POST-BUDGET MEMORANDUM

on

DIRECT TAX LAWS 2016-17

Bombay Chartered Accountants' Society

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6th April, 2016

Mr. Arun Jaitley
Hon. Minister of Finance
Government of India
North Block
New Delhi - 110 001.

Respected Sir,

Sub: Representation in respect of provisions relating to Direct Taxes of the Finance Bill, 2016

We welcome the Finance Bill, 2016 for its sincere attempt to reduce litigation and bring clarity. However, there are certain provisions in the Finance Bill, 2016 in respect of Direct Taxes that are inequitable or anomalous and/or may only increase litigation, without real addition to the net revenue to the Government.

Our suggestions on various topics for rationalisation of law, rectification of certain anomalies and correction of drafting errors are given in the enclosed representation relating to direct taxes.

We hope that our representation will receive due consideration. We will be pleased to present ourselves for any explanation and / or clarification that may be required by you.

Thanking you,

FOR BOMBAY CHARTERED ACCOUNTANTS' SOCIETY

Raman Jokhakar	Sanjeev R. Pandit	Ameet Patel
President	Chairman – Taxation Committee	Co-Chairman – Taxation Committee

Encl: As above.

CC:

- Shri Jayant Sinha, Minister of State for Finance
- Shri Ratan Watal, The Finance Secretary
- Dr. Hasmukh Adhia, The Revenue Secretary, Ministry of Finance
- Shri Atulesh Jindal, The Chairman, Central Board of Direct Taxes
- Member (Legislation & Computerisation), Central Board of Direct Taxes

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BCAS - Post Budget Memorandum 2016

1. PLACE OF EFFECTIVE MANAGEMENT [POEM] – SECTION 6 – CLAUSE 4

Section 6(3) is proposed to be amended to bring in the concept of POEM in case of companies, w.e.f. 1-4-2017.

Section 6(3), as amended by the Finance Act, 2015 provides that a company shall be resident in India in any previous year if it is an Indian company or its place of effective management, in that year, is in India. The term 'place of effective management' has been defined to mean a place where key management and commercial decisions that are necessary for the conduct of the business of an entity as a whole are, in substance made.

In the Explanatory Memorandum of Finance Bill, 2015, it was stated that POEM is an internationally recognised concept for determination of residence of a company incorporated in a foreign jurisdiction, that most of the tax treaties entered into by India recognise the concept of POEM for determination of residence of a company as a tie-breaker rule for avoidance of double taxation and that the principle of POEM is recognised and accepted by OECD also. Therefore, the modification in the condition of residence would align the provisions of the Act with DTAAs entered into by India with other countries and would also be in line with international standards.

It is submitted that the concept of POEM is a subjective one, and has different meanings from country to country, as clarified by the OECD itself. The OECD has, in its Report on BEPS Action Plan 6 - `Preventing the Granting of Treaty Benefits in Inappropriate Circumstances', recognised that the concept of POEM is not an effective test of residence, by stating that use of POEM as tie-breaker test was creating difficulties, and that dual residency should be solved on case to case basis rather than by use of POEM.

The OECD in its final report on BEPS Action Plan 6 has suggested replacement of paragraph 3 of Article 4 of the Model tax convention, by removing POEM as the sole criterion for solving dual residency cases, by providing that "Where by reason of the provisions of paragraph 1 a person other than an individual is a resident of both Contracting States, ***the competent authorities of the Contracting States shall endeavour to determine by mutual agreement the Contracting State of which such person shall be deemed to be a resident for the purposes of the Convention, having regard to its place of effective management, the place where it is incorporated or otherwise constituted and any other relevant factors. In the absence of such agreement, such person shall not be entitled to any relief or exemption from tax provided by this Convention except to the extent and in such manner as may be agreed upon by the competent authorities of the Contracting States***."

Therefore, internationally also, POEM is now being discarded as a measure of test of residence. Further, the subjectivity involved would result in substantial amount of litigation, given the proclivity of tax officers to take extreme stands wherever any such subjectivity is involved. This provision has been the subject matter of hardly any litigation so far.

It would also hamper the efforts of Indian companies to become multinationals, by subjecting their overseas subsidiaries to be potentially taxed in India, merely because the holding company is involved in approving decisions of the overseas subsidiaries. Indian companies would therefore be at a significant disadvantage as compared to their overseas counterparts, so far as international operations are concerned.

Further, section 2(10) of the Black Money (Undisclosed Foreign Income and Assets) and Imposition of tax Act, 2015 defines 'resident' to mean a person who is resident in India within the meaning of section 6 of the Income-tax Act. This could result into very harsh and unintended consequences in cases where POEM of company is subsequently held to be in India.

