All India Federation of Tax Practitioners

(An Association of Advocates, Chartered Accountants & Tax Practitioners of India)

Regd. Office : 215, Rewa Chambers, 31, New Marine Lines, Mumbai 400 020.
Tel.: 022-22006342 / 43 / 49706343 | E-mail: aiftpho@gmail.com | Website: www.aiftponline.org

NATIONAL PRESIDENT
Pankaj Ghiya
Jaipur
☎ (O) (0141) 2621679
M : 9829013626
pankajghiyajaipur@gmail.com

DEPUTY PRESIDENT
Narayan P. Jain
Kolkata
☎ (O) (033) 22821100/0182/8723
M : 9830951252 / 7980521720
npjainadv@gmail.com

SECRETARY GENERAL
Rajesh Mehta
Indore
☎ (O) (0731) 2520111 / 4046465
M : 9827036956 / 9424818719
rajeshmehta_indore@yahoo.com

TREASURER
Vinay Kumar Jolly
Jaipur
☎ (O) (0141) 2521300
M : 9414043300
jolly0450@yahoo.com

IMMEDIATE PAST PRESIDENT
D. K. Gandhi
New Delhi
M : 9810216801
advocatedkgandhi@gmail.com

VICE PRESIDENTS
Anil Mathur
Jaipur (CZ)
M : 9829056151
mathur_co@rediffmail.com

Vivek Agarwal
Kolkata (EZ)
M : 9433207785
vivagarwal01@gmail.com

Dr. Naveen Rattan
Amritsar (NZ)
M : 9417311987
rattanadvocates@gmail.com

C. Sanjeeva Rao
Visakhapatnam (SZ)
M : 9848193852
taxdoctor28@gmail.com

Samir Jani
Junagadh (WZ)
M : 9825037365
samirjani@yahoo.co.in

JOINT SECRETARIES
Dr. Hemant Modh
Jabalpur (CZ)
M : 9424394525
modhsons@hotmail.com
modhsons@gmail.com

Pradosh Pattnaik
Bhubaneswar (EZ)
M : 9337103745
pkp.associates@gmail.com

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New Delhi (NZ)
M : 9811565365
anujbansal@vpgco.com

M. V. J. K. Kumar
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M : 9849017388
mvjkkumar@gmail.com

Nitin Gautam
Nagpur (WZ)
M : 9823390091
mkgautam@gmail.com

ETHICS EDUCATION EXCELLENCE

POST BUDGET MEMORANDUM FOR THE DIRECT-TAX PROPOSALS IN THE FINANCE BILL-2023

The Hon'ble Sitharaman ji,
Union Minister of Finance,
Government of India,
North Block,
New Delhi.

Sub: Post Budget memorandum for kind consideration

Respected Madam,

All India Federation of Tax Practitioners is one of the largest professional bodies of tax practitioners, Advocates and Chartered Accountants, both of Direct and Indirect Taxes. It has been functioning for the last about 46 years and founded by Renowned Jurist Sri Nani Palkhiwala and Hon'ble Justice J C Shah Judge, Supreme Court of India. The aims of the Federation is to promote interest, awareness, and carrier opportunities in the field of taxations amongst Indian Citizen. Presently AIFTP has about 11000 members from all part of the country and about 130 Tax Bar Association located in 27 out of 29 state of our country.

All India Federation of Tax Practitioners, apex body of tax professionals, takes the opportunity to present some relevant issues for your kind consideration in the form of Post Budget Memorandum and if found appropriate, for incorporation in the Finance Bill 2023 :-

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Bhubaneswar (EZ)
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pkp.associates@gmail.com

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New Delhi (NZ)
M : 9811565365
anujbansal@vpgco.com

M. V. J. K. Kumar
Hyderabad (SZ)
M : 9849017388
mvjkkumar@gmail.com

Nitin Gautam
Nagpur (WZ)
M : 9823390091
mkgautam@gmail.com

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Proposals/Suggestions in the Finance Bill, 2023

1. Promoting timely payments to Micro and Small Enterprises [Clause 13] (2023) 451 ITR 70 (St)

Micro, Small and Medium Enterprises (**MSME**) are the backbone of a developing economy. To promote their development, the Budget has proposed several changes such as the extension of the credit guarantee scheme, Vivad Se Vishwas, Entity level Digi locker et cetera.

To promote timely payments to micro and small enterprises, it is proposed to include payments made to such enterprises within the ambit of section 43B of the Act.

