The Chamber of Tax Consultants

THE BUDGET 2018

— An Analysis

Innovate Excel & Lead

THE UNION BUDGET, 2018
– An Analysis

About CTC

The Chamber of Tax Consultants **(The Chamber)** was set up in 1926 and is one of the oldest voluntary non-profit making professional organisations. It is the voice of more than 4,000 professionals on pan-India basis which comprises of Advocates, Chartered Accountants, Company Secretaries, Cost Accountants, Corporates, Tax Consultants and Students.

The Chamber in its 91st year is a young dynamic organisation which has a glorious past and undisputedly ambitious future. The Chamber is a great institution with a tradition of high **integrity, independence and professionalism.**

The Chamber acts as a power house of knowledge in the field of fiscal law, always proactive in contributing to the development of law and profession through research and analysis, dissemination of knowledge and by tendering suggestions to authorities. The Chamber provides networking platforms to professionals through interactive meetings and seminars.

Some of the renowned personalities like Shri S. E. Dastur, Shri Y. P. Trivedi, Shri V. H. Patil, Dr. K. Shivaram, Shri S. N. Inamdar have led the Chamber as Presidents.
The Chamber shall be pre-eminent in upholding among the professionals, tradition of excellence in service, principled conduct, and social responsibility.

Knowledge sharing endeavours and building capabilities
The Chamber disseminates knowledge by holding unique Workshops, Seminars, Lecture Meetings, Study Circles and Study Group Meetings, Outstation Residential Conferences, etc. for the benefit of members which keeps them up-to-date with the latest developments in the field of Law.

Keeping in pace with the technology, The Chamber has also started webinars on various professional subjects especially for members from distant places. Through its various orientation and advance courses dedicated to new areas of expertise it empowers young professionals to build their careers in unconventional practice areas. It functions through 14 effective Sub-Committees comprising above 300 Core Committee members.

Chamber's monthly journal and CTC Newsletter
"The Chamber's Journal" which is its mouthpiece is very popular amongst the professionals and Corporates as well, mainly because of in-depth analysis on topical issues (theme based). These special issues have found a permanent place in libraries of leading tax professionals.

The CTC publishes a monthly newsletter called 'The CTC News'. This newsletter contains details of upcoming events, short synopsis of unreported decisions of Direct and Indirect Taxes, in house publication which are on sale and various activities to be taken up by The Chamber.

International Tax Journal
The Chamber recently launched International Tax Journal which is unique and first of its kind in India. Its main focus is to equip professionals on latest updates on domestic as well as Global developments.

Representations before Regulatory Authorities and Public Interest Litigations
The Chamber has always stood up for professionals, people by making effective representations before the Government and Regulatory Authorities. It has its echoes in Government and Ministries as well. Professionals look upon The Chamber as an institution which can take its voice to the court of law, whenever required.

Every year Chamber makes at least 25 representations on issues of tax laws which causes hardship to professionals. The CTC was successful in getting favourable order for the Writ Petition filed before Delhi High Court, challenging, inter alia, issuance of Income Computation & Disclosure Standards (ICDS) by the CBDT and the circular thereafter. In past Chamber was in the forefront in filing writ for extension of due dates for Tax audit report.

The Chamber is instrumental in filing Public Interest Litigations against the Regulatory authorities. It makes effective representation through pre and post Budget memorandums and making representation on various matters arising in Tax Laws, Allied Laws and Corporate Laws to the Government and regulatory authorities.

Contribution to Corporate Sector
The Chamber also has a Corporate Connect Committee which organises various distinguished lectures for its corporate members. The representations made by The Chamber before Regulatory Authorities has benefited Corporates to a great extent. Some of the renowned corporates are members of The Chamber.

Initiatives for Student Members
Student Committee of The Chamber organises many events for the knowledge of students. The Dastur Essay Competition, which is an annual feature, is one of such activities where students across India and even from outside India participate with great enthusiasm. The Essays are finally vetted by Judges of Bombay High Court or Members of Income Tax Appellate Tribunal, Mumbai. This competition serves the purpose of developing the habit of writing skills amongst the students who are the future of the profession.

In order to promote and encourage mooting activities among law students, the CTC also organises Dr. Y. P. Trivedi Tax Moot Court Competition, an inter college moot court hosted by the Government Law College, Mumbai.

The Chamber's Libraries
The Chamber manages two libraries at prominent places like Aayakar Bhavan and Pratyakshakar Bhavan which are widely used by the professionals. These libraries have more than 4,000 titles and all leading law journals /magazines and books.

The members of The Chamber enjoy a unique bond of fellowship and brotherhood which is evident in all its activities and programmes. Its monthly Newsletter, Chamber's News in its Journal keeps members updated on various events.

The Chamber of Tax Consultants

Vision Statement

The Chamber of Tax Consultants (The Chamber) shall be a powerhouse of knowledge in the field of fiscal laws in the global economy.

The Chamber shall contribute to the development of law and the profession through research, analysis and dissemination of knowledge.

The Chamber shall be a voice which is heard and recognised by all Government and Regulatory agencies through effective representations.

The Chamber shall be pre–eminent in laying down and upholding, among the professionals, the tradition of excellence in service, principled conduct and social responsibility.

THE TEAM

Ajay R. Singh
President

Vipin Batavia
Past President

Vipul Choksi
Chairman, Journal committee

Bhadresh Doshi
Vice Chairman, Journal Committee

K. Gopal
Editor, Journal Committee

Devendra Jain
Member, Editorial Board

Ganesh Rajgopalan
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Namrata Dedhia
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Convenor, Research and Publication Committee

Viraj Mehta
Convenor, Research and Publication Committee

Paras S. Savla
Member, Research and Publication Committee

Divyesh Jain
Member, Research and Publication Committee

EDITORIAL

The annual budget presented on the floor of the Parliament is an important event on the economic and financial calendar of the nation as well as the citizens. This gives an opportunity to the Government to underline its policy and provide emphasis to the same. However, over a period of time, the executive has tried to down play the importance of the same as the sole and only event of economic importance. Rightly so, a welfare Government cannot wait for the next budgetary session to bring out any urgent changes in the tax or fiscal laws. The media hype regarding Budget 2018 being the full budget of the present dispensation at the Centre before the next general elections has raised expectations of the citizens from the Government. The media is not disappointed. However, the citizens of the middle class are not too happy. Anyway, the details of the Finance Bill have been analysed by eminent professionals in the Special Story on Finance Bill, 2018. I refrain myself from commenting on the same. However, I cannot restrain myself from commenting that the amendment carried out especially with respect to the Income Computation and Disclosure Standards raises an important issue, whether the conduct of the executive of not to challenge the decision of the Hon'ble Delhi High Court in the case of *Chamber of Tax Consultants vs. Union of India 400 ITR 178* before the Apex Court but to dilute the impact of the decision through legislation falls for judicial review or not. This had been a consistent approach of the executive to overcome the unfavourable decisions of the courts through amendments to the Act. We strongly object to this approach.

The Hon'ble Finance Minister has rolled out many schemes to strengthen the social infrastructure. The Government's commitment to provide a strong social security network is a necessity if we aspire to be a super power in future. These steps should have been initiated along with the steps taken by the Government to liberalise the economy. However, it is never too late. We have seen the Hon'ble Finance Minister Justifying his budget on various channels. As professionals we agree with him on some points and may not agree with him on some points. Sufi wisdom says.

"First judge the one who judges within you –
the discriminating power
that calls this worthy and that worthless
within and among you.
If your inner judge acquits you
Who can lock you up?"

I thank all the contributors for taking out their valuable time for the Chamber's Journal.

K. GOPAL
Editor

FROM THE PRESIDENT

Dear Members

Finance Minister Arun Jaitley presented Union Budget 2018 in Parliament on 1st February 2018, the BJP Government's last full Budget before the 2019 Lok Sabha elections. Jaitley's budget allocated billions of dollars for rural infrastructure and unveiled a health insurance programme for around 500 million poor. The main focus of the Budget has been on farmer empowerment, health care schemes, infrastructure and ease of living for the common man. The FM has granted various tax benefits to senior citizens. This is a welcome step. The Budget 2018 has been a mixed bag for individuals, but positive for senior citizens as it will provide much-needed funds for their retired life.

The numbers presented in the budget in terms of growth in direct taxes and increase in the taxpayer base means that the Government's mission to crack down on the parallel economy, an aim which was put in the BJP Manifesto in 2014 ("By minimising the scope for corruption, we will ensure minimisation of the generation of black money") is leading to the right results.

Finance Bill has decided to introduce a 10% tax on long term capital gains on equities and equity oriented mutual funds exceeding ₹ 1 lakh. Although this measure looks like a shocker in the short-term, it simply brings equity investments at par with other investment options available in the country from a taxability perspective.

The Budget 2018 defied expectations that it will be a popular one on account of the elections next year. The crash in the mother market – the Dow Jones plunging by 2,200 points in 2 days – has unnerved equity markets globally. The sell-off in the US has led to a global sell off. Indian market was in tune with global markets in this down turn. Spike in interest rates in US and inflation concerns led to an initial sell-off. But this is the right time to churn the portfolio in favour of quality stocks. Time to go shopping!

The Government has proposed to amend the Income-tax Act to reduce interface between the I-T department and taxpayers by widening the scope of e-assessment for greater efficiency and transparency. According to me the Government should have a proper mechanism and infrastructure to handle e-assessment otherwise it will lead to more litigation.

This year Chamber had organised its first Debate Competition jointly with H R College of Commerce on 22nd January, 2018 about 14 colleges participated in the competition.

The Indirect Tax RRC at Udaipur was a successful event and appreciated by all participants. The Chamber team will be at its 41st RRC on direct tax at Amritsar between 22nd February, 2018 and 25th February, 2018. Chairperson of RRC & SD Committee, Ms Charu Ved and her team is ready with full enthusiasm for welcoming all participants at Amritsar. This year too we have got overwhelming response of participants. Amritsar is a Holy city, the spiritual and cultural centre for all. The city is known for its rich cuisines, culture and Wagah Border being only 28 km away. Surely participant will have unique experience by itself.

Friends RRC is not merely about learning but it's an event where an individual takes a break from his daily routine practice and spends quality time with friends and colleagues. It is more about rejuvenating oneself and enriching knowledge from together irrespective of their seniority and designation to share their knowledge and wisdom with friends and colleagues. Fresh entrance to profession should be encouraged to attend RRC as they get a chance to interact with senior members and gain knowledge and develop their skills and personality. My best wishes to all the participants this RRC will be a worthwhile experience and broaden perspective.

Chamber is coming up with its National Moot Court in month of April for Law students jointly with Sir Jamshedji Kanga Moot in association with Government Law College and Rotary Club of Bombay.

Shri Dinesh Vyas Sr. Advocate passed away on 23rd January, 2018. He was a great person, always helpful and always the first one to stand up to situations. When the Chamber of tax Consultants honoured the highest taxpayers of Mumbai in the year 1996, he was one of the tax professionals who was conferred with such an honour. His vision about the tax laws and tax administration was published in the Journal of the Chamber (1996) August-P. 187. Shri Vyas has successfully appeared in numerous landmark decisions but, one outstanding appearance which will never be forgotten by the fraternity of ITAT is his appearance in the celebrated judgment of Hon'ble Supreme Court in the case of ITAT Through President vs. V.K. Agarwal – [1999] 235 ITR 175, where the independence and glory of ITAT has been affirmed. Shri Vyas will live forever and his memories will last long.

Our Core Group member Shri Satish Boob from Nashik passed away on 30th January, 2018. He was an active member of CTC and a cheerful personality. May the departed soul rest in peace.

The Special Story for the month is on "Finance Bill, 2018". I thank all the authors for sparing their valuable time and for their contribution to the Chamber's Journal for this month.

I end with a quote:

'There is nothing called "Problem"
it's just absence of an idea to find solution'.

Jai Hind.

AJAY R. SINGH
President

CA Sanjeev Pandit

The Budget 2018 and the Finance Bill, 2018 – An Overview

The Finance Minister, Mr. Arun Jaitley, presented the Budget for the financial year 2018-19 and introduced the Finance Bill, 2018 in the Parliament on 1st February, 2018. This was the first Budget after the rollout of Goods and Services Tax (GST) in July 2017 and completion of the controversial demonetisation exercise. Moody's Investor Service upgraded India's Government bond rating to Baa2 from Baa3 and changed the outlook from stable to positive. This upgrade has happened after a gap of over 13 years. The GDP growth for the current financial year is expected to be 6.5% and the Economic Survey predicts the GDP growth in the ensuing financial year to be 7% to 7.5%. The Government missed the fiscal deficit target of 3% of the GDP. It is expected to be 3.5% in the current financial year and for the financial year 2018-19 it is projected at 3.3% of the GDP. The elections to the Lok Sabha are due in early 2019. Therefore, possibly this is the last full Budget that this Government has presented. It is on this background that one needs to look at the Budget 2018 and the Finance Bill presented along with it.

The hallmark of this Budget has been the increased spending on development of rural infrastructure, agriculture and healthcare.

On the agricultural front, the Government has announced that Minimum Support Price (MSP) for the majority of rabi crops will be at least at 1.5 times the cost. Initiatives are proposed for the development of Gramin Agricultural Markets which will be electronically linked to e-NAM (National Agricultural Market, a pan-India electronic portal). The Government proposes to promote cluster-based development of agricultural commodities and regions and incentivise Farmer Producer Companies through tax holiday. The Budget has allocated ₹ 5,750 crore to National Rural Livelihood Mission. The total amount to be spent by various Ministries for creation of livelihood and infrastructure in rural areas is ₹ 14.30 lakh crore. The Finance Minister expects that this expenditure will create employment of 321 crore person days, 3.17 lakh kilometres of rural roads, 51 lakh new rural houses, 1.88 crore toilets and provide 1.75 crore new household electric connections.

So far as the healthcare sector is concerned, the Finance Minister has announced an ambitious and flagship programme to be called National Health Protection Scheme. It is proposed to cover 10 crore poor and vulnerable families providing coverage up to ₹ 5 lakh per family for secondary and tertiary care hospitalisation. This is a quantum jump from the annual coverage of ₹ 30,000 to poor families provided under Rashtriya Swasthya Bima Yojana. The proposed Scheme is expected to be the world's largest Government funded health care programme. The Finance Minister has promised to provide adequate funds for the smooth implementation of the programme. Various estimates have been made about the funds required to implement this ambitious Scheme. The CEO of Niti Aayog estimates that the total cost of the proposed scheme will be around ₹ 10,000 crore to ₹ 12,000 crore. Others have estimated the fund requirement at a much larger amount.

The Finance Minister, in his Budget speech, made a mention of various e-governance initiatives in the Central Ministries and Departments. It is also proposed to review the existing guidelines dealing with Outward Direct Investment (ODI) and bring out a coherent and integrated ODI policy. It is also proposed to formulate a comprehensive Gold Policy to develop gold as an asset class and a policy relating to hybrid instruments.

It is also proposed to make necessary changes to the Salaries, Allowances and Pension of Members of Parliament Act, 1954 to provide for automatic revision of emoluments of the Members of Parliament every five years and such revision will be indexed to inflation. One wonders why various deductions such as u/ss. 80C, 80D, 80DD and various exempt allowances etc. under the Income-tax Act, 1961 (Act) are also not linked to the inflation index.

Every Government, while presenting the budget, announces a large number of schemes, policy measures and initiatives. The budget creates a lot of excitement for a few days. However, citizens, including professionals, rarely spend time in reviewing what was announced in the earlier years and what has been achieved. It is also true that even if various schemes are implemented efficiently, their effect on the economy begins with only some time lag. Take for example, construction of roads; while the construction itself may create employment and consequential demand boosting the economy in the short-term, the more lasting beneficial effects of infrastructure development may begin only after 2 to 3 years after the construction of the road. This is true with most initiatives concerning the infrastructure. So far as measures pertaining to health and education are concerned, their positive as well as negative impact becomes visible with an even longer time lag. So often Governments choose to spend on schemes that offer low hanging fruits. While this is generally true, this Government has undertaken several measures with long term goals in mind while taking political risk. This Budget being the last one before the elections, the Government has strived to boost infrastructure and healthcare, and at the same time taken care to announce schemes that will impact the rural population immediately.

We tax professionals are more interested in the proposals relating to direct taxes in the Finance Bill. Let us take an overview of these.

The proposals in the Finance Bill, 2018, barring a few, are largely non-controversial. The Government has generally kept its promise of not making amendments with retrospective effect. The few retrospective amendments proposed in the Finance Bill are generally in the nature of clarification or to remove the unintended hardship to assessees.

The rate of income tax has generally remained the same. The tax rate for small and medium-sized domestic companies having annual turnover or gross receipts not exceeding ₹ 250 crore in the financial year 2016–17 has been reduced to 25%. Having brought down the tax rate for small and medium-sized domestic companies, section 115BA providing for tax rate of 25% subject to many onerous conditions has, in fact, lost its relevance. The Finance Minister could have simultaneously extended the lower tax rates to LLPs and partnership firms as well. These entities form a significant part of small and medium sector.

The Government had promised that the corporate tax rate will be brought down for all companies. This promise has not been kept. The trend the world over is reduction in tax rates. As a part of tax reforms corporate tax rate in USA has been brought down to 21% from the peak rate of 35%. Our own experience is that when tax rates are brought down, tax revenue goes up. Yet, the Finance Minister felt appropriate to continue with the present tax rates for the large corporates, LLPs and firms.

A new cess `Health and Education Cess' at the rate of 4% is being introduced in the place of existing Education Cess of 2% and Secondary and Higher Education Cess of 1%.

Out of all the provisions in the Finance Bill, the provisions introducing tax on long-term capital gains on transfer of shares in listed companies have attracted the maximum attention and also rocked the share market. Frankly, levy of tax on long-term capital gains on transfer of listed shares (LTCG) in itself is not irrational. However, while levying the new tax, the Security Transaction Tax (STT) has not been withdrawn. It may be recollected that the STT was levied when Section 10(38) was brought on the statute book exempting the LTCG. So it is only fair that when tax on the LTCG is reintroduced, STT ought to have been withdrawn.

Apart from this, one wonders whether the provisions relating to tax on the LTCG could have been drafted with more care and thought. The new section 112A does not override the provisions of section 48 of the Act. The proposed section 112A is for computing the tax payable by an assessee on his total income if the total income includes any income chargeable under the head "Capital gains". Thus, the provision as it is drafted lacks clarity and is open to different interpretations than what is intended. It also leads to several questions, e.g. if the computation u/s 48 on transfer of listed shares results in a loss, whether the provisions of the proposed section 112A will be attracted, or these provisions are attracted only when the computation u/s. 48 results in positive capital gains and only in such a case the tax will be computed in accordance with the provisions of the proposed section 112A. Another point that may be noted is that 112A(6) defines `cost of acquisition' only in respect of the long-term capital asset acquired by the assessee before the 1st February, 2018. There is no definition of cost of acquisition for assets acquired after that date. If it is accepted that section 112A provides a self-contained code for computation of the LTCG, then in such a case can one resort to the definition of 'cost of acquisition' contained in section 55(2) which is otherwise for the purposes of sections 48 and 49 and not for section 112A. The definition of cost of acquisition in section 55 provides for cost in case of bonus shares, rights shares, shares received on consolidation or sub-division of shares, conversion of one kind of shares into another kind etc. Lack of definition of `cost of acquisition' may lead to reviving old controversies with respect to cost of rights shares, bonus shares, etc. Allowability of brokerage, stamp duty, STT will also be debatable since the computation provision is not under section 48.

It is also proposed to amend section 115AD dealing with taxation of Foreign Institutional Investors (now known as Foreign Portfolio Investors) by adding a proviso to the effect that tax at the rate of 10% shall be levied on transfer of long-term assets referred in section 112A. However, neither the detailed provisions contained in section 112A have been incorporated in section 115AD nor have they been made applicable for the purposes of section 115AD. The Central Board of Direct Taxes (CBDT) clarified that in case of FIIs the gains up to 31st January will not bear tax.

The CBDT has already issued FAQs. These FAQs do not have the force of law. The appropriate thing would be to make necessary changes in the Finance Bill to incorporate the new provisions so far as they deal with the computation of the LTCG in sections dealing with the computation of income under the head Capital Gains. Section 112A and the amendments to section 115AD should deal with the rate of tax on such LTCG. This will bring clarity and avoid potential litigation.

Simultaneously with introduction of section 112A, section 115R is proposed to be amended for levying tax at the rate of 10% on income distributed by an equity oriented mutual fund. This amendment is proposed with a view to bring on parity the growth schemes of equity oriented mutual funds and corresponding dividend schemes of equity oriented mutual funds.

An interesting issue that may be considered is the impact on disallowance u/s. 14A due to the introduction of section 112A. Assessees who have invested in shares, presently face disallowance u/s. 14A. In case where such investors receive dividend in excess of ₹ 10 lakh which is taxable u/s. 115BBDA, can the disallowance u/s. 14A be made since the dividend as well as the capital gains from the shares would be chargeable to tax. Similar would be the impact in case of investment in equity oriented mutual funds.

Another significant amendment proposed in the Finance Bill is relating to the scope of 'business connection' in section 9 of the Act. The changes are twofold. First, the scope of business connection is being expanded to cover an agent who plays a principal role leading the conclusion of contracts. Presently, only if the agent has the authority to conclude the contracts, there would be a business connection. Further, under the present provisions there is an exception i.e. if the activities of the agent are limited to purchase of goods or merchandise for the non-resident, the agency does not result in a business connection. However, while expanding the scope of business connection by replacing clause (a) of the Explanation 2 to section 9(1)(i), this exception has been omitted. Consequently, an agent of a non-resident sourcing goods and merchandise for the non-resident may amount to business connection in India. The proposed amendment is based on the recommendations contained in Base Erosion and Profit Shifting (BEPS) Action Plan 7.

