The Chamber of Tax Consultants
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POST-BUDGET MEMORANDUM 2018

Suggested Amendments in respect of

Direct Taxes for Finance Bill, 2018

THE CHAMBER OF TAX CONSULTANTS

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Treasurer : **Parag S. Ved**
Imm. Past President : **Hitesh R. Shah**

13th March, 2018

Honorable Finance Minister
Government of India,
Ministry of Finance,
North Block, Parliament Street,
New Delhi -110001.

Respected Sir,

Subject: Post – Budget Memorandum 2018 – Suggestions on Direct Taxes

We are pleased to submit our suggestions on Direct Taxes of the Finance Bill, 2018 for your Honor's kind consideration. We have concentrated on clauses and made suggestions 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/-
AJAY R. SINGH	**MAHENDRA SANGHVI**	**PARAS K. SAVLA**
PRESIDENT	**CHAIRMAN**	**CO-CHAIRMAN**

LAW & REPRESENTATION COMMITTEE

POST BUDGET MEMORANDUM – 2018

Suggestions on the amendments proposed by Finance Bill – 2018

Sr. No	Proposed Provision	Suggestion	Justification
1.	Vide Clause 5(b)(ii) and Clause 6 the Finance Bill, 2018 **("the Bill")** proposed to insert 13th proviso to section 10(23C) and Explanation 3 to section 11(1) to the Income-tax Act, 1961 **("the Act")** to provide that the provisions of sub-clause (ia) of clause (a) of section 40, regarding the deduction of tax at source under Chapter-XVII B of the Act, and sub-sections (3) and (3A) of section 40A shall be made applicable to various institutions, funds, university, hospital, etc., covered under clause (23C) of section 10 of the Act as also to charitable trust registered under section 12AA of the Act which are eligible to claim benefit of exemption under section 11 of the Act.	**Section 40(a)(ia) :–** The proposed amendment may be dropped or in the alternative it may be liberalised by providing the circumstances where it is practically difficult to deduct tax at source at the time of payment. Some such circumstances are illustrated in the subsequent paragraphs. **40A(3)/(3A) :–** The proposed Explanation may be made liberal with more number of exceptions in addition to those specified in Rule 6DD of the Income-tax Rules, 1962 (**"the Rules"**). The circumstances where it is practically impossible and/or	To reduce the compliance costs in the circumstances as given; It would be practically difficult, though not impossible, to comply with the provisions of sections 40(a)(ia) and 40A(3)/(3A) of the Act so that under the exceptional circumstances, expenditure can be incurred without deduction of tax at source and even the payments can be made in excess of the specified limit to cover the emergency needs of the Donee/recipient/deductee and/or at public at large. Further, the application of the proposed amendment may deprive the deserving persons from the benefits that would be availed by him in the given circumstances. Similarly, the assessee trust, institutions, etc. may not be able to fulfil their objective and help the needy people in the given circumstances. It may affect the economy, delay the process of bringing the life back to the normal situation, as the impugned agencies would reach at the place of natural incident to extend their help faster than any government and /or its agencies. The income of the registered charitable trust and the specified institutions, etc, is eligible for exemption under the Act As a consequence, the proposal to apply section 40(a)(ia) and section 40A(3)/(3A) may not be justified to restrict the scope of application of income of the trust and the institutions referred to above.

		difficult to avoid payment in excess of the specified limit as also for situations covered under section 40(a)(ia) are as under: 1. Payment to hospitals in case of emergency for medical treatment including surgery, either to Government hospital or to private hospital or otherwise; 2. Payment in case of purchase and/or supplies of basic necessities on the happening of unexpected events like flood, earth quake and/or any other natural calamity, etc.; 3. Payment for education specifically in case where the Donee/recipient is seeking admission for higher studies and in the circumstance that if the payment is not made immediately, then, the seat reserved for him would be cancelled	