Accordingly, it is proposed to insert a new clause (h) in section 43B of the Act to provide that any sum payable by the assessee to a micro or small enterprise beyond the time limit specified in section 15 of the Micro, Small and Medium Enterprises Development (**MSMED**) Act 2006 shall be allowed as deduction only on actual payment. Section 15 of the MSMED Act mandates payments to micro and small enterprises within the time as per the written agreement, which cannot be more than 45 days. If there is no such written agreement, the section mandates that the payment shall be made within 15 days. Thus, the proposed amendment to section 43B of the Act will allow the payment as a deduction only on a payment basis. It can be allowed on an accrual basis only if the payment is within the time mandated under section 15 of the MSMED Act.

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mvjkkumar@gmail.com

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mkgautam@gmail.com

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A few scenarios emerge from this proposed amendment:

a. Payments are made within the period prescribed under the MSMED Act

The expense will be allowed as an expense.

b. Payments are made after the due at as per the MSMED Act but before the end of the financial year.

The expense will be allowed as an expense on an actual basis under section 37 of the Act.

It is pertinent to note that the Hon'ble Supreme Court in the case of Checkmate Services (P.) Ltd. v. CIT (2022) 448 ITR 518/143 taxmann.com 178 (SC) where, inter alia, it was held that for the claim of deduction of payments, the same has to be made within the timeline prescribed in the special statute.

It is desired that the Central Board of Direct Taxes (CBDT) may clarify the claim for deduction under section 37 of the Act to avoid unnecessary litigation.

According to the Memorandum explaining the provisions of the Finance Bill of 2023, it appears that the Government intends to improve liquidity and cash inflows of MSMEs. A few considerations need to be considered and clarified to avoid unintended litigation and achieve the intention of the legislature.

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Firstly, the provision should be made applicable to only registered MSMEs. Secondly, the provisions should not be made applicable to an MSME making payments to other MSMEs. Thirdly, the claim of expenses on an actual basis if the payment is made after the time prescribed under the MSMED Act but during the financial year. Lastly, the interest paid to MSMEs on delayed payment being compensatory and not penal in nature should be allowed as a deduction on a payment basis.

2. Increasing threshold limits for presumptive taxation schemes [Clauses 15, 16 and 17] (2023) 451 ITR 72 (St)

One of the expectations of taxpayers is always ease of compliance. On the other hand, the Government is promoting cashless transactions. This proposed amendment has hit two birds with one stone.

The proposed amendment provides for an increase in the threshold for presumptive income for eligible businesses under section 44AD of the Act from Rs. 2 crores to Rs. 3 crores; and for professionals under section 44ADA of the Act from Rs. 50 lakhs to Rs. 75 lakhs.

This enhancement is applicable where the amount or aggregate of the amounts received during the previous year, in cash, do not exceed five per cent of the total turnover or gross receipts.

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It is pertinent to note that the Department on their website (https://incometaxindia.gov.in/news/finance-bill-2023-highlights.pdf) have interpreted this provision to include payments as well i.e., 95 per cent of the receipts and payments have to be through a non-cash mode. This is not as per the Finance Bill, 2023 or the Memorandum explaining the provisions of the Finance Bill, 2023. This difference is interpretation could lead to unintended litigations.

Overall, this is a welcoming amendment as it will reduce compliance costs for taxpayers and reduce cash transactions.

3. The increasing rate of Tax Collected at the Source (TCS) of certain remittances [Clause 90] (2023) 451 ITR 100 (St)

The Finance Act, 2020 **(2020) 428 ITR 1 (St)** proposed to levy TCS on remittances made on account of Liberalized Remittance Scheme (LRS).

The Finance Bill, 2023, proposed to increase the rate of TCS on overseas tour packages (from 5 per cent above Rs. 7,00,000/-) to 20 per cent without any threshold, and for other cases any other case at 20 percent.

The LRS is made under the Foreign Exchange Management Act, 1999 (**FEMA**) to allow all resident individuals, including minors, are allowed to freely remit up to USD 2,50,000/- per financial year.

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However, the levy of TCS, introduced by the Finance Act, 2020, on LRS transactions such as gift/ money given to a relative is prima facie looks unconstitutional and may lead to a challenge in an appropriate case

Firstly, at the outset, a gift made to a relative is not a commercial transaction but rather a domestic transaction which is exempt under the Income-tax Act, 1961, and there is no necessity to bring the same within the purview of the Scheme of TCS. The Hon'ble Supreme Court in the case of **GE India Technology Cen (P.) Ltd. v. CIT [2010] 187 Taxman 110/ 327 ITR 25 (SC)** held that wherein it was held that payments to non-residents will be subjected to withholding tax only when such payments are chargeable to tax in India as per sections 5 & 9 of the Act. That is, a non-resident company having no PE in India nor having any business connection in India, the income on this account even if paid, is not taxable in India **The principle upheld by the Hon'ble Supreme Court is that if a commercial transaction is not taxable in India, there is no need to impose any tax on such a transaction at its source. The gift given by a relative is not a commercial transaction and is a non-taxable transaction.**

Hence the proposed law in Finance Act, 2020 on imposing TCS on exempt transactions was arbitrary and violative of Article 14 of the Constitution of India.

