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SALIENT FEATURES OF FINANCE BILL, 2018
(AS AMENDED AND PASSED BY THE LOK SABHA ON 12TH MARCH, 2018)
DIRECTLY CONCERNING THE REAL ESTATE SECTOR INCLUDING
RETROSPECTIVE AMENDMENTS EFFECTIVE FROM THE
FINANCIAL YEARS 2016-17 & 2017-2018

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SALIENT FEATURES OF FINANCE BILL, 2018 (AS AMENDED AND PASSED BY THE LOK SABHA ON 12TH MARCH, 2018) DIRECTLY CONCERNING THE REAL ESTATE SECTOR

I N D E X

SALIENT FEATURES OF FINANCE BILL, 2018 DIRECTLY CONCERNING THE REAL ESTATE SECTOR AS AMENDED AND PASSED BY THE LOK SABHA ON 12TH MARCH, 2018

I. INTRODUCTION

The Union Budget 2018-19 presented by the NDA government on 1st February, 2018 seems to be heading to have minimal direct impact on the real estate sector which is a significant departure from the last three budgets presented by this government.

However, with the introduction of 10% tax on long term capital gains on sale of listed equity shares / units of equity oriented funds could accelerate the shift of preference from equity to other investment assets like real estate. The investors may alter their investment preference which we expect will see the real estate sector attracting more funds than before. There would be a reversal of the trend, which we have seen in the last five years and more investment could now start flowing in to the real estate.

In major cities, the stamp duty ready reckoner rates ("Circle Rates") have substantially increased and in many cases the Circle Rates had become more than the actual Market Rates. This resulted in huge gap between the two rates, which was considered as income in the hands of both buyer as well as the seller. The Union Budget 2018-19 has given a major relief to resolve the aforesaid concern by allowing up to a 5% gap between the Circle Rates and the Market Rates.

The Affordable Housing and Infrastructure gets a significant push in this Budget. As a result of the government's move to create a dedicated fund for affordable housing, more developers will embrace this segment of real estate, creating much-needed traction on the ground. However, this Budget has made certain amendments on the direct tax front by providing for upfront levy of tax on conversion of stock-in-trade into capital asset, which may impact the real estate developers.

The Union Budget 2018-19 has given several financial incentives to the MSME sector. As a result of which considerable number of MSMEs in the country will grow and expand their footprint. The financial boost towards the MSME sector, will also lead to a demand in the commercial real estate and managed office space for expansion.

The Finance Bill, 2018 as amended and passed by the Lok Sabha on 12th March, 2018 ("**Finance Bill**") has proposed few changes with far reaching consequences in respect of the taxation of transactions in immovable properties. Summarized below are the key direct proposals in the Finance Bill which are relevant to the real estate sector :

II. INCOME TAX

Unless otherwise specifically mentioned, the amendments are effective from A. Y. 2019-20 and are therefore applicable with respect to income arising on or after 1st April, 2018. Specific mention is made at the relevant places, where the effective date of the amendment is other than 1st April, 2018. Any reference to the sections, unless otherwise stated, is to the sections of the Income Tax Act, 1961 ("**Act**").

1. IMPORTANT CHANGES TO TAX RATES FOR THE F. Y. 2018-2019 (A.Y. 2019-2020)

With respect to rates of tax, the following changes have been made in the Finance Bill:

(a) The Finance Bill proposes no change in the existing tax rates for various types of assessees. However, in case of a domestic company, the tax rate shall be **25%** of the total income if the total turnover or gross receipts of the previous financial year 2016-17 does not exceed **Rs. 250 crores** and in all other cases the tax rate shall be **30%** of the total income.

(b) Cess has been increased from 3% to 4%. A new cess to be called “Health and Education Cess” @ 4% is introduced in place of the existing Education Cess of 2% and Secondary and Higher Education Cess of 1%.

(c) There is no change in the rate of Surcharge for Individuals and for entities/ assessees other than Individuals.

(d) Maximum marginal rate of tax comes to 35.88% (including Health and Education Cess of 4%).

(e) There is no change in rebate under Section 87A.

The income tax rates (inclusive of Surcharge, Health and Education Cess) and TDS Rates for the F. Y. 2018-19 is tabulated hereunder for ready reference. These income tax rates are applicable on income earned during the period from 1st April, 2018 to 31st March, 2019.

1.1 EFFECTIVE TAX RATES FOR INDIVIDUALS AND HUFs (INCLUSIVE OF SURCHARGE & HEALTH AND EDUCATION CESS)

Particulars	Tax Rates for F. Y. 2018-19		
	Resident Very Senior Citizens of age 80 Years & above	Resident Senior Citizens of 60 Years & above but below age of 80 years	Resident Men & Women below 60 Years & Non Residents (Men & Women)/ HUF
Total Income			
Up to Rs. 2,50,000	Nil	Nil	Nil
Rs.2,50,001 – 3,00,000	Nil	Nil	5.20%
Rs.3,00,001 – 5,00,000	Nil	5.20%	5.20%
Rs.5,00,001 – 10,00,000	20.80%	20.80%	20.80%
Rs.10,00,001 – 50,00,000	31.20%	31.20%	31.20%
Rs.50,00,001- 1,00,00,000	34.32%	34.32%	34.32%
Above Rs.1,00,00,000	35.88%	35.88%	35.88%

1.2 NORMAL TAX RATES FOR OTHER ASSESSEES (INCLUSIVE OF SURCHARGE & HEALTH AND EDUCATION CESS)

Particulars	Threshold Limit for Surcharge	F. Y. 2018-19		
		Tax Rate without Surcharge	Tax Rate with Surcharge	Rate of Surcharge
Partnership Firm	Rs.1 Crore	31.2%	34.944%	12%
Limited Liability Partnership	Rs.1 Crore	31.2%	34.944%	12%
Domestic Companies (where the total turnover or the gross receipts in F. Y. 2016-17 does not exceed Rs.250 Crs.)	Rs.1 Crore	25%	NA	Nil
	Rs.1 Crore to Rs.10 Crores	NA	27.82%	7%

Particulars	Threshold Limit for Surcharge	F. Y. 2018-19		
		Tax Rate without Surcharge	Tax Rate with Surcharge	Rate of Surcharge
(Basic Tax Rate applicable – 25%)	Rs.10 Crores	NA	29.12%	12%
Other Domestic Companies (Basic Tax Rate applicable – 30%)	Rs.1 Crore	31.20%	NA	Nil
	Rs.1 Crore to Rs.10 Crores	NA	33.384%	7%
	Rs.10 Crores	NA	34.944%	12%
Foreign Companies	Rs.1 Crore	41.60%	NA	Nil
	Rs.1 Crore to Rs.10 Crores	NA	42.432%	2%
	Rs.10 Crores	NA	43.68%	5%
Local Authority	Rs.1 Crore	31.20%	NA	Nil
	Rs.1 Crore	NA	34.944%	12%
Co-operative Society				
Up to Rs.10,000		10.40%	NA	Nil
Rs.10,001 - 20,000		20.80%	NA	Nil
Rs.20,000 - 1,00,00,000/-		31.20%	NA	Nil
Rs.1,00,00,001/- and above		NA	34.944%	12%
Tax on profits distributed by Indian Companies				
(A) Dividend Distribution Tax in respect of dividend declared, distributed or paid by Domestic Companies during the F. Y. 2018-2019 [including Deemed Dividend u/s. 2(22)(a) to (d) but other than Deemed Dividend u/s 2(22)(e)] – **Effective rate after grossing-up**		NA	20.555%	12%
(B) Dividend Distribution Tax in respect of dividend declared, distributed or paid by Domestic Companies during the F. Y. 2018-2019 [for Deemed Dividend u/s 2(22)(e)] (Refer para 3.3) – **No grossing-up**		NA	34.944%	12%
(C) Buyback of shares by unlisted Domestic Companies during the F. Y. 2018-2019		NA	23.296%	12%

1.3 AMT RATES FOR NON CORPORATE ASSESSEES AND MAT RATES FOR DOMESTIC COMPANIES AND FOREIGN COMPANIES (INCLUSIVE OF SURCHARGE, HEALTH AND EDUCATION CESS)

Particulars	Threshold Limit for Surcharge	F. Y. 2018-19		
		Tax Rate without Surcharge	Tax Rate with Surcharge	Rate of Surcharge
Partnership Firm - Alternate Minimum Tax (Basic AMT Rate – 18.50%)	Rs.1 Crore	19.24%	21.5488%	12%
Limited Liability Partnership – Alternate Minimum Tax (Basic AMT Rate – 18.50%)	Rs.1 Crore	19.24%	21.5488%	12%
Co-operative Society – Alternate Minimum Tax (Basic AMT Rate – 18.50%)	Rs.1 Crore	19.24%	21.5488%	12%
Individuals and HUFs – Alternate Minimum Tax (Basic AMT Rate – 18.50%)	Rs.50 Lakhs	19.24%	NA	Nil
	Rs.50 Lakhs to Rs.1 Crore	NA	21.164%	10%
	Rs.1 Crore	NA	22.126%	15%
Domestic Companies - Minimum Alternative Tax (MAT) (Basic MAT Rate – 18.50%)	Rs.1 Crore	19.24%	NA	Nil
	Rs.1 Crore to Rs.10 Crores	NA	20.5868%	7%
	Rs.10 Crores	NA	21.5488%	12%
Foreign Companies - Minimum Alternative Tax (MAT) (Basic MAT Rate – 18.50%)	Rs.1 Crore	19.24%	NA	Nil
	Rs.1 Crore to Rs.10 Crores	NA	19.6248%	2%
	Rs.10 Crores	NA	20.202%	5%

