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An e-newsletter from **Lakshmikumaran & Sridharan**, India

December 2022 / Issue–99

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December
2022

Article

Normal and substantial profits – A new yardstick for charitable purpose

By **Prachi Bhardwaj & Sanjhi Agarwal**

Introduction

Trusts/institutions created for charitable purpose have been granted tax exempt status under the income tax laws with a view to promote welfare of the needy and upliftment of the society. The charitable purpose is defined in Section 2(15) as including relief of the poor, education, yoga, medical relief, preservation of environments/monuments and the advancement of any other object of General Public Utility (**'GPU'**). Certainly, the charitable trusts/institutions do enjoy substantial income-tax benefits, but at the same these trusts/institutions are often subject to detailed scrutiny to ensure that commercial concerns are kept outside the boundaries of the tax-exempt status. Thus, a number of amendments have been made in the Income-tax Act to exclude commercial receipts of these institutes from the ambit of tax benefits.

Evolution of definition of charitable purpose and its judicial interpretation

Way back in 1922, the law provided that the business income of charitable entity would be exempt if it is *inter alia* earned in the course of actual carrying out the charitable purpose and is applied wholly for such purpose. Subsequently, in 1961, GPU purpose was qualified with the phrase *'not involving the carrying on of any activity for profit'*.

This phrase came up for interpretation before the Apex Court on myriad occasions. At first, the Apex court applied the phrase strictly and disentitled exemption in case there were no restrictions on profit yielding activity even if such activities are incidentally undertaken[1].

Thereafter, a more liberal approach was adopted by 5-member bench of the Apex Court in *Surat Art Silk*[2] by applying '**pre-dominant test**'. The Court observed that if the dominant object of a trust was charitable, the generation of profits or surpluses from the activities incidental to the dominant object will not undermine the charitable nature as long as the surpluses is feeding the dominant object.

Subsequently, the phrase *'not involving the carrying on of any activity for profit'* was deleted by 1983 amendment in the statute. Thereafter, *vide* 2008 amendment, profit earning was again qualified for GPU entity by insertion of a proviso to Section 2(15). The proviso essentially restricted GPU entities earning business income in excess of the **prescribed threshold** (which is 20% of the total receipts presently) irrespective of its application. In 2015, the proviso was tweaked to provide that such business income should be earned in the course of **actual carrying** out the GPU object.

Even after the amendment made in 2008, the pre-dominant test was favourably applied by various High Courts while analysing the tax-exempt status of statutory corporations, statutory regulators, trade promotion bodies, non-statutory bodies, state cricket associations and private trusts. However, the tables have turned with the

[1] *Sole trustee Loka Shikshana Trust* v. *CIT* [1975] 101 ITR 234 (SC) and *Indian Chamber of Commerce* v. *CIT* [1975] 101 ITR 796 (SC)

[2] [1978] 121 ITR 1 (SC).

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pronouncement of the recent Apex Court judgment in Ahmedabad Urban Development Authority (‘***AUDA***’)[3].

Apex Court decision in AUDA

The Supreme Court in *AUDA* noted that the Parliamentary intent while bringing amendments in the definition of charitable purpose was to deny exemption to GPU entities engaged in carrying out commercial activities. This meant that apart from other GPU entities, even a statutory corporation engaged in rendering service in the nature of a commercial activity will be ousted from the definition of charitable purpose, notwithstanding that the consideration is fixed under a law. The Court held that the test of predominant object, as laid down in *Surat Art Silk*, does not hold water after the legislative amendment made in 2008. The key parameters set by the Apex Court for checking eligibility for exemption for GPU entities are summarized below:

1. Pure charity does not mean absence of consideration. So long as any GPU entity’s objects involve activities which generate profits (incidentally or while actually carrying out the objectives of GPU entity), it can be granted exemption, subject to satisfaction of threshold limit (i.e., 20% limit in proviso to Section 2(15)) which is to be applied on yearly basis.
2. The prohibition against carrying on commercial activities does not apply on GPU entities which are engaged in activities that entails charging amounts only at cost or marginal mark-up over cost. *Vice-versa,* when GPU entities charge substantial amounts over and above costs, then exemption would be available subject to satisfaction of the threshold limit.
3. Corporations, boards, trusts or authorities discharging essential services of GPU like providing water, distribution of food grains/medicines, maintenance of roads/parks etc. ought not to be characterized as being engaged in commercial activity because the overall receipts in such cases may exceed the threshold limit, resulting in taxation of the GPU entity, and consequently shifting the burden to the ultimate user/customer by charging higher considerations from them. However, if these entities charge substantial amounts over and above costs, the exemption will not be available.

