POST–BUDGET MEMORANDUM 2021-22: DIRECT TAXES

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Sr. No.	Subject	Comments / Recommendations
1.	**Rationalisation of tax rates for Association of Person (AOP's) in infrastructure sector**	**Rationale:** ➢ Taxation of a joint venture, depends upon the agreement between the parties, forming the joint venture. If the joint venture is established in the form of a partnership firm or as a company, it is taxed accordingly i.e. as a partnership or as a company. But in all other cases, a joint venture is treated as an association of persons (AOP) or a body of individuals (BOI). From the income tax perspective, if two or more persons join hands to carry on a business but do not constitute a partnership they may be assessed as an AOP. ➢ In connection with infrastructure projects, a consortium of contractors is often formed to implement complex projects, particularly in Engineering, Procurement and construction ("EPC") contracts and Turnkey Projects primarily due to the requirement of expertise, and specialised resources in each specific area. The members in the consortium may or may not have clear demarcation of scope of work and they might be independent third parties or affiliated entities of a particular group. ➢ Leading EPC companies in India provide turnkey solutions for construction of roads, bridges, fully integrated rail & metro systems, commercial building & airports and setting up power generation plants, power transmission & distribution systems, etc. Such EPC companies have formed number of Joint Ventures in India in the form of AOP's with various partners (both overseas and local) for the purposes of bidding and execution of contracts. Such AOPs are formed for a temporary period for the specific project. In most large projects like road, rail, power, etc., the bids floated by statutory authorities have pre-condition qualification for presence of international qualified partner or presence of international partner is inevitable due to international bidding process. The AOP structure is preferred in view of relationship not constituting partnership and/or corporate form being unsuitable for short term projects.

		➢ Infrastructure is the fundamental enabler for growth. Recognising this, the government has laid down its Infrastructure Vision and Goals 2025 under which the Hon'ble Prime Minister has made a commitment of Rs 100 lakh crore under the National Infrastructure Pipeline (NIP). The investment under NIP would be made in more than 6500 infrastructure projects across sectors over the next five years. The new projects will include housing and water supply, affordable and clean energy, healthcare, airports, transportation and logistics, highways, digital services, health, education and project preparation facility for infrastructure projects to name a few. ➢ Further, India's vision for "Atmanirbhar Bharat" based on five significant economic pillars, includes infrastructure as one of the key pillars that will propel India towards growth with self-reliance. Several new schemes, projects and opportunities are envisioned under Atmanirbhar Bharat such as affordable housing, renewable energy, entire value chain of electricity generation (including coal mining) and distribution, to name a few. Even in the strategic sectors such as defence, space and atomic energy, participation of private and foreign sectors has been announced. Investment opportunities have also been created for agricultural infrastructure which will give a fillip to scientific storage facilities. ➢ The government has also taken specific measures to incentivise foreign investment. For instance, investments in notified infrastructure sectors by Sovereign Wealth Funds of foreign governments, will be allowed full tax exemption on interest, dividend and capital gains income, subject to the conditions specified. ➢ Even in the current Budget, thrust to infrastructure sector has been provided by announcing creation of institutional structure, big thrust on monetising assets and enhancing the share of capital expenditure in central and state budgets. ➢ The thrust to infrastructure development and quality of services will lead to greater urbanisation and increased employment opportunities that, in turn, will fuel domestic demand and growth. It will also improve the ease of living and provide equitable access to infrastructure for all, thereby making growth more inclusive.

		➢ As AOP is a preferred mode of operation for several infrastructure companies which operate in India and abroad, higher surcharge on AOPs is counter-productive and adversely dampens the efforts to attract investments in the infrastructure space through debt, equity or hybrid instruments. The increase in surcharge in an ad-hoc basis may be perceived as an uncertain tax environment by potential investors. AOP being a business entity, it seems levy of higher surcharge intended for 'super rich' taxpayers is an unintentional anomaly which needs to be corrected. **Issue:** ➢ While AOPs are taxed at base rate of maximum 30% which is same as partnership firms and LLPs, the surcharge rate differs between the two. ➢ The surcharge on firms/LLPs is 12% on income above Rs. 1 Cr. The surcharge rate for AOPs upto F.Y. 2018-19 was 10% for income between Rs. 50 lakh to Rs. 1 Cr and 15% for income above Rs. 1 Cr. However, from F.Y. 2019-20, the surcharge rate has been increased to 25% for income between Rs. 2 Cr to Rs. 5 Cr and 37% for income above Rs. 5 Cr ➢ The enhancement of surcharge on AOPs is an unintended fall out of enhancement of surcharge on individuals and HUFs. This is because AOPs are placed in same category as individuals/HUFs. While the intention was to levy higher tax on 'super rich' individuals earning more than Rs. 2 Cr in a year, it has also increased the surcharge for AOPs formed for business purposes by companies. ➢ As stated earlier, AOPs are formed for bidding and executing specific projects by pooling together expertise and specialised resources in specific areas by different entities. They cannot be used as vehicles for holding income generating assets. There are specific provisions regulating contribution on formation and withdrawal of assets on dissolution of AOPs to address any tax avoidance measures adopted by parties. ➢ Practically in majority of cases most AOPs may not be holding any asset within their fold since equipment and assets required for construction of infrastructure generally belong to individual

		members of AOP or may be outsourced. At best, there may be very few assets (-say, movables like machineries or vehicles) which may be held by AOP which are required to be transferred to the members on dissolution of AOP. ➢ From the taxation perspective, prior to the amendment in the law by Finance Act 1987, the settled legal position was that, a partnership firm/AOP is not a distinct legal entity and the partnership property in law belongs to all the partners constituting the firm/AOP, though the partnership firm /AOP may possess a tax personality distinct from the persons constituting it. Therefore, on dissolution, as the firm has no separate rights of its own in the partnership/AOP assets, there is no question of any extinguishment of the firm/AOP's rights amounting to a transfer of assets within the meaning of s. 2(47) of the Act. ➢ However, with a view to block such escape routes for avoiding capital gains tax, Section 45(3) and Section 45(4) were inserted in the Act by Finance Act 1987 to deem pooling of assets by partners in to the firm/AOP and distribution of assets by the firm/AOP to partners on dissolution or otherwise, as transfers for tax purposes, even though there would be none under the general law of partnership. The Finance Bill 2021 proposes to further rationalise these provisions by taxing settlement of capital account in cash in excess of balance in capital account (excluding revaluation) ➢ Moreover, the taxation rules when an AOP is dissolved is also covered by section 177 of the Income Tax Act, 1961, wherein the Income Tax Officer shall make an assessment of the total income of the association of persons as if no such discontinuance or dissolution had taken place and all the provisions of the Income tax Act, including the provisions relating to the levy of a penalty shall apply to such assessment ➢ The higher surcharge rate of 37 percent leads to additional tax burden on Indian companies, which are members of the AOP formed for infrastructure projects. Therefore, it also discourages domestic companies to invest in the infrastructure sector / projects. ➢ Therefore, considering the requirement of the economy and the fact that infrastructure creates maximum employment in the country, the additional surcharge is a stern deterrent to the

		overall vision of the government to boost infrastructure as a growth vehicle to make India a self-reliant nation **Recommendation:** ➢ The introduction of such high surcharge on AOPs appears to be unintentional fall out of measure to levy 'super rich' tax on rich individuals. It has discouraged investment in infrastructure projects in India which is not warranted. Therefore, we request the Government to kindly accept our representation above and reduce the surcharge on AOPs to level of 10%/15% as it was prior to enhancement by Finance (No.2) Act 2019. ➢ However, if a complete rollback is not possible, a specific carve out for infrastructure sector or relief to Indian Companies, in their capacity as member of AOP, by allowing their share of income in the AOP to be subject to surcharge rate applicable to Indian companies (i.e. 7% / 12%) instead of the enhanced surcharge rate for AOPs i.e. 25% / 37% may be considered. ➢ Alternatively, Tax share of income of Indian Companies, in their capacity as member of AOP, at the rate of tax as applicable to Indian Company.
2.	**Retrospective amendments proposed to be made from A.Y. 2021-22 should be deferred and made prospective from A.Y. 2022-23** **Alternatively, allow taxpayers to pay shortfall of advance tax till 30th June 2021 without incurring interest liability u/s. 234B or 234C**	**Rationale:** ➢ Significant amendments such as denial of depreciation on goodwill, taxation of slump exchange, taxation on cash settled capital account of retired partner, disallowance of employee's PF contribution to employers apply from A.Y. 2021-22 i.e F.Y. 2020-21. To this extent, these amendments are retrospective in nature since they impact the transactions undertaken during current financial year from 1 April 2020 till introduction of Finance Bill 2021 on 1 February 2021. As per current practice, the Bill is likely to get enacted before 31 March 2021 and thereby become law as on 1 April 2021. ➢ Additional tax liability arising from such amendments could not have been within contemplation of taxpayers. Thus, advance tax instalments paid till 15 December 2020 is

		likely to fall short and trigger interest liability u/s.234C for taxpayers who are impacted by such retrospective amendments. ➢ The taxpayer may not be justified in not paying catch up advance tax on 15 March 2020 on the basis that s. 294 permits compliance based on beneficial of the actual provision or proposed provision. This is because the liability to interest is not controlled by s. 294 once the enacted provision on 1 April 2021 makes the amended provisions applicable to F.Y. 2020-21 ➢ The amendments are contrary to professed tax policy of current Government of not making retrospective amendments prejudicial to the taxpayers which has been diligently followed since 2014 (barring certain exceptions). The Explanatory Memorandum does not state the compelling reason for making such exception. 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. ➢ It is true that CBDT instruction no. F.No.400/29/2002-IT(B) dated 26 June 2006 provides relief from interest u/s. 234B/C in certain circumstances. Para 2(c) of the order covers cases where there is jurisdictional High Court judgement in favor of taxpayer and subsequently, it is reversed by Supreme court ruling or by retrospective amendment or by Larger Bench ruling of same High Court (which is not challenged further). This is restrictive and may not cover all taxpayers who are impacted by retrospective amendments proposed to be made by Finance Bill 2021. For instance, there may be no jurisdictional HC ruling in favour of the taxpayer in many cases. Hence, there is a need to extend relief to all taxpayers who are impacted by these retrospective amendments.

		Recommendation: ➢ The substantive amendments impacting computation of total income proposed by Finance Bill 2021 should be made with prospective effect from A.Y. 2022-23 and not from A.Y. 2021-22. ➢ Alternatively, a general relief should be granted to all taxpayers impacted by such retrospective amendments by permitting to pay the shortfall of advance tax within extended time limit upto 30th June 2021 without incurring interest liability u/s. 234B or 234C.
3.	**Denial of depreciation on goodwill**	**Rationale** ➢ The term 'intangible assets' is defined in s.2(11)(b) and s.32(1)(ii) to include know-how, patents, copyrights, trade marks, licences, franchises or any other business or commercial rights of similar nature ➢ The Supreme Court, in the landmark case of CIT v. Smifs Securities Ltd (348 ITR 302) in 2012, held that 'goodwill' qualifies as 'intangible asset' under the residual category of 'any other business or commercial rights of similar nature' and hence qualifies for depreciation. The decision settled the controversy whether goodwill qualifies as 'intangible asset'. The judgement was applied in favour of taxpayer in many cases involving business acquisition on payment of cash and amalgamations. Notably, the cost substitution provisions applicable to amalgamation was specifically noticed in some of the above favourable rulings and yet depreciation was allowed on goodwill acquired on amalgamation. ➢ The Finance Bill 2021 proposes to amend the treatment of depreciation on goodwill in a very significant manner. Henceforth from A.Y. 2021-22 onwards, no depreciation will be admissible on goodwill irrespective of its source of acquisition. Furthermore, wherever depreciation was allowed in the past, CBDT will prescribe rules to carve out the goodwill from the block of assets. ➢ The rationale explained in Explanatory Memorandum is briefly as follows :-

