TAXATION OF PUBLIC TRUST, PRIVATE TRUST, AOP & BOI

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EVALUATION AND GROWTH OF CHARITABLE ORGANIZATIONS IN INDIA

India has a long history of civil society based on the concepts of daana (giving) and seva (service) and has long established traditions of philanthropic and charitable engagement. Voluntary organizations were active in cultural promotion, education, health, and natural disaster relief as early as the medieval era. The Rig Veda, one out of the four Vedas, refer to some elements of collective social entrepreneurship which manifested in the form of charity as a duty and responsibility of a conscious human being.
“Act of sacrifice, charity and penance are not to be given up but should be performed. Indeed, sacrifice, charity and penance purify even the great souls.”

During 19th century and 20th century, voluntary organizations received legal recognition as the government enacted various laws such as:

i) The Society Registration Act, 1860;
n) The Religious Endowments Act, 1863;
iii) The Indian Trust Act, 1882;
iv) The Charitable Endowments Act 1890; and
v) The Charitable and Religious Trust Act 1920;
CONSTITUTIONAL PROVISIONS

The Indian Constitution provides a distinct legal space to social capital/civil society institutions:

a) through its Article on the right to form associations or unions – Article 19(1)(c);

b) Through Article 43 which talks of States making endeavor to promote co-operative in rural areas; and

c) Through explicit mention in entries made in the seventh Schedule:

- The Union List (List I) : Entry 43 and 44
- The State List (List II) : Entry 32
- The Concurrent List (List III) : Entry 10 and 28
TYPE OF TRUST

PUBLIC TRUST
- Public charitable trust
- Public Religious Trust

PRIVATE TRUST
- Private Specific Trust
- Private Discretionary Trust
ESSENTIAL CONSTITUENTS TO THE CREATION OF TRUST

As held in case of Hanumantram Ramnath vs. CIT(1946) 14 ITR 716 718 (Bom), the three fundamental requirements to create a charitable trust are as under:-

A declaration of trust which is binding on the settlor;
Setting apart definite property and the settlor depriving himself of the ownership thereof.
A statement of the objects for which the property is thereafter to be held.

THREE CERTAINITIES REQUIRE

Although the provisions of the Indian Trust Act, 1882 do not apply to a charitable or religious trust, but three certainties of a valid trust, as laid down in section 6 of the Indian Trust act, it is necessary that the author of the trust must indicate with following certainties:-

CERTAINTY OF INTENTION TO CREATE THE TRUST
CERTAINTY OF THE OBJECTS AND THE BENEFICIARIES OF THE TRUST
CERTAINTY OF THE SUBJECT MATTER OF THE TRUST (TRUST PROPERTY)
A trust is said to be a public trust when it is constituted wholly or mainly for the benefit of the public at large. Public trust are governed by the general law as the Indian Trust Act, 1882 is not applicable to public charitable trust. There is no specific act under which public trust can be established excepting in the state of Gujrat and Maharashtra.

**PURPOSE FOR ESTABLISHING A PUBLIC TRUST**

Public trust can be established for a number of purposes. In general, trust may be register for one or more of the following purposes:

i) Relief to the poor  
ii) Education  
iii) Medical Relief  
iv) any other object of general public utility

Public trusts may be created *inter vivos* or by will.
TAXABILITY OF PUBLIC TRUST

Income not exempt under section 11 or 12 [section 164(2)]

Taxable at the rates applicable in case of AOP

Exemption under section 11 or 12 is forfeited due to contravention under section 13(1)(c) or 13(1)(d) [Section 164(2)]

Taxable at the Maximum Marginal Rate i.e. 30%+SC+EC
A trust is called a private trust when it is constituted for the benefit of one or more individual who are, or within a given time may be, definitely ascertained. Private trusts are governed by Indian Trust Act, 1882. Basic features of private trusts are:

- Beneficiaries are limited and specified.
- Governed by Indian Trust Act, 1882
- Beneficiaries are individual or families
- Can be oral or written

Purpose of creation of Private Trust:

- *During the life time of the Settlor or trust Creator*:
  
  (i) For the benefit of old parents,
  
  (ii) For the benefit of spouse, minor/disabled children/brothers-sisters
  
  (iii) For protecting own interest
  
  (iv) For the purpose of personal charity
  
  (v) To prevent alienation of personal/ancestral property

- *After death of the Settlor or trust creator*:
  
  (i) To safeguard interest of spouse and children
  
  (ii) To protect parents – old age commitments
  
  (iii) For perpetual charity
PRIVATE TRUST – PRACTICAL ISSUES

Who can create a Private Trust:
- Every person competent to contract. In case of minor, with the permission of the court.

Who can be a Trustee:
- Every person capable of holding property may be a trustee. Therefore even a minor can become a trustee.

Who can be a beneficiary of a Trust:
- Any person capable of holding property may be a beneficiary. Even unborn persons can be a beneficiary. Hon’ble Madras High Court in CIT Vs P. Bhandari [1984] (147 ITR 500) held that a trust created for the benefit of prospective wife of a minor son was valid if it contained a clause that in the event of his not marrying during his life time, the benefit would go to the prospective wife of another minor son and in case the other son is also not marrying, the benefit was to be used for charitable purposes.
- Private trust can also be created for a Deity (SC) (CIT Vs Sri Jagannath Jew (1977) 107 ITR 9)

How long can the trust operate:
- The trust will end at the time, or upon an event, specified in the trust deed. For Example when all the **beneficiaries dies** or at the expiry of **eighty years** since the trust was created.
TAXABILITY OF PRIVATE TRUST

Private Specific Trust

1) No business income – tax rates applicable to each beneficiary [Section 161(1)]
2) Business Income - Maximum Marginal Rate [Section 161(1A)]

However, there are certain exceptions from levy of tax at MMR as contained in proviso to section 161(1A)

Private Discretionary Trust

[Section 164(1)]

Taxable at the Maximum Marginal Rate i.e. 30%+SC+EC

However, there are certain exceptions from levy of tax at MMR as contained in proviso to section 164(1)
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Definition of income of the Trust Section 2 (24) (iia)

Section 2 (24) defines the Income under I.T. Act which says – “Income” includes - (iia) Voluntary contribution .......... or by an electoral trust.

