

IN THE INCOME TAX APPELLATE TRIBUNAL, JAIPUR BENCHES,  
JAIPUR

BEFORE: SHRI AMIT SHUKLA, JUDICIAL MEMBER &  
SHRI OM PRAKASH KANT, ACCOUNTANT MEMBER

ITA Nos. 252 & 253/JP/2018  
Assessment Year: 2006-07

Indian Medical Trust, B-4, Govind Marg, Adarsh Nagar, Jaipur.	Vs.	Principal Commissioner of Income Tax (Central), Jaipur.
PAN/GIR No.: AAATI 1398 F		
Appellant		Respondent

ITA No. 736/JP/2017  
Assessment Year: 2017-18

The NIMS University, Rajasthan, Jaipur.	Vs.	Commissioner of Income Tax (Exemptions), Jaipur.
PAN/GIR No.: AAAJN 0906 E		
Appellant		Respondent

ITA No. 545/JP/2018  
Assessment Year: 2017-18 & onwards

The NIMS University, Rajasthan, Jaipur.	Vs.	Commissioner of Income Tax (Exemptions), Jaipur.
PAN/GIR No.: AAAJN 0906 E		
Appellant		Respondent

Assessee by : Shri G.M. Mehta(CA)  
Revenue by : Shri Mukesh Verma (CIT-DR),  
Smt. Devangi Swarnkar (DCIT) &  
Smt. Shobha Meena (DCIT)

Date of Hearing: 27/09/2018  
Date of Pronouncement: 12/10/2018

ORDER

**PER: BENCH**

The appeals of the Indian Medical Trust, Jaipur, being ITA No. 252 & 253/JP/2018 have been filed by the assessee-appellant against the separate impugned orders of even date 16/01/2018, passed by the Ld. Pr. Commissioner of Income Tax (Central), Rajasthan, Jaipur withdrawing the approval granted to the assessee trust U/s 10(23C)(vi) and (via) of the Income Tax Act, 1961 (hereinafter referred as the Act) and cancellation of registration U/s 12AA(1)(b) of the Act, both w.e.f. 01/04/2016. The grounds taken by the assessee in both the appeals are as under:

Grounds of ITA No. 252/JP/2018

- (1) *Ld. Pr.CIT(C) has erred in law and on facts in withdrawing approval under section 10(23C)(vi) and 10(23C)(via) by invoking 14<sup>th</sup> proviso to section 10(23C)(vi) and 10(23C)(via) of Income tax Act by misinterpreting the true facts of the case.*
- (2) *Ld. Pr. CIT (C) was not justified in:-*
  - (a) *Not differentiating the Donations and Capitation fees, as the capitation fees is charged in advance and is of equal amount*

*for each course whereas the donations are received voluntarily, of different sums and were paid by the Donors even after the admission of the students as per their own convenience, even in installments (identical nature of donations received up to A.Y. 2008-09 were accepted as such in scrutiny assessments up to that year when recorded in regular books of accounts) in withdrawing the approval under section 10 (23C) (vi) and (via) of IT Act.*

- (b) Treating the activities of applicant Trust as not according to condition subject of which it was approved u/s. under section 10(23C) (vi) & 10(23C) (via) of IT Act;*
- (c) Treating the assessee Trust as not carrying its activities as per conditions laid down in 10<sup>th</sup> proviso to section 10(23C) of IT Act.*
- (d) Treating the additional donations of Rs.21.6 crores, estimated/ calculated by Hon'ble ITSC as further reason for withdrawal of approval under section under section 10(23C) (vi) & 10(23C) (via) of IT Act;*
- (e) Avoiding the degrees and diploma by the assessee Trust in production of T.V. programmes and Films by advancing money to TV channel and in treating it as personal benefit and use of Trustees of assessee Trust.*
- (f) Misinterpreting the facts of the case in treating at para 3.2.9 as misuse donations by the Trustees themselves though the assessee Trust has applied total income in accordance with the provisions contained in clause (a) and clause (b) of third proviso to section 10(23C) of IT Act and no personal use of any fund of the assessee Trust was found or established from any documents during course of search or thereafter.*
- (g) Treating unsigned and rough agreement between earlier shareholders of Omega TV Channel Ltd. on one part and Dr.*

*B.S. Tomar and Juhi Tomar on other part for which payment was made by assessee Trust to Omega TV Channel Pvt. Ltd. as personal payment by party of other part and as made in contravention to the provisions of section 11(5) of IT Act, though the major shareholder in Omega TV channel is Nims University holding 15,19,999 shares out of 15,20,000 shares of Rs.10 each.*

- (h) Unsigned typed list of Doctors with proposed amount of their salaries as payment made to the Doctors in cash without finding any proof of actual payment or without examining the Recipients.*
- (i) Not considering the benefits derived by the assessee Trust from Trustees in form of the rent-free city office accommodation, interest free loans and serving the assessee Trust without charging any salary or allowances by the Trustees.*
- (3) That Id. Pr. CIT (A) had failed to appreciate and consider that each assessment year is an independent year and sufficient checks and balances are provided under the Income tax Act to bring to tax on violation of provisions of Act but the same cannot be equated to be a ground to withdraw the approval by applying 14<sup>th</sup> Prov. to section 10(23C) (vi) & (via) of IT Act.*
- (4) Without prejudice to ground No. (1) to (3), above Id. Pr. CIT (C) has erred in law and on facts in withdrawing the approval under section 10(23C) ((vi) & (via) retrospectively w.e.f. 01.04.2006 without finding any such document or noticing any in-genuine activity of the Trust during the course of search justifying such action as the same being afterthought in order to nullify the effect of order dated 30<sup>th</sup> June 2017 u/s. 245D(4) of IT Act passed by Hon'ble Income tax Settlement Commission, Addl. Bench-2, New Delhi."*

Grounds of ITA No. 253/JP/2018

- (1) *Ld. Pr.CIT(C) has erred in law and on facts in cancelling registration under section 12AA of IT Act by invoking provisions of section 12AA (3) of Income tax Act by misinterpreting the true facts of the case.*
- (2) *Ld. Pr. CIT (C) was not justified in:-*
  - (a) *Not differentiating the Donations and Capitation fees, as the capitation fees is charged in advance and is of equal amount for each course whereas the donations are received voluntarily, of different sums and were paid by the Donors even after the admission of the students as per their own convenience, even in installments (identical nature of donations received up to A.Y. 2008-09 were accepted as such in scrutiny assessments up to that year when recorded in regular books of accounts) cancelling registration under section 12AA of IT Act by invoking provisions of section 12AA(3) of IT Act.*
  - (b) *Treating the activities of applicant Trust as not according to condition subject of which registration under section 12AA of IT Act was granted.*
  - (c) *Treating the assessee Trust as carrying its activities in violation of provisions of section 12A (1)(b) of IT Act.*
  - (d) *Treating the additional donations of Rs.21.6 crores, estimated/ calculated by Hon'ble ITSC as further reason for cancelling registration under section 12AA of IT Act by invoking provisions of section 12AA(3);*
  - (e) *Avoiding the degrees and diploma by the assessee Trust in production of T.V. programmes and Films by advancing*

*money to TV channel and in treating it as personal benefit and use of Trustees of assessee Trust.*

- (f) Misinterpreting the facts of the case in treating at para 3.2.9 as misuse donations by the Trustees themselves though the assessee Trust has applied total income in accordance with the provisions 11 and 12 of IT Act and no personal use of any fund or part thereof belonging to the assessee Trust was found or established as used by the Trustee from any evidence or documents during course of search or thereafter.*
  - (g) Treating unsigned and rough agreement between earlier shareholders of Omega TV Channel Ltd. on one part and Dr. B.S. Tomar and Juhi Tomar on other part for which payment was made by assessee Trust to Omega TV Channel Pvt. Ltd. as personal payment by party of other part and as made in contravention to the provisions of section 11(5) of IT Act, though the major shareholder in Omega TV channel is Nims University holding 15,19,999 shares out of 15,20,000 shares of Rs.10 each.*
  - (h) Unsigned typed list of Doctors with proposed amount of their salaries as payment made to the Doctors in cash without finding any proof of actual payment or without examining the Recipients.*
  - (i) Not considering the benefits derived by the assessee Trust from Trustees themselves in form of the rent-free city office accommodation, interest free loans and serving the assessee Trust without charging any salary or allowances by the Trustees.*
- (2) That Id. Pr. CIT (A) had failed to appreciate and consider that each assessment year is an independent year and sufficient checks and balances are provided under the Income tax Act to bring to tax on violation of provisions of Act but the same*

*cannot be equated to be a ground to revoke the registration under section 12AA of IT Act.*

- (3) *Without prejudice to ground No. (1) to (3), above Id. Pr. CIT (C) has erred in law and on facts in cancelling registration under section 12AA by invoking provisions of section 12AA(3) of IT Act retrospectively w.e.f. 01.04.2006 without finding any such document or noticing any in-genuine activity of the Trust during the course of search justifying such action as the same being afterthought in order to nullify the effect of order dated 30<sup>th</sup> June 2017 u/s. 245D(4) of IT Act passed by Hon'ble Income tax Settlement Commission, Addl. Bench-2, New Delhi."*

2. In the case of NIMS University, Rajasthan, Jaipur, the appeal has been filed by the assessee against separate impugned orders dated 29/08/2017, refusing the grant of registration U/s 12AA(1)(b) of the Act; and order dated 19/03/2018 refusing the grant of approval of exemption U/s 10(23C) (vi) and (via) of the Act by Ld. Commissioner OF Income Tax (Exemptions).

3. In so far as the appeals in the case of Indian Medical Trust are concerned, the facts and issues involved for cancellations of Registration u/s 12AA (3) and withdrawal of approval u/s 10(23C) are identical and similar finding has been given by the Ld. PCIT, therefore, our finding and reasoning would be applicable to both the

appeals except for examining the relevant provisions under which such withdrawal of exemption/cancellation has been done. In the case of NIMS University, Rajasthan, Jaipur also, facts and issues are exactly similar in both the appeals, therefore, our finding given would apply in both the appeals. Accordingly, all the four appeals were heard together and for the sake of convenience and brevity, a common order is being passed.

4. We will first take up the appeals of the Indian Medical Trust especially with regard to the withdrawal of approval for exemption U/s 10(23C) of the Act.

