

TAXATION OF CHARITABLE TRUSTS / INSTITUTIONS

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Section 11(1)

Income from property held for charitable or religious purpose shall not be included in the income if:

- a. In the case of property held under trust **wholly** for charitable or religious purpose and the trust having been established **after the commencement of this Act**. 85% or more of the income derived (excluding corpus donation) is applied towards the objects of the trust and Income not in excess of 15% is accumulated or set apart.
- b. In the case of property held under trust **partly** for charitable or religious purpose and the trust having been established **before the commencement of this Act**. 85% or more of the income derived (excluding corpus donation) is applied towards the objects of the trust and Income not in excess of 15% is accumulated or set apart.

Which in other words means that the trust created partly for charitable or religious purpose is no more recognized for section 11.

- c. Income applied on activities outside India is not eligible for exemption unless the following conditions are met:
 - The trust happens to be created before 1/4/1952 or it is engaged in promotion of international welfare in which India is interested.

- CBDT has by general or special order has granted the exemption for carrying out such activities.

Important Points

Area of operations is one of the important clauses in the constitutional document. All trusts should verify whether an enabling clause to work outside India is present in the constitutional document.

Tax will be charged on the income spent in contravention of section 11(1)(c). Total forfeiture of the income is not possible because applying funds outside India has not been envisaged as a reason for forfeiture under section 13.

Existence of a clause which provides for activities outside India will not disentitle the trust for exemptions. Provisions of section 11(1)(c) will be attracted only if actual expenditure is incurred outside India.

The FCRA is silent but as per the charter for NGO's provided by the FCRA Dept FC funds cannot be spent for activities outside India.

- d. Income in the form of voluntary contributions made with a specific direction that they shall form part of the corpus of the trust.

Corpus donations are considered as a part of Income u/s 2(24)(ia) and subsequently exempted u/s 11(1)(d).

No particular form or manner in which the direction is to be given by the donor. It is not necessary that written direction should necessarily accompany with the donation. The written direction or confirmation may be furnished at the time of assessment.

Trustees have no power to treat in their discretion, any donation as corpus donation. ACIT V/s Nagarjuna Education Society (2011)

Corpus donations can be accumulated indefinitely. But there is no prohibition in the Act for applying the amount received as corpus donations for charitable purposes. Dharma Prathishthanam 11 ITD 40 (Delhi). Appropriate resolutions to be passed in this regards.

Identity of the donor and voluntary nature of the donation to be established for corpus donation. ITO v/s Smt Vidyawanti Labharam Foundation [2012] 20 taxmann.com 793(Jodhpur Tribunal)

Other Conditions to be met for claiming exemption.

- Trust is registered with Commissioner of Income Tax u/s 12AA / 12AB.
- Books are audited as per section 12A(1)(b)

Explanations to section 11(1)(a)&(b):

Explanation 1

- (1) In computing the 15% of the income which may be accumulated or set apart, any voluntary contributions {(Section 12 (1))} shall be deemed to be part of the income;
- (2) If, in the previous year, the income applied to charitable or religious purposes in India falls short of 85% of the income derived during that year from property held under trust, by any amount-
 - (i) for the reason that the whole or any part of the income has not been received during that year,
 - (ii) for any other reason,

then,

- (a) for sub clause (i) above the amount may be utilized either during the previous year in which income is so received or during the previous year immediately following such year, by filing Form 9A online within the time specified under section 139(1) of the Income Tax Act, 1961.

The assessee is at liberty to wait for any number of years for the receipt of income. In case the income is not received in future AY's then there is no obligation on the part of the assessee to spend such income .

- (b) for sub clause (ii) above the amount may be utilized during the previous year immediately following the previous year in which the income was derived by filing Form 9A online within the time specified under section 139(1) of the Income Tax Act, 1961.

Online filing of Form No 9A & 10 was made mandatory from the AY 2016-17. The CBDT vide Circular No: 7/2018, dtd: 20/12/2018, has given the power to CIT to condone the delay in filing form No: 9A for AY 2016-17. The power to condone the delay was extended to AY 2017-18 & AY 2018-19 vide circular 30/2019, dtd: 17/12/2019 & 6/2020 dtd 19/02/2020 resp.

Explanation 2

- From FY 2017-18 onwards, any trust or NGO availing tax exemption benefit u/s section 11 or 10(23C) shall not be allowed to treat corpus donation given to another charitable organization registered u/s 12A, as application of Income.
- No such restriction is proposed to be provided for making corpus donation by a 10(23C) registered entity to 10(23C) registered entities.
- The amendment has no impact if the corpus donation is given out of accumulated funds.

Explanation 3

For the purposes of determining the amount of application under clause (a) or clause (b), the provisions of sub-clause (ia) of clause (a) of section 40 (Amounts not deductible) and sub-sections (3) and (3A) of section 40A (Disallowance of expenses in cash), shall, mutatis mutandis, apply as they apply in computing the income chargeable under the head "Profits and gains of business or profession wef 1st day of April 2019 (AY 2019-20).

Analysis :

- 30% of the expenditure will be disallowed when charitable trust was supposed to deduct TDS & it has not deducted.
- No deduction shall be allowed in respect of expenditure if payment done by trust exceeds Rs 10000 & it is done otherwise than by an account payee cheque drawn on a bank or account payee bank draft.
- Also if expenditure is claimed in particular year & payment is made in subsequent year, & payment exceeding Rs 10000 is done otherwise than by an account payee cheque drawn on a bank or account payee bank draft then the expenditure will be deemed as income in the year of payment.