Income in Commercial sense - .

For the purpose of determining the income of the Trust eligible for exemption under section 11, the income arising from property held under Trust constitutes the income of the Trust. It will mean income from property, business, dividends, interest on securities or other interest etc. It will also include donations (other than Corpus donations) received by the trust by virtue of the provisions of section-2(24) (iia). In other words, the income for the purpose of section 11 is the income as per the accounts of the trust.

This analogy is confirmed by many court pronouncements and by the CBDT in circular no. 5-P (LXX-6) dated 19-6-1968.
Definition of Charitable Purpose – Section 2(15)

Section 2(15) of the Income Tax Act, 1961, defines “charitable purpose” which includes:

- i) Relief to the poor,
- ii) Education,
- iii) Yoga, (w.e.f. 01/04/2016)
- iv) Medical relief,
- v) Preservation of environments (including water sheds, forests and wild life) and preservation of monuments or places or objects of artistic or historic interest (Added w.e.f. 1.4.2009 i.e. from A.Y. 2009-10)
- vi) The advancement of any other object of general public utility.
Amendment in section 2(15) w.e.f. 01-04-2016

The definition is modified by adding a proviso stating that the “Advancement of any other object of general public utility” shall not be a charitable purpose if it involves the carrying on of any activity in the nature of trade, commerce or business or any activity of rendering of any service in relation to any trade, commerce or business for a fee or cess or any other consideration, irrespective of any nature of use or application of the income from such activity or the retention of such income from such activity unless:

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

ii) The aggregate receipts from such activity or activities during the previous year, do not exceed 20% of the total receipts, of the trust or institution undertaking such activity or activities of that previous year.
Effects of amendment in section 2(15):

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

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

CBDT by circular No-21/2016 dated 27-05-2016 has clarified that if any trust does commercial activity with reference to proviso to section 2(15) exceeds the specified cut-off in particular year the **tax exemption would be denied in that particular year** and **cancelation of registration would not be mandatory as per section 13(8)** unless such cancelation becomes necessary on other ground(s). The field officers are advised not to cancel the registration of a charitable trust granted u/s 12AA just because the proviso to section 2(15) comes in to pay otherwise with the introduction of new chapter XII –EC the trust will become liable to tax on accreted income by getting hit by section 115TD(3). The process of cancelation of registration is to be initiated strictly in accordance with section 12AA (3) and 12AA (4) after carefully examining the applicability of these provisions.
Judicial pronouncements with regards to proviso to Section 2(15):

❖ - ICAI v/s DGIT (E) 347 ITR 99 (Del)
Institute cannot regarded educational Institution. An activity would be considered business if it is undertaken with a profit motive but in some cases this may not be determinative. When the dominant objective was only to regulate profession of Chartered Accountancy and is a charitable Institution therefore mere receipts of fees for conducting coaching classes as well as placements cannot be a business activity u/s 2 (15).

❖ - Bureau of Indian Standards v/s DGIT (E) 358 ITR 78 (Del)
Taking license fee for granting marks / certification cannot be said to be done for the purpose of profit – any profit / revenue earned is purely incidental Not involved in carrying on any activity in the nature of trade, commerce or business.
Judicial pronouncements with regards to proviso to Section 2(15):

❖ - DIT (E) v/s Sabarmati Ashram Gaushala Trust 362 ITR 359 (Guj)

The Trust sold semen, fodder and milk and earned some profit. Surplus by itself would not be the sole consideration for judging whether any activity is trade, commerce or business particularly if generating ‘surplus’ is wholly incidental to the principal charitable activities of the trust.

❖ - DIT (E) vs. Khar Gymkhana (Bombay High Court) dated 06/06/2016

The DIT has no jurisdiction to cancel registration of a charitable institution on the ground that it is carrying on commercial activities which are in breach of the amended definition of "charitable purpose" in s. 2(15). Registration can be cancelled only if the activities of the trust are not genuine or are not being carried out in accordance with its objects. This is clarified by Circular No.21 of 2016
Judicial pronouncements with regards to proviso to Section 2(15):

Various other verdicts on similar lines:

- DIT (E) vs. Lala Lajpatrai Memorial Trust (Bombay High Court) dated 13/04/2016.
- DIT (E) vs. Ahmadabad Management Association 366 ITR 85 (Guj)
- DIT (E) vs. Samudra Institute of Maritime Studies trust 369 ITR 645 (Bom)
- Loka Shikshana Trust (1975) -101 ITR 234 (SC)
- Indian institute of Bankers vs. Dy. DIT (E) 74 TTJ (Mum) 523
- CIT vs. Surat Art Silk Cloth Merchant Association 121 ITR 1
**SECTION 10(23C)**

**Section 10(23C) :** which covers income of specified/approved funds Hospital, University or Educational institutions, subject to certain conditions which can be divided in to three groups :

**Group I :**

- 10(23C) (i) Prime Minister’s National Relief Fund ;
- 10(23C) (ii) Prime Minister’s Fund (Promotion of Folk Art);
- 10(23C) (iii) Prime Minister’s Aid to Student Fund;
- 10(23C) (iiiia) National Foundation for Communal Harmony
- 10(23C) (iiiiaa) Swachh Bharat Kosh; 10(23C) (**w.e.f.01-04-2015**) ;
- 10(23C)(iiiaaa) Clean Ganga Fund; 10(23C) (**w.e.f. 01-04-2015**) ; and
- 10(23C)(iiiaaaa) CM’s or LG’s Relief Fund in case of State or UT.
- 10(23C)(iiiab) Any University or other educational institutions wholly or
substantially financed by the Governments
- 10(23C)(iiiac) any hospital or other institutions involve in reasaerch and
treatment of specific decease and wholly or substantially financed by the Governments
SECTION 10(23C) CONT ....

