1 SCOB [2015] HCD 4

HIGH COURT DIVISION
(STATUTORY ORIGINAL JURISDICTION)

In the matter of:
Applications under section 160 of the Income Tax Ordinance, 1984.

Income Tax Reference Application No. 159 of 2011
Rule No. 53(Ref.) of 2011
With
Income Tax Reference Application No. 160 of 2011
Rule No. 54(Ref.) of 2011
With
Income Tax Reference Application No. 161 of 2011
Rule No. 55(Ref.) of 2011
With
Income Tax Reference Application No. 162 of 2011
Rule No. 56(Ref.) of 2011

United International University
House No. 80, Road No. 8A (Old-15)
Dhanmondi Residential Area, Dhaka
… Applicant

Versus

The Commissioner of Taxes
Taxes Zone-3
Ayesha Manzil, Pioneer Road
Kakrail, Dhaka
… Respondent

With
Income Tax Reference Application No. 511 of 2004

Manarat Dhaka International College
represented by its Chairman
Shah Abdul Hannan
Plot-CEN-16, Road-104, Gulshan
Dhaka
… Applicant

Versus

The Commissioner of Taxes
Taxes Zone-3
35, Pioneer Road (Ayesha Manjil)
Kakrail, Dhaka-1000
… Respondent

Mr. Sarder Jinnat Ali
Mr. Md. Umbar Ali,
Mr. Md. Delwar Hosein,
Mr. Md. Ali Akbor Khan
… For the applicants

Mr. S. Rashed Jahangir, DAG with
Ms. Mahfuza Begum, AAG,
Mr. Titus Hillol Rema, AAG
… For the respondent

Mr. M. A. Noor
And
Mr. Kamal-ul Alam
… The Amici Curiae

Heard on the 10th, 11th, 12th & 13th May
And
Judgment on the 14th May, 2015

Present:
Ms. Justice Zinat Ara,
Mr. Justice Sheikh Hassan Arif
And
Mr. Justice J. N. Deb Choudhury

It is a settled principle of law that when the provision of a fiscal law carries different meaning, in such case, the benefit of it will go in favour of the citizen i.e. the assessee-university/the assessee-college.
... (Para 42)

SRO No. 454 read with SRO No. 178:
In order to get exemption, issuance of some certificate or producing exemption letter before the assessing officer is not necessary. ...(Para 45)

Income Tax Ordinance, 1984
Section 44(4)(b):
The Government has jurisdiction to issue Notification exempting or reducing income tax of any university or educational institution under section 44(4)(b) of the Ordinance. ...(Para 46)

In the above facts and circumstances, we are of the opinion that the income of the assessee-university/the assessee-college ought to have been treated as tax exempted under SRO No. 178 for the assessment years 2002-2003, 2004-2005, 2005-2006, 2006-2007 and 2007-2008 by the Taxes Authority and the Tribunal. ...(Para 49)

Judgment

Zinat Ara, J.

1. The aforesaid five income tax reference applications have been sent by the Hon'ble Chief Justice for hearing and disposal by this Full Bench. Similar facts and questions of law are involved in these income tax reference applications and so, these have been taken up for hearing together and are being disposed of by this common judgment.

2. Income Tax Reference Applications No. 159 of 2011 and 160 of 2011 under section 160 of the Income Tax Ordinance, 1984 (hereinafter stated as "the Ordinance") have arisen out of a common order dated 27.07.2010, passed by the Taxes Appellate Tribunal, Division Bench-1, Dhaka in Income Tax Appeals No. 2961 of 2009-2010 (assessment year 2004-2005) and 2962 of 2009-2010 (assessment year 2005-2006).

3. Income Tax Reference Applications No. 161 of 2011 and 162 of 2011 under section 160 of the Ordinance have arisen out of a common order dated 31.03.2010, passed by the Taxes Appellate Tribunal, Division Bench-5, Dhaka in Income Tax Appeals No. 1383 of 2009-2010 (assessment year 2007-2008) and 1384 of 2009-2010 (assessment year 2007-2008).

4. Income Tax Reference Application No. 511 of 2004 under section 160 of the Ordinance has arisen out of the order dated 22.07.2004, passed by the Taxes Appellate Tribunal, Division Bench-1, Dhaka in Income Tax Appeals No. 5690 of 2003-2004 (assessment year 2002-2003).

Admitted Facts of Income Tax Reference Applications No. 159 of 2011, 160 of 2011, 161 of 2011 and 162 of 2011

5. The assessee-applicant-United International University (hereinafter referred to as the assessee-university) is a private university established for imparting higher education with the permission of the Government. The assessee-university is a trust under an unregistered deed of trust registered under the provision of the Society Act, 1980. The object of the assessee-university is to impart higher education to the students on non-commercial and non-profit basis. The Government of the People's Republic of Bangladesh, Ministry of Finance (the Government) through SRO No. 454-L/80 dated 31st December, 1980 (shortly stated as "SRO No. 454"), as amended by ***এস,আর,ও, নং ১৭৮-আয়কর/২০০২*** dated 3rd July, 2002 ("SRO No. 178", in short), exempted the assessee-university from tax liability along with other educational institutions.

6. The assessee-university filed its income tax returns for the assessment years 2004-2005, 2005-2006, 2006-2007 and 2007-2008 before the concerned Deputy Commissioner of Taxes (briefly stated as "the DCT") claiming that it was entitled to get exemption of taxes on its income under the provisions of SRO No. 454 read with SRO No. 178. But the DCT refused to accept the assessee-university's entitlement to get exemption from taxes under the aforesaid SROs and estimated various income of the assessee-university for the aforesaid assessment years and issued demand notices accordingly.