Some Relevant Points / Case Laws.

Amount of excess application in the previous year can be setoff against the deficiency in application of the subsequent year. M/s Sevasadan Orphanage & Training Institute V/s Dy CIT (Exemptions) (2015). DIT v/s Raghuvanshi Charitable Trust [2011] Delhi HC. CIT V/s Shri Plot Swetamber MurtiPujak Jain Mandal [1994] Gujarat HC. The concept of application of Income for the year in which the income has arisen is not found in section 11(1)(a) of the Act. The principle relating to setoff of losses etc is not of any relevance and therefore any excess application of income during the year can be regarded as application of the income of the future years and can be adjusted. However there is no column for holding deficit and for its carry forward in the return. Therefore it cannot be declared in the return. The department may object when we try to setoff the deficit in the subsequent year/s on the ground that the deficit is not as per the return of income filed in the year in which the deficit has arisen.

Deduction u/s 11 cannot be denied if permission to take loans not taken from the charity commissioner u/s 35A(3) of the BPT Act 1950 {DIT (Exemptions) V/s G K R Charities}. Deduction can be denied only if there is violation of section 13 or registration u/s 12A is withdrawn.

The reference to the term property does not necessarily mean any moveable or immovable property. Business undertaking as covered under section 11(4) is also property held under trust.

Section 11 will not apply where sections 60 to 63 are applicable. Which means income belonging to a charitable organization will be included in the total income of the transferor if such income is subject to sections 60 to 63. Transfer of income without transfer of asset (Sec 60), Revocable Transfer (Sec 61), Transfers deemed to be revocable / irrevocable (Sec 62) & Definition of the terms transfer and revocable (Sec 63).

Any agreement or contract creates legal obligation. All legal obligations shall continue to remain legal obligations and only the surplus or deficit at the end of the legal obligation should go to the Income and expenditure account

ITO V/s Vokkaligara Sangha (2015) 44 CCH 509 (Bang. Trib). Chandraprabhu Jain V/s ACIT. ITA No: 230/Mum/2016, held that corpus donation cannot be taxed even if the trust is not registered u/s 12AA. Confirmed by Pune Tribunal in the case of ITO V/s Serum Institute of India Research Foundation (2018).

The SC in the case of CIT V/s Thanthi Trust held that when there was no doubt about the authenticity of the application then it could not be disallowed even if physical funds had not been parted with.

The word 'applied' not necessarily to be understood to mean 'spent'. It has a wider connotation, so that even a provision may require to be understood as applied – *CIT(E) vs. Ohio University Christ College (2018) 408 ITR 352 (Kar.)*.

It is not necessary that receipt of income should precede its application Siddaramanna Charities Trust V.s CIT.

Application is more important than the source. The source need not be confined to the income of the previous year. Chhotanagpur Diocesan Trust V/s ITO

Scope of Income includes capital income and scope of application includes application of capital nature.

Even if 100% of income is donated to another valid trust, the entire donation shall be treated as application for charitable purposes. DIT (Ex) V/s Bagri Foundation [2010] Delhi HC. CBDT Circular dated 5/1/1978 also clarifies that the donor trust will not lose exemption even if the donee trust does not spend the donation during the year of receipt itself.

Section 11(1A)

The amount of exemption in relation to capital gain arising on transfer of a capital asset, shall be as under:

- I. Where the capital asset is held under trust wholly for charitable or religious purposes:
 - a. if the whole of the net consideration is utilized for acquisition of a new capital asset, the entire capital gain shall be exempt; and
 - b. if only a part of the net consideration is so utilized, the amount of capital gain exempt shall be equal to Cost of Acquisition of New Capital Asset Minus Cost of Capital Asset transferred.

- II. Where the capital asset is held under trust in part only for charitable or religious purposes:
 - a. if the whole of the net consideration is utilized for acquisition of a new capital asset, the amount capital gain exempt shall be equal to, $(A/B * \text{Total Capital Gain})$
 - b. if only a part of the net consideration is so utilized, the amount of capital gain exempt shall be equal to, $[A/B * (\text{COA of New Asset}) - A/B (\text{Cost of Asset Transferred})]$

Where

A = Income derived from the capital asset transferred and applied to charitable or religious purpose, before its transfer.

B = Total income derived from the capital asset before its transfer.

If the purchase value of capital asset is treated as application of funds. The amount received on sale of the capital asset will be treated as income in the year of sale subject to capital gain tax as discussed above.

New Capital Asset whether includes Fixed Deposits

Sec 11(1A) does not provide for a specific definition of capital asset. The board has vide its instruction clarified that investment of the net consideration in fixed deposit with a bank for a period of 6 months or above would be regarded as utilization of the net consideration for acquisition of another capital asset within the meaning of section 11(1A). {CBDT Instruction Number 883 dated 24/09/1975}

However in CIT V/s Hindustan Welfare Trust, the Calcutta High Court has held that a deposit in Bank shall be a capital asset for the purpose of section 11(1A) and no minimum duration can be set forth as the determinative criterion.

CIT V/s East India Charitable Trust (1994). Held that deposit with public sector companies in view of section 11(5)(vii) shall qualify as new capital asset within the meaning of section 11(1A).