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Secondly, the levy of TCS on cross-border transactions on a gift made to a relative, merely because the relative is located outside India is discriminatory and violative of Article 14 of the Constitution of India i.e. Equality before the law; as the same transaction to a relative in India would be exempt from the levy of TCS.

The Doctrine of eclipse squarely applies to the said transaction, that the inconsistency in the new law should be overshadowed by the fundamental right of equality.

Thirdly, the LRS as the same suggests is a scheme for remittance up to a certain amount without the burden of excessive compliance. It authorizes the AD bank to undertake the remittance transaction without RBI's permission.

The levy of a transaction tax and subsequent compliance on the same defeats the purpose of the LRS i.e. the existing law. **The proposed amendment under the Income-tax Act, 1961 is inconsistent with the LRS issued under FEMA, 1999.** The repugnancy or inconsistency in the latter law should be avoided and a harmonious interpretation should be given to the provisions. **Therefore, the Scheme of TCS should carve out an exception for a gift made to a relative situated abroad.**

Fourthly, as the transaction of a gift to a relative is not taxable, the amount of TCS paid will be given as credit while paying the taxes for the relevant year. This process of credit is understandable in a commercial transaction. However, in a strict domestic transaction, unwarranted collection of tax in advance is a deprivation of right property which is enshrined under Article 300A of the Constitution.

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M : 9811565365
anujbansal@vpgco.com

M. V. J. K. Kumar
Hyderabad (SZ)
M : 9849017388
mvjkkumar@gmail.com

Nitin Gautam
Nagpur (WZ)
M : 9823390091
mkgautam@gmail.com

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Lastly, the rate of 20 per cent is very high. This is the same rate used for the non-furnishing of PAN, inter alia. There is no need for a payer to bear an excess of 20 per cent on a payment made to his relative.

In conclusion, the Parliament or CBDT via **delegated legislation should have carved out an exception to the amendment made via Finance Act, 2020 to save the TCS provisions from being ultra vires the Constitution. As an alternative, the newly amended TCS provisions can also be challenged via a Writ under Article 226 or 32 of the Constitution.**

4. Limiting the rollover benefit claimed under section 54 and section 54F of the Income-tax Act, 1961. [Clause 25 and 30] (2023) 451 ITR 75 (St)

The primary objective of sections 54 and section 54F of the Act was to mitigate the acute shortage of housing and to give impetus to house-building activity. However, it has been observed Government that claims of huge deductions by high-net-worth assessees are being made under these provisions, by purchasing very expensive residential houses and this is defeating the very purpose of these sections.

To prevent this, the Finance Bill, 2023 proposed to impose a limit on the maximum deduction that can be claimed by the assessee under sections 54 and 54F to rupees ten crores. It has been provided that if the cost of the new asset purchased is more than rupees ten crores, the cost of such asset shall be deemed to be ten crores.

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Regd. Office : 215, Rewa Chambers, 31, New Marine Lines, Mumbai 400 020.
Tel.: 022-22006342 / 43 / 49706343 | E-mail: aiftpho@gmail.com | Website: www.aiftponline.org

NATIONAL PRESIDENT
Pankaj Ghiya
Jaipur
☎ (O) (0141) 2621679
M : 9829013626
pankajghiyajaipur@gmail.com

DEPUTY PRESIDENT
Narayan P. Jain
Kolkata
☎ (O) (033) 22821100/0182/8723
M : 9830951252 / 7980521720
npjainadv@gmail.com

SECRETARY GENERAL
Rajesh Mehta
Indore
☎ (O) (0731) 2520111 / 4046465
M : 9827036956 / 9424818719
rajeshmehta_indore@yahoo.com

TREASURER
Vinay Kumar Jolly
Jaipur
☎ (O) (0141) 2521300
M : 9414043300
jolly0450@yahoo.com

IMMEDIATE PAST PRESIDENT
D. K. Gandhi
New Delhi
M : 9810216801
advocatedkgandhi@gmail.com

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Jaipur (CZ)
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mathur_co@rediffmail.com

Vivek Agarwal
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M : 9433207785
vivagarwal01@gmail.com