Suggestion:

a) **It is therefore suggested that the earlier provision of 'management and control being wholly located in India' should be restored.**

b) **The CBDT had on 23rd December, 2015, issued the Draft Guiding Principles for determination of POEM of a company, for public comments and suggestions. The said guiding principles have not been finalised so far.**

   Hence, it is alternatively suggested that the applicability of POEM for determination of residential status of companies should be deferred for 1 more year and should be considered along with introduction of GAAR provisions.

c) **In the alternate, considering the object of preventing misuse, appropriate provision should be added in the current section providing criteria of Place of Effective Management, only in case of shell companies.**

d) **Suitable amendments should be made in the Black Money (Undisclosed Foreign Income and Assets) and Imposition of tax Act, 2015, to obviate any unintended consequences.**

2. DEDUCTION U/S 32AC – CLAUSE 14

Section 32AC was introduced by the Finance Act, 2013 with effect from 1st April 2014. It provides for deduction of 15% of the cost of plant and machinery acquired and installed. There has been a controversy as to whether, in order to be entitled to this deduction, acquisition and installation of the new plant and machinery should be in the same previous year. The amendment proposed by the Finance Bill, 2016 effectively provides that where the acquisition and installation of the plant and machinery is not in the same year, the deduction under this section shall be allowed in the year of installation. This amendment is proposed to become effective from 1st April 2016.

Suggestion:

It is suggested that in order to settle the controversy and avoid unnecessary litigation on the issue, the proposed amendment be made effective from 1st April 2014 i.e. from the date when section 32AC became effective.

3. MAINTENANCE OF BOOKS OF ACCOUNT BY A PERSON CARRYING ON A PROFESSION - SECTION 44AA – CLAUSE 24

The Finance Bill, 2016 proposes to introduce new section 44ADA providing for presumptive taxation for assessees carrying on a profession referred to in section 44(1) and whose total gross receipts do not exceed Rs. 50 lakh.

Section 44AA(1) provides for mandatory maintenance of books of account and other documents by persons carrying on profession referred to in the said subsection. Although it is proposed to introduce section 44ADA providing for presumptive taxation for professionals referred in section 44AA(1), provision contained in section 44AA regarding maintenance of books of account has not been proposed to be amended. Consequentially, such professionals will continue to be required to maintain books of account.

Suggestion:

Section 44AA be amended to exempt professionals covered by the presumptive taxation scheme u/s 44ADA from mandatory requirement of maintenance of books of account.

4. LIMIT FOR TAX AUDIT - SECTION 44AB – CLAUSE 25

(a) It is proposed to amend section 44AD increasing the limit of being 'eligible business' as defined in clause (b) of the Explanation from Rs. 1 crore to Rs. 2 crore. This is welcome. However, the limit for carrying out Tax Audit u/s 44AB in case of business continues to be Rs. 1 crore. As a result, even though the assessee carrying on an eligible business is covered by a presumptive taxation u/s 44AD, he will be required to get his accounts audited u/s 44AB if his turnover exceeds Rs. 1 crore, though he is not required to maintain books of account u/s 44AD. This will not serve any purpose and appears to be an inadvertent omission. Such an assessee will also be liable to deduct tax at source under Chapter XVII-B increasing compliance burden on him. Prior to the proposed amendment to section 44AD, limits of total sales, turnover or gross receipts for getting accounts audited under clause (a) of section 44AB and under clause (b) in clause (ii) of the Explanation to section 44AD were the same.

Suggestion:

It is therefore suggested that simultaneously with the amendment to increase the limit for applicability of presumptive taxation u/s 44AD, the limit of Rs. 1 crore in clause (a) of section 44AB be increased to Rs. 2 crore.

(b) Presently, a person carrying on profession is not required to get his accounts audited u/s 44AB if his gross receipts do not exceed Rs. 25 lakh. With the proposed introduction of new section 44ADA providing for presumptive taxation for persons carrying on a profession referred to in section 44(1) this limit is proposed to be increased to Rs. 50 lakh. However, a professional who does not declare 50% of the gross receipts as income from profession will be required to get his accounts audited u/s 44AB irrespective of his gross receipts. Many young professionals who commence profession do not have 50% of the gross receipts as income from profession in the initial years due to interest burden for loans taken for purchase of office premises, depreciation on assets, cost of salaries etc. A small professional needs to be exempted from the requirement of Tax Audit even if he does not declare income in accordance with the scheme of presumptive taxation u/s 44ADA.

Suggestion:

A professional having gross receipts not exceeding Rs. 25 lakh should not be required to get his accounts audited u/s 44AB even if he has not declared his professional income in accordance with the presumptive taxation scheme u/s 44ADA. It is suggested that the existing limit of Rs. 25 lakh be continued and where the gross receipts exceed Rs. 25 lakh, the higher limit of Rs. 50 lakh should apply where the income from profession has not been declared in accordance with the presumptive taxation scheme u/s 44ADA.

Simultaneously, appropriate amendment may also be made in the sub-section (4) of the proposed new section 44ADA.

5. PRESUMPTIVE TAXATION - SECTION 44AD – CLAUSE 26

(a) The Finance Bill, 2016 proposes to delete the proviso to sub-section (2) which provides for deduction of salary and interest paid to partners of a partnership firm from the presumptive income computed under sub-section (1). This will hit hard small partnership firms which are required to pay tax at the flat rate. The reason given in the Memorandum explaining the provisions of the Finance Bill is hyper technical. The provision has been working well without any difficulty. A beneficial provision should not be deleted for technical reasons.