		"… while Hon'ble Supreme Court has held that the Goodwill of a business or profession is a depreciable asset, the actual calculation of depreciation on goodwill is required to be carried out in accordance with various other provisions of the Act, including the ones listed above. Once we apply these provisions, in some situations (like that of business reorganization) there could be no depreciation on account of actual cost being zero and the written down value of that assets in the hand of predecessor/amalgamating company being zero. However, in some other cases (like that of acquisition of goodwill by purchase) there could be valid claim of depreciation on goodwill in accordance with the decision of Hon'ble Supreme Court holding goodwill of a business or profession as a depreciable asset. *It is seen that Goodwill, in general, is not a depreciable asset and in fact depending upon how the business runs; goodwill may see appreciation or in the alternative no depreciation to its value. Therefore, there may not be a justification of depreciation on goodwill in the manner there is a need to provide for depreciation in case of other intangible assets or plant & machinery. Hence there appears to be little justification for depreciation on goodwill…"* **Issue** ➢ The proposed amendment is applicable from current financial year F.Y. 2020-21 (relevant to A.Y. 2021-22) onwards and thus it applies to goodwill acquired in past transactions. This is against the stated intent of the government that no retrospective tax will be introduced to the detriment of the taxpayers. ➢ Till now, businesses have been taking significant decisions such as pricing of M&As, fair exchange ratio etc. based on the judicial precedence that goodwill will be allowed depreciation for tax purposes, at least for acquisition in non-tax neutral transaction. The retrospective application of the Finance Bill proposal will unsettle all these decisions, with significant impact on business deals. ➢ Further, there may be a renewed focus on comparative valuation of separately identifiable assets and residual goodwill and the tax authorities may challenge valuations by questioning

		whether goodwill value has been artificially suppressed / shifted to other intangible assets. This will result in more litigation and higher uncertainty for taxpayers. **Recommendation** ➢ At a minimum, make the amendment on prospective basis such that the proposal regarding depreciation on goodwill is applied only to goodwill acquired on or after 1 April 2021. All goodwill acquired in the past should be 'grandfathered'. ➢ Reconsider the denial of depreciation on goodwill acquired in non-tax neutral transactions that are subject to capital gains tax in the hands of the seller. The Explanatory Memorandum to the Finance Bill states that there is 'valid claim' of depreciation on purchased goodwill in view of Smifs case. Goodwill is tested for impairment in accounts and provision is made for impairment on happening of adverse event. ➢ Reconsider the denial of depreciation for goodwill acquired in tax neutral merger/demerger. This is because goodwill is not recognised in books of amalgamating company and is recognised for the first time in the books of amalgamated company as per applicable accounting standards and approved by NCLT. The shareholder of amalgamating company will pay tax on sale of shares of amalgamated company. However, the amalgamated company will be deprived of cost deduction. ➢ Goodwill may be defined clearly for proper tax treatment and to avoid litigation. It should be distinguished from specified intangible assets like know-how, patents, copyrights, trademarks, licences and franchises and also from the residual category of intangible assets, i.e., 'any other business or commercial rights of similar nature'.
4.	**Allow deduction for employee's contribution towards welfare funds paid beyond statutory due date but prior to filing of ROI in hands of employer**	**Rationale:** ➢ S.36(1)(va) allows deduction to the employer of sum referred to in s. 2(24)(x), i.e. employee's contribution towards provident fund (PF), superannuation fund (SF) or any other fund set up under the Employee's State Insurance (ESI) Act, 1948 or any Employee Welfare Fund, if said

		contribution is credited to employee's account in the relevant fund on or before the statutory due date. ➢ S. 43B allows deduction for employer's contribution to any welfare fund on actual payment basis, if paid on or before the due date of filing of ROI u/S. 139(1). ➢ Presently there is judicial conflict on the issue whether S. 43B is applicable for employee's contribution also and accordingly, deduction of employee's contribution u/s. 36(1)(va) can be allowed even if paid beyond statutory due date if actually paid prior to filing of ROI by employer. While three High Courts (Gujarat, Kerala and Madras) have held in favour of the Tax Department (i.e. s.43B does not apply to employees' contributions), majority of High Courts like Bombay, Delhi, Karnataka, Punjab and Haryana, Uttarakhand, Himachal Pradesh and Rajasthan have held in favour of the taxpayer. The matter is presently pending before SC. ➢ FB 2021 proposes to insert – • Explanation 5 to s. 43B stating that the provision of s. 43B shall not apply and **shall be deemed never to have been applied** to any sum received as referred in s. 2(24)(x) by the taxpayer from his employees. • Explanation to s. 36(1)(va) stating that the provisions of s. 43B shall not apply and **shall be deemed never to have been applied** for purpose of determining the statutory due date provided under clause (va). • Both provisions are further qualified by the expression **'For the removal of doubts'** **Issue** ➢ The Explanatory Memorandum explains the rationale of the amendment as follows :- *"Though section 43B of the Act covers only employer's contribution and does not cover employee contribution, some courts have applied the provision of section 43B on*

		employee contribution as well. There is a distinction between employer contribution and employee's contribution towards welfare fund. It may be noted that employee's contribution towards welfare funds is a mechanism to ensure the compliance by the employers of the labour welfare laws. Hence, it needs to be stressed that the employer's contribution towards welfare funds such as ESI and PF needs to be clearly distinguished from the employee's contribution towards welfare funds. Employee's contribution is employee own money and the employer deposits this contribution on behalf of the employee in fiduciary capacity. By late deposit of employee contribution, the employers get unjustly enriched by keeping the money belonging to the employees. Clause (va) of sub-section (1) of Section 36 of the Act was inserted to the Act vide Finance Act 1987 as a measures of penalizing employers who mis-utilize employee's contributions." ➢ While the anxiety of Government to protect employee's interests is well appreciated, it is not correct to make amendment on retrospective basis which impacts the current financial year. This contrary to declared policy of the current Government not to make retrospective amendments which are prejudicial to taxpayer. ➢ Further, the amendment is couched in a language as if to suggest it applies with retrospective effect – probably to protect Tax Department's case before SC for past years. This creates more uncertainty for taxpayers since the amendment may be used to reopen past concluded assessments. ➢ The amendment will adversely impact businesses which are facing tough times due to downturn in business and Covid 19 pandemic impact. It may be noted that employer faces interest, penalty and prosecution consequences under respective social welfare legislations. The permanent disallowance in income tax further adds to the difficulties of genuine businessmen even where there is no intent of unjust enrichment.

		➢ In view of favourable judicial rulings, wherever employer is facing cash crunch, presently it is possible for employer to pay part or whole of the net salary to the employees immediately and pay employees' contribution to welfare funds later with interest and penalty without risk of losing tax deduction. This is more desirable from employees' perspective. While the intent of proposed amendment is that employer should not unjustly enrich himself with employee's funds, the proposed amendment may have counterproductive impact of employer giving priority to payment of employees' contributions over the net cash salary to employees or worse, not pay salary at all to avoid the permanent disallowance. ➢ At times, normal delays in PF/ESI deposit do happen for various genuine reasons viz. technical issues, non-functioning of payment portal, bank issues, practical issues in account maintenance, factory strike, office lockdown, unforeseen and unavoidable circumstances, new joinees and employee transfers, etc. ➢ Delay in PF deposit invites penal proceedings under the PF Act and any penalty payment towards such violation of the PF Act/Rules are disallowed under Explanation 1 to Section 37(1) of the Income Tax Act **Recommendation** ➢ It is recommended that proposed amendment be withdrawn and status quo be maintained till the matter is finally adjudicated by the SC. In any case, the language creating uncertainty for past years (***"For the removal of doubts"*** and "***and shall be deemed never to have been applied")*** may be omitted to remove the uncertainty for past years and allow the SC to decide the issue on the basis of language of the law as prevailed in past years. Without prejudice, in the least, the amendment may be made with prospective effect from A.Y.2022-23 onwards

5.	**Rationalising provisions for taxation in hands of partnership firm upon distribution to partner**	**Rationale** ➢ Under the existing s.45(4), the firm pays tax on the difference between fair market value of the capital asset distributed to partner on dissolution or otherwise, and its cost of acquisition in hands of the firm, as determined under other provisions of the Act. ➢ The existing s.45(4) addresses the situation of settlement of partner's capital account by distribution of capital asset but does not cover scenario of cash payment to outgoing partner. ➢ FB 2021 substitutes existing s.45(4) with 2 new provisions viz. 45(4) and 45(4A). ➢ Proposed s.45(4) applies *"where a [partner] receives during the previous year any capital asset at the time of dissolution or reconstitution of the [firm],* ***which represents the balance in his capital account in the books of accounts of such [firm]****".* ➢ Proposed s.45(4A) applies *"where a [partner] receives during the previous year any money or other asset at the time of dissolution or reconstitution of the [firm],* ***which is in excess of the balance in his capital account in the books of accounts of such [firm]****".* ➢ At a conceptual level, as we understand, the proposed provisions intend to tax the specified entity (herein illustratively referred to as firm) when a specified person (herein illustratively referred to as partner) is given any asset (whether capital asset or stock-in-trade) or cash in connection with dissolution or reconstitution of the firm. The tax liability in the hands of the firm is calculated taking into account cost of the capital asset and partner's capital balance (excluding revaluation of assets). ➢ For computing capital gains, – s.45(4) adopts fair market value of the capital asset as on the date of receipt of capital asset by partner and grants deduction of cost of acquisition of the capital asset; s.45(4A) adopts value of any money or the fair market value of other asset on the date of receipt of money or other assets by partner and grants deduction of balance in the capital account of the partner at the time of dissolution or reconstitution. ➢ While the intent of the proposed amendments to plug tax leakage is welcome, language of the proposed amendments is highly ambiguous and raises scope for varied interpretations and litigation.

		➢ The proposed amendments primarily intend to address a situation where, cash payment is made by the firm on its reconstitution or dissolution, in excess of capital balance (excluding revaluation of assets), which is claimed by partners as non-taxable capital receipt on the ground that they receive what they were always entitled as partner of the firm. **Issue** The provisions are proposed to apply retrospectively from 1 April 2020 (viz. A.Y. 2021-22), which has caused heightened uncertainty amongst the taxpaying community. ➢ **S.45(4) and (4A) are applicable simultaneously or they are mutually exclusive?** • It is not clear whether, in a given scenario, proposed s.45(4) and 45(4A) are to operate simultaneously, or, they are two separate silos - such that, when s.45(4) is applicable, there will be no taxability u/s. 45(4A). • For example, consider a case where, a firm is having 3 partners A, B and C. On the liability side, A and B are holding a capital balance of 10L each. Third partner C is a nominal partner. On the asset side, book value of land as a sole asset is 20L. A retires from the firm. FMV of land at the time of A's retirement is 2 Cr. 50% share in such land (viz. 1 Cr.) belongs to A. On A's retirement, A demands an amount of 1 Cr. from the firm. Firm pays A by allotting 50% of land share to A, instead of cash. • In such a scenario, capital asset of the firm is distributed to partner. Is s.45(4) applicable? The answer depends upon interpretation of the term asset 'which represents the balance in his capital account'. If yes, s.45(4) requires FMV of such capital asset to be taxed (1 Cr.) after granting deduction of proportionate cost of such capital asset (10L) in hands of firm. • Additionally, is s.45(4A) also to be applied? A receives property whose FMV (1 Cr.) is in excess of his capital balance in the firm (10L). The answer depends upon interpretation of

		the term asset 'which is in excess of the balance in his capital account'. Whether one needs to compare book value of capital asset with partner's capital balance, or, fair value of capital asset with partner's capital balance? • If s.45(4A) is applicable in addition to s.45(4), how to avoid double taxation since both sections propose to consider FMV of the asset as deemed consideration? • There is also no clarity as to whether, in such case, the firm is entitled to claim deduction of both cost of asset to the firm and also balance in partner's capital account. ➢ **Does s.45(4A) apply to receipt of capital asset?** • S.45(4A) refers to receipt of 'any money or other asset'. Does s.45(4A) apply to receipt of capital asset also, or, is s.45(4A) restricted to receipt of any money or other assets (which are not capital asset)? ➢ **Does s.45(4A) apply to receipt of stock-in-trade? If yes, is the firm immunised from business income taxation upon distribution of stock-in-trade to partner?** • Reference to 'other asset' in s.45(4A) may also cover distribution of stock-in-trade by the firm to the partner. Ordinarily, disposal of stock-in-trade is subject to business income taxation. However, proposed s.45(4A) results in capital gains taxation. There could be potential tax leakage in such case. Also, there could be challenges in classifying such capital gains between short term and long term. ➢ **Proposed s.45(4A) does not grant deduction of cost of stock-in-trade:** • Also, since s.45(4A) envisages deduction of partner's capital balance in hands of firm, deduction in respect of cost of stock-in-trade (being other asset) is not likely to be granted in hands of firm. Further, it may not be correct to proceed on the basis that capital balance in partner's account will always be in excess of cost of asset to the firm and therefore, such

		a deduction is beneficial to firm. Additionally, this may also create discrimination between capital asset and stock-in-trade, as cost of capital asset is allowed as a deduction u/s. 45(4) but cost of stock-in-trade is not allowed u/s. 45(4A). ➢ **What is the interplay of s.45(4A) with para 24 of ICDS II which requires stock-in-trade to be valued at net realisable value in case of dissolution of firm?** • Assuming the firm is dissolved, in terms of SC decision in case of ALA Firm [1991] 189 ITR 285 as codified by para 24 of ICDS II, stock-in-trade needs to be valued at FMV and business taxation is triggered in the hands of the firm, when there is distribution of stock in trade on dissolution of the firm. This leads to possibility of double taxation under business chapter as also capital gains chapter. ➢ **Characterisation of capital gains chargeable under proposed s.45(4A)** • In case of proposed s.45(4A), a suitable provision is needed to ensure that character of capital gain (short term or long term) is determined in the hands of the firm. Such characterisation is relevant as it governs grant of indexation benefit, set off of past losses and rate of tax. ➢ **Scope of cost-step up in proposed s.48(iii) is not clear.** • While the policy intent of the amendment appears to avoid double taxation which is welcome, the scope thereof is not clear and requires clarification. It is not clear whether the provision envisages grant of notional deduction to the firm at the stage of computing capital gains u/s. 45(4)/(4A), or at the stage of transfer of capital assets in future by the firm to an outsider.

		➢ **Expand proposed s.48(iii) to cover stock-in-trade and depreciable assets also** • The proposed provision intends to allow cost step but is restricted in the scope to cover only capital assets retained by the firm. There may need to have parallel provision also for stock-in-trade/depreciable assets retained by the firm, to eliminate scope for double taxation. ➢ **Ambiguity if receipt by the partner happens in a year later than year of dissolution or reconstitution** • The provision as drafted applies when the receipt by the partner is “at the time of” dissolution or reconstitution. This may create some ambiguity where partner’s entitlement is determined in year 1 on retirement but actual receipt happens in year 2. Alternatively, assuming partner retires on day 1, but payment happens in instalments over a period. In such case, should capital account balance for purposes of s.45(4A) be considered as on date of reconstitution or as on date of receipt of money by the partner? ➢ **Are partner’s loan account and current account also covered?** • Whether partner’s capital account balance at the time of dissolution or reconstitution is to be computed after including current account and loan account balance as well? ➢ **Depreciation on revaluation should also be ignored** • Provision requires computing partner’s capital account balance “without taking into account increase in the capital account of the specified person due to revaluation of any asset”. Is depreciation on revaluation of depreciable asset also to be ignored in calculating partner’s capital balance?

