

Recent controversies in 12A, 80G & 115TD of ITA, 1961

- CA Kishor Phadke



Index

- 1. Background
- 2. Complex law
- 3. Complex court decisions
- 4. Complicated procedure
- 5. Emerging principles
- 6. Registration u/s 12A / 80G
- 7. Income of charity
- 8. Application of income
- 9. Accumulation / Carry forward of income
- 10. Compliances
- 11. Taxation
 - a) 115BBC
 - B) 115BBI
 - C) 115TD

1. Background

- *In and around Pune, there exist thousands of charitable institutions (say 10,000)*
- *Now, till year 2017-18, all these entities were enjoying exemptions from ITA subject to some compliances*
- *New, 2 step (provisional + permanent) scheme of registration was introduced*
- *Now, as of date, majority of these trusts of have lost their registration*
- *Massive difficulties faced by trusts*
- *Deadlines for compliances extended 3 times as follows -*
 - *Circular dt 1/11/2022 - Time extended till 25/11/2022*
 - *Circular dt 24/5/2023 - Time extended till 30/9/2023*
 - *Circular dt 25/4/2024 - Time extended till 30/6/2024*
- *Despite these extensions, many trusts are still finding it “**tough**” to ensure compliances*
- ***Here is a recent RTI report which is an eye-opener***

1. Background

कार्यालय केन्द्रिय जन सूचना अधिकारी तथा आयकर अधिकारी ,(छूट)(मुख्या)पुणे कमरा क्रमजिल्हा तीसरी ,320. सी विंगस्वार्गट ,इमारत पीएमटी , पुणे 411037	भारत सरकार Govt. of India  सत्यमेव जयते	Office of the Central Public Information Officer & Income Tax Officer(HQ)(Exemptions), Pune Room No. 320, 3 rd Floor, C Wing, PMT Building Swargate, Pune - 411037
No.PN/CIT (E)/RTI/2023-24/ 5502		Date: 19/02/2024
Name and address of the applicant	Shri Manakchand Laxman Baheti, Harihar Apartment, 728/B, Sadashiv peth, Kumthekar Rad,Pin :411030	
Date of receipt of application	05/02/2024	
Date of order	19/02/2024	
<u>ORDER U/S 7(1) OF THE RIGHT TO INFORMATION ACT, 2005</u>		
The applicant has filed an application under the Right to Information Act, 2005 which has been received in this office on 06/02/2024 from the O/o the DGIT (Inv.), Pune, for furnishing of information. The details are as under:		
Sr.No	Information sought	Decision
1.	Information about 80G and 12 A approval for the period of 01/04/2022 to 31/12/2023. Please provide the following information: a) No. of applications received. b) No. of applications approved. c) No. of application rejected d) Balance pending for disposal	The data sought by the applicant in respect of 12A and 80 G application for the period of 01/04/2022 to 31/12/2023 in respect of the charge of CIT(E), Pune is as under: a) No. of applications received-8064 b) No. of application approved-1036 c) No. of applications rejected-4786 d) Balance pending for disposal-2242
2. The applicant may prefer appeal under section 19 of the Right to Information Act, 2005 against this order before the First Appellate Authority i.e., Commissioner of Income Tax, (Exemptions), C wing, PMT Building, 3rd Floor, Swargate, Pune-411037, within 30 days from the receipt of this order.		
 (Shripad D. Palekar)		

2. Complex law - Section 10(23C)

- 🗂 In section 10(23C), there are about 15 categories of charities, segregated in 4 families, and to which, different regimes and different provisions apply
- 🗂 Here, In there are 25 provisos', 15 Explanations and many sub-clauses
- 🗂 Which proviso / explanation, applies to which category, is quite confusing
- 🗂 Difficult to locate, which clause applies to which situation ..
- 🗂 ***For various families residing in this section, refer to Annexure-1***
- 🗂 ***This section deserves to be simplified ..***

2. Complex law - Section 11 + 12 + 13

- 🗂️ Very complex language, with 26 provisos and 20 Explanations apart from many sections & sub-sections
- 🗂️ A challenge to decipher, which income is taxable and which is exempt ..
- 🗂️ *These sections deserve to be simplified ..*
- 🗂️ *There ought to be segregation for*
 - 🗂️ *“revenue”*
 - 🗂️ *“applications”*
 - 🗂️ *“exemptions”*
 - 🗂️ *“accumulation”*

