Circular No. 9 of 2022

F. No.370142/2/2022-TPL
Government of India
Ministry of Finance
Department of Revenue
Central Board of Direct Taxes (TPL Division)

Dated: 9th May, 2022

Sub.: Guidelines under clause (23FE) of section 10 of the Income-tax Act, 1961 - reg.

The Finance Act, 2020, inter-alia, inserted clause (23FE) in section 10 of the Income-tax Act, 1961 (hereinafter referred to as "the Act") to provide for exemption to wholly owned subsidiaries of Abu Dhabi Investment Authority (ADIA), sovereign wealth funds (SWF) and pension funds (PF) [these are referred as "specified person" hereinafter] on their income in the nature of dividend, interest and long-term capital gains arising from investment made in infrastructure in India, during the period beginning with 01.04.2020 and ending on 31.03.2024 subject to fulfilment of certain conditions.

2. In order to incentivise infrastructure investments by specified persons in India the Finance Act, 2021, hereinafter referred to as "Finance Act", *inter alia,* amended the following provisions of clause (23FE) of section 10 of the Act:

(i) amended item (c) of sub-clause (iii) thereof to allow exemption for investment by specified person in Category I or Category II Alternative Investment Funds (hereinafter referred as AIF) which invest in one or more of the companies, enterprises or entities as referred to in item (b) (hereinafter referred to as "eligible infrastructure entity") through domestic companies and Non-Banking Finance Companies or in AIFs investing in an Infrastructure Investment Trust referred to in sub-clause (i) of clause (13A) of section 2 of the Act (hereinafter referred to as InvIT). Further, the Finance Act also relaxed the condition requiring an AIF to have investment in eligible infrastructure entity or InvIT from 100% to 50%;

(ii) inserted item (d) in sub-clause (iii) thereof, to allow investment by specified person in a domestic company set up and registered on or after 01.04.2021, having minimum 75 per cent investments in eligible infrastructure entity;

(iii) inserted item (e) in sub-clause (iii) thereof, to allow investment by specified person in a Non-Banking Financial Company registered as an Infrastructure Finance Company or in an Infrastructure Debt Fund (hereinafter referred to as NBFC), having minimum 90 per cent lending in eligible infrastructure entity;

(iv) inserted Explanation 3 thereof, to provide that the method for determination of 50 per cent, 75 per cent or 90 per cent investment referred to in item (c), (d) or (e) of sub-clause (iii) of the said clause (23FE) shall be prescribed by the Central Government;

(v) inserted fourth proviso thereof, providing that in case of an AIF, referred to in item (c) of sub-clause (iii), has investment of less than hundred percent in eligible infrastructure entity or in InvIT, income accrued or arisen to, or received by, or attributable to such investment, directly or indirectly, which is exempt under this clause shall be calculated proportionately to the investment made in eligible infrastructure entity or in InvIT , in the prescribed manner.

(vi) inserted fifth proviso thereof providing that in case a domestic company, referred to in item (d) of sub-clause (iii), has investment of less than hundred percent in eligible infrastructure entity, income accrued or arisen to, or received by, or attributable to such investments, directly or indirectly, which is exempt under this clause shall be calculated proportionately to the investment made in eligible infrastructure entity, in the prescribed manner.

(vii) inserted sixth proviso thereof, providing that in case an NBFC, referred to in item (e) of sub-clause (iii), has lending of less than hundred percent in eligible infrastructure entity, income accrued or arisen to, or received by, or attributable to such lending, directly or indirectly, which is exempt under this clause shall be calculated proportionately to the lending in eligible infrastructure entity, in the prescribed manner.

3. The method for computation of eligible threshold of 50 per cent, 75 per cent or 90 per cent and exempt income under clause (23FE) of section 10 of the Act has been prescribed in rule 2DCA of the Income Tax Rules (the Rules) vide Notification No 50 of 2022 dated 6th May, 2022.

4. First proviso to clause (23FE) of section 10 of the Act provides that if any difficulty arises regarding interpretation or implementation of the provisions of the said clause, the Board may, with the approval of the Central Government, issue guidelines for the purpose of removing the difficulty. In exercise of the powers under this proviso, Board, with the approval of the Central Government, hereby issues the following guidelines:

Guidelines

4.1. Transfer of investment within 3 years by the specified person or AIF/ domestic Company/NBFC

4.1.1. As per clause (23FE) of section 10 of the Act, any income of a specified person in the nature of dividend, interest or long-term capital gains arising from an investment made by it in India, whether in the form of debt or share capital or unit, is exempt from income tax subject to certain conditions. One of such conditions is prescribed in sub-clause (ii) of clause (23FE) of section 10 of the Act. Under this sub-clause, such investment is required to be held for at least three years'. It has

been brought to the notice of the Board that there may be cases where any of the following investments is transferred before the lock-in period of 3 years ("three years' rule"):

(a) Investment by the specified person in eligible infrastructure entity or InvIT or AIF or domestic company or NBFC;

(b) Investment by the AIF, out of the investment made by the specified person, in domestic company or NBFC or eligible infrastructure entity or InvIT;

(c) Investment by the domestic company, out of the investment made by the specified person directly or through AIF, in eligible infrastructure entity;

(d) Lending by NBFC, out of the investment made by the specified person either directly or through AIF, to eligible infrastructure entity.