7. Being aggrieved, the assessee-university filed four separate income tax appeals before the Commissioner of Taxes (Appeals), Taxes Appeal Zone-3, Dhaka ("the CTA", in brief). But the CTA, upon hearing, by a

common order dated 27.08.2007, disallowed Income Tax Appeals Patra No. 1217, 1218/Coy-9/KaAu-3/2006-2007 relating to the assessment years 2004-2005 and 2005-2006 with the opinion that the assessee-university is not entitled to any exemption of taxes under the provisions of the said SRO No. 454 read with SRO No. 178. The CTA also disallowed Income Tax Appeals Patra No. 645/Coy-9/KaAu-3/2008-2009 and 697/Coy-9/KaAu-3/2008-2009 for the assessment years 2006-2007 and 2007-2008 respectively by separate orders dated 08.07.2009 and 20.07.2009 on the ground of non-compliance of the provision of section 153(3) of the Ordinance due to non-payment of taxes under section 74 of the Ordinance.

8. The assessee-university then preferred Income Tax Appeals No. 2961 of 2009-2010 and 2962 of 2009-2010 for the assessment years 2004-2005 and 2005-2006 respectively before the Taxes Appellate Tribunal, Division Bench-1, Dhaka ("the Tribunal", in brief). The Tribunal, by a common order dated 27.07.2010, allowed the appeals in part and modified the orders of the CTA but, in principle, agreed that the assessee-university was not entitled to exemption vide the said SROs. The assessee-university also preferred Income Tax Appeals No. 1383 of 2009-2010 and 1384 of 2009-2010 for the assessment years 2006-2007 and 2007-2008 respectively before the Taxes Appellate Tribunal, Division Bench-5, Dhaka (the Tribunal). The Tribunal disallowed the appeals by a consolidated order dated 31.03.2010 holding that the orders passed by the CTA in rejecting the appeals for non-payment of tax liability under the provision of section 153(3) of the Ordinance were lawful.

Admitted Facts of Income Tax Reference Application No. 511 of 2004

9. The assessee-applicant-Manarat Dhaka International College (shortly, "the assessee-college") was established pursuant to a deed of trust executed by his Excellency Janab Fuad Abdul Hamid Al- Khatib, the Ambassador of Royal Kingdom of Soudi Arabia in Bangladesh and it was registered by registered deed No. 118/1982 dated 05.03.1982/06.03.1982. The assessee-college is an educational institution established under the trust and so, it is not liable to pay income tax on its income under the provision of section 44(3) of the Ordinance read with SRO No. 454 and SRO No. 178. So, the assessee-college did not file its income tax return for the assessment year 2002-2003, but the taxes authority, treating it as default, estimated income of the assessee-college for the said assessment year under the provision of section 84 of the Ordinance and demanded payment of income tax accordingly. Being aggrieved, the assessee-college preferred Income Tax Appeal Patra No. 479/Contra:-5/KaAu-3/2003-2004 before the Appellate Joint Commissioner of Taxes, Appellate Range-3, Taxes Appeal Zone-3, Dhaka ("the AJCT", in brief). The AJCT, by order dated 14.10.2010, affirmed the order of the DCT. Whereupon, the assessee-college preferred Income Tax Appeal No. 2181 of 2003-2004 before the Taxes Appellate Tribunal, Division Bench-4, Dhaka (shortly, "the Tribunal"). The Tribunal, by its order dated 13.01.2004, vacated the order of the CTA, set-aside the order of the DCT and directed the DCT to examine the case de novo and ascertain whether the conditions laid down in Part-A of the Sixth Schedule to the Ordinance were complied with by the assessee and take appropriate action as per law after giving the assessee an opportunity of being heard.

10. Thereafter, in response to the notices by the DCT, the assessee-college submitted duplicate of the original return. The DCT completed assessment under sections 84/156/159/93/82(2) of the Ordinance computing income of the assessee-college at Tk. 1,41,00,000/- and charged tax thereon, but allowed tax exemption for the house property income under section 44 read with the provision of Part-A of the Sixth Schedule to the Ordinance. The assessee-college then preferred Income Tax Appeal Patra No. 479/Contra:-5/KaAu-3/2003-2004 before Appellate Joint Commissioner of Taxes, Appellate Zone-3, Taxes Appeal Zone-3, Dhaka ("the AJCT", in brief) the AJCT, whereupon the AJCT, by order dated 27.06.2004 rejected the appeal for non-payment of tax liability as required under section 153(3) of the Ordinance. Thereafter, the assessee-college filed Income Tax Appeal No. 5690 of 2003-2004 before the Tribunal. But the Tribunal rejected the appeal and affirmed the order of the AJCT.

The Assessee-University/The Assessee-College's Case

11. The assessee-university and the assessee-college are trusts registered under the Societies Act, 1980. The profits earned by the assessees are not distributed to the members of the Board of Trustees and under the trust deed, these are non-commercial and non-profitable institutions/organizations. Therefore, the assessees' income falls within the purview of SRO No. 454 and SRO No. 178, but the Taxes Authority, without considering the said legal proposition of law, imposed taxes upon the income of the assessees unlawfully. As the assessees' income was exempted from payment of taxes, the rejection of appeals on the ground of non-payment of taxes as required under section 153(3) of the Ordinance is unlawful.

