Nishith Desai Associates
LEGAL AND TAX COUNSELING WORLDWIDE

MUMBAI SILICON VALLEY BANGALORE SINGAPORE MUMBAI BKC NEW DELHI MUNICH NEW YORK

# Corporate Social Responsibility & Social Business Models in India

## A Legal & Tax Perspective

January 2017

Dear Friend,

The last two decades has evoked unprecedented momentum and diversity of approach in the quest for inclusive growth. We see an intense and inventive movement to find sustainable solutions to social problems, and draw in the marginalized, deprived and weakest sections of the socio-economic spectrum to a more empowered existence. The convergence and blurring of the once-discrete lines between the business and social domains, the for-profit and not-for-profit models, and bringing of the social agenda into the core of business, has thrown up significant questions around legal and regulatory frameworks and options.

I am, therefore, particularly delighted to share this 2015 special publication, **Corporate Social Responsibility & Social Business Models in India – A Legal & Tax Perspective.** Our endeavor is to lay out a thorough and intricate perspective on the legal, tax and regulatory provisions and implications on two significant approaches: the emerging and transformative *Social Business* framework pioneered by Prof. Muhammad Yunus and a new breed of social evangelists and entrepreneurs; and the still strongly prevalent *Corporate Social Responsibility*.

We hope you find this edition useful and insightful. A soft version of this publication is available at our knowledge site: www.nishithdesai.com.
Do feel free to reach us with your suggestions, queries and experiences.

With warm regards,

Nishith Desai

# About NDA

Nishith Desai Associates (NDA) is a research based international law firm with offices in Mumbai, Bangalore, Palo Alto (Silicon Valley), Singapore, New Delhi, Munich and New York. We provide strategic legal, regulatory, and tax advice coupled with industry expertise in an integrated manner.

As a firm of specialists, we work with select clients in select verticals. We focus on niche areas in which we provide high expertise, strategic value and are invariably involved in select, very complex, innovative transactions.

We specialize in Globalization, International Tax, Fund Formation, Corporate & M&A, Private Equity & Venture Capital, Intellectual Property, International Litigation and Dispute Resolution; Employment and HR, Intellectual Property, International Commercial Law and Private Client. Our industry expertise spans Automotive, Funds, Financial Services, IT and Telecom, Pharma and Healthcare, Media and Entertainment, Real Estate, Infrastructure and Education. Our key clientele comprise marquee Fortune 500 corporations.

Equally passionate about philanthropy, social sector and start ups, our role includes innovation and strategic advice in futuristic areas of law such as those relating to Bitcoins (block chain), Internet of Things (IOT), Privatization of Outer Space, Drones,Robotics, Virtual Reality, Med-Tech and Medical Devices and Nanotechnology.

Nishith Desai Associates is ranked the 'Most Innovative Asia Pacific Law Firm in 2016' by the *Financial Times - RSG Consulting Group* in its prestigious **FT Innovative Lawyers Asia-Pacific 2016** Awards. With a highest-ever total score in these awards, the firm also won Asia Pacific's best 'Innovation in Finance Law', and topped the rankings for the 'Business of Law'. While this recognition marks NDA's ingress as an innovator among the globe's best law firms, NDA has previously won the award for 'Most Innovative Indian Law Firm' for two consecutive years in 2014 and 2015, in these elite *Financial Times* Innovation rankings.

Our firm has received much acclaim for its achievements and prowess, through the years. Some include:

**IDEX Legal Awards**: In 2015, Nishith Desai Associates won the "M&A Deal of the year", "Best Dispute Management lawyer", "Best Use of Innovation and Technology in a law firm" and "Best Dispute Management Firm". IDEX Legal recognized Nishith Desai as the Managing Partner of the Year in 2014.

**Merger Market** has recognized Nishith Desai Associates as the fastest growing M&A law firm in India for the year 2015.

**World Tax 2015 (International Tax Review's** Directory) recognized NDA as a Recommended Tax Firm in India

**Legal 500** has ranked us in tier 1 for Investment Funds, Tax and Technology-Media-Telecom (TMT) practices (2011, 2012, 2013, 2014).

**International Financial Law Review (a Euromoney publication)** in its **IFLR1000** has placed Nishith Desai Associates in Tier 1 for Private Equity (2014). For three consecutive years, IFLR recognized us as the Indian "Firm of the Year" (2010-2013) for our Technology - Media - Telecom (TMT) practice

**Chambers and Partners** has ranked us # 1 for Tax and Technology-Media-Telecom (2015 & 2014); #1 in Employment Law (2015); # 1 in Tax, TMT and Private Equity (2013); and # 1 for Tax, TMT and Real Estate – FDI (2011).

**India Business Law Journal (IBLJ)** has awarded Nishith Desai Associates for Private Equity, Structured Finance & Securitization, TMT, and Taxation in 2015 & 2014; for Employment Law in 2015

**Legal Era** recognized Nishith Desai Associates as the Best Tax Law Firm of the Year (2013).

**ASIAN-MENA COUNSEL** named us In-house Community 'Firm of the Year' in India for Life Sciences Practice (2012); for International Arbitration (2011); for Private Equity and Taxation in India (2009). We have received honorable mentions in ASIAN-MENA COUNSEL Magazine for Alternative Investment Funds, Antitrust/ Competition, Corporate and M&A, TMT, International Arbitration, Real Estate and Taxation and being Most Responsive Domestic Firm.

We have won the prestigious 'Asian-Counsel's Socially Responsible Deals of the Year 2009' by **Pacific Business Press.**

We believe strongly in constant knowledge expansion and have developed dynamic Knowledge Management ('KM') and Continuing Education ('CE') programs, conducted both in-house and for select invitees. KM and CE programs cover key events, global and national trends as they unfold and examine case studies, debate and analyze emerging legal, regulatory and tax issues, serving as an effective forum for cross pollination of ideas. Our trust-based, non-hierarchical, democratically managed organization that leverages research and knowledge to deliver premium services, high value, and a unique employer proposition has been developed into a global case study and published by John Wiley & Sons, USA in a feature titled 'Management by Trust in a Democratic Enterprise: A Law Firm Shapes Organizational Behavior to Create Competitive Advantage' in the September 2009 issue of Global Business and Organizational Excellence (GBOE).

**Please see the last page of this paper for the most recent research papers by our experts.**

# Disclaimer

This report is a copyright of Nishith Desai Associates. No reader should act on the basis of any statement contained herein without seeking professional advice. The authors and the firm expressly disclaim all and any liability to any person who has read this report, or otherwise, in respect of anything, and of consequences of anything done, or omitted to be done by any such person in reliance upon the contents of this report.

# Contact

For any help or assistance please email us on ndaconnect@nishithdesai.com or
visit us at www.nishithdesai.com

# Contents

# 1. Introduction

India's new economic policies since 1991 have been instrumental in creating favorable climate for ushering a rapid growth. The rapid economic growth, however, has not been able to sufficiently reduce socio-economic disparities that still exist across India. It is important to investigate whether this disparity can be minimized through, and through what measures. Thankfully, the issue of socio-economic disparity has attracted significant attention in the last two decades, specifically from Non-Governmental Organizations (**"NGOs"**), development scientists and social business pioneers like Prof. Muhammad Yunus, high net-worth philanthropists and business professionals. Businesses, governments, and NGOs are making collective efforts in reducing socio-economic disparity by developing innovative approaches in social sector space (Figure 1). While all of the approaches contribute to the socio-economic development and well-being of society, in this paper we specifically focus on two highly relevant business approach towards social sector i.e.: Social Business Models and Corporate Social Responsibility (**"CSR"**).

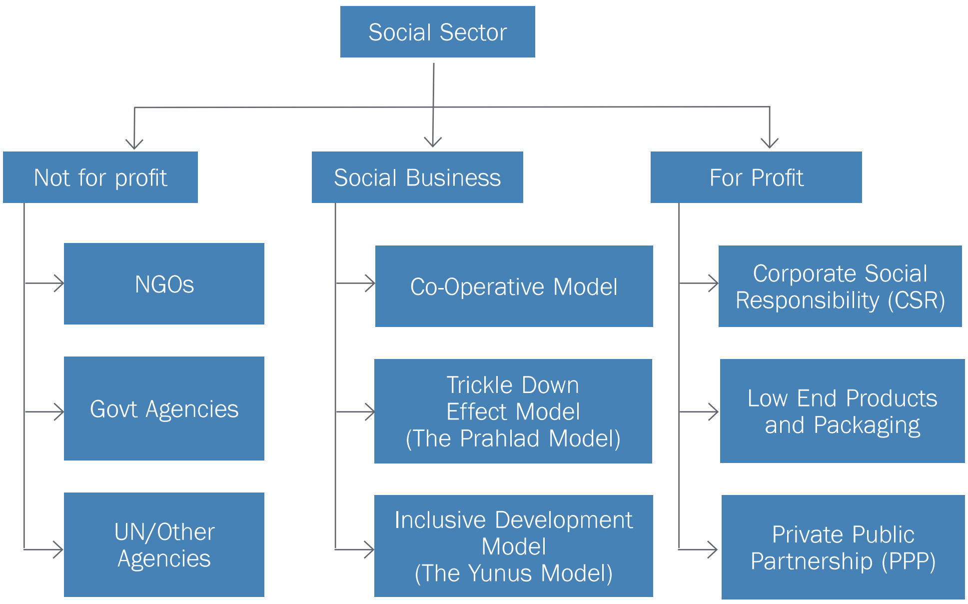



**Figure 1: Social Sector Structure in India**

The size of the social sector industry worldwide is huge but due to several verticals, such as education, health, resource development, etc., within this sector, it is difficult to estimate the exact volume or revenue of the sector. In 2011, close to 7% of India's GDP (about USD 1,848 billion[1]) was spent on the social sector. In last two decades, governments have drastically reduced public spending on certain vital social sectors like education, health and agriculture. However, such reduced spending by the government is duly compensated by an ever increasing participation of private sector in several social sector verticals. The private sector in India is uniquely positioned to venture into the social sector and expand its consumer base by using its innovation and market expertise to create a sustainable future. Social sector practice in India is gaining wide importance with the advent of social business and entrepreneurial models. Post liberalization, the number of high-net-worth individuals (**"HNIs"**) in India is constantly on the rise with greater participation in philanthropic activities. A recent report showed that India is emerging as a leading player in private philanthropy and charitable giving with donations totaling between 0.3% and 0.4% of GDP.[2] The report also shows that most of the HNIs on an average donate 3-4% of their income to this sector. India is home to one of the fastest growing

1. Retrieved from http://www.tradingeconomics.com/india/gdp. Last visited on October 18, 2012.
2. Retrieved from http://www.bain.com/Images/REPORT_India_Philanthropy_Report_2012.pdf. Website last visited on December 08, 2012.

economies in the world; and churns out a high percentage of HNWIs every year with an annual growth of 21% for such class. For social sector organizations to have access to finance of high value, it is important for them to have a robust internal governance mechanism. Although most of the contributions by donors are granted towards not-for-profit organizations that are not very large in scale, recently this sector is witnessing a giant leap towards private foundations, run and administered under the guidance of corporate houses.

Almost 30% of the contribution to social sector is towards support network and religious and charitable trusts. Most of the private foundations largely focus more on education, health and sanitation, and this sector provides an exciting prospect for private foundations to pioneer new forms of social entrepreneurial model based on a sound business principles which allows stakeholders' socio-economic prosperity. Private foundations and corporate philanthropy not only contribute to social inclusion but also help in sustaining the flow of investment and setting targets for the recipient organizations over several years with an aim to build their capabilities to achieve enhanced outcomes.

Social business projects form the core philosophy of corporate social responsibility and the earlier draft Schedule VII ("**Schedule**") of the Companies Act, 2013 ("**Companies Act**") contained "social business projects" among the list of various activities that a company could undertake. The Central Government vide notification dated February 27, 2014 made amendments to the Schedule and deleted 'social business projects' from the list of activities enlisted under the Schedule. The present CSR regime seems limiting for certain types of companies that engage in the field of social business or entrepreneurship which the CSR provisions intend to address.

While the introduction of CSR provision in the Companies Act is a welcome step, the current discourse of corporate philanthropy without giving any express autonomy to companies in choosing their CSR activities may not yield the desired outcome. By allowing only selected list of activities within the Schedule in a sectional manner may end up encouraging only a passive participation by corporates towards CSR activities. In order to enable corporates to participate fully in the philanthropy space, the participation must start with a more inclusive management of CSR policies where government and industry work side by side, which does not assume that (social) business and CSR are incompatible. The policy-makers should frame rules for social business projects instead of eliminating it from the scheme of CSR regime altogether.

Currently, there is no deduction available for expenditure incurred by domestic companies towards fulfilling their CSR obligations under the Companies Act. Introduction of such relief and many proposals were expected by the corporate sector in the recent budget proposal by the finance minister but the finance minister thought otherwise. It is anticipated that such introductions would be proposed in near future to give impetus to this sector.

# 2. Social Business

A social business is a unique combination of traditional for-profit businesses, which focus solely on maximizing profit, and not-for-profit entities, which relies solely on charitable donations.[3] Social business came into existence to fill the void that was created, mainly, due to two factors:

- extremely slow pace of human development despite high growth and GDP;
- insufficient government participation in providing basic public, social and economic infrastructure to its less privileged citizens

A social business is not contrary to the idea of business, yet is different in its approach. Its main objective is to engage every stake-holder concerned and provide for a sustainable growth and/or development alternative based on sound and ethical business principles. The main idea of social business is to empower people, to grant them agency and to make them less dependent on externalities that are not within their control. Such empowerment provides 'capability'[4] and 'freedom' to those less privileged to choose their development path.

According to Prof. Yunus there are two kinds of social business.

One being a non-loss, non-dividend company devoted to solving a social problem and owned by investors who re-invest all profits in expanding and improving the business. The second kind is a profit-making company owned by poor people, either directly or through a trust that is dedicated to a predefined social cause. Since profits that flow to poor people are alleviating poverty, such a business is by definition helping to solve a social problem.

