



J B NAGAR CPE STUDY CIRCLE

Do's and Don't – Buy Back, Capital Gains and Corporate Gifting

Presentation by:

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Buy Back of Shares

Buy Back – Amendment

- ❑ Going forward (w.e.f. 1-Oct-24) – Buyback in accordance with S. 68 of Companies Act would be regarded as dividend (S. 2(22)(f))
 - Dividend is taxable at applicable tax rate – highest – 35.88%

- ❑ Section 46A has been amended to provide that the full value consideration received by the shareholder on buyback referred to under Section 2(22)(f) shall be deemed to be nil.
 - Cost of acquisition shall result in capital loss in the hands of the shareholder and can be set off against any other capital gains as per carry forward and set-off rules.

- ❑ No deduction of expense u/s 57 against dividend taxable u/s 2(22)(f).

- ❑ S. 194 – TDS @ 10%. No amendment to S. 8.

Buy Back – Present Scheme

- ❑ Presently, purchase by a company of its own shares is chargeable u/s 115QA @ 23.30% of distributed income (buyback tax)
 - Distributed income = Buyback consideration – Issue price (Rule 40BB)
 - Exemption to the shareholders – S. 10(34A)
 - Effective tax rate – 18.9% (Rs. 89 x 23.3% = Rs. 18.9 || Rs. 89 + Rs. 18.9 = ~Rs. 100 || Dividend – Rs. 100 * 35.88% = Rs. 35.88)
 - Buyback v. Capital Gain - tax rate difference ~17% (not 12.6%)
 - Sunset – buy-back of shares, that takes place on or after the **1st day of October, 2024**

- ❑ Whether a company should consider buyback ? Time line ?

Buy Back – Time line for buyback – Unlisted Company

❑ Key steps for buyback

- Financials (LR) or Final a/c from FY 23-24, Auditor Certificate, Valuer report (no statutory requirement)
- Board Meeting - shorter notice (1 day)
- Shareholders meeting – shorter notice (95% consent) (1 day)
- Buy back offer letter, offer period – 15 days – can be shorter (100% shareholders consent) (5 days)
- Escrow – transfer of funds and communication of acceptance of offer (2 days)
- Payment to shareholders and cancellation of shares (1 day)

❑ Curtailed time frame – Unlisted Company – 7 to 12 days, listed company – 18 to 20 days (SEBI Regulations)

- ❑ Buyback is complete on acceptance of offer. Payment to be made in respect of buyback is secondary (Rule 17 and S. 68) – **buyback can still be done by 30 September 2024**

Buy Back – Time line for buyback – Unlisted Company

Reference to SEBI Buyback Regulations	Particulars	Max. time	Curtailed period	
		Date	Date	No. of Working Days
	Board meeting Date	26-Aug-24	26-Aug-24	
Regulation 7	Public announcement is to be made within 2 working days from the date of Board Meeting	28-Aug-24	27-Aug-24	1 day
	Record Date - As mentioned in the Public Announcemnt	30-Aug-24	28-Aug-24	1 day
Regulation 9(xi)	The company is required to deposit such sum as may be applicable in Escrow Account within 2 working days from the Public Announcement	30-Aug-24	28-Aug-24	1 day
Regulation 8	Letter of Offer is to be issued within 2 working days from the Record Date	03-Sep-24	29-Aug-24	1 day
Regulation 9(v)	The date of the opening of the offer shall not be later than 4 working days from Record Date	05-Sep-24	30-Aug-24	2 days
Regulation 9(vi)	The offer of Buy-back shall remain open for a period of 5 working days	11-Sep-24	05-Sep-24	No change
Regulation 10(ii)	The company shall complete the verification of offers received and make payment of consideration to those holders of securities whose offer has been accepted withing 5 working days from the closure of offer	18-Sep-24	10-Sep-24	3 days
Regulation 11	Shares/ Securities shall be extinguished within 7 working days from the date of payment to shareholder	27-Sep-24	13-Sep-24	3 days

Buy Back – Issues

- ❑ Buyback is taxable as dividend even in absence of accumulated profits
 - Constitutional validity – tax on receipt v. tax on income – No real income
 - Capital reduction route would be preferred – however the time and the cost involved might be more (NCLT)

- ❑ Listed shares – grandfathering price benefit u/s 55(2)(ac) – not available ?
 - Debatable – Deeming fiction of S. 46A v. S. 55(2)(ac) – full value consideration is the buyback price

- ❑ What is if the shares are held as stock in trade ?
 - S. 46A does not bifurcate between shares held as capital assets vs stock in trade.
 - Better view – The taxpayer may have to offer the gain to tax as dividend and claim the loss on the buyback of shares (cost of purchase of shares) as a business loss u/s 28.

