

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED 22.12.2016

<i>Date of Reserving the Order</i>	<i>Date of Pronouncing the Order</i>
03.10.2016	22.12.2016

Coram

The Hon'ble Mr.Justice T.S. SIVAGNANAM

W.P.Nos.37565 to 37567 of 2015, 38024 to 38028 of 2015, 38321 to 38325 of 2015, 38567 to 38570, 38687 to 38689 of 2016, 39238 to 39239 of 2015, 39311 to 39315 of 2015, M.P.Nos.1 to 3 of 2015 in all W.Ps, W.P.No.37103 of 2015, W.P.No.37000 of 2015 and M.P.Nos.1 and 2 of 2015, W.P.No.3009 of 2016 and W.M.P.Nos.2483 and 2484 of 2016, W.P.No.2843 of 2016 and W.M.P.No.2389 and 2390 of 2016, W.P.Nos.3524 to 3528 of 2016 and W.M.P.Nos.2876 to 2890 of 2016, W.P.Nos.4225 to 4228 of 2016 and W.M.P.Nos.3532 to 3543 of 2016, W.P.Nos.5125 and 5126 of 2016 and W.M.P.Nos.4484 to 4489 of 2016, W.P.Nos.5147 to 5148 of 2016 and W.M.P.No.4515 to 4519 of 2016, W.P.Nos.6721 to 6724 of 2016 and W.M.P.No.5986 to 5989 of 2016, 6990 and 6991 and 6692 to 6697 of 2016, W.P.Nos.8589 and 8590 of 2016 and W.M.P.Nos.7633 to 7636 of 2016, W.P.Nos.8748 to 8750 of 2016 and W.M.P.Nos.7742 to 7750 of 2016, W.P.Nos.8798 to 8800 of 2016 and W.M.P.Nos.7807 to 7815 of 2016, W.P.Nos.9541 to 9543 of 2016 and W.M.P.Nos.8574 to 8582 of 2016, W.P.Nos.9551 to 9553 of 2016 and W.M.P.Nos.8586 to 8594 of 2016, W.P.Nos.15110 and 15111 of 2016 and W.M.P.Nos.13163 to 13168 of 2016, W.P.Nos.462 to 466 of 2016 and W.M.P.Nos.301 to 315 of 2016, W.p.Nos.7365 and 7366 of 2016 and W.M.P.Nos.6573 to 6576 of 2016, W.P.No.12161 of 2016 and W.M.P.No.10511 and 10512 of 2016, W.P.Nos.3541 and 3542 of 2016 and W.M.P.Nos.2897 to 2900 of 2016
(74 Cases)

W.P.No.37565 of 2015

Institute of the Fransican Missionaries of Mary
Rep., by its President
St., Thomas Convent, New No.2, Old No.17/18,
Rosary Church Road,
Mylapore, Chennai - 600 004.

... Petitioner

Vs

1. Union of India,
Rep., by the Secretary,
Ministry of Finance,
North Block, New Delhi - 110 001.
 2. Central Board of Direct Taxes
Rep., by the Secretary,
Ministry of Finance,
North Block, New Delhi - 110 001.
 3. Principal Chief Commissioner of Income Tax (Chennai)
121, M.G. Road,
Nungambakkam,
Chennai - 600 034.
 4. The Commissioner of Income Tax (TDS)
7th Floor, New Block,
Aayakar Bhawan,
121, M.G. Road, Chennai - 600034.
 5. Director of Treasuries and Accounts,
Office of the Treasuries and Accounts
Panagal Building,
No.1, Jeenis Road,
Saidapet, Chennai - 600 015.
 6. The Director of School Education,
DPI Campus,
College Road,
Chennai - 600 006.
 7. The Director of Elementary Education,
DPI Campus, College Road,
Chennai - 600 006.
 8. Inspector of Anglo-Indian Schools,
DPI Campus, College Road,
Chennai - 600 006.
- ... Respondents

Prayer :-This Writ Petition is filed under Article 226 of the Constitution of India, seeking for a Writ of Certiorarified Mandamus to call for the records pertaining to the impugned order dated 07.10.2015 in C.No.Misc.PRO/2015-16, on the file of the third respondent and the consequential Circular dated 26.10.2015 in R.C.No.23545/2014/E1, on the file of the fifth respondent and quash the same in respect of the catholic nuns among the teaching and the non-teaching staff working in the educational institutions of the petitioner educational agency, as mentioned in the Annexure to the petition, directing the respondents to comply with the Circular of second respondent Central Board of Direct Taxes dated 05.12.1977 in F.No.200/88/75-IT (A1).

For petitioner .. Fr.Dr.Xavier Arul Raj Senior counsel for
Ms.A.Arul Mary in all W.Ps.,
Mr.P.Godson Swaminathan
in W.P.No.37103 of 2015, W.P.Nos.7365 &
7366 of 2016, W.P.No.3541 & 3542 of 2016

For Respondents .. Mr.J.Narayana Swamy
Standing Counsel for Income Tax in all W.Ps.
Assisted by Mr.S.Rajesh

Mr.S.Diwakar Spl.G.P., for State Govt.,

M/s.J.Sree Vidya for R8 in W.P.No.7365,
7366 of 2016,
R9 in W.P.Nos.3541, 3542 of 2016

Mr.U.Venkatesan for R6
in W.P.No.38321/2016

COMMON ORDER

The common issue which falls for consideration in these batch of cases is as to whether the respondent, the Income Tax Department, is justified in insisting upon recovery of tax at source from the salary payable to Nuns/Fathers/Priests working in various Teaching Institutions established and administered by the petitioners. Some of the Writ Petitions have been filed by the Congregation, some by the Institutions and some by the individual Priests/Nuns, however, since common issues have been raised in all these Writ Petitions, they were clubbed and heard together. The submissions made on behalf of the Revenue/Income Tax Department and the authorities of the State Government were common to all the Writ Petitions and therefore, the Court heard all matters together and are disposed of by this common order. With the consent on either side, W.P.No.37565 of 2015, is taken as the lead case and it would suffice to refer to the facts stated therein for the purpose of deciding the issues raised in these batch of cases.

2.The petitioner is a society constituted by the “Congregation of Franciscan Missionaries of Mary”, and the congregation exclusively comprises of Roman Catholic Nuns. It is stated that for the purpose of perpetuity, the

society is registered under the Societies Registration Act, 1860 with Registration No.3/1922-1923, under the name and style of “Institute of Franciscan Missionaries of Mary”. The society is a religious, educational and charitable society and for the day today administration of the congregation various units were constituted by the parent society of the petitioner, but they are exclusively comprised of the members of the same religious congregation of catholic nuns. The institutions are under the control of the General Manager and President of the Society. The religious congregation is recognised under Canon Law, for the purpose of religious administration under the guidance of Pope at Vatican, which is called as Papal Congregation under Canon Law. The petitioner society has established and administering several educational institutions for the welfare of the poor and downtrodden, with special focus on Christian religious minority. The petitioner has three Primary schools, five Higher Secondary Schools, two Nursery schools, one Matriculation school and one Arts and Science college of these three Primary schools, five Higher Secondary schools and one College are Government aided institutions. Apart from the religious institutions, the petitioner society has established Old Age Homes, Hospitals, Dispensaries and Social Service Centres. The petitioner society is a non-profit organisation and has been exempted under Section 11 of the Income Tax Act, 1961, (Act), by certificate dated 05.06.1973, under Section 12AA of the Act. The members of the Congregation profess the

