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Article

Deemed application provision causes uncertainties for donation aggregators

By Sanjhi Agarwal and Prachi Bhardwaj

The article in this issue of Direct Tax Amicus discusses elaborately the recent amendment in Section 11 of the Income Tax Act, 1961 vide Finance Act, 2023, with effect from 1 April 2024. Noting that a charitable entity was allowed to accumulate a maximum of 15% of its income received during a year for application towards charitable causes in subsequent years, the article explains how this benevolent threshold of 15% was misused by various charitable entities by formation of multiple layers of chartable entities, and how to plug this loophole, the Legislature has made an insertion in Explanation 4 to Section 11(1). However, according to the authors, though, the intent of this amendment was to discourage the practice of retention of more than 15% of the sums received through formation of multi-layers of charitable entities, it may seriously impact those charitable entities which are working on channelizing the donations by aggregating donations from multiple donors and applying almost whole of the donations by contributing to charitable entities engaged in actual application towards end causes. They are of the view that a charitable entity which has donated 100% of its receipts to another charitable entity could be subject to tax in respect of 15% of its receipts as it would fail to demonstrate that the 15% of the receipts have been accumulated for charitable purpose.

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Deemed application provision causes uncertainties for donation aggregators

Charitable entities set up for different charitable causes such as education, yoga, relief of poor, medical relief, advancement of any general public utility etc., receive a tax-exempt status under Section 10(23C) and Section 11 of the Income-tax Act, 1961 ('**Act**'). As per Section 11 of the Act, the trusts or charitable institutions are subject to following conditions to obtain tax exemption:

- During a financial year, charitable entities are expected to apply whole of the sums received by it towards charitable objects.
- However, these entities are permitted to accumulate sums towards charitable objects provided that the sums so accumulated do not exceed 15% of the income from property held for charitable objects.
- This application of income can be either towards themselves or by making donations to other charitable entities with similar objectives.
- If donated to other trusts or institutions, the donation should not be towards the corpus of other charitable entities[1].

A charitable entity was allowed to accumulate a maximum of 15% of its income received during a year for application towards charitable causes in subsequent years. However, this benevolent threshold of 15% was misused by various charitable entities by formation of multiple layers of chartable entities. It was seen that chains of charitable entities were formed to accumulate income to the extent of 15% at each stage. Retention of 15% at each stage essentially resulted in actual application of income towards charitable objects below 85% of the total receipts. The said practice was defeating the intent of legislature which aimed at ensuring maximum application of the income of charitable entities towards the end charitable causes.

Let us understand this with an example. Let us say there are 3 trusts- Trust A, Trust B and Trust C. Trust A receives INR 100. Trust A accumulates 15% with itself and donates the rest to Trust B. Similarly, Trust B accumulates 15% of the donations received

[1] Explanation 2 to S. 11(1)

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from Trust A and donates the rest to Trust C. The workings come out to be as follows:

Particulars	Amount (in INR)
Income of Trust A	100
Accumulation by Trust A	15 (15% of 100)
Donation to Trust B	85 (100-15)
Accumulation by Trust B	12.75 (15% of 85)
Donation to Trust C for application towards end charitable causes	72.25 (85-12.75)

The receipts of Trust C in this case are INR 72.25. Assuming Trust C also accumulates 15% of its receipts, then the actual application towards the end charitable causes comes out to INR 61.84. Thus, by formation of chain of charitable entities, the actual application has come down to 61.84% as against the intended minimum application of 85%. Thus, charitable entities with more layers were able to enjoy exempt status by applying a relatively small portion of their receipts towards charitable causes.

To plug this loophole, the Legislature has amended Section 11 of the Act *vide* Finance Act, 2023 with effect from 1 April 2024. An insertion has been made in Explanation 4 to Section 11(1) of the Act which restricts application of sums paid to other charitable entities to the extent of 85% of such payments. The bare text of the amendment reads as follows:

> *"(iii)* ***any amount credited or paid****, other than the amount referred to in Explanation 2, to any fund or trust or institution or any university or other educational institution or any hospital or other medical institution referred to in sub-clause (iv) or sub-clause (v) or sub-clause (vi) or sub-clause (via) of clause (23C) of section 10, as the case may be, or other trust or institution registered under section 12AB, as the case may be,* ***shall be treated as application for charitable or religious purposes only to the extent of eighty-five per cent of such amount credited or paid****."*

Though, the intent of this amendment was to discourage the practice of retention of more than 15% of the sums received through formation of multi-layers of charitable entities, however, it may seriously impact those charitable entities which are working on channelizing the donations ('**Aggregators'**) by aggregating donations from multiple donors and applying

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almost whole (after retention of small amount towards admin expenses) of the donations by contributing to charitable entities engaged in actual application towards end causes.