		and/or be allotted to someone else; and 4. Payment in cash to Government agencies, NGOs registered with the Charity Commissioner and Commissioner of Income Tax in the circumstances referred to in the immediate preceding paragraphs It is to be noted that the above circumstances are few illustrations and not exhaustive in nature, hence, the exceptions in addition to those provided in Rules 6DD of the Rules may also be provided.	
2.	Clause 5 Exemption u/s 10(38) in respect of Long Term Capital Gains (LTCG) on STT paid transfers of specified assets is proposed to be withdrawn.	a. STT should be withdrawn. b. Alternatively, it should be allowed as a deduction while calculating the capital gains.	Finance (No. 2) Act, 2004 had introduced a new levy - Securities Transaction Tax and in lieu thereof exemption was introduced in respect of LTCG arising in such transactions. Since the exemption u/s 10(38) is proposed to be withdrawn, STT should also be simultaneously withdrawn as it is causing an extra burden on persons investing in equity market. With reduction in overall interest rates on personal savings, more and more persons are entering into stock market. Levy of tax on gains as well as on the transaction is a double jeopardy for taxpayers. Also, it is against the settled principle of promissory estoppel. Para 111 of the then Finance Minister's speech is

			as under: "111. Capital gains tax is another vexed issue. When applied to capital market transactions, the issue becomes more complex. Questions have been raised about the definitions of long-term and short-term, and the differential tax treatment meted to the two kinds of gains. There are no easy answers, but I have decided to make a beginning by revamping taxes on securities transactions. Our founding fathers had wisely included entry 90 in the Union List in the Seventh Schedule of the Constitution of India. Taking a cue from that entry, I propose to abolish the tax on long-term capital gains from securities transactions altogether. Instead, I propose to levy a small tax on transactions in securities on stock exchanges."
3.	Clause 5 and clause 31 Exemption u/s 10(38) in respect of Long Term Capital Gains (LTCG) on STT paid transfers of specified assets is proposed to be withdrawn and tax at 10% of such gains exceeding Rs. 1,00,000/- is proposed to be levied.	Clause (38) of section 10 should be appropriately worded so as to deny the exemption in respect of gains in excess of Rs. 1,00,000/- only.	Section 112A(2)(i) provides for a tax rate of 10% in respect of gains exceeding Rs. 1,00,000/-. Section 112A(2)(ii) provides for tax on balance total income. Since section 10(38) is proposed to be withdrawn, such LTCG is now part of total income. Since Section 112A(2)(i) proposes to levy a tax on gains exceeding Rs. 1,00,000/-, the first Rs. 1,00,000/- of such gains are still part of the total income and may be interpreted to fall u/s 112A(2)(ii). This certainly is not the intention of the legislature. Hence, to avoid unnecessary hardship for a small amount of gain of Rs. 1,00,000/-, an exemption should be clearly provided for first Rs. 1,00,000/- of gains.
4.	Clause 31 Indexation benefit shall not be provided while calculating LTCG on STT paid transactions under proposed section 112A.	The option of computing tax at 20% on gains calculated after indexation of cost or 10% of gains calculated without indexation of cost should be provided.	It is a fundamental principle of economics that with passage of time, value of money deteriorates. The concept of indexation of cost has been introduced in respect of long term capital gains only based on that principle. By denying indexation benefit, all investors whether holding the shares for just above one year and those holding for a long period of 10-12 years or more are made at par. Hence indexation benefit should not be totally denied to all assessees. An option similar to the one provided in first proviso to S.112(1) should be provided to tax payers.
5.	Clause 31 LTCG till 31.01.2018 is	The definition of fair market value in clause (b) of Explanation to	In order to make the proposed levy prospective, sub-section (6) provides a special method of calculating cost of acquisition in case of specified

