

# ***THE TAXATION LAWS (AMENDMENT) BILL, 2021***

The government introduced the Taxation Laws (Amendment) Bill, 2021, which seeks to withdraw tax demands made under the Finance Act, 2012 retrospective legislation to tax the indirect transfer of Indian assets.

The Taxation Laws (Amendment) Bill, 2021 inserted three provisos (Fourth, Fifth, and Sixth Proviso) in Explanation 5 to Section 9(1)(i) to give relief to certain eligible entities impacted by the retrospective amendment. These amended provisions of indirect transfer of assets in India shall not apply to the assets transferred before 28-05-2012 (i.e., the date on which the Finance Bill, 2012 received the assent of the President). Accordingly, all pending assessments shall be deemed to have been concluded without additions for such income and the demand raised in concluded assessments or rectification orders for indirect transfer of Indian assets made before 28-05-2012 shall be nullified on the fulfillment of specified conditions.

## ***Explanation 5 to Section 9(1)(i)***

Explanation 5 to Section 9(1)(i) clarifies that an asset or a capital asset, being any share or interest in a company or entity registered or incorporated outside India, shall be deemed to be situated in India, if the share or interest derives, directly or indirectly, its value substantially from the assets located in India. In other words, an asset or capital asset shall be deemed to have been situated in India, and income arising from transfer of such asset shall be deemed to accrue or arise in India if the following conditions are satisfied:

1. The asset or capital asset is a share (or interest) in a company (or entity) registered or incorporated outside India;
2. The share or interest derives its value substantially from the assets located in India; and
3. Such value may be derived directly or indirectly from the assets located in India.

However, the share or interest shall not be deemed to derive its value substantially from the assets (whether tangible or intangible) located in India, if, on the specified date, the value of such assets:

1. Does not exceed Rs. 10 crores; and
2. Does not represent at least 50% of the value of all the assets owned by the company or entity, as the case may be.

***The Fourth Proviso to Explanation 5 to Section 9(1)(i)*** provides that the provisions of Explanation 5 (hereinafter referred to as 'indirect transfer of Indian assets') shall not apply, in respect of income accruing or arising through or from the indirect transfer of Indian asset made before 28-05-2012, to:

- a. an assessment or reassessment to be made under Section 143, Section 144, Section 147 or Section 153A or Section 153C;
- b. an order to be passed enhancing the assessment or reducing a refund already made or otherwise increasing the liability of the assessee under Section 154; or

- c. an order to be passed deeming a person to be an assessee in default under Section 201(1).

In other words, the retrospective impact of Explanation 5 to Section 9(1)(i) shall be ignored if assets situated in India are indirectly transferred before 28-05-2012. Thus, the income accruing or arising through or from such indirect transfer of Indian assets or capital assets shall not be taxable in India. Therefore, all assessments or rectification applications pending before the authorities, to the extent it relates to the computation of income from indirect transfer of assets, shall be deemed to be concluded without any additions.

***The Fifth Proviso to Explanation 5 to Section 9(1)(i)*** provides that the provisions of Explanation 5 shall not apply, in respect of income accruing or arising through or from the indirect transfer of Indian asset made before 28-05-2012, to:

- a. an assessment or reassessment made under Section 143, Section 144, Section 147 or Section 153A or Section 153C;
- b. an order passed enhancing the assessment or reducing a refund already made or otherwise increasing the liability of the assessee under Section 154;
- c. an order passed deeming a person to be an assessee in default under Section 201(1); or
- d. an order passed imposing a penalty under Chapter XXI or under Section 221.

In other words, the retrospective impact of Explanation 5 to Section 9(1)(i) shall be ignored if assets situated in India are indirectly transferred before 28-05-2012. Thus, the income accruing or arising through or from such indirect transfer of Indian assets or capital assets shall not be taxable in India. Therefore, all assessments or rectification applications concluded by the authorities, to the extent it relates to the computation of income from indirect transfer of assets, shall be deemed to never have been passed or made.

***The Sixth Proviso to Explanation 5 to Section 9(1)(i)*** provides that where any amount becomes refundable to such person, then such amount shall be refunded to him, but no interest under section 244A shall be paid on that amount.

