

# Taxation Law Amendment Ordinance 2019

14 November 2019

Bhaumik Goda

**BGSS & Associates**

Chartered Accountants

---

Where Passion Delivers Value

# Key highlights of ordinance

---

## Extract from Press Note 20 September 2019:

- Intended to promote growth and investment
- Attract fresh investment in manufacturing and thereby provide boost to 'Make-in-India' initiative of the Government
- Stabilise the flow of funds into the capital market

The total revenue foregone for the reduction in corporate tax rate and other relief estimated at Rs. 1,45,000 crore

## Crisil Research

- Corporate tax cut to help top 1,000 firms save Rs 37,000 cr
- A third of large firms won't switch to new tax regime
- companies want to use the savings for ongoing capex, reduce debt or retain cash, which would strengthen their balance-sheets and prime them for fresh capex once demand improves

- Slashes corporate tax rates for domestic companies to 22% (15% in case of new manufacturing companies). Provides for a uniform surcharge rate of 10%.
- Rolls back the enhanced surcharge on capital gains tax (i) payable by all classes of investors on transfer of listed equity shares (including listed units of an equity oriented fund and listed units of a business trust); and (ii) payable by FPIs on transfer of all securities, including derivatives
- Lowers the threshold for the applicability of MAT and the rate of tax in case of MAT from 18 ½ % to 15%. Ousts the applicability of MAT in case of companies which opt for taxability under section 115BAA /BAB
- Withdraws buy-back tax in respect of listed shares for which the announcement was made prior to July 5, 2019
- No MAT credit available for companies opting for taxation under concessional tax rate



Reduced CTR effective from AY 2020-21

# Legislative background of ordinance

---

- Article 123 of the Constitution grants the President certain law making powers to promulgate Ordinances
  - The President can only promulgate an Ordinance when either of the two Houses of Parliament is not in session
  - The President cannot promulgate an Ordinance unless he is satisfied that there are circumstances that require taking 'immediate action'
  - Ordinances must be approved by Parliament within six weeks of reassembling or they shall cease to operate. They will also cease to operate in case resolutions disapproving the Ordinance are passed by both the Houses
- Law prevailing on first day of assessment year is relevant for tax purpose – ratification of ordinance may suitably amend law

Ordinance drafting was phenomenally completed in flat 7 hours, while achieving the aim of confidentiality – Mr Kamlesh Varshney (Joint Secretary, Ministry of Finance) – Tax Sutra Conclave 2019

# Legislative background of ordinance

---

The approval for the ordinance for arguably India's biggest direct tax reform was yet to be obtained from President Ramnath Kovind. A joint secretary from the finance ministry was supposed to go to the Rashtrapati Bhawan on Friday morning to get president's signature on it, but he got late by a couple of minutes. By that time, security was tightened for the visiting Mongolian president Battulga Khaltmaa who was about to meet President Kovind.

"It was nerve-wracking for us. The revenue secretary and I were sitting next to each other and sipping tea, but we could not talk," Sitharaman said

- Live Mint dated 24 September 2019

# Corporate tax rate

Particulars	New		Existing		
	S. 115BAB (15% CTR)	S. 115BAA (22% CTR)	S. 115BA	Normal Tax Rate	Limited Liability Partnership
Base tax rate	15%	22%	25%	30%	30%
Maximum effective tax rate	17.16%	25.17%	29.12%	34.94%	34.94%
MAT	N/A	N/A	15%	15%	N/A
Income (A)	100	100	100	100	100
Less: Corporate tax (B)	17.16	25.17	29.12	34.94	34.94
Profit after tax (C)	82.84	74.83	70.88	65.06	65.06
Less: Dividend Distribution Tax at 20.56% (D)	14.13	12.76	12.09	11.10	N/A
Net amount available to owners (E)	68.71	62.07	58.79	53.96	65.06
Total tax outflow (B+D)	<b>31.29</b>	37.93	41.21	46.04	<b>34.94</b>

\* Excludes 10% additional tax in hands of shareholder – fact specific depending upon quantum of dividend and residential status of shareholder

# Company v/s LLP

Parameter	Company	LLP/Firm
Reinvestment of profit into business	✓	✗
Distribution of profits to owners	✗	✓
Fungibility of cash flow in terms of withdrawal of surplus cash and group financing	✗	✓
Tax efficiency in transfer of ownership interest in business	✗	✓
Future scalability in terms of strategic investor or listing or other modes of raising capital	✓	✗
Repayment of loan out of surplus cash	✓	✗
Preference to IGAAP vis-à-vis Ind AS accounting for high net worth business	✗	✓
Regulatory compliance (Cos Act etc)	✗	✓

