

# Amendments to Finance Bill, 2021

Presentation by:

Gautam Doshi

ICAI – WIRC

# Slump Sale – S. 50B

# Slump Sale – New Amendment – FMV

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- ❑ Fair market value of the undertaking would be deemed to be the full value of consideration accruing on the transfer of the undertaking. **Manner of computing FMV to be prescribed in Rules.**
  - Also retrospectively applied to transactions after April 1, 2020
  - Need of such an amendment ?
    - Undertaking is not a commodity like land, shares or securities
    - Tax avoidance ?
  - FMV – Rule 11UA or DCF ?
    - Examine itemized sale v. slump sale
  - Distinction between group re-structuring and sale to 3<sup>rd</sup> parties.
    - Reason for group restructuring is generally not to monetize the business but is for variety of other commercial, legal and regulatory considerations.
  
- ❑ Impact of the amendment on the investment climate in India

# Depreciation on Goodwill

# S. 43(6) – Block of Asset – Goodwill

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- ❑ Finance Bill proposed retrospective (w.e.f. FY 2020-21) disallowance of depreciation on goodwill. However, no amendment was made in S. 43(6) to exclude the component of goodwill forming part of the block of asset.
  
- ❑ S. 43(6) is proposed to be amended to provide a mechanism for excluding goodwill from the block of asset.
  - Value of goodwill to be reduced from the block of intangible asset would be calculated as if goodwill was the only asset in the block of asset and accordingly depreciation was claimed.
  
  - If the value so computed is more than the carrying value of the block of asset, the reduction would be restricted to the carrying value of the block of asset
  
  - No reduction is required from the carrying value of the block of asset if, goodwill is transferred in an earlier year.

# S. 43(6) – Block of Asset – Goodwill

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- Whether segregation of goodwill into its components is possible ? Would the components be eligible for depreciation ?
  - Areva T & D India Ltd. [2012] 20 taxmann.com 29 (Delhi HC) (SLP dismissed on merits)
  - CIT v. MIS Bharti Teletelch Ltd. [2015] 233 Taxman 238 (Delhi HC)
  - Saharanpur Electric Supply Co. Ltd. v. CIT [1992] 194 ITR 294 (SC)
- Why it was not done earlier ?
  - Didn't matter - *Reporting financial information imposes costs, and it is important that those costs are justified by the benefits of reporting that information* - Conceptual Framework for Financial Reporting under Ind AS
- Recast of goodwill in different intangibles in books is necessary ?
  - Kedarnath Jute Mfg. Co. Ltd. v. CIT [1971] 82 ITR 363 (SC)

# S. 43(6) – Block of Asset – Goodwill

## ❑ Illustrative list of other intangible asset

Brand Equity	Customer lists	Leasehold rights	Right to use any name for specified period
Brand Name	Customer loyalty	Loom hours	Scientific or technical knowledge
Business claims	Customer relationships	Market knowledge	Scientific research
Business information	Distribution network	Market share	Stage carriage permits
Business records	Domain Name	Mortgage servicing rights	Supplier relationships
Computer software	Export quotas	Motion picture films	Technology
Contracts	Import quotas	Non - compete	Tenancy rights
Customer base	Intellectual property	Publishing titles and mastheads	
Customer contracts	Internet Websites	Right to manufacture, produce or process any article or thing	

## ❑ Impairment of Goodwill ought to be allowed as business expenditure

# S. 43(6) – Block of Asset – Goodwill

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- ❑ Has explanatory memorandum accepted correctness of Smif Securities (SC) and therefore applicable to other intangible assets ?
  
- ❑ Oddities in drafting
  - Also requires reduction of depreciation claimed under 1922 Act. Depreciation on intangible was permitted only from AY 1999-20.
  