perpetual vows of Chastity, Obedience and Poverty called evangelical counsels, as condition precedent to become a member of the Congregation for religious life and in this regard, reference was made to canon No.668 of the Code of Canon Law. Further, it is submitted that apart from the Canon Law, Article 54 and 59 of the Constitution of the Congregation of the petitioner prohibits Nuns to own any property including salary. Thus, as a result of adopting the religious life as a member of the Congregation, the members suffer as a civil death and they are incapable of possessing any property or earnings including salary. After embracing religious life, if at all they receive any benefit, it is only for the religious congregation or on its behalf and the property, earnings or salary accruing to the catholic Nuns or Monks, automatically become the property of the religious congregation. That apart, under civil law, they sever their connections with their natural family and become part of the spiritual family and this position has been upheld in several decisions of the Hon'ble Apex Court as well as by the Hon'ble High Courts. The petitioner referred to the circular issued by the Income Tax Department in Circular No.1 of 1944, dated 24.01.1944, exempting the religious persons, who are drawing Government salary, from liability to pay tax on their salary. Subsequently, The Director of Public Instructions, Madras vide proceedings dated 18.07.1946, had instructed the education authorities that it is sufficient to be certified by the Head of Institution regarding the members of teaching staff of the Catholin

religious order, who have taken vow of poverty while submitting their pay particulars in the form of acquittance in respect of their monthly salary. Similar circular was issued on 31.09.1961, in response to the representation from the Madras Catholic Education Council. Circular issued in 1944 was followed in a subsequent instruction issued on 05.02.1977, which is still in force granting exemption to the members of the religious congregation, Priests and Nuns from payment of income tax. It is submitted that there has been no issues raised by the Pay and Accounts Office or by the Educational Authority or by the Income Tax Department till 2015, when for the first time, the Pay and Accounts Officer vide his proceedings, dated 28.09.2015, addressed a query to the Principal Chief Commissioner of Income Tax (Chennai), (PCCIT) whether tax is to be deducted from the salary of Nuns and Priests working as Teachers in the Government Educational Institutions or not. In response to such query, the PCCIT issued a clarification, dated 07.10.2015, stating that those income, which are listed under Section 10 of the Act, are only exempted income, the salary payable to Nuns is not listed in the same, hence, as per the existing provisions of the Act, Tax as applicable, is to be deducted at source from the salary payable to them. It is submitted that the clarification, dated 07.10.2015, has failed to take note of the earlier circulars and instructions and is in violation of under Section 119 of the Act and circulars issued by the CBDT is binding on the Income Tax authorities. The resultant consequence was that

salary was refused to be released to the Nuns and Priests, unless and until tax was deducted at source. This promoted the petitioners to approach this Court by way of this Writ Petition wherein, they have prayed for issuance of a Writ of Certiorarified Mandamus, to quash the clarification given by the PCCIT, dated 07.10.2015 and the consequential circular, dated 26.10.2015, issued by the Director of Treasuries and Accounts in respect of catholic teaching and non-teaching staff working in the educational institution of the petitioner education agency and to direct the respondent to comply with the CBDT circular, dated 05.09.1977.

3.Fr.Dr.Xavier Arul Raj learned Senior counsel assisted by Ms.A.Arul Mary, learned counsel for the petitioner prefaced his submission as to how Nuns and Priests adopt a religious life on joining a congregation resulting in a civil death and how they are incapable of possessing any property or earning including salary and made elaborate reference to the Canon Law, the aspects of the canon law, three vows taken by them namely that of chastity, obedience and poverty. It is submitted that no tax was deducted since 1944 and the present attempt made by the respondents to deduct tax, pursuant to the impugned clarification has caused chaos and confusion among the congregations and the religious establishments as the present move is in direct conflict with the Canon Law which ought to be respected by the income tax

authorities. The learned Senior counsel referred to the circulars and instructions which held the field since 1944 and submitted that the circular, dated 05.12.1977 of the CBDT clearly states that since the fees received by the missionaries are to be made over to the congregation concerned, there is an overriding title to the fees which would entitle the missionaries to be exempt from payment of tax and hence, such fees of earnings are not taxable in their hands. It is submitted that this circular of the CBDT having not been superseded or set aside, it is binding on the respondents and no tax can be deducted at source. While issuing the impugned clarification, dated 07.10.2015, the third respondent has not taken note of the binding circular issued by the CBDT, which has been holding the field since 1977. It is further submitted that what has been reiterated in circular 1977, is what was in vogue since 1944. By referring to the various canons in the Code of Canon Law and in particular can:783, 784, 793 and 801, it is submitted that the canon law calls “education as a mission” and in furtherance of that what has been done by the Nuns and Priests is a missionary activity. Referring to the canon 668, it is submitted that the persons, who profess the religious path totally renounce their goods, lose the capacity to acquire and possess goods and actions of theirs contrary to the vow of poverty is invalid and whatever they acquire after renunciation belongs to the institute in accordance with the Institute's laws. Referring to Article 26b of the Constitution of India, it is submitted that every

religious denomination shall have the right to manage its own affairs in the matters of religion. Therefore, the impugned circular would fall foul of this constitutional guarantee. After elaborating further on the religious duties and sanctities, the learned Senior counsel invited the attention of this Court to the compilation of judgments, which can be categorised under the following heads.

Diversion of Income by overriding title:-

- 1) AIR 1965 SC 1343 (Commissioner of Income Tax vs. Ashokbhai Chimmanbhai)
- 2) (1980) 16 CTR All 117 (Additional Commissioner of Income Tax vs. Rani Pritam Kunwar)
- 3) AIR 1961 SC 728 (CIT vs. Sita Tirthdas)

Status of a Sanyasi, Monk or Nun:-

- (1917) 33 MLJ 63 (Avasarala Kondal Row vs. iswara Sanyasi Swamulavaru)

Civil Death:-

- 1) AIR 1954 SC 606 (Sital Das vs. Sant Ram)
- 2) (1977) II LLJ 450 (Kerala) (Mother Superior, Adoration Convent vs. DEO and others)

- 3) 1994 ACJ 673 (Oriental Insurance vs. Mother Superior Sacred Heart Convent)
- 4) 2002 3 LLN 583 (Roman Catholic Society vs. Regional P.F. Commissioner, Madras)
- 5) III (2004) ACC 438 (Varghese and another vs. P.K.Krishnan Nair and others)
- 6) 2003 (2) CTC 577 (C.S.Robert vs. M.Kanagappan)

Effect of CBDT Circular:-

- 1) (2008) 12 SCC 466 (R&P Falcon (A) PTY Limited vs. Commissioner of Income Tax)
- 2) (2004) 3 SCC 488 (Commissioner of Customs, Calcutta and others vs. Indian Oil Corp. Ltd and another)
- 3) Order passed by the Madurai Bench of Madras High Court in the case of *Correspondent, Holy Cross Primary School, Goldenrock vs. The Central Board of Direct Taxes* in W.P.(MD).Nos.21172 to 21182 of 2015 etc., batch, dated 03.03.2016.

Judgment of the Kerala High Court:-

- 1) In W.P.(C).No.22299 of 2014 [Fr.Sabu P.Thomas & Anr., vs. UOI & Ors.], dated 04.02.2015
- 2) Order of interim stay granted by the Hon'ble Division Bench

of the Kerala High Court in W.A.No.410 of 2015, etc., batch dated 09.03.2015.

4.The learned Senior counsel further submitted that the authorities of the State Government having taken a stand before the Madurai Bench of this Court that they have no objection in respect of payment of salary directly to the congregation or the diocese, the respondents are bound by the said stand and cannot take a contrary stand in the present proceedings. Further, it is submitted that there is no allegation of unaccountability of the salary received by the religious, it is being audited by the congregation and only the point of accounting is different, the question of integrating the income tax law with the religious discipline has to be resolved only by this Court taking into account the Canon Law, the governing personal law for the Catholic Church.