Suggestion:

The proviso to sub-section (2) should not be deleted.

(b) The Finance Bill, 2016 proposes to substitute sub-section (4) by new sub-section (4) which effectively provides that where an assessee does not declare profit in accordance with the provisions of subsection (1) in an assessment year, for the next five assessment years he is not eligible to claim the benefit of section 44AD.

The Memorandum explaining the provisions of the Finance Bill does not provide any reason for this proposed provision. It is next to impossible for a person to misuse the provisions of section 44AD by manipulating the profits for five years. The proposed provision only complicates the section. There is no reason to show lack of trust in the assessees.

Suggestion:

The proposed subsection (4) should not be introduced.

6. PRESUMPTIVE TAXATION - SECTION 44ADA – CLAUSE 27

(a) The proposed new section 44ADA provides for presumptive taxation for assessees carrying on a profession referred to in section 44(1) and whose total gross receipts do not exceed Rs. 50 lakh. The Memorandum explaining the provisions of the Finance Bill states that this provision shall not apply to Limited Liability Partnership although the section does not indicate so.

Many professionals have started carrying on their profession in the form of Limited Liability Partnership. Generally, the Act does not differentiate between a partnership firm under the Indian Partnership Act, 1932 and a Limited Liability Partnership under the Limited Liability Partnership Act, 2008.

Suggestion:

There is no reason why the presumptive taxation scheme u/s 44ADA should not apply to a Limited Liability partnership. The proposed section should also apply to a Limited Liability Partnership.

In fact, clause (a) of the Explanation to section 44AD should also be amended making a Limited Liability Partnership an eligible assessee for the presumptive taxation u/s 44AD.

(b) In the proposed section 44ADA, there seems to be no bar of deduction of salary and interest paid to partner's u/s 40(b) for firms rendering professional services. At the same time, proviso similar to the existing proviso to sub-section (2) of section 44AD is absent. This may lead to avoidable litigation. It is only fair that a professional firm is allowed deduction for the salary and interest paid to its partners.

Suggestion:

It is suggested that a proviso similar to the proviso to sub-section (2) of section 44AD be introduced in the proposed new section 44ADA.

7. CONVERSION OF COMPANY INTO LIMITED LIABILITY PARTNERSHIP [LLP] – SECTION 47(XIIIB) – CLAUSE 28

For conversion of a private company or an unlisted public company into an LLP to be tax neutral the conditions mentioned in section 47(xiiib) of the Act are to be satisfied which, inter alia, include a condition that the company's gross receipts, turnover or total sales in any of the preceding three years did not exceed Rs. 60 lakh.

The Finance Bill has added one more condition viz., that the total value of the assets, as appearing in the books of account of the company, in any of the three previous years preceding the previous year in which the conversion takes place does not exceed Rs. 5 crore.

The limit of Rs. 60 lakh on the turnover of the company to be eligible for tax neutrality has made the provisions of section 47(xiiib) a non-starter. Now, the insertion of the proposed condition regarding total value of the assets, in the name of rationalisation, will act as further dampener and would defeat the very purpose of insertion of the section.

Suggestion:

It is therefore suggested that in order to encourage conversion of companies into LLPs by making the same tax neutral, the condition that the company's gross receipts, turnover or total sales in any of the preceding three years did not exceed Rs. 60 lakh, should be withdrawn.

Further the proposed amendment inserting the condition that the total value of the assets, as appearing in the books of account of the company, in any of the three previous years preceding the previous year in which the conversion takes place does not exceed Rs. 5 crore, should be omitted.

8. CONSOLIDATING PLANS OF A MUTUAL FUND SCHEME – SECTION 47(XIX) – CLAUSE 28

Clause (xix) in section 47 is proposed to be inserted to provide that capital gain arising on transfer of a capital asset being unit or units in a consolidating plan of a mutual fund scheme in consideration of allotment of unit or units in the consolidated plan of that scheme of the mutual fund will not be chargeable to tax.

It is noticed that corresponding provision in section 2(42A) providing that in the case of units which become the property of the assessee in consideration of a transfer referred to in clause (xix) of section 47, there shall be included the period for which the unit or units in the consolidating plan within a scheme of a mutual fund were held by the assessee, has remained to be inserted.

Similarly, it is observed that corresponding provision in section 49 providing that in the case of units which become the property of the assessee in consideration of a transfer referred to in clause (xix) of section 47, the cost of acquisition of the asset shall be deemed to be the cost of acquisition to him of the unit or units in the consolidating plan within a scheme of a mutual fund, has remained to be inserted.

Suggestion:

It is suggested that corresponding amendments in section 2(42A) and section 49, as mentioned above, should be carried out.

9. SPECIAL PROVISION FOR FULL VALUE OF CONSIDERATION – SECTION 50C – CLAUSE 30

Section 50C is proposed to be amended to provide that where the date of the agreement fixing the amount of consideration for the transfer of immovable property and the date of registration are not the same, the stamp duty value on the date of the agreement may be taken for the purposes of computing the full value of consideration. The proposed amendment is effective from 1-4-2017.

