Parveen Kumar Bansal, Advocate
Ex. Vice President ITAT
parveen_bansal34@yahoo.com

CA Gaurav Bansal
Practicing Chartered Accountant
gaurav.bansal@sgvb.com

Higher Tax Rate on Income in view of amended Section 115BBE by the Taxation Laws (Second Amendment) Act, 2016 – Whether retrospective?

1. INTRODUCTION:

1.1. The Taxation Laws (Second Amendment) Act, 2016 (No. 48 of 2016) was passed by the Hon'ble Lok Sabha of India on 29.11.2016 i.e. after the demonetization of legal tender of Rs. 500/- and Rs. 1,000/- was launched by our Hon'ble Prime Minister on 08.11.2016. The said Second Amendment Act, 2016 received the assent of the President on the 15th December, 2016 and the section 115BBE of the Income tax was substituted by a new section 115BBE w.e.f. 1st April, 2017. Prior to the amendment of Section 115BBE, it was as under: -

"(1) Where the total income of an assessee includes any income referred to in section 68, section 69, section 69A, section 69B, section 69C or section 69D, the income-tax payable shall be the aggregate of—
(a) the amount of income-tax calculated on income referred to in section 68 , section 69, section 69A , section 69B , section 69C or section 69D , at the rate of thirty per cent; and
(b) the amount of income-tax with which the assessee would have been chargeable had his total income been reduced by the amount of income referred to in clause (a)."

1.2. By the Taxation Laws (Second Amendment) Act, 2016, the substituted section is as under: -

"(1) Where the total income of an assessee,—
(a) includes any income referred to in section 68, section 69, section 69A, section 69B, section 69C or section 69D and reflected in the return of income furnished under section 139; or
(b) determined by the Assessing Officer includes any income referred to in section 68, section 69, section 69A, section 69B, section 69C or section 69D, if such income is not covered under clause (a),

the income-tax payable shall be the aggregate of—
(i) the amount of income-tax calculated on the income referred to in clause (a) and clause (b), at the rate of sixty per cent.; and
(ii) the amount of income-tax with which the assessee would have been chargeable had his total income been reduced by the amount of income referred to in clause (i)."

2. INSERTION OF SECTION 115BBE IN THE ACT BY FINANCE ACT, 2012 AND THE CHANGES IN SUB-SECTION (1) OF SECTION 115BBE BY THE SECOND AMENDMENT ACT, 2016:

2.1. Section 115BBE was first introduced in the Income tax Act, 1961 by the Finance Act, 2012 which was designed to impose higher tax burden on the assessees' who fail to explain the nature of source of their income, expenditure, investments etc. with the object to curb the black money and penalise the assesses for evasion of tax. It is apparent from the budget speech of the Hon'ble Finance Minister on 16th March, 2012 as reproduced below: -

"155. I propose a series of measures to deter the generation and use of unaccounted money. To this end, I propose,

…………………
Taxation of unexplained money, credits, investments, expenditures etc., at the highest rate of 30 per cent irrespective of the slab of income."

In the Explanatory Memorandum, it was stated that,

> *"Under the existing provisions of the Income-tax Act, certain unexplained amounts are deemed as income under section 68, section 69, section 69A, section 69B, section 69C and section 69D of the Act and are subject to tax as per the tax rate applicable to the assessee. In case of individuals, HUF, etc., no tax is levied up to the basis exemption limit. Therefore, in these cases, no tax can be levied on these deemed incomes if the amount of such deemed income is less than the amount of basic exemption limit and even if it is higher, it is levied at the lower slab rate.*
>
> *In order to curb the practice of laundering of unaccounted money by taking advantage of basic exemption limit, it is proposed to tax the unexplained credits, money, investment, expenditure, etc., which has been deemed as income under section 68, section 69, section 69A, section 69B, section 69C or section 69D, at the rate of 30% (plus surcharge and cess as applicable). It is also proposed to provide that no deduction in respect of any expenditure or allowance shall be allowed to the assessee under any provisions of the Act in computing deemed income under the said sections."*

2.2. By the Taxation Laws (Second Amendment) Act, 2016 which got its **assent from the Hon'ble President of India on 15th December, 2016**, there are two changes which have been made in section 115BBE: -

(i) Earlier, where the total income of the assessee included any income referred to in section 68, 69, 69A, 69B, 69C and 69D of the Income tax Act could be taxed u/s 115BBE of the Income tax Act. However by the substituted section, it has also included a case where the total income *includes any income referred to in section 68, section 69, section 69A, section 69B, section 69C or section 69D and* ***reflected in the return of income furnished under section 139***.

Comments: A person in its return do not show the income taxable u/s 68 (Unexplained Cash Credit), 69 (Unexplained Investment), 69A (Unexplained money), 69B (Amount of Investments, etc. not fully disclosed in books of account), 69C (Unexplained expenditure etc.) or section 69D (amount borrowed or repaid on hundi) of the Act. Generally, it is the income which is added by the assessing officer by applying any of these sections, which could be taxed u/s 115BBE of the Act as per the earlier section.

It can be a view that earlier also the assessee could offer its income by applying sections 68, 69, 69A, 69B, 69C or 69D which could also be brought to tax under this section. It is true that there is no restriction under the law on the assessee to not offer any income under any of these sections but practically there are no such cases found where the assessee offers the income under any of these sections itself. Generally it is only in the cases of survey, search or reopening of assessment where the additional income is offered by the assessee under any of these sections. If the income is not offered under these sections and the assessment is made by the assessing officer by considering the income offered by the assessee as income covered under any of these six sections, that income would be taxable at the higher rate. However, earlier it was not clear from the section whether to cover such cases or not.

The amendment is to cover the cases where the income is offered by the assessee itself in its return as covered under any of the six sections. There may be a case where there is a survey, search or reopening of assessment and in the return of income filed subsequently, the assessee offers the additional income under any of these sections. In such cases, the tax would be levied on the assessee u/s 115BBE of the Act.

