PRE–BUDGET MEMORANDUM 2022-23: DIRECT TAXES

PART A - ISSUES REQUIRING LEGISLATIVE AMENDMENTS

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

PRE–BUDGET MEMORANDUM 2021-22: DIRECT TAXES

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	Covid-19 Related Measures	
1.	**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. • Many companies have undertaken to pay / reimburse the cost of COVID-19 vaccination for employees and their family members. • Vaccination is mandatory for the employee to travel to office and vaccination of family member is also equally important as this is a contagious disease. COVID vaccine is now a basic necessity and should not be equated with personal expenditure / benefit / amenity. ➢ Considering the Covid-19 Epidemic, many organizations distributed PPE Kits, Masks, Food etc. 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 years 2020-21 and 2021-22. ➢ All expenses related to Covid 19 whether part of CSR or not be fully allowed as deduction u/s 37 of the ITA.

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		➢ Continuity of deduction u/s 80G towards contribution to combat Covid -19, even for the companies opting new tax regime.
2.	**Extension of WFH in relation to SEZ Units**	**Rationale:** ➢ To address the Covid19 Pandemic related hardships for the IT/ITeS industry having units in SEZs, the Dept. of Telecom provided relaxation for WFH to entities registered as Other Service Providers with DOT. The powers for relaxation for WFH in respect of SEZs was given to the respective locations Development Commissioner where each location provided generic approval for WFH and removal of assets on its own till a specified date which was extended from time-to-time ➢ The Department of Commerce permitted the Development Commissioners to consider and approve requests from the SEZ Units for extension of Work from Home (WFH) facility in a liberal manner till such time the National Disaster Management Authority or the State Governments continue to issue orders governing the Covid-19 Pandemic Management. Further, SEZs units have also been permitted to take desktops/laptops outside the SEZs to enable them to work from home. ➢ Having said this, ambiguity on whether employees WFH should be considered as an extension of the SEZ facilities as they would be connecting to servers through encrypted and secured networks while providing the required services to customers continues to persist. **Recommendation:** ➢ Expressly clarify that employees WFH should be considered as an extension of the SEZ facilities and correspondingly the SEZ Unit is eligible for all corresponding tax and non-tax benefits in this regard.
3.	**Section 6(3) amended with effect from AY 2017-18 – the application should be restricted to companies in tax haven countries**	**Rationale:** ➢ Section 6(3) of the Income-tax Act has been amended w.e.f. 1st April 2017 (AY 2017-18) whereby the residential status of a company shall be determined based on the location of place of effective management. Emphasis has been kept on the physical place of management. It may be seen that situation like Covid 19 has forced people in most of the countries to work from their residence. Thus, it has been proved that virtual work and presence is going to be the new normal.

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		➢ Though the intention of POEM is to restrict companies shifting their place of residence to tax heaven countries to avoid tax. ➢ However, in most of the countries where the corporate tax rates are more than 15% to 20%, there is no incentives for corporates to artificially create residence in a particular country. Also, in case of loss making companies the question of planning the place of residence and thereby saving / avoiding income tax does not arise. ➢ The provisions of POEM are resulting into hindrance in the global growth of Indian multinationals and are affecting ease of doing business. ➢ Further, the CBDT has issued circular No 6 dated 24 January 2017 to provide POEM guidelines. In the said guidelines, emphasis has been given on the place of taking key decisions. The place of Board meetings is an important event wherein the key personnel of the company resolve major decisions. The inference of the provisions is that, the persons taking attending meetings should be personally present at the venue of meeting, which would establish the place of effective management pertaining to such meetings and decisions. ➢ In para 8.2 clause (d) of the circular, it has also been mentioned that the modern technology impacts POEM in many ways. It is no longer necessary for the persons taking decision to be physically present at a particular location. Therefore, physical location of board meeting or executive committee meeting or meeting of senior management may not be where the key decisions are in substance being made. In such cases, the place where the directors or the persons taking the decisions or majority of them usually reside may also be a relevant factor. ➢ The aforesaid para needs a review post COVID-19 scene, as now it is almost impossible and unsafe to travel to the place of meetings and attend personally to take decisions. The meetings are getting conducted in virtual manner since March 2020 onwards. Therefore, it is necessary to relax such conditions whereby due to virtual presence the country where directors are ordinary resident no longer remains a factor in determining POEM.

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		Recommendations: ➢ In case of companies having active business outside India, it has been stated that majority of the Board meetings should be held outside India. Considering the new normal way of operations, this criteria be removed and therefore the primary presumption should be based on the first criteria as mentioned in the Guidelines as issued by CBDT in this regard. ➢ Clause (d) of Para 8.2 of the CBDT circular be suitably modified. The venue of board meeting be considered as the place of decision making in case of virtual meeting provided that at least one director or key managerial personnel is attending and recommending / proposing decisions from such venue of meeting.
4.	**Amendment to Section 43D – Taxation of Interest income on realization basis in case of Non-performing loans and Covid-19 moratorium cases**	**Rationale:** ➢ Section 43D of the Act specifically provides for taxation of interest income from Non-performing loans, having regard to prudential guidelines of RBI / NHB, to be taxed on realization basis or credit to Statement of Profit and loss, whichever is earlier. This provision is applicable to all banks, financial institutions, NBFCs and HFCs. ➢ However, it may be noted that all the HFCs and NBFCs have adopted the Ind AS accounting regime wherein interest income has to be recognized on such loans, generally classified as Stage 3 Loans, in the Statement of Profit and loss at credit impaired rate, whether or not the company has received such income. This creates an anomaly as the company is forced to pay taxes on incomes which is not received. Further, it defeats the very intent of the introduction of the section in the Act. Hence, a suitable amendment to this effect will be much appreciated. ➢ The Covid -19 outbreak has crippled the entire economy as lockdowns has been initiated throughout the nation. The Reserve bank of India had introduced COVID-19 Regulatory Package dated March 27, 2020, April 17, 2020, to offer a moratorium on the payment of installments falling due between March 1, 2020 and May 31, 2020 ('moratorium period') to eligible borrowers. The said moratorium was further extended to August 31, 2020. During this period, the HFCs / NBFCs have continued to recognise interest income on such loans where moratorium requests were made without actual receipt of the same.

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		➢ Thus, this will create undue hardships to the HFCs / NBFCs to pay tax on such interest income wherein the actual receipt of the same is not realized **Recommendation:** ➢ It is suggested that the section 43D read with Rule 6EA be suitably amended to tax interest income from Non-performing loans, classified as Stage 3 loans, of HFCs / NBFCs under Ind AS accounting framework to be taxed solely on receipt basis ➢ Further, interest on loans under moratorium, as per RBI Covid 19 Regulatory package, shall be charged to tax only on receipt basis
5.	**Time limit for eligibility of deduction claim under section 24 for any interest payment**	**Rationale:** ➢ Section 24 of the Act allows deduction of Rs. 200,000 in respect of any interest paid on accounts of loan taken for purchase or construction of properties. However, such deduction is not permissible in case the construction of the property is not completed within 5 years. ➢ The COVID-19 pandemic along with lock down has significantly impaired the pace of construction activities and may result in many projects missing the deadline and may end up losing the tax benefits. This will result in undue hardships to the taxpayers that are already suffering on account of the pandemic **Recommendation:** ➢ Accordingly, keeping in view the genuine difficulty on account of COVID-19 pandemic, suitable amendment shall be introduced in the Act, may be an extension of 2-year period, for taxpayers so that they do not lose out on the eligible deduction.
6.	**Reduce holding period for REIT/Invit units to one year to turn long term to align with holding period for equity instruments**	**Issue** ➢ Business trusts like REITs and InvITs have gained increasing popularity as a means of investment in assets in the infrastructure sector. Recognizing the same, the Government has also provided pass-through status for investments made through business trusts.

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		➢ However, investment in units of REITs and InvITs will turn long term only on holding the investment for a minimum of 36 months as against a period of 12 months prescribed for investment in listed securities. Such long period disincentivizes investors from seriously considering investment through business trusts given the higher tax rate attracted when the gains are short term in nature. ➢ REITS and InvITS are envisaged to play major role in success of Government's National Monetisation Pipeline of Rs. 6 lakh crores. To increase the attractiveness of such investment for both foreign and domestic investors, it should have same treatment as listed equity instruments. **Recommendation** ➢ Accordingly, it is recommended to bring down the period of holding for units in REITs and InvITs to be classified as long term to 12 months at par with listed securities.
7.	**Long Term Capital Gains on debt-oriented growth mutual funds**	**Rationale:** ➢ Period of holding of debt-oriented mutual funds was increased from 12 months to 36 months in 2015 for qualifying as Long-Term Capital Asset ➢ In Covid situation, the companies may require liquidity as well as investment in less risk-prone funds ➢ Reducing the period of holding will give flexibility to corporate to plan and manage their working capital requirements and investments in tax efficient manner **Recommendation:** ➢ Period of holding of debt oriented mutual funds may be reduced to 12 months to turn long term
8.	**Section 92C - % of variance requires to be increased**	**Rationale:** ➢ With Covid-19 crisis, the global economy has shrunk as also, there has been severe impact on Indian companies ➢ The impact may be long lasting and would require an entire revamp of some of the business activities ➢ In such scenarios, the entities may be required to enter into certain transactions which can be

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		exceptional and may require different methods of pricing to be adopted to meet the need of the business ➢ This would also entail some different methodology of benchmarking of transactions with associated enterprises ➢ In order to avoid litigation in coming years, some relaxations are required to be brought in the provisions of International Transfer Pricing prevailing under the Act **Recommendation:** ➢ Safe habour rules and mark-ups / benchmarks prescribed need to be reconsidered in the current context ➢ % of variance between transaction value and ALP should be increased from 3% to 5%, considering the impact which the assessees may have pursuant to Covid crisis and the impact can be long lasting
	Corporate Taxation	
9.	**Refrain from making amendments retrospective in substance although prospective in form**	**Rationale** ➢ Finance Act 2021 made 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 which applied from A.Y. 2021-22 i.e F.Y. 2020-21. To this extent, these amendments were retrospective in nature since they impacted the transactions undertaken during financial year from 1 April 2020 till introduction of Finance Bill 2021 on 1 February 2021. Although they applied from A.Y. 2021-22, the amendments could not be said to be prospective, in substance, since they impacted the past transactions undertaken prior to introduction of Finance Bill. ➢ 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 did 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

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		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. ➢ The Government rightly sent out strong signal of stable tax policy to the foreign investor by enacting the Taxation Laws (Amendment) Act, 2021, to reverse the retrospective amendments by Finance 2012 on indirect transfer of capital assets in India. Consistent therewith, it is strongly urged that all future amendments, which cast additional tax burden on the taxpayers, should be introduced with truly prospective effect i.e. from financial year following the Budget announcement. **Recommendation:** ➢ Any substantive amendments impacting computation of total income and creating additional tax burden on taxpayers by Finance Bill 2022 should be made with prospective effect from A.Y. 2023-24 and not from A.Y. 2022-23.
10.	**Tax on income of certain domestic companies (S. 115BAA) and related MAT issue**	**Rationale:** ➢ A new section, i.e. S.115BAA was introduced vide The Taxation Laws (Amendment) Ordinance, 2019 ('the Ordinance') & subsequently regularised through The Taxation Laws (Amendment) Act 2019 wherein the total income of certain domestic companies for previous year relevant to assessment year beginning on or after April 1, 2020 would at the option of the company be taxed at the rate of 22% (plus surcharge and cess). ➢ The option to avail the reduced rate of tax is subject to fulfilment of certain conditions prescribed therein. (which mainly requires giving up certain specified tax incentives). Further, once the option is exercised for any previous year, the same shall not be withdrawn. ➢ As per the clarifications issued by CBDT on October 2, 2019 vide Circular No. 29/ 2019, a company opting for a concessional tax rate would not be able to carry forward for set-off, the loss or depreciation relatable to specified tax incentives and will not be allowed to avail MAT credit as well. ➢ The CBDT vide Circular No. 29/ 2019 dt 2 Oct 2019 also clarified that domestic company opting for 22% rate shall not be allowed to claim set-off of any brought forward loss on account of additional depreciation in the year in which option is exercised or any subsequent AY. The Circular further suggested that since there is no time limit within which company can opt for 22% rate, domestic

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		company having brought forward losses on account of additional depreciation may, if it desires, exercise the option after set-off of losses so accumulated ➢ However, through a proviso inserted to s.115BAA(3), companies opting for s.115BAA in A.Y. 2020-21 were allowed benefit of reinstatement of tax WDV to the extent of unabsorbed additional depreciation as on 1 April 2019 and Rule 5 was also amended to prescribe the methodology for such reinstatement. ➢ It is submitted that CBDT's suggestion leads to double jeopardy for the companies. While availing the set off-of carried forward additional depreciation, the company becomes liable to MAT. Thereafter, the company will also need to wait till MAT credit is fully utilized. Further, with expansions and replacements happening on regular basis and additional depreciation being a mandatory allowance, it will be difficult for company to switchover to s.115BAA in distant future if it waits for complete utilisation of unabsorbed additional depreciation loss and resulting MAT credit. This will defeat the very object of introducing s.115BAA to have a lower corporate tax rate without tax incentives to spur economic activity and reduce tax litigation. One time facility for reinstatement of tax WDV if option is exercised in A.Y. 2020-21 is highly restrictive and lacks sufficient rationale. Since, s.115BAA gives option to choose lower tax rate in any AY in future, the reinstatement of tax WDV should also happen in any AY in which company opts to get governed by s.115BAA. ➢ To the extent there is unabsorbed additional depreciation loss or unabsorbed loss on account of section 35AD deduction for capital assets, the taxpayer cannot be regarded to have availed any tax incentive since the cost of the assets to that extent are not set off against profits of the business. Reference, in this regard, may be made to provisions of s.35AD(7B) which provides for 'claw-back' of deduction allowed u/s. 35AD if the asset is diverted from the specified business but even while clawing back the deduction allowed in past, the provision permits deduction for normal depreciation and WDV of the asset is also stepped up to that extent (refer, proviso to Explanation 13 to s.43(1)). This supports that the taxpayer should not be deprived of normal depreciation if conditions of s.35AD are not fulfilled

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		Recommendation: ➢ Section 35AD was introduced to reinvest the profits in the qualifying sectors and in turn channelise the huge investment in qualifying sectors. Overall intention of introduction of lower tax provisions is to boost the economy in an immediate period of time. Denial of the set off brought forward losses for the past 35AD claims will delay the favourable impact of lower corporate tax rate as companies may not opt for lower tax rates immediately. It is therefore recommended that the CBDT may reconsider its view on allowability of set-off of brought forward loss attributable to additional depreciation and s.35AD deduction (@ 100% of cost of assets). Companies may be permitted to recoup the unabsorbed loss representing cost of the asset while paying lower tax @ 22%. This will provide more meaningful benefit to the industry and provide incentive to move over to lower tax rate (without availing incentives) at the earliest ➢ Alternatively, it may be clarified that once domestic company opts for 22% rate and is denied the benefit of set off of unabsorbed loss represented by additional depreciation or s.35AD deduction, correspondingly, the WDV of the asset will be reinstated on which the company can claim normal depreciation.
11.	**Tax on income of newly established domestic manufacturing companies (S. 115BAB)**	**Rationale/ Recommendations:** ➢ Similar to S. 115BAA as discussed above, S. 115BAB was introduced vide the Ordinance to tax newly established manufacturing companies i.e. companies set-up and registered on or after October 1, 2019 and has commenced manufacturing before March 31, 2023 at the rate of 15% subject to the following conditions: • It is not formed by splitting up or reconstruction of a business already in existence; • Does not use any plant or machinery previously used for any purpose; • Does not use any building previously used as a hotel or a convention centre, in respect of which deduction u/s. 80ID has been claimed and allowed; • The company is not engaged in any business other than the business of manufacturing of any article or thing and research in relation to, or distribution of such article or thing manufactured or produced by it;

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		• The total income has been computed without claiming any deduction u/s 32, 32AD, 33AB, 35AD or under Chapter VIA etc, set-off of loss relating to the said provisions, depreciation under section 32(1)(iia) **Eligibility** ➢ The said section applies to any company engaged in the business of ‘manufacture or production’ of any article or thing. However, it is unclear whether food production industry viz for hotel, air catering are also covered within the scope of s. 115BAB. ➢ One of the conditions imposed by s. 115BAB is that the company should not use any second-hand plant and machinery. Restriction on “use” instead of “transfer” (which term is generally used in other profit linked incentives such as u/s 10A, 10AA, 35AD, 80IA, 80IB, 80IC) of any plant or machinery previously used for any purpose in S. 115BAB could have unintended consequences and the same needs to be corrected. Also, the restriction should apply to the undertaking and that too only at the formation stage and not to the entity as a whole over its entire lifespan, as is the case with other profit linked incentives. ➢ The condition of commencing manufacturing activity on or before 31st March 2023 will be practically very difficult to achieve in view of current Covid 19 restrictions. Most companies are currently focussing on recovery from the unprecedented crisis and need to consider health & safety for their employees while embarking upon expansion plans. The construction activity will be considerably delayed to achieve compliance with various Standard Operating Procedures (SOPs) for economic activities announced by central and state governments. The Government has been extending statutory deadlines for various compliances under the direct and indirect taxes considering the various operational challenges faced by taxpayers. The sunset date for commencing manufacture needs to be suitably extended. **Recommendation:** ➢ Restrictive conditions under the erstwhile profit linked incentive provisions have been tested over time and introducing the new ambiguous language shall result in new interpretational issues and unintended consequences. Accordingly, the restrictions on use of second-hand machinery should be worded appropriately. The purpose will be adequately served if the language which has been hitherto

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		consistently used for incentive deductions is adopted as part of this section as well. The restriction should be applied to use of plant and machinery previously in use which is transferred to the company. ➢ The sunset date for commencement of manufacture should be extended to 31 March 2025 considering Covid 19 restrictions
12.	**SEZ Units completing 15 years of scheme should be allowed to opt for lower Tax Regime under section 115BAA.**	**Rationale:** ➢ A new section, i.e. S.115BAA was introduced vide The Taxation Laws (Amendment) Ordinance, 2019 ('the Ordinance') & subsequently regularised through The Taxation Laws (Amendment) Act 2019 wherein the total income of certain domestic companies for previous year relevant to assessment year beginning on or after April 1, 2020 would at the option of the company be taxed at the rate of 22% (plus surcharge and cess). ➢ The option to avail the reduced rate of tax is subject to fulfilment of certain conditions prescribed therein. (which mainly requires giving up certain specified tax incentives such as deduction under section 10AA). Further, once the option is exercised for any previous year, the same shall not be withdrawn. ➢ The benefit of reduced rate of tax is available for a domestic company as a whole.. ➢ The sunset date for approval of SEZ unit to claim s.10AA benefit was 31 March 2020. Hence, the last tenth year for any taxpayer to claim s.10AA benefit will be A.Y. 2029-30 or 2030-31. It can extend to another 5 years by earmarking profits to Special Reserve. ➢ Many corporate taxpayers have several SEZ units set up over different points of time. If the tax holiday period expires for any SEZ unit, the company would like to opt for s.115BAA lower tax rate benefit for such unit. But s.115BAA precludes such claim since it applies to company as a whole. As a result, the company has to wait till the last of its SEZ units finishes its tax holiday period or opt in when it finds that the trade off between s.10AA deduction with MAT liability for qualifying units and lower tax rate u/s. 115BAA for entire company goes in favour of the latter.

