

## **POST-BUDGET MEMORANDUM - 2008**

### **A. INTRODUCTION**

- 1.0 The Council of the Institute of Chartered Accountants of India considers it a privilege to submit this Post-Budget Memorandum to the Government.
- 1.1 Every year, the Institute organizes a workshop on the Union Budget in which the senior officials from the Central Board of Direct Taxes participate and give appropriate clarifications. Accordingly, a workshop on the Union Budget 2008-09 was organized by the Institute on 20<sup>th</sup> March, 2008. The session was devoted to a discussion of the direct tax proposals. Senior Officials of the Government participated and gave appropriate clarifications on the various issues. In this memorandum, we have suggested certain amendments to the proposals contained in the Finance Bill, 2008 which would help the Government to achieve the desired objectives.
- 1.2 The Union Budget 2008-09 has been presented in the backdrop of an economy which is on its high growth trajectory, with an average growth rate of more than 9 per cent in the last two years. The major challenges facing the economy are sustenance of this growth rate, management and regulation of capital inflows and controlling the rate of inflation. The slow down of industrial growth and agricultural growth are a cause of worry and hence, the waiver of farm loans has come as a relief to the small and marginal farmers who have availed institutional loans.

- 1.3 The increase in the basic exemption limit and rationalization of the tax slabs coupled with excise duty cuts would lead to increase in purchasing power and consequent increase in spending, thus promoting industrial growth.
- 1.4 The increased deduction for medical insurance premium for the health of parents is a good measure, especially so, since the condition of dependency has been removed. The Budget 2007-08 had introduced the Reverse Mortgage Scheme for the benefit of senior citizens. The Finance Bill, 2008 has clarified that there would be no tax liability on a senior citizen on account of such reverse mortgage and the income received by the senior citizen would be exempt from tax. This is, no doubt, a novel scheme serving as a social security measure for the aged.
- 1.5 With a view to give proper credit in respect of TDS/TCS, the CBDT is now empowered to make rules as may be necessary. The ICAI undertakes to be a valuable partner in this exercise. The ICAI fully supports the initiative of the Government and would render complete assistance in framing the rules.
- 1.6 In this memorandum, firstly an executive summary of our suggestions on the specific clauses of the Finance Bill, 2008 relating to income-tax has been given. The detailed suggestions are given thereafter.

## **Executive Summary**

### **1. Clause 3 – Insertion of Explanation 3 to section 2(1A)**

- (a) *Explanation 3* may be modified to provide that income derived from saplings or seedlings grown in a nursery shall be deemed to be agricultural income, *whether or not the basic operations are carried out on land.*
- (b) *Explanation 3* may be made clarificatory and thereby given retrospective effect.
- (c) Definition of sapling and seedling may be provided.

### **2. Clause 3 - Substitution of section 2(15)**

- (a) The scope of applicability of section 11(4A) may be increased appropriately instead of amending section 2(15).
- (b) In the alternative, the proviso to section 2(15) may be suitably modified to exclude services rendered to members/constituents from its scope.

### **3. Clause 5 – Insertion of clause (iia) in section 35(1)**

- (a) Weighted deduction of 125% of the amount contributed should be available for contribution made for both research and development. It should not be restricted to contribution made for research alone.
- (b) Contributions made to foreign institutions for scientific research should also be eligible for deduction. A condition can be imposed that the Intellectual Property Rights should belong to the contributing entity in India. The eligible

foreign institutions may also be specified by the Central Government for this purpose.

**4. Clause 6 – Amendment of section 35D**

- (a) Fees paid for increase in authorised capital should be included under the expenses qualifying for deduction in the case of a company under section 35D(2)(c).
- (b) The words “or in connection with the increase in capacity of his existing business” may be added at the end of clause (ii) of section 35D(1).

**5. Clauses 7, 97 to 116 - Amendment of section 36(1) – Insertion of new clause (xvi)**

- (a) Clause 99 of Chapter VII of the Finance Bill, 2008 providing for charge of commodities transaction tax should be suitably amended to provide that commodities transaction tax would not be attracted in cases where the option is exercised.
- (b) An eligible transaction of trading in commodity derivatives should be excluded from the ambit of speculative transaction defined in section 43(5).