Buy Back – Issues

- ❑ Whether S. 47(iv) would apply to buyback of shares by WOS and consequently, capital loss will not be available, but dividend income would be charged to tax ?
 - No - PQR Gmbh., In re [2021] 125 taxmann.com 411 (AAR - Mumbai) – S. 47 is not applicable to S. 46A (ruling against the taxpayer)

- ❑ Dividend income set off against c/f business loss
 - CIT V. Shriram Chits And Investments Pvt Ltd [2018] 96 taxmann.com 300 (Madras HC) – Business investments

- ❑ S. 80M benefit shall be available to the recipient company in case of buybacks
 - Buyback stripping – convert capital gain into dividend income – Subscribe to new shares and buy back old or new shares generating capital loss for set off – but also generates dividend income – only beneficial if 80M benefit is taken by declaring dividend

Buy Back – Applicability of S. 50CA

❑ Whether S. 50CA would apply ?

- Section 46A – value of consideration on account of a buyback shall be deemed to be nil.
- S. 50CA requires comparison of consideration accruing as a result of transfer with fair value and if fair value is higher, fair value is deemed to be full value of consideration
- Language – value of consideration v. full value of consideration
- S. 46A already provides for a deeming fiction for value of consideration – difficult to apply another deeming fiction (S. 50CA) – gives absurd results. Also clear from example given in EM.
- Clash of deeming fiction – S. 45(3) v. S. 50C – Nareshbhai Ishwardas Patel [2023] 155 taxmann.com 141 (Ahmedabad - Trib.)
- **Buyback at token price to realign shareholding or to claim capital loss ?**

Buy Back – Redemption of Preference Shares

❑ Redemption of preference shares

- Present regime of S. 115QA – covers purchase under any provision of law – ongoing debate (Anarkali Sarabhai v. CIT [1997] 224 ITR 422 (SC))
- Section 2(22)(f) covers only purchase of own shares in accordance with S. 68 of the Companies Act, 2013.
- Redemption of preference shares is u/s 55 and not u/s 68 and hence, should be outside the purview of S. 2(22)(f)

❑ Preference shares issued on merger or de-merger or reverse merger

- Information Technology Park Ltd. v. ITO [2022] 143 taxmann.com 408 (Bangalore - Trib.)
- Fair value of assets ?

❑ Preference shares issued on conversion of firm or sole proprietor into Company (S. 47 (xiii)/(xiv))

Buy Back – Transactions not covered by S. 2(22)(f)

- ❑ Conversion of equity into preference pursuant to S. 230 scheme
 - Conversion – may be regarded as capital reduction – even then no distribution
 - Relisys Medical Devices Ltd. vs. Raju Reddy [2018] LSI 297 (NCLAT Delhi)
 - Conversion of equity into preference – no statutory exemption u/s 47
 - CIT v. Santosh L. Chowgule [1998] 234 ITR 787 (Bom HC) – liable to capital gains
 - Periar Trading v. ITO [2019] 174 ITD 137 (Mumbai - Trib.) – not liable to capital gain – relies on old CBDT Circular
 - Subsequent redemption of preference shares is u/s 55 and not u/s 68 – no double tax (conversion + redemption)
- ❑ Buyback of CCD or redemption of OCD are outside the purview of S. 68 of Companies Act – attract capital gains
 - Buyback of CCD is possible – no restriction under Company Law
 - Contractual decision between Holder and Company
- ❑ Foreign company shares bought back – not under S. 68 of Indian Companies Act

Buy Back – Transactions not covered by S. 2(22)(f)

- ❑ Conversion of cash rich company into LLP – not compliant with S. 47(xiii b) – capital gain at 12.5%
 - Consequence – Tax on the shareholders – capital gain 12.5%
 - Fair value v. Rule 11UA value of shares
 - Domino Printing Science Plc., In re [2021] 124 taxmann.com 187 (AAR - New Delhi)
 - Company – no material tax liability
 - No capital gains tax in absence of consideration – CIT v. Texspin Engg. [2003] 263 ITR 345 (Bombay HC)
 - Slump sale – S. 50B – Rule 11UA value (adjusted book value) to be considered as consideration
 - Book value of asset was considered as consideration - ACIT v. Celerity Power [2018] 100 taxmann.com 129 (Mum Trib)
 - No statutory restriction on withdrawal of balance in partners capital post conversion into LLP – GAAR ?