Notes :

1. ***Non-corporate units located in International Financial Services Centre (IFSC) are liable to Alternate Minimum Tax at a concessional rate of 9% (instead of 18.50%) plus Surcharge and Health and Education Cess.***

2. ***Assessees claiming deduction of an amount equal to 100% of the profits and gains derived from the business of developing and building affordable housing projects under Section 80-IBA, are still liable to pay Minimum Alternate Tax on their book profits at the rates specified in the above table.***

1.4 TAX ON CAPITAL GAINS (INCLUSIVE OF SURCHARGE & HEALTH AND EDUCATION CESS) - SECTIONS 10(38), 111A, 112 & 112A

Category of Assessee	Long Term Capital Gains			Short Term Capital Gains	
	On all Assets (other than listed securities)	On securities listed on Recognised Stock Exchange		On all Assets (including listed securities where STT is not paid)	On securities listed on Recognised Stock Exchange where STT is paid
		If STT is paid **	If STT is not paid		
Resident Individuals/ HUFs having taxable income up to Rs.2.50 lakhs	Nil	Nil	Nil	Nil	Nil
Individuals & HUFs having taxable income exceeding Rs.2.50 lakhs	20.80% / £ 22.88%/ * 23.92%	10.40%/ £ 11.44%/ * 11.96%	10.40%/ £ 11.44%/ *11.96% without Indexation or 20.80%/ £ 22.88%/ *23.92% with Indexation	Slab Rates Max – 31.20%/ £ 34.32% / * 35.88%	15.60%/ £17.16%/ * 17.794%
Partnership Firms/ LLPs	20.80%/ * 23.296%	10.40%/ *11.648%	10.40%/ *11.648% without Indexation or 20.80%/ *23.296% with Indexation	31.20% / * 34.944%	15.60% / * 17.472%
Companies	20.80%/ # 22.256%/ @ 23.296%	19.24%/ 20.5868%/ 21.5488% ($ - MAT)	10.40%/ #11.128%/ @11.648% without Indexation or 20.80%/ #22.256%/ @23.296% with Indexation	31.20%/ # 33.384%/ @ 34.944%	15.60%/ # 16.692% @ 17.472%
Co-operative Societies	20.80% / * 23.296%	10.40%/ * 11.648%	20.80%/ * 23.296%	31.20% / * 34.944%	15.60%/ * 17.472%

* *Where the taxable income of assessees other than Companies exceeds Rs.1,00,00,000/-, then the surcharge applicable would be 15% in case of Individuals/ HUFs and 12% in case of Partnership Firm/ LLP/ Co-operative Society.*

£ *Where the taxable income of Individuals/ HUFs exceeds Rs.50,00,000/- but does not exceed Rs.1,00,00,000/- the surcharge applicable would be @ 10%.*

Applicable rates where the taxable income of a Company is between Rs. 1,00,00,001/- to Rs.10,00,00,000/- the surcharge applicable would be @ 7%.

@ *Where the taxable income of a Company exceeds Rs.10,00,00,000/- the surcharge applicable would be @ 12%.*

$ *Applicable rate of MAT to be paid on the Book Profits of the Company, determined in accordance with the provisions of Section 115JB. No surcharge if the book profit for the purpose of MAT is less than Rs.1,00,00,000/-. Surcharge applicable @ 7% if the book profit for the purpose of MAT profit is between Rs.1,00,00,001 to Rs.10,00,00,000/-. Surcharge applicable @ 12% if MAT profit exceeds Rs.10,00,00,000/-.*

** *No long term capital gains tax would be levied if the long term capital gains arising or accruing on sale of listed equity shares or units of equity-oriented mutual fund is up to Rs. 1,00,000/-. Refer para 3.1 below.*

1.5 MAXIMUM MARGINAL RATES OF INCOME TAX (INCLUSIVE OF SURCHARGE, HEALTH AND EDUCATION CESS)

Category of Assessee	Normal Income	Rental Income from House Property (post standard deduction of 30%)
Individuals & HUFs having taxable income exceeding Rs. 1 Crore	35.88%	25.116%
AOPs / Joint Venture having taxable income exceeding Rs. 1 Crore	35.88%	25.116%
Partnership Firms/LLPs having taxable income exceeding Rs. 1 Crore	34.944%	24.4608%
Domestic Companies having taxable income exceeding Rs. 10 Crores	34.944%	24.4608%
Domestic Companies having turnover of less than Rs.250 Crores in the F. Y. 2016-17	29.12%	20.384%
Co-operative Societies having taxable income exceeding Rs. 1 Crore	34.944%	24.4608%

1.6. RATES OF TDS APPLICABLE FOR THE PERIOD FROM 1ST APRIL, 2018 TO 31ST MARCH 2019 DEPENDING UPON THE CATEGORY OF RECIPIENT WITH RESPECT TO THE IMPORTANT PAYMENTS MADE BY THE BUILDERS / DEVELOPERS

		TDS Rates for different Categories of Recipient		
Main Section	**Nature of payment**	**Resident Individual / HUF/AOP**	**Resident Company**	**Resident Firm / LLP**
193	**Interest on Debenture issued by a Company** Basic exemption Rs. 5000/-, where the payee is a resident individual or HUF	10%	10%	10%
	Interest on listed Securities of a Company held in dematerialized form	Nil	Nil	Nil

		TDS Rates for different Categories of Recipient		
Main Section	**Nature of payment**	**Resident Individual / HUF/AOP**	**Resident Company**	**Resident Firm / LLP**
194A	**Interest other than interest on securities** i.e. Interest on loans etc. (Basic Exemption - Rs.10,000/- (Rs.50,000/- for Senior Citizen w.e.f. 1st April, 2018) where the payer is Banking Company, Co-op. Society engaged in the business of banking and Post Office; and Basic Exemption – Rs. 5,000/- for all other types payers)	10%	10%	10%
194C	**Payments to Contractors** **(1) In case of Contract/Sub-Contract** **(2) Contractor/Sub-Contractor in Transport Business (provided Transporter furnishes his PAN)** (Basic Exemption –Rs.30,000/- per Contract subject to overall limit, of Rs.1,00,000/- per annum per contractor)	1% Nil	2% Nil	2% Nil
194H	**Commission or Brokerage** (Basic Exemption –Rs.5,000/-)	5%	5%	5%
194I	**<u>Rent to Residents</u>** **-Rent on Plant, Machinery and Equipment** (Basic Exemption-Rs.1,80,000/- per person) **-Rent for Land & Building or Furniture or Fittings** (Basic Exemption-Rs.1,80,000/- per person)	2% 10%	2% 10%	2% 10%
194-IA	**Consideration for transfer of immovable property (other than agricultural land)** (Basic exemption - Rs.50 lakhs) Applies to person other than the person referred to in Section194LA	1%	1%	1%
194-IB	**Rent payable by Individuals/ HUFs (other than those covered u/s 44AB) for use of Land or Building in excess of Rs.50,000/- per month or part of the month**	5%	5%	5%
194-IC	**Monetary consideration payable by Developer to the Land owner being Individual / HUF under a specified agreement (Joint Development Agreement) referred to in Section 45(5A)**	10%	-	-
194J	**Fees for professional or technical services or payment towards Royalty or Non-Compete Fees** (Basic Exemption - Rs. 30,000/- per person, per annum.)	10%	10%	10%
194J	**Remuneration (not in the nature of salary), fees or commission to Directors (w.e.f. 1st July, 2012)**	10%	-	-
194LA	**Payment of compensation/ consideration on compulsory acquisition of certain immovable property** (Basic Exemption - Rs. 2,50,000/-)	10%	10%	10%
195	**Payment of consideration exceeding Rs. 1 Crore by any transferee to a non-resident**	**Non-Resident /**	**Foreign Company**	

		TDS Rates for different Categories of Recipient		
Main Section	**Nature of payment**	**Resident Individual / HUF/AOP**	**Resident Company**	**Resident Firm / LLP**
	transferor towards purchase of any immovable property situated in India :	**Non Corporate Person (including surcharge)**	**(including surcharge)**	
	For a period exceeding 3 years	23.92%	21.84%	
	For a period of less than 3 years	35.88%	43.68%	

Notes:

1. **Time of deduction of tax** :

   Except in case of salary (wherein tax is to be deducted at the time of payment), tax is to be deducted at the time of payment or credit, whichever is earlier.

2. **Time of deposit of tax** :

   All sums deducted shall be deposited with the government within 7 days from the end of the month in which the deduction is made and where payment in made under section 194-IA (i.e. TDS on Purchase of Immovable Property) amount shall be deposit within 30 days from the end of the month in which it was deducted. However, where the amount is credited or paid to the account of the payee in the month of March, the tax is required to be deposited with the government on or before 30 April.

