Tax Hotline

March 29, 2023

AMENDMENTS TO FINANCE BILL, 2023

The Finance Bill, 2023 ("**Finance Bill**") was introduced at the time of presentation of the Union Budget for financial year ("**FY**") 2023-24 by the Indian Finance Minister on February 01, 2023. Our hotline containing a detailed analysis of the Finance Bill can be found here. Subsequently, certain amendments were proposed to the provisions of the Finance Bill through a notice of amendments passed by the Lok Sabha on March 22, 2023 ("**Amendment Bill**"). The Finance Bill and Amendment Bill have been passed by both the houses of the Indian Parliament.

The Amendment Bill makes few important changes with respect to taxation of debt repayments from Real Estate Infrastructure Trusts ("**REIT**") and Infrastructure Investment Trusts ("**InvIT**") (hereinafter collectively referred to as "**Business Trusts**"). Other changes proposed by the Amendment Bill include preponing applicability of withholding tax by online gaming operators and incentivizing the International Financial Services Centre ("**IFSC**"). Surprisingly, the Amendment Bill has also made a few changes which were not included in the Finance Bill. Key changes being increase in tax rate applicable on non-residents on royalty or fees for technical services ("**FTS**") from 10% to 20% and taxation of income from debt mutual funds. The amendments are discussed in detail below.

1. TAXATION OF BUSINESS TRUST

The Finance Bill proposed to amend the framework for taxation of Business Trust to inter-alia provide for taxation of distribution by Business Trusts in form of debt repayment / proceeds from amortization of debt as income from other sources ("**IOS**"). Such distributions from Business Trust (being capital payments) were earlier not taxable in hands of unit holders. The change essentially implied that unit holders of Business Trust would have to pay tax at rate of 40% (in case of non-residents) or applicable slab rates (in case of residents) on such debt re-payments. Further, the amendment by the Finance Bill also nullified the benefit provided to sovereign wealth funds ("**SWFs**") / pension funds ("**PFs**") under section 10(23FE) of the Income-tax Act, 1961 ("**ITA**") to the extent distributions made to SWFs / PFs were in nature of debt repayments from Business Trusts.

On basis of consultation with industry participants, the Amendment Bill makes the following changes to the proposals made by Finance Bill:

- Computation of specified sum taxable as IOS: The Amendment Bill provides that any 'specified sum' received by a unit holder from a Business Trust during the previous year, with respect to unit held by it at any time during the previous year will be taxable as IOS. The Amendment Bill has introduced a formula for computation of 'specified sum' which is A-B-C as explained in the table below. It has been clarified that specified sum will be deemed to be zero in case the result of the formula is negative.

Specified Sum (A-B-C)	Remarks
A = Aggregate of all distributions made by Business Trust in the previous year or during any earlier previous years, to such unit holder who holds such unit on the date of distribution or to any other unit holder who held such unit at any time prior to the date of distribution, which is (i) not in nature of interest or dividend referred to in section 10(23FC) or 10(23FCA) or (ii) not chargeable to tax at level of Business Trust under section 115UA	As a starting point, the Amendment Bill provides for aggregation of all distributions (not in nature of interest / dividend) made by the Business Trust irrespective of year of distribution.
B = Amount at which such unit was issued by the Business Trust	The Amendment Bill provides for reduction of the amount at which unit of Business Trust was issued while computation of specified sum. This implies that until the Business Trust distributes amount (other than in nature of interest / dividend) in excess of the issuance price of units, specified sum will be zero, therefore, there will be no implications under section 56(2)(xii) in hands of unit holders. For example, if a Business Trust made distributions (other than in nature of interest / dividend) to its unit holders as below:

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- INR 5/unit in FY 2020-21
- INR 5/unit in FY 2021-22
- INR 7/unit in FY 2022-23
- INR 3/ unit in FY 2023-24

For the purpose of computation of specified sum, the amount under item A will be equal to INR 20. Assuming, the amount at which unit of Business Trust was issued was INR 300/ per unit, specified sum will be negative and deemed to be zero. Accordingly, there will be no implications under section 56(2)(xii).

While this is a welcome move, some guidance may be required in relation to determination of amount at which unit was issued by Business Trust. This is because a Business Trust may raise funds at different points in time in different manner (for example, a Business Trust may raise funds through a follow-on offer or through preferential issue by way of a private placement). In such cases, the amount at which unit of Business Trust is issued may be different for different LPs.

