

## Changes in Income Tax in relation to Insolvency & Bankruptcy Code, 2016(IBC)- All Union Budgets

### Union Budget-2020

#### I. Amendment in Sec. 140 of Income Tax Act, 1961 relating to verification of the return of income:

Section 140 of the Income Tax Act, 1961 provides that in case of company the return is required to be verified by the managing director (MD) thereof. Where the MD is not able to verify for any unavoidable reason or where there is no MD, any director of the company can verify the return. It is also provided that in case of a company in whose case application for insolvency resolution process has been admitted by the Adjudicating Authority (AA) under the Insolvency and Bankruptcy Code, 2016 (IBC), the return has to be verified by the insolvency professional appointed by such AA. Similarly, in case of a limited liability partnership (LLP), the return has to be verified by the designated partner of the LLP or by any partner, in case there is no such designated partner.

Therefore, it is proposed to amend clause (c) and (cd) of section 140 of the Act so as to enable any other person, as may be prescribed by the Board to verify the return of income in the cases of a company and a limited liability partnership. Clause 67 of the Finance Bill, 2020 reproduced here:

*"67. In section 140 of the Income-tax Act,--*

*(i) in clause (c), after the words "by any director thereof", the words "or any other person, [as may be prescribed for this purpose](#)" shall be inserted;*

*(ii) in clause (cd), after the words "by any partner thereof", the words "or any other person, as may be prescribed for this purpose" shall be inserted."*

These amendments will take effect from 1st April, 2020.

#### II. Amendment in Sec. 288 of Income Tax Act, 1961 relating to appearance of authorized representative:

Section 288 of the Act provides for the persons entitled to appear before any Income-tax Authority or the Appellate Tribunal, on behalf of an assessee, as its "authorised representative", in connection with any proceedings under that Act. While the IBC empowers the Insolvency Professional or the Administrator to exercise the powers of the Board of Directors or corporate debtor, it has been reported that lack of explicit reference in section 288 of the Act for an Insolvency Professional to act as an authorised representative of the corporate debtor has been raising certain practical difficulties.

Therefore, it is proposed to amend sub-section (2) of section 288 to enable any other person, as may be prescribed by the Board, to appear as an authorised representative. Clause 102 of the Finance Bill, 2020 reproduced here:

*"102. In section 288 of the Income-tax Act, in sub-section (2), after clause (vii), the following clause shall be inserted, namely:--*

*["\(viii\) any other person as may be prescribed."](#)*

These amendments will take effect from 1st April, 2020.

## Union Budget-2019

### Budget 2019 proposed amendment in Income Tax Act, 1961 facilitating Resolution of Distressed Companies under Insolvency & Bankruptcy Code, 2016

#### I. Proposed amendment in Section 79 - Carry forward and set off of losses in case of certain companies:

Section 79 of Act provides that carry forward and set off of losses in a closely held company shall be allowed only if there is a continuity in the beneficial owner of the shares carrying not less than 51 percent. of the voting power, on the last day of the year or years in which the loss was incurred.

A proviso to sec. 79 inserted by the Finance Act, 2018 to allow carry forward and set off of losses even if there is change in voting power or shareholding due to pursuant to a Resolution Plan approved by NCLT. The proviso reproduced here:

*"Provided also that nothing contained in this section shall apply to a company where a change in the shareholding takes place in a previous year pursuant to a resolution plan approved under the Insolvency and Bankruptcy Code, 2016 (31 of 2016), after affording a reasonable opportunity of being heard to the jurisdictional Principal Commissioner or Commissioner."(w.e.f 01.04.2018)*

Now, the Budget, 2019 has proposed to allow carry forward and set off of losses to its subsidiaries and the subsidiary of such subsidiary also. The Memorandum Explaining the Provisions in The Finance Bill, 2019 as under:

