BOMBAY CHARTERED ACCOUNTANTS' SOCIETY

Pre - Budget Memorandum

2023-2024

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BOMBAY CHARTERED ACCOUNTANTS' SOCIETY

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Date: - December 7, 2022

Smt. Nirmala Sitharaman
Hon. Union Minister of Finance
Ministry of Finance
Government of India
North Block
New Delhi – 110001, India

Respected Madam,

Sub.: - Submission of Pre-Budget Memorandum 2023-24

We take this opportunity to submit a Pre-Budget Memorandum on Direct Tax Laws for your kind consideration while framing the proposals for the Finance Act 2023 for amendments to the Income Tax Act 1961.

The nation and the common man are grappling with intricate compliances concerning Direct Tax Laws. We hope you will consider the submitted proposals in the Pre-Budget Memorandum in the nation building process.

We shall be happy to present ourselves before you for any clarification or explanation that may be needed at your end.

Thanking You,
Sincerely,

For Bombay Chartered Accountants' Society

CA Mihir Sheth
President

CA Deepak Shah
Chairman

CA Anil Sathe
Co-Chairman
Taxation Committee of the BCAS

CC:

1. The Prime Minister's Office
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3. Shri Pankaj Chaudhary, Minster of State, Ministry of Finance
4. Shri Vivek Joshi, The Finance Secretary, Ministry of Finance
5. Shri Sanjay Malhotra, The Revenue Secretary, Ministry of Finance
6. Shri Nitin Gupta, Chairman, Central Board of Direct Taxes
7. The Member (Budget), Central Board of Direct Taxes

BOMBAY CHARTERED ACCOUNTANTS' SOCIETY [BCAS]

Pre-Budget Memorandum on Finance Bill, 2023

Contents

Suggestions for charitable trusts on account of recent Supreme Court decisions

The two recent Supreme Court decisions in the cases of charitable trusts, in the context of exemption for educational institutions in the case of New Noble Educational Society (2022 SCC Online SC 1458). and in the context of the proviso to section 2(15) in case of objects of general public utility (GPU) in case of Ahmedabad Urban Development Authority (Civil Appeal No. 21762 of 2017), have created great uncertainty amongst many charitable institutions on various aspects. It could also result in tax demands completely wiping out the entire funds of many genuine trusts, if interpreted and enforced strictly.

To remove this uncertainty, it is suggested that amendments be made in respect of the following:

1. It needs to be clarified that educational institutions will be given time to change their objects, to remove objects other than educational from their constitution documents, till 31st March 2024, particularly since getting trust deeds amended by civil courts is a time consuming process. It may be clarified that the ratio of the Supreme Court decision will operate in regard to "solely for education" only with effect from Assessment Year 2025-26. Alternatively, if a trust has initiated steps to amend its objects prior to 31st March 2023, the ratio should not apply, so long as the amendment is later completed till 31st March 2024.

2. It needs to be clarified that one-time fund-raising activities will not be regarded as business carried on by a trust. Similarly, passive incomes of earning rent (without any other services), interest and capital gains should not be regarded as business..

3. The fact that CBDT circulars are binding on assessing officers needs to be enacted in law, or else, there will be administrative chaos and huge litigation, with each officer choosing to take his own view of a matter, ignoring the CBDT directives or circulars on any subject.

4. No reassessments should be permitted to be initiated based on the two Supreme Court judgments, or else the Tribunals and High Courts will be flooded with thousands of cases involving taxation of charitable trusts.

5. The meaning of "substantial" mark-up and "marginal" mark-up needs more clarity, as it is highly subjective.

6. Further in the case of entities claiming exemption under section 10(23C) (vi) or (via), and those who are carrying on an activity which falls within the limbs other than general public utility "referred to as "per se charity" by the Supreme Court "the word " not for the purposes of profit" should be examined on a holistic basis. This would mean that if an identical /similar activity is carried on and the entity makes surplus in some and deficit in others, but on a holistic /aggregate basis the surplus if any is marginal, the activity should not be considered as being carried on for the purposes of profit. An amendment to that effect would mean that the principle of cross subsidisation, which has hitherto been accepted by judicial forums, is also accepted in the form of legislation.

