E-Book

Recent amendments to Income-tax Act, 1961

The Institute of Chartered Accountants of India

(Set up by an Act of Parliament)

Southern India Regional Council

Chennai

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This e-book has been authored by

CA. V K Subramani

The Institute of Chartered Accountants of India

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Southern India Regional Council

ICAI Bhawan, No. 122 Mahatma Gandhi Road, Nungambakkam, Chennai – 600034

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The Institute of Chartered Accountants of India

(Set up by an Act of Parliament)

Southern India Regional Council

Chennai

CHAIRMAN

THE INSTITUTE OF CHARTERED ACCOUNTANTS OF INDIA
SOUTHERN INDIA REGIONAL COUNCIL
(Set up by an Act of Parliament)
ICAI BHAWAN, P.B. No.3314, No. 122 Mahatma Gandhi Road
Nungambakkam, Chennai – 600034

January 13, 2023

FOREWORD

"Education" in essence lays emphasis on sharpening one's own acquired knowledge and enhancing their perspective and approach on subjects that are the core areas of one's own career growth in any field of their choice. The Southern India Regional Council of the Institute of Chartered Accountants of India therefore strongly believes that the members of our profession should always be attuned to the constant changes in their professional field.

It is in this direction SIRC has been steadfastly providing multiple form of imparting education like conducting continuing education programme, interaction between members in different forums and bringing out publications with updates in respect of subjects covered in such publications.

One of the core areas of our professional practices is Taxation. This subject is one area where regulatory frame work changes constantly making it therefore most dynamic. It is therefore imperative that members should give stress for continuing education in different spheres and in different mediums. One such medium of enhancing the skill is through 'reading". There could be no substitute to 'reading' and SIRC is conscious that it has to discharge his obligation to members not only by conducting programmes but also provide them the best exposure through publication of books relating to subjects of their professional interest.

SIRC has been bringing out publications in electronic format in varied subjects connected to our professional activity. The response from the members has been phenomenal and there has been demand for more publications on specific subjects. The outcome of the response was a publication by SIRC of ICAI exclusively on "Direct Taxation" with 11 specific areas covered in this E-Publication titled "Recent Amendments to Income-tax Act, 1961" now brought out

The publication contains 11 Chapters explaining the salient features in a crisp and candid way to give the best of reading experience to the members. I am sure our initiative in giving you yet another publication would add value to the knowledge base of our professional fraternity.

SIRC places on record it's grateful thanks to CA. V.K. Subramani, Erode for his painstaking efforts and acknowledges his contribution in assisting SIRC for bringing out this publication. We are grateful to CA. Puli NVK Sathish Kumar for devoting his professional time to review the basic draft which has led to appreciable level of value addition in this final version. SIRC invites suggestions for extending our services by bringing similar publications and look forward to their inputs on this publication. The comments and suggestions on the e-book are welcome at sirc@icai.in.

This publication is made available free of cost to our members and uploaded in our SIRC APP. The link https://www.sirc-icai.org/e-book.php can be accessed to download the publication.

CA. China Masthan Talakayala

Recent amendments to Income-tax Act, 1961

CA V K Subramani

Index of Contents

Chapter 1

Payment of cash, transfer of stock in trade and other assets to partner(s) on reconstitution or dissolution of firm [Section 9B and Section 45(4)]

The abovesaid two provisions viz. section 9B and 45(4) have to be read together since both the provisions are interconnected with one another. It may be noted that section 9B was not introduced while presenting the Finance Bill, 2021 and was inserted while moving the Bill in Parliament. Therefore, no discussion was there before it was inserted in to the statute book.

1.1 Income on receipt of capital asset or stock in trade by specified person from specified entity - Section 9B:

The Finance Act, 2021 inserted section 9B which is applicable w.e.f. assessment year 2021-22 onwards. In the case of a 'specified entity' any capital asset or stock in trade or both is given to a 'specified person' in connection with dissolution or reconstitution of such 'specified entity' this provision would apply.

- 'Specified entity' means a firm or AOP or BOI (not being a company or a co-operative society).
- 'Specified person' means partner of a firm or member of AOP or BOI (not being a company or a co-operative society).

The expression 'reconstitution of specified entity' means –

(a) Where one or more partners or members, ceases to be partners or members (in the case of AOP or BOI); or
(b) One or more new partners or members, are admitted in such 'specified entity' in such circumstances that one or more of the persons who were partners or members, as the case may be, before the change, continue as partner or partners or member or members after the change; or
(c) All the partners or members of such 'specified entity' continue with a change in their share or shares of some of them.

In short, when there is a change in profit sharing ratio due to admission of a partner or retirement of a partner or when there is a mere change in the respective shares of the partners (members) the provisions of section 9B get triggered. **However, the fundamental condition is that the 'specified entity' must transfer capital asset or stock in trade or both to one or more partners during such 'reconstitution of such specified entity' to attract section 9B.**

It may be noted that when there is no transfer of capital asset or stock in trade or both but there is retirement of a partner or admission of a partner or there is change in profit sharing ratio among the partners, the provisions of section 9B would not get triggered.

When there is transfer of capital asset or stock in trade or both to a 'specified person' on reconstitution of the 'specified entity' the provisions of section 9B would apply and it would apply **for taxing the 'specified entity'** and **not the 'specified person'** who receives such capital asset or stock in trade or both.

The fair market value of the capital asset or stock in trade or both shall be deemed to be the full value of consideration received or accruing to the 'specified entity' as a result of transfer of the said capital asset or stock in trade or both. Thus, the pre-condition for applying section 9B is that the 'specified person' **must receive capital asset or stock in trade or both, upon reconstitution of the 'specified entity'. When there is no such receipt, there is no scope for applying section 9B.**

It may be noted that the FMV on the date of actual receipt by partner / member of the specified entity would be adopted for computation envisaged by section 9B and not the date of agreement or arrangement inter se between the specified entity and its partner / member.

The **fair market value of the capital asset** less the cost of acquisition shall be chargeable to tax under the head 'Capital gains' in the hands of the 'specified entity'. In case the capital asset is a long-term capital asset, the **benefit of indexation** could be availed by the 'specified entity'. It is liable to tax in the year of actual receipt by the member/partner however the tax liability is on the specified entity.

The **fair market value of the stock in trade** less its cost shall be chargeable to tax under the head 'Profits and gains of business or profession' in the hands of the 'specified entity'.

The CBDT with the approval of the Central Government is empowered to issue guidelines for the purpose of removing any difficulty arising in giving effect to the provisions of this section and section 45(4). Every guideline so issued by the CBDT soon after it is issued, shall be laid before each House of Parliament and shall be binding on the Income-tax authorities and the assessee.

According to Schedule III of the Companies Act, 2013 the term 'stock in trade' does not include raw material and consumable stores. If such meaning is imported in interpreting this provision for the purpose of applying section 9B, some controversy could arise.

The CBDT has issued a Circular No.14 of 2021 dated 02.07.2021 by way of guidelines by exercising the powers conferred upon it by section 9B(4) referred hereinbefore.

The Circular of the CBDT elucidates attribution principle by stating that any increase in value of capital asset by adopting fair market value over its original cost has to be distributed to similar other assets held by the 'specified entity'.

1.2 Receipt of money or capital asset by 'specified person' from 'specified entity'- Section 45(4):

This section was substituted by the Finance Act, 2021 applicable from the assessment year 2021-22 onwards. It starts with a non-obstante clause and thus overrides section 45(1).

Where a 'specified person' receives any money or capital asset or both from a 'specified entity' in connection with reconstitution of such 'specified entity' any profits and gains arising from such receipt to the 'specified person' **is chargeable to tax under the head 'Capital gains' in the hands of the 'specified entity'.**

It may be noted that the tax consequence is on the 'specified entity' and not on the recipient being a person referred to as 'specified person'.

The quantification of the income chargeable to tax as capital gains is as per the formula viz. A = B + C – D where

A = Income chargeable to income tax as income of the 'specified entity' under the head "Capital gains";

B = The value of money received by the 'specified person' from the 'specified entity' **on the date of such receipt;**

C= The amount of fair market value of the capital asset received by the 'specified person' from the 'specified entity' **on the date of such receipt**; and

D = The amount of balance in the capital account (represented in any manner) of the 'specified person' in the books of account of the 'specified entity' at the time of 'reconstitution of such specified entity'.

It is stated in the proviso to section 45(4) that if the value of 'A' given above is negative, its value shall be deemed to be zero.

The further proviso to section 45(4) says that the balance in the capital account shall be calculated without taking into account any increase in capital account of the 'specified person' due to revaluation of any asset or due to self-generated goodwill or any other self-generated asset.

Explanation 1 to section 45(4) says that the expressions 'reconstitution of the specified entity', 'specified entity' and 'specified person' shall have the meanings respectively assigned to them in section 9B.

The expression 'self-generated goodwill' and 'self-generated asset' mean goodwill or asset which has been acquired without incurring any cost for its purchase or which has been generated during the course of business or profession.

Explanation 2 to section 45(4) clearly says that when a capital asset is received by a 'specified person' from a 'specified entity' in connection with the 'reconstitution of

specified entity' the provisions of section 45(4) shall apply in addition to provisions of section 9B. The taxation under the said **two provisions viz. section 9B and section 45(4) shall work independently and simultaneously** and there is no exclusion of applying one because of the application of the other.

1.3 Determination of the nature of capital gain, whether short-term or long-term- Rule 8AA(5):

The Income-tax (Eighteenth Amendment) Rules, 2021 w.e.f. 02.07.2021 has inserted sub-rule (5) to rule 8AA for the purpose of determining the nature of capital gain after computing the amount of capital gains of 'specified entity' under section 45(4).

It says that the amount or part of capital gains so computed shall be deemed to be **from transfer of short-term capital asset** if it is attributable to, –

(a) capital asset which is short-term capital asset at the time of taxation of the amount under section 45(4); or
(b) capital asset forming part of block of asset; or
(c) capital asset being self-generated asset and self-generated goodwill as defined in clause (ii) of Explanation 1 to section 45(4);

The amount so computed shall be **deemed to be from transfer of long-term capital asset** if it is attributable to capital asset not covered (a) to (c) above and is long-term capital asset at the time of taxation of amount under section 45(4).

1.4 Attribution of income taxable under section 45(4) to the capital assets remaining with the specified entity, under section 48- Rule 8AB:

The Finance Act, 2021 inserted clause (iii) to section 48 dealing with mode of computation. The section says that the capital gain shall be computed by deducting from the full value of consideration, amounts such as (i) expenditure incurred wholly and exclusively in connection with such transfer; (ii) the cost of acquisition of the asset and the cost of any improvement thereto.

The clause (iii) to section 48 inserted the Finance Act, 2021 says that the amount chargeable to income-tax as income of such 'specified entity' attributable to the capital asset being transferred to the 'specified person', calculated in the prescribed manner shall also be reduced.

Rule 8AB inserted by Income-tax (Eighteenth Amendment) Rules, 2021 w.e.f. 02.07.2021 deals with attribution of income taxable under section 45(4) to the capital assets remaining with the 'specified entity'.

Where the amount is chargeable to income-tax under section 45(4), the 'specified entity' shall attribute such amount to the capital asset remaining with the 'specified entity' in a manner provided in this rule.

Attribution of income *chargeable under section 45(4) for the purpose of section 48(iii) when it relates to revaluation of any capital asset or valuation of self-generated asset or self-generated goodwill [Rule8AB(2)] :* Where the aggregate value of money and the fair market value of the capital asset received by the 'specified person' from the 'specified entity', in excess of the balance in his capital account chargeable to tax under section 45(4) relates to revaluation of any capital asset or self-generated asset or self-generated goodwill of the 'specified entity', the amount attributable to the capital asset remaining with the 'specified entity' for the purpose of section 48(iii) shall be the amount which bears to the amount charged under section 45(4) the same proportion as the increase in, or recognition of, value of that asset because of revaluation or valuation bears to the aggregate of increase in, or recognition of, value of all assets because of the revaluation or valuation.

No attribution *of income chargeable under section 45(4) for the purpose of section 48(iii) when it does not relate to revaluation of any capital asset or valuation of self-generated asset or self-generated goodwill [Rule8AB(3)]:* Where the aggregate of the value of money and fair market value of the capital asset received by the specified person from the specified entity, in excess of the balance in his capital account, charged to tax under section 45(4**) does not relate to revaluation of any capital asset or valuation of self-generated asset or self-generated goodwill of the specified entity, the amount charged to tax under section 45(4) shall not be attributed to any capital asset for the purposes of section 48(iii).**

No attribution *of income chargeable under section 45(4) for the purpose of section 48(iii)* ***when capital asset is only received by the specified person and there is no revaluation or valuation of self-generated asset or self-generated goodwill*** *[Rule8AB(4)]:* Notwithstanding anything contained in sub-rule (2) or sub-rule (3), where the aggregate of the value of money and fair market value of the capital asset received by the 'specified person' from the 'specified entity', in excess of the balance in his capital account charged to tax under section 45(4) **relates to only to the capital asset received from the 'specified entity', the amount charged under section 45(4) shall not be attributed to any capital asset for the purposes of section 48(iii).**

The 'specified entity' shall furnish the details of amount attributed to capital asset remaining with it in Form No.5C. It shall be furnished electronically under digital signature or through electronic verification code and shall be verified by the person who is authorised to verify the return of income of the 'specified entity' under section 140. Form No.5C shall be furnished on or before the 'due date' for filing the return specified in section 139(1) for the assessment year in which the amount is chargeable to tax under section 45(4).

The Principal DGIT (Systems) or DGIT (Systems) shall (i) specify the procedure for filing Form No.5C; (ii) specify the procedure, format, data structure, standards and manner of generation of electronic verification code for verification of the person furnishing the said Form; and (iii) be responsible for formulating and implementing

appropriate security, archival and retrieval policies in relation to the Form 5C so furnished.

Where the amount chargeable to tax under section 45(4) relates to revaluation of capital asset or valuation of self-generated asset or self-generated goodwill of the 'specified entity', it shall be based / supported by valuation report obtained from a 'registered valuer' [the term which is defined in rule 11U(g)].

The revaluation of an asset or valuation of self-generated asset or self-generated goodwill does not entitle the 'specified entity' for making depreciation claim on the increased value of the asset on account of such revaluation or valuation.

The expressions 'self-generated asset' and 'self-generated goodwill' shall have the meaning as assigned in clause (ii) of Explanation 1 to section 45(4).

Rule 8AB discussed above in a way further clarifies Circular No.14 of 2021 referred earlier. It may be noted that rule 8AB deals with attribution of gain in the hands of 'specified entity' and does not deal with the tax consequence in the hands of the 'specified person' who may transfer the capital asset so received from the firm at a later date. There is no specific provision similar to section 49(4) for the purpose of adopting the fair market value of the capital asset by the 'specified person' for computing capital gain when he transfers the capital asset so obtained at a later date. **However, the Circular 14 of 2021 allows adoption of FMV on the date of receipt by the 'specified person' when he transfers the said capital asset at a later date**.

1.5 Guidelines under section 9B and section 45(4) - Circular No.14 of 2021 dated 2.7.2021:

1. Finance Act, 2021 inserted a new section 9B in the Income-tax Act 1961. This section mandates that whenever a 'specified person' receives any capital asset or stock in trade or both from a 'specified entity', during the previous year, in connection with the dissolution or reconstitution of such 'specified entity', then it shall be deemed that the 'specified entity' has transferred such capital asset or stock in trade or both, as the case may be, to the specified person (hereinafter referred to as "deemed transfer"). This deemed transfer would be in the year in which such capital asset or stock in trade or both **are received by the 'specified person'**. Any profits and gains arising from such deemed transfer is deemed to be the income of such 'specified entity' of the previous year in which such capital asset or stock in trade or both are received by the 'specified person'. Further, it is chargeable to income-tax as income of such 'specified entity' under the head "Profits and gains of business or profession" or under the head "Capital gains", in accordance with the provisions of this Act. It has also been provided that the fair market value of the capital asset or stock in trade or both, on the date of its receipt by the 'specified person', shall be deemed to be the full value of the consideration received or accruing as a result of such deemed transfer. The definition of terms "'reconstitution of the specified entity", "specified entity" and "specified person" are provided in section 9B of the Act.

2. Similarly the Finance Act 2021 substituted sub-section (4) of section 45 of the Act. This newly substituted sub-section (4) now provides that where a 'specified person' receives any money or capital asset or both from a 'specified entity', during the previous year, in connection with the reconstitution of such 'specified entity' then any profits or gains arising from receipt by the 'specified person' shall be chargeable to income-tax as income of the 'specified entity' under the head "Capital gains". It has been further deemed that this income shall be the income of the 'specified entity' of the previous year in which such money or capital asset or both were received by the 'specified person'. A formula to calculate such profits and gains has also been provided in this sub-section. The definitions of terms "reconstitution of the specified entity", "specified entity" and "specified person" shall be as provided in section 9B of the Act while the terms "self-generated goodwill" and "self-generated asset" have been defined in this sub-section [i.e. section 45(4)]. It has been further clarified that when a capital asset is received by a 'specified person' from a 'specified entity' in connection with the reconstitution of such 'specified entity', the provisions of sub-section (4) of section 45 of the Act shall operate in addition to the provisions of section 9B of the Act and the taxation under the said provisions thereof shall be worked out independently. Both, the new section 9B and substituted sub-section (4) of section 45 are applicable for the assessment year 2021-22 and subsequent assessment years.

3. Sub-section (4) of section 9B of the Act provides that if any difficulty arises in giving effect to the provisions of this section and sub-section (4) of section 45 of the Act, the Board may, with the approval of the Central Government, issue guidelines for the purposes of removing the difficulty.

Guidelines

4. It is noticed that the amount taxed under sub-section (4) of section 45 of the Act is required to be attributed to the remaining capital assets of the 'specified entity', so that when such capital assets get transferred in the future, the amount attributed to such capital assets gets reduced from the full value of the consideration and to that extent the 'specified entity' does not pay tax again on the same amount. It is further noticed that this attribution is given in the Act only for the purposes of section 48 of the Act. **It may be seen that section 48 of the Act only applies to capital assets which are not forming block of assets**. For capital assets forming block of assets there is sub-clause (*c*) of clause (6) of section 43 of the Act to determine written down value of the block of asset and section 50 of the Act to determine the capital gains arising on transfer of such assets. However, the Act has not yet provided that amount taxed under sub-section (4) of section 45 of the Act can also be attributed to capital assets forming part of block of assets and which are covered by these two provisions. **To remove difficulty, it is clarified that rule 8AB of the Income-tax Rules. 1962 (hereinafter referred to as "the Rules") notified *vide* notification no. 76 dated 2-7-2021 also applies to capital assets forming part of block of assets.** Wherever the terms capital asset is appearing in the rule 8AB of the Rules, it refers to capital asset whose capital gains is computed under section 48 of the Act as well as capital asset forming part of block of assets. Further, wherever reference is made for the purposes of section 48 of the Act, such reference may be deemed to include reference for the purposes of sub-clause (*c*) of clause (6) of section 43 of the Act and section 50 of the Act.

5. For the removal of doubt it is further clarified that in case the capital asset remaining with the specified entity is forming part of a block of asset, the amount attributed to such capital asset under rule 8AB of the Rules shall be reduced from the full value of the consideration received or accruing as a result of subsequent transfer of such asset by the specified entity, and the net value of such consideration shall be considered for reduction from the written down value of such block under sub-clause (*c*) of clause (6) of section 43 of the Act or for calculation of capital gains, as the case may be, under section 50 of the Act.

6. For the purposes of understanding and for removing difficulties, if any, the application of section 9B of the Act and sub-section (4) of section 45 of the Act is explained with the help of the following examples:

Example 1: There are three partners "A", "B" and "C" in a firm "FR", having one-third share each. Each partner has a capital balance of Rs. 10 lakh in the firm. There are three pieces of lands "S", "T" and "U" in that firm and there is no other capital asset in that firm. Book value of each of the land is Rs. 10 lakh. All these three lands were acquired by the firm more than two years ago.

Partner "A" wishes to exit. The firm revalues its lands based on valuation report from a registered valuer, as defined in rule 11U of the Rules, and as per that valuation report fair market value of lands "S" and "T" is Rs. 70 lakh each, while fair market value of land "U" is Rs. 50 lakh. On the exit of partner "A", the firm decides to give him Rs. 11 lakh of money and land "U" to settle his capital balance.

In accordance with the provisions of section 9B of the Act, it would be deemed that the firm "FR" has transferred land "U" to the partner "A" at its fair market value of Rs. 50 lakh. Let us assume that the indexed cost of acquisition of land "U" is Rs. 15 lakh.

Now on account of the deeming provisions of section 9B of the Act, it is deemed that the firm "FR" has transferred land "U" to partner "A". Thus, an amount of Rs. 50 lakh less Rs. 15 lakh would be charged to tax in the hands of firm "FR" under the head "Capital gains". For partner "A", the cost of acquisition of this land would be Rs. 50 lakh. Hence, the amount of Rs. 35 lakh is charged to long term capital gains and let us assume that the tax is Rs. 7 lakh (assume no surcharge or cess just for ease of calculation and illustration purposes).

This, net book profit after tax of Rs. 33 lakh (capital gains of Rs. 40 lakh without indexation less tax of Rs. 7 lakh) is to be credited in the capital account of each of the three partners, *i.e.* Rs. 11 lakh each. Thus partner "A" capital account would increase to Rs. 21 lakh. This exercise is required to be carried out since section 9B of the Act mandates that it is to be deemed that the firm "FR" has transferred the land "U" to partner "A" and the long-term capital gains of Rs. 35 lakh is chargeable to tax in the hands of the firm "FR".

As against capital balance of Rs. 21 lakh, partner "A" has received Rs. 61 lakh (Rs. 11 lakh of money plus land "U" of fair market value of Rs. 50 lakh). Thus Rs. 40 lakh is required to be charged to tax under sub-section (4) of section 45 of the Act. This shall be in addition to an amount of Rs. 35 lakh charged to tax under section 9B of the Act.

On account of clause (*iii*) of section 48 of the Act read with rule 8AB of the Rules, this Rs. 40 lakh is to be attributed to the remaining assets of the firm "FR" on the basis of increase in their value due to revaluation based on the valuation report of registered valuer. In this case as per revaluation there are only two capital assets remaining; lands "S" and "T". In

both cases the value has increased by Rs. 60 lakh each. Thus, out of Rs. 40 lakh, Rs. 20 lakh shall be attributed to land "S" and Rs. 20 lakh to land "T". When either of these lands gets sold, this amount attributed to them would be reduced from sales consideration under clause (*iii*) of section 48 of the Act.

The amount of Rs. 40 lakh which is charged to tax under sub-section (4) of section 45 of the Act shall be charged as long-term capital gains in view of sub-rule (5) of rule 8AA of the Rules, since the amount of Rs. 40 lakh is attributed to land "S" and land "T" which are both long term capital assets at the time of taxation of Rs. 40 lakh under sub-section (4) of section 45 of the Act.

Example 2: There are three partners "A", "B" and "C" in a firm '"FR", having one-third share each. Each partner has a capital balance of Rs. 10 lakh in the firm. There are three pieces of lands "S", "T" and "U" in that firm and there is no other capital asset in that firm. All these three lands were acquired by the firm more than two years ago.

Book value of each of the land is Rs. 10 lakh. Partner "A" wishes to exit. The firm sells land "U" for its fair market value of Rs. 50 lakh. Let us assume that the indexed cost of acquisition of land "U" is Rs. 15 lakh. Thus, an amount of Rs. 50 lakh less Rs. 15 lakh would be charged to tax in the hands of firm "FR" under the head "Capital gains". Hence, the amount of Rs. 35 lakh is charged to long-term capital gains and let us assume that the tax is Rs. 7lakh (assume no surcharge or cess just for ease of calculation and illustration purposes).