The eligible transaction of trading in commodity derivatives may be included as item (e) in the proviso to section 43(5), which excludes certain transactions from the definition of speculative transaction. Further, the definition of “eligible transaction” in the Explanation to section 43(5) should be amended to include a transaction of trading in commodity derivatives also.

**6. Clause 9 - Amendment of section 40A – Substitution of new sub-sections (3) and (3A) for existing sub-section (3).**

- (a) This amendment should be made effective in respect of payments made after the specified date i.e. 1.6.2008.
- (b) Consequential changes should be made in the disclosure requirement in tax audit report.

**7. Clause 15 – Amendment of section 80-IB – Insertion of sub-section (11C)**

- (a) The requirement of minimum number of beds should be reduced from 100 to 50.
- (b) The assessee should be permitted to avail the benefit of tax holiday in any 5 consecutive years out of the initial 8 years beginning from the year of setting up the hospital.

**8. Clause 16 - Amendment of section 80-ID – Insertion of new clause (iii) in sub-section (2)**

The assessee should be permitted to avail the benefit of tax holiday in any 5 consecutive years out of the initial 8 years beginning from the year of setting up the hotel.

**9. Clause 18 – Amendment of section 111A**

- (a) Marginal relief may be provided for in section 111A
- (b) The last proviso to section 48 should be removed so that securities transaction tax paid may be allowed as a deduction while computing short-term capital gains.

- (c) The proviso to section 111A(1) should also be correspondingly amended to increase the rate of tax on the balance of short-term capital gains to 15%.

**10. Clause 20 – Amendment of section 115JB**

It should be clarified that the following are to be deducted from net profit, if the same have been credited to the profit and loss account

- deferred tax asset and
- reversal of deferred tax liability or provision therefor.

**11. Clause 21 – Amendment of section 115-O – Insertion of sub-section (1A)**

- (a) The condition that the holding company should not be a subsidiary of any other company may be removed.
- (b) The deduction may be allowed to all companies which have received dividend from another company, on which dividend distribution tax is paid. In other words, this concession should not be restricted only to dividend received from a subsidiary company.
- (c) If a company has invested in a Mutual Fund and has received income from such Mutual Fund on which dividend distribution tax is paid under section 115R, the said income should also be deductible from dividend distributed by the company for the purpose of payment of dividend distribution tax under section 115O. This will avoid double taxation of the income received from the mutual fund.

**12. Clause 22 – Amendment of section 115WB**

- (a) Expenditure on in-house training, expenditure on any conference for skill development etc. should be excluded from the purview of FBT.
- (b) Surcharge on FBT should be attracted only in the case of those companies/firms where the value of fringe benefits exceed Rs.1 crore.

**13. Clauses 24 & 27 – Amendment of sections 115WD and 139(1)**

- (a) The definition of “specified date” in section 44AB should be amended to have the same meaning as in Explanation 2 to section 139(1).
- (b) In case of non-corporate assesses subject to audit, the due date may be further advanced to 31<sup>st</sup> August of the assessment year. Further, in the case of non-corporate assesses not subject to audit, the due date may be advanced to 30<sup>th</sup> June of the assessment year.

**14. Clause 26 – Insertion of new section 115WKB**

The stock option benefit enjoyed by an employee should be treated as his salary. Consequently, the employer can withhold the FBT in relation to such benefits from such employee’s salary. The employer should accordingly record this in the TDS certificate issued by him to his employee. This would help the employee to claim credit of such deemed payment of FBT in a country outside India.

**15. Clause 30 – Amendment of section 147 – Insertion of second proviso**

The Assessing Officer should be required to specifically state the details of income which has escaped assessment in the notice issued by him, and assessment/reassessment should be restricted to such specified income alone.