Group II:
- University, Educational Institution, hospital or any other institution, aggregate annual receipts do not exceed the amount prescribed (As per Rule 2BC it is prescribe Rs. 1 crore) Sections 10 (23C)(iiiad) & (iiiiae)

Group III:
- University, Educational Institution, hospital or any other institution aggregate annual receipts exceeds the prescribed amount (Rs. 1 Crore) are required to obtain approval from prescribe authority to avail exemption. Section 10(23C) (iv) to (via).

Approval under these section will be granted by Chief Commissioner/Director General, (under rule 2C & 2CA vide from 56 & 56D) through the jurisdictional Commissioner of Income Tax.
SECTION 11 : EXEMPTION

Meaning of ‘Property held under Trust’:
Before the benefit of section 11 (1) can be claimed the property must be held under trust. In case of a trust in relation to an immovable property, the instrument of trust should be duly registered. In other case, a deed of declaration and confirmation of the trust by which the trustees acknowledge receipt of money.

If merely the income and not the property, out of which the income arises, is held under a charitable or religious trust, no exemption shall be allowed u/s 11 in respect of such income. Such income will be taxed in the hands of the settlor (Transferor). Section 60.

Further, transfer of the property should be irrevocable, otherwise, income arising out of said property, no exemption will be allowed under section 11 to the trust, it will be taxed in the hands of the settlor. Section 61.

Further, transfers irrevocable for a specified period shall be governed by section 62.
Meaning of ‘Religious Purpose’

The expression ‘religious purpose’ has not been defined under the Act. ‘Religious purposes’ are necessarily associated with religion. A religion is certainly a matter of faith with individuals or communities and it is not necessarily theistic. A religion has its basic in a system of beliefs or doctrines, but it would not be correct to say that religion is nothing but a doctrine or belief.

‘Religious purpose’ includes the advancement, support or propagation of a religion and its tenets. The income of a Religious trust or institution is entitled to exemption even though it may be for the benefit of a particular religious community or caste. The exemption u/s 11 is, however, confined to public religious trusts only; any income from the property held under a trust for private religious purposes which does not ensure for the benefit of the public is not exempted.
SECTION 11 : MEANING OF INCOME

1. “The expression ‘total income’ has been specifically defined in Section 2(45) of the Act as “total amount of income referred to in Section 5, computed in the manner laid down in this Act”. And therefore the word ‘income’ used u/s 11(1)(a) could not be assigned the same meaning as specifically assigned to the expression ‘total income’ u/s 2(45).

2. In case of business undertaking ‘income’ will be the income as shown in the accounts of the undertaking u/s 11(4), any income of the business undertaking determined by the AO in excess of income shown in accounts will be deemed to have been applied for purposes other than charitable or religious and will be chargeable to tax u/s 11(3). Only income disclosed by accounts shall be eligible for exemption u/s 11(1), and permitted accumulation of 15% shall be calculated with reference to this income.

3. Where the trust derives income from house property, capital gains, or other sources, the word ‘income’ should be understood in its commercial sense i.e book income, after adding back any appropriations or applications thereof towards the purpose of the trusts or otherwise, and also after adding back any debits made for any capital expenditure, any amount added back shall become chargeable to tax u/s 11(3) to the extent they represent outgoings for purpose other than those of the trust.
Section 11: Meaning of income...

Income- Gross or net

The Hon’ble Supreme Court in CIT v. Programme for Community Organization [2001] 248 ITR 1, has held that the assessee-trust was entitled to exemption under section 11 at 25 per cent (now 15%) of its total income derived, not on amount remained after expending money on charitable purposes out of its total income

Followed by the Hon’ble ITAT Lucknow Bench, in the case of Krishi Utpadan mandi samiti & Anr. V. DCIT, 136 TTJ 635
**SECTION 11: EXEMPT VS TAXABLE INCOME**

**Exempt Income:**
- Income which is applied/accumulated to/for the purposes of the trust in India during the previous year to which the income relates is exempt. Further such application/accumulation should not be less than 85% of the income derived during the previous year.

**Taxable Income:**
- Income which is not applied to the purposes of the trust in India during the P.Y. to which the income relates is taxable.
- Income received by Private religious trust.
- Income received by a trust for charitable purposes or a charitable institution created or established after March 31, 1962, is the trust or the institution is created or established for the benefit of any particular religious community or caste or is applied for the benefit of the persons specified in section 13(3).
Section 11(1)(d) - Corpus Donation:

- Income from the voluntary contribution towards the corpus of the trust or the institution is not to be included in computing the income. Therefore, the trust is not under obligation to spend at least 85% of the receipt as provided in section 11(1)(d).

- Corpus Donations will be taxable in absence of exemption under section 11. In this situation, section 2(24) will be applicable.

- Donors may put certain conditions while giving donation towards corpus. Non-fulfilment of these conditions by the trust will not render these contributions as taxable in the hands of trust. These donations will still be exempt.

