are not educational. For this proposition he referred to paragraph number [4] of the order and stated that the clause itself is worded to say that the assessee would be organizing and conducting activities of English medium school from preprimary to standard 10<sup>th</sup> and activities may be extended to other activities with mutual consent of all the parties. However, it does not say that it will carry on any other activity other than the education. He further stated that assessee has always carried on educational activities with respect to the English medium school and its allied activities, which is evident from the object itself. He therefore submitted that the learned CIT – E has misunderstood the object clause of the assessee.

xi. In view of this he submitted that the assessee should be granted exemption u/s 10 (23C) of the income tax act. He referred to written submissions made.

14. The learned departmental representative supported the order of the learned CIT – E. He took us to date chart and submitted that

- i. on 12 August 2014, a management this agreement was entered into between Sharda Mandir Sikhshna Seva Samiti and Lodha charitable trust.
- ii. On 23/11/2016, Association of person was formed.
- iii. On 30/1/2018, the Charity Commissioner granted a certificate stating that Lodha charitable trust has merged with another entity.
- iv. On 31/10/2018, an application was filed by the assessee with educational department of Maharashtra for permission to open the English medium school.

- v. On 28 February 2019, the letter was issued by the education Department permitting the assessee to set up a minority school. On 7/3/2019 was issued by education Department wherein it was stated that school was be managed by Sitaben Shah Memorial Trust.
15. He further submitted that on 13/1/2018, a supplementary deed was submitted by the members of association of persons; however, as on that date Lodha charitable trust was not at all in existence as it already merged with another trust and therefore there is no validity of the supplementary deed furnished by the assessee. He further stated that as the permission was granted in the name of Sitaben Shah Memorial trust, and Appellant Association of person did not have any authority to run the school and therefore it was not existing for the purpose of education. He therefore submitted that there is no evidence available that the Association of person is running any educational institution. He therefore is submitted that there is no infirmity in the order of the learned CIT -E in rejecting the claim of the assessee for registration u/s 10 (23C) (vi) of The Act.
16. We have carefully considered the rival contention and perused the orders of learned CIT Exemption rejecting the claim of the assessee u/s 10 (23C) (vi) of the Act. We have also carefully perused the various judicial precedents cited before us by the learned authorised representative as well as the judgment relied upon by the learned CIT- E.
17. The provisions of Section 10 (23C) (vi) of The Act provides as Under:-
- 10.** 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—

(23C) any income received by any person on behalf

of—

- [(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

18. Thus, the above Section prescribes that any income of any university or other educational institutions, which are existing solely for educational purposes and are not existing for the purposes of profit, shall be exempt from tax if such entities are approved by the prescribed authority. The approval is not required in case of entities, which are substantially financed by the government, or their annual receipt does not exceed Rs. 1 Crore. Thus while granting approval to such entities, prescribed authority has to ensure that the applicant institutions must exist “solely for educational purposes” and “not for purposes of profit”. Further there is a proviso that where the institution, if so granted registration, and subsequently the prescribed authority is satisfied that such funds or institution has applied income for non-specified purposes or invested a sum which are not in accordance with the provisions of the Act, activities of the trust are not genuine or they are not being carried out in accordance with all or any of the conditions subject to which it was notified for which approved, the approval granted to such trust may be withdrawn at any time after giving a reasonable opportunity of hearing. There are also several provisos pertaining to that Section subject to which the approval may be granted. The scope of the enquiry at the time of granting approval to the nature trust, the authority is required to consider the nature, existence of for non-profit purposes and genuineness of the applicant institution. Such is

mandate of honourable Supreme Court in 301 ITR 86 wherein it has been held that at the time of granting approval the prescribed authority is to be satisfied that the institution existing during the relevant year solely for educational purposes and not for profit. Once the above condition is satisfied, it would be justifiable to grant approval to such an institution.

19. The Central Board Of Direct Taxes has issued a circular number 14/2015 on 17 August 2015, which also lays down the scope of enquiry while granting the approval. In that circular the ratio laid down by the honourable Supreme Court in 301 ITR 86 has been enshrined. It is also stated in paragraph number 1.3 of the circular that there are so many monitoring provisos which have been inserted Under that Section and anytime if there is any breach the approval can be withdrawn. It is also stated that the principle laid down by the honourable Supreme Court in American hotels and lodging Association educational Institute versus central board of direct taxes (301 ITR 86) (2008) must be followed while granting exemption.
20. Further the circular in paragraph number 2 clearly provides that there is no mandate of law that the 'person' seeking exemption u/s 10 (23C) (vi) is required to be registered u/s 12 AA of the act. It is for the simple reason that provisions of Section 11 and 12, for obtaining benefit Under those Sections requires registration u/s 12 AA of the act. However for availing exemption u/s 10 (23C) (vi) does not require any such registration. Therefore for availing exemption u/s 10 (23C) there is no requirement for registration Under that Section.
21. The circular also provides that mere generation of surplus cannot be a basis for rejection of application u/s 10(23C) of the act. It further stated that if the surplus is used for educational purposes then the institution can be said to be existing for the purposes of the profit.