**16. Clause 40 – Amendment of section 194C – Insertion of clause (ja) in sub-section (1)**

Only those AOPs and BOIs, which are liable to get their accounts audited under section 44AB, should be required to deduct tax under section 194C.

**17. Clause 46 – Amendment of section 254(2A) – Substitution of third proviso**

(a) In the third proviso, the words “if the delay in disposing of the appeal is attributable to the assessee” may be substituted for the words “even if the delay in disposing of the appeal is not attributable to the assessee”.

(b) Alternatively, responsibility should be vested with the Tribunal to dispose of the appeal during the period of stay.

(c) Time barring provisions, similar to the provisions contained in section 153 for completion of assessments, should be made applicable in cases where stay has been granted.

**18. Clause 52 – Insertion of new section 292BB**

(a) Clause (b) of section 292BB relating to non-service of notice in time should be removed

(b) The language of the section may be suitably modified to provide that where the assessee fails to raise preliminary

objection during the course of assessment proceedings that notice is not served upon him or that notice is served in an improper manner, then he cannot raise such an objection at the appellate or later stage.

## POST- BUDGET MEMORANDUM - 2008

### 1. Clause 3 – Insertion of Explanation 3 to section 2(1A)

Agricultural income is exempt from tax under section 10(1). The scope of “agricultural income” is defined in section 2(1A).

In the past, there have been court rulings that only if a nursery is maintained by carrying out the basic operations on land and subsequent operations in continuation thereof, income from such nursery would be treated as agricultural income and would qualify for exemption under section 10(1). Therefore, income derived from sale of plants grown directly in pots would not be treated as agricultural income.

The Finance Bill, 2008 has now proposed to insert *Explanation 3*, with effect from A.Y.2009-10, to provide that income derived from saplings or seedlings grown in a nursery would be deemed to be agricultural income. The intention of the proposed amendment, as explained in the Explanatory Memorandum, is that income derived from saplings or seedlings grown in a nursery are to be deemed as agricultural income, whether or not the basic operations are carried out on land.

The language of the Explanation does not clarify the intent explained in the Explanatory Memorandum. It should be appropriately modified by including the portion given in italics (at the end of the earlier paragraph) to reflect the correct intention. Also, since the proposed amendment is clarificatory in nature, it

should be given effect to retrospectively. Further, the meaning of sapling and seedling should be defined, to avoid confusion.

### **Suggestions**

- (a) *Explanation 3 may be modified to provide that income derived from saplings or seedlings grown in a nursery shall be deemed to be agricultural income, whether or not the basic operations are carried out on land.*
- (b) *Explanation 3 may be made clarificatory and thereby given retrospective effect.*
- (c) *Definition of sapling and seedling may be provided.*

### **2. Clause 3 - Substitution of section 2(15)**

The amendment proposes to clarify that “advancement of any object of general public utility” shall not be a charitable purpose if it involves carrying on of any activity in the nature of trade, commerce or business or any activity of rendering of any service in relation to any trade, commerce or business for a cess or fee or any other consideration. This is irrespective of the nature of use or application of the income from such activity or retention of such income by the concerned entity. Therefore, such entities would not be eligible for exemption under section 10(23C) or section 11. This proposal may affect genuine charitable institutions.

The scope of exclusion from “charitable purpose” would now also cover services rendered by Chambers of Commerce, Resident Welfare Associations (RWAs), trade associations, port trusts who are carrying on service activities by collecting the membership fee and providing services to their members, even though there is no

profit motive in such cases. It may be noted that the other income of such Chambers of Commerce etc. is taxable even now by virtue of section 11(4A).

### **Suggestions**

- (a) The scope of applicability of section 11(4A) may be increased appropriately instead of amending section 2(15).*
- (b) In the alternative, the proviso to section 2(15) may be suitably modified to exclude services rendered to members/constituents from its scope.*

### **3. Clause 5 – Insertion of clause (iia) in section 35(1)**

Section 35(1)(ii) provides for weighted deduction to a payer, to the extent of 125 per cent of the sum paid to an approved scientific research association, approved university, college or other institution to be used for scientific research subject to certain other specified conditions.