5.Mr.J.Narayanaswamy, learned Senior counsel for the Revenue submitted that the staff of the various educational institutions under the Christian machinery being nuns and priests are receiving salary for their teaching and other services. The grant in aid were paid by the State Government to the nuns and priests, who are working in the various educational institutions established and administered by the Christian machinery. The State Government earlier did not insist the educational

institution to deduct tax at source and later on the State Government through its Pay and Accounts Officer sought for written clarification from the Income Tax Department, as certain demands had arisen on the issue. On such clarification sought for the Commissioner of Income Tax vide proceedings dated 07.10.2015, clarified that while paying salary to nuns and priests, tax has to be deducted at source which is challenged in this Writ Petition. It is submitted that the institutions and societies cannot be aggrieved by the impugned clarification as tax is deducted by the Government on the salary paid to individual teachers and staffs. Therefore, the Writ Petitions are liable to be dismissed on the ground of lack of locustandi to challenge the impugned clarification. It is further submitted that the provision of deduction of tax at source is a tax and income tracking mechanism to help the citizens as well as the Government to record the income of the assessee and the tax paid by them. If the recipient of the income as salary is not taxable, then the recipient has to file a return of income and claim refund from the department. Therefore, even the recipient staff are not aggrieved and the Writ Petitions are liable to be dismissed. It is further submitted that if the tax is not deducted at source, then the provisions of Section 201 of the Act, will be attracted which obligates deduction of tax at source.

6. With regard to the circulars dated 24.01.1994 and 05.10.1997, they referred only to fees and other income earned by “missionaries”, and not all members of religious congregation. The term missionaries would apply only to those engaged in the dissemination of religious knowledge and not to members of a religious congregation engaged in general vocations including the teaching profession. Therefore, the said circulars issued in 1944 and 1977 would not be applicable to all cases of receipts by way of fees or other earnings. It is further submitted that the income/salary/pension are earned by the individual staff based on their educational qualification and their individual capacity and the staff alone have a right to receive the earned income and deal with the income received. The staff in their discretion allow the income earned by them to be appropriated by the societies and institutions and only on such option being exercised the amounts are paid over by the Government to be societies or institution. Therefore, it is a clear case of application of income and not a case of diversion of income at source and therefore, not a diversion of income by overriding title.

7. The Kerala High Court in the case of *Father Sabha Commerce and Anr., vs. UOI and Ors.*, reported in **275 ITR 352** considered an identical issue and held that payment of salary to priests and nuns is an application of income and tax had to be deducted by the Government while paying salaries to them.

It was further held that the principle of diversion of income by overriding title will not be applicable to such cases. It is further submitted that the said decision was rendered after following the decisions of the Hon'ble Supreme Court. By referring to the recent circular of the CBDT, dated 07.04.2016, it is submitted that the circular issued in 1944 and 1977 are applicable only where missionary employee collect fees in payment of bills due to the institution and not to salaries. It is further submitted that even if the income of the institution and societies are exempt that does not entitle the staff working in those institutions to claim exemption from deduction of tax at source inasmuch as the TDS proceedings are independent and separate. It is submitted that Section 194A of the Act specifically mandates that tax shall be deducted at source by the payer when he pays the salary to the recipient. If in cases where the recipient of the income is of the view that tax should not be deducted, they can file a petition under Section 197 of the Act before the Assessing Officer explaining the reasons and seek exemption from deduction of tax at source and get a certificate for non-deduction. However, the staff have not approached their Assessing Officers for obtaining such a certificate.

8. It is further submitted that the decision of the Madurai Bench of this Court in the case of *Correspondent, Holy Cross Primary School, Goldenrock* (supra), was rendered without any counter affidavit by the Income Tax

Department and appears to be on a concession and the decision having been rendered without considering the CBDT circular and the other decisions cannot be of any assistance to the case of the petitioner. Elaborating on the aspect that the instant cases are of application of income, it is submitted that salary payable to the priests and nuns does not directly pass to the congregation or the dioceses, but it is only through the priests and nuns and therefore, cannot be a diversion of income by overriding title. By placing reliance on the decision of the *Dr.George Thomas, Commissioner vs. CIT* reported in **1985 156 ITR 1412 (SC)**, it is submitted that teaching by priests and nuns is a vocation and the salary which is paid to them by the Government should be treated as income in the hands of the teachers and therefore they are taxable. To support the said proposition, reliance was also placed on the decision of the Hon'ble Supreme Court in *P.Krishna Manon vs. CIT* reported in **1959 35 ITR 48**. The learned counsel relied on the decision in the case of *CIT vs. Vannamalai Ramanujar G.Swamigal* reported in **1998 231 ITR 632 (Madras)** and submitted that in the said case Kanikkai were paid by the devotees to the Swamiji out of personal regard and veneration, Swamiji was not exercising any profession or vocation and since they were voluntary contribution it should not be considered as income. It is submitted that this decision will explain the distinction between voluntary contribution and monies received by way of salary. On the above submissions, the learned counsel sought to sustain the

impugned circular.

9. Dr. Fr. Xavier Arul Raj learned Senior counsel in reply submitted that on a careful reading of the circular issued in 1977 will show that the same dealt with fees of earnings and there is no difference between salary and fees of earnings and the said circular would bind the respondent. Insofar as the decision in the case of *Dr. George Thomas*, it was submitted that the petitioner therein was not a priest but a private person, who associated himself with the gospel missionary, who on coming to India started publishing newspaper and continued to receive donations and the said decision cannot be relied on to non-suit the petitioners, as the Hon'ble Supreme Court held that the receipts by the assessee in the said case is out of the avocation of the assessee and therefore taxable. It is further submitted that in the case of *P. Krishnamenon* (supra), the appellant was a Superintending of Police of the former Travancore state and after retirement spent time studying Vedantha philosophy and started expounding the same to several persons and was giving discourses so that the people could benefit from his teachings on Vedantha the facts of the said case being totally different cannot be made applicable to the case of the petitioners.

10. Heard the learned counsels appearing for the parties and perused the materials placed on record.

11. The legal issue which falls for consideration in these cases is whether tax has to be deducted at source from the salary payable to priests and nuns working in teaching and non-teaching posts in various Institutions run by religious congregation or diocese. The case of the petitioner is that by applying the principle of diversion of income by overriding title tax should not be deducted at source. The case of the revenue is that such principle will not apply as it is a case of application of income only. This controversy has to be resolved in these cases.

12. The revenue has raised a preliminary objection with regard to the maintainability of the Writ Petition. Their objections are two fold, that the petitioners who are religious congregation/machinery/ dioceses/institution are not aggrieved persons and therefore, they have no *locustandi* to challenge the impugned clarification. Secondly, the individual priests and nuns who are employed as teachers in the educational institutions and are paid salary for their avocation are not aggrieved persons, as tax has to be deducted by the payer which is the Government of Tamil Nadu. The plea of *locus standi* and the maintainability of the Writ Petition cannot be decided purely as a question

of law as factual aspects are required to be looked into.

