POST–BUDGET MEMORANDUM 2022-23: DIRECT TAXES

INDEX

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<table>
<tr><th>Sr. No.</th><th>Subject</th><th>Comments / Recommendations</th></tr>
<tr><td></td><td colspan="2">General Representations</td></tr>
<tr><td>1.</td><td>Refrain from carrying out retrospective amendments</td><td>Rationale and issue:

➢ There are many amendments proposed in Finance Bill 2022 which are effective from year prior to F.Y. 2022-23 (AY 2023-24) which industry perceive to be retrospective since they impact tax liabilities of past years or current year’s advance tax liability. Some of them are briefly as follows :-

• Disallowance of education cess w.e.f. A.Y. 2005-06

• Exemption of amount received for medical treatment and on account of death due to COVID-19 w.e.f. A.Y. 2020-21

• Disallowance of benefits/perquisites in violation of law and compounding fees w.e.f. A.Y. 2022-23

• Disallowance under section 14A in absence of exempt income during an assessment year w.e.f. A.Y. 2022-23

➢ The amendment for Covid 19 relief is reconcilable since Covid 19 pandemic started from A.Y. 2020-21 and it is beneficial to taxpayers. Others have impact of overruling the court decisions favouring the taxpayer.

➢ On the other hand, the amendment to s.43B which also seeks to change the legal position laid down in SC ruling in the case of M M Aqua Technologies Ltd (129 taxmann.com 145) in the context of conversion of unpaid interest into debentures is applicable from A.Y. 2023-24 which is truly prospective.

➢ Another significant feature is wherever the amendments are made with effect from current year, the language used indicates as if the law was always required to be interpreted in the manner proposed by the amendment (eg. ‘for the removal of doubts’, ‘shall be deemed to have always’). Use of such language creates uncertainty for the taxpayers whether the amendment is proposed to be retrospective or prospective.</td></tr>
</table>

Sr. No.	Subject	Comments / Recommendations
		➢ The Government's professed tax policy is not to make retrospective amendments. The recent amendment made by Taxation Laws (Amendment) Act 2021 to remove the retrospective effect of indirect transfer related amendment for taxpayers who are ready to settle all outstanding case is a salutary step which clearly manifests the Government's commitment to such policy. ➢ The justification provided in Explanatory Memorandum for such retrospective amendments is that the interpretation by the courts is not in accordance with legislative intent and hence the amendment is made in order to make the legislation clear and to make it free from any misinterpretation. It is submitted that this will be true for any amendment which seeks to overturn a court ruling in favour of taxpayer. Even the retrospective amendments made in respect of indirect transfer in 2012 were justified as bringing out the correct legislative intent but were subsequently made prospective considering the significant damage it caused to India's attractiveness in the eyes of international investors. ➢ The retrospective amendments create tax uncertainty for businesses and vitiate the investment climate in the country. It sends out wrong signal to foreign investors that tax risk on account of sudden changes in tax law is very high. It adversely impacts 'ease of doing business' in India ➢ Another aspect of concern for the industry is the statements made in the Explanatory Memorandum about interpretation given by the High Courts or various ITATs being against legislative intent. It is the constitutional duty of the courts to interpret the law on the basis of judicially settled principles of interpretation like literal interpretation, harmonious interpretation, Heydon's mischief rule, etc. If the Government feels that a particular interpretation by the Court is not correct and/or not aligned with legislative intent, it has right to appeal till Supreme Court. **Recommendations:** ➢ The Government should not deviate from its professed tax policy of not making any retrospective amendment which puts additional tax burden on the taxpayer. All the amendments proposed in the Finance Bill 2022 which adversely impact taxpayer's liability for financial years upto F.Y. 2021-22 should be made truly prospective on lines of proposed amendment to s.43B.

Sr. No.	Subject	Comments / Recommendations
		➢ Even otherwise, it may be desirable and helpful to the industry if amendments to the law are made immediately following a ruling contrary to the obvious legislative intent. The litigation can be nipped at the bud if such amendments are made immediately. This may not only remove uncertainty but also prevent Taxpayers from suffering retrospective demands due to taking a position on the basis offavourable court rulings prior to the statutory amendments. Else, the Government should wait for final outcome of the litigation by Supreme Court and then make truly prospective amendments on lines of s.43B. The current policy of making 'clarificatory' amendments does not help either the taxpayers or the Government to curb litigation. ➢ The Government should also refrain from using phrases like 'for removal of doubts' or 'shall be deemed to have always' when making prospective amendments. Such phrases create more uncertainty for the taxpayers and create new grounds of litigation in addition to existing ones.
	Deduction of Expenses	
2.	**Denial of Deduction for interest payment on conversion of outstanding interest into an instrument to be allowed in certain bona fide cases**	**Rationale and issue:** ➢ FB 2022 provides that no deduction will be allowed for interest liability discharged by conversion of the same into debentures or any other instrument by which the liability to pay is deferred to a future date. ➢ The amendment to s.43B appears to be intended to overturn the ratio of SC ruling in the case of M.M. Aqua Technologies Ltd (129 taxmann.com 145) but with a truly prospective effect from A.Y. 2023-24. The question before Supreme Court in that case was whether conversion of outstanding interest to debentures is hit by Explanations to s.43B. The SC held that interest liability discharged by issuing debentures tantamounts to 'actual payment' and allowed the deduction u/s. 43B. This was in context of following factual scenario before the SC - • payment by way of debentures was mutually agreed between parties • such arrangement is not covered by express language of the hitherto existing Explanation which disallows interest payment converted to loans • it resulted in extinguishment of interest liability in the year of deduction and

Sr. No.	Subject	Comments / Recommendations
		• there was no misuse of s.43B inasmuch as the lender had offered the interest income to tax in its own assessment ➢ One significant aspect which was considered by the SC, while ruling that conversion of unpaid interest into debentures constituted actual payment, was that the lender (ICICI in that case) had offered the interest income to tax on conversion into debentures. Hence, the SC held that there was no abuse of s.43B. ➢ Post amendment vide FB 2022, if the unpaid interest is converted into debentures or any other instrument by which liability to pay is deferred to a future date, it will be allowed as deduction only when such debentures or instruments are redeemed. ➢ On a literal reading of the proposed amendment, issue arises whether disallowance will get triggered in the hands of the borrower even if the lender has recognised interest income on conversion into debentures and offered it to tax in his own assessment. ➢ It is not correct to effect disallowance in the hands of the borrower if the lender has recognised and offered the interest income to tax. The object of s.43B (read with the Explanation thereof) was to prevent the misuse of mercantile method of accounting whereby the borrower claims deduction of interest expenditure even if not paid to lender and lender like bank or financial institution covered by s.43D does not offer such interest income to tax. If the lender has offered the interest income to tax on conversion into debentures or any other instrument, then there is no such abuse or misuse. Accordingly, the borrower should get deduction for such interest. **Recommendations** ➢ A carve out may be provided in Explanations 3C, 3CA and 3D to provide that where the lender has offered the interest converted into debentures or any other instrument to tax in its own assessment, the interest expenditure will be considered as actually paid.

<table>
<tr><th>Sr. No.</th><th>Subject</th><th>Comments / Recommendations</th></tr>
<tr><td>3.</td><td>Relaxation of cases where disallowance arises on account of contravention of Indian or Foreign Law, regulation or Guideline</td><td>Rationale and issue:
➢ The amendment to s.37 by insertion of new Explanation 3 disallows the following expenses:-
• Expenditure incurred for any purpose which is an offence or prohibited by Indian or foreign law
• Provision of any benefit or perquisite, in whatever form, to a person, whether or not carrying on a business or exercising a profession, and acceptance of such benefit or perquisite by such person is in violation of any law or rule or regulation or guideline, as the case may be, for the time being in force, governing the conduct of such person
• Expenditure incurred to compound an offence under any Indian or foreign law.
➢ It is clear that post amendment to s.37, the business expenditure should not only be compliant with law from payer's perspective, but it should also be compliant from payee's perspective.
➢ However, there is nuance in the language of the three clauses of new Explanation 3. The first and third clauses refer to 'law for the time being in force in India or outside India for the time being in force'.
➢ However, the second clause relating to 'benefit or perquisite' is broadly worded and includes not only 'law' but also 'rule or regulation or guideline…governing the conduct of such person'.
➢ There is an apprehension whether a payment which is lawful but deviating from internal guidelines or code of conduct of recipient entity will also be hit by this provision. For instance, there may be an internal rule that employees shall not accept gifts beyond a particular value. If the payer gives a gift in breach of such internal guideline, there is apprehension whether it will be disallowed. If so, it will cast onerous burden on the industry and practical challenges to find out whether the gift is in violation of internal guidelines of the recipient's organisation which are not of statutory nature.
➢ Additionally, questions also arise on whether payments made for settlement of a commercial dispute under any settlement scheme/ arbitration/ mediation or out of court settlement will be covered by the disallowance. In this regard, courts have consistently made distinction between compensatory and penal payments. Compensatory</td></tr>
</table>

Sr. No.	Subject	Comments / Recommendations
		payments like payments to settle commercial disputes or penalties/damages for breach of contract awarded in arbitration proceedings have been held to not hit by Explanation 1 to s.37. ➢ Another issue which arises is whether payment made to settle a regulatory proceeding without admission of guilt will be hit by the new Explanation 3. In such cases, the matters are settled with consent of regulatory authority without admitting any guilt on part of the taxpayer or its employees. It is nobody's case that any offence has been committed. ➢ Furthermore, the moot question which arises is whether the Assessing Officer or authorities under Income tax law are competent to decide whether the taxpayer has committed any offence under any other Indian or foreign law when the appropriate regulatory authorities under the relevant law have not taken any action or the matter is pending in litigation and is not finally decided under the relevant law. The Madras HC in Cholamandalam MS General Insurance [TS-772-HC-2018(MAD)] was concerned with reinsurance premium ceded by Indian insurance companies (such as taxpayer) in favour of foreign reinsurers. The issue was whether reinsurance arrangement by taxpayer with a foreign reinsurance company was prohibited under Indian insurance laws and hence, whether reinsurance premium paid by the taxpayer to foreign reinsurance company was allowable u/s. 37(1). The Madras HC held that the AO/Tribunal have no jurisdiction to declare a transaction as prohibited/illegal under a different statute of Insurance Act or Regulations over which it has no control. Any such attempt by the Income tax authorities will amount to statutory overreach and unwarranted interference by the income tax authorities in the functioning of other judicial authorities. **Recommendations** ➢ It may be clarified that the reference to ***'rule or regulation or guideline…governing the conduct of such person'*** appearing in the second clause of new Explanation 3 refers to rules or regulations or guidelines which are of statutory nature and does not cover internal rules or guidelines of a company. ➢ It may further be clarified that payment made for settlement of a commercial dispute under any settlement scheme/ arbitration/ mediation or out of court settlement is not covered by disallowance under S.37(1) irrespective of whether the same is incurred in the context of domestic or foreign law. In other words, it may be clarified that the distinction between compensatory and penal payments is still intact even after insertion of Explanation 3.

