CONSTRUCTION
FEDERATION OF
INDIA

CFI POST-BUDGET MEMORANDUM 2023-24

DIRECT TAX ISSUES

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<tr><td>1.</td><td>Section 56(2)(xii) (Other income) proposes to tax any payments received by the unit holders from business trusts (except in the nature of dividend or interest or leasing income in case of REIT)</td><td>The proposed amendment aims to tax capital repayment received by unit holders from business trusts.

The proposed amendment to section 56 is as under –
"(xii) any sum received by a unit holder from a business trust which—
(a) is not in the nature of income referred to in clause (23FC) or clause (23FCA) of section 10; and
(b) is not chargeable to tax under sub-section (2) of section 115UA:

Provided that where the sum received by a unit holder from a business trust is for redemption of unit or units held by him, the sum so received shall be reduced by the cost of acquisition of the unit or units to the extent such cost does not exceed the sum received"

At the outset, we would like to refer the memorandum to Finance Bill 2014 wherein business trust (tax pass through status) was introduced under section 115UA with the objective to provide the much-needed impetus for raising foreign investments and to provide a level playing field to the specific infrastructure and real estate assets/ portfolio</td><td>1. Repayment of capital, being in the nature of capital receipt, should be taxed as income from capital gains and not as other sources.

2. Additionally, indexation benefit also should be available to all investors for the purposes of computing capital gains.

3. Withholding tax rate applicable in respect of distribution to resident and non-resident vis-à-vis aforesaid amendment.

- Section 194LBA(2) deals with withholding on interest/ dividend / rental income paid to non-resident unit holders. Given that no amendment is proposed in 194LBA, amount paid on repayment of capital, if held chargeable, will be subjected to withholding tax under section 195. Hence it is suggested that the TDS provisions under Section 194LBA(2) be extended to incomes proposed to be taxed u/s 56(2)(xii)</td></tr>
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		While the expectation was to either provide additional incentives to Business Trusts or maintain status quo, the budget proposal would have the following adverse consequences/ far reaching impact: - Debt repayment received from SPV is repaid as capital by InVIT/ REIT to its unit holders. Merely introducing taxation provisions under a particular section cannot re-characterize the original nature of the receipt (i.e. repayment of debt / capital should retain its original character) - Upfront taxation of part of the cost/ capital invested would result in preponing the taxes and will have negative impact on the investor sentiment; which is likely to raise fundamental concerns since taxation without giving cost benefit would not be seen favourably across the globe. This could result in taxing the income at maximum marginal rate i.e. 43.46%. e.g. where investors undertake a secondary acquisition of units of a business trust, any potential unit capital repayment could be taxable upfront in the hands of the investors without considering the cost basis. - Redemption of units is a capital receipt in nature and hence may not be considered as 'income'. However, the amendment proposes to tax the same as 'income from other sources', resulting in payment of tax at maximum marginal rate for both resident and non-resident unit holder;	

		The proposed amendment raises ambiguity on the following issues: - A question may arise whether unit holder shall be entitled to deduction of expenditure against such distribution of repayment of capital - Where Business trust undertakes capital repayment, there is no clarity on whether the same shall be treated as 'redemption' as stated in the proposed amendment. If the interpretation is such that repayment of capital tantamounts to 'redemption', the tax shall be levied at each of such distribution at Maximum marginal rate. It is pertinent to note that legally for business trusts, the concept of redemption is not envisaged given that in all scenario's proportionate unit capital repayment is undertaken where the number of units held doesn't undergo any change. - There may be a scenario where investors may have undertaken secondary acquisition of units of a business trust, but the unit capital repayment may not be exceed the cost of acquisition. In this scenario, the proposed amendment may deny the loss from being available to investors for carry forward. - Withholding tax rate applicable in respect of distribution to resident and non-resident vis-à-vis aforesaid amendment. Section 194LBA(2) deals with withholding on interest/ dividend / rental income paid to	

