IN THE SUPREME COURT OF BANGLADESH

APPELLATE DIVISION

PRESENT:

Mr. Justice Borhanuddin

Mr. Justice M. Enayetur Rahim

Mr. Justice Md. Ashfaqul Islam

Mr. Justice Md. Abu Zafor Siddique

CIVIL APPEAL NOS.111-155 OF 2021.

(From the judgment and order dated 09.05.2016 passed by the High Court Division in Writ Petition Nos.9562-9564 of 2008, 9566-9567 of 2008, 11545 of 2015, 2110 of 2013, 6861 of 2012, 10929 of 2014, 8187 of 2015, 8930 of 2011, 11546 of 2015, 3681-3682 of 2013, 1969 of 2009, 2682 of 2016, 6404 of 2014, 4049 of 2013, 8507 of 2010, 3423 of 2012, 5793-5794 of 2014, 11195 of 2014, 14609 of 2012, 5176 of 2010, 13246 of 2015, 4050 of 2013, 9733 of 2015, 9934 of 2015, 12558 of 2012, 986-987 of 2011, 4878 of 2013, 10769 of 2014, 8697 of 2011, 5795 of 2014, 2510 of 2015, 3371 of 2015, 6177 of 2013, 1131 of 2009, 8985 of 2010, 11840 of 2015, 4048 of 2013, 12885 of 2015 and 1891 of 2015 respectively).

The Government of Bangladesh, represented by the Secretary, Ministry of Finance, Internal Resources Division, Bangladesh Secretariat, Ramna, Dhaka and others. : **...Appellants.** (in C.A. Nos.111-155 of 2007)

-Versus-

North South University, Dhaka. : **...Respondent.** (in C.A. Nos.111-112, 115, 117,120,146 & 153 of 2021)

International University of Business Agriculture and Technology (IUBAT), Uttara, Dhaka. : **...Respondent.** (in C.A. Nos.113-114, 136,138 & 141 of 2021)

Independent University of Bangladesh, Bashundhara, Dhaka. : **...Respondent.** (in C.A. Nos.116 & 137 of 2021)

World University of Bangladesh, represented by its Associate Professor Dr. Abdul Mannan Choudhury. : **...Respondent.** (in C.A. No.118 of 2021)

The University of Liberal Arts Bangladesh, represented by its Registrar Mr. Kamal Khan and another. : **...Respondents.** (in C.A. Nos.119,121-122 & 143 of 2021)

The University of Asia Pacific, Dhanmondi, Dhaka and another. : **...Respondents.** (in C.A. No.123 of 2021)

World University of Bangladesh, represented by the member Secretary of its Board of Trustee, Associate Professor Dr. Musfiq Mannan Choudhury. : **...Respondent.** (in C.A. Nos.124,131 & 134 of 2021)

The University of Liberal Arts Bangladesh, represented by its Registrar Mr. Md. Foyzul Islam and another.	:	**...Respondents.** (in C.A. No.125 of 2021)
Eastern University, Dhanmondi, Dhaka and others.	:	**...Respondents.** (in C.A. Nos.126 & 135 of 2021)
North South University, Dhaka and another.	:	**...Respondent.** (in C.A. Nos.127 & 142 of 2021)
The University of Asia Pacific, represented by its Registrar, Dhanmondi, Dhaka.	:	**...Respondent.** (in C.A. Nos.128,133,139-140,147 & 149 of 2021)
International University of Business and Agriculture and Technology (IUBAT), Uttara, Dhaka and another.	:	**...Respondents.** (in C.A. Noa.129-130 & 144 of 2021)
Eastern University, Dhanmondi, Dhaka.	:	**...Respondent.** (in C.A. No.132 of 2021)
Daffodil International University, represented by its Registrar and others.	:	**...Respondents.** (in C.A. No.145 of 2021)
Asian University of Bangladesh, represented by its Vice-Chancellor, Uttara, Dhaka.	:	**...Respondent.** (in C.A. No.148 of 2021)
Ahsanullah University of Science and Technology, Dhaka and another.	:	**...Respondents.** (in C.A. No.150 of 2021)
Southeast University, represented by its Vice-Chancellor, Banani, Dhaka.	:	**...Respondent.** (in C.A. No.151 of 2021)
Eastern University, Dhanmondi, Dhaka and others.	:	**...Respondents.** (in C.A. No.152 of 2021)
The University of Liberal Arts Bangladesh, represented by its Registrar Mr. Md. Foyzul Islam.	:	**...Respondent.** (in C.A. No.154 of 2021)
Southern University Bangladesh, represented by its Treasurer and others.	:	**...Respondents.** (in C.A. No.155 of 2021)

For the Appellants. (In C.A. Nos.111-155 of 2021)	:	Mr. A.M. Amin Uddin, Attorney General with Mr. Samarendra Nath Biswas, Deputy Attorney General, Ms. Mahfuza Begum, Deputy Attorney General, Mr. Mohammad Saiful Alam, Assistant Attorney General and Ms. Farzana Rahman Shampa, Assistant Attorney General instructed by Mr. Haridas Paul, Advocate-on-Record.
For the Respondents. (In C.A. Nos.111-112, 115, 117, 120, 127, 142, 146 & 153 of 2021)	:	Mr. A.F. Hassan Ariff, Senior Advocate with Mr. Fida M. Kamal, Senior Advocate and Mr. Muhammad Sakhawat Hossain, Advocate instructed by Mr. Md. Taufique Hossain, Advocate-on-Record.

For the Respondents. (In C.A. Nos.113-114, 129-130, 136, 138, 141 & 150 of 2021)	:	Mr. Muhammad Sakhawat Hossain, Advocate instructed by Mr. Md. Taufique Hossain, Advocate-on-Record.
For the Respondent. (In C.A. No.144 of 2021)	:	Mr. Md. Taufique Hossain, Advocate-on-Record.
For the Respondents. (In C.A. Nos.118-119, 121-122, 124-125, 131 ,134, 143 & 154 of 2021)	:	Mr. Omar Sadat, Advocate instructed by Ms. Madhumalati Chowdhury Barua, Advocate-on-Record.
For the Respondents. (In C.A. Nos.123, 128, 133, 139-140 & 149 of 2021)	:	Mr. Probir Neogi, Senior Advocate with Mr. Md. Abdur Razzak, Advocate instructed by Mr. Zainul Abedin, Advocate-on-Record.
For the Respondents. (In C.A. Nos.116 & 137 of 2021)	:	Mr. Rokanuddin Mahmud, Senior Advocate with Mr. Mustafizur Rahman Khan, Senior Advocate and Mr. Abul Kalam Azad, Advocate instructed by Mr. Zainul Abedin, Advocate-on-Record.
For the Respondents. (In C.A. Nos.126, 132, 135, 147-148 & 152 of 2021)	:	Not represented.
For the Respondent. (In C.A. No.151 of 2021)	:	Mr. A.F. Hassan Ariff, Senior Advocate with Mr. Munshi Moniruzzaman, Advocate and Mr. Md. Ashik-Al-Jalil, Advocate instructed by Ms. Mahmuda Begum, Advocate-on-Record.
For the Respondents. (In C.A. Nos.145 & 155 of 2021)	:	Mr. Mohammed Mutahar Hossain, Advocate instructed by Mr. Nurul Islam Bhuiyan, Advocate-on-Record (Dead).
Date of Hearing.	:	**The 25th & 27th February, 2024.**
Date of Judgment.	:	**The 27th February, 2024.**

