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Article

Taxation of unexempt income of Public Charitable Trusts

By Samyak Navedia

Income derived from Trust property has been exempt under Income-tax laws since the Act of 1886. Tracing the legislative history in respect of income from property held under trust, the author examines amendments made by Finance Act, 1970; Taxation Laws (Amendment) Act, 1975; Finance Act, 1983; and Finance Act, 2022, the author concludes that the present iteration of Section 13(1)(c) / Section 13(1)(d) makes it evident that only that part of income which has been applied / invested in violation of the Section 13(1)(c) / Section 13(1)(d) shall be liable to denial of Section 11 exemption. He is also of the view that Section 13(1)(c) and Section 13(1)(d) function as independent bars on Section 11 exemption, and that any protection guaranteed by Section 13(4) may relax requirements of Section 13(1)(c), but Section 13(1)(d) will continue to apply towards any exempted income under Section 11

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Taxation of unexempt income of Public Charitable Trusts

Introduction

Income derived from Trust property has been exempt under Income-tax laws since the Act of 1886. Voluntary contributions received by Trusts also became exempt by virtue of Act of 1918. Exemption to trusts was further expanded with the Act of 1922, which permitted the trusts to either apply or accumulate such income from property. For the purposes of the present Income-tax Act, 1961, trust income accrues in three manners:

- Income from property held under trust (*regulated by Section 11*);
- Voluntary contributions (*regulated by Section 12 read with Explanation 1(1) to Section 11*);
- Voluntary contributions towards corpus (*regulated by Section 11(1)(d)*).

For the purposes of this Article, income-tax implications will be restricted to income from property held under trust. The income-tax implications of utilisation of trust funds will be better understood if we examine the legislative history leading up to the present law.

Legal position up till 1961 Act

The Income-tax Act, 1961 as introduced granted exemption to income from property held under Trust, so long as a minimum of 75% of the same is applied to charitable or religious purposes within that assessment year.[1] Such accumulated sums could be used for charitable activities in the future period.

The 1961 Act also introduced Section 13 to deny Section 11 exemption to any Trust where any part of such income of the Trust enured directly or indirectly for the benefit of the author or founder of the trust.

Amendment by Finance Act, 1970

Section 13 of the Act was made more stringent *vide* Finance Act, 1970. As per this amendment, direct or indirect use of trust income for the benefit of the specified person would result in total denial of under Section 11 exemption on the entire trust income.

Newly introduced Section 13(2) deemed certain categories of transaction to be regarded as use of income of the Trust for the benefit of the specified persons. These included:

[1] Requirement of application of Trust income under Section 11(1) was subsequently increased to 85% *vide* Finance Act 2002 (w.e.f. 1 April 2002).

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- Loans to specified persons without adequate security and/or adequate interest;
- Any property of the trust let out to specified persons without charging adequate rent;
- Salary, allowance, etc. to specified persons in excess of what is reasonable;
- Provision of services by the trust to specified persons without adequate remuneration;
- Purchase of property by the trust from specified persons for excess consideration;
- Sale of property by trust to specified persons without adequate consideration;
- Substantial diversion of income or property of the trust towards specified persons; and
- Investment (shares, debentures, etc.) of trust funds in any concern in which specified persons has a substantial interest.

Finance Act, 1970 also introduced Section 13(4) of the Act, as an exception to Section 13(1)(c) (restriction on use of Trust income for the benefit of specified persons). Under Section 13(4), if the investment does not exceed 5% of the total capital of the investee concern (concern in which specified person has substantial interest), then Section 13(1)(c) would not apply, and the trust can still claim Section 11 exemption. However, the provision also states that the income arising from such investment shall not be entitled to Section 11 exemption.

Amendment by Taxation Laws (Amendment) Act, 1975

While Section 13(1)(c) r/w Section 13(2)(h) imposed restriction on investment of Trust funds in concerns in which the author had substantial interest, the legislature *vide* Taxation Laws (Amendment) Act, 1975 – III inserted new provisions to further restrict investment of Trust funds.