Respondent's Case

12. The Commissioner of Taxes has contested the reference applications by submitting separate affidavits-in-opposition supporting the respective orders of the Tribunal stating that the assessee-university and the assessee-college are run on commercial basis and not for the charitable and religious purposes. Only those universities and educational institutions, 'not operating commercially', are entitled to get exemption from payment of taxes on their income under SRO No. 178. The assessee-university and the assessee-college are operated commercially and so, the income of the assessees are taxable and the assessees are not entitled to get the benefit under SRO No. 178.

Supplementary Affidavit

13. The assessee-university filed a supplementary affidavit annexing the Memorandum of Association of United International University Trust.

The Original Questions Raised

<u>Income Tax Reference Applications No. 159 of 2011 and 160 of 2011</u>

14. More or less following similar questions were framed in the above mentioned income tax reference applications:-

(1) Whether, on the facts and in the circumstances of the case, the Tribunal is justified legally, under section 159(2)//44 of the Income Tax Ordinance, 1984 in maintaining the order of the Commissioner (Appeals) that maintained the assessment order in which total income was computed for taxation when the applicant is exempted from taxation under paragraph 3 of the SRO No. 454-L/80 dated 31.12.1980 as amended by SRO No. 178-Income Tax/2002 dated 3rd July, 2002?

(2) Whether, on the facts and circumstances of the case, the Tribunal is justified, legally, under section 159(2)/29 of the Income Tax Ordinance, 1984, in maintaining/reducing order of the Commissioner (Appeals), that maintained/reduced the disallowances made by the DCT arbitrarily, without deleting the same in full?

(3) Whether, on the facts and in the circumstances of the case, the Tribunal is justified, legally, under section 159(2)/44 of the Income Tax Ordinance, 1984 to ignore the fact, that the applicant is under the aegis of promissory estoppel by virtue of SRO No. 454-L/80 dated 31.12.1980 as substituted by SRO No. 178-Income Tax/2002 darted 3rd July, 2002, as enunciated by the High Court Division, as stated in paragraph 18 supra?

(4) Whether, on the facts and in the circumstances of the case, the Tribunal in passing its order can rely on SRO No. 158-Law/Income Tax/2007 dated 26.06.2007 effective from 01.07.2007 corresponding to the assessment year 2008-2009 in the light of the observation of the High Court Division to the effect that the law is applicable which is prevalent when the assessment proceedings started?

<u>Income Tax Reference Applications No. 161 of 2011 and 162 of 2011</u>

15. The questions raised in the above two income tax reference applications are more or less similar and basically as under:-

(1) Whether, on the facts and in the circumstances of the case, the Tribunal is justified, legally, under section 159(2)/74 of the Income Tax Ordinance, 1984 in rejecting the appeal and thereby maintaining the order of the Commissioner (Appeals) who rejected the appeal holding the erroneous view that the applicant failed to pay the admitted liability under sub-section (3) of section 153 of the Income Tax Ordinance, 1984, when the applicant was not required to pay any tax on the basis of the return filed by it under sub-section (1) of section 74 of the Income Tax Ordinance, 1984, and remanding the same to the Commissioner (Appeals) or hearing on merits?

(2) Whether, on the facts and in the circumstances of the case, the Tribunal is justified, legally, under sections 159(2)/74 of the Income Tax Ordinance, 1984, in rejecting the appeal and thereby ignoring the fact that the applicant is under the aegis of promissory estoppel, admissible to it by virtue of SRO No. 454-L/80 dated 31.12.1980 as amended by the SRO No. 178-Income Tax/2002 dated 3rd July, 2002, as enunciated by the High Court Division, as stated in paragraph 16 supra, which cannot be violated arbitrarily?

(3) Whether, on the facts and in the circumstances of the case, the Tribunal is justified, legally, in rejecting the appeal and thereby maintaining the appeal order passed by the Commissioner (Appeals) that maintained an

assessment order passed arbitrarily, involving promissory estoppels, is a malice in law, as held by the Appellate Division?

16. Income Tax Reference Applications No. 511 of 2004:-

"(I) Whether, in the facts and on the circumstances of the case, the Tribunal is judicious in holding the opinion that AJCT is right in law confirming the educational institution as commercial venture and denying exemption of tax enjoined to an educational institution by SRO No. 178-L/2002 dated 04.07.02 and having treated the applicant as defaulter under section 153(3) of the Ordinance?

(II) Whether, in the facts and on the circumstances of the case, the Tribunal is judicious in confirming higher tuition fees by Tk. 13,00,000/- and income from other source by Tk. 1,67,209/- and tax on the income, excepting the part of house property income under part-A of the Sixth Schedule of the Ordinance?"

Hearing and Decision by another Division Bench

17. The above mentioned income tax reference applications, namely, Income Tax Reference Applications No. 159 of 2011, 160 of 2011, 161 of 2011 and 162 of 2011, have been heard analogously by the Bench comprising Mr. Justice A.F.M. Abdur Rahman and Mr. Justice F.R.M. Nazmul Ahasan, and their lordships, upon considering the facts and circumstances of the cases and arguments placed before them by the contending parties, disagreed with the view taken in the judgment dated 14.01.2007 passed by a Division Bench comprising Mr. Justice Shah Abu Nayeem Mominur Rahman and Mr. Justice Abdul Awal to the effect that,- "i*n order to get such exemption it is necessary to satisfy the taxes authority as to the fulfillment of the conditions/criteria laid down in the SRO's by an University or educational institution and on being satisfied the tax authority is to issue a certificate or exemption letter to be produced/referred as and when required by the assessing officer. The SRO's do not authorize the assessing officer to decide the claim of such tax exemption by an assessee in as much as such claim for tax- exemption requires proper enquiry by competent authority."* Thereupon, their lordships, recording their point of difference, sent Income Tax Reference Applications No. 159 of 2011, 160 of 2011, 161 of 2011 and 162 of 2011 to the Hon'ble Chief Justice to take steps in accordance with the rule of the Supreme Court of Bangladesh (High Court Division) Rules, 1973. Similarly, by order dated 10.12.2012 passed in Income Tax Reference Applications No. 510 of 2004 and 511 of 2004, their lordships differed with the decision of the Division Bench as referred to above and sent these two income tax reference applications also to the Hon'ble Chief Justice to take steps in accordance with the provision of Chapter VII of the Supreme Court of Bangladesh (High Court Division) Rules, 1973.