2. Complex law - Sections 12A / 12AA / 12AB

- 📌 Many assessments are ongoing for past years registrations u/s 12A & 12AA
- 📌 Further, powers for grant / refusal of registration u/s 12AB are increased substantially
- 📌 Challenging situations are emerging where, a charity is good u/s 12A / 12AA but, disqualified for 12AB ..
- 📌 ***This confusion ought to be removed***

2. Complex law - Section 11 to section 13

- ☺ Consider a case of a charity, which exists from 1/4/2010 & which has not availed 12A registration in the old regime
- ☺ In the new regime, it should opt for sub-clause (vi)(B) ideally .. (though many have chosen wrong sub-clauses..)
- ☺ (Say), it applied for provisional registration on 20/2/22, and which was allowed for 3 years from 1/4/22 to 31/3/25
- ☺ Assuming that, it has rightly chosen sub-clause (vi)(B) for provisional one, and now, it wants to opt for clause (iii) for permanent, obscure wording of sub-clause (iii) to section 12A(1)(ac) comes in play, which says
 - “ ...at least six months prior to expiry of period of provisional registration or within six months of commencement of activities, whichever is earlier”
- ☺ First deadline date will be 30/9/24 (i.e. six months prior to 31/3/25) ... yet to be reached ...
- ☺ Second deadline will be 30/9/2010 (i.e. six months from the date of commencement of activities) Already over ..
- ☺ Hence, the clause whichever earlier can never be reached ...
- ☺ This confusion can lead to selection of wrong sub-clauses, leading to further complications ..
- ☺ **Suggestion - This anomaly needs to be removed, which has not been acted upon despite point out..**

3. Complex court decision - New Nobel

🗨️ On 19/10/2022, two decisions pronounced by Honorable Supreme Court

🗨️ 1st was the New Nobel decision related to section 10(23C)

🗨️ In this decision, Supreme Court observed that a charity, claiming exemption u/s 10(23C) ought to comply with the following phrase, strictly

“...existing solely for educational purpose and not for the purpose of profit...”

🗨️ It is observed therein that purposes little away from education violate the section

🗨️ As a result, many charities started opting for 12A registration, assuming that, this route is little easier ..

🗨️ ***Such steps lead to a chaos and confusion .. Clarification is awaited from CBDT***

3. Complex court decision - AUDA

- 📌 2nd decision was that of Ahmedabad Urban Development Authority (i.e. AUDA)
- 📌 Herein, it was provided that a charity earning mark-up / margin of 20% over its costs will lead to violation of section 2(15) i.e. charitable purpose
- 📌 Per se, 20% mark-up test is not emanating from the express language of the section
- 📌 In fact, from the section phraseology, receipts test (i.e. 20% of commercial receipts) emerges
- 📌 That too, 20% test is to be applied only for GPUs and not other non-GPU charities
- 📌 But, with mark-up test, situation has changed dramatically
- 📌 I-T officials have started applying this test to almost all situations .. Leading to challenges ..
- 📌 **Clarification ought to be issued by CBDT**

3. Complex court decision - AUDA

- ☹️ As per the AUDA decision of Honorable apex court, a charity may find itself as pursuing an object other than “charitable purpose” if, mark-up exceeds 20% of costs
- ☹️ Now, in many cases, mark-up could be a result of compelling factors like, stipulate fees fixed by authorities, etc.
- ☹️ Mark-up which may evolve at the end of the year may not be envisaged at the point of charge ..
- ☹️ There could be many loss-making activities for which, some income yielding activities may be taken up ..
- ☹️ How to compute the mark-up for testing AUDA ratio is a challenge .. Whether overall activity or, specific activity, or group of such specific activities ..
- ☹️ Whether to include passive incomes (say interest or rent) in this working or not ... another challenge
- ☹️ **Practically, very difficult to apply AUDA ratio**

3. Complex court decision - AUDA

☺ Consider a hypo case of two hospitals .. (and assuming that AUDA ratio of 20% is applicable to hospitals as well..)

