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POST – BUDGET MEMORANDUM 2022

Suggested amendments in respect of Direct Taxes for Finance Bill, 2022

THE CHAMBER OF TAX CONSULTANTS

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Imm. Past President
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Date: 10th March, 2022

To,
Honorable Finance Minister,
Government of India,
Ministry of Finance,
North Block, Parliament Street,
New Delhi – 110 001

Respected Madam,

Subject: Post – Budget Memorandum Direct Tax Proposals of Finance Bill 2022

We are pleased to submit our suggestions on Direct Taxes of the Finance Bill, 2022 for your Honor's Kind consideration. We have concentrated on certain clauses and made suggestion which, we are sure, will meet with your approval. Each of the suggestions has been necessitated as serious hardship or inconsistency in the law may be caused.

With regards,

Yours truly,

For THE CHAMBER OF TAX CONSULTANTS

Sd/-	Sd/-	Sd/-
Ketan L. Vajani	Mahendra Sanghvi	Apurva Shah
President	Chairman	Co-Chairman
	Law & Representation Committee	

Following are the suggestions:

Topic	Sub-Topic	Suggestion	Rationale
Taxation of Virtual Digital Asset ('VDA')	Definition of Virtual Digital Asset Ref – Clause 3(b)	▯ Definition be amended to cover those digital assets which are based on distributed through ledger technology or any other similar technology.	▯ The definition of "Virtual Digital Assets" as proposed, is very wide in nature and covers every product which involves use of "Cryptography means". Cryptography is a key to the security of the blockchain ledger. The cryptography does not lead to creation of virtual digital asset. Today, the digital assets are based on distributed ledger technology and blockchain technology is one part of the distributed ledger technology. ▯ If the intention is to cover those digital assets which are based on distributed ledger technology, then the definition be suitably amended to cover digital assets based on such technologies. ▯ Further, the word "otherwise" is very vague. It is not clear whether does it imply any similar technology like Cryptography or blockchain or distributed ledger technology which leads to creation of digital product.
	Situs of Virtual Digital Assets	▯ Necessary provisions to decide situs of digital assets, may be provided for.	▯ It is also difficult to know the situs of virtual digital assets based on distributed ledger technology or similar technology. The entire technology relies on peer-to-peer network model. ▯ This may create issues relating to transactions between a resident and a non-resident. In order to decide whether the non-resident is liable to tax in India in respect of sale of digital assets to a resident, it is important to decide where the situs of virtual digital asset is. If no clarity is provided in this regard, it may lead to unnecessary litigation.
	Set-off of loss from Sale of One VDA against Profit from another VDA Ref – Clause 28	▯ Section 115BBH or Section 70 be suitably amended to provide for set-off of losses relating to sale of VDAs.	▯ Income-tax is an annual tax. The computation of income is for entire year and not transaction wise. Currently, there is an ambiguity as to whether the income from VDA is to be computed and offered to tax on per transaction wise or based on nature of VDA e.g. separately for Bitcoin and Etherum etc. or on annual basis covering all VDA or based on characteristics of each VDA. The ambiguity is also as to whether loss from sale of one VDA can be set-off against profit from another VDA.
	Taxation of VDA	• Equate the taxation	• We understand that virtual digital asset

