

Amendment to Section 28(iv) - Impact on Taxation of Loan Waivers

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1. Budget 2023 has been widely praised as a progressive budget that has also not tinkered with the corporate tax and capital gains tax rates. Of-course, there have been a number of proposed amendments on the income tax front, but none of the proposed amendments have raised any hue and cry from the businesses / tax fraternity unlike on many occasions in the past.
2. While most proposed amendments may appear to be routine and procedural, there are some seemingly innocuous amendments that may have wide ranging ramifications. One such proposal worth noting is the amendment made to section 28(iv) of the Income-tax Act, 1961 ('the Act').
3. Section 28(iv) hitherto provides that any value of benefit or perquisite, whether convertible in money or not, arising from business or exercise of a profession would be considered as income and shall be chargeable to income tax as business income. The understanding was that this section would subject to tax only that income which is a non-monetary benefit in nature. However, like most of the income tax provisions, even this provision was a subject matter of much debate and litigation. The matter came up before the Hon'ble Supreme Court in the case of Mahindra & Mahindra Ltd. -vs.- CIT [2018] 404 ITR 1 (SC) [\[TS-220-SC-2018\]](#) wherein it was held that in case of a loan waiver (generally accounted as income by crediting the profit and loss account), since benefit is received in cash or in the shape of money, the provisions of section 28(iv) would not apply. Hence, such loan waivers cannot be taxed as income in the hands of the borrower.
4. Further, section 194R of the Act was introduced last year, providing for withholding of tax on benefits or perquisites arising out of business or profession. The language of the provisions of section 194R mirrored the language used in section 28(iv) of the Act. Hence, it was widely understood that withholding tax under section 194R of the Act would apply only to non-monetary benefits / perquisites. However, since there was an ambiguity, the Central Board of Direct Taxes ('CBDT') came out with guidelines vide [Circular No. 12 of 2022](#) to provide clarity on application of section 194R of the Act. Interestingly, in the said Circular, it was mentioned that provisions of section 194R would be applicable to perquisite or benefit in cash as well. It was further mentioned that principal amount of loan waived, being a benefit to the borrower, would also be covered under section 194R of the Act.
5. Thus, introduction of section 194R in the Act, followed by the CBDT Circular created a fresh controversy for the taxpayers even after the issue was settled by the Hon'ble Apex Court in the case of Mahindra & Mahindra (supra). However, the taxpayers drew comfort from the fact that withholding tax provisions cannot decide taxability in the hands of the recipient and that a Circular cannot override the provisions of law (unless blessed by the Parliament). The Government also appears to have sensed this lacuna and therefore, has now proposed to amend the provisions of section 28(iv) of the Act to include those perquisites which are received in cash or partly in cash and partly in kind.
6. Consequently, loan waivers are now likely to fall within the ambit of taxation under section 28(iv) of the Act, since the Apex Court decision in the case of Mahindra & Mahindra (supra) may no more be good law in view of the proposed amendment. This proposed amendment will have wide ranging ramifications on loan restructurings and IBC cases as these write back incomes will have the potential to wipe off past

available losses and, in few cases, may also require the acquirer to pay tax, both under normal provisions as well as under Minimum Alternat Tax (MAT) provisions (if losses are less than write back amount).

7. Normally, Resolution Applicants (Bidder) put in bid for assets after inter alia evaluating the amount of benefit that would be available on account of past tax losses of the corporate debtor (company undergoing IBC proceedings). These past losses will generally act as a tax shield against future income generated by the corporate debtor upon acquisition or against current and future income of the Resolution Applicant as well (if corporate debtor is merged with Resolution Applicant post acquisition). There would be many cases which are currently pending resolution before IBC where bidders would have bid for assets considering the available tax losses of the corporate debtor and non-taxability of loan waivers in view of the Apex Court decision. Such bidders may now be in a fix on the way forward (although availability of tax losses is not the only consideration, but nevertheless an important consideration for acquisition under IBC). Further, acquisition structures under IBC may have to be revisited for future bids in view of this amendment. Industry may also consider making representations to CBDT to keep out from the ambit of the proposed amendment, taxation of loan waiver in those cases where bids have already been submitted for corporate debtor.