4.1.2. In such cases, as per the third proviso to clause (23FE) of section 10 of the Act, any income which has not been included in the total income of the specified person due to the provisions of this clause, shall be chargeable to income-tax as the income of the specified person of the previous year during which such specified person fails to satisfy any of the conditions of the said clause.

4.1.3. In this context, it is hereby clarified that any capital gain accruing or arising on transfer of such investments (which have been transferred in violation of the three years'' rule) will be treated as follows:

(a) **Investment by the specified person in eligible infrastructure entity or InvIT or AIF or domestic company or NBFC**: such capital gain will not be exempt from tax under clause (23FE) of section 10 of the Act in the hands of the specified person.

(b) **Investment by the AIF, out of the investment made by the specified person, in domestic company or NBFC or eligible infrastructure entity or InvIT:** Since AIF is a pass through entity, such capital gain will be taxable in the hands of the specified person and since three years' rule has not been complied with, the income shall not be exempt from tax under clause (23FE) of section 10 of the Act in the hands of the specified person.

(c) **Investment by the domestic company, out of the investment made by the specified person directly or through AIF, in eligible infrastructure entity:** the income, attributable to such capital gains, shall be taxable in the hands of the specified person and since three years' rule has not been complied with, such income shall not be exempt from tax under clause (23FE) of section 10 of the Act in the hands of the specified person

(d) **Lending by NBFC, out of the investment made by the specified person directly or through AIF, to eligible infrastructure entity:** the income, attributable to such capital gain or other income of the NBFC, shall be taxable in the hands of the specified person and since three years' rule has not been complied with, such income shall not be exempt from tax under clause (23FE) of section 10 of the Act in the hands of the specified person

4.1.4. Further any interest or dividend on such investments (which is transferred in violation of the three years' rule) which has been exempted from income-tax under clause (23FE) of section 10 of the Act in the earlier years, will be subjected to tax in the hands of the specified person as the income of the previous year in which such investment is transferred in violation of the three year rule by the specified person or AIF or domestic company or NBFC, as the case may be.

4.1.5. The above guidelines are explained with the help of following examples:

Example 1: Specified person invests Rs 100 crore in an eligible infrastructure entity. The specified person is notified as on 30.04.2021 and such investment is made on 31.03.2022 in the form of shares. During the previous year 2022-23, the specified person gets dividend of Rs 10 crore from such investment which is claimed to be exempt. Further during the previous year 2023-24, dividend of Rs 12 crore is received which is also claimed to be exempt. As on 01.04.2024, the specified person decides to exit and transfers its shares for an amount of Rs 120 crore. In such case, during the previous year 2024-25, the dividend income given exemption during the previous year 2022-23 amounting to Rs 10 crore and Rs 12 crore dividend income given exemption during the previous year 2023-24 will be taxable as income of the previous year 2024-25 in the hands of the specified person. Further, there will be no capital gains tax exemption on transfer of shares of infrastructure company by the specified person.

Example 2: Specified person invests Rs 100 crore in an AIF, as referred to in item (c) of sub-clause (iii) of clause (23FE) of section 10 of the Act. The specified person is notified as on 30.04.2021 and such investment is made on 30.05.2021 in the form of units. The AIF in turn invests in a domestic company referred to in item (d) of sub-clause (iii) of clause (23FE) of section 10 of the Act as on 30.06.2021 out of the investment made by the specified person. The domestic company in turn invests Rs. 100 crore in an eligible infrastructure entity, on 31.07.2021 out of the investment made by the AIF. During the previous year 2022-23, the specified person gets dividend of Rs 10 crore from the investment made in the domestic company through AIF. Under Rule 2DCA of the Rules, an amount of Rs 8 crore is found to be exempt. Further during the previous year 2023-24, dividend of Rs 12 crore is received. Under Rule 2DCA of the Rules, an amount of Rs 10 crore is found to be exempt. As on 15.07.2024, the domestic company decides to exit and transfers its shares in the infrastructure company for an amount of Rs 120 crore. During the previous year 2024-25, dividend of Rs 20 crore is received by the AIF from the domestic company which is passed on by the AIF to the specified person. In such case, during the previous year 2024-25, the dividend of Rs 20 crore received during the previous year 2024-25, the dividend income which was granted exemption during the previous year 2022-23 amounting to Rs 8 crore and the dividend income treated as exempt during the previous year 2023-24 amounting to Rs 10 crore will be taxable as income of the previous year 2024-25 in the

hands of the specified person. Further, there will be no capital gain tax exemption on transfer of share of the domestic company through AIF by the specified person.

