

Affecting the Unaffected

An Auditor is now required to obtain & report, certain personal information and details, of relatives of a Trustee of a charitable trust. For instance, brothers PAN, Aadhar card copy and no etc.

Now we know that two brothers may not see eye to eye or meet for years, even though they are real brothers. How can one expect the Auditor (an outsider) to compel him to give information to the Auditor and with cyber crimes becoming the order of the day, trust him that it will not be misused or inadvertently passed on to a wrong person. Firstly, is it the Auditor job to elicit such information from an outsider and does he have such power? Suppose, the concerned person flatly refuses to give such person his personal details. Does the Auditor have any statutory power to compel and how will he exercise it? (Assuming that he has!)

S. 133 of the IT Act says that an Assessing officer or some higher authorities may, "for the purpose of this Act" require any specified person to give details / information which is prescribed in S.133 An Auditor should not be expected to do that. There is no statutory authority entrusted to him. In fact, rules and guidelines framed by the Institute of Chartered Accountants of India under a law of the land duly passed by the Parliament prohibits an auditor to disclose any personal information to any person. It is noteworthy that Govt officers are not excluded. Reference may be

made to S.137 which was on the statute book only for two years 1961 to 1963 and since then not been replaced for the over last sixty years. The clauses throw some light on this issue.

1. Old S.137(ix) provided that a public servant, through prohibited by S.137(2) from disclosing any information contained in any statement, return, accounts, documents record etc., shall disclose any such particular relevant to any inquiry into a charge of misconduct in connection income tax proceeding against a legal practitioner-chartered accountant, to the authority empowered to take disciplinary action against members of the profession to which he belongs.

This happens because the charitable trusts are seen as tax evaders / conspirators in avoiding tax, instead of partners in social good or public interest. To give one example, Govt comes out with Voluntary Disclosure Schemes and levies less than confirmed tax evaders, but if a charitable trust receives anonymous donation, Govt taxes on the trusts at 30% flat.

Layers Association in Mumbai has challenged the constitutional validity of S.2 of PMLA on the same grounds as stated above.

Part 1 of the second schedule is in following words:

“A Chartered Accountant in practice shall be deemed to the guilty of professional misconduct if he-

1. Discloses information acquired in the course of his professional engagements to any person other than client so engaging him, or without the consent of his client or otherwise, than as required by any law for the time being in force."

In my submission the information is not required by law, but merely a part of prior investigation to apply the law. What is more burdensome is to collect it and hand it over the information on the Auditor who has no statutory power is not expected from the S.44AB does not in terms apply to a charitable trust. S.12A(b) (ii) requires audit of books of accounts and refers to S.44AB rule 17B and form no. 10B and 10BB are clearly ultra vires the Act brings a charitable trust and other individual tax payer on par as far as deciding the maximum amount not chargeable to Income Tax. S.12A is not a charging section but merely prescribes the conditions for applicability of S.11&12.

Cl.(8) only requires to obtain sufficient information which is necessary for expression of an opinion or its exception as are sufficiently material to negate the expression of an opinion.

Forms 10B & 10BB prescribed for giving audit report, relevant portion read as under.

"In our opinion and to the best of our information and according to explanation given to the Annexure are true and correct"

This is what I call Expecting the Unexpectable. How can you ask an Auditor to say that the "particular given" are true and correct according to 'explanations' given by a third party. This is particularly surprising when the Auditor has no statutory power to collect from / or compel a person from an outsider. He will necessarily have to ask / rely on information furnished by the concerned trustee or office bearer of the trust authorized to do so.

Now the auditor is expected to gather and disclose information so that the Assessing officer can form and express an opinion whether conditions of S.13 are violated so as to forfeit exemption granted or to be granted to an otherwise genuine charitable trust. This is a totally irrational and unconstitutional provision which seeks to dictate and control a professional who is governed by its apex institution constituted by a law of parliament.

Sub-sec (2) of S.2 of the Chartered Accountant Act, 1949 talks of "services involving the auditing or verification of financial transaction books, accounts or records". This does not involve "obtaining of personal information of relatives of a trustee to be handed over or report to the tax authorities. It is not evidence of a transaction which needs verification and / or disclosure.

It is alleged in some quarters that this Govt is moving towards autocracy. Such irrational provisions and

autocratic instructions may support such allegation. At one time, the slogan of the Tax Dept was "we trust you, you trust us". Now the slogan seems to be "we do not trust you, but you must trust us and do whatever we tell you to do without questioning." This is clearly unconstitutional and violates many Articles-in particular Art.21-which guarantees fundamental right to life, liberty and pursuit of happiness. This is to be read with Art.19(1)(9) the fundamental rights to carry on occupation, trade, business or profession and equality before law. Art. 19(6) does not contemplate to unreasonable restrictions. See **Sri Venkateswara Timber Depot v. UOI (1991) 189 ITR 741 (Orissa) (HC)** .

The power to tax is an incident of sovereignty and since the Constitution of India is the supreme law of the law and all other laws, rules, instructions or directions must be subordinate to constitution of India and must be read and interpreted in the light of it. In **India Cements Ltd. V. State of Tamilnadu (1991) 188 ITR 690 (SC)** a seven-judge bench of the supreme court observed that the "constitution is the mechanism under which the laws are to be framed and not merely an Act which declares what the law is to be. "Art.265 provides that "no tax shall be levied or collected except by authority of law. The word 'Law' in this Article means a valid law enacted by a competent legislature and cannot include an Executive order or a rule without express statutory authority (see **Krishi Vtpedan v. Shree Mahalaxmi 1995 Sup. (3)**, sec 433. Decision of the

Supreme court in **Federation of Hotel & Restaurant Association of India v. UOI (1989) 178 ITR 97(SC)** may also be seen.

(Contents of the above para are gratefully borrowed from the classic commentary *Law & Practice of Income Tax*, by **Kanga & Palkhivala**).

In tax matters only any restrict on intended to curb the chances and opportunities to use or create black money cannot be regarded as curtailing the freedom to carry on trade, business or profession.

Obligation to collect and report personal information cannot be considered as using or creating black money. It will be blatant misuse of powers.

2. If a transaction/s has/have taken place between the Trust and the specified relative of a trustee of the value exceeding (say) Rs.50,000 during the previous year then allows some vital details / information should be asked to be submitted by the Trust to check tax evasion or misuse of funds of the Trust for personal benefit. Auditors should be kept out of this process.

The **Calcutta H.C in Exide Industries Ltd. v. CIT (2007) 292 ITR 470 (Cal.) (HC)** struck down cl.(f) of S.43B as no reasons were not given by the legislature as to why the amendment was being brought into force. This is the correct decision. Unfortunately, the Hon'ble S.C. overruled this decision without appreciating that, the basis of the judgment in **Bharat Earth Movers v. CIT**

(2000) 245 ITR 428 (SC) has not been removed by the introduction of S.43B(f). It is submitted that the logic adopted by the Calcutta H.C. is still valid.

It is earnestly felt that the amendment made in S.12A(1)(b)(ii) is also without giving reasons when read with Rule 17B and forms 10B & 10BB. The Chartered Accountants and / or their Institute must challenge this unreasonable and irrational and almost impossible to comply on the ground that it is constitutionally invalid as it imposes unreasonable and irrational, impractical obligations on a professional to report on matters, which is neither an Auditor's job nor does he have legal authority to collect such information. Law cannot expect or compel citizens to do the impossible.

It is said that in democracy, you get from the Govt you deserve. In Democracy, you also get the laws you deserve unless you challenge them on the ground of constitutional validity.

S. N. Inamdar
Senior Advocate
Bombay High Court