Thus, the amendment is made to clearly tax the income at a higher rate in all the cases where the income is assessable under sections 68, 69, 69A, 69B, 69C or 69D of the Act whether the income is offered by the assessee itself in its return under any of these six sections or the assessment is made by the assessing officer under these sections.

(ii) The second change which has been brought in section 115BBE is that such income which has been considered as income by invoking sections 68, 69, 69A, 69B, 69C or 69D of the Income tax Act shall be taxable at sixty percent though earlier it was taxable at thirty percent.

Comment: The said amendment was brought by the Taxation Laws (Second Amendment) Act which is passed by the Lok Sabha on 29th November, 2016 i.e. after 08.11.2016 with effect from which the currency of Rs. 500/- and Rs. 1000/- did not remain legal tender. This amended bill was assented by the Hon'ble President on 15.12.2016. The purpose and the object of the Government of India is to levy higher tax on the amounts which would be considered as taxable income invoking sections 68, 69, 69A, 69B, 69C or 69D in future due to the deposit of unaccounted currency as a result of demonetization or any other mode of unexplained income, expenditure or investment to avoid tax on it.

3. IMPACT OF THE SUBSTITUTION OF SUB-SECTION (1) OF SECTION 115BBE AND THE QUESTION OF ITS APPLICABILITY FOR ASST. YEAR 2017-18:

3.1. Due to the substitution of subsection (1) of section 115BBE of the Income tax Act, the **income whether offered by the assessee in its return of income or not under these six sections and considered as income by the assessing officer** invoking any of the sections 68, 69, 69A, 69B, 69C or 69D, has become taxable at a higher rate of tax. The amendment was brought to plug the loophole of taxing the unexplained cash in demonetized currency at 30% u/s 115BBE at the earliest otherwise the defaulting assessee would give tax at 30% and convert its 70% black money / unaccounted money as 'White Money'.

3.2. However, the question that arise is "Whether the tax u/s 115BBE at a higher rate can be levied on income considered by the assessing officer as taxable under these sections as per the amended section, even though it was assumed to be the income of the assessee prior to the date when the Bill was passed by the Parliament on 29.11.2016 under Article 110 of the Constitution of India or when the assent was given by the President of India under Article 111 of the Constitution of India i.e. on 15.12.2016?"

3.3. The Hon'ble Prime Minister of India declared on 08.11.2016 that after 12 am on 08.11.2016, Indian Currency Rs. 500/- and Rs. 1000/- notes will not be the legal tender. Due to several developments in the country subsequent to 08.11.2016, the government feared that the persons may use section 115BBE as a tool to convert their black money by paying 30% tax and therefore, the amendment was made in section 115BBE to tax the income at a higher rate of 60%.

3.4. A bill is a legislative proposal which is brought before the two houses of the Parliament of India. A bill is the draft of a legislative proposal, which, when passed by both houses of Parliament and assented to by the President, becomes an Act of Parliament. By the Taxation Laws (Second Amendment) Act, 2016, which was passed by the Parliament on 29.11.2016 and got its assent from the Hon'ble President on 15.12.2016, the tax rate as per section 115BBE was increased from 1.4.2017 i.e. applicable from the financial year 2016-17. Prior to the said Amendment Bill which became an Act on 15.12.2016, the tax was leviable at 30% on the income covered u/s 68, 69, 69A, 69B, 69C or 69D of the Act. Subsequently the tax was charged at 60%. Every year, the Finance Bill is introduced in the budget session and is tabled before the Lokh Sabha on 1st February (Earlier last day of February) for the coming financial year relevant to the assessment year commencing on the next year 1st April. **Thus, beforehand, the public knows the provisions which are to be introduced for the coming financial year starting from the 1st April of the same year in which the bill is tabled before the Parliament.**

3.5. In the case of Section 115BBE, there was no amendment proposed by the Finance Bill, 2016 which was presented before the Lokh Sabha on 29th February 2016 for the Asst. Year 2017-18 for increase in tax rate. **It was only as per the Second Amendment Act, the tax rate was increased from 30% to 60%.** In the Statement of Objects and Reasons accompanying the Taxation Laws (Second Amendment) Bill, 2016, it was stated that,

> *"Evasion of taxes deprives the nation of critical resources which could enable the Government to undertake anti-poverty and development programmes. It also puts a disproportionate burden on the honest taxpayers who have to bear the brunt of higher taxes to make up for the revenue leakage. As a step forward to curb black money, bank notes of existing series of denomination of the value of five hundred rupees and one thousand rupees (hereinafter referred to as specified bank notes) issued by the Reserve Bank of India have been ceased to be legal tender with effect from the 9th November, 2016.*

*2. **<u>Concerns have been raised that some of the existing provisions of the Income-tax Act, 1961 could possibly be used for concealing black money. It is, therefore, important that the Government amends the Act to plug these loopholes as early as possible so as to prevent misuse of the provisions. The Taxation Laws (Second Amendment) Bill, 2016, proposes to make some changes in the Act to ensure that defaulting assessees are subjected to tax at a higher rate and stringent penalty provision."</u>***

3.6. Thus, the object of the change in section 115BBE was to tax such income at a higher rate which arise to the assessee due to the deposit of bank notes declared as no legal currency after 08.11.2016 to penalise such assesses and to avoid such persons to take advantage of section 115BBE which earlier restricted the tax at 30% particularly when the tax under the Income Disclosure Scheme was 45%. The general view at the time of demonetisation was that the undisclosed income held in the form of demonetization currency can be deposited in the banks and can be offered to taxation under the specified six sections and the tax thereon could be paid at the rate mentioned in section 115BBE (as stood before last amendment) i.e. 30% plus applicable surcharge and cess. No penal provisions were attracted if these amounts are declared in the respective returns of income. However, if the same are not reflected in the return of income, the penalty shall be levied u/s 271AAC @ 10%. This section was also introduced by the Second Amendment Act, 2016 w.e.f. 1st April 2017.