Dr. Naveen Rattan
Amritsar (NZ)
M : 9417311987
rattanadvocates@gmail.com

C. Sanjeeva Rao
Visakhapatnam (SZ)
M : 9848193852
taxdoctor28@gmail.com

Samir Jani
Junagadh (WZ)
M : 9825037365
samirjani@yahoo.co.in

JOINT SECRETARIES
Dr. Hemant Modh
Jabalpur (CZ)
M : 9424394525
modhsons@hotmail.com
modhsons@gmail.com

Pradosh Pattnaik
Bhubaneswar (EZ)
M : 9337103745
pkp.associates@gmail.com

Anuj Bansal
New Delhi (NZ)
M : 9811565365
anujbansal@vpgco.com

M. V. J. K. Kumar
Hyderabad (SZ)
M : 9849017388
mvjkkumar@gmail.com

Nitin Gautam
Nagpur (WZ)
M : 9823390091
rnkgautam@gmail.com

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It is desired that for the purpose of section 54F of the Act, on purchase of the first house for self-occupancy, there should not be a limit of Rs. 10 Crores.

5. Introduction of the authority of Joint Commissioner (Appeals) [Clauses 3, 60, 61, 62, 64, 65, 73, 75, 76, 78, 79, 98, 99, 100, 101, 102, 103, 104, 107, 109, 110, 111, 112, 115, 117, 120, 121 & 122] (2023) 451 ITR 102(St)

More than 5 lakh appeals are pending before the Faceless Appeal Centre. The AIFTP made a representation to the Honourable Finance Minister to take remedial measures to expedite the hearing before the Faceless appeal centre.

The earlier section 246 of the Act was providing for the appeal functions of the Deputy Commissioner (Appeals). That institution was discontinued in the year 2000. Accordingly, it is proposed to substitute section 246 of the Act to provide for appeals to be filed before Joint Commissioner (Appeals). 100 new Joint Commissioner (Appeals) have been appointed all over India.

The Joint Commissioner (Appeals) will function in a faceless manner and have the same powers as the Commissioner (Appeals)

Although this is a welcoming proposal, it is important to understand that increasing the capacity without rectifying the deficiency in the system will not hold well in the long run.

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pankajghiyajaipur@gmail.com

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Kolkata
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npjainadv@gmail.com

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rajeshmehta_indore@yahoo.com

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rattanadvocates@gmail.com

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taxdoctor28@gmail.com

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samirjani@yahoo.co.in

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modhsons@hotmail.com
modhsons@gmail.com

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pkp.associates@gmail.com

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mvjkkumar@gmail.com

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nkgautam@gmail.com

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Today, as per our experience, there is not a single appeal where a remand report has been received in response to an application made under Rule 46A of the Income-tax Rules, 1962.

Further, it is advisable to choose Joint Commissioner (Appeals) and Commissioner (Appeals) amongst the Departmental Representatives who appear before the Income-tax Appellate Tribunal. They have a better understanding of the appeal procedure and the expectations of the Hon'ble Tribunal. They would know how to pass orders which will be upheld by the Hon'ble Tribunal. They would also have a better understanding of the Principles of Natural Justice.

The proposed amendment is a welcome move to expedite the adjudication of appeals pending before the Commissioner (Appeals). However, there is no upper time limit specified for disposal of appeals. This should be included in the amendment to ensure timely completion of the hearing of first appeals under the Income Tax Act, 1961.

Rationalisation of Appeals to the Appellate Tribunal

The Directions issued by the Dispute Resolution Panel (DRP) are binding on the Assessing Officer as per Section 144C(13). However, the proposal made in the Finance Bill, 2023 states that Cross-Objections can now be filed under Section 253(4) by the Assessing Officer, in all cases which are appealable before the Income Tax Appellate Tribunal.

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npjainadv@gmail.com

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rajeshmehta_indore@yahoo.com

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Jaipur
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jolly0450@yahoo.com

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New Delhi
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advocatedkgandhi@gmail.com

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mathur_co@rediffmail.com

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mvjkkumar@gmail.com

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mkgautam@gmail.com

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It implies that where the assessee files an appeal to the Appellate Tribunal against an order passed by the Assessing Officer in consequence of the Directions of the Dispute Resolution Panel (DRP), the Assessing Officer will now be able to file Cross Objections to such appeal which was not allowed previously.

As per Section 144C(13), "Upon receipt of the directions issued under sub-section (5), **the Assessing Officer shall, in conformity with the directions**, complete, notwithstanding anything to the contrary contained in section 153 or section 153B, the assessment .....". As per the present position, the assessing officer cannot file an appeal against the directions issued by the DRP.