Capital gains are allowed to be reinvested in purchase of another capital asset or otherwise they can also be applied for charitable purpose. This advantage is provided by the Act to protect the corpus of the trust.

Section 11(1A) does not provide any time limit for reinvestment in new capital asset. Time limit for utilizing capital gains is within the same year subject to the options available under the explanation to section 11(1). Capital gains can be accumulated under section 11(2).

No time limit has been prescribed for holding the new capital asset.

Section 50C not applicable to charitable organizations because they are governed by sections 11 to 13.

Section 11(1B)

Consequences of non-application of Income after exercising options under clause 2 of the Explanation 1 to sub section 1, during the period mentioned in sub clause (a) or sub clause (b) of the said clause.

The income not so applied will be deemed to be the income of the person in receipt thereof

In the case referred to sub clause (i) of the said clause, of the previous year immediately following the previous year in which the income was received;

or

In the case referred to in sub clause (ii) of the said clause, of the previous year immediately following the previous year in which the income was derived

It may be noted that where the assessee fails to apply the income as per clause 2 of explanation 1, he cannot exercise the option of accumulation under section 11(2).

Once the income is taxed u/s 11(1B) it would not be subject to the conditions of application for charitable purposes to the extent of 85%.

Exemption if income accumulated for specific purposes [Section 11(2)] read with section 13(9).

- a. Such person furnishes a statement in the prescribed form / manner to the Assessing Officer, stating the purpose for which the income is being accumulated or set apart and the period for which the income is to be accumulated or set apart, which shall in no case exceed 5 years.
- b. The money so accumulated or set apart is invested or deposited in the forms or modes specified in Section 11(5).
- c. The statement referred to in clause a is furnished before the due date specified u/s 139(1) for furnishing the return of income.

Reasons for accumulation is an integral part of form 10 both in manual as well as e-filing (from AY 2013-14). Though plurality of purpose is not precluded, the purpose has to be specific, precise and concrete.

From the AY 2016-17 e-filing of Form 10 was made mandatory. Circular Nos: 7/2018 dtd: 20/12/18, Circular No: 30/2019 dtd 17/12/19 & Circular 6/2020 dtd 19/02/20 provide for the condonation of delay in filing Form 9A & 10, by CIT u/s 119(2)(b).

Long term grants should be treated as income in the year of receipt and should be carried forward for a period of next five years u/s 11(2).

Section 11(3)

Exemption of Sec 11(2) withdrawn if specific conditions not satisfied

Any income referred to in section 11(2) which –

- a. Is applied to purposes other than the purpose for which it was accumulated or set apart.
- b. Ceases to remain invested in modes specified in section 11(5).
- c. Is not utilized for the purpose for which it is so accumulated or set apart during the 5 year period or in the year immediately following the expiry thereof.
- d. Is donated to any trust registered under section 12AA (Introduced by the Finance Act, 2002 to plug the practices of rotating funds within sister concerns). Sec 11(3)(d).

shall be deemed to be the income of such person in the previous year in which it is so applied or ceases to be so accumulated or set apart or ceases to remain so invested or deposited as the case may be

Section 11(3A): Modification of objects specified in Form 10

Relaxation provided by the Act to Charitable Organizations which are not able to apply the income accumulated or set apart and invested in the modes specified in section 11(5) in terms of section 11(2), due to circumstances beyond its control.

Conditions for availing the relaxation:

1. Request the AO to allow the application to some other charitable purpose
2. Satisfaction of the AO that the non application was beyond the control of the organization
3. The unutilized amount will be applied for such other objects which are in conformity with the objects of the trust.
4. By virtue of amendment in Finance Act 2002 the powers of the AO are curtailed to the extent that he cannot allow the organization to contribute such income to any other charitable organization please refer section 11(3)(d)

Section 11(4) & (4A)

Property held under trust includes business undertaking

Income from business shall be treated as income derived from “property held under trust” and shall be eligible for exemption under section 11(1) & 11(2) provided the business is incidental to the attainment of the objectives of the trust and separate books of account are maintained by such trust in respect of such business.

The assessing officer will have the power to determine the income of such undertaking and where any income so determined is in excess of the income as shown in the accounts of the undertaking, such excess shall be deemed to be applied to purposes other than charitable or religious purposes.

There is a strong judicial precedence including the Supreme Court’s ruling [ACIT V/s Thanthi Trust (2001) 247 ITR 785 (SC)] where even unrelated businesses held as property of the trust are treated as incidental provided the entire income is applied for charitable purposes. In other words use of the income will determine the incidentality of the business.

Business or profit making activity per se is not excluded from overall scope of charitable purpose. But presence of “profit motive” as against “activity for profit” will endanger the exemptions available under Section 11.

There is nothing in the statute to suggest that, Tax Audit u/s 44AB shall apply to business undertaking u/s 11(4A), as long as registration u/s 12AA / 12AB, is intact.

Important case laws in favour of the Assessee :

Divya Yog Mandir Trust V/s JCIT Hardwar (ITA No: 387/Del/2013). AY 2009-10.

ITO (E) Trust Ward II, Delhi V/s Suvasini Charitable Trust (ITA No: 4330/Del/2012). AY 2009-10.

In Shri Haridevji Gaushala Trust V/s CIT [2008] it was held that incidental activities such as sale of milk, Gobar, khattu and male calf are permissible for charitable organization maintaining Goushala.