3.7. It is a settled law that for the purpose of the assessment of the income of the assessee, the Act which is applicable on the first day of the financial year for which the income is to be assessed will be applicable. The second amendment was made effective from the 1st day of April, 2017 i.e. it is applicable for the Asst. Year 2017-18. When an amendment is made retrospectively, it should specifically state the date from which the said section would be applicable. Even though it has been mentioned that the section would be applicable w.e.f. 1st April 2017 i.e. w.e.f the Asst. Year 2017-18, the question is whether the legislation has the right to make a retrospective amendment in a case which modifies the rights of the assessee, imposes additional liability or create new liability.

3.8. The Hon'ble Apex Court in the case of **Karimtharuvi Tea Estate Ltd Vs. State of Kerala [1966] 60 ITR 262 (SC)** has observed that "*the Income-tax Act, **<u>as it stands amended on the first day of April of any financial year must apply to the assessments of that year. Any amendments in the Act which come into, force after the first day of April of a financial year, would not apply to the assessment for that year, even if the assessment is actually made after the amendments come into force.</u>***"

3.9. A statute is retrospective when it takes away or impairs any vested right acquired under the existing laws, or creates a new obligation, or imposes a new duty, <u>or attaches a new liability in respect of transactions or considerations already past</u>. In respect of the scope and ambit of an amending legislation and its retrospectivity, every litigant has a vested right in substantive law but no such right exists in procedural law.

3.10. In the case at present, **<u>the increase in the tax rate as per section 115BBE is not a procedural change but substantive change which cannot be retrospective</u>**. Recently the Hon'ble Gujarat High Court in the case of **Anil Kumar Gopikishan Agarwal Vs. ACIT [2019] 418 ITR 25 (Gujarat)** observed in respect of the applicability of section 153C post amendment that *"While it is true that section 153C is also a machinery provision for assessment of income of a person other than the person searched, in the opinion of this court, this is not a case where by virtue of the amendment, there is merely a change in the procedural provisions affecting the assessees who were covered by the unamended provision. By the amendment, a new class of assessees are sought to be brought within the sweep of section 153C, which affects the substantive rights of the assessees and cannot be said to be a mere change in the procedure. Since the amendment expands the scope of section 153C by bringing in an assessee if books of account or documents pertaining to him or containing information relating to him have been seized during the course of search, within the fold of that section, this question assumes significance, inasmuch as in the facts of the present case, as on the date of search, it was only if such material belonged to a person other than the searched person, that the Assessing Officer of the searched person could record such satisfaction and forward the material to the Assessing Officer of such other person. However, subsequent to the date of search, the amendment has been brought into force and based on the amendment, the petitioners who were not included within the ambit of section 153C as on the date of the search, are now sought to be brought within its fold on the ground that the satisfaction note and notice under section 153C have been issued after the amendment came into force. Therefore, this case does not relate to the interpretation of the provisions of any of the sections, but relates to the stage at which the amended section 153C can be made applicable, as to whether it relates to the date of search; or the date of recording of satisfaction by the Assessing Officer of the searched person; or the date of recording of* *satisfaction by the Assessing Officer of the other person; or the date of issuance of notice under section 153C."* and held that **"the amendment brings into its fold persons who are otherwise not covered by the said provisions and therefore, affects the substantive rights of such person."**

3.11. The substantive law is always prospective in nature unless it is made retrospective by express enactment or necessary intendment. In the case at present, the amended section is made effective from 1st April, 2017 (the first day of the assessment year) by the Second Amendment Act, 2016 which was passed by Parliament on 29.11.2016 and got the assent of the President on 15.12.2016. **<u>The intention of the law was to curb the misuse of section 115BBE after demonetisation. Thus, the income for which liability has accrued on the assessee prior to the said date should not be increased by imposing higher rate of tax. This is against the principal of promissory estoppel.</u>** Once the assessee has opted to get the income taxable under these six sections namely, Section 68, 69, 69A, 69B, 69C and 69D in view of the existing provisions of Section 115BBE with a view that the tax has to be imposed @ 30% how it can be increased subsequently by burdening the assessee @ 60% plus surcharge.

3.12. The income assessable under these six sections cannot be regarded to be the income chargeable under the head income from business and profession. Income from business and profession is accrued on the last day of the previous year. However, there are cases where the income accrues during the year and not only on the basis of system of accounting of mercantile on last day of the previous year as has been held by the Hon'ble Supreme Court in the case of **Ashokbhai Chimanbhai [1965] 56 ITR 42**. However in the case of income chargeable under these sections get accrued on the date when the entries are made, assets are found, unaccounted investments are made or expenditure are incurred. Similarly in the case of the sale of the property, capital gain arises on the date of transfer of the property. As in the case of the capital gain, the income assessable under sections under section 68, 69 to 69D, the law as applicable on the date when the income accrues should be applicable and not as per the amended provision which is introduced after the income arise to the assessee. The Hon'ble **Gujarat High Court in the case of CIT Vs. Nirmal Textiles [1997] 224 ITR 378 (Gujarat)** considered the question as to whether the nature of capital asset (short term or long term) has to be determined in accordance with provisions of law as standing on date of transfer of asset and has held that,