13. The case of the petitioners is that the Priests and Nuns on wearing the religious cloak, lose their original identity thereby, resulting in a civil death and as they profess vows of charity, obedience and poverty and the code of Canon Law clearly states that persons who are professed religious totally renounce their goods, lose the capacity to acquire and possess goods and actions of religious contrary to the vow of poverty are invalid. Whatever, they acquire after renunciation belongs to the institution in accordance with the institutes own law. Whatever a religious acquires by personal labour, or on behalf of the institute, belongs to the institute. Whatever, come to a religious by way of pension grant or insurance also passes to the institute, unless the institutes' own law declares otherwise [Refer Canon 668 (3) and (5)]. By applying the Canon Law, the petitioner institutions and religious congregation would submit that whatever payable to the Priests and Nuns as salary can never belong to them nor acquired or possessed by them, but it shall belong to the institution. This is so because, they have taken the vow of poverty and anything done contrary to such vow would be invalid. By virtue of the impugned clarification, the Revenue has advised the Pay and Accounts officer of the State Government to deduct tax at source from the salary paid to be Priests and Nuns treating them as recipients of the salary paid to them on

account of their individual capabilities and education. Thus, what is required to be seen is whether the taxation law could ignore the religious principles adopted by a religious sect codified in the form of laws binding the religious eternally to such code. If the code followed by the religious to which they are bound by the vows taken by them, it cannot be stated that the institutions to which they belong do not have *locustandi* to question the impugned circular. Viewing this aspect from a slightly different angle would make things clear. The Priests and Nuns having taken vow of poverty, bound over by the code of Canon Law would at best be treated as an intermediary for the receipt of the financial benefit, which may be payable on account of the educational or other capabilities of the individual Priests and Nuns, but the Canon Law, which binds the Priests and Nuns clearly lays down that whatever the religious acquires by personal labour shall belong to the institute. Therefore, while testing the validity of the impugned circular, it cannot be stated that the institutions of the Priests and Nuns do not have *locustandi* to question the circular. The Priests and Nuns would contend that they cannot be treated in a manner which is contrary to the religious vows and the binding Canon Law. The institutions would contend that the Revenue cannot ignore the law, which binds the religious and seek to give a different connotation to the whole concept. Therefore, this Court holds that the petitioners have *locustandi* to challenge the impugned circular. Accordingly, the Writ Petitions are held to be

maintainable and this question is decided against the Revenue.

14. Admittedly, there was no controversy over the issue till 2015 i.e., the tax was not deducted at source from the salaries paid to the Priests and Nuns. It is not known as what prompted, the Pay and Accounts officer to address the Chief Commissioner of Income Tax requesting for a clarification. What is represented is that until then salaries were paid to the institution by the Government based on the acquittance roll submitted by the institution and later on distributed by the institution to the teachers. After the implementation of the disbursement of salary through ECS, the salaries had to be credited to the individual bank accounts of the teachers and this resulted in a problem which prompted the Pay and Accounts officer to seek clarification. However, this appears to be only a oral submission and there is nothing on record to show the exact reason which prompted the Pay and Accounts Officer to address the Chief Commissioner of Income Tax. Therefore, we have to examine as to what was the position prior to the impugned clarification. The earliest circular issued by the CBDT on this aspect is Circular No.1 of 1944, dated 24.01.1944, in which the liability to tax on the fees received by missionaries and subsequently made over to the societies had been considered and it was clarified that the missionaries were not liable to pay income tax. In 1946, the Director of Public Instruction, Madras issued a proceedings in

R.C.No.387/B/46, dated 18.07.1946, pertaining to acquittance for salaries paid on behalf of members belonging to the Catholic religious order, it states that the Director is of the opinion that there is no justification for insisting on the members of teaching staff belonging to the Catholic religious order, who have taken the vow of poverty, passing acquittance in respect of their monthly salaries from the educational institutions for what are purely fictitious amounts, directs that it would be sufficient, if the head of the institution concern certifies the names of the staff members, who were members of the religious body and the period during which they have served and the designation of the post. Further, it was directed that the said decision to be brought to the notice of the managements for their information and guidance. Post Independence, i.e. in 1969, the Commissioner of Income Tax Madras, issued a clarification on a request made by the Secretary of the Madras Catholic Educational Council in proceedings R.C.No.230/11/75, dated 30.01.1969, stating that it has been decided that in cases where, the amounts received by the Priests and Nuns as salary are subject to overriding title by their conditions, and the Rules of service to be passed over to the Church authorities [whose income is exempted from tax], such amount will not be liable to be taxed.

15. In 1977, the CBDT issued a circular in F.No.200/88/75/IT [A1], dated 05.12.1977. In the said circular, the earlier circular, dated 24.01.1944, was referred to and relied on and while deciding the question as to whether the fees or other earnings of the missionaries be assessed as their income, the board decided that since fees received by the missionaries are to be made over to the congregation concerned, there is an overriding title to the fees which would entitle the missionaries to be exempt from payment of tax and hence, such fees of earnings are not taxable in their hands.

16. On a perusal of the communication of the Pay and Accounts Officer, Chennai, dated 28.09.2015, addressed to the Commissioner of Income Tax, it appears that the Officer sought for clarification on account of an audit objection raised by the office of the Accountant General, dated 02.09.2015, by stating that income tax is required to be deducted at source under Section 192 of the Income Tax Act chargeable under the head salaries at the rates applicable from the nuns/sisters/fathers working as teachers in government aided institutions, because of this objection, the Pay and Accounts Officer requested clarification. While issuing the impugned clarification, the Principal Chief Commissioner has not referred to or adverted to the circulars of the Board, which held the field from 1944, but the impugned clarification solely proceeds by referring to Section 10 of the Income Tax Act stating that those

income which are listed under Section 10 are only exempted from income tax and salary payable to the Nuns is not listed in the same and hence, as per the existing provisions of the Income Tax Act, TDS as applicable is to be deducted out of the salary payable to them. Pursuant to which, the Director of Treasuries and Accounts has issued the impugned circular, dated 26.10.2015.

17. The first issue would be as to whether the Principal Chief Commissioner of Income Tax could have issued the impugned clarification without reference to circulars issued by the Board. To consider this question, it would be beneficial to refer to the decision of the Hon'ble Supreme Court in *R&P Falcon* (supra). One of the questions, which arose for consideration was with regard to the interpretation given by the CBDT and the value and effect of such interpretations/circular. The Hon'ble Supreme Court pointed out that the CBDT has requisite jurisdiction to interpret the provisions of the Act and that being in the realm of executive construction, should ordinarily be held to be binding, save and except where it violates any provision of law or its contrary to any judgment rendered by courts. It was further held that the reasons for giving effect to such executive construction is not only same as contemporaneous which would come within the purview of the maxim *temporaria caste pesto*, even in certain situation a representation made by an authority like Minister presenting the Bill before Parliament may also be found

bound thereby.

18. In *Commr., of Customs vs. Indian Oil Corporation* (supra), the Revenue challenged the decision of the CEGAT, which held that the Central Board of Excise and Customs (CBEC), had issued a circular on 14.08.1991, in which it was said that demurrage did not form part of the assessable value of the goods imported; the circular was binding on the Revenue and the department could not contend otherwise. While considering the effect of the circular issued by the Board, it was pointed out that the circulars issued by the Board under Section 151A of the Customs Act or Section 37B of the Central Excise Act are generally binding on the revenue; normally the instructions issued by the superior authority on the administrative side cannot fetter the exercise of quasi judicial power and the statutory authority invested with such power has to act independently in arriving at a decision under the Act. However, when there is a statutory mandate to observe and follow the orders and instructions of the Board in regard to specified matters, that mandate has to be complied with. It is not open to the adjudicating authority to deviate from those orders or instructions, which the statute enjoins that it should follow and any order passed contrary to those instructions are liable to be set aside on that very ground. It was further pointed out that the Board has been empowered to issue orders or instructions in order to ensure uniformity in the

classification or in respect of levy of duty and the need to issue such instruction arises when there is a doubt or ambiguity in relation to those matters. However, once the relevant issue is decided by the Court at the highest level, very basis and substratum of the circular, itself disappears and the law laid down by the Hon'ble Supreme Court will ensure uniformity in the decisions at all levels.

19. Thus the question would be whether the Principal Chief Commissioner of Income Tax was justified in ignoring the Board circulars, which have held the field since 1944, by issuing the impugned clarification, that too, without reference to those circulars. The only answer to this question should be in the negative. That is to say that the Principal Chief Commissioner was bound by the circulars of the Board and the impugned clarification being contrary to the circular of the Board has to be definitely set aside.

