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## APPLICABILITY OF NEW SECTION TO DIFFERENT ASSESSEES

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### 3.1 APPLICABILITY OF NEW SECTION TO DIFFERENT ASSESSEES

Section 112A(1) provides for tax payable by an “assessee” on his total income. Hence, on a plain reading, subject to, and read with, the notes in **paras 3.2 to 3.6** below, generally speaking, the New Section is applicable to all assessees, whether corporate or non-corporate and whether non-resident or resident.

The applicability of section 112A *vis-à-vis* certain assessees are explained in following paragraphs:

### 3.2 CHARITABLE TRUSTS REGISTERED UNDER SECTION 12A/12AA

**3.2.1** In case, of a charitable trust registered under section 12A/12AA, Tribunal is divided regarding applicability of section 112 on its capital gains.

*View 1: The concessional rate of tax under section 112 is applicable. Jamsetji Tata Trust v. Joint CIT(E) [2014] 148 ITD 388 (Mum. - Trib.)*

*View 2: The concessional rate of tax under section 112 is not applicable.*

*Dy. DIT(E) v. India Cements Educational Society [2016] 67 taxmann. com 236/157 ITD 1008 (Chennai - Trib.)*

**3.2.2** According to one view, for following reasons, section 112A is not applicable to a charitable trust registered under section 12A/12AA and whose income is exempt under sections 11 and 12:

(a) Section 112A(1)(i) provides that the section applies only if the total income includes any income chargeable under the heads “capital gains”. Now, it is well settled that the taxable income of a charitable trust registered under section 12A/12AA is computed under section 11 and its income is not classified under the five heads of income including capital gains specified in section 14:

- (i) *CIT v. Rao Bahadur Calawala Kannan Chetty Charities* [1982] 135 ITR 485 (Mad.) (income is not to be computed under different heads of income, including income from house property; books of account to be the starting point)
- (ii) *Hindusthan Welfare Trust v. DIT* [1993] 68 Taxman 205 (Cal.)
- (iii) *CIT v. Institute of Banking Personnel Selection* [2003] 131 Taxman 386 (Bom.)

Since there is no income chargeable under the head capital gains, Condition 1 is not fulfilled and hence section 112A may not apply to a charitable trust whose income is computed under sections 11 and 12.

(b) The aforesaid decision in **para 3.2.1** in relation to section 112 is not applicable because unlike section 112A there is no requirement in section 112 that it would apply only if the total income of the assessee included any income “chargeable under the head capital gains”.

Under this view, in case of a charitable trust whose income is exempt under section 11, the taxation of capital gains will continue to be governed by section 11(1A), section 11(1) and section 11(2), and if the gains are taxable, they would be taxed in accordance with section 164(2).

According to the other view, the Tribunal has also observed as follows:

- (a) *Akhara Ghamanda Dass v. Asstt. CIT* [2001] 114 Taxman 27 (Asr.)(Mag.)

*‘Nowhere in sub-Chapter-‘E’, it is mentioned that the Capital gains in case of trust property is to be taxed and calculated in a different manner than what is provided in sub-Chapter E.’*

(b) *Al Ameen Educational Society v. DIT(E)* [2012] 26 taxmann.com 250 (Bang.-Trib.)

*‘The expression capital gain or the mode of computation of capital gain has not been defined for the purpose of Sec. 11(1A) of the Act and therefore the normal expression capital gain and the computation of such capital gain as laid down in the provisions of Sections 45 to 55A of the Act will apply.’*

If the Chapter regarding capital gains is applicable, then, by analogy, the gain should also be considered as chargeable under the head “capital gains” for the purposes of section 112A(1)(i).

In view of the above, the principle laid down by the Mumbai Tribunal in *Jamsetji Tata Trust (supra)* is the correct view and hence, section 112A should be applicable in respect of LTCG from Specified Asset in the case of a charitable trust.

### 3.3 PRIVATE DISCRETIONARY TRUST

In case of a private discretionary trust, it appears that section 112A would become applicable. This is also supported by the following judgments in the context of section 112:

(a) *Niti Trust v. CIT* [1997] 90 Taxman 169 (Guj.)

