

EY Tax Alert

Key amendments to Finance Bill, 2022 at enactment stage

Tax Alerts cover significant tax news, developments and changes in legislation that affect Indian businesses. They act as technical summaries to keep you on top of the latest tax issues. For more information, please contact your EY advisor.

Executive summary

The Finance Bill, 2022 (FB 2022 or Bill) was presented by the Hon'ble Finance Minister (FM) Nirmala Sitharaman on 1 February 2022¹. While moving the Bill for approval by the Lok Sabha² on 25 March 2022, the FM introduced amendments to FB 2022 (Amended FB 2022). The amendments are generally intended to address certain ambiguities arising from the wordings of proposals as contained in the Bill.

This Alert covers direct tax related amendments.

¹ Refer our sector alerts in the "Budget Connect 2022" series released on 1 February 2022

² The lower house of parliament

Key takeaways

- ▶ Amendments to the scheme of taxation of virtual digital assets (VDA)
 - ▶ Meaning of “transfer” clarified to be as same as per existing definition in the Income Tax Laws (ITL), applicable to capital asset even if VDA is held as stock-in-trade
 - ▶ Denial of set-off of loss from transfer of VDA against gains from transfer of another VDA
- ▶ Powers given to the Central Government (CG) to issue guidelines to remove any difficulty in the application of withholding provisions applicable to grant of a benefit or perquisite to a resident arising from carrying on of business or profession.
- ▶ Gift taxation will apply to gift of specified property made by registered charitable trust or institution to persons who are specified related parties of the donor entities.
- ▶ Deduction claimed on account of surcharge and cess to be deemed to be under-reported income and may lead to initiation of penalty proceedings unless taxpayer makes application to tax authority to disallow the deduction and pays the amount due.
- ▶ The eligibility criteria to file an updated return made stricter. Amongst others, the taxpayer shall not be eligible to file an updated return for any year if search/survey/requisition proceedings are undertaken.
- ▶ Any proceedings initiated in the name of predecessor during the pendency of succession process is to be deemed to have been initiated in the name of successor.
- ▶ Timeline for completion of assessments for tax year 2019-20 is extended from 31 March 2022 to 30 September 2022.
- ▶ Definition of “books of account” expanded to include books maintained in electronic/digital form.

Discussion of enactments at amendment stage

- ▶ **Amendments to the scheme of taxation of VDA**
 - ▶ FB 2022 proposed to introduce a special scheme of taxation for VDA, a specifically defined asset which covers crypto currencies/assets, non-fungible tokens³ and any other assets to be notified by the CG as VDA. Broadly under the proposed regime, *inter alia*, any income from transfer of VDA is proposed to be taxed @30% w.e.f. 1 April 2022, and consideration paid to a resident for such transfer, is subject to withholding @1% w.e.f. 1 July 2022.
- ▶ **Meaning of “transfer” clarified**
 - Under the existing provisions of the ITL, “transfer” is broadly defined with respect to a capital asset to, *inter alia*, include sale, exchange or relinquishment of the asset; or extinguishment of any rights therein;
 - The amended FB 2022 now provides that the same definition will apply for the term “transfer” used in the provisions relating to VDA as is applicable to capital assets.
 - This definition would apply irrespective of whether the VDA qualifies as a capital asset or stock-in-trade in the hands of the taxpayer.
- ▶ **Amendment to claim the cost of acquisition**
 - The FB 2022 proposed that no deduction shall be allowed in computing income from transfer of VDA except for the “cost of acquisition”.
 - In this regard, the Minister of State for Finance clarified in Lok Sabha on 21 March 2022⁴ that infrastructure costs incurred in mining of VDAs will not be treated as cost of acquisition as it is in the nature of capital expenditure not allowable as deduction under ITL.
 - The Amended FB 2022 now provides that the deduction in respect of “cost of acquisition” would be allowed only if it is available/ascertainable. This precludes a possible argument on part of taxpayers that the taxation under the new regime fails where cost of acquisition of VDA is not ascertainable.

³ To be notified by the Central Government (CG)

⁴ Source: www.loksabha.nic.in [Unstarred question number 2800 answered on 21 March 2022]

▶ **Denial of inter se set-off of gains and losses incurred from transfer of VDA**

- As per FB 2022, loss arising from transfer of VDA shall not be allowed to be set-off against income computed under **any other provision** of ITL. Ambiguity arose on whether such loss can be set-off against income/gains arising from transfer of another VDA which is computed under the same provision of the ITL.
- In this regard, the Minister of State for Finance recently informed the Lok Sabha on 21 March 2022 that loss from the transfer of VDA will not be allowed to be set off against the income arising from transfer of another VDA⁵.
- Consistent with the above, the Amended FB 2022 provides that the loss incurred on transfer of VDA will not be allowed to be set-off against income computed under **any provision** of ITL i.e., it may be interpreted to not permit a set off against income from transfer of another VDA as well. Further, such loss shall not be allowed to be carried forward to succeeding years.
- The enacted provision also includes an additional non-obstante clause to the main provision which provides for 30% rate of tax on income from transfer of VDA.

