

# THE TAXATION LAWS (AMENDMENT) BILL, 2021 – BURYING THE GHOST OF RETROSPECTIVE TAXATION

August 18, 2021

## INTRODUCTION

Retrospective taxation of indirect transfer of Indian assets has been a subject matter of protracted litigation between MNEs and the Indian Tax Authorities. In 2012, provisions of the Indian Tax Code were amended to clarify that capital gains arising from sale of shares of a foreign company are taxable in India in case where such share derive value substantially from assets located in India.

The amendment, (in)famously dubbed as the 'Vodafone amendment', was made applicable retrospectively catching transactions dating as far back as 1962 and was heavily criticised due to retrospective effect. Pursuant to the 2012 amendment, income-tax demand was raised in seventeen cases.

Amongst them, two cases; (Cairn Energy UK and Vodafone International Holdings BV) were recently in limelight due to arbitral awards being passed by Tribunals constituted under India's Bilateral Investment Protection Treaty with UK and Netherlands. The Tribunals ruled against the Indian State and held that 'fair and equitable treatment' of foreign investors is one of the most important commitments made by a country under an investment treaty.

In light of these developments and to boost investor's confidence, the Finance Ministry proposed an important amendment to the Indian Tax Code to do away with the controversial retrospective tax provisions. The new Taxation Laws (Amendment) Bill, 2021 protects transactions that occurred before 28th May, 2012 from any existing or future tax liability. The Bill also provides that where a taxpayer has already deposited tax, a refund of the amount so paid will be given, albeit without any interest thereon.

## **THE TAXATION LAWS (AMENDMENT) BILL, 2012**

The Bill's proposals are in relation to income arising from indirect transfer of Indian assets before 28th May, 2012 and can be divided into three parts:

### **A. No Future Demand**

The bill provides that where transactions occurred before 28th May, 2012:

1. no assessment or reassessment can be done under the provisions of Indian Tax Code<sup>1</sup> ; or
2. no rectification order enhancing income or reducing a refund or increasing the tax liability can be passed<sup>2</sup> ;  
or
2. no order holding an assessee to be in default for not deducting withholding tax on such income can be passed<sup>3</sup>.

### **B. Nullifying Existing Demand**

The bill further provides that where transactions occurred before 28<sup>th</sup> May, 2012, and—

1. an assessment or reassessment has already been made; or
2. a rectification order enhancing the income or reducing a refund or increasing the tax liability has already been passed under ; or

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1. Assessment and Reassessment can be done under sections 143/144/147/153A/153C

2. Rectification order can be passed under section 154

3. Order holding an assessee to be in default can be passed under section 201(1)

3. an order holding an assessee to be in default for not deducting withholding tax on such income has already been passed under; or
  4. an order imposing penalty has already been passed
- such assessment, reassessment, or order shall be nullified.

### **B.1 Conditions to avail the benefit**

To seek the benefit of nullifying existing demands, the taxpayer must fulfil the following specified conditions:

1. The taxpayer shall either withdraw or submit an undertaking to withdraw any appeal or writ petition filed before an appellate forum, or High Court or the Supreme Court.
2. The taxpayer shall either withdraw or submit an undertaking to withdraw their claim where any proceeding for arbitration, conciliation or mediation has been initiated under any law or any bilateral agreement that India has entered into with another Country.
3. The taxpayer shall furnish an undertaking waiving their right to seek any remedy or any claim which might have been available to them under any law, in equity, or any other statute or bilateral agreement that India has entered into with another Country.
4. The taxpayer shall fulfil such other conditions that may be further prescribed.

## C. Refund of Amount

The bill lastly provides that where a taxpayer has already deposited tax in relation to the impugned transaction, they shall be entitled to a refund of the amount so deposited, but no interest shall be paid by the authorities on that amount.

### WAY FORWARD

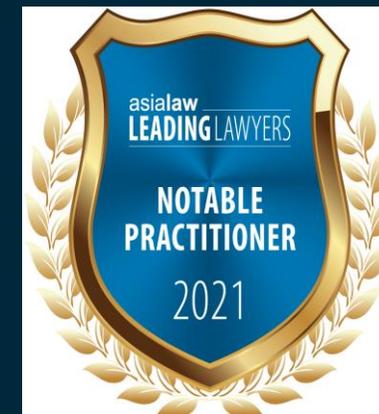
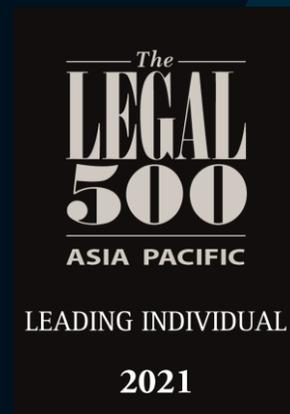
Retrospective amendments run against the principle of tax certainty damaging a country's reputation as an attractive investment destination. India has introduced major reforms in the financial and infrastructure sector to create a positive environment for investment but the contentious retrospective tax provisions were still sticking out like a sore thumb in India's bid to attract foreign investment. The proposed amendment is a step in the right direction that shall help in instilling confidence in foreign investors that India respects 'rule of law'.

At the ground level, Taxpayers impacted by this amendment will have to wait for the Direct Tax Board to make rules for the form and manner in which undertakings will have to be submitted and how the amendment shall be effectuated.

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The Firm focuses on providing efficient, effective, solution-oriented advice and representation based on specialist knowledge and experience. Amicus' boutique tax practice has been consistently ranked as a leading practice by Legal 500, Asia Law and World Tax (ITR).



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