Section 13(1)(d) was introduced as an independent bar on Section 11(1) exemption to specifically restrict investment of Trust funds in manners other than specified modes, such that violation of Section 13(1)(d) will result in total denial of under Section 11 exemption on the entire trust income. Specified forms or modes provided in Section 13(5), *inter alia*, included:

- investment in savings certificates
- deposit in Post Office Savings Bank account, nationalised banks, scheduled banks
- investment in government securities
- investment in shares of government company

Section 13 begins with the words "*Nothing contained in Section 11 or Section 12 shall operate so as to exclude from the total income*". Consequentially, this *non-obstante* clause requires all incomes exempted under Section 11, including sums accumulated under Section 11 [sub-section (1) and sub-section

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(2)], to comply with Section 13(1)(d) r/w specified modes under Section 13(5).[2]

Amendment by Finance Act, 1983

In 1983, Section 13(1)(d) was expanded to specifically prohibit investment of Trust funds in shares of non-Government Companies[3]. Specified forms or modes of investment were now provided in Section 11(5),[4] which was introduced as replacement of Section 13(5).

Vide Finance Act 1983, expression "*without prejudice to the provisions contained in clause (d) of that sub-section*" was inserted in Section 13(4). With reference to Section 220 of the Income-tax Act, 1961, the Supreme Court in *ITO* v. *Gwalior Rayon Silk Manufacturing (Weaving) Co. Ltd.*[5] explained the expression '*without prejudice to'* to mean that the provision which contains this expression must neither be inconsistent with nor prejudicial to the provisions contained in the other provision that follows this expression.

Thus, as per the aforesaid interpretation of the Apex Court, amendment to Section 13(4) made it specifically subject to Section 13(1)(d) which previously only acted as an exception to restrictions of Section 13(1)(c) (restriction on use of Trust income for the benefit of specified persons). This meant that for the availability of Section 13(4) as an exception against the restrictions of Section 13(1)(c), investment must not only be within 5% of the total capital of the investee concern (concern in which specified person has substantial interest), but also comply with Section 13(1)(d) r/w specified modes under Section 11(5). In other words, while Section 13(4) envisages protection to violation of Section 13(1)(c), but this protection does not extend to investments that fall within 13(1)(d) of the Act.

Arguably, amendment of 1983 did not change the scope of Section 13(4), i.e., it effectively remained the same as it stood post amendment of 1975. In other words, amendment of 1983 merely clarified and reinforced and made it beyond doubt that Section 13(1)(d) applies irrespective of protection of Section 13(4).

Amendment by Finance Act, 2022

Disputes arose as to whether violation of Section 13 would result in denial of exemption under Section 11 *in toto*, or only to the extent of such violation. Conflicting judicial views persisted on this question of law. The Supreme Court in *DIT* v. *Bharat Diamond Bourse Courts*[6], the Delhi High Court in *DIT* v. *Charanjiv Charitable Trust*[7] and the Kerala High Court in *Agappa Child Centre* v. *CIT*[8] held that the violation of Section 13(1)(c) would result in complete denial of Section 11 exemption. While this

[2] By virtue of Direct Tax Law (Amendment) Act, 1987, corpus donations were also subsequently required to comply with Section 13(1)(d) r/w specified modes under Section 11(5).

[3] "Government company" was substituted with "public sector company" *vide* Finance Act, 2007.

4 Investment in shares Depositories, National Skill Development Corporation, among others were subsequently permitted under Section 11(5)(xii) r/w Rule 17C of the Income-tax Rules, 1962.

[5] [1975] 101 ITR 457 (SC).

[6] [2003] 259 ITR 280 (SC).

[7] [2014] 267 ITR CTR 305 (Del).

[8] [1997] 226 ITR 211 (Ker).

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interpretation is detrimental from the perspective of Trusts, the law declared by the Apex court is more accurate.

On the other hand, the Bombay High Court in *CIT(E)* v. *Audyogik Shikshan Mandal*[9] and the Madras High Court in *CIT* v. *Working Women's Forum*[10], held that the violation of Section 13(1)(c)/ 13(1)(d) would result in the amount of violation alone being subject to denial of Section 11 exemption. Notably, in arriving at these judgments, Courts relied on Bombay HC's ruling in *DIT* v. *Sheth Mafatlal Gagalbhai Foundation Trust*[11] which dealt with purchase of shares before 1993 [protected by Clause (iia) of Proviso to Section 13(1)(d)] and not application / investment of Trust income.

Considering the legislative history, and the reason for which Section 13 was introduced, violation of Section 13(1)(c) / 13(1)(d) would result in denial of complete exemption under Section 11. Therefore, in our view, the reliance placed by Courts on *Sheth Mafatlal Gagalbhai Foundation Trust (supra)* with respect to application / investment of Trust income is inaccurate.