It is interesting to note the observation of the Hon'ble Supreme Court in **Superintending Engineer and Ors. v. B. Subba Reddy [1999] 4 SCC 423** where it was held that, "Cross objection is like an appeal. It has all the trappings of an appeal".

It is a settled legal principle that "what cannot be done directly, cannot be done indirectly" as observed by the Hon'ble Supreme Court in **Ram Jethmalani vs. UOI, 13 taxmann.com 189.**

When the Assessing Officer does not have any option to file an appeal, the option to file Cross Objections which is an equivalent of an appeal is in direct conflict of provision under Section 144C(13). In other words, the Directions of the DRP is binding on the Assessing Officer but will now be allowed to file Cross Objections which will result in increased litigation. The Government needs to look into the ambiguity of the provision and clarify/ amend as necessary.

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pankajghiyajaipur@gmail.com

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npjainadv@gmail.com

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rajeshmehta_indore@yahoo.com

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jolly0450@yahoo.com

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mathur_co@rediffmail.com

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rattanadvocates@gmail.com

C. Sanjeeva Rao
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M : 9848193852
taxdoctor28@gmail.com

Samir Jani
Junagadh (WZ)
M : 9825037365
samirjani@yahoo.co.in

JOINT SECRETARIES
Dr. Hemant Modh
Jabalpur (CZ)
M : 9424394525
modhsons@hotmail.com
modhsons@gmail.com

Pradosh Pattnaik
Bhubaneswar (EZ)
M : 9337103745
pkp.associates@gmail.com

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M. V. J. K. Kumar
Hyderabad (SZ)
M : 9849017388
mvjkkumar@gmail.com

Nitin Gautam
Nagpur (WZ)
M : 9823390091
mkgautam@gmail.com

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Assistance to Authorised Officer during Search & Seizure

Section 132 provides that during the course of search, the authorised officer may utilise the services of a Police Officer or a Central Government Officer, to assist him for actions to be performed during the course of such search, and it shall be the duty of such officer to comply.

The amendment brought in by the Finance Bill, 2023 expands the nature of persons to 'any person or entity' whose assistance can be sought by the Authorised Officer during Search, with the approval of the PCCIT/ CCIT/ PDGIT/ DGIT, to assist him for the purposes of the search.

It is suggested that the authorised officer should record reasons for appointing any person to assist him and the same should be made available to the assessee.

6. Bringing the non-resident investors within the ambit of section 56(2)(viib) of the Act to eliminate the possibility of tax avoidance. (Clause 32) (2023) 451 ITR 76(St)

As per the existing provisions of section 56 (2)(viib) of the Act, if a closely held company receives consideration for the issuance of shares, and the consideration is greater than the Fair Market Value of the shares. The excess of consideration over the Fair Market Value of the shares was considered as Income of the closely held company. Rule 11UA of the Income-tax Rules, 1962 provides the formula for the computation of the fair market value of unquoted equity shares for Section 56(2) (viib) of the Act.

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NATIONAL PRESIDENT
Pankaj Ghiya
Jaipur
☎ (O) (0141) 2621679
M : 9829013626
pankajghiyajaipur@gmail.com

DEPUTY PRESIDENT
Narayan P. Jain
Kolkata
☎ (O) (033) 22821100/0182/8723
M : 9830951252 / 7980521720
npjainadv@gmail.com

SECRETARY GENERAL
Rajesh Mehta
Indore
☎ (O) (0731) 2520111 / 4046465
M : 9827036956 / 9424818719
rajeshmehta_indore@yahoo.com

TREASURER
Vinay Kumar Jolly
Jaipur
☎ (O) (0141) 2521300
M : 9414043300
jolly0450@yahoo.com

IMMEDIATE PAST PRESIDENT
D. K. Gandhi
New Delhi
M : 9810216801
advocatedkgandhi@gmail.com

VICE PRESIDENTS
Anil Mathur
Jaipur (CZ)
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mathur_co@rediffmail.com

Vivek Agarwal
Kolkata (EZ)
M : 9433207785
vivagarwal01@gmail.com

Dr. Naveen Rattan
Amritsar (NZ)
M : 9417311987
rattanadvocates@gmail.com

C. Sanjeeva Rao
Visakhapatnam (SZ)
M : 9848193852
taxdoctor28@gmail.com

Samir Jani
Junagadh (WZ)
M : 9825037365
samirjani@yahoo.co.in

JOINT SECRETARIES
Dr. Hemant Modh
Jabalpur (CZ)
M : 9424394525
modhsons@hotmail.com
modhsons@gmail.com

Pradosh Pattnaik
Bhubaneswar (EZ)
M : 9337103745
pkp.associates@gmail.com

Anuj Bansal
New Delhi (NZ)
M : 9811565365
anujbansal@vpgco.com

M. V. J. K. Kumar
Hyderabad (SZ)
M : 9849017388
mvjkkumar@gmail.com

Nitin Gautam
Nagpur (WZ)
M : 9823390091
mkgautam@gmail.com

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This provision was also called Angel-tax, as it posed a threat to companies raising funds from angel investors.