☺ 1st Hospital is (say) a posh Hospital, providing services with

- All latest techniques, top notched surgeons .. Like RUBY HALL ..
- Which charges Rs. 5 lacs for a BYPASS surgery to patient ...
- (and let us assume that, overall mark-up in this like RUBY HALL Hospital is 10% of costs)

☺ 2nd Hospital is (say) an old Hospital, providing services with

- Old equipment and machines, Old surgeons (who do not take fat fees and charge minimum fees) and
- which charges Rs. 2 lacs for a BYPASS surgery to patient
- (and let us assume that, overall mark-up in this Old Hospital is 25%)

☺ As per AUDA ratio, Hospital-2 is out of eligibility of 2(15) while the Posh Hospital is eligible

☺ And from Patients perspective, it is Hospital-2 which has really done a charity

☺ **How to solve paradox ... Whether AUDA ratio is all-pervasive really ?**

3. Complex court decision - Baba Banda Bahadur Educational Trust

- 🏠 This was a educational charity, coverable u/s 10(23C)(vi)
- 🏠 For claiming exemption, approval sought for from CIT
- 🏠 CIT rejected petition, observing that, the entity
 - 🏠 a) earns 68% profit (before depreciation)
 - 🏠 b) earns 44% net profit (after depreciation)
- 🏠 Rejection of CIT confirmed by SC

3. Complex court decision - Baba Banda Bahadur Educational Trust

- 🏠 This was an educational charity, which can be covered u/s 10(23C)(vi)
- 🏠 For claiming exemption, approval sought for from CIT
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4. Complicated procedure

- ☹️ All charities have to proceed through the I-T portal, full of drop-down options
- ☹️ Many charities tend to select a wrong drop-down option, due to multiplicity of options ..
- ☹️ Difference between the drop-down options is difficult to decipher and, as such, not deep-rooted ..
- ☹️ Lead to many wrong selections ..
- ☹️ Leads to many cases of technical rejections ..
- ☹️ Many charities, eligible for permanent registration of five years, have, opted for provisional registrations of three years, and vice-versa ..
- ☹️ ***Difficult to make a choice ...***

4. Complicated procedure

- 🗣️ At times, to correct and overcome earlier wrong / irregular registration applications, new applications are required to be made ..
- 🗣️ In such cases, one is required to surrender the earlier registration ..
- 🗣️ ***This leads to complex decision***
- 🗣️ At times, due to 12A registration, earlier 10(23C) approval gets automatically cancelled ...and vice versa ...
- 🗣️ Despite eligibility u/s 10(23C)(iiiab) i.e. grants > 50% of total revenue, charities continue to join 12A registration stream ..
- 🗣️ ***All these complexities need to be resolved and clarified aptly***

4. Complicated procedure

- 📄 For all applications for registration u/s 12A and u/s 80-G, charities get stereotyped letters from I-T office
- 📄 Many clauses of the I-T letters are standard information, and typically, not applicable to the charities ..
- 📄 Yet, compliance of the same becomes compulsory ..
- 📄 ***Only pertinent and related questions related to activities ought to be asked ..***

5. Emerging principles

- 👤 Earning of large profits / stacking of large funds in banks is .. anti charity
- 👤 Charity funds are to be used for object (and not accumulated), as early as possible
- 👤 Maximum upto 20% Mark-up for GPU charities is permissible
- 👤 CORPUS and LOAN are separate than “income” which needs to be applies
- 👤 Deeming computations of various heads of income are N.A. to charity (e.g. Repairs allowance, Notional Rent, 43B mechanism, 50C mechanism, etc. etc.
- 👤 Now made explicit (for Application), CASH method of Accounting is applicable
- 👤 Deficit carry forward is not plausible in Charity

6.Registration u/s 12A / 80G

- 🗨️ As per the RTI, it appears, about 5000 charities in Pune have been denied 12A Regt ..
- 🗨️ Ratio of denial of 12A registration is over 80% of Applications disposed off
- 🗨️ Many of these denial cases are such charities, which were granted 12A earlier ..
- 🗨️ Cancellation of 12A now, leads to automatic invocation of section 115TD (Accretion of income)...unless litigated by the charity ..
- 🗨️ If such proceedings are put into service, it will be impossible to meet emanating tax demands
- 🗨️ ***Charities will be forced to dispose off their assets .. And trustees will be frightened ..***
- 🗨️ ***I-T department may become aggressive on issuance of 115TD notices ...***

6.Registration u/s 12A / 80G

🗨️ In last 2-3 years, many reasons are told / used by I-T officials, for denying 12A registration ..