Example 3: Specified person invests Rs 100 crore in an AIF, as referred to in item (c) of sub-clause (iii) of clause (23FE) of section 10 of the Act. The specified person is notified as on 30.04.2021 and such investment is made as on 30.05.2021 in the form of units. The AIF in turn invests the entire amount in a domestic company referred to in item (d) of sub-clause (iii) of clause (23FE) of section 10 of the Act as on 30.06.2021 out of the investment made by the specified person. The domestic company in turn invests Rs. 60 crore in an eligible infrastructure entity A and Rs 40 crore in eligible infrastructure entity B, on 31.07.2021 out of the investment made by the AIF. During the previous year 2022-23, the specified person gets dividend of Rs 10 crore from the investment made in the domestic company through AIF. Under Rule 2DCA of the Rules, an amount of Rs 8 crore is found to be exempt (Rs 4.8 crore attributable to investment in eligible infrastructure entity A and 3.2 crore attributable to investment in eligible infrastructure entity B). Further during the previous year 2023-24, dividend of Rs 12 crore is received. Under Rule 2DCA of the Rules, an amount of Rs 10 crore is found to be exempt (Rs 6 crore attributable to investment in eligible infrastructure entity A and 4 crore attributable to investment in eligible infrastructure entity B). As on 15.07.2024, the domestic company decides to exit and transfers its shares in the eligible infrastructure entity A for an amount of Rs 120 crore. During the previous year 2024-25, dividend of Rs 25 crore is received by the AIF from the domestic company which is passed on by the AIF to the specified person (Rs 20 crore attributable to investment in eligible infrastructure entity A and 5 crore attributable to investment in eligible infrastructure entity B). In such case, during the previous year 2024-25, the dividend of Rs 20 crore received during the previous year 2024-25, which is attributable to investment in eligible infrastructure entity A, the dividend income granted exemption during the previous year 2022-23 amounting to Rs 4.8 crore, which is also attributable to investment in eligible infrastructure entity A, and the dividend income granted exemption during the previous year 2023-24 amounting to Rs 6 crore, which is attributable to investment eligible infrastructure entity A, will be taxable as income of the previous year 2024-25 in the hands of the specified person. Further, there will be no capital gain tax exemption on transfer of share of the domestic company through AIF by the specified person with respect to this investment. The amount of exemption under clause (23FE) of section 10 of the Act, with respect to the income of the specified person attributable to the investment in eligible infrastructure entity B, will be decided as per the provisions of rule 2DCA. The minimum threshold of investment by the AIF/domestic company, as per sub-rule (2) and (3) of rule 2DCA, in eligible infrastructure entities or InVIT, as the case may be, will also have to be maintained.

4.2. Eligible infrastructure entity carrying on other businesses as well

4.2.1. A specified person may invest in an eligible infrastructure entity. Such investment by specified person may be either directly or through an AIF or a domestic company or NBFC. It has been brought to the notice of the Board that some such eligible infrastructure entities may be carrying on businesses other than the business of developing, or operating and maintaining, or developing, operating and maintaining any infrastructure facility as referred to in item (b) of clause (23FE) of section 10 of the Act. Concerns have been raised that in such cases, whether the entire investment will disqualify for exemption under the said clause.

4.2.2. In order to remove difficulty to the taxpayer, it is clarified that if eligible infrastructure entity carries on businesses other than the business of developing, or operating and maintaining, or developing, operating and maintaining any infrastructure facility as defined in the Explanation to clause (i) of sub-section (4) of section 80-IA of the Act or such other business as the Central Government may, by notification in the Official Gazette, specify in this behalf (hereinafter referred as "eligible activity"), the exemption could still be provided if the profit before tax of the eligible infrastructure entity from eligible activity is 50% or more of the total profit before tax of the eligible infrastructure entity. The exempt income from investment in such eligible infrastructure entity (hereinafter referred to as "hybrid infrastructure entity") attributable to such eligible activity shall be calculated proportionately. For the purposes of determination of such exempt income attributable to eligible activity, separate books of account shall be maintained by such hybrid infrastructure entity. The income of the specified person, from such hybrid infrastructure entity attributable to such eligible activity, exempt under clause (23FE) of section 10 of the Act shall be calculated using the following formula, namely:

A= B*C/D, where −

A= The income of the specified person from hybrid infrastructure entity attributable to the investment in eligible activity during the relevant previous year.

C= Profit before tax of the hybrid infrastructure entity from the eligible activity for the relevant previous year.

D= Profit before tax of the hybrid infrastructure entity from all the businesses/activities/sources for the relevant previous year.

"B" shall have the following meaning:

I. **In case of direct investment by the specified person in the hybrid infrastructure entity:**

B=Income accrued or arisen or attributed to, or received by, the specified person during the relevant previous year from the hybrid infrastructure entity, with respect to eligible investments made under clause (23FE), on or after the date of notification of the specified person under the said clause (23FE).

