

Chapter VI : Follow up Audit of Exemptions to Charitable Trusts and Institutions

6.1 Introduction

Income Tax Act, 1961 (Act), provides tax exemption to trusts, institutions and other organizations engaged in charitable or religious activities defined in section 2(15) subject to fulfilment of provisions of section 11, 12 and 13 of the Act. The Income Tax Department (ITD) is responsible for enforcement of these tax exemption provisions.

Earlier, we had examined the working of the scheme of tax exemption in the performance audit and included the findings in the C&AG Audit Report No. 20 of 2013 (Exemptions to Charitable Trusts and Institutions). The Report highlighted certain lapses such as (a) grant of approval/registration without adequate documents; (b) irregular exemptions to trusts creating huge surpluses consistently; (c) application of income in prohibited mode of investment; (d) non-monitoring of foreign contributions received by trusts etc.

In July 2018, Public Accounts Committee (PAC) in their 104th Report on the Action Taken by the Government on the observations/recommendations of the Committee contained in their 27th Report (16th Lok Sabha) on 'Exemptions to Charitable Trusts and Institutions' *inter alia* expressed their concern that public charitable trusts were being used to run commercially for profit business and had repeatedly violated provisions of the Income Tax Act. The Committee was concerned over the serious nature of all the violations and failure of the ITD to monitor whether the trusts were fulfilling the objectives under which they have been established and also ensuring that there is no abuse of the concession enjoyed by such trusts.

The Committee also desired the office of the Comptroller & Auditor General of India to submit a report on the violations of the Public Charitable Trusts and make recommendations on how to remedy the gaps and prevent such recurrences in future. In this regard, data/information relating to charitable trusts and institutions was requested for from CBDT in October 2018. The data was received only after six months in April 2019 and was also not in a usable form. CBDT had therefore to be addressed on 22 April 2019 for revised data sets. The information is yet to be received. A pan India performance audit will be conducted once CBDT provides complete and usable data.

In the meanwhile, a limited follow up Audit of Exemptions to Charitable Trusts and Institutions as contained in C&AG's Audit Report no. 20 of 2013 (Exemptions to Charitable Trusts and Institutions) was undertaken, alongwith

Charitable Trusts audit issues noticed in the compliance audit of states of Karnataka, Maharashtra and West Bengal.

6.2 Audit findings

Even in this limited audit, we noticed 99 irregularities involving tax effect of ₹ 723.43 crore. Some of the irregularities found in Audit are (a) Diversion of income/property to related group trusts/institutions considered as application of income; (b) Exemptions to assessees whose activities were not charitable in nature; (c) Lack of monitoring the investment of accumulated money by the trusts in the forms or modes other than those specified in the Act; (d) Exemption to assessee where voluntary contribution including foreign currency donation was considered as corpus fund without specific direction of donor; and (e) Non-cancellation of registration where activities of the Trust and Institutions are not in accordance with the provisions of the Act. These findings had featured in the earlier Audit Report no. 20 of 2013 as well, implying such types of irregularities have continued to occur and exemptions continued to be allowed incorrectly inspite of non-compliance with the provisions of the Income Tax Act. Further, we have noticed errors now such as (a) Allowance of expenditure and accumulation where exemption was denied; (b) Exemptions granted to trust on application of funds given to foreign universities; and (c) Failure of the Assessment Information System (AST) to levy surcharge. The important audit findings are discussed in the subsequent paragraphs.

6.3 Diversion of income/property to related group trusts/institutions considered as application of income

Section 10(23C)(vi) provides that the income of any university or other educational institution existing solely for educational purposes, and not for purposes of profit, shall be exempt provided the institution applies its income, or accumulates it, for application wholly and exclusively to the objects for which it is established.

Further, proviso 12 of section 10(23)(c)(vi) for FY 2014-15 provides that where the fund or Trust or institution does not apply its income during the year of receipt and accumulates it, then any payment or credit out of such accumulation to any trust or institution registered under section 12AA or institution referred to in section 10(23)(C)(iv) to (via), shall not be treated as application of income to the objects for which such fund or trust or the institution, is established. Section 11 of the Act provides for exemption of income derived from the property held under trust if applied or accumulated for charitable or religious purpose in accordance with the Act.