Sr. No.	Subject	Comments / Recommendations
		➢ It may also be clarified that payment made to settle a regulatory proceeding without admission of guilt will not be hit by the new Exp 3. ➢ Additionally, clarification may be also be given that no disallowance can be made under new Exp 3 by the AO if appropriate regulatory authorities under the relevant law have not taken any action or the matter is pending in litigation and is not finally decided under the relevant law.
	Taxation of Virtual Digital Assets	
4.	**Exclusion of certain items from wide scope of definition of virtual digital asset (VDA)**	**Rationale and issue** ➢ Proposed definition of virtual digital asset (VDA) u/s. 2(47A) is wide in nature. It covers any information, code, number, token which are generated through cryptographic means "or otherwise". It covers any item with digital representation of value or which functions as store of value or unit of account or used for investment purposes, with or without consideration. Such asset should be capable of being transferred or stored or traded electronically. ➢ The provision empowers Central Government to exclude any digital asset from definition of VDA. Further, the Government is also empowered to notify assets which can be regarded as non-fungible tokens (NFTs) within the scope of VDA. ➢ In digital ecosystem, various companies like online gaming, payment systems, credit card or debit card, etc. generate reward points on usage of the platform or app. Such reward points or credit points are used by customers or app users while undertaking in-app activity. In most cases, the in-app reward points are not marketable in other platforms but can only be redeemed on the platform to which they pertain to. The reward points are stored in the wallet on the platform in digital manner. ➢ The definition of VDA refers to wide terms like "information", "token", "code", "number". It seeks to cover elements which are generated through cryptographic means "or otherwise". Given such wide meaning of the terms, it is possible that such definition may cover various other items like loyalty points, airline miles, discount coupons, digital bullion, etc.

Sr. No.	Subject	Comments / Recommendations
		➢ The Budget Speech on Finance Bill 2022 and Explanatory Memorandum to Finance Bill 2022 state that the intent of the scheme of VDA taxation is to tax voluminous transactions which take place in recent times. Generally, tremendous volume of transactions take place in case of cryptocurrencies. In case of reward points or miles or gift cards, such items are given on a particular platform for undertaking some activity on the platform like using as payment gateway, purchase or sale of goods, availing of services. There is no voluminous trading in such loyalty points or gift cards. ➢ The definition of VDA also seeks to cover assets which are digital representation of inherent value. Such wide definition may cover dematerialised shares or securities which are held with custodian as such shares and securities are digital representation of value. Likewise unit of account for investment purposes may cover virtual investment instruments like Mutual Funds, Bonds, Gold ETFs. The above assets are presently taxable on disposal under capital gains chapter or business chapter depending on the circumstances. Where the same get covered under wide definition of VDA, there will be ambiguity whether taxation will arise under new regime or other chapters of the ITL. Additional issues may arise on which withholding provision to apply, treaty implications etc. Surely, it is not the Government's intention to change the taxation regime for such well regulated capital market instruments. The wide definition of VDA is intended to cover new types of VDA which may emerge in future with disruption in technology. Hence, it is necessary to clarify that the definition of VDA does not extend to regulated capital market instruments. **Recommendations** ➢ It is recommended that considering the intent of the scheme of taxation of crypto-assets, following items may be specifically excluded – o Reward points, airline miles, gift vouchers etc. o Shares/ securities held in demat account o Online investment instruments like digital bullion, Gold ETFs, Mutual Funds o Banking Apps, payment gateways which merely facilitate transactions in fiat currency.

Sr. No.	Subject	Comments / Recommendations
5.	**Clarification on determination of cost of acquisition where VDA is held as inventory**	**Rationale and issue** ➢ S.49 and S.55 of ITA provide for determination of cost of acquisition of a capital asset. In case of VDA or cryptocurrencies, there is no specific provision which determines the cost of acquisition of VDA. ➢ Apart from investment purposes, taxpayer may also undertake trading in VDA on recurring basis. The taxpayer may undertake general purchase and sale in VDA in ordinary course of business. In such case, VDA shall be treated as stock-in-trade in hands of trader. ➢ S.115BBH(2)(a) provides that no deduction is allowable in respect of expense or allowance or set-off of any loss in computing income from transfer of VDA except for cost of acquisition. ➢ The exact scope of cost of acquisition is unclear. In case of traders who hold VDA as stock in trade may treat the VDA as inventory in books of accounts under applicable accounting standards. Under ICAI AS-2, inventory is required to be measured at cost or NRV whichever is less. Ind AS 2 also requires the inventory to be valued at lower of cost and NRV except in case of commodity broker-trader, where inventory is valued at fair value less cost to sell. ➢ The Income Computation and Disclosure Standards (ICDS) notified u/s. 145(2) are relevant for determining income computation under profits and gains from business or profession and income from other sources. S.145A(i) r.w. ICDS II provides for valuation of inventory at cost or NRV whichever is lower. ➢ In case of individuals who are not subject to tax audit, provisions of ICDS are not applicable. Individuals who are traders in VDA hold such items as inventory in ordinary course of business. In such case, in absence of applicability of ICDS, issue arises on determination of cost of VDA. **Recommendation** ➢ In case where VDA is held as inventory by all taxpayers, in order to provide consistency, it should be clarified that cost of acquisition of such inventory has to be determined basis principles of S.145A(i) r.w. ICDS II rather than general principles of accounting.

Sr. No.	Subject	Comments / Recommendations
6.	**Clarification on manner of computation of "cost of acquisition" referred to in S.115BBH(2)(a)**	**Rationale and issue** ➢ S.45(2A) provides that in case of an existing DEMAT account, where the shares/ securities are sold from such DEMAT account FIFO method shall be applied in order to determine the 'cost of acquisition' of such shares/ securities sold. ➢ The FB 2022 proposes to introduce a separate tax regime for crypto assets. In this regard, S.115BBH(2)(a) provides that no deduction is allowable in respect of an any expenditure or allowance or set-off of any loss in computing income from transfer ofVDA except for the cost of acquisition. ➢ S.45(2A) which mandates FIFO method for securities held in demat account is not proposed to be amended to cover VDAs. Since VDAs are stored in digital wallets, issue arises whether taxpayer is mandatorily required to apply FIFO method to determine 'cost of acquisition' or can taxpayer apply other basis like weighted average or LIFO **Recommendations** ➢ Where VDAs are held in digital wallet, it may be clarified whether taxpayer has to adopt FIFO or can adopt any other method like weighted average or LIFO for the purposes of computing 'cost of acquisition'.
7.	**Benefit of set off of loss from transfer of one VDA against gain from another VDA**	**Rationale and issue** ➢ S. 115BBH 2(a) states that while computing income from transfer of VDA, no set off of any loss shall be allowed 'under any provision of this Act'. ➢ S.115BBH(2)(b) states that no set off of loss from transfer of VDA computed under s.115BBH(1)(a) shall be allowed against income computed 'under any other provision of this Act'. ➢ S. 115BBH2(a) appears to be restrictive to disallow of set off of "any losses". On the other hand, a possible interpretation of sub-section 2(b) may suggest the restriction on set-off is in relation to losses computed under any "other" provisions of the Act. To that extent, under sub-section 2(b), losses arising from VDA transfer are permitted to be set off against profits arising from transfer of other VDAs. This raises an ambiguity on the correct interpretation of s.115BBH(2)(a) and s.115BBH(2)(b) vis-à-vis set off loss on VDA against profit on VDA.

Sr. No.	Subject	Comments / Recommendations
		➢ Since it is proposed to have a separate tax regime for income arising from transfer of VDAs, the loss on one VDA should be permitted to be set off against profit from same or other VDAs. Such treatment will be fair and equitable from tax policy perspective. Otherwise, the proposed regime where profits will be taxed at highest rate of 30% whereas losses are disallowed is not consistent with sound tax policy. It may be noted that unlike undisclosed incomes, transactions in VDAs are not in violation of any law – rather they are unregulated by any law as at present. The tax rate of 30% is a sufficient deterrent/disincentive from entering into such transactions but does not warrant disallowance of genuine losses. Even losses from unregulated speculative businesses like commodities are allowed to be set off against speculative profits and carried forward for 4 years. **Recommendations** ➢ It may be clarified that loss from one VDA can be set off against gain from another VDA and only net gain will be liable to tax @ 30% u/s. 115BBH. ➢ Such treatment will be in line with current provisions of S.73(1) as per which any loss arising from a speculation business shall not be set-off against profits and gains, except for against profits and gains of a speculative business.
8.	**Relaxing compliance for withholding u/s. 194S in case of exchange transaction**	**Rationale and issue** ➢ Proposed S.194S provides for levy of 1% TDS on consideration paid to a resident on transfer of VDA. The withholding is to be undertaken at the time of credit or payment whichever is earlier. In case where the consideration arises in kind or in transaction of exchange, the person responsible for paying consideration shall before releasing consideration ensure that tax has been paid in respect of such transaction. ➢ On a blockchain network, it is customary for users to exchange one VDA for another VDA for instance, USDT is paid in order to acquire Bitcoins. Such coins are stored in wallet of both buyer and seller on network or with a custodian in online manner. When a transaction takes place between buyer and seller on the blockchain for transfer of VDA, the transaction is concluded when the block is validated and encrypted on the network. Such transaction takes place within a short span of time and in an instantaneous manner. The consideration is released in form of VDA when the block is added to the chain.

Sr. No.	Subject	Comments / Recommendations
		➢ On the blockchain network, the transaction of transfer of VDA between two parties and release of consideration in event of exchange of VDA takes place at the same time. ➢ Hence, given that the transaction takes place online and in a quick manner, it will be onerous for the deductor to pay tax before release of consideration. ➢ Rule 30 of the Income-tax Rules, 1962 prescribes the time limit for payment of TDS i.e. (i) TDS to be paid on the date of deduction if challan is not furnished and (ii) TDS deducted is required to be paid before 7 days from the end of the month when tax is deduction or 30 April when the income is credited or paid in month of March where challan is furnished. The proviso to proposed S.194S prepones the date of payment of TDS in case of transactions on exchange of VDA by requiring the deductor to pay TDS before release of consideration on lines of existing TDS provision for lottery winnings u/s. 194B. But unlike lottery winnings, where the payment of lottery winnings in kind can be deferred till payment of tax, it is technologically not possible to ensure tax payment before release of consideration in barter of VDAs which happens instantaneously. **Recommendations** ➢ It is recommended that in order to avoid practically difficulty to payer, condition of payment of TDS 'before release of consideration' may be relaxed to provide that the tax can be paid on or before the due date for payment of TDS.
9.	**Clarification on application of TDS on transactions undertaken through crypto exchange**	**Rationale and issue** ➢ S.194-O provides that the e-commerce operator (EOP) is required to deduct tax at source on gross amount of sale or services credited or paid to e-commerce participant (EP) if the sale of goods or provisions of services of e-commerce participant is facilitated by e-commerce operator through its digital or electronic platform. ➢ EOP is defined under clause (a) a person who is engaged in owning, operating or managing digital or electronic platform for the purposes of electronic commerce. For cryptocurrency, intermediaries like crypto exchanges may qualify as EOP as they own, operate, manage platform for purchase or sale of cryptocurrencies in India. The exchanges connect buyers and sellers and enable purchase and sale of currency on the platform. Hence, cryptoexchanges are required to undertake TDS on gross amount of sale payable to seller of cryptocurrencies.

Sr. No.	Subject	Comments / Recommendations
		➢ Likewise, as per section 194Q, every buyer of goods who meets the specified conditions is required to deduct tax at source at the rate of 0.1% from the resident seller on payment or credit, whichever is earlier. VDA is likely to qualify as goods to fall under S. 194Q, in case TDS is not deducted under S. 194O. ➢ Vide Circular No. 17/2020 dated 29 September 2020 and 13/2021 dated 30 June 2021, CBDT provided exemption from two types of transactions viz: o Transaction in securities which are traded through recognised stock exchange o Transaction in securities which are cleared and settled by recognised clearing corporation ➢ Proposed S.194S provides that deductor is required to deduct tax at source at the rate of 1% on consideration arising from transfer of VDA at the time of credit or payment whichever is earlier. S.194S(8) overrides S.194-O and states that where transaction is covered u/s. 194S as well as S.194-O, tax shall be withheld u/s. 194-S. ➢ The proposed provision grants relaxation to cryptoexchanges from undertaking TDS under S. 194O on transaction of transfer of VDA. However, on certain platforms, buyers are not aware of the identity of the sellers. Similar torecognised stock exchange or commodity exchange, the buyers and sellers are not directly connected to each other. Hence, difficulty may arise in hands of buyers as they are not aware of details seller. ➢ CBDT Circulars providing relaxation in the context of transactions on recognised stock exchange will not apply for crypto-exchanges although difficulty faced is similar to those faced by recognized stock exchanges. **Recommendations** ➢ Since the buyer in a cryptoexchange may not be able to identify the seller of VDAs in crypto exchange, the TDS obligation may be clarified to be applicable to crypto exchanges who make payment to the sellers.
10.	**No multiple withholding on transfer of VDA for consideration in kind**	**Rationale and issue** ➢ S.194S(4) provides that a transaction on which tax is deducted u/s. 194S(1) shall not be subjected to TDS / TCS under any other provisions of this Act.