	Ref – Clause 28	of virtual digital asset with taxation of speculative business instead of equating it with taxation from lottery and gambling.	is not very well-regulated asset class and world over regulators are struggling with it. Similarly, the intention here seems to be that of not to promote trading/investing in virtual digital asset. However, discouraging investments in next generation technology and where investing in them is even recommended by the largest wealth managers of the world and going to the extent of equating it with gambling or lottery is uncalled for. • Further, not giving the benefit of the slab rate only hits the common man. The HNIs are even otherwise being taxed at 30%. This should be considered to avoid hardship to small tax-payers.
	Definition of "Cost of Acquisition" Ref – Clause 28	The term "Cost of acquisition" be defined to mean "price paid by a person for purchase of a virtual digital assets which shall also include direct costs associated with such purchase". If the VDA transferred was acquired on account of mining, then cost incurred on mining of VDA shall be treated as Cost of Acquisition.	Section 115BBH allows deduction of "Cost of Acquisition" in computation of income arising from transfer of a VDA. However, it does not define the Cost of Acquisition. Currently, there is an ambiguity as to whether the Cost of Acquisition would only mean purchase price of VDA or other direct costs associated with purchase such as brokerage charges, Exchange Fees, Gas Fees etc. Further, with respect to those persons who are selling VDA after mining, it is not clear as to what shall be the cost of acquisition where VDA is generated through mining.
	Barter Transaction Ref – Clause 59	The definition of "income" be restricted to cover those transactions where there is realisation of money on sale of VDA and barter transactions be excluded therefrom as there is no realisation of income by the person.	The word "Income" under the Income-tax Act, 1961 is generally understood as realisation in monetary terms. Presently, it is not clear whether the "Income from transfer of virtual digital asset" will cover exchange of one VDA for another VDA. But, when one looks at proposed Section 194S, it casts an obligation even in case of barter transactions in VDAs.
	Withholding tax liability u/s. 194S Ref – Clause 59	The "person responsible for paying" be defined to mean those persons who facilitated the transfer of virtual digital assets.	The proposed Section 194S casts obligation to deduct tax at source on the "person responsible for paying". Presently, it is not clear whether such person will be the "person" who is purchasing the VDA or will it include the "Crypto exchanges" as well. If the duty is casted on the purchaser who in many cases can be individual also, then such individual shall be required to comply with other compliances such as

			deposit of TDS with the Central Government, filing of TDS statements, issuance of TDS certificate. Such an onus will be practically difficult to comply with and rather, it will create burden. Further, the individual may also not have the relevant details of the seller to comply with the TDS obligations. In today's times, almost all the transactions relating to sale and purchase of digital assets are carried out through exchanges. If an onus is casted on the exchange to deduct TDS before payment is being remitted to the seller, then it will result in efficient compliance and recovery of taxes. This will be similar to Section 194-O wherein the onus to withhold and deposit tax is on the e-commerce operator and not on the person who is paying for goods and services on the online platform.
Allowability of business expenditure – Section 37	Meaning of "Offence" Ref – Clause 12	The explanation be amended to exclude those charges which are compensatory in nature.	The proposed amendment disallows any expenditure which is incurred in relation to an "offence". It is not clear whether the word will also cover those cases where a fee or interest or penalty is paid in relation to procedural non-compliances. If such penalty or fee or interest is compensatory in nature, then such expenditures should not be governed by the proposed amendments.
	Compounding fees not allowed as an expense Ref – Clause 12	• Compounding fees should be allowed as an expense	• Many a times, compounding fees is paid to avoid litigation, for peace of mind, to maintain social reputation etc. Payment of compounding fees does not necessarily mean that the person is guilty of the offence being compounded. Therefore, to deem that compounding fees is paid for violation of law would be incorrect. • Further, the objective of the government has always been to reduce litigation and this amendment goes contrary to the philosophy of reducing litigation as the person opting to compound an offence is discouraged by the compounding fees not being allowed as an expense.
	Explanation 3(ii) Ref – Clause 12	• The explanation consists of the words "…any law or rule or regulation or guideline, as the case may be, for the time	• The wordings used in this explanation could cover a very wide gamut of laws, rules, regulations or guidelines which are impossible to implement. • Due to the impossibility to implement

		being in force…"	this provision, it is suggested that the explanation proposed be dropped or be suitably worded in order to make it implementable.
Amendment in relation to Education Cess	Retrospective Amendment made to Section 40(b) Ref – Clause 13	• make the amendment prospective and make early hearing petition in the Supreme Court	• Retrospective amendments lead to the uncertain atmosphere, which is contrary to the idea of providing ease of doing business to the taxpayers. Moreover, the present government has always been opposing the retrospective amendments to tax laws for very valid reasons. In such a situation, it would be appropriate to avoid making the amendments in a retrospective manner and create a situation of mistrust amongst the MNCs who otherwise look forward to do business in India and thereby contribute in the economic development of the country. All the MNCs operating in India would be reporting this additional tax burden in relation to earlier years due to retrospective amendment made to overrule the High Court ruling. Further since the matter is already before the Hon. Supreme Court and the government is very confident of the interpretation of law as emerging from the Memorandum, it would be appropriate for the government to wait for the final verdict by the Supreme Court. The government may make early hearing petition to the Supreme Court instead of a retrospective amendment.
Cash Credit – Source of Credit	Explanation about the nature and source of the person from whom a loan or borrowing or such amount is credited Ref – Clause 17	• Source of source in case of borrowings from unrelated parties would be very difficult and most of the time impossible to be proved by the person taking the loan. Hence, we suggest that proposed amendment be dropped. • Alternatively and without prejudice to the above, borrowings from regulated entities like banks, systematically important NBFCs should be excluded from the purview of the requirement of establishing source of	• For ease of doing business, loans accepted by small and medium business entities (including MSMEs) are from non-banking and unregulated persons. By inserting the proposed amendment, small and medium business entities (including MSMEs) would be hit badly. Further, there are provisions in the statute to identify and take necessary action against the wrong-doers. • This is in line with the present applicability of the provisions for issuance of shares where regulated entities, like venture capital funds, have been excluded from the application of the section. As regards the loans and borrowings, it would be appropriate to have specific exceptions for loans and borrowings from banks and financial institutions including NBFCs so as to avoid unnecessary difficulties for assessees in such genuine cases. • Further, it would be practically

