

**TYING UP PHILANTHROPY – A GUIDE TO AMENDED PROVISIONS FOR  
REGISTRATION OF CHARITABLE TRUSTS/ INSTITUTIONS UNDER THE INCOME  
TAX ACT, 1961**

- CA. Pranshu Singhal  
[ACA, DIT(ICAI), DISA(ICAI), B.Com(H)]

**INTRODUCTION**

Charity or philanthropy has always been virtue of the mankind. In the Indian tax jurisprudence, the entities engaged in charitable activities have always enjoyed benefits in the form of exemptions and deductions.

Charitable trusts or institutions can avail the exemptions, specially that of section 11, provided under Income Tax Act, 1961 only if they are registered under this Act by virtue of provisions of Section 12A/12AA of the Act (now Section 12AB).

The Income Tax Act provides for benefits and exemptions to the total income of the trust to a very wide extent. But because of its very nature, these provisions are the most misused provision. The department has to always be on its toes to control this. That is the reason that the revenue has laid down enormous procedures to grant registration to the trust which has further been tightened by Finance Act, 2020.

**FACTORS TO BE CHECKED WHILE GRANTING REGISTRATION:**

The process of obtaining registration under Section 12AA/12AB is like an entry document to secure the exemption and benefits of Income Tax Act and thus, it is most relevant process which had to be carefully examined by the concerned authority. Now, granting or rejecting of registration has itself been subjected to innumerable disputes. In order to get exemption, compliance of many conditions have been enumerated. Unless the exercise is carried out by the authorities concerned, it would not be proper for them to blindly grant registration.

At present the registration under section 12A or 12AA is granted by the CIT, DIT or the Principal CIT and only the twin conditions of the '*objects being charitable in nature*' and '*the activities being genuine*' are to be checked by him at the time of granting registration. However, Finance Act (No. 2), 2019 added the provision w.e.f. 01.09.2019 adding another aspect to be checked while granting registration, which is '*compliance of such requirements of any other law for the time being in force by the trust or institution as are material for the purpose of achieving its objects*'. This condition of *complying with requirements of any other law* is in addition to the power of the Principal Commissioner or Commissioner to call for such documents or information from the trust or institution as he thinks necessary in order to satisfy himself about the objects of the trust or institution and the genuineness of its activities. If he is not satisfied with any of the conditions, he possess an out-right power to reject the application by passing an order and may also cancel the registration (where already granted) only after affording a reasonable opportunity of being heard.

In the new provision section 12AB, this condition of complying with the requirements of any other law is now designated under Sub-clause (i) to clause (b) of section 12AB. This is to ensure that the trusts or institutions do not deviate from their objects and comply with all the other laws which are material for the purpose of achieving their objects. For instance, a company registered under Section 8 of the Companies Act 2013 which is also registered as Charitable Institution under Section 12A/12AA (now Section 12AB) has not complied with the provisions of Companies Act, 2013 by not making payment of ROC Fees. But this non-compliance cannot be considered to have affected its charitable activities or ultra vires its objects. Thus, this non-compliance cannot be made use of avoid the benefit of Income Tax Act. The non-compliance committed by the charitable trust or institution has to be something concrete and material which is having a direct impact on its activities and objects. For instance, non-compliance of labour laws by charitable trust due to deployment of child labor in the conduct of its activities. However, where the non-compliance with the provisions of any other law is disputed by the charitable trust or institution under such other law, then in

such cases, the assessing officer cannot use such fact to cancel the registration until the dispute has reached finality.

The Income Tax Act is self-contained Act and a complete code in itself. Prior to this amendment, there was no provision in the Act wherein non-compliance of any provisions of any other Act would lead to denial of registration under this Act and the income tax authorities had to restrain themselves within the provisions of this Act only as held by **Punjab and Haryana High Court** in the case of Pr. CIT vs. **M/s. Kids-R-Kids International ITA 6 of 2017, dt. 14.07.2017**. Similar decision was also given by **ITAT Delhi** in the case of **Civil Services Society vs. DIT (Exemption) 93 DTR 314 (Del)**.