🗨️ Here are some interesting examples ...

🗨️ For an educational institution, which wanted to construct a school, I-T asked for details of payments for construction, etc. final denial was for the reason that, *tenders were not invited while awarding construction contract* ...

🗨️ For a GPU charity which was collecting funds from MNCs and causing distribution of medicines / food, etc. in slums, despite giving all details ...final denial was for the reason that, *PHOTOGRAPHS of actual distribution were not given* ..

🗨️ For a religious trust (a temple), when asked to explain activity, it was explained that, amounts are spent on social causes ...one of such cause was ...PLANTATION OF TREESCIT refused registration by saying that, permission for tree plantation was not given

🗨️ ... many such empty / irrelevant / unwanted reasons are aired for denial of registration ...

🗨️ *Such reasons ought not to lead to refusal of registration ..*

🗨️ *At the max, such issues could be tested in ASSESSMENT ?*

7. Income of charity

- ☹️ Inflow of funds is different than income for a charity

- ☹️ Consider a quick chart given in **Annexure-2**

- ☹️ CORPUS is special type of inflow now (especially from 1/4/21 onwards)
 - a) Applications out of CORPUS, not deductible against normal income
 - b) CORPUS to be invested separately
 - c) CORPUS can be re-created
 - d) But, only in next 5 years, and after ensuring compliance of non-violation of other sections

- ☹️ LOAN is a separate type of inflow
 - a) Application out of loan is not deductible
 - b) Loan repayment out of income is deductible
 - c) Period of loan should be less than 5 years
 - d) Loan usage ought to ensure non-violation of other sections

7. Income of charity

- 📌 Reporting income correctly in Return of Income is a challenge
- 📌 If any error as regards accuracy of registration number or, wrong selection of drop-down option, or, mismatch in figures, etc. leads to taxation of GROSS revenue
- 📌 Mistakes of whatever nature, are open for correction / improvement
- 📌 But, time for correction of such mistakes is longish in many cases
- 📌 Taxation of Gross revenue in the mean-time leads to massive tax liabilities and relating agonies ...
- 📌 ***Aim of tax law relates procedure ought to be confined to taxation of “income” and not taxation of Gross Revenue ...***

8. Applications

- 👤 Now, it is provided that, Application of income of a charity will be based on actual outflow, and not “incurrence of expenditure”
- 👤 No similar clarification / provision introduced for revenue / income
- 👤 Many charities are having HYBRID system now, i.e. CASH for Applications / expenses, and, ACCRUAL for Income / revenue
- 👤 Like with Like comparison is logical, but, not expressly provided for ...
- 👤 Clear mismatch ..
- 👤 **Occult workings follow, which may lead to errors .. and uncalled for taxation ..**

8. Applications

- ☹ Applications outside India ... not deductible
- ☹ Only cash expenses are eligible Applications
- ☹ For 12A registered entities, even CAPEX is eligible Application
- ☹ Donations out of past Accumulations ... not deductible
- ☹ Donations out of current year's income is deductible, but only 85% of donated amt
- ☹ Provisions of 40A(3) / 40(a)(ia) apply to charity
- ☹ Application out of LOANS not deductible
- ☹ Loan repayment is eligible Accumulation
- ☹ Spending out of CORPUS is not deductible Application
- ☹ Creation of CORPUS is eligible deductible
- ☹ Once CAPEX claimed as Application, depreciation is not eligible Application

9. Accumulation / Carry forward of income

- 🗂️ Two avenues are available for such carry forward of income
- 🗂️ 1st is by filing form no. 9A and carrying forward income to next year
- 🗂️ 2nd method is by filing form 10 and seeking permission to apply income over next years (max 5 years)
- 🗂️ Both the avenues are marred by complications and investment in 11(5) manner is must
- 🗂️ Tax authorities scrutinize funds movement critically
- 🗂️ Hence, better to liquidate old accumulations for their usage in current year ..
- 🗂️ **Shifting of cap method**

10. Compliances

- 📄 Crucial that, returns must be filed in time, If not, exemption claims are lost
- 📄 Crucial that, form 10B and 10BB (though require large data from Auditors ..) must be in time
- 📄 These forms are e-filed ..
- 📄 Complex process of 1st filing by auditor and then their acceptance by assessee
- 📄 Reporting in these forms create many challenges for Assessee charities ..
- 📄 Example-1 - Auditor may consider some donations as “Anonymous Donations” though the charity may consider otherwise ..
- 📄 Example-2 - Auditor may consider some activities of the charity as a “business / trade / commerce” and report accordingly ..though charity may consider otherwise ..