The relief in cases of concluded assessments shall be given to only those assesseees who satisfy the following conditions:

- a. where the assessee has filed an appeal before an appellate forum or any writ petition before the High Court or the Supreme Court against any order in respect of said income, he shall either withdraw or submit an undertaking to withdraw such appeal or writ petition, in such form and manner as may be prescribed;
- b. where the said person has initiated any proceeding for arbitration, conciliation or mediation, or has given any notice thereof under any law for the time being in force or under any agreement entered into by India with any other country or territory outside India, whether for protection of investment or otherwise, he shall either withdraw or shall submit an undertaking to withdraw the claim, if any, in such proceedings or notice, in such form and manner as may be prescribed;

- c. the said person shall furnish an undertaking, in such form and manner as may be prescribed, waiving his right, whether direct or indirect, to seek or pursue any remedy or any claim in relation to the said income which may otherwise be available to him under any law for the time being in force, in equity, under any statute or under any agreement entered into by India with any country or territory outside India, whether for protection of investment or otherwise; and
- d. such other conditions as may be prescribed.

## **KEY HIGHLIGHTS**

1. Taxation Laws (Amendment) Bill, 2021 seeks to withdraw tax demands made under the 2012 retrospective legislation to tax the indirect transfer of Indian assets
2. The bill proposes that any demand raised for indirect transfer of Indian assets made before May 28, 2012 shall be nullified on fulfilment of specified conditions such as withdrawal or furnishing of undertaking for withdrawal of pending litigation and furnishing of an undertaking to the effect that no claim for cost, damages, interest shall be filed.
3. The bill proposes to refund the amount paid in these cases without any interest.
4. It also proposes to amend the Finance Act, 2012 to provide that the validation of demand under section 119 of the Finance Act, 2012 shall cease to apply on fulfilment of specified conditions.
5. The Bill states that the issue of taxability of gains arising from the transfer of assets located in India through the transfer of shares of a foreign company was a subject matter of protracted litigation.

## **SIGNIFICANCE**

1. The bill is likely to benefit many companies including Vodafone and Cairn Energy who had to pay tax based on the retrospective tax demand provision.
2. The amendment will have a direct bearing on the long-running tax disputes
3. As per the amendment, the centre will withdraw all back tax demands on companies and will refund the money collected to enforce such levies.
4. This is crucial as the country stands at a juncture today when quick recovery of the economy after the COVID-19 pandemic is the need of the hour and foreign investment will play a significant role in promoting faster economic growth and employment.

## THE TAXATION LAWS (AMENDMENT) BILL, 2021

### KEY FEATURES

1. Provides that no tax demand shall be raised in the future based on the retrospective amendment made through Finance Act, 2012, for any indirect transfer of Indian assets if the transaction was undertaken before 28th May 2012.

2. Provides that the demand raised for indirect transfer of Indian assets made before 28th May 2012, shall be nullified on fulfillment of specified conditions and on furnishing of an undertaking.



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## THE TAXATION LAWS (AMENDMENT) BILL, 2021

### KEY FEATURES

3. Proposes to refund the amount paid in these cases without any interest thereon.

4. Proposes to amend the Finance Act, 2012 so as to provide that the validation of demand, etc, under section 119 of the Finance Act, 2012 shall cease to apply on fulfilment of specified conditions and on furnishing of an undertaking.

5. Empowers CBDT to make rules to provide the form and manner in which an undertaking shall be submitted.



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# The Taxation Laws (Amendment) Bill, 2021

## KEY BENEFITS

1

Will instill foreign as well as domestic investors' with confidence in the Indian Economy.

2

Will spur companies which are at the cusp of deciding their investments into investing in India.

3

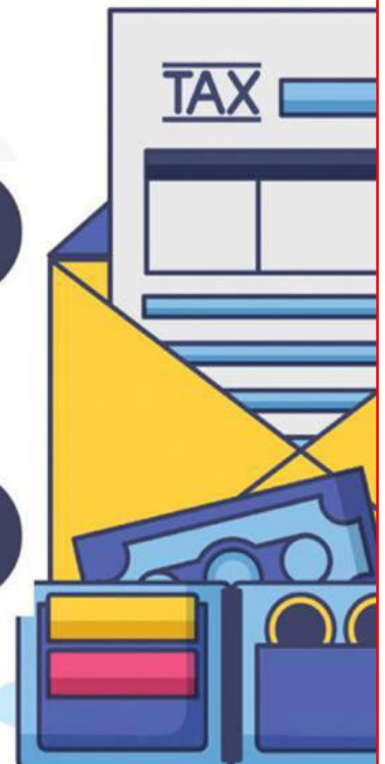
Will avoid unnecessary litigation and saves time and costs of the government.

