

## Has an Oversight in Surcharge Rule Made Some as Less Equals!

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## 1. Amendments made vide Finance (No. 2) Act, 2024-

1.1 The Finance (No. 2) Act, 2024 witnessed a series of amendments made to sections 111A, 112 and 112A as rationalization measures, to undo the complexity in taxation of capital gains, arising as a result of different tax rates for different categories of capital assets and assessees.

1.2 As a result of such amendments, for transfers taking place after the cut-off date of 23.07.2024, the rates stood retrospectively amended as under:

| Section   | Earlier rate  | New rate   |
|---|---|--|
| 112(1)(a)- for resident individual or HUF   | 20% with indexation or without indexation in case of listed securities (other than a unit) or ZCB | 10%12.5% without indexation (saving provided for LTCG from land or building or both) |
| 112(1)(b)- domestic company   | 20% with indexation or without indexation in case of listed securities (other than a unit) or ZCB | 10%12.5% without indexation  |
| 112(1)(c)(ii)- for non-resident foreign company in case other than section 112(1)(c)(iii)   | 20% with indexation or without indexation in case of listed securities (other than a unit) or ZCB | 10%12.5% without indexation  |
| 112(1)(c)(iii)- for non-resident foreign company in case securities or shares of a company in which public are not substantially interested | 10% without indexation  | 12.5% without indexation and 1st proviso to section 48                               |
| 112(1)(d)- any other case resident  | 20% with indexation or without indexation in case of listed securities (other than a unit) or ZCB | 10%12.5% without indexation  |
| 112A  | 10%   | 12.5%  |



|     |  |
|-----|--|
| (a) | Total income (including income by 10% way of dividend or income under sections 111A, 112 or 112A) > Rs. 50 lakhs and <= Rs. 1 crore                    |
| (b) | Total income (including income by 15% way of dividend or income under sections 111A, 112 or 112A) > Rs. 1 crore and <= Rs. 2 crores                    |
| (c) | Total income (excluding income by 25% way of dividend or income under sections 111A, 112 or 112A) > Rs. 2 crores and <= Rs. 5 crores                   |
| (d) | Total income (excluding income by 37% way of dividend or income under sections 111A, 112 or 112A) > Rs. 5 crore  |
| (e) | Total income (including income by 15% way of dividend or income under sections 111A, 112 or 112A) > Rs. 2 crore but not covered in clauses (c) and (d) |

3.6 The 1st Proviso below Paragraph A provides a cap on surcharge rate in case of income by way of dividend or income under sections 111A, 112 and 112A at 15%.

3.7 In case of individuals, HUFs, AOPs, BOIs and Artificial Juridical Persons covered under section 115BAC(1A), the cap on surcharge rates in case of capital gains under sections 111A, 112 and 112A is at 15% in terms of the 12th Proviso to section 2(3) of the Finance Bill, 2025.

#### **4. Surcharge rates in respect of capital gains taxable under other provisions contained in Chapters XII and XII-A-**

4.1 As highlighted in para 1.4 supra, Chapters XII and XII-A contain various provisions dealing with tax rates in case of capital gains in the hands of residents and non-residents other than those covered under sections 111A, 112 and 112A.

4.2 A reference may be made to the 2nd Proviso to section 2(3) of the Finance Bill, 2025 which provides for applicable surcharge in respect of incomes chargeable to tax under sections 115A, 115AB, 115AC, 115ACA, 115AD, 115B, 115BA, 115BB, 115BBA, 115BBC, 115BBF, 115BBG, 115BBH, 115BBI, 115BBJ, 115E, 115JB or 115JC

4.3 The said Proviso contains clauses (a) through (g) dealing with surcharge rates in different classes of assessee. In this article, we are concerned with clauses (a) and (b).

4.4 Clause (a) of 2nd Proviso to section 2(3) deals with surcharge rates in case of individuals, HUFs, AOPs other than those consisting of only companies as its members, BOIs and AOPs, not having income under section 115AD and not having income chargeable to tax under section 115BAC(1A). The applicable surcharge rates are as under:

| <b>Clause</b> | <b>Particulars</b>                              | <b>Rate of surcharge</b> |
|---------------|---|--------------------------|
| (i)           | Total income > Rs. 50 lakhs and <= Rs. 1 crore  | 10%                      |
| (ii)          | Total income > Rs. 1 crore and <= Rs. 2 crores  | 15%                      |
| (iii)         | Total income > Rs. 2 crores and <= Rs. 5 crores | 25%                      |
| (iv)          | Total income > Rs. 5 crore                      | 37%                      |