Buy Back – S. 230 Scheme of Arrangement

- ❑ Buyback u/s 230 of Companies Act – scheme of arrangement – approved by NCLT ?
 - S. 2(22)(f) - *any payment by a company on purchase of its own shares from a shareholder **in accordance with the provisions of section 68 of the Companies Act, 2013***
 - S. 230(10) - *No compromise or arrangement in respect of any buy-back of securities under this section shall be sanctioned by the Tribunal unless such buy-back is **in accordance with the provisions of section 68.***
 - Same phrase can have different meaning ?
 - Due to change in language, ruling and litigation under the erstwhile provisions may not be relevant –
 - Cognizant Technology-Solutions India Pvt. Ltd., Vs. ACIT [2023] 154 taxmann.com 309 (Chennai - Trib.)
 - Capgemini India (P.) Ltd., In re [2016] 67 taxmann.com 1 (Bombay HC)

Buy Back – Non residents

- ❑ Capital gain v. dividend – OECD Commentary tilts towards dividend [Article 10 Dividend (para 28) and Article 13 Capital Gain (para 31)]
 - S. 2(22)(e) Deemed dividend – DTAA – KIIC Investment Company [TS-708-ITAT-2018(Mum)]

- ❑ Facts will determine which of the two is more beneficial –
 - Rate of tax – 5%/10%/15% (Dividend) v. 12.5% (14.95%) Capital Gain (consideration less cost)
 - Mauritius, Singapore, etc. attempt can be made to justify as CG to avail benefit of shares acquired before 1 April 2017 – specific v. general, static v. ambulatory approach

- ❑ Dividend – possible arguments –
 - Dividend income is net of issue price – language ‘income from shares’
 - To the extent of accumulated profits – language ‘participating in profits’

Buyback – Non residents

- ❑ Buyback not dividend as per treaty – whether capital gains will apply ?
 - How to compute ? S. 46A deems nil consideration
 - Tax free ?
 - Get the loss ?

- ❑ Start ups – exit strategy – non-resident investors
 - Infuse capital by new investors
 - Buyback shares – tax 5%/10%
 - Mix of buy back and sale – sale is primarily to recoup capital loss arising on buyback of shares

- ❑ Transfer pricing issue – is benchmarking required? If yes, as Dividend or capital gains or both ?



Capital Gains

Capital Gains – Key Amendments

❑ Rate of tax – from July 23, 2024

- Long term capital gain – unified at 12.5% - earlier 10% & 20% - capping on surcharge at 15% continues
- STCG – S. 111A – Equity shares, equity oriented MF unit or REIT/INVIT – 20% - earlier 15%

❑ Computation – from July 23, 2024

- Withdrawal of indexation benefit
- Exception – resident individuals and HUFs.- transfer of land or building acquired before July 23, 2024 (lesser tax, no claim of higher loss)

❑ Period of holding – from July 23, 2024

- Listed securities – 12 months (change for units of business trust), Others Capital Assets – 24 months
- Exception – business undertaking – 36 months – no change in S. 50B

Capital Gains – Key Amendments

- ❑ Transfer, redemption, or maturity of unlisted bonds or unlisted debentures from July 23, 2024 will be deemed to STCG, **irrespective of the period of holding** – S. 50AA. (no purchase based grandfathering)

- ❑ Change in definition of specified mutual fund u/s 50AA – from FY 25-26
 - New definition – Debt fund > 65% in debt (or debt fund) – is specified mutual fund
 - Earlier definition was linked to investment by MF in domestic equity shares
 - Gold ETF, balanced fund (non-debt or equity concentration), Equity Fund of fund, Foreign equity fund, foreign fund of fund – moved out from FY 25-26

- ❑ Chapter VI-A benefit would be available – not available for LTCG

- ❑ Consequential impact on set off and carry forward of losses – Interest income was earlier regarded as business income or IOS or LTCG but, would now be regarded as STCG.