**Brief background of the case:**

5. Brief facts and background of the case are that the applicant/assessee Trust was constituted vide Trust Deed dated 23/02/2000 with the 'objects' which were in the nature of "charitable purposes". The objects have been incorporated in the impugned order at page 2, wherein the main object related to carrying out educational activities in the field of medical education and other ancillary objects in field of education. Looking to its objects which were solely for educational purposes, the assessee

was granted approval by the Ld. Chief Commissioner of Income Tax U/s 10(23C)(vi) & (via) of the Act, vide notification dated 20/03/2006 for the financial years 2003-04 to 2005-06, i.e., for the assessment years 2004-05 to 2006-07; and thereafter vide another notification dated 29/04/2008, the approval was granted by the ld. Chief Commissioner of Income Tax, Jaipur for the assessment years 2007-08 and onwards. Apart from that, the assessee was also earlier granted registration U/s 12AA of the Act vide certificate dated 24/3/2000. Thus, in view of approval granted U/s 10(23C) and registration U/s 12AA of the Act, the assessee Trust was enjoying the exemption U/s 10 and also alternatively the benefit of Section 11 to 13 of the Act. Search and seizure action U/s 132(1) of the Act was carried out on 30.10.2014 at various premises of the assessee Trust and the institutions run by it and the residential premises of the trustees. During the course of search and seizure operation, various documentary evidences were collected which as per the Revenue were mostly incriminating in nature and also post search enquiries established that the activities of the Trust were not genuine. One of the key incriminating materials which is the

subject matter of major dispute before us, was receipt of unaccounted 'capitation fees' charged by the Trust outside its regular books of account and income and expenditure account for the various assessment years. Though, there were other materials relating to undisclosed investments were found from the possession of the Trustees and persons running the institution in the form of unaccounted cash, jewellery, foreign currency etc., which may not have that direct relevance for the cancellation of approval/registration, *albeit* it may have some bearing in the hands of the Trustees. The assessee post search proceedings had filed an application before the Income Tax Settlement Commission, wherein it had offered Rs. 1.7 crores on account of unaccounted 'capitation fees', however, after calling for the details and report from the department based on the seized material and post search enquiry, the Settlement Commission had determined the unaccounted receipts in the form of 'capitation fees' at Rs.22,63,46,000/-, besides quantifying undisclosed investments. Another important fact is that, the assessee Trust had established NIMS Medical College and Hospital in the year 2008 and later on Dental College

and Hospital were also established under the aegis of 'NIMS University', which was wholly owned and controlled by the assessee Trust. As culled out from the record, the NIMS University was enacted by the Legislature of State of Rajasthan in the year 2008, which received the consent of the Hon'ble Governor on 29/03/2008. After the establishment of the NIMS University, the assessee through such an institution had expanded its educational activities and at present NIMS University runs more than 345 courses besides its major field running medical and dental colleges.

**Finding of the Id. Pr.CIT in the impugned order:**

6. In the impugned order, the Id. Pr. CIT(Central), Rajasthan, Jaipur had referred to various incriminating material found during the search so as to reach to a conclusion that the Trust's activities were not being carried out in accordance with the objects and also its activities were not genuine. The first and foremost issue which has been raised in the impugned order is of unaccounted 'capitation fees' collected by the assessee Trust for admission of various courses mainly relating to medical and dental courses. He has noted that certain diaries/registers, loose papers and computer

printouts were found and seized from the chamber of Smt. Shobha Tomar (one of the trustees and wife of Dr. B.S. Tomar) and Shri Kailash Chandra Jat, who was the Registrar of the NIMS University and also from their residences. In all, there were 638 entries of 'capitation fees' paid over the period of time from the financial year 2006-07 to 2014-15 which has been received by the assessee Trust from various students. The details of these entries spreading into various years have been elaborated in **Annexure-A** to the impugned order. Ld. PCIT observed that detailed analysis and investigations were carried by the department from various persons based on the details found during search in respect of the entries of unaccounted 'capitation fees' received by the Trust from the assessment year 2006-07 to 2014-15, which as per the department aggregated to Rs. 79.09 crores. It was also gathered that the 'capitation fees' received from the students were neither from the management quota nor NRI quota but from general students. The documents wherein 'capitation fees' recorded, were found to be written in the handwriting of the trustees and one of the main trustees, Dr. B.S. Tomar has been stated to be keeping trail of such capitation fees. In

response to the show case notice by the ld. Pr. CIT, the assessee submitted that, *firstly*, it is in the nature of 'voluntary donations' received from the parents/students and up to assessment year 2008-09 all these donations were duly recorded in the regular books of account, which were subjected to scrutiny u/s 143(3) and the same were accepted by the Assessing Officer; and *secondly*, from A.Y. 2009-10 onwards though such voluntary contributions were not recorded but assessment were completed u/s 143(3). However, the ld. Pr.CIT noted that from the A.Y. 2009-10 onwards, the capitation fees which has been treated as voluntarily donations by the assessee were collected in cash by the trustees and have neither been recorded in the regular books of account nor has been disclosed in the audited financial statements. Though, the assessments have been completed U/s 143(3) of the Act, but the issue of capitation fees/voluntary donation bases on such seized material were never scrutinized, because assessments were made on the basis of entries made in the regular books of account and amount shown in the audited income and expenditure account. The ld. Pr.CIT further noted that the Trust itself has admitted before the

Income Tax Settlement Commission that voluntary donation towards corpus were recorded in the books of account from A.Y. 2001-02 to 2008-09. However, no such entries were recorded after 2009-10. Therefore, reliance placed by the assessee on the earlier assessment order passed U/s 143(3) will not have any relevance. The assessee's further contention before the Id. Pr.CIT that major part of the donations received, which have not been recorded in the books of account have been ultimately utilized in the construction of educational and hospital buildings on existing lands and thus, any such undisclosed amount on account of donation stands fully utilized for the educational purposes. However, the Ld. Pr.CIT after making various remarks held that, if capitation fees/voluntary donations received in cash has not been recorded in the books of account and stated to be expended in construction of buildings, then such assertions of the assessee is without any evidence or any basis. The assessee has neither able to substantiate this contention and nor any such document or material was found during the course of search that the assessee had spent unaccounted capitation fees for the construction of the hospital building or

utilized for its objects. He has also rejected the assessee's contention that these voluntary donations have been received only by NRI or management quota students for admission in MBBS and PG courses after recording the finding of fact from the seized material that in the F.Y. 2008-09, capitation fees were collected from 82 students who were from general quota and similar other number of students who were from general quota in other years. Thus, the contention of the assessee was found to be misleading. In so far as the assessee's contention that the amount of voluntary donation was not fixed and it purely depends upon the donor's sweet will, he held that the same does not have any force in wake of evidences found and inquiries conducted that the students were force to pay capitation fees for taking admissions and receiving final "No Dues" certificate only when the entire capitation fees was paid. Many instances have been found where installments with fixed duration of payments of capitation fees was granted which only goes to show that it was not voluntarily at all but was thrust upon the parents/guardians of the students and were taken forcefully. Further the assessee's Trust was following a 'package system' in

which the students were given fixed packages of capitation fee, hostel fee and admission fee and this he held that it clearly goes to prove that the students were required to compulsorily pay the capitation fee to receive their degrees. Ld. PCIT has also demolished the assessee's contention that the major part of such voluntary donation has been applied in construction of new educational building on the ground that, *firstly*, there is no evidence for application of capitation fees in the construction of educational building which has been found during the course of search proceedings; and *secondly*, on the contrary there were various documents which shows the use of voluntary donation/capitation fees for personal purposes, such as foreign travel by the trustees, investment in benami property by the children of the trustee and investment in a Real Estate Company. He has also referred to certain observations of the Settlement Commission and the documents furnished by the assessee during the course of the Settlement Commission proceedings, wherein adverse view has been taken by the ITSC. The Settlement Commission itself has determined the amount of unaccounted voluntary donation /

capitation fees at Rs. 21.06 crores and also there were various evidences of unaccounted expenditure in the form of payment of salary to Doctors in cash, unaccounted investments in construction of property other than pertaining to the Trust, foreign travels etc. The foreign currency and unaccounted cash found from the residence of the trustees amounted to Rs. 3,36,09,610/-. He has further observed that the fees of the students admitted in the University were to be decided by the Fee Committee in which the trustees themselves were the decision makers. It was only in the wake of various Hon'ble Supreme Courts judgments strictly prohibiting collection of capitation fees from the students, the assessee Trust indulged in receiving capitation fees outside the books in cash and in this way, it has not only violated the objectives of the Trust and also its activities cannot be said to be genuine. He has also noted various instances from the seized material about the breakup of the fees and how the fee package was charged, like there is mention about separate capitation fees in figures and also regular fees and hostel fees. Based on the materials on record and rebutting all the contention raised by the assessee, he held that the activities

of the Trust cannot be held to be charitable, *albeit* it was for profiteering by taking unaccounted capitation fees from students and parents in the garb of fee and same cannot be held to be genuine. Accordingly, he invoked the *clause (ii)(a)* of the *14<sup>th</sup> proviso* to Section 10(23C) (vi)&(via) of the Act.

7. Further, the ld. Pr.CIT has given detailed observations and finding as to how the activities of the Trust were not being carried out in accordance with the conditions for which it was given approval U/s 10(23C). He held that, the assessee has been earning undisclosed income in cash from capitation fees, which was not accounted for in the books of account and hence it violated the conditions laid down in *10<sup>th</sup> proviso* to Section 10(23C)(vi) & (via) of the Act by earning undisclosed/suppressed income in the form of capitation fees and not accounting for it in the books of account. The receipts offered by the assessee before the ITSC and the amount added by the ITSC were unaccounted receipts not found recorded in the books of the Trust and therefore, it was clear cut violation of *10<sup>th</sup> proviso*. Thus, he concluded that in view of clear-cut violation of provisions of Section 10(23C) (vi) & (vi) of the Act

i.e., *10<sup>th</sup> proviso* and *14<sup>th</sup> proviso* whereby the assessee's activities has been found to be non-genuine, the approval granted to assessee Trust needs to be withdrawn.

8. Another important issue which has been raised by Ld. PCIT is on account of expenditure being incurred in 'News India Channel', by the Trust which was not as per the objectives of the Trust. The ld. Pr.CIT has noted that the assessee Trust was operating a news channel namely, "News India" at NIMS University and has two more offices at Ranchi and Patna. The assessee's claim was that the News India Channel was established in accordance with its objectives, because it was running courses for diploma in TV and film production after 2013. However, the Ld. PCIT observed that the assessee could not give any single audio/video CD containing transmission of education related material on the News India Channel. He has also referred to the observations made by the ITSC that the expenditure incurred on acquiring and running of the channel cannot be treated as for the objectives of the Trust as such an expenditure has not actually been made to fulfill the objective. In so far as the assessee's plea that the channel is owned by 'Omega

TV Media Pvt. Ltd.’ which is separately assessed to tax, he held that as per the MOU, the entire share holding including the rights title and interest in Omega TV Media Pvt. Ltd. was given to Dr. B.S. Tomar and Dr. Juhi Tomar for consideration of Rs. 3.00 crores, which was paid by the assessee Trust on their behalf. Thus, he concluded that the Trust’s fund has been utilized in contravention of the objectives of the Trust. In so far as the assessee’s contention at the objectives of the news channel was for its own educational purpose and programme and courses run by the NIMS University, the Id Pr.CIT has given a detailed reasoning as incorporated from pages 21 and 22 of the impugned order and based on the reasoning given therein, he came to the conclusion that setting up and running of a commercial news channel by utilizing the funds of the Trust is in violation of the objectives of the Trust. One most vital finding given by him was that the conditions laid down in sub-section (5) of Section 11; and *clause (b) of 3<sup>rd</sup> proviso* to Section 10(23C) (vi) & (via) of the Act have been violated as the trust cannot invest in shares of Private Limited Company. He has further discussed as to how such payment made by the Trust on behalf of

the trustees for acquiring the shares and rights is in violation of provisions of the Act and therefore, such an activity is neither in accordance with the objectives nor can be reckoned as genuine.