The other amendment expanding the scope of 'business connection' is introduction of the concept of 'Significant Economic Presence' through a new Explanation 2A to section 9(1)(i). Presently, to establish business connection, a physical presence in India or an agent in India is necessary. However, under new technology driven business models an entity may not have any physical presence or agent in the country and yet may generate revenue by use of modern technology and automated tools. This amendment has its roots in BEPS Action Plan 1 recommendation. It would cover (i) transactions in respect of any goods, services or property carried out by a non-resident in India including provision of download of data or software in India and (ii) systematic and continuous soliciting of business activities or engaging in the interaction with users in India through digital means. In the first case, it is proposed that a monetary floor limit for the aggregate of payments will be prescribed for attracting taxability. In the second case, floor limit for number of users with whom there is interaction will be prescribed for attracting the taxability. Income attributable to the transaction or activities indicated above shall be deemed to accrue or arise in India.

This provision may not have a significant impact immediately where India has entered into treaty for avoidance of double taxation. However, these amendments will form the basis for renegotiating treaties with various countries for enabling India to tax entities having 'significant economic presence' in India on account of activities indicated above. Once the treaties are renegotiated or are amended through the Multilateral Convention to Implement Tax Treaty Related Measures (MLI), the amended provisions will have a significant impact. The major challenge then will be attribution of profits to transactions or activities. Unless reasonable guidelines are laid down for attribution of profit taxable due to the amended scope of business connection and these are implemented fairly, the amendments may give rise to substantial litigation as was witnessed when transfer pricing provisions were introduced.

A set of amendments have been proposed for validating the provisions of Income Computation and Disclosure Standards (ICDS) notified u/s. 145. The Delhi High Court in the writ petition filed by the Chamber *(Chamber of Tax Consultants vs. Union of India to 52 Taxman 77)* had struck down some of the ICDS and had also struck down some of the provisions of other ICDS. Consistent view of the assessees and professionals has been that various ICDS have only advanced taxability of various receipts or postponed allowability of expenses. Further, by deviating from accepted accounting practices there is increased divergence between the book profits and the taxable profits. It appears that the Government and the CBDT are keen that the ICDS are implemented. With a view to reversing the impact of the decision of the Delhi High Court and validate the provisions of the ICDS, amendments have been proposed to sections 36(1)(xvii) and 40A(3) dealing with marked to market loss, section 145 dealing with valuation of inventory and section 145A dealing with extension of inclusive method for valuation of services; section 43AA dealing with taxation of foreign exchange fluctuation, section 43CB dealing with income from construction contracts and service contracts and section 145B dealing with taxation of subsidies or grants, claim for escalation of price in a contract and export incentives are proposed to be introduced. The way these amendments are worded, a question may arise whether these are applicable even to those assessees to whom the ICDS otherwise do not apply. These amendments are being proposed with retrospective effect from assessment year 2017–18. It is widely expected that more ICDS will be issued. In May 2017, the CBDT issued draft ICDS on Real Estate Transactions. Considering the amendments proposed in the Finance Bill for ICDS, should one expect amendments to the Act every time a new ICDS is notified? One really wonders if this is necessary. Will it not be better to withdraw ICDS completely and make changes in the law wherever felt necessary?

The Finance Bill proposes two amendments dealing with companies in whose case application for insolvency resolution process has been admitted under the Insolvency and Bankruptcy Code, 2016 (IBC). So far as the application of Minimum Alternate Tax (MAT) u/s. 115JB is concerned, such companies will be able to reduce the book profits by the aggregate amount of the unabsorbed depreciation and the brought forward loss. This is certainly welcome. Logically, all companies should be able to reduce both, the unabsorbed depreciation and the brought forward loss.

Under the provisions of section 79, a closely held company can carry forward and set off loss only if the beneficial owners of the shares carrying not less than 50% of the voting power on the last day of the previous year in which the loss was incurred remain the same on the last day of the previous year. It is now proposed to introduce a proviso in section 79 providing that where the change in shareholding takes place pursuant to the resolution plan approved under the IBC, the above condition in section 79 shall not apply and the company shall be entitled to carry forward and set off the losses. The amendment to section 79 is with retrospective effect from assessment year 2017–18. These provisions are welcome and will help in finalising resolution plans.

There has been litigation in respect of taxation of `Deemed Dividend' u/s. 2(22)(e) Section 115-O is proposed to be amended by bringing dividend u/s. 2(22)(e) within the scope of Dividend Distribution Tax. Such dividend would be chargeable to tax at the rate of 30% in the hands of the company. Companies may face practical difficulties in implementing the amended provision. Further, a shareholder holding majority shares may misuse this provision by enjoying the funds of the company, while tax will be paid by the company to the detriment of the minority shareholders.

The Finance Minister spent considerable time while delivering his speech on the proposed standard deduction for the salaried class. The Finance Bill provides for standard deduction of ₹ 40,000 for persons earning salary. However, simultaneously, the exemption in respect of medical expenditure incurred up to ₹ 15,000 and exemption in respect of transport allowance up to ₹ 1,600 shall be withdrawn. As a result, the net gain for an average salary earner will not be substantial. However, it will reduce the compliance burden of the employers as they will not have to obtain evidence for medical expenditure, etc. for allowing the exemption while computing the TDS.

The Finance Bill has proposed some benefits to senior citizens in form of an enhanced limit of ₹ 50,000 for expenditure on health insurance premium or preventive health check-up or medical expenditure u/s. 80D and ₹ 1 lakh for deduction of medical expenditure in respect of certain critical illnesses u/s. 80DD. Under the new section 80TTB, senior citizens will get a deduction of ₹ 50,000 in respect of any interest on any deposit with a banking company, a co-operative society or post office. Consequential amendments have been proposed in section 194A for deduction of tax at source only when the amount of interest exceeds ₹ 50,000. While these measures are welcome, TDS provisions could have been further liberalised providing TDS only when interest from any source exceeded ₹ 50,000.

Presently, there is a provision in section 45(2) for taxation a capital asset is converted into stock-in-trade. However, there is no provision for taxing the conversion or treatment of inventory into a capital asset. A new sub-clause (xiia) is being inserted in the definition of 'income' in section 2(24) and sub-clause (via) is being inserted in section 28 to provide for taxation on such conversion. The fair market value (FMV) of the inventory as on the date of the conversion will be taxed as business income immediately on conversion. On subsequent transfer of the capital asset, tax will be charged under the head capital gains taking FMV as the cost. While this provision is otherwise acceptable, there could be situations where it would lead to unfair taxation if it is unreasonably interpreted. Take an example of a grain merchant withdrawing certain inventory for his own consumption. If such a withdrawal of inventory is treated as conversion of inventory into a capital asset, tax will be charged under the new provision although, the inventory withdrawn will never be sold. Possibly, one may argue that such withdrawal does not amount to conversion or treatment of inventory into capital asset.

Last year section 80-IAC was introduced providing for 100% deduction of profits of an eligible start-up. It is now proposed to amend the definition of 'eligible business'. The new definition enlarges the scope by including start-ups engaged in innovation, development or improvement of the products or processes or services or a scalable business model with a high potential of employment generation or wealth creation. The previous condition of the business being driven by technology or intellectual property is being deleted. Further, it is proposed that a company or an LLP Incorporated on or after 1st April, 2016 but before 1st April, 2021 will be eligible. The restriction on the turnover of not exceeding ₹ 25 crore is also being liberalised.

Section 80-JJA provides for deduction of 30% of emoluments paid to eligible new employee provided that the employee has been employed for a minimum period of 240 days. Amendment is proposed to provide that where an employee is employed in a previous year for less than 240 days but in the immediately succeeding previous year is employed for at least 240 days, he shall be deemed to have been employed in such succeeding year and the assessee will be entitled to the deduction under this section accordingly. The condition of employment for 240 days was relaxed to 150 days in case of apparel industry. This relaxation is being extended to footwear and leather industry as well. On one hand the Government wants to phase out deductions, while on other hand, new deductions are introduced each year though they may not achieve their stated purpose, but only complicate the law.

Section 40(a)(ia) provides for disallowance where TDS provisions are not complied with. Section 40A(3) provides for disallowance of any expenditure exceeding ₹ 10,000 made otherwise than by account payee cheque or account payee bank draft. These provisions are being made applicable to certain institutions specified in 10(23C) as well as to charitable trusts claiming exemption u/s. 11. Accordingly, while computing the application of income towards the objects, provisions of sections 40(a)(ia), 40A(3) and 40A(3A) will apply. While the objective of the amendment is laudable, it is difficult for charitable institutions doing work at grassroot level, in rural areas, dealing with persons from the lowest economic strata to abide by such provisions. Government needs to treat charitable institutions with more understanding. Over the years, law relating to charitable institutions has become extremely complex and one gets a feeling that the Government looks at these institutions with suspicion rather than appreciating the work done by various NGOs.

Last but not the least, section 143 is being amended for enabling formulation of a scheme for making assessments without personal interface and with dynamic jurisdiction. Generally, avoiding personal interface reduces chance for corruption. Assessment is a quasi-judicial proceeding. Principles of natural justice need to be complied with. At times, one must be able to demand a personal hearing. The scheme under the new provision should be formulated keeping in mind the experience of processing of returns by CPC. There are many issues that assessees face in getting proper credit for taxes paid or deducted at source but are unable get these resolved in absence any individual who can be approached for resolution.

Apart from various changes discussed above, the Finance Bill proposes a few other changes relating to direct taxes and indirect taxes. All the changes are discussed and analysed in detail in this issue of the Chamber's Journal.

As the economy matures, the tax laws should become more stable. Let us hope we are heading towards that.

CA Kinjal Bhuta

Rate of Taxes and MAT

Rates of Income Tax in respect of income liable to tax for the AY. 2018-19

In respect of all categories of assessees liable to be taxed for the AY. 2018-19, the rates of taxes shall remain the same as specified in the Part I of the First Schedule of the Finance Bill, 2018. They are the same as specified in the Part III of the First Schedule to the Finance Act, 2017.

Rates of Income Taxes in respect of income liable to tax for the AY: 2019-20

The below mentioned rates of taxes shall be used for deduction of income tax at source from salaries, for computation of advance tax payable during the year in case of all categories of assessees and charging of tax in certain special cases of accelerated assessments. These rates are specified in Part III of the Finance Bill, 2018.

The basic tax rates have not changed for Individuals, HUFs, AOP, BOI, Firms and co-operative societies. The only change made is in respect of tax rates for domestic companies who are having turnover up to ₹ 250 crore. Also education cess rate has been increased in respect of all assessees.

Following are the tax rates for all assessees.

i. In case of individuals, other than at (ii) and (iii) mentioned below, HUF, AOP/BOI:

Net Income Range	Rate of tax
Up to ₹ 2,50,000	Nil
₹ 2,50,001 to ₹ 5,00,000	5 per cent
₹ 5,00,001 to ₹ 10,00,000	20 per cent
Above ₹ 10,00,000	30 per cent

ii. In case of resident individuals who is of the age 60 years or more but less than age of 80 years at any time during the year.

Net Income Range	Rate of tax
Up to ₹ 3,00,000	Nil
₹ 3,00,001 to ₹ 5,00,000	5 per cent

₹ 5,00,001 to ₹ 10,00,000	20 per cent
Above ₹ 10,00,000	30 per cent

iii. In case of resident individuals who is of the age 80 years or more at any time during the year.

Net Income Range	**Rate of tax**
Up to ₹ 5,00,000	Nil
₹ 5,00,001 to ₹ 10,00,000	20 per cent
Above ₹ 10,00,000	30 per cent

iv. In case of co-operative society:

Net Income Range	**Rate of tax**
Up to ₹ 10,000	10 per cent
₹ 10,000 to ₹ 20,000	20 per cent
Above ₹ 20,001	30 per cent

v. In case of firm and local authority 30 per cent

vi. Tax rate in case of corporates are as under:

In the Union Budget of last year i.e. in Finance Bill, 2017, the Finance Minister had reduced the corporate tax rate to 25% for domestic companies whose turnover was less than ₹ 50 crore, also it was promised that the further reduction shall happen in a phased manner. In pursuance to that, the benefit of reduced rate is now extended to companies having turnover **up to ₹ 250 crore** in the financial year 2016-17. This is one of the positive moves for the entire class of micro, small and medium enterprises and is estimated to benefit almost 99% of companies filing their tax returns.

Particulars	**Rate of tax**
Domestic Company	
i. In case of companies having total turnover or gross receipts of the previous year 2016-17 does not exceed ₹ **250 crore**	25 per cent
ii In case of companies other than (i) above	30 per cent
Foreign Company	
i. In case of income of royalties received in pursuance of an Agreement entered after 31-3-1961 but before 1-4-1976	50 per cent
ii. In case of income of fees for technical services received in pursuance of an agreement entered after 29-2-1964 but before 1-4-1976	50 per cent
iii. All other balance incomes	40 per cent

vii. Surcharge

Surcharge rates have not been changed in the Finance Bill, 2018 and it continues to remain the same as applicable for AY. 2018-19 provided as under:

Type of Assessee	Rate of tax
Individual	
Income exceeding ₹ 50 lakh but not exceeding ₹ 1 crore	10 per cent
Income exceeding ₹ 1 crore	15 per cent
Firms and Co-operative Societies	
Income exceeding ₹ 1 crore	12 per cent
Domestic Company:	
Income exceeding ₹ 1 crore but not exceeding ₹ 10 crore	7 per cent
Income exceeding ₹ 10 crore	12 per cent
Foreign Company:	
Income exceeding ₹ 1 crore but not exceeding ₹ 10 crore	2 per cent
Income exceeding ₹ 10 crore	5 per cent

Marginal relief shall continue to be given for the said surcharge.

viii. **Education Cess and Higher Education Cess**

Education cess and higher education cess shall be discontinued. However, a new cess called as 'Health and Education Cess' shall be levied at the rate of **four per cent** of income tax including surcharge wherever applicable for all assessees. No marginal relief shall be available in respect of such cess. The additional cess of 1 per cent is levied to cater the health and education needs of below poverty line and rural families. This increased cess shall hurt the high income tax payers the most.

Relief from liability of Minimum Alternate Tax (MAT)

MAT regime has been rationalised for companies undergoing insolvency proceedings.

1. Section 115JB of the Act, provides for levy of a minimum alternate tax (MAT) on the "book profits" of a company. In computing the book profit, it provides for a deduction in respect of the amount of loss brought forward or unabsorbed depreciation, whichever is less as per books of account. Consequently, where the loss brought forward or unabsorbed depreciation is Nil, no deduction is allowed. This non-deduction was a barrier to rehabilitating companies seeking insolvency resolution. It is hence now proposed to amend section 115JB to provide that the aggregate amount of unabsorbed depreciation and loss brought forward (excluding unabsorbed depreciation) shall be allowed to be reduced from the book profit, if a company's application for corporate insolvency resolution process under the Insolvency and Bankruptcy Code, 2016 has been admitted by the Adjudicating Authority.

   This amendment will take effect from 1st April, 2018 and will, accordingly, apply in relation to the assessment year 2018-19 and subsequent assessment years.

Reduction of AMT for International Financial Services Centre (IFSC)

The rate of MAT u/s. 115JB in case of company being a unit located in an IFSC was reduced to 9 per cent by the Finance Bill, 2016 and now a similar benefit is extended to assessees other than companies. Section 115JC of the Act provides for alternate minimum tax at the rate of 18.50 per cent of adjusted total income in the case of a non-corporate person. In order to promote the development of world class financial infrastructure in India, it is further proposed to amend the section 115JC so as to provide that in case of a unit located in an International Financial Service Centre, the alternate minimum tax under section 115JC shall be charged at the rate of 9 per cent.

This amendment will take effect, from 1st April, 2019 and will, accordingly, apply in relation to the assessment year 2019-20.

CA Usha Kadam

Personal Taxation – Income from Salary Deductions & Exemptions

The Finance Bill, 2018 presented in Parliament on 1st February, 2018 has proposed several amendments to the Income-tax Act, 1961. In line with the previous budget this budget also has proposed several schemes aimed at alleviating the rural distress and providing education and health to the underprivileged and infrastructure facilities for the rural sector and measures to boost the growth and the employment generation but no major tax reliefs for the individuals except for senior citizens.

This article proposed to deal with some of the amendments that the Finance Bill has proposed to the taxation of individuals. There is little in the budget for middle class and the salaried individuals except some benefits meted out to senior citizens. The following amendments proposed in the Finance Bill would be effective from A.Y. 2019-20 unless specifically mentioned otherwise.

Standard deduction to salaried employees (Sections 16 & 17 of the Income-tax Act)

Clause 7 of the Finance Bill seeks to insert clause (ia) to section 16 so as to provide standard deduction to salaried employees. Income chargeable under the head "Salaries" was entitled to Standard deduction up to A.Y. 2005-06. Standard deduction has been reintroduced to the extent of ₹ 40,000 or the amount of salary whichever is lower.

Clause 8 of the Finance Bill seeks to amend section 17 of the Income-tax Act. Clause (v) of the proviso occurring after sub-clause (viii) of clause 2 section 17 provides that any sum paid by the employer in respect of any expenditure actually incurred by the employee on his medical treatment or treatment of his family member not exceeding ₹ 15,000 in the previous year shall not be treated as perquisite in the hands of the employee. It is proposed to omit the said clause (v).

The Finance Minister while granting the Standard deduction says "However, income tax data analysis suggests that major portion of personal income-tax collection comes from the salaried class. ------- In order to provide relief to salaried taxpayers, I propose to allow a Standard deduction of ₹ 40,000/ in lieu of the present exemption in respect of transport allowance and reimbursement of miscellaneous medical expenses. ---------- Apart from reducing paper work and compliance, this will help middle class employees even more in terms of reduction in their tax liability. "

Thus Standard deduction is allowed in lieu of deduction of transport allowance of ₹ 19,200 per annum and ₹ 15,000 per annum for the medical reimbursement. In view of increase in cess by 1% and withdrawal of deduction of transport allowance and medical allowance there is no effective benefit to most salaried employees. Standard deduction shall benefit the pensioners who do not enjoy any exemption on account of transport allowance and medical expenses. The exemption of transport allowance would continue to be available to differently-abled persons.

Compensation received in connection with the termination or modification of a contract (Sections 2(24) and 56 of the Income-tax Act)

Clause 3 of the Finance Bill seeks to insert clause (xviib) to section 2(24) and also clause 21B of the Finance Bill seeks to insert clause (xi) in section 56(2) of the Income-tax Act so as to provide that any compensation or other payment due to or received by any person in connection with the termination of employment or modification of the terms and conditions relating thereto shall be chargeable to income tax under the head "Income from other sources".

NPS withdrawal exemption extended to non-employees

Section 10(12A) provides that amount received by an employee from National Pension Scheme (NPS) either on closure or opting out from scheme referred to in section 80CCD is exempt up to 40% of the total amount payable to employees at the time of such closure or opting out of the scheme. This exemption is not available to non-employee subscriber. It is proposed to extend the said benefit to all the subscribers to National Pension System Trust.

Deduction under section 80D

Clause 24 of the Finance Bill seeks to amend section 80D of the Income-tax Act relating to deduction in respect of health insurance premium. Currently, any payment towards medical insurance or preventive health check up of a senior citizen or medical expenditure of a very senior citizen was entitled for deduction up to ₹ 30,000.

The limit of said deduction in respect of payment of premium for all senior citizens is increased to ₹ 50,000. Further, the deduction available for medical expenditure only for a very senior citizen is now available for all senior citizens up to the limit of ₹ 50,000 subject to a condition that such senior citizen does not have a mediclaim policy.

As per section 80D any payment in lump sum to effect or to keep in force insurance on the health of a person, for more than a year was allowed as deduction, in the year of payment. It is proposed that in case of a single premium health insurance policies having cover of more than one year, deduction shall be allowed on proportionate basis for all those years for which health insurance cover is provided, subject to the specified monetary limit.

Deduction under section 80DDB

Clause 25 of the Finance Bill seeks to amend section 80DDDB of the Income- tax Act relating to deduction in respect of medical treatment etc. As per section 80DDB deduction was available to an individual and HUF in respect of payment made for medical treatment of specified diseases of senior citizen up to ₹ 60,000 and very senior citizen up to ₹ 80,000. The said deduction is proposed to be enhance to ₹ 1 lakh without any distinction between senior and very senior citizen.

Deduction in respect of interest on deposits for senior citizens

Keeping in view the fixed and restricted sources of income for senior citizens, a new section 80TTB is proposed to be inserted *vide* clause 30 of the Finance Bill. This provision allows a deduction up to ₹ 50,000 in respect of interest income of senior citizen from deposits with banks or post office or co-operative banks.

Further, corresponding amendment has been proposed in section 194A to provide that no tax shall be deducted at source from payment of interest to a senior citizen up to ₹ 50,000 w.e.f. 1st April, 2018.

Clause 29 of the Finance Bill seeks to amend section 80TTA of the Income-tax Act. It is proposed that deduction under section 80TTA shall not be available to senior citizens in respect of interest on saving deposits.

Certain Deduction not to be allowed unless return furnished

Clause 23 of the Finance Bill seeks to amend section 80AC of the Income-tax Act. As per existing provisions of section 80AC of the Act, no deduction would be admissible under section 80-IA or section 80-IAB or section 80-IB or section 80-IC or section 80-ID or section 80-IE, unless the return of income by the assessee is furnished on or before the due date specified under section 139(1). This burden of filing of return on time is not casted on other assesses who are claiming deductions under other similar provisions.

Therefore, to bring uniformity in all income-based deductions, it is now proposed that the scope of section 80AC shall be extended to all similar deductions which are covered in heading "C.—Deductions in respect of certain incomes" in Chapter VIA (sections 80HH to 80RRB). The impact of such amendment shall be that no deduction covered u/s. 80HH to 80RRB would be allowed to a taxpayer under these provisions if income-tax return is not filed on or before the due date. The deduction u/s. 80C would be allowed to taxpayer even if the return is filed after the due date. This amendment will take effect from the 1st April, 2018 and will accordingly apply in relation to assessment year 2018-19 and subsequent assessment years.