11.Taxation

- ☺ Taxation happens in following manner
- ☺ U/s 115BBC - Anonymous donations
- ☺ U/s 115BBI - Specified incomes
- ☺ U/s 115TD - Accretion of income
- ☺ Residuary income at MMR

11. Taxation

- ☹️ 115BBC - Anonymous donations
- ☹️ Where names and addresses of donors NA
- ☹️ Even if such data available, same needs to be authentic
- ☹️ Divided court rulings on this point

11. Taxation

- 📁 115BBI - Specified incomes
- 📁 For violations of 40A(3) / 40(a)(ia), charity has to pay 30% tax
- 📁 **Reversed deduction in case of payment of TDS not specified**
- 📁 If accumulated / carried forward income not used for specified purpose, pay 30% tax
- 📁 If accumulation procedures not ensured (like 11(5), etc.), pay 30%
- 📁 **Very stringent provisions**

11.Taxation

☺ 115TD - Accretion of incomes

☺ **Draconian provision**

☺ Conversion of charity in not-charity form or, merger of charity in non-12AB entity will trigger 115TD

☺ If 12AA / 12AB is cancelled, 115TD is triggered

☺ If 12A / 12AB registration not applies in time, 115TD triggered

☺ If 12AB application is rejected, 115TD is triggered

☺ **Very stringent provisions**

11.Taxation

- 115TD - Accretion of incomes
- Purpose for introduction of 115TD given in Annexure-3.
- Accretion of income = FMV of assets - liabilities of charity**
- Tax has to be paid within 14 days of trigger point
- Trigger point is last date of filing of appeal in case of cancellation / rejection / non-application of registration
- Moment 12A / 12AA / 12AB registration is disturbed / not availed, liability is fastened
- This liability is almost impossible to meet
- Solutions - Challenge to this harsh provision on a unanimous basis

11. Taxation

- 🕒 115TD - Accretion of incomes - Few reasons of challenge
- 🕒 Accretion of income is totally contrary to concept of “real income”
- 🕒 One can't make profit / income out of oneself
- 🕒 Error in drafting - i.e. non-grant of taxes paid in past
- 🕒 Error in concept - e.g. Accreted income could be far more than exempted income (say land appreciation case)
- 🕒 Along with the charity, even the trustees or the principal officers also liable for such tax
- 🕒 If tax on Accreted income not paid, all persons (i.e. charity + principal officers + trustees) to be assesseees in default
- 🕒 Similar provisions exist in new Income-tax bill of 2025 (clause 352)

12. Some challenging situations of rejection of 12A

- Dagdusheth Ganapati case - Clause for construction of temple not existing in deed
- Ayyappa trust - Permission for Plantation in some land not availed
- Amit Kamble trust - Food collected & distributed in COVID period, not accounted for
- Uttam Energy - Letter from Grampanchayat for permission of building approval in rural area invalid, in absence of approval of Development Authority
- Amba Trust - Full copy of resolution not given (only limited pages given) + Three tenders for CAPEX not taken
- I-excel Community - Activity stated by note + ledgers is insufficient since, photographs not filed
- Surat Halali - Mismatch in name of charity in form 10A as against name in PAN database
- **(Pro-active role in granting 12A is missing ..on contrary, some reason is found to reject application...STRANGE)**

12. Compassionate views of courts

- Compliances made by “a” - Corrupted in e-filing process - considered favorably and set-aside - Kalpakta
- If 15 days time not given for compliances, matter to be sent back for re-adjudication - Chaitanya
- Loans taken by trust without permission of Charity Commissioner - Compassionate view - GKR Charities
- Loans taken without permission of Charity Commissioner - Not fatal for 12A - Prerana
- Minor changes in trust deed (which were not approved) - No reason to reject 12A - Sarnayalam
- Absence of activities does not bar grant of 12A registration - International Health Care
- Period of regular registration - whichever is earlier = whichever is later - R L Education
- Selection of wrong clause in form 10A / 10AB does not disentitle registration - Help for Children