Price ₹ 300/- per copy

No. MCS/149/2022-24 / R.N.I. No. MAHENG/2012/47041 - Total Pages: 216

A Monthly Journal of
The Chamber of Tax Consultants

Estd. 1926
ज्ञानं परमं बलम्

THE CHAMBER'S JOURNAL

Your Monthly Companion on Tax & Allied Subjects

Vol. XII | No. 11 | August 2024

BUDGET 2024 - TAX PROPOSALS

including amendments tabled before Lok Sabha on 6th August 2024

Log on to The Chamber's website for Online payment for programmes

www.ctconline.org

Glimpses of the Workshop on The New Criminal Laws held jointly with Government Law College, Mumbai on 27th July, 2024 at the GLC Auditorium

Hon'ble Mr. Justice S. K. Shinde (Retd.) lighting the lamp

Dignitaries at the Inaugural function

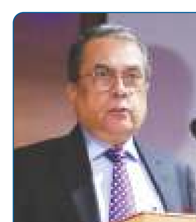
CA Vijay Bhatt, President welcoming the Chief Guest & faculties. Members on Dias L-R Niyati Mankad, Asmita Vaidya, Justice S. K. Shinde (Retd.), Dr. Sujay Kantawala, Adv. Sham Walve

Dr. Asmita Vaidya, principal GLC Mumbai, giving opening remarks

Adv. Niyati Mankad, Chairperson Student Committee. giving details about the workshop

Hon'ble Mr. Justice S. K. Shinde (Retd.) giving talk on Bharatiya Nagarik Suraksha Sanhita, 2023 (BNSS)

Dr. Sujay Kantawala, Advocate giving talk on Bharatiya Nyaya Sanhita, 2023 (BNS)



Mr. Rajiv Patil, Senior Advocate giving talk on Bharatiya Sakshya Adhiniyam 2023 (BSA)

View of the audience

CONTENTS

Vol. XII | No. 11 | August 2024

i

THE CHAMBER OF TAX CONSULTANTS
3, Rewa Chambers, Ground Floor, 31, New Marine Lines, Mumbai-400 020
Phone : 2200 1787/2209 0423/2200 2455
E-Mail: office@ctconline.org • Website : http://www.ctconline.org.

Estd. 1926
ज्ञानं परमं बलम्

THE CHAMBER'S JOURNAL

READER'S SUGGESTIONS AND VIEWS: *We invite the suggestions and views from readers for improvement of The Chamber's Journal. Kindly send your suggestions on office@ctconline.org.*

MEMBERSHIP FEES & JOURNAL SUBSCRIPTION — FOR THE F.Y. 2024-25

Sr. No.	Membership Type		Fees	GST 18%	Total
1.	Life Membership Fees	₹	15,000	2,700	17,700
2.	Ordinary Membership Fees - Yearly (April to March) (Hard Copy)	₹	2,500	450	2,950
3.	Ordinary Membership Fees - (April To March) – with Soft Copy of Journal (E- JOURNAL)	₹	1,500	270	1,770
4.	Admission Fees - Ordinary Membership	₹	750	135	885
5.	Associate Membership - Yearly (April to March)	₹	7,500	1,350	8,850
6.	Admission Fees - Associate Membership	₹	1,000	180	1,180
7.	Student Membership - Including E-Journal (April to March)	₹	500	90	590

CHAMBER'S E-JOURNAL SUBSCRIPTION — FOR THE F.Y. 2024-25

Membership Type	Fees	GST 18%	Total
(HARD COPIES)			
Journal Subscription - Life Members	1,350	0	1,350
Journal Subscription - Non Members	2,500	0	2,500
Journal Subscription - Student Members	1,000	0	1,000
(SOFT COPIES)			
E Journal Subscription - Life Members (Yearly)	700	126	826
E Journal Subscription - Non Members (Yearly)	1,000	180	1,180
E Journal Subscription - Single Journal	200	36	236

ii

From the Editor's Desk

My Brothers and Sisters,

ॐ सह नौ ववतु,
सह नौ भुनत्कु।
सह वीर्यं करवावहै।
तेजस्विना वधीतमस्तु,
मा विद्विषा वहै।।
ॐ शान्तिः शान्तिः शान्तिः।।

15th July is the birthday of two of my Gurus who have shaped me to become what I am today and made me have the courage to assume the role of the Journal's Editor. My heartfelt and most grateful pranaams to Shri Maganlal Thacker and Late Shri V. H. Patil, two dear friends, born on the same day three years apart. Thank you from the bottom of my heart for teaching me whatever I know and may I continue to receive your blessings for ever. Coincidentally, Guru Purnima, this year was just six days from this auspicious date and therefore I felt I should begin this communication with invoking the blessings of these two and all of my other Gurus, especially Sudhir Kapadia, whose birthday this year, was coincidentally on the auspicious day of Guru Purnima.

The importance of a Guru in one's life has been stated by many and felt by all of us in some way or another. Let us take this moment to once again, recognise the contribution of our Gurus in shaping us both professionally and personally.

Happiness and Sorrow are unfortunately, two sides of the same coin. I am distressed to communicate the unfortunate loss of one of our Past Presidents and Gurus, Shri S.N. Inamdar, Senior Advocate, on 18th July 2024, shortly before Guru Purnima. Inamdar Saheb was a professional par excellence and a noble soul, and this issue carries a tribute to him from the entire Chamber's Family on a separate page. In the next issue, we shall be carrying messages from some of our seniors who Inamdar Saheb was close to, and these reminiscences shall serve as a reminder to us, to mould our life with simplicity humility and hard work, qualities that Inamdar Saheb exemplified.

The Hon. Finance Minister, Mrs. Nirmala Sitharaman, presented a record seventh budget before the Parliament on 23rd July 2024. I do not consider myself equipped to comment on the macro aspects of the Budget or even Government's Policy for that matter. One aspect, however, stands out, which I had alluded to in my previous communication. The propensity to carry out 100 plus amendments to the Income-tax Act, 1961 (the Act) as part of every Finance Bill continues. I am painfully aware that the Act is complex because it needs to be able to address India's bulging Budget Deficit and also reduce litigation and ambiguity. The number of amendments however, in every Finance Bill, some of which can definitely be reconsidered, add to the taxpayers' scepticism and lead to a gap in trust as far as the administration is concerned. The Chamber earnestly appeals to the Government to seriously address this.

This is the much awaited issue covering the analysis of the Tax Proposals in the Budget, 2024. The concerted efforts of the Journal Committee, particularly Chairman, Ameya Kunte and Vice Chairman, Jiger Saiya have ensured that the amendments tabled in the Lok Sabha on 6th August 2024 and the analysis thereof have been captured in the well written articles written by learned and extremely cooperative authors. I thank the Journal Committee and the authors for their contribution to this very eagerly awaited issue. I hope you will find this issue comprehensive and analytical. Please do let us know so as to make the requisite changes if any required, going forward.

You should receive this issue near our 78th Independence Day. I wish all of you a Happy Independence Day.

I recently came across the book *"Hidden Potential"* by Adam Grant. The book is an eye opener on how to increase your productivity by learning certain habits that shape your character, which is different from your personality. Personality is your predisposition – your basic instincts for how to think, feel and act. Character is your capacity to prioritise your values over your instincts.

In this book, there is one quote by Hellen Keller, which has struck a deep chord in me, and I would like to end this communication with this quote:

> *"Character cannot be developed in ease and quiet. Only through experiences of trial and suffering can the soul be strengthened, vision cleared, ambition inspired, and success achieved."*

Wish you all the best for a hardworking and busy season ahead.

ANISH M. THACKER
Editor

iv

From the President

Dear Members,

I begin this communication with a somber note. On 18th July, 2024, we lost our Past President and Senior Advocate, Shri S. N. Inamdar. This came as a shock to us, especially to our seniors, who had been frequently interacting with him over many years. He was also a regular faculty for various professional organizations. On behalf our Chamber and on my personal behalf, I express heartfelt condolences to his family. We pray that his noble soul attains eternal peace.

July, 2024 was eventful year for the Chamber in many aspects. Alongwith the formation of New Managing Council and Committees, there was change of guard at the Editorial Board Team also. CA Shri Vipul Choksi, after his fantastic term as Editor, has been appointed as the Chairman of the Centenary Year Committee. And our erstwhile Chairman of Centenary Year Committee CA Shri Anish Thacker has taken over the charge as Editor. I take this opportunity to express my sincere thanks to CA Shri Vipul Choksi for all his untiring efforts as Editor of the Chamber Journal during his tenure. I also thank all the members of the Editorial Board and all the Assistant Editors of the earlier term for their contribution and advice for timely publication of our Journal Every month. My Best Wishes to CA Shri Anish Thacker for his new term as Editor. Also my best wishes to all the members of the Editorial Board and all the Assistant editors of the new term.

On 23rd July, 2024, the Honorable Finance Minister (FM), Smt. Nirmala Sitharaman has presented a growth oriented Budget for "Viksit Bharat". The Budget aims to provide opportunity to various sectors of the country such as Defense, Education, Agriculture, MSME, Employment & Skilling, Energy, Infrastructure, Next Generation Reforms etc. The Government has introduced several amendments in the Income Tax Act, 1961. Increase in Standard Deduction to ₹ 75,000/- in the New Tax Regime, some reduction in the rates of the New Tax Regime and increasing the limit for non-taxable long term capital gains under

v

section 112A of the Income-tax Act, 1961 (the Act) to ₹ 1,25,000/- are encouraging features to tax payers under the New Tax Regime. The FM also indicated that a comprehensive review of the Act would be carried out, which will be of major interest for all Tax Professionals across India. Also, various Notifications and Circulars have been issued in the recently held 53rd GST Council Meeting on 22nd June, 2024.

To understand the various provisions affecting Direct Tax Provisions as well Indirect Tax Provisions, the Direct Tax Committee, International Tax Committee & Indirect Tax Committee have organized various seminars/lecture meetings during the month of August.

I am pleased to share with you that we have launched the much awaited Certificate Course on "Practical Income Tax & Litigation" in collaboration with the Government Law College, Mumbai in a fully 'online' format. I earnestly request one and all to take the benefit of this uniquely designed course. Also, the International Tax Committee has planned a Transfer Pricing Masterclass which will be very valuable to practicing professionals. Please do also enroll yourselves and yours students for this course which has very learned and senior faculties.

On 24th July, the Income Tax Department celebrated its 165th "Income Tax Day" to commemorate the introduction of Income Tax in India on 24th July, 1860. On behalf of the Chamber of Tax Consultants, I express my best wishes to The Income Tax Department on this occasion. I am pleased to inform that we were also invited for this function where we had an occasion to interact with the senior most tax officers. The then Honorable Governor of Maharashtra Shri Ramesh Bais Ji was the Chief Guest of the function.

I would like to also compliment the Delhi Chapter, especially Chairman, Shri Prakash Sinha, Advocate, for holding a webinar on "GAAR Vs SAAR – Different Country Prospective" with speakers from Hong Kong & Mexico, matching different time zones of all the countries.

Our Bengaluru Study Group organized a meeting on Direct Tax proposals in Union Budget on 26th July, 2024 within a short span of time after the Budget was tabled. My compliments to Coordinator Shri Bharat Laxminarayana, Advocate and his team for the insightful session planned and executed swiftly.

It is heartening to see that the Chamber's activities in the new term have already started spreading from North to South.

The Chamber's Social media platforms have come up with the concept "Know your Committee", wherein Brief Introduction of Chairman/Chairperson and their Committee members are presented for the benefit of the members. This is an initiative of our I.T. Connect & Social Media Committee led by the Chairperson CA Bhavik Shah and his team.

This month's Journal is "**Budget 2024 - Tax Proposals (including amendments tabled before Lok Sabha on 6th August 2024)**". CA Ameya Kunte, Chairman, CA Jiger Saiya, Vice-Chairman and the team of the Journal Committee have worked very hard for bringing this analytical issue out in record time for the benefit of the readers. I thank the team and also thank all the authors for presenting their contributions within a short span of time.

On 15th August, 2024 India will celebrate her 78th Independence Day. My best wishes to all of you on this proud moment for us Indians. Our Honorable Prime Minister Shri Narendra Modi Ji has laid down the path for "Viksit Bharat" by 2047. Let us join hands and commit ourselves for making a positive contribution to this initiative by in spreading knowledge and maintaining professional ethics.

Jai Hind

VIJAY BHATT
President

Late Shri S. N. Inamdar
an outstanding professional and a noble soul

On 18th July 2024, we all woke up to the sad and tragic news of the passing away of one of our revered patriarchs, Shri S. N. Inamdar, Senior Advocate and Past President, an outstanding professional who helped so many of the Chamber's members professionally, and who was agentle and noble soul. The void he has left behind cannot be filled.

The Chamber expresses deep grief to his family and loved ones and expresses heartfelt and deepest condolences with a prayer to the Almighty to grant his soul eternal peace and the forbearance to his loved ones to cope with his loss..

This poem by William Wordsworth, the famous English poet aptly expresses our tribute:

There was a time when meadow, grove, and stream,
The earth, and every common sight,
To us did seem
Apparelled in celestial light,
The glory and the freshness of a dream.
It is not now as it hath been of yore;—
Turn wheresoe'er we may,
By night or day.

The things which we have seen we now can see no more.

We will deeply miss the sage guidance and the loving blessings of Inamdar Saheb. We pray to the Almighty to hold him in his arms, forever. Om Shanti!

Government's Direction on Tax Simplification

CA Dhiren Shah

Overview

In the labyrinth of modern taxation, the complexity of tax laws has grown to unprecedented levels, creating burdensome systems for individuals and businesses alike. The intricate web of regulations, deduction and exemptions not only confuses taxpayers but also imposes significant tax administration cost. The need for tax simplification has never been so pressing. Hon'ble Finance Minister, while presenting the Union Budget 2024, announced on the floor of the Parliament that the Income-tax Act will be reviewed to rationalize/simplify the same. Though multiple attempts have been made in the past and not much has seen light of the day. We hope the proposed exercise this time, does bear fruits.

This article delves into the objectives of simplification, journey so far, ideas / thoughts which can be considered while implementing this exercise and some insight on global tax simplification processes.

For the better health of the economy of any country, the structure of the tax laws plays an important role. Well-structured tax laws help the taxpayers to comply with tax laws efficiently, and at the same time, help the government to raise revenues with minimum administrative costs.

In his famous book ***'Wealth of Nation'***, Adam Smith presented 4 canons of taxation which are also commonly referred to as the "main canons of taxation". While dealing with simplicity of tax laws, he writes that -

Canon of Simplicity: The system of taxation should be made as simple as possible as complicated tax is bound to yield undesirable side-effects. In other words, every tax must be simple and intelligible to the people so that the taxpayer is able to calculate without any difficulty.

It appears that our Hon'ble Finance Minister also believes in simplicity of taxation regimes and is working hard towards the same. While delivering the budget speech in the parliament on 23rd July, 2024 she announced review of taxation provisions with greater emphasis on simplicity.

In this article we are trying to capture –

— simplification journey so far;

— efforts undertaken in the budget 2024;

— some ideas/thoughts which can be considered while reviewing the provisions; and

SS-XI-1

— examples of steps taken by some countries for bringing simplicity and certainty under their regulations

India's Income tax simplification journey so far

The Income-tax Act, 1961 (hereinafter referred to as "the Act") has been in existence for more than 60 years. Its provisions came in for interpretations before High Courts and the Supreme Court on numerous occasions. Both revenue and taxpayers have taken positions based on the interpretations taken by the judicial pronouncements as well as clarifications/circulars/guidance issued by CBDT from time to time. However, the same has increased litigation and not simplified the same. Successive Governments have undertaken various steps to simplify the law, providing clarity on various aspects, explaining certain provisions/amendments etc for reduction in litigation. Following chart provides snapshot of few of the important measures taken by the Government to simplify the Act and for ease of compliance with the Act –

Sr. No.	*Year*	*Particulars*
1	1961	The Income-tax Act, 1961 introduced w.e.f. 01-04-1962 repealing 1922 Act
2	1984	Taxation Laws (Amendment) Act 1984 passed to streamline procedures; reduce litigation; remove anomalies and rationalize some provisions
3	2002	Kelkar Committee constituted – recommended outsourcing of non-core functions of the department and reduction on exemptions, deductions, reliefs, rebates etc
4	2009	CPC Set-up for bulk processing of returns Direct Tax Code, 2009 published for public comments
5	2010	Direct Tax Code Bill, 2010 introduced in Parliament
6	2013	Direct Tax Code, 2013
7	2018	Launch of "E-proceedings" to conduct assessment proceedings electronically
8	2019	Concessional Tax Regime introduced
9	2020	Introduction of Faceless Assessment Scheme 2020 and Faceless Appeal Scheme 2020
10	2021	Launch of New e-filing portal and faceless proceedings before ITAT

Mammoth exercise was undertaken in 2009 under the UPA regime for overhauling the Act. The Direct Tax Code (DTC) was drafted and circulated for the public comments. The Standing Finance Committee also gave its suggestions on the revised version of DTC and the same were duly incorporated in the draft law. However, due to change in Government, the same could not see light of the day.

The NDA Government again took up the exercise of simplification of law and a committee was formulated for this purpose under the Chairmanship of Justice R.V. Easwar.

The said Committee submitted its first report on income tax law simplification in January 2016 with a focus on simpler issues in view of the crunched timelines. Yet again a task force was formulated in November 2017 for the review of the Act and to draft a new direct tax law. The task force submitted its report in August 2019 which was originally mandated to be given by May, 2018. However, instead of redrafting the law, certain suggestions of committee were accepted and existing law was amended to some extent.

Now, the Hon'ble Finance Minister is re-starting the exercise with a stated completion timeline of six months. It will be a challenging task to meet the deadline having regard to the complex legislation, numerous decisions, long history, and high expectations. We must acknowledge the will of the Government and hope that something concrete will be churned out this time.

Budget 2024 announcement

As stated above, the Hon'ble Finance Minister has announced a comprehensive review of the Act within six months. Objective is to make the Act concise, lucid, easy to read and understand – a legislation that will reduce litigation and disputes, thereby providing tax certainty to taxpayers.

The theme of the tax proposals of Finance Bill 2024 is definitely "Simplicity" as demonstrated by the following proposed amendments;

— New capital gain tax regime – only two rates and holding periods for all the capital assets. For ease in computation, indexation benefit has been removed.

— TDS rates rationalization.

— Taxation for charities – unified single provision (instead of multiple regimes).

— Removal of " Angel Tax" .

— Streamlining the timelines for reassessment/search processes.

It is still not clear as to how further simplification measures will be taken up post review of the Act - whether the changes will be made to the current Act as is being done today or there will be altogether a new Act or Code.

FM's commitment to review the tax provisions - simplicity and certainty

It is imperative that review should be undertaken from a holistic perspective. Interest of taxpayers as well as nation's kitty should be kept in mind. Necessary balance needs to be maintained.

What is tax simplification?

In my view, the same refers to efforts to make tax laws and processes easier to understand and comply with. This can involve reducing the number of tax brackets, simplifying the calculation of taxable income, eliminating, or consolidating deductions and credits, and streamlining tax form and filing procedures. The same should aim to make tax provisions more transparent so that taxpayers can easily understand how their taxes are being computed and where their money is going.

What is tax certainty?

The same refers to the stability and predictability of a tax system. It ensures that taxpayers have a clear understanding of their tax obligations and can anticipate future tax liabilities with confidence. Some key aspects of tax certainty are –

— Stable tax laws

— Clear and predictable rules

— Timely and transparent communication

— Fair dispute resolution

— Minimizing retrospective changes

— Reliable tax administration

If these aspects are prioritized during the review process, the changes can have a significant and far-reaching impact.

Now let us debate on certain thoughts/ideas which can be considered at the time of overall review of the taxation provisions for achieving above stated objectives.

1. Amendments once in three to five years

Instead of making changes in tax regulation every year, proposing amendments to tax laws once every 3 to 5 years can provide a balance between keeping the tax code updated and ensuring tax certainty. Some potential benefits and considerations for such approach is –

Key benefits	*Critical considerations*
— **Stability and predictability** – less frequent changes allow taxpayers to plan their finances and investments with greater confidence, knowing that tax landscape will remain stable for a certain defined period.	— **Flexibility for urgent issues** – while a regular amendment cycle promotes stability, it is crucial to retain flexibility to address urgent issues or significant economic changes that may require immediate action.
— **Thorough review of the changes-** regular but infrequent amendments can ensure that changes are well-considered, with ample time for analysis, debate, and stakeholder consultation, leading to more effective and balanced tax policies.	— **Stakeholder engagement** – Regular consultation with stakeholders, including businesses, tax professionals etc is essential to identify areas of improvement and ensure that amendments address practical concerns and achieve intended outcomes.
— **Reduced compliance cos**t – frequent changes to tax laws can increase compliance cost as businesses needs to continually update their systems and processes.	— **Transition period** – when amendments are made, providing adequate transition periods for implementation can help taxpayers to adjust with new laws without undue hardship.

This strategy can be implemented with the help of establishing a review schedule, creating advisory panels, conducting impact assessments and ensuring transparency.

By amending tax laws once every 3 to 5 years, instead of every year, revenue authorities can maintain balance between the need for stability and necessity of keeping the tax system relevant and effective in a changing economic environment. I am sure that the same can be a welcome change for Indian taxpayers as well as foreign investors.

2. Dispute resolution through mediation

India is known for tax litigation. A significant number of cases are pending at various appellate levels and before courts involving substantial disputed amounts. Dispute resolution time through appellate mechanism has made the tax litigation not only a very costly affair but has also adversely affected the investment environment.

The Government can consider an alternative dispute resolution process through mediation. Mediation is a method for resolving tax disputes through negotiations and collaboration rather than litigation. Key aspects and benefits of using mediation for tax dispute resolutions are –

Voluntary process – mediation should be voluntary and not mandated by any law.

Neutral mediator – mediator should be neutral and not from the tax department. Mix of representatives of industries, professionals and tax officers can serve the purpose.

Confidentiality – as the mediation process is confidential the same will not have persuasive effect or will not act as precedence in future cases.

Flexibility – both the parties have flexibility to agree or disagree, which would not deprive them if they don't want to agree and pursue litigation.

Benefits

— **Cost-effective** – mediation is very cost effective compared to litigation. It reduces legal fees, court costs, and other related expenses.

— **Time-saving** - mediation can be completed more quickly than court proceedings, which can be lengthy and drawn out.

— **Control over outcome** – parties have more control over the resolution and can craft a solution that is tailored to their specific needs and interests.

This has been implemented across various countries. For example, HMRC in the UK has adopted the collaborative approach in resolving tax disputes where mediation happens between the taxpayer and revenue department. It has achieved favorable outcomes and expeditious resolution of the tax disputes. Australia, United States, Netherlands, Belgium, New Zealand, France and Germany are the other major countries that have implemented mediation for alternative dispute resolution mechanism.

3. Group taxation system

The corporate sector requires SPV structure (separate entity/subsidiary company) to comply with the various commercial obligations such as requirements of tender, lender requirements, achieving focused management of business etc. However, SPV structure also poses a significant burden on the corporates as it involves for multiple compliances, tax inefficiencies.

To address the same, we can also consider the group taxation regime. Many of the progressive economies of the world including and not limited to the countries like the USA, UK, Germany, Japan, Singapore, Australia, the Netherlands, France, Australia, etc., have long adopted a group tax consolidation regime. From statistic perspective, 6 out of 8 largest economies (i.e. excluding India and China), 6 member nations of G7 nations and 10 member nations of G20 nations have already adopted some form of group taxation. Key advantage of group taxation systems is as under:

— *Tax efficiency* – by allowing companies within a group to offset profits and losses, group taxation can reduce the overall tax liability, making the tax system more efficient and eliminating timing issues for taxation for the group as a whole.

— *Simplified compliances* – consolidated reporting simplifies tax compliances, reducing administrative burden on the individual entities of the group as well as on tax officers.

— *Facilitation of corporate restructuring* - group taxation makes mergers, acquisitions, and reorganizations more tax-efficient. Sometimes, the same will avoid complex restructuring processes being carried out for ironing tax inefficiencies.

— *Encouragement of investments* – the ability to offset profits and losses across the group can incentivize investments in new ventures, as initial losses can be absorbed by profitable entities within the group.

— *International competitiveness* – for MNCs, group taxation systems can make operating in different jurisdictions more attractive by providing tax relief and simplifying cross-border transactions.

For India, with its current (i.e. 5th largest economy) and future position (i.e. becoming 3rd largest economy by 2027; developed country by 2047) in terms of becoming a formidable economic power in the globe, it is an opportune time for it to introduce the said concept.

4. Carry forward of losses without any time limits and carry back of losses

Income-tax is levied on profit earned by a corporation. Profits are delta between revenue earned by businesses and expenses incurred to earn that revenue. There may be a situation wherein business incurs losses in the initial years of commencement. In the case of Infrastructure projects, large capital-intensive industries etc which have long gestation period and having different risk profiles, incur heavy losses in initial phase of operation due to heavy finance cost, high depreciation etc. Having regard to the same, tax laws should allow carried forward and set off of losses for an indefinite period (instead of the current period of 8 years). The same will ensure that the businesses are taxed on their average profitability over a period of time. Many countries like Australia, Chile, Ireland, Israel, New Zealand, Norway, Sweden etc allow taxpayers to carryforward business losses without any time limit.

Tax loss carryback is a concept in tax law that allows businesses to apply a current year's net operating losses to the taxable income of the previous year. This may result in refund of taxes previously paid. In certain scenarios like pandemic, heavy losses, change of technology, political or economic turbulences, etc. these provisions are quite useful for sustenance of the companies. Carrying back of losses can provide benefit of immediate cash flow, quick economic stabilization, incentive for taking risks, etc.

Canada, Czech Republic, Estonia, French, Germany, Latvia etc. provide for the carry back provisions under their tax codes.

5. Dividend as tax deduction

Making dividends tax-deductible would significantly alter the current taxation landscape and offer several economic benefits, including –

— *Reduced double taxation* - currently, dividends are subject to double taxation – once at corporate level and again at shareholder level. Allowing dividends to be tax-deductible would alleviate this burden, potentially leading to more equitable taxation.

— *Increasing consumption* – companies might be more inclined to distribute more profits as dividends, give more money in the hands of shareholders which can in turn increase further investments/consumption. Increased consumption may result in greater increase in indirect taxes also.

— *Incentive for corporate transparency* – companies might be encouraged to adopt more transparent and shareholder-friendly policies, as regular dividend payments signal financial health and stability.

— *Support for retired and income-dependent investors* – individuals relying on dividend income, such as retirees, would benefit from higher after-tax returns, providing better financial security.

To bring tax neutrality, tax laws should allow the deduction of dividends or an allowance kind of notional interest on equity. Belgium, Italy, Poland, Portugal, and Turkey – have introduced an allowance for corporate equity. Rate of allowances can be based on corporate, or government bond rate adjusted by risk premium.

Alternatively, the concept of credit for taxes paid by corporate entities should be allowed to shareholders. E.g. Australia employs a system known as 'franking credits', which help avoiding double taxation of dividends. While dividends are not tax-deductible for corporations, shareholders receive credits for the tax already paid by the corporation profits, which can offset their personal tax liability.

6. Tax provisions for salaried taxpayers

The work force across India awaits the Budget for hearing the announcements which provides tax relief. It majorly comprises of the salaried individuals who many a time feel disappointed on comparative reliefs provided compared to corporates and businesses – by way of exemptions, deductions, concessional tax rates etc. India will enjoy significant benefit on account of the demographic dividend which will add more salaried individual to its work force in coming years.

Though focus is now on the New Tax Regime which does not allow much deductions/exemptions for the individual tax payers, including salaried ones. However, if the deduction for spending on white goods can be considered as deductible to a certain extent the same can be a win-win situation for taxpayers as well as for exchequer. Employees will get deductions to a certain extent and the same will increase consumption and hence boost the economy. Further, the same will result in higher GST collection which can recoup significant amount of losses, if any, from taxation receipts.

Above are certain thoughts/ideas which can be considered while carrying out overall review of the Taxation provisions. Apart from above there are number of areas like ESOP taxation, taxation in case of structuring and restructuring, transfer pricing provisions, TDS/TCS provisions, provisions in respect of OECD Pillar II implementation etc needs discussions/deliberation/interventions while overhauling of the Act. Difficulties faced by the taxpayers in faceless assessments as well as faceless appeals are also required to be addressed. Further, with the advancement of technology, Government should reconsider tax return, tax audit, transfer pricing forms etc. Duplicate information and on record information can be eliminated.

Simplicity measures should result in tax efficiency, ease of compliance, reduction in litigation and stable regime. Some examples of steps taken by certain countries in bringing simplicity has been given below -

United States

The Tax Cuts and Jobs Act (TCJA) of 2017 aimed to simplify the tax code by reducing the number of tax brackets, increasing the standard deduction and eliminating or reducing certain itemized deductions.

Australia

The Australian Tax Office has introduced various measures to simplify the tax system, including simplified tax returns for small businesses and pre-filled tax returns for individuals.

New Zealand

New Zealand's Inland Revenue Department has implemented a series of simplification measures, such as the Simplified Tax System for small businesses and the use of digital services to streamline tax administration.

Russia

Russia has implemented a flat tax rate, which significantly simplified the tax code and improved compliance.

Singapore

Singapore has a straightforward tax system with flat tax rate and minimal deduction and exemptions. The country focuses on ease of compliance and efficiency.

Concluding thoughts

The global trend towards tax simplification reflects a recognition of the benefits of simpler and stable tax systems. The same results in reduced compliance costs, increased efficiency and improved taxpayer satisfaction. As countries continue to embrace technology and streamline their tax codes, the trend towards simplification is likely to accelerate, contributing to more effective and equitable tax systems worldwide.

■●■

SS-XI-8

Taxation of Capital Gains for Residents

CA Abhitan Mehta

Overview

The Finance Bill proposes to overhaul the taxation regime for capital gains. The proposal is to broadly align the period of holding in two baskets – 12 months for listed securities and 24 months for all other assets. The long term capital gains tax rate is also consolidated into a single rate of 12.5% without the benefit of indexation. However, due to address the common man's concern on withdrawal of indexation benefit, a relaxation has been given to resident individual and HUF for land and building acquired prior to July 23, 2024, in those cases tax payable would be lesser of the new regime and the old regime. The scope of S. 50AA deeming the specified asset as short term capital asset irrespective of holding, has been expanded to include unlisted bonds and debentures and the scope of specified mutual fund is restricted to debt fund, taking Gold ETF, fund of fund, foreign fund, etc out of S. 50AA.

All amendments are not applicable from a uniform date, few are applicable from April 1, 2024, few from April 1, 2025 and majority from July 23, 2024. How to manoeuvre investment in CCD which is now deemed to be a short term capital asset and is it possible to have scenario where you have best of both worlds i.e. along with indexation benefit you are taxed at lower rate of 12.5% - like conversion of capital asset into stock-in-trade are some interesting aspects dealt in the article.

The Finance bill aims to simplify the present capital gains tax regime, but as would hold good for any simplification, there have been some hits and misses. I am penning this article knowing the fact that the readers would know the primary amendments, including withdrawal of indexation benefit, the single tax rate for long-term capital gains, 12.5%, S. 112A exemption limit increased from ₹ 1 lac to ₹ 1.25 lacs etc. Therefore, after giving an overview of the amendments, my endeavor through this article is to deal with a few ticklish issues that may arise pursuant to the amendment.

Snapshot of Capital Gains tax regime – going forward

Nature of Asset	***LTCG***	***STCG***	***PoH (in months)***
Listed Equity Shares, Equity Oriented Mutual Fund and listed units of Business Trust (REIT and INVIT)	12.5%	20%	12
Other listed securities (like preference shares, debentures, ETF {FY 25-26 onwards} etc.)	12.5%	Slab[1]	12
Business undertaking (S. 50B – Slump sale)	12.5%	Slab	36
Block of Asset	Slab rate (deemed STCG) – subject to ongoing controversy[2]		
50AA – Unlisted bonds, unlisted debentures, debt mutual fund, market-linked debentures	Slab rate (deemed STCG)		
All other assets – unlisted shares, land & building, brand, trademark, jewellery, painting, etc.	12.5%	Slab	24

So now we are reduced to 6 categories (and not 2) of capital asset for computation of capital gains. A listed asset becomes long-term in 12 months and all other assets become long-term in 24 months (except business undertaking – 36 months, and cases of deemed short term). Tax rate on long term capital gains on all assets is unified at 12.5% (+ surcharge + cess) without indexation. We have a class of assets specified u/s 50AA (specified in the table) that would always be considered as short term capital asset irrespective of the period of holding.

The capital gains regime has been significantly simplified, but we will have to still refer to a detailed tabular presentation for advising our clients on the nuances of the capital gains tax regime – especially in the year of change of regime - as the old regime applies for transfers upto July 23, 2024.

Transition – effective date of different amendments

Majority of the changes on the rate of tax and computation of income - like change of tax rates from 10% and 20% to 12.5% and from 15% to 20%, and withdrawal of indexation benefit (subject to exception discussed next), are effective from July 23, 2024. The following are the deviations –

— Change in the definition of specified Mutual Fund u/s 50AA - which would bring the ETFs (Gold ETF, balanced fund, Foreign equity fund, foreign fund of fund) out of the ambit of the section

1. Means the normal applicable tax rate to the taxpayer
2. *CIT vs. V.S. Dempo Company Ltd. [2016] 74 taxmann.com 15 (SC), CIT vs. M/s. Velvet Holdings Pvt. Ltd. (2017 (7) TMI 1355) (Bom HC)*

(and thereby restrict its applicability to debt mutual funds) is effective only from the next financial year 2025-26.

— In contrast, unlisted bonds and debentures have been added to the scope of section 50AA (deemed short-term capital asset) from July 23, 2024. Any gain from the transfer, redemption or maturity of unlisted bonds or unlisted debentures on or after July 23, 2024 would be deemed to be short term capital gain, irrespective of the date of acquisition of unlisted bonds and debentures. [The acquisition date-based grandfathering (non-applicability of S. 50AA) given to specified mutual funds last year has not been given this year for unlisted debentures and unlisted bonds.]

— The amendments in relation to the period of holding in the definition of short term capital asset[3] (S. 2(42A) are w.e.f. July 23, 2024. Therefore, the better view would be to apply the reduced period of holding for assets transferred on or after July 23, 2024. The law on the date of transfer of capital asset should be considered relevant instead of the law on the first day of the assessment year, which is also the intention of the legislature as per the explanatory memorandum.

Indexation Benefit

The Finance Bill proposed a complete transition to the new regime of 12.5% tax on long term capital asset without benefit of indexation. Due to significant concerns being raised on withdrawal of the indexation benefit, which would result in higher tax burden on properties which have not significantly appreciated (CAGR of 9% to 11%), an amendment is proposed[4] to the Finance Bill to allow indexation benefit in the following cases –

- Taxpayer – Resident Individual or HUF. Non-resident, corporates, firms, etc. are not covered
- Nature of Asset – Land or building or both
- Date of Acquisition – before July 23, 2024
- Test of Long Term Asset – Date of transfer of capital asset and not on July 23, 2024
- Point of sale – Any time in the future – no sunset
- Computation of Capital Gains tax – Tax as per new regime (12.5% without indexation) v. Tax as per old regime (20% with indexation) – whichever is lower
  - o If tax as per old regime results in a loss – pay zero tax. However, long term capital loss cannot be claimed as per old regime. The benefit of indexation has been restricted to reducing the tax liability but is not extended to permit claim of long term capital loss.
  - o As the comparison is of the income tax payable in the new regime versus old regime all the exemptions including deduction u/s

3. *CIT vs. Nirmal Textiles [1997] 224 ITR 378 (Guj HC)* - In case of sale of capital asset, whether asset is long term asset or short term asset has to be determined based on the law on the date of sale, not on the law on the first day of assessment year.
4. At the time of finalisation of Article – it has not been passed by the parliament

54 will be considered in computing the tax payable under both the regimes.

Other considerations which are sacrosanct even after the amendments

1. The taxpayers continue to be eligible to replace the cost of acquisition with the fair market value[5] as of April 1, 2001 for assets acquired prior to April 1, 2001 for computation of capital gain.

2. The computation of capital gain to a resident taxpayer on foreign assets in foreign currency continues as per Rule 115.

3. No change in the regime of carry forward and set off of losses. However, consequential change in type of loss (long term or short term) may happen due to S. 50AA or reduction in period of holding.

4. The capping of surcharge on long-term capital gain continues, and the highest effective tax rate is 14.95%.

5. No modification in the taxation on the retirement of a partner – S. 9B and S. 45(4) would apply – the consequential impact of amendments like reduction in the rate of tax (long term) and period of holding of the underlying assets (for classification as long-term gain and short-term gain) will follow.

6. Availability or non-availability of rebate u/s 87A and Chapter VIA deductions continues to be the same.

7. The benefit of the slab rate (in case a lower slab rate is applicable) is not available for long-term capital gains tax.

8. Recently, a Delhi High Court ruling[6] has raised an interesting controversy in relation to taxation of ESOP compensation for erosion of value. The court held the compensation to be a capital receipt. No amendments were made to nullify the impact of the ruling. However, whether the ruling would hold well after the S. 55 amendment last year is itself debatable.

What is the point of transfer?

Capital gains taxation regime has been modified primarily w.e.f. July 23, 2024. The point of transfer of capital assets would decide which regime is applicable. If the transfer of the capital asset is prior to July 23, 2024 the old regime would apply and if the transfer is on or after July 23, 2024 the new regime would apply. Therefore, it would be crucial to determine the date of transfer of the capital asset, especially for borderline cases. In some cases, the old regime (indexation) may be more beneficial, and in some cases, the new regime may be more beneficial. Point of transfer has always been a bone of contention; the amendment would only give further fuel to the fire.

In the context of shares, CBDT Circular 704 dated 28-Apr-1995, has clarified that date of broker note has to be considered as the date of transfer for listed transactions and for unlisted transactions, date of contract of sale as declared by the parties shall be treated as the date of transfer provided it is followed up by actual delivery of shares and the transfer deeds.

5. Subject to the cap as per proviso to Section 55(2)(b)(ii) in case of land or building or both

6. *Sanjay Baweja [TS-377-HC-2024(DEL)]*

Divergent views have been expressed by the courts like *Y.V. Ramana vs. CIT*[7] has held that, in the case of shares of unlisted companies, transfer would take place only when valid share transfer Form No. 7B is delivered to the company and endorsed by the company[8].

Suraj Lamp & Industries (P.) Ltd. vs. State of Haryana [2012] 340 ITR 1 (SC) (3 Judge) is the landmark ruling in the context of transfer of immovable property - transfer of immovable property by way of sale can only be by a deed of conveyance (sale deed). In the absence of a deed of conveyance (duly stamped and registered as required by law), no right, title or interest in an immovable property can be transferred by an agreement to sell or by simply giving the possession (subject to cases covered by S. 53A of TOPA (dealt with by clauses (v) of section 2(42A)) – point of transfer in such cases is a mega controversy by itself)

Use of ₹ 1.25 lacs benefit u/s 112A against which capital gains?

The exemption limit of ₹ 1 lac in section 112A has been increased to ₹ 1.25 lacs w.e.f. July 23, 2024. The increase in the limit is for the Assessment Year and is not linked to the date of transfer. The question for consideration would be that if a taxpayer has both, long-term capital gain chargeable at the rate of 10% and 12.5% – against which long-term capital gain would the exemption of ₹ 1.25 lakhs be used?

In absence of any legislative guidance on the order of claiming the benefit the general principle[9] that the benefit should be claimed in a manner that is most beneficial to the taxpayer should be applied and, consequently, the limit of ₹ 1.25 lacs would be first used against capital gain taxable at 12.5%, and the remaining exemption limit, if any, will be used against the capital gains taxable at 10%. It would be interesting to see how the same is captured in the return filing utility form - from a practical standpoint this may be more relevant than an understanding of the law.

Another interesting scenario would be if the entire long-term capital gain u/s 112A is earned prior to July 23, 2024 - which limit would apply ₹ 1 lac or ₹ 1.25 lacs – as the new limit is w.e.f. July 23, 2024.

In my humble view, the higher limit of ₹ 1.25 lacs should apply even if the capital gain has arisen prior to July 23, 2024. The reason is that S. 112A provides the rate of tax and is amended w.e.f. July 23, 2024, i.e., prior to the first day of the assessment year, April 1, 2024. It is a settled law[10] that the law on the first day of the assessment year has to be considered in determining the taxation of the taxpayer (especially, the computation and tax rate related provisions).

The amendment nowhere explicitly restricts the incremental benefit of ₹ 25,000 to the gains arising after July 23, 2024 – rather, the proviso to S. 112A(i) clarifies that the benefit of ₹ 1.25 lacs is for the aggregate of the capital gains arising before 23rd July and on or after 23rd July.

Therefore, it is subject to the practical difficulties of claiming a higher exemption in the income tax utility, if any. A taxpayer

7. *[2017] 78 taxmann.com 23 (Visakhapatnam - Trib.)*
8. CBDT circular is not binding on the taxpayer. Further, the any position in the circular contrary to High Court ruling has to be read down
9. Circular : No. 26(LXXVI-3) [F. No. 4(53)-IT/54], dated 7-7-1955.
10. *CIT vs. Isthmian Steamship Lines [1951] 20 ITR 572 (SC)*

would have a good case to claim relief of ₹ 1.25 lacs u/s 112A even if long term capital gain is earned prior to July 23, 2024.

Withdrawal of an earlier exemption or conversion of capital asset into S-I-T – double benefit of indexation and reduced rate?

We have instances of capital gains which are not taxed in the year of transfer of the capital asset and instead is taxed in a future year. Therefore a question would arise, as to which tax rate has to be applied to tax the capital gains in the future year, especially, if the taxing event is on or after July 23, 2024 and whether the benefit of indexation would still be available. Lets understand this through some instances where this concern may arise –

a) S. 45(2) – Conversion of capital asset into stock in trade - profits or gains arising from the transfer by way of conversion by the owner of a capital asset into, or its treatment by him as stock-in-trade of a business carried on by him shall be chargeable to income-tax as his income of the previous year in which such stock-in-trade is sold or otherwise transferred by him

   - Therefore, the Section envisages computation of capital gains at the time of transfer (conversion into SIT is regarded as transfer u/s 2(47)) and the levy of capital gains tax is deferred to the year of transfer of capital asset.

b) S. 45(5A) – Joint development agreement by Individual or HUF – Broadly, capital gain on transfer of capital asset through JDA is chargeable in the year of competition certification (CC) being obtained and stamp duty value of land or building on the date of CC is regarded as deemed consideration.

   - In this case, though it acknowledged that transfer happens at the time of entering the JDA, the computation of capital gains u/s 48 is deferred to the date of CC, as the full value of consideration is the stamp duty value of land or building on the date of CC

c) S. 47A(1) – Violation of the 8 year conditions for transfer between holding company and wholly owned subsidiary - deemed to be income chargeable under the head "Capital gains" of the previous year in which such transfer took place.

   - The Charge of capital gains, goes back to the year of transfer of capital asset between Holding Company and wholly owned subsidiary and is not taxed in the year of violation of the condition

d) S. 47A(3) and S. 47A(4) – In case of conversion of entity exempt u/s 47(xiii), 47(xiiib) and 47(xiv) if any of the stipulated condition is violated (say, change of shareholding beyond the permitted threshold) then the successor would be charged to capital gains not charged earlier to the predecessor, in the year in which the requirements are not complied

   - Therefore, similar to conversion of capital asset into SIT, the section envisages a charge in a subsequent year (violation of the condition). However, capital gains has to be computed with reference to the original point of transfer – it creates a charge on capital gains not charged at the point/time of transfer.

e) S. 54, 54F, 54EC, etc – Similar to S. 45(2), 47A(3) and 47A(4) – the charge is in the year of violation of the requirement – like not investing the funds set-aside in the separate bank account for acquisition of the residential house, selling the new asset (residential house or bonds) within the specified period, purchasing additional residential house in the stipulated period, etc.

- Therefore, similar to conversion of capital asset into SIT, the section envisages a charge in a subsequent year (violation of the condition). However, capital gains has to be computed with reference to the original point of transfer – it creates a charge on capital gains not charged at the point/time of transfer.

To summarise there are three classes of cases –

1) Capital gains relate back to the year of transfer on subsequent violation – example (c)

2) Capital gains is computed in year of transfer, but is taxable in the year of violation of condition or in the year of subsequent transfer of SIT – Example (a), (d) and (e)

3) Capital gain is computed, subsequently and not in the year of transfer and taxed in that year – Example (b)

However, in all the scenarios to my mind this nuances should not matter. Why?

The amendment to S. 48[11] denying indexation and amendment to S. 112[12] on lower rate of tax, makes distinction between capital asset transferred before July 23, 2024 and capital asset transferred on or after July 23, 2024.

In all the aforesaid cases, the transfer of capital asset would continue to be prior to July 23, 2024 and therefore, the taxpayer should be entitled to the benefit of indexation but, would not be entitled to the reduced tax rate of 12.5%, though the capital gains is chargeable after July 23, 2024 as the capital gains would still pertain to transfer of asset prior to July 23, 2024.

Issues around S. 50AA – deemed short term capital asset

1. CCD and OCD are deemed short term capital asset

As S. 50AA would now apply to unlisted bonds and unlisted debentures, S. 50AA would also apply to compulsory convertible debenture (CCD) and optionally convertible debenture (OCD). These instrument are generally quasi equity in nature, should on principle not be covered by S. 50AA.

However, in the absence of legislative amendment, it would be difficult not to apply S. 50AA to transfer of CCD and OCD. The way out could be to convert them into equity shares (which is exempt u/s 47) and then transfer equity shares – the period of holding and cost of acquisition of equity shares would relate back to the period of holding and cost of acquisition of CCD/OCD.

In case CCD/OCD cannot be converted into equity for some commercial considerations like price discovery for conversion is yet to happen or

11. where long-term capital gain arises from the transfer (which takes place before the 23rd day of July, 2024)

12. (A) at the rate of twenty per cent. for any transfer which takes place before the 23rd day of July, 2024; and
(B) at the rate of twelve and one-half per cent. For any transfer which takes place on or after the 23rd day of July, 2024:

SS-XI-15

is linked to a future event one may consider modifying the terms of OCD/CCD and converting them into optionally convertible preference shares or compulsory convertible preference shares (shares including preference shares are not covered by section 50AA), and the same price discovery mechanism for conversion into equity can be built in. [Obviously, conversion of CCD into CCPS has other commercial consideration which will have to be evaluated like classification of debt v. shareholder in case of insolvency.]

It should be arguable that GAAR should not apply to the conversion of CCD into CCPS as it is not against the legislative intent. The legislature does not intend to tax a quasi-equity instrument as a debt instrument. Especially, in the context of cross-border transactions, the department is itself arguing that CCD should be regarded as shares of an Indian Company. The change of instrument is not against the framework of capital gain tax but, it is done to get over a presumably, unintended anomaly created due to the amendment. There has to be a difference between tax avoidance and restructuring to achieve a normal tax incidence.

2. *Double taxation of premium on redemption*

Any transfer, redemption or maturity of unlisted bonds and debentures on or after July 23, 2024 would be deemed to be short term capital gain and the full value of consideration less cost of acquisition would be regarded as gain from transfer of short term capital asset.

As regards the point of taxation of premium on redemption of debenture – two schools of thought prevailed – i) premium on redemption of debenture has to be offered to tax in the year of maturity; or ii) premium on redemption of debenture has to be offered to tax over the period of the debenture as interest income.

As per S. 50AA the premium on redemption would be offered to tax in the year of redemption and as short-term capital gains and not as interest. However, ICDS IV (Para 8(iii)) stated that premium on debt securities held is treated as though it accrues over the period, to maturity.

For the taxpayers who have followed ICDS and already offered part of the redemption premium as income in earlier years will have to again pay tax u/s 50AA at the time of redemption of debentures. However, this type of double taxation cannot be the legislative intent, the general theory of no double taxation[13] of the same income should apply, and the taxpayers in computation of income u/s 50AA should be allowed to reduce the redemption premium which already has been offered to tax.

Going forward, the interest may not be offered to tax year on year, as now ICDS is in direct conflict with the provision of the Act (S. 50AA) and as the preamble of ICDS states that, in case of conflict between ICDS and provisions of the Act, the provisions of the Act shall prevail.

This will also have a consequential impact on set off and carry forward

13. *Laxmipat Singhania vs. CIT [1969] 72 ITR 291 (SC) (3 Judge), C.T.V.S. Chettyar Firm vs. CIT [1929] 4 ITC 160 (Rangoon), CIT vs. Surat Cotton Spg. & Wvg. Mills (P.) Ltd. [1993] 202 ITR 932 (Bombay HC)*

of loss - interest income was earlier regarded as business income or income from other sources but, would now be regarded as short-term capital gain. Therefore, the carryforward and set off provisions will apply accordingly.

3. ***Scope of deeming fiction***

In the context of S. 50 courts[14] have taken a view the deeming fiction of S. 50 is only for S. 48 and S. 49 and for other provisions of the Act (like 54F, rate of tax, etc) the depreciable asset has to be regarded as a long term capital asset. Though there may be slight lacuna in the drafting of S. 50AA in my humble view, the proposition of restricting the deeming fiction u/s 50AA is not available, primarily due to the difference in language of both the sections –

— S. 50 - Notwithstanding anything contained in clause (42A) of section 2. . . the provisions of sections 48 and 49 shall be subject to the following modifications . . . . . . shall be deemed to be the capital gains arising from the transfer of short-term capital assets

— S. 50AA – Notwithstanding anything contained in clause (42A) of section 2 or section 48 . . . shall be deemed to be the capital gains arising from the transfer of short-term capital assets

— S. 50 intends to modify the computation u/s 48 and 49, whereas S. 50AA deems the capital gain as capital gain arising from short term capital asset without the fiction being limited in its applicability only to sections 48 and 49. Therefore, taking the deeming fiction to its logical conclusion u/s 50AA the rate of tax has to be that of short term capital asset which is also the primary object of S. 50AA.

Questions to ponder

— Is the objective of simplification achieved by the present set of amendments or its only old wine in a new bottle?

— As the benefit of indexation is withdrawn, should we still tax the block of the assets as short-term capital gain, or to the extent of the depreciation claimed in the past it should be regarded as business income and, the remaining amount should be taxed as a long-term capital gain?

— After the corporate tax rate on companies was reduced to 22%, the debate on long-term or short-term or business income had lost its steam. Now again, the rate differential for long-term capital gain and other incomes is significant. The difference is even more glaring for non-corporate taxpayers – 12.5% v. 30% - which may reignite the debate. The department's contentions like adventure in the nature of trade to treat capital gains as business income will have one more innings.

■●■

14. *V.S. Demp (supra)*

Taxation of Capital Gains for Non-Residents


Parul Jain
Advocate

Ipsita Agarwalla
Advocate

Overview

Income earned by a non-resident through the transfer of a 'capital asset' situated in India is deemed to accrue in India. While non-residents are liable to be taxed as per provisions of the Income-tax Act, 1961 (ITA) or relevant tax treaty, whichever is more beneficial, the ITA provides the manner of determination of capital gains. Under the ITA, taxation of capital gains is dependent on nature of capital gains and type of asset being transferred.

In this article, we discuss the changes proposed by the Finance Bill, 2024 to the capital gains tax regime and its impact on non-residents. We discuss the changes to the capital gains tax rate and period of holding, specifically, its impact on foreign portfolio investors and units of business trust. We also discuss the interplay of the provisions of the Income-tax Act, 1961 and tax treaties in determining characterisation of income. We also discuss the implications of changes proposed to taxation of buyback for non-residents.

1. Taxation of non-residents

Non-residents are liable to tax in India only on income which accrues or arises or is deemed to accrue or arise in India or is received or deemed to be received in India. Section 9 of the Income-tax Act, 1961 ("ITA") sets out specific circumstances where income is deemed to accrue or arise in India. Under Section 9(1)(i), income earned by a non-resident through the transfer of a 'capital asset'[1] situated in India would be deemed to accrue in India. Under Section 90(2) of the ITA, a taxpayer can choose to be taxed as per the provisions of a tax treaty entered into between India and the country of residence of the taxpayer or the ITA, whichever is more beneficial.

2. Taxation of capital gains under the ITA

Taxation of capital gains is dependent on (i) nature of capital gains i.e. whether long-term capital gains (**"LTCG"**) or short-term capital gains (**"STCG"**) and (ii) type of asset being transferred. The Finance Bill, 2024[2] (**"Bill"**) has proposed to simplify and rationalise the capital

1. Section 2(14) of the ITA *inter-alia* defines capital asset to mean property of any kind held by an assessee, whether or not connected with his business or profession.
2. The President of India has not provided assent to the Finance Bill, 2024 as on July 30, 2024.

gains tax provisions. Subsequently, certain amendments were proposed to the provisions of the Bill through a notice of amendments passed by the Lok Sabha on August 06, 2024 ("Amendment Bill"). The changes will be applicable to transfers of capital assets made on or after July 24, 2024.

2.1 *Period of holding:* Determination of nature of capital gains is dependent on the period of holding of the asset. Section 2(42A) of the ITA provides for determination of period of holding depending on the type of asset being transferred. For classification as LTCG, for all listed securities, the holding period is proposed to be 12 months or more and for all other assets, the holding period is proposed to be 24 months or more. Essentially, the holding period for determination of nature of capital gains on transfer of units of business trust, unlisted bonds, other assets like gold silver etc. has been reduced from 36 months to 24 months. No change has been proposed on the holding period for unlisted shares and immovable property, which is retained as 24 months.

Reduction of holding period for units of business trust (real estate investment trust and infrastructure investment trust) has been a long-standing ask form industry. It is likely to benefit retail investors and enhance liquidity for units of business trust on stock exchanges.

2.2 *Tax rate*: The ITA provides for different tax rates on capital gains arising to residents and non-residents depending on the nature of asset being transferred. The changes in relation to tax rates for non-residents (other than FPIs) have been summarized below:

In relation to long-term capital assets				
Type of asset	**Residents**		**Non-residents**	
	Current	**Proposed**	**Current**	**Proposed**
• Listed equity shares • Units of equity oriented mutual fund • Units of business trust	10% (without indexation)	12.5% (without indexation)	10% (without indexation and without foreign exchange fluctuation benefit	12.5% (without indexation and without foreign exchange fluctuation benefit)[3]

3. Exemption limit under section 112A increased to INR 125,000 from INR 100,000

In relation to long-term capital assets				
Type of asset	**Residents**		**Non-residents**	
	Current	**Proposed**	**Current**	**Proposed**
• Unlisted equity shares	20% (with indexation)	12.5% (without indexation)	10% (without indexation and without foreign exchange fluctuation benefit)	12.5% (without indexation and without foreign exchange fluctuation benefit)
• Unlisted bonds/ debentures	20% (with indexation)	Deemed as STCG taxable at applicable rates	10% (without indexation)	Deemed as STCG taxable at applicable rates
• Immovable property	20% (with indexation)	12.5% (without indexation for immovable property acquired after July 23, 2024) For immovable property acquired by individuals or Hindu undivided family before July 23, 2024, in case tax computed as per 12.5% rate (without availing indexation benefit) is more than the tax computed at rate of 20% (with indexation benefit), the excess capital gains shall be ignored ("Grandfathering Option").	20% (with indexation for transfers before July 23, 2024)	12.5% (without indexation for transfers after July 23, 2024)

SS-XI-20

In relation to short-term capital assets				
Type of asset	***Residents***		***Non-residents***	
	Current	***Proposed***	***Current***	***Proposed***
• Listed equity shares • Units of equity oriented mutual fund • Units of business trust	15%	20%	15%	20%
• Others	No change – STCG taxable at applicable tax rate			

Corresponding changes have also been proposed to section 115AD in relation to taxation of income earned by Foreign Portfolio Investors (**"FPIs"**). For FPIs, while the tax rate on LTCG arising from transfer of listed equity shares, units of equity oriented funds and units of business trust has been proposed to be increased from 10% to 12.5%, the tax rate on LTCG arising from transfer of other securities like listed/unlisted debt etc. continues to be 10%.

2.3 *Taxation of unlisted bonds/ debentures:* The Bill proposes to amend section 50AA of the ITA to deem the capital gains arising on its transfer or redemption or maturity to be STCG in nature. Accordingly, any payment received by an investor on transfer or redemption or maturity of unlisted bond or debenture will be characterized as STCG and tax rate of such gains will be the tax rate applicable to such investor depending on its form and residency.