Suggestion:

Since this is a clarificatory beneficial amendment, the same should be made applicable from the date of the insertion of the section i.e. 1-4-2003.

10. RECEIPT BY AN INDIVIDUAL OR HUF OF SUM OF MONEY OR PROPERTY WITHOUT CONSIDERATION OR FOR INADEQUATE CONSIDERATION – SECTION 56 (2)(VII) – CLAUSE 34

Section 56(2)(vii) charges to tax receipt by an individual or an HUF of any sum of money or property without consideration or for inadequate consideration. Receipt of shares without consideration or for inadequate consideration is covered by section 56(2)(vii)(c). Second Proviso to section 56(2)(vii)(c) states that the clause does not apply to receipt of property from persons mentioned therein or in circumstances mentioned therein.

Second proviso is amended to expand the scope of non-applicability of the section and accordingly, this section will also not apply to the receipt of shares of by way of transaction not regarded as transfer under clause (vicb) or clause (vid) or clause (vii) of section 47 i.e. –

(i) A successor co-operative bank, in a business reorganisation, in lieu of shares of a predecessor co-operative bank.

(ii) A resulting company pursuant to a scheme of demerger; or

(iii) An amalgamated Indian company pursuant to a scheme of amalgamation;

Suggestion:

Since this is a clarificatory beneficial amendment, the same should be made applicable from the date of the insertion of the section i.e. wef 1-10-2009.

11. DEDUCTION OF INTEREST - SECTION 80EE – CLAUSE 37

(a) A new section 80-EE is proposed to be inserted providing for deduction of Rs. 50,000 in respect of interest payable on loan borrowed from a financial institution by an individual assessee for acquiring a residential house.

One of the conditions for this deduction is that the value of the residential house property should not exceed Rs. 50 lakh. In case of metro cities this limit is unrealistic. It is necessary to distinguish between acquisition of a residential house in metro cities and other places by having separate limits. Such distinction has also been made in the proposed new section 80-IBA.

Suggestion:

It is suggested that in case of cities of Chennai, Delhi, Kolkata and Mumbai or within the area of 25 km from the municipal limits of these cities, the limit on the value of property should be Rs. 1 crore instead of Rs. 50 lakh.

Further, it is suggested that with a view to avoid possible dispute, in clause (iii) of sub-section (3), instead of using the term 'value of residential house property' the term 'consideration for the residential house property' may be used.

(b) The proposed section provides that the amount of loan sanctioned should not exceed Rs. 35 lakh. There is no reason for having this condition for availing the deduction under this section. The financial institutions have their own well set norms for sanctioning of the loans. Generally, the financial institutions grant loan to the extent of 80% of the value of the property.

Suggestion:

The condition that the sanctioned loan should not exceed Rs. 35 lakh should be omitted from the proposed section.

12. DEDUCTION FOR AN ELIGIBLE START-UP - SECTION 80-IAC – CLAUSE 41

A new section 80-IAC is being introduced providing tax holiday to eligible start-ups. The deduction is available only to companies. One of the conditions for being an eligible start-up is that the total turnover of its business does not exceed Rs. 25 crore in any of the previous years beginning on or after 1st April 2016 and ending on the 31st March, 2021.

The section indicates that if the turnover exceeds Rs. 25 crore during this specified period, the assessee company will cease to be an eligible start-up and will lose deduction for all the years. The incentive section should not discourage growth of a successful start-up. A successful start-up should not be penalised by making it ineligible for deduction since the beginning of the tax holiday period. Also, the section does not provide any mechanism for withdrawing the deduction which may have been already granted in the earlier years where the turnover of the assessee company exceeds Rs. 25 crore in the subsequent previous year.

Suggestion:

(a) The condition that the turnover of the assessee company should not exceed Rs. 25 crore in any of the previous years specified in this section should be omitted.

(b) If at all this condition is to be retained, the assessee company should only become disentitled to the deduction from the previous year commencing after the previous year in which its turnover for the first time exceeds Rs. 25 crore. The assessee company should get the deduction for all the previous years including the previous year in which its turnover for the first time exceeds Rs. 25 crore.

(c) The deduction should not be restricted only to company assessees but should also be allowed to partnership firms including a Limited Liability Partnership.

13. DEDUCTION OF PROFITS FROM HOUSING PROJECTS OF AFFORDABLE RESIDENTIAL UNITS – SECTION 80-IBA – CLAUSE 43

Section 80-IBA is proposed to be inserted to provide for hundred per cent deduction of the profits of an assessee engaged in developing and building housing projects approved by the Competent Authority after 1st June, 2016 but on or before 31st March, 2019 subject to fulfilment of prescribed conditions. Delhi, Mumbai, Chennai or Kolkata or within 25 km from the municipal limits of these cities

One of the proposed condition is that in case of projects located in Delhi, Mumbai, Chennai or Kolkata or within 25 km from the municipal limits of these cities, the area of the residential unit does not exceed 30 sq. mts. and in respect of projects located in any other area the area of the residential unit does not exceed 60 sq. mts.

It is not clear whether the sizes of the residential units of 30 square meters or 60 square meters are based on the built up area or the carpet area. This needs to be clarified.

