

BUDGET 2017 NEWS FLASH-KEY PROPOSALS CONCERNING FOREIGN INVESTMENTS IN INDIA

The Union Budget presented by Finance Minister Arun Jaitley on Wednesday will be remembered for being historic in more ways than one. Besides the advancement of the date from February 28 to February 1 and merging of Railway Budget with the General Budget, the annual exercise will be registered in the annals of parliamentary history.

The Agenda for 2017-18 is: “Transform, Energise and Clean India” – TEC India i.e. Transform the quality of governance and quality of life of our people; Energise various sections of society, especially the youth and the vulnerable, and enable them to unleash their true potential; Clean the country from the evils of corruption, black money and non-transparent political funding.

The budget was broadly divided into ten distinct themes to foster this broad agenda, namely: Farmers, Rural Population, Youth, The Poor and Underprivileged, Infrastructure, Financial Sector, Digital Economy, Public Service, Prudent Fiscal Management and Tax Administration.

The Budget provided the much needed breather for FPIs, amid pessimistic expectations of FPIs, FIIs and MNEs in terms of tax incidence in India through indirect transfers. Some of the announcements concerning foreign investors are summarized below:

1. Foreign Exchange Regulations:

- Foreign Investment Promotion Board (FIPB)
 - ❖ The Foreign Investment Promotion Board (FIPB) offered a single window clearance for applications on Foreign Direct Investment (FDI) in India that are under the approval route.
 - ❖ The FIPB has successfully implemented e-filing and online processing of FDI applications.
 - ❖ The sectors under automatic route did not require any prior approval from the FIPB and are subject to only sectoral laws & caps. A stage has been reached where FIPB can be abolished.
 - ❖ The Budget proposes to abolish the FIPB in 2017-18 and create a new framework. A roadmap for the same will be announced in the next few months.
 - ❖ In the meantime, further liberalization of FDI policy is under consideration and necessary announcements will be made in due course.

2. Direct Tax proposals:

- Clarity relating to Indirect Transfer Provisions
 - ❖ The Bill seeks to amend section 9 of the Income tax Act relating to income deemed to accrue or arise in India. The said section provides that certain incomes mentioned therein shall be deemed to accrue or arise in India.
 - ❖ Explanation 5 to the said clause provides that an asset or 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.

- ❖ In order to address these concerns, it is proposed to amend the said section so as to clarify that the Explanation 5 shall not apply to any asset or capital asset mentioned therein being investment held by non-resident, directly or indirectly, in a Foreign Institutional Investor, as referred to in clause (a) of the Explanation to section 115AD, and registered as Category-I or Category II Foreign Portfolio Investor under the Securities and Exchange Board of India (Foreign Portfolio Investors) Regulations, 2014 made under the Securities and Exchange Board of India Act, 1992, as these entities are regulated and broad based.

[This amendment will take effect retrospectively from 1st April, 2012 and will, accordingly, apply in relation to the assessment year 2012-2013 and subsequent years.]

- Modification in conditions of special taxation regime for off shore funds under section 9A

- ❖ Section 9A of the Act provides for a special regime in respect of offshore funds. It provides that in case of an eligible investment fund, the fund management activity carried out through an eligible fund manager acting on behalf of such fund shall not constitute business connection in India of the said fund.
- ❖ In respect of corpus of the fund, the condition is that the monthly average of the corpus of the fund shall not be less than one hundred crore rupees except where the fund has been established or incorporated in the previous year in which case, the corpus of fund shall not be less than one hundred crore rupees at the end of such previous year.
- ❖ It is proposed to provide that in the previous year in which the fund is being wound up, the condition that the monthly average of the corpus of the fund shall not be less than one hundred crore rupees, shall not apply.

[This amendment will take effect retrospectively from 1st April, 2016 and shall apply to the assessment year 2016-17 and subsequent years.]

- Cost of acquisition in Tax neutral demerger of a foreign company

- ❖ It is proposed to amend section 49 so as to provide that cost of acquisition of the shares of Indian company referred to in section 47(vi c) in the hands of the resulting foreign company shall be the same as it was in the hands of demerged foreign company.

[This amendment will take effect from 1st April, 2018 and will, accordingly, apply in relation to the assessment year 2018-19 and subsequent years.]

- Exemption of income of Foreign Company from sale of leftover stock of crude oil from strategic reserves at the expiry of agreement or arrangement

- ❖ It is proposed to insert a new clause (48B) in section 10 so as to provide that any income accruing or arising to a foreign company on account of sale of leftover stock of crude oil, if any, from a facility in India after the expiry of an agreement or an arrangement referred to in clause (48A) of section 10 of the Act shall also be exempt subject to such conditions as may be notified by the Central Government in this behalf.