	grandfathered in the proposed section 112A.	section 112A, should include a mechanism to provide for the value as on 31.01.2018 in case of shares listed after that date. Alternatively, in case shares are acquired 12 months prior to 31-1-2018 and new shares are listed after 31-1-2018, price at which IPO is made may be considered as cost of acquisition.	assets acquired before 01.02.2018. Consequently, in case of listed shares the highest quoted price as on 31.01.2018 can be substituted for cost of acquisition, if it is higher than the actual cost of acquisition. However, in case of shares of a company where the listing takes place after 31.01.2018, there is no quoted price as on 31.01.2018. In case of such investors holding such shares as on 31.01.2018, the mechanism provided for ascertaining cost of acquisition u/s 112A(6) will fail and will lead to undue hardship and litigation.
6.	Clause 31 LTCG till 31.01.2018 is grandfathered in the proposed section 112A.	Sub-section (6) of section 112A should also cover the situation, where in case of specified capital asset acquired by assessee in one of the mode of acquisition u/s 49(1), the previous owner had acquired the assets before 01.02.2018.	Sub-Section (6) which deals with the grandfathering of LTCG accrued till 31.01.2018 only covers those assessee who have acquired the specified capital assets prior to 01.02.2018. Under the existing regime, an assessee who acquires any capital asset by one of the modes of acquisition referred to in S.49(1), is allowed to adopt the cost of acquisition in the hands of previous owner as deemed cost of acquisition. However, the use of words 'assessee' and 'Actual cost of Acquisition' in S.112A (6) and clause (b) of Explanation to S.112A may lead to an unintended interpretation that if the assessee acquires the Capital Asset on or after 01.02.2018, he shall not be entitled to the grandfathering provision, even if the previous owner u/s 49(1) had acquired the assets prior to 01.02.2018.
7.	Hon'ble FM Shri Arun Jaitley in his Budget 2018 speech has proposed to provide a standard deduction of Rs 40,000 from salary income to employees. However, at the	Prima facie income exempted from tax after setting off the gain and loss comes to only Rs 5800.	For taxable salary income of Rs 5 lakh.

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<td>same time he has also proposed to take away existing annual transport allowance of Rs 19,200 and Rs 15,000 medical reimbursement.</td>
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<table>
<tr><th>Tax Calculation - Resident</th><th></th><th>All figures in Rs per annum</th></tr>
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<td>8.</td>
<td>In respect of family pension, deduction u/s 57(iia) of</td>
<td>Standard deduction of Rs. 40000/- available to people covered u/s</td>
<td>Exemption be extended to the family pension earners too.</td>
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	Rs.15000 or 1/3rd of the amount received, whichever is less, is available.	17 should be extended to family pensioners also	
9.	Clause 10, 11, 13, 15 & 45 – ICDS related amendments are introduced with retrospective effect i.e. w.e.f. AY 2017-18.	The said amendment should be made prospective in nature or an option should be given to the assessees to either follow or not to follow ICDS for the AY 2017-18.	The reason given in this regard in the Explanatory Memorandum is that "*Recent judicial pronouncements have raised doubts on the legitimacy of the notified ICDS. However, a large number of taxpayers have already complied with the provisions of ICDS for computing income for assessment year 2017-18. In order to regularisethe compliance with the notified ICDS by a large number taxpayers so as to prevent any further inconvenience to them, it is proposed to bring the amendments retrospectively*" It was not clear even prior to the Delhi High Court judgment as to whether the ICDS would prevail over the binding precedents or not. Many assessees have preferred following the binding precedents of the Courts instead of the ICDS. Therefore, to bring ICDS with retrospective effect is unjustified especially by giving reasons that many taxpayers would have already complied with the provisions of ICDS. Secondly,, the judgment of the Court came on 7.11.2017 and some of the Returns where the transfer pricing provisions were applicable, whose due date was on 30.11.2017 were pending to be filed. Therefore, those assessees would have followed the Delhi High Court order. In such scenario, this should not be made mandatorily applicable w.e.f. AY 2017-18. An option should be given to the assessees to follow or not to follow ICDS for AY 2017-18
10.	Clause 10, 11, 13, 15 & 45 – ICDS related amendments make a reference to the ICDS notified u/s 145(2)	The proposed provision should apply only to persons other than an individual or a Hindu undivided family who are not subject to tax audit under section 44AB of the said Act and to whom ICDS already notified u/s	The amendments proposed apply to all assessees. Further, the said amendments refer to the ICDS notified u/s 145(2). Whereas the existing ICDS notified u/s 145(2), apply to persons other than an individual or a Hindu undivided family who are not subject to tax audit under section 44AB of the said Act. Therefore, for individuals and HUF to whom ICDS are not applicable, how would the computation part of the proposed provisions work?