2.4 *Taxation of distributions on buyback of shares:* The Bill proposes to amend the definition of dividend to deem payments made by a company for purchase of its own shares from a shareholder in accordance with section 68 of the Companies Act, 2013 (**"CA, 2013"**). It is also proposed to delete exclusion of payments made pursuant to buyback from definition of dividend. In addition, the Bill proposes to remove the buyback distribution tax. In relation to amount invested by the shareholder in the company, the Bill proposes to provide for a capital loss in hands of shareholder. These changes are proposed to be applicable from October 1, 2024.

2.5 *Withholding tax on payment to non-resident:* Currently, section 201 of the ITA does not provide any timeline within which tax authorities may initiate withholding tax proceedings in case of defaults in payment made to non-residents. In this regard, certain judicial precedents have held that the limitation applicable in respect of resident payees should apply for non-resident payees as well[4]. Recently, the Telangana High Court in case of Ariba Inc. vs. DDIT, International Taxation[5] held that since the legislature had not prescribed any time limit for an order under section 201 to be passed in case of payment made to a non-resident, it would be wrong on its part to read such a limitation into it. However, the Telangana High Court held that such an order qua a non-resident payee should be passed within a reasonable period. In order to bring an end to this uncertainty in context of payments made to non-residents, with effect from April 1, 2025, the Bill proposes to amend section 201 to provide a timeline for issuance of order under section 201 in case of payments made to non-residents as well. The Bill proposes to provide for a statutory timeline of 6 years from end of the financial year in which payment has been made for passing of order under section 201.

3. Impact of changes proposed by the Bill

3.1 *Impact on computation of capital gains:* Section 48 in of the ITA provides for manner of computation of capital gains. In so far as computation of capital gains is concerned, the proposals made under the Bill are not likely to impact non-residents. As per section 48, capital gains have to be computed as a difference between (i) full value consideration and (ii) cost of acquisition (**"COA"**) and expenses incurred for purpose of transfer. The ITA does not provide the benefit of indexation (which takes into account inflation) while determining the COA for non-residents on transfer of shares or debentures by such non-residents. Non-residents used to get indexation benefit on transfer of immovable property. The Bill has proposed to limit the indexation benefit on transfers made before July 23, 2024. While the Amendment Bill provides a Grandfathering Option to resident individuals and HUF, this benefit has not been extended to non-residents. Therefore, in case where non-residents transfer immovable property after July 23, 2024, LTCG should be computed without indexation benefit and should be taxable at rate of 12.5%.

Section 48 provides the benefit of computation of capital gains arising to a non-resident from transfer of shares or debentures of an Indian

4. The High Court of Delhi in case of *Bharti Airtel v. Union of India [2017] 291 CTR 254 (Delhi)* has held that the limitation period prescribed under section 201(3) of the ITA would be equally applicable in respect of non-resident.
5. TS-583-HC-2023(TEL).

company considering the foreign exchange fluctuation. Recently, the decision of Mumbai ITAT in the case of *Legatum Ventures Ltd. vs. Assistant Commissioner of Income-tax (International Taxation)*[6] stirred controversy on whether capital gains to a non-resident have to be computed considering foreign exchange fluctuations or not. The Mumbai ITAT denied grant of foreign exchange fluctuation benefit to the non-resident taxpayer on basis that section 112(1)(c)(iii) is a special provision for the computation of capital gains in the case of a non-resident and if all the ingredients of the aforesaid section are fulfilled, then capital gains have to be computed as per the said section and the general computation mechanism under section 48 would not apply. The amendments proposed under the Bill seemed to put an end to this controversy. However, the Amendment Bill provides that LTCG in hands of a non-resident or foreign company arising on transfer of unlisted shares after July 23, 2024 is taxable at rate of 12.5%, without giving effect to the first and second proviso of section 48. Therefore, the controversy stirred by Legatum case is likely to continue in cases where the computation of capital gains/ loss is different with or without giving effect to foreign exchange fluctuation benefit. LTCG arising on transfer of listed shares has to be computed without considering foreign exchange fluctuation benefit (as provided under section 112A).

3.2 *Impact on Foreign Portfolio Investors:* while no change has been proposed to the holding period for classification of gains as long-term capital gains ("LTCG") in relation to listed securities (like listed equity shares, debentures, derivatives etc.), changes proposed to the tax rates under section 115AD are likely to impact FPIs considerably. The tax rate for LTCG arising from transfer of listed equity shares, units of equity oriented funds and units of business trust has been proposed to be increased from 10% to 12.5% under section 112A. However, tax rate for LTCG arising from transfer of other listed securities like listed debentures, derivatives etc. seems to continue to be 10%. It is unclear if the intention is to keep this distinction between different listed securities.

3.3 *Impact on investments in unlisted bonds/debentures:* payments under debt instruments are typically structured in form of periodic interest payments coupled with a bullet payment upon redemption or maturity. Characterisation of

6. *Legatum Ventures Ltd. vs. Assistant Commissioner of Income-tax (International Taxation), [2023] 149 taxmann. com 436 (Mumbai - Trib.).*

payments made to investors on redemption of bonds/debentures has been a matter of debate. Courts have taken contrary positions wherein in certain cases redemption premium has been held to be taxable as capital gains[7] and in other cases it has been considered as interest[8]. The Bill proposes to put an end to this controversy by proposing an amendment to section 50AA of the ITA and deeming capital gains arising on transfer or redemption or maturity of unlisted bonds or debentures to be STCG in nature. Accordingly, in case of foreign companies and non-resident individuals such income will be taxable at rate of 35% (plus applicable surcharge and cess) and applicable slab rates, respectively.

In context of non-resident taxpayers, characterisation of such income will have to be seen in context of relevant tax treaties. On a simultaneous reading of the proposed amendment and an applicable tax treaty between India and the country of residence of the non-resident taxpayer, two interpretations are possible:

First, considering that the characterisation of income received pursuant to redemption of unlisted bonds will be STCG as provided in the ITA, one could argue that non-residents can claim benefit of capital gains tax exemption under certain tax treaties which allocate the right to tax capital gains arising on transfer of securities other than shares, to the country of residence. The India – Mauritius tax treaty, India-Singapore tax treaty, most treaties entered into between India and countries forming part of European Union, are examples of such tax treaties. Thus, in the event that section 50AA deems redemption premium, or consideration paid upon maturity of a debt instrument to be capital gains in nature, a non -resident taxpayer could argue that India does not have such a right to tax such capital gain income.

Second, considering that definition of interest under several tax treaties specifically includes redemption

7. *Mrs. Perviz Chang Chuk basi vs. JCIT (2006) (102 ITD 123), Anarkali Sarabhai vs. CIT (1997) (90 Taxman 509) (SC), Kartikeya V Sarabhai vs. CIT (1995) (95 Taxman 164) (SC), Sath Gwaldas Mathurdas Mohata Trust vs. CIT (1987) (33 Taxmann 328) (Bom).*

8. *Khushaal C. Thackersey vs ACIT, I.T.A. No. 3679/Mum/2015; Bennett Coleman & Co Ltd vs. ACIT (ITA No. 569/Mum/2009 dated 21-01-2010).*

9. For example, Article 11(3) of India-Singapore tax treaty defines interest to mean income from debt-claims of every kind, whether or not secured by mortgage, and whether or not carrying a right to participate in the debtor's profits, and in particular, income from Government securities, and income from bonds or debentures, including premiums or prizes attaching to such securities, bonds, and debentures. Similar definition of interest exists in Article 11(5) of the India-Mauritius tax treaty.

premium[9], premium paid upon redemption of an unlisted debt instrument may nonetheless be characterised as interest income, subject to lower tax rates (as compared to tax rate applicable to short term capital gains) under the applicable article of the relevant tax treaty.

The debatable question would then be whether a non-resident taxpayer can chose characterisation of such redemption premium as capital gains under proposed amended section 50AA of the ITA and claim such income to be tax exempt under an applicable tax treaty (which provides for such an exemption), or if such a taxpayer would then necessarily have to apply provisions of Article 11 pertaining to Interest Income should such a taxpayer chose to be governed by the provisions of the tax treaty. In either of the two situations, the non-resident taxpayer will not be subject to the higher tax rate applicable to STCG.

3.4 *Taxation of distributions on buyback of shares:* Taxation of buyback of shares has undergone several changes in recent years. Earlier, amount distributed by way of buyback of shares was considered as capital gains in hands of shareholders. The buyback route provided opportunity to shareholders for potential tax savings vis-à-vis receiving distributions in form of dividends. To curb this arbitrage, the Finance Act, 2013, introduced the buyback distribution tax (**"BDT"**) at rate of 20%[10] under section 115QA of the ITA. The company undertaking the buyback was required to discharge the BDT on amount of distributed income. The BDT was applicable on purchase of own shares by a company in accordance with the provisions of any law for the time being in force. Initially, the BDT applied only on buybacks undertaken by unlisted companies, however, it was subsequently extended to buybacks by listed companies as well. Distributions received by the shareholder were correspondingly exempt from tax under section 10(34A) of the ITA. Further, payments made pursuant to buyback of shares were specifically excluded from the scope of 'deemed dividends' under the ITA[11].

The amendment proposed in the Bill seeks to pass the tax burden on buyback to investors. As per the memorandum to the Bill, the rationale for the amendment was to align taxation of dividends and buyback, both of which are methods of distribution

10. Excluding surcharge and cess.
11. Section 2(22)(iv) of the ITA.

of accumulated reserves to shareholders. The amendment (partially) aligns taxation of buyback to capital reduction. In case of a capital reduction, the payments made to shareholders are considered as dividends to the extent of the accumulated profits of the company, however, as per the amendment the entire amount paid on the buyback of shares is now being proposed to be characterized as dividends (albeit the capital loss for the amount invested by shareholder). While the Bill proposes to provide for a capital loss in hands of the shareholders, from an investor perspective, such loss may not be set off against the dividend income. Further, long-term capital loss can be set-off against LTCG only and can be carried forward for a period of 8 years. Thus, it is possible that a non-resident shareholder who is unable to utilise benefit of the carry forward capital loss, will effectively end up paying tax on the capital invested in the company.

Further, from perspective of non-residents, the definition of dividend will have to be analysed in the relevant tax treaty. Article 10(3) of the OECD Model defines dividends as under:

"3. The term "dividends" as used in this Article means income from shares, "jouissance" shares or "jouissance" rights, mining shares, founders' shares or other rights, not being debt-claims, participating in profits, <u>as well as income from other corporate rights which is subjected to the same taxation treatment as income from shares by the laws of the State of which the company making the distribution is a resident</u>"

Characterisation of income received pursuant to a buyback will have to be determined on basis of tax treaty provisions. Considering the definition of dividend under the OECD Model, one will have to analyse whether income received on buyback can be said to be income from 'other corporate rights' and therefore, dividends under the tax treaty. In such a case, the non-resident taxpayer should be able to claim benefit of a lower withholding tax rate as applicable in case of dividends. This may lead to a better tax outcome as compared to the current law where the Indian entity conducting the buyback is required to pay BDT, as discussed above.

In absence of such language in the tax treaty, one will have to analyse if non-resident investors can continue to argue that the characterisation of proceeds from buyback will be capital gains (and not dividend income). Further, since the capital gains tax article in most tax treaties provides for taxation in case of alienation of shares, a non-resident taxpayer could argue that the consideration received upon buy back of shares should be regarded as consideration received upon alienation of shares. In such a case, the computation of capital gains tax would fall back on the ITA. In case these shares were acquired prior to April 1, 2017 by a Mauritius or a Singapore taxpayer, the gains arising on alienation of such shares during the buy back process could also arguably be claimed to be exempt by such a taxpayer.

Prior to the aforesaid amendment, redemption of preference shares was arguably covered within the scope of Section 115QA (taxable at 20%) considering BDT was applicable on purchase of own shares by a company in accordance with the provisions of any law for the time being in force. However, the proposed amendment makes a reference to payment by a company on account of a purchase of its own shares pursuant to Section 68 of the CA, 2013. Redemption of preference shares takes place under Section 55 of the CA, 2013. Therefore, one could argue that consideration received on account of such redemption of preference shares may not be considered as dividend.

3.5 *Taxation on sale of shares in offer for sale (**"OFS"**):* It is common for non-residents to exit from Indian companies under an OFS when the Indian company lists on Indian stock exchanges. From a tax perspective, currently, if the investor held the unlisted shares for period of 24 months or more, the gains were considered as LTCG in nature. Considering that LTCG on listed shares was made taxable from February 1, 2018, cost step-up upto January 31, 2018 was provided to equity shares. In case where shares were not listed as on January 31, 2018 or shares became property of the taxpayer in consideration of shares which were not listed on January 31, 2018 by way of an exempt transfer and are subsequently listed, the Bill has proposed an amendment to section 55 to provide cost step-up by way of indexation of cost of acquisition of such unlisted shares being sold under OFS. This is a welcome amendment and provides investors exiting in OFS benefit of cost step-up until January 31, 2018.

3.6 *Withholding tax on payment to non-resident:* As per section 195 of the ITA, any person making a payment of a sum to a non-resident that is chargeable to tax under the ITA (read with the relevant provisions of a tax treaty) would be required to withhold tax on such sum at the appropriate rate. Such withholding is required to be made either at the time of payment or at the time of credit of income to the account of the non-resident. Therefore, determination of whether taxes have to be withheld in a transaction where payment is being made to a non-resident is dependent on whether such transaction subject to tax in India or not. The buyer is statutorily obligated to withhold taxes under the ITA. In case where the buyer does not withhold tax or withholds tax incorrectly, section 201 provides that such buyer can be considered as an 'assessee-in-default' ("AID").

Typically, in M&A deals, sellers provide a capital gains computation along with a tax opinion to buyer on basis of which buyers withhold or do not withhold taxes. Buyers take several representations from the sellers in order to safeguard their interests[12]. It is common for sellers to also indemnify the buyer in case there is any breach of the tax representations and/or proceedings are initiated on the buyer for not withholding or incorrect withholding of taxes. These indemnities and representations are generally negotiated between the buyer and sellers. The amendment to provide a timeline for initiation of withholding in case of non-resident payees is welcome and will give clarity to parties while negotiating M&A deals. The trigger of tax indemnity in M&A deals can be limited to the time provided for initiation of withholding tax proceedings.

Conclusion

The Bill seeks to make several changes which are likely to impact taxation of capital gains earned by non-residents. The rationalisation of capital gains tax regime to provide for uniformity between asset classes is definitely welcome. Introduction of uniform rates for residents and non-residents will also reduce the complexity in capital gains provisions. However, as discussed above, the deeming fictions introduced for taxation of payments made pursuant to buybacks and on redemption of debt instruments may lead to complexity when read in context of applicable tax treaties.

12. Some of the typical representations taken by buyers inter-alia include representation on residency of seller, representation that asset being transferred is held as capital asset, representation that seller has not received any notice of any proceedings that are pending, or any notice of any taxes or other sums payable under the ITA which necessitates obtaining of a 'no objection certificate' under section 281 of the ITA from the relevant tax authorities prior to the transfer etc.

SS-XI-28

Reassessment Provisions Reassessed by Finance (No. 2) Bill, 2024


K.K. Chythanya
Sr. Advocate

Vipul Kamath
Advocate

Overview

The Finance (No. 2) Bill, 2024 proposes overhaul to the re-assessment provisions with changes in Sections 148, 148A, 149, 151 and 152 of the Income Tax Act, 1961. The earlier avatar of re-assessment provisions was extensively revamped recently by the Finance Act, 2021. These provisions enacted specific circumstances (which indeed were limited and exceptional) in which the assessing officer could reopen assessments invoking extended periods. The reassessment provisions enacted by Finance Act, 2021 were subject to numerous litigations within a short span of time before various High Courts and the Supreme Court of India. The Finance (No. 2) Bill, 2024 re-assesses one more time the re-assessment provisions. Major changes proposed, includes delinking assessments pursuant to search & seizure proceedings, reduction of extended timelines for reopening of assessments from 10 years to 5 years, significant dilution (or expansion) in circumstances where the assessing officer could invoke the extended period of limitation. This article provides a threadbare comparison of existing and proposed provisions. The analysis elucidates, not just on the proposed changes, but also the nuanced implications of such changes, the potential issues that the taxpayers might face, along with the jurisprudence to overcome such challenges.

1. Introduction

a. The Legislature previously revamped the provisions dealing with income escaping assessment, vide Finance Act, 2021 with effect from 01.04.2021. Thereafter, the said provisions were subject to amendments vide Finance Acts, 2022 and 2023. These provisions have been root cause of litigation across the country.

b. The Finance (No. 2) Bill, 2024 (hereinafter referred to as 'The Bill') has proposed certain amendments to the provisions. The Memorandum observes that the multiple suggestions have been received regarding the considerable litigation at various fora arising from the multiple interpretations of the provisions of aforementioned sections. Further, it observes that representations have been received to reduce the time-limit for issuance of notice for the relevant assessment year in proceedings of assessment, reassessment or re-computation. Thus, it observes that it is necessary to rationalize the reassessment provisions. The Memorandum states that

SS-XI-29

the new system would provide an ease of doing business to taxpayers as there is a reduction in time limit for issue of a notice for assessment or reassessment or re-computation.

c. In this article, the authors have discussed the proposed amendments to relating to reassessment and their impact.

2. Changes in section 148

a. Section 148 deals with issue of notice where income has escaped assessment. Section 44 of the Bill proposes to substitute section 148 with effect from 01.09.2024.

b. We may compare the provisions of section 148 as it presently stands with the proposed section 148 as under:

Present Section 148	***Proposed Section 148***
Before making the assessment, reassessment or recomputation under section 147, and subject to the provisions of section 148A, the Assessing Officer shall serve on the assessee a notice, along with a copy of the order passed, if required, under clause (d) of section 148A, requiring him to furnish within a period of three months from the end of the month in which such notice is issued, or such further period as may be allowed by the Assessing Officer on the basis of an application made in this regard by the assessee, a return of his income or the income of any other person in respect of which he is assessable under this Act during the previous year corresponding to the relevant assessment year, in the prescribed form and verified in the prescribed manner and setting forth such other particulars as may be prescribed; and the provisions of this Act shall, so far as may be, apply accordingly as if such return were a return required to be furnished under section 139:	*(1) Before making the assessment, reassessment or recomputation under section 147, the Assessing Officer shall, subject to the provisions of section 148A, issue a notice to the assessee, along with a copy of the order passed under sub-section (3) of section 148A, requiring him to furnish, within such period as may be specified in the notice, not exceeding three months from the end of the month in which such notice is issued, a return of his income or income of any other person in respect of whom he is assessable under this Act during the previous year corresponding to the relevant assessment year:*
***Provided** that no notice under this section 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 for the relevant assessment year and the Assessing Officer has obtained prior approval of the specified authority to issue such notice:*	***Provided** that no notice under this section 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 for the relevant assessment year*

SS-XI-30

Present Section 148	***Proposed Section 148***
Provided further *that no such approval shall be required where the Assessing Officer, with the prior approval of the specified authority, has passed an order under clause (d) of section 148A to the effect that it is a fit case to issue a notice under this section:*	***Provided further*** *that where the Assessing Officer has received information under the scheme notified under section 135A, no notice under this section shall be issued without prior approval of the specified authority.*
	(2) The return of income required under sub-section (1) shall be furnished in such form and verified in such manner and setting forth such other particulars, as may be prescribed, and the provisions of this Act shall, apply accordingly as if such return were a return required to be furnished under section 139:
Provided also *that any return of income, required to be furnished by an assessee under this section and furnished beyond the period allowed shall not be deemed to be a return under section 139.*	***Provided that*** *any return of income required under subsection (1), furnished after the expiry of the period specified in the notice under the said sub-section, shall not be deemed to be a return under section 139.*
Explanation *1.—For the purposes of this section and section 148A, the information with the Assessing Officer which suggests that the income chargeable to tax has escaped assessment means,—* *(i) any information in the case of the assessee for the relevant assessment year in accordance with the risk management strategy formulated by the Board from time to time;or* *(ii) any audit objection to the effect that the assessment in the case of the assessee for the relevant assessment year has not been made in accordance with the provisions of this Act; or* *(iii) any information received under an agreement referred to in section 90 or section 90A of the Act; or* *(iv) any information made available to the Assessing Officer under the scheme notified under section 135A; or* *(v) any information which requires action in consequence of the order of a Tribunal or a Court.*	*(3) For the purposes of this section and section 148A, the information with the Assessing Officer which suggests that the income chargeable to tax has escaped assessment means,—* *(i) any information in the case of the assessee for the relevant assessment year in accordance with the risk management strategy formulated by the Board from time to time; or* *(ii) any audit objection to the effect that the assessment in the case of the assessee for the relevant assessment year has not been made in accordance with the provisions of this Act; or* *(iii) any information received under an agreement referred to in section 90 or section 90A of the Act; or* *(iv) any information made available to the Assessing Officer under the scheme notified under section 135A;or* *(v) any information which requires action in consequence of the order of a Tribunal or a Court; or*

Present Section 148	***Proposed Section 148***
	(vi) any information in the case of the assessee emanating from survey conducted under section 133A, other than under sub-section (2A) of the said section, on or after the 1st day of September, 2024.
Explanation *2.—For the purposes of this section, where,—* *(i) a search is initiated under section 132 or books of account, other documents or any assets are requisitioned under section 132A, on or after the 1st day of April, 2021, in the case of the assessee; or* *(ii) a survey is conducted under section 133A, other than under sub-section (2A) of that section, on or after the 1st day of April, 2021, in the case of the assessee; or* *(iii) the Assessing Officer is satisfied, with the prior approval of the Principal Commissioner or Commissioner, that any money, bullion, jewellery or other valuable article or thing, seized or requisitioned under section 132 or section 132A in case of any other person on or after the 1st day of April, 2021, belongs to the assessee; or* *(iv) the Assessing Officer is satisfied, with the prior approval of Principal Commissioner or Commissioner, that any books of account or documents, seized or requisitioned under section 132 or section 132A in case of any other person on or after the 1st day of April, 2021, pertains or pertain to, or any information contained therein, relate to, the assessee, the Assessing Officer shall be deemed to have information which suggests that the income chargeable to tax has escaped assessment in the case of the assessee where the search is initiated or books of account, 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*	

Present Section 148	***Proposed Section 148***
seized or requisitioned in case of any other person.	
Explanation 3.—For the purposes of this section, specified authority means the specified authority referred to in section 151.	

c. The comparison of the above provisions would reveal the following material differences-

- While the present section 148 requires service of a notice under the said provision, the proposed section 148 only provides for an issue of notice to the assessee. However, it is needless to state that the even under the proposed section 148, service of the notice upon the assessee would be necessary. Unless the assessee is served a notice under section 148 he would not be able to respond to the same. Further, section 153(2) which deals with time limit for cases of income escaping assessment under section 147 reckons such time limit from the end of the FY in which the notice under section 148 is served. The said provision has not undergone any change vide the Bill. Hence, the requirement of service of notice under section 148 and the time of such service would be required even under the proposed dispensation.

- Under the present dispensation, furnishing of copy of order under section 148A(d) along with the copy of the notice under section 148 is not mandatory given that the requirement of passing of such order is waived off in certain cases as dealt with under the Proviso to section 148A. However, under the proposed dispensation, furnishing of copy of order under section 148(3) [which is pari materia to section 148A(d)] along with the notice under section 148 has been made compulsory. It may be noted that even under the proposed dispensation, the compliance with procedure under section 148A has been waived off in case where income chargeable to tax escaping assessment for any assessment year in the case of an assessee where the Assessing Officer has received information under the scheme notified under section 135A, in terms of section 148A(4). However, despite the same, proposed section 148(1) makes it compulsory to furnish the order under section 148A(3) in all cases. However, such mandatory condition of furnishing of order must be understood to be applicable only to cases where passing of such order is mandatory. Otherwise, it will result in requiring the Assessing Officer to do the impossible act of serving of an order under section 148A(3) though such order need not be passed. It is well settled that the law cannot expect a person to do an impossible act as held in ***Krishnaswamy S. Pd. vs. Union of India [2006] 281 ITR 305 (SC)*** and

Engineering Analysis Centre of Excellence Private Limited vs. CIT [2021] 125 taxmann.com 42 (SC).

- Under the present dispensation, the notice under section 148 must provide a minimum time limit of 3 months to the assessee to file a return in response thereto. Such period is extendable by the Assessing Officer on the basis of an application made by the assessee in this regard. However, under the proposed dispensation, the return is to be filed by the assessee within the period specified in the notice, which period is subject to an outer limit of 3 months from the end of the month in which such notice is issued. In the absence of mandatory minimum time in the notice, needless litigation may arise on the ground of violence to principle of natural justice.
- It may be noted that a return filed beyond the specified time is not treated as an invalid return. It is only deemed not to be a return under section 139. Non filing of return within the specified time would entail consequences like dispensation with issue of notice under section 143(2), processing of return under section 143(1), non applicability of section 270A(2)(a) etc.
- The 3 months period statutorily granted earlier would have given sufficient time for the assessee to explore writ options challenging the reassessment proceeding upon receipt of notice and before filing the return. However, it may now become be prudent to file the return within the specified time even if writ option is considered. This would help treat such return as one filed under section 139.
- It may be noted that both under the present and proposed dispensations, issue of notice under section 148 is subject to the overarching condition of existence of information with the Assessing Officer which suggests that the income chargeable to tax has escaped assessment in the case of the assessee for the relevant assessment year.
- Under the present dispensation, obtaining of prior approval of the specified authority before issue of notice under section 148 is mandatory in terms of 1st Proviso to section 148 subject to the exception that no such approval is required to be obtained where the Assessing Officer, with the prior approval of the specified authority, has passed an order under section 148A(d) to the effect that it is a fit case to issue a notice under section 148. This exception has been in order to avoid the requirement of obtaining multiple approvals i.e. first at the stage of passing an order under section 148A(d) and second at the stage of issuance of notice under section 148. However, the Legislature nevertheless provided for the requirement of obtaining prior approval before issue of notice under section 148 given that passing of order under section 148A(d) has been waived off in certain cases as are provided for in the Proviso to section 148A(d). In such cases,

since no prior approval would have been obtained at the first stage i.e. passing of order under section 148A(d), as no such order would be passed, the Legislature has required the obtaining of prior approval before the issue of notice under section 148.

- Under the proposed dispensation, obtaining of prior approval before issuance of notice under section 148 is required only where the Assessing Officer has received information under the scheme notified under section 135A, in terms of 2nd Proviso. This is for the reason that an order with prior approval under the proposed section 148A(3) would not apply to reassessment prompted by information under section 135A, in terms of proposed section 148A(4).

- An interplay of proposed section 148 with section 139(8A) dealing with filing of updated return may be discussed-

Time of filing return	***Consequence***	***Whether return u/s 139(8A) can be filed?***
Within time provided	Assessment would kick start once notice under section 143(2) is issued	No return under section 139(8A) can be filed once notice under section 143(2) is issued in terms of clause (b) of 3rd Proviso to section 139(8A). However, before issue of such notice, return under section 139(8A) could be filed.
After time provided	There is no requirement to issue notice under section 143(2). Assessment would kick start upon filing of return itself in terms of decision in ***Auto & Metal Engineers vs. Union of India [1998] 229 ITR 399 (SC)***.	Hence, no updated return under section 139(8A) can be filed in terms of clause (b) of 3rd Proviso to section 139(8A).

- Explanation 1 under the present dispensation and section 148(3) under the proposed dispensation provide the cases where there is information with the Assessing Officer which suggest that the income chargeable to tax has escaped assessment. These cases are exhaustive. The existence of such information is a sine qua non for issuance of notice under section 148.

- Clauses (i) to (v) of proposed section 148(3) are same as clauses (i) to (v) of Explanation 1 to section 148. They deal with the following cases-

  — Clause (i) - any information in the case of the assessee for the relevant assessment year in accordance with the risk management strategy formulated by the Board from time to time.

— Clause (ii) - any audit objection to the effect that the assessment in the case of the assessee for the relevant assessment year has not been made in accordance with the provisions of the Act

— Clause (iii) - any information received under an agreement referred to in section 90 or section 90A of the Act.

— Clause (iv) - any information made available to the Assessing Officer under the scheme notified under section 135A.

— Clause (v) - any information which requires action in consequence of the order of a Tribunal or a Court.

- In addition to the above, a new clause (vi) is proposed to be added which deals with any information in the case of the assessee emanating from survey conducted under section 133A, other than under sub-section (2A) of the said section, on or after the 1st day of September, 2024. This case is presently covered in Explanation 2(ii) to section 148 which provides for cases where the Assessing Officer is deemed to have information suggesting escapement of income. However, one may note the following differences-

  — Under Explanation 2(ii) to section 148, what is covered is a survey conducted in the case of the assessee. However, under proposed 148(3)(vi), survey conducted in anybody's case would be covered if information in the case of the assessee is emanating from such survey.

  — Under Explanation 2(ii) to section 148, once a survey is conducted, the Assessing Officer is deemed to have information suggesting escapement whether or not any information in case of the assessee emanates therefrom. However, under proposed 148(3)(vi), information in the case of the assessee must emanate from such survey. Further, it is needless to state that it is not any and every piece of information that qualifies for action. Such information must suggest escapement of income as is held in ***Divya Capital One (P.) Ltd., vs. ACIT [2022] 445 ITR 436 (Delhi);***

- As stated above, presently Explanation 2 to section 148 provides for cases where the Assessing Officer is deemed to have information suggesting escapement of income. These cases provided thereunder are as under-

  — Where a search is initiated under section 132 or books of account, other documents or any assets are requisitioned under section 132A, on or

SS-XI-36

after the 1st day of April, 2021, in the case of the assessee; or

— Where a survey is conducted under section 133A, other than under sub-section (2A) of that section, on or after the 1st day of April, 2021, in the case of the assessee; or

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

— Where the Assessing Officer is satisfied, with the prior approval of Principal Commissioner or Commissioner, that any books of account or documents, seized or requisitioned under section 132 or section 132A in case of any other person on or after the 1st day of April, 2021, pertains or pertain to, or any information contained therein, relate to, the assessee.

- Out of the above instances, as stated above, the 2nd instance has been brought within the purview of proposed section 148(3) dealing with cases of information suggesting escapement of income. As regards the remaining instances, the proposed re-introduction of the provisions under Chapter XIV-B dealing with block assessment takes care of the same. Hence, they are no longer brought within the purview of income escaping assessment under section 147. Considering the same, the proposed section 148 no longer provides for instances where the Assessing Officer is deemed to have information suggesting escapement of income.

- Presently, Explanation 3 to section 148 provides that for the purpose of the said section, the specified authority means the specified authority referred to in section 151. However, the proposed section 148 does not contain a similar provision. The Explanation to the proposed section 148A provides that for the purposes of the said section and section 148, specified authority means the specified authority referred to in section 151.

3. Changes in section 148A

a. Section 148A deals with the procedure to be followed before issue of notice under section 148. Section 44 of the Bill proposes to substitute section 148A with effect from 01.09.2024.

b. We may compare the provisions of section 148A as it presently stands with the proposed section 148A as under:

Present Section 148A	*Proposed Section 148A*
The Assessing Officer shall, before issuing any notice under section 148,—	
(a) conduct any enquiry, if required, with the prior approval of specified authority, with respect to the information which suggests that the income chargeable to tax has escaped assessment;	
(b) provide an opportunity of being heard to the assessee, by serving upon him a notice to show cause within such time, as may be specified in the notice, being not less than seven days and but not exceeding thirty days from the date on which such notice is issued, or such time, as may be extended by him on the basis of an application in this behalf, as to why a notice under section 148 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 and results of enquiry conducted, if any, as per clause (a);	*(1) Where the Assessing Officer has information which suggests that income chargeable to tax has escaped assessment in the case of an assessee for the relevant assessment year, he shall, before issuing any notice under section 148 provide an opportunity of being heard to such assessee by serving upon him a notice to show cause as to why a notice under section 148 should not be issued in his case and such notice to show cause shall be accompanied by the information which suggests that income chargeable to tax has escaped assessment in his case for the relevant assessment year.*
(c) consider the reply of assessee furnished, if any, in response to the show-cause notice referred to in clause (b);	*(2) On receipt of the notice under sub-section (1), the assessee may furnish his reply within such period, as may be specified in the notice.*
(d) 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, by passing an order, with the prior approval of specified authority, within one month from the end of the month in which the reply referred to in clause (c) is received by him, or where no such reply is furnished, within one month from the end of the month in which time or extended time allowed to furnish a reply as per clause (b) expires:	*(3) The Assessing Officer shall, on the basis of material available on record and taking into account the reply of the assessee furnished under sub-section (2), if any, pass an order with the prior approval of the specified authority determining whether or not it is a fit case to issue notice under section 148.*
***Provided** that the provisions of this section shall not apply in a case where,—* *(a) 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; or*	*(4) The provisions of this section shall not apply to income chargeable to tax escaping assessment for any assessment year in the case of an assessee where the Assessing Officer has received information under the scheme notified under section 135A.*

SS-XI-38

Present Section 148A	***Proposed Section 148A***
(b) the Assessing Officer is satisfied, with the prior approval of the Principal Commissioner or Commissioner 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; or *(c) the Assessing Officer is satisfied, with the prior approval of the Principal Commissioner or Commissioner that any books of account or documents, seized in a search under section 132 or requisitioned under section 132A, in case of any other person on or after the 1st day of April, 2021, pertains or pertain to, or any information contained therein, relate to, the assessee; or* *(d) 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.*	
Explanation.—For the purposes of this section, specified authority means the specified authority referred to in section 151.	*Explanation.—For the purposes of this section and section 148, "specified authority" means the specified authority referred to in section 151.*

c. The comparison of the above provisions would reveal the following material differences-

- Presently, section 148A(a) permits the Assessing Officer to conduct enquiry with the prior approval of specified authority which respect to the information which suggests that income chargeable to tax has escaped assessment. However, the proposed section 148A does not contain such power of enquiry. Such power of enquiry would could have prevented needless proceedings on the basis of information received in genuine cases which did not warrant any action at the end of the department. Where as a result of such enquiry the Assessing Officer was able to deduce that there was no escapement of income, he need not have proceeded with issuance of show-cause notice under section 148A(b). In the absence of such power, one may want to argue that it would become inevitable for the Assessing Officer to proceed with issue of show-cause notice under the proposed section 148A(1) where he receives information which suggests escapement of income. However, it is not that every receipt of information would warrant action even under the proposed dispensation. It may be noted even under the proposed section 148A(1), the sine qua non is that the Assessing Officer must have information which suggests that income chargeable to tax has escaped assessment. Thus, mere availability of any and every piece of information should not necessitate action at the end of the department. The information must 'suggest' that there is escapement of income. Thus, the information must indicate or point out to some possible escapement of income warranting an action by the Assessing Officer.

- Alternative view could be that even in the absence of a specific power of conducting enquiry, the Assessing Officer is not denuded of such power if exercised under the available provisions of the Act like sections 131, 133A etc.

- Present section 148A(b) and the proposed section 148A(1) provide for issue of show-cause notice by the Assessing Office before issue of notice under section 148 providing the assessee an opportunity of being heard as to why a notice under section 148 should not be issued. However, there are following key differences:

  — Existing Section 148A(b) permits the use of results of enquiry conducted under section 148A(a) apart from the information received by the Assessing Officer under the present dispensation. However, under the proposed dispensation since there express provision for such enquiry, the express requirement of sharing the results of any enquiry is dispensed with.

  — Under the present dispensation a statutory time period of minimum of 7 days and a maximum of 30 days has been stipulated for furnishing reply to the show-cause notice. Hence, it is mandatory for the Assessing Officer to provide a minimum period of 7 days. However, under the proposed dispensation no such time limit has been provided. However, even in the absence of such stipulation, it is needless to state that a minimum period must be provided for. Otherwise, the notices could be subject matter of challenge before the Courts as violating the principles of natural justice. In ***C.K. Sunny vs. Addnl. STO (2005) 139 STC 186 (Ker)***, the Honourable High Court has held that when a pre-assessment notice is issued for the first time, a minimum period of two weeks at least must be given. A reference may be made to the Para B.1 of the Standard Operating Procedure (SOP) for Assessment Unit under Faceless Assessment Scheme, 2019 issued vide Circular in F. NO. PR. CCIT/

NeAC/SOP/2020-21., dated 19.11.2020, wherein it has been clearly observed that normally a response time of 15 days may be given to the assessee for compliance of notice under section 142(1). Similar instruction has been given in para D.2.1.1 of the Standard Operating Procedure (SOP) for Assessment Unit (AU) issued vide Circular in F.No. Pr. CCIT/NaFAC/2022-23/112, dated 03.08.2022. In Advance Realty Developers v. National E-Assessment Centre [2021 GUJ HC 53030-DB], in the context of assessment under section 144B, it has been held that even when no time period is stipulated for seeking the details and response from the assessee, a minimum reasonable time could be of 15 days. The said decision has been referred to in ***Shree Ganesh Intermediary (P.) Ltd. vs. NFAC [2023] 154 taxmann.com 87 (Gujarat).*** On the basis of the said decisions and Circulars, one may argue that in the absence of stipulation as to minimum time limit, a reasonable time limit of 15 days may be provided for response to the show-cause notice issued under proposed section 148A(1).

— The present section provides for extension of time limit for response by the Assessing Officer upon an application by the assessee. However, proposed section 148A(2) requires the assessee to furnish the reply within the period specified in the notice. It does not provide for any power of extension by the Assessing Officer.

— The present dispensation does not expressly provide for furnishing of the information in possession of the Assessing Officer which suggests escapement of income, though such condition has been read by a number of judgments of the Courts across the country[1] including the Honourable Supreme Court in ***UOI vs. Ashish Agarwal [2022] 444 ITR 1 (SC).*** However, under the proposed dispensation, the provision expressly requires furnishing of information along with the show-cause notice under section 148A(1). Hence, a notice under section 148A(2) and resultant proceedings would be non-est where the information suggesting escapement is not furnished along with the same. Subsequent furnishing of such information cannot

1. *Alkem Laboratories Ltd. vs. PCIT [2023] 459 ITR 551 (Patna); Bhagwan Sahai Sharma vs. DCIT 456 ITR 67 Delhi; Vodafone Mauritius Ltd. vs. ACIT 294 Taxman 43 Delhi; Micro Marbles Pvt. Ltd. vs. ITO 457 ITR 569 Raj; Maharaja Edifice (P.) Ltd. vs. UOI [2022] 446 ITR 508 (Calcutta); Anurag Gupta vs. ITO [2023] 454 ITR 326 (Bom); Yuva Trading Co. (P.) Ltd. vs. ITO [2023] 292 Taxman 598 (Gujarat); Audhi Narayana Reddy Papa Reddy vs. UOI [2023] 150 taxmann.com 91 (Andhra Pradesh).*

validate the notice or proceedings. It may also be noted that the Assessing Officer must furnish the copy of the entire information and not just excerpts from the same or a summary of the same.

- Present section 148A(d) and proposed section 148A(3) deal with passing of an order by the Assessing Officer on the basis of the material available on record and taking into account the reply of the assessee deciding whether or not it is a fit case to issue a notice under section 148 with the prior approval of the specified authority. Presently, section 148A(d) provides for a time limit of 1 month from the end of the month in which the reply from assessee is received or where no reply is furnished, within 1 month from the end of the month in which the time or extended time allowed to furnish a reply as per section 148A(b) expires. It is needless to state that such time limit falls within the overall time limit provided under section 149 for issue of notice under section 148 given that the passing of order under section 148A(d) is a precursor to issue of notice under section 148, However, the proposed section 148A(3) does not deal with the time limit to pass such order, although it is indirectly dealt with by providing for separate time limits for issue of notices under sections 148 and 148A under section 149(1) and 149(2) respectively.

- Proviso to present section 148A deals with cases where the procedure under the said provision need not be followed. Clauses (a) to (c) of the said Proviso are instances of cases where assessing officer is deemed to have information suggesting escapement within the meaning of Explanation 2 (i), (iii) and (iv) to section 148. Clause (d) of the Proviso deals with cases the Assessing Officer has received any information under the scheme notified under section 135A (e-verification scheme) pertaining to income chargeable to tax escaping assessment for any assessment year in the case of the assessee. While cases covered by clauses (a) to (c) are moved out of Re-assessment and treated separately under section 158B, case covered by clause (d) is made free from rigors of section 148A by express exclusion provided in proposed section 148A(4).

4. Changes in section 149

a. a. Section 149 deals with time limit for issue of notice under section 148. Section 45 of the Bill proposes to substitute section 149 with effect from 01.09.2024.

b. We may compare the provisions of section 149 as it presently stands with the proposed section 149 as under:

Present section 149	***Proposed section 149***
(1) No notice under section 148 shall be issued for the relevant assessment year,—	*(1) No notice under section 148 shall be issued for the relevant assessment year,—*
(a) if three years have elapsed from the end of the relevant assessment year, unless the case falls under clause (b);	*(a) if three years and three months have elapsed from the end of the relevant assessment year, unless the case falls under clause (b);*
(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— *(i) an asset;* *(ii) expenditure in respect of a transaction or in relation to an event or occasion; or* *(iii) an entry or entries in the books of account,* *which has escaped assessment amounts to or is likely to amount to fifty lakh rupees or more:*	*(b) if three years and three months, but not more than five years and three months, 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 related to any asset or expenditure or transaction or entries which show that the income chargeable to tax, which has escaped assessment, amounts to or is likely to amount to fifty lakh rupees or more.*
	(2) No notice to show cause under section 148A shall be issued for the relevant assessment year,— *(a) if three years have elapsed from the end of the relevant assessment year, unless the case falls under clause (b);* *(b) if three years, but not more than five years, have elapsed from the end of the relevant assessment year unless the income chargeable to tax which has escaped assessment, as per the information with the Assessing Officer, amounts to or is likely to amount to fifty lakh rupees or more.*
***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 a notice under section 148 or section 153A or section 153C could not have been issued at that time on account of*	

Present section 149	***Proposed section 149***
being beyond the time limit specified under the provisions of clause (b) of sub-section (1) of this section or section 153A or section 153C, as the case may be, as they stood immediately before the commencement of the Finance Act, 2021:	
Provided further *that the provisions of this sub-section shall not apply in a case, where a notice under section 153A, or section 153C read with section 153A, is required to be issued in relation to a search initiated under section 132 or books of account, other documents or any assets requisitioned under section 132A, on or before the 31st day of March, 2021:*	
Provided also *that for cases referred to in clauses (i), (iii) and (iv) of Explanation 2 to section 148, where,—* *(a) a search is initiated under section 132; or* *(b) a search under section 132 for which the last of authorisations is executed; or* *(c) requisition is made under section 132A,* *after the 15th day of March of any financial year and the period for issue of notice under section 148 expires on the 31st day of March of such financial year, a period of fifteen days shall be excluded for the purpose of computing the period of limitation as per this section and the notice issued under section 148 in such case shall be deemed to have been issued on the 31st day of March of such financial year:*	
Provided also *that where the information as referred to in Explanation 1 to section 148 emanates from a statement recorded or documents impounded under section 131 or section 133A, as the case may be, on or before the 31st day of March of a financial year, in consequence of,—* *(a) a search under section 132 which is initiated; or*	

SS-XI-44

Present section 149	***Proposed section 149***
(b) a search under section 132 for which the last of authorisations is executed; or *(c) a requisition made under section 132A,* *after the 15th day of March of such financial year, a period of fifteen days shall be excluded for the purpose of computing the period of limitation as per this section and the notice issued under clause (b) of section 148A in such case shall be deemed to have been issued on the 31st day of March of such financial year:*	
Provided also *that for the purposes of computing the period of limitation as per this section, the time or extended time allowed to the assessee, as per show-cause notice issued under clause (b) of section 148A or the period during which the proceeding under section 148A is stayed by an order or injunction of any court, shall be excluded:*	
Provided also *that where immediately after the exclusion of the period referred to in the immediately preceding proviso, the period of limitation available to the Assessing Officer for passing an order under clause (d) of section 148A does not exceed seven days, such remaining period shall be extended to seven days and the period of limitation under this sub-section shall be deemed to be extended accordingly.*	
Explanation.—For the purposes of clause (b) of this sub-section, "asset" shall include immovable property, being land or building or both, shares and securities, loans and advances, deposits in bank account.	
(1A) Notwithstanding anything contained in sub-section (1), where the income chargeable to tax represented in the form of an asset or expenditure in relation to an event or occasion of the value referred to in clause (b) of sub-section (1), has escaped the assessment and the investment in such asset or expenditure in relation to such event or occasion has been	

Present section 149	*Proposed section 149*
made or incurred, in more than one previous years relevant to the assessment years within the period referred to in clause (b) of sub-section (1), a notice under section 148 shall be issued for every such assessment year for assessment, reassessment or recomputation, as the case may be.	
(2) The provisions of sub-section (1) as to the issue of notice shall be subject to the provisions of section 151.	

c. The comparison of the above provisions would reveal the following material differences-

- Presently, the default time limit to issue a notice under section 148 is 3 years from the end of the relevant AY in terms of section 149(1)(a) unless the case is covered under section 149(1)(b). Under the proposed section 149(1)(a), the default time limit is 3 years and 3 months unless the case is covered under proposed section 149(1)(b).

- Section 149(1)(b) as it presently stands provides for a longer period of limitation of 10 years from the end of the relevant AY. However, the same is subject to fulfilment of the following conditions-

  — The Assessing Officer has in his possession books of account or other documents or evidence;

  — Such books of account or other documents or evidence reveal that the income chargeable to tax has escaped assessment;

  — Such books of account or other documents or evidence reveal that income chargeable to tax has escaped assessment is represented in the form of

    (i) an asset; [as per section 149(1)(b) by Finance Act 2021]

    (ii) expenditure in respect of a transaction or in relation to an event or occasion; or [as per amended section 149(1)(b) by Finance Act 2022]

    (iii) an entry or entries in the books of account, [as per amended section 149(1)(b) by Finance Act 2022]

  — The amount of such income chargeable to tax that has escaped assessment is fifty lakh rupees or more;

- It may be noted that all the above elements viz., possession of materials, such materials revealing that income has escaped assessment, materials further revealing that escaped income is represented in the particular form and such escaped income amounting to ₹ 50 lakhs or more, need to be established by the Assessing Officer in every case falling within the ambit of section 149(1)(b).

- The above safeguard was brought in to ensure that re-assessment beyond 3 years is initiated only in exceptional cases. In this regard, reliance may be placed on the following:
  - — Para 154 of Finance Minister's Speech, during Budget 2021-22;
  - — Memorandum explaining the provisions of the Finance Bill, 2021;
  - — ***Union of India vs. Ashish Agarwal [2022] 444 ITR 1 (SC) (para 6.6);***
  - — INSTRUCTION F. NO. 225/135/2021/ITA-II, DATED 10-12-2021 (para 5);
  - — ***Sumit Jagdishchandra Agrawal vs. DCIT [2023] 455 ITR 216 (Gujarat) (para 5.2.2);***
  - — ***IDFC Ltd. vs. DCIT [2023] 459 ITR 169 (Madras).***
- Proposed section 149(1)(b) reduces the extended period limitation from 10 years to 5 years 3 months from the end of the relevant AY. However, pre-condition for availing extended period is significantly diluted. The proposed conditions are-
  - — the Assessing Officer has in his possession books of account or other documents or evidence;
  - — Such books of account or other documents or evidence are related to any asset or expenditure or transaction or entries;
  - — Such books of account or other documents or evidence related to any asset or expenditure or transaction or entries show that the income chargeable to tax has escaped assessment;
  - — Such income chargeable to tax, which has escaped assessment, amounts to or is likely to amount to ₹ 50 lakhs or more.
- Unlike the earlier provision, there no longer exists any requirement of income escaping assessment being represented in the form of asset etc. Under the proposed dispensation, possession of books of account or other documents or evidence related to any asset or expenditure or transaction or entries would be sufficient where such books of account or other documents or evidence would show that the income escaped assessment exceeds or is likely to exceed ₹ 50 lakhs or more.

- The words 'related to' or 'in relation to' generally denote wide connotation as held in the undernoted decisions[2]. Thus, where the books of account or other documents or evidence bear any direct or indirect relation to any asset or expenditure or transaction or entries and the same indicate the escapement of income amounting to or is likely to amount to Rs. 50 lakhs or more, section 149(1)(b) can be invoked. However, it is needless to state that the books of account, documents or evidence should relate to any asset or expenditure or transaction or entries of assessee and not any other person. This is for the reason that some extraneous material cannot be used to pin down the assessee unless sufficient nexus is established with the assessee.

- It would be pertinent to note that even under the proposed section 149(1)(b), mere escapement of income beyond the threshold limit of ₹ 50 lakhs would not invite the extended period of limitation under the said provision. Even under the proposed provision, the Assessing Officer is required to satisfy the conditions [albeit diluted] provided thereunder which in turn would require the possession of materials by way of books of account, documents or other evidences.

- Further, unlike the Explanation defining the term "asset" under present section 149, there is no similar definition contained in proposed section 149. This would mean that the natural dictionary meaning of the term "asset" will have to be understood for interpreting the provisions of proposed section 149.

- Under the present section 149, no separate time limit has been provided for issue of show-cause notice under section 148A(b). The time limit to issue of notice under section 148A(b) is subject to the overall time limit for issuance of notice under section 148 as provided in section 149, given that compliance with procedure under section 148A is a pre-cursor to issue of notice under section 148.

- Proposed section 149(2) provides for the time limit for issue of show-cause notice under section 148A. The time limit is 3 years from the end of the relevant AY in usual cases in terms of section 149(2)(a) unless the case falls under section 149(2)(b). Under section 149(2)(b), an extended time limit of 5 years is provided where the income chargeable to tax which has escaped assessment, as per the information with the Assessing Officer, amounts to or is likely to amount to fifty lakh rupees or more. Section 149(2)(b) is diluted when compared to section 149(1)(b) as the former only provides for a monetary threshold of Rs.

2. *Union of India vs. Mohit Mineral Pvt. Ltd. 92 KLJ 177 SC; State Wakf Board vs. Abdul Azeez, AIR 1968 Mad 79; CTO vs. Penar Industries Ltd [2015-TIOL-1660-HC-RAJ-VAT] and Airports Authority of India, In re [2008] 299 ITR 102 (AAR).*

50 lakh rupees as compared to additional conditions provided for in the latter.

- As per the 1st Proviso to section 149(1), no notice under section 148 can be issued for AY beginning on or before 01.04.2021, if a notice under sections 148, 153A or 153C could not have been issued at that time due to being beyond the time limit specified under the provisions of section 149 or sections 153A or 153C. This provision saves proceedings which are already barred under the earlier provisions from being saved by the extended period of 10 years provided under section 149(1)(b) introduced vide Finance Act, 2021. However, no such similar Proviso is contained in Proposed section 149. There is no necessity for such Proviso as there is a reduction of time limit from 10 years presently under section 149(1)(b) to 5 years and 3 months under proposed section 149(1)(b).

- 2nd Proviso to present section 149(1) provides that the provisions of the said section shall not apply in case where a notice under section 153A or section 153C r.w.s 153A is required to be issued in relation to a search initiated under section 132 or books of account, other documents or any assets requisitioned under section 132A, on or before the 31.03.2021. The said provision is only clarificatory and is actually superfluous considering that the provisions of section 147 do not apply to searches initiated or books of account, other documents or any assets requisitioned on or before 31.03.2021 and hence application of time limit under section 149 does not arise. Considering that re-introduction of scheme of block assessment has brought search cases outside the purview of section 147, no similar Proviso has been proposed under section 149.

- 3rd Proviso to present section 149(1) deals with cases of search/requisition. Since, upon the proposed provisions, the scheme of block assessment has been introduced to deal with such cases and given that such cases are no longer within the purview of provisions dealing with income escaping assessment, no similar Proviso is present under the proposed section 149.

- 4th Proviso dealt with extension of time limit in respect of information suggesting escapement emanating from statement under sections 131/133A in consequence of a search in certain cases. This would have application to both searched person or 'other person' to whom search materials may relate/pertain or even any other third person. However, new section 149 does not carry similar provision.

- 5th and 6th Provisos to the present section 149(1) are inter-connected. The 5th Proviso provides for exclusion of the time or extended time limit allowed to the assessee as per show-cause notice issued under section 148A(b) or the period during which the proceedings under section 148A is stayed by an order or injunction of any Court in computing the period of limitation as per section 149 for issue of notice under section 148.

Thereafter, the 6th Proviso provides that where after the exclusion of the period referred to in 5th Proviso, the period of limitation available to the Assessing Officer to pass order under section 148A(d) does not exceed 7 days, such remaining period shall stand extended to 7 days and the period of limitation under section 149(1) shall be deemed to be extended accordingly. These Provisos were required given that there was no separate time limits for issue of notice under section 148A(b). However, under the proposed provisions given that separate time limits have been provided for issue of show-cause notice under section 148A under section 149(2), no similar Provisos have been kept in the proposed section 149. However, there is no exclusion provided for the time during which the proceedings under section 148A is stayed by an order or injunction of any Court in computing the period of limitation as per section 149.

- Section 149(1A) overrides section 149(1) and seeks to address a situation where there is books etc., in possession of the Assessing Officer revealing the escaped income represented in the form of an asset or expenditure amounting to ₹ 50 lakhs or more but escaped income is spread over more than one year. The said provision enables the Assessing Officer to invoke section 147 even in situations where the escaped income of more than one AY is invested in the form of an asset or expenditure valued in aggregate to Rs. 50 lakhs or more. In such case, the Assessing Officer shall issue notice under section 148 for every such AY, irrespective of whether the threshold of escaped income for such year is breached or not. Given that the requirement of escaped income being represented in the form of an asset or expenditure is no longer a criteria for application of longer time limit under section 149(1)(b) under the proposed dispensation, no provision similar to section 149(1A) is contained. Under the proposed dispensation, if the escaped income is not ₹ 50 Lakhs or more in any year, extended period of limitation does not apply under any circumstances.

- Present section 149(2) provides that the provisions of section 149(1) as to the issue of notice shall be subject to the provisions of section 151. The said provision is otiose as the mandate of requisite approval is found in sections 148 and 148A and not in section 149. Hence, no similar provision is contained in proposed section 149.

5. Changes in section 151

a. Section 151 deals with Sanction for issue of notice. Section 46 of the Bill proposes to substitute section 151 with effect from 01.09.2024.

b. Presently, under section 151, the specified authority is as under:

Section	***Particulars***	***Specified Authority***
Section 151(i)	3 years or less have elapsed from end of the relevant AY	Principal Commissioner or Principal Director or Commissioner or Director
Section 151(ii)	More than 3 years have elapsed from end of the relevant AY	Principal Chief Commissioner or Principal Director General or Chief Commissioner or Director General

c. Further, the Proviso to the present section 151 provides that the period of 3 years for the purposes of section 151(i) shall be computed by taking into account the period of limitation as excluded by the 3rd or 4th or 5th Provisos or extended by the 6th Proviso to sub-section (1) of section 149.

d. Under the proposed section 151, the distinction on the basis of period is sought to be removed. The proposed provision provides that the Specified authority for the purposes of sections 148 and 148A shall be the Additional Commissioner or the Additional Director or the Joint Commissioner or the Joint Director, as the case may be.

e. It would be pertinent to note that sections 2(1C) and (1D) define the terms, "Additional Commissioner" and "Additional Director" respectively. Section 2(28C) defines the term "Joint Commissioner" to mean a person appointed to be a Joint Commissioner of Income-tax or an Additional Commissioner of Income-tax under section 117(1). Section 2(28D) defines the term "Joint Director" means a person appointed to be a Joint Director of Income-tax or an Additional Director of Income-tax under section 117(1). However, the definitions of the terms Joint Commissioner and Joint Director as referred to in the said sections cannot be imported into section 151, considering that the said section refers to Additional Commissioner and Additional Director separately and hence context of section 151 does not warrant such importing.

f. A reference may be made to section 120(4)(b), where the Board, by way of general or special order, and subject to such conditions, restrictions or limitations as may be specified therein, empower the Principal Director General or Director General or Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner to issue orders in writing that the powers and functions conferred on, or as the case may be, assigned to, the Assessing Officer by or under the Act in respect of any specified area or persons or classes of persons or incomes or classes of income or cases or classes of cases, shall be exercised or performed by an Additional Commissioner or an Additional Director or a Joint Commissioner or a Joint Director, and, where any order is made under this clause, references in any other provision of the Act, or in any rule made thereunder to the Assessing Officer shall be deemed to be references to such Additional Commissioner or Additional Director or Joint Commissioner or Joint Director by whom the powers and functions are to be exercised or performed under such order, and any provision of this Act requiring approval or sanction of the Joint Commissioner shall not apply.

g. In simple terms, section 120(4)(b) permits Board to authorize the PDGIT or DGIT or PCCIT or CCIT or PCIT or CIT to issue orders conferring powers of the Assessing Officer on the Addnl. CIT or Addnl. DIT or JCIT or JDIT and it also provides that in such cases provisions requiring approval or sanction of JCIT shall not apply. The said provision only does away with requirement of approval or sanction of JCIT and not of Addnl. CIT or Joint Director or Addnl. Director.

h. Under the proposed dispensation, where the JCIT is the Assessing Officer in terms of order under section 120(4)(b), the approval or sanction of the Addnl. CIT or Addnl. DIT in terms of section 151 would be required to be obtained. However, where the Addn. CIT or Addn. DIT is the Assessing Officer in terms of order under section 120(4)(b), section 151 is unclear as to whose approval or sanction needs to be obtained. Further, the requirement of such approval or sanction is also not waived off in terms of section 120(4)(b) as it only waives off the requirement of approval or sanction of the JCIT.

i. One may refer to section 151 as it stood prior to its' substitution vide Finance Act, 2021. Section 151(2) provided that in cases other than those referred to in section 151(1) [i.e. where notice is issued after expiry of 4 years], no notice shall be issued by an Assessing Officer below the rank of Joint Commissioner, unless the satisfaction of Joint Commissioner is obtained. It would have meant as under:

Rank of Assessing Officer	***Whether sanction is required?***
Below Joint Commissioner	Yes. Sanction of Joint Commissioner
Joint Commissioner	No. Waived off in terms of section 120(4)(b)
Additional Commissioner	No. As he is not below Joint Commissioner no sanction required in terms of section 151(2)

j. Thus, a language similar to section 151 as it stood prior to the substitution vide Finance Act, 2021, could have been adopted in the proposed section 151.