II. **In case of investment by specified person in the hybrid infrastructure entity through AIF :**

B= "I" as specified in sub-rule (5) of rule 2DCA of the rules attributable to the investment in hybrid infrastructure entity;

III. **In case of investment by specified person in the hybrid infrastructure entity through AIF and domestic company:**

B= "J" as specified in sub-rule (5) of rule 2DCA of the rules attributable to the investment in hybrid infrastructure entity;

IV. **In case of investment by specified person in the hybrid infrastructure entity through AIF, and non-banking finance company**

B="K" as specified in sub-rule (5) of rule 2DCA of the rules attributable to the investment in hybrid infrastructure entity;

V. **In case of investment by specified person in the hybrid infrastructure entity through a domestic company:**

B= exempt income computed under sub-rule (6) of rule 2DCA of the rules attributable to the investment in hybrid infrastructure entity;

VI. **In case of investment by specified person in the hybrid infrastructure entity through non-banking finance company,**

B= exempt income computed under sub-rule (7) of rule 2DCA of the rules attributable to the investment in hybrid infrastructure entity.

4.2.3. Where investment has been made by the specified person, either directly or through AIF or domestic company or NBFC, in different eligible infrastructure entities and one or more of such eligible infrastructure entities are hybrid infrastructure entities, exemption under rule 2DCA of the rules shall be computed as follows:

(a) in respect of the hybrid infrastructure entities as per paragraph 4.2.2 of these guidelines;

(b) in respect of other eligible infrastructure entities, as per rule 2DCA of the rules, to the extent attributable to the investment in such entities.

4.2.4. The above guidelines are explained with the help of following examples:

Example 4: Specified person invests Rs 100 crore in an hybrid infrastructure entity. The specified person is notified as on 30.04.2021 and such investment is made on 31.03.2022 in the form of shares. During the previous year 2022-23, the specified person gets dividend of Rs 10 crore from such investment which is claimed to be exempt. In such case, the hybrid infrastructure entity will have to maintain separate books of account for the eligible and non-eligible activities. Assuming that the profit before tax of the eligible infrastructure entity from the eligible infrastructure activities is Rs 50

crore and total profit before tax is Rs 100 crore. In such a case the income of the specified person exempted under clause (23FE) shall be calculated as follows:

A=B*C/D

B= Rs 10 crore

C= Rs 50 crore

D= Rs 100 crore.

A=10 crore* 50 crore/100 crore= Rs 5 crore

[assuming all other conditions of clause (23FE) of section 10 of the Act are satisfied]

Example 5: Specified person invests Rs 100 crore in an AIF, as referred to in item (c) of sub-clause (iii) of clause (23FE) of section 10 of the Act. The specified person is notified as on 30.04.2021 and such investment is made on 31.03.2022 in the form of units. Out of this investment, AIF invests 100 crore in the form of shares in an hybrid infrastructure entity, of the Act as on 31.05.2022. During the previous year 2022-23, the specified person gets dividend of Rs 10 crore from such investment made in eligible infrastructure entity through AIF. Assuming that the, Value of B is 8 Crore, as per paragraph 4.2.2-II. In such case, such hybrid infrastructure entity will have to maintain separate books of account for the eligible and non-eligible business. Assuming that the profit before tax of the hybrid infrastructure entity from the eligible infrastructure activities is Rs 50 crore and total profit before tax is Rs 100 crore. In such a case the income of the specified person exempted under clause (23FE) of section 10 of the Act for the previous year 2022-23 shall be calculated as follows:

A=B*C/D

B= Rs 8 crore

C= Rs 50 crore

D= Rs 100 crore.

A=8 crore* 50 crore/100 crore= Rs 4 crore [assuming all other conditions of clause (23FE) of section 10 of the Act are satisfied]

Example 6: Specified person invests Rs 100 crore in a domestic company, as referred to in item (d) of sub-clause (iii) of clause (23FE) of section 10 of the Act. The specified person is notified as on 30.04.2021 and such investment is made on 31.03.2022 in the form of shares of the domestic company. Such domestic company in turn invests Rs 60 crore out of this 100 crore in an hybrid infrastructure entity, on 31.05.2022 and the rest of Rs 40 crore is invested in companies other than eligible infrastructure entities. During the previous year 2022-23, the specified person gets dividend of Rs 10 crore from investment made in domestic company. Value of exempt income under sub-rule (6) of rule 2DCA of the rules, as per paragraph 4.2.2-V, is 6 crore. In such case, hybrid infrastructure

entity will have to maintain separate books of account for the eligible and non-eligible business. Assuming that the profit before tax of the hybrid infrastructure entity from the eligible infrastructure activities is Rs 50 crore and total profit before tax is Rs 100 crore. In such a case the income of the specified person exempted under clause (23FE) of section 10 of the Act for the previous year 2022-23 shall be calculated as follows:

A=B*C/D

B= Rs 6 crore

C= Rs 50 crore

D= Rs 100 crore.