  - Recent Supreme Court ruling in the software case [Engineering Analysis Centre of Excellence (P.) Ltd. v. CIT [2021] 125 taxmann.com 42 (SC)]

*78. Furthermore, it is equally **ludicrous for the aforesaid amendment which also inserted** explanation 6 to Section 9(1)(vi) of the Income Tax Act, to apply **with effect from 01.06.1976**, when technology relating to transmission by a satellite, optic fibre or other similar technology, was only regulated by the Parliament for the first time through the Cable Television Networks (Regulation) Act, **1995, much after 1976.***



# Slump Sale – Goodwill

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- ❑ No amendment was proposed in the Finance Bill, 2021 introduced in Lok Sabha on February 1, 2021. Proposed **retrospective** amendments –
  - In computation of net worth of undertaking (i.e. cost of acquisition of undertaking for computing capital gains) – goodwill not acquired by purchase from a previous owner to be valued at nil.
    - Scope of the word purchase – mode of transaction
      - Barter or exchange ?
      - Compliant/non-compliant de-merger or merger – drafting as purchase may make a difference
      - Conversion of firm into company - Padmini Products (P.) Ltd. [2021] 277 Taxman 22 (Karnataka HC)
      - CIT v. T.N. Aravinda Reddy [1979] 120 ITR 46 (SC); Dhampur Sugar Mills Ltd. v. Commissioner of Trade Tax [2008] 2008 taxmann.com 1111 (SC)
    - **Should the distinction be between taxable/non-taxable transaction of acquisition ?**

# Slump Sale – Goodwill

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- Purchase of undertaking ? goodwill is a component – then what ?
  - PNB Finance Ltd. V. CIT [2008] 307 ITR 75 (SC)
  - CIT v. Artex Mfg. Co. [1997] 227 ITR 260 (SC)
- Preference to itemized purchase of an undertaking ?
  - GST – exemption ought to be available even in case of itemized sale of business

# Reconstitution or Dissolution of Partnership

# Withdrawal of asset other than money

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Charge in hands of firm on withdrawal/transfer of assets to partner (capital asset or S-I-T)

## Prior to FA 2021

- Capital Asset – S 45(4)
- S-I-T – No charge
  - Analogy from SC in Kikabhai Premchand [1953] 24 ITR 506 (SC)

## Post FA 2021

- Section 9B - charges withdrawal of both Capital Asset and S-I-T
  - Receipt v. distribution
- **Capital Asset** - Computation similar to erstwhile S 45(4) – based on FMV charge as LTCG or STCG
- **S-I-T - New charge** – (see separate slide)

# Post Finance Act, 2021

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- ❑ Charge Receipts by Partner (in form of money or capital asset) on reconstitution over and above capital balance – **New Sec 45(4)**
  - Charge as capital gains - LTCG or STCG?
  - Effectively charge profits of Partner in hands of the Firm
  - Does not refer to withdrawal of S-I-T
  - Increase in capital balance by revaluation of asset and from self generated goodwill and assets is to be excluded from capital balance

# Post Finance Act, 2021

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- ❑ S. 48(iii) – Mitigate double taxation on **subsequent** transfer of asset which is revalued and charged
  - Not achieved completely - Double taxation on account of -
    - Rate difference – tax under 45(4) charged @ 30%(?) whereas transfer of capital asset @ 20%
    - Cost step-up allowed only for capital assets and not stock-in-trade
  
- ❑ Reconstitution – now defined
  - Retirement of partner
  - Admission of new partner(s) accompanied by continuation of old partner(s)
  - Change in share of partner(s)
  
- ❑ Power to CBDT to issue guidelines to remove difficulty

# Example

Liabilities	Amt (BV)	Amt (FV)	Assets	Amt (BV)	Amt (FV)
<u>Capital</u>					
A	1.5	7.5	Land as capital asset	4	20
B	2.5	12.5			
C	0.2		Cash	0.2	0.2
	<b>4.02</b>	<b>20.02</b>		<b>4.02</b>	<b>20.02</b>

**A retires and takes his share by withdrawing land worth Rs. 4 and cash of Rs.3.5.**

# Example

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## Tax under New Section 45(4)