It is proposed to insert a new clause (iia) in sub-section (1) of section 35 to allow a weighted deduction of 125 per cent of the amount paid by a person to a company to be used for scientific research. This proposal is to encourage outsourcing of scientific research, particularly by small companies which face difficulty in making heavy investment for building in-house scientific facilities. However, the company should fulfill the following conditions -

- (i) It should be registered in India;
- (ii) It should have as its main object the scientific research and development;

- (iii) It should be for the time being approved by the prescribed authority in the prescribed manner; and
- (iv) It should fulfill such other conditions as may be prescribed.

It may be noted that research and development is generally used as a single phrase. However, only the contribution made for research qualifies for deduction under the proposed amendment. In order to avoid any ambiguity in this regard, the contribution made for both research and development should qualify for deduction.

Further, at times, research of the nature required by the assessee may not be undertaken within India. In such cases, the assessee may have to make contribution to a foreign entity, for which deduction would not be available under this new clause. In order to encourage such research, it is necessary that deduction be available for contributions made to foreign entities also.

### **Suggestions**

- (a) *Weighted deduction of 125% of the amount contributed should be available for contribution made for both research and development. It should not be restricted to contribution made for research alone.*
- (b) *Contributions made to foreign institutions for scientific research should also be eligible for deduction. A condition can be imposed that the Intellectual Property Rights should belong to the contributing entity in India. The eligible foreign institutions may also be specified by the Central Government for this purpose.*

#### **4. Clause 6 – Amendment of section 35D**

Under section 35D, preliminary expenses are allowed as deduction over a period of 5 successive years from the year of commencement of business i.e. one-fifth of the expenditure is allowed as deduction in each year. Such preliminary expenses incurred before the commencement of business is allowed as deduction to companies in both the manufacturing and service sectors. However, such expenses incurred after the commencement of business for expansion of the existing business or for setting up a new unit was allowed only for the companies in the manufacturing sector. It is proposed to extend this benefit to the companies in the service sector as well.

Fees paid for increase in the authorised capital in case of companies are not treated as preliminary expenses for the purpose of section 35D. Further, the expenses incurred prior to and for the purpose of increase in capacity are not treated as preliminary expenses for the purpose of section 35D. Such expenses should also be treated as preliminary expenses for the purpose of availing the benefit of deduction under this section.

#### **Suggestions**

- (a) Fees paid for increase in authorised capital should be included under the expenses qualifying for deduction in the case of a company under section 35D(2)(c).*
- (b) The words “or in connection with the increase in capacity of his existing business” may be added at the end of clause (ii) of section 35D(1).*

**5. Clauses 7, 97 to 116 - Amendment of section 36(1) – Insertion of new clause (xvi)**

Commodities transaction tax is proposed to be levied in respect of every taxable commodities transaction i.e. transaction of purchase or sale of option in goods, or option in commodity derivative, or any other commodity derivative, traded in recognized associations.

Such tax is proposed to be allowed as a deduction from business income under section 36(1).

Since the basic transaction of trading in commodities is not taxable, commodities transaction tax should not be levied in a case where the option is exercised. It may be noted that securities transaction tax is attracted when an option is exercised because the basic transaction of trading in securities itself is taxable.

**Suggestions**

*(a) Clause 99 of Chapter VII of the Finance Bill, 2008 providing for charge of commodities transaction tax should be suitably amended to provide that commodities transaction tax would not be attracted in cases where the option is exercised.*

*(b) An eligible transaction of trading in commodity derivatives should be excluded from the ambit of speculative transaction defined in section 43(5).*

*The eligible transaction of trading in commodity derivatives may be included as item (e) in the proviso to section 43(5), which excludes certain transactions from the definition of speculative transaction. Further, the definition of “eligible transaction” in the Explanation to section 43(5) should be*

*amended to include a transaction of trading in commodity derivatives also.*

**6. Clause 9 - Amendment of section 40A – Substitution of new sub-sections (3) and (3A) for existing sub-section (3).**

Section 40A(3) provides for disallowance of expenditure incurred in respect of which payment is made of a sum exceeding Rs.20,000 otherwise than by an account payee cheque or an account payee bank draft.