		➢ **The term "reconstitution" is undefined** • Can one import s.187(2)(b) of ITL to understand scope of "reconstitution" for the purposes of s.45(4)/(4A)? In absence of clarity, ambiguity may arise as to whether events such as change in profit sharing ratio is or is not covered within the scope of "reconstitution", where such events involve receipt of money or capital asset or other assets by the partners. ➢ **Negative capital balance in partner's capital account** • Issue also arises as to how proposed provision takes care of negative capital balance in the hands of partner at the time of dissolution or reconstitution. A suitable provision may be required to address such situation. **Recommendations** ➢ A comprehensive relook is necessary before the amendments are enacted on statute. Additionally, to bring greater clarity, certainty and consistency on the application of the provisions, the CBDT must give illustrative examples. ➢ Government is committed to the professed intent of avoiding retrospective taxation. No exception should be made in the present case and the amendments maybe applied prospectively. It may also be considered if operation of the provisions can be deferred until necessary clarity is obtained and rules/circulars are issued citing examples. In the interregnum, the tax department does have GAAR provisions as a shield to tackle aggressive tax avoidance and abusive arrangements. ➢ However, in case above suggestions are not acceptable, in the minimum, the firm should be relieved from resultant liability to pay advance tax and interest u/s. 234C for FY 2020-21. ➢ As a suggestion, the provisions may be restructured on following lines to achieve the policy intent with more clarity and less scope for litigation: -

		1. S. 45(4) and (4A) can be merged into one scheme to deal with both settlement of capital account of partner in connection with dissolution or reconstitution by cash or in kind. 2. Receipt by the partner can be of cash or any other asset (whether capital or stock-in-trade) or both. 3. The total value of consideration will be aggregate of (a) sum of money and (b) FMV of asset other than money, if applicable, as on the date of dissolution or reconstitution received by the partner. 4. The cost for the purposes of this section can be determined along the lines of provisions of s. 50B as applicable for slump sale. Accordingly, deduction can be granted for following items. a. WDV of depreciable asset as determined on the principles of s. 50B b. Nil value in case of s. 35AD covered assets. c. Book value (excluding revaluation) of any other asset d. Net realisable value of inventory in case of dissolution considered for the purposes of para 24 of ICDS II and taxed separately under the head ‘profits and gains of business or profession’. e. Capital balance of the partner in the books of the firm at the time of dissolution or reconstitution as reduced by increase in capital account due to revaluation of any asset or due to self-generated goodwill or any other self-generated asset. f. Long term or short term nature of capital gains in the hands of the firm can be determined based on the tenure of partner’s interest in the firm viz. if the concerned partner held partnership interest for > 3 years, gain will be LTCG.

		g. The proposed amendment to s.48 to empower CBDT to prescribe rules for cost step up in hands of firm can be retained with suitable clarification that the provision is intended to apply at the time of transfer of residual assets by the firm to an outsider, post reconstitution of the firm. The scope of cost step up may be spread across all capital assets as also stock-in-trade/depreciable assets. h. Further, an amendment on lines of s.43(6)(c)(C) (for slump sale) can also be made to decrease the WDV of the block by standalone WDV of depreciable asset transferred to partner. 5. The above structure can simplify the taxation of settlement of partner's capital account by cash or in kind, achieve Government's objective, provide clarity and leave less scope for litigation. To avoid litigation and possible suggestion from the taxpayer on a restrictive scope of the provision where receipt happens in a year which is different than the year of reconstitution or dissolution, it may be evaluated if the proviso is made applicable when receipt is 'in connection with dissolution or reconstitution' though the actual receipt can be at a later date.
6.	**Reintroduce weighted deduction u/s 35(2AB) for inhouse R&D**	**Rationale**: ➢ The Finance Act 2016 has reduced weighted deduction of R&D expenses under section 35(2AB) in respect of DSIR approved in-house R&D facility to 150% from April 2016 and 100% from April 2020. ➢ The phasing out of weighted deduction for R & D incentives will not only discourage the various initiatives like "Make in India", Digital India", "e Governance", "Clean Energy" etc. which are being aggressively pursued by the Government but also will dampen the spirit of innovation which is essential for the robust growth of the Indian industry. The critical importance of R&D is acutely felt in current times when the economy is facing a crisis due to Covid 19 pandemic

		and there is a race amongst pharma companies to come out with effective and safe vaccines at the earliest. ➢ Incidentally, the current global trend is to encourage the R&D activities through provision of incentives e.g. such incentives are currently available in the USA, UK, Australia, France, Italy, China and Singapore to name a few. ➢ The UK Government continues to implement its R. & D. incentive regime despite drastic reduction in the headline tax rate of 26% in 2011 to 21% in 2015 and 18% by 2020. ➢ Several countries have low corporate tax rates along with R&D incentives, eg Singapore (Tax rate 17 percent; 100 to 150 percent of R&D expenditure), China (Tax rate 25 percent; 150 percent of R&D expenditure); UK (Tax Rate 20 percent – 30 percent; Patent box regime to encourage R&D). ➢ Hong Kong has also amended its R&D tax benefit regime. Under the new Hong Kong law, effective for expenditures incurred on or after 1 April 2018, qualifying R&D expenditures on a qualifying R&D activity (wholly undertaken and carried on within Hong Kong) will be eligible for a 300% deduction for the first HK$2 million (USD250k), and the remainder, a 200% deduction without limitation. Nonqualifying R&D expenditures will continue to be eligible for the normal 100% deduction. ➢ Also, present regime of inhouse R&D expenditure being regulated by DSIR which approves R&D expenditure as per its own subjective standards beyond statutory guidelines prescribed in Rule 6(7A), makes unilateral changes to its guidelines without any prior consultation with industry and applies the changes on retrospective basis to past years' claims is highly unsatisfactory and adversely impacts 'ease of doing business' for industry. For instance, DSIR revised its guidelines in 2017 which disqualifies expenditure reflected as 'Capital Work in progress'. There is no explanation for the basis of such disqualification. There is also no exception made for genuine R&D expenditure which may be reflected as CWIP (eg. machinery acquired in Year 1 which is

		installed in Year 2 and hence reflected as CWIP in Year 1 or developmental expenses capitalized in books as per requirements of AS-26). Inspite of several recommendations made in this regard, the same has not been taken note of so far. **Recommendation**: ➢ In view of the above, it is once again strongly recommended to continue not only the current scheme of weighted deduction but also introduce new R. & D. incentive schemes which are administratively easy to implement. ➢ Scope of R&D deduction should be expanded to partially outsourced activities and commercial R&D companies The DSIR's role should be restricted to approval of R&D facility and expenditure claims should be verified by Assessing Officers as per statutory guidelines prescribed in Rule 6(7A)
7.	**Full deductibility and additional incentives for COVID related expenses and/or contribution to trusts etc., for companies in old as well as new tax regime**	**Rationale:** ➢ Covid 19 has posed a severe challenge and impacted businesses performances. The govt has also reached out to all stake holders for continuous payout to the work force, increased CSR expenditure and generous contribution to PM relief fund. ➢ Section 37 of the ITA does not allow any expenditure incurred towards the CSR or the expenditure not related to the business. ➢ On one hand the business performance had severely impacted due to Covid and on other hand the cost has substantially increased due to additional safety measures, community welfare expenses or increased CSR expenditure. ➢ The Government needs to extend a helping hand to the industry through fiscal support in addition to credit and other support measures already announced.

		Recommendation: ➢ Expand the scope of Section 80JJAA to allow additional tax incentives on the new recruitments as well as the wages payout during the financial year 2020-21. ➢ All expenses related to Covid 19 whether part of CSR or not be fully allowed as deduction u/s 37 of the ITA. Continuity of deduction u/s 80G towards contribution to combat Covid -19, even for the companies opting new tax regime.
8.	**Rationalisation of charity related provisions**	**Restrictive condition for carving out corpus donation from application rule [s. 11(1)(d)]:** **Rationale** ➢ S. 11(1)(d) of the ITA provides that any income in the form of voluntary contributions made with a specific direction that they shall form part of the corpus of the trust should not be included for 85% application rule. In other words, corpus donation is not required to be applied for charitable purposes in the year of receipt and hence do not form part of income in the hands of registered charitable trust. In terms of existing s. 13 (1)(d), all trust funds including corpus funds are required to be keep deposited or invested in prescribed manner in terms of s. 11(5). ➢ S. 11(1)(d) of the ITA is proposed to be amended. For claiming benefit of s. 11(1)(d) of the ITA, a condition is attached that trust is required to invest or deposit such donation in one or more of permissible modes under s. 11(5) of the ITA maintained specifically for such corpus. **Issues:** ➢ The intent of the provision is to curb practice of utilising corpus towards other objects of the trust and claiming application thereof. Given that spending from out of utilisation of corpus is proposed to be derecognised as application (and thereby addresses the purpose for which such condition is prescribed), there is no need for putting further condition for corpus donation invested in s. 11(5) of the ITA under specific investments. This is besides being making onerous

		compliance on trust may become cause of concerns and litigation for securing exemption by the trust under s. 11(1)(d) of ITA as illustratively indicated below: • At what point of time, condition of corpus investment is to be seen. Suppose trust having received corpus donation with specific direction from donor on day 1, within what time, it should be invested by trust in s. 11(5) securities to avail exemption? • What if investment is matured within short period, say, corpus of invested in bank fixed deposit of 3 months, and same is matured within the previous year in which corpus is received. Will it impact the exempt characteristic of corpus? • Whether each corpus donation is required to be kept in separate mode? If yes, this will become an onerous obligation on the taxpayer • Whether change in investment option will trigger any consequences? • By very nature of the amendment, it would apply when donations are received in cash and not in kind. However, present language hit adversely to those corpus donations which are received in kind. As per proposed language, such donations in kind will never qualify as exempt under s. 11(1)(d). This will create hardship and injustice to may trust who receive corpus donations in kind. **Recommendations:** ➢ Proposed amendment may be omitted. ➢ At the highest, if desire is to regulate corups donation received in money form, investment pattern for such corpus donation may be prescribed under s. 13 instead of tagging it as the condition in s. 11(1)(d).

		No set-off of excess spending should be allowed as application of income [Proposed Explanation 5]: **Rationale** ➢ Presently, there is no provision in law governing the set-off and carried forward of excess spending in the hands of registered charitable trust. Such excess spending may generally arise either due to spending in excess of income through utilisation of corpus or loan borrowing. In case of spending through loan borrowing, there was potential scope of trust claiming double deductions as application of actual spending on objects of the trust as also on repayment of loan from out of income in later year. ➢ FB 2021 proposes to insert new Explanation to s. 11(1) of the ITA to provide that for computation of income required to be applied or accumulated during the previous year, no set off or deduction or allowance of any excess application, of any of the year preceding the previous year, shall be allowed. However, if the excess application was made out of corpus donation or loan, the replenishment of corpus or repayment of loan shall be allowed as application. This shows that the intent is to allow deduction once but do not permit double deduction. **Issues** ➢ The language of Explanation appears to suggest that it will apply to past deficits created under the old regime and hence may not be allowed to be set off against income under new regime even in cases where there is no case of double deduction. ➢ Consider a case where taxpayer has made excess application under old regime (say- year 2018) from out of loan funds. In the year of spending it may have resulted in some deficit which is carried forward for future year. Trust repaid loan in the year 2020 but not claimed any application thereof. Even in case of deficit carried forward, trust could not claim set off till 2021 in absence of sufficient income. Now, if trust has ability to set off deficit say in year 2020 under the new regime, there is apprehension that tax authority may deny benefit of set off by referring to Explanation 5 and applying it retroactively. In such case, trusts may be devoid of a deduction

		of legitimate spending against income of the trust despite there is no case of double benefit. Such may not be intention of the legislation **Recommendation:** In view thereof, it may be recommended to clarify that in relation to assessment year 2021-22 and earlier year, Explanation 5 will trigger only where trust had already obtained benefits of application in one or other form of application in those year and any further benefit of set off of excess application thereof will result in double benefit.
9.	**Rationalisation of taxability of interest on employee's contribution to EPF > INR 2.5 Lakhs per annum**	**Rationale:** ➢ S. 10(11) provides for exemption with respect to any payment (including accumulated interest) from provident fund to which Provident Fund Act, 1925 applies or other notified provident fund set up by Central Government ➢ S. 10(12) provides for exemption with respect to accumulated balance due and becoming payable to an employee participating in recognized provident fund subject to, inter alia, employee having rendered continuous service with employer for at least five years or alternatively employment is terminated due to reasons beyond the control of the employee such as ill-health, discontinuation of business by employer, etc. ➢ Last year, Finance Act 2020 introduced provision to tax employer's contribution to PF, NPS and Approved Superannuation Fund in excess of Rs. 7.5 lakhs per annum and interest accruing on such excess contributions (to be computed by rules yet to be prescribed by CBDT). ➢ FB 2021 proposes to introduce a cap u/s 10(11) and 10(12) where starting from 1 April 2021 interest earned with respect to **<u>employee contribution</u>** in excess of INR 2.5L per annum in a fund will not be eligible for exemption. Further the computation of interest ineligible for exemption shall be prescribed by rules.