 

CA Devendra Jain & CA Sujoy Mehta

Amendments relating to Computation of Business Income and related Incentives

I. Conversion of Inventory into Capital Asset or Treatment of Inventory as Capital Asset

(i) Background of existing provisions in Capital Gains

We are aware of the provisions relating to the treatment of converting or treating a ‘Capital Asset’ into ‘Stock-in-trade’. This transaction is governed by the provisions of Chapter IV-E relating to ‘Capital Gains’. Similarly, *vide* Finance Bill 2018, the Parliament has proposed to bring into tax ambit, a reverse situation where ‘Inventory’ is converted into or treated as ‘Capital Asset’. In order to further analyse the proposed amendment, let us first understand the background of existing provisions relating to converting or treating a ‘Capital Asset’ into ‘Stock-in-trade’ which was introduced by insertion of Sub-section (2) in Section 45 *vide* Finance Act, 1984 and other relevant amendments.

In *CIT vs. Bai Shirinbai K. Kooka (1962) 46 ITR 86*, the Honourable Supreme Court had held that, when a capital asset is converted into stock-in-trade and such converted stock-in-trade is subsequently sold, the difference between the fair market value of such capital asset on the date of conversion and the actual selling price is assessable as business income. There being no transfer of capital asset on the date of conversion of capital asset into stock-in-trade, no capital gains arise u/s. 45(1). To overrule this decision, a new sub-clause (iv) was introduced in Section 2(47) so as to regard such conversion or treatment of Capital Asset into stock-in-trade as ‘Transfer’. It was further provided that the ‘Fair Market Value’ (FMV) of Capital Asset as on date of such conversion or treatment shall be regarded as the ‘Full Value of Consideration’ for computing the capital gains. However, as no actual gain is realised on the date of such conversion, the chargeability of capital gains to tax was deffered to the year in which such converted stock-in-trade is actually sold or otherwise transferred. This was the brief scheme of Section 45(2) r.w. Section 2(47)(iv), which has addressed the following issues:

a. Appropriate addition in definition of ‘Transfer’ u/s. 2(47).

b. Deemed ‘Fair value of Consideration’.

c. Year of chargeability.

(ii) Need for amendments in 'Business Income'

There is no existing provision which specifically governs the chargeability to tax in case of Conversion/Treatment of Inventory into Capital Asset. As a result, there are disputes relating to the head in which the income is to be taxed on actual transfer of such capital asset, as also with regard to the determination of cost of acquisition and period of holding of such capital assets. Different High Courts and Tribunals have taken different views in this matter.

In some cases, revenue had taken a stand that difference between FMV of Inventory as on the date of conversion less actual cost of acquisition shall be treated as 'Business Income', whereas difference between actual sale consideration on transfer of 'Capital Asset' and FMV on date of conversion shall be treated as 'Capital Gains'. Assessee in such cases had contended that,actual Sale consideration less indexed cost of acquisition (on actual cost) shall be charged as capital gains. In case of *ACIT vs. Bright Star Investment (P.) Ltd.[2008] 24 SOT 288 (Mumbai),* Hon'ble ITAT had held that in the absence of a specific provision, out of these two formulae, the formula which was favourable to the assessee, should be accepted. However, Delhi High Court in the case of *CIT vs. Abhinandan Investment Ltd. (2016) 282 CTR 466,* has approved the former treatment. Further it also held that the period of holding of capital assets is to be computed from the date of conversion and not from the original date of acquisition.

In following case laws, even though shares were converted to investment from stock-in-trade, the whole of the transaction was taxed only under the head 'Capital Gains' and there was no bifurcation made with regards to 'Business Profits' and 'Capital Gains' out of the total actual gain earned by the assessee.

a. *CIT vs. Jannhavi Investments (P.) Ltd. [2008] 304 ITR 276 (Bombay)*

b. *Kalyani Exports & Investments (P.) Ltd. vs. DCIT [2001] 78 ITD 95 (Pune) (TM)*

To set at rest, these diverse judicial interpretations, certain amendments are proposed by the Finance Bill, 2018 with effect from Assessment Year 2019-20.

(iii) Relevant amendments

Unless any income/gain is covered by the definition of 'Income' under clause (24) of section 2, it cannot be said as 'income' earned and will also not form part of total income. Hence a new sub-clause (xiia) has been proposed to be introduced in Section 2(24) to include "the fair market value of inventory referred to in clause (via) of Section 28"in the definition of income.Further, it is proposed to introduce, a new clause (via) in Section 28 to include "the fair market value of inventory as on the date on which it is converted into, or treated as, a capital asset determined in the prescribed manner"into the chargeability under the head of business income. This clause specifies that FMV of inventory as on date of conversion/treating it as Capital Asset shall be considered as income earned from business or profession. The terms FMV and inventory are briefly explained below:

a. 'Fair Market Value' (FMV)

FMV as on the date of conversion/treatment as capital asset shall be taken into consideration. Definition of FMV in relation to 'capital asset' has been provided in clause (22B) of Section 2, however the same will not apply in this case as this clause requires FMV in relation to 'Inventory'. It has been mentioned in this clause that FMV of inventory shall be determined in prescribed manner. CBDT will notify the rules in this regard.

b. 'Inventory'

The term used by this clause is 'Inventory' which is a wider term, whereas Section 45(2) specifies only 'stock-in-trade' (relatively narrower term). Thus either following the definition of AS-2 or ICDS-2, inventory would also include 'raw-material', 'W.I.P' as well as 'Finished Goods'.

(iv) Relevant consequential amendments in Chapter IV-E relating to Capital Gains

Section 49 which deals with determination of cost with reference to certain modes of acquisition is proposed to bea mended to include new sub-section (9), which specifies that in case of transfer of Capital asset (which was earlier held as inventory) the cost of acquisition shall be the FMV which was adopted for the purpose of determining the income u/s. 28(via).

Further, in order to determine the period of holding in such cases, new sub-clause (ba) has been proposed to be inserted in clause (i) of *Explanation 1* to Section 2(42A). Accordingly the period of holding shall be reckoned from the date of conversion/treatment of Inventory as Capital asset [in confirmation with decision in case of *Deensons Trading Co. (P.) Ltd. vs. ITO [2017] 81 taxmann.com 71 (Chennai – Trib.)]*. Accordingly, other provisions relating to computation of capital gains shall apply (E.g.: Indexation benefit under second proviso to Section 48 from the date of conversion)

(v) Illustration of above amendments

Suppose a person is a trader in a particular product, and he brought 1 unit of such product at ₹ 100/- in FY 2018-19 which has been held as inventory. As on 16-7-2019 FMV of such product is ₹ 120/-. Now on 16-7-2019 he decides to convert such inventory into investment. As per the application of Section 28(via) the whole of the FMV (₹ 120) as on date of conversion (i.e. 16-7-2019) shall be regarded as income from Business or profession and the actual cost of ₹ 100/- will be allowed as a deduction against such business income. Further, if such converted capital asset is sold on 25-8-2020 for ₹ 150, then full value of consideration shall be ₹ 150 whereas as per Section 49(9) cost of acquisition will be ₹ 120/- (FMV adopted for the purpose of Section 28(via)). The benefit of indexation will be dependent on Period of Holding.

(vi) Year of taxability?

One important aspect to note in these amendments is that although converting/treating Inventory as Capital asset is treated as income u/s. 28, however the year of chargeability has not been expressly provided for in the amendments, unlike Section 45(2) (i.e. year in which Stock-in-Trade is actually sold). The wordings of newly inserted clause (via) are totally silent as to the year of chargeability. Section 145(1) provides that profits and gains of business or profession shall be computed in accordance with either cash or mercantile system of accounting regularly employed by the assessee.

In case the assessee follows cash system of accounting then taxability under the head business income will arise in the year of actual receipts on sale of capital asset. However, in case assessee maintains books of account on mercantile basis, in the absence of express provision, a doubt may arise whether tax shall be levied on business income in the year of conversion itself. It is a settled principle of taxation that what is to be taxed is real income of the assessee, unless otherwise specified. On the act of conversion of inventory into capital asset no real income accrues to the assessee. Reference can be made to the decisions of *CIT vs. Balbir Singh Maini [2017] 86 taxmann.com*

94 (SC) and *Sir Kikabai Premchand v. CIT [1953] 24 ITR 506 (SC).*

In *Sir Kikabai Premchand vs. CIT [1953] 24 ITR 506 (SC),* assessee was trader in shares and silver bars, during relevant previous year he withdrew from business certain shares and silver bars and settled/donated them on certain trusts. He, however, showed transfer of these shares and silver bars to trustees in his books of account at cost price. Revenue assessed the difference between cost price of said shares and silver bars and market value thereof on date of their withdrawal as income from business. It was held by the Honourable Supreme Court that the difference between the market value and the conversion price could not have been, at any rate, brought to tax, to the effect that no man can make or profit out of himself.The amendment now proposed to be made only specifies the manner of bifurcating the taxability under the head business income and capital gains. The ratio of the above decision will still apply so as to negate any such contention of taxing the FMV as business income in the year of conversion itself.

(vii) Conclusion

To sum up, we can say that the above mentioned amendments are mirror image of Section 45(2), however the year of taxability is one such area which requires further clarification, so as to avoid unwanted litigation.

II. Compensation/any payment received on termination/modification of contract relating to business

Presently clause (ii) of Section 28 governs the chargeability of only certain specific classes of compensation received by a person, enumerated in Sub-clauses (a) to (d) thereof. However the said clause (ii) of Section 28 does not cover all kinds of compensation. If any compensation is received by a person in the course of his business, it has to be seen whether it is a compensation of a revenue nature or a capital in nature. If it is of revenue nature, it can be brought to tax under clause (i) of section 28. However, if it is of a capital nature it is neither covered by clause (i) nor by clause (ii). In the following case laws, it was held that if compensation received was in nature of 'Capital Receipt' then such sum shall not be charged to tax:

a. *Elegant Chemicals Enterprises (P.) Ltd. vs. ACIT [2004] 91 ITD 85 (Hyderabad)*

b. *HCL Infosystems Ltd. [TS-5594-HC-2015 (Delhi)-O]*

c. *CIT vs. Motilal Chhadami Lal Jain [1997] 225 ITR 879 (Allahabad)*

To bring to tax such compensation of capital nature received in the course of business, a new sub-clause (e) is proposed to be inserted in section 28(ii) w.e.f. 1-4-2019. The reason given in the Explanatory Memorandum for this amendment is to avoid base erosion and revenue loss. The proposed Sub-clause (e) under clause (ii) of Section 28 shall govern the chargeability of any compensation or other payment which is received by/due to any person. However, it shall be in connection with the termination or the modifications of the terms and conditions of any contracts which is related to the business of the person receiving it. It is a very widely worded sub clause which shall cover all kinds of compensation in the course of business irrespective of the nomenclature of the said compensation. The only requirement is that it should relate to a contract relating to assessee's business. However, a doubt arises whether the proposed sub-clause is restricted in its applicability to compensation relating to business contracts or it will cover those contracts which provide compensation with respective a profession also. It does not refer to compensation received in the course of profession. The Honourable Supreme Court in the case of *G. K. Choksi and Co. (2007) 295 ITR 376* has held that the reference to the word 'business' in any provision of statute cannot be construed as a reference to the word 'profession'. Hence, one may argue that compensation received in the course of contracts relating to profession are outside the scope of the proposed amendment.

III. Amendments in Section 43CA

Section 43CA provides that in case of transfer of land or building or both (which are not held as capital assets), the value adopted or assessed or assessable by the stamp valuation authority for the purpose of payment of stamp duty shall be deemed as the full value of consideration for the purpose of computing profits and gains from transfer of such asset, if it is higher than the actual sale consideration. This causes undue hardship and litigation in a scenario where there was a small variation in the value adopted or assessed or assessable by the stamp valuation authority and the actual sale consideration. There are various judicial pronouncements which favoured the assessee in case the variation was up to 10% to 15%:

a. M/s. LGW Limited vs. I.T.O.(ITANo.267/Kol/2013)

b. ACIT vs. Suvarna Rekha(ITANo.743/Hyd/2009)

c. Rahul ConstructionCo. vs. ITO(2012) 51SOT192(Pune)

In order to overrule these decisions and avoid undue hardship due to some minor variations in the two values, Parliament has proposed to insert a proviso below Sub-section (1) of Section 43CA which provides that in case if value adopted or assessed or assessable by Stamp valuation authority is higher by an amount which is up to 5% of the actual consideration, then no addition shall be made. This proviso is stated to be applicable from AY 2019-20. However, being a proviso inserted to avoid hardship to the assessees, it can be equally argued to have retrospective effect from A.Y. 2014-15 i.e., the year of introduction of Section 43CA.

However it is important to note that, by a literal interpretation, this 5% is not an exemption limit i.e., if the difference amounts to 6% of actual sale consideration then whole of 6% shall be added up in order to determine the fair value of consideration and not just 1% (6% - 5%). But on the principles of purposive construction, it may be very well argued that in such cases only the excess beyond 5% shall be added to the assessee's income. This is similar to the interpretation placed for the implication of second proviso to section 92C(2) in the context of Transfer Pricing provisions. However, these provisions was subsequently amended retrospectively to provide that $\pm$ 5% is a tolerance band rather than a standard deduction.

It should be noted that the proposed amendment does not cover sub-section (2) of section 43CA which provides for reference to the Valuation Officer. In other words, the benefit of 5% variation with the actual consideration is not proposed to be allowed with reference to the value adopted by the Valuation Officer on a reference under sub-section (2) of section 43CA.

Further, Sub-section(3) provides that in case where 'date of agreement (fixing sale consideration)' and 'date of registration of Transfer' are not same, then for the purpose of determining the variation with actual sale consideration as provided in Sub-Section (1), Value adopted by authority as on 'date of Agreement' shall be taken. However, Sub-section (3) will only apply in case where consideration has been received by 'any mode other than cash' on or before the date of agreement for transfer of the asset as provided in Sub-section (4).

Thus Sub-section (4) puts an additional requirement for the applicability of the beneficial provisions of sub-section (3) that the consideration or part of it is received otherwise than in cash on or before the 'date of agreement'. In order to have further check on various other modes resorted by a person and to have more traceability via banking channels; sub-section (4) is proposed to be amended to provide that consideration or part of it must have been received only by account payee cheque or an account payee bank draft or by use of ECS service for the purpose of Sub-Section (3).

IV. Amendments in Section 44AE

The intent of legislature to introduce presumptive based taxation u/s. 44AE was to benefit small transporters. Any person in business of plying, hiring or leasing goods carriages who owns up to 10 goods carriages can opt for presumptive taxation. Presently Section 44AE does not distinguish on the basis of type of goods carriage. The distinction between heavy and other than heavy goods vehicle as to the minimum rate of presumptive income was removed by the Finance (No. 2) Act, 2014. It has now been proposed to bring back the distinction between large capacity vehicles, being those whose gross vehicle weight exceeds 12,000 Kg. from others with effect from A.Y. 2019-20. Thus accordingly, for a transporter who owns up to 10 vehicles (whether heavy or other than heavy goods vehicle), the scheme has been bifurcated based on type of vehicle as follows:

For Heavy Goods Vehicle (gross vehicle weight > 12,000 Kg.)

– [₹ 1,000/tonne x gross vehicle weight/unladen weight] x no. of months/part thereof

Or

– Amount claimed to have been actually earned

whichever is higher.

For other than Heavy Goods Vehicle (gross vehicle weight <= 12,000 Kg.):

– ₹ 7,500 per month/part thereof

Or

– Amount claimed to have been actually earned

whichever is higher.

For the purpose of this section, 'Gross Vehicle Weight' shall be total weight of the vehicle and load certified and registered by the registering authority as permissible for that vehicle; as defined in clause 15 of Section 2 of Motor Vehicles Act, 1988.

V. Amendments in Section 80JJAA

(i) Existing provisions

Section 80JJAA allows a deduction of 30% of additional employee cost incurred in the previous year in the course of business, for 3 assessment years starting from the assessment year relevant to the previous year in which such employment is provided.

For claiming such additional deduction, one of the conditions was that eligible new employee needs to be employed for a minimum period of 240 days during the relevant previous year. However, in the case of apparel industry, the minimum number of days of employment is only 150 days instead of 240 days.

(ii) Issues in existing provisions

In case where employees were employed in the organization in later part of the year, the duration of employment may be less than 240 days or 150 days and hence, the assessee was not eligible for the deduction in that year. Further, in the succeeding year also, no deduction was available for such employees as they were not newly employed in the succeeding year.

(iii) Proposed amendments effective from AY 2019-20

Hence, it is proposed to insert a proviso to the effect that if new employees are employed for less than the minimum period during the first year of employment but continue to remain employed for the minimum period in subsequent year, such employees will be deemed to have been employed in the succeeding year. This will entitle the assessee to claim deduction of 30% of such employee cost incurred in such succeeding year as a deduction for three years beginning with such succeeding year.

It has been also proposed to reduce the minimum employment period of 240 days to 150 days in case of 'Footwear' and 'Leather' industry.

VI. Benefits to Farm Producer Companies – Section 80PA

(i) Existing provisions

Section 80P provides for 100 per cent deduction in respect of profit of co-operative society which provides assistance to its members engaged in primary agricultural activities.

(ii) Introduction to new Section 80PA

As Section 80P applies only to 'Co-operative societies', a Farm Producer Companies (FPC) registered under Companies Act, 1956 is not entitled to avail the benefit even though the nature of its activities are similar to those of co-operative societies. Thus to provide similar benefits to Farm Producer Companies (FPC), the Finance Bill proposed to insert a new section 80PA in the Act to provide 100% deduction of profit and gains attributable to the eligible business:

'Eligible Business' shall cover the following activities:

a) the marketing of agricultural produce grown by the members; or

b) the purchase of agricultural implements, seeds, livestock or other articles intended for agriculture for the purpose of supplying them to the members; or

c) the processing of the agricultural produce of the members.

(iii) Other conditions

1) Deduction can be claimed from A.Y. 2019-20 to A.Y. 2024-25 (i.e. 6 A.Ys.). Explanatory Memorandum to the Finance Bill 2018 states that deduction shall be available for 5 A.Ys, which seems to be erroneous as the wordings of the section provide for deduction for 6 A.Ys.

2) Turnover of such FPC should be less than Rs. 100 Crore in any previous year.

3) In case if such FPC also claims deduction under any other section of Chapter VI-A, then deduction under Section 80PA shall be allowed only in respect of that amount of profit which is derived after deducting the other deduction claimed under Chapter VI-A.

VII. Measures to promote start-ups

(i) Existing provisions

Section 80-IAC of the Act, *inter alia*, provides that deduction of one hundred per cent of the profits and gains derived from eligible business shall be available to an eligible start-up for three consecutive assessment years out of first seven years at the option of the assessee.

(ii) Proposed amendments

In order to improve the effectiveness of the scheme for promoting start-ups in India, it is proposed to make the following changes with effect from 1st April, 2018 (effective from A.Y. 2018-19):

Particulars	Existing provisions	Proposed provisions
Eligibility criteria w.r.t. incorporation	On or after the 1st day of April, 2016 but before 1st date of April, 2019	On or after the 1st day of April, 2016 but before 1st date of April, 2021
Total turnover	Does not exceed ₹ 25 crore in any previous year beginning on or after the 1st day of April, 2016 and ending on the 31st day of March, 2021	Does not exceed ₹ 25 crores in any seven previous years commencing from the date of incorporation
Eligible business definition expanded	A business which involves innovation, development, deployment or commercialization of new products, processes, or services driven by technology or intellectual property	A business carried out by an eligible start up engaged in innovation, development or improvement of products or processes or services, or a scalable business model with a high potential of employment generation or wealth creation. The word 'new' has been dropped meaning thereby that the product need not be new but there should be innovation, development or improvement of products. Further, no definition is provided of the term scalable business model

VIII. Provisions in relation to Companies under the ambit of Insolvency and Bankruptcy Code

A. Carry forward of losses

(i) Existing provisions

Section 79 of Act provides that carry forward and set off of losses in case of a closely held company shall be allowed only if there is continuity in the beneficial owner of the shares carrying not less than 51% of the voting power, on the last day of the year or years in which the loss was incurred and the last day of the previous year in which the loss is to be set off.

(ii) Proposed amendments

In the case of a company where a resolution plan is approved under the Insolvency and Bankruptcy Code, 2016, the change in the beneficial ownership of shares may be beyond 49% i.e. the maximum permissible limit under section 79.

In order to address this problem, it is proposed to relax the rigours of section 79 in case of such companies, whose resolution plan has been approved under the Insolvency and Bankruptcy Code, 2016, after affording a reasonable opportunity of being heard to the jurisdictional Principal Commissioner or Commissioner.

B. Verification of return of income

In cases where application for corporate insolvency resolution process has been admitted by the Adjudicating Authority under the Insolvency and Bankruptcy Code, 2016, the powers of the board of directors stand suspended.

Hence, it is proposed to amend section 140 of the Act with effect from 1stApril, 2018 (i.e. from A.Y 2018-19), so as to provide that in such cases, the return of income of such company shall be verified by the insolvency professional appointed by the Adjudicating authority under the Insolvency and Bankruptcy Code, 2016.

C. Calculation of Book Profits for the levy of MAT

(i) Existing provisions and issues

Section 115JB of the Act, provides for levy of a minimum alternate tax (MAT) on the "book profits" of a company. In computing the book profit, reduction in respect of the amount of loss brought forward or unabsorbed depreciation, whichever is less as per books of account is allowed.

Consequently, where the loss brought forward or unabsorbed depreciation is NIL, no reduction is allowed. And even in other cases, deduction is allowed only for lower of the two amounts i.e loss and depreciation. This is creating a hardship for companiesagainst whom an application for corporate insolvency resolution process has been admitted by the Adjudicating Authority under the Insolvency and Bankruptcy Code, 2016.

(ii) Proposed amendments

In order to address above issue, it is proposed to amend section 115JB with effect from 1st April, 2018 (i.e. from A.Y. 2018-19), to provide that the aggregate amount of unabsorbed depreciation and loss brought forward (excluding unabsorbed depreciation) shall be allowed to be reduced from the book profit, if a company's application for corporate insolvency resolution process under the Insolvency and Bankruptcy code, 2016 has been admitted by the Adjudicating authority.

