

Proposed Amendments - Crypto Assets and International Taxation vide Finance Bill, 2022

The Finance Bill 2022 has come to give impact to the financial proposals of the Central Government for the financial year 2022-2023. It proposes a number of changes that are directed to galvanize the growth of economy. The budget this year tries to stabilize the economy and set the tone for future growth. Read on...



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Sl. No.	Section	Finance Bill (Clause No.)	Proposed Amendment
1	Section 2 (47A)	Clause 3	Definition on Virtual Digital Assets (VDA)
2	Section 56 (vii/x) and explanation thereto	Clause 16	Meaning of the expression "property"
3	Section 115BBH	Clause 28	Income from Virtual Digital Assets
4	Section 194S	Clause 59	TDS from payment on transfer of VDA
5	Section 92CA	Clause 24	Reference to Transfer Pricing Officer
6	Section 144C	Clause 43	Reference to DRP
7	Section 153	Clause 48	Time Limit for completion of Assessment/ Re-assessment/ Re-computation
8	Section 263	Clause 72	Revision of Order prejudicial to revenue



The article covers proposed amendments in the Finance Bill 2022, specifically in context to **Crypto Assets and International Taxation**. Further with reference to the above, in Finance Bill 2022, amendments proposed are as follows.

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Currency includes all currency notes, postal notes, postal orders, money orders, cheques, drafts, travellers' cheque, letters of credit, bills of exchange and promissory notes, credit cards or such other similar instruments as may be notified by the Reserve Bank. The current Finance Bill 2022 has introduced the virtual digital asset (VDA).

For quite a long time, from the point of view of legality, crypto currency has been a buzz word. The interesting debate about the legality of crypto currency from the point of view of legal tender or medium of accepting as currency in payments settlement system and its taxation has been appearing in the public domain. However, the uncertainty which has prevailed all along has been intervened and a change has been brought now in by the Finance Bill 2022 for the first time by proposing certain amendments regarding taxation of income from virtual currencies is a small step in the onward direction.

Though the Finance Minister has proposed levy of tax, there is a view that collection of the tax on VDA does not automatically make it legal. The levy of income tax knows no boundaries curtailing its levy and levy justified by the Courts on income which is earned illegally. One can refer to the decision of the Hon'ble Apex court on the point in case of *Dr T A Quereshi vs CIT (2006) [287 ITR 547 (SC)]* and decision of the Hon'ble Madras

High Court in case of *CIT Vs K. Thangamani (2009) [309 ITR 15 (Mad)]*

One can refer to the judgement of the Hon'ble Supreme Court in the case of *RBI vs Internet and Mobile Association of India (IMAI)* dated 4 March 2020 post issue of circular by RBI dated 6 April 2019.

Scheme for taxation of Virtual Digital Assets

Virtual Digital Assets have gained tremendous popularity in recent times and the volume of trading in such digital assets has increased substantially. Further, a market is emerging where payment for the transfer of VDA can be made through another **such asset**. Accordingly, a new scheme to provide for taxation of such VDA has been proposed in the bill.

Section 2 (47A) defines Virtual Digital Assets. As per this section, VDA means any information or code or number or token but excludes Indian currency or foreign currency. VDA is supposed to be generated through cryptographic means. It has a value which can be exchanged with or without consideration. From the definition, it is evident that it can be transferred, stored or traded but electronically.

Clause (b) of Section 2(47A) says VDA means non- fungible or any other token of similar nature. As per clause (c), government can notify any other currency as VDA.

Similarly, government can exclude any currency from the definition of VDA.

The above is the sum and substance of the definition.

One point to be noted is that, all virtual currencies are not anonymous.

What is meant by "generated through cryptographic means"?

Cryptography is a method of protecting information and communications through the use of codes, so that only those for whom the information is intended can read and process it.

In computer science, cryptography refers to secure information and communication techniques derived from mathematical concepts and a set of rule-based calculations called algorithms, to transform messages in ways that are hard to decipher. These deterministic algorithms are used for cryptographic key generation, digital signing, verification to protect data privacy, web browsing on the internet and confidential communications such as credit card transactions and email.