		➢ India does not have a universal social security system applicable to all citizens and hence middle & upper class taxpayers have to provide for their own social security. ➢ Provident fund has been traditionally a safe avenue for salaried taxpayers to build up a retirement corpus to maintain the same standard of living and/or for life events like marriage of children or buying of new home, etc. ➢ As per Explanatory Memorandum, the amendment is intended to tax those employees who are contributing huge amounts to these funds and enjoying full exemption on interest on such funds. Newspaper reports carry certain statistics of HNIs having substantial PF deposits. Out of 4.5 crore EPF contributors, more than 1.23 lakh accounts belong to HNIs who have been parking huge sums on monthly basis. As of FY19, HNI's contribution was Rs 62,500 crore. One of the highest contributors, for instance, had a balance of Rs 103 crore in his PF account, while another held more than Rs 86 crore. The top 20 HNIs have about Rs 825 crore in their accounts, while the top 100 have a balance of over Rs 2,000 crore. ➢ It is submitted that employee's contributions comes out of tax paid incomes of the employees and HNIs would have paid tax at highest rate on the amounts so deposited. For high salaried earner who wishes to create a retirement corpus through PF, there is no choice on quantum of contributions to be made. If the employee opts for PF, he is statutorily bound to contribute 12% of salary as employee's contributions. Hence, it is unfair to make distinction between contribution upto Rs. 2.50 lakhs and contributions in excess of Rs. 2.50 lakhs. ➢ There could be a valid case for not granting exemption on voluntary PF contributions in excess of stipulated statutory rate of 12% since such excess contributions are made voluntarily to earn tax free incomes. But in absence of facility under PF rules to limit employee's contribution to Rs. 2.50 lakhs, it is unfair to tax the interest on contribution in excess of Rs. 2.50 lakhs made out of statutory mandate.

		➢ The news wage code is likely to impact the salary structure as according to the provisions of Wage Code the allowances cannot be more than 50% of the total remuneration. This may necessitate enhancing of Basic Salary to maintain same level of CTC for the employees. Consequently, PF outgo @ 12% of Basic Salary + DA will also rise and bring those employees who are presently contributing less than Rs. 2.50 lakhs within the scope of amendment proposed by FB 2021. ➢ The interest earned on contributions made in excess of Rs. 2.50 lacs in a year will be taxable not only in the year of deposit but that portion of Interest income will be included to compute the taxability in all future years also; in view of such annual compounding, tracking interest across years that is attributable to only employee contributions will pose lot of challenges/complexities ➢ In absence of specific charging section on lines of s.17(2)(vii)/(viia) introduced last year, it is not clear whether the interest on employees' contribution in excess of Rs. 2.50 lakhs will be taxable in year of accrual in PF account or in the year of withdrawal on cessation of employment. As per current proposal, it seems to be taxable in year of withdrawal. In such case, there should be relief provided from higher surcharge which may become applicable to the employee due to cumulative taxation of interest accumulated over several years. **Recommendation** ➢ It is strongly recommended that the proposed provision should be withdrawn. ➢ Alternatively, it should be made applicable on voluntary PF contribution in excess of statutory minimum (i.e. contribution over and above 12% of Basic + D.A). ➢ Still alternatively, the PF rules should be modified to provide an option to the employees not to make contribution in excess of 12% to avoid rigors of new proposed provision It may be clarified that the taxation will be triggered in the year of withdrawal from PF and appropriate relief from higher surcharge may be provided in that year due to cumulative taxation of interest accumulated over several years.

10.	**Representation on introduction of clause (vii) and (viia) of sub-section (2) under Section 17 in the Income Tax Act, 1961**	**Rationale:** ➢ As per the earlier provision (sub-clause (vii) of Section 17(2)) of the Income-tax Act employer's contribution to superannuation fund, in excess of Rs.1.5 lacs were to be treated as perquisite, hence made taxable. ➢ The above said clause has been amended by the Finance Act, 2020 wherein exempt contribution an employer can make towards recognized Provident Fund (PF), National Pension scheme (NPS) and Superannuation Fund (hereinafter collectively referred to as 'employee welfare schemes') is capped at Rs. 7.5 lacs. The proposed clause provides contribution to ‘employee welfare schemes’ if in excess of Rs. 7.5 lacs, the differential shall be taxed as perquisite in the hands of the employee. ➢ Further, insertion of new sub-clause (viia) provides that interest/dividend accrued on any contribution to employee welfare schemes made by the employer, exceeding Rs. 7.5 lacs shall also be taxed as perquisite in the hands of the employees. **Issue** ➢ There is a challenge in identifying the interest relevant to the excess contribution from the total interest getting credited to an employee’s account. Interest accumulation is on the opening balance and monthly contributions on a cumulative basis, hence deriving interest accrued on excess contribution will vary for different companies as it will be based on assumptions and the Returns being generated by individual funds. ➢ Further PF and SAF interest rates are declared after the close of the financial year, hence it is not very clear as to how the same would be taken for tax computation in the previous year. ➢ Income on NPS account is a notional gain on a year-on-year basis as there is change only in net asset value of the fund. It is not clear as to how income on NPS for employer’s contribution

		exceeding the specified limit will be taxed annually as no real income gets credited to the employees account. ➢ Employer has no control over income being generated by the Trust registered under the Income Tax Act. This calls for rules and timelines to be framed where information is to be shared by the Funds with the employer facilitating deduction of accurate tax as per the Rules. ➢ If employer starts recovering TDS on this accrual it will complicate matter as the determination of income is ambiguous. **Recommendations:** ➢ The concept of Exempt-Exempt-Exempt (EEE) for social security schemes such as PF, SAF and NPS is being diluted for the high-income group. This may discourage long term investment and may even be contradictory to the principles of good tax governance. It is therefore requested to review section 17(2)(vii) i.e. on taxing Employer contribution beyond Rs 7.5 Lakhs and interest accretion thereon u/s 17(2) (viia). Alternatively, clear rules should be framed in order to bring in clarity regarding quantification of interest so as to reduce scope of litigation at a later date
11.	**Exemption for LTC Cash Scheme**	**Rationale:** ➢ The insertion of second proviso in clause 5 of section 10 is to provide the value in lieu of any travel concession or assistance received by, or due to, an individual shall also be exempt under this clause subject to fulfilment of conditions to be prescribed. ➢ The conditions for this purpose shall be prescribed in the Income-tax Rules in due course and some of the conditions shall be as under:

		• The employee exercises an option for the deemed LTC fare in lieu of the applicable LTC in the Block year 2018-21 • “specified expenditure” means expenditure incurred by an individual or a member of his family during the specified period on goods or services which are liable to tax at an aggregate rate of twelve per cent or above under various GST laws and goods are purchased or services procured from GST registered vendors/service providers; • “specified period” means the period commencing from 12th day of October,2020 and ending on 31st day of March 2021; • the amount of exemption shall not exceed thirty-six thousand rupees per person or one-third of specified expenditure, whichever is less. ➢ Considering the Pandemic and the on-going current travel restrictions the taxpayer is not in a position to avail the benefit of this clause even after 31st March 2021. ➢ Accordingly, benefit should be extended beyond the current specified period. **Recommendation:** The proposed specified period for applicability of this proposed proviso should be extended at least till 31st March 2022
12.	**Any gains from a ULIP policy shall be treated as capital gains in case the premium paid for any year exceeds Rs 2.5 lakhs.**	**Rationale:** ➢ Under the existing provisions of the Income Tax Act, there is no cap on the amount of annual premium being paid by any person during the term of the policy. The Unit Linked Insurance Plan (ULIP) so far was an EEE (exempt, exempt, exempt) category tax saving instrument, tax-free under Section 10(10D) of the Income Tax Act.

		➢ The FB 2021 has proposed that where the ULIP premium is above ₹2.5 lakh per annum, the maturity proceeds are going to be taxed as equity mutual funds and so they come on par with mutual funds. ➢ The rules will apply for ULIPs issued on or after 1 February 2021. ➢ Capital gain tax like equity oriented mutual fund (i.e. 10 percent exceeding Rs 1 lakh) has been proposed. However, if the amount will be received by the nominee after the death of subscriber irrespective of date of subscription of the plan, the amount will be exempt from income tax in the hand of the nominee. ➢ Security transaction tax is proposed to be levied on sale or surrender or redemption of a unit of an equity-oriented fund to the insurance company, on maturity or partial withdrawal, with respect to unit linked insurance policy issued by such insurance company on or after February 1, 2021. ➢ The proposed amendment is going to be applicable only on plan issued on or after the budget date. **Issue:** ➢ We believe that the new tax regime for ULIPs, while bringing in some additional tax revenues, may hinder other benefits that were being provided until now. Consequently, the net benefit may be negative, because of the following reasons: 1. ULIP and equity MF are products with very different characteristics: a) ULIP is a long-term product with a minimum lock in period of 5 years while equity MF has no such lock in period except ELSS MF which has a lock in period of 3 years. However, ELSS MF AUM is at Rs 1.2 trillion which is only 10% of the total equity MF AUM as of December 2020[1]. Thus, equity MFs are primarily perceived by customers as short-term products with very high liquidity.

		b) ULIP has a built-in life cover equal to 10 times of the annual premium (for age of policyholder < 45 years). Equity MFs don't provide any risk cover by way of insurance and are a purely an investment product. 2. ULIP is a long-term goal based financial solution with dual benefits of protection and investment. Along with this, EEE category tax implications for the taxpayers made ULIP a very attractive product for individuals who still are not comfortable to buy term insurance plans for their protection needs. This new tax regime will make ULIP less attractive and could further deteriorate the insurance penetration in India, currently at 2.8% of GDP against global average of 7.1% 3. Due to long term nature of ULIP, it is feasible to invest the funds under ULIP in long tenure debt instruments e.g., bonds issued by infrastructure companies. As of 31st March 2019, 7.2% of the total AUM with life insurance sector was in infrastructure investments[3]. With the new tax regime, ULIP would lose favor as long-term investment product and make it less feasible to fund the infrastructure related projects. And this may run counter to the government's push for infrastructure building at an accelerated pace now. **Recommendation:** ➢ The limit of aggregate premium of **Rs 2.5 lacs** may be too low to determine customers as HNI. Considering this and the disruption it may create, the Chamber recommends enhancing the limit at **Rs 10 lacs** of aggregate premium. **Secondly**, Govt. to allow some time for industry to adjust, make relevant communications and have sufficient time for system changes. It is recommended to grant atleast two months window and can be made effective from 01.04.2021 instead of 1st February 2021.

13.	**Deduction of tax at a higher rate in case of credit/payment to non-filers of returns**	**Rationale:** ➢ Under existing TDS provisions, a higher TDS rate of 20% is attracted if the payee does not hold PAN (s.206AA). There are similar provisions in TCS for collecting TCS at higher rate of 5% (s.206CC). These provisions were inserted to improve the tax compliance and track data of non-filers ➢ As per proposed S.206AB, any person (deductor) making payment to a specified person (deductee) will be required to deduct tax on amount paid, or payable or credited, higher of the following rates: i) at twice the rate specified in the relevant provision of the Act; or ii) at twice the rate or rates in force; or iii) at the rate of five per cent. ➢ But if PAN of the deductee is not available, then higher of rate u/s. 206AA or s.206AB will apply. ➢ "Specified Person" means any person who meets two conditions viz (a) who has not filed return for both of two assessment years relevant to the two financial years immediately prior to the financial year in which tax is required to be deducted and for which the time limit to file return u/s. 139(1) has expired and (b) the aggregate amount of TDS and TCS in his case exceeds INR 50,000 or more in each of these two preceding financial years. ➢ This is a non-obstante provision and will override the TDS rates under the Chapter XVIIB (except where TDS is required to be deducted u/s. 192, 192A, 194B, 194BB, 194LBC or 194N) ➢ Similar to S.206AB, S.206CCA is proposed to be introduced in context of TCS. Both these provisions are effective from 1 July 2021. ➢ The rationale of these provisions as explained in Explanatory Memorandum is to ensure filing of return of income by those persons who have suffered a reasonable amount of TDS/TCS. In

		other words, while the Government possesses data of the persons who suffer reasonable amount of TDS and can take action against these persons by invoking section 142(1)(i) or 147, yet the Government desires the industry to make higher TDS/TCS to compel these persons to file returns. **Issue** ➢ The proposed provisions put additional compliance burden on the industry to verify ROI filing compliance by the deductees/collectees and accordingly calibrate the rate of TDS/TCS. ➢ We understand that the CBDT will make available functionality on Income tax e-filing website to identify 'specified persons' on lines of functionality currently available for TDS on cash withdrawals from banks u/s. 194N. But the current process is extremely cumbersome since the verification is required to be made for each individual deductee. ➢ For illustrative purposes, one may consider a listed company with lakhs of individual shareholders. It will be required to verify ROI filing compliance individually for each shareholder from e-filing website which will be extremely cumbersome and time consuming. The exercise will need to be repeated at the time of each interim dividend and final dividend payment. This is for the reason that the two year period contemplated by the new sections is a rolling period. For example, for individuals whose return filing due date is 31 July, for the period from 1 July 2021 to 31 July 2021, ROI filing compliance will need to be checked for FY 2018-19 and FY 2019-20 and post 31 July 2021, ROI filing compliance will need to be checked for FY 2019-20 and FY 2020-21. If the due date is extended, the rolling period will also get extended. The complications increase due to different due dates for different classes of taxpayers. The companies will need to allocate additional resources for doing this compliance. ➢ The compliance burden casted on industry should be commensurate with the benefits by way of higher revenue collection. The time and costs to be incurred by industry will be much higher than the TDS collected at higher rates and that too, when Government already has data and statutory powers to pursue the non-filers. The new TDS/TCS provisions cast unreasonable

		burden on the industry and also expose them to litigation, additional demands, interest, penalty and prosecution risk. This adversely impacts the 'ease of doing business' in India. **Recommendation:** ➢ Considering the unreasonable compliance burden, it is recommended that this proposal be withdrawn. ➢ Without prejudice, if the provision is retained, following recommendations may be considered- • The functionality on e-filing website to check ROI filing compliance should be made available as early as possible – at least one month prior to effective date of 1 July 2021 to enable the industry to prepare themselves for the new compliance. • Instead of individual deductee/collectee verification, facility may be made available to do a bulk verification of data so that companies can upload the database of deductees/collectees on e-filing website at one go and get reports in computer friendly formats which can be automatically fed into TDS/TCS software system of companies. • Instead of rolling period of two years, the provisions should be amended to put a fixed period of two years which will apply for whole of the FY. For instance, for FY 2022-23, the ROI filing compliance can be checked for FY 2019-20 and FY 2020-21 which can be checked much before 1 April 2022 and a uniform rate of TDS can be applied throughout the year by configuring the TDS software system. This will reduce the compliance burden considerably. • Further, Section 194, 194Q, 206C(1H) should be excluded from its ambit • Clarification on the interpretation of TDS threshold of Rs. 50,000 should be provided if • Alternatively, taxpayers can be asked to obtain a tax clearance certificate from the income tax department through online portal for non-applicability of section 206AB/206CCA. This will eliminate the huge administrative burden as well as lead to ease of doing the business