A=6 crore* 50 crore/100 crore= Rs 3 crore [assuming all other conditions of clause (23FE) of section 10 of the Act are satisfied. The minimum threshold of investment by the domestic company, as per sub-rule (2) and (3) of rule 2DCA, in eligible infrastructure entities will also have to be maintained.]

Example 7: Specified person invests Rs 100 crore in a domestic company, as referred to in item (d) of sub-clause (iii) of clause (23FE) of section 10 of the Act. The specified person is notified as on 30.04.2021 and such investment is made on 31.03.2022 in the form of shares of the domestic company. Such domestic company in turn invests Rs 40 crore out of such 100 crore in an hybrid infrastructure entity A and 20 crore in eligible infrastructure entity B, on 31.05.2022 and the rest of Rs 40 crore is invested in companies other than eligible infrastructure entities. During the previous year 2022-23, the specified person gets dividend of Rs 10 crore from investment made in domestic company.

As per paragraph 4.2.3, since in this case investment has been made by the specified person, through domestic company, in different eligible infrastructure entities and entity A is hybrid infrastructure entity while entity B is eligible infrastructure entity other than hybrid infrastructure entity, exemption under rule 2DCA of the rules shall be computed as follows:

(a) in respect of entity A as per paragraph 4.2.2 of these guidelines;

(b) in respect of entity B, as per rule 2DCA of the rules, to the extent attributable to the investment in such entities.

Exemption attributable to investment in hybrid infrastructure entity A

The value of M, N and O, attributable to investment in hybrid infrastructure entity A, as per these guidelines, are respectively Rs 10 crore, 40 crore and 100 crore then the exemption attributable to investment in eligible infrastructure entity A shall be calculated as follows:

A=B*C/D

Where B=M*N/O (As per paragraph 4.2.2-V, "B" would be equal to the exempt income computed under sub-rule (6) of rule 2DCA of the rules attributable to the investment in hybrid infrastructure entity)

Hence B= 10 crore*40 crore/100 crore= 4 crore

Hybrid infrastructure entity A will have to maintain separate books of account for the eligible and non-eligible activities. Assuming that the profit before tax of the hybrid infrastructure entity -A from the eligible infrastructure activities is Rs 50 crore and total profit before tax is Rs 100 crore. In such case the income of the specified person exempted under clause (23FE) of section 10 of the Act for the previous year 2022-23 shall be calculated as follows:

A=B*C/D

B= Rs 4 crore

C= Rs 50 crore

D= Rs 100 crore.

A=4 crore* 50 crore/100 crore= Rs 2 crore [assuming all other conditions of clause (23FE) of section 10 of the Act are satisfied. The minimum threshold of investment by the domestic company, as per sub-rule (2) and (3) of rule 2DCA, in eligible infrastructure entities will also have to be maintained.].

Exemption attributable to investment in eligible infrastructure entity B

As per clause (b) of the paragraph 4.2.3, exemption with respect to other eligible infrastructure entities shall be computed as per rule 2DCA of the rules to the extent attributable to the investment in such entities. The total investment of the specified person in hybrid infrastructure entity A and eligible infrastructure entity B is Rs 60 crore. As per clause (b) of the paragraph 4.2.3, while computing the exemption with respect to the income from eligible infrastructure entity other than the hybrid infrastructure entity, the investment of the specified person in eligible infrastructure entity other than the hybrid infrastructure entity A will be considered.

Thus, the value of N in the formula in sub-rule (6) of rule 2DCA of the rules shall be Rs 60 crore minus Rs 40 crore=Rs 20 crore and the exemption attributable to investment in eligible infrastructure entity B shall be calculated as follows:

Exempt income as per rule 2DCA=M*N/O (exempt income computed under sub-rule (6) of rule 2DCA of the rules to the extent attributable to the investment in eligible infrastructure entities other than hybrid infrastructure entities)

i.e. 10 crore*20 crore/100 crore= 2 crore

Thus, the total exemption available to the specified person under clause (23FE) of section 10 of the Act shall be Rs 2 crore+2 crore= Rs 4 crore [assuming all other conditions of clause (23FE) of section 10 of the Act are satisfied. The minimum threshold of investment by the domestic company, as per sub-rule (2) and (3) of rule 2DCA, in eligible infrastructure entities will also have to be maintained.].

4.3. Violation of 50 per cent, 75 per cent or 90 per cent condition as per item (c), (d) or (e) of sub-clause (iii) of clause (23FE) of section 10 of the Act

4.3.1. Item (c), (d) and (e) of the said sub-clause (iii) of clause (23FE) of section 10 of the Act provide a threshold of minimum investment in an eligible infrastructure entity or InvIT. Rule 2DCA of the rules provide for the method for calculation of the said threshold. However, it has been brought to the notice of the Board that this threshold of investment is required to be maintained by the AIF or domestic company or NBFC through-out the period of investment, till the investment is transferred. There may be cases where the AIF or domestic company or NBFC decides to invest in non-eligible entity or transfer investment from eligible infrastructure entity or InvIT, as the case may be. In such cases the exemption already provided to the specified person for the years during which the threshold was met may need to be revisited giving rise to the difficulties to the specified persons.