3. **Mode of making payment of Tax** :

   For payment of tax, Challan No. INS 281 is to be used. All companies and deductors who are liable to tax audit have to make payment of tax by electronic mode. Others can make payment of tax either physically or by electronic mode.

4. **TDS Return** :

   Person deducting tax is required to file quarterly statements for the quarter ending on 30 June, 30 September, 31 December and 31 March in each financial year, in Form 26Q (Form 24Q for Salary), on or before 31 July, 31 October, 31 January, and 31 May respectively. Form 26Q and Form 24Q are to be filed electronically.

5. **<u>Certificate for tax deduction in case of non-salary payments</u>** :

TDS Certificate in Form 16A is required to be issued on quarterly basis within 15 days from the due date of furnishing the statement of TDS i.e. on or before 15 August, 15 November, 15 February and 15 June for quarters ended 30 June, 30 September, 31 December and 31 March respectively.

6. **<u>Certificate for tax deduction in case of salary payments</u>** :

TDS Certificate in Form 16 is required to be issued on annual basis by 31 May of the financial year immediately following the financial year in which the income was paid and tax deducted.

7. **<u>Higher TDS rate of 20% for not furnishing PAN</u>** :

In case the payee is not able to furnish his / her / its PAN to the payer, tax shall be deducted w.e.f. 1^{st} April, 2010 at higher of the rates specified in the relevant provisions of the Act or at the rates in force or 20%.

8. **<u>Liability of Individual or HUF to deduct tax at source</u>**

As such individuals or HUFs are not liable to deduct tax at source. However, in case of rent payable for use of land and building, consideration payable for transfer of an immovable property and Salary payments, even individuals or HUFs are liable to deduct tax at source under Section 194-IB, Section 194-IA and Section 192 respectively. However, an individual or HUF, who is liable to tax audit under Section 44AB during the financial year immediately preceding the financial year in which sum is credited or paid, shall be liable to deduct tax under Sections 194A, 194C, 194H, 194I and 194J, as the case may be.

9. **<u>Consequence for delay in deposit of tax at source</u>**

As per the provisions of Section 201(1A), an assessee shall be liable to pay interest @ 1% per month from the date the tax was deductible to the date on which tax is deducted and @ 1.5% per month from the date of tax deduction till the date of tax payment to the Government.

10. **<u>No Penalty in certain cases</u>**

As per the provisions of Section 201 read with Section 201(1A), any person who fails to deduct the whole or any part of the tax on the sum paid to a resident or on the sum credited to the account of the resident, shall not be deemed to be an assessee in default in respect of such tax if the resident-payee:

(a) Has furnished his return of income under Section 139;

(b) Has taken into account such sum for computing income in such return of income; and

(c) Has paid tax due on the income declared by him in such return of income,

and the resident-payee furnishes a certificate to this effect from a chartered accountant in the prescribed form. Accordingly, no penalty shall be leviable on such person under Section 221. However, such person shall still be liable to interest under Section 201(1A).

Furthermore, if any person does not deduct the whole or any part of the tax or after deducting fails to pay the tax, he shall be liable to pay simple interest under Section 201(1A) as specified in para 9 above.

2. AMENDMENTS RELATED TO TRANSACTIONS IN IMMOVABLE PROPERTIES

2.1 Rationalization of the provisions relating to adoption of Stamp Duty Value in case of transfer of an Immovable Property [Sections 43CA, 50C and 56(2) (x)]

<u>Background</u>

(a) Section 43CA(1) *inter alia* provides that for the purposes of computing the income under the head "Profits and gains of business or profession" from transfer of any land or building or both, held as stock-in-trade, the value adopted or assessed or assessable by the stamp valuation authority shall be deemed to be the full value of consideration received or accruing as a result of such transfer, if the stamp duty value is more than the consideration received or accruing as a result of such transfer. In other words, for the purposes of computing the income under the head "Profits and gains of business or profession" from transfer of any land or building or both, held as stock-in-trade, the sale consideration or the stamp duty value, whichever is higher, is to be adopted.

(b) Similarly, Section 50C provides that for the purposes of computing the income under the head "Capital Gains " on transfer of any land or building or both, held as capital asset, the value adopted or assessed or assessable by the stamp valuation authority shall be deemed to be the full value of consideration received or accruing as a result of such transfer, if the stamp duty value is more than the full value of consideration received or accruing as a result of such transfer. In other words, for the purposes of computing the income under the head "Capital Gains" from transfer of any land or building or both, held as capital asset, the sale consideration or the stamp duty value, whichever is higher, is to be adopted.

(c) Furthermore, Section 56(2) (x) *inter alia* provides that where any person receives, in any previous year, from any person or person on or after 1st April, 2017, any immovable property without consideration or for a consideration which is less than the stamp duty value of such property by an amount exceeding Rs.50,000/-, the stamp duty value of such property as exceeds the consideration, shall be chargeable to tax under the head "Income from other sources" in the hands of the recipient.

(d) Section 43CA (3) provides that where the date of the agreement fixing the value of consideration for the transfer of land or building or both, held as stock-in-trade, and the date of registration are not the same, the stamp duty value as on the date of the agreement may be taken for the purposes of computing the income under the head "Income from Business or Profession" instead of and in place of the date of registration. Section 43CA (4) provides that the provisions of Section 43CA (3) would apply only where the amount of consideration, or a part thereof, has been paid by "any mode other than cash" on or before the date of agreement for transfer of the asset.

Proposed Amendments

(a) It is proposed to insert a proviso to sub-section (1) of Section 43CA to provide that where the value adopted or assessed or assessable by the stamp valuation authority **does not exceed 105% of the consideration received or accruing** as a result of the transfer, the consideration so received or accruing as a result of the transfer shall, for the purpose of computing profits and gains of such assets, be deemed to be full value of consideration.

(b) Amendment similar to Section 43CA is proposed to be made also in Section 50C by way of insertion of a *proviso*, after the *second proviso*, to Section 50C(1).

(c) It is further proposed to amend Section 56(2) (x) by substituting sub-clause (b) of Section 56(2)(x)(B) to provide that where any person receives any immovable property for a consideration, the stamp duty value of property as exceeds such consideration, if the amount of such excess is more than Rs.50,000/- or the amount equal to 5% of the consideration, whichever is higher, shall be chargeable to tax under the head “Income from other sources” in the hands of the recipient.

(d) It is proposed to amend Section 43CA (4) by substituting the words "any mode other than cash" with the words "by way of an account payee cheque or an account payee bank draft or by use of electronic clearing system through a bank account".

Accordingly, where the date of the agreement fixing the value of consideration for the transfer of land or building or both, held as stock-in-trade, and the date of registration are not the same, the stamp duty value as on the date of the agreement may be taken for the purposes of computing the income under the head "Income from Business or Profession" instead of and in place of the date of registration, provided the amount of consideration, or a part thereof, has been paid "by way of an account payee cheque or an account payee bank draft or by use of electronic clearing system through a bank account" on or before the date of agreement for transfer of the asset.

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

Our Comments

(a) Hitherto the stamp duty valuation of an immovable property does not factor into variations occurring in the value of the immovable property on account of various factors, such as location of the immovable property, its shape, accessibility to public transportation, circumstances of sale vis-à-vis distress sale, etc. Thus, there may arise a difference in the actual sale value of the immovable property and its stamp duty value. This difference in the valuation of the immovable property was not taken into consideration by Sections 43 CA, 50C and 56(2) (x). In order to minimize the hardship in case of genuine transactions in real estate sector, it is now provided that where the stamp duty value of a property does not exceed the consideration received or accruing as a result of the transfer of such property by more than 5% of the consideration (Rs. 50,000/- in case of 56(2) (x) transaction), the consideration received or accruing as a result of such transfer shall be deemed to be the full value of consideration received or accruing for the purposes of Sections 43CA, 50C and 56(2) (x). In other words, no adjustments shall be made in a case where the variation between the stamp duty value and the sale consideration is not more than 5% of the sale consideration. The proposed amendment in Section 43CA, 50C and 56(2)(x) is further explained hereunder by way of an illustration :

Agreement Value	Rs. 10.00 Crores
Allowable margin of 5% on the Agreement Value	Rs.0.50 Crores
Allowable Limit	Rs.10.50 Crores
No adjustment under Sections 43CA, 50C or 56(2)(x) will be required to the sales consideration if the stamp duty value is less than or equal to Rs.10.50 Crores.	

(b) It is a welcome move by the government as it tones down the provisions of Sections 43CA, 50C and 56(2) (x) and provides a tolerance limit in case where sale consideration is lower than the stamp duty value of up to 5% of the sale consideration.