In order to escape disallowance under this section, there has been a practice of splitting up a high value payment into several cash payments, each below Rs.20,000, sometimes even during the course of a day.

In order to prevent such a practice, it has been proposed that disallowance under this section will be attracted if the payment or the aggregate of payments made to the same person during a day otherwise than by an account payee cheque or an account payee bank draft exceeds Rs.20,000. This amendment is proposed to be effective from 1.4.09 i.e. A.Y. 2009-10 (or P.Y. 2008-09). However, the Finance Bill, 2008 would receive the assent of the President only in May 2008. Hence, the amendment should be made effective only in respect of payments made after 1.6.2008.

**Suggestions**

- (a) This amendment should be made effective in respect of payments made after the specified date i.e. 1.6.2008.*
- (b) Consequential changes should be made in the disclosure requirement in tax audit report.*

**7. Clause 15 – Amendment of section 80-IB – Insertion of sub-section (11C)**

Hospitals set up in rural areas enjoy a five year tax holiday under section 80-IB if they are constructed during the period between 1.10.2004 and 31.3.2008 and fulfill the prescribed conditions. This is provided for in sub-section (11B).

It has now been proposed to extend the five year tax holiday under section 80-IB to hospitals set up in non-metro cities i.e. anywhere in India other than in excluded areas. Excluded area means the area comprising the urban agglomerations of Greater Mumbai, Delhi, Kolkata, Chennai, Hyderabad, Bangalore and Ahmedabad, the districts of Faridabad, Gurgaon, Ghaziabad, Gautam Budh Nagar and Gandhi Nagar and the city of Secunderabad. This amendment is proposed to be effected through insertion of new sub-section (11C)

To be eligible for this benefit, the hospital should be constructed and should start functioning between 1.4.08 and 31.3.2013. Further, it should have at least 100 beds for patients. Hospitals in small towns may find it difficult to comply with this condition.

Further, since there is a probability of incurring losses during the initial years, the assessee may not be able to avail the benefit of the five-year tax holiday, which would begin from the assessment year relevant to the previous year in which the business of the hospital starts functioning.

## **Suggestions**

- (a) The requirement of minimum number of beds should be reduced from 100 to 50.*
- (b) The assessee should be permitted to avail the benefit of tax holiday in any 5 consecutive years out of the initial 8 years beginning from the year of setting up the hospital.*

### **8. Clause 16 - Amendment of section 80-ID – Insertion of new clause (iii) in sub-section (2)**

Section 80-ID provides a five-year tax holiday to new two, three and four star hotels and convention centres set up in the Northern Capital Region.

It has been proposed to extend the benefit of this five year tax holiday to new two, three or four star hotels located in the specified district having a World Heritage Site. For availing this benefit, the hotel should be constructed and should start functioning between 1.4.08 and 31.3.2013.

Since there is a probability of incurring losses during the initial years, the assessee may not be able to avail the benefit of the five-year tax holiday, which would begin from the assessment year relevant to the previous year in which the business of the hotel starts functioning.

## **Suggestion**

*The assessee should be permitted to avail the benefit of tax holiday in any 5 consecutive years out of the initial 8 years beginning from the year of setting up the hotel.*

## **9. Clause 18 – Amendment of section 111A**

Section 111A provides for a special tax rate of 10% on short-term capital gain arising from the transfer of a short-term capital asset, being an equity share in a company or a unit of an equity oriented fund, where such transaction is chargeable to securities transaction tax.

It has been proposed to increase the rate of tax on such short-term capital gain to 15%. However, the proviso to section 111A(1), which provides for adjustment of unexhausted basic exemption limit, has not been correspondingly amended to increase the rate of tax on the balance of short-term capital gains to 15%.