[Smt Nirmala Keshavlal Vs CED (1982)(138 ITR 604)(Bom)]
[N.A. Ramachandra Raju Charity Trust Vs ITO (1985) 14 ITD 230 Mad]
[Dharma Pratisthanam Vs ITO (1985)(11 ITD 40)(Delhi)]
[ITO Vs Abhilash Kumari Public Charitable Trust (1987) 28 TTJ 523 (Delhi)]
CONDITIONS TO BE COMPLIED WITH TO CLAIM EXEMPTIONS UNDER SECTION - 11

a) The property from which income is derived should be held under a trust or other legal obligation.

b) The property should be held for charitable or religious purposes.

In the case of charitable trust created on or after April 1, 1962, the further conditions are:

i) The trust should not be created for the benefit of any particular religious community or caste;

ii) No part of the income should ensure, directly or indirectly, for the benefit of the settler or other specified persons; and

iii) The Property should be held wholly for charitable purposes.

c) The exemption is confined to the income which is applied to charitable or religious purposes or is accumulated for applying to such purposes within the limits of accumulation permitted under section 11(1) and (2)
CONDITIONS TO BE COMPLIED WITH TO CLAIM EXEMPTIONS UNDER SECTION – 11......

d) The exemption is restricted to such portion of the income as is applied to charitable or religious purposes in India except in the cases covered by section 11(1)(c).

e) The trust should be registered U/S 12A.

f) The accounts of the trust should be audited for such accounting year in which its income (without giving effect to the provisions of section 11 and 12) exceeds the exemption limit.

g) The funds of the trust should be invested or deposited in any one or more of modes or forms mentioned in section 11(5).
FORMS AND MODES OF INVESTING AND DEPOSITING TRUST MONEY – SECTION 11(5)

Rule 17C specifies such prescribed other modes of investments. The list is available in the Act.

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

Any charitable or religious trust or institution will forfeit exemption from tax if any funds of the trust or institution are invested or deposited otherwise than in any one or more of the modes specified in section 11(5) read with section 13(1) (d). Such trusts and institutions will also forfeit exemption from tax if any part of their funds invested before March 1, 1983, otherwise than in any one or more of the forms or modes specified in section 11(5), continue to remain so invested or deposited after November 30, 1983.
Consequences for failure to invest as per section 11(5)

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

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

When such income is accumulated in accordance with S 11(2), then the investment has to be made in accordance with S 11(5). Income so accumulated u/s 11(2) which ceases to remain invested in any of the modes specified in section 11(5) than the income so accumulated will be deemed to be the income of the previous year and become chargeable to tax as income of that year.
Whether entire exemption will be forfeited in case of violation of section 11(5)?

Section 13(1)(d) provides that in case of charitable or religious trust or institution, where any income thereof is invested or deposited otherwise than in any one or more of the forms or modes specified in s 11(5), then section 11 or 12 will not apply. But there are divergent views with regards to whether entire exemption will be forfeited or not.

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

In the case of Director of IT (Exemptions) v/s sheth Mafatlal Gagalbhai Foundation Trust (2001) 249 ITR 533 (Bom.), it was held that tax will be levied at maximum marginal rate only to the portion of violation u/s. 13(1) (d).

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

In the case of Asst. CIT v/s Sri Ramchandra Educational & Health Trust (2010)128 TTJ 408, the investment made was in contravention of section 11(5). The said trust made an effort to recover the amount. However, amount could not be recovered from the earlier investment due to the pendency of garnishee proceedings. It was held that under the circumstances, the reasons were beyond the control of the assessee, forfeiture will not raise.
Amendment by the Finance (No. 2) Act, 2014 :

Finance (No. 2) Act, 2014 has inserted two new sub sections 6 and 7 (w.e.f. 01/04/2015 i.e. A.Y. 2015-16 onwards)

Sub section 6 provides that where any income required to be applied or accumulated or set a part for application, then, for such purposes the income shall be determined without any deduction or allowable by way of depreciation or otherwise in respect of any assets, acquisition which has been claimed as an application of income U/s. 11 in the same or any other previous

Sub section 7 provides that where the trust or institutions has been granted registration U/s. 12A or 12AA and the said registration is in force during the previous year, then, nothing contained in section 10 (other than S. 10(1) & 10(23C) shall operate to exclude any income derived from the property held under the trust from the total income of the person in receipt thereof for that previous year.
INTER CHARITY DONATIONS:

**CBDT Instruction No. 1132 (1978),** has clarified that if the donee organization does not utilize in the year of receipt, then the exemption to donor will not be effected.

The Finance Act, 2002 has inserted an Explanation to S. 11(2), that prohibits donations to other charitable trusts out of accumulated funds.

The Finance Act, 2003 has inserted another proviso to sub section (3A) to section 11 which provides that inter charity donations out of accumulated funds will be permissible in case of dissolution of charitable organization.


The amendment by Finance Act, 2002 is applicable only to the payment made to other trusts/institutions out of amount accumulated **u/s 11(2) and not to payment out of current year's income,** which will continue to be treated as application of income.
APPLICATION OF INCOME:

Application of income means utilization of income for the charitable or religious purposes as enumerated in the instrument of the trust. Under the provisions of section 11(1)(a) income from property held under the trust for charitable or religious purposes is exempt to the extent it is applied for such purposes in India other way the amount spent on the object of the trust is allowed as deduction.

Following expenditure are considered as application of income:-

i) Administrative Expenses


iii) Loan for educational purpose *(CBDT Circular – 100 dated 24/01/1973)*


v) Contrary to Trust deed *(Trustees of Nizam’s Pilgrimage Money Trust v/s CIT (1987) 65 CTR 290 (AP)*
APPLICATION OF INCOME ....