(c) As per the Circular dated 2nd January, 2018 issued by the Office of the Inspector General of Registration and Controller of Stamps, Maharashtra State, Pune ("**IGR**") provides that while ascertaining the built-up area of the premises, the carpet area of such premises computed as per the provisions of RERA (which includes the area covered by the internal partition walls) needs to be multiplied by applying the conversion factor of 1.1 instead of 1.2, as applicable while computing the carpet area as per the provisions of MOFA (which excludes the area covered by the internal partition walls). Thus the BUA of premises would now be computed in the following manner :

BUA = RERA Carpet Area x 1.1

Based on the foregoing circular, the stamp duty value of the premises would now stand reduced by about 8.33% (0.1 / 1.2 x 100), on account of change in the conversion factor applicable for determining the built-up area of the premises. Thus taking into consideration the aforesaid proposed amendment read with the foregoing circular of IGR, if the actual consideration is up to 113.33% of the stamp duty value, then there no adjustment would be required to be made under Sections 43CA, 50C and 56(2) (x).

(d) In respect of the amendment proposed in Section 43CA (4) by substitution of the words “by any mode other than cash” with the words “by way of an account payee cheque or an account payee bank draft or by use of electronic clearing system through a bank account”, brings Section 43CA of the Act at par with Section 50C and Section 56(2) (x) .

2.2 Rationalization of provision relating to conversion or treatment of Stock-in-trade into Capital Asset [Sections 28, 2(24), 2(42A) and 49]

Background

(a) Presently, under Section 45(2), the profits or gains arising from the transfer by way of conversion by the owner of a capital asset into, or its treatment by him as stock-in-trade of the business carried on by him, is chargeable to tax as his income under the head "Capital Gains" of the previous year in which such stock-in-trade is sold or otherwise transferred by him. For this purposes, the fair market value of the capital asset on the date of conversion or treatment shall be deemed to be full value of consideration received or accruing as a result of the transfer of the capital asset.

(b) Unlike Section 45(2), there is no provision under the Act governing the tax treatment of the profits or gains arising from the transfer by way of conversion or treatment by the owner of his inventory/ stock-in-trade into capital asset.

Proposed Amendment

(a) It is proposed to widen the scope of Section 28, being the charging section, by insertion of a sub-section (via) to provide that the fair market value (FMV) of inventory as on the date on which it is converted into, or treated as, a capital asset to be determined in a manner to be prescribed, shall be chargeable to tax under the head "Profits and gains from business or profession".

Accordingly, the difference between the FMV on the date of conversion or treatment of inventory/ stock-in-trade as a capital asset and the cost of inventory/ stock-in-trade, shall be taxed as business income in the previous year in which the conversion/ treatment takes place.

(b) It is proposed to simultaneously amend the definition of "income" under Section 2(24) by insertion of a new sub-section (xiia) to bring within its ambit the FMV of inventory/ stock-in-trade converted into or treated as capital asset.

(c) Section 2(42A) which *inter alia* provides for determination of period for which the capital asset is held by the assessee, is proposed to be amended by insertion of sub-clause (ba) in clause (i) of Explanation 1 to Section 2(42A) to provide that in determining the period for which any capital asset referred to in Section 28(via) is held by the assessee, the period shall be reckoned from the date of its conversion or treatment.

(d) Furthermore, Section 49 which provides for cost with reference to certain modes of acquisition, is proposed to amended by insertion of the new sub-section (9) to provide that where the capital gain arises from the transfer of a capital asset referred to in Section 28(via), the cost of acquisition of such asset shall be deemed to be the FMV which has been taken into account for the purpose of Section 28(via).

(e) Further, a new Explanation 1A is proposed to be inserted to Section 43 to provide that the fair market value of the inventory as on the date of conversion shall be deemed to be the actual cost of capital asset.

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

Our Comments

(a) While the proposed amendment to Section 28(via) seeks to provide certainty of taxation when inventory/ stock-in-trade is converted into or treated as a capital asset and the amendment to Section 2(42A) seeks to resolve the contradictory views taken by various judicial authorities on the period of holding of such asset, it nonetheless seeks to overrule the well-settled proposition of law laid down by the Supreme Court in the case of *Kikabhai Premchand v. CIT, (1953) 24 ITR 506*, wherein it is held that that no man can be assumed to be trading with himself for the purpose of ascertaining taxable profits. In fact, this proposition of law was followed by Hon'ble Calcutta High Court, wherein it has been held that there cannot be actual profit or loss on transfer, when no third party is involved and the items are kept in a different account of the assessee himself.

(b) **Thus, despite providing certainty about the taxation, the provisions of Section 28(2) insofar as they relate to taxing the profits and gains on conversion of inventory or its treatment into capital asset upfront in the year in which such conversion/ treatment takes place, are asymmetrical with the existing provisions of Section 45(2) which recognize the above decision of Supreme Court and tax the capital gain only in the previous year in which the capital asset so converted into stock-in-trade is sold or otherwise transferred.**

(c) The proposed amendments to Section 28(via) discourages the practice of deferring the payment of tax by converting the inventory into capital asset at cost. However, the question of discouraging the practice of deferring the payment of tax arises only when the tax is 'actually payable'. The proposed amendment seeks to tax hypothetical income which is not earned by the assessee.

(d) The developers holding rent yielding asset as stock-in-trade should convert such asset into capital asset before 31st March, 2018 so that the FMV of such inventory which is converted into, or treated as, a capital asset is not chargeable to tax under the head "Profits and gains from business or profession" under Section 28(via). Furthermore, upon conversion of the inventory into capital asset at FMV on or before 31st March, 2018, the FMV of the inventory will be substituted in place of its actual cost in the Balance Sheet as at 31st March, 2018.

2.3 Exemption of Transfers between Holding and Subsidiary Company [Section 56(2) (x)]

Background

(a) Section 56(2)(x) provides that the receipt of sum of money or any immovable property or any property (other than immovable property) such as shares and securities by any person, without consideration or for inadequate consideration in excess of Rs. 50,000/- shall be chargeable to tax in the hands of the recipient as “Income from Other Sources”.

(b) The fourth proviso to Section 56(2) (x) excludes income arising out of certain tax neutral transfers from its ambit e.g. money or property received from a relative, receipt of money or property on the occasion of marriage, etc. Clause (IX) of the said proviso covers certain transactions which are not regarded as transfer under Section 47.

(c) Section 47 lays down certain transactions which are not regarded as transfer for the purposes of capital gains. Section 47(iv) and (v) provides that any transfer of a capital asset by a company to its subsidiary company or vice-versa is not regarded as transfer for the purposes of capital gains, provided certain conditions as stated therein are fulfilled.

Proposed Amendment

(a) In order to facilitate the transaction of money or immovable property or any property (other than an immovable property) between wholly owned subsidiary company and its holding company, it is proposed to amend the fourth proviso to Section 56(2) (x) to include therein the transfers referred to in Section 47(iv) and (v), thereby excluding the transfer of money or immovable property or any property (other than an immovable property) between wholly owned subsidiary company and its holding company from the ambit of taxation under Section 56(2) (x), subject to fulfillment of conditions specified in Section 47(iv)/ (v).

(b) This amendment brings parity between Section 47(iv)/ (v) with section 56(2) (x).

This amendment will be effective from 1st April, 2018 and will accordingly apply in relation to the transaction made on or after 1st April, 2018.

2.4 Restriction on scope of Exemption of 54EC Bonds [Section 54EC]

Background

(a) Section 54EC *inter alia* provides exemption from capital gains arising on transfer of a long-term capital asset, if such capital gain is invested within a period of six months from the date of the transfer of the long-term capital asset, in bonds issued on or after 1st April, 2007 by National Highway Authority of India (NHAI), Rural Electrification Corporation Limited (REC) or any other bond notified by the Central Government in this behalf ("**long-term specified asset**").

(b) Section 54EC (2) requires that the long-term specified asset is required to be held by the assessee for a period of 3 years from the date of its investment (lock-in period).

(c) Furthermore, clause (ba) of Explanation to Section 54EC provides that "long-term specified asset" for making any investment under this section on or after 1st April, 2007 means any bond, redeemable after 3 years and issued on or after the 1st day of April, 2007 by the NHAI, REC or any other bond notified by the Central Government in this behalf.

<u>Proposed Amendment</u>

(a) It is proposed to amend the provisions of Section 54EC (1) to restrict the benefit currently available under the section to long-term capital gains arising from transfer of only "land or building or both". Thus, the capital gains arising from the transfer of any other long-term capital asset (other than land or building or both) will no longer qualify for exemption under the amended Section 54EC.

(b) It is further proposed to amend clause (ba) of Explanation to Section 54EC to provide that the long-term specified asset issued on or after 1st April, 2018 shall be redeemable after 5 years, instead of the present 3 years.

(c) It is proposed to insert a new proviso to Section 54EC (2) to provide that the exemption under Section 54EC shall be withdrawn if the long-term specified asset issued on or after 1st April, 2018 is transferred or redeemed with 5 years. Thus, the lock-in period of holding the long-term specified asset has been increased from 3 years to 5 years from the date of investment.

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

Our Comments

(a) The proposed amendments to Section 54EC are applicable from the Financial Year 1st April, 2018 relevant to A.Y. 2019-20. Accordingly, investments made in long-term specified asset on or after 1st April, 2018 would be governed by the amended provisions of Section 54EC.