4

Will boost the policy of the government to have a predictable tax regime.

5

Will provide impetus to country's goal of becoming a \$5 trillion economy.



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**Bill No. 120 of 2021**

THE TAXATION LAWS (AMENDMENT) BILL, 2021

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*further to amend the Income-tax Act, 1961 and the Finance Act, 2012.*

BE it enacted by Parliament in the Seventy-second Year of the Republic of India as follows:—

CHAPTER I

PRELIMINARY

5           **1.** This Act may be called the Taxation Laws (Amendment) Act, 2021. Short title.

CHAPTER II

AMENDMENT TO THE INCOME-TAX ACT, 1961

43 of 1961.           **2.** In section 9 of the Income-tax Act, 1961, in sub-section (1), in clause (i), in *Explanation 5*, after the third proviso, the following provisos shall be inserted, namely:— Amendment of section 9.

10           "Provided also that nothing contained in this Explanation shall apply to—

(i) an assessment or reassessment to be made under section 143, section 144, section 147 or section 153A or section 153C; or



(ii) an order to be passed enhancing the assessment or reducing a refund already made or otherwise increasing the liability of the assessee under section 154; or

(iii) an order to be passed deeming a person to be an assessee in default under sub-section (1) of section 201,

in respect of income accruing or arising through or from the transfer of an asset or a capital asset situate in India in consequence of the transfer of a share or interest in a company or entity registered or incorporated outside India made before the 28th day of May, 2012:

Provided also that where—

(i) an assessment or reassessment has been made under section 143, section 144, section 147 or section 153A or section 153C; or

(ii) an order has been passed enhancing the assessment or reducing a refund already made or otherwise increasing the liability of the assessee under section 154; or

(iii) an order has been passed deeming a person to be an assessee in default under sub-section (1) of section 201; or

(iv) an order has been passed imposing a penalty under Chapter XXI or under section 221,

in respect of income accruing or arising through or from the transfer of an asset or a capital asset situate in India in consequence of the transfer of a share or interest in a company or entity registered or incorporated outside India made before the 28th day of May, 2012 and the person in whose case such assessment or reassessment or order has been passed or made, as the case may be, fulfils the specified conditions, then, such assessment or reassessment or order, to the extent it relates to the said income, shall be deemed never to have been passed or made, as the case may be:

Provided also that where any amount becomes refundable to the person referred to in fifth proviso as a consequence of him fulfilling the specified conditions, then, such amount shall be refunded to him, but no interest under section 244A shall be paid on that amount.

*Explanation.*—For the purposes of fifth and sixth provisos, the specified conditions shall be as provided hereunder:—

(i) where the said person has filed any appeal before an appellate forum or any writ petition before the High Court or the Supreme Court against any order in respect of said income, he shall either withdraw or submit an undertaking to withdraw such appeal or writ petition, in such form and manner as may be prescribed;

(ii) where the said person has initiated any proceeding for arbitration, conciliation or mediation, or has given any notice thereof under any law for the time being in force or under any agreement entered into by India with any other country or territory outside India, whether for protection of investment or otherwise, he shall either withdraw or shall submit an undertaking to withdraw the claim, if any, in such proceedings or notice, in such form and manner as may be prescribed;

(iii) the said person shall furnish an undertaking, in such form and manner as may be prescribed, waiving his right, whether direct or indirect, to seek or pursue any remedy or any claim in relation to the said income which may otherwise be available to him under any law for the time being in force, in equity, under any statute or under any agreement entered into by India with any country or territory outside India, whether for protection of investment or otherwise; and

(iv) such other conditions as may be prescribed.

## CHAPTER III

## AMENDMENT TO THE FINANCE ACT, 2012

23 of 2012.

**3.** In the Finance Act, 2012, in section 119, the following provisos shall be inserted, namely:—

Amendment  
of section  
119.