Suggestion:

a) **The desirability of the proposed deduction to the developers engaged in building affordable residential units, should be reconsidered in the light of the objective of the government to reduce the deductions and exemptions, as the same will benefit the developers and the benefit may not be passed on to the home buyers.**

b) **It is suggested that necessary clarificatory amendment regarding the sizes of the residential units of 30 square meters or 60 square meters, that the same are based on the carpet area, should be made.**

14. Deduction for Additional Employee Cost - Section 80JJAA – Clause 44

(a) Section 80JJAA is being substituted providing for deduction in respect of additional employee cost.

Second proviso to clause (i) to Explanation in sub-section (2) provides that in the first year of a new business, emoluments paid or payable to employees employed during the previous year shall be deemed to be the `additional employee cost’. It indicates that in the first year of a new business the definition of 'additional employee' contained in clause (ii) of the said Explanation is not to be referred to and sub-clauses (a) to (d) of clause (ii) of the said Explanation have no application. Accordingly, while determining the additional employee cost total emoluments paid or payable to all employees including those drawing more than Rs. 25,000 shall be considered.

Suggestion:

If the above provision is unintended, then to avoid future litigation appropriate modification may be made providing that in the first year of a new business while computing emoluments paid or payable to employees employed during the previous year emoluments of employees referred to in sub-clauses (a) to (d) of clause (ii) of the Explanation, shall not be considered.

(b) Clause (a) of sub-section (2) provides that no deduction shall be allowed if the business is formed by splitting up, or the reconstruction, of an existing business or to the business has been acquired by the assessee by way of transfer from any other person or as a result of any business reorganisation (for short, collectively referred to as reorganisation or reorganised business). This indicates that if a business has been split up or reconstructed or acquired or reorganised in the past, (even distant past), the assessee will not be entitled to deduction under this section. This seems to be unintended and is unjustified.

Suggestion:

It is suggested that in case of reorganisation of business, the assessee whose business comes into existence due to the reorganisation should not be entitled to deduction under this section for the year in which the reorganisation takes place. In the subsequent years the assessee should be entitled to the deduction based on additional employee cost as contemplated in the Explanation to sub-section (2). In such subsequent years the business would be considered as an existing business and the assessee would not be entitled to unintended deduction but will only be eligible for deduction on account of creation of employment.

15. TAX ON INCOME OF CERTAIN DOMESTIC COMPANIES – SECTION 115BA – CLAUSE 49

The proposed section 115BA provides for a concessional rate of tax of 25%, only in case of a newly setup and registered domestic company on or after 1st March, 2016, subject to fulfilment of prescribed conditions.

This being a beneficial provision, should have wider reach and coverage, so that the objectives of the insertion of the section could be achieved.

Suggestion:

a. **It is therefore suggested that the concessional rate should be extended to all the companies whether set up and registered before or after 1st March, 2016, which fulfil the conditions laid down.**

b. **Further, the provision should be extended to all non-corporate entities which fulfil these conditions as well, since such entities would also suffer from the phasing out of exemptions and deductions.**

16. ADDITIONAL TAX ON DIVIDENDS FROM COMPANIES U/S 115BBDA – CLAUSE 50

New section 115BBDA is proposed to be introduced levying 10% tax on dividends in excess of Rs. 10 lakh received from a domestic company by certain assessees. Subsection (1) uses the term 'a domestic company'. This indicates that in order to attract provisions of this section, dividend in excess of Rs. 10 lakh should be received from one single domestic company. This is likely to give rise to unnecessary litigation.

Suggestion:

If it is intended that tax u/s 115BBDA is to be levied if the aggregate dividends received from various domestic companies exceed Rs. 10 lakh, then the proposed section should be appropriately modified in order to avoid disputes and potential litigation.

17. PROVISIONS RELATING TO MINIMUM ALTERNATE TAX – SECTION 115JB – CLAUSE 53

The Finance Bill 2016 has proposed to insert Explanation 4 to section 115JB. It reads as under:

"*Explanation 4. — For the removal of doubts, it is hereby clarified that the provisions of this section shall not be applicable and shall be deemed never to have been applicable to an assessee, being a foreign company, if—*

(i) *the assessee is a resident of a country or a specified territory with which India has an agreement referred to in sub-section (1) of section 90 or the Central Government has adopted any agreement under sub-section (1) of section 90A and the assessee does not have a permanent establishment in India in accordance with the provisions of such agreement; or*

(ii) *the assessee is a resident of a country with which India does not have an agreement of the nature referred to in clause (i) and the assessee is not required to seek registration under any law for the time being in force relating to companies.*"

As per clause (ii) above, the provisions of section 115JB would be applicable to foreign company that require to seek registration under any law if it is resident of non-treaty country.

The Companies Act has inserted new definition of "foreign company" under section 2(42). This reads as under:

"foreign company" means any company or body corporate incorporated outside India which-

a. *has a place of business in India whether by itself or through an agent, physically or through electronic mode; and*

b. *conducts any business activity in India in any other manner."*

Further, Section 386 of Companies Act, 2013 defines "place of business" very broadly to mean a place which includes share transfer or registration office. Therefore, as per provisions of Companies Act, 2013 any foreign company having any place of business shall have to register with ROC and make necessary compliances. Thus, in case of no treaty countries, any company having any type of business presence in India would result in applicability of provision of section 115JB.