Section 13(1)(c)(ii) of the Act, provides that exemption to charitable Trusts or Institutions under section 11 or 12 would not be available, if any income or property of the trust is applied, directly or indirectly, for the benefit of any specified person referred to in section 13(3). The person specified in section 13(3) are the author of the trust or founder of the institution; any person who has made a substantial contribution to the trust or institution of amount exceeding ₹ 50,000; where such author, founder or person is a HUF; any trustee of the trust or manager; any relative of any such author, founder, substantial contributor, member, trustee or manager.

Audit noticed in Pune and Mumbai charges, three cases involving tax effect of ₹ 60.41 crore where income/ property of institutions were diverted to related group trust and where such diversion was considered as application of income. Two such cases are illustrated below:

6.3.1 In PCIT(E), Pune charge, the scrutiny assessment of a trust for the AY 2015-16 was completed in December 2017 determining income of ₹ 54.50 crore after allowing exemption under section 10(23C)(vi). Audit scrutiny revealed that the assessee, engaged in educational activity, donated ₹ 80.00 crore out of income of ₹ 115.65 crore to one of its related trusts, which was treated as application of income. As explained above, donation of ₹ 80.00 crore made to related party cannot be treated as application of income for education purposes. It should thus been brought to tax. The omission resulted in under assessment of income of ₹ 80.00 crore involving tax effect of ₹ 27.19 crore. The reply of the Ministry was awaited.

6.3.2 In CIT (E), Mumbai charge, scrutiny assessment of a trust for AY 2014-15, was completed in October 2016 allowing exemption under section 11. Audit observed that the assessee had paid an amount of ₹ 27.48 crore towards rent for school building to a company, where the Author-cum-Trustee of the Trust is the Managing Director. As per the lease agreement, the trust was required to pay fixed lease rent of ₹ 7.33 crore (calculated at the rate of ₹ 20 per sq. ft.) or up to 85 *per cent* of the total receipts of the trust depending on the slab wise net revenue, whichever is higher. The 85 *per cent* was to be worked out on a slab based on the yearly total collection of the trust.

Though the assessee has claimed benefit under section 10(23C)(vi), the AO assessed the case invoking the provisions of section 11 in computation of income. Audit observed that, though, the assessee is showing a deficit of ₹ 10.92 crore in its income and expenditure account, the deficit is basically due to the exorbitant rent charged to the Income and Expenditure Account as stated above. Had the rent payment been on the basis of rate based on area used by the school, the assessee would have been paying only ₹ 7.33 crore

and the assessee would have earned sufficient surplus for the trust for application to the object of the trust. However, it could be seen that, the trust, instead of accumulating income for the object of the trust as envisaged in the Act, was diverting surplus earned, in the guise of rent, to the company where the trustee is Managing Director. Therefore, the assessee has violated provisions of section 10(23C)(vi) and section 13(1)(c)(ii). Hence, exemption under section 11 was required to be denied on entire income of ₹ 72.41 crore. The omission resulted in under assessment of income of ₹ 72.41 crore involving short levy of tax of ₹ 24.61 crore.

In reply, department, while not accepting the audit objection, stated that the provisions of section 13(1)(c)(ii) do not apply to the assessee as the assessee claimed exemption under section 10(23C) and not under the section 11 of the Act. Department also stated that the assessee did not violate any provisions of section 10(23C) of the Act and the rent paid by the assessee is reasonable and applied wholly and exclusively for the objects of the trust.

The reply of the department is not acceptable. As per the provisions of section 10(23C), the educational institution shall apply its income or accumulations of it, wholly and exclusively to the objects of the trust. In the instant case, the rent agreement was framed in such a way that the rent payable to the institution increases vis a vis the increase in the income of the Trust assessee. Thus, instead of accumulating income gets diverted to the company in which Author-cum-Trustee is Managing Director, violating the provisions of third proviso to section 10(23C). Rent deed was devised in a manner that the benefit goes to a company, where the Author-cum-Trustee of the Trust is the Managing Director.