This, net book profit after tax of Rs. 33 lakh (capital gains of Rs. 40 lakh without indexation less tax of Rs. 7 lakh) is to be credited in the capital account of each of the three partners, *i.e.* Rs. 11 lakh each. Thus partner ''A" capital account would increase to Rs. 21 lakh.

Partner "A" decides to exit the firm "FR". The firm revalue its lands "S" and "T" based on valuation report from a registered valuer, as defined in rule 11U of the Rules, and as per that valuation report fair market value of lands "S" and "T" is Rs. 70 lakh each. On the exit of partner "A", the firm decides to give him Rs.61 lakh of money to settle his capital balance. Thus, as against capital balance of Rs. 21 lakh, partner "A" has received Rs. 61 lakh of money. Thus Rs. 40 lakh is required to be charged to tax under sub-section (4) of section 45 of the Act. This will be in addition to Rs. 35 lakh already charged to capital gains.

On account of clause (*iii*) of section 48 of the Act, read with rule 8AB of the Rules, this Rs. 40 lakh is to be attributed to the remaining assets of the firm "FR" on the basis of increase in their value due to revaluation based on the valuation report of registered valuer. In this case as per revaluation there are only two capital assets remaining; lands "S" and "T". In both cases the value has increased by Rs. 60 lakh each. Thus, out of Rs. 40 lakh, Rs. 20 lakh shall be attributed to land "S" and Rs. 20 Lakh to land "T". When either of these lands gets sold, this amount attributed to them would be reduced from sales consideration under clause (*iii*) of section 48 of the Act.

The amount of Rs. 40 lakh which is charged to tax under sub-section (4) of section 45 of the Act shall be charged as long-term capital gains in view of sub-rule (5) of rule 8AA of the Rules, since the amount of Rs. 40 lakh is attributed to land "S" and land "T" which are both long- term capital assets at the time of taxation of Rs. 40 lakh under sub-section (4) of section 45 of the Act.

Note: The final result in both example 1 and 2 is same due to the operation of section 9B of the Act.

Example 3:

There are three partners "'A". "B" and "C" in a firm "FR", having one-third share each. Each partner has a capital balance of Rs. 100 lakh in the firm. There is a piece of land "S" of book value of Rs. 30 lakh. There is patent "T" of written down value of Rs. 45 lakh. And there is cash of Rs. 225 lakh. The land was acquired by the firm more than two years ago. The patent was acquired/developed/registered one year back.

Partner "A" wishes to exit. The firm revalue its land and patent based on valuation report from a registered valuer, as defined in rule 11U of the Rules, and as per that valuation report fair market value of land "S" is Rs. 45 lakh and fair market value of patent "T" is Rs. 60 lakh. As per the valuation report there is also self-generated goodwill of Rs. 30 lakh. On the exit of partner "A", the firm decides to give him Rs. 75 lakh in money and land "S" to settle his capital balance.

In accordance with the provisions of section 9B of the Act, it would be deemed that the firm "FR" has transferred land "S" to the partner "A" at its fair market value of Rs. 45 lakh. Let us assume that the indexed cost of acquisition of land "S" is Rs. 45 lakh.

Now on account of the deeming provisions of section 9B of the Act, it is deemed that the firm "FR" has transferred land "S" to partner "A". However, since the sale consideration is equal to indexed cost of acquisition, there will not be any capital gains tax. For partner "A", the cost of acquisition of this land would be Rs. 45 lakh.

The net book profit of Rs. 15 lakh (capital gains of Rs. 15 lakh without indexation) is to be credited in the capital account of each of the three partners, *i.e.* Rs. 5 lakh each. Thus partner "A" capital account would increase to Rs. 105 lakh. This exercise is required to be carried out since section 9B of the Act mandates that it is to be deemed that the firm ""FR" has transferred the land "S" to partner "A". Thus, any gain in the books is to be apportioned to partners' capital accounts.

As against capital balance of Rs. 105 lakh, partner "A" has received Rs. 120 lakh (money of Rs. 75 Lakh plus land "S" of fair market value of Rs. 45 lakh). Thus Rs. 15 Lakh is required to be charged to tax under sub-section (4) of section 45 of the Act.

On account of clause (*iii*) of section 48 of the Act, read with rule 8AB of the Rules and this guidance note, this Rs. 15 lakh is to be attributed to the remaining capital assets of the firm "FR" on the basis of increase in the value due to revaluation of existing capital assets, or due to recognition of the value of self-generated goodwill, based on the valuation report of registered valuer. In this case as per this report the value of patent "T" has increased by Rs. 15 lakh and the self-generated goodwill value has been recognised at Rs. 30 lakh. Thus one- third of Rs. 15 lakh (*i.e.* Rs. 5 lakh) would be attributed to patent "T", while two- third of Rs. 15 lakh (*i.e.* Rs. 10 lakh) would be attributed to self-generated goodwill. Rs. 5 lakh attributed to patent "T" shall not be added to the block of the assets and no depreciation shall be available on the same. When patent 'T" gets transferred subsequently, this Rs. 5 Lakh attributed shall be reduced from the full value of the consideration received or accruing as a result of transfer of patent "T" by the firm "FR", and the net value shall be considered for reduction from the written down value of the intangible block under sub-clause (*c*) of clause (6) of section 43 of the Act or for calculation of capital gains, as the case may be, under section 50 of the Act.(Refer guidance in paragraph 5 of this circular). Let us say that Patent T is sold for Rs. 25 lakh. Rs. 5 lakh shall be reduced from Rs. 25 lakh and only net amount of Rs. 20 lakh shall be considered for reduction from the written down

value of the intangible block under sub-clause (*c*) of clause (6) of section 43 of the Act or for calculation of capital gains, as the case may be, under section 50 of the Act. Similarly, when goodwill gets sold subsequently, Rs. 10 lakh would be reduced from its sales consideration under clause (*iii*) of section 48.

The amount of Rs. 15 lakh which is charged to tax under sub-section (4) of section 45 of the Act shall be charged as short-term capital gains, as Rs. 5 lakh is attributed to the Patent "T" which is part of block of assets and Rs. 10 lakh is attributed to self-generated goodwill. In accordance with sub-rule (5) of Rule 8AA of the Rules, both of these are to be characterised as short-term capital gains.

Note: For the purpose of calculation of depreciation under section 32 of the Act, the written down value of the block of asset "intangible" of which Patent "T" is part, would remain Rs. 45 lakh and would not be increased to Rs. 60 lakh due to revaluation during the year. In this regard it may be highlighted that the following provisions are relevant in determining the amount on which depreciation is allowable under the Act:

Explanation 2 of sub-section (1) of section 32 of the Act provides that the term "written down value of the block of assets" shall have the same meaning as in clause (*c*) of sub-section (6) of section 43 of the Act.

Clause (*c*) of sub-section (6) of section 43 of the Act, with respect to block of assets, *inter-alia*, provides that the aggregate of the written down values of all the assets falling within that block of assets at the beginning of the previous year is to be increased by the actual cost of any asset falling within that block, acquired during the previous year. This clause does not allow any increase on account of revaluation.

Sub-section (1) of section 43 of the Act which defines "Actual cost" as actual cost of the assets to the assessee. In revaluation, there is no actual cost to the assessee.

Further, section 32 of the Act does not allow depreciation on goodwill. If in the given example "self-generated goodwill" is replaced by "self-generated asset", even then the depreciation will not be admissible on the amount of Rs. 30 lakh recognised in valuation. In this regard it may be highlighted that the above-mentioned provisions, in the immediately preceding paragraph, are also applicable to "self-generated asset" and since there is no actual cost to assessee in case of "self-generated asset", depreciation is not allowable under section 32 of the Act on an asset whose actual cost is nil.

Chapter 2

Amount received in respect of Life Insurance and Unit Linked Insurance Policy (Section 10(10D)

It is well known that any amount received under life insurance policy on the death of a person (being the insured) is not chargeable to tax and this is specifically stated in first proviso to section 10(10D). Also, any sum received under keyman insurance policy is liable to tax and would not be tax-free.

2.1 Life Insurance Policy

As regards any sum received in respect of life insurance policy the eligibility for tax exemption is on two-tier basis. In respect of policies issued after 1st day of April, 2003 but on or before 31st day of March, 2012 such sum is exempt if the premium payable for any of the years during the term of the policy does not exceed 20% of the actual capital sum assured. Where any sum is received under an insurance policy issued on or after 1st day of April, 2012 it is eligible for tax exemption only if the premium payable for any of the year during the term of the policy does not exceed 10% of the actual capital sum assured.

The limit of 10% for the premium paid during any of the years during the term of the policy mentioned above must be read as 15% where the policy is issued on or after 1st day of April, 2013 for insurance on life of any person who is (i) a person with disability or a person with severe disability as referred to in section 80U; or (ii) suffering from any disease or ailment as specified in the rules made under section 80DDB.

2.2 Unit Linked Insurance Policy

The Finance Act, 2021 inserted fourth proviso to section 10(10D) whereby the tax exemption is denied where the amounts received in respect of any unit linked insurance policy issued on or after **1st day of February 2021,** if the premium payable for any of the previous year during the term of the policy exceeds Rs.2,50,000.

The fifth proviso to the section 10(10D) says if the premium is payable by a person for more than one unit linked insurance policy issued on or after first day of February, 2021, the provisions of this section granting exemption (from tax) shall apply only with respect to those unit linked insurance policies where the aggregate amount of premium does not exceed Rs.2,50,000 in any of the previous year during the term of any of those policies.

The sixth proviso to section 10(10D) says that the amount received on the death of a person in respect of unit linked insurance policies shall be exempt from tax without regard to the amount of premium paid or payable for any of the years

during the term of the policy or policies.

Seventh proviso to section 10(10D) says that the CBDT with the previous approval of the Centra Government is empowered to issue guidelines for the purposes of removing the difficulty in giving effect to the provisions of this clause and every guideline issued by the Board shall be laid before each House of Parliament, and shall be binding on the income-tax authorities and the assessee.

Explanation 3 says that 'unit linked insurance policy' means a life insurance policy which has components of both investment and insurance and is linked to a unit as defined in clause (ee) of Regulation 3 of the Insurance Regulatory and Development Authority of India (Unit Linked Insurance Products) Regulations, 2019 issued by IRDA under the Insurance Act, 1938 and the Insurance Regulatory and Development Authority Act, 1999.

2.3 Section 45(1B)

The Finance Act, 2021 inserted sub-section (1B) to section 45 w.e.f. 01.04.2021. It says that notwithstanding anything contained in sub-section (1) of 45 and therefore this sub-section will have independent application and is not controlled by section 45(1).

It is applicable where any person receives at any time during the previous year any amount under a unit linked insurance policy to which exemption under section 10(10D) does not apply **for the reason that the amount of premium payable for any of the previous year during the term of the policy exceeds Rs.2,50,000.** It says that the amount received including the amount allocated by way of bonus on such policy and any profits or gains arising from such receipt shall be chargeable to income-tax under the head **'Capital gains'**. It shall be deemed to be the income of such person of the previous year in which such amount was received and such income taxable shall be calculated in such manner as may be prescribed.

2.4 Computation of capital gains for the purposes of section 45(1B) - Rule 8AD

Rule 8AD of the Income-tax Rules,1962 was inserted by Income-tax (Second Amendment) Rules, 2022 w.e.f. 18.01.2022. This rule is to be applied for the purpose of computing the amount of capital gains arising in respect of unit linked insurance policy where the premium in any of the years during the term of the policy exceeds Rs.2,50,000.

Where any person receives at any time during any previous year any amount under a specified unit linked insurance policy, including the amount allocated by way of bonus on such policy then –

(i) Where the amount is received for the first time under the specified ULIP during the previous year, the capital gain arising shall be calculated with the

formula **(A) – (B)**

where

A = the amount received for the first time under a specified ULIP during the previous year, including the amount allocated by way of bonus on such policy; and

B = the aggregate of the premium paid during the term of the specified ULIP till the date of receipt of the amount referred to in "A".

(ii) Where the amount is received under the specified ULIP during the previous year, at any time subsequent to receipt of the amount referred to in (i) above, the capital gain shall be calculated in accordance with the formula

(C) – (D)

where

C = the amount received under a specified ULIP during the previous year at any time after the receipt of the amount referred to in (i) above, including the amount allocated by way of bonus but excluding the amount that has already been considered for calculation of taxable amount under this sub-rule during the earlier previous year or years; and

D = the aggregate of the premium paid during the term of the specified ULIP till the date of receipt of the amount as referred to in (C) but reduced by the amount of premium that has already been in considered for calculation of taxable amount under this sub-rule during the earlier previous year or years.

The capital gains computed under clause (i) or clause (ii) shall be deemed to be the capital gain arising from the transfer of a unit of an equity-oriented fund set up under a scheme of an insurance company comprising unit linked insurance policies.

From sub-rule (2) of rule 8AD referred in previous para since the capital gain is deemed to be arising from unit of equity-oriented fund such amount would be eligible for concessional rate of tax specified in section 112A of the Act. **Which means the capital gain (deemed) is eligible for tax exemption up to Rs.1 lakh and the balance if any is liable to tax at 10% as per section 112A(2).**

There is a corresponding amendment in section 2(14) of the Act by way of insertion of sub-clause (c) to cover any unit linked insurance policy to which exemption under section 10(10D) being not applicable shall be treated as capital asset.

2.5 Payment in respect of life insurance policy - Section 194DA

Amount received in respect of life insurance policy including the sum allocated by

way of bonus and which is not exempt under section 10(10D) shall be liable for tax deduction at 5% on the amount of income comprised therein. The amount of tax is liable for deduction at source at the time of payment. It is applicable in respect of payment made to a resident under a life insurance policy.

The key aspects are that this provision applies to (i) resident receiving the amount; (ii) when the amount received is not eligible for exemption under section 10(10D); (iii) tax is deductible at source at the time of payment by the insurer; and (iv) the rate of tax deduction is @5% of the amount of income comprised in that payment. **It** may be emphasised that calculation of income comprised in the payment is a pre-requisite to quantify the amount of tax deduction under this provision.

Example: Mr. X took life a insurance policy on 5th January, 2016 for Rs.3,00,000. He paid annual premium of Rs.50,000 for six years. On 20th January, 2022 he received Rs.4,50,000 (including bonus) as the maturity amount.

Since the policy was taken on or after 01.04.2012 the premium should not exceed 10% of the sum assured. However, the actual premium paid was Rs.50,000 which is more than the ceiling limit of Rs.30,000 being 10% of Rs.3,00,000. Hence, the proceeds so received on maturity of the policy is taxable. As per section 194DA, the insurance company must deduct TDS @ 5% on Rs.1,50,000 being Rs. 7,500 while making the payment of the maturity amount.

Note: The CBDT Circular No.2 of 2022 dated 19th January, 2022 is given as appendix for ready reference of readers. It has examples for better appreciation of the legal provisions relating to taxation of the amount received on ULIP.

Appendix

Guidelines for computing exemption under section 10 (10D): The CBDT vide Circular No. 2 /2022 dated 19th January, 2022 has provided guidelines for computing exemption under section 10 (10D) as under:

(i) Clause (10D) of section 10 of the Income-tax Act, 1961 (the Act) provides for income-tax exemption on the sum received under a life insurance policy, including any sum allocated by way of bonus on such policy subject to certain exclusions.

(ii) The Finance Act, 2021 amended clause (10D) of section 10 of the Act by inserting fourth to seventh provisos. Fourth proviso provides that, with effect from 1-2-2021, the sum received under a Unit Linked Insurance Policy (ULIP), issued on or after 1-2-2021, shall not be exempt under the said clause if the amount of premium payable for any of the previous years during the term of such policy exceeds Rs. 2,50,000. Further, fifth proviso provides that if premium is payable for more than one ULIP, issued on or after 1-2-2021, the exemption under the said clause shall be available

only with respect to such policies where the aggregate premium does not exceed Rs. 2,50,000 for any of the previous years during the term of any of those policies. Sixth proviso provides that the fourth and fifth provisos shall not apply in case of sum received on death of the person.

(iii) Seventh proviso to the said clause (10D) also empowers the Central Board of Direct Taxes (Board) to issue guidelines, with the previous approval of the Central Government, in order to remove any difficulty which arises while giving effect to the provisions of the said clause. In exercise of the powers under this proviso, Board, with the previous approval of the Central Government, hereby issues the following guidelines.

(iv) Sum received including any sum allocated by way of bonus (hereinafter referred as "consideration") during the previous year (hereinafter referred as "current previous year") under any one or more ULIPs issued on or after 1-2-2021 (hereinafter referred as "eligible ULIP") shall be exempt under clause (10D) of section 10 of the Act, subject to the satisfaction of other provisions of said clause. The same are explained by way of examples of different situations: —

Situation 1

No consideration is received by the assessee on any eligible ULIPs during any previous year preceding the current previous year or consideration has been received on such eligible ULIPs but has not been claimed exempt. The exemption under clause (10D) of section 10 of the Act shall be determined as under:

i. If the assessee has received consideration, during the current previous year, under one eligible ULIP only and the amount of premium payable on such eligible ULIP does not exceed Rs. 2,50,000 for any of the previous years during the term of such eligible ULIP, such consideration shall be eligible for exemption under the said clause (10D);

ii. If the assessee has received consideration, during the current previous year, under one eligible ULIP only and the amount of premium payable on such eligible ULIP exceeds Rs. 2,50,000 for any of the previous years during the term of such eligible ULIP, such consideration shall not be eligible for exemption under the said clause (10D);

iii. If the assessee has received consideration, during the current previous year, under more than one eligible ULIPs and the aggregate of the amount of premium payable on such eligible ULIPs does not exceed Rs. 2,50,000 for any of the previous years during the term of such eligible ULIPs, such consideration shall be eligible for exemption under the said clause (10D);

iv. If the assessee has received consideration, during the current previous year, under more than one eligible ULIPs and the aggregate of the amount of premium payable on such eligible ULIPs exceeds Rs. 2,50,000 for any of the

previous years during the term of such eligible ULIPs, the consideration under only such eligible ULIPs shall be eligible for exemption under the said clause (10D) where aggregate of the amount of the premium payable does not exceed Rs. 2,50,000 for any of the previous years during their term (Refer Examples).

Situation 2

Consideration has been received by the assessee under any one or more eligible ULIPs during any previous year preceding the current previous year and it has been claimed to be exempt under clause (10D) of section 10 of the Act. Such eligible ULIPs are referred as "Old ULIPs" in this paragraph and corresponding examples and reference to eligible ULIPs shall not include old ULIPs. The exemption under clause (10D) of section 10 of the Act shall be determined as under:

i. If the assessee has received consideration, during the current previous year, under one eligible ULIP only and aggregate amount of premium payable on such eligible ULIP and old ULIPs does not exceed Rs. 2,50,000 for any of the previous year during the term of such eligible ULIP, the consideration under such eligible ULIP shall be eligible for exemption under the said clause (10D);

ii. If the assessee has received consideration, during the current previous year, under one eligible ULIP only and aggregate amount of premium payable on such eligible ULIP and old ULIPs exceeds Rs. 2,50,000 for any of the previous year during the term of such eligible ULIP, the consideration under such eligible ULIP shall not be eligible for exemption under the said clause (10D);

iii. If the assessee has received consideration, during the current previous year, under more than one eligible ULIPs and aggregate of the amount of premium payable on such eligible ULIPs and old ULIPs does not exceed Rs. 2,50,000 for any of the previous year during the term of such eligible ULIPs, such consideration shall be eligible for exemption under the said clause (10D);

iv. If the assessee has received consideration, during the current previous year, under more than one eligible ULIPs and aggregate of the amount of premium payable on such eligible ULIPs and old ULIPs exceeds Rs. 2,50,000 for any of the previous year during the term of such eligible ULIPs, consideration under only such eligible ULIPs shall be eligible for exemption under the said clause (10D) where aggregate amount of premium along with the aggregate amount of premium of old ULIPs does not exceed Rs. 2,50,000 for any of the previous year during the term of any of such eligible ULIPs (refer examples).

The above guidelines are explained with the help of the following examples:

Example 1:

The assessee has the following policy which satisfies all the conditions laid down in clause (10D) of section 10 of the Act (other than the conditions provided under the fourth and fifth proviso of the said clause, applicability whereof is being explained in the example).

ULIP	A
Date of issue	1-4-2011
Annual premium (Rs)	5,00,000
Sum assured (Rs)	50,00,000
Consideration received as on 1-11-2021 on maturity	60,00,000

Taxability as per fourth proviso to clause (10D) of section 10 of the Act:

The sum received on maturity will be exempt under clause (10D) of section 10 of the Act as the policy has been issued before 01.02.2021 and accordingly not covered by the 4th to 7th provisos to the said clause (10D) of section 10, inserted by Finance Act, 2021.

Example 2:

The assessee has the following policy which satisfies all the conditions laid down in clause (10D) of section 10 of the Act (other than the conditions provided under the fourth and fifth proviso of the said clause, applicability whereof is being explained in the example). The assessee did not receive any consideration under any other eligible ULIPs in earlier previous years preceding the previous year 2031-32.

ULIP	A
Date of issue	1-4-2021
Annual premium (Rs)	5,00,000
Sum assured (Rs)	50,00,000
Consideration received as on 1-11-2031 on maturity	60,00,000

Taxability as per fourth proviso to clause (10D) of section 10 of the Act:

The consideration received will not be exempt under clause (10D) as per the provisions of fourth proviso since the annual premium payable on the policy exceeded Rs. 2,50,000.

Example 3:

The assessee has the following policy which satisfies all the conditions laid down in clause (10D) of section 10 of the Act (other than the conditions provided under the fourth and fifth proviso of the said clause, applicability whereof is being explained in the example). The assessee did not receive any consideration under any other eligible ULIPs in earlier previous years preceding the previous year 2031-32.

ULIP	A
Date of issue	1-4-2021
Annual premium (Rs)	2,50,000
Sum assured (Rs)	25,00,000
Consideration received as on 01.11.2031 on maturity	32,00,000

Taxability as per fourth proviso to clause (10D) of section 10 of the Act:

The consideration received will be exempt under clause (10D) as the provisions of fourth proviso will not apply since the annual premium payable on the policy does not exceed Rs. 2,50,000.

Example 4:

The assessee has the following policies all of which satisfy all the conditions laid down in clause (10D) of section 10 of the Act (other than the conditions provided under the fourth and fifth proviso of the said clause, applicability whereof is being explained in the example). The assessee did not receive any consideration under any other eligible ULIPs in earlier previous years preceding the previous year 2031-32.

ULIP	A	B
Date of issue	1-4-2021	1-4-2021
Annual premium (Rs)	2,00,000	3,00,000
Sum assured (Rs)	20,00,000	30,00,000
Consideration received as on 01.11.2031 on maturity	22,00,000	35,00,000

Taxability as per fifth proviso to clause (10D) of section 10 of the Act: The consideration received under ULIP "B" will not be exempt under clause (10D) as per the provisions of fifth proviso, since aggregate of the annual premium payable for ULIP "A" and ULIP "B" exceeds Rs. 2,50,000 during the term of these policies. However, the consideration received under ULIP "A" shall be exempt under clause (10D) since its annual premium does not exceed Rs. 2,50,000 in any of the previous years during the term of the policy.

Example 5:

The assessee has the following policies all of which satisfy all the conditions laid down in clause (10D) of section 10 of the Act (other than the conditions provided under the fourth and fifth proviso of the said clause, applicability whereof is being explained in the example). The assessee did not receive any consideration under any other eligible ULIPs in earlier previous years preceding the previous year 2031-32.