Social business, as propounded by Prof. Yunus, advocates the following concepts:

i. The most important objective for a social business is to remove poverty and other socio-economic problems that society is beset with. The idea is to reduce or eradicate such problems using a business model.

ii. Such business models should not exist solely for profit maximization.

iii. The company engaged in social business will be able to achieve economic and financial sustainability.

iv. Investors would be eligible to only take back their investment money and would not be allowed to take back the dividend. Thus, profit stays with the company which is further invested for expansion and improvement of the business.

v. The company engaged in social business must be conscious towards environmental concerns.

vi. Workers should be paid at the market wage and provided with better workplace conditions.

vii. Such social business should be done with pleasure, dedication and with an objective. However, when applying the Yunus principle into an Indian context[5] we should also keep in mind other determinants such as:

- Relevant or existing taxation and financial incentives for such social businesses or enterprises
- Existing economic conditions and purchasing power parity of the target group
- Legislations or regulatory framework supporting such social business models

Social business is different from social entrepreneurship or charitable trusts or a foundation established for social welfare. While social business is purely on a no-loss-non-dividend model with a social cause, social entrepreneurship is more individually driven either modeled on *for-profit* or *not-for-profit* initiatives. Although the ultimate objective for both the kinds of entities would be same, the models on which they are structured are distinctly different.

Similarly, social business also differs a lot from a foundation. Foundations are incorporated largely to disburse funds and grant donations to various social sector organizations. Foundations don't generate any profit on their own and are mostly run by people with deep pockets. It could thus play a vital role in incubating and channelizing a social business

3. Muhammad Yunus, *Building Social Business (Public Affairs, New York, 2010).*
4. Amartya Sen, *Development As Freedom* (Oxford University Press, Oxford, 1999).
5. CeiS, *Social Enterprise Business Model* (CeiS, Glasgow, 2008). *Available at:* http://www.ceis.org.uk/downloads/Resources%20and%20Publications/Enterprise%20and%20Communities/CEiSBusinessModelsReport-June2008.pdf. (Last visited October 28, 2012). *Also see*, Venturesome, *The Three Models of Social Enterprises* (Charities Aid Foundation, London, 2008). *Available at:* http://evpa.eu.com/wp-content/uploads/2010/11/CAF-Venturesome-3-Models-Of-Social-Enterprise-Part-1.pdf. (Last visited October 28, 2012).

through venture philanthropy. Foundations could make strategic investments into social business projects based on muted returns. The Alternative Investment Regulation, 2012 (“**AIF Regulations**”) provide for investments into social business projects.

Figure 2 shows how a social business borrows from both for-profit and not-for-profit entities.[6] It has to cover its full costs from its operations, and its owners are entitled to recover their invested money, but it is more cause than profit-driven. Its position in the lower right quadrant shows that it has both the potential to act as a change agent for the world, and sufficient business-like characteristics to ensure it survives to do so.

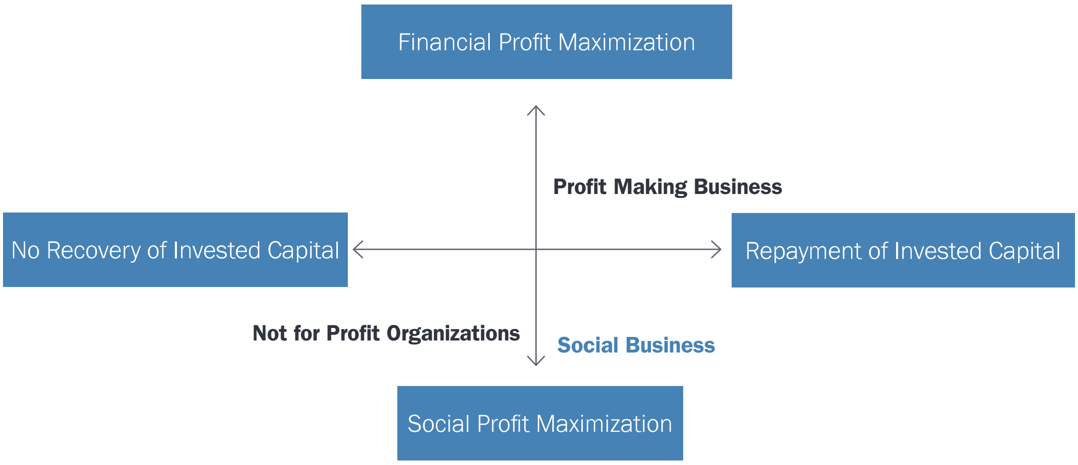



**Figure 2: Social Business versus Not-for-Profit and For-Profit Businesses**

## I. Inadequacy in AIF Regulations

While the need for social funds was recognized by the AIF Regulations, there are several deadlocks that need to be addressed for the impact investor community to fully utilize the recognition of social venture funds (“**SVFs**”) as a fund raising avenue.

### A. Definitions

Presently, a ‘social venture fund’ is recognized under AIF Category I as per AIF Regulations. A ‘social venture’ under Regulation 2 of the AIF Regulations is defined to mean a trust, society or company or venture capital undertaking or limited liability partnership formed with the purpose of promoting social welfare or solving social problems. It further goes on to provide an inclusive list of entities such as registered public charitable trusts, societies, section 25 companies and microfinance institutions.

Section 2(v) of the AIF Regulations defined a “social venture fund” is defined as a fund investing into securities of social ventures satisfying fund criteria.

A key issue that the industry faces with respect to the legal framework for SVFs is that currently only ventures that are charitable in nature, with the exception of micro-finance institutions fall within the definition of ‘social ventures’. However, a wide range of businesses engaged in agriculture, healthcare, low cost housing etc. which may be for-profit entities but with a primarily social motive, are not formally recognized under the AIF Regulations. Widening the ambit of ‘social ventures’ but recognizing for profit ventures having a social motive would enable such ventures to benefit financially from a pooling structure.

### B. Minimum fund size and investments

The minimum fund size for SVFs is the same as applicable to other AIFs i.e. INR 200 million. There are no separate set of criteria for fund size prescribed for SVFs. Considering that SVFs are typically smaller early stage investments, a 100 million size, as provided for angel funds is more appropriate.

6. Yunus, Moingeon and Lehmann-Ortega, “Building Social Business Models: Lessons from the Grameen Experience”, *Long Range Planning* 43 (2010) 309-325

Similarly, the current minimum investment (not in the form of grants) of 10 million should be reduced to a much smaller number to increase the investor base.

### C. Tax Pass through status

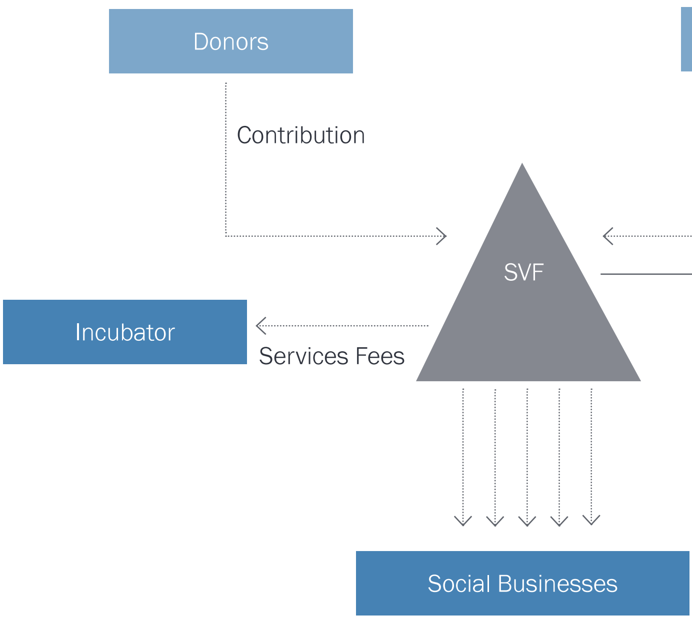
Currently, pass through status is only granted to Category – I Venture capital funds registered as AIFs. SVFs fall are pooling vehicles that fall under Category IAIFs but are not in the nature of venture capital funds. Globally, investment funds rely on a 'tax pass-through status' wherein the income of the investment fund is taxed directly in the hands of its investors, but not at the level of the fund itself. This provides fiscal neutrality to the funds as it eliminates tax at the pool level while maintaining taxation at the investor level. Therefore, a pass through status for SVFs would help in ensuring tax certainty and avoid a double levy of taxes.

## II. Priority Sector lending for social businesses/enterprises

Currently, priority sector lending norms only recognize social businesses to the extent that such businesses operate within the specified areas (agriculture, housing etc.). Social business outside such sectors even though servicing low-income groups and weaker sections are not recognized as priority sectors. Further, banks are typically reluctant to lend to MSMEs outside the specified sectors of agriculture, education, housing, making it difficult for several social businesses to diversify their funding streams. Therefore, specifically including social enterprises subject to fulfilment of certain criteria relating to social impact, business in specific sectors etc. would be useful for such enterprises to receive credit.

## III. Restrictions under Foreign Direct Investment (FDI) Policy

Currently, investment into SVFs (registered as AIFs) is not permitted under the automatic route and would thus require prior approval of the Foreign Investment Promotion Board (FIPB). Liberalizing foreign direct investment into specific social enterprises would be a welcome move for the impact investor community as it would result in ease of investment.




**(Figure 3: A typical Social Business Model)**

## A. Donors

Donors make contributions to the SVF in the form of grants. Capital contributions made to the Fund are not returned back, and neither are there any additional returns to the Donors. Currently, the AIF Regulations recognize investments into SVFs through grants (at a minimum of INR 25 Lakhs). The SVF may further make investments in social ventures through grants provided that adequate disclosures are made in the placement memorandum.

## B. Social Investors

Social investors may make contributions to the SVF in the form of debt or equity. Debt investments are made in the form of interest free loans, where Social Investors are only entitled to the principal amount that is advanced and further agree to muted returns on their investments.

## C. SVF

The SVF shall be set up as a pooling vehicle which shall further make investments in social ventures or businesses depending upon the investment objectives of the SVF.

## D. Incubator

An incubator acts as the manager of the SVF and provides advisory services to the SVF in respect of investment and divestment decisions in various social businesses. These decisions are made on the basis of a detailed due diligence of such portfolio businesses.

In consideration for advisory services provided to the SVF, an Incubator receives a service fee. Such service fee could be a percentage of the total corpus of the SVF, payable on an annual basis.

Presently, the absence of any clear policy prescription for social business projects has hampered responsible investment and not many companies have explored the need to invest in social business. Although social business is now a popularized buzzword, the expression needs to be reflected within the socio-legal lexicon in India. From an academic perspective, a social business based on Prof. Yunus' model may look too theoretical to implement but a closer look at the micro-economic benefits of the said model would pioneer the creation of companies that would foster community-led development.

# 3. Corporate Social Responsibility

The much discussed and awaited CSR provisions were notified by the Ministry of Corporate Affairs ("**MCA**") on February 27, 2014[7] giving effect to Section 135 the new Companies Act, 2013 ("**Companies Act**") dealing with Section 135, Schedule VII[8] ("**Schedule**") of the Companies Act and the Companies (Corporate Social Responsibility) Rules, 2014 ("**CSR Rules**"). This is in furtherance of powers provided to the Central Government under Section 469 and Section 467 the Companies Act to make and alter rules, regulations etc. and any provisions contained in any of the schedule under the Companies Act. Moreover, any such alteration in the rules or schedules needs to be placed before both the houses of the parliament for validity.

The said Section, Schedule and CSR Rules have come into effect from the first day of April, 2014.

## I. CSR Provision, When Applicable?

The CSR provision will be applicable to companies with an annual turnover of INR 10 billion and more, or a net worth of INR 5 billion and more, or a net profit of INR 0.05 billion or more during any financial year.[9] Companies that trigger any of the aforesaid conditions must spend at least two per cent (2%) of their average net profits made during the three immediately preceding financial years on CSR activities and/or report the reason for spending or non-expenditure. With the notification having been issued almost a month prior to the date of implementation of CSR provision, the companies will have to gear up to formulate their CSR policy; keeping in mind the revised list of activities enlisted under the amended Schedule VII and the CSR Rules.

## II. CSR Provisions as Envisaged under Section 135 of the Companies Act

Every qualifying company will be required to constitute a CSR Committee ("**Committee**") of the Board of Directors ("**Board**") consisting of three or more directors.[10] The Committee shall formulate and recommend to the Board, a CSR policy which shall indicate the activities to be undertaken; recommend the amount of expenditure to be incurred on the activities referred and monitor the CSR policy of the company.[11] The Board shall take into account the recommendations made by the CSR Committee and approve the CSR policy of the company.[12]

It will be important to understand the key changes brought in by the CSR Rules and Schedule VII as captured originally under Section 135 of the Companies Act.

## III. Inclusive Definition of the Term CSR

While the Companies Act used CSR as a nomenclature without actually defining it, the notified rules have defined the term 'CSR' to mean and include but not limited to:

i. projects or programs relating to activities specified in the Schedule; or

ii. projects or programs relating to activities undertaken by the Board in pursuance of recommendations of the CSR Committee as per the declared CSR policy subject to the condition

7. Press Release dated 27th February 2014; http://pib.nic.in/newsite/erelease.aspx?relid=104293
8. Schedule VII deals with the activities which may be included by companies in their CSR policies
9. "Any financial year" referred under Sub-Section (1) of Section 135 of the Act read with Rule 3(2) of Companies CSR Rule, 2014, implies 'any of the three preceding financial years'.
10. Section 135 (1) of the Companies Act
11. Section 135 (2) of the Companies Act
12. Section 135 (3) of the Companies Act

that such policy covers subjects enumerated in the Schedule.

By providing the definition of CSR, the scope and application of CSR that can be undertaken by the companies has been further clarified. The definition of CSR assumes significance as it allows companies to engage in projects or programs relating to activities enlisted under the Schedule. It also permits flexibility to companies by allowing them to choose their preferred CSR engagements that are in conformity with the CSR policy.

By keeping the definition of CSR inclusive, MCA acknowledges the urgent need of the industry to be given more freedom in choosing their CSR activities. However, it would be interesting to watch this space and see whether such autonomy (if given) can have any significant multiplier effect - both for the economy and corporates. It also needs to be seen whether such autonomy will allow flexibility to companies in choosing activities from outside the list of Schedule

## IV. Institutional Coverage of CSR

While Section 135 (1) of Companies Act brings under its purview every company which would mean to include a company incorporated in India.[13] The CSR Rules have made an attempt to broaden the definition of the term 'company' to include a foreign company having a branch or project office of a foreign company.[14] This gives an expansionist scope under the CSR Rules to regulate such companies which prima facie are not included under Section 135. Thus, the CSR Rules which were supposed to be supplementary to the main provision seems to have overreaching effect well beyond the scope of Section 135 as originally contemplated. This is a clear discordance which may be opened to judicial scrutiny as MCA has gone beyond its legislative mandate.