6. Changes in section 152

a. Section 47 of the Bill proposes to insert sub-sections (3) and (4) in section 152 with effect from 01.09.2024.

b. Proposed section 152(3) provides that where a search has been initiated under section 132 or requisition is made under section 132A, or a survey is conducted under section 133A [other than under sub-section (2A) of the said section], on or after 01.04.2021 but before 01.09.2024, the provisions of sections 147 to 151 shall apply as they stood immediately before the commencement of the Finance (No. 2) Act, 2024.

c. Vide Finance Act, 2021, with effect from 01.04.2021, assessments relating to searches, requisitions and surveys conducted on or after 01.04.2021 were brought within the purview of section 147. However, the Bill proposes to reintroduce the concept of block assessment to deal and remove such assessments from the purview of reassessment provisions. Corresponding to such proposed amendments, section 152(3) has been proposed to be inserted as a saving clause to provide that searches, requisitions and surveys initiated/made/conducted on or on or after 01.04.2021 but before 01.09.2024 shall be subject to provisions of sections 147 to 151 shall apply as they stood immediately before the commencement of the Finance (No. 2) Act, 2024. Therefore, in a case covered by section 152(3), it is permissible to proceed under unamended provisions including issue of notice under unamended section 148. The other provisions of unamended sections 149 and 151 would also apply in such cases.

d. Further, the bill proposes amendments to sections 148, 148A and 149 from 01.09.2024. By the time these amendments are made effective and the same substitute the existing provisions, there may be certain proceedings which are already in progress. Hence, in order to save such proceedings from being rendered infructuous, section 152(4) has been proposed to be inserted to provide that where in a case other than that covered under section 152(3), a notice under section 148 has been issued or an order under section 148A(d) has been passed, prior to the 01.09.2024, the assessment, reassessment or recomputation in such case shall be governed as per the provisions of sections 147 to 151, as they stood immediately before the commencement of the Finance (No. 2) Act, 2024.

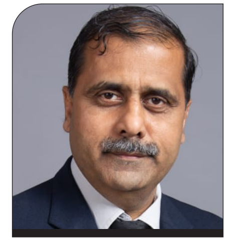
e. These amendments provide for saving and continuance of earlier proceedings and provide for a transition. However, no similar provision was introduced under the Finance Act, 2021, when there was a complete revamp of the provisions relating to income escaping assessment. The absence of such a provision in the Finance Act, 2021 would indicate that the Legislature did not intend to save those proceedings which already stood initiated prior 01.04.2021 (date on which the provisions relating to income escaping assessment were substituted vide Finance Act, 2021).

■●■

"All condemnation of others really condemns ourselves. Adjust the microcosm which is in your power to do) and the macrocosm will adjust itself for you."

— *Swami Vivekananda*

The Direct Tax Vivad Se Vishwas Scheme 2024



CA Kishor Phadke

Overview

After the success of V-S-V-Scheme of year 2020; Government has come out with a repeat scheme called as V-S-V Scheme of 2024. Features of both the schemes are almost similar, with little variations in quantum of amount to be paid. Considering the time distance of only 4 years between the two schemes, one wonders, how many appeals could be covered under this new V-S-V Scheme of 2024. But it needs to be appreciated that, massive number of pending appeals with CIT(A) (say about 5 lacs) as against miniscule appeals with ITAT (say about 25 Thousand). Despite targets of disposal given to CIT(A) and despite increased numbers, pendency is not effectively reducing. Present V-S-V Scheme of 2024 appears an answer to this. Now, assesses will have to pay the tax demanded, so that, interest and penalty gets waived automatically. Similar scheme also appears in new AVATAR of Block Assessments. Direction is clear, ensure best possible tax compliance, accept the initial level additions, and reach a quietus. With increased quest for reaching a quietus and focusing on normal activities, even this new V-S-V Scheme 2024 is expected to get good response.

1. Background

Vide Para-147 to Para-151, the Honorable Finance Minister of India, during her budget-2024, proposed three initiatives to reduce litigation. One of these initiatives is relaunching of the Vivad Se Vishwas – 2020 scheme (hereinafter referred to as old VSV Scheme). Now, there is being launched a new Vivad se Vishwas Scheme – 2024 (hereinafter referred to as new-VSV Scheme). As per facts, old-VSV Scheme, was a good success, and many appeals were settled in terms of the old-VSV Scheme. New VSV Scheme is based on the old VSV Scheme. As such, an obvious attempt to learn the new-VSV Scheme will be, comparing this with the old VSV Scheme.

2. Features of the new-VSV scheme (in comparison with old VSV Scheme)-

2.1. The new-VSV provides for a cut-off date of 22/7/2024. In other words, all appeals/objection petitions/revision petitions, which are pending before various appellate authorities (including DRP and 264 petitions before CIT) are eligible for the new-VSV scheme.

2.2. The date from which the taxpayers can begin to settle their disputes as well as the sunset date are to be notified in due course of time.

SS-XI-54

2.3. Benefit of new-VSV can be availed by taxpayers in following cases –

(i) Where appeals/writ petition/special leave petition relating to disputed tax, interest, penalty or fee are pending before the appellate authorities/High Court/Supreme Court;

(ii) Where objections are filed before the DRP, and the DRP is yet to issue directions,

(iii) Where objections are filed before DRP, and the DRP has issued directions, but consequential order is yet to be passed

iv) Where revision application is filed by the taxpayer before the Commissioner.

2.4 In terms of the 2024 scheme, a taxpayer may settle its eligible disputes by making payment of the amounts as determined by the Designated Authority as per the new VSV Scheme.

2.5 All types of disputes are sought to be covered under new VSV scheme on similar lines of old VSV scheme. It also covers disputes relating to taxes determined under the provisions relating to Tax Deducted at Source (TDS) and Tax Collected at Source (TCS).

2.6 Definition of key terms such as "Appellant", "disputed tax", "disputed penalty", "disputed fees", "tax arrears", etc. are exactly the same.

2.7 Following is the procedure of settling the disputes (same as that of old VSV Scheme) –

a) Appellant has to file a declaration, stipulate the tax arrears thereto, the amount required to be paid, etc.

b) At the point of filing of such declaration, the appeal/objection/revision prayer relating to the dispute involved therein, is deemed to be withdrawn

c) Thereafter, designated authority is to issue certificate of amount payable

d) Appellant has to ensure payment by stipulated date and inform the designated authority

e) Designated authority is to issue certificate stipulating such payment

f) Assessing Authority is to pass a consequential order of removing the tax arrears from I-T records

2.8 Following categories of assesses are not eligible for new VSV Scheme (same as old VSV Scheme)

a) Where the appeals/objections/revisions relate to any "search" based assessment

b) Where prosecution has been launched for any year

c) Where assessments are based on communications received under the cross-border 'Exchange of Information' situations

d) Where, orders of detention have been passed under COFEPOSA

e) Where, proceedings under following severe measures laws have been instituted

(i) Unlawful Activities (Prevention) Act, 1967,

(ii) the Narcotic Drugs and Psychotropic Substances Act, 1985,

(iii) the Prohibition of Benami

Property Transactions Act, 1988,

(iv) the Prevention of Corruption Act, 1988,

(v) the Prevention of Money-Laundering Act, 2002, etc.

2.9 Once the declaration order is issued by designated authority, the dispute is to be considered as concluded finally. No revisit to such issues covered therein is permitted.

2.10 The amount payable for covering any appeal/objection/revision under the new VSV Scheme is tabulated as under -

Sr. No.	*Nature of tax arrear*	*The amount payable on or before 31 December 2024*	*The amount payable on or after 1 January 2025 but on or before the last date*
(a)	Aggregate amount of disputed tax, interest on such disputed tax and penalty levied or leviable on such disputed tax: • Appeal filed after 31 January 2020 but on or before 22 July 2024 • Appeal pending at same forum on or before 31 January 2020	- 100% of disputed tax - 110% of disputed tax	- 110% of disputed tax - 120% of disputed tax
(b)	Disputed interest/penalty/fee: • Appeal filed after 31 January 2020 but on or before 22 July 2024 • Appeal/revision petition pending at same forum on or before 31 January 2020	- 25% of disputed interest/penalty/fee - 30% of disputed interest/penalty/fee	- 30% of disputed interest/penalty/fee - 35% of disputed interest/penalty/fee
(c)	The amount payable would be reduced to 50% in the following cases: • Where an appeal or writ or SLP is filed by the tax authority on any issue • Where the taxpayer has already got a decision on any issue in its favour by the appellate authority or the HC and the same has not been reversed by any higher authority or court		

3. Issues

3.1 ***Need for issuance of Clarifications*** - Many ticklish issues were deliberated and clarified elaborately by the CBDT under old VSV Scheme by CBDT. Considering identical provisions, similar clarifications could be issued at the earliest.

3.2 ***Debarring for prosecution under ITA, 1961*** – When prosecution is launched under ITA, 1961, assesses are debarred from new VSV Scheme. This debarring ought to be understood as a year-to-year exercise. Hence, if in (say) Year-3, prosecution is launched, assessee should be able to file declaration under new

VSV Scheme for (say) Year-1 and Year-2 and Year-4 and so on.

3.3 *Debarring for actions under stringent laws* - As of date, many instances are hitting the daily newspapers wherein, actions are taken by strong handed agencies of the Government, like ED/SFIO/CBI/EOW/etc., who deal with Money Laundering and various other related enactments. Even the I-T department specified wings are handling many Benami law related proceedings and Black Money Act related proceedings. It is a wide-spread belief that, many a times, innocent persons come under the enquiry of these strong handed Government agencies. At the conclusion of these proceedings, situations are quite likely that, such accused persons come out clean. But, such persons are to loose the opportunity of opting for the new VSV Scheme, considering "initiation" of actions under these stringent laws. Though situation was same under the old VSV Scheme, the number of cases covered by the strong handed government agencies was much lower then, than as of present time. Issue is likely to become acute .

3.3. ***Eligibility of appeals under the "Unexpired Period"*** - The new VSV Scheme, is not applicable for cases where, some assessment/appellate order is passed, and, the period of further appeal is yet to be over on the specified date i.e. 22/7/2024. This appears to an UNINTENDED MISS. Interestingly, when the old VSV Scheme launched vide the Finance Bill 2020 is compared with the old VSV Scheme at point of it's enactment, a similar UNINTENDED MISS is revealed. New VSV Scheme, at this stage of Budget-2024, appears a copy of the old VSV Scheme at the Finance Bill 2020 stage (and not at the Finance Act 2020 stage). Hence, one can expect that, such obvious error will be overcome when the Finance Bill 2024 gets enacted in the ensuing few weeks.

3.4. ***Appeals filed with "Delay"*** - In the old VSV Scheme, issue of belated appeals became a bone of contention. Many declarations under the old VSV Scheme stood rejected for non-condonation of delays in making of appeals. Situation was eased out after some court rulings in the old VSV Scheme period. It will be apt to clarify this issue right in beginning so that, efforts do not get consumed in similar exercise for the new VSV Scheme. After all, pursuit of reaching quietus for disputes, whether made out in time or with delay, remains equal for intent herein. As such, timely clarification ought to be provided by the CBDT.

3.5. ***Extra period for payment of tax arrears*** - The payment of extra 10% amount (over the tax arrears), in situations where payment is made after 31/12/2024 but before the "last date", triggers an interesting expectation as regards extra period. Whether such "last date" will have relevance to general rate of 1% for delayed payments, or not, is a mystery at present.

3.6. ***Arbitration, etc. cases not covered*** - Proceedings pending before 'Arbitration or Conciliation or Mediation" authorities were also made eligible under old VSV Scheme. No similar provision is found in new VSV Scheme.

3.7. ***Secondary Adjustment in T-P cases*** - An interesting issue arises w.r.t. additions under the T-P regulations. As per section 92CE, after primary T-P addition, secondary adjustment will keep on taking place, if, "Assessee" accepts primary adjustment, or, if the assessee looses in related T-P litigation. As per mechanism of VSV Schemes (old as well as new), the actual point, of loosing the T-P litigation, is never reached, but, same is required to be so imagined. After such imagination, emerging tax (basis such imagination) is required to be paid. But expecting funds inward remittance in India from foreign AE party, based on such imagined situations, is difficult to digest. Some relaxation on this front is called for. Even in the old VSV Scheme, unfortunately, such relaxation was not provided.

3.8. ***Enhancements*** - Cases of tax arrears related to any "Enhancement " of tax dues by CIT(A) were eligible for old VSV Scheme. Same is not feature of the new Scheme. It is felt, similar amendment will be introduced before enactment of new VSV Scheme.

3.9. ***Pending applications of rectifications/ orders giving effect to appellate orders, etc.*** – In the regime of old VSV Scheme, it was a common experience that, the tax arrears per Assessee, were different than tax arrears arising from I-T records. Reasons were many such as, non passing of rectification orders, non-grant of TDS claims, non-passing of orders giving effect to the appellate orders, etc. As the last date of such Schemes starts approaching, these "differences" start becoming acute. It will be beneficial to all, if some fixed period is specified wherein, focused efforts could be directed to both the sides so that, "differences" get removed.

3.10. ***Ticklish point of waiver of interest*** – In old VSV, an issues arose wherein, assessment orders containing T-P additions were settled. As per facts, in the said case, the said assessees had incurred losses (say in Year-1), which were obviously claimed as **"set-off"** in the subsequent years (say in Year-2/ Year-3) . Due to VSV application, the losses in Year-1 were sacrificed, and as a cascading effect, subsequent **"set-offs"** claimed in Year-2/Year-3 were reversed. After such reversal, emerging tax liabilities for Year-2 and Year-3, were inclusive of interest. As per the spirit of VSV Scheme, no interest ought to trigger once an application under VSV Scheme is made. The issue deserves consideration of the tax authorities.

3.11. ***Order giving effect to VSV order*** – From experiences of old VSV Scheme, CBDT ought to issue direction to the field officers, for passing consequential order giving effect to the VSV order, well withing time. Even today, cases exist where, despite settlement of some tax arrears under old VSV Scheme, the AO still chases the Assessees for the tax arrears related to the very same issue !

4. To conclude

Settlement of disputes is a positive perspective assumed by this Government. Disputes in Taxation is a perpetual reality. Disputes have many origins. Some of the disputes get triggered even from decisions of Honorable Supreme Court (for example, disputes erupting after apex court rulings like CHECKMATE/MANSUKH DYEING, etc.). Hence, attempt of the Government of settling disputes, ought to be always welcomed. With this new VSV Scheme, let us expect that, assessees will reach quietus and peace of mind.

SS-XI-58

Block Assessments are back!

Dharan Gandhi
Advocate

Overview

A significant proposal has been made in Finance Bill (No.2), 2024 regarding assessment of search matters with re-introduction of block assessment. The said proposal depicts the flip-flop and an uncertain approach followed by the Government regarding search assessments i.e., from erstwhile block assessment to the provisions of section 153A to 153D (vide Finance Act, 2003) and thereafter making search assessments part of the reassessment provisions (vide Finance Act, 2021) with now reintroducing the block assessment albeit in a new Avatar. The need for revamping the assessment provisions when the law on the subject is evolving or is already settled in unknown.

From taxpayer's as well as administration standpoint, reintroduction of block assessments seems to be a step in a right direction considering the complex nature of search cases and interlacing of transactions across years which demands a uniform and a consolidated approach. However, the new provisions are prone to various issues on account of ambiguous drafting of the provisions.

Hence, the present article makes an effort to introduce the readers with the provisions of newly inserted block assessments and provides section-wise analysis vis-à-vis the erstwhile block assessments. The author has made an attempt to describe the issues which could be prone to litigation under the new set of provisions.

The author believes that implementation/ execution of the provision carries more weightage with stricter rules to be put in place and need for revamping the law itself needs consideration. The above set of amendments have been proposed under the title 'Simplification and rationalisation' and time would only tell if such objective shall be achieved.

The biggest example of "change of opinion" is now found in the Finance (No. 2) Bill of 2024. Just three years back, the Legislature clubbed the reassessment and the search related assessment provisions. Now, within 3 years, it is proposed to go back to "block assessments" for search related assessment. The history given below will show a clear case of "change of opinion". Naturally, "change of opinion" at the highest level, depicts grave uncertainty at the highest level in government policy and the decision-making process. Obviously, it is not a good sign.

SS-XI-59

History

Before we go into the provisions per se, it would be in the scheme of things to understand the history of search related assessments.

Searches conducted by Tax Department are important means for unearthing black money. It is necessary to take the search proceeding to a logical conclusion, by assessing the undisclosed income in a time bound manner and to recover tax therefrom.

Vide Finance Act 1995, the Legislature for the first time introduced block assessment procedures for assessment of search cases. The reason for brining block assessment was specified in Circular No. 717 dated 14.08.1995. It was stated that valuable time was lost in trying to relate undisclosed income with different year and tax evaders generally manage to divert the focus to procedural and legal issues and often invent new evidence to explain undisclosed income. In order to make the procedure of assessment of search cases cost-effective, efficient and meaningful, block assessment was introduced. As is well known, such procedures were marred with various litigations.

As a result, vide Finance Act, 2003, the Legislature replaced the block assessment provisions with three new sections viz., 153A, 153B and 153C. The said provisions continued upto 1.4.2021. Instead of making one block assessment in respect of the entire period, the latter provisions, provided for individual assessment of six/ten years prior to the year of search.

Vide Finance Act, 2021, the Legislature merged the reassessment provisions and search related assessment provisions into one scheme of reassessment. It is interesting the note the reason behind the amendment as brought out in Explanatory Memorandum to Finance Bill 2021 and I quote:

"In cases where search is initiated u/s 132 of the Act or books of account, other documents or any assets are requisitioned under section 132Aof the Act, assessment is made in the case of the assessee, or any other person, in accordance with the special provisions of sections153A, 153B,153Cand 153D,of the Act that deal specifically with such cases. These provisions were introduced by the Finance Act, 2003 to replace the block assessment under Chapter XIV-B of the Act. <u>This was done due to failure of block assessment in its objective of early resolution of search assessments. Also, the procedural issues related to block assessment were proving to be highly litigation-prone. However, the experience with this procedure has been no different. Like the provisions for block assessment, these provisions have also resulted in a number of litigations.</u>"

Thus, the reason for doing away with the block assessment provisions and section 153A-153C was stated to be failure to achieve the objective and that procedural issues were proving to be litigation prone. Despite the above categorical averment, the Legislature is now proposing to go back to the block assessments and that too within a time period of three years of the last amendment. It was therefore stated earlier to be the biggest example of "change of opinion" and that too at the highest level. To put it colloquially, it is a case of summersault.

The reason for going back to block assessment is provided in the Explanatory Memorandum to the Finance (No. 2) Bill, 2024. The same is extracted hereunder:

"However, it has been gathered from the field formations that there are multiple problems that are arising under the present scheme of search assessment under section 148 of the Act. The absence of any legal requirement for consolidated assessments in search cases has led to a situation where every year only the time-barring year is reopened in the case of the searched assessee. This results in staggered search assessments for the same search and consequentially, the searched assessee may be engaged in the search assessment process for almost up to ten years. This is time-consuming process which escalates the litigation cost for the taxpayer as well as for the department. For the duration of such period, legal position on an issue may undergo change, leading to different additions in different years, on the same issue. Moreover, since such a long duration is involved, there is a possibility of change of opinion with respect to the line of enquiry. Further, due to such staggered assessments, coordinated investigation is not feasible in search cases."

Thus, within a period of three years of introduction, it appears, that the Government is not quite happy with the reassessment provisions. The major reason for the same is that the assessments are staggered, as every year only time barring assessment is reopened. This certainly is a lapse on the part of the executive in giving effect to reassessment provisions and nothing to do with the law per se. Since, the Department is not able to conduct assessments in a timely manner therefore, they have now thought that the procedure is ineffective and should be replaced by provisions which are already proven and accepted to be ineffective and a failure.

Proposed amendment in a nutshell

Chapter XIV-B which dealt with block assessment in search related matters is completely replaced with a new Chapter. Following sections are proposed to be introduced:

i. 158B – definitions

ii. 158BA - assessment of total income as a result of search

iii. 158BB – computation of total income of block period

iv. 158BC – procedure for block assessment

v. 158BD – undisclosed income of any other person

vi. 158BE – time limit for completion of block assessment

vii. 158BF – certain interest and penalties not to be levied or imposed

viii. 158BFA – levy of interest and penalty in certain cases

ix. 158BG – authority competent to make assessment of block period

x. 158BI – chapter not to apply in certain circumstances

Some essential features of the proposed provisions are as under:

1. These provisions are applicable where search is initiated or requisition is made on or after the 01.09.2024.

2. There will be one block period.

3. Such block period would include a period of six assessment years relevant to the previous year prior to the year

of search and period upto the date of the execution of the last of the authorisations for search or requisition. Thus, the time period has been curtailed from 10 years to 6 years.

4. The assessment would not be only in relation to undisclosed income, but also the income which is already disclosed and any other additions which have no connection with the incriminating material found.

5. Any assessment or reassessment proceeding pending in relation to the periods covered under block period would abate.

6. Tax is chargeable at the rate of 60% without any surcharge, interest and penalty.

7. Penalty at the rate of 50% of tax may be levied in respect of undisclosed income not disclosed in the return filed in response to notice u/s 158BC of the Act.

Thus, it can be seen, that this time around, the features of earlier block provisions and provisions of section 153A/153C have been merged.

Certain income/period is to be excluded which is as under:

1. Undisclosed income of the year of search would form part of block period. But income of the year of search other than the undisclosed income will be assessed separately and would not form part of the block assessment proceeding.

2. Any income in relation to any international transaction and specified domestic transaction relating the previous year in which the last of the authorisations of the search has been executed and upto the date of the execution of the last of the authorisations of the search would not be considered for the purposes of determining total income.

Without mincing any words, it appears that the law has been drafted in a hasty manner and has left many questions unanswered. The quality of drafting, softly put, is not upto the mark.

We shall now discuss the proposed provisions section wise and some of the issues arising thereunder.

Section 158B

Section 158B(a) defines the term "block period" to mean the period of six assessment years relevant to the previous year prior to the year of search and period upto the date of the execution of the last of the authorisations for search or requisition.

Section 158B(b) defines the term "undisclosed income" to include the following:

a. any money, bullion, jewellery or other valuable article or thing or

b. any expenditure or any income based on

    a. any entry in the books of account or

    b. other documents or

    c. transactions

where such money, bullion, jewellery, valuable article, thing, entry in the books of account or other document or transaction represents <u>wholly or partly income or property which has not been or would not have been disclosed for the purposes of this Act, or any expense,</u>

SS-XI-62

exemption, deduction or allowance claimed under this Act which is found to be incorrect.

Further, the explanation clarifies as to what is the last of the authorisation which is similar to what was provided for in explanation 2 to earlier section 158BE

Some pertinent features:

i. In the earlier scheme, block period was upto the date of commencement of search whereas now the block period is upto date of execution of the last of the authorisations for search.

ii. Though the section defines the term "undisclosed income", however, what is taxable under the block assessment is the total income and not just undisclosed income.

iii. In the earlier scheme, undisclosed income included any income based on any entry in the books of account whereas in the proposed definition, it also includes any expenditure based on an entry in the books of account.

iv. The term undisclosed income is defined at two places and poses some different results.

Section 158BA

The earlier section 158BA provided that the undisclosed income for the block period shall be assessed under Chapter XIVB of the Act. Further, it specified that such undisclosed income would be taxed at the rate specified in section 113 as income of the block period, irrespective of the period to which it relate. It also specified that the block assessment would be in addition to regular assessment and income assessed and relating to block period shall not be included in regular assessment.

Further, the earlier section 158BA provided that if any part of the income relates to search year or to a year for which time limit to file return of income u/s 139(1) has not expired and that such income or transactions has been recorded on or before the date of search in the regular books of accounts or other documents maintained in normal course then such income would not be added to the total income.

There is complete shift from such procedures. As already mentioned earlier, the proposed block provisions now cover not only undisclosed income but total income and therefore, there is no concept of parallel assessment. Moreover, since the total income is to be taxed under the block assessment, therefore, the concept of abatement has also been introduced. These provisions are proposed in section 158BA.

Proposed section 158BA is summarised as under:

a. AO has to assess total income of the block period under Chapter XIV B [Section 158BA(1)].

b. Pending assessment, reassessment in respect of assessment years falling within the block period shall abate and deemed to be abated on the date of initiation of search proceeding [Section 158BA(2)].

c. If any reference has been made u/s 92CA(3) to TPO, in respect of pending assessment/reassessment proceeding, which is also pending, then the same shall abate. If an order u/s 92CA(1) has been passed in respect of pending assessment/reassessment proceeding then even such order shall abate[Section 158BA(3)].

d. However, if any block assessment is pending and another search is conducted, then such block assessment would not abate. Such pending block assessment would be first completed. After completion of such block assessment, the block assessment for the second search proceeding would be completed. If, for the second block assessment, the time limit is less than three months, then the period would be extended to three months. [Section 158BA(4) and proviso thereto].

e. If any assessment proceeding has been abated, and the block proceedings or order have been annulled or set aside in any proceeding, then such abated assessment shall revive [Section 158BA(5)].

f. The total income of the year of search other than the undisclosed income will be assessed separately and would not form part of the block assessment proceeding. [Section 158BA(6)].

g. The total income relating to the block period shall be charged to tax, at the rate specified in section 113, as income of the block period irrespective of the previous year or years to which such income relates [Section 158BA(7)].

Issues

i. Whether during the pendency of first block assessment, can a notice u/s 158BC in respect of second search be issued? Can there be two block assessments at the same point in time?

ii. If during the pendency of block assessment proceeding of first search, a second search is conducted, then would the material found in the course of second search proceeding, be used to make addition in respect of first block proceeding? This is because, total income would include any other income as well. If yes, then what is the need for second block assessment?

iii. Other income of the year of search which has no connection with incriminating material found in the course of search would be taxed separately at normal rates, but other income of the preceding six years would be tax at the rate specified in section 113 @ 60%. Is this justified?

iv. If the order of TPO also abates, then will it be binding on the AO?

Thus, it can be seen that both the earlier regimes have been combined in the proposed provisions. This will lead to some bigger complications, some of which are brought out in this write up.

Section 158BB

Section 158BB provides for computation of total income. The earlier section 158BB provided for computation of undisclosed income.

Proposed section 158BB is summarised as under:

i. As per section 158BB(1), the total income shall be aggregate of the following:

   a. total income disclosed in the return furnished under section 158BC;

   b. total income assessed u/s 143(3)/144/147/153A/153C prior to the date of initiation of the search;

SS-XI-64

c. total income declared in the return of income filed u/s 139(1) or in response to a notice u/s 142(1) or 148 and which is not covered under earlier clauses;

d. in respect of the year of search on the basis of entries relating to such income or transactions as recorded in the books of account and other documents maintained in the normal course on or before the date of last of the authorisations for the search or requisition relating to such previous year and

e. undisclosed income determined u/s 158BB(2).

ii. Thus, the total income chargeable to tax under the block assessment is the aggregate of the income referred to in section 158BB(1).

iii. Undisclosed income in terms of section 158BB(1)(v) would comprise of the following:

a. Income on the basis of evidence found as a result of search or requisition;

b. Income on the basis of evidence found as a result of survey

c. Income computed on the basis of other documents and any other material or information as are either available with the Assessing Officer or come to notice of AO during the course of proceedings under this Chapter [Section 158BB(2)].

iv. Thus, undisclosed income would comprise of any addition on account of any incriminating material found in the course of search as well as any other addition which may not be connected with the material found in the course of search. However, this would be subjected to the definition of the term ‘undisclosed income’ as found in section 158B(b).

v. Any income in relation to any International transaction and specified domestic transaction relating the previous year in which the last of the authorisations of the search has been executed and upto the date of the execution of the last of the authorisations of the search would not be considered for the purposes of determining total income [Section 158BB(3)].

vi. For the purposes of determination of undisclosed income [Section 158BB(5)]:

a. In case of a firm, the deduction of salary, interest, commission, bonus or remuneration by whatever name called to any partner not being a working partner shall not be available;

b. provisions of sections 68, 69, 69A, 69B and 69C shall apply and reference to financial year shall be construed as block period;

c. provision of section 92CA shall apply and reference to previous year shall be construed as block period;

vii. Tax shall be charged at the rate specified in section 158BA(7) of the Act on the income disclosed in the return filed in response to return u/s 158BC of the Act and the undisclosed income to be added u/s 158BB(1)(e) only [Section 158BB(5)].

viii. If the disclosed income in return filed u/s 158BC or where the income disclosed in respect of any previous year comprising the block period, or the returned income or assessed income under clause (ii) or clause (iii) of section 158BB(1) or where the income as determined under clause (iv), is a loss, it shall be ignored for the purposes of computing total income u/s 158BB(1) [Section 158BB(6)].

ix. Losses and unabsorbed depreciation of years prior to the period falling in the block period would not be set off against the undisclosed income and may be carried forward for being set off in the previous year subsequent to the assessment year in which the block period ends, for the remaining period, taking into account the block period and such assessment year, and in accordance with the provisions of this Act. [Section 158BB(7)].

Issues

1. A person is required to disclose total income including undisclosed income in return filed in response to notice u/s 158BC(1) of the Act. Thus, a person, it appears, has to disclose even his income which he has returned u/s 139(1). This forms part of income u/s 158BB(1)(i). If there is a prior assessment or reassessment, then such amount is also forming part of income assessed u/s 158BB(1)(ii). Thus, the same income is included twice. Section 158BB(1) states that the total income is the aggregate of clauses (i) to (v). Thus, returned income is added twice.

2. The purpose of block assessment is to add all income and not only undisclosed income. Undisclosed income is defined to not only include income in respect of incriminating material found, but any other addition as well. It appears that normal additions made for earlier years would also be taxed at a higher rate of 60% as compared to the normal rates of tax. Thus, any disallowance say u/s 14A or 37(1) which has nothing to do with the search proceeding, would be taxed at 60%. There is no rationale to this.

3. Undisclosed income is defined u/s 158B(b) of the Act to mean money, bullion, jewellery, valuable article, thing, entry in the books of account or other document or transaction which represents wholly or partly income or property which has not been or would not have been disclosed for the purposes of this Act, or any expense, deduction or allowance claimed under this Act which is found to be incorrect. Thus, any income can be termed as undisclosed income if the same is not disclosed under the Act and any expense, deduction or allowance claimed which is found to be incorrect.

4. Where income found as a result of search is already included in return filed u/s 158BC(1) whether the same would also be considered as undisclosed income u/s 158BB(1)(e) of the Act? If yes, then there would be double addition. If no, then there would be some different consequences, inasmuch as the exceptions for not allowing any set off etc. in respect of undisclosed income would not apply.

5. As per 158BB(1)(iv), income of the year of search which is already disclosed in the books of account or other documents are to be included in the computation of total income u/s 158BB(1) of the Act. However, such income is specifically sought to be excluded u/s 158BA(6) of the Act. This appears to be inconsistent. It appears that the intention is to only tax income of the year of search for the period upto the date of execution of last of authorisation of search only which is related to incriminating material found. However, entire undisclosed income Is getting taxed and it includes not only the income relatable to incriminating material but all other income which comes to the knowledge of the AO. This doesn't appear to be the correct interpretation but it is so on plain reading of the provisions.

6. It appears that since, returned income is to be included in the return filed in response to notice u/s 158BC(1) of the Act, therefore, even such returned income is to be taxed at a higher rate of 60%. Again, there appears to be no rationale to this.

7. The tax rate of 60% is applicable only on the income u/s 158BB(1)(a) i.e., income disclosed in the return filed in response to notice u/s 158BC(1) and in respect of the additions of undisclosed income added by the AO u/s 158BB(1)(e) of the Act. There is no rate of tax prescribed in respect of the other incomes which is income u/s 158BB(1)(b), 158BB(1)(c) and 158BB(1)(d). Either the same are not to be taxed at all and are to be included in the computation of total income only or they are to be taxed at normal rates. The first interpretation appears to be more apt. Because there is no rate of tax prescribed for any block period other than section 113 of the Act. Also, there is no provisions for credit of any TDS/TCS/advance tax or SA Tax against the income assessed under block period. Naturally, there is a provision of treating the return filed u/s 158BC to be a return filed u/s 139 and all other provisions of the Act are to apply. However, since, this is a block period and only some income is to be taxed, therefore, the correct interpretation cannot be deciphered.

8. What is to be done of the losses of the years which are forming part of the block period. If the same are going to be assessed as loss of block period and not of any particular assessment year, then how will the provisions of carry forward and set off apply?

9. Is it possible to raise a new claim in the return filed u/s 158BC(1) of the Act? It appears to be.

10. Will the years forming part of the block assessment loose the tag of "income or loss of the assessment year" and would be considered as income or loss of the block period? If yes, then how would there be a reassessment of the said year after the block assessment and what income is to be disclosed in return filed in response to 148 of the Act? Also, how can an assessee make a claim to reduce the income disclosed in the return filed and assessed u/s 158BA of the Act? This issue arises because, in the earlier regime, the income not relating to material found in the course of search were taxed under regular parallel assessment

SS-XI-67

and therefore, each year had its own independent existence. The same now may not be possible. There would arise many other issues, where reference in various other provisions of the Act would be to Assessment year and not block period. Though, section 158BB specifies the reference to financial year and previous year in few sections would mean reference to block period, but then there is no such blanket provision in this regard.

11. How will the loss/unabsorbed depreciation of the earlier years prior to the years forming part of block would be treated? They cannot be set off against the undisclosed income, but they can be set off against income other than undisclosed income. Can it be set off against the income disclosed in return u/s 158BC(1) including the income disclosed as a result of search proceeding?

12. Loss/unabsorbed depreciation of the earlier years prior to the years forming part of block period, apparently, can be set off against income of the year of search other than the undisclosed income which is assessed under the block assessment provisions.

Section 158BC

Proposed section 158BC provides for the procedures for block assessment. It provides for the following:

a. AO shall issue a notice u/s 158BC of the Act, requiring an assessee to file a return of income disclosing total income including undisclosed income of the block period.

b. Such return has to be filed within 60 days. The said period would not be extended under any circumstances.

c. If a return has been filed then such return would be considered as a return filed u/s 139 and the procedures u/s 143 of the Act including notice u/s 143(2) would apply. Provisions of section 143(1) would not apply.

d. If return is not filed as per section 158BC(1)(a), then the same would not be considered as a return filed u/s 139 of the Act.

e. A person cannot file a revised return u/s 158BC.

f. AO has to follow provisions of section 142, 143, 144, 145, 145A or 145B of the Act.

g. AO has to determine total income and determine tax payable and pass an order of assessment or reassessment.

h. Provisions of section 144C (i.e., DRP) would not apply. Thus, even in case of an eligible assessee, no draft order has to be passed u/s 144C(1) of the Act.

i. Block period for third party u/s 158BD is same.

j. Before issuing any notice u/s 158BC approval has to be taken of Addl CIT/ Addl. DIT/Jt. CIT or Jt. DIT.

Section 158BD

Section 158BD proposes to tax undisclosed income of any other person. Section 158BD would apply in the cases where the AO is satisfied that any undisclosed income:

1. belongs to or

2. pertains to or

3. relates to

any person, other than the searched person. If such satisfaction is recorded then, any money, bullion, jewellery or other valuable article or thing, or assets, or expenditure, or books of account, other documents, or any information contained therein, seized or requisitioned shall be handed over to the AO having jurisdiction over such other person and such AO shall proceed u/s 158BC against such other person

Under the earlier provisions, the section 158BD used the words "undisclosed income belongs to". However, the proposed provision has used the words "undisclosed income belongs to or pertains to or relates to". It is not sure as to what one means by the term undisclosed income relates to another person. This is the result of mixture of provisions of block assessment and provisions of section 153A/153C of the Act. There is no meaning of the words "relates to or pertains to". Section 158BD may apply when undisclosed income belong to another person.

Further, in the latter part of section 158BD, what has to be handed over includes apart from assets and books, expenditure. This is absurd. How can expenditure be handed over? This, again, is the result of mixture of provisions of block assessment and provisions of section 153A/153C of the Act.

Section 158BE

Time limits prescribed for completion of assessment are as under:

a. 12 months from the end of the month in which the last of the authorisations for search u/s 132, or requisition u/s 132A, was executed or made;

b. If reference is made u/s 92CA, then there would be an extension of 12 more months.

c. Such period would be extended by a period (not exceeding 180 days) commencing from the date on which a search is initiated or a requisition is made and ending on the date on which the books of account, or other documents or assets etc. are handed over to the AO.

d. If after excluding the aforesaid period, the time available to make assessment expires before the end of the month, then such period would be extended to the end of the month.

e. In respect of third party covered u/s 158BD of the Act, the period of limitation would be twelve months from the end of the month in which the notice u/s 158BC is issued. Again, there would be an extension of 12 months, in case of reference to TPO.

f. There are certain exclusions prescribed in section 158BE(4).

Issues

1. There is no time limit prescribed to issue notice u/s 158BD of the Act. However, here one can rely upon the judgment of the Hon'ble Supreme Court in case of ***CIT vs. Calcutta Knitwears reported in [2014] 362 ITR 673 (SC),*** where the Court has held that *"The satisfaction note could be prepared at either of the following stages: (a) at the time of or along with the initiation of proceedings against the searched person under Section 158BC of the Act; (b)*

along with the assessment proceedings under Section 158BC of the Act; and (c) immediately after the assessment proceedings are completed under Section 158BC of the Act of the searched person” Thus, one cannot wait for long for recording satisfaction. This judgment has been accepted by the Board in Circular No. 24/2015 dated 31.12.2015.

2. Instead of extending the period during which the documents/assets are under transition from Investigation Wing to the AO, they could have simply provided for six more months. This is because, if the AO extends the time limit, how will an assessee come to know as to the exact period for transition. This will result into unnecessary litigation. Also, in all cases of extension, an assessee, as a matter of right, should ask for such details to know the exact period of limitation and AO should be dutybound to provide the same.

Section 158BF

Section 158BF provides that no interest u/s 234A, 234B or 234C or penalty u/s 270A shall be levied or imposed upon the assessee in respect of the undisclosed income assessed or reassessed for the block period. Thus, an assessee is only required to pay tax at the rate of 60% and that too without any surcharge. This appears to be more like an amnesty scheme where an assessee is asked to pay 60% and go scot-free. Where similarly placed undisclosed income which is charged to tax u/s 115BBE for non-search cases are to be taxed at a much higher rate, with surcharge and cess and with penalty as well. This is clearly irrational, arbitrary and discriminatory.

A person would be happy to pay tax u/s 113 of the Act without any interest and penalty. However, the section does not do away with levy of penalty under other provisions of the Act.

Section 158BFA

Section 158BFA deals with levy of interest and penalty in certain cases. It proposes the following:

i. As per section 158BFA(1), if no return of income is filed in response to notice u/s 158BC of the Act within the specified period, then the assessee shall be liable to pay simple interest at the rate of 1.5% for every month of the tax on undisclosed income determined u/s 158BC(1)(c) of the Act for period commencing on the day immediately following the expiry of the time specified in the notice, and ending on the date of completion of assessment.

ii. 158BFA(2) provides for levy of penalty. It can be summarised as under:

   a. Penalty is to be levied at the rate of 50% of the tax payable u/s 158BC(1)(c).

   b. Penalty can be levied by CIT(A) or AO;

   c. It can be levied in the course of any proceedings under this Chapter;

iii. No penalty can be levied under section 158BFA(2) or 271AAD(1) or 271D or 271DA or 271E of the Act if:

   a. A person has furnished a return u/s 158BC(1);

   b. Tax payable on the basis of income disclosed in the said return has been paid;

SS-XI-70

c. Evidence of tax paid is furnished with the return;

d. No appeal is filed against such part of income which is disclosed.

iv. However, penalty can be imposed on such part of the undisclosed income which is not disclosed in the return of income and which is added by the AO.

v. Order of penalty can be passed after giving reasonable opportunity of being heard. Further, such order has to be made where the penalty exceeds Rs. 2 lakh with the prior approval of Jt or Addl. CIT/DIT.

vi. Further, time limits have been provided for levy of penalty.

Though, the explanatory memorandum states that no penalty shall be levied and section 158BF provides for exclusion of section 270A of the Act, however, there is no specific exclusion in respect of other penalties. Section 271AAB may not apply, as it deals with specified previous years. Similarly, section 271AAC may not apply unless tax is payable u/s 115BBE of the Act.

Section 158BG

This section proposes that any order of block assessment shall be passed by an officer of the rank of ACIT/DCIT/ADIT/DDIT. Further, such order has to be passed with the prior approval of the JCIT/JDIT/Addl. CIT/Addl. DIT.

Section 158BH

This section makes all other provisions of this Act applicable to block assessment save as otherwise provided in this Chapter

Section 158BI

This sections states that the provisions of block assessment shall not apply where search was initiated or requisition has been made before the 01.09.2024.

Conclusions

It appears that the Government is not able to formulate a proper strategy for search related assessments. This time around, the amendment has nothing to do with the incompetence of law per se, but more with the execution issue, which could have been easily resolved, by putting strict procedures in place.

The proposed amendments are under the heading "Simplification and rationalisation". Nothing more is to be said in this regard.

It is important to understand, the process which goes behind drafting important piece of legislation. Drafting of ambiguous and vague provisions show non-application of mind. The same results in huge revenue loss. It would be important not only to change the law but to also hold people accountable for the revenue loss.

Provisions affecting Benami Law and Black Money Law

Dhinal Shah
Advocate

CA Rohit Pansari

Overview

Tax evasion and black money arise from illegal activities (crime, corruption) and unreported legal activities. Indian government laws addressing these include the Benami Transactions (Prohibition) Act, Prevention of Money Laundering Act, and Black Money Act. The common aim is to curb black money and recover illegal gains.

Recent proposed amendments under Benami law include immunity to benamidars if they assist in investigations by introduction of new section 55A under Benami Act. Under the present law, punishment is being levied on both beneficial owner and benamidar which results in hesitation by benamidars being of poor means and illiterate to come forward and disclosed information. Thus the proposed amendments to section 55A of the Benami Act would encourage benamidars to come forward and become approvers, which could result in mental peace to them as against substantial revenue collection for the Government.

Recent proposed amendments under Black Money Act proposed to de-penalize failure to disclose an asset or assets (other than immovable property) in the income tax return where the aggregate value of such asset or assets does not exceed INR 20 lacs. Under the present laws, no penalty is levied in respect of an asset, being one or more bank accounts having aggregate balance of upto INR 5 lacs. All other assets are not covered and amount is also small as compared to penalty of INR 10 lakhs. Proposed amendment will provide a big relief with regards to levy of penalty upon failure to disclose certain small assets by way of ignorance.

1. Background Benami Transactions (Prohibition) Act, 1988 and Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015

1.1. The problem of tax evasion and the generation of black money primarily ensues through two sources. The first source being activities which are not permitted by law, such as crime, drug trade, terrorism, and corruption. The second includes legally permissible activities, not accounted for or reported to revenue authorities, which may result in tax evasion.

1.2. To impede the first source, the Government of India has introduced various laws like the Benami Transactions (Prohibition) Act, 1988

SS-XI-72

('Benami Act'), Prevention of Money Laundering Act, 2002 etc. For the latter source, the Government has introduced various steps in the form of demonetization, voluntary disclosure schemes, amendments in the Income-tax Act (e.g. disclosure of foreign assets in the return of income, enactment of Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015 ('Black Money Act').

1.3. While the Income-tax Act is primarily an Act to consolidate and amend the law relating to income tax, a common link running between the Black Money Act, Benami Transactions Act and the Money Laundering Act is black money and undisclosed assets. These three Acts have been enacted to curb the generation of black money and to recover the benefits of the ill-gotten gains from the persons possessing black money.

Part A - Amendments in relation to Benami Act proposed by Finance Bill (No 2), 2024[1]

2. Proposed Amendments

Benami transactions are quite common in the real estate. However, recently, such transactions have also entered the arena of the stock and commodity market. To deal with and curb benami transactions, the Benami Act was introduced. However, this law suffered from various inadequacies. Accordingly, the Benami Transactions (Prohibition) Amendment Act, 2016 was passed to substantially modify the Benami Act,1988. Recently, by Finance Bill (No 2), 2024, certain amendments to the existing Act have been proposed which have been discussed below.

- Introduction of section 55A of the Benami Act.
- Amendment made in Section 24 of the Benami Act.

3. Amendment with respect to the introduction of section 55A of the Benami Act

Background as to what constitutes "Benami"

3.1. Before discussing amendments made in the Benami Act, first, let's understand what is benami and brief methodology of benami transactions.

3.2. A Benami Transaction is a transaction in which the property is acquired by one person in the name of another person or a business may be carried on by some person in the name of another person. Thus, the real or beneficial owner remains unknown and the apparent owner is only a name lender. As the word 'benami' suggests it is one without a real name. This practice of benami transactions is extremely prevalent in India.

3.3. The benamidar has no beneficial interest in the property or business that stands in his name, he represents, in fact, the real owner and so far as their relative realistic position is concerned, he is a mere trustee of the real owner.

3.4. The word 'benami' is used to denote two classes of transactions, which differ from each other in their legal character and incidents. In one sense, it signifies a transaction, which is real and secondly, the class of transactions, which is usually termed as benami. For example, when A sells properties to B but the sale deed mentions X as

1. Bill passed by both Houses of Parliament but President assent is pending

the purchaser. Here, the sale itself is genuine but the real purchaser is B, X, being his benamidar.

Present law with respect to penalty under section 53(2) of the Benami Act

3.5. Further, let us understand the benami transaction through an example. If a businessman, A, purchases a flat in the name of B, his driver and the source of income is not disclosed by Mr. A then the flat becomes the Benami property and Mr. B becomes the Benamidar. Hence Benamidar is the person whose name appeared on the paper i.e. the person in whose name the Benami property is bought, held or transferred.

3.6. It is clear that as per section 53(2) of the Benami Act, benamidar, Mr. B can be held liable for rigorous imprisonment for a minimum one year to a maximum of seven years, a fine upto 25% of the fair market value of the property and/or confiscation of property if he fails to explain the source of income for purchasing such a flat. Now, if Mr. B revealed that the actual owner was Mr. A then the same punishment is applicable to Mr. A without any compensation.

As the same quantum of penalty & prosecution is imposable in the case of beneficial owner and abettor, benamidars (ie abettor) do not come forward to give evidence against the beneficial owner.

Proposed amendments with respect to the introduction of section 55A of the Benami Act

3.7. Various other laws of the land provided for a tender of pardon/immunity from prosecution/reduced penalty in cases where the witness assists in the due process of law.

3.8. Accordingly, it is thus proposed to insert a new section 55A in the Benami Act, to provide the following:

- The initiating Officer may, for obtaining the evidence of the benamidar or any other person as referred to in section 53, other than the beneficial owner, tender to such person immunity from penalty for any offence under section 53
- Such immunity shall be granted with the previous sanction of the competent authority as referred to in section 55
- Immunity can be granted only on the condition of his making a full and true disclosure of the whole circumstances relating to the benami transaction.
- A tender of immunity made to, and accepted by, the person concerned, shall, to the extent to which the immunity extends, render him immune from prosecution for any offence in respect of which the tender was made and from the imposition of any penalty under section 53 of the Act.

3.9. Further, immunity tendered can also be withdrawn in certain cases as discussed below:

- It appears to the Initiating Officer that any person to whom immunity has been tendered has not complied with the condition on which the tender was made or is wilfully concealing anything or is giving false evidence

- The Initiating Officer may record a finding to that effect, and thereupon, with the previous sanction of the competent authority as referred to in section 55, the immunity shall be deemed to have been withdrawn.
- Any such person may also be tried for the offence in respect of which the tender of immunity was made or for any other offence of which he appears to have been guilty in connection with the same matter
- Such person shall also become liable to the imposition of any penalty under the Benami Act to which he would have otherwise been liable.

4. Amendment made in Section 24 of the Benami Act

4.1. The Benami Act provides authorities to carry out the process or mechanism laid down under it for dealing with benami transactions. Section 23 of the Benami Act empowers the authority to conduct necessary enquiry or investigation relevant for the proceedings. Further, Section 24 of the Benami Act relates to notice and attachment of property involved in the Benami transaction.

4.2. Finance Bill (No 2), 2024 has provided several revisions and introductions in time limits for issuance of notices/filing of submissions. The same is tabulated below:

Issue	***Old provisions***	***Amended provisions***
Time limit to file submission in case of benamidar or beneficial owner	Section 24(3) did not provide for any time limit for a benamidar or beneficial owner to file submissions in response to notice issued.	Sub-section 2A inserted to provide a maximum time limit of three months from the end of the month in which notice is issued.
Time limit for provisional attachment by Initiating Officer	Sub-section (3) and (4) provide for a time limit of 90 days from the last day of the month in which notice under sub-section (1) is issued	Sub-section (3) and (4) have been amended to increase the said period to four months from the end of the month in which notice under sub-section (1) is issued.
Time limit for statement of the case and reference to the Adjudicating Authority by Initiating Officer.	Sub-section (5) provide for a time period of fifteen days from the date of attachment order to the Initiating Officer to draw up a statement of the case and reference to the Adjudicating Authority.	Sub-section (5) has been amended to increase the said period to one month from the end of the month in which the attachment order has been passed.
Note: These amendments will take effect from the 1st day of October, 2024.		

SS-XI-75

5. Conclusion

5.1. Thus, as discussed in the Memorandum, many benamidars being of poor means and illiterate background, imposing upon them the same penalty as the beneficial owner of such a benami transaction could be disproportionate in nature. If such benamidars were to become approvers, it would help in gathering clinching evidence and details about benami properties and result in convictions of the beneficial owners, thus strengthening the regime.

5.2. Thus the proposed amendments to section 55A of the Benami Act would encourage benamidars to come forward and become approvers, which could result in mental peace for them and lead to substantial revenue collection for the Government.

Part B - Amendments in relation to Black Money Act proposed by Finance Bill (No. 2), 2024

6. Proposed Amendments

Under the aegis of the Income Tax Act, 1961 ('Income tax Act') with an intent to tax illegitimate/undisclosed foreign income and assets earned/acquired outside India by residents of India, a more stringent enactment i.e. Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015 ('Black Money Act') has been notified with effect from 1st July, 2015. The Black Money Act has been enacted to deal with the issue of black money i.e., undisclosed foreign income and assets and the procedure for dealing with such income and assets and to provide for imposition of tax on any undisclosed foreign income and assets held outside India and for matters connected therewith or incidental thereto.

Recently, by Finance Bill (No 2), 2024, certain amendments to the existing Act have been proposed in respect of disclosure of 'Foreign asset' which have been discussed below.

- Amendment in the proviso to sections 42 and 43 of the Black Money Act.

7. Amendment in the proviso to sections 42 and 43 of the Black Money Act

Background of current requirements to disclose foreign asset and income

7.1. Before discussing amendments made in the Black Money Act, first, let's understand what are the present reporting requirements under Black Money Act read with Income tax Act, 1961.

7.2. As per Income tax Act, 1961, with effect from 1 April 2016, it is obligatory for a resident (other than not ordinarily resident in India) to disclose the following assets in its return of income:

- Holds, as a beneficial owner or otherwise, any asset (including any financial interest in any entity) located outside India or has signing authority in any account located outside India; or
- is a beneficiary of any asset (including any financial interest in any entity) located outside India,

7.3. Thus, income earned from a source located outside India or assets acquired or made located outside India including assets held by a person as beneficial owner or otherwise or in which he is a beneficiary, are required to be disclosed in 'Schedule FA' in the return of income. These could include 'bank deposits', 'custodial accounts', 'equities',

SS-XI-76

'insurances', 'real estate properties', etc held outside India. In case of failure to do so, the assessee shall be chargeable to tax under section 3 of the Black Money Act for every assessment year commencing on or after 1st April, 2016.

Background of penalty under sections 42 and 43 of the Black Money Act

7.4. Black Money Act defines undisclosed foreign income and asset as below:

- Undisclosed **foreign income and asset** is the total amount of undisclosed income of an assessee from a source located outside India and the value of an undisclosed asset located outside India
- **Undisclosed asset located outside India** is as an asset (including financial interest in any entity) located outside India, held by the assessee in his name or in respect of which he is a beneficial owner, and he has no explanation about the source of investment in such asset

7.5. Besides chargeability of tax in respect of undisclosed foreign income and asset under section 3 of the Black Money Act, a person shall also be liable for penalty of INR 10 lakhs in respect of foreign asset/income in following circumstances:

- Under section 42 of the Black Money Act - If he has failed to furnish the return of Income under section 139 of the Income Tax Act
- Under section 43 of the Black Money Act - If he fails to furnish any information or furnishes inaccurate particulars in return of income filed under section 139 of the Income Tax Act

Exceptions to penalty under section 42 and 43 of Black Money Act as per present provisions

7.6. The proviso to section 42 and 43 of the Black Money Act provides that no penalty shall be levied in respect of an asset, being one or more bank accounts having an aggregate balance which does not exceed or value equivalent to INR 5 lakhs at any time during the previous year.

7.7. Hence, there was no penalty in case of failure to disclose bank accounts with a cumulative balance of up to INR 5 lakhs at any time during the year.

Proposed amendments in respect of penalty under section 42 and 43 of Black Money Act

7.8. As per present provisions, the penalty shall still be levied in case of non-disclosure of all other foreign assets (except Bank account as discussed above) of even single penny held by resident person at any time during the previous year. Examples of such assets are given below:

- Term deposits held outside India
- Shares or securities of foreign company acquired and held in Demat account outside India
- Right to exercise Employee Stock Option Plans ('ESOP')/Share Appreciation Rights ('SAR's')/ Employee Stock Purchase Plan ("ESPP') given by foreign company to resident employees/professionals.
- Any other movable/immovable assets

7.9. Accordingly, such resident individuals were penalized under section 42 and 43 of Black Money Act for non-disclosure of even small foreign assets due to oversight or ignorance. Therefore, the Finance Bill (No. 2) 2024 propose to substitute the existing proviso to section 42 and 43 of the Black Money Act to de-penalize failure to disclose an asset or assets (other than immovable property) where the aggregate value of such asset or assets does not exceed INR 20 lakh. Such an amendment comes as a big relief with regard to disclosure requirements and the levy of penalty upon failure of such disclosure.