18. At this stage, these income tax reference applications have been sent by the Hon'ble Chief Justice for hearing and disposal by this Full Bench.

The Point of Difference

19. The point of difference in Income Tax Reference Applications No. 159 of 2011 to 162 of 2011 are quoted hereinafter:-

"(1) *Whether the private university registered under the Private University Act 1992 being a trust registered under the Society Registration Act 1860 having in its object clause to impart higher education on the basis of non-profit, non-commercial basis can be treated as a commercial organization due to its charging higher tuition fee and paying higher rate of remuneration to the tutors.*

(2) Whether the provision of Section 44 along with the Provision of 6th Schedule Part-A of the Income Tax Ordinance 1984 and also the SRO No. 454-L/80 dated 31.12.1980 as amended by SRO No. 178-Income Tax/2002 dated 3.7.2002 require any prior certificate to be issued by the taxes authority i.e. the Board of Revenue in order to allow the exemption under the aforesaid SRO."

20. The point of difference in Income Tax Reference Application No. 511 of 2004 are quoted hereinafter:-

"1 Whether the private university registered under the Private University Act, 1992 being a trust registered under the Society Registration Act, 1860 having in its object clause to impart higher; education on the basis of non-profit, non-commercial basis can be treated as a commercial organization due to its charging higher tuition fee and paying higher rate of remuneration to the tutors.

(2) Whether the provision of section 44 along with the provision of 6th Schedule Part-A and also the SRO No. 454-L/80 dated 31.12.1980 as amended by SRO No. 178-Income Tax/2002 dated 3.7.2002 requires any

prior certificate to be issued by the taxes authority i.e. the Board of Revenue in order to allow the exemption under the aforesaid SRO."

21. It may be mentioned that Income Tax Reference Applications No. 510 of 2004 and 511 of 2004, both are relating to the assessment year 2002-2003. The initial assessment order was, eventually, set-aside by the Tribunal and subsequently, fresh assessments were made and it was challenged up to the Tribunal. Therefore, the initial assessment order as challenged in Income Tax Reference Application No. 510 of 2004 merged with the subsequent order of the Tribunal relating to Income Tax Reference Application No. 511 of 2004. So, at the time of hearing, Income Tax Reference Application No. 510 of 2004 has not been pressed and, thus, rejected for non-prosecution by order passed separately in Income Tax Reference Application No. 510 of 2004.

Arguments of the assessee-university/the assessee-college

22. Mr. Sarder Jinnat Ali, the learned Advocate for the assessee-university/the assessee-college, appearing with Mr. Md. Umber Ali, Mr. Md. Ali Akbor Khan and Mr. Md. Delwar Hossin, has taken us through the reference applications, connected materials on record, relevant SROs No. 454 and 178 and put forward the following arguments before us:-

(1) the Government (Ministry of Finance) in exercise of its power as conferred by sub-section (1) of section 60 of the Income Tax Act, 1922 (hereinafter referred to as the Act, 1922) and in supersession of the Ministry of Finance's previous Notification No. 1041(K)61 dated 31st October, 1961 published Gazette Notification being SRO No. 454. In the Notification SRO No. 454, some classes of income was made tax exempted including the income of a university or other educational institutions existing solely for educational purposes and not for purpose of profit;

(2) subsequently, the Government in exercise of its power as conferred by clause (b), sub-section (4) of section 44 of the Ordinance amended SRO No. 454 and substituted sub-clause (3) of clause (a) making the income of university/other educational institution "not operated commercially" as tax exempted. The assessee-applicants are trusts registered under the Societies Registration Act and the assessee-university/the assessee-college are non-profit organizations not being operated commercially. Therefore, the assessees are entitled to have the benefit of SRO No. 454 read with SRO No. 178;

(3) merely because the assessee-applicants charge higher tuition fees on the students and pay higher salaries to the teachers would not make the assessee-university and the assessee-college a commercially operated organization so as to disentitle the assessees from the exemption as provided by SRO No. 178;

(4) the object of the assessee-university and the assessee-college is non commercial object and no profit is distributed amongst the sponsors of the university and the college. The income of the assessee-university and the assessee-college is spent for promoting education by giving scholarships and other incentives to the students for development of education;

(5) in the aforesaid facts and circumstances of the cases, the points referred to by the Division Bench are liable to be decided in favour of the assessee-applicants.

However, Mr. Sarder Jinnat Ali submits that he has no submission relating to application of the provision of section 44 read with the provision of Part A of the Sixth Schedule to the Ordinance as those provisions are not related to these cases and, as such, points of reference may be reframed accordingly.

