



Resource support on NGO Governance, Accounting and Regulations



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LEGAL STATUS OF A FACILITATING NGO



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CAN A FACILITATING NGO BE TREATED AS CHARITABLE IN NATURE

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INTRODUCTION

1.01 In the current milieu of corporatisation of the charity sector and the increasing influence of CSR various new model of NGOs are emerging. One of the new model of charitable work is the concept of mother NGO or a Facilitating NGO which does not implement programmes directly but generates funds and resources for its downstream NGOs. The issue here is that, can such NGOs be considered as charitable in nature and can they charge a facilitation cost without being deemed as a commercial entity.

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WORKING THROUGH OTHERS ONLY

- 1.02** *Can a charitable organisation be said to be existing for a particular purpose when it is directly not engaged in such purpose but is working through various other charitable organisation :* In the case *Aditanar Educational Institution v. Additional Commissioner of Income-tax* [1997] 90 TAXMAN 528 (SC) the hon'ble Supreme Court laid down the ratio for determining the purpose for which an organisation exists. In this case, the assessee was registered solely for educational purposes but it imparted education through various registered schools and colleges. The department contended that the assessee itself was not providing any education directly therefore it cannot be considered as existing solely for educational purposes. The court observed that it will be rather unreal and hyper-technical to hold that the assessee-society is only a financing body and will not come within the scope of 'other educational institution' as specified in section 10(22). The relevant observation is as under ;

"It will be rather unreal and hyper-technical to hold that the assessee-society is only a financing body and will not come within the scope of 'other educational institution' as specified in section 10(22). The object of the society is to establish, run, manage or assist colleges or schools or other educational institutions solely for educational purposes and in that regard to raise or collect funds, donations, gifts, etc. Colleges and schools are the media through which the assessee imparts education and effectuates its objects. In substance and reality, the sole purpose for which the assessee has come into existence is to impart education at the levels of colleges and schools and so, such an educational society should be regarded as an 'educational institution' coming within section 10(22).

- 1.03** The other relevant cases in this regard are; *Addl. CIT v. Aditanar Educational Institution* [1979] 118 ITR 235/[1980]3 Taxman 56 (Mad.), *CIT v. Rajagopal Educational Trust* [Special Leave Petition No. 6281 of 1986], *Katra Education Society v. ITO* [1978] 111 ITR 420 (All.), *CIT v. Doon Foundation* [1985] 154 ITR 208/22 Taxman 9 (Cal.), *Agarwal Shiksha Samiti Trust v. CIT* [1987] 168 ITR 751/[1988] 36 Taxman 165 (Raj.), *Governing Body of Rangaraya Medical Colleges. ITO* [1979] 117 ITR 284 (AP) and *Secondary Board of Educations v. ITO* [1972] 86 ITR 408 (Ori.).

- 1.04** *Can a charitable organisation be considered as charitable in nature when the entire donation mobilised is given as intercharity donation :* This issue was brought before Delhi High Court in *Commissioner of Income-tax v. Hps Social Welfare Foundation* [2010] 235 CTR 330 (Del), (2010) 235 CTR 0330 (Del), (2010) 043 DTR 0067 (Del). In this case, the assessee had received 2 crore as donation during the year and had donated 2.07 crore to various NGOs and institutions. The AO argued that giving money to various organisations could not be considered to be a charitable activity. He further argued that the funds given as inter charity donation might not have been applied for charitable purposes. It was held that the Assessing Officer had not pointed out violation of any provision of section 13 by the assessee. The Commissioner (Appeals) as well the Tribunal, both, had found that the organisations, to which donations were given by the assessee during the assessment year in question, were genuine charitable organisations. There

was absolutely no material before the Assessing Officer to show that the funds given to those NGOs/institutions were used for personal benefit of the Donor or any of its Directors.

INTER CHARITY DONATION

1.05 *Can intercharity donation be treated on par with direct implementation of charitable activities : 'End justifies the means'* is what the courts have consistently held in determining the charitable nature of an organisation. In *CIT v. J. K. Charitable Trust* [1992] 196 ITR 31 (All.), it was held that a charitable purpose may be served in more than one way. One is to directly contribute for the promotion of that cause, the other is to contribute money to another charitable organisation which advances that cause. In other words the Allahabad high court laid down the principles of treating the work done through another charity at par with doing the work directly. The Supreme Court in *CIT v. Thanthi Trust* [1999] 239 ITR 502, has also upheld the treatment of inter-charity donations as valid application of funds. In this case Supreme Court further held that the Assessing Officer cannot deny exemptions even if the donee trust had not expended the amounts received in the year of receipt. Similar views were also taken in *CIT v. Aurobindo Memorial Fund Society* [2001] 247 ITR 93 (Mad.) and *CIT v. Matriseva Trust* [2003] 128 Taxman 261 (Mad.). To sum up, inter-charity donation have been held as application for the purposes of section 11(1)(a).

NGOs PROVIDING NON FINANCIAL SUPPORT ONLY

1.06 *Is it possible to create a charitable organisation which acts as a support organisation to another charitable organisation, such support need not be financial in nature :* Charitable purpose has never been confined or given a narrow interpretation of expecting charities to physically implement the programs themselves. The courts have always held that any activity which directly or indirectly supports charitable activities or even charitable organisations should be considered as a charitable activity. There was an interesting case in Delhi Court where one NGO formed a charitable trust to manage its properties. The CIT denied registration because according to him, managing the properties of another NGOs was not a charitable purpose. The Delhi High Court in the case *DIT (Exemption) v. PRADAN Property Holding Trust*, ITA No. 361/2007 dt. August 16, 2010, ruled that a trust constituted for the management of properties of another charitable society should be considered as charitable in nature. The court observed that the stated fact that, the assessee does not carry out any independent charitable activity was not enough to deny the 12AA registration. It further observed that there was no reason why holding of properties cannot be said to be charitable object.