Way forward

The Apex Court decision has brought a swirl for the GPU entities and their tax exemption status. Not only the predominant object test which has been applied so far has been discarded, but a new test of nominal consideration/substantial profits has been devised to determine whether the threshold limit would become applicable. Consequently, both the taxpayer and the Revenue Authorities will have to verify the material on record on a yearly basis, so as to determine whether the activities of the GPU entities amount to commercial activity and the corresponding receipts is within the threshold limit or not.

Although, the long-drawn tussle between the taxpayer and Revenue Authorities with respect to interpretation of GPU charities has come to an end, however, no set clarity on what constitutes as ‘nominal’ or substantially high mark-up may surface another round of litigation.

It is also worth mentioning that in the light of the Apex Court ruling in *AUDA*, the Revenue

[3] Civil Appeal No. 21762 of 2017.

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Authorities may seek to cancel registration granted under section 12AB alleging breach of conditions mentioned in first proviso to Section 2(15). In such a case, the taxpayers may also be burdened with huge tax demands (computed by applying maximum marginal rate to the accreted income) in terms of Section 115TD. Considering the aforesaid, the GPU entities may to have re-visit the activities carried out by them and the pricing of sums charged in relation to such activities to analyse the impact of Apex Court ruling in *AUDA*.

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Notifications and Circulars

Interest rates increased in schemes formulated to channelise savings from general public

Vide Notification G.S.R. 842€ [F.NO. 1/04/2016-NS-II], dated 22 November 2022, the Central Government (**'CG'**) has amended the Senior Citizens' Savings Scheme, 2019 to increase the interest rate to 7.6% per annum for deposits made under the said scheme on or after 1 October 2022.

Vide Notification No. G.S.R 838 (E) [F. NO. 1/04/2016-NS], dated 22 November 2022, the CG has amended the National Savings Time Deposit Scheme, 2019 to increase the interest rate for two-year and three-year deposits made under the said scheme on or after 1 October 2022 to 5.7% per annum and 5.8% per annum respectively.

Vide Notification No. G.S.R. 839(E) [F.NO. 1/04/2016-NS], dated 22 November 2022, the CG has amended the National Savings (Monthly Income Account) Scheme, 2019 to increase the interest rate to 6.7% per annum for deposits made under the said scheme on or after 1 October 2022.

Vide Notification S.O. 5163(E) [F.NO. 12(5)-B(W&M)/2021], dated 7 November 2022, the CG has amended the Electoral Bond Scheme, 2018 and introduced additional 15 days' time period to purchase electoral bonds in the year of general elections to the legislative assembly of States and Union territories with legislature.

Vide Notification No. G.S.R. 837(E) [F. NO. 1/4/2016-NS], dated 22 November 2022, the CG has amended the Kisan Vikas Patra Scheme, 2019 to reduce the maturity period to 10 years 3 months and has inserted 'Table-3' to include premature closure values of account opened on or after 1 October 2022 with INR 1000.

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Public Investment fund is 'specified person' for purposes of Section 10(23FE)

Section 10(23FE) of the Income Tax Act specifies that income in the nature of dividend, interest or long-term capital gains of a '*specified person*' from an investment in India which was made between 1 April 2020 and 31 March 2024 will be exempt if, *inter-alia*, such investment is held for at least 3 years.

Via Notification No. 125/2022, dated 16 November 2022, the Central Government has notified a sovereign wealth fund named 'Public Investment Fund (PAN: AAAJP1787D)', as a specified person with respect to the investments made by it between 16 November 2022 to 31 March 2024. The notification also specifies the format of the audit report which is required to be furnished by the Public Investment Fund (PIF). Further the said notification prescribes certain conditions which is to be fulfilled by the PIF. Some of the conditions are discussed hereunder:

i. The PIF shall file return of income on or before the due date under Section 139 of the Income Tax At, 1961 for all previous years falling within the period beginning from the date on which the said investment has been made and ending on the date on which such investment is liquidated.

ii. The PIF shall get its books of account audited by an accountant and furnish the report as per the format prescribed under the said notification.

iii. The PIF shall submit quarterly statement within 1 month from the end of each quarter electronically.

iv. The PIF shall continue to be owned and controlled, directly or indirectly, by the Government of the Kingdom of Saudi Arabia, and at no point of time should any other person have any ownership or control, directly or indirectly, in PIF.

v. The PIF shall not have any loan or borrowing directly or indirectly for the purpose of making investment in India,

Federation Internationale de Football Association notified as 'person' under Section 10(39)

Section 10(39) of the IT Act specifies that the specified income arising from any international sporting event held in India, to any person(s) as notified by the Central Government will be exempt.