Further, it seems to be an overarching provision and applicability of the same may be perceived by the foreign companies as an additional tax, over and above their corporate taxes for doing business in India.

## V. Computation of Net Profit

Every company will have to report its standalone net profit during a financial year for the purpose of determining whether or not it triggers the threshold criteria as prescribed under Section 135(1) of the Companies Act.

### A. Indian Company

The CSR Rules have clarified the manner in which a company's net worth will be computed to determine if it fits into the 'spending' norm. In order to determine the 'net profit', dividend income received from another Indian company or profits made by the company from its overseas branches have been excluded. Moreover, the 2% CSR is computed as 2% of the average net profits made by the company during the preceding three financial years.

### B. Foreign Company

The CSR Rules prescribe that in case of a foreign company that has its branch or a project office in India, CSR provision will be applicable to such offices. CSR Rules further prescribe that the balance sheet and profit and loss account of a foreign company will be prepared in accordance with Section 381(1)(a) and net profit to be computed as per Section 198 of the Companies Act. It is not clear as to how the computation of net worth or turnover would be arrived at in case of a branch or project office of a foreign company. Expenditure incurred by foreign holding company for CSR activities in India will qualify as CSR spend of the Indian subsidiary if, the CSR expenditures are routed through Indian subsidiaries and if the Indian subsidiary is required to do so as per section 135 of the Companies Act.

## VI. Appointment of Independent Directors on the Board

The CSR Rules have dispensed with the requirement of appointing an independent director on the CSR

13. Section 2(20) defines the term Company as a company incorporated under this Act or under any previous company law.
14. Section 2(42) of the Companies Act, 2013 defines a "foreign company". A "foreign company" means any company or body corporate incorporated outside India which-
    i. has a place of business in India whether by itself or through an agent, physically or through electronic mode; and
    ii. conducts any business activity in India in any other manner.

Committee of the Board of an unlisted company as well as a private company. It has brought in the much needed clarity, as under the boarder scheme of the Companies Act, there is no requirement regarding appointment of independent director on the board of directors of the unlisted or private company.

Further, the CSR Rules have relaxed the requirement regarding the presence of three or more directors on the CSR Committee of the Board. In case where a private company has only two directors on the Board, the CSR Committee can be constituted with these two directors. The CSR Committee of a foreign company shall comprise of at least two persons wherein one or more persons should be resident in India[15] and the other person nominated by the foreign company.[16]

The CSR Rules, by including foreign companies within its ambit, have provided latitude to treat persons authorized by the foreign company akin to directors of an Indian company for the purposes of affixing a fiduciary duty and liabilities in the event of any breach in the reporting requirements for CSR provisions. By expanding the scope of CSR Rules, it is apparent that the government has overlooked the limited role (to accept on behalf of company service of process and any notices or other documents) of the authorized persons of the foreign companies in India.

## VII. Modalities for Undertaking CSR Activities

### A. Conducting CSR Through a Third Party

CSR activities can be undertaken through a registered society or trust or a Section 8 Company under the Companies Act. In this regard, the CSR Rules have liberalized the participation of a third party to undertake CSR activities on behalf of the spending company provided it fulfills the relevant track record of three years in undertaking similar projects or programs. Such an entity would have to follow the specifications and modalities regarding utilization of funds, monitoring and reporting requirements as provided by the spending company.

### B. Companies permitted to undertake CSR activities along with another company/its group companies

Recently, the MCA amended rule 4 of the CSR Rules to allow companies to permit board of directors of a company to undertake CSR activities approved by CSR Committee through a Section 8 company established either singly or along with its holding company or subsidiary company or associate company or along with another company or holding company or subsidiary company of such other company or otherwise.

### C. Conducting CSR Through Group Entities

Autonomy to the companies to carry out their CSR activities through their own or holding or subsidiary or associate company's registered society or trust or Section 8 Company have been provided.

### D. Collaborating or Pooling Resources

Collaboration with other companies for undertaking CSR projects or programs is also permitted subject to the condition that the collaborating companies are in a position to report separately as per the reporting requirements under the Companies Act.

## VIII. CSR Expenditure

### A. Nature of CSR Expenditure and Geographic Limitations

Expenditure incurred on specified activities that are carried out in India will qualify as CSR expenditure. Such expenditure includes contribution to the corpus or on projects or programs relating to CSR activities. Any activity undertaken solely for the benefits of employees and their families will remain outside the purview of CSR activity.

Expenditure incurred in undertaking normal course of business will not form a part of the CSR expenditure. Companies would need to clearly

15. One of the person shall be as specified in Section 380 (1) (d) of the Companies Act. The said section provides that one or more persons resident in India authorized to accept on behalf of the company service of process and any notices or other documents required to be serviced on the company.

16. Section 380(1) of the Companies Act provides that one or more person resident in India is authorized to accept on behalf of the company service of process and any notices or other documents required to be served on the company.

distinguish those activities which are undertaken specifically in pursuance of normal course of business and those that are done incrementally as part of the CSR initiatives.

Any surplus arising out of CSR activities will not be considered as business profit for the spending company. It is unclear whether the surplus will form part of the CSR Fund for the next financial year.

The CSR Rules are unequivocal in stating that any form of direct or indirect contribution made to any political party by company cannot be counted towards CSR activity.

### B. Employees' Contribution Towards CSR

Companies are permitted to train their employees and/or personnel of their implementing agencies to build CSR capabilities. Any expenditure incurred in providing such training up to a ceiling of five percent in one financial year is permitted under the CSR budget. Moreover, salaries paid by the companies to regular CSR staff as well as to volunteers of the companies (in proportion to company's time/hours spent specifically on CSR) can be factored into CSR project cost as part of the CSR expenditure.

It has been further clarified that overhead and administrative expenses will be included within the 5% cap that companies are allowed to spend on building administrative capabilities and staffing. Thus, companies may build CSR capacities of their own personnel as well as those of their Implementing agencies through institutions with established track record of at least three financial years but such expenditure including expenditure on administrative overheads, shall not exceed five percent of total expenditure of the company in one financial year.

## IX. Reporting

It is mandatory for companies to disclose their CSR Policy, programs/projects undertaken and amount spent in their report and the CSR Rules provide for a separate format. The report containing details of such activities and CSR policies have to be made available on the company's website for informational purposes.

## X. Provision for Cease of Applicability of CSR Provision

The requirement and compliance under the CSR provision will cease to be applicable to a company which for the three consecutive years falls outside the purview of the threshold requirement of annual turnover or net worth or net profit as envisaged under Section 135(1) of the Companies Act.

## XI. Scope of Activities under Schedule VII[17]

Several new spectrum of activities such as promoting rural sports, nationally recognized sports, setting up homes and hostels for women, orphans and senior citizens, reducing inequalities in socially and economically backward groups and support to technology incubators in academic institutions have also been included in the list of CSR activities under Schedule. However, the most notable absentees are 'social business projects' and residual clause giving power to the government to prescribe other matters on CSR related activities.

## XII. Limits on the Power of Alterations under Section 467 of the Companies Act

Section 467 of the Companies Act gives power to the central government to alter the provisions contained in any of the Schedules. The section is similarly worded as Section 641 of the Companies Act, 1956 which gave power to the central government to make changes in the Schedules.

The notification dated February 27, 2014 is a delegated legislation issued under a statutory provision, namely Section 467 of the Companies Act which provides that the Central Government may, by notification, alter any of the regulations, rules. tables, forms and other provisions contained in any of the Schedule to the Act. Delegated legislation is a means by which the legislature delegates part of its legislative function to an executive authority. However, there are well-settled constitutional limits on the scope of delegated legislation. The legislature cannot delegate essential

17. http://pib.nic.in/newsite/PrintRelease.aspx?relid=104293. Website last visited on February 28, 2014.

legislative functions such as the determination of legislative policy and cannot delegate its power to repeal or modify its essential features.[18]

Schedule VII of the original Companies Act, 2013 contained 'social business projects' among the list of various activities that a company could undertake as part of its CSR policy. The Central Government vide notification dated February 27, 2014 made amendments to the Schedule while deleting 'social business projects' from the list of activities enlisted under the Schedule. Although Section 467 empowers the government to amend the Schedule through delegation, the power to amend under this section is meant to make simple alterations without affecting the legislative policies enshrined in the Companies Act, 2013. Deletion of 'social business projects' through the notification seems to override the CSR policy as envisaged under the Companies Act. By deleting 'social business projects' through the notification, the central government seems to have exceeded its legislative mandate and the same may be subject to judicial review in future.[19]

# XIII. Clarification Issued by the MCA with Regard to Provisions of CSR

- Section 135 and provisions of CSR Rules is to ensure that while activities undertaken in pursuance of the CSR policy must be relatable to the Schedule, the entries in the said Schedule must be **interpreted liberally** so as to capture the essence of CSR. The items enlisted in the amended Schedule are broad-based and are intended to cover a wide range of activities as illustratively mentioned in the Annexure.

- One-off events such as marathons/awards/ charitable contribution advertisement/ sponsorships of TV programs would not be qualified as part of CSR expenditure.

- Expenses incurred by companies for the fulfillment of any Act/ Statute of regulations (such as Labor Laws, Land Acquisition Act etc.) would not count as CSR expenditure under the Companies Act.

- Salaries paid by the companies to regular CSR staff as well as to volunteers of the companies (in proportion to company's time/hours spent specifically on CSR) can be factored into CSR project cost as part of the CSR expenditure.

## A. Tax Deductibility on CSR Expenditure

Non clarity on tax treatment for undertaking CSR activities:

In the context of tax deductibility for companies spending on CSR activities by way of creating capital assets, certain amendments have been proposed in the Income-tax Act, 1961 (**"ITA"**).

i. CSR expenditure will not be allowed deductibility as the CSR expenditure- being an application of money- is not incurred for the purposes of carrying on business, cannot be allowed under the existing provisions of Section 37 of the ITA.

ii. The CSR expenditure for certain activities (which are of the nature of activities described under Section 30 to Section 36 of ITA) shall be allowed deduction under those sections subject to fulfillment of conditions, as specified.

Of Sections 30-36, the provisions most relevant are sections 35CCA-CCD which allow deductibility for: (i) expenditure towards payments to institutions for carrying out programs of rural development or conservation of natural resources or (ii) for expenditure on certain notified agricultural extension projects or skill development projects. While the heads of CSR expenditure are required to be *interpreted liberally*[20]*,* the tax deductible heads are narrow. This limited convergence between the two legislations denies the benefit that may have been otherwise available. It leads to a risk that CSR expenditure may get unduly concentrated in specific activities. It also leaves the door open for disputes arising from differences in interpretation of the scope of CSR activities.

## B. Regulatory fault-line Between Foreign Contribution and CSR Regime

It is important to see whether CSR Rules is positioned to allow convergence with foreign contribution

18. In Re The Delhi Laws Act, 1912 [1951 AIR 332]
19. J.K. Industries Ltd. v Union of India and Ors [165 TAXMANN 323 (SC)]
20. Please refer to the General Circular No. 21/2014 dated 18th June, 2014 released by the Ministry of Corporate Affairs (MCA) regarding clarification with regard to provisions of Corporate Social Responsibility under Section 135 of the Companies Act, 2013.

regime in India. Any foreign contribution received from any foreign source requires approval under the Foreign Contribution Regulation Act, 2010 ("**FCRA**"). It is interesting to note that the definition of foreign source is wide enough to include a Indian company wherein one-half or more nominal share capital is held by a citizen of a foreign country or a foreign corporation or a foreign company. Therefore any spending or contribution made by the foreign source falling within the ambit of the CSR provision will come within the purview of FCRA hence no spending/contribution can be made without the express approval or permission by the Ministry of Home Affairs. Allowability of foreign as well as Indian companies' to make contributions through CSR provision may give rise to inter-regulatory fault-lines within the broader context of CSR and foreign contribution regime in India.

## C. Non clarity on Computation of Financial Accounts of Foreign Companies

No clarity under the Companies Act is provided towards any mechanism that allows computation of accounts of a foreign company in order to determine the net worth or turnover of a branch or a project office. Ascertaining the incidence of CSR exposure in the absence of any clear provision for financial computation of branch or project offices of foreign companies may prove problematic and create practical difficulties.

While no specific tax exemption has been extended to CSR per se, spending on several activities like contributions to Prime Minister's Relief Fund, scientific research, rural development projects, skill development projects, agricultural extension projects, etc. which find place in the Schedule, already enjoy exemptions under different sections of the ITA.

While the introduction of CSR provision in the Companies Act is a welcome step, however the current discourse of corporate philanthropy without giving any express autonomy to companies in choosing their CSR activities may not yield the desired outcome. By allowing only selected list of activities within the Schedule in a sectional manner may end up encouraging only a passive participation by corporates towards CSR activities. In order to enable corporates to participate fully in the philanthropy space, the participation must start with a more inclusive management of CSR policies where government and industry work side by side, which does not assume that (social) business and CSR are incompatible.

Although Section 135 of the Companies Act did not contemplate enlarging the scope of companies to cover foreign companies in the first place, the CSR Rules nonetheless included foreign companies within its scope. It seems the central government is not opposed to the idea of allowing excessive delegated powers to the executive to make such changes in the Companies Act which cannot be brought unless an amendment to the original Act is proposed. The CSR Rules, in essence, exceeds its legislative mandate; and this aspect needs to be considered by the policy makers.

By expanding the scope of CSR to include foreign companies, its impact on such companies may be manifold. In light of the ambiguity surrounding financial computation of foreign companies, it needs to be seen how practical it would be for branch or project offices to participate in CSR activities. In order to retain the advantage of having a CSR provision in the Companies Act, MCA must also facilitate greater convergence with tax and foreign contribution laws in India.

