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The Chamber's Journal

41 Year of Publication

YOUR MONTHLY COMPANION ON TAX & ALLIED SUBJECTS

June - 2016 | Vol. IV | No. 9

CHARITABLE TRUST AND ASSOCIATION–TAXATION AND FCRA

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International Taxation
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ALLIED LAWS COMMITTEE

Two Half Day Series "Auditing – A Way Forward – SME Perspective" held on 3rd & 4th June, 2016 at CTC Conference Room.

CA Avinash Lalwani, President delivering opening speech. Seen from L to R : S/Shri CA Sanjeev Maheshwari, Faculty, CA Kamal Dhanuka, Chairman and CA Anil Sharma, Convenor.

CA Kamal Dhanuka, Chairman welcoming the faculty and delegates. Seen from L to R : S/Shri CA Avinash Lalwani, President, CA Sanjeev Maheshwari, Faculty and CA Anil Sharma, Convenor.

Faculties

CA Sanjeev Maheshwari

CA Jayant Gokhale

Mr. Anand Paurana

CA Abhay Mehta

CA Bhaskar Iyer

STUDENT AND IT CONNECT COMMITTEE

Lecture Meeting on New MVAT Return and CST Return held on 27th May, 2016 at Maheshwari Bhawan.

CA Avinash Lalwani, President delivering opening speech.

CA Aalok Mehta, Vice Chairman welcoming the faculty and members.

CA Vikram Mehta addressing the members

Section of members.

Practical Workshop on Effective E-Mail Management held on 28th May, 2016 at CTC Conference Room.

CA Parimal Parikh, Chairman welcoming the faculties & delegates. Seen from L to R : S/Shri CA Maitri Savla, Faculty, CA Uday Shah, Faculty, CA Avinash Lalwani, President and CA Ashok Manghnani, Hon. Jt. Secretary.

Faculties

CA Uday Shah

CA Maitri Savla

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Editorial

The city of Mumbai is still awaiting the arrival of monsoon this year. The summer had been very severe one and we had to face acute shortage of water. Hope the monsoon, though delayed, compensates for the deficit due to delay.

In this issue of The Chamber's Journal, under the column Hot Spot, our past President and Sr. Advocate, Mr. S. N. Inamdar has shared his agony that executives amending the Income-tax Act to tax certain receipts which are beyond the scope of taxation. These amendments may not meet the test of constitutionality. However, they have largely remained unchallenged by the assessee as well as professionals. In an informal discussion, he said if these things had happened 15 years back, he would have challenged these amendments rather than writing an article on the same. Immediately I was reminded of Frederick Douglass, words: "If there is no struggle, there is no progress. Those who profess to favour freedom, and yet deprecate agitation, are men who want crops without plowing up the ground. They want rain without thunder and lightning. They want the ocean without the awful roar of its many waters. The struggle may be a moral one, or it may be a physical one, or it may be both moral and physical, but it must be a struggle. Power concedes nothing without a demand." He was a 19th century American abolitionist, author and orator and an eminent human rights leader. I think there is a message for us professionals from Mr. Inamdar whom we admire.

The Income Declaration Scheme, 2016 has become operational from June 1, 2016. The Central Board of Direct Taxes has issued Circular 16 of 2016 dated May 20, 2016 in which they have provided explanatory note on the provisions of the scheme. They have issued circular 18 of 2016 dated May 23, 2016 in which clarifications on the income declaration scheme, 2016 have been provided in question and answer form. The effort is commendable but as usual, these clarifications clear some doubts but raise further issues. As of now, there is not much enthusiasm with respect to the scheme. But as a professional, I feel that this is an opportunity for any defaulter to come clean and pay the tax if he satisfies the conditions. This opportunity is very valuable one as it seems that there may not be any such disclosure scheme in future. I may further add that I don't have any information that Income Disclosure Scheme, 2016 has been challenged in any of the High Courts.

The special story of the Chamber's Journal for the month of June is in continuation of our April issue wherein we had covered **Charitable Trusts and Associations : Laws and Procedures**. In the present issue, we are dealing with taxation and related issues. In this issue, we have covered the FCRA requirements also for NGO's. Very eminent professionals have contributed to this issue on various topics. I am confident the same will be of great help to the members. I thank all the contributors of this issue for their valuable time.

K. Gopal
Editor

From the President

Dear Readers,

Current Issue is on Charitable Trust and Association – Taxation & FCRA. I must compliment CA Vipin Batavia for creating a synopsis to provide excellent coverage to the Current subject of Charitable Trust and Association – Taxation & FCRA. I am sure it will be very useful to our members as a reference material while dealing with matters.

Committee update

May 2016, was the month of Family Vacations. Exams of CA students got over in mid May and results of SSC & HSC have come. All the Committee members were in a vacation mood. During the month, The Chamber's Student and IT Connect Committee had organised its first programme of May on 27-5-2016 on MVAT Returns and CST Returns. Attendance for the same was 175 people. And on 28-5-2016, the Student and IT Connect Committee organized a session on "Effective email management". It also got house full response. The International Committee had organised two events; on 31-5-2016 a FEMA Study Circle and on 2-6-2016 an ISG-On BEPS Report. Allied Laws Committee had organised two half day events on 3-4-2016 and 4-6-2016 on Auditing a Way Forward-SME Perspective. It got house full response. CTC Delhi Chapter organized an event on 4th June, 2016 on Drafting of Deeds for M & A and PE. It went very well. The Registration was very good. From 8th June, 2016 to 4th July, 2016, Chamber will be organising 14 events including AGM. On 8-6-2016 Indirect Taxes Committee has invited Commissioner of Sales tax, Mr. Rajiv Jalota for the first time to the chamber platform. Registration of this event is closed. RRC (23rd to 26th June, 2016) planned by the International Taxation Committee got a very good response. Registration was closed almost one and half months before the conference date - on 12-5-2016. Membership Committee is organizing 12 outstation programmes at Nanded and on 20-6-2016, a SAS is also planned. Direct Tax Committee program on ICDS is on 2-7-2016 and is already getting a great response from members and the registrations for the event on 11-6-2016 on Appellate proceedings, DRP and AAR are also going very well. On 27-6-2016 an ISG on Direct Tax is also planned. During the month three lecture meetings are planned – Firstly on 10-6-2016 on Professional opportunities in Information Technology Era, the second one on 17-6-2016 on Succession and the last one on 21-6-2016 on CARO-2016.As usual Study Group and Study Circle has planned meetings on 14-6-2016 and on 30-6-2016 respectively. A very good program on START UP is planned by Corporate Committee on 18-6-2016. R&P Committee is coming out Book on ICDS and International Taxation Committee is coming out book on TDS and EPC.

July 3, 2015, was the day my journey to lead this 89 year old organisation began. I have been communicating with all of you for the last 11 months. My journey of communicating with you is coming to an end as this is my last communication as President of this esteemed organisation, **"The**

Chamber of Tax Consultants". *I wish best of luck to President-elect CA Hitesh Shah and his team.* I look forward to the Chamber achieving greater heights during his term. We have been generous and we will be much more generous in the future. But most importantly, we must be strong here, strong in our hearts, strong in our souls, strong in our belief and strong in our willingness to sacrifice as you have been willing to sacrifice, in a pecuniary way, to serve in the Chamber.

Chamber has a glorious past and it serves as an inspiration to create an even greater future and I made a humble attempt to contribute towards the same by putting my best efforts for the Chamber as a President, working with dignity, fellowship, love and in the process upholding the glory of the Chamber. If there were any deficiencies in the working of the Chamber, the top man always takes full responsibility and I have never ducked it.

I have thoroughly enjoyed my term as the President and feel very lucky to have Excellent Team Chamber for the year 2015-16. I am proud of my Office Bearers for their support, Committee Chairmen for proactive approach and the Managing Council for critical inputs. I am also proud of all our Past Presidents for their guidance, Advisors to Committees for their valuable inputs, Past Chairmen for sharing their experiences, all the members, authors, speakers who have contributed to the Chamber activities. All in all I am proud of the entire Chamber Team i.e. Each and Every Core Committee member, all other members,persons,other professional associations, vendors and the Entire Staff of the Chamber who stood behind us through thick and thin. But I want to say one thing and we can be proud of it. "In One year, we have organised 170 (approx.) events, the highest ever in the history of The Chamber" This was possible only due to the support from all of you. And so I want to say that on this occasion, as I leave, I leave proud of all the people who have stood by us and worked for us and served this great body, "The Chamber". I want ALL OF YOU TO BE PROUD of what you have done. ***In future, I solicit same support as given in the past to "The Chamber"***.

I humbly thank all the persons who have guided and supported me during the tenure. I am also thankful to my Mother, Wife CA Divya Lalwani, my Children – Vidhi, Hardya & Harshita, Sisters, our relatives, friends, clients and Staff of our firm for understanding and supporting me throughout my tenure.

Mistakes, yes, ***but for personal gain, never***. I did what I believed in. Sometimes right, sometime wrong. And I only wish that we shall always respect the Chair in the future too.

I must admit that my journey at the Chamber has led to a transformation in me. It was a learning experience for me on how to work and get results as a leader on the social front where every person in the organisation has a different way of thinking, a different opinion and a different way of viewing the things. This has given me the most memorable experience which I will cherish in future. And as I leave, let me say that it is only a beginning, always. The young must know it; the old must know it. It must always sustain us because greatness comes not when things go always good for you but greatness comes when you are really tested, when you take some knocks, when disappointments come, when sadness comes because only if you have been in the deepest valley can you ever know how magnificent it is to be at the highest mountain. Always give your best, never get discouraged and never be petty. Always remember, others may hate you but those who hate you give them more love and forgive them and let go things and thoughts which disturb your work. Always work hard towards your vision and objective.

The emphasis during the year has been on Change and Innovation. This was just not reflected in the mission statement for the year but Team Chamber has truly put the same in practice during the year. The portfolio of activity also saw diversity in the form of :

(1) **Ease of doing Professional Initiatives:** Representations for benefit of the members: - Writ Petition filed before Bombay High Court on Extension of Tax Audit Report deadline, Representation to (a) North Block on Pre & Post Budget Memorandum to the CBDT and CBEC. (b) Minister of Finance & Planning, Maharashtra State, Shri. Sudhir Mungantiwar on State Finance Budget.(c) Sushma Swaraj, Union Cabinet Minister(d)and on Direct, Indirect, Corporate and International tax laws

(2) **Unique Panel discussions by the Stalwarts of the Profession**

(3) **Research & Dissemination of Knowledge through Publications and The Chamber's Journal :** (1) Release of publication on the (a) Black Money Law – Complimentary book was presented to Maharashtra Chief Minister Mr. Devendra Fadnavis and Union Finance Minister Mr. Arun Jaitley (b) First E-Publication on "E-Budget 2016" (c) Special Story on BEPS in the CTC Journal. (d) Unique Industry Specific Special Story in the CTC Journal on Logistics and supply Change Management. (2) Proposed Publications on: - (a) ICDS (b) TDS(c) EPC. (3) Introduction of Unreported Decisions on Service Tax in CTC Newsletter.

(4) **CTC Growth – Addition – Overwhelming response, Excellent attendance & Effective Representation** : (a) 26 Representations, 209 delegates at 39th RRC at Lavasa, 148 delegates at Indirect Tax RRC, 13 outstation meetings with joint associations,21 lecture meetings,6 events on a single day, 20 pages CTC News Letter, 185 entries for Dastur Essay Competition. Non Members attendance at CTC Events – 800 in Mumbai and above 1600 in Outstation programmes, 25 programs with sister organisations (b) 5 RRC's including First Youth RRC jointly with BCAS (c) The Paper "Chai Ke Sath" and Antakshiri also completed 10 years. (d) Indirect Tax RRC.

(5) **Recognising and Interacting with Luminaries & Leaders** : (a) Felicitating Past Presidents Shri P. C. Joshi, Late Shri Narayan Varma, Shri K. K. Ramani, Shri V. P. Verma on completion of 50 glorious years in the Profession (b)Go Live with Luminaries – Live discussion with Shri Y. P. Trivedi and Shri S. E. Dastur at 39th RRC at Lavassa (c) Padma Bhushan Dr. S. B. Mujumdar, the Founder and President, Symbiosis and Chancellor, Symbiosis International University, Pune inaugurated the 39th RRC at Lavasa. (d) Chairmen Orientation meeting (e) Felicitation of Union Railway Minister Shri Suresh Prabhu at joint function

(6) **CTC Power House of Knowledge : Educational Initiatives** : (a) Seminar on Introduction to IPR (b) Education Course on Capital Markets and Internal Audit (c) Suburban six half day workshops on Direct Tax jointly with MCTC (d) Unique joint Study Circle Meeting with Lawyer from USA Mr. Parag Patel on US Tax Compliances. (e) Seminars on Start Ups at Delhi & Mumbai (Two) to support Prime Minister's Initiative (f) Lecture Meeting on CARO, RERA and MVAT Automation (g) Workshop on Advanced Transfer Pricing with focussed topics and longer sessions.

(7) **Membership Initiative** : (a) Reaching out to Outstation Professionals at Ahmedabad, Nashik, Solapur, Ulhas Nagar, Vapi, Valsad, Jalgaon, Aurangabad, Dhule, Nanded, Kolhapur & Jamnagar (b)Good Number of Increase in CTC Membership strength both Life Members and Ordinary Members (c) Reconciliation of Membership data by Vice-President Shri Hitesh R. Shah.

(8) **Digital India Initiatives:** - (a) New column of "Digital India" introduced in the Chamber's Journal (b) The Digital India Initiative Programme by the IT Committee was focused on E era.

(9) **Administrative and HR initiatives** :-(a)Proposed plan submitted for E-mail Cost Cutting for mass e-mails (b) Staff Meeting was held for improving performance and administration efficiency (c) Satyanarayan Pooja with Staff.

(10) **Social Responsibility and Members Welfare** :- (a) Eye Check Up & Health Check Up Camps for members (b) Unique Self Skill Programme for leadership and spirituality (c) Jamnagar Joint programme with Rotary club was organised to help mentally retarded people.

(11) **Exchange of Ideas with Regulators** :- (a) CPC – TDS Officials from Ghaziabad addressed the Seminar on TDS (b) RBI Officials including Executive Director addressed during Advanced FEMA Conference (c) The Charity Commissioner addressed during the Seminar on Charitable Trusts (d) Commissioner of Sales Tax addressed during the Seminar on MVAT Automation (e) CBDT Representative addressed the joint Budget seminar at Delhi.

(12) **Brand Building** :- (a) Distribution of preprinted stationery in seminars (b) On Social media Chamber Facebook crossed 1340 likes through a wider reach Pan India Basis.

My communication would not be complete, if I do not thank all members and subscribers of "The Chamber Journal", who have motivated me to work for the cause of the professionals. I am here to say good bye to all of you, the best word in French is "Au Revoir" which means goodbye until we meet again. And so I leave with high hopes, in good spirit and with deep humility in my heart. I can only say one last thing to each and every one of you, "We come from many faiths, we pray perhaps to a different God but I will always not only remember you but also be very grateful to you for giving me this opportunity to lead this Chamber to the best of my ability. You all will always be in my heart and the CHAMBER's prosperity will be in my prayers.

As per tradition, every President becomes Immediate Past President. So on 4-7-2016, my journey as President ends and a greater responsibility as IPP starts. My heart is with the Chamber and will always remain with Chamber. I shall always be available for any service which the Chamber may require.

Request all members to attend the 90th AGM of The Chamber to be held on 4-7-2016.

Jai Hind

With personal Regards

Avinash Lalwani
President

Place: Mumbai
Date: 10-6-2016

Chairman's Communication

Dear Readers,

The Finance Act, 2016 has been passed by both the Houses of Parliament and also received accent of the President and there are number of changes made in Income-tax Act from what was proposed at bill stage. There are various amendments and provisions applicable from 1st June, 2016 like Increase in threshold limit of deduction of tax at source, Income Declaration Scheme, 2016, The Direct Tax Dispute Resolution Scheme, 2016, modifications in the scheme of tax collection at source, Equalisation levy, Relief to a non-resident for furnishing PAN etc.

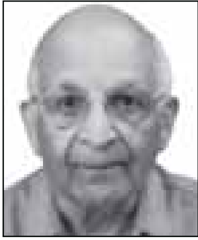
The Special Story for the current month deals with Taxation aspect of Charitable Trust and Association. It deals with some of the important and recent controversies relating to Charitable Trust. An attempt has been made to cover all the important aspects of taxability in this Special Story. The Special Story will be exhaustive reference book for our readers. Taxation of "Charitable Trusts and Association" is an important area in the Income-tax Act. Since the medium of charitable trusts is widely perceived as a tool of tax planning, the Government has progressively made the law relating to taxation of charitable trust very strict. In the recent past there have been many amendments in the law through which the Government has tried more stringent rules so that no income of these charitable trusts and institutions actually chargeable to tax escapes the tax net. The amendment of the definition of Charitable purpose under section 2(15) is one of the important steps in this direction.

I am thankful to each of the authors for their valuable contribution and giving their article in time, viz. Shri P. N. Shah, Anil Sathe, Paras K. Savla, Vipin Batavia, Himanshu Kishnadwala, Mandar Vaidya, R. V. Shah, Ajay Singh, Yatin Desai, Bhavik Shah, Rajesh Kadakia, Deepak Thakkar, Rajiv Luthia, Vijay Joshi and Aditya Bhatt. I am also thankful to Shri Vipin Batavia for assisting in designing the structure of this Special Story. I also thank the contributors of the regular features for giving their articles in time.

This is my last communication to you all as the Chairman of the Journal Committee. It was a great pleasure and learning experience interacting with you all through the medium of this Journal of the Chamber. It was our sincere attempt to provide the members with the Special Stories on varied topics which were of benefit to you all. During my tenure as a leader of Journal Committee, I was guided by the esteemed Editorial Board, Editor Shri K. Gopal, all the assistant Editors, all the office bearers led by Shri Avinash Lalwani and was duly assisted by co-chairperson Toral Shah and all the Convenors. Any deficiency in workings of the Journal are on my account alone. I also thank all the members who motivated me to work for the cause of continued education.

I wish all the best for new incoming Journal Committee and wishing you all a great years of education ahead. Lastly, a good bye to all and looking forward to meet you again, in a different role.

CA Haresh Kenia
Chairman, Journal Committee



CA P. N. Shah

Overview on Taxation of Charitable Institutions

The subject of taxation of charitable trusts and Institutions is becoming complex from year after year. We find that successive governments, in recent years, have been trying to put more restrictions on the activities of Charitable Institutions. This is evident from the amendments made to the Income-tax Act almost every year in the last 5 to 7 years. The law relating to taxation of Charitable Institutions has been made so complicated that it has become difficult for the trustees of any Trust to keep track of these developments and to comply with the provisions of law. It must be recognised that trustees are rendering honourary services and the Charitable Institutions cannot afford to have qualified staff to ensure compliance with the complicated provisions of the Income tax Act. This results into many Charitable Institutions losing Registration u/s. 12AA of the Income-tax Act and entering into long drawn tax litigation.

2. It is well recognised that sections 10(23C) and 11 to 13 of the Income-tax Act form a code by themselves for granting exemption in respect of income of Charitable Institutions. These sections are to be read with section 2(15) defining "Charitable Purpose". These sections try to ensure that (i) The Charitable Trust or Institution carries on only those activities specified in section 2(15) (ii) It invests the trust funds only in the specified manner as provided in section 11(5), (iii) It utilises specified percentage of its income for objects of the trust, (iv) It does not give benefit of its income or permit utilisation of its assets to certain related parties as specified in section 13, and (v) The trust or institution obtains Registration from CIT u/s. 12AA.

3. The provisions of section 2(15) defining "Charitable Purpose" have been amended from time-to-time. Originally this definition included Relief of the Poor, Education, Medical Relief and Advancement of any other object of general public utility. This definition was later on expanded by including preservation of environment, monuments and places of historic interest, Yoga etc. There was a lot of litigation on the interpretation of the words "advancement of any other object of general public utility." Some restrictions were placed on activities of this nature by introduction of proviso in dection 2(15) which was amended by the Finance Acts, 2010 and 2011. By these amendments it was provided that if a Charitable Trust having "any other object of general public utility", carries on any activity in the nature of trade, commerce or business, or any activity of rendering any service in relation to the above for a consideration, will lose the exemption u/s.11

if the total receipts from such activities is more than ` 25 lakh. Further, by amendment of this section by the Finance Act, 2015 from A.Y. 2016-17 it is now provided that such a Trust will not lose its exemption if: (a) Such activity is undertaken in the course of actual carrying out of such advancement of any other object of general public utility; and (b) The aggregate receipts from such activities, during the previous year, do not exceed 20% of the total receipts of the trust.

4. Another area where difficulties arise is with regard to interpretation of provisions of section 13 which prohibit transactions which give benefit to trustees and other related parties. The question about interpretation of the term related party arises in many cases. Again, whether a particular transaction amounts to benefit to related party arise in many cases. Cases have arisen where salary paid to a relative of a trustee is considered as excessive and provisions of section 13(1)(d) read with section 13(2)(c) have been invoked to deny exemption from tax to the trust.

5. Finance (No. 2) Act, 2014 has amended sections 10(23C) and 11 from A.Y. 2015-16 to provide that a trust or institution, which is claiming exemption u/s. 10(23C) and u/s. 11 will not be entitled to claim exemption u/s. 10 (except section 10(1). The intention is that such entities which are governed by the special provisions of sections 10(23C), 11,12 & 13, which are a code by themselves, should not be eligible to claim exemption under other provisions of section 10. Therefore, such entity will not now be entitled to claim that its income, like dividend income (exempt u/s. 10(34) or income from mutual funds (exempt u/s. 10(35), or interest on tax free bonds, is exempt under section 10. The effect will be that exemption for such income can be claimed by complying with the other provisions of sections 10(23C) and 11 to 13. However, Agricultural income of such an entity will continue to enjoy exemption under section 10(1). Further, an entity eligible for exemption under section 11 will not be barred from claiming exemption under section 10(23C).

6. Another area in which Charitable Trusts and Institutions will suffer is the area relating to allowable of depreciation on assets. By amendment to sections 10(23C) and 11, from A.Y. 2015-16, it is now provided that depreciation will not be allowed in computation of income of the Trust or Institution in respect of an asset, where cost of acquisition has already been claimed and deduction by way of application of income in the current or any earlier year. It may be noted that this amendment has overruled many decisions of various High Courts.

7. The effect of the above amendment will be that all the Trusts/Institutions which will be affected by this amendment will have to maintain separate records of Capital Assets as under:

a) WDV of Capital Assets in respect of which depreciation as well as deduction by way of application of income is claimed upto A.Y. 2014-15.

b) WDV of Capital Assets in respect of which deduction by way of application of income has not been claimed up to A.Y. 2014-15 but only depreciation is claimed and allowed.

It may be noted that from A.Y. 2015-16 depreciation will not be allowed in respect of WDV of Capital Assets as stated in (a) above. As regards WDV of Capital Assets as stated in (b) above, depreciation can be claimed in A.Y. 2015-16 onwards even after the above amendment.

8. Amendment of section 12AA w.e.f. 1-10-2014 by the Finance (No. 2) Act, 2014, has created great hardship to the trusts and

institutions. By this amendment CIT is given very wide powers to cancel Registration of any Trust or Institution. He can cancel registration if it is noticed that the Trust has not complied with the provisions of sections 11 to 13. This will include instances such as (a) Income does not enure for the benefit of the public; (b) Income is applied for the benefit of any religious community or caste, (c) Income is applied for the benefit of persons specified in section 13(3) or (d) Funds are invested in prohibited modes i.e., there is non-compliance with Section 11(5) or 13.

9. It may be noted that these additional powers given to CIT raises several issues which have not been considered while making the above amendment. Some of these issues are as under:

a) Compliance with sections 11, 12 and 13 raise several issues of interpretation. Therefore, the question arises as to at what stage the CIT will exercise this additional power to cancel registration. In other words, whether he can cancel registration when any adverse assessment order for a particular year is passed by the A.O. or when the entire appellate proceedings, in which the order is challenged, are completed.

b) Whether cancellation of registration as a result of this amendment will be for the year in which there is non-compliance with section 11, 12 or 13. If this is not the case, the trust will not be able to claim exemption u/s 11 in subsequent years although all the conditions of sections 11 to 13 are complied with in those years.

c) If the registration is cancelled for non-compliance with sections 11 to 13 in one year, whether the CIT can consider granting registration for subsequent years when the trust is complying with these provisions.

d) If registration is cancelled in the case of a Trust holding certificate u/s. 80G, what will be the position of persons who have given donations and claimed deduction u/s. 80G in that year and in subsequent years. It may be noted that there is no amendment in section 80G where by CIT can cancel certificate given under that section.

Considering all these issues, it appears that when the Trust is required to pay tax in the year when provisions of sections 11 to 13 are not complied with, this additional power of CIT to cancel registration of the trust should not have been given. Due to this power given to CIT, there is grave danger of unhealthy practices being adopted by those dealing with assessments of Charitable Trusts.

10(i) The Finance Act, 2016, has inserted a new chapter XII – EB consisting of sections 115 TD, 115 TE and 115F in the Income-tax Act effective from 1-6-2016. The provisions of these sections are very harsh and are likely to create great hardship to trustees of Charitable Trusts. In the Explanatory Memorandum to the Finance Bill, 2016, it is explained that "there is no provision in the Income tax Act which ensures that the corpus and asset base of a trust accreted over a period of time, with promise of it being used for charitable purpose, continues to be utilised for charitable purposes. In the absence of a clear provision, it is always possible for charitable trusts to transfer assets to a non-charitable trust. In order to ensure that the intended purpose of exemption availed by the trust or institution is achieved, a specific provision in the Act is required for imposing to levy in the nature of an "Exit Tax" which is attracted when

the charitable organisation is converted into a non-charitable organisation". It appears that the stringent provisions in section 115TD to 115 TF have been inserted to achieve this objective. This is another blow to Charitable Trusts. Since these sections apply to all Trusts and Institutions registered u/s. 12A / 12 AA which claim exemption u/s. 10(23C) or 11, they will apply to all Charitable or Religious Trusts claiming exemption u/s. 11 and Education Institutions, Hospital etc., claiming exemption u/s. 10(23C).

(ii) Broadly stated, the above sections provide that a Trust or an Institution shall be deemed to have been converted into any form not eligible for registration u/s. 12AA in a previous year, if, the registration granted to it u/s. 12AA has been cancelled or it has adopted or undertaken modification of its objects which do not conform to the conditions of registration. It is further provided that the accretion in income (accreted income) of the trust or institution will be taxable on conversion of a trust or institution into a form not eligible for registration u/s. 12AA or on merger into any entity not having similar objects and registered u/s 12AA, or on non-distribution of assets on dissolution to any charitable institution registered u/s. 12AA.

(iii) For the above purpose, the term "Accreted Income" is defined to mean the aggregate fair market value of total assets of the Trust or Institution after deduction of liabilities on the specified date computed according to the Valuation method prescribed by Rules.

(iv) The accreted income will be taxable at the maximum marginal rate (i.e 30% plus applicable surcharge and education cess) in addition to any income chargeable to tax in the hands of the entity. This tax will be the final tax for which no credit can be taken by the trust or institution or any other person, and like any other additional tax, it will be leviable even if the trust or institution does not have any other income chargeable to tax in the relevant previous year. The principal officer or trustee of the Trust has to deposit the above tax within 14 days of the due date.

(v) It is also provided that the principal officer or any trustee of the trust will be considered as assessee in default if the above tax and interest are not paid before the due date. In other words, they can be made personally responsible for payment of such tax and interest. It is also provided that the non-charitable entity with which the trust has merged or to whom the assets of the trust are transferred will also be liable to pay the above exit tax and interest. However, the liability of such an entity will be limited to the value of the assets of the trust transferred to such entity.

(vi) It is for consideration whether levy of the above "Exit Tax" is valid under the Income tax Act. There is no amendment to Section 2(24) defining the word "Income" and, therefore, such tax on transfer of assets by one entity to another may not satisfy the test of it being "Income" for the purposes of Income-tax Act.

11. To sum up:

(i) From the above discussion it is evident that when political leaders have recognised that Charitable Trusts and Institutions are supplementing the efforts of the Government in its Schemes to eradicate poverty, giving

medical relief and education to poor, the tax department is trying to put restrictions on the activities of the such trusts and institutions. Whenever any court judgment in favour of a trust or institution is pronounced the tax department comes with an amendment in law so that no trust or institution can get benefit of such favourable judgment. This complicates the law relating to tax exemption granted to the Charitable Trusts and Institutions. In recent years the amendments made in the Income-tax Act have put lot of burden on the trustees and it has become difficult for them to take day-to-day decisions without taking advice from professionals about the tax implications of any decision.

(ii) The introduction of a new chapter XII – EB (sections 115 TD to 115 TF) effective from 1-6-2016 to levy 'Exit Tax' on Charitable Trusts and Institutions is a big blow to such entities. As some one has said: "The tax department is most uncharitable while administering the law relating to grant of exemption to Charitable Trusts and Institutions" the attempt of the tax administration is to see how best this benefit to Charitable Trusts is denied. By levy of 'Exit Tax on cancellation of registration u/s. 12AA is one such step. It is the general experience of such Trusts that section 12AA Registration is being cancelled on some technical grounds and the Trusts have to litigate on this issue. If 'Exit Tax' is levied on cancellation of Registration u/s. 12AA, the trustees of such Trusts will be put to great hardship.

(iii) It is essential that there is some supervision by a Government Agency over the activities of Charitable Trusts and Institutions. However, this cannot be done through the Income-tax Act. The attitude of the tax department is to collect maximum revenue. Therefore, there is always a conflict of interest. The best way to supervise the activities of such entities is to have an all India Law for regulation of Charitable Trusts on the lines of Bombay Public Trust Act. This all India Law can have a central regulator (e.g., Central Charity Commissioner) with Regional Commissioners in different States. This regulatory body can supervise the activities of Charitable Trusts and Institutions, regulate investment of funds, utilisation of funds and other administrative matters. This will go a long way to regulate the activities of such entities which can be asked to contribute a nominal amount to a common fund and enjoy exemption from income-tax.

(iv) In the Chapters to follow there is detailed discussion on topics of Charitable Purpose, Computation of Income of Charitable Trusts, Audit, Registration, Restructuring of Activities, Exit Tax and other related matters by eminent authors.

"Wisdom comes from experience. Experience is often a result of lack of wisdom."

— *Terry Pratchett*

CA Anil Sathe

Charitable Purpose under the Income-tax Act, 1961

Introduction

A claim for exemption of income can be made only if such income is derived from property held under trust only for charitable or religious purposes. The existence of such a purpose is the threshold for the claim. The term "charitable purpose" is defined in an inclusive manner in the Income-tax Act 1961, hereinafter referred to as the "Act" and the definition is neither exhaustive nor precise. The Act does not define the term religious purpose.

From the commencement of the Act till around 1984, the definition was fairly static. Up to that time the words object of general public utility were followed by the words "not involving the carrying on of any activity for profit." These were deleted with effect from 1st April 1984 by Finance Act 1983. Thereafter there was an amendment to the provisions of section 11(4A), with effect from 1st April, 1992. This had a significant impact on what constituted a business incidental to the objects of a Trust and substantial litigation ensued thereafter. For an analysis of the provisions of the law, in this regard prior to 1984, the position between 1984 to 1992, and the position thereafter, readers would do well refer to a decision of the Supreme Court in Thanti Trust {247 ITR 785 SC}. However the maximum violence to the definition of charitable purpose was done by Finance Act 2008 with effect from 1st April, 2009. The Finance 2016 contains a separate chapter regarding tax on accreted income of certain Trusts {Chapter XII-EB}. While analysing the said chapter the threshold test of whether the Trust is for charitable purposes or otherwise, would attain significance.

It is with this background that I propose to discuss the provisions of section 2(15), the provisos thereto and their impact. In this article I have refrained from referring to judicial pronouncements unless they are from the Supreme Court and lay down some principles for interpretation. Readers particularly young ones must remember that judgments are rendered in the backdrop of a factual matrix and it is necessary to appreciate those facts before relying on the said decisions.

Definition of charitable purpose

The definition of charitable purpose is contained in section 2(15). For the sake of clarity the said provision as amended by Finance Act, 2015 is reproduced hereunder

(15) "Charitable purpose" includes relief of the poor, education, yoga medical relief, preservation of environment (including watersheds, forests and wildlife) and preservation of monuments or places or objects of artistic or historic interest, and the advancement of any other object of general public utility:

Provided that the advancement of any other object of general public utility shall not be a

charitable purpose, if it involves the carrying on of any activity in the nature of trade, commerce or business, or any activity of rendering any service in relation to any trade, commerce or business, for a cess or fee or any other consideration, irrespective of the nature of use or application, or retention, of the income from such activity, unless—

(i) Such activity is undertaken in the course of actual carrying out of such advancement of any other object of general public utility; and

(ii) The aggregate receipts from such activity or activities during the previous year, do not exceed twenty per cent of the total receipts, of the trust or institution undertaking such activity or activities, of that previous year;

It will be apparent from an analysis of the said definition that it is an inclusive one. It contains six limbs other than the advancement of "any other object of general public utility" which is the residual clause or limb.

There are a large number of judicial pronouncements which have discussed what constitutes a charitable purpose. Broadly the following parameters need to be borne in mind in testing whether the objects of an entity claiming an exemption satisfy the threshold of being objects for charitable purposes. These are:

(a) It is not necessary that to be charitable, the entity must provide something for nothing or something for less than the ordinary price. As long as the objects and the activities carried on in pursuance, thereof are for the benefit of and identifiable section of the public they would still be charitable.

(b) The mere fact that activities yield profit does not vitiate a charitable object. However if profit making is the predominant object, the purpose will not be charitable.

(c) It is not necessary that, the benefit of the activities should be for the poor. It is sufficient if the objects benefit a particular identifiable class defined by an impersonal character.

It is possible to prepare a long list of such parameters but I have specified only three because they are important touchstones in determining whether the entity exists for a charitable purpose or otherwise, and they often cause the maximum confusion.

Before we proceed, to briefly discuss the limbs other than the advancement of any other object of general public utility, dwell upon the concept of religious purpose. The Act does not define religious purpose, but in granting the exemption under section 11 the law uses the phrase charitable purpose and religious purpose. Though a "religious purpose" is not defined, exemption is available income derived from property held for a "public religious purpose". To illustrate, if there is trust for a deity housed in one's residence, then the purpose is a private religious purpose. If the object is to propagate a particular religion or faith with the benefits of such object being available to all those belonging to that religion or faith then the entity would exist for religious purposes.

Relief of the poor

As has been mentioned in the foregoing paragraphs, in order to be charitable it is not necessary that the trust should provide something for nothing or for less than its cost in the form of free alms etc. To illustrate, if the object was promotion of goods manufactured by the poor in rural areas with the object of improving their condition of living, the object would be a charitable object.

Education

The term "education" has been the subject matter of substantial litigation. A fairly narrow view of the term was taken by the Supreme Court in Sole trustee, *Loka Shikshana Trust vs. CIT 101 ITR 234.* In that decision the Supreme Court held that the term education as is understood in the context

of a "charitable purpose" or would be limited scholastic education, delivered in a structured manner in a classroom.

Over a period of time subsequent decisions of various High Courts, appreciated the context in which the Apex Court rendered its decision and did not restrict the meaning of education to only schooling or scholastic instruction. Consequently music, dance and other forms of physical training have been held to be included in the definition of education. Further the fact that education can now be imparted through the use of technology, it no longer needs to be limited to education delivered through the classroom. The ratio of the decision of the Supreme Court has now been explained and to an extent its narrow contours broadened.

Medical relief

There has been significant controversy in regard to this term as well. The concept of charging fees which the person paying can afford and then using the surplus for providing the same medical facilities to the poor is now well accepted. Following the principle of cross-subsidisation will not make an entity non-charitable. Needless to say the facts of each case have to be considered before coming to any conclusion.

The other three limbs of the definition of charitable purpose (other than any advancement of the object of general public utility are a relatively new and have therefore not been subjected to judicial scrutiny to that extent.

General Public utility

The term general public utility, is very wide and will include in its encompass all objects which are for the welfare of an identifiable section of the public. Such section of the public should be identified with impersonal character. To illustrate if a Trust is incorporated for the benefit of residents of Dadar, then the Trust is incorporated for a charitable purpose. If however the Trust is for the purpose of employees of a particular organisation, then it would not be a charitable purpose. By and large if these tests are satisfied and the entity is not for private gain, it could be said to be for an object of general public utility. It is probably because of its ambit that the lawmakers felt it necessary to restrict the exemption from tax to entities which were not carrying on business.

Threshold of the proviso

It must be remembered that if the object falls within any of the limbs other than the advancement of any other object of general public utility, the restrictions of the proviso will not apply. It is therefore necessary to determine the class and character of the object before proceeding to test it for the taint of commerciality.

The law is clear in this regard but, the concept has been made clearer by the circular of the CBDT issued on 19th December 2008 being circular Number 11/2008. The circular makes it clear in paragraph 3 thereof that the proviso will apply only to those entities whose purpose is advancement of any other object of General Public utility.

Effect of section 11(4) and section 11(4A)

While the proviso, provides that if the object of general public utility involves the carrying on of any activity in the nature of trade, commerce or business it will not be treated as a charitable purpose, the express provisions of section 11 (4), and 11(4A), have not been amended. It is therefore necessary to reconcile the two.

As far as section 11(4) is concerned that covers situations where a business itself is settled on a trust as an independent property. For example a factory may be settled on the Trust. In such a situation in my opinion the proviso will not apply. This is for the reason that the proviso comes into play when the advancement of any other object of general public utility "involves" the carrying on of any activity in the nature of trade, commerce or business. For the proviso to

trigger the advancement of the object itself must involve the carrying on of an activity. The factory settled on the Trust constitutes an independent business having no relation whatsoever with the objects of the Trust. In such a situation the provisions of section 11(4) would apply and the mere fact that such a business constitutes property of the Trust would not result in the proviso getting attracted. The other view could be that since the income of such a business would be used or applied for the objects of the Trust the proviso would still be attracted as the words of the proviso clearly indicate its attraction even if the income is applied for the objects of the trust. I would however take a view that the second view is not correct as the threshold of the proviso is that the advancement of any other object of general public utility should involve carrying on of the activity which constitutes the business. It must be remembered that the proviso uses the words "property held under a trust includes a business undertaking". As long as the business undertaking operates independently, without any "involvement" of the trust the benefit of section 11(4), ought to be available. Therefore if the threshold of "involvement" is not crossed the latter part of the proviso cannot be invoked. This proposition is however yet to be tested by judicial forums after the insertion of the proviso to section 2(15).

As far as section 11(4A) is concerned, the reconciliation, is difficult. This is because the said section covers a business which is incidental to the attainment of the objectives of the institution. In such a situation the proviso would be attracted as the business and the objectives are intrinsically connected. Further the ratio of the decision of the Supreme Court in Thanti Trust case may not necessarily come to the aid of the assessee as the last lines of the proviso contemplate its attraction even if the proceeds of a business are used for the objectives of the Trust. Therefore it appears that in cases covered under section 11(4A), both the threshold of the proviso will be crossed, and it will apply. The result would be a possible denial of exemption to the entire income of the trust.

Mutuality

As per the speech of the Finance Minister the proviso to section 2(15), was brought in only to cover entities carrying on a regular trade, commerce or business or providing services in relation to any trade commerce or business. The speech would therefore apply to all chambers of commerce and trade associations. However the circular referred to above states that if there is complete identity between the contributors and the participants then such associations would be entitled to invoke the principle of mutuality. It may so happen that, in regard to some of the activities they would be covered in the principle of mutuality but in regard to some others, they would be for the benefit of the public and therefore remain charitable. Whether an exemption under section 11 and an exclusion of income from the charge to tax on the principle of mutuality can coexist is a matter of debate. Therefore the position of Chambers of Commerce, for which purportedly the proviso was inserted, has not been clarified at all. Wherever possible entities should eschew commercial activity, so that they would be entitled to the benefit of an exemption.

Trade, commerce or business

These terms, are extremely difficult to define. Whether an activity would really constitute trade commerce or business will depend on the fact matrix of each case. These terms are extremely wide and would include within the ambit a large spectrum of activities. Very often an organised activity, carried out consistently has been held to be a business. In the context of the proviso, I would believe that the litmus test would be that at the point of time of carrying on the activity whether the intent is to make a surplus. If that be so then the activity would constitute a business. However if the intent to earn a surplus is non-existent at the time of embarking on the activity and subsequently on account of circumstances a surplus does result that would not make the activity business. A similar view can be taken in the context of the terms of trade and commerce.

As far as the latter limb of the proviso dealing with services in relation to trade commerce or business is concerned, if the services are rendered for a charge then it is likely that the proviso would stand attracted. However if such services are part of a regulatory compliance then possibly they may fall outside the proviso.

The intent as stated on the floor of the house when the proviso was brought in and the impact of the proviso itself are materially different. However the avowed principle of interpretation is that if the words of a statute are unambiguous then one cannot have recourse to the speech of the Finance Minister on the floor of Parliament which is an aid to construction. It is extremely difficult to invoke the principle of executive estoppel, in regard to the speech.

Second proviso

The second proviso (as it stood prior to the amendment by Finance Act, 2015) was brought in to reduce the rigours of the first. However it is likely that the same would give rise to a separate set of controversies. Up to assessment year 2015-16, the first proviso would not apply if the aggregate value of receipts from the activities designated as trade commerce or business was less than ` 25 lakhs. This was then substituted with effect from assessment year 2016-17.

The amendment permits the rigours of the proviso to be saved if two cumulative conditions are satisfied namely-

(i) Such activity is undertaken in the course of actual carrying out of such advancement of any other object of general public utility; and

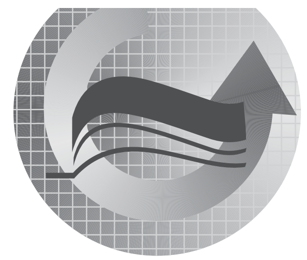
(ii) The aggregate receipts from such activity or activities during the previous year do not exceed twenty per cent of the total receipts, of the Trust or Institution undertaking such activity or activities, of that previous year;

While the first carve out can be understood laying down limits as a percentage of total receipts, as well as absolute amounts (which was the position prior to the amendment by Finance Act, 2015) could compound problems. This is because, in one year if the aggregate receipts from the activity which constitutes a business are less than the specified percentage the Trust would be entitled to an exemption. It would therefore be entitled all the provisions of section 11 including accumulation.

If in the subsequent year, the activity aforementioned crosses the limits of the specified percentage the exemption would not be available. In such an year if the assessee seeks to claim that the earlier accumulation has been spent and sets about claim exemption in regard, thereto it is totally unclear as what the position would be. This is because in the year in question the assessee trust may not be able to avail of the exemption on account of the proviso getting attracted, but whether that would operate to exclude the benefit in respect of an earlier year is debatable. Since these provisions have come in recently, these are yet to be tested before judicial forums but they could result in tremendous confusion

Conclusion

In all over successive years the path to claiming an exemption particularly when the objects of the Trust are covered within the last limb of the definition namely they constitute an activity which in the nature of general public utility, is filled with difficulties. The revenue authorities hold a very uncharitable view in regard to various activities carried out by Non-Government Organisations. While it is true, that some persons have abused the exemption provision, it is inappropriate to paint every entity with the same brush. Until, the law settles in regard to the scenario after Assessment Year 2009 -10, it is necessary to adopt a more humane approach in regard to administering the tax provisions in regard to Charitable Trusts. It is only then that Charitable Organisations which supplement and support the Government's welfare activities will be able to survive.



CA Paras K. Savla

Taxation of Trust – Some Important Aspects

Computation of Income of Trust

Total income of the Charitable or Religious Trust is determined as per the provisions of section 11 to 13. Set of provisions contained in section 11 to 13 are complete code in itself. Section 11(1) provides that subject to the provisions of sections 60 to 63 'the following income shall not be included in the total income of the previous year...'. We may analyse meaning of the word 'income', whether it is synonymous to 'total income' or not? The reference in sub-section (1)(a) of Section 11 is invariably to 'income' and not to 'total income'. The expression 'total income' has been specifically defined in section 2(45) of the Act as 'the total amount of income . . . computed in the manner laid down in this Act'. Accordingly, the word 'income', used in section 11(1)(a) cannot be assigned the same meaning as has been specifically assigned to the expression 'total income', vide section 2(45). A combined reading of sections 11(1)(a), 11(1)(b) and section 11(1A), it is clear that the income of a trust including capital gains is treated on a separate footing and the assessee-trust has to fulfil the conditions prescribed therein for the purpose of availing of exemptions from taxation. The income from property held for charitable or religious purposes cannot, therefore, be equated with the income which is computed under the general provisions of the Act in respect of other assessees who are not entitled to the benefit of the aforesaid provisions.

An exemption is provided to the income from property held for charitable or religious purposes. Further initial words of section 11 are "Subject to provisions of section 60 to 63…". Hence merely transferring income without transfer of property is not sufficient[1]. In case only income is transferred, such income may be subject to clubbing provisions. What is exempted is income from property, hence it is also important to understand the meaning of the term'property'. The 'property' is a term of the widest import, and subject to any limitation or qualification which the context might require, it signifies every possible interest which a person can acquire, hold and enjoy. Business would undoubtedly be property, unless there is something to the contrary in the enactment. There is nothing in language of the Act which restricts in any manner the normal and accepted meaning of the word 'property', and excludes business from its connotation[2]. The Charitable or Religious Trust is required to apply 85% of it income for charitable or religious purposes. In case it is not possible to apply specified percentage of funds, it can accumulate it and apply in future as per the prescribed conditions.

The question of chargeability of a part of income to tax which is not exempt arises only when the accumulation is more than the permissible limit or

1 Ganpatrai Sagarmal (Trustees) For Charity Fund vs. CIT [1963] 47 ITR 625 (Cal.)

2 J K Trust vs. CIT 32 ITR 535 (SC)

in other words trust has applied less than 85% of its income. To assess such excess income, it cannot be classified under different heads. It is only when any income is assessed under a particular head that the question of allowing deduction under that head arises for consideration. The head of income is irrelevant unless the entire income comes from one specific head. The income from property held under trust has to be arrived at in a normal commercial manner and when the income from property held under trust as such is excluded, there is no scope for computing the income from property by applying the provision of section 14 of the Act[3].

As discussed above assessee is required to apply atleast 85% of its income in India. The word 'applied' is wider in import than the word 'expenditure'. As per Webster's Third New International Dictionary, Vol. 1, the word 'applied' means:

"to put to practical use ; engaged in for a utilitarian or contributory purpose; employed in the decoration, design or execution of useful objects."

The word 'expenditure' means: 'disbursement'. 'Expend' means: 'to put out or distribute; to spend'. The Supreme Court in the decision in *Indian Molasses Co. (P.) Ltd. v. CIT [1959] 37 ITR 66* held that the word 'expenditure', means: 'pay out or away; spending something which is gone out irretrievably'. Considering the analysis of these two words, it can be inferred that word 'applied' is bigger in scope than 'expenditure' or 'disbursement'[4].

Application of income few points-

a. Application within India

The section states that the income derived from property held under trust wholly for charitable purposes shall not be included in the total income to the extent to which such income is applied to such purposes in India. The question is whether the section requires the application of money in India or the carrying out of the purposes in India or both. The expression "applied to such purposes in India" refers only to the situs of the expenditure and not to the place where the "purposes" are carried out. In the following situation it has been held that application of funds has been within India –

- grants to various Indian students/ persons to pursue their education/higher education in various universities abroad[5];
- trade delegation sent abroad for the benefit of the entire trade in India, with a view to increase the possibilities of exports out of India[6], however contrary view was held, in respect of expenditure on events / activities held in connection with an exhibition in Hanover, Germany[7],
- conferences outside India by an association, if the benefit of such conference would ultimately go to the association and its members in India[8],

Further recently in case of earth quake in Nepal, CBDT has allowed application of funds in Nepal. However such allowance was subject to specific approval.

b. Application of income also includes incidental expenditure incurred by the trust. To determine application it is immaterial whether expenditure is debited to income or expenditure / profit & loss account or not. Application is allowed even if such expenditure is beyond limits prescribed in constitution documents, provided such expenditure is towards object of

3 DIT(E) vs. Girdharilal Shewnarain Tantia Trust [1993] 199 ITR 215 (Calcutta)

4 CIT vs. St. George Forane Church [1988] 170 ITR 62 (Kerala)

5 ACIT(E) vs. Jamshetjee Tata Trust ITA No.3807/Mum/2015, Date of Pronouncement : 04.02.2016; Bharata Kalanjali vs. ITO, (1989) 30 ITD 161 (Mad); Critical Art and Media Practices vs. DIT(E), TS-122-ITAT-2015(Mum)

6 Gem & Jewellery Export Promotion Council vs. ITO, (1999) 68 ITD 95 (Bom)

7 DIT vs. National Association of Software & Services Companies, (2012) 345 ITR 362 (Delhi)

8 CEO Clubs India vs. DIT (2012)25 taxmann.com 217 (Mum)

trust[9]. Following are few instances where it has been held as application of income :

- Payments of income-tax and wealth-tax[10],
- Expenditure on salaries and miscellaneous expenses for the purpose of carrying out the objects[11],
- Establishment expenditure[12],
- Grant of loan or waiver of loans earlier granted[13],
- Repayment of loans[14],
- Expenditure celebration of diamond jubilee celebration of the trust and felicitation of members for their contribution subject to reasonability[15],
- Loss on foreign exchange fluctuation[16],
- Writing off debts[17]
- Defending criminal charges of office bearers of trust[18] etc.

Accumulation of Income

Act allows for the higher accumulation subject to fulfilment of certain conditions prescribed in section 11(1)(a) and 11(2).

Accumulation u/s 11(1)(a)

Section 11(1)(a) provides that in case application of funds is less than 85% of the income, assessee can apply it subsequently on fulfilment of prescribed conditions -

a. In case shortage in on account of whole or part of income not received during the year, it can be applied in the year in which received or in the previous year immediately following,

b. In case shortage is for any other reason, it can be applied in the previous year immediately following the previous year in which such income was derived.

It is also provided that such option to be exercise in writing before due date of filing return of Income u/s 139(1)[19] and application to be made in Form No. 9A. On exercising such options, it shall be deemed to be the income applied during the previous year in which the income was derived. Application in Form No. 9A has been prescribed by Finance Act 2015 w.e.f. 1-4-2016 i.e. AY 2016-17. In past no such form was prescribed and application for accumulation can be made on plain paper. It was judicially held that application could be filed before Assessing Officer, before completion of assessment. Hence, post amendment application in Form No. 9A, is not made before due date of filing return of income u/s 139(1), benefit of accumulation would not be available.

9 Satya Vijay Patel Hindu Dharamshala Trust vs. CIT (1972) 86 ITR 683 (Guj)

10 CIT vs. Trustee of H.EH. the Nizam's Supplemental Religious Endowment Trust [1981] 127 ITR 378 (AP)

11 CIT vs. Birla Janahit Trust [1994] 73 Taxman 465 (Cal) Arvindkumar J. Saheba, Trustees of Karnamu-kteshwar Mahadev Trust vs. CIT [1981] 131 ITR 86 (Guj) Deo Radha Madhava Lalji Genda Trust vs. Property Tax Officer [1980] 125 ITR 531(MP)

12 CIT vs. Market Committee [2010] 195 Taxman 206 (P & H)

13 CIT vs. Indian National Theatre Trust (2008) 169 Taxman 42 (Delhi), CIT vs. Sacred Heart Church, (2005) 198 CTR 189 (Guj)

14 DIT vs. G.K.R. Charities vs. DDIT (2012) 21 taxmann.com 45 (Chennai), Govindu Naicker Estate vs. DIT, (2009) 315 ITR 237 (Mad)

15 Baroda Cricket Association vs. ITO (2006) 8 SOT 735 (Ahd)

16 DDIT vs. Ohio University Christ College ITA No. 1075 / Bang / 2014, decision dated 09.10.2015

17 Sundaram Medical Foundation vs. DDIT(E) (2016) 45 ITR(Trib) 500 (Chny)

18 Ananda Marga Pracharaka Sangha vs. CIT [1994] 76 taxman 88 (Cal.)

19 If a return is filed within the time specified in section 139(4) and the option contemplated by the Explanation to section 11(1) is exercised in writing along with such return, the requirements of the Explanation to section 11(1) would stand satisfied Trustees of Tulsidas Gopalji Charitable & Chaleshwar Temple Trust vs. CIT [1994] 73 Taxman 612 (Bom.), Applicability of this decision need to be tested under revised provisions.

In case there is non-application of any amount out of income referred Section 11(1)(a)/(b), and such amount is transferred to other institution registered u/s u/s 10(23C)(iv)/(v)/(vi)(via) or u/s 12AA, the same shall not qualify as application of income for charitable or religious purposes either during the period of accumulation or thereafter.

Consequences of non-application of accumulated sums u/s 11(1)(a)

If the assessee religious or charitable trust fails to apply the income within extended time it shall be the deemed to be income as under

- In case when option is exercised to apply income in the year of receipt and if such income is not applied in the year of receipt or following year, it shall be the income of the immediately following year.
- If the income is not spend in the year in which it is derived and the option was exercised to apply the income in the next year, then the amount not spent in next year shall be taxable as income of next year.

Accumulation u/s 11(2)

Section 11(2) also provides relaxation for accumulation of more than 15% of income. It allows accumulation for longer period i.e. maximum 5 years. In past it was allowed for 10 years. Higher accumulation is subject to fulfilment of following conditions-

- Application to be made in Form No. 10, stating purpose, period, of accumulation. Purpose should not be vague and ambiguous. It can specify multiple purposes[20]. It may also be object clauses as per Trust deed[21].
- Money so accumulated need to invested or deposited in modes specified in section 11(5). The provisions of sec. 11(2)(a) talks about "income", whereas the provisions of sec. 11(2)(b) talks about the "money" so accumulated. The "money" available with the assessee may be pertaining to the current year's income or earlier year's income. Earmarking of existing bank fixed deposits, which is free from any lien, towards the income accumulated u/s 11(2) of the Act during the year under consideration would be sufficient compliance with the provisions of sec. 11(2)(b) of the Act, since the accumulated income is represented by the corresponding deposit/investment[22]. Contrary view deposit made during earlier could not be considered as investment under these provisions[23].
- Application is required to be filed before due date of filing return of income u/s 139(1)

Technical mistake in Form No. 10 can be rectified by giving proper intimation to Assessing Officer[24]. In case no specific purpose is specified in Form No. 10, if such information is provided before the completion of assessment, it may suffice[25]. Condition prescribing filing of form within due date of filing return of income u/s 139(1) has been introduced by Finance Act 2015 w.e.f. 1-4-2016 i.e. AY 2016-17. Earlier, it was governed by rules only. Rule 17 has also been amended. Further such form is required to be filed electronically. In past it has been held that such application can be made before Assessing

20 DIT vs. Trustees of Singhania Charitable Trust (1993) 199 ITR 819 (Cal)

21 CIT vs. Market Committee, Tohana (2011) 12 taxmann.com 252 (P & H), DIT vs. Mitsui & Co. Environment Trust (2008) 167 Taxman 43 (Del.) , DIT vs. Eternal Science of Man's Society (2006) 155 Taxman 42 (Del.)

22 Dharmodayam Co. vs. ITO [2015] 59 taxmann.com 467 (Cochin - Trib.)

23 CIT vs. Indian National Theatre Trust [2008] 169 Taxman 42 (Delhi)

24 Shri Premnarain Memorial Educational & Charitabe Society . ACIT 92007) 110 TTJ 274 (Luck)

25 Samak Seva Nidhi vs. ACIT (2015) 376 ITR 507 (T & AP).

Officer before finalization of assessment. This amendment overrules series of decisions viz. *Bagalkot Town Development Authority vs. CIT [2014] 42 taxmann.com 582 (Bang-Tribunal), Kandala Dock Labour Board vs. ITO [2011] 15 taxmann.com 47 (Rajkot- Tribunal); Kerala Rural Employment & Welfare Society vs. ADIT [2009] 184 Taxman 93 (Ker), CIT vs. Nagpur Hotel Owners Association [2001] 114 Taxman 255 (SC).* No benefit of accumulation shall be available in case no form is filed before due date of filing of return u/s 139(1) or no return of income is filed before due date prescribed u/s 139(1). However in case assessee fails to file form 10 or fails to file return of income before due date, it can apply to CIT for condonation of delay[26]. The Commissioners will, while entertaining such applications, satisfy themselves that the following conditions are fulfilled:

(a) that the genuineness of the trust is not in doubt;

(b) that the failure to give notice to the Income-tax Officer under section 11(2) of the Act and investment of the money in the prescribed securities was due only to oversight;

(c) that the trustees or the settlor have not been benefited by such failure directly or indirectly;

(d) that the trust agrees to deposit its funds in the prescribed securities prior to the issue of the Government sanction extending the time under section 11(2); and

(e) that the accumulation or setting apart of income was necessary for carrying out the objects of the trust.

Accumulation u/s 11(1)(a) and u/s 11(2) are independent and accumulation under both sub-sections can be done simultaneously.

Consequences of non-application of accumulated sums u/s 11(2)

In case assessee religious or charitable trust -

- Apply to the purposes other than charitable or religious purposes
- Ceases to remain invested or deposited as per the provisions of section 11(5)
- Not utilising for the purposes for which it was accumulated
- Transfers accumulated sums to other institutions registered u/s 10(23C)(iv)/(v)/(vi)(via) or u/s 12AA

amount so unutilised or utilised in violation of provisions shall be deemed to be the income of such institutions in the year in which it was mis-utilise or remains unutilises within the period for which it was accumulated or set apart, as income of the previous year immediately following the expiry of that period.