Though the assessee claimed exemption under section 10(23C), the department completed the assessment under the provisions of section 11 of the Act. The department needs to confirm which section is applicable in the instant case.

The assessee continues to violate the provision of the Act, in either case.

6.4 Exemptions to assessee whose activities were not 'charitable' in nature

Section 11 of the Act provides that the income derived from the property held under trust for charitable or religious purpose, shall not be included in total income, to the extent it was applied to charitable purpose in India in accordance with the provision of section 11, 12 and 13. Further, section 2(15) amended by the Finance Act, 2010 and 2015 provides that advancement of any other object of general public utility shall not be a charitable purpose, if

- (i) 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 thereof for consideration, irrespective of the nature of use or application, or retention of the income from such activity and
- (ii) the aggregate receipts from such activity exceed ₹ 25 lakh (20 per cent w.e.f. 1.4.2016 of the total receipts).

Audit observed that ITD granted exemptions in two cases in Mumbai and Pune charges involving tax effect of ₹ 12.23 crore where activities of the assesseees were not charitable in nature in accordance with section 2(15). One such case is illustrated below:

6.4.1 In PCIT (E), Pune charge, the scrutiny assessment of a trust for AY 2013-14 was completed in March 2016 determining income of ₹ 57.75 crore after allowing deduction of ₹ 16.21 crore under section 11. Audit scrutiny revealed that the assessee engaged in providing securities to properties, giving plots on lease basis and to construct housing colonies, shops and commercial complexes for lease on consideration etc. which fall in the category of trade, commerce or business for a consideration. Further, it was also noticed from the profit and loss account and computation of income that the gross receipt from such activities exceeds the allowable limit of ₹ 25 lakh for charitable activities. Hence, in view of the provisions of section 2(15) the activities of the institution are precluded from the definition of the charitable purpose and therefore, the assessee is not eligible for deduction under section 11. The omission resulted in under assessment of income of ₹ 16.21 crore with short levy of tax of ₹ 5.01 crore. The reply of the Ministry was awaited.

6.5 Allowance of expenditure and accumulation where exemption was denied

Section 11 of the Act provides for exemption of income derived from the property held under trust if applied or accumulated for charitable or religious purpose in accordance with the Act. Further, Section 164(2) provides that in case exemption is denied under section 11, such income of the trust shall be charged to tax at maximum marginal rate.

For the Trusts and Institutions registered under section 12A, provisions of sections 11, 12 and 13 are only applicable for determining income. These sections do not have provision for deduction of expenditure, but allow entire income as exempt, provided provisions of the relevant sections are followed.

Audit noticed in 12 cases in Maharashtra and Karnataka that ITD denied exemptions under section 11, but allowed deductions for expenditure to the

extent of ₹ 322.42 crore involving tax effect of ₹ 108.29 crore. One such case is illustrated below:

6.5.1 In CIT (E), Mumbai charge, the scrutiny assessment of a trust for AY 2014-15 was completed in December 2016. The AO has denied the exemption under section 11. Audit scrutiny revealed that the expenditure of ₹ 70.82 crore was allowed by the AO while computing the total income. Since there is no provision for allowing expenses from the disallowed income, the entire income should have been charged to tax. The omission resulted in under assessment of income of ₹ 70.82 crore involving short levy of tax of ₹ 24.07 crore.

In fact, the ITD itself, in case of another assessee (AY 2014-15), in an assessment completed under section 143(3) in December 2016, denied exemption under section 11 and did not allow any expenses while computing the total income. The reply of the Ministry was awaited.

6.6 Lack of monitoring the investment of accumulated money by the trusts in the forms or modes other than those specified in the Act

Section 11(1)(a) of the Act provides that (i) the income derived from the property held under trust for charitable or religious purpose, shall not be included in total income, to the extent it was applied to charitable purpose in India; and (ii) where any such income is accumulated or set apart for application to such purpose in India to the extent to which the income so accumulated or set apart is not in excess of 15 *per cent* of the income from such property. Section 11(5) prescribes that the forms and modes of investing or depositing the money so accumulated or set apart by charitable trusts will be investment in Government savings certificates; deposit in any account with Post office savings bank/scheduled bank; investment in units of the Unit Trust of India, investment in any Central Government or state Government securities; investment or deposit in bonds issued by financial corporation, public sector company etc.