		source	impossible to establish a source of source in certain scenarios. For eg. if a person has borrowed from State Bank of India or Bank of America, it would not be possible for the taxpayer to insist their bankers to establish a source of source.
TDS on Benefit or Perquisite	Valuation of Benefit or Perquisite Ref – Clause 58	The proposed section to provide that the tax shall be deducted on the cost for the assessee.	The proposed amendment does not provide as to how the value of the benefit or perquisite should be computed. There can be various different types of benefits which will get covered under the said section and it will be practically impossible to decide the value for various such benefits. In the absence of such clarity, it will create ambiguities as to how the value of the benefit or perquisite should be computed
	Ineligibility to avail the option to file updated returns Ref – Clause 38	• The option to file updated returns is not available if proceedings for assessment, reassessment, re-computation or revision are pending	• There is an inherent ambiguity the way the proposed section has been drafted. It is unclear as to at which stage would proceedings be pending after the return has been filed by the assessee. • A clarification is required as to the stages at which it would be deemed that proceedings are pending in order to avoid litigation.
Filing of Updated returns	Updation of Tax Audit Report or Form 3CEB Ref – Clause 38	The proposed Section 139(8A) be expanded to include filing of updated tax audit report or Form No. 3CEB, as the case may be.	Presently, the proposed amendment provides for filing of updated returns within 12 / 24 months from the end of relevant assessment year. In cases where the tax audit u/s. 44AB or requirements to file Form No. 3CEB are applicable, the assessee can file returns once the tax audit report or Form No. 3CEB has been filed. If such an assessee wishes to file updated returns, then without having first amended the tax audit report or Form No. 3CEB, these assessee's may not avail the benefit of the proposed amendment. Therefore, the proposed amendment be further expanded to allow assessee's to file updated tax audit report or Form No. 3CEB.
	Disclosure of foreign assets Ref – Clause 38	The proposed Section 139(8A) be clarified to include cases to make necessary disclosures in the return of income.	The proposed amendment are presently silent as to whether an assessee can file an updated return of income to disclose foreign assets which could not be disclosed in the original / belated or revised return of income.
Assessment Proceedings	Continuation of Assessment Proceedings on the successor Ref – Clause 53	• The proposal provides for continuation of assessment proceedings in the	• Predecessor continues to exist in the case of demerger and the assessment proceedings can continue in the hands of the predecessor. Further, it would lead to unnecessary absurdity that in case of a

		hands of the successor in case of a business re-organisation. The suggestion is that the amendment should be made applicable only in case of merger and not in case of demerger.	demerger the assessment is transferred to the successor who would have acquired just one of the many undertakings of the predecessor but the entire income tax assessment Would be carried on in the name of the successor for a period even prior to the takeover.
Charitable and Religious Trusts	Cancellation of Approval u/s 10(23C) and Registration u/s 12AB 15th proviso to s.10(23C) and section 12AB(4) & (5) Ref – Clauses 4(b)(iv) & 7)	• Application of even small amount by trust, for genuine purposes such as Covid relief or disaster relief, which may strictly not fall within objects, may attract complete loss of registration. • Whether an activity constitutes business or not is a highly disputed issue currently – cancellation of registration may add to the litigation • Minor violations, such as not maintaining separate books, would attract severe consequences. Some of the conditions being laid down while granting registration are not required by law, impractical and add to difficulties faced by trusts – these include: a. Seeking prior approval of CIT for amendment in rules & regulations (not objects) b. Quoting of PAN in all communications c. Separate accounts in respect of each activity to be maintained d. Public notice of activities carried on/to be carried on and target group of	• The cancellation of registration should be restricted to cases where: o Activities of the trust are not genuine o Trust set up after 1.4.1962 spends more than 90% of its income for benefit of particular religious community or caste o Trust has not complied with requirements of any law which are material for the attainment of its objects • All other cases of violation should at best result in taxation of relevant income at 30% u/s 115BBI • Provisions of section 115TD should not be applicable to cases of cancellation of registration u/s 12AB