4.3.2. To remove the difficulties, it is hereby clarified that if the AIF or domestic company or NBFC, as referred to in item (c), (d) or (e) of the said sub-clause, fails to meet the threshold of minimum investment in an eligible infrastructure entity or InvIT, as the case may be, during any subsequent previous year (such thresholds were met during all the previous years for which exemption has been claimed by the specified person) then income of specified person which has been exempted during any preceding previous year under the said clause (where minimum threshold was met during that previous year), shall remain to be exempted under the said clause and shall not be withdrawn solely because of the reason of minimum threshold not being met during the subsequent previous year. However, income of the specified person during the previous year of violation of minimum threshold and for all subsequent years, from such AIF/Company/NBFC shall not be exempted under the said clause. This is subject to the condition that other conditions specified under clause (23FE) of section 10 of the Act or rules 2DCA are not violated. For example, if the "three years' rule" is violated, consequences will be decided as per paragraph 4.1 of these guidelines.

4.4. Violation of one or more conditions in clause (23FE) of section 10 of the Act or rules thereunder or under the notification exempting the specified person under the said clause.

4.4.1. The exemption provided to the specified person under clause (23FE) of section 10 of the Act is subject to certain conditions provided under the said clause, relevant rules and also specific conditions provided in the notification issued in the case of the specified person. Concerns have been raised that in case of violation of one or more of such conditions during any of the previous years, the

exemption provided during the previous years preceding such previous year may also be taken away leading to a lot of uncertainty in the hands of the investors.

4.4.2. The conditions provided under clause (23FE) of section 10 of the Act or prescribed under Rule 2DB of the Rules or under Circular No 15 of 2020, dated the 22nd July, 2020 with F No. 370142/26/2020-TPL are essential conditions, as may be applicable, (other than the conditions for which relaxation is provided under paragraph 4.4.4 of these guidelines) without which there is no case of exemption under clause (23FE) of section 10 of the Act. Any violation of the applicable conditions specified would require withdrawal of the exemption already allowed. Thus, the "general rule" is that if any of these applicable conditions are violated, exemption under clause (23FE) of section 10 of the Act will be withdrawn for all the years in which the exemption has been claimed and the income will be taxable in the same previous year in which it was claimed to be exempt. To remove difficulty in some cases, in para 4.1 (w.r.t the three years' rule) of these guidelines, it has been clarified that capital gains on transfer of the investment, in violation of the conditions under clause (23FE) of section 10 of the Act, shall be taxable and the income received in earlier previous years on which investments, which has been claimed to be exempt in such years, shall also become taxable in the previous year during which the three years' rule was violated. Thus para 4.1 carves out an exception to the "general rule".

4.4.3. Para 4.3 carves out an exception to the "general rule" and provides that in case of violation of minimum threshold by the AIF or domestic company or NBFC, exemption under the said clause shall not be available to the specified person the previous year in which the violation took place and all subsequent previous years. It may be noted that para 4.1 (w.r.t the three years' rule) and para 4.3 (relaxation for the violation of minimum threshold) are exceptions to the "general rule" and any other violation of any of the applicable conditions provided under clause (23FE) of section 10 of the Act or prescribed under Rule 2DB of the Rules or under Circular No 15 of 2020, dated the 22nd July, 2020 with F No. 370142/26/2020-TPL (other than the conditions for which relaxation is provided under paragraph 4.4.4 of these guidelines) by the specified person will be treated in the same way as provided under paragraph 4.1 i.e. where any income which has not been included in the total income of the specified person due to the provisions of clause (23FE) of section 10 of the Act, shall be chargeable to income-tax as the income of the specified person of the previous year during which such specified person fails to satisfy any of the conditions of the said clause.

4.4.4. Further, the following conditions have been specified in the notifications issued in the case of a specified person being either a SWF or PF:

a. The specified person shall get its books of account audited for the previous years referred to in clause (i) by an accountant specified in the Explanation below sub-section (2) of section

288 of the Act and furnish the Audit Report in the format annexed as Annexure to this notification herewith at least one month prior to the due date specified for furnishing the return of income under sub-section (1) of section 139 of the Act

b. It shall maintain a segmented account of income and expenditure in respect of such investment which qualifies for exemption under clause (23FE) of section 10 of the Act.

4.4.5. It is clarified that if the specified person, being a SWF or PF, fails to meet any of the conditions specified in the notification (referred to in paragraph 4.4.4), during any subsequent previous year then income of the said specified person ,being a SWF or PF, which has been exempted during any previous year earlier under the said clause preceding such previous year, shall not be withdrawn solely because of the reason of violation of any one or both of the conditions mentioned in para 4.4.4 above, during the subsequent previous year. However, income of the specified person, being a SWF or PF, of the previous year in respect of which violation of any one or more of the conditions mentioned in para 4.4.4 above has taken place and for all subsequent years shall not be exempted under the said clause. This is another exception to the "general rule".