ULIP	A	B	C
Date of issue	1-4-2021	1-4-2021	1-4-2021
Annual premium (Rs)	1,00,000	1,50,000	3,00,000
Sum assured (Rs)	10,00,000	15,00,000	30,00,000
Consideration received as on 01.11.2031 on maturity	12,00,000	18,00,000	34,00,000

Taxability as per fifth proviso to clause (10D) of section 10 of the Act:

The consideration received under ULIP "C" will not be exempt under clause (10D) as per the provisions of fifth proviso since aggregate of the annual premium payable for ULIP "A", ULIP "B" and ULIP "C exceeds Rs. 2,50,000 during the term of these policies.

However, the consideration received under ULIPs "A" and "B" shall be exempt under clause (10D), since aggregate of annual premium payable for these two policies do not exceed Rs. 2,50,000 for any previous year during the term of these two policies.

Example 6:

The assessee has the following policies all of which satisfy all the conditions laid down in clause (10D) of section 10 of the Act (other than the conditions provided under the fourth and fifth proviso of the said clause, applicability whereof is being explained in the example). The assessee did not receive any consideration under any other eligible ULIPs in earlier previous years preceding the previous year 2030-31.

ULIP	X	A	B	C
Date of issue	1-4-2020	1-4-2021	1-4-2021	1-4-2021
Annual premium (Rs)	2,50,000	1,00,000	1,50,000	3,00,000
Sum assured (Rs)	25,00,000	10,00,000	15,00,000	30,00,000
Consideration received as on 1-11-2030 on maturity	30,00,000			
Consideration received as an 1-11-2031 on maturity		12,00,000	18,00,000	34,00,000

Taxability as per fifth proviso to clause (10D) of section 10 of the Act:

The consideration under ULIP "X" will be exempt under clause (10D) as the policy has been issued before 01.02.2021 and it is not covered by recently introduced provisions.

The consideration received under ULIP "C" will not be exempt under clause (10D) as per the provisions of fifth proviso since aggregate of the annual premium payable for ULIP "A", ULIP "B' and ULIP "C" exceeds Rs. 2,50,000 during the term of these policies.

However, the consideration received under ULIPs "A" and "B" shall be exempt under clause (10D), since aggregate of annual premium payable for these two policies do not exceed Rs. 2,50,000 for any previous year during the term of these two policies.

Example 7:

The assessee has the following policies all of which satisfy all the conditions laid down in clause (10D) of section 10 of the Act (other than the conditions provided under the fourth and fifth proviso of the said clause, applicability whereof is being explained in the example). The assessee did not receive any consideration under any other eligible ULIPs in earlier previous years preceding the previous year 2031-32.

ULIP	X	A	B	C
Date of issue	1-4-2021	1-4-2022	1-4-2022	1-4-2022
Annual premium (Rs)	2,00,000	1,00,000	1,50,000	3,00,000
Sum assured (Rs)	20,00,000	10,00,000	15,00,000	30,00,000
Consideration received as on 1-11-2031 on maturity	25,00,000			
Consideration received as on 1-11-2032 on maturity		12,00,000	18,00,000	34,00,000

Taxability as per fifth proviso to clause (10D) of section 10 of the Act:

The consideration under ULIP "X" will be exempt for the previous year 2031-32 under clause (10D) since the annual premium does not exceed Rs. 2,50,000.

The consideration received under ULIPs "A", "B" and "C" will not be exempt under clause (10D) as per the provisions of fifth proviso since aggregate of the annual premium payable for these three ULIPs and ULIP "X" exceeds Rs. 2,50,000 for the previous years 2022-23 to 2031-32 which fall under the tenure of these policies. The consideration under ULIP "A" will also not be eligible for exemption under the said clause as the aggregate of annual premium of ULIPs "X" and "A" exceeds Rs. 2,50,000.

Example 8:

The assessee has the following policies all of which satisfy all the conditions laid down in clause (10D) of section 10 of the Act (other than the conditions provided under the fourth and fifth proviso of the said clause, applicability whereof is being explained in the example). The assessee did not receive any consideration under any other eligible ULIPs in earlier previous years preceding the previous year 2031-32.

ULIP	X	A	B	C
Date of issue	1-4-2021	1-4-2022	1-4-2022	1-4-2022
Annual premium (Rs)	1,00,000	1,00,000	1,50,000	3,00,000
Sum assured (Rs)	10,00,000	10,00,000	15,00,000	30,00,000
Consideration received on maturity as on 1-11-2031	12,00,000			
Consideration received as on 1-11-2032 on maturity		12,00,000	18,00,000	34,00,000

Taxability as per fifth proviso to clause (10D) of section 10 of the Act:

The consideration under ULIP "X" will be exempt under clause (10D) for the previous year 2031-32 since the annual premium does not exceed Rs. 2,50,000.

The consideration received under ULIP "B" only will be exempt under clause (10D) during the previous year 2032-33 while consideration received under ULIPs "A" and "C" will be taxable as per the provisions of fifth proviso.

The exemption is restricted to consideration under ULIP "B" since aggregate of the annual premium payable for the ULIPs "X" and "B" together did not exceed Rs.

2,50,000 for any of the previous years during the term of ULIP "B".

Here instead of ULIP "B", we could have taken ULIP "A" as the aggregate of annual premium payable for ULIPs "X" and "A" is also less than Rs. 2,50,000 during the term of these ULIPs. However, since including ULIP "B" instead of ULIP "A" is more beneficial to the assessee, ULIP "B" has been considered for exemption.

Example 9:

The assessee has the following policies all of which satisfy all the conditions laid down in clause (10D) of section 10 of the Act (other than the conditions provided under the fourth and fifth proviso of the said clause, applicability whereof is being explained in the example). The assessee did not receive any consideration under any other eligible ULIPs in earlier previous years preceding the previous year 2031-32 (It needs to be specified that consideration under ULIP "X" has not been claimed exempt)

ULIP	X	A	B	C
Date of issue	1-4-2021	1-4-2022	1-4-2022	1-4-2022
Annual premium (Rs)	1,00,000	1,00,000	1,50,000	3,00,000
Sum assured (Rs)	10,00,000	10,00,000	15,00,000	30,00,000
Consideration received on maturity as on 1-5-2031	12,00,000			
Consideration received as on 1-5-2032 on maturity		12,00,000	18,00,000	34,00,000

Taxability as per fifth proviso to clause (10D) of section 10 of the Act:

The consideration under ULIP "X" was not claimed to be exempt under clause (10D) by the assessee therefore it is not covered within the definition of old ULIP.

The consideration received under ULIPs "A" and "B" will be exempt under clause (10D). However, since aggregate of the annual premium payable for the ULIPs "A" and "B" together did not exceed Rs. 2,50,000 for any of the previous years during the term of any of these ULIPs "A" or "B" and ULIP "X" was not claimed to be exempt under clause (10D) the consideration received under ULIP "C" will be taxable as per the provisions of fifth proviso to the said clause (10D) of section 10 of the Act.

Example 10:

The assessee has the following policies all of which satisfy all the conditions laid down in clause (10D) of section 10 of the Act (other than the conditions provided under the fourth and fifth proviso of the said clause, applicability whereof is being explained in the example). The assessee did not receive any consideration under

any other eligible ULIPs in earlier previous years preceding the previous year 2032-33 other than under ULIPs "X" and "Y".

ULIP	X	Y	A	B	C
Date of issue	1-4-2021	1-4-2021	1-4-2022	1-4-2022	1-4-2022
Annual premium (Rs)	1,00,000	1,00,000	1,00,000	1,50,000	3,00,000
Sum assured (Rs)	10,00,000	10,00,000	10,00,000	15,00,000	30,00,000
Consideration received on surrender as on 1-7-2025	6,00,000				
Consideration received maturity as on 1-11-2031		12,00,000			
Consideration received as on 1-11-2032 on maturity			12,00,000	18,00,000	34,00,000

Taxability as per fifth proviso to clause (10D) of section 10 of the Act:

The surrender value of ULIP "X" and consideration received under ULIP "Y" on maturity will be exempt under clause (10D) since the annual premium does not exceed Rs. 2,50,000 during the term of these policies.

The consideration received under ULIPs "A", "B" and "C" will be taxable under clause (10D) as per the provisions of fifth proviso to the said clause (10D) since aggregate of the annual premium payable for the ULIPs "X" and "Y" for the previous years 2021-22 to 2025-26 was Rs. 2,00,000. If the annual premium of ULIP "A" or "B" or "C" is added then the aggregate of the premium will exceed Rs. 2,50,000 for the previous years 2022-23 to 2025-26.

As per the provisions of fifth proviso, in case of multiple ULIPs, the aggregate of the premium payable for all the policies which are claimed to be exempt under clause (10D) shall not exceed Rs. 2,50,000 for any previous year during the term of any of the policies.

Example 11

If in Example 10, the assessee does not claim exemption with respect to the surrender value of ULIP "X", then the consideration received under ULIP "Y" will be exempt for the previous year 2031-32 and the consideration received under ULIP "B" will be exempt for the previous year 2032-33 under clause (10D). The exemption is restricted to ULIP "B" since the aggregate of the annual premium payable for the ULIPs "Y" and "B" together did not exceed Rs. 2,50,000 for any of the previous years during the term of ULIP "Y" or "B" and the assessee did not claim ULIP "X" as exempt. ULIP "B" is preferred in place of ULIP "A" as it is more beneficial to the assessee.

Chapters 3

Amendments relating to non-profit organisations [Sections 10(23C) and 11]

The Finance Act, 2021 has brought in many significant changes with regard to taxation of educational institutions and hospitals existing not for purposes of profit and those relating to charitable trusts and institutions. Some of them are discussed in this chapter.

3.1 Monetary limit for blanket exemption from tax for educational and medical institutions:

Section 10(23C)(iiiad) meant for any university or other educational institution existing solely for educational purposes and not for purposes of profit if the aggregate annual receipts of the person from such university or universities or educational institution or educational institutions does not exceed Rs.5 crores, the entire income thereon would be exempt from tax.

Similarly, section 10(23C)(iiiae) meant for any hospital or other institution for the reception and treatment of persons suffering from illness or mental defectiveness or for the reception and treatment of persons during convalescence or of persons requiring medical attention or rehabilitation, existing solely for philanthropic purposes and not for purposes of profit if the aggregate annual receipts of the person from such hospital or hospitals or institution or institutions does not exceed Rs.5 crores, the entire income thereon would be exempt from tax.

Explanation is inserted to clarify that for the purposes of sections 10(23C)(iiiad) / 10(23C)(iiiae) **the aggregate annual receipts of the entity i.e. NGO /NPO/ would be relevant and not annual receipt of each of the institution or institutions** as the case may be, which was the **legal position** prior to the amendment.

3.2 Keeping corpus fund in identifiable section 11(5) investments

Explanation after the third proviso to section 10 (23C)was inserted by the Finance Act, 2021 and it was renumbered as Explanation 1 which says that the educational institution or university or any hospital or medical institution **shall not include income in the form of voluntary contributions made with a specified direction that they shall form part of the corpus of the trust or institution or university or other educational institution or hospital or other medical institution** *subject to the condition that such voluntary contributions are invested or deposited in one or more of the forms or modes specified in section 11(5) maintained specifically for such corpus*.

Note: Section 11(1)(d) was also amended by the Finance Act, 2021 w.e.f. 01.04.2022 on similar lines in respect of charitable trusts and institutions covered by sections 11 to 13 of the Act.

3.3 Accumulation in the case of trust or institution for religious purpose (section 10(23C)(v))

Explanation 1A to the third proviso to section 10(23C) was inserted by the Finance Act, 2022 applicable with retrospective effect from 1st April,2021. It says that where the property is held under trust (referred to in section 10(23C)(v)) includes any temple, mosque, gurdwara, church or other place notified under section 80G(2)(b), any sum received as voluntary contribution towards renovation or repair of such temple, mosque, gurdwara, church or other place, may at its option be treated as forming part of corpus of the trust or institution subject to the following conditions:

(i) apply such corpus only for the purpose for which the voluntary contribution was made;
(ii) does not apply such corpus for making contribution or donation to any person;
(iii) maintains such corpus as separately identifiable; and
(iv) invests or deposits such corpus in the forms and modes specified in section 11 (5).

As and when there is violation of the above conditions such sum referred above (as corpus amount) shall be deemed to be the income of the trust or institution of the previous year during which such violation takes place. It may be noted that the Explanation 1A is applicable only where the property is held by trust or institution covered by section 10(23C)(v) which is meant for religious purposes.

Note: Explanation 3A, 3B to section 11(1) is inserted by the Finance Act, 2022 w.r.e.f. 01.04.2021 which is pari materia of the Explanation 1A and Explanation 1B of third proviso to section 10(23C). Thus, same conditions apply in respect of charitable trusts and institutions which are governed by sections 11 to 13 of the Act.

3.4 Use of corpus and borrowings not to be treated as application of income

Explanation 2 to section 10(23C) was inserted by the Finance Act, 2021 w.e.f. 01.04.2022 and thus is applicable from the assessment year 2022-23 onwards. For the purposes of determination of the amount of income applied by the educational institution or university or hospital or medical institution the following aspects are to be taken into account:

(i) Application for charitable or religious purposes from the corpus shall not be treated as application of income for charitable or religious purposes. However, the amount not so treated as application shall be treated as application for charitable or religious purposes in the previous year in which the amount or part thereof is invested or deposited back in one or more of

the forms or modes specified in section 11 (5) maintained for such corpus. To simplify the expression, the corpus amounts have to be kept in an identifiable form or mode specified in section 11(5) as per Explanation 1 of the third proviso. The amounts withdrawn if any from the said corpus amount and applied will not be treated as application of income. However, when the amount is replenished in the subsequent previous year it would be treated as application of income by the trust or institution.

(ii) Application for charitable or religious purposes out of any loan or borrowing shall not be treated as application of income for charitable or religious purposes. However, when the loan or borrowing as and when repaid, such repayment would be treated as application of income by the trust or institution.

Note: Explanation 4 to section 11(1) inserted by the Finance Act, 2021 w.e.f. 01.04.2022 is similar Explanation 2 of the third proviso to section 10(23C). Thus, the treatment of the use of corpus fund and borrowings by way of loans are the same for charitable trusts and institutions governed by sections 11 to 13 of the Act.

Note: Any fund or institution or trust or any university or other educational institution or any hospital or other medical institution referred to in sub-clause (iv) or sub-clause (v) or sub-clause (vi) or sub-clause (via) of section 10(23C) hereinafter is referred to as '**eligible unit'** in some of subsequent paragraphs of this chapter for ease in reference.

3.5 Accumulation of income

The Finance Act, 2022 inserted Explanation 3 to third proviso to section 10(23C) applicable from the assessment year 2023-24 onwards.

The Explanation 3 to third proviso to section 10(23C) says that for the purposes of determining the amount of application under this proviso, 85% of the income referred to in clause (a) of this proviso (third proviso) is not applied towards the objects of the 'eligible unit' during the previous year but accumulated or set apart for application to such objects, such income so accumulated or set apart shall not be included in the total income of the previous year when the following conditions are satisfied:

(a) Such trust or institution or fund furnishes a statement in such form and manner as may be prescribed to the Assessing Officer stating the purpose for which the income is being accumulated or set apart and the period of such accumulation. However, the period of accumulation shall in no case exceed 5 years;

(b) The money so accumulated or set apart must be invested or deposited in the forms or modes specified in section 11(5) of the Act;

(c) The statement for accumulation referred in (a) above, must be furnished on or before the 'due date' specified under section 139(1) for furnishing the return of income for the previous year.

It may be noted that for computing the period of five years for accumulating the income any time period during which the income could not be applied for the purpose for which it is so accumulated or set apart, due to an order or injunction of any court has to be excluded.

3.6 Consequence of breach of conditions

The Finance Act, 2022 inserted Explanation 4 to section 10(23C) which is applicable from the assessment year 2023-24 onwards.

This Explanation deals with income of the 'eligible unit' which has applied less than 85% and sought accumulation or set apart for being applied in the subsequent years. Explanation 4 deals with instances where there is violation of the conditions of Explanation 3 which is tabulated below:

Explanation 4:

Breach of conditions of accumulation	***Year of taxation, on breach of conditions***
Where the accumulated income is applied other than for wholly and exclusively to the objects of the 'eligible unit' or	As income of the previous year in which it is so applied or ceases to be accumulated or set apart;
Accumulated income ceases to remain invested or deposited in any of the forms or modes specified in section 11(5); or	As income of the previous year in which it ceases to remain so invested or deposited in the forms or modes specified in section 11(5).
Accumulated income is not utilised for the purpose for which it is so accumulated or set apart during the period of accumulation referred to in clause (a) of Explanation 3; or	As income of the last previous year for which the income is so accumulated or set apart.
Is credited or paid to any trust or institution registered under section 12AA or section 12AB or to any fund or institution or trust or any university or other educational institution or any hospital or other medical institutions referred to in sub-clauses (iv), (v), (vi) or (via),	As income of the previous year in which it is credited or paid to any fund or any institution or trust or any university or other educational institution or any hospital or other medical institution.

Note: Explanation 3 to section 11(2) is amended on similar lines by the Finance Act, 2022 w.e.f. 01.04.2023 and thus the treatment of the NGOs governed by section 10(23C) and sections 11 to 13 are the same in this respect.

3.7 Change in purpose of accumulation - Explanation 5 to section 10(23C)

The Finance Act, 2022 inserted Explanation 5 to section 10(23C) applicable from the assessment year 2023-24 onwards.

This Explanation starts with the expression 'notwithstanding anything contained in Explanation 4' and thus would have overriding effect. Where due to the circumstances beyond the control of the person in receipt of income, any income invested or deposited in accordance with clause (b) of the Explanation 3 (means the income accumulated and set apart which is kept in section 11(5) investments / deposits) it could not be applied for the purpose for which it was accumulated or set apart, the assessee may make an application to the Assessing Officer to allow him to apply such income for such other purpose in India as is specified in the application. It may be noted that the purpose however must be in conformity with the objects for which the 'eligible unit' was established.

Upon such permission being accorded by the Assessing Officer, Explanation 4 would apply as if the purpose specified by that person in the said application under this Explanation were a purpose specified in the notice of accumulation referred to in clause (a) of Explanation 3.

The Assessing Officer shall not allow application of income by way of payment or credit to any trust or institution registered under section 12AA or section 12AB or any fund or institution or trust or any university or other educational institution or hospital referred to in sub-clauses (iv), (v), (vi) or (via). In other words, the amount accumulated as per clause (a) of Explanation 3 cannot be used for giving by way of donation to any trust or institution referred to in section 12AA or section 12AB or any such institution referred to in section 10(23C) clauses (iv), (v), (vi), (via).

3.8 Audit of accounts

The Finance Act, 2022 substituted tenth proviso to section 10(23C) w.e.f. 01.04.2023. It is meant for audit of accounts of the trust or institution or university or other educational institutions or any hospital or other medical institution(s).

Where the total income of the trust or institution etc without giving effect to the provisions of the sub-clauses (iv), (v), (vi) or (via) of section 10(23C) exceeds the maximum amount which is not chargeable to tax in any previous year, such fund or institution shall –

(a) keep and maintain books of account and other documents in such form and manner and at such place, as may be prescribed; and

(b) get its accounts audited in respect of that year by an accountant as defined in Explanation below section 288(2) before the specified date referred to in section 44AB and furnish a report of such audit in the prescribed form duly signed and verified by such accountant and setting forth such particulars as may be prescribed.

Note: Similar to the above, tenth proviso to clause 10(23C), clause (b) to section 12A(1) is substituted by the Finance Act, 2022 w.e.f. 01.04.2023.

3.9 Contribution to any other trust or institution:

The Finance Act, 2021 amended the fourteenth proviso to section 10(23C) whereby an 'eligible unit' if does not apply its income during the year of receipt and accumulates the same and subsequently makes any payment or credit out of such accumulation to any trust or fund or institution registered under section 12AA or section 12AB or to 'eligible unit', **it shall not be treated as application of income for the objects for such fund or trust or institution etc is established.**

3.10 Cancellation of approval or provisional approval

The Finance Act, 2022 substituted the fifteenth proviso to section 10(23C) which deals with cancellation of approval or provisional approval.

Where any fund or trust or institution etc governed by section 10(23C)(iv)(v)(vi) or (via) is approved or provisionally approved and subsequently the Principal Commissioner or Commissioner notices **'specified violations'** or the Principal Commissioner or Commissioner has received a reference from the Assessing Officer under the second proviso to section 143(3) for any previous year or such case has been selected for in accordance with risk management strategy formulated by the Board from time to time for any previous year, the Principal Commissioner or Commissioner shall do the following:

(i) Call for such documents or information from the 'eligible unit' or make such enquiry as he thinks necessary in order to satisfy himself about the occurrence of any specified violation;

(ii) Pass an order in writing cancelling the approval of such 'eligible unit' before the **specified date,** after affording a reasonable opportunity of being heard, for such previous year and all subsequent previous years if he is satisfied that one or more specified violation has taken place;

(iii) Pass an order in writing refusing to cancel the approval of such 'eligible unit' before the specified date, if he is not satisfied about the occurrence of one or more specified violations;

(iv) Forward a copy of the order under clause (ii) (cancellation of approval) or clause (iii) (refusal to cancel approval) to the Assessing Officer of such 'eligible unit'.

The **specified date** shall mean the day on which the period of 6 months calculated from the end of the quarter in which the first notice is issued by the Principal Commissioner or Commissioner on or after 1st day April, 2022 calling for any document or information or for making any enquiry under clause (i) expires.

Note: Sections 12AB(4) and 12AB(5) were inserted by the Finance Act, 2022 w.e.f. 01.04.2022 is on similar lines meant for charitable trust and institutions governed by sections 11 to 13 of the Act.

3.11 Specified violations to invoke 15th Proviso to section 10(23C)

The following are the list of specified violations which can trigger the fifteenth proviso to section 10(23C) inserted by the Finance Act, 2022 w.e.f. 01.04.2022.

(i) Where any income of the fund or trust or institution etc **has been applied for purposes other than for the objects** for which it is established; or

(ii) The fund or trust or institution etc **has income from profits and gains of business, which is not incidental to the attainment of its objectives** or separate books of account are not maintained by it in respect of the business which is incidental to the attainment of its objectives; or

(iii) Any activity of the fund or trust or institution etc is (a) **not genuine;** or (b) **not being carried out in accordance with all or any of the conditions** subject to which it was notified or approved; or

(iv) The fund or institution or trust etc has **not complied with the requirement of any other law** for the time being in force and the order, direction or decree, by whatever name called, holding that such non-compliance has occurred, has either not been disputed or has attained finality.

Explanation 3 to fifteenth proviso says that where an intimation is made under the first proviso to section 143(3) by the Assessing Officer about the contraventions of the provisions of sub-clauses (iv), (v), (vi) and (via) of section 10(23C) and no approval was withdrawn on or before 31st day of March, 2022 it shall be deemed to be a reference received by the PCIT or CIT as on 1st day of April, 2022 and the provisions for cancellation of approval etc shall apply accordingly.

The Nineteenth proviso is substituted by the Finance Act, 2022 w.e.f. 01.04.2022. It is to substitute the reference of the expression 'prescribed authority' with 'Principal Commissioner' or 'Commissioner'. An Explanation is added to the proviso to cover

cases where in the case of fund or trust or institution referred to in sub-clause (iv)/(v)/(vi)/(via) to section 10(23C) is notified under section 10(46), the approval or provisional approval granted to such fund or institution or trust or university or other educational institution or hospital or other medical institution shall become inoperative from the date of notification of such fund or institution or trust etc.,

The twentieth proviso inserted by the Finance Act, 2022 w.e.f. 01.04.2023 mandates that the 'eligible unit' shall furnish the return of income in accordance with the provisions of section 139(4C), within the time allowed under that section.