It is also provided that religious or charitable trust can apply to the assessing officer for modification in the purposes of the accumulation and such new purposes should be such which is allowed as the objects specified in the constitution documents. However Assessing Officer is not empower to allow it's transfer to other institutions registered u/s 10(23C)(iv)/(v)/(vi)(via) or u/s 12AA, unless such trust or institution is being dissolved.

Capital Gains

Taxability on transfer of capital assets held by the religious trust or charitable institution is covered u/s. 11(1A) of the Act provisions of section 45 has no applicability. Where a capital asset is transferred by a charitable or religious

26 CBDT General Order F. No. 180/57/80-ITA (AI) Dt. 3/6/1980 / Circular No. 273 dt 3/6/1980. The circular issued by the department dated 3-6-1980 and the judgment of the Apex Court in STO vs. K.I. Abraham [1967] 20 STC 367 it can be considered that the requirement to prescribe the time limit is only directory and not mandatory. Non-compliance within the stipulated time should not disentitle an assessee from the exemption to which he is otherwise entitled – CIT vs. Anjuman Moinia Fakharia [1994] 75 Taxman 517 (Rajasthan). Post introduction of time limit in section 11(2), observation in the said decision pertaining to time limit is only directory and not mandatory need to be tested.

trust, for the purpose of arriving at deduction available u/s. 11(1), it's utilisation of the net consideration[27] in acquisition of new capital asset that has to be measured. Where the entire net consideration is invested in the new asset, whole of capital gains is considered as an application of income and where part of net consideration is invested in the new asset, so much of such capital gain as is equal to the amount, if any, by which the amount so utilized exceeds the cost of the transferred asset, shall be deemed to have been applied to charitable or religious purposes.

Example:

Cost of Asset transferred	` 10,00,000
Net consideration of the Asset transferred	` 12,00,000

Cost of new capital Asset acquired

Case A – ` 12,00,000

Case B – ` 11,00,000

In case A, the capital gain (considering short term) is ` 2,00,000. As the entire net consideration is invested in new asset, ` 2,00,000 shall be deemed to have been applied for charitable or religious purposes. In case B, ` 1,00,000 (Amount invested – Original purchase cost of asset) shall be deemed to have been applied for charitable or religious purpose. However, in case B, if the conditions of application or accumulation of income are satisfied, full deduction can be claimed.

In case of property held under trust in part only for charitable or religious purposes, the appropriate fraction of the capital gain arising from the transfer shall be deemed to have been applied for the charitable or religious purposes where the whole of the net consideration is utilized and in case where part of net consideration is invested in the new asset, he exemption shall be limited to so much of the appropriate fraction of the capital gain as is equal to the amount, if any, by which the appropriate fraction of the amount utilized for acquiring the new capital assets, exceeds the appropriate fraction of the cost of the transferred asset. In our above example, say 75% of the asset is being utilized for charitable or religious purposes. Then the exemption available u/s. 11(1A) shall be as under :

Case A: Capital gain is Rs. 2,00,000. Appropriate fraction of capital gain i.e. 75% of Rs. 2,00,000 which comes to Rs. 1,50,000 shall be deemed to have been applied for charitable purposes.

Case B:

Appropriate fraction of amount utilized (75% of ` 11,00,000)	` 8,25,000
Appropriate fraction of cost (75% of ` 10,00,000)	` 7,50,000

The amount deemed to be utilised for charitable purposes shall be appropriate fraction of amount utilized minus the appropriate fraction of cost i.e., ` 8,25,000 - ` 7,50,000 = ` 75,000.

Capital Gains are to be computed as per the provisions of Sec. 45 of the Income Tax Act 1961. Such capital gains, whether long term or short term, is treated as Income from property held under a trust for application of income. Period of holding has to be determined in terms of Sec. 2(42A). Cost of acquisition of transferred asset shall be as ascertained by Sec. 48 and Sec. 49. The option available under sec. 11(1) and 11(2) for application of 85% of the income to charitable purposes is also available to income from such capital gains. For claiming exemption u/s. 11(1A) investment in new Capital asset has to be done before the end of the financial year in which the capital gains arises[28]. In view of the provisions of Sec. 11(1A), there is no condition that the capital asset should be held till the end of the financial year.[29]. The basic condition is that the net sale consideration should be utilised for acquiring the new capital asset(s) before the end of the financial year. The trust can also exercise the option of "deemed application."

27 Net consideration means the full value of consideration received or accruing as a result of the transfer of the capital asset as reduced by any expenditure incurred wholly and exclusively I connection with such transfer

28 Trustees of Dr. Sheth's Charitable Trust vs. ITO (1982) 2 ITD 649(Bom)

29 South Point Education Society vs. ITO (Exemption II) [2015] 62 ITR 320

In case of subsequent transfer of new capital asset acquired, the cost of acquisition shall be the amount of consideration utilised i.e. the actual cost of asset and not the actual cost less capital gains already claimed exempt u/s. 11(1A) during the 1st transfer. In above example in Case A, if the new capital asset is sold for a net consideration of ` 20,00,000 then, cost of acquisition shall, for the purpose of calculating Capital Gains shall be ` 12,00,000.

- Deposit in public sector company is an eligible investment - The contention of the revenue that the investment by way of deposit in the public sector company cannot be treated as a new asset acquired with the net consideration, in terms of section 11(1A), is not tenable.[30]
- Reinvestment in fixed deposits of any duration is permissible - CBDT Circular dated 24-9-1975, declaring that deposits for a period of six months or more could be considered as capital assets for the purpose of section 11(1A), is not in consonance with the general principles of law and it cannot hold the field. Once a deposit is accepted to be an asset, the larger or lesser duration of the term is an immaterial consideration[31].
- Where 90% of the sale consideration was kept with the purchaser as a fixed deposit on interest, ITO took the view that 90% of the sale consideration is unpaid purchase price, payment for which was to be given in installments with interest. Hence it cannot be said that 90% of the sale consideration was being utilized to acquire another capital asset. Hence the benefit of S. 11(1A) was not available. It was held that the whole of the net consideration was utilized by the assessee trust for acquiring another capital asset, i.e.10% in bank and balance 90% in fixed deposits with the erstwhile purchasers of the capital asset. The provisions of S. 11(1A) were therefore fully satisfied[32]. Special leave petition filed by the Department was dismissed by the Supreme Court. (1989) 176 ITR 236.

The exemption available u/s. 11(1A) is subject to fulfillment of conditions laid down in s. 11(5)/13(1)(d). In case of violation in modes of investment laid down in S. 11(5), trust may lose the exemption altogether by virtue of S. 13(1)(d).

Certain other issues are being analysed herein below viz. carry forward of excess expenditure, allowance of depreciation, implication of earning of exempt income e.g. agricultural income., receipt of anonymous donation

Excess Application of income in earlier year

Whether excess expenditure incurred in year 1 can be claimed as application in subsequent year or not? Let try to understand the issue with the help example

(Sums in `)

Particulars	Year 1	Year 2
Income	1000	1000
Application	1400	550
Application (Excess) /Short	#(400)	@300
Minimum application 85%	850	850

1000-1400

#1000- (min. application of 85%) 850

Trust is required to apply atleast 85% of the income during year. You may observe that during year it has applied ` 400 more than its income and during year 2 its application is short by ` 350 (as compared to 85% application). Now the issue whether short fall in application of income in year 2, whether excess utilization of income during the earlier year 1 can be adjusted against the short fall in the utilization during current year. Argument of the revenue for non-adjustment is that in the case of charitable trust, their income is assessable under self-contained code mentioned in section 11 to 13. Provision

30 CIT vs. East India Charitable Trust [1994] 206 ITR 152/73 Taxman 380 (Cal.)
31 CIT vs. Hindusthan Welfare Trust [1993] 70 Taxman 93/[1994] 206 ITR 138 (Cal.)
32 CIT vs. Ambalal Sarabhai Trust No. 3 (1988) 40 Taxman 369 (Guj)

pertaining to carry forward and adjustment of losses are not applicable to income derived by charitable trust. There is no word of limitation in section 11(1)(a) providing that the income should have been applied for charitable or religious purposes only in the year in which the income had arisen. The word "applied" means "to put to use" or "to turn to use" or "to make use" or "to put to practical use". Having regard to the provisions of section 11, it is clear that the when the income of the trust is used or put to use to meet the expenses incurred for charitable purposes, it is considered to be applied for the purposes. The said application of the income for the purposes takes place in the year in which the income is adjusted to meet the expenses. In other words, even if expenses for charitable and religious purposes have been incurred for earlier year and the said expenses are adjusted against the income of the subsequent years.

Alternatively, it is the well-settled position that income derived from the trust property has to be determined on commercial principles and if commercial principles for determining the income are applied, it is but natural that the adjustment of the expenses incurred by the trust for charitable and religious purposes in the earlier year against income earned by the trust in the subsequent year will have to be regarded as application of income of the trust for charitable and religious purposes in the subsequent year in which such adjustment has been made having regard to the benevolent provisions contained in section 11 of the Act and will have to be excluded from the income of the trust under section 11(1)(a) of the Act[33]. However another contrary view is that it is evident that carry forward of excess application of fund in the commercial principles cannot be allowed as per the provisions of the Act because it would result in notional application of income in the subsequent year[34].

Allowance of excess expenditure in subsequent year has been uphleld by various ITAT and High Court viz. Karnataka Food and Civil Supplies Ltd.[35], Academy of Liberal Education[36], Maharana Of Mewar Charitable Foundation[37], Institute of Banking Personnel Selection (IBPS)[38] etc.

Conclusion

Excess application of expenditure by the religious or charitable organisation can be adjusted against the short applicable in subsequent year. However excess application is required to be reckoned against gross income and not against the 85% of income which is minimum amount required to be applied every year e.g. in above example excess application has worked ` 400 (1000-1400) and not ` 550 (850-1400).

Depreciation

Allowance of depreciation on assets held by the charitable and religious organization has been point of debate between the assessee and tax collectors. It was always viewed by revenue collected that depreciation is allowance and no real expenditure. Unlike other expenditure, depreciation does not involves actual delivery of parting of money and hence no deduction should be allowed. On the other hand assessee's used to claim depreciation on the ground that income which is taxed should be computed on the commercial principles. Depreciation is the exhaustion of the effective life of a fixed asset owing to 'use' or obsolescence. It may be computed as that part of the cost of the asset which will not be recovered when the asset is finally put out of use. The object of providing for depreciation is to spread the expenditure, incurred in acquiring the asset, over its effective lifetime; the amount of the provision, made in respect of an accounting period, is intended to represent the proportion of such expenditure, which has expired during that period[39].

33 CIT vs. Shri Plot Swetamber Murti Pujak Jain Mandal [1995] 211 ITR 293 (Gujarat)

34 Anjuman-E-Himayath-E-Islam vs. ADIT(E) [2015] 59 taxmann.com 379 (Chennai - Trib.)

35 ITA No.124/Bang/2014, Banglore ITAT Order dt 20/10/2015

36 ITA No.687/Bang/2014, Banglore ITAT Order dt.20.02.2015

37 [1987] 164 ITR 439 (Raj.)

38 [2003] 131 Taxman 386 (Bom.)

39 Spicer & Pegler's Book-keeping and Accounts, 17th Edn., pp. 44, 45 & 46

It was also contended that allowing exemption on the application of income on the capital asset acquired during the relevant year and further, allowing depreciation in the subsequent years, at any stretch of imagination, could not be construed as double deduction. This view of the assessee has also been judicially appreciated in various cases viz. Institute of Banking Personnel Selection (IBPS)[40], Market Committee, Pipli[41] etc. Contrary view for non-allowance of depreciation was taken by Kerala High Court in case of Lissie Medical Institutions[42]. Further Revenue's stand denying depreciation was based on decision of Supreme Court in case of Escorts Ltd[43]. It must be appreciation that issue before Supreme Court was deduction of scientific research expenditure u/s 35(2)(iv) and allowance of depreciation on same expenditure u/s 32(1)(ii). Court's have held that a trust claiming depreciation cannot be equated with a claim for double deduction.

However controversy has been set to rest by introduction of sub-section 6 to section 11 by Finance (No. 2) Act, 2014. It is provided that where any income is required to be applied or accumulated or set apart for application, then, for such purposes the income shall be determined without, any deduction or allowance by way of depreciation or otherwise in respect of any asset, acquisition of which has been claimed as an application of income under this section in any previous year. Said amendment leads to next round of litigation whether said amendment is prospective, retrospective or clarificatory. The Karnataka High Court in case of Al- Ameen Charitable Fund Trust[44] after following the principles enunciated by the Apex Court, in Vatika Township (P.) Ltd.[45] has held that Section 11(6) of the Act is prospective in nature and operates with effect from 01.04.2015

Conclusion

Hence post amendment no depreciation would be considered as application in case capital expenditure was considered as application in earlier years. Corollary would be that depreciation would be allowed as application in case where capital expenditure was not considered as application in earlier years. Further said amendment is neither clarificatory nor retrospective. It applies prospectively from 1-4-2015 i.e. AY 2015-16.

Agricultural income

Charitable or religious trust may be earning agricultural or other income which is exempt u/s section 10. Under this scenario issue may arise whether such income would be exempt u/s 10 or still it would be governed by the provisions of section 11 to 13 i.e. assessee is required to apply 85% of the income since provisions of section 11 to 13 are self-contained code governing taxation of Charitable or religious trust. The exemption u/s.11 of the Act would be available only for the income to the extent the same was derived in conformity with section 11 of the Act and applied during the year for such purposes of charitable nature. Thus if the income derived from the property held under trust is applied to the extent of 85% for charitable/religious purpose in India, such income is exempt.

Section 10 & 11 are the part of Chapter III with heading Income which do not forms part of total Income. Section 10 states "In computing the total income of a previous year of any person, any income falling within any of the following clauses shall not be included....". Whereas Section 11 states that "Subject to the provisions of sections 60 to 63, the following income shall not be included in the total income of the previous year of the person in receipt of the income"

Analysis of both the section conclusion can be drawn that the exemption u/s 10 is income specific irrespective of the status/class of person. Whereas the exemption under section 11 is person specific though on the income derived from the property

40 [2003] 131 Taxman 386 (Bom.)
41 [2012] 20 taxmann.com 559 (Punj. & Har.)
42 [2012] 24 taxmann.com 9 (Ker.)
43 [1993] 199 ITR 43 (SC)
44 [2016] 67 taxmann.com 160 (Karnataka)
45 [2014] 49 taxmann.com 249 (SC)
46 CIT vs. Divine Light Mission [2005] 278 ITR 659 (Del.)

held under the trust. Further the exemption u/s 11 is subject to the application of income and modes or form of deposit and investment. Section 10(1) of the Act specifically points out that agricultural income shall not be included in computing the total income of a previous year and hence, the agriculture income earned by the charitable and religious Trust would be out of the ambit of section 11[46]. Section 11 cannot override the provisions of section 10. The benefit of section 10 cannot be denied by invoking the provisions of section 11 to 13 of the Act. Once the conditions of section 10 are satisfied then no other condition can be fastened for denying the claim under section 10 of the Act[47].

Income which is exempt u/s 10 and 11 need to be computed separately. In absence of separate records, the tax officer in order to take a reasonable and realistic view of the amount applied towards charitable or religious purpose may require to allocated in appropriate proportion between agricultural and non-agricultural income and then determine the amount applied in terms of section 11(1)(a)[48]. However contrary view has been taken by the Calcutta High Court[49]. Further Income/loss from agricultural properties held under trust is to be separately computed and cannot be given set off against income from non-agricultural properties held under trust eligible for exemption under section 11[50].

Anonymous Donation

Section 115BBC provides for the taxation of anonymous donation received by institution/fund/trust registered u/s 10(23C)(iiiad)/(iiiae)/(iv)/(vi)/(via) or trusts referred in section 11 other than trusts established for religious purposes. Provisions of this section are applicable from 1-4-2007 i.e. AY 2007-08. This section is basically meant to check the movement of black money into the system in the name of anonymous donations[51].

Anonymous donation means any voluntary contribution referred in S. 2(24)(iia), where receiver has not maintained a record of the identity indicating name and address of the donor and such other prescribed records (no such other records has been prescribed). Voluntary contribution may also include corpus donation. Section defines anonymous donation in exhaustive manner[52]. Hence institute/trust need to obtain proof of identity as well as address of the donor. Adequate care need to be taken in case donation is received in cash/kind, since unlike S. 80G no restriction has been placed for receiving donation in cash or kind.

Such anonymous donations which are in excess of 5 per cent of total donation or Rs One Lac, whichever is higher shall taxes at the rate of 30 per cent.

Eg.

Total Donation	25,00,000
Anonymous Donation	5,00,000
Other donation	20,00,000
Taxable anonymous donation ` 500,000 (-)	
Higher of two	
a. ` 100,000	
b. Excess of 5% of ` 25,00,000 = 1,25,000	
` 3,75,000	
Tax u/s 115BBC @30%	3,75,000

Provisions of Section 115BBC are not applicable to

a. the trust or institution established wholly for religious purposes

b. any trust or institution created or established wholly for religious and charitable purposes other any anonymous donation made with a specific direction that such donation is for any university or other educational institution or any hospital or other medical institution run by such trust or institution.

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47 ACIT(E) vs. Jamshetjee Tata Trust ITA No.3807/Mum/2015 Order Pronounced Dt. 4-2-16

48 CIT vs. Panchayati Akhara Nirmal [1991] 56 Taxman 61 (All.)

49 CIT vs. Ashoka Charity Trust [1982] 135 ITR 556 (Cal.)

50 ITO vs. Trilok Tirath Vidyavati Chuttani Charitable Trust [2004] 90 ITD 569 (Chd.)

51 Gurudev Siddha Peeth vs. ITO [2015] 59 taxmann.com 400 (Mumbai - Trib.)

52 Hans Raj Samarak Society vs. ADIT(E) [2011] 16 taxmann.com 103 (Delhi), confirmed in [2013] 35 taxmann.com 642 (Delhi)

CA Vipin Batavia

Business under Trust, Investments & Forfeiture of Exemption u/s. 13

A. BUSINESS UNDER TRUST

Income of a charitable trust is exempt according to the provisions of Sections 11, 12 and 13. The trust should be one established in accordance with law and its objects should fall within the definition of the term Charitable purposes as defined in section 2(15).

The definition of Charitable purpose in section 2(15) is amended with effect from A.Y. 2009-10. The definition is modified by adding a proviso stating that the "Advancement of any other object of general public utility" shall not be a charitable purpose if it involves the carrying on of any activity in the nature of trade, commerce or business or any activity of rendering of any service in relation to any trade, commerce or business for a fee or cess or any other consideration, irrespective of any nature of use or application of the income from such activity or the retention of such income from such activity unless – (substituted for first and second proviso w.e.f. 1-4-2016)

I) Such activity is undertaken in the course of actual carrying out of such advancement of any other object of general public utility and

II) The aggregate receipts from such activity or activities during the previous year, do not exceed 20% of the total receipts, of the trust or institution undertaking such activity or activities of that previous year.

With this amendment if a charitable trust caring on business activities and its activities are falling under advancement of any other object of general public utility and total receipts from such business activity exceeds the prescribed limit then in that case the activities of the trust will not be for charitable purpose and accordingly loses all the exemptions permitted under the Act.

This amendment in Sec. 2(15) covers only one limb that is "advancement of any other object of general public utility" but does not cover other limbs such as Education, Medical, Yoga etc. Therefore the business activities carried on by the trust under these areas are permitted subject to the provisions and conditions mentioned in sections 11(4) and 11(4A).

Any trust having mix charitable activities and if it falls under the said proviso to section 2(15) i.e. carry on activity in the nature of trade, commerce or business for advancement of any other general public utility along with other charitable activities then in that case, since one of the activity of the trust is to be considered as non charitable purpose, in that case whole trust will loose exemption u/s. 11 & 12 and will be taxed accordingly as a unregistered trust as per section 13(8) in that particular year in which its receipts from commercial activities exceed the threshold limit.

In view of monetary limit brought under the proviso to section 2(15), if the monetary limit is

exceeded then exemption will not be available u/s. 11 in case of advancement of any general public utility. This proviso puts an end to all controversies that may emanate from profits and gains being incidental to main object or not. In this regard CBDT has issued an explanatory circular *vide* No. 11/2008, dt. 19-12-2008, F.No. 134/34/2008-TPL.

In the following cases, it was held that certification of seeds by the petitioner facilitates trade, commerce or business in the certified seeds by the client of the petitioner. Hence, the proviso to the said section would come into operation.

a) *Andhra Pradesh State Seed Certification Agency vs. CCIT & Ors. (2013) 83 DTR (AP) 23.*

b) *Punjab State Seed Certification Authority vs. Commissioner of Income-Tax –I, Chandigarh [2013] 37 taxman.com 81 (Chandigarh – Tribunal).*

Recently CBDT by Circular No. 21/2016 dated 27-5-2016 has clarified that if any trust does commercial activity with reference to proviso to section 2(15) exceeds the specified cut-off in particular year the tax exemption would be denied in that particular year and cancellation of registration would not be mandatory section 13(8) unless such cancelation becomes necessary on other ground(s). The officers are advised not to cancel the registration of a charitable trust granted u/s. 12AA just because the proviso to section 2(15) comes in to pay otherwise with the introduction of new Chapter XII–EB the trust will become liable to tax on accreted income by getting hit by section 115TD(3). The process of cancellation of registration is to be initiated strictly in accordance with sections 12AA(3) and 12AA(4) after carefully examining the applicability of these provisions.

Section 11(4) says that property held under trust includes a business undertaking so held and where a claim is made that the income from such undertaking shall not be included in the total income of the persons in receipts thereof and the Assessing Officer has power to determine the income of the undertaking as per the provisions of income tax act and the income so determined in excess of the income shown in the books of the undertaking shall be deemed to be income applied to purposes other than charitable or religious purposes.

Conditions to be complied for the applicability of section 11(4) :-

1) There should be a business undertaking.

2) Business undertaking should be held under trust.

3) Assessee makes a claim that the income of the trust should not be included in the total income.

4) The A.O. determines the excess income than shown in the books of accounts.

5) Such assessed income is deemed to be income applied other than the charitable or religious purposes.

Section 11 (4A) enables charitable or religious trusts or institutions to carry on of business with certain conditions mentioned here in below,

1) The business is incidental to the attainment of the objectives of the trust or Institution.

2) Separate books of accounts are maintained by such trust or institution in respect of the business.

In order to ensure that the business income of a trust or institution is exempt, the business should be incidental to the attainment of the objectives of the trust or institution. And a business whose income is utilized by the trust or the institution for the purpose of achieving the objectives of the trust or the institution and separate books of accounts are maintained for such business.

There are many decisions rendered that the trust can hold business property. The trust can do the business subject to fulfillment of aforesaid conditions. The important Supreme Court judgments in this regard are as under:-

1) CIT vs. Dharmodayam Company (1977) 109 ITR 527 (SC)

2) *Thiagrajar Charities vs. Addl. CIT [1997] 225 ITR 1010 (SC)*

3) *CIT vs. A. P. State Road Transport Corp [1986] 159 ITR 1(SC)*

4) *CIT vs. Thanthi Trust (2001) 247 ITR 785 (SC)*

5) *Dharmadeepti vs. CIT [1978] 114 ITR 454 (SC)*

The Supreme Court in its another landmark judgment in the case of *Surat Art Silk Cloth Mfrs. Asso (1980) 121 ITR 1* and in the case of *Andhra Chamber of Commerce (1965) 55 ITR 722* held that if the primary and dominant object of the trust is charitable, the other objects ,which by themselves may not be charitable but since they were incidental or ancillary to the attainment of the primary or dominant purpose, would not prevent the trust from being a charitable one.

What is the effect of non-compliance of section 11(4A)? In the case of non compliance of conditions mentioned in section 11(4A) provisions of sub-sections (1), (2), (3) and (3A) of section 11 shall not available to any business income.

Any activity carried on by the trust which results in to profit in that case it is a different from carrying on business. If without carrying on any business as such, the activity of the trust results in profit which is used for charitable objects, the trust will not fall u/s. 11(4A)

It may be noted that, if a trust is carrying on a business, it is only the business income of the trust which will be liable to tax under section 11(4A) at the appropriate rate and not at maximum marginal rate, the proviso to sections 164(2) and (3) levying tax at maximum marginal rate is attracted only where the exemption is lost by virtue of section 13 (1)(C) or 13(1)(D) and the trust fund (With certain exceptions) are invested in contravention of the investment pattern mentioned in section 11(5) and not in other cases. The other income will however continue to enjoy exemption under section 11.

It is to be kept in mind that the tax audit u/s. 44AB is applicable to charitable trust if the turnover of such business exceeds the specified limit prescribed in section 44AB.

B. INVESTMENTS

• Funds of the trusts are to be invested in specified modes section 11(5) read with Section 13(1)(d)

Income of trust/institution is not eligible for exemption under section 11 or 12 if its funds are invested/deposited otherwise than in the forms and modes specified in section 11(5) as provided in section 13(1)(d) as under:-

1) The exemption under section 11(1) (a) is available only if at least 85 per cent of the income is applied for charitable/religious purpose in India during the year and the remaining amount is invested in the forms /modes specified under section 11(5). Thus, both the requirements will have to be fulfilled before the trust can claim and avail of the exemption under section 11(1) (a). It is only then that the entire income of the trust will get exemption (Circular No. 335, dated April 13, 1982)

2) Any charitable or religious trust or institution will forfeit exemption from tax if any funds of the trust or institution are invested or deposited otherwise than in any one or more of the modes specified in section 11(5). Such trusts and institutions will also forfeit exemption if any part of their funds invested before March 1, 1983, otherwise than in any one or more of the forms or modes specified in section 11(5), continue to remain so invested or deposited after November 30, 1983.

3) Trusts or institutions which continue to hold any shares in a company [other than in public sector company or shares which are prescribed as mode of investment under section 11(5)(xii)] after 30th November, 1983 will also forfeit exemption from income-tax.

However there are certain exceptions provided in section 13(1)(d) which provides forfeiture of exemption, will not apply in respect of investments made other than modes specified in section 11(5). These exceptions are mentioned hereinbelow under the sub heading "Forfeiture of Exemption".

- **Forms or modes of investment [Sec. 11(5)]**

A pattern of investment is laid down, with effect from April 1, 1983, for all categories of funds belonging to charitable and religious trust or institutions. The same pattern of investment will apply in relation to accumulation of income in excess of 15 per cent. The uniform forms or modes for investing funds of charitable and religious trust or institutions are specified in section 11(5).

- **Consequences for failure to invest as per section 11(5)**

Failure to invest the income in circumstances as explained will amount to violation as per section 13(1)(d) of the Act. Therefore, the exemptions that are available u/s. 11(1) (a) will not be available.

As per section 11(1A), the income from capital gain is recognized as income derived from property held under trust, as such the provision of accumulation of income applied to capital gains too as held in the case of Trustees of *Dr. Sheths Charitable Trusts vs. Seventh Income Tax Officer (1982) 2 ITD 649 (Mum-Trib.),* also clarified by Circular No. 72, dated 6-1-1972.

The Capital Gains arising u/s. 11(1A), if not utilised in acquiring an asset, have to be invested in a mode specified u/s. 11(5). Various High Courts have held that making fixed deposits in bank and investment in public sector companies amounts to capital asset and have held as investment specified u/s. 11(5) of the Act.

When such income is accumulated in accordance with S 11(2), then the investment has to be made in accordance with S 11(5).

Income so accumulated u/s. 11(2) which ceases to remain invested in any of the modes specified in section 11(5) then the income so accumulated will be deemed to be the income of the previous year and become chargeable to tax as income of that year.

Section 11(2) of the Income Tax Act, 1961, read with rule 17 which deals with accumulation of income for specific purpose and it provides that such accumulated income is required to be invested in a specified mode. But it has not specified the time frame for making such investment. However in Form No. 10, notice to the Assessing Officer u/s. 11(2) at item no. 2 reads as follows, "Before expiry of six months commencing from the end of each previous year, the amount so accumulated or set apart has been / will be invested or deposited in any one or more of the forms or modes specified in sub-section (5) of section 11" Therefore investment has to be made before the expiry of six months from the end of the previous year.

- **Whether entire exemption will be forfeited in case of violation of section 11(5)?**

Section 13(1)(d) provides that in case of charitable or religious trust or institution, where any income thereof is invested or deposited otherwise than in any one or more of the forms or modes specified in section 11(5), then section 11 or 12 will not apply.

But there are divergent views with regards to whether entire exemption will be forfeited or not.

In the case of *Gurudayal Berila Charitable Trust vs. ITO, Fifth (1990) 34 ITD 489 (Mum.),* the issue on the amount of violation of investment came up whether the entire exemption has to be forfeited or to the extent of violation committed. It was held that amount to the extent violated be brought to tax.

In the case of *Director of IT (Exemptions) vs. Sheth Mafatlal Gagalbhai Foundation Trust (2001) 249 ITR 533 (Bom.),* it was held that tax will be levied at

maximum marginal rate only to the portion of violation u/s. 13(1)(d).

In the case of *Director of IT (Exemptions) vs. Sheth Mafatlal Gagalbhai Foundation Trust (2002) 253 ITR 593 (Del.),* there was an innocent violation of section 11(5) of investing in a mode other than mode prescribed u/s. 11(5). As soon as the assessee came to know about such violation, he had withdrawn the said investment. Therefore, the Court held that this would not attract forfeiture of exemption.

In the case of *Asst. CIT vs. Sri Ramchandra Educational & Health Trust (2010)128 TTJ 408,* the investment made was in contravention of section 11(5). The said trust made an effort to recover the amount. However, amount could not be recovered from the earlier investment due to the pendency of garnishee proceedings. It was held that under the circumstances, as the reasons were beyond the control of the assessee, forfeiture will not raise.

C. FOREITURE OF EXEMPTION

The following incomes of the charitable and/or religious trusts & institutions will be excluded from total income of the previous year and exemption u/s. 11 will not apply. (Section 13)

- **Income for private religious purpose – (Section 13(1)(a)**

Any part of income from property held under a trust for private religious purpose which does not endure for the benefit of the public is not eligible for exemption under section 11 or 12.

- **Income for the benefit of particular religious community (Sec. 13(1)(b)**

Entire income of the charitable trust / institutions (established on or after April 1, 1962) created for the benefit of any particular religious community or caste is not eligible for exemption under section 11 or 12. But the Nagpur Tribunal has decided in the case of *Shiv Mandir Devsttan Panch Committee Sanstan vs. CIT [2013]* that, Worshipping of Lord Shiva, Hanumanji, Goddess Durga and maintaining of temple cannot be regarded as advancement, support or propagation of a particular religion.

There are certain exceptions. The following categories of the trusts and institutions exempted from the operation of section 13(1)(b).

a) A trusts or institution created or established for religious purposes, as held in the case of *ITO vs. Catholic Church (1982) 13 TTJ (Ahd.) 200, Dawoodi B Ohra Jamat vs. CIT (2010) 123 ITD 452, 467 (Indore) 317 ITR (AT) 133 (Indore).*

b) Trusts or institutions which is composite (both charitable and religious), as held in the case of *CIT vs. Barkate Safiyaah Society (1995) 213 ITR 492 (Guj).*

c) Trusts or institutions created or established prior to commencement of the Income-tax Act, 1961. For the trusts or the institutions that have been created or established before the commencement of this Act, which is April, 1, 1962, for religious purposes, the restriction as contained in S. 13 (1) (b) will not apply. This was held in the following cases:

   - *Commissioner of Income Tax, M.P. vs. Shri M Aheshwari Agrawal Marwari Panchayat (1982)136 ITR 556 (MP)*
   - *CIT vs. Saraswath Poor Students Fund (1984) 150 ITR 142 (Kar.)*
   - *Trustees of Charity Fund vs. Commissioner of Income Tax, Bombay [1959] 36 ITR 513 (SC) and Rajklot Visha Shrimali Jain Samaj vs. ITO (2007) 109 TTJ 286 (Rajkot-Trib.)*
   - *Trustees of Charity Fund vs. CIT [1959] 36 ITR 513 (SC)*

d) Whether Linguistic community is hit by section 13(1)(b) :

   The bar provided in S.13(1)(b) pertains to particular religious community or caste. The linguistic group cannot *per se* be treated as a particular community. Therefore, S.13(1)(b) will not apply as held in the case

of *Commissioner of Income Tax vs. Gujarathi Mandal (1999) 240 ITR 293.*

e) Whether benefit to people of particular region be hit by section 13(1)(b):

No. when the objective of the institution is charitable, even though it may be to a particular region or a state, it does not affect the charitable of public charity.

f) The following categories of trusts created for the benefit of certain castes or communities are outside the purview of section 13(1)(b) :-

I. Scheduled Castes
II. Backward Classes
III. Scheduled Tribes
IV. Women and
V. Children

- **Forfeiture of exemption when investments or deposits are made in the modes other than specified in section 11(5) –Section 13(1)(d)**

The trust created for charitable or religious purposes or a charitable or religious institution will lose their exemptions u/s. 11 if the investments made after the 28 day of February 1983 are not in any one or more modes specified under Section 11(5) for any period during the previous year after the 28 day of February 1983.

The circumstances under which the income and / or funds have to be invested are already explained hereinabove under the sub-heading "Investments".

However section 13(1)(d) provides certain exceptions

There are certain circumstances in which sec. 13(1)(d) will not apply where investments are made other than modes specified in section 11(5).

1. Any assets held by the trust or institution where such assets form part of the corpus of the trust as on June 1, 1973.

2. Any accretion to the shares of the company forming part of the corpus of the trust or institution as on June 1, 1973, where such accretion arise by way of allotment of bonus shares.

3. Debentures acquired by the trust of any company or corporation acquired before 1st day of March, 1983.

4. Acceptance of donations in kind or acquired any asset which is not in conformity of the provisions of section 11(5). The trust will not lose tax exemption if the trust disposes of or converts such assets into permissible investment within one year from the end of the financial year in which such assets are acquired or March 31, 1993, whichever is later.

5. Any funds representing the profits and gains of business, being profits and gains of any previous year relevant to the assessment year commencing on the 1st day of April, 1984 or any subsequent assessment year if the trust maintains separate books of account in respect of such business.

In following circumstances the payments made will not fall under investments or deposits

a) When an advance is paid to the supplier in the normal course, such advance cannot be treated as an investment for section 11(5). Supreme Court in the case *CIT vs. Calcutta National Bank Ltd. (1959) 37 ITR 171* held that the fundamental purpose of the investment is earning a return.

b) Kerala High Court in the case of *CIT vs. Shri P. Subramanium Religious Trust (2009) 179 Taxmann 144.* The advance given to supplier was treated as application in the extreme case where amount held as an advance for more than five years and court held as an investment or deposit. Therefore, there was violation of Sec. 13 (1) (d).

c) Temporary loan to a society or charitable institution would not amount to an investment or deposit; thereby, S. 13(1)(d) read with S. 11(5) will not apply. This position was held in the following cases:

i) *Director of Income Tax vs. Acme Educational Society (2010) 326 ITR 146 (Del.)*

ii) *Kanpur Subhash Shiksha Samiti vs. Deputy Commissioner of Income Tax 1, Kanpur [2011] 11ITR (T) 23 (Lucknow) (2011) 11 ITR (T) 23*

iii) *DIT (Exemption) vs. Alarippu (2000) 244 ITR 358 (Del.)*

The relevant circulars issued by CBDT with regard to Sec. 13(1)(d)

i) Investment of funds in an interested person's concerns – Effect of amendment in S.13 (4) by Finance (No. 2) Act, 1971, Circular No. 72, dt. 6-1-1972

ii) Investment of the Trust Funds – Conditions prescribed under Secs. 11(1)(b) and 13(1)(d), Circular No. 335, dt. 13-4-1982 (Clari.)

iii) Investment of Trust Funds – Amendment of proviso to cl (d) of sub-s (1) of S.13 by Finance Act, 1992, Circular No. 636, dt. 31-8-1992

iv) Investment of trust funds – Clarification regarding applicability of Sec. 13(1)(d) from assessment year 1983-84, Circular No. 596, dated 15-3-199.

- **Any income of the trust used or applied directly or indirectly for the benefit of persons referred in section 13(3) – Section 13(1)(c)**

a. Section 13(1)(c) puts an embargo on charitable or religious trusts or institutions when the income or the property of the said trust or institution is applied either directly or indirectly to the benefit of specified persons referred in S.13(3). In such circumstances, the benefit of exemption under Section 11 and 12 will not be available.

b. This provision will be hit only when a benefit goes to a specified person as defined in section 13(3). Benefit means advantage or favour. Therefore, the scope and applicability of this provision depend on the advantage or favour provided by the trust or institution to the specified persons. If payment is made in normal circumstances without any favour, Sec. 13 (1)(c) will not apply.

c. Whether a trust comes under the purview of 'person' as referred to in Sec. 13(1)(c)

This question came up in the case of *Champa Charitable Trust vs. CIT (1995) 214 ITR 764 (Bom)* and the court held that the expression 'person' used in the said provision would include a trust.

d. When the trustee provides his services and time for the trust and for the benefit of the trust, there is no bar under the law to pay salary for such services. This is recognised under the law. Sec. 13(2)(c). What is contemplated in the law is that a reasonable salary has to be paid. This obviously for the reason that the trustee is holding fiduciary relationship with the trust and cannot misuse the funds of the trust by overdrawing salary. If salary paid is unreasonable, then it amounts to doing favour, therefore, hit by Ss. 13(1)(c) and 13(2)(c). Otherwise, there is no bar to pay salary to the trustees.

e. The payment of salary to trustee is well accepted under the following cases:

I. *ACIT vs. Indicula Trust Society (2012) 21 taxman.com 144 (Delhi Trib.)*

II. *DDIT (Exemption) – 2, Hyderabad vs. Society for the Poor and Oppressed (2010) 125 ITD 190 (Hyd.)*

f. The shares received as gift or corpus donation are not attracted by S 13(1)(c)(ii). This was held in the following cases:

a) *Sarladevi Sarabhai Trust No. 13 vs. ITO (1991) 36 ITD 376*

b) *CIT vs. Birla Charity Trust (1988) 170 ITR 150 (Cal.)*

g. In the normal circumstances, the ownership of the asset acquired by the trust or institution should be in the name of the trust or institution. If the title of the asset is in the name of trustee and the control of ownership is with him, then it amounts to violation under S.13(1)(c).

h. When property has not been made exclusively available for the specified person, then section 13 (1) will not apply. It was upheld in the case of *George Educational Medical & Charitable Society vs. Asst. Director of Income Tax (exemption) (2002) 80 ITD 916 (Coch.).*

- **Income for the benefit of the interested persons – Sec 13 (2)**

Section 13(2) specifies following categories of transactions which would be deemed to be used or application of the income or property of the trust for the benefit of excluded persons referred to in section 13(3).

(a) Lending of the income or property of the trust or institutions to any of the specified persons without either adequate security or adequate interest o both – 13(2)(a)

(b) Making available land, building or other property of the trust or institution for the use of the any of the specified persons without charging adequate rent or other compensation – 13(2)(b)

(c) Payment of excessive remuneration to any of the specified persons for services rendered by him to the trust or institutions – 13(2)(c)

(d) Making the services of the trust or institution available to any of the specified persons without adequate remuneration or other compensation – 13(2)(d)

(e) Purchase of shares, securities or other properties for the trust or institutions from any of the specified persons for more than adequate consideration – 13(2)(e)

(f) Sale of shares, securities or other property of the trust or institution to any of the specified persons for less than adequate consideration – 13(2)(f)

(g) Diversion of substantial portion of the income or property of the trust or institution in favour of the specified persons – 13(2)(g)

(h) Investment of the trust funds in any concern in which any of the specified persons has a substantial interest – 13(2)(h)

Conferment of Benefit, Amenity or Perquisite on an Interested Person –

The income of the property of the trust (or institution) shall be deemed to have been used (or applied) in a manner which results (directly or indirectly) in conferring any benefit, amenity or perquisite (whether convertible into money or not) on any interested person, in the following cases:

Where any part of the income or property of the trust or institution is (or continues to be) lent to any interested person for any period during the previous year without either adequate security or adequate interest or both [Sec. 13(2)(a)].

The following judicial ruling in this regard should be noted –

- Where secretary and executive secretary pledged FDRs of trust to raise loans for personal rules without any security or compensation to trust, exemption granted under section 11 – *CIT vs. Ram Samarak NIdhi [2004] 141 Taxman 297 (Delhi).*
- Personal security given by the directors of a company to which assessee-trust had advanced loan can be considered to be adequate security for allowance of exemption under section 11 – *CIT vs. Ram Smarak Nidhi [2004] 141 Taxman (Delhi).*
- Where any amount is paid by way of salary, allowances or otherwise during

the previous year to any specified person out of the resources of the trust for service rendered by that person to such trust and the amount so paid is more than what may be reasonably paid for such services [Sec. 13(2)(c)]. There is no prohibition to remunerate specified person but such remuneration should be commensurate with services rendered by him – *DIT (Exemption) vs. Manav Bharti Child Institute & Child Psychology [2008] 20 SOT 517 (Delhi)* and it should not be unreasonable or excessive – *ITO vs. Human Resource Development & Management Trust (ASBM Trust) [2011] 47 SOT 85 (Cuttack).*

- Where any fund of the trust are (or continue to remain) invested for any period during the previous year in any concern in which any specified person has a substantial interest [Sec. 13(2)(h)]. Where, however, the aggregate of funds of the trust invested in concern in which any specified person has a substantial interest does not exceed 5 per cent of the capital of the concern, exemption under section 11 will not be denied in relation to the application of any income other than the income arising to the trust or institution from such investment [Sec. 13(4)].

- It cannot be said that the concern contemplated by section 13(2)(h) is stranger concern and not a concern in which trust itself is a partner – *CIT vs. Sree Haryana Chandrika Trust [1994] 77 Taxman 137 (Ker.).*

- Contribution of share capital to a firm in an 'investment' made by partner for the purpose of section 13(2)(h) – *CIT vs. Lallubhai Gordhandas Mehta Charitable Trust [1993] 116 CTR (Guj.) 315.*

- Exemption loss to a trust should be limited to undue benefits extended to persons specified in Section 13(3) – Restriction is applicable only to those amounts which have been applied directly or indirectly for the benefits of interested person referred to in section 13(3) and it will nowhere lead to any conclusion that the assessee would lose its charity status. In other words, if a small is to be disallowed that would not disqualify to enjoy the status of charity – *CIT vs. Idicula Trust Society [2012] 21 taxman.com 144 (Delhi-Trib.).*

- The breach of section 13(1)(d) and 13(2)(h) would lead to forfeiture of exemption of income derived from such investment and not the entire income would be subjected to the maximum marginal rate of tax u/s. 164(2). Thus the exemption u/s. 11 is available to the assessee only on the income to the extent the same is derived in conformity of section 11 and applied during the year for such purpose of charitable trust.

6. For the purpose of section 13 the following are specified persons – section 13(3):

a. The author of the trust or founder of the institution;

b. Any person who has made a total contribution (up to the end of the relevant previous year) of an amount exceeding ` 50,000 (substantial contributor);

c. Any member of the HUF where such author or founder is an HUF;

d. Any trustee of the trust or manager (by whatever name called) of the institution;

e. Any relative of such author, founder, person, member, trustee or manager as aforesaid; and

f. Any concern in which any of the persons referred to above has a substantial interest.

CA Himanshu Kishnadwala

Accounts and Audit of Charitable Institutions

1. Introduction

Charitable Institutions enjoy various exemptions and/or incentives under various fiscal laws of the Central Government as well as the State Governments. Generally, such exemptions or incentives are granted subject to compliance with several conditions. One of the important conditions for this is that the Institutions claiming exemption must get its accounts audited.

The focus of this article is to examine the provisions relating to audit of accounts of those Institutions which claim exemptions under section 10(23C) and section 11 of the Income-tax Act, 1961 ('the ITA').

The Institutions claiming such exemption may be a Trust, a Society or a Company registered under section 8 of the Companies Act, 2013 ('the 2013 Act') or section 25 of the erstwhile Companies Act, 1956 ('the 1956 Act') or any other legal entity. For the purpose of this article, such entities have been referred to as 'Institution'.

2. Statutory Provisions for audit

2.1 As per tenth proviso to section 10(23C) of the ITA, the following Institutions claiming exemption under section 10(23C) are required to get its accounts audited when their total income, (without giving effect to the exemption provisions) exceeds the maximum amount not chargeable to tax:

i) Institutions established for charitable purposes and approved by the prescribed authority under section 10(23C)(iv) of the ITA;

ii) Institutions established wholly for public religious purposes or wholly for public religious and charitable purposes and approved by the prescribed authority under section 10(23C)(v) of the ITA;

iii) Institutions existing solely for educational purposes and not for profit under section 10(23C)(vi) of the ITA and Hospitals or other medical Institutions existing solely for philanthropic purposes and not for profit under section 10(23C)(via) of the ITA.

However, if the educational or medical institution is wholly or substantially financed (i.e., more than 50% of the total receipts, including any voluntary contribution) by the Government [Institutions covered under section 10(23C)(iiiab) and section 10(23C)(iiiac) respectively] or where its aggregate annual receipts does not exceed the amount prescribed (currently ` 1 crore) under Rule 2BC of the Income-tax Rules, 1962 ('the IT Rules') [Institutions covered under section 10(23C)(iiiad) and section 10(23C)(iiiae) respectively], then such educational or medical institutions are not required to get its accounts audited.

2.2 As per Rule 16CC of the IT Rules, the audit report of the Institutions described in para 2.1 above is to be in Form No. 10BB.

2.3 In case the Institution claims exemption under section 11 of the ITA, then as per section 12A of the ITA the Institution whose total income, without giving effect to the provisions of section 11 and section 12, exceeds the maximum amount which is not chargeable to tax, is required to get its accounts audited. As per Rule 17B of the IT Rules, the audit report of such an Institution is to be furnished in Form No. 10B.

2.4 For the purpose of determining whether the total income has exceeded the maximum amount not chargeable to tax, contributions made with a specific direction that they shall form part of the corpus of the Institution, are also includible.

2.5 As per section 2(15) of ITA, "Charitable purpose" includes not only relief of the poor, education and medical relief, but also the advancement of other objects of general public utility. However, the advancement of other objects of general public utility shall not be regarded as charitable activity, if it involves the carrying on of any activity in the nature of trade, commerce or business or any activity of rendering any service in relation to any trade, commerce or business, for a cess or a fee or any other consideration and the aggregate receipts from such activity exceeds twenty percent of the total receipts of the Institution. This is irrespective of the fact whether the income earned therefrom is applied for the charitable purpose or otherwise.

3. Accounting System

3.1 As per section 145 of the ITA, the Institution has the option to maintain its books of account either in accordance with cash system or mercantile system of accounting. However, section 128 of the 2013 Act, requires a company to maintain its books of account as per accrual system of accounting. Therefore, an Institution which is a company registered under section 8 of the 2013 Act or section 25 of the 1956 Act, cannot maintain its books of account as per cash system of accounting. However, any non-corporate Institution has the option to maintain its books of account as per cash system of accounting.

3.2 Further, the accounts of the Institution should be prepared in accordance with the generally accepted accounting principles, which includes, keeping distinction between transactions which are of capital and revenue in nature. The balance sheet should therefore summarise assets and liabilities, and the income and expenditure account should enumerate items of income and expenditure.

3.3 In case the Institution receives donation in kind, e.g. books, furniture items, medical equipments, etc., such items are considered as grants in the form of non-monetary assets and accordingly, should be accounted for as per Accounting Standard on Accounting for Government Grants (AS-12), which requires that non-monetary grants should be accounted for at a nominal value (e.g. rupee one).

4. Accounting Standards

The applicability or otherwise of the Accounting Standards would depend on the following:

4.1 In case of a corporate entity: The Institution, in the form of a corporate entity, is governed by the provisions of the 2013 Act. As per the said Act, all companies, including those engaged in charitable activities, are required to prepare its annual accounts as per the accounting standards prescribed under section 133 of 2013 Act read with Rule 7 of the Companies (Accounts) Rules, 2014. By General Circular No. 15/2013 dated 13th September 2013, the Ministry of Corporate Affairs ('MCA') has clarified that till the Standards

of Accounting or any addendum thereto are prescribed by the Central Government in consultation and recommendation of the National Financial Reporting Authority, the Accounting Standards notified under the 1956 Act, i.e., the Standards notified under the Companies (Accounting Standard) Rules, 2006 shall continue to apply. Accordingly, all corporate Charitable Institutions, without exception, have to prepare its annual accounts which are in compliant with the Standards notified under the Companies (Accounting Standard) Rules, 2006. Effective from 1st April 2016, the Central Government *vide* Companies (Accounting Standards) Amendment Rules, 2016 has further amended some of the Accounting Standards. Therefore, in respect of the accounts from financial year 2016-17 onwards, the amended Accounting Standards will be applicable.

In respect of companies with net worth of ` 250 / 500 crore or more, the Central Government has notified separate accounting standards ('the Ind AS') *vide* the Companies (Indian Accounting Standards) Rules, 2015 ('the Rules'). As per the Rules, the Ind AS would be applicable in the phased manner. From Financial Year 2016-17, it would apply *inter-alia* to all companies with net worth of ` 500 crore and above and from Financial Year 2017-18, to the companies with net worth of ` 250 crore and above. Thus, the corporate Charitable Institutions whose net worth is more than the limits of ` 500 crore or ` 250 crores as the case may be, shall have to prepare its accounts based on Ind AS.

4.2 In case of a non-corporate entity

- As per para 3.3 of the Preface to the Statements of Accounting Standards issued by Institute of Chartered Accountants of India ('ICAI'), "Accounting Standards apply in respect of any enterprise (whether organised in corporate, co-operative or other forms) engaged in commercial, industrial or business activities, irrespective of whether it is profit oriented or it is established for charitable or religious purposes. Accounting Standards will not, however, apply to enterprises only carrying on the activities which are not of commercial, industrial or business nature, (e.g., an activity of collecting donations and giving them to flood affected people). Exclusion of an enterprise from the applicability of the Accounting Standards would be permissible only if no part of the activity of such enterprise is commercial, industrial or business in nature. Even if a very small proportion of the activities of an enterprise is considered to be commercial, industrial or business in nature, the Accounting Standards would apply to all its activities including those which are not commercial, industrial or business in nature".

  Thus, if the activity of a non-corporate Institution, whose object, for example, is the advancement of the object of general public utility, involves the carrying on of any activity in the nature of trade, commerce or business or any activity of rendering any service in relation to any trade, commerce or business, then the Accounting Standards issued by the ICAI would be applicable to such non-corporate Institutions.
- In cases where the institution maintains its books of account as per cash system of accounting, such Institution is required to ensure that the provisions of the accounting standards which are applicable in the context of the basis of accounting followed by the Institution, have been complied with.

5. Income Computation and Disclosure Standards ('ICDS')

5.1 The Central Government *vide* Notification No. 32/2015 dated 31st March,

2015 notified ten ICDS under section 145(2) of ITA. These ICDS apply with effect from 1st day of April, 2015, i.e. from Assessment Year 2016-17.

5.2 ICDS applies to all assessees, including Charitable Institutions following the mercantile system of accounting. Thus, where the Institution maintains books of account as per cash system of accounting, ICDS would not be applicable. It is applicable while computing income chargeable under the heads 'Profits and Gains of Business or Profession' or 'Income from Other Sources' under the ITA. ICDS does not affect the manner in which the Institution maintains its books of account.

5.3 Thus, in case of a Trust whose income becomes taxable for not applying eighty five percent of its income towards the charitable objects under section 11(1) of ITA, the principles of ICDS would apply to that portion of income offered to tax under the head "Income from Other Sources". Similarly, where the Trust has earned business income which is more than twenty percent of its total income [as referred to in section 2(15) of the ITA – refer para 2.5 above], then to such portion of the Income which is taxable under the head 'Profits and Gains of Business or Profession', ICDS would be applicable.

5.4 The taxable income after applying ICDS may vary since ICDS requires the assessee to treat certain items of receipts and payments in a particular manner. For example:

- The Institution which accounts for interest income on due basis would be required to compute the same on accrual basis for income tax purpose;
- As per ICDS the recognition of grant cannot be postponed beyond the date of actual receipt (irrespective of whether the conditions attaching to the grant have been or will be fulfilled);
- Grants relating to a depreciable fixed asset should be deducted from its actual cost or written down value of block of assets;

6. Applicability of Standards on Auditing

6.1 The nature of audit of Institutions mentioned above is similar to that of audit of general purpose financial statements. Hence, the audit procedures as prescribed under Standards on Audit ('SA') issued by the ICAI shall also be applicable. Thus, the auditor is expected to use his professional skill and expertise and apply such audit tests as the circumstances of the case may require, considering the contents of the audit report. Special attention is drawn to the following:

- **SA-230 – Audit Documentation:** An audit under the ITA is also an Attestation Engagement and thus is covered by the Statement of Peer Review and adequate documentation for the same is necessary.
- **SA-250 – Consideration of Laws and Regulations in an Audit of Financial Statements:** Depending on its constitution, the laws applicable to the Institutions would differ with each other. This SA deals with the auditor's responsibility to consider laws and regulations while conducting audit of the Institution. Though the auditor is not required to verify or certify about the compliance with the provisions of other laws, if such non-compliance affects the truth and fairness of the Accounts, then it is the duty of the auditor to verify the compliance thereof.
- **SA-315 – Identifying and Assessing the Risk of Material mis-statement** Many times the Charitable Institutions are run by the honourary persons who lack the required knowledge and /

or experience to keep and maintain accounts and other records. Therefore, the controls and checks necessary to run the Institution may not be in place or may be inadequate. This SA deals with auditor's responsibility to identify and assess the risk of material mis-statement in the financial statements, through understanding the entity and its environment, including the entity's internal control.

- **SA-320 – Materiality in Planning and Performing an Audit:** This Standard deals with the auditor's responsibility to apply the concept of materiality in planning and performing an audit of financial statements. For the reasons stated as above and in order to mitigate the risk of material mis-statement, this Standard assumes more importance while conducting the audit of the Institutions.

- **S-500 – Audit Evidence:** Many a times the Charitable Institutions do not have the formal system of record keeping which makes the task of the auditor more difficult. Therefore, it is important that the auditor applies the procedure as given in this Standard.

- **SA-600 – Using the Work of another Auditor:** If the Institution is constituted under other laws, which in turn also provides for the statutory audit, then the auditor doing the audit under the ITA would be entitled to rely on the report of the statutory auditor, to such extent and in such manner as provided in the Standard.

6.2 ICAI has also issued 'Guidance Note on Audit of Public Charitable Institutions under the Income-tax Act, 1961' The auditor of the Institution is also expected to follow the same while discharging the attest function.

7. Audit Report

7.1 In its audit report (in Form 10B or Form 10BB), the auditor is required to:

- State whether the Balance Sheet and Income and Expenditure account ('the Financial Statements') are in agreement with the books of account maintained;

- Express his opinion as to: (i) the maintenance of books of account; and (ii) whether the financial statements give true and fair view in the case of Balance Sheet, about its state of affairs and in the case of Income and Expenditure account, about the surplus or deficit for the year;

- Annex particulars as prescribed. With respect to the same, although there is no specific requirement to certify the correctness of the particulars, since the auditor is required to put his signature at the end of the particulars, it implies that the auditor is taking the responsibility for verifying the correctness of the particulars given in the Annexure;

7.2 With reference to the Annexure, the auditor has to verify following particulars:

- Application of income towards the objects of the Institution;

- Accumulation of income and its investment and its subsequent utilization;

- Investments held by the Institution in violation of section 11(5) of the ITA, including where the Institution is covered under section 11 of the ITA, the particulars of those investments held in concerns in which persons referred to in section 13(3) have a substantial interest.

7.3 In case of audit carried out under section 10(23C) following additional information is to be verified:

- Business, if any, carried on is incidental to the attainment of the objects of the Institution or not;
- Any sum paid, out of the accumulated income, to the Institutions registered under section 12AA;
- Particulars regarding anonymous donation.

7.4 Similarly, in case of audit under section 12A(1)(b) following additional information is to be furnished:

- Income eligible for exemption under section 11(1)(c);
- Application or use of income or property for the benefit of persons referred to in section 13(3);

With reference to the persons covered u/s. 13(3), the CBDT has clarified that the auditor can accept, as correct, the list of specified persons given by the managing trustees and base his report on the strength of this certificate.

7.5 While preparing his report, the auditor should also consider the following:

- In terms of the 'Announcement' by ICAI in January 1994, where the Institution is not statutorily required to prepare and present its financial statements on accrual basis, and the financial statements have been prepared on a basis other than 'accrual', e.g., cash basis of accounting, the auditor is required to describe in his audit report, the basis of accounting followed, without necessarily making it a subject matter of a qualification. Further, the auditor is required to examine whether those provisions of the accounting standards which are applicable in the context of the basis of accounting followed by the Institution, have been complied with or not and consider making suitable disclosures / qualifications in his audit report.
- **SA-700, SA-705 and SA-706:** - Auditor's Report: These three Standards deal with form and content of the auditor's report. Depending on whether the auditor expresses unmodified or modified opinion or whether the report includes paragraph on Emphasis of Matter, the Standard explains how the form and content of the Report are affected. While conducting the audit of the Institutions, the auditor may be obliged to use a layout or wording in the auditor's report that differs from that described in these SA. In such circumstances the SA provides that if each of the elements identified in paragraph 43(a)-(i) of SA 700 are included in the auditor's report, the auditor's report can refer to SA and it would be considered that the auditor has complied with the requirements of SAs, even when the layout and wording used in the auditor's report are specified by legal or regulatory reporting requirements.
- The prescribed form of the report requires the auditor to state the reasons for any qualification in the report or for any negative answer therein.

7.6 With respect to charitable and religious trusts, CBDT has issued following clarifications:

- The following would amount to application of income towards the objects of the Institution:
  - Repayment of loan originally taken by the Institution to fulfil its objects;
  - In case of the educational trust, loan scholarship granted;

  - Utilisation of capital gains earned in acquisition of new capital assets.