The first amendment by Finance Act, 2022 to Section 13(1)(c) and Section 13(1)(d) sought to put an end to this conflicting view. The amendments clarify that only that part of income which has been applied / invested in violation of the Section 13(1)(c) / Section 13(1)(d) shall be liable to denial of Section 11 exemption.

Second amendment brought by Finance Act of 2022 was introduction of Section 115BBI to the Act laying down that income-tax shall be payable on any specified income in the following manner:

- at the rate of 30 percent on the aggregate of specified income; and
- normal rate of income-tax which would have been chargeable to the assessee had the total income of the assessee been reduced by the aggregate of such specified income.

Clauses (c) and (d) of Explanation to Section 115BBI defines the expression 'specified income' to include income as has been applied / invested in violation of the Section 13(1)(c) / Section 13(1)(d). This is further evident from the words '*All the above income are also required to be taxed at special rate. Hence, it is proposed to insert new section 115BBI in the Act*' found in para 5.2(d)(e) of Memorandum to Finance Act 2022. Therefore, as per Section 13(1)(d)(iii), only investment in shares of public sector company or under Section 11(5)(xii) read with Rule 17C of the Rules will not attract Section 115BBI, but by implication, any investment in shares of a private limited company will attract income tax at the rate of 30% of such investment under Section 115BBI.

Conclusion

In case of all charitable or religious Trusts, any part of Trust income applied / invested:

[9] [2019] 101 taxmann.com 247 (Bom).
[10] [2014] 365 ITR 353 (Mad).
[11] [2001] 249 ITR 533 (Bom).

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- violates Section 13(1)(c) where it is, directly or indirectly, for the benefit of specified person;
- violates Section 13(1)(d) where it is not invested in public sector company or modes specified under Section 11(5).

The legislative history leading up to the present iteration of Section 13(1)(c) / Section 13(1)(d) makes it evident that only that part of income which has been applied / invested in violation of the Section 13(1)(c) / Section 13(1)(d) shall be liable to denial of Section 11 exemption. Such application / investment will be taxed at the rate of 30 percent on the aggregate of such investments under Section 115BBI of the Act.

Section 13(1)(c) and Section 13(1)(d) function as independent bars on Section 11 exemption. Section 13(4) has been drafted in such a manner that stipulations of Section 13(1)(c) can be disregarded, but stipulations of Section 13(1)(d) must be given due regard. In other words, any protection guaranteed by Section 13(4) may relax requirements of Section 13(1)(c), but Section 13(1)(d) will continue to apply towards any exempted income under Section 11.

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Key amendments proposed in Income-tax Act vide Finance Bill, 2023

- Change in rate of taxes
- Deductions and Exemptions
- Income from business or profession
- Capital Gains
- Charitable and Religious Trusts
- Assessment and Appeals
- Set-off and carry forward of losses
- TDS and TCS
- Penalties and Prosecutions

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Key amendments proposed in Income-tax Act *vide* Finance Bill, 2023

I. Change in rate of taxes

For individuals

a) In the alternate tax regime under Section 115BAC, the basic exemption limit shall be INR 3,00,000 and for every additional INR 3,00,000 of income, the next slab rate will be applicable. The highest slab rate of 30% shall continue to apply to income above INR 15,00,000. The new tax regime is proposed to serve as the default regime.

b) The threshold limit for total income eligible for rebate under Section 87A has been proposed to be increased from INR 5,00,000 to INR 7,00,000 for assessees opting for the new tax regime.

c) Under the new tax regime, the highest surcharge rate of 37% on income above INR 5,00,00,000 has been proposed to be reduced to 25%.

d) Standard deduction from salary income and deduction from family pension is proposed to be extended to employees who opt for New Tax Regime.

e) A new Section 115BBJ is proposed to be inserted to provide for a flat tax rate of 30% on any winning from online gaming.

For other assessees

f) A new section 115BAE is proposed to be inserted, which provides for reduced rate of tax of 15% (plus surcharge of 10% and cess) for manufacturing co-operative societies established on or after 1 April 2023, and commencing production on or before 31 March 2024 [provided that specified incentives or deductions are not availed]. Further, income not derived or incidental to manufacturing or production of an article or thing shall be taxed at 22%.

g) Provisions of Alternate Minimum Tax (AMT) and credit thereof shall not apply to cooperative societies opting for an alternate tax regime under Section 115BAE.