Many foreign companies operate in India through agents, whether marketing agents, sourcing agents, C&F agents, or collection agents. These agents can be related or unrelated.

The issue is that the foreign companies now require registration and need to comply with other requirements (annual compliances) under the Companies Act, 2013 even if they operate in India through agents. In such cases, they would also get covered by clause (ii) of Explanation 4 to section 115JB above.

It is also noteworthy that the concept of 'Permanent Establishment' has not been defined under the provisions of Income-tax Act, 1961 save as provided under section 44DA for limited purpose of that provision.

Suggestion:

It is suggested that a clarification should be inserted that unless the assessee has a permanent establishment in India, the provisions of section 115JB will not be applicable. Simultaneously, `permanent establishment' should be exhaustively defined for this purpose.

In addition, an exception can be made in cases of airlines, shipping companies, etc. where even if there is a PE in India but if the income of such assessee is exempt pursuant to the provisions of respective DTAA, the provisions of section 115JB will not be applicable.

18. TAX ON DISTRIBUTION OF INCOME BY DOMESTIC COMPANY ON BUY-BACK OF SHARES – SECTION 115QA – CLAUSE 56

Section 115QA is proposed to be amended in order to provide clarity and remove any ambiguity relating to various issues, to provide that the provisions of this section shall apply to any buy back of unlisted share undertaken by the company in accordance with the provisions of the law relating to the Companies and not necessarily restricted to section 77A of the Companies Act, 1956. It is further proposed to provide that for the purpose of computing distributed income, the amount received by the company in respect of the shares being bought back shall be determined in the prescribed manner. The rules would thereafter be framed to provide for manner of determination of the amount in various circumstances including shares being issued under tax neutral reorganisations and in different tranches.

Chapter XII-DA containing Sections 115QA to QC had been inserted by the Finance act, 2013 with the objective to curb the practice of buy-back of shares by unlisted companies, instead of payment of dividends, in order to avoid payment of DDT, particularly where the capital gains arising to the shareholders are either not chargeable to tax or are taxable at a lower rate. Accordingly, it is provided that the consideration paid by the company for purchase of its own unlisted shares which is in excess of the sum received by the company at the time of issue of the shares (distributed income) will be charged to tax and the company would be liable to pay additional income tax at the rate of 20% of the distributed income paid to the shareholder.

For the purposes of this section, ‘buy-back’ has been defined to mean purchase by a company of its own shares in accordance with the provision of Section 77A of The Companies Act, 1956. Section 77A of the Companies Act, 1956, provides that a company may buy-back its own shares: (a) Out of its free reserves; (b) Out of securities premium account; and (c) Out of proceeds of any share or other specified securities.

Thus, there is a possibility that a company may not have free reserves and yet buy-back its shares financed out of share premium or an issue of shares of different category. In such a case, there would not have been any avoidance of DDT and yet the company would be liable to pay additional tax, on the deemed distributed income under Section 115QA.

In addition, in view of provisions of section 46A of the Act, there is no justification for application of the provisions in case of resident shareholders.

Suggestion:

It is suggested that suitable amendments should be made for non-applicability of the section in cases where buy-back of a company’s shares financed out of share premium or an issue of shares of different category.

It is suggested that provisions of Chapter XII-DA should be made applicable only to non-resident shareholders, as resident shareholders would in any case be subjected to tax u/s 46A.

19. PERSONS HAVING INCOME EXEMPT U/S 10 (38) REQUIRED TO FILE RETURN U/S 139 - CLAUSE 65

Sixth proviso to section 139(1) is proposed to be amended making it mandatory for a person to file return of income if his total income without giving effect to the provisions of section 10(38) exceeds the maximum amount not chargeable to income tax.

If the exemption u/s 10(38) is not to be given effect to, capital gain in respect of transfer of long-term capital asset being equity shares or units of equity oriented fund etc. will have to be computed by considering provisions for indexation of the cost of acquisition as well as set off of loss u/s 70.

Suggestion:

In order to avoid disputes, potential litigation and unintended default by assessees in filing the return, while making the amendment appropriate explanation should be inserted under the proviso being amended to clarify the position stating that for this purpose, the capital gains should be computed based on indexed cost of acquisition.

20. ADJUSTMENTS TO RETURNED INCOME – SECTION 143 – CLAUSE 66

The proposal to increase the scope of adjustments that can be made to the returned income while processing the same u/s 143(1) is fraught with difficulties. The insertion of sub-clauses (iv) and (vi) in particular are highly objectionable as these would lead to unprecedented litigation and hardship to assessees. This in turn would be against the government's very laudable steps taken in the recent past for reducing and avoiding litigation.