Section 11(5)
Specified modes for investing funds of the trust

1. Investment in Government Savings Certificates; (Cannot invest in IVP & KVP)
2. Deposit in any account with the Post Office Savings Bank;
3. Deposit in any account (includes Current A/c) with a scheduled bank or a co-operative society;
4. Investment in any central government or state government securities
5. Investment in units of the Unit Trust of India;
6. Investment in debentures;
7. Investment or deposit in any public sector company.
8. Immoveable Property
9. Bonds issued by financial corporation engaged in providing long term funds for industrial development of India

10. Bonds issued by public company carrying on business of providing long term finance for construction or purchase of house in India for residential purposes.

11. Deposits with IDBI.

Any other prescribed form or mode

1. Units issued under any scheme of the mutual fund referred to in clause (23D) of section 10 of the Act. (Refer notifications issued from time to time)
2. Any transfer of deposits to the public Account of India.
3. Deposits made with an authority constituted in India by or under any law enacted either for the purpose of dealing with and satisfying the need for housing accommodation or for the purpose of planning, development or improvement of cities, towns and villages, or for both.
4. Investment by way of acquiring equity shares of a depository as defined in clause (e) of sub-section (1) of section 2 of the Depositories Act, 1996 (22 of 1996).
5. Certain securities by a recognized stock exchange. 6. Equity shares of an incubator or incubatee.

6. Shares of National skill development
7. Debt instruments issued by any Infrastructure finance company
8. Investment / Deposit in any bonds issued by public company formed and registered in India with the main object of carrying on business of providing long term finance for urban infrastructure in India.
9. Stock certificate as defined by Sovereign Gold Bonds Scheme 2015

Only income from investment or deposit which has been made in violation of section 11(5) is liable to be taxed at MMR. Violation does not tantamount to denial of exemption u/s 11 on total income of the assessee. {CIT V/s Fr. Mullers Charitable Institutions [2014] 44 Taxmann(Kar)}.

Case Laws :

- Innocent violation of section 11(5) would not attract forfeiture of exemption {DIT V/s Agrim Charan Foundation [2001] 119 Taxman 569 (Delhi)}.
- {CIT V/s Orpat Charitable Trust [2015] 230 Taxmann 66 (Guj.)}. Renewal of 80G was granted even when the provisions of section 11(5) were contravened.

Section 11(6)

The Finance (No: 2) Act, 2014 lays down that depreciation will not be considered as application of income if the asset on which depreciation has been charged has already been considered as a part of application of income, earlier.

Depreciation shall be permissible on assets not created out of Income. Depreciation cannot be claimed if cost of acquisition is Nil.

The depreciation rates provided by the Income tax laws are not mandatory. Section 32 will have no application to charitable organization.

Section 11(7)

Before the Amendment vide Finance Act 2020 the trust could have claimed exemption under section 10(23C) and 10(46) along with exemption u/s 11 & 12.

After the Amendments vide Finance Act 2020 the registration u/s 12AA and 12AB shall become inoperative from the date the trust is approved u/s 10(23C) or is notified u/s 10(46) as the case may be, or the date on which this proviso has come into force whichever is later

The trust whose registration has become inoperative may apply to get its registration operative u/s 12AB subject to the condition that the approval under section 10(23C) or notification u/s 10(46) shall cease to have effect from the date on which said registration becomes operative.

Which in other words means you can either claim exemption u/s 11 / 12 vide approval u/s 12AB (erstwhile 12AA) or 10(23C) / 10(46).

Deduction u/s 10(1) being on account of agricultural income can be claimed in either situations. No deduction under any other sub clauses of section 10 can be claimed.

Section 12

Income of Trusts or institutions from contributions

1. Income from voluntary contributions (not being contributions made with specific direction that it shall form part of the corpus) shall be deemed to be income derived from property held under trust for the purposes of section 11. For instance Membership Fee of Subscription is income from property held under trust and not voluntary contribution.
2. Value of services provided to persons referred in section 13(3) (specified persons) shall be deemed to be the income of such trust or institution derived from property held under trust, during the previous year in which such services were provided. Please refer section 13(6) (exception to denial of exemption).

Explanation: Value shall mean value of services provided free of cost or at a concessional Rate.

3. Any donation received for providing relief to the victims of Gujarat earthquake, which has been utilized for purpose other than providing relief to the victims of Gujarat Earthquake or has not been utilized for the relief of the victims of Gujarat Earthquake and the said unutilized amount is not transferred to PMNRF till 31st Day of March 2004 shall be deemed to be the Income of the previous year.

Section 12A

Conditions for applicability of section 11 and 12 of the Act.

Application for registration to be made in the prescribed form to obtain registration u/s 12AA. The PCIT or CIT had the powers to condone the delay in applying for registration within 1 year from the date of creation. Section 12A(1)(a)

Applications made after 1st June 2007. The registration u/s 12AA was applicable from the AY immediately following the previous year in which application was made. The delay could not be condoned by the PCIT or CIT. If the application is made under Section 12A(1)(ac)(i) & (iii) the registration shall be effective from the AY from which the trust was originally granted registration or provisional registration as the case may be. Sec 12A(1)(aa) & Sec 12A(2).