4.5 Clause (b) of 2nd Proviso to section 2(3) deals with surcharge rates in case of individuals, HUFs, AOPs

other than those consisting of only companies as its members, BOIs and AJPs, having income under section 115AD and not having income chargeable to tax under section 115BAC(1A). The applicable surcharge rates are as under:

| Clause | Particulars  | Rate of surcharge |
|--------|--|-------------------|
| (i)    | Total income > Rs. 50 lakhs and<br><= Rs. 1 crore  | 10%               |
| (ii)   | Total income > Rs. 1 crore and <= Rs. 2 crores   | 15%               |
| (iii)  | Total income (excluding income by way of dividend or income under section 115AD(1)(b) [i.e. LTCG on securities]) > Rs. 2 crores and <= Rs. 5 crores                      | 25%               |
| (iv)   | Total income (excluding income by way of dividend or income under section 115AD(1)(b) [i.e. LTCG on securities]) > Rs. 5 crore   | 37%               |
| (v)    | Total income (including income by way of dividend or income under section 115AD(1)(b) [i.e. LTCG on securities]) > Rs. 2 crore but not covered in clauses (iii) and (iv) | 15%               |

4.6 A reference may be made to the Proviso below clause (b) of 2nd Proviso to section 2(3), which places a cap on the surcharge on income by way of dividend and LTCG under section 115AD(1)(b) at the rate of 15%.

4.7 Though the said Proviso is placed after clause (b) of 2nd Proviso and such positioning of the Proviso is questionable, the same applies to both clauses (a) and (b) of 2nd Proviso for the following reasons-

- Though it is placed after the 2nd Proviso to section 2(3) and appears after clauses (a) and (b) to the said Proviso, it begins with the words 'Provided that'. Had the intention of the Legislature been to treat the said Proviso as the 3rd Proviso to section 2(3), the words would have been 'Provided also that'.
- The said Proviso is appearing after clauses (a) and (b) to 2nd Proviso to section 2(3) before clause (c) begins. This would indicate that the said Proviso is applicable to both clauses (a) and (b) to 2nd Proviso.
- If the said Proviso is applied only in case of clause (b), then those assesseees who are having dividend incomes and covered under clause (a) would not get the benefit of the said Proviso, while those having dividend income and covered under clause (b) would get the said benefit. This would be a travesty and would lead to unintended consequences by discriminating between two categories of assesseees covered under clauses (a) and (b) in respect of dividend income.

4.8 From the Proviso below 2nd Proviso to section 2(3) of the Finance Bill, it is clear that there is a cap on surcharge in respect of LTCG under section 115AD(1)(b). However, such cap does not extend to other capital gains taxable under other provisions of Chapter XII and XII-B i.e. [sections 115AB, 115AC, 115ACA and 115E].

4.9 This understanding is confirmed in the website of the income tax department, which is captured as under [Source: <https://www.incometax.gov.in/iec/foportal/help/individual/return-applicable-0#taxslabs>]-

1. Tax rates for Non Resident Individual are as under:

| Old Tax Regime              |                                    |            | New Tax Regime u/s 115BAC   |                                    |            |
|-----------------------------|------------------------------------|------------|-----------------------------|------------------------------------|------------|
| Income Tax Slab             | Income Tax Rate                    | *Surcharge | Income Tax Slab             | Income Tax Rate                    | *Surcharge |
| Up to ₹ 2,50,000            | Nil                                | Nil        | Up to ₹ 3,00,000            | Nil                                | Nil        |
| ₹ 2,50,001 - ₹ 5,00,000     | 5% above ₹ 2,50,000                | Nil        | ₹ 3,00,001 - ₹ 7,00,000     | 5% above ₹ 3,00,000                | Nil        |
| ₹ 5,00,001 - ₹ 10,00,000    | ₹ 12,500 + 20% above ₹ 5,00,000    | Nil        | ₹ 7,00,001 - ₹ 10,00,000    | ₹ 20,000 + 10% above ₹ 7,00,000    | Nil        |
| ₹ 10,00,001 - ₹ 50,00,000   | ₹ 1,12,500 + 30% above ₹ 10,00,000 | Nil        | ₹ 10,00,001 - ₹ 12,00,000   | ₹ 50,000 + 15% above ₹ 10,00,000   | Nil        |
| ₹ 50,00,001 - ₹ 100,00,000  | ₹ 1,12,500 + 30% above ₹ 10,00,000 | 10%        | ₹ 12,00,001 - ₹ 15,00,000   | ₹ 80,000 + 20% above ₹ 12,00,000   | Nil        |
| ₹ 100,00,001 - ₹ 200,00,000 | ₹ 1,12,500 + 30% above ₹ 10,00,000 | 15%        | ₹ 15,00,001 - ₹ 50,00,000   | ₹ 1,40,000 + 30% above ₹ 15,00,000 | Nil        |
| ₹ 200,00,001 - ₹ 500,00,000 | ₹ 1,12,500 + 30% above ₹ 10,00,000 | 25%        | ₹ 50,00,001 - ₹ 100,00,000  | ₹ 1,40,000 + 30% above ₹ 15,00,000 | 10%        |
| Above ₹ 500,00,000          | ₹ 1,12,500 + 30% above ₹ 10,00,000 | 37%        | ₹ 100,00,001 - ₹ 200,00,000 | ₹ 1,40,000 + 30% above ₹ 15,00,000 | 15%        |
|                             |                                    |            | Above ₹ ₹ 200,00,001        | ₹ 1,40,000 + 30% above ₹ 15,00,000 | 25%        |

