Unsuccessful Appeal Submissions Turned into Explanatory Memorandum to Finance Bill!!

Just 1 less than 200, i.e., 199.

Well yes Friends, that is the total page count of this year's Memorandum explaining the provisions in the Finance Bill 2022, and going through these 199 pages of the explanatory memorandum, one can easily fathom the reason for the choice of the captioned title of this writing piece.

Like the previous years, this year's Union Budget (Finance Bill 2022) is also characterised by umpteen budget amendments, which have been brought in by the legislature, primarily for the purpose of nullifying or overturning the well-settled and established judicial ratios or legal positions arising out of the time-tested judgements/judicial pronouncements of hon'ble High Courts and the hon'ble Supreme Court.

Let us analyse some of these budget amendments proposed in the Finance Bill, 2022, aimed at overturning the well-known and established judgements.

1. **Amendment related to validity of assessment or other income-tax proceedings, initiated or completed in the name of a predecessor non existing entity, pursuant to business re-organisation.**

It is a settled position of law arising out of time-tested judicial pronouncements of various hon'ble High Courts and even the hon'ble Apex Court that assessment or any other income-tax proceedings initiated or completed in the name of any non-existing person or a corporate entity, is null and void-ab-initio, in the eyes of Law. The Hon'ble Supreme Court in the case of **Principal CIT Vs. Maruti Suzuki Ltd. (2019) 416 ITR 613(SC)** has categorically held that initiation of assessment proceedings against a predecessor corporate entity which had ceased to exist pursuant to a scheme of amalgamation, was void-ab-initio.

So, with the sole objective of nullifying this well-settled legal position, the Finance Bill 2022, has proposed to insert a **sub-section (2A) to section 170**, to provide that the assessment or other proceedings pending or completed on the predecessor in the event of a business reorganization, shall be deemed to have been made on the successor. This amendment will take effect from 1st April, 2022.

2. Amendments in the New Re-Assessment Regime

The Finance Act 2021, has substituted the old re-assessment regime with a new re-assessment regime, by substituting the then existing sections 147-151 with the new sections. In this new re-assessment regime, the well-settled and established legal position in respect of mandatory condition of formation of an independent reason to believe, of escapement of income, by the jurisdictional assessing authority, has been replaced with the presence of any information as per the risk management strategy of

CBDT or the final audit objection of C&AG, suggesting that income of the assessee has escaped assessment.

Now, the Finance Act 2022 has further proposed to broaden the scope of, as to what constitutes information under Explanation 1 to section 148, so as to include any audit objection, and not just the final audit objection of C&AG, or any information received from a foreign jurisdiction under an agreement or directions contained in a court order, or information received under a scheme notified under section 135A etc.

Further, the re-opening period was reduced from six years to three years by the Finance Act 2021. However, an exception was provided in cases, where the **undisclosed income in the form of an asset**, **exceeds Rs. 50 lakhs in any assessment year, and such cases can be reopened up to ten years.**

Now, the **Finance Bill 2022** has proposed to amend **clause (b) of sub-section (1) of the section 149** to provide that a notice under section 148 shall be issued only for the relevant assessment year **after three years but prior to ten years** from the end of the relevant assessment year where the Assessing Officer has in his possession books of account or other documents or evidence which reveal that the income chargeable to tax, represented,

(a) in the form of an asset; or

(b) expenditure in respect of a transaction or in relation to an event or occasion; or

(c) an entry or entries in the books of account,

which has escaped assessment amounts to or likely to amount to fifty lakh rupees or more.

Thus, the criteria of the undisclosed income represented in the form of an asset has been enlarged to cover almost all the probable forms of undisclosed income including an asset, or any expenditure or even any entry in the books of accounts.

Also, the earlier prescribed threshold limit of undisclosed income of Rs. 50 lakhs was for **one assessment year.** Now, the reference to **'one assessment year'** has been **omitted,** and as such, **any undisclosed income of Rs 50 lakhs, spread across the entire 10-year period of reopening is sufficient to reopen the already concluded assessments for such 10 years.**

Further, the Finance Act 2021, has subsumed the erstwhile block assessments pursuant to search action u/s 132 or survey u/s 133A, within the newly substituted re-assessment regime, and has provided that such search/survey cases can be reopened only for previous three assessment years only.

However, the Finance Bill 2022, has once again proposed the enabling of re-opening of such cases up-to six preceding assessment years.