A certain class of company i.e., registered start-ups was exempted from this provision. Companies receiving consideration from Alternative Investment funds, Venture Capitalists, and Non-residents inter alia were exempted.

Now, to prevent tax evasion, the provision is extended to funds raised from non-residents as well.

The Hon'ble Supreme Court in the case of **PCIT v. NRA Iron & Steel (P.) Ltd. (2019) 418 ITR 449/ (2020) 268 Taxman 1 (SC)** held that where the assessee received share capital/premium, however, there was a failure of the assessee to establish the creditworthiness of investor companies, it was held that the Assessing Officer was justified in passing the assessment order making additions under section 68 of the Act for share capital/premium received by the assessee company.

Therefore, even if the closely held company manages to prepare a valuation report as per rule 11UA of the Income-tax Rules, 1962 doesn't necessarily protect the company if the genuineness of the transaction is doubted. Further, an addition under section 68 of the Act will attract tax at the rate of 60 per cent as per section 115BBE of the Act.

Issues will arise in cases of foreign subsidiary companies in India, they would have to adhere to FEMA regulations and Transfer pricing provisions.

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rajeshmehta_indore@yahoo.com

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mkgautam@gmail.com

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The Income-tax Act, 1961 considers the date of receipt for valuation whereas FEMA considers the date of issuance. Further, FEMA accepts any internationally prescribed method for valuation, however, the Act only considers Net Asset Value Method and Discounted Free Cash Flow Method. Further, FEMA requires the shares to be issued at Fair Market Value or Higher but the Act does not allow the shares to be issued at a value higher than the Fair Market Value.

Concerning Transfer Pricing provisions, the Hon'ble Bombay High Court in the case of **Vodafone India Services (P.) Ltd. v. UOI [2014] 361 ITR 531 (Bom)(HC)** where the assessee raised capital by issuance of shares from its foreign parent company, it was held that Chapter X i.e. Transfer Pricing does not apply to the said transaction as the transaction is a capital transaction and there is no element of Income.

After the proposed amendment, the excess consideration would be deemed to be income and the same would attract transfer pricing provisions and consequent compliances.

7. Rationalisation of the provisions of Charitable Trust and Institutions. [Clauses 5, 7, 8, 9, 57, 60] (2023) 451 ITR 67 (St)

a. There are several amendments being made to charitable trusts and institutions on a year-on-year basis. The interpretation of the settled Law regarding Charitable Organizations has been remoulded by the Hon'ble Supreme Court in the case of **ACIT v.**

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mvjkkumar@gmail.com

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Nagpur (WZ)
M : 9823390091
mkgautam@gmail.com

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Ahmedabad Urban Development Authority [2022] 449 ITR 1 (SC) and **New Noble Educational Society v. CCIT [2022] 448 ITR 594 (SC)**. It becomes crucial for consultants to be updated with these changes, otherwise bona fide charitable organizations may suffer.

For example, on delay in filing Form 10B, CBDT issued **Circular No. 2 of 2020 dated January 03, 2020, (2020) 420 ITR 38 (St)** wherein a delay of up to 365 days could be condoned by Commissioner (E). On further delay, an application under section 119 (2)(b) of the Act would have to be made before CBDT (As held in the case of **Little Angels Education Society v. UOI [2021] 434 ITR 423 (Bom)(HC)**. The powers of the Commissioner (E) were further widened empowering them to condone the delay of up to 3 years by CBDT vide **Circular No. 15 of 2022 dated July 19, 2022 (2022) 445 ITR 85 (St)**, **Circular No 16 of 2022 dated July 19, 2022 (2022) 445 ITR 86 (St)** and **Circular No 17 of 2022 dated July 20, 2022 (2022) 445 ITR 87 (St)**. This proves the fact that **there is a high level of non-compliance in the case of Charitable organizations.**

Most trustees of Charitable organizations are not well versed in the rapid changes in the law. It is an honorary position and cannot be expected to be updated either. Therefore, it is desired that the **Department should release a document explaining its interpretation in simple language to avoid excessive litigation.**