> *"Insofar as the first part of imposition of tax is concerned, namely,* ***<u>what persons in respect of what property are liable to pay tax is to be determined with reference to law as on the date of the occurrence of the event which creates or attracts the liability to tax, unless the statute by express or by necessary implication provides otherwise</u>****. In computing such liability what is to be excluded or included or conditions or allowances of deductions or exemptions and the like matters, the law as it exists on 1st of April of the relevant assessment year governs the assessment. Applying the aforesaid principles,* ***<u>the taxable event which attracted liability to tax was the transfer of immovable property as a result of which the income in the nature of capital gain arose during the previous year.</u>***
>
> *<u>The question whether the capital asset which was transferred was a long-term capital asset or a short-term capital asset has direct relevance and nexus to the date of transfer, whether on that date it was a long-term capital asset or a short-term capital asset. It would be incongruous to say that when the taxable event occurred on a particular date in respect of a long-term capital asset it would be deemed to be in respect of a short-term capital asset on 1st April of the relevant assessment year because of the definition which has come into existence as on the date of the commencement of the assessment year.</u> Computation of income or assessment of liability would depend upon the nature of income earned during the previous year. It is not part of the computation but it is relevant for determining the nature of the capital asset transferred which would result in a different nature of capital gains in the two sets of capital assets resulting in different liabilities and applicability of various provisions in different manner. As is seen from the scheme of the Act, <u>section 45 defines capital gains which arise from transfer of capital assets effected in the previous year, i.e., capital gains do not refer to an income which is accruing from day-to-day for a spell of period but arise at a fixed point of time, namely, the date of transfer.</u>* ***<u>This is unlike the income arising or accruing as profits and gains of a business to be computed in terms of section 28, where the profits and gains can only be said to accrue at the end of the previous year, when the result of the working of business for the entire periods is known.</u>*** *<u>Section 48 which prescribes the mode of computation and deduction in respect of income chargeable under the head 'capital gains' divides types of capital gains into two categories, namely, capital gains in general and capital gains arising from transfer of long-term capital</u>*

<u>asset. Again reference is to capital gains arising from transfer of long-term capital asset.</u> The period for the holding of a capital asset is also related to the date of transfer and the transfer of such long-term held asset on the date of transfer falls into the category of a long-term capital gains. This also indicates that determination of the factum whether transfer of a capital asset is of a long-term capital asset or short-term is to be determined anterior to the stage of reaching computation of income under that head. First it has to be determined whether capital gain which has arisen in the previous year is of long-term or short-term. On such determination its quantification for making the charge effective takes place. This inherently postulates determination of the nature of the capital asset on the date of transfer.

Similarly, under sections 68, 69, 69A, 69B, 69C and 69D, the deemed income is considered for the entries found recorded / not recorded in the books of account. Such income is to be considered as accrued to the assessee on the date when the entry is found credited in the books of account of the assessee or when the undisclosed investment, undisclosed money, amount of investments etc. not fully disclosed in the books of account, unexplained expenditure, amount borrowed or repaid in hundi were invested or expended.

3.13. Assume a situation where there is a survey on an assessee and the assessee offers an income u/s 68 of the Act or some unaccounted expenditure was found which was offered by the assessee during the survey proceedings. Such income is offered by the assessee in its return of income under the applicable section such as under section 68 or 69A of the Act. In such case, the addition is made for the income which was already accrued in view of these sections prior to the amendment of section 115BBE. Taxing such income at the rate given in the amended section 115BBE will tantamount to be imposing a tax liability on the assessee with retrospective effect. Taxing a person with higher rate of tax by way of subsequent amendment cannot be regarded to be a procedural amendment. This also cannot be regarded to be clarificatory in nature or curative.

3.14. Justice G.P. Singh in his book on principles of statutory interpretation (Sixth Edition, 1977) observes,

"In determining, therefore, the nature of the Act, regard must be had to the substance rather than to the form. If a new Act is to 'to explain' an earlier Act, it would be without object unless construed retrospective. An explanatory Act is generally passed to supply an obvious omission or to clear doubts as to the meaning of the previous Act. It is well-settled that if the statute is curative or merely declaratory of the previous law, retrospective operation is generally intended. The language 'shall be deemed always to have meant' is declaratory, and is in plain terms retrospective. In the absence of clear words indicating that the amending Act is declaratory, it would not be so construed when the pre-amended provision was clear and unambiguous. An amending Act may be purely clarificatory to clear a meaning of a provision of the principal Act which was already implicit. A clarificatory amendment of this nature will have retrospective effect."

3.15. Before the new provisions came into operation, a vested right had already accrued to the assessee and the assessee has even estimated the income at the law prevailing on the date when the income has accrued to him and even would have computed and paid the advance tax accordingly. The new provisions cannot revive the barred right or take away the accrued vested right. It was a substantive amendment creating new obligation and was not a matter of procedure. This contention takes support from the following judgements of the Hon'ble Apex Court: -

(i) **<u>CIT v. Hindustan Electro Graphites Ltd. [2000] 109 Taxman 342/243 ITR 48 (SC)</u>**

Income by way of cash compensatory support became taxable retrospectively with effect from 1-4-1967 but that was by amendment of section 28 by the Finance Act, 1990 which amendment could not have been known before the Finance Act came into force. Levy of additional tax bears all the characteristics of penalty. Additional tax was levied as the assessee did not in its return show the income by way of cash compensatory support. The Assessing Officer on that account levied additional income-tax. No additional tax would have been leviable on the cash compensatory support if the Finance Act, 1990 had not so provided even though retrospectively. The assessee could not have suffered additional tax but for the Finance Act, 1990. After it had filed its return of income, which was correct as per law on the date of filing of the return, it was thereafter that the cash compensatory support also came within the sway of section 28. When additional tax has imprint of penalty, the revenue cannot be heard saying that levy of additional tax is automatic under section 143(1A). If additional tax could be levied in such circumstances, it would be punishing the assessee for no fault of it. That cannot ever be the legislative intent. It shocks the very conscience if in the circumstances section 143(1A) could be invoked to levy the additional tax. In the circumstances of the case, levy of additional tax taking into account the income by way of cash compensatory support was not warranted.