- Donation by one Institution to another would amount to application of income by the donor Institution, even though the donee Institution has not spent the donation during the year of receipt.

- In case the Institution desires to accumulate or sets apart more than 15% of its income, in order to avoid taxation under section 11(1)(a) it is essential amongst others that, it invests the entire amount of the sum so accumulated (including the exempted portion) in the modes specified under section 11(5).

7.7 Based on the various judicial decisions the auditor should also keep in mind the following:

- Application of income towards the objects of the Institution would include:

  - Capital expenditure incurred, including the acquisition of fixed assets, by the Institution

  - Payment of taxes

- 15% of the income which automatically qualifies for exemption has to be worked out on the gross income before reducing the amount applied for charitable purposes during the year.

- Condition regarding application of income to corpus donation does not apply.

- Repayment of loan scholarship cannot constitute income of the Institution, even if it had claimed as an application of income, when such loan scholarship was granted.

7.8 The auditor should also bear in mind that the provisions of section 14A have no implication on income of the Institution (which is covered under Chapter III of the ITA) as the said section applies only to computation of total income under Chapter IV of the ITA.

8. Management Representation

8.1 In view of the peculiar nature of the Institution, the accounting system and procedures prevailing in the Institution may widely differ from normally found in the business organisation. For example, donations in kind may be received defying precise quantitative and monetary values; the commitments both as to donations or grants already offered, may be doubtful or lack precise knowledge. In such circumstances, the auditor, apart from applying his usual checks and scrutiny, will have to rely on the management representation.

8.2 Similarly, the management representation may be obtained with respect to the following transactions entered into with the persons specified u/s. 13(3):

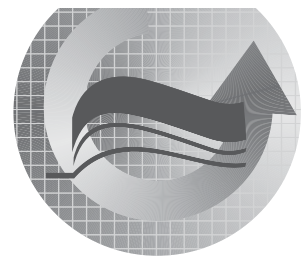
- Services, including medical or educational services, of the Institution made available to them;

- Payment of salary and / or allowances;

- Purchase or sale of shares, securities or other property;

- Diversion of income or property;

- Application of income or property for the benefit of the specified persons.



Mandar Vaidya, *Advocate*

Exemptions u/ss. 10(23C)/10(21)

Section 10 of the Income-tax Act, enlists those kinds of incomes which would not form part of the total income. The incomes on which deduction is provided under Chapter VI-A, do enter the stream of computation and after having entered the stream of computation, the deductions are granted under the relevant sections of Chapter VI-A. This difference in these two incomes results in different tax implications. For e.g., section 14A would apply to incomes covered under section 10 because such incomes do not form part of the total income (to which section 14A is attracted). But section 14A will have no application to incomes under the relevant sections of Chapter VI-A because such incomes form part of the total income.

Secyion 10(21) of the IT Act, 1961, provides for grant of exemption to any income of a scientific research association approved for the time being for the purposes of s.35(1)(ii) of the Act which is applied solely to the purposes of that association. Further certain donations to such associations would also be eligible for deduction in the hands of donors, u/s. 80GGA. Earlier, the associations which were engaged in undertaking research in social science or statistical research were not covered by the provisions of existing section 35(1)(iii). Such research associations were also not entitled to exemption in respect of their income u/s. 10(21). Therefore section 35(1)(iii) of the Act was amended by Finance Act, 2010 so as to include an approved research association which has as its object undertaking research in social science or statistical research. Section 10(21) of the Act was also correspondingly amended so as to provide exemption to such associations in respect of their income. An amendment to include allow ability of deductions for donations made to such associations was also made {section 80GGA (1)(aa)}. The provisions of Sections 11(2) & 11(3) apply to an exemption u/s.10(21). The second proviso to section 10(21) states that the exemption shall not be available to any income of the scientific research association, being profits and gains of business, unless the business is incidental to the attainment of its objectives and separate books of account are maintained by it in respect of such business. And finally the fourth proviso provides for withdrawal of exemption if the conditions are not complied with.

Procedure for Application – Rule 5C of the Income-tax Rules

An application for approval shall be made in the following forms:

(i) Under clause (ii) or clause (iii) of sub-section (1) of section 35 by a research association in duplicate in Form No. 3CF-I. Annexure to the application in Form No. 3CF-I shall be filled out if the association claims exemption under clause (21) of section 10 of the Income-tax Act.

(ii) Under clause (ii) or clause (iii) of sub-section (1) of section 35 by a university, college or

other institution in duplicate in Form No. 3CF-II:

- The application shall be made, at any time during the financial year immediately preceding the assessment year from which the approval is sought, to the Commissioner of Income-tax or the Director of Income-tax having jurisdiction over the applicant.
- The applicant shall send a copy of the application in Form No. 3CF-I or, as the case may be, Form No. 3CF-II to Member (IT), Central Board of Direct Taxes accompanied by the acknowledgement receipt as evidence of having furnished the application Form in duplicate in the office of the Commissioner of Income-tax or the Director of Income-tax having jurisdiction over the case.
- The period of one year, as specified in the fourth proviso to sub-section (1) of section 35, before the expiry of which approval is to be granted or the application is to be rejected by the Central Government shall be reckoned from the end of the month in which the application Form from the applicant for approval is received in the office of Member (IT), Central Board of Direct Taxes.
- If any defect is noticed in the application in Form No. 3CF-I or Form No. 3CF-II or if any relevant document is not attached thereto, the Commissioner of Income-tax or, as the case may be, the Director of Income-tax shall serve a deficiency letter on the applicant, before the expiry of one month from the date of receipt of the application Form in his office.
- The applicant shall remove the deficiency within a period of fifteen days from the date of service of the deficiency letter or within such further period which, on an application made in this behalf may be extended, so however, that the total period for removal of deficiency does not exceed thirty days, and if the applicant fails to remove the deficiency within the period of thirty days so allowed, the Commissioner of Income-tax or, as the case may be, the Director of Income-tax shall send his recommendation for treating the application as invalid to the Member (IT), Central Board of Direct Taxes.

The Central Government, if satisfied, may pass an order treating the application as invalid.

- If the application Form is complete in all respects, the Commissioner of Income-tax or, as the case may be, the Director of Income-tax, may make such inquiry as he may consider necessary regarding the genuineness of the activity of the association or university or college or other institution and send his recommendation to the Member (IT) for grant of approval or rejection of the application before the expiry of the period of three months to be reckoned from the end of the month in which the application Form was received in his office.
- The Central Government may before granting approval under clause (ii) or clause (iii) shall call for such documents or information from the applicant as it may consider necessary and may get any inquiry made for verification of the genuineness of the activity of the applicant.
- The Central Government may, under sub-section (1) of section 35, issue the notification to be published in the Official Gazette granting approval to the association or university or college or other institution or for reasons to be recorded in writing reject the application.
- No order treating the application as invalid or rejecting the application or withdrawing

the approval, shall be passed without giving a reasonable opportunity of being heard to the research association or university or college or other institution.

– A copy of the order invalidating or rejecting the application or withdrawing the approval shall be communicated to the applicant, the Assessing Officer and the Commissioner of Income-tax or, as the case may be, the Director of Income-tax.

Section 10(23C) – Broadly, under section 10(23C), an Institution/Trust is allowed tax exemption (subject certain stiff conditions) if the said organisation is engaged in educational service, charitable activity, public religious purpose or rendering hospital services.

Up to the Assessment Year 1998-99, section 10(22), was providing exemption from taxability of income of an educational institution. It provided that income of an educational institution was exempt, if it was existing solely for educational purposes and not for purposes of profit. Section 10(22) stipulated no condition(s) for granting exemption to an educational institution. There was no monitoring by any Government authority. Earlier (Prior to Finance Act, 2001), an organisation registered u/s. 10 (22) were not subjected to conditions as specified u/ss. 11, 12, 12A and 13. The organization registered u/s. 10(23C) were not required to file Income-tax return. Further the clause of spending at least 75% was also not applicable The Finance Act, 2001 imposed the condition of spending at least 75% of income, which was enhanced by Finance Act, 2002, to be at least 85%. The Finance Act, 2002 has further inserted Section 139(4C) requiring such institution to file returns as per the provisions of Section 139(1). Reference in this regard can be made to circulars of CBDT Nos. 712, dated July 25, 1995, 372, dated December 28, 1983 and 772, dated December 23, 1998.

Section 10(23C) was amended with effect from April 1, 1999 and simultaneously section 10(22) was omitted. However, sub-clauses (iiiab) and (iiiad) of section 10(23C), provided exemption to educational institutions in the same manner as was available earlier under section 10(22). Above sub-clauses were applicable to educational institutions substantially financed by the Government and to educational institutions having annual receipts up to ` 1 crore. In respect of other educational institutions, however, exemption was available under sub-clause (vi) of section 10(23C). With reference to above sub-clause, certain conditions were provided with a view to monitor activities of such educational institutions. Second proviso to above section specifically provided for power of the Central Government to call for any information in order to satisfy itself about the genuineness of the activities of the educational institution. In this regard, reference can be made to circular of CBDT No. 779, dated September 14, 1999. With a view to monitor, it was required that approval of the prescribed authority is to be obtained. In order to avail exemption by an educational institution under section 10(23C)(vi), following conditions are provided :

(a) Educational institution exists solely for educational purposes;

(b) It is not for purposes of profit; and

(c) It is approved by the prescribed authority.

Further, provisos to above section provide certain conditions, such as, income is to be applied up to 85 per cent of receipts towards educational purposes; in case accumulation is to be made in excess of 15 per cent, same would be only for a period of five years; investment of funds has to be in the modes prescribed in section 11(5); and books of account have to be maintained and audited and also report in the prescribed format is to be submitted with the return of income. Section 11 provides for exemption of income of a charitable institution. These are general provisions applicable to every charitable institution, including an educational institution. Conditions provided for exemption under section 11 are that 85 per cent of receipt should be spent for charitable purposes, accumulation in excess of 15 per cent has to be made for the purpose of the institution for a period of five years, investment has to be

made in the modes prescribed in section 11(5); and accounts have to be audited and report has to be submitted in the prescribed form. Section 13 further provides that exemption under section 11 will not be available in case any part of income has been used for the personal purpose or benefit of a person having interest in the activities of the charitable society including its founder, substantial contributor, trustees, etc.

So one can see that section 10(23C)(vi), provides substantially the same conditions for an educational institution as are applicable to a Charitable Institution u/s.11. A further condition is inserted by Finance Act, 2014 {A.Y. 2015-16} in section 11(6) viz. where an asset is acquired by the Trust and its cost is claimed as an application of income, depreciation will not be allowable on the same asset. The same is inserted in section 10(23C) by way of an 'Explanation' by the same Act.

Section 10(23C)(vi), however, further provides for application of its income to the extent of 85 per cent, which condition was absent in the earlier section 10(22). As stated above, in order to avail exemption by an educational institution under section 10(23C)(vi) it should be solely for the purpose of education and it should apply at least 85 per cent of its receipts during the year for educational purposes and it should be not for the purpose of profit.

As per the fifteenth proviso to section 10(23C), inserted by Finance Act, 2006, anonymous donations referred to in section 115BBC shall be included in the hands of the trust/organisation. However section 10(23C), unlike section 11, makes no difference between a corpus donation and voluntary donation.

The Finance Act, 2010 inserted a proviso to section 2(15), providing that the advancement of any other object of general public utility shall not be a charitable purpose, if it involves the carrying on of any activity in the nature of trade, commerce or business, or any activity of rendering any service in relation to any trade, commerce or business, for a cess or fee or any other consideration, irrespective of the nature of use or application, or retention, of the income from such activity. The seventeenth proviso makes this proviso to section 2(15), applicable to trust/institutions covered under clauses (iv) & (v) of section 10(23C). However this proviso will not apply to institutions covered under clause (iiiad) & (iiiae) viz. institutions without approval of the prescribed authority to whom the limit of ` 1 crore applies.

Procedure for obtaining registration

Under Rule 2CA any University or other Educational Institution whose aggregate annual receipts exceed ` 1 crore referred to in sub-clause (vi) of section 10(23C) is required to file an application for approval in Form No. 56D to the Chief Commissioner or Director General of Income Tax. For this purpose, Chief Commissioner or Director General means the Chief Commissioner or Director General whom the Central Board of Direct Taxes may, authorise to act as prescribed authority for the purposes of sub-clause (iv) or sub-clause (v) of clause (23C) of section 10 in relation to any Fund or Trust or Institution.

Before approving any University or other Educational, Chief Commissioner or Director General of Institution, may call for such documents (including audited annual accounts) or information, as the case may be, as it thinks necessary in order to satisfy itself about the genuineness of the activities and the prescribed authority may also make such enquires as it deems necessary in this behalf.

An order granting registration or refusing registration should be passed within 12 months from the end of the month in which the application is received by prescribed authority. *[Ninth Proviso to section 10(23C) w.e.f. 13-7-2006].*

If the income of Educational Institution referred u/s. 10(23C)(vi) exceeds maximum amount which is not chargeable to tax in any previous year then it shall get its accounts audited in respect of that year and furnish the audit report in form 10BB, along with the return of income. [Tenth Proviso to section 10(23C)]. Where Educational Institution referred u/s. 10(23C)(vi) does not apply its income during the year and accumulates it, any payment

or credit of receipt out of such accumulation to any trust or institution registered u/s. 12AA or to any institution registered u/s. 10(23C)(iv),(v), (vi), (via) shall not be treated as application of income. [12th Proviso to section 10(23C)].

An Educational Institution referred u/s. 10(23C)(vi), which did not apply 85% of its income as per clause (via) of third proviso to section u/s. 10(23C) or does not invest as per clause (b) to third proviso to section 10(23C) or the activities of such Educational Institution are not found genuine or are not being carried out in accordance with all or any of the conditions subject to which it was notified and approved, then the Prescribed Authority may at any time after giving reasonable opportunity of being heard may rescind the notification or withdraw the approval. [Thirteenth Proviso to section 10(23C)].

Now lets see the scope and meaning of some terms which are relevant for the purpose of studying the provisions of section 10(23C) viz. 'Education', 'Solely for the purpose of education', 'Not for the purpose of profit', 'Application of income'.

The term 'Education' has not been specifically defined in the Act. Commonly, it has been understood that an Institution imparting education by way of classroom courses in schools, colleges, etc., including courses for professionals, lectureships, scholarships, fellowships and readerships and also grants in respect of researches, prized essays and other academic rewards is for promotion of education. The Apex Court in *Sole Trustee, Loka Shikshana Trust vs. CIT [1975] 101 ITR 234 (SC)* observed as follows, while interpreting the expression 'education' in section 2(15).

"The sense in which the word 'education' has been used in section 2(15) the systematic instruction, schooling or training given to the young is preparation for the work of life. It also connotes the whole course of scholastic instruction which a person has received. The word 'education' has not been used in that wide and extended sense, according to which every acquisition of further knowledge constitutes education. According to this wide and extended sense, travelling is education, because as a result of travelling you acquire fresh knowledge. Likewise, if you read newspapers and magazines, see pictures, visit art galleries, museums and zoos, you thereby add to your knowledge. Again, when you grow up and have dealings with other people, some of whom are not straight, you learn by experience and thus add to your knowledge of the ways of the world. If you are not careful, your wallet is liable to be stolen or you are liable to be cheated by some unscrupulous person. The thief who removes your wallet and the swindler who cheats you teach you a lesson and in the process make you wiser though poorer. If you visit a night club, you get acquainted with and add to your knowledge about some of the not much revealed realities and mysteries of life. All this in a way is education in the great school of life. But that is not the sense in which the word 'education' is used in clause (15) of section 2. What education connotes in that clause is the process of training and developing the knowledge, skill, mind and character of students by normal schooling." (p. 241).

Taking cue from the above exposition of law, the Hon'ble Tribunal recently held that coaching classes providing specific training are not eligible u/s. 10(23C) since such coaching does not amount to coaching in normal schools *{See; Information Systems Audit & Control Association of India {2016} 46 ITR (Trib.) 665 (Chennai)}*.

The term 'solely for the purpose of education' has also come up for discussion before the Courts in certain cases. In this regard also, the Courts have taken a common man's approach depending upon the facts and circumstances of each case and has taken a view that wherever receipts/income are being spent only for educational purposes, society is solely for educational purposes. In a case, however, only a small portion of income of Trust was spent for educational purpose leaving a huge portion thereof for other charitable purposes and a part of income was also spent on religious purposes, therein it was held that Trust was not existing solely for educational purpose so as to

qualify for exemption under section 10(22) – *Sri Rao Bahudur A. K. D. Dharmaraja Education Charity Trust vs. CIT [1990] 182 ITR 80/[1989] 47 Taxman 441 (Mad.).* In another case where memorandum of an educational society provided for managing other allied or ancillary institutions also including an automobile workshop, driving school and printing press, etc., and it was provided that, if need be these ancillary institutions can be run on commercial basis in order to make them self-supporting, it was held by the Madras High Court that the clause of the memorandum providing to run these ancillary institutions on commercial basis was only to make them self-supporting and the intention was to run them on a no profit no loss basis and, accordingly, this excluded the idea of any intention to earn profit by establishing such institution and, therefore, the society was solely for the purpose of education and not for the purpose of earning profit. *CIT vs. Bimetal Bearings Ltd. [1985] 152 ITR 85/[1984] 16 Taxman 235 (Mad.).* However this position may not apply now wholly with the insertion of the proviso to section 2(15) and corresponding insertion of seventeenth proviso to section 10(23C).

In the case of *CIT vs. Vidya Vikas Vihar [2004] 265 ITR 489 (Bom.),* it was held that if an educational institution as per its objects undertakes construction of houses for poor out of its surplus income and profit earned therefrom is also to be used solely for the purpose of promoting education, it cannot be said that institution is not solely for the purpose of education and, accordingly, it was held to be eligible for exemption.

The term "not for the purpose of profit" has also been considered by the Courts in certain cases. It has been observed that overall facts and circumstances of each case have to be considered in order to decide whether institution is for the purpose of profit or not. In the case of *Ereaut vs. Girl's Public Day School Trust Ltd. [1930] 15 TC 529 (HL)* in spite of the facts that the society had issued preference shares to generate funds for the purpose of establishing the school and dividend was paid on preference shares, the House of Lords came to the conclusion that issue of preference shares and payment of dividend was only a method of raising funds for the purpose of funding the charitable religious organisation. The dominant purpose of the institution was to run school as a charity. The purpose of making a profit was completely a subsidiary purpose. Accordingly, the institution was not for the purpose of making profit. Applying the above test, it has been held by the Andhra Pradesh High Court in the case of *Governing Body of Rangaraya Medical College vs. ITO [1979] 117 ITR 284, 287* that where no finding was recorded that any surplus arising from the operations of the institution was distributed by way of profit to any individuals, the assessee-trust, the sole object of which was managing and maintaining the medical college, was an educational institution without any motive of private or personal profit. It was further held in the above case that merely because immovable properties had not been formally vested in the society, it would not be in any manner, deprived of its character of an educational institution existing solely for the purpose of educational purpose.

However, in the case of *Dharmaraja Educational Charity Trust (supra)*, it has been held that where only a small portion has been spent for charitable purpose it would not qualify for exemption as educational institution under section 10(22). Further, in the case of *CIT vs. Delhi Kannada Education Society [2000] 246 ITR 731/113 Taxman 503,* the Delhi High Court held that merely for the reason that middle and higher secondary schools were being run at profit so as to subsidise the primary school, it would not lose the exemption.

The term 'application of income' has also been repeatedly considered by the Courts and it has been held by the Courts that application of income is not the same as spending {See: *CIT vs. Trustees of H.E.H. the Nizam's Charitable Trust [1981] 131 ITR 497/7 Taxman 178 (AP).; CIT vs. Radhaswami Satsang Sabha [1954] 25 ITR 472 (All.).; CIT vs. St. George Forane Church [1988] 170 ITR 62/36 Taxman 42 (Ker.).*}

Expenditure incurred for capital purposes including construction of a building for charitable

purpose and also repayment of loan borrowed for the purpose of construction of building would also be considered as application of income for charitable purposes and would, accordingly, qualify for exemption. *{Satya Vijay Patel Hindu Dharamshala Trust vs. CIT [1972] 86 ITR 683 (Guj.); CIT vs. St. George Forane Church [1988] 170 ITR 62/36 Taxman 42 (Ker.)*

In connection with exemption of income in the cases of educational institutions broadly following controversies have arisen for the reason that exemption has been refused by the Assessing Officer's or approval required under section 10(23C)(vi) has been rejected on the basis of these contentions :–

(a) Exemption is available to educational institution and not to the trust/society running the educational institution.

(b) Objects of Trust/Society include other objects also and, therefore, it is not solely for educational purposes.

(c) Activities have resulted in surplus and, therefore, it cannot be said that Society is being run not for the purpose of profit.

These issues have arisen for consideration before the Courts in a number of cases and the Courts have been taking the view that exemption is available in respect of income of educational institution and it is immaterial whether exemption is being claimed in the assessment of educational institution, i.e., school or college or in case of a society running the educational institution. Similarly, as regards second controversy, the Courts have taken the view that the educational institution for which exemption is being claimed should be solely for the purpose of education. It may be that there are other charitable objects also being carried on by the same assessee. In such a case, exemption is not available in respect of receipts from other objects. It has also been the view of the Courts that it would make no difference if there are objects other than education also in the memorandum, but, in fact, only object of education is being pursued by the assessee-society. Similarly, as regards the third controversy regarding surplus of income also, the Courts in number of decisions have observed that exemption will not be denied simply for the reason that there has been surplus from the running of educational institution in case same is used for educational purposes only. In fact, the Supreme Court in the case of *Addl. CIT vs. Surat Art Silk & Cloth Mfrs. Association [1980] 121 ITR 1 (SC)* observed that ".....where the predominant object of the activity is to carry out the charitable purpose and not to earn profit, it would not lose its character of a charitable purpose merely because some profit arises from the activity. The exclusionary clause does not require that the activity must be carried on in such a manner that it does not result in any profit. It would indeed be difficult for persons in charge of a trust or institution to so carry on the activity that the expenditures balances the income and there is no resulting profit. That would not only be difficult of practical realisation but would also reflect unsound principle of management......"

Further, the Hon'ble Supreme Court in the case of *Aditanar Educational Institution vs. Addl. CIT [1997] 224 ITR 310/90 Taxman 528, 534* observed that "......We may state that the language of section 10(22) is plain and clear and the availability of the exemption should be evaluated each year to find out whether the institution existed during the relevant year solely for educational purposes and not for the purposes of profit. After meeting the expenditure, if any surplus results incidentally from the activities lawfully carried on by the educational institution, it will not cease to be one existing solely for educational purposes, since the object is not one to make profit. The decisive or acid test is whether on an overall view of the matter, the object is to make profit....."

These issues have been discussed by the High Court of Calcutta in the case of *Birla Vidhya Vihar Trust vs. CIT [1982] 136 ITR 445.* In the above case, the High Court had also reproduced a circular of the CBDT No. F. No. 194/16-17II(AI), wherein the CBDT had, in fact, expressed its view in respect of all the controversies mentioned above after taking note of the fact that a number of instances have come to the notice of the Board that exemptions

were not being allowed to educational institutions and hospitals under sections 10(22) and 10(22A). It was clarified that an educational institution may be owned by the Trust or Society. Further, where all the objects of the Trust are educational and the surplus is used only for educational purposes, it cannot be said that institution was not existing solely for educational purposes and for the purpose of profit. Further, it was stated that if surplus can be used for non-educational purposes, then only it could be said that institution is not existing solely for educational purposes. If profit of an educational institution can be diverted for the personal use of the proprietor, then income of the educational institution will be subject to tax.

In regard to the matter, it would also be relevant to refer to the decision of the Supreme Court in the case of *American Hotel & Lodging Association, Educational Institute vs. CBDT [2008] 301 ITR 86 (SC).* In the above case, the issue that came up before the Supreme Court was also regarding approval of an educational institution under section 10(23C)(vi). The Supreme Court analysed the relevant provisions quite in detail and held that at the stage of granting prior approval scope of the authority is restricted to examine whether the institution has the necessary stipulation for the compliance of the conditions. Actual compliance of the conditions has to be examined subsequently. Accordingly, at the time of granting the approval, the authority has to satisfy that institution existed solely for educational purposes and not for profit. The questions regarding application of income, accumulation of income or investments in specified assets, etc., have to be examined at the time of assessment and in case the institutions do not fulfil the condition, exemption can be denied and approval earlier granted can be withdrawn. In the light of aforesaid decision of the Supreme Court, approval in terms of section 10(23C)(vi) should be granted considering the objects of the institutions.

It may be added that legal position discussed hereinabove in the context of educational institutions is equally applicable in respect of hospitals and other institutions carrying on activities solely for philanthropic purposes, to which institutions provisions of section 10(23C)(iiiae) or 10(23C)(via) are applicable.

Recently the CBDT came out with a Circular being no. 14/2015 dated 17th August 2015. The gist of the circular is as follows:

1. Scope of enquiry while granting approval

a) Reference is made to the decision of Hon'ble Supreme Court in case of *American Hotel and Lodging Association Educational Institute vs. CBDT [301 ITR 86](2008)* in which it has been held that at the time of granting approval u/s. 10(23C)(vi), the prescribed authority is to be satisfied that the institution existed during the relevant year solely for educational purposes and not for profit. Once the prescribed authority is satisfied about fulfilment of this criteria i.e. the threshold pre-condition of actual existence of an educational institution under section 10(23C)(vi), it would not be justifiable, in denying approval on other grounds, especially where the compliance depends on events that have not taken place on the date on which the application for grant of approval has been made.

b) However, the prescribed authority is eligible to grant approval u/s. 10(23C)(vi), subject to such terms and conditions as deemed necessary including those falling within the framework of various Provisos to the said clause of section 10. It has also been clarified in the said judgment that the compliance of prescribed conditions can be gauged while monitoring the case and in case of any breach thereof, the approval can be withdrawn. It is, therefore, clarified that the principle laid down by the Apex Court in American Hotels case (supra) must be followed while considering the applications filed seeking approval for exemption u/s. 10(23C)(vi).

2. Necessity for registration u/s. 12AA while seeking approval /claiming exemption u/s. 10(23C)(vi)

– Section 10(23C)(vi) does not prescribe any stipulation which makes registration u/s. 12AA a mandatory pre or post condition. In fact, provisions of section 11 and 10(23C) are two parallel regimes and operate independently in their respective realms although some of the compliance criteria may be common to both. Hence obtaining prior registration before granting approval u/s. 10(23C) cannot be insisted upon.

– However, in case of a Trust or an Institution having obtained registration u/s. 12AA as well as approval u/s. 10(23C)(vi), if registration is withdrawn at some point of time due to certain adverse findings, the withdrawal of approval u/s. 10(23C)(vi) shall not be automatic but will depend upon whether these adverse findings also impact the conditions necessary to keep approval u/s. 10(23C)(vi) alive.

3. Generation of surplus out of gross receipts

Mere generation of surplus cannot be a basis for rejection of application u/s. 10(23C)(vi) on the ground that it amounts to an activity of the nature of profit making. In fact, the third Proviso to the said clause clearly provides that accumulation of income is permissible subject to the manner prescribed therein provided such accumulation is to be applied "wholly and exclusively to the objects for which it is established". Hence, it is clarified that mere generation of surplus by educational institution from year to year cannot be a basis for rejection of application u/s. 10(23C)(vi) if it is used for educational purposes unless the accumulation is contrary to the manner prescribed under law.

4. Collection of amounts under different heads of fee from students

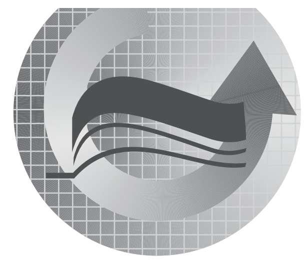
In some cases, collection of small amounts from students by way of application fee, examination fee, fee for issuing transfer certificate, subscription fee for library etc. is being treated by some Assessing Officers as profit making activity resulting in denial of exemption u/s. 10(23C)(vi). Collection of small and reasonable amounts under different heads of fee, which are essentially in the nature of fee connected with imparting education and do not violate any Central or State regulation does not, in general, represent a profit making activity. Hence, there is no justification for treating the charging of small amounts under different heads of fee as profit making activity unless the amount in the nature of 'capitation fee' is charged directly or indirectly.

5. Impact of extraordinary powers of the Managing Trustees to appoint remove or nominate other trustees

– Doubt has been expressed whether extraordinary powers to the Managing Trustees to appoint or remove other trustees and also to nominate their successor affect the nature of charitable activity of the Trust and whether in such an eventuality, exemption can be denied.

- There is no provision under the Act which calls for denial of exemption merely on account of appointment or removal of trustees. Although answer to such a situation would normally depend on the factual implication of such arrangement, the same should generally not be a ground for denying exemption unless the nature of activities of the trust or institution get changed or modified or no longer remain to exist 'solely for educational purpose and not for purposes of profit'. Hence denial of exemption would not be justifiable only on the ground of induction of new trustees or removal of existing ones.

6. Similar principles would also apply to cases covered u/s. 10(23C)(via) of the Act.



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Principles of Mutuality vis-a-vis Charitable Trust

Introduction

A mutual Society is an organisation, where a group of persons comes together for the benefit of the members of the association or Society so formed. Another distinct feature of a mutual Society is that such members have the right to claim the benefit from that society/ association. Such societies are not considered as charitable organisations. Therefore, they cannot be registered under Section 12A and also cannot claim exemption under Section 11.

However, income generated from such societies are not subject to tax under principles of mutuality. As it is settled law that income tax authorities cannot assess all receipts. They can assess only those receipts that amounts to income.

1. Principles of mutuality

In order to ascertain the applicability of the principles of mutuality to a charitable trust or institution, it is necessary to first understand the meaning of principles of mutuality.

If the contributors to associations as well as the participants in the surplus arising out of the business carried out by the association happen to be the same, such an association is known as mutual association and the income from the same will not fall within the ambit of the charging provision of Section 4 on the principles of mutuality as enunciated in the decision of *Style vs. New York Life Insurance Company (1889) 2TC 460(HL),* according to which no one can trade with himself. Thus where persons engage themselves in mutual activities and there remains an excess of receipts over expenses, such excess is not taxable and is to be regarded as merely a surplus having no revenue quality.

In *CIT vs. Merchant Navy Club (1974)96 ITR 261 (AP),* it was observed that no person can trade with himself and make an assessable profit. If instead of one person, more than one combine themselves into a distinct and separate legal entity, or the purpose of rendering services to themselves or for the supply of refreshments, beverages, entertainment etc., by charging themselves, the resulting surplus is not assessable to tax if the surplus is to be refunded to the members. The contributors to the common fund and participators in the surplus must be an identical body. That does not mean that each member should contribute to the common fund or that each member should participate in the surplus or get back from the surplus precisely what he has paid. What is required is that the members as a class must be able to participate in the surplus. It is immaterial whether the surplus is paid back to the members in cash or is put to reserve with the club for its development and for providing better amenities to its members. When a body of individuals is incorporated into a Company formed into a registered society, what is essential is that it should not have dealings

with an outside body which results in surplus. The participation of the members in the surplus must be in their character as contributors to the common fund or as consumers and not as shareholders getting dividend on their share account or as debenture holders earning interest. *CIT vs. Bankipur Club Limited (1997) 226 ITR 97 (SC) and J.K. Organisation vs. ITO (1983) 6 ITD 16 (ALL-Trib).*

2. Applicability

As far as principle of mutuality is concerned, it presupposes an association by specified individuals or class of individuals who contribute to the common fund to be used for earning income for the benefit of those specified individuals or class of individuals, that is, the contributors to the common fund and its beneficiaries must be specified individuals or class of individuals. As discussed above it is not necessary that only contributors should be beneficiaries, but to constitute mutual association, both the contributors and the beneficiaries should belong to an ascertainable class of individuals. Even the income arising out of trade by the association with its members will not be governed by principles of mutuality. As such, to constitute mutual association and to claim that the income of such association is not taxable as income on the principle that one cannot make profit out of one's self, therefore, unless the contributors and the beneficiaries are one and the same, principle of mutuality will not apply. The excess arising out of such association after meeting the expenses out of the contribution, will not be treated as income because it is only the amount belonging to the persons or class of persons who have contributed to such fund. Thus the rule, that taint of commerciality will lose benefit of exemption, has been recognised by the Supreme Court in Bankipur Club Ltd. (supra).

A reference can be made to the decision of Apex Court in the case *Bangalore Club vs. Commissioner of Income Tax and Anr. [2013] 350 ITR 509 (SC):*

In this case the assessee sought an exemption from payment of income tax on interest earned on fixed deposits kept with certain banks, which were corporate members of the assessee, on the basis of doctrine of mutuality. The Hon'ble Supreme Court held that the interest earned by the assessee from the four banks would not fall within the ambit of the mutuality principle and would, therefore be accessible to tax in the hands of the assessee-Club because:-

a. The arrangement lacked complete identity between the contributor and participators till the stage of generation of surplus funds, the flow of money to and fro was maintained within the closed circuit formed by the banks and the club, and to that extent, nobody who was not privy to this mutuality, benefited from the arrangement. However, as soon as these funds were placed in Fixed Deposits with banks, the closed flow of funds between the Bank and the club suffered from deflections due to exposure to commercial banking operations. During the course of the banking business, the member banks used such deposits to advance loans to their clients. Hence, with the funds of the mutuality, the member banks engaged in commercial operations with the third parties outside of the mutuality, rupturing the privity of mutuality and consequently, violating one to one identity between contributors and the participators as mandated by the first condition.

b. The surplus funds are in use for any specific service, infrastructure maintenance or for any other direct benefit of the members of the club. When the member banks placed them at the disposal of third parties, an independent contract between the club and the client of the bank, a third part, not privy to the mutuality was initiated. This contract was not an activity of the club in pursuit of its objective.

c. The principle of impossibility that the contributors would derive profits from

contributions made by themselves to a fund which could only be expended or returned to themselves requires that the funds must be returned to the contributors, as well as expended solely on the contributors. Although in the assessee's case the funds did return to the club, before that, they were expended on non-members i.e. the clients of the banks. The loaning by the banks out of the funds of the club to the outsiders for commercial reasons snapped the link of mutuality. The club did not give, or get, the treatment of a club gets from its members; the interaction between them clearly reflected one between the bank and its client. The interest accrued by the surplus deposited by the club lie in the case of any other deposit made by the account holder with the Bank.

d. The assessee was already availing of the benefit of the doctrine of mutuality in respect of the surplus amount received as contributions or price for some of its facilities availed by its members, before it was deposited with the bank. The assessee was therefore not permitted to claim double benefit of mutuality. An almost similar issue arose in *Kumbakonam Mutual Benefit Fund Limited [1964] 53 ITR 241 SC* and the principle was also followed in this case.

3. Test of mutuality and basis of exemption

The Gujarat High Court in the case of *CIT vs. Shree Jari Merchants Association [1977] 106 ITR 542 (Gujarat)* observed that the main test of mutuality is a complete identity of the contributors with the recipients. This identity did not necessarily be of individuals, because it is the identity of status or capacity which matters more. Thus, individual members of an association may be different at different times, but so long as the contributors and recipients are both holding the membership status in the association, their identity would be clearly established, and the principle of mutuality would be available to them. Nothing would detract from this principle even if their association is a body corporate and hence a legal person.

The Supreme Court in *CIT vs. Royal Western India Turf Club Limited (1953) 24 ITR 551(SC)* has recognised the basis of exemption in the case of mutual concerns based on:–

(i) The identity of the contributors to the fund and the recipients from the fund.

(ii) The treatment of the company, though incorporated as a mere entity for the convenience of the members and policy-holders, in other words as an instrument obedient to their mandate.

(iii) The impossibility that the contributors should derive profits from contributions made by themselves to a fund which could only be expended or returned to themselves. In every case, therefore in which it is claimed that any income or surplus is exempt from taxation on the ground that it is an income or a surplus earned by a mutual concern, the Court has to scrutinise the facts and circumstances with a view to ascertaining the three conditions have been satisfied. In other words claiming an exemption of this nature must establish:–

  (a) The identity of the contributors and recipients

  (b) The instrumentality of the assessee in the matter of carrying out the mandates of its members and

  (c) The impossibility of the assessee deriving any profits made from contributions made to it. – *Indian Tea Planters vs. CIT (1971) 82 ITR 322 (Cal).*

Once the finding is recorded that there is no commerciality and what is being offered are usual privileges, advantages and conveniences that would attract the principle of mutuality and, therefore, should even if there be temporary or honorary members who are not entitled to vote, the assessee would not be ceased to be governed by the principles of mutuality – *vide CIT vs. Wellington Sports Club, (2008) 302 ITR 279 (Bom).* The income of the assessee plant is contributed by its members and formed specifically with an object of providing common effluent facility to its members. The income is not generated out of dealings with any third party, the entire contribution originates from its members and is expended only in the furtherance of the objects of the Association for the benefit of the members, principle of mutuality was, therefore, applicable to the assessee AOP *vide CIT vs. Common Effluent Treatment Plant (Thane, Belapur) Association (2010) 328 ITR 362 (Bom.).*

The Bombay High Court in the case of *CIT.3 vs. M/s. Air Cargo Agents Association of India in ITA No. 2455 of 2013 dated 31-3-2016* held that the test to be satisfied before an association can be classified as a Mutual concern are complete identity between the members i.e. contributors and the participants, the action of mutual concern must be furtherance of profiteering by the contributors from a fund. This tests have been reiterated in Bangalore Club (supra).

4. No one can trade with himself or derive profit for himself

No man can trade with himself, he cannot make, in what is its true sense or meaning, taxable profits, by dealing with himself. There must be at least two parties, one supplying the goods and services and the other to whom it is supplied and who should to pay for it. If these two parties are identical there can be no trading. If the people were to do the things for themselves, there would be no profit, and the fact that they incorporate a legal entity to do it for them makes no difference, there is still no profit. *CIT vs. Karachi Chamber of Commerce [1939] 7 ITR 575 (Sind).*

5. Identity between contributors and participants in surplus

The main test of mutuality is that all the contributors to the common fund must be established to participate in the surplus and that all the participators in the surplus must be contributors to the common fund, in other words there must be complete identity between the Contributors and Participators. Explaining the above ratio, the Supreme Court in the case of *CIT vs. Kumbakonam Mutual Benefit Fund Limited (1964) 53 ITR 241 (SC)* observed:

"All Participators must be contributors to the common fund and not that all the participators must be entitled to contribute. The essence of mutuality lies in the return of what one has contributed to the common fund".

However, it is not necessary for the purpose of this identity, that there must be an actual contribution by all the members. It is sufficient if all the members have a right to make contribution. *Surat District Cotton Dealers Association vs. CIT [1959] 35 ITR 121 (Bom.).*

It is well settled that the identity need not be necessarily of individuals because it is identity of status or capacity which matters more. The individual members of an association may be different but so long as the contributors and recipients both are holding the membership status in the association, their identity would be available to them if such a mutual concern receives any income the surplus of which goes back to the contributors of the said income. Thus, where a particular clause of a memorandum of an association stipulated that surplus, on dissolution of the association would not go to the members but to an association with similar objects, it is implied that the members have a right to dispose of the surplus. The association was, therefore, a mutual association and the income was not chargeable to tax in the

case of *CIT vs. West Godavari District Rice Millers Association (1984) 40 CTR 335 (AP)* and *Canara Bank Jubilee Staff Welfare Fund vs. Dy. CIT (2009) 308 ITR 202 (Karn.) 286.*

6. Profit element – Irrelevant

The Gujarat High Court in *CIT vs. Shree Jari Merchants Association, (1977) 106 ITR 542 (Guj.)* in a mutual association, the members contribute not with an idea to trade but with an idea of rendering mutual help. The word "trade" by itself has a wide meaning and has a profit element in it. Even where an association *prima facie* appears to be indulging in trade, it has been held that if the profit motive is absent, with other conditions fulfilled, the association may still be a mutual association making it surplus outside the purview of Section 4.

In *CIT vs. Standing Conference of Public Enterprise (Scope) (2009) 319 ITR 179 (Del.).* In this case the assessee society was incorporated as a society and the main object was to improve the performance of the public enterprises. The Assessing Officer got influenced by the fact that the assessee had let out part of the premises to its members and was receiving rent and also giving the convention centre to non-members, and concluded that principle of mutuality was not applicable. It was held that letting out of convention centre was not sufficient to clothe the activity of the assessee as commercial activity, which was not the object with which the assessee society was formed. Predominant object was to render appropriate assistance and help to its members for improving their performance and their role and therefore, assessee was entitled to principle of mutuality.

7. Principles of mutuality vis-a-vis Charitable Trust

As such, the concept of charitable trust and the concept of mutual association are diametrically opposite to each other. Whereas, a charitable trust is for the benefit of the public or section of the public wherein the individual beneficiaries are not ascertainable, in case of mutual association, the beneficiaries are ascertainable because the beneficiaries are the same who are contributors or belonging to a class of contributors and, as such, they are ascertainable and, therefore, it cannot be said that a mutual association is for a charitable purpose because the whole concept of it, is to benefit one self and to benefit one's self by no stretch of imagination, can be treated as a charitable purpose.

As such, a charitable trust cannot be a mutual association or a mutual association cannot be a charitable trust.

Obviously, the promotion of an object of general public utility in an altruistic spirit may constitute a charitable purpose. What have to be found out are the main or principal objects of the association, and if there are any objects which are incidental to the main objects and which are beneficial to the members as contrasted with the general public, then such incidental objects would not distract from the main object. To serve a charitable purpose, it is not necessary that the object should be to benefit the whole of mankind or even all living persons in a particular country or province. It is sufficient if the intention is to benefit a section of the public as distinguished from specified individuals.

On the issue of whether in the given circumstances, the body constitutes a mutual association or a charitable association becomes relevant in case of a club or trade association. If the benefit of a trade association is confined to a member who contributes to such association, it could be a mutual association. However, if the benefit of such association is charitable in nature where the benefit is for the public or section of public, then such trade association ceases to be a mutual association and it becomes a charitable association. For example in case of *Addl. CIT vs. Ahmedabad Mill Owners Association (1977) 106 ITR 725 (Guj.),* a member association whose benefit was confined to specific individual who formed an association was not considered a charitable association, by the Supreme Court

and other conditions having been fulfilled, the same would constitute a mutual association. As against that in case of various Chambers, trade associations, though there is a membership of such associations, as the benefit goes to the industry as a whole and not confined to the members of such association, they are not mutual associations but they are charitable associations. As such, many of the trade associations though there is membership the benefit of such association is to go to the trade as a whole, which itself constitutes a section of the public. Such association will be a charitable association and not a mutual association.

Similarly, in the case of clubs, they could be either mutual associations or charitable associations. If the benefit of such clubs is not confined to the contributing members but is for the development of sports etc. it could be charitable association and if it is open to contribution and the benefit of the club is confined to the contributing members then it may be considered as mutual association and not as a charitable association. As such, the dividing line between the two associations is in the range of beneficiaries. If the beneficiaries are only the contributing members it is a mutual association, as against this, if the benefit of such association is for the benefit of the public or a section of the public then it is a charitable association.

Therefore, in the case of a club or association, always alternative contentions are put forward. First, the association is for the benefit of the public or section of the public, therefore, it is a charitable association. In the alternative if it is not a charitable association and is only a private association and not for the benefit of the public, then it is a mutual association and the principle of mutuality would apply for the income in question, provided other conditions required for the purpose of mutual association are fulfilled. If the association is for the promotion, protection, aiding or stimulation of trade, commerce and industries, even though not specifying the modus or the steps by which the object might be achieved or secured, it would be a charitable association. As against that, if it is for the mutual benefit of its members and not the benefit of public, it would be a mutual association.

As such, the association is either a mutual association or a charitable association. It cannot be both. Profit motive is the hall mark of trade and commerce, and, hence though an activity is for the utility of general public, if it contains as one of its ingredients, the carrying on of a commercial or trading operation, it would cease to be for a charitable purpose.

The Supreme Court in *CIT (Addl.) vs. Surat Art Silk Cloth Mfrs. Assn. (1980) AIR 387,* is that what is frowned upon is an activity for profit by a charity established for advancement of an object of general public utility in the course of accomplishing its objects. The exclusion is of cases where profit-making is the end to which the activity of the trust is directed or where the predominant object of the activity is the making of profit. Where an activity is not pervaded by profit motive but is carried on primarily for serving the dominant charitable purposes, it would not be correct to describe it as an activity for profit. But where, on the other hand, an activity is carried on with the predominant object of earning profit it would be an activity for profits though it may be carried on in the advancement of the charitable purpose of the trust or institution. In this view, when applying section 11, it is open to the tax authority in an appropriate case to pierce the veil of what is proclaimed on the surface by the document constituting the trust or establishing the institution, and enter into an ascertainment of the true purpose of the trust or institution. The true purpose must be genuinely and essentially charitable.

8. Exemption under Section 10 or 11 of a Charitable trust and exemption on ground of mutuality

The exemption under Section 10 or 11 as a charitable trust and the exemption on the ground of mutuality are mutually inclusive as charitable trust is for the benefit of the public and not for mutual benefit of the contributors to the fund. Thus, if a society enjoys exemption as a charitable institution it cannot simultaneously claim exemption on the ground of principle of mutuality. However, exemption under Section 10 or 11 is denied to such society, then it can claim exemption by invoking the principle of mutuality with reference to membership fee and other contribution from members which satisfy the test of mutuality.

9. Principle of mutuality an alternative avenue for claiming exemption under Section 11

The income of a mutual concern falls outside the charging Section 4 of Income-tax Act 1961 and is therefore outside the purview of tax net. The net effect of applicability of exemption provision contained in Section 11 is also the same. Section 11 exempts the income which are otherwise chargeable under Section 4 of the Act. Thus the principle of mutuality may constitute an alternative avenue for claiming exemption for such trusts which are incorporated as associations, Chambers of Commerce, Bar Councils, Societies, etc. and vice versa. Such mutual concerns can claim the benefit of Section 11 if they are established for the benefit of public or a definite identifiable section of the public. The principles of mutuality applies not only to societies but also to companies registered under Section 25 of the Companies Act, 1956, now Section 8 of the Companies Act, 2013, and to trusts, provided the basic tests of mutuality are satisfied.

The Bombay High Court in the case of *CIT vs. Silk and Art Silk Mills Association Limited,(1990) 182 ITR 38 (Bom),* it dealt with the case of the association Trust which received income both from the properties held under the trust and also income from subscriptions, both of which were credited to a common fund and the expenditure on the object of the trust was incurred therefrom. The subscription income was accepted as not taxable by the Department based on the principles of mutuality. However, the Department sought to apportion the expenditure incurred on the objects of the trust on a pro rata basis between the income from property held under trust and the income from subscriptions. The Hon'ble Court held that expenditure incurred on the object of the trust was entirely allowable as a deduction against the taxable income being the income derived from property held under trust so as to obtain benefit of exemption under section 11. The Court went on to observe that it was not permissible for the IT Department to apportion the expenditure on pro rata basis even though both the income being taxable and non-taxable ones were credited to a common account. In *CIT vs. Indian Bank Limited (1965) 56 ITR 77 (SC)* and *CIT vs. Maharashtra Sugar Mills Limited (1971) 82 ITR 452 (SC),* holding that where an assessee carries on indivisible business a part of whole profits, is not liable to tax the entire business expenditure would be allowable as a deduction against the taxable income.

10. Clarification regarding definition of Charitable Purpose by CBDT vide Circular No. 11/208 dated 19th December, 2008

The CBDT has clarified the definition of "charitable purpose" *vide* Circular No. 11/208 dated 19th December, 2008, in view of the amendment by the Finance Act 2008. The contents of the circular are as under:-

(i) Amendment in section 2(15) by Finance Act, 2008 and reasons regarding:-

1. Section 2(15) of the Income-tax Act, 1961, ("Act") defines "charitable purpose" to include the following:-

   a. Relief to the poor.

b. Education.

c. Medical Relief, and

d. The advancement of any other object of general public utility.

An entity with a charitable object of the above nature was eligible for exemption from tax under Section 11 or alternatively under Section 10(23C) of the Act. However, it was seen that a number of entities who were engaged in commercial activities were also claiming exemption on the ground that such activities were for the advancement of objects of general public utility in terms of the fourth limb of the definition of "Charitable Purpose". Therefore, section 2(15) was amended *vide* Finance Act, 2008 by adding a proviso which states that "the advancement of any other object of general public utility" shall not be a charitable purpose if it involves the carrying on of:-

a. Any activity in the nature of trade, commerce or business;

b. Any activity of rendering any service in relation of any trade, commerce or business;

for a cess or fee or any other consideration irrespective of the nature of use or application, or retention of the income from such activity.

(ii) Proviso to section 2(15) not applicable in respect of the first three limbs of section 2(15)

The circular clarifies that the newly inserted provisos to section 2(15) will not apply in respect of the first three limbs of section 2(15) of the IT Act i.e. relief of the poor, education or medical relief, it will constitute "Charitable Purpose" even if it incidentally involves the carrying on of commercial activities. Entities who have these objects will continue to be eligible for exemption even if they incidentally carry on a commercial activity, subject, however to the conditions stipulated under section 11 (4A) or the seventh proviso to section 10(23C) which states that:-

a. The business should be incidental to the attainment of the objectives of the entity, and

b. Separate books of account should be maintained in respect of such business.

Similarly, entities whose object is "education" or "medical relief" would also continue to be eligible for exemption as charitable institutions even if they incidentally carry on a commercial activity subject to the conditions mentioned above.

(iii) Applicability of proviso to fourth limb of section 2(15)

The newly inserted proviso to section 2(15) will apply only to entities whose purpose is "advancement of any other object of public utility" i.e. the fourth limb of definition of "charitable purpose" contained in section 2(15). Hence such entities will not be eligible for exemption under section 11 or under section 10(23C) of the Act if they carry on commercial activities. Whether such an entity is carrying on activity in the nature of trade, commerce or business is a question of fact which will be decided based on the nature, scope, extent and frequency of the activity.

(iv) Proviso not applicable in case of association run on mutuality principle

There are industries and trade associations who claim exemption from tax under section 11 on the ground that their objects are for charitable purpose as these are covered under "any other object of general public utility". Under the principle of mutuality, if trading takes place between

persons who are associated together and contribute to a common fund for the financing of some venture or object and in this respect have no dealings or relations with any outside body, then any surplus returned to the persons forming such association is not chargeable to tax. In such cases, there must be complete identity between the contributors and participants. Therefore, where industry or trade associations claim both to be charitable institutions as well as mutual organisations and their activities are restricted to contributions from and participation of only their members, these would not fall under the purview of the proviso to section 2(15) owing to principle of mutuality. However, if such organisations have dealing with non–members, their claim to be charitable organisations would now be governed by the additional conditions stipulated in the said proviso to section 2(15).

(v) Determination of object "advancement of any other object of general public utility" would depend upon the facts of each case

If the assessee is engaged in activity in the nature of trade, commerce or business or renders any service in relation to trade, commerce or business it would not be entitled to claim that its object is charitable purpose. In such a case, the object of "general public utility" will only be a device to hide the true purpose which is trade, commerce or business or the rendering any of services in relation to trade, commerce or business. Each case, therefore, will be decided on its own facts and no generalisation is possible.

(vi) Impact of amendment in definition of charitable purpose vis-à-vis exemption under section 11(4A)

No simultaneous amendment has been carried out in sub-section (4A) of section 11 in consequence of insertion to provisos in section 2(15) by the Finance Act, 2008. Therefore it becomes doubtful as to whether exemption would be available by virtue of section (4A) in case of business incidental to the main object of the trust. But the second proviso now provides that the "advancement of any other object of public utility" should continue to be a "charitable purpose" if the total receipts from any activity in the nature of trade, commerce or business does not exceed ` 25 lakhs in the previous year. In order to claim exemption in respect of business income of the trust or institution falling within the fourth limb of definition of charitable purpose i.e. is now receipt from any activity in the nature of business or commerce must not exceed ` 25 lakhs in the previous year for availing such exemption. However, the separate books of account have to be maintained then the same will qualify for exemption under section 11. Therefore, the restriction has not been imposed on charitable trusts providing relief of the poor, education, medical relief, preservation of environment (including watersheds, forests and wildlife) and preservation of monuments or places or objects of artistic or historic interest. However, the restriction imposed in respect of business income by sub-sections (4) and (4A) of section 11 shall apply to all charitable trusts.

(vii) Advancement to be for the benefit of section or public and not whole mankind

An object beneficial to a section of the public is an object of public utility and it is sufficient if the intention to benefit a section of the public as distinguished from a specified individual is present; the section of the public sought to be benefited must be sufficiently definite and identifiable by some common quality of a

public or impersonal nature, where there is no common quality uniting the potential beneficiaries into a class, the trust must not be regarded as valid.

Ahmedabad Rana Caste Association vs. CIT (1971) 82 ITR 704 (SC).

A fluctuating body of private individuals, such as the present and future officers and members of the staff and other employees of a company, cannot be a part of the general public or any section of the public. In *Harilal Bhagwati vs. CIT (2000)246 ITR 188 (Guj.),* it was observed that where a section of the public is given benefit, it can be said that it is not a trust for charitable purpose in the interest of public, hence it is not necessary that public at large should get the benefit.

In *Rajkot Visha Shrimali Jain Samaj vs. ITO (2007) 109TTJ 286 (Rajkot-Trib),* trust created for the benefit of a small community cannot be denied benefit under section 11 on the ground that it is not for general public. It is sufficient if the intention is to benefit an identifiable section of the public as distinguished from specified individuals.

(viii) Element of private gain vitiates object of general public utility

In *CIT vs. Western India Chamber of Commerce Limited (1982)136 ITR 67 (Bom),* the organisation which provides for the distribution of its property among its members on winding up is not for that reason an organisation formed for the private gain of its members. However, the object of private profit can be taken to have been eliminated if the company or association concerned is granted licence under section 25 of the Companies Act, 1956 with a clause in the Memorandum to the effect that no distribution of profits will be made by declaration of dividends or otherwise amongst the members.

Addl. CIT vs. Surat Art Silk Clothes Manufacturers Association (1980) AIR 387 (SC) and *Dharmadeepti vs. CIT (1978)114 ITR 454 (SC).*

Where the rules and regulations of an association or institution permit distribution of profits amongst its members constitute private gain which is inconsistent with the object of general public utility.

CIT vs. Indian Sugar Mills Association (1974) 97 ITR 486 (SC).

(ix) Income incidental to main purpose

Where the assessee – trust is providing on rent its premises, furniture, utensils on hire for marriage and other functions is only a passive letting and no commercial aspects are involved and more so when an assessee does not undertake any contract for marriage functions, catering etc *vide ITO vs. Brahman Karyalaya (2000) 73 ITD 456 (Pune Trib).* The dominant and the primary objects of the assessee-trust was charitable in nature and letting out its mangal karyalay was only ancillary and incidental to the primary and dominant purpose of charity. It was held that there was no infirmity in the findings of the Commissioner (Appeals) allowing the claim of the assessee.

11. Case Laws

A. *Director of IT (Exemptions) vs. Ahmedabad Management Association [2014] 366 ITR 85 (Guj.)*

In this case the activities of the assessee are in the field of education. The question arises whether the assessee is entitled to exemption under section 11 or not and whether in the facts and circumstances of the case, the assessee can be denied exemption under section 11 relying upon and/or considering the proviso to section 2(15) is concerned, so far as the

amendment in section 2(15) amended vide Finance Act, 2008 and insertion of proviso to section 2(15) is concerned, as such the same has been explained *vide* Circular No. 11 of 2008 dated 19th December, 2008. It is clarified that where industries or trade associations claim both to be Charitable Institutions as well as mutual organisations and their activities are restricted to contributions from and participation of only their members, these would not fall under the purview of the proviso to section 2(15) owing to principles of mutuality. From the said Circular No. 11 of 2008, it appears that newly inserted proviso to section 2(15) will apply to entities whose purpose is advancement of any other object of general public utility i.e. fourth limb of definition of "Charitable Purpose" contained in section 2(15) and hence such entities will not be eligible for exemption under section 11 or under section 10(23C), if they carry on commercial activities. Thus, on fair reading of section 2(15), the newly inserted proviso to section 2(15) will not apply in respect of the first three limbs of section 2(15) i.e. relief to the poor; education or medical relief. Thus, where the purpose of a trust or institution is relief of the poor, education or medical relief, it will constitute "charitable purpose" even if it incidentally involves the carrying on of the commercial activities. Thus, on fair reading of section 2(15) read with Circular No. 11 of 2008 dated 19th December, 2008, it appears that if the case of the assessee does not fall within the first three limbs of section 2(15) i.e. relief to the poor, education or medical relief and if it fails in the fourth limb i.e. advancement of any other object of general public utility and is found that such activity of advancement of any other object of public utility involves carrying on of (a) any activity in the nature of trade, commerce or business; or (b) any activity of rendering any service in relation to any trade, commerce or business; for a cess or fee or any other consideration, irrespective of the nature of use or application, or retention of the income from such activity, the same shall not be considered for "charitable purpose" and shall not be entitled to exemption under section 11. In this case the activities of the assessee are related to education and, therefore, assessee is entitled to exemption under section 11. That the activities of the assessee are educational activities and therefore they have claimed exemption under section 11 of the IT Act. It is to be noted that right from A.Y.: 1995-96 the activities of the assessee have been considered by the Revenue as educational activities.

