

income accruing or deemed to accrue to the recipient in India. As per Section 9 income is deemed to accrue only if there is business connection. If the party has no branch or any other business connection, income does not accrue and hence there is no TDS. Where ever India has entered into DTAA's you also have to see the definition of permanent establishment 'PE' as given under Article 5 of the relevant DTAA. If the supplier has no PE in India there is no income deemed to accrue and hence there is no TDS.

#### ***On Payment of Fee for Technical Services***

Fee for technical services (FTS) is also covered under Section 9 of the IT Act. Most of the DTAA's have a separate article for FTS and one has to see the definition of FTS to arrive at the TDS liability. Some of the DTAA's define FTS to mean only that FTS which 'makes available' the technical know how. In such cases only where the technology is 'made available' TDS provisions would be attracted.

#### ***On Payment of sales commission for services rendered outside India***

No payments made to Non- residents for sales commission for services rendered outside India attract withholding tax. Cases where services are rendered outside India

and when payment is made to the non-resident by direct transfer of money to an account outside India were covered under Circular Nos.23 of 1969 and 786 of year 2000. However both these circulars have been withdrawn by the CBDT in October 2009. Even if the circulars are withdrawn the principle underlying the circulars which is clearly laid down in Section 9 would apply and where payment is being made for services rendered by a non-resident outside India and where this is for export sale (*i.e.*, to earn income from a source outside India).

#### ***Payment for bandwidth charges***

As held by judicial authorities in *Software Technology Parks of India v. ITO*, 3 SOT 529 (Bangalore), *Wipro Ltd v. ITO*, 80 TT J 191 (Bangalore), provision of standard facilities by service providers has been held not to constitute payment for use of process/fees for technical services.

#### ***Conclusion***

whether the payment is made in India or outside India or whether by a resident or Non Resident to a Non Resident on the income earned by Non Resident in India, the provisions of Section 195 applies and Tax has to be deducted in advance from the NRIs in the interest of revenue by the Income Tax Department.

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## **CHARITABLE INSTITUTIONS UNDER INCOME TAX ACT**

*By*

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India is known for its charity and there are innumerable charitable institutions whether formal or informal and whether registered under the respective Acts or not are established and working for the public welfare either in general or for specified

purposes. The Charitable Institutions are mostly in the form of public trusts registered under the Indian Trusts Act or societies registered under The Societies registration Act. Thus the Institution shall become the legal entity governed by its own rules and

regulations within the purview of their respective Acts.

The Charitable Institutions are also taxable under the Income Tax Act like any other person as a separate legal entity but the Income tax Act allows the exemption of the total income of the Institutions under the Act after fulfillment of certain conditions prescribed in the respective sections and conditions on registration.

***Characteristics of Charitable Institutions:***

- (a) It should be formal *i.e.*, evidenced by a written deed
- (b) It should be private *i.e.*, a few members of the board of trustees or members of the society
- (c) It should be self governing *i.e.*, by laws or rules of governance must be in writing and registered.
- (d) It should not be for profit *i.e.*, the basic intention of formation of the institution should be for charitable purposes. They may earn profit but it should not be for profit.
- (e) It should be voluntary *i.e.*, self interested persons should work for a particular cause.
- (f) It should not be religious *i.e.*, the Institutions should not work for a particular religion.
- (g) It should be Non-Political *i.e.*, the objects of the institution should be for charitable only.
- (h) It should be for public benefit *i.e.*, the fruits of the institute should go to the public in general and should not be for a particular caste, community, religion *etc.*,

***Exemption of Income of Educational Institutions :***

Section 10(23-C) of the IT Act, exempts the incomes of the educational institutions

of the Trusts and other societies who have established any University or other educational Institution existing solely for educational purposes and not for profit and having aggregate annual receipts do not exceed one crore rupees in the year.

In this case the exemption of receipts of one crore rupees applies to each institution working under the trust/society separately and not the aggregate value of the total receipts of the trust. For example, a trust is running five institutes and each one having less than one crore of total receipts than the entire income of the trust is exempted under Section 10(23 C) of the Act.

To claim exemption under this section, the Society/Trust need not be registered under Section 11 of the Act and the conditions specified under Sections 11, 12 and 13 shall not apply to the institution and only the conditions specified in this section are applicable.

The Society/Trust shall make an application in Form No.56 along with enclosures in seven sets to the Director of Income Tax – Exemptions for grant of exemption or continuance thereof during the financial year immediately preceding the assessment year from which such exemption is sought.

The Trust/Society having claimed exemption under this section is not barred to make an application under Section 11 of the Act and claim exemption in that section also.