20. In the decision in the case of *Indian Oil Corporation* (supra), the Hon'ble Supreme Court pointed out that the circulars or orders would bind the authorities till the Hon'ble Supreme Court clarifies the legal issue. Therefore, from the decisions cited by the Revenue, it has to be seen as to whether the Hon'ble Supreme Court has rendered any decision dealing with the issue in

question so as to render the circulars as inoperative.

21. Though the conclusion arrived at by this court in the preceding paragraphs holding that the impugned clarification could not have been issued contrary to the circulars of the Board, this Court proceeds to examine as to whether in the facts and circumstances of the case principle of diversion of income by overriding title would apply or principle of application of income.

22. In *CIT, Gujarat vs. Ashokbhai Chimanbhai* (supra), it was pointed out that under the Income Tax Act, income is taxable when it accrues, arises or is received or when it is by fixation deemed to accrue, arise or is deemed to be received. Receipt is not only test of chargeability to tax; if income accrues or arises, it may become liable for tax.

23. In the said judgment, reference was made to *Bhogilal Laherchand vs. CIT* reported in **28 ITR 919**, wherein Chagla, C.J., while delivering the judgment referred to the case in *E.D. Sasson Company Limited vs. CIT* reported in **26 ITR 27** and observed that though income may accrue or arise to an assessee before he actually receives it, income cannot accrue or arise to him until he acquires a right to receive it; and unless and until there is created in favour of the assessee a debt due by somebody, it cannot be said that he has

acquired a right to receive the income. Following passage from the ***E.D.Sasson Company Limited's*** case reads as follows:

“..... income may accrue to an assessee without the actual receipt of the same. It is the assessee acquires a right to receive the income, the income can be said to have accrued to him though it may be received later on its being ascertained. The basic conception is that he must have acquired a right to receive the income. There must be a debt owed to him by somebody. There must be as is otherwise expressed *debitum in praesenti solvendum in future*.....

Unless and until there is created in favour of the assessee a debt due by somebody it cannot be said that he has acquired a right to receive the income or that income has accrued to him.”

24.In ***CIT vs. Sitaldas Tirathdas*** (supra), the assessee had many sources of income and the chief among them being property, stocks, share in a firm, etc. For the assessment years 1953-54 and 1954-55 the said assessee claimed certain deductions on the ground that under a decree he was required to pay sums as maintenance to his wife and children. The assessee placed reliance on the decision of the Hon'ble Privy Council in ***Bejoy Singh Dudhuria vs. CIT*** reported in (1933) 1 ITR 135. Those contentions of the assessee was disallowed by the Income Tax Officer, whose decision was affirmed on appeal and on further appeal to the Tribunal, the Tribunal observed that the Income

Tax Act does not permit any deduction from the total income in such circumstances. On appeal to the High Court, it was held that even though there was no specific charge upon the property so long as there was an obligation upon the assessee to pay, which could be enforced in a Court of law is one of the test and it was held that the income to the extent of the decree must be taken to have been diverted to the wife and children and never become the income in the hands of the assessee. The correctness of this decision as well as two earlier decisions in *Seth Motilal Manekchand vs. CIT* reported in **1957 31 ITR 735** and *Prince Khanderao Gaekwar vs. CIT* reported in **1948 16 ITR 294** were challenged before the Hon'ble Supreme Court. After referring to the various decisions in paragraph 16, the Hon'ble Supreme Court held as follows:

“16. These are the cases which have considered the problem from various angles. Some of them appear to have applied the principle correctly and some, not. But we do not propose to examine the correctness of the decisions in the light of the facts in them. In our opinion, the true test is whether the amount sought to be deducted, in truth, never reaches the assessee as his income. Obligations, no doubt, there are in every case, but it is the nature of the obligation which is the decisive fact. There is a difference between an amount which a person is obliged to apply out of his income and an amount which by the nature of the obligation cannot

be said to be a part of the income of the assessee. Where by the obligation income is diverted before it reaches the assessee, it is deductible; but where the income is required to be applied to discharge an obligation after such income reaches the assessee, the same consequence, in law, does not follow. It is the first kind of payment which can truly be excused and not the second. The second payment is merely an obligation to pay another a portion of one's own income, which has been received and is since applied. The first is a case in which the income never reaches the assessee, who even if he were to collect it, does so, not as part of his income, but for and on behalf of the person to whom it is payable. In our opinion, the present case is one in which the wife and children of the assessee who continued to be members of the family received a portion of the income of the assessee, after the assessee had received the income as his own. The case is one of application of a portion of the income to discharge an obligation and not a case in which by an overriding charge the assessee became only a collector of another's income. The matter in the present case would have been different, if such an overriding charge had existed either upon the property or upon its income, which is not the case. In our opinion, the case falls outside the rule in Bejoy Singh-Dudhuria's case and rather falls within the rule stated by the Judicial Committee in P. C. Mullick's case.

25. Thus the test is whether the amount sought to be deducted, in

truth reaches the assessee as his income. Though obligations may be there in every case, it is the nature of the obligation which is the decisive fact. Thus if an amount which by nature of the obligation results in deduction, it cannot be said to be a part of the income of the assessee. Thus in cases where income never reaches the assessee, who even if he were to collect it, does so, not as part of his income, but for and behalf of the person to whom it is payable. The above referred decision point out to us the true test which has to be applied and decide whether it is a diversion of income by overriding title or an application of income. The said principle has been tested in cases pertaining to priests and nuns and it would be relevant to refer few decisions in that regard.

26. In *Mother Superior, Adoration... vs. D.E.O and others* (supra), a nun was working as a School Assistant, upon her demise the Mother Superior made a claim for the death cum retirement benefits on the strength of a nomination made by the deceased. The Accountant General objected to the disbursement of the amount in the name of the Mother Superior on the ground that the nomination of the petitioner is not in order as the nominee does not come under the term "family". These proceedings were put to challenge before the Court. The Court accepted the stand of the petitioner that the deceased on becoming a nun and joining the Holy Order, the category of

persons specified in the Servicee Rules defining the term “family” ceased to be her relatives. Interestingly, in the said decision elaborate reference has been made about the Catholic Encyclopaedia, the life of Monks and Nuns, etc. and the following paragraphs would be relevant:

“....Catholic Encyclopaedia, Vol. 12, page 287, describes what is meant by a religious life. It is described as a particular expression of the love of God through a following of Christ. It is approved by the Church as a public state of life by the profession of poverty chastity and obedience through public vows and by some form of separation from the world, practised for the sake and service of the world.....After the expiry of the period of three years the religious shall either make his or her perpetual profession or he or she can return to the world. Before the perpetual vow is taken the professed must renounce in favour of the person whom he or she likes, all the property which he or she actually possesses on condition however of it solemn profession subsequently taking place. After the solemn profession is taken all property which may come to the religious in any manner whatsoever accrues to the order according to the Constitution and if the Order cannot acquire or own any property it becomes the property of the Holy See.

A monk or nun cannot acquire or have any proprietary rights. When a man becomes 'professed in religion', his heir at once inherits from him any land that he

has, and, if he has made a will, it takes effect at once as though he were naturally dead.

....A monk or nun could make no contract. But he or she is capable of acting as the agent of his or her sovereign and even in litigation he or she could appear as the superior's attorney. In the History of French Private Law included in the Continental Legal History Series, Vol. III, para 585, it is stated thus:

Entering Religious Orders resulted in the eyes of the church in death to the world. From this it should have been concluded that from the time of his entrance into a monastery the monk could not acquire anything, and that the possessions which he had at that time should pass to his heirs.

It is well known that entrance into a religious order generally operates as a civil death. The man who becomes an ascetic severs his connection with the members of his natural family and being adopted by his preceptor becomes, so to say, a spiritual son of the latter.”