(ii) **CIT v. Vatika Township (P.) Ltd. [2014] 49 taxmann.com 249/227 Taxman 121/367 ITR 466 (SC)**

Of the various rules guiding how a legislation has to be interpreted, one established rule is that unless a contrary intention appears, a legislation is presumed not to be intended to have a retrospective operation. The idea behind the rule is that a current law should govern current activities. **Law passed today cannot apply to the events of the past.** One principle of law is known as lex prospicit non respicit: law looks forward not backward. As was observed in Philips v. Eyre [1870] LR 6 QB 1 a retrospective legislation is contrary to the general principle that legislation by which the conduct of mankind is to be regulated when introduced for the first time to deal with future acts ought not to change the character of past transactions carried on upon the faith of the then existing law. [Para 31]

3.16. In a case where there was an omission in a former legislation, the retrospective amendment can be made. In the instant case, the tax rate as was applicable till 14th December, 2016 u/s 115BBE was 30% which was as specifically given in section 115BBE itself. By the Finance Act, 2016, there was no amendment made in the said tax rate. It was only as per the Amended Act, 2016, the tax rate was increased. There was no former omission in the legislation and the assessee is burdened with extra new liability. **Recently the Hon'ble Jaipur Tribunal in the case of Utsav Cold Storage (P) Ltd Vs. ITO [2019] 107 taxmann.com 184 (Jaipur - Trib.)** has held that retrospective operation of a law should not be given so as to effect, alter or destory an existing right and to create a new liability or obligation.

3.17. It is true that no amendment in the law is constitutionally invalid merely because it is retrospective. The constitutional validity of an enactment can be challenged before a court of law, if it infringes the fundamental rights of the citizen. It is a rule of law that a person can be subject only to the established and known law and he cannot be made liable for a past act based on a future law. The legal maxim "nova constitutio formam imponere debet non praeteritis" means 'a new law ought to regulate what is to follow, not the past'. Article 20(1) of the Constitution of India provides a protection against 'Ex post facto laws'. 'Ex post facto laws' is a law that retrospectively affects the legal consequences of an act done or a liability/right vested before the enactment of such law. Article 20(1) provides that *"Protection in respect of conviction for offences (1) No person shall be convicted of any offence except for violation of the law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence"*. Article 20 of the Constitution of India prohibits the legislature to make retrospective criminal laws, however, it does not prohibit a civil liability retrospectively i.e. with effect from a past date. Therefore, tax can be levied retrospectively. However, in tax law, if there is a penal provision, retrospectivity is not permitted to that extent. In the case of **T. Barai v. Henry Ah Hoe, AIR 1983 SC 150**, the Hon'ble Supreme Court held that,

> *It is only retroactive criminal legislation that is prohibited under article 20(1).* ***The prohibition contained in article 20(1) is that no person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence nor shall he be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence.*** *It is quite clear that in so far as the Central Amendment Act creates new offences or enhances punishment for a particular type of offence no person can be convicted by such ex-post facto law nor can the enhanced punishment prescribed by the amendment be applicable. But in so far as the Central Amendment Act reduces the punishment for an offence punishable under section 16(1)(a) of the Act, there is no reason why the accused should not have the benefit of such reduced punishment. The rule of beneficial construction requires that even ex-post facto law of such a type should be applied to mitigate the rigour of the law. The principle is based both on sound reason and common sense.*

3.18. Attention is drawn to the judgement of the **Hon'ble Apex Court in the case of Star India (P) Ltd. Vs. Commissioner of Central Excise [2006] 280 ITR 321 (SC)**. In the said case, the assessee was made liable to pay service tax by a retrospective amendment brought in by the Finance Act, 2002 making agents like the assessee to pay service tax. Interest was levied by the revenue on the payment of the service tax. The question which arose was whether the liability to pay interest would only arise on default and is really **in nature of a quasi-punishment** and such liability although created retrospectively by amending Act, could not entail punishment of payment of interest with retrospective effect? The Hon'ble Apex Court held that,

> *"It is well established that while it is permissible for the Legislature to retrospectively legislate, such*

retrospectivity is normally not permissible to create an offence retrospectively. There were clearly judgments, decrees or orders of courts and Tribunals or other authorities, which were required to be neutralised by the validation clause. We can only assume that the judgments, decrees or orders, etc. had, in fact, held that persons situate like the appellants were not liable as service providers. This is also clear from the Explanation to the validation section which says that no act or acts on the part of any person shall be punishable as an offence which would have been so punishable if the section had not come into force. [Para 7]

The liability to pay interest would only arise on default and is really in the nature of a quasi-punishment. Such liability although created retrospectively could not entail the punishment of payment of interest with retrospective effect."

The liability increased as per section 115BBE is indirectly penal in nature. Higher rate is introduced where the income is taxed under six sections for which the assessing officer is not satisfied with the explanation of the assessee. **Since, this is penal in nature, retrospective applicability of amended section 115BBE should not be permitted.**

3.19. Every assessee is entitled to arrange his financial affairs on the basis of the law as it exist on the date of arranging the financial affairs. He cannot foresee the amendment to be taken with retrospective effect and imposing the liability on him. This is unreasonable and shows the arbitrariness on the part of the legislature. The Hon'ble Supreme Court in the case of **Lohia Machines Ltd. v. Union of India [1985] 20 Taxman 9 (SC)** has opined:

Even the power and competence of the Parliament to amend any statutory provision with retrospective effect cannot be doubted. Any retrospective amendment to be valid must, however, be reasonable and not arbitrary and must not be violative of any of the fundamental rights guaranteed under the Constitution. Unreasonableness or arbitrariness of any such amendment with retrospective effect has necessarily to be judged on the merits of the amendment in the light of the facts and circumstances under which such an amendment is made.

The imposition of any fresh tax with retrospective effect for years for which there was no such levy is bound to operate unduly harshly on every assessee who is entitled to arrange and normally arranges his financial affairs on the basis of the law as it exists. Such retrospective taxation imposes an unjust and unwarranted accumulated burden on the assessee for no fault on his part and the assessee has to face unnecessarily without any just reason very serious financial and other problems. Imposition of any tax with retrospective effect for years which no such tax was there, cannot also be considered to be just and reasonable from the point of view of the Revenue.