#### ***"Measures for resolution of distressed companies***

*The existing provisions of section 79 are not applicable to a company where any change in shareholding takes place in a previous year pursuant to a resolution plan approved under the Insolvency and Bankruptcy Code, 2016 (IBC) subject to the condition that jurisdictional Principal Commissioner or Commissioner is provided a reasonable opportunity of being heard. Thus, loss in such cases can be carried forward and set off even if there is change in voting power or shareholding. This benefit is proposed to be extended to certain companies. Thus it has been provided in newly substituted section 79 that the provision of this section shall not apply to those companies, and their subsidiary and the subsidiary of such subsidiary, where-*

*(i) the National Company Law Tribunal (NCLT) on a petition moved by the Central Government under section 241 of the Companies Act, 2013 has suspended the Board of Directors of such company and has appointed new directors, who are nominated by the Central Government, under section 242 of the Companies Act, 2013: and*

*(ii) a change in shareholding of such company, and its subsidiaries and the subsidiary of such subsidiary, has taken place in a previous year pursuant to a resolution plan approved by NCLT under section 242 of the Companies Act, 2013, after affording a reasonable opportunity of being heard to the jurisdictional Principal Commissioner or Commissioner.*

*Further, it is also proposed that under section 115JB of the Act for calculating book profit, the aggregate amount of unabsorbed depreciation and loss (excluding depreciation) brought forward shall also be allowed to be reduced in cases of the above*

*mentioned companies.*

*This amendment will take effect from 1st April, 2020 and will, accordingly, apply in relation to the assessment year 2020-21 and subsequent assessment years."*

Now, even if change in shareholding more than 49% due Resolution Plan approved by NCLT, losses of holding company and its subsidiaries and the subsidiary of such subsidiary was being allowed to be carry forward and set off.

**Notes:**

Clause 22 of the Bill seeks to substitute section 79 of the Income tax Act relating to carry forward and set off of losses in case of certain companies and provides that where a change in shareholding has taken place during the previous year in the case of a company, not being a company in which the public are substantially interested, no loss incurred in any year prior to the previous year shall be carried forward and set off against the income of the previous year, unless on the last day of the previous year, the shares of the company carrying not less than fifty-one per cent. of the voting power were beneficially held by persons who beneficially held shares of the company carrying not less than fifty one per cent. of the voting power on the last day of the year or years in which the loss was incurred.

Clause (c) of sub-section (2) to the said section provides that nothing contained in this section shall apply to a company where a change in the shareholding takes place in a previous year pursuant to a resolution plan approved under the Insolvency and Bankruptcy Code, 2016, after affording a reasonable opportunity of being heard to the jurisdictional Principal Commissioner or Commissioner.

Clause (d) of sub-section (2) to the said section provides that nothing contained in this section shall apply to a company, and its subsidiaries and the subsidiary of such subsidiary, where,--

- (i) the National Company Law Tribunal, on a petition moved by the Central Government under section 241 of the Companies Act, 2013 has suspended the Board of Directors of such company and has appointed new directors which are nominated by the Central Government, under section 242 of the said Act; and
- (ii) a change in shareholding of such company, and its subsidiary and the subsidiary of such subsidiary, has taken place in a previous year pursuant to a resolution plan approved by the National Company Law Tribunal under section 242 of the Companies Act, 2013 after affording a reasonable opportunity of being heard to the jurisdictional Principal Commissioner or Commissioner.

The Explanation to the section specifies that a company shall be a subsidiary of other company, if such other company holds more than half in nominal value of the equity share capital of the company.

This amendment will take effect from 1st April, 2020 and will, accordingly, be applicable for assessment year 2020-2021 and subsequent assessment years.

**II. Proposed amendment in Section 115JB-MAT:**

Section 115JB of the Act, provides for levy of a minimum alternate tax (MAT) on the "book profits" of a company. In computing the

book profit, it provides, inter alia, for a deduction in respect of the amount of loss brought forward or unabsorbed depreciation, whichever is less as per books of account. Consequently, where the loss brought forward or unabsorbed depreciation is Nil, no deduction is allowed.

