AMENDMENTS RELATING TO CAPITAL GAINS, TDS AND TCS

CA Paras Maru
Email : paras@calnmaru.com

Introduction

Union Finance Minister Nirmala Sitharaman presented the Union Budget 2023, the fifth budget of Modi 2.0 and the last full-fledged Budget before the general elections next year. The government has reaffirmed its commitment to the path of fiscal consolidation. Higher capex spend, a roadmap to reduce the fiscal deficit, and boosting consumption will provide a major leg-up to the economy, especially at a time when global growth has been hit hard by slowdown and recessionary fears. The budget has proposed amendments to the Income-tax Act, 1961, many with the aim to rationalise the provisions, providing clarifications and expanding the tax base. In this article, an attempt has been made to elaborate on proposed amendments pertaining to Capital Gains, TDS, and TCS related amendments.

Amendments relating to Capital Gain

1. Section 45 (5A): Alignment of provisions of section 45(5A) with the TDS provisions of section 194-IC

Present Position

As per the provisions of Section 45(5A), capital gains arising to individuals and HUF, by entering into a prescribed agreement for the development of a project, would be taxable in the year in which the designated authorities issue a certificate of completion for the whole or part of the project. The provisions also explicitly laid down the full value of the consideration (FMV) which would be subject to the tax, i.e. the stamp duty value ('SDV') of the land or building or both, pertaining to the owner's share in the project, on the date of issue of said certificate, plus the consideration received in cash, if any, by the owner.

Proposed Amendment

There was a misinterpretation that any amount of consideration that is received in a mode other than cash, i.e., cheque or electronic payment modes would not be included in the consideration for the purpose of computing capital gains chargeable to tax under section 45(5A). It is proposed to clarify that FMV under Section 45(5A) of the Act, in a transaction involving the transfer of a capital asset under a joint development agreement ('JDA'), will be taken to be the stamp duty value of the share of the assessee in the capital asset, as increased by any consideration received in cash or by a cheque or draft or by any other mode.

This amendment will take effect from 1st April 2024 and shall accordingly, apply in w.e.f. assessment year 2024-25.

2. Section 2(42A), 47, 49: Conversion of Gold to electronic Gold Receipt and vice versa

Indians have always cherished Gold as an investment, for its ability to provide liquidity, safety, returns and act as a hedge against inflation. The country fulfills more than 90% of its gold demand through imports, which has a direct bearing on the country's current account deficit (CAD). To boost the holding of gold in digital form instead of physical form, the following amendments are proposed:

Sections	Proposed Amendments
Section 47 - Such conversions shall not be treated as transfer	It is proposed that the conversion of physical gold into Electronic Gold Receipts (EGR) or Electronic Gold Receipts (EGR) to physical gold, through a SEBI-registered Vault Manager, shall not be regarded as a transfer for the purpose of capital gains. Which means that no capital gain tax on such conversion of physical gold into EGR and vise-versa.
Section 49 - Cost acquisition in above cases	It is proposed that, in cases where physical gold was converted to EGR, the Cost of acquisition of EGR shall be the cost of physical gold in the hands of such person. Similarly, in cases where EGR was converted to physical gold, the Cost of acquisition of physical gold shall be the cost of EGR in the hands of such person.
Section 2(42A) - Holding Period	It is proposed that, in the case of EGR or physical gold being a capital asset, the holding period for the purpose of capital gain shall include the period for which the physical gold or EGR, was held by the assessee prior to conversion into EGR or physical gold, as the case may be.

It is further proposed to define the expressions "Electronic Gold Receipt" and "Vault Manager" to mean Electronic Gold Receipt and Vault Manager as defined in clauses (h) and (l) of sub-regulation (1) of regulation 2 of the Securities and Exchange Board of India (Vault Managers) Regulations, 2021respectively.

This amendment will take effect from 1st April 2024 and shall accordingly, apply w.e.f. assessment year 2024-25.