(b) Considering the low rate of interest being offered on long-term specified asset, it is better to pay the long-term capital gains tax on transfer of the capital asset rather than investing the capital gains in long-term specified asset and earning a very low rate of interest. In effect, there is depreciation of investment considering the time value of money.

3. OTHER SIGNIFICANT AMENDMENTS

3.1 Taxation of Long Term Capital Gains on Sale of Listed Equity Shares, etc. [Sections 10(38), 112A, 48, 55 and 115AD]

Background

(a) Presently Section 10(38) provides that any income arising from a transfer of long term capital asset, being equity share of a company or a unit of an equity oriented fund or a unit of a business trust (collectively "**specified assets**"), is exempt from tax if the transaction of sale is undertaken on or after 1st October, 2014 and is chargeable to Securities Transaction Tax ("**STT**") under Chapter VII of the Finance (No. 2) Act, 2004.

Proposed Amendments

(a) It is proposed to withdraw the exemption under Section 10(38) in respect of income earned from transfer of specified assets made on or after 1st April, 2018.

(b) It is further proposed to introduce a new Section 112A to provide that where the total income of an assessee includes any income chargeable under the head "Capital Gains", arising from transfer of long-term capital asset, being an equity share in a company or a unit of an equity oriented fund or a unit of a business trust, subject to the following conditions specified under the section, the tax payable by the assessee on the long-term capital gain exceeding Rs. 1 lakh shall be calculated @ 10%:

(i) In case where the long-term capital asset is in the nature of equity shares in a company, STT has been paid both on acquisition [subject to certain exceptions as may be notified by the Central Government under section 112A(4)]) and on transfer of such capital asset; or

(ii) In case where the long-term capital asset is in the nature of a unit of an equity oriented fund or a unit of a business trust, STT has been paid on transfer of such capital asset.

The expression "equity oriented fund" is defined in sub-clause (a) of Explanation to Section 112A. It may be noted that the definition of the term "equity oriented fund" appearing under Section 112A, as compared to the definition contained in Section 10(38), has been made wider to include fund of funds, which fulfils certain conditions. Finance (No. 2) Act, 2004 has also been amended to make the definition of "equity oriented fund" wider in line with Section 112A thereby bringing fund of funds referred to above within the purview of STT.

(c) It is also proposed that the provisions of Section 112A shall apply to a transfer undertaken on a recognised stock exchange located in an International Financial Services Centre and where the consideration for such transfer is received or receivable in foreign currency, even though STT has not been paid. The expressions "International Financial Services Centre" and "recognised stock exchange" are respectively defined in sub-clause (c) and (d) of Explanation to Section 112A.

(d) Section 112A (4) provides that the Central Government may, by a notification in the Official Gazette, specify the cases of acquisition of a long-term capital asset being in the nature of an equity share in a company where the provisions of Section 112A would apply even though STT has not been paid on such acquisitions.

The Central Government may notify such transactions in line with the Notification No. F. No. 43/2017 dated 5th June, 2017 issued by the Central Board of Direct Taxes under Section 10(38) of the Act.

(e) Section 48 is proposed to be amended to provide that the benefit of indexation and foreign currency conversion will not be available in computing the long-term capital gains on transfer of specified assets.

(f) It is further proposed to provide that in case of an Individual or a Hindu undivided family, being a resident, where the total income (after excluding the long-term capital gains chargeable under this section) is below the maximum amount which is not chargeable to income-tax, then such long-term capital gains shall be first adjusted against such shortfall and tax shall be payable only on the balance amount of long-term capital gains in excess of Rs. 1 lakh, if any.

(g) Section 55 is proposed to be amended to specify the method of computation of the cost of acquisition of the specified assets and define the expression "fair market value". Accordingly, for the purposes of computing the long-term capital gains on transfer of specified assets the cost of acquisition of the specified assets acquired before 1st February, 2018 shall be deemed to be higher of the following:

(i) Actual cost of acquisition of such asset; and

(ii) Fair market value of the asset as on 31st January, 2018 or the full value of consideration received or accruing as a result of the transfer of the capital asset, whichever is lower.

The expression "fair market value" shall mean:

(A) in a case where the capital asset is listed on any recognised stock exchange, the highest price of the capital asset quoted on such exchange on 31st January, 2018;

Provided that where there is no trading in such asset on such exchange on 31st January, 2018, the highest price of such asset on such exchange on a date immediately preceding 31st January, 2018 when such asset was traded on such exchange shall be the fair market value;

(B) in a case where the capital asset is a unit and is not listed on a recognised stock exchange, the net asset value of such asset as on the 31st January, 2018;

It may be noted that the capital appreciation or the profits/ gains up to 31st January, 2018 in respect of specified asset acquired prior to 1st February, 2018 is grandfathered (exempt). The above provision is explained by way of an illustration given hereunder:

Particulars	**Present Provisions of Section 10(38)**	**As per Amendment u/s. 112A**			
		Scenario I	**Scenario II**	**Scenario III**	**Scenario IV**
		Sale before 31.03.2018	**Sale after 31.03.2018 with LTCG**	**Sale after 31.03.2018 with LTCG**	**Sale after 31.03.2018 with LTCL**
Date of Acquisition	01.08.2016	01.08.2016	01.08.2016	01.08.2016	01.08.2016
Date of Sale	15.09.2017	31.03.2018	15.08.2018	15.08.2018	15.08.2018
Purchase Price (Rs.)	1,00,000	1,00,000	1,00,000	1,00,000	1,00,000

Particulars	Present Provisions of Section 10(38)	As per Amendment u/s. 112A			
		Scenario I	Scenario II	Scenario III	Scenario IV
		Sale before 31.03.2018	Sale after 31.03.2018 with LTCG	Sale after 31.03.2018 with LTCG	Sale after 31.03.2018 with LTCL
Highest price on 31.01.2018 (**FMV**) (Rs.)	NA	1,75,000	1,75,000	1,75,000	1,75,000
Sale Price (Rs.)	2,20,000	2,20,000	3,20,000	1,50,000	90,000
FMV or Sale Price, whichever is lower - (A)	*NA*	*NA*	*1,75,000*	*1,50,000*	*90,000*
Purchase Price or (A) whichever is higher – (B)	*NA*	*NA*	*1,75,000*	*1,50,000*	*1,00,000*
Cost of Acquisition for the purposes of Section 112A = (B)	NA	NA	1,75,000	1,50,000	1,00,000
Whether Taxable/ Exempt	**Exempt u/s. 10(38)**	**Exempt u/s. 10(38)**	**Taxable**	**Taxable**	**Taxable**
Long-term Capital Gains / (Loss) (Rs.)	1,20,000	1,20,000	1,45,000	Nil	(-) 10,000
Exempt Long-term Capital Gains (Rs.)	1,20,000	1,20,000	1,00,000	Nil	Nil
Taxable Long-term Capital Gains (Rs.)	NIL	NIL	45,000	Nil	Loss c/f.
Capital Gains Exempt/ Grandfathered [FMV (-) Purchase Price]	**NA**	**NA**	**75,000**	**50,000**	**Nil**

(h) Section 55 of the Act further proposes to provide that the fair market value of equity shares which are unlisted as on 31st January, 2018 but listed on date of transfer i.e., 1st April or onwards, shall be allowed to take the benefit of indexation of cost of acquisition for up to Financial Year 2017-18. This provision will also apply to shares which are unlisted on 31st January, 2018 but listed on the date of transfer and such shares became the property of the assessee in consideration of shares, in lieu of any transaction specified in Section 47 (amalgamation, demerger, gift, succession, etc.).

(i) It is also proposed to amend Section 115AD to bring it in line with the proposed amendment in Section 112A, whereby the income arising to a Foreign Institutional Investor from transfer of long-term capital assets being the specified assets, shall be taxed @ 10% of such long-term capital gains, in excess of Rs.1 lakh.

(j) The benefit of deduction under Chapter VIA shall be allowed from the Gross Total Income (excluding the capital gains). No rebate under Section 87A will be allowed to be claimed against tax payable on the long-term capital gains on specified assets under Section 112A.

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

Our Comments

(a) The proposed amendments to Section 10(38) and 112A are applicable from the Financial Year 1st April, 2018 relevant to A.Y. 2019-20. Accordingly, specified assets transferred on or before 31st March, 2018 shall be governed by the existing law and hence the profits and gains accruing or arising therefrom will be tax-exempt under Section 10(38).

(b) The exemption under Section 10(38) was introduced in the statute by the Finance Act 2004. The rationale for introducing the exemption under Section 10(38) was that the government would be earning tax by way of levy of STT on transfer of specified assets. However, the Finance Bill proposes to withdraw the exemption of long-term capital gains accruing or arising on transfer of specified assets but continuing with the levy of STT on such transfers. This amounts to double levy of taxes i.e. STT as well as tax on long-term capital gains tax. This contradicts the perceived objective of levy of STT in 2004 when the Hon. Finance Minister, Mr. P. Chidambaram while introducing STT and simultaneously exempting long-term capital gains on transfer of specified assets under Section 10(38) has said “the new tax regime will be win-win situation for all concerned”.