Tax slabs are proposed to be rationalized and consequently, individuals with income up to Rs.3 lakhs have to pay tax @ 10%. However, if a person has only short-term capital gains, his income would be taxable @ 15%. Further, no deduction under Chapter VI-A would be allowed against such short-term capital gains. Therefore, marginal relief should be provided for in section 111A.

Securities transaction tax is now proposed to be allowed as a deduction while computing business income. However, the same is not allowed as a deduction for computing short-term capital gains. Thus, there is a differential tax treatment for securities transaction tax paid by a businessman and an investor.

### **Suggestions**

- (a) Marginal relief may be provided for in section 111A*
- (b) The last proviso to section 48 should be removed so that securities transaction tax paid may be allowed as a deduction while computing short-term capital gains.*

*(c) The proviso to section 111A(1) should also be correspondingly amended to increase the rate of tax on the balance of short-term capital gains to 15%.*

**10. Clause 20 – Amendment of section 115JB**

This section provides that if the tax computed under the Income-tax Act is less than 10% of book profit, then the book profit is deemed to be the total income and tax is payable @10% thereon. For this purpose, book profit means the net profit as per the profit and loss account prepared in accordance with Part II and Part III of Schedule VI to the Companies Act, as adjusted by certain additions/deductions as specified. One of the adjustments is to add back income-tax paid or payable, and the provision therefor.

It is proposed to clarify that deferred tax liability should also be added to the book profit for computing Minimum Alternate Tax, if the same were debited to the profit and loss account. However, there is no corresponding clarification regarding deductibility of a deferred tax asset and reversal of deferred tax liability or provision therefor from the net profit, if the same has been credited to the profit and loss account.

**Suggestion**

*It should be clarified that the following are to be deducted from net profit, if the same have been credited to the profit and loss account*

- deferred tax asset and*
- reversal of deferred tax liability or provision therefor.*

**11. Clause 21 – Amendment of section 115-O – Insertion of sub-section (1A)**

Section 115-O relates to tax on distributed profits of domestic companies. Sub-section (1) of the section provides that tax on distributed profits at the rate of 15% shall be levied on any amount declared, distributed or paid by a domestic company to its shareholders by way of dividends.

However, there is a problem of double taxation in case of dividend distributed by a subsidiary company to its holding company.

In order to avoid such double taxation, it has now been proposed that a domestic company receiving dividend from subsidiary company can reduce the same from dividends declared, distributed or paid by it. For this purpose, holding company is one which holds more than 50% of the nominal value of equity shares of the subsidiary. This amendment is proposed to be effected by insertion of new sub-section (1A).

However, companies other than holding companies cannot avail the benefit of reduction of dividend received from dividend paid for the purpose of payment of dividend distribution tax.

There are certain conditions to be fulfilled by the subsidiary company/holding company to avail this benefit. They are -

- the subsidiary company should have actually paid the dividend distribution tax;
- the holding company should be a domestic company; and

- it should not be a subsidiary of any other company.

If the holding company is a subsidiary of another company, then it cannot claim the benefit in respect of dividend received from its own subsidiary. This condition would cause difficulty to all companies which are subsidiaries of other companies.

## **Suggestions**

- (a) *The condition that the holding company should not be a subsidiary of any other company may be removed.*
- (b) *The deduction may be allowed to all companies which have received dividend from another company, on which dividend distribution tax is paid. In other words, this concession should not be restricted only to dividend received from a subsidiary company.*
- (c) *If a company has invested in a Mutual Fund and has received income from such Mutual Fund on which dividend distribution tax is paid under section 115R, the said income should also be deductible from dividend distributed by the company for the purpose of payment of dividend distribution tax under section 115O. This will avoid double taxation of the income received from the mutual fund.*

## **12. Clause 22 – Amendment of section 115WB**

Sub-section (2) of section 115WB provides that where an employer incurs any expenditure, *inter alia*, for the purposes of

entertainment, hospitality, conference, and sales promotion (including publicity) etc., such employer shall be deemed to have provided fringe benefits to its employees.