Arguments of the respondent-the Commissioner of Taxes

23. Mr. S. Rashed Jahangir, the learned Deputy Attorney General appearing with Ms. Mahfuza Begum and Mr. Titus Hillol Rema, the learned Assistant Attorney Generals, on behalf of the respondent, takes us through the affidavits-in-opposition and SROs No. 454 and 178 and subsequent Notifications published in the official gazette being SRO No. 156-Income Tax/2007 dated 28th June, 2007 showing that sub-clauses (1), (2) and (3) of clause (a) were deleted with effect from 1st July, 2007 and contends as under:-

(a) SRO No. 158-Law/Income Tax/2007 dated 28th June, 2007 shows that the Government imposed 15% taxes on the income of private universities and other universities except public university;

(b) Notification being SRO No. 268-Ain/Income Tax/2010 dated 1st July, 2010 shows that the previous Notification was rescinded and the private universities, private medical colleges, private dental colleges and private engineering colleges have to pay reduced taxes of 15% on their income except public universities and institutions engaged in information technologies;

(c) according to the development by subsequent SROs, it is evident that originally the income of the private universities/educational institutions were fully exempted from payment of taxes at the initial stage. Subsequently, after certain periods of time, when the private universities started profiteering by charging higher tuition fees, then the Government decided to impose taxes upon the said universities/educational institutions that run on profit;

(d) under further development, the Government included the income of the private universities, colleges, medical colleges, etc. operated on commercial basis within the ambit of taxation;

(e) from the SROs No. 454, 178 and subsequent SROs, it is evident that the intention of the Government was clear that the private universities/colleges are to pay taxes on their income, because they are operating commercially i.e. charging high tuition fees and making profit;

(f) whether the profit is distributed to the organizers is not a question to be decided. It is not the purpose for utilizing the profit but the operation on commercial basis would be the factor to decide the ambit of taxation in view of the provision of SRO No. 178;

(g) therefore, the orders passed by the Tribunal in deciding that the income of the assessee-university/the assessee-college are not tax exempted are lawful;

Mr. S. Rashed Jahangir placed before us Internal Revenue Bulletin 2011-48 dated November, 28, 2011 in support of his contentions about the nature of an activity, not the purpose or motivation for conducting the activity, is determinative factor to decide commercial activity.

Submissions of the Amici Curiae

24. In course of arguments, it was found that the words "not operated commercially" have not been defined in the Ordinance or the Rules made thereunder or in SRO Nos. 454 or 178. Therefore, Mr. M. A. Noor and Mr. Kamal-ul-Alam, the learned Counsels, were requested to assist the court as Amici Curiae.

25. Mr. M. A. Noor, the learned Amicus Curiae, submits that the intent of SRO No. 178 is not clear. If there is any doubt in the interpretation of the terms of the SRO i. e. the words "if not commercially operated," the benefit should go to the tax payer. He further submits that if there is large scale abuse of the exemption, the Government can withdraw the exemption or modify it to clarify the position. He also submits that the "commercial activity" has been the subject of judicial examination for a long time and in the case of Sakharam Narayan Kherdekar vs City of Nagpur Corporation reported in AIR Bom 200 (1963) 65, "any activity which can justly be called a commercial activity must imply some investment of capital and the activity must run the risk of profit or loss" and according to the Law Lexicon the term includes any type of business or activity which is carried on for a profit. He next submits that the words "which is not operated commercially" have not been defined in the Ordinance or in the Notification and, as such, there is vagueness in the Notification itself. In the circumstances, there being doubt in the terms of the SRO No. 178, the benefit should go to the tax payer.

26. Mr. Kamal-ul-Alam, the learned Amicus Curiae, has put forward the following submissions before us:-

(i) when SRO No. 454 was notified, as a matter of fact, there has not been any private university and a real term "tax exempted" never existed for the purpose of profit, as all were public universities being funded by the Government.

(ii) In 1990s, the concept of private university gained momentum and the Government enacted Private University Act, 1992. The said Act was subsequently repealed and re-enacted as Public University Act, 2010. Thereafter, varieties of private universities have been established in the country.

(iii) in SRO No. 178, the Government put emphasis on the commercial operation without defining the word "commercial" in any precise term. There are two aspects of the SRO. The first is that the university/educational institution in order to get exemption must "not operate commercially." The Government's view is that the universities are charging commercial rate for imparting education from the students resulting in the surplus/profit and, as such, the surplus or profit is taxable. On the other hand, the assessees' point is that the surplus/profit is not distributed to the sponsors and it may only be spent for further expansion for development of universities/educational institutions and so, there is no commercial object in the commercial charging and, as such, the surplus should be exempted from tax liability.

(iv) the presence or absence of a formal non-profit making status of an organization is not a helpful criteria for determining whether or not an organization 'operate commercially.' Many formally non-profit organizations 'operate commercially.' Moreover, many non-profit organizations consistently seek to generate profit in the sense of operating surplus, which permit re-investment and the constitution of reserves as protection against future bad times. They are, however, non-profit in the sense that they do not distribute their surplus/profit outside the organization i.e. its sponsors/share-holders.

(v) as 'commercial operation' has neither been defined in the Ordinance nor in SRO No. 178, there is clearly vagueness in the SRO itself and the mater being related to fiscal law, the benefit should go in favour of the citizen i.e. the assessees.

27. However, Mr. Alam, in principle, has agreed that when some private educational institutions are charging higher tuition fees and making profit years together and without reducing tuition fees for the purpose of education, increasing tuition fees on regular basis, in such case, the Government may impose taxes on such universities/educational institutions.

28. In support of his submissions, Mr. Alam has placed before us an unreported Indian Jurisdiction judgment dated March 16, 2015 passed by the Supreme Court of India in Civil Appeal No. 5167 of 2008 (M/S Queen's Educational Society vs Commissioner of Income Tax).