In the Form No. 3CD that contains the particulars referred to in a tax audit report, the assessee reports several matters where there could be a difference of opinion between the assessee and the tax auditor. Many times due to early completion of tax audit and payment of various section 43B dues or TDS payable before the due date of filing the returns u/s 139(1), may also lead to differences. In addition, in some cases, the issues may remain debatable and the tax auditor out of abundant caution mentions the same in the tax audit report. However, this cannot be made a subject matter of automatic adjustment to the income u/s 143(1). The very objective of section 143(1) is to permit the income-tax department to make adjustments on account of prima facie incorrect claims and of arithmetical mistakes in the return.

When a tax payer takes a particular stand based on judicial decisions or interpretation of law or a legal opinion, the same cannot by any stretch of imagination be placed in the same basket as prima facie mistakes/incorrect claims. Further, it is now mandatory to file the tax audit reports only in electronic form. For this purpose, a rigid electronic utility has been made available on the e-filing website. In the said utility, at most places, there is no space made available to tax payers or tax auditors to mention detailed explanation for a particular stand taken on the basis of which a particular item is reported / not reported. This makes it even more important and necessary that the tax audit report should not be compared mechanically with the income-tax return to identify differences, if any, and then to add those differences as income u/s 143(1).

Similarly, the proposal to add income appearing in Form 26AS / 16 / 16A to the returned income if that income has not been reported in the return, is also extremely unfair and unwarranted. As it is, thousands of tax payers are facing numerous problems when the returns filed electronically are processed by the CPC and credit for several items of TDS is not given primarily because of mismatch with Form 26AS. This has resulted in huge demands being raised in a large number of cases or refunds being converted to demands in many cases. In many cases, refunds are not issued to tax payers because of the mismatches. Thus, the issue of comparing the returned figures with the Form 26AS has already resulted in massive problems across the country for a large number of tax payers. Now, if the income is also sought to be adjusted in line with the Form 26AS then it will create unprecedented chaos. The CPC, despite its best efforts and notwithstanding the excellent work that it is doing in terms of quick processing of returns, is not equipped to deal with the work load that would arise on account of large scale applications for rectification that are bound to be filed if the adjustments are made to the returned income based on Form 26AS.

At present, once the CPC processes the returns, if there is an issue of granting credit for TDS and such issue arises on account of differences in the method of accounting followed by the deductor and the deductee, the CPC transfers the file to the jurisdictional assessing officer. Practically, in such cases, the tax payer is caught between the CPC and the jurisdictional assessing officer. Despite running from pillar to post, rectification of wrong demands takes months to get rectified and that too after a lot of stress and tension for the concerned tax payer.

In this back ground, adding to the tax payer's problems would not be the right thing to do and would create mistrust in the whole system.

Suggestion:

Therefore, it is requested that the proposed sub clauses (iv) and (vi) be deleted.

21. ADVANCE-TAX – SECTION 211 – CLAUSE 87

In view of the proposed amendment to section 211 vide Finance Bill 2016, the due dates of payment of advance tax by a non-corporate assessee has been brought in alignment with the due dates applicable to corporate tax assessees i.e. non-corporate assessees are also required to pay advance tax, 4 times in a year. This will unnecessarily burden the assessees, since most of the income received by non-corporate assessees like individuals, HUFs etc are already subject to TDS provisions.

Suggestion:

Accordingly, it is suggested that the advance tax payments should be kept as per the original provisions for the non-corporate assessees.

22. PENALTY – SECTION 270A – CLAUSE 97

Section 270A is proposed to be inserted wef AY 2017-18 in order to rationalise and bring objectivity, certainty and clarity in the penalty provisions.

It is submitted that the present penalty provisions under section 271 have been on the statue book for a fairly long time and after substantial litigation, the law on penalty has by and large been settled with significant certainty. The litigation in respect of penalty has primarily been on account of lack of understanding of the scope of penalty by the Assessing Officers. Therefore, there is no need to disturb the existing provisions, but rather a need to educate the Assessing Officers regarding the settled law on the subject.

The new concepts for levy of penalty of "under-reporting" and "misreporting" are going to be matters of serious debate and litigation. Further, it will be a long time before the understanding and interpretation of these provisions gets settled. The very purpose of introduction of this new provision would therefore be defeated. It is suggested that instead of changing the entire scheme of levy of penalty, suitable amendments could be made to existing provisions, retaining the concepts of "furnishing of inaccurate particulars of income" and "concealment of income".

Alternatively, if the proposed provisions of section 270A are retained, the following points may be noted:

i. There is no specific amendment in section 246A of the Act, providing for right of appeal against any penalty order u/s 270A. There could be a matter of debate as to whether an addition to the income amounts to under-reporting or misreporting, or whether the explanation given is bona fide or not, or whether all relevant information and particulars in relation to the income have been provided, which issue would need to be adjudicated in appeal. In all fairness and in the interest of justice, penalty order should be appealable.

ii. Section 270A(3)(i)(b) provides that in a case where no return is furnished, the amount of under reported income shall be (a) in case of a company, firm or local authority, the entire amount of income assessed and (b) in other cases, the difference between amount of income assessed and the maximum amount not chargeable to tax.

The provisions are too harsh and drastic in those cases where an assessee fails to file the return for *bona fide* reasons beyond his control.