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		➢ However, if the company is provided option to avail lower tax rate u/s. 115BAA for those SEZ units which have crossed tax holiday period of 10 years, it will facilitate moving into the new regime faster. ➢ Providing benefit of lower tax rate qua particular SEZ unit is not inconsistent with object of s.115BAA. There are several tax benefits and lower tax rates in the Act which are aligned to qualifying units or specific streams of incomes. For instance, even if a company has opted for s.115BAA effective tax rate of 25.17%, it can still avail further lower tax rate of 10% on royalty on patents developed and registered in India u/s. 115BBF or 15% on dividends from foreign subsidiaries u/s. 115BBD. **Recommendation:** ➢ To facilitate ease of doing business, It is recommended that the SEZ units should be allowed to opt for reduced rate of tax under section 115BAA after completing 10 years under the scheme.
13.	**New Tax regime for newly established SEZ units for service sector**	**Rationale:** ➢ S. 115BAB was introduced vide the Ordinance to tax newly established manufacturing companies i.e. companies set-up and registered on or after October 1, 2019 and who have commenced manufacturing before March 31, 2023 at the rate of 15% (plus surcharge and cess) subject to the fulfilment of certain conditions ➢ However, there is no such provision available for the services sector. ➢ Further, the existing tax holiday under Section 10AA has also expired on March 31, 2020, making the Indian services sector, highly uncompetitive in the international environment. ➢ Service sector has a prominent role in the Indian economy. It has a strong multiplier effect on outcome and employment. For instance, as per International Civil Aviation Organisation (ICAO) study, the output multiplier and employment multiplier are 3.25 and 6.10 respectively in Civil Aviation sector (Para 1.2 of National Civil Aviation Policy of 2016). There is similar multiplier

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		effect for all other service sectors which can be analysed by the Government for a fiscal stimulus. **Recommendation:** ➢ It is recommended that the benefit of the reduced rate of tax @ 15% (plus surcharge and cess)should be extended to the service sector as well.
14.	**Expand the scope of utilization of SEZ Re-investment Reserve created for availing deduction under section 10AA of the Income Tax Act, 1961 ("the Act"), to include all expenses of capital nature and certain expenditure which are operating expenses**	**Rationale:** ➢ During 11th to 15th Year of operation (3rd Phase of 5-year Term) of the SEZ scheme, a Unit in SEZ can avail deduction under section 10AA of the Act provided it credits 50% the profit for a year to "Special Economic Zone Re-Investment Reserve Account". The same is required to be utilized for the purposes of the business for acquiring machinery or plant which is first put to use before the expiry of a period of three years following the year in which the reserve was created. ➢ The provision is restrictive for IT Companies as unlike manufacturing Companies it does not require to invest in heavy Plant & Machinery. Infact, SEZ units are required to invest in huge facilities and create delivery centers. The investment which falls under Plant & Machinery are laptop, desktop, servers and networking equipment etc. are not that significant. Further due to change in technology the requirements of "on premises" assets have reduced, and companies are using third party clouds and infrastructure. Further, there is a sun set clause for SEZ units and there are no new SEZ units which will enjoy the tax benefits. **Recommendation:** ➢ The requirement of creating a SEZ re-investment reserve as a pre-requisite for claiming deduction under section 10AA should be abolished. This will enable IT companies to use tax benefits available without any restriction taking into consideration sun set of tax holiday benefits.

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		➢ Alternatively, for the purposes of utilizing the re-investment reserve, in addition to plant and machinery, the scope of utilization to be expanded by allowing: • Investment in facilities created in form of Delivery centers owned by the SEZ Units, i.e., investment in building, infrastructure, workstation, interiors, furniture related cost etc. Further, investment in Delivery Centers obtained on lease by way of lease rentals etc. should also be included in the scope. • operating expenses like cloud, and digital IT infrastructure platforms etc.
15.	**Reducing surcharge on Association of Persons to 10%/15% 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

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		structure is preferred in view of relationship not constituting partnership and/or corporate form being unsuitable for short term projects. ➢ The Finance (No.2) Act 2019 increased the surcharge rate for Individuals, HUF, AOPs, BOIs and AOPs. From AY 2020-21, an enhanced surcharge is levied on such taxpayers as under: • 25 percent if taxable income is between Rs. 2 Cr to Rs. 5 Cr • 37 percent if taxable income exceeds Rs. 5 Cr ➢ Thus, the surcharge rate which was initially increased to 15 percent for AOPs vide Finance Act 2016 has been increased to 37 percent vide Union Budget 2019. ➢ As such increase in surcharge has adverse impact on the infrastructure sector as well as on Indian companies, which are members of AOPs in infrastructure sector with determinate shares, a representation is made below for your kind consideration to reduce the surcharge to 10%/15% as it prevailed prior to increase by Finance (No.2) Act 2019. Increasing number of AOPs ➢ There has been a significant increase in the number of AOPs in India since 2013. According to data, the number of returns filed by AOPs by the end 2017 has been doubled to 2.07 lacs since 2013. Indian companies are required to form an AOP for leveraging upon the expertise and capital requirements for critical infrastructure projects. Such AOPs are formed as a part of the contractual arrangement with project owners. Thus, AOP is primarily formed due to commercial and business considerations rather than for the purposes of taxation. Boost in the infrastructure sector ➢ 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,

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		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. ➢ This is further embellished by the recent institution of the National Monetisation Pipeline as indicated in the Budget Speech 2021 to monetize operating public infrastructure assets to finance option for new infrastructure construction. ➢ 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. ➢ 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.

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		<u>Taxation of AOPs</u> ➢ 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.

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		➢ 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. ➢ 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. Adverse impact of increase in surcharge ➢ 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. **Recommendations** ➢ 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.

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16.	**Withdrawal of section 145A(a) as doesn’t have relevance in light of introduction of GST**	**Rationale:** ➢ As per Indian Accounting Standards, income and expenses get accounted net of excise duty, VAT, etc. in the Statement of Profit and Loss Account in cases where indirect tax credits are available ➢ Section 145A(a) mandatorily requires restatement of sales, purchases and inventory inclusive of such taxes ➢ With introduction of GST Law, GST paid on purchase of goods or services becomes available for input tax credit ➢ Further, there remains no distinction between input tax credit available in relation to purchase of goods and that with respect to services ➢ In such scenario, arriving at value of inventory inclusive of taxes becomes difficult as this will require identification of input credit attributable to goods and services purchased ➢ This becomes an onerous compliance / disclosure requirement even for tax audit purpose ➢ Hon’ble Supreme Court in Indo-Nippon Chemical Co. Ltd. (261 ITR 275) has held that either of the method (inclusive or exclusive of taxes) does not give result to any change in the taxable income of an entity ➢ However, as the provision stills exists in the Act and pursuant to specific disclosure requirement in the tax audit report, gives rise to unnecessary litigation and are onerous from compliance perspective **Recommendation:** ➢ The provision of section 145A(a) requiring restatement of purchases, sales and inventory (on inclusive basis) be withdrawn with retrospective effect ➢ Similarly, the Income Computation and Disclosure Standard for inventories and Tax Audit Report (Form 3CD) be suitably modified to that effect
17.	**Taxability of loan processing fees earned: Point of taxation**	**Rationale:** ➢ Loan processing fee is a one-time fee that is levied on the borrower at the time of processing of a loan. ➢ Under the erstwhile Indian GAAP, while there was no guidance in terms of when such processing fee should be offered to tax, there were varied practices of recognizing this income

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		where some recognized this in the profit and loss account in the year of receipt whereas some recognized this over the period of loan. ➢ Now, under Ind AS, the processing fee is required to be adjusted in the loan amount and amortized over the period of loan on the basis of effective interest rate model. **Recommendation:** ➢ Considering the introduction of Ind AS provision, it is recommended that the processing fee earned by NBFCs could be offered to tax in line with the accounting practice adopted to avoid differentiated approach for books and tax purposes, this being a matter of mere timing difference.
18.	**Section 79 - Expiry of Tax Loss: Business Loss to be expired within 8 years**	**Rationale:** ➢ Health insurance companies generally have longer gestation period to break even due to reserving requirement & investment in distribution and operations. This leads to expiration of tax losses due to the current tax laws of allowing the carry forward of losses only until 8 years from the respective years of incurred loss. **Recommendation:** ➢ Extension in time period for expiry of Tax losses from 8 years to 12 years for Health Insurance Companies
19.	**ESOP expenditure**	**Rationale**: ➢ Presently there is no express provision in the Act about allowability of ESOP expenditure while computing taxable income. There are Rulings from different Courts / tribunals giving favourable views regarding allowability of ESOP expenditure. Since ESOP expenditure is in the nature of employee compensation, the same should be allowed as revenue expenditure. ➢ However, there are further issues about quantification of such expense and timing of deduction.

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		Recommendation: ➢ It is suggested that a specific provision be incorporated permitting ESOP expenditure to be allowed as revenue deduction in the computation of income. Such provision may also consider the quantum of expenditure to be allowed and timing of deduction for consistency across all types of companies.
20.	**Allow funding of leave salary in approved gratuity fund**	**Rationale:** ➢ Income tax allows assessee to set up trust and fund the gratuity liability payable to employees on retirement / separation. This helps to de-risk business and secure employee dues. ➢ In addition to gratuity liability, employees are given facility to accumulate leaves and such accumulated leave can be either availed or encashed. It is seen that where entities pass though bad times, employee lose not only their employment but also leave encashment payment due to financial and other issues. ➢ In view of section 43B(f) of the Act, provision made by an entity towards leave salary is allowable on payment basis only. **Recommendation:** ➢ Approved gratuity fund related provisions of the Act and Rules be amended to allow funding of liability towards accumulated leave of employees on actuarial basis. This will secure interest of employee.
21.	**Rationalisation of disallowance u/s 40(ba)**	➢ **Rationale:** Currently as per section 40 (ba) of ITA, any payment of interest, salary, bonus, commission or remuneration by whatever name called paid by an association (AOP) to it's member is not allowed as deduction. ➢ 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. ➢ Several Large infrastructure projects require expertise in multiple discipline which is generally not

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		available with any single company. Therefore, to meet overall project requirements few EPC Companies join together and submit bid as a Joint entity (JV) by bringing their respective expertise for executing complex project. Such joint ventures are purely to meet project criteria requirements. However, payments made by Joint entity (JV) to members for expert service provided or towards executing work is disallowed as per section 40 (ba). This result into additional tax cost and ultimately increase the project cost. **Issue** ➢ The provisions of Sec. 40 (ba) are completely unjustifiable and genuine business expenditures are also disallowed just because the payees are partners in JV. ➢ The same also amounts to double taxation of the same income. ➢ There are enough provisions otherwise in IT Act to address any unreasonable payments or transaction with sole objectives of tax evasion. **Recommendation:** ➢ It is recommended that to rationalize following measure be taken by the Govt: To Amend Section 40 (ba) of ITA so as to restrict the disallowance in that section only to interest, salary, bonus, commission or remuneration paid to members of such Association. (i.e. disallowance of section 40 (ba) should not be apply to payment by Association to members towards work carried out and technical / professional service provided by members to joint entity/ Association if test of reasonableness is satisfied.
22.	**Impact on life insurance company on account of shift from DDT to classical system**	**Rationale:** ➢ Life insurance industry provides safety and security, generates financial resources, encourages savings and safeguards against loss of source of livelihood and generates employment, hence it an important

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		sector which contributes to Indian economy is big way. Having said this, the penetration and reach of life insurance in India is still at an abysmally low level @ 2.82%[2]. ➢ Lack of awareness of need for life insurance, unstructured savings, traditional mind-set of savings being in bank deposits or gold, lack of tax attractiveness, etc. are some of the few factors that contribute to low level of insurance penetration. ➢ The shift from DDT to classical system of dividend taxation by Finance Act 2020 has a negative impact on the insurance sector ➢ Under DDT regime, the taxation of dividend was a win-win for both policyholder and the life insurance company. The switch to classical system has led to taxability of dividend in the hands of insurance company (being the recipient of the dividend) and subsequently no exemption is available u/s. 10(34) of the Act. ➢ Unit Linked policy insurance plan (ULIP plan), which comes with inbuilt 10 times life coverage and thereby strengthen the social and financial security of the policyholder. ULIP are the products offered by life insurance companies which not only helps policyholder save money, but also create wealth while securing life risk with 10 times life cover. ➢ The life insurance companies invest majority of the premium received under ULIP policies in the capital market in the nature of long-term investment. Return earned along with dividend by the insurance company from the capital market are subsequently transferred to the policyholders. At the time of maturity of the policy, policyholder receives extra money over and above the sum assured. This extra money received helps policyholder in its wealth creation. ➢ Since the insurance company is the recipient of the dividend, after the amendment such dividend income is now taxed in the hands of insurance company. It is pertinent to note that under ULIP plans, in principal insurance companies act as an intermediary between policyholder and investee company. Therefore, taxing of dividend income in the hands of insurance company merely because it is recipient of the dividend creates undue hardship and financially challenging.

[2] Source: NITI Aayog Website (https://www.niti.gov.in/insurance-industry-india-lessons-covid-19)

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		➢ Looking at the conditions of the insurance industry, any undue pressure will push back the industry for decades and revival from that would be far more challenging. Further this amendment will invite financial and profitability pressure on the insurance companies, which be eventually shifted on the policyholders through change in the product pricing. The switch to classical system of dividend taxation requires suitable calibration in hands of life insurance companies to protect the yields to policy holders. **Recommendation:** ➢ The exemption u/s. 10(34) of the Act, should be continued to be available to the life insurance companies; or ➢ The monetary benefits passed on to the policyholders to be considered as dividend distributed and accordingly, deduction u/s. 80M of the Act be allowed to the life insurance companies; or ➢ A new deduction be introduced under the Act in order to provide deduction to the life insurance companies for the dividend received by them.
23.	**Unreasonable restriction on deduction against dividend income and ambiguity with regard to use of phrase "total income" under proviso to Section 57 which allows interest deduction only if dividend income is included in "total income"**	**Rationale** ➢ The proviso to s.57 restricts deduction of expense against dividend income to interest expenditure up to 20% of gross dividend income and provides that deduction shall not exceed twenty percent of the dividend income, or income in respect of units, included in the "total income" for that year, without deduction under this section. This creates ambiguity on the interplay/priority between deduction u/s. 57 and deduction under s.80M for inter corporate dividends. ➢ It is well settled by Supreme Court ruling in the case of Distributors (Baroda) Pvt. Ltd v. UOI (155 ITR 120) (SC) that deduction u/s. 80M is required to be computed w.r.t net dividend income after deduction of expenses. However, the use of the phrase "total income" in proposed proviso to s.57 creates ambiguity whether the deduction of interest expenditure is to be made after allowing deduction u/s. 80M for inter corporate dividends. Any such suggestion will be contrary to the law settled by SC in Baroda Distributors' case (supra). It will further restrict the scope of deductible expense against dividend income.

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		➢ In any case, introduction of artificial restriction of 20% of dividend income for interest expenditure and disallowance for any other expense is not consistent with classical system of dividend taxation. The tax policy intent behind introducing such artificial restriction is not clear. The switch from DDT regime to classical system was motivated by one of the reasons being that DDT regime resulted in artificial disallowance of genuine expenditure by taxing dividend on gross basis in hands of dividend paying company and disallowing corresponding expenditure in hands of dividend receiving entity. The artificial restriction of 20% will create great hardship for companies which make investment in shares with borrowed funds for various commercial reasons. It is very common in insolvency resolution plans to set up an SPV to pool funds from acquirer and lenders to acquire a company undergoing insolvency resolution under IBC. The tax cost of such arrangements will become very onerous and adversely impact resolution of stressed companies. It may be noted that there is no carry forward benefit for loss under Income from other sources and hence the introduction of artificial cap lacks sufficient rationale. ➢ Further, it may be noted that the equity investments are not always made to merely earn dividend income, especially when such investments are made for strategic shareholding. In case of strategic investments, the objective is to control the business and have commercial transactions between two or more entities. Incidentally the income from such investments would also be in the form of dividend income. Since the main purpose of making such investments is to run business and make commercial profits, any expenditure in relation to such investments be allowable as deduction and the restriction under section 57 should not be made applicable in such cases. ➢ In case of strategic investments, where the objective of acquiring the controlling stake requires certain expenditure to be incurred, it should be allowed as a deductible expense as the objective is not restricted to earn dividend income and therefore such dividend is essentially in the nature of business income. **Recommendation** ➢ The artificial restriction of 20% of dividend income for interest expenditure and disallowance of other expenses should be removed.