9. Lastly, the Id. Pr.CIT has also raised an issue of unaccounted cash payments of salary to Doctors and staffs. He has noted that during the course of search proceedings, loose papers were seized marked at page No. 79 as Annexure-A-2 and at page No. 66 of Annexure-A-4 which goes to show that the cash payments were made to Doctors which were not accounted for in the books. For instance, in page 79 there is a noting of salary paid to Dr. Nilesh at 5.40 lacs, which is 90,000/- for six months and similar payment to Dr. Harvey @ Rs.95,000/- for 12 months and Dr. Mahesh @ Rs. 70,000/- for three months. The total of these amounts has been written as '18.9', which was deduced by the department as Rs. 18.9 lacs. Similar noting was there regarding cash payment to Dr. Thomas for Rs. 95,000+80,000. All these revealed that payments were made to the doctors in cash to the tune of Rs. 20.65 lacs. Similarly, noting is appearing at page No. 66 for the payment made to the various doctors, the details of which has been noted by him

in para 6.1 of the impugned order which aggregated to Rs. 6.25 lacs. From these seized documents, the ld. Pr.CIT concluded that the Trust was incurring expenditure in cash from its unaccounted receipts and this fact too has been accepted by the ITSC in para 16.15 of the order.

10. After giving detail reasoning, he thus concluded that the approval granted to the assessee Trust U/s 10(23C) (vi) & (via) of the Act is to be withdrawn after invoking the 14<sup>th</sup> proviso to its Section w.e.f. from 01/4/2006. The final conclusion of the ld. Pr. CIT in para 7 reads as under: -

*“7. In view of the facts stated above especially forcing students/parents to give unaccounted donations in lieu of admission, enriching the trustees from such unaccounted capitation fee, running of commercial channel & incurring unaccounted expenditure, it is established that activities of the trust cannot be held to be charitable as per sec. 2(15) of the Act, and hence not genuine. It has also been established that the activities of the assessee trust are not being carried out in accordance with the condition subject to which it was notified and the trust is being run not as per the objects mentioned in the trust deed. In view of the discussion made above, I am satisfied that the assessee trust (M/s Indian*

*Medical Trust) has not applied its income in accordance with the provisions of clause (a) of 3<sup>rd</sup> proviso to section 10(23C)(vi) and s. 10(23C)(via), has not invested or deposited its funds in accordance with the provisions of clause (b) of 3<sup>rd</sup> proviso to section 10(23C)(vi) and s. 10(23C)(via), the activities of the assessee trust are not genuine and are not being carried out in accordance with the conditions subject to which it was notified. Therefore, the approval granted to the trust u/s 10(23C)(vi) and s.10(23C)(via) is hereby withdrawn by invoking the 14<sup>th</sup> Proviso to s. 10(23C)(vi) and s.10(23C)(via) of the I.T. Act, 1961 with effect from 01/04/2006.”*

11. In the appeal relating to cancellation of registration U/2 12AA of the Act, exactly similar facts are permeating and exactly same reasoning has been given by the ld. Pr. CIT based on the same facts and material on record. The ld. Pr.CIT has analysed the same material and has applied the same reasoning for holding that there is clear cut violation of conditions laid down from Sections 11 to 13 of the Act and again vide para 7 of the impugned order, he has cancelled the registration w.e.f. 01/4/2006, which reads as under:

*“7. In view of the facts stated above especially forcing students/parents to give unaccounted donations in lieu of*

*admission, enriching the trustees from such unaccounted capitation fee, running of commercial channel & incurring unaccounted expenditure, it is established that activities of the trust cannot be held to be charitable as per sec. 2(15) of the Act, and hence not genuine. The activities of the trust are not being carried out in accordance with its objects. In view of the discussion made above, I am satisfied that activities of the assessee trust (M/s Indian Medical Trust) are not genuine and are not being carried out in accordance with the objects of the assessee trust. Therefore, the registration of the assessee trust u/s 12AA(1)(b)(i) is hereby cancelled by invoking section 12AA (3) of the Income tax Act, 1961 with effect from 01/04/2006.”*

**Argument placed by the Ld. A.R. of the assessee:**

12. Before us, Ld. Counsel for the assessee Shri G.M. Mehta after reiterating the entire facts and background of the case submitted that the various allegations made by the ld. Pr. CIT, in the impugned order cannot be sustained so as to cancel the approval/registration from retrospective effect. One of the main allegation of the ld. Pr.CIT was that the assessee has received capitation fees in cash, the same is not correct appreciation of facts, because these were purely in the nature of ‘voluntary donations’

received from the parents/students and such voluntariness is borne by the fact that, *firstly*, it has not been received by all the students but from very few students as highlighted in the Annexure-2 of the impugned order; *secondly*, there is no fixed amount charged and in fact the amount varies from student to student; and *lastly*, the so called capitation fee was not received at the time of admission which generally is a feature where the capitation fees are received by the colleges. Once, similar nature of voluntary donation which were recorded in the books of account up to A.Y. 2008-09, has been accepted to be genuine by the department in the scrutiny assessment passed U/s 143(3) of the Act, then for similar nature of voluntary donation, it cannot be held that it is a capitation fee which needs to be adversely viewed in the case of assessee. Earlier, these donations were recorded in the regular books of account and now they are recorded in diaries and most importantly all the donations have been fully utilized for its charitable objects and there was no use or misuse of such fund by the trustees or by any of their relatives. The assessee is carrying out various philanthropic and charitable activities, which is evident

from the fact that it has undertaken free medical camps at villages wherein major operations were conducted for a nominal fee and even various medical investigation procedures like MRI, Scanning, X-ray etc. were done for free for the poor citizens. In support, he also showed us certain pamphlets and news cuttings. Apart from that, he submitted that the assessee Trust had utilized the entire funds of the Trust in expansion of infrastructure facilities, medical equipment, modernization and construction of educational buildings, etc. There is no evidence found from the search which could indicate that the funds of the Trust have been misused by the trustees. In fact, he pointed out that the trustees have not charged any remuneration for their services rendered to the activities of the Trust and in fact they have given huge interest free funds to the Trust. None of its activities has been found to be carried out beyond the objects. Once the activities of the assessee Trust are charitable in nature as defined in Section 2(15) of the Act, then without any material on record that the assessee has digressed from such activities, the approval/registration granted under the Act cannot be revoked/ cancelled. The Trust is still running hospital and

providing medical facilities and education. The observation and the finding of the Id. Pr.CIT that the activities of the Trust are not in accordance with the objects is not correct or based on any material on record, but is based on surmises and conjectures with various incorrect interpretation of facts wrong assumptions. Ld. Pr. CIT could not show from the material on record that there has been diversion of funds by the assessee Trust to the trustees and it was used for the personal purposes as alleged in the impugned order. He pointed out that the addition made on account of foreign travel expenses, unaccounted investments, jewellery etc. in the hands of the trustees and relatives have been subject matter of scrutiny assessment U/s 153A of the Act in their hands and no adverse inference has been drawn and all the additions have been deleted. Thus, the observations of the Id. Pr.CIT that the Trust's fund has been misused are wholly divorced from the facts. The entire adverse inference based on so called alleged capitation fees received in cash, he submitted that though may not have been recorded in the books of account but the same has been fully utilized for the objects and activities of the Trust and therefore, no adverse inference

whatsoever could have been drawn. Mere mentioning of 'capitation fees' at some places in the seized document does not make that the whole payment received by the assessee was not voluntary donation and there is no proof with the department that the donations were not by free will of the donors. The department had recorded the statement of donors behind the back of the assessee without cross examination and therefore, such statement cannot be adversely viewed against the assessee. He also pointed out that the ITSC after examining nature of receipts of all the 638 entries recorded in the diaries on account of voluntary donation which has been termed as capitation fees by the department had been held to be ordinary receipts which is evident from reading of page 40 of the Settlement Commission order.

13. Regarding investment in Omega TV channel, he submitted that, it was as per the decision of the Board of trustees for education of the students in the field of running the TV channel and not for relay of educational programmes on it. In pursuance of objects for providing education on production of TV contents, Feature Films, Journalism etc. to the students, advance of Rs.3

crores were given to earlier shareholders. Since the Omega TV Channel had no liquid sources, therefore, in order to secure the amount of advance so given, shares were transferred in name of NIMS. Omega TV is separately assessed to tax and no personal benefit from running of TV channel was gained by the Trustees as alleged by Ld. Pr. CIT. Had any benefit was gained by any of the Trustees, then additions would have been made in the hands of the trustees in their assessment orders. Even the allegation of the Ld. PCIT that running of TV channel was for publicity of Dr. B.S. Tomar is without any basis and proof. By running of TV channel, the assessee is providing degrees to the student and training, because it is running various courses relating to running of TV channels, production of TV contents, journalism, mass communication, advertisement etc. and once it is part of curriculum, which is relating to the objects, then running of TV channel cannot be a basis for cancellation of registration. He pointed out that Omega TV is separately assessed to tax and the assessee has acquired shares to get the rights only to run the channel for the educational purposes and not for any other commercial purpose.

14. Ld. Counsel has also referred and relied upon the CBDT Circular No. 21/2016 dated 27/05/2016 wherein clarification has been given for cancellation of registration U/s 12AA of the Act that it is not mandatory that the registration already granted U/s 12AA on the ground that the cut-off specified in the *proviso* to section 2(15) of the Act has exceeded in a particular year and without there being any change in the nature of activities of the institution, then cancellation of registration without justifiable reasons cause additional hardship to the assessee. Therefore, keeping the spirit of the said circular, he prayed that cancellation of the registration of charitable institution granted U/s 12AA of the Act is not warranted just because of *proviso* to Section 2(15) of the Act comes into play.