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<td>14.</td>
<td>Rationalization of the TDS provisions to allow for treaty benefits</td>
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Rationale:

S.115AD of the ITA provides for special rate and manner of taxation of incomes earned by Foreign Institutional Investor (FII) and S.196D provides for withholding of taxes at fixed rate of 20% on incomes from securities paid to FIIs
The SC in case of PILCOM v CIT [2020] 425 ITR 312 held that where a withholding provision under Chapter XVII-B of ITA provides for specific rate for withholding of taxes, the taxes shall be deducted at specified rate only and provisions of DTAA shall not be taken into account. The ratio of this SC ruling required payer of income in respect of securities to FII to deduct taxes at the rate of 20% even where FII was eligible to claim DTAA benefit and DTAA provided for lower rate of taxes
Post SC ruling in case of PILCOM (supra), several representations were made to CBDT to allow the payers to deduct the taxes at the rates provided in DTAA while making payment to FII and also other non-resident payees wherever the relevant TDS section provides for fixed rate of TDS and not at ‘rates in force’. List of such other sections is as follows :-

<table>
<tr><th>Sr. No.</th><th>Section</th><th>Particulars</th><th>Withholding rate (excluding surcharge and cess)</th></tr>
<tr><td>1.</td><td>194E</td><td>Payment to non-resident sportsmen/sports association</td><td>20%</td></tr>
<tr><td>2.</td><td>194LB</td><td>Payment of interest on infrastructure debt fund</td><td>5%</td></tr>
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			3.	194LBA (2)	Payment of interest and dividend income by business trust	5%/10%
			4.	194LC	Payment of interest by an Indian company or a business trust in respect of money borrowed in foreign currency	5%/4% (IFSC unit)
			5.	194LD	Payment of interest on rupee denominated bond of an Indian company or government securities to a foreign portfolio investor	5%
			6.	196B	Income from units (including long-term capital gain on transfer of such units) to an offshore fund	10%
			7.	196C	Income from foreign currency bonds or Global Depository Receipts (GDR) of an Indian company (including long-term capital gain on transfer of such bonds or GDR)	10%
			8.	196D	Income of foreign institutional investors from securities (excluding capital gain arising from such securities)	20%

		➢ It may be noted that even in respect of TDS provisions which provide for concessional rate of tax like s.194LC or s.194LB, there could be situations where the non-resident payee is entitled to treaty exemption like payment of interest to central banks of treaty countries or international financial agencies. The PILCOM ratio prevents the payers from considering treaty exemption for such payments which leads to excess tax deduction and refund situations. ➢ In deference to representations made, FB 2021 proposes to insert a proviso to section 196D(1) of ITA to provide that, payer shall withhold tax at the rate of 20% or rate specified in DTAA (whichever is lower) where, • DTAA entered between India and other country is applicable to FII payee • Payee has furnished tax residency certificate ➢ Proposed amendment is applicable from 1 April 2021 i.e. applicable to payment made by payer on or after 1 April 2021 **Issue:** ➢ As explained earlier, SC ruling in case of PILCOM (supra) impacted various other withholding provisions where a flat rates are prescribed for withholding. These sections are 194E, 194LB, 194LBA(2), 194LC, 194LD, 196B, 196C. These sections are not amended and hence the impact of SC ruling in case of PILCOM (supra) will continue to apply in respect of these provisions. ➢ While the amendment is welcome and addresses the difficulty for FIIs, it is not clear why other non-residents are not granted similar treatment. The application of TDS at higher rate compels the payees to file returns to claim refund of excess TDS. In many cases, the payments are made on 'net of tax' basis and TDS at higher rate results in higher cost for the residents since the NR payees are not inclined to file returns to claim refund of excess TDS.

		➢ As a matter of tax policy, India has, till date avoided the policy of 'retain and refund', and has consistently adopted a tax policy where TDS is restricted to the amount of the actual tax liability incurred by the NR recipient of income. This has eased compliance on the taxpayers as also administrative burden for the Tax Department. The proposed amendment to s.196D is consistent with this policy ➢ Such tax policy, if continued to be applied for other sections as well, may harmonize with the thinking that TDS is secondary tax obligation and should ideally follow the primary tax obligation. In order to avoid any form of differentiation or discrimination, the tax policy may adopt procedure which, on principles, treats all the taxpayers at par **Recommendation:** ➢ Amendments on lines of proposed proviso to section 196D of ITA, may be made to all other provisions which provide for fixed rate of TDS for payments to non-residents in order to allow the non-resident taxpayers take benefit of the lower tax rates provided in the respective tax treaty
15.	**TDS in respect of purchase of goods (S.194Q)**	**Rationale:** ➢ Presently, s.206C(1H) requires a seller whose turnover exceeded Rs. 10 Cr in preceding financial year and receives sale consideration towards goods of more than Rs. 50 lakhs from a buyer to collect TCS @ 0.1% (0.075% till 31 March 20210 - subject to certain exceptions ➢ A new TDS provision u/s.194Q is proposed to be introduced on purchase of goods w.e.f. 1 July 2021. As per this provision, the buyer while making payment to resident seller for purchase of goods having value exceeding fifty lakh rupees in the previous year is required to withhold taxes at the rate of 0.1%.

		➢ Deduction shall be at the time of credit of such sum to the account of the seller or at the time of payment by any mode, whichever is earlier. The provisions are attracted even if the amount is credited to 'suspense account' ➢ Explanation to s.194Q(1) defines 'Buyer' as a person whose total sales, gross receipts or turnover from the business carried on exceed INR 10cr during immediately preceding financial year in which the purchase of goods is carried out. ➢ As per s.194Q(5), the above provisions would not be applicable in cases where payment is already subject to TDS under other provisions of the Act or TCS under S.206C other than 206C(1H) ➢ It was only recently that the Government introduced TCS on sales w.e.f. 1 October 2020 to widen and deepen the tax net. The industry had raised many concerns on the new TCS which were partially addressed by issuing guidelines dated 29 September 2020 ➢ Neither TCS on sale of goods nor TDS on purchase of goods appears to be a revenue collection exercise since the TCS/TDS rate is kept very low at 0.1%. Hence, it appears to be information collection exercise for Government. Contrary to intent of deepening and widening the tax net, the compliance burden and impact of TDS/TCS falls on those taxpayers who are already within the tax net. ➢ Further, such transactions being subject to GST, there is already an audit trail available with the GST Department which can be easily leveraged by the Income tax Department through electronic sharing of data on automated basis and making use of Artificial Intelligence to mine the data to detect tax evasion. TDS and TCS on sales results in multiple levy of tax on same transaction.

		Issues: ➢ The new TDS provision will result in an additional compliance cost and burden to the industry by way of withholding, issuance of TDS certificate, return filing etc. ➢ Like in case of TCS for sale of goods u/s. 206C(1H), the new TDS on purchases also does not specifically make distinction between sales made to the intermediate customers (B2B transactions) and sales made to the final customers (B2C transactions). In absence of specific exclusion for B2B transactions, the provision appears to apply for all types of sale transactions, irrespective of whether the transaction involves sales to intermediate entities/ customers or it is sale to final customers ➢ Applicability of TDS or TCS provisions to B2B transactions as well may result in tax being collected at multiple levels, in turn, may lead to cash blockage at entity level. In a supply chain structure consisting of manifold entities (as is usually prevalent in the retail sector), this would result in tax being deducted or collected multiple times on the same transaction. Deduction/collection of tax at multiple entity levels increases the administrative compliance burden, transaction costs and results in cash flow trap. ➢ Since B2B transactions are made with multiple vendors, it is administratively burdensome to apply for lower/ NIL TDS for all vendors. Further, benefit of lower/ Nil TDS has not been extended to s. 194Q since s.197 is not proposed to be amended ➢ Considering the economic downturn due to Covid-19 pandemic scenario, taxpayers are facing cash crunch and this new provision will further result in reduction of cash blockage. ➢ The combined interplay between TDS and TCS will lead to further litigation and disputes. This is because like in case of TCS on sales, the term 'goods' is not defined. It is not clear whether the definition of "goods" needs to be interpreted as per the Sale of Goods Act or the CGST Act or some other legislation as the term 'goods' is not defined under the ITA. For instance, whether

		the term “goods” includes shares, securities, money/ foreign currency, actionable claims etc. within its scope is not clear since there are different inclusions and exclusions within scope of ‘goods’ under various laws. Under GST law, items like share, securities, money, actionable claims are specifically excluded from definition of goods but under the Sale of Goods Act, goods include stock and shares. ➢ The expanded scope of TDS and TCS severely impact ‘ease of doing business’ in India ➢ TCS is applicable on receipt basis whereas TDS is applicable on credit or payment whichever is earlier. Hence, determining the applicability for the sales made before 30th June and consideration received on or after 1st July will create practical difficulties ➢ Implementation of 194Q have separate set of implementation challenges, some of which are listed below: • Changes in ERP system before implementation date • Communication with customers and vendors and changes with contracts. • Impasse on account of application of TCS and TDS in same transactions • Challenges of application of Section 206AB • Treatment on Purchase/Sales Return if the seller is credited buy the buyer and goods are returned ➢ Further, in respect of GST on services, CBDT Circular No. 23/2017 dated 19 July 2017 has clarified that TDS is not applicable on GST on services where GST is separately indicated in the invoice. It is submitted that similar analogy should apply to GST on goods since GST represents liability of the seller to pay to the Government and hence, there should be no TDS on GST component. It is true that at para 4.6 of CBDT Circular No. 17/2020 dated 29 Sep 2020 in context of TDS u/s. 194O and TCS u/s. 206C(1H), the CBDT has clarified that no adjustment on account of indirect tax should be made for the purposes of TCS on sale of goods u/s. 206C(1H) since TCS is made with receipt of sale consideration. But, TCS represents collection of tax payable by

		purchaser for whom GST is a cost of goods purchased whereas TDS represents payment of tax on behalf of seller for whom GST is a liability payable to Government. Hence, it is justified to exempt purchasers from deducting tax on GST component even though sellers are not exempted from collecting tax on GST component. **Recommendation:** ➢ It is recommended that this proposal be withdrawn completely for transactions which are already within the GST regime and/or B2B transactions. The provisions be made applicable only to payees or payers who are not registered with GST. This will then align with the Government's intention of widening and deepening the tax net. ➢ Alternatively, as between TDS and TCS, only one measure i.e TDS on purchase of goods should be retained since it is comparatively more easier to implement than TCS. ➢ It is recommended that meaning of "goods" may be clearly defined for better clarity of applicability of this provision. ➢ It is also recommended that exemption be granted to all transactions in shares, securities, actionable claims and foreign currency since there is ambiguity on whether these items are at all included within the definition of 'goods'. Generally, these items are traded in well-regulated financial markets and there is no need for imposing TDS by 194Q when the relevant information can be easily obtained from financial intermediaries. ➢ Further, all exemptions which are currently provided in s.206(1H) like imports & exports or through CBDT guidelines like exchange traded transactions be made applicable to TDS u/s. 194Q. ➢ S.197 may also be amended to enable the seller to obtain lower/NIL TDS certificate.

		➢ The exemption granted by CBDT Circular no. 23/2017 on TDS on GST on services may be extended to TDS on GST on goods.
16.	**Rationalisation of Re-opening of assessment:**	**Rationale and issue:** ➢ The new regime for reassessment proposes to do away with the time tested safeguard of 'reason to believe' and substitute it lower threshold of 'information which suggests that income chargeable to tax has escaped assessment'. It may be recollected that in 1987, it was proposed to substitute 'reason to believe' with 'opinion' of the Assessing Officer. But in the wake of representations from taxpayers, the proposal was withdrawn and 'reason to believe' was reinstated. The following clarification was provided in CBDT Circular No. 549 dated 31 Oct 1989. ***"7.2** Amendment made by the Amending Act, 1989 to reintroduce the expression "reason to believe" in section 147 - A number of representations were received against the omission of the words "reason to believe" from section 147 and their substitution by the "opinion" of the Assessing Officer. It was pointed out that the meaning of the expression, "reason to believe" had been explained in a number of court rulings in the past and was well settled and its omission from section 147 would give arbitrary powers to the Assessing Officer to reopen past assessments on mere change of opinion. To allay these fears, the Amending Act, 1989 has again amended section 147 to reintroduce the expression "has reason to believe" in place of the words "for reasons to be recorded by him in writing; is of the opinion". Other provisions of the new section 147, however, remain the same."* It is submitted that there is no justification for moving away from time and judicially tested safeguard of 'reason to believe'. The third proviso to proposed s.149(1) contemplates that the new proposed pre-reassessment process of conducting inquiry and providing opportunity before issue of notice u/s. 148 may be stayed by court and hence provides for exclusion of such stay period from the time limit for initiating reassessment. This shows that the litigation which