Sr. No.	Subject	Comments / Recommendations
		➢ VDAs can be utilised for paying consideration in many transactions. E.g. o Various crypto-platforms provide remuneration to its employees in form of VDA. o VDAs are paid to independent service providers as service fee ➢ In such event, qua the transferee of VDA, implications may arise u/s. 194S as VDA is transferred to the employee/ professional. It may be incorrect to state that the VDA is transferred for no consideration as transferor has availed consideration in kind i.e. in form of services from employee/ professional. ➢ From the perspective of transferor, since salary or professional fees are paid to employees or professional implications u/s. 192 or S.194J may arise. It is a settled principle that TDS is applicable where any sum is paid by deductor in kind to the service provider. ➢ However, s.194S(4) clarifies that the same transaction shall not be subjected to multiple TDS where TDS u/s. 194S is applied. But there could be ambiguity or confusion whether the payment of salary or professional fees in form of VDAs represent a single transaction from both payer's and payee's perspective or whether there are two different transactions viz. (a) payment of salary/professional fees and (b) transfer of VDA **Recommendations** ➢ It should be clarified that transaction of transfer of VDA against employment or professional services represents same transaction. It is recommended that the event should not be viewed as two different transactions i.e. transfer of VDA for consideration in kind and secondly,availing services by transferor of VDA by making payment in kind. ➢ As per CBDT Circular No. 720 dated 30 Aug 1985, multiple withholding provisions should not be applied on same transaction. Hence, it is recommended to clarify that once TDS is withheld u/s. 194S on transfer of VDA, the payment shall not be liable for any TDS under any other provision from perspective of transferor of VDA. In other words, S. 194S(4) shall override TDS in the hands of the transferor on the same transaction.

Sr. No.	Subject	Comments / Recommendations
11.	**Appropriate valuation rules to be prescribed for receipt of VDA as gift or inadequate consideration**	**Rationale and issue** ➢ Finance Bill 2022 proposes to amend definition of “property” under clause (d) of Explanation to S.56(2)(vii) to include VDA. Such definition of “property” is applicable in case of S.56(2)(x) by virtue of Explanation to S.56(2)(x). ➢ S.56(2)(x)(c) provides for taxation of income where property is transferred for NIL or inadequate consideration as compared to fair market value (FMV). The difference between FMV and consideration in excess of Rs. 50,000 is considered as income in hands of recipient. ➢ Explanation to S.56(2)(x) r.w. clause (b) of Explanation to S.56(2)(vii) defines fair market value of property as per prescribed method. Rule 11UA prescribes the manner of determination of FMV of property. ➢ The proposed amendment provides for gift taxation of receipt of VDA in hands of recipient where the VDA is received for NIL or inadequate consideration. While VDA has been included within the definition of property u/s.56(2)(x), there is no valuation mechanism prescribed for determination of value of VDA under Rule 11UA. ➢ In absence of valuation mechanism for determining FMV of VDA, it is difficult to determine income chargeable to tax under S.56(2)(x)(c). **Recommendations** ➢ Considering the nature of VDA and volatile nature of pricing of VDA, it is recommended that appropriate valuation rules should be introduced in Rule 11UA for valuation of VDA after giving due consideration to current market practices and without casting unreasonable burden on the taxpayers.
12.	**Determination of cost of acquisition where VDA received as gift is held as inventory**	**Rationale and issue** ➢ Proposed S.56(2)(x) provides that where VDA is received for NIL or inadequate consideration, the difference between FMV and consideration will be taxed as income in hands of recipient. ➢ On subsequent transfer of VDA, S.115BBH taxes income on transfer of VDA at the rate of 30%. While determining income from transfer of VDA, S.115BBH allows deduction of cost of acquisition of VDA.

Sr. No.	Subject	Comments / Recommendations
		➢ S.49(4) provides that "where capital gains arises from transfer of property" which is taxed u/s. 56(2)(x), the FMV determined u/s. 56(2)(x) r.w. Rule 11UA is taken as cost of acquisition. S.49(4) is triggered when property is held as a capital asset resulting in capital gains on transfer. Likewise, S.49(1) provides that where capital asset is acquired by way of gift, the cost to previous owner is considered as cost in hands of done. ➢ In the case of VDA, income from transfer will be subject to 30% tax under S. 115BBH. **For** this, it is not relevant whether VDA is held as a capital asset or stock in trade and to that extent, transfer of VDA will not result in 'capital gains' as such. Hence, issues may arise whether provisions of S. 49(4)/ 49(1) in the present form will apply to VDA transfer covered under S. 115BBH? If answer to above is negative, issue arises what should be considered as cost of acquisition of such VDA which is received under S. 56(2)(x)? ➢ Due to high fluctuation in value of VDA, it is possible that FMV of VDA determined at the time of receipt u/s. 56(2)(x) may be higher than FMV at the time of subsequent transfer. Such instance may lead to unintended double whammy in hands of the recipient of VDA. **Recommendations** ➢ It is recommended that S.49(4) may be amended in context of VDA to allow deduction of FMV which is taxed in hands of recipient u/s. 56(2)(x) irrespective whether VDA is held as capital asset or stock in trade.
13.	**Determination of situs for non-residents earning income from transfer of Virtual Digital Asset (VDA)?**	**Rationale and issue** ➢ S. 5 provides for taxation of income of NR which accrues/arises/ deems to accrue or arise in India. Section 9(1)(i) of ITL ('source rule') provides that any income accruing or arising, whether directly or indirectly, through or from any business connection in India, through or from any property in India, or through or from any asset or source of income in India or through the transfer of any capital asset situated in India, shall be deemed to accrue, or arise in India. ➢ The source rule under S. 9 is relevant for creating a charge on income of a non-resident taxpayer. Further, it requires property or capital asset or source of income to be located in India to tax any income accruing or arising through or from such property/ capital asset source of income.

Sr. No.	Subject	Comments / Recommendations
		➢ Proposed Section 115BBH provides for taxation of income from the transfer of any VDA. Further, proposed amendment to S. 56(2)(x) provides for taxation of receipt of VDA for NIL or inadequate consideration in the hands of recipient of such VDA. ➢ Taxation under the proposed provisions apply for both resident as well as NR taxpayers. However, for creating a charge in the hands of NR, it would be imperative that the income is taxable under S. 5/ 9 of the ITL. ➢ Issue arises in what circumstances VDA can be considered as located in India or having its situs in India, to trigger taxation under S. 5/ S. 9(1)(i) of the ITA. In other words, which place should be considered as of situs of a VDA? ➢ To illustrate, the above issue will be relevant to determine tax charge in cases like – o Where non-resident sells VDA through an Indian crypto exchange or o where non-resident sells VDA directly to a resident of India or o where the non-resident carries on trading in crypto assets through an Indian crypto exchange. o For residents of India to declare a VDA as foreign asset in its tax return in India. **Recommendations** ➢ Situs of VDA can be related to one of the following places – o Place of the residence of owner of VDA – This is supported by the HC rulings in India dealing with situs determination of intangible assets[1] as well as guidance of the UK HMRC guidance[2] o Place of IP Address of Block which represents the VDA – Each VDA is stored on a Block in the Blockchain which will have a unique IP Address of the node where the Block is created. Considering the VDA will always be stored on the particular Block, locale of such IP Address may be considered as situs of the VDA. o Place of underlying asset (where VDA is digital representation of an underlyingasset] – As per UK HMRC Guidance, where a virtual currency is issued as a representation of beneficial interest in any underlying

[1] CUB Pty Limited v. UOI &Ors. (2016) (71 taxmann.com 315) (Delhi HC); Followed in Mahyco Monsanto Biotech Ltd. v. UOI [74 taxmann.com 92]; Lal Products v. Intelligence Officer [WP © 13408/2009] [Kerala HC]

[2] CRYPTO22600 - Cryptoassets Manual - HMRC internal manual - GOV.UK (www.gov.uk)

Sr. No.	Subject	Comments / Recommendations
		asset (e.g gold bullion), the location of virtual currency is determined by reference to the location of the underlying asset. o Place of utilization/ exploitation of VDA (E.g. VDA frequently traded on a crypto-exchange or VDA used as payment made for services/ goods) ➢ Unlike shares, VDA is neither issued by any particular entity nor it is held in any digital account in any specific country. VDA is held in on a decentralised digital ledger (DLT) which is not based on any particular location, though it has a unique address/ number on a block chain and is also owned by a person. It is recommended that o Situs of VDA may be linked to place of residence of owner of such VDA. Such parameter of situs will be certain, easily determinable and can be applied for all forms of VDA including NFTs, stable coins. ➢ As a second option, place of IP Address of the block may be considered which will be unique and determinable through the information on the DLT. It is recommended that the situs of VDA should not be place of exploitation which may vary at different points of time. Further, place of underlying asset may be relevant only for stable coins whose value is pegged to an underlying asset. This will also have additional consideration of finding situs of the underlying asset.
14.	**Guidance to be provided on VDA transaction in form of mining and staking**	**Rationale and issue** ➢ Proposed S.115BBH provides for taxation of income arising on transfer of VDA. S.115BBH provides that income from transfer of VDA shall be taxed at 30%. While computing income from transfer of VDA, only cost of acquisition is allowed as deduction. S.115BBH(2) does not allow deduction of any other expenditure or allowance or set-off of losses. Further, loss arising on transfer of VDA is not allowed to be carried forward to subsequent tax years. ➢ The proposed scheme of taxation of S.115BBH provides for transfer of VDA at the time of sale or transfer by owner to buyer. ➢ In blockchain technology, cryptocurrencies are generated by way of mining process or staking process. Under mining process, miners use large computation powers to solve complex mathematical problems generated by the network. Solving the mathematical problem involves computational efforts – resulting in high energy consumption, whereby each miner makes calculations to verify the transaction and share their results with the

Sr. No.	Subject	Comments / Recommendations
		network, working on a competitive basis since a reward is credited to the miner who finds the solution first. ➢ As an alternate to mining process, certain blockchains also employ proof of stake system[3] assigns shares of validation rights to users according to the stake they have in the blockchain. In such a system, validators are not called miners – but ‘forgers’ or ‘stakers’. Stakes can be measured differently (amount of tokens owned, holding period, amount of assets locked in the blockchain as collateral). Forgers or stakers must have a minimum stake in the blockchain to be able to participate in the verification process: they ‘stake’ their own tokens to have the right to verify a transaction and are credited a transaction fee or new tokens. No mathematical equations are therefore required to verify a transaction. This makes the verification process considerably more energy efficient. ➢ Thus, miners or stakers receive VDA on undertaking mining or staking transaction over a blockchain network. The miners or stakers are in receipt of VDA rather than transfer of VDA. ➢ Presently, proposed S.115BBH covers only income arising from transfer of VDA. There is no guidance under ITA for tax treatment of income arising in form of VDA through mining and staking activity. **Recommendations** ➢ As per OECD Report 2020 on Taxing Virtual Currencies: An Overview of Tax Treatments And Emerging Tax Policy Issues, even if existing tax laws are applicable for taxation of VDA received on mining or staking activities it is recommended that it is necessary to provide clarity and certainty for taxpayers. The CBDT may consider issuing circular or guidance on tax treatment arising on creation of VDA being cryptocurrency via mining/forging, initial coin offerings and airdrops and related expenses.