Section 13(1) of the Act, provides that exemption to charitable Trusts or Institutions under section 11 or 12 would not be available, if any income or property of the trust is applied, directly or indirectly, for the benefit of any specified person referred to in section 13(3). The person specified in section 13(3) are the author of the trust or founder of the institution; any person who has made a substantial contribution to the trust or institution of amount exceeding ₹ 50,000; where such author, founder or person is a HUF; any trustee of the trust or manager; any relative of any such author, founder, substantial contributor, member, trustee or manager. Section 13(1)(d)(i) prescribes that exemption under section 11 or 12 is not applicable if any

funds of the trust are invested or deposited or remain invested or deposited after 30 November 1983 otherwise than in any one or more of the forms or modes specified in section 11(5). Section 13(1)(d)(iii) also provides for non-availability of exemption to a charitable trust if shares in a company other than shares in a public sector company or shares prescribed as form or mode of investment under section 11(5) are held by the trust or institution after 30 November 1983.

Further, section 12AA(4) inserted w.e.f. 1.10.2014, stipulates that if the activities of the trusts are being carried out in a manner that the provisions of sections 11 and 12 do not apply to exclude either whole or any part of the income of such trust or institution due to operation of section 13(1) then, Principal Commissioner or the Commissioner may by an order in writing cancel the registration of such trust or institution.

6.6.1 In CIT(E), Mumbai charge, Audit noticed that four trusts invested ₹ 4,034.95 crore during AYs 2009-10 to 2014-15 and one trust invested ₹ 2.02 crore in AY 2012-13 in shares of its group of companies, which is a prohibited mode under section 13(1)(d)(iii) read with section 11(5). The ITD disallowed assessee's claims of exemption in four trusts under section 11. However, in another case of a trust for AY 2012-13, ITD did not disallow the exemption.

In view of the fact that these trusts continued to flout the provisions of the Act governing investments year after year and also since the AO has been disallowing the exemption year after year without taking steps to check this irregularity, continuation of registration under section 12A granted to these assesseees needs to be reviewed. Further, there is a need to check whether such errors were errors of omission or commission. If these were errors of commission, necessary action as per law needs to be taken. The reply of the Ministry was awaited.

6.6.2 As per proviso (i) and (ia) to section 13(1)(d)(iii), provisions of section 13(1)(d)(iii) shall not apply to any assets held by trust where such assets form part of the corpus of the trust as on 1.6.1973 or any accretion to the shares, forming part of the corpus by way of bonus shares allotted to the trust.

In CIT(E), Mumbai charge, three trusts continued to hold investment in modes other than those prescribed under section 11(5). These trusts held collectively 55.55 *per cent* of shares (2,24,478 shares valuing ₹ 76.90 lakh) in a group company as on 31.3.2014 which were invested prior to June 1973. Audit noticed that there is nothing on record to show that the investments were made from corpus/income of these trusts as on 1.6.1973 or before.

The corpus fund of the trusts is being utilized to control the business of the group companies by holding majority stake in a group company, instead of applying funds for charitable purpose. Therefore, the continuity of exemption provisions for investment by such trusts prior to 1.6.1973 needs to be reviewed. The reply of the Ministry was awaited.

6.7 Exemptions granted to trust on application of funds given to foreign universities

Section 11(1)(c) provides for exemption to trusts created on or after the 1st day of April 1952, for charitable purpose which tends to promote international welfare in which India is interested, to the extent to which such income is applied to such purposes outside India provided that the Board, by general or special order, has directed that it shall not be included in the total income of the person in receipt of such income.

In, CIT(E), Mumbai charge, in the case of a trust, Audit noticed that during AY 2009-10 to 2014-15, the trust (established in July 2008) donated equivalent of ₹ 430.03 crore to two foreign universities, ₹ 232.89 crore for creation of an Endowment Fund and ₹ 197.14 crore for financing a building in the campus.