7. The above principle should also apply while interpreting the proviso to section 2(15) to determine whether an activity is trade, commerce or business.

Sr No	Existing provision under the Income-tax Act, 1961	Difficulties / Obstacles / Hurdles faced	Suggestions
Other suggestions for charitable trusts / organisations			
1	**Section 12A(1)(b)** Maintenance of prescribed books of account and documents	Eligibility to exemption under section 11 is subject to its books of account and other documents being maintained in the form, manner and place prescribed. A similar amendment has been made by way of substitution-of the 10th Proviso to section 10(23C). Issues: • Rule 17AA provides an elaborate list of books and other documents to be maintained. • A majority of charitable trusts run their administration through honorary services of volunteers. These trusts would be located across the length and breadth of the country, at places which may not have the requisite infrastructure/facilities to	Rationale: The existing provision provides for the conduct of an audit by an accountant mentioned in section 288. Further a comprehensive audit report in form 10B has already been prescribed. In the circumstances an audit would ensure proper maintenance of accounts as well as the documents necessary to verify the claim of an exemption Making a further amendment to require the trust/ institutions to maintain elaborate record would impose a heavy burden which is uncalled for. Recommendation: ✓ The condition requiring the trust to maintain accounts in a prescribed form should be deleted. ✓ Alternatively, if provision for maintenance of accounts and record in a specified manner is to be prescribed, it should be only for Charitable institutions whose gross receipts exceed the threshold limit, of Rs 5 crore, which is the same as that prescribed for educational/medical institutions which claim exemption under section 10(23C)(iiiad)/(iiiae). Such large trusts would have the wherewithal to comply with the provision. ✓ Further, non-compliance should not result in a denial of the exemption, but only levy of a penalty commensurate with the gross receipts/turnover.

		ensure compliance with conditions. • A violation of the maintenance of books/record as prescribed would result in a denial of the exemption. For a technical infraction, the consequence is catastrophic. • These books and records are required to be maintained for a period of 10 years.	✓ Section 149 is amended and assessment of past 3 years can be reopened. It is, therefore, suggested that The requirement of maintaining books and records for Trusts should be reduced to 3 years, instead of 10 years.
2	**<u>Cancellation of Registration under Section 12AB</u>**	PCIT / CIT have power to cancel registration on the occurrence of, among others, following violations- • Application of any part of its income for other than objects of the trust • Application of any part of income for private religious purposes A similar amendment is made in the 15th proviso to section 10(23C) <u>Issues:</u> • These events, (defined as specified violations) are in	<u>Recommendation:</u> ✓ Cancellation of registration should only apply where activities of the trust are not genuine, or in the event of non- compliance with requirements of any law material to attainment of its objects. ✓ Alternatively, cancellation of registration should apply where more than 15% of the income of the Trust is applied for other than objects of the trust or for private religious purposes.

		most cases are restricted to specific years or are aberrations. Cancellation of registration which would affect the trust in the year of occurrence of such a violation and subsequent years, would cause grave prejudice and permanent damage to the charitable institution especially if the violation is in significant as compared with the overall activities of the trust. • A cancellation of registration causes permanent damage to the interest of a charitable institution and would attract tax on accreted income. This is a power that should be used very sparingly, incases where the infringement is of a significant amount and recurring.	
3	**<u>Section 12A(1)(ba)</u>** Loss of exemption on late filing of Return of Income	Exemption under section 11 is subject to filing return of income under section 19(4A) before the prescribed due date. <u>Issues:</u>	<u>Recommendation:</u> ✓ Non-filing of Return of Income before the due date should not result in denial of exemption but only levy of interest/penalty commensurate with the gross receipts/Turnover.