Fortunately, the much anticipated, **saving or enabling clause** in the newly substituted proviso to section 149 by the Finance Act, 2021, **has not been brought** in by the Legislature in Finance Bill 2022, in order to nullify the recent undermentioned judgements of the hon'ble High Courts, holding the reassessment notices issued under old section 148, on or after 1.4.2021, as bad in law:

(i) Delhi High Court in the case of Mon Mohan Kohli v ACIT and others (WP(C) No. 6176/2021);
(ii) Allahabad High Court in the case of Ashok Kumar Agarwal v UOI [2021] 131 taxmann.com 22;
(iii) Rajasthan High Court in the case of Bipip Infra Private Limited vs ITO (S.B. Civil Writ Petition No 13297/2021);
(iv) Calcutta High Court in the case of Manoj Jain v Union of India & Ors. (WPA No. 11950 of 2021)

3. Clarification regarding treatment of 'Cess and Surcharge'

Sub-clause (ii) of clause (a) of section 40 of the Act provides that any sum paid on account of any rate or tax levied on the profits or gains of any business or profession or assessed at a proportion of, or otherwise on the basis of, any such profits or gains shall not be deducted in computing the income chargeable under the head "Profits and gains of business or profession".

The Hon'ble Bombay High Court in the case of **"Sesa Goa Limited Vs. JCIT" (2020) 117 taxmann.com** and the Hon'ble Rajasthan High Court in the case of **"Chambal Fertilizers & Chemicals Ltd Vs. JCIT": D.B Income-tax Appeal No. 52/2018,** relying upon the CBDT Circular Dt. 18-05- 1967 have held that 'education cess' can be claimed as an allowable deduction while computing the income chargeable under the heads "profits and gains of business or profession".

Thus, with a view to nullify these judgements, the Finance Bill 2022 has proposed to include an Explanation retrospectively in the Act itself to clarify that for the purposes of this sub-clause, the term "tax" includes and shall be deemed to have always included any surcharge or cess, by whatever name called, on such tax. This amendment is proposed to take effect retrospectively from 1st April, 2005 and will accordingly apply in relation to the assessment year 2005-06 and subsequent assessment years.

4. Disallowance u/s 14A in absence of any Exempt Income

The Fine Print of the Finance Bill 2022 proposes to insert an **Explanation to section 14A of the Act,** to clarify that notwithstanding anything to the contrary contained in this Act, the provisions of this section shall apply and shall be deemed to have always applied in a case where exempt income has not accrued or arisen or has not been

received during the previous year relevant to an assessment year and the expenditure has been incurred during the said previous year in relation to such exempt income. This amendment will take effect from 1st April, 2022.

Thus, this amendment has also been proposed in the Finance Bill 2022, just to nullify several judgements of the hon'ble High Courts including the judgements of the hon'ble Delhi High Court in the cases of 'Cheminvest Ltd vs. CIT reported in CIT (2015) 378 ITR 33 (DEL) and 'PCIT vs IL&FS Energy Development Company Ltd reported in 250 Taxman 0174, holding that no disallowance u/s 14A of the Act could be made in respect of any expenditure incurred in earning any exempt income, in the absence of any exempt income.

5. Establishing Source of Source of Loans and Borrowings in section 68

The Finance Act 2012 has inserted the first proviso to section 68 w.e.f. 1.4.2013, to mandate the establishment of source of source of share application money, share capital money or the share premium money, in order to discharge the burden of establishing the identity and creditworthiness of such share subscribers and genuineness of such receipts of share application/ share capital/ share premium receipts.

However, the onus of establishing the source of source in cases of receipts of unsecured loans and borrowings, was still not specifically stipulated in section 68, and as such in numerous judgements of the hon'ble High Courts, including the hon'ble Delhi High Court judgements in the cases of **'CIT vs. Shiv Dhooti Pearls & Investments vs. CIT [2015] 64 taxmann.com 329 (Delhi); CIT vs. Vrindavan Farms in ITA No. 71/2015; CIT vs. Value Capital Services Ltd [2008] 307 ITR 334 (Delhi);** it was held that in case of unsecured loans and borrowings, the establishment of the source of source was not required.

Thus, with a view to overcome and nullify such numerous judgements, it has been proposed in the Finance Bill 2022 to amend the provisions of section 68 of the Act so as to provide that the nature and source of any sum, whether in form of loan or borrowing, or any other liability credited in the books of an assessee shall be treated as explained only if the source of funds is also explained in the hands of the creditor or entry provider. However, this additional onus of proof of satisfactorily explaining the source in the hands of the creditor, would not apply if the creditor is a well-regulated entity, i.e., it is a Venture Capital Fund, Venture Capital Company registered with SEBI.