Clause (iih) to explanation 1 in section 115JB inserted by Finance Act, 2018 to provide that the aggregate amount of unabsorbed depreciation and loss brought forward (excluding unabsorbed depreciation) shall be allowed to be reduced from the book profit, if a company's application for corporate insolvency resolution process under the Insolvency and Bankruptcy Code, 2016 has been admitted by the Adjudicating Authority.(w.e.f. 01.04.2018). Clause (iih) & (iii) reproduced here:

*"(iih) the aggregate amount of unabsorbed depreciation and loss brought forward in case of a company against whom an application for corporate insolvency resolution process has been admitted by the Adjudicating Authority under section 7 or section 9 or section 10 of the Insolvency and Bankruptcy Code, 2016 (31 of 2016).*

**Explanation.**—*For the purposes of this clause, the expression "Adjudicating Authority" shall have the meaning assigned to it in clause (1) of section 5 of the Insolvency and Bankruptcy Code, 2016 (31 of 2016) and the loss shall not include depreciation; or*

*(iii) the amount of loss brought forward or unabsorbed depreciation, whichever is less as per books of account **in case of a company other than the company referred to in clause (iih).***

*Explanation.*—*For the purposes of this clause,—*

*(a) the loss shall not include depreciation;*

*(b) the provisions of this clause shall not apply if the amount of loss brought forward or unabsorbed depreciation is nil; or"*

Budget 2019 proposed that under section 115JB of the Income Tax, 1961 for calculating book profit, the aggregate amount of unabsorbed depreciation and loss (excluding depreciation) brought forward shall also be allowed to be reduced in cases of the above mentioned companies. This amendment will take effect from 1st April, 2020 and will, accordingly, apply in relation to the assessment year 2020-21 and subsequent assessment years.

#### **Notes:**

Clause 34 of the Bill seeks to amend section 115JB of the Income-tax Act relating to special provision for payment of tax by certain companies. The said section provides for levy of tax on certain companies on the basis of book profit which is determined after making certain adjustments to the net profit disclosed in the profit and loss account prepared in accordance with the provisions of the Companies Act, 2013. It also provides that in case of a company, against whom an application for corporate insolvency resolution process has been admitted by the Adjudicating Authority under section 7 or section 9 or section 10 of the Insolvency and Bankruptcy Code, 2016, the aggregate amount of unabsorbed depreciation and loss brought forward shall be allowed to be reduced from the book profit and the loss shall not include depreciation.

It is proposed to amend the said section so as to provide that the aggregate amount of unabsorbed depreciation and loss (excluding depreciation) brought forward shall also be allowed to be reduced from the book profit in case of a company, and its subsidiary and the subsidiary of such subsidiary, where, the National Company Law Tribunal, on an application moved by the Central Government under section 241 of the Companies Act, 2013 has suspended the Board of Directors of such company and has appointed new directors who are nominated by the Central Government, under section 242 of the said Act.

It is also proposed to amend the said section so as to provide that a company shall be a subsidiary of another company, if such other company holds more than half in nominal value of the equity share capital of the company.

This amendment will take effect from 1st April, 2020 and will, accordingly, apply in relation to the assessment year 2020-2021 and subsequent assessment years.

### III. Prescription of exemption from deeming of fair market value of shares for certain transactions:

The existing provisions of the section 56(2)(x) of the Income-tax Act, inter alia, provide for chargeability of income in case of receipt of money or specified property for no or inadequate consideration. For determining the amount of income for receipt of certain shares, the fair market value of the shares is taken into account. Similarly, section 50CA provides for deeming of fair market value of unquoted shares for computing the capital gains from the transfer of such shares. For both these provisions, the fair market value is determined based on the prescribed method. Currently, the provisions of section 56(2)(x) are not applicable to certain specified transactions. However, no such exemption is available under section 50CA.