The twenty-first proviso inserted by the Finance Act, 2022 w.e.f. 01.04.2023 says that where any 'eligible unit' has applied income directly or indirectly for the benefit of any person referred to in section 13(3), such income or part thereof shall be deemed to be the income of the trust or institution of the previous year in which it is so applied.

Note: Explanation 2 to section 12AB(4) lists out 'specified violation' in the case of charitable trusts and institutions governed by sections 11 to 13 of the Act.

3.12 Failure to get the accounts audited or to file ITR within due date

The twenty second proviso to section 10(23C) was inserted by the Finance Act, 2022 w.e.f. 01.04.2023. It says that where any '**eligible unit'** violates the conditions of the tenth proviso (failure get the books of account audited) or the twentieth proviso (failure to file the return of income in accordance with section 139(4C) within the time allowed under that section) its income shall be computed after allowing deduction for the expenditure (other than capital expenditure) incurred in India, for the objects of the fund or institution subject to fulfilment of the following conditions:

(i) Such expenditure is not from the corpus standing to the credit of the 'eligible unit' as at the end of the financial year immediately preceding the financial year relevant to the assessment year for which the income is being computed, (Example : Expenditures incurred in previous year 2025-26 from the corpus held as on 31.03.2024 would not be considered as application);

(ii) Such expenditure is not from any loan or borrowing;

(iii) Claim of depreciation is not in respect of an asset, acquisition of which has been claimed as application of income in the same or any other previous year; and

(iv) Such expenditure is not in the form of any contribution or donation to any person.

Note: Similar provision could be found in section 13(10) applicable in the case of charitable trusts and institutions when they fall within the mischief of section 13(8)

or violates the conditions specified under clause (b) or clause (ba) of section 12A(1). Section 13(10) was inserted by the Finance Act, 2022 w.e.f. 01.04.2023.

3.13 Computation of income:

Explanation to the twenty-second proviso says that the provisions of sections 40(a)(ia), 40A(3) and 40A(3A) shall mutatis mutandis, apply as they apply in computing the income chargeable under the head 'Profits and gains of business or profession'.

Note: Explanation to section 13(10) is similar to Explanation to twenty-second proviso to section 10(23C) for applying the provisions mentioned above. This explanation was inserted by the Finance Act, 2022 w.e.f. 01.04.2023.

The twenty-third proviso says that for the purpose of computing income chargeable to tax under the twenty-second proviso, no deduction in respect of any expenditure or allowance or set off of any loss shall be allowed to the assessee under any other provision of the Act.

Note: Section 13(11) is pari materia of the twenty third proviso mentioned above.

Explanation 2 to twenty third proviso says that it is clarified that the calculation of income required to be applied or accumulated during the previous year shall be made without any set off or deduction or allowance of any excess application of any of the year preceding to the previous year.

Explanation 3 to twenty-third proviso says that any sum payable by 'eligible unit' shall be considered as application of income only during the previous year in which such sum is actually paid by it irrespective of the previous year in which the liability to pay such sum was incurred.

Note: Explanation to section 11(7) is inserted by the Finance Act, 2022 w.e.f. 01.04.2022 which is similar to Explanation 3 to twenty-third proviso to section 10(23C).

The twenty-fourth proviso to section 10(23C) inserted by the Finance Act, 2022 says that where during any previous year any sum has been claimed to have been applied for the fund or institution or trust or any university or other educational institution or any hospital or other medical institution, **such sum shall not be allowed as application in any subsequent previous year.**

Note: Proviso below the Explanation to section 11(7) is inserted by the Finance Act, 2022 w.e.f. 01.04.2022 which is similar to twenty-fourth proviso to section 10(23C).

3.14 Benefits to related persons – section 271AAE

The Finance Act, 2022 inserted section 271AAE applicable from the assessment year 2023-24 onwards. It is to levy penalty when a fund or institution or trust covered in section 10(23C)(iv)/(v)/(vi)/(via) or a trust or institution gives a benefit to an

interested person by way of foregoing its income wholly or partly or by incurring an expenditure or by granting a benefit to such person.

The following are the salient features of the said provision:

(a) Without prejudice to any other provision contained in Chapter XXI of the Income-tax Act, this penalty provision would operate.

(b) Where it is found that any fund or institution referred to in section 10(23C)(iv)/(v)/(vi)/(via) or any trust or institution referred to in section 11 has violated the provisions of the twenty-first proviso to section 10(23C) or section 13(1)(c) such fund or institution or trust, as the case may be, is liable for penalty.

(c) It may be noted that the twenty-first proviso to section 10(23C) makes reference to granting of benefit directly or indirectly for the benefit of any person referred to in section 13(3). Which means any 'interested person' referred to in section 13(1)(c). Also, with regard to trust or institution referred to in section 11 the interested person would mean the same person as referred to in section 13(1)(c).

(d) Quantum of penalty:

(i) a sum equal to the aggregate amount of income applied directly or indirectly by fund or institution or trust for the benefit of such interested person, when the violation is noticed for the first time during any previous year; and

(ii) a sum equal to 200% of the aggregate amount of income of the fund or institution or trust, as the case may be, where the violation is noticed again in any subsequent previous year.

Chapter 4

Remittance of employees PF /ESI contributions (Section 36(1)(va))

4.1 Section 36(1) (va):

The Finance Act, 2021 inserted Explanation 2 to section 36(1)(va) which reads as under:

"For the removal of doubts, it is hereby clarified that the provisions of section 43B shall not apply and shall be deemed never to have been applied for the purposes of determining the "due date" under this clause".

Section 36(1)(va) reads "any sum received by an assessee from any of his employees to which the provisions of sub-clause (x) of clause (24) of section 2 apply, if such sum is credited by the assessee to the employee's account in the relevant fund or funds on or before the due date".

Explanation 1 says that for the purposes of this clause, **"due date" means the date by which the assessee is required as an employer to credit an employee's contribution to the employee's account in the relevant fund under any Act, rule, order or notification issued thereunder or under any standing order, award, contract of service or otherwise.**

The amount recovered out of salary by the employer from the employee is chargeable to tax as income under 2(24)(x). When the sum is remitted within 15 days of the next month, it is eligible for deduction under section 36(1)(va).

The Finance Act, 2021 also inserted Explanation 5 to section 43B which reads as under:

"For the removal of doubts, it is hereby clarified that the provisions of this section shall not apply and shall be deemed never to have been applied to a sum received by the assessee from any of his employees to which the provisions of sub-clause (x) of clause (24) of section 2 applies".

4.2 Need for amendment

In the Memorandum Explaining the Provisions of the Finance Bill, 2021 it was observed as under:

Clause (24) of section 2 of the Act provides an inclusive definition of the term "income". Sub-clause (x) to the said clause provides that income to include any sum received by the assessee from his employees as contribution to any provident fund or superannuation fund or any fund set up under the provisions of ESI Act or any other fund for the welfare of such employees.

Section 36 of the Act pertains to other deductions. Sub-section (1) of the said section provides for various deductions allowed while computing the income under the head 'Profits and gains of business or profession'.

Clause (va) of the said sub-section (1) to section 36 provides for deduction of any sum received by the assessee from any of his employees to which the provisions of sub-clause (x) of clause (24) of section 2 apply, if such sum is credited by the assessee to the employee's account in the relevant fund or funds on or before the due date. Explanation to the said clause provides that, for the purposes of this clause, 'due date' to mean the date by which the assessee is required as an employer to credit an employee's contribution to the employee's account in the relevant fund under any Act, rule, order or notification issued there-under or under any standing order, award, contract of service or otherwise.

Section 43B specifies the list of deductions that are admissible under the Act only upon their actual payment. Employer's contribution is covered in clause (b) of section 43B. According to it, if any sum towards employer's contribution to any provident fund or superannuation fund or gratuity fund or any other fund for welfare of employees is actually paid by the assessee on or before the 'due date' for furnishing the return of income under sub-section (1) of section 139, assessee would be entitled to deduction under section 43B and such deduction would be admissible for the accounting year. **This provision does not cover employees' contribution referred to in clause (va) of sub-section (1) of section 36 of the Act.**

Though section 43B of the Act covers only employer's contribution and does not cover employees' contribution, some courts have applied the provisions of section 43B on employees' contribution as well. There is a distinction between employer contribution and employees' contribution towards welfare fund. It may be noted that employees' contribution towards welfare funds is a mechanism to ensure the compliance by the employers of the labour welfare laws. Hence, it needs to be stressed that the employer's contribution towards welfare funds such as ESI and PF needs to be clearly distinguished from the employees' contribution towards welfare funds. Employees' contribution is employees' own money and the employer deposits this contribution on behalf of the employee in fiduciary capacity. By late deposit of employee contribution, the employer gets unjustly enriched by keeping the money belonging to the employees. Clause (va) of sub-section (1) of section 36 of the Act was inserted to the Act vide Finance Act, 1987 as a measure of penalising employers who mis-utilise employees' contributions.

Accordingly, in order to provide certainty, it is proposed to –

(i) amend clause (va) of sub-section (1) of section 36 of the Act by inserting another Explanation to the said clause to clarify that the provisions of section 43B does not apply and deemed to never have been applied for the purposes of determining the 'due date' under this clause; and

(ii) amend section 43B of the Act by inserting Explanation 5 to the said section to clarify that the provisions of the said section do not apply and deemed to never have been applied to a sum received by the assessee from any of his employees to which provisions of sub-clause (x) of clause (24) of section 2 applies.

These amendments will take effect from 1st April, 2021 and will accordingly apply to the assessment year 2021-22 and subsequent assessment years.

4.3 Impact of amendment

The amendment is effective from 1st April, 2021 and would apply only from assessment year 2021-22 onwards. However, various High Courts have decided in favour of the assessee by importing section 43B even in respect of employee's contribution remitted by the employer as allowable deduction by making reference to omission of further proviso to section 43B. It is also equally appreciated that some of the Hon'ble High Courts have decided in favour of the Revenue by holding that remittance of employee's contribution by the employer must be before the 'due date' under the respective rule or regulation and it is not eligible for extended time by applying section 43B.

The following table shows the how various High Courts have decided for and against the taxpayer prior to the amendment and that would hold the forte up to the assessment year 2020-21:

Gujarat High Court	Not allowed	*CIT v. Gujarat State Road Transport Corporation (2014) 366 ITR 170 (Guj)*
Karnataka High Court	Allowed	*Essae Teraoka P Ltd v. Dy.CIT (2014) 366 ITR 408 (Kar)*
Calcutta High Court	Allowed	*CIT v. Vijay Shree Ltd (2014) 43 taxmann.com 396 (Cal)*
Bombay High Court	Allowed	*CIT v.Ghatge Patil Transports Ltd (2014) 368 ITR 749 (Bom)*
Madras High Court	Not allowed	*Unifac Management Services India (P) Ltd v. Dy. CIT (2018) 409 ITR 225 (Mad)*
Delhi High Court	Allowed	*CIT v. AIMIL Ltd (2010) 321 ITR 508 (Del).*
Rajasthan High Court	Allowed	*CIT v. Jaipur Vidyut Vitran Nigam Ltd (2014) 363 ITR 307 (Raj)*
Kerala High Court	Not allowed	*CIT v.Merchem Ltd (2015) 378 ITR 443 (Ker)*
Madya Pradesh High Court	Not allowed	*B.S.Patel v. Dy.CIT(2010) 326 ITR 457 (MP)*
Punjab & Haryana High Court	Allowed	*CIT v. Hemla Embroidery (P) Ltd (2014) 366 ITR 167*
Allahabad High Court	Allowed	*Sagun Foundry (P) Ltd v. CIT (2017) 291 CTR (All) 557*
Gauhati High Court	Allowed	*CIT v. George Williamson (Assam) Ltd (2006) 284 ITR 619 (Gau).*

Apex Court decision in Checkmate Services (P) Ltd v. CIT (2022) 143 taxmann.com 178 / 448 ITR 518 (SC) has held that there is a marked difference between nature and character of employer's contribution to ESI / PF and the amounts retained out of emplyees' salary by way of deduction which is deemed to be income under section 2(24)(x) of the Act. The amount so received in trust by employer way of deduction out of salary is eligible for deduction only on its remittance before the 'due date' prescribed in the relevant Act, rule, order or notification issued thereunder. The extended time available as 'due date' under section 43B which makes reference to the 'due date' specified in section 139(1) is not applicable. This decision being clarificatory would apply retroactively for the earlier assessment years as well. **Thus, the decision of Apex court would prevail over all other decisions referred above.**

Chapter 5

Expenditure incurred in contravention of law – disallowance

[Explanation 1 and 3 to section 37(1)]

Section 37(1) is a residuary provision for allowance of deduction against income liable to tax under the head 'Profits and gains of business or profession'. The section says that the following are to be satisfied for allowance of expenditure: (i) an expenditure not being in the nature described in sections 30 to 36; (ii) not being in the nature of capital expenditure or personal expenditure of the assessee; and (iii) laid out or expended wholly and exclusively for the purposes of business or profession.

On satisfaction of the abovesaid three conditions, it is eligible for deduction in computing the income under the head "Profits and gains of business or profession".

5.1 Explanations to section 37(1):

Explanation 1 inserted by the Finance (No.2) Act, 1998 with retrospective effect from 01.04.1962 says that any expenditure incurred by an assessee for any purpose **which is an offence or which is prohibited by law shall not be deemed to have been incurred for the purpose of business or profession.** Thus, no deduction or allowance shall be made in respect of such expenditure.

The Finance Act, 2022 w.e.f. 01.04.2022 inserted Explanation 3 to section 37(1) and it is to further support and clarify Explanation 1 to section 37(1). It reads as under:

"For the removal of doubts, it is hereby clarified that the expression "expenditure incurred by an assessee for any purpose which is an offence or which is prohibited by law" under Explanation 1, shall include and shall be deemed to have always included the expenditure incurred by an assessee, –

(i) for any purpose which is an offence under, or which is prohibited by, any law for the time being in force, in India or outside India; or

(ii) to provide any benefit or perquisite, in whatever form, to a person, whether or not carrying on a business or exercising a profession, and acceptance of such benefit or perquisite by such person **is in violation of any law or rule or regulation or guideline,** as the case may be, for the time being in force, governing the conduct of such person; or

(iii) to compound an offence under any law for the time being in force, in India or outside India.

5.2 Memorandum Explaining the Amendment

In the Memorandum Explaining the Amendment, it was observed that the taxpayers where incurring expenditure like travel, hospitality, conference etc and claiming those expenditures as deduction. The acceptance of these benefits by the recipients when violates any law or rule or regulation or guidelines as the case may be, governing the conduct of such person, it is not to be allowed as business expenditure.

It referred to Circular No.5 of 2012 dated 01.08.2012 wherein the CBDT clarified that the claim of expenses incurred in providing some benefit by way of gift, travel facility, hospitality, cash or monetary grant to medical practitioner and their professional associations being in violation of the provisions of Indian Medical Counsel (Professional Conduct, Etiquette and Ethics) Regulations, 2002 shall be inadmissible under section 37(1) of the Act being expenditure prohibited by law.

It made reference to appellate decisions such as *Confederation of Indian Pharmaceutical Industry v. CBDT (2013) 335 ITR 388 (HP), Max Hospital v. Medical Council of India (WP No.1334 of 2013) of Delhi High Court*.

It clarified that in order to make the intention of the legislature clear and make it free from any misinterpretation an Explanation 3 to sub-section (1) of section 37 is inserted. It is to clarify that the expression "expenditures incurred by an assessee for any purpose which is an offence or which is prohibited by law", under Explanation 1 shall include item (i) to (iii) discussed earlier.

The Explanation 3 to section 37(1) will take effect from 1st April, 2022.

5.3 Supreme Court decision

The Apex Court in the case of *Apex Laboratories (P) Ltd v. Dy. CIT (2022) 135 taxmann.com 286 (SC)* rendered a decision on 22.02.2022 on the same issue before the amendment was brought into the statute by the legislature. In this case, the assessee claimed expenditure in respect of gifts and freebies given to medical practitioners which was the subject matter of disallowance in assessment and disputed before the court. The Apex Court took note of the decision of *P.V.Narasimha Rao v. State (CBI/SPE) (1998) 4 SCC 626* wherein it observed that the Parliament has the power not only to punish its members for an offence committed by them but also those who conspired with them for committing the offence. **Thus, the decision of the Apex Court hence would apply even for the assessment years preceding the assessment year 2022-23.**

The Calcutta High Court in *Peerless Hospitex Hospital & Research Centre Ltd v. Principal CIT (2022) 137 taxmann.com 359 (Cal)* held that the expenditure by way of commission paid to doctors for referral fee for treatment of patients to it, is not a

business expenditure eligible for deduction in view of Explanation 1 to section 37(1). This decision was rendered on 19th April, 2022 by following the binding precedent of the apex court in Apex Laboratories case (Supra).

Chapter 6

Amendments relating to reassessment provisions

[Sections 147 to 151]

Finance Act, 2021 and Finance Act, 2022 have made many amendments relating to reassessment provisions. Some of the changes envisaged in the Finance Act, 2021 were again subjected to change in the Finance Act, 2022.

6.1 Section 147 – Income escaping assessment

The Finance Act, 2021 substituted section 147 in its entirety. It says if any income chargeable to tax has escaped assessment for any assessment year, the Assessing Officer subject to the provisions of sections 148 to 153, may assess or reassess such income or recompute the loss or the depreciation allowance or any other allowance or deduction for such assessment year.

Explanation to the section says that for the purposes of assessment or reassessment or re-computation, the Assessing Officer may assess or reassess the income in respect of any issue which has escaped assessment and such issue comes to his notice subsequently in the course of proceedings under this section, irrespective of the fact that the provisions of section 148A have not been complied with.

Previously, the Assessing Officer must have reason to believe that any income chargeable to tax has escaped assessment for any assessment year. Now the 'reason to believe' is not the basis for the purpose of section 147.

The Finance Act, 2021 by substituting section 147 has dispensed with (i) the protection from reassessment of income when there is no failure on the part of the assessee to disclose fully and truly all material facts necessary for assessment; and (ii) the requirement of deeming a case where the income chargeable to tax has escaped assessment which was previously dealt with by Explanation 2 to section 147.

6.2 Section 148 - Issue of notice where income has escaped assessment

The Finance Act, 2021 also substituted section 148 which also contained deemed service of notice in certain situations.

The substituted provision says that before making assessment, reassessment or re-computation under section 147 the Assessing Officer after having complied with the requirement of section 148A shall serve on the assessee a notice along with copy of the order passed under clause (d) of section 148A.

The Assessing Officer after passing an order under clause (d) of section 148A require the assessee to furnish a return of income or the ITR of any other person in respect

of which he is assessable under the Act in the prescribed form and verified in the prescribed manner and setting forth such other particulars as may be prescribed. The provisions of the Act would apply to the ITR so filed as if it is an ITR furnished under section 139.

The first proviso to section 148 says that no notice under section 148 shall be issued unless there is information with the Assessing Officer which suggests that the income chargeable to tax has escaped assessment in the case of the assessee and the Assessing Officer has obtained prior approval of the **specified authority** before issue of such notice. Specified authority means the authority specified in section 151.

The Finance Act, 2022 inserted a further proviso to provide relief from obtaining prior approval of the specified authority for issue of notice under section 148 if the Assessing Officer had previously passed an order under clause (d) of section 148A.

6.3 Information which suggests income chargeable to tax has escaped assessment

Explanation 1 to section 148 says that both for the purposes of section 148 and section 148A the following are to be construed as information which suggest escapement of income chargeable to tax under the Act:

(i) Any information in the case of the assessee for the relevant assessment year in accordance with risk management strategy formulated by the Board from time to time;

The following clause (ii) was substituted by the Finance Act, 2022 w.e.f. 01.04.2022.

(ii) Any audit objection to the effect that the assessment in the case of the assessee for the relevant assessment year was not made in accordance with the provisions of the Act.

The following clauses (iii), (iv) and (v) were inserted by the Finance Act, 2022 w.e.f. 01.04.2022.

(iii) Any information received under an agreement referred to in section 90 or section 90A of the Act;

(iv) Any information made available to the Assessing Officer under the Scheme notified under section 135A;

(v) Any information which requires action in consequence of the order of a Tribunal or a Court;

6.4 Instances where the Assessing Officer shall be deemed to have information of escapement of income:

Explanation 2 to section 148 says that the Assessing Officer shall be deemed to have information that the income chargeable to tax has escaped assessment in the case of the assessee where the search is initiated or books of account, or other documents or any assets are requisitioned or survey is conducted in the case of the assessee or money, bullion, jewellery or other valuable article or thing or books of account or documents are seized or requisitioned in the case of any other person. Those instances are given below:

(i) Where a search is initiated under section 132 or books of account or other documents or any assets are requisitioned under section 132A on or after 1st day of April, 2021, in the case of the assessee;

(ii) Where a survey is conducted under section 133A, other than under sub-section 2A (dealing with survey for TDS /TCS) on or after 1st day of April, 2021 in the case of the assessee;

(iii) Where the Assessing Officer is satisfied with the prior approval of the PCIT or CIT, that any money, bullion, jewellery or other valuable article or thing, seized under section 132 or requisitioned under section 132A in the case of any other person on or after 1st day of April, 2021, belongs to the assessee;

(iv) Where the Assessing Office is satisfied with the prior approval of PCIT or CIT, that any books of account or other documents seized or requisitioned under section 132 or section 132A in the case of any other person on or after 1st day of April, 2021, pertains or pertain to, or any information contained therein, relates to, the assessee.

6.5 Section 148A – conducting enquiry providing opportunity before issue of notice under section 148:

The Finance Act, 2021 inserted section 148A which is altogether a new provision / new mechanism for initiating proceedings for reassessment of income which had escaped assessment previously.

The Assessing Officer shall conduct any enquiry with the approval specified authority with respect to the information which suggests that the income chargeable to tax has escaped assessment. However, such enquiry is to be made only if required and it is not routine or mandatory.

The Assessing Officer shall provide an opportunity of being heard to the assessee. The Finance Act, 2022 omitted the requirement of taking prior approval of the specified authority for the purpose of providing such opportunity of hearing to the assessee. For the purpose of such hearing the Assessing Officer shall serve a show cause notice upon the assessee with time period of not less than 7 days but not more than 30 days from the date of issue of such notice or within such time extended by

him on the basis of an application filed in this behalf by the assessee. The show cause notice is to elicit a response as to why a notice under section 148 should not be issued on the basis of information in the possession of the Assessing Officer which suggests that the income chargeable to tax has escaped assessment in the relevant assessment year.

The Assessing Officer shall consider the reply, if any, furnished by the assessee in response to the show cause notice given as above.

The Assessing Officer on the basis of material available on record including reply of the assessee shall decide whether or not it is a fit case for issue of notice under section 148. He shall pass an order with the prior approval of the specified authority within one month from the end of the month in which the reply was furnished by the assessee. Where the assessee has not given any reply to the show cause notice, the Assessing Officer shall within one month from the end of the month in which time or extended time was allowed for furnishing the reply, shall pass an order. The order so passed under section 148A(d) would accompany the notice issued under section 148. No prior approval of the specified authority is required for the purpose of issue of notice under section 148 if an order under section 148A(d) was passed previously for the same assessment year.