II. Deductions and Exemptions

For individuals

a) Receipts arising from life insurance policies issued on or after 1 April 2023 shall be considered as income from other sources if the premium paid exceeds INR 5,00,000

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in a given year. The exemption for receipts in the event of the insured person's death shall remain unchanged.

For other assessees

b) Deduction under Section 10AA shall only be allowed if the proceeds from the sale of goods or provision of services are received within 6 months from the end of the previous year or within such further period as the competent authority may allow in this behalf. In addition, to avail a deduction under Section 10AA, the assessee must also submit a return of income on or before the due date specified under Section 139(1).

c) Tax exemption under Section 10(46A) is proposed to be extended to 'Non-corporate entities (Such as bodies, authorities, boards, trusts, or commissions), established by a Central or State Act for the purpose of providing housing, planning urban development, and regulating activities for the benefit of the public.

d) Income distributed from offshore derivative instruments (ODI) entered into with an offshore banking unit of an IFSC shall be exempt from tax under Section 10(4E).

III. Income from business or profession

a) Under Section 43B, deductions for sums payable to Micro, Small, and Medium Enterprises (MSMEs) proposed to be allowed on payment basis.

b) It is proposed that for sugar co-operatives societies, for years prior to A.Y. 2016-17, if any deduction claimed for expenditure made on purchase of sugar has been disallowed, an application may be made to the Assessing Officer, who shall recompute the income of the relevant previous year after allowing such deduction up to the price fixed or approved by the Government for such previous year.

c) Restrictions is proposed for set off of losses and unabsorbed depreciation by the assessees who opt for presumptive tax schemes under Sections 44BB and 44BBB.

d) The threshold limits for presumptive taxation schemes under Section 44AD and Section 44ADA have been proposed to be increased to INR 3 crores and INR 75 lakhs respectively, provided at least 95% of receipts and payments are made through non-cash methods.

e) The threshold limit for opting for the presumptive taxation scheme under section 44AD and section 44ADA is proposed to be increased to INR 3 crores or INR 75 lakhs, respectively, where 95% of the transaction are made in non-cash mode. The consequential amendments have been made under section 44AB to remove the tax audit requirement for persons opting for such presumptive schemes.

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IV. Capital Gains

For individuals

a) An individual or HUF can claim a maximum exemption of INR 10 crore under Sections 54 and 54F.

b) The gains derived from the transfer, redemption, or maturity of Market Linked Debentures shall be taxed at applicable rate as short-term capital gains under Section 50AA.

c) To align the provisions of Joint Development Agreement with the TDS provisions under section 194-IC, amendment is proposed in section 45 to provide that the full value of consideration shall be taken as the stamp duty value of the property received as increased by any consideration received in cash or by a cheque or draft or by any other mode.

d) The transformation of physical gold into Electronic Gold Receipts and vice versa by a Vault Manager registered with the Securities and Exchange Board of India (SEBI) shall not be considered as a transfer for purposes of capital gains taxation.

For other assessees

e) The cost of any intangible assets and rights shall be considered as “Nil” for which no consideration has been paid for acquisition.

f) No tax shall be imposed on the transfer of capital assets in connection with the relocation of an offshore fund to an International Financial Services Centre (IFSC). The deadline for this relocation has been extended to 31-03-2025.

V. Charitable and Religious Trusts

a) The utilization of corpus, loans or borrowings by a charitable or religious trust prior to 01-04-2021 will not be considered an application for charitable or religious purposes if the amount is subsequently deposited back into the corpus or the loan is repaid.

b) The repayment of a loan or investment into the corpus will only be considered an application for charitable or religious purposes if it occurs within 5 years of the initial utilization.

c) The donations made by one trust or institution to another trust or institution shall be deemed to be an application of up to 85% of the donated amount.

d) The provisions for tax on accreted income as specified in Section 115TD have been extended to trusts or institutions, if they fail to apply for re-registration.

e) In order to claim the accumulation of income, trusts or institutions must file Form 9A and Form 10 at least two months prior to the deadline for filing the return of income.

