

## Withdrawal of retrospective amendment in relation to indirect transfer, not to apply to transactions before May 28, 2012: Taxation Laws (Amendment) Bill, 2021

### Introduction:

- The Taxation Laws (Amendment) Bill, 2021 (**Proposed Bill**) was introduced in the Lok Sabha on August 5, 2021. It seeks to withdraw the retrospective applicability of indirect transfer provisions under the Income-tax Act, 1961 (**IT Act**), subject to fulfilment of conditions.
- The Finance Act, 2012 had introduced an amendment to the IT Act by inserting Explanation 5 to Section 9(1)(i) of the IT Act, which prescribed that an asset or a capital asset being any share or interest in a company or entity registered or incorporated outside India shall be deemed to be and shall always be deemed to have been situated in India, *if the share or interest derives, directly or indirectly, its value substantially from the assets located in India*. The Finance Act, 2012 sought to apply the said amendment retrospectively with effect from April 1, 1962.
- The issue of taxability of indirect transfer has been a subject matter of protracted litigation on which the Hon'ble Supreme Court of India in 2012 had given a verdict that gains arising from indirect transfer of Indian assets are not taxable under the extant provisions of the IT Act.
- However, to overcome the verdict of the Hon'ble Supreme Court of India, the above amendment was inserted in 2012 with retrospective effect from April 1, 1962.
- The above amendments invited criticism from stakeholders mainly with respect to the retrospective effect given to the amendments. Industry's grievance was that such retrospective amendments militate against the principle of tax certainty and damage India's reputation as an attractive destination.

### Amendment:

- The Bill proposes that nothing contained in the Explanation 5 to Section 9(1)(i) of the IT Act shall apply to any assessment or reassessment to be made or order to be passed enhancing the assessment or reducing refund or order to be passed deeming a person as an assessee in default in respect of income accruing or arising through or from the indirect transfer of an asset or a capital asset situated in India made before May 28, 2012.
- The Bill further proposes that any assessment or reassessment made or order passed enhancing the assessment or reducing refund or order passed deeming a person as an assessee in default or order passed imposing a penalty in respect of income accruing or arising through or from the indirect transfer of an asset or a capital asset situated in India made before May 28, 2012, then, such assessment or reassessment or order, to the extent it relates to the said income, shall be deemed never to have been passed or made subject to fulfilment of specified conditions.
- The following is proposed to be the specified conditions:
  - where any appeal/writ petition has been filed before an appellate forum against any order in respect of said income, the taxpayer shall either withdraw or submit an undertaking to withdraw such appeal/writ petition;
  - where any proceeding for arbitration, conciliation or mediation has been initiated or notice under any law for the time being in force or under any agreement entered into by India with any other country or territory outside India, whether for protection of investment or otherwise, is given, the taxpayer shall either withdraw or shall submit an undertaking to withdraw the claim; and
  - the taxpayer to furnish an undertaking, waiving its right, whether direct or indirect, to seek or pursue any remedy or any claim in relation to the said income.

- Further, it has been proposed that where any amount becomes refundable to the taxpayer as a consequence of fulfilment of the specified conditions, then, such amount shall be refunded, but no interest under Section 244A of the IT Act shall be paid on that amount. In other words, as per the proposed Bill, the income-tax department shall issue refunds of the amount paid in these cases without any interest.

**ELP views:**

- Retrospective applicability of the indirect transfer amendment has been the most discussed amendment in recent times. This amendment created lot of unrest and has certainly impacted foreign investment into India. This is one amendment, which has literally visited the doors of almost all judicial fora including arbitration.
- The Proposed Bill has been introduced primarily to restore India's damaged reputation with respect to tax uncertainty. The Government hopes that this will re-assure foreign investors of India being a favourable investment destination. Additionally, the Government is also looking towards increased foreign investment to stimulate a quick recovery from the pandemic. All in all, the proposal not to apply the retrospective amendment for transactions undertaken before May 28, 2012 is certainly a welcome step from the Government.

We hope you have found this information useful. For any queries/clarifications please write to us at [insights@elp-in.com](mailto:insights@elp-in.com) or write to our authors:

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