7.10. Example for understanding the disclosure requirement

- Mr. A is an Indian resident individual working in an American multinational conglomerate company called ABC Inc. During the year Mr. A filed his income tax return in India under Income Tax Act, 1961 in which he failed to disclose the foreign assets in Schedule FA under following situations:

  Situation 1 - Mr. A has a bank account maintained with Citi Bank USA wherein the aggregate balance during the year was INR 3,25,000.

  Situation 2 – In addition to facts mentioned in Situation 1, the company has ongoing Employee Stock Ownership scheme under which Mr. A has exercised such ESOP's amounting to INR 2,50,000 during the year

  Situation 3 – In addition to facts mentioned in Situation 2, Mr. A has also acquired a House property in Florida, USA amounting to INR 12,50,000.

- Penalty implications in pre-amendment and post-amendment eras under above scenarios are tabulated below:

Situation	***Penalty under Pre-amendment era***	***Penalty under Post-amendment era***
Only Bank Balance	• No penalty shall be levied since the aggregate balance in Bank does not exceeds INR 5 lakh.	• No penalty shall be levied since the aggregate value of all movable foreign assets does not exceed INR 20 Lakh.
Bank Balance plus ESOP	• Failure to disclose ESOP would attract penalty of INR 10 lakh	• Answer shall remain same as 1 above.
Bank Balance plus ESOP plus House property	• Failure to disclose ESOP and House property would attract penalty of INR 10 lakh	• Failure to disclose House property may attract penalty of INR 10 lakh as the proposed amendment provides relief in respect of failure to disclose movable assets only.

8. Others amendments under Income tax Act, 1961 having reference of Black Money Act

8.1. Amendment to include the reference of Black Money Act for the purpose of obtaining a tax clearance certificate under sub-section (1A) to section 230 of Income Tax Act, 1961:

SS-XI-78

- The existing provisions of sub-section (1A) of section 230 of Income Tax Act, 1961 provides that no person of Indian domicile shall leave India unless he obtains a certificate from the income-tax authorities stating that he has no liabilities under Income-tax Act, 1961, or the Wealth-tax Act, 1957, or the Gift-tax Act, 1958, or the Expenditure-tax Act, 1987, or he makes satisfactory arrangements for the payment of all or any of such taxes which are or may become payable by that person.
- In this regard, it was observed that most of the liabilities arising under the Acts administered by the Central Board of Direct Taxes ('CBDT') have been already covered for the purpose of obtaining a tax clearance certificate, except the liabilities arising under Black Money Act.
- Accordingly, it has been proposed in the Finance Bill (No. 2) 2024 to insert a reference of liabilities under Black Money Act in the sub-section (1A) of the section 230 of the Act with effect from 1 October 2024 for the purposes of obtaining a tax clearance certificate.

8.2. Amendment to include the reference of Black Money Act for adjusting liabilities against seized assets in section 132B of the Income-tax Act, 1961:

- The existing provision of section 132B of Income Tax Act provides that any existing liability under the Income-tax Act, 1961, the Wealth-tax Act, 1957, the Expenditure-tax Act, 1987, the Gift-tax Act, 1958 and the Interest-tax Act, 1974, and the amount of liability determined on completion of the assessment or reassessment in consequence of search or requisition, may be recovered from the taxpayer out of the seized assets under section 132 or requisitioned under section 132A of Income Tax Act, 1961.
- However, it is to be noted that post introduction of Black Act, tax on undisclosed foreign income and value of undisclosed foreign asset is levied under Black Money Act as against Income-tax Act. Accordingly, it has been proposed in the Finance Bill (No. 2) 2024 to include the reference of Black Money Act in the section 132B of the Income-tax Act with effect from 1 October 2024 in order to extinguish liability arising in the Black Money Act by recovery out of the seized assets.

9. Conclusion

9.1. Thus, under existing provisions, failure to furnish the return of income ITR in relation to foreign income and asset or to report such foreign income and assets located outside India in the return of income may attract a penalty under section 42 or 43 of the Black Money Act of an amount of ten lakh rupees regardless of the value of asset located outside India. As mentioned in Finance Speech by Hon'ble Finance Minister, proposed amendments will de-penalise Indian professionals working in multinationals for non-reporting of movable assets upto INR 20 lakhs.

■●■

SS-XI-79

Personal Tax Proposals

CA Santhosh S

Overview

The budget proposals have provided some tax reliefs to the individual taxpayers by changing the income slabs and increasing the standard deduction from INR 50,000 to INR 75,000 for only those opting the new tax regime. The Government is also making it clear over the years to move towards new tax regime.

It has been proposed to increase the threshold of private sector employer contributions towards National Pension Scheme from 10% to 14%.

The TCS provisions brings some relief to the taxpayers as the TCS can be offset for salary tax liability. Further, TCS made on a minor can be utilized as a tax credit by the parent under the clubbing provisions. The capital gains tax rates and provisions have been simplified.

The TDS rates is proposed to be reduced among various provisions. One of them impacting individuals would be on TDS on rent payment more than INR 50,000 per month for resident landlords.

Under the Black Money Act, penal provisions to attract only if the aggregate value of assets (other than immovable property) is more than INR 20 lakhs.

A few more compliance related changes such as inclusion of clearing liabilities under the Black Money Act, discontinuance of quoting Aadhaar enrolment ID has been introduced.

Overall, the personal tax proposals are going to benefit the individual taxpayers.

After the interim budget for 2024, the much-anticipated annual budget was unveiled by Hon'ble Finance Minister (FM) on July 23, 2024.

While most of the anticipated benefits for salaried employees, such as higher housing loan deductions and an increased 80C threshold, were not included, there are several other proposals relevant to the Financial Year (FY) 2024-25 that are discussed below.

These proposals aim to provide relief and benefits to various segments of the population, particularly salaried individuals.

1. Standard Deduction

Background

Section 16(ia) of the Income Tax Act, 1961 (the Act), provides for a standard deduction of INR 50,000 per annum from the gross salary income. This deduction is available under both the Old Tax Regime (OTR) and the New Tax Regime (NTR). The standard deduction was reintroduced in FY 2018-19 at INR 40,000 per year, replacing the previous transport and medical reimbursement exemptions.

Change in Provision

It has been proposed that the existing standard deduction be increased to INR 75,000 per year for those who opt for the NTR. For those who opt for the OTR, the deduction remains at INR 50,000 per year.

Amendment Period

The entire FY 2024-25.

Impact

This proposed change is expected to have a positive impact on salaried individuals opting for the NTR, as it provides an incremental tax benefit due to the increase in the standard deduction. For instance, an individual in the 30% tax bracket (exclusive of surcharge and education cess) would achieve an incremental tax saving of INR 7,500 through this amendment. This is a significant relief for taxpayers and aims to provide additional disposable income.

Over six years since the standard deduction was reintroduced, the Government has increased it by 1.875 times, considering the rising costs, inflation, and other economic factors.

Given that most salaried employees reside in metro cities where the cost of living is considerably higher compared to non-metro cities, there is a hopeful expectation that future considerations will address the disparity in living expenses between these areas. It is important to ensure that tax benefits and deductions are equitable and reflect the varying costs of living across different regions of the country.

However, it also raises questions about the disparity between the OTR and NTR. While in the OTR, the amount of standard deduction remains at INR 50,000, those opting for NTR receive a higher deduction. This could potentially encourage more taxpayers to shift to the NTR, aligning with the Government's objective of simplifying the tax structure and reducing exemptions and deductions.

The NTR, with its higher standard deduction, might appeal more to younger taxpayers who prefer straightforward tax calculations over multiple exemptions and deductions.

Effectively, with the increase in standard deduction under NTR, an individual with taxable income of INR 7,75,000 will go tax free after considering rebate.

2. Change in Tax Rates

Background

The Hon'ble FM has proposed modification to the income-tax slab rates under the NTR. No changes are proposed under the OTR, which means that the existing tax rates for the old tax regime will remain unchanged.

Change in Provision

The following changes in tax rates are proposed for the NTR under section 115BAC of the Act, which will be effective for FY 2024-25:

Existing (INR)	*Proposed (INR)*	*Tax Rate*
Up to INR 3 lacs	Up to INR 3 lacs	NIL
3,00,001 – 6,00,000	3,00,001 – 7,00,000	5%
6,00,001 – 9,00,000	7,00,001 – 10,00,000	10%
9,00,001 – 12,00,000	10,00,001 – 12,00,000	15%
12,00,001 – 15,00,000	12,00,001 – 15,00,000	20%
Above 15,00,000	Above 15,00,000	30%

The proposed changes to the tax slabs under the NTR will result in lower tax liabilities for all individual taxpayers.

Furthermore, the rebate under section 87A for the NTR remains unchanged. This means, effectively those having taxable income up to INR 7.75 lakhs before standard deduction would not have any tax liability.

Let's take an example of an individual earning a salary of INR 12 lakhs per annum and how its tax liability may reduce under NTR as compared to OTR for the FY 2024-25:

Particulars	*OTR (INR)*	*NTR (INR)*
Salary	12,00,000	12,00,000
Standard deduction	(50,000)	(75,000)
Deduction under sec. 80C	(75,000)	—
Deduction under sec. 80D	(10,000)	—
Taxable Income	**10,65,000**	**11,25,000**
Income tax	1,32,000	68,750
Education cess	5,280	2,750
Total Tax	**1,37,280**	**71,500**

From the above, it is evident that an individual having INR 12,00,000 salary would end up saving taxes of INR 65,780 compared to OTR which means additional disposable income of approximately INR 5,400 per month.

Now, let's take another example if we have to compare the NTR itself between FY 2023-24 and FY 2024-25, the changes will look like below:

Taxable Income before Standard Deduction (INR)	*Tax NTR FY 23-24 (INR)*	*Tax NTR FY 24-25 (INR)*	*Tax savings (INR)*
7,75,000	28,600	—	28,600
10,00,000	54,600	44,200	10,200
15,75,000	1,63,800	1,45,600	18,200
2,20,00,000	81,70,500	81,47,750	22,750

From the above, it signifies that how the proposed change in slabs under NTR would provide tax savings to the individual.

Surcharge Rates

There are no changes to the surcharge rates or education cess under both the tax regimes, which remain as follows:

Surcharge (SC) rates for FY 2024-25

Income Range (INR)	*SC % under OTR*	*SC % under NTR*
Up to 50 lacs	0%	0%
50 lacs to 1 crore	10%	10%
1 crore to 2 crores	15%	15%
2 crores to 5 crores	25%	25%
Above 5 crores	37%	25%

Education cess

4% on the overall tax, including surcharge.

Amendment Period:

The entire FY 2024-25.

Impact

According to statistics available on the income tax e-filing portal, most tax filers have incomes below INR 20 lakhs per annum. This indicates a young and emerging workforce who prefers higher disposal income and simplified tax system where tax relief is not linked with investments.

Tax filers (in lacs):

Income range in INR lacs	*June 2024*	*July 2023*
Up to 5	58.95	101.05
5 to 10	45.56	21.06
10 to 20	7.86	7.27
20 to 50	2.22	2.25
50 to 100	0.20	0.23
100 and above	0.08	0.08
Total	114.87	131.94
Source - https://eportal.incometax.gov.in/iec/foservices/#/pre-login/success-enablers		

The change in income tax slab rate will achieve two objectives which is very much relevant for young tax-payers population:

— Leave higher disposal income for everyone as it passes on tax relief to all taxpayers. However, the taxpayers in lower income group may benefit more in terms of tax saving in comparison to their taxable income.

— Encourage taxpayers to opt for NTR.

However, the unchanged surcharge rates, especially the high rates for higher income brackets, continue to be a point of contention. While the objective is to ensure that higher-income earners contribute more to the exchequer, the high surcharge rates can also discourage high earners and lead to tax planning strategies to minimize liabilities.

3. Increase in Deduction from National Pension Scheme (NPS) from 10% to 14%

Background

NPS is available to both government and non-governmental (private sector) employees. Certain key existing tax provisions relating to NPS include:

- Individual Contribution sec. 80CCD(1) & (1B): Deduction up to 10% of Salary (Basic Salary + Dearness Allowance) for employees or 20% of gross total income for others, not exceeding INR 50,000.

- Employer Contribution sec. 80CCD(2): Deduction up to 14% of salary for Government employees and 10% for others.

Change in Provision

It is proposed to increase the deduction under Sec 80CCD(2) on account of employer contribution towards NPS from 10% to 14% of Salary for non-government or private sector employers, provided they opt to offer their income to tax under the NTR.

Amendment Period

The entire FY 2024-25.

Impact

This proposed change provides additional deduction for private sector employees under Sec 80CCD(2) of the Act on account of employer's contribution to NPS up to 14% of salary and hence encourage higher contribution to NPS. However, this additional benefit is limited to those who opt for NTR.

However, one must be cautious of section 17(2)(vii) of the Act, where employer contributions towards Provident Fund, Superannuation Fund and NPS exceeding INR 7,50,000 in aggregate are taxable as perquisites. Accordingly, planning the employer portion of the NPS contribution is crucial for those nearing this threshold.

This change aims to bring parity between government and private sector employees concerning NPS contributions. By increasing the deduction limit for employer contributions to 14% for private sector employees, the Government ensures that both sectors receive similar tax benefits, promoting fairness and equity in retirement savings.

The increased NPS contributions also underscore the importance of financial literacy among employees. Understanding the long-term benefits of NPS, including its tax advantages and the role it plays in retirement planning, is crucial for making informed decisions.

4. Adjustment of Tax Collection at Source (TCS) with TDS for Salaried Employees

Background

Section 192 of the Act requires employers to withhold taxes from salary income on monthly basis. Previously, the Act did not allow the employers to adjust the TCS declared by the employee while computing the taxes to be deducted from his salary. It only allowed TDS from other incomes but with appropriate reporting to the employer in advance.

Change in Provision

Individuals can now inform their employers about Tax Collected at Source (TCS) from them, which will be considered to offset while estimating salary taxes. Rule 26B of the Income Tax Rules, 1962, provides the declaration format, but modifications may be notified by the Government.

It has also brought an amendment to the Finance Bill that along with setting off house property loss from salary income, the TDS from other incomes and TCS can be reduced before arriving at the tax liability on salary.

Amendment Period

Effective from September 2024.

Impact

This proposal allows offsets of TCS whole calculating TDS on salary and will provide better cashflow for the salaried individual during the FY.

For example, Ms. X, has paid TCS on foreign remittance. She can now report the same to her employer and her TDS liability will be reduced to such extend.

For employees with substantial TCS, this provision ensures better cash flow management. However, it also places a greater responsibility on employees to accurately provide details to their employers. Any discrepancies in reporting can lead to issues with tax authorities and potential interest and penalty charges.

Employers, on the other hand, need to establish robust processes to handle such declarations from employees. Ensuring that the correct amount of tax is withheld based on the combined income sources is essential for compliance and avoiding any under withholding.

The employers may have to relook at the investment declaration forms they seek from employees to capture the TCS information. The Government needs to amend the format of Form 24Q and Form No. 16 to capture the TCS information.

5. Claiming Credit for Tax Collected at Source of a Minor

Background

Section 64(1A) of the Act allows clubbing a minor child's income under certain circumstances.

Section 206C(1G) of the Act requires TCS from remitters under the Liberalised Remittance Scheme (LRS) if aggregate remittance exceeds INR 7 lacs annually.

Previously, TCS credit reflected under the minor's account, creating issues for parents claiming this credit during tax return filing.

Change in Provision

It is proposed to amend section 206C(4) of the Act to allow credit for amounts collected to be given to any eligible person in accordance with rules. Rule 37-I(2A) is expected to be modified to accommodate this change.

Amendment Period

Effective from January 1, 2025.

Impact

This change addresses the inconvenience caused when TCS amounts, rightfully creditable at tax return filing, could not be claimed by the eligible person. The proposed modifications ensure that eligible persons can claim the credit.

This amendment is particularly beneficial for families where significant transactions, such as remittances made under LRS, are made from minor's account. It simplifies the process of claiming TCS credits and ensures that the tax credits are accurately reflected in the appropriate tax returns, thereby reducing administrative hassles and potential disputes with tax authorities.

However, taxpayers need to be aware of the rules and procedures for claiming such credits. Proper documentation and accurate reporting are essential to avoid any issues during the tax filing process.

6. TDS on Rent Payment in Excess of INR 50,000 per Month

Background

As per section 194-IB of the Act, individuals paying house rent exceeding INR 50,000 per month to a resident landlord must withhold tax at 5% on the last month of the FY or the month of vacating, whichever is earlier.

Change in Provision

It is proposed to reduce the TDS rate from 5% to 2%.

Amendment Period

Effective from October 1, 2024.

Impact

This change benefits resident landlords by improving cash flow at the end of the FY, as the withholding rate reduces to 2%. However, for Non-Resident Indian (NRI) landlords receiving rent in excess of INR 50,000 per month, the withholding rate remains at 30%. A parity between resident and non-resident landlords would have been beneficial.

However, maintaining the higher TDS rate for NRI landlords might still pose a challenge for tenants renting properties from NRIs. A balanced approach that addresses the concerns of both resident and non-resident landlords would have been ideal.

Moreover, tenants need to be aware of their responsibilities concerning TDS on rent payments. Proper documentation, accurate withholding, and timely remittance of TDS are crucial to avoid penalties and ensure compliance with tax regulations.

7. Foreign Asset Reporting

Background

Individuals who have overseas incomes or assets requires reporting in the annual income tax filing depending on their residential status for the given FY.

For those who qualify as Non-Resident or Not Ordinary Residents does not require reporting of overseas assets/income whereas those qualifying as Resident and Ordinary Resident for the FY requires reporting of overseas assets and income.

The requirements of foreign asset reporting in the Income Tax Return (ITR) forms emanate from Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015 [Black Money Act].

Section 42 and 43 of the Black Money Act imposes penalties for those qualifying as ordinary residents and not accurately reporting foreign assets including interests in overseas financial entities.

However, there was an exception to the above, where overseas bank accounts having aggregate balance which does not exceed INR 5 lakhs would not attract penalties.

Change in Provision

Now, it has been proposed to increase the threshold of INR 5 lakhs to INR 20 lakhs. Further, it has been proposed that the threshold of INR 20 lakhs would apply to all the foreign assets (excluding immovable property) and not restricted to bank accounts as per the existing provisions.

Impact

This brings significant relief to the tax filers as currently any misreporting/wrong reporting of foreign assets attract flat penalty of INR 10 lakhs irrespective of the amount of misreporting/wrong reporting with only exception to bank account balance upto INR 5 lakhs.

There are judicial precedents imposing penalty of INR 10 lakhs on minimal amount of default. This is a welcome step to avoid such type of hardship on taxpayers.

8. Reference to Black Money Act while obtaining tax clearance certificate:

Background

As per sec. 230(1A) of the Act provides that a person who is domiciled in India shall, at the time of departure from India, obtain certificate from tax authorities that the has no liabilities under the Act and other laws specified therein.

Change in Provision

It is proposed to insert liabilities covered under the Black Money Act as well to obtain the tax clearance certificate.

Amendment Period

Effective from October 1, 2024.

Impact

It is important for the taxpayers to take note of this and comply while filing the Form 30C to obtain such tax clearance certificates.

9. Quoting of Aadhaar enrolment ID not allowed

Background

Under sec. 139AA of the Act, from July 1, 2017, a person who is eligible to obtain Aadhaar number shall quote the same in the Permanent Account Number (PAN) application form; and in the ITR form. It provided an exception that in case of non-allotment of Aadhaar, the enrolment ID of Aadhaar could be quoted.

Change in Provision

Now, it is proposed to discontinue to report the enrolment ID of Aadhaar. Taxpayers who used enrolment ID of Aadhaar to obtain PAN, need to intimate Aadhaar number by the date to be notified.

Amendment Period

Effective from October 1, 2024.

Impac

Since July 2017, as per publicly available data, majority of Indian population have obtained Aadhaar. The underlying reason for discontinuance is to avoid duplication and misuse of PAN which are issued based on Aadhaar enrolment ids.

Hence, the taxpayers must note this change and ensure compliance as and when the Government notifies the date by which the Aadhaar number should be intimated for those who obtained PAN based on Aadhaar enrolment ID.

Conclusion

The annual budget for FY 2024-25 brings several significant changes that impact salaried employees and other taxpayers. While some anticipated benefits were not included, the proposed changes in standard deductions, NPS contributions, and TDS provisions reflect the Government's efforts to provide relief and simplify tax compliance.

The increase in the standard deduction for NTR, the adjustment in tax rates, and the enhanced NPS contribution limits are steps toward a more progressive and equitable tax system. However, taxpayers need to carefully evaluate the benefits of NTR and OTR based on their individual circumstance which is more beneficial to them.

The provisions allowing tax credits for TDS and TCS from other incomes and claiming TCS credits for minors address practical challenges. However, accurate reporting and proper documentation are essential to avoid discrepancies and ensure compliance.

Overall, the budget aims to provide relief to middle-income earners, encourage retirement savings, and simplify tax compliance. Taxpayers need to stay informed about the changes, evaluate their impact on their financial situations, and make informed decisions to optimize their tax liabilities and achieve their financial goals.

SS-XI-87

Budget 2024 – Impact on Taxation of Partnerships

Ishita Farsaiya
Advocate

Overview

Budget 2024 is regarded as the most significant budget of the 'Amrit kaal'. It brought about substantial changes, thereby affecting several sectors of the Indian economy. The changes in tax laws introduced by the Finance Bill, 2024 have a rippling effect on the taxation of partnerships. Direct changes include the addition of section 194T and the amendment of section 40 of the Income Tax Act, 1961. Taxpayers were relieved from the much-anticipated increase in the deduction limit. However, the implementation of section 194T, which withholds taxes on sums such as salaries and remuneration paid to partners, dampened the spirits of partnership firms.

The proposed amendments in the Capital Gains Tax Regime under the Finance Bill, 2024 have wide-ranging implications for the taxation of partnerships. This article explores the interplay between section 48 and section 45(4) of the act, focusing on the potential impact of these changes while highlighting the unique factors involved in taxing partnerships. The author also examines the applicability of Tax Deducted at Source (TDS) on specified payments made to partners. Additionally, this article outlines the primary compliance-related challenges anticipated in implementing these key changes.

A. Introduction

Budget 2024, being the first budget of the Government in power for the third time, was eagerly awaited. People from various sectors had different expectations from the Government and the Hon'ble Finance Minister. After the budget, there were claps and criticisms. Some sectors were happy, but some were disappointed. Businesses operating in the form of partnership firms were expecting relief in the form of tax cuts, but the same eluded them. Certain key changes have been introduced which would have a notable effect on the taxation of partnerships.

B. Direct changes to taxation of partnerships

1. Amendment to Section 40 of the Act

The amendment as proposed in the Finance Bill is as follows:

SS-XI-88

Amendment of section 40.	In section 40 of the Income-tax Act, in clause (b), in subclause (v), in item (a), with effect from the 1st day of April, 2025, — (a) for the letters and figures "Rs. 3,00,000", the letters and figures "Rs. 6,00,000" shall be substituted; (b) for the letters and figures "Rs. 1,50,000", the letters and figures "Rs. 3,00,000" shall be substituted.

The explanation in the Memorandum to the Bill is as follows:

"Increase in limit of remuneration to working partners of a firm allowed as deduction

Section 40 of the Act provides for amounts that shall not be deducted in computing the income chargeable under the head "Profits and gains of business or profession". Sub-clause (v) of clause (b) of the said section provides for disallowance of any payment of remuneration to any partner who is working partner which is authorized by and is in accordance with the terms of the partnership deed and relates to any period falling after the date of such partnership deed in so far as the amount of such payment to all partners during the previous year exceeds the aggregate amount computed as hereunder:

(a)	*on the first Rs. 3,00,000 of the book profit or in case of a loss*	*Rs. 1,50,000 or at the rate of 90 per cent of the book profit, whichever is more;*
(b)	*on the balance of the bookprofit*	*at the rate of 60 per cent :*

This limit was put in place on the statute w.e.f AY 2010-11. It is now proposed to amend the limit of remuneration to working partners in a partnership firm, which is allowed as deduction. It is proposed that on the first Rs 6,00,000 of the bookprofit or in case of a loss, the limit of remuneration is increased to Rs 3,00,000 or at the rate of 90 per cent of the bookprofit, whichever is more as follows:

(a)	*on the first Rs. 6,00,000 of the book profit or in case of a loss*	*Rs. 3,00,000 or at the rate of 90 per cent of the book profit, whichever is more;*
(b)	*on the balance of the book-profit*	*at the rate of 60 per cent :*

3. The amendments to sub-clause (v) of clause (b) of section 40 of the Act will take effect from the 1st day of April, 2025 and will, accordingly, apply in relation to assessment year 2025-2026 and subsequent years. [Clause 14]"

2. Introduction of Section 194T to the Income Tax Act, 1961 ('the Act')

The amendment as proposed in the Finance Bill is as under:

Insertion of new section 194T.	*62. After section 194S of the Income-tax Act, the following section shall be inserted with effect from the 1st day of April, 2025, namely:—*

Payments to partners of firms.	*"194T. (1) Any person, being a firm, responsible for paying any sum in the nature of salary, remuneration, commission, bonus or interest to a partner of the firm, shall, at the time of credit of such sum to the account of the partner (including the capital account) or at the time of payment thereof, whichever is earlier shall, deduct income-tax thereon at the rate of ten per cent.* *(2) No deduction shall be made under sub-section (1) where such sum or the aggregate of such sums credited or paid or likely to be credited or paid to the partner of the firm does not exceed twenty thousand rupees during the financial year."*

The explanation in the Memorandum to the Bill is as follows:

"TDS on payment of salary, remuneration, interest, bonus or commission by partnership firm to partners

Presently there is no provision for deduction of tax at source (TDS) on payment of salary, remuneration, interest, bonus, or commission to partners by the partnership firm. Hence, it is proposed that a new TDS section 194T may be inserted to bring payments such as salary, remuneration, commission, bonus and interest to any account (including capital account) of the partner of the firm under the purview of TDS for aggregate amounts more than Rs 20,000 in the financial year. Applicable TDS rate will be 10%.

3. The provisions of section 194T of the Act will take effect from the 1st day of April, 2025."

C. Analysis of the proposed changes

The increase of limit of deduction of remuneration is a much welcome change since AY 2010-11. However, the spirits of those running Partnerships Firms are dampened with the introduction of Section 194T as it introduces a withholding tax liability on specified amounts payable to partners.

The intent of the newly inserted Section 194T to the Act is clearly explained in the Memorandum to the finance bill to bring under the TDS purview, transactions in the nature of payments such as salary, remuneration, commission, bonus and interest to any account(including capital account) paid by the Partnership Firm to its Partners for aggregate amounts of more than Rs. 20,000/- in the financial year.

The taxation of partnerships is unique because of the following two factors considered while applying the provisions of the Act. Firstly, the economic relationship between the firm and the partners, which is governed by the partnership deed and secondly, the book profits and actual amounts of monies which are distributed between the partners,

While the intent of the provision is fairly simple, it is the application of the provision along with other provisions and compliances under the Act which would create many computational issues under the Act, especially for small firms who already face many compliance-based challenges. The primary challenges that can be anticipated with the introduction of Section 194T are as follows:

a. More than often the sums paid as salary, commission, bonus , remuneration and

SS-XI-90

interest paid to partners of a firm are out of the profits of the firm and are solely dependent on the profits of the firm. In such a scenario on which sum, the amount of TDS under Section 194T is to be applied cannot be pre-empted before the finalization of the P&L account of the firm

b. The above quagmire is further complicated on account of a specified date for TDS deposit for a financial year falling prior to the finalization of the P&L Account and filing of returns of income by a Partnership Firm. To determine the amount of TDS deductible, deduct it from the specified sums payable to a partner and deposit it without attracting any penalty and interest, a partnership firm would have to determine its book profits and finalize its P&L accounts much prior to the statutory time limit prescribed for filing of annual returns of income. Thus, the introduction of Section 194T in reality, would deprive most partnership firms of the prescribed statutory limit for finalizing their books of accounts. This de-facto reduction of the time limit for a partnership firm to finalize its P&L and books would prove to be burdensome for many firms, especially those in the nature of Medium and Small Scale Enterprises.

c. The practical aspect of collating all information from various sources like AIS-TIS, TDS Returns, etc and arriving at profits to determine sums payable to a partner cannot be ignored.

d. Partnerships might be forced to book remuneration not at the year-end but at the time of payment, a situation which might not be suitable to many businesses or would run counter to the terms of the partnership deed.

e. Another issue that might arise is how to determine the amount on which TDS has to be levied on. For instance, if a partnership deed states the Partner to withdraw a salary of Rs. 40,000 per month subject to the final profits then how to compute the TDS liability in such a scenario as the sum might change in the year end.

f. Assessees being partners of a firm while filing their ITR will have to be extremely cautious about the disallowance of excess remuneration and credit of the TDS deducted.

Partners of a firm will now be subject to TDS under Section 194T along with TDS under Section 194R, since partners of a partnership firm are not excluded from the applicability of 194R.

D. Why should amounts like salary and remuneration paid to partners be subject to TDS? – A question to ponder!

The Central Board for Indirect Taxes and Customs has clarified that GST is not leviable on salary and remuneration payable to Partners. The rationale behind this is found in the AAR's decision in ***KAR ADRG- 30/2020 dated 04.05.2020 in the case of Anil Kumar Agarwal***, wherein it was held that if the person is in receipt of an amount towards his share of profit from the said partnership firm, then the said amount is not under the purview of GST as the share of profit is nothing but an application of money. Thus, it was held that salary is not required to be included in the aggregate turnover for registration under GST Laws. Even Section 40(b) of the Act recognizes that amounts like commission, salary and remuneration payable to partners are a form of distribution of profits. In this context, is the levy of TDS on such a form of distribution of profits correct?

It can be argued that Section 194T has been introduced to track the transaction, but then is such a high rate justified? Will it just not lead to an additional layer of tax leading to further claims of refunds. These are just some questions that question the wisdom of Section 194T, which will be tested in the future.

E. Changes in the Capital Gain Tax Regime which impacts taxation of partnerships – Is there any impact on Section 9B and Section 45 (4) of the Act?

The proposed amendment to the Second Proviso to Section 48 of the Act seeks to take away the benefit of indexation while computing capital gains on Long Term Capital Gains. This amendment, along with the proposed reduction rate of taxation, has perhaps received the strongest responses from the public. Whether the proposed changes are beneficial or not totally depends on various permutations and combinations of when property was acquired, what was the cost of acquisition, and what is the sale price. The other changes introduced are an increase in the rate of certain Short Term Capital gains and the creation of two slabs for determining the classification of assets as long-term. As per the newly proposed amendments, the holding duration of assets will determine their classification as long-term when it is held for more than 12 months for listed financial assets and for more than 24 months for unlisted financial and non-financial assets.

These changes have an indirect impact on taxation due to sub-section 4 of Section 45 and Section 9B of the Act, both of which were substituted and inserted respectively by the Finance Act, 2021. .

Section 9B – Explained

Section 9B of the Income-tax Act, 1961 provides for taxation of "Income on receipt of capital asset or stock in trade by specified person from specified entity". The said section is a deeming provision to bring distribution of capital asset or stock in trade or both, on dissolution or reconstitution within the ambit of Income. In terms of a Partnership Firm the the said provisions is explained as follows:

Partner receives capital asset or stock in trade or both from firm in connection with dissolution/reconstitution

Firm shall be deemed to have transferred such capital asset or stock in trade to partner in year in which they were received by partner and would be income of that year

⬇

The said income will be chargeable in the hands of the Partnership Firm

As Capital Gains if a capital asset is transferred	Profits from Business or Profession in case of Stock in Trade

⬇

The amount so chargeable will be the FMV of capital asset or stock in trade or both on date of its receipt by the partner

For the purposes of this section, 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 of the capital asset or stock in trade or both by the specified entity

SS-XI-92

Section 45(4) – Explained

Section 45(4) of the Act deals with the taxation of capital gains arising from the transfer of a capital asset by way of distribution at the time of dissolution or reconstitution of a firm. The said provision in the context of partnerships is explained as under:

The said provisions seeks to levy Capital Gain on Transfer of a capital asset of Money by a firm to its Partner	
Where partner/Member receives	During Previous Year
⬇	
Any Money or Capital Asset of Both	
On Reconstitution (Which include Retirement, Admission or Change in Share/Profit sharing ratio)	
⬇	
Then any profit or gain on such transaction will be chargeable in the hands of Firm/AOP/BOI	
Under the head Capital gain in the PY in which the money or the capital assets or both are received by such Partner	

The formula for computation of Capital Gain is

- **A = B+C-D**

Formula explained

- A= Gain
- B= Money Received
- C= FMV of Asset Reeceived
- D= Balance in Capital A/c as reduced by revaluation and self generated goodwill/asset

With the proposed changes, the question will be the interplay of Section 9B, Section 48 and Section 45(4) of the Act – (*explained as under*)

Section 9B pertains to both taxation of profits/ gains from business and profession and capital gains, however, we are limiting the present discussion only for the purposes of taxation of capital gains vis-à-vis Partnership Firms.

Tax incidence is attracted under Section 9B only when the partner in a firm receives a capital asset. When it is not received, in case of mere entries in books of account, it is debatable whether section 9B could be invoked.

Section 9B is attracted both in the case of reconstitution and dissolution of specified entity whereas Section 45(4) is attracted only in case of Reconstitution.

Both Section 9B and Section 45 (4) tax the notional gain of a partnership firm when capital assets are received by a partner on the specified occasion of reconstitution and / or dissolution as the case may be. The said notional gain of the firm is computed by adopting the fair market value. The firm would be liable to tax on the capital gain. It could be either short-term or long-term.

Indexation and Section 9B

Under Section 9B a transaction is routed to respective head of income, the computation would also be done as per relevant provisions therein. Sub-Section (3) of Section 9B defines fair market value of the capital asset, once it has been identified then Capital Gains basis the period pf holding and cost of acquisition have to be computed. Under Section 9B while computing Capital Gains the benefit of indexation was given and the same was added to the cost of acquisition.

Post 2024, under Section 9B the benefit of indexation will not be given. As stated above whether the denial of indexation is favourable or not is dependent on the facts of each case.

Indexation and Section 45(4)

While section 45(4) provides the mechanism of computing the gains arising in the hands of partner which is to be deemed as income of firm. A formula is provided in Section 45(4) to determine the gain. The formula, as provided under section 45(4), is 'A= B + C – D', wherein B and C is the value of money and Fair market value of asset received by the partner while D refers to the capital balance of respective partner at the time of reconstitution.

The indexation benefit was never available to the Firm under the computation mechanism of Section 45 (4).

It has to be understood that when a partner or member receives a capital asset which was valued at fair market value for the purpose of Section 45(4) at the time of receipt, and upon its subsequent sale , the value considered by the firm shall be reduced under Section 48(iii) by the partner or member as his cost of acquisition. Section 48(iii) covers such a situation, however, it says that the amount chargeable to income-tax in the hands of the specific entity shall be considered. Thus, the benefit of indexation was already denied for such an asset since the amount deductible does not fit into the terms' cost of acquisition or cost of improvement'.

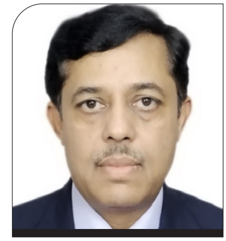
Therefore, the changes in Section 48 i.e. denial of indexation benefits shall not impact the computation scheme under Section 45 (4) of the Act.

■●■

"Come out into the broad light of day, come out from the little narrow paths, for how can the infinite soul rest content to live and die in small ruts?"

— *Swami Vivekananda*

Amendments in Corporate Tax and Domestic Transfer Pricing



Neeraj Jain
Advocate

Overview

The author discusses impact of the following amendments – i) Income from letting out residential house property, ii) Disallowance of an amount paid to settle contraventions, iii) Computation of profits of Life Insurance business, iv) Section 92CA – Reference to TPO in respect of SDT; and iv) Taxes withheld outside India included in income. The author comments that "Where income from letting out of residential house was to be taxed under the head "profits and gains of business or profession", taxpayers were not obligated to include notional rent earned on the residential house in the total income returned by them, in case the property remained vacant during whole or any part of the financial year relevant to the respective assessment year. After the amendment, taxation of Annual Letting Value or notional rent will become unavoidable in such situations". On taxes withheld outside of India, the author cites the judicial pronouncements sought to be overruled.

Income from letting out residential house property

Over the past few years, India has been rationalising the income tax regime for reduced litigation, a simplified tax structure and moderate rates of tax without tax exemption. Simplification and rationalisation seems to be the central theme of the Finance (No.2) Bill, 2024.

There has been long-standing controversy on the classification of rental income from letting out of properties, whether the same would qualify as 'business income' or 'Income from House Property'. It has been judicially held time and again that the classification of an item of income under a particular head is, *inter alia*, dependent on the main objective of earning such income. In ***Karanpura Development Co Ltd vs CIT: [1962] 44 ITR 362 (SC)***, it was held that the objects of the company must also be kept in view to interpret the activities. The said principle was followed by the Apex Court in ***Chennai Properties & Investments Ltd vs CIT: [2015] 373 ITR 673 (SC)***. In ***Rayala Corporation (P) Ltd vs ACIT: [2016] 386 ITR 500 (SC),*** the Apex Court similarly held that rental income earned by a taxpayer engaged in the business of leasing out house properties was to be taxed

SS-XI-95

as 'business income' and not 'income from house property'[1].

By way of amendment to section 28 of the Income-tax Act ("the Act"), it is now proposed to settle the said controversy by clarifying that income from letting out of **residential** house or a **part thereof** shall be chargeable under the head 'Income from House Property' as opposed to 'Profit and gains of business or profession'.

The amendment would provide clarity regarding the taxation of income generated on letting out of residential house property. However, the question regarding the classification of rental income on commercial properties is still likely to be debated between the taxpayers and the Revenue. In treating rental income from residential house as business income, usually, the taxpayers were able to claim higher expenses related to the property majorly in the form of depreciation, maintenance charges, etc.

Under the head "Income from House Property", a standard deduction of 30% of the rental income will only be allowed, leading to higher tax outgo in such cases. Where income from letting out of residential house was to be taxed under the head "profits and gains of business or profession", taxpayers were not obligated to include notional rent earned on the residential house in the total income returned by them, in case the property remained vacant during whole or any part of the financial year relevant to the respective assessment year. After the amendment, taxation of Annual Letting Value or notional rent will become unavoidable in such situations.

Disallowance of an amount paid to settle contraventions

Explanation 1 to section 37(1) of the Act provides for the disallowance of "expenditure incurred by an assessee for any purpose, which is an offence, or which is prohibited by law". Explanation 3 thereof, inserted vide Finance Act, 2022, expands the scope of the said expression by providing that the same includes expenditure for: (i) any purpose which is an offence under, or which is prohibited by any law in India or outside India; (ii) providing benefit or perquisite in violation of any rule or regulation or guideline governing conduct of professionals or persons carrying on any business; (iii) compounding an offence in India or outside India. The Finance Bill, 2024 has now proposed to expand the scope of Explanation 3 by including under its ambit any expenditure incurred to **'settle proceedings'** initiated in relation to a contravention under any law, as may be notified by the Central Government in the *Official Gazette*.

In ***CIT vs. Desiccant Rotors International: [2012] 347 ITR 32*** the Delhi High Court held that the amount paid for settling a suit filed against the assessee for alleged patent infringement was allowable as a business expense on the ground that no Court had given any finding that assessee had violated patents of the contesting party, payment was made for loss of goodwill and damages to

1. Editor's Note - Readers may also refer to the Supreme Court ruling in *Raj Dadarkar & Associates [2017] 394 ITR 592 (SC)*

capital and for terminating of a case in US Courts. Similarly, in the case of ***Harbinger Systems (P) Ltd vs. DCIT: [2017] 77 taxmann.com 284*** the Pune Bench of the ITAT held that when a civil suit was filed against the assessee-company for using a pirated version of Microsoft software, the compensation payment made to Microsoft for loss of business pursuant to compromise entered into between parties was an allowable business expenditure.

While payments made for settlement of disputes is a common practice in the US, the same is not the position in India. An example is the ISO Settlement Scheme, 2024 introduced by SEBI wherein settlement opportunity is provided to all the entities that have executed reversal trades in the stock options in the period between 01.04.2014 and 30.09.2015, against whom proceedings have been initiated and are pending before any authority or forum.

Similar instances of settlement with SEBI in the past are also prevalent. Another example is the Competition Commission of India (Settlement) Regulations, 2023 introduced by the Competition Commission of India for settlement of proceedings initiated against entities for alleged contraventions of certain provisions of the Competition Act, 2002.

The Latin maxim *'Expressio Unius Est Exclusio Alterius'* denotes that the express mention of the thing implies the exclusion of another, ie. if one or more things of a class are specifically mentioned in an enactment, it amounts to express exclusion of other things belonging to that class. The above principle was applied by the Supreme Court in the case of ***R. C. Cooper vs. UOI, AIR 1970 SC 564***. It remains to be seen as to which contraventions may be notified by the Central Government for the purpose of this section.

Computation of profits of Life Insurance business

Section 44 of the Act provides for the computation of profits and gains of any insurance business, including any such business carried on by a mutual insurance company or by a co-operative society, in accordance with rules contained in the First Schedule of the Act. No adjustments are required to be made as per sections 28 to 43B of the Act. Rule 2 of the First Schedule, applicable for Life Insurance business, provides that the profits and gains shall be taken to be the annual average of the surplus, arrived at by making prescribed adjustments to the surplus or deficit disclosed by the actuarial valuation made in accordance with the Insurance Act, 1938. To curb the practice of misuse of the said Rule 2 to claim a deduction for expenses that are not otherwise admissible under section 37 of the Act, it is proposed to insert a proviso to the said Rule to provide that deduction for expenses which are not otherwise admissible under section 37 of the Act shall be added back to the profits and gains of Life Insurance business.

Section 92CA – Reference to TPO in respect of SDT

Sub-sections (2A) and (2B) of section 92CA of the Act provides that if an international transaction comes to the notice of the TPO which has not been referred to him by the AO or which has not been reported in Form 3CEB, the TPO can proceed to determine the ALP in respect of such international transaction. The aforesaid section at present does not extend to the 'Specified Domestic Transactions' ('SDTs').

It is proposed to amend sub-sections (2A) and (2B) of section 92CA to enable the TPO to examine the SDTs that have not been referred to him by the AO or that have not been reported in Form 3CEB.

The amendment seeks to rectify the anomaly wherein, the TPO was authorized to examine any international transaction which was not referred to him by the assessing officer or which was not reported in Form 3CEB but could not have examined a SDT not referred to him by the AO. By way of the above amendment, the TPO is now being authorised to determine the ALP of an SDT even if it was not referred to him by the AO or if it was not reported in Form 3CEB.

Taxes withheld outside India included in income

Under existing provisions of section 198 of the Act, tax deducted at source under Chapter XVII-B of the Act is treated as income of the payee. This stands to reason because the taxpayer (payee) would get credit for such tax deducted under section 199 of the Act. In the case of ***Sunil Shinde vs. ACIT: [2017] 166 ITD 596 (Bang Trib.)***, it was held that tax deducted abroad is not required to be added back to quantify the income taxable in India, by relying on the decision of the Madhya Pradesh High Court in the case of ***CIT vs. Yawar Rashid: [1996] 218 ITR 699 (MP).*** Memorandum to Finance (No.2) Bill, 2024 states that this interpretation was leading to anomaly inasmuch as taxpayers were not including taxes withheld outside India while calculating their 'total income' but at the same time, claiming credit for taxes withheld abroad, resulting in double deduction. In order to address this issue, the Finance (No. 2) Bill, 2024 has proposed to amend section 198 of the Act to provide that income-tax paid outside India by way of deduction, in respect of which credit is allowed in India, shall be deemed to be income received.

■●■

"This human body is the greatest body in the universe, and a human being the greatest being. Man is higher than all animals, than all angels; none is greater than man. Even the Devas (gods) will have to come down again and attain to salvation through a human body. Man alone attains to perfection, not even the Devas."

— *Swami Vivekananda*

Rationalisation of TDS and TCS Provisions

CA Ketan Vajani

Overview

The article seeks to discuss the amendments proposed in the Finance (No.2) Bill 2024 in the areas of TDS and TCS. Most of the amendments proposed are either beneficial for the tax payers. This is contrary to the earlier Finance Bills which has always attempted to expand the scope of TDS and TCS. Few of the clarificatory and procedural amendments are also discussed in this article. Some of the specific amendments dealing with applicability of TDS on Interest and Remuneration to partners are dealt with in an independent article in this journal and hence the same are not covered in this article.

The provisions relating to Tax Deduction at Source (TDS) and Tax Collection at Source (TCS) are significant provisions in the Income-tax Act. The primary purpose of these provisions is the ease of collection of taxes and therefore there is no reason to challenge the validity of these provisions. At the same time, it needs to be appreciated that the deductor of TDS or collector of TCS have been saddled with additional duty. The belief that he is in a way providing service to the government cannot be completely rejected at threshold. It has also been observed in last few years that the scope of TDS and TCS provisions have been expanding disproportionately.

Most of the amendments made in these provisions in past few years resulted in additional compliance burden on the assessee. Few of the amendments, like section 194N and also section 206C(1G), disregarded the fundamental principle that Income-tax is ultimately a tax on Income. The Finance (No. 2) Bill, 2024 is however a pleasant exception to the ever expanding scope of TDS provisions. Most of the amendments proposed by the Bill are benevolent to the tax deductors, tax collectors and tax payers. Albeit there may still be a valid feeling that lot more could have been done in these areas. But let's hope that few more genuine concerns will be addressed in future. We are anyways given an indication that the entire Act is being revamped. Hopefully some more good news in the areas of TDS and TCS are on the ways.

The present article seeks to discuss the amendments proposed by the Finance (No. 2) Bill 2024 in the areas of TDS and TCS provisions in general. Some specific amendments like section 194T, one of the

SS-XI-99

exceptions to the otherwise benevolent amendments, being more appropriate to be dealt in detail is being taken care in an independent article in this issue.

Let's look at the provisions which are in the nature of relaxation first.

Adjustment of TCS collected while computing the amount of TDS deduction for an employee

Section 192 of the Act provide for deduction of Tax at source by an employer from the salary income of its employees. Sub-section (2B) of the section provides for considering the incomes of the employee, under any other head of incomes and also considering the tax deducted on any such income while computing the amount of tax deductible from the salary income of such employee. The existing provisions do not permit the amount of Tax Collected at Source from an employee to be reduced while determining the amount of tax deductible.

With the expansion of TCS provisions, it is certainly possible that an employee would have suffered Tax Collection at Source under some of the provisions of TCS. While this TCS amount is collected from the employee, not allowing the same to be reduced while arriving at the TDS amount u/s. 192 results in excess collection of tax from the employee, which will eventually result in refund.

Considering this difficulty, Clause 50 of the Bill seeks to substitute sub-section (2B) of section 192. The proposed sub-section seeks to permit adjustment of the TCS collected from an employee while arriving at the amount of TDS to be deducted from his salary income. The amendment is proposed to be effective from 1-10-2024. This amendment will result in better cash flow in the hands of the employee.

Claiming credit for TCS of minor in the hands of parent

Section 206C of the Act provides for collection of tax at source from various types of receipts. Sub-section (4) of the section provide that the amount collected at source under the section shall be deemed to be a payment of tax on behalf of the person from whom the amount has been collected. While the credit of TCS is permitted in the hands of the person from whom the amount has been collected, there is no provision under the Act permitting the credit of TCS in the hands of any other person other than the collectee.

This results in a genuine hardship especially in a case where the TCS is collected on the funds remitted abroad under the Liberalized Remittance Scheme of the RBI. In a situation where the remittance is made in the name of a minor, the existing provisions allow credit of TCS only in the name of the minor, who may not be liable to tax considering the clubbing provisions as applicable. The parent in whose case the income is clubbed cannot claim the credit under the existing provisions.

With a view to address this issue, Clause 70(c) of the Bill seeks to amend sub-section (4) of section 206C so as to permit credit of TCS collected in the hands of any other person on similar lines with the credit available in the case of the person from whom the amount has been collected. As per the Memorandum explaining the provisions, the CBDT will notify the Rules for the cases where credit of TCS are given to person other than the collectee. The Memorandum further states that with a view to ensure that the provision is not misused, the Rule will provide for credit of TCS of the minor to be allowed only where the income of the minor is being clubbed with the parent as per section 64(1A) of the Act. The amendment is proposed to be made with effect from 1st January, 2025.

Exemption from TCS collection in case of certain persons or class of persons

Section 206C of the Act which provide for collection of TCS in respect of various receipts do not have any specific exemption in relation to the TCS collection in cases of entities whose income is exempt from taxation. Such entities are not required to furnish returns of income. In absence of any such exemption, the TCS gets collected from such entities and they are required to get the refund by filing the returns of income.

With a view to remove this difficulty and compliance, Clause 70(e)(ii) of the Bill seeks to insert an addition sub-section (12) in section 206C. The proposed sub-section provides for no collection of TCS or collections of TCS at lower rates in respect of specified transaction from such persons including institution, association or body or class of institutions as may be notified. The amendment is proposed with effect from 1-10-2024.

Extending the scope of Lower deduction or collection of TDS/TCS

Existing provisions of section 197 of the Act provide for lower rate of deduction of tax at source in respect of various payments as specified in the section. On similar lines, provisions of sub-section (9) of section 206C provide for lower rates of collection of tax at source for the specified nature of transactions. Section 194Q of the Act provide for deduction of TDS @ 0.1% on purchase of goods where the payments for such goods exceed ₹ 50 Lakhs. Sub-section (1H) of section 206C also provide for collection of TCS @ 0.1% where the amount received in respect of goods sold exceeds ₹ 50 Lakhs in a financial year.

Unfortunately the existing provisions of section 197 or section 206C(9) do not provide for the application to be made for lower rate of TDS or TCS under section 194Q or 206C(1H) of the Act respectively. Though the rate prescribed under both the sections is 0.1% of the transaction value, the overall amount that gets blocked on account of these provisions can be of significant value considering the fact that the section applies for the entire amount of purchase or receipts as the case may be. The provisions of TDS and TCS also apply in a case where the assessee is in losses and therefore actually not liable to make any tax payment.

Considering this difficulty, Clause 65 of the Bill seeks to amend section 197 of the Act to permit lower deduction of TDS under section 194Q in line with the other sections specified in the section. Similarly clause 70(e)(i) of the Bill seeks to amend sub-section (9) of section 206C to permit lower collection of TCS under section 206C(1H) of the Act. Both the amendments are proposed to be effective from 1-10-2024.

Having discussed some of the provisions relaxing the burden of TDS and TCS, let's now look into the provisions expanding the scope of both TCS and TDS.

TCS on purchase of luxury goods

Section 206C which provide for TCS on various transactions inter-alia provide for TCS to be collected by seller of a motor vehicle. Sub-section (1F) of the said section provides that the seller of a motor vehicle is required collect TCS @ 1% from the buyer in a case where the consideration exceeds ₹ 10 Lakhs.

Clause – 70(a) of the Bill seeks to expand the scope of TCS by way of substituting sub-section (1F) with effect from 1st January 2025. The proposed sub-section (1F) provides that a seller who receives any amount as consideration exceeding ₹ 10 Lakhs for sale of (i) a motor vehicle; or (ii) any other goods as may be notified shall at the time of receipt of such amount collect from buyer TCS @ 1% of the consideration. The proposed amendment will empower the CBDT to expand the scope of TCS in respect of any of the luxury goods by way of notification as and when felt necessary.

Amendment in Section 194-IA – TDS on Transfer of Immovable Property

Section 194-IA of the Act provides for deduction of TDS in respect of transfer of immovable property, other than agricultural land. The TDS is required to be deducted by the transferee at the time of credit or payment @ 1% of the consideration. Sub-section (2) provides for basic threshold of ₹ 50 Lakhs for applying the provisions of the section. On plain reading of the existing provisions of sub-sections (1) and (2) of the section, it emerges that in a case where there are more than one transferor, the threshold of ₹ 50 Lakhs is applicable in respect of each of the transferor. If the consideration payable to each of the transferor does not exceed ₹ 50 Lakhs, the deduction is not required to be made under the existing provisions of the section. Similarly in a case where there are more than one transferee but each of the transferee is not paying consideration in excess of ₹ 50 Lakhs, the provisions do not apply. This interpretation of section 194-IA has also been confirmed by the decisions of the Income-tax Appellate Tribunal inter-alia in cases of ***Vinod Soni vs. ITO [2019] 174 ITD 598 (Del.)*** and ***Bhikhabhai Hirabhai Patel v. ITO [2023] 155 taxmann.com 87 (Ahd.)***

Despite of the clear language of the provisions, the Memorandum explaining the provisions states that this is against the intention of legislature. Clause 58 of the Bill seeks to insert a proviso in sub-section (2) of the section 194-IA. The proviso seeks to provide the threshold of ₹ 50 lakhs shall be the aggregate of the amounts paid or payable by all the transferees to the transferor or transferors. Accordingly in a case where there are more than one transferors or transferees in respect of an immovable property, the threshold of ₹ 50 Lakhs will need to be seen with reference to the total consideration for the transfer of the immovable property. The proviso is proposed to be inserted with effect from 1-10-2024.

Clarificatory and Procedural amendments

Exclusion of sums paid under section 194J from section 194C

Existing provisions of section 194C of the Act provide for deduction of TDS @ 2% or 1% on the payments to contractors in respect of any work. The rate of TDS applicable is depending on the status of the recipient. As against this, section 194J of the Act provide for deduction @ 10% or 2% depending on the nature of payment. Clause (iv) of Explanation to section 194C defines the term “work” for the purpose of the section 194C. The said definition does not have explicit exclusion in respect of items that are covered by the provisions of section

194J of the Act. On account of there being no specific exclusion, it is possible for one to contend that the particular payment is getting covered under section 194C though the same is in the nature of professional fees or technical fees as per section 194J of the Act. This results in deduction of tax at lower rates u/s. 194C as compared to the rates u/s. 194J of the Act.

Clause – 53 of the Bill seeks to amend clause (iv) of the *Explanation* to section 194C of the Act. The proposed amendment seeks to explicitly exclude any sum referred to in sub-section (1) of section 194J from the definition of "work" for the purpose of section 194C of the Act. This amendment will accordingly result in clarity as regards the applicability of the correct section and it will not be possible to deduct TDS at lower rates under section 194C. The amendment is proposed to be made with effect from 1-10-2024.

Alignment of Interest Rates for late payment of TCS in line with that applicable to late payment of TDS

Sub-section (7) of section 206C provide for interest in respect of TCS either not collected or not paid within the prescribed time after collection by the collector of the TCS. The sub-section provides of interest @ 1% for a month or part of a month on the amount of such tax from the date on which such tax was collectible to the date on which the tax was paid. As against this, sub-section (1A) of section 201 provide for interest of 1% per month in a case where the TDS was not deducted by the deductor. However, the said sub-section also provide for a higher rate of 1.5% per month or part thereof in a case where the TDS is deducted but not paid within the time specified.

Clause – 70(d) of the Bill seeks to amend sub-section (7) of section 206C so as to provide that the interest will be charged @ 1% for every month or part thereof in case of failure of collection of TCS. A higher rate of 1.5% for every month or part thereof is proposed in case of TCS collected but not paid within the specified time. This amendment will bring parity between the interest charged in respect of delay in payment of TDS and TCS. The amendment is proposed with effect from 1-4-2025.

Time limit for furnishing corrected statement of TDS and TCS

Section 200(3) of the Act casts the duty on the deductor of TDS to furnish quarterly statements of TDS. The proviso to the sub-section also permits the deductor to file a correction statement for rectification of any mistakes or to add, delete or update the information furnished in the original statement filed. Similarly section 206C casts duty on collector TCS to furnish quarterly statements of TCS. Sub-section (3B) permit filing of correction statement in respect of TCS.

Both the sections provide for time limit within which the original statements of tax deducted or collected are to be furnished by the deductor/collector. However, there is no time limit provided for furnishing of the correction statement. As per the Memorandum explaining the provisions, this results in situations where the statements may be revised multiple times indefinitely. This is likely to result in misuse of the provisions causing difficulties to the deductees/collectees.

Clause 67 of the Bill seeks to insert second proviso to sub-section (3) of section 200 to provide that no correction statement shall be delivered after the end of six years from the end of the financial year in which the original statement was required to be delivered. Similarly clause 70(b) of the Bill seeks to insert a proviso in sub-section (3B) of section 206C for making similar provisions in relation to correction statements for TCS. Both the amendments are proposed with effect from 1-4-2025.