Examination of Materials on Record

29. We have gone through the income tax reference applications, the affidavits-in-opposition and the connected materials on record. We have also gone through the judgment dated 14.01.2007 passed by a different Bench of this Division in Income Tax Reference Application No. 274 of 2006, the order dated 16.10.2012 passed by a Division Bench comprising Mr. Justice A. F. M. Abdur Rahman and Mr. Justice F. R. M. Nazmul Ahasan in Income Tax Reference Applications No. 159 of 2011, 160 of 2011, 161 of 2011 and 162 of 2011and also the order dated 12.10.2010 passed by the said Bench in Income Tax Reference Applications No. 510 of 2004 and 511 of 2004. We have also carefully studied the relevant provisions of law and the judgments referred to us.

Questions Reframed

30. In view of the arguments as advanced before us by the contending parties, it transpires that the learned Advocate for the applicants admits that the income of the assessee-university/the assessee-college is not tax exempted under the provision of section 44 read with the provision of Part-A of the Sixth Schedule of the Ordinance except house property income. From the materials on record, it transpires that the assessee-college has some house property income and it has been given benefit under the provision of section 44 read with the provision of Part-A of the Sixth Schedule of the Ordinance for that part of income. Therefore, there is neither any grievance of the assessees on this portion of question nor any argument has been made on it. Moreover, we are of the view that the questions need reframing to avoid future confusion. Therefore, we would like to reformulate the questions in the following manner:-

(i) Whether, in the facts and circumstances of the cases, the Tribunal was justified in not allowing tax exemption benefit to the assessee-university/the assessee-college in view of the provision of clause (3) of ***এস,আর,ও, নং ১৭৮-আয়কর/২০০২*** dated 03.07.2002 in the assessment years 200102002, 2004-2005, 2005-2006, 2006-2007 and 2007-2008 by treating the assessees as "operated commercially" due to charging higher tuition fee and paying higher remunerations to the teachers?

(ii) Whether, in the facts and circumstances of the cases, any prior certificate issued by the Taxes Authority is required in order to allow the exemption to the assessee-university/assessee-college under SRO No. 454 dated 31.12.1980 read with SRO No. 178 dated 03.07.2002?

Deliberation of the Court

31. Question (i) is relating to the assessees' entitlement to get exemption of tax on the assessees' income under SRO No. 178.

32. Admittedly, the assessee-university and the assessee-college have been established for imparting education. It is further admitted that under SRO No. 454, the income of a university or other educational institutions existing solely for educational purposes and not for the purpose of profit were tax exempted. Subsequently, some amendment was made to the aforesaid Notification by SRO No. 178.

33. For better understanding, relevant portions of SRO No. 454 and SRO No. 178 are quoted below:-

"No. S.R.O. 454-L/80.—In exercise of the power conferred by sub-section (1) of section 60 of the Income Tax Act, 1922 (XI of 1922) and supersession of the Ministry of Finance Notification No. S.R.O. 1041(K)/61, dated the 3^{1st} October, 1961 the Government is pleased to direct that:--

(a) <u>the following classes of income shall be exempt from the tax payable under the said Act and they shall not be taken into account in determining the total income of an assessee for the purposes of the said act</u>.—

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(3) the income of a university or other educational institution existing solely for educational purposes and not for purposes of profit;

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“**এস,আর,ও নং ১৭৮-আয়কর/২০০২/--** Income-tax Ordinance, 1984 (XXXVI of 1984) **এর** section 44 **এর sub-section (4) এর** clause (b) **তে প্রদত্ত ক্ষমতাবলে সরকার অত্র বিভাগের ৩১শে ডিসেম্বর, ১৯৮০ ইং তারিখের প্রজ্ঞাপন এস, আর, ও নং** 454-L/80 **এ নিম্নরুপ সংশোধন করিল, যথাঃ-**

উপরি-উক্ত প্রজ্ঞাপনের clause (a) **এর** sub-clause (3)**এর পরিবতে নিম্নরুপ** sub-clause (3) **প্রতিস্থাপিত হইবে, যথাঃ-**

“(3) the income of any university, or any other educational institution, which is not operated commercially and also medical college, dental college, engineering college and institution imparting education on information technology;”

(Underlined by us)

34. The main arguments centered around whether the assessee-university or the assessee-college may be treated as “being operated commercially. There is no dispute that the words “operated commercially” or “not operated commercially” have not been defined in the Ordinance or the Rules made thereunder. From the Notification, SRO No. 178, it appears that no definition or explanation has been given for treating a university or educational institution as “not operated commercially.”

35. In the Law Lexicon by P. M. Bakshi, Edition 2005 (reprint 2008), the word ‘commercial’ has been explained as under:-

“COMMERCIAL.—It relates to trade and commerce in general. Harendra H. Mehta v. Mukesh H. Mehta, AIR 1999 SC 2054 : 1999 (2) Raj 547 (SC).

The word ‘commercial’ is defined in the Concise Oxford Dictionary, New Edition for the 990, at page 227. **The word ‘commercial’ is defined as “having profit as a primary aim rather than artistic etc., value.”** So also, in Stroud’s Judicial Dictionary, Fifth Edition, Volume 1 (A to C), the word “commercial action” is stated to include, “any cause arising out of the ordinary transactions of merchants and traders”, and further” any cause relating to the construction of mercantile document, etc.” See Dena Bank, Ahmednagar v. Prakash Birbhan Katariya, AIR 1994 Bom 343 at 345; 1994 (1) Bom CR 537: 1994 Civil Court Cas 505.”