# 4. The Conventional Route to Charity in India

Under the existing laws, charitable activities can be carried out by all types of legal entities in India. Most of the companies in India have now started to engage themselves in CSR as well as voluntary activities, either through donations or through active participation on their own. In India, the choice of an entity to carry out such charitable activities becomes important because of tax implications. Incomes of charitable entities are exempt under the Income Tax Act ("**ITA**"), and the three forms of charitable entities that exist in India are namely a society, trust and Section 8 companies.

In India, charitable entities can be registered under the following legal instruments:

i. Societies Registration Act, 1860

ii. Charitable and Religious Trust Act, 1920

iii. Section 8 of the Companies Act, 2013

Under the directives of these legislations, an organization engaged in voluntary work can carry out their activities as one of the following entities:

- Registered Society
- Section 8 company
- Public Trust

An organization can choose any of the above forms depending upon the purpose and mandate of the organization.

## I. Registered Society

Seven or more persons are entitled to form a registered society under the Societies Registration Act. The organization so formed must be registered to carry out literary, scientific or charitable activities. In addition to the above Act, several states have also enacted their respective Acts and Rules, and registration is carried out by respective states where such organizations are located. Normally, an organization registers in the concerned district where it operates, but, to have a state-wide scope of its operation, the organization needs to be registered with the registrar of societies.

## II. Section 8 Company

Section 8 of the Companies Act, 2013 permits a company to register itself as a not-for-profit company with limited liability to its members.

An association formed under Section 8 has the status of a body corporate or a limited company. It is registered under the Companies Act and is recognized as an independent entity. As it is a separate legal entity, the property of a Section 8 company vests in the company and law suits can be filed against the company itself. The members of the management committee enjoy similar powers as that of the board of directors. It is not necessary for a Section 8 company limited by guarantee, to have any share capital.

## Distinctive Features of a Section 8 Company

| | |
|---|---|
| Admission of Members | A governing body is constituted to govern the membership to a Section 8 company. Even firms can become members of Section 8 companies. This is again to encourage development of associations which promote social or charitable causes. |
| Funding | Funds can be accepted in the form of donations from members of the company. The surplus generated by excess of receipts over and above the expenditure cannot be taxed as it does not qualify as "Income" as defined under the ITA.[21] Any voluntary contributions received by a Section 8 company are taxable as income. |
| Licensing | The license for incorporation of Section 8 company is granted by the central government. An organization having granted such license is allowed to drop the word "Limited" from its name. The license is granted subject to the following two conditions: (1) the company should be formed for the promotion of commerce, art, science, religion, charity or any other useful object and (2) the company should apply its income in promoting its objects and must prohibit the payment of dividends to its members |

21. *CIT, Bihar v. Bankipur Club Ltd*, (1997) 2 SCC 394.

# III. Public Charitable Trust

Under the local laws in India, a trust can be formed either as a private or a public trust. Formation of a private trust is governed by the Indian Trust Act, 1882 ("**ITRA**"). However, the ITRA does not govern trusts of public charitable nature. Trusts of public charitable nature are governed under the Religious Endowment Act, 1863, the Charitable and Religious Act, 1920 and the Bombay Public Trust Act, 1950 ("**BPT Act**").[22]

To form a public charitable trust, it is very important that the objects of the trust must be charitable in nature and to engage in activities for general public utility. The Charitable Endowment Act, 1890 defines 'charitable purpose' as a purpose for the relief of poor, education, medical relief and advancement of any other objects of general public utility but does not include a purpose which relates exclusively to religious teachings or worship.

Formation of a trust is fairly simple but the statutory provisions, procedures and the laws relating to trusts need detailed study. Under the Indian laws, various kinds of private and public trusts can be formed. The ITRA is not applicable to a public charitable trust. A public trust is formed under general law with guidance drawn from the ITRA. The other relevant Acts are Religious Endowment Act, 1863, the Religious Trust Act, 1920 and the BPT Act. Although the ITRA applies to private trusts, the general principles on which its provisions are based may be applied to public trusts in the absence of any specific corresponding provision for public trusts. However, such provisions, when borrowed from the Indian Trusts Act, may lack enforceability when applied to public trusts.

A public charitable trust may be formed by any juristic person competent to contract or by any such person who has the power of disposition over a property and the capacity to create a trust for such property. Under Indian law, legal ownership of trust property vests in the trustees. Under the ITRA (the general principles of which, as mentioned, may be applied to public trusts), the liability of the trustees is unlimited; unless it is specified in the trust deed that trustees are acting only in the capacity of trustees.

## A. Ingredients of a Valid Trust

- There must be an author or settlor of the trust
- There must be a trustee
- There must be a beneficiary or beneficiaries
- There must be clearly delineated property
- The objects of the trust must be specific

## B. Is Written Trust Deed Compulsory?

It is always desirable to have a written trust deed even if not statutorily required, as:

- a written trust deed is prima facie evidence of the existence of a trust;
- it facilitates devolution of trust property to the trust;
- it clearly specifies the trust objectives which enables one to ascertain whether the trust is charitable or otherwise;
- it is essential for the registration of conveyance of immovable property in name of the trust;
- it is essential to obtain registration under the Income Tax Act to claim exemption from tax;
- it helps to control, regulate and manage the workings and operations of the trust;
- it lays down the procedure for appointment and removal of the trustee/s, his/their powers, rights and duties; and
- it prescribes the course of action to be followed in the event of any eventuality including dissolution of the trust.

## C. Is Registration Mandatory?

While registration of the trust deed in states that do not have a specific statute for public trusts is optional, it is recommended that the trust is registered under the Registration Act, 1908 ("**RA**"). Such registration is mandatory if the trust property

22. Manoj Fogla, *Taxation of Trusts and NGOs* 1102 (Taxmann, New Delhi, 12th edn., 2012)

has immovable property. To enable the trust to seek tax exemptions, it should also be registered under the Income Tax Act, 1961. It should also be registered under the Foreign Contributions (Regulation) Act, 2010 (“**FCRA**”) that enables it to receive foreign contributions.

- The trust deed should be filed with the sub-registrar of the registration department of the state where there is no state-specific public trust act, or with the Charity Commissioner under a state-specific statute such the BPT Act if registration is sought in Maharashtra or Gujarat.
- If the trust property includes immovable property, the trust deed should also be filed with the Registrar of Sub-Assurances who has jurisdiction in the area where the immovable trust property is situated.

Documents required for annual filing

- Annual returns
- Audited accounts

Other statutory obligations and/or compliances

- Registration under ITA
- Registration and/or permission under the FCRA to be able to receive foreign funds
- Employee welfare schemes as applicable
- Other local/municipal laws

# 5. Governance Issues in Charitable Trusts

## I. Administration of Trust Property only by Proper Persons

Under trust law, the legal ownership of trust property vests in the trustees. To determine who would be considered a proper trustee in this regard, (in the absence of any explanation in the state-specific BPT Act from where we could draw a parallel), we may refer to the ITRA, which deals with private trusts. The principles of the ITRA may be applied to public trusts in the absence of any corresponding provisions in public trust statutes. Section 60 of the ITA provides that "the beneficiary has a right (subject to provisions of the instrument of trust) that the trust property shall be properly protected and held and administered by **proper persons** and by a proper number of such persons". According to Explanation I to Section 60 of the ITRA, "a person domiciled abroad" is "not a proper person within the meaning of this term".

Further, while the Foreign Exchange Management Act, 1999 ("**FEMA**") is silent with regard to trusts or other not-for-profit entities (unless such entities set up a branch, a liaison office or a project office), we may examine certain provisions in the Foreign Exchange Management (Acquisition and transfer of immovable property in India) Regulations, 2000("**FEMA Regulations regarding Immovable Property**") with regard to a person of Indian origin resident outside India.

Clause 4 of the FEMA Regulations regarding Immovable Property provides that a person of Indian origin who is resident outside India, may acquire immovable property in India other than an agricultural property, plantation, or a farm house, provided that in case of acquisition of immovable property, the payment of purchase price, if any, shall be made out of (i) funds received in India through normal banking channels by way of inward remittance from any place outside India or (ii) funds held in any non-resident account maintained in accordance with the provisions of the Act and the regulations made by the Reserve Bank of India ("**RBI**"). There are also specific provisions with regard to the acquisition and transfer of immovable property in India by a person of Indian origin resident outside India in respect of gift, inheritance, etc. It is not clear whether the presence of a foreign trustee will affect the acquisition by the trustees of any immovable property even if it falls in any of the three categories mentioned above (agricultural property, plantation, or a farm house), as immovable trust property is required to be registered in the name of the trust and not in the names of individual trustees. Also, though the legal ownership of trust property is that of the trustees, such ownership is on behalf of the beneficiaries. In this case, the beneficiaries would be Indian residents. Further, any transaction in this regard would involve trust funds, not the trustees' individual financial resources. This concept has not been dealt with under the FEMA Regulations. Due to the lack of clarity on this issue, it is advisable to consult or ascertain the same from the appropriate authorities whether a foreign trustee is cause for any objection in this regard, as such foreign trustee would, as mentioned, be considered one of the legal owners of trust property along with the other trustees and subject to any liabilities that may arise thereof.

With respect to a foreign trustee dealing with investments made out of trust funds (trust funds may be invested in specified securities under Section 11 (5) of the ITA), If the trust has been registered as a charitable trust and granted tax exempt status under the Act, one may look into the restrictions imposed under the Foreign Exchange Management (Transfer or Issue of Security by a Person Resident outside India) Regulations, 2000 ("**FEMA Regulations on Security**"). While the investment of trust funds by a person resident outside India is not specifically covered by FEMA, it is nevertheless recommend that the approval of the RBI be taken for such purpose if a foreign trustee is on board.

## II. Indian Courts to Administer Trust in Certain Cases

A trust, unlike a company or a society, has no independent legal existence. In the event of any breach of trust, it is the trustees who are held jointly and severally (individually) liable, and not the trust as an entity. Please note that a public trust is always open to public scrutiny and subject to court enquiry and direction.

Under Section 92 of the Code of Civil Procedure, 1908, (a central statute), any two or more interested persons or the Advocate General of the state where the public trust is registered may institute court proceedings for an enquiry into any alleged breach of trust, or where the direction of the court is deemed necessary for the administration of the trust, or to institute a suit for a court decree for specified purposes.

In addition, the Charitable and Religious Trusts Act, 1920 (also a central statute), empowers any person having an interest to apply to the courts by petition to obtain the following: (i) directions to the trustees to furnish particulars about the trust, its objects and its management, both administrative and financial; (ii) directions that the accounts of the trust be examined and audited within a limited period of three years prior to the date of the petition.

Since a public trust is subject to public scrutiny and court enquiry and direction, all the trustees, including the foreign trustee, would be subject to such public scrutiny and the jurisdiction of Indian courts. While one trustee may be authorized by the other trustees to appear on their behalf for any court proceeding, any liability in respect of the trust (unless otherwise proved) will fall jointly and severally on all the trustees.

From the point of view of best practices in governance, a trustee acts in a fiduciary capacity and has certain responsibilities and obligations regarding the operation of the trust. While facilities such as teleconferencing or video conferencing may be used optimally by a foreign trustee, including for attendance of board meetings, close monitoring of the trust operations will present some difficulty to a foreign trustee not resident in the country where the trust is registered. As mentioned earlier, under ITR a person not resident in India is not considered a "proper person" to be entrusted with trust property. Moreover, under Section 47 of the BPT, ("Power of Charity Commissioner to appoint, suspend, remove or discharge trustees and to vest property in new trustees"), a trustee may be suspended, removed or discharged if he "leaves India for the purpose of residing abroad"[23], or if he is "absent for a continuous period of six months without the leave of the Charity Commissioner".[24] While the BPT Act applies only to Maharashtra and Gujarat and is not enforceable against a trust registered elsewhere in India, the principles underlying its provisions may be relied upon or referred to for general guidelines on public trusts in India. An absentee trustee may trigger an enquiry by the authorities or by any interested member of the public, which could lead to a court enquiry into the governance and management of the trust.

While there is no specific law against the appointment of foreign trustees in a public trust, the BPT Act and the ITRA do specifically exclude a person residing abroad. While the provisions under the FEMA Regulations present a grey area, one may nevertheless refer to such regulations by way of abundant caution as it concerns a person of Indian origin and/or a person not resident in India. Appointment of a foreign trustee, therefore, may have legal, regulatory and compliance issues.

23. Section 47 (1)(c)
24. Section 47(1)(b)

# 6. Foreign Contribution Regulation Act, 2010

FCRA is a non-fiscal statute with the object "to consolidate the law relating to the acceptance and utilization of foreign contribution or foreign hospitality by certain individuals or associations or companies and to prohibit acceptance and utilization of foreign hospitality for any activities detrimental to the national interest and for matters concerned therewith or incidental thereto". The core objective of the legislation seems to be to prohibit activities detrimental to national interest. FCRA covers both profit and non-profit entities as well as persons in sensitive government position, political parties and persons associated with news media.

Foreign contribution is defined to mean any donation, delivery or transfer made by a foreign source of any article, currency (whether Indian or foreign) or any security. Thus, the definition of contribution is very wide both in terms of coverage and mode of transfer of the assets in question. It brings within its ambit not only money but every asset transferred from a foreign source to an Indian non-profit entity. The Ministry of Home Affairs ("**MHA**"), Government of India, which oversees implementation of FCRA provisions, imputes a very wide interpretation of the term 'contribution' to cover any direct or indirect receipt from a foreign source. Even the definition of 'foreign source' is given a very wide import under the Act and it becomes very difficult for foreign citizens to even participate indirectly in the charitable activities of not-for-profit entities in India. Under the new Act, not-for-profit entities receiving foreign funds are not permitted to defray more than 50% of the foreign contribution to meet administrative expenses. This has resulted in an indirect control by the MHA over the operational autonomy on the functioning of such entities.

While there is no specific bar in law against a foreign national serving on the board of trustees of a public trust registered in India, there is a degree of sensitivity regarding the grant of approval for acceptance of foreign contributions under the Act. The FCRA is not a fiscal statute, but an act passed for the purposes of internal security regulated by the MHA. The presence of a foreign trustee in a public trust could lead to greater scrutiny, leading to delays in the grant of FCRA approval, or even rejection of the application for registration.