[3] Source: OECD Report 2020 on Taxing Virtual Currencies

Sr. No.	Subject	Comments / Recommendations
15.	**Scheme for Taxation of Non-Fungible Tokens (NFT's) as introduced by FB 2022**	**Rationale and Issue** ➢ A non-fungible token (NFT) is a unique and non-interchangeable unit of data which is stored on a digital ledger termed as blockchain and can be traded with interested buyers[4]. ➢ The process of creation of NFT involves creating a digital record of the underlying asset on the blockchain. The underlying asset may be a physical asset such as a painting or a digital asset such as a music video. At times, a gas fee may be charged by the blockchain administrator/NFT marketplace for creation of the NFT on the blockchain. ➢ An NFT is a proof, i.e. token of ownership of the underlying digital/physical asset, which is stored on a secured digital ledger, i.e. blockchain. It may be equated to a share certificate evidencing ownership of the share. An NFT may not have any independent attributable value which can be delinked from the underlying asset. ➢ Many physical assets such as paintings and real estate[5] have been sold recently via NFTs and the NFT market has been booming recently. These NFTs can also be used for secondary transfers of the underlying asset or spreading the ownership of underlying asset amongst several persons who can then independently sell their fractional ownership. ➢ Under the present ITL, tax implications on sale of NFT may be dependent on the tax implications of the sale of the underlying digital/physical asset tagged to the NFT. ➢ The sale of the underlying asset may be taxed under the head 'income from business or profession', 'income from capital gains' or 'income from other sources' depending on the intent of holding the underlying asset, nature of asset and nature of income earned. Additionally, a deduction may be possible for costs associated with minting, i.e. creation of the NFT (gas fees) and charges paid to the NFT marketplace on the sale of the NFT under the respective head of income. ➢ In this background, considering that NFT is merely a title record of underlying property, in the context of the present scheme of tax for VDA proposed to be introduced vide FB 2022, it may not be justified to accord the same stiff tax treatment as is being proposed for VDAs like bitcoins. This is primarily because bitcoins and NFTs do not share the same attributes and risk profile for taxpayers and Government. ➢ FB 2022 proposes to insert – ○ S.2(47A) to define the term 'virtual digital asset'. S.2(47A) (b) states that VDA means, inter alia,*"a non-*

[4]https://en.wikipedia.org/wiki/Non-fungible_token

[5]https://propy.com/browse/propy-nft/https://www.thehindu.com/scitech/technology/internet/virtual-real-estate-plot-sells-for-record-24-million/article37656785.ece

Sr. No.	Subject	Comments / Recommendations
		fungible token or any other token of similar nature, by whatever name called". The class of NFT to be covered by the VDA definition as per s.2(47A) will be notified by the Central Government in the Official Gazette (hereinafter referred to as 'notified NFTs'). But the definition also covers any other token which is similar in nature to notified NFTs without requirement of separate notification for such other NFTs. o S.115BBH states that any income from transfer of a VDA (and consequently NFTs) shall be taxed at 30 per cent with no deduction allowed except for cost of acquisition. No set of off loss incurred on transfer of a VDA (and consequently NFTs) shall be allowed against income computed under any other provision o S.194S to provide for withholding at 1% on transfer of VDAs (and consequently NFTs) to a resident person subject to certain specified conditions. o Receipt of a VDA (and consequently NFTs) for no consideration/inadequate consideration attracts tax in the hands of the recipient under s.56(2)(x) ➢ In light of the fact that an NFT is merely a title record of ownership of an underlying asset on the blockchain without any independent existence of its own which is very well covered within the present taxation, there is no need to impose a strict tax regime by equating NFTs with other VDAs like bitcoins. For instance, there is no dispute that a physical painting held by an art connoisseur is a capital asset and triggers capital gains on transfer for the transferor and gift taxation u/s. 56(2)(x) for the transferee if received for NIL or inadequate consideration. It is also covered by existing TDS/TCS provisions of s.194Q or 206C(1H) on sale to resident. There is no sufficient rationale for changing such normal tax treatment to a more stiff tax treatment as proposed in FB 2022 merely because the art connoisseur decides to tokenise such painting and sell NFT to one or more persons instead of physical painting.The same holds true for other digital assets like music album, poems, digital pictures, etc ➢ From a tax policy perspective, NFTs may not be comparable to other assets contemplated to be covered under VDA definition as per s.2(47A) proposed by FB 2022 such as bitcoin, Ethereum, etcwhich are not backed by an underlying asset.VDAs like bitcoin, Ethereum represents the asset in itself. The basis for the determination of the value of the NFT is definite, i.e. the underlying asset and hence it is more stable in nature, whereas the market forces of demand and supply may tend to lend VDAs like bitcoin and Ethereum like assets more volatility and risky from tax policy perspective. **Recommendation** ➢ The definition of VDA under s.2(47A) should exclude the NFT from its ambit. Accordingly, clause (b) of s.2(47A) *"a non-fungible* token *or any other token of similar nature, by whatever name called"* may be omitted from the

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<tr><th>Sr. No.</th><th>Subject</th><th>Comments / Recommendations</th></tr>
<tr><td></td><td></td><td>definition of VDA because the present scheme of taxation can effectively deal with the tax consequences on sale of underlying digital or physical assets. Mere tokenization of the same should not attract stiff tax consequences such as higher rate of tax at 30%, no allowance for any expenditure other than cost of acquisition and no set off of losses against income computed under any other provision of the ITL.</td></tr>
<tr><td></td><td colspan="2">TDS Related</td></tr>
<tr><td>16.</td><td>Rationalisation of TDS on business perquisites u/s. 194R @ 10%</td><td>Rationale and issue:
➢ S.28(iv) brings to tax value of any benefit or perquisite, whether convertible into money or not, arising from business or the exercise of a profession. This provision existed in the Act since A.Y. 1964-65. The effect of insertion of s.28(iv) was explained by CBDT Circular No. 20D dated 7 July 1964 as follows :-
“The effect of the above-mentioned amendment is that in respect of an assessment for the assessment year 1964-65 and subsequent years, the value of any benefit or amenity, in cash or kind, arising to an assessee from his business or the exercise of his profession, e.g., the value of rent-free residential accommodation secured by an assessee from a company in consideration of the professional services as a lawyer rendered by him to that company, will be assessable in the hands of the assessee as his income under the head Profits and gains of business or profession.”
➢ It is now proposed to introduce a TDS provision u/s. 194R to require the payer of such benefit to deduct tax @ 10% on payments to residents. It may be noted that the text of the amendment as proposed does not give power to remove difficulties in the application of this provision.
➢ We appreciate that the new TDS on provision of business perquisites is intended to gather information by the Tax Department. It will also help the beneficiaries since the information will appear in their Form 26AS/AIS and nudge them to pay correct amount of tax thereon. However, the new TDS provision raises several practical challenges for the industry.
➢ In this regard, one may also note the provisions of S. 40(a)(v) in operation for AY 1969-70 to 1971-72 which was later replaced by section 40A(5). Both the provisions employed very similar language wherein, any expenditure which resulted directly or indirectly in the provision of any benefit or amenity or perquisite to an employee or any expenditure or allowance in respect of any assets of the assessee used by such employee either wholly or partly for his own purposes or benefit, was not allowable as deduction in computing the taxable profits of the</td></tr>
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Sr. No.	Subject	Comments / Recommendations
		business or profession to the extent the aggregate of such expenditure and allowance exceeded a specified threshold. ➢ In this regard, S. 40A(5) was omitted w.e.f. 1 April 1989 to end the artificial disallowance of expenses actually incurred and bring it closer to real income. ➢ Similarly, Fringe Benefits Tax (FBT) was introduced from 2005 to tax fringe benefits enjoyed by employees through a surrogate measure of specified percentage of expenditure incurred by the employer under different accounting heads. However, it was withdrawn in 2009 recognizing that FBT caused significant compliance burden for the industry. ➢ It is submitted that the new TDS u/s. 194R will result in similar compliance burden for the industry disproportionate to the benefit to the Government by way of collection of additional taxes on business perquisites. It will open up new vistas of litigation on whether a particular expenditure results in ‘benefit’ or ‘perquisite’ for the recipient and if yes, what is the value of such benefit or perquisite. It is submitted that the industry should not be burdened with disproportionate compliance merely with a view to collect the last rupee of tax revenue. Rather the information gathering of the Tax Department should be strengthened to encourage voluntary compliance and enforcement of coercive measures under the existing law against tax evaders. ➢ The new TDS provision creates compliance hurdles in relation to valuation of the benefits or perquisites so sought to be taxed. In absence of valuation rules for perquisites on lines of Rule 3 for salary perquisite, there is challenge on valuation of the perquisites to deduct tax. Circular No. 20D provides example of rent-free residential accommodation provided to lawyer as an instance of perquisite taxable u/s. 28(iv). The valuation rules for providing rent-free or concessional accommodation to employees has undergone changes from time to time and since 2001 it is linked to percentage of salary paid to the employees to avoid the practical difficulties of ascertaining the fair value of such accommodation. If same yardstick is used to value business perquisites (like percentage of professional fees paid), it can cause immense practical difficulty. ➢ Separately, there is distinction between bonafide selling expenditure and personal benefits. A company may organise conference of its dealers at a resort to explain its business strategy, new products, set sales targets, etc. Predominant time may be spent on bonafide business activity. Leisure activity may be incidental. In such case, the whole of the expenditure incurred by the company is for official purposes.

Sr. No.	Subject	Comments / Recommendations
		➢ In many cases, freebies given have a definite business purpose of sales promotion. For instance, an equipment (-say, printer) may be given free with the object that the recipient will buy the consumables (like toner) required to run such equipment from the taxpayer. The equipment is used for business purposes of recipient. In this case, there is effectively no 'benefit' or 'perquisite' for the recipient. If on one hand the value of equipment is not taxed in the hands of the recipient, the recipient is also not entitled to depreciation on such asset in absence of any 'actual cost' incurred by him. ➢ Free medical samples distributed to doctors has been held by SC in the case of Eskayef Ltd. etc. (245 ITR 116) as a sales promotion measure. In FBT regime, it was clarified that free samples of medical and other products distributed to doctors, trade or consumers was liable to FBT. Similarly, it was clarified that freebies like tattoos, cricket cards or similar products, to trade or consumers was liable to FBT. The free samples are customary business practice to increase the awareness of the company's products. There is no element of personal benefit for the recipient like doctor who dispenses them to his patients. Similarly, the cost of freebies like tattoos, cricket cards or similar products is embedded in the price of the main product. They are akin to special discount for making a product popular. ➢ CBDT in its Circular No. 8/2005 dated 29 Aug 2005 in context of erstwhile Fringe Benefits Tax had clarified that the following benefits constitutes ordinary selling expenses and/or reduction from sales price and hence not liable to FBT:- • Sales discount or rebates allowed to wholesale dealers or customers from the listed retail price • Incentives given to distributors for meeting sales targets (including free goods given as incentive to distributors for achieving certain sales and cash incentives adjustable against future supplies) • Bonus points given to credit card customers ➢ If interest free or concessional loan is given by parent to subsidiary or to a customer or vendor, issue arises whether it will be considered as benefit or perquisite liable to TDS. It may be recollected that similar issue arose in context of salary taxation in the past. The SC in Salgaocar v CIT [243 ITR 383] held that not charging interest to the employee-director to whom the company advanced interest-free loans cannot be regarded as a perquisite in absence of a specific provision. This decision is now superseded by Rule 3(7)(i) which treats interest free or concessional loan as a perquisite for salary taxation.

