



INCOME TAX ALERT

N. A. SHAH **BULLETIN**

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N. A. SHAH ASSOCIATES LLP
Chartered Accountants



CBDT Notification dated 05.06.2017 issued under section 10(38) of the Income Tax Act, 1961

- i. The existing provision of section 10(38) of the income-tax Act, 1961 ('Act'), provides that capital gains arising on transfer of long-term capital asset, being equity share in a company or unit of an equity oriented fund, shall be exempt if the transfer is made on or after 01.10.2004 and is chargeable to Securities Transaction Tax ('STT').
- ii. In order to curb the practice of declaring unaccounted income as exempt u/s 10(38) by entering into fake transactions, Finance Act, 2017 inserted a new proviso to section 10(38) which provides that exemption u/s 10(38) would not be available if the acquisition of shares is made on or after 01.10.2004 and such acquisition is not chargeable to STT. However, the newly inserted proviso also provide that genuine cases of acquisition of shares on or after 01.10.2004, where STT could not be paid, would be protected by notifying such transactions of acquisition.
- iii. CBDT on 03.04.2017 has issued a draft notification wherein certain transactions of acquisition of shares were proposed to be excluded from the applicability of the newly inserted proviso to section 10(38) of the Act.
- iv. CBDT, vide notification dated 05.06.2017 has released the final guidelines notifying the three negative transactions of acquisition of shares which would not be eligible for exemption under section 10(38) of the Act. Further, the notification also provide exceptions to these three negative transaction where exemption u/s 10(38) would continue to be available.
- v. Transactions notified under this notification which would not be eligible for exemption under section 10(38) and exceptions to such transactions are summarized as under:
 - a) Acquisition of existing listed equity share of a company whose shares are **not frequently traded** on recognized stock exchange in India is made through a preferential issue. However, the exemption u/s 10(38) would continue to be available in respect of acquisition of listed equity shares in a company:

- which has been approved by the Supreme Court, High Court, National Company Law Tribunal, Securities and Exchange Board of India or Reserve Bank of India;
 - by any non-resident in accordance with foreign direct investment guidelines issue by the government;
 - by a SEBI registered investment fund referred to in clause (a) of Explanation 1 to Section 115UB of the Act (i.e. AIF category I or II) or a venture capital fund referred to in Section 10(23FB) of the Act or a Qualified Institutional Buyer or;
 - through preferential issue to which provisions of Chapter VII of SEBI (issue of capital and disclosure requirements) Regulations, 2009 does not apply.
- b) Acquisition of existing listed equity share of a company which is not entered through a recognized stock exchange of India. However, the exemption u/s 10(38) would continue to be available in respect of following transactions of acquisition of listed equity shares which are made in accordance with Securities Contracts (Regulations) Act, 1956, if applicable:
- acquisition through an issue of share by a company other than the issue referred to in clause (a)
 - acquisition by scheduled banks, reconstruction or securitization companies or public financial institutions during their ordinary course of business;
 - acquisition which has been approved by the Supreme Court, High Courts, National Company Law Tribunal, Securities and Exchange Board of India or Reserve Bank of India in this behalf;
 - acquisition under employee stock option scheme or employee stock purchase scheme framed under the Securities and Exchange Board of India (Employee Stock Option Scheme and Employee Stock Purchase Scheme) Guidelines, 1999;
 - acquisition by any non-resident in accordance with foreign direct investment guidelines of the Government of India;
 - where acquisition of shares of company is made under Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulation, 2011;
 - acquisition from the Government;
 - acquisition by an investment fund referred to in clause (a) to Explanation 1 to section 115UB of the Act or a venture capital fund referred to in clause (23FB) of section 10 of the Act or a Qualified Institutional Buyer;

- acquisition by mode of transfer referred to in sections 47 or 50B of the Income-tax Act, if the previous owner of such shares has not acquired them by any mode referred to in clause (a) or clause (b) or clause (c) [other than the exceptions provided in the proviso to clause (a) or clause (b)]
- c) Where the equity share of a company is acquired between the period from when the company is delisted from the recognized stock exchange till the date on which it is again listed on a recognized stock exchange in accordance with Securities Contracts (Regulations) Act, 1956 read with SEBI Act, 1992 and any rules made thereunder.
- vi. The above notification also provide the definition of frequently traded shares, listed, preferential issue, Qualified Institutional Buyer, public financial institution, schedule bank, recognized stock exchange, reconstruction company and securitization company.
- vii. This notification shall come into force with effect from the 1st day of April, 2018 and shall accordingly apply to assessment year 2018-19 and subsequent assessment years.

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From:

N. A. Shah Associates LLP
Chartered Accountants

Address: B 41-45, Paragon Centre, Pandurang Budhkar Marg, Mumbai – 400013.

Tel: 91-022-4073 3000, Fax: 91-022-4073 3090

E-mail Id: info@nashah.com