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f) Exemption under Section 10(23C) or Section 11 or Section 12 shall be allowed if the return of income is furnished within the time allowed under Section 139(1) or Section 139(4) and not Section 139(8A).

g) Under the new registration rules proposed by the Finance Bill 2023, provisional registration must be applied before the commencement of the activities to claim an exemption under Sections 11 and 12.

VI. Assessment and Appeals

a) Appeal can now be filed against the penalty orders imposed by the Commissioner (Appeals) under Sections 271AAB, 271AAC, and 271AAD and revision orders passed by the Principal Chief Commissioner or Chief Commissioner under Section 263. The amendment also allows for the filing of a memorandum of cross-objections in all cases that are appealable to the Appellate Tribunal.

b) A new appellate authority, the Joint Commissioner (Appeal), has been introduced for specific categories of taxpayers, such as individuals and HUFs, to speed up the resolution process in appeal proceedings.

c) The deadline for completing the scrutiny and best judgment assessment has been extended from 9 months to 12 months, starting from Assessment Year 2022-23.

d) Return in response to a notice under Section 148 shall be furnished within 3 months from the end of the month in which such notice is issued or within such further time as may be allowed by the Assessing Officer on a request made in this behalf by the assessee.

e) Specified authority for granting approval for issuance of notice under Section 148 and Section 148A shall be Principal Chief Commissioner or Principal Director General or Chief Commissioner or Director General, where more than three years have elapsed from the end of the relevant assessment year.

f) Where search related information is available after 15th March of any financial year, an additional period of fifteen days shall be allowed for the issuance of the notice, for assessment/reassessments etc., under section 148 of the Act.

g) The time limit for completion of any pending assessment or reassessment is proposed to be extended by 12 months, where a search is initiated under Section 132 or requisition is made under Section 132A. The extension shall be applicable for the assessee being searched and to whom any seized or requisitioned items (money, bullion, jewellery, valuable articles, books of account, documents) belong or pertain.

h) The amendment proposed to Section 132 allows the authorized Officer to receive assistance from approved

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professionals, such as digital forensic experts and registered valuers, during the search and seizure process.

i) The timelines for completing assessment or reassessment in search cases are linked to the execution of the last of the authorizations during such procedure. It is proposed to provide the meaning of execution of the last authorization under Section 132 itself.

VII. Set-off and carry forward of losses

a) The definition of 'strategic disinvestment' in Section 72A has been proposed to be modified to include the sale of shares by the Central or State Governments, or by a public sector company in another public sector company resulting in a reduction of its shareholding below 51% and transfer of control to the buyer.

b) Section 72AA proposed to be amended to allow the carry forward of accumulated losses and unabsorbed depreciation in the case of the amalgamation of a banking company with another banking company within five years of the strategic disinvestment.

c) Eligible startups will be able to set off and carry forward losses incurred during their first ten years of incorporation, even if there has been a change in shareholding, as long as all shareholders continue during the relevant period. The previous time limit of seven years has been proposed to be increased to ten years.

VIII. TDS and TCS

a) The threshold limit for TDS under Section 194N has been proposed to be raised from INR 1 crore to INR 3 crore for recipients who are cooperative societies.

b) The rate of TCS for foreign remittances, for other purposes under LRS and purchase of overseas tour program, is proposed to be increased from 5% to 20% .

c) TDS on winning from online gaming is proposed without any threshold benefit. The tax will be deducted either upon withdrawal or at the end of financial year.

d) The exemption from TDS available on interest payments on listed debenture is proposed to be removed.

e) If the recipient of EPF withdrawal does not provide his PAN, TDS on the withdrawal will be 20%, instead of the maximum marginal rate.

f) Section 197 is proposed to be amended to include section 194LBA in its scope. Thus, unit holders receiving income from business trusts can obtain lower or nil deduction certificates.

g) Sections 206AB and 206CCA have been amended to exclude certain persons from the scope who are not required to file a return of income and are notified by the government.

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h) For certain income paid to non-residents or foreign companies, TDS will be deducted at a rate of 20% or the rate specified in a tax treaty, whichever is lower. This relief will be available if the payee provides a tax residency certificate.

i) Amendment to Section 155 will allow taxpayers to apply to the assessing Officer within two years of the financial year in which the tax was withheld. The Assessing Officer will then amend the assessment to allow the taxpayer to claim TDS credit. Section 244A is also amended to provide that the interest on refund arising out of the above rectification shall be for the period from the date of the application to the date on which the refund is granted.