3. Section 48: Prevention of double deduction claimed on interest on borrowed capital

Present Position

The amount of any interest paid on borrowed capital for acquiring or improving a property can, subject to certain conditions, be claimed as a deduction under the head "Income from house property" under section 24 of the Act. Further, while computing capital gains on the transfer of such property the said interest could also be claimed as a part of the cost of acquisition or cost of improvement under section 48 of the Act. ITAT Chennai Bench in case of Asst. CIT v. C. Ramabrahmam [2012] [27 taxmann.com 104], allowed the claim of the assessee to include interest paid on the housing loan for computation under section 48 even though said amount has already been deducted under section 24(b) while computing income from house property.

Proposed Amendment

In order to prevent this double deduction, it is proposed to insert a proviso after clause (ii) of section 48 so as to provide that the cost of acquisition or the cost of improvement shall not include the amount of interest claimed under section 24 or Chapter VIA.

However, dispute as to the allowability of interest as a part of the cost of acquisition or cost of improvement of house property is not new. It is a very old issue and Courts and Tribunals have allowed interest paid while computing capital gains on the transfer of such property. Interestingly, no such restriction is proposed by Finance Bill if such interest is not claimed under section 24 or Chapter VIA. Therefore, one could take view that it indicates legislative intent of allowing interest which is not claimed under section 24 or chapter VIA, as part of the cost of acquisition or cost of improvements. However, the above view may be a subject matter of litigation.

This amendment will take effect from 1st April 2024 and shall accordingly, apply w.e.f. assessment year 2024-25.

4. Section 50AA: Market Linked Debentures

This is newly introduced section which provides for special provisions for the computation of capital gains in the case of Market Linked Debentures. It has been noticed that a variety of hybrid securities that combine features of plain vanilla debt securities and exchange-traded derivatives are being issued through private placements and listed on stock exchanges. Such securities differ from plain vanilla debt securities.

"Market Lined Debenture" (MLD) are defined as a security by whatever underlying principal component in the form of a debt security and where the returns are linked to market returns on other underlying securities or indices and include any securities classified or regulated as a MLD by Securities and Exchange Board of India (SEBI).

Present Position

MLD's are listed securities, therefore they are currently being taxed as a long-term capital gain at the rate of 10% without indexation if held for more than 1 year. However, these securities are in the nature of derivatives which are normally taxed at applicable slab rates. Further, they give variable interests as they are linked with the performance of the market.

Proposed Amendment

In order to tax the capital gains arising from the transfer or redemption or maturity of these securities as short-term capital gains at the applicable rates, it is proposed to insert a new section 50AA in the Act. The section provides for computation of such short-term capital gains as follows:

Computation of Capital Gains on transfer/redemption/maturity of MLD:-

Particulars	Amt Rs.
Full value of consideration	XX
Less:	
1. Cost of acquisition	(XX)
2. Expenditure incurred in connection with transfer/redemption (except STT)	(XX)
Short Term Capital Gains	**XX**

- **Taxation of MLD's acquired on or before 31.03.2023.**

Scenario 1:

It is to be noted that for existing MLDs acquired and transferred on or before 31.03.2023 and holding period is more than 1 year, the gains will be taxed as long-term capital gain at the rate of 10%.

Scenario 2:

If MLDs acquired on or before 31.03.2023 and transferred or matured after 01.04.2023, the gains will be taxed as Short-term capital gain in all cases. No grandfathering relaxation has been proposed in the Finance Bill 2023.