In this context, it is worthy to note that in the list titled "Common Grounds for Rejection" for the grant of FCRA approval (posted on the website of the MHA, http://www.mha.nic.in/fcra.htm) one of the grounds mentioned is: "If any of the office bearers/trustees, including the chief functionary, is a foreign national, **other than of Indian origin**".

"Indian origin" is neither defined in the FCRA nor in the Citizenship Act, 1955. Reliance, therefore, must be placed on Section 2 (c) of FEMA Regulations regarding Immovable Property for the definition of a person of Indian origin, which is as follows:

"An individual (not being a citizen of Pakistan or Bangladesh or Sri Lanka or Afghanistan or China or Iran or Nepal or Bhutan) who

i. at any time held an Indian passport; or

ii. who or either of whose father or whose grandfather was a citizen of India by virtue of the Constitution of India or the Citizenship Act, 1955."

It has been reported that as a matter of internal practice, MHA is reluctant to allow registrations to not-for-profit entities with foreigners on board. It is however unclear whether the FCRA authorities, in practice, distinguish between foreign nationals of non-Indian origin and foreign nationals of Indian origin.

It may be noted that the onus of getting registered under FCRA lies on the recipient and therefore, before accepting foreign contribution, it is the responsibility of the association to ensure all the requisite formalities are complied with and registration is granted before accepting any foreign exchange.

## I. Time Limit for Making Application for FCRA Registration

No specific time limit has been provided under FCRA for making an application, unlike ITA, which requires an organization to apply within one year from its creation or registration under Section 12A. Normally FCRA is granted after three years of active existence, therefore, the application should be made after three years, though nothing in the Act prevents an organization from making such application earlier. Based on an interpretation of various applicable provisions of law, and decided case law, an application for registration under FCRA can be filed at any time after the registration of the organization. But, in practice an organization with a considerable history of activities has a greater chance of convincing the FCRA authorities with regard to the relevance of their purpose.

# 7. Taxation of Not-for-Profit Entities in India

India being a huge country both in terms of population and size has always been home to social enterprise across time and space. The social sector enterprise caters to a large part of its population either in the form of charity/philanthropy or voluntary activity or any other activity of social importance. Such activity becomes even more important because the State needs to be supported and supplemented by non-state actors in areas of policy polity and welfare initiatives and the socio-economic well-being of people concerned. Considering the recent electoral and social movements by the civil society organizations (**"CSOs"**) and non-for-profit entities in India, it would not be wrong to admit that the present sector has become one of the most important pillars of development in India. In India, organizations engaged in social service and social welfare may exist either as a trust or a society or a Section 8 company. One of the most important criteria that often distinguish non-profit from business entities are its 'charitable objectives'.

Over the years, the social sector has witnessed a spurt in donations and grant-in aid from domestic and foreign sources. And whereas most of such donations have been made towards not-for-profit sectors, reasonable funding have come for social enterprises as well. Social sector, therefore, is witnessing a positive involvement of multiple players from across different sectors, geographies and markets. This sector is not devoid of challenges such as issues concerning regulations and tax, issues concerning greater transparency and accountability and most importantly, issues concerning utilization of foreign funds by domestic recipients. To channelize social sector efficiently one needs to carry out structural reform in a more sustainable manner so that it has a crowding-in effect for philanthropy and social business, fostering entrepreneurial engagements and investments into this sector.

Trusts and charitable institutions come under the concurrent list of Article 246 of the Indian constitution. Thus, the State as well as the Union has the authority to govern and frame rules for governing such entities. ITA being a federal legislation governs taxation issues concerning public trusts and charitable institutions in India.

## I. Charitable Purpose: Definition

Under Section 2(15) of the ITA "charitable purpose" includes: relief of the poor, education, yoga, medical relief, preservation of environment (including watersheds, forests and wildlife) and preservation of monuments or places or objects of artistic or historic interest. The above definition also includes an act of "advancement of any other object of general public utility", subject to the condition that no business activity or trade or commerce should be carried out for a fee or for any other consideration in the name of charity. The advancement of any other object of general public utility shall not be a charitable purpose, if it involves the carrying on of any activity in the nature of trade, commerce or business, or any activity of rendering any service in relation to any trade, commerce or business, for a cess or fee or any other consideration, irrespective of the nature of use or application, or retention, of the income from such activity, unless

i. such activity is undertaken in the course of actual carrying out of such advancement of any other object of general public utility; and

ii. the aggregate receipts from such activity or activities during the previous year, do not exceed twenty per cent of the total receipts, of the trust or institution undertaking such activity or activities, of that previous year.

For the purpose of income-tax registration and availing exemption under Section 11 of ITA, it is of utmost importance that the criteria of 'charitable purpose', as laid down in Section 2(15), be strictly adhered to. The above definition becomes doubly important because of the insertion of the clause "*the advancement of any other object of general public utility*". From now onwards the applicability and scope of the definition and understanding of "charitable purpose" will have wider significance with regard to certain tax benefits and exemptions thereunder. In a very recent case of *DIT v. Chembur Gymkhana* [25] the ITAT held that definition of the expression "charitable purpose" in Section 2(15) includes *inter alia*, "any other object of general public utility" and 'general public' would not necessarily mean the entire public. The Tribunal held that trustees for the said trust can be drawn from a diverse cross Section of the public at large and would not be meant for a group or a private family. It is a settled principle of law that the primary or dominant

25. [2012] 251 CTR (Bom) 145

purpose of the institution must be charitable. The test to be applied is whether the object which is pursued is of the main or primary object or whether it is ancillary to a dominant object. The word 'general' in the said expression means pertaining to a whole class. Therefore, advancement of any object of benefit to the public or a Section of the public, as distinguished from benefit to an individual or a group of individuals, would be a charitable purpose. If the primary or predominant object of an institution is charitable, any other object, which might not be charitable but which is ancillary or incidental to the dominant purpose, would not prevent the institution from being a valid charity. A careful reading of Section 2(15) clearly indicates that, while profit is permissible for non-profit entities, profiteering is not. Profit generated by the charitable organization shall not have any adverse effect on its charitable nature but the reverse may also be true.

The ITAT Delhi Tribunal has, in the case of *ITO v Moradabad Development Authority*[26], held that if a Section 25 company is incorporated for the activity of construction and sale of immovable property then such activity should be construed as 'business' on its face value. Even if the business is carried on continuously in an organized manner with a set purpose, it will not be construed as a 'business' if it is carried out with a view to earning profit so as to use the profit for the object of the trust, i.e. urban town planning and development. However, if the said activity is incidental to its main object then the incidence of tax is lifted if separate books of accounts are maintained in respect of such business.

Thus, if the motive of a non-profit entity is to solely make profit under the garb of Section 2(15), then the veil can be lifted and its 'charitable nature' can be questioned. The CBDT issued an explanatory circular dated 19th December 2008 [27] clarifying that the purpose to create a residuary class of non-profit entities under Section 2(15) was solely to ensure that no commercial activities are carried out in the name of charity and the State does not lose out on tax claims. The definition, however, only includes entities falling under the residuary category while dominant category entities are exempt from tax incidence even if they carry business activities in furtherance of their charitable work. Moreover, entities falling under the dominant category may also have incidental and ancillary forms of business activities and they would not be hit by residual category proviso.

It seems that the distinction as enunciated in Section 2(15) is violative of Article 14 of the Indian constitution because it makes an unreasonable distinction between residual category organizations carrying "any other object of general public utility" and the former. Neither ITA nor the General Clauses Act, 1897 define what constitutes "general public utility" therefore, merely relying on the administrative understanding of "general public utility", an organization seeking registration under Section 12AA might run into a lot of subjectivity. Moreover, the definition presumes that only the residual category entities might misuse the charitable status and tax exemptions but what it fails to recognize is that such misuse and misappropriation may also happen with non-residual category entities as well. Although, the courts and policy makers have been more accepting towards discriminatory provisions concerning tax legislations, it would be highly implausible to ignore the (un)constitutionality of this certain provision in the ITA.

In *Shree Ram Krishna Dalmia v Justice S.R. Tendolkar* [28], the Apex court observed that constitutional proprietary and validity of an enactment is presumed and the burden of proof shifts upon someone who thinks otherwise. The Apex court further added that the 'presumption' test for constitutionality would not be valid for such provisions which make a distinction through discrimination in favor or against any class [.....thus, the presumption of constitutionality cannot be carried to the extent of holding that there must be some undisclosed and unknown reasons for subjecting individuals or corporations to hostile or discriminating legislation."].[29] The Apex court in the case of *Arun Kumar v. Union of India* [30] observed that discrimination under Article 14 of the constitution should be made on the basis of *intelligible differentia* and then only can such discrimination not be hit by illegality or invalidity.

Thus, a particular class of non-profit entities runs the risk of losing its exemption if it carries out or is in the nature of any trade, commerce or business

26. [2012] 145 TTJ 746 (Delhi)(Trib.)
27. Circular No. 11/2008, F. No. 134/34/2008-TPL
28. AIR 1958 SC 538
29. *Supra note* 20 at p.61
30. (2006) 286 ITR 89

irrespective of whether such activities were incidental or ancillary to its main activity. Therefore such entities would not come under the purview of Section 11, 12 and 13 for tax benefit purposes.[31]

The Apex court in *Thanthi Trust Case* [32] held that no tax implication would arise if the income generated by the trust is completely used for charitable purpose. The Delhi High Court in the case of *Institute of Chartered Accountants of India v. DGIT(E)* [33] held that a broad understanding of 'business' should not be used to understand the first proviso of Section 2(15). For the purpose of this Section an activity would be treated as 'business' only when it is carried out with a profit motive. The question of determining what kind of activity would tantamount to a 'business' would depend on the nature of execution of such business. If sound business principles were applied with an intention of continuity then such activities would be termed as a 'business'.

A non-profit entity falling under the residuary proviso shall lose its exemption status for that particular year if the gross receipts from trade surpass the amount specified in Section 2(15). The Assessing Officer cannot question the existence of charitable nature; instead she/he has the power to deny the exemption that the charitable entity would have otherwise been entitled to for that particular year.[34] The exemption shall be denied only when the business exceeds INR 25 lakh cap (USD 38,400 approx). Denial of exemption would not mean that the said entity will cease being constituted as an entity incorporated for charitable purposes. It can be stripped of its charitable purpose only when the Commissioner of Income-tax withdraws the same under Section 12AA(3). Thus, all such entities, save those mentioned in the residuary proviso, are entitled to carry on incidental and ancillary business activities and the gross receipts cap of Indian rupees 25 lakh is not applicable for them.[35]

# II. Registration under Section 12AA

It is mandatory for all voluntary organizations, whether it is a trust, society or company, to be registered under Section 12AA of the ITA to avail the benefits prescribed under Section 11 and 12 respectively. The benefit is also subject to the condition that the organization seeking registration must obtain an audit report where the income of the organization exceeds the maximum amount *which is not chargeable to income-tax in any previous year.*

## A. Procedure for Applying for 12AA Registration

Organizations seeking registration are required to apply in Form No. 10A as per rule 17A of the Income-tax Rules in duplicate. The following documents are required to be enclosed along with the application:

i. The original instrument along with the certified true copy of the original

ii. For a registered society, documents containing bye-laws along with its object clause and the Registration Certificate should be enclosed at the time of registration.

iii. For a Section 8 company, the MOA and AOA along with the certificate of incorporation to be enclosed, and

iv. Statement of accounts of three previous years. And where the organization was not incorporated during previous three years then copies of accounts of lesser number of years may be submitted.[36]

In *New Life in Christ Evangelistic Association v CIT*[37], the court held that in order to get tax benefits under Section 11 and 12 of the ITA, registration under Section 12A is mandatory. However, a mere registration cannot be construed to be an entitlement

31. *Supra note* 20 at p.51
32. (2001) 247 ITR 785
33. (2011) 245 CTR 0541
34. In the case of *Rajasthan Housing Board v. Commissioner of Income-tax, Jaipur-II* [2012] 51 SOT 383 (Jaipur-Trib.) the Tribunal held that the Assessing officer has the authority to decide whether the assesse should be allowed exemption under section 11 but his/her (non) allow-ability shall have no bearing on granting of registration u/s 12AA of the Income-tax Act.
35. *Supra note* 20 at p.39
36. *Supra note* 20 at pp.178-179
37. [2000] 246 ITR 532 (Mad.)

towards tax exemptions.[38] The application is to be made to the Commissioner of Income-tax in whose jurisdiction the organization is located. And for organizations located in four metropolitan cities of Kolkata, Delhi, Chennai and Mumbai, the application for registration is to be made before the Director of Income-tax (Exemptions). The time-limit for making an application is one year from the date of creation of a trust or establishment of an institution, whichever is later. It is incumbent upon the authority to make an order in writing within six months from the end of the month in which the application is made.

In the case of *Society for the Promotion of Education, Adventure Sport & Conservation of Environment v CIT*[39] the Allahabad High Court held that after the statutory limitation period of six months is over, the Commissioner or the Director (Exemptions), whichever the case may be, becomes *functus officio* and non-consideration of the registration application within the time as specified in Section 12AA(2) would result in deemed registration.

In a very recent case (*Tishir Shiskha Prasar Samiti v. CIT*[40]), the ITAT Tribunal (Agra) held that during the stage of registration, before the CIT/DIT (E), Section 12A/12AA of ITA does not envisage any requirement to ascertain whether the trust or organization is eligible for income or not.[41] Thus, at the time of considering the application for registration, one need not look into application of income, accumulation of income or its entitlement to the benefits of Section 11 and 12 of the Act.[42]

In the case of *Dy. DIT v. Kottukaran Foundation*[43] the Tribunal held that mere registration will not automatically grant exemptions under Sections 11 and 12. Registration under Section 12A is only to identify the institution and the assessee has to establish that the income from property held under trust was applied for charitable purpose within the meaning of Section 2(15). Merely conducting classes for open university/distance education cannot be construed as charitable activity within the meaning of Section 2(15).

