

NEWS FLASH**Key amendments proposed by The Taxation Laws (Amendment) Bill, 2021**

7 August 2021

The Taxation Laws (Amendment) Bill, 2021 ('TLA 2021') was passed in the Lower House of the Parliament on 6 August 2021. The purpose of introducing TLA 2021 is to dilute the impact of the retrospective amendments that were brought about by the Finance Act, 2012 which effectively made indirect transfer of assets located in India taxable in India retrospectively with effect from Assessment Year 1962-63.

Background:

The issue of taxability of gains arising from the transfer of assets located in India through the transfer of the shares of a foreign company was a subject matter of protracted litigation. Finally in 2012, in the case of Vodafone International Holdings, the Supreme Court gave a verdict that gains arising from indirect transfer of Indian assets are not taxable under the extant provisions of the Income-tax Act, 1961 ('the Act').

Post this verdict, the provisions of the Act were amended by the Government through the Finance Act, 2012 with retrospective effect, to clarify that gains arising from the sale of shares of a foreign company is taxable in India if such shares, directly or indirectly, derived its value substantially from the assets located in India. The Finance Act, 2012 also provided for validation of demand, etc., under the Act for cases relating to indirect transfer of Indian assets.

Pursuant to this, tax demands were raised by the tax department in seventeen cases. In two of these cases, assessments are pending due to the stay granted by the High Court. Out of the said seventeen cases, arbitration under Bilateral Investment Protection Treaty with United Kingdom and Netherlands had been invoked in four cases. In two cases, the Arbitration Tribunal ruled in favour of the taxpayer and against the tax department.

The amendments invited criticism from stakeholders mainly due to the retrospective nature of the amendments and damaged India's reputation as an attractive investment destination.

Proposed amendment:

With a view to attract foreign investment and promoting faster economic growth and employment, TLA 2021 proposes that the provisions of indirect transfer of assets in India shall not apply to the assets transferred before 28 May 2012 (i.e the date on which the Finance Bill, 2012 received the assent of the President). It is further proposed to provide that the demand raised for indirect transfer of Indian assets made before 28 May 2012 shall be nullified on fulfilment of specified conditions such as withdrawal or furnishing of an undertaking for withdrawal of pending litigation and furnishing of an undertaking to the effect that no claim for cost, damages, interest, etc., shall be filed. It is also proposed to refund the amount paid in these cases. However, no interest under section 244A of the Act shall be payable.

TLA 2021 also proposes to amend the Finance Act, 2012 so as to provide that the validation of demand, etc., under section 119 of the Finance Act, 2012 shall cease to apply on fulfilment of specified conditions such as withdrawal or furnishing of an undertaking for withdrawal of pending litigation and furnishing of an undertaking that no claim for cost, damages, interest, etc., shall be filed.

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While, to conserve the principle of tax certainty, the retrospective amendment should never have been made, it would have been better had the TLA 2021 been introduced in the law before the outcome of the Cairn arbitration case. Nevertheless, this is a welcome step by the Government of India and should significantly reduce the uncertainty for foreign investors. India is on the path of major reforms and by introducing this bill it has attempted to clear a major hurdle needed to create a positive environment for investment in the country.

The proposal not to grant any interest on tax refund appears to be unfair to the taxpayers whose disputes have been pending for a long time. Further, it remains to be seen whether relief would be granted to taxpayers who had paid the tax demand arising from the gains on indirect transfer and did not contest the demand before the appellate authorities.

Should you wish to discuss the above in detail or understand the applicability to your specific situation, please feel free to reach out to us on coe@jmpadvisors.in.

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