		145(2) are applicable.	
11.	Clause 10, 11 – insertion of section 36(1)(xviii) and 40A(13).	The said clauses deals with MTM loss. However, there is no express provision dealing with MTM gains. It is therefore, desirable to have some clarification on the same.	The said clauses deals with MTM loss. However, there is no express provision dealing with MTM gains. It is therefore, desirable to have some clarifications on the same.
12.	Clause 13 – Insertion of section 43AA to deal with Foreign Exchange fluctuation.	Section 43A and 43AA read with ICDS VI, would provide for contrary treatment in case of loan taken for acquisition of capital asset. It is suggested that similar treatment be prescribed.	Treatment provided in section 43A and section 43AA are contrary to each other. Section 43A deals with a case, where the assessee has acquired any asset from outside India and there is increase or reduction in liability to pay as a result of fluctuation in foreign exchange rate. In such a case, any increase or decrease in liability at the time of making payment has to be adjusted to the actual cost of the asset u/s 43(1) or other sections as provided therein. Thus, section 43A applies to any asset purchased from outside India and it recognises the fluctuation which arises at the time of making payment. In all other cases section 43AA would apply. In other words, section 43AA would apply to any asset purchased from within India, but for the purchase of which a loan has been taken in foreign currency from outside India. Also, section 43A would apply only at the time of making payment, whereas section 43AA would apply for year-end valuations. Section 43A provides adjustment in the cost whereas, section 43AA provides that any exchange fluctuation has to be recognised at loss or gain as the case may be. Thus, contrary treatment are provided for similar nature of transactions. There is no intelligible difference between assets acquired from within India and from outside India if the payment has to be ultimately made in foreign currency. Also, now one can argue that gain or loss arising as at the year-end on account of foreign exchange fluctuation has to be recognised as gain/loss as per section 43AA, even when the asset is purchased from outside India, since section 43A apply only at the time of payment. In such a case, a very peculiar situation would arise i.e. exchange fluctuation at

			the time of making payment would be required to be capitalised whereas the fluctuation arising on year end valuation would be required to be taken as income or loss.
13.	Clause 15- insertion of section 43CB which provides for method of accounting in case of construction contract and service contract.	Proviso to section 43CB(1) provides for project completion method and straight line method in case where the conditions enumerated therein are fulfilled. ICDS IV provided an option to follow project completion method and straight line method in identical scenarios. However, here the proviso mandates the methods to be followed. It is suggested that the wordings of ICDS VI, whereby option was given, be retained.	ICDS IV provided an option to the assessee in case where the service contracts took less than 90 days for completion to follow contract completion method; however, proviso to section 43CB(1) mandates the usage of project completion method. Thus, in case of all service contracts, irrespective of the method of accounting followed for maintaining books of account, one has to offer revenue to tax only on the basis of project completion method. Similar is the case of contracts which involve indeterminate number of acts for completion; ICDS IV provided for an option to follow either the percentage completion method or straight line basis method. However, the proviso to section 43CB(1) mandates the usage of straight line basis method. Unnecessary compliance would increase if the assessee follows percentage completion method for such services for the purpose of maintenance of their books. Therefore, option should be given.
14.	The Finance Bill, 2018 proposes to provide relief from sections 43CA, 50C and 56(2) where the value adopted or assessed for stamp duty purposes aggregate in a day is to be ignored for the purposes does not exceed 105% of the consideration received or accruing as a result of transfer.	However the judiciary have in majority cases after considering the facts of each case with respect to property, location, sale consideration, stamp duty valuation and valuation by approved valuer decided the matters accepting 10% variation in actual sale consideration from the stamp duty or valuation by approved valuer.	The variation of 10% has become a settled principle if facts are in line with such variation. Now such lenient approach of accepting 10% variation on the basis of facts of specific case may not hold good in light of the proposed amendment accepting the variation of 5%.
15.	Clause 3 and 38 Levy of distribution tax on deemed	The proposed provision of levying distribution tax in the hands of a closely	Under the existing regime, loan or advance by a closely held company which is deemed as dividend u/s 2(22)(e), is taxed in the hands of shareholder at the applicable marginal rate of tax. Levy of