		has so far ensued on 'reason to believe' can also arise on the new concept of 'information flagged by Risk Management Strategy' or information which 'suggests' escapement of income. There is no clarity that information flagged in RMS will not emerge from original assessment record and hence, there cannot be 'review' of original assessment order. ➢ The proposed scheme of re-assessment provides that reassessment can be initiated on the basis of information flagged in accordance with the Risk Management Strategy of the CBDT. Whilst this is a welcome move making the process more objective rather than subjective, the reporting of information by the concerned parties needs to be error-free, else it is likely to result in penalising honest taxpayers in situations where the information reported by third parties (which would be used by the automated systems for flagging) is incorrect or mis-reported – this has been the experience in case of data reported in the Annual Information Returns ('AIR') where Courts have held that additions cannot be made only on the basis of data reported in the AIR and that the onus is on the AO to prove that the transaction pertains to the tax payer ➢ Various judicial precedents have held that an assessment cannot be re-opened only on the basis of CAG Audit objections. These decisions are sought to be over-ruled by virtue of this amendment and will increase uncertainty and result in undue hardship to taxpayers ➢ Under the current scheme of re-assessment, the outer time limit for issuing re-assessment notice is six years from the end of the assessment year (other than cases pertaining to income from assets located outside India where it is 16 years). However, under the proposed re-assessment scheme, by setting this limit to 10 years, it will increase uncertainty for taxpayers and lengthen the time limit for attaining finality of proceedings. More so since currently, re-opening beyond 4 years but up to 6 years in cases where is prior scrutiny assessment is permissible only if there is a failure on the part of the taxpayer to disclose fully and truly all

		material facts necessary for the assessment. However, under the proposed scheme, the re-opening is permitted on the basis of books of account, documents or evidence in the possession of the AO which reveal that income chargeable to tax, represented in the form of an asset which has escaped assessment amounts to or is likely to amount to Rs.50 lacs or more. It is submitted that there is no justification for reopening beyond 3 years if there has been no failure on assesse's part in making full and disclosure of all material facts. The assessee should not be harassed for oversight on AO's part – more particularly, when the assessment under new regime is done in faceless manner with a team based assessment with dynamic jurisdiction with internal peer review process. ➢ In the new regime, it is proposed that reassessment beyond 3 years can be made only if the AO has in his possession books of account or other documents or evidence which reveal that the income chargeable to tax, represented in the form of asset, which has escaped assessment amounts to or is likely to amount to Rs. 50 lakhs or more for that year. This is borrowed from current fourth proviso to s.153A relevant to search assessment. In this provision, Explanation 2 defines the term 'asset' to include immovable property being land or building or both, shares and securities, loans and advances, deposits in bank account. In absence of corresponding definition in the new s.149(1)(b), there is no clarity on the scope of 'represented in the form of asset'. ➢ As per the current re-assessment scheme, the AO is required to record reasons for re-opening the assessment and obtain approval of the higher authorities before he issues a re-opening notice. Further, in cases where the AO notices any income escaping assessment subsequently during the re-assessment proceedings, he can re-assess such income. There are conflicting judicial decisions in respect of the issue as to whether the AO can make additions for issues which came to his notice subsequently during the re-opening proceedings, in case no additions are made on account of the issues for which reasons were recorded for re-opening,

		➢ However, as per the proposed re-assessment scheme, whilst the AO is empowered to make additions for issues which he notices subsequently, he is not required to obtain approval of the higher authorities for such issues – this could lead to frivolous additions being made and increase litigation. ➢ Under the proposed re-assessment scheme, the re-opening is likely to be largely information-driven and/ or basis data flagged by automated systems. Experience has shown that information recorded in AIR statements many a times is incorrect and does not pertain to the concerned taxpayer – accordingly, sufficient time should be provided to the tax payer to approach the third parties who have reported the information and reconcile the same if necessary before responding to the AO. Minimum time of 7 days is too short for the taxpayer to verify the information and respond to the show cause notice. **Recommendations:** ➢ Risk Management strategy of CBDT should be made publicly available to enable transparency and certainty amongst taxpayers. Further, once the taxpayer has confirmed that the particular transaction does not pertain to him, there should be a mechanism whereby the AO takes action on the third party who has mis-reported the information rather than re-opening the assessment of the taxpayer ➢ Re-opening of assessment on the basis of audit objections should be rolled back since the fault does not lie with the taxpayer in such cases. Under the new faceless assessment system, there is process of peer review and monitoring of the assessment order before it is finally issued. When the final assessment order is passed after such checks and balances, the taxpayer should not be harassed for audit objection raised by CAG.

		➢ Outer time limit for issuing notice for re-opening assessment should be retained at 6 years from end of the assessment year in place of the proposed limit of 10 years to bring certainty and closure to past matters. ➢ Clarity is required in respect of the relevance of the term 'income chargeable to tax in the form of an asset' to trigger the 10-year time limit. ➢ It is suggested that AO should be required to take approval of higher authorities and give opportunity to taxpayer as per new s.148A even in case of any issue which subsequently comes to his notice ➢ It is recommended that the minimum time limit provided to a taxpayer to respond to a show cause notice seeking to re-open the assessment should be at least 15 days
17.	**Recommendation on applicability of New dispute resolution scheme ("DRS")**	**Rationale:** ➢ The existing provisions provide for alternate dispute resolution through Dispute Resolution Panel which is collegium of three PCIT/ CITs but the facility is restricted to taxpayers being non-residents or taxpayers having TP disputes. There is no alternate dispute resolution forum available for other taxpayers. ➢ New dispute resolution scheme ("DRS") to be notified for resolving specified disputes in relation to specified Taxpayers and New Dispute resolution committee (DRC) to be set up to undertake dispute resolution in a faceless manner involving dynamic jurisdiction. Constitution of DRC and the overall scheme will be notified. ➢ The DRC will have powers to reduce or waive any penalty or grant immunity from prosecution where dispute is resolved through this forum

- The scheme is available on a voluntary basis to Taxpayers and is alternate to appeals mechanism. Taxpayers will be provided an option for settlement of disputes arising due to a variation in the specified order in respect of a specified taxpayer who satisfies prescribed conditions
- The variation in the specified order should be less than or equal to 10 Lakhs (disputed amount)
- If return has been filed by taxpayer for the AY relevant to the specified order, then the returned income should be less than 50 Lakhs
- The specified order should not have been passed pursuant to search or survey proceedings or pursuant of exchange of information under tax treaties/ international agreements

Issue

- The proposal is in deference to industry representations for mediation as an alternate dispute resolution forum and we welcome it.
- However, the scheme is limited to small taxpayers where the returned income is less than INR 50 lakhs and disputed addition is less than Rs. 10 lakhs. The rationale for keeping out mid-sized and large sized taxpayers outside the proposed scheme is not clear.
- While it is stated that 'specified order' which can be resolved through DRC includes a draft order, it is not clear whether DRC can settle pending litigation cases satisfying the qualification criteria of returned income < Rs. 50 lakhs and disputed addition < Rs. 10 lakhs

Recommendation:

- It is recommended that the current threshold limits of returned income of INR 50 lakhs and disputed amount of INR 10Lakhs should be eliminated to cover mid-sized and large sized taxpayers as well.

		➢ It should also be clarified whether DRC can settle the pending litigation cases ➢ The DRC must be constituted at the earliest with competent personnel and its performance must be monitored in terms of time-bound resolution of cases.
18.	**Defer the proposal of Faceless Scheme for conducting Income Tax Appellate Tribunal (ITAT) proceedings for at least two years**	**Rationale:** ➢ In the recent past substantial amendments have been introduced in the ITA for enabling Government to notify faceless schemes, introduction of Faceless Assessment Scheme 2019, Faceless Appeal Scheme 2020, Faceless Penalty Scheme etc. ➢ In line with the above, FB 2021 proposes to insert new provisions u/s. 255 to enable the Central Government to frame a faceless scheme for conducting Income Tax Appellate Tribunal (ITAT) proceedings. **Issue** ➢ Introduction of enabling provisions for faceless ITAT proceedings have given rise to lot of apprehensions in the minds of the taxpayers considering lack of experience in the field of faceless assessment and faceless appeal scheme introduced in 2020. ➢ The industry is yet to experience a full cycle of faceless assessment which has got delayed due to Covid 19 pandemic. ➢ The ITAT is the last fact-finding authority in the appellate hierarchy for the income tax matters. When the facts are not properly appreciated by lower authorities, ITAT is the only forum for analysis of facts and legal issues and requires lot of advocacy in person. The Supreme Court and High Court admits and decides only on the question of law and not on question of facts.

		➢ During Covid 19 pandemic, different benches of the Tribunals implemented protocols for virtual hearings. However, both Members and representatives of taxpayers and Tax Department faced many practical challenges in conducting the hearings. ➢ Government has already implemented almost all other tax proceedings in the faceless system. The taxpayers may face severe hardship if the in-person hearings are not granted even at ITAT level. ➢ Given the fact that under the Faceless Assessment and Appeal Scheme, the opportunity of being heard is provided under exceptional circumstances with the approval of the higher tax authorities, it is anticipated that faceless ITAT proceedings may also provide for limited opportunity of being heard in person through video conferencing. This will adversely impact of cause of justice. **Recommendation** ➢ It is recommended that considering the uncertainties of new system, the proposal should be deferred till the faceless system is fully stabilised for assessment and appeal proceedings. It should be deferred for at least two years to give taxpayers and Tax Department enough time to experience and equip themselves for faceless proceedings. ➢ Alternatively, if the scheme for faceless ITAT proceedings is to be implemented, • It is recommended that faceless ITAT be implemented for only low effect appeal matters in the initial phase, that too, at the option of the taxpayers, and other large cases be gradually covered in future. • The scheme for faceless ITAT proceedings should also provide for adequate opportunity of being heard at all stages of the hearing. Video conferencing facility need to be liberally made available and not on discretion basis

19.	**Clarifications on constitution of Board for Advance Ruling (BAR) to replace Authority of Advance Ruling (AAR)**	**Rationale** ➢ Currently, AAR is headed by SC/HC judges. Power and functions of AAR is discharged by its 3 benches, comprising of - Chairman, Vice-chairman, one Revenue member and one Law member. ➢ Advance ruling is binding on the applicant as well as Tax Authority. However, a constitutional remedy of filing a writ petition before the HC is available to the parties. ➢ Presently, withdrawal of application is allowed within 30 days from the date of the application. However, in practice AAR is allowing withdrawal of application even after 30 days i.e. at the advanced stages of hearing. ➢ The time interval between date of application and date of rejection/pronouncement of ruling is excluded while computing the period of limitation for completion of assessment. Also, if the period left after such exclusion is less than 60 days, the limitation period is extended by 60 days. ➢ The working of AAR has been stalled due to difficulties faced in filling up vacancies in Chairman and there are more than 450 applications pending for a period upto 5-6 years defeating the very purpose of constitution of such forum. ➢ It is proposed to replace the AAR with BAR run by two members, each being an officer not below the rank of Chief Commissioner ➢ Advance ruling pronounced by the BAR shall not be binding on either of the parties. ➢ A new provision on appeal is proposed to provide for an appeal from a ruling of the BAR to both the parties to the High Court, within 60 days of date of communication of the ruling.

		➢ The 30 days period for withdrawal of application from date of application will continue to apply. ➢ Pending applications in respect of which no order has been passed before the notified date, such application along with all the relevant records, documents or material, on the file of the AAR shall be transferred to the BAR and shall be deemed to be the records before the BAR for all purposes ➢ It has also been proposed to make the advance ruling schemes faceless. **Issue** ➢ The relegation of the AAR to BAR makes the system a lot less attractive to foreign taxpayers since the rulings are not binding and the process is no longer one which will be examined from the viewpoint of a fair and unbiased retired HC/ SC judge. DRP is a good example, which consists of three CITs and yet it is very difficult for them to take an independent view considering the revenue impact of their decisions – they have inherent conflict of interest in discharging their functions. Foreign taxpayer may not apply to BAR as there is an apprehension that decision may go against them. ➢ Non-binding nature of the advance ruling proposal will put the HCs overburdened as the applicant as also the tax department may file appeal in almost every case where the outcome of advance ruling is not in their favour. ➢ Since there is change in constitution of forum, the taxpayers whose applications are pending for a long time may no more wish to pursue their applications. The limitation of 30 days from date of application will preclude them from withdrawing their applications. It is not clear whether BAR will permit them to withdraw the applications as judiciously as erstwhile AAR – despite stiff opposition from Tax Department.