IX. Relaxation of Minimum Alternate Tax (MAT) provisions for certain Foreign Companies:

(i) Background

Income from business and profession of Foreign Companies availing benefit of presumptive taxation u/s. 44B (Shipping Business), 44BB (Mineral Oil Exploration), 44BBA (Operation of Aircraft), 44BBB (Turnkey Power Projects) are determined on the basis of specific percentage generally ranging between 5% to 10% of a sum specified in that section.

However if MAT provisions are applied to such companies, tax would be 18.5% of computed book profit. Thus in such cases, total income under the normal provisions of the Act will be relatively lower and accordingly the normal tax liability will be lower than 18.5% of book profits. Hence, foreign companies falling under the presumptive taxation under above mentioned sections were not benefited due to application of MAT provisions.

(ii) Proposed amendments

In order to overcome the above situation, a retrospective clarification effective from 1st April, 2001 is proposed to be inserted in section 115JB of the Act to provide that the provisions of section 115JB of the Act shall not be applicable and shall be deemed never to have been applicable to assessee, **being a foreign company,** if its total income comprises **solely** profits and gains from business referred to in section 44B or section 44BB or section 44BBA or section 44BBB and such income has been offered to tax at the rates specified in the said sections.

It is important to note that in case if the said foreign company is also engaged in any other business, other than those specified in above section, this explanation will not apply and provisions of MAT will be applicable.

Dharan Gandhi, *Advocate*

Amendments to incorporate Income Computation and Disclosure Standards

As expected, an amendment proposed by Finance Bill, 2018, to give legitimacy to Income Computation and Disclosure Standards ('ICDS') after the Delhi High Court ruling. However, no one ever expected a retrospective amendment especially in view of the staunch stand of the Government against retrospective amendments. In the present article, I shall be dealing with the amendments proposed in Finance Bill, 2018, to incorporate some of the provisions of the ICDS.

In the November 2017 edition of The Chambers Journal, Adv. Vipul Joshi along with CA Viraj Mehta and myself gave a detailed analysis of the history of ICDS, the petition filed by The Chamber before the Hon'ble Delhi High Court to challenge the validity of the ICDS and the order of the said Court *(Chamber of Tax Consultant vs. UOI – 400 ITR 178)* in an article titled "High Court puts a brake on the power of Central Government to issue ICDS!". Without going into the background, the important findings of the Court in the said order is summarised as under:

Findings of the Court

Court firstly, held that the essential legislative functions cannot be delegated and in context of income-tax law, following were held to be essential legislative function:

a. Changing the basic principles and method of accounting that have been recognized in various provisions of the Act for computation of income or according tax treatment to a particular transaction.

b. To make a validation law to override judicial precedents and that too by actually removing the defect pointed out by such precedent.

The High Court after considering the judgment of the Apex Court in case of *Tuticorin Alkali Chemicals and Fertilizers Limited vs. CIT (1997) 227 ITR 172,* held that Accounting Standards has hardly any role to play in the principles governing determination of income, which has been well settled by the provisions of the Act as well as by judicial precedents.

The Court, in order to preserve the Constitutional validity of the ICDS, read down section 145(2) of the Act as amended, to restrict power of the Central Government to notify ICDS that do not seek to override binding judicial precedents or provisions of the Act or Rules. Thus, it was held by the Court that the Central Government, under delegated legislation, cannot override any judicial precedents and also cannot amend or alter any basic principles governing the computation of income. After laying down the above important principles the Court gave specific findings *qua* each ICDS and struck down some part of Notification No. 87/2017 as unconstitutional. Corresponding amendments in Form 3CD and clarifications in the Circular were also struck down.

In so far as the above fundamental principles are concerned, there is no amendment proposed in the Act. However, there are several amendments proposed in the Bill to do away with the findings of the Court in respect of specific ICDS.

I shall be dealing with the amendments proposed in the Finance Bill clause by clause.

Concept of Prudence

The Chamber had challenged ICDS-I on the ground that the concept of prudence was done away with. The Court found merit in the contention that ICDS-I does away with the concept of 'prudence' which was present in AS-1 notified u/s. 145 (2) of the Act. A negative provision was in fact present in the ICDS stating that prudence is not to be followed unless it is specified. The Court also agreed with the arguments of The Chamber and held that concept of prudence is embedded in Section 37(1) of the Act which allows deduction in respect of expenses "laid out" or "expended" for the purpose of business. Further, it also held that the concept of prudence was recognised by the Courts. Accordingly, it held that ICDS-I which does away the concept of 'prudence' was contrary to the Act and binding judicial precedents and was struck down as unconstitutional.

To overcome the said findings of the Court, the Finance Bill, 2018, has proposed two amendments in clauses 10 and 11. *Vide* clause 10, the Finance Bill proposes to insert clause (xviii) in section 36(1). The said clause proposes to allow marked-to-market loss and other expected loss as computed in accordance with the income computation and disclosure standards notified u/s. 145(2). Further, *vide* clause 11, Section 40A(13) is proposed to be inserted, wherein it is provided that no deduction or allowance shall be allowed in respect of any marked-to-market loss or other expected loss, except as allowable u/s. 36(1)(xviii).

Thus, by inserting a specific clause in section 36(1), firstly the jurisdiction of section 37(1) recognised by the Delhi High Court is ousted. This is because section 37(1) would apply to any expenditure not being an expenditure of the nature described in sections 30-36. By giving specific recognition to marked-to-market loss and expected loss u/s. 36(1)(xviii), provisions of section 37(1) would not apply. Thus, the finding of the Court that the concept of prudence is embedded in section 37(1) is expressly overruled. Secondly, the effect of the proposed amendment is that marked-to-market loss or other expected loss would be allowed only to the extent such loss has been specifically allowed under various ICDS notified u/s. 145(2). If there is no specific allowance of such loss under ICDS, or where the ICDS specifically denies allowance of such loss, the same shall not be allowed as per section 40A(13). Similar was the effect of the provisions in ICDS-I. Thus, in so far as MTM loss and expected loss is concerned, the position prior to the order of the Court has been retained with the only difference that now there is an effective and binding legislation which has to be adhered to in preference over the judgments.

In so far as MTM gains are concerned, the CBDT in Circular No. 10, 2017, in reply to question number 8, had stated that same principle as contained in ICDS-I relating to MTM losses or an expected loss shall apply *mutatis mutandis* to MTM gains or an expected profit. This position should also prevail after the proposed amendments.

Foreign Exchange fluctuation

ICDS-VI was challenged on several grounds viz., under ICDS-VI, foreign exchange fluctuation as at the end of the year on loan taken for capital purpose would be treated as item of income or expenses in contradiction to the ruling of the Hon'ble Supreme Court in case of *Sutlej Cotton Mills Limited vs. CIT (1979) 116 ITR 1 (SC);* ICDS VI also states that marked-to-market loss/ gain in case of foreign currency derivatives held for trading or speculation purposes are not to be allowed which again was running against the ruling of Supreme Court in case of *Sutlej and Woodward Governor India P. Ltd. [312 ITR 254(SC)];* lastly the clarification prescribed under Circular 10 for Foreign Currency Translation Reserve Account balance as on 1st April, 2016, which was to be recognized as income/loss of the previous year relevant to the AY. 2017-18, was also challenged. The Court accepted all the three contentions of the Petitioners and in light thereof, ICDS-VI was struck down completely.

Vide Clause 13 of Finance Bill, 2018, section 43AA is proposed to be inserted with the sole motive of negating the above findings of the Court. Section 43AA states that subject to the provisions of section 43A, any gain or loss arising on account of any change in foreign exchange rates shall be treated as income or loss, as the case may be, and such gain or loss shall be computed in accordance with the ICDS notified u/s. 145(2). Section 43AA(1) is in the nature of charging provision. Further, the gain or loss u/s. 43AA would have to be computed in accordance with the ICDS notified u/s. 145(2). It should be noted that only the computation part has been delegated u/s. 145(2).

Section 43AA(2) states as under:

"For the purposes of sub-section (1), gain or loss arising on account of the effects of change in foreign exchange rates shall be in respect of all foreign currency transactions, including those relating to—

(i) Monetary items and non-monetary items;

(ii) Translation of financial statements of foreign operations;

(iii) Forward exchange contracts;

(iv) Foreign currency translation reserves."

Thus, section 43AA(2) states that sub-section (1) which is in effect a charging provision shall apply only to foreign currency transactions. Further, foreign currency transactions shall include all transactions as given in clauses (i) to (iv) above. Thus, the section only gives an inclusive list of foreign currency transaction and is definitely not restricted to these items. It can be seen that even the non-monetary items are proposed to be included as well as the translation of financial statement of integrated and non-integrated foreign operations. Though such terms are not defined anywhere in the Act.

It can be seen that sweeping changes are proposed to be brought in this regard. The impact is summarised as under:

a. Loss or gain arising on foreign exchange fluctuation in respect of any foreign currency transaction has to be recognised as income or loss. Only computation of such loss/gain is to be in accordance with the provision of ICDS notified u/s. 145(2). Thus, ICDS notified u/s. 145(2) cannot say as to which loss/gain is not to be recognised or *vice versa*. It can only provide for computation of such loss/gain.

b. Land mark judgment in case of Sutlej (supra) which was holding the field for about 40 years is given a go-by. The said judgment held that if a transaction is on capital account, then the foreign currency loss/ gain has to be treated as one on capital account and if a transaction is on revenue account, then foreign currency loss/ gain has to be treated as one on revenue account. The said judgment was subsequently followed by the same Court in case of Woodward Governor (supra). However, now except for the treatment provided for in section 43A, any gain or loss arising on any monetary item or non-monetary item has to be recognised as an item of income or loss without any distinction between a transaction on revenue account or capital account.

c. Marked-to-market loss/gain in case of foreign currency derivatives held for trading or speculation purposes is to be recognised as per section 43AA as gain or loss, since the same arises out of foreign currency transaction. Even if the ICDS notified u/s. 145(2) states that no such loss or gains should be recognised, the same shall run the risk of being contrary to section 43AA as the only thing which the ICDS can provide is the computation of such loss/gain.

d. Foreign currency translation reserve arises as a result of year end valuation of assets and liabilities of a non-integrated foreign operations. In Circular No. 10 of 2017, in answer to Question No. 16 the CBDT had clarified that Foreign Currency Translation Reserve Account balance as on 1st April 2016 has to be recognized as income/loss of the previous year relevant to the AY 2017-18. No amendment has been proposed in this regard. The amendment proposed only treats the foreign currency translation reserve as a foreign currency transaction. This would in effect mean that any adjustment to reserve of this sort would be held to be gain or loss in the year of adjustment. However, the balance as on 1-4-2016 cannot be taxed in FY 2016-17. Firstly, because the Court held that such income is notional in nature, and in any case, such income pertains to earlier years and therefore, cannot be taxed in FY 2016-17.

e. Treatment provided in section 43A and section 43AA are contrary to each other. Section 43A deals with a case, where the assessee has acquired any asset from outside India and there is increase or reduction in liability to pay as a result of fluctuation in foreign exchange rate. In such a case, any increase or decrease in liability at the time of making payment has to be adjusted to the actual cost of the asset u/s. 43(1) or other sections as provided therein. Thus, section 43A applies to any asset purchased from outside India and it recognises the fluctuation which arises at the time of making payment. In all other cases section 43AA would apply. In other words, section 43AA would apply to any asset purchased from within India, but for the purchase of which a loan has been taken in foreign currency from outside India. Also, section 43A would apply only at the time of making payment, whereas section 43AA would apply for year-end valuations. Section 43A provides adjustment in the cost whereas, section 43AA provides that any exchange fluctuation has to be recognised at loss or gain as the case may be. Thus, contrary treatment are provided for similar nature of transactions. There is no intelligible difference between assets acquired from within India and from outside India if the payment has to be ultimately made in foreign currency. Also, now one can argue that gain or loss arising as at the year end on account of foreign exchange fluctuation has to be recognised as gain/loss as per section 43AA, even when the asset is purchased from outside India, since section 43A apply only at the time of payment. In such a case, a very peculiar situation would arise i.e., exchange fluctuation at the time of making payment would be required to be capitalised whereas the fluctuation arising on year end valuation would be required to be taken as income or loss.

Method for recognising revenue in respect of construction contract and service contract

The Chamber had challenged the provision of ICDS-IV which prescribed only one method for recognition of revenue from service contracts i.e., proportionate completion method. Various precedents had accepted the other method also viz., contract completion method. The Court accepted the plea of the petitioner and held that proportionate completion method as well as the contract completion method have been recognized as valid method of accounting under mercantile system of accounting. Accordingly, to the extent that para 6 of ICDS-IV permits only one of the methods, i.e., proportionate completion method, it was held to be *ultra vires* the Act. Though no reference was made to the Construction contracts under ICDS-III, the ratio would have squarely applied to those contracts also.

To nullify the above ratio of the Court, clause 15 of the Finance Bill, 2018, proposes to introduce section 43CB in the Act. Section 43CB(1) states that the profits and gains arising from a construction contract or a contract for providing services shall be determined on the basis of percentage of completion method in accordance with the ICDS notified u/s. 145(2). However, the proviso to section 43CB(1) states that in respect of service contracts, which takes less than 90 days for completion, the income has to be calculated as per project completion method. Similarly, a contract of service which involves indeterminate number of acts over a specific period of time has to be determined as per straight line method.

One has to note that ICDS-IV provided an option to the assessee in case where the service contracts took less than 90 days for completion to follow contract completion method; however, proviso to section 43CB(1) mandates the usage of project completion method. Thus, in case of all service contracts, irrespective of the method of accounting followed for maintaining books of account, one has to offer revenue to tax only on the basis of project completion method. Similar is the case of contracts which involve indeterminate number of acts for completion; ICDS-IV provided for an option to follow either the percentage completion method or straight line basis method. However, the proviso to section 43CB(1) mandates the usage of straight line basis method.

Also, where one follows project completion method while maintaining books of account and is required to follow percentage completion method for computing taxable income, there may arise MAT implications, as a result of which same income would be taxed doubly; one under the normal provisions and one under MAT. In this regard, one should refer to the judgment of the Hon'ble Andhra Pradesh High Court in case of *CIT vs. Nagarjuna Fertilizers & Chemicals Ltd.(373 ITR 252),* wherein the Court has held that once an income has been taxed under normal provisions of the Act, the same cannot be taxed under MAT provisions.

Retention money and reduction of incidental income from contract cost

The taxability of retention money as per the percentage completion method in contravention of the settled legal principles laid down by various High Courts was challenged. The Court after considering the case laws held that the treatment to retention money under Paragraph 10(a) in ICDS-III will have to be determined on a case to case basis by applying settled principles of accrual of income and by deploying ICDS-III in a manner that seeks to bring to tax the retention money, the receipt of which is uncertain/conditional, at the earliest possible stage, the Government would be acting contrary to the settled position in law as explained in the above decisions. The Court accordingly, held that para 10(a) to the extent of treatment given to retention money was *ultra vires.*

ICDS-III was also challenged on the ground that not all incidental income are allowed to be reduced from contract cost viz., interest, dividend and capital gains. This treatment was not in consonance with the principles laid down by the Hon'ble Supreme Court in case of *CIT vs. Bokaro Steel Limited (1999) 236 ITR 315*. The Court held that such treatment cannot be sustained in light of the binding Supreme Court judgment.

The above findings of the Court are now proposed to be overruled. Clause 15 of Finance Bill, 2018 proposes to introduce section 43CB. We have discussed section 43CB(1) earlier. Now we shall deal with section 43CB(2). It states that for the purposes of percentage of completion method, project completion method or straight line method the contract revenue shall include retention money and the contract costs shall not be reduced by any incidental income in the nature of interest, dividends or capital gains.

Thus, it is now provided that contract revenue shall include retention money and therefore, it has to be taxed as per relevant method. However, in this regard, it is necessary to refer to para 9 of ICDS-III. It states that contract revenue shall be recognised when there is reasonable certainty of its ultimate collection. Thus, this condition still prevails. Accordingly, even if retention money has to be included in contract revenue, if there is no reasonable certainty then the same should not be recognised as income. However, even if the payment of retention money is delayed or is to be made on fulfilment of certain conditions, but there is reasonable certainty of its ultimate collection then the same has to be recognised. In order to play safe, one can write off the amount so recognised and claim deduction u/s. 36(1)(vii).

Also, the proposed amendment provides that incidental income in the nature of interest, dividends and capital gains cannot be reduced from contract cost. In effect, the judgment of the Supreme Court in case of Bokaro and other judgments like *CIT vs. Karnal Co-operative Sugar Mills Ltd. [243 ITR 2(SC)]* are overruled to the extent of computation of contract cost. However, the above section i.e., 43CB(2) will not apply except for calculation of contract cost. Also, incidental income other than interest, dividends or capital gains can be reduced from contract cost like, rent income from temporary leasing of premises to the contractor etc.

Taxation of export incentives

Para 5 of ICDS-IV which necessitated the assessee to recognise income from export incentive in the year of making of claim was challenged on the ground that it was running contrary to the judgment of the Hon'ble Supreme Court in *CIT vs. Excel Industries Limited (2015) 358 ITR 295 (SC).* The Court held that in Excel Industries (supra), the Supreme Court held that it is only in the year in which the claim is accepted by the Government that a right to receive the payment accrues in favour of the assessee and the corresponding obligation to pay arises in the hands of the Government and only in such year the income from export incentive can be said to have accrued and can be recognized as income. Therefore, para 5 of ICDS-IV was held to be not consistent with the law explained by the Supreme Court. To that extent para 5 was held by the Court to be *ultra vires.*

Vide Clause 45 of the Finance Bill, 2018, entire section 145A is replaced by new section 145A and section 145B. Section 145B deals with three items of income viz., interest received on compensation or enhanced compensation, taxability of subsidy and taxability of claim for escalation of price in a contract or export incentives. At present we shall deal with the latter. Section 145B(2) states that any claim for escalation of price in a contract or export incentives shall be deemed to be the income of the previous year in which reasonable certainty of its realisation is achieved. Thus, the judgment in case of Excel Industries (supra) has been overruled to this extent and the export incentive has to be taxed in the year in which the claim has been made or any year thereafter if there is reasonable certainty of its ultimate collection without waiting for the claim to be accepted by the Government. Also, section 145B(2) should apply only if one follows mercantile system of accounting.

Subsidy

ICDS-VII provided that recognition of Government grants cannot be postponed beyond the date of receipt of Government grants. This was challenged. The Court held that the said treatment is contrary to and in conflict with the accrual system of accounting. Therefore, ICDS-VII was declared *ultra vires* to the above extent.

As already discussed above, *vide* clause 45 of the Finance Bill, 2018, it has been proposed to introduce section 145B. Section 145B(3) states that the income referred to in section 2(24)(xviii) i.e., subsidies and grants shall be deemed to be the income of the previous year in which it is received, if not charged to income-tax in any earlier previous year. Thus, it is proposed that recognition of subsidy or grants as income cannot be postponed beyond the previous year in which it is ultimately received.

Sections 145 and 145A dealt with the method of accounting and fell under the Chapter XIV - Procedure for Assessment. These sections were in the nature of machinery provision. However, now with the introduction of section 145B it can be seen that the nature of section has changed from machinery provision to charging provision. It provides for the point of taxation in respect of three items of income viz., interest on compensation, export incentives and subsidies.

Valuation of inventories and securities

ICDS-II was challenged on two grounds viz., diffusion of the ruling in case of *Shakti Trading Co. vs. CIT (2001) 250 ITR 871 (SC)* and futility of ICDS-II in light of the binding provisions of section 145A. Section 145A of the Act overrides the provision of section 145 in view of the specific *non-obstante* clause. ICDS have been notified u/s. 145(2) of the Act. Further, section 145A of the Act provides that inventory of goods shall be valued in accordance with the method of accounting regularly employed by the assessee. Therefore, if an assessee regularly follows a method for valuation of inventory, same would be sufficient to comply with the provisions of section 145A of the Act, even though such method is not in consonance with the provisions of section 145 and ICDS.

Both the above contentions were accepted by the Court and it was pleased to strike down ICDS-II in its entirety.

ICDS-VIII *inter alia* deals with valuation of securities held by a person as stock-in-trade. It has been divided into 2 parts. Part A deals with entities other than scheduled banks and public financial institutions whereas Part B deals with scheduled banks and public financial institutions. The method of valuation of stock of securities as at the end of the year on bucket system basis was challenged. The Court accepted the challenge and held that this change is not possible to be effectuated without a corresponding amendment to the Act and accordingly, the Court declared Part A of ICDS -VIII as *ultra vires.*

Both the above findings of the Court are proposed to be diffused by clause 45 of the Finance Bill, 2018. This clause replaces entire section 145A by new section 145A and section 145B. Proposed section 145A deals with valuation of inventories and securities for calculating business income. It briefly provides for as under:

i. The valuation of inventory shall be made at lower of actual cost or net realisable value (NRV) computed in accordance with the ICDS notified u/s. 145(2)

ii. The valuation of purchase and sale of goods or <u>services</u> and of inventory shall be adjusted to include the amount of any tax, duty, cess or fee (by whatever name called) actually paid or incurred by the assessee to bring the goods or services to the place of its location and condition as on the date of valuation

iii. The inventory being securities not listed on a recognised stock exchange, or listed but not quoted on a recognised stock exchange with regularity from time-to-time, shall be valued at actual cost initially recognised in accordance with the ICDS notified u/s. 145(2)

iv. The inventory being securities other than those referred to in clause (iii), shall be valued at lower of actual cost or net realisable value in accordance with the ICDS notified u/s. 145(2). Further, such comparison of actual cost and net realisable value of securities shall be made <u>category-wise</u>.

v. *Explanation 1* provides that for the purposes of this section, any tax, duty, cess or fee (by whatever name called) under any law for the time being in force, shall include all such payment notwithstanding any right arising as a consequence to such payment.