(Bold, emphasis given)

36. In the Major Law Lexicon by P. Ramanatha Aiyar, Forth Edition, 2010, the expression “commercial purpose” has been used as under:-

“The expression ‘commercial purpose’ is not defined in the Act. **In the absence of a definition, its ordinary meaning has to be seen. ‘Commercial’ denotes “pertaining to commerce” (Chamber’s Twentieth Century Dictionary); it means “connected with, or engaged in commerce; mercantile; having profit as the main aim” (Collins English Dictionary)** whereas the word ‘commerce’ means “financial transactions especially buying and selling of merchandise, on a large scale” (Concise Oxford Dictionary). Laxmi Engineering Works v. P.S.G. Industrial Institute, AIR 1995 SC 1428 (Consumer Protection Act, 1986, S. 2(1)(d).”

(Bold, emphasis given)

37. In the Internal Revenue Bulletin: 2011-48 dated November 28, 2011, the definition of “Commercial Activity” is as under:-

“Definition of Commercial Activity

Section 1.89204T of the 1988 temporary regulations provides rules for determining whether income is derived from the conduct of a commercial activity, and specially identifies certain activities that are not commercial, including certain investments, trading activities, cultural events, non-profit activities, and governmental functions. Several comments have expressed uncertainty about the applicable U.S. standard for determining when an activity will be considered a commercial activity, a non-profit activity, or governmental function for purposes of section 892 and s 1.892-4T.

Section 1.892-4T(d) of the proposed regulations restates the general rule adopted in the 1988 temporary regulations that, subject to certain enumerated exceptions, all activities ordinarily conducted for the current or future production of income or gain are commercial activities. Section 1.892-4(d) of the proposed regulations further provides that only the nature of an activity, not the purpose or motivation for conducting the activity, is determinative of whether the activity is a commercial activity. This standard also applies for purposes of determining whether an activity is characterized as a non-profit or governmental function under s 1.892-4T(c)(3) and (c)(4). In addition, s 1.892-4(d) of the proposed regulations clarifies the rule in the 1988 temporary regulations by providing that an activity may be considered a commercial activity even if the activity does not constitute a trade or business for purposes of section 162 or does not constitute (or would not constitute if

undertaken in the United States) the conduct of a trade or business in the United States for purposes of section 864(b).

(Underlined by us)

38. In the case reported in AIR 1964 Bom 200, 210, their lordships while deciding the meaning of "commercial activity" observed that **the very concept of any activity which can justly be called a commercial activity must imply some investment of capital and the activity must run the risk of profit or loss.** "Commercial activity" has been defined in Black's Law Dictionary, Ninth Edition, 38 as an activity such as operating a business conduct to make a profit.

39. From the above discussions, it appears that 'commercial activity' has been defined in various sorts of manner. Here, in this case, the assessee-university and the assessee-college claim that they are non-profit and non-commercial organizations. However, admittedly, the assessee-university and the assessee college charge high tuition fees and some income generated from the university/the college which, at the end of the fiscal year, remain as surplus income or profit.

40. According to the learned Deputy Attorney General, the assessees, by charging higher tuition fees gradually each year and without adjusting or reducing the surplus income or profit, are running business operation and the purpose of business operation is immaterial. But he failed to explain the criteria for treating an university or educational institution as operating commercially or that only because an universities or educational institutions are charging high tuition fees and there are some surplus income or profit, invested for the development of the university and the college, those may be treated as operated commercially. It is true that the assessee-university and the assessee-college are charging high tuition fees having surplus income/profit, and there is risk of profit or loss in running such university/college, though the main aim may not be profit earning.

41. In the above circumstances, two different views may be taken. The first view is that the assessee-university and the assessee-college are charging higher tuition fees so that at the end of a year there is surplus amount or profit and so, they are operating commercially. The second view is that the income of the assessee-university/the assessee-college is not for the purpose of profit or loss, but for imparting education to the students and, as such, it cannot be treated as "operated commercially."

42. Thus, considering the meaning of "commercial activity" as discussed hereinbefore, it is evident that the expression of the words "not operated commercially" is vague and it may carry meaning in favour or against the assessees i. e. both ways. When there is doubt, an interpretation which is favourable to the subject should be preferred.—National Board of Revenue vs. Bata Shoe Co., 42 DLR (AD) 105. When a particular provision is susceptible of two or more interpretations, that one most favourable to the citizen must accepted.—Commissioner of Customs vs. Customs, Excise & VAT Appellate Tribunal, 8 BLC 329. It is a settled principle of law that when the provision of a fiscal law carries different meaning, in such case, the benefit of it will go in favour of the citizen i.e. the assessee-university/the assessee-college.

43. Question (ii) is about the requirement of certificate or exemption letter issued by Tax Authority to get exemption from payment of income tax.

44. In the judgment dated 14.01.2007 passed in Income Tax Reference Application No. 274 of 2006, their lordships observed as under:-

"The SRO No. 454-L/80(a) dated 31.12.80 as amended by SRO No. 178-Income Tax/2002 dated 3.7.2002 contains, amongst other, that the income of any University or any other educational institution "not operated commercially" and or "institution imparting education on information technology" are exempted from payment of tax and the same is general provision as to entitlement to claim exemption. **In order to get such exemption it is necessary to satisfy the taxes authority as to the fulfillment of the conditions/criteria laid down in the SRO"s by an university or educational institution and on being satisfied the Tax authority is to issue a certificate or exemption letter to be produced/referred as and when required by the assessing officer."**

(Bold, emphasis supplied)

45. The learned Deputy Attorney General failed to show before us that there is any legal requirement to issue a certificate by the Tax Authority or exemption letter to be produced in order to get the benefit of SRO No. 454 read with SRO No. 178. Therefore, we agree with the view expressed by the Division Bench comprising

Mr. Justice A. F. M. Abdur Rahman and Mr. Justice F. R. M. Nazmul Ahasan that in order to get exemption, issuance of some certificate or producing exemption letter before the assessing officer is not necessary.