(c) If substitution of the cost of acquisition by the FMV results in a loss on sale of the specified assets, such loss shall not be allowed.

(d) The provisions of new Section 112A shall not apply to unlisted shares. The profits and gains on transfer of unlisted shares will continue to be governed by Section 112 of the Act.

(e) The Central Board of Direct Taxes, have vide File No. No. F No. 370149/20/2018-TPL dated 4th February, 2018, given its response by way of Frequently Asked Questions (FAQs) to various queries relating to the taxation of long-term capital gains on transfer of specified assets.

3.2 Widening of scope of Accumulated Profits for the purposes of Deemed Dividend [Section 2(22)(a) to (e)]

Background

(a) As per section 2(22), any distribution by a company to its shareholders in the forms specified in Section 2(22)(a) to (e) to the extent of its accumulated profits, is considered as "deemed dividend", and such distribution becomes chargeable to tax in the hands of the company under Section 115-O or in the hands of its shareholder in a case specified in Section 2(22)(e) read with the Explanation to Section 115Q. "Accumulated Profits" for the purposes of dividend distribution/ payments under Section 2(22), includes all profits of the company up to the date of distribution/ payment.

(b) In case of amalgamation between two companies, the accumulated profits of the amalgamating company (Transferor Company) may lose their identity in books of account of the amalgamated company (Transferee Company) post amalgamation. Furthermore, under the existing provisions of 2(22), profits of the amalgamating company are not to be regarded as accumulated profits of the amalgamated company for the purposes of section 2(22), In order to escape liability of paying tax on distribution of profits as per the provisions of Section 2(22), companies with large accumulated profits are adopting a practice of amalgamation to reduce accumulated profits.

Proposed Amendment

(a) It is proposed to insert an Explanation to Section 2(22) to provide that the accumulated profits, whether capitalised or not, or loss, as the case may be, of the amalgamated company (Transferee Company) shall be increased by the accumulated profits, whether capitalised or not, of the amalgamating company (Transferor Company) on the date of amalgamation.

These amendments will be effective retrospectively from 1st April, 2018 and will accordingly apply in relation to Assessment Year 2018-19 and subsequent years.

Our Comments

Though it is proposed that amendment will take effect from 1st April, 2018, in the context of this provision, this will have to be interpreted as applicable to dividends declared, distributed or paid after 1st April, 2018. It appears that it will cover within its scope the amalgamations, which have already been approved before 1st April, 2018, and the amalgamated company declares, distributes or pays dividend after 1st April, 2018, thereby effectively making the proposed amendment retrospective.

3.3 Applicability of Dividend Distribution Tax to Deemed Dividend under Section 2(22)(e) [Section 115-O]

Background

(a) Presently, deemed dividend under Section 2(22) (e) read with Explanation to Section 115Q relating to any payment made by a company (not being a company in which public are substantially interested) of any sum by way of advance or loan to a shareholder being a person who is a beneficial owner of shares (not being shares entitled to fixed rate of dividend whether with or without a right to participate in profits) holding not less than 10% of the voting power, or to any concern in which such shareholder is a member or a partner and in which he has substantial interest or any payment by such company on behalf, or for the individual benefit, of such shareholder, to the extent to which the company in either case possesses accumulated profits, is chargeable to tax in the hands of the shareholder under the head "Income from other sources".

Proposed Amendment

(a) It is proposed to delete the Explanation to Section 115Q thereby shifting the liability of tax on deemed dividend under section 2(22)(e) in the hands of the company instead of the shareholder.

(b) It is further proposed to insert a proviso to Section 115-O (1) so as to provide for levy of tax @ 30% (plus applicable surcharge and Health and Education Cess) on the profits distributed under Section 2(22)(e).

(c) It is further proposed to insert a proviso to Section 115-O (1B) so as to provide that grossing-up provisions of tax shall not apply to dividend distribution tax on deemed dividend under Section 2(22)(e).

These amendments will be effective in relation to transactions referred to in Section 2(22)(e) undertaken on or after 1st April, 2018.

Our Comments

(a) Since the taxability of deemed dividend in the hands of recipient posed serious problem of collection of tax liability and also was the subject matter of extensive litigation, the tax liability on deemed dividend under Section 2(22)(e) has now been shifted in the hands of the company.

(b) Furthermore, such dividend is proposed to be taxed @ 30% (plus applicable surcharge and Health and Education Cess) (without grossing up) in order to prevent camouflaging dividend in various ways such as loans and advances.

(c) The dividend distribution tax on deemed dividend under Section 2(22)(e) is not required to be grossed-up and is taxed @ 30% (plus surcharge and Cess) whereas the dividend distribution tax on deemed dividend under Section 2(22)(a) to (d) and interim or other dividends under section 115-O, is required to be grossed-up and taxed at the effective rate of 20.555% (including surcharge and Cess).

3.4 Relaxations to Companies seeking Insolvency Resolution under the Insolvency and Bankruptcy Code, 2016 ("IBC")

3.4.1 Benefit of set off and carry forward of losses for companies under IBC [Section 79]

Background

(a) Section 79 *inter alia* provides that where a change in shareholding has taken place in a previous year in case of a company, not being a company in which public are substantially interested, no loss incurred in any year prior to the previous year shall be carried forward and set off against the income of the previous year unless on the last day of the previous year the shares of the company carrying not less than 51% of the voting power were beneficially held by persons who beneficially held shares of the company carrying not less than 51% of the voting power on the last day of the year or years in which the loss was incurred.

(b) The provisions of section 79 was acting as a hurdle for restructuring and rehabilitation of companies seeking insolvency resolution under IBC involving change in the beneficial ownership of its shares beyond the permissible limit under Section 79. In order to address this problem, it is proposed to relax the rigors of Section 79 in case of such companies, whose resolution plan has been approved under the IBC after affording a reasonable opportunity of being heard to the jurisdictional Principal Commissioner or Commissioner.

Proposed Amendment

It is proposed to insert a *third proviso* to Section 79 to provide that provisions of Section 79 shall not apply to a company where a change in the shareholding of the company takes place in a previous year pursuant to an approved resolution plan under the Insolvency and Bankruptcy Code, 2016, after affording a reasonable opportunity of being heard to the jurisdictional Principal Commissioner or Commissioner

This amendment will be effective retrospectively from 1st April, 2018 and will accordingly apply in relation to Assessment Year 2018-19 and subsequent years.

Our Comments

(a) This is a welcome provision as it would provide certainty to companies seeking insolvency resolution.

(c) The proposed amendment would cover all resolution plans approved by National Company Law Tribunal under IBC during the F.Y. 2017-18.

3.4.2 Relief from liability of Minimum Alternate Tax (MAT) [Section 115JB]

Background

(a) Section 115JB provides for levy of minimum alternate tax (MAT) on the "book profits". In computing the book profit, Section 115JB provides *inter alia* for a deduction in respect of the amount of loss brought forward or unabsorbed deprecation, whichever is less as per books of accounts of the company. Consequently, where the loss brought forward loss or unabsorbed deprecation is NIL, no deduction is allowed. This non-deduction is a barrier to rehabilitating companies seeking insolvency resolution.

(b) Currently, MAT provisions apply uniformly to all foreign companies except those who are resident of the countries with whom India has DTAA and who do not have any Permanent Establishment (PE) in India or those who residents of countries with whom India does not have DTAA and the assessee is not required to seek registration under any law for the time being in force relating to such companies.

Proposed Amendments

(a) It is proposed to amend Section 115JB by inserting clause (iih) in Explanation 1 to 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 of a company whose application for corporate insolvency resolution process under IBC has been admitted by the Adjudicating Authority under Sections 7, 9 or 10 of IBC.

(b) Consequently, a company whose application for corporate insolvency resolution process under IBC has been admitted by the Adjudicating Authority under Sections 7, 9 or 10 of IBC, would henceforth be entitled to reduce the loss brought forward (excluding unabsorbed depreciation) and unabsorbed depreciation for the purposes of computing book profit under Section 115JB.

These amendments will be effective retrospectively from 1st April, 2018 and will accordingly apply in relation to Assessment Year 2018-19 and subsequent years.

(c) A clarificatory amendment is also proposed by inserting Explanation 4A to Section 115JB to provide that the provisions of Section 115JB shall not be applicable and shall be deemed never to have been applicable to an assessee, being a foreign company, who opts for presumptive scheme of taxation under Sections 44B, 44BB, 44BBA or Section 44BBB, where the total income of such company comprises solely of profits and gains from business referred to any of the above sections and such income is the only income of the foreign company and it has been offered to tax at the rates specified in the said sections.

This amendment will be effective retrospectively from 1st April, 2001 and will accordingly apply in relation to Assessment Year 2001-02 and subsequent years.

Our Comments

(a) The proposed amendment in Section 115JB will enable the companies whose application for corporate insolvency resolution process under IBC has been admitted by the Adjudicating Authority under Sections 7, 9 or 10 of IBC, to reduce their MAT liability.

(b) The proposed amendment is a welcome move and will reduce the burden of MAT on the company already facing financial crisis and thus will smoothen the insolvency process and revival of sick company.