J U D G M E N T

Borhanuddin,J: These civil appeals by leave are directed against a common judgment and order dated 05.09.2016 passed by the High Court Division in Writ Petition Nos.9562-9564 of 2008, of 2008, 9566-9567 of 2008, 11545 of 2015, 2110 of 2013, 6861 of 2012, 10929 of 2014, 8187

of 2015, 8930 of 2011, 11546 of 2015, 3681-3682 of 2013, 1969 of 2009, 2682 of 2016, 6404 of 2014, 4049 of 2013, 8507 of 2010, 3423 of 2012, 5793-5794 of 2014, 11195 of 2014, 14609 of 2012, 5176 of 2010, 13246 of 2015, 4050 of 2013, 9733 of 2015, 9934 of 2015, 12558 of 2012, 986-987 of 2011, 4878 of 2013, 10769 of 2014, 8697 of 2011, 5795 of 2014, 2510 of 2015, 3371 of 2015, 6177 of 2013, 1131 of 2009, 8985 of 2010, 11840 of 2015, 4048 of 2013, 12885 of 2015 and 1891 of 2015 making all the Rules absolute with direction.

Since all the appeals originated from a common judgment and order passed in aforesaid writ petitions involving identical point of law based on similar facts as such all the civil appeals have been taken together for hearing and disposed of by this single judgment.

Facts relevant for disposal of the appeals are that the Rules in the aforementioned writ petitions were basically issued in two fold terms, namely, calling upon the writ respondents including the Government of Bangladesh to show cause as to why the SRO No.156-Ain/Aikor/2007 dated 28.06.2007 and SRO No.158-

Ain/Aikor/2007 dated 28.06.2007 issued by the Government under Section 44(4)(b) of the Income Tax Ordinance, 1984 (hereafter referred to as 'the Ordinance, 1984') withdrawing the tax exemptions infavour of the writ petitioner universities/educational institutions and thereby imposing 15% tax on their income relating to assessment years 2008-2009 to 2010-2011 and as to why the SRO No.268-Ain/Aikor/2010 dated 01.07.2010 issued by the Government under the same provisions purportedly re-fixing the tax payable by said writ-petitioners @15% in respect of assessment year 2011-2012 and onwards should not be declared to be without lawful authority and are of no legal effect and as to why the respective assessment orders followed by demand notices as well as notices demanding advance taxes from them pursuant to the said SROs, should also not be declared to be without lawful authority.

It is commonly stated by the writ petitioners that, since inception they have been enjoying exemption from paying income tax on the surplus income generated by them by virtue of an SRO being SRO No.454-L/80 dated 31st

December, 1980 issued by the Government (Ministry of Finance) under Section 60(1) of the then Income Tax Act, 1922 which, vide its Clause-(a)(3), exempted the universities and other non-profitable educational institutions from payment of income tax. That during their such enjoyment of exemption, the Government issued another SRO, being SRO No.178-Income Tax/2002 dated 3rd July, 2002, under Section 44(4)(b) of the Ordinance, 1984 substituting the above Clause-(a)(3) that such exemption would continue only in respect of universities who were not operated commercially.

It is further stated that, said SRO No.178 dated 3rd July, 2002 did not make any material difference from the earlier SRO No.454-L/80 dated 31st December, 1980 so far exemption from payment of income tax by the writ-petitioners were concerned. The earlier SRO was applicable to non-profitable universities and other educational institutions and the latter became applicable to the universities and educational institutions which were operated on non-commercial basis and as such the intention and object of both the SROs were same. Thus, it

is stated that the writ petitioners remained entitled to get exemption from payment of income tax under the said SRO dated 3rd July, 2002 as the writ petitioners could not in any case run their universities on commercial basis as per their own charters.

It is further stated that, the writ petitioners being non-profitable institutions do not operate commercially and the whole income of the writ petitioners are applied for imparting education as per the objects of their Society/Charter/Foundation/Trust. No part of the income of the writ petitioners are consumed/utilized by the members of the said Foundation/Society/Trust/Non Commercial University. But the same are utilized solely for the purpose of education and diffusion of knowledge which is absolutely non-commercial in nature.

However, it is stated that by the two impugned SROs being, SRO No.156-Ain/Aikor/2007 dated 28.06.2007 and SRO No.158-Ain/Aikor/2007 dated 28.06.2007, the then Non-Party Caretaker Government promulgated/issued new provisions regarding tax on the surplus income of the writ-petitioner universities purportedly under Section

44(4)(b) of the Ordinance, 1984 and thereby cancelled the exemption of taxes which they were entitled to by the earlier SRO No.454-L/80 dated 31st December, 1980 and SRO No.178 dated 3rd July, 2002.

It is also stated that, vide impugned SRO No.158 dated 28.06.2007, Non-Party Caretaker Government (the Ministry of Finance) for the first time made division between public universities and private universities with an additional proviso and thereby imposed/re-fixed 15% tax on private universities. Finally, it is stated, the Government (the Ministry of Finance) vide impugned SRO No.268 dated 01.07.2010 introduced a new provision under Section 44(4)(b) of the Ordinance, 1984 which virtually imposed wholesale tax @15% on private universities irrespective of its nature whether it is run non-commercial basis or imparting education on medical science or engineering or imparting education in other fields including information technology.

Common grievance of the writ petitioner universities are that, pursuant to the aforesaid impugned SROs, the tax exemptions as enjoyed by them have been withdrawn

without lawful authority, taxes have been collected from them illegally and they have been illegally asked to pay advance taxes and/or arrear taxes vide different impugned memos issued by the concerned tax authorities. Being aggrieved by the said impugned SROs as well as the impugned actions of the respondents pursuant to the said SROs, the writ petitioners moved before the High Court Division and obtained the aforesaid Rules. At the time of issuance of the Rules, the High Court Division vide different ad-interim orders, either stayed operation of the impugned SROs or stayed such demand of taxes issued by the writ-respondents on the writ-petitioners or proceedings that followed.

Rules have been opposed by the writ-respondents by filing separate affidavit-in-opposition since the case of the writ-respondents are common in all the writ petitions.

After hearing learned Advocates for the respective parties, the High Court Division made all the Rules absolute with direction vide impugned judgment and order dated 09.05.2016 declaring the impugned SROs withdrawing

the tax exemptions and thereby imposing 15% tax in whatever names as ultra-vires to the Constitution and the Ordinance, 1984 and those were declared to have been issued without lawful authority and were of no legal effect. The High Court Division also directed the writ-respondents to refund the realized taxes pursuant to the impugned SROs.