4.5. Computation of the capital gains arising to the specified person on account of the transfer of their holding in domestic company or non-banking finance company

4.5.1. Sub-rule (5), (6) and (7) of rule 2DCA provide for the formula to compute the income of specified person exempt under clause (23FE) of section 10 of the Act from the investment in the form of debts, share capital or unit in domestic company under item (d) and in NBFC under item (e) of sub-clause (iii) of said clause, either directly or through AIF, (hereinafter referred as "eligible capital asset"). The following concerns have been raised, namely:-

(a) these domestic companies or NBFC may, at a later stage, transfer their investment/lending in eligible infrastructure entities, made out of the eligible capital assets held by the specified person in such domestic company or NBFC (hereinafter referred as "downstream investment/lending") during the course of time.

(b) As per the provisions of the rule 2DCA of the rules, the exempt income of the specified persons, including the capital gains on eligible capital assets will be calculated as per sub-rule (6) and (7) of rule 2DCA of the rules.

4.5.2. There may be a difference between the year in which the eligible capital asset is transferred by the specified person and the year in which the downstream investment/lending is transferred by the domestic company or repaid to NBFC. This may work to the disadvantage of the specified persons if transfer/repayment of downstream investment/lending precedes transfer of eligible capital asset. This is for the reason that the exemption with respect to capital gains on eligible capital asset will be

available to the specified person in the ratio of the eligible downstream investments/lending to the total investments/lending by the domestic company/NBFC, as on the last date of the previous year immediately preceding the relevant previous year (last date of the relevant previous year if eligible lending has been made during the relevant previous year), in accordance with sub-rule (6) or (7) of rule 2DCA of the rules. Since the eligible downstream investments were transferred by the domestic company in an earlier year, the value of "N", as specified under sub-rule (6) of rule 2DCA of the rule, will reduce and therefore the exemption available to the specified person with respect to the capital gain on the transfer of investment will also reduce and there may be cases where such exemption from capital gains is not at all available to the specified person in the subsequent year in which eligible capital asset is transferred on account of reduction in the value of the said "N".

4.5.3. In order to remove the difficulties, the capital gain arising on eligible capital assets to the specified person may need to be computed in the ratio worked out as per sub-rule (6) or (7) of rule 2DCA of the rules as on the date of transfer of each of the eligible downstream investments or repayment of eligible downstream lending. Hence, capital gain relating to transfer of eligible capital assets shall be computed as follows: —

(a) During the previous year when any eligible downstream investment is transferred, or downstream lending is paid, the capital gain on the eligible capital assets shall be calculated as on the date of transfer of the eligible downstream investment/repayment of lending where fair market value of such eligible capital asset as on the date of transfer/repayment of the eligible downstream investment/lending shall be used for computing the capital gains on the date of transfer of the eligible downstream investment/repayment of lending ;

(b) At the time of subsequent transfer of such eligible capital assets by the specified person, the fair market value, as referred to in clause (a) of this para shall be deemed to be the cost of acquisition of such capital asset and capital gains chargeable to tax, shall be computed accordingly,

4.5.4. For the purposes of these guidelines, "fair market value" means,—

(i) in a case where the eligible capital asset is listed on any recognised stock exchange as on the date of transfer/repayment of eligible downstream investment/lending, the highest price of the capital asset quoted on such exchange on the said date:

Provided that where there is no trading in such asset on such exchange on the date of transfer/repayment of eligible downstream investments/lending, the highest price of such asset on such exchange on a date immediately before such date when such asset was traded on such exchange shall be the fair market value;

(ii) in a case where the eligible capital asset is a unit which is not listed on a recognised stock exchange as on the date of transfer/repayment of eligible downstream investments/lending, the net asset value of such unit as on the said date;

(iii) in a case where the eligible capital asset is an equity share in a company which is not listed on a recognised stock exchange as on the date of transfer/repayment of eligible downstream investments/lending fair market value calculated as per the provisions of sub-rule (2) of rule 11UA of the Income-tax Rules, 1962;

4.5.6. For the purposes of these guidelines, "recognised stock exchange" shall have the meaning assigned to it in clause (ii) of Explanation 1 to clause (5) of section 43 of the Act;

4.6. Secondary investment in infrastructure companies

4.6.1. As per the provisions of clause (23FE) of section 10 of the Act, the specified person shall invest in eligible infrastructure entities either directly or through AIF or a domestic company or NBFC or in an InvIT either directly or through AIF. The exemption under said clause is intended to promote investment in eligible infrastructure entities or InvIT.

4.6.2. Concerns have been raised that some of the specified persons may acquire the stake in eligible infrastructure entities or InvITs from any other person as secondary investment i.e. the specified person is buying stake from a person who had earlier invested in such entity/InvIT. Similarly, AIF or domestic company may invest the funds of specified persons by acquiring stake in eligible infrastructure entities or InvITs from any other person as secondary investment. Income on such investment may not qualify for exemption under the said clause as it is a secondary investment and not a first time investment in infrastructure made between 1st April, 2020 and 31st March, 2024.