15. Lastly, he submitted that the registration granted earlier could not be cancelled with retrospective effect especially in the case of assessee, when no show cause notice or opportunity was given by the ld. Pr. CIT that he is withdrawing the registration/approval w.e.f. 01/4/2006. In support of his contention that registration cannot be withdrawn from retrospective date, he strongly relied upon the judgment of Hon'ble Allahabad

High Court in the case of **ACIT Vs. Agra Development Authority (2018) 302 CTR (All) 308; CIT Vs. Manav Vikas Avam Sewa Sansthan (2011) 336 ITR 250 (All)**; and ITAT Mumbai Bench decision in the case of the **South Indian Education Society Vs CIT in ITA No. 3288/Mum/2013.**

**Arguments placed by the Ld. CIT D.R.:**

16. Before us, the Ld. CIT-DR has filed voluminous paper book in 3 volumes containing all the materials and documents found during the course of search. Some of the pages were also referred to by him at the time of hearing. He submitted that here in this case, specific evidences and materials were found in the course of search and also in the post search enquiry which revealed that the assessee was charging huge capitation fee from various students for the courses offered in the medical colleges. Such capitation fees were over and above the regular fees and hostel fees. These capitation fees have neither been recorded in the books of account nor have been shown or reflected in the audited statement of income and expenditure. Such a capitation fee has been quantified by the ITSC at more than Rs. 21.00 crores. Apart from that, he

submitted that the assessee was running a News TV channel on commercial lines, which was beyond the objects of the Trust. There were other incriminating materials found during search and investigation pointing that the trustees were misusing the funds for their personal benefits. This aspect too has been dealt in detail in the order of the Settlement Commission. It is in the light of these backgrounds and incriminating documents and evidences found, the ld. Pr. CIT (Central), Rajasthan, Jaipur has initiated the cancellation of the approval granted U/s 10(23C), as well as registration U/s 12AA of the Act. In support of his contentions, he strongly referred and relied upon to the various observations made in the impugned order, which we have already discussed above. He further submitted that the cancellation of registration has been provided U/s 12AA (3) and also in the 14<sup>th</sup> proviso to Section 10(23C) (vi) & (vii) of the Act, wherein it has been clearly provided that if the assessee's activities are not genuine or are not carried out in accordance with the objects of the Trust or institution, then the authorities have the power to cancel such registration. There are twin conditions wherein the ld. Pr. CIT can cancel the

registration and both the conditions are independent and mutually exclusive to each other. In other words, if either of the conditions is violated, i.e., the activities are not carried out in accordance with the objects; or the activities are not genuine, then the statute provides power to rescind or cancel the approval/registration granted earlier to the Trust. Here in this case, both the charges have been framed against the assessee Trust and especially on non-genuineness of the activities of the assessee Trust. He then tried to impress upon as to what kind of activities of any Trust or Institution can be reckoned to be non-genuine. These are, according to him are as under: -

- activities are not legal as it has caused some infringement of law.
- accounts are not properly maintained or the receipts are not accounted for in the books of accounts.
- the trust/society is not registered with competent authority.
- it has caused some misrepresentation of facts before any authority.
- it has encroached public property.
- it has given undue benefits to the trustees or office bearers.
- it is selling education.
- it is doing commercial activities

Herein in this case, he submitted that such kind of non-genuine activities are clearly borne out from the material on record and therefore, such non-genuine activities entails cancellation of registration and that to be from retrospective date. Here the registration/approval has not been cancelled since inception, i.e., from the date of registration/approval, albeit from the year or period for which incriminating documents or evidences have been found. The seized material and post search enquiries have revealed that capitation fee has been received by the assessee in a systematic manner. Since the incriminating materials found relates back only from the assessment year 2006-07 and onwards, therefore, the cancellation of registration has been made w.e.f. the assessment year 2006-07 onwards.

17. In so far as the contention of the ld. counsel for the assessee that capitation fees are purely a voluntary donation, Ld. CIT DR submitted that the concept of voluntary donation has a different connotation and meaning and in support thereof, he has referred to various dictionary meaning of the term 'voluntary', which are as under:

**“As per Collins dictionary a voluntary donation means:**

*“performed, undertaken, or brought about by free choice, willingly, or without being asked”*

**As per Merriam Webster dictionary:**

- *“proceeding from the will or from one's own choice or consent*
- *having power of free choice*
- *acting or done of one's own free will without valuable consideration or legal obligation”*

**As per Cambridge English Dictionary:**

- *“done, made, or given willingly, without being forced or paid to do it:*

The word ‘donation’ has to be seen from the context that it has been given by free will. On the other hand, the word ‘fee’ indicates compulsion, i.e., there is some kind of force to charge fees. Therefore, fee and voluntary donation cannot be equated and treated at par. The word ‘fee’ does not bear the voluntary character *albeit* it is to be understood as fixed charge or sum paid or a charge for a service, i.e., it is some sort of consideration paid compulsorily for utilization of services. The element of voluntariness is completely missing in the term fee. In the seized documents found, he pointed out that there are noting by the trustees in their own handwriting for charging of capitation fee and that to be installments have been

granted. Voluntary donation cannot be charged or given in schedule and fixed installments. Now whether capitation fee can be legally collected by educational institution or not, he referred to the Constitutional Bench judgment of the Hon'ble Supreme Court in the case of **TMA Pai Foundation Vs. State of Karnataka (2002) 8 SCC 481**. He further submitted that a distinction has to be drawn between the donation towards corpus and the donation for earmarked purpose. Referring to the judgment of Hon'ble Supreme Court in the case of **Municipal Corporation of Delhi Vs. Children Book Trust (1992) 63 Taxman 385**, he pointed out that the Hon'ble Court has held that term 'voluntary contribution' towards the corpus fund must satisfy twin tests viz., (i) it should be voluntary without any quid pro quo; and (ii) with a specific direction towards corpus fund of the trust. Beneficiary's contribution could not be called as voluntary contributions, as there would be some consideration for the contribution in the form of certain benefits being direct or indirect. He submitted that similar view has been expressed by the Hon'ble Karnataka High Court on similar set of

facts in the case of **DIT Vs. Ramakrishna Sewa Trust, 205**

**Taxman 26** wherein following observations have been made:

*“the capital of an assessee; a capital of a society, a capital of a trust; a capital of an institution. Therefore, if voluntary contribution is made with a specific direction that it is forming part of corpus, then it shall be treated as capital of the trust for carrying on its charitable or religious activities.”*

Thus, corpus donation is a permanent capital which cannot be used either as an application or for giving any loan or advance to any other Trust or party. Here in this case, so called voluntary donation was not for the corpus but extra money forced from the parents of the students. Such forceful money cannot be reckoned as voluntary donation.

18. Coming to the issue of investment in news channel, i.e., in the ‘Omega TV Media Pvt. Ltd.’, he submitted that first of all, there is no such object in the trust deed so as to authorize the trust for running a TV channel on commercial lines. Once such a channel is being run without there being any object, then it goes to show that the assessee’s activities are not being carried out in accordance with its objects. Secondly, he pointed out that a Trust of Institution

cannot make investment in shares of a Private Limited Company which has been specifically debarred in sub-section (5) of Section 11 read with Section 13(1)(d); and Section 10(23C) *clause (b)* of 3<sup>rd</sup> *proviso* to Section 10(23C) (vi)&(via) of the Act. Thus, making such investment in the shares of Private Limited Company by the assessee trust, itself acts as a deterrent and whence there is a violation of the statutory provision, then it can be held that its activities are not genuine and they are not being carried out as per the statutory provision. In the search proceedings, an MOU was found wherein the trustees namely, Dr. B.S. Tomar and Dr. Juhi Tomar were parties to such MOU and the entire funds for acquiring of shares have been routed through Trust. He also drew our attention to the share hold pattern wherein the NIMS University, Rajasthan was held 15,99,999 shares at the face value of Rs. 10 with percentage of holding of 99.9999%; and Dr. B.S. Tomar was having one share of face value of Rs. 10 and the percentage of his holding was 0.0001%. Once the Trust is the owner of a Private Limited Company practically having all the shares, then it is a clear-cut violation of Section 11(5) and 10(23C) of the Act.

19. Regarding allegation of cash payments to the Doctors, he pointed out from the seized documents, which has been placed in the paper book filed before us, that there is clear cut noting in the handwriting of the trustees wherein cash payments had been made to the doctors which shows that the assessee has incurred unexplained expenditure outside the books, because in the regular books of account only cheques payment have been reflected. If the payments have been made in cash then there must be cash earnings which are nothing but coming from capitation fees received in cash. For this reason, also it can be held that the assessee's activities were not genuine.

20. Lastly, coming to the issue whether registration/approval can be cancelled from a retrospective date, ld. DR submitted that here in this case, registration was granted in the year 2000, whereas the same has been cancelled only w.e.f. 2006-07 which are based on documentary evidences found. Thus, cancellation is not from the date of inception but from the date when the documentary evidences/material has been found that the assessee's activities are not genuine and it has been receiving huge capitation fees. He also

referred to the relevant provisions of Section 12AA (3) and also the *14<sup>th</sup> proviso* to Section 10(23C) of the Act that the Act itself provides that the cancellation can be done from the time when non-genuineness of the activities is found. In support of his contention that the registration/approval can be cancelled or withdrawn from the retrospective date, he relied upon the following three judgments:

- (i) U.P. Distillers Association (ITA 830/2017) (Delhi High Court);
- (ii) Sri Vidyaranya Sewa Sangha Vs CIT, Hubli (2016) 71 Taxmann.com 152 (Banglore Trib);
- (iii) Novodaya Education Trust Vs Union of India (2018) 90 Taxmann.com 148 (Kar.).

**Decision:**

21. We have carefully considered the entire gamut of facts and material placed before us, submissions made by both the parties and the findings given in the impugned order. We have already discussed the facts and background of the case and the contentions raised by the parties in detail. The assessee is an Indian Medical Trust, which was formed on 23/2/2000 and was registered as a Charitable Trust under the 'Rajasthan Public Trust Act'. It was not only granted approval U/s 10(23C) (vi) & (via) of the Act from time

to time, but was also granted registration U/s 12AA of the Act w.e.f. 24/3/2000. The registration and approval under the relevant provisions of the Act was granted looking to the fact that the Trust was carrying out educational activities by setting up several colleges, schools and institutions for imparting education in various disciplines and courses. A medical college and hospital were also opened in the name of NIMS Medical College in the year 2004 and later on the Trust has been extending its courses in various fields of medical science and health services. The assessee has set up its own private university as NIMS University, Rajasthan, Jaipur which later on was enacted by the Legislature of Rajasthan through “NIMS University Rajasthan, Jaipur Act 2008”. After the establishment of NIMS University, the assessee Trust through NIMS University has extended its educational activities on a very large scale. A global search and seizure action were carried out by the Income Tax department and Investigation Wing of the department on 30/10/2014 at various premises of the assessee Trust as well as the residential premises of the trustees. Though, various incriminating materials/documents and unexplained investments

and cash was found, however, in the present case, we are concerned mostly with the documents and seized material which indicates that the assessee Trust has been receiving 'capitation fee' in a very systematic and organized manner from various students right from the A.Y. 2006-07 till the date of search. The quantification of the 'capitation fee' which could be unearthed from the search and post search enquiry were quantified to 650 students as tabulated by the department which is also forming part of the impugned order marked as **"Annexure-A"**. In the said annexure, detail analysis of unaccounted capitation fee received by the assessee Trust has been given which highlights the details of seized annexure number, page number, financial year to which capitation fees pertain, date of fees received, name of the student, name of the father/relative of the student, professional courses opted by the student, address, mobile number, courses, amount received in lacs, and the name of the trustee in whose handwriting it has been written and other details. These entire capitation fees have been received in cash and it an undisputed fact that from the assessment years 2009-10 onwards, such capitation fees have neither been

recorded in the books of account nor have they been disclosed in the audited financial statements or income and expenditure account. These entries of capitation fees have been found from the diary kept by the trustees in their own handwriting. The department has quantified the amount of capitation fee in various years at Rs. 79.9 crores starting from the financial year 2006-07 to 2014-15.