Sr. No.	Subject	Comments / Recommendations
		➢ In the above case, the value of benefit from interest free loan is already taxed in the hands of the recipient since he does not claim any interest expenditure on the said loan and hence, his business income is higher to that extent. If there is additional imputation of income, it will result in double taxation. To provide a simple illustration if a parent provides interest free loan of Rs. 1 Cr to a subsidiary, the subsidiary does not recognise any cost towards interest expenditure and hence, its business income already captures the value of such benefit. Despite this, if an additional notional interest income – say, Rs. 10 lakhs is imputed in its hands, then logically the same income should be allowed as deduction in its hands since the loan is used for business purpose and s.36(1)(iii) grants deduction for interest paid on capital borrowed for business purposes. If such deduction is not granted, it will result in double taxation. This can be understood by considering a comparable example where in one case (SubCo1), the loan is given at 10% interest and in another case (SubCo2), the loan is given on interest free basis. In SubCo1's case, there will be no imputation of notional interest income u/s. 28(iv) and it is also entitled to claim Rs. 10 lakhs as deduction u/s. 36(1)(iii). In SubCo2's case, since no interest is paid, business income is already higher by Rs. 10 lakhs. If there is further addition of Rs. 10 lakhs u/s. 28(iv), its income will rise to Rs. 20 lakhs resulting in double taxation. ➢ Sometimes freebies like IPL tickets, holiday package, television sets, computers, mobile phones, etc. are given to distributors/agents being legal entities which are actually availed by individuals associated with entities like directors/partners/employees, etc. Issue arises in whose name tax should be deducted in such cases – legal entity or individuals availing the benefit? ➢ Generally, industry follows a conservative approach for TDS considering that the payee can claim TDS credit while filing return of income whereas the payer runs the risk of disallowance of expense u/s. 40(a)(ia) in addition to withholding tax default proceedings. Following similar approach on business perquisites will create commercial disputes with the vendors or customers since the beneficiaries may resist such TDS on the ground that there is no 'benefit' or 'perquisite'. The taxpayer company may need to gross up the tax to ensure TDS compliance which will increase the cost of compliance for the industry. Also, wherever the recipients who have suffered TDS desire to put up claim of there being no 'benefit' or 'perquisite', they will suffer litigation if they claim TDS credit without offering corresponding income to tax. All in all, the proposal is a retrograde proposal which increases compliance burden for industry and creates potential for litigation disproportionate to benefit to Government by way of additional collection of taxes.

Sr. No.	Subject	Comments / Recommendations
		Recommendations ➢ The new TDS provisions increases the compliance burden for the industry without leading to commensurate generation of revenue and has potential to give rise to new areas of litigation which is contrary to the Government's intent to reduce litigation. It goes against the 'ease of doing business' philosophy of the Government. Given this and the potential for deviation from taxation of only real income under the ITA as highlighted above, it is recommended to drop the proposal of introduction of new TDS provision under S. 194R. Without prejudice to the above, even if S. 194R is to be retained, the following alternative recommendations may be considered. ➢ It is recommended to issue detailed guidelines on various instances covered under section 194R. Specific exceptions may also be notified which would not be covered as benefit or perquisite to make the law free from interpretation. Additionally, it is strongly recommended that the new TDS provision may be deferred till industry is provided full clarity on above referred issues. The guidelines may be issued after adequate public consultation. ➢ The existing provision of S.295(2)(c) gives power to CBDT to prescribe rules for determination of the value of any perquisite chargeable to tax under the Act in such manner and on such basis as appears to CBDT to be proper and reasonable. The CBDT can use this power to prescribe valuation rules for business perquisites on lines of Rule 3 for salary taxation. In addition, the CBDT may also take power to remove difficulties on lines of similar power taken for TDS u/s.194-O and 194Q, TCS u/s. 206C(1H), TDS u/s. 194S, etc. ➢ While prescribing such valuation rules, the CBDT may also clarify the distinction between bonafide business expense and personal perquisite. For instance, in salary perquisites, the distinction between performance of official duties and personal benefit is well recognised in Rule 3. Refer following instances :- • In case of travelling, touring, accommodation provided for holiday availed by employee, it is clarified that if official tour is extended as vacation, expenditure incurred on vacation will be treated as perquisite. If family member accompanies employee on official tour, expenditure on family member is treated as perquisite. Thus, expenditure incurred on official tour for employee is not treated as perquisite. • Credit card expenses incurred wholly and exclusively for official duties is not treated as perquisite. • Club payments incurred wholly and exclusively for official duties or health club, sports and similar facilities provided uniformly to all employees by the employer is not considered as perquisite.

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<tr><th>Sr. No.</th><th>Subject</th><th>Comments / Recommendations</th></tr>
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Use of employer’s assets like laptops and computers is not considered as perquisite
Expenses on telephone expenses including mobile phone is not considered as perquisite.
➢ Sales discount or rebates allowed to wholesale dealers or customers from the listed retail price or incentives given to distributors for meeting sales targets (including free goods given as incentive to distributors for achieving certain sales and cash incentives adjustable against future supplies) or bonus points given to credit card customers or similar benefits and rewards may be clarified as not constituting benefit or perquisite since they are ordinary selling expenditure and/or represent discount to the selling price.
➢ In case of provision of asset or interest-free/concessional loan, it may be clarified that it will be regarded as business perquisite only if the recipient does not use the asset or the loan for business purposes. Alternatively, with a view to avoid double taxation, it may be clarified the amount taxed as perquisite can be claimed as deduction by way of depreciation allowance for asset or revenue deduction for others.
➢ The SC in the case of Mahindra & Mahindra [2018] 404 ITR 1 (SC) held that monetary benefits are not covered by s.28(iv). Hence, it may be clarified that monetary benefits like trade discounts or rebates are not covered by TDS u/s. 194R.
➢ It may also be clarified whether TDS u/s 194R applies on benefits provided by pharma companies to doctors employed by hospitals and if yes, whether TDS to be made in name of hospitals or doctors.
➢ Further, whether deduction of tax is to be carried out in name of the individuals availing the benefit or the legal entity having business relationship with the payer may be expressly clarified.
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<tr><td>17.</td><td>Similar to S. 50C, permit a tolerable variance between stamp duty value and sale consideration of 10% for the purpose of S. 194-IA</td><td>
Rationale and issue:
➢ Section 194-IA is proposed to be amended by FB 2022 to provide that TDS is to be deducted at the rate of 1% on sales consideration payable or stamp duty value of property, whichever is higher.
➢ Section 50C permits tolerable band of 10% for immovable assets for difference between stamp duty value and actual sales consideration. However, proposed amendment in Section 194-IA does not consider the same. Hence, issue might arise where TDS is deducted on stamp duty value under section 194-IA whereas income is taxed on sales value under section 50C as it is within tolerance limit of 10%
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Sr. No.	Subject	Comments / Recommendations
		Recommendation ➢ To bring parity, it is suggested a suitable amendment be brought in the proposed amendment to consider stamp duty value of property or sales consideration whichever is higher subject to 10% tolerance limit.
18.	**Clarify exact controversy and intent behind amendment to S. 201(1A) whereby interest on TDS to apply in accordance with order made by the AO**	**Rationale and issue:** ➢ S.201(1A) is proposed to be amended to provide that where an order is made by an AO for TDS default, the interest shall be paid by the person in accordance with such order. ➢ The Explanatory Memorandum states that this amendment is to clarify the legislative intent in respect of computation of interest where the default for deduction/collection of tax or payment of tax continues. (i.e. the TDS amount is not paid by the defaulter) **Recommendations:** ➢ The exact controversy which is sought to be addressed by the amendment is not becoming clear from the language of the proposed amendment. If the intent is to prevent taxpayers from taking a stand that the TDS/TCS amount being unpaid, there is no terminal date for levy of interest u/s. 201(1A) and hence interest cannot be levied u/s. 201(1A), then the appropriate changes may be made to the language of the amendment to correctly bring out such intent
		Filing of Updated Return
19.	**Relaxation of Stringent Requirements for Eligibility to File Updated Return**	**Rationale and issue:** ➢ The Finance Bill 2022, via Section 139(8A) has proposed, a new provision, permitting taxpayers to file an updated return within 2 years from the end of the relevant AY, only if it results into additional tax liability, subject to additional tax payment of 25%/50%, as prescribed. ➢ The new window of taxpayer suo-motu filing updated return within a period of 2 years from end of AY with payment of 25%/50% additional tax is a very welcome and pragmatic step by the Government. It helps both taxpayers and Government. Taxpayers get opportunity to regularise their returns and avoid litigation. Government gets its fair share of taxes with additional compensation for delay.

Sr. No.	Subject	Comments / Recommendations
		➢ Unlike s.139(5) which permits revision of return only if taxpayer discovers 'omission or wrong statement', the new s.139(8A) does not provide any positive circumstance in which updated return may be filed. However, it gives a long negative list of circumstances in which updated return cannot be filed such as loss return or case of decrease of tax liability/increase of refund or cases where assessment/reassessment/re-computation/ revision is pending or completed. ➢ Due to long negative list, it appears the window is available only in a limited situation where taxpayer himself discovers the omission. It is not available where the omission is already detected by the Tax Department and action has been initiated. ➢ However, there are certain issues which require further consideration and clarity from the Government. **Recommendations:** ➢ Since the window is provided to correct only inadvertent and bonafide errors, the requirement of payment of additional tax of 25%/50% is quite punitive and virtually penalises the taxpayer. It may be noted that if the same additions are made in scrutiny assessment, there is scope for the taxpayer to urge that it does not constitute 'underreporting' and hence no penalty should be levied u/s. 270A. Alternatively, there is immunity from levy of penalty and prosecution u/s. 270AA if taxpayer pays up the demand and does not file appeal. Considering this, the requirement of payment of additional tax should be reduced to a more reasonable level – say, 5% to 10% to improve voluntary compliance in line with intent of the provision. ➢ Under the proposed s.139(8A), the taxpayer cannot file updated return if any proceeding for assessment or reassessment or re-computation or revision of income under this Act is pending. If return is filed but intimation u/s. 143(1) is not received, it is not clear whether an updated return be filed. This is because there is ambiguity whether the assessment or re-computation of income is pending in such case. In context of s.281, the SC in the case of Auto and Metal Engineers (229 ITR 399) held that filing of ROI leads to commencement of assessment proceedings and same may be regarded as pending till time limit of issuance of notice has expired. It is recommended to remove the ambiguity to make the provision clear and free from any misinterpretation. ➢ Similarly, if intimation u/s. 143(1) is received either accepting returned income or making some additions on account of certain apparent errors whereas updation of return is for a different issue, it should be permitted. Please note that the amount of additional tax is computed after increasing the amount of refund, if any, issued in respect of return filed earlier u/s. 139(1)/ (4)/ (5) which is possible only if intimation is received.