As per ITA, non-profit entities can be registered under Section 12A as well as 10(23C)(vi). The latter Section is silent on whether application and usage of funds outside India for charitable purposes would be exempt from tax. And whereas Section 11(1)(c) clearly mentions "in India", no such restrictive clause is found in Section 10(23C)(vi) of the Act. The issue that comes to the forefront is whether entities incorporated under Section 10(23C)(vi) can have all its charitable activities outside India and claim exemption as well. The Apex Court[44] opined that such non-profit entities should have the majority of its charitable work in India and 10(23C)(vi) would not prevent it from applying its income to charitable purposes abroad. However, to avail tax exemptions, the dominant purpose and activity should remain in India.[45] More recently, the High Court of Delhi in the case of *Director of Income-tax (Exemption) v. National Association of Software & Services Companies*[46] has also held that income of the trust should not only be applied for charitable purposes, but also be applied in India to such purposes.

If the trust deed contains activities to be carried outside India then the provisions of Section 11(1)(c) can be invoked in the case of that trust actually incurring expenditure on charitable work outside India. A mere mention or incorporation of any such clause would not render the trust deed to lose out on exemptions. To invite forfeiture of exemption, activities must be carried outside the territory of India. The Apex court has also held that the *situs* of the property held by the trust is not important for the purpose of assessment of tax, what becomes relevant

38. *M. Visveesvaraya Industrial Research & Development Centre v. ITAT* [2001] 251 ITR 852 (Bom.)
39. [2008] 171 Taxman 113 (All.)
40. [2012] 21 taxmann.com 525 (Agra-Trib.)
41. *Supra* Para 9.4: "........the language of the section 12AA does not show that in order to be able to get registration under section 12A/12AA, there is necessity of first establishing how the concerned Samiti or Institution or, as the case may be, the society would be able to claim the exemptions under section 11 or 12. The question of exemptions under sections 11 and 12 would come only when the said exemptions are claimed by the Samiti or society at the time when it is assessed to tax. To consider whether the said society would be entitled to the benefits under sections 11 and 12 would be prejudging the issue before the grant of certificate. At the stage of the grant of certificate under section 12A/12AA, the only enquiry which is to be made by the Commissioner would be about the objects of the trust or institution and the genuineness of its activities. The procedure for registration of the trust or institution is prescribed under section 12AA. In terms of clause (a) of section 12AA, the Commissioner is to satisfy himself about the genuineness of the activities and objects of the trust on such inquiries as he may deem necessary."
42. Supra note 20 at p.197
43. [2012] 51 SOT 175 (Cochin)(Trib.)
44. American Hotel & Lodging Association Educational Institute v. CBDT [2006] CTR (Delhi) 601
45. *Supra* note 20 at p.326
46. [2012] 21 taxmann.com 213 (Delhi)

is that the public purpose of charitable nature should be in India.[47] Application of income for charitable purposes outside India will not be a relevant factor during registration under Section 12AA of the Act. The tax authorities cannot, therefore, disallow registration on the pretext that a charitable organization holds property outside the tax territory of India.[48]

In the context of the exemption applicable in cases of religious and charitable trusts or institutions, certain amendments have been made in ITA Specially:

i. In circumstances where trusts and institutions are registered for the purposes of availing exemption (under Section 11 and 12 of the ITA), exemption provisions under Section 10 of the ITA would not be applicable;

ii. In the context of determining whether 85% of the income of the trust or institution has been applied / set apart for application in furtherance of its objects (which is a pre-condition for claiming exemption from income tax), the trust or institution will not be allowed to claim depreciation for assets in computing its income, if the amount spent on purchase of the asset is sought to be claimed towards application of 85% of income;

### i. Cancellation of Registration of Trusts or Institutions in Certain Cases

While earlier the provisions of Section 12AA of ITA provided that the registration once granted to a trust would remain in force till it was cancelled by the Commissioner. The Commissioner could cancel the registration under two circumstances: (i) the activities of a trust are not genuine; and (ii) the activities are not being carried out in accordance with the objects of the trust or institution.

Therefore, in order to rationalize the provisions relating to cancellation or registration of a trust, Section 12AA of the ITA was amended to provide for cancellation of registration of a trust in cases where:

i. Its income does not enure for the benefits of general public;

ii. It is for benefit of any particular community or religion or caste;

iii. Any income or property of the trust is applied for benefit of specified persons like author of the trust, trustees etc.; or

iv. Its funds are invested in prohibited modes

These amendments introduced have vastly expanded the powers of the income tax authorities to clamp down on activities of non-profit entity that the government may not wish to see expand its role. The amendment doesn't spell out what "benefit of general public" or "prohibited mode" means. Its interpretation is, possibly, left to the discretion of the income-tax authorities.

Further, the ITA has also tightened the rules under which a non-profit entity or a trust can seek tax exemption for money it has received from the sale of a property "held under the trust".

## III. Changes proposed in the Finance Bill, 2016

### A. Levy of tax where the charitable institution ceases to exist or converts into a non-charitable organization

The existing provisions of section 2(24) of the ITA define "Income" in an inclusive manner. Any voluntary contribution received by a charitable trust or institution or a fund is included in the definition of income. Sections 11 and 12 of the ITA provide for exemption to trusts or institutions in respect of income derived from property held under trust and voluntary contributions, subject to various conditions contained in the said sections. The primary condition for grant of exemption is that the income derived from property held under trust should be applied for the charitable purposes, and where such income cannot be applied during the previous year, it has to be accumulated and invested in the modes prescribed and applied for such purposes in accordance with various conditions provided in the section. If the accumulated income is not applied in accordance with the conditions provided in the said section within a specified time, then such income is deemed to be taxable income of the trust or the institution. Section 12AA of the ITA provides for registration of the trust or institution which entitles them to be able to get the benefit of

47. Trustees of H.E.H. The Nizam's Pilgrimage Money Trust v CIT [2000] 243 ITR 676

48. M.K.Nambyar Saarc Law Charitable Trust v Union of India [2004] 140 Taxman 616 (Delhi)

sections 11 and 12. It also provides the circumstances under which the registration can be cancelled. Section 13 of the ITA provides for the circumstances under which exemption under section 11 or 12 in respect of whole or part of income would not be available to a trust or institution.

A society or a company or a trust or an institution carrying on charitable activity may voluntarily wind up its activities and dissolve or may also merge with any other charitable or non-charitable institution, or it may convert into a non-charitable organization. In such a situation, the existing law does not provide any clarity as to how the assets of such a charitable institution shall be dealt with. Under provisions of section 11 of ITA, certain amount of income of prior period can be brought to tax on failure of certain conditions. However, there is no provision in the ITA which ensure that the corpus and asset base of the trust accreted over period of time, with promise of it being used for charitable purpose, continues to be utilized for charitable purposes and is not used for any other purpose. In the absence of a clear provision, it is always possible for charitable institutions to transfer assets to a non-charitable institution. There is a need to ensure that the benefit conferred over the years by way of exemption is not misused and to plug the gap in law that allows the charitable trusts having built up corpus/wealth through exemptions being converted into non-charitable organization with no tax consequences.

In order to ensure that the intended purpose of exemption availed by trust or institution is achieved, a specific provision in the Act is required for imposing a levy in the nature of an exit tax which is attracted when the organization is converted into a non-charitable organization or gets merged with a non-charitable organization or does not transfer the assets to another charitable organization.

Accordingly, it is proposed to amend the provisions of the ITA and introduce a new Chapter to provide for levy of additional income-tax in case of conversion into, or merger with, any non-charitable form or on transfer of assets of a charitable organization on its dissolution to a non-charitable institution. The elements of the regime are: -

i. The accretion in income (accreted income) of the trust or institution shall be taxable on conversion of trust or institution into a form not eligible for registration u/s 12 AA or on merger into an entity not having similar objects and registered under section 12AA or on non-distribution of assets on dissolution to any charitable institution registered u/s 12AA or approved under section 10(23C) of the ITA within a period twelve months from dissolution.

ii. Accreted income shall be amount of aggregate of total assets as reduced by the liability as on the specified date. The method of valuation is proposed to be prescribed in rules. The asset and the liability of the charitable organization which have been transferred to another charitable organization within specified time will be excluded while calculating accreted income.

iii. The taxation of accreted income shall be at the maximum marginal rate.

iv. This levy shall be in addition to any income chargeable to tax in the hands of the entity.

v. This tax shall be final tax for which no credit can be taken by the trust or institution or any other person, and like any other additional tax, it shall be leviable even if the trust or institution does not have any other income chargeable to tax in the relevant previous year.

vi. In case of failure of payment of tax within the prescribed time a simple interest @ 1% per month or part of it shall be applicable for the period of non-payment.

vii. For the purpose of recovery of tax and interest, the principal officer or the trustee and the trust or the institution shall be deemed to be assesse in default and all provisions related to the recovery of taxes shall apply. Further, the recipient of assets of the trust, which is not a charitable organization, shall also be liable to be held as assesse in default in case of non-payment of tax and interest. However, the recipient's liability shall be limited to the extent of the assets received.

These amendments will take effect from 1st June, 2016.

## IV. Transfer of Funds when Made to a Foreign Territory

In the context of non-profit entity, transfer of funds can be made in two ways namely:

i. Transfer of funds when sent to an overseas branch or project

ii. Transfer of funds to organizations incorporated in a foreign territory

Entities that are incorporated in India but wish to have activities outside India as well will have to register under Section 10(23)(C), and then only can any transfer or contribution be made subject to provisions of FCRA. Similarly, no contributions by way of FCRA funds can be made by non-profit entities incorporated in India to a foreign charitable organization. For an organization to receive foreign contribution, it should be registered with the MHA under the said Act. Thus, for a non-profit entity (of foreign origin) to receive such contributions from an Indian entity, registration under the FCRA would be mandatory. FCRA registration of non-profit entities not incorporated in India is not envisaged under the Act. Non-profit entities in India are not permitted to transfer FCRA funds to other countries, nor can they have any direct activities outside India from FCRA funds.[49] However, there seems to be an exception for organizations registered under Section 10(23C)(vi) as they may have limited activities outside India as per FEMA regulations but even such entities cannot transfer FCRA funds to other charitable entities outside India. Therefore, FCRA funds under no circumstance can be transferred out of India, activities outside India (if any) have to be done from domestic income and application of such income to that effect must be duly incorporated in the trust deed.[50] A careful reading of Section 11 would indicate that no distinction is done based on the *situs* of incorporation of a charitable organization if the same is present and carries out charitable work in India. Section 11, therefore, does not make it mandatory, for all practical purposes, that trusts or voluntary organizations should be incorporated or registered in India. Even a foreign trust can have exemption provided its activities are in India and it is duly registered under Section 12A of the ITA. Furthermore, to claim exemption, it is also important that provisions of Section 10(22) are adhered to. The conditions are stated herein-below:

i. The educational institution must actually exist

ii. Some form of education should be imparted either in the form of primary or elementary education

iii. It should be engaged in educational purposes only and should be not for profit

iv. Only such income is entitled for exemption which is directly relatable to the educational activity.

Courts have rightly observed that a university established in a foreign country would come within the purview of Section 10(22) if its activities are for educational purposes.[51]

## V. Non-Profit Entities Under Section 10(23)

Educational and medical institutions which are substantially funded by government under Section 10(23C)(iiiab) & (iiiac) and educational institutions under Section 10(23C)(iiiad) having a turnover less than INR 10 million are not required to apply for registration as their incomes are totally exempt without any conditions as laid down in Section 11(5). CBDT Circular No.1/2007, dated 27th April, 2007, provides a time line as it becomes necessary to expedite disposal of application made under Section 10(23C). A grant of registration or an order of rejection should, therefore, be passed within the period of twelve months from the end of the month in which such application was received. The Circular is, however, silent on a case where the delay exceeds 12 months. In such a situation an inference can be drawn from a recent judgment of Allahabad High Court in which it was held that if the Commissioner of Income-tax is unable to process the application made under Section 12AA within 6 months, then it will be deemed that the application for registration is granted. The reason stated by the High Court was that the intent of the statute was to frame a time-limit for disposal of such applications and if deemed registration is not construed after the time lapse, then the very purpose of time limitation within the statute will get defeated and would run against the intent of the said provision. Hence, an application for registration made under Section 10(23C) will be deemed as registered if no action by the Commissioner of Income-tax is taken with regard to the application of registration or rejection thereof within twelve (12) months from the end of the month in which such application for registration was made.

In the case of an application under Section 10(23C) is rejected, the assessee may still be eligible under Section 11 [52] provided the assessee had applied a return of income for claiming exemption under Section 10(23C) due to ignorance. The Assessing

49. *Supra* note 20 at p.332

50. *Ibid*

51. Educational Institute of American Hotel and Motel Association v CIT [1996] 219 ITR 183 (AAR)

52. CIT v. Lucknow Public Educational Society [2009] 183 Taxman 62 (All.)

Officer is under a duty to ask for all information from the assessee at the time of scrutiny of documents and failing to do so before completing the assessment under Section 143(3) will not render the 'revised return' *non est* for claiming exemption under Section 11 of the ITA . Moreover, the CBDT Circular No. 14(XL-35)/1955, dated 11th April, 1955 also states that the department should not take advantage of the ignorance of the assessee.[53] It must also be noted that once all requisite conditions under Section 11 have been met, even if conditions under Section 10(23C)(vi) have not been complied with, there will be no bar to seek exemption under Section 11.[54] Denial of registration under Section 10(23C)(iv) on grounds of misappropriation in the accounts books or excess expenditure on administrative costs etc., can only be upheld by the court when an order has been passed denying registration on such grounds after giving a proper hearing to the concerned party. Any order made in contravention of the said procedure will be bad in law.[55] Any withdrawal of exemption under Section 10(23C) made by the prescribed authority is non-appealable and the aggrieved party will have to prefer a writ petition under Article 226 of the Indian Constitution.[56]

The Finance Bill has clarified that when an NGO has got a tax exemption under Section 11 of ITA which does not allow for such sale or transactions, it cannot ask for a switch over to another Section 10(23c) of the Act to claim the tax exemption.