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		➢ Alternatively, the deduction be granted upto 80% of dividend income. The deduction could be of any nature of expenditure including interest on borrowings. Further, for dividend on strategic investment, such restriction should not be made applicable. ➢ Alternatively, the reference in proposed proviso to s.57 to “total income” may be modified to “gross total income” to make it clear that deduction of interest expense is required to be allowed against gross dividend income and not net dividend income after s.80-M deduction.
24.	**Sec 79.** **Carry forward and set-off of losses in certain cases** **Carry forward and set-off of losses due to Change in immediate shareholding or change in ultimate ownership**	**Rationale**: ➢ The Karnataka High Court in the case of AMCO Power Systems Ltd. [TS-607-HC-2015 (Kar)] held that the term beneficial shareholding as used in section 79 would apply to the ownership by ultimate holding company as well, and not be restricted to the immediate shareholding. ➢ Hence it is recommended to make an express provision that the provisions of section 79 should not apply unless the ultimate beneficial ownership (including indirect ownership by the parent entity of the group) has changed by more than 50%. **Recommendation**: ➢ A proviso be inserted to section 79 stating that the provisions of the section would not apply unless the beneficial ownership, including indirect ownership is transferred by more 50% of the ownership.
25.	**Additional deduction u/s. 80M for foreign dividends to compensate for incurrence of foreign taxes**	**Rationale:** ➢ Finance Act 2020 abolished the dividend distribution tax on domestic companies and withdrawn sec. 115-O (7) of Income Tax Act. Consequently, dividend income received by a shareholder is taxable in the hands of shareholders. ➢ Finance Act 2020 also re-enacted s. 80M to remove the cascading effect of taxes on inter corporate dividend. Section 80M permits the deduction of dividend received from the domestic companies as well as foreign companies and used for further distribution of dividend to the shareholders. ➢ Several countries have provisions for withholding taxes @ 5%/10% on the dividend distribution. Even India also mandates TDS @ 20% on the dividend payout to the foreign shareholders. Hence when the

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		domestic companies receive dividend from the foreign subsidiaries it suffers withholding tax in the distributing company's country. ➢ This impedes the company's ability to claim full s.80M deduction. For instance, if the gross foreign dividend is Rs. 100 and tax paid in foreign country as per treaty is Rs. 15, the company receives net dividend of Rs. 85. The company can only distribute net dividend of Rs. 85 to its shareholders. This leads to cascading impact of taxation of foreign dividend of Rs. 15 in hands of Indian company. ➢ In contrast, if dividend of Rs. 100 is received from domestic company, even if there is TDS of 10% and net dividend received is Rs. 90, the company can distribute dividend of Rs. 100 to its shareholders, claim s.80M deduction for Rs. 100 and claim refund of TDS of Rs. 10. This is not possible for foreign dividends. This is for the reason that foreign tax credit for the foreign dividend will not be available due to absence of 'doubly taxed' income once s.80M deduction is allowed. ➢ In case a view is taken that credit of WHT on dividend distribution by the foreign companies is not allowable, the cascading impact will continue and will defeat the purposes of providing deduction u/s 80M. **Recommendation:** ➢ It is recommended that the provisions of s.80M be suitably amended or CBDT may issue suitable circular to clarify that deduction u/s. 80M will be granted w.r.t foreign dividends on gross amount even if dividend actually distributed to shareholders is net of foreign taxes.
26.	**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

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		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 19% by 2020. ➢ Several countries have low corporate tax rates along with R&D incentives, eg Singapore (Tax rate 17 percent further reduced to between 5 to 10 per cent in respect of qualifying IP income; 100 to 250 percent of R&D expenditure), China (Tax rate 25 percent reduced to 15% in respect of High and New Technology Enterprise; 170 percent of R&D expenditure); UK (Tax Rate 19 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.

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		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)
27.	**Incentives for Expenses incurred on activities which results in innovation**	**Rationale:** ➢ Apart from in-house research activities the companies also undertake various activities which have element of innovation for its customers which also has lot of uncertainties as far as outcome is concerned. Currently these activities are not eligible for any kind of benefit under the Income-tax Act. ➢ To promote innovation, scientific research in area of Information and Technology Government should provide the benefits in line with the benefits which are being provided by many countries such as UK, Australia, Canada etc. especially when Indian IT industry is competing with the global companies. ➢ The pre-requisite for eligibility for availing the benefit should be that the activities undertaken under the scheme should have an element of innovation irrespective of the fact that activities are being taken under any customers project or undertaken independently. **Recommendation:** ➢ It is recommended that a weighted deduction of 125% of expenditure incurred for such activities which results in innovation in order to promote and encourage such activities to be carried out from India should be allowed.

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28.	**CSR expenses – Explanation 2 to Sec 37(1)**	**Rationale:** ➢ The Companies Act, 2013 has cast an obligation on large companies to incur expenditure equivalent to 2% of the average net profits of company made during the three immediately preceding financial year ➢ Section 37(1) allows deduction for expenses incurred by an assessee for the purpose of business. Explanation 2 was inserted by the Finance Act, 2014 to provide that expenses incurred for activities related to corporate social responsibility as per the provisions of section 135 of the Companies Act, 2013 shall not be deemed to be an expenditure incurred for the purpose of the business. Hence, CSR expense is not allowable as deduction in the computation of income. ➢ Further, deduction under Section 80G is also not allowed if a corporate assessee exercises its option to avail lower tax rate as per the provisions of Section 115BAB of the Act. ➢ The CSR spend is effectively assisting the Government in undertaking social projects for the country; Given that it is a mandatory cost of doing business in a corporate form and is intended for the benefit of society at large, making an express provision for not allowing a deduction is unfair and leads to additional tax burden on Companies that carry out CSR activities. **Recommendation:** ➢ It is recommended that the Explanation 2 to Section 37 of the Act should be omitted and a deduction of CSR expenses incurred by the taxpayers pursuant to provisions of the Companies Act, 2013 should be allowed under Section 37 in computing business income. ➢ Alternatively, deduction under Section 80G should be allowed for eligible expenditure / donations incurred by companies which have exercised the option of lower tax rate by making suitable amendment in Section 115BAA, 115BAB to allow Chapter VIA deduction – under Section 80G even if lower tax rate is availed/ exercised

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29.	**Benefit restricted to 'true and first inventor of the invention': A non-starter under Patent Act which does not acknowledge company or firm as a 'true and first inventor'(S.115BBF)**	**Rationale**: ➢ The benefit of s. 115BBF is restricted to 'true and first inventor of the invention'. Even a person who is jointly registered with 'true and first inventor' should be 'true and first inventor'. ➢ In view of following features under the Patent law, the benefit of the provision may be denied to firms/LLPs/companies who register the patents jointly with 'true and first inventor' who may be an employee even though they may have incurred significant expenditure for development of the patent and they are first economic owners of such patent. ➢ Under the Patents Act, following persons can apply for patent (a) a person claiming to be true and first inventor of the invention (b) an assignee of the true and first inventor in respect of right to make an application and (c) legal representative of a deceased person who immediately before his death was entitled to apply. ➢ It is also settled under the Patent Act that a company or firm cannot claim to be 'true and first inventor'. They can only apply as assignee of true and first inventor. ➢ Similarly, whether an invention made by employee should belong to employer depends upon contractual relations, express or implied. It is possible that, absent any contractual obligation, an employee may apply for an invention in his own name even though he developed the invention in the course of employment and by using employer's resources. **Recommendation**: ➢ It is, hence, recommended that the condition of joint patentee also being 'true and first inventor' be omitted. If the intent is allow benefit only to first person to register patent, the phrase 'being the true and first inventor of the invention' used in context of joint person may be substituted with the phrase 'being the assignee of the true and first inventor in respect of the right to make an application for a patent'.

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30.	**Patent registered in India as also in a foreign country may be regarded as qualifying under Patent Box regime (S.115BBF)**	**Rationale**: ➢ The requirement of patent being registered in India under the Patents act raises an ambiguity whether royalty received from overseas in respect of patent which is registered both in India and outside India will be denied the benefit on the ground that the royalty is relatable to foreign patent and not Indian patent. ➢ It may be noted that Patent law is territorial in nature and monopoly cannot be exercised in any country unless the patent is registered in that country as per local patent law. ➢ The condition of patent being developed in India ensures that the benefit of PBR is restricted to inventions which are developed in India. Benefit should not be denied for royalty received from overseas countries for the same invention by registering it outside India. **Recommendation**: ➢ It should be clarified that royalty received from overseas for a patent which is registered in India as also in a foreign country also qualifies for concessional rate of tax. The benefit should not be denied on the ground that such royalty is attributable to foreign patent.
31.	**Relaxation u/s.68 to Cat I and Cat II AIF**	**Rationale / Recommendation:** ➢ S.68 was amended by Finance Act 2012 to require unlisted companies to explain 'source of source' in respect of share application / capital / premium, etc and also introduced s.56(2)(viib) to tax excessive premium received by unlisted companies from residents. But in both provisions, exception was carved out for share capital raised from Venture Capital Fund / Venture Capital Company. ➢ Finance (No.2) Act 2019 has amended s.56(2)(viib) to extend the carve out to all the Category I and Category II SEBI registered AIFs. However, similar consequential amendment is not made in s.68. Since Category I and II AIFs are regulated entities like VCC/VCF, they should be exempted from s.68 as well.
32.	**Deduction u/s 80JJAA to be liberalised**	**Rationale**: ➢ As per the provisions of section 80JJAA, an additional deduction of 30% of the additional wages paid to new regular workmen employed by the company during the year is allowed for three consecutive years if certain conditions are fulfilled.

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		➢ S.115BAB was introduced vide the Ordinance to provide an impetus to the domestic manufacturing companies by allowing a reduced rate of tax. However, as witnessed, the beneficial reduced tax rate is only provided for companies engaged in the production or manufacture of any article or thing. Similarly, s.80JJAA provides benefit in the form of deduction of 30% of additional employee cost. ➢ Additional employee cost is defined to mean the total emoluments paid / payable to 'additional' employees employed during a particular year and whose emolument is not more than Rs 25,000 per month. ➢ The threshold of Rs 25,000 is too low given the current scenario in India as well as globally.. ➢ Further, it is not clear whether s.80JJAA is a standard deduction for three years based on wages paid to qualifying new employees in Year 1 or is it a year-on-year deduction which can change with change in wages paid to qualifying new employees in subsequent years. ➢ S.80JJAA(2)(b) provides that the deduction shall not be available if the business is acquired by the assessee by way of transfer from any other person or as a result of any business reorganisation. This is intended to deny deduction in respect of employees who newly join the taxpayer-entity by virtue of such transfer/business reorganisation. However, a literal reading of this provision can lead to erroneous interpretation that the taxpayer will become permanently disqualified to claim s.80JJAA deduction even in respect of employee who newly join post the transfer/business reorganisation. This can lead to litigation. It is submitted that the object of the deduction being to encourage new employment, the employees who join post the transfer/business reorganisation should not be disqualified. ➢ Further, pursuant to such unprecedent times, Indian economy may require significant time for revival. In order to incentivise organisations to generate new employment opportunities, additional employee cost deduction benefit should be enhanced, if an organisation has generated any new employments during a financial year.

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		Recommendation: ➢ It is recommended that the monthly employee cost limit of INR 25,000 be done away with. Alternatively, it is recommended to increase the threshold to atleast Rs 100,000. ➢ Clarity may be provided on whether s.80JJAA is a standard deduction or year-on-year deduction. Further, Explanatory Circular may be issued on computing quantum of s.80JJAA deduction in different practical scenarios like newly formed business, amalgamation, demerger, slump sale, etc. ➢ S.80JJAA(2)(b) may be amended to provide that nothing contained in that clause will apply to additional employee who is not employed by virtue of such transfer or business reorganisation. ➢ Each new employment opportunity leading to an additional employee cost being incurred by the business should be entitled for additional deduction / tax benefit.
33.	**Restriction on setoff of House property loss to Rs. 200,000 be removed**	**Rationale:** ➢ The Finance Act 2017 inserted sub-section (3A) in section 71 of the Act which restricted the setoff and carry forward of losses from House property by capping the maximum setoff permissible to Rs. 200,000 in the year it accrues. Section 71 of the Act describes the provisions pertaining to the inter head setoff loss from House property. ➢ The above amendment has reduced the benefit available to the taxpayer under income from house property. Earlier provisions allowed the taxpayer to claim the entire loss from House property against gains from any other head without any upper limit. Further, the balance loss, although available to be carried forward and setoff in future years, will in practice will not be available till the interest for the current year falls below Rs. 2,00,000. ➢ There is a need to stimulate the rental market in India. According to the World Bank, we are one of the few countries in the world where participation of rental markets has declined sharply since the 1970s. This trend is contrary to other countries where economic growth has been associated with a significant increase in rental market activity. Rental markets are important as every city in India has a 20 to 30% floating population, not necessarily wanting to buy houses. Moreover, India is rapidly urbanising as currently 32% of our total population live in urban areas. By the year 2030, it is estimated that 40% of the population or 600 million people will be living in cities and towns. Higher

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		urbanisation would require a vibrant rental market which needs to be encouraged so that cities are able to absorb and house the migrating population. ➢ Rental housing is the most affordable form of housing that will reasonably fit into the low income group's budget. According to the 'Report of the High Level Task Force on Affordable Housing for All (2008)' rental housing is an important component of affordable housing. There is a need to create a healthy rental market and it should work in conjunction with government housing programs. Accordingly, rental housing could be a crucial component in fulfilling the government's objective of 'Housing for All' by 2022. This shall impact further investments in the housing sector ➢ Sub-section (5) of s. 23 provides that for real estate developers, annual value of property held as stock in trade shall be NIL for first 3 years (and by implication, full annual value thereafter). The restriction on set off of house property loss to Rs. 2 lakhs in such cases will result in great hardship. For instance, if a builder completes housing project having 100 flats in Year 1 and sells 40 flats in that year, he will be unable to set off interest cost (including pre-construction period interest cost) pertaining to unsold 60 flats in excess of Rs. 2 lakhs against profit of 40 flats. This is because, as per Tax Authority, interest pertaining to unsold 60 flats will be processed under House Property chapter. Further, the interest cost pertaining to 60 flats of Year 1 cannot be set off against profit on sale of such 60 flats itself in future year because such profits shall be assessable as Business income whereas House Property loss can be set off only against House Property income. This would be quite unfair for the builder since interest represents a commercial cost incurred to earn profit from sale of flats. Artificial denial of interest deduction will result in taxation of unrealistic and hypothetical income. ➢ Even in case of individuals owning a second home which is actually let out, it is well known fact that interest cost generally does not cover full rental income since market rates of rent are not commensurate with capital cost. The loss set off limitation will virtually result in interest expenditure going down as sunk cost in view of inability to absorb it against rental income of next 7 years **Recommendation:** ➢ It is recommended that the restrictive amendment be relooked and suitably amended so that earlier law could be restored. Alternatively, the limit for setoff of loss on account of interest should be increased to Rs. 500,000

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		➢ It is also recommended that there be no restriction in setting off the house property losses and hence, the earlier law should be restored. Further, any carried forward house property loss should be allowed to be set off against any other head of income in future years. ➢ As another alternative, the entire scheme of house property taxation should be changed. The taxation of notional fair value should be eliminated and no deduction should be granted for vacant properties. The interest deduction for two self occupied house properties can be granted as Chapter VIA deduction from Gross Total Income. Taxpayers should be taxed on actual rent income in case of let out properties against which standard deduction of 30% and full deduction for municipal/local taxes and interest expenditure should be allowed. This will simplify house property taxation, reduce litigation and eliminate the inequity caused due to restriction of house property loss set off.
34.	**Provisions of section 36(1)(viia) – Deduction for provisions for bad and doubtful debts**	**Rationale:** ➢ Post 2008-09 financial meltdown, the shadow financial sector of India had been buoyant till late 2017. However, in FY 2019, defaults by leading NBFCs shook the entire sector leading to negative sentiments in the stock market and a dearth of liquidity in the sector. The fourth quarter of FY 2020 started showing green flags as far as growth and liquidity were concerned which earlier were restricted to large NBFCs. Now faced with the unforeseen effects of the COVID-19 pandemic, the financial sector including NBFCs, unsurprisingly, has borne the maximum brunt of the cascading effects of the pandemic. Cash flow of companies is squeezed and creditworthiness of borrowers is uncertain. There is no question that the impact on the banking sector and resultant NPAs will be massive. In a scenario where credit financing and repayment are weak, NBFCs would need to do provision for unforeseen NPAs in the near term. ➢ This representation aims to draw your attention to income-tax provisions w.r.t. Section 36(1)(viia) of the Income Tax Act, 1961 ('the Act') and the need for amending the provisions to allow Covid-19 provision as tax deductible and increase the maximum permissible amount of deduction, which is currently capped at 5% of the Gross total income. **A. Section 36(1)(viia) deduction in its current state:** ➢ It is a prerequisite that an NBFC creates a provision in its books towards bad and doubtful debts for it to claim any deduction under Section 36(1)(viia).

