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POST – BUDGET MEMORANDUM 2023

Suggested amendments in respect of Direct Taxes for Finance Bill, 2023

THE CHAMBER OF TAX CONSULTANTS

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Date: 18th March, 2023

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 2023

We are pleased to submit our suggestions on Direct Taxes of the Finance Bill, 2023 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/-
Parag Ved	Mahendra Sanghvi	Ketan Vajani
President	Chairman	Co-Chairman

Law & Representation Committee

Following are the suggestions:

Topic	Sub-Topic	Suggestion	Rationale
Deduction under section 54 and 54F	Limiting the roll over benefit claimed under section 54 and section 54F of the Act to INR 10 crores	Clause 25 of the Finance Bill seeks to amend section 54 of the Income-tax Act by inserting third proviso to sub-section (1) of section 54. The proposed third proviso seeks to provide that where the cost of new asset exceeds INR 10 Crores, the amount exceeding INR 10 Crores shall not be taken into account for the purpose of the section. Clause 30 of the Finance Bill seeks to amend section 54F by inserting the second proviso to sub-section (1) of section 54F on similar lines. It is recommended that the above restriction / limit on deduction should be removed from section 54 where a residential property is purchased against another residential property as the very purpose of section 54 is to promote purchase of another property as against the sale of existing property. Alternatively, the above restriction / limit on deduction should be removed and full deduction should be allowed in case where the assessee does not own more than one house property and enters into a transaction of purchase of another house property by utilising the funds received from transfer of	As mentioned in the memorandum to the Finance Bill, 2023 the primary objective of sections 54 and 54F of the Act was to mitigate acute shortage of housing, and to give impetus to the house building activity. However, the proposed amendment restricting the amount of deduction to INR 10 crores will impact the growth of the Real Estate Sector and therefore, it is recommended to remove such restriction / limit on deduction upto INR 10 crores. Further, the proposed amendment, coupled with existing mechanism provided to compute the deduction under section 54F on a proportionate basis will never allow the deduction to be INR 10 crores and it will always be much lower than INR 10 crores. Therefore, appropriate amendment should be made to atleast allow the deduction of INR 10 crores as intended. Lastly, in so far as section 54 is concerned, there arises an unintended hardship in a case where the assessee transfer the new asset within the period of 3 years from the date of its acquisition. The provisions of section 54(1) provide that while computing the capital gains in respect of the new asset arising from its transfer within a period of three years, the cost shall be considered as Nil in a case where some portion of capital gains was charged on transfer of the original asset. Further, in a case where the entire amount of capital asset for the original asset was available as deduction, the section provides that if in such case the new asset is transferred within a period of three years, the cost of acquisition shall be reduced by the amount of capital gains, which is not charged on account of deduction at the time of transfer of the original asset. This mechanism provided in section 54 has not been amended and therefore it creates a situation where the assessee will suffer double disallowance. This can be better explained with the help of an example.