Sr. No.	Subject	Comments / Recommendations
		➢ Under the proposed s.139(8A), updated return cannot be filed if the Tax Department has discovered some incriminating information under various laws or through exchange of information with other countries or prosecution proceedings have been initiated under Chapter XXII. The taxpayer cannot file updated return even if the additional incomes sought to be offered by the taxpayer have no relation to such information with the Tax Department or prosecution initiated by the Tax Department. For instance, prosecution may be initiated for TDS default whereas the updated return may be filed by the taxpayer to offer some income which appears in AIS but was inadvertently not included in original return of income. There is no sufficient justification for not permitting such taxpayer to file updated return for unrelated incomes. Hence, it is recommended to amend the provisions to permit taxpayer to file updated return in respect of income which has no connection with the proceedings initiated by the Tax Department. ➢ Along with filing updated tax returns, there could also be a situation wherein simultaneous impact is applicable to tax audit report or transfer pricing reports. The current Finance Bill does not provide for corresponding provisions to permit amendment and filing of updated Tax audit reports or Transfer pricing forms. It is suggested a suitable amendment be provided in case of filing for updated tax audit reports or transfer pricing forms. ➢ There is no clarity on what happens to additional taxes paid if the updated return filed by the taxpayer is not accepted as valid return. It should be clarified in such cases that the additional tax will be treated as S.A / regular tax paid by the taxpayer and refunded/adjusted on completion of assessment/reassessment
20.	**Taxpayers filing Updated Return to be relieved from rigors of Black Money Act**	**Rationale and issue:** ➢ S.4 of the Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015 [“Black Money Act”] defines scope of undisclosed foreign income as that not disclosed in return of income specified in s.139(1)/(4)/(5). There is no consequential amendment proposed in the Finance Bill 2022 to amend this provision to cover updated return to be filed u/s. 139(8A). ➢ This will have effect of taxpayer offering foreign incomes or disclosing foreign assets in updated return not being protected from adverse implication of Black Money Act. **Recommendations:** ➢ Since the updated return requires payment of additional tax of 25%/50% and is a voluntary measure prior to any action taken by Tax Department, it is submitted that the taxpayer may be granted immunity from adverse

Sr. No.	Subject	Comments / Recommendations
		consequences of Black Money Act upon filing of updated return. The proposed amendment prohibits filing of updated return where the AO has information in respect of such person for the relevant assessment year in his possession under, inter alia, Black Money Act and the same has been communicated to him, prior to the date of furnishing the updated return. This is sufficient to safeguard Tax Department's interests. Hence, a consequential amendment may be made in S.4 of Black Money Act to add reference to return of income filed u/s. 139(8A).
	Reopening of Cases under New Reassessment Regime	
21.	**Dilution of Stringent Conditions for reopening of proceedings under New Regime introduced vide Finance Act 2021**	**Background and Existing provision** ➢ With a view to provide certainty to taxpayers and reduce litigation, Finance Act (FA) 2021 substantially revamped the procedure for reopening of cases under the Income Tax Act 1961 (ITA) w.e.f. 1 April 2021. ➢ The new procedure had the following features: • Shift from criteria of reason to believe that income chargeable to tax has escaped assessment to requirement of information which suggests that income chargeable to tax has escaped assessment. • Such information which suggests that income chargeable to tax has escaped assessment exists where the following objective criteria are met [Explanation 1 to S. 148],148 of the ITA], namely: a. Any information flagged in case of taxpayer for relevant AY in accordance with Risk Management Strategy (RMS) formulated by CBDT from time to time; b. Any final objections raised by C&AG to the effect that assessment in case of taxpayer for relevant AY has not been made in accordance with provision of ITA. • Formalisation of procedure for reopening of cases laid down by the Supreme Court in the case GKN Driveshaft [2002] 125 Taxman 963 (SC) in S. 148A of the ITA. • Need for approvals at various steps even prior to issue of notice for reopening to avoid frivolous/ arbitrary reopening by tax authorities.

Sr. No.	Subject	Comments / Recommendations
		➢ In addition to the above, the general limitation period for reopening was also reduced to 3 years from the end of the AY sought to be reopened as compared to the earlier 4 years. Moreover, while the extended limitation period was enhanced to 10 years from the erstwhile 6 years, such extended limitation period was to be applicable only in cases where tax authority was in possession of books, documents or evidence that income amounting to Rs. 50L or more which is represented in the form of an asset has escaped assessment [S. 149(1)(b)].) of the ITA]. ➢ In this backdrop, the Budget Speech of the Finance Minister in 2021 read with the Annexure thereof indicated that the extended limitation period of 10 years would apply only in limited cases involving "serious tax fraud/ evasion" where there is "evidence of undisclosed income" in the form of an asset. On similar lines, even the Finance Minister's reply to the Lok Sabha on the New Regime clearly stated that : *"……We have not increased the number of years for which the scrutiny or assessment survey could be done. What was six years was brought down to three years. Already for ten years, when it can be opened up, we actually brought in a condition by saying, only where up to Rs. 50 lakh of undisclosed income is in question, and only in such cases, will it be opened and it can be opened for up to ten years……"* **Proposed amendment** ➢ FB 2022 proposes to amend Explanation 1 to S. 148 of the ITA whereby the following objective criteria for presence of information which suggests that income chargeable to tax has escaped assessment are met: a. any information in the case of taxpayer in accordance with the risk management strategy formulated from time to time by CBDT; b. any audit objection to the effect that assessment in the case of the taxpayer was not in accordance with the provisions of the ITA; c. any information received from a foreign jurisdiction under an agreement entered into u/s. 90 or section 90A; d. any information requiring action in consequence of a tribunal/court order; e. information received under a scheme notified under section 135A (Dealing with information collected by tax authorities electronically under different provisions of ITA)

Sr. No.	Subject	Comments / Recommendations
		➢ Separately, even the requirement of multiple approvals prior to issue of notice u/s 148 has been dispensed with in favour of streamlined approvals for conduct of enquiry prior to issue of notice and issue of order stating that case is fit for reopening. ➢ Further, FB 2022 also proposes an amendment to S. 149(1)(b) wherein escaped income which hitherto was to be represented in the form of an asset, may now also take the following forms for application of Extended period of limitation: • Expenditure in respect of a transaction; • Expenditure in relation to an event or occasion; or • An entry or entries in the books of account. **Issue** ➢ Enlarging the scope of Explanation 1 to S. 148 by removing the requirement of flagging of information by RMS and/ or the coverage of all audit opinions (whether draft or final, whether C&AG or otherwise) within the ambit have the potential to enable tax authorities to reopen a host of cases. ➢ The amendments have the effect of reversing settled jurisprudence on the impermissibility of reopening of proceedings on the basis of borrowed satisfaction from audit opinion [illustratively refer Delhi HC in Kelvinator of India Ltd6]. ➢ Separately, questions also arise on the breadth of the requirement in S. 149(1)(b) which has been extended to cover cases where income is represented in the form of an expenditure or book entry. ➢ All in all, the above amendments dilute the very intention with which the Finance Act 2021 introduced the New Regime – viz. to provide certainty to taxpayers by limiting cases which can be reopened as well as reducing the time period and therefore, reduce litigation on account of reassessment.

[6] [2002] 256 ITR 1 (Delhi); Subsequently affirmed by SC in [2010] 320 ITR 561

Sr. No.	Subject	Comments / Recommendations
		Recommendation ➢ Considering the intent with which the New Regime was introduced vide FA 2021, it may be prudent to reconsider the amendments proposed by FB 2022 expanding the scope and ambit of the reopening of proceedings particularly amendments to Explanation 1 to S. 148 pertaining to information which suggests that income chargeable to tax has escaped assessment and S. 149(1)(b) pertaining to trigger of extended limitation period.
22.	**Restriction of Extended Limitation Period of 10 years to only cases of reopening pursuant to search, requisition or survey**	**Rationale and issue:** ➢ There was a paradigm change in the reassessment provisions by Finance Act 2021 to bring about transparency, objectivity and certainty. The taxpayers got an impression that earlier time limit of 6 years for normal cases was reduced to 3 years whereas 10 years time limit for search/survey cases involving undisclosed income represented by asset of more than Rs. 50 lakhs continued as it is. This was fortified by following statements made by Honourable Finance Minister and clarification provided in Explanatory Memorandum :- • “In serious tax evasion cases, where there is evidence of concealment of income” (FM Speech) • “Only if there is evidence of undisclosed income” (Part B of Budget Speech) • “In specific cases where the AO has in possession evidence that reveal that income escaping assessment, represented in the form of asset amounts to Rs 50 L” (Explanatory Memorandum) • “And if you have some proof in your hand, then you may open it” (FM’s reply to debate in Loksabha) ➢ However, it is now proposed that extended time limit of 10 years can also apply to undisclosed income represented by expenditure in respect of a transaction or in relation to an event or occasion or an entry/entries in the books of account. ➢ This gives an impression as if the time limit of 6 years with undisclosed income threshold of Rs. 1 lakh which existed prior to FA 2021 amendment is virtually extended to 10 years with higher threshold of Rs. 50 lakhs. In other words, the extended time limit of 10 years is not merely for search/survey cases but also for regular cases.

Sr. No.	Subject	Comments / Recommendations
		➢ This appears to be in direct conflict with the objectives as explained while making amendments through Finance Act. **Recommendation** ➢ In line with object of the new reassessment regime to bring certainty and closure of matters, it should be provided that the extended time period of 10 years is applicable only in cases where undisclosed income is found in search, survey or requisition proceedings and not otherwise.
23.	**Ambiguities on Reopening pursuant to information requiring action in consequence of a Tribunal/ Court order**	**Background and Issues** ➢ As discussed above, FB 2022 proposes to expand the objective criteria for information which suggests that income chargeable to tax has escaped assessment to include information requiring action in consequence of a Tribunal/ Court order. ➢ Various terms used in such provision, as inserted, are defined neither in the ITA nor in the General Clauses Act, such as “require”, “action”, “in consequences of”, “Court” and “Tribunal”. ➢ The afore-mentioned terms therefore lead to uncertainty on the scope of the amendment and may be susceptible to broad interpretation which may be unintentional. For instance, • Whether orders passed in the case of a Third Party can be said to “require action in consequence” thereof in the case of a Taxpayer? • Whether the AAR is a Tribunal, and if yes, whether an AAR ruling passed in case of a Third Party can result in reopening in the case of a Taxpayer despite such ruling not being applicable and binding to the Taxpayer? • Whether Tribunals constituted for the purpose of other laws such as NCLT would also be covered? **Recommendation** ➢ It is therefore recommended that the terms Court or Tribunal be specifically defined to cover Income Tax Appellate Tribunal, High Court or Supreme Court only. ➢ Further, it may be clarified that “information requiring action in consequence of a Tribunal/ Court order” would

<table>
<tr><th>Sr. No.</th><th>Subject</th><th>Comments / Recommendations</th></tr>
<tr><td></td><td></td><td>cover only those cases where the court has given a specific direction regarding reopening of proceedings for reassessment in the case of the same Taxpayer whose assessment is sought to be reopened.</td></tr>
<tr><td>24.</td><td>Reassessment pursuant to information received under a scheme notified u/s 135A</td><td>Background and Issue
➢ As discussed above, FB 2022 proposes to expand the objective criteria for information which suggests that income chargeable to tax has escaped assessment to include information received under a scheme notified u/s 135A of the ITA.
➢ In this regard, S. 135A of the ITA empowers CBDT to make a scheme for the purpose of calling information under various provisions of the ITA in a faceless manner such as (illustratively):
• S. 133 – Requiring firm or HUF to provide details of names, addresses of partners/ managers and members of HUF
• S. 133C – Verification of information in possession of tax authority relevant to any inquiry or proceeding
• S. 134 – Inspection of register of companies
➢ So far, the scheme is not yet notified by the government. Hence, it is not clear what sort and type of information would be covered by the scheme u/s.135A of the ITA.
➢ Further, reopening carried out based on information received u/s 135A will not be subject to pre-notice procedure for reassessment as per S. 148A pertaining to enquiry and taxpayer being given opportunity of being heard.
Recommendation
➢ Considering that reopening based on information u/s 135A is not subject to pre-notice procedure u/s 148A, it is recommend that the scheme to be notified u/s 135A also involve pre-notice procedure of conduct of enquiry post approval by Specified Authority, and giving taxpayer opportunity of being heard, to ensure that reassessment is carried out only on valid grounds.</td></tr>
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Sr. No.	Subject	Comments / Recommendations
	Business Reorganisation	
25.	**Section 170(2A) - Expanding the scope of “business reorganization” to include the scenarios which may not result in succession of business and rationalization of provision where predecessor continues to be in existence post sanction of court scheme**	**Rationale and issue:** ➢ The intent behind proposed s.170(2A) is that proceedings carried on in the name of predecessor should not be invalidated due to retrospective effect of court order which takes effect from a past date. ➢ For this purpose, it is deemed that the proceedings carried in the name of predecessor during the course of ‘pendency’ shall be deemed to be made on successor. The term ‘pendency’ is defined to mean the period between the date of filing application before competent authority and the date of receipt of competent authority’s order by the PCIT/CIT. ➢ The definition of “business reorganisation” is curious. It defines “business reorganisation” exhaustively to mean reorganisation of business involving the amalgamation or de-merger or merger of business of one or more persons. Hence it raises ambiguity whether it will include slump sale/exchange through a court order? What is the significance of reference to ’merger of business of one or more persons’ when it already refers to ’amalgamation’? ➢ In case of demerger, the demerged company continues after the demerger. The demerger involves transfer of one or more business undertakings from demerged company to resulting company. However, the new provision states that the assessment shall be deemed to have been made on the successor. Ideally, the tax liability pertaining to demerged undertaking alone should be assessed on the successor. **Recommendations:** ➢ To remove ambiguity and make the provision free from any misinterpretation, the provision may be extended to any scheme of reorganisation of undertaking, business or capital structure of the taxpayer for which application is filed with competent authority. ➢ Furthermore, where the predecessor continues to exist (like in demerger or slump sale/exchange), it may be