Fresh applications for registration to be made, on adoption or modifications of the objects, which do not conform with the conditions subject to which the registration was granted u/s 12AA, within 30 days of such adoption or modification. Sec 12A(1)(ab)

Section 12A(1)(ac) introduced by the Finance Act separately covered under Amendments by the Finance Act 2020.

The Organization must get its accounts audited where its income exceeds the minimum exemption limit. Audit report in Form 10B is required to be filed online to the assessing officer. Sec 12A(1)(b).

Return to be filed as per the section 139(4A) within the time limit allowed under that section. 12A(1)(ba) wef 1/4/2018 that is AY 2018-19

The CPC misinterpreted the section 12A(1)(ba) and is proposing to disallow the entire application of Income made by the trust and add the same to the income of the trust. The words “under that section” should be construed as section 139 and not sub section 4A of section 139. Moreover 139(4A) does not prescribe any due date / time limit for filing the return

CBDT Clarification dated 23rd April 2019 provides for rectification of demands raised due to the above amendments for AY 2018-19.

Note:

Please disclose application or use of income or property of the trust / institute for the benefit of persons referred to in section 13(3)

The organization should not indulge in business activity unless such activities are incidental to the attainment of the objects and separate books of account for such activities are maintained.

All Investments have to be made in accordance with the provisions of Section 11(5)

No part of income should be applied for purposes other than for the benefit of public.

No part of income should be applied for the benefit of any particular religious community or caste.

No part of income should be applied for the benefit of interested persons as specified in section 13(3).

In order to remove hardships in genuine cases, The Finance (No: 2) Act 2014 has amended section 12A with effect from October 1 2014. Under the amended provisions, the benefits of section 11 and 12 shall be available in respect of any income derived from property held under trust in any assessment proceedings for an earlier AY which is pending before the assessing officer as on the date of such registration, if the objects and activities of such trust or institution in the relevant earlier AY are the same as those on the basis of which such registration had been granted. **(Please refer explanatory notes as given in CBDT Circular No: 01/2015 dated 21/01/2015).**

Further no actions for reopening of an assessment under section 147 shall be taken by the AO in the case of such trust or institution for an AY preceding the first AY for which the registration applies merely for the reason that such trust or institution has not obtained the registration under section 12AA for the said AY. However the above benefits will not be available in case of any trust or institution which at any time had applied for registration and the same was refused under section 12AA or a registration once granted was cancelled.

The Finance (No: 2) Act, 2014 restores the provisions back to 2007. Prior to 1/6/2007 the CIT had the power to condone the delay in filing of an application for registration under section 12AA.

Sree Sree Ramkrishna Samity V/s DCIT (ITAT Kolkata) ITA Nos: 1680-1685/Kol/2012

Sahasra Educational Society V/s ADIT(E)-I Hyderabad ITA No: 772/Hyd/2016

Section 13(1)

Denial / Withdrawal of Exemption

Exemption u/s 11 & 12 shall not be available in the following cases:

- a. Income applied for private religious purpose and not for the public at large.

Test : Presence of an uncertain and fluctuating population of beneficiaries.

- b. Income of charitable trust / institution applied for the benefit of particular religious community or caste except trust or institution established for the benefit of Scheduled Castes, Scheduled Tribes, Backward Classes or women and children.

This clause would not be applicable to composite and religious trusts / institution. CIT v/s Dawoodi Bohra Jamat [2009] MP.

In the case of *CIT vs. Indian Society of the Church of Jesus Christ of Latter day Saints* (2017) 397 ITR 762 the Delhi High Court held that, the programmes conducted by assessee are open to public at large, the activities of assessee are not considered to be exclusively meant for one particular religious community and hence assessee is entitled to exemption u/s 11.

c. Income applied for the benefit of specified persons referred to in subsection 3.

Reasonable remuneration u/s 13(1)(c) read with section 13(2)(c) is allowed. A benefit implies payment of anything which is not legally due to a person.

International school of Human Resources and social welfare society V/s CIT I Patna [2015] Patna Tribunal, it was held that giving of interest free loan for construction of building to the trustees in itself not sufficient to infer violation of section 13(1)(c) red with section 13(3).

d. Funds invested or deposited otherwise than in any one or more of the forms specified in subsection (5) of section 11.

In all above cases Trust shall be chargeable to tax at MMR except violation of section 11(5) as discussed earlier.

The applicability of section 13 arises only when an organization is eligible for exemption u/s 11.

Voluntary contribution received in kind could not be applied, accumulated and invested therefore it cannot be treated as Income. ITO Ward 2(2) Jodhpur V/s Shri Sachyaya Mataji Trust V/s DIT (2013) date of order 9th May 2014.

Donation in kind cannot be said to be funds of the trust as contemplated by section **13(1)(d)**, though they generally form part of the assets of the trust constituting its corpus. In order to claim exemption u/s 11 it is not incumbent on the part of the trust to convert the asset into cash and invest proceeds in specified modes as per section 11(5). Auditor Dasaradha Rami Reddy Charities v/s CIT (1989)

Section 13(2).

The income or the property of the trust or institution or any part of such income or property shall be deemed to have been used or applied for the benefit of person referred to in sub- section 3 of section 13 (specified person) if:

- a. Income of the property of trust or institution is lent without charging adequate rent or compensation.
- b. Land / Building / property of trust or institution is lent without charging adequate rent or other compensation.
- c. Unreasonable Amount paid by way of salary, allowance for the services rendered.
- d. Services of the trust made available without adequate remuneration or compensation.
- e. Share / Security / Property purchased on behalf of the trust or institution from specified persons for consideration which is more than adequate.
- f. Share / Security / Property sold on behalf of the trust or institution to specified persons for consideration which is less than adequate.