		the existing house property. Further, while the amendment intends to restrict the deduction under section 54F to INR 10 crores, as per the mechanism provided to compute the said deduction i.e. proportionate to the capital gains, practically the deduction allowable after the proposed amendment will always be lower than INR 10 crores. Therefore, it is recommended that at the most the deduction should be restricted to INR 10 crores. Lastly, section 54(1) provides that while computing the capital gains in respect of the new asset arising from its transfer within a period of three years, the cost shall be considered as Nil in a case where some portion of capital gains was charged on transfer of the original asset. Further, in a case where the entire amount of capital asset for the original asset was available as deduction, the section provides that if in such case the new asset is transferred within a period of three years, the cost of acquisition shall be reduced by the amount of capital gains, which is not charged on account of deduction at the time of	Let us assume a situation where the assessee has earned long term capital gains of Rs. 15 Crores on transfer of old asset. The assessee invests an amount of Rs. 12 Crores in the new residential house and is therefore eligible for deduction of Rs. 12 Crores under the present provisions. Accordingly the difference of Rs. 3 Crores is subjected to tax in the year of transfer of the original asset. Now assuming further that the new asset is transferred within a period of three years from its acquisition say for same amount Rs. 12 Crores. The section provides that for the purpose of computing capital gains on transfer of the new asset, the cost will be assumed to be Nil and therefore the entire amount of Rs. 12 crores will be treated as capital gains. This amount of Rs. 12 Crores is nothing but the withdrawal of deduction allowed earlier at the time of transfer of original asset. As against this, under the proposed amended provisions, the assessee will be eligible to exemption of only Rs. 10 Crores as the cost of the new asset is capped at Rs. 10 Crores. Therefore, in the year of transfer of original asset, the assessee will be subjected to long term capital gains of Rs. 5 Crores. Now in the subsequent year, when the new asset is transferred for Rs.12 Crores, the section provides that the cost shall be taken at Nil. Accordingly the entire 12 crore will be subjected to tax. Here it can be seen that though the assessee had got the deduction of only Rs. 10 Crores in the year of transfer of original asset, the amount brought to tax in the year of transfer of the new asset is Rs. 12 Crores and therefore the assessee suffers double disallowance to the extent of Rs. 2 Crores. It appears that the above implication is again an unintended implication and is arising on account of the mechanism provided for the transfer of the new asset within a period of three years. With the deduction being capped at INR 10 Crore, a back-up amendment is also required to provide that where the deduction is restricted to INR 10 Crores in accordance with the proposed third proviso, the cost of acquisition at the time of the transfer of the

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<tr><td></td><td></td><td>transfer of the original asset. It appears that the above implication is again an unintended implication and is arising on account of the mechanism provided for the transfer of the new asset within a period of three years. Therefore, it is proposed to provide for a corresponding amendment to provide that where the deduction is restricted to INR 10 Crores in accordance with the proposed third proviso, the cost of acquisition at the time of the transfer of the new provision should be the actual cost of acquisition as reduced by INR 10 Crores.

This mechanism provided in section 54 has not been amended and therefore it creates a situation where the assessee will suffer.</td><td>new provision will be the actual cost of acquisition as reduced by INR 10 Crores. If such a corresponding amendment is also brought in, the same will meet the ends of justice and the assessee would not suffer double disallowance as brought out hereinabove.</td></tr>
<tr><td rowspan="2">Section 28(iv) and Section 194R – to apply to benefit or perquisite in cash</td><td>Supreme Court ruling in the case of Commissioner v. Mahindra And Mahindra Ltd. [2018] 404 ITR 1 (SC)</td><td>To reconsider the proposed amendment</td><td>The Supreme Court ruling in the case of Commissioner v. Mahindra And Mahindra Ltd. [2018] 404 ITR 1 (SC) has held that a benefit or perquisite in cash is not covered by Section 28(iv). The amendment would nullify the impact of the court ruling and raise a host of uncertainties in relation to taxation of cash benefit, especially loan waiver.</td></tr>
<tr><td>Applicability of Section to loan waiver or bad debt write-off</td><td>It should be clarified that the Sections do not apply in case of loan waiver or bad debt write off</td><td>Generally, the a loan waiver or bad debt write off is when the creditor is unable to recover from the debtor and as a commercial decision is to waive a part of the loan or enter into one time settlement. Also, in IBC cases the loan waiver or extinguishment of trade creditor is pursuant to the approval of the resolution plan. The transaction is not intended nor does provide any benefit to the debtor – as</td></tr>
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			otherwise the debtors financial position does not permit him to pay the debt. Therefore, to avoid litigation and to boost resolution process under IBC it is advisable to exclude the application of the section to loan waiver and write-off of bad debt.
Section 56(2)(viib)	Bringing the non-resident investors within the ambit of section 56(2)(viib) to eliminate the possibility of tax avoidance	It is proposed to include the consideration received from a non-resident also under the ambit of clause (viib) by removing the phrase 'being a resident' from the said clause. This will make the provision applicable for receipt of consideration for issue of shares from any person irrespective of his residency status. It is recommended that the said proposed amendment be reconsidered and non-resident investors should be kept out of the net of section 56(2)(viib)	At the outset, as provided in the memorandum to the Finance Bill, 2023, Clause (viib) of sub section (2) of section 56 of the Act was inserted *vide* Finance Act, 2012 to prevent generation and circulation of unaccounted money through share premium received from resident investors in a closely held company in excess of its fair market value. In case of non-residents, the subscription for shares is received through normal banking channels with proper KYC documentation of the Non-resident investors. Further, while investing the funds in the Indian Companies, the valuation is done under FEMA (as per any of the internationally accepted valuation methodologies) based on which the issue price is decided. Therefore, there is no question of unaccounted money through share premium. Given the recent geopolitical developments, this proposed amendment could be seen as an unstated objective to monitor FDI into India. Inherently, share premium is never an item of income but a value which the shareholder pays over and above the share price based on the company's potential, after considering various factors. Widening of the tax base by proposing to tax share premium on FDI could act as a hindrance to Indian Companies from raising investments as it could deprive the Indian Company from a good market driven economic valuation. Lastly, while FEMA provides for the minimum price at which the shares are to be issued, the proposed amendment on the contrary prescribe a ceiling limit (maximum of FMV) for proceeds received by an Indian Company towards issue of shares to enjoy tax exemption. In case shares are issued at a price higher than the