Via Notification No. 126/2022, dated 30 November 2022 the Central Government has notified Federation *Internationale de* Football Association Under-17 Women's World Cup, 2022 as the 'international sporting event' and Federation *Internationale de* Football Association as the 'person'. The income arising from the receipts from National supporters (Hero Motocorp Ltd., the Department of Tourism – Government of Odisha, etc.) has been notified as specified income arising to Federation *Internationale de* Football Association from organising the international sporting event in India i.e., Federation *Internationale de* Football Association Under-17 Women's World Cup, 2022.

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Ratio Decidendi

TDS deductible on Supplementary Commission, paid to the travel agents, under Section 194H which also recognizes indirect payments

Assessee, an airline company, engaged travel agents to sell tickets to the customers. The International Air Transport Association ('**IATA**') set the 'Base Price', i.e. the maximum price at which a ticket can be sold. The assessee set the 'Net Price' which is the minimum price at which a ticket can be sold. The travel agents earned a fixed commission on sale of each ticket on Base Price, called the 'Base Commission'. Additionally, the travel agents could also sell tickets over and above the Net Price but below the Base Price to earn 'Supplementary Commission' on the sale of each ticket. After the sale of tickets, the travel agents retained the Supplementary Commission and transferred the Net Price to the assessee.

The assessee deducted tax at source ('**TDS**') under Section 194H of the Income-tax Act, 1961 ('**Act**') on the Base Commission earned by the travel agents, but not on the Supplementary Commission.

The Assessing Officer ('**AO**') and the Commissioner of Income Tax, Appeals ('**CIT(A)**') held that the assessee was liable to deduct TDS on the Supplementary Commission paid to the travel agents, therefore the Assessee was in default under Section 201 of the Act. However, the Income Tax Appellate Tribunal ('**ITAT**') held that the Assessee was not liable to deduct TDS on Supplementary Commission earned by the travel agents. On the Revenue's appeal, the High Court of Delhi set aside the ITAT's order, observing that there existed a principal-agent relationship between the assessee and the travel agent.

Before the Supreme Court, the assessee contended that it was not liable to deduct TDS on the Supplementary Commission for *inter alia*, the following reasons:

a. There was no principal-agent relationship between the assessee and the travel agent;

b. The assessee was neither aware of the final price nor had any control on the travel agents while they sell tickets to the customers to earn Supplementary Commission;

c. In any case, the travel agents had filed their income tax return and paid taxes on the Supplementary Commission earned, making the present matter revenue neutral.

The Revenue contended that there was no transfer of title of the tickets from the assessee to the travel agents, and there was a principal-agent relationship between the assessee and its travel agents. Moreover, the assessee had access to the Billing and Settlement Plan data which would allow it to make comprehensive TDS deduction in due time on the correct amount. Further Section 194H of the Act is inclusive and covers both direct and indirect payments to the agents.

The Supreme Court noted that:

a. the Passenger Sales Agency Agreement: i.) provided prior authorization from the assessee to the travel agents to sell tickets; ii.) indemnified the travel agent for any shortcoming in actual service of transportation and iii.) does not distinguish in terms of stages of the transaction.

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b. the opportunity for the travel agents to earn Supplementary Commission, arises from their actual relationship with the assessee.

c. Since there was no transfer of title of tickets from the assessee to the travel agents, there existed a principal-agent relationship, within the definition under Section 182 of the Contract Act.

d. The Assessee can use the Billing and Settlement Plan system to differentiate between the quantum of Base Commission and Supplementary Commission to deduct the correct TDS.

However, the Supreme Court accepted the assessee's argument that the transaction was tax neutral and observed that the amount of TDS has already been considered, when the travel agents paid their respective income tax and thus, the assessee cannot be held in default.

However, it was directed that the Revenue may initiate proceedings to collect interest on the amount of TDS which was liable to be deducted under Section 201(1A) of the Act for the period between the date of default in deduction of TDS and date on which the recipient actually paid income tax.