Aggregators work as a single point of contact for a large number of donors and collect funds for application towards various charities. In order to enable the donors the claim deduction under Section 80G, the Aggregators may be registered under Section 80G of the Act. The Aggregators retain a small margin to meet their operating expenses and apply the remaining amounts towards other charitable entities. Clearly, in case of the Aggregator there is no accumulation of funds using layers of charitable entities. Rather, these Aggregators play a significant role in channelizing the donation by acting as a bridge between the end cause charities and the donors and ease out the compliance burden at the end of the end charities.

The amendment proposed to Explanation 4 to section 11 was not intended to be applied to charities applying 100% of the sums received by them to other charitable entities. However, on literal reading, it seems that there is incongruity between exemption criteria in Section 11 and the amendment made *vide* Finance Act, 2023. As per Section 11, a charitable entity is generally expected to apply the entire sums received by it towards a charitable object. However, the charitable entity is granted exemption even if it has accumulated 15% of the sums for charitable purpose. Thus, the benchmark for exemption under Section 11 for unapplied receipts is accumulation of income.

The amendment made *vide* Finance Act, 2023 deems that 85% of the sums paid/credited by a charitable entity to another charitable entity will be treated as application of income. In doing so, the amendment ensures that 85% of the sums will not be taxed in the hands of the Aggregator. However, as stated above, the qualifying condition for exemption of unapplied receipts under Section 11 is accumulation of not more than 15% of income for charitable object. Since, the Aggregator would have applied entire sums received by them, they would not be able to demonstrate any positive accumulation for charitable cause. The proposed amendment does not lend any support to the donor charitable entity for demonstrating that 15% of the remaining sums (in respect of which exemption has not been granted) have been accumulated for charitable purpose.

Thus, a charitable entity which has donated 100% of its receipts to another charitable entity could be subject to tax in respect of 15% of its receipts as it would fail to demonstrate that the 15% of the receipts have been accumulated for charitable purpose.

If the aforesaid interpretation is followed by the tax authorities, the Aggregators would be left worsen off from the charitable entity which have accumulated 15% of their receipts. This may be explained with the help of an example where Charity A receives INR 100 and donates INR 100 to Charity B *vis-à-vis* Charity X which receives INR 100, accumulates 15% and applies 85% towards charitable objects.

Particulars	**Charity A**	**Charity X**
Receipts (A)	100	100
Donations made to other charities	100	0

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Particulars	Charity A	Charity X
Accumulation	0	15
Actual application on charitable causes		85
Application of income (B)	85 (100*85%)	100
Taxable income	15	Nil

Thus, Charity A would be subject to tax at maximum marginal rate on INR 15 even after applying its entire receipts whereas Charity X does not suffer any tax even after accumulation of receipts. Further, there may be practically challenges to bear the tax cost on INR 15 in the absence of availability of any receipts in the hands of Charity A.

It is also possible that fearing tax demands, certain Aggregators may reduce the quantum of donations (to accumulate funds to meet tax demands). If such a practice is adopted by the Aggregators, the amendment may become counterproductive to its stated intent.

Visibly, the intent of legislature as is evident from Memorandum was not to scope in genuine Aggregators, however, the language of the amendment is wide enough to encapsulate them. Further, amendment uses the words 'any sum paid or credited' which signifies that not only donations, but also any other amount payable/paid (like service fees) by one charitable entity to another charitable entity will be subject to the rigors of the amendment. Further, in such a case there may be challenges as to computation of exemption amount of 85% of the sums paid or credited where the amount is credited in current year and the payment is spread across future years.

Conclusion

Truly, the language employed in Explanation 4 goes way beyond the intent of the legislation while introducing the said explanation. This has forced many Aggregators to reconsider their operational models. The Aggregators may consider approaching Central Board of Direct Taxes for necessary exclusions/relaxations in this regard.