IX. Penalties and Prosecutions

a) A penalty of INR 5,000 will be imposed on financial establishments for submitting inaccurate SFTs as a result of incorrect information provided by account holders The financial institution has the right to recover the fine from the account holder.

b) It is proposed to amend Section 271C and Section 276B to provide for penalty and prosecution where deductor fails to ensure that tax has been paid under Section 194R, Section 194S and Section 194BA.

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Ratio Decidendi

- Incidental income of a Trust managing a School, from letting out of auditorium to outsiders, is also eligible for exemption under Section 11 – ITAT Chennai
- Non-maintainability of writ against order under Section 148A(d) – Supreme Court sets aside High Court observations – Supreme Court
- Revenue Authorities cannot go behind Tax Residency Certificate issued by Revenue Authorities of foreign jurisdiction – Delhi High Court
- Where a taxpayer is a 'non-resident', his concession in the return of income as a 'resident' would not result in the taxpayer being regarded as a 'resident' – ITAT Mumbai
- Merely inclusion of words 'Make Available' in commercial agreement will not decide taxability as Fee for technical services under Tax Treaties – ITAT Delhi

Ratio Decidendi

Incidental income of a Trust managing a School, from letting out of auditorium to outsiders, is also eligible for exemption under Section 11

The assessee trust was running an educational institution and was registered under Section 12A of the Act. The school infrastructure included an auditorium which was ordinarily used for holding lectures, and other extra-curricular activities for the school students. Outside the school hours and on holidays, the auditorium was let out to outsiders, for conducting dance programme, music programme, corporate meetings, corporate conference, corporate get together and family functions. The Trust had maintained separate books of accounts for the letting out of the auditorium.

The Revenue Authorities contended that the activities of letting out of the auditorium for outsiders would amount to carrying on trade or business by the Trust, and hence the income therefrom was not exempt from taxes. The denial of exemption was however restricted to the profits from the activity of letting out of the auditorium.

On appeal to the Tribunal, relying upon the judgment of the Supreme court in *ACIT* v. *Ahmedabad Urban Development Authority* [2022] 449 ITR 1 (SC)], it was held that the proviso to Section 2(15) of the Act would not apply to a trust undertaking educational activities. According to the Tribunal, undoubtedly, the auditorium was primarily used for educational activities, and letting of the property outside the school hours was clearly activity incidental to education activities of the Trust. The Tribunal concluded that such incidental activities cannot dis-entitle the exemption to the Trust, even to the extent of the income from such incidental activities. **[Note: The Tribunal has however not considered the impact of the judgment of the Supreme Court in *New Noble Educational Society* v. *CIT* [2022] 448 ITR 594 (SC)]** [*M.Ct.M. Chidambaram Chettiar Foundation* v. *DDIT (E)* – Order dated 11 January 2023 in ITA 976 of 2019, ITAT Chennai]

Non-maintainability of writ against order under Section 148A(d) – Supreme Court sets aside High Court observations

The Finance Act 2020 significantly amended the provisions relating to reopening of assessment. The new regulations require the Revenue Authorities to conduct a preliminary investigation u/s 148A(a), then if satisfied issue a notice under Section 148A(b), enables the taxpayer to file an objection under Section 148A(c) and then requires the Revenue Authorities to dispose of the objections by a reasoned order. Thereafter, the re-assessment

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proceedings commence by issuance of notice under Section 148 of the Act.

An order passed under Section 148A(d) and a notice under Section 148 of the Act was challenged before the High Court of Punjab and Haryana in a Writ Petition under Article 226 of the Constitution. The challenge was inter alia on the ground that the notice was issued without jurisdiction, and that the objections raised by the Taxpayer were not considered before issuing the notice. The High Court dismissed the writ petition as non-maintainable, as there was alternative remedy available to the Taxpayer to challenge the order in appellate proceedings when the final assessment order is passed. The High Court also observed that the jurisdiction though was wrongly exercised, when proceedings initiated were yet to be concluded by a statutory authority, interference by High Court in exercise of jurisdiction under Article 226 of Constitution at this intermediate stage is not warranted.