		Filing of Return of income beyond the prescribed due date would result in a denial of the exemption. For a technical infraction, the consequence is catastrophic.	
4	**Explanation 3A and 3B to Section 11(1)** Investment of Corpus donation in specified modes	Corpus donation received by a trust is not included in the total income if such donation is invested in modes specified in section 11(5) Issues: Corpus donations may be used at times to acquire assets of the trust, such as medical equipment, ambulances, etc, and may not necessarily be invested. Such acquisition of assets would result in loss of exemption for the corpus donation	Rationale: The Government is not able to carry out sufficient welfare activities due to various reasons. Trusts are bridging the gap and supplementing the efforts of the Government, with available means. Recommendation: This provision is not required, as in any case, all investments of the trust have to be in modes prescribed u/s 11(5).
5	**Sections 13(2) and 13(3)** Meaning of 'Substantial Contributor'	Issues: A person who has made contribution of more than Rs. 50,000 to the Trust in a year, is defined as a 'substantial contributor'. If Trust uses or	Recommendation: The amount of Rs. 50,000/- was fixed about 25 years ago, and is not substantial in the present age. Hence the limit of contribution should be increased to 50,00,000

		apples any part of its income or property for the benefit of such person or his relative or any concern in which he has substantial interest then the Trust loses its exemption	
6	**Section 11** Application of income to be allowed only if actual payment is made	Explanation to Section 11(7) provides that, only sums actually paid will be regarded as application of income from assessment year 2022-23. A similar amendment has been made by insertion of an explanation below the 23rd proviso to section 10(23C)- Issues : • This creates substantial hardship to Charitable trusts • This means that the income is accounted for on mercantile or accrual basis while the application would be on cash basis. This significantly distorts the matching principle which is the basis of accrual/ accounting. It also creates substantial hardship for	Recommendation: (a) The amendment be deleted, OR (b) Alternatively, a provision akin to section 43B be incorporated whereby, expenses actually paid before the due date of filing of return are considered as application

		Companies incorporated under section 8 of the Companies Act 2013 (corresponding to section 25 of the Companies Act 1956), which are bound to maintain their accounts on mercantile basis. • The provision would require charitable trusts to compute income on cash basis while their accounts continue to be on mercantile/accrual basis. This will cause undue hardship on charitable trusts which are already saddled with a substantial compliance burden. • When the government itself is desirous of all its departments as well as local bodies to maintain accounts on accrual basis, imposing a cash basis on charitable trusts is uncalled for.	
7	**<u>Section 10(23C)</u>** Alignment of provisions of section 10(23C)(iv), (v), (vi) and (via) with section 11	The cumulative effect of the amendments is that the exemption under sections 10(23C)(iv), (v) (vi) and (via),	<u>Recommendation</u>: (a) These clauses namely (iv), (v), (vi), (via), be deleted (b) Simultaneously, an automatic registration under section 12AB be granted to such trusts in place of their recognition

		are now almost identical to the exemption under section 11. <u>Issues:</u> On account of the number of clauses, the 23 provisos and the explanations there under section 10(23C) has become unwieldy and difficult to comprehend and analyse particularly for a person not conversant with interpretation of tax laws. Trustees of charitable institutions and the persons associated with such entities are required to refer to these provisions.	under the above clauses. This will enable them to claim an exemption under section 11.
8	<u>Simple exemption scheme for small Trusts</u>	The provisions granting exemption to Trusts are made complex by amendments made from time to time. Small charitable trusts find it difficult to comply with these procedural and other requirements since majority of trusts run their administration through honorary services of volunteers. The costs for meeting the compliances have considerably increased.	<u>Recommendation:</u> A simple scheme of exemption should be provided for small Trusts. Audit should not be mandatory for Trusts having gross receipts/Turnover upto Rs. 5 crore, which is same as that prescribed for educational/medical Institutions claiming exemption under section 10(23C)(iiiad)/(iiiae). Such small trusts would not have wherewithal to comply with the complex provisions.
Reconstitution and dissolution of Partnership Firms			