			FMV determined as per Rule 11UA of the Rules, then such excess share premium would be taxable as income in the hands of the Company issuing the shares. Determining the business valuation of securities involves exercising judgment with a varied degree of assumptions. Valuation is subjective and not an exact science and the price paid for the shares is often a result of a negotiation process between the buyer and seller. Therefore, the valuation methodology adopted could range anywhere from being a normal book value-based approach to other complex methods. Since the share valuation methodology under both the regulations are not aligned, it may pose an inherent challenge in satisfying the requirement under both the regulations (Income-tax and FEMA). Therefore, the government may consider taking necessary steps to harmonise the valuation of shares under both the regulations i.e., FEMA and Income-tax Act, before the amendment takes effect.
Amendment to Section 206C(1-G) by Clause 90 to the Finance Bill	Issue of collecting TCS on remittances under the LRS / overseas tour packages	The increase in TCS rate from 5% to 20% should not be done. The TCS rate should be restricted if at all to 0.1% like it is for Section 194Q.	The TCS levied on remittance made / overseas travel package are not a collection of any tax on Income earned. Hence the only intent of the TCS can be the collection of data related to such payments – and not collection of tax in advance as a portion of tax eventually payable. Hence the is no case to levy a TCS rate any higher than 0.1% which is what is levied even under 194Q where intent is to collect data related to transactions. Increasing the TCS from 5% to as huge as 20% on LRS remittances of most kinds is an unfair levy – for high net worth individuals it only means a lower payment of advance tax and hence the tax would anyways have been collected. For others it is a needless burden and will be returnable back as a refund once a return is filed. Any

			levy that causes more burden than intended must be revisited. Increasing the TCS on overseas travel packages is a disincentive to domestic operators who book these packages and offer an income to tax in India – whereas this will encourage the use of portals and aggregators based outside India where TCS is not applicable. In any case a 20% is very large – even in cases where TDS is collected on Income , the rate seldom exceeds 10% except cases where there is no expense involved and the intent is to discourage transactions. **Strongly plead that Clause 90 be withdrawn in totality and in fact the TCS rate be reduced from the current 5% to a simple 0.1% as the intent is only to have the transactions reported – there being no income embedded in any of these.**
Taxation of Market Linked Debentures	Gains/ losses arising on transfer deemed to be short term in nature	Gains/ losses arising on transfer of market linked debentures should not be deemed to be short term in nature. Instead, gains/ losses arising on transfer of market linked debentures held for less than 3 years can be treated as short term. Gains on debentures held for more than 3 year may be at 20% (with indexation benefit) or at 10% (without indexation benefit).	<u>Proposed Amendment:</u> Vide the Finance Bill, 2023, the Legislature has proposed to insert a new provision viz. 50AA to provide for taxation for deemed short term capital gains treatment for transfer, redemption or maturity of market linked debentures regardless of period of holding. The rational for the amendment, as explained under the Explanatory Memorandum to the Finance Bill, 2023 is that such instruments differ from plain vanilla debt and are actually in the nature of derivatives which are normally taxed at applicable rates. <u>Rationale of our suggestion:</u> The concept of market linked debentures are not new to the India capital markets and many investors, retail and institutional alike, have made significant investments therein owing to 10% tax rate on long term capital gains.