C = Amount charged to tax under section 56(2)(xii) of the ITA in any earlier previous years	The Amendment Bill provides for reduction of the amount which has been subject to tax under section 56(2)(xii) while calculating specified sum. Units of Business Trusts are publicly traded and implication under section 56(2)(xii) may arise in hands of different unit holders at different points in time. Appropriate disclosures to unit holders should be made by Business Trust to enable unit holders to determine their tax liability (if any), Form 64C may need to be amended to this effect.

On an overall basis, this amendment is a welcome move and provides partial relief to unit holders (see discussion in point (c) below). Implications under section 56(2)(xii) may not arise until the distributions by way of debt repayments exceed the issuance price of unit of Business Trust. Additional disclosures from Business Trusts may be required to be made for benefit of unit holders.

Lastly, the Amendment Bill still does not provide a corresponding withholding tax obligation on the Business Trust under section 194LBA in relation to amounts taxable under section 56(2)(xii). No changes have been proposed to section 195 as well, therefore, Business Trust may be liable to withhold tax under section 195 on distributions to non-resident unit holders. This results in an anomaly with respect to distributions taxable under section 56(2)(xii) between residents and non-residents.

- Exemption to SWFs/ PFs: Section 10(23FE) of the ITA exempts income in nature of dividend, interest or long-term capital gains earned by specified SWFs/ pension funds from investment in InvITs, subject to fulfillment of conditions laid therein. The Amendment Bill has extended applicability of section 10(23FE) of the ITA to specified sum referred to in section 56(2)(xii) of the ITA as well. Accordingly, any distributions received by SWFs / PFs in form of specified sum should be exempt from tax in their hands subject to fulfillment of conditions under section 10(23FE). This is a welcome change and should put a rest to concerns of SWFs / PFs investing in InvITs.
- Computation of cost of acquisition ("**COA**"): The Amendment Bill provides that the COA of unit of Business Trust shall be reduced by any sum received by a unit holder from Business Trust which (i) is not in nature of interest of dividend referred to in section 10(23FC) or 10(23FCA) of the ITA and (ii) is not chargeable to tax under section 56(2)(xii) and (iii) is not chargeable to tax under section 115UA(2). The impact of this change is summarized below:

S No	Distributions by way of repayment of debt	Implication in hands of unit holders	
		Capital Gains	**IOS**
1	To the extent of issuance price of unit of Business Trust	COA of units to be reduced by such distributions, therefore, unit holders end up paying capital gains tax on higher amount	No implication
2	Above the issuance price of unit of Business Trust	No implication	Amount received by unit holder in excess of issuance price and amount already subject to tax under IOS, to be taxable as IOS: - at applicable slab rates, in case of resident unit holders; - at 40% (subject to any tax treaty relief), in case of non-resident unit holders

- Exemption from withholding on interest payments: As per section 194A[1], there is no obligation to withhold tax on payment of interest (other than interest on securities) to Business Trust. However, there is a requirement to withhold

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tax on payment of interest on securities (like debentures) to Business Trust. In a welcome move, the Amendment Bill seeks to amend section 193 of the ITA to remove the requirement to withhold tax on payment of interest on securities by Indian companies in which Business Trust holds controlling interest or such interest as per specific regulations regulating Business Trust.

2. INCENTIVES FOR IFSC

The Government seems to remain committed to promoting IFSC. The Amendment Bill seek to make the following changes to incentivize IFSC:

- Relocation of funds to IFSC: Finance Act, 2021 amended the provisions of ITA to facilitate relocation of an offshore fund to IFSC in a tax neutral manner both for the offshore fund as well as investors. Such provisions are applicable where the assets of the 'original fund' are 'relocated' to a 'resultant fund' in IFSC. For this purpose, the ITA defines the term 'original fund', 'relocation' and 'resultant fund'.

  The Amendment Bill modifies the definition of 'original fund' to mean an investment vehicle, in which Abu Dhabi Investment Authority ("**ADIA**") is the direct or indirect sole shareholder or unit holder or beneficiary or interest holder and such investment vehicle is wholly owned and controlled, directly or indirectly, by the ADIA or the Government of Dubai. The change in the definition of original fund essentially paves way for tax neutral relocation of an offshore fund wholly owned and controlled by ADIA or Dubai government and in which ADIA is the direct or direct shareholder / beneficiary to IFSC. The change seems to be in consonance with the recent relaxations provided by the International Financial Services Centre Authority ("**IFSCA**") to sovereign wealth funds desirous of setting up fund management entities / schemes in IFSC.[2]

  The Amendment Bill has also provided Government the power to notify any other fund as 'original fund'. A notified fund will be able to relocate to IFSC in a tax neutral manner.