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		➢ The intent of the statute seems to be, to give deduction for provisions created in books in line with the norms framed by the RBI, but to restrict the deduction to a percentage of taxable profits. The allowable deduction is restricted to the amount of provisions actually made or 5% of total income whichever is lower. ➢ It is interesting to note that this cap of 5% on total income is to be calculated before claim of deduction under Section 36(1)(viia) and before claim of deduction under Chapter VI-A. The phrase used is 'total income' which is a defined in Section 2(45) of the IT Act. Total income essentially means the amount on which income tax is payable and is computed by giving effect to all the provisions of the IT Act. Therefore, total income will include income chargeable under all heads of income and will also take into account set off of all eligible brought forward or current period losses. ➢ As an example, if the provisions actually made is Rs.100 and the amount calculated at 5% of total income works to Rs.150, then, the deduction will be restricted to Rs.100. Conversely, if the provisions actually made is Rs.150 and the amount calculated at 5% of total income works to Rs.100, then, the deduction will be allowed for Rs.100. And, if the NBFC has incurred a loss, no deduction would be allowed under this section. ➢ Additionally, under Ind AS, loans will no longer be bucketed into standard/ sub-standard/ doubtful or loss categories (as currently prescribed under the RBI norms). Thus, the RBI Norms/ Guidelines would not be applicable, and the classification of loan shall be based on days past due and other qualitative criteria and shall be bucketed into Stage 1, Stage 2 and Stage 3. ➢ In the current scenario, it is imperative that the NBFCs will have higher provisioning for bad and doubtful debts in view of Covid-19 provisioning due to liquidity/financial stress on its customers caused by lower business activity during the Covid-19 lockdown. On the other hand, the gross total income is bound to be lower due to reduced profitability on account of lower business volumes due to slowdown in economy. Under Section 36(1)(viia) of the Act, an amount not exceeding 5% of the total income of NBFCs is allowable as deduction for provision for bad and doubtful debts. NBFCs / HFCs are regulated entities and have migrated to Indian Accounting Standard (Ind –AS) from April 1, 2018. Under Ind AS, asset classification and provisioning are based on the Expected Credit Loss (ECL) model and such provisions are termed as Expected credit loss – impairment allowance. Thus, the HFCs have

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		to provide for the Expected Credit Loss on Stage 3 loan under Ind AS as compared to provision for non-performing assets under IGAAP. ➢ Further, in view of the current challenging economic scenario, the deduction for provision for bad and doubtful debts should be increased from present 5% limit to make it at par with the deduction of 8.5% available to Banks. **Recommendation:** We request that the following amendments be brought in the provisions of Section 36(1)(viia) of the Act: ➢ It is recommended that limit of deduction should be increased to make it at par with the banks. Alternatively, capping of maximum deductible amount be increased to 10% (Currently – 5% for NBFCs) of the Gross Total Income; ➢ Clarification that the deduction u/s 36(1)(viia) of the Act can be extended to Covid-19 provision as well irrespective of the terminology used for creating the said provision; and ➢ Clarification as to provisioning on which stages of loan shall qualify for deduction under section 36(1)(viia) of the Act. ➢ It is recommended that it should be clarified that Expected Credit Loss on Stage 3 accounts as per IndAS is allowable under section 36(1)(viia)(d). **B. Extension of limit of deduction u/s. 36(1)(viia) for NBFC at par with banks** **Rationale:** ➢ Without prejudice to above, we would also like to bring to your attention that Section 36(1)(viia) of the IT Act provides that a bank shall be allowed a deduction of provision of bad and doubtful debts to the extent of 8.5 percent of the total income and an amount not exceeding 10% of the aggregate average advances made by the rural branches of such bank (computed before making any deduction under this section and Chapter VIA). Budget 2016 extended similar benefit to NBFCs and permitted them to deduct provision of bad and doubtful debts to the extent of 5 percent of the total income (computed before making any deduction under this section and Chapter VIA). Such disparity is

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		unwarranted since NBFCs are subject to regulatory norms in all the key areas similar to banks, including requirement of minimum capital adequacy ratio of 15 percent (9 percent for banks under Basel III norms), maintenance of leverage ratio and compliance with Know Your Customer norms, provisions of Prevention of Money Laundering Act, 2002 and other prudential norms. ➢ Further we would like to highlight that the amendment as suggested below would not lead to any revenue loss to the Government since: (i) the said deduction only prepones the event of deduction to creation of provision instead of actual write off in books (ii) Combined reading of First proviso to Section 36(1)(vii), Explanation 2 to Section 36(1)(vii) and Clause (v) to Section 36(2), ensures that the no deduction is claimed twice - once, at the stage of provisioning and again, at the stage when the bad debts are actually written off. ➢ However, the same is critical to provide the additional liquidity and temporary lower tax effect to the NBFC sector which is currently crippling with increasing provision for bad and doubtful debts on one hand and lower profits due to lower business volumes due to slowdown in economy and higher NPA provisions. **Recommendation:** ➢ Given the above, it is recommended that the threshold of deduction of 5 percent under section 36(1)(viia) applicable to NBFCs is at least increased to 8.5 percent to be at par with the banks and a level playing field be created for NBFCs.
35.	**Taxation of deferred consideration under capital gains**	**Rationale:** ➢ With the growth of the Indian economy and rapid globalisation, business restructuring has gained significant prominence in India with entities perennially on the look-out for funding and/ or inorganic growth opportunities. Among others, one of the major drivers of decision making is the tax efficiency of such restructuring. ➢ One of the common features of such new-age business reorganisations is to link the payment of consideration for transfer with the future growth prospects of the business i.e. the consideration is

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		contingent upon certain parameters such as growth, profits, EBIDTA, etc. achieving their prescribed level. ➢ This is especially true for the start-up sector where given the large valuations seen based on future potential, there is often a difference in value perception between the promoters and the potential investors. ➢ However, the currently prevailing provisions of the Act do not have clarity on the taxation of such contingent consideration i.e. whether the tax implications would relate back to year of transfer or the same would be brought to tax in year of receipt. Even the judiciary seems to be divided on this issue with rulings for and against both views3. **Recommendation** ➢ In order to provide clarity, as well as to boost the Indian Start-up sector, appropriate provisions may be introduced to clarify that such capital gains taxation will arise only in the year in which contingent consideration becomes due as per terms of agreement. ➢ This would also be in line with the rationale adopted for taxation of enhanced compensation on compulsory acquisition which is taxed in year of receipt [in S. 45(5)] or taxation of capital gains arising from conversion of capital asset into stock in trade which is taxed in year of sale of such stock [in S. 45(2)].
36.	**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, trademarks, licences, franchises or any other business or commercial rights of similar nature

[3] For instance, refer SC ruling in Ghanshyam (HUF) [315 ITR 1 (SC)] and Delhi HC in Ajay Guliya [TS-520-HC-2012 (Del)] which favoured contingent consideration relating back to year of transfer and hence being taxable in year of transfer. Also refer Bombay HC ruling in Mrs. Hemal R Shete (ITA No. 2348 of 2013) which favoured contingent consideration being taxable in year of determination of such contingent consideration

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		➢ 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 Act 2021 amended 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 has notified Rule 8AC to carve out the goodwill from the block of assets. ➢ The rationale explained in Explanatory Memorandum of Finance Bill 2021 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…"*

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		Issue ➢ The amendment made by Finance Act 2021 became applicable from financial year F.Y. 2020-21 (relevant to A.Y. 2021-22) onwards and thus it applied 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. ➢ Goodwill is an integral business right acquired in any business organisation, which allows acquirer to leverage upon inherent business advantages and carry on business smoothly ➢ In any kind of business reorganisation, be the case of amalgamation or slump sale, the entire business including all employees and all commercial rights associated to the business are transferred to the transferee ➢ In true sense, Goodwill is ultimately a cost incurred towards bundled assets and business rights acquired by an acquirer and hence, an intangible asset being acquired for which a price is paid at the time of its acquisition ➢ The rationale that the Goodwill value does not depreciate does not necessarily hold good in business acquisitions ➢ 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 amendment by Finance Act 2021 has unsettled all these decisions, with significant impact on business deals. ➢ If Goodwill becomes a cost for the acquirer, the same would significantly impacts valuation of businesses, pursuant to which the seller will receive a lower consideration. Specifically, in cases of foreign investments, it would mean lower cash inflow to the Indian Seller. ➢ 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.

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		Recommendation ➢ The provisions introduced vide Finance Act 2021 should be rolled back and depreciation should be allowed on goodwill. ➢ At a minimum, the amendment should be on prospective basis such that the denial of 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'.
37.	**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).

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		➢ 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. ➢ Finance Act 2021 insert the following provisions – • 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*

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		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 is 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 for delayed payments. 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, it is possible in the past 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 amendment is that employer should not unjustly enrich himself with employee's funds, the 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.

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		➢ 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 amendment made by Finance Act 2021 should 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.
	Issues related to TDS on dividends	
38.	**Dividend surcharge mismatch for different classes of non-resident taxpayers and mismatch with income from mutual funds and units of business trusts**	**Rationale** ➢ The amendments at enactment stage to FB 2020 have reduced surcharge rates on dividend for individuals, HUFs, AOP, BOI and AJP to maximum 15% (as compared to highest surcharge of 37%) as per original budget proposal. ➢ The amendments carried out to FB 2020 at enactment stage are at Parts II and Part III of First Schedule to FB 2020 which are linked to 'rates in force' referred in s.2(5) of FB 2020. Thus, wherever the relevant final rate or TDS provision refers to 'rates in force', the maximum surcharge on dividends stands reduced to 15%. ➢ However, many final rate and TDS provisions provide for specific rates of tax on dividend income. They are covered by s.2(6) and s.2(9) of FB 2020. Unfortunately, s.2(6) and s.2(9) of FB 2020 have not been amended at enactment stage to reduce maximum surcharge to 15% for dividend income. This anomaly has percolated into Finance Act 2021 also. ➢ This has resulted in mismatch between (a) surcharge on dividends between different classes of non-resident taxpayers and (b) TDS rates and final rates on dividend income for some non-resident taxpayers. This is summarised in Table on the next page.

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		➢ The most significant impact was on FPIs (assessed in the status of individual or AOP or BOI) who would have been liable to higher rate of surcharge on dividend income. However, by an amendment through Taxation and Other Laws (Relaxations and Amendment of certain provisions) Act 2020, the higher surcharge was restricted to 15% for FPIs both for withholding and advance/final tax purposes. ➢ However, other class of non-resident taxpayers remain adversely impacted by higher surcharge and some of them also face mismatch between TDS rate (10%) and final rate (20%) as indicated in Table below. **Recommendation** ➢ The anomaly of higher surcharge for certain classes of non-resident taxpayers and mismatch between TDS rates and advance/final tax rates should be removed. **Table summarising dividend surcharge rate mismatch for different classes of non-resident taxpayers.**

Section	Nature of payment to non-resident	TDS rate prescribed (rates in force or specified rate)	Whether covered by s.2(5) r.w Part II of First Schedule or s.2(6) of Finance Act 2021?	Whether TDS at higher or lower surcharge?	Whether final tax liability for advance tax purposes at higher or lower surcharge?
194LBA	Dividend income from business trust	Rate specified - section 194LBA(2) – 10%	s. 2(6) of Finance Act, 2021	Higher surcharge	Higher surcharge Rate – 20% S.115A(1)(a)(i)r.w. clause (a) of third proviso to s.2(9) of Finance Act 2021
194LBB	Dividend income from Alternative Investment Fund	Rates in force - section 194LBB(ii)	s. 2(5) of Finance Act, 2021	Lower surcharge	Higher surcharge S.115A(1)(a)(i)r.w. clause (a) of third proviso to s.2(9) of Finance Act 2021

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		194LBC · Dividend income from Securitisation Trust (Practically possibility of dividend from securitisation trust is less likely but cannot be completely ruled out) · Rates in force - section 194LBC(2) · s. 2(5) of Finance Act, 2021 · Lower surcharge · Higher surcharge S.115A(1)(a)(i)r.w. clause (a) of third proviso to s.2(9) of Finance Act 2021 195 · Dividend income · Rates in force · s. 2(5) of Finance Act, 2021 · Lower surcharge · Higher surcharge S.115A(1)(a)(i)r.w. clause (a) of third proviso to s.2(9) of Finance Act 2021
39.	**Higher surcharge on mutual fund income & income from units of business trusts (ReITs/InvITs) may be reduced to bring at par with 15% surcharge on dividend incomes.**	**Background and Issue** ➢ While maximum surcharge on dividend income is reduced to 15%, there is no corresponding reduction in surcharge for income from mutual fund units and units of business trusts (REIT/Invits). This creates mismatch between different classes of capital market equity instruments. ➢ It may be noted that the capital gains income from equity oriented mutual funds and units of business trust are subjected to lower surcharge upto 15%. Similarly, there should be parity between surcharge on dividend income and income from mutual fund units/units of business trust. **Recommendation** ➢ Income from mutual funds and business trusts may be put at par with dividend income by restricting maximum surcharge to 15%.

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40.	**TDS on Dividend – clarification on threshold of Rs. 5000 under section 194**	**Rationale:** ➢ As per section 194 of the Income Tax Act, if the amount of dividend paid/distributed/likely to be distributed or paid to the Indian resident shareholder is not exceeding Rs. 5000 in a financial year, then there is no requirement for withholding tax on such payment. ➢ There would be cases where companies distribute dividends more than once in the same financial year. In such cases, there is a possibility, that in the first dividend payout, a shareholder was below the threshold limit, but with the second/ subsequent dividend payout, the aggregate dividend payout (including the earlier dividend in the same year), exceeds the threshold limit of Rs. 5000 in a financial year. In this scenario, with the existing tax provisions, the company is required to deduct tax on the whole/ aggregate amount of dividend paid to the shareholder. There could be cases where the TDS on the aggregate dividend paid out is more than the second/ subsequent dividend to be paid to the shareholder. This is anomalous situation, which needs to be addressed at the earliest. **Recommendation:** ➢ It is recommended that in case of resident individuals, tax should be deducted on dividends exceeding Rs. 5000. Dividends up to Rs. 5000 should not be subjected to tax deduction; any amount over and above the Rs 5000 should be subjected to tax deduction at source.
		TDS and TCS Provisions
41.	**Deduction of tax at a higher rate in case of credit/payment to non-filers of returns**	**Rationale:** ➢ Prior to amendment by Finance Act 2021, a higher TDS rate of 20% was 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 S.206AB inserted by Finance Act 2021 w.e.f 1 July 2021, 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

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		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 was also 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. ➢ In this regard, CBDT has made available a functionality on Income tax e-filing website to identify 'specified persons' on an individual basis and also in bulk. CBDT also issued Circular no. 11/2021 dated 21 June 2021 which provided administrative relief by clarifying that 'specified person' status needs to be checked only once at the beginning of the financial year such that if the person is not identified as 'specified person' at the beginning of financial year, he will not be regarded as a 'specified person' for whole of the year even if he defaults in filing return for immediately preceding year and technically becomes 'specified person'.

<table>
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<tr><td></td><td></td><td>Issue
➢ The above referred provisions put additional compliance burden on the industry to verify ’specified person’ status of the deductees/collectees and accordingly calibrate the rate of TDS/TCS.
➢ 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 new shareholders may get added in the intervening period.
➢ The compliance burden cast 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. These 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 the provisions of s.206AB & 206CCA be withdrawn.
➢ Without prejudice, if the provision is retained, following recommendations may be considered-
• TDS on dividend under section 194 should be excluded for listed companies due to very high fluctuating base of resident shareholders and strict timelines to pay dividend from record date.</td></tr>
<tr><td>42.</td><td>Section 194J - TDS on Fees for Professional/Technical Services - rate to be reduced to 2% to avoid characterisation dispute</td><td>Rationale:
➢ The Finance Act 2020 has reduced the TDS rate u/s 194J to 2% (from existing 10%) in case of FTS payments but retained TDS rate at 10% for fees for professional services.
➢ The Explanatory Memorandum clarifies that the amendment is proposed since there are large number of litigations on the issue of short deduction arising out of characterisation dispute between Sec 194C and Sec 194J.</td></tr>
</table>

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		➢ While provision of 2% rate for FTS payments is a welcome change, the proposed amendment will give rise to a new litigation in the form of distinction between professional services and technical service. Thus, such selective amendment for providing lower rate only for FTS payments is in direct conflict with the rationale in the Explanatory Memorandum that it is intended to avoid litigation on short deduction issues. ➢ There is significant overlap between scope of FTS which covers managerial, technical or consultancy services and fees for professional services which, inter alia, includes profession of technical consultancy, engineering services, information technology, etc. Hence, disputes will arise whether payments for such services will be liable for TDS @ 2% or TDS @ 10%. **Recommendation:** ➢ Hence, it is recommended that TDS rate on professional services should also be reduced to 2% to avoid characterization disputes between fees for technical services and fees for professional services. ➢ Alternatively, CBDT should issue proper guidance with illustrations for uniform implementation of revised TDS rates by the payers and avoid characterization disputes. ➢ As a broader measure to simplify TDS compliance, the disparity in TDS rates for payments to residents under different provisions like Sec 194, 194A, 194C, 194H, 194I, 194J, etc should be eliminated and a uniform TDS rate should be provided for all payments to residents to avoid characterization disputes.
43.	**Increase in threshold for Non deduction of TDS on Interest in case of Fixed deposits with HFCs**	**Rationale:** ➢ Interest income from fixed deposits is subject to withholding taxes at the rate of 10% under section 194A of the Act subject to threshold of Rs. 40,000 for non-deduction in case of Banks including Co-operative banks, post offices etc. However, the aforesaid limit is restricted to Rs. 5,000 in case of HFCs and NBFCs. ➢ Finance Act 2018, further, increased the aforesaid threshold to Rs. 50,000 in case of deposits held by Senior citizens in case of Banks including Co-operative banks, post offices etc.

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		➢ It may be noted that Fixed deposits accepted by HFCs are subject to NHB regulations and therefore should be on par with the banks, cooperative banks, post offices etc. **Recommendation:** It is recommended that the treatment of threshold for Non deduction of TDS on Interest in case of Fixed deposits in case of HFCs should be at par with Banks, post offices etc.
44.	**Clarify applicability of treaty benefit while deducting tax on payments to non-residents under provisions which provide for specific rate of TDS (as distinguished from 'rates in force' under s.195)**	➢ **Background facts: Supreme Court judgment in the case of PILCOM** a) The Hon'ble Supreme Court in a recent decision in the case of PILCOM v. CIT (2020)(116 taxmann.com 394) held that the payer cannot consider DTAA benefit available to the non-resident payee at the stage of TDS on payments to such non-resident payees, in a case where the transaction was not covered by S.195 of ITA. b) The SC was concerned with a case where PILCOM made payments in nature of guarantee money to non-resident sports association related to the cricket matches played in India, Sri Lanka and Pakistan during Cricket World Cup 1996. The SC held that once it is established that the payments made to the non-resident sports associations were 'in relation to' to the matches played in India, such guarantee money can be said to be earned from a source in India and hence, the income is deemed to accrue or arise in India attracting corresponding withholding obligation for the payer. c) In context of consideration of DTAA benefit for TDS purposes, the SC held at para 18 of its ruling as follows :- *"**18.** We now come to the issue of applicability of DTAA. As observed by the High Court, the matter was not argued before it in that behalf, yet the issue was dealt with by the High Court. In our view, the reasoning that weighed with the High Court is quite correct. The obligation to deduct Tax at Source under Section 194E of the Act is not affected by the DTAA and in case the exigibility to tax is disputed by the assessee on whose account the deduction is made, the benefit of DTAA can be pleaded and if the case is made out, the amount in question will always be refunded with interest. But, that by itself, cannot absolve the liability under Section 194E of the Act."*

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		d) As it seems, the Honourable SC has taken a view that, in a case where the TDS rate is provided in a specific section, the DTAA rate of tax may not be taken into account. e) Prior to the pronouncement of the judgment, it was considered fairly well settled that the tax withholding can be made at DTAA rate in a case where it was lower than rate provided in the ITA or relevant Finance Act. The Tax Authorities as also taxpayers have complied with TDS compliances on such understanding. This approach was also perceived to be in sync with earlier judgments of SC in the cases of CIT v. Eli Lilly and Co. (India) Pvt. Ltd. [2009] (312 ITR 225), G.E. India Technology Centre Pvt. Ltd. v. CIT [2010] (327 ITR 456) and Vijay Ship Breaking Corporation v CIT [2009] (314 ITR 309) f) S.195(2) and s.197 of ITA permit the taxpayers to apply for nil or lower rate of tax if DTAA rate is lower than the rates specified in the domestic law. The tax policy behind these provisions is inter alia, guided by the ease of operation without injuring interests of Revenue. There may not be insistence on collection of tax which is higher than the amount of primary tax liability incurred by the NR taxpayer having regard to DTAA provisions. g) As a fall out of SC judgment in PILCOM's case, many apprehensions have arisen in the minds of the taxpayers on the exact scope, applicability and width of the ratio of the judgment. There is also an apprehension on the extent to which the earlier judgments of the SC may be regarded as inapplicable or distinguishable. Doubts have also arisen about the posture that CBDT may adopt with regard to the ongoing /future and the past transactions. The list of sections dealing with payments to non-residents which are impacted by PILCOM ruling are provided in Table below. ➢ **Apprehensions/uncertainty in the minds of the taxpayers** Amongst others, the following apprehensions are raised by taxpayers :- a) Whether the ratio of PILCOM ruling will be restricted to a case covered by section 194E or will it apply to all other provisions of ITA where specific TDS rate is specified within the section? b) Whether the ratio of PILCOM ruling be considered by CBDT to be applicable also in a case where the tax payable by income recipient is nil either as a result of DTAA or as a result of S. 10 or other

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		exemption provisions of ITA or as a result of certain other international agreements under which exemption may have been conceded by India. c) Do the earlier judgments of SC continue to hold the field, and if yes, the extent to which CBDT will consider various judgments to be reconcilable in terms of compliance by the taxpayer. d) Will PILCOM judgment have prospective implication in terms of compliance expectation from the tax deductors? e) Whether Tax Department will reopen past cases based on this ruling to recover shortfall of TDS being the difference between TDS rate as per Act and tax rate as per treaty to raise demands along with interest u/s. 201(1A)? f) Whether Tax Department will also levy penalty u/s. 271C or initiate prosecution u/s. 276B? g) Going forward, whether non-residents will suffer higher TDS due to application of ratio of PILCOM ruling and will necessarily be required to file return to claim refund of excess TDS? h) Will CBDT consider appropriate Circular to be issued under S. 119 and/or notification under S.197(1F) of ITA to permit the taxpayers, under the shelter of administrative dispension, to follow the same course of action as was being followed prior to PILCOM ruling? ➢ **<u>Our submissions in brief for consideration:</u>** a) 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. b) Such tax policy, if continued to be applied, may harmonize with the thinking that TDS is secondary tax obligation and should ideally follow the primary tax obligation. c) 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.