		non-resident unit holders. Given that no amendment is proposed in 194LBA, amount paid on repayment of capital, if held chargeable, will be subjected to withholding tax under section 195. In light of the above, a question may arise on ability of the business trust to determine the cost of acquisition for secondary unit holders for the purpose of withholding of taxes; - Basis on which cost of acquisition shall be determined	
2.	**Investment from Non-resident investors have been brought within the ambit of section 56(2)(vii b)**	The amount in excess of fair market value received by way of investments by Closely held companies from their non-resident holding Company or through other investors	The taxing of this sum will affect foreign investments in India. In general, such investments are made either from an acquisition standpoint or at times with the purpose of supporting nascent operations in competitive markets like India.
3	**Removal of exemption from TDS on interest on listed securities to a resident**	Exemption for TDS on interest on listed securities has been withdrawn	The compliance burden increases & importantly since these are listed securities and freely transferrable, the interest deduction will be in hands of one person while the instrument may have passed to another. The matching of the deduction with income will be problematic due to this. From the issuer's perspective, it will be a challenge to identify the holders of the security for crediting the accrued interest and simultaneously deducting TDS at accounting period end.

			Alternatively, reporting requirement of Interest on Debentures may be added in the Statement of Financial Transactions leading to Annual Information Statement
4.	**TCS on certain LRS remittances have been hiked to 20% from the existing 5% & basic exemption limit of Rs. 7 Lakhs has been removed while considering liability to deduct TDS**	The TCS rate is made 20% for foreign remittances other than medical and student fee related transfers	It is requested that erstwhile rate is retained. The TCS of 20% will affect the cash flow of the remitter. The purpose of tracking transaction is already met with a 5% rate of TDS.
5.	**Limit to the roll over benefit claimed u/s 54 and 54F**	It is proposed to restrict the said deductions from capital gains u/s 54 and 54F up to Rs.10 Crores	The amendment is applicable w.e.f. 1st April 2023, therefore it is understood that the restriction of Rs.10 Cr. in investment in new residential property will not be applicable with respect to capital gains that have arisen before 1st April 2023. A clarification to this effect is sought
6.	**The benefit of Lower Tax Regime has been extended to AOPs and BOI**	In the Construction Industry the AOPs are formed between Companies and at times there are also foreign companies forming part of the AOP. The new tax regime has prescribed lower slab rates, however, the application of provisions of Section 167B of the Act would not enable the application of lower tax rate since it prescribes taxing the income at maximum marginal rate or a rate higher than that as may be applicable to a member if the income of the member exceeds the maximum amount not chargeable to tax	It is suggested that in case of AOP which has Companies as its members, instead of maximum marginal rate, the tax rate as applicable to the said company may be considered. This will bring the taxation of the member under AOP structure or as a standalone entity at par. In the present scenario if the member company is being taxed at 25% its share in AOP gets taxed at maximum marginal rate which is 39% as per latest budget
7.	**Short Term Capital Gains on market linked debentures (MLDs)**	Income from transfer of MLDs proposed to be considered as short-term capital gains taxed at applicable rates without allowing any grandfathering relaxation	The transfer of an MLD is considered as a short-term capital gain in all cases, and taxing the same at the higher tax rate based on the applicable slab of the investor, has been made applicable, even for existing MLDs lying in the portfolio of investors and acquired

			before 1.4.2023, and no grandfathering relaxation has been proposed in the Finance Bill 2023 In the absence of any grandfathering relaxation, the proposed treatment of considering any gain on transfer of even those MLDs acquired before 1.4.2023, as short term capital gain, will create new obligations and impose new tax in respect of the MLDs transactions already undertaken which should be avoided
8.	**Amount payable to MSME allowable as deduction on payment basis**	Disallowance of payment to MSME beyond the period specified under MSME Act leading to blockage of capital	Interest is leviable if the amount is not paid as per the provisions of MSME Act and the same is being disallowed being in the nature of tax expense. Further, allowance of payment to MSME (beyond the period specified under MSME Act) as a deductible expense only on actual payment basis u/s 43B would result in blocking of capital. There is already a penal consequence of not paying the MSME within the time frame prescribed, including the same in section 43B increases the compliance and monitoring burden on the assessee. This would lead to a cumbersome exercise of closely tracking the disallowances and allowances in subsequent year(s) to comply with the provisions of the Act thereby saddling the assessee(s) with higher operational costs.
9.	**Set off and withholding of refunds in certain cases – Sections 241A, 244A and 245**	a. Withholding of refunds illustratively arising from order giving effect to various appellate orders ('OGE') till assessment/re-assessments for any other years is pending.	The scope of Section 245 has been expanded, wherein authorities have been given power to withhold all the refunds and not only refunds arising from 143(1), Intimation subject to