- Clarity with respect to non-applicability of angel tax to AIFs set up in IFSC: The Finance Bill extended the applicability of the infamous 'angel tax' to non-residents. Angel Tax provisions consider the difference between (i) the consideration received by an investee company by way of issuance of shares and (ii) the fair market value ("**FMV**") of such shares, as income from other sources in the hands of such company.

  The Amendment Bill makes a clarificatory change in the definition of 'specified fund' under section 56(2)(viib) to clarify that angel tax will not be applicable where consideration for issuance of shares is received by an unlisted Indian company from an AIF set up in IFSC.

- Incentives for aircraft leasing: Finance Act, 2021 introduced certain incentive to promote aircraft leasing in IFSC. Such incentives included (i) extension of tax holiday to income arising on transfer of aircraft or aircraft engine by a Unit located in IFSC to a domestic company engaged in business of aircraft leasing and (ii) exemption of royalty income earned by a non-resident on account of aircraft leasing, subject to fulfillment of certain conditions.

  In order to further incentivize aircraft leasing in IFSC, the Amendment Bill introduces a new section 10(4H) exempting any income of a (i) non-resident or (ii) a unit in IFSC engaged primarily in business of aircraft leasing, by way of capital gains arising from transfer of equity shares of domestic company subject to fulfillment of the following conditions:

  - The operation of domestic company in IFSC have commenced on or before 1 April 2026; and
  - Such capital gains arise within a period of 10 years from the year in which the domestic company in IFSC has commenced operations, or AY 2034-35, whichever is later

  Dividend income of units of IFSC engaged primarily in business of aircraft leasing from a company being a unit of any IFSC engaged primarily in business of aircraft leasing have also been exempt from tax by way of introduction of section 10(34B). These amendments are welcome and should boost aircraft leasing in IFSC enabling setting up of multiple SPVs without tax leakages. These amendments bring IFSC based aircraft lessors at par with lessors in competitive foreign jurisdictions.

- Increase of tax holiday for offshore banking units ("**OBU**") in IFSC: Section 80LA of the ITA provides that OBUs having income in IFSC can avail (i) 100% deduction from such income for 5 consecutive assessment years relevant to previous year in which permission from relevant authority was obtained and thereafter (ii) 50% of such income for five consecutive assessment years. The Amendment Bill has increased the 50% limit to 100% for assessment year commencing April 1, 2023.

- Reduced rate of tax on dividend distributions by IFSC unit: The Amendment Bill modifies section 115A to provide that dividend received by non-resident or a foreign company from IFSC unit will be taxable at rate of 10% (instead of 20% rate applicable on dividends received by an Indian company (not based in IFSC)). The change is likely to incentivize investments from non-residents in IFSC.

- Reduced rate of tax on borrowings: Section 194LC provides a concessional rate of withholding tax for certain interest income earned by non-resident, not being a company or a foreign company. Interest income received by a non-resident from long-term bond or rupee-denominated bond, which are listed only on IFSC stock exchanges are taxed at a lower rate of 4%. However, the concessional tax rate of 4% has a sunset clause and applies only for bonds issued prior to July 1, 2023. Accordingly, bonds issued post July 1, 2023 and listed on IFSC exchanges would have been taxed at 20%. In order to provide for tax rate competitive with other financial centers, the Amendment Bill provides interest income earned by non-resident in respect of monies borrowed by it from a source outside India by way of issue of any long-term bond or rupee denominated bond on or after July 1, 2023, which is listed only on a recognized stock exchange located in any IFSC will be taxed at 9%. This is a welcome move and make debt investments attractive in IFSC.

- Tax collection at source on remittances to IFSC under Liberalised Remittance Scheme ("**LRS**"): The Finance Bill had increased the rate of TCS on remittances out of India under LRS from 5% to 20%. The Amendment Bill has modified the relevant section to remove the words 'out of India', thereby, implying that remittances even to IFSC will be subject to increased TCS at rate of 20%.

- Others: The Finance Act, 2022 introduced an exemption to exempt any income received by a non-resident from

portfolio of securities or financial products or funds, managed or administered by any portfolio manager on behalf of such non-resident, in an account maintained with an OBU in the IFSC, to the extent such income accrues or arises outside India and is not deemed to accrue or arise in India. The Amendment Bill grants powers to Government to provide similar exemption to activities carried out by certain persons from financial products, which accrues/arises outside India and is received in an account maintained with OBU. This is an important change and should provide clarity to non-residents with respect to taxation.