Sr. No.	Subject	Comments / Recommendations
		clarified that the proceedings carried on in the name of predecessor will continue to apply to the extent of assets and liabilities remaining with the predecessor.
26.	**Widening the scope of 170A to give opportunity to successor to modify the return**	**Rationale and issue:** ➢ Proposed Section 170A allows successor of business reorganization to modify its return of income to give impact of the business acquired by such successor in process of business of reorganization. The return needs to be modified within period of 6 months from the end of the month in which court order is issued. ➢ The intention of Section 170A is to give opportunity to successor to modify its return where statutory time- line for revision of ROI would have lapsed by the time court sanctions the scheme. ➢ In court approved schemes, pursuant to SC decision of Marshall Sons & Coo. [(1996) 223 ITR 809], the business vest in successor from appointed date as sanctioned by the court and the income/ expenditure/ loss/ profit from the appointed date would belong to successor. Considering that sanction of scheme by court is a time consuming procedure, in certain cases, it was resulting in a long time gap between the appointed date and the effective date of court order. Due to such time interval as also considering the uncertainty of court sanctioning the scheme, the predecessor and successor may file their return of income without giving impact of business reorganization. ➢ However, on sanctioning of scheme by court, the predecessor as also successor was required to revise their return of income to give effect of transfer of business from the appointed date sanctioned by court. In such cases, due to lapse of statutory date for revision of ROI by successor for the year in which appointed date falls, the difficulties were being faced by predecessor and successor to give effect of succeeded business in their return of income from the appointed date. The proposed s.170A addresses this issue by giving opportunity to successor to file modified return. ➢ However, section 170A only gives option to successor to modify the return of income and such option is not available with predecessor. From the perspective of predecessor also, the impact of business succession needs to be given in its return of income from the appointed date once court sanctions the scheme. ➢ The other change in relation to business reorganisation is a specific provision requiring AO to give effect to approved resolution plan under IBC by way of reduction of tax demands. This provides procedural clarity on post

Sr. No.	Subject	Comments / Recommendations
		M&A compliances. **Recommendation** ➢ It is recommended that the return forms for such modified return and internal systems of Tax Department be modified to enable the successor entity to seamlessly claim corresponding tax credits of the predecessor entity like TDS/TCS, advance/S.A. tax, foreign tax credit, MAT credit, etc. ➢ It is also recommended to amend proposed s.170A to enable the predecessor for modification of return of income similar to proposed requirement for successor.
27.	**Extension of benefits of carry forward of losses in intra-group reorganisation to all private sector companies**	**Rationale and issue:** ➢ The proposed amendment to s.79 facilitates intra-group reorganisation post strategic divestment of PSU where the ultimate control remains with the same acquirer company. For instance, now that Tatas have acquired Air India, if they decide to merge Vistara and/or Air Asia with Air India or bring them under a common vertical, S.79 will not be a hurdle in carry forward and set off of Air India's losses. ➢ The industry had made representations that such facility be also extended to private sector companies which carry out such intra-group reorganisation for various business reasons. **Recommendation** ➢ Since the policy principle of there being no abuse in intra-group reorganisation so long as ultimate holding company remains same is recognised for a public sector company which becomes part of private sector, it is strongly recommended that the same policy dispensation may be extended to private sector to avoid irrational discrimination between the two sectors
	SEZ related	
	New SEZ law to be introduced	The Finance Minister in her Budget Speech has announced that the existing SEZ Act will be replaced with a new legislation that will enable the states to become partners in 'Development of Enterprise and Service Hubs'. This will cover all large existing and new industrial enclaves to optimally utilize available infrastructure and enhance competitiveness of exports. In this light, we would like to make some recommendations on direct tax issues in current SEZ related provisions

Sr. No.	Subject	Comments / Recommendations
		which can be addressed in the new legislation. The indirect tax issues are covered in our separate Post Budget representations on Indirect taxes. The direct tax issues are discussed below
28.	**Clarification to be provided on extending S.10AA benefits to SEZ units opting for work from Home option**	**Rationale and issue:** ➢ To address the Covid19 Pandemic related hardships for the IT/ITeS industry having units in SEZs, the Dept. of Telecom provided relaxation for WFH to entities registered as Other Service Providers with DOT. The powers for relaxation for WFH in respect of SEZs was given to the respective locations Development Commissioner where each location provided generic approval for WFH and removal of assets on its own till a specified date which was extended from time-to-time. However, these relaxations were provided temporarily and was not brought in as a permanent provision. ➢ The Department of Commerce permitted the Development Commissioners to consider and approve requests from the SEZ Units for extension of Work from Home (WFH) facility in a liberal manner till such time the National Disaster Management Authority or the State Governments continue to issue orders governing the Covid-19 Pandemic Management. Further, SEZs units have also been permitted to take desktops/laptops outside the SEZs to enable them to work from home. ➢ Having said this, ambiguity on whether employees WFH should be considered as an extension of the SEZ facilities as they would be connecting to servers through encrypted and secured networks while providing the required services to customers continues to persist. **Recommendations:** ➢ Expressly clarify that employees WFH should be considered as an extension of the SEZ facilities and correspondingly the SEZ Unit is eligible for all corresponding tax and non-tax benefits in this regard. Now, considering that new SEZ legislations are proposed to be brought in and also taking into consideration the hybrid working model which is proposed to be implemented by various industries, it is recommended to provide an option to SEZ units for allowing its employees to work from home on a permanent basis by amending the respective

Sr. No.	Subject	Comments / Recommendations
		rules of SEZ and may also accordingly clarify on the eligibility of SEZ units to claim tax benefits under ITA.
29.	**Clarification/ amendment to be sought on expanding the scope of utilization of SEZ Re-investment Reserve created for availing deduction under section 10AA of the Income Tax Act, to include all expenses of capital nature and certain expenditure which are operating expenses**	**Rationale and issue** ➢ During 11th to 15th Year of operation (3rd Phase of 5 year Term) of the SEZ scheme, an Unit in SEZ can avail deduction under section 10AA of the Act provided it credits 50% the profit for a year to "Special Economic Zone Re-Investment Reserve Account". The same is required to be utilized for the purposes of the business for acquiring machinery or plant which is first put to use before the expiry of a period of three years following the year in which the reserve was created. ➢ The provision is restrictive for IT Companies, as unlike manufacturing Companies it does not require to invest in heavy Plant & Machinery. Infact SEZ units are required to invest in huge facilities and create delivery centers. The investment which falls under Plant & Machinery are laptop, desktop, servers and networking equipment etc. are not that significant. Further due to change in technology, the requirements on premises and assets have reduced considerably and companies are using third party clouds and infrastructure. ➢ The requirement of creating a SEZ re-investment reserve as a pre-requisite for claiming deduction under section 10AA should be abolished. This will enable IT companies to use tax benefits available without any restriction taking into consideration sun set of tax holiday benefits. **Recommendations** ➢ For the purposes of utilizing the re-investment reserve, in addition to plant and machinery, the scope of utilization to be expanded by allowing: o Investment in facilities created in form of Delivery centers owned by the SEZ Units, i.e., investment in building, infrastructure, workstation, interiors, furniture related cost etc. Further, investment in Delivery Centres obtained on lease by way of lease rentals etc. should also be included in the scope. o Operating expenses like cloud, and digital IT infrastructure platforms etc.

Sr. No.	Subject	Comments / Recommendations
	Charity	
30.	**Application shall be allowed only on payments basis [Explanation to s. 11(1) and Explanation to s. 10(23C)]**	**Background and Issue** ➢ Currently, the application of income in the hands of trust is allowed on the basis of commercial principles. This is subject to certain specific provisions (such as no application shall be allowed made out of corpus funds, loan funds, etc.) ➢ FB 2022 proposes to introduce a provision in the scheme of s. 11 and s. 10(23C) of ITA to allow application only on actual payment basis. ➢ The proposal is effective from FY 2021-22 itself. ➢ It is a settled proposition that income of the trust is to be computed on the basis of commercial principles. The amendment proposes to unsettle this principle. ➢ Trusts are allowed to maintain books of accounts on cash basis or mercantile basis of accounts. In case if trust prepares the accounts on mercantile basis, then there will be apparent mismatch between the books of accounts and tax computation. This will become annual feature and will add to administrative inconvenience and hassle. The mis-match represents only timing difference. ➢ Generally, payment for operating expenses of the month of March are paid in the month of April or May. In such cases, trust will not be allowed application for the month of March which may result in surplus. However, there may not be any real surplus with the trust to that effect. **Recommendation:** ➢ In view of the above, the proposed provision should not be implemented

Sr. No.	Subject	Comments / Recommendations
31.	**Maintenance of books of accounts at specific place [S. 12A(1)(b) and 10th proviso to s. 10(23C)]**	**Background and Issue** ➢ There is currently no specific provision presently for maintaining books of accounts of trust – much less, there is no provision for specifying the place for maintaining such books of accounts ➢ FB 2022 now proposes to authorize CBDT to prescribe mode and manner ofmaintenance books of accounts by the trust. Additionally, CBDT is proposed to be authorised to prescribe place for maintaining such books of accounts ➢ The requirement to prescribe place for maintaining books of accounts appears to be onerous. Difficulty may arise when activities of the trust are carried out at multiple locations. In case if books are not found at relevant place, there is risk of taxation of trust's income under proposed s. 13(10) and (11) despite trust is otherwise a complying trust for complete exemption u/s 11. **Recommendations:** ➢ Reconsider the requirement of place of maintaining books of accounts. ➢ Alternatively, CBDT should be authorised to provide form and manner for maintaining books of accounts and not to prescribe place of maintaining such books of accounts.
32.	**New provision is inserted for computation of trust's income under specified circumstances [Refer proposed s. 13(10)**	**Background and Issues** ➢ S. 13(10) read with s. 13(11), proposed by the FB 2022, provide a mechanism to claim deduction of application of income on objects of the trust in certain specified situations where trust loses benefit of deduction under s. 11 for the given year viz (a) when business income of the trust (having object of general public utility) exceeds 20% of trust receipt, (b) Where books of accounts are not maintained, audit is not conducted, or (c) Where return of income is not filed within time limit.