27. In *Oriental Insurance Co. Ltd., vs. Mother Superior, Sacred Heart Convent* reported in *1994 ACJ 673*, the Division Bench of the Kerala High Court was dealing with the Motor Accidents Claim Petition filed by the Mother Superior on the death of a member of the Holy Order in a road traffic accident. The Insurance Company contended that the Mother Superior is not a legal representative of the deceased as envisaged under Section 110A of the

Motor Vehicles Act. The said contention stood rejected by giving the following reasons:

“7.The deceased joined the Holy Order of the Sacred Heart Congregation after renouncing her natural family. As soon as she professed the perpetual vow she ceased to be a member of her natural family and became a member of the Holy Order. She had embraced a life of poverty, chastity and obedience. The convent became her family and the Mother Superior became the head of the family as well as her legal representative. All her income by way of her salary and other benefits will devolve on the convent, of which the Mother Superior is the Administrator. Therefore, the Mother Superior being the head of the convent is entitled to claim compensation on account of the death of the deceased.

8.In the additional counter-affidavit filed by the petitioner (1st respondent in the appeal) it is stated that the Holy Order Sacred Heart Congregation is a community leading a canonically approved religious life. It functions according to the Constitution and a Directory and Rules approved by the Holy See or the General Chapter or competent bodies decided by Canon Law. Articles 168, 169 and 170 of the Constitution of the Congregation are extracted in the affidavit. Article 37of the Constitution of the Sacred Heart Congregation is as follows:

(37)Whatever a religious receives as gifts, donations or acquires through her labour belongs to the community.

We must be obedient to the lawful superiors in the use of material goods, we do not become free from our obligations to observe evangelical poverty, simply on the ground of having secured a permission. Superiors are to meet the needs of the Sisters.

For the above reasons we hold that the petitioner is the legal representative of the deceased and was entitled to maintain the claim before the Tribunal.”

28. In *Roman Catholic Society vs. Regional P.F. Commissioner, Madras* (supra), the Roman Catholic Society represented by its Correspondent questioned the validity of the demand made by the Provident Fund Organisation. The Court after referring to some of the decisions referred above held as follows:

“10. It is not in dispute that the Employees Provident Funds contribution has been demanded in respect of the amounts paid to the Nun teachers, who were employed in the petitioner's school. It is the contention of the learned advocate for the petitioner that the Nuns are not paid any salary and when once they have entered the religious order and also taken vow of poverty, they are considered only as fictitious persons and they are further considered that their entrances to the religious order generally operate as a civil death. As they are considered as a fictitious persons and also they had civil death, they

cannot acquire property, keep property and dispose of property. Unless, they receive salary, the question of 'payment of contribution towards Employees Provident Funds' would not at all arise. It is submitted that the Nun Teachers, who are employed in the Petitioner's school, are not receiving salary nor they are entitled to receive salary. Whatever amount, which was earmarked for them, was sent to the Congregation and therefore, those Nun Teachers do not have any access to the said amounts and therefore, they are not liable to pay the Employees Provident Funds.”

In the said decision, the Court also took into consideration that including the Income Tax Department have granted exemption from payment of the amounts arising under other statutes.

29. In *Varghese and another vs. P.K. Krishnan Nair and others* reported in *III (2004) ACC 438*, a Priest died in a motor vehicle accident and claim petition was filed claiming compensation. In the said judgment, certain portions of the Continental History Legal series Volume VIII were quoted, which is as follows:

“A sort of civil death overtook one who took solemn religious vows, though limited in its effect to property and inheritance. Again, in Catholic Encyclopaedia, page 329 the legal effects on taking to a religious profession as set

forth in the Canon Law are stated with reference to those who take temporary vows and who take the perpetual vow. It is stated at page 330 that any 'religious' in simple minor vows, must before joining the profession make a Will disposing of all his or her property and cannot retain any property which later comes to them. It automatically becomes the property of the Order to which he or she belongs.”

30. In *Most Rev. P.M.A. Metropolitan vs. Moran Mar Marthoma* reported in *1995 Supp. (4) SCC 286*, wherein the Hon'ble Supreme Court explained the Canon Law. After considering the Black's Law Dictionary and the Encyclopaedia of Religion, it was held:

“Canon is explained in Black's Law Dictionary as under:

“A law, rule or ordinance in general, and of the church in particular. An ecclesiastical law or statute. A rule of doctrine or discipline. A criterion or standard of judgment. A body of principles, standards, rules, or norms.”

Canon means both a norm and attribute of the scripture. The term 'canon law' is explained in The Encyclopedia of Religion Vol. 3 as under:

“The term canon is based on the Greek word Kanon. Originally signifying a straight rod or bar, especially one used to keep something else straight, canon came to mean something that is fixed, a rule or norm. The term has

several applications in church usage: the canon of scripture, or that fixed list of books that are determined to belong to sacred scripture; the canon of the Mass, the fixed portion of the Eucharistic prayer; the process of declaring a deceased person to be among the fixed list of saints in heaven, or canonization. From the third century, directives for church living and norms for church structures and procedures have been issued as canons.

Canon law refers to the law internal to the church. In the early centuries of Christianity, canon was used for internal church norms, to distinguish them from the imperial *nomos* (*leges* in Latin) or laws. Church norms have also been known as sacred or divine, to distinguish them from civil or human laws. At times they are referred to as the "sacred canons" or the "canonical order". The term ecclesiastical law refers to the civil law adopted in various nations to regulate church affairs. The term canon law is used in the Roman Catholic, Anglican, and Orthodox communions.

Canon law is drawn from sources in scripture, custom, and various decisions of church bodies and individual church authorities. Over the centuries these have been gathered in a variety of collections that serve as the law books for various churches".

Canons are thus the principal scriptural bases for the religious practices observed in a Church.”

31. Thus the legal principles deductible from these decisions is that a monk or nun cannot acquire or have any proprietary rights upon embracing into a religious order, the same operates as a civil death, they can make no contract and incapable of inheriting any assets. It is not in dispute that the petitioners are the members of the diocese or priest and nuns who have embraced religious order and they are incapable of owning any property. In the preceding paragraphs, the Court has noted as to the true test that should be adopted to ascertain as to whether it is a case of diversion of income or an application of income. To examine this point, it would be necessary to collate the decisions which were referred to with regard to the diversion of income by overriding title, namely, *Ashok Bhai, Rani Pritam Kunwar and Sital Tirthdas*. The salaries or fees received by the nuns and priests are sought to be subjected to tax deducted at source on the ground that it is being received as wages or remuneration for the qualification of particular individual and it is on her/his own volition income is diverted to the diocese or congregation to which he/she belongs and it is because of application of income. Thus, we need to apply the correct test to ascertain as to what is the nature of income. As pointed by the Hon'ble Supreme Court in *Sital Tirthdas's* case, the correct test is whether the amount from which tax is sought to be deducted, in truth, reaches the assessee as his or her income. The obligations no doubt is there in every case but it is the nature of obligation which is the decisive factor. If

these tests are applied to the facts of the present case, there can hardly be any doubt to the fact that the fee paid to those Nuns and Priests never reaches their hands and reaches the congregation or diocese to which they belong.