22. This issue of unaccounted capitation fee had been the subject matter of settlement before the ITSC wherein the Settlement Commission has quantified the undisclosed capitation fee chargeable to tax at Rs. 21,63,46,000/- from A.Y. 2009-10 to 2015-16. For the A.Y. 2006-07 to 2008-09, the capitation fee has not been quantified by the ITSC for the reason that, for these three years, the capitation fee has been duly recorded in the books of account and also disclosed as a part of income and expenditure account wherein the details of receipts as well as utilization has been given. Apart from that, the income and expenditure account were subjected to scrutiny assessments u/s 143(3) of the Act and in the assessment made, no adverse inference has been drawn. Even

before us, the department could not establish that the capitation fee from the period A.Y. 2006-07 to 2008-09 found from the seized document were not recorded in the regular books of account; and perhaps that is the reason why the ITSC also has also quantified the undisclosed capitation fee only from the A.Y. 2009-10 onwards. Regarding issue of capitation fee, the observations of the Settlement Commission in its order only for the sake of reference is reproduced herein below: -

*“c) We have considered the issues raised and the evidence presented before us by the Department and the clarifications given by the applicant. On the basis of the evidence produced it is not possible to come to a definite conclusion about the voluntary nature of the donations or otherwise. The most damaging evidence would appear to be the use of word 'capitation' on a statement prepared by the applicant itself which was found during the search. However, the applicant argues that a mere statement which was prepared by an employee and not by a Trustee and in which word 'capitation' is used on a few entries cannot be made the basis to term the entire donations received by it during the years under consideration to be not voluntary in nature.*

d) *Whether the donations were voluntary or otherwise is of relevance for the proceedings before us only in the context of the stand taken by the applicant that these donations being voluntary contributions should be treated as 'corpus donations' which are to be treated as exempt. Sec 11(1)(d) of the Income-Tax Act provides that income in the form of voluntary contributions are not be included in the total income of a Trust. However, Sec. 11(1)(d) lays down another condition: such voluntary contributions are not to be treated as exempt unless the donor gives a specific direction that they shall form a part of the corpus of the trust or Institution. It is seen that in none of the 638 donations received by the applicant there is any declaration by the donor that the amount is to be form a part of the corpus of the applicant trust. In view of this none of this donations can be treated as 'corpus donations' exempt under sec 11(1)(d) and all these are to be treated as ordinary receipts which shall form a part of applicant's income and taxed subject to the conditions relating to application of income for the objective of the Trust. In view of this we are of the view that whether the donations were 'voluntary' or 'involuntary' becomes of academic nature as far as the determination of the total Income of the applicant. Whether the amount in question may be treated as 'Capitation charges' too is a question that would be relevant to the Prohibition of Capitation Fee Act and not the present proceedings. This question may however assume relevance in the context of withdrawal of registration granted to*

*the applicant under Sec 12A and withdrawal of approval under Sec 10(23C)(vi) which is also one of the issues raised before us. To that extent it would be dealt with when we deal with that issue little later in this order.”*

The aforesaid observation of the Settlement Commission goes to show that some of the entries of cash received has been captioned as “capitation fees”, however, the issue whether capitation fees is voluntary or not has been left open as they have held that this issue would assume relevance only at the time of cancellation/withdrawal of the registration U/s 12AA/10(23C) of the Act

23. From a careful analysis of the findings given in the impugned order as well as the seized documents shown before us, it is quite glaring that the assessee has been receiving huge money in cash over and above the regular course fees and hostel fees from the parents/guardians of the students in various years for the various courses run by the trust. The ld. Pr.CIT had given various instances where the capitation fee has been collected from various students who were not from NRI or management quota but were from general quota. For various medical courses, cash has been charged from the students/parents which have been clearly specified and not

only that, fixed schedule of installments have been granted for payment of such cash. There is very systematic and organized manner in which such cash fees are being charged from the students for various courses and in fact trustees have devised a 'package system' whereby the students were given fixed packages of capitation fee, hostel fee and admission fee which this clearly goes to prove that the students were required to compulsorily pay the capitation fee to receive their degrees. Only when such cash was received, the student was given "No Dues Certificate". Such huge cash received over and above the regular course fees and hostel fees, which have been termed as 'capitation fee' by the department and 'voluntary donation' by the assessee has not been recorded in the books of account at all and which fact has also been admitted by the assessee trust right from the A.Y. 2009-10. The reason given by the assessee for not recording these cash fees/voluntary donation /capitation fees before the authorities below and also before us is that, the head of the accounts department has left the job after assessment year 2008-09 and therefore, these amounts could not be recorded in the regular books of account for all the

subsequent years. Such a reasoning and the argument ostensibly cannot appeal to the conscience of any court, because if the assessee has recorded all other receipts which are running into hundred of crores of rupees in the regular books of account then to say that these cash fees/voluntary donations could not been recorded due to the lack of head of accounts is very vague and lame excuse. One of the reason for not recording such huge cash fees in the books of account, perhaps could be due to the fact that by this time, various courts including the Hon'ble Supreme Court have come out very heavily against the private educational institutions especially the private medical colleges for receiving such huge capitation fees from the students and such judicial pronouncement later got ratified by subsequent Constitutional Bench judgments of the Hon'ble Apex Court in several cases holding it to be illegal, which we shall be discussing in brief in succeeding paragraphs. In so far as assessee's contention that once the assessments have been completed u/s 143(3) from A.Y. 2009-10 to A.Y. 2011-12, therefore, no adverse inference should be drawn, is not tenable at all, because admittedly these cash donation/ capitation fees have

neither been recorded in the regular books of account nor has been disclosed in the audited financial statements and even though, the assessments have been completed U/s 143(3) earlier, but the issue of capitation fees/cash donation only surfaced after the search and seizure wherein huge incriminating material and evidence were found, which could not have be subject matter of scrutiny, because assessments were made much prior to the date of search on the basis of entries made in the regular books of account and amount shown in the audited income and expenditure account. Thus, such a plea raised by the assessee lacks merits.

24. Now the moot question before us is that, whether in the wake of clinching evidences found during the course of search and corroborated by post search enquiry that the assessee has been receiving huge capitation fees which admittedly was unaccounted money, can it be held that the assessee's activities are genuine or not. First of all, such huge cash fees have been received over and above the regular fees claimed to in the nature of 'voluntary donation' by the assessee, cannot be treated as voluntary at all, because the concept of 'voluntary' alludes to the concept of free will

and choice and there cannot be any element of force. The nature and pattern of amount of cash received shows that, *firstly*, they are over and above the regular fees and hostel fee charged; and *secondly*, there is a systematic pattern of fixing of the capitation fees course wise devised in a package system and also there is a schedule for making the payments of such fees in installments. Such systematic way of receiving cash fees cannot be held to be given by consent or free choice and willingly, because there cannot be any fixed amount for a sum which is given by free will and choice and it completely lacks element of voluntariness. The donation has element of free will and there cannot be any fixed amount and here in this case it has been brought on record by the department that once this amount is given then only 'no dues certificate' has been issued to the students by the trustees. Thus, under no circumstances, such a cash fees can be held to be given voluntarily or is in the nature of voluntary donation. It is undoubtedly in the nature of enforced fee charged over and above the regular fees by the assessee trust through its trustees which has neither any sanction of law nor has been recorded in the books of account.

25. This issue of charging of 'capitation fee' by private Medical Colleges and other educational institutions has received judicial frown and admonition not only by the various Hon'ble High Courts but also by the Hon'ble Supreme Court and that to be by the Constitutional Bench on several occasions. Providing education for various levels to the citizens is one of the paramount goals of a welfare state and is regarded as the fundamental duty of the State to provide the education to its citizens. Rather the Constitution of India has enshrined such a goal in "Directive Principles" which is a mandate not only for the Central Government but also upon the State Governments and that is why it is in the 'Concurrent List' of the Constitution whereby the Central and State Government have to ensure that proper education in all the fields is provided to its citizens as well as the children. Providing education is most solemn duty of the government and to establish adequate number of educational institutions in the country at all levels including technical, scientific, professional and medical to cater to the varied sections of the society. Since looking to the size of our country and increasing need of education in all walk of life, the State has

encouraged private educational institutions to fulfill the Constitutional goal of providing education, therefore, State has always given a separate status to education and has treated it distinct with other economic activities. That is why there are various Regulations and Acts passed by the various State Governments and Central Government to regulate and control educational activities both for the private institutions as well as for State institutions. For this reason alone, the providing of education has been treated to be one of the paramount activities of charity and has been enshrined as one of the “charitable purposes” u/s 2(15) of the Act. Carrying out such charitable activity by any Trust or institution has been provided with certain benefits and exemptions under Chapter III of the Act, especially under Section 10(23C) and Sections 11 to 13 of the Act. If any Trust or institution transgresses such a noble activity of education on a commercial line which is tainted with commerciality and for profiteering, then same has to be adversely viewed and any such benefits enjoyed by the Trusts or institutions has to be withdrawn or they have to be derecognized from the exemption provisions. A whole procedure has

been laid down under the Income Tax Act not only for providing benefit from exemption of tax but also if any violation is found, then the Act authorizes the authorities to withdraw such benefit. For instance, u/s 10 (23C) clauses (vi) and (via) read with 13<sup>th</sup> proviso provides for rescinding and withdrawal of the approval granted earlier. The relevant *proviso* reads as under:

***Provided also*** that where the fund or institution referred to in sub-clause (iv) or trust or institution referred to in sub-clause (v) is notified by the Central Government [or is approved by the prescribed authority, as the case may be,] or any university or other educational institution referred to in sub-clause (vi) or any hospital or other medical institution referred to in sub-clause (via), is approved by the prescribed authority and subsequently that Government or the prescribed authority is satisfied that—

- (i) such fund or institution or trust or any university or other educational institution or any hospital or other medical institution has not—
  - (A) applied its income in accordance with the provisions contained in clause (a) of the third proviso; or
  - (B) invested or deposited its funds in accordance with the provisions contained in clause (b) of the third proviso; or
- (ii) the activities of such fund or institution or trust or any

*university or other educational institution or any hospital or other medical institution—*

*(A) are not genuine; or*

*(B) are not being carried out in accordance with all or any of the conditions subject to which it was notified or approved,*

*it may, at any time after giving a reasonable opportunity of showing cause against the proposed action to the concerned fund or institution or trust or any university or other educational institution or any hospital or other medical institution, rescind the notification or, by order, withdraw the approval, as the case may be, and forward a copy of the order rescinding the notification or withdrawing the approval to such fund or institution or trust or any university or other educational institution or any hospital or other medical institution and to the Assessing Officer:]*

Thus, if any Trust or institution's activities are found to be not genuine or are not been carried out in accordance with objects or any of the conditions for which it was notified or approved, then such notification can be rescinded or can be withdrawn. There is no specific date prescribed under the said provision from which such approval can be withdrawn. From the plain reading of aforesaid provision, it can be interpreted that if from a particular year or date

it is found that the activities are not genuine or such activities are not carried out in accordance with the objects then from that date/year, approval/notification can be withdrawn.