**\*Note:** The enhanced surcharge of 25% & 37%, as the case may be, is not levied, from income chargeable to tax under sections 111A, 112, 112A and Dividend Income. Hence, the maximum rate of surcharge on tax payable on such incomes shall be 15%, except when the income is taxable under section 115A, 115AB, 115AC, 115ACA and 115E.

**\*\*\*Note:** Health & Education cess @ 4% to be paid on the amount of income tax plus Surcharge (if any) in both the regimes.

Marginal relief can be claimed from surcharge if the amount of income earned exceeding ₹ 50 lakhs, ₹ 1 crore, ₹ 2 crore or ₹ 5 crores respectively as under:

## 5. Discrimination in surcharge rates in cases covered by sections 115AB, 115AC, 115ACA and 115E -

5.1 From the above discussion, what transpires is that while there is a cap on maximum surcharge in respect of capital gains chargeable under sections 111A, 112, 112A and 115AD(1)(b), both in cases of assesseees who are covered under section 115BAC(1A) and otherwise, no such cap exists in respect of capital gains taxable under other provisions of Chapters XII and XII-A of the IT Act such as sections 115AB, 115AC, 115ACA and 115E.

5.2 This is in clear contradiction to the avowed object of the Legislature in simplifying the entire scheme of capital gains taxation by bringing parity between different classes of capital gains and assesseees. It is also against the object of the Legislature in bringing parity between taxation of capital gains in the hands of residents and non-residents.

5.3 It would be pertinent to note that the capital assets as are referred to under sections 115AB, 115AC, 115ACA and 115E are no different from those referred to in sections 112 and 115AD(1)(b) to be meted out any different treatment.

5.4 It would also be pertinent to note that in case of capital gains covered under sections 115AB, 115AC, 115ACA and 115E, the rates stood increased from 10% to 12.5% by way of amendments made vide Finance (No. 2) Act, 2024 to bring them at par with capital gains under sections 112 and 112A. However, the surcharge rates in respect of the said capital gains have not been rationalized to bring them at par with that of capital gains under sections 112 and 112A. This lacuna existed in the Finance (No. 2) Act, 2024 and continues to exist in the Finance Bill, 2025. As a result of the same, assesseees earning capital gains under sections 115AB, 115AC, 115ACA and 115E suffer a double whammy in so far as they have to pay a higher tax at 12.5% as a result of increase in rates and also suffer the brunt of a higher surcharge without any cap. This is a complete travesty and is in teeth of the objective of treating residents and non-residents alike.

**6. Concluding remarks-** It is difficult to believe that the Finance Ministry has deliberately retained the higher rates of surcharge in respect of assesseees having income under sections 115AB, 115AC, 115ACA and 115E. It appears that this lacuna has gone unnoticed in the heat of a much awaited and anticipated revamp of the Income Tax Act. Whatever it may be, this is a serious shortcoming which needs to be resolved by the Legislature while implementing the Finance Bill. If no such resolution is arrived at, it could seriously impact the inflow of investments by non-residents in Indian markets, having an adverse impact on the economy. Any inaction on part of the Government could also frustrate the whole exercise of rationalization and simplification of the entire scheme of taxation of capital gains.