Other allowable applications of trust income:

- Donation to other trust – When the amount donated to other charitable trust for charitable purposes it is treated as application of income. However, Following Explanation 2 has been inserted after the renumbered Explanation 1 to sub-section (1) of section 11 by the Finance Act, 2017, w.e.f. 1-4-2018:

   Explanation 2. —Any amount credited or paid, out of income referred to in clause (a) or clause (b) read with Explanation 1, to any other trust or institution registered under section 12AA, being contribution with a specific direction that they shall form part of the corpus of the trust or institution, shall not be treated as application of income for charitable or religious purposes.

It means that corpus donations from one trust to another shall not be considered as an application of income.

The word ‘applied’ necessarily does not mean ‘spent’. Even if the amount has been earmarked and allocated for the purposes of the institution, it will be deemed to have been applied for its purposes – CIT v. Radhaswami Satsang Sabha (1954) 25 ITR 472 (All.).
APPLICATION OF INCOME ....

Other allowable applications of trust income:

➢ Excess application of last year’s (Deficit) :
If a trust has incurred deficit due to excess spending on the object of the trust during a particular a year, the surplus made by in a subsequent year to make up for the past deficit should be set off against such deficit. It will be application of funds as decided in following cases:

- i) CIT v/s Maharana of Mewar Charitable Foundation (1987) 164 ITR 439 (RJ)
- ii) CIT v/s Shri Swetambar Murti Pujak Jain (1995) 211 ITR 293 (GJ)
- iv) Gem and Jewellery export promotion council v/s ITO 68 ITD 95 (Bom Tribunal)
- v) Volkart Foundation ITA No. 4209 / Bom / 73-74
- vi) Balkan-ji-Bari ITA No. 3078 (Bom) / 77-78 (1979) 2 Taxman 377.
REGISTRATION OF CHARITABLE TRUST – SECTION 12A & 12AA

Registration under section 12A is condition precedence to avail exemption under sections 11 and 12. Unless and until an institution is registered under section 12A or 12AA, it cannot claim the benefit of section 11(1) (a).

Procedure for Registration: Application in Form No. 10 is to be made to the jurisdictional Commissioner of Income tax. The Commissioner after verifying the activities and genuiness of the trust, will either grant or reject registration within a time of 6 months from the date of application.

There were divergent views of different courts on this issue:

Non-consideration of application for registration within time limit, it was decided that in result there of it is to be treated as deemed grant of registration. Society for the promotion of Education Adventure sport & Conservation of Environment v CIT (2008) 171 Taxman 113 (All)

Madras High Court in the case of CIT v/s Sheela Christian Charitable Trust reported in 32 taxmann.com 242 (2013) decided that not passing an order within the prescribed time would not automatically result in granting registration to trust.

The above controversy has now been resolved by the Apex court in 2016 by confirming first decision of Allhabad High Court.
CANCELLATION OF REGISTRATION – SECTION 12AA(3)

If the commissioner is satisfied that the activities of any trust or institution are not genuine or not carried out in accordance with the objects of the trust or institution, he shall pass an order in writing (after providing an opportunity of being heard to the concerned trust or institution), to cancel the registration granted under section 12AA or registration obtained u/s 12A (Added w.e.f. 1-6-2010) However, the commissioner cannot utilize its power to cancel registration on basis of a search and seizure proceeding, prior to completion of the search and seizure assessment -Kalinga Inst. of Ind. Techn.v.CIT(2008)23SOT74 (Cuttack).

New sub section 4 as inserted w.e.f. 01-04-2014 provides that where a trust has been granted registration U/s. 12A or 12AA and subsequently it is noticed that the activities of the trust are not carried out in a manner that the provision of section 11 & 12 do not apply to exclude either whole or any part of the income of the such trust due to operation of section 13 (1) then the Principal Commissioner or Commissioner may by order cancel the registration of such trust. However, registration shall not be cancelled if the trust proves that there was a reasonable cause for the activities carried out in the said manner.
FRESH REGISTRATION:

Till 31-03-2018, Registration under section 12A/12AA was a one time process during the life time of the trust. No renewal or fresh registration of trust was required. Only an information to the concerned CIT was required in case there was any change in the object of the trust.

Following clause (ab) has been inserted after clause (aa) of sub-section (1) of section 12A by the Finance Act, 2017, w.e.f. 1-4-2018:

“the person in receipt of the income has made an application for registration of the trust or institution, in a case where a trust or an institution has been granted registration under section 12AA or has obtained registration at any time under section 12A [as it stood before its amendment by the Finance (No. 2) Act, 1996 (33 of 1996)], and, subsequently, it has adopted or undertaken modifications of the objects which do not conform to the conditions of registration, in the prescribed form and manner, within a period of thirty days from the date of said adoption or modification, to the Principal Commissioner or Commissioner and such trust or institution is registered under section 12AA”

It means where a trust or an institution has been granted registration and subsequently it has adopted or undertaken modifications of the objects which do not conform to the conditions of registration, it shall be required to obtain fresh registration by making an application within a period of thirty days from the date of such adoption or modifications of the objects in the prescribed form and manner.
FORFEITURE OF EXEMPTION - SECTION – 13

Income for private religious purpose – Section 13(1)(a)
Any part of income from property held under a trust for private religious purpose which does not endure for the benefit of the public is not eligible for exemption under section 11 or 12.

Income for benefit of particular religious community (Sec. 13 (1) (b))
Entire income of the charitable trust / institutions (established on or after April 1,1962) created for the benefit of any particular religious community or caste is not eligible for exemption under section 11 or 12. But the Nagpur Tribunal has decided in the case of Shiv Mandir Devsthan Panch Committee Sansthan v. CIT [2013] that, Worshiping of Lord Shiva, Hanumanji, Goddess Durga and maintaining of temple cannot be regarded as advancement, support or propagation of a particular religion.