6.6 Instances where no enquiry is required for issue of notice under section 148:

The proviso to section 148A says that no enquiry is required to be made before issue of notice under section 148 in respect of the following cases:

(i) Where a search is initiated under section 132 or books of account, other documents or any assets are requisitioned under section 132A in the case of the assessee on or after the 1st day of April, 2021;

(ii) Where the Assessing Officer is satisfied with the prior approval of the PCIT or CIT that any money, bullion, jewellery or other valuable article or thing, seized in a search under section 132 or requisitioned under section 132A in the case of any other person on or after the 1st day of April, 2021, belongs to the assessee;

(iii) Where the Assessing Officer is satisfied, with the prior approval of the PCIT or CIT that any books of account or documents seized in a search under section 132 or requisitioned under section 132A, in the case of any other person on or after the first day of April, 2021, pertains or pertain to or any information contained therein relate to the assessee;

(iv) Where the Assessing Officer has received any information under the Scheme notified under section 135A pertaining to income chargeable to tax escaping

assessment for any assessment year in the case of the assessee. This clause was inserted by the Finance Act, 2022 w.e.f. 01.04.2022.

6.7 Section 148B – Prior approval for assessment, reassessment or re-computation in certain cases:

No order of assessment or reassessment or re-computation under this Act shall be passed by the Assessing Officer below the rank of Joint Commissioner in respect of an assessment year under clause (i), (ii), (iii) or (iv) of the Explanation 2 to section 148 without the prior approval of the Additional Commissioner or Additional Director or Joint Commissioner or Joint Director.

Where a notice under section 148 is issued (without an enquiry under section 148A in view of the proviso contained therein) being a case where it is related to search under section 132 or requisitioned under section 132A or a survey under section 133A (other than survey for TDS/TCS) or where in a search or seizure valuable articles were seized or the books of account or documents were seized **the order of assessment or reassessment or re-computation shall not be made without the prior approval of the higher authorities mentioned therein.** Thus, section 148B is to provide necessary checks and balances in reassessment of cases relating to search /seizure / survey etc.,

6.8 Time limit for issue of notice:

The Finance Act, 2021 substituted section 149 w.e.f. 01.04.2021. It inserted clause (a) to provide that notice for reassessment shall not be issued if 3 years have elapsed from the end of the relevant assessment year unless it is covered by clause (b).

Clause (b) to section 149 provides that for time limit of 3 years but not more than 10 years where the income escaping assessment amounts to Rs.50 lakhs or more **for that assessment year**. This would mean that the extended time beyond 3 years and up to 10 years could be invoked for reassessment, only where the income escaping assessment was Rs.50 lakhs or more for any of the assessment year (separately).

The Finance Act, 2022 substituted clause (b) to section 149 and it covers the scope for invoking reassessment provisions as under:

Notice for reassessment could be issued if 3 years but not more than 10 years have elapsed, from the end of the relevant assessment year unless the Assessing Officer has in his possession books of account or other documents or evidence which reveal that the income chargeable to tax, represented in the form of –

(i) an asset;
(ii) expenditure in respect of a transaction or in relation to an event or occasion;
(iii) an entry or entries in the books of account,

which has escaped assessment amounting to or is likely to amount to Rs.50 lakhs or more.

Thus, the substitution of clause (b) to section 149 now empowers the Assessing Officer to invoke reassessment provisions **where the aggregate of income escaping assessment is Rs.50 lakhs or more in respect of cases where 10 years have not elapsed from the end of the relevant assessment year.**

The impact of the amendment is that if the aggregate escapement of income chargeable to tax is Rs.50 lakhs or more for various assessment years and up to 10 assessment years from the end of the relevant assessment year, reassessment provisions could be invoked.

The proviso to section 149 was also substituted by the Finance Act, 2022 w.r.e.f 01.04.2021 to insulate certain cases in respect of which a notice which could not have been issued as per the provisions as they stood immediately before the commencement of the Finance Act, 2021. Thus, where a notice under section 148 or section 153A or section 153C could not have been issued on account of time limitation as per time limit specified under clause (b) of section 149(1) or section 153A or section 153C as the case may be, as per the provisions immediately before the commencement of the Finance Act, 2021 such of those cases would not be covered by the extended time limit given in clause (b) of section 149 as amended by the Finance Act, 2022.

The Finance Act, 2022 w.e.f. 01.04.2022 has inserted sub-section (1A) to section 149. Where the income chargeable to tax is represented in the form of an asset or expenditure in relation to an event or occasion referred to in section 149(1)(b) has escaped assessment and investment in such asset or expenditure (in relation to an event or occasion) in more than one previous year relevant to the assessment years then notice under section 148 shall be issued for every such assessment year for assessment, reassessment or re-computation as the case may be.

For example, if there is an unaccounted expenditure of Rs.15 lakhs in 4 previous years preceding the previous year of its detection, the Assessing Officer has to issue notice under section 148 for each of the assessment year comprised therein.

6.9 Section 151 - Sanction for issue of notice:

The Finance Act, 2021 substituted section 151 in the light of the changes in reassessment provisions and monetary limits prescribed for invoking reassessment provisions.

The 'specified authority' for the purpose of issue of notice under section 148 or according approval for the orders passed under section 148A(d) would be –

(i) Principal Commissioner or Principal Director or Commissioner or Director if 3 years or less than 3 years have elapsed from the end of the relevant

assessment year in respect of which there is escapement of income chargeable to tax under the Act;

(ii) Principal Chief Commissioner or Principal Director General or where there is no PCCIT or PDGIT it shall be with the approval of PCIT, PDIT if more than 3 years have elapsed (but less than 10 years) from the end of the relevant assessment year in respect of which there is escapement of income chargeable to tax under the Act and the aggregate of escapement is Rs.50 lakhs or more;

6.10 Recent Apex Court decision - Union of India v. Asish Agarwal (2022) 444 ITR 1 (SC)

The Apex Court the above said case had to deal with the validity of notice issued under section 148 on or after 1st day of April, 2021 in the background of the fact that many High Courts have quashed the proceedings by holding that the issue of notice for reassessment as bad in law. The Apex Court has given its observations as under:

(i) The impugned section 148 notices issued to the respective assessees which were issued under unamended section 148 of the Act, which were the subject matter of writ petitions before the various respective High Courts shall be deemed to have been issued under section 148A of the Act as substituted by the Finance Act, 2021 and construed or treated to be show-cause notices in terms of section 148A(*b*).

(ii) The Assessing Officer shall, within thirty days from the date of judgment (i.e. 4th May, 2021) provide to the respective assessees information and material relied upon by the Revenue, so that the assesees can reply to the show-cause notices within two weeks thereafter;

(iii) The requirement of conducting any enquiry, if required, with the prior approval of specified authority under section 148A(*a*) is hereby dispensed with as a one-time measure *vis-à-vis* those notices which have been issued under section 148 of the unamended Act from 1-4-2021 till date, including those which have been quashed by the High Courts.

(iv) Even otherwise as observed hereinabove, holding any enquiry with the prior approval of specified authority is not mandatory but it is for the concerned Assessing Officers to hold any enquiry, if required;

(v) The Assessing Officers shall thereafter pass orders in terms of section 148A(*d*) in respect of each of the concerned assessees. Thereafter, after following the procedure as required under section 148A may issue notice under section 148 (as substituted);

(vi) All defences which may be available to the assessees including those available under section 149 of the Act and all rights and contentions which may be available to the concerned assessees and Revenue under the

Finance Act, 2021 and in law, shall continue to be available.

The CBDT has issued instruction regarding implementation of judgement of the Apex Court which is given as appendix.

Appendix

INSTRUCTION NO. 1/2022 [F.NO. 279/MISC/M-51/2022-ITJ], DATED 11-5-2022

1. Hon'ble Supreme Court, *vide* its judgment dated 4-5-2022 (2022 SCC Online SC 543), in the case of Union of India v. Ashish Agarwal has adjudicated on the validity of the issue of reassessment notices issued by the Assessing Officers during the period beginning on 1st April 2021 and ending with 30th June 2021, within the time extended by the Taxation and Other Laws (Relaxation and Amendment of Certain Provisions) Act. 2020 [hereinafter referred to as "TOLA"] and various notifications issued thereunder (these reassessment notices hereinafter referred to as "extended reassessment notices").

2. These extended reassessment notices were issued by the Assessing Officers under the provision of section 148 of the Income-tax Act. 1961 (hereinafter referred to as "the Act") following the procedure prescribed under various sections pertaining to reassessment namely sections 147 to 151, as they existed prior to their amendment by the Finance Act. 2021 (hereinafter referred to as "old law"). With effect from 1st April 2021, the old law has been substituted with new sections 147-151 (hereinafter referred to as the "new law").

3. Hon'ble Supreme Court has held that these extended reassessment notices issued under the old law shall be deemed to be the show cause notices issued under clause (*b*) of section 148A of the new law and has directed Assessing Officers to follow the procedure with respect to such notices. It has also held that all the defences available to assessees under section 149 of the new law and whatever rights are available to the Assessing Officer under the new law shall continue to be available. Hon'ble Supreme Court has passed this order in exercise of its power under Article 142 of the Constitution of India.

4. The implementation of the judgment of Hon'ble Supreme Court is required to be done in a uniform manner. Accordingly, in exercise of its power under section 119 of the Act, the Central Board of Direct Taxes (hereinafter referred to as "the Board") directs that the following may be taken into consideration while implementing this judgment.

5. Scope of the judgment:

5.1 Taking into account the decision of the Hon'ble Supreme Court in various paragraphs, it is clarified that the judgment applies to all cases where extended reassessment notices have been issued. This is irrespective of the fact whether such notices have been challenged or not.

6. Operation of the new section 149 of the Act to identify cases where fresh notice under section 148 of the Act can be issued:

6.1 With respect of operation of new section 149 of the Act, the following may be seen:

Hon'ble Supreme Court has held that the new law shall operate and all the defences available to assessees under section 149 of the new law and whatever rights are available to the Assessing Officer under the new law shall continue to be available.

Sub-section (1) of new section 149 of the Act as amended by the Finance Act, 2021 (before its amendment by the Finance Act, 2022) reads as under:—

149. (1) No notice under section 148 shall be issued for the relevant assessment year.

if three years have elapsed from the end of the relevant assessment year unless the case falls under clause (*b*);

if three years, but not more than ten years, have elapsed from the end of the relevant assessment year unless the Assessing Officer has in his possession books of account or other documents or evidence which reveal that the income chargeable to tax, represented in the form of asset, which has escaped assessment amounts to or is likely to amount to fifty lakh rupees or more for that year:

Provided that no notice under section 148 shall be issued at any time in a case for the relevant assessment year beginning on or before 1st day of April, 2021, if such notice could not have been issued at that time on account of being beyond the time limit specified under the provisions of clause (*b*) of sub-section (1) of this section, as they stood immediately before the commencement of the Finance Act, 2021.

Hon'ble Supreme Court has upheld the views of High Courts that the benefit of new law shall be made available even in respect of proceedings relating to past assessment years. Decision of Hon'ble Supreme Court read with the time extension provided by TOLA will allow extended reassessment notices to travel back in time to their original date when such notices were to be issued and then new section 149 of the Act is to be applied at that point.

6.2 Based on above, the extended reassessment notices are to be dealt with as under:

(i) AY 2013-14, AY 2014-15 and AY 2015-16: Fresh notice under section 148 of the Act can be issued in these cases, with the approval of the specified authority, only if the case falls under clause (*b*) of sub-section (1) of section 149 as amended by the Finance Act, 2021 and reproduced in paragraph 6.1 above. Specified authority under section 151 of the new law in this case shall be the authority prescribed under clause (*ii*) of that section.

(ii) AY 16-17. AY 17-18: Fresh notice under section 148 can be issued in these cases, with the approval of the specified authority, under clause (*a*) of sub-section (1) of new section 149 of the Act, since they are within the period of three years from the end of the relevant assessment year. Specified authority under section 151 of the new law in this case shall be the authority prescribed under clause (*i*) of that section.

7. Cases where the Assessing Officer is required to provide the information and material relied upon within 30 days:

7.1 Hon'ble Supreme Court has directed that information and material is required to be provided in all cases within 30 days. However, it has also been noticed that notices cannot be issued in a case for AY 2013-14, AY 2014-15 and AY 2015-16, if the income escaping assessment, in that case for that year, amounts to or is likely to amount to less than fifty

lakh rupees. Hence, in order to reduce the compliance burden of assessees, it is clarified that information and material may not be provided in a case for AY 2013-14, AY 2014-15 and AY 2015-16, if the income escaping assessment, in that case for that year, amounts to or is likely to amount to less than fifty lakh rupees. Separate instruction shall be issued regarding procedure for disposing these cases.

8. Procedure required to be followed by the Assessing Officers to comply with the Supreme Court judgment:

8.1 The procedure required to be followed by the Jurisdictional Assessing Officer/Assessing Officer, in compliance with the order of the Hon'ble Supreme Court, is as under:

- The extended reassessment notices are deemed to be show cause notices under clause (*b*) of section 148A of the Act in accordance with the judgment of Hon'ble Supreme Court. Therefore, all requirement of new law prior to that show cause notice shall be deemed to have been complied with.
- The Assessing Officer shall exclude cases as per clarification in paragraph 7.1 above.
- Within 30 days *i.e.* by 2nd June, 2022, the Assessing Officer shall provide to the assessees, in remaining cases, the information and material relied upon for issuance of extended reassessment notices.
- The assessee has two weeks to reply as to why a notice under section 148 of the Act should not be issued, on the basis of information which suggests that income chargeable to tax has escaped assessment in his case for the relevant assessment year. The time period of two weeks shall be counted from the date of last communication of information and material by the Assessing Officer to the assessee.
- In view of the observation of Hon'ble Supreme Court that all the defences of the new law are available to the assessee, if assessee makes a request by making an application that more time be given to him to file reply to the show cause notice, then such a request shall be considered by the Assessing Officer on merit and time may be extended by the Assessing Officer as provided in clause (*b*) of new section 148A of the Act.
- After receiving the reply, the Assessing Officer shall decide on the basis of material available on record including reply of the assessee, whether or not it is a fit case to issue a notice under section 148 of the Act. The Assessing Officer is required to pass an order under clause (*d*) of section I48A of the Act to that effect, with the prior approval of the specified authority of the new law. This order is required to be passed within one month from the end of the month in which the reply is received by him from the assessee. In case no such reply is furnished by the assessee, then the order is required to be passed within one month from the end of the month in which time or extended time allowed to furnish a reply expires.
- If it is a fit case to issue a notice under section 148 of the Act, the Assessing Officer shall serve on the assessee a notice under section 148 after obtaining the approval of the specified authority under section 151 of the new law. The copy of the order

passed under clause (*d*) of section 148A of the Act shall also be served with the notice u/s 148.

- If it is not a fit case to issue a notice under section 148 of the Act, the order passed under clause (*d*) of section 148A to that effect shall be served on the assessee.

Chapter 7

Amendments relating to TDS/TCS provisions

[Section 194Q and section 206C(1H)]

One of the significant amendments in the recent times in the sphere of direct tax laws relate to TDS/TCS provisions. They act in such a way that the payer or payee is assigned the responsibility of deducting or collecting tax and creating a trail for verification by the Department. This has proved to be very effective when tagged with dire consequences by way of disallowance of expenditure besides penalties and prosecution.

7.1 Deduction of tax at source on payment of certain sum for purchase of goods- section 194Q:

Section 194Q was inserted by the Finance Act, 2021 meant for deduction of tax at source on payment of certain sum for purchase of goods.

It is applicable to any person being a buyer who is responsible for paying any sum to any resident (called as seller) for purchase of any goods of the value or aggregate of such value exceeding Rs.50 lakhs in any previous year. He shall deduct tax at source at the time of credit of such sum to the account of the seller or at the time of payment thereof by any mode, whichever is earlier. The rate of tax deduction is 0.1% of the amount exceeding Rs.50 lakhs. For example, if a person makes purchase for Rs.60 lakhs the TDS amount would be @ 0.10% on Rs.10 lakhs being Rs.1000.

The term 'buyer' to whom the provisions of this section would apply means a person whose total sales or gross receipts or turnover from the business carried on by him exceeded Rs.10 crore during the financial year immediately preceding the financial year in which the purchase of goods is carried out. However, this would not apply to certain persons who may be notified by the Central Government in the official gazette with such conditions attached thereto.

Even where the amount is not credited to the seller's account but credited to any account whether called as 'suspense account' or by any other name in the books of account of the buyer the amount so credited shall be deemed to be to the credit of such income to the account of the payee (seller) and accordingly the TDS provision would apply. For example, if the amount is paid by way of purchase advance, then also the tax is deductible at source to the extent, it exceeds Rs.50 lakhs during the year.

In case, any difficulty arises in implementing or giving effect to the provisions of this section, the CBDT with the previous approval of the Central Government may issue guidelines for the purpose of removing such difficulty. Also, every guideline so

issued by the CBDT as soon as it is issued be laid before each House of Parliament and shall be binding on the Income-tax authorities and person liable to deduct tax.

This provision seeking deduction of tax at source will not apply where (i) tax is deductible under any other provisions of the Act; and (ii) tax is collectible under the provisions of section 206C, other than a transaction to which the provisions of section 206C(1H) applies.

7.2 Circular No. 13 of 2021 [F. NO. 370142/26/2021-TPL], dated 30-6-2021

Finance Act, 2021 inserted a new section 194Q in the Income-tax Act, 1961 (hereinafter referred to as "the Act") which takes effect from 1st day of July, 2021. It applies to any buyer who is responsible for paying any sum to any resident seller for purchase of any goods of the value or aggregate of value exceeding fifty lakh rupees in any previous year. The buyer, at the time of credit of such sum to the account of the seller or at the time of payment whichever is earlier, is required to deduct an amount equal to 0.1% of such sum exceeding fifty lakh rupees as income tax.

2. Buyer is defined to be person whose total sales or gross receipts or turnover from the business carried on by him exceed ten crore rupees during the financial year immediately preceding the financial year in which the purchase of good is carried out. Central Government has been authorised to specify by notification in the Official Gazette, person who would not be considered as buyer for the purposes of this section.

3. Sub-section (3) of section 194Q of the Act empowers the Board (with the approval of the Central Government) to issue guidelines for the purpose of removing difficulties. Various representations have been received by the Board for issuing guidelines for removing certain difficulties. In exercise of power contained under sub-section (3) of section 194Q of the Act, the Board, with the approval of the Central Government, hereby issues the following guidelines. These guidelines at some places have also tried to remove difficulties in implementing the provisions of section 194-O and sub-section (1H) of section 206C of the Act using power contained in sub-section (4) of section 194-O of the Act and sub-section (1-I) of section 206C of the Act.

4. Guidelines

4.1 ***Applicability on transactions carried through various Exchanges:***

4.1.1 It has been represented that there are practical difficulties in implementing the provisions of Tax Deduction at Source (TDS) contained in section 194-Q of the Act in case of certain exchanges and clearing corporations. It has been stated that sometime in these transactions there is no one to one contract between the buyers and the sellers.

4.1.2 In order to remove such difficulties, it is provided that the provisions of section 194Q of the Act shall not be applicable in relation to,—

(i) transactions in securities and commodities which are traded through recognized

stock exchanges or cleared and settled by the recognized clearing corporation, including recognized stock exchanges or recognized clearing corporation located in International Financial Service Centre;

(ii) transactions in electricity, renewable energy certificates and energy saving certificates traded through power exchanges registered in accordance with Regulation 21 of the CERC; and

For this purpose, —

(i) "recognized clearing corporation" shall have the meaning assigned to it in clause (*i*) of the *Explanation* to clause (23EE) of section 10 of the Act;

(ii) "recognized stock exchange" shall have the meaning assigned to it in clause (*ii*) of the *Explanation* I to sub-section (5) of section 43 of the Act; and

(iii) "International Financial Services Centre" shall have the meaning assigned to it in clause (*q*) of section 2 of the Special Economic Zones Act, 2005.

4.2 *Calculation of threshold for the financial year 2021-22.*

4.2.1 Since section 194Q of the Act would come into effect from 1st July, 2021, it was requested to clarify how the threshold of fifty lakh rupees specified under this section shall be computed and whether the tax is required to be deducted in respect of advance paid before 1st July 2021 and sum credited thereafter.

4.2.2 It hereby clarified that,—

(i) Since section 194Q of the Act mandates buyer to deduct tax on credit of sum in the account of seller or on payment of such sum, whichever earlier, the provision of this sub-section shall not apply on any sum credited or paid before 1st July 2021. If either of the two events had happened before 1st July 2021, that transaction would not be subjected to the provisions of section 194Q of the Act.

(ii) Since the threshold of fifty lakh rupees is with respect to the previous year, calculation of sum for triggering TDS under section 194Q shall be computed from 1st April. 2021. Hence, if a person being buyer has already credited or paid fifty lakh rupees or more up to 30th June 2021 to a seller, the TDS under section 194Q shall apply on all credit or payment during the previous year, on or after 1st July 2021, to such seller.

4.3 *Adjustment for GST, purchase returns*

4.3.1 It is requested to clarify that whether adjustment is required to be made for GST or purchase returns for the purpose of tax deduction under section 194Q of the Act. *Vide* circular no 17 of 2020 dated 29th Sept 2020 it was clarified that no adjustment on account of GST is required to be made for collection of tax under sub-section (1H) of section 206C of the Act since the collection is made with reference to receipt of amount of sate consideration. However, the situation is different so far as TDS is concerned. It has been clarified in circular No 23 of 2017 dated 19th July 2017 as under

"wherever in terms of the agreement or contract between the payer and the payee, the component of 'GST on services' comprised in the amount payable to a resident is indicated

separately, tax shall be deducted at source under Chapter XVII-B of the Act on the amount paid or payable without including such 'GST on services' component. GST for these purposes shall include Integrated Goods and Services Tax, Central Goods and Services Tax, State Goods and Services Tax and Union Territory Goods and Services Tax. "

4.3.2 Accordingly with respect to TDS under section 194Q of the Act, it is clarified that when tax is deducted at the time of credit of amount in the account of seller and in terms of the agreement or contract between the buyer and the seller, the component of GST comprised in the amount payable to the seller is indicated separately, tax shall be deducted under section 194Q of the Act on the amount credited without including such GST. However, if the tax is deducted on payment basis because the payment is earlier than the credit, the tax would be deducted on the whole amount as it is not possible to identify that payment with GST component of the amount to be invoiced in future.

4.3.3 Further, with respect to purchase return it is clarified that the tax is required to be deducted at the time of payment or credit, whichever is earlier. Thus, before purchase return happens, the tax must have already been deducted under section 194Q of the Act on that purchase. If that is the case and against this purchase return the money is refunded by the seller, then this tax deducted may be adjusted against the next purchase against the same seller. No adjustment is required if the purchase return is replaced by the goods by the seller as in that case the purchase on which tax was deducted under section 194Q of the Act has been completed with goods replaced.

4.4 ***Whether non-resident can be a buyer under section 194Q of the Act?***

4.4.1 It is requested to clarify if the provisions of section 194Q of the Act shall apply to a buyer being a non-resident. To remove difficulties, it is clarified that the provisions of section 194Q of the Act shall not apply to a non-resident whose purchase of goods from seller resident in India is not effectively connected with the permanent establishment of such non-resident in India. For this purpose, "permanent establishment" shall mean to include a fixed place of business through which the business of the enterprise is wholly or partly carries on.

4.5 ***Whether tax is to be deducted when the seller is a person whose income is exempt***

4.5.1 It is requested to clarify if the provisions of section 194Q of the Act shall apply to a seller whose income is exempt. To remove difficulty, it is clarified that the provisions of section 194Q of the Act shall not apply on purchase of goods from a person, being a seller, who as a person is exempt from income tax under the Act (like person exempt under section 10) or under any other Act passed by the Parliament (Like RBI Act, ADB Act etc.).

4.5.2 Similarly, with respect to sub-section (1H) of section 206C of the Act, it is clarified that the provisions of this sub-section shall not apply to sale of goods to a person, being a buyer, who as a person is exempt from income tax under the Act (like person exempt under section 10) or under any other Act passed by the Parliament (Like RBI Act, ADB Act etc.).

