



Global Business Tax Alert Sharp Insights

CBDT releases final notification under the amended provisions of section 10(38) of the Income-tax Act, 1961

Issue no: GBTA/47/2017

In this issue:

[Background](#)
[Final Notification](#)
[Conclusion](#)
[Do you know about Dbriefs?](#)
[Contacts](#)

Background

- Section 10(38) of the Income-tax Act, 1961 (the 'Act') exempts long term capital gains arising from transfer of listed equity shares, where transfer of shares is on or after 1 October 2004 and the transaction of sale is chargeable to Securities Transaction Tax ('STT')¹.
- It was noticed by revenue authorities that the exemption is being misused by certain persons for declaring their unaccounted income as exempt long-term capital gains by entering into sham transactions. With a view to prevent this abuse, vide Finance Act 2017, a third proviso was inserted under section 10(38) of the Act to provide that the aforesaid exemption would not be available if the transaction of acquisition of such equity shares is entered into on or after 1 October 2004, and such acquisition is not chargeable to STT.
- However, to protect the exemption for genuine cases (where STT could not have been paid), it was proposed to notify list of transfers for which the condition of chargeability to STT on acquisition shall not be applicable.
- The CBDT issued the draft notification² of transactions proposed to be excluded from the applicability of the third proviso to section 10(38) of the Act for comments and suggestions from stakeholders and general public.
- The CBDT has now released the final notification³ which would come into force with effect from 1st of April, 2018 and shall accordingly apply to assessment year 2018-19 onwards.

¹ STT is chargeable under Chapter VII of the Finance (No. 2) Act, 2004

² Press release dated 3rd April, 2017

³ Notification No. S.O. 1789(E) dated 5th June, 2017

Final Notification

The government, for the purposes of the proviso to section 10(38), notifies all the transactions of acquisition of equity shares entered into on or after 1 October 2004, which are not chargeable to STT, other than the following;

Preferential allotment

- a) Where acquisition is made through a preferential issue of existing listed equity shares in a company whose equity shares are not frequently traded in a recognised stock exchange of India. However, the exemption under section 10(38) of the Act would continue to be available in respect of acquisition of listed equity shares in a company -
 - i. which has been approved by the Supreme Court, High Court, National Company Law Tribunal, Securities and Exchange Board of India or Reserve Bank of India in this behalf;
 - ii. by any non-resident in accordance with foreign direct investment guidelines issued by the government of India;
 - iii. by an investment fund referred to in clause (a) of Explanation 1 to section 115UB of the Income-tax Act or a venture capital fund referred to in clause (23FB) of sn 10 of the Income-tax Act or a Qualified Institutional Buyer;

- iv. through preferential issue to which the provisions of chapter VII of the Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2009 does not apply.

Off-market acquisitions

- b) Where transaction for acquisition of existing listed equity shares in a company is not entered through a recognised stock exchange of India.
 - i. However, exemption would continue to be available in respect of the following transactions of acquisition of listed equity shares even if such acquisition is not through a recognised stock exchange in India, provided the same is made in accordance with the provisions of the Securities Contracts (Regulation) Act, 1956, if applicable,:
 - ii. acquisition through an issue of shares by a company other than the issue referred to in (a) above;
 - iii. acquisition by scheduled banks, reconstruction or securitisation companies or public financial institutions during their ordinary course of business;
 - iv. acquisition which has been approved by the Supreme Court, High Courts, National Company Law Tribunal, Securities and Exchange Board of India or Reserve Bank of India in this behalf;
 - v. acquisition under employee stock option scheme or employee stock purchase scheme framed under the Securities and Exchange Board of India (Employee Stock Option Scheme and Employee Stock Purchase Scheme) Guidelines, 1999;
 - vi. acquisition by any non-resident in accordance with foreign direct investment guidelines of the Government of India;
 - vii. where acquisition of shares of company is made under Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulation, 2011;
 - viii. acquisition from the Government;
 - ix. acquisition by an investment fund referred to in clause (a) to Explanation 1 to section 115UB of the Income-tax Act or a venture capital fund referred to in clause (23FB) of section 10 of the income-tax Act or a Qualified Institutional Buyer;
 - x. acquisition by mode of transfer referred to in sections 47⁴ or 50B⁵ of the Act, if the previous owner of such shares has not acquired them by any mode referred to in point (a)/(b) or (c) [other than the carve outs mentioned under (a) or (b) above].

Acquisition during de-listed period

- c) acquisition of equity shares of a company during the period beginning from the date on which the company is delisted from a recognised stock exchange and ending on the date immediately preceding the date on which the company is again listed on a recognised stock exchange in accordance with the Securities Contracts (Regulation) Act, 1956 read with Securities and Exchange Board of India Act, 1992 and the rules made thereunder.