The Hon'ble Court considered whether the assessee is entitled to exemption under section 11 of the Income-tax Act or not and whether the assessee can be denied exemption under section 11 of the Act. Relying upon and/or considering the proviso of section 2(15) of the Act is concerned so far as the amendment in the section 2(15) of the Act amended, *vide* the Finance Act 2008, and the insertion of the proviso to section 2(15) of the Act is concerned, as explained, *vide* Circular No. 11 of 2008 dated 19th December, 2008, it is clarified that where industries or trade associations claim both to be charitable institutions as well as mutual organisations and their activities are restricted to contribution from and participation of only their members, this would not fall under the purview of the proviso of section 2(15) of the Act owing to principles of mutuality. From the said Circular No. 11 of 2008 it appears that newly inserted proviso to section 2(15) of the Act will apply to entities whose purpose is the advancement of any other object of general public utility, i.e. the fourth limb of the definition of "Charitable Purpose" contained in section 2(15) of the Act and hence, such entities will not be eligible for exemption under section 11 or under section 10 (23C) of the Act if they carry on commercial activities. Thus on a fair reading of section 2(15) of the Act, the newly inserted proviso will not apply in respect of the first three limbs of section 2(15) of the Act. Thus, where the purpose of a Trust or Institution is relief of the poor; education or medical relief, it will constitute "Charitable Purpose" even if it incidentally involves the carrying on of the commercial activities. Further, on a fair reading of section 2(15) of the Act read with Circular

No. 11 of 2008, dated 19th December, 2008, it appears that if the case of the assessee does not fall within the first three limbs of section 2(15) of the Act and if it falls into the fourth limb i.e. advancement of any other object general public utility and it is found that such activity of advancement of any other object of public utility involves carrying on of:-

(i) Any activity in the nature of trade, commerce or business; or

(ii) Any activity of rendering any service in relation to any trade, commerce or business; for a cess or a fee or any other consideration irrespective of the nature of use or application, or retention of the income from such activity the same shall not be considered for charitable purpose and shall not be entitled to exemption under section 11 of the Act.

In view of the above the Hon'ble Court held that the activities of the assessee are related to education and therefore is entitled to exemption to section 11 of the Act.

B. *Institute of Chartered Accountants of India and Anr. vs. Director General of Income Tax (Exemptions) and Ors – [2013] 358 ITR 91 (Del.)*

On a plain reading of section 2(15) of the Income-tax Act, 1961 indicates that the expression "Charitable Purpose" has been divided into six categories. The first proviso to section 2(15) of the Act carves out an exception which excludes advancement of any other object of general public utility from the scope of charitable purpose to the extent that it involves carrying on any activity in the nature of trade, commerce or business or any activity of rendering certain services in relation to any trade, commerce or business, for a cess or fee or any other consideration irrespective of the nature of the use or obligation or retention of the income from such activity. The expression "trade", "commerce" and "business", as occurring in the first proviso to section 2(15) of the Act must be read in the context and the intent and purport of section 2(15) of the Act and cannot be interpreted to mean any activity which is carried on in any organised manner. The purport of the first proviso to section 2(15) of the Act is not to exclude entities which are essentially for charitable purpose but are conducting some activities for a consideration or a fee. The object of introducing the first provisos is to exclude organisations which are carrying on regular business from the scope of "charitable purpose". The expression "business", "trade", "commerce" as used in the first proviso must, thus, be interpreted restrictively and where the dominant object of an organisation is charitable any incidental activity for furtherance of the object would not fall within the expression "business", "trade" or "commerce". The Delhi High Court held that after going through the provisions of the Chartered Accountants Act and the Regulations framed therein as well as various activities carried on by the Institute, it was clear that the Institute did not carry on any business, trade or commerce. The activity of imparting education in the field of accountancy and conducting courses both at pre-qualification as well as post-qualification level were activities in furtherance of the objects for which the Institute had been constituted. Activities of providing coaching classes or undertaking campus placement interviews for a fee were in relation to the main object of the Institute which cannot be held to be trade, business or commerce. Accordingly, even though fees were charged by the Institute for providing coaching classes and holding interviews with respect to campus placements, the activities cannot be stated to be rendering service in relation to any trade, commerce or business as such activities are undertaken by the Institute in furtherance of its main object which as held earlier are not trade, commerce or business. The Hon'ble High Court held that the Institute was entitled to exemption under section 11.

CA Yatin Desai

Procedure for Approval and Deduction u/s. 80G

Introduction

Primarily, it is the duty of the Government to fulfil social causes. Probably, due to inability and inactiveness of Government and to encourage natural instinct of benevolence of Indian, Government has conveniently allowed public trusts, institutions and NGOs to perform their duty.

Under the Income Tax Act, 1961 to encourage donations to such trusts, institution and NGOs, to promote social causes, deduction from Income is granted. The section also attempts to restrict a misuse of benefits granted. The Income Tax Act first introduced S. 80G w. e. f. 1-4-1968. The text heading of the section 80G is "Deduction in respect of donation to certain funds, Charitable institutions etc.".

The importance of the Charitable institutions and NGOs has enhanced with the introduction of the Companies Act, 2013. The Companies Act, 2013 has introduced section 135 which has made mandatory for certain companies to spend certain percentage of its profits in pursuance of its 'Corporate Social Responsibility Policy'. Such responsibility can be said to be complied by way of, either the company undertakes specified activities by itself or contributes for the specified activities through a registered trusts or a registered society or a company under s. 8 of the Companies Act 2013, etc. either singly or jointly with any other company. Practically, most of the companies to which such provisions are applicable, prefer to contribute rather than undertake activities themselves.

Legislative Background

Upto AY 1967-68, section 88 of the I. T. Act allowed the entities for rebate of tax on the qualifying amount of donations. W. e. f. 1st April, 1968, section 88 was replaced by Section 80G in the new chapter VIA of the I. T. Act. Under section 80G, donors will be entitled to deductions in the computation of total income.

Donations-meaning

"A **donation**, as defined by Wikipedia, the Web Encyclopaedia, is a gift given, typically to a cause or/and for charitable purposes. A donation may take various forms, including cash, services, new or used goods i.e. clothing, toys food, vehicles, emergency or humanitarian aid items, and can also relate to medical care needs i.e. blood or organs for transplant. Charitable gifts or services are also called gifts in kind".

In case of Manojkumar v. ITO (2003) SOT 412, the Hyderabad Tribunal has explained the meaning of donations as "The generic and natural meaning of the word '**donation**' is that a person gives money to another voluntarily and without any consideration and without any expectation of material return".

Donations can be of movable or immovable property. Donations of movable properties can be further classified into two categories; cash/cheque or kind. Kind includes donation of immovable properties which requires payment of Stamp Duty and Registration fees. The donation can be made towards corpus, for specified purpose or for the general objects of the trust.

As per the provisions of section 80G, deductions are available to any assessee for donations made only in cash (within specified limits) / cheque. The assessee may be an individual, firm, company, HUF, etc. Further, the deductions are also available to Non resident assessees. However, there are conditions attached to the second limb of the Text Heading of the sections i.e. **"……... to certain funds, charitable institutions, etc".**

Types of Funds, charitable institutions, trusts etc for being eligible

For claiming deductions, the donation has to be made to certain funds and charitable institutions. The purpose here is to channelise the donations to purposeful utilisation and the unauthorised trusts or groups do not take undue advantage or abuse the provisions of law. Donations made to private parties or those funds and institutions not approved are not eligible for deductions. There are various institutions which can receive donations and such donations are eligible for deductions, however, there are few conditions which need to be satisfied. On the basis of fulfilment of these conditions, S. 80G grants deduction at different rates or percentages.

Categories

I. Deduction allowed at the rate of 100% (e.g. PM Relief fund, CM Relief fund etc.) or 50% (Indira Gandhi Memorial Trust, Rajiv Gandhi Foundation etc.) of donation without any restriction of net qualifying amount

II. Deduction allowed at the rate of 100% (Government / Approved institution set up for promoting family planning, Indian Olympic Association etc.) or 50% (notified temple, mosque for renovation, specified corporation u/s 10(26BB), etc.) of donation granted subject to restriction of net qualifying amount

III. Deduction allowed at the rate of 50% (Any other fund or any institution) of donation granted subject to restriction of net qualifying amount and they are also required to further conditions specified u/s 80G(5).

Net qualifying amount of Donation

The amounts of donations are subjected to limits prescribed. The same may be called 'Net qualifying amount of donation'.

If the aggregate of the sums of donations made to the funds or charitable institutions exceeds 10% of the gross total income after adjustments as per provisions of the Law (say Adjusted Gross Total Income) the excess amount is to be ignored in computing the aggregate of the sums on which deduction is to be allowed.

"Adjusted Gross Total Income" means, gross total income as reduced by-

i) Amount of deduction under any other provisions of Chapter VIA. The gross total income will be reduced by deductions allowable u/s 80C to 80U except S. 80G.

ii) Incomes on which tax is not payable under provisions of the Income Tax Act, 1961. In this, apart from incomes on which tax is not payable, there are some incomes which are worth a special mention. There are certain Income/ Gains which specifically do not allow deductions under chapter VIA, which includes 80G, and they are as under:

- Long Term Capital Gains taxable u/s. 112;
- Short Term Capital Gains taxable u/s 111A;

- Income of non residents referred to in sections 115A, 115AB, 115AC, 115ACA, 115AD and 115D; and
- Share of income from AOP/BOI, where such income is taxable in the hands of AOP/BOI which is chargeable at the maximum marginal rate.

Further conditions applicable to Category III: Any donations made to any institutions or fund referred to in sub clause (iv) of clause (a) of Sub section (2) [as mentioned in category III above], only if it is established in India for a charitable purpose and it fulfils following conditions [Sec. 80G (5)]

(a) Where the institution or fund derives any income, such income should not be liable to be included in its total income under the provisions of sections 11 and 12 or clause (23AA), (23C) of Sec. 10. Where an institution or fund derives any income (being profits and gains of business) the condition that such income would not be liable to inclusion in its total income under the provisions of section 11, will not apply in relation to such income, if-

i) The institution or fund maintains separate books of account in respect of such business;

ii) The donations made to the institution or fund are not used by it, directly or indirectly, for the purposes of such business; and

iii) The institution or fund has issued to the person making the donation a certificate to the effect that it maintains separate books of account in respect of such business and that the donations received by it will not be used, directly or indirectly, for the purposes of such business.

However, Explanation 2 of section 80G clarifies that the deduction shall not be denied merely on either or both of the following grounds, namely: -

- That subsequent to the donation, any portion of the income of the institution/fund has become chargeable to tax because of non-compliance with the provisions of section 11, 12 or 12A;
- The aggregate of the funds invested by the institution/fund in a concern referred to in section 13(2)(h), exceeds 5 per cent of the capital of the concern and due to which the exemption is denied u/s 13(1)(c).

b) The instrument/rules governing the institution/fund do not contain any provision for the transfer or application, at any, time of the whole or any part of the income or assets of the institution/fund, for any purpose, other than charitable purpose.

Explanation 3 of S. 80G clarifies that for this section, “charitable purpose” does not include any purpose, the whole or substantially the whole of which is of religious nature.

c) The institution/fund is not expressed to be for the benefit of any particular religious community or caste.

However, as explained in Explanation 1, an institution or fund established for the benefit of Scheduled Caste, backward classes, Scheduled Tribes or of women and children shall not be deemed to be an institution or fund for the benefit of a religious community or caste.

d) The institution or fund maintains regular accounts of its receipts and expenditure.

e) The institution or fund is –

- Constituted as a public charitable trust, or

- Registered under the Societies Registration Act, 1860 or Registered under section 25 of the Companies Act, 1956 (now section 8 of the Companies Act, 2013), or
- A University established by law, or its affiliates or educational institution recognised by Govt. or a university
- An institution financed wholly or in part by the Government or a local authority.

f) Where a deduction under S. 80G is claimed and allowed, such donation shall not qualify for deduction under any other provisions of the Act.

All the above mentioned conditions must be satisfied for obtaining recognition for the purpose of section 80G. It is incorrect to state that all institutions claiming exemption under section 10 (23AA), (23C), or section 11 and 12 are qualified for the purpose of section 80G (5). For instance, Explanation 3 to **section 80G** lays down that for the purpose of section 80G "charitable purpose" does not include any purpose the whole or substantially the whole of which is of religious nature, whereas such institution may be still notified under section 10 (23C)(v).

Certain important points worth noting

– Deduction u/s 80G is not denied in case of tax payable on income determined as presumptive income.

– There is no separate deduction or adjustment made in case of a company assessee while determining book profit u/s 115JA/115JB. In fact, since donations paid are charged to profit and loss accounts, the same has been automatically considered as expenses while arriving at the book profit.

– Agriculture income is an exempt income u/s 10(1). However, the income from agriculture is considered for determining rate purpose. Therefore, there is usually some element of tax which is paid on account of agriculture income. However, the agriculture income is not considered for, while arriving at the adjusted gross profit as it is not the part of total income.

– No deduction is allowed u/s 80G in respect of donation in cash exceeding ` 10,000/-.

Procedure for Approval of the institution

Under section 80G(5)(vi) of the Act, donations made to any institution or fund after 31-3-1992 will be eligible for deduction, only if the said fund or institution is for the time being approved by the Commissioner in accordance with the rules made in this behalf. Rule 11AA of the Income Tax Act Rules, 1962 lays down the requirements and the procedure for obtaining the requisite approval.

It may be noted that the initial approval was granted for a specific period and the same was subject to renewal before the expiry of the approval. However, CBDT vide Circular No. 7 of 2010 clarified that the approval under clause (iv) of sub section 5 of section 80G granted on or after 1st October, 2009 is valid until withdrawn. Which means that the charitable trusts/institutions need to obtain approval initially and the same is perpetual unless withdrawn. This has reduced the periodic procedural burden on the charitable trusts/institutions of renewal. However, issue arises in respect of the approval granted which were to expire after 1-10-2009. Whether these organisation are required to obtain registration which will last perpetual or existing registration will continue? Considering the purpose and intent of the amendment, no new approval is required to be obtained, since initial approval grated which was to expire in the period where amended provisions were in the statue.

Requirement for approval of an institution or fund under section 80G:

The application for approval of any institution or fund under section 80G(5)(vi) shall be in Form No. 10G and shall be made in triplicate.

- The application shall be accompanied by the following documents, namely-
  - a) Copy of registration granted under section 12A or copy of notification issued under section 10(23) or 10(23C);
  - b) Notes on activities of institution or fund since its inception or during the last three years, whichever is less;
  - c) Copies of accounts of the institution or fund since its inception or during the last three years, whichever is less.
- The Commissioner may call for such further documents or information from the institution or fund or cause such inquiries to be made as he may deem necessary in order to satisfy himself about the genuineness of the activities of such institution or fund.

  Usually following additional information is called for:

  - o Certificate of non-violation of provisions of section 11, 12 and 13.
  - o Certificate that condition of section 80G(5) have been satisfied.
  - o Name & Address of Trustee.
  - o Copy of PAN of trust & all trustees.
  - o List of Donors of Rs. Rs. 10,000/- & above.
  - o Declaration of no change in constitution & object of trust.
  - o Certified Copy of Trust deed duly registered under Bombay Public Trust Act, 1950.
  - o Copy of acknowledgement for filing returns of last three years.
  - o Copy of financial statement along with the form 10B of last three years.
  - o Copy of latest 80G certificate, if any
- In the case of *N. N. Desai Charitable Trust vs. CIT 246 ITR 452,* the Gujarat High Court has held that while processing the application for approval u/s 80G, the commissioner is not expected to act as an assessing officer, but his enquiry should be restricted to find out whether the Trust satisfies prescribed conditions. The above decision has been subsequently followed in many cases including in case of *Ganjam Nagappa & Son Trust vs. DIT, 135 Taxman 321 (Karnataka).*
- The enquiry for the purpose of sec 80G(5)(vi) relates to whether the applicant is registered under section 12A; whether it is a trust wholly for charitable purposes and whether the income received by it is liable to be considered under section 11 of the Act. The enquiry whether at the end of the previous year, the donor will be able to sustain a claim because of non-fulfilment of some conditions by him would depend at the close of the relevant previous year, as it is not possible to predicate these conditions in present when the donation is made – *Sonepat Hindu Educational and Charitable Society vs. CIT [2005] 278 ITR 262 (P&H)*
- The authorities can reject the application filed for renewal of exemption under section 80G(5) of the Act the institution has made very low expenses out of the total donation received under section 80G(5) of the Act - *Vishwa Budha Parishad vs. Commissioner of Income-tax [2003] 264 ITR 357 (Patna)*
- Where the Commissioner is satisfied that all the conditions laid down in section 80G(5)(i) to (v) are fulfilled by the institution or fund, he shall record such

satisfaction in writing and grant approval to the institution or fund specifying the assessment year or years not exceeding 5 assessment years for which the approval is valid (as mentioned earlier, the approval is now perpetual and valid till withdrawn).

In the case of *Kirti Chand Tarawati Charitable Trust vs. DIT(E) 232 ITR 11* the Delhi High Court had held that the approval must be granted by looking at the real purpose of the trust as against ostensible purpose. The commissioner must not grant an approval merely by looking at the instrument creating the Trust. The purpose of establishment—the real purpose as distinguished from the ostensible purpose—is germane to the enquiry which the Commissioner has to hold while granting approval under section 80G(5)(vi).

- Where the Commissioner is satisfied that one or more of such conditions are not fulfilled, he shall reject the application for approval after recording the reasons for such rejection in writing. When a commissioner refuses exemption under section 80G, he acts as a quasi-judicial statutory authority, therefore, the reasons for refusal should be recorded by him. Moreover, an order of rejection of an application shall not be passed without giving the institution or fund an opportunity of being heard.
- The time limit, within which the commissioner shall pass an order either, granting the approval or rejecting the application, shall not exceed six months from the date on which such application was made. However, in computing the period of six months, any time taken by the applicant in not complying with the directions of the Commissioner shall be excluded.

Application for approval for the trust / institutions specified u/s. 80G(2)(b)

Any sum paid for the renovation or repair of temple, church, mosque, gurdwara or any other place notified by the Central Government in the Official Gazette to be a place or historic, archaeological or artistic importance or a place of public worship of renown throughout any State or States, will qualify for deduction from the total income of the donor to the extent of 50 per cent of the donations. The DGIT(E) is the prescribed Authority to whom such application is to be made and he will recommend the applicant's case with his comments to the CBDT for such notification.

The applicant under section 80G(2)(b) has to submit an application to the DIT(E)/CIT, with the following particulars / documents:

a) Applications on plain paper, in quadruplicate, stating name of the temple, mosque, gurdwara, church, or other place (as distinct from the name of the institution / trust undertaking renovation / repair work) with precise particulars to identify the name.

b) Copy of the trust deed or evidence of the instrument of creation of the trust, if any.

c) The composition of the Managing Committee of the organisation undertaking renovation / repair work.

d) Whether the permission of the State Government authorities has been obtained to carry out the renovation / repair work.

e) The category in which the notification is to be recommended whether of historical importance or archaeological importance or artistic importance or a place of public worship of renown throughout a State or States. In case it falls in more than one category, the same should specifically be mentioned.

f) In case recommendation is for the notification as building of historical, archaeological or artistic importance, the

supporting material preferably with some expert opinion should be furnished.

g) In case the recommendation is for notification as a place of public worship renowned throughout a State of States, the particular State or States must be specified and the material in support of the contention of importance should be furnished.

It is to be noted that donations made to the temple, mosque, gurdwara, church, etc., notified under section 80G(2)(b) shall only qualify for deductions under section 80G of the Income-tax Act, 1961. Donations made to ordinary religious entities are not eligible for any deduction under section 80G of the Act.

Some other provisions of Income Tax Act vis-à-vis S. 80G.

1) Sec. 37(1) vs. Sec. 80G

a) Section 37(1) is a residuary section under the Head of Income from Business or Profession. There are conflicts in case of assesse having business or profession whether a particular payment made is deductible as expenses u/s 37(1) or it is eligible as deduction u/s 80G.

The law is well settled that for the purpose of income tax, any contribution made by the assessee, which is directly related to the business of the assessee, is regarded as an allowable deduction u/s 37(1).

It may be noted that Sec. 80G and Sec 37(1) are not mutually exclusive. If any expense claimed by the assessee which could not be considered as an expenditure allowable u/s 37(1) of the Act, the assessee can claim deduction u/s 80G, subject to the conditions of provisions of sec. 80G.

Few examples of the expenses allowable as business expense though in the nature of donations;

– Contribution to a public welfare fund which is directly connected with or related to the carrying on of the business or which results in benefit to the business - *CIT vs. Industrial Development Corporation of Orissa Ltd. (2001) 115 taxman 626 (Ori.).*

– Contribution to a trade syndicate with a view to preventing uneconomic competition – *CIT vs. Darbhanga Sugar Co. Ltd. (1957) 32 ITR 64 (Pat.).*

– Donation/ contribution made by the assessee to any relief fund, such as Chief Minister's Drought Relief Fund or a District Welfare Fund established by District Collector for benefit of public with a view to securing benefit to the assessee's business (cannot be regarded as payment opposed to public policy) irrespective of the fact that the contribution is voluntary or at instance of authorities concerned – *Sri Venkata Satyanarayana Rice Mill Contractors Co. vs. CIT (1996) 89 Taxman 92 (SC), CIT vs. Kuber Singh Bhagwandas (1979) 118 ITR 379 (MP), CIT vs. Katlabomman Transport Corpn. Ltd. (2004) 268 ITR 507 (Mad.).*

b) Corporate Social Responsibility was made applicable from the 1st day of April 2014 by the Companies Act, 2013. The question remained whether CSR expenses are fully deductible or not? The Finance Act, 2014, an explanation was added to Section 37(1) specifically denying allowability of expenditure relating to CSR. However, there is no corresponding restriction u/s 80G. which means that if the CSR expenses are incurred by contributing to eligible charitable trusts/institutions, the deduction u/s 80G cannot be denied. This has been further received force in the FAQ issued by Ministry of Company Affairs vide General

Circular No. 01/2016 dated 12th Jan, 2016. A specific question has been dealt with on the subject which is reproduced below:

Question No. 6: What tax benefits can be availed under CSR?

Ans: No specific tax exemptions have been extended to CSR expenditure per se. The Finance Act, 2014 also clarifies that expenditure on CSR does not form part of business expenditure. While no specific tax exemption has been extended to expenditure incurred on CSR, spending on several activities like contribution to Prime Minister's Relief Fund, scientific research, rural development projects, skill development projects, agricultural extension projects etc, which find place in Schedule VII, already enjoy exemptions under different sections of the Income Tax Act, 1961.

2) Deduction of tax on salary u/s 192 and sec. 80G

Tax is deductible from salary in case, the taxable salary is in excess of the taxable limits as per provisions of the law. The employer needs to calculate taxable salary after considering deduction u/s 80C, 80D etc. However, deduction u/s 80G is not considered while calculating tax deductible on salary by the employer in terms of Circular 798 dated 30th October, 2000. The tax relief on such donations as admissible u/s 80G will have to be claimed by the taxpayer in the return of income, except in case donation is made to the Prime Minister's National Relief Fund, the Chief Minister's Relief Fund or the Lieutenant Governor's Relief Fund through their respective employer, it is not possible for such funds to issue separate certificate to every such employee in respect of donations made to such funds as contributions made to these funds are in the form of a consolidated cheque. An employee who makes donations towards these funds is eligible to claim deduction u/s 80G (Circular No. 2/2005 dt. 20-1-2005).

Requirements in Income Tax Return for claiming deduction u/s. 80G:

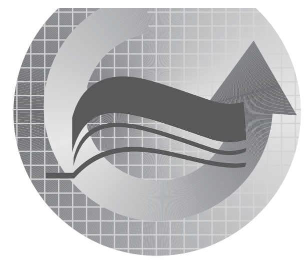
In the era of physical filing of returns, the Assessing Officers were insisting on the proof of donation made i. e. receipt of the donation accompanied by a valid exemption certificate. However, in case of online returns or attachment-less returns, there is no provision for such attachment. The schedule 80G is reproduced below:

Name of donee	Address	City or Town or District	State Code	Pin Code	PAN of Donee	Amount of donation	Eligible Amount of Donation

NOTE: IN CASE OF DONEE FUNDS SETUP BY GOVERNMENT AS DESCRIBED IN SECTION 80G(2), PLEASE USE PAN AS "GGGGG0000G"

Lastly….

Whether the Government gives any incentives for Charity or not, we Indians continue to do charity. Whenever, required, our countrymen have risen to the occasion. As mentioned earlier, the Companies Act, 2013 introduced CSR. However, even without having statutory requirements, various corporate houses had been liberally carrying out the charity work. The question is whether the Government really encourages such activities? The answer probably is NO. The reason why I state is that we consultants and assessees face problems day in and day out, in obtaining approvals, deductions are denied on frivolous grounds, and the most recent one is specific denying deduction u/ s 37(1) of I. T. Act of the amount spent on CSR by Companies. We only hope that the things changes for better in future.



CA Bhavik Shah

Return of Income and Applicability of Wealth Tax Provisions

Who has to file a Return

1. Every person has to file his return of income if his total income or the total income of any other person in respect of which he is assessable under the Income-tax Act, 1961 ('the Act') during the previous year exceeded the maximum amount which is not chargeable to income-tax. However, as per the provisos to section 139(1), certain persons have to file their return of income if they fulfill certain conditions, though their income may not exceed the maximum amount which is not chargeable to tax. It could, thus, be seen that a person holding property under trust for charitable and religious purposes and complying with the provisions of sections 11, 12 and 13 is under no obligation to file the return of his income until the insertion of a new sub-section (4A) with effect from April 1, 1971. The said sub-section (4A) of section 139, obliges even such persons holding property under a trust for charitable and religious purposes to file the return of their income if the total income, without giving effect to sections 11 and 12, exceeds the taxable limit; which means that even when the income of such trust is not liable to tax for reason of the exemptions available under the provisions of sections 11 and 12, yet by virtue of sub-section (4A) of section 139, such trusts are liable to file their return of income. The object, which the Legislature had in its mind to cast an obligation upon the trustees to file the returns of their income, was to enable the revenue to examine, whether the trusts have utilized their income during the year, to the extent prescribed, and if there is any accumulation, it does not exceed 15% of the income. It could, thus, be seen that the Income-tax Act contains specific and distinct provisions, which oblige the trust to file its return of income, irrespective of the fact whether there is liability for payment of tax or not.

2. A question regarding interpretation of sub-section (4A) of section 139 came before the Bombay High Court in the case of *Director of Income-tax vs. Malad Jain Yuvak Mandal Medical Relief Centre [2001] 250 ITR 488/ 117 Taxman 606.* In that case, the respondent was a trust running an educational institution and its income was exempt under section 10(22) (as it stood therein now omitted and reinserted in section 10(23C) in a different form). The assessment years were 1991-92 and 1992-93 (prior to insertion of sub-clause (4C)). As per the Assessing Officer, the assessee was required to file the return on 31-10-1991 (for the assessment year 1991-92) but it filed the return only on 11-3-1993 (that is 495 days later). So the Assessing Officer imposed penalty under section 272A(2)(e).

The assessee objected to the imposition of penalty as it was not claiming exemption under sections 11 and 12, so did not come under section 139(4A) and had no taxable income (as all his income exempted under section 10(22), as it stood at that time) so it was not required to file return under section 139(1). The first appellate authority accepted the contention of the assessee and cancelled the penalty. The Tribunal also confirmed the view of the first appellate authority. The department appealed to the Bombay High Court under section 260A. The question of law, as reframed, was as follows:

"Whether the assessee-charitable trusts, whose income is exempted under section 10(22) were required to file their returns under section 139(4A) and, therefore, penalty under section 272A(2)(e) was warranted?"

The Bombay High Court observed that in the present matters, it was concerned with the interpretation of section 139(4A) as it stood at the relevant time. The High Court reversed the decision of the Tribunal and held that the assessee is liable to file the return, relying on the observation of the Supreme Court in the case of *Aditanar Educational Institution vs. Addl. CIT [1997] 224 ITR 310/ 90 Taxman 528.* Supreme Court's view:

". . . it passes our comprehension as to why the assessee filed the appeals at all from the judgment of the High Court dated February 23, 1979, which is in its favour. When questioned, senior counsel appearing for the assessee, Mr. G.C. Sharma, stated that there are some observations of the High Court in the concluding portion of the judgment, which may prejudicially affect the assessee in future. We are of the view that this apprehension has no basis. All that the High Court has stated in the penultimate paragraph of the judgment is that counsel for the assessee gave a right answer to a hypothetical question put forward by the Court to the effect that the applicability of section 10(22) should be evaluated or investigated every year, and only if it is found that the 'institution' exists for educational purposes in the relevant year and even if any profit results, which is only incidental to the purpose of education, the income would be exempt. The High Court has made an observation that any income, which has a direct relation or is incidental to the running of the institution as such, would qualify for exemption. We may state that the language of section 10(22) of the Act is plain and clear and the availability of the exemption should be evaluated each year to find out whether the institution existed during the relevant year solely for educational purposes and not for purposes of profit. . . ." [Emphasis supplied] (p. 317)

So the Bombay High Court based on these observations held that even if a trust or an institution claims that its income is exempt from tax under section 11 and section 12, it is required to file a return because the assessee's claim for exemption could be decided by the department only after the relevant material is placed before the department by the filing of the assessee's return. Therefore, if an assessee who claims exemption under section 11 and section 12 is required to file the return, as stated above, then we do not see any reason as to why an assessee who claims exemption of income under section 10(22) should not file the return because, ultimately, the assessee's claim for exemption has to be decided by the department only after the relevant material is placed before it by filing the returns.

How to file the Return

3. Rule 12(1) of the Income Tax Rules requires every trust and institution including a Section 8 company which is required to file

its return of income u/s. 139(4A) and (4C) to file its return in Form No. ITR-7;

4. w.e.f. 1-4-2015 A person required to furnish the return in Form ITR-7 needs to file its return electronically either

a. Using a Digital signature or

b. Transmitting the data in the return electronically under electronic verification code

c. Transmitting the data in the return electronically and thereafter submitting the verification of the return in Form ITR-V

5. It further provides that where an assessee is required to furnish a report of audit specified under various sub-clauses of section 10(23C), section 12A(1)(b), section 44AB, section 115JB or section 115VW or section 11(2)(a) of the Act, shall be furnished electronically.

6. The ITR-7 form has been divided into 2 parts and 23 schedules:

Part-A – General information

Part-B – Outline of the total income and tax computation with respect to income chargeable to tax.

Schedule-I: Details of amounts accumulated/ set apart within the meaning of section 11(2) in last year's viz., previous years relevant to the current assessment year.

Schedule-J: Statement showing the investment of all funds of the Trust or Institution as on the last day of the previous year.

Schedule-K: Statement of particulars regarding the Author(s)/ Founder(s)/ Trustee(s)/ Manager(s), etc., of the Trust or Institution.

Schedule-LA: Details in case of a political party.

Schedule-ET: Details in case of an Electoral Trust

Schedule-HP: Computation of income under the head Income from House Property.

Schedule-CG: Computation of income under the head Capital gains.

Schedule-OS: Computation of income under the head Income from other sources.

Schedule-VC: Details of Voluntary Contributions received

Schedule-OA: General information about business and profession

Schedule-BP: Computation of income under the head "profit and gains from business or profession

Schedule-CYLA: Statement of income after set off of current year's losses

Schedule-MAT: Computation of Minimum Alternate Tax payable under section 115JB(n)

Schedule-MATC: Computation of tax credit under section 115JAA

Schedule AMT: Computation of Alternate Minimum Tax payable under section 115JC(p)

Schedule AMTC: Computation of tax credit under section 115JD

Schedule-SI: Statement of income which is chargeable to tax at special rates

Schedule-IT: Statement of payment of advance-tax and tax on self-assessment.

Schedule-TDS: Statement of tax deducted at source on income other than salary.

Schedule-TCS: Statement of tax collected at source

Schedule FSI: Details of income accruing or arising outside India

Schedule TR: Details of Taxes paid outside India

Schedule FA: Details of Foreign Assets

Specific Issues

Jurisdiction

7. A new trust or institution which has not yet obtained registration u/s 12AA is under the jurisdiction of the regular wards based on its registered address, which is allotted at the time of obtaining its PAN. However, once the trust or institution has obtained its registration u/s. 12AA it has to be transferred to the exemption wing of the Income Tax Department.

Rectifications

8. Recently ever since the returns of these trusts and institutions which have been filed online and have claimed deductions u/s. 11. It has been seen that in many cases while processing of these returns u/s. 143(1) by the Central Processing Centre, Bengaluru (CPC), deductions u/s. 11 are not allowed. CPC is also rejecting the rectification applications made u/s. 154 and simultaneously transferring the rectification rights to the jurisdictional officer. Since new trusts jurisdiction are still based on their address, these officers do not have jurisdiction to allow the benefits of exemption u/s. 11. Hence the trust should apply for transfer of its PAN to the exemption wing and thereafter apply for rectification with the exemption wing for allowing deductions u/s. 11.

Wealth Tax

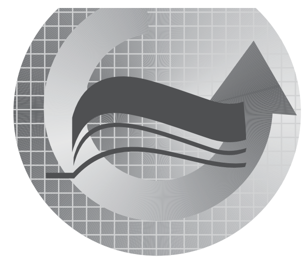
9. Wealth-tax Act, 1957, though it has been significantly watered down and is applicable only up-to AY 2016-2017. Despite this, some trusts may be liable for Wealth Tax for earlier years, especially ones that hold immovable property, may well come in its ambit. Section 5(1)(i) of the Wealth-tax Act, 1957 specifically exempts any property held in trust or other legal obligation for any public purpose of a charitable or religious nature in India. Therefore, such property will not attract wealth-tax. There is no specific definition of 'Religious or Charitable Purpose' under the Wealth-tax Act, 1957 and, therefore, it is reasonable to conclude that even if a trust's objects do not fall squarely within the definition of 'charitable purpose' as defined under section 2(15) of the Income-tax Act, 1961, no wealth-tax liability is attracted. However, wealth-tax liability would be attracted on the assets of a trust, if:

a. any part of the income or property of a trust is applied for the benefit of a person interested as per section 13(3) of the Income-tax Act, 1961;

b. any funds of the trust are invested or deposited or shares in any company are held by the trust, in contravention of section 13(1)(d) of the Income-tax Act, 1961.

It will, therefore, be observed that the conditions for attraction of liability to wealth-tax on a trust are the same as those for loss of exemption under section 13 of the Income-tax Act, 1961.

> To succeed in your mission, you must have single-minded devotion to your goal.
>
> — *Abdul Kalam*



CA Rajesh S. Kadakia & Aditya Y. Bhatt, *Advocate*

Recent Amendments in Foreign Contribution (Regulation) Act, 2010 and Foreign Contribution (Regulation) Rules, 2011

1. Introduction

Foreign Contribution (Regulation) Act, 1976 was enacted, *inter alia*, with a view -

(a) To regulate the acceptance and utilisation of foreign contribution by certain individuals or associations or companies (including charitable institutions);

(b) To prohibit acceptance and utilisation of foreign contribution for any activities detrimental to the national interest.

The said Act was repealed by Foreign Contribution (Regulation) Act, 2010 (FCRA). Subsequently, Foreign Contribution (Regulation) Rules, 2011 (FCRR) were notified.

Recently, amendments have been made both in FCRA and FCRR. This article aims to explain these amendments in the following paragraphs:

2. Amendment in the definition of "foreign source" by the Finance Act, 2016

FCRA is applicable to a charitable institution if contribution is to be received from "foreign source"

The relevant portion of definition of "foreign source" in section 2(1)(j) of FCRA, prior to its amendment by the Finance Act 2016, read as follows:

"'Foreign source' includes-

…

(vi) A company within the meaning of the Companies Act, 1956 (1 of 1956), and more than one-half of the nominal value of its share capital is held, either singly or in the aggregate, by one or more of the following, namely:-

(A) The Government of a foreign country or territory;

(B) The citizens of a foreign country or territory;

(C) Corporations incorporated in a foreign country or territory;

(D) Trusts, societies or other associations of individuals (whether incorporated or not), formed or registered in a foreign country or territory;

(E) Foreign company;"

In order to bring harmony between FCRA, Companies Act, 2013 and FDI Policy of Government of India, the following proviso has been inserted to section 2(1)(j)(vi) by the Finance

Act, 2016, with retrospective effect from 26th September, 2010:

*"**Provided** that where the nominal value of share capital is within the limits specified for foreign investment under the Foreign Exchange Management Act, 1999, or the rules or regulations made thereunder, then, notwithstanding the nominal value of share capital of a company being more than one-half of such value at the time of making the contribution, such company shall not be a foreign source".*

Before the amendment, any Indian company in which a foreign company/foreign citizens were holding more than 50% capital was regarded as a "foreign source" and consequently, any contribution received from such Indian company was treated as "foreign contribution". The position remained the same whether the Indian company was a subsidiary or not and whether it was listed or unlisted. This caused various issues, especially in terms of donations made by them to Indian charitable institutions, contributions towards Corporate Social Responsibility under section 135 of the Companies Act 2013, etc. The recipient-institution had to be registered under FCRA or had to approach the Government for obtaining prior permission to receive any contribution made by these companies. To avoid this, the proviso has been inserted. Broadly it proposes that if the investment by the foreign entity/individuals is within the permissible limits (sectoral cap) under the Foreign Exchange Management Act, 1999, then such a company will not be regarded as "foreign source" and consequently, the contributions will not be treated as "foreign contribution" under FCRA.

To illustrate, suppose a multinational is owning 100% share capital in an Indian company where the entire capital is within the sectoral cap permitted under FEMA. In such circumstances, the subsidiary will not be regarded as a "foreign source".

The proviso refers to nominal value of "share capital" and hence on a literal reading, it will cover all types of shares including preference shares although under FDI policy, "capital" is defined to mean "equity shares; fully, compulsorily & mandatorily convertible preference shares; fully, compulsorily & mandatorily convertible debentures."

Drafting ambiguity

With respect, it appears that the proviso has not been properly drafted. This is explained by way of an illustration:

Suppose the total capital of an Indian company is ` 10 crores. The foreign investment in the Indian company is ` 6 crores. Now, the proviso reads as follows –

*"**Provided** that where the **nominal value of share capital** is within the limits specified for foreign investment under the Foreign Exchange Management Act, 1999, or the rules or regulations made thereunder, then, notwithstanding the **nominal value of share capital of a company** being more than one-half of **such value** at the time of making the contribution, such company shall not be a foreign source"*

As can be seen, at different places, the proviso refers to-

(a) "Nominal value of share capital"

(b) "Nominal value of share capital of a company"

(c) "Such value"

It appears that –

(a) "Nominal value of share capital" in (a) above refers to the amount of investment by the foreign company in the Indian company (that is, ` 6 crores in the illustration).

(b) "Nominal value of share capital of a company" in (b) above refers to the total capital of the Indian company (that is, ` 10 crores in the illustration).

(c) "Such value" in (c) above refers to the investment by the foreign entity (that is, ` 6 crores in the illustration).

Thus, from a literal reading of the proviso, it appears that the proviso excludes from the definition of "foreign source" a company whose nominal value of share capital, that is, ` 10 crores, is more than one-half of "such value" that is, is more than one-half of ` 6 crores, that is being more than ` 3 crores.

It is obvious that the nominal value of share capital of a company (` 10 crores) will always be more than 50% of the investment by a foreign entity!

It is pertinent that *vide* Circular dated 21st December, 2015, the Ministry of Home Affairs (MHA) had sought suggestions on the aforesaid amendment. In the Circular, the proposed language of the proviso was as follows:

"Provided that if the nominal value of share capital is within the foreign investment limits prescribed under the relevant rules and regulations issued under Foreign Exchange Management Act, 1999, then notwithstanding the nominal value of share capital being more than one-half at the time of making the contribution, such company shall deemed to be, and shall always deemed to have been not a foreign source"

It is evident that the language in the aforesaid proposed amendment clearly captured the essence of the proposal.

3. Amendments to FCRA

3.1 A charitable institution can receive a foreign contribution only if it has obtained from the Central Government –

(a) Certificate of registration; or

(b) Prior permission.

[section 11 of FCRA]

For these purposes, it has to make application to the Central Government.

Post registration/prior permission, a charitable institution has to-

(a) File an annual return with the Central Government; and

(b) Apply for renewal of registration.

(c) Intimate the Central Government upon happening of various events such as opening of a bank account, change in name, change in trustees, etc.

The Foreign Contribution (Regulation) Rules, 2011 dealing with the above referred applications/intimations/filings were amended in December 2015 *vide* Foreign Contribution (Regulation) Amendment Rules, 2015 (hereinafter referred to as "FCRAR, 2015"). A summary of the amendments, along with the para number in this article dealing with the amendments, is tabulated below:

Sr. No.	Particulars	Relevant Rule	Form to be used		Fees (`)	Para in this article
			before FCRAR 2015	after FCRAR 2015		
1.	Application for registration	9(1)(a)	FC-3	FC-3	2000	3.2
2.	Application for obtaining prior permission	9(1)(a)	FC-4	FC-3	1000	3.3
3.	Application for renewal of registration	12(2)	FC-5	FC-3	500	3.4

Sr. No.	Particulars	Relevant Rule	Form to be used		Fees (`)	Para in this article
			before FCRAR 2015	after FCRAR 2015		
4.	Annual return	17(1)	FC-6	FC-4	Nil	3.5
5.	Foreign contribution in kind (articles)	17(3)	FC-7	FC-1	Nil	3.6
6.	Foreign contribution (securities)	17(4)	FC-8	FC-1	Nil	3.7
7.	Change in designated bank account	17A(iii)	Proforma was available on MHA website	FC-6	Nil	3.8
8.	Opening of utilization bank account	9(1)(e) / 9(2)(e)	No prescribed form	FC-6	Nil	3.9
9.	Change in name	17A(i)	Proforma was available on MHA website	FC-6	Nil	3.10
10.	Change in address	17A(i)	Proforma was available on MHA website	FC-6	Nil	3.11
11.	Change in aims and objects	17A(ii)	No prescribed form	FC-6	Nil	3.12
12.	Change in key members / trustees	17A(iv)	No prescribed form	FC-6	Nil	3.13
13.	Change in registration / nature	17A(ii)	No prescribed form	Not dealt with in FC-6	Nil	3.14
14.	Transfer of foreign contribution to	24				
	(i) Other registered institutions		Not required	Not required	–	–
	(ii) Non-registered institutions		FC-10	FC-5	Nil	3.15
15.	Placement audited accounts on website	13(a)	NA	NA	NA	3.16
16.	Placement of details of contributions received on website	13(b)	NA	NA	NA	3.17
17.	Reporting by bank	16	NA	NA	Nil	3.18

The salient features of the amendments in FCRR are explained in subsequent paragraphs:

3.2 Application for registration: [Rule 9(1)(a)]

(a) Hitherto, the application for registration was to be made in FC-3. Form FC-3 has been amended by the FCRAR 2015. The application for grant of registration is to be submitted online in Form FC-3 on the website fcraonline.nic.in

(b) A comparison of the pre-amended Form FC-3 and amended Form FC-3 shows that certain additional details are now sought. Primarily, these are as follows:

(a) Official website address, if any, of the institution.

(b) The following details of the key functionaries of the Association.

(i) Aadhaar Number, if any

(ii) Contact details, Office address, Residential address, e-mail address, Landline No., Mobile No.

(iii) If any current key functionary is a current key functionary of any other association, then details of such association.

(c) Once an application for registration is submitted online by an association, there is no need to submit that application in physical form. All requisite documents are to be uploaded with the application[1]. [Rule 9(1)(b)].

(d) The online application Form FC-3 for registration has been designed in an easy to fill format. The applicant will find detailed instructions on each web page of online form while filing the application[2].

(e) No rectification of error is allowed after the application has been finally submitted online. In case of error, fresh application is required to be filed[3].

(f) Submission of verification certificate from the District Collector or Deputy Commissioner or District Magistrate is not mandatory.

(g) Along with application for registration, the association is required to pay a fee of ` 2,000/- [Rule 9(4)(b)].

(h) The amended Rule 9(4)(d) provides that the fee shall be remitted

(i) by demand draft or banker's cheque in favour of the "Pay and Accounts Officer, Ministry of Home Affairs", payable at New Delhi; or

(ii) through online electronic payment gateway as specified by the Central Government.

The FAQ, however, states that the fee is to be paid while filing online form through the payment gateway only and no cheque / bank draft will be accepted[4].

1. Also see: FAQ No. 2 under "Registration and Prior Permission", Topic: "d. How to apply" in FAQs available on https://fcraonline.nic.in
2. Also see: FAQ No. 3 under "Registration and Prior Permission", Topic: "c. Filling of online form" in FAQs available on https://fcraonline.nic.in
3. Also see: FAQ No. 4 on FCRA under "Registration and Prior Permission", Topic: "c. Filling of online form" in FAQs available on https://fcraonline.nic.in
4. Also see: FAQ No. 2 on FCRA under "Registration and Prior Permission", Topic: "e. Payment of fee" in FAQs available on https://fcraonline.nic.in

3.3 Application for obtaining prior permission: [Rule 9(1)(a)]

A charitable institution may not be eligible to obtain registration under FCRA during its formative stage. In these circumstances, it may apply for grant of prior permission to receive foreign contribution under FCRA.

Hitherto, the application had to be made in Form FC-4. After the amendment in Rules, a consolidated Form FC-3 for registration, prior permission and renewal has been prescribed which has to be submitted online in Form FC-3 on the website fcraonline.nic.in. Mainly, the additional details referred to in para 3.2(b) above, in respect of registration are now required for prior permission also. However, a copy of the proposal / project which has been approved by the foreign source for funding, including, projected outlays, budget breakups is no longer required to be submitted.

The fees for application for prior permission are ` 1,000. [Rule 9(4)(a)]

Also see paras 3.2(c) to 3.2(h) above, which, *mutatis mutandis*, apply to the application for prior permission.

3.4 Renewal of registration: [Rule 12(2)]

Hitherto, the application for seeking renewal of registration was required to be made in Form FC-5. As mentioned above, after the amendment, a consolidated Form FC-3 has been prescribed for registration, prior permission and renewal. The form is to be submitted online on the website fcraonline.nic.in.

Mainly, the additional details as referred to in para 3.2(b) above are also required for renewal.

The fees for renewal of the certificate of registration are ` 500 [Rule 12(4)].

Also see paras 3.2(c) to 3.2(h) which, mutatis mutandis, apply to application for renewal.

3.5 Annual return: [Rule 17]

(a) Hitherto, a charitable institution had to file annual return in Form FC-6. Now, after the amendment, the annual return has to be filed online in Form FC-4 within 9 months of the closure of the financial year, that is, by 31st December each year [rule 17(1)].

(b) The important differences between Form FC-6 and FC-4 are as follows:

(i) Form FC-6 had listed 56 different purposes relevant to the institution had to be selected. Now, the Form FC-4 requires the institution to only specify the broad category for which the foreign contribution is received, that is, cultural, economic, educational, religious or social.

(ii) Form FC-4 now requires

(i) donor wise detail of foreign contribution received in excess of ` 20,000 as follows:

Sl. No.	Name of donor(s)	Institutional/ Individual	Details of the donor: Official Address; e-mail address; Website address;	Purpose(s) for which received	Amount (`)
(1)	(2)	(3)	(4)	(5)	(6)

(ii) The details of total number of foreigners working (salaried / in honorary capacity)

(iii) The total amount of foreign contribution utilized towards administrative expenses as provided in rule 5

(c) It is mandatory for the charitable institution to submit a 'Nil' return, even if no foreign contribution is received or utilised during the year. However, in such a case, it shall not be required to enclose certificate from Chartered Accountant or Income & Expenditure Statement or Receipt & Payment Account or Balance Sheet with Form FC-4 [Rule 17(8)[5]]

(d) All requisite documents are to be uploaded online with the return.

(e) In respect of application for registration / prior permission, it has been clarified that no rectification of error is allowed after the application has been finally submitted online and in case of error, fresh application is required to be filled. No similar clarification has been issued for filing of annual return in Form FC-4. It would be advisable to obtain guidance from FCRA Authorities by an e-mail or a physical letter in the event of such error.

(f) CA Certificate

The certificate to be given by a Chartered Accountant along with the annual return, now requires the following additional details :

"(iii) interest accrued on foreign contribution and other income derived from foreign contribution or interest thereon of/worth ` __________ was received by the Association during the financial year ____________;

…

(vii) The association has utilized the foreign contribution received for the purpose(s) it is registered/granted prior permission under Foreign Contribution (Regulation) Act, 2010."

Thus, the certifying chartered accountant will have to compute the income "derived" from foreign contribution. He or she will also have to examine the activities of the institution and ensure that the utilisation of foreign contribution is strictly for the purposes for which the association is registered / granted after taking into consideration the restrictions on utilisation of foreign contribution for administration expenses etc.

3.6 Foreign contribution in kind (articles) [Rule 17(3)]

The pre-amendment rule required intimation about foreign contribution in kind (articles) in Form FC-7. Now, the details of contributions in kind (articles) have to be given in Form FC-1. Form FC -1 has been slightly simplified and requires lesser details as compared to the old Form FC-7.

3.7 Foreign contribution (securities) [Rule 17(4)]

Hitherto, an intimation had to be given about foreign contribution in the form of securities in Form FC-8. Now, the details have to be given in Form FC-1. The Form has also been slightly simplified and requires lesser details as compared to the old Form FC-7.

3.8 Change in designated bank account: [Rule 17A(iii)]

(a) A person who has been granted a certificate of registration or prior permission has to designate a single bank account in which all the foreign contributions are to be deposited [section 17(1)].

(b) Under the pre-amended rules, the institution was required to obtain prior permission of the Central Government before changing bank / branch. However, under the amended rules, the requirement of obtaining prior permission has been dispensed with and the institution is only

5. Also see: FAQ No. 3 under Topic: "Filing of Annual Returns" in FAQs on https://fcraonline.nic.in

required to intimate electronically in Form FC-6, within 15 days, of any change in bank and/or branch of the bank and/or designated foreign contribution account number.

(c) The following details, *inter alia*, are required for the Form:

(i) Details of the new designated bank account of the association for receipt and utilisation of foreign contribution.

Name of the Bank	Branch Address	IFSC Code	Account Number

(ii) Self certified copy of letter from the existing bank regarding the change.

(iii) Self certified copy of letter from the new bank regarding the change.

Apart from the above, the Chief Functionary who has to electronically sign the Form has to affirm that the Bank authorities have been duly informed about change in the designated bank account and a resolution of the governing body was passed before effecting the change.

(d) All requisite documents are to be uploaded online with the intimation.

(e) The rules are silent regarding payment of fees. Hence, such intimation does not require payment of any fees.

3.9 Opening of utilization bank account: [Rules 9(1)(e)/9(2)(e)]

A charitable institution which has obtained registration / prior permission may open one or more accounts in one or more banks for the purpose of utilising the foreign contribution after it has been received [1st proviso to section 17(1)]. Before amendment, the intimation had to be furnished to the Secretary, Ministry of Home Affairs, New Delhi on plain paper within 15 days of the opening of any account. After the amendment, the intimation has to be furnished electronically online in Form FC-6. The main details required in the Form are :

Name of the Bank	Branch Address	IFSC Code	Utilisation Account Number

Apart from the above, the Chief Functionary who has to electronically sign the Form has to affirm that the Bank authorities have been duly informed about change in the opening of Utilisation Bank Account and the resolution of the governing body was passed before effecting the change.

The rules are silent regarding payment of fees. Hence, such intimation does not require payment of any fees.

The Form requires details of new Utilisation Bank Account opened. It does not seek details of accounts closed. Moreover, it does not specifically require the institution to enclose copy of letter from the bank in which such utilisation account(s) have been opened.

3.10 Change in name: [Rule 17A(i)]

(a) Hitherto, there was no prescribed form in the FCRR for intimation to the Central Government regarding change in the name of the institution, although a proforma was available on the website. Post amendment, a person who has been granted a certificate of registration or prior permission shall intimate electronically online in Form FC-6, within 15 days, of any change in the name of the association.

(b) The following details are required to be submitted:

(i) Amended / changed name of the association as recorded with local / relevant authority;

(ii) Self-certified copy of amendment approved by local / relevant authority.

Apart from the above, the Chief Functionary who has to electronically sign the Form has to affirm that change of name has been duly recorded with the concerned registering authority and the resolution of the governing body was passed before effecting the change.

All requisite documents are to be uploaded online with the intimation.

(c) The rules are silent regarding payment of fees. Hence, such intimation does not require payment of any fees.

3.11 Change in address: [Rule 17A(i)]

(a) Hitherto, there was no prescribed form in the FCRR for intimation to the Central Government regarding any change in the address of the institution, although a proforma was available on MHA website. Now, a person who has been granted a certificate of registration or prior permission has to intimate electronically online in Form FC-6, within 15 days, of any change in its address within the State for which registration/prior permission has been granted under the Act

(b) Apart from the above, the Chief Functionary who has to electronically sign the Form has to affirm that-

   (i) Change of name and/or aims and objects; address of the association has been duly recorded with the concerned registering authority.

   (ii) The resolution of the governing body was passed before effecting the changes.

(c) The rules are silent regarding payment of fees.

3.12 Change in aims and objects: [Rule 17A(ii)]

(a) Hitherto, there was no prescribed form for intimation to the Central Government regarding any change in the aims and objects of the institution. Now, a person who has been granted a certificate of registration or prior permission shall intimate electronically online in Form FC-6, within 15 days, of any change in its aims and objects.

(b) The following details are required to be submitted:

   (i) Amended / changed aims and objects of the association as recorded with local / relevant authority.

   (ii) Self-certified copy of amendment approved by local / relevant authority.

   Apart from the above, the Chief Functionary who has to electronically sign the Form has to affirm that-

   (i) Change of aims and objects has been duly recorded with the concerned registering authority.

   (ii) The resolution of the governing body was passed before effecting the changes.

(c) All requisite documents are to be uploaded online with intimation.

(d) The rules are silent regarding payment of fees. Hence, such intimation does not require payment of any fees.

3.13 Change in key members / trustees: [Rule 17A(iv)]

(a) Hitherto, if a change of Members of the Executive Committee / Governing Council was proposed, and such change would cause replacement of 50% or more of such Members as were mentioned in the application for registration, then a prior permission of the Central Government had to be obtained before effecting such change. However, there was no prescribed form for the application.

(b) The amended rules provide that a person who has been granted a certificate of registration or prior permission shall intimate electronically in Form FC-6, within 15 days, of any change in key members of the association, if at any point of time such change causes replacement of 50% or more of the original key members as reported in the application for grant of registration / prior permission / renewal of registration.

Thus, the requirement of obtaining prior permission has been substituted by the requirement of sending intimation.

(c) Illustration :

"X", a charitable institution, had 10 trustees on its governing body at the time of applying for registration in 2010. In April 2016, 4 trustees were replaced. Now, 2 other trustees are to be replaced.

Thus, in April 2016, only 40% of the original 10 trustees were replaced. Consequently, no intimation was required to be sent to the Central Government. However, now, although only 2 trustees are to be replaced, it cumulatively leads to replacement of more than 50% of the original governing body, and consequently, intimation to the Central Government is necessary.

(d) The following details are required in the Form:

(i) Details of all the key members after change in 50% or more of the original key members

Name	Name of father / spouse	Nationality	Aadhaar Number, if any	Occupation	Designation in the Association	Relationship with other Member(s) of the Executive Council / Governing body / Office bearers	Contact Details; Office Address; Residential Address; e-mail address; Landline No.; Mobile No.

(ii) If any of the above is a foreigner (including PIO/OCI card holder), details thereof

Name	Date and Place of birth	Passport number	Address in the foreign country	Whether a person of Indian origin	PIO/OCI Card Number, if any	If resident in India, date from which residing in India

Apart from the above, the Chief Functionary who has to electronically sign the form has to affirm that none of the key members has been appointed in violation of section 12(4) of FCRA and the resolution of the governing body was passed before effecting the change.

(e) All requisite documents are to be uploaded online with the intimation.

(f) The rules are silent regarding payment of fees. Hence, such intimation does not require payment of any fees.

3.14 Change in nature of the institution / its registration [Rule 17A(ii)]

Hitherto, there was no prescribed form for intimation to the Central Government regarding any change in the registration of the institution. Rule 17A(ii) refers to intimation in case of any change in the "nature, aims and objects and registration with local/ relevant authorities". However, Form FC-6 only refers to intimation regarding "change of aims and objects of the association". Thus, the Form is silent regarding change in the nature of the institution / its registration with any authority simpliciter without any corresponding change in aims and objects. This appears to be inadvertent and it would be advisable to obtain guidance from FCRA Authorities by an e-mail or a physical letter in the event of such a change.

3.15 Transfer of foreign contribution to unregistered persons (Rule 24)

(a) Hitherto, the application for seeking permission for transfer of foreign contribution to other unregistered persons was to be made in Form FC-10. After the amendment, it has to be made in Form FC-5. There is no other substantial change in the details required.

(b) Unlike other rules, rule 24(1) is silent as to whether Form FC-5 has to be filed electronically online or not. This appears to be inadvertent and the website fcraonline.nic.in is enabled for online submission.

(c) The rules are silent regarding payment of fees. Hence, such intimation does not require payment of any fees.

3.16 Placement of accounts on website [Rule 13(a)]

After the amendment to the rules, a person who has been granted a certificate of registration or granted prior permission has to place the audited statement of accounts on receipts and utilisation of the foreign contribution, including income and expenditure statement, receipt and payment account and balance sheet on its official website or on the website as specified by the Central Government. Such accounts have to be placed within 9 months of the closure of the financial year.

See para 3.17(b) - A similar notification has not been issued under this rule specifying the website on which accounts, etc. are to be placed.

3.17 Placement of details of contributions received on website [Rule 13(b)]

(a) Under the amended rules, a charitable institution receiving foreign contribution in a quarter of the financial year shall place the details of foreign contribution received on its official website or on the website as specified by the Central Government.

Such details –

(i) Have to be placed;

(ii) Within 15 days following the last day of the quarter in which it has been received;

(iii) Should clearly indicate the details of donors, amount received and date of receipt.