From the above proposed section, it can be seen that *prima facie* the *non-obstante* part of the erstwhile section 145A has been now removed. Therefore, 145A would not prevail over section 145. Secondly, it has been proposed that the inventory has to be valued at cost or net realisable value whichever is lower. Thus, the principle laid down by the Apex Court in *Chainrup Sampatram vs. CIT (24 ITR 481)* finally gets statutory recognition. Also, the valuation has to be made irrespective of the method of accounting followed by the assessee.

The computation of cost or NRV is as per the ICDS notified u/s. 145(2). Thus, the ICDS can only provide for the computation of cost or NRV and nothing more than that. The ICDS cannot prescribe under which scenario the inventory has to be valued at either cost or at NRV. Therefore, indirectly, the judgment of the Apex Court in case of Shakti Trading has received approval from the legislation. In fact the judgment of the Apex Court in case of A. L. A. Firm – [(1989) 189 ITR 285 (SC)], now stands overruled, because section 145A(i) clearly states that inventory has to be valued at cost or NRV whichever is lower without any exception. Therefore, even if on dissolution of the firm, the business is discontinued, the inventory has to be valued at cost or NRV whichever is lower.

Further, the erstwhile section 145A only dealt with purchase and sale of goods and inventory of goods and required the assessees to add the amount of tax to the same. However, the proposed section 145A also deals with services. In respect of services, the Hon'ble Bombay High Court in case of *CIT vs. Knight Frank (India) P. Ltd. (ITA No. 247 of 2014 and 225 of 2014),* has held that section 145A(a)(ii) of the Act, would not apply to the service tax billed on rendering of services. Therefore, now the said judgment stands overruled. Even the service tax or GST amount on rendering of services has to be added to purchase and sale of services.

In so far as valuation of securities is concerned, proposed clauses (iii) and (iv) deal with the subject. Clause (iii) deals with the inventory being securities not listed on a recognised stock exchange, or listed but not quoted on a recognised stock exchange with regularity from time-to-time and states that it has to be valued at cost in accordance with the ICDS notified u/s. 145(2). Other than the inventories covered by clause (iii), the same has to be valued at cost or NRV whichever is lower and further, the same has to be valued in accordance with the ICDS notified. Recognised stock exchange is given the same meaning as assigned to it in clause (ii) of *Explanation 1* to section 43(5). Further such valuation would be as per the bucket system. Thus, the judgment of the Delhi High Court stands overruled to this effect.

The term securities has not been defined in section 145A. If we refer to the definition of the term securities in Section 2(h) of the Securities Contract Regulation Act, 1956, the definition of the term securities also includes derivatives. Thus, even the derivatives which are listed on a recognised stock exchange and quoted with regularity have to be valued at cost of market value whichever is lower. This, in effect means that the MTM loss on derivative contract held for trading purposes would be allowed u/s. 145A(iv), however, there would be no need to recognise MTM gains. The same view has been taken consistently by the Tribunal starting with the judgment in case of *Edelweiss Capital Ltd. vs. ITO [ITA No. 5324/M/2007]*. However, such valuation has to be done as per the bucket approach.

Other items not proposed to be amended

The Delhi High Court also held that to the extent ICDS-IX dealing with borrowing cost does not allow incidental income to be reduced from borrowing cost, the same is not in consonance with the judgment of the Supreme Court in case of Bokaro Steel (supra). To that extent, para 5 of ICDS-IX was struck down. There is no amendment proposed in the Finance Bill *qua* the said finding of the Court. Therefore, the same can be said to be the tacit approval of the legislation.

The Delhi High Court in some cases has struck down the entire ICDS and in some cases, some parts of the ICDS. Further, the corresponding amendments in Form 3CD and the clarifications in the Circular are also struck down. The amendments proposed in the present Finance Bill, 2018, provides life to certain issue of the entire ICDS struck down. It does not revalidate all the portion of the Notification which was struck down. The same are not brought back to life by any amendment. Accordingly, those aspects of ICDS still remain buried till the time the judgment of the Delhi High Court prevails. The said judgment can be overruled either by the Supreme Court or by bringing a new notification in line with the amendments and the findings of the Hon'ble Delhi High Court. Further, Notification No. 88/2017 dealing with the amendments in Form 3CD also needs to be reissued, however, in compliance with the amendments proposed.

Also, there are number of other issues wherein the ICDS has tried to bypass the judgments but which has not been dealt with specifically by this judgment. Further, there may also be judgment which may crop up in future years dealing with any issue for which the ICDS provides for a contrary treatment. In this regard it is important to note that the Court has clearly read down the provisions of section 145(2) to disentitle the Government to overrule any judgments of the Court. Further, the Court has held that aspects of computation of income and the power of overruling the judgments are essential legislative function which cannot be delegated to the Executive. Therefore, any act to the contrary, even if not dealt with by the judgment would not survive. The legislature has proposed amendment in the Finance Bill, 2018, only *qua* the issues dealt with by the Court in the judgment. Thus, in those cases, where no amendments are proposed in the Finance Bill, 2018, the position would be that the judgments would prevail over the ICDS.

Effect of striking down of certain ICDS

In the proposed amendments, the Government has referred to the ICDS notified u/s. 145(2). In so far as the ICDS notified *vide* Notification No. 87/2017 is concerned, some of them are struck down as unconstitutional while some parts of the others are struck down. Therefore, in so far as the status of said notification is concerned, the Delhi High Court ruling would still prevail till the time the same is reversed by the Supreme Court. The amendments proposed by the Finance Bill, 2017 as discussed above, does not bring to life the Notification struck down. In only provides for treatment of certain items and refers to the ICDS notified u/s. 145(2). Therefore, in my view, the Government has to come out with new notification to bring back to life the portion of ICDS struck down.

The other view would be that to the extent the Finance Bill, 2018 gives legitimacy to the ICDS, to that extent the ICDS struck down would come back to life. However, only to that effect and not anymore. In order to remove the confusion, it would be better if the Government issues new ICDS u/s. 145(2) in place of the existing one after taking into account the amendments proposed in the present Finance Bill and judgment of the Delhi High Court to the extent not proposed to be overruled.

Retrospectivity issue

All the amendments proposed to overcome the ICDS ruling of the Delhi High Court have been brought out retrospectively w.e.f. 1-4-2017. The reason given in this regard *in the* Explanatory Memorandum *is that "Recent judicial pronouncements have raised doubts on the legitimacy of the notified ICDS. However, a large number of taxpayers have already complied with the provisions of ICDS for computing income for assessment year 2017-18. In order to regularise the compliance with the notified ICDS by a large number taxpayers so as to prevent any further inconvenience to them, it is proposed to bring the amendments retrospectively with effect from 1st April, 2017 i.e. the date on which the ICDS was made effective and will, accordingly, apply in relation to assessment year 2017-18 and subsequent assessment years"*.

This certainly is not the case. It was not clear even prior to the Delhi High Court judgment as to whether the ICDS would prevail over the binding precedents or not. Many assessees have preferred following the binding precedents of the Courts instead of the ICDS. Therefore, to bring the ICDS with retrospective effect is clearly unjustified especially by giving reasons that many taxpayers would have already complied with the provisions of ICDS. In fact, the judgment of the Court came on 7-11-2017 and most of the Returns whose due date was on 30-11-2017 were pending to be filed. Therefore, those assessees would have followed the Delhi High Court order. Therefore, it is unfair on the part of the Government to bring the amendment with retrospective effect especially when the present Government is strictly not in favour of retrospective amendments. Instead of introducing the amendments with retrospective effect, the Government could have given an option to the assessees to follow the ICDS for the AY 2017-18.

Here it would not be out of context to mention that in case where the amendment is made retrospectively as a result of which the tax liability is arising, the assessee would not be required to pay interest u/s. 234A and 234B of the Act [please see *CIT vs. Glenmark Pharmaceuticals Ltd. - 398 ITR 439 (Bom.)* and *CIT vs. National Dairy Development Board - 397 ITR 543(Guj.)]*

Conclusion

It may be perceived by many that because of the Delhi High Court judgment, the above discussed amendments are proposed in the Finance Bill, 2018 and once the same is passed, there would be no way to wriggle out. Had there been no judgment, the assessees would have had the chance to argue that the judgments would prevail over the notification.

However, it should be made clear that without the judgment of the Delhi High Court, the Government would have come out with many other ICDS to overrule favourable rulings, which is now barred. Litigation to that extent is avoided. In any case the Government was clear that the judgments so overruled were to be shown the door, however, at least the notification route is closed which was much simpler for the Government to come out with, without even the concurrence of the Parliament.


Paras S. Savla & Keerthiga Sharma, *Advocates*

Taxation on Conversion of Inventory into Capital Assets, Stamp Duty Valuation and Investment in Bonds as per Section 54EC

By the time this article is published, one would have definitely read and analyzed the budget, and also gauged whether it was a populous budget or was a corrective measure for the nation. Thankfully, the Government was fast enough to react to the concerns raised by various stakeholders, and has issued press releases on certain points to clarify the doubts raised. Hopefully, it would rectify drafting errors in the budget as well. In light of this, let us see as to what the budget has proposed on conversion of inventory into capital assets, property valuations and investment in bonds to claim exemption under section 54EC.

1. Conversion of inventory into Capital Asset

1.1 Amendment to sections 28 and 49 – Conversion of Inventory into Capital Asset

Section 45(2) of the Income-tax Act, 1961 ('Act') provides that gains arising from conversion of a capital asset into stock-in-trade is taxable as capital gains in the year in which the stock-in-trade is sold by an assessee. Thus, the point of taxability is when the assessee ultimately alienates and transfers the asset. However, the extant law does not provide for taxing the reverse situation i.e. conversion of stock-in-trade into capital asset. To cover such situations, concurrent amendments have been introduced to sections 2, 28 and 49 of the Act by the Finance Bill, 2018.

Clause (via) has been introduced to section 28 of the Act, to provide that the fair market value of the inventory/stock-in-trade, as on the date of its conversion or treatment as capital asset shall be chargeable to tax under the head "Profit and Gains of Business or Profession". The fair market value of the inventory, as on the date of conversion, will be determined in the prescribed manner. Parallel amendment has been made to the definition of 'income' in section 2(24) by introducing sub-clause (xiia), to include fair market value of inventory as referred to in section 28(via) of the Act.

Consequent amendments have been brought in for computation of capital gains as well. By virtue of introduction of sub-section 9 to section 49 of the Act, such fair market value will be taken as the cost of acquisition of such converted capital asset. Further, the period of holding of such capital asset will be calculated from the date of such conversion, as per amendment to *Explanation 1* to section 2(42A) of the Act.

These amendments will apply from Assessment Year 2019-20 onwards.

1.2 Taxing Fair Market Value, rather than the Profit / Gains

An anomaly exits in the drafting of section 28(via), which can been seen by simultaneously reading the relevant section in the Finance Bill along with the memorandum to the Finance Bill. While the intent has been to tax the "profits or gains" from the conversion of inventory into capital asset, the Finance Bill, unfortunately, states that the fair market value will be taxed as business profits. Similarly, section 2(24)(xiia) also states that the fair market value of the inventory would be considered as income. To the contrary, section 45(2) states that the profits or gains arising out of conversion of a capital asset into stock-in-trade is taxable as capital gains. Similar wording has not be considered while drafting section 28(via) and section 2(24)(xiia). We apprehend that this inconsistency will probably be rectified in the enacted law.

1.3 Point of Taxation

Another situation where the new provision of section 28(via) differs from section 45(2) is on the time of taxation. Section 45(2) taxes capital gains when the converted asset is finally sold i.e. in the year of transfer, and not in the year in which the capital asset is converted into stock-in-trade. To the contrary, the amended section 28 seems to tax the conversion of inventory into capital asset, in the year of conversion, rather than the year in which the asset is sold.

A conversion of inventory into capital asset or *vice versa,* is actually a transaction with oneself. It is the basic testament of tax law that one cannot earn income from oneself. Hence, the point of taxation should have been when the asset is ultimately alienated / sold/ discarded. Further, taxation at the time of conversion is taxing notional income, which is bound to cause undue financial hardship to an assessee. Without realization of any income, the amendment postulates that tax has to be paid on such estimated income.

The taxation of stock-in-trade, if used for other than to sell, has always been in dispute. Way back in 1953, the Hon'ble Apex Court in the case of *CIT vs. Sir Kikabhai Premchand*[1] had held that usage of stock for personal use cannot be taxed by the Tax Department. In that case, the assessee, a dealer of silver bars and shares had withdrawn some silver bars and shares and settled them in trusts, where he was a beneficiary. The department sought to tax the difference between the fair market value and the cost of purchase of such silver bars and shares. The case was referred to Full Bench of the Hon'ble Supreme Court. The majority view, dismissed the contentions of the Department and held that the Revenue could not assume that all stock had to be sold at the market value and compel the assessee to pay tax on notional gains, in case it is not sold. The Apex Court appreciated the method of accounting and held that when there was no sale of inventory, there cannot be tax on the notional value of transfer. The Court reiterated that there cannot be income earned from oneself and the amendment to section 28 is a blatant contradiction to this. However, Justice N. H. Bhagwati was of the view that even in the case of withdrawal of the asset, the business was entitled to credit in the goods account, the market value of the asset as at the date of its withdrawal, whatever be the method adopted by it for valuation of its stock-in-trade on hand, at the close of a year of account.

One can argue that the amendment i.e. section 28(via) is a deeming fiction and it can tax any notional income. However, deeming fiction cannot be extended to tax a transaction with oneself. Considering

1. [1953] 24 ITR 506 (SC)

the overall structure of the Act, never has there been any deeming fiction extended to transactions with oneself. This is for the first time that such a provision has been introduced to tax a transaction with oneself.

Apart from above, issues may also arise due to different methods of accounting followed by assessees. If the assessee follows mercantile system of accounting, the conversion will attract tax immediately, however, if one follows cash basis of accounting, then one may argue that taxation should be deferred due to application of section 145.

1.4 "Treatment" as a Capital Asset

Apart from including situations where inventory is actually converted into capital asset, the bill also brings into purview situations where inventory is "treated as" a capital asset. However, there is no clarity on when can an inventory be "treated" as capital asset. Will the accounting treatment of inventory in the books of account, or actual usage of stock-in-trade as a capital asset be taken into consideration to understand whether the inventory has been converted into capital asset? The Assessing Officer can always allege that retaining the stock-in-trade for a long duration, amounts to "treating" it as a capital asset. There is ambiguity in this aspect, and one can foretell that disputes are bound to arise while interpreting this clause, based on the facts of the case. What would be the rule of evidence to consider "treatment" as a capital asset is something that could be laid down only by the courts of law.

Consider a situation where an individual assessee withdraws stock-in-trade for his personal purpose. Capital asset is defined in the Act under section 2(14), to include any asset whether or not used for business, but excludes personal effects (except jewellery, work of art etc.). Suppose the assessee deals in an article (other than jewellery, work of art, archeological collection, etc.), and uses it for personal purposes, then the amended section 28(via) may not apply, since it would not be a capital asset. On the other hand, if the assessee was dealing in land or building or any work of art, then personal usage would automatically trigger section 28(via) and tax would be payable.

Gifting, within the purview of section 56(2), of inventory may be considered as sale at "NIL" value, thereby circumventing the application of section 28(via) of the Act. However, an interesting situation will arise in case a stock-in-trade is gifted to the minor child of an individual assessee. Since the gift will actually be transfer at NIL value, it would be reduced from an inventory in the books of the account of the assessee. The said asset, in the hands of the minor child, can be considered as capital asset and applying the provisions of section 47, the cost of acquisition will be the cost at which the assessee had purchased it as inventory and the period of holding in the hands of the minor child will be from the date on which the inventory was purchased by the assessee. The income of the minor child will be clubbed along with the income of the assessee and double benefit may arise to the assessee. However, one will have to keep in mind that the Assessing Officer can always trigger the omnipotent General Anti-Avoidance Rule.

1.5 Fair Market Value

The next ambiguity is the determination of fair market value of the inventory as on the date of conversion. The bill states that the method of determination of fair market value will be prescribed. One will have to wait for further guidance to understand the methodology that will be adopted by the Revenue for determining the fair market value.

One aspect to be considered is the conversion of inventory, which is a depreciable article. Upon conversion into capital asset, the fair market value may be lower than the cost of acquisition and it is possible that such conversion may result in a loss to the assessee. However, an asset, whose value is always appreciating, will lead to income taxable as business profits.

2. Amendment to sections 43CA & 50C – Stamp Duty Valuation

Stamp duty valuation has always been the Income-tax law's Achilles' heel. Section 43CA taxes the difference between the stamp duty value of an immovable property and the actual consideration received on the sale of it, as business profits, if the latter is lower. Further, section 50C also taxes such difference as capital gains in case land or building, being a capital asset, is transferred at a value lower than the stamp duty value. Last year, section 56 was also amended to bring to tax any difference as income from other sources, in case an immovable property is received by any person for a consideration less than the stamp duty value.

However, there were certain instances where stamp duty values varied due to the location of the property or size of the property or nature of property. The Government, as a measure to address practical difficulties, has now amended all the aforementioned sections to allow a 5% variation between the stamp duty value and the actual consideration. In case the stamp duty value does not exceed 105% of the actual consideration, then the difference will not be taxed under sections 43CA, 50C and 56. However, it was judicially held that 10% variation between the stamp duty value and the actual consideration would not trigger rigors of these sections.

This amendment is applicable only from assessment year 2019-20. Being a beneficial provision, this ought to be applied retrospectively and a change to this effect in the enacted law will contribute to reduction in litigation.

3. Amendment to section 54EC – Exemption only on sale of land or building

In another attempt to increase the collection of taxes, the Government has made sweeping amendments to section 54EC. Section 54EC allowed exemption of capital gains arising out of the transfer of any long term capital asset, if the resultant capital gains was invested in long term specified asset for a period of 3 years. These long term specified assets were bonds issued by the National Highways Authority of India and Rural Electrification Corporation Limited. This section was introduced in 2001 and did not see substantive changes, until now. The Finance Bill now seeks to limit the benefit of exemption to only transfer of land or building or both, instead of exempting long term capital gains arising out of any asset. Further, the term for investment of 3 years, has now increased to 5 years. Term 'Land & building' may not include leasehold rights, rights of a buyer of flat under construction, tenancy rights, development rights etc.

4. Conclusion

This budget has been a mixed bag; giving some and taking some, but if one takes an unbiased, pragmatic and rational view, these changes are not revolting or draconian, they are more to do with strengthening the economy and nix tax planning activities. However, in all their well-meaning actions, it appears that the Government has brought in more litigation than necessary.

CA Bhavik B. Shah

Amendments to Provisions related to "Income from Other Sources"

In this article, I propose to deal with the provisions contained in the Finance Bill, 2018 which pertain or relate to provisions under the head "Income from Other Sources".

1. Amendment to section 56(2)(x)(b)

The Parliament introduced a new Clause (x) in section 56(2) in the Finance Act, 2017 replacing sub-clauses (vii) & (viia) commonly referred to as tax on gifts.

Currently, in case where any person receives, in any previous year, from any person or persons any immovable property, –

1. *Without consideration, the stamp duty value of which exceeds fifty thousand rupees, such stamp duty value;*

   (i.e., whole of such 'Stamp Duty Value' of the said property shall be considered as 'Income From Other Sources').

2. *For a consideration which is less than the stamp duty value of the property by an amount exceeding fifty thousand rupees, the stamp duty value of such property as exceeds such consideration.*

   (i.e., if difference between 'Stamp Duty Value' and actual consideration is more than ₹ 50,000/-, then whole of such difference shall be considered as 'Income from Other Sources')

There have been several situations where the actual consideration paid is below the stamp duty valuation for various factors. This has caused genuine hardship to the assessees since the Assessing Officers have simply ignored the arguments of the assessee and adopted the stamp duty value and added the difference. It has been held in *ACIT vs. Harpreet Hotels Pvt. Ltd. ITA No. 1156-1160/PN/2007, ITO vs. Kaaddu Jayghosh Appasahebh* and recently Mumbai ITAT in the case of *John Fowler (India) Pvt. Ltd. vs. DCIT ITA No. 7545/Mum/2014,* that difference of up to 10% of sale consideration, between the actual sale consideration and stamp duty valuation should be ignored.

The Finance Bill proposes to substitute Item (B) of Sub-Clause (b) of Clause (x) of Section 56 above as follows:

"(B) for a consideration, the stamp duty value of such property as exceeds such consideration if the amount of such excess is more than the higher of the following amounts, namely:-

(i) The amount of fifty thousand rupees; and

*(ii) The amount equal to **five per cent** of the consideration."*

Accordingly, sub-Clause (b) of Clause (x) of Section 56 will be invoked only in case where:

(a) The value of the property exceeds ₹ 50,000 **and**

(b) The difference between the consideration paid and stamp duty value, exceeds 5% of such consideration paid.

This amendment is in line with the amendments being made to section 50C and section 43CA.

Effective Date:
This amendment is w.e.f. from 1st April 2019 and will accordingly apply in relation to AY 2019-20 and subsequent years.

2. Expanding the scope of taxing payments related to employment – new clause u/s. 56(2)(xi)

Under the existing provisions of the Act the assessing officers have attempted to bring to tax certain types of compensation received by an employee under section 17(3)(iii) under the head 'Income from Salaries'. Whereas, the appellate authorities, in certain cases, have held these receipts to be 'capital' in nature and hence cannot be taxed. Further, in certain cases where employer-employee relationship did not exist at the time of payment of such compensation and hence held that these would not be chargeable to tax under 'Income from Salaries'.

In *CIT vs. Pritam Das Narang (2016) 381 ITR 416 (Del.)* ***a case where there was no commencement of the employment and that the offer by prospective employer to the assessee was withdrawn even prior to the commencement of such employment—Amount received by the assessee was a capital receipt and could not be taxed under the head 'Profits in Lieu of Salary.'***

In *M. G. Mohan Kumar vs. DCIT in ITA No. 981/Bang/2010* the Bangalore ITAT ***a case where the compensation paid by the former employer was all about the future engagement of the assessee to provide its services of knowledge in the airlines business to third party and particularly to the competitor or prospective competitor was not held as 'Profits in Lieu of Salary' u/s. 17(3)(iii).***

In order to overcome all such judicial pronouncements where compensation received has not been charged to tax by the appellate authorities, the Finance Bill proposes to insert a new Sub-Clause (xi) Section 56(2) which provides the chargeability of any compensation or other payment which is received by/due to any person. However, it shall be in connection with the termination or the modifications of the terms and conditions of any contracts which is related to the employment of the person receiving it.