Having aggrieved by and dissatisfied with the impugned judgment and order passed by the High Court Division, the Government and others as petitioners have preferred 44 separate civil petitions for leave to appeal invoking Article 103 of the Constitution and obtained leave granting order on 09.02.2021.

Consequently, these civil appeals arose.

Mr. A.M. Amin Uddin, learned Attorney General appearing for the appellants in all the appeals submits that the provision of Section 44(4)(b) of the Ordinance, 1984 has empowered the Government to make exemption, reduction in rate or other modification in respect of tax infavour of any class of income or in regard to the whole

or any part of the income or any class of persons and impugned SROs having been issued by the Government pursuant to the above provision of law, but said legal provision has not been challenged by the writ-petitioner-respondents and as such without declaring said provision of law as ultra-vires to the Constitution, the High Court Division erred in law in declaring the impugned SROs as illegal. He next submits that pursuant to Section 21 of the General Clauses Act, 1897 the exemption can never be treated as right rather the same is a privilege which can be recalled/withdrawn/rescind and the Government having issued the SRO withdrawing the privilege of the exemption of tax and the said exercise is within the authority of the Government, the High Court Division erred in law in declaring the same as ultra-vires to the Constitution. He further submits that High Court Division failed to consider that the Non-Party Caretaker Government during their period declared national budget for collection of revenue which was subsequently ratified and the impugned SROs were issued for the interest of the state revenue and the said function of the then Caretaker Government

was a necessity for smooth functioning of the Government which was given legal coverage by converting into an Act in the year, 2009 but the High Court Division without appreciating this legal aspects erroneously declared impugned SROs as illegal. He again submits that the High Court Division while deciding the issue regarding Public/Private discrimination has failed to consider that public universities are established under their own statutes and on the other hand the private universities established under the provision of বেসরকারি বিশ্ববিদ্যালয় আইন, ১৯৯২ or বেসরকারি বিশ্ববিদ্যালয় আইন, ২০১০ and by the said enactment it appears that the private universities have itself formed a separate group which can be intelligibly differentiate from the public universities and thus the question of discrimination between public and private universities does not arise at all and as such the High Court Division erred in law in passing the impugned judgment and order. He also submits that High Court Division while deciding the issue relating to Fundamental Principles of State Policy has failed to consider that the Fundamental Principles of State Policy is not judicially enforceable

and as such the High Court Division erred in law in making the Rules absolute holding that Fundamental Principles of State Policy as enunciated under Articles 15 and 17 as well as the Fundamental Right to life as enshrined under Article 32 of the Constitution has infringed/violated by the impugned SROs. He lastly submits that the High Court Division failed to consider that income tax being a direct tax, has no bearing upon the students rather it will be collected from the universities from their income, if any, after expenditure without affecting any students as such the impugned judgment and order is liable to be set-aside.

On the other hand, learned Advocates appearing for the respondents in separate civil appeals made their submissions in the same line. Summary of their submissions are that the High Court Division upon proper appreciation of the provisions of Constitution, the Ordinance, 1984 and other relevant laws rightly made all the Rules absolute with direction. They submits that the writ-petitioner private universities are charitable and philanthropic educational institution and those were

established or created for the purpose of imparting education, a fundamental right guaranteed under Constitution, and there was no motive to earn profit and as such those educational institutions are not liable to pay income tax. They again submits that Section 44(4)(b) of the Ordinance, 1984 did not authorize the Government to impose taxes by a sub-ordinate legislation and only the Parliament can impose taxes by a law framed under Article 83 of the Constitution and thereby the Government committed gross illegality in imposing 15% taxes upon the private universities. They further submits that though the public universities received Government grants to run universities and are exempted to pay any taxes but the private universities which were established and created for charitable and philanthropic purpose only to impart education and no Government grant was given to them, inspite of that they were directed to pay 15% taxes which is illegal as well as discriminatory. They also submits that as per provisions of Private Universities Act, 1992 and/or 2010, the trust deed as well as other instruments by which the universities are established, there was no

profit motive and the trustees or university authorities have no income from the universities, the income of the writ-petitioner universities cannot be termed as income from university or profession within the meaning of the Ordinance, 1984. Thus, the High Court Division rightly made those Rules absolute with direction, which do not require any interference by this Division.

Heard the learned Attorney General for the appellants and the learned Advocates for the respective respondents and perused the impugned judgment and order passed by the High Court Division alongwith relevant papers/documents contained in the respective paper books.

From the materials on record it appears that the writ-petitioners in question are private universities established in different years under Societies Registration Act, 1860/Section 28 of the Companies Act, 1994/The Trust Act, 1882 etc. The common characteristics of these Private Universities are that they were formed under the Private University Act, 1992, claimed themselves as non-profit charitable or philanthropic organizations, as Universities they mainly receive

different types of fees and charges from the students and meet expenses for contributing educational services towards the students.

In the context of above, it is necessary to examine whether these private universities are taxable entities or are required to pay tax under the Ordinance, 1984 (Recently repealed by the Income Tax Act, 2023).

The Ordinance, 1984 is meant for the taxation of income. Where there is income there must be imposition of tax under the said Ordinance unless the income or incomes are explicitly exempted under the lawful arrangement. Therefore, first question is what constitutes 'income' under the Ordinance, 1984. The word 'income' is defined under Section 2(34) of the Ordinance, 1984. It essentially not an exhaustive definition rather an inclusive one having an elastic ambit. Various Judicial pronouncements have tried to define 'income'. In the case of *CIT vs. Shaw Wallace & Co.*, the Privy Council held:

> *"Income in this Act connotes a periodical monetary return 'coming in' with some sort of regularity, or expected regularity, from definite sources."*

However, subsequent amendments in the Ordinance, 1984 made some changes. An isolation adventure may also be treated as business, for example, business income might have been deemed under Section 19(20) of the Ordinance, 1984 from the disposal of asset representing expenditure of a capital nature on scientific research. Even a windfall gain or a non-recurring receipt like winnings from lotteries may be treated as 'income' under Section 19(13). In view of the above discussions, it can be said that the Private Universities receive fees and charges from the students which are nothing but monetary return coming in as revenue receipt and, in the accounts, they are exhibited in a periodical manner. Therefore, the private universities received 'income' in their hands.