(b) *Vide* Notice dated 3rd March 2016, MHA has notified that institutions which do not have their own website may intimate their receipts of foreign contribution on https://fcraonline.nic.in. It is pertinent to note that on a plain reading of the Notice, it appears that it is only those institutions which do not have an official website are permitted to place the details on https://fcraonline.nic.in. However, rule 13(b) gives an option to the institution to place the details either on their own official website or on the website as specified by the government.

3.18 Reporting by bank [Rule 16]

Erstwhile rule 16 dealing with reporting by bank has been substituted by a new rule which provides that the bank having a designated account or utilisation account shall report to the Central Government all transactions in respect of receipt or utilisation of any foreign contribution by any person whether or not such person is registered or granted prior permission under the Act. Such report shall be sent within 48 hours of the transaction.

Credit / utilisation in the bank account

Rule 16 states that every bank shall report to the Central Government within 48 hours of any transaction in respect of receipt of foreign contribution by any person whether or not such person is registered or having prior permission under the Act. In view of the above, it follows that bank may credit any foreign contribution received by an institution without registration or prior permission.

However, it is not necessary for the banks to report foreign contribution that is returned to the donor without crediting in the account of the recipient where foreign contribution is returned to the remitter by the beneficiary institution for want of registration/prior permission .

Practically, banks are instructed that they should not allow any foreign inward remittance in the designated account till such time the association is granted registration. However, while the banks can prevent such a situation in cases where a cheque is presented by the recipient of foreign contribution for deposit in its savings/current account, it may not always be possible when the foreign remittance is through wire transfer. Therefore, in all such cases, besides sending a report to MHA as per Rule 16, the bank would not allow any withdrawal or transfer or utilisation of the FC amount till such time the institution produces documentary evidence from MHA permitting it to do so.

Concluding remarks

The amendment in the definition of "foreign source" appears to be well-intentioned and is likely to alleviate the problems faced by charitable institutions at the time of receiving donations / CSR contributions from certain Indian companies having foreign interest. Also, the amendments in the Rules are a step towards making the entire process of filing applications, annual returns, etc. online and more user-friendly.

"There are only two ways to live your life. One is as though nothing is a miracle. The other is as though everything is a miracle."

— Albert Einstein

"Finish each day and be done with it. You have done what you could. Some blunders and absurdities no doubt crept in; forget them as soon as you can. Tomorrow is a new day. You shall begin it serenely and with too high a spirit to be encumbered with your old nonsense."

— Ralph Waldo Emerso

CA Deepak Thakkar

Implication under MVAT on Activity by Trusts & Associations

The Public Charitable Trusts & incorporated or unincorporated societies, clubs or other Association of Persons (AOP) are covered under the definition of 'dealer' u/s 2(8) of the Maharashtra VAT Act (MVAT Act). Thus, NGOs which are formed as such are also dealers under the MVAT Act. The educational institutions which carry on the activity of manufacturing, buying or selling goods in the performance of its functions for achieving its objects, shall not be deemed as dealer as provided under Exception II to the definition of dealer. The supply of goods by any association or body of persons, incorporated or not, to a member thereof for money consideration is deemed as 'sale' by such AOP as defined u/s. 2(24). Hence, the mutuality concept has no role to play under sales tax laws in view of sales specifically covering deemed sales transactions.

If such persons are selling any goods in or from Maharashtra State, whether or not engaged in any 'business' activity, they are dealers which need to comply with the provisions of MVAT law. The threshold limit is ` 10 lakh i.e., if such person crosses the sales turnover of ` 10 lakh in a financial year then he shall get it registered under the law & comply. Said limit of total sales is reduced to ` 1 lakh, if there is any purchase/bringing of goods from outside the State/country of any value and the value of taxable goods sold/purchased is not less than ` 10,000/- in said financial year.

The activity may be carried on with the object of charity or non-profit motive or the resultant surplus may be used just for charity but irrespective their object, the trust is a dealer for all purposes of the MVAT Act. If they are doing business, while carrying on or in order to carry on their primary non-business activity i.e. running educational institution or hospital or serving the poor/needy class of the society, they are dealers liable under the sales tax law for their business activity. It shall register under MVAT Act & obtain TIN.

The educational institution is not a dealer *qua* its sales which is in furtherance of its educational objectives. The trust running the hospital is liable to pay sales tax/VAT on sale of medicines, drugs, etc. through its medical store/chemist shop, sale of any item through its gift shop, sale of used capital assets and scrap. If it is running a cafeteria or restaurant for serving visitors then, its sale is also liable to sales tax. However, the medicines administered, consumables and implants used in the course of medical treatment of in-patients/admitted patients does not attract sales tax as the dominant intention is treatment of disease and not the supply/sale of medicines, implants, etc. as clarified by a Circular # 7A dated 13th March 2008. The said clarification was given considering the Supreme Court ruling in case of *BSNL vs. Union of India (2006) 145 STC 91 / 3 VST 95 (SC).* The said view is further confirmed by rulings in case of *Tata Main Hospital vs. State of*

Jharkhand (2008) (2) JCR 174 (JHR); International Hospitals Pvt Ltd vs. State of UP (2014) 71 VST 139 (All) and Fortis Healthcare Pvt Ltd vs. State of Punjab WP # 1922 to 1924 of 2012 (23rd Jan 2015) (P&H). However, in spite of said status, some VAT authorities are taxing receipts of such nature which is improper/illegal, resulting in chaos & high handedness on trusts which runs philanthropic activities in society.

When the Trust/AOP sells any goods which are manufactured in-house or got it manufactured by paying labour charges or purchased for trading or which are received by way of donation-in-kind, it is a sale turnover under the MVAT Law. It includes sales of used capital assets or scrap/unserviceable. The sale may be of books, idols, agarbatti, Cassettes/CDs/DVDs, greeting cards, picture post-cards, calendars, diaries, flowers, fruits, gift items, etc. It may be running a canteen or eating house or restaurant serving food & drinks to visitors / devotees, for a price, is also a part of sales turnover.

The sales of goods may be tax free or exempt fully/partially or liable to tax at a rate specified for relevant goods under applicable Schedule Entries & Notification. Of course, setoff/input tax credit is granted of VAT paid on its corresponding local purchases, iff supported by valid purchase tax-invoice, as provided under setoff rules, taking care of retention/negative rules.

It shall maintain regular books of a/c, records, invoices, challans, contracts, prepare financial statements, file returns as prescribed, pay taxes, and so on as provided under MVAT Law. If its sales or purchase turnover crosses the limit of ` 1 crore in a financial year then its accounts & records are required to be audited and its VAT audit report in Form 704 needs to be filed online before prescribed due date.

Let us consider some important relevant Determination (DDQ) Orders of Commissioner of Sales Tax of Maharashtra and rulings of Mah. Sales Tax Tribunal/Courts on the subject:

1] Ramakrishna Math and Chitshakti Trust, both Public Charitable Trusts, organise sale of spiritual books, cassettes and CD's on spiritual topics and devotional songs, photographs and laminated posters. It also sells meditation asanas, bhasma, kumkum, meditation cushions, dhoop, incense, incense holders, Hatha yoga belts, Japa malas, Japa rings, meditation oils [perfumes], musical instruments such as tabla, harmonium, mridanga, santoor, pooja cloths, meditation shawls, pendants, greeting cards, calendars and carry bags. Reliance was placed on the Supreme Court judgment in the case of *Sai Publication Fund (126 STC 228).* Commissioner observed that the said judgment is based upon the provisions of Bombay Sales Tax Act, 1959 (BST Act) and definition of 'dealer' as per Section 2(11) of BST Act. The Supreme Court, on interpretation of the definition of 'business' and 'dealer' of the BST Act came to the conclusion that, as per the provisions of definition of 'dealer' as per BST Act unless a person carries on the business as per the meaning of term 'business' in section 2(5A) of BST Act a person cannot become a dealer. The Supreme Court thus observed that the main activity of the applicant is to spread message of Sai Baba which cannot to be termed as an activity of business as per Section 2(5) of BST Act. The Court further observed that if the main activity is not business, any transaction incidental or ancillary would not normally amount to business unless an independent intention to carry on business in the incidental or ancillary activity is established. The provisions of taxation of Public Charitable Trusts are different in MVAT Act as compared to BST Act. Under MVAT Act as per Sections 2(8)(iv-a), the Public Charitable Trusts are included as deemed dealers. Such inclusion was not present in the category of deemed dealer under the BST Act. The explanation to the definition of dealer is thus read as "for the purposes of this clause, each of following persons, bodies and entities who sell any goods whether by auction or otherwise, directly or through an agent for cash, or for deferred payment, or for any other valuable consideration, shall, notwithstanding anything

contained in clause (4) or in other provisions of this Act, be deemed to be a dealer, namely – ...(vi-a)- Public Charitable Trust".

By virtue of the above inclusion, the ratio of the Supreme Court judgment of Sai Publication Fund, becomes infructuous in the applicants' case, in the context of the MVAT Act. The explanation to the definition of dealer, clearly mentions that, notwithstanding anything contained in Clause (4), i.e., the definition of business, the certain bodies including the public charitable trusts are deemed to be dealers. Once a legal fiction is created, the law assumes the fiction to take all the requisites of the deeming provisions. As such the requirement of a dealer to carry on the activity of business gets fulfilled, once a deeming fiction is created. Supreme Court in the case of *Commissioner of Income-tax vs. S. Tejasingh (35 ITR 408),* observed that "it is a rule of interpretation well-settled that in construing the scope of legal fiction, it would be proper, even necessary to assume all these facts on which alone can fiction operate". Thus, the Court in an unequivocal term stated that in order to operate legal fiction, the fiction assumes the necessary act to make it operational. The question whether the activity of the applicant is in the nature of trade or business or is its main activity does not arise once the deeming fiction is created. In view of this clear provision of law, the reliance on the judgment of Sai Publication Fund, is not much helpful to the applicants, as the judgment of Sai Publication was based on the provisions of BST Act, wherein the Public Charitable Trusts were not in the category of deemed dealer. The applicants do not succeed on this ground. Alternatively, it is argued that, by virtue of exception to the definition of 'dealer', they get exempted being an educational institution. The Exception-II reads as under:

"An educational institution carrying on the activity of manufacturing, buying or selling goods, in the performance of its functions for achieving its objects, shall not be deemed to be a dealer within the meaning of this clause."

It is to be noted that the legislation has extended the benefit only to the educational institutions and not to the bodies spreading education. No doubt, the applicants are spreading the education among the masses, but still they cannot be termed as educational institutions.

Commonly speaking, the educational institutions that would be excluded from the purview of definition of 'dealer' are those institutions which satisfy all the following five criteria simultaneously, namely:

1) Recognized as Educational Institutions by University or UGC, or as the case may be, by technical or education board.

2) Have prescribed courses or syllabus for the alumni.

3) Has teaching staff which is on the payroll of the college or institution.

4) Issues certificates to its alumni.

5) Conducting tests/exams as per prescribed rules.

Both the applicants do not satisfy the above criteria and hence cannot be termed as educational institutions. Thus Ramakrishna Math and Chitshakti Trust, both Public Charitable Trusts, are dealers within the meaning of Section 2(8) read with Explanation (iv-a) of the MVAT Act, 2002. The applicants' request as regards prospective effect to the determination order was accepted & liability was protected till the date of this order.

[Ramakrishna Math and Chitshakti Trust DDQ-11-2005/Adm-5/53/54/B-02 dated 20-1-2006]

2] The National Associations for the Blind instituted an Industrial Home for visually impaired men in the name of Muncherjee Nowrojee Banajee. The Muncherjee Nowrojee Banajee Industrial Home for the Blind started functioning from July, 1956. The M. N. Banajee Industrial Home For The Blind was established with the sole intention of providing education

and training to the visually impaired persons. It is an activity of the National Association for the Blind, India. It is registered under the Bombay Public Trusts Act.

The institute imparts vocational training to the blind students enrolled in the institute in various courses, such as assembly work, cane work, candle making, agarbatti making, handloom weaving, light engineering, tailoring, etc. For imparting training on these courses, various items are required to be purchased. This activity of purchases is done with the object of the institute as regards imparting training to the blind. The items made by students/trainees while imbibing the skills for the particular course, are sold by the institute.

The Institute can be termed as an educational institution for having fulfilled the criteria of an educational institution. So it is covered by an Exception-II to the section 2(8) of the MVAT Act and hence not a dealer.

[M. N. Banajee Industrial Home For The Blind. DDQ-11-2005/Adm-5/82/B-01 Mumbai, dated 2-6-2006]

3] THE NAB WORKSHOP FOR THE BLIND is a deemed dealer for the purposes of MVAT Act. The Exception-II to the definition of dealer, w.r.t. educational institution, would be applicable only to the extent it undertakes activities of manufacturing, buying or selling which are in the performance of functions for achieving the objects.

[The NAB Workshop for the Blind. DDQ-10/2005/ Adm-5/89/B-02 dt. 13-3-006]

4] The society "The NSD Industrial Home for the blind"is not a 'dealer' under the provisions of the MVAT Act, 2002 as it is an Educational Institution which comes under Exception-II of the explanation to the definition of 'dealer' under Section 2(8) of the MVAT Act.

[The NSD Industrial Home for the blind. DDQ. 11/2006/Adm-5/34/B- 3 Mumbai, dt. 14-12-2009]

5] Vipassana Research Institute is an Educational Institution hence not a dealer under clause (8) of section 2 of the MVAT Act.

[DDQ-11/2008/Adm-3/34/B- 4 dt. 18-9-2008.]

6] Bombay Natural History Society is not an educational institution carrying on the activity of buying or selling of goods in the performance of its functions for achieving its objectives and hence a 'deemed dealer' within the meaning of the section 2(8)(iv-a) of the MVAT Act. However, its liability is, protected till the date of this order.

[Bombay Natural History Society. DDQ-10/Adm-5/116/B- 1 Mumbai, dt. 6-3-2006]

7] 'Shree Shirdi Sai Baba Sansthan Trust' is a deemed dealer under clause iv(a) of the Explanation to the definition of dealer under section 2(8) of the MVAT Act, 2002. The activities statutorily required to be undertaken by the Committee amount to a transaction of sale when the offerings in kind are liquidated or amenities afforded to the devotees through providing rooms, food and drink at a reasonable rate. It is liable to pay tax for such transactions under the provisions of the MVAT Act. It falls under clause (x) of the Explanation to the definition of 'dealer' u/s. 2(a) of MVAT Act.

[Shree Shirdi Sai Baba Sansthan Trust DDQ/11-2007/Adm.3/11/B-4 dt. 18-3-2009]

8] 'Seva Sadan Society'is a dealer under clause (8) of section 2 of the MVAT Act *qua* its activities of running a 'canteen', 'cooking 'Aahar service' and the 'By the way' restaurant and the sales pertaining to the above activities are taxable under the MVAT Act, 2002. The liability of the Society is protected till the date of the order.

[Seva Sadan Society. DDQ/11-2006/Adm.3/66/B- 1 dt. 9-3-2009]

9] Mumbai Grahak Panchayat (MGP) is a voluntary consumer organisation, registered under The Charitable Trusts Act and also registered as a Society. Its motto is declared as

"Promote and protect the interest of consumer and to create awareness about their rights and duties amongst the public at large." The distribution system became operational in 1975 in Mumbai. Over a period of 32 years, it has grown from about 28 buying groups to 1,574 buying groups. The membership has risen from 400 members to 21,632 in the year 2007. At present MGP supplies about 90 items of grocery every month and about 250 different items in a year to its 21,000 families. Its total turnover is about ` 250 million. This distribution system is being operated with the help of 90 paid employees.

The Commissioner held that said activity of acquiring the goods as per requisition of the members and distributing the same to the members on "No Profit No Loss" basis amounts to sale and purchase in the terms of the MVAT Act which would be liable to tax on taxable goods, under the Act. The prayer for prospective effect is rejected.

[Mumbai Grahak Panchayat (MGP). DDQ 11/2007/ Adm-3/54/ B-2 dt. 7-12-2010]

10] Rajasthani Sammelan and Ghanashyamdas Saraf Trust are dealers & liable to pay VAT on the transfer of use of utensils, furniture, etc. Such transaction is covered by sub-clause (iv) of clause (b) of section 2(24) of the MVAT Act. It has leased many items. Schedule Entry C-33(a) (b) & (c) covers ferrous and non ferrous domestic utensils. Schedule Entry C-81, schedule entry C-101 and Schedule Entry A-45 cover textiles. Furniture is covered by residuary entry. It is entitled to set off u/r. 52(2) of the MVAT Rules subject to Retention Rule 53 and Negative Rule 54 of the MVAT Rules.

[Rajasthani Sammelan and Ghanashyamdas Saraf Trust. DDQ-11-2006/Adm-5/27/B- 5 & DDQ-11-2006/Adm-5/30 dt. 20-7-2010]

11] Lalbagcha Raja Sarvajanik Ganeshostsav Mandal is a dealer under MVAT Act. It is liable to pay tax on sale by auction of articles, ornaments & offerings of gold & silver. Prospective effect request not accepted.

[Lalbagcha Raja Sarvajanik Ganeshostsav Mandal. DDQ/11-2012/Adm-6/30/B-2 dt 30-12-2013]

12] SEBI (Securities and Exchange Board of India) is a deemed dealer under clause (x) of Explanation to definition of 'dealer' u/s. 2(8) of MVAT Act for engaging in activity of sale of scrap & as well as acquisition & sale of fixed assets as movable property. Request for prospective effect is rejected.

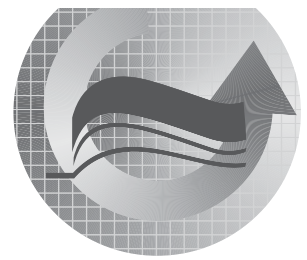
[SEBI DDQ/11-2012/Adm-6/15/B-1 dt. 10-11-2014]

13] "Stressed Assets Stabilisation Fund" is a trust set up by Central Govt. in the year 2004, is a deemed dealer under clause (x) of Explanation to definition of 'dealer' u/s. 2(8) of MVAT Act. Disposal of movable goods to recover the stressed assets amounts to sale but sale of immovable property is not taxable under MVAT Act. Sale would be in the hands of the person or dealer who effects the transaction of sale of goods & accordingly transfers the title in the property to the purchaser. Request for prospective effect is rejected.

[Stressed Assets Stabilisation Fund. DDQ/11-2014/ Adm-6/1/B-2 dt. 28-3-2014]

14] Sulabh International Social Service Organisation a non-profit voluntary social service organisation of international repute is a dealer under the MVAT Act. The transaction of construction of public toilet is a works contract. The permission to maintain & operate said public toilets for a period of 30 years on the basis of "pay & use" for a fee is a sale or deemed sale. Request for prospective effect is rejected.

[Sulabh International Social Service Organisation. DDQ/11-2013/Adm-6/13 & 18/B-1 dtd 11-4-2016]



CA Rajiv Luthia

Critical Analysis of Applicability of Service Tax on NGOs

Introduction

Applicability of Service Tax on Non-Government Organisations (NGOs) who are non-profit making entities has always been vexed and debatable issue.

As we all understand, a Non-Government Organisation (NGO) is engaged in socio-economic activities catering to the needs of the poor & needy people. NGOs play a very important role in the development of any economy, especially in developing country like India, and can be very effective in reaching the target groups in the areas where even the government cannot reach.

The term "Non-Governmental Organisation" came into popular use with the establishment of the United Nations Organisation in 1945 with provisions in Article 71 of Chapter 10 of the UN Charter for a consultative role for organisations which are neither Governments nor member states.

An NGO is independent from States and international Governmental organisations. They are usually funded by donations but some avoid formal funding altogether and are run primarily by volunteers. NGOs are highly diverse groups of organisations engaged in a wide range of activities and take different forms in different parts of the world. Some may have charitable status, while others may be registered for tax exemption based on recognition of social purposes. Others may be fronts for political, religious, or other interests. (source : www.wikipedia.com).

Such organisations, by virtue of their object of being non-profit making entity, enjoy various exemptions from payment of Income-tax under the Income-tax Act, 1961. However, this very exemption under Income-tax Act creates a misconception that NGOs are not liable to pay service tax also. In this article, the author has tried to analyse the applicability of service tax on such NGOs.

Brief History

Under the selective approach for levy of service tax, as existed up to 30th June, 2012, most of the NGOs were out of the service tax net till 2006 as the levy of service tax under most of the categories was on services provided by the service provider being a "commercial concern".

Vide Finance Act, 2006, the term "commercial concern" was replaced by the term "any person" for most of the service categories hence NGOs were brought within the ambit of service tax in respect of services provided by them under various categories such as

Club or Association Services, Renting of Immovable Property Services, Commercial Training or Coaching Services, Mandap Keeper's Services etc.

Central Board of Excise & Customs (CBEC), *vide* Circular No.84/2/2006-ST (F. No. 137/123/2006-CX.4) dated 19th September, 2006 had clarified that:

- Exemption under the Income Tax Act on the ground of being a public Charitable Institution is of no consequence to levy of service tax. Levy of service tax is entirely governed by the provisions contained in the Finance Act, 1994 and the rules made thereunder.
- The definition of "charity" and "charitable" as defined in Black's Law Dictionary may be kept in mind. "Charity" is defined as "aid given to the poor, the suffering or the general community for religious, educational, economic, public safety, or medical purposes", and "charitable" as "dedicated to a general public purpose, usually for the benefit of needy people who cannot pay for the benefits received".

CBEC, *vide* Circular No.127/9/2010-ST dated 16th August, 2010, while dealing with the issue whether donations and grants-in-aid received from different sources by a Charitable Foundation imparting free livelihood training to the poor and marginalised youth, will be treated as "consideration" received for such training and subjected to service tax under "commercial training or coaching service", clarified that "unless the link or nexus between the amount and the taxable activity can be established, the amount cannot be subjected to service tax. Donation or grant-in-aid is not specifically meant for a person receiving such training or to the specific activity, but is in general meant for the charitable cause championed by the registered Foundation. Between the provider of donation/grant and the trainee there is no relationship other than universal humanitarian interest. In such a situation, service tax is not leviable, since the donation or grant-in-aid is not linked to specific trainee or training."

Similarly, under the category of "Commercial Training or Coaching Services", an explanation was inserted by Finance Act, 2010 retrospectively w.e.f. 1st July, 2003 to clarify that the term "commercial" appearing in section 65 (26) only means that such training or coaching is being provided for a consideration, whether or not such training or coaching is conducted with a profit motive.

However, NGOs continued to avail benefit of exemptions/exclusion for various service transactions under the categories such as Club or Association Services, Mandap Keeper's Services, Renting of Immovable Property Services etc.

Taxability under Negative List Regime

W.e.f. 1st July, 2012, there is a paradigm shift in the Service Tax Law as India adopted comprehensive approach (popularly known as "Negative List" regime) for levy of service tax as against the selective approach adopted till 30th June, 2012.

In the Negative List Regime, all the services provided within the taxable territory by any person to another for a consideration are liable to service tax other than those mentioned in the Negative List or exempted by way of notifications.

In nutshell, w.e.f. 1st July, 2012, for any activity to fall within the meaning of service, following are the essential requirements. There must be:

a) An activity

b) By one person for another

c) For a consideration

d) Would include declared service

CBEC, in Para 2.2.2 of Educational Guide for Taxation of Services dated 20th June, 2012 has clarified that "activity carried out without any consideration like donations, gifts or free charities are therefore outside the ambit of service. For example grants given for a research where the researcher is under no obligation to carry out a particular research would not be a consideration for such research. An act by a charity for consideration would be a service and taxable unless otherwise exempted. Conditions in a grant stipulating merely proper usage of funds and furnishing of account also will not result in making it a provision of service. Donations to a Charitable Organisation are not consideration unless charity is obligated to provide something in return e.g., display or advertise the name of the donor in a specified manner or such that it gives a desired advantage to the donor."

In view of the above, grants and unrestricted funds received by NGOs cannot be treated as service in absence of *quid pro quo.* However, if there are any stipulations whereby any benefit/advantage directly arises to the donor in lieu of his donation, then it shall be treated as a taxable service. An example of such benefit could be displaying donor's logo or name prominently at the places of activity giving distinct advantage to the donor

Exemptions

Apart from services covered under Negative List u/s. 66D, presently following specific exemptions are enjoyed by entities having non-profit motive under Notification No.25/2012-ST dated 20th June, 2012:

- Clause 4 of the said Notification grants exemption to services provided by entities registered u/s. 12AA of the Income-tax Act, 1961 by way of charitable activities. The term "charitable activity" is defined in clause 2(k) of the said Notification.

There are many organisations who are not registered u/s. 12AA but carrying out charitable activities and claiming exemption in Income-tax u/s. 10(23C). However, such organizations will not get benefit of this exemption provided in clause 4 for the purpose of service tax on the ground of non registration u/s. 12AA.

Section 2(15) of the Income-tax Act, 1961 defines "charitable purpose". The said definition is broader as compared to the term "charitable activities" defined under Clause 2(k) of the said Notification. The activity like preservation of monuments or object of artistic or historic interest is not covered under service tax as charitable activity thereby the service transactions of this nature would not get exemption under service tax.

- Clause 5(a) of the said Notification grants exemption to services provided by way of renting of precincts of a religious place meant for general public.

- Clause 13(c) of the said Notification grants exemption to services provided by way of construction, erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation or alteration of a building owned by an entity registered u/s. 12AA of the Income-tax Act,1961 and meant predominantly for religious use by general public.

  The said exemption is restricted only to buildings meant predominantly for religious use. No exemption is granted for buildings use for other charitable purposes such as education, medical, old age home etc. Hitherto, these

services were not liable to service tax for the period upto 30th June, 2012.

- Clause 28 of the said Notification grants exemption to services by a non-profit entity registered under any law for the time being in force, to its own members by way of reimbursement of charges or share of contribution –

  (a) As a trade union;

  (b) For the provision of carrying out any activity which is exempt from the levy of service tax; or

  (c) Up to an amount of ` 5,000/- per month per member for sourcing of goods or services from a third person for the common use of its members in a housing society or a residential complex

- Clause 34(b) of the said Notification grants exemption to services received from a provider of service located in a non-taxable territory by an entity registered u/s. 12AA of the Income-tax Act, 1961 for the purposes of providing charitable activities

No such exemption is available to entities claiming exemption u/s. 10(23C) of the Income-tax Act, 1961 & who are not registered U/s. 12AA

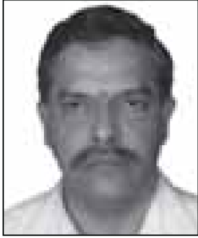
However, while claiming any of the above exemptions, NGOs have to take utmost care not only about its eligibility for claiming such exemption but also about fulfilling various conditions attached.

In this regard, readers may refer the decision of Constitutional Bench of Hon'ble Supreme Court in the case of *CCE, New Delhi vs. Hari Chand Shri Gopal (2010) TIOL 95 (SC-CX-CB)* wherein the Hon'ble Apex Court has held that exemption Notifications have to be strictly construed. The law is well settled that a person who claims exemption or concession has to establish that he is entitled to that exemption or concession. A provision providing for an exemption, concession or exception, as the case may be, has to be construed strictly with certain exceptions depending upon the settings on which the provision has been placed in the statute and the object and purpose to be achieved. If exemption is available on complying with certain conditions, the conditions have to be complied with. The mandatory requirements of those conditions must be obeyed or fulfilled exactly, though at times, some latitude can be shown, if there is a failure to comply with some requirements which are directory in nature, the non-compliance of which would not affect the essence or substance of the notification granting exemption.

Conclusion

NGOs have played a very important role and supported Governments in performing their obligations in the areas of medical, education, natural calamities like floods, earthquakes etc. for the benefit of citizens.

There is a saying that only two things in this world are certain: death & taxes. Interpretation of statute is always being a subject matter of litigation in the area of taxation. NGOs are also not immune from this litigation process. In fact, the Government should encourage the NGOs by giving more incentives and benefits especially in the areas of indirect taxes.



CA Vijay Joshi

Restructuring of the entities carrying on Charitable Activities

Introduction

In the life of every organisation, be it charitable or commercial, there comes a phase in view of circumstances surrounding, within and outside, where it finds itself not evolving, saturated and at times, on a declining path looking for an exit route. In respect of Charitable Organisations, such an exit route has been provided in respective governing legislations.

Since an entity or institution eligible for registration under section 12AA can be a public charitable trust registered under Maharashtra Public Trusts Act (hereafter referred to as 'MPT') or a society registered under Societies Registration Act 1860 or a Company registered under section 8 of Companies Act, 2013, let us look at the above situations under the laws governing such entity.

1. Procedure of Dissolution of Charitable Trust under Maharashtra Public Trusts Act

The dissolution may take form of winding up or amalgamation or deregistration and all three modes are under different circumstances though end result may lead to same destination. The Charity Commissioner under MPT is an authority to take into account all the facts, hold an inquiry, take evidence, suggest measures as well as pass orders to prevent any *mala fide* action by or against Trust to save Charitable Trust from failing. Hence, all or any of these intended actions are routed through Charity Commissioner.

1.1 In the circumstances where Charity Commissioner is of the opinion that

i. The original object for which the Trust was created has failed;

ii. The income or surplus has not been utilised or is not likely to be utilised;

iii. It is not in the public interest, expedient, practicable, desirable, necessary or proper to carry out the original intention of author of the trust.

The Charity Commissioner shall require the trustees to apply for directions of the Court and trustees of such Trust shall make such application within three months of the date of receipt and where such an application is not made by trustees, the Charity Commissioner himself shall make such an application. Once this application is made, Court shall make effort to save Trust by passing an appropriate order. The Court may direct the property or income of the trust or any portion thereof to be applied cy-pres to any other charitable or religious object [section 55].

Section 55 of MPT Act provides for doctrine of *cy-pres* under which, when to give an effect to a charitable and religious Trust is impossible and impracticable initially or becomes so subsequently, the Court will save the trust from failing by invoking the *cy-pres* doctrine and utilise the Trust property for some other charitable and religious purpose as near as possible to the object

of the Trust mentioned by the Settlor. *[Trustees of HEH the Nizam's Pilgrimage Money Trust vs. CIT, 2000 (4) SCC 179; AIR 2000 SC 1802].*

Charity Commissioner holds wide powers and acts as ground level officer to sort out many issues and reduce burden on Civil Courts. He is empowered to hold enquiries and has been given powers of Civil Court in the matter of proof of facts by affidavits, summoning and enforcing the attendance of any person and examining him on oath as well as ordering discovery and inspection and compelling production of documents etc. However, in spite of these powers, many a times, it becomes necessary to approach Civil Court having appropriate jurisdiction for seeking orders under different circumstances.

Section 50 empowers filing of suit by or against or relating to Public Trusts or trustees or others in case it is alleged that there is a breach of a public trust, negligence, misapplication or misconduct on the part of trustees OR where recovery of possession of trust property is sought OR in any such cases where direction of Court is deemed necessary. However, the same can be done only after obtaining the consent in writing of CC as provided in section 51.

1.2 Amalgamation of Trust

Charity Commissioner may frame a scheme where he has a reason to believe that in the interest of proper management or administration, two or more Public Trusts may be amalgamated. He shall proceed to frame such a scheme only after receiving an application from two or more persons interested in a Public Trust and after giving an opportunity of hearing to the trustees of the Public Trust and only after he forms an opinion that such amalgamation is necessary. Before forming an opinion as aforesaid, he shall publish a note in the official gazette and also if necessary in any newspaper which in the opinion of the CC is best calculated to bring to the notice of persons likely to be interested in the Trust and that such newspaper is having wide circulation in the region in which the Trust is registered and gives the trustees of such Trust and all other interested persons due opportunity to be heard. The scheme so formed shall be subject to modification and any person aggrieved by the framing of such scheme may approach Court within sixty days from the date of decision, to set aside any such decision. In such a case, the scheme framed shall be subject to the decision of the court.

Every application under sub-section (1) of section 50A shall set out concisely material facts about the Public Trust along with the draft scheme and shall contain *inter alia* the particulars of Trust, its members, their address, approximate value of the Trust property and income of Trust, objects of Trust, nature of applicant's interest and statement showing as to how the proposed scheme is necessary in the interest of such Trust.

Charity Commissioner shall hear every such application involving allegations of breach of public trust, misapplication or misconduct or unlawful retention of possession of property belonging to such Trusts by trustees or others or improper administration and frame a scheme after giving an opportunity to trustees of such Public Charitable Trust. If he is of the opinion that two or more Public Trusts may be amalgamated, shall frame appropriate scheme, publish a note in the official gazette and if necessary, also in any newspaper widely circulated in the region in which the trust is registered.

1.3 However, in the case of allegations of breach of trust or mismanagement, negligence etc., permission to file suit by or against or relating to Public Trust or trustees is to be filed, different reliefs which can be claimed include amalgamation of two or more Trusts by framing a scheme or variation or alteration in a scheme already settled or order for winding up of any trust and applying the funds of such Trust for other charitable purpose could be obtained. Section 50 is not restrictive but cumulative in its effect. It only enables persons having an interest to sue and does not prohibit any suits being filed by trustees of Public Trusts.

1.4 Deregistration of Trust

By an ordinance passed in the official gazette on 23-2-2016, State Government of Maharashtra has proposed insertion of sub-section (3A) in section 22 of MPT Act whereby CC has been empowered to deregister the Public Trust after holding detailed and impartial enquiry on the following grounds –

(a) When its purpose is completely fulfilled; or

(b) When its purpose becomes unlawful; or

(c) When the fulfilment of its purpose becomes impossible by destruction of the trust property or otherwise; or

(d) When the trust, being revocable, is expressly revoked; or

(e) When the trustees are found not doing any act for fulfilling object of the trust

However, in the case of (e) clause, it is further provided that no Trust shall be deregistered unless its trustees have committed default in reporting the change under sub-section (1), in submission of the audited accounts as prescribed by sub-section (2) of section 33 or sub-section (1A) of section 34 or in making any other compliance prescribed by or under this act for a period of five years from the last date of reporting change, submission of the accounts or making the compliance, as the case may be. The Deputy or Assistant Charity Commissioner may take over the management of properties of the trust so de-registered under sub-section (3A) may, if considered expedient, dispose them by sale or otherwise and deposit the sale proceeds in the Public Trusts Administration Fund.

2. Procedure of Dissolution under Societies Registration Act, 1860

In the case of societies registered under Societies Registration Act, 1860, the law does not provide for amalgamation or merger but only mode provided is dissolution. The provisions governing such dissolution are contained in sections 13 and 14.

2.1 The combined reading of both the above sections make it clear that :–

a. A general meeting of all the members of such society shall be convened for the purpose of dissolution as agenda of the meeting;

b. At least three-fifths of the members present in person or proxy shall have voted in favour of such dissolution. This condition of three-fifths votes of members present to be polled in person or by proxy is mandatory;

c. In case of dispute, the matter shall be referred to Civil Court having jurisdiction over the registered office of the society and appropriate order shall be passed by the said Court;

d. In addition to the decision of dissolution, members in three-fifths majority shall also have to decide manner of disposal of all its assets and settlement of all its claims according to the bye-laws of the society or as governing body shall find the expedient.

e. Where the Government is a contributor or member or is otherwise interested in any other manner in the said society, no dissolution shall take place without the consent of the Government.

f. After disposal of its property as aforesaid and settlement of all its claims, if any surplus arises, the same shall not be distributed among members of the society BUT shall be given to some other society, to be determined by not less than three-fifths of the members present. Here, though there is no reference to similarity of objects of society to which such surplus is being contemplated to be handed over, it is expected to be adhered to and in any case, no society is formed under this act for commercial purpose or for making profits. The taxability of such surplus or amended provision of Income Tax for charity is not relevant here. The act being

piece of legislation of the year 1860, disparity remains and governing body or members shall have to select appropriate society or entity to which the surplus shall be handed over so as to retain the benefit of exemption even under section 115TD.

3. Restructuring including Merger and Amalgamation under Companies Act, 2013

Section 8 Company stands on little different footing as the governing legislation is Companies Act, 2013 which provides for amalgamation and/ or winding up in a fairly structured and detailed manner.

3.1 Company registered under section 8 may be –

i. Converted into a company of any other kind only after complying with such conditions as may be prescribed;

ii. Amalgamated ONLY with another company registered under section 8 and having similar objects;

iii. Wound up or amalgamated on revocation of licence by Central Government where it is found that the Company has been guilty of fraudulent conduct of its affairs or violative of its objects.

Conversion into a company of any other kind is possible by passing a Special Resolution at a General Meeting convened for approving such conversion. However, there are various details that are required to be annexed to notice convening the meeting which include explanatory statement giving the reasons for opting such conversion apart from other details like Company particulars, concessions enjoyed by the Company, assets acquired by Company by way of bequests or at concessional rates with conditions attached to the same, if any and impact of such conversion on members with details of benefits that may accrue to them, if any.

Where such Company wishes to amalgamate with another Company, it can do so ONLY with another Company registered under section 8 and having similar objects.

3.2 Where two Companies propose to amalgamate, such Companies have to issue a notice of the proposed scheme inviting objections or suggestions, if any, from Registrar and Official Liquidator where registered office of the companies is situate or persons affected by the scheme within thirty days and the objections and suggestions so received are considered by the respective Companies in their respective general meetings and the scheme is approved by holders of at least 90% of the total number of shares. After such meeting, respective Companies file the declaration of solvency. The scheme is also required to be approved by majority creditors representing at least 90% of value at the meeting specially called by giving at least 21 days clear notice.

Thereafter, the transferee Company is required to file a copy of the scheme so approved with the Central Government, Registrar and Official Liquidator. On receipt of the scheme, if Registrar and Official Liquidator have no objections to the said scheme, then the Central Government shall register the same and issue a confirmation to the Companies. However, where the Registrar or Official Liquidator have any objection or suggestion and the same is conveyed to Central Government within 30 days, the Central Government, if it finds that the scheme is not in public interest or in the interest of creditors, may file an application in Tribunal within a period sixty days stating its objections and requesting the Tribunal to consider the scheme under section 232.

3.3 Revocation of Licence

Where it is found that Company is conducting its affairs fraudulently or in a manner violative of its objects or prejudicial to public interest, Central Government may, after giving reasonable opportunity of being heard to the Company, pass an order –

a. Converting such Company into Company of any other kind; or
b. Amalgamate such Company with another Company registered under section 8; or
c. Winding up the said Company.

In the case of amalgamation, order may provide for formation of a single company with such constitution, properties, powers, rights, interests, authorities and privileges and with such liabilities, duties and obligations as may be specified.

In the case of winding up, the order may direct Company to file necessary application for winding up and follow the procedure. In the case of winding up, if the surplus assets remain after meeting the debts and liabilities of such Company, the Tribunal may permit transfer of such assets to another Company registered under section 8 on such terms and conditions as may be imposed or direct sale with proceeds to be credited to the Rehabilitation and Insolvency Fund under section 269 of Companies Act, 2013.

3.4 Winding up of the Company

A Company may be wound up by the Tribunal or voluntarily. Different circumstances may lead to filing of petition to Tribunal for winding up which may include inability to pay debts, passing of special resolution to wind up, any action against sovereignty and integrity of India, order of winding up passed while following merger application by Tribunal, actions of company having found to be fraudulent, default in filing financial statements or annual reports with Registrar for five consecutive years. The winding up petition may be filed by Company, its creditors, contributors, Registrar or Government.

The Tribunal shall direct for filing statement of affairs by Company and appoint an Official Liquidator or liquidator from the panel as the Company Liquidator. Such Company Liquidator acting under the directions of the Tribunal shall take over the assets, conduct meetings of creditors, debenture holders, contributories, prepare report giving details of assets, list of contributories, list of creditors, guarantees issued, legal cases filed and pending and such other information as may be included in the directions from Tribunal including viability of the business of the Company. The sale and transfer of assets, recovery of debts and final settlement of creditors shall be progressively completed under the direction of Tribunal and when the affairs of the Company have been completely wound up, the Company Liquidator shall make an application for dissolution of the Company.

3.5 Where the Company wishes to wind up voluntarily, the same can be carried out by passing a special resolution in the general meeting of the company to that effect. After passing such Special Resolution, the Declaration of Solvency shall be filed by the Company. In addition to general meeting, Company shall also call a meeting of its creditors to obtain consent of at least 90% of its creditors in value and makes sufficient arrangement to secure dissenting creditors. The resolution so passed shall be published in Official Gazette as well as in a newspaper in the district. After passing of the resolution as aforesaid, the Company shall also appoint a Company Liquidator from the panel prepared by Central Government.

3.6 The Company liquidators so appointed shall report quarterly on progress of winding up of the Company in such form and in such manner to members and creditors and shall also call meeting of members and creditors as and when necessary to apprise them of the progress. As soon as affairs of the Company are fully wound up, the Company Liquidator shall prepare a report showing that the assets of the Company have been disposed off and its debts fully discharged to the satisfaction of its creditors and laying final accounts before members with explanation therefor. Within two weeks after the meeting, the Company liquidator shall send a copy of the report to Registrar and file an application along with his report before Tribunal for passing an order of dissolution of the Company. If the Tribunal is satisfied, after considering the Report, the Tribunal shall pass an

order dissolving the Company within sixty days of receipt of such report.

4. Impact of Income tax on Restructuring

Having considered the procedure of exit including amalgamation and winding up under various governing laws of the charitable entity, let us consider the impact of amended provisions of Chapter XII-EB on such events of exit as well as provisions of sections 12A, 12AA and section 80G including pending cases, assessments and appeals.

As stated earlier in the beginning of this article, the tax is liable to be paid on 'accreted income' of such entity under different conditions if and only if such entity –

i. Converts itself into an entity not eligible to register under section 12AA; or

ii. Merges with an entity not registered under section 12AA and not having similar objects;

iii. Fails to transfer its assets to an entity to any other trust or institution registered under section 12AA or such institutions referred to in sub-clauses (iv), (v), (vi) or (via) section 10(23C).

The 'accreted income' means the amount by which the aggregate fair market value of the total assets of the trust or institution as on the specified date exceeds the total liability of such trust or institution computed in accordance with the method as may be prescribed.

As seen earlier, a Public Trust or Society is not allowed and cannot convert itself into an entity of any other kind. Even if such is the intention of trustees of such an entity, law provides sufficient restrictions and prevents any asset being transferred to any such non-charitable purpose. The route of amalgamation and/or dissolution in the case of Trust or Society also provides for transfer of assets to similar Trust or Society. Interestingly, proviso to sub-section (3A) of section 11 clearly provides that inter-charity donations out of accumulated funds will be permissible in the case of dissolution of charitable organisation. Only in the case of deregistration due to non-filing may create a situation calling for applicability of section 115TD attracting liability on accreted income.

However, in the case of section 8 Companies, section 8(4)(ii) read with Rules 21 and 22 of Companies (Incorporation) Rules, 2014 provides an option to convert itself into a Company of any other kind. Section 8(1) provides a blanket restriction on section 8 Companies to amalgamate only with other Company registered under section 8 of Companies Act, 2013. Even on dissolution or winding up, law provides for transfer of surplus, if any, left after disposal of assets to 'Rehabilitation and Insolvency Fund' formed under section 269 of Companies Act, 2013.

The position of applicability of different modes of exit as discussed herein before can be summed up as shown in the table herein below:

Form of Entity	Governing Laws	Provisions of Governing law to be referred	Mode of Exit	Whether transfer to similar entity necessary?	Applicability of section 115TD of Income-tax Act, 1961
Public Trust	Maharashtra Public Trusts Act	Section 55	Dissolution	Yes	No
Public Trust	Maharashtra Public Trusts Act	Sections 50, 50A and 51 read with rule 26 and 27	Amalgamation	Yes	No
Public Trust	Maharashtra Public Trusts Act	Sections 22(3) and (3A)	Deregistration	Not provided	Possible

Form of Entity	Governing Laws	Provisions of Governing law to be referred	Mode of Exit	Whether transfer to similar entity necessary?	Applicability of section 115TD of Income-tax Act, 1961
Society	Societies Registration Act, 1860	Sections 13 and 14	Dissolution	Yes	No
Section 8 Company	Companies Act, 2013	Section 8 read with rules 21 and 22	Conversion into a Company of any other kind	Not provided	Possible
Section 8 Company	Companies Act, 2013	Section 8, 232 and 233	Merger or amalgamation	Yes	No
Section 8 Company	Companies Act, 2013	Section 8 read with rule 23	Revocation of Licence by Central Government	Yes	No
Section 8 Company	Companies Act, 2013	Sections 270 to 365	Winding up – Voluntary or Compulsory through Tribunal	Yes	No

Apart from above, provisions of sub-section (3) of section 12AA provides authority to Commissioner to cancel registration by passing an order in writing where he is satisfied that activities of Trust or Institution are not genuine or are not being carried out in accordance with the objects of the Trust. However, before passing any such order reasonable opportunity of being heard must be offered to such Trust or Institution.

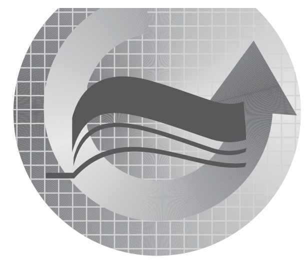
Similar would be the situation where section 80G (5)(ii) would come in to play where any part of income or assets are being transferred for any purpose other than charitable purpose, thereby leading to being ineligible for exemption under section 80G.

Yet another question would arise as to what happens to pending proceedings under Income Tax Act, 1961 relating to assessments and/or penalty as well as appeals at different levels as on the date of dissolution. To this end, section 160 makes every official trustee or Company Liquidator as 'Representative Assessee' liable for assessment or penalty and sections 161 and 162 provide for liability and rights of such representative assessee. Similarly, section 174A provides for assessment of income covered in period from previous year till date of dissolution in the manner provided in section 174(2) to (6) applicable to assessment of persons leaving India. Section 177 makes every person, who was a member or representative assessee of such Trust at the time of dissolution, liable for the amount of penalty or other sum payable in the same manner as if no dissolution has taken place.

Similarly, in the case of merger or amalgamation, section 170 provides for succession to business otherwise than death making predecessor liable till the date of amalgamation and successor being liable for the period after succession and making even successor liable for income of predecessor, in certain situations as provided in sub-section (2) of the said section.

Conclusion

As can be seen from the discussion above, restructuring of entities carrying on charitable activities in certain modes is likely to be affected by amendments made in Finance Act, 2016 and every trustee or member of such Institution must make note of these provisions in order to ensure proper compliance.



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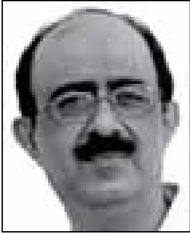


CA Dinesh Tejwani

DIGITAL INDIA SERIES
Unified Payment Interface: Towards Disrupting Cash and Boosting Electronic Payments

Unified Payment Interface (UPI) is the payment system for next generation instant payments leveraging mobile phones. UPI was launched in April this year and is developed by National Payment Corporation of India (NPCI).

Stated simply, UPI permits you to instantly transfer money to a third party using your mobile phone without disclosing your bank account details. It is going to be a faster, smoother and simpler way to transfer money, make utility payments, over the counter payments and online shopping.

Currently UPI system is available only to banks. 29 banks have agreed to implement it and more will join in future.

India is still a cash payment economy. According to NCPI, the number of non-cash transactions per person stands at just 6 per year. Only 6% of Indian retailers have card acceptance facility.

According to RBI's Payment System Vision Document (2012-15), UPI aims to achieve the goals of universal electronic payments, a less-cash society, and financial inclusion, using the latest technology trends.

How it is different from other online payments systems

Most common forms of online cashless transactions we know and use are NEFT, RTGS and IMPS. The table below explains their main features and how UPI is different:

NEFT : National Electronic Fund Transfer	NEFT is done via bank web site or app. The bank account number and IFSC Code of sender and receiver are used to initiate the transfer. All transactions are pooled every hour by bank's NEFT centre and forwarded to RBI for settlement on hourly basis. These transfers are possible during banking hours only
RTGS : Real Time Gross Settlement System	It is similar to NEFT except that each transaction is handled one-to-one basis in real time and usually done for large value transactions typically over ` 2 Lakh
IMPS : Immediate Payment Service	In addition to account number and IFSC Code, IMPS also permits transfer via a Mobile Money Identifier (MMID) Code and Mobile Number. It is real time and can be done during non-banking hours and on bank holidays also.
UPI	UPI is improved version of IMPS. All you need is a mobile app to use it and a virtual payment address.

Benefits of UPI

Ease of use : The easiest form of payments is cash. It is universal, requires no equipment or technology.

All other forms of payments, netbanking, debit/ credit cards are complex. They require several details to be entered and then authentication done via One Time Password.

UPI aims to bring simplicity of cash into digital payments. Having just a mobile phone and a virtual payment address is enough to complete the transaction.

Payment Address : Each user can have a virtual payment address. For sending or receiving money, one needs to share only this address and there is no need to give bank account number, IFSC details etc. Any of the following can be used as payment addresses:

Identifier	Example
Mobile Number	mobilenumber@mobile.ncpi
Aadhaar Number	aadharnumber@aadhaar.ncpi
User ID as created by bank app	dineshtejwani@hdfc
Prepaid Payment Card	cardnumber@icashcard

Security : The authentication used is single click 2 factor authentication. It will use MPIN as two factor authentication for completing the transaction. You get MPIN once you register for mobile banking with your bank.

Interoperable : One of the biggest advantages of UPI is common money transfer API used by all banks. This makes is interoperable. Stated simply, you just need any bank's App to manage your accounts with multiple banks. Example : you have account with SBI, HDFC and Union Bank. You can download SBI' app (UPI enabled). Now you can send receive payment into any of three banks.

Typical Use Cases

Pay : Make Payment to another person.

Collect : Collect payment from another person

Pay By : This can be used for collect requests to be executed later e.g. utility bills to be paid on due date

Make Recurring Payments: Authorise multiple recurring payments similar to ECS with one time authentication.

Few scenario are listed below

Scenario	Present	UPI
Buying groceries at a store	At billing counter, you hand over your debit card to cashier, who swipes it on card machine and asks you to enter the MPIN on the machine.	During billing you give your virtual address which is entered in the billing system. Your virtual address is mapped to your mobile, so you get a payment request message on your mobile. You authorise it by entering your MPIN.
Third party payment	You visit your bank's web site or open its App. Enter transferee's bank account number and IFSC Code. Wait for it to be approved. After approval, you enter amount details against transferee's name and authenticate it via OTP.	You use your bank's app or a third party App which is UPI enabled. You enter virtual address of the transferee and amount details. Authenticate it by entering MPIN and money instantly gets transferred
Ordering items from e-Commerce	You enter debit card number, CVV, expiry date. Wait for OTP to arrive. You enter OTP to complete the transaction	You enter your UPI ID. You get payment request on your mobile and you authenticate it by entering your MPIN. The transaction is complete.
Paying a utility bill	You need to fill up ECS form and submit it to bank and service provider, or use netbanking facility to enable bill payment facility	Service provide sends collect request for bill. You can authorise it by entering MPIN. You can also permit recurring payments and set up upper amount limits.

Is it end of Mobile Wallets ?

There is a fear among mobile wallets that with UPI, they may become obsolete. Mobile wallets started with their extreme ease of use and immediately got attention of tech savvy smartphone users. They made it possible to avoid carrying cash, hassle of change while making payments, withdrawing cash from ATM etc.

Private players like PayTM, MobiKwik were quick to capture market and then banks also jumped in with their own mobile wallets like SBI's Buddy, HDFC's Chillr.

- At this stage UPI is open only to bank and mobile wallets are not allowed to join in.
- Mobile wallets work only in the closed group. So a user of PayTM can transfer money only to another user having PayTM app. For him it is not possible to transfer money to a MobiKwik user. Similarly a wallet user will be able to transact with only merchants who are on the same platform.
- Under UPI a person can transfer money to any other bank account, so long as that bank has joined UPI. This makes UPI a very large group
- For using mobile wallet, a person has to first transfer funds from bank account to mobile wallet. There is no such requirement in UPI, hence money stays in your bank account and earns interest.
- UPI scores in terms of credibility as it is developed by NPCI which operates national level large payments systems such as NFS, APBS, IMPS, AEPS and BBPS

At this stage, it is not very clear what is going to be impact of UPI on mobile wallets. Some of these wallets have a very large user base, they are offering cashback to acquire and retain clients. They feel that their simple interface and faster processing will make it possible for them to survive and grow. They are also hoping that in future, they may be allowed to join in UPI.

How will it impact Payment Gateways?

Today several payment gateways (PG) operate as a link (mediator) between merchant on ecommerce sites and several banks, credit card companies and mobile wallets.

Once UPI is operational, the PG just need to incorporate UPI as one of the payment methods in addition to netbanking, debit/credit card and wallets.

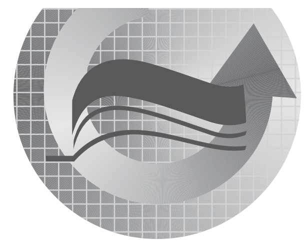
It is estimated that cost of each transaction on UPI is very low : approx Re. 050 per transaction. Today payment gateways are charging typically 0.75% to 2% as transaction fee. UPI will sure bring down this cost. In order to stay competitive, PG will have to provide more value added services and not just payment processing.

Current status

Although the interface was launched in April, banks are still working on technology to be incorporated in their apps. As of writing this article, no app is available to transact on UPI. Most banks are hopeful of coming up with the app by June-July, 2016.

Every bank will have its own timeline to integrate UPI. So full impact will be known only when substantial number of banks and merchants adopt UPI.

> "The saddest aspect of life right now is that science gathers knowledge faster than society gathers wisdom."
>
> – *Isaac Asimov*



S. N. Inamdar, *Sr. Advocate*

HOT SPOT
Is the Tax Department ignoring the Constitution of India?

Preamble

In recent years, there have been at least four amendments to the Income-tax Act, 1961 whereby amounts, which in no sense can be treated as income are treated as income and income tax levied thereon. This is done by simply inserting clauses in the definition of income (which is an inclusive definition) in S. 2(24} of IT Act. In these cases, then elaborate provisions are made in different sections on the assumption that the said amounts are now income. This simplistic legal approach seems to be *prima facie* unconstitutional and in complete disregard to the wording, mandate and objectives of the Constitution of India.

Basic Principles

There are some basic principles enshrined in the constitution of India. One of them is enunciated in Art 265 of the Constitution of India which mandates that 'no tax shall be levied or collected except by authority of law". This principle has been repeatedly referred to by the Hon'ble Supreme Court when validity of a levy of tax is challenged before it. Such law should include judge made law also particularly when it is repeatedly laid down by the Supreme Court. There are three lists – Union list, state list and concurrent list-which clearly define the subjects on which Union Govt. can make law.

Entry 82 empowers the Govt. to levy 'Taxes on income except agricultural income'. The word income howsoever wide in import and elastic can never include capital receipts whether in its natural sense or by fiction.

Entry 86 authorises the levy of tax 'on capital value of the assets exclusive of agricultural land of individuals and companies; taxes on capital of the companies.'

It is no doubt true that the word income is of widest import. But no court or law had said anytime before, that capital receipts shall be deemed to be income. Wherever such attempt has been made by the legislature, it has been open to challenge. Unfortunately, the taxpaying community and legal fraternity has not looked at this issue with the seriousness it deserved and meekly surrendered to the legislative terrorism.

It was Lord McNaughten, who had to remind the law Lords that "Income Tax, if I may say so, with respect, is a tax on income, not a collection of taxes."

The distinction between income receipt and capital receipt is age old and has been recognised over a century. The Supreme Court has repeatedly laid down that every

receipt is not income and onus of proving that it is an income receipt is on the Revenue and if it fails do discharge that onus, the charge must fail.

In *CIT vs. A. Raman & Co. 67 ITR 11,* the Supreme Court held that 'an assessee can be taxed only on the income, which he has in fact earned and not on income, which he could have, but has not in fact earned'.

Now the unabashed trend seems to be to Simply amend s. 2(24) and say that a capital receipt is now deemed to be income and proceed to levy tax on it – ignoring the mandate of the Constitution.

When question arose Whether gift can be taxed u/s. 10(3) – now deleted – as casual and non- recurring receipt, CBDT came out with a Circular asserting that gifts are capital receipts and cannot be taxed as income as only casual and non-recurring receipts of income nature can be brought to tax.

But then s. 56(2) r.w.s. 2(24) was quietly amended to provide that gifts will be deemed to be income and will form part of 'other income'. It is necessary to remember that sub-sec(l) of s. 56 still continue to say that Incomes which do not fall under any of the specific heads shall be computed under the head "Income from other Sources. S. 56 is not a charging section. But then Govt's answer will be "we have amended s. (24) and deemed this as income. The Bombay High Court held in CGT in Cawasji Jehangir & Co. P Ltd. 106 ITR 390 that the definition clause begins with "unless, the context otherwise requires" and this permits the court to take into consideration the basic principles and does not compel the court to apply the definition to a case where having regard to those basic principles, it cannot apply.

However no attempt seems to have been made to examine and test the constitutional validity of such provisions. Not only that, but there has not been even a debate among the tax experts (To the best of my knowledge) except on s. 50C. So let us now begin with constitutional validity of s. 50C.

1 & 2 S. 50C and S. 52(2) - Since deleted.

In one sense, s. 50C is a successor to old S. 52(2) deleted w.e.f. 1-4-1988 and which was subject matter of interpretation by the Supreme Court in the case of *K. P. Varghese vs. ITO, 131 597 ITR (SC).* Hence it would be appropriate to consider both the sections together S. 50C, in brief provides that" where the consideration received or accruing as a result of the transfer by an assessee of a capital asset being land or buildings or both is less than the value adopted or assessed or assessable by any ------- Stamp Valuation Authority (of a State) the value so adopted or assessed or assessable shall for the purpose of s. 48, be deemed to be the full value of consideration received or accruing as a result of such transfer.