Capital Gains – Key Amendments

- ❑ Exemption threshold u/s 112A – listed equity shares, equity-oriented mutual funds, units of business trust increased from Rs. 1 lac to Rs. 1.25 lacs – from FY 2024-25
- ❑ Retrospective clarification – Sale of shares in OFS – computation of cost u/s 55(2)(ac) w.e.f. April 1, 2018
- ❑ Non-resident continues to be ineligible for forex benefits under 2nd proviso to S. 48 – amendment to Finance Bill (No 2) 2024.
- ❑ FPI – few case continue at 10% (S. 115AD(1)(iii) – Securities not covered by S. 112A like listed bonds, debentures, etc.)
- ❑ Benefit of substitution of fair value of 2001 continues
- ❑ The computation of capital gain to taxpayer on foreign assets in foreign currency continues as per Rule 115.
 - Legatum Ventures Ltd. vs. ACIT [2023] 149 taxmann com 436 (Mumbai - Trib.).

Capital Gains – Indexation benefit

- ❑ Calculation of capital gains in case 2 properties are sold in the same year – If 12.5% is beneficial for one property and 20% is beneficial for another property can different methods be used for different assets?
 - Prima facie this should be possible – the proviso provides for a capital asset wise comparison and not envisages aggregate comparison.

- ❑ ‘Acquired before July 23, 2024’ – Gift or inheritance after July 23, 2024 – whether covered by the proviso ?
 - CIT v. Manjula J. Shah [2013] 355 ITR 474 (Bombay HC)
 - Similar controversy in S. 55(2)(ac) – grandfathering price for listed shares – benefit of proviso

- ❑ Scope of the phrase ‘land or building or both’ – controversy of S. 50C and S. 56(2)(x)
 - Leasehold rights, tenancy, under construction, etc.
 - Words can have different meaning for different sections

Capital Gains – Indexation benefit example

Impact of proposed amendment due to removal of indexation benefit

Consider Mr. A purchased a house before 2001 and 2001 FMV is Rs 1 crore

Mr. A sold the house in August, 2024 for Rs. 24 crore and used Rs. 20 crore for purchasing a new house.

Particulars	No investment made in accordance with S. 54		With Investment made u/s 54	
	Old	New	Old	New
Full value of consideration	24,00,00,000	24,00,00,000	24,00,00,000	24,00,00,000
Less: Cost of acquisition	-	1,00,00,000	-	1,00,00,000
Less: Indexed cost of acquisition	3,63,00,000	-	3,63,00,000	-
Capital gains	20,37,00,000	23,00,00,000	20,37,00,000	23,00,00,000
Investment in 54	-	-	10,00,00,000	10,00,00,000
Liable to capital gains	20,37,00,000	23,00,00,000	10,37,00,000	13,00,00,000
Tax rate	20.00%	12.50%	20.00%	12.50%
Tax payable	4,07,40,000	2,87,50,000	2,07,40,000	1,62,50,000

Capital Gains – Indexation benefit example

- In the above example if we consider that half of the property is gifted to spouse (before transfer) , computation of capital gains would be as below :

Particulars	Investment made under section 54 - Old		Investment made under section 54 - New	
	Self	Spouse	Self	Spouse
Full value of consideration	12,00,00,000	12,00,00,000	12,00,00,000	12,00,00,000
Less: Cost of acquisition	-		50,00,000	50,00,000
Less: Indexed cost of acquisition	1,81,50,000	1,81,50,000		-
Capital gains	10,18,50,000	10,18,50,000	11,50,00,000	11,50,00,000
Investment in 54	10,00,00,000	10,00,00,000	10,00,00,000	10,00,00,000
Liable to capital gains	18,50,000	18,50,000	1,50,00,000	1,50,00,000
Tax rate	20%	20%	12.50%	12.50%
Tax payable	3,70,000	3,70,000	18,75,000	18,75,000
Total	7,40,000		37,50,000	

Capital Gains – Indexation benefit example

- However, it the proviso to section states that the method of computation of 20% without indexation shall be available only in the case of assets that are acquired before 23 July 2024. Whether the gift received by spouse will be considered as acquired before 23 July 2024 is ambiguous and hence the computation of capital gains shall be as below:

Particulars	Investment made under section 54	
	Self - old	Spouse - new
Full value of consideration	12,00,00,000	12,00,00,000
Less: Cost of acquisition	-	50,00,000
Less: Indexed cost of acquisition	1,81,50,000	
Capital gains	10,18,50,000	11,50,00,000
Investment in 54	10,00,00,000	10,00,00,000
Liabile to capital gains	18,50,000	1,50,00,000
Tax rate	20%	12.50%
Tax payable	3,70,000	18,75,000
Total	22,45,000	