(b) *Mahindra & Mahindra Employees’ Stock Option Trust v. ADCIT* [2015] 62 taxmann.com 390/155 ITD 1046 (Mum.)

Also see para 5.5.3.

### 3.4 ASSOCIATION OF PERSONS

It appears that the section 112A may apply to an association of persons even if the shares of individual members are not determined and the income of the AOP is taxable under section 167B. This is also supported by the decision in *Asstt. CIT v. Niranjana Narottam* [2003] 128 Taxman 25 (Ahd.)(Mag.), in the context of section 112.

### 3.5 FOREIGN INSTITUTIONS INVESTORS (FII) COVERED BY SECTION 115AD

It has been held that the taxation of the capital gains of FIIs is governed by section 115AD and not section 112:

- (a) *Advantage Advisors Inc. v. Dy. DIT* [2009] 33 SOT 46 (Mum. - Trib.)
- (b) *Universities Superannuation Scheme Ltd., In re.* [2005] 145 Taxman 141 (AAR)

Further, proviso to section 115AD as proposed by the Finance Bill, 2018 expressly provides that in case of income arising from the transfer of a long term capital asset referred to in section 112A, income tax @ 10% shall be calculated on such income exceeding ₹ 1 lakh.

In view of the above, section 112A is not applicable to FIIs covered by section 115AD.

Also *see* para 13.10.

### 3.6 SPECIAL PROVISION RELATING TO NON-RESIDENT INDIANS

Chapter XII-A contains special provisions relating to certain incomes of Non-resident Indians (NRI). Essentially, it provides that :

- (a) Long-term capital gains arising to an NRI [as defined in 115C(e)], in respect of equity shares acquired in convertible foreign exchange shall be taxable @ 10% [section 115E(ii)].
- (b) In computation of such capital gains while second proviso to section 48 is not applicable [section 115D(2)(a)], the first proviso to section 48 regarding computation in terms of foreign exchange utilized to acquire the asset is applicable.
- (c) Alternatively, if the assessee invests the net consideration in a specified asset, then, the capital gains would be exempt as specified in section 115F.

It appears that Chapter XII-A is a specific provision and section 112A is a general provision. Now, the Supreme Court has observed as follows:

“The general rule to be followed in case of conflict between two statutes is that the later abrogates the earlier one. In other words, a prior special law would yield to a later general law, if either of the two following conditions is satisfied: (i) The two are inconsistent with each other. (ii) There is some express reference in the later to the earlier enactment. If either of these two conditions is fulfilled, the later law, even though general, would prevail.

... From the text and the decisions, four tests are deducible and these are (i) The Legislature has the undoubted right to alter a law already promulgated through subsequent legislation, (ii) A special law may be altered, abrogated or repealed by a later general law by an express provision, (iii) *A later general law will override a prior special law if the two are so repugnant to each other that they cannot co-exist though no express provision in that behalf is found in the general law, and (iv) It is only in the absence of a provision to the contrary and of a clear inconsistency that a special law will remain wholly unaffected by a later general law. See in this connection, Maxwell on the Interpretation of Statutes, Twelfth Edition, pages 196-198.*”

[*Ajay Kumar Banerjee v. UOI*[1984] 3 SCC 127 cited in *S. Prakash v. K. M. Kurian* AIR 1999 SC 2094]

Hence, it is argued that the latter provision in section 112A overrides Chapter XII-A.

On the other hand, the relationship between a special provision and a general provision has been explained by the Supreme Court as follows in a number of decisions, including the following:

- (a) if a special provision is made on a certain subject, that subject is excluded from the general provision. [*State of Rajasthan v. Gopi Kishan Sen* AIR 1992 SC 1754 cited in *CIT v. Kiran Crimpers* [1997] 94 Taxman 502 (Guj.)]
- (b) ... in cases of conflict between a specific provision and a general provision the specific provision prevails over the general provision and the general provision applies only to such cases which are not covered by the special provision. [*J.K. Cotton Spinning & Weaving Mills Co. Ltd. v. State of Uttar Pradesh* AIR 1961 SC 1170]