4.5.3 The above clarifications would not apply if only part of the income of the person (being a seller or being a buyer, as the case may be) is exempt.

4.6 ***Whether tax is to be deducted on advance payment?***

4.6.1 It is requested to clarify if the provisions of section I94Q of the Act shall apply to advance payment made by the buyer. It is clarified that since the provisions apply on

payment or credit whichever is earlier, the provisions of section 194Q of the Act shall apply to advance payment made by the buyer to the seller.

4.7 *Whether provisions of section 194Q of the Act shall apply to buyer in the year of incorporation?*

4.7.1 It is requested to clarify if the provisions of section 194Q of the Act shall apply to a buyer in the year of its incorporation. It is clarified that under section 194Q of the Act a buyer is required to have total sales or gross receipts or turnover from the business carried on by him exceeding ten crore rupees during the financial year immediately preceding the financial year in which the purchase of good is carried out. Since this condition would not be satisfied in the year of incorporation, the provisions of section I94Q of the Act shall not apply in the year of incorporation.

4.8 *Whether provisions of section 194Q of the Act shall apply to buyer if the turnover from business is 10 crore or less?*

4.8.1 It is requested to clarify if the provisions of section 194Q of the Act shall apply to a buyer who has turnover or gross receipt exceeding Rs. 10 crore but total sales or gross receipts or turnover from business is Rs. 10 crore or less. It is clarified that for the purposes of section 194Q of the Act, a buyer is required to have total sales or gross receipts or turnover from the business carried on by him exceeding ten crore rupees during the financial year immediately preceding the financial year in which the purchase of good is carried out. Hence, the **sales or gross receipts or turnover from business carried on by him must exceed Rs. 10 crore. His turnover or receipts from non-business activity is not to be counted for this purpose.**

4.9 Cross application of section 194-O, sub-section (1H) of section 206C and section 194Q of the Act.

4.9.1 It is requested to clarify how section 194-O, sub-section (1H) of section 206C and section 194Q of the Act, apply on the same transaction.

4.9.2 Under sub-section (3) of section 194- O of the Act. a transaction in respect of which tax has been deducted by the e-commerce operator under sub-section (1), or which is not liable to deduction under sub-section (2), shall not be liable to tax deduction at source under any other provision of chapter XVII of the Act.

4.9.3 Under second proviso to sub-section (1H) of section 206C of the Act, provisions of this sub-section shall not apply, if the buyer is liable to deduct tax at source under any other provisions of this Act on the goods purchased by him from the seller and has deducted such tax.

4.9.4 Under sub-section (5) of section I94Q of the Act, the provision of this section shall not apply to a transaction on which-

(i) tax is deductible under any of the provisions of this Act; and

(ii) tax is collectible under the provisions of section 206C, other than a transactions on which sub-section (1H) of section 206C applies

4.9.5 After conjoint reading of all these provisions the following is clarified:

(i) If tax has been deducted by the e-commerce operator on a transaction under section 194-O of the Act [including transactions on which tax is not deducted on account of sub-section (2) of section 194-O], that transaction shall not be subjected

to tax deduction under section 194Q of the Act.

(ii) Though sub-section (1H) of section 206C of the Act provides exemption from TCS if the buyer has deducted tax at source on goods purchased by him, to remove difficulties it is clarified that this exemption would also cover a situation where instead of the buyer the e-commerce operator has deducted tax at source on that transaction of sale of goods by seller to buyer through e-commerce operator.

(iii) If a transaction is both within the purview of section 194-O of the Act as well as section 194Q of the Act, tax is required to be deducted under section 194-O of the Act and not under section 194Q of the Act.

(iv) Similarly, if a transaction is both within the purview of section 194-O of the Act as well as sub-section (1H) of section 206C of the Act tax is required to be deducted under section 194-0 of the Act. The transaction shall come out of the purview of sub-section (1H) of section 206C of the Act after tax has been deducted by the e-commerce operator on that transaction. Once the e-commerce operator has deducted the tax on a transaction, the seller is not required to collect the tax under sub-section (1H) of section 206C of the Act on the same transaction. It is clarified that here primary responsibility is on e-commerce operator to deduct the tax under section 194-O of the Act and that responsibility cannot be condoned if the seller has collected the tax under sub-section (1H) of section 206C of the Act. This is for the reason that the rate of TDS under section 194-O is higher than rate of TCS under sub-section (1H) of section 206C of the Act.

(v) If a transaction is both within the purview of section 194-Q of the Act as well as sub-section (1H) of section 206C of the Act, the tax is required to be deducted under section 194-Q of the Act. The transaction shall come out of the purview of sub-section (1H) of section 206C of the Act after tax has been deducted by the buyer on that transaction. Once the buyer has deducted the tax on a transaction, the seller is not required to collect the tax under sub-section (1H) of section 206C of the Act on the same transaction. However, if, for any reason, tax has been collected by the seller under sub-section (1H) of section 206C of the Act, before the buyer could deduct tax under section 194-Q of the Act on the same transaction, such transaction would not be subjected to tax deduction again by the buyer. This concession is provided to remove difficulty, since tax rate of deduction and collection are same in section 194Q and sub-section (1H) of section 206C of the Act.

Guidelines under sections 194-O)(4), 194Q(3) and 206C (1-I) of the Income-tax Act,1961

7.3 Circular No. 20 of 2021 [F.NO.30142/56/2021-TPL], dated 25-11-2021

Finance Act, 2020 inserted a new section 194-O in the Income-tax Act, 1961 (hereinafter referred to as "the Act") which mandates that with effect from 1st day of October, 2020, an e-commerce operator shall deduct income-tax at the rate of one per cent of the gross amount of sale of goods or provision of services or both, facilitated through its digital or electronic facility or platform. However, exemption from the said deduction has been

provided in case of certain individuals or Hindu undivided family subject to fulfilment of specified conditions. This deduction is required to be made at the time of credit of the amount of such sale or service or both to the account of an e-commerce participant or at the time of payment thereof to such e-commerce participant, whichever is earlier.

2. Finance Act, 2020 also inserted sub-section (1H) in section 206C of the Act which mandates that with effect from 1st day of October 2020 a seller receiving an amount as consideration for sale of any goods of the value or aggregate of such value exceeding fifty lakh rupees in any previous year shall collect from the buyer, a sum equal to 0.1 per cent of the sale consideration exceeding fifty lakh rupees as income-tax. The collection is required to be made at the time of receipt of amount of sale consideration. Seller is defined as the person whose total sales or gross receipts or turnover from the business carried on by him exceed ten crore rupees during the financial year immediately preceding the financial year in which the sale of good is carried out. Central Government has been authorised to specify by notification in the Official Gazette, the person who would not be considered as seller for the purposes of this section, subject to the fulfillment of certain conditions as specified therein.

3. Finance Act, 2021 inserted a new section 194Q to the Act which took effect from 1st day of July, 2021. It applies to any buyer who is responsible for paying any sum to any resident seller for purchase of any goods of the value or aggregate of value exceeding fifty lakh rupees in any previous year. The buyer, at the time of credit of such sum to the account of the seller or at the time of payment, whichever is earlier, is required to deduct an amount equal to 0.1% of such sum exceeding fifty lakh rupees as income tax. Buyer is defined to be person whose total sales or gross receipts or turnover from the business carried on by him exceed ten crore rupees during the financial year immediately preceding the financial year in which the purchase of goods is carried out. Central Government has been authorised to specify by notification in the Official Gazette, person who would not be considered as buyer for the purposes of this section, subject to fulfillment of specified conditions.

4. Sub-section (4) of section 194-O, sub-section (3) of section 194Q and sub-section (1-I) of section 206C of the Act empowers the Board (with the approval of the Central Government) to issue guidelines for the purpose of removing difficulties.

4.1 In this regard, *vide Circular no.17 dated 2020*, guidelines were issued by the Board (with the approval of the Central Government) in relation to the provisions of section 194-O and section 206C(1H) of the Act in certain cases to remove difficulties and provide clarity for certain transactions.

4.2 Further, *vide Circular no.13 of 2021* dated 30-6-2021 guidelines were issued by the Board in relation to the provisions of section 194Q of the Act through which the difficulties arising from the applicability of the provisions of section 194Q in certain cases were removed. Furthermore, guidelines with respect to the cross application of the provisions of sections 194-O, 194Q and 206C (1H) of the Act were also issued through the said circular.

4.3 In continuation of the above, to further remove the difficulties, the Board, with the approval of the Central Government, hereby issues the following guidelines under sub-section (4) of section 194-O, sub-section (3) of section 194Q and sub-section (1-I) of section 206C of the Act.

5. Guidelines

5.1 E-auction services carried out through electronic portal:

5.1.1 Representations have been received from various stakeholders involved in the business of carrying out e-auction services through electronic portal owned, operated or maintained by them (hereinafter referred as 'e-auctioneer'). It has been stated that in an e-auction, the e-auctioneer involved in conducting the e-auction through its portal is responsible only for the price discovery for the sale/purchase of goods or services and the result of the auction report is submitted to the client. The client could be the buyer or the seller. Participants in the auctions are sellers (if client is buyer) or buyers (if client is seller). The transaction of sale/purchase is being carried out directly between the buyer and the seller which are not done through the electronic portal of the e-auctioneer. Further, the price so discovered can be further negotiated between the parties without the know ledge of the e-auctioneer. In such a scenario, it has been represented that provisions of section 194-O of the Act does not apply as the transaction of sale/purchase itself is not taking place through the electronic portal.

5.1.2 From the representations made, the following facts have been noticed:

(a) The e-auctioneer conducts e-auction services for its clients in its electronic portal and is responsible for the price discovery only which is reported to the client.

(b) The price so discovered through e-auction process is not necessarily the price at which the transaction takes place and it is up to the discretion of the client to accept the price or to directly negotiate with the counter-party.

(c) The transaction of purchase/sale takes place directly between the buyer and the seller part) outside the electronic portal maintained by the e-auctioneer and price discovery only acts as the starting point for negotiation and conclusion of purchase/sale.

(d) The e-auctioneer is not responsible for facilitating the purchase and sale of goods for which e-auction was conducted on its electronic portal except to the extent of price discovery.

(e) Payments for the transactions are carried out directly between the buyer and the seller outside the electronic portal and the e-auctioneer does not have any information about the quantum and the schedule of payment which is decided mutually by the client and the counterparty.

(f) For payment made to e-auctioneer for providing e-auction services, the client deducts tax under the relevant provisions of the Act other than section 194-O of the Act.

5.1.3 In order to remove difficulty, it is clarified that the **provisions of section 194-0 of the Act shall not apply in relation to e-auction activities carried out by e-auctioneers if all the facts listed at (*a*) to (*f*) of para 5.1.2 are satisfied. This clarification shall not apply if any of these facts are not satisfied**. Further, it is clarified that the buyer and seller would still be liable to deduct/collect tax as per the provisions of section 194Q and 206C (1H) of the Act, as the case may be.

5.2 Adjustment of various state levies and taxes other than GST

5.2.1 In Para 4.3.2 of circular no. 13 of 2021, dated 30-6-2021, it has been provided that in case the GST component has been indicated separately in the invoice and tax is deducted at the time of credit of the amount in the account of the seller, then the tax is to be deducted under section 194Q of the Act on the amount credited without including such GST. It has been further provided that in case the tax is deducted on payment basis as the payment is earlier than the credit, the tax is to be deducted on the whole amount as it is not possible to identify that payment with GST component of the amount to be invoiced in future. Further, adjustment of tax deducted in case of purchase return has also been provided.

5.2.2 It has been represented that in case of goods which are not within the purview of GST, such as petroleum products, various levies like VAT. Excise duty, sales tax etc. are charged. While the treatment of GST component has been clarified in the circular no. 13 of 2021, the same is silent on other non-GST levies which have otherwise been subsumed and replaced by GST.

5.2.3 In this regard, it is hereby clarified that in case of purchase of goods which are not covered within the purview of GST, when tax is deducted at the time of credit of amount in the account of seller and in terms of the agreement or contract between the buyer and the seller, the component of VAT/Sales tax/Excise duty/CST, as the case may be, has been indicated separately in the invoice, then the tax is to be deducted under section 194Q of the Act on the amount credited without including such VAT/Excise duty/Sales tax/CST, as the case may be. However, if the tax is deducted on payment basis, if it is earlier than the credit, the tax is to be deducted on the whole amount as it will not be possible to identify the payment with VAT/Excise duty/Sales tax/CST component to be invoiced in the future. Furthermore, in case of purchase returns, the clarification as provided in Para 4.3.3 of circular no. 13 of 2021 shall also apply to purchase return relating to non GST products liable to VAT/excise duty/sales tax/CST etc.

5.3 Applicability of section 194Q of the Act in cases where exemption has been provided under section 206C (1A) of the Act

5.3.1 Sub-section (1A) of section 206C of the Act provides that notwithstanding anything contained in sub-section (1) of the said section, no tax is to be collected in case of a buyer, who is a resident in India, if such buyer furnishes to the person responsible for collecting tax, a declaration to the effect that the goods (as referred to in sub-section (1)) are to be utilized for the purposes of manufacturing, processing or producing articles or things or for the purposes of generation of power and not for trading purposes.

5.3.2 As per the provisions of sub-section (1H) of section 206C of the Act, tax is to be collected in respect of sale of goods other than the goods which have not been covered under sub-section (1) or sub-section (1F) or sub-section (1G). It has been represented that in case of goods which are covered under the provisions of sub-section (1) of the said section but exempted under sub-section (1A), tax will not be collectible under either sub-section (1) or sub-section (1H) of section 206C as the provisions of sub-section (1H) categorically exclude the goods which are covered under sub-section (1) of section 206C. It has been requested to clarify if the provisions of section 194Q of the Act will be applicable in such cases.

5.3.3 The issue has been examined. It is seen that the provisions of section 194Q of the Act does not apply in respect to those transactions where tax is collectible under section 206C [except sub-section (1H) thereof] of the Act. Since by virtue of sub-section (1A) of section 206C of the Act, the tax is not required to be collected for goods covered under sub-section (1) of the said section, it is hereby clarified that in such cases, the provisions of section 194Q of the Act will apply and the buyer shall be liable to deduct tax under the said section if the conditions specified therein are fulfilled.

5.4 Applicability of the provisions of section 194Q in case of department of Government not being a public sector undertaking or corporation

5.4.1 There have been representations from department of the Government (both Central Government and State Government), to enquire if such department is required to deduct tax under the provisions of section 194Q of the Act.

5.4.2 As per the provisions of section 194Q, tax is to be deducted by a person, being a buyer, whose total sales, gross receipts or turnover from business carried on by that person exceed ten crore rupees during the financial year immediately preceding the financial year in which the goods are purchased by such person. Thus, for a person to be considered as a buyer for the purposes of section 194Q of the Act, following conditions are required to be fulfilled:

(a) Such person shall be carrying out a business/commercial activity;

(b) The total sales, gross receipts or turnover from such business/commercial activity shall be more than Rs. 10 crore during the financial year immediately preceding the financial year in which goods are being purchased by such person.

In case of any Department of the Government which is not carrying out any business or commercial activity, the primary requirement for being considered as a 'buyer' will not be fulfilled. Accordingly, such an organization will not be considered as 'buyer' for the purposes of section 194Q of the Act and will not be liable to deduct tax on the goods so purchased by them. However, if the said department is carrying on a business/commercial activity, the provision of section 194Q of the Act shall apply subject to the fulfillment of other conditions.

5.4.3 Issue has been raised in case where any department of the Government will be considered as a 'seller' for the purposes of deduction of tax under section 194Q of the Act. In this regard, it is hereby clarified that for the purposes of section 194Q, Central Government or State Government shall not be considered as 'seller' and no tax is to be deducted by the buyer, in cases where any Department of Central or State Government are seller of goods.

5.4.4 In connection with above, it is further clarified that any other person, such as a Public sector Undertaking or corporation established under Central or Slate Act or any other such body, authority or entity, shall be required to comply with the provisions of section 194Q and tax shall be deducted accordingly.

7.4 Collection of tax at source on receipt of certain sum for sale of goods: Section 206C (1H)

The Finance Act, 2020 inserted sub-section (1H) to section 206C w.e.f. 01.10.2020. The coverage of the provision is given below:

(i) Every person being a seller who receives any amount as consideration for the **sale of any goods** of the value or aggregate of such value exceeding Rs.50 lakhs in any previous year, **other than** the goods being exported out of India or goods covered in sub-section (1) or sub-section (1F) (motor vehicle) or sub-section (1G) (LRS remittance , overseas tour package etc.,)shall at the time of receipt of such amount, collect from the buyer a sum equal to 0.10% of the sale consideration exceeding Rs.50 lakhs as income-tax. For example, if the seller receives Rs.60 lakhs from a buyer, he has to collect 0.1% on Rs.10 lakhs being Rs.1,000.

(ii) The proviso to section 206C(1H) says that if a buyer being the payer and who pays above Rs.50 lakhs in any previous year in respect of any goods does not provide PAN or Aadhaar number to the seller, the seller must collect tax at source at 1% (as per section 206CC read with proviso to section 206C(1H)).

(iii) The further proviso to section 206C(1H) says that the provisions of this section shall not apply if the buyer is liable to deduct tax at source under any other provision of this Act on the goods purchased by him from the seller and has deducted tax on such amount.

For the purposes of this section –

'buyer' means a person who purchases any goods but does not include (i) the Central Government, a State Government, an embassy, a High Commission, a legation, commission, consulate and the trade representation of a foreign State; or (ii) a local authority as defined in the Explanation to section 10(20) of the Act; or (iii) a person importing goods into India or any other person as the Central Government may by notification in the Official Gazette specify for this purpose, subject to such conditions as may be specified therein.

'seller' means a person whose total sales, gross receipts or turnover from the business carried on by him exceed Rs.10 crores during the financial year immediately preceding the financial year in which the sale of goods is carried out, not being a person as the Central Government may, by notification in the Official Gazette specify for this purpose, subject to such conditions as may be specified therein.

Section 206C(1-I) says that if any difficulty arises in giving effect to the provisions of section 206C(1G) or section 206C(1H), the CBDT may with the approval of the Central Government, issue guidelines for the purpose of removing the difficulty.

Section 206C(1 J) says that every guideline issued by the CBDT under 206C(1-I) shall be laid before each House of Parliament and shall be binding on the income-tax authorities and on the person liable to collect the sum.

It may be noted that there is exclusion of section 206C(1H) applicability if TDS under any other provision is applicable for such transaction. However, the vice versa would not apply. In other words, if TCS is effected by the supplier of goods, it would not absolve the buyer being the payer from TDS obligation under section 194Q. This may be kept in mind in view of dire consequence of disallowance applicable under section 40(a)(ia) of the Act.

7.5 Transactions in respect of which section 206C(1H) will not apply

Section 206C(1) deals with tax collection at source relating to the following:

S.No.	Nature of goods	Percentage
(i)	Alcoholic liquor for human consumption	1%
(ii)	Tendu leaves	5%
(iii)	Timber obtained under a forest lease	2.5%
(iv)	Timber obtained by any mode other than under a forest lease	2.5%
(v)	Any other forest produce not being timber or tendu leaves	2.5%
(vi)	Scrap	1%
(vii)	Minerals, being coal or lignite or iron ore	1%

Section 206C(1F) is meant for a person being a seller who receives any amount as consideration for sale of a motor vehicle of the value exceeding Rs.10 lakhs, shall, at the time of receipt of such amount, collect from the buyer, a sum equal to 1% of the total sale consideration as income-tax.

Section 206C(1G) is applicable where a person being an authorised dealer receives for remittance out of India from a buyer, being a person remitting such amount under the Liberalized Remittance Scheme of the RBI; also in the case of a seller of an overseas tour program package, who receives any amount from a buyer, being the person, who purchases such package. The tax collection shall be at the time of debiting the amount payable by the buyer or at the time of receipt of such amount from the said buyer, by any mode, whichever is earlier. The tax collection shall be a sum equal to 5% of such amount as income-tax.

The proviso to section 206C(1G) says that the authorised dealer shall not collect if the aggregate amount is less than Rs.7 lakhs in a financial year and the purpose is, other than purchase of overseas tour program.

The further proviso says that the authorised dealer shall collect 5% of the amount in excess of Rs.7 lakhs where the amount is remitted for a purpose other than purchase of overseas tour program. *In other words, in the case of payment received for overseas tour program 5% of tax collection shall be on the full amount. However, where it is not in respect of overseas tour program the authorised dealer shall collect 5% on the sum exceeding Rs.7 lakhs.*

Besides, LRS remittance and overseas tour package program discussed above, where the authorised dealer collects amount in respect of the remittance out of a loan obtained from a financial institution as defined in section 80E for the purpose of pursuing any education (outside India) tax is collectible at 0.50% of the amount or the aggregate of the amounts in excess of Rs.7 lakhs remitted by the buyer in a financial year.

The fourth proviso to section 206C(1G) says that the authorised dealer shall not collect the sum by way of TCS on an amount in respect of which the sum has been collected by the seller.

The fifth proviso says that the provisions of section 206C(1G) shall not apply in the following cases:

(a) if the buyer is liable to deduct tax at source under any other provisions of this Act and has deducted such amount;
(b) the Central Government, a State Government, an embassy, a High Commission, a legation, a commission, a consulate, a trade representation of a foreign State, a local authority as defined in the Explanation to section 10(20) or any other person as the Central Government may, by notification in the Official Gazette, specify for this purpose, subject to certain conditions as may be specified therein.

Explanation for the purposes of this sub-section says 'authorised dealer' means a person authorised by Reserve Bank of India to deal in foreign exchange or foreign security.

'overseas tour program package' means any tour package which offers visit to a country or countries or territory or territories outside India and includes expenses for travel or hotel stay or boarding or lodging or any other expenditure of similar nature or in relation thereto.

It may be noted that sub-sections (1), (1F) and (1G) of section 206C when covers a transaction such of those transaction will not be covered by section 206C(1H).

Chapter 8

Amendments relating to non-filers as regards TDS / TCS provisions

[Section 206AB and section 206CCA]

Having found deduction of tax at source and collection of tax at source as effective measures for creating trail of financial transactions besides collection of revenue, the legislature in its wisdom has incorporated section 206AB vide Finance Act, 2021 w.e.f. 01.07.2021 by prescribing higher rate of tax deduction at source when the payee is a non-filer of ITR. On similar lines, section 206CCA was introduced by the Finance Act, 2021 w.e.f. 01.07.2021 for higher collection of tax at source from the non-filers of ITR.

8.1 Special provision for TDS for non-filers of income-tax - Section 206AB

This section is applicable in respect of deduction of tax at source under Chapter XVII-B by prescribing higher rate of tax deduction. The rate of tax deduction shall be as under –

(i) at twice the rate specified in the relevant provision of the Act; or
(ii) at twice the rate or rates in force; or
(iii) at the rate of 5%
- Whichever is higher

Twice the rate specified in the relevant provision of the Act would mean the rate of tax as specified in the relevant provision contained in Chapter XVII-B.

Twice the rate or rates in force would mean the rate of tax deduction specified in the Finance Act as applicable.

At the rate of 5% is a limit prescribed in the section.

For example, when interest is paid to a non-resident, the tax is deductible at source as per the rate of tax deduction prescribed in the Finance Act. If the same interest when paid to resident reference is to be made to section 194A.

<u>In respect of the following, the higher rate specified in section 206AB will not apply:</u>

Section 192 – salary;

Section 192A – payment out of accumulated balance in provident fund account;

Section 194B – winning from lottery or crossword puzzle;

Section 194BB – winnings from horse race;

Section 194-IA – payment on transfer of immovable property other than agricultural land;

Section 194 IB – rent paid by certain individuals or HUF;

Section 194 LBC – income payable to a resident investor in respect of investment in securitisation trust;

Section 194M – Certain sums paid by individuals or HUFs;

Section 194N – payment of certain amounts in cash (commonly known as TDS on bank withdrawals).