22. Honourable Delhi High court in [2018] 92 taxmann.com 132 (Delhi)/[2018] 255 Taxman 78 (Delhi) on provision of section 10(23C) (vi) after analyzing several decision of Honourable Supreme court has laid down certain parameters for exemption as under:-

“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. Addl. CIT [1997] 224 ITR 310/90 Taxman 528 (SC), and American Hotel and Lodging Assn. Educational Institute (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 *Addl. CIT v. Surat Art Silk Cloth Manufacturers Association* [1980] 121 ITR 1/[1979] 2 Taxman 501 (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* (supra) 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. 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 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."

23. Now question that arises whether the assessee as an 'Association of person' is entitled to claim exemption u/s 10(23C) (vi) of the act or not. This issue arose before the honourable Madras High Court in case of Commissioner Of Income Tax Versus Sengunthar Matt Relation Higher Secondary School In Tax Case (Appeal) Number 467 of 2017 wherein in paragraph number 8 – 12 it was held as Under:-

“8. Undisputedly, the Assessee has been filing its Return of income as Association of Persons (Educational Institution) with the Respondent/Income Tax Department. The Assessee (AOP) is also undisputedly covered by the definition of 'Person' as defined in Section 2(31) of the Act which provision is also quoted to the relevant extent below:-

""person" includes --

- (i) an individual,
- (ii) a Hindu undivided family,
- (iii) a company,
- (iv) a firm,
- (v) an association of persons or a body of individuals, whether incorporated or not,
- (vi) a local authority, and
- (vii) every artificial juridical person, not falling within any of the preceding sub-clauses.

Explanation. -- For the purposes of this clause an association of persons or a body of individuals or a local authority or an artificial juridical person shall be deemed to be a person, whether or not

such person or body or authority or juridical person was formed or established or incorporated with the object of deriving income, profits or gains."

9. Since the AOP is recognised as a "person" for the purpose of Income Tax Act, 1961 and Section 10(23C) of the Act also grants exemption to a person engaged in deriving income from specified sources including the University or Educational Institution, covered by this provision and on these facts, there is no dispute before us that the appellant Educational Institution was duly registered with the State Registered Authorities and was only engaged in the educational activities. Therefore, we do not find any reason to deny the exemption or registration under Section 10(23C) of the Act, which was denied by the learned Chief Commissioner.

10. In our opinion, the Tribunal has rightly discussed the relevant provisions of the Act and finding that the Appellant Educational Institution is undoubtedly, an "Institution" covered by the provisions of Section 10(23C) (vi) of the Act and therefore, as an AOP, it was entitled to exemption irrespective of the fact whether it had separate registration under other law as an Institution or Society or not. The requirement of the Applicant being a registered Body or juristic person is not there in Section 10(23C) of the Income Tax Act. The definition of 'Person' who is entitled to exemption under Section 10(23C) (vi) of the Act is clear enough and it specifically covers Association of Persons (AOP), which need not be a registered Body. The Income Tax Act recognizes certain types of Assesseees which do not have any independent juristic existence like Corporate or individuals viz., Hindu Undivided Family (HUF) and Association of Persons (AOP), who are entitled to maintain their Books of Accounts and file their Returns of Income in their own capacity and can be assessed as such in that capacity.

11. The submission made on behalf of the Revenue that unless the Applicant under Section 10(23C) of the Act is independently registered, the Revenue may not have control over it is fallacious, since the Appellant/Assessee is admittedly filing its Returns of Income as AOP. So long as the Assessee adheres to the parameters required to be satisfied under Section 10(23C) of the Act to avail the exemption granted under the provision, it is so entitled. Therefore, unless the finding of facts are given on the basis of evidence that the Assessee does not meet the parameters of Section 10(23C) of the Act, the exemption claimed by the Assessee cannot be denied on the ground that it does not have independent Memorandum of

Association, Bye laws, etc. and this is not a sustainable ground to deny the exemption as required under Section 10(23C) of the Act and the definition of "person" under Section 2(31) as quoted above.

12. Therefore, in our considered opinion, the learned Tribunal has not committed any error in reversing the order of the learned Chief Commissioner and directing the grant of exemption to the under section 10(23C) (vi) of the Act."