Now it can be looked into whether the Private Universities are doing business. Activities relating to trade or manufacture may be signify as business. However, the word 'business' conveys wider meaning. In the case of *Barendra Prasad Ray and others vs. Income Tax Officer 'A' Word Foreign,* reported in (SC) 1981, 129 ITR 295, it was expressed by the Indian Supreme Court that:

> *"Business is one of wide import and it means an activity carried on continuously and systematically by a person by the application of his labour or skill with a view to earning an income."*

In the case of *Unni Krishnan, J.P. and others vs. State of Andhra Pradesh and others*, reported in AIR 1993 SC 2178, to answer the question *'whether there is a fundamental right to establish an educational institution'*, the Supreme Court of India discussed meaning to be attributed to the words "profession", "occupation", "trade", or "business" as mentioned in Article 19(1)(g) of the Constitution of India. After referring meaning of "occupation" in P. Ramanatha Aiyar's Law Lexicon, Reprint Edition 1987, and Black's Law Dictionary, Fifth Edition, the Court cited the observation made in *P.V.G. Raju vs. Commissioner of Expenditure*, reported in 86 ITR 267, which is as follows:

> *"The activity termed as "Occupation", if of wider import than vocation or profession. It is also distinct from a hobby which can be resorted to only in leisure hours for the purpose of killing time. Occupation, therefore, is that with which a person occupies himself either temporarily or permanently or for a considerable period*

> *with continuity of activity. It is analogous to a business, calling or pursuit. A person may have more than one occupation in a previous year. The Occupations may be seasonal or for the whole year.*
>
> *Firstly, there can be a business, profession, vocation or occupation without any profit motive or on "no profit on loss basis". To, illustrate, co-operative societies or mutual insurance companies may carry on business without earning any income or without any profit motive. The vocation or occupation to do social service of various kinds for the uplift of the people would also come under this category. The profit motive or earning of income is not an essential ingredient to constitute the activity, termed as business, profession, vocation or occupation."*
>
> *(emphasis supplied by us)*

In the cited case the meaning of "business" also discussed.

In the case of *Bangalore Water Supply and Sewerage Board vs. R. Rajappa*, reported in AIR 1978 SC 548, Krishna Iyer, J. observed:

> *"To Christian education as a mission, even if true, is not to negate is being an Industry, we have to look at education activity from the angle of the Act and so viewed the ingredients of education are*

> *fulfilled. Education is, therefore, an industry nothing can stand in the way of that Conclusion."*

In the case of *Unni Krishnan, J.P. and others vs. State of Andhra Pradesh and others*, reported in AIR 1993 SC 2178, Justice B.P. Jeevan Reddy observed:

> *"In the above circumstances, it is ideal to contend that imparting of education is a business like any other business or that it is an activity akin to another activity like building of roads, bridges etc."*

However, learned Justice B.P. Jeevan Reddy also observed:

> *"We must make it clear that we have not gone into the precise meaning and content of the expressions profession, occupation, trade or business for the reason that it is not necessary for us to do so in view of the approach we are adopting hereinafter, which would be evident from succeeding paragraphs. Our main concern in the entire preceding discussion is only to wish that the activity of establishing and/or running an educational institution cannot be of commerce."*

The learned Justice B.P. Jeevan Reddy also makes it clear that:

> *"Commercialization of education is not permissible."*

The Private Universities, in question applied their skill and labour in rendering services for which they earn income.

It may be mentioned here that the Private Universities claimed that they being non-profit charitable or philanthropic organization do not have any profit motive. But it is well settled that profit motive is not essential to constitute business income. In the case of *Krishna Menon vs. CIT*, reported in [1959] 35 ITR 48, 52-3 (S.C. of India) it has been expressed by the Supreme Court of India that *'making profit or that desire'* or wish to make a profit is not essential in the case of carrying on a trade or business. The motive of making profit or the actual earning of profit is not essential ingredient of business, for example, mutual concerns and societies do carry on business although they may not make and may not want to make any profit.

In view of the above, it can be said that Private Universities earn income and the income falls under the head of Business income. In line with the above decision it can also be logically concluded that Private

Universities, being non-profitable organizations, might not have any motive to earn income; however, they are doing business.

As mentioned earlier, Private Universities are originated and established under certain Law or Laws. They can be identified as body corporate within the meaning of section 2(20)(a) of the Ordinance, 1984.

It is not disputed that a private university is a juristic person and on that capacity each of the Private Universities preferred the writ petition. Therefore, a private university being a body corporate established or constituted by or under law or laws can be identified as a company for income tax purpose. And, accordingly, any income earns by a private university is chargeable to tax under Section 16 of the Ordinance, 1984. In other words, a private university is a company-assessee, total income of which is assessable by applying laws. As regards tax liability the tax rate or rates as fixed through the Finance Act or Ordinance are applied on the total income in order to determine the tax liability or refund. Total income under Section 2(65) of the Ordinance, 1984 is

defined as the total amount of income referred to in Section 17 and computed in the manner laid down in the Ordinance, 1984. It may also be noted that when it comes to income from business or profession there has to consider some allowable deduction in accordance with the law in order to get the amount of total income and then rate or rates of taxes are applied in order to calculate the payable or refundable amount of tax, if any. Here, tax rate of a company as fixed in the Finance Act or Ordinance is to be applied given the fact that a private university is a company-assessee as discussed above and liable to pay tax on the basis of its total income mainly under the head of business income.

Admittedly, Government promulgated SRO No.454-L/80 dated 31.12.1980. Relevant portion of the SRO is reproduced below:

4324 THE BANGLADESH GAZETTE, EXTRA, DECEMBER 31, 1980

MINISTRY OF FINANCE

Internal Resources Division

NATIONAL BOARD OF REVENUE

NOTIFICATIONS

Dacca, the 31st December, 1980

> *No.SRO 454-L/80.-In exercise of the powers conferred by sub-section (1) of Section 60 of the Income-tax Act, 1922 (XI of 1922), and in supersession of the Ministry of Finance Notification No. SRO 1041(K)/61, dated the 31st October, 1961, the Government is pleased to direct that-*
>
> *(a) 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:-*
>
> *----------*
>
> *(3) the income of a University or other educational institution existing solely for educational purposes and not for purposes of profit.*

It appears from the SRO No.454-L/80 dated 31.12.1980 that the Government, in exercise of the power under Section 60(1) of the then Income Tax Act, 1922, exempted tax liability of universities and other educational institution, irrespective of private or public, which were existing solely for educational purposes and not for profit. Thereafter, an amendment has been made in this regard through another Notification being SRO No.178-Aikor/2002 dated 03.07.2002 in the following manner:

রেজিস্টার্ড নং ডি এ-১

বাংলাদেশ  ***গেজেট***

অতিরিক্ত সংখ্যা

কর্তৃপক্ষ কর্তৃক প্রকাশিত

বৃহস্পতিবার, জুলাই ৪, ২০০২

গণপ্রজাতন্ত্রী বাংলাদেশ সরকার

অর্থ মন্ত্রণালয়

অভ্যন্তরীণ সম্পদ বিভাগ

(আয়কর)

প্রজ্ঞাপন

তারিখ: ১৯শে আষাঢ়, ১৪০৯ বঙ্গাব্দ/৩রা জুলাই, ২০০২ খ্রিষ্টাব্দ

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 নিম্নরূপ সংশোধন করিল, যথা:-

উপরি-উক্ত প্রজ্ঞাপনের Clause (a) এর Sub-Clause (3) পরিবর্তে নিম্নরূপ Sub-Clause (3) প্রতিস্থাপিত হইবে, যথা:-

"(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."