▶ **Amendment to the interplay of TDS on transfer of VDA with other TDS provisions:**

- As per FB 2022, the new tax withholding @ 1% on consideration paid for transfer of VDA to a resident was proposed to override any other provision of tax deduction at source (TDS) or tax collection at source (TCS) under the ITL. Further, it shall also override TDS obligation on e-commerce operators.⁶
- The amended FB 2022 now omits the overriding impact on any other provision relating to TDS and TCS under the ITL. In other words, the withholding of 1% applicable to transfer of VDA would now override only the withholding provisions applicable to e-commerce operators and no other TDS/TCS provisions. But this does not alter the overriding nature of TDS on transfer of VDA over TDS and TCS on purchase/sale of goods. This is because TDS on purchase of "goods" does not apply if the transaction is liable to TDS or TCS⁷ under any other provisions of the ITL. Likewise, TCS on sale of goods is unlikely to apply if the tax withholding on

transfer of VDA is done under the special scheme.

- Thus, TDS on transfer of VDA shall prevail over TDS on e-commerce operators where the transaction is covered under both the provisions. This means the buyer of VDA in an e-commerce transaction will be liable to withhold tax if the specified conditions (including threshold limits) are met and the e-commerce operator will be relieved from withholding taxes on such transaction.

▶ **TDS on benefit or perquisite arising in the course of business or profession**

- ▶ As per the ITL, the value of any benefit or perquisite, whether convertible into money or not, arising from business or exercise of profession is taxable as business income in the hands of the recipient of such benefit or perquisite.
- ▶ In order to ensure correct reporting of particulars in the return of income and to widen and deepen the tax base, FB 2022 proposed to cast an obligation on the payer of such benefit or perquisite to a resident to withhold tax at the rate of 10% of the value of such benefit or perquisite exceeding threshold value of INR 20,000.
- ▶ Further, it was proposed that in case where the benefit or perquisite is provided partly in cash and partly in kind or wholly in kind and the monetary component is not sufficient to cover the quantum of tax required to be deducted, then the person responsible for withholding should ensure that taxes are paid in respect of such benefit or perquisite before they are released. The amended Bill clarifies that the taxes required to be paid should be equal to the taxes which are required to be withheld by the provider of such benefit/perquisite. To illustrate, if value of benefit is INR 100,000, then payer should ensure payment of tax by payee of INR 10,000 (@ 10%) even if slab rate of tax applicable to payee is, say, 25%.
- ▶ The amended Bill has further amended FB 2022 to provide powers to the CG to issue guidelines for the purposes of removing any difficulty in giving effect to the above withholding provision. It is also provided that every guideline issued by the CG and laid before the Parliament would be binding on the taxpayer as well as the tax authority.

⁵ Source: www.loksabha.nic.in [Unstarred question number 2800 answered on 21 March 2022]

⁶ Section 194-O requires e-commerce operator to deduct tax at the rate of 1% on gross value of sale or service where

transaction of sale of goods or provision of service by e-commerce participant through platform of the e-commerce operator.

⁷ Except TCS on sale of goods

▶ **Gift received from charitable trust in certain cases is now taxable**

- ▶ ITL provides for gift taxation if specified property is received by any taxpayer without or for inadequate consideration. But it provides an exclusion that gift taxation will not apply if such specified property is received by any taxpayer, *inter alia*, from a registered charitable trust or institution. Amended FB 2022 now provides that the exclusion from gift taxation will not apply if the recipient of specified property is a person who is a specified related party of the donor entities.

▶ **Deduction of surcharge and cess will be treated as under-reported income triggering penalty, unless voluntarily owned up by taxpayer**

- ▶ FB 2022 clarified that deduction for surcharge and cess on income tax, being contrary to legislative intent, will not be allowed as deduction in the computation of business income of the taxpayer and same was proposed to be made applicable retrospectively from tax year 2004-05.
- ▶ Amended FB 2022 provides as follows:
 - If any deduction for surcharge and cess is claimed and allowed in any tax year, the tax authority is authorized to recompute the income by way of rectification within a period of four years from the end of the tax year commencing on 1 April 2021 (i.e., by 31 March 2026) and raise consequential demand. Further, if a deduction has been claimed for education cess and surcharge, then it will be deemed that the income is under-reported for the purposes of levy of penalty on the taxpayer @ 50% of tax payable on such disallowance.
 - However, where the taxpayer makes an application to the tax authority in a prescribed form and within the prescribed time for re-computation of income in respect of a tax year without considering the claim of surcharge and cess and pays amount due thereon within the specified time limit, then no penalty shall be levied on such taxpayer.
 - Thus, as it appears, if taxpayer voluntarily owns up the disallowance and makes payment of requisite amount, no penalty shall be levied whereas if tax authority makes re-computation, then penalty shall be levied in addition to amount due on disallowance.