26. Similarly section 12AA(3) provides for cancellation/withdrawal of registration granted U/s 12A/12AA of the Act, which for the sake of ready reference is reproduced herein:

*“[(3) Where a trust or an institution has been granted registration under clause (b) of sub-section (1) [or has obtained registration at any time under section 12A [as it stood before its amendment by the Finance (No. 2) Act, 1996 (33 of 1996)]] and subsequently the [Principal Commissioner or] Commissioner is satisfied that the activities of such trust or institution are not genuine or are not being carried out in accordance with the objects of the trust or institution, as the case may be, he shall pass an order in writing cancelling the registration of such trust or institution:”*

The aforesaid provision thus, clearly provides that PCIT/CIT has the power to cancel the registration granted u/s 12A or 12AA, if he is satisfied that the activities of the trust or institution are not genuine or are not carried out in accordance with the objects. Both the conditions are mutually exclusive to each other and if any of the

one condition is satisfied, then the registration granted can be cancelled.

27. Now the issue is, whether receiving of a 'capitation fee' can be held to be genuine or not; or whether it is for the purpose of education. One of the main contentions raised by the assessee was that all such cash fees received, though not recorded in the books has been fully utilized in the construction of college/ hospital buildings and being used for expanding the infrastructure and therefore, no adverse inference can be drawn regarding non-genuineness. Such an argument is delusive and flawed, firstly for the reason that it is purely based on hypothesis as no evidence or material has been brought on record or has been found during the course of search that these cash fees has been utilized for the purpose of construction of building or applied for charitable purposes; and secondly, such illicit charging of fees enforced upon the students cannot be genuine education activity. If the assessee is receiving huge unaccounted cash fees, which are not recorded in the books of account and neither its application has been recorded then there cannot be any presumption that such cash received

deemed to have been applied for charitable purposes. At no stage assessee could substantiate such utilization of unaccounted receipts with any evidence. In any case, even if some of the such capitation fees has been utilized for construction of buildings, but that cannot justify the illicit money from students. Here the end cannot justify the means. Thus, we reject the contention of the ld. counsel for the assessee that the assessee's cancellation of registration is not justified simply because the entire money received in the form of capitation fee /donation has been fully utilized for the purpose of education. The 'capitation fee' *per se* has been strictly condemned and castigated by the Hon'ble Constitutional Bench of the Hon'ble Supreme Court comprising of seven judges in the case of **P.A. Inamdar & ors. Vs State of Maharashtra (2005) 6 SCC 537**, wherein while referring the principle laid down by the Hon'ble Constitutional Bench of 11 Judges in **T.M.A. Pai Foundation & ors. Vs. State of Karnataka (2002) 8 SCC 481**, the Hon'ble Court had observed as under:

***“Capitation fees***

***140. Capitation fee cannot be permitted to be charged and no seat can be permitted to be appropriated by payment of***

**capitation fee. “Profession” has to be distinguished from “business” or a mere “occupation”.** While in business, and to a certain extent in occupation, there is a profit motive, profession is primarily a service to society wherein earning is secondary or incidental. A student who gets a professional degree by payment of capitation fee, once qualified as a professional, is likely to aim more at earning rather than serving and that becomes a bane to society. **The charging of capitation fee by unaided minority and non-minority institutions for professional courses is just not permissible. Similarly, profiteering is also not permissible. Despite the legal position, this Court cannot shut its eyes to the hard realities of commercialisation of education and evil practices being adopted by many institutions to earn large amounts for their private or selfish ends.** If capitation fee and profiteering is to be checked, the method of admission has to be regulated so that the admissions are based on merit and transparency and the students are not exploited. It is permissible to regulate admission and fee structure for achieving the purpose just stated.”

Further, in the judgment of **T.M.A. Pai Foundation & ors. Vs. State of Karnataka (supra)**, the Hon’ble Apex Court had made a very important observation which reads as under:

***“57. We, however, wish to emphasize one point, and that is that inasmuch as the occupation of education is, in a sense, regarded as charitable, the government can provide regulations that will ensure excellence in education, while forbidding the charging of capitation fee and profiteering by the institution. Since the object of setting up an educational institution is by definition “charitable”, it is clear that an educational institution cannot charge such a fee as is not required for the purpose of fulfilling that object. To put it differently, in the establishment of an educational institution, the object should not be to make a profit, inasmuch as education is essentially charitable in nature. There can, however, be a reasonable revenue surplus, which may be generated by the educational institution for the purpose of development of education and expansion of the institution.”***

*[Emphasis in bold is ours]*

28. Thus, the law as it stands is very clear that the educational institution cannot charge capitation fees and are not permitted to charge any such fee. Strong contempt and obloquy have been expressed by the Supreme Court of Land that the capitation fee and profiteering by the educational institution defeats the noble cause of education and it has to be checked and regulated. If an educational

institution is charging capitation fees, then educational institution's activity cannot by any means be reckoned to be genuine. Thus, this reason alone is sufficient to hold that the activities of the assessee trust are not genuine and accordingly, we hold that the Ld. Pr.CIT is justified in law and on facts in cancelling the approval/notification issued U/s 10(23C) of the Act and also registration granted U/s 12AA of the Act.

29. Now coming to the issue whether running of TV channel by the NIMS University which is controlled and managed by the assessee Trust can be held to be in accordance with objects of the trust or under the law. Before us, the ld AR of the assessee has harped upon the fact that one of the curriculums run by the NIMS University is that, it is providing course of Mass communication, journalism, TV production, feature film etc. and it is for this purpose, the University has desired to have its own TV channel for the benefit of its students. The ld. counsel has also shown us the various courses and curriculum wherein the students were required to participate in the activities of the TV channel. However, one of the most noticeable fact is that Omega TV Media Pvt. Ltd. which

owns and has the rights to run a news channel is an independent assessee separately assessed to tax, however, the entire investment in the said private limited company has been made by the Trust. Such an investment made in the shares of the private limited company is clearly prohibited u/s 11(5) of the Act and also under *3<sup>rd</sup> proviso* to Section 10(23C) (vi) & (via) of the Act wherein it has been provided that a Trust or institution cannot invest in the shares of private limited company. This has been specifically provided in Sub-section (5) of Section (11) of the Act. Once there is a clear-cut bar upon a Trust or institution carrying out charitable activity to invest in the shares of private limited company, then if such a Trust or institution violates such provision then it has to be held that the activities of the Trust is not genuine as it is not in accordance with the law governing benefit given to the charitable trust or institution. On this point also, we hold that the assessee's activities are not genuine.

30. Lastly, in so far as the issue of cash payment to the Doctors outside the books, we find from perusal of the seized documents that the revenue has not been able to properly correlate or establish

that such payments have been made outside the books or such cash has actually been made. In any case, even it is treated as some adverse material, however, we are not dwelling upon this aspect as we have already held on two counts that the assessee's activities are not genuine and therefore, we are not adjudicating this allegation of the Revenue.

31. Another moot question here in this case is, whether such an approval u/s 10(23C) or registration U/S 12AA granted earlier can be withdrawn from a retrospective date; and if the answer is yes, then what would be the relevant date/period from which such cancellation be made effective. In so far as the withdrawal of approval /notification U/s 10(23C) is concerned, we have already observed in the foregoing paragraphs that there is no such provision which specifically provides that withdrawal cannot be made from retrospective date as the statutes provides that the authorities have the power to withdraw the approval once it is found that the activities of the Trust or institution are not carried out in accordance with its objects or its activities are not genuine.

If, such non-genuineness is found from a particular date then such approval can be withdrawn from that date.

32. In so far as the language used in Section 12AA (3), the conditions for cancelling the registration is that, *firstly*, the activities of such Trust or institution are not genuine; or *secondly*, its activities are not being carried out in accordance with its objects. Prior to 1.04.1997 the registration was granted u/s 12A and after the amendment by the Finance (No. 2) Act, 1996 w.e.f. 1.04.1997, the registration is granted u/s 12AA. Assessee Trust was granted registration on 24/3/2000 u/s 12AA. In sub-section (3) two amendment have been brought, one which has been brought w.e.f. 01/10/2004 by which sub-section (3) was introduced wherein the CIT was given power to cancel the registration which was granted under clause (b) of sub-section (1) of Section 12AA of the Act. Such granting of registration as discussed above U/s 12AA was brought in the statute w.e.f. 01/4/1997. Thus, any registration granted after 01/4/1997, was U/s 12AA and prior to this date, the registrations were granted U/s 12A of the Act. If the registration was granted under the earlier provision of Section 12A, then if such

a registration is cancelled by invoking the provisions of Section 12AA (3) then in that case the courts have held that the CIT cannot cancel such registration from the retrospective date, because these provisions were meant only to cancel the registration granted U/s 12AA of the Act and not for the earlier registration granted u/s 12A with retrospective date. In order to examine the conditions for cancellation of registration granted u/s 12A, the Parliament brought an amendment by the Finance Act, 2010 w.e.f. 01/6/2010, wherein it has been provided that the registration granted at any time U/s 12A can also be cancelled by the Pr.CIT or CIT. The intention of the Legislature was thus to bereft any charitable trust for enjoying benefit of exemptions if its activities are found to be non-genuine or is not carried out in accordance with objects for which it was granted registration. Though the section does not provide clearly from which date registration can be cancelled, however on plain reading it is quite palpable that the cancellation can be done from the time when the activities are found to be non-genuine or is found not being carried out in accordance with objects. If non-genuineness is not found from an earlier date but

from the present date then cancellation cannot be made from back date, however if the trust or institution based on any material or information is found to be carrying non-genuine activity from the earlier period then from that period registration can be cancelled. The date from when the non-genuineness is found is the decisive and determinative factor. There are set of judgments as cited by the Id. DR like U.P. Distillers Association (ITA 830/2017) (Delhi High Court); Sri Vidyaranya Sewa Sangha Vs CIT, Hubli (2016) 71 Taxmann.com 152 (Banglore Trib); and Novodaya Education Trust Vs Union of India (2018) 90 Taxmann.com 148 (Kar), wherein the courts have held that the cancellation can be made from the retrospective date. However, there are other set of judgments which has been relied upon by the Id. counsel wherein the courts have held that the registration cannot be cancelled from the date of inception. Here in this case, we have held that the non-genuineness of the activities of the assessee Trust has been found from A.Y. 2009-10 when the assessee had received huge capitation fee in cash which has not been recorded in the books of account and from this date onwards i.e. A.Y. 2009-10, the non-genuineness of the

activities is writ at large and therefore, the cancellation of registration or withdrawal of approval has to be given from A.Y. 2009-10 and not from the date of inception. Though, the revenue's case is that the withdrawal/cancellation should be made from A.Y. 2006-07 onwards, however, before us, the revenue has failed to establish that the capitation fee which has been found during the course of search is over and above what has been recorded in the regular books of account and duly accepted in the scrutiny proceedings U/s 143(3) of the Act. Perhaps that is the reason why the Settlement Commission also has quantified the undisclosed capitation fee from A.Y. 2009-10 onwards and not for the earlier years. If the revenue seeks to cancel registration w.e.f. A.Y. 2006-07, then the onus was upon the Revenue to show that the capitation fee received by the assessee is outside the books of account. Accordingly, we hold that the cancellation of registration u/s 12AA (3) or withdrawal of approval u/s 10(23C) should be only from the A.Y. 2009-10 onwards and not from the A.Y. 2006-07.