On a Special Leave Petition filed against this order, the Supreme Court observed that the matter would require a deeper and in-depth consideration by the High Court, keeping in view the old and amended law. The Supreme Court thus set aside the order of the High Court requiring the High Court to examine the issue on merits, rather than on dismissing the writ petition *in limine*. [*Red Chilli International Sales* v. *Income Tax Officer* – Special Leave Petition No. 86/2023, decided on 12 January 2023, Supreme Court]

Revenue Authorities cannot go behind Tax Residency Certificate issued by Revenue Authorities of foreign jurisdiction

The Taxpayer, resident of Singapore, earned gains from transfer of shares of an Indian Company. The gains were claimed as not taxable in India by virtue of Article 13(4) the Double Tax Avoidance Agreement entered into and subsisting between India and Singapore ('**India-Singapore DTAA**'). The Taxpayer produced its Tax Residency Certificate ('**TRC**') as the evidence of it being resident of Singapore. The Revenue Authorities however sought to dis-regard the TRC issued by the Singapore Authorities and denied exemption available under the India-Singapore DTAA.

The Taxpayer challenged the action of the Revenue Authorities before the High Court in a Writ Petition under Article 226 of the Constitution. The High Court observed that Singaporean Authorities would have granted the TRC after proper due diligence of the documents and disregarding of same by Indian Authorities would be contrary to international law. The High Court also took note of the press release by Finance Minister dated 1 March 2013 which clarified that *"Tax Residency Certificate produced by a resident of a contracting state will be accepted as evidence that he is a resident of that contracting state and the Income Tax Authorities in India will not go behind the TRC and question his resident status"*. The Court accordingly held that the Revenue Authorities cannot go behind the TRC and such certificate is sufficient evidence to claim treaty eligibility,

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residence status and legal ownership. [*Blackstone Capital Partners (Singapore) VI FDI Three Pte. Ltd.* v. *The Assistant Commissioner of Income Tax, International Taxation 1(1)(2)* – Judgement dated 30 January 2023 in W.P.(C) No. 2562/2022, Delhi High Court]

Where a taxpayer is a 'non-resident', his concession in the return of income as a 'resident' would not result in the taxpayer being regarded as a 'resident'

The taxpayer filed his original return of income declaring himself to be a 'resident'. Thereafter, during a search and seizure action, certain documents were found, which contained detail of undisclosed foreign bank account in the name of the taxpayer. In the return filed pursuant to the search proceedings, the taxpayer declared himself to a 'non-resident' and that the credits in the foreign bank account were not liable to tax in India. The Revenue Authorities however treated the taxpayer to be a 'resident' of India, merely on the ground that the Taxpayer had himself declared himself to be a 'resident' in the original return filed by the taxpayer.

On appeal, the Tribunal observed that on application of law of residency to facts, the taxpayer cannot be regarded as a resident of India. Given the period of stay outside India, the taxpayer would have to be in law, regarded as non-resident of India. There can be no estoppel as to law, and hence the Tribunal held that the mere fact that the taxpayer regarded himself to be resident in the original return, he cannot be barred from claiming himself to be a non-resident. [*Anaya Ajay Mittal* v. *DCIT* – Order dated 29 December 2022 in ITA No. 6949/Mum/2019 AY 2010-11, ITAT Mumbai]

Merely inclusion of words 'Make Available' in commercial agreement will not decide taxability as Fee for technical services under Tax Treaties

The Taxpayer, resident of United Kingdom, was engaged in providing information technology related services to financial payments industry. The Taxpayer developed certain software, which were licensed to customers in India, and was also rendering certain services relating to the software developed by it. The Taxpayer claimed the entire income as not taxable in India, under the Double Taxation Avoidance Agreement between India and UK.

While the Dispute Resolution Panel held the license income as not taxable in India based upon the judgment of the Supreme Court in *Engineering Analysis Centre of Excellence Private Ltd.* v. *CIT* (Civil Appeal Nos. 8733- 8734 of 2018), it held the income from services rendered by it 'made available' technical knowledge and experience to the Indian customers.

On appeal, the Tribunal held that the services in the nature of training and updation of software were intricately and inextricably

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associated to the licensing of software. When the charges from licensing of software itself is not taxable, the activities relating to training, updation, etc. cannot be a separate service de-hors the licensing. The Tribunal also held that merely because the commercial agreement between the parties used the phrase "Make Available" the technology, it would not by itself mean that the services become taxable under the DTAA between India and UK. [*TSYS Card Tech. Ltd.* v. *DCIT* – Order dated 24 January 2023 in ITA No. 2006/Delhi/2022], ITAT Delhi]

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