Reduction in Time Limit to treat a deductor/ collector as Assessee in default

Section 201 of the Income-tax Act provide for various consequences for failure to deduct tax at source or failure to pay the tax deducted at source by a deductor. As per the provisions of the section, a deductor who had failed to either deduct the tax as required or failed to make payment of tax after such deduction is treated as an assessee in default. Sub-section (3) of the section provides time limit of seven years from the end of the financial year in which the payment is credited or paid as the time available to treat the deductor as assessee in default. As per the existing provision this time limit applies in a case where the payee is a resident of India. There is no such time limit prescribed in a case where the payee is a non-resident.

Clause 69 of the Bill seeks to amend sub-section (3) of section 201 of the Act. As per the proposed amendment, the time limit of seven years from the end of the financial year is proposed to be reduced to six years from the end of the financial year. Further, it is also proposed to apply the sub-section in relation to the cases of all the payees without any difference between resident and non-resident.

In so far as TCS is concerned, sub-section (6A) of section 206C provides that in case of failure of collecting tax at source or payment of the collected TCS, the person responsible for the same shall be treated as an assessee in default in respect of the TCS amount either not collected or not paid after collecting the same. As per the existing provision, there is no time limit prescribed to pass an order treating such a person as an assessee in default.

Clause 70(d)(ii) of the Bill seeks to insert an additional sub-section (7A) in section 206C of the Act. The proposed sub-section (7A) provides the time limit to pass order to treat the person responsible as assessee in default. As per the proposed sub-section, the time limit provided is later of (a) six years from the end of the financial year in which the tax was collectible or (b) two years from the end of the financial year in which the correction statement is delivered by the collector of TCS.

Both the above sections are proposed to be amended with effect from 1st April, 2025.

Reduction of Rates of Deduction of Tax

Various clauses of the Finance (No. 2) Bill 2024 seek to amend various sections of Income-tax Act so as to have a reduced rate of Tax Deduction in respect of various payments. The reduction in rates of TDS and the effective date has been tabulated hereunder for ease of understanding:

Section	*Nature of Payment*	*Existing Rate of Deduction*	*Proposed Rate of Deduction*	*Effective Date*
194F	Payment on account of repurchase of units of Mutual Funds or Unit Trust of India	20%	Section is proposed to be omitted	1-10-2024
194D	Payment of insurance commission (in case of person other than company)	5%	2%	1-4-2025
194DA	Payment in respect of life insurance policy	5%	2%	1-10-2024
194G	Commission etc. on sale of lottery tickets	5%	2%	
194H	Payment of commission or brokerage	5%	2%	
194-IB	Payment of rent by certain individuals or HUF	5%	2%	
194M	Payment of certain sums by certain individuals or Hindu undivided family	5%	2%	
194-O	Payment of certain sums by e-commerce operator to e-commerce participant	5%	2%	

The reduction of rates of TDS will result in better liquidity in the hands of the recipient and therefore is certainly a welcome amendment.

At the same time, one wish the long standing demand for suitably increasing of threshold limits for various types of payments was considered favourably. As a professional one also wish that the above reduction of TDS was also made applicable in respect of section 194-J of the Act. Let us keep our hopes alive that this request and many other genuine request, not only in the area of TDS and TCS, but also for various other genuine concerns raised by the Chamber and various other professional bodies will be considered sooner. Let us also wish that the proposed new Income-tax Act brings better clarity in otherwise complex world of taxation.

I express my sincere gratitude to the Journal Committee of the Chamber for entrusting me with this assignment. In the process, I find myself better educated on the subject before any of the readers are benefitted, if at all.

■●■

SS-XI-105

Charitable Trusts - Proposed Amendments

CA Vipin Batavia

Overview

a) ***Section-10(23C)*** *– The sub sections (iv), (v), (vi) & (vi) of first regime will gradually merged with section 11 the second regime. (W.e.f. 01-10-2024)*

b) ***Section-11(7)*** *– Scope is widen by including reference of sections (23EA), (23ED) &(46B) (w.e.f. 01-04-2025)*

c) ***Section-12A****- Corresponding amendments are made to offset the amendments made in section 11(7) and a proviso is added after sec-12A(1)(ac) to empower PCIT/CIT for condonation of delay in filing the application. (w.e.f. 01-10-2024)*

d) ***Section-12AB(3)*** *– The timeline for passing the order is rationalized. (w.e.f. 01-10-2024)*

e) ***Section 12AC****- New section 12AC is inserted for merger of charitable trusts or institutions in certain cases.(w.e.f. 01-04-2025)*

f) ***Section 13****- Corresponding amendment is made in section 13 to offset the proposed amendment in section 10(23)(C) to protect the permitted investments. (w.e.f. 01-10-2024)*

g) ***section 80G****- (i) The time line is rationalized for making application for approval by deleting the condition of claim of exemption u/s 11. (ii) The time line for passing the order is also rationalized. (w.e.f. 01-10-2024)*

Every year there are amendments pertaining to charitable trusts are carried out in the Budget and this year is also not exception. However, one good thing in this budget is this year there is no any adverse amendment is proposed. There are some good welcome amendments but some of the burning issues having practical difficulties are not given any attention in spite of bringing to their notice. Any way this is the way the charity has to go on.

The proposed amendments reflect broader trend towards increased scrutiny of charitable institutions to ensure that the granted tax benefits are appropriately applied and not exploited for non-charitable purposes. This aligns with global trends in regulating non-profit organisations.

Let us study in detail the proposed amendments.

A) Integration of two regimes of charitable trusts and institutions under first regime with the second regime - Sections 10(23C) (iv), (v), (vi) or (via) and 11

The memorandum explaining the provision (Clauses 4, 6 & 9)-

1) The Act puts in place two main regimes for trusts or funds or institutions to claim exemption. The first is contained in the provisions of sub-clause(s) (iv), (v), (vi) or (via) of clause (23C) of section 10. The second is contained in the provisions of sections 11 to 13 of the Act. The provisions of the respective regimes lay down the procedure for filing application for approval/ registration, the conditions subject to which such approval/registration shall be granted or can be withdrawn etc.

2) As both the regimes intend to grant similar benefit, the procedure and conditions across the two regimes have been aligned, over the last few years, vide successive Finance Acts.

3) In order to take forward the process of simplification of procedures and to reduce administrative burden, it is proposed that the first regime be sunset and trusts, funds or institutions be transited to the second regime in a gradual manner.

4) It is, therefore, proposed that:

i) Applications seeking approval or provisional approval under sub-clauses (iv), (v), (vi) or (via) of clause (23C) of section 10, and filed on or after 1st October, 2024, shall not be considered.

ii) Applications filed under these sub-clauses before 1st October, 2024, and which are pending would be processed and considered under the extant provisions of the first regime itself.

iii) Approved trusts, funds or institutions would continue to get the benefit of exemption, as per the provisions of sub-clauses (iv), (v), (vi) or (via) of clause (23C) of section 10, till the validity of the said approval.

iv) They would be eligible to apply for registration, subsequently, under the second regime. Amendments have accordingly been proposed in section 12A.

v) Certain eligible modes of investment, under the first regime (viz. those Specified in clause (b) of third proviso to clause (23C) of section 10 shall be protected in the second regime, by way of amendment in section 13.

5) These amendments will take effect from the 1st day of October, 2024.

Comments

a) The provisions of Sec. 10(23C) (iv), (v), (vi) or (via) are now became the sunset provisions. The majority of cases of these approved sections will be converted by end of AY 2026-27 and some of the cases where they obtained approval after AY 2022-23 and up to 30th September, 2024 will get over by AY 2029-2030.

b) After the conversion of these trusts/ institutions into second regime the provisions of Sec. 11 to 13 and other applicable provisions will apply.

c) The sub-section (iii) of Sec. 10(23C) will continue since it is not covered in a aforesaid proposed amendment. Moreover, there is no requirement of approval for claiming exemption under sub-section (iii).

d) There are certain specified trusts covered under sub sections (i) to (iiiaaaa) and other sub-sections (iiiab) to (iiiae) of section 10(23C) will continue to be governed by section 10(23C)

Let us study the sub sections (iiiab) to (iiiae), applicable to Education and Medical purposes which are important to us-

(iiiab) - Any university or educational institution existing solely for education purposes and not for profit and which is wholly or substantially financed by Government.

(iiiac) – Any hospital or other institution for medical treatment existing solely for medical purposes and not for profit and which is wholly or substantially financed by Government.

(iiiad) – Any university or other educational institution existing solely for educational purposes and not for profit if the aggregate annual receipts do not exceed 5 Crore rupees.

(iiiae) - Any hospital or other institution for medical treatment existing solely for medical purposes and not for profit if the aggregate annual receipts do not exceed 5 Crore rupees.

Comments

Looking at the benefits available to aforesaid class of trusts/institutions, it can be regarded as privileged class of organizations. Since there is no requirement of any approval to claim exemption and even audit under income-tax act is also not applicable. However, the ratio decided by Supreme Court in the case of New Noble Education society may be applied by the department though the subject matter in this case was on section 10(23C) (vi) and interpretation of the word "Solely" and "not for profit" used in the provision for the purpose of entitlement of exemption under the said section. It is pertinent to note that the same words are used in all aforesaid four sub -sections. Therefore, these trusts/institutions have to take utmost care while claiming exemption under these sub sections.

B) Amendment in Section – 11 (7)

Inclusion of reference of sections 10(23EA), 10(23ED), 10(46B) in section-11(7)

i) Sub-section (7) of section 11 of the Act lays down that registration under section 12AB shall become inoperative, if the trust or institution is approved/notified under clause (23C), (23EC), (46) or (46A) of section 10. Such trust or institution has a one-time option to apply to make its registration under section 12AB operative. Thus, a trust or institution may choose the provisions under which it seeks to claim exemption.

ii) It is proposed to amend sub-section (7) of section 11 of the Act to include reference of clause (23EA), clause (23ED) and clause (46B) of section 10 of the Act, to enable trusts under the second regime to claim exemption under the above-noted specific clauses of section 10.

It is now proposed to widen the scope of section 11(7) to include trusts/ Institutions approved or notified u/s 10(23EA),10(23ED) and 10(46B). Now

SS-XI-108

these organisations have an option to claim exemption u/s 10 or u/s 11.

This amendment is applicable with effect from 1st April, 2025.

C) Amendment in Sec. 12A

Condonation of delay in making an application under section 12A for registration of trust/institution.

i) A trust or institution desirous of seeking registration under section 12AB is inter alia required to apply within timelines specified in clause (ac) of sub-section (1) of section 12A.

ii) It has been noted that at times trusts or institutions are unable to file application within specified timelines. In case a trust or institution is unable to apply within time specified, it may become liable to tax on accreted income as per provisions of Chapter XII-EB of the Act. A situation of permanent exit of trust or institution from the exemption regime may also arise.

iii) It is proposed that the Principal Commissioner/Commissioner may be enabled to condone the delay in filing application and treat such application as filed within time. The delay may be condoned if he considers that there is a reasonable cause for the same.

This amendment is applicable with effect from 1st October, 2024.

Comments

This is a welcome provision since many trusts/institutions were facing problem due to this water tight provisions for filing of application within the prescribed time limit which resulted into rejection of application and followed by severe consequences of huge tax liability including attraction of Exit Tax u/s 115TD and litigation.

To mitigate this hardship following proviso is added after sub-clause vi to section 12A (1)(ac) –

> *"**Provided** that where the application is filed beyond the time allowed in sub-clause (i) to (vi), the Principal Commissioner or Commissioner may, if he considers that there is a reasonable cause for delay and such application shall be deemed to have been filed within time."*

This amendment certainly will give relief to genuine cases having reasonable cause for the delay. If the delay is condoned, such application shall be deemed to have been filed within time.

D) Time limit for passing order Section 12AB

Present provision

As per the existing provision applications desirous of seeking registration u/s. 12AB filed by trusts or institutions. As per Sec. 12AB(3) requires PCIT/CIT to pass an order allowing/ denying registration of trust or institution within the time limit of six months from the end of the month in which application is received for registration of trust under section 12A(1)(ac)(ii)/(iii)/(iv)/(v) or item (B) of (vi).

Proposed amendment provision

Section 12AB (3) is now amended and the PCIT/CIT is now required to pass his order within a period of six months from the end of the quarter in which he receives the application seeking registration of the trust or institution.

Comments

As a result of this amendment the PCIT/CIT will have more time to pass the order and the time barring now will be four times in a year as compare to every month. At the same time, it will take more time to get the order.

This amendment is applicable with effect from 1st October, 2024.

E) Insertion of new Sec. 12AC

Merger of Charitable trust or institution in certain cases

After Sec. 12AB of IT Act a new Section 12AC shall be inserted w.e.f. 01-04-2025.

New Sec. 12AC

"Where any trust or institution registered u/s. 12AB or approved under sub-clause (iv) or (v) or (vi) or (via) of clause (23C) of Sec. 10, as the case may be, merges with another trust or institution the provisions of chapter XII-EB shall not apply if –

(a) The other trust or institution has same or similar objects;

(b) The other trust or institution is registered under section 12AA or section 12AB or approved under sub-clause (iv) or sub-clause (v) or sub-clause (vi) or sub-clause (via) of clause (23C) of Sec. 10, as the case may be; and

(c) The said merger fulfils such conditions as may be prescribed.

This amendment is applicable with effect from 1st April, 2025.

Comments

a) This is a good provision which is in fact is clarificatory in nature. There was an apprehension that it may attract provisions of Chapter XII-EB relating to tax on accreted income commonly known as Exit Tax. Now it is clarified that the provisions of exit tax will not apply if the aforesaid conditions are fulfilled. However, if these conditions are not fulfilled than it seems the provisions of exit tax may apply.

b) This provision will encourage the consolidation of charitable activities, which can lead to more efficient use of resources and better management of charitable funds.

c) This is the first time address the merger of charitable trusts, ensuring the continuity of charitable status post-merger.

d) The applicability of this section envisage that the mergers are to be done between the trusts having same or similar objects and are registered or approved under relevant sections, this ensures that the charitable purpose is not diluted or lost in the merger process.

e) This amendment will provide greater clarity and certainty in the cases to merging of two or more trusts.

F) Amendment in Sec 13

Expand the scope of cases under Sec. 13 deals where Sec. 11 does not apply to certain trusts/ institutions.

Notable amendment as under

In Section 13 of IT Act, in sub-section (1), in clause (d), in the proviso, after clause (iii) the following clause (iv) shall be inserted w.e.f. 01-10-2024.

Clause – (iv)

"Any asset referred to in sub clauses (i), (ia) and (ii) of clause (b) of the third proviso to clause (23C) of Sec. 10 or any accretion to the shares forming part of corpus mentioned in said sub clause (i) and (ia) and voluntary contributions referred to in sub clause (iv) of clause (b) of the said proviso."

Section 13 has been amended to provide that assets held by trusts, institutions, etc. registered under section 10(23C) the assets are referred to in sub-clauses (i)/(ia)/(ii)/(iv) of clause (b) of third proviso to section 10(23C) i.e. assets forming part of corpus as on 1st June 1973, equity shares of public company forming part of corpus as on 1st June 1998 or any accretion thereto, debentures issued by any company or corporation acquired before 1st March 1983 and voluntary contributions received and maintained in the form of jewellery, furniture or any other article as may be notified by CBDT shall be treated as an eligible form of investment while claiming exemption under section 11.

These amendments are applicable with effect from 1st October, 2024.

G) Amendment in Sec. 80G

Rationalization of timelines for funds or institutions to file applications seeking approval u/s. 80G

Memorandum Explaining the provision

i) Section 80G of the Act, inter alia, provides for the grant of approval to certain funds or institutions for receiving donation. Deduction is available for donations to approved funds or institutions, in the hands of the assessee making such donations.

ii) The first proviso to sub-section (5) of section 80G provides timelines for filing application for approval, for funds or institutions referred to in sub-clause (iv) of clause (a) of sub-section (2) of section 80G. The second proviso lays down the procedure for processing the same. It has been noted that at times funds or institutions are unable to file application within specified timelines. A situation of unintended permanent exit of fund or institution from section 80G approval may also arise.

iii) It is proposed to amend the first and second provisos to rationalize the timelines for filing applications for approval.

Amendments in section 80G

a) In sub-section (2), in clause (a), in sub clause (iiihg) the words "The National Sports Funds to be set up" the words "The National Sports Development Funds set up" shall be substituted w.e.f. 01-04-2025.

b) In the 1st proviso at the end of clause (iii) the word "or" is to be added.

c) In the clause (iv)

   i) The words "in any other case" shall be omitted.

   ii) In sub clause (b) the portion beginning with the words "and where no income or part, and ending with the words "such application" shall be omitted.

SS-XI-111

After the amendment the clause (iv) will read as under –

(iv) Where activities of the institution or fund have –

A – not commenced, at least one month prior to commencement of the previous year relevant to assessment year from which the said approval is sought.

Comment - The time line prescribed has been clarified by CBDT in circular no 6/2023 dated 24th May 2023 that the approval will be granted from the year in which the application is made. However, it is to be noted that the 80G approval is granted from the date of order.

B – commenced, at any time after the commencement of such activities.

Comment - This is a welcome amendment since the earlier provisions were not allowing many trusts who had claimed exemption either in Sec. 10(23C) (iv to via) or Sec. 11 and 12 for any previous year. Now after the amendment the trust can apply any time after the commencement of its activities.

d) In second proviso in clause (ii) in sub clause (b) for Item – B following item shall be substituted namely –

(B) – if he is not so satisfied pass an order in writing, rejecting such application and cancelling its approval, if any, after affording it a reasonable opportunity of being heard.

e) In the third proviso earlier, the provision was that the order was required to be passed within six months from the end of the month in which the application is made now the words "six months" is omitted from third proviso since the timeline is changed to before the expiry of six months from the end of the quarter in which application was made by adding proviso iv.

These amendments, other than (a) above, are applicable with effect from 1st October, 2024.

NOTABLE UNINTENDED NO AMENDMENT

It seems unintended, but there is no amendment has been brought in section 80G empowering PCIT/CIT to condone delay in making applications as it is done under clause 6 for filling application for registration.

While the explanatory memorandum notes says that sometimes funds or institutions are unable to make applications for approval under section 80G within the specified timelines which results in unintended consequences such as permanent exit of fund or institution from the preview of section 80G.

This requires post budget representation on this issue.

■●■

SS-XI-112

M&A and Restructuring Amendments

CA Amol Khanna CA Anshul Gupta

Overview

M&A Amendment(s) vide Finance Bill 2024

Buy-back of shares

Entire amount received by the shareholder pursuant to Buy-Back of shares taxable in the hands of such shareholder as dividend @ applicable tax rates. Companies required to withhold taxes upon discharge of buy back consideration to shareholders.

Cost of acquisition of shares would be allowed as capital loss in the hands of shareholders (eligible for carry forward for 8 years) and could be set-off against future capital gains.

Angel Tax Provisions

Section 56(2)(viib) of the Income Tax Act provided for taxation of excess share premium received by companies on issuance of shares as income from other sources in the hands of such recipient company. The same is now completely abolished.

However, section 68 of the IT Act, dealing with unexplained cash credits, is still applicable whereby Companies would be required to prove the source of funds and explain genuineness of the transaction.

Corporate Gift of shares

It is proposed that provisions of section 47(iii) of the IT Act (wherein transfer of a capital asset under a 'gift or will or irrevocable trust' is not considered a transfer) would be applicable only to transfer via 'gift' made by individuals/HUF. Thus, gifting of capital assets by Corporates is now not permissible.

Like most things in life, in the world of taxation too, change is the only constant, albeit going back and forth at times. Gone are those days where things remained constant much longer and there was no need felt to amend the status quo. We are living in times where acceptance for change is instantaneous and hence there is no hesitation to bring about one. So much so that half-baked ideas sometimes find entry into law and at the same time there is quick realization of mistakes and reversals too are done quickly.

Summary of the key changes in Finance Bill 2024 especially concerning M&A transactions are discussed below:

Nature of Amendment	Existing Clause	Amendment vide Finance Bill 2024
Buy-back of shares	Buy back consideration Taxable in the hands of Company @ 23.3% and exempt in the hands of shareholders	Entire amount received by the shareholder pursuant to Buy-Back of shares taxable in the hands of such shareholder as dividend @ applicable tax rates viz. 25.17% (in case of companies under new tax regime *viz*. 115BAA of IT Act) or 35.88% (in case of individuals) Companies required to withhold taxes upon discharge of buy back consideration to shareholders Cost of acquisition of shares would be allowed as capital loss in the hands of shareholders (eligible for carry forward for 8 years) and could be set-off against future capital gains
Angel Tax Provisions	Section 56(2)(viib) of the Income Tax Act provided for taxation of excess share premium received by companies on issuance of shares as income from other sources in the hands of such recipient company. Exemptions from applicability of Angel tax provisions were provided to certain category of non-resident investors and eligible startups registered with DPIIT	Section 56(2)(viib) now completely abolished. Having said that, provisions of section 68 of the IT Act dealing with unexplained cash credits are still applicable whereby Companies would be required to prove the source of funds and explain the genuineness of the transaction
Corporate Gift of shares	Section 47(iii) of the IT Act provides that transfer of a capital asset under a 'gift' is not considered a transfer and were consequently, not subject to capital gains tax under section 45 of the IT Act. Owing to the above, corporate entities could erstwhile gift shares of other corporates without being taxed as capital gains.	It is now proposed that provisions of section 47(iii) of the IT Act would be applicable only to transfer via 'gift' made by individuals/HUF. Thus, Gifting of capital assets by Corporates is now not permissible

Buy-back of shares - Going back in time

History of buy back provisions in India

- Buy back refers to the activity wherein a company decides to repurchase its own shares from shareholders for an agreed consideration in compliance with Section 68 of the Companies Act, 2013. Buy-back and dividend typically acts as tools by the companies to reward its shareholders in case the Company has surplus cash available for distribution.

- Prior to the introduction of buy back tax, buy back was governed by the provisions of section 46A of the Income Tax Act, 1961 (IT Act) wherein buy back of shares was taxable in the hands of shareholders as Capital Gains (Long-Term Capital Gains or Short-Term Capital Gains, depending upon the period of holding of share by the shareholder) and was exempt in the hands of the Company. Further, section 2(22)(iv) of the IT Act provided an exception for not considering buy–back as any kind of dividend distribution as stipulated u/s 2(22) of the IT Act.

- Thus, buy-back mechanism was leading to situation(s) wherein certain shareholders were claiming exemption from tax (especially those from treaty countries such as Mauritius and Singapore) or were not liable to tax (in case shareholders do not have income more than the basic exemption limit). On the other hand, Companies were liable to pay dividend distribution tax @ 20.56% on dividends being distributed to its shareholders.

- In order to address this anomaly, vide section 115QA of the IT Act, buy-back tax was introduced for companies and receipt in the hands of the shareholders was considered exempt from tax. The concept of dividend distribution tax in the hands of Companies was abolished vide Finance Act 2020 and was thus taxable in the hands of shareholders, however, no such amendment was made with respect to buy-back taxability in the hands of Companies/shareholders.

Existing buy back provisions under the Income Tax Act prior to amendment by Finance Bill 2024

- As per the provisions of section 115QA of the IT Act, every company is required to pay tax on 'distributed income' @23.3% (including surcharge and cess) upon buy back of shares (within the meaning of section 68 of Companies Act, 2013). Distributed income is defined as Consideration paid by the Company to buy-back the shares as reduced by the amount received at the time of issuance of shares by the Company.

- Income arising in the hands of shareholders pursuant to buy back is exempt in their hands pursuant to provisions of section 10(34A) of the IT Act. The rationale for such an amendment was to exempt the same in the hands of shareholders since tax had already been paid by the Company as buy-back tax.

Changes proposed in Finance Bill 2024-25

- Keeping in mind the legislative intent of the Government to keep buy back of shares and distribution of dividends on similar footing, Finance Bill 2024-25 has, with effect from October 1, 2024, proposed to abolish buy back tax in the hands of Companies and provides for taxability in various sections as under -

— ***Amendment in Section 2(22)*** – Sub-clause (f) has been introduced in section 2(22) of the IT Act vide which any payment received by the shareholders pursuant to buy back of shares in accordance with section 68 of Companies Act 2013, would be considered as deemed dividend in the hands of shareholders as income from other sources.

— ***Amendment in section 115QA*** – Sunset period has been proposed in section 115QA of the IT Act such that provisions of section 115QA would not apply to any buy back being undertaken post October 01st, 2024.

— ***Amendment in section 10(34A)*** – Any income arising in the hands of shareholders pursuant to buy back would not be exempt w.e.f. October 01st, 2024.

— ***Amendment in section 46A*** - Vide this proposed amendment, it has been suggested that for the purposes of computing capital gains in the hands of shareholders, the value of consideration received by the shareholder shall deemed to be NIL. The cost of acquisition of shares which have been bought back would generate a capital loss in the hands of shareholder as these shares are being extinguished. When the shareholder has any subsequent capital gain(s), they would be entitled to claim the original cost of acquisition of all the shares (i.e. the shares earlier bought back plus remaining shares finally sold). This has been illustrated by way of below example -

200 shares bought in 2019	INR 100/- per share
Total cost of acquisition	INR 20,000/-
40 shares bought back in 2024	INR 150/- per share
Income taxable as deemed dividend	INR 6,000/-
Capital loss on such buyback (INR 40 *100)	INR 4,000/-
160 Shares sold in 2025	INR 200 per share
Total sale consideration (INR 160*200)	INR 32,000
Cost of acquisition of 160 shares	INR 16,000
Capital Gains (INR 32,000 – INR 16,000)	INR 16,000
Chargeable capital gain after set-off	INR 12,000 (i.e. INR 16,000 less INR 4,000 capital loss)

— ***Amendment in section 57*** - No deduction shall be allowed to the shareholders for expenses against dividend income while determining the income from other sources.

— ***Amendment in section 194*** - Company would be responsible for deduction of tax @ 10% at the time of discharge of consideration to the resident shareholders.

SS-XI-116

— Similarly, Company would also be responsible to withhold taxes @ 20% (plus applicable surcharge and cess) u/s 195 r.w.s. 115A of the IT Act, upon discharge of buy back consideration to non-resident shareholders (subject to tax treaty relief if any).

Analysis of the proposed changes and implications thereof for Companies/ Shareholders

Increase in tax outflow for shareholders - Under the current tax regime, dividend for resident shareholders (under maximum marginal rate) are taxed @ 35.9% while buy back is taxed @ 23.3%, owing to difference in tax/surcharge rates. Now buy back consideration received by shareholders would be taxed as dividends. While this amendment brings parity in taxation of buy back of shares and dividends, it is important to note that extinguishment of shares, being capital assets, should ideally be taxed in line with sale of shares (as was provided in the pre-amended section 46A of the IT Act) and benefit of cost of acquisition of shares ought to be given to the shareholders upfront at the time of buy back. Instead, entire amount of buy back consideration is being taxed in the hands of shareholders upfront as dividends and capital loss (to the extent of cost of acquisition of shares) could be carried forward (i.e. for a period of only 8 years) and set-off against future capital gains. Thus, the quantum of taxation pursuant to buy-backs would increase for the shareholders once the proposed amendments are made effective.

Tax implications for non-resident shareholders - Consideration received on Buy back of shares would be taxed as dividend income in the hands of non-resident shareholders, thus it would be pertinent to evaluate whether such dividends would qualify for lower rate of tax withholding under the provisions of Tax Treaty. Alternatively, non-resident shareholders can argue that such consideration should be treated as Capital Gains under the provisions of Tax treaty owing to the fact that consideration is being received on account of relinquishment of capital rights by the shareholder in the Company.

Increased burden of compliance on the Company – Company shall have to establish/ follow a mechanism to ensure compliance of withholding tax from payment of buy-back consideration.

Taxability upon redemption of Preference Shares – Debate existed whether the redemption of preference shares is liable to be taxed as capital gains or would be covered under section 115QA of the IT Act. Amendment in Section 2(22) with introduction of sub-clause (f) deems any receipt by a shareholder pursuant to buy-back of shares in accordance with section 68 of Companies Act 2013 as deemed dividend. Thus, redemption of preference shares should be liable to capital gains.

Availability of benefit u/s 80M of the IT Act - As per the provisions of section 80M of the IT Act, dividends received by a domestic company from any other domestic/foreign company shall be allowed as a deduction in case entire dividends are distributed to the shareholders by the recipient company within the prescribed time period. Thus, it would be imperative to analyse whether such dividends (i.e. consideration received pursuant to buy back) would also qualify as inter-corporate dividends and be eligible for deduction u/s 80M of the IT Act.

In light of the aforementioned changes being effective from October 01, 2024, one can expect companies to undertake buy backs under the existing regime to avail the benefit of lower taxation under the current regime. Additionally, careful analysis would also need to be undertaken to assess the impact of new buy back taxation for non-resident shareholders (especially from treaty countries) as well as eligibility of buy back consideration for inter-corporate dividends.

Angel Tax: A Stifling Tax No More

Startups across India breathe a sigh of relief as the Hon'ble Finance Minister, Smt. Nirmala Sitharaman proposed the abolishment of the so called 'angel tax' or Section 56(2)(viib) of the Income Tax Act, 1961 (IT Act) in order to bolster the Indian startup ecosystem, boost the entrepreneurial spirit and support innovation across the country.

Background and Genesis

Angel tax, the unpopular term coined for this tax provision, was first introduced in the year 2012 by the then Finance Minister, Shri Pranab Mukherjee and was positioned as a potential tool to prevent tax evasion by scrutinizing the valuation of shares issued by unlisted companies. Section 56(2)(viib) of the IT Act provided for taxation of excess share premium received by companies on issuance of shares as income from other sources in the hands of such recipient company.

The underlying principle was sound: to prevent companies from artificially inflating value of shares to evade taxes on the difference between the issue price and the fair market value. Additionally, it was also a mechanism to stop unaccounted money inflow into the company by way of excess share premium over and above the fair value of the company. However, over the years, it had unintended consequences for Indian private limited companies looking to raise money and particularly Indian startups.

Valuation of an early-stage startup is a complex exercise. Traditional valuation methods often fall short in assessing the potential of disruptive businesses which often tend to grow multi-fold in a relatively short span of time. The tax authorities, mandated to scrutinize valuations, often found themselves in conflicts with startups and their investors.

Until April 01, 2023, Indian private limited companies had to pay tax under Section 56(2)(viib) of the IT Act only where shares were issued at a premium to Indian resident investors. However, in a major change to the scope of the angel tax provisions, with effect from April 01, 2023, Indian private companies had to pay the angel tax in cases where shares were issued at a premium to non-resident investors as well. Relaxation was provided to investment made by resident/non-resident investors in eligible start-up which were registered with Department for Promotion of Industry and Internal Trade at the Ministry of Commerce and Industry and also complied with the prescribed limits.

Owing to the introduction of Angel Tax, and the subsequent fear of tax scrutiny, investors and especially non-resident investors started shying away from infusing funds into Indian startups often due to hitting deadlocks of complying with multiple provisions when determining the issuance price. Additionally, startups also felt a burden of compliance with hostile tax laws pertaining to their valuation, diverting attention from their core business operations and fear of unnecessary scrutiny/ litigation by the Tax Authorities.

Recognizing the detrimental impact of Angel tax on startups, the Government of India relaxed the provisions pertaining to section 56(2)(viib) by introducing more valuation methods for non-resident investors as well prescribing certain conditions for eligible startups to claim exemptions from applicability of Angel tax provisions. The government also amended section 56(2)(viib) of the IT Act and kept certain classes of non-resident investors out of the ambit of angel tax provisions.

Key Issues faced by Indian startups in the context of Angel Tax provisions:

Multiple Valuation methodologies – While the idea was to make India a start-up friendly jurisdiction, diverse Valuation methodologies under different laws (income-tax, FEMA, Companies Act) with somewhere a floor test and somewhere ceiling started making Companies and their investors extremely nervous.

If this was not enough, the tax authorities started enquiring about the source of funds, details of the investors (especially non-residents) making investors nervous and investee companies scramble for this tall data requests rather than focus on their business.

Applicability of Transfer Pricing Provisions* -** In the landmark decision of ***Vodafone India Services Pvt. Ltd (2014 50 taxmann.com 300), Hon'ble Bombay High Court held that transfer pricing provisions would not be applicable in case issuance of shares at premium to non-resident investors on the premise that share capital represented capital receipt for the company and was thus not taxable under the IT Act. Central Board of Direct Taxes vide instruction no. 02/2015 dated January 29, 2015 had also accepted the contention of Hon'ble Bombay High Court. However, vide amendment made in Finance Act 2023, the effect of this judgement/CBDT notification was overruled wherein in case of investment(s) made by non-resident investor, being an associated enterprise of the Indian entity, transfer pricing provisions may get attracted on funds received by the India entity from associated non-resident investor.

Challenging the valuation methodology adopted by the Taxpayer - There has been prolonged litigation by the tax authorities wherein they have disregarded the valuation report being shared by the Company on the premise that valuation methodology adopted by the Company does not accurately captures the fair market value of shares of the Company, parameters used in the valuation report are not correct etc. While there have been favourable judicial precedents in support of the assessee on the grounds that AO can challenge the valuation report used by the assessee, however, choice of valuation methodology cannot be challenged, litigation on this issue lead to additional compliance burden on startups, cash flow issues in case of start-ups (wherein they were required to deposit part demand for challenging the order of AO before the higher Tax Authorities).

Other Issues - Applicability of angel tax provisions upon issuance of convertible instruments such as compulsorily convertible preference shares, compulsorily convertible debentures as well as conversion of convertible instruments into equity shares (the later event being typically exempt from capital gains tax).

When the Indian investee companies needed full flexibility on conducting their business(es), decide on valuations in the future (since full value is not discovered) and agree on just commercial rights at the time of raising funds, the Government required not only compliance of FEMA provisions (which too a great extent is justifiable), it went ahead to make things further complicated by enforcing tax on a then derived valuation (forceful) where these companies were yet to discover their potential.

Considering the above, the start-up community kept requesting the Government to reconsider these provisions. These repeated requests found partial hearing with the provisions not going away but providing some more methods of valuation and some exemption scenarios. What however was needed was a full withdrawal of this provision for it was not serving the very purpose for which it was introduced but was a dent in India's image as the destination for attracting global capital.

Proposal for abolition of Angel Tax vide Finance Bill 2024

In a welcome move, the hon'ble Finance Minister has proposed the removal of the Angel Tax for all categories of investors, with effect from Assessment Year 2025-26 (i.e. with effect from April 01, 2024). Investors and VCs across the world have hailed this as a 'phenomenal move' and a 'much needed course correction'.

While this move is in the right direction, below mentioned issues still remain unresolved and would require further clarifications/involvement from Government's standpoint to further aid ease of doing business in India -

— While it is proposed to make section 56(2)(viib) of the IT Act inoperable, similar amendment has not been made in section 2(24)(xvi) of the IT Act dealing with income in the hands of Company. This seems to be a clerical omission which, fingers crossed, should be corrected in the final Bill;

— Plethora of appeals are pending resolution on this very issue for the past year where Companies struggle to get stays, are coerced to deposit some demand during appeal stage and that stays are seldom. It would be a welcome move if the Government asks the tax authorities to not press these appeals and provide much needed relief to the Indian Companies facing the brutal blow from authorities on this issue – We really hope that the Government does not makes it a part of the new Vivad se Vishwas Scheme (VVS) 2024, since Angel Tax Issue cannot be looked at from the same lens as that of the other matters where the assesses opt for VVS to settle litigation;

— While section 56(2)(viib) of the IT Act has been abolished, provisions of section 68 of the IT Act dealing with unexplained cash credits are still applicable whereby Companies would be required to prove the source of funds and explain the genuineness of the transaction. Certainly, certain nature of transactions warrant review under section 68 but genuine transactions by start-ups, especially funding from non-residents, should be excused on *bona fides* so the litigation of taxability on fresh issue of capital is settled for good. Thus, urgent attention is needed to rationalise the provisions of section 68 of the IT Act as well to ensure that it brings about a comprehensive relief for the Indian Companies, and that they are subjected to only critically needed safeguards.

SS-XI-120

Corporate Gifting Abolished

Section 47(iii) of the IT Act provides that any transfer of a capital asset under a 'gift or will or an irrevocable trust' is not considered a transfer.

Taking cognizance of this, there have been instances where Companies have transferred assets (~ say shares of a company) for nil consideration and treated the same as being exempt under section 47(iii) and therefore not applied section 50CA of the Act as well. This position has been litigated by the tax authorities in the past citing gift to be meant for individuals only since the same is out of love and affection and hence not applicable in case of Companies, and the same have been upheld by some courts. Contrary decisions also exist wherein the courts have allowed treatment of without consideration transfers as 'gift' irrespective of the entity type.

The amendment proposed in the Finance Bill 2024 seeks to restrict the applicability of section 47(iii) to individuals/HUF only. In the memorandum explaining the intent of the Finance Bill, 2024 it has been reasoned that vide insertion of sections 50D of the IT Act (providing for taking fair market value as full value of consideration in cases where the consideration received or accruing as a result of the transfer of a capital asset is not ascertainable or cannot be determined) and section 50CA of the IT Act (providing for taking fair market value as full value of consideration in case of unquoted shares where the consideration received or accruing is less than the fair market value of such share), the government had introduced anti abuse measures to tackle incidence of non-payment of Capital Gains Tax. However, since there have been instances of gifting by corporates where there is no element of natural love and affection, it has been proposed to restrict the applicability of section 47(iii) of the IT Act to individuals and HUF(s). Though this amendment has laid to rest the controversy whether corporates could avail the benefit of section 47(iii) of the IT Act prospectively (w.e.f. from April 1, 2024), the fate of gifts undertaken by non-individuals/ HUFs remains unresolved.

Some aspects concerning this change merit further deliberation, like:

- Would this amendment not lead to double taxation, both for transferor [since gift would be taxable going forward except from individuals/HUF] as well as the transferee [~say under section 56(2)(x)] Should there have been an amendment to tax only one leg, in the interest of not taxing the same transaction more than once?
- While this provision impacts corporate gifts but not all nature of assets may get covered here, for example, section 50CA would necessitate that transfer of shares of an unlisted company by a Company is now a taxable transfer (if gifted) but some other assets for which there is no deemed consideration is prescribed would not have a tax incidence on the Company gifting these other assets since while there would be a taxable transfer but in absence of a consideration there would not be a liability in the hands of the transferor company. For transferee however, provisions of section 56(2)(x) would come into play.

Certain other changes, though impacting wider situations, would also play an important role in M&A situations. Some of the key amendments are:

- Rationalization of capital gains tax regime, especially the tax rate upon sale of unlisted shares (long term) coming down to 12.5% from 20%, could make decision making on divestments easier;

- Reduction in time-period of re-opening of assessments to 6 years (including matters concerning tax withholding involving non-residents payees) is a positive step as the tax indemnities and their time period can be for a reduced period;

- Debentures have been a very popular instrument for investors, especially investments coming into start-ups. It now being considered as short term irrespective of its holding period is an amendment which would lead to some re-thinking on these instruments in the future.

- In another clarificatory amendment, it has now been proposed to amend section 55(2)(ac) of the IT Act and clarify that cost of acquisition of shares being transferred under OFS route in an IPO would be computed in a similar manner as Fair Market Value (FMV) of other unlisted shares are being computed u/s 55(2)(ac) of the IT Act i.e. FMV of such shares would be calculated based on Cost Inflation Index of FY 2017-18 with Cost Inflation Index of the 1st year when the share was held/01st April 2001 (whichever is later). This amendment is proposed to be inserted with effect from 01st April 2018 and would thus apply retrospectively from AY 2018-19 onwards.

To sum-up, the amendments impacting M&A are a win some lose some at best. In these dynamic times and the ever-evolving situation, it is only fair for the tax authorities to keep experimenting, learning, and improving and it will be through introduction of new provisions, abolishment/amendments to the same to address the nuances as the same are applied in practice.

■●■

"Never think there is anything impossible for the soul. It is the greatest heresy to think so. If there is sin, this is the only sin; to say that you are weak, or others are weak."

— *Swami Vivekananda*

SS-XI-122

Equalisation Levy – Amendments

CA Ganesh Rajgopalan

Overview

The Finance (No. 2) Bill 2024 has proposed withdrawing the equalisation levy of 2% payable by non-resident e-commerce operators on e-commerce supply and services provided or facilitated by them. The article describes the international developments relating to the levy and discusses the impact of the withdrawal on chararcterisation of such payments for the purposes of taxation with a special focus on payments for computer software.

The proposed changes

Equalisation levy of 2% was introduced on the amount of consideration received/receivable by an e-commerce operator from e-commerce supply or services with effect from 1st April 2020. The Finance Bill (No. 2) 2024 proposes that the levy of 2% shall not apply to such consideration received or receivable on or after 1st August 2024.

The Memorandum explaining the provisions of the Finance Bill states that the reason for the withdrawal of E.L. of 2% ("EL 2.0") is due to concerns expressed by some stakeholders that the scope of the levy is ambiguous. The amendment is made by inserting a new sub-section (4) to section 165A of the Finance Act 2016 (containing the provisions for charging the levy), which provides that this section shall not apply to any consideration received or receivable by an e-commerce operator from e-commerce supply or services made or provided or facilitated by it on or after 1st August 2024. The exemption in section 10(50) to income arising from e-commerce supply or services chargeable to an equalisation levy of 2% from income tax is also withdrawn.

The levy imposed on consideration received or receivable by an e-commerce operator from e-commerce supply or services made or provided or facilitated in the month of July 2024 is not affected even though the due date for its payment falls on 7th August 2024 after the withdrawal of the levy.

The equalisation levy of 6% on specified services (being online advertisement, provision of digital advertising space, and facility and related services) ("EL 1.0"), which was introduced from 1st June 2016, remains unchanged.

L.E.L. Transition Agreement with the US

A broader perspective covering international developments would be useful to understand the imposition of EL 2.0 and its withdrawal.

The levy was introduced in March 2020 by the Finance Act 2020. On June 2, 2020, the Trade Representative (an Executive Office of the President of the United States of America) initiated an investigation of India's 2020 Equalisation Levy under Section 301 of the Trade Act of 1974. The Investigation Report was released in January 2021. The Report noted that India's L.E.L. imposed a 2% tax on revenue generated from a broad range of digital services offered in India, including digital platform services, digital content sales, digital sales of a company's own goods, data-related services, software-as-a-service, and several other categories of digital services. India's EL 2.0 (referred to in the Report as Digital Services Tax or DST) explicitly exempted Indian companies—only "non-residents" must pay the tax. According to the Report, USTR's investigation indicated that the levy is discriminatory against U.S. companies; the levy contravenes prevailing international tax principles and is therefore unreasonable; and the levy burdens or restricts U.S. commerce. It concluded that the levy was actionable under Section 301 including (i) suspending, withdrawing, or preventing the application of benefits of trade agreement concessions; (ii) imposing duties, fees, or other import restrictions on the goods or services of the foreign country; (iii) entering into binding agreements that commit the foreign country to eliminate or phase out the offending conduct or to provide compensatory trade benefits; or (iv) restricting or denying the issuance of authorisations needed to supply services in some sectors in the United States. Notably, EL 1.0 (referred as "digital advertising tax" in the Report) was not the focus of the investigation.

Meanwhile, Action 1 of the BEPS[1] Project, which related to addressing the Tax Challenges Arising from the Digitalisation of the Economy, was being discussed by over 130 countries of the G20/OECD Inclusive Framework. An agreement was reached on the two-Pillar package of reforms to the international tax framework on 8th October 2021.

On 24th November 2021, the United States and India announced, in a joint statement,[2] the terms of a political compromise on the transition from India's existing equalisation levy to the new multilateral solution and to continuing discussions on this matter through constructive dialogue ("Transition Agreement"[3]). In terms of the political compromise, on an agreement being reached on Pillar One under the OECD/G20 Inclusive Framework and taxes levied by India thereunder, India would give as credit from the Pillar One taxes the equalisation levy collected by it between 1st April 2022 until 31st March 2024 (referred to as the "Interim Period"). As part of the compromise, the U.S. agreed to terminate proposed trade actions and committed not to impose further trade actions against India with respect to the equalisation levies until the end of the Interim Period. As per the formula prescribed in the Transition Agreement, the amount of equalisation levies levied and collected during the Interim Period by India from a

1. Base Erosion and Profit Shifting.
2. India and USA agree on a transitional approach on Equalisation Levy 2020 (pib.gov.in)
3. US entered into similar Transition Agreement with Austria, France, Italy, Spain and the United Kingdom for the digital services taxes imposed by these countries.

U.S. company is to be given as a credit to be adjusted to the extent of Pillar 1 taxes to be levied on that company every year until the same is exhausted. In effect, India has committed to return the equalisation levies levied during the Interim Period by foregoing its Pillar One levies once they are imposed. Interestingly, the Transition Agreement agreed between the United States and India covers EL1.0 also for credit against Pillar One taxes though the USTR 301 investigations did not cover the same. Presumably, India has committed to withdraw both EL 1.0 and EL 2.0 under the Transition Agreement with the .S.U.S. in line with its similar commitment under the agreements reached in Action 1 in the Inclusive Framework.

On June 28, 2024, the United States and India announced that the Interim Period, which was to end on 31st March 2024, was to be extended to 30th June 2024 in order to align with the revised OECD/G20 Inclusive Framework timeline of 30th June 2024 for the implementation of Pillar One.

The proposed withdrawal of EL 2.0 from 1st August 2024 before an agreement is reached on Pillar One under the OECD/G20 Inclusive Framework does not impact India's commitment to forego Pillar One taxes to the extent of sequalisation levies collected by it during the Interim Period under its Transition Agreement with the United States.

Withdrawal of exemption from total income

Section 10(50) of the Income-tax Act, 1961 (the "Act") provides that the total income excludes any income arising from any specified service provided on or after 1st June 2016 (under EL 1.0) or arising from any e-commerce supply or services made or provided or facilitated on or after the 1st April 2020 (under EL 2.0) and that is chargeable to equalisation levy. The Finance (No. 2) Bill 2024 proposes to amend the said clause by limiting the exclusion to income arising from any e-commerce supply or services made or provided or facilitated by the e-commerce operator on or after the 1st April 2020 where equalisation levy of 2% is chargeable but before 1st August 2024.

The Proviso to section 163 of the Finance Act 2016 (that contains the L.E.L. provisions) provides for exemption from equalisation levy any consideration received or receivable for specified services and for e-commerce supply or services which are taxable as royalty or fees for technical services ("FTS") in India under the Income-tax Act, 1961 read with an agreement notified under section 90 or section 90A of the said Act. Thus, the equalisation levy yields to the provisions of the Income-tax Act (read with the relevant treaty) for the taxation of royalties and fees for technical services. The withdrawal of EL 2.0 does not impact the need for analysing whether the payment is to be characterised as royalty or FTS.

Though the EL 2.0 applied to a wide variety of online supply of goods or services, payments for computer software, which have been subject to legislative changes and intense judicial scrutiny, are discussed below.

L.E.L. on Computer Software Payments

The Supreme Court, in *Engineering Analysis*[4], held that payments by end users for the

4. *Engineering Analysis Centre of Excellence Ltd vs. CIT (2021) 125 taxmann.com 42 (SC).*

purchase of software copies were not payments in respect of any copyright and thus are not royalty under clause (vi) of section 9(1) of the Act. These payments are not for the use of or right to use copyright and, thus, cannot be characterised as royalties under treaties. The Apex Court also held that payments by distributors are not royalties both under the Act and the treaties since these are not in respect of copyright or for the use or copyright.

Explanation 4 was inserted to section 9(1)(vi) by the Finance Act 2012 with retrospective effect from 1-6-1976 to nullify the outcome of various court rulings which had held that payments for a licence to use software were not royalties. The explanation 'clarifies' that the transfer of all or any rights in respect of right, property or information contained in the various clauses in the definition of royalty includes 'transfer of right for use or right to use computer software (including granting of a licence) irrespective of the medium through which such right is transferred.' The explanation intends to obliterate the distinction between payment for copyright and payment for a copyrighted article for tax purposes. The explanation operates prospectively after its insertion vide Finance Act 2012[5] and cannot be read into a tax treaty.

If the transaction is a sale of the copy of the software, it involves a transfer of title in the copy to the user, notwithstanding that the vendor labels it to be a licence.[6] Consequently, the consideration the user pays is not for the transfer of right for use or right to use the copy of the software. Since the end-user owns the copy (notwithstanding the EULA), Explanation 4 is of no avail, and such consideration is not royalty under the Act. However, if the transaction is one where the incidents of ownership of the copy do not pass to the user to a significant degree, then the transaction could either be a transfer of the right to use the copy to the user or merely permit him to use the copy. In either case, there is no sale of goods and Explanation 4 is attracted. It is also necessary to examine whether the delivery of a software online, which is to be downloaded by the acquirer, falls under online provision of service. One needs to examine the transaction terms and the licence agreement for computer software more closely to identify whether there is a sale of the copy of software or it is only a right to use that is given. Following the Engineering Analysis, an equalisation levy is chargeable at 2% on computer software payments before 1st August 2024 if they involve online supply or provision of services falling within the scope of e-commerce supply or services.[7]

Significant economic presence

Where the payment is not to be taxed as royalty or FTS under the Act read with the relevant treaty, the withdrawal of EL 2.0 and the exemption under section 10(50) would require an examination of whether the income arises through or from a business connection under section 9(1)(i) of the Act.

Under Explanation 2A to Section 9(1)(i) of the Act, significant economic presence

5. *Engineering Analysis Centre of Excellence Ltd vs. CIT (2021) 125 taxmann.com 42 (SC).*
6. *Capgemini Business Services (India) Ltd. vs. ACIT (2016) 46 CCH 253 (Mum).*
7. Finance Act 2016, Section 164(cb).

("SEP") of a non-resident in India shall constitute a business connection in India,[8] and any income arising through or from a SEP is deemed to accrue or arise in India. The meaning of the expression "business connection" is significantly expanded by the insertion of the SEP. SEP means, inter alia, transaction in respect of goods, services or property including provision of download of data or software by non-residents with persons in India. The definition of SEP is so wide that any transaction of digital supply of goods or services which was subject to EL 2.0 before 1st August 2024 will fall under the SEP provisions if section 9(1)(vi) read with Explanation 4 thereto and would be subject to tax in India unless the non-resident is eligible for relief under the relevant treaty whereunder income is not taxable in India in the absence of a permanent establishment in India of the non-resident.

One other aspect is the seeming overlap between SEP and section 9(1)(vi) of the Act, which the assessee must negotiate to achieve the right characterisation. SEP is defined to mean any transaction in respect of goods, services or property and includes provision of download of software. At the same time, Explanation 4 to section 9(1)(vi) refers to consideration for payment of right for use or right to use computer software. However, after its withdrawal, one has to decide on the characterisation between clause (vi) and clause (i) to section 9(1). One interpretation is that where there is a sale of a copy of software that falls outside Explanation 4 (see above), it falls into the SEP net. Also, the online supply of software other than computer software, which was hitherto chargeable under EL 2.0, gets covered under SEP provisions in the absence of treaty protection.

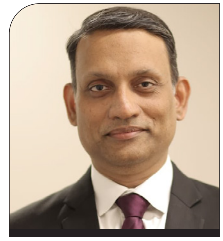
Final remarks

It is widely believed that the withdrawal of the 2% equalisation levy provides relief to non-resident digital companies, but a higher compliance burden is cast on the payer since the non-resident e-commerce operator is no longer subject to the levy. This conclusion is not entirely correct as even when the equalisation levy was payable by the non-resident, its non-payment left the payer open for being declared his agent under section 163 of the Act. However, the liability as an agent of the non-resident, which was limited to 2% of the gross consideration paid or payable to the e-commerce operator before 1st August 2024, the payer as an agent of the non-resident becomes liable for the tax on income attributable due to business connection being constituted through the existence of a significant economic presence in India.

After the withdrawal of EL 2.0, the payer has the obligation to correctly characterise the payment and deduct the applicable rate of tax from the income of the non-resident, who becomes eligible for credit for the same against his taxes in the country of his residence. The credit for L.E.L. was not available.

8. SEP provisions apply with effect from AY 2021-22.

IFSC related proposals



CA Suresh Swamy CA Nehal Sampath

Overview

The Finance (No 2) Bill, 2024 proposes changes to the tax regime for retail schemes and ETFs in the International Financial Services Centre (IFSC). It aims to encourage fund managers to set up retail schemes and ETFs in IFSC, bring parity in benefits for Venture Capital Funds (VCFs) registered with SEBI and IFSCA, and streamline the tax code for IFSC entities. Other notable mentions include the promotion of a variable capital company structure, streamlining rules for overseas investments, and the intention to replace the existing Income-tax Act with a new, simplified tax code. However, there are misses in the budget, such as the extension of sunset clauses and the lack of a separate tax regime for outbound funds.

If there is a catchphrase to summarise the full-year Budget 2024 proposals from International Financial Services Centre (IFSC) perspective, it would be "*yeh dil maange more*"!

IFSC has been one of the initiatives which has received extensive time, attention and support of the Central Government in the past few years. It has literally risen from the banks of Sabarmati to be embedded virtually in all conversations and initiatives around financial services. From seeking to spread awareness about IFSC a few years ago, with the efforts of various stakeholders including the International Financial Services Centre Authority (IFSCA), the narrative has shifted more towards a "solution" oriented approach ie can IFSC help solve a cross-border finance/financial services problem? To help IFSC gain more prominence internationally as it competes with other global financial centres, everyone was looking forward to announcements which would (i) provide tax incentives or (ii) 'plug the gap' to make the tax regime in IFSC 'at par' with the regimes in these centres.

This article summarises the key announcements in the Finance Minister's Budget speech and in the Finance (No. 2) Bill, 2024 (FB) for IFSC.

I. Tax regime for retail schemes and ETFs in IFSC (clause 4(a) of the FB – proposed amendment to clause (4D) of section 10 of the Income-tax Act, 1961 [ITA])

Existing provisions

Section 10(4D) of the ITA was introduced to provide tax exemptions to certain

SS-XI-128

Funds domiciled in IFSC that are similar to the tax exemptions enjoyed by offshore Funds domiciled in certain tax favourable jurisdictions. The section exempts any income accrued or arisen to, or received by a 'specified fund' which is attributable to units held by non-residents (not being the permanent establishment of a non-resident in India) from:

— Transfer of a capital asset referred to in clause (viiab) of Section 47, on a recognised stock exchange located in any IFSC and where the consideration for such transfer is paid or payable in convertible foreign exchange;

— Transfer of securities (other than shares in a company resident in India);

— Securities issued by a non-resident (not being a permanent establishment of a non-resident in India) and where such income otherwise does not accrue or arise in India; or

— From a securitisation, trust which is chargeable under the head 'Profits and gains of business or profession'.

The exemptions provided above are largely relevant for Funds investing in derivatives, debt securities, mutual funds and overseas investments.

Further, clause (c) of the *Explanation* to clause (4D) of section 10 of the ITA defines a 'specified fund' to mean, inter alia, a fund established or incorporated in India in the form of a trust or a company or a limited liability partnership or a body corporate —

(I) which has been granted a certificate of registration as a Category III Alternative Investment Fund (AIF) and is regulated under the Securities and Exchange Board of India (Alternative Investment Fund) Regulations, 2012, made under the Securities and Exchange Board of India Act, 1992 (15 of 1992) or regulated under the International Financial Services Centres Authority (Fund Management) Regulations, 2022, made under the International Financial Services Centres Authority Act, 2019 (50 of 2019);

(II) which is located in any International Financial Services Centre; and

(III) of which all the units other than unit held by a sponsor or manager are held by non-residents;

As evident from the above, the exemption is available only to a Category III AIF set-up in IFSC.

The Fund Management regime in IFSC has, nonetheless, been far extensive and permits setting-up of other categories of Funds such as retail schemes and ETFs, for which there was no express tax regime in the ITA.

Proposed amendment

It is now proposed to expand the coverage of section 10(4D) to include funds established or incorporated in India in the form of a trust or a company or a limited liability partnership or a body corporate, which have been granted a certificate as a **Retail Scheme** or an **Exchange Traded Fund** under the relevant Fund regime, and which satisfy such conditions as may be prescribed.