In general, one has to contend that cryptography is in the form of a code/token. Broadly, it can also be understood as an intangible asset like patent, trademark, copyright. However, VDA is in the domain of currency.

Section 115BBH- Tax on Income on Virtual Digital Assets

In this section, it is proposed that where the total income of an assessee includes income from transfer of any Virtual Digital Asset, the tax shall be payable at the rate of 30% plus tax on other income of the assessee which shall be charged to tax after reducing the income from transfer of VDA. It is further provided that no deduction except for cost of acquisition shall be allowed. Further, loss from VDA shall neither be allowed to set off nor will be allowed to be carried forward.

It is interesting to note that no amendment is proposed in section 2(24), section 28 and section 45. None of the heads of the income as specified in section 14 of the Act are made applicable for computation of income from transfer of VDA. Generally, Income-tax Act, provides that if the income is not taxable under the head Profits and Gains from Business and Profession, the income will be taxed as Income from



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other Sources. For example, interest earned in money lending business is taxable as PGBP or IOS depending upon the facts of the case. Similarly, rent from renting of properties can be taxed as income under the head PGBP or Income from House Property depending upon the facts of the case. Provision regarding clarity for characterization of income under particular head brings more clarity for taxpayer and saves taxpayer from litigation. Otherwise in the past we all have witnessed lot of litigation for determination of head of income for a particular stream of income.

General principle that income includes negative income

It is the cardinal principle of the law that income includes negative income. While claiming set off of losses, inter source/ inter-head adjustment is generally permissible. It is common that any activity carried out may not always lead to earning of profit. Despite all precautions, the commercial activity may run into loss. It is also acknowledged by the Hon'ble Apex Court that once the expenditure is incurred, it does not mean that would necessarily lead to earning profits. Refer, the decision of *CIT v/s Rajendra Prasad Moody (1978) [115 ITR 519 (SC)]*.

Even in the case of speculative business, speculative business loss from speculative activity is allowed to be set off from profit of speculative business.

However, in the context of the proposed amendment, no set off of loss/ expenditure except for cost of acquisition is permissible. The provision appears to be very harsh. As a taxpayer, if the money is lost, then obviously there cannot be flow for payment of taxes. This kind of provision therefore needs a relook and may be re-considered.

Virtual currencies have to be seen qua users, consumers, traders and investors and accordingly, the characterization and computation of income rather real income be allowed to compute with regard to all the other applicable provisions of the Act.

Tax Deduction at source under section 194S

Section 194S provides that any person responsible for paying to a **resident any sum** by way of consideration for transfer of VDA shall at the time of credit of such sum to the account of resident or at the time of payment of such sum by any mode, whichever is earlier deduct an amount equal 1% of such sum as income tax thereon.

Provided that where the consideration is wholly in kind or in any exchange of other VDA and there is no part in cash or partly in kind or partly in cash and the part in cash is insufficient to meet the liability of TDS in respect of sum of whole transfer, the person responsible for paying such consideration has to ensure that

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The tax deduction is not applicable where the consideration is payable by a specified person where the value of such consideration does not exceed Rs. 50,000 in a year.

tax has been paid in respect of such consideration for the transfer of VDA.

The tax deduction is not applicable where the consideration is payable by a specified person where the value of such consideration does not exceed Rs. 50,000 in a year. The meaning of specified person is explained in explanation to section 194S. The value of consideration of Rs. 50,000 is reduced to Rs. 10,000 if the consideration is payable other than the specified person. Once, tax is deducted under section 194S then TDS or TCS under other provisions of the Act shall not apply. Even if the consideration is credited in "Suspense A/c" the provision of section 194S shall apply.

Rate prescribed under section 115BBH to be increased by surcharge, while deducting tax under section 194S surcharge is not to be considered

It is proposed that the rates for deduction of income-tax at source during the FY 2022-23 under the provisions of section 193, 194A, 194B, 194BB, 194D, 194LBA, 194LBB, 194LBC and

195 is to be deducted at the rate of deduction of tax at source as specified in Part II of the First Schedule to the Bill. The amount of tax so deducted is to be increased by surcharge. The rate of surcharge to be considered while deducting tax under these sections is variable as per the slabs of income and status of the taxpayer prescribed in the relevant schedule.