[This amendment will take effect from 1st April, 2018 and will, accordingly, apply in relation to assessment year 2018-19 and subsequent years.]

- Extension of capital gain exemption to Rupee Denominated Bonds
 - ❖ With a view to provide relief to non-resident investor, in the wake of permission by the Reserve Bank of India (RBI) to the Indian corporates to issue rupee denominated bonds outside India as a measure to enable the Indian corporates to raise funds from a source outside India.
 - ❖ It is proposed to amend section 48 providing that the said appreciation of rupee shall be ignored for the purposes of computation of full value of consideration.
 - ❖ Further, with a view to facilitate transfer of Rupee Denominated Bonds from non-resident to non-resident, it is proposed to amend section 47 so as to provide that any transfer of capital asset, being rupee denominated bond of Indian company issued outside India, by a non- resident to another non- resident shall not be regarded as transfer.

[These amendments will take effect from 1st April, 2018 and will, accordingly, apply in relation to the assessment year 2018-19 and subsequent years.]

- Exemption of long term capital gains tax u/s 10(38)
 - ❖ It is proposed to amend section 10(38) to provide that exemption under this section for income arising on transfer of equity share acquired or on after 1st day of October, 2004 shall be available only if the acquisition of share is chargeable to Securities Transactions Tax under Chapter VII of the Finance (No 2) Act, 2004.
 - ❖ In order to protect the exemption for genuine cases where the Securities Transactions Tax could not have been paid like acquisition of share in IPO, FPO, bonus or right issue by a listed company acquisition by non-resident in accordance with FDI policy of the Government etc., it is also proposed to notify transfers for which the condition of chargeability to Securities Transactions Tax on acquisition shall not be applicable.

[This amendment will take effect from 1st April, 2018 and will, accordingly, apply in relation to the assessment year 2018-19 and subsequent assessment years.]

- Extension of eligible period of concessional tax rate on interest in case of External Commercial Borrowing and Extension of benefit to Rupee Denominated Bonds
 - ❖ It is proposed to amend section 194LC to provide that the concessional rate of five per cent. TDS on interest payment under this section will now be available in respect of borrowings made before the 1st July, 2020. This amendment will take effect from 1st April, 2018 and will, accordingly, apply in relation to the assessment year 2018-19 and subsequent years.
 - ❖ Further, consequent upon demand from various stakeholders for granting benefit of lower rate of TDS to rupee denominated bonds, a Press Release dated 29th October, 2015 was issued clarifying that TDS at the rate of 5 per cent would be applicable to these bonds in the same way as it is applicable for off-shore dollar denominated bonds.
 - ❖ In order to give effect to the above, it is further proposed to extend the benefit of section 194LC to rupee denominated bond issued outside India before the 1st July, 2020.

[This amendment will take effect retrospectively from 1st April, 2016 and will, accordingly, apply in relation to the assessment year 2016-17 and subsequent years.]

- Extension of eligible period of concessional tax rate under section 194LD

- ❖ It is proposed to amend section 194LD to provide that the concessional rate of five per cent. TDS on interest will now be available on interest payable before the 1st July, 2020.

[This amendment will take effect from 1st April, 2018 and will, accordingly, apply in relation to the assessment year 2018-19 and subsequent years.]

- Rationalization of Provisions relating to tax credit for Minimum Alternate Tax and Alternate Minimum Tax

- ❖ It is proposed to amend section 115JAA to provide that the tax credit can be carried forward up to fifteenth assessment years immediately succeeding the assessment years in which such tax credit becomes allowable, earlier the same can be carried forward till tenth assessment year.
- ❖ It is also proposed in section 115JD to allow carry forward of Alternate Minimum Tax (AMT) paid under section 115JC up to fifteenth assessment years in case of non corporate assessee.
- ❖ It is also proposed to amend section 115JAA and 115JD so as to provide that the amount of tax credit in respect of MAT/ AMT shall not be allowed to be carried forward to subsequent year to the extent such credit relates to the difference between the amount of foreign tax credit (FTC) allowed against MAT/ AMT and FTC allowable against the tax computed under regular provisions of Act other than the provisions relating to MAT/AMT.

[These amendments will take effect from 1st April, 2018 and will, accordingly, apply in relation to the assessment year 2018-19 and subsequent years.]

- Clarification with regard to interpretation of 'terms' used in an agreement entered into under section 90 and 90A.

- ❖ It is provided in section 90 and 90A of the Act that any 'term' used but not defined in this Act or in the agreement referred to in sub-section (1) of respective provisions shall have the meaning assigned to it in the notification issued by the Central Government in the Official Gazette in this behalf, unless the context otherwise requires, provided the same is not inconsistent with the provisions of this Act or the agreement.
- ❖ It is further proposed to amend the sections 90 and 90A of the Act, to provide that where any 'term' used in an agreement entered into under sub-section (1) of Section 90 and 90A of the Act, is defined under the said agreement, the said term shall be assigned the meaning as provided in the said agreement and where the term is not defined in the agreement, but is defined in the Act, it shall be assigned the meaning as definition in the Act or any explanation issued by the Central Government.

