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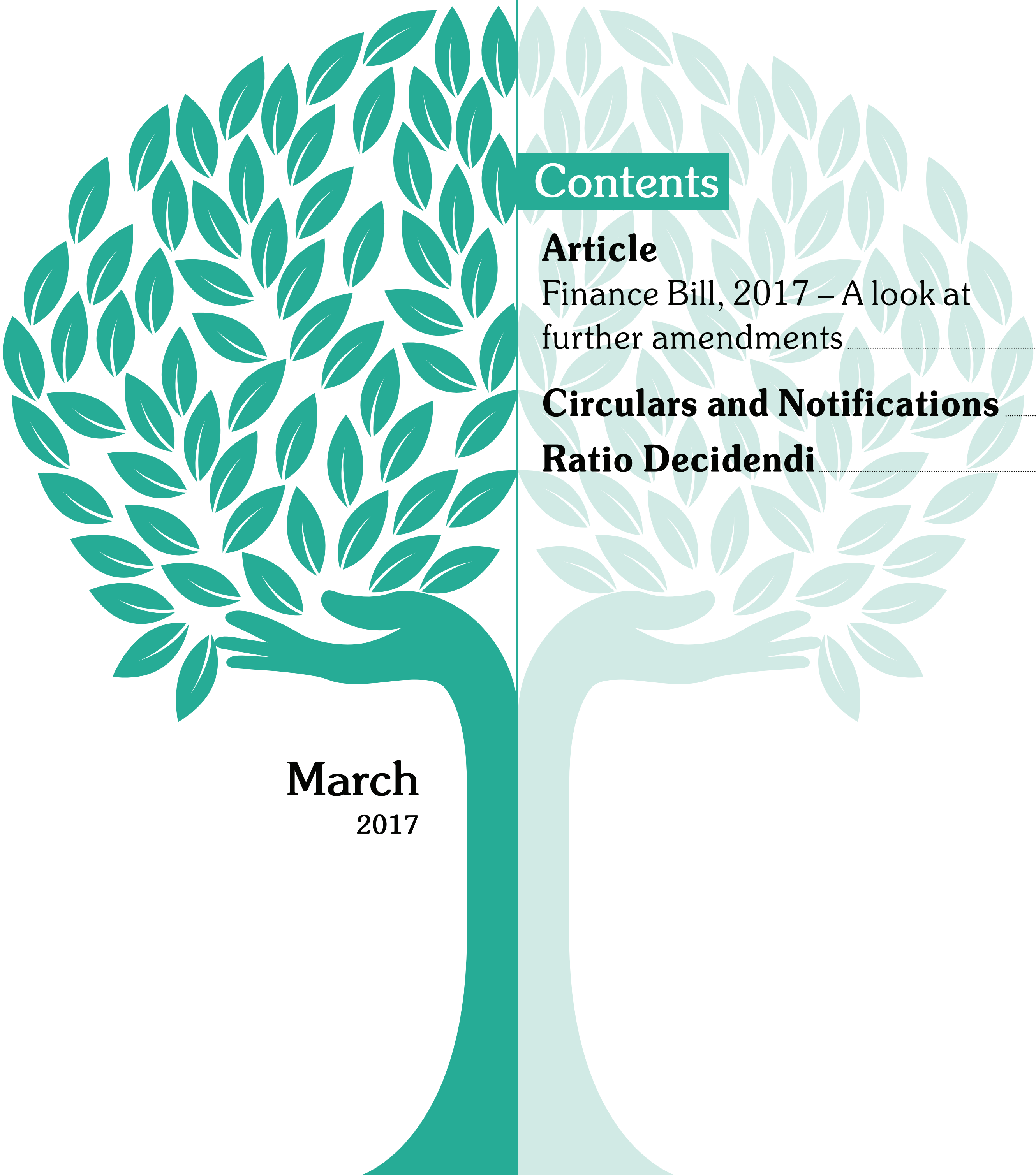

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Finance Bill, 2017 – A look at further amendments

By **Subhashree & Shashank Sharma**

This year's Budget was different in many ways. While the Finance Minister opted to present it on 1st February and departed from the decades-old tradition of presenting it on the last day of February, it also saw the merger of the rail budget alongside. The changes in this budget have been significant ranging from introduction of new international tax provisions like thin capitalization, secondary adjustments norms to rationalization of period of holding of capital assets, imposition of cash transaction limits and amendment in taxation of joint development agreements.