It is to be noted that the rate of deduction of tax at source under section 194S is prescribed at the rate of 1%. The rate of tax under section 115BBH is to be increased by surcharge to be levied based on status of the taxpayer and slab of income. However, for rate of tax deduction under 194S there is no provision for considering surcharge. The provision of section 194S is applicable with effect from 1 July 2022.

An important "argument"

This section i.e., 194S uses the term "sum" and not the term "income". The general principle laid down by various courts that if there is no income chargeable to tax, the tax is not liable for deduction. However, when TDS provisions prescribe TDS from "sum" instead of "income" the applicability of these judicial precedents is not applicable meaning thereby if there is absence of income yet TDS provisions will get attracted.

"Cash v/s Kind"

If consideration in kind is larger than cash, then the deductor has to ensure that the portion

in cash is sufficient to meet the obligation of TDS on entire consideration. This certainly causes difficulty for deductor. TDS is a vicarious liability and ultimate obligation of payment of tax is of the deductee. In view of larger portion of consideration in kind if tax deduction cannot be made from cash portion, the deductee is always liable for balance payment of tax while filing the return of income. In view of this casting the obligation on deductor for deduction of tax on "in kind" portion is unwarranted and may be amended suitably to avoid the hardship of the deductor.

Identification of two persons in dealing of crypto currency or VDA is difficult and KYC norms such as PAN, Aadhar Card number will be not in the knowledge of payer. Therefore, how these difficulties can be encountered is a real challenge while, implementing TDS provisions. For revenue also, if there are any provisions of violation of 194S, how to catch the assessee in default can also pose a challenge.



Rate of deduction of tax at source under section 194S is prescribed at the rate of 1%. The rate of tax under section 115BBH is to be increased by surcharge to be levied based on status of the taxpayer and slab of income.



If consideration in kind is larger than cash, then the deductor has to ensure that the portion in cash is sufficient to meet the obligation of TDS on entire consideration.

TDS under section 194S *vis a vis* 194O

It is proposed that where tax is deductible under section 194O along with proposed section 194S then tax is to be deducted under section 194S and not under section 194O.

Proposed amendment in section 56

Section 56(2)(x) inserted by Finance Act, 2017 and applicable for receipt without consideration/ inadequate consideration on or after 01st April, 2017, the meaning of the word “property” is clarified in explanation thereto (explanation to clause (vii) of section 56 (2)). Now, the said explanation is proposed to be amended to enlarge the meaning of the word “property” to include VDA. The said amendment will take effect from 01st April 2023 and will apply in relation to assessment year 2023-2024 and subsequent years thereon.

Faceless schemes under the Act

The Central Government has undertaken a number of measures to make the processes

under the Act, electronic, by eliminating person to person interface between the taxpayer and the Department to the technologically feasible extent and provided for optimal utilisation of resources and a team-based assessment with dynamic jurisdiction. A series of futuristic reforms have been introduced in the domain of Direct Tax administration for the benefit of taxpayers and economy. This started with faceless assessment in electronic mode involving no human interface between taxpayers and tax officials. The faceless procedures are being introduced in a phased manner in the Act.

As part of this process of making the tax administration transparent and efficient, provisions for notifying faceless schemes under sections 92CA, 144C were introduced in the Act through Taxation and Other Laws (Relaxation and Amendment of Certain Provisions) Act, 2020 with effect from 01 November 2020, was inserted through Finance Act, 2021 with effect from 01 April 2021.

As per the earlier scheme, the date of limitation under section 92CA for determination of arm's length price in faceless scenario and under section 144C for faceless Dispute Resolution Panel route was 31 March 2022. The modifications proposed for this purpose will have an impact on Information technology structure. The notification at this time shall result in delay in stabilisation of the systems.

In light of this, it is proposed to extend the date of issuing directions for the purposes of sections 92CA and 144C till 31 March 2024 as against the earlier date of limitation which was declared as 31 March 2022.