9	**Section 9B** Section 9B deems the fair market value of the capital asset or stock in trade as prevailing on the date of its transfer as the full value of consideration received or accruing as a result of its deemed transfer by the specified entity for the purpose of computing the taxable income arising therefrom. However, there is no corresponding provision whereby the fair market value so considered for the purpose of section 9B is treated as cost of acquisition in the hands of the specified person.	In the absence of any express provision, the issue arises as to what is the cost of acquisition of the capital asset or stock in trade in the hands of the specified person when it has been received from the specified entity in connection with the reconstitution or dissolution.	To resolve, these difficulties, we suggest – ✓ Insertion of specific provision within section 9B itself to provide that the fair market value as considered under sub-section (3) would be regarded as the cost of acquisition of the relevant capital asset or stock in trade in the hands of the specified person for the purposes of the Act including for the purpose of section 43(1) which defines 'actual cost'. ✓ It may be noted that this view has already been expressed in the Circular No. 14 of 2021 dated 2-7-2021.
10	**Section 45(4)** Section 45(4) as inserted by the Finance Act, 2021 provides for chargeability of profits and gains arising from the receipt of money or capital asset by the specified person from the specified entity in connection with the reconstitution of such specified entity under the head "Capital gains". However, it provides that it shall be deemed to be the income of the specified entity. Thus, the said	Shifting of tax burden of the specified person to the specified entity results in several difficulties and inequities some of which are pointed out as follows – • The specified entity might not be left with enough liquidity to discharge its tax liability which has been cast upon it due to such deeming fiction and this often leads to disputes	To resolve, these difficulties, we suggest as under: ✓ The profits or gains arising from receipt of money or capital asset by the specified person from the specified entity in connection with its reconstitution should be charged to tax in the hands of specified person. ✓ Further, it should be expressly provided that it shall be treated as deemed transfer of his interest in the specified entity to the extent to which his share has been reduced as a result of the reconstitution.

	capital gain is chargeable to tax in the hands of the specified entity and not in the hands of the specified person.	between its partners or members. • The specified person might have capital losses from his other transactions which he would have been entitled to set-off against the capital gain so arising upon receipt of money or capital asset from the specified entity if it had been charged to tax in his hands. • The specified person would have been entitled to claim the exemption under the other provisions like section 54F etc. if the capital gain has been charged to tax in his hands.	
Updated Income Tax Return			
11	**Section 139(8A)–Updated Return** Vide Finance Act, 2022, a new sub-section (8A) to section 139 has been inserted which provides for filing of an 'updated return' by any person, whether or not he has filed a return previously for the relevant year. Such updated return is to be filed within 24 months from the end of the assessment year.	A taxpayer who may come across mistake in the return of income filed earlier and willing to pay appropriate taxes may not be able to file updated return of income post 24 months from end of the relevant assessment years. Further, the additional tax rate is very high so to encourage	To encourage more assessee filing the updated return of income, it is suggested to reduce the additional tax rate to 5% or 10%. Further, it is suggested that the assessee may be allowed to file updated return for all the years for which re-opening is permissible. Alternatively, it is suggested that the progressively incremental tax rate may be provided basis no. of years of delay. For e.g. additional tax of 5% on updated tax filed within 1 year post end of relevant financial year, 10% within 2 years, 15% within 3 years, and so on.