- **Can deduction under section 54F, etc. be claimed?**

Finance Act 2023 has not amended section 2(42A) defining Short-term capital assets or section 54F, etc with respect to MLD's. Therefore, if the holding period of MLD is more than 1 year, it will be interesting to explore the possibility of claiming benefits of reinvestment-based tax exemption under section 54F, etc available for long term capital assets. The Hon'ble Supreme Court in the case of V.S. Dempo Company Ltd. [2016] 74 taxmann.com 15 has agreed with the decision of the Bombay High Court in the case of ACE Builders (P.) Ltd. [2006] 281 ITR 210, wherein the High Court has observed that Section 50 of the Act which is a special provision for computing the capital gains in the case of depreciable assets and has limited application only in the context of mode of computation of capital gains contained in Sections 48 and 49 and would have nothing to do with the exemption that is provided by a totally different provision i.e. Section 54E of the Act. The legal fiction created by the statute under Sec.50 is only to deal with capital gain as short-term capital gain and not to deem the asset as a short-term capital asset. Therefore, it cannot be said that Sec.50 converts long-term capital assets into short-term capital assets. Hence, the benefit of Sec.54E is available to the assessee irrespective of the fact that the computation of capital gains is done either under sec.48 & 49 or u/s.50. Can we take similar view for MLD's as well?

This amendment will take effect from 1st April 2024 and shall accordingly, apply w.e.f. assessment year 2024-25.

5. **Section 54 and section 54F: Limiting deduction for reinvestment of capital gains into residential house property.**

Present Position

Presently there is no cap on the maximum amount of deduction that can be claimed under both the sections.

Proposed Amendment

It is proposed to limit the maximum deduction that can be claimed under sections 54 and 54F to Rupees 10 crores. Consequently, it is also proposed that the amount required to be deposited in the Capital Gains Account Scheme to claim deduction under sections 54 and 54F shall be restricted to Rupees 10 crores.

However, the following question emerges due to the proposed amendments:

- **Whether the limit of Rs. 10 crores would be applicable per co-owner basis or on the entire value of the property**?

Since deductions under sections 54 and 54F are available qua co-owners, the limit of 10 crores would be also available to each co-owner separately.

- **What would be the consequence in case the new property is transferred within 3 years of acquisition in terms of section 54(1)(i)?**

Section 54(1)(i) covers the situations *where capital gains are higher than the cost of the new residential house and that the new residential house is sold within 3 years of its purchase/construction, as the case may be, the cost shall be nil*. Let's understand with the help of an example:

Long Term Capital Gains on sale of old house	20 crores
Investment in New residential house	15 crores
Deduction availed u/s. 54	10 crores

Computation of Taxable Long-Term Capital Gains on sale of old house:

(In crores)

Particulars	As per Old provisions	After Proposed amendment
Long Term Capital Gains on sale of old house	20	20
Investment in New residential house	15	15
Deduction allowed u/s. 54	15	10
Taxable Long Term Capital Gains (A)	**5**	**10**

Now, the new residential house is sold within a period of 3 years for Rs. 16 crores.

Computation of Capital Gains on sale of new residential house:(In crores)

Particulars	As per Old provisions	After Proposed amendment
Sale Consideration	16	16
Cost of acquisition or improvement in terms of section 54(1)(i)	NIL	NIL
Taxable Capital Gains (B)	**16**	**16**
Total Capital Gains (A + B)	**21**	**26**

Effective capital gains as per old provision will be Rs. 21 cores, whereas after the proposed amendment effective capital gains will be Rs. 26 crores under the same situation. Therefore, there will be double taxation to the extent of Rs. 5 crores in the above example. Hence, appropriate amendments are required to rationalise the provisions of section 54.

This amendment will take effect from 1st April 2024 and shall accordingly, apply w.e.f. assessment year 2024-25.

6. Section 55: Cost of acquisition in case of certain assets

Present Position

As per section 55 of the Act, the cost of acquisition for intangible assets such as Goodwill of business or profession, or a Trademark or brand of business or profession, or right to manufacture, or produce or process any article, or right to carry on any business or profession, or tenancy rights, or stage carriage permits, or loom hours is defined as the amount of purchase price if acquired from the previous owner or NIL in any other case. Therefore, in the case of intangible assets/rights which are not covered by section 55, it was possible to argue that since there is no cost of acquisition, the same could not be taxed in view of the decision of the supreme court in the case of B. C. Srinivas Shetty 128 ITR 294.