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Notifications & Circulars

- India-Chile Double Taxation Avoidance Agreement (DTAA) notified
- Exemption under Section 10(46) – Certain entities notified
- Exemption under Section 10(46) – Insertion of new clauses to specified income arising to Maharashtra Electricity Regulatory Commission
- National Institute of Design, Ahmedabad notified under Section 35(1)(ii)

Notifications & Circulars

India-Chile Double Taxation Avoidance Agreement (DTAA) notified

A Double taxation avoidance agreement ('**DTAA**') and protocol between the Government of Republic of India and the Government of Republic of Chile for the elimination of double taxation and prevention of fiscal evasion and avoidance with respect to taxes on income was signed on 09 March 2020. Subsequently, the said DTAA and the protocol came into force on 19 October 2022.

Recently, the Central Board of Direct Taxes ('**CBDT**) in exercise of powers conferred to it by Section 90(1) of the Income-tax Act, 1961 (**'Act'**), has notified the DTAA between India and Chile *vide* Notification No. 24 of 2023, dated 3 May 2023.

Exemption under Section 10(46) – Certain entities notified

Section 10(46) empowers Central Government to notify entities whose specified incomes would be exempt from tax provided that these entities are set up under statute or are constituted by the Government for regulating or administering activities for the benefit of general public. In exercise of powers conferred under 10(46), CBDT has notified following entities:

(a) **Central Board of Secondary Education, Delhi ('CBSE')**: Following incomes of CBSE shall be exempt:

- Examination fees
- Affiliation fees
- Sale of textbooks and publications
- Registration fees, sports fees, training fees and other academic receipts
- Receipts from CBSE projects/ programmes
- Interest on income tax refunds
- Interest earned on above

The notification has been given retrospective application from 1 June 2020 and will be operative till 31 March 2025. [***Notification No. 19 of 2023 and Notification 20 of 2023 dated 10 April 2023***]

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(b) **Greater Noida Industrial Development Authority ('GNIDA') :** Following incomes of GNIDA shall be exempt:

- Moneys received from the disposal of land, building, and other properties, movable and immovable;
- Moneys received by the way of rent & fees or any other charges from the disposal of land, building, and other properties, movable and immovable;
- The amount of interest/penalties received on the deferred payment received from the allottees of various movable or immovable properties;
- Water, sewerage and other municipal charges from the allottees of various immovable properties; and
- Interest earned on above

Further, the above exemption shall apply retrospectively from FY 2020-21. [***Notification No. 18 of 2023* dated 10 April 2023)**

The exemption is subject to satisfaction of following conditions:

- Notified entity shall not engage in any commercial activity;
- Activities and the nature of the specified income shall remain unchanged throughout the financial years;
- Notified entity files return of income under sub-section (4C) of Section 139 of the Act.

Exemption under Section 10(46) – Insertion of new clauses to specified income arising to Maharashtra Electricity Regulatory Commission ('MERC')

Vide Notification No. 34/2020 dated 23 June 2020, CBDT had specified certain incomes arising to MERC which shall be exempt under Section 10(46) of the Act. By virtue of Notification No 22/2023 dated 17 April 2023, earlier notification has been modified to include within its ambit following additional incomes, with retrospective effect from 23 June 2020:

(m) Profit on sale of fixed assets;

(n) Charges collected for the personal use of office vehicle by employees;

(o) Interest on Income tax Refund; and

(p) Interest earned on Government Securities.

National Institute of Design, Ahmedabad notified under Section 35(1)(ii)

Section 35(1)(ii) of the Act provides deduction of an amount equal to any sum paid *inter-alia* to approved university, college or other institution for use in scientific research. Such deduction is subject

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to a condition that the university, college or other institution is notified by the Central Government.

In exercise of power conferred by Section 35(1)(ii), *vide* Notification No. 23/2023 dated 21 April 2023, the CBDT has notified National Institute of Design, Ahmedabad.

The notification will be effective from its publication in the official gazette and shall be applicable for AYs 2024-25 to 2028-29.

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Ratio Decidendi

- Subscription fees for providing access to online database cannot be considered as 'Royalty' under India-Switzerland DTAA – ITAT Mumbai
- Reassessment proceedings – Concept of 'reasonable opportunity' is a common thread in both old and new regimes – Gujarat High Court
- Retrospective applicability of the amended Section 153C to the searches conducted prior to 2015 – Supreme Court
- No penalty leviable under Section 271C on mere delay in remittance of the withholding tax – Supreme Court
- 13 hours not a fair opportunity for responding to the Show Cause Notice – Madras High Court
- No deduction available under Section 37(1) upon loss incurred due to infraction of law – Supreme Court