			It is well known that a sound tax policy has to be consistent. The proposal of the Legislature to deem the gains/ losses as short term attracting higher rate of tax is not investor friendly and erodes their faith in the country's taxation system. Given also that many retail and institutional subscribers to such instruments are based outside India and the Government has been aggressive in their efforts to make India an attractive investment destination, such an amendment clearly erodes faith of such investors also. This is especially important now as the global economy heads towards a recession. While the impact on tax collections would be negligible, rollback of the proposed amendment would go a long way in restoring investor faith and place India in a unique position in the backdrop of the economic downturn ahead. Accordingly, it is recommended that Gains/ losses arising on transfer of market linked debentures should not be deemed to be short term in nature. Gains on debentures held for more than 3 year may be at 20% (with indexation benefit) or at 10% (without indexation benefit).
		Grandfathering existing market linked debentures from section 50AA.	In case if roll back of the proposed amendment is not possible, it is recommended to 'grandfather' existing market linked debentures from the special treatment under section 50AA and apply s.50AA only to MLDs issued on or after 1 April 2023.
Appeal to ITAT	Cross Objections u/s 253(4) of the Act	Section 253(4) enables filing of cross objections ('CO') if an appeal is filed by the other party. It has been proposed that even Revenue can file cross objections against any order which is subject matter of appeal. This, with respect should not be permitted and the Revenue can be allowed to file CO only against an	Revenue can file appeal only against an order passed by appellate authorities i.e., CIT(Appeals) and now JCIT(Appeals). However, an assessee can file also appeal against an order passed by Assessing Officer in some cases like after the directions of DRP, order of PCCIT/CCIT/PCIT/CIT under various sections. These orders, cannot be appealed against by the Department. Where there is no right to file appeal against any order, there cannot be any right to file CO. This is indirectly allowing something, which is not

		order against which it can otherwise file an appeal. At best, the section should be amended to included order passed by CIT(Appeals) or JCIT (Appeals).	directly allowable. Revenue can always defend the order by presenting their case in an appeal filed by an assessee. In case, where Revenue wants to bring any other income to tax, then the same can be done either by way of reassessment u/s 148 or by way of revision u/s 263 of the Act. In any case, the ITAT has no power to enhance. Thus, there is no question of filing of CO in such cases. Moreover, it is inconceivable that a CO can be filed by an Assessing Officer, challenging the order of his superior officer viz., PCCIT/ CCIT/ PCIT/ CIT/ DRP. Thus, the amendment proposed in this regard should be modified to only include orders passed by JCIT (Appeals).
Taxation of sums (including bonuses) received from high value life insurance policies	Taxation under the head 'Income from other sources'	The surplus received from life insurance policies, not exempt under section 10(10D), should be taxed as long term capital gains where the policy is held for more than 3 years either at 20% (with indexation benefit) or at 10% (without indexation benefit).	<u>Proposed Amendment:</u> Vide the Finance Bill, 2023, the Legislature has proposed to withdraw exemption in respect of life insurance policies issued on or after 1 April 2023, where the premium payable for any of the previous years during the term of such policies exceeds Rs. 5,00,000 and tax the proceeds from such policies under the head 'Income from Other Sources' as per section 2(24)(xviid) read with section 56(2)(xiii). However, death benefit on such policies will continue to be exempt. Where a taxpayer pays premium on multiple life insurance policies issued on or after 1 April 2023, exemption under section 10(10D) shall be applicable only to those policies where aggregate premium (of all policies) does not exceed Rs. 5,00,000 in any of the previous years during the 'term' of any of those policies. The rational for the amendment, as explained under the Explanatory Memorandum to the Finance Bill, 2023 is to prevent misuse by HNIs investing in large policies and claiming exemptions of sum received. <u>Rationale of our suggestion:</u> While we understand from the Explanatory Memorandum to the Finance Bill, 2023 that the Legislature views high value insurance covers as an investment tool and not a life