Impact of the proposed amendment

Extending the current 'Specified Fund' regime to Retail Scheme/ETFs is expected to encourage Fund Managers to set-up such Funds in IFSC. These schemes enable Fund

Managers to raise monies from investors with lower 'ticket size'. Further, non-resident investors are not taxable on gains from investments in ETFs, which are traded on IFSC exchanges. The tax regime proposed in the FB along with changes to the Capital Gains Tax regime could lead to Fund Managers evaluating more "Fund of Fund" structures in IFSC. This coupled with the relaxation of "NRI/OCI holdings" cap for Funds in IFSC may pave the way for many more "inbound" retail schemes/ETFs and AIFs to be set-up in IFSC.

II. Alignment of surcharge rates (Clause 2(3) of the FB)

Existing provisions

One of the asks from the Fund Management industry which was accepted by the Government in the past was, capping the tax rate on dividends and interest earned by a 'specified fund' in IFSC to 10% (in line with the withholding rates in most of the Tax Treaties) by removing surcharge and cess. However, in the fine print in the Finance Act, 2023, surcharge was capped only for association of persons (which had not corporate taxpayers as members). The surcharge continued to apply for other types of 'specified funds' including funds set-up as a limited liability partnership, company, or even investment divisions of foreign companies.

Proposed amendment

It is now proposed to correct the oversight by extending the exemption from applicability of surcharge on income received in respect of securities i.e., interest and dividend, chargeable under section 115AD of the ITA to all specified funds set up in IFSC (including investment divisions of foreign companies) irrespective of their legal form.

III. 'Thin capitalisation norms' (clause 28 of the FB – proposed amendment to section 94B of the ITA)

Existing provisions

Section 94B of the ITA restricts the deduction of interest payable (in excess of INR 1 crore) by an Indian company, or a permanent establishment' of a foreign company in India, to a non-resident related party to 30% of its "earnings before interest, taxes, depreciation and amortisation (EBITDA)". The provisions of this section do not apply to Indian companies or permanent establishments of foreign companies which are engaged in the business of banking or insurance or such class of non-banking financial companies (NBFCs) as may be notified by the Central Government.

Proposed amendment

It is now proposed to extend the carve out from section 94B of the ITA to a finance company, located in IFSC, as defined in clause (e) of sub-regulation (1) of regulation 2 of the International Financial Services Centres Authority (Finance Company) Regulations, 2021 made under the International Financial Services Centres Authority Act, 2019 (50 of 2019). This is further subject to satisfaction of such conditions as may be prescribed.

Impact of the proposed amendments

Finance Companies including leasing entities, treasury centres established in IFSC are similar to NBFCs wherein their business, inter-alia, involves lending monies and are regulated by a financial sector regulator. Given their nature of business, finance companies in IFSC can be highly leveraged incurring significant interest expenditure.

Restrictions imposed under section 94B could impede on finance companies in IFSC having an appropriate capital structure, especially for the periods when the finance companies are not availing the 'tax holiday' under section 80LA of the ITA. The proposed amendment will bring finance companies in IFSC at par with other NBFCs operating in India and help capitalise them appropriately.

IV. Unexplained cash credits - VCFs in IFSC (clause 4(c)(ii) of the FB – proposed amendment to section 10(23FB) of the ITA)

Existing provision

Section 68 of the ITA provides that where any sum is found to be credited in the books of an assessee maintained for any previous year, and the assessee offers no explanation about the nature and source thereof or the explanation offered by him is not, in the opinion of the Assessing Officer, satisfactory, the sum so credited may be charged to income-tax as the income of the assessee of that previous year.

The Finance Act, 2023 amended the provisions of section 68 so as to provide that the nature and source of any sum, whether in form of loan or borrowing, or any other liability credited in the books of an assessee shall be treated as explained only if the source of funds is also explained in the hands of the creditor or entry provider. However, this additional onus of proof of satisfactorily explaining the source in the hands of the creditor does not apply to Venture Capital Funds (VCFs) or Venture Capital Companies (VCCs) (registered with SEBI) as referred to in section 10(23FB) of ITA.

Proposed amendment

It is now proposed to extend the relaxation to VCFs which are regulated by the IFSCA.

Impact of the proposed amendments

The proposed amendments bring parity in benefits between VCFs registered with SEBI and IFSCA and will ensure that the benefit of exemption from applicability of unexplained cash credits is also available to VCFs regulated by the IFSCA.

V. Settlement Guarantee Fund (Clause 4(c)(i) of the FB – proposed amendment in section 10(23EE) of the ITA)

Existing provisions

Section 10(23EE) of the ITA provides and exempts from tax any specified income earned by the Core Settlement Guarantee Fund, set up by a recognised clearing corporation and notified by the Central Government under the Official gazette. Currently, only clearing corporation registered with the SEBI is covered under the exemption provided under section 10(23EE) of the ITA.

Proposed amendment

It is now proposed to extend the exemption under section 10(23EE) of the ITA to include any specified income of Core Settlement Guarantee Fund set up by recognised clearing corporations in IFSC.

VI. Other announcements

Some of the other notable mentions in the Finance Minister's speech that may be relevant from IFSC perspective include:

Variable Capital Company structure

IFSCA has been promoting innovative structures to rapidly catapult the IFSC into the next orbit. Among others, it has been contemplating to promote variable capital company in the IFSC.

The Government is seeking legislative approval to establish a more efficient and flexible financing mode for leasing of aircrafts and ships. This will be facilitated through a 'variable company structure'. This may streamline the process of financing and attract more investment in aircraft and shipping industry. Additionally, pooled funds of private equity are to be introduced through a ‘variable company structure’ to enhance private equity investment opportunities.

Overseas investments

The rules and regulations governing Foreign Direct Investment and Overseas Investments will be streamlined to achieve three key objectives: (1) facilitate foreign direct investments, (2) prioritise targeted sectors, and (3) promote opportunities for using the Indian Rupee as a currency for overseas investments

These measures are expected to create a more favorable investment climate and bolster India's position as an attractive destination for foreign capital inflows.

New simplified tax code

The Finance Minister has announced her intention to have the existing ITA, which has been around for more than six decades, replaced with a new, simple, lucid tax code. Readers may recollect similar attempts in the past in the form of Direct Taxes Code which unfortunately couldn’t see the light of the day. While replacing the entire ITA can be a mammoth task, a simple beginning could perhaps be made in the form of separately codifying the tax regime for IFSC entities (which currently is spread across several provisions in the ITA).

VII. Misses!

Extension of sunset clauses

Certain sunset dates have been provided under the ITA linked to the commencement of the operations in IFSC on or before the 31 March, 2025. These clauses are becoming a limiting factor as foreign entities are finding it challenging to setup within such timelines.

Currently, sunset clauses are provided in several provisions for IFSC entities such as:

Section 10(4D) – Benefits extended to investment division of offshore banking unit as a specified fund

Section 10(4F) – Exemption from tax on any income of a non-resident by way of royalty or interest, on account of lease of a ship or aircraft in a previous year, paid by an IFSC unit

Section 80LA – Deduction of income arising from the transfer of an aircraft or a ship, leased by an IFSC unit to a person

Section 47(viiad) – Tax neutral relocation of offshore fund to a resultant fund in the IFSC.

There is an initial gestation period for any jurisdiction to develop a complete ecosystem and financial institutions usually take some time to understand the value proposition for setting up a business in new jurisdiction. IFSC is still in its nascent stages and several businesses are still evaluating their need to set up in IFSC. In addition, as IFSC progresses and develops into a matured financial center, other entities may subsequently establish a presence (in GIFT IFSC). In order to promote growth of IFSC, such sunset clauses should be removed.

Separate tax regime for outbound Funds

Currently, resident individual investors are investing dollars/foreign currency in global securities under the Liberalised Remittance Scheme (LRS) of the Reserve Bank of India (RBI) through various pooling structures situated in offshore jurisdictions such as Singapore, Mauritius, Dubai, Luxembourg etc. Further, an Indian entity is permitted to make Overseas Portfolio Investment (OPI) which shall not exceed 50% of its net worth as on the date of its last audited balance sheet. The IFSCA has provided level playing field to funds setup in IFSC for investment outside India for both residents and non-resident investors under its IFSCA (Fund Management) Regulations, 2022.

From a tax perspective, when the resident investors invest in the funds setup in offshore jurisdictions, the resident investors are subject to Indian taxes only at the time of receipt of income in India from the offshore fund or at the time of redemption of offshore units/ shares of offshore funds. Whereas, if the resident investors invest through a IFSC Fund, due to the IFSC Fund being tax resident in India, the taxes will be levied at the Fund level on each income earned by the Fund. In the absence of any specific tax provisions, such Fund would be taxed under the principles of trust taxation and may be subject to tax at the Maximum Marginal Rate (MMR) for each income earned by the IFSC Fund.

Further, the non-resident investors investing through the IFSC Funds in the overseas market would also be taxed at the Fund level whereas the non-resident investor should not be taxed in India on the income earned from the investments made in the overseas market through an IFSC Fund.

To enable the IFSC to compete effectively with other international financial centers, it is crucial to ensure complete parity in taxation on an equal footing. While the tax regime for in-bound investments has been clarified for Non-Retail Schemes, the lack of a globally competitive tax regime for outbound investments acts as a hindrance in the growth of IFSC.

Conclusion

The Budget proposals related to IFSC are welcome and will certainly promote IFSC, especially asset management/capital market related activities.

On a parting note, one of the frequent concerns raised in conversations with various stakeholders including clients evaluating IFSC has been, what will be the future of IFSC if there were to be a change in the political dispensation at the Centre. With the Prime Minister Modi being re-elected, many of those speculations would have been quelled. Going into the first Budget of Modi Government 3.0, expectations were, therefore, high for IFSC related announcements. While there have been a few encouraging proposals in the Budget for IFSC, one can only hope that many more will follow in the months to come and in the Budget for 2025!

■●■

SS-XI-133

Key Indirect Tax Proposals

CA R Parthasarathy   CA Kartik Solanki

Overview

The indirect tax proposals contained in the Finance No. 2 Bill, 2024, to the extent pertaining to proposed amendments to GST laws, were largely to give effect to the recommendations made by the GST Council in its 53rd meeting, such as introduction of amnesty scheme, powers to regularise short/non levy depending on trade practice, extension of time period for claiming ITC for the historical period etc. There were few other amendments in Customs laws as well. In this article, we are looking at fine print of some of the important amendments with its implications and some of the open issues, which should be addressed in the way forward.

Introduction

The Finance Minister's indirect tax proposals in the Finance (No. 2) Bill, 2024 (FB 2024) will have a significant impact on various sectors, including solar energy and alcoholic beverages. Furthermore, the budget aligned customs duty rates with India's growth objectives to promote domestic manufacturing under the 'Make in India' initiative. To foster a conducive business environment, the budget also outlined measures to facilitate trade and improve ease of doing business in India.

In this article, we analyse the impact of the key indirect tax proposals contained in the FB 2024 as well as some of the open issues in respect of these proposed amendments.

Part A: Recommendations relating to the GST law

1. **Scope of supply, taxability of goods/ services and exemptions**

- **Exclusion of undenatured Extra Neutral Alcohol (ENA) or Rectified Spirit (RS) used for manufacture of alcoholic liquor for human consumption from the levy of GST:**

  — The applicability of GST on ENA/RS used for manufacturing alcoholic liquor for human consumption was a contentious issue with divergent positions being adopted within the liquor industry as well as amongst the different tax authorities (i.e., GST and VAT authorities).

  — In this regard, the Allahabad High Court in ***Jain Distillery Pvt. Ltd. vs. State of Uttar Pradesh [Writ Tax No. 378 of 2021]*** had inter alia held that pursuant to the 101st Constitution Amendment, the State Government has lost its legislative

SS-XI-134

competence to levy VAT on ENA/RS and hence, any attempt to levy VAT on the same is ultra vires. The aforesaid ruling has been challenged by the State of Uttar Pradesh before the Supreme Court in SLP(C) 7787 of 2022 and the matter is currently pending for admission.

— With both the GST and the VAT authorities seeking to levy taxes on ENA/RS, the GST Council in its 52nd meeting had proposed to give up its right to levy GST on ENA/RS. The proposed amendment is to give effect to this recommendation.

— Issues pertaining to the levy of VAT on ENA/RS:

- The amendment appears to be prospective in nature and hence, the ongoing disputes for past periods are likely to continue.

- Even if it is assumed that the GST authorities would not issue notices for levy of GST on ENA/RS even for the past period, an issue which would require clarity is whether the taxpayer can claim refund of GST paid or can adjust the same towards the corresponding VAT liability?

- Another issue that could arise with respect to the levy of VAT is that since the Allahabad High Court has already held that the States do not possess any legislative competence to levy VAT on ENA/RS, whether a Constitution amendment is necessary for the States to collect VAT? This issue has to be addressed/resolved as the competency to levy VAT for the past period (i.e., prior to the amendment) as well as for the future (i.e., after the amendment) is dependent on the answer to this question. Also, clarity needs to be provided to the industry regarding the VAT liability for the past period, where the industry had paid GST on ENA/RS.

— How these issues are addressed/resolved is critical.

• **Regularization of non-levy/short-levy of GST due to prevalent trade practice:**

— A new provision is proposed to be inserted to empower the Government to regularize non-levy or short levy of GST, where tax was being short paid or not paid due to common trade practices. The proposed provision is pari materia to the provision under the Customs, Central Excise and Service tax laws.

— While this provision is now proposed to be introduced, the Government, in the past had regularised non-payment/short-payment of tax on 'as-is where-is' basis based on prevalent trade practices by issuing Circulars. Examples of such regularisations include Fish Soluble Paste, Desiccated Coconut, imitation Zari thread or yarn, etc.

— However, going forward, once this provision is notified, the regularization can be done only by issuing notification and not by issuing Circulars.

— Various industries, where there are major ongoing disputes relating to levy of GST would be hoping that once the section becomes effective, the GST Council would recommend giving them relief for the past periods. Some of the prominent industries with industrywide disputes are online gaming, suppliers of ENA/RS, etc.

- **Addition to the list of activities or transactions which are neither supply of goods nor supply of services (Schedule III to Central Goods and Services Tax Act, 2017 (CGST Act):**

— The following activities/transactions are now proposed to be included in Schedule III:

▪ Co-insurance premium apportioned by Lead insurer to the Co-insurer for supply of insurance service to the insured in co-insurance agreements.

▪ Transaction of Ceding commission/Re-insurance commission between insurer and re-insurer.

— While the 53rd GST Council meeting had also recommended to regularise past practices in respect of the aforesaid activities/transactions on 'as-is where-is' basis, the same is yet to be notified. Further, the aforesaid amendment appears to be prospective in nature.

— In addition to the above, clarity is awaited in respect of the following:

▪ Eligibility to claim refund for the taxes already paid on such transactions.

▪ Taxability of ceding commission/re-insurance commission where the re-insurance services are provided by a person situated outside India and the tax is paid by an Indian recipient and not foreign recipient.

2. Input Tax Credit (ITC) including transition credit

- **Time limit for claiming ITC (retrospective amendment - with effect from 1 July 2017):**

— To settle issues faced by taxpayers in respect of availing ITC during the initial stages of GST implementation, the last date for claiming ITC for FY 2017-18 to FY 2020-21 is proposed to be extended to 30 November 2021. However, the same is subject to the condition that the taxpayer has claimed ITC in respect of such invoice/debit note and has also reported the same in its Form GSTR-3B, on or before 30 November 2021.

▪ The amendment seeks to extend the benefit provided by the Kerala High Court ruling in ***M. Trade Links vs. Union of India & Ors. [TS-343-HC(KER)-2024-GST]*** wherein it was held that ITC can be claimed latest by 30 November following the end of the financial year to which the invoice/debit note pertains, effectively making the amendment in Section 16(4) of the CGST Act retrospective in effect.

— The time limit for claiming ITC is relaxed in cases where cancellation

SS-XI-136

of registration is revoked, where returns for the period from the date of cancellation of registration/ effective date of cancellation of registration till the date of revocation of cancellation of registration, are filed by the registered person within thirty days of the order of revocation or the time limit provided under Section 16(4) of CGST Act, whichever is later.

It is pertinent to note that as per Clause 146 of FB 2024, no refund shall be made of the tax paid or ITC reversed which would not have been so paid/ reversed had the aforesaid amendment been in force at all material times. An unclear area is the placement of such restriction as a separate provision in FB 2024 as against incorporating the same in the relevant provision viz., Section 16 of the CGST Act. Also, clause 146 seems to inadvertently mention Section 114, instead of clause 114, while referring to the amendment.

- **Restriction to claim ITC on specified tax payments:**
  - — Presently, ITC is specifically restricted in respect of any tax paid in accordance with the provisions of Sections 74 (demands pursuant to the allegation of fraud, wilful misstatement or suppression of facts), 129 (detention/seizure) and 130 (confiscation) of the CGST Act.
  - — This provision is to be amended as under:
    - ▪ Effective FY 2024-25, the restriction on availment of ITC of GST paid under situations of alleged fraud, suppression, etc., has been done away with.
    - ▪ Further, ITC restriction in respect of tax paid in cases of detention, seizure and confiscation of goods and vehicles is now proposed to be removed from a date to be notified.

      As per Notes on Clauses to FB 2024, the aforesaid proposal seeks to restrict the non-availability of ITC in respect of tax paid under Section 74 of the said Act only for demands up to FY 2023-24.

  It may be noted that Rule 36(3) of the Central Goods and Services Tax Rules, 2017 (CGST Rules) also restricts the claim of ITC in respect of tax paid pursuant to demand notices/orders alleging fraud, wilful misstatement or suppression of facts. Thus, a corresponding amendment would also be required to be made to Rule 36(3) of the CGST Rules so as to give effect of the aforesaid intention of the legislature.

- **Section 140(7) of the CGST Act (retrospective amendment with effect from 1 July 2017):**
  - — This retrospective amendment allows opening balance of accumulated CENVAT Credit with an Input Service Distributor (ISD) on invoices pertaining to services provided before 1 July 2017 to be transitioned to GST regime, where such invoices were received by the ISD before such date.
  - — This amendment seeks to bring conclusion to ongoing disputes pertaining to this issue, where the Bombay High Court had been hearing the matter.

SS-XI-137

3. Demands, recovery and penalties

- A new Section 74A of the CGST Act is sought to be introduced, dealing with demand and adjudication processes from FY2024-25 and onwards, replacing section 73 and 74 of the CGST Act. Under the proposed section 74A, a common time limit is fixed for issuance of demand notices and orders, irrespective of whether such notice involves any allegation of fraud, suppression, wilful misstatement etc., or not. A comparative tabular matrix of the proposed time limits pre and post amendment is as under:

Particulars	***Time limit to issue Notice***		***Time limit to issue order***	
	Existing	***Proposed***	***Existing***	***Proposed***
Cases involving fraud, willful misstatement, suppression of facts, etc.	54 Months*	42 Months*	60 Months (5 Years)*	12 Months#
Cases other than above	33 Months*	42 Months*	36 Months (3 Years)*	12 Months#

** - From the due date of filing annual return or date or erroneous refund, as the case may be*

 # - From the date of issuance of show cause notice. Time limit can be extended by a further period of up to 6 months

— The time limit for availing the benefit of the reduced penalty (by paying tax along with interest) is sought to be increased from 30 days to 60 days from FY 2024-25 onwards in terms of Section 74A of the CGST Act. However, the corresponding time limit till FY 2023-24 continues to remain 30 days.

- **Amnesty Scheme:**

— A new section 128A is sought to be introduced, to grant a conditional waiver of interest and/or penalty in respect of demand notices issued under Section 73 (cases not involving alleged fraud, suppression, etc.) for FY 2017-18 to FY 2019-20.

— Key conditions and restrictions are as follows:

▪ Applicability of the Scheme: Demands pertaining to the following:

- Show Cause Notices pending for adjudication;
- Cases where no order has been issued by the First Appellate Authority or the GST Appellate Tribunal;
- Cases were the show cause notice had alleged fraud, etc. but the same was subsequently held otherwise in adjudication/appeal.

▪ Benefit: Waiver of interest and/or penalties, available only if –

- Tax is paid within notified date (while the FB 2024 only refers to notified date, the GST Council had recommended such date to be 31 March 2025).
- Additional tax pursuant to order in respect of an appeal/application filed

by the Tax Authorities before the First Appellate Authority/GST Appellate Tribunal/Court is paid within 3 months from the date of the said order.

- ***Exceptions:***
  - The amnesty scheme is not applicable in cases where the amounts are payable on account of erroneous refund.
- ***Miscellaneous provisions:***
  - Pending appeal/Writ petition (if any) must be withdrawn before the due date of payment.
  - The conclusion of the proceedings under this scheme is non-appealable qua the Taxpayers.

— While the other conditions for availing benefit under the scheme are awaited, the following are some of the open issues in respect of which clarity is required:

- Whether a taxpayer would be entitled to opt for the scheme in cases where no appeal is filed against the adjudication order/appellate order and the time limit to file such appeal (including the period of delay that can be condoned) has already lapsed?
- Whether the payment is required to be made through cash or whether the same can be made by utilising ITC?
- Where the SCN/order involves multiple issues/years, whether a taxpayer can opt for the scheme for one or more issues/years while continue to litigate the other issue(s)/years?

- **Summons:**

— Presently, only a summoned person is required to appear before the proper officer to inter alia give evidence or produce documents. The proposed provision seeks to enable a summoned person to appear either in person or through an authorised representative, as the proper officer may direct.

— As per Notes on Clauses, the intention behind the aforesaid amendment is to enable an authorised representative to appear on behalf of the summoned officer in compliance of summons. However, the use of the phrase ***'as the proper officer may direct'*** in the proposed provision results in a grey area as to whether a summoned person is mandatorily required to seek approval of the proper officer before directing an authorised representative to appear on his behalf or a mere authorisation/intimation should suffice.

Part B: Recommendations relating to the Customs law

1. Certificate of Origin vis-à-vis Proof of Origin (Amendment to Section 28DA of the Customs Act, 1962 (Customs Act)):

- The concept of 'certificate of origin' is proposed to be replaced with the term 'proof of origin'. In line with the recent trade agreements which provide for self-certification as a proof of origin, this amendment seeks to enable acceptance of different types of documents evidencing the proof of origin of imported goods.

SS-XI-139

- Consequential amendment is also made to the definition of Issuing Authority to also include any person designated for issuing proof of origin under the relevant trade agreement.

2. Manufacturing and Other Operations in a Warehouse (No. 2) Regulations, 2019 (MOOWR scheme)

- Section 65 of the Customs Act is proposed to be amended to enable the Government to notify certain class of goods for which manufacturing and other operations will not be permitted under the MOOWR scheme.
- The proposed amendment is potentially aimed to restrict the applicability of MOOWR scheme to solar power generating units. The historical background pertaining to the eligibility of solar power generating units under the MOOWR scheme is as under:
    - o Vide Instruction No.: 13/2022-Customs dated 9 July 2022, CBIC had stipulated that solar power generating units fall outside the scope of the MOOWR scheme. Consequently, the Customs officers were directed that the permissions granted to solar power generating units to operate under Section 65 of the Customs Act need to be reviewed immediately by taking necessary follow-up actions and no further permissions should be granted to solar power generating units for operating under Section 65 of the Customs Act.
    - o The proceedings initiated by the customs authorities pursuant to the aforesaid instruction and the validity of the aforesaid instruction were challenged before the Delhi High Court. The Delhi High Court in ***ACME Heergarh Powertech Pvt. Ltd. [TS-168-HC-2024(DEL)-CUST]*** quashed the resultant proceedings, pursuant to the aforesaid instruction and commented adversely on the very validity of the instruction.
- Hence, one would need to wait for the relevant notification as well as its applicability for the past period to determine the eligibility of solar power generating units under the MOOWR scheme and also, decision of the Government to exclude any other goods from the MOOWR scheme.

3. Retrospective exemption of GST Compensation Cess on goods imported by SEZ:

- Notification No. 27/2024-Customs dated 12 July 2024 inter alia exempted all goods imported by a unit or developer in an SEZ for authorised operations from the levy of GST Compensation Cess (Cess). The aforesaid notification is proposed to be given retrospective effect from 1 July 2017.
- This amendment seeks to overcome the Andhra Pradesh High Court ruling in ***Maithan Alloys Ltd. vs. Union of India [TS-677-HC(AP)-2023-GST]*** wherein it was held that Cess is leviable on goods imported by SEZ units.

4. Amendments have been proposed in the Customs Tariff Act, 1975 (Customs Tariff Act) and various Finance Acts , for incorporation of various provisions of Customs Act, 1962 (Customs Act)/ Central Excise Act, 1944 (Central Excise Act) by reference:

- In the FB 2024, tabled for passage in Lok Sabha, some additional amendments have been proposed. By

SS-XI-140

these amendments various sections in Customs Tariff Act and various Finance Acts, are proposed to be substituted.

- These proposed amendments seek to borrow all the provisions relating to the Customs Act, Central Excise Act etc and make them applicable to the additional duty of customs under section 3, Safeguard duty under section 8B, countervailing duty under section 9 and anti-dumping duty levied under section 9A of the Customs Tariff Act and various Finance Acts. The need for these amendments arose as a result of court decisions.

- The Bombay High Court in ***Mahindra & Mahindra Ltd. [2022-TIOL-1319-HC-MUM-CUS]*** had held that in the absence of incorporation by reference of all provisions relating to confiscation, levy of interest and/or penalty for short levy of duties under in Section 3 of the Customs Tariff Act, the same cannot be recovered by taking recourse to the machinery provision relating to the recovery of duty. Accordingly, the imposition of interest and/or penalty on the portion of demand pertaining to surcharge or additional duty of customs or special additional duty of customs was held to be unsustainable and without jurisdiction. The Supreme Court had dismissed the Special Leave Petition (SLP) as well as the Review Petition challenging the Bombay HC decision.

- However, the Kolkata bench of the CESTAT in ***Texmaco Rail and Engineering Ltd. [2024 (1) TMI 902 – CESTAT Kolkata]*** ('Assessee') had distinguished the Bombay High Court judgment and held that as per Section 3 of the Customs Tariff Act read with Section 12 of the Customs Act, the additional duty is to be construed as 'Customs Duty'. Accordingly, all the provisions of the Customs Act and rules and regulations made thereunder are applicable in respect of the duty leviable under Section 3 of the Customs Tariff Act. The Calcutta High Court has admitted the appeal filed by the Assessee against the order of the CESTAT vide order dated 5 July 2024 [CUSTA/64/2024], where the matter is currently pending.

- The proposed amendments seek to overcome the above lacuna. Since the aforesaid amendments are made prospectively, it appears that the ratio laid down by the Bombay High Court in ***Mahindra and Mahindra Ltd. (supra)*** (affirmed by the Supreme Court) would hold the field for the past period.

Conclusion

The industry has positively reacted to several trade facilitation measures, such as the amnesty scheme, the extension of the time limit for claiming ITC, permitting authorised representative to attend summons and a common timeline for issue of notices and adjudication. However, the extended adjudication period of up to five years from the due date of filing annual returns for bona fide taxpayers appears long and it is hoped that over time, the time limits for issuing notices and adjudication are further reduced, giving certainty to businesses for the past periods. Additionally, significant attention will be focused on the conditions and restrictions related to the eligibility criteria for the amnesty scheme. However, the industry's wish of an amnesty/settlement scheme for disputes under Customs Laws is unaddressed and it is hoped that it would be announced in the Union Budget for 2025-26.

SS-XI-141

The Dastur Essay Competition 2024

Abortion Law Worldwide : Comparative Analysis and Ethical Consideration

Deeksha Rao

Abstract

The essay will provide with a comparative analysis of the abortion laws in the world. The entire world has a different view when they look at the abortion laws. While some have accepted it wholly, many countries still have many concerns regarding the same. However, the issue cannot be answered with yes or no. It has to be deeply discussed and debated. Moreover, the ethical perspective of the procedure has to be considered to get a better understanding of the issue.

Introduction

"Abortion is a worse sin than killing one's parents"

- Kaushitaki Upanishad

Abortion stands for the expulsion of a fetus from the uterus before it has reached the stage of viability[1]. An abortion may occur spontaneously, in which case it is called a miscarriage or '*Garbhahatya*', or it may be brought on purposefully, in which case it is often called an induced abortion or '*bhrunahatya*'.

The question of right or wrong, ethical or evil comes into play when we deal with the abortions that are not natural and are a result of medical procedures, i.e, induced abortions. If we rely on traditional sources such as our customs and religions act to understand the perception of the process in our society, the answer that surfaces is always in negation and describes it as something that is undesirable and some even go to the extent to call it sinful.

Today, in many countries, abortion has been sought to become a legal right, following which many have granted the same. This worldwide scenario makes us ponder over the question that, whether something that was considered evil at some point by all cultures has become one of the requisites that our society needs to address and implement.

1. https://www.britannica.com/science/abortion-pregnancy
2. https://www.thehindu.com/news/international/france-becomes-the-only-country-to-explicitly-guarantee-abortion-as-a- constitutional-right/article67914799.ece

ML-599

What we may call, is a spectrum, when we analyze the multitude of responses the cause has received worldwide. While some parts of the world have shown a very stern and stringent reaction, there are countries that have accepted it whole-heartedly, for instance, France; the country has made abortion a constitutional right[2]. Between these two extremes of black and white, the grey are the countries that have yet to decide their legal stance on the issue and abortion rights are subjective to various conditions.

1) Countries With Complete Ban

Case Study 1 : Abortion In El Salvador

In the case of Supreme Court of El Salvador vs Beatriz, 2013, the latter was informed by the medical practitioners that there was an absolute chance of her death if she went ahead with her pregnancy, given that she already suffered from a series of medical issues that risked her life[3]. She appealed in the court to have an abortion legally; however, the Supreme Court rejected the request.

The ground for such a decision as stated by the Supreme Court was "humanity" or "upholding the human rights of the fetus". The right to life of a fetus is recognized in El Salvador since the moment it is conceived. This was the reasoning behind the case. However, the decision itself presents to us a paradox when we analyze its duplicity – on one side the Apex Court upholds the principles of human rights and on the other side decides the case in a manner that does not give much thought to the well-being of the women who suffer serious consequences due to pregnancy.

El Salvador is the representative of that many countries that have completely ruled out abortion from their list of legal medical practices. The question of right or wrong will be discussed further, now let us analyze why the condition and stance of the country on the issue is the way it is. All countries that have banned abortion could be considered to have the following ideals or statics to have such a standing-

- ***Religious Beliefs:*** All countries that have such a strict ban on abortion are most probably the countries that have a stringent set of religious beliefs. For example, Ethiopia has population comprised of people having orthodox religious connotation, therefore, its' views on the issue of abortion are concurred with the same.[4] Other countries having restrictive laws on abortion based on religious sentiments include Iran, Iraq, and Egypt etc.
- ***Availability of Facilities:*** The views of a country are also dependent on the quality of facilities that a country has to offer. Not all countries are equipped with the right kind of resources to do the same, be it, the contrivance

3. https://www.reuters.com/world/americas/human-rights-court-begins-review-high-stakes-el-salvador-abortion-case-2023-03-22/#:~:text=Beatriz%20appealed%20to%20the%20Supreme,route%20to%20a%20medical%20appointment.
4. https://www.aljazeera.com/news/2022/5/3/a-global-look-at-abortion-and-some-of-the-worlds-toughest-laws

of medical practitioners, the essential mode of technology, developed hospital amenities, lack of know-how etc.

- ***Prejudice:*** Apart from the above-mentioned reasons, let us take a glance through the social eyes. Many countries in the world have stigma against it irrespective of any reasoning. These prejudices arise out of religious biasedness. According to a research by Kate Cockrill, Ushma D, Upadhyay, Janet Turan and Diana Greene Foster, there are three types Of stigma (internalized, felt and enacted)[5].

- ***To avoid sex-selective abortions:*** Many people use abortion as a tool to fulfil their gender- bias. Female feticide is one of the major issues in countries where a male child is more valued than a female child is, especially in regions of East and South Asia, Parts of North America, Western Balkans etc. Thus, to avoid such an issue, many countries have banned abortion altogether.

- ***To increase the population of a country:*** Some countries are affected by their low birth rate and therefore are prone to provide incentives to citizens', to increase the birth rate and in this cue one of the measures they take is to prohibit practices such as abortion.

  According to the Centre for Reproductive Rights, there is a list of 16 countries that have prohibited abortion altogether, these countries include Egypt, Iraq, the Philippines, Laos, Senegal, Nicaragua, El Salvador, Honduras, Haiti and the Dominican Republic[6].

The case study provides a brief analysis of the views that such a country with complete ban on abortion could hold and further delve into the reasons as to determine and verify their stance.

2) Countries with Highly Restrictive Abortion

In these countries, the predominant expression of abortion is infelicitous. However, the conflict between their belief-system and the need to address the scenarios in this century have resulted in the development of a system that allows a very narrow space for women to have a say in these cases of abortion.

Around 40 percent of women of reproductive age live in places where abortion access is illegal or limited. Such countries allow abortion only in cases where women's health is at risk, some counties also allow it in case of rape, incest, or fetal abnormality.

a) ***The Indian Subcontinent:*** In a wave of coloring all the legislations in a way for them to comply with the Islamic laws, Pakistan's government that offences against the human body were void since they violated Islamic edicts. Abortions are only permitted before four months under necessary treatment while only to save the mother's life after the fourth month has passed. Violation of this law could lead to imprisonment of 3 to 10 years. Similarly, only legal parameters to have an abortion in Bhutan is rape, incest, for the sake of the women's

5. https://www.guttmacher.org/sites/default/files/article_files/4507913.pdf
6. https://www.aljazeera.com/news/2022/5/3/a-global-look-at-abortion-and-some-of-the-worlds-toughest-laws

mental and physical health. Abortion in Bangladesh is regulated by the Indian Penal Code,1860 and under section 312-316, it is only permissible to save a woman's life.[7]

In Nepal, the laws are liberal than the above-mentioned countries, here, a pregnancy to be terminated has to be under 12 weeks with the permission of the women's husband or guardian, in cases of rape, incest, the termination of the fetus could be done under 18 weeks. However, it could be done at any stage of the pregnancy if it poses danger to the physical and mental health of the women as recommended by the doctor.

b) Other countries that have a restricted access to abortion include,

- ***Libya:*** Abortion is illegal[8] and the only little or no "relief" they get is in the cases of rape when the termination of pregnancy is recognized as "honor killing" and the punishment for the same is halved. In other cases, women face punishments up to at least 6 months.
- ***Iran***: The country allows abortion only if there is a risk on mother's life or in the cases of fetal abnormalities. However, a panel consisting of a medical doctor, a forensic doctor and a judge rather than the pregnant women makes the final decision. She can only not her acquiescence.
- ***Nigeria:*** In the cases of Rex vs Edgar and Rex vs Bourne[9], the concept that abortion transgressed the criminal codes, even if it was attempted to save the mother's life, was overturned and the exemption to the act was noted and accepted by the country.
- ***Venezuela:*** The country has one of the most restrictive laws on abortion in Latin America. Innately, abortion is illegal and the only exemption provided is the risk of the mother's life. Apart from this, abortion is punishable.
- ***Indonesia:*** According to the Health Law 2009, the exceptions provided to the illegal act of abortion as deemed by the country, are the cases of rape or saving the mother's life[10]. However, prolonged procedures have limited the application of the law. There is an ongoing revision of the criminal codes in the country to cater to the needs of the people ensure a healthy livelihood for them.

Apart from these countries, numerous others share the same restrictive policies on abortion. The issue enshrouds all spheres be it, legal, social or political. However, these restrictions have resulted in various consequences that will be further discussed in the essay.

7. http://adsearch.icddrb.org/assets/pdf/1.AdSEARCH_Situation_Analysis_Report_Abortion_in_Bangladesh.pdf
8. https://www.refworld.org/reference/countryrep/freehou/2005/en/50615
9. https://www.google.com/url?sa=t&source=web&rct=j&opi=89978449&url=https://portal.abuad.edu.ng/Assignments/158732599 8health_law_assignment.docx&ved=2ahUKEwiKhtS31L- FAxVUp1YBHTg4C7YQFnoECBUQAQ&usg=AOvVaw05LBRniyI14JUS2mLZL4W8
10. https://www.thejakartapost.com/opinion/2022/06/28/making-abortion-legal.html

Consequences of The Restrictive Laws

1. ***Increasing Maternal Mortality Rate (MMR):*** WHO defines MMR as "the number of maternal deaths during a given time period per 100000 live births during the same time period". One of the major reasons for the increasing MMR is the occurrence of unsafe abortions performed without proper guidance due to the lack of adequate facilities, given that the act in itself is illegal in the concerned country.

2. ***Worsened situation of the child:*** Even if the child is born, the probability of his situation worsening is very high, given that he/she is deemed to be unwanted. It could lead to major effects on his psychology. These children face the risk of turning into delinquents. The idea here is to back the concept of restrictive abortion laws with a proper plan to help these children, if the arrangement of such strict laws have to work in these countries.

3. ***A step backwards for Gender-Equality:*** As discussed above, the consent of women to all these processes is limited or zilch. The world in its ways to bring about gender-equality has lacked if women are not even allowed to speak about something that could be life changing for them and concerns their body and mind.

4. ***Suffering of Rape-victims:*** Many countries have given the exception for abortion only in cases where the women's life is at risk. Other cases such as pregnancy of rape- victims have been completely ignored. If the victim is not allowed to abort the child, what exactly is the future that the country has envisaged for the victim and the child? It could lead to a life-time of suffering for both the child and the women. Yet another completely different problem that every such country faces is, if the rape-victim is a minor herself.

5. ***Financial issues:*** Many a times, abortion are also done due to financial difficulties. If this stance is considered, the restrictive laws will not allow the same and this could lead to poor financial conditions of the family affecting their overall living conditions. However, it is an ethical question to consider abortions based on financial issues.

3) Countries With Liberal Laws On Abortion

1. ***France:*** The country is the world's first country to explicitly declare abortion rights as one of the constitutional rights of the citizens. Women who seek abortion have the constitutional right under Article 34 of the 1958's French Constitution stating "the law determines the conditions in which a woman has the guaranteed freedom to have recourse to an abortion"

2. ***Japan:***

   - The country has provided women with sufficient space and provisions to get their pregnancy terminated as per the women's will In Japan, abortion allowed under the term limit of 22 weeks.

   - If we rummage through their laws, we find that the Penal Code of Japan, in fact, makes abortion illegal in the country. However, the exceptions provided to the clause cover a broad range of situations thereby giving women a broader access to abortion

ML-603

- Exceptions are:
  - (i) If the pregnancy risks the health of the women;
  - (ii) Cases of rape or;
  - (iii) If the decision to abort is due to economic reasons, this exception is not very common worldwide.
- In April 2023, Japan approved the use of abortion pill to terminate the pregnancies under 9 weeks. Similar medication is available in many countries such as France since 1988 and the US since 2000[11].

3. *India:*

- The Indian Penal Code under Section 312 declares induced abortions as a criminal offence. The only exception to this, is the "Medical Termination of Pregnancy Act".
- The act incorporated new rules in 2021 and has extended the term limit for pregnancy in the following manner,
  - (i) The limit for terminating a pregnancy with 1 doctor's opinion has been extended from 12 weeks to 20 weeks, the new rules have also made these provisions available to unmarried women.
  - (ii) Whereas, the term limit for terminating the pregnancy with 2 doctor's opinion has also been extended from 20 weeks to 24 weeks, in the following cases as provided by the MTP Act, 2021,
    - (a) Survivors of sexual assault or rape or incest
    - (b) Minors
    - (c) Change of marital status during the pregnancy (widowhood and divorce)
    - (d) Women with physical disabilities
    - (e) Mentally ill women
    - (f) Fetal abnormalities that have substantial risk of being incompatible with life or if the child is born it may suffer from such physical or mental abnormalities to be seriously handicapped.
    - (g) Women with pregnancy in humanitarian settings or disaster or emergency.[12]
- These provisions have given women in India access to abortion in a broad sphere and analyzing the situation of India in the world, we are far ahead of many countries. The reasoning behind these laws have been the various case laws that have acted as the guiding principle towards the development of rules that

11. https://www.theguardian.com/world/2023/apr/29/japan-approves-abortion-pill-for-the-first-time
12. MTP 2021 Act.

meet the current demands. For instance, in the landmark case of ***Suchita Srivastava & Another vs. Chandigarh Administration (2009) 11 S.C.C. 409*** , the judgement laid the connection between Article 21 and the abortion rights of women. It laid down that the right to life and personal liberty includes the women's right to make reproductive choices. Another case, ***Justice K. S. Puttaswamy (Retd) & Anrs. vs. Union of India and Ors., (2017) 10 S.C.C. 1*** , made the judgement that the right of women to make reproductive choices is also encompassed under right to privacy and therefore the state should recognize these rights of women and make provisions in accordance to it.

- Another question that may be posed is the status of the fetus and, is the fetus qualified to have right to life extended to it? In India, under the PCPNDT Act, the definition of fetus does not include the word "person" instead uses the term "human organism" during the period of its development, whereas the right to life is only guaranteed to a person. [13]Therefore, very concretely it could be said that rights of women for their reproductive choices as part of their personal liberty is upheld.

4. USA

Case Study 2: Roe vs. Wade, 1973

In this American case, the US Supreme Court made a statement that the USA constitution protected the rights of women to have an abortion, following this, many abortion related laws were struck down and also made in favour of the process.

The reasoning provided for such a stance by the Supreme Court was; restrictions on abortion infringes the right to privacy held by women, therefore any breach of their abortion right inferred the breach of their constitutional right. However, to avoid granting an absolute right to abortion, the Supreme Court cited the role of the state to fulfil their "compelling" interests in protecting the health of pregnant persons and the "potentiality of human life".[14]

The decision provided with adequate conditions for abortions in reasonable conditions. This case is important since it has been a base for many countries to liberalize the abortion rights. It created a balance between the women's right to abortion and the state's duty to intervene.

13. https://legalserviceindia.com/legal/article-1691-constitutionality-of-abortion-laws-in-india.html
14. https://www.britannica.com/event/Roe-v-Wade

The estoppel set by the above-mentioned case that focused on the well-being of the women physically, mentally as well as legally; was however put down in another case named, "***Dobbs vs. Jackson Women's Health Organisation***[15]". This case led to the decision that abortion rights are not a fundamental or constitutional rights of the citizens'.

In the backdrop of this case, many countries in the USA overturned their abortion friendly laws. The case study is important to understand- how vulnerable abortion rights are, in today's world, even one of the most developed nations are observed to get perplexed when it comes to such sensitive issues.

5. CHINA

Case Study: Abortion in China

Majority of country have determined the abortion laws with respect to the religious and societal affiliations that the citizens' of that country holds, which has little or nothing to do with the practical needs of the country, for instance, population control. For the same reason, this case study on the abortion laws in China gets important to be delved into. China is currently the second country with the largest population, and also is the country with the largest number of ageing population in the world. In the past, China has implemented policies to curb its population, for instance, the one- child policy, limiting the families to bear a single child. Nevertheless, today, the ageing population has posed a variety of problems for the country, such as,

- Ageing population is indicative of improved standards of living, while this is also an inference of a country in its developing or developed stage; however, it has also increased the risk of chronic diseases due to factors such as smoking, high fat and high-calorie diets and more leisure time without physical activity.
- The increased cost of health –care is another issue, since it gets less feasible for the family to maintain it in long-term.
- These issues have forced the government to make policies in the directions to make medical facilities available to the ageing population, which has diverted their funds, their policies and time substantially and sometimes wholly.

Abortion laws in China are liberal and the medical facility is available at all stages of pregnancy and is accessible nationwide. The reason for such liberal notion of the country is due to its past policies attempting to decrease the population growth rate. However, the country's stance on the issue has been renewed, in 2022; the National Health Commission announced to formulate measures to reduce non-medically necessary abortion in an effort to boost the country's declining population. This change is the result of the country's reinvigorated interest in balancing out the ageing population.

15. https://www.law.cornell.edu/wex/dobbs_v._jackson_women%27s_health_organization_%282022%29

Ethical Consideration

Abortion; this practice and the issues related to it cannot be differentiated into black and white. While the procedure sometimes becomes a need for an individual, it could also be misused against the society. Currently, the world is an amalgamation of different views on abortion. All views and principles followed by countries all across the world have their own reasoning. However, this puts us in a dilemma when it comes to the determination of the correct set of principles to be followed when the situation asks for it. The right or wrong in these conditions is a grey area. Some issues to be considered are:

- ***Ethics considering the right to life of the fetus***

  The justification provided by many liberal countries for abortion is the identification of the fetus as a "biological organism" rather than a "person". [16]The differentiation between these two terms is the ability of the "person" to have a rational thought process, use of language, etc. However, the surmise behind the justification comes at loggerheads when we analyze the fact that the inabilities making "biological organism" ineligible to have the right to life according to the above justifications not exclusive to them. The reasoning behind the above assertion does not consider the citizens' who are suffering from various disorders, physical or mental and are not exactly able to qualify as a "person" as mentioned in the above definition. Considering this logic, would the next step be to end their lives as well? Therefore, without mapping out the conditions of the pregnant women and the fetus, there is no way to determine the ethics behind upholding the fetus's right to life or overturning it.

- ***Ethics considering the right to life of the pregnant woman***

  The right to life is broad and here, it does not only mean to survive. In fact, it encompasses various fundamentals of life such as right to privacy, right to dignity etc. It is inferred to be the infringement of the woman's right to privacy if she is not able to make her reproductive choices. If her pregnancy is at the cost of her health, then abortion is the recommended procedure for her. However, if the woman decides to have an abortion owing to her socio-economic conditions, the question of ethics is raised since; abortion here is not a necessity but a convenience. In addition to this, solutions to her problems in the latter case is possible to be traced out.

- ***Ethics in cases of Rape or Incest***

  Many victims of rape or incest seek abortion and analyzing its ethical consideration is extremely difficult. At one side of the table, we have the victims of such heinous crimes; who cannot be expected to bear their rapist's child given her circumstances. It could be a wrong decision for the woman and the child. On the other side, it is an undeniable fact that the fetus is also a human life. Abortion here could mean holding an innocent for the wrongdoing of another.

16. https://pubmed.ncbi.nlm.nih.gov/7041095/

Abortion has been in practice since ancient times, although criticized, and often claimed to be at par with "killing of a Brahmin", "stealing of gold" in various religious texts. Even today, countries that have put ban on abortion or have restricted laws have to face the problem of unsafe and illegal abortions because they are happening anyway. This also puts an ethical question on the state whether it should protect its people from unsafe abortion by making it accessible or try to curb it considering the right to life of the fetus.

The issue requires too be understand in depth only then the state can formulate laws that are suited according to the current needs of the world.

Bibliography

- https://www.britannica.com/science/abortion-pregnancy https://pubmed.ncbi.nlm.nih.gov/7041095/
- https://www.britannica.com/event/Roe-v-Wade
- https://www.law.cornell.edu/wex/dobbs_v._jackson_women%27s_health_organization_%282022%29
- MTP 2021 Act.
- https://legalserviceindia.com/legal/article-1691-constitutionality-of-abortion-laws-in- india.html
- https://www.theguardian.com/world/2023/apr/29/japan-approves-abortion-pill-for-the- first-time
- https://www.refworld.org/reference/countryrep/freehou/2005/en/50615
- https://www.google.com/url?sa=t&source=web&rct=j&opi=89978449&url=https://portal.abuad.edu.ng/Assignments/1587325998health_law_assignment.docx&ved=2ahUKEwiKhtS31L- FAxVUp1YBHTg4C7YQFnoECBUQAQ&usg=AOvVaw05LBRniyI14JUS2mLZL4W8
- https://www.thejakartapost.com/opinion/2022/06/28/making-abortion-legal.html
- https://www.thehindu.com/news/international/france-becomes-the-only-country-to-explicitly-guarantee-abortion-as-a-constitutional-right/article67914799.ece
- https://www.reuters.com/world/americas/human-rights-court-begins-review-high-stakes- el-salvador-abortion-case-2023-03-22/#:~:text=Beatriz%20appealed%20to%20the%20Supreme,route%20to%20a%20medical%20appointment

■●■

> "All condemnation of others really condemns ourselves. Adjust the microcosm which is in your power to do) and the macrocosm will adjust itself for you."
>
> — *Swami Vivekananda*

ML-608

Supreme Court

Keshav B. Bhujle
Advocate

1 *Principal CIT vs. Trigent Software Ltd.; [2024] 464 ITR 770 (SC): Dated 17/05/2024:*

Business expenditure — Capital or revenue expenditure — Software company incurring expenditure on developing new product — New product abandoned as not feasible — High Court held amount spent deductible as revenue expenditure — Supreme Court dismissed special leave petition filed by the Revenue: S. 37 of ITA 1961: A. Ys. 2006-07, 2007-08

The assessee is engaged in the business of software development solutions and management. The assessee filed its return of income on October 31, 2007, declaring the total income at ₹ 3,31,29,870. The Assessing Officer completed the original assessment on a total income of ₹ 3,78,61,610. Later on, the case was reopened, and the assessment was completed u/s. 143(3) read with section 147 of the Act. The Assessing Officer found that the assessee had debited to the profit and loss account an amount of ₹ 7.09 crores under the head "Exceptional items", which expenditure, the Assessing Officer held after investigation, was incurred in connection with the development of a new product. The assessee had treated the expenditure as a part of capital work-in-progress for the A. Ys. 2004-05 to 2007-08. The development of this software was abandoned and the assessee then claimed the whole capital work-in-progress as revenue expenditure. The Assessing Officer accordingly made an addition of ₹ 7.09 crores.

The Commissioner of Income-tax (Appeals) allowed the assessee's appeal. The Commissioner of Income-tax (Appeals) held that the expenditure for the development of a new product by the assessee was in the assessee's existing line of business, and therefore, relying upon the decisions of the Delhi High Court in the case of ***Indo Rama Synthetics India Ltd. vs. CIT [2011] 333 ITR 18 (Delhi)*** and of the Mumbai Income-tax Appellate Tribunal in the case of IL and ***FS Education and Technology Services Pvt. Ltd. vs. ITO, I. T. A. No. 765/Mumbai/2009, dated April 10, 2013***. The Commissioner of Income-tax (Appeals) held that though the assessee had also shown the expenditure as capital work-in-progress for the assessment years 2004-05 to 2007-08, the deduction had to be allowed as a revenue expenditure in the year in which the project in question was abandoned. The Tribunal dismissed the Revenue appeal by placing reliance upon the judgment of the Delhi High Court in the case of ***Indo Rama Synthetics India Ltd. (supra)*** and IL and ***FS Education and Technology Services Pvt. Ltd. (supra)***.

The Bombay High Court upheld the decision of the Tribunal and held as under:

ML-609

"i) When an expenditure is made, not only once and for all, but with a view to bringing into existence an asset or an advantage for the enduring benefit of a trade, there is very good reason (in the absence of special circumstances leading to an opposite conclusion) for treating such an expenditure as properly attributable not to revenue but to capital. However, the "enduring benefit test" is not a certain or conclusive test and cannot be applied mechanically without regard to the particular facts and circumstances of a given case and that what is material to consider was the nature of the advantage and that it is only where the advantage was in the capital field that the expenditure would be disallowable on an application of this test. If the advantage consisted merely in facilitating the assessee's trading operations or enabling the management and conduct of the assessee's business to be carried on more efficiently or more profitably, while leaving the capital untouched, the expenditure would be on revenue account, even though the advantage may endure for an indefinite future.

ii) The assessee was admittedly in the business of development of software solution and management, and therefore, its endeavour to develop a new software was nothing but an endeavour in its existing line of business of developing software solutions. Admittedly, the product which was sought to be developed, never came into existence and was abandoned. No new asset came into existence which would be of an enduring benefit to the assessee, and therefore, in these circumstances, the expenditure could only be said to be revenue in nature."

(See ***Pr. CIT vs. Trigent Software Ltd. [2023] 457 ITR 765 (Bom)***).

The Supreme Court dismissed the petition for special leave to appeal filed by the Revenue and held as under:

> "No case for interference is made out in exercise of our jurisdiction under article 136 of the Constitution of India. The special leave petition is, accordingly, dismissed."

2 ***CIT(Exemption) vs. Lata Mangeshkar Medical Foundation.; [2024] 464 ITR 706 (SC): Dated 29/04/2024:***

Charitable purpose — Exemption — Denial of exemption by AO on grounds that assessee did not furnish information to charity commissioner, that there was shortfall in provision for indigent patients, that assessee had generated huge profits, that hospital did not serve poor and under-privileged, and assessee paid remuneration to trustees — Grant of exemption by appellate authorities following orders for earlier assessment years which had not been set aside or over-ruled — High Court affirming order of Tribunal granting exemption — Supreme Court dismissed special leave petition filed by the Revenue: Ss. 11 and 13(1)(c) of ITA 1961: A. Y. 2010-11

The Assessing Officer denied the assessee-trust, which was running a medical institution, exemption u/s. 11 of the Income-tax Act, 1961 for the A. Y. 2010-11 on the grounds (a) that the assessee did not furnish proper information to the Charity Commissioner, (b) that there was shortfall in making provision for indigent patients, (c) that the assessee had generated huge surplus and therefore, its intention was profit-making, (d) that the hospital of the assessee did not provide services to the poor and underprivileged class of the society, and (e) that there was violation of provisions of section 13(1)(c) since the assessee had paid remuneration to two individuals trustees who did not possess significant qualifications and one of them was beyond 65 years of age.

The Commissioner (Appeals) restored the exemption u/s. 11 following the orders of the Tribunal for the A. Y. 2008-09 and 2009-10, and the Tribunal affirmed his order for the A. Y. 2010-11.

The High Court found no reason to interfere with the order of the Tribunal since there was nothing on record to show that the orders of the Tribunal had been set aside or overruled in any manner by the court (see ***CIT (Exemptions) vs. Lata Mangeshkar Medical Foundation [2024] 464 ITR 702 (Bom)***).

The Supreme Court dismissed the petition for special leave to appeal filed by the Revenue and held as under:

> "No case for interference is made out in exercise of our jurisdiction under article 136 of the Constitution of India. The special leave petition is, accordingly, dismissed."

---

3 ***Jt. CIT vs. Clix Capital Services Pvt. Ltd.; [2024] 464 ITR 768 (SC): Dated 16/02/2024:***

Penalty — Notice — Limitation — Effect of s. 275(1)(c) — Order of assessment in 2011 — Penalty notice issued in November 2017 — High Court holding notice barred by limitation — Supreme Court dismissed special leave petition filed by the Revenue: Ss. 271 and 275 of ITA 1961: A. Y. 2007-08

The assessee petitioner's return for the A. Y. 2007-08 was subjected to scrutiny and an assessment order u/s. 143(3) of the Income-tax Act, 1961 was framed on October 28, 2011. The Assessing Officer quantified the petitioner's total taxable income as ₹ 102,06,71,340.

The record also discloses that nearly four years later, the Assessing Officer, in an internal communication dated September 9, 2013, addressed to the Additional Commissioner of Income-tax, Range-50, New Delhi, wrote that penalty should be imposed on the petitioner for failure to deduct tax at source qua the assessment year 2007-08. Since there was no movement in the matter, the Assessing Officer sent a reminder on July 11, 2014. It appears that thereafter, the respondent- Revenue became somnambulant, and the show-cause notice was issued only on November 9, 2017, as per the mandate of section 274 of the Act. Accordingly, the petitioner was called upon to show cause as to why penalty ought not to be imposed under section 271C of the Act, qua the assessment year 2007-08.

The assessee filed a writ petition and challenged the notice and the ground of limitation. The Delhi High Court allowed the writ petition and held as under:

"i) Section 275(1)(c) of the Income-tax Act, 1961, has two limbs. The first limb concerns fixation of the period of limitation when penalty is sought to be imposed as a fall-out of action taken in another proceeding. On the other hand, the second limb of clause (c) of sub-section (1) of section 275 of the Act fixes the period of limitation, where initiation of action of imposition of penalty is taken on a stand-alone basis, i. e., not as a consequence of action taken in another proceeding. For the second limb, the Legislature has provided a limitation of six months from the end of the month in which action for imposition of penalty is initiated.