4.6.3. In order to remove the difficulties, it is hereby clarified that the following transfers of capital asset, between 1st April, 2020 and 31st March, 2024 (both days inclusive), shall be considered as investment under clause (23FE) of section 10 of the Act, eligible for exemption under the said clause subject to fulfilment of the conditions, namely:-

(a) Transfer of the shares or units of eligible infrastructure entity or InvIT by any person to a specified person after the date of notification of such specified person under clause (23FE) of section 10 of the Act; or

(b) Transfer of the units of AIF or shares of domestic company or NBFC, which has invested in an eligible infrastructure entity or InvIT, by any person to a specified person after the date of notification of such specified person under clause (23FE) of section 10 of the Act; or

(c) Transfer of the shares of domestic company or NBFC, which has invested in an eligible infrastructure entity, by any person to an AIF where such investment by AIF is made out of the funds of the specified person after the date of notification of such specified person under clause (23FE) of section 10 of the Act; or

(d) Transfer of the shares of an eligible infrastructure entity by a person to a domestic company where such domestic company has made investment out of the funds of the specified person after the date of notification of such specified person under clause (23FE) of section 10 of the Act.

4.7. Tax audit

4.7.1. Clause (vi) of the rule 2DB of the rules provides that the PF shall furnish a certificate in Form No. 10BBC, in respect of compliance to the provisions of clause (23FE) of section 10 of the Act, along with the return of income. Such certificate shall be signed by an accountant as defined in the *Explanation* below sub-section (2) of section 288 of the Act. The notifications under clause (23FE) of section of the Act, granting exemption to the PFs, have a similar condition.

4.7.2. Similarly, the Circular No 15 of 2020 provides that the SWF shall be required to furnish return of income along with audit report. The notifications under clause (23FE) of section 10 of the Act granting exemption to the SWFs have a condition that the assessee shall get its books of account audited by any accountant specified in the *Explanation* below sub-section (2) of section 288 of the Act and furnish the Audit Report in the format annexed as Annexure to the said notification at least one month prior to the due date specified for furnishing the return of income under sub-section (1) of section 139 of the Act.

4.7.3. Concerns have been raised that the specified person may have large scale global operations out of which the investments made in India may constitute a significantly lower proportion. In such scenarios, it would be difficult for the specified person to get accounts audited for their entire global operations for the purposes of making investment in India.

4.7.4. In order to remove the above mentioned difficulty, it is hereby clarified that where the specified person maintains (i) separate account with respect to the Indian investments and foreign investments and (ii) a segmented account of income and expenditure in respect of eligible investment which qualifies for exemption under clause (23FE) of section 10 of the Act, then the certificate of the accountant, as mentioned in paragraph 4.7.1 and 4.7.2 above, shall be based on audit of the books of account pertaining to the investments made in India only (both eligible and non-eligible investments) and not the global operations of such specified person.

4.8. Quarterly statement of investments

4.8.1. Clause (v) of the rule 2DB of the rules provides that the Pension Fund shall intimate the details in respect of each investment made by it in India during the quarter within one month from the end of the quarter in Form No. 10BBB. The notifications under clause (23FE) of section 10 of the Act, granting exemption to the PFs, also have similar condition.

4.8.2. Similarly, the Circular No 15 of 2020 provides that the SWFs shall be required to furnish a quarterly statement within one month from the end of the quarter electronically in Form II in respect of each investment made during the quarter in the annexure to the said circular. The notifications under clause (23FE) of section 10 of the Act, granting exemption to the SWFs, have similar condition.

4.8.3. Concerns have been raised that the specified persons may have made huge investments, both eligible and ineligible, inside India and outside India and providing details of all investments may be difficult for the SWF/PFs.

4.8.4. In order to remove the difficulties, it is hereby clarified that where the specified person maintains (i) separate account with respect to the Indian investments and foreign investments and (ii) a segmented account of income and expenditure in respect of eligible investment which qualifies for exemption under clause (23FE) of section 10 of the Act, the quarterly details of the investments, as referred to in paragraph 4.8.1 and 4.8.2 above shall be furnished only with respect to the eligible investments made in India.

(Neha Sahay)
Under Secretary, TPL- I

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1. PS/ OSD to FM/ PS/OSD to MoS(F).
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3. Chairman and Members, CBDT.
4. Joint Secretaries/ CsIT/ Directors/ Deputy Secretaries/ Under Secretaries, CBDT.
5. C&AG of India (30 copies).
6. JS & Legal Adviser, Ministry of Law & Justice. New Delhi.
7. Institute of Chartered Accountants of India.
8. CIT (M&TP). Official Spokesperson of CBDT.
9. Principal DGIT (Systems) for uploading on departmental website.

(Neha Sahay)
Under Secretary, TPL- I