There are however certain exceptions to above as provided in the proviso and second proviso to the section such as :
1. The trust specially created for religious purpose ;
2. The trust created before commencement of this act ;
3. The trust’s objects are composite i.e. charitable as well as religious ;
4. The trust created for the benefit of particular community or caste such as : Scheduled Caste, Schedules Tribes, Backward Class, women and children
FORFEITURE OF EXEMPTION - SECTION – 13 …….

When investment and deposits are made in violation of section 11(5). Section 13(1)(d)

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

However there are certain exceptions to section 13(1)(d):

1. Any assets held by the trust or institution where such assets form part of the corpus of the trust as on June 1, 1973.
2. Any accretion to the shares of the company forming part of the corpus of the trust or institution as on June 1, 1973, where such accretion arise by way of allotment of bonus shares.
3. Debentures acquired by the trust of any Company or Corporation acquired before 1st day of March 1983.
4. Acceptance of donations in kind or acquired any asset which is not in conformity of the provisions of section 11(5).
5. Any funds representing the profits and gains of business, being profits and gains of any previous year relevant to the assessment year commencing on the 1st day of April 1984 or any subsequent assessment year if the trust maintains separate books of account in respect of such business.
FORFEITURE OF EXEMPTION - SECTION – 13 ……

Relevant circulars issued by the CBDT:

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

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

iii) Investment of Trust Funds – Amendment of proviso to cl (d) of sub-s (1) of S13 by Finance Act, 1992, Circular No. 636, dt. 31-8-1992

FORFEITURE OF EXEMPTION - SECTION – 13 …….

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

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

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

Relevant case laws :
- Champa Charitable Trust v/s CIT (1995) 214 ITR 764 (Bom)
- ACIT v/s Indicula Trust Society (2012) 21 taxman.com 144 (Delhi Trib)
- DDIT (Exemption) – 2, Hyderabad v/s Society for the Poor and Oppressed (2010) 125 ITD 190 (Hyd)
- Sarladevi Sarabhai Trust No. 13 v/s ITO (1991) 36 ITD 376
- CIT v/s Birla Charity Trust (1988) 170 ITR 150 (cal)
Section 13(2) specifies following categories of transactions which would be deemed to be used or application of the income or property of the trust for the benefit of excluded persons referred to in section 13 (3).

- (a) Lending of the income or property of the trust or institutions to any of the specified persons without either adequate security or adequate interest or both – 13 (2) (a)
- (b) Making available land, building or other property of the trust or institution for the use of the any of the specified persons without charging adequate rent or other compensation – 13 (2) (b)
- (c) Payment of excessive remuneration to any of the specified persons for services rendered by him to the trust or institutions – 13 (2) (c)
- (d) Making the services of the trust or institution available to any of the specified persons without adequate remuneration or other compensation – 13 (2) (d)
- (e) Purchase of shares, securities or other properties for the trust or institutions from any of the specified persons for more than adequate consideration – 13(2) (e)
- (f) Sale of shares, securities or other property of the trust or institution to any of the specified persons for less than adequate consideration – 13 (2) (f)
- (g) Diversion of substantial portion of the income or property of the trust or institution in favor of the specified persons – 13 (2) (g)
- (h) Investment of the trust funds in any concern in which any of the specified persons has a substantial interest – 13 (2) (h)
For the purpose of section 13 the following are specified persons - section 13 (3):

- a. The author of the trust or founder of the institution;
- b. Any person who has made a total contribution (up to the end of the relevant previous year) of an amount exceeding Rs. 50,000 (substantial contributor);
- c. Any member of the HUF where such author or founder is an HUF;
- d. Any trustee of the trust or manager (by whatever name called) of the institution;
- e. Any relative of such author, founder, person, member, trustee or manager as aforesaid; and
- f. Any concern in which any of the persons referred to above has a substantial interest.
ANONYMOUS DONATIONS - SECTION – 115BBC

This section provides that where total income of the assessee being a person in receipt of income on behalf of:-

- (a) Any education institution referred to in sub clause (iiiad) & (vi) of section 10 (23C)
- (b) Any hospital/institution referred to in sub-clause (iiiae) & (viA),
- (c) Any fund or trust or institution referred to in sub clause (iv) & (v) of section10 (23C) or
- (d) Any trust or institution referred to in section 11. The Income Tax is payable:

The amount of income-tax calculated at the rate of thirty per cent on the aggregate of anonymous donations received in excess of the higher of the following namely:-

(a) Five percent of the total donations received by the assessee; or
(b) One lakh rupees

With effect from 01-04-2015, a clause ii) has also been inserted in sub section 1 as under:

“The amount of income-tax with which the assessee would have been chargeable had his total income been reduced by the aggregate of anonymous donations received in excess of the amount referred to in sub clause (A) or Sub Clause (B) of clause (i), as the case may be”.

ANONYMOUS DONATIONS - SECTION – 115BBC

Meaning of Anonymous Donation:

The term “anonymous donation” means any voluntary contribution referred to in section 2(24)(iia), where the person receiving such contribution does not maintain the record of the identity indicating the name and address of person making such contribution and such other particulars as may be prescribed.