3.20. The Hon'ble Rajasthan High Court in the case of **Niharika Jain Vs. Union of India [2019] 107 taxmann.com 272 (Rajasthan) (Dated 12.07.2019)** has observed as under with reference to the Benami Transactions (Prohibition) Amendment Act, 2016: -

By now, it is well settled law that unless a contrary intention is reflected, a legislation is presumed and intended to be prospective. For in the normal course of human behaviour, one is entitled to arrange his affairs keeping in view the laws for the time being in force and such arrangement of affairs should not be dislodged by retrospective application of law. The principle of law known as lex prospicit non prospicit (law looks forward not backward), is a well-known and accepted principle. The retrospective legislation is contrary to general principle for legislation by which the conduct of mankind is to be regulated when introduced for the first time to deal with future acts ought not to change the character of past transactions carried out in the faith of the then existing law. Thus, the principle against retrospectivity is the principle of 'fairplay' and unless there is a clear and unambiguous intendment for retrospective effect to the legislation which affects accrued rights or imposes obligations or castes new duties or attaches a new disability is to be treated as prospective. [Para 80]

It is trite law that an explanatory or declaratory Act is intended to supply an obvious omission or is enacted to clear doubts as to the meaning of the previous Act. While retrospective operation is generally intended as to declaratory or curative provisions, which is supplied with the 'language' 'shall be deemed always to have meant'. Therefore, in absence of clarity amendment being declaratory or curative in the face of unambiguous or confusion in the pre-amended provisions; the same is not required to be treated as curative *or declaratory amendment. Viewed in the light of the settled legal proposition, as aforesaid, Benami Amendment Act, 2016, neither appears to be clarificatory nor curative. Moreover, by way of amendment, penal consequences have been introduced providing for confiscation of the benami property and enhanced punishment. [Para 81]*

The power to confiscate and consequent forfeiture of rights or interests are drastic being penal in nature, and therefore, such statutes are to be read very strictly. However, there can be no exercise of powers under such statutes by way of extension or implication. [Para 83]

3.21. In the case of **Niko Resources Ltd. Vs Union of India [2015] 55 taxmann.com 455 (Gujarat)**, the disputed issue was relating to the amendment made in section 80-IB(9) by adding an Explanation to section 80-IB(9), by Finance (No.2) Act, 2009 with retrospective effect from 1-4-2000 purporting to explain the meaning of the term 'undertaking' providing that all blocks licensed under a single contract shall be treated as a single undertaking which took away accrued and vested right of petitioner enjoying seven years tax holiday on each undertaking in block. The Hon'ble High Court held that,

"If any law or amendment to the law made by Parliament or legislature overrides or is made in violation of fundamental rights or any other constitutional provision without sufficient objective and justification, the Court are empowered to declare the law arbitrary and violative of article 14 of the Constitution. Further, from the scrutiny of the law made by the Parliament or legislature, if the Court finds that the law which is under challenge as ultra vires infringes the rights or interests of the petitioner, the Court can strike down the enactment.[Para 37.4]

When a tax law or amendment made therein is impugned under article 14, the Court is to decide whether the amendment in tax law is palpably so arbitrary or unreasonable that it must be struck down. The word 'arbitrary' is used in the sense of being discriminatory. An act which is discriminatory is liable to be labelled as arbitrary. [Para 37.9]

After the foreign investors entered India and apart from other sectors, they also participated in exploration, discovery and commercial production of mineral oil and gases, the Finance Minister in his speech under the pretext of clarification, added an Explanation by laying down an absolutely new proposition that all blocks under a single contract would be treated as a single undertaking. The investors have carried out commercial production of mineral oil under a bona fide belief that each well/cluster of wells is an undertaking and he enjoys the benefit of 100 per cent tax deduction for a period of seven years on each well/cluster of wells which is an undertaking and qualifies for tax deduction. The amendment in section 80-IB(9) and addition of Explanation was made by the legislature by Finance (No.2) Act, 2009 which was given retrospective operation with effect from 1-4-2000, after the petitioner had started commercial production and were entitled for 100 per cent tax deduction on profits and gains.[Para 44]

The benefits of deductions under section 80-IA were expressly made available with effect from 1-4-1999 by amending the then existing section 80-IA. Later on section 80-IB(9) was introduced to provide for such benefits. At all times the benefit had been available to an 'undertaking'. Neither section 80-IA, section 80-IB nor the provisions of PSC provided that the 'undertaking' would be construed as a whole Block.[Para 47]

Section 80-IB(9)(ii) before the insertion of the Explanation had created a substantive vested right in the petitioner in deriving profits and seeking deductions for every undertaking comprised in each Development Area within the Contract Area or Block. No ambiguity or doubt could be imputed to section 80-IB(9) (ii).[Para 49.18]

3.22. The assessee cannot foresee that in future, the tax rate will be increased in between for the financial year. There was no amendment by the Finance Act, 2016 in the rate of tax payable u/s 115BBE. It was only in between of the Financial Year subsequent to the demonetization, the tax rates were increased u/s 115BBE by the Taxation Laws (Second Amendment Act) by the Parliament on 29.11.2016 and got the assent from the President on 15.12.2016 with effect from AY 2017-18. It is the date on which the assent of the President of India is given, the Finance Bill / Amended Finance Bill converts into an Act. In the case of **Ashok Kumar S Agarwal Vs. ITO ITA No.4048/Ahd/2008, the Hon'ble Ahmedabad Bench** of the Income tax Tribunal considered the applicability of Section 40(a)(i) which was substituted by the Finance (No. 2) Act, 2004 with effect from 01.04.2005. In the said case, the Hon'ble Bench held that, *"Section 40(a)(i) was substituted by the* ***Finance (No.2) Act, 2004 with effect from 01-04-2005****. This section was proposed by the Finance (No.2) Bill, 2004 which was* ***introduced in the Parliament on 08-07-2004****. The relevant Clause of the Bill is Clause 11. Notes on Clauses state that this amendment will take effect from 1st April, 2005 and will accordingly apply in relation to Assessment Year 2005-06 and subsequent year. The Memorandum to the impugned Finance Bill also states that the proposed amendment will take effect from 1st April, 2005 and will accordingly apply in relation to Assessment Year 2005-06 and subsequent year.* ***The Finance (No.2) Act, 2004 received the assent of the Hon'ble President on 10th September, 2004.***

This provision has been brought into the statute with the intention to augment compliance of the TDS provision. The very nature of this provision is that it restricts the allowance of an expenditure if the assessee did not deduct TDS or if has deducted the TDS and has not paid to the Government in accordance with the provisions of Chapter XVII-B before expiry of the time prescribed in section 200(1). Thus, it is restrictive in nature.