It is significant to note that in the very first sentence of the section, it is admitted that there is no understatement of the consideration received or accruing. It is nowhere stated or suggested so. Then the section compares such consideration actually and factually received or accruing, with stamp duty valuation which, if more than the stated consideration, is deemed to be the full value of consideration received or accruing as a result of transfer. The verb 'deem' indicates a fiction and fiction is created when it is not existing in fact or is not real. Thus without casting any obligation on the Revenue, that the stated or apparent consideration is understated and without there being any evidence of such understatement or receipt of higher consideration, it simply deems the difference as income and levies tax on it. This is totally impermissible under the Constitution of India. As stated earlier, an assessee can be taxed only on the income which he has in fact earned and not on

income which he could have, but has not, in fact, earned. It is a matter of common knowledge that stamp duty ready reckoner is prepared area-wise, but in cities like Mumbai, Pune, Chennai, Bengaluru or Kolkata the real value is far different from the assumed value for stamp duty purposes.

Further the value of adjacent buildings in the same area may differ vastly. Valuation is an art and not a science. One cannot substitute such theoretical or mathematical valuation as consideration received or accruing. It will be clearly beyond the legislative power and Article 265.

The old s. 52(2) also had a similar ProVision saying that if the difference between stated consideration and the fair market value (academically worked out by a valuer) is found to be more than 15 of the stated consideration, the fair market value so ascertained will be deemed to be the full value of consideration received or accruing as a result of transfer. The Supreme Court held that if this provision is applied literally as it is, it will be clearly unconstitutional. The S. C therefore read down the section to mean that it can be applied only where the Revenue has produced some eVidence that something more was received than the stated consideration under the table, but where eXact quantum of such on-money cannot be ascertained then and then alone the fiction can be invoked see *K. P. Varghese vs. ITO, 131ITR 597 (S.C).*

It is submitted, with respect, that the above decision applies mutatis mutandis to s.50-C also and unless the revenue produces some evidence of on money received, fiction of treating stamp duty valuation as full value of consideration received cannot be invoked to make the section constitutionally valid.

The Hon'ble Madras High Court upheld the constitutional validity of this section in *Palanisamy (K.R) vs. Union of India 306 ITR 61* on the only ground that arbitrary result on application of s.50C can be aVOided by the protection offered by recourse to remedies available in the section its e if. But the only so -<:alled protection offered is to make a reference to Departmental Valuation Officer. This, as the experience of Dept's Valuation cell has shown, is no protection at all. Further the High Court has held in *CIT vs. Chandni Bhuchar 323 ITR 510* valuation to be a question of fact. Bombay High Court also upheld the validity of S. 50-C on the above ground without examining the issue from all angles See 334 ITR 145.

As held by the S.C. in *Jawaji Naganathan vs. RDO 4SCC 395* and also in 4SCC 667 such a valuation is not even binding on the Registering Authority. Unfortunately, all aspects of constitutional validity were neither argued nor considered by the Hon'ble Madras High Court and the Bombay High Court and hence its decision cannot be considered as a binding precedent. Recently R. V. Easwar Committee has recommended deletion of S. 50-C on, this very ground.

Transfer pricing regulation to the extent they provide for the arm's length price on the sole basic of prescribed methods, without there being any evidence of understatement or concealment, will also be unconstitutional for the above reason. The Chapter X is titled as 'Special Provision Relating to Avoidance of Tax" Only saving grace is that the chapter directs to take into account or have regard to these rule but leaves the discretion to the A.O. whether to make any addition or not. S.92C(4} says 'where an arm's length price is determined by Assessing Officer under sub-Section(3}, the A.O. may compute the total income of the assessee, having regard to the arm's length price so determined'.

The expression 'having regard to' permits the Assessing Officer to not restrict himself or be bound by only the prescribed methods, but take a decision considering all the relevant facts and evidence (or absence of evidence)

Income u/s. 2(24)

Another such draconian provision is one introduced by the Finance Act, 2015 by inserting c1. (xvii} in s. 2(24). The height of indifference was that this proposal did not form part of original tax proposal placed before the Parliament in the Finance Bill, 2015. It was quietly introduced later when the opposition was busy in discharging their national duty of blocking the proceedings of the Parliament. It is doubtful whether there was any meaningful discussion or discussion at all. They say our democracy is governed by Rule of Law – Yes but by the Thumb Rule of Law. Economics should always be in front of politics. But it is always kept behind – far behind politics.

This provision seeks to treat all kinds of grants and subsidies – Whether capital or revenue even if they are of the nature of pure capital receipts as income, by simply amending the definition of income. This is done, we are told to nullify the effect of Supreme Court judgment in Ponni Sugars & Chemicals 306 ITR 392. You can nullify the consequence of a judgment, but cannot nullify a basic principle itself.

Legislature has been gracious enough to exclude those subsidies referred to in Explanation (10) to s. 43(1) which go to reduce the cost of a capital asset. Thus now al distinction between capital receipts and income receipts is being wiped out without at least renaming the Income-tax Act as "Whatever comes in Tax". Reducing the subsidy from the actual cost is also an indirect way of taxing an admittedly capital receipt.

Subsidies which are based on investment but are granted to say encourage industrial development in backward areas were held to be capital receipts by CBDT itself in circular No. 142 dated 1-8-1974

It is not known why this sudden change of heart except stripping the citizen of their legitimate money to hide Government bankruptcy. Income Tax should be treated as tool for economic development and equality and not as a Revenue yielding Jizia tax alone. Here subsidy is given by one hand and taken back substantially by the other.

The Bombay High Court held in *Sadichha Chitra vs. CIT 189 ITR 774* that a subsidy received by a film producer in the form of refund of entertainment tax is a capital receipt, not liable to tax. The legislature tried to get over the decision by enacting Rule 9A and reducing the subsidy from the cost of production to be allowed as deduction and thus indirectly treating it as a revenue receipt. The Rule has also been challenged before the Hon'ble High Court of Bombay and has been admitted and is pending final decision. The Tribunal in an appeal read down the Rule and held that it can be applied only to subsidies of a revenue nature and not to capital receipt. The challenge is on the ground that Rule 9A goes beyond the charging section 4 and is unconstitutional unless record down.

Ss. 56(2){vii), (viia), (viiib)

S. 56(2) of IT Act deems receipts of money or property without consideration or for inadequate consideration (less than the market value) to be income from other sources and tax as normal income.

It is well established that testimonials and personal gifts or amount received in appreciation of personal qualities made voluntarily are not receipts of income nature at all are see *Divecha vs. CIT 48 ITR 222 (SC)* Such receipts will now fall under s. 56(2) (vi) exceeding ` 50,000/- per year in the aggregate. This provision also is thus clearly unconstitutional. Parliament cannot alter the fabric of law though it can iron out the creases. Amounts received as a token of personal esteem and veneration or regard for ability and personal qualities is not income and goes out of the ambit of the Income-tax

Act at the threshold itself. Any attempt to bring them to tax merely by deeming them as income will be clearly unconstitutional.

While there may be some justification for treating receipt of money as income, there is no justification whatsoever for treating property –movable or immovable as income at all. Merely bringing it in the definition of income u/s. 2(24)(iv), will not confer power on the Union Govt. to tax it as income which is essentially a capital receipt.

S. 56(2) creates an artificial liability and must be strictly construed. Literally interpreted, it talks of only monetary consideration. It sweeps in its fold transactions which are done absolutely genuinely, *bona fide* and for valuable consideration such as family settlement, compromise decree or arbitration award.

IT Act already contains provisions to safeguard the interest of the revenue by providing that cost to be adopted in case of demerger or amalgamation of asset transferred or shares allotted as the cost of the previous owner.

S. 56(2)(viia). It excludes certain transactions not regarded as transfer u/s. 47. It refers to cl. (via) (Amalgamation of a foreign company), cl. (vic) (demerger of a foreign company), cl. (vicb) (business reorganisation of a co-op bank) cl. (vid) shares allotted by resulting co. to the shareholders of demerged company cl.(vii) shares allotted on amalgamation by the amalgamated co.

Thus, it will be noticed that cl. (vib) of s. 47 is omitted from the operation of the proviso. Similarly cl. (vi) is also omitted.

This will mean that if the amalgamated company or the resulting company receives any property being shares of a private company on amalgamation or demerger the difference between book value and market value will be deemedt o be income of the recipient.

The glaring anomaly is that the definition of demerger in s. 2(19AA} requires the undertaking to be transferred at book value [see cl. {iii}].

It is not clear how s. 56(2) will be applied in case of a slump sale.

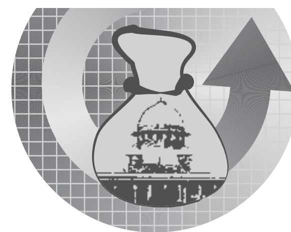
These sections can be held to be constitutionally valid, if and only if, they are applied where there is proof or evidence of the transaction not being genuine or the consideration received if any is not fully disclosed.

In some quarters, it is wrongly argued that these provisions (and also s. 50-C) simply shift the onus of proof from Revenue to the tax-payer. This is not correct at all. These attack the Rule of law, mandate of the Constitution and well established basic principles of taxation.

It is suggested that the President should refer the question of constitutional validity of all the above provisions to the Supreme Court under Article 143 of the Constitution of India and obtain its opinion.

If we meekly accept and surrender before such tax terrorism, the day is not too far when a provision will be introduced to tax loans received from scheduled banks as income in the year of receipt and allowed as deduction u/s. 43B only when actually repaid. And this will be done claiming public interest will be served as NPAs of Banks are rising!

Amen.



B.V. Jhaveri, *Advocate*

DIRECT TAXES
Supreme Court

S. 158BC: A stay on the conduct of a "special audit" u/s. 142(2A) amounts to a "stay of the assessment proceedings" and extends limitation u/s. 158BE. One warrant of authorisation can be used for multiple visits and searches and limitation commences only after the panchnama records the conclusion of the search

VLS Finance Ltd. & Anr. vs CIT [Civil Appeal No. 2667 of 2007, dated 28th April, 2016]

The Supreme Court had to consider two questions arising from the judgment of the *Delhi High Court V.L.S. Finance Ltd vs. CIT 289 ITR 286 (Del.):*

(i) Whether an interim order staying the direction for special audit could be construed as amounting to stay of assessment proceedings?

(ii) Whether it is permissible under Section 132 of the Act that the same warrant of authorisation be executed 16 times and be revalidated again and again instead of issuing fresh authorisation for each visit and whether such revalidation can be done without recording any reasons justifying the revalidation as in the present case.

The Supreme Court held as under:

(i) It is not in doubt that Explanation 1 to Section 158BE(2) of the Act grants benefit of exclusion only for those cases where 'the assessment proceeding is stayed by an order or injunction' of the court. On literal construction, therefore, it becomes clear from the reading of this provision that the period that is to be excluded while computing the period of limitation for completion of Block Assessments is the period during which assessment proceedings are stayed by an order of a court and this provision shall not apply if the stay of some other kind, i.e, other than staying the assessment proceedings, is passed. The provision relating to limitation need to be strictly construed.

(ii) As a general rule, therefore, when there is no stay of the assessment proceedings passed by the Court, Explanation 1 to Section 158BE of the Act may not be attracted. However, this general statement of legal principle has to be read subject to an exception in order to interpret it rationally and practically. In those cases where stay of some

other nature is granted than the stay of the assessment proceedings but the effect of such stay is to prevent the assessing officer from effectively passing assessment order, even that kind of stay order may be treated as stay of the assessment proceedings because of the reason that such stay order becomes an obstacle for the Assessing Officer to pass an assessment order thereby preventing the Assessing Officer to proceed with the assessment proceedings and carry out appropriate assessment. For an example, if the court passes an order injuncting the assessing officer from summoning certain records either from the assessee or even from a third party and without those records it is not possible to proceed with the assessment proceedings and pass the assessment order, even such type of order may amount to staying the assessment proceedings. The special audit is an integral part of the assessment proceedings, i.e., without special audit it is not possible for the Assessing Officer to carry out the assessment and so, stay of the special audit may qualify as stay of assessment proceedings and, therefore, would be covered by the said explanation.

(ii) The argument of the appellants that there was only one warrant of authorisation which empowered the Revenue authorities to carry out search and visit of the revenue officials on 22nd June, 1998 on the basis of said Warrant of Authorisation dated 19th June, 1998, would end in exhausting the said warrant of authorisation and that for subsequent visits, fresh authorisation was required and no such authorisation was taken and, therefore, subsequent searches are illegal and no benefit thereof should enure to be respondent cannot be accepted.

(iii) The appellants never challenged subsequent visits and searches of their premises by the respondents on the ground that in the absence of a fresh authorisation those searches were illegal, null and void. The revenue authorities visited and searched the premises of the appellants for the first time on 22nd June, 1998. In the panchnama drawn on that date, it was remarked 'temporarily concluded', meaning thereby, according to the revenue authorities, search had not been concluded. For this reason, the respondent authorities visited many times on subsequent occasions and every time panchnama was drawn with the same remarks, i.e. 'temporarily concluded'. It is only on 5th August, 1998 when the premises were searched last, the panchnama drawn on that date recorded the remarks that the search was 'finally concluded'. Thus, according to the respondents, the search had finally been completed only on 5th August, 1998 and panchnama was duly drawn on the said date as well. The appellants, in the writ petition filed, had nowhere challenged the validity of searches on the subsequent dates raising a plea that the same was illegal in the absence of any fresh and valid authorisation. On the contrary, the appellants proceeded on the basis that search was conduced from 22nd June, 1998 and finally concluded on 5th August, 1998. On the aforesaid facts and in the absence of any challenge laid by the appellants to the subsequent searches, we cannot countenance the arguments of the appellants that limitation period is not to be counted from the last date of search when the search operation completed, i.e. 5th August, 1998. Therefore, this issue is also decided in favour of the respondents.

S. 263: Even if AO applies mind and decides not to assess expenditure as unexplained u/s. 69C because the assessee withdrew the claim for deduction, the CIT is entitled to revise the assessment on the ground that the matter needed further investigation

CIT vs Amitabh Bachchan Civil Appeal No. 5009 of 2016 [Arising out of S.L.P.(C) No.11621 of 2009, dated 11th May, 2016]

The CIT u/s. 263 of the I. T. Act, 1961, took the view that notwithstanding the withdrawal of the claim by the assessee, in view of the earlier stand taken that the said expenses were incurred for security purposes of the assessee, the Assessing Officer ought to have proceeded with the matter as the assessee was following the cash system of accounting and the filing of the re-revised return, *prima facie,* indicated that the additional expenses claimed had been incurred. Withdrawal of claim by assessee can be for variety of reasons and this does not mean that Assessing Officer should abandon enquiries regarding sources for incurring expenses. Assessee follows cash system of accounting and the claim regarding additional expenses was made through duly verified revised return. The claim was pressed during assessment proceedings carried on by A.O. after filing revised return and it was specially stated in letter dated 13-2-2004 that expenses were for security purposes and that payments have been made out of cash balances available etc. Under the circumstances, the Assessing Officer was expected to examine the matter further to arrive at a definite finding whether assessee incurred expenses or not and in case, actually incurred, then what were sources for incurring these expenses. Assessing Officer was satisfied on withdrawal of the claim and his failure to decide the matter regarding actual incurring of additional expenses and sources thereof resulted into erroneous order which is prejudicial to the interest of revenue.

Reversing the decision of the Appellate Tribunal and the High Court, the Supreme Court upholding the order of the CIT u/s. 262 of the Act held as under:

"There can be no doubt that so long as the view taken by the Assessing Officer is a possible view the same ought not to be interfered with by the Commissioner under Section 263 of the Act merely on the ground that there is another possible view of the matter. Permitting exercise of revisional power in a situation where two views are possible would really amount to conferring some kind of an appellate power in the revisional authority. This is a course of action that must be desisted from. However, the above is not the situation in the present case in view of the reasons stated by the learned C.I.T. on the basis of which the said authority felt that the matter needed further investigation, a view with which we wholly agree. Making a claim which would *prima facie* disclose that the expenses in respect of which deduction has been claimed has been incurred and thereafter abandoning/ withdrawing the same gives rise to the necessity of further enquiry in the interest of the Revenue. The notice issued under Section 69-C of the Act could not have been simply dropped on the ground that the claim has been withdrawn. We, therefore, are of the opinion that the learned C.I.T. was perfectly justified in coming to his conclusions insofar as the issue No. (iii) is concerned and in passing the impugned order on that basis. The learned Tribunal as well as the High Court, therefore, ought not to have interfered with the said conclusion."

S. 5/147: Even if income by way of rent is enhanced with retrospective effect, it accrues only when a right to receive the income is vested in the assessee. A notice u/s. 148 seeking to assessee the income prior to its accrual is without jurisdiction

P. G. & W. Sawoo Pvt. Ltd. & Anr. vs. ACIT Civil Appeal No.(s) 4091 of 2016 (Arising out of SLP (Civil) No.(s)6384 of 2009, dated 19th April, 2016)

The income in question being income from house property is liable to be computed in accordance with the provision of Sections 22 and 23 of the Act. The premises belonging to the appellant was let out on rent to the Government of India. The rent was enhanced from ` 4.00 to ` 8.11 per sq.ft. per month effective from 1-9-1987. The said enhancement of rent was made by a letter dated 29-3-1994 of the Estate Manager of the Government of India. The said letter makes it clear that the enhancement was subject to conditions including execution of a fresh lease agreement and communication of acceptance of the conditions incorporated therein. Such acceptance was communicated by the appellant by letter dated 30-3-1994. The assessee challenged the notice issued u/s. 148 to reopen the assessment on the ground that having regard to the provisions of Sections 5, 22 and 23 of the Act and the decision of this Court in '*E.D. Sassoon & Company Ltd. And Others vs. Commissioner of Income-Tax', (1954) 26 ITR 27,* no income accrued or arose and no annual value which is taxable under Sections 22 and 23 of the Act was received or receivable by the assessee at any point of time during the previous year corresponding to the assessment year 1989-90. Hence, it was contended the impugned notice seeking to reopen the assessment in question is without jurisdiction or authority of law. Setting aside the order of the High Court, the Supreme Court held as under :

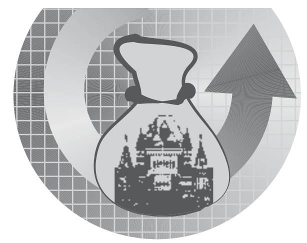
(i) A reading of the decision of this Court in E.D. Sassoon (supra) would go to show that the income to be chargeable to tax must accrue or arise at any point of time during the previous year. This Court in E.D. Sassoon (supra) has held in categorical terms that income can be said to have accrued or arisen only when a right to receive the amount in question is vested in the appellant-assessee.

(ii) Viewed from the aforesaid perspective, it is clear that no such right to receive the rent accrued to the assessee at any point of time during the assessment year in question, inasmuch as such enhancement though with retrospective effect, was made only in the year 1994. The contention of the Revenue that the enhancement was with retrospective effect, in our considered view, does not alter the situation as retrospectivity is with regard to the right to receive rent with effect from an anterior date. The right, however, came to be vested only in the year 1994.

(iii) In the light of the foregoing discussions, it has to be held that the notice seeking to reopen the assessment for the assessment year 1989-90 is without jurisdiction and authority of law.

Success is when your Signature turns to Autograph.

— A. P. J. Abdul Kalam



Ashok Patil, *Advocate*

DIRECT TAXES
High Court

1. Sec. 80-IA – Captive generation – Self consumption of power – Deduction available – Deduction is to be allowed at the rate at which saleable to the distribution company – AY 2002-03

CIT vs. ITC Ltd. (2016) 134 DTR (Cal.) 293

The assessee is in the business of manufacture of paperboard. For supplying power to its manufacturing unit, it installed a power generation unit. The entire power generated was consumed by the assessee. The AO held that the deduction was not available to the assessee as it did not make any profit from the sale of power as the same was self consumed. The questions raised for adjudication before the High Court were, [a] if the assessee is entitled to the benefit of the provisions of section 80-IA, [b] if yes, then the benefit should be computed at the rate at which electricity was supplied by the electricity board. The Hon'ble High Court held that even if the entire power generated in consumed by the assessee, deduction cannot be denied on the ground that the assessee did not earn profit from sale of power, on the second issue, it held that for determination of the market value of the power generated for the purpose of deduction u/s. 80-IA, the rate at which power is salable to a distribution company is to be applied and not the rate at which power is supplied by electric board to consumers.

2. Sec. 22, 28, 56 – Terrace floor licensed out for erecting a telecom tower – Income is to be assessed as income from house property – A.Y. 2008-09

Niagara Hotels & Builder Ltd. vs. CIT (2016) 134 DTR (Del) 158

The assessee is a private limited company and is the owner of a terrace floor. It entered into leave and licence agreement with another company, whereby the assessee gave on licence the terrace floor as the space for installing a radio trunking related equipment along with some covered area. The licensee shall pay the actual electricity consumption. The AO held that the income is business income. The ITAT held the income is to assessed as income from other sources and not business income nor income from house property. On appeal to the High Court, the High Court held that terrace is part of the building which has been constructed on the land beneath the super structure, and therefore held that giving the terrace space on licence for raising a telecom antenna, the licence fees received would be assessable as income from house property.

3. Sec. 2(29A), 2(42A), 45 – Long-term or short term – Sale of shares acquired on conversions of shares – Sold within a year of conversions – Assessable as long term capital gain – A.Y. 2003-04

CIT vs. Naveen Bhatia (216) 134 DTR (P&H) 139

The assessee was allotted convertible debentures of Telco on 20-12-2001, which were converted into shares on 31-3-2002. The shares were sold between 23-12-2002 and 10-3-2003, and offered the same as long-term capital gains. The AO held that the same is to be assessed as short term capital gains. The Hon'ble High Court held that, on a plain reading of sec. 47(x) would indicate that conversion of convertible debentures into shares would not constitute transfer for the purposes of computation of income under the head Capital Gains. Similarly sec. 49(2A) clarifies that for computing the capital gains on sale of shares received on conversion of convertible debentures, the cost of acquisition of shares shall be the cost of convertible debentures and thus it shall be deemed to be the cost of such shares received on conversion. In such a situation, as a necessary corollary, it would be logical to reckon the date of acquisition of the convertible debentures as the date of acquisition of such shares received on conversion of convertible debentures, and therefore held that capital gains arising from the sale of such shares was to be assessed as long term capital gain.

4. Sec. 254(2A) – Tribunal has power to extend stay even after the substituted third proviso to sub-section (2A) of sec. 254 – AY 2012-13

CIT vs. Tata Teleservices (Maharashtra) Ltd. vs. CIT (2016) 133 DTR (Bom.) 119

The writ petition was filed against the order of the ITAT, Mumbai bench for extending the stay granted by another six months in respect of pending appeals of the assessee. The contention of the petitioner was that the ITAT has no power under the Act to extend the stay of demand in the appeals pending before it beyond the period of 365 days in view of the substituted third proviso to sec. 254(2A), which reads as 'even if delay in disposing of the appeal is not attributable to the assessee'. The Hon'ble High Court while placing reliance on the decisions in the cases of *Narang Overseas vs. ITAT 295 ITR 22 (Bom.), ITO vs. M. K. Mohammed Kunhi 71 ITR 815 (SC)* and *Pepsi Foods vs. ACIT (2015) 119 DTR (Del) 373,* noted that the power to grant stay or interim relief has to be read as co-extensive with the power to grant final relief. The Object being that in the absence of the power to grant interim relief the final relief itself may be defeated, and therefore held that the ITAT has power to extend stay even after the substituted third proviso to sub-section (2A) of sec. 254 was introduced.

5. Sec. 115JB – Capital gain taken to the capital reserve directly – Not routed through profit and loss account – AO has no power to recompute the book profit – AY 2003-04

Sri Hariram Hotels Ltd. vs. CIT (2016) 133 DTR (Kar.) 102

The assessee in the instant case had credited the capital gain arising from the sale of land directly to the capital reserve and not to the profit and loss account. The AO took the view that the capital gain ought to have been included in the Profit and Loss account as prescribed in the accounting standards. The CIT and the ITAT also confirmed the order of the AO. On appeal to the High Court, it held that when capital gains are directly taken to capital reserve without taking the same amount to the profit and loss account, the explanation to clause (b) to sec 115JB is not applicable, and further the AO has no power to recompute the book profit and has to accept the statement of accounts of the company approved in the general body meeting and filed with the Registrar of Company.

Jitendra Singh & Sameer Dalal
Advocates

DIRECT TAXES
Tribunal

1. Capital gains – Section 55 of the Income-tax Act, 1961 – Cost of acquisition – The expression, 'where capital asset became property of assessee before 1st day of April 1981' as used in section 55(2)(b)(i) of Act cannot be equated to legal ownership. A.Y. 2004-05

Stewarts & Lloyds of India Ltd. vs. CIT – (2016) 134 DTR 161 (Kol.)

In March 1971, by virtue of an assignment deed, State Government assigned a property to assessee for construction of building and installation of machinery. Thereafter, State Government handed over management of said industrial estate to State Small Industries Development Corporation Ltd., who sold property in question to assessee in year 1994 by executing a sale deed for a consideration already paid by assessee in terms of deed of assignment. During relevant previous year, assessee sold said property and computed capital gain on basis of fair market value of land as on 1-4-1981. Assessing Officer accepted capital gain declared by assessee. However, Commissioner was of view that assessee became owner of property in year 1994 only and, thus, he concluded that the order of the Assessing Officer accepting indexed cost of acquisition as on 1-4-1981 was erroneous and prejudicial to the interest of the Revenue and was liable to be revised in exercise of powers of Revision under section 263 of the Act.

On appeal the Tribunal held that, the expression, 'where the capital asset became the property of the assessee before 1-4-1981 in the context of section 55(2)(b)(i) of the Act, does not speak of the date of vesting of legal title to the property. Clause (b)(i) of section 55(2) would be attracted only when, the capital asset became the property of the assessee' before 1-4-1981. Thought in the present case a registered conveyance in respect of the property was obtained by the assessee only in the year 1994, it became the owner of the property by paying the entire consideration as set out in the deed of assignment dated executed in 1971 and by complying with the conditions of assignment much before 1-4-1981, thus, under clause (b)(i) of section 55 of the Act, it was entitled to adopt the fair market value as on 1-4-1981 as cost of acquisition while computing capital gain.

2. Reassessment – Section 148 of the Income-tax Act, 1961 – Service of Notice – Notice under section 148 of the Act served by affixture at a wrong address where the assessee was not residing – Cannot be said to have been served upon the assessee – Consequential reassessment proceedings held to be bad in law. A.Y. 2006-07

ITO vs. Om Prakash Kukreja – (2016) 134 DTR 208 (Chd.)

In the original return filed by the assessee the assessee gave his address as, House No. 1627, Sector 18 – D, Chandigarh. The Assessing Officer issued notice under section 148 of the Act upon the assessee mentioning the address of the assessee as, 'House No. 1626' instead of 'House No. 1627'. The Notice under section 148 of the Act containing address as, 'House No. 1626' was served by affixture at the wrong address, being 'House No. 1626'.

On these facts the assessee submitted that proceeding under section 147 initiated in his case were invalid and barred by limitation as no notice was served upon him within the limitation period. It was submitted that the notice under section 148 of the Act was served at the address, 'House No. 1626' whereas the assessee was residing at, 'House No. 1627'. Hence, the non-receipt of valid notice under section 148 of the Act would make the reassessment proceedings as void *ab initio* even though the assessment order contained correct address.

On appeal the Tribunal held that it is a settled law that A. O. will have no jurisdiction to make assessment under section 147 of the Act unless the notice under section 148 of the Act is validly issued and served upon the assessee. Thus, in case where the A.O. serves the notice under section 148 of the Act by affixture at a wrong address where the assessee was not residing, it cannot be said that notice under section 148 of the Act was served upon the assessee and, therefore the resultant reassessment proceedings were invalid and bad in law and liable to be quashed and set aside.

3. Reassessment – Section 148 of the Income-tax Act, 1961– For A.Y. 2002-03, assessee filed his revised return on 31-3-2004, which was processed under section 143(1) of the Act – Assessing Officer issued on assessee a notice under section 148 of the Act on 28-5-2004 – Held the A.O. in issuing notice under section 148 within time limit available for issue of notice under section 143(2) was not as per law. A.Y.: 2002-03

Vardhman Holdings Ltd. vs. Asstt. CIT – [ITA No. 523 / Chd. / 2008; Order dated 5-5-2016; Chandigarh Bench]

For the A.Y. 2002-03, the assessee filed the original return of income on 31-10-2002. Thereafter, 31-3-2004, it filed the revised return, which was processed under section 143(1) of the Act.

The A.O. on 28-5-2004 issued a notice under section 148 of the Act for the A.Y. 2002-03. The assessee objected to the issue of notice under section 148 of the Act. The assessee submitted that the A.O. ought to have issued notice under section 143(2) within the prescribed time which was available up to 31-3-2005, instead within available time for issuing notice under section 143(2), he voluntarily adopted the course of issuing notice under section 148 of the Act as such the notice issued under section 148 was bad in law.

On appeal Tribunal held that the assessee had filed return for assessment year 2002-03 on 30-10-2002. The return was revised as on 31-3-2004, the revised return was filed within the time as per the provisions of section 139(5) of the Act. The provisions of section 143(2) of the Act provides that notice under the section must be issued him the period of twelve months from the end of the month, in which the return is furnished. The term, 'return' has not been stated to be under any particular head whether, regular return, belated return or revised return, thus, it has to be computed from the end of the month in which the assessee files the return, in the present case had filed the revised return, which was also within the prescribed time. Thus, the time available with the A.O. for issuing notice under section 143(2) of the Act was up to 31-3-2005, that is, within twelve months from the end of the month in which the revised return has been filed by the assessee.

Thus, on the above facts action of the A.O. in issuing notice under section 148 of the Act within time limit available for issue of notice under section 143(2) of the Act was bad in law.

CA Sunil K. Jain

DIRECT TAXES

Statutes, Circulars & Notifications

NOTIFICATIONS

Section 35(1)(ii) of the Income-tax Act, 1961 – Scientific Research Expenditure – Approved scientific associations/ Institutions

The organization ONGC Energy Centre Trust, Indra Chowk New Delhi (PAN:- AAAT02299M) has been approved by the Central Government for the purpose of clause (ii) of sub-section (1) of section 35 of the Income-tax Act, 1961 from Assessment year 2015-16 onwards in the category of 'Scientific Research Association', subject to the conditions stipulated therein.

(Notification No.28/2016 [F.No. 203/14/2015/ITA-II], dated 26-4-2016)

Income-tax (Tenth Amendment) Rules, 2016 – Re-prescribed authority for expenditure on scientific research – Amendment in Rule 6, Form No. 3CK and Form No. 3CM; substitution of Form No. 3CL and insertion of Form No. 3CLA

Notification No. SO 1580(e)[No.29/201 6(F. No.142/19/2015-TPL)], dated 28-4-2016)

Income-tax (Eleventh Amendment) Rules, 2016 - TDS related – Amendment in Rules 30, 31A, 37CA, Forms 24G, 24Q, 26Q & 27Q and insertion of Rule 26C & Form 12BA

The Central Board of Direct Taxes made the rules further to amend the Income-tax Rules, 1962, which may be called the Income-tax (11th Amendment) Rules, 2016 and shall come into force from the 1st day of June, 2016.

(Notification No. SO 1587(E) [No. 30/2016 (F.No.142/29/2015-TPL)], dt. 29-4-2016)

Section 206C of the Income-tax Act, 1961 – Profits and Gains from the business of trading in alcoholic liquor, forest produce, scrap, etc. – Procedure for online submission of statement of deduction of tax under section 200(3) and statement of collection of tax under proviso to section 206C(3)

The Principal Director General of Income-tax (Systems) laid down the procedures of registration in the e-filing portal, the manner of the preparation of the statements and submission of the statements as detailed in the said instructions. The deductors /collectors will have the option of online filing of e-TDS/TCS returns through e-filing portal or submission at TIN Facilitation Centres. Procedure for filing e-TDS/TCS statement online through e-filing portal about Registration, Preparation and Submission.

(Notification No. 6/2016 dated 4-5-2016)

Section 197A of the Income-tax Act, 1961 – Deduction at Source – No deduction to be made in certain cases – Procedure for submission of declaration by a person claiming receipt of certain incomes without deduction of tax in Form 15G/15H

(Notification No. 7/2016 dated 4-5-2016)

Section 195 of the Income-tax Act, 1961 – Deduction at Source – Other sums – Procedure for submission of Form 15CC by an authorised dealer in respect of remittances under section 195(6)

This Rule is in respect of revised procedure (generation of ITDREIN) for online submission of Form 15CC (to be submitted within 15 days from the end of the quarter).

(Notification No. 8/2016 dated 4-5-2016)

Section 183, read with sections 187 and 190 of the Finance Act, 2016 – Undisclosed income – Declaration of – Notified date for specified sections of Finance Act, 2016

The Central Government appointed (i) the 30th day of September, 2016 as the date on or before which a person may make a declaration under sub-section (1) of section 183; (ii) the 30th day of November, 2016 as the date on or before which the tax and surcharge is payable under section 184, and the penalty is payable under section 185 in respect of the undisclosed income; and (iii) the 30th day of September, 2017 as the date on or before which the benamidar shall transfer to the declarant, being the person who provides the consideration for such asset, or his legal representative.

(Notification No. SO 1830(E) No.32/2016 (F.No.142/8/2016-TPL), dt. 19-5-2016)

Section 199 of the Finance Act, 2016 – Power to make rules – Income Declaration Scheme Rules, 2016

The Central Board of Direct Taxes, subject to the control of the Central Government hereby made the rules for carrying out the provisions of Chapter IX of the said Act relating to the Income Declaration Scheme, 2016 which may be called the Income Declaration Scheme Rules, 2016 and shall come into force on the 1st day of June, 2016.

The rules contain important definitions, rules for determination of Fair Market Value and declaration of income or income in the form of investment in any asset.

(Notification No. SO 1831(E) [No.33/2016 (F.No.142/8/2016-TPL), dt. 19-5-2016)

CIRCULARS

Section 45, read with section 28(i) of the Income-tax Act, 1961 – Capital Gains, chargeable as – Consistency in taxability of income/loss arising from transfer of unlisted shares

Regarding characterisation of income from transactions in listed shares and securities, Central Board of Direct Taxes ('CBDT') had issued a clarificatory Circular No. 6/2016 dated 29th February, 2016, wherein with a view to reduce litigation and maintain consistency in approach in assessments, it was instructed that income arising from transfer of listed shares and securities, which are held for more than twelve months would be taxed under the head 'Capital Gain' unless the taxpayer himself treats these as its stock-in-trade and transfer thereof as its business income. It has, accordingly, been decided that the income arising from transfer of unlisted shares would be considered under the head 'Capital Gain', irrespective of period of holding, with a view to avoid disputes/litigation and to maintain uniform approach.

(Letter F.No.225/12/2016/ITA.II, dated 2-5-2016)

Section 9A of the Income-tax Act, 1961, read with Rule 10VA of the Income-tax Rules, 1962 – Certain activities not to constitute business connection in India – Notified committee for purposes of Rule 10VA(4)

(Order [F.No. 173/237/2016-ITA-I], dated 6-5-2016)

Section 139 of the Income-tax Act, 1961 – Return of Income – Verification of tax returns for Assessment Years 2009-10, 2010-11, 2011-12, 2012-13, 2013-14 and 2014-15 through EVC which are pending due to non-filing of ITR-V form and processing of such returns

In order to regularise the aforesaid returns which have either become nonest or have remained pending due to non-filing/non-receipt of respective ITR-V Form, which were uploaded electronically by the taxpayer within the time allowed and which have remained incomplete due to non-submission of ITR-V Form for verification, hereby permits verification of such returns also through EVC.

(Circular No.13/2016 [F.No.225/46/2016-ITA.II], dated 9-5-2016)

Section 90 of the Income-tax Act, 1961 – Double Taxation Agreement – Exchange of information requests to British Virgin Islands (BVI)

(Letter F.No. 500/12/2013-FT&TR-III, dated 12-5-2016)

Section 285BA of the Income-tax Act, 1961 – Statement of financial transaction or reportable account, obligation to furnish – Digital reporting of Form No. 60

It has been brought to the notice of the Central Board of Direct Taxes (the Board) by various stakeholders that hardship is being faced in complying with online submission of statement in Form No. 61, containing particulars of declaration made in Form No. 60.

In view of the above, the board decided that filling of all the fields in Form No.60 shall be considered to be mandatory in respect of transactions entered on or after 1-4-2016. It is also decided that online reporting of declarations in Form No. 61 for quarter ending March, 2016 may be done along with report for quarter ending September, 2016.

(Circular No.14/2016 [F.No.370149/68/2016-TPL], dated 18-5-2016)

Section 32 of the Income-tax Act, 1961 – Depreciation – Additional Depreciation under section 32(1)(iia) for assessees engaged in business of manufacture or production of an article or thing

It has been a contentious issue whether printing or printing and publishing amounts to manufacture or production of article or thing has been contested in legal forums.

The Hon'ble Kerala High Court in the case of Mathrubhoomi Printing & Publishing Co. *vide* its judgment dated 16-2-2015 in ITA No. 23 of 2015 relied upon the Hon'ble Delhi High Court judgment dated 31-5-2013 in ITA No 49 of 1996 in the case of Delhi Press Patra Prakashan Ltd., held that printing and publishing activity is a manufacturing activity and therefore, assessee is eligible for grant of additional depreciation u/s. 32(1)(iia). The Board has accepted the above position. It is, therefore, a settled position that the business of printing or printing and publishing amounts to manufacture or production of an article or thing and is accordingly eligible for additional depreciation u/s. 32(1)(iia) of the Act.

(Circular No.15/2015 [F.No.279/MISC/140/2015/ITJ], dated 19-5-2016)

Section 197A of the Income-tax Act – Deduction of Tax at Source – No deduction to be made in certain cases – Relaxation for furnishing of UID in case of Form 15G/15H for certain quarters

Considering the concerns of certain stakeholders, the Central Board of Direct Taxes, relaxed the condition of furnishing of Unique identification number allotted by the deductor for the quarter ending 31-12-2015 and 31-3-2016 in the quarterly statement of deduction of tax in accordance with sub-rule (5) of Rule 29C.

(Circular No.18/2016 [F.No.142/32/2015-TPL], dated 23-5-2016)

Section 9 of the Income-tax Act, 1961 – Income deemed to accrue or arise in India – Manner of determination of fair market value and reporting requirement for Indian concern – Indirect transfer provisions – Draft rules

Under section 9 of the Income-tax Act, income arising from indirect transfer of assets situated in India is deemed to accrue or arise in India. The provisions of section 9(1)(i) of the Act provides that if any share or interest in a foreign company or entity derives its value substantially from the assets located in India, then such share or interest is deemed to be situated in India. Thereby, any income arising from transfer of such share or interest is deemed to accrue or arise in India. The share or interest is said to derive its value substantially from assets located in India, if fair market value (FMV) of assets located in India comprise at least 50% of the FMV of total assets of the company or entity. The computation of FMV of Indian and global assets is to be in the prescribed manner.

Further, section 285A of the Act mandates reporting requirement on the Indian concern through or in which the foreign company or entity holds the assets in India. The information to be furnished and its manner are also required to be prescribed. Therefore, the manner of computation of FMV of assets of the foreign company or entity and the reporting requirement by the Indian concern are proposed to be provided through the amendments of the Income-tax Rules, 1962. The draft rules and forms, on which comments and suggestion of stakeholders and general public on the draft rules and forms as above were to be sent electronically by specified date at the email address, ustpl1@nic.in in this regard.

Form No.(s) Form No. 3CT *vide* rule 11UC - for Income attributable to assets located in India under section 9 of the Income-tax Act, 1961 & Form No. 49D *vide* Rule 114DB - Information and documents to be furnished by an Indian concern under section 285A are also proposed to be provided.

(Letter F. No. 142/26/2015-TPL], dated 23-5-2016)

Section 139 of the Income-tax Act, 1961 – Return of Income – E-filing of appeals – Extension of time limit

In order to mitigate any inconvenience caused to the taxpayers on account of the new requirement of mandatory e-filing appeals, CBDT extended the time limit for filing of such e-appeals. E-appeals which were due to be filed by 15-5-2016 can be filed up to 15-6-2016. All e-appeals filed within this extended period would be treated as appeals filed in time. In view of the extended window for filing e-appeals, taxpayers who could not successfully e-file their appeal and had filed paper appeals are required to file an e-appeal in accordance with Rule 45 before the extended period i.e. 15-6-2016. Such e-appeals would also be treated as appeals filed within time.

(Circular No. 20/2016 [F.No.279/MISC/M-54/2016/ITJ], dated 26-5-2016)

Section 12AA of the Income-tax Act, 1961 – Charitable or Religious Trust – Registration procedure – Clarification on cancellation of registration under section 12AA in certain circumstances

It shall not be mandatory now to cancel the registration already granted u/s. 12AA to a charitable institution merely on the ground that the cut-off specified in the proviso to section 2(15) of the Act is exceeded in a particular year without there being any change in the nature of activities of the institution. If in any particular year, the specified cut-off (20% of total receipts) is exceeded, the tax exemption would be denied to the institution in that year and cancellation of registration would not be mandatory unless such cancellation becomes necessary on the ground(s) prescribed under the Act. The cancellation of registration without justifiable reasons may, therefore, cause additional hardship to an assessee institution due to attraction of tax-liability on accreted income. The field authorities are, therefore, advised not to cancel the registration of a charitable institution granted u/s. 12AA just because the proviso to section 2(15) comes into play. The process for cancellation of registration

is to be initiated strictly in accordance with sections 12AA(3) and 12AA(4) after carefully examining the applicability of these provisions.

(Circular No. 21/2016 [F.No.197/17/2016-ITA-I], dated 27-5-2016)

PRESS RELEASES

Atal Pension Yojana – Amendment in existing Atal Pension Yojana

The Government has made following amendment in the existing Atal Pension Yojana (APY) *vide* Government Notification F. No. 16/1/2015 PR dated 22nd March, 2016.

Option to the spouse of the subscriber to continue contribution to APY on death of subscriber before the age of 60 years: "If the subscriber dies before the age of 60 years, his/her spouse would be given an option to continue contributing to APY account of the subscriber, which can be maintained in the spouse's name, for the renaming vesting period, till the original subscriber would have attained the age of 60 years. The spouse of the subscriber shall be entitled to receive the same pension amount as that of the subscriber until the death of the spouse".

(Press Release, dated 29-4-2016)

Various steps taken by Revenue Department to give relief to small taxpayers and to small business and professionals

The Revenue Department of the Ministry of Finance takes several steps for boosting-up growth and employment generation:

(a) Lowering the Corporate tax rates to 25% for new manufacturing companies

(b) Extending tax benefits for housing sector so as to promote construction industry

(c) Rate of tax on royalty and fees for technical services reduced from 25% to 10%

(d) Tax incentives for Start-up India

Similarly, it has taken various steps to give relief to the small taxpayers and to the small business and professionals:

The limit of deduction that can be claimed under section 80C of Income-tax Act 1961 has been enhanced from ` 1 lakh per annum to ` 2 lakh per annum, subject to the additional ` 50,000/- being contributed to NPS. Further, the scope of presumptive taxation regime for small businesses has been extended by increasing the turnover up to ` 2 crore. The presumptive taxation benefit is now available for professionals having turnover up to ` 50,00,000.

(Press Release, Dated 8-5-2016)

Section 90 of the Income-tax Act, 1961 – Double Taxation Agreement – Protocol for amendment of convention for avoidance of double taxation and prevention of fiscal evasion with respect to taxes on income and capital gains between India and Mauritius

(Press Release, dated 10-5-2016)

Income Declaration Scheme, 2016 – Declaration of Domestic Black Money from 1-6-2016 to 30-9-2016

The Income Declaration Scheme, 2016 incorporated as Chapter IX of the Finance Act 2016 provides an opportunity to all persons who have not declared income correctly in earlier years to come forward and declare such undisclosed income(s). Under the Scheme, such income as declared by the eligible persons, would be taxed at the rate of 30% plus a 'Krishi Kalyan Cess' of 25% on the taxes payable and a penalty at the rate of 25% of the taxes payable, thereby totaling to 45% of the income declared under the scheme.

The scheme shall remain in force for a period of 4 months from 1st June, 2016 to 30th September, 2016 for filing of declarations and payments towards taxes, surcharge & penalty must be made latest by 30th November, 2016. Declarations can be filed online or with the jurisdictional Pr. Commissioners of Income-tax across the country.

- The scheme shall apply to undisclosed income whether in the form of investment in

assets or otherwise, pertaining to Financial Year 2015-16 or earlier.

- Where the declaration is in the form of investment in assets, the Fair Market Value of such asset as on 1st June 2016 shall be deemed to be the undisclosed income under the Scheme. However, foreign assets or income to which the Black Money Act, 2015 applies are not eligible for declaration under this scheme.
- Assets specified in the declaration shall be exempt from Wealth-tax.
- No scrutiny and enquiry under the Income-tax Act or the Wealth tax Act shall be undertaken in respect of such declarations.
- Immunity from prosecution under the Income-tax Act and Wealth-tax Act is also provided along with immunity from the Benami Transactions (Prohibition) Act, 1988 subject to transfer of asset to actual owner within the period specified in the Rules.
- Non-payment of total taxes, surcharge & penalty in time or declaration by misrepresentation or suppression of facts shall render the declaration void.
- The circumstances in which the Scheme shall not apply or where a person is held to be ineligible are specified in section 196 (Chapter IX) of the Finance Act, 2016.
- Non-declaration of undisclosed income under the Scheme, will render such undisclosed income liable to tax in the previous year in which it is detected by the Income tax Department. Other penal consequences will also follow accordingly.

The full text of the Scheme is available on the departmental website www.incometaxindia.gov.in

(Press Release, dated 14-5-2016)

Section 90 of the Income-tax Act, 1961 – Double Taxation Agreement – India and Slovenia sign protocol amending India Slovenia Double Taxation Avoidance Convention

India and Slovenia signed a Protocol amending the existing Convention and Protocol between the two countries for avoidance of double taxation and prevention of fiscal evasion with respect to taxes on income in Ljubljana. The Protocol will broaden the scope of the existing framework of exchange of tax related information which will help curb tax evasion and tax avoidance between the two countries and will also enable mutual assistance in collection of taxes.

(Press Release, dated 19-5-2016)

Section 143 of the Income-tax Act, 1961 – Assessment – Extension of Scheme for e-assessment

Paperless assessment/e-mail based assessment on a pilot basis commenced in the financial year 2015-16 in non-corporate charges of five cities i.e. Ahmedabad, Bengaluru, Chennai, Delhi and Mumbai. The e-mail based assessment scheme has now been extended to two more cities, namely Hyderabad and Kolkata during the current financial year. It shall now be open for all the taxpayers assessed in these seven cities, whose cases have been selected under scrutiny to opt for being scrutinised under the e-mail based paperless assessment proceedings by giving their consent. However, in case of practical difficulties in submission of scanned copies of voluminous documents through e-mail, the documents could be received by the assessing officer in physical form after recording reasons for the same.

All the taxpayers of the aforesaid seven cities, whose cases are picked up for scrutiny, may convey their consent to their respective Assessing Officers in order to avail the facility of e-mail based paperless assessment proceedings.

(Press Release, dated 25-5-2016)

CA Tarunkumar Singhal & Sunil Moti Lala, *Advocate*

INTERNATIONAL TAXATION
Case Law Update

A. HIGH COURT JUDGMENTS

1. For AY 2001-02, prior to the insertion of section 40(a)(ia) of the Act, disallowance of payments to non-residents on account of non-deduction of tax at source was discriminatory and consequently assessees would be eligible to benefit of Article 26(3) of the India-US DTAA and the said expenses would be allowable in spite of non-deduction.

CIT vs. Herbalife International India – (2016) 69 taxmann.com 205 (Delhi)

Facts:

(i) The assessee, an Indian subsidiary of Herbalife International Inc, USA, ('Herbalife USA') was engaged in the business of trading and marketing of herbal products. The assessee entered into an administrative services agreement with Herbalife USA, which was approved by the RBI, wherein Herbalife USA agreed to provide the assessee data processing services, accounting, financial and planning services, marketing services, long-term financial planning services etc for the purpose of obtaining government approvals / approvals from regulatory bodies for its products and also to assist the assessee in protecting the trademark and trade name logo of the Herbalife products, in consideration of an administrative fee. Since Herbalife USA followed the calendar year, the administrative fee amounting to ` 5.83 crore covered the period of January to March, 2000 which pertained to the earlier assessment year i.e. AY 2000-01. However, the assessee claimed the entire amount as deduction in AY 2001-02 on account of (i) the fact that it was informed about the said amount payable in AY 2001-02 and (ii) it received sanction from the RBI for the said payment only in June 2000, which pertained to AY 2001-02. Further, for the amount payable for January 2001 to March 2001, the assessee made a payment of the fee based on an estimate basis since no bills were received from Herbalife USA. It did not deduct tax at source on the payment contending that it was merely a cost sharing arrangement and not in the nature of fee being remitted overseas. The AO disallowed the payment on three grounds (i) that a portion of the amount pertained to the previous AY and therefore could not be claimed in the current AY and (ii) the fee for the current AY was in the nature of fees for technical services liable to deduction of tax at source under section 195 of the Act and since the assessee did not deduct any taxes, the AO invoked section 40(a)(i) of the Income-tax Act, 1961 ('the Act') and (iii) the amount pertaining to the period of January 2001 to March 2001 was a dead liability and neither were any bills received by the assessee, nor was

any provision for future payment created by the assessee.

(ii) The CIT(A) upheld the order of the AO with regard to the 40(a)(i) disallowance and failed to deliberate on the allowance of expenses pertaining to the previous AY. On further appeal, the Tribunal deleted the addition made by the AO / CIT(A) on the ground that the said administrative fee was not taxable in the hands of the payee as it was business income of Herbalife USA and in the absence of a PE in India no tax was to be paid. Further, it held that under the India – USA DTAA, the same would not be taxable under Article 12(4) of the said DTAA and that even as per Article 26(3) of the DTAA, section 40(a)(i) of the Act was discriminatory and could not be invoked as no corresponding disallowances were applicable in the case of residents during AY 2001-02. As regards, the disallowance made by the AO on the account of the expenses pertaining to the previous AY, the Tribunal held that the payment could not have been made prior to the approval of the RBI which came only in June, 2000 and therefore the liability accrued to the assessee only in AY 2001-02 and therefore was eligible for deduction. For the fee attributable to the period January 2001 to March 2001, the Tribunal allowed the deduction on the ground that the same was made on a reasonable basis.

(iii) Aggrieved by the order of the Tribunal, the Revenue filed an appeal before the Honourable High Court. The Revenue contended that Article 26(3) of the India–US DTAA would have no application in the instant case and that the amounts pertaining to the previous assessment year and the period of January 2001 to March 2001, for which no bill was raised, were not to be allowed. However, the Revenue did not raise any specific contention about the fee being in the nature of fees for technical services.

Judgment

(i) The Hon'ble High Court observed that Article 26(3) of the India-US DTAA states that for the purpose of determining the taxable profits of a resident of a contracting state (India), the payment of interest, royalty and other disbursements paid to resident of another contracting state (USA), shall be deductible under the same conditions that apply to such payments being made to residents of India. The High Court rejected the contention of the Revenue that the impugned payment of administrative fee did not fall under Article 26(3) of the India-US DTAA and held that the expression "other disbursements" was wide enough to encompass the administrative fee paid by the assesee to Herbalife USA.

(ii) It held that section 40(a)(i) of the Act, as it was during AY 2001-02 did not provide for deduction of TDS where the payment was made in India and that such requirement was introduced for the first time vide section 40(a)(ia) with effect from April 1, 2005. While examining the term "same condition", the Court held that Article 26(3) of the DTAA clarifies the nature of receipt and conditions of deductibility and is not relatable merely to the compliance requirement of deduction of TDS. It held that the lack of parity in allowing the payment as deduction is what brings about the discrimination. It further held that as per section 90(2) of the Act, the provisions of the DTAA would prevail over the Act unless the Act was more beneficial to the assessee. Accordingly, the Court held that section 40(a)(i) of the Act was discriminatory and not applicable in terms of Article 26(3) of the India-US DTAA and therefore allowed the administrative fee paid.

(iii) As regards, the expenses pertaining to the periods January 2000 to March 2000 (previous AY) and January 2001 to March, 2001 (for which the assessee claimed deduction on the basis of a reasonable estimation), the Court upheld the finding of the Tribunal and allowed the same.

2. Income arising from the offshore supply of goods is not taxable in India

merely because an Indian subsidiary company installed it

Nortel Networks India International Inc vs. DIT – (2016) 69 taxmann.com 47 (Delhi)

Facts

(i) The assessee, a company incorporated in the USA was a part of the Nortel Group, engaged in the supply of hardware and software GSM Cellular Radio Telephone systems. The Nortel group had both a liaison office ('Nortel LO') as well as a subsidiary company in India ('Nortel India'). Nortel India entered into three contracts with Reliance Infocom in India – Equipment contract, Services contract and Software contract and assigned all rights and obligations to sell, supply and deliver equipment under the Equipment Contract to the assessee pursuant to which Reliance placed orders directly with the assessee and made all payments directly to the assessee. The equipment supplied to Reliance was manufactured by Nortel Canada and Nortel Ireland and delivered to Reliance overseas. The assessee did not file any return of income since it was of the view that its income was not chargeable to tax in India.

(ii) The AO issued a notice under section 148 of the Act requiring the assessee to file returns in India in response to which the assessee filed 'Nil' returns. The AO held that the assessee failed to book any costs in its account, nor showed any source of funds and that the equipment sourced from Nortel Canada and Nortel Ireland were supplied to Reliance at almost half the price. Accordingly, the AO concluded that the assessee did not have the financial or technical ability to perform the equipment contract. The AO held that the assessee was merely a shadow company and that Nortel LO and Nortel India along with Nortel Canada actually performed the contract and observing that both Nortel LO and Nortel India operated from the same premises and provided services to the group companies concluded that there was no difference between the two and held that Nortel LO and Nortel India constituted the assessee's Fixed Place and Dependent Agent PEs in India.

(iii) The CIT(A) and the Tribunal upheld the order of the AO on the basis that the assessee had employed the services of Nortel India for fulfilling its obligations of installation, commissioning, after sales service and warranty services. The Tribunal also concurred with the view that since employees of group companies had visited India in connection with the project, the business of the assessee was carried out by those employees from the business premises of Nortel India and Nortel LO. The Tribunal attributed 50 per cent of the profits to the PE observing that the assessee's entire business enterprise activities were managed by the Indian PE.

(iv) Aggrieved, the assessee filed an appeal before the Hon'ble High Court.

Judgment

(i) The Hon'ble High Court, held that there was no material on record that would suggest that Nortel LO had acted on behalf of the assessee in negotiating and concluding agreements on its behalf and therefore it was not possible to accept that the offices of Nortel LO could be considered as a fixed place of business of the assessee.

(ii) As regards, Nortel India, the Court examined the assignment of contract and noted that the task of installation, commission and testing were performed by Nortel India on its own account and that the assessee did not perform any installation or commissioning activity in India. It held that Nortel India could not be considered as a Dependent Agent PE in India as there was no material to indicate that Nortel India exercised authority to conclude contracts for the assessee. It also held that the premises of Nortel India were not at the disposal of the assessee and therefore could not be considered as a Fixed Place PE of the assessee. It further refused to accept that Nortel

India constituted the assessee's service PE or installation PE. It held that a subsidiary company was an independent tax entity and its income was chargeable to tax in the State where it was resident and that in the present case, the tax payable on activities carried out by Nortel India would have to be captured in the hands of Nortel India, itself.

(iii) Accordingly, it held that the assessee did not have a PE in India and therefore no income was attributable to activities in India.

3. Where the subsidiary company was compensated at ALP for international transactions with its AE, assuming the existence of a PE, no further profits were to be attributed. Also, assessee's subsidiary in India did not constitute a PE as none of the conditions in Article 5 of the India-US DTAA were satisfied

Adobe Systems Incorporated vs. ADIT – (2016) 69 taxmann.com 228 (Delhi)

Facts

(i) The Petitioner, a US Company, was engaged in providing software solutions for networking publishing. It had a wholly owned subsidiary in India viz. Adobe India which provided the Petitioner software related research and development services for which the Petitioner remunerated Adobe India at cost plus 15 per cent. The Petitioner claimed that it was not assessable to tax in India in respect of any of its income other than interest of advance fees for which appropriate tax had been deducted. Adobe India was assessed to tax in India in respect of its income and the international transaction of providing the impugned research and development services at cost plus 15 per cent had been accepted to be at ALP by the TPO.

(ii) The AO issued notices under section 148 of the Act seeking to reopen the assessment of the Petitioner on the ground that the activities carried out by Adobe India were a part of the Petitioner's core business activities and therefore Adobe India constituted a Fixed Place PE, Service PE and Dependent Agent PE of the Petitioner under Article 5 of the India-US DTAA. Additionally, the AO contended that the transaction between the Petitioner and Adobe India was to be benchmarked under the PSM rather than TNMM as it involved transfer of intangibles and multiple interrelated transactions.

(iii) Aggrieved, the Petitioner filed a writ petition before the Hon'ble High Court.

Judgment

(i) The Court noted that Adobe India was already assessed to tax on ALP basis and that since the transfer pricing provisions sought to tax the real income of the assessee derived from international transactions with AEs, the transfer pricing assessment of Adobe India would have resulted in capturing the entire income from the provision of such research and development services. Referring to Article 7 of the India-US DTAA, the Court held that even if Adobe India was to be considered as a PE of the Petitioner, only the income attributable to the PE could be brought to tax in India and since the entire income was already taxed in the hands of Adobe India at ALP, the AO was unjustified in re-opening assessment having reason to believe that the income of the assessee had escaped assessment.