Definitions

The notification defines frequently traded shares, listed, preferential issue, Qualified Institutional Buyer, public financial institution, scheduled bank, recognised stock exchange, reconstruction company and securitisation company.

⁴Such as transfers under a gift/will/ irrevocable trust, transfers between holding/subsidiary, amalgamation, demerger etc.

⁵Slump sale

Conclusion

The release of the final notification under the third proviso to section 10(38) of the Act is a welcome step and in line with the commitment of the central government spelt out in the Memorandum to Finance Bill, 2017 , to protect the exemption for genuine cases where the STT could not have been paid like acquisition of share in IPO, FPO, bonus or right issue by a listed company, acquisition by non-resident in accordance with FDI policy of the government etc.

Further, the final notification has addressed the concerns / issues raised by the stakeholders on the draft notification by covering acquisition of existing listed equity shares pursuant to amalgamation, demerger or slump sale, shares acquired by employees under ESOP, shares acquired upon gift, will or transfer to an irrevocable trust, off-market acquisition by any non-resident in accordance with foreign direct investment guidelines.

Do you know about Dbriefs?

Dbriefs are live webcasts that give valuable insights on important developments affecting your business. To register, visit the [Dbriefs](#) page



Download the report



Contacts

Ahmedabad

19th Floor, Shapath - V
SG Highway,
Ahmedabad – 380 015.
Tel: + 91 (079) 6682 7300
Fax: + 91 (079) 6682 7400

Coimbatore

Shanmugha Manram
41, Race Course,
Coimbatore
Tamil Nadu - 641018
Tel: + 91 (0422) 439 2801
Fax: +91 (0422) 222 3615

Kolkata

Bengal Intelligent Park Building
Alpha, 1st floor, Block EP and GP
Sector V, Salt Lake Electronics
Complex,
Kolkata - 700 091.
Tel : + 91 (033) 6612 1000
Fax : + 91 (033) 6612 1001

Bangalore

Deloitte Centre, Anchorage II,
100/2, Richmond Road,
Bangalore 560 025.
Tel: +91 (080) 6627 6000
Fax: +91 (080) 6627 6010

Delhi/Gurgaon

Building 10,
Tower B, 7th Floor,
DLF Cyber City,
Gurgaon 122 002
Tel : +91 (0124) 679 2000
Fax : + 91 (0124) 679 2012

Mumbai

Indiabulls Finance Centre,
Tower 3, 28th Floor,
Elphinstone Mill Compound,
Senapati Bapat Marg, Elphinstone
(W),
Mumbai – 400013
Tel: + 91 (022) 6185 4000
Fax: + 91 (022) 6185 4101

Chennai

No.52, Venkatanarayana Road,
7th Floor, ASV N Ramana Tower,
T-Nagar,
Chennai 600 017.
Tel: +91 (044) 6688 5000
Fax: +91 (044) 6688 5050

Hyderabad

1-8-384 and 385, 3rd Floor,
Gowra Grand S.P.Road,
Begumpet,
Secunderabad – 500 003.
Tel: +91 (040) 6603 2600
Fax: +91 (040) 6603 2714

Pune

106, B-Wing, 7th Floor,
ICC Trade Tower,
Senapati Bapat Road,
Pune – 411 016.
Tel: + 91 (020) 6624 4600
Fax: +91 (020) 6624 4605



Deloitte makes an impact that matters

Deloitte refers to one or more of Deloitte Touche Tohmatsu Limited, a UK private company limited by guarantee, and its network of member firms, each of which is Deloitte refers to one or more of Deloitte Touche Tohmatsu Limited, a UK private company limited by guarantee ("DTTL"), its network of member firms, and their related entities. DTTL and each of its member firms are legally separate and independent entities. DTTL (also referred to as "Deloitte Global") does not provide services to clients. Please see www.deloitte.com/about for a more detailed description of DTTL and its member firms.

This material and the information contained herein prepared by Deloitte Touche Tohmatsu India LLP (DTTI LLP) is intended to provide general information on a particular subject or subjects and is not an exhaustive treatment of such subject(s). This material contains information sourced from third party sites (external sites). DTTL LLP is not responsible for any loss whatsoever caused due to reliance placed on information sourced from such external sites. None of DTTI LLP, Deloitte Touche Tohmatsu Limited, its member firms, or their related entities (collectively, the "Deloitte Network") is, by means of this material, rendering professional advice or services. This information is not intended to be relied upon as the sole basis for any decision which may affect you or your business. Before making any decision or taking any action that might affect your personal finances or business, you should consult a qualified professional adviser.

No entity in the Deloitte Network shall be responsible for any loss whatsoever sustained by any person who relies on this material.

©2017 Deloitte Touche Tohmatsu India LLP. Member of Deloitte Touche Tohmatsu Limited