রাষ্ট্রপ্রতির আদেশক্রমে

(মোঃ দেলোয়ার হোসেন)

অতিরিক্ত সচিব (পদাধিকারবলে)

The writ petitioners, however, did not express their grievance in response to the said amendment through SRO dated 03.07.2002 as their interest was not affected by the said SRO.

Subsequently, the Government by the impugned SRO No.156-Ain/Aikor/2007 dated 28.06.2007 withdrew the exemption by omitting, interalia, the Sub-Clause (3) of Clause (a) of the SRO No.454-L/80 dated 31.12.1980, which is quoted below:

গণপ্রজাতন্ত্রী বাংলাদেশ সরকার
অর্থ মন্ত্রণালয়
অভ্যন্তরীণ সম্পদ বিভাগ
জাতীয় রাজস্ব বোর্ড
(আয়কর)

প্রজ্ঞাপন

তারিখ: ১৪ আষাঢ়, ১৪১৪ বঙ্গাব্দ/২৮ জুন, ২০০৭ খ্রিষ্টাব্দ

এস.আর.ও নং-১৫৬-আইন/আয়কর/২০০৭।- Income Tax Ordinance, 1984 (XXXVI of 1984) এর Section 44 এর Sub-Section (4) এর Clause (b) এ প্রদত্ত ক্ষমতাবলে সরকার এই বিভাগের SRO No.454-L/80 dated 31st December, 1980 এ নিম্নরূপ সংশোধন করিল, যথা:

Clause (a) এর Sub-Clause (2) ও Sub-Clause (3) বিলুপ্ত হইবে।

২। ইহা ১লা জুলাই ২০০৭ ইং হইতে কার্যকর হইবে।

রাষ্ট্রপ্রতির আদেশক্রমে
স্বাক্ষরিত/-
(আলী আহমদ)
অতিরিক্ত সচিব (পদাধিকারবলে)

On the same date, the Government issued another SRO bearing No.158-Ain/Aikor/2007 by fixing the tax rate at 15% for the private universities, in the following manners:

গণপ্রজাতন্ত্রী বাংলাদেশ সরকার
অর্থ মন্ত্রণালয়

অভ্যন্তরীণ সম্পদ বিভাগ
জাতীয় রাজস্ব বোর্ড
(আয়কর)

প্রজ্ঞাপন

তারিখ: ১৪ আষাঢ়, ১৪১৪ বঙ্গাব্দ/২৮ জুন, ২০০৭ খ্রিষ্টাব্দ

এস. আর. ও নং-১৫৮-আইন/আয়কর/২০০৭- Income Tax Ordinance, 1984 (XXXVI of 1984) *এর* Section 44 *এর* Sub-Section (4) *এর* Clause (b) *এ প্রদত্ত ক্ষমতাবলে সরকার বিশ্ববিদ্যালয় মঞ্জুরী কমিশন কর্তৃক অনুমোদিত প্রাইভেট বিশ্ববিদ্যালয় এবং অপরাপর বিশ্ববিদ্যালয়, যাহারা পাবলিক বিশ্ববিদ্যালয় নয়, তাহাদের উদ্ভুত আয়ের উপর ১৫% হারে আয়কর পুনঃ নির্ধারণ করিল।*

২। মেডিক্যাল, ডেন্টাল, ইঞ্জিনিয়ারিং ও তথ্য প্রযুক্তি শিক্ষাদানে নিয়োজিত প্রাইভেট কলেজ বা বিশ্ববিদ্যালয়সমূহের আয় করমুক্ত হইবে কিন্তু ঐ সকল প্রতিষ্ঠানের ক্ষেত্রে প্রতিবছর যথারীতি নিরীক্ষিত হিসাব বিবরণীসমেত আয়কর বিবরণী দাখিল করিতে হইবে।

৩। পাবলিক বিশ্ববিদ্যালয়সমূহের আয় করমুক্ত হইবে।

৪। ইহা ১লা জুলাই ২০০৭ ইং হইতে কার্যকর হইবে।

রাষ্ট্রপ্রতির আদেশক্রমে
স্বাক্ষরিত/-
(আলী আহমদ)
অতিরিক্ত সচিব (পদাধিকারবলে)

In the SRO No.158 dated 28.06.2007, the public universities were kept out of the ambit of taxation and some other private educational institutions such as Medical, Dental, Engineering and IT colleges and universities were given tax exemption under certain conditions. Thereafter, the Government issued SRO No.268-Ain/Aikor/2010 dated 01.07.2010 replacing the immediately preceding SRO No.158-Ain/Aikor/2007 dated 28.06.2007 and re-fixing a reduced tax rate to be at 15% for all private

universities including Medical, Dental, Engineering and IT colleges. The contents of said SRO is as under:

রেজিস্টার্ড নং ডি এ-১

বাংলাদেশ  **গেজেট**

অতিরিক্ত সংখ্যা

কর্তৃপক্ষ কর্তৃক প্রকাশিত

বৃহস্পতিবার, জুলাই ১, ২০১০

গণপ্রজাতন্ত্রী বাংলাদেশ সরকার
অর্থ মন্ত্রণালয়
অভ্যন্তরীণ সম্পদ বিভাগ
(আয়কর)

প্রজ্ঞাপন
তারিখ: ১৭ আষাঢ়, ১৪১৭ বঙ্গাব্দ/১ জুলাই, ২০১০ খ্রিষ্টাব্দ

এস. আর. ও নং-২৬৮-আইন/আয়কর/২০১০।- Income Tax Ordinance, 1984 (Ord. No.XXXVI of 1984) এর Section 44 এর Sub-Section (4) এর Clause (b) তে প্রদত্ত ক্ষমতাবলে সরকার, ১৪ আষাঢ় ১৪১৪ বঙ্গাব্দ/২৮ জুন, ২০০৭ খ্রিষ্টাব্দ তারিখের প্রজ্ঞাপন নং-এস.আর.ও নং -১৫৮-আইন/আয়কর/২০০৭ এতদ্দ্বারা রহিতক্রমে, পাবলিক বিশ্ববিদ্যালয় ব্যতীত বেসরকারি বিশ্ববিদ্যালয়, বেসরকারি মেডিক্যাল কলেজ, বেসরকারি ডেন্টাল কলেজ, বেসরকারি ইঞ্জিনিয়ারিং কলেজ বা কেবলমাত্র তথ্য প্রযুক্তি বিষয়ে শিক্ষাদানে নিয়োজিত বেসরকারি কলেজ এর উদ্ভুত আয়ের উপর প্রদেয় আয়করের হার হ্রাস করিয়া ১৫% নির্ধারণ করিল।

২। ইহা ১লা জুলাই ২০১০ তারিখ হইতে কার্যকর হইবে।

রাষ্ট্রপ্রতির আদেশক্রমে
(আমিনুর রহমান)
অতিরিক্ত সচিব (পদাধিকারবলে)

The aforementioned SROs of 2007 and 2010 were challenged by the writ-petitioners in the form of writ petitions.