(ii) As regards the contention of the AO, that the transaction of research and development services was to be benchmarked under the PSM, the Court held that the question as to which was the correct method of determining ALP could only be debated in the proceedings relating to the assessment of Adobe India. Accordingly, the same was dismissed.

(iii) Though academic, for the sake of completeness, the Court held that Adobe India could not be considered as a PE of the Petitioner

merely because it was its subsidiary. It held that Adobe India was not a fixed place PE since there was no evidence that the Petitioner had the right to use its premises or any fixed place at its disposal. Further, it held that in the absence of any evidence that any of the Petitioner's employees provided services in India, there could be no Service PE. Merely because the Petitioner had the right to audit Adobe India, it could not be concluded that the employees of the Petitioner provided services in India. Additionally, it held that there was no allegation that Adobe India was authorized to conclude contracts on behalf of the Petitioner and therefore could not be considered as a Dependent Agent PE.

(iv) Accordingly, the Court quashed the notices issued and the orders passed by the AO dismissing the objections filed by the Petitioner against the reasons recorded for reopening the assessments.

4. While computing the PLI, only those costs incurred by the assessee were to be included in the cost base – cost of sales of goods could not be added to the cost base of the assessee who merely provided support services.

Pr CIT vs. Mitsui & Co India Pvt Ltd – TS-195-HC-2016 (Del) – TP

Facts

(i) The assessee, a wholly owned subsidiary of Mitsui & Co Ltd, Japan which is one of the leading Sogo Shosha establishments in Japan i.e. a company undertaking general trading and which links buyers and sellers for a wide range of products. The assessee provided support services to the various Mistui group entities and acted as a facilitator for transactions entered into by the Group. The assessee benchmarked its international transactions using TNMM and adopted the Berry Ratio (Gross Profit / Operating Cost) as the Profit Level Indicator.

(ii) The TPO disagreed with the contention of the assessee and was of the view that the cost of sales was to be included in the denominator of the PLI referring to Rule 10B(1)(e)(i) of the Income-tax Rules, 1962 ('the Rules') wherein it is provided that the net profit margin of an international transaction was to be computed in relation to the costs incurred, sales effected or assets employed by the assessee. Therefore, treating the income from support services rendered by the assesee as trading income, the TPO made an upward adjustment.

(iii) The Tribunal, relying on the decision of the Court in the case of *Li & Fung India Pvt Ltd. (TS-346-HC-2013 (Del)-TP,* wherein it was held that the net profit margin of the assessee was to be calculated with reference to the cost incurred by the assessee and not the costs incurred by any other entity, either third party or AE, held that the cost of sales could not be added to the cost base of the assessee who merely provided support services and accordingly deleted the TP addition.

(iv) Aggrieved, the Revenue filed an appeal before the Hon'ble High Court.

Judgment

(i) The Hon'ble High Court upheld the order of the Tribunal and noted that the said question was duly covered by the decision of the Court in Li & Fung India. Accordingly, the addition made by the TPO was deleted.

B. Tribunal Decisions

5. Transfer Pricing – Whether APA has a persuasive value for resolving disputes even beyond the rollback years – Held: Yes – In favour of the assessee

Ranbaxy Laboratories Ltd. vs ACIT 2016-TII-221-ITAT-DEL-TP

Assessment Year: 2008-09

Facts

(i) The assessee is a manufacturer of pharmaceuticals for many decades, having manufacturing at several locations. It is engaged in other activities such as R&D, quality control processes, etc. For the multi-country operations, the assessee has set up a number of wholly-owned subsidiaries, joint ventures and representative offices in different parts of the world.

(ii) The AEs of the company are mainly engaged in the distribution of pharmaceuticals to customers in overseas markets. Some of the AEs are also engaged in the conversion and sale of active pharmaceutical ingredients (APIs) into dosage forms, repacking and finishing activities. For the Transfer Pricing (TP) purposes, the assessee characterized itself as normal risk bearing entity, bearing the risk of success or failure of the business. It also stated that the AEs were engaged only in the business of selling and distribution or secondary manufacturing activity, bearing minimum risk with least complex operations without owning any intangible or unique asset. Accordingly, it considered AEs as tested parties for determining the arm's length price.

(iii) During assessment proceedings, the Transfer Pricing Officer (TPO) rejected the selection of foreign AE as tested party on the ground that there is a geographical difference between the AE and the comparables, and selected assessee as the tested party. TPO determined the arm's length nature of the international transactions of the assessee on the basis of a set of comparables selected by him, and made TP adjustment for the difference. The Dispute Resolution Panel (DRP) confirmed the TP adjustment made by the TPO.

Issues before the Tribunal

a) Whether overseas AEs can be considered as "tested party" if they are least complex entities?

b) Though APA was signed for AY 2014-15, can it have any impact on the international transactions for the year under appeal?

Decision

The Tribunal held in assessee's favor as under:

(i) The assessee submitted that it entered into an APA on August 7, 2015 with the CBDT, Government of India for AY 2014-15. For the purpose of arriving at the advance pricing, the CBDT conducted detailed FAR analysis of the assessee and concluded that the assessee was an entrepreneur manufacturer and the AEs were functioning as distributors or secondary manufacturers.

(ii) The assessee also contended that there was no change in the FAR of the AEs in the year under appeal vis-à-vis the year of APA. The mechanism for TP analysis as accepted in the APA may, therefore, be applied in the years under appeal also.

(iii) The Departmental Representative (DR) contested that an APA was merely a negotiated agreement and was applicable only for the year for which it was entered into, and so it should not be applied retrospectively to the year under appeal which was not covered year even under the rollback period.

(iv) The Tribunal observed that the CBDT agreed to accept AEs as the tested party in the APA with the assessee, and adopted TNMM as the most appropriate method. The CBDT also approved the concept of regional benchmarking for the purpose of determining arm's length price – this basically meant that to select the appropriate comparables, regional benchmarking can be applied in case country-by-country benchmarking is not feasible though the same shall be preferred over regional bench marking. In fact, the CBDT agreed to apply European benchmarking for South African, Peru, Ireland and Romanian AEs and Asian benchmarking for AEs in Nigeria, Malaysia, Egypt, Brazil, Thailand and Morocco.

(v) Based on the above, the Tribunal held that even though the APA would be applicable for the year for which it has been entered into but the principles laid down in the APA for the comparability analysis would have a greater persuasive value for past years also if the nature of international transactions and the FAR of the AE and the assessee remained the same.

(vi) The Tribunal also observed that if the CBDT agrees to apply the same terms and conditions to the roll back years, the methodology accepted in the APA can be applied in the year under appeal also, provided the international transactions and the FAR are the same for the year under appeal.

6. Beneficial Ownership – Whether, on facts and circumstances of the case, Singapore tax resident company is the beneficial owner of royalty and interest and entitled to concessional rate of tax under the Treaty – Held: Yes, in favour of the assessee.

Imerys Asia Pacific Pvt. Ltd. vs. DDIT 2016-TII-102-ITAT-Pune-Intl. – Assessment Year: 2010-11

Facts

(i) The assessee, a Singapore resident rendered administrative, marketing and sales services to the group and affiliated companies trading in paper and performance minerals, It also undertook other related business activities including project work. The assessee was a 100% subsidiary of A Co., and B Co. was its ultimate holding company.

(ii) The assessee had entered into an agreement with C Ltd., UK, to sub-license know-how to other group companies. As per the Technology License Agreement entered into with D Pvt. Ltd. (a group company), D Pvt. Ltd. was granted a non- exclusive, non-transferable, non-assignable and revocable license to use the technology to manufacture, use and sell calcium carbonate and calcium products in the territory of India.

(iii) Another group company, E Pvt Ltd., had obtained External Commercial Borrowings (ECB) loans from the assessee for purchase of capital goods, since it was in the process of setting up plants in India. The loans were granted in accordance with the ECB guidelines issued by the Reserve Bank of India.

(iv) During assessment proceedings, the assessee was asked to submit proof that it was the beneficial owner of interest and royalty, and that these incomes were remitted to, or received by the assessee in Singapore, and offered as income there.

(v) The Assessing Officer (AO) noted that the beneficial owner of royalty was not the assessee, but C Ltd., UK, and did not accept the assessee's claims that the know- how agreement with C Ltd., UK was on a principal-to principal basis and that the assessee was not an agent of C Ltd., UK. As regards interest income, the TO observed that the assessee had failed to remit it in the same fiscal year. Therefore, the AO rejected the assessee's claim for lower rate of tax for interest and royalty as per the tax treaty

(vi) In response, the assessee filed objections before the Dispute Resolution Panel (DRP), which confirmed the AO's decision; the benefits of the tax treaty were denied to the assessee.

Issues before the Tribunal

a) Was the assessee the beneficial owner of the royalty and interest income?

b) Were the provisions of Article 24 of the tax treaty applicable to the assessee?

Decision

The Tribunal held in assessee's favour as under:

A) Re: Beneficial ownership

i) The Tribunal perused the agreement between C Ltd., UK, and the assessee, and

observed that the UK company had developed a body of secret, substantial and identifiable know-how in connection with designing, building, operating and maintaining of plants for manufacture of certain products. The UK company wished to develop a sub-licensing market in the Asia Pacific Region for this know-how, and accordingly wanted the assessee to sub-license the know-how. The Tribunal noted that the agreement between C Limited, UK, and the assessee allowed it to only sub-license the know-how, but did not permit its exploitation.

(ii) In view of the above, the assessee had sub-licensed the know-how to D Private Limited to use along with the technology, and had received 5% of the annual net sales from D Private Limited as royalty, but in turn, it had paid license fees equivalent to only 2% of the sales of the product to the UK company.

(iii) The Tribunal also reviewed the invoices raised by the assessee, the documents submitted to the authorised dealer for remittance of the royalty, the certificate issued by the auditor for the payment of royalty under foreign technical collaboration and also extracts of the Singapore tax return wherein credit for tax withheld in India had been claimed in Singapore.

(iv) In the totality of these facts and circumstances, the Tribunal held that the assessee was the beneficial owner of royalty in line with the provisions of Article 12 of the tax treaty, and the same was to be taxed at 10%. In this regard, the Tribunal relied on the ratio laid down in the ABC ruling.

B) Re: Requirement of a Tax Residency Certificate (TRC)

Another aspect of the issue as stated by the Tribunal was that the benefits available under the tax treaty should have been granted to the assessee based on a valid TRC, as was the proposition approved by the Supreme Court in the case of *Union of India vs. Azadi Bachao Andolan [2004] (10) SSC 1 (SC).* Since the assessee had placed on record the Singapore TRC for the relevant fiscal year, the Tribunal held that the benefit of the tax treaty was also available to the assessee on this ground.

C) Re: Conduit company

As regard the TO's contention that the assessee was a conduit company, the Tribunal relied on its earlier ruling in *Shaan Marine Services Private Limited. vs. Dy.* Director of Income-tax [2014] 165 TTJ 952 (Pune) and dismissed the TO's observation.

D) Re: Remittance of incomes to Singapore

i) The Tribunal further observed that the case before it was not that the amounts had not been remitted to Singapore, but the fact that the benefits of the tax treaty had been denied to the assessee, since those amounts had not been remitted in the relevant fiscal year. The Tribunal found no merit in denying the benefits of the tax treaty to the assessee in a situation where the amounts had been remitted to, and taxed in Singapore. The Tribunal found support from the ratio laid down by the Rajkot Bench of the Tribunal in *Alabra Shipping Pte. Limited, Singapore vs. ITO (ITA No.392/RJT/2014).*

Conclusion:

(i) It has been established that where the assessee had, under an agreement with its principal, received the know-how with the right to sub-license, the royalty it received would be regarded as having been received by the assessee on its own right. Therefore, it could be subject to tax at the concessional tax rate prescribed under the tax treaty.

(ii) Similarly, the interest income remitted by the assessee, though not in the same fiscal year, was held to be taxable at concessional tax rate under the treaty.

7. Transfer Pricing – AMP Expenses-Agreement between assessee and its AE and proof that the AMP expenditure is not for the assessee's business in

India are prerequisite for treating the AMP expenditure as an international transaction - AMP Expenses deleted - in Assessee's favor

Loreal India Pvt. Ltd. vs. DCIT 2016-TII-251-ITAT-Mum-TP – Assessment Year: 2008-09

Facts

(i) The assessee is engaged in the business of manufacturing and distribution of cosmetics. During the transfer pricing assessment proceedings, the tax officer found all international transactions of the assessee to be at arm's length, except one i.e. AMP expenditure

(ii) For benchmarking the international transaction of AMP expenditure the A.O. adopted Profit Split Method (PSM). He held that profits could be attributed to three major activities of tax payer viz. manufacturing –50%, research and development –15% and AMP –35%. The tax officer computed that AMP expenditure incurred by the tax payer were 0.63% of the global AMP expenditure. Thus out of 35% of the global profits, he attributed 0.63% of the profits to the assessee which was ` 348.44 crore. The tax officer observed that the assessee had declared a profit of ` 42.90 crore, hence he allowed a deduction of ` 15.01 crore (35% of ` 42.90 crore) and arrived at an adjustment of ` 333.43 crore

(iii) Alternatively, the tax officer had also determined the Arm's Length Price (ALP) of AMP expenditure based on Bright Line Test (BLT) for the manufacturing segment and the distribution segment of the assessee. He computed an adjustment of ` 98.43 crore for the manufacturing segment and ` 43.83 crore for distribution segment based on Cost Plus Method (CPM). A total adjustment of ` 142.26 crore was proposed by the TPO.

(iv) The assessee contended that AMP expenditure incurred by it was not an international transaction for the following reasons:

a) Payment for AMP expenditure was made to third parties in India

b) There was no agreement between the assessee and the AEs in respect of AMP expenditure

c) AMP expenditure were incurred in the course of carrying on its business in India for promotion of its products in the Indian market

d) Tax officer had not brought any evidence on record to prove that there was an arrangement between the assessee and the AE

e) More so since the assessee had furnished a certificate from its AE showing that there was no arrangement between them on AMP expenditure.

f) The assessee had relied on the decision of the Delhi High Court in *Maruti Suzuki India Ltd. vs. CIT [2015] 64 Taxmann.com 150 (Del), Honda Ciel Power Products Ltd vs. DCIT [2016] 64 Taxmann.com 328 (Del), and CIT vs. Whirlpool of India Ltd.[2015] 64 Taxmann.com 324 (Del)* for the proposition that AMP expenditure could not be termed as an international transaction in the absence of an agreement between the assessee and the AE.

g) The assessee further contended that advertisements were for its own products and not for the brand of its AE. Such products were developed specifically for Indian markets as per the requirements and preferences of Indian people.

h) The assessee also contended that it was an independent risk bearing entity, thus, it alone enjoyed the increased product sales as a result of AMP expenditure. Even if some benefits were derived by the AE, they were only incidental and ancillary.

i) The assessee had also contended that the methods adopted by the tax officer were

not correct. More so, the approach of the tax officer in arriving at two alternate ALP by adopting two different methods (PSM and CPM) was bad in law.

(v) The Dispute Resolution Panel (DRP) concurred with the findings of tax officer and did not provide any relief to the assessee.

Decision

The Tribunal held in assessee's favor as under:

(i) The Tribunal appreciated the argument of the assessee that AMP expenditure incurred by it was for products launched especially for the Indian market and that the brand of the AEs was not promoted. In coming to this conclusion, the Tribunal had taken cognisance of the assessee's growth in sales of 19 times since the year 1999. It held that AMP expenditure incurred by the assessee had played an important role in the rapid progress made by the assessee in Indian market.

(ii) The Tribunal held that the tax officer's assumption that AMP expenditure incurred by the assessee would have benefitted AE who owned the brands used by the assessee, suffered from a basic flaw since it presumed that assessee would not incur AMP to promote its own business.

(iii) The Tribunal held that the moot question that had to be answered in this case was whether in the absence of any agreement for payment of AMP expenditure it could be held that there was an international transaction. The answer was an emphatic 'no' in view of the decision of the Delhi High Court in the case of *Maruti Suzuki, Whirlpool India, and Bausch & Lomb Eyecare (India) Pvt. Ltd (ITA No. 643 of 2014 of Delhi High Court).*

(iv) On the tax department's contention that the matter ought to be remanded to the file of the tax officer the Tribunal held that non-availability of a particular decision of the higher forum cannot justify the restoration of issues in each and every case. Unnecessary litigation has to be avoided, and issues have to be settled for once and all.

(v) The Tribunal held that in the absence of an agreement between the assessee and the AE on AMP expenditure, the first and primary precondition of treating the transaction in question an international transaction remained unsatisfied. Without crossing the first threshold, the second threshold of application of principles of Sony Ericcson could not be approached. Hence, when AMP expenditure itself was not an international transaction, the matter was not required to be restored to the file of the tax officer.

8. India-Mauritius DTAA – Existence of Permanent Establishment – Should the assessee's independent activities under each contract be aggregated for determining the 9-month threshold period under Article 5(2)(i) of the tax treaty – Held No: Does the LO of the assessee's group company constitute a PE under Article 5(2)(c) of the tax treaty – Held: No

ACIT vs. M/s. J RAY MC Dermott Eastern Hemisphere Ltd. 2016-TII-111-ITAT-MUM-INTL Assessment Year: 1998-99

Facts

(i) The assessee was incorporated in, and a tax resident of, Mauritius. In India, it was engaged in transportation, installation and construction of off-shore platforms for mineral oil exploration.

(ii) The assessee executed two contracts in India, from March 1996 to November 1996 and from February 1997 to May 1997.

(iii) The Tax Officer (TO) assessed the assessee on the basis that it had a PE in India under Article 5(2)(c) (in form of Liaison Office (LO) of the assessee's group company) and Article 5(2)(i) (Construction PE) of the India-Mauritius tax treaty. He aggregated the period of installation activities under the two contracts to allege existence of Construction PE.

(iv) Further, relying on the report of a survey carried out under section 133A of the Income-tax Act, 1961 (the Act), the A.O. concluded that the LO premises were used exclusively for the assessee's business and therefore the LO was a Fixed Place PE. Accordingly, the TO determined the PE's taxable income under section 44BB of the Act.

(v) The company appealed before the Commissioner of Income-tax (Appeals) [CIT(A)] who, after perusal, of the facts and submissions, held that the assessee did not have a construction PE under Article 5(2)(i) of the tax treaty. However, the CIT(A) upheld the TO's argument that the assessee had a Fixed Place PE since the LO was exclusively used for the assessee's projects.

Decision

The tribunal held in the favour of the assessee as under:

A) Re: Construction PE

(i) Following its own order for an earlier year, the Tribunal held that since each project's duration in India was less than 9 months, the assessee did not have a construction PE in India.

(ii) Article 5(1) of the tax treaty lays down the general rule regarding existence of a PE. However, Article 5(2)(i) substitutes and limits the permanence test with the duration test. Thus, even if there exists a PE under the general rule of Article 5(1), it would be outside the ambit of definition of PE by virtue of Article 5(2)(i).

(iii) A plain reading of Article 5(2)(i) showed that the activities of a foreign enterprise on a particular site or a particular project, or supervisory activity connected therewith, had to be taken into account, and not all activities in a tax jurisdiction as a whole.

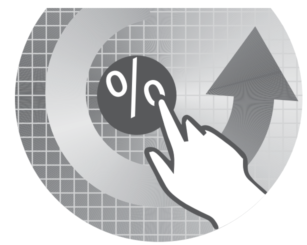
(iv) There was no specific mention about aggregating the number of days spent on various sites, projects or activities. Each building site, construction or assembly project or supervisory activities in connection therewith had to be viewed on standalone basis.

(v) However, India's tax treaties with Australia, Austria, Belgium, Bulgaria, Canada, China, Denmark, Italy, New Zealand, Norway, Spain, Turkey and USA provide for aggregation of days to compute the threshold period. Thus, the aggregation principle could not be read into tax treaties which did not specifically provide for the same. Even when aggregating days, double counting of days (when more than one site or project existed, or when work was carried out at two or more different places on a single day) had to be excluded.

B) Re: LO as PE

(i) The tax authorities had not appreciated the survey documents completely. Furthermore, none of the documents show that the employees of the LO negotiated or concluded contracts for the assessee, or that substantive business was carried out from the LO. The survey documents depicted the situation that the LO merely provided co-ordination, liaison, and back office support activities. Such activities were preparatory and auxiliary in nature, and did not constitute PE under Article 5(2)(c) read with Article 5(3)(e). ***(Refer: UAE Exchange Centre Limited v. UOI [2009] 313 ITR 94 (Delhi); DIT v. Morgan Stanley [2007] 292 ITR 416 (SC))***

(ii) The assessee did not carry on any other activity (having an independent identity or economic substance and yielding separate business profits) other than the installation/construction project. Therefore, the assessee's case needed to be considered only under Article 5(2)(i) and not under any other clause. (Refer: *National Petroleum Construction Company v. DIT (ITA no. 143/2013)(Delhi); Cal Dive Marine Construction (Mauritius) Limited [2009] 182 taxmann.com 124 (AAR); Kreuz Subsea Pte. Limited v. DDIT [2015] 58 taxmann.com 371 (Mumbai-ITAT); BKI/ Ham (ITA No. 34 of 2007)(Utt.)*



CA. Hasmukh Kamdar

INDIRECT TAXES

Central Excise and Customs – Case Law Update

Commissioner of Central Excise, Delhi–I, vs. Rohit Bal Designs (P) Ltd. [2016 (335) E.L.T. 543 (Tri. – Del.)]

Manufacture

The facts in this case were as follows:–

The assessee was a fashion designer and engaged in manufacturer of designer ready to wear garments. On scrutiny of records, it was revealed that the assessee cleared designer sarees without payment of duty. The Department was of the view that the assessee was engaged in manufacturer of designer sarees involving extra work and as such was contributing greater thickness to the cloth. Therefore such sarees are required to be classified under Chapter Heading 6307.90 as made-ups and chargeable to excise duty. The assessee was of the view that the conversation of sarees into a designer sarees is not a process of manufacture as per Section 2(f) of the Central Excise Act, 1944.

A show cause notice was issued to the assessee. The Adjudicating Authority relying on the C.B.E. & C. Circular No. 557/53/2000-CX., dated 3-11-2000 and held that the assessee has converted fabric into designer sarees with extra work which contribute greater thickness to the cloth and same is classifiable under CTH 6307.900 as made-ups. Consequently, they are liable to pay duty. On appeal before the learned Commissioner (Appeals) the adjudication order was set aside and appeal was allowed.

Aggrieved from the said order, Revenue filed this Appeal to Hon'ble CESTAT.

The Department strongly relied on the C.B.E. & C. Circular No. 557/53.2000- CX., dated 3-11-2000 to contend that it is admitted fact that sarees were unhemmed, therefore, as per the CBEC Circular, the extra work which contribute greater thickness to the cloth and same was classifiable under CTH 6307.90, therefore, impugned order in appeal is liable to be set aside.

None appeared on behalf of the respondent. There was no request for adjournment. The matter was taken up for disposal by Hon'ble CESTAT.

It was noted that the learned Commissioner (Appeals) has recorded a fact that "I find that it is not a disputed fact that the appellants have carried out embroidery and hemming work etc. on the duty paid sarees purchased from the market',

The Hon'ble Tribunal further observed that, the fact recorded by the learned

Commissioner (Appeals) has not been controverted by the learned AR, therefore, the C.B.E. & C. Circular dated 3-11-2000 has no application to the facts of this case. The Hon. CESTAT also agreed with the following findings of the learned Commissioner (Appeals) recorded in Order in Appeal.:-

"I find that saree remain a Saree even after subjecting to various processes of hemming and hand embroidery work and such processes do not alter the character and use of the saree. In other words, no new article with distinct name, character and use emerges out as result of the processes stated by the department in the show cause notice. I rely on judgment of the Hon'ble Apex Court in the matter of *Meltex (I) Pvt. Ltd. vs. Commissioner of C. Ex., New Delhi – 2004 (165) E.L.T. 129 (SC)* wherein principle has been laid down by the Hon'ble Court that "Product is a film to start with and remain a film after lamination or metallization and no new and distinct product comes into existence". Said principle has already been followed by the Hon'ble Tribunal in the case of *Ellora Mechanical Products Pvt. Ltd. vs. Comm. of C. Ex., Noida – 2005 (186) E.L.T. 234 (Tri. – Del.)* and *Kuwer Industries Ltd. vs. CCE, Noida – 2005 (184) E.L.T. 49 (Tri. - Del.)* while dealing with identical issue and same product. The evidence and reason put forth by the adjudicating authority are not sufficient to render the process of conversion of saree into designer sarees as process of manufacture and the finding to conclude contrary is in utter disregard to the principle laid down by the Hon'ble Apex Court as stated above and is therefore liable to be set aside. In view of the above I hold that conversion of sarees into designer sarees is not a process of manufacture as per Section 2(f) of the Act ibid, and such sarees are not chargeable to Central Excise duty. Consequently demand of duty, interest and penalties imposed in the impugned order cannot be sustained'.

The Hon'ble CESTAT was in agreement with the finding of the learned Commissioner (Appeals) and held that as the respondent had purchased sarees and did embroidery and hemming work thereon will not change the character of sarees, therefore, the activity undertaken by the respondent does not amount to manufacture as per Section 2(f) of Central Excise Act, 1944, consequently, not excisable.

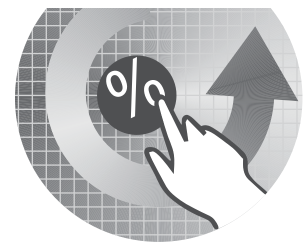
The appeal filed by the Revenue was dismissed.

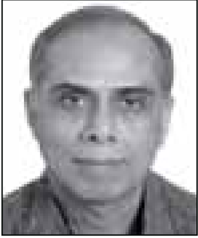
"A learning experience is one of those things that says, 'You know that thing you just did? Don't do that."

— *Douglas Adams*

No one knows for certain how much impact they have on the lives of other people. Oftentimes, we have no clue. Yet we push it just the same."

— *Jay Asher*





CA Rajkamal Shah & CA Naresh Sheth

INDIRECT TAXES
Service Tax – Statute Update

1. Krishi Kalyan Cess

Krishi Kalyan Cess ('KKC') is effective from 1-6-2016. It is to be levied at 0.5% of the value of taxable services. Central Board of Excise and Customs came out with following notifications relevant to KKC:

- **Notification No. 27/2016 – ST dated 26-5-2016**

  Notification No. 30/2012-ST dated 20-6-2012 notifying services on which service tax payment is to be made under reverse charge will also be liable to KKC.

- **Notification No. 28/2016-ST dated 26-5-2016**

  – KKC will not apply on

  i. Taxable services wholly exempt from service tax

  ii. Services not liable to service tax u/s. 66B of the Act i.e. services falling in negative list or services provided in non-taxable territory.

  – KKC will apply on abated value of services.

  – Value of taxable services for KKC to be determined as per Service Tax (Determination of Valuation) Rules, 2006.

- **Notification No. 29/2016-ST dated 26-5-2016:**

  Service exporters will be entitled to rebate/refund of KKC paid on input services used for export of services in terms of Rule 6A of STR.

- **Notification No. 30/2016-ST dated 26-5-2016:**

  SEZ units / developers will be allowed refund of KKC paid on input services availed by it.

- **Notification No. 31/2016-ST dated 26-5-2016:**

  Air travel agent service, life insurance service, money changing, lottery distributor services are services where service provider has an option to pay service tax at alternate rate as specified u/r 6(7), 6(7A), 6(7B) or 6(7C) of Service Tax Rules, 1994.

  Person paying tax on specified services at alternate rate shall calculate KKC as under:

  – Multiplying total service tax liability as calculated u/r 6(7),

6(7A), 6(7B) or 6(7C) by KKC (0.5%); and

- Dividing the product by rate of service tax as specified in section 66B of the Act (14%).

- **Notification No. 28/2016-CE (NT) dated 26-5-2016**

  CENVAT Credit Rules, 2004 ('CCR') are amended to provide that:

  - Service Provider can take CENVAT credit of KKC paid on input services.
  - Manufacturer is not entitled to take CENVAT credit of KKC paid on input services.
  - KKC CENVAT can be utilised only for the payment of KKC [Rule 3(7)(d) of CCR].
  - CENVAT of Excise duty, service tax, etc. cannot be utilised for payment of KKC [tenth proviso to Rule 3(4) of CCR].

- **Circular No. 194/04/2016-ST dated 26-5-2016**

  Prescribes accounting codes in respect of KKC as under:

Krishi Kalyan Cess (Minor Head)	Tax Collection	Other receipts (Interest)	Deduct Refunds	Penalties
0044-00-507	00441509	00441510	00441511	00441512

2. Services provided by specified organisations in respect of religious pilgrimage

- Services provided by specified organisations in respect of a religious pilgrimage facilitated by the Ministry of External Affairs of the Government of India under a bilateral arrangement are exempted *vide* Entry No. 5A of the Mega Exemption Notification w.e.f. 20-8-2014. No such exemption was there for the period 1-7-2012 to 19-8-2014.
- Exemption is now provided for services provided by specified organisations for the period 1-7-2012 to 19-8-2014.

[Notification No. 25/2016 – ST dated 17-5-2016]

3. Clarifications in relation to taxability of Government services

Services provided by Government or local authority to business entity having turnover up to `. 10 lakh in preceding financial year are exempted *vide* Entry 48 of Mega Exemption Notification.

It is now clarified that aforesaid exemption is not applicable to following services:

- Services specified in sub-clauses (i), (ii) and (iii) of clause (a) of section 66D of the Finance Act, 1994
- Services by way of renting of immovable property

[Notification No. 26/2016-ST dated 20-5-2016]

4. Clarification on Arbitration services

- Up to 31-3-2016, services provided by a person represented on an Arbitral Tribunal to an Arbitral Tribunal was exempted under Entry 6(c) of the Mega Exemption Notification.
- This entry 6(c) is substituted by another Entry *vide* Notification No. 9/2016 – ST dated 1-3-2016. This gave an impression that this exemption has been withdrawn and such service is taxable under forward charge.

- The CBEC *vide* its Circular has clarified that:
  - There is no change as to taxability of the services provided by Arbitral Tribunal and member of such Arbitral Tribunal
  - Such services are taxable and service recipient is liable to discharge service tax liability thereon under RCM

[Circular No. 193/03/2016-ST dated 18-5-2016]

5. Indirect Tax Dispute Resolution Scheme ('ITDRS') Rules, 2016

Said Rules come into force on 1-6-2016. Following Rules are made:

Form and manner for declaration of amount payable under ITDRS:

- Declaration to be made to designated authority in Form 1 (annexed to notification) in duplicate for amount payable under the Scheme.
- Such declaration to be signed by person making the declaration or by any person competent to act on his behalf.
- Designated authority to issue acknowledgment in Form 2 (annexed to notification) within 7 days of receipt of declaration.
- Copy of declaration made in Form 1 and acknowledgement issued in Form 2 to be furnished to the concerned Commissioner (Appeals) within 15 days of receipt of acknowledgment.
- On receipt of the declaration and acknowledgment, Commissioner (Appeals) shall not proceed with the appeal in respect of which declaration is made for a period of 60 days from the date of receipt of copy of declaration and acknowledgment as furnished above.

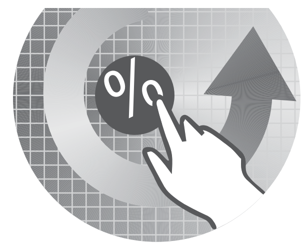
Form of reporting deposits made by declarant:

- Declarant shall within 15 days of receipt of acknowledgment deposit the amounts.
- Within 7 days of making the deposit, intimate the designated authority about the deposit made in Form 3 (annexed to notification).

Form of Order u/s. 214(4) of the Act:

- Designated authority within 15 days of receipt of information about the deposit made issue the order of discharge of dues in Form 4 (annexed to notification).
- Declarant shall intimate and furnish copy of order of discharge to the concerned Commissioner (Appeals) about the said discharge of dues before expiry of 60 days from the date of furnishing copy of declaration (Form 1) and acknowledgment (Form 2) to concerned Commissioner (Appeals).
- On receipt of above information, concerned Commissioner (Appeals) shall remove the appeal from the list of pending appeals with him and intimate the same to declarant within 7 days of receipt of such information.

[Notification No. 29/2016-ST dated 31-5-2016]



CA Bharat Shemlani

INDIRECT TAXES
Service Tax – Case Law Update

1. Services

Business Auxiliary Service

1.1 CCE,C&ST vs. Federal Bank Ltd. 2016 (42) STR 418 (SC)

The Supreme Court in this case held that, cash management service is not liable to service tax under BAS for the period prior to 1-6-2007 as service relating to all banking activities specifically covered under section 65(12) of FA, 1994.

1.2 National Engineering Industries Ltd. vs. CCE, Jaipur 2016 (42) STR 537 (Tri.-Del.)

In this case appellant received commission from foreign suppliers and in some cases directly from Indian buyers, however goods were directly supplied by foreign suppliers. Since Indian buyers paid commission on behalf of foreign supplier and had to remit same to them along with price of goods as per agreement agreed upon, such commission deemed to have been paid in foreign exchange and therefore qualify as export of service.

Business Support Service

1.3 Doon's Caterers vs. CST, Delhi 2016 (42) STR 447 (Tri.-Del.)

The Adjudicating authority confirmed demand of service tax on services of catering, supply of bed rolls, supply of cleaning staff etc. in specified trains under BSS. However, the Commissioner (A) did not agree with the classification and changed the same to BAS though not proposed in SCN. The Tribunal held that, appellate order travelled beyond SCN and therefore not sustainable. It is well-settled law that, classification not proposed in SCN cannot be concluded.

Authorised Service Station Service

1.4 CCE&C, Nashik vs. Automotive Manufacturers Ltd. 2016 (42) STR 448 (Tri.-Mumbai)

In this case, the department sought to levy service tax on free services provided by the selling dealer to customers during warranty period. The Tribunal observed that, undisputedly charges for such services not received from customers as same being part of margin given by manufacturer to dealer and held that, payment of bills for free services by selling dealer to servicing dealer was an internal arrangement and had nothing to do with payment of service provided by selling dealer to customers of car.

Real Estate Agent Service

1.5 Ajay Enterprises Pvt. Ltd. vs. CST, Delhi 2016 (42) STR 471 (Tri.-Del.)

The Tribunal in this case held that, administrative/transfer charges recovered for rendering services in relation to real estate viz., changing names of owner (last allottee) in records prior to execution of sale deed in favour of buyer clearly falls within Real Estate Agent Service. Since there was Commissioner (Adjudication) Service Tax, New Delhi Order in another case holding that such transaction not dutiable, supports appellants claim regarding *bona fide* belief and therefore extended period of limitation cannot be invoked.

Franchise Service

1.6 Punjab Technical University vs. CCE&ST, Ludhiana 2016 (42) STR 474 (Tri.-Del.)

The appellant a University appointed Learning Centres (LC) all over India to provide training/education strictly as per its commands and norms and also appointed Regional Centres (RC) to monitor working of these LC. The Tribunal after going through facts held that notwithstanding that agreements with LC stating that it is not for Franchise Service, all statutory requirements of said service are covered under the said agreement and therefore appellant is liable to pay service tax under Franchise Service. It is further held that since the appellant is established under an Act of State Legislature and programme are widely advertised and more than 1000 LC, hence charge of suppression or misstatement of facts cannot be established to invoke extended period of limitation.

Port Service

1.7 Tuticorin Port Trust vs. CCE, Tirunelveli 2016 (42) STR 512 (Tri.-Chennai)

The appellant in this case received monthly royalty charges from their licensee during the period under dispute for the development of seventh berth as container terminal and its operation and maintenance on BOT basis. The Tribunal observed that agreement reveals that it is a licence agreement and not a lease or rent agreement and it casts certain principal obligation and operational obligation on the appellant and therefore it is liable to service tax under Port Service.

Works Contract Service

1.8 Pioneer Fabrications Pvt. Ltd. vs. CCE, Meerut 2016 (42) STR 563 (Tri.-All.)

The Tribunal in this case held that, supply and installation of Metal Crash Barriers alongside highways is composite contract involving supply of materials and provision of service falling under category of Works Contract Service and not liable to Service Tax prior to 1-6-2007 as held by Apex Court in case of *Larsen & Toubro Ltd. 2015 (39) STR 913 (SC).*

Cargo Handling Agency Service

1.9 DC of CE vs. Sushil & Company 2016 (42) STR 625 (SC)

The Supreme Court in this held that, for taxability under CHS, goods must be cargo and activity of loading/unloading and packing/unpacking must be carried out by an independent agency. In the present case assessee only supplied labour for working in packing plant as per specific requirement of customer and supervised work done by them and no part of loading or unloading or packing of cement assigned such labour which was in fact done by automatic machines, hence service provided by them is not liable to service tax under CHS.

Construction Service

1.10 Shapoorji Paloonji & Co. Pvt. Ltd. vs. CCCEX&ST, Patna 2016 (42) STR 681 (Pat.)

The appellant in this case carried out construction of academic block of IIT which

is set up by and IIT as an institute of national importance under Article 248 of Constitution of India and claimed exemption from service tax. The High Court held that, assessee was entitled to benefit of Notification No. 25/2012-ST as IIT is Government Authority as defined under Notification No. 2/2014-ST. It is held that, sub-clauses (i) and (ii) of clause 2(s) of Notification No. 2/2014-ST were independent disjunctive and expression "90% or more participation by way of equity or control to carry out any function entrusted to municipality under Article 243W of Constitution" is related to sub-clause (ii) alone. Such condition is not applicable to Authority set up by Act of Parliament or State Legislature.

1.11 CST-VII vs. S. M. Sai Construction 2016 (42) STR 716 (Tri.-Mumbai)

The Tribunal in this case held that, construction of college building which is carrying out technical education approved by AICTE, Gov. of Maharashtra is as non commercial construction, therefore not liable to service tax.

2. Interest/Penalties/Others

2.1 CST, Mumbai vs. Lark Chemicals P. Ltd. 2016 (42) STR 417 (SC)

The Apex Court in this case held that, in view of judgment in *Dharmendra Textile Processors 2008 (231) ELT (SC)* penalty imposed under section 76 and 78 not reducible under section 80 of FA, 1994.

2.2 Reliance Infratel Ltd. vs. CCE, Thane-II 2016 (42) STR 452 (Tri.-Mumbai)

In this case the issue before the Tribunal was whether service tax is payable on actual amount of consideration received every year or by taking average of total gross consideration for ten years in each financial year inclusive of lease rent advance not actual received for right to use optic fibre cable network for telecommunication. The Tribunal held that, to qualify as 'gross amount charged' there must first be payment which is in the nature of 'consideration' for taxable services provided. As per Accounting Standard - 19 followed by appellant, said notational amount is not income for purpose of computing tax under Income Tax Act and therefore cannot be held liable to service tax. Since said notional amount is not payment actually received therefore it is neither consideration nor gross amount charged in terms of section 67(1) of FA, 1994.

2.3 Inox Leixure Limited vs. CST, Mumbai 2016 (42) STR 497 (Tri.-Mumbai)

The appellant in this case provided services from multiplexes in several locations individually and each location has separate Service Tax registration. The DGCEI issued SCN answerable to CST, Mumbai demanding service tax on fees collected from each location. The Tribunal held that, company having pan India presence would have consolidated Balance sheet, hence department has to ascertain services rendered from each locations and issue SCN accordingly. The CST, Mumbai has no jurisdiction to adjudicate cases in respect of services provided beyond his jurisdiction.

2.4 Banco Products India Limited vs. CCE&ST, Vadodara 2016 (42) STR 535 (Tri.-Ahmd.)

The Tribunal in this case held that, the date of which original claim filed to be taken as relevant date and not the date when revised application filed *suo motu* with correction of certain calculation errors. Since original claim filed within time limit prescribed, refund is not barred by limitation especially when amount mentioned in revised application also included in original application.

2.5 Purnima Advertising Agency Pvt. Ltd. vs. CST, Ahmedabad 2016 (42) STR 710 (Tri.-Ahmd.)

In this case, initially refund was sanctioned to appellant but credited to Consumer Welfare Fund on the ground of unjust enrichment. Consequent upon Tribunal's decision, refund granted and deposited in appellant's account within 3 months of Tribunal's Order. The Tribunal held that, appellant is entitled for interest from the period of 3 months after filing of refund claim till the date when refund was initially sanctioned and for the period when refunded amount was lying with Consumer Welfare Fund. Revenue cannot be held liable to grant interest for the period when amount was lying with Consumer Welfare Fund.

2.6 Federal Mogul TPR (India) Ltd. vs. CCEST&C, Bangalore-II 2016 (42) STR 724 (Tri.-Bang.)

In this case SCN was issued after 4 years of filing of invoices and verification of the same by Range Superintendent. Further, credit being availed by assessee by reflecting the same in monthly returns which were being regularly filed. The Tribunal held that no *mala fide* intention with any intent to evade, suppress or misstate facts can be attributed to appellant to invoke larger period of limitation.

2.7 Dinesh M. Kotian vs. CCE&ST-I, Mumbai 2016 (42) STR 772 (Tri.-Mumbai)

In this case appellant providing services to postal department which is paying service tax on total value of services including value of services of appellant. The Tribunal held that, service tax if paid by appellant, Postal Department is entitled for CENVAT credit of such tax resulting into revenue neutral situation, therefore demand is not sustainable.

3. CENVAT Credit

3.1 CCE, Goa vs. Kamat Construction & Resorts Pvt. Ltd. 2016 (42) STR 450 (Tri.-Mumbai)

The department in this case denied CENVAT credit on capital goods on the ground that credit has been availed without getting registration as output service provider. The Tribunal held that, since capital goods received during construction activity, installed in hotel premises and undoubtedly used for providing output service for which assessee got registration subsequently, the credit is admissible.

3.2 Reliance Industries Ltd. vs. CCE&ST(LTU) Mumbai 2016 (42) STR 457 (Tri.-Mumbai)

The Tribunal in this case allowed CENVAT credit of service tax paid on Construction Service, Repair & Maintenance Service, Security Service, Manpower Recruitment Service, Works Contract etc. used in residential colony of the employees attached with factory as the factory was located in remote area and for smooth running of business residential colony for employees was necessary near factory. It is settled law that, all services which form part of assessable value on which Excise duty is discharged are input service for allowing credit. By allowing credit of duty/tax paid on inputs, input services and capital goods, excise duty is actually payable on value addition only, thereby avoiding cascading effect of duty on duty.

3.3 Hinduja Foundries Ltd. vs. CCE, Chennai-I 2016 (42) STR 494 (Tri.-Chennai)

The Tribunal in this case allowed CENVAT credit of service tax paid on membership of CII &TN Electricity Consumer Association, Group Mediclaim Policy and Housekeeping charges as such services are essential to carry on business of manufacture of final product.

3.4 Maruti Suzuki India Ltd. vs. CCE&ST, Delhi-III 2016 (42) STR 527 (Tri.-Del.)

The appellant in this claimed CENVAT credit of service tax paid on transportation

of gas through pipeline for producing electricity cleared outside factory to other units. The department contended that credit on transportation of gas attributable to generation of electricity sold outside factory is not admissible in absence of nexus input service availed and its utilisation in manufacture of dutiable final product. The Tribunal held that, the appellant contention that Apex Court decision in their own case *2009 (240) ELT 641 (SC)* is not applicable as nexus test applicable to inputs cannot apply to input services is not sustainable. It is held that credit of proportionate service tax attributable to transportation of gas used for producing electricity sold outside factory is not admissible and liable to be reversed.

3.5 CST, Bangalore vs. Jubilant Biosys Ltd. 2016 (42) STR 729 (Tri.-Bang.)

The Tribunal in this case held that, any service received and which is commercially required for the purpose of carrying on business of service provider is covered by expression "activity relating to business" contained in rule 2(l) of CCR, 2004.

3.6 JDSU India Pvt. Ltd. vs. CST, Pune 2016 (42) STR 752 (Tri.-Mumbai)

The appellant in this case availed CENVAT credit on services of renovation and modernisation of premises which service provider has classified under Works Contract Service and discharged tax accordingly. The Tribunal held that, Works Contract Service having been excluded in definition of Input Service, it is not open for recipient i.e. appellant to avail input service credit by changing its category.

3.7 Pam Pharma & Allied Machinery Co. P. Ltd. vs. CCE, Mumbai-V 2016 (42) STR 757 (Tri.-Mumbai)

The Tribunal in this case held that, membership of business club like the Enterpreneur Organisation is indirectly related to the promotion of business therefore, it is input service and the appellant can legally take CENVAT credit of expenses incurred on the membership of the club.

3.8 Prudential Process Mgmt. Services (I) P. Ltd. vs. CST Mumbai Zone-II 2016 (42) STR 764 (Tri.-Mumbai)

The Tribunal in this case held that, registration of unit with Department is not a criteria for allowing CENVAT credit in respect of duty suffered on input/output service. It is further held that, neither input tax/duty nor output tax/duty should be exported therefore either duty/tax should not be charged at both stages or if at all due to practical working if duty/tax is charged, it has to be refunded to exporter. Output service even though is exempted duty suffered on input service is refundable to exporter.

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CORPORATE LAWS
Company Law Update

Case Law No. 1

[2016] 196 Comp Cas 125 (Cal.)

[In the Calcutta High Court]

Shree Hari Agro Industries Ltd. and others vs. Deepak Vegpro P. Ltd. and Others

Brief case

Constitutional scheme of things requires courts or quasi-judicial authorities to operate within the bounds of their authority. If the system of courts and quasi-judicial authorities are to maintain order in society, they have to guard against their own indiscipline to trend beyond the limits of their jurisdiction.

This appeal has been filed against the order of the Principal Bench of the Company Law Board ("CLB"). The applicant company (respondent in case of CLB case) has filed this appeal against the one-page Order of the CLB. The petitioner before the CLB has the following grievances and requested for reliefs under Sections 237, 247 and 250 of the Companies Act, 1956 ("Act").

a. The Company was fraudulently siphoning off funds in favour of an entity controlled by the persons who controlled the company.

b. The above act is prejudice to the interests of genuine creditors like the petitioner.

The said order contained the following:

1. The applicant was directed to provide balance sheets, profit and loss accounts, directors' reports and annual reports of the company to the petitioner.
2. That petitioner is a creditor of the company and has charge over the assets of the applicant company.
3. Subsequent to charge created in favour of the petitioner, the company has sought to enter into an agreement with another company for creating a further charge on its assets. The company with whom the agreement was proposed is a company which has an association with those persons having control over the company.
4. By undertaking the aforesaid act, the company was also paying a sizable amount as lease rentals to associate company.

As per the applicant company:

a. The order does not have any reasoning.

b. The petition before the CLB made under various sections, do not give powers to the CLB as to either give a direction for furnishing old records or making substantive order of injunction restraining the company from making payment to another creditor of the company.

The relevant judgments where it was observed that "the relevant provision must confer authority on a Tribunal to pass an ad-interim order for such an order to be sustained. The said judgments are (1) unreported order of October 24, 2008 passed in T. No. 108 of 2008 – *Birla Corporation Ltd. vs. Rameshwara Jute Mill Co. Ltd. (2) A Division Bench in Shaw Wallace and Co. Ltd vs. Union of India [1998] 4 Comp LJ 299 (Cal)* and *(3) Morgan Stanley Mutual Fund vs. Kartick Das [1994] 81 Comp Cas 318 (SC); [1994] 4 SCC 225.*

Judgment and reasoning

The Hon'ble Court allowed the appeal and set aside the CLB order. The court observed that the said order does not give reasons in support and that ex facie, to be in excess of the authority of the CLB in the context of the petition The Court observed that the Constitutional scheme of things requires courts or quasi-judicial authorities to operate within the bounds of their authority. It also observed that the nature of the proceedings before the CLB did not permit it to issue the direction as to production of records or giving substantive injunction. The Court further also observed that said proceedings also does not give powers as to ultimate reliefs that could be sought under Sections 237, 247 and 250 of the Act.

Case Law No. 2

[2016] 196 Comp Cas 130 (Cal.)

[In the Guwahati High Court]

Calcom Cement India Ltd and Another vs. Binod Kumar Bawri and Others.

As long as the conditions contained in Section 403 are met, an interim order cannot be set aside merely on the ground of indecency of reasons recorded therein.

Brief case

The company appeal has been filed under Section 10F of the Companies Act, 1956 ("Act"). The appeal is against challenging the judgment of the Company Law Board ("CLB"). The judgment is an ad-interim for maintaining the status quo as regards the shareholding of the company and composition of the board of directors. It also restrained both the rival parties to create any third party interest over the fixed assets of the company.

The facts of the case are as follows:

1. Originally, the company was owned and controlled by the respondents ("Bawari Group").
2. They agreed to induct a strategic investor and to hand over the ownership and control of the company to the second applicant ("Dalmia Group").
3. Several agreements were executed for recording the above understanding.
4. The Dalmia Group failed to pay the money to Bawari Group as per agreed the terms of the shareholder's agreement.
5. It was alleged that Dalmia Group had started indulging in various *mala fide* activities which were injurious to the interest of the company and its shareholders.
6. The Dalmia Group claimed that as per default clause due to alleged non-fulfilment of the project conditions, Bawari Group had to sell their shares to Dalmia Group.
7. Bawari group filed application under Section 9 of the Arbitration and Conciliation Act, 1996 ("ACA") before the Delhi High Court.
8. Based on the undertaking by the Dalmia Group, the Delhi High Court issued an Order that until the next date fixed, there would be no transfer of shareholding as held in escrow account.
9. The Bawari Group also filed a case before the CLB for oppression and mis-management under Sections 397, 398, 402, 403 and 406 of the Act by Dalmia Group.

10. In the said petition, the Bawari Group made various allegations that the Dalimia Group was conducting the affairs of the company in violation of the Articles of Association which was causing loss to the company and its shareholders.

11. The Dalmia Group in their submission to the CLB made an application for arbitration under Section 8 of the ACA. It also stated that the Bawari Group had already filed application under Section 9 of ACA.

12. CLB after hearing both the sides passed an interim order to maintain status quo. CLB has also directed both the parties to file their affidavits in terms of the Order.

13. Dalmia Group approached the Calcutta High Court against said Order, which refused to do so on the ground of lack of territorial jurisdiction.

This application is for the above reason invoking Article 227 of the Constitution stating that the learned CLB had committed manifest illegality and erred in exercise of its jurisdiction vested by law.

The questions before the Court were as follows:

1. Whether the CLB was justified in the eyes of law in passing an interim order without recording reasons and recording any *prima facie* findings?

2. Is it without jurisdiction and hence, a nullity in the eyes of law?

The submissions made by the applicants were as follows:

a. The CLB Order does not provide any reasoning.

b. It has unduly fettered the authority of the appellants to run and manage the affairs of the company.

c. The reference of the Supreme Court Judgments in *Secretary and Curator, Victoria Memorial Hass vs. Howrah Ganatantrik Nagrik Samity [2010] 3 SCC 732* submitted that reasoning is the heartbeat of every conclusion. In the absence of any mention thereof in the Order, the said Order is a nullity in the eyes of law and is indefensible.

d. The decisions of the Calcutta High Court was referred in *[2007] 4 Cal. HN 712 (Cal.); [2008] 143 Comp Cas 551 (Cal.) Uniworth Resorts Ltd. vs. Ashok Mittal. Birla Corporation vs. Rameshwara Jute Mills (C.P No. 57 of 2004). Birla Corporation Ltd. in re [2009] 149 Comp Cas 228 (CLB)* etc.

e. As the arbitration application under Section 8 of ACA is before a court, it will be obligatory for the CLB to refer the same to an arbitrator. The Supreme Court judgment in the case of *Hindustan Petroleum Corporation Ltd. vs. Pinkcity Mideway Petroleums [2003] 6 SCC 503* and *Sundaram Finance Ltd. vs. T. Thankam [2015] SCC* Online 146 were also referred.

The submission from the respondents (Bawari Group) are as under:

1. It is only an interim order as per discretionary powers under Section 402 of the Act.

2. The said order has sufficient reasons disclosing the mind as to the factors that had led to passing of the disputed order.

3. In support of CLB powers under Section 402 of the Act, various decisions were referred such as Calcutta High Court in *NEPC Micon Ltd. vs. Magma Leasing Ltd .[1999] 2 Cal. LT 347 (Cal.); Cosmosteels P. Ltd vs. Jairam Das Gupta, [1978] 48 Comp Cas 312 (SC)* as well as decisions in the case of *Uma Devi vs. Amal Kr* in company Petition No. 1163 of 2010.

4. The powers under Sections 397 and 398 of the Act as to oppression and mis-

management is vested with the CLB as per statute and said jurisdiction cannot be assumed by the arbitrator. The Supreme Court Judgment in *Booz Allen and Hamilton Inc vs. SBI Home Finance Ltd. AIR 2011 SC 2507; [2012] 173 Comp Cas 184 (SC); Smt. Claude -Lila Parulekar vs. Sakal Papers P. Ltd [2005] 124 Comp Cas 685 (SC); [2005] 11 SCC 73. The Bombay High Court judgment in Rakesh Malhotra vs. Rajinder Kumar Malhotra [2014] SCC Online 1146 (Bom); [2015] 192 Comp Cas 516 (Bom.)*

5. Certain respondents were not party to the arbitration agreement. As per Supreme Court decision in *Sukanya Holdings P. Ltd. vs. Jayesh H. Pandya [2003] 5 SCC 331,* disputes can be referred to arbitration only if all the parties are signatory to the arbitration agreement.

6. As per various judgments and Apex Court decision, there is no absolute bar in referring disputes involving Sections 397 and 398 petition to arbitration.

Judgment and reasoning

The Court has held as under:

1. That an appeal filed under Section 10F of the Act is held to be devoid of any merit and the same is dismissed.

2. The learned CLB to expeditious the hearing for petition filed under Sections 397 and 398 of the Act.

3. The appellants are also at liberty to approach the CLB seeking for any alteration / modification of the said order.

The Court gave following reasoning and observations:

1. As per scheme of Sections 397, 398, 402 and 403 of the Act, as long as conditions contained in Section 403 are met, an interim order cannot be set aside merely on the ground of inadequacy of reasons recorded therein.

   The order has been passed after discussing the brief factual background of the case. The Board observed as to non-compliance of provisions of the Articles of Association would constitute oppression and mismanagement. The Board has also taken note of arbitration application made under Section 8 of the ACA. It also observed that certain respondents are not signatories to the arbitration agreement.

2. CLB observed that the power to deal with oppression and mismanagement under Sections 397, 398 and 402 of the Act cannot be exercised by the arbitrator.

3. The arbitration agreement is not in dispute but the dispute is about the authority as to act of oppression and mismanagement which are exclusively falling within the domain of the CLB and that the arbitrator is neither competent nor has the power to grant any reliefs envisaged under Sections 397 and 398 of the Act.

"Just when you think it can't get any worse, it can. And just when you think it can't get any better, it can."

— *Nicholas Sparks*

CA Mayur Nayak, CA Natwar Thakrar &
CA Pankaj Bhuta

OTHER LAWS
FEMA Update

In this article, we have discussed recent amendments to FEMA through Circulars issued by RBI:–

1. Amendments to Foreign Exchange Management (Deposit) Regulations, 2016

The RBI has repealed and superseded Notification No FEMA-5 the Foreign Exchange Management (Deposit) Regulations, 2016 by Notification No. FEMA 5(R)/2016-RB dated April 1, 2016), also referred to as Deposit Regulations which seeks to regulate deposits between a person resident in India and a person resident outside India:

Some of the key changes are summarized as below

– PIO now includes great grandchild i.e there is extension of benefit this regulations to one more generation

– PIO will include an 'Overseas Citizen of India' cardholder within the meaning of Section 7(A) of the Citizenship Act, 1955.

– Permissible currency is now defined to include any foreign currency which is freely convertible.

– Form A2 is not required to be filled while remitting funds at the time of closure of FCNR (B) accounts.

– Any person resident outside India, having a business interest in India, may open an Special Nonresident Rupee -SNRR account in Indian Rupee with Authorized Dealers for the purpose of putting through bona fide transactions in rupees, subject to the conditions specified in Schedule 4 of the Deposit Regulations.

– A shipping or airline company incorporated outside India, can open, hold and maintain a foreign currency account with an Authorized Dealer for meeting the local expenses in India of such airline or shipping company, provided the credits to such accounts are only by way of freight or passage fare collections in India or by inward remittances through banking channels from its office outside India.

– Settlement of charges of International Credit Cards out of balances held in NRO accounts are subject to the limits for repatriation of balances held in NRO accounts specified in regulation 4(2) of Foreign Exchange Management (Remittance of Assets) Regulations, 2016.

2. Amendments to Foreign Exchange Management (Exports of Goods and Services) Regulations, 2015

Earlier RBI, in consultation with the Government of India, repealed and superseded the Foreign

Exchange Management (Exports of Goods and Services) Regulations, 2015 by *Notification No. FEMA. 23(R)/2015-RB dated January 12, 2016*

On review, RBI has made further changes in the Notification which are attached as Annexure to this Circular containing detailed directions relating to dealings of ADs with their exporter clients.

3. Establishment of Branch Office (BO)/ Liaison Office (LO)/Project Office (PO) in India by foreign entities – Procedural guidelines

Through this circular, RBI has outlined the salient provisions of the procedure for a person resident outside India to open a branch office or a liaison office or a project office in India.

4. Money Transfer Service Scheme – Submission of statement/returns under XBRL

In accordance to A.P. (DIR Series) Circular No. 89 dated March 12, 2013, all Authorised Persons, who are Indian Agents under Money Transfer Service Scheme, are required to submit quarterly statement of the quantum of remittances received in the prescribed format.

From Quarter ending June 2016, such Authorised Persons, who are Indian Agents under this scheme, are advised to report the statement under eXtensible Reporting Language (XBRL) system.

(A.P. (DIR Series) Circular No. 70 dated 19th May, 2016)

(Comments: This circular has enabled electronic filing of statement by the Authorised persons who are Indian Agents.)