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Regd. Office : 215, Rewa Chambers, 31, New Marine Lines, Mumbai 400 020.
Tel.: 022-22006342 / 43 / 49706343 | E-mail: aiftpho@gmail.com | Website: www.aiftponline.org

NATIONAL PRESIDENT
Pankaj Ghiya
Jaipur
☎ (O) (0141) 2621679
M : 9829013626
pankajghiyajaipur@gmail.com

DEPUTY PRESIDENT
Narayan P. Jain
Kolkata
☎ (O) (033) 22821100/0182/8723
M : 9830951252 / 7980521720
npjainadv@gmail.com

SECRETARY GENERAL
Rajesh Mehta
Indore
☎ (O) (0731) 2520111 / 4046465
M : 9827036956 / 9424818719
rajeshmehta_indore@yahoo.com

TREASURER
Vinay Kumar Jolly
Jaipur
☎ (O) (0141) 2521300
M : 9414043300
jolly0450@yahoo.com

IMMEDIATE PAST PRESIDENT
D. K. Gandhi
New Delhi
M : 9810216801
advocatedkgandhi@gmail.com

VICE PRESIDENTS
Anil Mathur
Jaipur (CZ)
M : 9829056151
mathur_co@rediffmail.com

Vivek Agarwal
Kolkata (EZ)
M : 9433207785
vivagarwal01@gmail.com

Dr. Naveen Rattan
Amritsar (NZ)
M : 9417311987
rattanadvocates@gmail.com

C. Sanjeeva Rao
Visakhapatnam (SZ)
M : 9848193852
taxdoctor28@gmail.com

Samir Jani
Junagadh (WZ)
M : 9825037365
samirjani@yahoo.co.in

JOINT SECRETARIES
Dr. Hemant Modh
Jabalpur (CZ)
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modhsons@hotmail.com
modhsons@gmail.com

Pradosh Pattnaik
Bhubaneswar (EZ)
M : 9337103745
pkp.associates@gmail.com

Anuj Bansal
New Delhi (NZ)
M : 9811565365
anujbansal@vpgco.com

M. V. J. K. Kumar
Hyderabad (SZ)
M : 9849017388
mvjkkumar@gmail.com

Nitin Gautam
Nagpur (WZ)
M : 9823390091
mkgautam@gmail.com

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UAE introduced the corporate tax with effect from June 01, 2023. The UAE Government has explained the provision on their website and other social media platforms. It is desired to have a user-friendly website giving information to the stakeholders.

b. Limitation of 5 years for reinvestment on account of expenditure incurred out of Corpus donation and repayment of loan

In case Revenue Department insists the exemption may be subject to the condition that the entity files a form like form No 9A within the time for filing the return of income declaring the amount applied for the objects out of corpus the deduction of which will be claimed in the year of reinvestment. In that case it will not be difficult for the revenue Department to manage the claim of exemption.

It is therefore requested that the proposal to limit the benefit only if the reinvestment/ repayment within 5 years may be dropped

c. Reinvestment in corpus on account of application for objects before 1st April 2021 and repayment of loans taken up to 31st of March 2021 not considered as income applied for the objects:-

It is pertinent to mention that before insertion of proviso to explanation 4 to section 11 by Finance Act 2021 in 2021 repayment of loan was considered as amount applied for the objects of the trust as per CBDT Board Circular: No. 100 [F. No.

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vivagarwal01@gmail.com

Dr. Naveen Rattan
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M : 9417311987
rattanadvocates@gmail.com

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M : 9848193852
taxdoctor28@gmail.com

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M : 9825037365
samirjani@yahoo.co.in

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modhsons@hotmail.com
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Pradosh Pattnaik
Bhubaneswar (EZ)
M : 9337103745
pkp.associates@gmail.com

Anuj Bansal
New Delhi (NZ)
M : 9811565365
anujbansal@vpgco.com

M. V. J. K. Kumar
Hyderabad (SZ)
M : 9849017388
mvjkkumar@gmail.com

Nitin Gautam
Nagpur (WZ)
M : 9823390091
mkgautam@gmail.com

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195/1/72-IT(A-I)], dated 24-1-1973. and also as per some judicial decisions as under:-

1. CIT v. Janamabhumi Press Trust (200) 242 ITR 457
2. CIT Vs. Janmabhumi Press Trust, (2000) 242 ITR 703 KAR,
3. CIT v. Kannika Parmeswari Devasthana & Charities (1982) 133 ITR 779 (Mad)

In any case , in order to protect the interests of the revenue about possibility of undue double deduction a proviso can be added to the explanation 4 after first proviso as under:-