To add to these, at the time of passing of the Finance Bill, 2017 on 23rd March, a few more amendments to the Income-Tax Act, 1961 ('the Act') have been moved in the Lok Sabha (Lower House of the Parliament). This write-up intends to take the readers through a quick sojourn of these amendments.

Indirect Transfer Rules not to apply

For the purposes of providing ample clarity to foreign investors two provisos have been inserted to Explanation 5 of Section 9(1) of the Act. The provisos specify non-applicability of provisions of indirect transfer under Section 9(1)(i) of the Act on certain category of investors like foreign institutional investors (FIIs) and foreign portfolio investors (FPIs). While the first proviso deals with FIIs for investments made between 1st April, 2012 to 31st March, 2015, the second proviso provides exception to assets held by FPIs [as provided under SEBI (Foreign Portfolio Investors) Regulations, 2014]. The inclusion of FIIs and FPIs has been made to provide ample clarity of non-applicability of provisions of indirect transfers since its very inception i.e. from 1st April, 2012.

Income or property received from a trust

The application of newly inserted clause (x) to Section 56(2) of the Act has been restricted and shall not apply in case of receipt of money or property received by a trust from an individual wherein the trust has been created or established solely for the benefit of the relative of the individual. Prior to this amendment, the Finance Bill, 2017, had proposed to bring into tax all cases of money or property received by the trust with no such exception.

Thin Capitalization

A new Section 94B has been proposed to be introduced in the Act *vide* Finance Bill, 2017. It provides for restriction on interest payout by an Indian company or PE of a foreign company in India as specified percentage of EBITDA. The language of the section has been amended by replacing the word '*pays interest*' with '*incur interest*'. The term used in the final version of the Finance Bill, 2017, reads as '*incurs any expenditure by way of interest or of similar nature*'. Thus, by doing so it seems to have included the act of accrual of interest expense in the ambit of calculation of specified percentage.

Quoting of Aadhaar Number

A new Section 139AA has been inserted which requires compulsory quoting of Aadhaar number. It provides that from 1-7-2017 every person eligible to obtain Aadhaar number shall quote such Aadhaar number on the (i) application form of PAN; and (ii) Return of Income. However, where the applicant for the PAN or the person filing the return of income does not have Aadhaar number then the Enrolment ID of the Aadhar application form will suffice. Further, persons having PAN as on 1-7-2017 are required to intimate the Aadhaar number on or before the date to be notified by the Central government to the prescribed authority. On failure to do so, the PAN will be deemed invalid as if the person had not applied for allotment of PAN. Further, penal provisions have also been introduced for non-compliance of the same.

TCS not applicable on cash sales of goods including bullion or jewellery and services

In view of insertion of a new section viz., Section 269ST, the Finance Bill, 2017 has omitted sub-section 1D and 1E of Section 206C of the Act. Section 206C(1D) of the Act provided that a seller, who receives any amount in cash as consideration for sale of bullion or jewellery [or any other goods (other than bullion or jewellery) or providing any service], shall, at the time of receipt of such amount in cash, collect from the buyer, a sum equal to 1% of sale consideration as income tax. Therefore, in view of the new Section 269ST, the compliance under Section 206C(1D) & (1E) of the Act has been done away with.

Ceiling on receipts in cash

The new Section 269ST provides that the maximum amount a person may receive in cash from another person in a day or in respect of a single transaction or in respect of transactions relating to one event or occasion from a person should not exceed INR 2 Lakhs. The limit has been revised from proposed Rs 3 Lakhs to Rs 2 Lakhs.

Overall, it appears that the government is intent on making tax avoidance more difficult so as to improve compliance levels which may ultimately result in more revenue from the direct tax side given the uncertainty over the potential revenue that may accrue after introduction of GST on the indirect tax side.