46. However, it appears that in this judgment dated 14.01.2007, their lordships has not addressed the issue of "not operated commercially." Be that as it may, we are of the opinion that the Government has jurisdiction to issue Notification exempting or reducing income tax of any university or educational institution under section 44(4)(b) of the Ordinance. In fact, by subsequent Notification, being SRO No. 268-Law-Income Tax/2010 dated 1st July, 2010 the Government has done so.

47. The above view of ours is supported by the unreported judgment dated 16th March, 2015 (M/S. Qeen'S Educational Society vs. Commissioner of Income Tax) wherein it has been decided as under;-

"8.13 From the aforesaid discussion, the following principles of law can be summed up:-

(1) It is obligatory on the part of the Chief Commissioner of Income Tax or the Director, which are the prescribed authorities, to comply with proviso thirteen (un-numbered). Accordingly, it has to be ascertained whether the educational institution has been applying its profit wholly and exclusively to the object for which the institution is established. Merely because an institution has earned profit would not be deciding factor to conclude that the educational institution exists for profit.

(2) The provisions of section 10(23C)(vi) of the Act are analogous to the erstwhile Section 10(22) of the Act, as has been laid down by Hon'ble the Supreme Court in the case American Hotel and Lodging Association (supra). To decide the entitlement of an institution for exemption under Section 10(23C)(vi) of the Act, the test of predominant object of the activity has to be applied by posing the question whether it exists solely for education and not to earn profit [See 5-Judges Constitution Bench judgment in the case of Surt Art Silk Cloth Manufacturers Association (supra)]. It has to be borne in mind that merely because profits have resulted from the activity of imparting education would not result in change of character of the institution that it exists solely for educational purpose. <u>A workable solution has been provided by Hon'ble the Supreme Court in para 33 of its judgment in American Hotel and Lodging Association's case (supra). Thus, on an application made by an institution, the prescribed authority can grant approval subject to such terms and conditions as it may deems fit provided that they are not in conflict with the provisions of the Act. The parameters of earning profit beyond 15% and its investment wholly for educational purposes may be expressly stipulated as per the statutory requirement. Thereafter the Assessing Authority may ensure compliance of those conditions.</u> The cases where exemption has been granted earlier and the assessments are completed with the finding that there is no contravention of the statutory provisions, need not be reopened. However, alter grant of approval if it comes to the notice of the prescribed authority that the conditions on which approval was given, have been violated or the circumstances mentioned in 13th proviso exists, then by following the procedure envisaged in 13th proviso, the prescribed authority can withdraw the approval.

(3) The capital expenditure wholly and exclusively to the objects of education is entitled to exemption and would not constitute part of the total income.

(4) The educational institutions, which are registered as a Society, would continue to retain their character as such and would be eligible to apply for exemption under section 10(23C)(vi) of the Act. [See para 8.7 of the judgment-Aditanar Educational Institution case (supra)]

(5) <u>Where more than 15% of income of an educational institution is accumulated on or after 1st April, 2002, the period of accumulation of the amount exceeding 15% is not permissible beyond five years, provided the excess income has been applied or accumulated for application wholly and exclusively for the purpose of education.</u>

(6) The judgment of Uttrakhand High Court rendered in the case of Queens Educational Society (supra) and the connected matters, is not applicable to eases fall within the provision of Section 10(23C)(vi) of the Act.

There are various reasons, which have been discussed in para 8.8 of the judgment, and the judgment of Allahabad High Court rendered in the case of City Montessori School (supra) lays down the correct law.

48. And finally held:

"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. <u>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.</u>

8.16 The writ petitions stand disposed of in the above terms."

(Underlined by us)

49. In the above facts and circumstances, we are of the opinion that the income of the assessee-university/the assessee-college ought to have been treated as tax exempted under SRO No. 178 for the assessment years 2002-2003, 2004-2005, 2005-2006, 2006-2007 and 2007-2008 by the Taxes Authority and the Tribunal.

50. In the circumstances, rejection of appeals for non-payment of admitted tax as required under section 153(3) of the Ordinance and imposing taxes on the income of the assessee-university/the assessee-college were not justified.

51. In view of the discussions made in the foregoing paragraphs, vis-à-vis the law, we find merit and force in the submissions of Mr. Sarder Jinnat Ali, the learned Advocate for the assessee-applicants and the learned Advocates Mr. M. A. Noor and Mr. Kamal-ul-Alam, the Amici Curiae and we find no merit in the submissions of Mr. S. Rashed Jahangir, the learned Deputy Attorney General.

52. In the result, our answer to questions (i) and (ii) as re-formulated by us are decided in the negative in favour of the assessee-applicants and against the department-respondent.

53. The connected Rules being Rules No. 53(Ref.) of 2011, 54(Ref.) of 2011, 55(Ref.) of 2011 and 56(Ref.) of 2011 are, hereby, disposed of.

54. This judgment of ours do govern Income Tax Reference Applications No. 160 of 2011, 161 of 2011, 162 of 2011 and 511 of 2004.

55. No costs.

56. Before we part with the judgment, we convey our gratitude to the learned Amici Curiae for their assistance rendered to this court.

57. The Registrar, Supreme Court of Bangladesh is directed to take steps under section 161(2) of the Income Tax Ordinance, 1984.

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