"Provided no deductions shall be allowed on the repayment of loan or amount applied on objects out of corpus in respect of which deduction has been allowed in any year before 1st April 2021"on the basis of expenditure incurred out of such corpus orLoan/borrowings "

It is also pertinent to mention that the above amendment unjustifiably discriminates between the trusts/institutions having spent on objects out of loans/corpus before 1st April 2021 and Trusts spending on objects out of loans after 1st April 2021.There does not appear to be any justification for this discrimination.

d. Restriction of exemption to 85% in case of Donation from one trust/institution to another trust/institution

The perception that multiple trusts are created with a view to take advantage of the provision may be partially correct. It cannot be denied that undue advantage was taken by some trusts/institutions under the existing provision. In my view there may be few bad apples in the box to be sorted out

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samirjani@yahoo.co.in

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however, care need to be taken that good apples are not spoiled while treating the bad apples. It is common knowledge that there are several Group trusts/institutions operating in the field. In most of the cases one main trust acts as a Financier to the other trusts .In that case the main trust would be making voluntary donations to the other trusts of the group without any intention of taking undue advantage of the exemption provisions .The proposed provision will hit hard such Group trusts. In order to prevent the undue advantage by some trusts/institutions without affecting the genuine cases **it is suggested not to disallow 15% accumulation in the case of the First donor but make it compulsory for the Donee trusts to spent 100% instead of 85% of the donations received from other trusts/institutions, required under section 11 of the Act of the Act**. In our humble view if my suggestion is accepted the mischief will be plugged without hearting the genuine trusts/institutions

e. Time limit for filing declarations for extension of time for spending out of 85%

Exemption under section 11 is allowed on the income though accrued but not received during the year for any reason; if such income is spent in the year of receipt exemption is also allowed on the amount not spent out of the income for any other reason provided form 9A is filed before the time allowed for filing the return and the amount is spent in the next year

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samirjani@yahoo.co.in

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Now the time for filing the above mentioned form is proposed to be curtailed as it has to be filed two months before the time allowed for filing of the return of income. We could not find any reasons mentioned in the Memorandum explaining the proposed amendments we would only request the Finance Minister to avoid complicating the compliance provision for exemption in order to encourage genuine operators in the field of public welfare. The Government is committed to simplify tax laws as such the proposed amendment may be dropped.

8. Defining the cost of acquisition in case of certain assets for computing capital gains (Clause 31) (2023) 451 ITR 76 (St)

There are certain assets like intangible assets or any sort of right for which no consideration has been paid for the acquisition. The cost of acquisition of such assets is not clearly defined as 'nil' in the present provision. This has led to many legal disputes and the courts have held that for taxability under capital gains, there has to be a definite cost of acquisition or it should be deemed to be nil under the Act. Since there is no specific provision which states that the cost of such assets is nil, the changeability of capital gains from the transfer of such assets has not found favour with the Courts.

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pkp.associates@gmail.com

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M : 9811565365
anujbansal@vpgco.com

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mvjkkumar@gmail.com

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Nagpur (WZ)
M : 9823390091
rnkgautam@gmail.com

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The intention of the Finance Bill is to overcome the decision of The Hon'ble Supreme Court in the case of **CIT v. B.C. Srinivasa Setty [1981] 128 ITR 294 (SC)** wherein it was held that if the asset does not have any ascertainable cost, the computation mechanism fails and hence no capital gains can be computed.

The Hon'ble Bombay High Court in the case of **Chheda Housing Development Corpn, a Partnership firm v. Bibijan Shaikh Farid & ors 2007 (3) MHLJ 402 (Bom) (HC) held** that FSI/TDR being a benefit arising from the land, consequently must be held to be immovable property.

Now an issue arises whether TDR will be considered as an immovable-intangible property and whether the decision of the Hon'ble Bombay High Court in the case of **CIT v. Sambhaji Nagar Co-op. Hsg. Society Ltd. [2015] 370 ITR 325 (Bom)(HC)** held that where the assessee had not incurred any cost to acquire TDR attached to the land owned by the society, transfer of same to the developer for consideration for construction of a floor space index would not be eligible to capital gains tax. Whether the ratio will hold well after the proposed amendment is a debatable issue.

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To summarize, the budget has not proposed any harsh amendments and has also reduced the burden of compliance which will aid the ease of doing business.

Respectfully submitted for kind consideration.

Yours faithfully
For All India Federation of Tax Practitioners

Adv. Pankaj Ghiya	CA Jamuna Shukla	CA Rajesh Mehta
National President	Chairperson Direct Tax Committee	Secretary General

Place: Mumbai
Date : 21.02.2023