Consequential amendment has also been made to the definition of income u/s. 2(24) wherein a new Sub-Clause (xviib) has been inserted to define the amount specified in newly inserted Sub-Clause (xi) of Section 56(2) as 'Income'.

Henceforth, all payments received by any person which relates to either the termination of his employment or any variation of terms of employment whether capital or revenue would be chargeable to tax.

Effective Date
This amendment is w.e.f. 1st April, 2019 and will accordingly apply in relation to AY 2019-20 and subsequent years.

3. Benefit of NPS withdrawal to non-salary assessee – Amendment to section 10(12A)

Currently, under Clause (12A) of section 10 provides an exemption of up to 40% to an employee contributing to the National Pension Scheme (NPS) on withdrawal from the same at the time of closure of his account or on opting out.

In order to promote the National Pension Scheme and to bring about parity between an employee contributing to the National Pension Scheme and non-employee subscribers it is proposed to amend Clause (12A) of Section 10 by replacing the word ***"employee"*** with the word ***"assessee"***. Henceforth, the benefit of the exemption would be applicable to both employee as well as non-employee subscribers of National Pension Scheme.

Effective Date
This amendment is w.e.f. 1st April, 2019 and will accordingly apply in relation to AY 2019-20 and subsequent years.

4. Clarification in sub-section 2 of section 115BBE

Currently section 115BBE of the Income-tax Act provides for levy of tax at the rate of 60% on income referred to in Clauses (a) & (b) of sub-section (1).

Clause (a) relates to unexplained income referred to section 68, section 69, section 69A, section 69B, section 69C and section 69D of the Act and reflected in the return of income filed u/s. 139(1).

Clause (b) relates to unexplained income referred to in the above sections which have been determined by the assessing officer and not covered under Clause (a) above).

Sub-section (2) starting with a *non-obstante* clause provides that no deduction in respect of any expenses or allowances or set-off of any loss shall be allowed to the assessee under any provision of this Act in computing his income referred to in Clause (a) of sub-section (1) referred to above.

This bar on non-deduction of expenditure or allowance or set-off of any loss was applicable only to Clause (a) and not to Clause (b).

Therefore, in a case where the assessing officer himself charges tax on income referred to in the specified sections (Section 68 to Section 69D), then the assessee was entitled to claim the deductions of expenses or allowances as well as set-off of any loss. This seemed to be an unintentional anomaly.

The amendment in Finance Bill, 2018 seeks to correct this anomaly and hence proposes a retrospective amendment w.e.f. 1st April, 2017 to include income referred to in both Clauses (a) and (b) of sub-section (1) in sub-section (2).

5. 7.75% GOI Savings (Taxable) Bonds, 2018

The Government has introduced a new "7.75% GOI Savings (Taxable) Bonds, 2018" commencing from 10th January, 2018. Investment in this scheme is open only to resident individuals & HUF without any monetary ceiling. The bonds have a maturity period of 7 years. The rate of interest on these bonds is 7.75% and the same is taxable in the hands of the investors.

The Finance Bill proposes that TDS on interest paid/payable on these bonds shall be deductible u/s. 193 at rates in force (presently 10%) if the said interest exceeds ₹ 10,000/-.

Effective Date

This amendment will take effect from 1st April 2018 and is applicable from financial year 2018-19 onwards.

CA Bhadresh Doshi

Taxation of Securities

Much awaited tax on long-term capital gains as indicated by Honourable Prime Minister has finally found its place in this year's budget proposals. It has been stated in the Budget speech that the total amount of exempted capital gains from listed shares and units is around ₹ 3,67,000 crores as per returns filed for A.Y. 2017-18. A modest tax of 10% is proposed to be levied on the long-term capital gains subject to grandfathering of accrued gains up to 31st January, 2018. It is expected to result into a revenue gain of about ₹ 20,000 crores in the first year.

In this article, the provisions proposed in the Finance Bill, 2018 relating to taxation of securities have been analysed in detail.

Reintroduction of tax on long-term capital gains arising from securities

Currently, long-term capital gains arising from transfer of certain securities is exempt under Section 10(38) subject to the conditions specified therein. The exemption is available to the following securities (referred as specified long-term capital assets in this article):

i. Equity share in a company

ii. Unit of an equity oriented fund

iii. Unit of a business trust

The exemption is available subject to the condition that transfer of such assets should be chargeable to Securities Transactions Tax (STT). In order to prevent abuse of exemption by entering into sham transactions, the Finance Act, 2017 imposed an additional condition for claiming exemption in respect of long-term capital gain arising from transfer of equity shares. As per the amended provision, the exemption is available only if the acquisition of equity shares, which were acquired on or after 1-10-2004, was also chargeable to STT. However, this additional condition for claiming exemption is not applicable in respect of certain acquisitions which may be notified for this purpose. Accordingly, a Notification No. 43/2017 dated 5-6-2017 was issued notifying the transactions of acquisition which are eligible for the purpose of exemption under Section 10(38), though not chargeable to STT.

Withdrawal of exemption under Section 10(38)

It has been proposed to withdraw the exemption available under Section 10(38) in respect of transfer of specified long-term capital assets made on or after 1st April, 2018. Thus, the exemption under Section 10(38) will no longer be available in respect of long-term capital gains from A.Y. 2019-20 onwards. The exemption continues to apply in respect of transfers made till 31st March, 2018 subject to fulfilment of relevant conditions.

As a result of withdrawal of exemption which was available hitherto under Section 10(38), the concerned long-term capital gains will now be chargeable to tax under Section 45. However, the assessee can claim exemptions against such long-term capital gains under the applicable provisions like Section 54EE, 54F etc. The loss arising upon transfer of specified long-term capital assets can be set off against any other long-term capital gain or may be carried forward to the subsequent assessment year in accordance with the provisions of Sections 70 & 74 respectively. The set-off of such long-term capital loss may be claimed even against that long-term capital gain which is otherwise taxable at a rate higher than 10%.

New Section 112A – applicability

A new Section 112A is proposed to be inserted in Chapter XII to deal with taxation of such long-term capital gains. The proposed provisions of Section 112A will apply if the following conditions are satisfied –

1. The total income of the assessee includes any income chargeable under the head “capital gains”.
2. The capital gains arises from the transfer of a long-term capital asset being –
    a. an equity share in a company
    b. unit of an equity oriented fund
    c. unit of a business trust
3. Securities Transaction Tax has been paid on acquisition and/or transfer of such capital asset as mentioned below:

Type of Capital Asset	Whether STT should have been paid on acquisition?	Whether STT should have been paid on transfer?*
Equity shares	'	'
– Acquisitions covered by a notification	No	Yes
– Other acquisitions	Yes	Yes
Units of equity oriented fund or units of business trust	No	Yes

* If the transfer has taken place on a recognised stock exchange located in any International Financial Services Centre and the consideration is received / receivable in foreign currency, then payment of STT on transfer is not required.

1. FAQ issued by CBDT dated 4th February, 2018 (F. No. 370149/20/2018-TPL)

Thus, in substance, the provisions of Section 112A will apply to that long-term capital gain which was hitherto exempt under Section 10(38). The condition of payment of STT on acquisition of equity shares is also retained in the proposed provisions of Section 112A subject to the exceptions to be notified for this purpose. It is clarified in FAQ[1] that the same notification, which has been issued under Section 10(38), is proposed to be reiterated for the purposes of new provisions of Section 112A after its enactment.

Section 10(38) expressly provides that the condition of payment of STT on acquisition is applicable only in respect of those equity shares which have been acquired on or after 1st October, 2004 i.e., the date on which STT came into force. Section 112A does not provide so expressly. However, it is but obvious that this condition should be read with the relevant provisions of Chapter VII of the Finance (No. 2) Act, 2004 which came into force from 1st October, 2004 only. If STT itself was not applicable prior to 1st October, 2004, the condition of payment of STT on acquisition cannot be made applicable to equity shares acquired before 1st October, 2004. This view is further fortified from the clarifications issued *vide* FAQ which clearly provides that STT is required to be paid even at the time of acquisition in case of equity shares acquired on or after 1-10-2004.

The definition of "equity oriented fund" is proposed to be amended for the purpose of Section 112A. As per the new definition, a fund which invests in another fund is also included in it provided it satisfies the following conditions –

i. Minimum 90% of the total proceeds of such fund is invested in the units of another fund which is traded on a recognised stock exchange; and

ii. Such other fund also invests a minimum of 90% of its total proceeds in the equity shares of domestic companies listed on a recognised stock exchange

Consequential amendments have also been proposed in the Finance (No. 2) Act, 2004 in order to bring sale of units of such fund within the chargeability of STT. Accordingly, sale of units of such fund would be chargeable to STT with effect from 1st April, 2018.

The provisions of Section 2(42A) which defines a "short-term capital asset" still refer to the old definition of "equity oriented fund" as provided in Section 10(38). Therefore, units of such fund which invests in another fund are required to be held for more than 36 months in order to be qualified as long-term capital assets unless suitable amendments have been made in Section 2(42A).

Impact of Section 112A on computation of long-term capital gains

Section 112A not only provides for computation of tax on the long-term capital gains but also provides for computation of long-term capital gains in a specified manner. The long-term capital gains to which Section 112A applies is required to be computed as per the normal provisions but subject to the following modifications –

i. The benefit of indexation as provided in the second proviso to Section 48 will not be allowed.

ii. The benefit of computation of capital gains in foreign currency in the case of a non-resident as provided in the first proviso to Section 48 will also not be allowed.

2. But without considering Fair Market Value as provided in point (iii) below.

However, a non-resident Indian following special provisions of Chapter XII-A may compute the long-term capital gains in accordance with the first proviso to Section 48 and pay tax on it @10% under Section 115E[2].

iii. In a case where the long-term capital asset is acquired by the assessee before 1st February, 2018, its cost of acquisition will be –

Higher of –	the actual cost of acquisition; and
	the lower of – a) the fair market value; and b) the full value of consideration received or accruing as a result of the transfer of such asset

The fair market value for this purpose will be determined as follows:

Type of capital assets	**Fair market value**
Capital assets which are listed on any recognised stock exchange and also traded on 31-1-2018	Highest price quoted on 31-1-2018
Capital assets which are listed on any recognised stock exchange but not traded on 31-1-2018	Highest price on a date immediately preceding 31-1-2018 when such asset was traded
Units which are not listed on any recognised stock exchange	NAV as on 31-1-2018

The impact of this adjustment can be understood with the help of following illustration:

Actual cost of acquisition	100	100	100	100	100	100
FMV as on 31-1-2018	130	130	130	70	70	70
Full value of consideration	150	120	90	120	90	50
Total Gain	50	20	(10)	20	(10)	(50)
Taxable Gain	20	–	(10)	20	(10)	(50)
Non-taxable Gain*	30	20	–	–	–	–

* It may be noted that this amount of capital gains is not exempt but not chargeable to tax because of the computation mechanism provided in Section 112A.

Thus, the gain due to appreciation in market price upto 31-1-2018 is not taxable. However, the loss due to depreciation in market price up to 31-1-2018 is protected and allowed to be claimed to the extent it has been actually incurred at the time of sale.

This mechanism of computing the cost of acquisition is applicable even in cases where the long-term capital asset has been acquired by way of bonus or in rights issue if they were acquired prior to 1st February, 2018.

This benefit of cost step-up is available only when the long-term capital asset is *acquired by the assessee before 1st February, 2018*. The issue may arise in getting this benefit in case where the 'previous owner' [referred to in Section 49(1)] has acquired such asset before that date but the assessee has acquired it subsequently and such other like cases. One will have to extend the principles as laid down by various Courts with regard to the indexation in respect of capital assets acquired by the modes specified under Section 49(1) and claim that reference to the assessee should include reference to the previous owner as well.

The actual cost of acquisition for this purpose should be computed in accordance with the applicable provisions. Thus, in respect of the assets acquired before 1st April, 2001, the fair market value of that asset as on 1st April, 2001 may be considered as actual cost of acquisition for the purpose of computing final cost of acquisition in the manner as provided above.

The moot question here is whether the computation mechanism as provided in Section 112A shall apply only if the tax is required to be computed on such long-term capital gains as it forms part of the total income or even otherwise. To understand the issue, let us assume that the long-term capital gains arising on transfer of equity share, if computed without indexation, is ₹ 2,00,000. However, it results into a long-term capital loss of ₹ 1,00,000 if it is computed after reducing the indexed cost of acquisition. Can the assessee claim set-off of loss of ₹ 1,00,000 against other long-term capital gains in accordance with the provisions of Section 70 or he has to compute the long-term capital gains in accordance with the provisions of Section 112A mandatorily?

Section 112A is proposed to be inserted in Chapter XII which is titled as "Determination of tax in certain special cases". Section 112A itself is also titled as "Tax on long-term capital gains in certain cases". It provides for determination of tax on such long-term capital gains which is included in the total income. This is clear from the reading of sub-section (1) of Section 112A. Therefore, the total income is required to be computed first as per the other provisions of the Act before applying the provisions of Section 112A. While computing the total income, due effect has to be given to all the provisions applicable for computation of long-term capital gains like Sections 48, 70 etc. It is only after computing the total income, one needs to see whether it includes the long-term capital gains as referred to in Section 112A(1). The question of applying provisions of Section 112A would arise only if the total income includes such long-term capital gains and not otherwise.

As per another view, the computation mechanism as explained above is provided in sub-sections (5) and (6) of Section 112A. Their application is not dependent upon applicability of sub-section (1) of Section 112A. Therefore, the long-term capital gains which satisfies the conditions of sub-section (1) is required to be computed always in accordance with the said provisions. This view appears to have more weightage as compared to the first view.

Like any other long-term capital gains, deduction under Chapter VI-A shall also not be available against the long-term capital gains to which Section 112A is applicable.

Impact of Section 112A on computation of tax long-term capital gains

Generally, tax on long-term capital gains is required to be computed in the manner laid down in Section 112. However, Section 112A provides for an exception to it in respect of long-term capital gains as mentioned above.

Sub-section (2) of Section 112A provides that the tax payable by the assessee shall be the aggregate of –

i. *the amount of income-tax calculated on such long-term capital gains exceeding ₹ 1,00,000 at the rate of 10%; and*

ii. *the amount of income-tax payable on the balance amount of the total income as if such balance amount were the total income of the assessee.*

It may first be noted that the amount of long-term capital gains is required to be included in the total income of the assessee irrespective of whether it exceeds ₹ 1,00,000 or not. Thus, the total income of the assessee, for all purposes like levy of surcharge, availability of rebate under Section 87A etc., will include the entire amount of long-term capital gains to which Section 112A applies. It is only when the tax is computed the amount of long-term capital gains will be relevant.

The long-term capital gains computed in the manner provided in Section 112A exceeding ₹ 1,00,000 is taxable @10% plus surcharge as applicable, if any, and plus cess @4%. Though the intention appears to not tax long-term capital gains up to ₹ 1,00,000 at all, the language used in the proposed provision creates confusion with respect to its taxability. Clause (ii) as reproduced above refers to "the balance amount of the total income" which may be interpreted as including the long-term capital gains up to ₹ 1,00,000 on which tax is not computed as per clause (i). Section 115BBDA provides for similar computation of tax on dividends exceeding ₹ 10,00,000. There, clause (b) of sub-section (1) of that Section expressly provides for computation of tax on the total income as reduced by the amount of dividends. Had the proposed provision of Section 112A used similar terminology, this confusion would not have arisen. Hoping that suitable amendment will be carried out to the Finance Bill avoiding such an interpretation, a small relief would be available for the long-term capital gains up to ₹ 1,00,000.

In case of resident individual or HUF, if their other income is below the maximum amount which is not chargeable to tax, then the long-term capital gains will be reduced by such balance amount. The tax will be computed only on the balance amount of long-term capital gains in the manner as explained above.

Further, it has been proposed that rebate under Section 87A shall not be allowed from the tax payable on the long-term capital gains as per Section 112A.

The provisions of MAT under Section 115JB continue to apply to such long-term capital gains. Also, in cases where the provisions of AMT under Section 115JC are applicable[3], the tax is required to be computed @18.5% even in respect of long-term capital gains which forms part of adjusted total income. This would result into undue hardships in such cases.

Taxability of long-term capital gains in the hands of FII

As a result of withdrawal of exemption under Section 10(38), the long-term capital gains become taxable even in case of a Foreign Institutional Investor (now referred as Foreign Portfolio Investor). In order to extend similar tax treatment of such long-term capital gains, Section 115AD is proposed to be amended to provide that long-term capital gains referred to in Section 112A exceeding ₹ 1,00,000 shall be taxed @10%.

3. Non-corporate assessees claiming certain deductions as specified in Section 115JEE

The doubt was raised regarding grandfathering of gains up to 31st January, 2018 in case of FII as the corresponding provision allowing substitution of FMV over the actual cost of acquisition was not incorporated in Section 115AD. However, it is clarified in FAQ that there will be no tax on gains accrued up to 31st January, 2018 in case of FIIs also. Thus, it is hoped that the provisions of Section 115AD will be modified suitably.

Requirement to deduct tax at source

It has been clarified in FAQ that tax is required to be deducted at source in accordance with the provisions of Section 195 where the long-term capital gains has accrued to the non-resident assessee. Accordingly, rate of deduction has been prescribed in Part-II of the First Schedule to the Finance Act which is 10%. For this purpose, the capital gains will be required to be computed in accordance with Section 112A. However, there will be no deduction of tax at source from payment of long-term capital gains to a Foreign Institutional Investor in view of the provisions of Section 196D(2).

Impact of non-applicability of Section 112A

If the provisions of Section 112A are not applicable due to violation of any condition specified therein, then the long-term capital gains will be computed in accordance with the normal provisions and will be taxed in accordance with the provisions of Section 112. For instance, the listed equity shares have been sold off-market (without paying STT). In such case, the assessee may apply Proviso to Section 112 and compute the tax @10% of long-term capital gains without applying second proviso to Section 48 i.e., indexation. However, the assessee will not be able to compute the cost of acquisition in the manner provided in Section 112A in respect of assets acquired before 1st February, 2018.

Introduction of distribution tax in case of Equity Oriented Fund

Section 115R provides for tax on income distributed by the mutual funds. Currently, distribution of income by equity oriented fund is not chargeable to distribution tax under this Section.

It is proposed to levy tax @10%[4] on income distributed by an equity oriented fund to any person with effect from 1st April, 2018. The justification for levy of such tax as explained in the Memorandum is that it is necessary to provide a level playing field between growth oriented funds and dividend paying funds, in the wake of new capital gains tax regime for unit holders of equity oriented funds. For this purpose, equity oriented fund will have the same meaning assigned to it in the new section 112A as explained above. Thus, it will also include the fund which invests in another fund and satisfies the other conditions.

The tax is required to be paid on the entire amount of the income distributed without reducing it by the amount of dividend which the fund might have received from the investee companies. Thus, it will result into a cascading effect of distribution tax.

Extension of DDT to deemed dividend under Section 2(22)(e)

The loans or advances granted by a closely held company to certain shareholders or concerns wherein such shareholders have a substantial interest are considered as deemed dividend as per

4. The effective rate will be 11.648% after adding surcharge and cess
5. Gopal & Sons (HUF) vs. CIT
6. CIT vs. Madhur Housing & Development Co.

sub-clause (e) of Section 2(22). Presently, such deemed dividend referred to in Section 2(22)(e) is not subject to Dividend Distribution Tax (DDT) under Section 115-O and is taxable in the hands shareholder/recipient at the applicable rate.

Recently, Supreme Court has dealt with several issues regarding taxability of such deemed dividend like applicability of provision where the shares were issued in the name of Karta of HUF[5] and the person who should be taxed in case where loan was given to the concern in which the shareholder had the substantial interest[6]. Considering such extensive litigation with regard to taxability of deemed dividend under Section 2(22)(e), it is proposed to shift the burden of tax on it to the company in the form of DDT. The following amendments have been proposed with effect from 1st April, 2018 in this regard:

1. The definition of "dividend" in the Explanation below Section 115Q which referred in turn to Section 2(22) but other than its sub-clause (e) has been omitted. Thus, all types of dividends including deemed dividend falling under sub-clause (e) of Section 2(22) shall be subject to additional tax under Section 115-O.
2. The DDT @30%[7] is payable on such deemed dividend under Section 2(22)(e) but without grossing up.

Such deemed dividend will be exempt under Section 10(34). Further, provisions of Section 115BBDA are not applicable to deemed dividend falling under sub-clause (e) of Section 2(22).

The DDT is required to be paid within fourteen days from the date of payment of deemed dividend. In case of delay in making payment, the interest shall be charged @1% per month or part of month for the period of delay in making the payment. Further, if DDT is not paid in accordance with the provisions of Section 115-O, then the company and its principal officer shall be deemed to be the assessee in default. In such case, penalty may be levied under Section 221 and prosecution may also be launched under Section 276B.

'Accumulated Profits' in case of amalgamation

The distribution made by the company can be regarded as dividend as per Section 2(22) only if the company possesses 'accumulated profits'. In case of amalgamation, in several cases, the accumulated profits of the amalgamating company were converted into the capital of the amalgamated company. In such cases, subsequent reduction of capital of the amalgamated company did not result into 'deemed dividend' with respect to the payout from the accumulated profits of the amalgamating company as the same were converted into the capital. In order to prevent such abusive arrangements, it is proposed to widen the scope of the term 'accumulated profits' by inserting Explanation 2A so as to provide that in the case of an amalgamated company, accumulated profits, whether capitalised or not, or losses as the case may be, shall be increased by the accumulated profits of the amalgamating company, whether capitalised or not, on the date of amalgamation. This amendment is effective from A.Y. 2018-19 onwards.