Value of money received by partner [B]	3.5
FMV of asset received by partner [C]	4.0
	<b>7.5</b>
Less: Balance in capital account [D]	(1.5)
<b>Profits or gains chargeable under the head Capital Gains [A]</b>	<b>6</b>
Tax @ 30%	1.8

Available  
as cost in  
future

$A = B + C - D$  (formula specified in the Act)



# Example

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## Tax under Section 9B – as per the provisions of the Act


FMV of asset received by Partner	4.0
Less: Cost of acquisition of the asset	(0.8)
<b>LTCG</b>	<b>3.2</b>
Tax @ 20%	0.64

Already  
charged to tax  
under New  
Sec 45(4)

# Example

## On future sale of balance land by partnership – Tax under Section 45(1)

Consideration	<b>16.0</b>
Less: Cost of acquisition [S 48(ii)]	(3.2)
<b>Less: Income charged under S 45(4) [S 48(iii)]</b>	<b>(6)</b>
Long Term Capital Gains	6.8
Tax @ 20%	1.36



Earlier  
taxed at  
30%

### Additional Cost

- Additional tax paid is rate differential of 10% on income charged under new S 45(4) –  $10\% * 6 = 0.6$
- Plus timing difference - preponement of tax

# Reconstitution of Partnerships – Issues S. 9B

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- ❑ Transfer of stock-in-trade is to be charged as business income. Is it a separate business (S. 70) ? What is the cost for this business ?
  - CIT v. Groz Beckert Saboo Ltd [1979] 116 ITR 125 (SC) – FMV – gift of stock in trade
  - CIT v. Bai Shirinbai K. Kooka [1962] 46 ITR 86 (SC) FMV – capital asset converted into SIT
  - CBDT Instruction No. 90, Dated 1-8-1969 – FMV agriculture land converted into N.A.
  
- ❑ S. 9B(2)(ii) – ‘chargeable’ as income under the head PGBP or capital gain – whether income would include loss ?

# Reconstitution of Partnerships – Issues S. 9B

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## ❑ Power to issue guideline

- Why new phrase ?
- S. 119(1) good enough ?
- Binding on taxpayer ?
  - Akin to a circular or a Rule/Notification
- Delegated legislation ?
- What difficulty will the tax payer have ? Double taxation ?
  - CIT v. B.C. Srinivasa Setty [1981] 128 ITR 294 (SC)

# Reconstitution of Partnerships – Common Issues

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## □ Reconstitution

- Reconstitution ‘means’ – specific definition – restricted to specified scenarios
- Scenarios not covered
  - only introduction and withdrawal of capital without change in share of profit/loss
  - Change of powers between partners
- Whether only a change in loss sharing ratio is covered ? ‘change in share’
- Whether change in remuneration or interest on capital tantamount to reconstitution ?
  - CIT v. R.M. Chidambaram Pillai [1977] 106 ITR 292 (SC) – remuneration to partner regarded as manner of payment of share of profit.
- What if the share of profit/loss is based on ratio of balance in the fixed capital account or current capital account or both ?

# Reconstitution of Partnerships – Common Issues

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- ❑ Transfer of asset has to be ‘in connection with’ reconstitution –
  - What if the withdrawal of asset by a partner from the partnership firm is after a significant time from the reconstitution of the firm ?
    - E.g. Cash brought in by the new partner is withdrawn by the old partner after one year of admission of a new partner
    - If transfer of asset to the partner is not in connection with reconstitution – no tax ?
  
- ❑ What if interest in partnership (whole or part) is transferred directly by an existing partner to the new partner/existing partner ?
  - Anik Industries Ltd. [2020] 116 taxmann.com 385 (Mumbai - Trib.)
  - Cost of acquisition – not determinable ?
    - Sunil Siddharthbhai v. CIT [1985] 156 ITR 509 (SC)

# Reconstitution of Partnerships – Issues S. 45(4)

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- ❑ Tax on withdrawals on reconstitution over and above capital balance would be taxable – LTCG or STCG or none (failure of machinery provision) ?
  - Tax rate ? (does not specify the capital asset giving rise to the gain)
  - Transfer of capital asset ? Which is the capital asset ? Interest in partnership ?
  - Set-off of long/short term capital loss ?
  