This is an admitted fact that at the time of incurrence of the expenditure there is no prevailing law by which the expenditure can be disallowed to the assessee. Section 40(i)(a) was inserted by the Finance (No.2) Act, 2004 although with effect from 1st April, 2005, the Finance Act got the assent of the Hon'ble President only on 10th September, 2004. Thus, the Finance (No.2) Act, 2004 became the law of the Country from 10th September, 2004, and not prior to that. *If we take an interpretation that this provision was applicable from Assessment Year 2005-06 as has been mentioned in the Memorandum and Notes on Clauses to the Finance (No.2) Bill, 2004 by which this provision was proposed, the assessee will be denied deduction of an expenditure if he has not deducted the TDS or after deducting the TDS has not paid it within due dates.* ***A person of an ordinary prudence cannot foresee that such an amendment will come and will be the law of the Nation by which such restrictions will be put. The very nature of the disallowance is punitive and, therefore, at the most it can be made applicable in respect of expenditure incurred after 10th September, 2004, and not prior to that.*** *An assessee cannot be expected to do something which is not in existence."*

3.23. The Hon'ble ITAT Allahabad in the case of **Sahara States Gorakhpur Vs. DCIT ITA No. 04 & 15/Alld/2012** in reference to the amendment made in sub-section (10) of section 80IB by the Finance (No. 2) Act, 2004 w.e.f. 01.04.2005 observed that,

"there were only three conditions which were stipulated for the eligibility of the deduction u/s.80IB(10) these conditions nowhere requires that the assessee should have completed the project before a particular date and would have obtain the completion certificate even there was no condition regarding the restriction on the built up area of the commercial area. …. once the assessee has acted and plan were approved as per the prevailing law prior to 1.4.2005, the rights so vested cannot be taken away it is ridiculous on the part of the Revenue Authorities to expect the assessee's to do something which is almost impossible."

The said decision is uphold by the Hon'ble **Allahabad High Court [2019] 110 taxmann.com 70 (Allahabad)**. The Hon'ble High Court held that,

"where a project fulfills the criteria for being approved as a housing project, then deduction cannot be denied under Section 80IB(10) merely because the project is approved as 'residential plus commercial'….The restriction under Section 80IB(10) regarding the size of the residential unit would in no way curtail the powers of the local authority to approve a project with commercial user to the extent permitted under the DC Rules/Regulations. Therefore, ***the argument of the Revenue that the restriction on the size of the residential unit in Section 80IB(10) as it stood prior to 1.4.2005 is suggestive of the fact that the deduction is restricted to housing projects approved for residential units only cannot be accepted.***

The argument of the revenue that Section 80IB(10) as amended by inserting clause (d) with effect from 1.4.2005 should be applied retrospectively is also without any merit, because, firstly, clause (d) specifically inserted with effect from 1.4.2005, and therefore, that clause cannot be applied for the period prior to 1.4.2005. Secondly, clause (d) seeks to deny Section 80IB(10) deduction to projects having commercial user beyond the limit prescribed under clause (d), even though such commercial user is approved by the local authority. Therefore, ***the restriction imposed under the Act for the first time with effect from***

> ***1.4.2005 cannot be applied retrospectively**. Thirdly, it is not open to the revenue to contend on the one hand that Section 80IB(10) as stood prior to 1.4.2005 did not permit commercial user in housing projects and on the other hand contend that the restriction on commercial user introduced with effect from 1.4.2005 should be applied retrospectively. The argument of the revenue is mutually contradictory and hence liable to be rejected. Thus, in our opinion, the Tribunal was justified in holding that clause (d) inserted to Section 80IB(10) with effect from 1.4.2005 is prospective and not retrospective and hence cannot be applied to the period prior to 1.4.2005."*

3.24. In the case of **Avani Exports Vs. CIT [2012] 348 ITR 391**, the amendment made to section 80HHC of the Income Tax Act **by the Taxation Laws (2nd Amendment) Act, 2005** was challenged to the extent of its retrospectivity. The **Hon'ble Gujarat High Court** held that *"although in a taxing statute laxity is permissible and a benefit already given to the assessees can be taken away or curtailed, that can be done only with prospective effect and not retrospectively. The Court noticed that a citizen has a right to arrange his business in a manner which accorded with the law and claim a benefit accordingly; the benefit cannot be taken away by law with retrospective effect by imposing a new condition which the citizen at that stage is incapable of complying, whereas if such promise (by the legislature) was not there, the citizen could have arranged his affairs in a different way to get the same or at least some part of the benefit."* The in-between amendment in the Act by the Second Amendment as on 15th December, 2016, resulted increased tax rate which was not there in the Finance Act, 2016 which was presented on 28th February, 2016 and got its assent from the President of India on 14th May, 2016. In view of the above judicial pronouncements, such amendment cannot be retrospective.