Suggestion:

It is therefore suggested that the present provisions of section 271 of the Act should continue, with suitable modifications, wherever thought appropriate.

In any case, if the new provisions have to be implemented then:

a) **specific right of appeal in section 246A of the Act should be provided by suitable amendment; and**

b) **necessary amendments should be made in section 270A(3)(i)(b) to provide for relief in cases having bonafide reasons for non-filing of returns of income, where full / substantial portion of the taxes have been deducted / paid.**

c) **In addition, for the sake of clarity, an Explanation may be added to define, as to what would constitute a bona fide explanation for the purposes of clause (b) of sub-section (6) of section 270A.**

For this purpose, 'bona fide explanation' should include claim under wrong section(s), facts disclosed prior to issue of notice under section 143(2), agreed addition to buy peace and / or end litigation and reliance on judicial decisions/interpretation in case of conflicting decisions.

23. EQUALISATION LEVY – CHAPTER VIII – CLAUSES 160 TO 177

Based on the reading of Chapter VIII, it is understood that the Equalisation levy is not a "tax" on income but a "levy", therefore all other normal provision of the Act will not apply, unless specifically mentioned in Chapter VIII.

Various issues in relation to Equalisation Levy are likely to arise. For example, where a payment to a non-resident is taxable in his home country and the payer in India has to deduct and pay the equalisation levy on the same, in such a case, whether the non-resident will be eligible to claim treaty benefit for the purposes of non-levy of Equalisation Levy in India. Secondly, an issue would arise as to whether Equalisation levy paid in India can be claimed by the non-resident as tax paid credit in his home country.

Also, it is necessary to have specific mechanism for the purpose of collection of the Equalisation levy.

Further, it also needs to be clarified whether section 147/ 263 can be invoked for purpose of levy, as the provisions of clause 175 of the Finance Bill, 2016, do not mention anything in this regard.

Suggestion:

A clarification needs to be issued as to whether the Equalisation levy is to be paid on the payments made for advertisement at combined cost in both electronic media and print media, and on what amount.

Further, clarification needs to be issued that levy is not applicable to payments made for advertisement on international radio and television networks.

An appeal also needs to be provided for, where an Assessing officer takes a view that equalisation levy is chargeable, while the assessee is of the view that he is not liable for such levy. Such difference could arise as to whether a particular payment constitutes online advertisement or a service in connection with online advertisement.

24. INCOME DECLARATION SCHEME, 2016 - CLAUSES 178 TO 196

The Finance Bill, 2016 proposes to introduce The Income Declaration Scheme, 2016 (Declaration Scheme). We believe that notwithstanding the name, the Declaration Scheme, in substance, is an Amnesty Scheme. One may recall that the previous government had given assurances in the Supreme Court of India that in future no scheme providing amnesty to tax evaders shall be introduced.

The present Declaration Scheme provides for payment of 30% tax, Krishi Kalyan Cess at the rate of 25% of the tax and penalty at the rate of 25% of the tax aggregating to 45% of the income declared. If one considers what a defaulter would have paid by way of tax, interest and penalty under the provisions of the Income tax Act, the amount of 45% payable under the Declaration Scheme is a concession. The Declaration Scheme provides for immunity from prosecution under the Income tax Act and the Wealth tax Act. It also provides that the declaration made under the Declaration Scheme shall not be admissible as evidence against the declarant for the purposes of imposition of penalty under any law. These provisions make the Declaration Scheme an Amnesty Scheme.

Therefore, in principle, we oppose the Income Declaration Scheme.

Presuming that the Declaration Scheme will be enacted along with the Finance Bill, 2016 our **suggestions** are as under:

(a) Clause 194(c) provides for taxation of any income or an asset acquired prior to the commencement of the Declaration Scheme (and in respect of which no declaration has been made under the Declaration Scheme) in the year in which a notice u/s 142 or 143(2) or 148 or 152A or 153C is issued. By deeming provision, time of accrual of such income is modified.

In effect, any undisclosed income of any past year will be chargeable to tax in future year without any limitation as to the time. Such a provision completely overrides the time-limit specified in section 149. This is not desirable. No assessing authority should have power to assess income of past years without any time-limit.

Suggestion:

Clause 194(c) should be omitted.

(b) **In order that the Declaration Scheme is successful, appropriate clarifications by way of circulars and instructions be issued well in time so that there is clarity about its implementation**.

25. SHARES OF UNLISTED COMPANIES - PERIOD OF HOLDING FOR BECOMING LONG-TERM ASSET – PARA 127 OF BUDGET SPEECH

Under section 2(42A) shares of an unlisted company held for less than 36 months immediately preceding the date of its transfer is regarded as a short-term capital asset. The Finance Minister in paragraph 127 of the Budget Speech had stated that the period for getting an effect of long-term capital gain regime in case of unlisted companies is proposed to be reduced from three years to two years. However, the necessary amendment to this effect does not appear in the Finance Bill, 2016.

Suggestion:

It is suggested that section 2(42A) be amended to give effect to the proposal in the speech of the Honourable Finance Minister.

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