Audit noticed that CBDT had initially rejected (June 2014) the claim of the trust for exemption made in May 2010, stating that, *'The proposed activities of the Trust are not tending to promote "international welfare in which India is interested" and the same are not covered for the purpose of section 11(1)(c) of the Act'*. Audit further noticed that the assessee was aggrieved by the decision of rejection of claim for exemption. Thereafter, CBDT reversed its earlier order and issued another order (November 2015) allowing the exemption to the Trust on foreign donations retrospectively from the AY 2009-10 to AY 2016-17 for an amount of \$100 million. Following the order of CBDT, exemption was allowed to the trust in respect of such foreign donations from AY 2009-10 onwards.

Audit observed that the exemption granted based on the order of CBDT is irregular for the following reasons.

- (i) The reversal of earlier rejected order is erroneous as the Board has no power to review its own earlier rejected order. The CBDT in its noting has itself brought out the clarification by Ministry of Law in another case that;

"It is well settled law that the power to review is not an inherent power. It must be conferred by law either specifically or by necessary implication (some High Courts are of the view that only courts have inherent power to review their orders). As there is no provision in the Act

indicating that the prescribed authority has the power to review its earlier order, hence it is felt that prescribed authority is not in a position to use the power of review of its earlier order".

The CBDT has further noted that the above view had been consistently adopted by it in all such reconsideration requests.

- (ii) After the CBDT passed the order dated 10 November 2015 under section 11(1)(c), the approach adopted by the AO in granting exemption for different AYs was not consistent. For AY 2009-10, AO granted exemption by passing order under section 143(3) read with section 147 in March 2016. For AY 2011-12 and AY 2012-13, AO granted exemption by passing order under section 154 in December 2015. Further, for reopening of the assessments under section 154 for AY 2011-12 and 2012-13, the condition of mistake apparent from records was not made out as the CBDT's order issued subsequent to passing of assessment orders, cannot be treated as a mistake apparent from record.

In view of the fact that the CBDT has no power to review its own earlier order rejecting the claim of the assessee, the exemption granted on the income applied outside India by CBDT was not correct. The tax impact on account of the order passed by the CBDT is to the extent of ₹ 135.62 crore.

6.8 Exemption to assessee where voluntary contribution including foreign currency donation was considered as corpus fund without specific direction of donor

Section 11(1)(d) provides that a donation could be treated as corpus donation, only when the donor makes a specific direction to make it part of the corpus and such donation shall not be included in the total income of the trust.

In CIT (E), Mumbai charge, scrutiny assessment of a trust for AY 2014-15 was completed in November 2016 allowing exemption of ₹ 75.45 crore under section 11. Audit noticed that trust received corpus of ₹ 39.14 crore including foreign currency donation of ₹ 13.89 crore. However, details of donors as well as reports required under Foreign Contribution Regulation Act (FCRA) on donation received in foreign currency to verify the genuineness of corpus donation were not found on records. Therefore, the specific direction to make it a part of corpus was not available. Further, since source of foreign currency donation was not known, ITD needs to verify this to preclude the chances of round tripping.

As per provision of the section 11(1)(d), amount can be taken to corpus with specific direction of the donor. In this case in the absence of such direction the amount should have been treated as income for the year. Hence, the

entire surplus of ₹ 38.76 crore earned during the year should have been charged to tax as accumulation under section 11(2) was not sought by the assessee. This resulted in short levy of tax of ₹ 13.17 crore. The reply of the Ministry was awaited.