		Recommendation ➢ A complete revamp in the scheme of advance rulings may not be warranted at this stage. • Competent personnel may be appointed to man the AAR since the lethargy in delivering ruling was owing to the long vacancies in Chairman/Vice Chairman's office. • An alternative resolution to the challenge faced in the existing scheme i.e. vacancy of the member at the Authority, would have been is to ease qualifications for appointing the members from the Bar Council directly or include a President/ Vice-President of ITAT. This is similar to practice where several judicial members of the ITAT were elevated as judges in various HCs. Even industry/ tax experts from the non-government sector who can bring in specific expertise could be considered. • This would help in speedy disposal of applications and at the same time, it would not hamper the independent functioning of the Authority. Both taxpayer and Tax Department will continue to have remedy of writ before HC. ➢ Without prejudice to the above, following are some specific recommendation in relation to functioning of BAR • The advance ruling should be made binding on the Tax Department. • It may be clarified that where neither of the party has gone into appeal against order of the BAR, the same becomes binding on both the parties • The scheme for faceless functioning may not be implemented at this stage. This is for the reason that faceless determination of application without effective hearing may lead to erroneous determination. The same may be implemented based on the experience gained on faceless assessment and faceless CIT(A) • The admitted applications should be heard in entirety by current AAR itself. This would be just and fair for taxpayers who applied for advance ruling from SC/ HC judges and not from an inferior panel of Commissioners. • With prejudice, in case pending applications are transferred to the BAR and the applicant wishes not to pursue application with the BAR, the application may be allowed to be

		withdrawn at any stage of the proceedings. The application fee may be refunded to them after deducting certain portion. • If 2 members of BAR have disagreement, there should be an enabling provision to solve such disagreement. • There is also a need to ensure that consistency in rulings is maintained between the different benches of BAR. Different benches must be consistent in the approach and must follow the Orders passed by the coordinate benches. ➢ Since the taxpayers applied to AAR for expeditious resolution of contentious issues, the time limit for completing assessment after withdrawal of application or pronouncement of BAR should be reduced to 6 months from such withdrawal or pronouncement.
20. Clarifications required on expanded scope of Equalisation Levy		
a)	**Scope of "online sale of goods" or "online provision of services"**	**Rationale and issue:** ➢ In today's world, every business (including traditional brick and mortar business) has embraced technology to bring greater efficiency to its business operations. The technology could be adopted with various different goals in mind. Very often, technology is being used to make the activity more time and cost efficient (e.g. collection of Purchase Orders through an online link as against emailing or posting), or as a mode of communication (e.g. email for correspondence)as against letter or phone call), or collection payment (e.g. weblink to make payment as against a wire transfer), or receipt of inquiry on company's website which would be construed as acceptance or placing of order (e.g. inquiry box or contact us links).. ➢ Where traditional or digital business participate substantially in India's vast market through digital means, India could certainly look at a recompense for erosion of its tax base where laws are not sufficient to create a taxable nexus. It is, therefore, important to determine what will constitute such digital nexus that ought to be taxed ➢ Finance Bill 2021 seeks to expand the scope of 'online sale of goods' or 'online provision of services' to one or more of the following online activities viz. (a) acceptance of offer for sale;

		or (b) placing of purchase order; or (c) acceptance of the purchase order; or (d) payment of consideration; or (e) supply of goods or provision of services, partly or wholly. ➢ The proposed amendment seeks to widen the scope of EL provisions to physical/ offline supply of goods and services where any one of the specified activities take place online. Such approach perhaps has an unintended, and certainly undesirable, effect of covering traditional businesses wherein technology plays only an incidental or trivial role. In such cases, the digital or electronic facility is utilised not for availing the principal goods or service but merely for seeking information or for confirming the booking or simply streamlining supply chain. The primary object of such business continues to be purchase of physical goods or availment of physical services. This perhaps was also not the intent of the expert committee which was set up to examine Equalisation Levy in 2016 as could be noted from para 3 of Appendix 2 of the committee report. ➢ Such a wide scope does not align with global discussion with regard to digital economy taxation. Most of the Digital Service Taxes (DST) imposed or proposed by various countries are restricted to digital goods or services. ➢ It may also be noted that the unusually wide ambit of India's EL is criticised in investigation report issued by the United States Trade Representative (USTR) under Section 301 of the Trade Act, 1974. India's response to this particular observation has been that India is seeking to tax only those transaction which have sufficient nexus with India that would have otherwise given it taxing rights. This argument may get diluted with the broad expanse now the levy would have post amendments. ➢ It virtually taxes all activities which constitute 'business with India' rather than taxing activities constituting 'business in India'. There will hardly be any import of goods or services which will not involve any of the above referred specified online activities. In the least, all payments for imports of goods or services are made through digital channels involving some payment facility through digital or telecommunication network

		➢ It is appreciated that the intent of the Government is to create a level playing field between non-residents and residents but this rationale misses the point that the non-residents are also taxable on the same income in their home jurisdiction. Imposition of tax on 'business with India' extending beyond the 'digital' sphere of activities goes much beyond the current global debate on taxation of digital economy. It must be noted that level playing field between residents and non-residents is created by imposing customs duty and GST on import of goods into India. **Recommendations:** ➢ In terms of Explanation to s.164(cb), the applicability of EL should be restricted only to those cases wherein all or substantially all activities take place online. ➢ It should also be clarified that the intent is to tax e-commerce transactions and therefore, instances such as online ordering systems (or such similar internet based systems), or Enterprise Resource Planning (ERP) software, or corporate websites through which orders are received, or purchase orders received vide emails or a common portal (such as a document management and storage system) using the internet, through which orders are received by non-residents, should not be brought within the ambit of EL, only because they have used telecommunication network for such interaction. Such systems are used only as a means to achieve operational efficiency and not to effectuate sales or solicit customers. In other words, the ambit of provisions should exclude what is not normally regarded as "e-commerce", e.g. email, ERP, intranet etc. ➢ Provide also clarity that functions which were traditionally being carried out offline and have been made online only due to Covid-19 travel restrictions should not be covered within the ambit of EL

b)	**Specific exclusion for payment gateways/ payment aggregators**	**Rationale and issue:** ➢ Given the expanded scope of EL, the non-resident payment gateways, or aggregators may be liable to EL, even though they are only facilitating payment leg of the transaction for an offline transaction or a transaction facilitated by another e-commerce operator. ➢ Promoting digital payments is one of the policy initiatives placed by the Government. To give impetus to digital payments, the Honorable Finance Minister in her Budget Speech 2021 declared that an amount of INR 1,500 Crores will be earmarked to promote digital mode of payments. Another amendment proposed in Finance Bill 2021 is to increase the turnover threshold for tax audit to INR 10 crores, if 95% of receipts and payments are executed through digital modes. Thus, the Government itself has been incentivizing the taxpayers to use digital mode of transactions. In such situation, it may be contrary to the Government's initiatives to levy EL on transactions merely on the ground that payment has been made online or through digital means. ➢ Further, it may be difficult, rather impossible, for the payment processor to determine whether the consideration is chargeable under EL, for instance, whether it is in the nature of royalty/ fees for technical services (FTS), if subjected to advertisement EL, etc. **Recommendations:** ➢ Without prejudice to our representation to restrict the levy only to digital goods or services, it is requested to eliminate clause (d) of Explanation to s.164(cb), viz. "payment of consideration". ➢ Alternatively, a specific exclusion for payment gateways/ payment aggregators should be considered. It should at least be clarified that transaction is not covered under ESS EL if entire transactions take place offline (booking, acceptance, confirmation, delivery) but payment take place online. ➢ Please also clarify that where the payment gateway is collecting monies from an Indian resident on behalf of the non-resident ecommerce operator , it is in-effect providing

		collection services to the non-resident ecommerce operator under their agreement. Indian resident, if at all, is merely agreeing to the terms of use of payment gateway operator. Therefore, such transaction will not be subjected to equalisation levy ➢ Reference may be made to clarification provided at para 4.2 of Circular No. 17/2020 dated 29 September 2020 in the context of TDS u/s. 194O where it is clarified that payment gateway will not be liable to do TDS if tax has been deducted by the e-commerce operator on the same transaction. Similar logic will apply even in context of EL except for the aspect that it may be difficult for payment processor/gateway to find out whether the recipient is NR E-commerce operator and whether such NR E-commerce operator is liable to EL. In any case, the payment processor/aggregator merely provides payment service and the scope of EL should not extend beyond consideration receivable for such payment services
c)	**Clarify that EL will not apply where services are availed outside India**	**Rationale and issue:** ➢ Consider a scenario where the services of overseas hotels are booked online, and the actual accommodation services consummated outside India. In such cases, the contract is for use of room rights and not rendering online services of booking. The broad scope of EL covers such situations merely on the premise that booking takes place online from India or is done by a person resident in India. ➢ Place of consumer is the very basis of granting taxing rights to market jurisdiction as per the ongoing debate in the context of digital economy. Coverage of such situation within the realm of EL may amount to extra-territorial application of the law. ➢ Even under the existing source-based taxation principles, the FTS/ royalty payments which are for the purpose of business or source outside India are not subjected to tax in India. The broad scope of EL may also cover unintended cases where FTS/ royalty payments meant for business outside India is not taxable in India by virtue of source rule exclusion under ITA but is subjected EL because order is placed online or payment is made online from India. ➢ Please also consider a scenario where an Indian resident reserves a ticket for a theme park attraction or a natural wonder or sports event or a theatrical performance outside India and

		pays for it online. The services of the physical attraction are availed physically outside India. Now the entire reservation fees could be subjected to EL India only because payment was made online **Recommendations:** ➢ The scope of EL should exclude cases where objects of consumption are outside India and the physical consumption of goods or services, therefore, takes place outside India
d)	**Clarify that internal goods/ services management systems are not covered by the levy**	**Rationale:** ➢ Both traditional and new economy organisations employ various electronic systems in the form of ERP, content management systems, inventory management including Just-in-time systems, workflow systems, accounting, payroll and compliance management, knowledge sharing and information systems, etc. ➢ All these systems are primarily driven towards promoting efficient business operations. For example, the system may make it more efficient to place an order which could otherwise be placed through physical means or over a telephone or email. R&D in pharma industry or solutions in consulting industry could be more easily be accessible over internal systems by the group companies. ➢ The scope of EL perhaps unintentionally may extend to these systems. **Recommendations:** ➢ A clarification may be provided that such systems do not constitute e-commerce and therefore, will be excluded from the purview of EL

e)	**Clarity on terms "acceptance", "offer for sale"**	**Rationale and issue:** ➢ Amendment employs the terms such as "offer for sale", "acceptance" or "placing" of purchase order. Presently, there is no clarity as to the scope and coverage of these terms. It is possible that in some businesses entire negotiation of agreement take place offline and the necessary documents are sent online or uploaded on an internal system. In such circumstances, there is an apprehension that mere sharing of relevant documents may tantamount to placement of purchase order or acceptance of offer for sale. **Recommendations:** ➢ Suitable clarifications should be provided in this regard. It may be clarified that mere "receipt" of purchase order or offer for sale is excluded from the scope of the levy
f)	**Clarify that EL is restricted only to the convenience fees earned by the e-commerce intermediary for facilitating the transaction**	**Rationale and issue:** ➢ E-commerce operators are liable to 2% EL on the amount of consideration "received or receivable" from e-commerce supply or services. The amendment proposed under s. 165A(3)(b) appears to impose EL on the gross consideration collected by intermediary/ aggregator. ➢ It may be noted that when the aggregator/ facilitator collects consideration from the customer, it collects the same on behalf of the seller/ service provider (e-commerce participant) and has no right over such consideration. The intermediary is entitled only to commission or facilitation fees as a consideration for its facilitation or marketplace services. In such situation, to impose a levy on a consideration which does not even belong to the e-commerce operator may not be fair and justified. ➢ Also consider an instance where Indian resident makes an offer for purchase of an overseas property online, and thereafter consummates the deal offline. EL may bring to tax the entire value of the property to tax in India ➢ This may also impact eligibility of aggregators to claim de-minimis exemption of INR 2 Crs under s.165A(2)(iii) if the consideration received on behalf of e-commerce participants is

		reckoned to the account of e-commerce operator. Also, where non-resident seller or service provider has a PE in India, EL on gross consideration may result in application of EL despite the exemption under s.165A(2)(i). ➢ Further, taxing gross consideration may result in duplicated levy wherein the e-commerce participant itself is liable to EL for the consideration received for online sale of goods or online provision of services. Also, in certain cases, online sale transaction may take place through multiple e-commerce operators and charging EL to each such operator may result in multiple taxation with cascading effect leading to increased cost of the transaction. ➢ This will get further complicated if one e-commerce operator has a PE in India or its income is in the nature of royalty/ FTS and hence avail benefit of exclusion, will be excluded from the scope of EL provisions, however, the other e-commerce operator may still face the burn of ESS EL on same transaction. Equally, where supply being made is in the nature of royalty or FTS, but intermediary services do not follow that characterisation will also create complications. ➢ It may also be noted that a transaction facilitated by an e-commerce operator is already subjected to withholding tax under s.194O. The exemption under s.10(50) may also not relieve the TDS under s.194O which is with reference to the gross amount of sale or service and is not linked to income of e-commerce participant. **Recommendations:** ➢ The proposed amendment in s. 165A(3)(b) on the scope of consideration received or receivable" should be omitted. ➢ It should be clarified that the amount of consideration received or receivable by the e-commerce operator for facilitating the transaction will be restricted to convenience fees received or receivable by such operator in its own rights. ➢ <u>Without prejudice to the above, aggregator/ facilitator should be relieved from compliance with EL to the extent of value of third party supply it has facilitated, where the payment has not been routed through the operator. Equally, third party supplier cannot be asked to made good on EL liability of the aggregator/ facilitator</u>

g)	**Specific relief to seller or service provider if the aggregator or intermediary discharges EL on the gross consideration**	**Rationale and issue:** ➢ The seller or service provider itself may be liable to EL if qualifies as e-commerce operator. Thus, there is a possibility of duplicated collection of EL. **Recommendations:** ➢ In such cases, if levy is imposed with reference to the gross consideration, a specific relief should be provided to the seller or service provider from its own EL obligation. For this purpose, the seller or service provider may obtain a declaration similar to the one sought by payment gateways in the context of s.194O (refer Circular No. 17 of 2020 dated 29 September 2020). ➢ Further, it should be clarified that such seller or service provider will be eligible for exemption under s.10(50) once the transaction of online sale of goods or provision of services has been subjected to EL on gross basis. If seller or service provider is otherwise taxable under ITA, denial of exemption may result into double taxation, which is contrary to the intent of providing exemption as supported by Explanatory Memorandum to FB 2016. ➢ Also, if levy is imposed on the gross consideration and the obligation to discharge EL is on the aggregator or intermediary, payment challans and Form 1 be appropriately amended to capture the details of the seller or service provider on whose consideration EL is paid by the aggregator or intermediary
h)	**Specific relief from withholding u/s. 194O where EL is charged by aggregator or intermediary on the gross consideration**	**Rationale and issue:** ➢ In terms of s.194O, the e-commerce operator is obliged to withhold taxes on the gross amount of sale or services by the e-commerce participant. Thus, where e-commerce operator is required to discharge EL on gross consideration, there will be duplicated obligation on the e-commerce operator to pay EL as well withhold tax under s.194O. **Recommendations:** ➢ The intent of s.194O as expounded in the Explanatory Memorandum to FB 2020 is to widen and deepen the tax net by bringing participants of e-commerce within tax net. Thus, once EL