24. Applying the above decision in the case of the assessee, it is apparent that assessee is also an 'Association of person' which is covered Under the definition of person u/s 2 (31) (v) of the act. Further the assessee's educational institution i.e. English medium school is also registered with the educational department. The honourable High Court further categorically held that that the word 'institution' covered by the provisions of Section 10 (23C)(vi) of the act does not make any distinction between the class of the persons. In paragraph number 11 the honourable High Court further referred to the argument of the revenue which is also identical in the present case that the revenue does not have control over such entities and held that so long the assessee adheres to the parameters required to be satisfied Under that Section and is filing return of income for availing the exemption Under that provision, assessee is entitled for exemption. Further assessee also cannot be denied exemption merely in absence of any independent memorandum of Association/bylaws etc. In the case of the assessee before us, it is evident that undisputedly it is an association of two charitable trusts. Both these charitable trusts are also registered with the income tax authorities. Objects of Assessee / Appellant AOP is education. The Sharda Sikhshna Seva Samiti is a charitable trust registered Under the provisions of The Bombay Public Trust Act 1950 and registered since 24/5/1954. The Lodha trust is also a public trust registered



Under The Bombay Public Trust Act 1950. This trust is also engaged in various charitable activities including educational activities and is operating schools at different places. These facts are already available in the management agreement entered into by the entities on 12<sup>th</sup> day of August 2014. Thus, There is evidence that both these members of the association of persons are regulated entities by the Charity Commissioner. Further Appellant AOP has also filed its return of income. In view of this the reasons given by the learned CIT that assessee is an Association of person, an unregulated entity and does not have any control over it, therefore cannot be registered for exemption, is fallacious.

25. With respect to the allegation that there is a clause in the agreement of association of persons, dated 23<sup>rd</sup> day of November 2016 that the profit or loss of the Association of person shall be distributed amongst the members as per the conditions stipulated in the management agreement dated 12 August 2014. Subsequently on 23<sup>rd</sup> day of August 2018, prior to making an application for exemption, which was made on 30 September 2018, a supplementary deed was entered into wherein it was stated that there should not be any distribution of profit amongst the members of the association of persons. The annual accounts of the assessee are also placed at page number 18 – 20 of the paper book, which clearly shows that there is no distribution of the profit between the members of the Association of person, and it has been invested in the fixed deposits as prescribed Under the provisions of Section 10 (23C) of the act. The main reason of rejecting the supplementary deed by the revenue authorities is that it has been executed on 23<sup>rd</sup> day of August 2018 and on that date , e Lodha Charitable trust merged into another trust along with two other trusts, In Sitaben Shah memorial Trust on 30/1/2018. Therefore,

Lodha Charitable Trust could not have executed the supplementary deed on 23<sup>rd</sup> day of August 2018. Be that as it may, the fact of the matter remains that there is no distribution of profit amongst the members of the Association of person. Further, the annual accounts also show that the profit has been invested in the fixed deposit receipts, which is an approved manner of investment, and have not been taken away by any of the members of the Association of person. Even otherwise, instead of taking profit from the Association of person assessee, both the members have invested the sum in the assessee, which has been utilized for educational purposes. The annual accounts as on 31/3/2018 shows that Sharda Sikhshna Seva Samiti has invested ₹ 675,000/- and Lodha charitable trust has invested Rs. 4,28,83,823 in the assessee educational institution. Therefore, there is no distribution of profit amongst the members of the association of persons.

26. Further Honourable supreme court dismissing SLP of revenue against the decision of Honourable Delhi High court DIT (Exemption) v. Delhi Public School Society [2018] 92 taxmann.com 132/255 Taxman 78/403 ITR 49 (Delhi) in Director of Income-tax (Exemptions) vs Delhi Public Schools Society [2018] 100 taxmann.com 370 (SC) has held that that where assessee society was set up with object of imparting education and it had entered into franchise agreements with satellite schools and also used gains arising out of these agreements in form of franchisee fees for furtherance of educational purposes, it fulfilled requirements to qualify for exemption under section 10 (23C) (vi) of the Act. In the case before honourable Delhi High courts there were joint venture agreements with other association and franchisee fees are earned by that assessee. Thus even earning of franchisee fees and not running those schools

directly by the assessee was allowed exemption u/s 10 (23C) (vi) of the Act, provided the surplus is used for educational purposes. The case of assessee also demonstrates that funds/ surpluses are utilized for educational purposes.