▶ **Eligibility criteria for filing updated return of income**

- ▶ The existing provisions of the ITL permits filing of a belated or revised return within nine months from the end of the relevant tax year or prior to completion of assessment, whichever is earlier. FB 2022 proposed, vide a new provision effective from 1 April 2022, to permit a taxpayer to file an "updated return" within three years from the end of the relevant tax year, subject to various conditions.
- ▶ As per FB 2022, an updated return cannot be filed if, *inter alia*:
 - It is a loss return; or
 - It decreases total tax liability or increases refund as compared to return previously filed
 - It pertains to a tax year in which:
 - Search has been initiated or books/documents/assets has been requisitioned in case of taxpayer
 - Survey has been conducted in the case of taxpayer (excluding TDS survey)
 - Notice has been issued stating that any money/bullion/jewellery/valuable article or thing, seized or requisitioned in case of any other person, belongs to the taxpayer
 - Notice has been issued stating that books/documents seized or requisitioned in case of any other person pertain/s to taxpayer, or any other information contained therein relates to taxpayer

In case of search/survey/requisition proceedings as above, disqualification applied to two preceding tax years as well.

- ▶ Amended FB 2022 amends some of the conditions relating to filing of updated return as follows:
 - ▶ Taxpayer can file an updated return for a tax year even where a loss return was previously filed for such tax year, provided that such updated return is a return of income.
 - ▶ If an updated return filed for a tax year results in reduction of carried forward loss or unabsorbed depreciation or MAT⁸/AMT⁹ credit for subsequent tax years, taxpayer shall file an updated return for all such subsequent tax years

⁸ Minimum alternate tax for companies

⁹ Alternate minimum tax for taxpayers other than companies

- ▶ In case of search/survey/requisition proceedings as above, taxpayer shall be ineligible to file an updated return for that tax year as also all tax years preceding the tax year of search/survey/requisition.

▶ **Resolution of administrative difficulties in tax proceedings on succession of business**

- ▶ FB 2022 proposed that any proceedings made on the predecessor entity during the course of pendency of business reorganization will be deemed to be validly carried out in the name of successor entity. This was to ensure that proceedings continue to be valid despite the predecessor entity ceasing to be in existence on completion of business reorganization process.
- ▶ The term “business reorganisation” was defined to mean reorganization of business involving amalgamation or demerger of companies or merger of business of one or more persons.
- ▶ Due to the reference to the term “merger” and “demerger” in the definition of the term “business reorganisation”, there was an ambiguity whether it would cover all forms of succession of business. In order to remove such ambiguity, the amended FB 2022 replaces the term “business reorganisation” with the term “succession”, thereby covering all forms of succession of business.
- ▶ Further, there was an ambiguity whether proceedings which are initiated but not completed in name of predecessor prior to completion of succession process would continue to be valid by deeming it to be in the name of successor.
- ▶ The amended FB 2022 clarifies that any proceedings initiated in the name of predecessor during the pendency of succession process shall be deemed to have been initiated in the name of successor.
- ▶ Separately, FB 2022 proposed to introduce new provisions to enable the “successor” entity to file a modified return in lieu of the returns which were filed for tax year pertaining to the “business reorganisation” to reflect the impact of change due to the reorganization.
- ▶ The Amended FB 2022 defines the term “successor” to mean all resulting companies in a business reorganisation, whether or not the company was in existence prior to such business reorganisation or not.

▶ **Timeline for completion of assessments for tax year 2019-20 extended till 30 September 2022**

- ▶ Amended FB 2022 extends timeline for completion of assessment for tax year 2019-20 from 31 March 2022 to 30 September 2022. The timeline for completion of assessment for other tax years remain unchanged.

▶ **Definition of books of account expanded to include books maintained in electronic/digital form**

- ▶ The existing definition of “books or books of accounts” under ITL includes only ledgers, daybooks, cash books, account books and other books kept in written form or as print-out of the data stored in certain storage devices. Amended FB 2022 expands the scope of the term “books or books of account” under the ITL to include books maintained in an electronic or digital form as well.

Comments

The Amended FB 2022 provides clarity on some of the ambiguities and difficulties created by the FB 2022. For instance, it provides that an updated return can be filed even in cases where the returned income was loss and provide clarity on the meaning of the term "transfer" used in VDA. It also gives power to the CG to remove any difficulties in implementing the new withholding provision on business perquisites. It is likely that the CG may also provide rules for valuation of such benefits and perquisites. This provides opportunity for industries to engage with CG to provide clarifications on several contentious issues impacting new withholding on business perquisites and transfer of VDA.

Amended FB 2022 makes the new tax regime for VDAs stricter by precluding set off of loss on VDA against gain on VDA. It also provides for harsh consequence of deemed penalty on disallowance of surcharge and cess on income tax arising on account of retrospective amendment unless voluntarily owned up by taxpayer. This is a harsh measure considering that the deduction was supported by certain judicial precedents.

The amended bill will now be placed before the upper house of Parliament and would be enacted into law once it is approved by the President.

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