There is yet another provision in section 206AA which provides for higher rate of tax deduction at source where the payee does not furnish his PAN to the person responsible for deducting tax at source in respect of a payment.

Sub-section (2) of section 206AB says that if section 206AA is applicable for the reason that the non-filer has not furnished his PAN to the payer of income, the tax is deductible at source at the higher of two rates provided in section 206AB or section 206AA. It is reiterated that if the payee is a non-filer and has not furnished his PAN to the payer a comparative study of the rate applicable under section 206AA vis a vis section 206AB has to be made and the higher rate of tax deduction would apply.

Section 206AB (3) specifies the term 'specified person' which was substituted by the Finance Act,2022 w.e.f. 01.04.2022.

The term **'specified person'** means a person

(i) who has not furnished the return of income for the assessment year relevant to the previous year preceding the financial year in which tax is required to be deducted and for which the time limit for furnishing the ITR under section 139(1) has expired; and

(ii) the aggregate of tax deducted and collected in his case is Rs.50,000 or more in the said previous year.

For example, if tax is deductible at source in August, 2022 for a payment under section 194C and if the payee has not furnished his return for the assessment year 2022-23 for which the time limit for filing the return has expired by 31.07.2022 and the aggregate of TDS / TCS of such person for the previous year ended 31.03.2022 exceeded Rs.50,000 then he is a 'specified person' to whom the higher rate of tax deduction shall be applicable as per section 206AB.

The proviso to section 206AB(3) says that the 'specified person' would not include a non-resident if he does not have a permanent establishment in India. The legislature has explained the expression 'permanent establishment' as a place which includes a fixed place of business through which the business of the enterprise is wholly or partly carried on.

8.2 Special provision for non-filers of ITR for higher rate of TCS- Section 206CCA

The Finance Act, 2021 inserted section 206CCA which is applicable wherever provisions relating to collection of tax at source is attracted under the provisions of Chapter XVII-BB of the Act. This would apply in respect of any sum received by a person from a specified person and the tax collection shall be at the higher of the following two rates viz.

(i) at twice the rate specified in the relevant provision of the Act; or
(ii) at the rate of 5%.

Section 206CC is corollary to section 206AA (applicable for higher rate of TDS in case PAN is not furnished by the payee to the payer) to cover a case where a person making payment of TCS does not furnish his PAN to the recipient and the recipient has to collect TCS at a higher rate.

Section 206CCA(2) says that where the provisions of section 206CC is also applicable for the reason that the person making payment does not furnish his permanent account number, the TCS at the higher of the two rates provided in this section and the rate as applicable under section 206CC, shall apply.

Section 206CCA(3), the proviso and Explanation are pari materia of section 206AB, the proviso and Explanation thereon. For the sake of brevity, they are not repeated here.

Chapter 9

Taxation of virtual digital asset

[Section 2(47A)]

The Finance Act, 2022 took significant steps for taxation of virtual digital assets (VDAs). Hon'ble Finance Minister clarified after presenting the Finance Bill, 2022 that the insertion of provision in the Act for the purpose of taxation of virtual digital assets is not to be viewed as legal recognition of the VDA transactions in India. Taxation of virtual digital asset and the attendant provisions thereto will apply from assessment year 2023-24 onwards. TDS provisions contained in section 194S meant for tax deduction at source in respect of purchase of VDAs shall apply w.e.f. 01.07.2022.

9.1 Definition

Section 2(47A) says that virtual digital asset means –

(a) any information or code or number or token (not being Indian currency or foreign currency), generated through cryptographic means or otherwise, by whatever name called, providing a digital representation of value exchanged with or without consideration, with the promise or representation of having inherent value, or functions as a store of value or a unit of account. It includes use in any financial transaction or investment, but not limited to investment scheme and which can be transferred, stored or traded electronically.
(b) a non-fungible token or any other token of similar nature, by whatever name called.
(c) any other digital asset as the Central Government may by notification in the Official Gazette specify.

The proviso to section 2(47A) says that the Central Government may exclude any digital asset from the definition of virtual digital asset subject to such conditions as may be prescribed therein.

The Central Government has notified that the following assets **shall be excluded from the definition of virtual digital asset** (Notification No.S.O.2958 dated 30.06.2022)

(i) Gift card or vouchers, being a record that may be used to obtain goods or services or a discount on goods or services;

(ii) Mileage points, reward points or loyalty card, being a record given without direct monetary consideration under an award, reward, benefit, loyalty, incentive, rebate or promotional program that may be used or redeemed only to obtain goods or services or a discount on goods or services;

(iii) Subscription to websites or platforms or application.

9.2 Taxation of virtual digital asset

The Finance Act, 2022 after defining the term 'virtual digital asset' in section 2(47A) provides for taxation of income from transfer of any virtual digital asset by inserting section 115BBH.

It says that notwithstanding anything contained in any other provision of the Act the Income-tax payable shall be at the rate of 30% for the income arising from transfer of any virtual digital asset. Even the unexhausted basic exemption limit will not go to reduce the taxable income and resultant tax from transfer of VDAs.

- No deduction in respect of any expenditure other than the cost of acquisition is allowable in computing the income from transfer of VDAs.
- No loss shall be set off in computing the income from transfer of VDAs.
- Similarly, any loss from transfer of VDAs shall not be allowed set off against any income computed under any provision of the Act.
- Also, any loss from transfer VDAs shall not be allowed to be carried forward to succeeding assessment year.

The word 'transfer' defined in section 2(47) shall apply in respect of any virtual digital asset whether held as capital asset or otherwise. Thus, the VDAs are treated as both capital asset or stock in trade and its taxation would be attracted when it is transferred. The term 'transfer' encompasses much wider coverage than mere 'sale'.

9.3 Tax deduction at source:

The Finance Act, 2022 has inserted section 194S w.e.f. 01.07.2022 for the purpose of deduction of tax at source in respect of VDAs.

Any person responsible for paying to **any resident** any sum by way of consideration for the transfer of VDA shall at the time of credit of such sum to the account of the resident (payee) or at the time of payment, whichever is earlier, shall deduct income tax at source thereon @1% of such sum.

The proviso to section 194S(1) says that where the consideration is wholly in kind or any exchange of another VDA where there is no part in cash or the consideration is partly in cash and partly in kind and the part in cash is not adequate to meet the liability of deduction of tax at source in respect of the whole of such transfer, **the person responsible for paying such consideration is required to ensure that the tax required to be deducted at source has been paid. Only after ensuring such payment of tax (by the payee) the payer shall release the consideration to the payee.**

The provisions of section 203A (TAN number) and section 206AB (meant for higher rate of TDS for non-filers) shall not apply where tax is deductible under section

194S. Thus, the payer need not deduct higher rate of tax at source (even if the payee is a non-filer of ITR) or obtain TAN for the purpose of complying with the provision. The payer of consideration for transfer of VDA need not deduct tax at source where-

(i) the consideration does not exceed Rs.50,000 during the financial year; or
(ii) the consideration is payable by a person other than a **specified person** does not exceed Rs.10,000 during the financial year.

The term 'specified person' is stated in the Explanation to section 194S which says as under:

(a) In the case of individual or HUF whose total sales or gross receipts or turnover does not exceed Rs.100 lakhs or Rs.50 lakhs in the case of profession during the financial year immediately preceding the financial year in which such virtual digital asset was transferred.

(b) In the case of individual or HUF not having any income under the head 'Profits and gains of business or profession'.

Thus, in the case of transferor being a specified person the threshold limit for tax deduction at source is Rs.50,000. Where the transferor is **not a specified person then the lower threshold limit for tax deduction at source being Rs.10,000 would apply.**

Example: Mr.X not having income from business or profession need not deduct tax at source where the consideration for purchase of VDA does not exceed Rs.50,000. If has income from business/ profession and the turnover in the immediately preceding financial year does not exceed Rs.100 lakhs/ Rs.50 lakhs respectively, then also the higher threshold limit of Rs.50,000 would apply.

Where the transaction is covered by section 194-O (meant for deduction of tax at source by e-commerce operator to e-commerce participant) the transaction is liable for tax compliance by way of deduction under 194S. In such of those cases, the provisions of section 194-O shall not apply and section 194S would operate.

Where any sum referred to section 194S(1) i.e consideration payable for transfer of VDAs is credited to any account whether called suspense account or by any other name, in the books of account of the payer, such credit shall be deemed to be the credit of such sum to the account of the payee and the provisions of section 194S shall apply. This is similar to all other TDS provisions which cover credit to 'suspense account' or any other account by whatever name called in order to attract deduction of tax at source.

Any difficult arising in giving effect to the provisions of section 194S the CBDT may with the prior approval of the Central Government, issue guidelines for the purpose of removing such difficulty. Every guideline issued by the CBDT shall be laid before

each House Parliament and shall be binding on the Income-tax authorities and on the person responsible for paying the consideration on transfer of such VDAs.

The CBDT has given guidelines by way of two circulars viz. Circular No.13 and Circular No.14 for the purpose of removing the difficulties the relevant extracts are given below:

9.4 The CBDT in Circular No.13 of 2022 dated 22.06.2022*:*

It contains guidelines in relation to ***TDS under section 194S for transactions in VDAs where the transactions take place on or through an exchange (except answer to Q6 meant for transfer between peers).***

***Guidelines*:**

Question 1. Who is required to deduct tax when the transfer of VDA is taking place on or through an Exchange and payment is made by the purchaser to the Exchange (directly or through broker) and then from the Exchange it goes to seller directly or through the broker?

Answer: According to section 194S of the Act, any person who is responsible for paying to any resident any sum by way of consideration for transfer of VDA is required to deduct tax. Thus, in a peer to peer (i.e. direct buyer to seller) transaction, the buyer (i.e. person paying the consideration) is required to deduct tax under section 194S of the Act.

However, if the transaction is taking place on or through an Exchange there is a possibility of tax deduction requirement under section 194S of the Act at multiple stages. Hence, in order to remove difficulties for *transactions taking place on or through an Exchange,* the following clarifications are issued: —

(i) *In a case where the transfer of VDA takes place on or through an Exchange and the VDA being transferred is owned by a person other than the Exchange:* In this case buyer would be crediting or making payment to the Exchange (directly or through a broker). The Exchange then would be required to credit or make payment to the owner of VDA being transferred, either directly or through a broker. Since there are multiple players, to remove difficulty it is clarified that:

1. Tax may be deducted under section 194S of the Act only by the Exchange which is crediting or making payment to the seller (owner of the VDA being transferred). In a case where broker owns the VDA, it is the broker who is the seller. Hence, the amount of consideration being credited or paid to the broker by the Exchange is also subject to tax deduction under section 194S of the Act.

2. In a case where the credit/payment between Exchange and the seller is through a broker (and the broker is not seller), the responsibility to deduct tax under section 194S of the Act shall be on both the Exchange and the broker. However, if there is a written agreement between the Exchange and the broker, that broker shall be deducting tax on such credit/payment, then broker alone may deduct the tax under section 194S of the Act. The Exchange would be required to furnish a quarterly statement (in Form no 26QF) for all such transactions of the quarter on or before the due date prescribed in the Income-tax Rules, 1962.

(ii) *In a case where the transfer of VDA takes place on or through an Exchange and the*

VDA being transferred is owned by such Exchange: In this case there are no multiple players. The buyer is required to deduct tax under section 194S of the Act. However, there may be a practical issue as the buyer may not know whether the VDA being transferred is owned by the Exchange or not. Hence, there may be genuine doubt in the mind of buyer with regard to its responsibility to deduct tax under section 194S of the Act. This difficulty would also be there if the buyer is buying VDA from an Exchange through a broker.

To remove this difficulty, it is clarified that while the primary responsibility to deduct tax under section 194S of the Act, in this case, remains with the buyer or his broker, as an alternative the Exchange may enter into a written agreement with the buyer or his broker that in regard to all such transactions the Exchange would be paying the tax on or before the due date for that quarter. The Exchange would be required to furnish a quarterly statement (in Form No. 26QF) for all such transactions of the quarter on or before the due date prescribed in the Income-tax Rules, 1962. The Exchange would also be required to furnish its income tax return and all these transactions must be included in such return. If these conditions are complied with, the buyer or his broker would not be held as assessee in default under section 201 of the Act for these transactions.

For the purpose of this circular, —

(i) The term "Exchange" means any person that operates an application or platform for transferring of VDAs, which matches buy and sell trades and executes the same on its application or platform.

(ii) The term "Broker" means any person that operates an application or platform for transferring of VDAs and holds brokerage account/accounts with an Exchange for execution of such trades.

Question 2: Question no. 1 was with respect to transactions where the consideration for transfer of VDA is not in kind. How will this operate in a situation where it is in kind or in exchange of another VDA?

Answer: According to proviso to sub-section (1) of section 194S of the Act, there could be situations where the consideration is in kind or in exchange of another VDA or partly in kind and cash is not sufficient to meet the TDS liability. In these situations, the person responsible for paying such consideration is required to ensure that tax required to be deducted has been paid in respect of such consideration, before releasing the consideration.

In the above situation, the buyer will release the consideration in kind after seller provides proof of payment of such tax (e.g. Challan details etc.). In a situation where VDA "A" is being exchanged with another VDA "B", both the persons are buyer as well as seller. One is buyer for "A" and seller for "B" and another is buyer for "B" and seller for "A". Thus, both need to pay tax with respect to transfer of VDA and show the evidence to other so that VDAs can then be exchanged. This would then be required to be reported in TDS statement along with challan number. This year Form No. 26Q has included provisions for reporting such transactions. **For specified persons, Form No. 26QE has been introduced**.

However, if the transaction is through an Exchange there is practical issue in implementing this provision. In order to address this practical issue and to remove difficulty, it is clarified that in such a situation, as an alternative, tax may be deducted by the Exchange. Such an

alternative mechanism can be exercised by the Exchange based on written contractual agreement with the buyers/sellers.

If such an alternative mechanism is exercised,

(i) the Exchange would be required to deduct tax for both legs of the transactions and pay to the Government. In the Form 26Q it will, for the reasons explained before, need to report it as tax deducted on both legs of the transaction.

(ii) the buyer and seller would not be independently required to follow the procedure prescribed in proviso to sub-section (1) of section 194S of the Act.

When the Exchange opts for deduction of tax under section 194S of the Act on such transactions, there is also a possibility that the tax amount deducted is also in kind and needs to be converted into cash before it can be deposited with the Government. In this regard, the following mechanism shall be adopted by the Exchange:

(i) At the time of transaction, the Exchange will deduct TDS in the pair being traded. For example, in case of trade for Monero to Deso, 1% of Monero and 1% Deso will be deducted as tax under section 194S of the Act by the Exchange and balance shall be transferred to the customer. The trail of transactions evidencing deduction of 1% of consideration for every VDA to VDA trade shall be maintained by the Exchange.

(ii) The Exchanges shall immediately execute a market order for converting this tax deducted in kind (1% Monero / 1% Deso in the above example) to one of the primary VDAs (BT, ETH, USDT, USDC) which can be easily converted into INR. This step will ensure that the tax deducted under section 194S of the Act in the form of non-primary VDAs like Deso/Monero is converted to an equivalent of primary VDAs which have a ready INR market. Time stamps of timing of orders to be maintained to ensure such conversion of VDAs withheld to be done on immediate basis by the Exchange. If the taxes are withheld in primary VDAs, this step would be ignored.

(iii) All the tax deducted under section 194S of the Act in the form of primary VDAs (or converted into primary VDA under step (*ii*)) will be accumulated for the day. Time limit will be from 00:00 hours to 23:59 hours. VDA accumulation by the Exchange shall be verifiable from the trail of orders for VDA to VDA trades executed during the day.

(iv) The accumulated balance of primary VDAs at 00.00 hours will be converted into INR based on the market rate existing at that time. In order to bring in consistency and to avoid discretion, the Exchanges are required to place market order at 00:00 hours for the tax withheld (or converted under step (*ii*)) in form of primary VDAs for conversion into INR. These sell market orders shall be executed based on the open buy orders in the market. Price and quantity data for every matched trade shall be maintained by the Exchange and shall be available for verification. It shall be verifiable from the system coding that the conversion into INR happened at the first available buy order based on the prevailing buy order book of the respective Exchange at the time of conversion. As a practice, the respective Exchange liquidating the VDA shall be prohibited to be a buyer for these VDAs.

(v) Customer will be issued a contract note over email which will include the amount of tax withheld in kind under section 194S and the amount of INR realized from such

tax withheld.

(vi) The tax withheld in kind under section 194S of the Act and converted into INR by following the above procedure shall be deposited in the Government Account as per the time line and process given in the Income-tax Rules 1962.

It is clarified that there would not be any further TDS for converting the tax withheld in kind in the form of VDA into INR or from one VDA to another VDA and then into INR.

Question 3: Whether the provision of section 194Q of the Act is also applicable on transfer of VDA?

Answer Without going into the merit whether VDA is goods or not, it is clarified that once tax is deducted under section 194S of the Act, tax would not be required to be deducted under section 194Q of the Act.

Question 4: Whether the consideration for transfer of VDA shall be on Gross basis after including GST/commission or it shall be on "net basis" after exclusion of these items?

Answer: In order to remove difficulty, it is clarified that the tax required to be withheld under section 194S of the Act **shall be on the "net" consideration after excluding GST/charges levied by the deductor for rendering service**.

Question 5: In transactions where payment is being carried out through payment gateways, there may be tax deduction twice. To illustrate that a person 'XYZ' is required to make payment to the seller for transfer of VDA. He makes payment of one lakh rupees through digital platform of "ABC". On these facts liability to deduct tax under section 194S of the Act may fall on both "XYZ" and “ABC”. Is tax required to be deducted by both?

Answer: In order to remove this difficulty, it is provided that in the above example, **the payment gateway will not be required to deduct tax under section 194S of the Act on a transaction, if the tax has been deducted by the person ('XYZ') required to make deduction** under section 194S of the Act. Hence, in the above example, if "XYZ" has deducted tax under section 194S of the Act on one lakh rupees, "ABC" will not be required to deduct tax under section 194S of the Act on the same transaction. To facilitate proper implementation, "ABC" may take an undertaking from "XYZ" regarding deduction of tax.

Question 6: Section 194S shall come into effect from the 1st July, 2022. The liability to deduct tax under section 194S of the Act applies only when the value or aggregate value of the consideration for transfer of VDA exceeds fifty thousand rupees during the financial year in case of consideration being paid by specified person and ten thousand rupees in other cases. It is not clear how this limit of fifty thousand (or ten thousand) is to be computed?

Answer: It is clarified that, —

(i) Since the threshold of fifty thousand rupees (or ten thousand rupees) is with respect to the financial year, calculation of consideration for transfer of VDA triggering deduction under section 194S of the Act shall be counted from 1st April, 2022. Hence, if the value or aggregate value of the consideration for transfer of VDA payable by a person exceeds fifty thousand rupees (or ten thousand rupees) during the financial year 2022-23 (including the period up to 30th June, 2022), the provision of section 194S of the Act shall apply on any sum, representing consideration for transfer of VDA, credited or paid on or after 1st July, 2022.

(ii) Since the provision of section 194S of the Act applies at the time of credit or payment (whichever is earlier) of any sum, representing consideration for transfer of VDA, such sum which has been credited or paid before 1st July, 2022 would not be subjected to tax deduction under section 194S of the Act.

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9.5 The CBDT in Circular No.14 of 2022 dated 28.06.2022*:*

It has given guidelines in relation to TDS under section 194S for transactions in VDAs where the transactions **other than those taking place on or through an exchange**. *Edited extracts are given below:*

In exercise of the power conferred by sub-section (6) of section 194S of the Act, CBDT has issued guidelines in the form of Circular No. 13 of 2022, dated 22-6-2022 for transactions conducted on or through an Exchange. For all other transactions, only the clarification provided in answer to question no 6 of that circular is applicable. The term "Exchange" has been defined to mean any person that operates an application or platform for transferring of VDAs, which matches buy and sell trades and executes the same on its application or platform. Same definition applies to this circular.

For all other transactions (not covered by circular no. 13/2022), this circular is being issued under section 119 for proper administration of the Act.

1. Liability to deduct tax at source under section 194S of the Act when the consideration is other than in kind

According to section 194S of the Act, any person who is responsible for paying to any resident any sum by way of consideration for transfer of VDA is required to deduct tax. Thus, in a peer to peer (*i.e.* buyer to seller without going through an Exchange) transaction, the buyer (*i.e.* person paying the consideration) is required to deduct tax under section 194S of the Act. The tax so deducted is required to be deposited with Government in accordance with the time and procedure prescribed in the Act, read with the relevant provisions of the Income-tax Rules, 1962.

After deduction, the deductor is required to furnish a quarterly statement (in Form No. 26Q) for all such transactions of the quarter on or before the due date prescribed in the Income-tax Rules, 1962. **For specified person Form 26QE has been introduced**.

It may be clarified that the **TDS shall be on consideration for transfer of VDA less GST**.

2. Liability to deduct tax at source under section 194S of the Act when the consideration is in kind or in exchange of VDA

According to the proviso to sub-section (1) of section 194S of the Act, there could be a situation where the consideration is in kind or in exchange of another VDA or partly in kind and cash is not sufficient to meet the TDS liability. In this situation, the person responsible for paying such consideration is required to ensure that tax required to be deducted has been paid in respect of such consideration, before releasing the consideration.

Thus, the buyer will release the consideration in kind after seller provides proof of payment of such tax (e.g. challan details etc.). In a situation where VDA "A" is being exchanged with another VDA "B", both the persons are buyer as well as seller. One is buyer for "A" and seller for "B" and another is buyer for "B" and seller for "A". Thus,

both need to pay tax with respect to transfer of VDA and show the evidence to other so that VDAs can then be exchanged. This would then be required to be reported in TDS statement alongwith challan number by both of them. This year Form 26Q has included provisions for reporting such transactions. For specified persons, Form 26QE has been introduced.

3. Interplay between provision of section 194S and section 194Q

Without going into the merit whether VDA is goods or not, **it is clarified that once tax is deducted under section 194S of the Act, tax would not be required to be deducted under section 194Q of the Act.**

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Chapter 10

Faceless assessment [Section 144B]

The Finance Act, 2022 has substituted sub-sections (1) to (8) and has omitted sub- sections (9) and (10) of section 144B. All these provisions deal with faceless assessment. Originally, the concept of faceless assessment was inserted by Taxation and Other laws (Relaxation and Amendment of Certain Provisions) Act, 2020 w.e.f. 01.04.2021 and the provisions stated above have been substituted and omitted to provide further clarity in law.

10.1 Preliminary requirements and collection of information / evidence:

Section 144B(1) starts with non obstante clause by using the expression "notwithstanding anything to the contrary contained in any other provisions of the Act" and covers that the assessment, reassessment or re-computation under section 143(3) or section 144 or section 147 shall be made in a faceless manner as per the procedure prescribed therein.

The National Faceless Assessment Centre (NFAC) shall assign the case selected for the purposes of faceless assessment as per this provision to a specific assessment unit through an automated allocation system (section 144B(1)(i)).

The NFAC shall intimate the assessee that the assessment in his case shall be completed in accordance with the procedure laid down under this section (section 144B(1)(ii)).

A notice shall be served on the assessee through NFAC under section 143(2) or section 142(1) and the assessee may file his response within the date specified therein. The NFAC shall forward the said response received from the assessee to the assessment unit (section 144B(1)(iii)).

