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BUDGET 2009 ANONYMOUS DONATIONS

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INTRODUCTION

The Budget 2009 has proposed some relief to the taxation of anonymous donations. The Finance Act, 2006 had brought in radical changes with regard to anonymous donations received by charitable

organisations. A new section 115BBC was inserted w.e.f. 1-4-2007 whereby anonymous donations are taxable at the rate of 30% without any deduction or set off under any other head. This amendment caused harassment to many genuine voluntary organisations who received

anonymous donations through donation boxes and various other sources. There is some relief to such organisations as, at least, anonymous donation to the extent of 5% of total income has been exempted.

**SCOPE OF SECTION 115BBC
AS AMENDED BY BUDGET 2009**

The text of the newly inserted section 115BBC is as under :

'115BBC. Anonymous donations to be taxed in certain cases.— (1) Where the total income of an assessee, being a person in receipt of income on behalf of any university or other educational institution referred to in sub-clause (iiiad) or sub-clause (vi) or any hospital or other institution referred to in sub-clause (iii ae) or sub-clause (via) or any fund or institution referred to in sub-clause (iv) or any trust or institution referred to in sub-clause (v) of clause (23C) of section 10 or any trust or institution referred to in section 11, includes any income by way of any anonymous donation, the income-tax payable shall be the aggregate of—

- (i) the amount of income-tax calculated at the rate of thirty per cent of the aggregate of anonymous donation, as exceeds five per cent. of the total income of the assessee or an amount of rupees one lakh, whichever is higher; and"*
 - (ii) the amount of income-tax with which the assessee would have been chargeable had his total income been reduced by the amount of income subject to tax under clause (i).*
- (2) The provisions of sub-section (1) shall not apply to any anonymous donation received by—
- (a) any trust or institution created or established wholly for religious purposes;
 - (b) any trust or institution created or established wholly for religious and charitable purposes other than any anonymous donation made with a specific direction that such donation

***Any anonymous donation
received by a trust
or institution created
for religious purposes
shall not be covered
by the new section***

is for any university or other educational institution or any hospital or other medical institution run by such trust or institution.

- (3) For the purposes of this section, "anonymous donation" means any voluntary contribution referred to in sub-clause (iia) of clause (24) of section 2, where a person receiving such contribution does not maintain a record of the identity indicating the name and address of the person making such contribution and such other particulars as may be prescribed.'

However, religious organisations have been kept outside the purview of this provision. In other words, any anonymous donations received by a trust or institution created for religious purposes shall not be covered by the new section. In case of partially religious and partially charitable organisations the anonymous donations received shall be subjected to tax if it has been received with specific direction that such donation is for a university, educational institution or hospital or medical institution run by such trusts or institutions.

**EXPLANATORY NOTE PROVIDED
IN MEMORANDUM TO BUDGET 2009**

Tax relief on anonymous donations in certain cases... under the current provisions of section 115BBC, wholly

religious entities are outside the purview of taxation of anonymous donations. Partly religious and partly charitable entities have also been exempted from the taxation of anonymous donations, except where the anonymous donation is made to an educational or medical institution run by such entity in which case such donations are taxed at the rate of 30 per cent. In the case of wholly charitable entities, all anonymous donations are taxed at the rate of 30 per cent.

In order to mitigate the compliance burden, it is proposed to provide relief to such organizations by exempting a part of the anonymous donations from being taxed. The proposed amendment will result in the following:—

1. Anonymous donations received by wholly religious institutions shall remain exempt from tax.

2. In the case of partly religious and partly charitable institutions, anonymous donations directed towards a medical or educational institution run by such entities shall be taxable only to the extent such donations exceed 5 per cent of total income of such trust or institution or a sum of Rs.1 lakh, whichever is more.

3. In the case of wholly charitable institutions, anonymous donations shall be taxable to the extent such donations exceed 5 per cent of total income of such trusts/institution or a sum of Rs.1 lakh, whichever is more.

However, in case of partially religious and partially charitable organisation, the anonymous donation received shall be subjected to tax if it has been received with specific direction that such donation is for a university, educational institution or hospital or medical institution run by such trusts or institutions.

The proposed amendments will be

The Wanchoo Committee had recommended that all anonymous donations to charitable trust should be taxed at the rate of 65%.

applicable with effect from the 1st day of April, 2010 and will accordingly apply in relation to assessment year 2010-11 and subsequent years.