Capital Gains – Increase in exemption limit u/s 112A

- ❑ S. 112A – limit increase from Rs. 1 lac to Rs. 1.25 lac is w.e.f. July 23, 2024 – whether higher limit will apply to capital gain prior to July 23, 2024 ?
 - The limit is for the Assessment Year and is not linked to the date of transfer - law on 1st day of Assessment year - CIT v. Isthmian Steamship Lines [1951] 20 ITR 572 (SC)
 - Proviso also provides that limit of Rs. 1.25 lacs applies to aggregate capital gain for the year
- ❑ If LTCG both taxable at 12.5% and 10% against which the limit of 1.25 lac is to be used first ?
 - First against 12.5% and then against 10% since more beneficial
 - Circular : No. 26(LXXVI-3), dated 7-7-1955. In the absence of any such indication, the general rule to be followed in all fiscal enactments is that where words used are neutral in import, a construction most beneficial to the assessee should be adopted – set off of loss.
- ❑ How it will be captured in ITR utility ?

Capital Gains – Point of Transfer – Transitional issue

- ❑ CBDT Circular 704 dated 28-Apr-1995
 - Date of broker note has to be considered as the date of transfer for listed transactions
 - Unlisted transactions, date of contract of sale as declared by the parties shall be treated as the date of transfer provided it is followed up by actual delivery of shares and the transfer deeds

- ❑ Y.V. Ramana v. CIT – in case of transfer of unlisted shares transfer would take place only when valid share transfer Form No. 7B is delivered to the company and endorsed by the company

- ❑ Suraj Lamp & Industries (P.) Ltd. v. State of Haryana [2012] 340 ITR 1 (SC) (3 Judge) - transfer of immovable property by way of sale can only be by a deed of conveyance (sale deed) and not by an agreement to sell or by simply giving the possession (subject to cases covered by S. 53A of TOPA (dealt with by clauses (v) of section 2(42A)))

Capital Gains – Conversion of Capital asset into Stock in trade, etc.

- ❑ Certain cases wherein the capital gains is delayed as below
 - Conversion of capital asset into stock in trade - Capital gains is computed in year of transfer, but is taxable in the year of subsequent transfer of SIT
 - Capital gains in Joint Development Agreement ('JDA') – Capital gains chargeable in the year completion certificate is received - Capital gain is computed, subsequently and not in the year of transfer and taxed in that year
 - S. 47A Violation of 8 year condition between holding and wholly owned subsidiary company – Capital gains relate back to the year of transfer on subsequent violation
 - S. 47A(3) and S. 47A(4) – In case of conversion of entity exempt u/s 47(xiii), 47(xiiib) and 47(xiv) if any of the stipulated condition is violated – Capital gains so computed in year of transfer, is taxable in the year of violation of condition

Capital Gains – Conversion of Capital asset into Stock in trade, etc.

- S. 54, 54F, 54EC, etc – Similar to S. 45(2), 47A(3) and 47A(4) – the charge is in the year of violation of the requirement – like not investing the funds set-aside in the separate bank account for acquisition of the residential house, selling the new asset - Capital gains is computed in year of transfer, but is taxable in the year of violation of condition

- Language of S. 112 –
 - *at the rate of twenty per cent. for any transfer which takes place before the 23rd day of July, 2024*
 - *at the rate of twelve and one-half per cent. for any transfer which takes place on or after the 23rd day of July, 2024*

- In all the aforesaid cases, the transfer of capital asset would be prior to July 23, 2024 and therefore, taxpayer would not be entitled to the reduced tax rate of 12.5%, though the capital gains is chargeable after July 23, 2024 **as the capital gains would still pertain to transfer before July 23, 2024.**
 - The taxpayer should be entitled to the benefit of indexation u/s 48 as the transfer is before July 23, 2024

Capital Gains – ESOP

- ❑ Value erosion – Sanjay Baweja [TS-377-HC-2024(DEL)] has raised an interesting controversy in relation to taxation of ESOP compensation for erosion of value. The court held the compensation to be a capital receipt.
 - Contrary view – Nishithkumar Mukeshkumar Mehta [TS-582-HC-2024(MAD)] – taxable as perquisite and not a perquisite.
 - However, whether the ruling would hold well after the S. 55 amendment last year is itself debatable.