	The said return may be filed only on payment of tax and interest along with additional payment of 25% (if return is filed within 12 months from end of AY) / 50% (if return is filed within 24 months from end of AY) of such additional tax. Further, interest u/s 234A/ B/ C shall be computed having regard to the updated return filed.	voluntary compliance for filing of updated return of income, the same needs to be reduced	
Provisions relating to tax deduction at source			
12	**<u>Section 194R</u>** This section has been inserted, with effect from 1 July 2022, to provide that any person responsible for providing to a resident, any benefit or perquisite arising from carrying out of a business or profession by such resident, shall be required to deduct tax, before providing such benefit or perquisite @ 10% on the value of such benefit or perquisite, if it exceeds in aggregate Rs. 20,000 in the financial year	The CBDT issued Circular nos. 12 of 2022 and 18 of 2022, providing clarifications on several practical issues raised. The words of section 194R and the above two CBDT Circulars have created lot of confusion. The valuation aspect of benefit or perquisite still remains unclear and would require guidelines to be issued for the same. Further, in case of a person who is providing benefit or perquisite to any other person, the obligation of following the TDS	It is suggested that section 194R may be amended to remove ambiguity and make it clear that: - Aggregate value of the benefits or perquisites may be increased to Rs. 50,000 in a financial year as the current threshold of 20,000 is very low. - Further, the rate of TDS @ 10% is too high and rate of TDS ought to be reduced to 2% (largely to align with other TDS rates) especially in view of the fact that it is introduced to track such benefits provided - Provision be introduced that where the person receiving the benefit or perquisite makes a declaration in the prescribed form that he will be including the benefit or perquisite in his taxable income, then the person providing benefit or perquisite need not deduct TDS. Further, the CBDT in order to remove difficulties has issued two circulars (Circular 12 of 2022 and Circular 18 of 2022).

		compliances is too onerous for them. Also, at times it will be the person providing the benefit or obligation who will have to bear the cost of the TDS. Levy of 194R on free samples will create challenge for certain industries for whom sales promotion is essential	However, there are certain ambiguities arising out of the Circulars which need to be clarified. - FAQ 1 of Circular 12 states that S. 194R applies to a benefit or perquisite irrespective of whether such benefit is chargeable to tax and irrespective of the provision under which it is chargeable to tax. This expands the scope of section 194R much beyond the ambit of section 28(iv). It is recommended that it may be clarified that TDS under section 194R is applicable only to payment of benefit or perquisite which is taxable under section 28(iv). - FAQ 2 of Circular 12 states that section 194R applies even to monetary benefits. This is contrary to the Supreme Court ruling in the case of Mahindra and Mahindra wherein the Court held that for benefit to be taxable under section 28(iv) (which has identical language as s.194R), the benefit should be received in some other form rather than in the form of money. Hence, it may be clarified that section 194R is applicable only to payment of non-monetary benefit or perquisite which is taxable under section 28(iv) in line with the ratio of the SC ruling in Mahindra & Mahindra's case - The clarification provided in FAQ 4 with respect to free samples may be reconsidered and it may be clarified that the provisions of free samples for testing or customer evaluation does not constitute benefit or perquisite liable to TDS under section 194R. If required, to avoid abuse, a safe harbour like capping total free sample cost may be restricted to 2% of total sales. - Free medical samples do not represent 'benefit' or 'perquisite' for the doctors. Hence, it should be clarified that TDS under section 194R will not apply on free samples distributed in compliance with statutory guidelines.

			- FAQ 5 of Circular 12 provides that valuation would be at fair market value. However, fair market value of benefit / perquisite could be ambiguous and could be subjective. Hence, perquisite valuation rules (akin to rule 3 for employees) need to be introduced. - FAQ 7 of Circular 12 providing for applicability of 194R on out of pocket expenses by service providers has been complicated. The Circular considers applicability of 194R in a situation where the travel / lodging expenditure of a consultant providing services is met by the service recipient for the consultant. Further, Circular 18 of 2022 links the applicability of 194R to a "pure agent" concept under GST law to say that in case of pure agent, 194R is not applicable, else it will be applicable. It is recommended that it be clarified that such expenses incurred are not perquisite / benefit as the same are directly linked to providing the services and are not benefit / perquisite. This would lead to income in the hands of consultant which he has not even earned. - Vide FAQ 1 of Circular 18, exemption has been provided in case of loan settlement / waiver by a bank. This should also be extended to business advance waiver / write-off by any assessee.

Bombay Chartered Accountants' Society

BCAS - A voluntary organization of Chartered Accountants' established on 6th July 1949, has 9,000+ members from all over the country. Having published the BCA Journal for over 50 years, it has pioneered professional learning through publications, seminars, workshops, RRC's and interactive techniques. BCAS Foundation runs RTI Clinics for free amongst other charitable initiatives.