Determination of fair market value based on the prescribed rules may result into genuine hardship in certain cases where the consideration for transfer of shares is approved by certain authorities and the person transferring the share has no control over such determination. In order to provide relief to such types of transactions from the applicability of sections 56(2)(x) and 50CA, it is proposed to amend these sections to empower the Board to prescribe transactions undertaken by certain class of persons to which the provisions of section 56(2)(x) and 50CA shall not be applicable.

These amendments will take effect from 1st April, 2020 and will, accordingly, apply in relation to the assessment year 2020-21 and subsequent assessment years.

#### Notes:

Clause 19 of the Bill seeks to amend section 50CA of the Income tax Act relating to special provision for full value of consideration for transfer of share other than quoted share.

The said section, inter alia, provides that where the consideration received or accruing as a result of the transfer by an assessee of a capital asset, being share of a company other than a quoted share, is less than the fair market value of such share determined in such manner as may be prescribed, the value so determined shall, for the purposes of computing capital gains, be deemed to be the full value of consideration received or accruing as a result of such transfer.

It is proposed to amend the said section so as to provide that the provisions of the said section shall not apply to any consideration received or accruing as a result of transfer by such class of persons and subject to ***such conditions as may be prescribed.***

This amendment will take effect from 1st April, 2020 and will, accordingly, apply in relation to the assessment year 2020-2021 and subsequent assessment years.

Clause 21 of the Bill seeks to amend section 56 of the Income tax Act relating to income from other sources.

Clause (viib) of sub-section (2) of the said section provides that where a company, not being a company in which the public are substantially interested, receives in any previous year, from any person being a resident, any consideration for issue of shares that exceeds the face value of such shares, the aggregate consideration received for such shares as exceeds the fair market value of the shares shall not be charged to tax, if the consideration for issue of shares is received by a venture capital undertaking from a venture capital company or a venture capital fund or by a company from a class or classes of persons as may be notified by the

Central Government in this behalf.

It is proposed to amend the said clause so as to provide that where a company, not being a company in which the public are substantially interested, receives in any previous year, from any person being a resident, any consideration for issue of shares that exceeds the face value of such shares, the aggregate consideration received for such shares as exceeds the fair market value of the shares shall not be charged to tax, if the consideration for issue of shares is received by a venture capital undertaking from a specified fund.

It is further proposed to define the expression "specified fund". It is also proposed to insert a second proviso to the said clause so as to provide that where the provisions of the said clause have not been applied to a company on account of fulfilment of conditions specified in the notification issued under clause (ii) of the first proviso and the company fails to comply with any of those conditions, then, any consideration received for issue of share that exceeds the face value of such shares shall be deemed to be the income of the company chargeable to income-tax for the previous year in which such failure has taken place.

These amendments will take effect from 1st April, 2020 and will, accordingly, apply in relation to the assessment year 2020-2021 and subsequent assessment years.

Clause (viii) of sub-section (2) of the said section provides that income by way of interest received on compensation or on enhanced compensation referred to in clause (b) of section 145A shall be chargeable to tax.

It is proposed to amend the said clause so as to substitute the reference of clause (b) of section 145A with the reference of subsection (1) of section 145B therein.

This amendment will take effect retrospectively from 1st April, 2017 and will, accordingly, apply in relation to the assessment year 2017-2018 and subsequent assessment years.

The second proviso to the sub-clause (b) of clause (x) of subsection (2) of the said section specifies that the first proviso shall apply only in a case where the amount of consideration or a part thereof has been received by way of an account payee cheque or an account payee bank draft or by use of electronic clearing system through a bank account on or before the date of agreement for transfer of the asset.

It is proposed to amend the said second proviso so as to empower the Board to make rules to provide that the first proviso shall also apply in respect of those cases where the amount of consideration or part thereof has been received by way of any other electronic mode as may be prescribed.

The proviso to the said clause (x) provides that where any person receives, in any previous year, from any person or persons any property without consideration, the aggregate fair market value of which exceeds fifty thousand rupees, the whole of the aggregate fair market value of such property or consideration which is less than the aggregate fair market value of the property by an amount exceeding fifty thousand rupees, then the aggregate fair market value of such property as exceeds such consideration shall be the income of the person receiving such property.