- ❑ Lock- in period – Ravi Kumar Sinha [TS-590-HC-2024(DEL)] – restriction has to be factored in valuation

- ❑ Buyback of employees' stock option by the Company u/s 68 of the Companies Act ?
 - S. 17 v. S. 46A – perquisite v. capital gain
 - Buyback amendment u/s 2(22) only covers shares and does not cover ESOPs

Capital Gains – S. 50AA – CCD and OCD

- ❑ **As part of unlisted debentures – CCD and OCD are also deemed short term capital asset u/s 50AA – way forward –**
 - Convert them into equity shares (which is exempt u/s 47) and then transfer equity shares – the period of holding and cost of acquisition of equity shares would relate back to the period of holding and cost of acquisition of CCD/OCD.
 - If for certain reasons OCD or CCD cannot be converted to equity shares (say, pending price discovery, anti-dilution clauses, etc) – one can considering amending the terms of OCD/CCD and converting them into optionally convertible preference shares with identical terms – subject, to other commercial considerations, if any.
 - It should be arguable GAAR shouldn't apply - as it is not against the legislative intent. The legislature does not intend to tax a quasi-equity instrument as a debt instrument.
 - It is curing unintended tax inefficiency

Capital Gains – S. 50AA – Double Taxation of premium on redemption

- ❑ Any transfer, redemption or maturity of unlisted bonds and debentures on or after July 23, 2024 would be deemed to be short term capital gain.
- ❑ As regards the point of taxation of premium on redemption of debenture – two schools of thought prevailed – i) premium on redemption of debenture has to be offered to tax in the year of maturity; or ii) premium on redemption of debenture has to be offered to tax over the period of the debenture as interest income (ICDS IV).
- ❑ Who have followed ICDS and offered to tax the premium on redemption in earlier years – again will have to pay tax as per 50AA- the general theory of no double taxation of the same income should apply -
 - Laxmipat Singhania v. CIT [1969] 72 ITR 291 (SC) (3 Judge),
 - CIT v. Surat Cotton Spg. & Wvg. Mills (P.) Ltd. [1993] 202 ITR 932 (Bombay HC)
- ❑ Going forward interest will not be offered to tax on year on year basis – preamble to ICDS clarifies that in case of conflict between ICDS and Act the Act shall prevail.

Capital Gains – S. 50AA – Scope of deeming fiction

- ❑ In the context of S. 50 -CIT v. V.S. Dempo Company Ltd. [2016] 74 taxmann.com 15 (SC) courts have taken a view the deeming fiction of S. 50 is **only for S. 48 and S. 49** and for other provisions of the Act (like 54F, rate of tax, etc) the depreciable asset has to be regarded as a long term capital asset.
- ❑ S. 50 intends to modify the computation u/s 48 and 49, whereas S. 50AA deems the capital gain as capital gain arising from short term capital asset without the fiction being limited in its applicability only to sections 48 and 49. Therefore, taking the deeming fiction to its logical conclusion u/s 50AA the rate of tax has to be that of short term capital asset which is also the primary object of S. 50AA.

Capital Gains – S. 50AA – Interplay with DTAA

- ❑ DTAA – Whether the premium on redemption would be treated as interest or capital gains ?
 - E.g. India UK DTAA – *The term "interest" as used in this Article means income from debt-claims of every kind, whether or not secured by mortgage and whether or not carrying a right to participate in the debtor's profits, and in particular, income from Government securities **and income from bonds or debentures, including premiums . . .***
 - What is beneficial ?
 - Capital gain – right with resident state or source state ?
 - Interest (US, UK, etc.) or Capital Gain (Singapore, Mauritius, UAE, etc.)
 - Can I pick and choose – ignore definition of interest under DTAA and say capital gain taxation right is with the resident state ?

Corporate Gifting

Corporate Gifting – S. 47(iii) – Amendment

- ❑ Section 47(iii) provides that any transfer of a capital asset under a gift or a will or an irrevocable trust shall not be treated as a transfer.
- ❑ Amendment – Restrict the exemption only to transfer of capital asset by **an individual or HUF**, under a gift or will or irrevocable trust. (applicable to gifts **from April 1, 2024**)
 - In other words, gift of capital asset by partnership firms, companies, LLPs, etc. would not enjoy statutory exemption u/s 47(iii)
- ❑ EM –
 - bolstering the anti-avoidance machinery provisions of the Act (50CA, 50D) to eliminate avoidance of Capital Gains tax
 - tax avoidance and erosion of Indian tax base.