10.2 Assessment unit:

Where a case is assigned to the assessment unit, such assessment unit may make a request through NFAC for the following:

(i) Obtain such further information, documents, or evidence from the assessee or any other person, as it may specify;
(ii) Conduct enquiry or verification through verification unit;
(iii) Seek technical assistance in respect of determination of ALP, valuation of property, withdrawal of registration, approval, exemption or any other technical matter by referring to the technical unit (section 144B(1)(iv));

Where a request has been initiated by the assessment unit, the NFAC shall serve appropriate notice or requisition on the assessee or any other person for obtaining the information, document or evidence, as the case may be. The assessee shall file his response to such notice within the time specified therein or the extended time on the basis of an application filed in this regard to NFAC. Upon

receipt of reply, document, evidence as submitted by the assessee, the NFAC shall forward the same to assessment unit (section 144B(1)(v)).

10.3 Availing service of verification unit / technical unit:

Where a request for conducting enquiry or verification by the verification unit is made by the assessment unit, the NFAC shall assign the same to the verification unit through an automated allocation system. Similarly, where the assessment unit has made reference for the technical unit, the request so made by the assessment unit shall be assigned by NFAC to a technical unit through an automated allocation system (section 144B(1)(vi)).

The NFAC shall send the report received from the verification unit or technical unit as the case may be, based on the request referred above to the concerned assessment unit (section 144B(1)(vii)).

10.4 Proposal determining income or loss

Where the assessee fails to comply with the notice issued under section 143(2) or section 142(1), the NFAC shall intimate such failure to the assessment unit (section 144B(1)(viii)).

Thereupon, the assessment unit shall serve a notice under section 144 through the NFAC to the assessee giving an opportunity to show cause on a date and time specified in such notice as to why the assessment in his case should not be completed to the best of its judgment (section 144B(1)(ix)).

The assessee shall within the time specified in the notice referred above shall file his response to NFAC. The assessee may also seek time by filing an application to submit his response. The response so submitted within the time or the extended time to NFAC will be forwarded to the assessment unit (section 144B(1)(x)).

Where the assessee fails to file response within the time or the extended time as per clause (x) of section 144B(1) then the NFAC shall intimate the assessment unit the fact of failure to respond by the taxpayer (section 144B(1)(xi)).

The assessment unit after getting intimation from NFAC that there is failure of response within the time or the extended time by the assessee shall after taking into account all the relevant materials available on record prepare in writing an income or loss determination proposal to NFAC **where no variation prejudicial to the assessee is proposed (section 144B(1)(xii)(a))**.

Where there is variation in the income, the assessment unit shall issue a show cause notice stating the variations prejudicial to the interest of assessee proposed to be made and provide an opportunity as to why the proposed variation should not be made. The show cause notice in this regard shall be served through NFAC ((section 144B(1)(xii)(b)).

The assessee when the proposed order making variation prejudicial to his interest shall file his reply to the show cause notice referred above in section 144B(1)(xii)(b) and such reply shall be furnished on a date and time specified in the notice or within such extended time on the basis of application made in this regard to NFAC. The reply of the assessee so received shall be forwarded by NFAC to the assessment unit (section 144B(1)(xiii)).

Where the assessee fails to file his response to the show cause notice which contains variations prejudicial to his interest, within the time or the extended time, if any, the NFAC shall intimate such failure to the assessment unit (section 144B(1)(xiv)).

Where the assessee has furnished all the information and explanation as specified in show cause notice referred to in section 144B(1)(xii)(b) by means of reply as referred to in section 144B(1)(xiii) or where the assessee has not filed his reply and the NFAC has intimated the same as referred to in section 144B(1)(xiv), the assessment unit shall after considering the response by way of reply or the materials available on record (in the case of non-reply), shall prepare an income or loss determination proposal and send the same to NFAC (section 144B(1)(xv)).

10.5 Process after proposal determining income or loss:

Both when (i) there is no variation in the income or loss determination vis a vis the income admitted by the assessee; and (ii) there is variation in the income or loss whether or not the assessee has given reply to the show cause notice of the assessment unit, the NFAC upon receipt of the income or loss determination proposal of the assessment unit, may on the basis of guidelines issued by the CBDT (i) convey to the assessment unit to **prepare a draft order** in accordance with the income or loss determination proposal; **or** (ii) assign the income or loss determination proposal to a review unit through an automated allocation system, for conducting a review of such proposal (section 144B(1)(xvi)).

Where the case is assigned: Where the case is assigned to review unit, it shall conduct review of the income or loss determination proposal assigned to it by the NFAC and whereupon it shall prepare a review report and send to the same to the NFAC (section 144B(1)(xvii)).

The NFAC upon receiving review report from the review unit shall forward the same to the assessment unit which has proposed the income or loss determination proposal (section 144B(1)(xviii)).

The assessment unit after considering such review report shall either accept or reject some or all of the modifications proposed therein and after recording reasons in the case of rejection of such modifications, prepare a draft order (section 144B(1)(xix)).

As per section 144B(1)(xx) the assessment unit shall send the draft order prepared to NFAC where the NFAC has conveyed the assessment unit to do the same previously either under section 144B(1)(xvi)(a) or section 144B(1)(xix).

In cases not covered by section 144C the NFAC shall convey to the assessment unit to pass the final assessment order in accordance with such draft order. Accordingly, the assessment unit would pass the final assessment order and send it to NFAC and also initiate penalty proceedings, if any (section 144B(1)(xxii)).

Upon receiving the final assessment order, the NFAC shall serve a copy of such order and notice for initiating penalty proceedings, if any, on the assessee along with demand notice specifying the sum payable or the amount refundable on the basis of such assessment (section 144B(1)(xxiii)).

10.6 In the case of eligible assessee covered under section 144C:

If the assessee is an eligible assessee under section 144C and where the proposal to make any variation to the returned income is prejudicial to the interest of the assessee (refer section 144B(1)(xii)(b)) the NFAC shall serve the draft order on the assessee (section 144B(1)(xxi)).

Where the assessee is an eligible assessee under section 144C when a draft assessment order is served on the assessee, the assessee may (i) accept the variations proposed in such draft order to NFAC; or (ii) file his objections to such variations with Dispute Resolution Panel (DRP) and with NFAC within 30 days of the receipt of draft order (section 144B(1)(xxiv)).

The NFAC upon receipt of acceptance from the eligible assessee or where there is no objection within the specified time intimate the assessment unit to complete the assessment on the basis of draft order (section 144B(1)(xxv)).

The assessment unit shall upon receipt of the said intimation from NFAC shall pass the assessment order in accordance with the draft order within one month from the end of the month in which the acceptance is received or the period for filing the objection expires (section 144B(1)(xxvi)).

Where the eligible assessee files objections with DRP, the NFAC shall send such intimation along with copy of the objection so filed to the assessment unit (section 144B(1)(xxvii)).

The NFAC upon receipt of directions issued by DRP shall forward such directions to the assessment unit (section 144B(1)(xxviii)). It may be noted that the DRP must issue directions before the expiry of 9 months from the end of the month in which the draft order was forwarded to the eligible assessee (section 144C(11)).

The assessment unit shall pass the order in conformity with the directions issued by DRP within one month from the end of the month in which such direction is received. Also, the assessment unit shall initiate penalty proceedings, if any, and send a copy of the assessment order to the NFAC (section 144B(1)(xxix).

The NFAC upon receipt of the assessment order passed (when there is acceptance or no objection filed by the assessee within the prescribed time) or when passed as per

the directions of DRP shall serve a copy of such order and notice for initiating penalty proceedings, if any, on the assessee, along with the demand notice specifying the sum payable by or the amount of refund due to the assessee on the basis of such assessment (section 144B(1)(xxx)).

10.7 Post-assessment of income

The NFAC shall after completion of assessment transfer all the electronic records of the case to the Assessing Officer having jurisdiction over the said case for such action as may be required under the provisions of the Act (section 144B(1)(xxxi).

10.8 Complexity of accounts and invoking section 142(2A):

As per section 144B(1)(xxxii) if at the any stage of the proceedings before it, the assessment unit having regard to the nature and complexity of the accounts, volume of the accounts, doubts about the correctness of the accounts, multiplicity of transactions in the accounts or specialized nature of business activity of the assessee and in the interests of the revenue, may upon recording its reasons in writing, refer the case to NFAC stating that the provisions of section 142(2A) may be invoked and thereafter such case shall be dealt with in accordance with the provisions of section 144B(7).

The Principal Chief Commissioner or the Principal Director General, as the case may be, in-charge of NFAC shall, in accordance with the procedure laid down by the Board in this regard, if he considers appropriate that the provisions of section 142(2A) are to be invoked he may –

(i) forward the reference received from an assessment unit to the PCCIT or CCIT or PCIT or CIT having jurisdiction over such case and inform the assessment unit accordingly;
(ii) transfer the case to the Assessing Officer having jurisdiction over such case.

Once a reference has been received by PCCIT or CCIT or PCIT or CIT, he shall direct the Assessing Officer having jurisdiction over the case to invoke section 142(2A).

Where a reference has not been forwarded to the PCCIT or CCIT or PCIT or CIT having jurisdiction over the case, the assessment unit shall proceed to complete the assessment in accordance with the procedure laid down in this section i.e. 144B.

The PCCIT or PDGIT, as the case may be, in-charge of NFAC may, at any stage of the assessment transfer the case to the Assessing Officer having jurisdiction over such case with the prior approval of the Board.

10.9 Formation of various Centres and units for the purposes of faceless assessment:

Section 144B(3) says that the CBDT for the purposes of faceless assessment may set up the following Centres and Units and specify their functions and jurisdictions:

(a) NFAC for the purpose of facilitating the conduct of faceless assessment

proceedings in a centralised manner;

(b) Form assessment units, as it may deem necessary to conduct the faceless assessment and perform the function of making assessment which includes identification of points or issues material for the determination of any liability (including refund) under the Act. For this purpose, it can seek information or clarification on points or issues so identified, analysis of the material furnished by the assessee or any other person and such other functions as may be required for the purpose of making faceless assessment. The term "Assessment unit" shall refer to an Assessing Officer having powers so assigned by the Board.

(c) Form verification units, as it may deem necessary to facilitate the conduct of faceless assessment, to perform the function of verification, which includes enquiry, cross verification, examination of books of account, examination of witnesses and recording of statements and such other functions as may be required for the purposes of verification. The term "verification unit" shall refer to an Assessing Officer having powers so assigned by the Board.

(d) Form technical units, as it may deem necessary to facilitate the conduct of faceless assessment, to perform the function of providing technical assistance which includes any assistance or advice on legal, accounting, forensic, information technology, valuation, transfer pricing, data analytics, management or any other technical matter under the Act or an agreement entered into under section 90 or 90A, which may be required in a particular case or a class of cases. The term 'technical unit' shall refer to an Assessing Officer having powers so assigned by the Board.

(e) Form review units, as it may deem necessary to facilitate the conduct of faceless assessment, to perform the function of review of the income determination proposal assigned under section 144B(1)(xvi)(b), which includes checking whether the relevant and material evidence has been brought on record, relevant points of fact and law have been incorporated, the issues requiring addition or disallowance have been incorporated and such other functions as may be required for the purposes of review. The term 'review unit' shall refer to an Assessing Officer having powers so assigned by the Board.

Chapter 11

Updated return

[Section 139(8A)]

The Finance Act, 2022 brought one of the far-reaching changes in filing of ITRs by inserting sub-section (8A) to section 139. It provides some leeway for the taxpayers to file ITR for the preceding two previous years subject to certain attendant conditions. This in a way a sort of 'give and take' measure by asking the assessee to pay extra amount by way of tax and providing a concession for filing the return of income beyond the time specified in section 139(4).

11.1 Updated return - section 139(8A):

Any person who has filed a return of income under section 139(1) or section 139(4) or section 139(5) or who has not filed his return of income for an assessment year, may file an updated return. This could be filed in respect of income of the assessee or the income in respect of which he is assessable under the Act. It has to be furnished in the prescribed form (ITR-U) verified in such manner and setting forth such particulars as may be prescribed. The time limit for filing the updated return in ITR U is 24 months from the end of the relevant assessment year. The provision was introduced by the Finance Act, 2022 w.e.f. 01.04.2022. Thus, updated return can be filed up to 31st March,2023 for the assessment year 2020-21 and for the assessment year 2021-22 it can be filed up to 31st March,2024.

The following cases are not eligible for filing an updated return:

(i) An (updated) return of loss;
(ii) An updated return which has the effect of decrease in the total tax liability determined on the basis of return furnished under sections 139(1) / 139 (4) / 139 (5);
(iii) An updated return which results in refund or increases the refund due on the basis of the return furnished previously under sections 139(1) / 139 (4) / 139(5).

In other words, an updated return cannot lead to decrease in income-tax liability of the assessee. Also, an updated return cannot be to seek refund of tax or increase in refund of tax with reference to the return filed previously under sections 139(1)/139(4) or section 139(5). If the assessee has not furnished a return earlier, then in such case the filing of ITR **for the purpose of refund could not be achieved by filing an updated return.**

The following persons are not eligible to file updated return:

(i) In the case of a person in respect of whom a search has been initiated under section 132 or books of account or other documents or any assets are requisitioned under section 132A;

(ii) In the case of a person in respect of whom a survey has been conducted under section 133A. However, **survey under section 133A(2A) meant for survey to verify TDS / TCS is not hit by the disqualification**. Therefore, if a survey under section 133A(2A) was conducted then such assessee can opt for updated return and the survey so conducted under section 133A(2A) is not a disqualification;

(iii) In the case of a person to whom a notice has been issued to the effect that any money, bullion or jewellery or other valuable article or thing, seized or requisitioned under section 132 or section 132A (in the case of any other person) when belongs to such person, the person to whom it belongs is not eligible to file updated return;

(iv) In a case where a notice has been issued to the effect that any books of account or documents, seized or requisitioned under section 132 or section 132A in the case of any other person, pertain or pertains to, or any other information contained therein, relate to, such person.

However, it is to be noted that the assessee shall not be eligible for filing updated return (i) in respect of the assessment year relevant to the previous year in which the above said search is initiated or survey is conducted or requisition is made; and (ii) also any other assessment year preceding such assessment year of search or survey or requisition as the case may be**.** For example, if a survey is conducted under section 133A in August, 2022 then the taxpayer cannot file updated return for the assessment year 2023-24 and also for any assessment year preceding that assessment year.

Besides the above two disqualifications viz. the type of updated return and disqualification of a person, the following persons are not eligible to file updated return for the relevant assessment year but could file the same for the other assessment years other than those listed below:

(i) An updated return has been furnished by the assessee for the relevant assessment year; This means a repeat of updated return is not possible.

(ii) Where any proceeding for assessment or reassessment or re-computation or revision is pending or has been completed for the relevant assessment year.

Thus, an updated return cannot be filed where the assessment is pending or was made for the said assessment year. Similarly, where the reassessment or re-computation or revision is pending or completed, such of those cases is not eligible to file updated return for those years.

(iii) Where the Assessing Officer has information in respect of such person for the relevant assessment year in his possession under the Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976 or the Prohibition of Benami Property Transactions Act, 1988 or the Prevention of Money-Laundering Act, 2002 or the Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015 and the same has been communicated to him, prior to the date of furnishing the updated return. *It can be interpreted that if the proceedings are taken but the assessee has not been communicated in such of those cases it is not a disqualification for filing updated return;*

(iv) Where the information for the relevant assessment year has been received under an agreement referred to in section 90 or section 90A in respect of such person and the same has been communicated to him, prior to the date of furnishing of updated return. *Thus, communication of information is a pre-requisite for attracting disqualification of the benefit available under section 139(8A);*

(v) Where any prosecution proceedings under Chapter XXII have been initiated for the relevant assessment year in respect of such person, before furnishing of updated return.

(vi) Any other case being a person who belongs to such class of persons as has been notified by the CBDT.

11.2 Where ITR was filed with loss earlier:

If any person has sustained a loss in any previous year and has furnished a return of loss in the prescribed form within the time allowed under section 139(5) he shall be allowed to furnish an updated return provided such return is a return of income and not an (updated) return of loss. Therefore, **where a person who has furnished loss return originally can also file updated return but the condition is, it should disclose positive income and not loss.**

Where the loss or any part thereof carried forward under Chapter VI or unabsorbed depreciation under section 32(2) is carried forward or tax credit carried forward under section 115JAA or under section 115JD is reduced as a result of furnishing updated return then such person must furnish updated return for each such subsequent previous year.

For example, if a taxpayer files an updated return for assessment year 2020-21 in August, 2022 and it leads to reduction in carry forward of loss then such person must necessarily file updated return for the assessment year 2021-22 also. However, if in the assessment year 2021-22 also the loss is carried forward besides brought forward loss (although with reduction for the assessment year 2020-21 as a result of updated return) whether would be hit by disqualification specified in first proviso to section 139(8A) requires clarification.

11.3 Tax on updated return - section 140B:

Section 140B (1) inserted by the Finance Act,2022 deals with computation of tax payable where the assessee has not filed a return under section 139(1) or under section 139(4) or under section 139(5). The tax payable on the income admitted in the updated return shall be determined after taking in to account the following:

(a) The amount of tax, if any, already paid as advance tax;
(b) Any tax deducted or collected at source;
(c) Any relief of tax claimed under section 89;
(d) Any relief of tax or deduction of tax claimed under section 90 or section 91 on account of tax paid in a country outside India;
(e) Any relief of tax claimed under section 90A on account of tax paid in any specified territory outside India referred to in that section; and
(f) Any tax credit claimed to be set off in accordance with the provisions of section 115JAA or section 115JD.

The assessee is liable to pay such tax together with interest and fee payable under any of the provisions of the Act for any delay in furnishing the return (section 234A interest), or any default or delay in payment of advance tax (section 234B interest and section 234C interest), along with payment of additional tax computed in accordance with section 140B(3), before furnishing the ITR. The return of income shall be accompanied by the payment of such tax, additional income-tax, interest and fee.

11.4 Adjustment of tax and TDS admitted in the ITR filed previously:

Section 140B(2) says where an ITR under section 139(1) or under section 139(4) or section 139(5) was furnished by the assessee and subsequently an updated return is opted to be filed then the tax payable on the basis of return to be furnished under section 139(8A) i.e updated return shall be after taking into account –

(a) The amount of relief or tax referred to in section 140A(1), which has been given credit in the earlier return;
(b) The tax deducted or collected at source in accordance with Chapter XVII-B, on any income which is subject to such deduction or collection and which is taken into account in computing the total income and which has not been included in the earlier return (could be claimed in the updated return);

(c) Any relief of tax or deduction of tax claimed under section 90 or section 91 on account of tax paid in country outside India which has not been included in the earlier return could be claimed in the updated return;

(d) Any relief of tax claimed under section 90A on account of tax paid in any specified territory outside India referred to in that section on such income which has not been included in the earlier return could be claimed in the updated return;

(e) Any tax credit claimed to be set off in accordance with the provisions of section 115JAA or section 115JD, which has not been claimed in the earlier return could be claimed in the updated return; and

Any amount of refund already issued in respect of the earlier return must be added to the tax liability of the assessee.

The amount of tax payable on the income admitted in the updated return in the light of a return filed earlier or return not filed earlier, as the case may be, the assessee shall be liable to pay tax together with interest payable under any provision of the Act for any default or delay in payment of advance tax along with the payment of additional income tax as computed under section 140B(3) after reducing the amount of interest paid in the earlier return.

If the assessee opts to file updated return then the tax liability on the income so admitted in the updated return must be computed first. Thereafter, interest for default or delay in payment of advance tax and delay in furnishing the return must be computed. On the resultant the additional income tax @ 25% or 50% as the case may be is to be added. Finally, the tax or TDS / TCS or any relief eligible has to be deducted for determination of tax payable for filing the updated return.

11.5 Additional income-tax on updated return - section 140B(3):

Section 140B(3) provides additional income-tax on two-tier basis. They are –

(i) 25% of the aggregate of tax and interest payable determined as payable where the ITR is furnished after the expiry of the time available under section 139(4) or section 139(5) and **before completion of a period of 12 months from the end of the relevant assessment year**;

(ii) 50% of the aggregate of tax and interest payable determined as payable where the return is furnished **after the expiry of 12 months from the end of the month relevant assessment year but before completion of a period of 24 months from the end of the relevant assessment year**.

	AY 2020-21	AY 2021-22	AY 2022-23
Due date for filing the return U/s.139(4) /139 (5)	31st July 2020	31st July 2021	31st July 2022
Tax liability on income including interest and fee	Rs.1,00,000	Rs.1,00,000	Rs.1,00,000

Date of filing updated return	20.08.2022	20.08.2022	20.01.2023
Additional income tax payable	50,000 (50%)	25,000 (25%)	25,000 (25%)
Note : If the time limit under section 139(4) /139(5) has expired then the taxpayer is eligible to file updated return whether or not an ITR was filed previously. Thus, for the assessment year 2022-23 after 31st December 2022 an updated return could be filed by paying 25% by way of additional income tax.			

The additional income-tax shall include surcharge and cess, by whatever name called on such tax.

11.6 Interest payable in respect of updated return - section 140B(4):

In respect of updated return the computation of interest under section 234B is governed by section 140B(4), which reads as under:

Notwithstanding anything contained in Explanation 1 to section 234B for the purposes of computing interest payable under section 140B(2), interest payable under section 234B shall be computed on an amount equal to 'assessed tax' less the amount of advance tax.

'Assessed tax' means the tax on total income as declared under section 139(8A) after taking into account –

(a) The amount of relief or tax referred to in section 140A(1), the credit for which has been claimed in the earlier return;
(b) Tax deducted or collected at source under Chapter XVII-B, on any income which is subject to such deduction or collection and which was taken into account in computing the total income, which was not included in the earlier return;
(c) Any relief of tax or deduction of tax claimed under section 90 or section 91 on account of tax paid in a country outside India which has not been included in the earlier return;
(d) Any relief of tax claimed under section 90A on account of tax paid in any specified territory outside India referred to in that section on such income which has not been included in the earlier return;
(e) Any tax credit claimed, to be set off in accordance with the provisions of section 115JAA or section 115JD which has not been claimed in the earlier return; and
(f) As increased by the amount of refund, if any issued in respect of such earlier return.

11.7 Interest payable on updated return – Explanation to section 140B:

For the purpose of computing the period for which interest is payable under sections 234A and 234C, the Explanation to section 140B says as under:

(i) Interest payable under section 234A shall be computed on the amount of tax payable on the total income as declared in the updated return in accordance with the provisions of section 140A(1A). It would be worth noting that section

140A(1A) is meant for computation of interest on the income declared less advance tax, TDS, TCS and self-assessment tax paid. Where the assessee filing the updated return pays tax on the income admitted on the updated return, no interest under section 234A would be attracted in spite of the delay in filing the updated return from the original due date specified in section 139(1).

(ii) Interest payable under section 234C shall be computed after taking into account the total income admitted in updated return. It may be noted that section 140B(4) specifically provides for computation of interest under section 234B and therefore section 234C interest would apply for the short-fall in payment of advance tax reckoned with reference to the tax liability arising from updated return.

(iii) Clause (iii) of the Explanation says that the interest payable for the purposes of section 140B(3) shall be interest chargeable under any provision of the Act on the income admitted as per updated return after reducing any interest paid in the earlier return.

(iv) The proviso to the Explanation says that where the assessee has not filed ITR previously (which is dealt with in section 140B(1)) the interest paid in the earlier return shall be deemed to be `nil' for the purpose of computation explained above.

11.8 Time limit for completion of assessment of updated ITRs – section 153(1A):

Section 153(1A) says that where a return is furnished under section 139(8A) being updated return, an order of assessment under section 143 or section 144 may be made at any time before the expiry of 9 months from the end of the financial year in which the updated return was furnished.