Sub-Section (2) of section 115 BBC provides that the exclusion which are:

- (i) Any trust or institution created or established wholly for religious purposes
- (ii) Any trust or institutions created or established wholly for religious and charitable purposes other than any anonymous donation made with a specific direction that such donation is for any university or other educational institution or any Hospital or other medical institution run by such trust or institution.
NEW CHAPTER XII-EC
TAX ON ACCRETED INCOME OF CERTAIN TRUST OR INSTITUTIONS

Finance Act, 2016 inserted a new chapter XII-EC to the Income tax Act, 1961 to tax accreted income by introducing sections 115TD, 115TE and 115TF:

Section 115TD (1) is a charging provision and lays down “charge of additional income tax” on prescribed situations occurring which are as under:

- i) Conversion of the trust into other entity which is not eligible for grant of registration U/s. 12AA
- ii) Merger with any entity which does not have objects similar to that of the merging trust, and is not registered under section 12AA
- iii) Failure to transfer assets on dissolution of the trust / institution to an entity registered U/s. 12AA, 10(23C)(iv), 10(23C)(v), 10(23C)(vi) and 10(23C)(via), within a period of 12 months from the end of the month in which dissolution takes place. On one of the above mentioned events occurring, the trust is liable to pay tax on “Accreted Income” at “maximum marginal rate (MMR)”
Section 115TD (2) : Defines the concept of accreted income which is “fair market value” of total asset on specified date as exceeding total liabilities. The meaning of specified date is given in explanation and one must refer to the same for calculating accreted income on the said date.

Section 115TD (3) : Enunciates a concept of “Deemed Conversion of a trust to an entity not registered U/s. 12AA” and the specified events are as under:

- i) Registration granted U/s. 12AA to the trust has been cancelled.
- ii) Modification of objects is not in consonance with original registration conditions and an application for fresh registration has not been made or has been made but rejected. It is pertinent to note that if one of the events take place in the year then it is deemed that the trust is converted into an entity not registered U/s. 12AA and charging provision of Sec 115TD(1) will be attracted.

Section 115TD (4) is a clarification in nature which clearly lays down that additional income tax U/s. 115TD is to be paid notwithstanding the fact that income tax is not paid or payable under normal provisions of the act.
Section 115TD (5) : The principal officer or the trustee of the trust or the institution, as the case may be, and the trust or the institution shall also be liable to pay the tax on accreted income to the credit of the Central Government within fourteen days from
i) The date on which,
   a) The period for filing appeal under section 253 against the order cancelling the registration expires and no appeal has been filed by the trust or the institution; or
   b) The order in any appeal, confirming the cancellation of the registration, is received by the trust or institution,
   In case referred to in clause (i) of sub section (3);
ii) The end of the previous year in a case referred to in sub-clause (a) of clause (ii) of sub section (3);
iii) The date on which,
   a) The period for filing appeal under section 253 against the order rejecting the application expires and no appeal has been filed by the trust or the institution; or
   b) The order in any appeal, confirming the cancellation of the application, is received by the trust or institution,
   In a case referred to in sub clause (b) of clause (ii) of sub section (3);
iv) The date of merger in a case referred to in clause (b) of sub section (1);
v) The date on which the period of twelve months referred to in clause (c) of sub section (1) expires.
**NEW CHAPTER XII-EC ……**

- **Section 115TD (6)**: Provides that the tax on accreted income shall be treated as the final tax on income and no further credit shall be claimed in regard to the same.

- **Section 115TD (7)**: Does not allow deduction of income tax paid U/s. 115TD to any person, trust or institution under any provisions of the income tax act, 1961.

- **Section 115TE**: Charges simple interest @1% on delayed payment. The interest is to be calculated from expiry of 14 days in which payment to be made till actual date of payment.

- **Section 115TF**: Provides that the trust is deemed to be “assesses in default” if the tax is not paid under Sec 115TD.
**Miscellaneous provisions:**

- **TDS provisions:** TDS provisions will be applicable as other tax payers. No exemption from TDS provisions is available to trust or institutions availing exemption of income tax.

- **Filing of Income Tax Return:** filing of income tax return was mandatory to all the trust. However, w.e.f. 01-04-2018, filing of income tax return within the time prescribed under section 139(4A) is mandatory to claim benefit of section 12A. Finance Act, 2017 has made amendments accordingly in section 12A.

  Following clause (ba) has been inserted after clause (b) of sub-section (1) of section 12A by the Finance Act, 2017, w.e.f. 1-4-2018:

  (ba) the person in receipt of the income has furnished the return of income for the previous year in accordance with the provisions of sub-section (4A) of section 139, within the time allowed under that section.
Meaning of AOP:
When two or more persons join for a common purpose with a view to earn an income, it is called an AOP, as upheld in the case of CIT v/s Indira Balkrishna (1960) 39 ITR 546 (SC) and G. Murugesan & Brothers v/s CIT [1973] 88 ITR 432 (SC).

Meaning of BOI:
When a group of individuals come together for a common purpose, it is normally termed as BOI.

BOI means a set of individuals who carry an activity with the object of earning an income as held in the cases of Deccan Wine & General Stores v/s Commissioner of Income Tax, A.P. (1977) 106 ITR 111 (AP) and Meera & Company, etc. v/s Commissioner of Income Tax (1997) 224 ITR 0635 (SC).
How income determined in case of AOP/BOI:

Section 167B of the Income Tax Act, 1961 deals with the taxation of AOP / BOI. There are two situations under which income can be assessed:

- a) Where the individual share of the members of an AOP or BOI is indeterminate or unknown. Section 167B(1)

- b) Where the individual share of the members of an AOP or BOI is known. Section 167B(2)
ASSESSMENT OF AOP/BOI CONT...

Taxability of AOP/BOI where share of the members is unknown:

Section 167 B (1) provides that when the individual share of the members of an AOP/BOI is indeterminate or unknown, then tax will be charged on the total income of the AOP/BOI at the maximum marginal rate i.e. 30%+SC+EC.