# Comparative summary of new provisions

Parameters	22% CTR	15% CTR
ETR	25.17%	17.16%
Year of applicability	AY 2020-21 and onwards	AY 2020-21 and onwards
Existing or new domestic companies	Applicable to all, existing as well as new domestic companies	New domestic manufacturing companies set up and registered on or after 1 October 2019 and commencing manufacture by 31 March 2023
Sector	No restriction (covers everyone including service/ trading industry/ finance entities)	Companies engaged solely in manufacture/ production of any article or thing and related research or distribution
Exercise of option	<ul style="list-style-type: none"> <li>On or before the due date of filing the return for any year.</li> <li>Option once exercised cannot be withdrawn</li> </ul>	<ul style="list-style-type: none"> <li>On or before the due date for filing the 1st year return.</li> <li>Option once exercised cannot be withdrawn</li> </ul>
Any formative conditions applicable	None	<ul style="list-style-type: none"> <li>Yes; not be formed by split-up/ reconstruction of existing business</li> <li>Not to use second hand plant and machinery (subject to 80:20 condition)</li> </ul>
Specified domestic transaction provisions	Not applicable	Applicable

Section 115BAA – 22% CTR

---



# 22% CTR – Overview of S. 115BAA

---

## Scope

- ETR 25.17 % applicable to all companies irrespective of sector of business and turnover
- Applicable only to domestic company – thus, POEM of FCO in India cannot avail said benefit
- Provision states ‘Notwithstanding anything contained in this Act but subject to this Chapter’ [i.e. Chapter XII]. Thus, capital gains income taxable at respective rate under section 111A or section 112A or section 112 as the case may be. Undisclosed income taxable at 60%
  - Whether provisions applies to company which has only CG income?
- MAT credit cannot be set off against normal tax [Circular 29 of 2019]
- Option can be exercised at any time during the life cycle of company – thus, Company can subject itself to 22% CTR after claiming MAT credit
- Formative conditions are not applicable to 22% CTR
  - Partnership firm converting into Company can avail benefit
  - New Company formed by vertical split of tax incentive business and other business can avail benefit
- Lower ETR may result in loss of FTC if tax rate in Source Country is higher [Refer Rule 128]

# 22% CTR – Conditions

Total income of Company is computed without any deductions in specified sections

- Assume Company gives up all claim of specified deduction as also loss attributable to those deductions – whether claw back provisions in terms of section 32AD(2)/35AD(7B) applies?
- Deduction not covered by specified deductions can still be claimed

# 22% CTR – Conditions

Without set off of any loss carried forward from any earlier assessment year if such loss is attributable to any of deductions in specified sections

- Does this condition make claim of depreciation optional
  - Impact of Explanation 5 to section 32
- Can Company increase WDV of asset?
  - Explanation 3 to section 43(6)
  - CIT v Hindustan Electrographites Ltd [1998] 229 ITR 585 (MP)

*“ Explanation 3 to section 43(6) lays down that any allowance in respect of any depreciation carried forward under section 32(2) shall be deemed to be depreciation 'actually allowed'. It is, thus, clear that if full effect cannot be given to any allowance relevant to the depreciation under section 32 in any previous year, owing to there being no profits or gains chargeable for that previous year or profits or gains chargeable being less than allowance, the same though carried forward as unabsorbed depreciation, shall count under Explanation 3 to section 43(6) for calculating the written down value as deemed to be depreciation actually allowed.”*

# 22% CTR – Conditions

Without set off of any loss carried forward from any earlier assessment year if such loss is attributable to any of deduction in specified sections

- No bar on set off of brought forward business loss other than one attributable to deductions in specified section
- Company may accelerate MAT credit or loss utilization and then opt for CTR
- normally the word 'attributable' implies that 'for a result to be attributable to anything it must be wholly, or in material part, caused by that thing'. [See: Stroud's Judicial Dictionary, 5th edn., Vol. I, page 223] A causal connection is necessary [India Leather Corpn. (P.) Ltd. v. CIT, (1997) 227 ITR 552 (SC)]
- Thus, law requires assessee to identify loss 'attributable to' specified business

# 22% CTR – Conditions

## FY 16-17

Revenue	1000
Less: Expenses	(1200)
Business Loss	(200)