Exclusion of agricultural commodities derivatives from 'speculative transaction'

Presently, the transaction in respect of trading in commodity derivatives carried out in a recognised association is excluded from the definition of 'speculative transaction' as per Section 43(5) subject to fulfilment of several conditions. However, such exclusion is applicable only if such transaction is chargeable to Commodities Transaction Tax (CTT). The CTT as introduced by the Finance Act, 2013

7. The effective rate will be 34.944% after adding surcharge and cess

is applicable to transaction of sale of commodity derivatives in respect of all commodities but other than agricultural commodities. Since derivative contracts in agricultural commodities are not subject to CTT, they are not eligible for exclusion from 'speculative transaction' as provided in Section 43(5).

It is proposed to amend Section 43(5) to remove the condition of chargeability of CTT in respect of trading in agricultural commodity derivatives. Thus, trading in agricultural commodity derivatives will no more be regarded as 'speculative transaction' if it is an 'eligible transaction' otherwise and carried out in a 'recognised association'. This amendment is effective from A.Y. 2019-20.

CA Viraj Mehta

Amendments relating to Assessment, Appeals, Penalty & Prosecution

Clasue 42 – Amendment to Section 139A of Income-tax Act, 1961 ('the Act') – Permanent Account Number (PAN) Mandatory for certain cases

Section 139A provides that every person specified therein shall apply to the Assessing Officer for allotment of a PAN.

Finance Bill, 2018 has proposed to extend the said requirement of PAN by virtue of clause (v) of Section 139A(1) of the Act to every person (not being an individual) which will enter into a financial transaction of an amount of ₹ 2,50,000/- or more in a financial year.

Further, by virtue of clause (vi) of Section 139A(1) of the Act it is also proposed that managing director, director, partner, trustee, author, founder, karta, chief executive officer, principal officer or office bearer or any person competent to act on behalf of above entities referred in clause (v) of Section 139A(1) of the Act shall also apply to the Assessing Officer for allotment of PAN.

Application of PAN shall be governed by Rule 114 of Income Tax Rules, 1962.

Financial Transaction has not been defined in Section 139A of the Act.

This amendment will take effect from 1st April, 2018.

Clause 43 – Amendment to Section 140 of Income-tax Act, 1961 ('the Act') – Return to be verified by whom where an application for insolvency has been admitted under Insolvency and Bankruptcy Code, 2016

Finance Bill, 2018 has proposed to amend section 140 of the Act by virtue of insertion of clause (c) to second proviso so as to provide that where for a company an application for corporate insolvency resolution process has been admitted by Adjudicating Authority under Section 7 or Section 9 or Section 10 of the Insolvency and Bankruptcy Code, 2016 then the return shall be verified by an Insolvency Professional appointed by the Adjudicating Authority under the Insolvency and Bankruptcy Code, 2016.

For the meaning of 'Adjudicating Authority' and 'Insolvency Professional', reference be made to relevant provisions of Insolvency and Bankruptcy Code, 2016.

This amendment will take effect from 1st April, 2018 and will, accordingly apply to return filed on or after the said date.

Clause 44 – Amendment to Section 143(1) of Income-tax Act, 1961 ('the Act') – Rationalisation of *prima facie* adjustments

To restrict the scope of adjustment u/s. 143(1) of the Act, Finance Bill, 2018 has proposed to insert a proviso to section 143(1)(a) that provides that no adjustment shall be made under sub-clause (vi) while processing the return of income i.e. no addition shall be made to income appearing in Form 26AS or Form 16A or Form 16 which has not been included in computing the total income in the return by the assessee.

This amendment will take effect from 1st April, 2018 and will, accordingly, apply in relation to the assessment years 2018-19 and subsequent years.

Clause 44 – Insertion of New Sections – 143(3A), 143(3B) and 143(3C) of Income-tax Act, 1961 ('the Act') – New Scheme for Scrutiny Assessment

Since year 2014 when Modi Government came into power, Government intended to bring transparency and accountability and further eliminate corruption in Income Tax Proceedings. In year 2016, CBDT initiated the concept of using e-mail-based communication for paperless scrutiny proceedings. It was decided to launch a pilot project, comprising non-corporate taxpayers in 5 cities, namely, Delhi, Mumbai, Bengaluru, Ahmedabad and Chennai. Few taxpayers would be identified in each of the cities from the cases which have been selected for scrutiny and with the consent of the selected taxpayers, tax officials would conduct the e-hearing through e-mails. The initiative was launched to reduce visits by taxpayers to I-T offices and their interface with the taxman, thereby curbing corruption.

On 29th September, 2017, CBDT issued Instruction No.8/2017 to conduct assessment proceedings electronically getting time barred during FY 2017-18. It said that as a part of Government's initiative towards E-governance, Income-tax Department has brought digital transformation of its business processes to a significant extent through the Income Tax Business Application (lTBA) project which provides an integrated platform to conduct various tax proceedings electronically through the 'e-Proceeding' facility available on it. CBDT has decided to utilize the digital platform in a widespread manner for conduct of proceedings in scrutiny cases electronically.

Further, Government's intention to roll out a pan-India "faceless and nameless" e-assessment procedure for income taxpayers was further confirmed in December 2017 when CBDT notified a nine-member committee–headed by a Principal Chief Commissioner rank officer and set for it a deadline of February 28, 2018, for submitting its report on concept of a faceless and nameless e-assessment procedure.

In lines of above, Hon'ble Finance Minister Mr. Arun Jaitley in its Union Budget 2018-19 speech stated as hereunder:

"We had introduced e-assessment in 2016 on a pilot basis and in 2017, extended it to 102 cities with the objective of reducing the interface between the department and the taxpayers. With the experience gained so far, we are now ready to roll out the E-assessment across the country, which will transform the age-old assessment procedure of the income tax department and the manner in which they interact with taxpayers and other stakeholders. Accordingly, I propose to amend the Income-tax Act to notify a new scheme for assessment where the assessment will be done in electronic mode which will almost eliminate person to person contact leading to greater efficiency and transparency."

Accordingly, Finance Bill, 2018 proposed to prescribe a new scheme for the purpose of making assessments so as to impart greater transparency and accountability, by eliminating the interface between the Assessing Officer and the assessee, optimal utilization of the resources, and introduction of team-based assessment.

New section 143(3A) of the Act states that the Central Government by way of notification in the Official Gazette may make a scheme, for the purposes of making assessment of total income or loss of the assessee under sub-section (3) so as to impart greater efficiency, transparency and accountability by—

(a) Eliminating the interface between the Assessing Officer and the assessee in the course of proceedings to the extent technologically feasible;

(b) Optimising utilisation of the resources through economies of scale and functional specialisation;

(c) Introducing a team-based assessment with dynamic jurisdiction.

It is further proposed to insert sub-section (3B) in the said section, enabling the Central Government to direct, by notification in the Official Gazette, that any of the provisions of this Act relating to assessment shall not apply, or shall apply with such exceptions, modifications and adaptations as may be specified therein. However, no such direction shall be issued after the 31st March, 2020.

It is also proposed to insert sub-section (3C) in the said section, to provide that every notification issued under the sub-section (3A) and sub-section (3B), shall be laid before each House of Parliament.

However, we will have to wait for the blue print of the scheme which the Government would come out with to attain its object of faceless, nameless, paperless and jurisdictionless assessments under the Income Tax law and would bring greater efficiency, transparency and accountability in the system.

Clause 50 – Amendment to Section 253 of Income-tax Act, 1961 ('the Act') – Appeal against penalty imposed u/s. 271J of the Act

Section 253 of the Act *inter alia* provides that any assessee aggrieved by any of the orders mentioned in sub-section (1) of the said section may appeal to the Appellate Tribunal against such order.

Finance Bill, 2018 has proposed to amend clause (a) of the said sub-section so as to also make an order passed by a Commissioner (Appeals) under section 271J appealable before the Appellate Tribunal.

Section 271J of the Act *inter alia* provides for levying penalty for furnishing incorrect information in any report or certificate furnished under the provision of this Act or Rules by an accountant or a merchant banker or a registered valuer.

This amendment will take effect from 1st April, 2018.

Clause 51 – Amendment to Section 271FA of Income-tax Act, 1961 ('the Act')

Section 271FA of the Act provides that if a person who is required to furnish the statement of financial transaction or reportable account under sub-section (1) of section 285BA, fails to furnish such statement within the prescribed time, he shall be liable to pay penalty of one hundred rupees for every day of default.

The proviso to the said section further provides that in case such person fails to furnish the statement of financial transaction or reportable account within the period specified in the notice issued under sub-section (5) of section 285BA, he shall be liable to pay penalty of five hundred rupees for every day of default.

In order to ensure compliance of the reporting obligations under section 285BA, it is proposed to amend the section 271FA so as to increase the penalty leviable from one hundred rupees to five hundred rupees and from five hundred rupees to one thousand rupees, for each day of continuing default.

These amendments will take effect from 1st April, 2018.

Clause 52 – Amendment to Section 276CC of Income-tax Act, 1961 ('the Act')

Section 276CC of the Act provides that if a person wilfully fails to furnish in due time the return of income which he is required to furnish, he shall be punishable with imprisonment for a term, as specified therein, with fine. The sub-clause (b) of clause (ii) of proviso to the section 276CC further provides that a person shall not be proceeded against under the said section for failure to furnish return for any assessment year commencing on or after the 1st day of April, 1975, if the tax payable by him on the total income determined on regular assessment as reduced by the advance tax, if any, paid and any tax deducted at source, does not exceed three thousand rupees.

In order to prevent abuse of the said proviso by shell companies or by companies holding Benami properties, it is proposed to amend the provisions of the said sub-clause so as to provide that the said sub-clause shall not apply in respect of a company.

This amendment will take effect from 1st April, 2018.

CA Namrata Dedhia

Proposals on International Taxation and Transfer Pricing

The Union Budget 2018-19 was the last full budget before the upcoming general elections in 2019 and hence, was awaited with baited breath. While there were no populist proposals as was expected from an "election budget", there have been several key changes, especially on a policy level. Interestingly, a few proposals have also been introduced to prepare for alignment of the domestic tax provisions with global developments in international taxation such as Base Erosion and Profit Shifting ('BEPS') and Multilateral Instruments ('MLI'), which have been pro-actively adopted by India. However, there have not been any significant proposals in connection with the Transfer Pricing regulations, except for streamlining provisions relating to Country-by-Country Report ('CbCR').

This article deals with the proposals of the Finance Bill pertaining to International Taxation and Transfer Pricing. These proposed amendments dealt with in this article will be effective from AY 2019-20 unless mentioned otherwise.

A] Proposals relating to International Taxation

1. Expansion of scope of Dependent Agent Business Connection

Existing provisions
As per Section 9(1)(i), non-residents can be taxed in India in respect of their business income, if they have a business connection in India, to the extent of profits attributable to such business connection. Business connection includes business activity carried out through a dependent agent, who, *inter alia*, has and habitually exercises in India, the authority to conclude contracts on behalf of the non-resident, except where the activities are limited to purchase of goods.

Proposed amendment
Clause (a) of Explanation 2 to section 9(1)(i) is proposed to be substituted to provide that business connection will exist even in case of a dependent agent, who habitually plays the principal role leading to conclusion of contracts by the non-resident, where such contracts are in the name of the non-resident; or for transfer of ownership of or for granting the right to use the property of which the non-resident is the owner or has right to use; or for provision of services by the non-resident.

Rationale

Often, the affairs of non-residents and their agents in India are organised as commissionaire arrangements, whereby the agent carries out all activities including negotiations on behalf of the non-resident, but the contract is concluded by the non-resident outside India. Such arrangements remain outside the scope of a dependent agent business connection and are thus, not liable to tax in India even though substantial activities are undertaken in India. The proposed amendment seeks to widen the meaning of business connection to include such situations where significant activities prior to conclusion of a contract are carried out by the agent without concluding the contract, so as to avoid creation of a business connection.

Notably, the concept of Permanent Establishment ('PE') as per Article 5 of Double Tax Avoidance Agreements ('DTAA'), so far as a dependent agent is concerned, is broadly similar to the existing scope of business connection. The DTAAs will be modified pursuant to the MLI signed by India, resulting in a much wider scope of PE as per the DTAA. This would however, be rendered redundant if the narrower definition of dependent agent business connection under the domestic law continues since under section 90(2), the assessee would be able to apply the more beneficial provisions of the Act. The aforesaid budget proposal aims to prepare the domestic law for the anticipated modifications in the DTAA.

Analysis

Artificial avoidance of PE status is a matter of concern globally and forms the subject- matter of BEPS Action Plan 7. Circumvention of the existing PE definition by entering into commissionaire arrangements is an acknowledged avoidance measure. Further, avoidance is also resorted to by artificially splitting contracts to take advantage of the exclusion from PE in case of preparatory and auxiliary activities such as use of facilities or maintenance of stock solely for storage, display or occasional delivery of goods; maintenance of stock for processing by another entity; purchasing of goods or collection of information, etc. Both these are addressed in the recommendations of BEPS Action Plan 7, which are now a part of Article 12 of the MLI. To address the fragmentation of activities, Paragraph 4.1 introduced in Article 5 of the OECD Model Tax Convention states that the exclusion pertaining to preparatory and auxiliary activities shall not apply the same enterprise or its closely related enterprise carries on business in the other State through a PE or the combination of activities carried out by the same enterprise or along with its closely related enterprise is not preparatory or auxiliary in nature. Consequently, only intentional fragmentation of activities is targeted, while activities which are genuinely of a preparatory or auxiliary character will not be affected.

However, the proposed amendment under the Income-tax Act, 1961 ('Act') not only provides for dealing with agency structures where conclusion of contracts is deliberately avoided, but also deletes the phrase "unless his activities are limited to the purchase of goods or merchandise for the non-resident" from clause (a) of Explanation 2. Consequently, in the absence of any specific exclusion for preparatory or auxiliary activities under the Act, the limited exclusion available to purchasing activity will also be done away with. This will result in a much wider scope of business connection and will impact transactions with non-treaty countries.

2. Significant Economic Presence to constitute Business Connection

Existing provisions

The present concept of business connection focuses largely on physical presence of the non-resident in India, to tax the business profits of such non-resident.

Proposed amendment

Explanation 2A is proposed to be added to Section 9(1)(i) to provide that business connection shall include significant economic presence ('SEP') in India, which means –

a) Transaction in respect of any goods, service or property carried out by the non-resident in India, including provision of download of data or software in India, provided the aggregate payments during a previous year, arising from such transactions exceed the prescribed limit, or

b) Systematic and continuous soliciting of business or engaging in interaction with prescribed number of users, in India through digital means.

SEP shall be constituted even if the non-resident does not have a residence or place of business in India or does not render any service in India. Further, only income attributable to the aforesaid transactions or activities shall be deemed to accrue or arise in India.

Rationale

With the advent of technology and digital means of doing business, physical presence in a territory is no longer necessary to do business. This defeats the very basis of business connection as well as PE, which largely rely on the physical nexus to tax business profits. Acting on one of the recommendations of the BEPS Action Plan 1, the proposed amendment seeks to address this by tapping into "significant economic presence" of digital businesses in India, which exists by way of transactions carried out in India, download of data or software in India, solicitation of business or user interactions.

Analysis

BEPS Action Plan 1 on Taxation of Digital Economy has suggested taxation based on a new nexus that hinges on the concept of SEP as one of the approaches to meet the challenges put forth by digitization of businesses. This approach, however, could present several implementation challenges such as determining when are transactions "carried out" in India, determining the appropriate threshold, tracking activities of user interaction which does not culminate into any transaction, determination of income attributable to the SEP, etc.

It is pertinent to note that Equalisation Levy ('EL'), which was introduced on certain specified services by Chapter VIII of Finance Act, 2016, was also an alternate approach suggested by BEPS Action Plan 1 to address the same issue. EL was brought in as a separate tax outside the ambit of the Act, with a corresponding exemption under section 10(50) of the Act in respect of income arising from specified services, which are chargeable to EL. This ensured that no treaty benefits can be availed in case of such specified services, thereby, making it a unilateral levy. Interestingly, the amendment proposed is not by way of expansion of scope of specified services chargeable to EL, but instead, it seeks to widen the meaning of business connection. Consequently, till such time that the DTAAs entered into by India are not renegotiated to incorporate similar provisions in the PE Article, non-residents would be able to apply the more beneficial provisions of the applicable DTAAs. This has also been acknowledged in the memorandum explaining the Finance Bill, 2018.

While the SEP test has been introduced with the intention to bring into the tax net non-residents who have a digital presence but not a physical presence in India, the proposed amendment seeks to include transaction in respect of *any goods, service or property* carried out by the non-resident in India. The provision could, thus, potentially apply to any transactions, whether or not carried out digitally.

3. Exemption for Royalty and Fees for Technical Services in certain cases

Proposed amendment

New sub-section (6D) is proposed to be introduced in section 10 to exempt income in the nature of Royalty or Fees for Technical Services received by a non-resident or a foreign company, from National Technical Research Organisation ('NTRO').

Rationale

The NTRO is a technical intelligence agency under the National Security Advisor. The proposed amendment is introduced considering business exigencies of the NTRO. As a result, the NTRO will not be liable to deduct tax at source on such payments.

This amendment will be effective retrospectively from AY 2018-19 onwards.

4. Exemption for Royalty and Fees for Technical Services in certain cases

Existing provisions

Section 10(48B), introduced by Finance Act, 2017, provides exemption to income of a foreign company from sale of remaining stock of crude oil from its Indian facility, pursuant to expiry of notified agreement or arrangement entered into by such foreign company with the Central Government for storage and sale of crude oil.

Proposed amendment

The aforesaid section is now proposed to be amended to extend the exemption to income arising from sale of leftover crude oil in case of termination of the said agreement or arrangement.

Rationale

The agreements and arrangements referred to above are entered into by the Central Government to build up its petroleum reserves and are strategic in nature. In view of this, income from sale of crude oil while the agreement is still in force or upon expiry of the agreement is exempt from income-tax. However, income arising from sale of crude oil upon termination is not presently exempt, resulting in an inequitable treatment of such income, which the proposed amendment seeks to address.

5. Transfer of certain capital assets by Non-residents

Existing provisions

Section 47 of the Act provides tax neutrality to several transfers, upon satisfaction of specified conditions. *Inter alia,* it covers transactions of transfer of bonds, Global Depository Receipts referred to in Section 115AC(1), rupee denominated bonds of Indian companies issued outside India or certain Government securities, provided such transfers are made by a non-resident to another non-resident outside India.

Proposed amendment

New clause (viiab) is proposed to be introduced in section 47 to provide tax neutrality to the transfer of a capital asset, being bond or Global Depository Receipt referred to in Section 115AC(1), rupee denominated bond of an Indian company or derivatives, provided –

i) The transfer is made by a non-resident on a recognized stock exchange located in any International Financial Services Centre ('IFSC'), and

ii) The consideration for such transaction is paid in foreign currency.

The terms "International Financial Services Centre", "recognized stock exchange" and "derivative" have been defined for the purpose of this clause.

Rationale

Recent years have seen efforts to establish IFSCs in India to improve the financial infrastructure and encourage participation of non-residents in finance, financial products and services. In order to give an impetus to IFSC, it is proposed that transactions in certain assets undertaken by non-residents on a recognized stock exchange located in an IFSC, which is settled in foreign currency, shall not be considered as transfers. Consequently, such transactions shall not be liable to tax on the capital gains arising therefrom.

6. Rationalisation of provisions relating to Authority for Advance Rulings

Existing provisions

Section 245O lays down the constitution of Authority for Advance Rulings ('AAR') to deal with applications for advance rulings made under section 245Q. The AAR is presently empowered to deal with applications for advance rulings pertaining to matters under the Act or under Customs Act or under Excise Act or under Service Tax provisions contained in the Finance Act, 1994. Also, a revenue member from either the IRS or ICCES can be appointed as a revenue member of the AAR, irrespective of the matter on hand.

Proposed amendment

It is now proposed to provide that from the date of appointment of a new Customs Authority for Advance Ruling ('Customs AAR'), the AAR under section 245O of the Act shall not act as AAR for the purposes of Customs Act. It shall, however, act as the appellate authority for the purpose of Chapter V of the Customs Act.

Further, it is provided that in case of an application for advance ruling pertaining to any matter under the Act, only a revenue member from the IRS can be appointed as a revenue member of the AAR.

Rationale

A new Customs AAR is proposed to be set up under section 28EA of the Customs Act to deal with application for advance ruling under the Customs Act. Accordingly, to address the overlapping jurisdiction, the powers of AAR under section 245O of the Act are curtailed to that extent and replaced with powers to act as an Appellate Authority, from the date of appointment of the Customs AAR.

This amendment will be effective from 1st April, 2018.

7. Applicability of MAT to certain foreign companies

Existing provisions

Currently, MAT provisions apply uniformly to all foreign companies, except, those who are residents of countries with whom India has entered into a DTAA and who do not have any PE in India, or those who are residents of countries with whom India does not have a DTAA.

Proposed amendment

Explanation 4A is now inserted to section 115JB to clarify that the MAT provisions will not apply to foreign companies opting for presumptive scheme of taxation under sections 44B, 44BB, 44BBA or 44BBB, where the total income of the foreign company comprises solely of profits and gains from the business referred to in any of these sections and it has been taxed at the respective tax rates mentioned.

Rationale

Sections 44B, 44BB, 44BBA or 44BBB offer a scheme of presumptive taxation to foreign companies engaged in certain activities, prescribing a fixed rate of tax. Application of MAT at the higher rate of 18.5% to such companies, while tenable as per the provisions of the Act, was inequitable and not as per the intention of the legislature. This issue has now been sought to be addressed by way of the retrospective amendment.

This amendment will be applicable retrospectively from AY 2001-02 onwards.

B] Proposals relating to Transfer Pricing

1. Streamlining of provisions pertaining to CbCR

Existing provisions

Section 286 of the Act contains provisions for furnishing CbCR in respect of an international group, including the entity responsible for furnishing the report, the timelines for furnishing the same as well as the content of the report.