With the amendment as discussed above, the law as erstwhile laid down by judiciary does not hold and is no longer extant. Every charitable trust or institution shall have to comply with the provisions of all the other laws which are material to its objects. Any non-compliance otherwise of which would pose the risk of cancellation of registration and consequent tax liability under Section 115TD.

#### **AMENDMENT BROUGHT OUT BY FINANCE ACT, 2020**

With Finance Act 2020, the provisions of Section 12AA are entirely expunged and are replaced by Section 12AB. This new provision was originally made applicable from 01.06.2020. But due to the ongoing COVID-19 worldwide pandemic, the cut-off date has been extended by 4 months and the entire procedure to obtain registration by a trust stands changed with introduction of a new Section 12AB into the Act w.e.f 01.10.2020. Under the amended provisions, the time limit of granting registration to the trust has been restricted to five years as against indefinite period in the earlier provision, where the registration was granted in perpetuity until the same gets cancelled. Now, in every five years, all such entities will be required to renew their registration by submitting a fresh application. Further, while granting the registration, the Principal Commissioner or Commissioner shall call for documents or information which he thinks are necessary in order to satisfy himself about the compliance of above stated three conditions.

For fresh registration of a trust, i.e. the first time registration, under the new provisions section 12AB of the Act, 3-Year 'Provisional Registration' will be provided which will later be converted to 'Normal Registration' as per the provisions discussed hereunder.

This new section specifies the provisions regarding issuance of registration to the trusts or institutions making fresh application and also to the trusts or institutions existing as on the date of commencement of Section 12AB. That being said, even after the introduction of the new provisions for obtaining registration, all the trusts and institutions which are existing as on the date of the applicability of Section 12AB, i.e. 01.10.2020, and are already registered under section 12A/12AA of the Act, shall be required to obtain fresh registration in accordance with the new procedure. Although certain issues may arise for the elderly trusts/institutions which were formed long ago 20-30 years back or even before that. In some situations, these elderly trusts may not possess necessary documents or even their certificate of registration. For such instances, it is perceived that the registration will be granted with not much severe scrutiny. It has also been specifically provided that all the applications for obtaining registration which are pending as on 01.10.2020 (those made under section 12A/12AA) shall be deemed to have been made under the new section 12AB and registration will be granted accordingly as per the new law.

### **TIME LIMIT FOR MAKING APPLICATION FOR REGISTRATION**

Section 12A which talks about conditions for availing exemption under section 11 and 12 has also been amended to insert a new clause (ac) to sub-section 1. This new clause prescribes time limit for making application to obtain registration under section 12AB.

1. Where trust or institution is already registered under Section 12A/12AA before 01.10.2020 [Section 12A(1)(ac)(i)]– Fresh application has to be made within 3 months starting from 1<sup>st</sup> October 2020 for obtaining or converting the earlier registration under section 12A or 12AA to the one under Section 12AB of the Act.

2. Where trust or institution applying for fresh registration[Section 12A(1)(ac)(vi)]– Application to be filed atleast one month prior to the commencement of the previous year relevant to the assessment year from which the said registration is sought. For instance, if a trust seeks to obtain registration for FY 2021-22, then the application has to be made on or before 28.02.2021. In order to comply with this provision, the trust has to make up its mind prior to the commencement of the relevant year. Any delay beyond the month of February of the preceding year (28.02.2021 in this case) would disentitle it from claiming exemption for one whole year. So, now if a trust is created in the middle of the year say, in May 2021, it would not be able to get itself registered and claim exemption for FY 2021-22 since the time barring date to apply as per this provision would be 28.02.2021 which had already been gone.

This new provision seems very stringent as in most cases, it would disentitle the trust from claiming the benefit in its first year of formation and thus, it is apprehended that there might be some drafting error here. The legislature can clear the air only if further clarification or amendment comes up in this regard.

In this case, provisional registration will be granted for three years.

3. Where the trust or institution is provisionally registered under Section 12AB[Section 12A(1)(ac)(iii)] –Application shall have to be filed to obtain regular registration atleast six months prior to expiry of period of provisional registration or within six months of commencement of its activities, whichever is earlier.
4. Where trust or institution has obtained regular registration under Section 12AB[Section 12A(1)(ac)(ii)] - Application to obtain re-registration has to be filed once the period of five years is about to expire. It has to be made atleast six months prior to the expiry of the said period of five years.