With a view to rationalizing the provisions of Fringe Benefit Tax, the following amendments to sub-section (2) of section 115WB have been proposed-

- (i) Any expenditure on or payment through pre-paid electronic meal card shall also be excluded from the hospitality expenditure for calculation of the value of fringe benefit. Such electronic meal card should not be transferable, should be usable only at eating joints or outlets and should fulfill such other conditions, as may be prescribed.
- (ii) Explanation to clause (E) is proposed to be amended to provide that any expenditure incurred or payment made to –
  - provide crèche facility for the children of the employee; or
  - sponsor a sportsman, being an employee; or
  - organize sports events for employees,shall not be considered as expenditure for employees' welfare.

However, there are several other issues relating to FBT which also need to be addressed. Expenditure on in-house training, expenditure on any conference for skill development etc. should also be excluded from the purview of FBT.

Surcharge on FBT should be attracted only in the case of those companies/firms where the value of fringe benefits exceed Rs.1 crore. This would be in line with the limit at which surcharge is applicable for income-tax.

## **Suggestions**

- (a) Expenditure on in-house training, expenditure on any conference for skill development etc. should be excluded from the purview of FBT.*
- (b) Surcharge on FBT should be attracted only in the case of those companies/firms where the value of fringe benefits exceed Rs.1 crore.*

### **13. Clauses 24 & 27 – Amendment of sections 115WD and 139(1)**

The due date for filing return of income for companies, persons subject to audit and working partners of a firm subject to audit is 31<sup>st</sup> October of the assessment year. The due date for filing return of fringe benefits for companies and persons subject to audit is also 31<sup>st</sup> October of the assessment year. These due dates are proposed to be advanced to 30<sup>th</sup> September of the assessment year.

However, the “specified date” for the purpose of getting the accounts audited and filing the report of such audit under section 44AB continues to be 31<sup>st</sup> October of the assessment year.

## **Suggestions**

- (a) The definition of “specified date” in section 44AB should be amended to have the same meaning as in Explanation 2 to section 139(1).*
- (b) In case of non-corporate assessees subject to audit, the due date may be further advanced to 31<sup>st</sup> August of the assessment year. Further, in the case of non-corporate assessees not subject to audit, the due date may be advanced to 30<sup>th</sup> June of the assessment year.*

#### **14. Clause 26 – Insertion of new section 115WKB**

It has been proposed to insert a new section 115WKB to provide that where fringe benefit tax (with respect to allotment or transfer of specified security or sweat equity shares) has been paid by the employer and subsequently recovered from the employee, the recovery of fringe benefit tax shall be deemed to be the tax paid by such employee in relation to value of fringe benefits provided to him. The deeming provision shall apply only to the extent to which the amount of recovery relates to the value of the fringe benefits provided to such employee.

The proposed amendment may achieve the desired purpose only if the employee is legally liable to pay the FBT on the benefit arising out of the stock options. As per the existing provisions, FBT can be recovered from the employee. However, since the employee is not legally liable to pay FBT, he may not be entitled to claim the recovery of the same in his country of residence as tax paid by him. Further, on the procedural front, an employee would be required to establish that the FBT recovered from him is in relation to the ESOP benefit enjoyed by him. Currently, there is no provision in the Income-tax Act providing for the issue of any certificate or related document in this regard.

#### **Suggestions**

*The stock option benefit enjoyed by an employee should be treated as his salary. Consequently, the employer can withhold the FBT in relation to such benefits from such employee's salary. The employer should accordingly record this in the TDS certificate issued by him to his employee. This would help the*

*employee to claim credit of such deemed payment of FBT in a country outside India.*

**15. Clause 30 – Amendment of section 147 – Insertion of second proviso**

It is proposed to add a second proviso to provide that the Assessing Officer may assess or reassess such income, other than the income involving matters which are the subject matter of any appeal, reference or revision, which is chargeable to tax and has escaped assessment.

The proposed amendment allows the Assessing Officer to issue notice to assess/reassess income which has escaped assessment if the matter is not pending in appeal/reference/revision. The Assessing Officer should be required to state in his notice under section 148, the specific details of income which has escaped assessment for which the notice is being issued. He should restrict the assessment/re-assessment to such specific income only.