Proposed amendment

In order to streamline the provisions for furnishing CbCR, the following amendments are proposed to Section 286 –

a) In case the non-resident parent entity of an international group has no obligation to file CbCR in its country or territory, the group's constituent entity resident in India shall be required to furnish CbCR in India.

b) The report is required to be furnished within 12 months from the end of the reporting accounting year in all cases as against the due date of filing return of income.

c) Constituent entity in India of an international group is not required to furnish CbCR in India if an ARE of the group has furnished a CbCR with the tax authority of the country or territory, of which such ARE is a resident, within the due date specified by that country or territory as against the due date of filing return of income under section 139(1).

d) Definition of the term "agreement" is amended to include an agreement for exchange of CbCR as may be notified by the Central Government.

e) Similarly definition of the term "reporting accounting year" is amended to mean the accounting year in respect of which the financial and operational results are required to be reflected in the CbCR filed by the parent entity or ARE or constituent entity.

Rationale

The provisions for furnishing CbCR were introduced by Finance Act, 2016 based on the recommendations in BEPS Action Plan 13. There were, however, a few points of confusion in the provisions as to obligation to file and timelines for filing the CbCR. These are sought to be clarified by way of the proposals in Finance Bill, 2018.

This amendment will be applicable retrospectively from AY 2017-18 onwards.

Conclusion

The proposals in the Union Budget, 2018-19 pertaining to International Taxation and Transfer Pricing clearly reflect the attitude of keeping pace with the global developments and in some cases, even pioneering in incorporating certain recommended practices. The effectiveness with which these are implemented, will decide whether these changes will pave the way for better compliances and higher tax revenues for India or simply additional litigations.

CA Vipin Batavia

Proposals relating to Charitable Trusts

1. Introduction

The Hon'ble Finance Minister presented the Finance Bill, 2018 in Parliament on 1-2-2018. He has proposed many amendments in the direct taxes and like every year this year also the provisions pertaining to Charitable Trusts are proposed to be amended. In recent years the approach of the Government and tax department towards the Charitable and the nonprofit organizations is not lenient. The uncharitable approach of the Government results into cascading of charity itself. Moreover the perception of the Government is also changing towards NGOs and is becoming negative which is resulting in to the harsh provisions. This seems to be due to the fact that some of the black sheep are misusing the trust provisions which have set a chain effect between the Government and such people as a result the genuine trust and its humble activities are suffering.

2. Proposed Amendments

This year the Finance Minister has proposed two amendments applicable to Charitable Trusts in order to encourage a less cash economy and to reduce the generation and circulation of black money, it is proposed to insert a new explanation to the section 11 to provide that for the purpose of determining the application of Income under the provisions of sub-section (1) of the said section, the provisions of sub-clause (ia) of clause (a) of section 40 and of sub-sections (3) and (3A) of section 40A shall, *mutatis mutandis*, apply as they apply in computing the income chargeable under the head "Profits and Gains of Business or Profession".

It is also proposed to insert a similar proviso in clause (23C) of section 10 so as to provide similar restriction as above on the entities exempt under sub-clauses (iv), (v), (vi) or (via) of said clause in respect of application of income.

These amendments will take effect from 1st April, 2019 and will, accordingly, apply in relation to the Assessment Year 2019-20 and subsequent years.

These proposed amendments are briefly discussed in the following paragraphs.

3. Applicability of Section 40(a)(ia)

The existing TDS provisions, under chapter XVII-B, are applicable to Charitable Trust. But the provisions of section 40(a)(ia) were not applicable to the Charitable Trusts since the section 40(a)(ia) was applicable under chapter - IV for computation of business income and the income tax provisions are applicable to charitable trust are under chapter III of the Act therefore the section 40(a) (ia) was not applicable to Charitable Trusts. Therefore there was no disallowance in case of the defaults under Chapter XVII-B for TDS provisions.

Bombay High Court in the case of *Bombay Stock Exchange Ltd vs. Dy. DIT (Exp) (2014) 52 taxman.com 29 / (2015) 228 Taxman 195* has decided that provisions of section 40(a)(ia) are not applicable to Charitable trusts.

Now it is proposed that with effect from Assessment Year 2019-20 the provisions of section 40(a)(ia) will as it is *(mutatis mutandis)* apply to Charitable Trusts. It means the present provisions and any future amendments, circulars, changes, clarifications, notifications, litigations, case laws, disputes, interpretation of this section will also apply accordingly.

Section 40 – AMOUNTS NOT DEDUCTIBLE
Reproduced herewith for better understanding.

"Notwithstanding anything to the contrary in sections 30 to 38 the following amounts shall not be deducted in computing the income chargeable under the head Profits and Gains of Business or Profession (now applicable to Charitable Trusts also for the purposes of determining the application of income.)

Sub-section (a) and sub clause (ia) says that in the case of any assessee

"thirty per cent" of any sum payable to a resident, on which tax is deductible at source under Chapter XVII-B and such tax has not been deducted or, after deduction, has not been paid on or before the due date of filing of ITR as specified in section 139(1).

Provided that where in respect of any such sum, tax has been deducted in any subsequent year, or has been deducted during the previous year but paid after the due date specified in sub-section (1) of section 139, (thirty per cent of) such sum shall be allowed as a deduction in computing the income of the previous year in which such tax has been paid.

Provided further that where an assessee fails to deduct the whole or any part of the tax in accordance with the provisions of Chapter XVII – B on any such sum but is not deemed to be an assessee in default under the first proviso to sub-section (1) of section 201, then, for the purpose of this sub-clause, it shall be deemed that the assessee has deducted and paid the tax on such sum on the date of furnishing of return of income by the resident payee referred to in the said proviso.

Now as per the proposed amendment if the Charitable Trust make any default under the provisions of Chapter XVII-B then in that case there will be disallowance of thirty per cent of such sum on which TDS either not deducted or after deduction is not paid on or before the due date of filing of return which is 30th September in case of Charitable Trust, provided the said disallowance of thirty per cent of such sum shall be allowed as a deduction in computing the income of the previous year in which such tax is paid."

4. Disallowance for cash payments exceeding prescribed limit (Sub Sections (3) and (3A) of Section 40A)

A) Section-40A(3) provides that where assessee incurs any expenditure in respect of which a payment or aggregate of payments made to a person in a day, otherwise than by an account payee cheque drawn on a bank or account payee bank draft or payment made by use of electronic clearing system through a bank account exceeds ₹ 10 000/- (₹ 20,000/- up to A.Y. 2017-18), the whole of such expenditure shall not be allowed as deduction in computing profits and gains of business or profession. (Now applicable to charitable trusts also for the purposes of determining the application of income). That is to say that payment of expenditure exceeding ₹10,000/- in cash will be disallowed.

B) Section 40A(3A) provides that if the expenditure is incurred in a particular year but the payment is made in any subsequent year of a sum exceeding ₹ 10,000/- (₹ 20,000/- up to A.Y. 2017-18) in a day otherwise than by an account payee cheque drawn on bank or account payee bank draft or payment made by use of electronic clearing system through a bank account, the payment so made will be deemed to be the profit and gains of business or profession and chargeable to tax in the year of payment. (Now applicable to Charitable Trusts also for the purposes of determining application of income). That is to say that if the payment of expenditure exceeding ₹ 10,000/- pertaining to any previous year will be disallowed in the subsequent year in which such payment is made in cash.

The first proviso provides exceptions to such payments prescribed under **Rule 6DD** for cases and circumstances in which a payment or aggregate of payments exceeds ₹ 10,000/- may be made to a person in a day, otherwise than by an account payee cheque drawn on bank or account payee bank draft or electronic clearing system through a bank account. This exception under Rule 6DD will also apply in the case of Charitable Trusts.

The second proviso provides the higher limit of ₹ 35,000/- for disallowance of expenditure made in cash in the case of transporters under section 40A(3) and (3A) from the monetary limit of ₹ 10,000/-. The limit of 20,000/- was reduced to ₹ 10,000/- from A.Y. 2018-19 but the higher limit of ₹ 35,000/- is unchanged.

5. Insertion of new proviso to section 10(23C) to cover similar provision of applicability of Sections 40(a) (ia), 40A(3) & (3A)

After the twelfth proviso to Section 10(23C) the following proviso shall be inserted with effect from 1st April, 2019 and will accordingly apply in relation to A.Y. 2019-20 and subsequent years.

"Provided also that for the purposes of determining the amount of application under item (a) of the third proviso, the provisions of sub-clause (ia) of clause (a) of section 40 and sub-sections (3) and (3A) of section 40A, shall, mutatis mutandis, apply as they apply in computing the income chargeable under the head "Profits and Gains of Business or Profession".

It is proposed to insert similar proviso in clause (23C) of section 10 so as to provide similar restrictions on the entities covered under item (a) of the third proviso which refer to only sub-clauses (iv), (v), (vi) or (via) of said clause in respect of application of income. Even the memorandum explaining the provisions speaks only about sub clauses (iv),(V),(vi) or (via). This means the proposed amendment will not apply to other fund/ institution/trust covered under sub-clauses (i) to (iiiae) of clause (23C) of section 10 since the amendment will apply only to sub-clause (iv) to (via).

The sub-clauses (i) to (iiiaaaa) are pertaining to certain funds created by the Central Government like Prime Minister, Chief Minister relief funds and such other funds. But sub-clause (iiiab), (iiiac) (iiiad) and (iiiae) are applicable to educational and medical institutions which are falling under certain criteria or within certain prescribe limits are fully exempted but these are not covered under the proposed amendment.

The proposed amendment is applicable for determining the application of income which will be restricted to the extent of disallowance. The impact of these provisions will not be very effective since the whole income of the Trust even after the reduction in application of income will be exempt.

6. The impact of these proposed amendments on the scheme of taxation of Charitable Trust

Now let us consider the impact of these proposed amendments:

As per the proposed amendments the disallowance u/s. 40(a)(ia) and sub-sections (3) and (3A) of section 40A will apply for the purpose of determining the application of income u/s. 11(1). In other words the application of income will be reduced to the extent of disallowance. It means it will not be treated as application of the income for that year.

So in this situation a question arises whether a charitable trust can get the benefit of the existing provision of the deemed application of income by exercising the option available under explanation (2) to Section 11(1) for spending the income in the next year and/or the trust can opt for accumulation of income for specific purpose u/s. 11(2) to spend it in next 5 years. According to me there is no any amendment is proposed in these both the sections therefore these options of deemed application of income should be available to Charitable Trust.

Even in the case of excess spending by the trust it will not have any effect on tax liability since no tax will be required to pay if the excess spending is more than the disallowance. On the contrary, in the case of default in the payment of TDS, the benefit of the application of income will be available in the year in which such TDS is paid.

7. Miscellaneous amendment to section 10(46)

Clause 46 of section 10 of the Act empowers the Central Government to exempt, by notification, specified income arising to a body or authority or Board or Trust or Commission.

Under the existing provisions, the Central Government is required to notify each case separately even if they belong to the same class of cases. Consequently, the whole process of approval is considerably delayed. Therefore it is proposed to amend the said clause so as to enable the Central Government to also exempt, by notification, a class of such body or authority or Board or Trust or Commission (by whatever name called).

This amendment will take effect from 1st April, 2018 and is applicable to A.Y. 2018-19.

8. Conclusion

The aforesaid proposed provisions were earlier not applicable to the Charitable Trusts therefore to bring this situation at par with the provisions applicable to business entities these provisions are brought in to achieve the intentions of the Government in order to encourage a less cash economy and to reduce the generation and circulation of black money and to stop expenses incurred in cash to mitigate the misuse of providing non-genuine expenses.

CA Jayesh Gogri

Amendments proposed in Customs Duty Law

1. Expansion of scope of Customs Act

Current position of law

Currently, the provisions of Customs Law are limited to the Indian customs waters. The limit of 'Indian Customs waters' is limited to 24 nautical miles from the baseline. The offences committed within such limits were punishable under the law. Moreover, if any person commits any violation of the provisions of customs law could escape by moving out of India.

Proposed Changes in law

- The definition of 'Indian customs waters' has been amended to extend up to 200 nautical miles
- It has been proposed that, along with India, the Act would be applicable to any person who has committed any offence or contravention mentioned under the Customs Act outside India also
- Also, a new section 151B is proposed to be inserted to empower Central Government to enter into an agreement with Government of other countries or such competent authorities for
    - i. Facilitation of trade
    - ii. Enforcing provisions of Customs Act
    - iii. Exchange of information for facilitation of trade, risk analysis, verification of compliance and prevention, combating and investigation of offences
    - iv. Use the information so received as evidence for the proceedings under the Act
- Board is authorised to provide for procedures

2. Prohibited goods in other laws to be notified by Customs Act

Regulatory requirements relating to import or export of goods or class of goods or clearance thereof, in any other law/rules/regulations/ order/notifications shall not be effective under the said law unless it is also notified under the Customs Act.

3. Exemptions for goods imported for repairs, further processing or manufacture

New section 25A is proposed to be inserted to empower the Government to provide exemptions in respect of goods imported for repair, further processing or manufacture, subject to certain conditions. Also, similar exemption is granted *vide* Section 25B in respect of reimported goods which were exported for the purposes of repair, further processing or manufacture, subject to certain conditions.

4. Pre-notice consultation

Current position of law

Where any duty has not been levied or not paid or has been short-levied or short-paid or erroneously refunded, or any interest payable has not been paid, part-paid or erroneously refunded, for any reason other than the reasons of collusion or any wilful misstatement or suppression of facts, the proper officer could serve notice u/s. 28 – Recovery of duties not levied or short-levied or erroneously refunded on the person chargeable with the duty or interest within two years from the relevant date requiring him to show cause why he should not pay the amount specified in the notice.

Proposed amendment

It has been proposed that before issue of demand notice in cases not involving collusion, suppression, etc., the proper officer should conduct pre-notice consultation. Pending proceedings where showcause notice has been issued after the 14th May, 2015, but before enactment of Finance Bill, 2018 shall continue to be governed by the provisions of section 28 as it stood immediately before the date of enactment and would not require pre-notice consultation.

5. Time limit for adjudication

Current position of law

There is a time limit for adjudication of 6 months in normal cases and 1 year in cases where reasons of collusion or any wilful misstatement; or suppression of facts are involved. However, time limit was applicable 'where it was possible to do so'!

Proposed amendment

It is proposed that the time limits shall be strictly followed and the words 'where it was possible to do so' are omitted. These time limits shall be further extended by six months or one year as the case may be. If demand notice is not adjudicated within the extended period, it would be deemed as if no demand has been issued. This time limit shall not be applicable where the proper officer is unable to determine amount of duty or interest because of the following cases:

i. Appeal in similar matter is pending in court

ii. An interim order of stay has been issued

iii. Board has an order/direction to keep such matter as pending

iv. Settlement Commission has admitted an application of the assessee

6. Advance Ruling

Following amendments have been proposed in respect of 'Advance Rulings'

- Definition

  It has been proposed to amend the definition of advance ruling as "advance ruling" means a written decision on any of the questions referred to in section 28H raised by the applicant in his application in respect of any goods prior to its importation or exportation

- Question on which Advance Ruling can be sought for:

  i. classification of goods

  ii. applicability of a notification issued under section 25(1), on the rate of duty

  iii. the principles to be adopted for determination of value

  iv. applicability of notifications issued in respect of duties or taxes under this Act or any duty chargeable under any other law for the time being in force.

  v. determination of origin of the goods

  Central Government is now empowered to provide by notification any other matters

- Currently, applicant for advance ruling could be any of the below persons

  i. a non-resident setting up a joint venture in India in collaboration with a non-resident or a resident

  ii. a resident setting up a joint venture in India in collaboration with a non-resident

  iii. a wholly owned subsidiary Indian company, of which the holding company is a foreign company, who or which, as the case may be, proposes to undertake any business activity in India

  iv. a joint venture in India

  v. a resident falling within any such class or category of persons, as specified by notification

  It has been proposed to remove 'a wholly owned subsidiary Indian company, of which the holding company is a foreign company, who or which, as the case may be, proposes to undertake any business activity in India' from the definition of as applicant.

  Now, it has been proposed to add the following persons in the definition of applicant

  i. holding a valid IEC

  ii. exporting any goods to India

  iii. with a justifiable cause to the satisfaction of the Authority who makes an application for advance ruling under section 28H

7. Powers of Commissioner (Appeals)

Current position of law

Presently, the Commissioner (Appeals) after making further inquiry as may be necessary has powers to pass such order as he thinks just and proper, confirming, modifying or annulling the decision or order appealed against.

Proposed amendment

Power is proposed to be granted to Commissioner (Appeals) to remand back the matters to original adjudicating authority with directions for fresh adjudication in the below cases:

i. where an order or decision has been passed without following the principles of natural justice

ii. where no order or decision has been passed after reassessment

iii. where an order of refund has been issued crediting the amount to the Fund without recording any finding on the evidence produced by the applicant

8. Empowerment of Board to make regulations

It is proposed to empower the Board to make regulations on the following matters:

i. time and manner of finalisation of provisional assessment

ii. manner of conducting pre-notice consultation

iii. circumstances under which supplementary notice can be issued

iv. form and manner in which an application for advance ruling or appeal shall be made, and the procedure for the authority, under Chapter VB

v. manner of clearance or removal of imported or export goods

vi. documents to be furnished in relation to imported goods

vii. conditions, restrictions and the manner for deposits in electronic cash ledgers, the utilisation and refund , maintaining such ledger

viii. conducting audit

ix. goods for controlled delivery

x. measures and the simplified or different procedures or documentation for a class of importers or exporters or categories of goods or on the basis of the modes of transport of goods

9. Electronic Cash Ledger (ECL)

Current position of law

Currently the importer or exporter does transaction wise payment. There is no concept of ECL currently under customs.

Proposed amendment

It is proposed to introduce a new Chapter VIIA with respect to ECL in Customs Act :

i. To make deposit online in ECL to be utilised for any payment of duty, interest, penalty, fees or any other sum payable under the Act.

ii. To provide for refund of balance in ECL

iii. That board may exempt the deposits made by such class of person or such category of goods as may be specified by notification from all or any of the provisions of this section.

10. Introduction of controlled delivery

"Controlled delivery" means movement of goods under knowledge or supervision of the officer. Currently, any officer of customs appointed for any area adjoining the land frontier of India may require any person in possession of any goods which have been imported into India by land, to produce the order made under section 47 permitting clearance of the goods. It is proposed to insert section 109A for introducing the concept of controlled delivery on specified goods as may be provided in the regulations of any consignment of goods to any destination in India or a foreign country.

11. Seizure of goods

As per section 110 If the proper officer has reason to believe that any goods are liable to confiscation under this Act he may seize such goods. The proper officer should issue the show cause notice within six month of seizure of the goods in case of seized goods. The above period can be extended for a additional period of six months. If the SCN is not issued within the specified time then the goods shall be returned to the person from whose possession they were seized.

It is proposed to amend section 110 to provide that for additional 6 months officer should also record the reasons in writing and inform the person from whom such goods were seized. It is proposed to amend section 110 to provide that in case of provisional release of goods time limit of 6 months for issue of SCN will not apply, in other words SCN can be issued any time.

12. Option to pay fine in lieu of confiscation

In case of goods which are not prohibited if the officer thinks fit may grant option to pay fine in lieu of confiscation of goods and such fine shall not exceed the market price of the goods confiscated, less in the case of imported goods the duty chargeable thereon.

It is proposed to amend section 125 to provide :

i. That where the demand proceedings against a notice/co notices have been closed on grounds of having paid the dues mentioned in section 28, the fine need not be paid.

ii. That where fine has not been paid within 120 days from the date of option, then the option shall become void except in case of pending appeal.

iii. In case order to pay fine is passed before the date of assent of the Finance Bill and no appeal is pending against such order, then 120 days will be counted from the date of on which assent is received

13. Exemption from IGST

It is proposed to give retrospective effect to Notification No. 65/2017-Customs dated 8th July, 2017 amending Notification No. 50/2017- Customs dated 30th June, 2017 so as to exempt IGST leviable under section 3(7) of the CTA, 1975 on aircraft, aircraft engines and other aircraft parts imported under cross-border lease during the period from the 1st July, 2017 to the 7th July, 2017.

Application for claim of all such integrated tax which has been collected, shall be made within a period of six months from which the Finance Bill, 2018 receives the assent of the president.

14. Miscellaneous amendments

- Import Manifest and Export Manifest is proposed to be substituted as 'arrival manifest or import manifest' and 'departure manifest or export manifest' respectively
- It has been proposed to authorise the Board for providing time limit for the importer or exporter to submit relevant documents and to the proper officer to finalise provisional assessment under section 17
- Name of the Board is proposed to be changed from 'Central Board of Excise and Customs' to 'Central Board of Indirect Tax and Customs'
- Amendment in section 30 - Delivery of import manifest or import report, so as to include export goods in addition to imported goods as part of the information provided in the manifest. It also seeks to provide by regulation the manner of delivery of manifest.
- Similarly amendment in section 41 – Delivery of export manifest or export report, so as to include imported goods in addition to export goods as part of the information provided in the manifest and provide penalty provisions of late filing of manifest and the manner of delivery of manifest, by regulations
- It has been proposed that where an order for refund is modified in any appeal and the amount of refund so determined is less than the amount refunded, the excess amount so refunded shall be recovered along with interest thereon at the rate fixed by the Central Government under section 28AA, from the date of refund up to the date of recovery, as a sum due to the Government.
- Measures undertaken for facilitation of trade

  The Board is empowered to prescribe trade facilitation measures or separate procedure or documentation for a class of importers or exporters or for categories of goods or on the basis of the modes of transport of goods for:

  i. maintenance of transparency in import and export documentation and procedure

  ii. expeditious clearance or release of goods entered for import or export

  iii. reduction in the transaction cost of clearance of importing or exporting goods

  iv. maintenance of balance between customs control and facilitation of legitimate trade
- In section 122 it is proposed to empower the Board to fix monetary limits for adjudication of cases by officers below the rank of Joint Commissioner by way of notification.