**Sections like 115BBE, 112 etc in Chapter XII – whether independent of Finance Act ?**

**CA. Pankaj Agrwal**

**pankaj@mgcoca.com**

Every year annual Finance Act provides rates of tax and it has two parts. Part I provides for rates as applicable to assessment year and Part III provides for rates which may be used for tax deduction of tax at source from Salary and payment of advance-tax. Part III generally become Part I of the next Financial year. Finance Act also provides application of special rates as provided in various sections of Income-tax Act to the specified incomes i.e. those sections get incorporated by reference in the Finance Act.

It is important to understand because a view is being expressed that amendment to section 115BBE by the Taxation Laws (Second) Amendment Act, 2016 makes it retrospective. In my understanding, the Income-tax Act provides a mechanism for computation of ‘total income’ which is chargeable to tax for an assessment year and the rates are to be provided in the annual Finance Act.

Section 4 of the Income-tax Act which is the charging section reads as under:

“4. CHARGE OF INCOME-TAX

(1) Where any **Central Act enacts** that income-tax shall be charged for **any assessment year at any rate or rates**, income-tax at that rate or those rates shall be charged for **that year** in accordance with, and subject to the provisions (including provisions for the levy of additional income-tax) of, this Act in respect of the total income of the previous year of every person :

Provided that where by virtue of any provision of this Act income-tax is to be charged in respect of the income of a period other than the previous year, income-tax shall be charged accordingly.

(2) In respect of income chargeable under sub-section (1), income-tax shall be deducted at the source or paid in advance, where it is so deductible or payable under any provision of this Act.”

From the reading of the above section it is evident that the Income is to be charged **for an assessment year**, though it is total income of the previous year. It also provides ‘any Central Act enacts’. So if there is no central Act enacting the rates for levy of income-tax, Income-tax Act to the extent of charging tax will be inoperative. There are certain sections in chapter XII of the Act itself which provides for special rates for certain specified incomes and section 115BBE is one of them. Because of this provision, Income-tax Act may be called ‘a schedule’ providing the methodology for computing the total income of previous year.

I will draw attention to section 2 of the Finance Act, 2020 (for the sake of convenience) which is almost the same every year which is as under:

“**2.** (*1*) Subject to the provisions of sub-sections (*2*) and (*3*), **for the assessment year** commencing on the 1st day of April, 2020, income-tax shall be charged at the rates specified in Part I of the First Schedule and such tax shall be increased by a surcharge, for the purposes of the Union, calculated in each case in the manner provided therein.”

(2)…

(*3*) In cases to which the provisions of Chapter XII or Chapter XII-A or section 115JB or section 115JC or Chapter XII-FA or Chapter XII-FB or sub-section (*1A*) of section 161 or section 164 or section 164A or section 167B of the Income-tax Act, 1961 (hereinafter referred to as the Income-tax Act) apply, the tax chargeable shall be determined as provided in that Chapter or that section, and with reference to the rates imposed by sub-section (*1*) or the rates as specified in that Chapter or section, as the case may be:

Provided that the amount of income-tax computed in accordance with the provisions of section 111A or section 112 or section 112A of the Income-tax Act shall be increased by a surcharge, for the purposes of the Union, as provided in Paragraph A, B, C, D or E, as the case may be, of Part I of the First Schedule, except in case of a domestic company whose income is chargeable to tax under section 115BAA or section 115BAB of the Income-tax Act:

Provided further……(Not relevant for our discussion)

Provided also that in respect of any income chargeable to tax under clause (*i*) of sub-section (*1*) of section 115BBE of the Income-tax Act, the amount of income-tax computed under this sub-section shall be increased by a surcharge, for the purposes of the Union, calculated at the rate of twenty-five per cent. of such income-tax:

From the above it is evident that it is the Finance Act of the relevant year which provides for charging of income-tax and prescribes the ‘rate of tax’ for the relevant assessment year. Chapter XII of which section 115BBE is also incorporated by reference in the Finance Act. If this is not done, section 115BBE will have no operation.