6.9 Non-cancellation of registration where activities of the Trust and Institutions are not in accordance with the provisions of the Act

Section 11(2) provides that where 85 *per cent* of the income is not applied or is not deemed to have been applied to charitable or religious purposes but is accumulated or set apart, such income so accumulated or set apart shall not be included in the total income, provided such person furnishes a statement in the prescribed form in the prescribed manner to AO stating the purpose for which the income is being accumulated or set apart and the period for such accumulation. Section 12AA(3) empowers CIT to cancel the registration, if he is satisfied that activities of the trust are not genuine or activities are not carried out in accordance with the objects of the trusts. Further, section 12AA(4), inserted w.e.f. 1.10.2014, provides for cancellation of registration in case the activities of the trust or the institution are being carried out in a manner that provisions of section 11 and 12 do not apply to exclude either whole or part of the income of such trust or institution, due to operation of sub-section (1) of section 13. Further, section 2(15) amended by the Finance Act, 2010 and 2015 provides that 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 and the aggregate receipts from such activity or activities during the previous year, exceed ₹ 25 lakh (20 *per cent* w.e.f. 1.4.2016 of the total receipts) from such activity or activities.

6.9.1 Audit observed that in 15 cases in CIT(Exemptions), Mumbai charge, due to the amendment to section 2(15) w.e.f. AY 2009-10, the ITD, at the time of assessments, observed that the activities of these trusts were held non charitable due to violations of Section 11(2) read with Section 2(15) and treated them as not valid Trusts for the purpose of the Act. The ITD cancelled registration of three such trusts. Since, these trusts lost the character of charitable trust for the purpose of the Act, the income accumulated or set apart under section 11(2) for future application on charitable purpose was required to be taxed. Further, audit could not ascertain such accumulation by these trusts for want of details and also whether the department taxed such accumulation on cancellation. The ITD has been asked to clarify the

action taken on taxing the accumulation in respect of the Trusts where registration was cancelled. The reply is awaited.

In remaining 12 cases, Audit observed that although the department has held the activities of these trust as non-charitable for the purpose of the Act, the registration under section 12A of these trusts had not been cancelled. Therefore, registration of these entities needs to be reviewed and if deemed fit, funds accumulated out of exempt income may be brought to tax.

6.9.2 In CIT (E), Mumbai charge, the scrutiny assessment of a trust for AY 2014-15 was completed in November 2016 after allowing exemption of ₹ 11.38 crore under section 11(2). Audit noticed that during the year trust applied ₹ 1.91 crore (i.e. 10.64 *per cent*) for charity against receipts of ₹ 17.95 crore. This accumulation is in addition to corpus fund of ₹ 21.23 crore. Audit further observed from assessment records of AY 2012-13 and AY 2013-14 that trust applied ₹ 3.69 crore (i.e. 31.86 *per cent*) and ₹ 1.64 crore (i.e. 11.17 *per cent*) for charity against receipts of ₹ 11.58 crore and ₹ 14.68 crore respectively. This accumulation is in addition to corpus fund of ₹ 15.06 crore and ₹ 18.10 crore received during AY 2012-13 and AY 2013-14 respectively. This shows that trust had not been applying income for charity and rather accumulating it by misusing the provision of accumulation. The meagre application on charity over the years indicates that assessee has no motive or plan for charity. Since, trust failed to discharge its primary responsibility for application of income towards charity, continuation of registration of the trust under section 12AA needs to be reviewed. The reply of the Ministry was awaited.

6.10 Failure of the Assessment Information System (AST) to levy surcharge

The Finance Act, 2014 introduced levy of surcharge at the rate of 10 *per cent* on taxable income of Association of Persons, if the income exceeds ₹ 1.00 crore. Audit observed that in 33 cases of trust, surcharge was not levied even though the income exceeded rupees one crore. The omission resulted in non-levy of surcharge of ₹ 212.38 crore including cess. Two such cases are illustrated below:

6.10.1 In CIT(E), Mumbai charge, a Trust for AY 2014-15 was assessed at ₹ 1,894.92 crore. Income Tax Computation Form revealed that the ITD system (AST) failed to levy surcharge of ₹ 58.55 crore including cess. The reply of the Ministry was awaited.

6.10.2 In CIT (E), Mumbai charge, a Trust for AY 2014-15, was assessed at ₹ 893.24 crore. Income Tax Computation Form revealed that the ITD system

failed to levy surcharge of ₹ 27.60 crore including cess. The reply of the Ministry was awaited.

As we have seen only a limited number of assessment cases relating to Trusts, ITD needs to ascertain the dates between which the surcharge was leviable by the system and to identify all the assessees who did not pay surcharge during that period and take action to recover the same.