		beneficiaries to be displayed at registered office e. principal place of activity not to be transferred outside jurisdiction of CIT without prior approval f. no asset to be transferred without knowledge of CIT g. all contributions to be routed through a bank account to be communicated to CIT Violation of any of these can result in cancellation of registration • These provisions will result in harassment of trusts and a spate of litigation	
	Loss of exemption in respect of investment in non-specified modes S.13(1)(d) Ref – Clause 8(a)(ii)	• the investment is in any case not being treated as an application of income for charitable purposes, the amount of such investment should not lose exemption. In most cases, the investment is being made out of surplus funds of earlier years, accumulated u/s 11(1)(a). It appears that the intention is that the income from such impermissible investments should lose exemption	• Only the income from such impermissible investments should lose exemption, and be taxable at 30% u/s 115BBI
	Prescription of maintenance of books of accounts and other documents with form, manner and place of maintenance S.12A(b)(i)	• The existing requirement of audit already implies maintenance of proper books of account. The loss of exemption is too harsh a punishment for minor deficiencies in maintenance of	• The requirement of prescription of books of account and documents is unnecessary and should not be implemented • Besides, non-maintenance of books and documents in prescribed form and manner, and at prescribed place should not result in loss of exemption. If the purpose is to use the provisions as

	Ref – Clause 6	books of account	deterrent, a token penalty might be provided to address the same so as to avoid disproportionate hardships.
	Exemption for application of income Explanation to Section 11 Ref – Clause 5(c)	• Many trusts following mercantile system of accounting, will have to consider income on mercantile basis and application of income on cash basis (a hybrid method, which will give distorted results). Besides, trusts have less than one month left to actually pay out expenses incurred by them for the current financial year 2021-22, which is inadequate. • The audit requirement ensures that trusts do not accrue an expenditure for which a liability is not actually incurred	• Trusts following mercantile basis should continue to be permitted to claim application of income for expenditure accrued following the same basis. • In any case, if at all felt essential, the amendment should apply only w.e.f. AY 2023-24
	Taxation of Specified Income Clause (a) of Explanation to S.115BBI Ref – Clause 28	• It is not clear as to which type of accumulation is referred to in this clause.	• This clause should be deleted, since an impermissible accumulation is not exempt, in any case
	Alignment of provisions of s.10(23C) with s.11 Section 10(23C) Ref – Clause 2(b)	• Most trusts have had to opt for one of the 2 categories of exemption in the current financial year on the basis of the then prevailing provisions. They may not have so opted had these amendments been in existence. • Section 10(23C) is the most complicated provision of the Act, having as many as 24 provisos	• All trusts approved u/s 10(23C)(iv),(v),(vi) or (via) should be granted deemed registration u/s 12AB, and henceforth be governed by exemption u/s 11 to 13 • Alternatively, all trusts approved u/s 10(23C)(iv),(v),(vi) or (via) should be permitted to change their option once to obtain automatic registration u/s 12AB, without this being considered as exercise of option under second proviso to s.11(7)
	Tax on Accreted Income	• Such tax will also now be attracted to	• Section 115TD should not apply to cases of cancellation of registration u/s

	S.115TD Ref – Clause 31	cases where s.10(23C) approval is cancelled due to seeking registration u/s 12AB and vice versa	12AB/approval u/s 10(23C) • In any case, cases of cancellation of s.10(23C) approval due to obtaining registration u/s 12AB or vice versa should certainly be exempted from the applicability of s.115TD • The tax on accreted income should be a flat rate of 30%, as under s.115BBI, instead of the maximum marginal rate

NOTES

The Chamber of Tax Consultants

Estd. 1926

Vision Statement

The Chamber of Tax Consultants (The Chamber) shall be a powerhouse of knowledge in the field of fiscal laws in the global economy.