Corporate Gifting – Was the exemption out of abundant caution ?

- ❑ Legislature can provide an exemption out of abundant caution.
 - CIT v. Madurai Mills [1973] 89 ITR 45 (SC)

- ❑ Capital gains – charge is on full value of consideration – in absence of consideration the charge fails ?
 - Bennett Coleman & Co. Ltd. v. ACIT [2011] 12 ITR(T) 97 (Mumbai T) (SB)
 - Jai Trust v. UOI [2024] 160 taxmann.com 690 (Bombay HC)
 - Banca Sella S.p.A., In re [2016] 72 taxmann.com 360 (AAR New Delhi)

- ❑ Whether it should be considered as a case of nil consideration and taxpayer should be allowed capital loss ?
 - Tata Sons Limited vs CIT [2024] TS 42 (Mum Trib.)
 - CIT v. Jaykrishna Harivallabhdas [1998] 231 ITR 108 (Gujarat HC)
 - No amendment to S. 48 – like the 6th proviso to deem fair value as full value of consideration (ESOP trust)

Corporate Gifting – Was the exemption out of abundant caution ?

- ❑ Whether S. 50C and S. 50CA would apply (assuming S. 45 & 48 applies) ?
 - Jai Trust v. UOI [2024] 160 taxmann.com 690 (Bombay) (para 18) – S. 50CA will not apply to a transfer without consideration
 - Limited assets are covered – land and building, unquoted shares. Interest in partnership, listed shares, trademark etc. are not covered.

- ❑ Whether S. 50D would apply (assuming S. 45 & 48 applies) i.e. can it be said that consideration is not determination ?
 - Jai Trust v. UOI [2024] 160 taxmann.com 690 (Bombay HC) (para 18) – Section 50D postulates receiving consideration and not a situation where admittedly no consideration has been received.
 - No need of amendment to apply S. 50D – if the case is of consideration not being determinable, then it is not a case of transfer without consideration

- ❑ No consideration can be envisaged (Without consideration) v. Nil Consideration
 - Gift, Family arrangement, corporate restructuring v. Buy Back & Capital Reduction

Corporate Gifting – Areas of Impact

- ❑ Corporate donation of capital asset to Charity (say, a parcel of land to construct school or hospital)

- ❑ Whether private Trust would be regarded as an Individual ?
 - In the context – no (unless all beneficiaries are individual and they decide to give a gift)
 - Contrary view – for many of the sections courts have regarded private trust as Individual

- ❑ Family arrangement – can corporate be party to family arrangement ?
 - No consideration exists in a family arrangement – it is only realignment of pre-existing interest

- ❑ Contribution of capital asset to ESOP trust (not common)

- ❑ Division of business through gift of undertaking to WOS or mirror shareholding company

Corporate Gifting – Cost to the recipient ?

- ❑ No amendment to S. 49(1)(ii) – Gift – cost to previous owner [subject to cost step-up if tax is paid u/s 56(2)(x)]
 - No cross reference to S. 47(iii)
 - In the context, Gift is different from transfer without consideration – reverse argument (to take advantage of S. 47(iii) it was always contended that transfer without consideration is gift – love and affection is not required)

- ❑ Double whammy ?
 - The transferor pays tax
 - No cost step-up for the recipient

- ❑ If the Gift is a stock in trade for the recipient – FMV of the asset
 - CIT v. Groz Beckert Saboo Ltd [1979] 116 ITR 125 (SC)

- ❑ What if the asset is to be added to the block of asset ?

Corporate Gifting – Cross Border Transactions

❑ Foreign merger and de-merger not exempt u/s 47

- Subject to the scope of S. 9 and DTAA
- Banca Sella S.p.A., In re [2016] 72 taxmann.com 360 (AAR New Delhi)

❑ International corporate gifting

- Subject to the scope of S. 9 and DTAA
- PCIT v. Redington (India) Ltd. [2020] 122 taxmann.com 136 (Madras HC) - sole intention of assessee being corporate re-structuring, assessee was liable to tax under section 45 (bona fides were doubted)
- Vodafone India Services (P.) Ltd. v. DCIT [2018] 89 taxmann.com 299 (Ahmedabad - Trib.) – Transfer pricing would apply

Thank You

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