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"Provided that this section shall cease to apply to the person who fulfils the following conditions, namely:—

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(i) where such person has filed any appeal before an appellate forum or a writ petition before the High Court or the Supreme Court against any order in respect of said income, he shall, either withdraw or submit an undertaking to withdraw such appeal or writ petition, in such form and manner as may be prescribed;

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(ii) where such person has initiated any proceeding for arbitration, conciliation or mediation, or has given any notice thereof under any law for the time being in force or under any agreement entered into by India with any other country or territory outside India, whether for protection of investment or otherwise, he shall either withdraw or submit an undertaking to withdraw the claim, if any, in such proceedings or notice, in such form and manner as may be prescribed;

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(iii) such person shall furnish an undertaking, in such form and manner as may be prescribed, waiving his right, whether direct or indirect, to seek or pursue any remedy or any claim in relation to the said income which may otherwise be available to him under any law for the time being in force, in equity, under any statute or under any agreement entered into by India with any country or territory outside India, whether for protection of investment or otherwise; and

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(iv) such other conditions as may be prescribed:

43 of 1961.

Provided further that if any amount becomes refundable under the Income-tax Act, 1961 to the person referred to in first proviso as a consequence of him fulfilling said conditions, such amount shall be refunded to him, but no interest under section 244A of the Income-tax Act, 1961 shall be paid on that amount."



## STATEMENT OF OBJECTS AND REASONS

The issue of taxability of gains arising from the transfer of assets located in India through the transfer of the shares of a foreign company (hereinafter referred to as "indirect transfer of Indian assets") was a subject matter of protracted litigation. Finally, the Supreme Court in 2012 had given a verdict that gains arising from indirect transfer of Indian assets are not taxable under the extant provisions of the Act.

2. As the verdict of the Supreme Court was inconsistent with the legislative intent, the provisions of the Income-tax Act, 1961 were amended by the Finance Act, 2012 with retrospective effect, to clarify that gains arising from sale of share of a foreign company is taxable in India if such share, directly or indirectly, derives its value substantially from the assets located in India. The Finance Act, 2012 also provided for validation of demand, etc., under the Income-tax Act, 1961 for cases relating to indirect transfer of Indian assets.

3. Pursuant thereto, income-tax demand had been raised in seventeen cases. In two cases assessments are pending due to stay granted by High Court. Out of the said seventeen cases, arbitration under Bilateral Investment Protection Treaty with United Kingdom and Netherlands had been invoked in four cases. In two cases, the Arbitration Tribunal ruled in favour of taxpayer and against the Income Tax Department.

4. The said clarificatory amendments made by the Finance Act, 2012 invited criticism from stakeholders mainly with respect to retrospective effect given to the amendments. It is argued that such retrospective amendments militate against the principle of tax certainty and damage India's reputation as an attractive destination. In the past few years, major reforms have been initiated in the financial and infrastructure sector which has created a positive environment for investment in the country. However, this retrospective clarificatory amendment and consequent demand created in a few cases continues to be a sore point with potential investors. The country today stands at a juncture when quick recovery of the economy after the COVID-19 pandemic is the need of the hour and foreign investment has an important role to play in promoting faster economic growth and employment.

5. The Bill proposes to amend the Income-tax Act, 1961 so as to provide that no tax demand shall be raised in future on the basis of the said retrospective amendment for any indirect transfer of Indian assets if the transaction was undertaken before 28th May, 2012 (i.e., the date on which the Finance Bill, 2012 received the assent of the President). It is further proposed to provide that the demand raised for indirect transfer of Indian assets made before 28th May, 2012 shall be nullified on fulfilment of specified conditions such as withdrawal or furnishing of undertaking for withdrawal of pending litigation and furnishing of an undertaking to the effect that no claim for cost, damages, interest, etc., shall be filed. It is also proposed to refund the amount paid in these cases without any interest thereon. The Bill also proposes to amend the Finance Act, 2012 so as to provide that the validation of demand, etc., under section 119 of the Finance Act, 2012 shall cease to apply on fulfilment of specified conditions such as withdrawal or furnishing of undertaking for withdrawal of pending litigation and furnishing of an undertaking that no claim for cost, damages, interest, etc., shall be filed.

6. The Bill seeks to achieve the aforesaid objectives.

NEW DELHI;  
*The 4th August, 2021.*

NIRMALA SITHARAMAN.

PRESIDENT'S RECOMMENDATION UNDER ARTICLE 117 OF THE  
CONSTITUTION OF INDIA

[Letter No. 142/38-TPL, dated 4.8.2021 from Smt. Nirmala Sitharaman, Minister of Finance and Corporate Affairs to the Secretary General, Lok Sabha] The President, having been informed of the subject matter of the Taxation Laws (Amendment) Bill, 2021, recommends under clause (1) and (3) of article 117, read with clause (1) of article 274 of the Constitution of India, the introduction of the Taxation Laws (Amendment) Bill, 2021, in Lok Sabha and also recommends to Lok Sabha the consideration of the Bill.

