

---

# Draft Direct Tax Code Bill - 2009

## NR Taxation & Unexplained Income

Presentation by : CA. Kapil Goel, ACA, LLB  
Chartered Accountant  
9910272806  
New Delhi  
*cakapilgoel@gmail.com*

# OBJECT/SCOPE

*To deliberate upon provisions proposed in new Code vis a vis Non Resident Taxation (INTERALIA) & Unexplained Incomes in New Avtaar*

**Concept of Assessment Year done away with :**  
**Replaced with Financial year (as stated in Discussion Paper of New Code said change will not impact the existing system of TDS; Advance Tax; Self Assessment Tax etc and is aimed to reduce confusion in compliance and administration)**

# New Concept of Tax base

---

- 275. **“tax bases”** means-
  - (a) income or total income, as the case may be, in relation to income-tax;
  - (b) net wealth in relation to wealth-tax;
  - (c) dividend distributed in relation to dividend distribution tax; and
  - (d) the income or total income, net wealth, or dividend distributed referred to in sub-clauses (a) to (c) of any other person in respect of which the assessee is assessable under this Code

# Revenue's Objective in Discussion Paper towards new Code

- *The Code is not an attempt to amend the Income Tax Act, 1961; **nor is it an attempt to "improve" upon the present Act.** In drafting the Code, the Central Board of Direct Taxes (the Board) has, to the extent possible, started on a clean drafting slate. **Some assumptions which have held the ground for many years have been discarded.** Principles that have gained international acceptance have been adopted. The best practices in the world have been studied and incorporated. Tax policies that would promote growth with equity have been reflected in the new provisions. **Hence, while reading the Code, it would be advisable to do so without any preconceived notions and, as far as possible, without comparing the provisions with the corresponding provisions of the Income Tax Act, 1961 (Para 1.7)***

# Comparison at a glance

Provisions in new code bill	Comparative provisions in old/present 1961 Act
Charging provision – section 2	Section 4
Scope of total income – section 3	Section 5
Residence status- section 4	Section 6
Income deemed to accrue in India – section 5	Section 9
Special rate of taxation for income from special source (Interest etc) <b>Section 13 read with Sch I &amp; IX</b>	Section 115A etc
DTAA SECTION 258	Section 90
Foreign Tax Credit Section 206	Section 91

# Comparison at a glance

Provisions in new bill	Comparative provisions in old 1961 Act
Tds for non residents – in new code - common for residents and non residents section 195 Sch.IV (for TDS on NR payments)	Section 195
Special source income for NR's XIV Schedule- section 30- deemed presumptive income	Section 44B, 44BB; etc (aircraft operations; ship operations etc)
Transfer pricing provisions 105,106,107 (Advance pricing agreement provided) read with section 160	Chapter X Section 92 to 92F
Branch profits tax- section 100	No provision
Special Anti avoidance provisions section 108; 112; with special presumption u/s 114- read with section 161	No provision except section 93

# Section 258 – DTAA New Code- New Additions in comparison to 1961 Act

---

- “A person shall not be entitled to claim relief under the provisions of the agreement unless a certificate of his being a resident in the other country or specified territory is obtained by him from the tax authority of that country or specified territory, in the prescribed form”

***To whom to be filed and at what time?***

# Section 258 – DTAA New Code- New Additions in comparison to 1961 Act

- ❑ “For the purposes of determining the relationship between a provision of a treaty and this Code,-
  - (a) neither the treaty nor the Code shall have a preferential status by reason of its being a treaty or law; and
  - (b) the provision which is later in time shall prevail.”
- ❖ ***How far constitutional and allowable?***
- ❖ ***SC Ruling in Azadi Bachao Andolan apparently sought to be nullified.....HUGE IMPACT?***