		b. No additional interest payable to the assessee from the date of withholding of refund till the date on which assessment/re-assessment is made.	certain conditions. This is expected to cause severe financial hardship to the assessee. Rectification & refund matters of taxpayers are still stuck with CPC for years, due to errors not related to questions of law/fact. The proposed amendment aims to withhold refunds till the completion of assessment/re-assessment proceedings which will increase the financial burden on the assessee.
10.	**Introduction of new Appellate authority**	New Appellate Authority introduced	The introduction of additional first level appellate authority further to an existing Commissioner (Appeals) is indeed a welcome step for law abiding taxpayers. It is hoped that this move may lead to speedier disposal of appeals and the reduction in the massive volume of pending litigation. However, the proposed amendment states that the focus is on eliminating the interaction between taxpayer and JCIT (Appeals); thereby hinting that this scheme may also be faceless-centric. There are various aspects which need clarity - For example: threshold limits for the cases that can be appealed with JCIT(Appeals); the process that would be followed for transfer of existing appeals from the Commissioner (Appeals); whether the transfers would be automatic or at the behest of assessee; procedure for application to be made by the assessee (if any) in this regard, etc.
11.	**Stringent compliance burden on trusts**	Exit tax @ maximum marginal rate, on the difference between the fair market value of the assets and liabilities is being proposed on non-renewal of registration/ registration of trust within the time frame specified	The trust / institutions has to be very careful with respect to meeting the deadlines and timely compliance / application. These provisions will add to the

			administrative difficulties in managing the trust. The Trustees work on an Honorary basis and are not professional managers. There should be some provision of condoning the delay in making the application and levying an Exit tax on the entire income accreted is too harsh.
PART B- PROCEDURAL/ADMINISTRATIVE SUGGESTIONS			
12.	**Enabling ease of filing Income Tax Returns**	Various technical errors are faced in uploading JSON file while filing return of income.	Java Utility/ Excel Utility available on the Income tax portal has to compatible to remove all errors of Income Tax Returns
PART C – CONCERNS			
13.	**Prosecution for delayed deposit of TDS**	At present cases where an assessee has deposited TDS with delay but has suo-moto deposited tax with interest, are also being prosecuted.	It is suggested that where assessee has deposited tax suo moto along with interest thereon or where interest is under a particular threshold the offence be decriminalised
14.	**Section 68**	Scope of section 68 is widened to include within its ambit instances of loan or borrowing or any such amount akin to loan or borrowing. It further states that person in whose name credit is recorded offers an explanation about the nature and source of such which the Assessing Officer should find satisfactory. Exemption is provided where funding is provided by venture capital fund or venture capital company as referred in section 10(23FB).	This proposal has given wide powers to AO to question each and every loan or borrowing or any such amount akin to loan or borrowing. Instances where loans or borrowings have been availed from banking companies or non-banking finance companies or institutions which are regulated by RBI / SEBI should be included within exclusion category. Similarly, any such loans or borrowing undertaken under FDI route should also be exempted from the purview of section 68.