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Ratio Decidendi

Subscription fees for providing access to online database cannot be considered as 'Royalty' under India-Switzerland DTAA

A Swiss company was *inter alia* engaged in the business of providing market research report on pharmaceutical sector to its customers across the world at a predetermined subscription price. The said reports were shared with the customers through online knowledge link. The company granted non-exclusive and non-transferrable license to use the reports and thereby restricted the use of information by the customer for its own benefit, back-up etc. During FY 2017-18, the Swiss company received certain subscription income from its third-party Indian customers for online subscription of reports. The consideration was subject to withholding tax in India by some of the third-party Indian customers. The Assessing Officer ('**AO**') alleged that the said subscription fee was in the nature of 'royalty' under both the Income Tax Act, 1961 ('**Act**') and the Indo-Swiss DTAA. Upon appeal, the Mumbai Tribunal has held that the consideration received will not be taxable as royalty as it did not involve transfer of any intellectual property rights/copyright in the report, nor the server was located in India. In this regard, the Tribunal applied the consistency rule and relied on its own ruling passed in Swiss company's case for earlier years. [*IQVIA AG [Previously known as IMB AG]* v. *Deputy Commissioner of Income Tax* – ITA No. 666/Mum/2022, Order dated 27 April 2023, ITAT Mumbai]

Reassessment proceedings – Concept of 'reasonable opportunity' is a common thread in both old and new regimes

The assessee was issued a notice under Section 148 of the Act under the old regime on 30 June 2021 and was supplied reasons recorded on 27 September 2021. The assessee filed its objections to reasons recorded on 12 October 2021. However, the said objections were never disposed of by the AO. Meanwhile, Supreme Court delivered its decision in *Ashish Agarwal* [(2022) 444 ITR 1 (SC)] to provide that Section 148 notice issued under the old regime up to 30 June 2021 shall be treated as notice under Section 148A(b) under the new regime. No notice under Section 148A(b) was received by the assessee in the instant case. But the order under Section 148A(d) of the Act was passed and consequent notice under Section 148 was issued on 30 July 2022. While passing Section 148A(d) order, the AO had neither considered the objections filed by the assessee on 12 October 2021 nor provided any opportunity to assessee in terms of Section 148A(b) notice. In writ proceedings, the Gujarat High

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Court remanded the matter to the AO and directed that the objections filed by the assessee on 12 October 2021 be considered as reply filed to Section 148A(b) notice ensuring fair opportunity to the assessee which remains a common thread in both old and new regime. [*Sahil Infra Creative Pvt. Ltd.* v. *The Income Tax Officer* – (2023) 150 taxmann.com 2019 (Guj)]

Retrospective applicability of the amended Section 153C to the searches conducted prior to 2015

A search was conducted in the year 2013 under Section 132 of the Act on various premises of H.N Safal Group. During the search proceedings, certain incriminating material and documents related to the assessee were found and seized. The incriminating documents were then handed over to the AO of the assessee in 2017 consequent to which notice under Section 153C was issued. The assessee raised objections against the said notice on the ground that where search is conducted prior to 1 June 2015, exercise of jurisdiction under Section 153C can be assumed only if the incriminating documents belongs to the assessee, which was not the present case. In this regard, judgement of Delhi High Court in *Pepsico India Holdings Private Limited*[2] and the amendment by the Finance Act, 2015 substituting the words 'belongs or belong to' with the words 'pertains or pertains to' in Section 153C with effect from 1 June 2015, were relied upon.

Upon the rejection of objections by AO, the assessee filed writ petition before the Delhi High Court**.** The High Court held that the amendment made in Section 153C of the Act brought a new class of assesses within its sweep, which effects the substantive rights of an assessee. According to the High Court, therefore, in the absence of any retrospective applicability, the assessee's case cannot be brought within the ambit of the amended Section 153C

On appeal, the Supreme Court has reversed the order of the Delhi High Court, holding that the amendment by Finance Act 2015 did not bring into existence a separate class of person as Section 153C dealt with persons other than the searched persons both pre and post amendment. Further, it was noted that the amendment was necessitated to remedy the mischief noted pursuant to *Pepsico India* (*supra*) judgment. Thus, not subjecting assessees to Section 153C on the ground that search was conducted prior to amendment will frustrate the purpose and object of the amendment. Accordingly, it was held by the Apex Court that the amended Section 153C will be applicable to the cases where search was conducted prior to 1 June 2015. [*ITO* v. *Vikram SujitKumar Bhatia* – Judgement dated 6 April 2023 in Civil Appeal No. 911 of 2022 and Others, Supreme Court]