# Deemed to accrue/arise in India New Section 5 in light of earlier section 9

- ❖ *Format changed earlier seven sub clauses in section 9 in sub section 1- now two sets of sub sections one sub section (1) for earlier clause (i) – business connection etc and new subsection (2) for other incomes earlier given under clauses ii to vii*
- ❖ *Additional clause in sub section 2 of new section 5 for transportation income to be treated at par with erstwhile treatment to royalty/FTS etc (outside india to outside india transport excluded for resident payer) for definition refer clause 289 of section 284*
- ❖ *Principle of special versus general earlier applied by Mad HC in Copes Vulcan whether sought to be overruled in as much as following is concerned in new provision “Without prejudice to the generality of the provisions of sub-section (1), “*

# Transportation Charges under Section 9

- Section 284 clause 289. **“transportation charge”** includes
  - 
  - (a) any amount paid (whether in or out of India) to the assessee, or to any person on his behalf, on account of the carriage of passengers, livestock, mail or goods shipped to, or from, any place in India;
  - (b) any amount received or deemed to be received in India by or behalf of the assessee on account of the carriage of passengers, livestock, mail or goods shipped at any place outside India;
  - (c) any amount paid or payable, directly or indirectly by way of demurrage charges or handling charges or any other amount of similar nature; or
  - (d) any amount paid or payable for charter, including an arrangement as slot charter, space charter or joint charter or similar arrangement, of ships, aircraft or any other mode of transport, along with crew;

# Deemed to accrue/arise in India New Section 5 in light of earlier section 9

---

Rendition & accrual outside India irrelevant for deemed accrual: New provision (earlier in explanation to section 9(1)(viii)- remodelled)

- (5) The provisions of sub-section (2) shall be applicable regardless of the fact that,-
  - (a) *the payment is made outside India;*
  - (b) *the services are rendered outside India; or*
  - (c) *the income has otherwise not accrued in India*

*Refer SC ruling in Ishikawajima and Latest Kar HC in Jindal Thermal*

# Royalty Scope u/s 5 read with clause 240/section 284

- Extension for (in comparison to section 9(1)(vi)):

...(e) the use or right to use of any industrial, commercial or scientific equipment ***including ship or aircraft but excluding the amount, referred to in item numbers 10 and 11 of Table in the Fourteenth Schedule, which is subjected to tax in accordance with the provision of that schedule;***

***(f) the use or right to use of transmission by satellite, cable, optic fiber or Similar technology;***

(g) the transfer of all or any rights (including the granting of a licence) in respect of: -

(i) any copyright, literary, artistic or scientific work; or

(ii) cinematographic films or work on films, tapes or any other means of reproduction; or

***(iii) live coverage of any event;...***

# FTS Scope u/s 5 read with clause 105/section 284

---

- Extension for (in comparison to section 9(1)(vii)):

*...(iii) development and transfer of a design, drawing, plan or software, or any other service of similar nature; and*

*Refer Special Bench ITAT ruling in Motorola ; SC in TCS ; AAR in Airport authority etc*

# Interest Scope u/s 5 read with clause 149/section 284

New Definition	Earlier definition
<p data-bbox="54 439 884 1163"><i>149. "interest" means any amount payable to any person (including any participant), in any manner, in respect of any borrowing or debt incurred or any other similar right or obligation</i></p> <p data-bbox="54 1196 904 1420"><u><i>Incidental financial chgs in clause 127 covering later part of 2(28A)</i></u></p>	<p data-bbox="967 439 1787 1335">SECTION 2(28A) : Interest" means interest payable in any manner in respect of any moneys borrowed or debt incurred (including a deposit, claim or other similar right or obligation) <u><i>and includes any service fee or other charge in respect of the moneys borrowed or debt incurred or in respect of any credit facility which has not been utilised</i></u></p>

# New provision in scope of Total income u/s 3(3)

---

- (3) Any income which accrues to a resident outside India in the year, or is received outside India in the year by, or on behalf of, such resident, shall be included in the total income of the resident, regardless of -
  - (a) the income having been charged to tax outside India; or
  - (b) the method for granting of relief for the avoidance of double taxation under any agreement referred to in section 258