6.11 Other irregularities in assessments

Under the provisions of Income Tax Act, 1961, in scrutiny assessments the assessing officer is required to make a correct assessment of the total income or loss of the assessee and determine the correct sum payable by him or refundable to him on the basis of such assessment. The CBDT has issued instructions in this regard from time to time.

We noticed irregularities in assessment while allowing exemption to trusts/institutions in 23 cases in Haryana, Karnataka, Maharashtra and West Bengal involving tax effect of ₹ 181.33 crore. Five such cases are illustrated below:

6.11.1 In CIT (E), Mumbai charge, in a Trust for AY 2014-15, the assessing officer denied the assessee's claim for exemption. Audit scrutiny, however, revealed that while computing total income, assessing officer erroneously allowed exemption under section 10(23C)(iv) to the extent of ₹ 125.57 crore. The mistake resulted in under assessment of income of ₹ 125.57 crore involving short levy of tax of ₹ 42.68 crore. In reply (February 2018), department accepted the audit observation. The reply of the Ministry was awaited.

6.11.2 Explanation (2) below section 11(1) provides that if, in the previous year, the income applied to charitable or religious purposes in India falls short of eighty-five *per cent* of the income derived during that year from property held under trust, or as the case may be, held under trust in part, by any amount for any other reason, then income may, at the option of the person in receipt of the income be deemed to be income applied to such purposes during the previous year in which the income was derived and the income so deemed to have been applied to such purpose shall not be taken into account in calculating the amount of income.

In PCIT-(E), Kolkata charge, the assessment of a trust for AY 2015-16 was completed under section 143(3) in August 2017 at 'nil' Income. The AOP was registered under section 10(23C)(vi) having its objective to impart education and thus fall under definition of charitable purpose under section 2(15). The assessee was allowed exemption of ₹ 126.97 crore under section 10(23C) as accumulation of Income for application in next previous year. Audit noticed that the assessing officer while completing the assessment erroneously

mentioned the surplus of income at ₹ 151.47 crore instead of ₹ 45.04 crore. This resulted in excess allowance of exemption of ₹ 106.43 crore having a potential tax effect of ₹ 36.16 crore. On being pointed out by audit, the error was rectified under section 154 in October 2018.

6.11.3 Section 40(a)(ii) provides that any sum paid on account of any rate or tax levied on the profits or gains of any business or profession or assessed at a proportion of, or otherwise on the basis of, any such profits or gains is not deductible.

In CIT (E), Mumbai charge, in a trust (company) for AY 2014-15, the assessing officer denied the assessee's claim for exemption. Audit observed that in computation of income the assessee claimed reduction of ₹ 27.91 crore on account of Tax Deducted at Source (TDS) and Advance Tax. The department, while computing taxable income, had again reduced the above amount of ₹ 27.91 crore from taxable income instead of adding the same to taxable income in view of the provision of section *ibid*. Error resulted in underassessment of income of ₹ 55.82 crore involving short levy of tax of ₹ 18.97 crore. In case, this is an error of omission, the ITD should take action against the AO for gross incapacity and if such error is of commission, then action as per law needs to be taken. The reply of the Ministry was awaited.

6.11.4 In CIT(E), Bengaluru charge, the assessment of a trust engaged in the activity of running educational institutions, for AY 2015-16 was completed at an income of ₹ 11.35 crore in September 2017. Audit noticed that the AO passed the order by disallowing the brought/carry forward of excess expenditure to the subsequent years. The CIT(A) in para 5.2 and 5.3 of its order dated 12.2.2018 directed the AO to allow the carry forward of excess expenditure (pertaining to earlier years) of ₹ 58.99 crore to subsequent years as application of income after due verification of the figures with the assessment records. It included the deficit of ₹ 31.14 crore pertaining to AY 2009-10. Audit noticed from the assessment orders for the AY 2009-10 passed under section 143(3) read with section 147 in December 2016 and the order giving effect to CIT(A) in January 2018 that there was no deficit to be carried forward. Thus, incorrect set-off and carry forward of deficit of ₹ 31.14 crore resulted in short levy of potential tax effect of ₹ 10.58 crore.