- g. Income or property diverted to specified persons.
- h. Funds of the trust or institution continue to remain invested in any concern in which the specified person has substantial interest

Attention is drawn to sub clause c which allows reasonable payment of salary, allowance or otherwise, out of the resources of the trust or institution, during the previous year, to specified persons referred to in clause 3 of section 13, for services rendered by such specified persons.

The test of Reasonableness of salary is not whether the payment was more than their needs but whether it was commensurate with the services rendered by them. CIT v/s 21st Society of immaculate conception [2000] Madras HC.

Section 13(3)

Meaning of specified persons (as referred to in clause (c) of sub section 1 and sub section 2)

- a. The author of the trust or the founder of the institution
- b. Any person who has made a total contribution of an amount exceeding Rs.50,000 (substantial contributor)
- c. Where such author or founder or substantial contributor is an HUF, a member of HUF
- cc. Any trustee of the trust or manager (by whatever name called) of the institution
- d. Any relative of such author, founder, substantial contributor, member, trustee or manager
- e. Any concern in which any of the persons referred to above has a substantial interest.

Section 13(4)

Exemption shall not be denied if the investment of the trust or institution, in a concern, in which the specified person has a substantial interest, provided such investment is not more than 5% of the capital of that concern.

Section 13(5)

Exemption u/s 11 and 12 shall not be denied if Debentures purchased between 28/2/ 1983 25/7/1991 do not continue to remain invested beyond 31/3/1992.

Section 13(6) read with section 12(2)

Educational and medical facilities to specified persons

As per section 13(1)(c), income of a charitable trust will not be exempt if any part of such income or any property of the trust is used or applied directly or indirectly for the benefit of any person specified in section 13(3).

But, subsection (6) provides that a charitable or religious trust running an educational institution or a medical institution or a hospital shall not be denied the benefit of exemption u/s 11 or 12, in relation to any income by reason only that, such trust has provided educational or medical facilities to specified person. The exemption will be lost only to the extent of the value of the services so provided.

Section 13(7)

Nothing contained in section 11 or 12 shall apply in case of anonymous donations referred to in section 115BBC.

Section 115BBC. (inserted wef 1/4/07 by Finance A 2006, amended by the Finance Act 2009 and Finance (No: 2) Act 2014).

Anonymous donations to be taxed in certain cases

Sub Section 1

Tax payable will be aggregate of

- (i) 30% flat rate of tax on anonymous donation in excess of the higher of the following amounts:
 - a. 5% of the total donations received by the assessee; or
 - b. Rs. 1,00,000.
- (ii) The amount of income tax with which the assessee would have been chargeable had his total income being reduced by the amount of anonymous donation as calculated above or in other words after reducing the amount taxable at the rate of 30% (MMR).

Sub Section 2

Sub Section 1 shall not apply to:

- a. Trust or institution created wholly for religious purpose
- b. Anonymous Donations to any Trust or institution created for charitable and religious purpose, other than any anonymous donation made with specific direction that such donation is for university, educational institution or hospital.

It is not known how a specific direction can come anonymously and how can it be substantiated.

Sub Section 3

Anonymous Donations means any voluntary contribution referred to 2(24)(iia) where a person receiving such contribution does not maintain a record of the identity indicating the name and address of the person making such contribution and such other particulars as may be prescribed.

Donations received by way of box collections and other anonymous donations, do not form part of the corpus of the trust, but are deemed to be income of the trust.

The taxability of anonymous donation by virtue of section 115BBC shall affect Trust / Institutions / Organizations covered u/s 11, 10(23C) (iiiad) (iii ae) (iv) (v) (vi) and (via).

Exemptions available u/s 11 are not available to anonymous donations and they are to taxed as per the provisions of section 115BBC. Therefore in our opinion the condition relating to application and accumulation will also not apply to such donations. Which also means that, anonymous donations will not be subject to 85% application.

In our opinion anonymous donations once taxed u/s 115BBC will not be subject to double taxation even in case of violation u/s 13.

Religious organizations not covered u/s 115BBC will be covered under PMLA 2002.

Some Case laws:

DCIT v/s All India Pingalwara Charitable Society [2016] ITAT, Amritsar, Gurudev Siddha Peeth V/s ITO Ward 1(1) Kalyan [2015], ITAT, Mumbai, held that the intent of Sec 115BBC was to tax unaccounted money, not small and petty collections through donation boxes.

The above judgements are supported by Explanation to Memorandum to Finance Bill 2006, Budget speech of the Finance Minister and CBDT's explanatory Circular No: 5/2010 Dated 3/6/2010 regarding section 115BBC.

The Delhi high court in DIT (E) V/s Keshav Social and Charitable Foundation [2005] held that anonymity of donors cannot lead to the inference that unaccounted money has been introduced. Which in other words means provisions of section 68 to 69D cannot be invoked. Anonymous donation is a valid income available for charitable purposes.

In the case of Bhagwan Shree Laxmi Narayan V/s ITO(E) [2014] the Delhi High Court held that tax authorities had proceeded on a very narrow and incorrect understanding in holding that the assessee trust was engaged in spreading spirituality and is not a religious trust, to qualify for sub clause 2a and 2b which are exceptions to sub clause 1 of section 115BBC.