## VI. Voluntary Contributions and other Incomes Under Section 12

As per Section 12(1) of the ITA, voluntary contributions are considered as a part of income for charitable organizations. For the purpose of Section 11 (1), voluntary contribution is considered as income except such contributions made with a specific purpose forming part of the corpus of the trust/institution. Although, voluntary contributions are in the nature of receipts without consideration, it should be treated like a gift and not considered as income. Section 12(1) however treats it as deemed income for charitable organizations. The voluntary contributions have to be solely for charitable or religious purpose and even if only a small portion is for other purposes, the entire contributions would not be exempt. It may be noted that the flexibility of voluntary contribution under Section 12(1) does not imply forfeiture of income under various provisions of Section 13. Section 12(1) uses the word 'received' as against the word 'derived' in Section 11(1)(a). Therefore, voluntary organizations should always be treated as income on receipt basis only, irrespective of the method of accounting.[57]

## VII. Wealth-Tax

As per Section 5(1) of the Wealth-tax Act, charitable organizations are exempted from paying wealth-tax in respect of the assets or property held under trust or other legal obligations for any public purpose of a charitable nature in India. Exemption under the wealth-tax may be withdrawn if the voluntary organization in question either forfeits or loses its exemption status under Section 12AA(3) of ITA. In case of forfeiture, for wealth-tax purposes, the voluntary organization will be treated as an individual assesse.

## VIII. Treatment of Donations

Donation is defined as "when a person, who is the owner of a thing, voluntarily transfers the title and possession of the same from himself to another, without any consideration is donation. A gift or gratuitous payment is, in simple English, a donation."[58] Thus, a donation is synonymous to gift minus consideration. Under ITA there are several avenues available for donations to claim deductions such as Section 37(1), Section 80G, Section 35AC and deductions under Section 35CCA, 80GGA etc.

The assesse making donations under Section 37(1) must establish a direct relation between the donation made and the running of the business of the assesse to claim deduction. A direct link needs to be established between contribution and trade of the assesse for the donation to fall within the ambit of business expenditure under Section 37(1). Thus, if

53. *Supra* note 20 at p.354
54. CIT v. Mahasabha Gurukul Vidyapeeth Haryana [2010] 326 ITR 25 (Punj. & Har.)
55. Synodical Board of Health Services v. Director General of Income-tax [2012] 18 taxmann.com 133 (Delhi)
56. *Supra* note 20 at p.372
57. *Ibid* at p. 470
58. *Ibid* at p. 936

the person making the donation is able to establish a direct nexus between the donation made and the usage of such donation for enhancement of business prospect of the assessee then such donation would be considered as deductible expenditure under Section 37(1).

Under Section 80G of the ITA, donors can also avail tax exemptions with deduction in the computation up to 100% of the donations made. To claim deduction under the present Section, donation must be made only in terms of money and not in kind. Any donation which is made in excess of INR 10,000 must always be paid in any mode other than cash to claim the deduction. If a donation is made cross-institutionally then the amount of such donation should be restricted to one-tenth of total gross income of the donor organization in order to claim deduction under sub-Section 4 of Section 80G.[59] Deduction is allowed only when the assesse has some income and deduction is available only against taxable income. Unlike Section 37(1), the assesse is not required to prove a nexus between donation and business to claim deduction under the present Section.

An entity seeking exemption under Section 80G must apply for registration through Form 10G before the Commissioner of Income-tax/Director of Income-tax (Exemption). Once the request for registration is made, the concerned authority should either grant the same or reject it within six (6) months from the date on which such application was made. This six month duration would not include the time taken by the assesse to furnish additional documents which the concerned authority may have called for during the course of six months for ascertaining the veracity of the documents presented along with the application. If the concerned authority, even after the expiry of six months from the date on which the application was made, does not grant permission or reject it then it would be deemed that application has been registered. All 80G certificates issued on or after the 1st of October, 2009 are permanent and perpetual in nature unless withdrawn by the department.[60] Similarly, organizations having income from business or profession are eligible to get 100% exemption under Section 35AC and assessees not having income from business or profession can claim deduction on donation made under Section 80GGA of the I.

59. *Ibid* at p. 944

60. CBDT Circular on Perpetual Nature of Sections 10(23C) & 80G Renewals, Circular No. 7/2010, dated October 27 2010

# 8. Non-profit Entities in the US

In India, charitable activities are carried out by three forms of entities namely trusts, societies and section 25 [61] companies. All these entities get regulatory relaxations and fiscal interventions in the form of tax exemptions from the State in recognition of the fact that motive behind such operations are purely for charitable and public benefit purposes. Principles governing structural governance of non-profit entities across the globe are more or less the same. In India, ITA governs taxation issues of non-profit entities. Similarly, in US the Internal Revenue Code (IRS) governs the taxation issues of such entities.

Under the IRS, only two forms of voluntary organizations are recognized namely public charity and private foundation. The most common types of organizations that work in the field of non-profit sectors are charitable, educational and religious. Internal Revenue Code 501(c)(3) ("**Code**") provides that a corporation, community chest, fund or foundation may qualify for exemption if it organized and operated exclusively for charitable purposes.

## I. Basic Framework for United States "Non-profits"

For a charitable organization to be tax-exempt under 501(c) Code, the entity must be organized and operated exclusively for the exempt purposes listed in 501(c)(3). 501(c)(3) states:

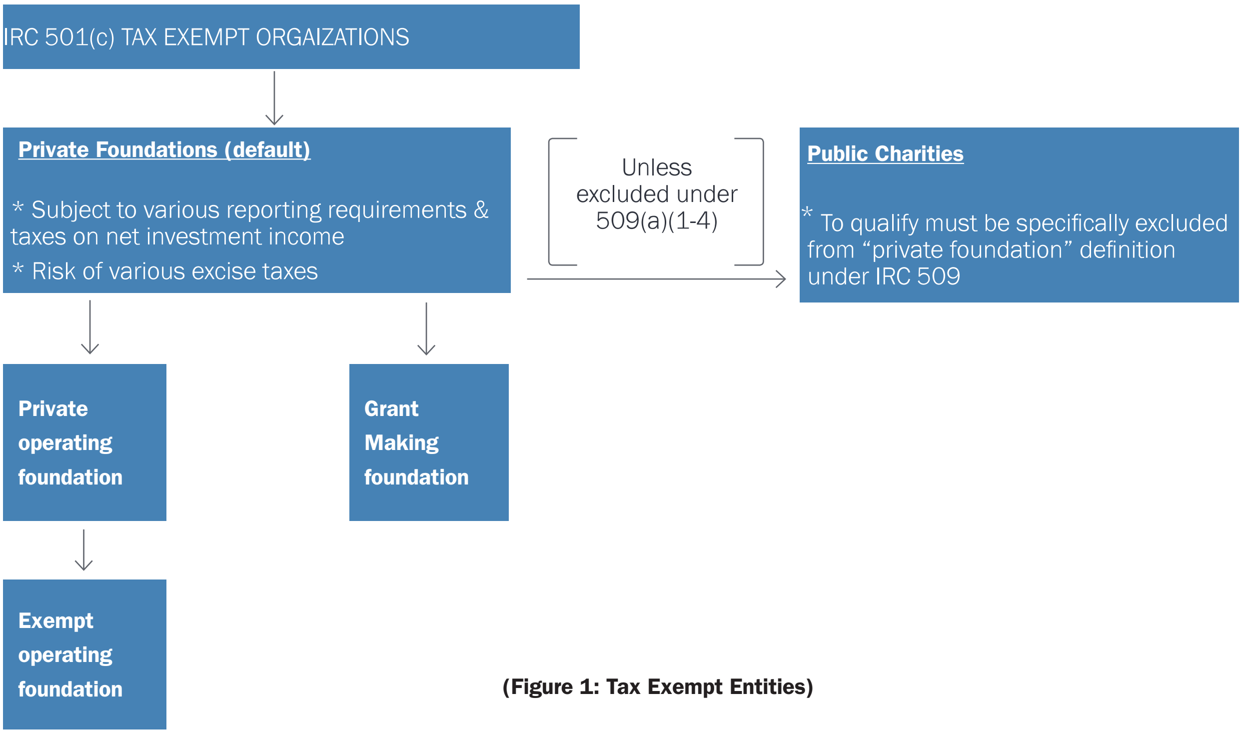
*Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation (except as otherwise provided in subsection (h)), and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office.* [62]

An entity must be organized as a corporation, trust, or association for IRS to recognize the entity's exemption [63] however, a partnership will not be exempt. Most non-profits are organized in form of corporations, as formation of an association involves almost the same formalities as formation of a corporation, a corporation will provide a more certain legal structure, and in many jurisdictions, an un-incorporated association does not shield its members from liability.[64]

All organizations that qualify for tax exemption under 501(c) are designated private foundations unless specifically excluded from the definition under 509(a)(1-4).[65] In effect, IRC 509 divides non-profits into two separate and distinct classes: "private foundations" and "public charities".[66] The latter class is favorable for tax purposes, since private foundations are subject to various reporting requirements and taxes on net investment income.[67] Unlike public charities, private foundations risk various excise taxes.[68] Under 509(a)(1-4), organizations considered public charities rather than private foundations (the default designation) include churches, educational organizations which maintain regular faculty and regular curriculum, hospitals

61. Indian Companies Act, 1956 has been replaced by the Companies Act, 2013 and the relevant section dealing will be Section 8: formation of companies with charitable objects, etc.
62. 26 U.S.C. 501(c)(3)
63. IRS website, *Life Cycle of a Private Foundation – Starting Out*
64. 2E-2E:5 Lexis Tax Advisor – Federal Topic § 2E:5.03
65. A private foundation is also a charitable entity and described in the IRS by section 509. The IRS issues a 509(a) ruling to every organization with a 501(c)(3) tax-exempt ruling. Section 509(a) of IRS, which includes references to Section 170(b), is called both a public charity ruling and a private foundation ruling. While the 501(c)(3) ruling designates an organization's tax-exempt status, the 509(a) ruling further categorizes the organization as either a public charity or a private foundation. This designation is important to a potential grantor because it indicates whether the granting organization will be required to exercise expenditure responsibility for the organization's grant. IRS website, *Private Foundations*
66. Id.
67. Id.
68. Id.

or medical research facilities, and organizations which test for public safety. Further, public charities include organizations which have an active program of fundraising and receive contributions from many sources, including the general public, government agencies, corporations, private foundations or other public charities, or receive income from the conduct of activities in furtherance of the organization's exempt purposes or actively function in a supporting relationship to one or more existing public charities.[69] For such organizations to be considered public charities the aggregate of contributions should exceeds 50% of a taxpayer's contribution base for the taxable year.[70]




**(Figure 1: Tax Exempt Entities)**

Generally, public charities draw their support from a variety of sources, while private foundations typically "have a single major source of funding (usually gifts from one family or corporation rather than funding from many sources) and most have as their primary activity the making of grants to other charitable organizations and to individuals, rather than the direct operation of charitable programs."[71] If an organization is appropriately designated a private foundation, it is further classified as either a private operating foundation, an exempt operating foundation, or a grant-making foundation.

The private operating foundations are those which contribute the majority of their resources to the active conduct of exempt activities. Such foundations are subject to the same restrictions and risks as other forms of private foundations (including the tax on net investment income), except that private operating foundations are not subject to an excise tax for failure to distribute income.[72]

Further, contributions to private operating foundations described in Code section 4942(j)(3) are deductible by the donors to the extent of 50 percent of the donor's adjusted gross income, whereas contributions to all other private foundations are generally limited to 30 percent of the donor's adjusted gross income."[73]A private operating foundation is only classified as an exempt operating foundation—and thus not subject to the tax on net investment income subject to the condition that (i) it has been publicly supported for 10 years; (ii) governing body consists of individuals less than 25 percent of whom are disqualified individuals and is broadly representative of the general public; and (iii)

69. IRS website, *Public Charities*
70. 26 U.S.C. § 170(b)(1)(A)(viii).
71. IRS.gov, *Life Cycle of a Public Charity/Private Foundation*
72. 26 U.S.C. § 4942(j)(3).
73. IRS.gov, *Private Operating Foundations*

has no officer who is a disqualified individual during the year.[74] In case private foundations that do not qualify as private operating foundations, they are generally referred to as grant-making foundations or private non-operating foundations.[75]

## II. United States Regulation of International Non-profit Entities

A United States non-profit may conduct all or part of its charitable activities in a foreign country without jeopardizing its tax-exempt status [76] (subject to the laws and regulations of the country of origin). Further, an organization's tax-exempt status will remain unchanged even if it distributes funds to individuals or other organizations that are not charities, so long as the distribution is charitable and aimed at achieving the organization's purpose.[77]

Interestingly, the U.S. government does not interfere with how the non-profit entity accomplishes its purposes. Charitable entities are free to recruit participants for their organizations as they wish, and need not provide notification to any government agency about its membership, activities, or outreach. Like other U.S. organizations and companies, U.S. non-profit entities must refrain from working with governments or individuals under U.S. sanctions, as well as with groups designated as foreign terrorist organizations, but otherwise, they are free to collaborate with foreign NGOs or foreign governments to achieve their purposes. There are no regulations that restrict U.S. non-profit entities from attending conferences abroad, finding donors overseas, or performing work internationally.[78]

Accordingly, United States non-profits may significant flexibility in conducting affairs abroad without foregoing tax-exemption. Contributions to such non-profits are only deductible; however, if the contribution is in fact to or for the use of the domestic organization and the domestic organization is not serving as an agent for, or conduit of, a foreign charitable organization.[79]

### A. 501(c)(3) entities operating in India and entitlement to treaty benefits

Taxation of income in India is governed by the provision of ITA. The ITA contains separate rules for the taxation of residents and non-residents. Residents are taxable on worldwide income, while non-residents are taxable only on Indian-source income (i.e. only and to the extent that such income accrues or arises, or is deemed to accrue or arise in India or is received or deemed received in India).

Such taxability of non-residents on their Indian-source income is however subject to the provisions of the applicable tax treaty to the extent they are more beneficial to the non-resident. In addition to the conditions prescribed under the relevant tax treaty regarding the applicability of such tax treaty, the ITA prescribes certain additional conditions for availing the benefit of a tax treaty entered into by India.[80]

The foremost requirement for the applicability of the India-US tax treaty ("**Treaty**") to a charitable organization which is a tax exempt entity under the Code, is that it should qualify as a person as defined in the Treaty. Article 3.1(e) and 3.1(f) of the Treaty provides that the term *"person" includes an individual, an estate, a trust, a partnership, a company, any other body of persons, or other taxable entity* and the term *"company" means, anybody corporate or any entity which is treated as a company or body corporate for tax purposes respectively.*

If the charitable organization does not qualify as either of the specific entities (particularly trust, company, any other body of persons), it is important to analyze the meaning of the terms 'taxable entity'. The term should not mean an entity actually taxed, but an entity that may be 'liable' to tax under the relevant domestic regime. To the extent that the tax free status of charitable organization is derived from a specific exemption provision pursuant to a 501(c)

74. IRS.gov, *Exempt Operating Foundations*

75. IRS.gov, *Grant Operating Foundations*

76. IRS Memorandum (hereinafter "IRS Memo"), Office of Chief Counsel, 200504031 at p. 2 (28/01/2005) (citing Rev. Rul. 63-252, 1963-2 C.B. 101).