6.11.5 In CIT(E), Bengaluru charge, the assessments of a Trust for AY 2014-15 and AY 2015-16 were completed at a loss of ₹ 55.64 crore and ₹ 54.16 crore respectively. The assessee, established for providing public transport service, was registered under section 12AA of the Act. The AO denied the claim of deduction under section 11 in view of section 2(15) read with section 13(8) and its income was brought to tax as normal business income. Audit noticed that while computing the income, the provisions of business income was not

applied in totality; instead computation was done by adopting income as per section 11. The error resulted in under assessment of income of ₹ 8.23 crore and ₹ 37.84 crore involving potential tax of ₹ 3.66 crore and ₹ 16.78 crore for the AY 2014-15 and AY 2015-16 respectively.

6.12 Conclusion

Despite having been featured in earlier performance Audit Report no. 20 of 2013, Audit still noticed instances of irregularities where

- ITD considered diversion of income/property by trusts to related group trusts/institutions as application of income;
- ITD allowed exemptions to assessees whose activities were not charitable in nature;
- ITD has not taken action to cancel registration of the trusts whose activities were held as non-charitable;
- the internal control mechanism to monitor the investment of accumulated money by the trusts in the forms or modes other than those specified in the Act is weak; and
- ITD granted exemption to assessee where voluntary contribution including foreign currency donation was considered as corpus fund without specific direction of donor.

Audit, further noticed instances where

- ITD allowed expenditure and accumulation though exemption was denied;
- In contravention of the rules, ITD granted exemptions to trust constituted after 1952 on charitable grounds though the investment was in a foreign universities. They did not have powers to review and pass such an order; and
- AST of ITD failed to levy surcharge.

CBDT needs to provide the data/information needed by audit to submit report on the violations of the Public Charitable Trusts in the Parliament. CBDT needs to review not only those cases pointed out by Audit but all Trusts cases without exception.

6.13 Recommendations

The PAC in their 104th Report on the Action Taken by the Government on the observations/recommendations of the Committee contained in their 27th Report (16th Lok Sabha) on 'Exemptions to Charitable Trusts and Institutions'

had also desired C&AG to make recommendations on how to remedy the gaps and prevent recurrences in future. The following recommendations are therefore made:

- i. *CBDT may ensure that the various conditions prescribed in the Act are complied with by the Trusts before granting exemptions and registration of trusts not fulfilling the prescribed conditions are reviewed.*
- ii. *CBDT may consider amending the provision to make prior approval a pre-condition for foreign donation by a charitable trust or institution. The CBDT may also specify a limit say, 5 to 10 per cent of income for such donations.*
- iii. *CBDT may consider including a provision to make the trustee also liable in case where the provisions of the Act are not complied with.*
- iv. *Some of the provisions for exemptions to charitable trusts and institutions viz. section 11(1)(c) from on or after 1.4.1952, section 13(1)(d)(iii) after 30 November 1983, proviso to section 13(1)(d)(iii) from 1.6.1973 are from specific dates and apply to different trusts differently thereby not providing a level playing field. CBDT may consider bringing in a level playing field by inserting a sunset clause for such provisions applicable to those Trusts that have retained the benefit on ground of actions, having been taken earlier though these are prohibited now. A sunset clause for such provisions would ensure that benefits not available now are not available to anyone, and thus that all types of Trusts and Institutions are treated on similar lines. This will reduce the difficulties in assessing Trusts, when different trusts have to be treated differently, and reduce the “errors” in assessments. CBDT may consider giving a period of say, three years to the affected trusts to comply with the new provisions.*
- v. *Since the issues pointed out in the earlier Audit Report no. 20 of 2013 are continuing, ITD is advised to review all the trust cases without exception and ensure that exemptions and concessions allowed to them are as per the provisions of the Act.*
- vi. *CBDT may examine whether the instances of “mistakes” noticed are errors of omission or commission and if these are errors of commission, then ITD should ensure necessary action as per law.*