**Suggestion**

*The Assessing Officer should be required to specifically state the details of income which has escaped assessment in the notice issued by him, and assessment/reassessment should be restricted to such specified income alone.*

**16. Clause 40 – Amendment of section 194C – Insertion of clause (ja) in sub-section (1)**

Sub-section (1) of section 194C provides for deduction of income-tax at source from any sum credited or paid to a resident contractor for carrying out any work (including supply of labour for carrying out any work) in pursuance of a contract between the contractor and the Government, local authorities, statutory corporations, companies, co-operative societies, statutory authorities engaged in providing housing accommodation, registered societies, trusts, universities, firms and those individuals/HUFs who are required to get their accounts audited under section 44AB. However, association of persons and body of individuals were not subject to tax deduction at source under section 194C.

This section is proposed to be amended to provide that any association of persons or body of individuals, whether incorporated or not, shall be liable to deduct income-tax at source under sub-section (1) of section 194C. This inclusion may cause genuine difficulty to certain AOPs and BOIs. For example, Resident Welfare Associations making payment to security agencies would also be required to deduct tax at source, which would cause genuine difficulty to them.

### **Suggestion**

*Only those AOPs and BOIs, which are liable to get their accounts audited under section 44AB, should be required to deduct tax under section 194C.*

### **17. Clause 46 – Amendment of section 254(2A) – Substitution of third proviso**

The proviso to section 254(2A) provides that the Appellate Tribunal may, on merit, pass a stay order in any proceeding relating to an appeal filed under section 253(1). However, the aggregate period of stay should not exceed 365 days.

It is proposed to substitute the third proviso to clarify that if the appeal is not disposed of within such period, the order of stay shall stand vacated, even if delay in disposing the appeal is not attributable to the assessee.

As per this proposed amendment, the period of stay cannot be extended even if the delay in disposing the appeal is not attributable to the assessee (for example, if the Bench is not functioning).

If the principles of natural justice are applied, an assessee should not be penalized if he is not at fault. Therefore, in such cases, taking into consideration the principles of natural justice, the Appellate Tribunal should have the power to extend the period of stay.

### **Suggestion**

- (a) *In the third proviso, the words “if the delay in disposing of the appeal is attributable to the assessee” may be substituted for the words “even if the delay in disposing of the appeal is not attributable to the assessee”.*
- (b) *Alternatively, responsibility should be vested with the Tribunal to dispose of the appeal during the period of stay.*
- (c) *Time barring provisions, similar to the provisions contained in section 153 for completion of assessments, should be made applicable in cases where stay has been granted.*

**18. Clause 52 – Insertion of new section 292BB**

This section proposes to provide that where an assessee has appeared in any proceeding or co-operated in any inquiry related to an assessment or reassessment, it shall be deemed that notice has been duly served upon him. He cannot take an objection in any proceeding or inquiry that the notice was

- not served upon him; or
- not served upon him in time; or
- served upon him in an improper manner.

It may be noted that the words “appearance in any proceeding” or “co-operation in any inquiry” may be interpreted to include the following:

- (a) the assessee may appear on subsequent notice (reminder) to file objection to the original notice claimed to have been issued but not served on the assessee.
- (b) the assessee may appear “on protest”
- (c) the Assessing Officer may depute his field inspector to enquire about the facts and a statement of the assessee may be recorded at his residence or business premises.
- (d) the appearance of an assessee during the course of another proceeding for another assessment year may constitute the appearance or cooperation in the proceeding under consideration.

Further, non-service of notice within the time limit amounts to violation of the principles of natural justice. The appearance by the assessee or his co-operation in the inquiry would not set right this violation.

## **Suggestions**

- (a) Clause (b) of section 292BB relating to non-service of notice in time should be removed*
- (b) The language of the section may be suitably modified to provide that where the assessee fails to raise preliminary objection during the course of assessment proceedings that notice is not served upon him or that notice is served in an improper manner, then he cannot raise such an objection at the appellate or later stage.*