33. In so far as the judgments relied upon by the ld. counsel for the assessee that the cancellation should not be made from

retrospective effect, especially the judgment of the Hon'ble Allahabad High Court in the case of ACIT Vs. Agra Development Authority (supra), on perusal of the said judgment, it is seen that it was a case of registration of a Development Authority, which was granted registration U/s 12AA of the Act w.e.f. 01/4/2003. The registration was cancelled by the ld. CIT U/s 12AA (3) vide order dated 04/4/2012 from the date of registration. The reason for cancellation of registration was that a *proviso* was inserted in Section 2(15) w.e.f. 01/4/2009 and therefore, the activities of the authority was violating the conditions of such proviso and therefore, the assessee's registration was cancelled from the date of inception. In this background, the Hon'ble High Court held that the registration cannot be cancelled from the retrospective date. However, the Hon'ble High Court by way of *obiter dicta* did observe that even after the amendment in Section 12AA (3), it does not indicate that the ld. CIT can cancel the registration with retrospective effect. At the same, there is a judgment of Hon'ble Karnataka High Court in the case of Navodaya Education Trust Vs Union of India (supra) wherein it has been held that withdrawal can

be made from retrospective date if the evidence and material has been found about the non-genuineness of the activities of the Trust. Similarly, the Hon'ble Delhi High Court in the case of U.P. Distillers Association (supra) have opined that the cancellation of registration on that particular case can relate back from the date of introduction of Section 12AA (3) of the Act w.e.f. 01/10/2004. Since in this case, the cancellation has not been done from the date of granting of registration, albeit we have held that such a cancellation or withdrawal of approval should be done from A.Y. 2009-10 onwards, because there are specific material and evidences to show that the assessee's activities from that period has been non-genuine. Accordingly, on the facts and circumstances of the case, we hold that the ld. Pr.CIT was justified in cancelling the registration U/s 12AA and also withdrawing the approval U/s 10(23C) of the Act, but with a rider that such cancellation/ withdrawal would be from the A.Y. 2009-10 onwards and not from the earlier years. Accordingly, both the appeals of the assessee are dismissed in the manner indicated above.

### **Appeals of NIMS University**

34. Now we will take the appeals of NIMS University in ITA No.736/JP/2017 & ITA No. 545/JP/2018 for the A.Y. 2017-18. Both these appeals have been filed by the assessee against two separate orders passed by the Id. CIT (Exemptions), Jaipur dated 29/08/2017 and 19/03/2018 respectively. In both these appeals, the assessee has taken following grounds of appeal:

#### “Grounds of ITA No. 736/JP/2017

- (1) *Ld. CIT(Exemptions) was not justified in denying registration U/s 12AA of Income Tax Act to the assessee university merely on basis that certain Khasara of land were not in ownership of the sponsoring body (M/s Indian Medical Trust- though the sponsoring body was already granted registration U/s 12AA by ld. CCIT, Jaipur and was carrying out educational activities from the year 2000)*
- (2) *The ld. CIT(Exemptions) was not justified in ignoring the charitable objects of the assessee University for the purpose of granting registration U/s 12AA of IT Act (392 ITR 285 Raj), to assessee University who came into existence by an Act passed by Rajasthan Legislative Assembly and accordingly started its educational activities after transfer of all the assets and liabilities of the sponsoring body- Indian Medical Trust.*

#### Grounds of ITA No. 545/JP/2018

1. *Ld. CIT(Exemption) was not justified in denying approval under section 10(230) (vi) and (via) Income tax Act to the assessee University solely that certain Khasaras of land mentioned in enactment passed by Rajasthan Legislative Assembly were not in ownership of the sponsoring body (M/s. Indian Medical Trust) though the assessee University is running its charitable and hospital activities on about 90 bighas of land which is sufficient to run such type of charitable activities.*
2. *That Id. CIT (Exemption) was not justified in refusing approval u/s. 10(23C)(v) & (via) of IT Act to the assessee University by taking pretext of the followings:*
  - (a) *Action u/s. 132 of IT Act in case of sponsoring body (Indian Medical Trust) in which no extra cash, no unexplained jewellery, no unexplained foreign currency or no other incriminating documents or material was found except recorded donations in diaries (used for construction of educational buildings) whereas no misuse of funds by Trustees or relatives was found, rather trustees had deposited their own interest free funds with it, did not charge any rent or other expenses for city office and always provided voluntary services without charging any remuneration.*
  - (b) *Common application made for the purpose of approval under section 10(23C) (vi) and for 10 (23C) (via) of IT Act.*
  - (c) *TV channel, which is being run by an independent company by the name M/s. Omega TV Media Pvt. Ltd. with different PAN.*
  - (d) *Refusal of registration under section 12AA/10(23C) of IT Act to the Applicant University.”*

35. The aforesaid appeals have been filed by the NIMS University, Rajasthan, Jaipur against the refusal of grant of registration U/s 12AA of the Act and refuse to grant approval for notification U/s 10(23C) (vi) & (via) of the Act. The facts and the reasoning given by the Id. CIT(E) to deny the same are exactly same, therefore, our finding would be applicable for both the appeals.

36. As discussed in the earlier appeals, the assessee Trust had set up its own private University under the aegis of NIMS University, Rajasthan, Jaipur. Such University was enacted by the 'NIMS University Rajasthan Act, 2008' by the Legislature of the Rajasthan which got ascent from the Hon'ble Governor on 29/03/2008. Thus, the NIMS University was established in the year 2008. The Indian Medical Trust was running and controlling the said University. Later on, an agreement was entered into between the Indian Medical Trust and NIMS University, vide agreement dated 30/09/2016, wherein it was agreed that Trust will transfer all the assets and liabilities to the NIMS University w.e.f. 01/10/2016 and all the activities of education and medical hospital would henceforth be run by the NIMS University only. All the assets owned

by the Indian Medical Trust was transferred in the ownership of the NIMS University including all the liabilities. However, no registration of the properties/assets held by the Trust has been transferred by registered documents by way Registry or by paying the stamp duty. Similarly, the liabilities have also not been assigned specifically to the assessee by way of registered agreement. The sponsoring body continued to be the Indian Medical Trust by same trustees. All the recognition and approval by the State and Central Government for running the educational and other courses and medical hospital run by the Indian Medical Trust was to be treated and considered as taken by the NIMS University. The 'objects' of the NIMS University continued to be the same.

37. An application was filed U/s 12AA (1) (aa) of the Act on 16/2/2017 before the Id. CIT(E). However, such an application for granting registration U/s 12AA has been denied by the Id. CIT(E) mainly on the ground that certain 'Khasra' Nos. of land allotted as per the notification of the Government was not in the ownership of the sponsoring body, i.e., Indian Medical Trust. In the impugned

order, the ld CIT(E) in the show cause notice to the assessee has made following observations:

*“In this connection, spot visit & verification report of inspector of this office is submitted herewith for kind perusal & necessary action. As per the spot visit report & other information’s gathered, the NIMS University is engaged in educational and medical activities, in addition to the above, following facts are submitted herewith: -*

- 1. As per the Gazette notification issued dated 29-03-2008 by the Rajasthan Government as well as prospectus of the University. The University having 60.67 acres of land comprising in Khasara Nos. 152, 514, 515, 516, 517, 518, 519, 528, 529, 530, 531, 532, 519/666, 519/ 668, 396, 397, 398 & 520 of Village Jugalpura, Tehsil- Amer. Shobha Nagar, Distt.- Jaipur (Rajasthan). During verification of the same, following discrepancies have been notice.*
  - 1.1 The Khasara No. 152 (Khata Sankhya-32) pertains to Goverdhan S/o Ghasi Ram, Cast - Meena.*
  - 1.2 Khasara No. 514 (Khata Sankhya- 169) pertains to Public Works Departments.*
  - 1.3 Khasara No. 515 (Khata Sankhya- 02) pertains to Agarwal Farms Pvt. Ltd. Registered office Raja Raoji ka Khurra, Ramganj Bazar, Jaipur Director Sh. Girish Chandra S/o Hari Prasad, Part 14 F 35 Ghiya Marg, Bani Park, Jaipur,*

*M/s Bholaram & Sons investment Pvt. Ltd. Through Director Shri Vinod Kashera Post- Panitola Aasam part 1/2.*

- 1.4 Khasra No. 516 (Khata Sankhya -01) pertains to Government of Rajasthan. Khasra No. 518 (Khata Sankhya-165) pertains to Jaipur Development Authority, Jaipur.*
- 1.5 Khasra No. 528 (Khata Sankhya-165) pertains to Jaipur Development Authority, Jaipur.*
- 1.6 Khasra No. 531 & 532 (Khata Sankhya - 165) pertains to Jaipur Development Authority, Jaipur.*
- 1.7 Khasra No. 519 (Khata Sankhya - 1) pertains to Indian Medical Trust Registered Office 4 Govin.d Marg, Adarsh Nagar, Jaipur through Trustee Smt. Rajeshwari Devi W/o Late Hotam. Singh Tomar part. 306/490 Sajjan Kumar S/o Chaturbhuj Agarwal Part 138/490 Mahandra Kumar Fahher Chaturbhuj Agarwal part 46/490 residence 20, in front of Sawai Jai Singh Highway Tagore, Bani Park, Jaipur.*
- 1.8 Khasra No. 396/397/398 (Khata Sankhya- 89) pertains to Madhusudan HUF S/o Ram Ratan Agarwal Karta Madhusudan Part  $\frac{1}{4}$  Madhusudan Son Ramratan Part  $\frac{1}{4}$  Sushila W/o Ramratan Cast Agarwal, Residence Ruiyawalan Post- Topkhana Hujuri, Jaipur.*

*From the above, it appears that major part of the land which is occupied by the applicant i.e. NIMS, University, Jaipur does not pertain to it.”*

In response to the said show cause notice, the assessee submitted that the ‘Khasra’ Nos. as been mentioned in the notice was never in the ownership of the Indian Medial Trust nor was transferred to NIMS University. Further the NIMS University had not yet become the owner of the land bearing said ‘Khasra’ numbers. However, the Ld. CIT (E) noted that, as per the notification issued by the government, Schedule-1 provided that the University will have 60.67 acres of land comprising of various ‘Khasra’ numbers, but some of the Khasra numbers were not found to be in the ownership of the University. Thus, he concluded that there is a clear-cut contradiction from the Govt Gazette Notification and the reply filed by the assessee that the ownership of the land intended to be vested in the university is not established. Accordingly, he has refused to grant registration after observing as under: -

*“11. Once it is found that the ownership of land intended to be vested in university is not with the sponsoring body, the next question comes whether such issue can be examined while*

*granting registration u/s 12AA of the IT Act, 1964 in present case where university came into existence in 2008, almost 9 years back. Section 12AA clearly empowers Commissioner of Income Tax to examine objects of the university as well as genuineness of the activities. Both the phrases “objects of the institution” and “genuineness of its activities” used in the act are coupled with the word “and” which clearly indicates that they should be satisfied simultaneously as well as independently. As in the present case, the ownership of land which is intended to be transferred from the sponsoring body to the university is in doubt, it cannot be held as genuine activity. As the activities of transfer to assets for creation of university does not seem to be genuine, it is not a fit case for registration u/s 12AA of the Act.*