Proposed Amendment

It is proposed that to define the 'cost of improvement' or 'cost of acquisition' of a capital asset being any intangible asset or any other right shall be 'Nil' other than those acquired from the previous owner for a consideration.

The term "any other rights" is wide and its scope has not been defined. It could include all kind of rights such as, TDR, FSI, personal rights, actionable claims or compensation, right to sue, voting rights, right to receive any capital assets, etc. By incorporating the term "any other rights", the scope of section 55 is expanded drastically and requires deeper examination while dealing with the transfer of any kind of rights.

This amendment will take effect from 1st April 2024 and shall accordingly, apply w.e.f. assessment year 2024-25.

Amendments relating to TDS\TCS

1. Section 192A: Relief from Higher TDS on Payment of accumulated balance due to an employee from the Employees' Provident Fund (EPF) Scheme

Present Position

Tax is deductible at the rate of 10 percent of the taxable component of lump sum payment if withdrawal is above the threshold limit of Rs.50,000/- and other exemption conditions for withdrawal are not satisfied. However, if an employee fails to furnish PAN, then tax shall be deducted at Maximum Marginal Rate.

Proposed Amendment

It is proposed that, in case of failure to furnish PAN by the person, the tax will be deducted at the rate of 20% as per section 206AA of the Act. This amendment is a welcome relief for low-paid employees, who do not have PAN.

This amendment will take effect from 1st April 2023.

2. Section 193: Removal of exemption from TDS on payment of interest on listed debentures to a resident.

Present Position

Clause (ix) of the proviso to section 193 of the Act provides an exemption from deducting TDS in the case of any interest payable on any security issued by a company, where such security is in the dematerialized form and is listed on a recognized stock exchange in India.

Proposed Amendment

It is proposed to omit clause (ix) of the proviso to section 193 of the Act. Henceforth, Interest payable on listed securities in dematerialized form will also be liable for TDS. This amendment is being proposed to capture such transactions in 26AS.

The aforesaid amendment is proposed to be effective from 1st April 2023.

3. Sections 194B and 194BB: TDS on winning from lottery, crossword puzzle and horserace

Present Position

Section 194B of the Act provides that at the time of payment, tax is to be deducted on any income by way of winnings from any lottery or crossword puzzle or card game and other game of any sort if an amount exceeds Rs.10,000/-. TDS is to be deducted at the rates provides by Section 115 BB of the Act, i.e. @30% + SC + EC.

Similarly, Section 194BB of the Act provides for the deduction of tax at source on income from horse racing in any race course or for arranging for wagering or betting in any race course.

Proposed Amendment

Presently, it was observed that under both sections transactions were split below Rs.10,000/- to avoid TDS. Both sections are proposed to be amended so that, the deduction of tax under these sections shall be made if the amount or aggregate of the amounts exceeds Rs.10,000/- during the financial year.

Further, it is being proposed to include gambling or betting of any form or nature whatsoever within the scope of Section 194BB.

The aforesaid amendment is proposed to be effective from 1st April 2023.

Further, with effect from 1st July 2023, it is proposed to exclude online games from the preview of Section 194B, since a new Section 194BA is proposed to be introduced to cover online games.

4. Section 194BA: TDS on Winnings from online games

In India, the trend for online gaming is booming, especially among the youth, who are passionately pursuing it. From just playing it for fun to opting for it as a full-time career, the online gaming industry has come a long way. A large number of individuals participate in fantasy leagues, card games, online challenges, etc., which involve actual money. To cover this gaming business under the Income Tax Act, separate sections, i.e., 115BBJ and 194BA have been introduced in the Union Budget 2023.

Applicability of Section 194BA

Section 194BA states that if any person receives any income by way of winning from any online game during the financial year then the person responsible for paying such income shall deduct TDS from the net winnings at the end of the financial year. However, in a case where a user withdraws the amount during the financial year then the tax shall be deducted at the time of such withdrawal from the net winnings.