Sr. No.	Subject	Comments / Recommendations
	and 13(11)]	➢ S. 13(10)/(11) provide that income will be calculated without granting deduction for following: • Expenditure which is capital in nature • Expenditure incurred outside India • Expenditure incurred out of corpus standing as on the end of financial year immediately preceding the previous year relevant to the assessment year • Expenditure from loan or borrowing • Claim of depreciation in respect of an asset, acquisition of which has been claimed as application of income in any year • Expenditure by way of contribution or donation to other person • Disallowance of 30% of expenditure when deduction of taxes as required under Chapter XVII-B of ITA is not carried out or after deduction taxes have not been paid - s. 40(a)(ia) of ITA • Expenditure by way of payment to any person in excess of Rs. 10,000 per day otherwise than by way of specified mode - s. 40A(3) of ITA ➢ Further, in computing income, s. 13(11) provides a blanket prohibition, for any deduction in respect of any expenditure or allowance (which may include deprecation as well) or set-off of any loss which may be allowable under any other provisions of ITA [S.13(11)] ➢ While amendment proposed is welcome, the language of s. 13(10) read with s. 13(11) is prone to an ambiguity. While intent seems to be to allow as an additional facility, deduction of application of income on the objects of the trust after income of the trust from various sources such as business income or capital gains income etc has been computed, apprehension is that the tax authority may erroneously read the provisions as creating an embargo against deduction of any other expenses including in computation of business income or capital gains income, such that Trust’s entire income from whatever forms would get only deductions specified in the proposal. In other words, there is scope that tax authority may disallow expenses incurred in earning business

Sr. No.	Subject	Comments / Recommendations
		income or cost of acquisition of asset while computing capital gains on sale of such asset by the trust. ➢ S. 13(10) inter alia disallows expenditure incurred from out of corpus and loan funds. This is consistent with Explanation 4 to s. 11(1) of ITA introduced by Finance Act 2021. However, along the lines of provisos to said Explanation 4 to s. 11(1) of ITA, there is no back provision made in s. 13(10) to allow deduction when corpus is restored or loan is repaid from income of the trust in current year or subsequent year. Similarly, s. 13(10) provides for disallowance of 30% of expense due to tax withholding default by applying provision of s. 40(a)(ia) but does not specifically provide for allowance of 30% expenditure on compliance of conditions of proviso to s. 40(a0(ia). These may be an unintentional omission or lapses. ➢ Clause (d) of S. 13(10) provides for disallowance of expenditure by way of contribution or donation 'to any person'. The language is too wide to disallow help provided to poor or medical expenditure of poor or needy person borne by charitable trust by direct payment to hospital or for purchase of medicine etc. These may get adversely disallowed under the present limb despite the fact that trust has directly incurred expense in terms of its objects. **Recommendation:** ➢ A suitable language correction may be made in s. 13(10) in parathesis to bring out the intent that provision shall apply post computation of income of the trust under the respective provision of ITA. ➢ A suitable back up provisions may be provided to allow deduction of expenses which are disallowed under specified circumstance provided in sub-para (ii) of para 3.3 above ➢ Clause (d) of s. 13(10) may modified as under : *(d) such expenditure is not in the form of any contribution or donation ~~to any person~~ to any trust or institution registered under section 12AA or section 12AB or to any fund or institution or trust or any university or other educational institution or any hospital or other medical institution referred to in sub-clause (iv) or sub-clause (v) or sub-clause (vi) or sub-clause (via) of clause (23C) of section 10.*

Sr. No.	Subject	Comments / Recommendations
33.	**Proposed penalty for cases where benefit is passed on to related parties appears to be stringent and without benefit of reasonable cause- [S. 271AAE]**	**Background and Issue** ➢ S 273B currently provides that penalty leviable for breach of provisions of various sections specified therein shall not be levied on the taxpayer, if he proves that there was reasonable cause for the said failure. ➢ FB 2022, proposes to introduce new penalty provision for the charitable trusts/institutions when benefit is being passed on to specified persons. Penalty under s 271AAE is proposed to be levied at sum equal to benefit applied in the first year and a sum equal to 200% in the subsequent year ➢ However, said new section is not included in s. 273B. ➢ In absence of back up amendment in s. 273B to provide protection to the trust for reasonable cause, the proposed penalty provision makes trust liable on automatic basis even where breach is unintended or innocent. This appears to be unintended lapse. **Recommendation:** ➢ Provisions of s. 273B of ITA should also be amended to include s. 271AAE of ITA to allow benefit of reasonable cause to the trust. ➢ Additionally, it is recommended to provide threshold of benefit alleged to have been given to related party say 5% of total receipts of the trust of the year (similar to threshold provided in section 13(4)) beyond which alone the penal provisions should trigger.
34.	**Provide option to acquire another capital asset to claim application for s.10(23C) charities**	**Rationale and issue** ➢ S.11 allows application to trust if capital gains earned during the year by the trust is reinvested to acquire another capital asset to be held for charitable purposes. This is to provide relief to trust so that entire amount of sale consideration need not be spent out on the year of sale and to keep the asset base of the trust intact.

Sr. No.	Subject	Comments / Recommendations
		➢ S.10(23C) which is very similar to S.11 does not have a similar provision. **Recommendations** ➢ The intention of the legislation is to bring the scheme of s. 11 to 13 and s. 10(23C) on parity. Therefore, it is recommended that similar provision may be brought in 10(23C) as well.
35.	**Simplification of language of s. 10(23)**	**Rationale and issue** ➢ There are around 22 provisos in the text of s. 10(23C). This makes it very cumbersome for a taxpayer to read and apply. The legislative intent of several amendments to charity related provisions of Finance Bill 2022 is to align the scheme of s.10(23C) and s.11. Hence, it would be more expedient to combine both provisions in a single section by avoiding multiple provisos. **Recommendations** ➢ For the sake of convenience for the stakeholders, both s.10(23C) and s.11 may be combined into one section. If this is not feasible, at least the multiple provisos of s.10(23C) may be properly numbered or converted into sub-clauses to a new section.
36.	**Accumulation Provisions in case of Trust**	**Rationale and issue** ➢ Under the existing provisions of the Act, a trust or institution is required to apply 85% of its income during any previous year. As per section 11(2) of the Act such accumulation is allowed for the maximum period of 5 years and if unutilized the same to be taxed in 6th year. However, as per section 10(23C) the unutilized amount to be taxed in the 5th year itself. ➢ To rationalize both the sections, it has been proposed to amend section 11(2) to tax the unutilized amount in the 5th year instead of 6th year. **Recommendation** ➢ It is recommended that more logical approach that taxable event should arise once the entire period of 5 years gets completed and therefore if both the sections need to be rationalized the amendment should be done in section 10(23C) to make the taxable event in the 6th year.

Sr. No.	Subject	Comments / Recommendations
	Other Representations	
37.	**Relaxation for bona fide cases from expanded scope of s.68 to explain 'source of source' of loans and borrowings**	**Rationale and issue:** ➢ Hitherto, taxpayer was required to explain 'source' of cash credits like loans and advances, share capital, etc. i.e. to explain the identity of lender, creditworthiness of lender and genuineness of the lending. There was no requirement to explain 'source of source' in lender's hands i.e. from where lender got the funds, his creditworthiness and genuineness. ➢ Under existing law, the requirement to explain 'source of source' is restricted to closely held companies raising share capital from residents. ➢ There is limited exemption in respect of amounts received from Category I/II AIFs. ➢ It is proposed to amend s.68 to provide that every taxpayer will be required to explain 'source of source' of 'loan or borrowing or any such amount'. It applies to every taxpayer whether listed or unlisted company, bank, firm/LLP, AOP, individual, etc. ➢ The intent of the above amendment is to catch dubious transactions (eg. where lender has given loan from cash deposits made in his bank account). ➢ A fall out of the amendment is that the same amount can be taxed in the hands of two persons. For instance, if A has lent monies to B and A is unable to explain the source in his hands, the amount can be added in the hands of both A and B. ➢ However, a significant concern for the industry is that the language is very broad to cast onerous requirement on even genuine/bonafide loans – say, borrowings from regulated entitles like banks/NBFCs, overseas borrowings by issue of forex or Rupee bonds, etc. Even banks/NBFCs will need to explain 'source of source' of savings, current, fixed, recurring deposits from customers. ➢ Another issue is whether the expression 'any such amount' will include items like deposits, advances from

Sr. No.	Subject	Comments / Recommendations
		customers, EMD, Security Deposit etc. Explanatory Memorandum uses the expression 'or any other liability'. ➢ The information of 'source of source' is not required to be furnished in return of income but will need to be furnished in scrutiny assessment. But taxpayers cannot wait till case is picked for scrutiny. They need to compile information beforehand and hence the amendment casts onerous burden on bonafide taxpayers. It is in direct conflict with 'ease of doing business' principle. **Recommendations** ➢ While we appreciate the intent behind the amendment, , it is strongly recommended to grant relaxation for bona fide cases. It may be clarified that the such expanded requirement will not apply to following illustrative cases :- • Borrowings from banks, NBFCs and financial institutions. • Borrowing made by banks, NBFCs and financial institutions themselves • Deposits, advances from customers, EMD, Security Deposit etc. accepted in ordinary course of business from customers or vendors. ➢ Alternatively, for this purpose, power may be given to CBDT to notify 'white list' of such bonafide cases. This measure has been adopted in context of other provisions like gift taxation u/s.56(2)(x), transfer of unlisted shares u/s. 50CA, etc. ➢ It may be noted that taxpayer raising borrowing may or may not be able to collect data from his lender/creditor, considering confidentiality or other issues. Hence, it is suggested that the CBDT adopts a milder approach and allows acceptance of declaration from the lender/creditor as sufficient compliance to explain source of funds. This can be provided in the Income-tax Rules, 1962. Any further investigation can be done by the tax authorities directly with the lender as per the provisions of the Act.
38.	**Relaxation for conditions for COVID-19 relief for medical assistance and ex-**	**Rationale and issue:** ➢ In order to provide relief to taxpayers, CBDT had vide Press Release dated 25 June 2021 announced tax exemption on (a) medical assistance and (b) ex-gratia sum received for death due to COVID-19 for FY 2019-20 and subsequent years without any limit if received by an employee from its employer but limited to Rs.10 Lakh in

Sr. No.	Subject	Comments / Recommendations
	gratia payments	other cases. ➢ In this regard, FB 2022 now codifies such announcement by way of enactment. While the amendments proposed in the Finance Bill are largely in line with the Press Release, following are new features :- • The definition of 'family' is borrowed from s.10(5) in context of LTA which includes spouse, children and dependent parents & siblings. It does not include close relatives like daughter-in-law or son-in-law. • The ex-gratia has to be paid within 12 months of death of the individual as a lump sum • The medical assistance and ex-gratia has to satisfy conditions which will be notified by Central Government ➢ It is possible that the ex-gratia may be received by close family member who do not fit within the narrow definition of 'family' u/s. 10(5). **Recommendations:** ➢ Considering the financial and emotional impact Covid-19 has had in the lives of individuals, it is recommended that amount received by family members of deceased persons be considered fully exempt without attaching any terms and conditions thereon. ➢ Alternatively, it may be provided that any sum paid at any point of time, towards COVID relief would be fully exempt from tax so long as the announcement of such relief takes place within the specified threshold of 12 months (or extended to 24 months as below), whether in lump-sum or annuity. ➢ Without prejudice to the above, the following recommendations may be considered • It is recommended that broader definition of 'relative' in s.56(2)(vii) may be adopted. Alternatively, it may be aligned with criteria adopted by Government while making ex-gratia payment of Rs. 50,000. • Due consideration should be given to extraordinary situations in which such payments were made in the past and claimed as exempt without any knowledge of conditions to be imposed by the Government in the future. In other words, the likely conditions to be notified on past payments should not be onerous such that

Sr. No.	Subject	Comments / Recommendations
		it results in retrospective taxation. ➢ Further, there may be cases where considering the tax uncertainty, no-exgratia may have been paid within 12 months of death but is proposed to be now paid. Accordingly, the period within which ex-gratia has to be received may be extended upto 24 months of death of the individual.