27. Even if the arguments of the revenue is accepted, then the proviso to Section 10 (23C) clearly says that that the moment there is a violation of the provisions, the exemption granted to the assessee trust can be withdrawn immediately. Though the counsel of the assessee has submitted that till date there is no distribution of profit amongst any of the members of the association and after the amendment to the deed of association of persons therein, there is no question of distribution of profit and all the surplus has been utilized for the educational activities and not for any other activity. Revenue authorities are at always liberty to invoke such provisions the moment the violation is found. It is a fact on the basis of the information produced before us that there is no distribution of profit between the members of the Association of person. The learned departmental representative has merely doubted the supplementary deed only because of the reason that one of the signatories of the supplementary deed has already merged with another trust, but has not shown us any evidence that there is any allocation of profit between the members of even a single rupee.
28. The next issue that arises whether the assessee is existing solely for the educational activities or not. The agreement of Association of person dated 23 November 2016 clearly shows that that both the trust who have formed an 'Association of person;, are public charitable trusts registered Under the Bombay public trust act 1950. The Sharda Sikhshna Seva Samiti is engaged in various charitable activities and mainly engaged in running of Marathi medium school

and an English medium Jr College. The Lodha Charitable trust is also engaged in educational activities and operating schools at different places. Both of them found in need to set up an English medium school at the existing facilities of one of the member. Resolution was passed at the board meeting of the trustees where they decided to form a separate entity for jointly run and manage the school and therefore the Association of person/assessee was formed. Assessee was to run and manage the English medium school at the said property belonging to 1 of the members of the AOP. The annual accounts furnished before us for 2017 - 18 clearly shows that only assessee has earned educational fees and bank interest on fixed deposits. There is no other revenue earned by Assessee. The expenses incurred by the assessee are also met and are with respect to the educational activities only and running of the school. At the end of the year, gross receipt of Rs 4,54,73,382/- was earned and surplus of ₹ 1,254,386/- remained which went into recoupment of the earlier loss of ₹ 1,634,128/-. The fixed assets schedule of the assessee also shows that it has created assets for education of Rs 4,62,67,463/- out of the funds generated by the Association of person through its members. Therefore, it is apparent that mere generation of surplus in the income and expenditure account is not the basis for determination that whether the assessee exist not for the purposes of profit. If the surplus is utilized for educational activities then it cannot be said that it is an institution existing for the profit. In the present case, the surplus was utilized only for educational purposes. No evidences lead before us to show that any of the income earned by the assessee institution has been spent for non-educational purposes. This is in consonance with paragraph number 3 of the circular issued by the central board of direct taxes.

Thus on this basis, rejection of the exemption claim of the assessee is not justified.

29. The next issue that arose that whether the Association of person is running an educational Institute or not. For this purpose, the certificate placed at page number 72 of the paper book clearly says that Sharda Sikhshna Seva Samiti , one of the members of the AOP and Sitaben Shah Memorial trust, an entity in which one of the member of the AOP was merged, were granted permission to run a minority school. Therefore, in the permission granted by the education Department both the members of the AOP are mentioned. Undisputedly as on 28 February 2019, one of the members of the AOP was merged with another trust and therefore instead of the member of the AOP, trust in which the member of AOP amalgamated is mentioned. Further, in certificate dated 7 March 2019 , name of both the members of the Association of person are mentioned. The fees have been received by the Association of person, the educational activities are also carried out by the Association of person, and fixed assets created for education purposes are in the name of AOP, which fact is evident by the annual accounts placed before the CIT. The fact also mentioned in form number 10 BB filed before him. Form number 56D in column number 3 clearly shows that the Association of person is formed to run and manag an English medium public school. In the same form, the total income is also shown which clearly shows that that assessee is running a school. Thus all these facts cumulatively s shows that assessee Association of person is running the school and in all these certificates issued by the educational department Maharashtra clearly mentions the name of both the members of the assessee AOP. In view of these facts, we find that finding of the CIT

exemption that the school is run by one of the members of the AOP and not by the AOP is not correct.

30. Even otherwise, at any time, if any of the conditions are violated based on which the exemption is granted to the assessee, the provisions of the law itself gives authority to prescribed authority to withdraw the exemption already granted. This is also mandated and explained in detail in the circular issued by the central board of direct taxes. So far this year is concerned, there is no violation of any of the conditions prescribed u/s 10(23C) by the assessee. None is shown to us by the revenue authorities. It is also not shown that even for any of the subsequent years; there is any violation of the conditions. In view of this, we are of the opinion that, the assessee is an educational Institute running solely for the purpose of education and not existing for the purposes of the profit. It satisfies all the conditions mentioned u/s 10(23C) (vi) of the act.
31. Thus, coming to the grounds of appeal raised by the assessee, we allow appeal of the assessee directing the learned CIT –E to grant exemption to the assessee u/s 10 (23C) (vi) of the act.
32. In the result, appeal filed by the assessee is allowed.

Order pronounced in the open court on 15.02.2022.

Sd/-

(KULDIP SINGH)

(JUDICIAL MEMBER)

Sd/-

(PRASHANT MAHARISHI)

(ACCOUNTANT MEMBER)

Mumbai, Dated: 15.02.2022

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A)
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

BY ORDER,

Sr. Private Secretary/ Asst. Registrar  
Income Tax Appellate Tribunal, Mumbai