In passing the impugned judgment and order, the High Court Divisions observed that by virtue of the provisions

of Article 58D of the then Chapter 11A of Part IV of the Constitution, the Caretaker Government was only authorized to do routine works and then arrived at a finding that imposition of tax on private universities and creation of classification between private and public universities in respect of tax is a policy issue even though the High Court Division agreed on the submission of the learned Deputy Attorney General (DAG) that the Caretaker Government promulgated two budgets and it became necessary on the part of the Government to do some taxation work.

The issue of taxation work needs a careful examination in light of the budgetary exercise of the Government. Every year the Government is required to promulgate annual budget with some estimate of income and expenditure. To run a Government, it is necessary to meet day to day expenditure and fulfil other obligation to make payments such as loan repayment and interest payment to domestic and international organizations. Besides, the Government irrespective of its characteristics is responsible for various development activities in the

country. Therefore, budget estimates in respect of expenditure must with the estimate of earnings where the major source of earnings is taxation. That is why Government's budgetary exercise always produces taxation law in the form of Finance Act or Ordinance and other ancillary legal instruments like SRO, rules or notification. As a result, SROs in relation to taxation cannot be seen in isolation of budgetary exercise. Under the budgetary exercise, it is necessity for the Government to make payments and to earn revenue. In the absence of earnings, the payments are not possible. But smooth earnings depend on a well-planned revenue earning arrangements. As a result, imposition or even reduction of tax under the lawful authority is a necessity, not an ordinary policy issue. It is to be noted here that because of the necessity the budgets promulgated by the Caretaker Government under the coverage of Appropriation Ordinance and Finance Ordinance for the two years being 2007 and 2008 were converted into Act, in the year of 2009. The relevant portions of the অর্থ (২০০৭-২০০৮ অর্থ বৎসর) আইন, ২০০৯ এবং অর্থ (২০০৮-২০০৯ অর্থ বৎসর) আইন, ২০০৯ are reproduced below:

"ধারা-১। (১) এই আইন অর্থ (২০০৭-২০০৮ অর্থ বৎসর) আইন, ২০০৯ নামে অভিহিত হইবে।

(২) এই আইন ১৭ আষাঢ়, ১৪১৪ বঙ্গাব্দ মোতাবেক ১ জুলাই, ২০০৭ খ্রিষ্টাব্দ তারিখ হইতে কার্যকর হইয়াছে বলিয়া গণ্য হইবে।

ধারা-৭১। অর্থ অধ্যাদেশ, ২০০৭ (২০০৭ সনের ১০নং অধ্যাদেশ) রহিতকরণ এতদ্দ্বারা রহিত করা হইল।

-AND-

ধারা-১।(১) এই আইন অর্থ (২০০৮-২০০৯ অর্থ বৎসর) আইন, ২০০৯ নামে অভিহিত হইবে।

(২) এই আইন ১৭ আষাঢ়, ১৪১৫ বঙ্গাব্দ মোতাবেক ১ জুলাই, ২০০৮ খ্রিষ্টাব্দ তারিখ হইতে কার্যকর হইয়াছে বলিয়া গণ্য হইবে।

ধারা-৪৮। অর্থ অধ্যাদেশ, ২০০৮ (২০০৮ সনের ৩৩নং অধ্যাদেশ) রহিতকরণ এতদ্দ্বারা রহিত করা হইল।"

It may be mentioned here that when an Appropriation Ordinance is converted into an Act, the actions taken under the Ordinance are also given legal coverage. In this regard relevant provisions from নির্দিষ্টকরণ (২০০৭-২০০৮ অর্থ বৎসর) আইন, ২০০৯ (২০০৯ সনের ২নং আইন) is reproduced hereunder:

"৪। (১) সংযুক্ত তহবিল (অগ্রিম মঞ্জুরী দান ও নির্দিষ্টকরণ) অধ্যাদেশ, ২০০৭ (২০০৭ সনের ১২ নং অধ্যাদেশ) এতদ্দ্বারা রহিত করা হইল।

(২) অনুরূপ রহিতকরণ সত্ত্বেও উক্ত অধ্যাদেশের অধীনে কৃত বা গৃহীত ব্যবস্থাদি এই আইনের অধীনে কৃত বা গৃহীত হইয়াছে বলিয়া গণ্য হইবে।"

A Government budget is estimates of earning and spending for a particular period of time referred to as a financial or fiscal year. In other words, it is a projection of the revenue and expenditure of the

Government within a fiscal year. For smooth functioning of the Government and for implementing its economic policies, budget plays a vital role. Constitutional provision under Chapter II of the Constitution regulates the budgetary process of the Government. The budget is presented to the Parliament and once the budget is approved, the Government can use the funds and impose the tax to make the revenue inflow of the fund nonstop. Accordingly, we find two pieces of legislation—one in relation to spending and the other chiefly in connection to taxation. There is, however, another piece of legislation which is connected to the revised budget. As regards spending the legislation is termed as 'Appropriation Act' or 'নির্দিষ্টকরণ আইন', while the other relating to Government revenue or tax is called 'The Finance Act' or 'অর্থ আইন'. Through the Appropriation Act, the Parliament empowers the Government to spend from the consolidated fund while The Finance Act which gives the Government right to impose tax plays an important role to make the fund uninterrupted. Therefore, both the legislations are integral parts of the whole budgetary

process. In other words, they are the two opposite sides of the same coin of budgetary process.

As the Parliament was not in session in the year of 2007, the then Caretaker Government in connection to the budget passed two Ordinances one being সংযুক্ত তহবিল (অগ্রিম মঞ্জুরী দান ও নির্দিষ্টকরণ) অধ্যাদেশ, ২০০৭ (২০০৭ সালের ১২নং অধ্যাদেশ) and the other being অর্থ অধ্যাদেশ, ২০০৭ (২০০৭ সালের ১০নং অধ্যাদেশ). Subsequently, the Parliament converted the said two Ordinances as Acts. Accordingly, the সংযুক্ত তহবিল (অগ্রিম মঞ্জুরী দান ও নির্দিষ্টকরণ) অধ্যাদেশ, ২০০৭ has been converted as নির্দিষ্টকরণ (২০০৭-২০০৮ অর্থ বছর) আইন, ২০০৯ (২০০৯ সালের ৯নং আইন). As a result, all the Constitutional defects, if any, in course of budgetary process of the then Caretaker Government has been entirely removed by the 9th Parliament. Thus, the SROs which were issued on 28.06.2007 by the Government under Section 44(4) (b) of the Ordinance, 1984 to collect the revenue from the income of private universities cannot be called into question.

In view of the above discussions, it can be said that the classification of public and private universities in respect of taxation is closely connected to the necessary

revenue earnings under the budgetary exercise, that such classification is not an ordinary policy issue, that the Government issued the impugned SROs in exercise of the power given under Section 44(4)(b) of the Ordinance, 1984, and that the Parliament subsequently accepted all budgetary work by converting the related Ordinances into Acts. Therefore, the impugned SROs being No.156-Ain/ Aikor/2007 dated 28.06.2007 and No.158-Ain/Aikor/2007 dated 28.06.2007 cannot be said to have been issued unlawfully on the ground that they have been issued by the Caretaker Government.