In the case of Hans Raj Smarak Society V/s ADIT (E) [2011], the Delhi Tribunal held that the receiver has to maintain the identity indicating the name and address of the donor and such other particulars as may be prescribed. No other particulars has been prescribed under this provision [115BBC(3)] or elsewhere in the Act or Rules. The AO had insisted for confirmation letters from the donors.

Section 13(8)

Nothing contained in section 11 and 12 shall operate if the provisions of the first proviso to section 2(15) becomes applicable, that is 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, 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;

Section 13(9) wef 1/4/2016 (AY 2016-17)

Nothing contained in subsection 2 of section 11 shall operate if:

- The statement referred to in clause (a) of section 11(2) in form No: 10, is not filed before the due date as per section 139(1).
- The return of income is not filed before the due date for filing the return as prescribed by section 139(1)

Explanation 1

Trust includes any other legal obligation (project grants) for the purposes of section 11, 12, 12A and 13 and the term relative is defined. A legal obligation is generally not included in income.

Circular 6/2020 dtd: 19th Feb 2020 gives power to the CIT to condone the delay in filing the return of income as prescribed by section 139(1), for the AY's 2016-17, 2017-18 & 2018-19 provided, the return is filed on or before 31st March of the respective AY's. Condoning the delay of filing form 9A & 10 will not reduce the hardship of the assesses without condoning the delay in filing the return of Income.

Section 80G

Deduction in respect of donations to certain funds / institutions.

Subsection 1 read with subsection 2, defines the organizations to which donations will qualify for deduction in the computation of Income of the donor assessee and the quantum of deduction. It specifies two categories of donations one entitled for 100% donation and the other for 50%.

Subsection 3 omitted by the Finance Act 1994.

Subsection 4 defines the gross qualifying amount of donation to 10% of the total income (as reduced by any portion thereof on which income tax is not payable and by any amount in respect of which the assessee is entitled for deduction) in respect of certain organizations mentioned in subsection 2.

Subsection 5 is about donations to trust institutions, subject to below mentioned conditions:

- (i) Whose income is not liable to inclusion in its total income under the provisions of section 11,12, 10(23C) or 10(23AA).

Provided that where an institution or fund derived any income from business the institution or fund should satisfy the following conditions:

- a. The institution or funds maintains separate books of accounts in respect of income derived from business.
 - b. The donations are not used for business.
 - c. A certificate is issued by the institution or fund to the donor that the above two conditions are met.
-
- (ii) The instrument under which the institution or fund is constituted does not contain any provision for the transfer or application of income for purpose other than charitable purpose.
 - (iii) The institution or fund is not expressed to be for the benefit of any particular religious community or caste, except an institution or fund established for the benefit of Scheduled Castes, Scheduled Tribes or of women and children (Explanation 1)
 - (iv) The institution or fund maintains regular accounts of its receipts and expenditure
 - (v) The institution or fund is duly established or registered under the respective acts for eg. Societies Registration Act 1860, The Maharashtra Public /trust Act 1950, Section 8 of the Companies Act 2013.

(vi) The institution or fund is for the time being approved by the commissioner.

Subsection 5A

Deduction so allowed under this section shall not qualify for deduction under any other provision of this Act for the same or any other AY.

Subsection 5B

The provisions of this section shall apply only to institution or fund if expenditure on religious purpose does not exceed 5% of its income.

Subsection 5C

In relation to donations for providing relief to the victims of earthquake in Gujarat. No more relevant.

Subsection 5D

No deduction shall be allowed in respect of any donation exceeding Rs: 2000 unless such amount is paid by any mode other than cash (wef AY 2018-19).

Explanation 2 => The deduction shall not be disallowed to the donor if :

The income of the institution or fund becomes taxable due to non-compliance of section 11,12 and 12A.

The exemption under section 11 and 12 is denied due to violation of section 13(1)(c) read with section 13(2)(h).

Explanation 3 => Charitable purpose does not include religious purpose.

Explanation 4 => Association or institution for the promotion of games and sports as notified by the Government shall be deemed to be an institution established for charitable purpose.

Explanation 5 => Section 80G not applicable to donations in kind.

Deduction u/s 80G can be claimed only against positive income and taxable income. It can neither be claimed against the losses nor can be carried forward.

Donation out of current years income, reserve fund or the previous year's income are eligible for deduction.

CHAPTER XII-EB ADDED BY FINANCE ACT 2016.

SPECIAL PROVISIONS RELATING TO TAX ON ACCRETED INCOME OF CERTAIN TRUST AND INSTITUTIONS.

Section 115TD.

- (1) Where in any previous year a trust or institution registered u/s 12AA / 12AB has:
 - a. Converted into any form not eligible for registration u/s 12AA / 12AB.
 - b. Merged with any trust or institution not having similar objects & is not registered u/s 12AA / 12AB.
 - c. On dissolution failed to transfer all its assets to any other trust or institution registered u/s 12AA / 12AB or institution registered u/s 10(23C) Sub section iv / v / vi / via, within a period of 12 months from the end of the month in which the dissolution takes place.

Then, income of the organization for that year and the accreted income shall be taxed at MMR. Once the tax is charged under this section no other section shall apply.

(2) Accreted income means excess of FMV of the total assets less total liability as on the specified date.

