NEWSFLASH

Retrospective amendment taxing 'indirect transfers' made in 2012 withdrawn

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Retrospective amendment taxing 'indirect transfers' made in 2012 withdrawn

Taxation Laws (Amendment) Bill, 2021 has been introduced in the Lok Sabha withdrawing the retrospectivity to the amendment brought about vide Finance Act 2012, which clarified that gains arising from sale of shares of a foreign company were always taxable in India if such shares, directly or indirectly, derive its value substantially from assets located in India.

Background

- The issue of taxation of ‘indirect transfer’ has been a matter prone to long-drawn litigation in India. In 2012, while the Supreme Court ruled in favour of the taxpayers, the government found the judgement to be against legislative intent. Consequently, a retrospective amendment was brought about vide Finance Act 2012, to ‘clarify’ that gains arising from sale of shares of a foreign company shall be taxable in India if such shares, directly or indirectly, derive its value substantially from assets located in India. Provisions were also introduced for validation of demand for cases relating to indirect transfer of Indian assets.

- The retrospectivity to the clarificatory amendment, met widespread disapproval from stakeholders, who contended that such amendments go against the principle of tax certainty and are detrimental to India’s image as a taxpayer/ investor friendly nation.

- The matter was also deliberated upon by the Arbitration Tribunal under Bilateral Investment Protection Treaty, and was decided against the Indian government in the case of Vodafone and Cairn.

- The Taxation Laws (Amendment) Bill, 2021 has now been introduced in the Lok Sabha withdrawing the retrospectivity to the amendment brought about vide Finance Act 2012.

Amendment vide The Taxation Laws (Amendment) Bill, 2021

- The Bill proposes to amend the Income Tax Act, 1961, so as to provide that **going forward, no tax demand shall be raised** on the basis of the said retrospective amendment for any indirect transfer of Indian assets, if the **transaction was undertaken before 28th May, 2012** (i.e. the date when the Finance Act 2012 received President’s assent).

- It has also been proposed that any **demand raised** for indirect transfer of Indian assets made before 28th May, 2012 **shall be nullified** on fulfilment of ‘specified conditions’.

- Further, it has been proposed to **refund the demand collected /refund adjusted** in these cases, however, **without any interest under section 244A.**

- Finance Act 2012 has also been proposed to be modified, so as to provide that the validation of demand, etc., under section 119 **shall cease to apply on fulfilment of ‘specified conditions’**

Specified Conditions

- **Withdrawal or submission of an undertaking to withdraw:**
  - any **appeal before** an appellate forum or any **writ petition** before the High Court/ Supreme Court against any order on such income, in prescribed form/ manner
  - **any claim in any proceedings for arbitration/ conciliation/ mediation/ notice** under any law or agreement entered into by India with any other foreign country, for protection of investment or otherwise
- **Furnishing of an undertaking** in prescribed form and manner, **waiving the right**, whether direct or indirect, **to seek/ pursue any remedy or any claim in relation to the said income**, which may otherwise be available, under any statute or agreement between India and a foreign country, for protection of investment or otherwise

Nangia Andersen LLP's Take

With the proposed amendment, the government has demonstrated its pragmatic and investor friendly approach, by withdrawing the retrospectivity in the amendment on indirect transfers. It has chosen to honour the verdict of the Supreme Court by giving up claims on taxes due under such covered indirect transfers of Indian assets.

The action shall reset the focus on brining a fresh set of FDI and mega projects into the country, making India a credible alternative for the world's manufacturing. The attention of the global board will shift from India's retro tax to current trends such as the PLI scheme, ease of doing business and push the case for examining India for its intrinsic strengths and serve as a fresh pitch to make India a much larger and integral part of world's supply chain and claim its rightful place.

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