HISTORICAL BACKGROUND TO ANONYMOUS DONATIONS

Voluntary contributions including anonymous donations were not considered as a part of income of the voluntary organisations upto 31.03.1973. Section 12(1) which provides that voluntary contributions should also be treated as income was inserted with effect from 01-04-1973. The voluntary contributions or donations were treated as income on the basis of the recommendation of the *Wanchoo Committee*. One of the observations of *Wanchoo Committee* was that anonymous donation should not be allowed exemption to curtail the menace of black money. The *Wanchoo Committee* recommended that all anonymous donations to charitable trust should be taxed at the rate of 65%. However, the Select Committee of the Parliament did not accept these recommendations of the *Wanchoo Committee*. It opined that no objection should be made to anonymous donation if it is spent for charitable or religious purposes. It was further observed that, in India, owing to the spiritual traditions, many donors do not like to

disclose their identity. Further, donations collected through charity boxes would also come under trouble as it is difficult to establish the identity. The ghost of *Wanchoo Committee* seems to have resurrected in the Finance Act, 2006, as a new section 115BBC was inserted which proposes to tax anonymous donations at a rate of 30%.

SECTION 115BBC WILL AFFECT THE FOLLOWING ORGANISATIONS

- (i) Organisations covered under section 11.
- (ii) Any University or other educational institution referred to in section 10(23C)(iiiad) and (vi).
- (iii) Any hospital or other institution referred to in section 10(23C)(iii ae) and (via).
- (iv) Any fund or institution referred to in section 10(23C)(iv).
- (v) Any trust or institution referred to in section 10(23C)(v)
- (vi) Any trust of institution which is partially religious and partially charitable in nature if it has received anonymous donations with specific direction that such donation is for a university, educational institution or hospital or medical institution run by such trusts or institutions.

The anonymous donation shall become taxable only if it exceeds 5% of the total income. Further for smaller NGOs anonymous donations shall be exempted to the extent of Rs. 1 lakh even if it exceeds 5%. The tax liability of the Trust or NGO shall be computed at the rate of 30% of the excess anonymous donations received

The anonymous donation shall become taxable only if it exceeds 5% of the total income

and at the normal rates for the balance income, if any, after taking into account the exemption under section 11.

ANONYMOUS DONATIONS TOWARDS SPECIFIC PROJECTS

Normally restricted project grants should not be considered as a part of income as they are contractual obligations. However, to prove that a donation is for a specific project purpose, it should be supported by specific instruction from the donor, which is not possible in case of anonymous donations. Because of the anonymity, it would not be possible to prove that such donations are specific and restricted for a particular purpose. In this regard sub-section (2)(b) of section 115BBC creates further confusion. The text is as under :

The provisions of sub-section (1) shall not apply to any anonymous donation received by -

(b) any trust or institution created or established wholly for religious and charitable purposes other than any anonymous donation made with a specific direction that such donation is for any university or other educational institution or any hospital or other medical institution run by such trust or institution.

The above clause provides that anonymous donation received by religious as well as charitable trust would be taxable if it is received with a specific direction that such donation is for any university, educational institution or medical institutions. It is not clear how a specific direction can come from anonymity. If such directions are valid without knowing the identity of the donor, then a trust may also contend that the anonymous donations are restricted donations and therefore not a part of its income as they could not be treated as voluntary contribution under section 12(1) or section 2(24)(iia).

However, specific direction from an anonymous donor may not be a legally tenable position either way. Therefore, sub-section (2)(b) of section 115BBC needs to be amended appropriately. Amidst confusion and lack of clarity, it seems that anonymous donation irrespective of the nature would be hit by section 115BBC and shall be taxable if it exceeds 5% of total income or Rs. 1 lakh, whichever is higher.

WHETHER ANONYMOUS DONATIONS CAN BE ACCUMULATED INDEFINITELY

After insertion of section 115BBC regarding taxation of anonymous donations no amendment was made to sections 11 and 12 which create a confusion whether anonymous donations are subject to application and accumulation. However, a new sub-section (7) has been added to section 13 which provides that nothing contained in section 11 or 12 shall operate to exclude anonymous donations from total income. The text is as under :

Nothing contained in section 11 or section 12 shall operate so as to exclude from the total income of the previous year of the person in receipt thereof, any anonymous donations referred to in section 115BBC

The anonymous donation shall become taxable only if it exceeds 5% of the total income

on which tax is payable in accordance with the provisions of that section.

The exemptions available under section 11 are not available to anonymous donations and they are to be taxed as per the provisions of section 115BBC. Therefore, in our opinion, the condition relating to application and accumulation of income would not apply to anonymous donations. Therefore, anonymous donations shall not be subject to 85% application for charitable purposes. In other words, the portion of anonymous donations which has been subjected to tax shall be available for indefinite accumulation.

IF SECTION 13 IS VIOLATED, WILL ANONYMOUS DONATIONS BE TAXED AGAIN ?

All charitable organisations may forfeit their income tax exemptions if they violate the provisions of Section 13 and their entire income shall become taxable. The question arises whether anonymous donations would be taxed again in case there is a violation under section 13. A plain reading of section 13(1) along with section 13(7) implies that anonymous donations have at the outset been excluded from the purview of sections 11 and 12. Any violation under section 13 results in a forfeiture of the exemptions available under sections 11 and 12. Under

such circumstances double taxation of anonymous donations does not look tenable as it does not enjoy any exemption under section 11 or 12.