3.25. In the case of **D. Cawasji & Co. v. State of Mysore & Ors. (1984) 150 ITR 648 (SC)**, the Hon'ble Apex Court held that *"it may be open the legislature to impose levy of tax at a higher rate with prospective operation, but levy of taxation at a higher rate, which really amounts to imposition of tax, with retrospective operation, has to be justified on proper and cogent grounds."* In the instant case, the State instead of remedying the defect or removing the lacuna has by the impugned amendment sought to raise the rate of tax from 6.1/2% to 45% with retrospective effect from the 1st April 1966 to avoid the liability of refunding the excess amount collected and has further purported to nullify the judgment and order passed by the High Court directing the refund of the excess amount illegally collected by providing that the levy at the higher rate of 45% will have retrospective effect from 1st of April 1966. The judgment of the High Court declaring the levy of sales tax on excise duty, education cess and health cess to be bad became conclusive and was binding on the parties. It may or may not have been competent for the State Legislature to validly remove the lacuna and remedy the defect in the earlier levy by seeking to impose sales tax through any amendment on excise duty, education cess and health cess but in any event, the State Government has not purported to do so through the Amending Act.

3.26. In the case of Section 115BBE, the tax rate is increased after the demonetization when the government considered that the benefit of section 115BBE may be taken by the assessee for the unexplained demonetized currency. The addition u/s 68, 69 to 69D need not be only on account of the demonetized currency, in-fact addition has to be made on account of unexplained Cash Credit u/s 68, unexplained investment u/s 69, unexplained money 69A, amount of investments, etc. not fully disclosed in books of account u/s 69B, unexplained expenditure etc. u/s 69C or amount borrowed or repaid on hundi 69D and when the explanation offered by the assessee is not acceptable to the assessing officer. Additions are made under these sections even under those cases where explanation given by the assessee is plausible one but the assessing officer in his opinion think otherwise not as person of ordinary prudence. There may be number of reasons for making the addition under these sections. Presumption that all the additions under these sections are to be made on account of demonetization is illogical and is an incorrect assumption. **Prior to the demonetization, there was no reason for increase in the tax rate in between of the financial year otherwise, the same should have been increased by the Finance Act, 2016 passed on 14th May, 2016.**

3.27. In the Statement of Objects and Reasons accompanying the Taxation Laws (Second Amendment) Bill, 2016, the object of amendment is spelled out as under,

> As a step forward to curb black money, **bank notes of existing series of denomination of the value of five hundred rupees and one thousand rupees (hereinafter referred to as specified bank notes) issued by the Reserve Bank of India have been ceased to be legal tender with effect from the 9th November, 2016**. Concerns have been raised that some of the existing provisions of the Income-tax Act, 1961 could possibly be used for concealing black money. It is, therefore, important that the Government amends the Act to plug these loopholes as early as possible so as to prevent misuse of the provisions.

3.28. Before concluding, it is necessary to point out the observation of one of the most respected economists of India Mr. Parthasarthy Shome who headed the expert committee after the case of Vodafone India Limited for rendering advise on the retrospective amendment relating to indirect transfer, as under,

> *The Committee concluded that retrospective application of tax law should occur in exceptional or rarest of rare cases, and with particular objectives: first, to correct apparent mistakes/anomalies in the statute; second, to apply to matters that are genuinely clarificatory in nature, i.e. to remove technical defects, particularly in procedure, which have vitiated the substantive law; or, third, to "protect" the tax base from highly abusive tax planning schemes that have the main purpose of avoiding tax, without economic substance, but not to expand the tax base. Moreover, retrospective application of a tax law should occur only after exhaustive and transparent consultations with stakeholders who would be affected.*

3.29. The World Bank published a report downgrading India in the index of investment friendliness from its position of 131 in 2011 to 134. The government appointed a committee headed by Shri Damodaran to examine issues which contributed to this decline. The committee addressed the question of retrospective amendment and had to say:

> *It has often been said that death and taxes are equally undesirable aspects of human life. Yet, it can be said in favour of death that it is never retrospective. Retrospective taxation has the undesirable effect of creating major uncertainties in the business environment and constituting a significant disincentive for persons wishing to do business in India. While the legal powers of a Government extend to giving retrospective effect to taxation proposals, it might not pass the test of certainty and continuity. This is a major area where improvements should be attempted sooner rather than later ….*

CONCLUSION:

The constitutional validity in respect of the retrospective operation of this amendment is challengeable before the judicial body. **In the Rajasthan High Court, Jodhpur Bench, a petition has been filed challenging the validity of the amendment to section 115BBE by the Taxation Laws (Second Amendment) Act, 2016 in the case of Deepak Maratha Vs. UOI, through the Ministry of Finance & Anr. Vide Civil Writ Petition No. 3625/2020. The Hon'ble High Court vide order dated 06th March, 2020 directed the Union of India through the Ministry of Finance to take no coercive steps against the petitioner towards recovery.**

SUGGESTION:

At present due to COVID – 19 the economy of India is in bad shape. The migrant labour wants to move from their work place to their village and home town. The industry is shut due to lockdown. Labour has no earning. A distrust has created on China in all the countries of the World and therefore, the imports from China are demoralized. This is the situation under which our India can take an advantage. Our Hon'ble Prime Minister has declared the financial package of Rs. 20 lakh Crores. Our suggestions in this regard are that the manufacturing should be promoted in India by giving tax holidays/incentives and reduction in GST rates by developing industries in rural area. No question should be asked for the source of investment in that area. The exorbitant tax rates such as @ 60%+25% surcharge as per section 115BBE of the Income tax Act should be repelled and the source of the money brought for investment should not be asked. The focus should be on the investment of funds in all the large scale, medium scale and small scale industries by entrepreneur from whatever source. If no source of investment is asked for and tax is not imposed u/s 115BBE, the money/gold lying idle with the persons and the religious organization will come to the productive channel. In rural area, area be specified for industries so that entrepreneur buy and use be converted by regulated authority. Anti-dumping tax be imposed on imports from china on items which can be made in Bharatvarsh such as toys, idols, cycles, sanitary items etc. etc. Interest subsidy, power and gas subsidy, insurance subsidy, be given to industries being affected by Covid-19. One window clearance within specified time as had been done in Gujarat during Hon'ble P.M. regime be done.