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Circulars and Notifications

CBDT issues guidelines for granting reduction/waiver of interest charged under Section 201 (1A)(i)

By Circular No. 11/2017 dated 24-3-2017, the CBDT has directed that the Chief Commissioner of Income Tax or Director General of Income Tax may reduce or waive interest charged under Section 201 (1A)(i) for non-deduction of TDS or failure to pay the tax as required. One of the conditions for granting waiver is that the principal demand should have been fully paid or satisfactory arrangements to pay the same have been made. The Chief Commissioner or Director General may impose additional conditions for reduction or waiver of interest. The Circular also lists class of cases which may be considered including inability to comply with TDS provisions on account of seizure of books of accounts or documents necessary for making deduction, under Section 132, where sum paid/payable was not liable for deduction in terms of order of jurisdictional High Court but became deductible on account of retrospective amendment of law or a decision of Larger Bench of the High Court or the Supreme Court and where dispute has been settled by way of Mutual Agreement Procedure (MAP) and the person in default has accepted the resolution. The Circular further directs that even if the interest has been paid, refund can be given to the deductor if waiver is ordered. The authorities concerned have to pass a speaking order after examining the application for waiver.

Amendment to India-Israel DTAA notified

Amendments to the Convention and the Protocol between the Government of the Republic of India and the Government of the State of Israel incorporating provisions for taxing indirect share transfers (in Article 1), provide enabling provisions for exchange of information (in Article 27) and Limitation of Benefits clause restricting benefit from the benefits of the convention in case of anti-avoidance arrangements, have been notified by way of Notification No. 10/2017 dated 14-2-2017.

Ratio decidendi

Payment to seconded employees with high managerial skills taxable as FTS

The assessee received reimbursement of salary costs of its certain employees it had deputed to Bangalore International Airport (BIAL). As per the Expatriate Remuneration Reimbursement Agreement, the seconded employees were in direct control of BIAL and there was separate correspondence between BIAL and the assignees accepting the terms of employment with BIAL. However, the department argued that the relationship between the assessee and the assignees continued to exist in as much as the assignees continued to receive remuneration in foreign currency from the assessee and the payment was taxable as FTS since the assignees had expertise in the field of management. The assessee however argued that the seconded personnel were employees of BIAL and in order to be taxable as FTS, the services must be rendered by technical persons. Agreeing with the department the Tribunal held that once the payment is held to be for managerial services, there was no need to examine the provision of service by technical or other personnel and hence, the payment was taxable as FTS. [*Flughfen Zurich AG* v. *DCIT (Int. Taxn)*, [2017] 79 Taxmann.com 199 (Bangalore - Trib.)]

Payment for advertising and marketing rights not taxable as royalty

At issue was the taxability of payment 'rights fee' made by the assessee, a sportswear major for 'certain promotional, advertising, marketing and other commercial rights on a world-wide basis in connection with the ICC events'. The assessee was official partner with ICC for various events and was permitted to use ICC's corporate logo, competition logo and designations. It received a package of 21 rights including right to internet promotion, backdrops, commercial air time and right to tickets in-stadia video screens. One right pertained to use of the mark in connection with manufacture and sale of licensed products. The assessee did not deduct tax at source on rights fee. It had also made separate payment towards royalty on sale of licensed products. The department contended the payment towards use of/right to use marks was taxable as royalty. However, the Tribunal held that payment for advertisement and publicity by the assessee during the ICC events, with or without the use of marks or identification is not taxable as royalty. It also held that as regards the right to use marks in sale of licensed product which could be covered under the term royalty, since there was no mechanism to bifurcate the composite payment among the 21 rights, no part of the fee was attributable to this right and be taxed as royalty. Hence there was no case for disallowance of expenditure on account of non-deduction of TDS. [*Reebok India Company* v. *DCIT*, [2017] 79 taxmann.com 271 (Delhi - Trib.)]