15.	**Lower Tax Rates**	Benefits of New Lower Tax Regime (17% / 22%) is available to companies only, (& now to AOP/BOI) Firms & LLPs which are also used as structures for conducting business are taxed at a higher rate as compared to Corporates opting for lower tax regime.	Lower tax regime should be extended to Firms, LLPs to bring on parity with Corporates enjoying lower tax regime. Reduced rates of tax of 17% and 22% should therefore be extended to firms, LLPs and AOPs (where all members are domestic companies) as well.
16.	**Credit for the taxes deducted at source**	Generally TDS is deducted at the time of booking of bills or while making payment whichever is earlier. However, as per the Ind-AS 115, income from E&C business is recognised based on percentage of completion method ['POC'] whereas TDS applies on invoices raised on customer. ITR Forms require details of TDS and disclosure of corresponding income. It is practically difficult to correlate the income which is recognised based on POC method and the TDS.	It is necessary to ease burden on taxpayer by doing away with the requirement of linking TDS credit entitlement with the income recognized in terms of Ind-AS 115. In cases involving recognition of revenue on POC basis, TDS credit should be granted based on the TDS actually deposited by the customers without its linkage with revenue recognition. If suggestion is unacceptable, a system for carry forward and grant of TDS by CPC and AO should be made operational such that TDS carried forward in return or assessment proceedings are made available in subsequent years through Form 26AS itself.
17.	**Work sharing Joint Ventures (JV)**	Taxability of Work sharing JVs – Addition of Ad hoc percentage by the Assessing Officer.	In case of work sharing joint ventures (JV), the income is offered in the hands of the joint venture members. However, the Income Tax Department treats such work sharing joint ventures as separate entities and ad-hoc percentage additions are made on the turnover of such JV's, leading to double taxation. Request for streamlining Assessments of Work Sharing Joint Ventures.

18.	**Integration of Form 26AS, Annual Information Statement and Tax Information Statement**	The Income Tax Department is now making available information to the Tax Payers in Form 26AS, Annual Information Statement (AIS) and Taxpayer Information Statement (TIS). There are multiple sources of information and forms now available to the taxpayer, which necessarily have to be reconciled before filing of return.	It is recommended that all the Forms be unified into one single form to avoid duplication of data and work put into reconciliation downloadable in CSV format in one go.
19.	**Section 37** **Expenses pursuant to Employee Stock Option Plan [‘ESOP’]**	Awarding ESOPs to employees is an important tool for talent retention adopted by most companies in India. It is one of the modes of compensating employees for their services. Granting of shares under ESOP is treated as perquisite in the hands of the employees and on this perquisite, tax is paid by employees. SEBI guidelines prescribe method for charging of ESOP discount in the books of accounts. However, tax authorities do not treat ESOP expense as deductible while computing the business income and this leads to litigation.	ESOP expenses debited to profit and loss account should be an allowable expense for deduction for computing the business income.
20.	**Applicability of Section 194R**	The legislative intent was to create withholding obligation in respect of income which is taxable under section 28(iv) as it was escaping assessment due to the lack of a reporting framework. However, CBDT Circular seems to traverse beyond this realm and casts a vast net in which transactions likes reimbursements of expenses to business associates in normal course of business, small gifts/ mementoes given to business partners on special occasions and even a unilateral write back of liability in the books of accounts is caught.	a) The provision should be confined to the intent with which the section was introduced. b) As the point of taxation is not linked to the payment or credit in the books of accounts, there are a lot of practical challenges in identifying the exact point of time when the benefit/ perquisite has arisen and accounting for the same.

21.	**Disallowance under section 14A**	Share in profits of the LLPs is exempt in the hands of the Company holding investments in these LLPs. However, this represents an appropriation of profits which are already taxed in the hands of the LLP. Considering such profits and categorising it as 'exempt income' in the hands of the company owning the stake in such LLP is unfair and disallowing expenses according to the formulae put forth in Rule 8D amounts for double taxation. More so when the funds invested in these LLPs are strategic investments made out of own funds and there are no expenses directly attributable to making or maintaining such investments. Constituting the entity as an LLP is a commercial decision not borne out of the tax considerations and as such LLPs are taxed at a rate higher than Corporates. Hence considering the share of profits from LLP as exempt income and dis-allowing a rule-based expenses as a result is unfair.	Share in profits from entities which have already been taxed in those entities, should not be considered for 14A disallowance in the hands of the recipient company holding investment in such entities.

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