[These amendments will take effect from 1st April, 2018 and will, accordingly, apply in relation to the assessment year 2018-19 and subsequent years]

- Limitation of Interest deduction.
 - ❖ The OECD has recommended several measures in its final report to address the issue of excess interest deductions by MNEs in BEPS Action 4. In view of the above, it is proposed to insert a new section 94B.
 - ❖ The provision shall be applicable to an Indian company, or a permanent establishment (PE) of a foreign company being the borrower who pays interest in respect of any form of debt issued to a non-resident or to a PE of a non-resident and who is an 'associated enterprise' of the borrower.
 - ❖ Further, the debt shall be deemed to be treated as issued by an associated enterprise where it provides an implicit or explicit guarantee to the lender or deposits a corresponding and matching amount of funds with the lender.
 - ❖ The provisions shall allow for carry forward of disallowed interest expense to eight assessment years immediately succeeding the assessment year for which the disallowance was first made and deduction against the income computed under the head "Profits and gains of business or profession" to the extent of maximum allowable interest expenditure.
 - ❖ In order to target only large interest payments, it is proposed to provide for a threshold of interest expenditure of one crore rupees exceeding which the provision would be applicable.
 - ❖ However It is further proposed to exclude Banks and Insurance business from the ambit of the said provisions keeping in view of special nature of these businesses.

[This amendment will take effect from 1st April, 2018 and will, accordingly, apply in relation to the assessment year 2018-19 and subsequent years.]

- Enabling claim of credit for foreign tax paid in cases of dispute
 - ❖ Procedure for amendment of assessment order in case of certain specified errors is furnished in Section 155 of the Act
 - ❖ According to Income Tax Rules, 1962, rule 128 provides a mechanism for claim of foreign tax credit, proposed to insert sub-section (14A) in section 155 to furnish that where credit for foreign taxes paid is not given for the relevant assessment year
 - ❖ The payment of such foreign tax was in dispute, the Assessing Officer shall rectify the assessment order or intimation under sub-section (1) of section 143. If the assessee, within six months from the end of the month in which the dispute is settled, provides proof of settlement of such dispute, submits evidence before the Assessing Officer that the foreign tax liability has been discharged and furnishes an undertaking that credit of such amount of foreign tax paid has not been directly or indirectly claimed or shall not be claimed for any other assessment year.

[This amendment will take effect from 1st April, 2018 accordingly, this amendment apply in relation to assessment year 2018-19 and subsequent years.]

- Reducing the time for filing revised return
 - ❖ It is proposed to amend the provisions of sub-section (5) of section 139 to provide that the time for furnishing of revised return shall be available upto the

end of the relevant assessment year or before the completion of assessment, whichever is earlier.

[This amendment will take effect from 1st April, 2018 accordingly, this amendment apply in relation to assessment year 2018-19 and subsequent years.]

- Secondary adjustments in certain cases

- ❖ "Secondary adjustment" means an adjustment in the books of accounts of the assessee and its associated enterprise to reflect that the actual allocation of profits between the assessee and its associated enterprise are consistent with the transfer price determined as a result of primary adjustment, thereby removing the imbalance between cash account and actual profit of the assessee.
- ❖ It is proposed to insert a new section 92CE to provide that the assessee shall be required to carry out secondary adjustment where the primary adjustment to transfer price, has been made suo motu by the assessee in his return of income; or made by the Assessing Officer has been accepted by the assessee; or is determined by an advance pricing agreement entered into by the assessee under section 92CC; or is made as per the safe harbour rules framed under section 92CB; or is arising as a result of resolution of an assessment by way of the mutual agreement procedure under an agreement entered into under section 90 or 90A.
- ❖ It is proposed to provide that where as a result of primary adjustment to the transfer price, there is an increase in the total income or reduction in the loss, as the case may be, of the assessee, the excess money which is available with its associated enterprise, if not repatriated to India within the time as may be prescribed, shall be deemed to be an advance made by the assessee to such associated enterprise and the interest on such advance, shall be computed as the income of the assessee , in the manner as may be prescribed.
- ❖ It is also proposed to provide that such secondary adjustment shall not be carried out if the amount of primary adjustment made in the case of an assessee in any previous year does not exceed one crore rupees and the primary adjustment is made in respect of an assessment year commencing on or before 1st April,2016.

[This amendment will take effect from 1st April, 2018 accordingly, this amendment apply in relation to assessment year 2018-19 and subsequent years.]