3.4.3 Verification of Return of Income for company [Section 140]

Background

Section 140 provides that the Return of Income under Section 139 shall, in case of a company-assessee, be verified by the managing director or in his absence by any other director of the company.

Proposed Amendment

It is proposed to insert clause (c) to the *second proviso* to Section 140(c) of the Act to provide that with effect from 1st April, 2018, where in case of a company an application for its corporate insolvency resolution process has been admitted by the Adjudicating Authority under Sections 7, 9 or 10 of the IBC, the Return of Income filed after 1st April, 2018 of such company shall be verified by the Insolvency Professional appointed by the Adjudicating Authority under IBC.

This amendment will apply to a return of income filed on or after 1st April, 2018.

Our Comments

(a) Upon appointment of the Insolvency Professional, the powers of the Board of Directors stand suspended and the same are to be exercised by the Insolvency Professional. The proposed amendment to Section 140 is intended to facilitate the Insolvency Professional to verify the Return of Income of the company once the application for its corporate insolvency resolution has been admitted under IBC. This amendment is intended to bring harmony between the Act and the IBC so to remove practical difficulties in verifying the Return of Income of the companies under insolvency proceedings.

3.5 Taxability of compensation in connection of termination or modification of any terms of contract relating to the Business [Section 28(ii)(e)]

Background

(a) Section 28(ii) *inter alia* provides that certain types of compensation receipts as set out in sub-clauses (a) to (d) are taxable under the head "Profits and gains of business and profession".

(b) However, the existing provisions of clause (ii) of Section 28 is restrictive in its scope insofar as the taxation of compensation is concerned. A large segment of compensation receipts in connection with business is out of the purview of taxation leading to base erosion and revenue loss.

Proposed Amendment

(a) It is proposed to insert a new sub-clause (e) in Section 28(ii) to provide that any compensation due or received by any person, by whatever name called, at or in connection with the termination or the modification of the terms and conditions, as the case may be, of any contract relating to his business shall be chargeable to tax under the head "Profits and gains of business or profession".

This amendment will be effective from 1st April, 2019 and will accordingly apply in relation to Assessment Year 2019-20 and subsequent years.

3.6 Taxability of compensation in connection of termination or modification of any terms of contract relating to the Employment [Section 56(2)(xi)]

Background

(a) Section 17(3)(i) *inter alia* provides that certain types of compensation receipts in lieu of an employment are taxable under the head "Income from Salaries".

(b) However, the existing provisions is restrictive in its scope insofar as the taxation of compensation is concerned. A large segment of compensation receipts in connection with employment is out of the purview of taxation leading to base erosion and revenue loss.

Proposed Amendment

(a) It is proposed to insert a new sub-clause (xi) in Section 56(2) so as to provide that any compensation or other payment, due to or received by any person, by whatever name called, in connection with the termination of his employment or the modification of the terms and conditions relating thereto, shall be chargeable to tax under the head "Income from Other Sources".

This amendment will be effective from 1st April, 2019 and will accordingly apply in relation to Assessment Year 2019-20 and subsequent years.

Our Comments

(a) Section 17(3) (i) specifies that profits in lieu of salary includes any compensation due or received by an assessee from his employer or former employer in connection with termination or modification of employment.

However, it did not include a case where there was no employment but only a proposal of employment.

(b) It may be noted that a specific provision already exist u/s. 17(3) (i) pursuant to which such any compensation in connection with termination of employment or modification of the terms and conditions relating thereto is chargeable to tax as "profits in lieu of salary". Thus, *per se* the amendment is not required.

Also Section 56 is a residual head of income and thus, since the compensation is already chargeable to tax under Section 17(3) (i), the provisions of the proposed clause (xi) to Section 56(2) would not be applicable.

(c) Further, in the case of *CIT v. Pritam Das Narang, (2016) 381 ITR 416 (Delhi)* it has been held that amount received by assessee from prospective employer as compensation for non-commencement of employment would not be in nature of "profit in lieu of salary" but in nature of capital receipt not chargeable to tax. In view of the proposed amendment, such cases of compensation from prospective employer, which are not chargeable to tax under Section 17(3) would now be chargeable to tax under the Act.

3.7 Restrictions on cash payments and consequences of non-deduction of tax in respect of certain exempted entities [Sections 10(23C) and 11]

(a) The third proviso to Section 10(23C) provides for exemption in respect of income of the entities referred to in sub-clause (iv) to (via) of said clause in a case where such income is applied or accumulated during the previous year for certain purposes in accordance with the relevant provisions. Section 11 also contains provisions relating to income from property held for charitable or religious purposes.

(b) At present, there are no restrictions on payments made in cash by charitable or religious trusts or institutions. There are also no checks on whether such trusts or institutions follow the provisions of deduction of tax at source under

Chapter XVII-B of the Act. This has led to lack of an audit trail for verification of application of income.

(c) In order to encourage a less cash economy and to reduce the generation and circulation of black money, it is proposed to insert thirteenth proviso to Section 10(23C) to provide that for the purposes of determining the application of income of the entities referred to in clauses (iv) to (via) of Section 10(23C), the provisions of Sections 40(a)(ia), 40A(3) and 40A(3A) shall, *mutatis mutandis,* apply as they apply in computing the income chargeable under the head "Profits and gains of business or profession". In other words, expenses / payments made by institution/ trust towards application of income shall not be allowed:

(i) To the extent of 30% of any sum payable to the resident by the institution/ trust, where tax has not been deducted by the institution on such sum or after deduction the same has not been paid by the institution on or before specified due date [non-compliance with the provisions of Section 40(a) (ia)].

(ii) If such institution/ trust has made payment towards any expenditure to a person in a day, in excess of Rs.10,000/- otherwise than by an account payee cheque drawn in a bank or account payee bank draft [non-compliance with the provisions of Section 40A (3)].

(iii) If such institution/ trust has made payment of any liability in respect of any expenditure incurred in prior years, to a person in a day, in excess of Rs. 10,000/- otherwise than by account payee cheque drawn in a bank or account payee bank draft [non-compliance with the provisions of Section 40A (3A)].

(d) It is also proposed to insert a new Explanation 3 to Section 11 to provide analogous provisions on restriction of application of income by institution/ trust registered under Section 12A / 12AA.

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

<u>Our Comments</u>

(a) As per CBDT Circular No.5-P(LXX-6) dated 19the June, 1968, “income” for the purpose of Section 11 is the commercial income as per accounts of the trust, as increased by the appropriations towards the objects of the trust or otherwise, and also after adding back any debits made for capital expenditure incurred for the objects of the trust or otherwise. Thus, the starting point for computing “income” of a charitable trust/ institution is after reducing normal outgoings for running of such trust.

(b) The proposed amendment restricts deduction towards application of income, which is after computing the commercial income of the trust/institution. Hence, the proposed amendment would not apply to expenses in the nature of normal outgoings of the trusts/institutions.

(c) Charitable trusts/institutions often have to incur expenses towards their objects in cash, e.g., giving aid to poor and needy people who do not have bank accounts, meeting hospitalization cost of needy people on urgent basis, etc. Though Rule 6DD of the Rules lists circumstances under which disallowances are not to be made under Sections 40A(3) and 40A(3A), there is no provision under Rule 6DD to cover exceptional circumstances, like the ones mentioned above. Hence, even in genuine cases of charitable activities, amounts spent would not be treated as application of income.

(d) As far as TDS compliance is concerned, Section 40(a)(ia) applies to computation of business income. For a charitable trust registered under Section 10(23C)/ 11, there is no concept of computing head-wise income. Further, the Act contains adequate provisions to deal with non-compliance with TDS machinery. Hence, the proposed amendment is extremely harsh for charitable trusts/institutions.

3.8 Allowance of deductions in respect of certain income on filing of return of income – [Section 80AC]

Under the existing provisions of Section 80AC, no deduction would be admissible under Sections 80-IA, 80-IB, 80-IC, 80-ID, 80-IE, etc., unless the return of income is furnished by the assessee on or before the due date specified under Section 139(1) of the Act.

It is proposed to amend Section 80AC to provide that no deduction shall be allowed to the assessee under any of the provisions mentioned under the head "*C. -Deduction in respect of certain income*" of Chapter VIA of the Act unless the return of income is filed on or before the due date specified under Section 139(1).

It may be noted that the above provisions apply only to the income-based deductions (such as 80-IA, 80-IB, 80-IC, 80-ID, 80-IE, etc.) available under the head "*C. -Deduction in respect of certain income*" of Chapter VIA of the Act and not to:-

(a) payment-based deductions (such as deductions under Section 80C, 80CC, 80CCA, 80D, etc.) covered under the head "*B. – Deductions in respect of certain payment*";

(b) other income-based deductions (such as 80TTA and 80TTB) covered under the head "*CA. – Deductions in respect of other income*" of Chapter VIA of the Act; and

(c) other deductions (such as 80U) covered under the head "*D. – Other deductions*" of Chapter VIA of the Act.

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

3.9 Requirement for obtaining PAN made mandatory for certain transactions [Section 139A]

(a) Presently, an assessee is required to apply for a PAN only if:

(i) the total income exceeds Rs.2,50,000/-; or

(ii) total sales, turnover or gross receipts exceed Rs. 5,00,000/-; or

(iii) who is required to furnish return of income under Section 139(4A).