***Registration under Income Tax Act:***

The Charitable Institution, to claim exemption of its income and for other benefits it must get itself registered with the Director of Income Tax exemptions of the State in which it is registered. There is no time limit for registration but the exemption is available from the year in which registration is granted and the Institution must make an application and that application shall contain the following:

1. Form No.10A in triplicate duly signed by the Managing Trustee/Authorised Signatory.
2. A copy of Trust Deed
3. Certificate of declaration by the trustees/members under Section 13(1)(c) of the IT Act that they have not taken any personal benefit out of the Income of the trust.
4. A declaration under Section 11(5) of the IT Act by the Trustees/Members that they shall invest the funds of the Institution in the modes specified by the Act.
5. Note on activities of the Trust
6. Balance Sheets, Receipts and Payments Account and Income and Expenditure Accounts from the date of formation till immediately preceding previous year ending on 31st March.
7. List of founders
8. List of present trustees/members.

The Director of Income tax (Exemptions) after receipt of the application he has to dispose of the application within six months from the end of the month in which the application is received. The Director may issue a notice to the Institution fixing up date of hearing and he may ask some more details such as Original Instrument, books of accounts, details of assets, details of contributions or donations, details of amendments if any *etc.*

On the date of hearing after going through the trust deed and all other information furnished, If he is satisfied that the objects of the trust are for charitable in nature he shall issue certificate of registration under Section 12AA setting out the terms and conditions therein. If there is no communication received within six months from the end of the month in which application is filed it is deemed registered under the Act.

### ***Can Charitable Institute Carry on Business ?***

The decisions of the supreme Court and various high Courts allows the charitable institutions to do any business but it should be incidental to the main objects and the profit earned on such business shall be applied for charitable purposes.

The following are some of the incomes:

- Rent from properties held under trust.
- Income from conference halls held under trust.
- Income from one time activities such as charity show *etc.*
- Professional services rendered incidental to charitable work.
- Market committees.
- Sale of books, publications *etc.*
- Running old age home with charge.
- Micro finance activity
- Medical and educational activity
- Exhibitions and concerts
- Sale of milk by ghoshalas.
- Running coaching classes by Professional Institutes
- Telecasting, radio, TV for social religious purposes.

### ***Application of Income :***

At least 85% of the total income earned by the registered charitable institution shall be applied during the year for charitable purposes and the balance shall be carried forward to the next years. If any Institution could not apply its 85% of income during the previous year it has to file Form No.10 along with the Return of Income to carry forward the same to the next years. The

Application of Income need not be a revenue expenditure and even capital expenditure shall be treated as application of income for this purposes.

***Specified Investments under Section 11(5) :***

The Act specifies that where income is accumulated the same is required to be kept invested or deposited in the forms or modes specified in Section 11(5) of the Act. The eligible investments are specified in the Act and The Government from time to time specified the new modes and forms of investments that includes deposits with Post Offices, Schedule Banks, UTI, securities, bonds, debentures shares of a State Government and Central Government *etc.*,

If the deposit/Investment is out of the list of specified investments than the investment is not qualified for application and the investment is so made shall be taxable in the year in which it is made.

***Taxation of Registered Charitable Institution :***

The Institution which do not apply its income for charitable purposes or infringes any of the provisions envisaged under Section 13 it has to be taxed at Maximum Marginal rate currently @ 30%.

***Withdrawal of Exemption:***

In the following cases Income of the charitable Institution loses its character and exemption is denied.

01. The income of a private religious trust, which does not ensure for the benefit of the public.
02. The application of income is for the benefit of particular caste, religion, community *etc.*,

03. Any part of its income either directly or indirectly spent for the benefit of the founders, trustees or their relatives or any benefit either directly or indirectly attributed to them from the assets of the Institution.

*Exception :* Any fees, remuneration rent *etc.*, given to any trustees/members by the institution which is reasonable for their services rendered to the Institute.

***Cancellation of Registration :***

The Director of Income Tax can cancel the registration after giving opportunity of being heard from the Institution if he satisfied that the activities of the Institution are not genuine or are not being carried out in accordance with the objects of the Institution. In that case he pass an order in writing cancelling the registration granted under Section 12AA of the Act. However, the Institute can challenge the cancellation in Tribunal.

***Conclusion :***

Apart from the Government many individuals and corporates intends to contribute their assets and earnings to the service of the poor and downtrodden and also the other welfare activities for the upliftment of the society in the form of trust/societies *etc.*, and the Government as a policy to encourage these institutions in the interest of the society exempts the income of the institutions from the payments of taxes on the condition that the income earned by these institutions applied for charitable purposes. At the same time it also controls the activities and ensures that the charitable institution should not work for the benefit of the trustees and not for a particular sect of people and should not deviate from its objects.