- ❑ S. 45(4) – charge is missing – only deems the withdrawal to be income chargeable under the head capital gains and does not deem the withdrawal to be ‘capital gain’ i.e. included in the definition of income u/s 2(24).
  - The legal fiction enacted in a section must be taken to its logical conclusion - Life Insurance Corporation of India v. CIT [1996] 219 ITR 410 (SC)
  
- ❑ ‘gain from receipt of such money shall be chargeable’ – reference to capital asset is missing

# Reconstitution of Partnerships – Issues S. 45(4)

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- ❑ S. 45(4) – charge on profit and gains – whether there should be profit and gain in general parlance to trigger the computation provision to determine the quantum of capital gain ?
  - Addanki Narayanappa v. Bhaskara Krishtappa and 13 Ors. AIR 1966 SC 1300
  - UOI v. A. Sanyasi Rao & Ors. [1996] 3 SCC 465 (3 judge)
  - K.P. Varghese v. ITO [1981] 131 ITR 597 (SC)
  - Malabar Fisheries Co. v. CIT [1979] 120 ITR 49 (SC)
  
- ❑ Whether balance in reserve or profit and loss account to be considered in computing partners capital ?
  
- ❑ What if negative capital balance is forgone at the time of retirement ?



# Reconstitution of Partnerships – Issues S. 45(4)

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- ❑ Revaluation of asset to be ignored for determining balance in capital account
  - Write back of liability is not covered
  - If asset is bought cheap can it be recorded at fair value ? Support – Ind AS
  - Whether recoding of scrap for the first time at FMV ? self generated asset ?
  
- ❑ S. 45(4) is not applicable to transfer of stock-in-trade – e.g. bullion.
  
- ❑ Firm is liable to tax on retrospective basis and not the partner
  
- ❑ Value of asset in the hands of the partner ?
  - Smt. Laxmi Jain v. DCIT [2004] 1 SOT 358 (Mum T)
  - CIT v. Bai Shirinbai K. Kooka [1962] 46 ITR 86 (SC)
  - Justified as tax is paid by the firm which is equal to tax paid by partner – as good as purchased from tax paid profits

# Definition of liable to tax

# Liable to tax

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- ❑ Finance Bill, 2021 proposed to define the term ‘liable to tax’ primarily for S. 6 to mean that the person is liable to income tax in the country of residence/domicile even though after imposition of the levy, the assessee is subsequently exempted from the levy.
- ❑ Clarification – to be tested with reference to specific “country”
- ❑ Clarification – tax liability in respect of income tax to be considered and not any other tax (say GST or VAT)
- ❑ Concerns that continue –
  - Applicability of the definition to DTAA (static v. ambulatory approach)
  - Union of India v. Azadi Bachao Andolan [2003] 263 ITR 706 (SC)
  - DTAA benefit to fiscally transparent entity ?
  - Problem for Indian citizen employed in countries that do not have a tax – e.g. Oman, Qatar

# Liable to tax – serves the purpose ?

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- ❑ Intention – to tax ultra high networth Individual becoming non-resident due to time spent abroad.
- ❑ Citizenship of about 10 countries is available by making an investment in that country of ~ Rs. 1 crore.
  - The Ultra HNI would explore the option of giving up Indian Citizenship
  - Earn nominal income in the country of residence – such countries are not likely to levy income tax or only tax income earned in that country (territorial taxation)
- ❑ Similarly a person becomes a UK resident if the person owned or rented a home for at least 91 days and has spent at least 30 days in UK
  - Non-dom taxation – only UK source income (or foreign income remitted to UK) is taxable in UK