	dividend u/s 2(22)(e).	held company on deemed dividend u/s 2(22)(e) may kindly be dropped.	distribution tax @34.944% (including Surcharge and Cess) on the company, is an undue financial burden on the minority shareholder of such company. At one hand, such loans are enjoyed by shareholder, who is able to influence the decision making of the company and on the other hand, the distribution of tax on company will affect all the shareholders of the company who are not the beneficiaries of such loans. Secondly, if the company has temporarily given loan for interest at the prevailing market rate and received back with interest. Company will pay distribution tax @34.944% on the loan amount and regular income tax on the interest income which is very harsh.
16.	There is no specific provision providing relief / benefit on waiver of loan to the Companies which are being revived pursuant to a resolution plan passed by NCLT under the Insolvency and Bankruptcy Code.	Reference of Resolution Plan under the Insolvency and Bankruptcy Code should be added where relief has been provided in the erstwhile regime of Board for Industrial and Financial Reconstruction (BIFR). Section 35AD(7C), 47(xii) and 115JB refer to the BIFR regime. In addition to that Section 41(1) (cessation of liability) should be amended to provide that the section will not apply to the aforesaid companies.	Taxing a company which otherwise would be liquidated on waiver of loans/due by the creditors is unfair.

NOTES

THE CHAMBER OF TAX CONSULTANTS

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 the year 1926 and is one of the oldest voluntary non- profit making professional organisations formed.
The Chamber is in its 91st year and is a young dynamic organisation which has a glorious past and undisputedly ambitious future.
The Chamber acts as power house of knowledge in the field of fiscal law, contributes to the development of law and profession through research, analysis and dissemination of knowledge. The Chamber shall be preeminent in upholding among the professional, tradition of excellence in service, principle conduct, and social responsibility.

The Chamber is a **great institution** with a tradition of high **integrity, independence and professionalism.**

Some of the renowned personalities like Shri Soli Dastur, Shri Y. P. Trivedi, Shri V. H. Patil, Shri S. N. Inamdar have led the Chamber as President.

It has membership of approx. 4000 on PAN India basis which comprises of Advocates, Chartered Accountants, Company Secretary, Cost Accountants, Corporates, Tax Consultants and Students.

Knowledge sharing endeavours and building capabilities

The Chamber disseminates knowledge by holding unique Workshops, Seminar, Lecture Meetings, Study Circle and Study Group Meetings, Outstation Residential Conferences, etc for the benefit of members which keep them up-to-date with the latest developments in the field of Law. Keeping in pace with the technology, the Chamber has also started webinars on various professional subjects, specially for members from distant places. Through its various orientation and advance courses dedicated to new areas of expertise it empowers young professionals to build their careers in unconventional practice areas. It functions through various 14 effective sub-committees comprising above 300 core committee members.

Chamber's monthly journal

The Chambers Journal" which is its mouth piece is very popular amongst the professionals and Corporates as well, mainly because of in-depth analysis on topical issues (theme based). These special issues have found a permanent place in libraries of leading tax professionals.

Representations before Regulatory Authorities and Public Interest Litigations:

The Chamber has always stood up for professionals, people by making effective representations before the Government and Regulatory authorities. It has its echoes in Govt. and ministries as well. Professional's look upon Chamber as an institution which can take its voice to the court of law, whenever required.

The Chamber is instrumental in filing Public Interest Litigation against the Regulatory authorities, it represents pre and post budget memorandum and making representation on various Tax Allied and Corporate Laws to the Government and regulatory authorities.

THE CHAMBER OF TAX CONSULTANTS

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