32. An identical issue arose before the Madurai Bench of Madras High Court in the case of Holy Cross Primary School (supra). In the said writ petition, the prayer sought for was identical to that of the prayer in this cases. The learned Additional Advocate General appearing for the State informed the Court that the State has no objection in respect of payment of the salary directly to the congregation or diocese provided individual users filed affidavits before them as well as the Income Tax Department so as to enable them to credit the salary directly to the diocese or congregation concerned without deducting tax at source. The Court after recording the said submissions took note of the circulars issued by the Board which have been referred in the preceding paragraphs, pointed out that if the amount is being paid directly to the congregation which is the ultimate beneficiary which enjoys an order of exemption, tax should not be deducted at source. The Income Tax Department having not disputed the fact that the ultimate beneficiary is the congregation which has already been exempted from payment of Income Tax and there would be no need to deduct tax at source. Accordingly, the writ petitions were disposed of by directing the individual priests and nuns to give

an undertaking affidavit to the Income Tax Department that their salary should be paid by the Government directly to the congregation or diocese to which they belong and similar affidavit should be filed before the Joint Director of Collegiate Education, District Educational Officer, District Elementary Educational Officer and Pay and Accounts Officer by the congregation and the individuals and the Income Tax Department on receipt of such affidavit and upon their satisfaction were directed to issue a certificate or a letter to the Government of Tamil Nadu stating that tax need not be deducted at source from the salaries payable to the priests and nuns because they are not being paid to the individual but to the congregation or the diocese.

33.The decision of the Madurai Bench is sought to be distinguished on the ground that it was an order which was passed by consent. On a careful reading of the entire order, this Court is of the opinion that the order is not a consent order but an order passed directions after taking note of the circulars issued by the Central Board which have been in vogue from 1944 onwards. The learned counsel appearing for the revenue submits that an appeal has been preferred against the said order.

34.The revenue seek to rely upon the decision of the High Court of Kerala in the case of *Fr.Sabu P.Thomas and another vs. Union of India and*

others in *W.P(C).No.22299 of 2014(J)*, wherein the Court dismissed a batch of cases upholding the stand taken by the Income Tax authorities that tax is required to be deducted at source from the payments by way of salary/pension effected to persons who are members of religious congregation. The petitioners therein have preferred an appeal before the Hon'ble Division Bench of the High Court of Kerala and an order of interim stay has been granted. Nevertheless, this Court would consider the said decision, wherein, more or less an identical contention was raised by the petitioners as well as the revenue. The issue which was decided is whether there is a diversion of income by overriding title to the religious congregation or not or it is a case of application of income. The Court held that in the former, the income is diverted at source is not liable to tax in the hands of the assessee and in the latter, the transaction is ignored and the assessee in whose hands the income accrues becomes liable to take. The Court referred to the decisions of *Sital Das* (supra) and *Mother Superior, Adoration Convent* (supra) and it was pointed out that in those cases, the Court did not have to consider the issue whether, at the first instance, the amounts ever reached the member or accrued to him/her and in the case on hand, the question to be considered is whether the notwithstanding the obligation of a member of the religious congregation to make over any amount, received by him/her by way of remuneration of other earnings to the congregation concerned, the amount

could be treated as having accrued to him/her for the purpose of Income Tax Act.

35. Thereafter, the court proceeded to refer to the decisions in the case of *K.A.Ramachar vs. Commissioner of Income Tax* reported in **1961 (42) ITR 25(SC)**, *Murlidhar Himatsingka vs. Commissioner of Income Tax* reported in **1966 (62) ITR 323 (SC)**, *Commissioner of Income Tax vs. Sunil J.Kinariwala* reported in **(2003) 1 SCC 660** and *V.Venugopala Varma Rajah vs. CIT, Trivandrum* reported in **1972 (84) ITR 466 (SC)**. It was observed that for the concept of diversion of income by overriding title to apply, the diversion of income must be effective at the stage when the income in question leaves the source, on its way to the intended recipient and at that stage, on account of a pre-existing legal obligation, the amount should be diverted to another, who can claim it as of right, based on the pre-existing legal arrangement. The person to whom the amount is diverted should have a legal right that entitles him to claim the amount directly from the source and without the intervention of the person who would have received the amount but for the said legal arrangement. After pointing out the above principle, the Court held that the receipts in the said cases are amounts by way of salary and pension which accrued to the individuals concerned and it does not accrue to the congregation to which they are members. While accepting the precepts

of Canon Law which required them to entrust the amount so received to the religious congregation of which they form a part, it was held that the said obligation is only an obligation based on personal law, would not clothe the religious congregation with the legal right to receive the salary/pension directly from the Government/employer without involving the member. Hence, it was held that the entrustment of the amounts received by the member to the congregation would amount only to application of income by the member in favour of the congregation and it will not be a case of diversion of income by way of overriding title. With regard to the effect of circulars of the Central Board, it was observed that the impugned instruction of the Income Tax Department cannot be said to be contrary to the circulars and instructions issued by the CBDT as they are simply instructions issued in situations not covered by CBDT circular/instruction and such instructions or circulars cannot be contrary to the law declared by Courts on the concept of diversion of income by overriding title.

36. This Court with respect does not agree with the reasoning assigned in the case of *Fr. Sabu P. Thomas* (supra) as the correctness of the impugned instruction has to be decided on the anvil of the test laid down by the Hon'ble Supreme Court in *Sital Das Tirtha Das* (supra). In the said decision, the Court held that the true test is whether the amounts sought to be deducted, in truth,

never reaches the assessee as his income. In *Fr.Sabu P.Thomas's* case though the Court accepted the fact that the precepts of Canon Law required the nuns and priests to entrust the amounts received by them to the religious congregation, yet held that it is a case of application of income as the congregation had no legal right to receive the salary/pension. However, the test to be applied cannot be without giving due regard to the personal law, in the instant case the precepts of Canon Law. Therefore, the Income Tax Department are duty bound to examine as to whether such income reaches the nuns and priests as their income. The revenue cannot dispute the fact that on account of vows taken by the nuns and priests especially the vow of poverty, the income has to reach the congregation to which they belong. Therefore, without considering such aspect merely by referring to the fact that the salary is paid to the individuals on account of their personal skills appears to be applying an incorrect test. As pointed out in *Sital Das Tirtha Das*, there may be obligations in other cases but what is required to be seen as the nature of obligation which alone is the decisive factor. If this obligation is taken into consideration, it is clear that by virtue of the precepts of Canon Law the salaries cannot be treated as income in the hands of the priests and nuns. It is not the case of the revenue that based on such obligation the persons who embrace religious order part with a portion of the receipts, retaining a portion to themselves nor it is the case of the revenue that such receipts lie in the

hands of these priests and nuns to be treated as income in their hands. In the case of the salaries paid to the priests and nuns, though paid for discharging the duties either teaching or non-teaching, even if they were to collect it and they do so does not partake their income but for and behalf of the congregation. This underlying principle was the basis for the decision in the case of *Oriental Insurance vs. Mother Superior, Sacred Heart Convent* and the Court granted the relief to the administrator of the congregation as they were entitled to maintain the claim of compensation before the Tribunal.

37. In *Roman Catholic Society vs. Regional P.F. Commissioner, Madras*, the Court pointed out that after they enter the religious order and take the vow of poverty, they are considered only as fictitious person as their entrance to the religious order operates as civil death and they cannot acquire property, keep property and dispose of property. Therefore, it was held that unless they received salary, the question of payment of contribution towards the employees provident fund would not arise. Further, it was observed that the Nun teachers who are employed in the school are not receiving salary nor they are entitled to receive salary and whatever amount which was earmarked for them was sent to the congregation and therefore, the Nun teachers do not have any access to the said amount and therefore not liable to remit employees' provident fund contribution. In the said decision, the Court was

conscious that the Income Tax Department has granted exemption from payment of the amounts arising under other statutes.

