

9th November, 2021

Request for relief from unintended adverse impact of Rule 11UAE of the Income-tax Rules, 1962 for slump sale transactions

1. **Amendment to section 50B(2) at enactment stage of Finance Act 2021 and notification of Rule 11UAE on 24 May 2021**
 - 1.1. Finance Act 2021 amended the definition of 'slump sale' as per section 2(42C) of the Income-tax Act, 1961 (IT Act) to include "transfer of the undertaking by any means". This was primarily intended to cover 'slump exchange' transactions. The amendment was proposed to be retrospectively effective from A.Y. 2021-22 (F.Y. 2020-21) and onwards. At the Bill stage, no amendment was proposed to section 50B which provides for methodology of computation of capital gains on slump sale.
 - 1.2. However, at enactment stage, further amendment was carried out to section 50B(2) to provide that fair market value (FMV) of the undertaking as on the date of transfer, calculated in the prescribed manner, shall be deemed to be the full value of the consideration received or accruing as a result of the transfer of the undertaking. There was no clarification provided on the policy rationale for this amendment at enactment stage. This amendment was also made effective from A.Y. 2021-22 (F.Y. 2020-21) and onwards.
 - 1.3. The Finance Act 2021 received Presidential assent on 28 March 2021.
 - 1.4. If the amendment was merely intended to provide a valuation rule for valuing consideration received in slump exchange (where non-monetary consideration is received by seller entity), it was reconcilable with the amendment made to section 2(42C). However, surprisingly, the CBDT notified Rule 11UAE on 24 May 2021 vide Notification No. 68/2021 dated 24 May 2021 without any prior stakeholder consultation. Furthermore, the said Notification No. 68/2021 is silent on the effective date of insertion of Rule 11UAE.
 - 1.5. Apart from valuation rule for valuing consideration received in slump exchange, Rule 11UAE also brings an 'anti-abuse' provision for conventional slump sale as explained below.
 - 1.6. Rule 11UAE provides for adoption of higher of FMV1 or FMV2 as FMV of the undertaking for computing capital gains on slump sale. The first component of FMV1 looks at value of undertaking based on existing valuation rules for s.56(2)(x)/50CA read with Rule 11UA and adopts a partial 'look through' approach where values of certain assets & liabilities are adopted as per books of account and certain specified assets are valued as per fair valuation criteria (like stamp duty ready reckoner value for immovable property or listed shares are valued based on stock exchange quotation).
 - 1.7. The second component of FMV2 looks at monetary and non-monetary consideration received for transfer of the undertaking. The consideration in the form of unlisted shares is to be valued as per partial 'look through' approach as applicable for s.56(2)(x)/50CA read with Rule 11UA.
 - 1.8. Under slump sale, undertaking is transferred on going concern basis for a lump sum consideration without assigning values to individual assets and liabilities. Rule 11UAE proposes to value each asset and liability and thus contradicting section 50B. Rule 11UAE is resulting in levy of tax on notional income ignoring the actual consideration received by seller. On the other hand, the buyer is not allowed to step up its cost of acquisition of assets for depreciation allowance and other purposes.
2. **Suggestion 1 - Request to provide relief from retrospective application of Rule 11UAE for transactions which were publicly announced by 24 May 2021 but are consummated after 24 May 2021**

- 2.1. As stated earlier, amendment to s.50B(2) was not originally proposed in Finance Bill 2021. It was introduced on 23 March 2021 by the Finance Minister while replying to the debate on the Bill in Lok Sabha. The Finance Act 2021 received President's assent on 28 March 2021. Rule 11UAE was notified on 24 May 2021.
- 2.2. Rule 11UAE, therefore, has retroactive impact on deals which was publicly announced prior to 24 May 2021 and was pending for regulatory approval. In such cases, the enhancement in tax liability due to application of Rule 11UAE which was not in picture when commercial deal was signed and announced could disturb the entire deal mechanics.
- 2.3. Stable and certain tax legislation is one of the prerequisites for development of business in the country. In fact, the Taxpayer's Charter declared u/s. 119A lists down providing complete and accurate information and timely decisions as duties of the Income Tax Department and taxpayer to be informed of his compliance obligations under tax law and seek help of department, if needed, as expectation from taxpayer. Making tax rules which have retrospective effect on concluded business deals is in clear conflict with these rights and obligations of taxpayers.
- 2.4. The erstwhile Finance Minister of current Government has in past given commitment on the floor of the Parliament that amendments in the income tax law will not be done with retrospective effect to the prejudice of the taxpayers. The amendment to Section 50B(2) was inserted in the Finance Bill 2021 at last moment without discussion and with retrospective effect. Changes in section 50B(2) and Rule 11UAE could adversely impact genuine transactions.
- 2.5. It may be recollected that similar situation arose in the past when buyback distribution tax u/s. 115QA was extended to listed shares by Finance (No.2) Act 2019 w.e.f 5 July 2019. The amendment had a retroactive impact on buybacks which were publicly announced by listed companies prior to 5 July 2019 but consummated after that date. In the wake of industry representations, the Taxation Laws (Amendment) Act 2019 inserted a proviso to s.115QA(1) to clarify that the buyback distribution tax shall not apply to shares of listed companies in respect of which public announcement has been made on or before 5 July 2019 in accordance with SEBI regulations. It is submitted that similar relief is warranted in context of Rule 11UAE.
- 2.6. Without prejudice to para 2.5 above, taxpayers may be provided to be governed by old law as prevailing prior to Rule 11UAE or by Rule 11UAE. It may be recollected that similar option was provided to individual salaried taxpayers in 2001 when new perquisite valuation rules were notified by amending Rule 3 in September 2001 with retrospective effect from 1 April 2001. The proviso to erstwhile Rule 3(9) gave option to the employees to compute the value of all perquisites made available to him or any members of his household for the period from 1 April 2001 to 30 September 2001 in accordance with the Rules as they stood prior to the amendment.
- 2.7. Another option is to provide that actual slump sale value declared by taxpayer shall not be disturbed unless the AO takes prior approval of High-Powered Committee constituted by CBDT. It may be recollected that such Committee was constituted in the past vide CBDT Order No.149/141/2014-TPL dated 28 August 2014 in context of retrospective amendment for indirect transfer to provide that no fresh cases shall be taken up to tax past indirect transfers without seeking prior approval of the Committee which shall give directions after giving proper opportunity to the taxpayer.