Refer SC ruling PVAL Chettiar; Turquoise; ITAT rulings in Patni Computers; Pooja Bhatt; BHC in Essar ; AAR in S Mohan; Latest Notification by GOI u/s 90

# TDS and Non residents

---

- *New provision in section 195*
- *No condition for payment being chargeable to tax in India unlike earlier section 195 (that is, whether or not business connection/ Permanent establishment for business income is there, seems not relevant for new TDS provision) and;*
- *No recourse to DTAA whereby relief can be claimed unlike earlier section 2(37(iia)) and section 195 HUGE IMPACT?*
- *Whether for TDS; to see how much income element is there in subject payment?*
- *SCHEDULE IV – SPECIFYING CERTAIN PAYMENTS – IS VERY WIDE AND GIVES TDS RATE AS HIGH AS 35% FOR NORMAL BUSINESS INCOME (RESIDUARY RATE?)*



# Final Tax Rates for Special Source NR income – Flat

---

- *Unlike earlier regime whereby DTAA benefit for claiming relief in tax rate etc was allowed as far as rates given under earlier section 115A were concerned, it seems that in new Sch I read with Sch IX read with section 13; flat rate for royalty/FTS income is given whereby no recourse to DTAA/Treaty is allowed*
- *That is FLAT rate taxation for certain nature of income is proposed...HUGE IMPACT?*

# New Branch Profit Tax @ 15% u/s 100

---

- Subject to the provisions of this Code, every foreign company shall be liable to branch profits tax, at the rate specified in Paragraph C of The Second Schedule, on its branch profits.

(2) The branch profits referred to in subsection (1) shall be the total income for the financial year as reduced by the amount of income tax thereon.

# Advance Pricing Agreements – Board Empowered u/s 107

---

- The Board, with the approval of the Central Government, may enter into an advance pricing agreement with any person in respect of the arm's length price in relation to an international transaction which may be entered into by that person on the basis of the prescribed method being the most appropriate method.

# Section 108 – Anti Avoidance Rule for NR's

---

- *Earlier section 93 provided the rule for Avoidance of income tax in transactions resulting transfer of income to non residents*
- *Section 108(2) of new code lists deemed cases whereby a person shall be deemed to have power to enjoy income of non resident- to be compared with expl to section 93 part (c)*
- *Section 108(3) – manner of determining whether person has power to enjoy income – pari materia to earlier expl to section 93 part (d)*
- *Section 108(4) Onus on assessee – person to establish to satisfaction of AO that transactions purpose bonafide and not to avoid tax liability- earlier part in section 93(3)*

# Section 112 – New Anti Avoidance Rule

## □ General anti-avoidance rule

□ **112.** (1) Any arrangement entered into by a person may be declared as an impermissible avoidance arrangement and the consequences, under this Code, of the arrangement may be determined by, -

(a) disregarding, combining or re-characterising any step in, or a part or whole of, the impermissible avoidance arrangement;

(b) treating the impermissible avoidance arrangement-

(i) as if it had not been entered into or carried out; or

(ii) in such other manner as in the circumstances of the case the Commissioner deems appropriate for the prevention or diminution of the relevant tax benefit.

(c) treating parties who are connected persons in relation to each other as one and the same person; or

(d) disregarding any accommodating party or treating any accommodating party and any other party as one and the same person;

# Section 112

- ❑ **General anti-avoidance rule**
- ❑ **112.** (1) Any **arrangement** entered into by a person may be declared as an impermissible avoidance arrangement and the consequences, under this Code, of the arrangement may be determined by,-
  - .....(e) deeming persons who are connected persons in relation to each other to be one and the same person;
  - (f) re-allocating, amongst the parties to the arrangement,-
    - any accrual, or receipt, of a capital or revenue nature; or
    - any expenditure, deduction, relief or rebate;
  - (g) re-characterising-
    - any equity into debt or vice-versa;
    - any accrual, or receipt, of a capital or revenue nature; or
    - any expenditure, deduction, relief or rebate;
- (2) The provisions of this section may be applied in the alternative for, or in addition to, any other basis for making an assessment.