5. Where trust or institution has adopted or undertaken modifications to its objects[Section 12A(1)(ac)(v)] - Application has to be made for getting registration to the modifications to the object. It should be made within thirty days from the date of the said adoption or modification.

### **PARAMETERS TO AWARD REGISTRATION**

1. Forexisting trusts or institutions applying for registration under Section 12AB[application made under section 12A(1)(ac)(i)]- Principal Commissioner or Commissioner shall pass an order granting registration under Section 12AB of the Act for a period of 5 years without calling of documents for checking objects of the trust or institution and genuineness of its activities. It would be safe to infer that automatic registration shall be granted to the trust without any further scrutiny or verification, if the trust is an existing trust, registered under section 12A/12AA of the Act.
2. For trusts or institutions applying for fresh registration under section 12AB [application made under section 12A(1)(ac)(vi)] - Principal Commissioner or Commissioner shall pass an order granting provisional registration for 3 years without calling of documents for checking objects of the trust or institution and genuineness of its activities. As it is provisional, it is strongly apprehended that the registration will be granted without any detailed scrutiny or verification. The trust or institution shall have to then make separate application for obtaining regular registration.
3. For trusts or institutions applying for re-registration after 5 years or which are provisionally registered applying for regular registration or which has adopted modifications to the objects[application made under section 12A(1)(ac)(ii)/(iii)/(v)]- Principal Commissioner or Commissioner shall pass an order granting registration under Section 12AB only after calling for such documents or information which he considers necessary and after satisfying himself about the three conditions i.e.,
  - objects of the trust or institution and

- the genuineness of its activities and
- compliance of such requirements of any other law for the time being in force as are material for the purpose of achieving its objects.

If he is not satisfied with any of the above three conditions, then an order may be passed rejecting such application. The registration already granted may also be cancelled. However, it shall be imperative for the concerned authority to afford a reasonable opportunity of being heard to the applicant before taking any such adverse action. This concept of re-registration has surely empowered the revenue to keep the functioning of the trusts and the genuineness of their activities in check every 5 years. This would also mean that the strenuous task of obtaining the registration or re-registration would get more onerous and burdensome.

### **TIME LIMIT IN WHICH ORDER GRANTING REGISTRATION SHALL BE PASSED**

1. For existing trusts or institutions applying for fresh registration under Section 12AB [application made under section 12A(1)(ac)(i)]- Order granting registration under section 12AB(1)(a) shall be passed within three months from the end of the month in which the application was received.
2. For trusts or institutions applying for fresh registration under section 12AB [application made under section 12A(1)(ac)(vi)]- Order granting provisional registration under section 12AB(1)(c) shall be passed within one month from the end of the month in which the application was received.
3. For trusts or institutions applying for re-registration after 5 years or which are provisionally registered applying for regular registration or which has made modifications to the objects [application made under section 12A(1)(ac)(ii)/(iii)/(v)]- Order granting registration under section 12AB(1)(b) shall be passed within six months from the end of the month in which application was received.

## **ASSESSMENT YEAR FOR APPLICATION OF THE PROVISIONS OF SECTION 11 AND 12**

1. Where existing trusts or institutions has applied registration under Section 12AB [application made under section 12A(1)(ac)(i)] - Exemption under Section 11 and 12 shall be available from the year in which the trust or institution was earlier granted registration under the erstwhile provisions of Section 12A/12AA.
2. Where trusts or institutions has applied fresh registration under Section 12AB [application made under section 12A(1)(ac)(vi)] - Exemption under Section 11 and 12 shall be available from the year immediately following the financial year in which the application is made by the trust or institution.
3. Where trusts or institutions has applied provisional registration under Section 12AB [application made under section 12A(1)(ac)(iii)]-Exemption under Sections 11 and 12 shall apply starting from the year in which the provisional registration was granted.
4. Where trust has applied for re-registration after 5 years or has adopted or undertaken modifications to its objects [application made under section 12A(1)(ac)(ii)/(v)] – Exemption under Section 11 and 12 shall be available from the year immediately following the financial year in which the application is made by the trust or institution.