		is discharged even on the part of consideration earned by e-commerce participant, it is fair to exclude such transactions from the gamut of withholding obligation u/s. 194O.
i)	**“Consideration received or receivable” to exclude sales returns, collections of taxes on behalf of Government, such as GST, service tax or alike**	**Rationale and issue:** ➢ In case of sales of goods or services by e commerce operator, sales returns are very common in both retail and wholesale scenarios. In certain categories like fashion merchandise, the returns can be as high as 25% of the sales. Refunds are also common either due to certain technical issues or non-delivery of standard services to the customers. ➢ Further, in the context of various TDS provisions, CBDT has clarified that consideration for a given service is to be calculated without taking into account statutory levies which are collected for handing over to the Government. Refer CBDT Circular No. 1/2014 for service tax on rent and professional services and CBDT Circular No. 23/2017 on GST. **Recommendations:** ➢ Accordingly, without prejudice to our representation in the above paras, it would be fair to restrict levy to consideration towards net consideration received or receivable. Also, the e-commerce operator should be permitted to make adjustment of sales returns and credit notes in the quarter of the financial year to which it pertains while doing quarterly compliance u/s. 166A of the FA 2016. The fact that the related sale may pertain to earlier quarter may not be relevant consideration while granting reduction so long as such sale was considered for ESS EL in the earlier quarter. Please note that TCS under CGST Act 2017 is also calculated with reference to net value of taxable supplies” after reducing the aggregate value of taxable supplies returned to the suppliers during the month. ➢ Further, a suitable clarification may be provided that ESS EL will be levied with reference to consideration flowing to the operator and will exclude collections on behalf of Government such as GST

j)	**Instructions for Indian resident payer**	**Rationale:** ➢ It is quite possible that there will be several transactions where there could be debate on applicability of EL vis-à-vis royalty/ FTS. ➢ It is also possible that Indian resident payer may decide to err on the conservative side and withhold income tax on the payment by treating as royalty or FTS only to protect against adverse consequences of failure to withhold taxes. **Recommendations:** ➢ It should be clarified that where non-resident has duly discharged EL on its receipt and evidenced it to Indian resident, then Indian resident payer should not be considered as an 'assess-in-default' and should not be made liable to consequences of failure to withhold taxes. Form 15 CA / 15 CB procedures could carry suitable disclosures to this extent. ➢ Indian tax authorities will in any case have the opportunity to audit the EL compliances made by the non-resident and where for any reason royalty/ FTS characterisation or existence of PE is determined, EL paid should be adjusted against tax demand raised to prevent undue hardship
k)	**Clarify that clarifications are 'retrospective in nature' and without prejudice, they should come into effect only from FY 2021-22, except applicability of s.10(50) of the ITA**	**Rationale and issue:** ➢ The EL were introduced at enactment stage as a surprise package and without any supporting Memorandum or clarificatory document. Given such situation, the taxpayers have been grappling with the interpretational issues and procedural hurdles. Stakeholders had been seeking clarifications time and again to gain clarity and certainly with regard to the applicability of the levy. ➢ Post 10 months of the levy, the Government, vide Finance Bill 2021, has proposed certain amendments with retrospective effect from 1 April 2020. The Explanatory Memorandum to

		FB 2021 now states that the amendments to EL have been introduced with a view to provide *"clarifications to correctly reflect the intention of various provisions concerning this levy"*. ➢ It may be noted that the amendments are substantive in nature and significantly widen the scope of EL provisions. The amendments have resulted in covering the business models which were otherwise outside the net of EL; also, the base of levy has underdone change by virtue of the amendment to "consideration received or receivable". Such amendments are causing significant hardships to the taxpayers with no breather to comprehend the provisions and immediately comply with the same. **Recommendations:** ➢ The present Government has always fostered the policy of prospective amendments. Aligning with such philosophy, the amendments to EL chapter (except applicability of s.10(50)) should be made prospective with effect from 1 April 2021 (FY 2021-22). Retrospective amendments negatively impact the sentiments of the stakeholders
l)	**Provide for protection from interest and penalty under ITA as well as EL**	**Rationale and issue:** ➢ On account of retrospective amendment, following issues may arise: (a) Additional EL liability for the e-commerce operator who adopted a view that EL is restricted to digital goods and services alone (b) Additional EL liability for intermediaries or aggregators who discharged EL on the net consideration received (c) Income-tax liability to e-commerce operators who claimed exemption under s.10(50) with respect to royalty/ FTS income (d) Withholding tax liability to payers of royalty/ FTS who did not deduct tax at source relying on s.10(50) exemption

		Recommendations: ➢ For above referred genuine cases, it should be explicitly clarified that no interest and penalty will be levied for additional income-tax or EL or withholding tax liability arising pursuant to the retrospective amendments
m)	**Clarify explicitly that EL is an interim measure and will be abolished once global consensus under BEPS 2.0 is in place**	**Rationale and issue:** ➢ The blueprints of unified approach under BEPS 2.O have already been released and there is a strive and commitment to achieve global consensus by mid-2021. The public discussions and stakeholder consultations in this regard are in progress. ➢ The efficacy of such global measure is highly dependent on uniform approach to be adopted by each member country. Any unilateral measure is not only inconsistent with global agenda but is also likely to result in undesirable multiple taxation of same income without any tax credit or an effective opportunity of eliminating such multi taxation. India has, time and again, even while vocalising its view point vociferously, expressed solidarity and support for the OECD led solution for taxation of digital ecommerce. **Recommendations:** ➢ In tandem with the above global spirit, it should be clarified that EL is a transit/ temporary/ interim measure. An explicit statement to this effect will send assuring signals to the investors particularly as the scope of EL as now applicable is fairly wide.
n)	**Definition of terms “goods” and “services”**	**Rationale and issue:** ➢ ESS EL applies to online sale of goods or online provision of services or facilitation thereof. The terms “goods” or “services” are not defined. ➢ Reference can be made to definitions under CGST which exclude share, securities, money, actionable claims from scope of TCS.

		Recommendations: ➢ Thus, it is recommended to introduce suitable definition to exclude certain terms like financial instruments, insurance, forex derivatives, actionable claims, shares, securities, bonds, debentures from scope of “goods” and “services”
o)	**Clarity on “sale of advertisement”, “sale of data” between two non-residents**	**Rationale and issue:** ➢ **Sale of advertisement between non-residents -** The expansive language of the provisions could potentially cover a wide gamut of transactions between non-residents. The language of clause (i) of Section 165A(3) also covers situations where an online advertisement is merely accessed by persons in India, who were not the target audience for such advertisement at first place. Further, through advertisements, enterprises may intend to target markets region-wise rather than a specific country (say, India). This creates a complexity as to how much consideration for the sale of advertisement shall be allocated to persons accessing the advertisements in India and outside India. **Recommendations:** ➢ Clarity should be provided on the scope and exclusions from the provision and rule out the possibility of it extending to unintended situations. We also request that clarity be provided with respect to the India allocation of sale consideration where the advertisements are more widely targeted. It should be clarified that the levy will not trigger if while browsing New York times, a person is resident in India finds a general/static advertisement of US products (not specifically meant or designed for Indian). Also, depending on pricing model, it may so happen that ad revenue is not earned only when a customer clicks on the ad. In such cases, the revenue cannot be attributed to the Indian customers who merely views the advertisements but does not click on it.

		Reference can be made to the draft guidance released under France Digital Service Tax (DST) which provides guidance on what is "targeted advertising". According to the said guidance, "targeted advertising" is characterized by three cumulative conditions: (i) services are marketed to advertisers or their agents; (ii) advertising messages are placed on a digital interface; and (iii) the messages are targeted based on user's data (either collected on the interface itself or collected/generated when users consult other digital interfaces). The guidance clarifies that targeted advertising messages are designed, at least partially, based on data from the user of the digital interface on which the message is placed. Such data, notably keywords in a search engine, identification username or password and personal or non-personal data, could have been collected on any digital interface. However, it does not apply in cases where the data is not collected or generated via digital interfaces; data that have no influence on the recipient or the content of the advertising message; and data related to the digital interface itself but not specifically related to the user of the digital interface. **Rationale and issue:** ➢ **Sale of data between non-residents -** Clause (ii) of Section 165A(3) aims to apply the EL on transactions relating to *"sale of data collected from a person who is resident in India or from a person who uses internet protocol address located in India".* While the language is clear to include only sale or disposal of data transactions, the language does not specify the nature of 'data' sought to be covered by the provision. Further, the provisions purport to tax sale of data irrespective of whether it was collected in the past. **Recommendations:** ➢ The nature of 'data' intended to be covered should be clarified. Clarification should also be provided to with respect to the period to which the 'data' relates.

		Further, some users may not provide the correct contact information, thereby, making it all the more difficult to ascertain if the data is collected from persons resident in India. It is humbly prayed that suitable clarification be brought in to address this issue as collation of reliable information and attribution thereof is almost impractical
p)	**Guidance on determination of IP address, residential status**[1]	**Rationale and issue:** ➢ As per s.165A(1)(i), ESS EL shall be charged on the amount of consideration received or receivable by an e-commerce operator from e-commerce supply or services made or provided or facilitated by it to a 'person resident in India' or a person using IP address in India. ➢ Whether a person is a resident or not in India is a fact specific exercise and may be challenging for the 'e-commerce operator' to verify the residential status for its customers. Further, it may be impractical for companies to keep track of the IP address of every user and data flows. It also raises questions regarding whether the IP address requirement is sufficient, reliable and verifiable indicator of nexus in all cases. There could also be security concerns while adopting IP address as criteria to trigger ESS EL (e.g. a hacker to sabotage the company by a DDoS attack (or a method of masking IP address) can create a risk for company) **Recommendations:** ➢ Thus, it is imperative that a guidance about determination of IP address is provided and determine residential status of a person
q)	**Appeal remedy against all EL disputes**	**Rationale and issue:** ➢ Presently, remedy for filing appeal only against order imposing penalty under EL for default in deduction or payment of EL and/or filing of annual statement. **Recommendations:** ➢ Therefore, appeal remedy should also be available for any EL disputes

[1] For instance, in case of a non-resident University/ Education institute, student travel to and fro from India

r)	**Scope of 163 to be made restrictive for the purpose of EL**	**Rationale and issue:** ➢ S.178 of the FA 2016 states that the provisions of Chapter XV of the ITA shall so far as may be, apply in relation to equalisation levy, as they apply in relation to income-tax. Chapter XV of the ITA provides liability in special cases and includes provisions with regard to representative assessee as well. S.163 of the ITA which provides meaning of agent with respect to NR provides various limbs and one such limb covers a person in India from or through whom the non-resident is in receipt of any income, whether directly or indirectly (S.163(1)(c) of the ITA). **Recommendations:** ➢ It may be noted here that the reason for shifting the compliance burden on NR for ESS EL is due to the fact that it captures even B2C transactions and making every customer who is in receipt of online sale or supply of services as agent of NR can become clumsy and non-feasible. On similar basis, it is prayed that limb (c) can be deleted or modified in a manner that liability of representative assessee is not cast on the customers in case of B2C transactions
s)	**Set off of EL liability against liability under ITA and vice-versa. Also, provide clarity on refund mechanism for excess EL liability paid**	**Rationale and issue:** ➢ There can also be a situation where the non-resident e-commerce operator pays EL on the basis that there exists no PE in India, however in appellate proceedings, it is finally concluded that e-commerce operator has a PE in India and hence the income is taxable under the provisions of ITA and not under FA 2016 due to s.165A(2)(i). Similarly, situation may arise where tax department alleges that the payment is royalty/FTS and in appellate proceedings the payment is held as not subject to EL but liable to tax as royalty/FTS under the provisions of ITA. ➢ It is also possible that Indian payer may approach the Indian Revenue under s.195 for determination of appropriate taxes where non-resident ecommerce operator has already discharged ESS EL and represented such income to be eligible for exemption under s 10(50).

		➢ In such cases, an issue arises as to how should the EL tax which has been paid initially by the e-commerce operator be treated. Currently, there appears to be no mechanism for e-commerce operator to claim credit or refund for ESS EL already discharged. **Recommendations:** ➢ It is recommended that in the absence of any clear directions in this regard, the amount paid as EL should be treated as advance tax for ITA purposes and accordingly, the amount should be available for set off/ adjustment against the income tax payable under the ITA. ➢ Further, as a corollary, it should also be clarified that in a case where resident payer, conservatively withholds @ 10% as royalty/ FTS while the payee believes it is liable to EL, a credit of 10% withholding tax against EL liability of 2% (as also facility to claim of refund of excess 8% taxes) should be available through EL annual return itself. This will eliminate the concerns over cash blockage for taxpayer to the extent of tax withheld by the payer (since otherwise NR e-commerce operator will have to claim refund of taxes withheld in the ROI).
t)	**Extension of due dates prescribed for making the quarterly payments of ESS EL**	**Rationale and issue:** ➢ As per Section 166A, every e-commerce operator is required to pay EL to the credit of the Central Government for the quarter of the financial year within the due dates specified. While in respect of quarters ending in June, September and December, the due dates for deposit of EL are 7 July, 7 October and 7 January, respectively' in respect of the quarter ending 31 March, the due date to deposit EL is 31 March itself. ➢ As per the general business practices, the sales reports are generated/ finalised in 3-4 working days after the end of the month. Basis such sales reports, the amount of ESS EL shall be calculated and finalised. Further, the NR needs to remit the payment to Indian banks for subsequent payment to the Indian treasury which further consumes time.

		Recommendations: ➢ Given that the e-commerce operator will be required to assess transactions and amounts on which EL is required to be discharged which may take time, it is prayed that the due dates for making the payment of ESS EL should be relaxed to 30 days after the end of each quarter. ➢ Without prejudice, it is recommended that at least the due date for the March quarter is specified as 30 April, same as the due date for deposit of TDS for March quarter.