(b) To expand the list of cases requiring application of PAN and to use PAN as Unique Entity Number (UEN) and with the objective to link financial transaction with natural persons, it is proposed to amend Section 139A by insertion of clause (v) and (vi) in Section 139A as under :

(i) A person, not being an Individual, which enter into a financial transaction of an amount aggregating to Rs. 2,50,000/- or more in a financial year, is required to apply for a PAN.

(ii) Managing director, director, partner, trustee, author, founder, karta, CEO, principal officer or office bearer or any person competent to act on behalf of such non-individual entity, shall also apply for a PAN.

It may be noted that the term "financial transaction" has not been defined.

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

3.10 Focus on scrutiny e-assessments [Section 143(3A)]

As a part of the 'Digital India' initiative, the government had introduced e-assessment on a pilot basis in 2016. In order to implement this as full- fledged procedure, it has been proposed to introduce a new scheme of e-assessment under section 143(3A).The Central Government is yet to notify the scheme for e-assessments for the purpose of making assessment of total income or loss of the assessee under Section 143(3).

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

3.11 No adjustments while processing of return of income [Section 143(1)(a)]

Presently, under section 143(1), adjustments in respect to the additions of income that is not included in the return of income but appears in Form 26AS or Form 16A or Form 16 can be made while processing the return of income.

It has been proposed to curtail the scope of such adjustment by inserting a new proviso that no such adjustment shall be made in respect for any return furnished on or after 1st April, 2018.

This amendment will be effective in relation to return furnished for Assessment Year 2018-19 and subsequent years.

3.12 Prosecution on failure to furnish Return of Income [Section 276CC]

Presently Section 276CC provides that if a person willfully fails to furnish his return of income within the time limits provided in Section 139(1) which he is required to furnish, he shall be punishable with an imprisonment and fine as specified therein. The clause (ii) (b) of the *proviso* to Section 276CC provides that a person shall not be prosecuted against under this section if the tax payable by him on the total income determined on regular assessment, as reduced by the advance tax paid, if any, and any tax deducted at source, does not exceed Rs. 3,000/-.

It is now proposed to amend the provisions of clause (ii) (b) of the *proviso* to Section 276CC to provide that the provisions of the said sub-clause shall not apply in respect of a company. In other words, a company can be prosecuted under Section 276CC if it fails to file its return of income within the time limit specified in Section 139(1) irrespective of the fact that there is NIL tax liability of the company.

This amendment is made to prevent abuse of the proviso by the shell companies or by the companies holding benami properties.

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

3.13 Harmonising the provisions of Income Computation and Disclosure Standards [ICDS]

The ICDS were introduced in order to provide a framework for computation of income with effect from F.Y. 2016-17. The ICDS led to litigations at various courts and recently the Hon'ble Delhi High Court, in *Chamber of Tax Consultants v. Union of India (2017) 252 Taxman 77*, struck down some of the ICDS fully and read down some of the ICDS partially holding them to be contrary to the judicial precedents or provisions of the Act. In order to remove such conflicts and to regularize the compliance with the notified ICDS, several amendments and new sections are proposed, particularly dealing with manner of computation of income and allowability of deductions. All these ICDS amendments are applicable retrospectively with effect from A. Y. 2017-18.

3.13.1 Deduction on account of marked-to-market / expected forex loss [Sections 36(1)(xviii) and 40A(13)]

(a) Presently, expected loss or marked-to-market loss through any instrument for hedging currency related risk is allowed as a deduction based on commercial accounting principles and judicial pronouncements.

(b) It is proposed to introduce a new provision under Section 36(1)(xviii) to provide for a deduction in respect of marked-to-market losses or expected loss in line with ICDS-VI "Effects of changes in foreign exchange rates". As per

ICDS-VI, only marked-to-market losses or expected forex losses in respect of only forward exchange contracts are recognised as an expense.

(c) Further, a new provision is proposed to be introduced under Section 40A(13) to provide that no deduction shall be allowed for any other losses arising on hedging instruments other than losses allowable under Section 36(1)(xviii).

3.13.2 <u>Taxation of foreign exchange fluctuations [Section 43AA].</u>

It is proposed to introduce a new Section 43AA in line with ICDS-VI on "Effects of changes in foreign exchange rates" which deals with transactions in foreign currency. Accordingly, 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. Such gain or loss shall be computed in accordance with ICDS-VI and shall be in respect all foreign currency transactions, including those relating to –

(a) Monetary items and non-monetary items
(b) Translation of financial statements of foreign operations
(c) Foreign exchange contracts
(d) Foreign currency translation reserve

In respect of the exchange difference on settlement of non-monetary items, the provisions of Section 43A would apply i.e. adjustment to the cost.

3.13.3 <u>Computation of profits and gains from a construction contract / service contract [Section 43CB]</u>

(a) It is proposed to introduce a new Section 43CB to provide treatment of profits and gains arising from construction or service contracts. Such profits shall be determined on the basis of percentage completion method in accordance with ICDS notified under Section 145(2).

(b) In respect of service contract:

(i) Where the duration of the contract is 90 days or less, profits and gains from such contract shall be determined on the basis of project completion method;

(ii) Where the contract involves indeterminate number of acts over a specified period of time, profits and gains from such contract shall be determined on the basis of straight line method; and

(ii) Where the contract is not covered by (i) or (ii) above, profits and gains from such contract shall be determined on the basis of percentage of completion method in accordance with ICDS notified under Section 145(2).

(c) It is further proposed to provide that contract revenue shall include retention money and accordingly retention money will be considered for above purposes. Contract costs shall not be reduced by any incidental income in the nature of interest, dividend or capital gains. Such income shall be offered to tax separately under relevant head of income.

3.13.4 <u>Valuation of inventory [Section 145A]</u>

(a) Presently, inventory are valued as per the method of accounting regularly followed.

(b) It is now proposed as follow:

(i) As per amendment in Section 145A, inventory is required to be valued at lower of cost or net realizable value.

(ii) Listed securities which are quoted on recognised stock exchange shall be valued at cost or net realizable value, whichever is lower. The comparison of actual cost and net realizable value shall be made category-wise.

(iii) Unlisted securities and listed securities which are not quoted on recognised stock exchange shall be valued at actual cost.

Further, Section 145A currently provides for inclusion of the amount of any tax, duty, cess or fee actually paid or incurred by the assessee to bring the goods to the place of its location and condition as on the date of purchase and sale of goods and valuation of inventory. This Section has been substituted by new Section 145A.

Substituted Section 145A retains the above provision and also extends it to valuation of services. Therefore, services are required to be valued inclusive of taxes which have been paid or incurred by the assessee.

3.13.5 <u>Income recognition / Year of Taxability of certain incomes [Section 145B]</u>

ICDS provides for taxability of certain incomes even before they have accrued. In order to validate such provisions of ICDS, Section 145B is proposed to be inserted to provide for the following:

(a) Interest on compensation or enhanced compensation and subsidy or grant received from the government shall be recognised as income in the year of receipt.

(b) Claim for escalation of contract shall be recognised as income in the year when there is reasonable certainty to receive the same.

All these ICDS related amendments and newly inserted sections will be retrospectively applicable from 1st April, 2017 and will accordingly apply in relation to Assessment Year 2017-18 and subsequent years.

CONCLUSION

To conclude, though there is not much in terms of addressing the problems faced by the real estate sector but the move of the government towards no adjustment in case of the circle rate not exceeding 5% of sale consideration is a welcome move. The implementation of Real Estate (Regulation and Development) Act, 2016 (“**RERA**”) , Credit Linked Subsidy Scheme under Pradham Mantri Awas Yojana (“**PMAY**”) and extension of income tax benefits up to 60 square metre sized apartments shall pave the way for overall growth of the sector.

'Housing for All' still ranks as one of the top priorities for the ruling squad at the helm. The government has announced that it would establish a dedicated Affordable Housing Fund out of fully serviced government bonds. This would bridge the funding gap and provide an access to the alternative, rather than cheaper source of funds. The government also displayed its commitment in providing houses for the poor by sanctioning PMAY scheme substantially in rural areas.

Nevertheless the sector, which has seen some path breaking changes with demonetisation and the implementation of RERA, since 2016 was hoping for a revival but was felt dejected with lack of emphasis and further reforms to this sector in the present budget. The push for affordable housing however, was taken positively by the sector, hoping for the scheme to prop up demand. The government had provided clarity on the tax impact on the Joint Development Agreements entered in to on area sharing basis partially in the last budget, covering Individual and HUFs. However, a complete rationalization (impact for all categories of land owner) have not been brought in this budget which was much expected.

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PRIVATE CIRCULAR

SALIENT FEATURES OF FINANCE BILL, 2018 (AS AMENDED AND PASSED BY THE LOK SABHA ON 12TH MARCH, 2018) DIRECTLY CONCERNING THE REAL ESTATE SECTOR

Compiled by
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CHARTERED ACCOUNTANTS

29th day of March, 2018