38. Thus the question would be whether the precepts of Canon Law to which the nuns and priests are bound over could be ignored by the revenue and take a stand that the salaries are paid to the nuns and priests and has to be treated as income in the hands. In the considered view of this Court, the answer to such question should be in the negative. It was argued on behalf of the revenue that the nature of receipts in the instant case would have to be looked into to determine whether they constitute the income of the member of the religious congregation who received it, the income having been earned by the staff based on their individual capacity and educational qualification, the staff alone have the right to receive the earned income and to deal with the income received and it is only on exercising their discretion the staff allow the monies to be by the Societies and Institutions and on exercising such option only the amounts are paid over by the Government to the Societies and Institutions, therefore, it is clear case of application of income only and in a case of diversion of income at source and therefore, in a diversion of income by overriding title.

39. To test the correctness of this submission once again, we are

required to fall back and what would be the test to determine the transaction as a case of application of income or diversion of income by overriding title. When the revenue does not deny the fact that the priests and nuns can own no asset to themselves on account of the precepts of Canon Law, the obligation which they are bound over cannot be ignored by the Department. On account of the vow of poverty taken by the priests and nuns and by virtue of the operation of the Canon Law, none of them are entitled to own any properties or hold any income to themselves and this being a condition implicit in the religious order, cannot be brushed aside. By virtue of the personal law which operates in the field the income gets diverted directly to the Societies and Institutions even before it reaches the concerned priests or nuns. Therefore the test is not with regard to qualifications or the individual capacities of those priests and nuns but the test in the instant case is whether tax is liable to be deducted at source. When the revenue states that the amounts are paid over by the Government to the Societies and Institutions by virtue of option exercised by the priests and nuns, it is required to be seen as to whether it is an option exercised by the priests and nuns post receipt of the salaries. Factually it has been established that as soon as they become members of the religious order the precepts of Canon Law operate by virtue of said personal law there is no exercise of option by the priests or nuns but it is an obligation as per their codified law. This has been taken into consideration by the

Central Board and has clarified that fees received by the missionaries has been made over to the congregation concerned, there is overriding title to the fee which would entitle the missionaries to exemption from payment of tax. The revenue has not been able to point out as to the incorrectness of the circulars issued by the CBDT nor it has been demonstrated as to how and in what manner it is conflict with any decided case. In such circumstances, the circulars issued by the CBDT are binding upon the respondents, as long as these circulars and clarifications having not been withdrawn or modified, they have to be followed by the officers subordinate to the Central Board. Even in the impugned notification the Income Tax Department has not dealt with circulars which have been holding the field since 1944 nor there is any attempt to distinguish the earlier decision taken nor it is pointed out that those circulars are contrary to any settled legal position.

40. The Hon'ble Division Bench of the Kerala High Court entertained the appeals against the judgment in the case of *Fr. Sabu P. Thomas* (supra) made an observation that when fees or earnings are not taxable in the hands of the missionaries as noted in Ex.P.1 (therein) would it be necessary to insist on TDS in relation to such payment. While answering such question the Hon'ble Division Bench pointed out that this is primarily an issue which the CBDT ought to consider having regard to the instruction of CBDT following the circular of

1944 which still appears to hold the field. Therefore, a direction has been issued to the Secretary, CBDT to place the issue along with the copy of the order of the Hon'ble Division Bench and materials referred to for the consideration of the CBDT so that a decision can be generated by CBDT to be placed before the Court for further consideration. Further the Secretary, CBDT was directed to afford an opportunity of hearing to the appellants if they make appearance. With these observations, the Hon'ble Division Bench directed the interim order to continue until further orders.

41.The learned counsel for the revenue submits that the appeal is still pending before the Hon'ble Division Bench of the High Court of Kerala and the order of interim stay is in force.

42.As observed by the Hon'ble Division Bench the circulars and instructions given by the CBDT which have been in vogue from 1944 onwards have not been revised or modified. Therefore, essentially CBDT has to take up the matter for appropriate clarification and while doing so, it would be in the interest of justice to offer a hearing to the congregation and the diocese as it appears that in several States this issue has cropped up in the recent past. An argument was advanced that the exemption from TDS is only in respect of fees collected and not over the salary drawn as per the CBDT instruction dated

05.12.1977. It is to be pointed out that the said instruction does not restrict to fees alone but it also refers to “other earnings” which includes salary in terms of the definition under Section 17(1) of the Income Tax Act”. Further, we may note that there is no allegation of any unaccountability of the salaries received by the religious. The congregation to which they belong have been periodically filing returns and it appears that there has been no dispute on the same as nothing has been placed on record by the revenue on the said issue. Thus the point of accounting alone has been changed in so far as the priests and nuns who are employed as teaching and non-teaching staff in the various institutions.

43.The revenue referred to the decision in the *Commissioner of Income Tax vs. Vanamamalai Ramanuja Jeer Swamigal* reported in (1998) 231 ITR 0632. In the said case the question which fell for consideration was whether “Kanikkai” and “Sambhavanai” voluntarily offered to Swamiji by devotees out of personal regard, personal esteem and veneration is not income chargeable where the Swamiji was not exercising any profession or avocation. It was held that the “Kanikkai” was paid by the devotees to the Swamiji out of personal esteem and veneration and Swamiji is not exercising any profession or avocation and since it is voluntary contribution it may not be considered as income. The said decision is clearly distinguishable on facts and does not

render support to the stand of the revenue.

44. In the case of *Dr.K.George Thomas vs. Commissioner of Income Tax* reported in (1985) 156 ITR 0412, the question was whether donations received by the assessee therein constituted income. The said assessee carried on a vocation of preaching against atheism and received donations for the furtherance of the objects of his vocation. It was held that the receipts arose to the assessee from the carrying on of the vocation by the assessee and these were not casual and non-recurring and were taxable. What is important to note is that the said assessee was not a missionary though belonged to christian religion and he appears to be an evangelist associated himself to a religious mission in United States of America. Therefore, the said decision does not help the case of the revenue.

44. At this juncture, it would be worthwhile to refer to the decision of the Hon'ble Supreme Court in the case of *Commissioner, Hindu Religious Endowments, Madras vs. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt* reported in AIR 1954 SC 282, wherein the Hon'ble Supreme Court pointed out that in terms of Article 26 of the Constitution of India, there is a guarantee to a religious denomination right to acquire its own property and to administer such property in accordance with law and that the administration of the

property by a religious denomination has thus been placed on a different footing from the right to manage its own affairs in matters of religion. The latter is a fundamental right which no legislature can take away, whereas the former can be regulated by laws which the legislature can validly impose. It was further pointed out that a religion may not only lay down a code of ethical rules for its followers to accept, it might prescribe rituals and observances, ceremonies and modes of worship which are regarded as integral part of a religion and these forms and observances might extend even to matters of food and dress. The bedrock of the legal principle enunciated in the said decision is Articles 25 and 26 of the Constitution of India. Thus, an action by an authority which impinges upon the right to practice a religion as guaranteed under Article 25 of the Constitution of India has to be held as not sustainable.

45. For all the above reasons, all the writ petitions are allowed and it is held that no tax can be deducted at source from the salaries and other monetary benefits effected to persons who are the members of the religious congregation and it would be sufficient if the head of the Institution concerned certifies the names of the staff members, who were members of the religious body and the period during which they have served and the designation of the post. No costs. Consequently, connected miscellaneous petitions are closed.

22.12.2016

pbn/cse
Index :Yes/No
Internet :Yes/No

To

1. Union of India,
Rep., by the Secretary,
Ministry of Finance,
North Block, New Delhi - 110 001.
2. Central Board of Direct Taxes
Rep., by the Secretary,
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3. Principal Chief Commissioner of Income Tax (Chennai)
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5. Director of Treasuries and Accounts,
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6. The Director of School Education,
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College Road,
Chennai - 600 006.
7. The Director of Elementary Education,
DPI Campus, College Road,
Chennai - 600 006.
8. Inspector of Anglo-Indian Schools,
DPI Campus, College Road,
Chennai - 600 006.

T.S.SIVAGNANAM, J.

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