12. *In the light of the above facts the application seeking registration u/s 12AA is hereby rejected and filed.”*

38. On the same reasoning also, approval U/s 10(23C) has been refused by the Id. CIT (E) by holding as under: -

*“Thus from 1.10.2016 the applicant took over all the assets and liabilities of X 1MT alongwith all of its activities. Therefore, it becomes imperative to examine the genuineness of activities of 1MT. It is also worthwhile to mention here that in the case of M/s Indian Medical Trust, Jaipur, which is the sponsoring body the applicant, a search operation u/s 132(1) of the I.T. Act was*

*carried out on 30.10.2014. During the search proceedings - unaccounted cash, jewellery, foreign currency and various incriminating documents were found and seized. After examining the documents and various evidences collected during the course of search, and considering assessee's submissions the approval granted to the trust u/s 10(23C)(vi) and 10(23C)(via) has been withdrawn by the Pr.CIT(Central), Jaipur vide order dated 16.01.2018. The approval of the trust has been withdrawn due to following irregularities and facts noticed in the functioning of the trust-*

*7.1 The trust is profiteering by taking unaccounted capitation fee from the students and parents. It cannot held to be genuine, and in the accordance with the objectives as per the trust deed.*

*7.2 The trust has violated the condition laid down in 10<sup>th</sup> proviso to sec. 10(23C)(vi) and (via) of the I.T. Act ,as the receipts of Rs. 21.6 crores were not accounted by the assessee. Sufficient evidence of misuse of trust funds has been found during the search proceedings.*

*7.3The trust is operating a news channel namely "NEWS INDIA" at NIMS University, Shobha Nsgar, Jaipur, whose city office is at Sahakar Marg, Jaipur. It is clear that the trust has utilized its funds in contravention of its objectives as running a commercial news channel is not as per the stated objectives of the trust. Hence, it has violated the 3<sup>rd</sup> proviso to section 10(23C) of the Act.*

*7.4 The trust has also made unaccounted cash payment of salaries to doctors/staff, over and above the salaries given to these doctors/staff by way of cheque.*

*In view of the above facts, the approval granted u/s 10(23C)(vi) & (via) to the Indian Medical Trust has been withdrawn w.e.f. 01.04.2006. Thus, it can be concluded, when activities of the sponsoring Body taken over by NIMS University are not genuine, the activities of the sponsored body i.e. NIMS University cannot be independently considered as genuine. Thus, the activities of the applicant are held as non-genuine.*

*8. It is also important to note that the applicant University applied for approval under both the Sec./clauses 10(23C)(vi) & 10(23C)(via) by filing common form. On giving show cause regarding correct section under which approval is sought the applicant replied-*

*“It is therefore requested that single application may please treated as application for approval under section 10(23C) (vi) as well as under section 10 (23C) (via) of IT Act.”*

*The section 10(23C)(vi) & 10(23C)(via) are mutually exclusive because of word ‘solely’ used in both the clauses. The applicant can seek approval under one clause only. Seeking approval under both the clauses is technically and legally wrong. The reliance in this regard has been placed on the judgement of Hon’ble Rajasthan High Court in the case of CIT Vs Maharaja Sawai Mansingh ji Museum Trust (1988) 169 1TR*

*379(Raj.) wherein it was held that It is amply clear from a bare reading of sec. 10(22) that the “educational institutions” must exist “solely” for educational purposes. “Solely” means exclusively and not primarily. The emphasis in sec. 10(22) is on word “solely.” Section 10(22) has been inherited by section 10(23C) and decisions applicable on erstwhile sec. 10(22) holds good for the present section of 10(23C).*

*9. In light of the discussions as held herein earlier paras of this order, the application filed by the applicant for grant of approval of exemption u/s 10(23C)(vi)& (via) of the Income Tax Act is hereby rejected.”*

39. Before us, the ld. counsel for the assessee has submitted that only ground taken for rejecting the application of the assessee U/s 12AA is that, some of the land as per the Government Notification was neither in the ownership of the Indian Medical Trust nor could be transferred to NIMS University, Rajasthan. It has not been doubted that the University has been carrying out various educational activities and is running a hospital. He further submitted that what is required to be seen while granting registration U/s 12AA of the Act is whether the assessee's objects are charitable in nature or not and whether its activities are genuine

or not. In support of this contention he strongly relied upon the judgment of Hon'ble Jurisdictional High Court in the case of **Commissioner of Income-tax, Bikaner v. Gopi Ram Goyal Charitable Trust 392 ITR 285 (Raj)**. He further submitted that the Government had issued a notification only when verification was done that the hospital and education activities of the Indian Medical Trust was being run and was duly approved by the various authorities at Central and State Government. Thus, the ownership of certain land bearing certain 'Khasra' numbers is irrelevant consideration for refusing the registration U/s 12AA of the Act.

40. On the other hand, the Ld. CIT-DR submitted that, if once it is found that the assessee has not found to be running its hospital and educational activities on the land which has been notified by the government, then it cannot be said that its activities are genuine. He, thus strictly relied upon the order of the ld. CIT (E).

41. After considering the rival submissions and on perusal of the material facts placed on record, we find that the NIMS University, Rajasthan, Jaipur has been notified by an enactment passed by the Legislature of Rajasthan. The said university was

enacted to provide higher education in various fields. The sponsoring body of the University was Indian Medical Trust. Thereafter in the Gazette Notification, Schedule-1 provided that the University will have 60.67 acres of land comprising of various khasras numbers in village Jugalpura, Teshil- Amber, district- Jaipur. The said schedule also enlists various buildings, academic facilities and various kinds of degrees run by the said University. In an enquiry conducted by the Id. CIT (E), it was found that certain 'Khasra' number as mentioned in the Government Notification for the allotment of land to the University was not in the ownership of the Indian Medical Trust or NIMS University. Solely on this ground, he has refused to grant registration. No where he has discussed the "objects" for which the said University is running; nor there is any whisper about the genuineness of the activities *qua* the objects. It is well settled position of law that at the time of granting registration u/s 12AA, the Id CIT(E) is required to examine the 'objects' of the Trust or institution as to whether they are for the charitable purposes or not and also to see the genuineness of the activities *qua* the objects. If certain 'Khasra' numbers as notified by the

Government has not been acquired or is not owned by the Indian Medical Trust or by the NIMS University and it is standing on some different land bearing different 'Khasra' numbers, but that does not mean that its activities are not genuine or is not carrying out charitable activities. Even if there is some technical breach or violation of the Notification pertaining to land that the said University is not standing on a particular 'Khasra' notified, then that would be a subject matter of issue of dispute with State authorities and not the Income Tax Department. What is required to be seen in terms of Section 12AA is, only the 'objects' and the genuineness of the activities. Accordingly, the reasons given by the Id. CIT (E) for refusing the registration cannot be upheld. Since the objects and the genuineness of the activities have not been examined, therefore, we are remitting the issue of grant of registration back to the file of the Id. CIT (E), who shall examine the 'objects' of the institution whether they are for educational or charitable purposes or not; and whether its activities are being carried out in accordance with such objects including the genuineness of the activities *qua* that 'objects'. With this direction,

the entire matter is restored back to the ld. CIT (E) who shall decide and examine the issue of registration u/s 12AA afresh and in accordance with law after giving due and effective opportunity of hearing to the assessee to substantiate its case. Accordingly, the appeal relating to refusal of registration U/s 12AA of the Act is allowed for statistical purposes only.

42. Lastly, coming to the additional reason given by the ld. CIT(E) while refusing the approval U/s 10(23C) of the Act that, *firstly*, during the course of search and seizure operation U/s 132(1) of the Act, it was found that the Indian Medical Trust was profiteering by taking unaccounted capitation fee and such fee was not accounted by the assessee in view of the *10<sup>th</sup> proviso* to Section 10(23C)(vi) & (via); and *secondly*, the Trust was operating News Channel, namely, News India at NIMS University which is not genuine. While coming to this conclusion he has referred to the decision and finding given by Pr. CIT in his order for withdrawal of approval u/s 10(23C) in the case of Indian Medical Trust and on that basis, he has refused to grant approval to NIMS University also. In so far as the issue of material found during the course of

search in the case of Indian Medical Trust that it was receiving unaccounted capitation fee, the same was applicable till the date of search and that to be in the case of Indian Medical Trust for which we have already given our finding while deciding the case of the Indian Medical Trust. However, the same charge or allegation cannot be imported in the case of NIMS University also until and unless there is some incriminating material or any kind of enquiry has been conducted leading to any adverse inference, for instance, receiving of unaccounted capitation fee is still continuing or is permeating in the subsequent years also, that is, from the date when NIMS University has taken over by entire assets and liabilities of the Trust and also the educational activities. We are of opinion that the issue of grant of approval u/s 10(23C) needs to be examined afresh. On the issue of running of a news channel also, the issue needs to be examined under the scope of 3<sup>rd</sup> proviso to Section 10(23C) (vi) & (via) and Section 11(5) of the Act. The Id. CIT (E) shall examine this aspect also without getting prejudice with the finding given in the appeals of the Indian Medical Trust as decided above for the reason that here the activities of the NIMS University

had only started after 01/10/2016 when all the assets and liabilities of the Indian Medical Trust has been transferred to NIMS University by way of an agreement between the Indian Medical Trust and NIMS University. The genuineness of the agreement whereby entire assets and liabilities have been transferred from the Indian Medical Trust to NIMS University also can be examined whether it is in accordance with relevant provisions of law and there is actual transfer of assets and liability or it is mere paper entry or is just a façade. Accordingly, the issue of approval U/s 10(23C) of the Act is also remanded back to the file of the Id. CIT(E) to be examined denovo and afresh and in accordance with law after examining the objects and genuineness of the activities. Needless to say, the Id. CIT (E) shall give due and proper opportunity to the assessee to present its case. Accordingly, this appeal of the assessee is also allowed for statistical purposes only.

43. In the result the appeals of the Indian Medical Trust in ITA No. 252 & 253/JP/2018 are dismissed; and the appeals of NIMS University in ITA No. 736/JP/2017 & 545/JP/2018 are allowed for statistical purposes.

Order pronounced in the open court on 12<sup>th</sup> October, 2018.

Sd/-  
(OM PRAKASH KANT)  
Accountant Member

Sd/-  
(AMIT SHUKLA)  
Judicial Member

Dated:- 12<sup>th</sup> October, 2018

\*Ranjan

Copy of the order forwarded to:

1. The Appellant- (i) Indian Medical Trust, Jaipur.  
(ii) The NIMS University, Rajasthan, Jaipur
2. The Respondent- (i) The Pr.CIT (Central), Jaipur.  
(ii) The CIT (Exemptions), Jaipur.
3. CIT
4. The CIT (A)
5. DR, ITAT, Jaipur
6. Guard File (ITA No. 252 & 253/JP/2018, 736/JP/2017 & 545/JP/2018)

By order,

Asst. Registrar