			cover. What we are not in synch with the taxability of the proceeds from such 'investments' under the head 'Income from Other Sources' instead of 'Capital Gains'. Taxation under the residuary head attracts a higher rate than that for 'Capital Gains'. The proposed amendment will lead to insurance policies losing their shine. Given that India is an emerging life insurance market where life insurance penetration is only 4% of its GDP, the proposed amendment is likely to hit the Insurer's bottom-line which will have its ripple effects on the investments capabilities of insurers, who are major investors in the debt and capital markets alike. Most of the existing life insurance products have an insurance cover of at least 10 times the annual premium being paid on the policies, which in many cases is provided only after requisite financial and medical underwriting. The 10x cover is also a pre-requisite for availing the tax benefits under section 10(10D) under the current tax regime. While, we understand that roll-back of the proposed amendment does not appear to be not an option for the Legislature, the taxpayers should at least be allowed to treat the alleged income on the receipt of proceeds from life insurance policies as capital gains. This is rational and logical. The proposed amendment is highly discriminatory towards taxpayers who the necessary economic means to afford a high value life insurance should not be punished with higher tax rates on the presumption of the policies being an 'investment' too rather than a bonafide life cover. Also, it is possible that a middle-class taxpayer buys a high value insurances policy purely to protect his family to protect it from the risk of galloping inflation and value erosion of the families investible corpus after his passing away . These taxpayers will suffer than the HNIs which cannot be a consequence of the proposed amendment.
Taxation of Charitable Trusts	Clause 7	Filing of audit report by August – amendment to be withdrawn	The current situation requires the filing of a Form 9A/10 for accumulation of income before the filing of the return of income –

			and that is correct because the situation can be determined only after an audit is completed (last date 30 September) and a tax computation is made (last date 31 October). Requiring a Trust to file form 9A/10 by 31 August is not fair as an audit may not even be completed by then – and there is no purpose served by pre-poning this date. Also Trusts work on limited infrastructure as the focus is on spending every rupee on objects rather than on compliance – increasing the burden on Trusts for compliance may be avoided. Pre poning the date of filing form 9A/10 may not be of benefit to anyone and may kindly be withdrawn.
		Proviso added that replenishment of corpus or repayment of loan taken must be done within 5 years in order to be treated as an application – this amendment may be withdrawn.	A Trust may have genuine reasons for which a replenishment of corpus may take time –and there may be loans which re actioned which have a repayment period of more than 5 years – it would be unfair to insist on a replenishment or repayment in 5 years to be treated as an application of income. This puts a burden on the Revenue in terms of monitoring and is unfair to a Trust which has been sanctioned a loan with a larger repayment schedule. These provisions make it complicated for a Trust and for reasons stated earlier too, such burdensome compliance may kindly be avoided.
		Sub section added to state that if a donation is given to another Trust then only 85% shall be treated as application – this amendment should be withdrawn.	Tracking of such data becomes very complicated for a Trust, for an Auditor as well as for the Revenue to monitor. Also a lot of donations are made by giving funds to implementing agencies – medical treatment is sponsored by paying a hospital run by a trust – school fees are sponsored by paying the educational institution – rather than paying the beneficiary as there may then loss of propriety control. All these donations also get into a 15% disallowance. These kind of amendments again out excessive restriction, make compliance complicated and Revenue monitoring difficult too and hence may kindly be avoided.
	Clause 9	Section 12 AB amended to provide for cancellation of registration if application is found to be incomplete or contains false or	This amendment is very harsh – keeping in mind what is stated above regarding Trusts having limited infrastructure. Often there are systemic issues with filing of online registration applications. Merely cancelling a registration without giving an opportunity to explain or rectify a defect

		incomplete information – amendment to be withdrawn or amended to provide that the application be treated as defective and applicant be given 30 days' time to cure the defect	may be a very harsh protocol and it is requested that in all such cases, just like 139(9) allows treating a return as defective, the application be treated as defective and an opportunity be given for rectifying the effect failing which any measures as proposed may be taken.

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.