# New Section 114 Presumption of Purpose

---

## □ Presumption of purpose

**114. (1) An arrangement shall be presumed to have been entered into, or carried out, for the main purpose of obtaining a tax benefit unless the person obtaining the tax benefit proves that obtaining the tax benefit was not the main purpose of the arrangement.**

(2) An arrangement shall be presumed to have been entered into, or carried out, for the main purpose of obtaining a tax benefit, if the main purpose of a step in, or part of, the arrangement is to obtain a tax benefit, regardless of the fact that the main purpose of whole arrangement may not be to obtain a tax benefit.

# Implementation of Section 112- VIA Section 161

---

- *The Commissioner shall, for the purposes of determining the consequences under section 112, serve on the assessee a notice requiring him, on a date to be specified therein to produce, or cause to be produced, any evidence or particulars-*
- *(a) which may be required for the purposes of determining the consequences; or*
- *(b) on which the assessee may rely in support of his claim that the provisions of section 112 are not applicable to his case*

*NO APPEAL UNDER CODE APPARENTLY PROVIDED  
AGAINST ABOVE ORDER?*



# Section 112 versus DTAA Discussion Paper Extracts

- **Treaty override** 24.11 *Under the Vienna Convention, international agreements are to be interpreted in 'good faith'. In case any international agreement/treaty leads to unintended consequences like tax evasion or flow of benefits to unintended person, it is open to the signatory to take corrective steps to prevent abuse of the treaty. Such corrective steps are consistent with the obligations under the Vienna Convention. Further, the OECD Commentary on Article 1 of the Model Tax Convention also clarifies that a general anti-abuse provision in the domestic law in the nature of "substance over form rule" or "economic substance rule" is not in conflict with the treaty. The general anti-abuse rule will override the provisions of the tax treaty. The Code provides accordingly.*

# Other changes vis a vis NR's

New Provisions	Old Provisions
Non Resident – Representative Assessee – Section 170	Section 160(1)(i) and Section 163
Royalty CLAUSE 240 in section 284	Earlier defined in section 9(1)(vi)
Fees for Technical Services CLAUSE 105 in section 284	Earlier defined in section 9(1)(vii)
<u>Section 149- reporting of international transaction accountant report to TPO</u>	

# Definitions in Section 284 for NR's

---

*Clause 43- Defines **Business connection** in manner similar to what earlier stood defined in section 9 of 1961 Act*

*Clause 183. "**non-resident**" means a person who is not a resident;*

*Clause 184. "**non-resident deductee**" means a person who is non-resident in India and receives any amount which is liable to deduction of tax at source under Chapter XI*

*Clause 198. "**permanent establishment**" in relation to a non-resident includes a fixed place of business through which the business of the enterprise is wholly or partly carried on;*

# Discussion Paper – Some relevant extracts

---

□ Under the Code, **the following expenditure will not be allowed as a deduction** in the computation of total income .....

***(d) any expenditure where the source of funds for such expenditure is unexplained; (SECTION 56(2)(o) read with section 17(1)(e))***

***(e) any expenditure incurred by a non-resident in respect of,-***

***(i) royalty;***

***(ii) fees for technical services; or***

***(iii) any income which is liable to tax at the special rate of income-tax specified in Part II of the First Schedule.***