The Chamber shall contribute to the development of law and the profession through research, analysis and dissemination of knowledge.

The Chamber shall be a voice which is heard and recognised by all Government and Regulatory agencies through effective representations.

The Chamber shall be pre-eminent in laying down and upholding, among the professionals, the tradition of excellence in service, principled conduct and social responsibility.

Unveiled by **Shri S. E. Dastur,** Senior Advocate on 30th January, 2008.

ABOUT THE CHAMBER OF TAX CONSULTANTS

The Chamber of Tax Consultants (The Chamber) was established in 1926 and is one of the oldest voluntary non-profit making professional organisations. It is the voice of more than 4,000 professionals on a pan-India basis. Its members comprise of Advocates, Chartered Accountants, Company Secretaries, Cost Accountants, Corporates, Tax Consultants and Students.

The Chamber, despite its vintage, is a young dynamic organisation having a glorious past and undisputedly ambitious future. The Chamber is a well-respected institution with a tradition of high integrity, independence and professionalism.

The Chamber acts as a power house of knowledge in the field of fiscal law, always proactive in contributing to the development of law and profession through research and analysis, dissemination of knowledge and proactive interaction with policy makers. The Chamber also provides professionals several networking opportunities through interactive meetings and seminars.

Professional luminaries like late Shri B. C. Joshi, late Shri V. H. Patil, Dr. Y. P. Trivedi, Shri S. E. Dastur, late Shri D. M. Harish, late Shri Narayan Varma, Dr. K. Shivaram, Shri S. N. Inamdar, have been The Chamber's Presidents.

For The Chamber education is the supreme power and spread of education is its motto.

The Chamber Strives to be pre-eminent in upholding among the Professionals a Tradition of Excellence in Service and Principled Conduct with Social Responsibility

Knowledge sharing initiatives

The Chamber disseminates knowledge by holding high quality Workshops, Seminars, Lecture Meetings, Study Circles and Study Group Meetings, Outstation Conferences, etc., for the benefit of members which keeps them up-to-date with the latest developments in the field of tax and commercial laws.

Keeping in pace with the technological revolution, The Chamber also holds webinars on various professional subjects especially for members outside its area of physical presence. Through its various orientation and advance courses in new and emerging areas of practice, it equips young professionals to build their careers in unconventional practice areas. It functions through effective sub-committees in addition to its Managing Council which have about 300 core group members.

The Chamber also holds three offsite Residential Refresher Courses (RRCs) annually on Direct Tax, Indirect Tax and International Tax. In-depth study and close fellowship and bonding make the RRCs a 'must attend' for loyal enthusiasts and eager new learners alike.

Representations before Regulatory Authorities and Public Interest Litigations

The Chamber has always stood up for its members and also the taxpayers at large by making effective representations before the Government and Regulatory Authorities. Its voice is respected in Government Departments and Ministries. Professionals look upon The Chamber as an institution which can take their grievances to the Court of Law, when required.

Every year, The Chamber makes at least 25 representations on issues of tax and allied laws which cause or are likely to cause hardship to the public. The Chamber was successful in getting favourable order for the Writ Petition filed before Delhi High Court, challenging, *inter alia*, issuance of Income Computation & Disclosure Standards (ICDS) by the CBDT and the circular thereafter. The Chamber also filed a Writ petition in the Bombay High Court against the proposal by the Central Board of Direct Taxes (CBDT) to reward appellate authorities for 'quality' orders which ultimately led to the proposal being shelved. Recently the Chamber had filed a Public Interest Litigation (PIL) before the Hon. Bombay High Court against the fundamental flows in the Faceless Appeal Scheme 2020 as notified by the Central Government. This has resulted in the Faceless Appeal Scheme being completely revamped and a new scheme – Faceless Appeal Scheme 2021 has been now notified on 28-12-2021. Most of the issues raised by the Chamber in its petition has been addressed by the Central Government while framing the new scheme. The Chamber *inter alia* makes effective representation through pre and post Budget memorandums and need based representations on burning issues.