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		d) In deference to representations made, FA 2021 inserted a proviso to section 196D(1) of ITA w.e.f 1 April 2021 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 This was specifically in view of PILCOM ratio. Similar amendments are required for other provisions which provide for fixed rate of TDS on payments to non-residents. ➢ **<u>Our representations in brief</u>** a) Without prejudice to our other submissions, it is submitted that the CBDT may clarify the following and/or adopt appropriate legislative process to so as to avoid hardship to the taxpayers and to ease the burden of compliance :- ○ It may be clarified that the ratio of SC ruling in PILCOM's case applies only to those TDS provisions which provide for specific TDS rate and would not apply in determination of TDS liability under S.195 and other provisions which require TDS at 'rates in force'. ○ It may be clarified that any payment made to a non-resident, except in a case which is specifically excluded under S. 195 of ITA, may be considered as covered by S. 195 of ITA concurrently with any other provision of the Act so that treaty benefit can be considered by the payer for TDS purposes. ○ Even in respect of payments which are specifically excluded from s.195 being interest covered by s.194LB, s.194LC and s.194LD, it may be clarified through a Circular and/or notification may be issued u/s. 197A(1F) that treaty benefit can be considered by the payer for TDS purposes. ○ It may be clarified that the ratio of SC judgment in PILCOM's case will be considered to have prospective application in terms of the expectation of compliance obligation from the taxpayers and accordingly, no notices will be issued and/or demands will be raised for

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		past years where payers have considered treaty benefits while making payments under TDS provisions requiring TDS at specific rates. ○ Without prejudice, in harmony with the tax policy adopted so far, and in exercise of the powers contained in S. 119 and/or S.197(1F), it may be clarified through a Circular/Notification (failing which, through suitable legislative amendment) that even where TDS is provided at specific rate for payment to non-resident (as distinguished from 'rates in force'), the payer can consider treaty benefit for TDS purposes. **List of sections dealing with payment to non-resident which may be impacted by SC ruling in PILCOM's case:**

Sr. No.	Section	Particulars	Withholding rate (excluding surcharge and cess)
1.	194E	Payment to non-resident sportsmen/ sports association	20%
2.	194LB	Payment of interest on infrastructure debt fund	5%
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%

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		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%
45.	**Section 196C – TDS on dividend on GDRs**	**Rationale:** ➢ In case of GDRs, identity of beneficial owner of GDR is not known to the Company. The rate of surcharge is different for different categories of payees. Therefore, the deductor company cannot determine applicable rate of surcharge on TDS on dividend paid to GDR holders. ➢ Vide Circular No. 3P dated 01-05-1966, CBDT has clarified that, when shares are registered in the name of banking company, TDS should be deducted at the rates in force applicable to the banking company without regard to the beneficial owner of shares. **Recommendation:** ➢ CBDT may clarify that while deducting tax at source u/s 196C surcharge should be as applicable to the custodian.
46.	**TDS in respect of purchase of goods (S.194Q)**	**Rationale:** ➢ 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 2021 - subject to certain exceptions ➢ Additionally, FA 2021 introduced a new TDS provision u/s.194Q 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%.

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		➢ 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) ➢ CBDT also issued Circular No. 13/2021 dated 30 June 2021 to clarify certain issues and remove difficulties in application of the provisions of s.194O, 206C(1H) and 194Q. ➢ 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. ➢ Further, there are business transactions where a seller receives advance payments for future sale / supply of goods. Such advance received per-se cannot constitute a sales consideration, rather is in nature of an advance receipt towards future sales. Also, there can be instances where the advance is returned as the actual sale transaction doesn't take place.

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		➢ In such cases, if an advance receipt is considered as liable for TDS / TCS and subsequent sale / purchase does not fructify, it results in unnecessary practical challenges w.r.t. TDS/ TCS compliances. **Issues:** ➢ The new TDS provision 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

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		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 is creating practical difficulties ➢ Implementation of 194Q have separate set of implementation challenges, some of which are listed below: • Changes in ERP system • 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 **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. ➢ 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

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		the definition of 'goods'. Generally, these items are traded in well-regulated financial markets and there is no need for imposing TDS/TCS by 194Q/206C(1H) when the relevant information can be easily obtained from financial intermediaries. ➢ Consequential clarification with respect to TCS/TDS reconciliation vs income / purchases or GST returns ought to be brought in to avoid future litigations / denial of credit to the assessee. ➢ S.197 may also be amended to enable the seller to obtain lower/NIL TDS certificate.
47.	**Relaxation of provisions for assessee-in-default and facility for lower TCS certificate to be also extended to sub-sections (1F)/(1G)/(1H) of s. 206C**	➢ **Rationale** o S. 206C(6A) provides that if the person responsible for collecting tax (say, seller) does not collect whole or part of the tax amount or fails to pay after collecting, he shall be deemed to be an assessee-in-default. o The proviso to s. 206C(6A) provides that such person/ seller responsible for collecting tax u/s 206C shall not be deemed to be assessee-in-default if the buyer has: ▪ Furnished his return of income u/s 139(1) ▪ Taken into such amount (on which TCS was collectible) for computing income in his return of income, and ▪ Paid tax due on income declared by him in the return of income o Further, s.206C(9) provides facility to buyer to apply to AO for lower TCS certificate. ➢ **Amendment by FA 2020** o FA 2020 has restricted the benefit of the proviso to s.206C(6A) only to sub-section (1) and (1C) of s. 206C. In other words, the relaxation has not been extended to expanded scope of TCS such as sub-section (1F)/(1G)/(1H) of section 206C in relation to sale of motor cars, LRS, overseas tour program package and sale of goods. o Further, no consequential amendment is made to s.206C(9) to permit remitters/buyers covered by s.206C(1F)/(1G)/(1H) to apply for lower TCS certificate

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		➢ **Issue** ○ The underlying rationale of proviso to s. 206C(6A) is statutory recognition of legal position clarified by CBDT vide its Circular No. 275 dated 29 Jan 1997 upheld by Supreme Court in the case of Hindustan Coca Cola Beverages (P) Ltd v. CIT (293 ITR 226) and Ely Lilly & Co(I) Pvt. Ltd (312 ITR 225) viz. once the payee/ buyer has paid tax and filed return, the purpose of TDS/ TCS of ensuring tax collection is achieved and hence, the payer/ seller should no more be considered as an assessee-in-default. Hence, the rationale of not extending the relaxation granted by the proviso to other sub-sections is not clear. ○ In case where the buyer has already done the compliance as stated in the proviso to s. 206C(6A), not extending the benefit to the sellers/ persons responsible for collecting tax u/s 206C(1F)/ (1G)/ (1H) will lead to double whammy and create unnecessary administrative and tax compliances for the seller/ buyer. ○ Further, the omission to amend s.206C(9) to cover TCS newly introduced u/s. 206C(1F)/(1G)/(1H) seems to be unintentional. There is no reason why remitters/buyers under these provisions should not be permitted to apply for lower TCS if their total incomes justify lower/NIL TCS. ➢ **Recommendation** ○ Accordingly, it is recommended that the relaxation provided by the proviso to s. 206C(6A) may be extended to the other provisions of TCS such as sub-section (1F)/(1G)/(1H) of section 206C also, since once the buyer has already done the necessary compliance, not extending the benefit of the proviso will lead to double whammy and create unnecessary administrative and tax compliances for the seller/ buyer. ○ Further the facility to apply to lower/NIL TCS certificates may be extended to remitters/buyers covered by TCS u/s. 206C(1F)/(1G)/(1H) by amending s.206C(9)
48.	**Section 194-O casting TDS obligation on e-commerce operators**	**Rationale**: ➢ Section 194-O provides that an e-commerce operator who, through his digital or electronic platform, facilitates sale of goods or supply of services of e-commerce participant shall be liable to undertake TDS @ 1% on the gross amount of such sale or service at the time of credit or payment to e-commerce operator, whichever is earlier.

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		➢ The terms 'digital' or 'electronic platform' are not defined. This has led to wide coverage of transactions which can also bring traditional ways of carrying business also into the net of TDS ➢ There are some digital platforms which merely allow sellers to list their products and their contact information of the portal and potential buyers to solely view such product information. Thereafter, the role of the platform ends. The platform is not even aware whether or not sale has taken place ➢ However, owing to the wide meaning of the term "facilitate", doubts may arise whether such platform which act as classified repositories and have no role to play in completion of sale or service will also be obligated to withhold under Se. 194-O ➢ Further, Explanation to S.194-O(1) deems that direct payment made by customer to e-commerce participants for sale of goods or services is deemed to be amount paid or payable by e-commerce operator to e-commerce participants. Also, S.194-O(6) provides that the e-commerce operator shall deemed to be a person responsible for paying to the e-commerce participants. ➢ In certain types of electronic commerce transactions, where the sale of goods or provision of service takes place directly between buyer and seller, the e-commerce operator does not have visibility over the transaction. In such cases, the e-commerce operator may not be aware of the pricing of the goods, conclusion of the contract, etc. ➢ Levying TDS obligation on such e-commerce models not only creates difficulty in deducting TDS in absence of payments but also adds to administrative inconvenience and working capital hurdles. It casts an unnecessary obligation on platforms who are not involved in consummation of the transaction between buyer and the seller **Recommendation**: ➢ There should be an explanation inserted in the section to provide clarification on the term 'facilitation' ➢ Deeming proviso in the section should be removed ➢ E-commerce transactions where e-commerce operators are merely acting as repositories and don't have any visibility on the conclusion of transaction should be excluded ➢ Section should explicitly carve out transactions where any sale contract is concluded over an email, telecom, etc.

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49.	**Provide relief from deduction of tax at source on payments that are accrued but are not due to the payee and for which the payees are not identifiable and represents only a provision made on a month end and year end basis on estimated basis**	**Rationale:** ➢ Most of the companies record provision entries towards various expenditures on a monthly basis to report performance to their parent entities. These entries are reversed in the subsequent month. ➢ These accruals are made on very broad estimates. The tax officers have been insisting that tax be deducted on these provisional entries. ➢ Year-end provisions are made by assessees to follow accrual system of accounting. Very often provision for expenses at the year-end are made based on best estimates available with the assessee even if the supporting invoice is received at the subsequent date. In most of the cases, even the identity of the payee is not known and a consolidated liability is provided on an entirely ad-hoc basis. Owing to such ad-hoc nature of such liabilities, they are mostly reversed at the start of the succeeding year and whenever identity of the payees and amounts payable to them becomes clear, liability for the same is provided subsequently. ➢ As per the current tax regime, tax is required to be deducted on such provisions which often leads to excess deduction and deposit of tax, disputes with the vendor and causes hardship to the assesses. ➢ Reference may be made to Bangalore Tribunal ruling in the case of Sasken Network Engineering Ltd. (TS-539-ITAT-2021-Bangalore), where the taxpayer faced difficulty of obtaining TDS credit where the customer had deducted tax on the basis of provision made in customer’s books based on purchase orders which ultimately did not match with actual invoices raised by the taxpayer. The Tribunal adopted a strict view of not granting TDS credit in absence of corresponding income offered to tax. This highlights the practical challenges which both payer and payee face if TDS is insisted on month/year end provisions. **Recommendation** ➢ It is recommended that relief from deduction of tax at source should be given on payments that are accrued but are not due to the payee and for which the payees are not identifiable and represents only a provision made on a month end and year end basis on estimated basis for reporting purpose and are reversed subsequently.

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50.	**TDS on income from funds in escrow account**	**Rationale:** ➢ There are circumstances where funds are kept in escrow account and based on outcome on an identified event or happening of certain event, it is decided as to who will be beneficiary of the funds and accretion thereto. ➢ The problem arises as to TDS compliance. Payer of interest insist for deduction of tax at source, but it is not clear as to who will be beneficiary of the income. **Recommendation:** ➢ In case of escrow arrangements, the payer of income be allowed to comply with TDS provisions on actual payment basis rather than accrual basis.
	Mergers & Acquisitions and Business reorganisation related suggestions	
51.	**Tax on buy-back of shares under section 115QA be omitted**	**Rationale**: ➢ A domestic company doing buy-back of shares is liable to pay tax on the distributed income – which is defined to mean the consideration paid by the company on buy-back as reduced by the amount received by the company at the time of issue of shares. ➢ With effect from 5th July 2019 this section has been made applicable even to listed entities also. In case of listed entities, the shares get transacted quite frequently and the shareholder are liable to pay tax on the difference in prices in the form of capital gains. Thus, the real income earned by the shareholder by surrendering shares in the buy-back is the difference between the buy-back price offered by the company and his/her purchase price of such shares. ➢ However, the buyback tax gets levied on the company on the entire difference between the buy-back price and the issue price. To illustrate, if the issue price is Rs. 10 and the shares have changed hands frequently such that the last shareholder has acquired the shares for Rs. 100 and buyback is made at Rs. 120, the buyback distribution tax is levied on Rs. 110 (Rs. 120 – Rs. 10) even though all shareholders who sold the shares in the intervening period paid tax on Rs. 90 (Rs. 100 – Rs. 10). This results in double taxation of Rs. 90. ➢ This results into double taxation of the same income though in the hands of different assessee. Therefore, it is necessary to eliminate double taxation. Hence section 115QA be omitted and the buyback of shares be made taxable in the hands of respective shareholders.

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		Recommendation: ➢ To eliminate double taxation the buy back tax under section 115QA be omitted and the gain on buyback be made taxable in the hands of respective shareholders by omitting section 10(34A).
52.	**Business acquisition expenditure** **No specific provision to allow expenditure for the purpose of acquisition of business.**	**Rationale**: ➢ To expand business, corporates acquire different entities. During acquisition, various expenses get incurred for feasibility study, due diligence, foreign travel expenses etc. Presently there is no specific provision to allow such expenditure while computing taxable income. Considering the competitive business requirement, such expenditure should be allowed as deduction. **Recommendation**: ➢ It is suggested that such business acquisition expenditure should be allowed as deduction.
53.	**Section 2(22) read with section 49 Value of deemed dividend to be allowed as cost**	**Rationale**: ➢ Section 2(22) provides for taxation of distribution of profits in the form of assets, debentures, debenture stock, deposits etc as dividend in the hands of the shareholder. ➢ Once shareholder pays tax on receipt of asset in the form of dividend income – then the fair market value of the asset should be allowed as cost to the shareholder at the time of subsequent sale thereof. ➢ Similar provision exists on taxation of ESOP shares where the value on which tax has already been paid gets allowed as cost under section 49. ➢ There should be express provision in section 49 whereby the shareholder should be allowed cost of asset based on the value the basis of which tax has been paid by him as deemed dividend. **Recommendation**: ➢ Section 49 be amended to provide for cost of acquisition in relation to assets acquired / received by a shareholder on which income tax has been charged / paid by the shareholder as deemed dividend under section 2(22). ➢ This amendment should be made retrospective from the date the deemed dividend under section 2(22) has been introduced into the Statue in line with the fair principles of eliminating double taxation.

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54.	**Providing benefits u/s 72A to service sector.**	**Rationale:** ➢ Currently the section 72A of ITA is applicable only to industrial undertakings engaged in the manufacturing, processing etc. and not applicable to the service sector like trading, real estate, ITES etc. ➢ Due to unprecedented Covid-19 situation several service sector companies shall be looking for optimizing the operations by amalgamation with other companies. However as per the existing law the business losses if any shall be lapsed and not allowed to be utilized by the merged entity. ➢ With growing emphasis on the digitization of economy and major portion of Indian GDP being contributed by service sector there seems to be no rationale for treating the service sector differently than manufacturing sector and restricting the applicability of Sec 72A only on Industrial sector. **Recommendation:** ➢ It is recommended that the provisions of S. 72A (aa) be amended to include the all kind of business and remove the applicability only on the industrial undertaking. ➢ Since the conditions relating to installed capacity may not be appropriate for all service sectors, a different criterion like number of employees pre and post merger may be introduced for service sector.
55.	**Indirect transfer – Capital gains on transfer of shares of foreign entity deriving substantial value from assets located in India (Proviso to S.9(1)(i))**	**Rationale**: ➢ Finance Act 2012 introduced indirect transfer provisions, w.e.f. 1 April 1962, to tax income where a share or interest in an entity situated outside India derives substantial value, either directly or indirectly, in an Indian company. ➢ Circular 41 of 2016 issued pursuant to various queries raised by stakeholders seeking clarification on the scope of indirect transfer provision clarified that the provisions of IDT shall apply even to investors holding investment in India directly/ indirectly through FII/ FPI unless they are eligible for small shareholder exemption. This raised the risk of multiple taxation and Circular 41 was kept in abeyance pending decision in the matter.