Apart from the above analysis, it has been held in the Supreme Court on several occasions that income cannot be taxed twice. Double taxation is possible only if the Legislature has distinctly enacted it. In the case of *Laxmipat Singhania v. CIT* (1969) 72 ITR 291, the Supreme Court observed that it is a fundamental rule that income cannot be taxed twice unless otherwise expressly provided. In another case *Jain Bros. v. Union of India* [1970] 77 ITR 107, the Supreme Court observed that as such there is no constitutional bar on double taxation, but for that the legislature should expressly enact provision for such double taxation.

In the light of the above case studies, in our opinion anonymous donations once taxed under section 115BBC would not be subject to double taxation even in case of a violation under section 13. In other words, the exempted portion of anonymous donation shall be subjected to tax under Section 13 and the portion of anonymous donation which has already been taxed will not be taxed twice.

CAN THE PROVISIONS OF SECTIONS 68, 69, 69A TO 69C BE INVOKED ?

Under sections 68 to 69D, unexplained cash credits, money, investments, expenditure, etc., are subjected to income tax. Since anonymous donation is also an unexplained receipt, the question arises whether the above income tax provisions can be invoked against it. The provisions of sections 68 and 69A can be invoked only when the assessee does not treat a particular receipt as income. However, in case of charitable organisations, since

The provisions of sections 68 and 69A can be invoked only when the assessee does not treat a particular receipt as income.

anonymous donations are shown as a part of the income of the trust, it would not be possible on the part of the Assessing Officer to invoke section 68, 69, 69A or 69C. In a recent case, the Delhi High Court in *DIT (Exemption) v. Keshav Social and Charitable Foundation* [2005] 278 ITR 152 held that anonymity of the donors cannot lead to the inference that unaccounted money has been introduced. Section 68 had no application to the facts of the case because the assessee had disclosed the donation as a part of its income. Therefore, there was full disclosure of income and its application by the assessee.

In the light of the above case law and the legal interpretations made therein, the possibility of invoking sections 68, 69, 69A to 69C does not seem feasible. Here it is worthwhile to note that the *Select Committee* of Parliament had rejected the recommendation of *Wanchoo Committee* in 1973 which wanted to tax anonymous donations at the rate of 65%. The *Select Committee* was of the opinion that as long as the money was spent for charitable or religious purposes it did not matter whether the source was anonymous or determined.

The position of the legal statutes has been consistently clear about treating anonymous donations as valid income available for charitable purposes, no change in principle has resulted after the enactment of section 115BBC.

SUMMING UP

To sum up the aforesaid discussion :

- (i) The Finance Act, 2006 had brought radical changes with regard to anonymous donations received by charitable organisations. A new section 115BBC was inserted w.e.f. 01.04.2007 whereby anonymous donation is taxable at the rate of 30% without any deduction or set off under any other head.
- (ii) The Budget 2009 provides some relief by exempting anonymous donations to the extent of 5% of total income or Rs. 1 lakh whichever is higher.
- (ii) Religious organisations have been kept outside the purview of this provision. In other words, any anonymous donations received by a trust or institution created for religious purposes shall not be covered by the new section.
- (iii) Anonymous project donations should normally be considered as a part of income as they can not be proved as restricted funds. To prove that a donation is for a specific project purpose, it should be supported by specific instruction from the donor, which is not possible in case of anonymous donations. Because of the anonymity, it would not be possible to prove that such donations are specific and restricted for particular purpose.
- (iv) Exemptions available under section 11 are not available to anonymous donations and they are to be taxed as per the provisions of section 115BBC. Therefore, in our opinion, the condition relating to application and accumulation of income would not apply to anonymous donations. Therefore, anonymous donations shall not be subject to 85% application for charitable purposes. In other words, anonymous donations, subjected to

Anonymous project donations should normally be considered as a part of income as they can not be proved as restricted funds.

tax, can be accumulated indefinitely. It may be noted that the exempted portion of anonymous donation shall be subject to 85% application along with other incomes.

- (v) Anonymous donations once taxed under section 115BBC would not be subject to double taxation even in case of a violation under section 13.
- (vi) In case of charitable organisations since anonymous donations are shown as a part of the income of the trust it would not be possible on the part of the Assessing Officer to invoke section 68, 69, 69A or 69C. These sections deal with undisclosed income and receipts.
- (vii) The anonymous donation shall become taxable only if it exceeds 5% of the total income. Further for smaller NGOs anonymous donations shall be exempted to the extent of Rs. 1 lakh even if it exceeds 5%. The tax liability of the Trust or NGO shall be computed at the rate of 30% of the excess anonymous donations received and at the normal rates for the balance income, if any, after taking into account the exemption under section 11.
- (viii) Thus Budget 2009 has provided a much needed relief to NGOs.

Reference Book : **Taxation of Trust and NGOs with FCRA and FEMA** by **Manoj Fogla**, published by TAXMANN Publications, New Delhi

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