Now, I wish to draw attention to sub-section (9) of the Finance Act which is as under:

(*9*) Subject to the provisions of sub-section (*10*), in cases in which income-tax has to be charged under sub-section (*4*) of section 172 or sub-section (*2*) of section 174 or section 174A or section 175 or sub-section (*2*) of section 176 of the Income-tax Act or deducted from, or paid on, income chargeable under the head “Salaries” under section 192 of the said Act or in which the “advance tax” payable under Chapter XVII-C of the said Act has to be computed at the rate or rates in force, such income-tax or, as the case may be, “advance tax” shall be charged, deducted or computed at the rate or rates specified in Part III of the First Schedule and such tax shall be increased by a surcharge, for the purposes of the Union, calculated in such cases and in such manner as provided therein:

Provided that in cases to which the provisions of Chapter XII or Chapter XII-A or section 115JB or section 115JC or Chapter XII-FA or Chapter XII-FB or sub-section (*1A*) of section 161 or section 164 or section 164A or section 167B of the Income-tax Act apply, “advance tax” shall be computed with reference to the rates imposed by this sub-section or the rates as specified in that Chapter or section, as the case may be:

Provided further…… (not being reproduced)

Provided also that in respect of any income chargeable to tax under clause (*i*) of sub-section (*1*) of section 115BBE of the Income-tax Act, the “advance tax” computed under the first proviso shall be increased by a surcharge, for the purposes of the Union, calculated at the rate of twenty-five per cent. of such “advance tax”:”

Usually Part III of the Finance Act of the earlier financial year becomes Part I of the Finance Act of the next financial year. If the Parliament in its wisdom enhances the rate of tax in Part I of the next year, can we say that it is retrospective amendment. The only relief one may expect is of interest arising on short-fall of payment of ‘advance-tax.

As it became necessary for the government to make the things clear, the amendment to section 115BBE was brought with effect from 1st April 2017 by an amendment Act instead of waiting for the Finance Act 2017. If the government had brought this amendment by the Finance Act, 2017, even then it would not have been retrospective.

The total income of assessment year can only be ascertained at the end of year. Hence, the income of the previous year is taxed for assessment year. Sections specifying the special rates like 115BBE, 112 also starts with ‘Where the total income of an assessee includes’, hence, even for application of those sections, it is pertinent to compute the total income.

Is there any vested rights which is getting affected? In view of above discussion, there is no vested rights or obligations till the year ends. The direct judgment which is referred to is **Karimtharuvi Tea Estate Ltd Vs. State of Kerala [1966] 60 ITR 262 (SC).** The said judgement also does not support the view because the said judgment was in the context of Kerala Agricultural Income-tax Act, where probably the charge was for a financial year. However, in the very said judgment, the honb’le apex court has referred to its judgment in **Commissioner of Income-tax v. Isthmian Steamship Lines** [1951] [20 I.T.R. 572](file:///C:\Users\pankajca\Google%20Drive\%5b1951%5d%20020%20ITR%200572), 577 (S.C.) and quoted therefrom as under:

The High Court has, however relied upon a decision of this court in Commissioner of Income-tax v. Isthmian Steamship Lines, where it was held as follows:

“It will be observed that we are here concerned with two datum lines: (1) the 1st of April, 1940, when the Act came into force, and (2) the 1st of April, 1939, which is the date mentioned in the amended proviso. The first question to be answered is whether these dates are to apply to the accounting year or the year of assessment. They must be held to apply to the assessment year, because in income-tax matters the law to be applied is the law in force in the assessment year unless otherwise stated or implied. The first datum line therefore affected only the assessment year of 1940-41, because the amendment did not come into force till the 1st of April, 1940. That means that the old law applied to every assessment year up to and including the assessment year 1939-40."

**This decision is authority for the proposition that though the subject of the charge is the income of the previous year, the law to be applied is that in force in the assessment year, unless otherwise stated or implied.** The facts of the said decision are different and distinguishable and the High Court was clearly in error in applying that decision to the facts of the present case.

The Surcharge Act having come into force on September 1, 1957, and the said Act not being retrospective in operation, it could not be regarded as law in force at the commencement of the year of assessment 1957-58. Since the Surcharge Act was not the law in force on April 1, 1957, no surcharge could be levied under the said Act against the appellant in the assessment year 1957-58”

Attention is also drawn to section 294 of the Income-tax Act, 1961 as under which provides for contingent situation when the Finance Act is not passed as on 1st April as it used to be passed some time in May:

“294. ACT TO HAVE EFFECT PENDING LEGISLATIVE PROVISION FOR CHARGE OF TAX

If on the 1st day of April in any assessment year provision has not yet been made by a Central Act for the charging of income-tax for that assessment year, this Act shall nevertheless have effect until such provision is so made as if the provision in force in the preceding assessment year or the provision proposed in the Bill then before Parliament, whichever is more favourable to the assessee, were actually in force.”

As the amendment was made effective 1st April 2017 i.e. for assessment year 2017-18, the amendment made by the Taxation Laws (Second) Amendment Act, 2016 which is a date prospective, it cannot be said to be retrospective.