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		➢ Addressing the above concerns, Finance Act 2017 inserted second proviso to Explanation 5 to s. 9(1)(i) wref 1 April 2015 stating Explanation 5 shall not apply to transfer of direct or indirect investment made by a non-resident in an FII registered as Category I or Category II FPI under the SEBI (FPI) Regulations, 2014 made under the SEBI Act, 1992. The exemption has also been extended to erstwhile FIIs notified for tax purposes prior to SEBI (FPI) Regulations, 2014 vide first proviso to Explanation 5 to s. 9(1)(i) applicable wref 1 April 2012. ➢ Certain categories of investors kept out of the purview: IDT provisions to apply in respect of such investors? o The amendment has left out non-resident investors making investments, directly or indirectly, in Indian Alternative Investment Funds and Venture Capital Funds, Infrastructure Investment Trusts, Real Estate Investment Trusts and mutual funds investing in Indian securities. Many such non-resident investors may directly or indirectly have assets that derive value from assets located in India and consequently the redemption/transfer of investment in the fund by these non-resident investors outside India may lead to tax liability in India. ➢ In the Budget Speech, it was mentioned that it is proposed to issue a clarification that indirect transfer provision shall not apply in case of redemption of shares or interests outside India as a result of or arising out of redemption or sale of investment in India which is chargeable to tax in India. **Recommendations**: ➢ Modification in the definition of FII/ FPI to broaden their scope: It is recommended that the definition of FPIs is suitably modified to extend the benefit even for the following classes of FPIs: o SEBI registered Alternative Investment Funds [under the SEBI (Alternative Investment Funds) Regulations, 2014], SEBI registered Venture Capital Funds [under the SEBI (Venture Capital Funds) Regulations, 1996], SEBI registered Infrastructure Investment Trusts [under the SEBI (Infrastructure Investment Trusts) Regulations, 2014], SEBI registered Real Estate Investment Trusts [under the SEBI (Real Estate Investment Trusts) Regulations, 2014], SEBI registered mutual funds [under the SEBI (Mutual Funds) Regulations, 1996.

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		➢ We also expect that clarification exempting the applicability of the indirect transfer tax provisions to redemptions of shares or interests of any foreign entity having underlying Indian investments, as a result of or arising out of the redemption / sale of Indian securities which are chargeable to Indian tax, be issued.
56.	**Exemption for transfer of Rupee Denominated Bonds from one non-resident to another non-resident outside India (S.47(viiaa))**	**Rationale**: ➢ Any transfer made outside India, of a capital asset being rupee denominated bond of an Indian company issued outside India, by a non-resident to another non – resident is exempt u/s. 47(viiaa). But no exemption is provided for buyback of RDBs by Indian issuing company from non-resident investors ➢ The terms of the issue of such bonds generally permit the Indian issuing company to buy them back, if so, permitted by RBI. It may be recollected that RBI had permitted Indian companies in past to buy back FCCBs which were trading at discount in overseas stock exchange. The buyback at discount benefits the Indian economy by reducing the outflow of foreign exchange (For example, if bond with face value of $ 100 is bought back at $ 75, it results in foreign exchange savings of $ 25 for India). ➢ But the exemption is restricted to transfer from one NR to another NR. It does not cover transfer by NR to Indian issuing company. ➢ Further, in case of transfer of listed bonds through stock exchange mechanism, the seller NR will be unable to ascertain whether purchaser on the other side is NR or Indian issuing company. This creates ambiguity and practical challenge for NR sellers **Recommendation**: ➢ The capital gains exemption u/s. 47(viiaa) be expanded to cover transfer of bonds from NR to Indian issuing company as well as a part of buyback.

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57.	**New Long-Term Capital Gains (LTCG) regime @10% with ‘grandfathering’ of value appreciation till 31 January 2018 for equity shares, equity oriented MF units and units of business trust (w.e.f. A.Y. 2019-20)**	**Rationale**: ➢ **Clarify ‘grandfathering’ for listed shares held on 31 January 2018 in lieu of which shareholder may get shares of amalgamated or resulting company subsequently** o An issue arises whether section 55(2)(ac) of the Act which provides for ‘grandfathering benefit’ for shares held on 31 January 2018 seeks to cover only listed shares that have been acquired before 1 February 2018 or whether it also cover the listed shares of the amalgamated company, received in lieu of the shares of the listed amalgamating company (which are acquired before 1 February 2018), by the shareholders of the listed amalgamating company pursuant to the Scheme. o The legal fiction of the Act in relation to amalgamation is to treat the event of amalgamation as a tax neutral event in the hands of the amalgamating company, amalgamated company and the shareholders of the amalgamating company. However, on a plain reading of the section, the Assessing Officer may suggest that section 55(2)(ac) will not apply in case where the shares of listed amalgamated company which are acquired post 1 February 2018 in lieu of the shares of the listed amalgamating company which were acquired by the shareholders prior to 1 February 2018.. This may lead to an unjust and unintended consequence in as much as the grandfathering of the gains up to 31 January 2018 would be denied resulting in the entire gain being held taxable. While it could be argued that such an interpretation of section 55(2)(ac) is unjustified and that the Act has to be read as a whole and section 55(2)(ac) ought to be read along with section 2(42A)- This could lead to unnecessary and avoidable litigation and uncertainty o Ironically, the definition of ‘fair market value’ contemplates a situation where the listed shares are acquired by way of transaction not regarded as transfer u/s. 47 in lieu of shares which are unlisted on 31 January 2018 (Refer Explanation (a)(iii)(B) to s.55(2)(ac)) but not shares which are listed on 31 January 2018. ➢ **Other tax neutral transactions where cost and holding period of previous owner is substituted in hands of successor which will face similar issue** o Similar issue arises in following illustrative cases where provisions of s.2(42A), s.47 and s. 49 provide for tax neutrality with cost and holding period substitution

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		• Shares of listed company held on 31 January 2018 which is demerged post 31 January 2018 and shareholders receive shares of resulting listed company. • Shares held by previous owner on 31 January 2018 which is received post 31 January 2018 under exempt transfer like gift, inheritance, settlement into trust, intra-group transfer between a Holding Company and its wholly owned subsidiary exempt u/s. 47(iv)/(v), corporatisation of firm, conversion of company into LLP, etc **Recommendation:** ➢ A specific clarification be issued that for the purpose of applicability of section 55(2)(ac) of the Act, the shares of the listed company received by the shareholders shall be deemed to be acquired from the date of acquisition of the previous owner, and/or as the case may be, assets in lieu of which shares listed on date of transfer were acquired, under transfer exempt u/s. 47. ➢ Further, it may also be clarified that, in a case where shares acquired are in lieu of shares listed as on 31 January 2018 under transfer exempt u/s. 47, the 'fair market value of such asset', for the purpose of section 55(2)(ac) of the Act, should be the fair market value of shares of the listed company held on 31 January 2018, which is the highest price of the equity shares of the listed company quoted on such exchange on 31 January 2018. ➢ In case of shares of demerged company held on 31 January 2018, the FMV of the shares of demerged company as determined in terms of Explanation (a) to s.55(2)(ac) may be pro-rated between shares of demerged company and resulting company as per the provisions of s.49(2C)/(2D).
58.	**Exemption for exchange of shares in the course of delisting of listed subsidiary of listed parent under SEBI Delisting Regulations.**	**Rationale** ➢ The Board of SEBI has recently approved amendments to Securities and Exchange Board of India (Delisting of Equity Shares) Regulations, 2009 ('Delisting Regulations') which provide for delisting of a listed subsidiary through a scheme of arrangement. The amendments operate as follows: o Listed subsidiary can be converted into a wholly owned subsidiary of the listed parent through a scheme of arrangement where listed parent and listed subsidiary are engaged in same line of business.

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		○ There will be an exchange of shares whereby listed parent shall issue its shares to the public shareholders in lieu of shares held by them in listed subsidiary company. Share swap ratio shall be determined based on independent valuation of both the companies. ○ The scheme of arrangement shall be approved by NCLT (similar to merger under section 2(1B) and demerger under section 2(19AA) of the Income-tax Act, 1961 ('the Act')). Also, the scheme would be approved by SEBI, Stock exchange and 2/3rd majority of public shareholders of listed subsidiary company. ➢ In the Consultation paper dated 16 March 2020 issued by SEBI inviting public comments for the proposed amendments to Delisting Regulations, it has been recognized that while a full merger of a listed subsidiary with its listed parent entity would help achieve the intended synergies, it may not be favorable on account of industry specific issues such as license conditions, transaction costs or cultural differences. To address the situation and to provide impetus to delisting process which so far has not been very successful, SEBI has permitted a new way of reorganization ie delisting of subsidiary through a scheme of arrangement. It is indeed a welcome measure and certainly provides much needed certainty for delisting considering current business and economic requirements. ➢ **Issues**: ○ The receipt of shares of the listed parent by the public shareholders of listed subsidiary in lieu of shares held by them in listed subsidiary would constitute 'exchange' in the definition of 'transfer' under section 2(47) of the Act. Consequently, any gains arising on such transfer would be chargeable to capital gains tax under section 45 of the Act. The public shareholders would be required to discharge tax liability even though they receive shares and no money is received/realized by them. ○ Further, the exchange of shares would not happen through stock exchange, instead, it would happen through scheme of arrangement as per the process laid down by SEBI. This would disentitle the public shareholders to substitute cost of shares in listed subsidiary with fair market value as on 31 January 2018 while computing capital gains. This would result in higher amount of capital gains thus higher incidence of capital gain tax. These tax implications to

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		public shareholders (which may include a large number of small individual shareholders) would cause major hurdle in the implementation of the scheme and it is much likely that they may not vote in favour of the scheme of arrangement for delisting. As mentioned above the scheme of arrangement needs to be approved by 2/3 majority of the public shareholders. ○ Furthermore, the swap ratio in the scheme would be determined by independent valuers on a particular date (as may be determined by the Board of directors of the companies and approved by the shareholders/regulators). However, section 56(2)(x) read with rule 11UA requires valuation of shares on a valuation date (ie the date on which shares are received by the assessee) which would be certainly minimum 8 to 10 months ahead (considering the process involved) than the date considered for determination of swap ratio. Thus, there may be different fair values of the shares under consideration on the valuation date which is to be considered for the purpose of section 56(2)(x) read with rule 11UA and the date when swap ratio was determined. Such difference in fair value can result into unwarranted tax implications to the public shareholders as well as listed parent for a process which is highly regulatory driven. ○ Additionally, the listed parent would be required to withhold tax on the capital gains arising to non-resident public shareholders on account of exchange of listed subsidiary shares with its shares and undertake withholding tax compliances. Considering the transaction would be in nature of share swap and without any cash consideration, it is administratively difficult to deduct tax and comply with withholding tax provisions. ○ The above tax incidence in the hands of public shareholders can cause major impediments in the implementation of this new way of reorganization and may not bring desired results of the scheme which is conceived and permitted by SEBI. ○ There are various existing provisions under the Act in relation to the business reorganization which provide tax neutrality (viz., merger, demerger, conversion of firms into companies or proprietary concerns into companies, transfer of capital asset by a company to its wholly owned subsidiary (and vice-versa) , conversion of bonds / debentures / preference shares into shares / dentures / equity shares etc.). With the same end in view, new provisions should be

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		inserted to provide tax neutrality on delisting of subsidiary through scheme of arrangement in accordance with the SEBI Regulations. It would also resolve the difficulties in compliance with withholding tax obligation while transacting with non-residents. These measures would also add to ease in doing business. To prevent any revenue leakage, capital gains arising on any future sale of shares of listed parent should be computed considering cost of shares in the listed subsidiary. o The economic impact on the shareholder of listed subsidiary who gets shares of listed parent is the same as shareholder of amalgamating company who gets shares of amalgamated company. The only difference is, there is no merger of the entities for the reasons cited in SEBI guidelines like regulatory restrictions, cultural differences, etc. Hence, from tax policy perspective, there is adequate justification for treating the exchange as tax neutral transfer. In addition to amalgamation and demerger, support can also be drawn from s.47(xvii) which treats transfer of SPV shares by promoter to REIT/Invit in exchange for REIT/Invit units as tax neutral event for both normal tax and MAT purposes. o It would be impracticable to cover these transactions in Securities Transaction Tax regime (and consequential 10% LTCG regime u/s. 112A) since there is no cash flow involved in the transaction which is essentially a transaction of exchange or barter of listed subsidiary's shares with listed parent's shares. **Recommendation:** Accordingly, it is recommended that the following amendments should be made: **Tax treatment in hands of shareholder who receives shares of listed parent in lieu of holding of shares of listed subsidiary** o A new clause to be inserted in section 47 to provide 'any transfer, in a scheme of arrangement, of a capital asset being shares of a listed subsidiary where it becomes the wholly owned subsidiary of the listed parent pursuant to Delisting Regulations should not be regarded as transfer.

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		○ A new provision to be inserted in section 49 to provide that cost of acquisition of the shares in the listed parent company shall be deemed to be cost of acquisition of shares in the listed subsidiary. This would ensure that there is no tax leakage. ○ A new provision to be inserted in section 2(42A) to provide that in the case of a capital asset being shares in the listed parent which become the property of the assessee in a scheme of arrangement in accordance with Delisting Regulations, there shall be included the period for which shares in the listed subsidiary were held by the assessee. ○ Benefit of substituting the cost of acquisition of shares in the listed subsidiary with fair market value of listed subsidiary shares as on 31st January 2018 should be allowed for the purpose of calculating any capital gains in future on transfer of shares in the listed parent. ○ Section 56(2)(x) should not be applied for any shares received by listed parent and public shareholders of listed subsidiary by way of transaction not regarded as transfer under newly inserted provision in section 47 of the Act w.r.t transfer of shares in a scheme of arrangement under Delisting Regulations. **Tax treatment in hands of listed parent which issues its own shares to shareholders of listed subsidiary in exchange of acquisition of shares of listed subsidiary** ○ The cost of acquisition of shares of listed subsidiary through Delisting should be taken at fair value as computed by Category I Merchant Banker for the purposes of arriving at swap ratio. **MAT exemption to shareholders of listed subsidiaries** ○ Similar to transaction of swap of shares held in SPV with REIT/Invit units by promoters which is treated as MAT neutral, the transaction of exchange of shares of listed subsidiary with shares of listed parent should also be made MAT neutral (and consequential deferment of MAT to year of transfer of shares of listed parent) by making following amendments :-

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		▪ Exclude any fair valuation gain/loss on exchange recognised in P&L ▪ Include actual gain/loss on transfer of shares (otherwise than through a tax neutral transfer) of listed parent computed with reference to cost of acquisition of shares of listed subsidiary ➢ Not to treat the exchange as per Delisting regulation as 'retired, disposed, realised or otherwise transferred' to trigger Ind-AS MAT impact under second proviso to s.115JB(2A) or first proviso to s.115JB(2C)
	Measures to discourage cash transactions	
59.	**Levy of additional tax on cash holding & cash expenditure**	**Rationale/ Recommendations** ➢ With a view to discourage cash holdings, additional tax (akin to wealth tax) may be levied on holding cash over specified threshold limit as on the last day (i.e. 31st March) of financial year: o For taxpayers engaged in business or profession, ▪ who are liable to tax audit under the ITA - Rs. 10 lakhs; ▪ other taxpayers - Rs. 5 lakhs o For individuals and HUFs not in business or profession - Rs. 5 lakhs ➢ With a view to discourage cash expenses, there should be levy of some tax on expenses in cash beyond the specified limit as under: o For taxpayer engaged in business or profession: ▪ who are liable to tax audit under the ITA - if aggregate expenditure exceeds Rs. 25 lakhs ▪ other taxpayers – if aggregate expenditure exceeds Rs. 10 lakhs o For individuals and HUFs, in relation to personal expenses, if aggregate expenditure exceeds Rs. 10 lakhs

<table>
<tr><th>Sr. No.</th><th>Subject</th><th>Comments / Recommendations</th></tr>
<tr><td></td><td></td><td>➢ Tax incentive may also be provided to e-commerce companies introducing various modes of digital payments such as digital wallets, mobile wallets, etc. particularly creation of instruments which are user friendly and capable of being operated without internet connectivity</td></tr>
<tr><td></td><td colspan="2">International taxation</td></tr>
<tr><td>60.</td><td>Issues related to Significant Economic Presence (SEP)</td><td>Background
➢ In order to address Base Erosion and Profit Shifting arising from the rapidly digitalising economy, Finance Act 2018 expanded the concept of business connection to include a new nexus rule based on SEP to tax the digital economy, which hitherto enabled entities world over to carry out business in India without an actual physical presence, and thereby escape taxation in India.
➢ As per SEP provisions, a Business Connection will be constituted in India based on below parameters:
a) <u>Revenue-linked condition</u>: Any transaction in respect of any goods, services or property carried out by a Non-Resident with any person in India, including provision of download of data or software in India, if the aggregate of payments arising from such transaction or transactions during the tax year exceeds the amount as may be prescribed; or
b) <u>User-linked condition</u>: Systematic and continuous soliciting of its business activities or engaging in interaction with such number of users in India as may be prescribed
➢ Further, once an SEP is triggered, only so much of income as is attributable to the transactions or activities referred to in (a) or (b) above shall be taxable in India.
➢ Additionally, income attributable to transactions and activities referred to in condition (a) and (b) shall also cover income from:
• Such advertisement which targets a customer who resides in India or who accesses the advertisement through internet protocol (IP) address located in India;
• Sale of data collected from a person who resides in India or who uses IP address located in India; and</td></tr>
</table>

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		• Sale of goods or services using data collected from a person who resides in India or who uses IP address located in India ➢ In this regard, CBDT through Notification No. 41 dated 3 May 2021 prescribed revenue and user thresholds as below thereby putting SEP provisions into application. • For revenue-linked condition stated in (a) above, a revenue threshold of INR 2 crores (INR 20 million) shall be applicable; • For user-linked condition stated in (b) above, a user threshold of 3 lakhs (0.3 million) shall be applicable ➢ These thresholds are applicable from 1 April 2022 aligning with the effective date of the new nexus rule. **A. Modify the existing SEP provisions in light of global consensus solution reached under Pillar One discussions** **Rationale** ➢ As stated above, provisions of SEP were introduced in the Act in 2018 (then subsequently modified vide Finance Act 2020) in lieu of ongoing global discussions under G20-OECD BEPS project on taxation of digitalised economy under BEPS Action 1. ➢ Subsequent to BEPS Action 1, the OECD continued its strive for a global consensus solution under two pillar approach wherein Pillar One particularly focused on "Tax Challenges Arising from Digitalisation". On 1 July 2021, the long awaited global consensus was reached and currently, more than 134 countries[4] of BEPS inclusive framework (IF) have agreed on the key components of the Pillar One framework including, scope, nexus, allocation of profits under Amount A etc.