It must be noted here that similar amendments have also been made to the provisions of Section 10(23C) and 80G to incorporate the procedural changes made in regard to the filing of application to obtain approval, time limit within order for approval is to be made, parameters to award approval, assessment year from which exemption could be availed.

## **POWER TO CANCEL REGISTRATION**

Certain powers have been granted to the Principal Commissioner or Commissioner for cancelling the registration granted to the trust or institution under sub-section (4) and (5)



to Section 12AB of the Act. The action of cancelling the registration can be taken under the following scenarios:

- Where he is satisfied that the activities of such trust or institution are *not genuine* or are *not being carried out in accordance with the objects* of the trust or institution **[Section 12AB(4)]**or
- Where the trust or institution is not eligible for exemption under Section 11 or 12 due to the *violation of Section 13(1)* of the Act **[Section 12AB(5)(a)]** or
- Where the trust or institution has *not complied with the requirement of any other law***[Section 12AB(5)(b)]**,

Upon satisfaction of any of the conditions as stated above, the Principal Commissioner or Commissioners shall pass an order in writing cancelling the registration of such trust or institution after affording it a reasonable opportunity of being heard.

### **SOME OTHER CRITICAL ISSUES:**

#### **✚ Ramifications to the existing trusts on failure to make or on delay in filing of application for registration under Section 12AB**

Chapter XII-EB in the Act imposes liability of additional tax under Section 115TD on the trusts or charitable institutions. There is a *non-obstante clause* in the section and would be in addition to the tax liability arising in the hands of trusts or institutions under any other provisions of the Act. This section comes into play when the charitable trust ceases to exist or ceases to carry on charitable activities, in such case, the tax liability would arise on the accreted income i.e., fair market value of its assets reduced by fair market value of its liabilities.

Finance Act 2020 has revamped the complete procedure to obtain registration. There is no express provision under the revamped law as to what consequences would arise where the existing trust or institution does not file application for obtaining fresh registration under Section 12AB within the cut off period of 3 months or files application after the expiry of period of 3 months. In such circumstances, the possible tax liability seems to arise only under Section 115TD at MMR on accreted income. However,

considering the gruesome provisions of Section 115TD, it distinctively mentions three circumstances –

- Where the trust is converted into any form which is not eligible for registration under Section 12AA/12AB i.e., cancellation of registration or modifications of objects not approved/rejected by CIT or not approved from CIT.
- Where the trust is merged with any entity which is not registered under Section 12AA/12AB and has different objects
- Where the trust has dissolved and has not transferred its assets to any trust or institution registered under Section 12AA/12AB or which is approved under Section 10(23C)(iv)/(v)/(vi)(via) within 12 months from the end of the month in which dissolution takes place.

Neither of the three peculiar instances covered under Section 115TD involve this situation of failure to make application within 3 months nor has Section 12AB addressed it. Was it that the legislature presumed that no trust would cause any delay in procuring the fresh registration? The trust which fails to make application by 31.12.2020 (if not extended any further) would cease to be registered under 12A/12AA and would not be able to entail the benefit of Section 11 & 12 anymore. Further, deeming the unregistered trust as an AOP under Income Tax Laws and taxing its income at MMR can be one repercussion.

Also, there is no provision for filing the application for fresh registration with condonation of delay. It is not certain whether the applications for registration filed after the due date would be accepted and whether the delay therein would be condoned by the concerned authority or not. Even if the application is made with condonation of delay, it has to be supported with splendid and genuine cause of delay.

Only future clarifications can bring an end to this debate. As of now, in the absence of any specific or express provision, it can only be inferred that once the already registered trust or institution fails to obtain fresh registration under Section 12AB, the registration earlier granted under Section 12A/12AA would stand cancelled which will eventually bring in the taxation of income at MMR.

## Procedure for entities enjoying dual registration at present

To claim exemption of income under Section 11 & 12, one must be registered under Section 12A/12AA/12AB. While, on the other side, there is Section 10(23C) specifically for trusts or institutions like university or other educational institutions, hospitals or medical institutions which are engaged in the activities of education or medical facility for charity and not for making profit. Earlier there were entities engaged in the activities of education or medical facility, which had obtained the registration under Section 12A/12AA as well as the approval under section 10(23c) or 10(46). Now, first proviso to Section 11(7), has been inserted by Finance Act 2020, making even the registration of trust or institution, under section 12A/12AA inoperative from the date on which the trust or institution is approved under Section 10(23C) or 10(46) of the Act or on 01.10.2020, whichever is later. This can be interpreted to state that the Act now restricts the trust or institution which are registered under Section 12AB from not only claiming exemption under Section 10(23C) or 10(46), but also the approval under these sections.