## FY 17-18

Revenue	1000
Less: Expenses	(800)
Less: Additional Depreciation	(400)
Less: R&D under sec 35(2AB)	(200)
Less: Section 35(2AA) deduction	(100)
Business Loss	(500)

- Principle of beneficial allocation
  - Reliance Utilities [2009] 313 ITR 340 (Bombay) in context of S.14A
- Assessee can opt for set off in manner beneficial to it
  - Circular No. 26(LXXVI-3) [F.No. 4(53)-IT)/54], dated 7-7-1955
  - Coated Fabrics (P.) Ltd [2006] 101 ITD 297 (Pune)
  - Montgomery Emerging Markets Fund (2006) 100 ITD 217

What is loss attributable to specified business – INR 500 or ZERO

# 22% CTR – Conditions

## A Limited FY 18-19 – Loss from specified business

Revenue	1000
Less: Expenses	(1200)
Business Loss	(200)

## B Limited FY 2019 -20 – Profitable other business

Revenue	1200
Less: Expenses	(1000)
Business Profit	200

### Interplay between sec 72A(2) and section 115BAA(2)(ii)

- Tax rate is applicable to assessee being domestic company
- Section 72A(2) deems UAL and UAD of amalgamating company to be loss of amalgamated company for the previous year in which amalgamation takes place
- Arguably there is no loss which is carried forward and accordingly limitation should not apply
- Fresh period of 8 years carry forward starts from year of merger for UAL of amalgamating company
- GAAR requires evaluation

- A Ltd incorporates B Ltd and merges w.e.f 1 April 2019
- B Ltd opts for 22% CTR and claims set off against past losses in FY 2019-20

Whether set off of INR 200 is attributable to specified business ?

# 22% CTR – Conditions

## A Limited FY 18-19 – Loss from specified business

Revenue	1000
Less: Expenses	(1200)
Business Loss	(200)

## B Limited FY 2018 -19 – Profitable other business

Revenue	1000
Less: Expenses	(1200)
Business Loss	(200)

- Principle of beneficial allocation
  - Reliance Utilities [2009] 313 ITR 340 (Bombay) in context of S.14A
- Assessee can opt for set off in manner beneficial to it
  - Circular No. 26(LXXVI-3) [F.No. 4(53)-IT)/54], dated 7-7-1955
  - Coated Fabrics (P.) Ltd [2006] 101 ITD 297 (Pune)
  - Montgomery Emerging Markets Fund (2006) 100 ITD 217

- A Ltd merges with B Ltd w.e.f 1 April 2019
- B Ltd opts for 22% CTR and claims set off against past losses in FY 2019-20

Whether set off of INR 200 is attributable to specified business due to fiction of section 72A(2)?

# 22% CTR – Conditions

---

## A Limited FY 18-19 – tax attributes

Specified Business Loss brought forward	(1000)
Other business	NIL
Assets of other business	70%
Assets of specified business	30%

- A Limited demerges its other business in New Co
- New Co claims benefit of lower CTR

Whether loss of specified business be apportioned to New Co in terms of Sec 74A(4)?  
Can limitation of conditions hit New Co from claiming 22% CTR



# 22% CTR – Conditions

Without set off of any loss carried forward from any earlier assessment year if such loss is attributable to any deduction in specified section

- Circular 29 of 2019 states 22% CTR company will not be allowed to claim set off of brought forward loss on account of additional depreciation
  - Loss is different from unabsorbed depreciation [Subhulaxmi Mills Ltd (2001) 249 ITR 795 (SC)]
  - Is Circular overstepping ?
- Section 32(2)

Where, in the assessment of the assessee, full effect cannot be given to any allowance under sub-section (1) in any previous year, owing to there being no profits or gains chargeable for that previous year, or owing to the profits or gains chargeable being less than the allowance, then, subject to the provisions of sub-section (2) of section 72 and sub-section (3) of section 73, the allowance or the part of the allowance to which effect has not been given, as the case may be, shall be **added to the amount of the allowance for depreciation for the following previous year and deemed to be part of that allowance**, or if there is no such allowance for that previous year, be deemed to be the allowance for that previous year, and so on for the succeeding previous years”

# 22% CTR – Conditions

Option to be exercised before due date of furnishing ROI u/s 139(1)