---

**Unexplained Income in New  
Avtaar : Taxable Under Residuary  
Head : Cash Credit etc**

# Unexplained Income in New Avtaar

New Section 56(2)(I)	Earlier section 68
<p data-bbox="98 454 1025 639"><u>any amount found credited</u> in the books of an person maintained for the financial year, if-</p> <ul data-bbox="98 654 1025 1188" style="list-style-type: none"><li data-bbox="98 654 1025 825"><i>(i) <u>the person offers no explanation about the <b>nature and source</b> thereof; or</u></i></li><li data-bbox="98 839 1025 1011"><i>(ii) <u>the person offers an explanation but <b>fails to substantiate the explanation</b>; or</u></i></li><li data-bbox="98 1025 1025 1188"><i>(iii) <u>the explanation offered by him is not, in the opinion of the Assessing Officer, satisfactory;</u></i></li></ul>	<p data-bbox="1025 454 1852 1410">Cash credits Where any sum is found credited in the books of an assessee maintained for any previous year, and the assessee offers no explanation about the nature and source thereof or the explanation offered by him is not, in the opinion of the Income-tax Officer, satisfactory, the sum so credited may be charged to income-tax as the income of the assessee of that previous year".</p>

# Unexplained Income in New Avtaar

New Section 56(2)(m)	Earlier section 69/69B
<p><b><u>the value of any investment</u></b> made by the person in the financial year to the extent for which, -</p> <p>(i) the person offers no explanation about the <b><u>nature and source of the investments; or</u></b></p> <p>(ii) the person offers an explanation but <b><u>fails to substantiate the explanation</u></b>; Or</p> <p>(iii) the explanation offered by him is not, in the opinion of the Assessing Officer, satisfactory;</p>	<p>Unexplained investments. Where in the financial year immediately preceding the assessment year the assessee has made investments which are not recorded in the books of account, if any, maintained by him for any source of income, and the assessee offers no explanation about the nature and source of the investments or the explanation offered by him is not, in the opinion of the Income-tax Officer, satisfactory, the value of the investments may be deemed to be the income of the assessee of such financial year".</p>

# Unexplained Income in New Avtaar

New Section 56(2)(N)	Earlier section 69A
<p><u>the value of any money, bullion, jewellery or other valuable article owned by the person to the extent for which,-</u></p> <p>(i) the person offers no explanation about the <u>nature and source of acquisition of the money, bullion, jewellery or other valuable article; or</u></p> <p>(ii) the person offers an explanation but fails to substantiate the explanation; or</p> <p>(iii) the explanation offered by him is not, in the opinion of the Assessing Officer, satisfactory;</p>	<p>Where in any financial year the assessee is found to be the owner of any money, bullion, jewellery or other valuable article and such money, bullion, jewellery or valuable article is not recorded in the books of account, if any, maintained by him for any source of income, and the assessee offers no explanation about the nature and source of acquisition of the money, bullion, jewellery or other valuable article, or the explanation offered by him is not, in the opinion of the Assessing Officer, satisfactory, the money and the value of the bullion, jewellery or other valuable article may be deemed to be the income of the assessee for such financial year.</p>



# Unexplained Income in New Avtaar

New Section 56(2)(O)	Earlier section 69C
<p>the amount of any expenditure incurred by the person in the financial year, if-</p> <p>(i) <b><u>the person offers no explanation about the source of such expenditure or part thereof</u></b>; or</p> <p>(ii) <i>the explanation, if any, offered by him is not, in the opinion of the Assessing Officer, satisfactory;</i></p>	<p>Where in any financial year an assessee has incurred any expenditure and he offers no explanation about the source of such expenditure or part thereof, or the explanation, if any, offered by him is not, in the opinion of the Assessing Officer, satisfactory, the amount covered by such expenditure or part thereof, as the case may be, may be deemed to be the income of the assessee for such financial year;</p> <p><i>Provided that, notwithstanding anything contained in any other provision of this Act, such unexplained expenditure which is deemed to be the income of the assessee shall not be allowed as a deduction under any head -income<sub>33</sub></i></p>

---

# Thank You

CA.KAPIL GOEL

9910272806

[cakapilgoel@gmail.com](mailto:cakapilgoel@gmail.com)