This amendment will take effect from 1st April, 2023 and will accordingly apply in relation to the assessment year 2023-24 and subsequent assessment years.

Thus, it has now become mandatory to explain the source of the source in the cases of unsecured loans and borrowings also, in order to establish the identity, creditworthiness and genuine-ness parameters under section 68 of the Income Tax Act.

6. Amendment in Faceless Assessment u/s 144B under the Act:

The existing section 144B inserted by the Finance Act 2021, mandating for the conduct of the assessments in a faceless manner and in accordance with the prescribed procedure therein, has now been proposed to be replaced with a new section 144B.

In this new section 144B, a by-default right of personal hearing through video conferencing to the assesses, in line with the recent amendments in the Faceless Appeal Scheme, has been vested in the assesses. This is a welcome amendment aimed at reducing probable tussles and litigations.

However, at the same time, the existing sub-section (9) of section 144B, mandating that the entire assessments proceedings shall be considered as non-est in law, if the prescribed procedure of conduct of faceless assessments in section 144B is not being complied with, has been proposed to be omitted.

It is pertinent to mention here that in numerous High Court Judgements, (some of which are listed below), the faceless assessments for the AY 2018-19, have been set-aside, on the grounds of non-adherence to the prescribed assessment procedure in section 144B(9)/ faceless assessment scheme.

(i) DJ Surfactants vs. National E-Assessment Centre in W.P.(C) No. 4814/2021 dated 3.5.2021 (Delhi High Court);
(ii) SAS Fininvest LLP vs. National e-Assessment Centre in W.P.(C). No. 5087/2021 dated 4.5.2021 (Delhi High Court);
(iii) K L Trading Corporation vs. National e-Assessment Centre in W.P. (C) 4774/2021 dated 16.4.2021 (Delhi High Court).

Thus, the Legislature, in order to provide a predictable assessment regime (probably in favour of revenue authorities), has conveniently chosen to omit, the very same section 144(9), which was inserted by the Legislature, in the first place, to ensure adequate safeguard for adoption of principle of natural justice, (audi alteram partem), in the conduct of faceless assessments, instead of encouraging the concerned assessment authorities to ensure adherence to the said subsection.

However, the principle of natural justice is a principle of common law and has the constitutional backing by article 14 and 21 of the Constitution of India, and as such even after the proposed omission the said sub section (9) in section 144B, the faceless assessments conducted in contravention of the principle of natural justice, are still liable to be set aside and considered as nonest in law.

7. Amendment in section 43B for not treating the Conversion of Interest into Debenture as Actual Payment

The hon'ble Supreme Court in the case of M.M. Aqua Technologies Ltd vs. CIT (2021) 129 taxmann.com 145, has held that the issuance of debentures in lieu of outstanding interest would be considered as actual payment, and as such deduction for interest can be claimed.

In order to overcome this judgement, the Finance Bill 2022 proposes to amend Explanation 3C, Explanation 3CA and Explanation 3D to section 43B, to expressly provide that conversion of outstanding interest into a debenture or any other similar instrument, by which the liability to pay is deferred to a future date, the deduction shall not be available.

8. Amendment in the Customs Act, 1962 to authorise DRI Officers to Issue Summons and Show Cause Notices demanding Customs Duty

The hon'ble Supreme Court in the case of Canon India Pvt Ltd vs. Commissioner of Customs [2021] 125 taxmann.com 188, has held that by virtue of sections 2(34) and 28 of the Customs Act, 1962, the Additional Directorate General of Department of Revenue Intelligence (DRI) is not a proper officer to issue SCN demanding the customs duty in respect of goods which have already been assessed and cleared by the Deputy Commissioner of Customs.

In order to overcome this judgement, the Finance Bill 2022 proposes to amend the definition of 'proper officer' u/s 2(34) and similar amendments in section 3, section 5 and section 28 of the Customs Act, 1962, to authorise the DRI Officers to issue summons and SCNs in order to levy customs duty on already assessed goods.

Concluding Remarks:

So, Friends, by now, you would have grasped the real purport of my title to this writing piece. Those 199 pages, seem nothing less than the detailed appeal submissions of the revenue authorities, represented unsuccessfully, before various appellate forums, including the hon'ble High Courts and the hon'ble Supreme Court, and now turned into the Explanatory Memorandum to the Finance Bill 2022, to overturn the respective judgements by the exercise of Executive Power, by the Legislature, with the underlying philosophy that,

"If you can't win your cases on merits in Court, then simply amend the Law."

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