Also, in a case where the net winnings are partly in cash, partly in kind, or wholly in kind and the cash is not sufficient to meet the tax liability of deduction from net winning, then the person responsible for paying such income shall ensure that before releasing the winnings the tax has been paid in respect of the net winnings.

Rate of TDS under section 194BA

The payer shall deduct TDS at the rate of 30% from the net winnings of the user account. There is no threshold limit on the amount, and the tax will be deducted from the entire net winning amount.

An "Online Game" refers to a game that is available on the internet and can be played by a user via a computer resource or telecommunication device. The definition of net winnings is yet to be prescribed.

If any difficulty arises in giving effect to the provisions of new section 194BA, the Board may, with the prior approval of the Central Government, issue guidelines for the purpose of removing the difficulty. Every such guideline issued by the Board shall be laid before each House of Parliament and shall be binding on the income tax authorities and on the person responsible for the deduction of income tax on any income by way of winnings from an online game.

This amendment will take effect from 1st July 2023.

5. Section 194N: Enhancement of limit for Co-op. Societies from TDS on Cash Withdrawals from Bank

Present Position

Tax deduction at source (TDS) at the rate of 2% will apply if the withdrawal of all sums of money or an aggregate of sums of all withdrawals exceeds Rs. 1 crore from a particular bank in a financial year. However, if the recipient is a non-filer of income tax returns, 2% TDS is to be deducted for cash withdrawal between Rs. 20 lakhs to Rs. 1 crore and 5% TDS if aggregate withdrawal above Rs. 1 crore during the fiscal year.

Proposed Amendment

It is proposed to amend section 194N of the Act by inserting a new proviso to provide that where the recipient is a co-operative society, the aggregate cash withdrawal limit is relaxed to Rs. 3 crores.

The aforesaid amendment is proposed to be effective from 1st April 2023.

6. Section 194R: Certain Clarification on Deduction of tax on benefit or perquisite in respect of business or profession

Present Position

The Finance Act of 2022 introduced section 194R of the Income-tax Act, 1961, with the objective to widen the tax base by bringing benefits paid by taxpayers, whether convertible into money or not, to their distributors, agents, dealers, etc., arising from the business or profession.

In simple terms, the government aimed at plugging the tax leakage arising on account of transactions entered by taxpayers for marketing expenditure in the form of gifts, prizes, trips, etc., for dealers and distributors of their products. The taxpayers claimed the said expenditure as a deduction in their tax returns. However, since the said benefits or perquisites were in kind, the same were not necessarily reported as income by the recipients in their tax returns, leading to tax evasion.

Section 194R requires the taxpayer to deduct tax at 10% on the provision of 'benefit or perquisite', whether convertible into money or not, arising from business or profession to a resident. The section provides a threshold of INR 20,000 for applicability of the section, such that no tax is to be deducted if the aggregate value of benefits or perquisites provided to a single person during a financial year does not exceed INR 20,000.

Under the insertion of this section, certain clarifications were provided by the Central Board of Direct Taxes ('CBDT') vide Circular No. 12 dated 16 June 2022, and Circular No. 18 dated 13 September 2022, for the removal of difficulties in the implementation of provisions of section 194R of the Act. However, these clarifications triggered more questions than answers.

Proposed Amendment

It is proposed to clarify vide Explanation 2 of the section that tax needs to be deducted on any benefit or perquisite, whether in cash or in kind or partly in cash and partly in kind.

Rather than solving the issue of whether cash benefits can be covered within the purview of section 194R or not, the Finance Bill, 2023 proposes to expand the definition by bringing in cash benefits within the purview of taxable income. The said provision may now unsettle the settled questions, for instance

as that held by the Supreme Court in the case of Mahindra and Mahindra [404 ITR 1 (SC)], where write-off of loan for capital assets was held as not taxable under section 28(iv). It was held that for the benefit to be taxable under section 28(iv) of the Act, the benefit should be received in some form, other than in cash. Therefore, cash benefits were not taxable u/s 28(iv) of the Act. Will such write-off of the loans now be taxable under section 28(iv) and subject to withholding tax under section 194R?