Pursuant to Section 44(4)(b) of the Ordinance, 1984, the Government is empowered to make any exemption, reduction in rate or other modification in respect of tax infavour of any class of income or in regard to the whole or any part of the income of any class of persons and the impugned SROs having been issued/promulgated by the Government pursuant to the above mentioned provision of law, as such it cannot be said by any means that the impugned SROs were issued/promulgated without lawful authority. Moreover, no new tax is being imposed through

the impugned SROs; rather the rate of exemption is modified only. The rate of exemption can never be treated as right rather same is a privilege which can recalled/withdrawn/rescind by the Government at time any considering the prevailing economic condition of our country as a basis of necessity.

Apart from that, the issue of Caretaker Government was discussed thoroughly in the case of *Abdul Mannan Khan vs. Government of Bangladesh (popularly known as 13th Amendment Act Case)*, reported in ADC Vol. IX (A) (2012) 1 (Special issue). In that case validity of the Constitution 13th Amendment Act, 1996 (Act No.01 of 1996) was questioned. Though, it was held by the majority that the Constitution 13th Amendment Act, 1996 (Act No.01 of 1996) is prospectively declared void and ultra-vires to the Constitution but this Division observed that:

> *"পরবর্তী প্রশ্ন হইতেছে যে এই রায়ের ভূতাপেক্ষ প্রয়োগকরতঃ তর্কিত আইনটিকে void ab initio ঘোষণা করা হইবে কিনা। প্রশ্নটি বিশেষ গুরুত্বপূর্ণ আকার ধারন করিয়াছে কারন ১৯৯৬ সাল হইতে তর্কিত সংবিধান সংশোধন আইনের অধীনে সপ্তম, অষ্টম ও নবম জাতীয় সংসদ নির্বাচন অনুষ্ঠান হইয়াছে। দুইটি নির্বাচিত সরকার ১০(দশ) বৎসর কাল দেশ পরিচালনা করিয়াছে এবং তৃতীয় নির্বাচিত সরকার বর্তমানে দেশ পরিচালনা করিতেছে। এই দীর্ঘ সময়ের মধ্যে আবশ্যিকভাবে দেশে বহু সংখ্যক আইন বিধিবদ্ধ হইয়াছে। বহুবার বাৎসরিক বাজেট পাশ হইয়াছে। সম্ভবতঃ এই সময়ের মধ্যে বহু সংখ্যক আন্তর্জাতিক, বহুজাতিক ও দ্বিপাক্ষিক চুক্তি স্বাক্ষরিত হইয়াছে। মোট*

কথা, ১৯৯৬ সাল হইতে এই ১৫ বৎসরে রাষ্ট্রীয় অসংখ্য কর্মকান্ড পরিচালিত হইয়াছে। যদি তর্কিত আইনটি void ab initio বলা হয় তবে এই ১৫ বৎসরের রাষ্ট্রীয় সকল কর্মকান্ড অবৈধ হইয়া যাইবে এবং দেশে একটি চরম বিপর্যয়ের সৃষ্টি হইবে।"

And thereafter finally arrived at some findings including:

"(১৬) ২০০৭ সালে দ্বিতীয় তত্ত্বাবধায়ক সরকারের ৯০ দিন মেয়াদ পরবর্তী অতিরিক্ত প্রায় দুই বৎসর সময়কাল প্রশ্নবিদ্ধ বিধায় ঐ অতিরিক্ত সময়কালের কার্যাবলী মার্জনা (condone) করা হইল।"

As regards public and private classification the High Court Division opined that SRO No.158-Ain/Aikor/2007 dated 28.06.2007 and SRO No.268-Ain/Aikor/2010 dated 01.07.2010 are discriminatory and violative of Articles 27, 31 and 32 of the Constitution. But when it comes to taxation the concept of fundamental right being Equality before Law, Right to protection of law and Protection of right to life and personal liberty cannot be applied loosely. State has an inherent right to tax its subjects. Income tax being a direct tax secure a very special place in connection to the justice and injustice. Lord Sumner in the case of *Wankie Colliery vs. C.I.R.*, reported in 1 A.T.C. 125: (1922) to A.C. 51, expresses in this regard as follows:

"I think, however, that considerations of justice and injustice have not much to do

> *with modern direct taxation; they belong to a different order of ideas. Taxation is concerned with expediency or inexpediency. It regularly results in one person being burdened for another's benefit in the sense that the subject who pays the tax may be last person to benefit by the expenditure of it."*

It is also held in different jurisdiction of the subcontinent that:

> *"Equity and Income tax are strangers."*
>
> [See *Raja Jagadambika Pratap Narain Singh vs. Central Board of Direct Taxes*, reported in (1975) 100 I.T.R. 698 (SC)]

Again, the Supreme Court of India in the case of *Elel Hotels and Investments Limited and Others vs. Union of India (UOI)*, reported in AIR 1990 (SC) 1664, held:

> *"It is now well settled that a very wide latitude is available to the legislature in the matter of classification of objects, persons and things for purposes of taxation. It must needs to be so, having regard to the complexities involved in the formation of a taxation policy. Taxation is not now a mere source of raising money to defray expenses of Government. It is a recognised fiscal tool to achieve fiscal and social objectives."*

So, the classification of the private and public university should not be examined by the loose

application of fundamental rights. Such classification should be examined by the certain characteristics of the persons. Private Universities are established under a special law different from the laws under which the Public Universities are established. This difference in the formation of private and public universities can be the basis of classification. Therefore, in respect of income tax being a direct tax such classification cannot be viewed as discriminatory.

Articles 15 and 17 under Part II of the Constitution are supplementary and complementary to each other and must be read together. Article 15 of the Constitution provides that the fundamental responsibility of the state to attain basic necessities of life, including food, clothing, shelter, **education** and medical care and Article 17 provides that the state shall adopt effective measures for the purpose of (a) establishing a uniform, mass oriented and universal system of **education** and extending free and compulsory education to all children to such stage as may be determined by law.

(emphasis supplied by us)

It is noteworthy to mention here that according to the National Education Policy, 2010, the level of compulsory primary education in all streams was extended from Class V to Class VIII and the Government also providing free and compulsory education up to Class VIII.