Our request

- 2.8. In lines of proviso to section 115QA(1), it may be clarified that Rule 11UAE shall not apply to slump sale transactions which were publicly announced on or before 24 May 2021 and/or was pending for regulatory approval as on that date.

- 2.9. Alternatively, option may be provided to such taxpayers to get covered by Rule 11UAE or be governed by old law.
- 2.10. As another alternative measure to provide relief from retrospective taxation, it may be provided that actual slump sale value declared by taxpayers shall not be disturbed unless the AO takes prior approval of High Powered Committee constituted by CBDT.

It may be mentioned that the above measure does not require any legislative amendment. The issue has arisen in Rule 11UAE notified by CBDT on 24 May 2021 and hence, it is possible for CBDT to implement the measure by appropriate amendment to Rule 11UAE itself.

3. Suggestion 2 - Request to provide opportunity to taxpayer to rebut normative FMV as per Rule 11UAE

- 3.1. There could be many situations where bonafide deals may be adversely impacted by normative FMV as per Rule 11UAE which does not provide any opportunity to taxpayer to rebut the artificial value. There could be bonafide situations where the actual transaction value is lower than Rule 11UAE value. The stamp duty value is also not necessarily indicative of fair value at which transaction of a business transfer on going concern basis can take place, as the value of the business lies in the future profits and not the stamp duty value of immovable property.
- 3.2. It is precisely for the above reason that all anti-abuse provisions like s.56(2)(x), s.50C, s.43CA, s.50CA, s.56(2)(viib) etc. have a 'safety valve' where the taxpayer has an opportunity to rebut the normative value derived by the stamp duty authorities.
- 3.3. In s.56(2)(x), s.50C and s.43CA, the stamp value of the property which has not been disputed before stamp duty authorities can be adjudicated by the DVO on dispute raised by the taxpayer and if value adjudicated by DVO is less than stamp duty value, such lower value is reckoned for the purposes of application of those provisions.
- 3.4. Further, it may be noted that section 50C(2) provides that where taxpayer claims before the tax authority that the stamp duty value is more than the FMV of the property, the Tax Authority 'may' refer the valuation of the property to the Valuation Officer. It may be noted that in several decisions, it has been held that once the taxpayer claims that the stamp duty value is in excess of the FMV, it is mandatory upon the tax officer to make reference to the valuation officer. Reference to 'may' in the context of the provision should be construed as 'shall'.
- 3.5. In view of the foregoing discussion, it is pertinent to note that section 50C is not at the discretion of the AO but is a remedy provided to the taxpayer to challenge the normative FMV/ SDV determined for land and building under section 50C of the Act. On the contrary, neither s.50B(2) nor Rule 11UAE provides such 'safety valve' or opportunity to the taxpayer to rebut the normative FMV as determined under Rule 11UAE. This can give rise to unwarranted litigation in bonafide cases and levy of tax on notional income.

Our request

- 3.6. Rule 11UAE may be amended to provide opportunity to the taxpayers to rebut the normative FMV as determined under Rule 11UAE and justify that actual transaction value is the FMV. The following measures may be considered in this regard without prejudice to one another:
 - a. Where taxpayers dispute the stamp duty value of the property, the mechanism as currently provided in s.50C(2) to refer the valuation to DVO may be provided in Rule 11UAE.
 - b. Taxpayers may be permitted to furnish valuation report by an independent valuer in support of FMV being lower than Rule 11UAE value.

- c. Transactions between Indian listed companies and/or transactions which are approved by NCLT after affording a reasonable opportunity of being heard to the Income Tax Department(akin to s.79(2)(c)) may be exempted from higher valuation under Rule 11UAE.

We request you to kindly take the above on record and oblige. In case any further information or clarifications are needed, we shall be happy to provide.