Now when this registration becomes inoperative due to operation of first proviso to Section 11(7), the trust shall be required to make fresh application for registration under section 12A(1)(ac)(iv), at least six months prior to the commencement of the assessment year from which the said registration is sought to be made operative. The Principal Commissioner or Commissioner shall pass an order granting registration under Section 12AB(1)(b) only after calling for such documents or information and after satisfying himself about the prime three conditions i.e.,

- objects of the trust or institution, and
- the genuineness of its activities, and
- compliance of such requirements of any other law for the time being in force as are material for the purpose of achieving its objects.

If he is not satisfied with any of the above-mentioned conditions, then an order may be passed rejecting such application. The registration already granted may also be cancelled. However, it shall be imperative for the concerned authority to afford a


reasonable opportunity of being heard to the applicant before taking any such adverse action.

This order shall be passed before the expiry of six months from the end of the month in which the application was received and the exemption under Section 11 and 12 shall be available from the year immediately following the financial year in which the application is made by the trust or institution.

If these trusts or institutions, having approval under section 10(23C) or 10(46) seek to renew their registrations under Section 12AA (now Section 12AB), they would have to give up their approval under section 10(23C) or 10(46), for which, the law has provided certain time limit in Section 12A(1)(ac)(iv) to make application which is at least six months prior to the commencement of the assessment year from which the said registration is sought to be made operative.

Now, if the registration granted under Section 12AA becomes inoperative on 01.10.2020 due to this proviso to 11(7), the trust would have to file an application at least 6 months prior to the commencement of the AY for which registration is sought to be made i.e, upto 30.09.2020 (to revive the registration for PY 2020-21); which is not practically possible as the cut off date would have already lapsed.


In such circumstance, the only possible approach is that the trust gets its approval under the amended provisions of Section 10(23C) or 10(46) and claims exemption thereon for PY 2020-21 only and for PY 2021-22 onwards, the registration under Section 12AB is revived by making application under Section 12A(1)(ac)(iv).

 Where application for registration was made under Section 12AA on or before 31.03.2020 and is yet to be disposed off

Section 12AA(2) of the Act states that the order granting or refusing registration shall be passed before the expiry of six months from the end of the month in which the application was received. If the application for obtaining registration is not disposed of

within six months, the trust or institution shall be deemed to have been granted. This view has also been affirmed by **Supreme Court** in **CIT v. Society for the Prom. Of Edn., Allahabad, Civil Appeal No. 1478 of 2016 dt. 16.02.2016 (SC), CIT v. TBI Education Trust [2018] 96 taxmann.com 356 (Ker).**

In view of the above SC decision and as the provisions of Section 12AA, applicable upto 30.09.2020, it can be deemed that the registration to the trust shall be deemed to have been granted if not disposed of within the prescribed time limit, and thus, the charitable trust or institution would be able to make fresh application for registration under Section 12A(1)(ac)(i) as an existing trust. In this case, the trust should be granted normal registration of 5 years without any further scrutiny of documents.

 Where order against cancellation or rejection of registration/ approval is pending before income tax authority or court

Assuming an instance where appeal against order of cancellation or rejection of registration/ approval is pending before any authority or court as on 01st October 2020 and the application for registration/ approval was made in 2018. In such cases the charitable trust cannot be considered to have been registered under Income Tax Laws and thus, the trust or institution should submit a fresh application under Section 12A(1)(ac)(vi) for procuring provisional registration of 3 years. Even if the appeal is later decided say, in April 2021 against the said trust or institution and the registration/approval under the old law is denied or cancelled, it would still be provisionally registered under the new law and would have to contest again the validity of its registration before CIT under the new laws for converting the provisional registration into the regular registration.

