

Rules for withdrawal of retrospective taxation of indirect transfers notified

05 October 2021



Summary

The Taxation Laws (Amendment) Act, 2021 (Amendment Act) which was enacted on 13 August 2021, had withdrawn the retrospective applicability of the indirect transfer provisions. Consequentially, indirect transfer provisions do not apply to indirect transfers made before 28 May 2012.

The Central Board of Direct Taxes (CBDT) has recently notified Rule 11UE and Rule 11UF for implementing these changes. Rule 11UE provides for specified conditions to claim relief and Rule 11UF provides the manner and procedure to be followed to seek relief. These rules will be applicable from 1 October 2021.

Background

- The Finance Act, 2012 amended deeming provisions¹ of the Income-tax Act, 1961 (the Act) to provide that gains arising from sale of shares of a foreign company would be taxable in India, if such shares, directly or indirectly, derive their value substantially from the assets located in India (hereinafter referred to as the indirect transfer provisions). These provisions were introduced with retrospective effect from 1 April 1962.
- The Amendment Act was enacted on 13 August 2021, which withdrew the retrospective applicability of the indirect transfer provisions. Accordingly, these provisions will not apply to indirect transfers

made before 28 May 2012 (i.e., the date on which the Finance Bill, 2012 received President's assent).

- The CBDT has now notified rules² for effective implementation of these changes. Brief outline of these rules is discussed in the ensuing paras.

Specific conditions to claim relief from retrospective taxation of indirect transfers

- The declarant and all interested parties shall irrevocably withdraw, terminate or discontinue, against the relevant order(s) –
 - all the appeals or applications or petitions or proceedings;

¹ Section 9

² Rule 11UE and Rule 11UF

- all the proceedings for arbitration, conciliation or mediation;
- all the proceedings to enforce or pursue attachments in respect of any award, order or judgement, or any other relief against the Republic of India or Indian affiliates;
- waive all rights, whether direct or indirect, and any claims, demands, liens, actions, suits, causes of action, obligations, controversies, debts, costs, attorneys' fees, court's fees expenses, damages, judgments, orders, declaratory relief and liabilities of whatever kind
- The declarant and all interested parties shall also refrain from facilitating, procuring, encouraging or assisting any person (both related and unrelated) from bringing any proceedings or claims related to a relevant order(s).
- The declarant and all interested parties shall then notify by a public notice or press release, that no claims or related award subsist against the relevant order(s). The signed copy of the undertaking³ along with indemnity bond⁴ against all claims shall be

furnished. Such undertaking and indemnity bond shall be duly authorised⁵.

Manner of furnishing undertaking

- The undertaking⁶ shall be furnished to the jurisdictional Principal Commissioner/Commissioner (PCIT/CIT) within 45 days from the date of commencement of the Rules, i.e., 1 October 2021.
- The PCIT/CIT shall on receipt of such undertaking, within a period of 15 days –
 - Grant a certificate⁷ accepting such undertaking; or
 - Pass an order rejecting such undertaking.
- On receipt of the certificate, the declarant and all interested parties shall fulfil the specific conditions mentioned in the preceding paras and file an intimation⁸ within 60 days (can be extended by further 60 days on specific approval) with the PCIT/CIT. If the intimation is filed beyond the period of 60 days (or such extended period), it shall be considered invalid.

³ In Form No. 1 or Part M of the Annexure to the undertaking in Form No. 1

⁴ In Part N of the Annexure to the undertaking in Form No. 1

⁵ Through Board resolution or similar authorisation under applicable law

⁶ In Form No. 1

⁷ In Form No. 2

⁸ In Form No. 3

- No intimation is required to be furnished in the following cases where the declarant and all interested parties –
 - Have not filed any proceedings⁹ against the relevant order(s); or
 - Have irrevocably withdrawn all the aforementioned proceedings; or
 - Have filed no further proceedings against the disposed proceedings against the relevant order(s).
- On receipt of intimation¹⁰ or certificate,¹¹ as applicable, the PCIT/CIT shall pass an order¹² granting relief or decline granting relief, after providing suitable opportunity to the declarant. Such order shall be passed within a period of 30 days of receipt of intimation or certificate, as applicable.
- The order rejecting the undertaking or declining granting of relief to the declarant shall be passed after approval from the Chief Commissioner.
- The directions of the PCIT/CIT shall be binding on the tax officer, who shall –
 - Give effect to such directions and pass an order and issue the refund and revoke attachments, if any; and

- file an application to withdraw any appeal or application or petition or proceeding filed by any Income-tax Authority or any other person representing the Republic of India.

Meaning of important terms

- **Declarant** - The person in whose case a specified order has been passed
- **Indian affiliate** - Any departments, agencies, instrumentalities, public sector companies, and other entities of the Republic of India, owned or controlled, directly or indirectly, allegedly or in fact, by any thereof, as well as any officials, officers, directors, employees, attorneys, representatives, those providing financing, and agents of any of these persons, whether in India or in any other country or territory outside India.
- **Interested party** – means the following –
 - All the companies or entities in the entire chain of holding till the ultimate holding company or entity;
 - Any person to whom the declarant has transferred any of its claims under any award, judgment, or court order;

⁹ Such as appeal or application or petition, arbitration, conciliation or mediation or proceedings to enforce or pursue attachments in respect of any award, order or judgement

¹⁰ In Form No. 3

¹¹ In Form No. 2

¹² In Form No. 4

- Any other person in whose favour an interest has been created or assigned by the declarant; and
- Any person who has initiated any proceedings with respect to the relevant order(s).
- **Related party** - means affiliates, predecessors, successors, all the companies or entities in the entire chain of holding till the ultimate holding company or entity, subsidiaries (whether direct or indirect), assignees, agents, shareholders (present and future), owners, directors, officers, those providing financing, and employees of the declarant.
- **Relevant order** - means any specified order passed with regard to indirect transfer transactions made before 28 May 2012.
- **Specified Order** – means an assessment or reassessment order¹³, an order passed for enhancing the assessment or reducing the refund¹⁴, an order passed deeming a person to be an assessee in default¹⁵, or an order imposing penalty¹⁶.
- **Ultimate holding company or entity** - A company or an entity that has ultimate control of the declarant, directly or indirectly, and such company or entity is not itself controlled by, or is subsidiary of, any other company or entity.

Our comments

These rules provide clarity on the exact procedure to be followed for seeking relief in respect of indirect transfers made before 28 May 2021. However, the requirement of furnishing undertakings by all the interested parties may be administratively challenging in some cases.

¹³ Under section 143, section 144, section 147, or section 153A or section 153C

¹⁴ Under section 154

¹⁵ Under section 201(1)

¹⁶ Under Chapter XXI or under section 221

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