Provided that so much of the accreted income attributable to the following shall be excluded:

- (i) Any asset acquired from agricultural income.
 - (ii) Any asset acquired after creation of the trust till the registration of the trust u/s 12AA / 12AB (said period), if the trust has not been allowed the benefit of section 11 and 12 during the said period.
- (3) A trust or institution shall be deemed to have converted into any form not eligible for registration u/s 12AA / 12AB if
- (i) Registration granted u/s 12AA / 12AB has been cancelled.
 - (ii) modified the objects of the trust which do not confirm with the conditions of registration and it has
 - (i) Not applied for fresh registration u/s 12AA / 12AB.
 - (ii) Applied for fresh registration but the same has been rejected.
- (4) Even if no tax on regular income is payable tax on accreted income will be payable as per sub section 1 of this section.

- (5) The principal officer of the trust or trustee shall be liable to pay the tax within 14 days from
- (i) Cancellation of Registration u/s 12AA / 12AB. the date on which:
 - (a) the period for filing the appeal u/s 253, against the order cancelling the registration is passed, expires, and no appeal has been filed.
 - (b) the order confirming the cancellation is received by the trust or institution.
 - (ii) from the end of the FY in which the modification took place that is where the trust institution did not apply for fresh registration {3(ii)a}.
 - (iii) Rejection of Fresh application for Registration, on modification, the date on which
 - (a) period for filing appeal u/s 253 expires.
 - (b) the order in any appeal confirming the cancellation of application received by the trust or institution {3(ii)b}
 - (iv) the date of merger as mentioned in 1(b)
 - (v) date on which the period of 12 months expires as mentioned in 1(c) above (transfer of assets after dissolution)

- (6) Tax on accreted income will be the final payment of tax and no further credit shall be claimed by the trust / institution.
- (7) No deduction under any other provision of the tax shall be claimed.

Section 115TE.

Interest payable by the principal officer or trustee @ 1% for every month or part thereof of the delay in paying tax as per subsection 5 of Section 115TD.

Section 115TF.

- (1) In the case of non payment of tax on accreted income the principal officer / trustee or the trust / institution shall be deemed to be an assessee in default and all the provisions for collection and recovery of this act shall apply.
- (2) In the case of dissolution of the trust or institution and transfer of assets to some other trust or institution, the tax on accreted income, if not paid, the person to whom the asset forming part of the computation of the accreted income is transferred, shall be deemed to be an assessee in default in respect of tax, interest thereon and all the provisions for collection and recovery shall apply. Provided that the liability of the person shall be restricted to the value of the asset received by him.

Few fundamental and Prima Facie issue arising out of accreted income, noticed.

The mandate of Income Tax Act is confined to taxing income only and not assets held as legal obligation

The provisions apply only to organizations registered u/s 12AA/12AB therefore all organizations registered u/s 10(23C) shall not be covered. Such provision is probably in violation of Article 14 of the Constitution of India because of the differential treatment.

The entire corpus and capital assets will be taxed which is against the judicial precedence where it has been held that corpus donation will not be taxed even if the organizations are not registered u/s 12AA.

There are many provisions where the charitable organizations are required to pay tax on, for example anonymous donation u/s 115BBC, Violation of sections 11(5) etc. Any asset created out of the above income will lead to double taxation.

Section 164(2)&(3) and Section 167B

There is a common misconception that if 12AA registration is withdrawn or not availed or the income becomes taxable, the trust will be assessed as AOP under section 167B at MMR of 30%. However the taxes should be determined on the basis of sec 164(2) and (3) and not 167B. As per section 164(2) and (3) the trust should be charged at normal rates applicable to individuals. The minimum tax slab exemption which is currently Rs: 2.5 lakhs is also available.

Definition of individual is inclusive. Besides being a single living human being, it can include body of individuals. Even though the assessment of income was in the hands of the trust it has to be made in the same manner and to the same extent as it would have been made in the hands of the beneficiaries. {DIT(Exempt) V/s Shardaben Bhagubhai Mafatlal Public Charitable Trust [2001]247 ITR1(Bom)}.

In the case of CIT v/s Children's Education Society (2013)358 ITR 373/(2013) 92DTR158/(2014) 264 CTR (Kar.) 389 the High Court of Karnataka held that the assessment status of a society shall be AJP and not AOP or BOI.

Section 167B will not be applicable because of the following reasons:

Section 167B specifically excludes Companies and Societies registered under societies registration act and or any other similar legislation.

Rates as prescribed in section 167B are based upon knowledge and determination of share of individual members. In charitable or religious organizations there is no scope of share of income or surplus among members concerned. Moreover the beneficiaries are public at large and not individual private beneficiaries.

Proviso to section 164(2) makes it abundantly clear that a charitable trust can be taxed at MMR only if there is a violation of clause (c) or (d) of section 13(1).

M/s KMR Educational Society V/s ACIT Central Circle Hyderabad (ITA 1146 / Hyd / 2011) whereby it was decided that, the income has to be computed in a commercial manner even in the case where exemption is denied. The capital receipts cannot be taken as income of the assessee. Moreover the revenue expenditure has to be reduced against revenue receipts to arrive excess / deficit of Income over expenditure.

Please read circular number 308 Dated 29/06/1981 along with circular number 320 dated 11/01/1982.

THANK YOU

Ravi B Gupta

Chartered Accountant