[4] Data as on 31 Aug 2021

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		➢ The provisions of SEP are fairly different from agreement solution under Pillar One. The key difference being while SEP determines taxable nexus of NR at entity level qua the transactions/ activities undertaken with person/ users in India, Pillar One proposes to establish nexus and attribution profits at Multinational enterprise (MNE) group level. ➢ Since SEP was introduced in light of BEPS discussions, it is our humble suggestion that provisions of SEP be tailored to fit them in line with global consensus solution. The Blueprint released by OECD in October 2020 also acknowledged that implementation of Pillar One proposals will require changes not only in treaty but also in domestic laws. The report states that BEPS IF members would need to create domestic taxing rights consistent with the design of Amount A, provide method for elimination of double taxation for residents, dispute prevention and resolution mechanisms, etc. **Recommendation:** In order to ensure consistency with Pillar One solution, we propose the following changes be made to SEP provisions: ➢ **Applicability of SEP to MNE groups with global turnover or gross receipts of above €750 million and having profitability of 10[5]%:** Similar to global consensus, a MNE level revenue threshold should be introduced in the Act. While the currently agreed revenue threshold of €20 billion (to be subsequently reduced to €10 billion after 7 years) may be fairly high, India may consider a threshold in line with CbCr provisions i.e. €750 million qua MNE group. It will ensure that the companies covered under CbCr are also covered under new SEP provisions under the Act. This will also ensure that domestic source rule taxation is wider than treaty threshold and entities of MNE group not having treaty protection will be covered under domestic taxation. ➢ **Exclusion for extractive industry and Regulated Financial services sectors:** Businesses engaged in extractive industry[6] and financial sector[7] such as banking, insurance, asset management etc. be excluded from scope of SEP in line with Pillar 1 scope exclusion

[5] Profit before tax/revenue

[6] Extractive businesses are those engaged in the exploration for, and extraction from the earth's crust of, non-renewable natural resources such as hydrocarbons and minerals, the processing and refining of those resources into usable commodities, and the sale of those commodities. As per the OECDs "Tax Challenges Arising From

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		➢ **Establish taxable nexus in India basis revenue generated by MNE group:** Under Pillar One IF solution, an MNE group establishes nexus with a market jurisdiction only where such MNE earns revenues of more than € 1 million from such market (€ 250,000 from countries with GDP less than € 40 billion) . On similar lines, SEP provisions need to be amended where MNE earns revenues from Indian market above certain threshold. Since domestic taxation rules need to be wider, the threshold of € 250,000 may be considered for SEP. Thus, the user-based nexus rule under existing SEP rule should be deleted. The attribution based on targeted advertisement audience from India or data collection from India or sale of goods/services based on data collected from India should also be deleted. ➢ **Introduce profit attribution rules in line with Pillar One solution:** Under Pillar One proposal, a portion of MNE level profits are allocated to market jurisdiction basis a formulary approach. As per the formula agreed, 20-30% of MNE non routine profits[8] will be allocated to market jurisdictions with nexus using a revenue-based allocation key. Such formula agreed under global consensus needs to be introduced under the Act as well ➢ ***Without prejudice to above, if the provisions of SEP are not amended in light of Pillar One discussions and/or pending implementation of Pillar One proposals, we humbly request to consider following representations on issues related to SEP*** **B. Exemption should be provided from procedural requirements (like obtaining PAN, filing return, etc.) where SEP is triggered but treaty protection is available**

Digitalisation – Report On Pillar One Blueprint" dtd 12 October 2020, taxes on profits from the extraction of a nation's natural resources can be considered to be part of the price paid by the exploiting company for those national assets, a price which is properly paid to the resource owner.

[7] The rationale for exclusion of the Financial Services sector from the Pillar 1 proposal stems from the highly-regulated nature of FS business. However, it should be emphasised that this central rationale is not premised on the mere fact of regulation but rather is based on the effects of that regulation. More specifically, the regulations governing the relevant business in each of these three sectors, generally require that appropriately capitalised entities are maintained in each market jurisdiction to carry on business in the market concerned. Due to this factor, the profits that arise in a particular market jurisdiction will generally be taxed in that market location with the result that there is no further need for re-allocation.

[8] Defined as profit in excess of 10% of sales/ revenue of MNE

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		Rationale: ➢ While the SEP provisions have become operational as source rule, it may have no applicability to taxpayers who are from treaty jurisdictions. Such fact is also noted by the Explanatory Memorandum to Finance Bill 2018 which observed that *“unless corresponding modifications to PE rules are made in the tax treaties, the cross border business profits will continue to be taxed as per the existing treaty rules”.* ➢ However, given the fact that taxpayers fall within the ambit of the source rule within the Act, the Tax Authorities may insist that such taxpayer should comply with various procedural requirements of the Act, such as obtaining PAN, filing return of income, etc. Any such measure merely increases compliance burden for NR entities, adversely impacts ‘ease of doing business’ with India and provides no revenue benefit to India – except, perhaps statistical information of revenues flowing from India which is already available from alternative sources like foreign remittance filings by banks. **Recommendations** ➢ To avoid unwarranted compliance burden for NR entities, it may be explicitly provided that the taxpayers from treaty jurisdiction who remain completely outside the scope of the extended nexus rule will not be required to undertake procedural compliances under domestic law (say, obtaining PAN, filing ROI, withholding obligations, etc.). **C. Guidance should be provided on determination of “users in India” w.r.t user linked condition** **Rationale** ➢ Under the User-linked condition above, SEP is determined basis number of users in India. However, ascertaining the number of users is complex and volatile having regard to differing features and level of participation by users in different types of apps/websites. **Recommendations** For determining the user threshold of 3 lakh users, it is recommended that sufficient guidance be provided for various industry segments to deal particularly with the following illustrative aspects:

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		➢ The guidance must comprehensively deal with scenarios such as repeated use by the single user, multiple accounts by single user, fake accounts or fake information provided by users etc. ➢ Transient users such as tourists must be excluded while determining "users in India". ➢ Only "active users" should be considered while determining user threshold, since it is mostly the data pertaining to user preferences/behaviour of such active users, which create a value for businesses ➢ Guidance about determination of location of the user in India should also be provided. For example, as per erstwhile EU directive on significant digital presence, location is determined by reference to the Internet Protocol (IP) address of the user's device or, if more accurately possible, by any other method of geolocation. ➢ To even out the fluctuations and to capture meaningful and regular presence, annual average of daily/monthly active users may alone be considered as the basis for determining fulfilment of the User-linked condition. ➢ For this purpose, it may also be clarified that the active users will be determined as per the applicable industry parlance and with particular reference to data which may be published by the business for regulatory and other purposes. **D. Clarify that certain websites/apps which are not interactive from the scope of SEP** **Rationale** ➢ As discussed above, user linked condition will create SEP of NR in India if it engages in interaction with prescribed number of users in India. Interaction is generally understood as two-way communication and hence, in some scenarios it is possible that a non-resident has a website (providing generic information about the non-resident) but such non-resident does not engage in interaction through the website. Thus, distinction may need to be drawn between passive websites and interactive websites or mediums. ➢ As illustrated in BEPS Action 1, interactive websites can include those which allow users to create a personalised account and utilise the local payment options offered on the site for concluding

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		transactions electronically on the website and in such cases there is a clear link between revenue of non-resident and users in source country. **Recommendations** ➢ Even assuming there are merits to keep the user-Linked condition, it may be clarified that websites which are merely accessed by Indian users for information like corporate websites, Wikipedia, product/service information, etc without creating any user account or conducting any financial transactions are not covered under SEP. Since such websites do not store any user information which can be monetised, there is sufficient rationale for keeping them out of scope of SEP. **E. Clarify that income which is otherwise chargeable under other provisions of the Act should be understood as being outside the scope of SEP** **Rationale:** ➢ It is possible that there is an overlap between SEP provisions and other provisions of the Act such as provisions of interest/ royalty/ FTS under S. 9(1)(v)/(vi)/(vii). It is well settled judicially that specific provision prevails over the general provision. ➢ Clear distinction needs to be drawn between taxpayers who carry on their business digitally and/or those who are players of the Digital Economy, as distinguished from those who may support the Digital Economy from at a distance. For example – • A service provider to a digital player may continue to earn fees for services as before • The hirer of the facility will continue to earn rent income and hence royalty income as before • Grant of IP license by content owner to the licensee for exploitation through digital means is royalty taxable at par with royalty taxable for grant of IP license for exploitation in physical world ➢ The new provision is apparently not meant to create any different tax treatment for such business enterprises who are otherwise covered by specific charging provisions of the Act.

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		➢ For instance, interest which is taxable at concessional tax rate @ 5% u/s. 194LC should not be covered by SEP **Recommendations** ➢ To avoid unintended litigation and in the interest of clarity and certainty, it should be provided that any revenue which is otherwise considered to be chargeable as per any other provision of law should be understood as being outside the scope of this newly introduced SEP provision. For example, if any part of the revenue comprises of royalty income or FTS income, or the like, which is covered by special provisions, the same should be kept out of the revenue base as also the attribution base under Explanation 2A. ➢ Thus, no part of the revenue which is hitherto considered chargeable to tax should be considered within the net of new taxation policy. The principle will hold good even if such income were to be considered non-taxable by reason of an exemption under the domestic law or by reason of a provision of treaty, etc. For example, fees for technical service should be kept out of the attribution base even if the technical service fee may not be actually subjected to tax since the treaty is operating on the principle of included services (or 'make available' clause). **F. Clarify the year in which NR triggers SEP where buyer makes advance payment but sale takes place in separate financial year** **Rationale:** ➢ SEP of NR is triggered where any transaction in respect of any goods, services or property is carried out by a NR with any person in India if the **aggregate of payments arising from such transaction or transactions during the previous year** exceeds INR 2 crore ➢ In business transactions**,** it is common phenomenon for buyers to make advance payment (say in year 1) and the sale or service transactions takes place subsequently (say in year 2). In such case, where advance payment made in year 1 exceeds INR 2 crore, doubts arise whether SEP triggers

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		• in year 1 when advance payment is received by NR, or • in year 2 when sale transaction takes place, or • both year 1 and 2 ➢ Out of the above options, it may be improper to trigger SEP qua the same transaction in two different years. **Recommendation** ➢ Explicitly clarify that where payment is made in advance and transaction takes place in subsequent financial year, SEP triggers only in one year either in year of payment or year of sale/service – more preferably, in the year of sale/service. **G. Relieve obligation of payers as withholding agents and/or representative assessee** **Rationale:** ➢ Predominantly large part of the revenue generated by business players are B2C transactions such that there are millions of users/ customers and each of the user/ customer contributes to a moderate amount of the revenue earned by the business enterprises. The user base is relatively wide, comprised of people of all ages and educational / economic background and from all corners of the geography. ➢ The present tax withholding provisions, if applied in a strict sense, all the users/ customers who contribute to revenue of business enterprises, which is chargeable to tax under the Act will be required to withhold taxes and comply with related procedures. It can include even payers who would have carried out a small transaction, of say Rs 100, to have monthly subscription of online content. ➢ It would be extremely onerous to expect such users/ customers of moderate means to comply with the tax withholding provisions and/or to expect them to be treated as representative assessees on behalf of non-residents. The sheer scale of customer base (considering the India population) and the model of business world may require that the recovery and collection model cannot be at par with

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		conventional recovery and collection model. The difficulty multiplies in case of user linked condition wherein payment is not a pre-condition. ➢ Further, the cost incurred by revenue officers targeting the withholding non-compliance and also catching hold of representative assessee is likely to be not commensurate with the benefit one may derive due to deployment of additional force, tracking every order, every customer etc. ➢ BEPS Action 1 also states that in the case of B2C transactions requiring withholding from the payer would be more challenging as private consumers have little experience nor incentive to declare and pay the tax due and moreover, enforcing the collection of small amounts of withholding from large numbers of private consumers would involve considerable costs and administrative challenges. The relevant extracts from BEPS Action 1 are: *"In the case of B2C transactions, however, requiring withholding from the payor would be more challenging as private consumers have little experience nor incentive to declare and pay the tax due. Moreover, enforcing the collection of small amounts of withholding from large numbers of private consumers would involve considerable costs and administrative challenges."* ➢ The report also acknowledged that one possible solution in such B2C cases would be to require intermediaries processing the payment to withhold taxes.[9] The difficulty in collecting levy in B2C transactions and hence, equipping payment gateways for tax collection is also recognised in EL Report[10]. However, any such administrative mechanism will require creation of suitable infrastructure but will be essential for simplified and consistent implementation of any such novel levy having wide scale impact. This also highlights that till such time a country is ready with suitable infrastructure, the implementation may need to be deferred to a later date. ➢ Litigation on TDS default has consequential liability as an assessee-in-default as also has interest and penal consequences. Disallowance of expenditure particularly when the quantum of profit attribution is uncertain can have significant tax impact for the payer.

[9] Para 297 of BEPS Action 1 report (2015)

[10] Para 162 of "Committee on Taxation of e-Commerce" which recommended introduction of EL

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➢ There is also an apprehension about possible coverage of multiple of small customers within the scope of S.163, if trigger of SEP is regarded as trigger of business connection and/or an opportunity of earning income directly or indirectly from such customers or users in India. While the exposure u/s. 163 cannot be beyond the amount which is earned through a particular customer, it only highlights uncertainty and possible risk of litigation.

Recommendations

➢ In the initial years of SEP, the provisions may be implemented and enforced only against the primary taxpayer and there should be general notification under S.197A(1F) that provisions of Chapter XVII B will not be made applicable to the payments which may get covered by provisions of Explanation 2A to S.9(1)(i). In any case, such notification must cover those payees which are covered by treaty jurisdictions and it is clear that provisions do not apply to them till there is a suitable treaty modification.

➢ Without prejudice to the above, a mechanism along the lines of provisions of S.195(3) may be introduced for the payees such that there is ring fencing of the TDS obligation and certainty of implementation from the perspective of the payers.

➢ In addition thereto, the following carve out may also be provided:

• In view of onerous obligation on small users in case of B2C, it is recommended that the primary as also the secondary tax liability of collection should be squarely on the recipient of the income and the payer should be relieved completely of its obligation as a withholding agent or representative assessee irrespective of whether the payee is from treaty jurisdiction or non-treaty jurisdiction.

• Further, in case of B2B transactions, a threshold of INR 10 million may be prescribed such that in those B2B cases, the payer may be required to withhold taxes only when estimated aggregate payments exceeds INR 10 million.

H. Separate cell for dispute resolution or redressal of SEP cases
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		Rationale ➢ Considering the complexity and various issues involved in this novel subject, it is essential that the disputes are resolved in an expedited manner or an advance ruling basis by a panel which is comprised of and involves presence of subject specialist. **Recommendations** ➢ A separate cell or bench or panel should be constituted to tackle disputes dealing with SEP similar to Approving Panel entrusted with review of GAAR proposals or designated panel for Advance Pricing Agreements (APAs). It can also be a separate dedicated panel from newly constituted Board for Advance Rulings (BAR). However, any such mechanism should be an alternative to existing mechanisms and optional for taxpayers. It should issue clarifications or pronounce rulings in a time bound manner. ➢ There should be a highly effective panel which is not only knowledgeable but is independent. The panel may comprise, amongst others, of a business and technology expert. **I. Introduce specific profit attribution rules for NR triggering SEP in India in lieu of powers taken by board under S. 295** **Rationale** ➢ The current profit allocation principles are strongly rooted in physical presence requirements. The principal focus of the existing tax framework is to align allocation of income with the location of tangible or physical economic activities undertaken by the enterprise, including the significant people functions and infrastructure deployed on production / supply side of business. The need to depart from traditional profit attribution rules is acknowledged not only in BEPS report but also in EL Report which evaluated alternatives from India perspective ➢ Raw customer data, in itself does not result in any value creation and there is, if at all, very small weightage which can be assigned to such raw data. Data can have value to an enterprise only if it is aggregated and structured in a way that the analytical tools deployed by the enterprise can determine

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		relationships among the individual data points. That value is created solely through the development and deployment of the enterprise's platform and data base analytics tools, which in most cases is located outside India. Also, the R&D efforts relevant to such tools involve huge cost and risk. Hence, careful study and sufficient weightage from different factors such as high entrepreneurial risk, large capital, long maturity period, infrastructure, artificial intelligence, software, research and development and innovative skill and significant people functions of business may be relevant to be undertaken before reaching to any approach ➢ Any profit attribution approach adopted for SEPs would have to acknowledge that huge losses – particularly in initial years - can be attributed to the SEP. In fact, many digitalized enterprises sustain losses for many years, as they seek to establish a stable market presence. There would need to be explicit guidance on the attribution of such losses, including the prescription of a rule which, in a transit year, recognises all accumulated losses to date for prior years ➢ Any global formulary approach will be contrary to ALP principles and revenue linked presumptions levy often has vice of being passed on to customers ➢ Risk of double count of income attributable under clause (a) and (b) of Explanation 2A needs to be eliminated **Recommendations:** ➢ The existing principles/ rules relating to profit attribution to business connection would need to be modified substantially before they can be applied in a meaningful manner to determine profits attributable to a SEP. The modification will require evolution of norms of assessing value contribution of certain features of highly digitalised business models. ➢ The rules for allocating profits to a SEP should be built on the current transfer pricing framework based on the arm’s length principle by treating the SEP as a separate and independent activity for the purpose of identifying assets used, functions performed and risks assumed, adapted suitably to include attributes of digital business.