- Can option be exercised subsequently
  - Filing claim during assessment proceeding
  - Filing ROI pursuant to re-opening notice
- What if assessee claims option by filing revised ROI u/s 139(5)
- In context of section 80 which places restriction on carry forward and set off of loss if ROI is not filed before due date, Court have taken pragmatic view and permitted carry forward:
  - Chhattisgarh State Civil Supplies Corporation v CIT [2017] 396 ITR 440 (Chhattisgarh)
  - Luxury Goods Retail (P.) Ltd v DCIT [2017] 83 taxmann.com 186 (Mumbai - Trib.)
  - CBDT v Regen Infrastructure & Services (P.) Ltd [2016] 75 taxmann.com 135 (Madras)

Section 115BAB – 17% CTR

---

# 17% CTR – conditions

Company has been set up and registered on or after 1 October 2019 and has commenced manufacturing on or before 31 March 2023

- Restrictive to manufacturing companies incorporated after 1 Oct 19
  - Companies incorporated prior to 1 Oct 19 but not yet to commence manufacturing will not be entitled to lower CTR
- Relevance of 'set up' of Company
  - Sec 3 applies concept to setting up of business to determine previous year
- Head note and provisions refers to manufacturing whereas section 2(29BA) refers to 'manufacture'
  - Does context require to take broader meaning
  - Section 115BAB(2) makes reference to 'manufacture' and 'production' indicating manufacturing encompasses production
  - SC in CIT v N.C. Budharaja & Co

“The words 'manufacture' and 'production' have received extensive judicial attention both under the Income-tax Act as well as Central Excise Act and the various sales tax laws. The word 'production' has a wider connotation than the word 'manufacture' while every manufacture can be characterised as production, every production need not amount to manufacture.

The word 'production' or 'produce' when used in juxtaposition with the word 'manufacture' takes in bringing into existence new goods by a process which may or may not amount to manufacture. It also takes in all the byproducts, intermediate products and residual products which emerge in the course of manufacture of goods”

# 17% CTR – conditions

Company has been set up and registered on or after 1 October 2019 and has commenced manufacturing on or before 31 March 2023

- Status of following activities
  - Software
  - Construction
  - Mining
  - Film industry
- In case of contract manufacturing arrangement who is 'manufacturing' ? Contractor or contractee or both
- Manufacturing has to commence on or before 31 March 2023
  - Full fledge or making proto-type/ trail run
  - Commencement of manufacturing in partial plant out of overall larger manufacturing plant

# 17% CTR – conditions

Company is not formed by splitting up or reconstruction of a business already in existence

- Whether applicable in Year 1 or subsequent years ?
  - What if there is amalgamation in 17% Co after say 10 years – will conditions be violated?
- Contrast with other similar limitation say section 10AA – “undertaking should not be formed by the splitting up, or the reconstruction, of a business already in existence”
- Whether conditions applies to Company or Business ?
- Whilst main provision makes reference to ‘Company’ proviso makes reference to ‘undertaking’
- Whether transfer of CWIP of company contemplating manufacturing is hit by limitation?

# 17% CTR – conditions

Does not use any machinery or plant previously used for any purpose  
Safe harbour – permitted use of 20% of total value of machinery

- Whether applicable in Year 1 or subsequent years ?
- Contrast with section 10AA “undertaking is not formed by **the transfer to a new business**, of machinery or plant previously used for any purpose
- Difficulty in case of use of equipment v/s service [e.g. laptop on lease, contract manufacturing, car hire]
- Whether plant or machinery includes intangibles [say manufacturing company using know how of parent]
- Meaning of total value – FMV or WDV or acquisition price

# 17% CTR – conditions

Company is not engaged in any business other than business of manufacture or production and research in relation to, or distribution of, such article or thing manufactured or produced by it

- Is conducting research mandatory ? Drafting snag
- Contract manufacturer who does not undertake distribution may still qualify as manufacturer
- Ancillary income
  - Spare leasing of warehouse
  - Service Income
  - Sale of scrape/waste/ surplus material
  - Interest income from treasury



# Breach of conditions

---

# Breach of conditions

---

- Applicable tax rate
- Can incentives forgone be availed
- Will MAT apply?
- Breach of conditions in subsequent years ?

# Thank You

---

## MUMBAI

605, Zee Nayak, M.G. Road, Vile Parle (East),  
Mumbai – 400 057

Email : [bhaumik@bgss.co.in](mailto:bhaumik@bgss.co.in)

Mobile No: +91 98339 15583

## AHMEDABAD

604, Shitiratna Building, Panchwati Circle, C.G.  
Road, Ahmedabad – 380 009

Email : [saumya@bgss.co.in](mailto:saumya@bgss.co.in)

Mobile No: +91 90999 27783