3. TAXATION OF ONLINE GAMING

The Finance Bill proposed to introduce a new tax regime for the taxation of winnings from 'online games'. The withholding tax provision with respect to winnings from online games were proposed to come into effect from July 1, 2023. However, the Amendment Bill provides that the withholding tax provision for online games will now come into effect from April 1, 2023, instead of July 1, 2023. Importantly, the rules with respect to computation of 'net winnings' have not been specified yet by the Finance Ministry yet. We understand that industry participants are making recommendations to the Central Board of Direct Taxes ("**CBDT**") in this regard.

Further, the requirement to withhold tax at higher rate as provided in section 206AB[3] will not apply in relation to withholding tax on winnings from online games.

4. TAXATION OF INCOME FROM ROYALTY / FTS IN HANDS OF NON-RESIDENTS

Non-residents are taxable only on their India-source income i.e., only and to the extent that such income accrues or arises or is deemed to accrue or arise in India or is received or deemed to be received in India. Income in nature of royalty or FTS is deemed to accrue arise in India, therefore, taxable in hands of non-residents in India.[4] Section 115A of the ITA provides the rate at which different streams on income are taxable in hands of non-residents. Section 115A was amended by Finance Act, 2015 to reduce the rate of tax on royalty / FTS in hands of non-residents from 25% to 10% under the ITA. The reason for reduction of tax rate was to reduce hardships faced by small entities due to high rate of tax of 25%. The Amended Bill has increased the rate of tax for royalty / FTS income earned by non-residents from 10% to 20%. Importantly, this change was not proposed in the Finance Bill. While the changes appears to be minor, it is likely to have several implications for non-residents.

Under Section 90(2) of the ITA, a non-resident can choose to be taxed as per the provisions of a tax treaty entered into between India and the country of residence of the taxpayer or the ITA, whichever is more beneficial. In order to claim benefit under a tax treaty, a non-resident is required to furnish a valid tax residency certificate ("**TRC**") issued by the government of its country of residence.[5] Tax treaties provide for lower tax rate for royalty / FTS provided that the recipient is the beneficial owner of such income. The term "beneficial owner" has not been defined under the ITA. In common parlance, a beneficial owner is recognized as an owner of something because the actual use and title belong to that person, even though legal title may belong to someone else.[6] Pertinent to note that the Circular 789 dated April 13, 2000 issued by the CBDT ("**Circular 789**") clarifies that a TRC will constitute sufficient evidence for accepting the status of residence as well as beneficial ownership for applying the provisions of a tax treaty. Although Circular 789 was issued in the context of the India – Mauritius tax treaty, it has been applied in relation to other treaties as well. For instance, in DIT v. Universal Music International BV,[7] the High Court of Bombay relied on Circular 789 and a TRC issued by the Dutch tax authorities to find a Dutch entity to be the beneficial owner of royalties received by it from an Indian entity, for the purposes of Article 12 of the India – Netherlands tax treaty. The validity of Circular 789 was upheld by the Supreme Court of India in Azadi Bachao Andolan v. Union of India,[8] and it has been relied on by Courts in a plethora of other judgements since.[9] In HSBC Bank (Mauritius) Ltd v. DCIT,[10] the Mumbai Tribunal held that the recipient of interest income should be deemed the beneficial owner absent evidence to suggest that the income was received for the benefit of third persons. The Mumbai ITAT further stated that the beneficial owner would the one with full right and privilege to benefit directly from the interest income earned. However, in certain decisions, Courts have also taken contrary views specifically challenging the beneficial ownership of income and denying benefit under tax treaty alleging that the recipient is not beneficial transaction.[11] Determination of beneficial ownership is increasingly becoming a factual exercise.

Earlier to this amendment, the tax rate (10%) provided in section 115A was either at par with certain Indian tax treaties[12] or was lower than tax rate provided under certain Indian tax treaties[13]. Resultantly, several non-residents were not taking benefit under tax treaty and paying taxes as per rate provided in section 115A. Pursuant to this change non-residents may have to take benefit of lower tax rate under relevant tax treaties. As discussed above, in order to take benefit under tax treaty a non-resident has to furnish TRC, Form 10F and also substantiate beneficial ownership of income. This may increase compliance burden on non-residents who were simply paying taxes as per tax rate provided in the ITA earlier.

The change may result in additional tax burden in case of non-residents where tax treaty provides for a rate higher than 10% or in case where India does not have a tax treaty with jurisdiction of non-resident. The Amendment Bill may adversely impact Indian payors in cases were royalty / FTS payments were being grossed-up for tax.