# Other Key Amendments

# Individual Taxation & Small Tax Payers

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- ❑ The proposed limit for exemption of interest earned on PF deposit – Rs. 2.5 lacs, is relaxed to Rs. 5 lacs for taxpayers wherein no contribution is made by the employer.
- ❑ Gain on transfer of ULIP not eligible for exemption u/s 10(10D), subject to payment of STT would be taxable u/s 112A @ 10%
- ❑ S. 44AB – for taking benefit of higher limit of Rs. 10 crores – payment or receipt through cheque other than account payee cheque would be considered as receipt through cash.
- ❑ S. 44ADA – reference to HUF in the definition of eligible assessee proposed the Finance Bill is removed. Now only Individual and Partnership Firm (other than LLP) eligible.
- ❑ Fee for delayed return reduced to Rs. 5,000 from Rs. 10, 000 (S. 234F)
- ❑ Fees of Rs. 1,000 for not linking Aadhaar with PAN (S. 234H)

# Government Companies

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- ❑ 10 years exemption to any income of the institution established for financing the infrastructure and development.
  - Transfer of capital asset by India Infrastructure Finance Company Limited to the said financing institution would be exempt u/s 47(viaae). Also, S. 56(2)(x) will not apply to such transfer.
  
- ❑ 5 years exemption to any income of a development financing institution licensed by RBI. [C.G. power to grant further exemption for 5 years]
  
- ❑ Transfer of capital asset by a public sector company to another public sector company would be exempt u/s 47(viaaf). [CG to notify such exempt transaction]. Also, S. 56(2)(x) will not apply to such transfer.

# Returns & Assessment

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- ❑ Re-opening cannot be done pursuant to a TDS survey or survey at a ceremony.
  
- ❑ Strict test to trigger extended period u/s 147 –
  - Books of accounts or other documents or evidence
  - Reveal that the income chargeable to tax
  - Represented in the form of asset
  - Has escaped assessment
  
- ❑ The word 'asset' [test of Rs. 50 lacs] is defined to include immovable property, being land or building or both, shares and securities, loans and advances, deposits in bank account.
  - Reason for definition ?
  - Jewellery, bullion, cash – not specifically mentioned



# Returns & Assessment

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## ❑ Correction in drafting

- Revised return and belated to return to filed on or before 31<sup>st</sup> December of the Assessment Year. [Possible interpretation of the earlier drafting - revised return and belated to return to filed in between 1<sup>st</sup> January and 31<sup>st</sup> March of the Assessment Year.]

## ❑ Clarification – S. 147 – reference to requisition means requisition u/s 132 and 132A

## ❑ In case of withdrawal of application to Settlement Commission – AO will get one year to complete the assessment, if the time period left for completing the assessment is less than one year.

# Financial Sector

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- ❑ AIF taxation regime (Cat I & II) earlier applicable to AIF approved by SEBI would now also apply to AIF (Cat I & II) approved by IFSC Authority.
- ❑ The proposed benefit of no tax on relocation of foreign fund to IFSC and no tax on subsequent transfer of shares in Indian Company (subject to conditions) is also extended to Indian AIF relocating to IFSC and to a SPV of the foreign fund.
- ❑ Fund Manger - dividend income from GDRs in an IFSC and GDR listed on IFSC – tax rate 10% (S. 115ACA)

# Aircraft leasing

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- ❑ Interest income of a non-resident on lease of aircraft by an unit located in IFSC is also exempt (Finance Bill had only proposed an exemption for royalty income). Also, the requirement of IFSC unit eligible for S. 80LA deduction is removed.
  - The phrase 'aircraft' is now defined to include helicopter and any part thereof – does not include satellite or spacecraft.
- ❑ S. 80LA deduction on transfer of aircraft extended to transfer of aircraft to any person (Finance Bill had proposed to grant the deduction only on transfer of aircraft to domestic companies)
- ❑ No clarity on GST liability in case of aircraft leasing

# MAT – APA

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## □ Clarification

- The application for recomputation of book profit – if the MAT credit has not been subsequently utilized.
- The benefit of the Section also available for earlier assessment year
- No interest on refund of income tax arising on account of this section.

Thank You