## FINANCIAL MEMORANDUM

The Bill does not involve any expenditure, recurring or non-recurring, from the Consolidated Funds of India.

#### MORANDUM REGARDING DELEGATED LEGISLATION

Clause 2 of the Bill seeks to amend section 9 of the Income-tax Act, 1961 relating to income deemed to accrue or arise in India. The proposed amendment seeks to insert fourth, fifth and sixth provisos in *Explanation 5* to clause (i) of sub-section (1) of the said section alongwith an *Explanation* which empowers the Board to make rules to provide for (i) the form and manner in which an undertaking shall be submitted; and (ii) any other condition to be fulfilled for the purposes of fifth and sixth provisos.

2. Clause 3 of the Bill seeks to amend section 119 of the Finance Act, 2012 relating to validation of demands, etc. under Income-tax Act, 1961 in certain cases. The proposed amendment seeks to insert first and second provisos to the said section. The first proviso empowers the Board to make rules to provide for (i) the form and manner in which an undertaking shall be submitted; and (ii) any other condition to be fulfilled.

3. The matters in respect of which rules may be made are matters of detail or procedure and as such the delegation of the legislative powers involved is of a normal character.

ANNEXURE

EXTRACT FROM THE INCOME-TAX ACT, 1961

(43 OF 1961)

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Income  
deemed to  
accrue or arise  
in India.

**9. (1)** The following incomes shall be deemed to accrue or arise in India:—

(i) all income accruing or arising, whether directly or indirectly, through or from any business connection in India, or through or from any property in India, or through or from any asset or source of income in India, or through the transfer of a capital asset situate in India.

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*Explanation 5.*—For the removal of doubts, it is hereby clarified that an asset or a capital asset being any share or interest in a company or entity registered or incorporated outside India shall be deemed to be and shall always be deemed to have been situated in India, if the share or interest derives, directly or indirectly, its value substantially from the assets located in India:

Provided that nothing contained in this Explanation shall apply to an asset or capital asset, which is held by a non-resident by way of investment, directly or indirectly, in a Foreign Institutional Investor as referred to in clause (a) of the Explanation to section 115AD for an assessment year commencing on or after the 1st day of April, 2012 but before the 1st day of April, 2015:

Provided further that nothing contained in this Explanation shall apply to an asset or capital asset, which is held by a non-resident by way of investment, directly or indirectly, in Category-I or Category-II foreign portfolio investor under the Securities and Exchange Board of India (Foreign Portfolio Investors) Regulations, 2014, made under the Securities and Exchange Board of India Act, 1992.

15 of 1992.

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EXTRACT FROM THE FINANCE ACT, 2012

(23 OF 2012)

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**119.** Notwithstanding anything contained in any judgment, decree or order of any Court or Tribunal or any authority, all notices sent or purporting to have been sent, or taxes levied, demanded, assessed, imposed, collected or recovered or purporting to have been levied, demanded, assessed, imposed, collected or recovered under the provisions of Income-tax Act, 1961. In respect of income accruing or arising through or from the transfer of a capital asset situate in India in consequence of the transfer of a share or shares of a company registered or incorporated outside India or in consequence of an agreement, or otherwise, outside India, shall be deemed to have been validly made, and the notice, levy, demand, assessment, imposition, collection or recovery of tax shall be valid and shall be deemed always to have been valid and shall not be called in question on the ground that the tax was not chargeable or any ground including that it is a tax on capital gains arising out of transactions which have taken place outside India, and accordingly, any tax levied, demanded, assessed, imposed or deposited before the commencement of this Act and chargeable for a period prior to such commencement but not collected or recovered before such commencement, may be collected or recovered and appropriated in accordance with the provisions of the Income-tax Act, 1961 as amended by this Act, and the rules made thereunder and there shall be no liability or obligation to make any refund whatsoever.

Validation of demands, etc., under Income-tax act, 1961 in certain cases.

43 of 1961.

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further to amend the Income-tax Act, 1961 and the Finance Act, 2012.

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*(Smt. Nirmala Sitharaman, Minister of Finance and Corporate Affairs)*