Non-resident bank qualified to perform FII activities in India is eligible for exemption under India-Mauritius DTAA

The assessee was a foreign company registered as a bank in Mauritius and as an FII in India. The AO noted that the assessee had earned certain interest income which the assessee claimed as exempt income. The AO denied the claim of the assessee and proposed to levy tax as per Section 115AD of the Income Tax Act, 1961. According to the AO, interest is not exempt because it is not derived from banking activities in India. Applying literal interpretation to the words 'derived from' and 'bona fide banking activities' as appearing in Article 11 (3)(c) of India-Mauritius DTAA, ITAT concluded that it is not appropriate to link the expression of 'derived' to the banking activities or the FII activities and it is appropriate to relate the said expression to 'any bank' used in Clause (c) of Article 11 (3) of the DTAA. Thus, it was held that the assessee who earned interest income out of bona fide banking activities was eligible for exemption. [*HSBC Bank (Mauritius) Ltd* v. *DCIT*, (2017) 78 taxmann.com 174 (Mum-Tri)]

Amounts which are otherwise not taxable under normal provisions of the Act cannot be held to be taxable for the purposes of Section 115JB.

The assessee had availed various rupee denominated and foreign currency denominated loans (including buyers' credit) for setting up its integrated steel plants and since the assessee was reeling under huge losses a debt restructuring package was implemented and certain loan waivers were sanctioned. The assessee contended that the waivers comprised of both principal and interest component and since the principal component was used to set up the steel plants, the same constituted capital receipts. As regards the interest payable, the assessee contented that some portion of the interest was not claimed as deduction due to the provisions of Section 43B and hence the same is not offered as income under Section 41(1) of the Act. With regard to their exclusion from book profits, the assessee contended that the loans were taken for acquiring capital assets and hence constituted capital receipts. The assessee relied on Accounting Standards and on the Apex Court ruling in *Indo Rama Synthetics* to the effect that, what is to be construed for the purposes of Section 115JB is only working profits and not capital profits. The assessee also argued that only if an amount is income under Section 4 the same can be held to be liable under Section 115JB. The department argued that when an item of receipt is disclosed by the assessee itself in its Profit and Loss Account, then the department cannot alter it for the purposes of Section 115 JB and placed reliance on the Apex Court Ruling in *Apollo Tyres*.

The Mumbai Tribunal, agreed that waiver cannot be subject to tax under Section 41(1). The Bench also observed that it was never the intention of Section 115JB to tax receipts that were otherwise not taxable at all under any provisions of the Act. Upon a harmonious reading of the provisions of the Companies Act, 1956 it concluded that what is required is only to *disclose* extraordinary or non-recurring items and the item of gain on account of waiver of loan should ideally be credited to the Capital Reserve account so that the same is not available for distribution of dividend. The Bench also referred to the relevant accounting standards which clearly (under AS-9) laid down that discharge of an obligation at less than fair value would not be revenue. The Standard (AS-5) also required disclosure to be made with regard to extraordinary items. The Bench, thus held that amounts representing waiver of loan, both revenue and capital which is not deemed income under Section 41(1) cannot be held to be taxable for the purposes of Section 115JB. [*JSW Steel Limited* v. *ACIT*, ITA No.923/Bang/2009, ITAT, Mumbai Order dated 13-1-2017]

Payment for use of standard facility in nature of reimbursement is not royalty

The assessee made payments to its group company towards information system support services which were billed at cost to the assessee and thus the assessee claimed that these expenses were in the nature of reimbursements. The Assessing Officer rejected the stand of the assessee and held that major portion of the payment was for the use or right to use, industrial, commercial or scientific equipment while the remaining cover the use of various processes for which access has been granted to the assessee and thus the Assessing Officer held that tax ought to have been deducted at source. The ITAT held that the payments were in the nature of reimbursement and that the same cannot be seen as payments for right to use an equipment. The Court observed that even if the services involved use of equipment that by itself does not vest right in the assessee to use the equipment. The Bench also observed that even if portion of the consideration is attributable for use of equipment, it is not possible or practicable to assign monetary value to each of that economic activity and consider that amount in isolation for deciding the character of the payment. [*DCIT* v. *Bombardier Transportation India P. Ltd.*, 77 taxmann.com 166 (Ahmedabad)]

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