It is apparent, that while a timeframe has been provided for the conclusion of penalty proceedings once initiated, there is no indication, as to when the period of six months ought to commence. The initiation of penalty proceedings cannot be left to the whims and fancies of the Revenue and it should be hitched to the dicta of "reasonable period" adopted by courts in such situations, in the absence of a statutory provision.

ii) The initial return qua the assessment year in issue, i. e., A. Y. 2007-08 was filed on March 31, 2007, and the revised return was filed on March 31, 2009. The scrutiny assessment u/s. 143(3) concerning the A. Y. 2007-08, was framed on October 28, 2011. Despite the fact that the issue concerning limitation was flagged as far back as on September 9, 2013, and then again in an internal communication dated July 11, 2014, no steps were taken for the issuance of a show-cause notice. The show-cause notice was issued only on November 9, 2017.

iii) The delay in issuing the show-cause notice dated November 9, 2017 was inexcusable. There was no explanation, whatsoever, available on the record, as to why the show-cause notice under section 274 of the Act was not issued in 2013-14, if not earlier. As a matter of fact, there was no explanation, even with regard to the period falling between the time when the scrutiny assessment was framed (i.e., on October 28, 2011) and the communication dated September 9, 2013. Thus, even if the period for commencement of limitation prescribed in terms of the second limb of clause (c) of sub-section (1) of section 275 were considered, limitation would commence either from 2013 or 2014. There was a period of unexplained substantial delay, as the show-cause notice, concededly, was issued only on November 9, 2017. The show-cause notice dated November 9, 2017 deserved to be quashed."

(see ***Clix Capital Services Pvt. Ltd. vs. JT. CIT [2023] 459 ITR 470 (Delhi)***).

The Supreme Court dismissed the petition for special leave to appeal filed by the Revenue and held as under:

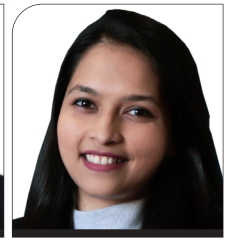
"No case for interference is made out in exercise of our jurisdiction under article 136 of the Constitution of India. The special leave petition is, accordingly, dismissed."

■●■

"The sages of the world have only the right to tell us that they have analysed their minds and have found these facts, and if we do the same we shall also believe, and not before."

— *Swami Vivekananda*

DIRECT TAXES
High Court


Jitendra Singh
Advocate

Radha Halbe
Advocate

Harsh Shah
Advocate

1 ***Pr. CIT vs. North Eastern Electric Power Corporation Ltd. [2024] 164 taxmann.com 307 (Meghalaya)***

Revision of orders prejudicial to revenue - Section 263 of the Income Tax Act 1961 – Assessee following hybrid system of accounting – accepted by the department in earlier years – further, transaction recorded under the advance licences or under the duty entitlement passbook do not represent the real income of the assessee - revision order passed under section 263 of the Act is not justified

Facts

The assessee before the Hon'ble High Court was operating a largest hydro power plant in North Eastern Region. The assessee was following Mercantile System of accounting to record its transactions, when they arise. However, the incomes were recorded in the books of the accounts, when it is earned, irrespective of the fact that it is received or accrued. The Principal Commissioner of Income Tax on the basis of above observation passed an order under section 263 of the Act holding that the Hybrid System of accounting, which is a mixture of Cash Basis and the Accrual Basis of Accounting, cannot be adopted by the assessee as per the provisions of Section 145(1) of the Act and therefore the assessment orders passed in the assessee's case were erroneous as well as prejudicial to the interest of the revenue. On appeal the Appellate Tribunal quashed the order passed under section 263 of the Act. The department being aggrieved by the above order of the Appellate Tribunal filed an appeal before the Hon'ble Meghalaya High Court.

Ruling of the High Court

Hon'ble High Court was pleased to dismiss the appeal of the department by observing that there was no real income accrued to the Company, as the transaction recorded under the advance licences or under the duty entitlement passbook did not represent the real income of the assessee. Thus, hypothetical income that may or may not materalise should not be made subject matter of tax merely because of an entry in the account books maintained by an assessee. Therefore, the revisions order passed on the basis of Hybrid System of accounting has no legs to stand. Further, it is true that the term '*res judicata*' cannot be blindly applied to the income-tax proceedings as held by the Supreme Court in the case of ***Parashuram Pottery Works Co. Ltd. vs. ITO [1977] 106 ITR 1***, but at the same time, in the absence of

ML-613

challenge to the fundamental aspect permeated through different assessment years, no attempt could be made to alter the position in the subsequent year.

2 *Sankarnaryanasamy Selvanarayanan vs. ITO [2024] 164 taxmann.com 169 (Madras)*

Reassessment – Section 148A of the Income Tax Act 1961 - Assessee receiving monthly remuneration from hospital for rendering services – Filed return of income using Form ITR-3 and claimed benefit under Section 44ADA – AO sought to re-open the case on the grounds that Assessee was not a professional but a salaried person is against the provisions of law.

Facts

The Assessee before the Hon'ble Madras High Court was a medical professional in the field of anaesthesia and rendering his services to various hospitals in and around Coimbatore. The assessee filed his return of income for AY 2018-19 in ITR 3 and claimed the benefit under section 148ADA. The AO issued a notice under Section 148A(b) of the Act, on the grounds that Assessee had wrongly used ITR-3, inter-alia applicable to professionals and that the hospitals had wrongly deducted taxes as per Section 194J instead of Section 192 of the Act. The assessee in reply to the above explained that that he was an independently practising doctor in the field of anaesthesia, visiting various hospitals on appointment and assist during operations. Cumulatively he visited around fifteen hospitals in and around Coimbatore in lieu of which the hospitals paid him professional fees. He was not an employee associated only with one hospital. The AO did not agree with the response provided by the Assessee and passed an order under Section 148A(d) of the Act concluding that it was a fit case for issuing a notice under Section 148 of the Act.

The assessee being aggrieved by the order passed under section 148A(d) and notice issued under section 148, challenged the same before the Hon'ble Madras High Court.

Ruling of High Court

Hon'ble High Court was pleased to quashed the reassessment proceedings by observing that unless the department had documents to substantiate that the assessee was an employee in the respective hospitals and TDS were wrongly deducted under Section 194J instead of Section 192 of the Act, the department could not re-open the assessment.

3 *PCIT vs. ITC Limited [ITA No. 125 of 2018 vide order dated 27 June 2024 (Calcutta HC)]*

Business income or Capital receipt - Section 45 read with section 2(47) of the Income Tax Act 1961 – compensation received by the licensee on termination by the licensor of the operating license to run the hotel is a revenue receipt. [Section 28]

Facts

Assessee entered into agreement with ELEL Hotels & Investment Ltd. ("ELEL") on 01.10.1983 whereby assessee render services to "Sea Rock" hotel belonging to ELEL group. The said agreement was superseded by an agreement dated 03.05.1986, wherein ELEL granted license to the assessee to operate the hotel 'Sea Rock' from the first day of July, 1986 for a period of 25 years with an option to renew the licence for a further period of

ML-614

25 years on giving notice to ELEL of such intention of not less than 24 months before the expiry of the licence. The license fee was calculated and paid @ 23% on the gross turnover of the Sea Rock Hotel to ELEL for each financial year. Further, assessee has right to terminate the contract by giving not less than 24 months' notice to ELEL. Assessee had no right, title or interest in the hotel. Assessee entered with ELEL a settlement agreement dated 11.05.2005 under which ongoing civil litigation and other disputes were settled on a consideration of ₹ 43.10 crores out of which settlement amount relating to license was determined at ₹ 32.42 crores which was reduced in writing by an award of the sole Arbitrator. During the relevant assessment year 2006-07, the assessee has received ₹ 32.42 crores from under the award/consent terms which was claimed as long-term capital gain by the assessee in its return of income. AO while finalizing the assessment made the addition of ₹ 32.42 crores received from ELEL treating it as revenue in nature. On appeal Ld. CIT(A) as well as Appellate Tribunal deleted the addition made by the AO and held the receipts as long term capital gains.

The department being aggrieved by the order of the Appellate Tribunal challenged the same before the Hon'ble Madras High Court under section 260A of the Act.

Ruling of the Hon'ble High Court

Hon'ble High Court held that the receipts under the award/consent terms is revenue receipt by observing that under the agreement dated 03.05.1986 the assessee was only authorized to run and operate the hotel. No right, title or interest of any kind was created by the ELEL in favour of the assessee in any of the assets/properties of ELEL to carry on commercial activity of operating the hotel. Considering the terms of the license operating agreement in its entirety, it is a trading contract. To run or operate the hotel is one of the business activities of the assessee under which it was also running hotel of ELEL. The amount received under the award in the matter of trading contract to settle disputes, claims and counter claims is not the transfer of any capital asset. Therefore, receipt of ₹ 32.42 crores from ELEL on termination of operating license agreement would be revenue receipt in hands of assessee and not capital receipt.

■●■

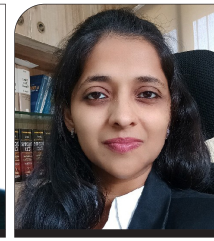
"It is the greatest manifestation of power to be calm. It is easy to be active. Let the reins go, and the horses will run away with you. Anyone can do that, but he who can stop the plunging horses is the strong man."

— *Swami Vivekananda*

ML-615

DIRECT TAXES
Tribunal





CA Nikhil Mutha
CA Viraj Mehta
CA Kinjal Bhuta
Advocate

1 *Kumar Housing Corporation Pvt. Ltd vs. ITO (ITA No. 539/PUN/2024 dated 23.07.2024) (AY 2016-17)*

Section 36(1)(iii) – Funds advanced by Holding Co. to its subsidiary – Short recovery of incremental cost incurred on restructuring the funds borrowed by Holding Co. – Held, deductible

Facts

The assessee is a Private Limited company engaged in the business of Real Estate Development & Sales. During FY 2010-11, the assessee borrowed Long Term fund amounting to INR 135,27,00,000 at interest of 12.16% per annum. Since the project did not materialize, therefore, the borrowed funds were given as Loan to its subsidiary, M/s. Kumar Snew Developers Pvt. Ltd for interest @12%. The assessee during the year under consideration restructured the loan with payment of entire amount borrowed for which the assessee also paid restructuring charges. The assessee had charged interest and restructuring charges to its subsidiary but there was short recovery of INR 80,21,369. The said amount was claimed as deduction. The Assessing Officer made the addition of the same and during the course of the assessment proceedings, the AR of the assessee agreed to the disallowance. The assessee filed an appeal before the CIT(A) but the same was dismissed on the ground that the AR of the assessee has agreed to the disallowance in the course of assessment proceedings. The assessee filed an appeal before the Hon'ble Tribunal. The Counsel before the Hon'ble Tribunal relied on the decision of the Hon'ble Bombay HC in the case of ***Balmukund Acharya vs. DCIT (176 Taxman 316)***, the Hon'ble Tribunal decision in the case of ***Phadnis Clinic Pvt Ltd (ITA No. 1666/PN/2018 dated 21/09/2022*** and the decision of the Hon'ble SC in the case of S.A. Builders (288 ITR 1).

Held

The Hon'ble Tribunal relied upon various decisions of the Hon'ble SC wherein it has been held that the concession made by the party cannot preclude it to agitate the matter before the higher appellate forum. Basis such decisions, the Hon'ble Tribunal held that the decision relied upon by the CIT(A) to hold that agreed additions cannot be agitated in appeal were distinguished.

On merits, the Hon'ble Tribunal observed that the assessee had advanced the amount to its wholly owned subsidiary. The Hon'ble SC in the case of S.A. Builders (supra) held that funds where funds are advanced by the Holding Co. to its subsidiary and even when interest is not charged, advancing of funds would be for commercial expediency and no disallowance of interest is warranted. The Hon'ble Tribunal also relied upon the Hon'ble Delhi High Court decision in the case of ***Moonrock Hospitality (P) Ltd vs. ACIT (139 Taxmann.com 378)***. Basis the same, the Hon'ble Tribunal concluded that disallowance cannot be made in the facts of the present case.

---

2 ***Samkeet Arya Homes LLP vs. ITO (ITA No. 249/Ahd/2024 dated 16.07.2024) (AY 2018-19)***

Section 37 - Non-compete fees paid to retiring partner – Held, revenue in nature

Facts

The assessee is in the real estate business. During FY 2016-17 and FY 2017-18, it paid non-compete fees to the retiring partner of INR 70 lakhs. From said amount, INR 38 Lakhs was charged to the profit & loss account for FY 2017-18/AY 2018-19. As per the non-compete clause, the retiring partner agreed that he shall not start any real estate project in the nearly 2 km area of the scheme undertaken by the assessee. The assessee treated the non-compete fees as revenue expenditure. The Assessing Officer disallowed the expenditure on the ground that the non-compete fees paid to the retiring partner were capital expenditure. The CIT(A) dismissed the appeal of the assessee. In the proceedings before the Hon'ble Tribunal, the Authorized Representative emphasised the market standing and reputation of the retiring partner, demonstrating the various projects which he has independently undertaken in the past 8-9 years.

Held

The Hon'ble Tribunal observed that the non-compete clause was a strategy entered with the retiring partner in respect of ensuring the competitive element as well as the profit element. The compensation payment for refraining from carrying competitive business needs to be taken into account for 2 years period. The Hon'ble Tribunal further observed that the Department not only received the tax in the very first year from the assessee but also got a higher amount of tax from the retiring partner as the surcharge payable was higher in the case of an individual compared to the firm. The Hon'ble Tribunal also observed that non-compete consideration under Section 28(va) of the Act is considered as income and, therefore, the assessee has rightly claimed the same as expenditure as the source of the profit or income of profit-making apparatus remains untouched and unaltered. Accordingly, the appeal of the assessee was allowed.

---

3 ***Jagjeet Singh vs. DCIT [ITA No. 278/279/Asr/2024 dt. 10.07.2024] (AY 2017-18 & 2018-19)***

Section 147 and 263 –

a. **If the original order is based on which revision proceedings are initiated u/s. 263 is non-jurisdictional- section 263 order is also bad in law.**

b. **The correct proceedings in case the assessment is framed based on documents found during the search is Section 153C and not re-assessments u/s. 147.**

ML-617

c. **The PCIT has to prove that how the assessment order is made without application of mind of the documents and records available during assessment proceedings.**

Facts

The assessee is a doctor and there was a search operation conducted u/s. 132 in other group, and in this search, a copy of the ledger account of the appellant was found. Pursuant to the same, re-assessment was conducted u/s. 147 after getting relevant approvals. In this re-assessment the returned income was accepted by the AO and assessment order was passed. PCIT initiated revisionary proceedings on the ground that the AO failed to carry out necessary inquiries and verification on the issue of unexplained cash transactions recorded in the ledger account so seized. In the order u/s. 263, PCIT has pointed out that AO while passing the order has failed to bring on record the treatment of entries appearing in the ledger account seized in the assessment records of a third party. Also, it was stated that the appellant has relied upon certain sections of the Evidence Act which do not apply to Income Tax provisions. The appeal is filed challenging the revision order u/s. 263 passed by the PCIT.

Held

On behalf of the assesssee, the AR submitted before the Bench that, the re-assessment was done based on only the transactions appearing in the ledger account reproduced in the reasons recorded by the AO. The assessee had filed objections against the reasons recorded on the ground that the reasons are unsigned and categorically stated that assessee has nothing to do with the transactions appearing on the ledger account seized and also denied giving any cash loan to any of the stated parties in the statements. Alongwith these replies, the assessee had submitted the income tax return, copies of bank statements, copy of audit report, copy of cash book etc. It was argued by the AR that, the assessment order was passed after thorough verification of the reply filed by the assessee during the assessment proceedings. The AR also submitted that the original re-assessment proceedings are based on non-signed reasons recorded and the correct section for assessment should have been section 153C as it is based on the documents found in search proceedings. It was submitted that the order passed u/s. 263 is bad in law as it is based on the re-assessment order which itself is without jurisdiction. Based on the submissions of the AR and the case laws relied upon, it was observed by the Hon'ble Tribunal that the whole case has been framed based on material found during the search. Thereby, the correct course of action was required to be taken u/s. 153C and not section 148. The Hon'ble Tribunal referred to the decision of the Apex Court in the case of ***DCIT vs. Sri Dinakara Suvarna (454 ITR 27).*** It was further held that since the AO has erred in invoking the re-assessment proceedings u/s. 147, the subsequent cause of action based on an invalid order is without jurisdiction. This view was taken by referring to the decision of Orrisa HC in the case of ***Badal Prakash Jindal (457 ITR 345)***. Further, the party who was searched has not identified the parties from whom loans have been taken and his assessment order was finalised on account of not bringing the lenders on record. This assessment order of the searched party was considered by the AO while passing the assessment order of the appellant. It was held that PCIT has not been able to prove as to how the assessment order is erroneous and prejudicial to the interests of revenue and that mere allegation that the AO has passed the order without application of mind would not be legally justified to set aside the order u/s. 263. Based on the facts and judicial precedences, it was held that this is not a fit case for invocation of provisions of section 263 and the revision order was quashed.

---

4 ***ITO vs. M.P.Police Sakh Sahakari Sanstha Maryadit [ITA No. 173 & 174/Ind/2024 dt. 12.06.2024] (AY: 2014-15 & AY:2016-17)***

Sec. 268A – CBDT Circular no. 5/2024 supersedes the previous circulars of monetary limit of tax effect for filing of appeal by revenue authorities – the exceptions are different in the new circular as compared to the earlier ones – for all pending appeals the new circular applies.

Facts

Before the first appellate authority, the appeal was allowed in favour of the assessee. The issue was regarding the allowability of deduction of section 80P(2)(d). Both appeals were filed by revenue authorities, and the AR challenged the maintainability of the appeals. The tax effect of the appeals was less than ₹ 50 lakhs.

Held

Before Hon'ble Tribunal, the AR relied on the latest Circular no. 5/2024 dated 15th March, 2024 and submitted that appeals are not maintainable due to low tax effect. The DR filed comments of the AO that due to tax audit objection in the case of the assessee which was accepted by the AO while re-opening the assessment, the case falls within the exception in para 10(c) of the Circular no. 3/2018 and Circular no. 17/2019. The DR therefore contended that the circulars of monetary limits do not apply and therefore appeal may be decided on the merits of the case. It was contended by the AR of the assessee that the latest circular of 2024 is in supersession of earlier circulars issued by CBDT and that exceptions of the earlier circular are modified by the new circular. It was observed by the Hon'ble Tribunal, that the latest circular no. 5/2024 clearly speaks that it is in supersession of the other communications issued by CBDT. Further, para 3.1 of the new circular specifies the new exceptions to the applicability of the monetary limits, however, there is no exception to the monetary limit regarding any audit objection. It was held by the Hon'ble Tribunal that, it is a settled position that the CBDT circulars prescribing monetary limits for filing the appeals by the Department before the Tribunal/Hon'ble High Court/Hon'ble Supreme Court are also applicable on the pending appeals on the date of circular. The Hon'ble Tribunal relying upon the decision of BOM HC in the case of ***CIT vs. Madhukar K Inamdar HUF (318 ITR 149),*** held that the CBDT circular no. 5/2024 (dated 15th March) is applicable to the pending appeal which was filed on 27.02.2024 (before the circular was issued) and due to low tax effect the appeals of revenue are not maintainable and were dismissed.

5 ***Renu Bala vs. Addl. CIT, Range-II [ITA No. 2310/DEL/2023 dated 12.07.2024] [AY 2017-18]***

Section 271D – Cash received before 01/06/2015 in relation to the sale of rights in property cannot attract provisions of section 269SS & 271D – the amendment is prospective- specified sum explanation introduced with effect from 01/06/2015

Facts

During the assessment proceedings, the AO observed that the assessee has received cash for total sale consideration during the said year. The AO observed that there was a violation of the provision of section 269SS of the Act, subsequently penalty proceedings u/s. 271D were initiated. The assessee denied receiving any cash loan and submitted a statement on oath stating that the assessee had applied for a Janta Category Plot under the Rohini Residential Scheme 1981 of the Delhi Development Authority and was entitled to the allotment of a plot. She agreed to sell future ownership rights of the plot and received the sale consideration in instalments, in cash. It was the submission of the assessee that since the amounts by way of instalments have been received before 01.06.2015, section 269SS does not apply to the facts of the case. It was only the registration of the agreement which was done in June, 2016. The AO rejected the submissions made by the assessee stating that the whole transaction was in lieu of the sale of immovable property which was registered in June, 2016. The AO mentioned that since cash was received exceeding ₹ 20,000/- other than the account payee cheque, the second proviso of section 269SS also does not apply, the assessee has failed to discharge the onus and it was a clear case of violation of section 271D and confirmed the penalty. On further appeal, The CIT(A) dismissed the appeal and sustained the penalty imposed by the AO.

Held

Before the Hon'ble Tribunal, the assessee was able to demonstrate that the payments and instalments in cash were received from the years 2007 to 2010. It was the claim of the assessee that since the amendment to provisions of section 269SS was made on 01/06/2015, the same cannot be retrospectively applied to the case of the assessee. It was also submitted that no cash or loan was received in the FY: 2016-17 against the sale of property. The Hon'ble Tribunal relying on the decision in the case of Ruhil Developer Pvt Ltd of Delhi Hon'ble Tribunal, held that in this case the assessee has received cash settlement prior to the amendment and not received during the year under consideration, the amendment to section 269SS is applicable prospectively and therefore the 'specified sum' mentioned in the Act is applicable only to those cash receipts by the assessee after amendment. Accordingly, the penalty was deleted and appeal of the assessee was allowed.

6 ***M/s. Doshion Veolia Water Solution P. Ltd vs. ACIT (ITA No. 78 & 1503/MUM/2018 dated 18 July 2024) (AY 2009-10 and AY 2012-13)***

Section 178 - Interplay of Insolvency and Bankruptcy Code ('IBC') with proceedings under Income Tax Act – No legal impediment to adjudicate the issue on merits but no authority to initiate recovery of taxes during moratorium period

Facts

The assessee company is engaged in the business of manufacturing of water treatment plant and Ion exchange resins and dealers in water treatment components-spares. The Assessing Officer made additions of INR 47.44 crores under Section 68 for unexplained share capital and INR 78.12 lakhs under Section 14A for disallowance of expenditure in relation exempt dividend income. The CIT(A) allowed the appeal of the assessee on merits having regard to the facts of the case. The assessee was undergoing liquidation under IBC as per the National Company Law Tribunal (NCLT) order dated 20.09.2021. This order initiated the liquidation process under the IBC.

The Tribunal initially dismissed the Revenue's appeals on 02.02.2023 observing that the corporate debtor was made respondent despite commencement of liquidation proceedings. It was further observed that if the revenue wants to pursue these appeals, then 'Official Liquidator' be impleaded as respondent. The Revenue accordingly filed a Miscellaneous application on the basis of revised Form 36. Accordingly, the appeals were recalled for adjudication on merits.

Held

The Hon'ble Tribunal observed that it should first discuss the legal position as to the determination of the Appellant/Revenue's dues and thereafter decide on the merits of the case. The Hon'ble Tribunal referred to the non-obstante provision of section 238 of the IBC Code read with section 178(6) of the Income-tax Act ('Act') to hold that the IBC code shall override the provision of the Act. The Hon'ble Tribunal relied on the Hon'ble SC decision in the case of ***Ghanshyam Mishra and Sons Pvt. Ltd vs. Edelweiss Asset Reconstruction Company Ltd (Civil Appeal No.8129 of 2019),*** wherein it has been held that once the resolution plan is duly approved by the Adjudicating Authority under section 31(1), the claims as provided in the resolution plan shall stand frozen and will be binding on Corporate Debtor including Central Government, State Government and Local Authority. The Hon'ble Tribunal further relied on the decision in the case of ***Sundaresh Bhatt, Liquidator of ABC Shipyard vs. CBIC (Civil Appeal No. 7667 of 2021 dated 26.08.2022)***, wherein it has been held that it is unacceptable that the proceedings for assessment or reassessment of a company which is being wound up can only be started or continued with the leave of the liquidation court is sought. The liquidation court would have full power to scrutinise the claim of the revenue after income tax has been determined and its payment demanded from the liquidator. In view of the above decisions, the Hon'ble Tribunal held that the provisions of IBC would prevail over the Act. However, Income Tax authorities have limited jurisdiction to assess/determine the quantum of Income Tax dues but have no authority to initiate recovery of such dues on its own during the period of moratorium. The Income Tax Authorities are like any other creditor, may stake their claim before the liquidator in the statutory limitation period provided under the IBC, which can be considered in accordance with the waterfall mechanism provided u/s. 53 of IBC. On merits, the Hon'ble Tribunal dismissed the appeal of the Revenue. The Hon'ble Tribunal also observed that a proactive approach needs to be followed by the taxing authorities to stake the claim of dues as creditor, immediately after the determination of tax dues, subject to the outcome of any pending appeal.

■●■

INTERNATIONAL TAXATION
Case Law Update

Dr. CA Sunil Moti Lala
Advocate

A. SUPREME COURT

1 ***CIT- Int. Tax vs. Infosys Ltd. - [2024] 164 taxmann.com 701 (SC)***

SLP dismissed against High Court ruling that where assessee, an Indian software development company, sub-contracted certain overseas work to its wholly owned subsidiary in China and made payment to it for sub-contract work done, assessee was not required to deduct TDS on said payment - since amendment to section 9 by Finance Act, 2010 and substitution of Explanation to said section which provided for deduction of tax at source on such payment treating same as FTS u/s 9(1)(vii) was effective from 2011-2012, same would not apply to assessee during relevant assessment years 2009-10 and 2010-11.

B. HIGH COURT

2 ***CIT (TDS). v. Idea Cellular Ltd. - [2024] 164 taxmann.com 323 (Calcutta)***

Following the judgment of Hon'ble Supreme Court in ***Engineering Analysis Centre of Excellence (P.) Ltd. vs. Commissioner of Income-tax [2021] 125 taxmann.com 42/281 Taxman 19/432 ITR 471 (SC)/(2022) 3 SCC 321***, the Hon'ble HC held that provisions of Section 9(1)(vi), as amended by Finance Act, 2012 with retrospective effect from 01.06.1976, (which came into operation only after 31.03.2012), would not apply to assessee - cellular service provider who had availed/ used a standard facility that did not amount to royalty under Section 9(1)(vi) for assessment year 2012-13. Thus, assessee could not be held liable to deduct tax as at the relevant time there was no such liability.

3 ***CIT vs. Lucent Technologies GRL LLC - [2024] 164 taxmann.com 703 (Bombay)***

Following the judgment of Hon'ble Supreme Court in ***Engineering Analysis Centre of Excellence (P.) Ltd. vs. Commissioner of Income-tax [2021] 125 taxmann.com 42/281 Taxman 19/432 ITR 471 (SC)/(2022) 3 SCC 321***, the Hon'ble HC held that amounts paid by resident Indian end-users/distributors to non-resident computer software manufacturers/ suppliers, as consideration for resale/use of computer software through EULAs/distribution agreements, was not payment of royalty under Section 9(1)(vi) for use of copyright in computer software and the same did not give rise to any income taxable in India

ML-622

4 *International Management Group (UK) Ltd. vs. CIT - [2024] 164 taxmann.com 225 (Delhi)*

Advisory and managerial services provided by assessee, a tax resident of UK, to BCCI for establishment, commercialization and operation of IPL events outside India was not liable to be taxed as FTS.

Facts

i. Assessee, a tax resident of UK, had entered into service agreement with BCCI for providing advisory and managerial services for establishment, commercialization and operation of IPL events. It had received consideration of ₹ 28 crores from BCCI for providing advisory and managerial services for establishment, commercialization and operation of the IPL.

ii. Adopting the profit split method, it had attributed revenue of INR 20.19 crores to the Indian PE. The net income of INR 7.83 crores attributable to activities undertaken in India had been offered to tax on net income basis in accordance with the provisions of section 44DA read along with the provisions of article 7 of the India - UK DTAA. The remaining revenue of ₹ 7 crores, according to the assessee, pertained to work done outside India and was thus not attributable to the PE and consequently not liable to be taxed in India.

iii. The AO held that the receipts of ₹ 7 crores received for work done outside India was liable to be taxed as Fee for Technical Services (FTS).

iv. The DRP held that the same was attributable to the service PE of the assessee which would be liable to tax under article 13 of the DTAA being FTS.

v. The Hon'ble Tribunal further held that the make available stipulation comprised in article 13 of the DTAA also stood satisfied.

vi. Aggrieved, the assessee filed appeal to the Hon'ble HC.

Decision

i. The Hon'ble HC held that, no expertise, skill or know-how had been made available to BCCI and that there was no discernible intent on part of BCCI to absorb or internalise assessee's unique skills and knowledge in curation of sporting leagues. No part of that knowledge or skill stood transferred to BCCI. Consequently, the said services could not be taxed as FTS under Article 13 of the DTAA.

ii. Further, it was held that since the services rendered by assessee were utilized outside India and were availed of for purposes of earning income from a source outside India, the same was covered under the exception forming part of s.9(vii).

iii. It concluded that, in light of the admitted position of a Service PE existing in the relevant assessment years, the income attributable to that entity was correctly offered to tax under article 7 of the DTAA. Insofar as the revenue attributable to the UK office was concerned, it was already found that the same did not qualify

ML-623

for taxation under article 13 since the "make available" test was not fulfilled.

iv. Accordingly, assessee's appeal was allowed and impugned order of the Tribunal was set aside.

C. TRIBUNAL

5 ***Pralay Pradyotkanti Ghosh vs. ITO – [2024] 164 taxmann.com 705 (Ahmedabad – Trib.)***

Salary income received by assessee from his foreign employer was held to be exempt income because of his non-residential status as salary was earned for working in international waters

Facts

i. The assessee was an Engineer (Under Water Inspector) working at offshore fields. During the year under consideration, he had received salary income from his Singapore based employer for the work done in oil fields in Bay of Bengal in international water. It had deducted tax on the same under section 192, however, the same was shown as "exempt income" in the return of income filed by the assessee.

ii. The AO, however, concluded that the oil fields in Bay of Bengal were part of Indian Territory and therefore, the work performed by the assessee could not be termed as work outside Indian Territory. He further concluded that co-ordinates of KG-D6 Oil Fields in Bay of Bengal were situated within Exclusive Economic Zone of India and the same was within the part of "India" as defined in section 2(25A). Accordingly, he made an addition of the same to the total income of the assessee under section 5(2)(b) read with section 9(1)(ii).

iii. The CIT (A) held that the income earned by the assessee was salary for the activities within India and, thereby upheld the addition made by the AO.

iv. Aggrieved, the assessee filed appeal to the Hon'ble Tribunal.

Decision

i. The Hon'ble Tribunal held that as per Section 2(25A), 'India' includes its territorial waters, the seabed and subsoil underlying such waters, the continental shelf, the Exclusive Economic Zone (EEZ), and other maritime zones as defined in the Territorial Waters, Continental Shelf, Exclusive Economic Zone and Other Maritime Zones Act, 1976.

ii. It further held that the EEZ extends up to 200 nautical miles from the baseline but does not constitute territorial waters, which extend only up to 12 nautical miles. The EEZ is recognized for its resource exploitation rights, but does not extend India's sovereignty to the extent that territorial waters do. Operations on a foreign ship within the EEZ, especially those not involving direct interaction with the seabed or subsoil, are not automatically considered as services rendered within 'India' for tax purposes.

iii. It noted that Notification No. GSR 304(E) specifically extends the Act only in respect of income derived from specified activities. It held that the CIT (A) had failed to consider the fact that sub-section 9 of section 7 of The

Territorial Waters, Continental Shelf, Exclusive Economic Zone and Other Maritime Zones Act, 1976 gives freedom of navigation to foreign ships and therefore employees working on such ships who are not carrying out activities as specified by the said notification are not deemed to be working in India.

iv. It further noted the provisions of s 9(1)(ii) which states that income earned from services rendered in India is taxable. Since the assessee's duties, which were not covered by Notification No. GSR 304(E), were performed on a foreign ship operating beyond the territorial waters (though within the EEZ) it held that the services were not rendered in India.

v. It held that given the facts and relevant legal provisions, if the assessee qualified as an NRI under section 6, the salary income earned from services performed outside the territorial waters of India would be exempt under the Act. Since, the AO had passed his order under section 143(3) read with section 144C(3) and had verified the Continuous Discharge Certificate and passport entries of the assessee, it concluded that the AO had confirmed the residential status as non-resident. Therefore, the salary income earned by the assessee was "exempt income". Accordingly, the addition was deleted.

6 *India Property (Mauritius) Company-II vs. ACIT – [2024] 164 taxmann.com 440 (Delhi – Trib.)*

It was held that where assessee, a Mauritius based company, was incorporated as an investment fund and held investment in Indian companies for more than five years and had validly discharged its burden by establishing that day to day administrative activities of assessee company were as per law of land, AO was not justified in denying treaty benefits to assessee.

Facts

i. Assessee, a company incorporated in Mauritius was engaged in business of investment activities. During year under consideration, assessee transferred shares of Indian companies and thereby earned long term capital gains (LTCG) on such transfers

ii. In view of provisions of section 90(2), assessee claimed LTCG as exempt as per article 13(4) of India-Mauritius Tax Treaty

iii. AO denied treaty benefits to assessee on the ground that assessee was a mere conduit entity without any economic substance

iv. The DRP upheld the AO's order

v. Aggrieved , the assessee filed appeal to the Hon'ble Tribunal.

Decision

i. The Hon'ble Tribunal noted that assessee was an investment fund, which pooled capital from investors from various countries through series of funds

ML-625

investor vehicles/feeder funds creating a master fund which was used for investment into various entities in India.

ii. Further, assessee was earlier also making investment and divestments and still held investment in various other companies.

iii. There was no allegation of AO on basis of any evidence that any investment flowing from India was received for creating assessee.

iv. After noting that the investments were held for over five years before they were transferred and that day to day administrative activities of assessee company were as per law of land, it held that except for suspicion there was no evidence with AO to rebut statutory evidence of presumption of genuineness of business activity of assessee company on basis of TRC held by assessee.

v. It concluded that the AO was not justified in denying treaty benefits to assessee.

vi. Accordingly the assessee's appeal was allowed.

7 ***Tiger Global Eight Holdings vs. DCIT (International Taxation) – [2024] 165 taxmann.com 16 (Delhi – Trib.)***

Where assessee, a Mauritius based company, claimed benefit of tax exemption under India-Mauritius DTAA in respect of long term capital gain arising from sale of shares of an Indian company, it was held that the AO was not justified in denying the tax exemption under the DTAA merely on the basis of suspicion that the assessee was a conduit company engaged in treaty shopping – since the assessee had provided all necessary documents to AO to prove a) its residential status b) that it was controlled and managed by its board of directors in Mauritius c) all decisions with respect to investment holding company and divestment decisions were taken by board of directors of assessee in Mauritius d) Board of Directors of assessee had sole authority over affairs of assessee e) assessee had an office space in Mauritius, where all its accounting records, registers, books of accounts and other statutory records were maintained.

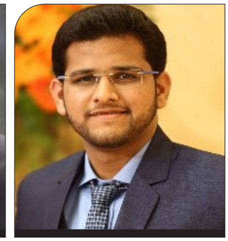
■●■

"Be not afraid, for all great power throughout the history of humanity has been with the people. From out of their ranks have come all the greatest geniuses of the world, and history can only repeat itself. Be not afraid of anything. You will do marvelous work."

— *Swami Vivekananda*

ML-626

INDIRECT TAXES
GST

CA Naresh Sheth CA Jinesh Shah

A. WRIT PETITIONS

1 *Indian Medical Association vs. Union of India [(2024) 164 taxmann.com 626] – Kerala High Court*

Facts and Issues involved

The petitioner's case is that the petitioner is an association of qualified modern practitioners formed under the provisions of the Travancore - Cochin Literary Scientific & Charitable Societies Registration Act, 1955.

Members are admitted to the petitioner association on payment of one-time admission fee. The petitioner association is like a club formed to promote medical science, upholding the interests of the medical profession, guiding government bodies in evolving a health policy for the state and in implementing it, formulating schemes and projects for the welfare of members of the association, their families and the general public, helping in proper disposal of Biomedical waste, etc.

The petitioner runs various mutual beneficial schemes for the benefit of its member- doctors wherein any doctor who is a member of the petitioner may become a member of these Social Scheme upon payment of admission fees and they are required to pay annual subscription.

Further, petitioner has guest houses wherein rooms are let out to their traveling members/ guests. Also, various charitable activities such as HIV awareness, End-TB campaigns, etc., are being carried out by petitioner.

To summarize, the activities carried out by petitioner are like mutual self-help and is a kind of charitable organization.

Petitioner has preferred writ before Honorable Court that Section 2(17)(e) and Section 7(1)(aa) along with its explanation under CGST Act are ultra virus. Alternatively, prayer was made to declare retrospective effect of Section 7(1)(aa) of CGST Act unconstitutional and violative of Article 14,19,265 and 300A of Constitution of India.

Submission of Petitioner

The association is only a group of individuals serving themselves and as per the doctrine of mutuality, there is no service by one person to another. Therefore, it cannot be said that there is a supply of goods and services by association to the petitioner, and therefore, no GST is payable in respect of the activities of the petitioner association.

ML-627

In support of its above contention's, petitioner placed reliance on the following judgments:

- ***Graf vs. Evans [(1882) 8 QBD 373]***
- ***Trebanong Working Men's Club and Institute Ltd vs. Macdonald [(1940) 1 All ER 454***
- ***Inland Revenue Commissioners vs. Westleigh Estate Co. Ltd [1924 (1) KB 6390]***

The above principle is well recognized in India and has been taken note of several judgments by the High courts and Supreme Court:

- ***Bengal Nagpur Cotton Mills Club vs. Sales Tax Officer, Raipur and Another [8 STC 781],***
- ***Century Club and Another vs. The State of Mysore and Another [16 STC 38]***

The petitioner also relied on the judgement of Supreme Court in case of ***Madras Gymkhana Club Employees Union vs. Management of the Gymkhana Club [1967 SCC OnLine SC 51***], it was held that the services provided by the club for members have to be treated as activities of a self-serving institution, even if the club is incorporated as a limited company under the Companies Act, as held in ***Cricket Club of India Ltd vs. Bombay Labour Union [AIR 1969 SC 276]***.

In the 46th Amendment (1981) of the Constitution, an attempt was made to legitimize the levy of sales tax on a club/ association, the "tax on sale or purchase of goods" was defined in broader terms to include a tax on the supply of goods by an unincorporated association or body of persons to a member thereof for cash, deferred payment or other valuable consideration.

However, the Supreme Court in ***State of West Bengal vs. Calcutta Club [2019 (29) GSTL 545 (SC)]*** emphatically held that the principle of mutuality continued even after the 46th Amendment.

The Parliament brought in the **101st Amendment by inserting Article 246A**, empowering the Parliament and the State legislatures to levy goods and services tax under Article 246A. Article 366 was also amended, and 366 (12A) was inserted by the 101st Constitution Amendment, which defined goods and services tax as a "tax on supply of goods or services or both".

The supply of goods or services would mean supply **by one person to another**. There cannot be a supply of goods or services by a person/entity to itself, such as in the case of a club/association, as they are not two separate persons/entities.

After the judgment in ***State of West Bengal vs. Calcutta Club (supra)***, the parliament introduced Section 7(1)(aa) by the Finance Act, 2021, retrospectively that is with effect from the date of commencement of the GST regime i.e. 01.07.2017, inserting a legal fiction and artificially deeming a club/association and its members to be two separate persons.

The legislative power granted by the Constitution cannot be extended beyond the known legal connotations, it can be done only by a constitutional amendment.

The petitioner further submitted that the amendment brought in the GST/CGST Act by inserting Section 7(1) (aa) retrospectively is ultra-virus as it runs contrary to the long-established and well-recognized concept of mutuality. The provision under Section 7(1) (aa) and the explanation thereto cannot be given retrospective operation.

ML-628

Discussion by and Observations of High Court

A combined reading of Article 246A and Article 366(12A) provides that goods and services tax means any tax on the supply of goods and services or both. The Parliament and State Legislature would have the power to make laws with respect to goods and services tax viz, Tax on supply of goods and services or both.

Article 246A or Article 366(12A) does not have any reference to the term Person. The tax is on activities, i.e., the supply of goods and services or both. Therefore, court was of the view that the Parliament as well as the State Legislature, in the exercise of their power under Article 246A r/w Article 366(12A), would be empowered to Legislate for imposing tax on the supply of goods and services, irrespective of the person/individual involved.

The Constitution does not put any restriction or limitation from defining a person(s) for the purpose of levy of GST. This supply of goods and services may be by club/association to its member and therefore, the principle of the mutuality will not come in a way of the Parliament or the State legislature to enact law for tax on supply of goods and services.

As far as the question of mutuality as held in ***Calcutta club (supra)*** is concerned, this court was dealing with the levy of service tax under Section 366(29A) of the Constitution of India. The Supreme Court held that the transaction between the club and its members was by one to oneself, and there was no service. It was held that since the club (incorporated club) was rendering service to its members, it was not liable for service tax.

From the perusal of Article 366(29A), it would be evident that a levy of service tax on the supply of goods by an Unincorporated Association or Body of Persons to a member for cash, deferred payment, or other valuable consideration would be covered. However, Article 366(29A) does not provide the service tax on incorporated associations. Even otherwise, if it is held that the principle of mutuality is involved in the supply of goods or services by a club/association to its members, the basis of the judgment can be altered or removed by necessary amendments in the legislature.

In view thereof, the Parliament/State Legislature has amended Section 7(a) by inserting Section 7(aa) by the Finance Act, 2021. The amendment, as held, is neither beyond legislative competence nor offends any of the fundamental rights guaranteed under Part III of the Constitution of India nor is manifestly arbitrary or capricious. Therefore, the amendment brought in Section 7(a) by inserting Section 7(aa) is well within the legislative competence and not ultra-virus.

The next issue that requires consideration is whether the petitioner can be asked to pay tax retrospective, i.e., w.e.f. 01.07.2017 when the principal of mutuality was in vogue, and GST authorities never issued a notice to the petitioner for payment of GST by them. Thus, before the amendment was brought in by inserting Section 7(aa) by the Finance Act, 2021, the law of mutuality was well established in the principle of taxation in case of supply of goods and services by clubs/ associations to its members. The GST is an indirect tax to be paid by the recipient of goods and services. When the law of mutuality, as held in the Calcutta club case, was understood by the authorities as well as the petitioner, the petitioner did not collect the GST. However, once the amendment has been brought into statute by inserting Section 7(aa) by the Finance Act 2021, the petitioners have become liable to pay the GST on the

ML-629

supply of goods and services to their members. Section 7(aa), therefore, should not be given retrospective operation w.e.f. 01.07.2017 but it should be given effect from the date when it was notified i.e., 01.01.2022.

Various activities are being undertaken by petitioner. Assessing authority is required to examine each activity (involving the supply of goods and services to its members) undertaken by the petitioner independently to arrive at a conclusion as to whether such an activity involves the supply of goods and services so that the tax may or may not be imposed on such activity.

Decision of High Court

Provisions of Section 7(aa) will have prospective operation with effect from 01.01.2022.

2 *Standard Chartered Bank vs. Principal Commissioner of Central Tax [(2024) 164 taxmann.com 506] – Telgana High Court*

Facts and issues involved

The petitioner's headquarter is in Mumbai and same is registered under GST. The petitioner was entitled to avail transitional ITC of ₹ 1,41,26,69,646 in Maharashtra Registration. The petitioner attempted to file form Tran-I of Maharashtra but same could not be filed due to technical glitch on the GST portal. The petitioner filed the Tran-I in its Telangana Registration and availed the transitional ITC and transferred the same to the portal of Maharashtra.

The petitioner was served with a pre-show cause notice on 03.09.2021 wherein it was alleged that the credit availed by the petitioner through TRAN-I return filed by the Telangana registration is ineligible and requires to be reversed along with applicable interest and penalty. The petitioner promptly replied and made it clear that total transitional credit of ₹ 1,41,26,69,646/- was transferred to Maharashtra GST registration on the same day of filing the TRAN-1.

Thereafter the respondent issued show cause notice against which the petitioner filed its reply. Not considering the petitioner submissions, the GST authorities adjudicated the matter by confirming the demand raised in notice.

Petitioner submitted that they have availed ITC through Telangana registration under compelling circumstances and there is no prohibition under the Act for filing such return electronically in another State where branch of petitioner exists. More so, when the petitioner has not derived any undue benefit from the said act nor revenue suffered any loss. In these circumstances, the impugned order is bad in law. Petitioner prayed before the Court to quash the order passed by GST authorities.

Discussions by and Observations of High Court

It was an admitted fact in the show cause notice itself that the petitioner faced problem in filing return electronically because of technical glitch in the GST portal of Maharashtra. For this reason and considering the last date of filing return, the petitioner filed the return in the Telangana GST portal. It is evident from the Electronic Credit Ledger that ITC has not been utilized in Telangana State and in fact the credit was debited from ECL on the very same day and hence, they had not availed credit irregularly in the State of Telangana.

Section 140(1) of CGST Act does not arrive at a conclusion that the petitioner was obliged to file return electronically only in the GST portal of Maharashtra to claim transitional ITC.

It was the duty of the Department to keep their portal functional. If the portal was not functional or having technical glitch and because of that the petitioner was compelled to file return in the portal of Telangana, the petitioner cannot be saddled with demand, interest and penalty.

Decision of High Court

Writ petition is allowed by setting aside the impugned show cause and order-in-original.

3 *AU Finja Jewels vs. Assistant Commissioner of CGST & CX [(2024) 164 taxmann.com 278] – Bombay High Court*

Facts and issues involved

Petitioner is a jewellery processor and manufacturer of jewellery and in the course of his business, imports gold and exports gold jewellery in accordance with the Foreign Trade Policy of the Government of India. Petitioner has been regularly filing returns and claiming refund in respect of Input Tax Credit (ITC) accumulated on account of import of gold.

For the period June 2018 to September 2018, petitioner filed a refund application claiming refund of ₹ 21,00,000 of accumulated unutilized ITC under Letter of Undertaking.

In the invoice issued to the foreign customer, the FOB amount charged for jewellery was indicated in the invoice. In the same invoice, the gold imported from that foreign party on free of cost basis for making jewellery was reduced from the value of jewellery showing net amount to be realized from the foreign customer.

While filing GSTR-1, the petitioner declared the FOB value of exports in the returns and refund application was also filed considering the same turnover.

GST authorities granted a refund of ₹ 88,295 as against the refund claim of ₹ 21,00,000 considering net realizable value as the exports turnover instead of the FOB value.

GST authorities has relied upon instructions contained in Board Circular No. 37/11/2018-GST dated 15.03.2018 which directs that lower of the export invoice and value declared in the shipping bills must be considered for the purpose of determining the export turnover. Petitioner challenged the refund order before High Court.

Discussions by and Observations of High Court

As per the refund order sanctioning the refund of ₹ 88,295, the GST authorities have considered the net realized by petitioner the export turnover for the purpose of refund instead of the FOB value. There is nothing in the rules to indicate nor the rules mentioned anywhere that it is only the net realization value which has to be considered for the purpose of sanctioning refund .The rule states the value of the goods declared in the GST Invoice should be considered as export turnover for the purpose of sanctioning refund.

Decision of High Court

Writ petition is allowed by quashing the refund order and remanding the matter back with an instruction to process the refund application in accordance with law.

4 *TVL. Norton Granites & Properties (P.) Ltd. vs. Commercial Tax Officer – [(2024) 164 taxmann.com 636 (Madras)] – Madras High Court*

Facts and issues involved

Petitioner had entered into an agreement for development/sale with KG Foundation Private Limited (KG Foundation). Under the said agreement, the property was to be developed by KG Foundation. In relation thereto, KG Foundation collected GST at 18% in relation to the construction activities. On the basis that GST should have been collected at 5% and not at 18%, petitioner filed for refund of excess tax paid which was rejected by the GST Authorities.

The petitioner submitted that it paid GST at 18% to KG Foundation and, therefore, the application for refund is maintainable at the instance of the petitioner.

Respondent submitted that the registered person for the purpose of GST is KG Foundation and not the petitioner. Hence, the refund application should have been filed by the registered person and not by the petitioner.

Discussions by and Observations of High Court

GST is imposed on construction services on forward charge basis on the provider of services. In this case, services were provided by KG Foundation and not by the petitioner. Therefore, the contention of the respondent is liable to be accepted.

Decision of Madras High Court

Writ petition is not maintainable at the instance of the petitioner.

5 *Konkan LNG Ltd. vs Commissioner of State Tax [(2024) 164 taxmann.com 167] – Bombay High Court*

Facts and Issues involved

Petitioner is engaged in regassification of LNG at its regassification plant situated in Dabhol. Petitioner receives LNG, being the input for the regassification plant, by sea from various countries through LNG carriers which contain large cryogenic tanks onboard. The LNG imported is received at petitioner's captive jetty which is 300 meters long and situated at 1.8 km into the sea.

Adjacent to the jetty, there exists a breakwater which was partially constructed by Dabhol Power Company. The primary function and purpose of breakwater is to absorb or throw back as completely as possible the energy of the maximum sea waves assailing the coast. It is to ensure that the swell and wave height is kept at minimum within desired limit thereby preventing damage to the jetty and other structures on shore.

Petitioner was not allowed to berth and unload LNG during monsoon and during rough weather conditions. Therefore, petitioner decided to reconstruct the existing incomplete breakwater to ensure safety of the jetty and the LNG carriers so that LNG carriers could berth and unload LNG even during monsoon season. Petitioner issued a notice inviting tender. Larsen and Toubro Ltd. bid and was awarded the contract. Petitioner spent approximately ₹ 600 crores of which, approximately ₹ 360 crores was towards supply of material and ₹ 240 crores was towards supply of services.

Petitioner filed an advance ruling as to whether it is not entitled to avail ITC (in accordance with Section 17 of CGST Act) of GST paid to supplier of goods/services on the construction of the break water wall, which is an important and integral part of the existing jetty and very much required for the purpose of safety and longevity of the jetty. Maharashtra AAR answered in affirmative and held that ITC is not eligible for above mentioned works. Petitioner preferred an appeal to Maharashtra AAAR who confirmed the order passed by AAR.

Petitioner has preferred writ against the order of Maharashtra AAAR.

Discussions by and Observations of High Court

The reading of Section 17(5)(d) of CGST Act shows that "plant and machinery" though immovable are eligible for ITC. What is "plant and machinery" is defined in the explanation and it says the input must be used: (a) for making the "plant and machinery" which should be apparatus, equipment and machinery; (b) it is used for making outward supply of goods or services and (c) it should be neither: (i) land, building or any other civil structures; (ii) telecommunication towers and; (iii) pipelines laid outside the factory premises.

As seen from the facts presented, petitioner provides the services of regassification of LNG to Ratnagiri Gas and Power Company for which LNG is supplied to them by LNG carrier which are berthed at the captive jetty. LNG is then transferred to petitioner's unit for regassification. The breakwater has been constructed to ensure safety of the ship that are berthed at the jetty and also to allow the ship to reach the jetty and remain safe at any point of time irrespective of the severity in the weather conditions.

The dictionary meaning used by respondents for the term "plant" indicates that it would mean and include a place where the industrial activity takes place and/or factory where certain material is produced or machinery are used to carry out certain process or production. Even if we take both plant and machinery together, it should be interpreted to mean a place where certain manufacturing activities of production are carried out with the help of inputs. In the present case, the breakwater wall or accropode that are essential, certainly do not qualify as plant and machinery. The breakwater wall can hardly be called "plant or machinery". Accropode loses its identity when breakwater wall is constructed using accropode.

Explanation to Section 17 also provides that "plant and machinery" should be used for making outward supply of goods or services. In the instant case, breakwater wall is used for protecting the vessel from tides while unloading the LNG received and not for making outward supply of goods or services. Therefore, even on this count, petitioner does not satisfy the condition provided in the Explanation to Section 17 to be eligible for ITC.

Decision of High Court

Petition was dismissed.

B. RULINGS BY ADVANCE RULING AUTHORITY

1 *Fidelity Information Services India Private Limited [Advance Ruling No. KAR ADRG 31/2024] – Karnataka AAR*

Facts and issue involved

Applicant is a private limited company engaged in the business of software development and maintenance services and Information Technology enabled services.

ML-633

At the time of hiring any employee, the applicant enters into a contract with the employee by issuing a 'Letter of Appointment'. It contains all the terms and conditions relating to the employment which have been mutually agreed upon.

In addition to salary, the applicant offers the following:

a) A **retention bonus** to incentivize the employees and retain them for a longer duration.

b) A one-time **joining bonus** to encourage the employee to join the organization.

c) A one-time **Work-from-home (WFH) set-up allowance** in order to enable employees to undertake work effectively and efficiently during the Covid-19 pandemic.

d) A **Tuition Assistance Program (TAP)** that provides financial assistance to employees to pursue further education in a related field i.e., a course which is relevant to the employee's existing job role or towards the approved company assignments that he/she may be required to undertake in the future.

Applicant has sought advance ruling in respect of the following questions:

1. The Company recovers 'joining bonus' and 'retention bonus' on account of employee's inability to serve the organization (or a particular department, in case of retention bonus) for a pre-agreed period. The applicant wishes to seek clarity whether GST would be applicable on recovery of such bonus?

2. Whether GST would be applicable on recovery of work from home one-time setup allowance paid to employees in case where the employees exit before serving the pre-defined period from the payout date?

3. Whether GST would be applicable on recovery of amount paid as financial assistance to employees under Tuition Assistance Program (TAP) policy in case where the employee exit before serving the pre-agreed period in the organization?

Applicants' Submissions

Applicant submits that there is no contractual agreement between the applicant and employee for toleration of act. The applicant is merely exercising his contractual right arising out of the original 'Letter of Appointment' without carrying out any activity as a reciprocal gesture, which would have entitled the applicant to receive the said amount from the employee i.e., amount recovered from employee is not consideration for any supply provided by the applicant.

Since the fundamental premise of 'activity for consideration' itself is not satisfied, therefore recovery of bonus/allowance should not be taxable.

It can be construed that where an employee receives an amount from employer for premature termination, it is considered to be a part of employment contract. Therefore, in a reverse situation, wherein an employer is receiving compensation from employee in lieu of unserved notice period, then in such a case it should not be considered as a fresh obligation or toleration on the part of employer as the relevant clauses were already available and agreed upon at the time of signing the employment contract.

Reliance was placed on Circular No. 178/10/2022-GST dated 03.08.2022 wherein

ML-634

it is specifically clarified that the provisions for forfeiture of salary or recovery of bond amount in the event of employee leaving the employment before serving the minimum agreed period is not collected as consideration for tolerating the act of such premature quitting of employment. Rather, it is collected as penalty for the purpose of dissuading the non-serious employees from taking up employment and deter such situations.

Therefore, such amounts recovered by the employer are not taxable as consideration for the service of agreeing to tolerate an act or situation.

Discussion by and Observations of AAR

Applicant is recovering retention bonus, joining bonus, work from home allowance and expenses under TAP, only when the employee wishes to voluntarily exit the organization before serving minimum employment period. The intention of such bonus/allowance is to incentivize and motivate the employee to remain in the organization.

Thus, the recovery of bonus/allowance by the applicant is analogous to forfeiture of salary or recovery of bond amount in the event of employee leaving the employment before the minimum agreed period which is not taxable under GST.

Ruling of AAR

GST is not applicable on the recovery of retention bonus, joining bonus, work from home allowance and financial assistance given to employees under TAP in case where the employee exits before serving the pre-agreed period in the organization.

2 *Ernst & Young LLP [Advance Ruling No. KAR ADRG 30/2024] – Karnataka AAR*

Facts and issue involved

Applicant states that they are engaged in providing services in auditing, accounting and taxation. Applicant has entered into an engagement letter for rendering professional services in relation to corporate tax return filing to Bangalore Water Supply & Sewerage Board (hereinafter referred as 'BWSSB).

Applicant has sought advance ruling as to whether the professional services for assistance in filing of corporate tax returns provided to BWSSB is an exempt supply as referred to in Sr. No.3 (chapter 99) of table mentioned in Notification 12/2017 Central Tax (Rate) dated 28 June 2017?

Applicant's submissions

BWSSB is an autonomous body formed by state legislature under Bangalore Water Supply and Sewerage Board Act, 1964. BWSSB has been constituted by the Government of Karnataka to discharge the public duties on behalf of the State Government i.e., to make provision of supply of water and disposal of sewage within Bangalore Metropolitan Area and other areas. Thus, the board is an extended arm of the State Government and akin to municipality and is not into any business operations.

Applicant states that they have entered into an agreement with BWSSB for rendering services for assistance in filing corporate tax returns of BWSSB for the period 2022-23.