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[2] *Pepsico India Holdings Private Limited* v. *ACIT* - (2015) 370 ITR 295W (Del)

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No penalty leviable under Section 271C on mere delay in remittance of the withholding tax

In a case before Supreme Court, the question which came up for consideration was whether a delay in deposit of withholding tax ranging from 5 days to 10 months will attract penalty under Section 271C of the Act. The Supreme Court held that on true interpretation of Section 271C there shall not be any penalty leviable on mere delay in remittance of the withholding tax after deduction. The reasons as quoted by the Apex Court were that (i) the clause (a) of Section 271C uses the word 'fails to deduct' and does not speaks of belated remittance of withholding tax, (ii) Clause (b) of Section 271C provides penalty for non-payment of withholding tax, however it being limited to specific sections is not applicable to assessee, (iii) wherever the legislature wanted to stipulate the consequences of non-payment and/ or belated remittance/payment of the withholding tax, it has done so, like in Section 201(1A) and Section 276B of the Act. The penalty provisions are to be read strictly and the Court will not read anything more into Section 271C(1)(a) which is contrary to the intent and legislative wisdom. [*US Technologies International Pvt. Ltd. & Others* v. *Commissioner* – Judgement dated 10 April 2023 in Civil Appeal No. 7934 of 2011 and Others, Supreme Court]

13 hours not a fair opportunity for responding to the Show Cause Notice

The assessee was issued with the first SCN on 6 March 2023 which was replied to within the stated timelines. Subsequently, the assessee on 25 March 2023 filed an application seeking more time to file additional voluminous documentary evidence. Despite assessee's request for additional time, another SCN was issued on 27 March 2023 at 07.11 P.M. (after business hours) requiring assessee's reply by 9 am on 28 March 2023. Considering the short timeline of 13 hours, an adjournment request was filed by the assessee which was rejected on the ground that assessment will get time barred on 31 March 2023. In fact, the AO passed the assessment order on 31 March 2023. In writ proceedings, the Madras High Court set aside the assessment order on the ground that 13 hours' time granted to assessee was in violation of principles of natural justice. Consequently, the matter was remanded to the AO to consider matter afresh and pass appropriate order after granting opportunity to the assessee. [*Sundaresan Suresh Kumar* v. *Assessment Unit & Anr.* – Order dated 18 April 2023 in W.P. No. 11529 of 2023, Madras High Court].

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No deduction available under Section 37(1) upon loss incurred due to infraction of law

A search was conducted by the Directorate of Revenue Intelligence at the premises of the assessee who was engaged in jewellery business. Consequent to search, 146 slabs of silver were confiscated by the custom authorities and penalty was levied on the premise of smuggling. The AO assessed the amount of unaccounted silver discovered as income under Section 69A of the Act. Upon appeals, additions made by AO were upheld by CIT(A) and ITAT. The Rajasthan High Court upheld the additions made but also allowed the assessee the loss of confiscation as business loss by relying upon the judgment of Supreme Court in the case of *Piara Singh* [3].

On further appeal, the Supreme Court held that loss on confiscation cannot be allowed as expenditure to the assessee. However, the two Hon'ble Division Bench Judges made separate observations for arriving at their decision. The first Hon'ble Judge held that the High Court had wrongly relied upon *Piara Singh* judgment as it was rendered in the case of assessee carrying out an illegal business whereas in the instant case the assessee is in the business of silver and not smuggling business. Thus, smuggling of goods by assessee was contrary to law and the confiscation loss being incurred on infraction of law was rightly disallowed.

The second Hon'ble Judge held that Explanation to Section 37(1) was introduced to bring clarity with regards to allowability of expenditure incurred for any purpose which is an offence or prohibited by law. It was held that earlier judgment in *Piara Singh* do not lay down a correct law particularly in light of Explanation 1 to Section 37. Thus, it was held that the confiscation loss will not be available for deduction irrespective of the nature of business as penalty or confiscation cannot be said to be incidental to any business. [*Commissioner of Income Tax* v. *Prakash Chand Lunia (D) Thr. Lrs. & Anr.* – Judgement dated 24 April 2023 in Civil Appeal Nos. 7689-90 of 2022, Supreme Court].

[3] CIT, Patiala v. Piara Singh 124 ITR 41

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