By quoting from the observation made by Justice Jeevan Reddy in *Unni Krishnan, J.P. and others vs. State of Andhra Pradesh and others,* reported in AIR 1993 SC 2178, the High Court Division in the impugned judgment and order compared the issue of "right to education" with "right to life" but in the same case Justice Jeevan Reddy observed that:

> *"In the above state of law, it would not be correct to contend that Mohini Jain was wrong in so far as it declared that 'the right to education flows directly from right to life'. But the question is what is the content of this right? How much and what level of education is necessary to make the life meaningful? Does it mean that every citizen of this country can call upon the State to provide him education of his choice? In other words, whether the citizens of this country can demand that the State provide adequate number of medical colleges, engineering colleges and other educational institutions to satisfy all their*

> *educational needs? Mohini Jain seems to say, yes. With respect, we cannot agree with such a broad proposition."*

And in the referred case the learned Judges disposed of the writ petition and civil appeals in the following terms amongst others:

> *"1. The citizens of this country have a fundamental right to education. The said right flows from Article 21. This right is, however, not an absolute right. Its content and parameters have to be determined in the light of Articles 45 and 41. In other words every child/citizen of this country has a right to free education until he completes the age of fourteen years. Thereafter, his right to education is subject to the limits of economic capacity and development of the State."*

The 'ORDER' passed in the case of *Unni Krishnan, J.P. and others vs. State of Andhra Pradesh and others*, reported in AIR 1993 SC 2178, is relevant to nullify the impugned judgment and order passed by the High Court Division, which is reproduced below:

> *"1. We have had the benefit of going through the two judgments of our learned Brothers B.P. Jeevan Reddy and S. Mohan, JJ. We are in agreement with the judgment of Brother B.P. Jeevan Reddy, J. except to the extent indicated below.*

2. The question which arose in the case of Miss Mohini Jain v. State of Karnataka: MANU/SC/0357/1992: [1992]3SCR658, as also in the present cases before us, is whether a citizen has a Fundamental Right to education for a medical, engineering or other professional degree. The question whether the right to primary education, as mentioned in Article 45 of the Constitution of India, is a Fundamental Right under Article 21 did not arise in Mohini Jain's case and no finding or observation on that question was called for. It was contended before us that since a positive finding on that question was recorded in Mohini Join's case it becomes necessary to consider its correctness on merits. We do not think so.

3. Learned arguments were addressed in support of and against the aforesaid view which have been noticed in the judgments of our learned Brothers. It was contended by learned Counsel appearing for some of the parties before us that Article 37 in Part IV of the Constitution expressly states that the provisions contained in Part IV shall not be enforceable by any court and that, therefore, assuming the right under Articles 45 to be included within the ambit of Article 21, it would still not be enforceable. Emphasis was also laid upon the language used in Article 45 which requires the State to "endeavour to provide" for the free and compulsory education of children. A comparison of the language of Article 45 with that of Article 49 was made and it was

suggested that whereas in Article 49 an "obligation" was placed upon the State, what was required by Article 45 was "endeavour" by the State. We are of the view that these arguments as also the arguments of counsel on the other side and the observations in the decisions relied upon by them would need a thorough consideration, if necessary by a larger Bench, in a case where the question squarely arises.

4. Having given our anxious consideration to the arguments in favour of and against the question aforementioned, we are of the view that we should follow the well established principle of not proceeding to decide any question which is not necessary to be decided in the case. We, therefore, do not express any opinion upon this question except to hold that the finding given in Mohini Jain's case on this question was not necessary in that case and is, therefore, not binding Law. We are of the view that if it becomes necessary to decide this question in any subsequent case then, for the reasons set out above and having regard to its vast impact, inter alia on the country's financial capacity, the question may be referred to a larger Bench for decision.

5. For the purposes of these cases, it is enough to state that there is no Fundamental Right to education for a professional degree that flows from Article 21."

(emphasis supplied by us)

The respondent-writ petitioners challenged promulgation of SRO No.156 dated 28.06.2007; SRO No.158 dated 28.06.2007 and SRO No.268 dated 01.07.2010. It is pertinent to be mentioned here that in the case of *United International University and other vs. the Commissioner of Taxes and others*, reported in 2017 11 ALR (HCD) 6, a larger Bench of the High Court Division *(wherein the author judge of the impugned judgment and order was a member)* in discussing the contents of SRO No.454-L/80 dated 31.12.1980 as amended by mainly SRO No.178 dated 03.07.2002 observed that:

> *"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."*
>
> *(emphasis supplied by us)*

Said judgment of the larger Bench was affirmed by this Division on 6th February, 2017, in Civil Petition for Leave to Appeal Nos.1896-1900 of 2015.

By the impugned judgment and order the High Court Division declared all the SROs including SRO No.268-

Ain/Aikor/2010 dated 01.07.2010 as ultra-vires to the Constitution and the Ordinance, 1984.

In the circumstances narrated above, despite a clear observation of the larger Bench which is affirmed by this Division, can the High Court Division pass the impugned judgment and order which is totally contradictory to the judgment passed earlier.

The observation of the High Court Division that tax on private universities will increase the education cost of the students is not correct, since income tax is a direct tax payable only when a private university earns income; In case of loss no tax is payable.

It is pertinent to mention here that provisions providing for an exemption may be properly construed strictly against the person who makes the claim of an exemption. In other words, before an exemption can be recognized, the person or property claimed to be exempt must come clearly within the language apparently granting the exemption. *(The Construction of Statutes, by Earl T. Crawford, reprinted in 2014)*

Moreover, exemption laws are in derogation of equal rights, and this is an equally important reason for construing them strictly. And a third reason appears from the Court's language in the case of Bank of Commerce vs. Tennessee, reported in 161 U.S. 134, 145; 16 S.Ct. 456; 40 L.Ed. 645, held:

> *"Taxes being the sole means by which sovereignties can maintain their existence, any claim on the part of anyone to be exempt from the full payment of his share of taxes on any portion of his property must on the account be clearly defined and founded on plain language. There must be no doubt or ambiguity used upon which the claim to the exemption is founded. It has been said that a well founded doubt is fatal to the claim; no implications will be indulged in for the purpose of construing the language used as giving the claim for exemption, where such claim is not founded upon the plain and clearly expressed intention of the taxing power."*

However, the writ-petitioner-respondent private universities may not be required paying tax if it enjoys tax exemption under any lawful arrangement.

Accordingly, all the civil appeals are disposed of with the observation made above.

The impugned judgment and order dated 09.05.2016 passed by the High Court Division in Writ Petition

Nos.9562-9564 of 2008, 9566-9567 of 2008, 11545 of 2015, 2110 of 2013, 6861 of 2012, 10929 of 2014, 8187 of 2015, 8930 of 2011, 11546 of 2015, 3681-3682 of 2013, 1969 of 2009, 2682 of 2016, 6404 of 2014, 4049 of 2013, 8507 of 2010, 3423 of 2012, 5793-5794 of 2014, 11195 of 2014, 14609 of 2012, 5176 of 2010, 13246 of 2015, 4050 of 2013, 9733 of 2015, 9934 of 2015, 12558 of 2012, 986-987 of 2011, 4878 of 2013, 10769 of 2014, 8697 of 2011, 5795 of 2014, 2510 of 2015, 3371 of 2015, 6177 of 2013, 1131 of 2009, 8985 of 2010, 11840 of 2015, 4048 of 2013, 12885 of 2015 and 1891 of 2015 is hereby set-aside.

No order as to costs.

J.

J.

J.

J.

The 27th February, 2024.
Jamal/B.R./Words-*8856*