The aforesaid amendment is proposed to be effective from 1st April 2023.

7. Section 196A: DTAA benefits for TDS on Income in respect of units of non-residents

Present Position

The section provides for TDS at the rate of 20% on payment of income to a non-resident in respect of units of Mutual Fund specified in section 10(23D) of the Act or specified company referred to in explanation to section 10(35) of the Act. The section did not provide for considering tax treaty benefits while deducting TDS.

Proposed Amendment

It is proposed to allow the benefit of tax treaty at the time of TDS so that if the treaty provides a rate lower than 20%, TDS is made at that lower rate.

The aforesaid amendment is proposed to be effective from 1st April 2023.

8. Section 197: Certificate for deduction at a lower or nil rate

Present Position

The section provides for obtaining a certificate of tax deduction at a lower or nil rate for certain sections under TDS.

Proposed Amendment

It is proposed to extend the benefits of obtaining a certificate of lower or nil rate under section 197 to section 194LBA as well. Section 194 LBA of the Act provides that business trusts (such as REITs and InvITs) shall deduct tax at rates prescribed on income distributed to the unit holders.

The aforesaid amendment is proposed to be effective from 1st April 2023.

9. Section 206AB and 206CCA: Relief from higher TDS/TCS for certain non-filers of income tax return

Present Position

Section 206AB & 206CCA of the Income Tax Act, 1961 provide for deduction of tax or collection of tax at a higher rate in the case of non-filers of returns. These non-filers in these sections are referred to as "specified person".

The term Specified person covers the person who:-

a. has not filed a return of income for last one year and the return filing date for that year is over

AND

b. aggregate of TDS deducted and TCS collected for the year is Rs. 50,000/- or more

Non-residents with no permanent establishment in India are excluded from the definition of Specified person.

Proposed Amendment

The above definition of specified person has created hardship for certain persons who are not required to furnish the return of income but falls in the category of non-filers. Hence, in order to provide relief in such cases, it is proposed to amend the definition of the 'specified person' in sections 206AB and 206CCA to exclude a person who is not required to furnish the return of income for the assessment year relevant to the said previous year and who is notified by the Central Government in the Official Gazette in this behalf.

The aforesaid amendment is proposed to be effective from 1st April 2023.

10. Section 206C: Steep increase in TCS rates for certain remittances

Type of foreign remittances	Present Position	Proposed Amendment
For the purpose of any education which is out of loan from the financial institution as defined u/s 80E.	0.5% of the amount or the aggregate excess of Rs. 7lakh	No change
For the purpose of education other than above or for medical treatment	5% of the amount or the aggregate excess of Rs. 7lakh	No change
Overseas tour package	5% without any threshold limit	20% without any threshold limit
Any other case	5% of the amount or the aggregate excess of Rs. 7lakh	20% without any threshold limit

The above amendment will result in additional blockage of funds for foreign tours and traveling, buying foreign assets, investing abroad, etc. The TCS proposed in the budget seems to be steep, one will have to initially pay TCS and claim a refund in an income tax return at the end of the financial year.

This amendment will take effect from 1st July, 2023.

Conclusion:

The above amendments proposed are in line with the objectives highlighted by the Hon'ble Finance Minister towards reducing litigations, curbing loopholes, reducing the hardships faced by the taxpayer and penalising tax evaders. Though some amendments are at the cost of unsettling the existing law pronounced by the highest judicial forum. However, there are various capital gains and withholding tax provisions where clarifications were expected, which are still awaited. Overall, some amendments facilitate increased/ early collection of taxes for the government and others provide relief to the taxpayers by offering reduced tax rates/ compliances.

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