It is proposed to insert a new clause (XI) in the proviso to the said clause (x) so as to provide that any sum of money or any property received from such class of persons and subject to such conditions, as may be provided by rules shall not be the income of such persons.

These amendments will take effect from 1st April, 2020 and will, accordingly, apply in relation to the assessment year 2020-2021

and subsequent assessment years.

## Union Budget-2018

**Following Changes in provisions under Income Tax Act, 1961 to bring in line with Insolvency and Bankruptcy Code, 2016 (IBC 2016) by Union Budget 2018:**

### **I. Section 79 of the Income Tax Act, 1961 “Carry forward and set off of losses in case of certain companies”-**

This section provides that in any previous year where there is a change of shareholding representing more than 49% of the voting power of a company in which the public is not substantially interested, the loss of any year prior to the said previous year shall not be allowed to be carried forward or set off.

Finance Act, 2018 inserted third Proviso to the Section 79 that provision will not be applicable to the companies where a change in shareholding takes places in a previous year pursuant to the approval of Resolution Plan under IBC 2016. The proviso reproduced here:

*“Provided also that nothing contained in this section shall apply to a company where a change in the shareholding takes place in a previous year pursuant to a resolution plan approved under the Insolvency and Bankruptcy Code, 2016 (31 of 2016), after affording a reasonable opportunity of being heard to the jurisdictional Principal Commissioner or Commissioner.”*

### **II. Section 115JB of the Income Tax Act, 1961 “Special provision for payment of tax by certain companies”-**

In terms of clause (iii) of the explanation to Section 115JB, the amount of loss brought forward or unabsorbed depreciation whichever is less as per books of account is permitted to be set off in computing book profit.

The Finance Act, 2018 inserted clause (iih) prior to clause (iii) that on admission of application to appoint Insolvency Resolution Professional and to initiate CIRP process under IBC Code under Section 7, 9, or 10, then the aggregate amount of unabsorbed depreciation and loss shall be allowed to reduce from book P&L, which shall not include depreciation. The clause (iih) read as under:

*“(iih) the aggregate amount of unabsorbed depreciation and loss brought forward in case of a company against whom an application for corporate insolvency resolution process has been admitted by the Adjudicating Authority under section 7 or section 9 or section 10 of the Insolvency and Bankruptcy Code, 2016 (31 of 2016).*

*Explanation.—For the purposes of this clause, the expression “Adjudicating Authority” shall have the meaning assigned to it in clause (1) of section 5 of the Insolvency and Bankruptcy Code, 2016 (31 of 2016) and the loss shall not include depreciation; or“*

This amendment will mean that the eligible company will be entitled to set off the aggregate of loss and depreciation as per books of account.

### III. Section 140 of the Income Tax Act, 1961 “Return by whom to be verified”-

This section prescribes the person who is to verify the return of income. In the case of a company, the return is to be verified by a managing director or where he is not able to verify the return, or there is no managing director, by any director. Section 17(1)(b) of the IBC 2016 provides that, on the appointment of an interim resolution professional the powers of the board will stand suspended.

The Finance Act, 2018 inserted clause (c) after the second proviso to Section 140(c), which reads as under:-

*“(c) where in respect of a company, an application for corporate insolvency resolution process has been admitted by the Adjudicating Authority under section 7 or section 9 or section 10 of the Insolvency and Bankruptcy Code, 2016 (31 of 2016), the return shall be verified by the insolvency professional appointed by such Adjudicating Authority.*

*Explanation.—For the purposes of this clause the expressions “insolvency professional” and “Adjudicating Authority” shall have the respective meanings assigned to them in clause (18) of section 3 and clause (1) of section 5 of the Insolvency and Bankruptcy Code, 2016 (31 of 2016);”*

The above provisions come into effect from 01.04.2018.