77. Id.

78. Fact Sheet: Non-Governmental Organizations (NGOs) in the United States, U.S. Dept. of State, *http://www.humanrights.gov/2012/01/12/fact-sheet-non-governmental-organizations-ngos-in-the-united-states/*

79. IRS Memo, p.2.

80. The non-resident should obtain a tax residency certificate ("TRC") from the government of which he is a resident pertaining to the relevant period; the non-resident should furnish certain prescribed particulars to the extent they are not contained in the TRC; the non-resident should obtain a tax id in India (called the permanent account number); and the non-resident should file tax returns in India.

(3) registration, we can assume that the charitable organization would otherwise have been considered a taxable entity in the United States. However, this position has not been free of doubt and there have been judicial views expressed to the contrary. But, the position would not be relevant if the charitable organization qualifies as either of the specific entities (particularly trust, company, any other body of persons), in which case it should qualify as a 'person' irrespective of its tax-exempt status.

The next requirement for availing the benefit of the Treaty is that the charitable organization should be a resident of the US as defined in Article 4.1 of the Treaty.[81] In this context, the nature of the entity the charitable organization is set up as – body corporate, trust, foundation, etc. If the charitable organization is established as an entity (for example, a body corporate) which is not one of the entities referred to in Article 4.1(b) above (particularly a trust), to qualify as a resident of the US for the purposes of the Treaty, it would have to satisfy only one test – it should be 'liable' to tax in the US in the manner outlined above – i.e., by reason of domicile, residence, citizenship, place of management, place of incorporation, or any other criterion of a similar nature. Also, as already highlighted above, it should possess a tax residency certificate issued by the US government with respect to the period for which it proposes to claim Treaty relief.

However, if it is established as either of the entities referred to in Article 4.1(b), it will also have to satisfy the additional test of being actually subject to tax in the US. Therefore, given that its income is exempt from tax under Section 501 of the IRC, to satisfy the condition, its income should be subject to tax in the hands of its beneficiaries.

The Code status entails strict regulatory requirements and adherence to IRS Regulation. In addition, state-wise compliances are also required to be followed. Non-filing of paper work or mis-stating the records of funds may jeopardize the tax-exempt status. Moreover, all due care must be taken to ensure that no lobby is conducted in the name of charity and activities arising out of such charitable work does not benefit any private citizen. To avail of the tax-exemptions, growing number of new ventures have elected to be non-profit organizations. Many of these ventures depend on federal tax exemption to scale-up their business and conduct charitable work at the same time. 501(c)(3) provision, besides being used for charitable activities, can also be used by entities to gain new forms of capitalization and business plans.

81. Article 4.1 of the Treaty, reads thus:

*For the purposes of this Convention, the term "resident of a Contracting State" means any person who, under the laws of that State, is liable to tax therein by reason of his domicile, residence, citizenship, place of management, place of incorporation, or any other criterion of a similar nature, provided, however, that*

i. *this term does not include any person who is liable to tax in that State in respect only of income from sources in that State; and*

ii. *in the case of income derived or paid by a partnership, estate, or trust, this term applies only to the extent that the income derived by such partnership, estate, or trust is subject to tax in that State as the income of a resident, either in its hands or in the hands of its partners or beneficiaries.*

# 9. Conclusion

The social sector industry in India has grown manifold. New forms of business have emerged and with it new and young breeds of entrepreneurs have come to the fore-front. These young leaders will provide several social and technological solutions to many of India's social sector problems in the coming days and years. At the same time, one also needs to look into the administrative and professional side of carrying out charitable activities in India. Companies, organizations and individuals have become more structured and professional in their approach to philanthropy and charitable activities. Gone are the days when doling out cheques was considered philanthropic and charitable. In today's world, charity has become more strategically linked to a company's balance sheets and visibility. Legal and market reforms in the last two decades have enabled private players to participate in national building through charitable activities with much vigor. While tax implications are clear and well explained in ITA, a need for greater clarity is required under the Companies Act and the Regulations thereunder with regard to investment and expenditure of CSR funds for charitable purposes.

The recent CSR provision in the Companies Act has the potential to usher a new era in the field of corporate and institutional philanthropy in India. The challenges faced by the philanthropy sector, however, remain manifold. Social business as a concept has found strong footholds in India. The time is ripe to take social business to the next level and CSR can provide the crowding-in effect for such business. Corporates and not-for-profit entities must engage more and participate regularly with civil society organizations so that capacity building at the grass-root level is strengthened. In the absence of democratization and decentralization at the lowest level, the trickle-down-effect model may be difficult to achieve.

Central and State legislations regulating non-profit sector need to be more open and accommodating of genuine demands made by the donors. Under the existing laws, it is almost impossible for foreign donors to have any direct administrative control or direct say in the functioning of the recipient organization. In such a situation it becomes difficult for such donors to ensure transparency and accountability of their funds. Owing to a very wide ambit of FCRA, genuine foreign contributors or donors often face a lot of legal and regulatory compliances to adhere (to), which eventually leads to donations either getting denied or unduly delayed to reach the intended beneficiaries.

The definition of terms like 'education', 'relief of the poor' etc. needs to be expanded under the ITA. Judicial pronouncements on the above terms have proved to be very restrictive and counter-productive. Fiscal laws and regulations need to be more accommodating to the demands of social sector. Governance issues should be given due importance as compliances can go a long way in ensuring corporate governance of donor companies. At the same time, non-profit organizations should also consider engaging with market players with a renewed vigor and not just looking at the arrangement from a donor-recipient perspective. Successful social business models can only be created and replicated when such organizations are more professional, transparent and wish to scale up.

The CSR provision may prove to be a game-changer for corporate and institutional philanthropy. Although, more clarity is required with respect to CSR Rules and other compliance requirements, corporate India has come a long way from being a corporate citizen to becoming a responsible corporate citizen. With the rise of globalization and de-regulated market, we may begin to see many Indian companies setting up non-profit entities in the US as well. Companies across jurisdictions are looking to enter into new forms of market, develop new models of social businesses and practice innovative models of corporate governance aimed at optimizing social returns on such investments.

# Annexure - I
# Ministry of Corporate Affairs Notification

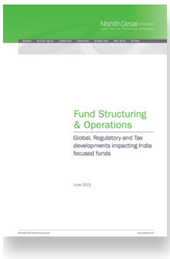
## New Delhi, the 27th February, 2014

G.S.R, 130(E).-In exercise of the powers conferred by sub-section (l) of section 467 of the Companies Act, 20l3 (18 of 2013), the Central Govemment hereby makes the following amendments to Schedule Vll of the said Act, namely:-

In Schedule VII, for items (i) to (x) and the entries relating thereto, the following items and entries shall be substituted, namely :-

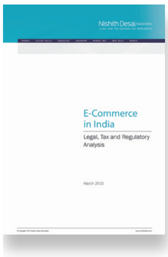
i. "eradicating hunger, poverty and malnutrition, promoting preventive health care and sanitation and making available safe drinking water;
ii. promoting education, including special education and employment enhancing vocation skills especially among children, women, elderly, and the differently abled and livelihood enhancement projects;
iii. promoting gender equality, empowering women, setting up homes and hostels for women and orphans; setting up old age homes, day care centres and such other facilities for senior citizens and measures for reducing inequalities faced by socially and economically backward groups;
iv. ensuring environmental sustainability, ecological balance, protection of flora and fauna, animal welfare, agroforestry, conservation of natural resources and maintaining quality of soil, air and water;
v. protection of national heritage, art and culture including restoration of buildings and sites of historical importance and works of art; setting up public libraries; promotion and development of traditional arts and handicrafts;
vi. measures for the benefit of armed forces veterans, war widows and their dependents;
vii. training to promote rural sports, nationally recognized sports, paralympic sports and Olympic sports;
viii. contribution to the Prime Minister's National Relief Fund or any other fund set up by the Central Government for socio-economic development and relief and welfare of the Scheduled Castes, the Scheduled Tribes, other backward classes, minorities and women;
ix. contributions or funds provided to technology incubators located within academic institutions which are approved by the Central Government;
x. rural development projects."

The following research papers and much more are available on our Knowledge Site: www.nishithdesai.com



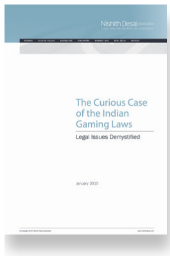

**Fund Structuring and Operations**

July 2016



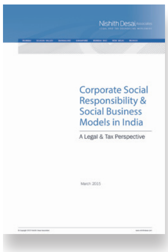

**E-Commerce in India**

July 2015




**The Curious Case of the Indian Gaming Laws**

September 2015




**Corporate Social Responsibility & Social Business Models in India**

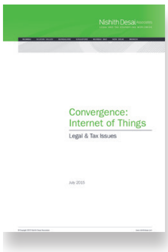
March 2016


**Joint-Ventures in India**

November 2014


**Outbound Acquisitions by India-Inc**

September 2014




**Internet of Things**

April 2016


**Doing Business in India**

June 2016


**Private Equity and Private Debt Investments in India**

June 2015

# NDA Insights

| TITLE | TYPE | DATE |
|---|---|---|
| Thomas Cook – Sterling Holiday Buyout | M&A Lab | December 2014 |
| Reliance tunes into Network18! | M&A Lab | December 2014 |
| Sun Pharma –Ranbaxy, A Panacea for Ranbaxy's ills? | M&A Lab | December 2014 |
| Jet Etihad Jet Gets a Co-Pilot | M&A Lab | May 2014 |
| Apollo's Bumpy Ride in Pursuit of Cooper | M&A Lab | May 2014 |
| Diageo-USL- 'King of Good Times; Hands over Crown Jewel to Diageo | M&A Lab | May 2014 |
| Copyright Amendment Bill 2012 receives Indian Parliament's assent | IP Lab | September 2013 |
| Public M&A's in India: Takeover Code Dissected | M&A Lab | August 2013 |
| File Foreign Application Prosecution History With Indian Patent Office | IP Lab | April 2013 |
| Warburg - Future Capital - Deal Dissected | M&A Lab | January 2013 |
| Real Financing - Onshore and Offshore Debt Funding Realty in India | Realty Check | May 2012 |
| Pharma Patent Case Study | IP Lab | March 2012 |
| Patni plays to iGate's tunes | M&A Lab | January 2012 |
| Vedanta Acquires Control Over Cairn India | M&A Lab | January 2012 |
| Corporate Citizenry in the face of Corruption | Yes, Governance Matters! | September 2011 |
| Funding Real Estate Projects - Exit Challenges | Realty Check | April 2011 |

# Research @ NDA

**Research is the DNA of NDA.** In early 1980s, our firm emerged from an extensive, and then pioneering, research by Nishith M. Desai on the taxation of cross-border transactions. The research book written by him provided the foundation for our international tax practice. Since then, we have relied upon research to be the cornerstone of our practice development. Today, research is fully ingrained in the firm's culture.

Research has offered us the way to create thought leadership in various areas of law and public policy. Through research, we discover new thinking, approaches, skills, reflections on jurisprudence, and ultimately deliver superior value to our clients.

Over the years, we have produced some outstanding research papers, reports and articles. Almost on a daily basis, we analyze and offer our perspective on latest legal developments through our *"Hotlines".* These *Hotlines* provide immediate awareness and quick reference, and have been eagerly received. We also provide expanded commentary on issues through detailed articles for publication in newspapers and periodicals for dissemination to wider audience. Our *NDA Insights* dissect and analyze a published, distinctive legal transaction using multiple lenses and offer various perspectives, including some even overlooked by the executors of the transaction. We regularly write extensive research papers and disseminate them through our website. Although we invest heavily in terms of associates' time and expenses in our research activities, we are happy to provide unlimited access to our research to our clients and the community for greater good.

Our research has also contributed to public policy discourse, helped state and central governments in drafting statutes, and provided regulators with a much needed comparative base for rule making. Our *ThinkTank* discourses on Taxation of eCommerce, Arbitration, and Direct Tax Code have been widely acknowledged.

As we continue to grow through our research-based approach, we are now in the second phase of establishing a four-acre, state-of-the-art research center, just a 45-minute ferry ride from Mumbai but in the middle of verdant hills of reclusive Alibaug-Raigadh district. The center will become the hub for research activities involving our own associates as well as legal and tax researchers from world over. It will also provide the platform to internationally renowned professionals to share their expertise and experience with our associates and select clients.

We would love to hear from you about any suggestions you may have on our research reports. Please feel free to contact us at
**research@nishithdesai.com**

Nishith Desai Associates

LEGAL AND TAX COUNSELING WORLDWIDE

MUMBAI

93 B, Mittal Court, Nariman Point
Mumbai 400 021, India

tel +91 22 6669 5000
fax +91 22 6669 5001

SILICON VALLEY

220 S California Ave., Suite 201
Palo Alto, California 94306, USA

tel +1 650 325 7100
fax +1 650 325 7300

BANGALORE

Prestige Loka, G01, 7/1 Brunton Rd
Bangalore 560 025, India

tel +91 80 6693 5000
fax +91 80 6693 5001

SINGAPORE

Level 30, Six Battery Road
Singapore 049 909

tel +65 6550 9856

MUMBAI BKC

3, North Avenue, Maker Maxity
Bandra–Kurla Complex
Mumbai 400 051, India

tel +91 22 6159 5000
fax +91 22 6159 5001

NEW DELHI

C–5, Defence Colony
New Delhi 110 024, India

tel +91 11 4906 5000
fax +91 11 4906 5001

MUNICH

Maximilianstraße 13
80539 Munich, Germany

tel +49 89 203 006 268
fax +49 89 203 006 450

NEW YORK

375 Park Ave Suite 2607
New York, NY 10152

tel +1 212 763 0080