However, there is proviso to this section which provides that where the total income of any member of such AOP/BOI is chargeable to tax at a rate which is higher than the maximum marginal rate, then the tax charged on the total of the income of the AOP/BOI will be at the higher rate.
ASSESSMENT OF AOP/BOI CONT...

Taxability of AOP/BOI where share of the members is known:

Section 167 B (2) provides that where that the individual share of the members of an AOP / BOI is known or determinate, then three situations arise, which are as follows:

**Situation 1**: where total income of **any** member **exceeds** maximum amount not chargeable to tax, then the tax shall be charged on the total income of the AOP / BOI at the **maximum marginal rate**.

**Situation 2**: where total income of **any** member does not **exceeds** maximum amount not chargeable to tax, then the tax shall be charged on the total income of the AOP / BOI at the rates **applicable to individuals**.

**Situation 3**: where the total income of any member of the AOP / BOI is chargeable to tax at a rate which is higher than the maximum marginal rate, then,

- on that portion of the total income, tax will be charged at **such higher rate**;
- on the balance portion of the total income, tax will be charged at **Maximum Marginal Rate**
ASSESSMENT OF AOP/BOI- OTHER ISSUES

Whether remuneration and interest paid members is deductible while computing the income of AOP:

In respect of interest, salary, bonus, commission or remuneration paid to any member of the AOP / BOI, the same shall be disallowed while computing the income of AOP in accordance with S 40 (ba) of the Income Tax Act, 1961.

It is to be noted that only the net interest is disallowable in view of the explanation provided in Explanations 1 and 2 to S 40 (ba).

Whether interest paid in a representative capacity is disallowed:

When an interest is paid in representative capacity, then such interest shall not be allowed.

What is the meaning of maximum marginal rate (MMR):

The MMR is defined in S 2 (29C) of the Income Tax Act, 1961 which is as follows:

“maximum marginal rate’ means the rate of income-tax (including surcharge on income-tax, if any) applicable in relation to the highest slab of income in the case of an individual, Associations of Persons or, as the case may be, Body of Individuals as specified in the Finance Act of the relevant year.”
ASSESSMENT OF AOP/BOI - TAXABILITY OF SHARE OF INCOME IN THE HANDS OF THE MEMBERS: SECTION 86

The assessment of the members of AOP or BOI depends on whether the AOP or BOI is chargeable to tax at the maximum marginal rate or at slab rate or is not chargeable to tax at all. Tax-treatment in the three cases is discussed below:

- Where AOP or BOI is chargeable to tax at a **maximum marginal rate** or any higher rate, the share of profit of a member is exempt from tax. Thus, it is **not to be included** in the total income of the member [Sec. 86(a)].

- AOP or BOI is taxed **at slab rates**, the share of profit of a member from AOP or BOI is to be included in the total income of the member **only for rate purposes**. The member is entitled to a rebate of tax on the entire share of profit at the average rate of tax applicable to total income. [Sec. 86(b)].

- Where AOP or BOI is not **chargeable to tax at all**, the share of profit of a member from AOP or BOI is **included in his total income** and he will pay tax on it. He is not entitled to any rebate of tax on such profits [Proviso to Sec. 86(b)].
**MISCELLANEOUS PROVISIONS:**

- **Applicability of Section 14A**: The provision of section 14A are not applicable to the charitable trusts since the exemptions granted are under chapter III of the income tax act which is applicable to “incomes which do not form part of total income” and deals with sections 10 to 13.

- **Applicability of Section 40 (a) (ia)**: The provisions of section 40 (a) (ia) were not applicable to charitable trust till now on the premises that since this section is applicable to chapter IV of the income tax act which is applicable to “Computation of business income”.

  Finance Act, 2018 has inserted new proviso in section 10(23C) after the 12th proviso with effect from the assessment year 2019-2020. It provides that for the purpose of determining application of income under section 10(23C)(iv)/(v)/(vi)/(via), the provisions of section sections 40(a)(ia) and 40A(3)/(3A), shall , mutatis mutandis, apply as they in computing the income chargeable under the head “Profit and gains of business and profession”. Moreover , a new Explanation has been inserted in section 11 so as to provide similar restrictions as above on entries converted by section 11 in respect of application.

**Hence provisions of section 40(a)(ia) will be applicable to trust or institutions as well effective from AY 2019-20.**
OTHER RELEVANT AMENDMENTS:

A new clause (x) in section 56(2) has been inserted by Finance Act, 2017 to broaden the scope and to cover the charitable trust under its ambit 56(2)(x).

Consequently, now if any property is being received by the charitable trust or by any private trust for inadequate consideration or without consideration in excess of Rs. 50,000 then it will chargeable to income-tax under the head “Income from other sources” under section 56(2)(x) in the hands of the recipient trust.

However, this newly inserted clause(x) in section 56 shall not apply to any sum of money or any property received:

- 1) from any fund or foundation or university or other educational institution or hospital or other medical institution or any trust or institution referred to in clause (23C) of section 10.
- 2) from or by any trust or institution registered under section 12A or section 12AA.
- 3) by 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.
- 4) from an individual by a trust created or established solely for the benefit of relative of the individual.

Thus, it is important to note that above mentioned trusts and institutions are out of the ambit of Section 56(2)(x). The trusts registered u/s 12A and specified institutions registered u/s 10(23C) are excluded from this clause so that Donations received by these trusts are not get taxed.

Amendment in Section 80G.

Finance Act 2017 amended section 80G so as to provide that no deduction shall be allowed under the section 80G in respect of donation of any sum exceeding Rs. 2,000/- unless such some is paid by any mode other than cash. Earlier this limit was Rs. 10,000/-