Therefore, the Supreme Court observed that Section 194H of the Act recognizes both direct and indirect payments arising from the customers, even if the Supplementary Commission is retained by travel agents, the assessee is liable to deduct TDS on Supplementary Commission. The Supreme Court directed that and if any travel agent has not paid tax on Supplementary Commission earned, the Revenue is at liberty to proceed in accordance with law under the Act to recover shortfall in TDS from the assessee. [*Singapore Airlines Ltd.* v. *CIT, Delhi* – 2022 (11) TMI 783, Supreme Court]

Issuance of fresh show cause under Section 148, after change in incumbent AO, would not lead to dropping of previous show cause notice issued by previous AO

For AY 2008-09, the AO issued a notice dated 23 March 2015 under Section 148 of the Income Tax Act to the Assessee and also shared the reasons for re-opening with the assessee *vide* letter dated 18 May 2015. Subsequently, the AO was transferred and replaced by a new AO. Section 129 of the Act provides that, '*Whenever in respect of any proceeding under this Act an income-tax authority ceases to exercise jurisdiction and is succeeded by another who has and exercises jurisdiction, the income-tax authority so succeeding may continue the proceeding from the stage at which the proceeding was left by his predecessor […]*'.

However, the new AO, in the instant case, without considering Section 129, issued a fresh notice dated 18 January 2016 under Section 148 of the Act to the assessee for AY 2008-09. Subsequently, the new AO also communicated the reasons for re-opening *vide* letter dated 23 February 2016. Further, the new AO passed the assessment order under Section 143(3) of the Act on 30 March 2016 by making certain additions to the assessee's income.

Aggrieved, the assessee challenged the reopening of assessment before the Delhi High Court through a writ petition. The High Court set aside the reopening of the assessment for the following reasons:

a. In view of the second notice under Section 148 being issued on 18 January 2016, the first notice under Section 148 dated 23 March 2015 was dropped. Also, it was not mentioned in the later notice that it was in continuation of the first notice.

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b. The second notice, being the fresh notice under Section 148, is barred by limitation.

c. No reasons for reopening were recorded when the fresh notice under Section 148 dated 18 January 2016 was issued.

The Supreme court set aside the aforesaid order of the Delhi High Court as being unsustainable. The Supreme Court observed that:

a. In case of change of AO, Section 129 of the Act allows the previous proceedings to continue from the stage at which the proceedings were left by the old AO.

b. Issuance of second notice was not required or warranted.

c. The previous notice dated 23 March 2015 cannot be said to be dropped due to subsequent issuance of second notice dated 18 January 2016.

d. Reasons for reopening were already supplied to the assessee after issuance of the first notice. However, the High Court considered the reasons for reopening recorded after the second notice, which were not required to be considered.

e. Assessment order was also passed on the basis of the first notice and not the second notice.

f. High Court's finding that the second notice was time-barred was unsustainable.

The Supreme Court thus, quashed and set aside the High Court's order, while also giving liberty to the assessee to challenge the assessment order before the CIT(A) within four weeks. The Supreme Court also directed that the assessee's, appeal, if any such appeal is filed with due compliance, before the CIT(A) is to be considered in accordance with the law and on its own merits. Further, the Supreme Court also clarified that the assessee will not be allowed to argue the issue of the reopening being bad in law, before the CIT(A) and/or the Appellate Authority. [*Dy. CIT* v. *Mastech Technologies Pvt. Ltd. (now Avaids Technovators Pvt. Ltd.)* – Decision dated 3 November 2022 in Civil Appeal No. 8077 of 2022, Supreme Court]

Section 80-IB deduction not available to manufacturer of 'polyurethane foam' even if foam subsequently used in making automobile seats

Assessee manufactures 'polyurethane foam', which is ultimately used in making automobile seats. For the AY 2003-04, the assessee claimed deduction under Section 80-IB of the Income Tax Act, which allows deduction in respect of profit and gains from certain industrial undertakings. However, as per Section 80-IB(2)(iii), such deduction is not allowed if the undertaking is manufacturing any article/thing mentioned in the Eleventh Schedule of the Act. During assessment proceedings, the AO observed that 'polyurethane foam' is mentioned in Entry 25 to the aforesaid Eleventh Schedule and thus AO disallowed the Section 80-IB deduction claimed by the assessee. CIT(A) upheld the AO's order.