5. Rupee Drawing Arrangement – Submission of statement/returns under XBRL

In accordance to the circulars A.P. (DIR Series) Circular No. 28 [A. P. (FL/RL Series) Circular No. 02] dated February 6, 2008 and the A. P. (DIR Series) Circular No. 7 dated July 18, 2014, the banks are required to submit a statement 'E' on total remittances received each quarter.

The banks are advised to report the same under eXtensible Business Reporting Language (XBRL) system from quarter ending June 2016.

(A.P. (DIR Series) Circular No.71 dated 19th May, 2016)

(Comments: This circular has enabled electronic filing of Statement under XBRL system.)

6. Memorandum of Procedure for channelling transactions through Asian Clearing Union (ACU)

With regards to the earlier provisions of (Memorandum ACM) issued on February 17, 2010, when any transactions are channelled through the Asian Clearing Union (ACU) The Reserve Bank of India receives U.S. $ 25,000 or Euro € 25,000 and pays U.S. $ 1,000 and pays Euro € 1,000.

With regards to the understanding reached amongst the members of the ACU during the 44th Meeting of the ACU Board of Directors in June, 2015, the minimum amount and the multiples in which Reserve Bank will receive and pay has been revised. Hence, for the purpose of funding or for repatriating the excess liquidity in the ACU Dollar and ACU Euro accounts, the Reserve Bank shall receive and pay U.S. $ 500 or Euro € 500.

(A.P. (DIR Series) Circular No. 72 dated 26th May, 2016)

(Comments: RBI has reduced the rate it shall receive and hence this will lead to increase of Forex transactions.)

7. Foreign Exchange Management Act, 1999 (FEMA) Foreign Exchange (Compounding Proceedings) Rules, 2000 (the Rules) – Compounding of Contraventions under FEMA, 1999

Foreign Exchange (Compounding Proceedings) Rules, 2000, empowered Reserve Bank of India to compound contraventions relating to rules 7, 8 and 9 of and the Third Schedule to the Foreign Exchange Management (Current Account Transactions) (FEMCAT) Rules, 2000. Also, *vide* GSR 609 (E) dated September 13, 2004, Reserve Bank was empowered to compound all the contraventions of Foreign Exchange Management Act, 1999 (FEMA) except section 3(a) of FEMA.

The Reserve Bank, in order to ensure more transparency and greater disclosure, has decided on the following:

1. Public disclosure of compounding orders

To disseminate information pertaining to compounding orders, RBI has decided to host the compounding orders passed on or after June 1, 2016 on the Bank's website (www.rbi.org.in). The data on the website will be updated at monthly intervals in the following format:

Sr. No.	Name of Applicant	Amount imposed under the compounding order	Whether the amount imposed has been paid	Download order

2. Public disclosure of guidelines on the amount imposed during compounding

Section 13 of FEMA provides for penalty up to three times the amount involved in the contravention. The amount of contravention is calculated on basis of a guidance note. RBI has now decided to put the guidance on its website for information of general public.

A further clarification given by RBI in this regard is that the guidance note is meant only for the purpose of broadly indicating the basis on which the amount to be imposed is derived by the compounding authorities in RBI. The actual amount imposed may sometimes vary, depending on the circumstances of the case taking into account various factors such as:

a) The amount of gain of unfair advantage, wherever quantifiable, made as a result of the contravention;

b) The amount of loss caused to any authority/agency/exchequer as a result of the contravention;

c) Economic benefits accruing to the contravener from delayed compliance or compliance avoided;

d) The repetitive nature of the contravention, the track record and/or history of non-compliance of the contravener;

e) Contravener's conduct in undertaking the transaction and in disclosure of full facts in the application and submissions made during the personal hearing; and any other factor as considered relevant and appropriate.

The Guidance Note as issued by RBI is as follows:

I. Computation Matrix

Type of Contravention	Existing Formula
1] Reporting Contraventions A) FEMA 20 Paras 9(1)(A), 9(1)(B), Part B of FC (GPR), FCTRS (Reg. 10) and taking on record FCTRS (Reg. 4)	Fixed amount : ` 10,000/- (applied once for each contravention in a compounding application) +

Type of Contravention	Existing Formula
B) FEMA 3 Non-Submission of ECB statements C) FEMA 120 Non-reporting/delay in reporting of acquisition/setup of subsidiaries/step down subsidiaries /changes in the shareholding pattern D) Any other reporting contraventions (except those in Row 2 below)	Variable amount as under: Up to ` 10 lakhs : 1,000 per year ` 10-40 lakhs : ` 2,500 per year ` 40-100 lakhs : 7,000 per year ` 1-10 crore : 50,000 per year ` 10 -100 crore : 1,00,000 per year Above ` 100 crore : 2,00,000 per year
E) Reporting contraventions by LO/BO/PO	As above, subject to ceiling of ` 2 lakhs. In case of Project Office, the amount imposed shall be calculated on 10% of total project cost.
2] AAC/ APR/ Share certificate delays In case of non-submission/delayed submission of APR/ share certificates (FEMA 120) or AAC (FEMA 22) or FCGPR (B) Returns (FEMA 20)	` 10,000/- per AAC/APR/FCGPR (B) Return delayed. Delayed receipt of share certificate – ` 10,000/- per year, the total amount being subject to ceiling of 300% of the amount invested.
3] A] Allotment/Refunds Para 8 of FEMA 20/2000-RB (non-allotment of shares or allotment/ refund after the stipulated 180 days) B] LO/BO/PO (Other than reporting contraventions)	` 30,000/- + given percentage: 1st year: 0.30% 1-2 years: 0.35% 2-3 years: 0.40% 3-4 years: 0.45% 4-5 years: 0.50% >5 years: 0.75% (For project offices the amount of contravention shall be deemed to be 10% of the cost of project).
4] All other contraventions except Corporate Guarantees	` 50,000/- + given percentage: 1st year : 0.50% 1-2 years : 0.55% 2-3 years : 0.60% 3-4 years : 0.65% 4-5 years : 0.70% > 5 years : 0.75%
5] Issue of Corporate Guarantees without UIN/ without permission wherever required /open ended guarantees or any other contravention related to issue of Corporate Guarantees.	` 50,0000/- + given percentage: 1st year : 0.050% 1-2 years : 0.055% 2-3 years : 0.060% 3-4 years : 0.065% 4-5 years : 0.070% >5 years : 0.075% In case the contravention includes issue of guarantees for raising loans which are invested back into India, the amount imposed may be trebled.

Further, RBI stated the following:

II. The above-mentioned amounts are subject to the below mentioned provisos:

i. The amount imposed should not exceed 300% of the amount of contravention

ii. In case of the amount of contravention being less than ` One lakh, the total amount imposed should not be more than amount of simple interest @5% p.a. calculated on the amount of contravention and for the period of the contravention in case of reporting contraventions and @10% p.a. in respect of all other contraventions.

iii. In case of paragraph 8 of Schedule I to FEMA 20/2000 RB (Mode of payment for shares issued to persons resident outside India) contraventions, the amount imposed will be further graded as under:

If the shares are allotted after 180 days without the prior approval of Reserve Bank	1.25 times the amount calculated as per table above (subject to provisos at (i) & (ii) above).
If the shares are not allotted and the amount is refunded after 180 days with the Bank's permission	1.50 times the amount calculated as per table above (subject to provisos at (i) & (ii) above).
If the shares are not allotted and the amount is refunded after 180 days without the Bank's permission	1.75 times the amount calculated as per table above (subject to provisos at (i) & (ii) above).

iv. If the fact that a contravenor has made undue gains is established – the amount thereof may be neutralised to a reasonable extent by adding the same to the compounding amount calculated as per chart.

v. If a party who has been compounded earlier applies for compounding again for similar contravention – the amount calculated as above may be enhanced by 50%.

III. For calculating amount in respect of reporting contraventions under para I.1 above, the period of contravention may be considered proportionately {(approx. rounded off to next higher month ÷ 12) X amount for 1 year}. The total No. of days does not exclude Sundays/holidays.

IV. Along with the circular, RBI released various illustrations on the same.

(A.P. (DIR Series) Circular No. 73 dated 26th May, 2016)

8. Export Data Processing and Monitoring System (EDPMS)

This guideline has been issued in relation to export of goods & services. Additional modules have been issued for caution listing of exporters, reporting of advance remittance for exports and migration of old XOS data.

It has been decided to integrate the returns related to (a) handling of shipping bills for caution listed exporters; (b) delayed utilisation of advances received for exports; and (c) exports outstanding with Export Data Processing and Monitoring System (EDPMS).

Caution / Decaution Listing of Exporters

To streamline the procedure, cautioning/de-cautioning of exporters has been automated. The banks can access the updated list of caution listed exporters through EDPMS on daily basis. The list of all caution listed exporters would also be made available to banks through their registered e-mail.

Detailed criteria for cautioning/de-cautioning of exporters in EDPMS are as laid

Reporting of Advance Remittance for Exports

Presently the export data in EDPMS is being captured only from the shipping bills generated. It has now been decided to capture the details of advance remittances received for exports in EDPMS. Henceforth, banks will have to report all the inward remittances including advance as well as old outstanding inward remittances received for export of goods/software to EDPMS. Further, banks need to report the electronic FIRC to EDPMS wherever such FIRCs are issued against inward remittances.

A quarterly return is presently being submitted by banks for delay in utilisation of advances received for export in terms of A. P. (DIR Series) Circular No. 74 dated February 9, 2015. It has been decided that banks will upload the particulars of all the overdue export advances into the system and discontinue submission of quarterly return henceforth.

Export Outstanding Statement (XOS)

With effect from March 1, 2014, details of all export outstanding bills can be obtained from the EDPMS. Banks were, however, required to report the old outstanding bills prior to March 1, 2014 in XOS on half yearly basis as at the end of June and December every year. To reduce the reporting burden of banks, it is decided to migrate the XOS data reported by the banks for half year ended December, 2015 onwards to EDPMS and discontinue separate reporting of XOS for the subsequent periods. Banks are required to mark off / close the XOS data pertaining to pre March 1, 2014 as and when amount has been realised.

(A.P. (DIR Series) Circular No. 74 dated 26th May, 2016)

(Comments: This is a welcome move by RBI, which would lead to simplification of the procedure for filing returns on a single platform and for better monitoring.)

9. Foreign Exchange Management (Manner of Receipt and Payment) Regulations, 2016

RBI, in supersession of Notification No. FEMA.14/ 2000-RB dated May 3, 2000, dealing with Manner of Receipt and Payment, Notification No. FEMA.16/2000-RB dated May 3, 2000, dealing with Receipt from and Payment to a person Resident outside India and Notification No. FEMA. 17/2000-RB dated May 3, 2000, dealing with Transactions in Indian Rupees with Residents of Nepal and Bhutan, has issued Notification No. 14(R) called the Foreign Exchange Management (Manner of Receipt and Payment) Regulations, 2016.

10. Foreign Exchange Management (Transfer or Issue of Security by a Person Resident Outside India) (Seventh Amendment) Regulations, 2016

The Reserve Bank of India has made the following amendments in the Foreign Exchange Management (Transfer or Issue of Security by a Person Resident Outside India) Regulations, 2000 (Notification No. FEMA. 20/2000-RB dated 3rd May, 2000)

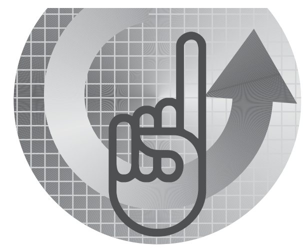
In the Principal Regulations, after Regulation 10, the following regulation 10A shall be inserted:

"10A. In case of transfer of shares between a resident buyer and a non-resident seller or vice-versa, not more than twenty five per cent of the total consideration can be paid by the buyer on a deferred basis within a period not exceeding eighteen months from the date of the transfer agreement. For this purpose, if so agreed between the buyer and the seller, an escrow arrangement may be made between the buyer and the seller for an amount not more than twenty five per cent of the total consideration for a period not exceeding eighteen months from the date of the transfer agreement or if the total consideration is paid by the buyer to the seller, the seller may furnish an indemnity for an amount not more than twenty five per cent of the total consideration for a period not exceeding eighteen months from the date of the payment of the full consideration.

Provided the total consideration finally paid for the shares must be compliant with the applicable pricing guidelines."

(Notification No. FEMA.368/2016-RB, dated 20th May, 2016.)

(Comments: This is a welcome move by the RBI, as they would increase the quantum of transactions and even the forex balance.)



Ajay Singh, *Advocate* & CA Namrata Bhandarkar

BEST OF THE REST

1. Banker's Lien – Title Deed of flat pledged with bank by borrower and co-borrower in respect of home loan – Co-borrower has obtained cash credit facilities from same bank – Loan document did not exclude exercise of general lien by bank against them under S. 171 of Act – Bank therefore can exercise bankers's lien over title deeds for amount outstanding in account maintained by co-borrower in respect of cash credit account. Contract Act, 1872, S. 171

The writ petitioner along with his brother has obtained a home loan from the bank upon deposit of title deeds of the flat as security. The bank is not allowing the writ petitioner to repay the home loan and to obtain release of the title deeds kept as security in respect of such home loan. The brother of the writ petitioner had a partnership firm and this partnership firm had obtained a cash credit facility. The title deeds kept as security for the home loan account was withheld as there were amounts outstanding in cash credit limit taken by the brother of the writ petitioner. According to the writ petitioner the bank does not have a lien on the title deeds of the immovable property in respect of any other amount that may be outstanding to the bank. Petitioner contented that the provision of lien and section 171 of the Contract Act, 1872 does not apply in favour of the bank. Since the home loan is on the basis of a written contract and such contract does not allow the bank to exercise banker's lien, it cannot exercise such lien in respect of the title deeds for a different loan account.

The Hon'ble Calcutta Court observed that the writ petitioner is yet to pay the bank the entire home loan amount. Apart from the writ petitioner there is one more borrower, that is, the brother of the writ petitioner. The brother of the writ petitioner obtained cash credit facilities from the bank. Amounts are outstanding in the cash credit account. Consequently, the bank has lien over the title deeds of the immovable property of the writ petitioner as security for the outstanding amount in the cash credit account enjoyed by the brother of the writ petitioner through the partnership firm.

It was further observed that the loan documents for the home loan account have been made available. And such loan documents do not exclude the exercise of general lien by the bank against the writ petitioner under Section 171 of the Contract Act, 1872. The bank therefore has banker's lien over a security which has come in its possession in its usual course of business, namely, the title deeds of the immovable property pledged as security in respect of the home loan account. The bank can exercise banker's lien over such title deeds for the amount outstanding in respect of the accounts maintained by the brother of the writ petitioner in respect of the cash credit account enjoyed by the partnership firm in which the

brother of the writ petitioner is a partner. This is so as the brother of the writ petitioner has pledged the title deeds of the immovable property along with writ petitioner in respect of the home loan account. Both the writ petitioner and the brother of the writ petitioner have enjoyed the home loan account. The brother of the writ petitioner is common to the home loan account and also the cash credit facility enjoyed by the partnership firm. Moreover, the writ petitioner has not paid the entire amount of the home loan account and the bank has also not issued a No due Certificate in favour of the writ petitioner or his brother in respect of the home loan account. The Court accordingly dismissed the petition.

Md. Nayabuddin vs. Union of India AIR 2016 Calcutta 172

2. Transfer of membership of flat – By nomination or inheritance – Issue of title between inheritors or successors to property – Irrelevant – Co-operative society liable to transfer flat – However, open to the other members of family of deceased member to pursue is case of succession or inheritance in consonance with law: West Bengal Co-operative Societies Act, Sec 79 & 80

Biswa Ranja was member of Sarbar View Co-operative housing society Ltd. who was allotted a flat in Kolkata. He had married Parul Sengupta and they had two children a daughter Appellant Indrani Wahi and second a son Dhruba Sengupta. Biswa Ranjan recorded the name of the appellant Indrani Wahi in terms of the mandate contained in section 79 of the West Bengal Co-operative Societies Act, 1983 (nomination). After the death of father i.e., Biswas Ranjan Sengupta. The Appellant addressed a letter to the Co-operative housing society for entering the name in place of the name of her father. The Managing Committee of the Housing society passed an unanimous resolution to transfer the flat in favour of her. Subsequently the son addressed the letter to co-operative society to transfer the membership of the father to his wife and demonstrated that they were the family of the deceased. Further letter was addressed to the society wherein it was informed that Biswa had not nominated Indrani Wahi but had nominated Parul Sengupta in terms of the nomination u/s. 79 of the 1983 Act. In view of the same the Co-operative societies declined to record the name of Indrani Wahi as the successor of the flat. It was Appellant's contention that transfer of the said flat was declined on the ground that married daughter did not fall within the definition of family as contemplated u/s. 79 of the Act and that being a married daughter Indrani Wahi was not a member of the family of Biswa Sengupta.

Aggrieved by the decision taken by the Society the Appellant filed a writ before the Calcutta High Court. The High Court accordingly held that the married daughters were not excluded from the purview of Rule 127 of the 1987 Rules and directed the Registrar to grant necessary approval for transfer of membership to the Appellant. The mother and brother of the Appellant being aggrieved assailed the same by preferring appeal before the Division Bench of the High Court. The Division bench concluded that the Writ petitioner in whose favour nomination has been made shall not be member a society having regard to sub- section 4 of section 69 and merely because of nomination in her favour she cannot transfer the share in which she has part interest and can only transferred by expressing consent of all heirs.

On further appeal by the Appellant, the Hon'ble Apex Court observed that in the manner as is postulated under section 79 of the 1983 Act, Rule 127 of the 1987 Rules provides that a nomination has been made by a member under Section 79, the share or interest standing or the value of such share or interest standing in the name of the deceased member, would be transferred to the nominee. Rule 128 of the 1987 Rules also leads to the same inference. Inasmuch as Rule 128 provides that only in the absence of a nominee, the transfer of the share or interest of the erstwhile member, would be made on the basis of a claim supported by an order of probate, a letter of administration

or a succession certificate (issued by a Court of competent jurisdiction)

Insofar as the instant aspect of the matter is concerned, Rules 127 and 128 of the 1987 Rules, leads to the inference, that in case of a valid nomination, under Section 79 of the 1983 Act, 'the Co-operative Society' is liable to transfer the share or interest of a member in the name of nominee.

It is necessary to clarify that transfer of share or interest based on a nomination under Section 79 in favour of the nominee, is with reference to the concerned Co-operative Society and is binding on the said society. The Co-operative society has no option whatsoever except to transfer the membership in the name of the nominee, in consonance with Sections 79 and 80 of the 1983 Act. That, would have no relevance to the issue of title between the inheritors or successors to the property of the deceased. It was directed to the Co-operative Society to transfer the share or interest of the society in favour of the appellant-Indrani Wahi. However, issue of succession or inheritance, was open to the other members of the family to pursue if they are so advised, in consonance with law.

Indrani Wahi vs. Registrar of Co-op. Societies and Others. AIR 2016 Supreme Court 1969

3. Right to life – Immediate help to victim of accident – And protection to bystander or Good Samaritan – Laying down guidelines and standard operating procedure for protection of rights under Article 21 read with Article 14 of victims as well as good Samaritan: Constitution of India Articles. 21, 32 and 141; Motor Vehicles Act, 1988

The petition has been filed by a non-profit, non-Government organisation under Article 32 of the Constitution of India in public interest for the development of supportive legal framework to protect Samaritans i.e. by standers and passersby who render the help to the victims of road accidents. These individuals can play a significant role in order to save lives of the victims by either immediately rushing them to the hospital or providing immediate life saving first aid. The petitioner has also drafted recommendations to address the critical deficiencies in the Motor Vehicles Act and other laws governing road safety.

It was pointed out that on 7-8-2015 the court had noted that notification dated 12-5-2015 laying down Good Samaritan Guidelines has been issued by the Ministry of Road Transport and Highways published in the Gazette of India. A further notification had been issued on 21-1-2016 in accordance with the earlier guidelines which required standard operating procedures to be framed and issued for examination of Good Samaritans by the police or during trial. It was pointed out that due to absences of any statutory backing, it is felt that it will be difficult to enforce these guidelines and standard operating procedures. It has been prayed that the court may declare the same to be enforceable and binding on all states until the Union Government enacts a law to this effect.

On the said issue the Supreme Court observed that guidelines and directions can be issued by the Court including a command for compliance of guidelines and standard operating procedure issued by the Government of India, Ministry of Road Transport and Highways till such time as the legislature steps in to substitute them by proper legislation. The Court can issue such direction under Article 32 read with Article 142 to implement and enforce the guidelines which are necessary for protection of rights under Article 21 read with Article 14 of the Constitution of India so as to provide immediate help to the victims of the accident and at the same time to provide protection to Good Samaritans. The guidelines will have the force of law under Article 141. By virtue of Article 144, it is the duty of all the authorities-judicial and civil – in the territory of India to act in the aid of this Court by implementing them.

In para 13 of the guidelines, the 'acknowledgement' if so desired by Good

Samaritans has to be issued as may be prescribed in a standard format by the State Government. In the Court's opinion, till such time the format is prescribed there should be no vacuum hence directed that acknowledgement be issued on official letter pad etc. and in the interregnum period if so desired by Good Samaritan, mentioning the name of Samaritan, address, time, date, place of occurrence and confirming that the injured person was brought by the said Samaritan. On going through the notification dated 21-1-2016 with respect to the examination of Good Samaritan by the Police as contained in para 2(vii) it was modified to read that the affidavit of Good Samaritan if filed, shall be treated as complete statement by the Police official while conducting the investigation and in case statement is to be recorded, complete statement shall be recorded in a single examination.

Remaining guidelines in the notification dated 12-5-2015 and 12-1-2016 were also approved and it was ordered that guidelines with aforesaid modifications made by the court be complied with by the Union Territories and all the functionaries of the State Government as law laid down by this court under Article 32 read with Article 142 of the Constitution of India and the same be treated as binding as per the mandate of Article 141.

It was further directed that the courts should not normally insist on appearance of Good Samaritan as that causes delay, expenses and inconvenience. The concerned court should exercise the power to appoint the Commission for examination of Good Samaritans in accordance with the provisions contained in Section 284 of the Code of Criminal Procedure,1973 *suo motu* or an application moved for that purpose, unless for the reasons to be recorded personal presence of Good Samaritan in court is considered necessary .

The Apex Court further observed that there have been affidavits filed on behalf of the State of Tripura and State of Odisha. They have issued the notification. However, the treatment shall not be less favourable than the one as provided in the aforesaid guideline which are issued by the Ministry of Road Transport and Highways and the guidelines issued by the State Government in consonance thereof shall be binding upon all concerned to be complied with scrupulously. However, it is clarified that guidelines in relation to protection of a Good Samaritan are without prejudice to the liability of the driver of a motor vehicle under Motor Vehicles Act, 1988.

Savelife Foundation vs. Union of India AIR 2016 Supreme Court 1617

4. Abnormal delay in operating the patient and lack of proper monitoring – Complaint filed by parent for compensation – Held that it was a case of negligence on part of the hospital – Directed to pay Compensation for loss of life and mental agony

Ms. Kaberi Roy, 29 years of age, daughter of complainants, Dr. Manika Roy and Dr. Durga Prasad Roy, suffered acute abdominal pain on 27-6-2002. The complainants stated that the deceased Kaberi, was a young healthy woman. She died within two days of hospitalisation, and within 36 hours of her operation. There were several lapses in the treatment and by the attending doctors in the OP hospital. The complainants had gone to a reputed hospital i.e. OP and expected to receive prompt and efficient services from highly skilled doctors. The doctors made wilful delay of 17 hours', despite clinical signs, and lab reports, which were indicative of acute emergency. The complainant filed this complaint on the grounds of negligence that,

i) The OP did not take proper care and precaution which led to death of their daughter, ii) There was inordinate and unexplainable delay in performing the operation after Kaberi's reporting to the hospital which caused perforation and spread of infection to the peritoneal cavity, iii) The OP ignored crucial laboratory findings which were diagnostic of acute appendicitis, but unnecessarily administered pain killers without adopting emergency surgery. iv) It

was a case of gangrenous appendicitis, was not managed properly post operatively. Therefore, complainants commenced this medical negligence action alleging, *inter alia*, that the OP Bombay Hospital, and the two doctors were negligent in failing to timely diagnose and treat their daughter Kaberi's appendicitis which resulted into her death. It caused personal and financial loss to the complainants. Therefore, the parents filed this complaint and claimed compensation.

The Commission observed that the family physician, Dr. Sainath Shetty referred the patient to a higher centre – Bombay Hospital at 9.30 PM. She was operated after more than 17 hours of her emergency admission. The patient was admitted in late night, thus emergency USG scan should have been sought on an urgent basis to rule out the causes of acute abdomen. The OP hospital is one of tertiary care hospital and the highest care is expected than from other hospitals. Had the USG scan been obtained and interpreted promptly, these complications might have been avoided. If that had happened, patient could have been operated expeditiously as an emergency basis. The patients approached the hi-tech hospitals with the expectation of treatment and consultation from the experts and best doctors. Even acute appendicitis, without any complications, needs immediate medical attention. It should be considered as a 'medical emergency', as complications can arise suddenly and the patient's health may decline rapidly. The standard treatment for acute appendicitis is appendectomy, but in isolated environments, where there are no surgical capabilities, medical management is required, until surgical resources become available, whereas, it was not so in this case. It was the duty of OP-1 to attend the patient during emergency hours. Thus, if the OP-1 had not breached its duty of care to the patient, the pain and discomfort that she experienced prior to the operation would have been shortened by several hours, thus it was negligence, which became fatal. However, she was not reviewed by a consultant surgeon (OP-1) at emergency hours, he assessed her in the next morning and decided for surgery at 2 pm. She had persistent RIF tenderness and looked unwell. That afternoon, OP-1 had her appendix removed, although it became apparent that the organ had perforated, sometime before the procedure was carried out.

The Commission also referred to the Supreme Court decision in the case of *Dr. Laxman Balakrishna Joshi vs Dr.Trimbak Bapu Godbole AIR 1969 SC 128* , which laid down that a doctor when consulted by a patient, owes him certain duties, namely, (a) a duty of care in deciding whether to undertake the case; (b) a duty of care in deciding what treatment to give; and (c) a duty of care in the administration of that treatment. A breach of any of these duties gives a cause of action for negligence to the patient. The Commission relied on the Supreme Court decision in the case of *Poonam Verma v. Ashwin Patel, (1996) 4 SCC 332* where it was held that Negligence has many manifestations - it may be active negligence, collateral negligence, comparative negligence, concurrent negligence, continued negligence, criminal negligence, gross negligence, hazardous negligence, active and passive negligence, wilful or reckless negligence or Negligence *per se*."

In the present case, an appropriate standard of care had not been met as surgery took place after 17 hours, the OPs failed to foresee the risk of a patient with acute appendicitis, having a ruptured appendix was at least 1%, and probably nearer to 3%. Thus, "A one per cent risk of serious harm is not inconsequential, There was no proper monitoring of electrolyte levels, and fluid intake-output.

Ms. Kaberi was a victim of medical negligence. She lost her life. Kaberi died at the age of 30 years, therefore, considering her life expectancy and future prospects, we are of the considered view that, ` 25,00,000/- will be just and proper compensation and for the mental agony sustained by the family members a further sum of ` 15,00,000/- was directed to be paid.

Dr. Manika Roy & Anr. vs. Dr. B. L. Chitlangra & Ors, Dr. Vikram Agarwal, The Medical Director of

Bombay Hospital and Medical Research and Bombay Hospital Trust [National Consumer Disputes Redressal Commission, New Delhi; Consumer Case No. 42 of 2003 dated 5-1-2016]

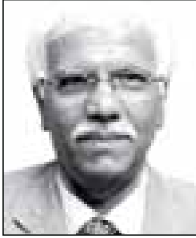
5. Booking of flat with builder - Payment made as per agreed terms but possession of flat not handed over – Complaint filed with State Consumers Disputes Redressal Commission – Commission directed the builder to either allot possession within three months along with facilities or pay back the amount received as per the Ready Recknor Rate of 2016.

Complainants booked a flat No. 284/B admeasuring 375 sq.ft. carpet area situated at Talegaon, Igatpuri, Dist. Nashik with a Company and one of its directors. From time to time, complainants paid total amount of ` 4 lakh to the Company. Thereafter, the director informed the complainants to pay ` 50,000/- to a third party, as it was a joint venture with the third party. This amount was duly paid. In spite of the payments made, possession has not been given by the opponents. Hence, consumer complaint is filed against all three parties and sought for possession of the flat and also claim interest on the amount paid from the date of payment @ 24% p.a. till 28-2-2014 or alternatively, complainants claimed current market price of the flat. Complainants prayed that opponents should obtain completion certificate and occupancy certificate of the flat and regular water supply connection to the flat and obtain separate electricity meter to the flat and provide all amenities as mentioned in the agreement and execute conveyance or deed of apartment. The complainant prayed that ` 5 lakhs be given to the complainants towards compensation for inconvenience caused to the complainants because of deficiency on the part of the opponents. Complainants prayed for ` 50,000/- as legal and other charges.

The Hon'ble State Consumer Disputes Redressal Commission observed that opponents failed to file written version and hence, matter proceeded without written version of the opponents. Complainants filed affidavit, receipts of payments, copy of agreement, etc. Considering the recital in the complaint, receipts and agreement and as the opponents failed to file written version, the contentions of the complainants are to be accepted. However, it is very clear from the complaint itself that out of total consideration of ` 5 lakh complainants have paid 90% of total consideration amount i.e. ` 4,50,000/-. As per Ready Reckoner Rate of 2016, current market value of the flat in question is ` 10,53,640/-. Therefore, in case of failure to hand over possession of the flat by the opponents, the complainants are at their option entitled for ` 9,48,276/- (90% of ` 10,53,640/-) in lieu of flat in question.

The Hon'ble State Consumer Disputes Redressal Commission directed that the complaint was allowed with costs quantified to ` 15,000/- to be paid to the complainants. It was further directed that the opponents are jointly and severally directed to hand over possession of the flat No. G-4 in Building No. 'G' at Gat No. 284/B, admeasuring 375 sq.ft. carpet area situated at Talegaon, Igatpuri, Dist. Nashik to the complainants within three months from the date of order by obtaining building completion certificate and Occupancy Certificate, obtain water and electricity connection to the flat and other facilities mentioned in the agreement. Alternatively at the option of the opponents it was directed that opponents are jointly and severally directed to pay ` 9,48,276/- to the complainants in lieu of flat in question. Opponents are jointly and severally directed to pay ` 2,00,000/- to the complainants towards mental agony.

Ketan Rajul Doctor and Rajul Girish Chandra Doctor vs. Manas Shelter Pvt. Ltd., Nitin Karamberkar and A Prabhav Manas Project [State Consumer Disputes Redressal Commission; Complaint Case No. CC /4/117 dated 9-3-2016]



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TAX ARTICLES FOR YOUR REFERENCE

Articles published in Taxman, Current Tax Report (CTR), The Tax Referencer (TTR), Income Tax Report (ITR), ITR's Tribunal Tax Reports (ITR (Tribunal), Sales Tax Review (S. T. Review), The Bombay Chartered Accountant Journal (BCAJ), The Chamber's Journal (CJ), The Chartered Accountant (CAJ), All India Federation of Tax Practitioners Journal (AIFTPJ), Company Case, Times of India and Economic Times for the period April to May, 2016 has been arranged and indexed topic-wise.

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CA Rajaram Ajgaonkar

ECONOMY AND FINANCE

STEADY PROGRESS

The month of May turned out to be positive for the Indian economy. There were apprehensions about the quarterly results of Indian corporates for the quarter ended 31st March, 2016, which were to be published in the months of April–May. Specially, the results in the month of May sometimes give negative surprises. This year, many results about which there were uncertainties, were in positive territory; which pleased the Indian investors. The economic numbers trickling in were positive. The GDP of 7.9% clocked by the Indian economy for the last quarter of the Financial Year 2015-16 was encouraging to the policy makers, Government and the public. The meteorological department has predicted a good monsoon for India, which is expected to be 6% above the average. If it is timely and appropriately spread across India, it can boost the foodgrain output and the country can surpass its past record achieved in agricultural year 2013-14 (July-June). The results of the State elections, which were held over the last couple of months turned out to be favourable for the ruling party. This has given confidence about its ability to pass essential legislations, especially those which are considered important for the reforms in the economy. Many reforms being talked about earlier are likely to take shape in the near future and that gives positive signals to the Indian as well as foreign investors. On the domestic front, the month turned out to be positive, improving hope and morale.

The global scenario remained positive, though certain risks associated with the events scheduled in the month of June weighed a bit on the minds of the global community. The economic data coming from the US was quite encouraging and that promises better growth for the world. The numbers from China are not very positive and the indication of the slowdown continues. However, it is expected to be gradual and not sudden and severe as earlier expected. This allowed the world to remain hopeful for the Chinese economy in the near future. The investors, though remain cautious about the global economy, they harbour positive sentiments. The problems of Europe and the South American economies have not eased. Japan remains cautious and South Africa is slowing down. However, the gains made by the US made the overall sentiment positive, in spite of lurking risks.

The month of June is going to be eventful. The Reserve Bank of India (RBI) is going to announce its bi-monthly policy on 7th June, 2016, but no major change is expected therein. The FED meeting is fixed for 14-15 June and there is an apprehension of increase in the interest rate by a quarter per cent, though many believe that it may happen only after a couple of months. The recent tone of FED in respect of interest rates is a bit hawkish as the economic indicators in the US are positive. This made people believe that the interest hike is around the corner. However, the employment data announced recently may be a spoiler and the hike may be deferred for a while. The event has global repercussions as it can trigger outflow of funds

from many markets, especially from developed economies. Though this risk exists, many investors do believe that the world economy has already factored in this risk. This event is inevitable and the only question remains is its timing.

A major risk, which is a concern for the world and specially Europe, is Brexit. The referendum is to take place in Great Britain on the 23rd of June, when the country will decide whether to remain in the Euro zone or to exit therefrom. Even while being in the European Union, the country has not adopted the common currency of Euro and it has continued with its original currency British Pound / Sterling. Though a majority of senior citizens are comfortable to be in the European Union, the young citizens are of the opinion that the sovereignty and economic well-being of their country is being sacrificed by being in the Union. The Union can dictate many policies, which may not be in the interest of the country. They believe that Britain will be better off by getting out of the union, though it means some sort of loss and sacrifices over a short run. As of now, the pendulum remains against the Brexit, but the last moment swing remains crucial. If Britain exits from the European Union, it will mean trouble for the zone as its economic interests can get affected. Further, such an event can trigger a similar movement in other well developed countries in the union. Therefore, a negative vote on Brexit is very important for the overall wellbeing of Europe. A positive vote will damage the European economy and will also have a negative effect on the world.

The oil prices have already crept upwards and are hovering around 50 US Dollars a barrel. It is not expected to cross 60 US Dollars in the near future and it may be range bound between 40–60 US$ for atleast 6 months. The demand supply question for crude oil is currently fairly balanced and it is not likely to get disturbed based on the current estimates. So a disturbance is neither in the interest of oil producers nor in the interest of the world economy. However, if the price breaks the range and goes down, it may be harmful for the economies of oil producing countries. Substantial rise in price may negatively affect economies of oil importing countries, such as China, India, Japan, South Korea and many countries of the European Union. The scenario of oil is likely to be volatile as relentless efforts are being made by researchers to replace oil and other fossil fuels by renewable sources of energy. If there is any major breakthrough and demand for oil and other traditional energy source such as gas and coal goes down, it will destabilise the economic balance and the repercussions will be felt across the world.

In spite of the risks prevailing, the global stock markets have done well during the last month. Most of them have advanced by 2% plus in the month. Many of them are inching towards their one-year peak. The rally was mainly triggered by the growing US economy and a hope that China will not slowdown fast. The rally can sustain further if FED refrains from hiking interest rates and Britain decides to remain in the European Union. However, it is likely that the good news is already discounted by the markets and even a small event may weigh heavily on the markets and puncture the rally. The investors need to exert caution as the global valuations of stocks are not very cheap and selective approach will be useful.

Indian stock markets have done very well over the last one month. They were initially subdued but due to better than expected corporate results from certain large cap companies, the picture suddenly changed in the second half of the month and stock markets appreciated more than 5% during the month. The development was quite heartening to the investors as well as the Government as it improved the sentiments. However, the markets are no more under priced and probably at the higher end of appropriate pricing based on price earnings ratio (PE). The current PE of the Nifty is 22.80, which is on the higher side as compared to the average historical PE of the index. Over the last five years, the PE has remained below this level and for only a short period it has touched the level of 24. Considering that benchmark, the upside available over a short period is about 5%. The earnings can increase as expected and it can give more traction to the stock prices, but that can happen only gradually. Therefore, considering

historical data, the investors need to be a bit cautious about short term investment plans in stocks. The long term investors can bank on the Indian growth story, which is expected to unfold gradually and benefit from the same. Due to the uncertainties in the current month specially on account of international events, investors need to be cautious in selecting stocks for their portfolio. From the current levels, large caps are likely to appreciate better as compared to small caps, as the small caps have already appreciated well over the last few months.

The Indian bond market is stable as the RBI is not reducing the benchmark interest rate aggressively to control inflation. The bond prices may improve gradually and more in tandem with reduction of policy interest rates. The overall yield on bonds as well as on deposits is coming down and this phenomenon may continue for a while. The bonds have given better returns than equity over the last couple of years. This situation is likely to reverse over the coming years, specially as interest rates are expected to seek lower levels and corporate profits may increase, due to reduction in interest burden.

The property market in India remains subdued. Earlier, the commercial property market was very sluggish though there was some movement in the residential property market. Over the last few months, things have suddenly changed. The demand for commercial property is increasing thereby increasing its price and more so the rental rates. On the other hand, residential property has become more sluggish and there are hardly any buyers specially for high end, high value properties. This has caused a lot of stress to the industry and its financial health has suffered. The builders and developers have been borrowing at a high rate of interest to complete their projects and the sluggishness in the market has pushed them under heavy debt burden. More and more builders and developers are defaulting on their financial commitments and even on construction schedule, which pose a substantial risk to financiers as well as investors of properties. The situation may take more time to improve and it is difficult to predict the time frame of such improvement as of now.

Gold and precious metals have experienced a rally over the last few months. In fact, most of the metals have rallied over the period. The rally is triggered by improved offtake of metals by the Chinese economy, which is a major buyer. There are doubts whether the Chinese buying will persist in light of its slowing economy and slow global trade due to lack of paying capacity with many countries as well as consumers. The metal rally may remain intact for a short period. The prices of base metals may get softer and their fall will be larger as compared to precious metals. If the Dollar strengthens against the Rupee, the precious metals can harden due to the domino effect. Delay in increase of interest rate by the US FED also can keep the prices of the precious metals firm.

Indian currency has been weakening against the US Dollar over the last few months. However, the weakness is not substantial as compared to many other countries and more so after considering the fact that the US Dollar has globally become stronger. The Dollar is not expected to strengthen further unless there is rapid interest rate hike in the US. Rupee may remain range bound between 66 to 68 Rupees per US dollar for a few months.

The Indian economy seems to be on the right track and that is positive for investing in India. However, as many positives seem to have already been factored in the stock prices, caution is desirable. Selective businesses which can positively get impacted by good Monsoon and falling rate of interest may be favoured. If the economy grows at about 8%, it will have a favourable impact on companies engaged in the business of consumer staples. If the growth remains robust, it can also support businesses of consumer discretionary products. Fixed income instruments may also be considered by investors in appropriate proportion, taking into consideration risk appetite and expectation of returns.

CA. Ninad Karpe

The Lighter Side

PANAMA PANORAMA

Jaspal Bhatti (RIP), the famous satirist, had a long running serial on television, where he poked fun at the travails of a common man. In one such episode, he had shown a worried father (played by the late Jaspal Bhatti) tying to find a suitable groom for his daughter. When he approaches a potential family, he is asked "Have you ever had an Income Tax raid in your house?" He promptly and indignantly responds with a vehement "No"! To which the groom's family retorts, that he does not have any "status" in society!

Being innovative, he hires some actors to behave like Income Tax Officers to conduct a "mock raid" on his house. He take pictures of this raid and shows it to the potential family, which now accepts them as having a "good status" in society!

Although a satire, this episode probably shows how a tax raid was taken as a matter of pride. Of course it meant dealing with the tax complications arising from the raid itself; but it was definitely a measure of the person having finally "arrived" in society.

Tax raids are now passé.

So are the other related status symbols – fancy cars, racehorses, yatches or bungalows in Monaco. And leaving the country with huge unpaid debts is also looked down upon!

In place of all these, new status symbols have emerged. Significant among the lot are the various "lists" which are being leaked. First, there was an HSBC list of offshore accounts held by many Indians and now we have the famous Panama list. There is an unspoken excitement at the names that might be thrown up in these revelations. And of course it makes for a lot of cocktail conversations.

If Jaspal Bhatti were alive, he would have now created an episode to show the hapless father of the bride desperately wanting to show his "status" by pointing to his name figuring in the Panama list.

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Heetesh Veera, Partner, EY LLP and
Ravikumar Yanamandra, Director, EY LLP.

Service Tax on Sale of Flats – A Twist in the Tale

The disputes in indirect taxes surrounding the works contracts have become a regular phenomenon since the Gannon Dunkerley days in the 90s. Since then several aspects of the works contracts have been tested at the courts mainly to decide the applicability of taxes. Basis those judgments, the legislators felt the need to amend the constitution to bring transfer of property in goods used in execution of works contract within the purview of the erstwhile Sales Tax and now extended to current VAT legislations. The increased coverage of services in the service tax regime coupled with the fact of untouched services portion not suffering any indirect taxes caught the attention of the legislators and prompted them to bring the works contracts to into the purview of service tax regime. All is well with the way in which these taxes are administered and the principles are laid out in the respective legislations (of service tax and VAT) for determining the value liable to each tax. Though there is an overlap of the value between both the legislations, the trade and industry got used to the fact that both these taxes are going to stay and GST only possibly could end these problems.

While this was largely the way in which the industry is operating by paying the taxes to respective administrators, a sweeping change in service tax was brought by levying service tax on sale of under construction premises from 2010. The impact of the tax is directly on the home buyers also for the residential flats who are huge in number. Hence, the Government in its wisdom has also understood that these property construction transactions are not the typical works contracts as the buyer generally never directly approaches the builder to build a premises for him. Therefore, these services have been carved out of the existing works contracts that are otherwise taxable and made adequate safeguards to ensure that the taxation does not extend to sale of constructed flats. The Government has also recognised the way in which the industry functions and they brought in a differential valuation mechanism in cases where the consideration for the construction services included the value of land by way of abatement provisions.

However, the latest ruling of the Delhi High Court set aside the valuation mechanism in case of service tax on sale of under construction premises, for absence of machinery provisions. This judgment is the outcome of the writ petition filed by certain individuals who took the route of approaching the Court to challenge the levy of service tax on under constructed flats. The petitioners contested the levy primarily on absence of powers to the Central Government to tax the transactions of purchase of immovable property (though under construction which included land) and lack of administrative mechanism for taxing the correct value of services.

Specifically the following points were raised and challenged before the Delhi High Court:

- Whether service tax is applicable on under construction property which includes land
- In case the construction services have started much before the buyer's agreement, only the services provided after the flat buyer's agreement need to be considered.
- Whether service tax is applicable on the extra price paid for preferential location.

A careful look at the detailed judgment reveals the fact that while the Court has set aside the argument of absent legislative competence, the distinction brought down by the petitioners that the said contracts are not typical works contract gained Court's attention . The petitioners very carefully have highlighted the

fact that these contracts contain the element of transfer of undivided interest in land in addition to transfer of property in tangible goods and provision of construction services. Thus, the petitioners have brought to light a new category of contracts which are beyond works contract, as works contract typically involves only goods and services and there is generally no third element. The Revenue representatives tried to defend their case by citing different High Court judgments which upheld the imposition of service tax on sale of under construction flats and the fact that abatement mainly toward value of land has been given and what is taxed is only 25% to 30% of the agreement value.

The Court has very categorically held that

- The legislative competence of the Parliament to tax the element of service involved cannot be disputed.
- The levy itself would fail, if it does not provide for a mechanism to ascertain the value of the services component which is the subject of the levy and in the present case since the machinery provisions are absent, service tax cannot be levied on such transactions.
- The legal fiction of providing a higher abatement through a notification in cases where value of land is included cannot be treated as machinery provision to levy tax. The text of the legislation has not withstood the test of having an effective administrative mechanism to impose this tax. Although the law provides for the levy of service tax, there is no direct provision in the Act or Rules which specifically exclude all non-service components. A direct abatement without a provision to determine the value of service in normal course cannot substitute statutory machinery provisions and therefore, has been held to be beyond the legislative competence.
- The preferential location charges collected by the builder are leviable to Service tax under Section 65(105)(zzzzu) since they are a measure of additional value that a customer derives from acquiring a particular unit.

This judgment by setting aside the levy for want of administrative mechanism to determine the value has not addressed one of the important aspects as to whether the levy needs to be restricted to the services provided post the flat buyers' agreement and not the entire value of the service.

Further the issue as to whether the services rendered only after execution of the flat buyer's agreement could be subjected to tax as prior to the said date, service is rendered by the builder to itself and cannot be subjected to service tax has not been dealt and answered by the High Court.

While this decision covered extensively the provisions pertain to the pre negative list era, the Court has not made any remarks in the applicability of this rationale in the current regime despite the provisions governing the transactions are more or less similar and even the assessee has submitted that the challenge in the said writ petition would be equally applicable for the provisions under the current regime. Time will tell whether there needs to be a complete overhaul of the valuation mechanism or there is a crucial need to bring in a new concept of extended works contract. In case of latter, the same could result in various kinds of litigation which are not tested. It is also necessary to see whether the Government comes up with clarificatory amendments/circulars to protect the past cases. While High Court judgments are basically applicable in their designated jurisdiction, it is settled principle that these judgments can prevail as law till the time there are any contrary judgments by other High Courts at least for the Central levies. It needs to be seen what actions the Department will take in this case. It is imperative for Department to approach the Supreme Court, as a silence from Department in this matter could be viewed as acceptance of the Judgment and can result into (a) non-payment of service tax on such transactions in future and (b) possible refund of service tax already paid. The practical implementation of the decision needs to be tested as the builders would mostly likely continue the practice of charging the service tax as the same, being an indirect tax, can be collected from the customers. However, it is now up to the ultimate customers, as in this case, who have to contest the levy following this judgment and this will get into contractual discussions / determinations.

NOTICE OF THE ANNUAL GENERAL MEETING

Notice is hereby given that the Eighty Ninth Annual General Meeting of THE CHAMBER OF TAX CONSULTANTS will be held at Garware Club House, 2nd Floor, Hall Nos. 2 & 3, Wankhede Stadium, D Road, Churchgate, Mumbai – 400 020 on Monday, 4th July, 2016 at 4.30 pm to transact the following business:

1. To consider the Annual Report of the Managing Council for the year 2015-16.
2. To consider and adopt the audited accounts for the year ended 31st March, 2016.
3. To appoint auditors for the year 2016-17 and fix their honorarium.
4. To declare results of the election of President and thirteen Members of the Managing Council.
5. To transact any other business with permission of the Chair.

FOR AND ON BEHALF OF THE MANAGING COUNCIL
OF THE CHAMBER OF TAX CONSULTANTS

Sd/-

Place : Mumbai
Dated: 30th April, 2016

AJAY SINGH
ASHOK MANGHNANI
Hon. Jt. Secretaries

Office:
3, Rewa Chambers, 31, New Marine Lines, Mumbai – 400 020.

Notes:

1. As per the decision taken at 86th Annual General Meeting, Annual Report would be circulated in electronic form. It shall also be available on the Chamber's website after 6th June, 2016. Any member desiring physical copy can send written request and get it collected from Chamber's office after 6th June, 2016. Alternatively, can also send written request for sending it by post or courier.
2. If there is no quorum by 4.30 p.m. the meeting will be adjourned for half an hour and the members present at such adjourned meeting shall form the quorum.
3. The members are requested to send their queries, in writing, if any, on the Statements of Accounts and Annual Report for the year 2015-16 to the Hon. Jt. Secretaries at least four days before the day of the Annual General Meeting.

BOOK REVIEW

Radius Developers have published a book titled "Real Estate (Regulations and Developments) Act, 2016". This book, "Real Estate (Regulations and Developments) Act, 2016", is authored jointly by Mr. K.K. Ramani and Shri N.C. Jain – Advocates. The Act was long awaited by all the stakeholders in the Real Estate industry, especially the flat purchasers who usually become the victims of the circumstances or of the unscrupulous elements. The book is properly timed and the authors have put together their experience and analytical skills to demystify the legislations and placed the same on table for the readers to understand. Mr. Ramani, one of the authors has a long experience in handling disputes of builders as well as the flat owners. Similarly, Mr. N.C. Jain has experience of a tax administrator as well as of handling disputes before various forums under the Income tax Act, 1961 as an advocate.. This book will be of great help to many.

Ajay Singh, *Advocate,* CA. Ashok M. Manghnani
Hon. Jt. Secretaries

The Chamber News

Important events and happenings that took place between **8th May, 2016 and 8th June, 2016** are being reported as under:

I. ADMISSION OF NEW MEMBERS

1) The following new members were admitted in the Managing Council Meeting held on 1st June, 2016.

Life Members

1	Mr. Doshi Nishit Kirit	Advocate	Mumbai
2	Mr. Murty Yanamandra Suryanarayana Bhaskara	CA	Visakhapatnam
3	Mr. Ajmera Amit Suresh	CA	Mumbai
4	Ms. Zaveri Saloni Suketu	CA	Mumbai
5	Ms. Shah Vidhi Rajendra	CA	Mumbai
6	Mr. Shah Raj Pravin	ITP	Mumbai
7	Mr. Pudhussery Verghese Chakkapen	Advocate	Thane
8	Mr. Vage Govind Shivram	B.Com LLB	Thane
9	Mr. Kenia Hemish Haresh	CA	Mumbai
10	Mr. Saranu Venkateswarlu S. Yarraiah	CA	Pune
11	Mr. Agarwal Amit Kumar	CA	Mumbai
12	Mr. Shah Bhavik Rajendra (Ord. To Life)	CA	Mumbai
13	Ms. Shah Priyanka Vishal	CA	Mumbai
14	Mr. Gupta Mohit C. S.	CA	New Delhi

Ordinary Members

1	Mr. Ranavat Darshankumar Rakeshkumar	CA	Mumbai
2	Ms. Deshmukh Nalinee Sandeep	ICWAI	Mumbai
3	Mr. Kaiche Sunil Ashok	CA	Thane
4	Ms. Dosi Mitali Vilas	CA	Mumbai
5	Mr. Khambete Nandan Girish	CA	Thane
6	Mr. Kapadia Dineshkumar Thakorlal	CA	Mumbai
7	Mr. Mehta Kartik Mukul	CA	Mumbai
8	Mr. Patil Pandurang Hari	ITP	Kolhapur
9	Mr. Sawant Santosh Balkrishna	B.Com.	Kolhapur

10	Mr. Khot Tanaji Baburao	B.Com.	Kolhapur
11	Mr. Gajanan Gopalrao Subhedar	B.Com.	Shahapur
12	Mr. Sabharwal Manuj Vinod Kumar	CA	New Delhi
13	Mr. Davad Bharat Vashrambhai	CA	Jamnagar
14	Mr. Maurya Santosh Udayraj	CA	Mumbai
15	Ms. Shah Jainee Tushar	Advocate	Mumbai
16	Mr. Parmar Paresh Chunilal	CA	Mumbai
17	Mr. Pathak Vyomesh Mahesh	CA	Thane
18	Mr. Parmar Jay Mayurbhai	CA	Ahmedabad
19	Mr. Kallianpur Sadanand Annappayya	ITP	Mumbai
20	Mr. Sutaria Dharmen Ajit	CA	Mumbai
21	Mr. Tulsyan Gopal Girdhari Lal	CA	Bihar
22	Ms. Bhonsle Manisha Kishor	CA	Mumbai
23	Mr. Bhayani Dipen Ashok	CA	Mumbai
24	Mr. Vaishampayan Amit Arvind	CA	Mumbai
25	Ms. Jaisinghani Minal Prakash	Advocate	Mumbai
26	Mr. Jagwani Bhagwan Kanyalal	CA	Mumbai
27	Mr. Padvekar Riyaz A. Sattar	Advocate	Mumbai
28	Mr. Khan Aziz Mohd. Ahmed	CA	New Delhi
29	Mr. Ladha Rajendra Prasad	CA	Mumbai

Student Membership

1	Mr. Vadinkar Minesh Ishwar	CS Student	Ahmedabad
2	Mr. Garg Shubham Pankaj Kumar	CA Student	New Delhi
3	Mr. Shah Yash Sandeep	CA Student	Mumbai
4	Mr. Prajapati Shiv Rohit Bachubhai	CA Student	Mumbai
5	Mr. Gupta Akhil Rajesh	CA Final	Jaipur
6	Mr. Tanna Mihir Ashok	CA Student	Mumbai
7	Mr. Badani Sagar Pankaj	CA Student	Thane

Associate Membership

1	M/s. Diren Web Technology Pvt. Ltd.		Mumbai

II. FUTURE PROGRAMMES

(For details of the Future Programmes, kindly visit www.ctconline.org or refer The CTC News of June 2016)

A) ALLIED LAWS COMMITTEE

Lecture Meeting on "Succession – Issues includes Wills, Intestate Succession, Partition and Gifts" will be held on 17th June, 2016 at A. V. Centre Hall, 4th Floor, Jai Hind College, Churchgate, Mumbai – 400 020.

B) CORPORATE MEMBERS COMMITTEE

A **Full Day Conference on "Startup–Roundup – Business, Regulation and Tax Perspective"** will be held on 18th June, 2016 at St. Regis Hotel, Lower Parel, Mumbai- 400 013.

C) DIRECT TAXES COMMITTEE

a) **Full Day Seminar on Appellate Proceedings, DRP and AAR** will be held on 11th June, 2016 at West End Hotel, New Marine Lines, Mumbai- 400 020.

b) **Full Day Seminar on Income Computation and Disclosure Standards (ICDS)** will be held on 2nd July, 2016 at Walchand Hirachand Hall, 4th Floor, Indian Merchants' Chamber, Churchgate, Mumbai – 400 020.

D) INDIRECT TAXES COMMITTEE

Half Day Seminar on Intricate Issues in VAT Returns and Settlement of Arrears in Dispute will be held on 8th June, 2016 at Jai Hind College Auditorium, Churchgate, A Road, Mumbai – 400 020.

E) INTERNATIONAL TAXATION COMMITTEE

10th Residential Refresher Conference on International Taxation, 2016 will be held from 23rd to 26th June, 2016 at Rhythm. Lonavala.

F) MEMBERSHIP & PUBLIC RELATIONS COMMITTEE

Half Day Seminar on "ICDS and Income Tax Amendment in Budget 2016" will be held on 12th June, 2016 at Hotel, Atithi Shivaji Nagar, Nanded.

G) RESEARCH & PUBLICATIONS COMMITTEE

Committee is coming out with a Forthcoming Publication on **INCOME COMPUTATION AND DISCLOSURE STANDARDS** in the month of June 2016. The publication will contain the Legislative history, burning issues, detailed commentary on each ICDS and a dedicated chapter on Practical case studies on each ICDS. Kindly contact Chamber's office to book your copy after 25th June, 2016.

H) STUDENT & IT CONNECT COMMITTEE

Lecture Meeting on "Professional Opportunities in Information Technology ERA" will be held on 10th June, 2016 at CTC Conference Room, 3, Rewa Chamber, 31, New Marine Lines, Mumbai – 400 020.

I) OTHERS

a) **NOTICE OF ANNUAL GENENAL MEETING**

The Eighty Ninth Annual General Meeting of The Chamber of Tax Consultants will be held on Monday, 4th July, 2016 at 4.30 pm at Garware Club House, Wankhede Stadium, D Road, Churchgate, Mumbai – 400 020.

b) **RENEWAL NOTICE – 2016-17**

The Renewal Fees for Annual Membership, Study Group and Study Circle and other Subscription for the F.Y. 2016-17 falls due for payment on 1st April, 2016. The renewal notices are sent separately which contains entire information of members as per CTC Data Base. In case any change in information of Member as shown in form, kindly provide updated information along with the form. Members are requested to visit the website www.ctconline.org for online payment.

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INTERNATIONAL TAXATION COMMITTEE

FEMA Study Circle Meeting on the subject "Secondment of employees – Recent issues from FEMA, Direct Tax and Service Tax Perspective" held on 31st May, 2016 at CTC Conference Room

CA Paresh P. Shah addressing the members.

Intensive Study Group on International Taxation Meeting on the subject "BEPS Report on Action 3 – Designing Effective Controlled Foreign Company Rules" held on 2nd June, 2016 at CTC Conference Room.

CA Ronak Doshi addressing the members

DELHI CHAPTER

Full Day Seminar on "Drafting & Understanding Legal Documentation in M & A / PE Funding Transaction" held on 4th June, 2016 at India International Centre, New Delhi

CA Avinash Lalwani, President delivering opening speech

CA Suhit J. Aggarwal, Vice Chairman welcoming the faculties and delegates. Seen from L to R : S/Shri CA C. S. Mathur, Past Chairman, Lalit Kumar, Faculty, Inder Mohan Singh, Faculty, CA Avinash Lalwani, President, V. P. Verma, Advisor and Sulabh Rewari, Faculty.

Faculties

Mr. Inder Mohan Singh chairing the session. Seen from L to R : S/Shri CA Suhit Aggarwal, Vice Chairman, V. R. Neelakantan, Faculty, R. P. Garg, Chairman, V. P. Verma, Advisor and CA Vijay Gupta, Hon. Jt. Secretary.

Mr. Lalit Kumar

Mr. Sulabh Rewari

Mr. V. R. Neelakantan

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