However, assuming the appeal is decided in favour of the trust or institution in April 2021, then in such cases, it would be able to enjoy the benefit entailed in this Act retrospectively since the time application for registration was originally made under the old law i.e, from 2018. Now as the trust is considered to have obtained registration as on 01.10.2020 under old law (12AA), it should have been granted regular registration for 5

years under section 12AB(1)(a). However, the trust was granted provisional registration as above under the new law. So, the question that arises here is whether the trust would be provisionally registered and would have to undergo the process of obtaining normal registration again or that the law would grant regular registration to it as on 01.10.2020. As no specific answer is available in law in this regard, it could be inferred that the Courts or Tribunal when deciding the matter in favour of the assessee would have to direct the revenue to treat the registration granted as regular registration under section 12AB(1)(a) for 5 years and in such cases, trust should be granted normal registration from 01.10.2020 itself. This area is open to wide amount of litigation and is upon the courts to decide in future.

In any case, as per the prevalent jurisprudence, if the appeal is pending and not disposed of before 01.10.2020, the trust having no registration in its hands, has to apply for a fresh registration.

✚ Where appeal against cancellation of registration is decided in favour of trust and set aside to the file of the CIT(E) for fresh examination and the matter is yet to be adjudicated by CIT(E)

As the trust or institution is already registered under Income tax laws, it would be open to it to file application for registration as an existing trust under Section 12A(1)(ac)(i) and obtain regular registration under Section 12AB(1)(a) of the Act. The law is very clear, since the issue of cancellation of registration has been sent back to the file of the CIT by a higher forum, the cancellation order made earlier becomes non est and it may be conveniently assumed that the registration of the trust has been restored, till the date on which the CIT again passes an order cancelling the registration. Therefore in cases no such consequential order is passed before 01.10.2020, the trust should apply for re registration of trust under section 12AB of the Act.

### **DUE DATE FOR FILING OF RETURN OF INCOME BY TRUSTS OR INSTITUTIONS:**

The trusts or institutions whose total income, without giving effect to the provisions of exemption claimed under Section 11 and 12, exceeds the maximum amount of income not chargeable to tax shall be required to get their books of accounts audited by a Chartered Accountant. The audit report in Form No. 10B has to be filed one month prior to the due date of filing of return of income under Section 139 of the Act. Since the due date u/s 139 of the Act, as amended by Finance Act, 2020, stands to be 31<sup>st</sup> October of the AY, the cutoff date for furnishing audit report in Form No. 10B now stands to be 30<sup>th</sup> September of the AY. This amendment for change in due dates is effective from AY 2020-21 and onwards.

However, owing to worldwide pandemic COVID-19, the Ministry of Finance has extended the due date of filing of return of income u/s 139(4A)/(4C) to 30<sup>th</sup> November, 2020 and accordingly, the revised due date for auditing the books of accounts and furnishing audit report stands to be 31<sup>st</sup> October, 2020. This extension is only for the previous year ending 31.03.2020 i.e., AY 2020-21.

## **CONCLUSION**

The Finance Act 2020 restricted the period of registration for a period of five years at one time unlike the erstwhile provision where the registration once granted was to remain operative until cancelled by the concerned authority. It goes without doubt that all the trusts or institutions which are utilizing the benefit of exempted income under Section 11 and 12 will be under close watch of the revenue and would have to prove the genuineness of their activities time and again every five years. This has been done to ensure that the conditions of approval or registration or notification are adhered to for want of continuance of exemption. The question that arises here is whether it will be feasible and practicable for the trusts to obtain re-registration after every 5 years. There is high possibility of trusts to have surpassed the time limit of obtaining registration after the period of five years has expired. In such cases, some repercussions may arise in the hands of the trust as not obtaining the re-registration after five years would preclude them from claiming exemption of their income and would result in hefty income tax liability at the maximum marginal rate. Needless to say, this restriction of five years has

surely added the burden of compliance on the trusts under question. This would also add to the difficulties (which the trusts used to face only once) in obtaining registration from the revenue. This restrictive registration is the essence of the amendment brought out by the Finance Act, 2020 in relation to the trusts or institutions and is surely an appreciable move of the revenue to keep this sector under their guard. Apart from the issues discussed above, there are various other aspects which the trust might have to face. Hence, it would be interesting to see how these provisions unfold in near future.

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