On assessee's appeal, the ITAT observed that 'polyurethane foam' was neither produced as a final product by the assessee and was also neither an intermediate product nor a by-product. Rather, it was used as automobile seat and thus will not fall under Entry 25 to the Eleventh Schedule of the Act. Thus, the ITAT allowed the deduction to the assessee.

However, in appeal, the High Court took a contrary view and observed that the assessee manufactures only 'polyurethane foam' in different sizes/design, which is listed in Entry 25 to the Eleventh Schedule of the Act. It did not undertake any further process to convert the foam into automobile seats. Thus, the High Court denied Section 80-IB deduction to the assessee.

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On the assessee's appeal, the Supreme Court upheld the High Court's decision for the following reasons:

a. The assessee manufactured 'polyurethane foam' by injecting two chemicals, polyol and isocyanate. It then supplied this foam in difference designs and sizes to assembly operators. There was no further process undertaken by the assessee.

b. The assembly operators used the polyurethane foam as an ingredient, through the process of moulding, for manufacturing car seats.

c. Merely because the assessee used the two chemicals to manufacture polyurethane foam and it was ultimately used to make car seats by assembly operators, in absence of a further process undertaken by the assessee, it cannot be said that the end product manufactured by the assessee was car seats.

d. Thus, polyurethane foam manufactured by the assessee, being mentioned in Entry 25 of the Eleventh Schedule, will disentitle the assessee from claiming Section 80-IB deduction.

[*Polyflex (India) Pvt. Ltd.* v. *CIT* – Decision dated 17 November 2022 in Civil Appeal No. 8260 of 2022, Supreme Court]

Pendency of assessee's case in MAP resolution proceedings not entitles waiver of interest arising under Section 220(2)

Assessee, a branch office of Pioneer Overseas Corporation, USA ('**POC USA**'), was engaged in the business of contract research activities and cultivation of parent seeds. In 2005, for resolving the assessee's tax matters in India, POC USA invoked the Mutual Agreement Procedure ('**MAP**') under Article 27 of the India-US DTAA. Consequently, an agreement regarding the assessee's income taxable in India and setting off of the taxes paid by the assessee in India against the taxes payable by POC USA in USA was concluded. Accordingly, the assessee's assessment for AYs 1997-98 to 2006-07 was finalized and the assessee paid the necessary taxes along with interest under Section 220 of the Income Tax Act.

Subsequently, the assessee filed an application under Section 220(2A) of the Act, before the Commissioner for waiver of the aforesaid interest levied under Section 220(2) of the Act. Section 220(2A) prescribes certain conditions to be fulfilled by the assessee for waiver of the interest levied under Section 220(2) of the Act. One such conditions was, as given under Section 220(2A)(i), that the payment of the interest has caused genuine hardship to the assessee. The second such condition was, as given under Section 220(2A)(ii) that the default in payment of the amount on which such interest has been paid/was payable.

The Commissioner rejected the aforesaid application of the assessee on the ground that no genuine hardship was caused to the assessee due to the payment of interest. On a writ petition by the assessee, the High Court upheld the Commissioner's order as being a plausible view. The HC noted that in deciding whether any 'genuine hardship' was caused to the assessee:

a. that the interest was 1.5 times the tax wasn't a useful factor,

b. that the assessee is a part of 'DuPont', a global conglomerate having $37/96 billion in net sales and $6.253 billion as operating profit in 2011 was a relevant factor.

The HC further noted that compared to the assessee's profitability over the year, it only paid $0.004 billion as interest under Section 220(2). Thus, the HC dismissed the assessee's writ.

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The assessee filed an SLP before the Supreme Court, contending that the since the dispute in its case was pending for MAP resolution which was concluded later only in 2012, hence the liability to pay tax can also be said to arise thereafter. Thus, the assessee contended that accordingly the interest should be waived off under Section 220(2A)(ii). The Supreme Court rejected this contention, stating that merely raising a dispute before any authority cannot be reason to waive interest under Section 220(2A). Further, it was noted that the under Section 220(2), the levy of interest on non-payment of tax is mandatory. Thus, the Supreme court upheld the High Court order and dismissed the SLP. [*Pioneer Overseas Corporation USA (India Branch)* v. *CIT (International Taxation)* – Special Leave to Appeal (C) No. 21488/2017, Supreme Court]

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