Lastly, section 115A exempted non-residents from filing income-tax returns in India provided that (i) such non-resident had only income from dividend/ interest / royalty / FTS from India and (ii) tax has been withheld at source from such income at a rate which is not lower to the rate provided under section 115A. With the increase in tax rate under section 115A, withholding on royalty / FTS payments to non-residents may be made at a lower rate as per applicable tax treaty. Therefore, non-residents may no longer be exempt from filing income-tax return. This would again increase the compliance burden on non-residents including the requirement to obtain PAN in India.

5. TAXATION OF DEBT MUTUAL FUNDS

In a surprise move, the Amended Bill seeks to deem capital gains arising from transfer of unit of a 'specified mutual fund' acquired on or after April 1, 2023 as short-term capital gain. In this regard, 'specified mutual fund' has been defined to mean a mutual fund which invests not more than 35% of its total proceeds in equity shares of domestic companies. It has also been provided that the capital gains will be computed by reducing COA and expenditure incurred wholly and exclusively in connection with transfer or redemption on maturity. Essentially, the Amendment

Bill takes away the benefit of indexation of COA in computing capital gains on transfer of units of 'specified mutual funds'. Resultantly, such capital gains will be taxable at applicable slab rates in hands of resident investors. In addition to debt funds, this change is likely to adversely impact several other categories of funds like ETFs, fund of funds or international funds, gold funds as well.

6. OTHER CHANGES

- Increase in securities transaction tax ("**STT**"): The Amendment Bill increases the STT rate as below:
  - Sale of options in securities: 0.0625% from 0.05%
  - Sale of futures in securities: 0.0125% from 0.01%
- Payment for foreign tours through credit card to be considered for LRS: while moving the Finance Bill for consideration and passage in the lower house of Indian Parliament, the Finance Minister indicated that the Reserve Bank of India has been asked to monitor use of credit cards for foreign travel purposes. Representations have been made to the Finance Ministry indicating that payments for foreign travels through credit card is not being captured under the Liberalised Remittance Scheme ("**LRS**") currently.

  Considering the large volume of credit card transactions, it is unclear currently how RBI will monitor such payments for LRS purposes. In case where payment for foreign travel is accounted under LRS, the requirement to tax collect at source at rate of 20% on such payment may also become applicable.

– Ipsita Agarwalla & Ashish Sodhani

You can direct your queries or comments to the authors

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[1]Section 194A obligates the person who is responsible for paying to any resident income by way of interest other than income by way of interest on securities to withhold tax at rates in force

[2]F. No. 333/IFSCA/SWF/2022-23

[3]Section 206AB provides for a higher rate of withholding in case where payment is being made to persons who have defaulted in filing of income-tax return

[4]Section 9(1)(vi) / section 9(1)(vii)

[5]In case where TRC does not contain the prescribed information, the non-resident is also required to furnish such information in form 10F

[6]Black's Law Dictionary 8th ed., 2004.

[7][2013] 214 Taxman 19 (Bombay)

[8][2003] 263 ITR 706 (SC)

[9]In re, E*Trade Mauritius Limited, [2010] 324 ITR 1 (AAR); Dynamic India Fund I, AAR 1016/2010 dated July 19, 2012; DDIT v. Saraswati Holdings Corporation, [2009] 111 TTJ 334; DB Swim Mauritius Trading, [2011] 333 ITR 32 (AAR); In re, Ardex Investments Mauritius Ltd., [2012] 340 ITR 272 (AAR); In re, SmithKline Beecham Port Louis Ltd., [2012] 3408 ITR 56; In re, Castleton Investment Ltd. [2012] 348 ITR 537; Moody's Analytics Inc., [2012] 348 ITR 205; In re, DLJMB Mauritius Co., [1997] 228 ITR 268; Zaheer Mauritius v. DIT, [2014] 270 CTR (Del) 244; HSBC Bank (Mauritius) Ltd. v. DCIT [2018] 96 taxmann.com 544 (Mumbai - Trib.)

[10][2017] 163 ITD 310 (Mumbai ITAT)

[11]"AB" Mauritius, In re AAR No. 1128 of 2011

[12]For example, India-Singapore tax treaty, India-Netherlands tax treaty, India-Ireland tax treaty provided for 10% tax rate on royalty/ FTS

[13]For example, India-Mauritius tax treaty, India-Australia tax treaty provided for 15% tax rate on royalty/ FTS