Amendment in the provisions of section 263 of the Act – Clarity as to the provisions of power under section 263 to revise the order of Transfer Pricing Officer (‘TPO’) passed under section 92CA of the Act

There was an important ongoing controversy with reference to the revision of the order passed by the TPO under section 92CA of the Act by Principal CIT by assuming the jurisdiction under section 263 of the Act. Recently, just 3-4 days before the presentation of the Budget by the Hon'ble Finance Minister, the decision by the Hon'ble Delhi Tribunal in the case of *JCB India Ltd [TS-26-ITAT-2022(DEL)-TP]* has come to the notice, in which the Tribunal has rejected the revisionary jurisdiction over TPO's order as well as consequent assessment order passed in conformity with TPO's order for the assessee. In the facts of case, after following



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the procedure laid down in Sec. 92CA, the TPO passed an order and made an adjustment to the ALP of the royalty paid to the AE. Accordingly, the AO passed the final assessment order in conformity with the order passed by the TPO. Subsequently, a show-cause notice (SCN) was issued under Sec. 263 and assessment order was set aside by PCIT since the same was based on TPO's non-inquiry/non-examination of royalty paid for the product.

While delivering its judgement, the Hon'ble ITAT emphasised on the twin condition of assessment order being '**erroneous**' and '**prejudicial**' to the interest of revenue as a pre-requisite for invoking revisionary powers. The Hon'ble ITAT further holds that due to restriction imposed under section 263(1), learned PCIT had no administrative power to revise the order passed by the TPO. Accordingly, the Hon'ble ITAT proceeds to decide whether the assessment order passed in conformity of the TPO order be subjected to revisionary proceedings. While interpreting the use of word "shall" in Sec. 92CA, the Hon'ble ITAT observes that TPO had proposed adjustment only in respect of royalty paid to the AE and accordingly, AO had not made any error in passing assessment order based on TPO's order. The

Hon'ble ITAT has drawn support from the decisions of the Tribunal in the case of *Essar Steel Limited vs Addl. CIT (2012) [28 taxmann.com 232 (Mum)]* and *Tata Communications Limited vs DCIT (2014) [41 taxmann.com 486 (Mum)]*. Accordingly, Hon'ble ITAT held that the revisionary order was invalid and quashed the same and restored the original assessment.

As mentioned earlier, this decision has appeared in public domain 3-4 days prior to presentation of the Budget. Before the ink of the said decision could dry, the Budget proposed an amendment to settle this controversy. Section 263 of the Act contains the provision for revision of order which is erroneous in so far as it is prejudicial to the interests of revenue. An order under section 263 of the Act can be passed within two years from the end of the financial year in which the order sought to be revised was passed.

As per provisions of section 92CA, if the Assessing Officer considers it necessary or expedient, he may, with the approval of the Principal Commissioner or Commissioner refer the computation of arm's length price (ALP or specified domestic transaction entered into by an assessee, to the Transfer Pricing Officer (TPO). The TPO passes an order determining the ALP in an

international transaction or specified domestic transaction under the provisions of section 92CA and sends it to the Assessing Officer for final income determination. However, as per the existing provisions in the Act, it is not clear as to who has the power under section 263 to revise the order of the TPO passed under section 92CA.

Therefore, it is proposed to amend the provisions of section 263 of the Act so as to provide that the Principal Chief Commissioner or the Chief Commissioner or the Principal Commissioner or Commissioner who is assigned the jurisdiction of transfer pricing may call for and examine the record of any proceeding under this Act, and if he considers that any order passed by the TPO, working under his jurisdiction, to be erroneous in so far as it is prejudicial to the interests of revenue, he may pass an order directing revision of the order of TPO. Consequential changes are also be made in the provisions of section 153 of the Act inter alia to provide two months' time to the Assessing Officer to give effect to the order of TPO consequent to the directions in the revision order. As the provision is intended to remove the confusion for exercising the revisionary power, it is a good amendment to save the litigation on technicality of the issue of exercising the power of the revision. ■■■