Applicant was of the view that assistance in filing of corporate tax return provided by the Applicant to BWSSB is exempt from GST as

ML-635

per Notification No. 12/2017-Central Tax (Rate) dated 28 June 2017.

Discussions by and Observations of AAR

BWSSB is a Board set up by The Bangalore Water Supply and Sewerage Act 1964. Hence, the same cannot be considered as State Government. Section 2(69) of CGST Act 2017 defines Local Authority as below:

"*Local authority*" *means-*

(a) a "Panchayat" as defined in clause (d) of article 243 of the Constitution.

(b) a "Municipality" as defined in clause (e) of article 243P of the Constitution.

(c) a Municipal Committee, a Zilla Parishad, a District Board, and any other authority legally entitled to, or entrusted by the Central Government or any State Government with the control or management of a municipal or local fund.

(d) a Cantonment Board as defined in section 3 of the Cantonments Act, 2006 (41 of2006);

(e) a Regional Council or a District Council constituted under the Sixth Schedule to the Constitution.

(f) a Development Board constituted under article 371 of the Constitution; or

(g) a Regional Council constituted under article 371A of the Constitution.

BWSSB is neither a Municipal Committee nor a Zilla Parishad nor a District Board since it is not vested with the control or management of a municipal or local fund. Hence, BWSSB is not Local Authority.

Applicant states that he is providing professional services in relation to corporate tax return filing to BWSSB. But these services are not provided by way of any activity in relation to any function entrusted to a Panchayat under article 243G of the Constitution or in relation to any function entrusted to a Municipality under article 243W of the Constitution.

Hence the services provided by the Applicant to BWSSB are not exempt as per entry No. 3 of Notification 12/2017 Central Tax (Rate) dated 28 June 2017.

Ruling of AAR

The professional services for assistance in filing of corporate tax returns provided by the Applicant to BWSSB is not an exempt supply as per Sr. No. 3 of Notification No. 12/2017 Central Tax (Rate) dated 28 June 2017.

■●■

"Do one thing at a Time, and while doing it put your whole Soul into it to the exclusion of all else."

— *Swami Vivekananda*

Service Tax


CA Rajiv Luthia CA Keval Shah

1 *International Horticulture Innovation and Training Centre vs. CCE, Jaipur 2024-(7)- TMI-687-CESTAT- New Delhi*

Backgrounds and facts of the case

- That the appellant was engaged in providing Scientific & Technical Consultancy, Commercial Training & Coaching and Work Contract Service along with other services as a non-profit organization, to work as an international centre of excellence in horticulture.
- They were paying service tax on Works Contract Service only, on the amount received towards the orders for execution of greenhouse projects for the Government of Rajasthan.
- That they had not paid service tax on various amounts paid to M/s PTC Netherlands for imparting training to their officers, because the same was related to horticulture and agriculture & did not fall under the purview of service tax.
- Based on the enquiry by department, a SCN was issued alleging non-payment of service tax on Commercial Training & Coaching Service and Scientific & Technical Consultancy service provided to various clients and also on import of similar services. The demand was confirmed by adjudicating authority.
- Hence the present appeal.

Arguments by Appellant Assessee

- That the demand of service tax with respect to the training imparted by the Appellant under the category of "Commercial Training or Coaching Services is not sustainable, since the 'Training services' provided by a vocational training institute were exempt till 26.2.2010. They further contended that trainings were provided to farmers, students, teachers etc. in the field of horticulture, which further helped them in seeking employment as well as towards self-employment. Thus, till 26.2.2010, the appellant was entitled for benefit under Notification No. 24/2004-ST dated 10.9.2004.
- Also, certain portion of receipts of training charges were towards the cost of study materials, on which no service tax can be levied on account of the exemption provided

ML-637

under Notification No. 12/2003-ST dated 20.6.2003 and certain amount was towards the reimbursement of expenses on which service tax is not leviable in view of decision of Intercontinental Consultants and Technocrats Pvt Ltd.

- As regards the receipt of ₹ 20,00,000/- it is submitted that the amount pertained to grants-in-aid given by National Mission for Medicinal Plants (NMMP) for development of model nursery for propagation of medicinal plants and hence no service tax is payable under Commercial Training and Coaching services in view of circular 127/9/2010-ST.
- With respect to the demand of service tax of Rs. 25,34,202/- for the execution of greenhouse projects and other projects under the category of ‘Works Contract Services' denying the benefit of Composition Scheme, the appellant submitted that non-intimation of exercising the composition scheme is merely a procedural irregularity and that substantive benefit cannot be denied. Further, a part of the consideration is towards grants-in-aid, which is not taxable under the said category.
- As regards, the demand under Mandap Keeper Services, it is submitted that the amount received by the Appellant for leasing out space for conducting various educational seminars of horticulture. Under the said category, services are taxable if the immovable property is let out for organizing any official, social or business function.
- The demand of service tax under RCM on the foreign remittances made for providing training to the trainers/managers, it is submitted that in view of rule 3 of Import of Service Rules the services of Commercial Training or Coaching Services are performance-based services i.e. the place of performance of such service is the place of provision of such service. the training services have been provided by PTC Netherlands to trainers/managers in Netherlands, i.e. a place outside India, hence same is not taxable.
- That the demand of service tax of ₹ 5,38,952/- was with respect to the activity of design of business & master plan undertaken by M/s. Stitching PTC Netherlands for the Appellant. The said activity was neither in the nature of a scientist or a technocrat or a science or technology institution or organization. M/s. Stitching PTC Netherlands is a foreign-based company, having the expertise and know-how with respect to Horticulture. Hence the same is not taxable under 'Scientific or Technical Consultancy Services'.
- That the demand of ₹ 22,24,800/- on the operational expenses of the Appellant incurred by M/s. DCM Shriram Consolidated Limited is confirmed under the category of 'Scientific or Technical Consultancy Services without identifying the activity undertaken in lieu of such amount and how the same would be classifiable under the said category. As the expenses have been incurred by M/s, DCM Shriram Consolidated Ltd. being one of the founding members, it cannot be said to be towards any service.

Decision of the Hon'ble Tribunal:=

- The issues for consideration are as follows:
- ***(i) Liability of service tax on trainings imparted by the appellant under the head Commercial training or Coaching service;***
  - o The demand of service tax towards the cost of study materials is exempted under the notification 12/2003.
  - o The amount received towards reimbursement of expenses is not liable to service tax in view of Apex court decision of Intercontinental Consultants and Technocrats Pvt Ltd.
  - o The grant-in-aid received from the National Mission for medicinal plants, i.e. the government for the scheme is not taxable in view of Supreme Court in the case of ***Commissioner vs. Apitco Ltd [2011 (23) STR J94 (SC***)], wherein the grant-in-aid received from the Government for implementation of schemes were fully utilised for the said activity and no consideration was received for any service to the government, was not taxable.
  - o As regards the training/coaching services provided by the appellant, the services were not taxable for the period i.e., 10.09.2004 to 26.2.2010. The amended definition of "vocational training institute" by Notification No. 3/2010-ST dated 27.2.2010 has only prospective effect. The appellant provided training to farmers, students, teachers in the field of horticulture would enable the trainee to upskill themselves and carry forward the objective of the institute, viz., promotion of agricultural entrepreneurship. Therefore, we are of the view that as long as there is the ability to seek employment or self-employment in terms of the explanation of the notification supra, the benefit of exemption cannot be denied the appellant is entitled to the exemption for the period prior to the amendment dated 27.02.2010. As regards the demand for the subsequent period, we hold that the same would be taxable. However, the demand would be restricted to the normal period only.
- ***(ii) Eligibility of composition scheme under Works Contract Service:***
  - o We note that the Rule 3(3) of the Composition Scheme Rules does not prescribe for any intimation for exercising such an option, and it only prescribes for exercising of the option prior to payment of Service Tax. Further, if it is to be understood that the said Rule provided for an intimation for exercise of an option, non-intimation is merely a procedural irregularity and substantive benefit cannot be denied to the appellant.
- ***(iii) Service Tax on Mandap Keeper services:***
  - o We note that the appellant has received consideration under the head 'Booking of venue', which was let out for conducting seminars or other functions by their clients. We are of the opinion that the appellant's activity of renting out the property for holding of

seminars by their clients is squarely covered by mandap keeper service. Hence, the demand is upheld for the normal period.

- ***(iv) Liability of service tax under Reverse Charge Mechanism on foreign remittances:***
  - o We observe that the training services have been provided by M/s Stitching PTC Netherlands to trainers/managers in Netherlands, i.e. a place outside India. Thus, since the place of performance of such service is outside India, the same is not taxable this issue stands covered in the decision of ***Commissioner of Central Excise and Service Tax, vs. Maersk India Pvt Ltd: [2015 (40) STR 1059 (Bom HC)]***
- ***(v) Liability of service tax on Scientific & Technical Consultancy received by the appellant***
  - o It is evident that advice/consultancy has to be rendered by a scientist or a technocrat, or any technological institution or organisation, would fall within the purview of this service. In the present case, what has been received by the appellant from M/s Stitching PTC is in respect of horticulture, which does not fall within the definition of this service. In the instant case, what has been received is design of business and master plan, which as per the decision of ***Administrative Staff College of India vs. Commissioner, C.Ex, Hyderabad,*** cannot be classified as Scientific or Technical consultancy
- As regards the invocation of extended period, we observe that no cogent evidence has been adduced for invocation of the extended period or establish suppression of facts with an intent to evade tax. Therefore, the demand for extended period, and the penalties are set aside. However, the liability to interest will be recalculated as per the demand to be recalculated by the adjudicating authority.

---

2 *GKW Ltd vs. CCE, Howrah 2024-(7)-TMI-754-CESTAT- Kolkata*

Backgrounds and facts of the case

- The appellant is engaged in the business of immovable property and during the financial year, 2015, the appellant booked 33 flats with M/s Riverbank Developers Private Limited.
- They made a part payment of ₹ 9,98,94,000/- on 30.11.2015 and service tax thereon amounting to ₹ 35,81502/- on 16.12.2015.
- The above said flats booking was cancelled during the period September, 2017 to January, 2018. the part payment of ₹ 9,98,94,000/, was returned to the appellant. The amount of ₹ 35,81,502/- as service tax was not returned to them on the ground that the same has been deposited with the Department.
- Thereafter, the appellant filed refund application within one year from the date of cancellation of booking of flats. The said refund claim was initially rejected holding that the

refund claim has been filed beyond the time limit prescribed under 11B of the Central Excise Act, 1944 and the same has been filed after one year from the payment of service tax.

- Hence the present appeal.

Arguments by Appellant Assessee

- The appellant has borne component of service tax and have not taken any cenvat credit of service tax paid by them.
- The booking of flats was cancelled 01.09.2017. and they have filed refund claim on 25.06.2018, which is within one year from the date of cancellation of flats. The appellant has furnished the Chartered Accountant's Certificate certifying the above said facts.

Decision of the Hon'ble Tribunal

- The builder has returned the amount of advance payment made and did not refund the payment of service tax to the appellant as the builders have no provisions to claim refund of service tax paid by them during the impugned period as the service tax was changed to GST Regime, therefore, the appellant has borne the component of service tax paid thereof. In those circumstances, the appellant has borne the component of service tax and is entitled to claim the refund thereof.
- The cause of action arose in this case at the time of cancellation of flats. Therefore, the time limit under Section 11B shall start from the date of cancellation of flats and admittedly the appellant has filed the refund claim within one year thereof. In those circumstances, the refund claim is not barred by limitation.
- The Tribunal in the case of ***M/s Grey Orange India Private Limited 2021 (12) TMI 1232-CESTAT,*** Chandigarh in similar case, allowed to claim the refund to the effect that they have not taken the cenvat credit and have borne the component of service tax paid by them.

---

3 *Chevron Philips Chemicals India Pvt Ltd vs. CCE, Trichy 2024-7-TMI- 618-CESTAT- MUMBAI*

Backgrounds and facts of the case

- The appellants were providing sale-promotion and sale-support service to its associated company namely M/s. Chevron Phillips Chemicals Global FZE ("CPC Global") established in Dubai. It was receiving consideration in the form of commission which was calculated on certain percentage of sales taking place in India (as per para 5 of terms of agreement between Appellant and CPC Global).
- Holding the same to be "intermediary" services as provided under Rule, 2(f) of the POPS Rules, 2012 read with Rule, 9A periodic denial of refund were made by the Respondent-Department since July 2012.
- Hence the present appeal for the period October, 2015 to June, 2017.

Arguments by Appellant Assessee

- That Clause 10.1 of the agreement clearly states that it is an agreement with independent contractor and

ML-641

service provided by the Appellant to CPC Global was on principal-to-principal basis, that excludes the Appellant clearly from the purview of being called as 'intermediary.

- That though pre-agreed percentage of actual value of goods sold was paid to the Appellant in foreign exchange, the said mechanism cannot be considered as criteria for determining principal-agency relationship.
- That issue is no more res integra in view of final order passed in Appellant's own case for two other periods by this Tribunal.

Decision of the Hon'ble Tribunal

- The order passed in earlier matter for the period from July, 2012 to September, 2015 was disposed of after bifurcating it into two periods up to 01.10.2014 and after 01.10.2014, from which day definition of "intermediary" had undergone change with inclusion of 'supply of goods' in the said Rule, 2(f) of the POPS Rules, 2012. For the period prior 01.10.2014, reliance was placed by this Tribunal on its previous order passed in the case of ***Lubrizol Advanced Materials India Pvt. Ltd in 2019 (22) GSTL 355 (Tribunal)*** & and ***R.S. Granite Machine Tools Pvt. Ltd. 2019 (1) TMI 1179-CESTAT Chennai.***
- However, we are constrained to note that in Lubrizol Advanced Materials India Pvt. Ltd. the consideration paid was calculated on the basis of 'cost plus mark-up' price and in R.S. Granite Machine Tools Pvt. Ltd. the nature of service was stated to be that of obtaining/procuring orders for its foreign principle which were unconnected to supply/sale of goods.
- In the instant case, agent (appellant) is paid a commission on all sale of products by the selling companies for providing services (promotional and other sale services as noted in para 3) by the principle namely CPC Global. But, the Tribunal passed their orders for earlier matter with reference to those two paragraphs noted in Lubrizol Advanced Materials India Pvt. Ltd. and R.S. Granite Machine Tools Pvt. Ltd. respectively by holding that consideration received by the Appellant from M/s CPC Global as a service provider was not directly linked with the sale of products by the selling company in India.
- Except for the fact on record as the agreement explicitly puts the Appellant in the nature of 'independent contractor agent' and not a salary paid agent of CPC Global, we would have disagreed with the decisions of Co-ordinate Bench of this Tribunal and referred the matter to the Larger Bench. Also, because the Hon'ble Supreme Court denied the admission of the appeal by the respondent against the order of this tribunal for one of the earlier periods.
- Basis the above discussion, the Hon'ble Tribunal allowed the appeal of the assessee.

4 ***L Subramaniam vs. The Assistant Commissioner of GST And Central Excise Writ Petition - 2024-TIOL-1104-HC-MAD-ST***

Backgrounds and facts of the case

- The petitioner in this case has challenged an Order wherein the department has wrongly invoked the larger period of limitation under Proviso to Section 73 of the Finance Act, 1994 and confirmed the demand.

- The impugned order was passed on the assumption that the petitioner has suppressed the material fact by comparing the gross receipts declared in the income tax returns filed under Section 139 of the Income Tax Act and ST-3 returns filed under the provisions of the Finance Act, 1994 read with Services Tax Rules, 1994. The petitioner has rendered services to several individuals and that the services provided to the individuals were exempted in terms of Serial No. 14 of Mega Exemption Notification No. 25/2012-ST, dated 20.06.2012.

- The respondent has disbelieved the oral contract between the petitioner and the petitioner's small clients for whom the petitioner has built single unit house and has produced declarations from the respective clients, which has however, been disbelieved by the respondent.

Arguments by Respondent

- There are several disputed questions of facts and therefore, this Writ Petition is liable to be dismissed. It is further submitted that the petitioner has an alternate remedy under Section 85 of the Finance Act, 1994 before the Appellate Commissioner and therefore, the petitioner should be directed to work out the remedy before the Appellate Commissioner.

Decision of the Hon'ble HC

- Even if the petitioner may have a case on merits, it is best left to be decided by the Appellate Authority under the hierarchy prescribed under the Finance Act, 1994. The submissions made by the petitioner also indicate that there could be finer aspects of law, which may have to be settled in a case like the petitioner and therefore, it is best left to be decided by the authorities including the High Court in exercise of its appellate jurisdiction against the orders of the Tribunal, in case, the petitioner fails before the respondent as also before the Appellate Commissioner as also before the CESTAT.

- In view of the above, this Writ Petition is disposed of by giving liberty to the petitioner to file a statutory appeal before the Appellate Commissioner within a period of 30 days from the date of receipt of a copy of this order. All the issues are left open including the issue relating to limitation.

---

5 ***Shri Sujit Gogoi vs. Commissioner of CGST and Excise, Guwahati 2024-TIOL-614-CESTAT-KOL***

Backgrounds and facts of the case

- The appellant is engaged in providing contract service directly or sub-contract works like construction of roads and other civil contracts under Oil India Limited. They were registered with the Service Tax Department and they were paying service tax.

- An audit was conducted for the period April, 2011 to March, 2016 and the report thereof was submitted on 05.10.2016 where the appellant was directed to make the payment of ₹ 2,77,928/-, which the appellant

ML-643

has also been paid. Thereafter, the appellant was issued a notice on 06.03.2022 for submitting ST-3 Returns for the Financial Year 2014-15 to 2017-2018, copy of contract agreements, invoices and other documents. But the appellant did not submit the documents. Therefore, it was concluded that the appellant has collected service tax and not paying service tax to the Department on the basis of Form 26AS collected from the Income Tax Department and a show-cause notice was issued by invoking extended period of limitation.

- The demand of service tax was confirmed. The order was challenged by the Ld. Commissioner (Appeals), who observed that the appellant has filed the documents, but he confirmed the demand against the appellant, hence the appeal is before the Hon'ble Tribunal.

Arguments by Appellants

- The ld. Counsel for the appellant submits that it is a fact that the audit was conducted for the period April, 2011 to March, 2016 and as per the audit report, a demand of ₹ 2,77,928/- was payable by the appellant, which has been paid by the appellant vide challan dated 01.08.2016. It is his submission that whole of the demand has been raised on the basis of Form 26AS obtained from the Income Tax Department, which is not sustainable. As the appellant is engaged in the construction of roads, which is covered under Negative List and no service tax is payable by the appellant. Therefore, the demand against the appellant is not sustainable.

Arguments by Respondent – Department

- The Revenue, submits that the appellant did not submit the documents as demanded before issuance of show-cause notice. Therefore, the demand has rightly been confirmed against the appellant.

Decision of the Hon'ble Tribunal

- As per the Audit report, the appellant has paid the service tax as demanded for the period of Audit i.e. upto March 2016. In those circumstances, the demand for the period up to March, 2016, is not sustainable against the appellant.

- Further, as per the impugned order, the demand has been raised up to June, 2017, which is not included in the year 2016-2017. The said demand has been raised on the basis of Form 26AS. In this regard, the tribunal referred to the Work Orders submitted by the appellant.

- As per the said Works Order, it is clear that the appellant was engaged in the activity of construction of road, which is exempted from payment of service tax. In those circumstances, the demand of service tax is not sustainable against the appellant. As the demand is not sustainable, consequently, penalty is also not imposable on the appellant.

■●■

CORPORATE LAWS
Case Law Update

CS Makarand Joshi

IBC – Case 1

In the matter of Global Credit Capital Limited & Anr - Appellant vs SACH Marketing Private Limited & Anr – Respondent in the order passed by the Hon'ble Supreme Court dated 25th April 2024

Facts of the Case

- SACH Marketing Private Limited (**SMPL/first respondent)** entered into agreements with Mount Shivalik Industries Limited (**MSIL/Corporate Debtor/CD**), on 1 April, 2014, and 1 April, 2015 (**Agreements**), whereby the first respondent (SMPL) was appointed as Sales Promotor for promoting the beer manufactured by CD over twelve months, for which ₹ 4,000 (Rupees four thousand) per month was agreed to be paid to the first respondent.

- The terms of the Agreement dated 1 April, 2014, were nearly identical to those of the Agreement dated 1 April, 2015, except for an additional requirement of a Security Deposit under the latter agreement.

- Under the Agreements, it was agreed that first respondent would deposit a minimum security of Rupees Fifty-Three Lakhs Fifteen Thousand (₹ 53,15,000/-) (**Security Deposit**) with the CD which would carry interest @ 21% per annum for which CD would pay interest on Rupees Seven Lakhs Eighty-Five Thousand Eight Hundred And Fifty (₹ 7,85,850/-) at the same rate.

- In an independent proceeding, CD was admitted into the Corporate Insolvency Resolution Process (**CIRP**) by an order of the National Company Law Tribunal, Jaipur (**NCLT**) under the Insolvency Bankruptcy Code, 2016 (IBC).

- Consequently, the NCLT imposed a moratorium and appointed an Interim Resolution Professional (**IRP/RP**).

- In the CIRP of CD, first respondent filed a claim for Rupees One Lakh Fifty-Eight Thousand Three Hundred and Forty-One (₹ 1,58,341/-) as operational debt (arising out of its monthly remuneration as a sales promoter) and Rupees One Crore Forty-One Lakhs Thirty-Nine Thousand Four Hundred and Ten (₹ 1,41,39,410) as financial debt (arising out of the interest from the security deposit).

- The RP reclassified the claim for financial debt as operational debt, stating that the first respondent/SMPL could not be considered a financial creditor.

ML-645

- Challenging the said classification, the first respondent filed an application before the NCLT.
- During the pendency of the application, the committee of creditors (**CoC**) of CD approved a resolution plan submitted by a bidder. Thereafter, the RP filed an application seeking approval of the resolution plan before the NCLT.
- The NCLT rejected the application filed by the first respondent and allowed the application seeking approval of the resolution plan. The first respondent filed an appeal before the National Company Law Appellate Tribunal (**NCLAT**) against the rejection. By judgment and order dated 7 October, 2021 (**Impugned Order**), NCLAT held that the first respondent/SMPL was a financial creditor and not an operational creditor.
- Aggrieved by the Impugned Order, Global Credit Capital Limited and other members of the CoC (**Appellants**) preferred an appeal before the Supreme Court on the following grounds:
  - — First Respondent's role was to provide services promoting CD's beer manufacturing. Therefore, the Security Deposit paid to CD constituted operational debt and not funds extended to CD for financial purposes.
  - — CD had no intention of availing any financial facility. The mere payment or accrual of interest should not determine the classification of the debt as financial debt.
- First respondent contested the appeal on the following grounds:
  - — The essence of the transaction needed to be scrutinized to determine the nature of the debt.
  - — The criteria for defining financial debt—such as disbursement, time value of money, and the commercial impact of borrowing under the IBC were all met.
  - — The money was repayable under the Agreements without any deductions or provisions for forfeiture, and the interest rate of 21% per annum was the consideration for the time value of the money.

Arguments of the Appellant

- The reason is that the agreements indicate that the CD was appointed by the first respondent to render services to promote the beer manufactured by the CD. He relied upon the definition of operational debt under sub-section (21) of Section 5 of the IBC. Both the agreements provided for paying a minimum-security deposit by the first respondent as a condition for being appointed as Sales Promoter of the CD.
- There was no intention on the part of the CD to avail any financial facility from the first respondent. The amount paid towards the security deposit was not the money disbursed to the CD towards financial facilities availed by the CD.
- The security deposit paid by the first respondent would not qualify as a

financial debt defined under sub-section (8) of Section 5 of the IBC.

- That the payment of the security deposit by the first respondent is a condition precedent for being appointed as a Sales Promoter of the CD. The intent of the agreements is to appoint the first respondent as the Sales Promoter and not to avail any financial facilities from the first respondent. The amount paid by the first respondent does not constitute financial facilities extended to the CD. There was no intention to raise finance from the first respondent, who was appointed as a Sales Promoter.

- Also relied upon the decisions of in the *cases of* ***Anuj Jain, Interim Resolution Professional for Jaypee Infratech Limited vs. Axis Bank Limited & Ors., Phoenix ARC Private Limited vs. Spade Financial Services Limited & Ors. and New Okhla Industrial Development Authority vs. Anand Sonbhadra*** *wherein it was held that* booking or payment of interest was not the only criterion for ascertaining whether the debt is a financial debt.

- In the case of an invoice involving any transaction, the delay in payment attracts interest liability. Therefore, the payment of interest is not the sole criterion for ascertaining whether a debt is a financial debt.

Arguments of the Respondents

- The true nature of the agreements will have to be examined for deciding the nature of the debt. The CD's acknowledgment of the liability of payment of interest on a security deposit for the Financial Years 2014-2015, 2015-2016, 2016-2017 and 2017-2018. The CD deducted TDS on the interest payable to the first respondent for three financial years

- The three criteria, namely, disbursal, time value of money and commercial effect of borrowing, were satisfied in the case of the present transaction.

- Relied upon the decision of the Tribunal in the case of Anuj Jain, Interim Resolution Professional for Jaypee Infratech Limited. It was submitted that it was very clear from the terms of the agreement that the money was repayable after a fixed tenure without a deduction or provision for forfeiture. An interest @21% per annum was the consideration for the time value of money.

- NCLAT was right in going into the issue of the true nature and effect of the transaction reflected in the agreements. Relying upon the decision in the case of Pioneer Urban that clause (f) of sub-section (8) of Section 5 of the IBC is a "catch all" and "residuary" provision which includes any transaction having the commercial effect of borrowing and any transaction which is used as a tool for raising finance.

- That the agreements entered into were the tools for raising finance, and no actual services were ever been rendered to the first respondent or other lenders. The true effect of the transaction has to be taken into consideration. It was pointed out that the CD established a practice of raising finance through private entities in the garb of security deposit under various services agreements. Therefore, it was submitted that there was no fault in the impugned judgment.

ML-647

Arguments of the second respondent/RP

- Resolution Professional supported the appellants by contending that the money advanced by the first respondent cannot be categorised as a financial debt. Therefore, the first respondent was an operational creditor.

- Relied upon the definition of operational debt under sub-section (21) of Section 5 of the IBC. That the security deposit was not meant to reorganize the CDs debts.

- The agreements are service agreements by which the CD agreed to take services from the first respondent for consideration. Therefore, the security deposit was obviously to ensure the performance of the terms of the agreements by the first respondent.

- It was submitted that accounting treatment cannot override the law and the definition of operational debt under the IBC.

- None of the ingredients of clauses (a) to (f) of sub-section (8) of Section 5 of IBC are present in the case at hand. In this case, there is no disbursal of debt. That there was no financial contract between the CD and the first respondent. Lastly, it was submitted that in view of the judgment date 29 September 2018 of the NCLAT on an application filed by ***M/s. New View Consultants Private Limited, the second respondent categorised Global Credit Capital Limited & Anr. vs. Sach Marketing Pvt. Ltd. & Anr*** the first respondent as operational creditor and submitted that the view taken by the NCLAT was not correct.

Held

- The Supreme Court interpreted the words of 'debt', 'claim' and 'financial debt' as defined under the Code and held as follows:

  — Both financial debt and operational debt must stem from a liability or obligation associated with a claim.

  — Cases falling within the categories outlined in the definition of financial debt must meet the criteria specified earlier in Section 5(8) of IBC, namely, there must be a debt with any applicable interest disbursed as consideration for the time value of money.

  — In situations where one party owes a debt to another party under a written agreement or arrangement involving the provision of 'service', the debt qualifies as an operational debt only if the claim (which is the subject matter of the debt) is connected with or correlated to the service (that is the subject matter of the transaction).

  — The wording of the written document cannot be taken at face value. Thus, it is essential to discern the true nature of the transaction by examining the agreements.

- Applying the above principles, the Supreme Court held the following as regards the clauses in the Agreement:

  — A nominal amount of rupees four thousand per month (₹ 4000/-) was paid to the first respondent for its role as a sales promoter, and this sum was the only correlation for the services provided.

— The first respondent was not entitled to any commission based on sales volume.

— There was no provision for the forfeiture of the Security Deposit.

— The payment of the Security Deposit was unrelated to the performance of other conditions by the first respondent.

— Funds were arranged to be transferred to the first respondent, resembling a form of commercial borrowing, given the treatment of interest on the Security Deposit as long-term loans/liabilities and interest revenues in the financial statements of CD and the first respondent.

- Consequently, the Supreme Court determined that the Security Deposit specified in the Agreements constitutes a financial debt owed to CD, classifying the first respondent as a financial creditor under the provisions of the IBC.

SEBI – Case 1

Securities and Exchange Board of India's adjudication order in the matter of Norben Tea and Export Ltd

Facts of The Order

1. The Securities Exchange Board of India ('SEBI') conducted an investigation in the matter of Norben Tea & Export Ltd ('Company/Noticee'), a public company listed National Stock Exchange of India Ltd ('NSE') as well as the Bombay Stock Exchange Ltd ('BSE').

2. The investigation was conducted to ascertain whether there was any violation of SEBI Circular CIR/CFD/CMD1/114/2019 dated October 18, 2019, read with Regulation 4(1) (g) of SEBI (LODR) Regulations, 2015.

3. During the investigation, it was observed that the Noticee had alleged non-compliance with the SEBI Circular dated October 18, 2019, pertaining to 'Resignation of statutory auditors from listed entities and their material subsidiaries'.

4. Noticee's statutory auditor M/s L.K. Bohania and Co. issued the limited review of the quarter June 2023 and resigned on September 25, 2023, which was after 45 days of the end of the financial quarter. The board of directors of the Company appointed M/s P D Rungta, Chartered Accountants as statutory auditors to fill a casual vacancy arising due to the resignation of M/s L.K. Bohania & Co. M/s P D Rungta & Co. issued the limited review for the quarter September 2023. As per SEBI Circular October 18, 2019, Para 6(A) (ii), "*if the auditor resigns after 45 days from the end of a quarter of a financial year, then the auditor shall, before such resignation, issue the limited review/audit report for such quarter as well as the next quarter.*

5. SEBI alleged that M/s L.K. Bohania & Co. should have given a limited review report for the quarter ended September 2023 also.

Charges Levied

SEBI alleged that as M/s. L. K. Bohenia and Co did not issue the limited review for the

ML-649

financial quarter of September 2023 hence the Noticee is in violation of SEBI Circular CIR/CFD/CMD1/114/2019 dated October 18, 2019, read with Regulation 4(1)(g) of SEBI (LODR) Regulations, 2015.

Contentions by the Noticee

1. The Noticee contended that they have taken due cognizance and ensured compliance with Para 6(A) of the SEBI circular dated October 18, 2019, in the appointment of a new auditor. M/s. L. K. Bohania and Co has resigned before the end of the September 30, 2023, quarter. Hence, they were only required to issue a limited review report for the quarter ended June 30, 2023. As they had already issued the limited review for the quarter ended June 30, 2023, hence they are not required to issue a limited review report for the quarter ended September 30, 2023.

2. The resignation of M/s. L. K. Bohania and Co was before the commencement of the limited review procedure for the quarter ended September 30, 2023, and the same was completed by the newly appointed auditors i.e. P D Rungta & Co who had issued an unmodified opinion on the quarterly financials.

3. The Noticee further submitted that incorporating Para 6(A) and 6(B) as a specific provision in the engagement letter for appointment/re-appointment of the auditor is not mentioned in SEBI circular dt: October 18, 2019.

Submissions by the SEBI Adjudication Officer ('SEBI AO')

1. SEBI AO observed that as resignation of the statutory auditors was w.e.f. September 25, 2023, the relevant quarter to examine the applicability of the SEBI circular October 18, 2019, in this matter is June 2023 and not September 30, 2023. Hence the requirement of Para 6(A)(ii) of the SEBI Circular CIR/CFD/CMD1/114/2019 dt: October 18, 2019, M/s L.K. Bohenia & Co. should have given a limited review report for the quarter ended September 30, 2023, also.

2. SEBI AO further observed that from the appointment obtained from the Company vide with respect to M/s L.K. Bohenia & Co and M/s P D Rungta & Co that clauses/conditions of the SEBI circular have not been incorporated by the company in the terms of appointment of their statutory auditor. Based on these findings the SEBI AO concluded that the allegations against Noticee of the violation of provision of SEBI Circular CIR/CFD/CMD1/114/2019 dated October 18, 2019, read with Regulation 4(1)(g) of SEBI (LODR) Regulations, 2015 stand established.

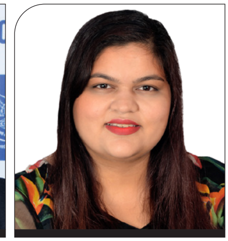
Penalty

Penalty was imposed on Noticee under Section 15 HB of SEBI Act, 1992 of ₹ 1,00,000/- (Rupees One lakh Only).

■●■

OTHER LAWS

FEMA – Updates and Analysis



CA Hardik Mehta   CA Tanvi Vora

In this article, we have discussed recent amendments made in FEMA through Notifications, Circulars, Master Directions, Press Notes & Press Releases.

A. Update through A.P. (DIR Series) Circulars

1. Online submission of Form A2: Removal of limits on amount of remittance

Until now, RBI permitted AD Cat-I banks and AD Cat-II entities to allow their customers to submit Form A2 (along with requisite documents) through *online mode*, subject to following conditions and limit:

(a) They offer internet banking facilities to their customers; and

(b) Transactions limit of USD 25,000 (or its equivalent) for individuals and USD 100,000 (or its equivalent) for corporates applicable

To improve ease of doing business, all AD Cat-I banks and AD Cat-II entities are now permitted to facilitate remittances based on online/physical submission of Form A2 and other related documents irrespective of any limit on the amount being remitted on the basis of 'online' Form A2.

The following aspects shall continue to apply:

(a) Compliance with the relevant provisions of FEMA 1999 and 'Master Direction – Know Your Customer (KYC) Direction, 2016' as updated from time to time, for all transactions (for AD Cat-I banks and AD Cat-II); and

(b) Report transactions in FETERS by AD Banks

A.P. (DIR Series) Circular No. 12 dated July 3, 2024

(Comments: Online submission for Form A2 was permitted only for transactions upto USD 25,000 (in case of individuals) USD 100,000 for corporates applicable. With this amendment RBI seeks to provide ease in filing Form A2 for even high value transactions. Accordingly, online filing of Form A2 can now be done without any limitation on the transaction amount as long as the transaction is complaint with FEMA, 1999)

2. Release of foreign exchange for Miscellaneous Remittances

Authorised Dealers were permitted to release foreign exchange for *any current account* transaction, based on a simple letter containing basic information, subject to an upper limit of USD 25,000 or its equivalent. ADs were not required to obtain any other documents (including Form A2) in connection with these remittances. Payment by applicant is to be made through demand draft or a cheque drawn on his/her bank account.

The above-mentioned circulars have now been withdrawn with a view to streamlining the regulatory compliances and operational procedures. Authorised Dealers will now obtain Form A2 in physical or digital form for all cross-border remittances irrespective of the value of transaction.

A.P. (DIR Series) Circular No. 13 dated July 3, 2024

(Comments: With the amendment withdrawing the benefit of permissibility foreign remittance for low value transactions i.e. upto USD 25,000, without documentation in the case of current account transactions, ADs are now required to collect Form A2 for each and every cross-border remittance irrespective of the transaction amount.

This requirement for documentation for all cross-border transactions is aimed at ensuring thorough vetting and transparency. This may increase the compliance burden of ADs as well as businesses, however the liberalization in terms of online filing of Form A2 should bring some relief.)

3. Remittances to International Financial Services Centres (IFSCs) under the Liberalised Remittance Scheme (LRS)

At present, the RBI has permitted remittances to IFSC under LRS i.e. applicable to resident individuals for only two purposes i.e. (i) Making investments in IFSCs in securities except those issued by entities/companies resident in India (outside IFSC); and (ii) Payment of fees for education to foreign universities or foreign institutions in IFSCs for pursuing courses mentioned in the gazette notification no. SO 2374(E) dated May 23, 2022, issued by the Central Government. Residents were also permitted to open Foreign Currency Accounts (FCAs) in IFSC for these purposes.

The RBI has now broadened the scope of permitted remittances and opening of FCAs in IFSC for all permissible purposes under LRS to IFSCs for:

- Availing financial services or financial products as per the International Financial Services Centres Authority Act, 2019 within IFSCs; and
- All current or capital account transactions, in any other foreign jurisdiction (other than IFSCs) through an FCA held in IFSCs.

A.P. (DIR Series) Circular No. 15 dated July 10, 2024

(Comments: The latest amendment by RBI will allow resident Indians to use the benefit of IFSC manage their foreign exchange transactions and facilitate seamless remittances. It will provide greater flexibility for Indian residents to open a

fixed deposit in foreign currency like dollars in a bank account in GIFT City, enable transactions like insurance and education loan payments in foreign currency and all other transactions permitted under LRS. Currently, under LRS a resident individual is permitted capital account transactions such as opening of foreign currency account abroad with a bank, acquisition of immovable property abroad, extending loans including loans in Indian Rupees to Non-resident Indians (NRIs) who are relatives etc while permitted current account transactions include private visit, gift, donation, going abroad on employment, emigration, maintenance of relatives abroad, business trip, medical treatment abroad, studies abroad, etc.

In the past, in case of remittance to FCA in IFSC were idle for more than 15 days from the date of its receipt, they were required to be repatriated. In April 2023, this condition was withdrawn and since then was governed by the provisions of the scheme as contained in the aforesaid Master Direction on LRS i.e. the 180 days idle funds condition. Therefore, as it stands today, in our view, the abovementioned liberalization would also be subject to the 180 days idle funds condition which means that funds repatriated into the FCA in IFSC would need to be used/utilized or (re)invested within 180 days. Clarification from RBI would be welcome in this regard.)

B. Issue of Master Direction

1. Master Direction – Overseas Investment

Guidance regarding overseas investment by Indian resident individuals' and listed Indian entities was compiled under the Foreign Exchange Management (Overseas Investment) Directions, 2022 ('OI Directions') by way of Circular No.12 dated August 22, 2022.

The RBI has now removed the OI Directions from its website and issue Master Direction - Overseas Investment (FED Master Direction No.15/2024-25) dated 24th July 2024.

FED Master Direction No. 15/2024-25 dated July 24, 2024

(Comments: RBI had issued FEM (OI) Directions, 2022 on 22nd August 2022 which was not exactly in line with the 'procedure' followed for other rules and regulations. On going through the Master Direction on Overseas Investment, it can be seen that it is the same as compared to the OI Directions 2022 which have now been removed from RBI website. The legality of the OI Directions or the Master Directions on Overseas Investment is not in question since both were issued under Section 10(4) and 11(1) of the Foreign Exchange Management Act, 1999. These Master Directions have been updated with the 2 circulars issued in 2022 and 2023 and shall be regularly updated with any amendments in the future.)

■●■

ML-653

Best of The Rest

Rahul Hakani
Advocate

Niyati Mankad
Advocate

VIDYA AND OTHERS VERSUS M/S PARSVNATH DEVELOPERS LTD. – JUDGMENT DT. 29/07/2024 PASSED IN CIVIL APPEAL NO. 8985 OF 2022 [SUPREME COURT]

Consumer Protection Act - Undisputedly, the facts of the case show that the project was delayed inordinately - The complainants-appellants were made to suffer for long, for no fault of them - In spite of making the entire payment, they were deprived of the possession within the stipulated time – awarded refund of entire amount paid along with interest @12% as provided in the Agreement.

Facts

M/s Parsvnath Developers Limited (Developer) launched a group housing project titled 'Parsvnath Paramount' in New Delhi in 2008. The complainants-appellants booked a 3BHK flat in the project, depositing ₹ 16,03,066/- on 15/07/2008 and an identical sum on 14/08/2008. A Flat Buyer Agreement was signed on 10/10/2008, with the total price of the flat set at ₹ 1,28,24,525/- and an additional ₹ 3,00,000/- for parking. The agreement specified that construction would be completed within 30 months plus a 6-month grace period from the commencement of construction. The complainants-appellants paid about 95% of the total sale price. The Developer unilaterally transferred the allotted flat to another unit in April 2011. Despite payments, the Developer failed to hand over possession within the stipulated time, prompting the complainants-appellants to file a complaint with the National Consumer Disputes Redressal Commission ("Commission"). The Commission partly allowed the complaint, directing the Developer to refund the entire deposited amount with 9% interest per annum. The Developer contended that since there was a delay in sanctioning layout plans, it was covered under force majeure clause.

Issues Involved

Whether the Developer was liable to refund the entire amount with interest due to the delay in possession?

The appropriate rate of interest to be awarded for the delay?

Held

The Supreme Court held that the Developer's failure to hand over possession within the agreed timeframe constituted a breach of contract. The court found no merit in the Developer's claim of force majeure due to delayed plan sanctioning. In this regard,

ML-654

the court relied upon its earlier decision in the case of DLF Home Developers Limited (earlier known as ***DLF Universal Limited) and Another vs. Capital Greens Flat Buyers Association and Others [(2021) 5 SCC 537]***. Given the inordinate delay and the complainants-appellants' prolonged suffering, the court deemed it just to award interest at 12% per annum, as specified in the agreement for delay by the Developer, rather than 9% awarded by the Commission. The Court upheld the Commission's order directing the Developer to refund the entire amount.

GAURAV KUMAR VS. UNION OF INDIA & ORS. – JUDGMENT DT. 30/07/2024 PASSED IN WRIT PETION (CIVIL) NO. 352 OF 2023 [SUPREME COURT OF INDIA]

Section 24(1)(f) of the Advocates Act, 1961 - enrollment fees - only charges permissible at the stage of enrolment are those stipulated under Section 24(1)(f) of the Advocates Act - All other miscellaneous fees, including but not limited to, application form fees, processing fees, postal charges, police verification charges, ID card charges, administrative fees, photograph fees etc. charged from the candidates at the time of admission are to be construed as part of the enrollment fee - The fees charged under these or any similar heads cannot cumulatively exceed the enrolment fee prescribed in Section 24(1)(f).

Facts

The present case pertains to proceedings under Article 32 of the Constitution challenging the validity of enrolment fees charged by State Bar Councils (SBCs), on the ground that these fees exceed the amount prescribed under Section 24(1)(f) of the Advocates Act, 1961. The Advocates Act aims to regulate legal practitioners and establish a unified Bar across India, with SBCs and the Bar Council of India (BCI) responsible for various regulatory functions, including enrolment, conduct, and legal education. Section 24 of the Act specifies the qualifications and fees for enrolment as an advocate, with standard fees set at ₹ 600 for the SBC and ₹ 100 for the BCI. However, SBCs additionally charge various other fees, leading to significant variations in total enrolment costs, ranging from ₹ 15,000/- to ₹ 42,000/-. The Petitioner argued that these additional fees contravene the Advocates Act, prompting the Court to issue a notice and consolidate similar petitions from several High Courts for review.

Issues involved

The Petitions give rise to the following issues:

a. Whether the enrolment fees charged by the SBCs are in contravention of Section 24(1)(f) of the Advocates Act, 1961; and

b. Whether payment of other miscellaneous fees can be made a pre-condition for enrolment.

Held

The Court observed that Section 24(1) of the Advocates Act lays down the conditions subject to which an advocate may be admitted on a State roll. Section 24(1)(f) provides that the enrolment fee is paid by the advocate “in respect of the enrolment.” The use of the phrase “in respect of the enrolment” conveys that the fee is paid for the entire enrolment process. Under the Advocates Act, the process of enrolment commences when an applicant makes an application to the SBC within whose jurisdiction the applicant proposes to practice. Thereafter, the enrolment committee of the SBC scrutinizes the application on the basis of the eligibility qualifications laid down

ML-655

under Section 24(1). The name of an applicant who is found eligible is entered on the roll of advocates and a certificate of enrolment is issued to the applicant by the SBC. The enrolment fee prescribed under Section 24(1)(f) comprehends the whole enrolment process. After considering various submissions, relevant provisions, case laws, the court concluded that:

“a. The SBCs cannot charge “enrolment fees” beyond the express legal stipulation under Section 24(1)(f) as it currently stands;

b. Section 24(1)(f) specifically lays down the fiscal pre-conditions subject to which an advocate can be enrolled on State rolls. The SBCs and the BCI cannot demand payment of fees other than the stipulated enrolment fee and stamp duty, if any, as a pre-condition to enrolment;

c. The decision of the SBCs to charge fees and charges at the time of enrolment in excess of the legal stipulation under Section 24(1)(f) violates Article 14 and Article 19(1)(g) of the Constitution; and

d. This decision will have prospective effect. The SBCs are not required to refund the excess enrolment fees collected before the date of this judgment.”

Accordingly, the writ petition, transferred cases and transferred Petitions were disposed off.

MADHUMALTI DAFRE VS. STATE OF MAHARASHTRA THROUGH MINISTRY OF CO-OP. DEPT. & ORS. – ORDER DT. 01/08/2024 PASSED IN WP/58/2024 [BOMBAY HIGH COURT]

Section 81(3)(c) of the Maharashtra Co-operative Societies Act, 1960 (“MCS Act”) – order directing test audit report is an administrative action and not quasi-judicial order – revision against the same u/s 154 of the MCS Act not maintainable.

Facts

The Petitioner challenged the order dated 05.07.2023 passed by the Hon’ble Minister for Co-operation under Section 154 of the MCS Act which set aside the test audit report dated 06.03.2023 submitted by the Respondent No.3 (i.e. the Test Auditor & Special Auditor). The Respondent No.3 was appointed as an auditor to conduct the audit of the society by the Respondent No.2 (i.e. the Joint Registrar, Co-operative Societies (CIDCO) under Section 81(3)(c) of the MCS Act. The Petitioner argued that the revision application against the order exercising powers under Section 81(3)(c) of the MCS Act is not maintainable.

Issue Involved

Whether a Revision Application under Section 154 of the MCS Act is maintainable against an order appointing an auditor and the subsequent test audit report?

Held

The Court held that the appointment of an auditor under Section 81(3)(c) of the MCS Act is an administrative action, not a quasi-judicial order, and thus, cannot be challenged under Section 154 of the MCS Act. While doing so, the court placed reliance on its earlier order

ML-656

dated 10/05/2024 passed in WP/3500/2024 in the case of ***Dattatraya Mahadev Ugale and Ors. vs. The State of Maharashtra***. The court further observed that the test audit report submitted by the auditor can only be rectified under Section 82 of the MCS Act, and allowing a revision under Section 154 would render Section 82 redundant. Consequently, the order dated 05.07.2023, which allowed the revision and set aside the test audit report, was quashed and set aside. The revision was dismissed, and the petition was allowed.

SHANKAR VITHOBA DESAI & ORS. VS. GAURI ASSOCIATES & ANR. ORDER DT 16/07/2024 PASSED IN COMM. ARBITRATION APPLICATION (L.) NO. 21070 OF 2023 [BOMBAY HIGH COURT]

Section 11 of the Arbitration and Conciliation Act, 1996 ("the Act") - individual members or groups of members cannot invoke arbitration or seek the Court's jurisdiction under Section 11 of the Act, as they are not parties to the arbitration agreement – individual members are not signatories to the arbitration agreement - the fundamental requirement under Section 7 of the Arbitration Act, that the arbitration agreement has to be in writing among the parties to the arbitration proceedings has also not been met.

Facts:

Eleven members of a cooperative housing society filed an application to invoke Section 11 of the Act, 1996, concerning disputes under a re-development agreement. The Development Agreement dated 29/06/2018 was between Dahisar Chunabhatti Panchratna Co-operative Housing Society Limited (Society) and M/s Gauri Associates AOP (Developer). A notice dated 31/03/2023 from 13 members to both the Society and the Developer was issued to invoke arbitration, but the Society did not consent to arbitration on behalf of the members. The Developer questioned the authority of the members issuing the notice in a reply dated 18/04/2023. The Petitioners approached the Hon'ble Bombay High Court u/s 11 of the Act.

Issue involved

Whether individual members or groups of members of the Society can invoke arbitration under the Development Agreement?

Held

The Court held that an Arbitration cannot be invoked by individual members or groups of members as they are not parties to the arbitration agreement contained in the Development Agreement. The arbitration agreement is a bilateral contract between the Society and the Developer. Individual members are neither independent parties nor independent signatories to the Development Agreement. The term "each Party" in the arbitration agreement refers to the Society and the Developer, not the individual members. Since, individual members are not signatories to the arbitration agreement, the requirement under Section 7 of the Arbitration Act is not met. Accordingly, the court rejected the application to invoke arbitration and the jurisdiction of the Court under Section 11 of the Arbitration Act. While deciding the present case, the court relied on its earlier decision in the case of ***Ketan Champaklal Divecha vs. DGS Township Pvt. Ltd. and Another [2024 SCC OnLine Bom 1***]

ML-657

MANISH RAMESHCHANDRA SHAH VS. THE STATE OF MAHARASHTRA – ORDER DT 18/07/2024 PASSED IN BAIL APPLICATION NO. 1988 OF 2024 [BOMBAY HIGH COURT]

Code of Criminal Procedure, 1973 – Bail granted – as there was scant material to prove that the applicant was directly linked with the incident in question and Applicant had already faced more than 5 months of incarceration.

Facts

In the present case, the Applicant, Manish Rameshchandra Shah, sought bail after being arrested on February 3, 2024. The arrest was in connection with FIR No. 0911 of 2023 dated November 27, 2023, registered at Police Station Kasturba Marg. The FIR involved charges under Sections 420 (cheating), 465 (forgery), 467 (forgery of valuable security), 468 (forgery for the purpose of cheating), and 471 (using forged documents) read with 120(B) (criminal conspiracy) of the Indian Penal Code (IPC). The case was initially registered against unknown persons, later identified as involving Manish Shah among others. The allegation is that fake Demat accounts were created for dormant shares, which were then fraudulently sold, with the proceeds misappropriated. Manish Shah's counsel argued that the primary evidence against Shah consists of WhatsApp chats and his role as a broker. The applicant claimed there is no substantial evidence linking him directly to the fraud or showing personal benefit from the alleged offense. The counsel also highlighted that Shah has been in custody for over five months, which should be considered for bail. However, the prosecution cited WhatsApp messages and Call Detail Records (CDR) showing communication between Shah and the main accused, Arvind Goyal. The prosecution argued that Shah played a significant role in opening fake accounts, thereby establishing a prima facie case against him.

Issue involved

Whether the Applicant was entitled to bail in the facts of the present case?

Held

The Court noted that the charge-sheet included evidence of WhatsApp chats and CDRs indicating Shah's communication with accused No.1, Arvind Goyal. However, the Court found insufficient evidence to directly link Shah to the actual act of opening fake accounts or benefiting from the fraud. Additionally, an employee of Goyal described the method of opening fake accounts but did not implicate Shah. The Court concluded that the evidence was insufficient to warrant continued detention of Shah and considered the duration of Shah's incarceration. Thus, the bail application was allowed, with the condition that the observations made by the Court were solely for the purpose of deciding the bail and should not influence the ongoing trial.

MOHD. JAMIL VS. MANAGING DIRECTOR, KANPUR ELECTRICITY SUPPLY COMPANY (KESCO) AND 2 OTHERS – ORDER DT. 09.07.2024 PASSED IN WRIT - A NO. 3143 OF 2021 [ALLAHABAD HIGH COURT]

Government order entitles disabled persons to family pension if they have a valid disability certificate from a qualified medical officer.

Facts

Mohd. Jamil, a disabled person, claimed to be dependent on his parents. Petitioner's claim for family pension was rejected by the Senior Accounts Officer of Kanpur Electricity Supply

Company Ltd. ('Kesco') on 12.11.2020. The Petitioner's father, an ex-employee of Kesco, retired on 31.05.1975 and died in 2003. The Petitioner's mother received pension until her death on 21.04.2013. The petitioner, who was dependent on his mother, applied for family pension on 07.05.2013 after her death. The Petitioner submitted that disabled persons are entitled to family pension as per the Government Order dated 20.05.1997, which amended an earlier order from 1981 [thereby making disabled son and daughter of an ex-government employee to be entitled to family pension] and in support of his case had provided a disability certificate from the Chief Medical Officer, confirming 60% disability. The Petitioner argued that the rejection by the committee, which lacked medical expertise, was improper as the decision was based solely on the fact that the petitioner had once run a public call office (PCO), not on medical grounds. Hence, the present Writ Petition.

Issue involved

Whether the committee erred by rejecting the application of the Petitioner for family pension even though he had a valid disability certificate?

Held

The court found that the committee, lacking medical expertise, was not qualified to question the validity of the medical certificate issued by the Chief Medical Officer. Moreover, the rejection of the petitioner's claim based on his past employment running a PCO was deemed unreasonable and not in line with the government orders. The court emphasized that the government order entitles disabled persons to family pension if they have a valid disability certificate from a qualified medical officer. Accordingly, the writ petition was allowed and that the committee's findings were considered unsustainable as they did not account for the petitioner's substantial disability or its impact on his livelihood.

■●■

"The great secret of true success, of true happiness, is this: the man or woman who asks for no return, the perfectly unselfish person, is the most successful."

— *Swami Vivekananda*

ML-659

CA Mehul Sheth
Hon. Jt. Secretary

CA Neha Gada
Hon. Jt. Secretary

THE CHAMBER NEWS

Important events and happenings that took place online/ physical between **1st July, 2024 to 31st July, 2024** are being reported as under:

I. PAST PROGRAMMES

Sr. No.	*Date*	*Topics*	*Speakers*
		STUDY CIRCLE & STUDY GROUP	
1	2.7.2024	Recent Judgements under Income Tax Act	Adv. Devendra Jain
2	12.7.2024	Critical Analysis of Provisions of Section 9B, 45(4), 48 (Iii) & Rules	Mr. K. K. Chythanya, *Sr. Advocate*
		STUDENT	
1.	5.7.2024	Changes in ITR & Tax Audit	CA Avinash Rawani
2	27.7.2024	Workshop on The New Criminal Laws	Hon'ble Mr. Justice S. K. Shinde (Retd.) Dr. Sujay Kantawala, *Advocate* Mr. Rajiv Patil, *Senior Advocate*
		INDIRECT TAXES	
1.	8.7.2024	Lecture Meeting on Important Recommendations of the 53rd GST Council Meeting and Circulars issued thereafter	CA Vaibhav Jajoo Chairman Adv. Harsh Shah
2	18.7.2024	Issues related to Blocked Credits under Section 17(5) of the CGST Act, 2017	CA Jignesh Kansara Chairman CA Pranav Kapadia

ML-660

Sr. No.	Date	Topics	Speakers
INTERNATIONAL TAXATION			
1.	10.7.2024	Schedule FA (Foreign Assets) Disclosure in ITR	CA. Hardik Mehta
2	11.7.2024	How to claim foreign tax credit (FTC) in India	CA Parizaad Sirwalla
DELHI CHAPTER			
1.	13.7.2024	Webinar on GAAR Vs SAAR - Different country prospective	*Chairman* CA Vispi Patel, *Panelist* Ms. Christine Koo – Hong Kong, Mr. Pedro Palma – Mexico, CA Richa Sawhney – India *Moderator* CA Saurav Bhattacharya
BENGALURU STUDY GROUP			
1.	26.7.2024	Analysis of select direct tax proposals in the Union Budget 2024-25	CA PV Srinivasan

"We are responsible for what we are, and whatever we wish ourselves to be, we have the power to make ourselves. If what we are now has been the result of our own past actions, it certainly follows that whatever we wish to be in the future can be produced by our present actions; so we have to know how to act."

— *Swami Vivekananda*

ML-661

THE CHAMBER'S JOURNAL

Posted at the Mumbai Patrika Channel
Sorting Office, Mumbai 400 001.
Date of Posting: 15th-16th of Every Month

No. MCS/149/2022-24
R.N.I. No. MAHENG/2012/47041
Date of Publishing 12th of Every Month

Printed and Published by Shri Kishor D. Vanjara on behalf of The Chamber of Tax Consultants, 3 Rewa Chambers, Ground Floor, 31, New Marine Lines, Mumbai - 400 020 and Printed at Finesse Graphics & Prints Pvt. Ltd., 309 Parvati Industrial Premises, Sun Mill Compound, Lower Parel (W), Mumbai - 400 013. Tel.: 4036 4600 and published at The Chamber of Tax Consultants, 3, Rewa Chambers, Ground Floor, 31, New Marine Lines, Mumbai - 400 020. Editor : Vipul K. Choksi