CHARGING REMUNERATION OR ADMINISTRATIVE COST

- 1.07** *Can any remuneration or fee charged against any charitable project be considered as commercial activity* : In the case *ICAI Accounting Research Foundation v. Director General of Income-tax (Exemptions)* [2009] 183 TAXMAN 462 (DELHI), the assessee was a foundation set up by Institute of Chartered Accountants of India (ICAI) with main objective to make it an academic institution for imparting, spreading and promoting knowledge, learning, education and understanding in various fields related to profession of accountancy. It was a deemed company under Section 25 of Companies Act, 1956 and was having a status of an academic institution. Assessee filed application for claiming exemption under section 10(23C)(iv) taking plea that it was covered by expression 'charitable purposes' as defined in section 2(15). The application was rejected on grounds : (i) that assessee had undertaken three research projects on behalf of local bodies and had also received remuneration for those projects which amounted to doing business of providing professional services; and (ii) that assessee had received funds from Infosys Technologies Limited in form of Infosys Fellowship Fund and though it was for grant of fellowship to deserving candidates for undertaking research projects, yet if a fellow would leave in middle of programme, or would finish his research early with funds left in account, only Infosys would decide how funds was to be spent and, hence, assessee could not be said to be doing any charitable activity in that regard. "The issue raised was whether merely on undertaking research projects at the instance of the Government/Local bodies and receiving remuneration thereof changes the essential character of the assessee-foundation into a commercial or business nature activity and therefore engaged in trade, business or commerce. It was held by the Honourable Delhi High Court that the charitable character would not change even if the Foundation had charged fees against various projects".
- 1.08** **Supreme Court on Commerciality and existence of profit for Charitable Organisations** : With regard to the issue of surplus generated by charitable organisation, it is important to study the observations of the Hon'ble Supreme Court in *T.M.A. Pai Foundation v. State of Karnataka* [2002] 8 SCC 481. The 11-Judge Constitution Bench has held that the private educational institutions are bound to generate funds for betterment and growth of the institutions and for which there may be a surpluses for furtherance of education. Therefore, it is not only permissible but an important requirement to run the institutions of such strength. Further, in *Aditanar Educational Institution's case (supra)*, Hon'ble the Supreme Court has observed that when surplus is utilized for educational purposes *i.e.*, for infrastructure development, it cannot be said that the institution was having the object to make profit. Hon'ble the Supreme Court has rightly observed time and again that surpluses used for management and betterment of the institutions could not be termed as profit. If the stand of the Department/revenue is accepted to be correct, especially in the wake

of the methodology adopted by the AO in ascertaining profits, then no educational institution like the petitioner-society could be said to be existing solely for educational purposes as in case of every educational institution there is a possibility of profit. The Court further held that no profiteering does not imply that the institutions cannot have reasonable surplus for future sustenance and expansion of the institute. It was held that upto 6-15% of profit could be considered as reasonable and legitimate. This issue was further reaffirmed by the Supreme Court ruling in the case of *P.A. Inamdar v. State of Maharashtra* AIR 2005 SC 3226/[2005] SCC 537.

FCRA ISSUES FOR A FACILITATING/ NETWORKING ORGANISATION

- 1.09** Inter charity donation is treated at par with direct implementation of charitable activities, however under FCRA the funds are received by the donee as subsequent recipient. Under the Rule 24 of FCRR, 2011 donation to subsequent organisation can only be given if such organisation is also registered under FCRA and has not been proceeded against. In other words all facilitating organisation providing grant should ensure two things (i) that the donee organisation is also having FCRA registration (ii) the donee organisation has not violated any provision of FCRA and has not been proceeded against by the FCRA department. To ensure this compliance the donor organisation should collect and undertaking from the donee organisation that it has not been proceeded against. Further, under the Rule 24 of FCRR, 2011 donations can also be given to organisations not registered under FCRA by taking prior permission in Form 10.
- 1.10** Further the new FCRA law requires that the administrative expenditure should not exceed 50% of total utilisation. As per the various judicial rulings discussed in this article, the entire amount transferred to other charitable organisations is treated as applied towards charitable purposes. Therefore, the donor organisation should ensure that the administrative expenditure does not exceed 50% of the total utilisation including the amount given as inter charity donation.

CONCLUSION

- 1.11** In the light of the various judicial precedence it can be said that the term 'charitable purpose' is very broad and is not confined to a narrow interpretation of the charitable work that it has to be directly implemented by the NGO. To sum the following ratios are emerging;
- A charitable organisation be said to be existing for a particular purpose even if it is directly not engaged in such purpose but is working through various other charitable organisation

- Inter charity donation is treated ot par with the direct implementation of charitable activities
- A charitable organisation can be considered as charitable in nature even if the entire donation mobilised is given as inter charity donation
- The revenue cannot argue that the funds given as inter charity donation might not have been applied for charitable purposes in the absence of any evidence
- It is possible to create a charitable organisation which acts as a support organisation to another charitable organisation, such support need not be financial in nature
- Reasonable remuneration or fee charged against any charitable project cannot be considered as commercial activity
- Existence of surplus or profit as a part of charitable activity is permissible.
- Under FCRA inter charity donation can be given only to organisations registered under FCRA, for other organisation prior permission is necessary.

Standards & Norms aims to provide relevant informations and guidance on NGO governance, Financial Management and Legal Regulations. The informations provided are correct and relevant to the best of the knowledge of the author and contributor. It is suggested that the reader should cross check all the facts, law and contents before using them. The author or the publisher will not be responsible for any loss or damage to any one, in any manner.



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