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		➢ Raw data in itself may not be valuable hence, careful and proper weightage needs to be given to consumer data while attributing profits ➢ The transfer pricing framework would need to be adapted in a consistent manner to reflect the way value is created in digital activities. For instance, the functional analysis of a SEP, while one may consider the relevance of raw data and users, it also needs to take into account role played by factors like high entrepreneurial risk, large capital, long maturity period, infrastructure, research and development and innovative skill and significant people functions of business and has to suitably dovetail risk of such factors borne overseas. ➢ **Exclusion needed for loss making entities and/or the entities which do not earn income from third parties; 'one size fits all' approach is unlikely to work** • Business models in digital industry are peculiar. While the digital world is highly innovative, the rate of technological obsolesce is also very high and many players who are unable to keep up with such pace of innovation fade quickly in this fast paced digital market. Accordingly, the guidance on attribution needs to carefully consider such features and peculiarities of loss making enterprises, obsolescence risk, prospects of loss of loyalty etc. • Further, while data and user interaction may be relevant, it may be noted that these inputs do not contribute to income or profits until they are monetised. Also, revenue covered by (a) should not be again attributed to activities of clause (b). Further, the headcount of users will need to exclude such users who have contributed to earning of revenue. • A key element of the business model of many digital firms is that they first aim at rapid growth by creating a large user base, even if this does not initially generate much revenue or profits. This only highlights the need for a nuanced approach while dealing with this issue rather than trying to develop a "one-size-fits-all" model. More specific guidelines on the allocation of profits would need to be developed to provide clarity and certainty. ➢ Adoption of global formulary approach or presumptuous basis of taxation is contrary to ALP principles and also has vice of being passed on to the customers as transaction cost. Unlike indirect tax levy, such cost does not provide input credit to the customer and enhances the cost of business.

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61.	**Place of effective management (POEM) (S.6(3)**	**Rationale:** ➢ Finance Act 2015 had introduced the concept of Place of Effective Management (POEM) in the Income tax Act 1961. Later the Finance Act 2016 deferred the concept to financial year 2016-17 and onwards. ➢ The objective behind introduction of POEM is to identify the right place of generation of profits and enable the respective country to levy tax thereon. It may be noted that the concept of POEM has been introduced with the intention to stop the tax evaders who form shell companies in tax haven countries and thereby misusing the Double Tax agreement benefits. ➢ The CBDT has issued guidelines for determination of POEM which lay down several criteria. Further it has also been mentioned in the guidelines that inspite of meeting some or all of the conditions still substance would prevail over form. This has created a lot of uncertainty in the mind of Indian Multinational companies who are doing operative business outside India through its subsidiaries and that too in non-tax haven countries. ➢ When the subsidiaries of Multinational companies already are liable to pay tax in the respective countries then only question remains is about determination of correct share of profit for each country. This aspect gets take care of by transfer pricing provisions that exist in almost all countries including India. ➢ Further it may be noted that the Finance Act 2016 has also introduced reporting of transfer pricing on a global basis by way of introduction of section 286 relating to furnishing of report in respect of international group. Thus, there are adequate measures available to identify country-wise profitability. Even otherwise the transfer pricing regulations have ability to identify jurisdictional profits and levy tax thereon. ➢ In light of the above, the requirement of POEM compliance will be cumbersome and will affect the ease of doing business of Indian multinational groups **Recommendation** ➢ The companies which have active business and are operating in non-tax haven countries such as US, Australia, South Africa, China etc. be made exempt from the compliance of the POEM provisions.

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		➢ Without prejudice to above, penalty and prosecution provisions should be waived for at least initial 5 assessment years till the time law is settled.
62.	**Deduction for taxes paid on income to the provincial/local tax bodies like the State, Cities, Countries in overseas tax jurisdictions etc.**	**Rationale**: ➢ In order to mitigate the rigours of double taxation in respect of cross border transactions, India has entered into Double Tax Avoidance Agreements (DTAAs) with many overseas tax jurisdictions. The provisions of the DTAAs prescribe tax relief to resident of a contracting country either by way of exemption method or tax credit method. Generally, the DTAAs entered into by India are with the central governments of overseas countries. ➢ However, in case of countries like the USA, Canada, and Switzerland which have Federal structure of governance, the local governments at the provincial/state, cities, counties, which also levy taxes on income, are not party to the DTAA, and hence, taxes on income levied by such jurisdictions are not covered by the Scope of Taxes of such DTAAs. Such local taxes are merely not covered because the respective Federal Governments lack the necessary constitutional authority to contract on behalf of the local tax jurisdictions in view of the peculiar prevalent Federal structure of governance. ➢ Though the levy of such local taxes on income also amounts to double taxation of income, the relief is denied by the tax authorities in India on an erroneous ground that such local taxes are not covered by the applicable tax treaty. ➢ The anomaly becomes more apparent in cases where India has not signed a DTAA with any country. The provisions of section 91 which allows tax relief in such cases, do not distinguish between taxes on income levied by the Federal and/or provincial/local bodies and allows tax credit even for local taxes on income. **Recommendation**: The FTC should be allowed for taxes on income levied by overseas provincial/local tax jurisdictions by amending s.91 or alternatively the taxes paid should be allowed as deduction from the total income of the assessee.

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63.	**FTC for foreign disputed taxes to be allowed in year of payment pursuant to settlement of dispute (S.155)**	**Rationale**: ➢ Tax Authority will rectify the assessment orders or an intimation order and allow credit of foreign taxes in the year in which the taxpayer furnishes the evidence of settlement of dispute and discharge of foreign tax liability ➢ Amendment by the Finance Act 2017 does not provide for time limit within which the AO has to rectify the assessment order. The amendment only gives a reference to S.154. S. 154 provides a limit of 4 years for reassessment, excluding anything specifically provided under S. 155. Issues may arise on what is the period of limitation which may apply for S. 155(14A) and how it should be applied. ➢ The amendment has provided that the AO shall amend the earlier order which denied FTC, if the taxpayer within six months from the end of the month in which the dispute is settled, furnishes to the AO evidence of settlement of dispute and evidence of payment of tax. Time threshold of six months from date of dispute settlement gives a very small window for taxpayers to claim the benefit for previous years, hence, giving a limited scope to the benefit. ➢ It is not clear as to what could constitute sufficient evidence on the part of taxpayers to claim the FTC benefit on dispute settlement. **Recommendation**: ➢ Since all the sub-sections in S.155, provide for the time limit to be applied and some of the sub-sections provide for a different time limit, hence it may be expressly clarified that what is the period of limitation which may apply to cases covered by S. 155(14A). ➢ It may also be clarified that the period of limitation (e.g. if it is 4 years), should be 4 years from the end of the year in which the amended order is passed and it should not be date of the original order. This is for the reason that if the dispute in the foreign country takes more than 4 years to get resolved and if the limitation period is considered to be 4 years from the date of the original order, the taxpayer may not get credit for taxes which he has actually paid. Such may not be the intent of the amendment.

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		➢ A similar provision is contained in S.155(16) which provides that where the compensation for compulsory acquisition is reduced by any Court or Tribunal, then the period of limitation shall be reckoned to be 4 years from the end of the year in which the order of the Court or Tribunal is passed. ➢ The time limit should be amended to provide for 6 months from date of settlement of dispute or date of effect of the amended order passed u/s. 155(14A), whichever is later ➢ Clarification should be provided on what is the documentation which shall constitute as sufficient evidence for justifying that the dispute has been settled. This may be done by specifying an illustrative set of documents, which shall constitute as evidence for settlement of dispute. Illustratively the following may be considered as evidence for settlement of dispute o Final assessment order/ final demand notice of the tax authority of the foreign country o Judgment of the Court of Law along with the final demand notice of the tax authority based on the judgement o Proof of payment of taxes o Self-declaration
64.	**Foreign companies having incomes liable to presumptive scheme of taxation u/s. 44B/BB/BBA/BBB excluded from MAT (w.e.f. A.Y. 2001-02)**	**Rationale**: ➢ The retrospective amendment to S. 115JB by FA 2018 to clarify that MAT provisions do not apply to a foreign company, where its total income comprises of profits and gains from business referred to in S.44B/BB/BBA/BBB and such income has been offered to tax at the rates specified in those sections, is a welcome amendment which provides relief to foreign companies engaged in shipping, aircraft, oil & gas exploration and turnkey power project execution. ➢ But relief from MAT is limited to cases where such foreign company derives income which is 'solely" from the specified business in S.44B/BB/BBA/BBB. This is likely to be interpreted to mean that if such foreign company has any other income (– say, from sale of capital asset used for specified business or interest on income-tax refund or interest on temporary deposits with banks, etc), the exclusion will not apply and the foreign company will be fully exposed to MAT even on income from specified

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		business. This will render the MAT protection academic since most foreign companies engaged in specified businesses are likely to have one or other incidental incomes like interest income. The object of the provision will be defeated by such onerous & impractical condition. **Recommendation**: ➢ It may be provided that, income covered by presumptive provisions will be excluded from MAT by inserting a specific clause on the lines of exclusions provided in clause (f) and (fb) for capital gains or interest/royalty/FTS income earned by foreign companies. ➢ As next best alternative, it may be provided that earning of income which is ancillary/ incidental to the specified business of foreign company will not disqualify the Taxpayer from relief under MAT.
	Equalisation levy	
65.	**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 Act 2021 expanded 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.

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		➢ The 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.

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		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
66.	**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 introduced vide Finance Act 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.

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		➢ 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
67.	**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

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		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
68.	**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.

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		➢ 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.
69.	**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
70.	**Clarification on person liable to EL where multiple e-commerce operators are involved in the transaction chain**	**Rationale** ➢ Finance Act 2021 inserted an Explanation in S. 164(cb) to provide that where even a specific activity such as placement/ acceptance of purchase order, payment of consideration, any part of sale or supply etc. is carried out online, such activity constitutes an "online sale of goods" or "online provision of services" and thereby trigger EL charge. **Issue** ➢ The digital business models are highly integrated with multiple e-commerce operators sometimes being involved in the transaction chain. ➢ For instance, consider business models where there is one e-commerce operator (ACo) which merely lists the products and permits placement of purchase orders thereon with respect to

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		various other online sellers/ e-commerce operators (say BCo). In such case, on acceptance of the purchase order, the customer will be redirected to BCo's platform where the sale will be actually concluded. The customer can buy the product only on BCo's platform. Further, payment may be made using platform of payment gateway (say CCo) ➢ In such case, there is a concern whether all ACo, BCo and CCo will be liable to pay EL on gross transaction amount specially since this may create multiple levy on the same transaction. **Recommendation** ➢ Appropriate guidelines may be issued to clarify on which party the primary responsibility to discharge EL will lie. Further, it may be provided that if the consideration on which EL is so paid covers facilitation fees, if any, earned by other e-commerce operators from the same transaction, the other e-commerce operators be exempted from EL levy to avoid multiple levels of taxation on same stream of income in hands of different entities.
71.	**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 made to 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

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		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. ➢ In certain types of electronic commerce transactions, especially those falling within the expanded scope of “online sale of goods” and “online provision of service” discussed above, where the sale of goods or provision of service takes place directly between buyer and seller, the e-commerce operator does not have visibility over the transaction. In such cases, the e-commerce operator may not be aware of the pricing of the goods, conclusion of the contract, etc. ➢ Also, there are numerous e-commerce models or aggregators where e-commerce operators are not contractually obliged to collect or pay the transaction amounts or at times even remain involved in conclusion of transaction. In fact, the suppliers/ service providers are required to make commission payments to such platforms. ➢ Bringing such transactions within the scope of EL not only creates difficulty in discharging the tax obligation in absence of payments but also adds to administrative inconvenience and working capital hurdles. It casts an unnecessary obligation on platforms who are not involved in consummation of the transaction between buyer and the seller. ➢ Even GST law also imposes a Tax Collected at Source (‘TCS’) of 1% on e-commerce operators from the consideration received by it on behalf of a supplier of goods or services through its online platform. In other words, there is no GST TCS obligation where the sale consideration is not routed through the e-commerce operator.

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		➢ The difficulty is highlighted by recent interim order dated 25 August 2021 passed by Calcutta HC in the case of MJunction Services Ltd. and Anr. v/s Union of India and Ors.[11] in context of s.194-O which provides for TDS on e-commerce transactions of resident e-commerce participants. The HC has directed CBDT to decide upon representation filed by M-Junction on similar difficulty faced by e-commerce operator for deducting tax where payments are not routed through e-commerce operator. ➢ 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 amendment in s. 165A(3)(b) on the scope of consideration received or receivable" should be reversed. ➢ 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. ➢ 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

[11] Order Sheet; WPO/441/2021

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		➢ In such case, if necessary, the EL law may be amended to make the NR sellers/service providers liable to EL in such cases and a reporting mechanism may be built into the EL provisions wherein such e-commerce operator will be required to provide details of the buyer, supplier/ service provider, amount of consideration and other information (to the extent available with him) to ensure the transactions are adequately captured in the Indian tax net.
72.	**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
73.	**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.

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		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.
74.	**"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, CBDT Circular No. 23/2017 on GST and para 4.3.2 of Circular No. 13/2021. **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

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75.	**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
76.	**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

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		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
77.	**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

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78.	**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 consensus statements of unified approach under BEPS 2.O have already been released and there is a strive and commitment to achieve global consensus under two pillars. 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. ➢ Further, the Statement which has been discussed in the OECD/G20 Inclusive Framework on BEPS and agreed to by 134 member jurisdictions including India also states that the OECD solution will provide for the removal of all Digital Service Taxes and other relevant similar measures on all companies. **Recommendations:** ➢ In tandem with the above global spirit and the assurance given by India at the international level, 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.
79.	**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.

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		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"
80.	**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:

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		(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

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81.	**Guidance on determination of IP address, residential status**[12]	**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
82.	**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
83.	**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

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

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		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
84.	**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.

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		➢ 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).
85.	**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.
86.	**Measurement/ attribution issue**	➢ Basis the guidance provided under Report of the Committee on Taxation of E-Commerce, it appears that basis of 2% tax effectively is derived based on 5% margin attributable to India operations, which is taxable at 40%. For MNC groups already present in India through their local subsidiaries, this is an incremental tax on 5 % margin in addition to what the local subsidiaries are already paying on a transfer pricing basis.

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		➢ Further, where global audited financials of e-commerce operator report losses for immediately preceding fiscal year, such companies should be exempt from EL. As per draft "CBDT proposal for amendment of rules for profit attribution to permanent establishment" dated 18 April 2019, loss making companies were supposed to be 2% and even if that guidance were to be accepted, the rate of tax for loss making companies cannot be in excess of 0.8% and such EL paid should be allowed to be credited in future. ➢ With the scope of EL, and the low threshold of 2Cr, companies at various levels of growth maturity – right from start-ups to unicorns to large MNC would get covered. Equally, the products and services they deal with, will have very different margin scenarios. This problem is also recognised by BEPS Pillar 1. ➢ Therefore, to tax every company at such a high attribution % may not be fair. Accordingly, it is urged that provisions similar to s.197 of ITA can be introduced in EL chapter such that business models with lower or no profits can apply for a lower tax certificate and EOP can pay EL at such lower % on consideration.
	Transfer pricing	
87.	**Time Limit for Audit Proceedings**	**Rationale** ➢ Currently, the time limitation for concluding assessments under section 153 of the ITA does not provide for keeping the TP assessment/audit under abeyance for the years covered under the APA (including roll back) until the conclusion of APA. This is resulting in administrative inconvenience for the taxpayers by simultaneously going through the rigorous audit proceedings in spite of opting for an APA regime **Recommendation**: ➢ Since APA is a mechanism to negotiate the arm's length pricing of inter-company transactions, the participation of both the parties in such discussion would essentially take time. ➢ Therefore, non-consideration of the time being spent on APA negotiations under the "exclusions" of s. 153 of the ITA would effectively require the taxpayers to go through normal audit proceedings for the years covered under the APA (including rollback years).

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		➢ In case a taxpayer files APA, suitable provisions be incorporated in the law such that no TP audit proceedings are initiated for the years covered under the APA. However, in case the Applicant withdraws the APA subsequently, the provision should then enable authorities to initiate TP audit, if deemed appropriate, even if assessment proceeding time limit has lapsed.
88.	**Implementation of Country by Country report (CbCR) (S.286)**	**Rationale** & **Recommendations**: ➢ As per the provisions of s. 286 of the ITA, the ultimate parent entity, preparing consolidated financial statement, is responsible to file CbC report within 12 months from end of reporting accounting year. o In case the parent company, based in India, does not have any international transactions or SDTs, s. 92E is not applicable to it. Conversely, will it have to file CbC report by the due date? o There are certain areas in CbC reporting and Masterfile where further clarity would help the taxpayer to understand the provision in a better way thus publishing a CbC reporting and Masterfile FAQ may help to achieve the objective. ➢ Guidance could be issued on how to deal with permanent establishments for CbC reporting. o For the purposes of Table 1 of CbC reporting, the revenue, earnings before tax (EBT), tax figures and headcount of the permanent establishment should be included in the aggregated results of the jurisdiction in which it is situated. o The ease with which the results of PEs can be identified varies from group to group. Many taxpayers treat PEs as separate entities in their consolidating working papers/ERP systems and therefore their results would be easy to identify. The challenge here has been to ensure that representative offices are not treated as PEs. Other taxpayer’s ERP systems have not been set up to account for branches separately and there may be challenges for determining CbC Data for such cases. ➢ Dispensation from filing of the CbC by the ultimate holding company in India and instead CbC can be filed by each of the operating companies that consolidate other subsidiaries i.e. allowing an alternate reporting entity within India.

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		○ Many MNCs operate with multiple group companies operating in different businesses and industries. Ownership of these independently run businesses is through a holding company which is the ultimate parent entity. Some of the businesses may also be separately listed and may be preparing consolidated financial statements that includes its subsidiary companies. The ultimate parent entity may be consolidating all the different businesses and preparing its own consolidated financial statements for management information purposes and not for listing requirements. ○ As per a plain reading of the Income-tax Act, 1961, the CbC would have to be prepared by the ultimate parent entity. ○ The holding company, operating as an investor has limited visibility and control on the operations of the operating company and its subsidiaries that are managed independently. Therefore, the holding company is dependent on the operating company for both collation of data as well as understanding of businesses of various subsidiaries. ○ It may also be noted, that in case of risk based assessment and subsequent queries from tax authorities, the same would have to be addressed by the operating company, since the holding company as an investor, will not be in a position to respond on the operations of the operating company and its subsidiaries. ➢ An option could be provided to the group, wherein if both the holding company i.e. Company A and the operating company i.e. Company B, cross the 750 Million Euro Threshold, then either Company A or Company B could file the CbC. This would not lead to non-compliance due to non-reporting on the part of the Group. However, it will significantly ease the administrative burden on the company.
89.	**Secondary TP adjustment (s.92CE)**	**Rationale** ➢ S. 92CE provides that in case where a primary adjustment is made in respect of an assessment year commencing on or after 1 April 2016, the excess money (difference between ALP determined by way of primary adjustment and actual transaction price) is not repatriated and lying outside India, will be treated as an advance in the hands of the assessee in whose hands the primary adjustment is made. ➢ S. 92CE(2) provides that, where as a result of primary adjustment to the transfer price, there is an increase in the total income or reduction in the loss, as the case may be, of the assessee, the excess

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		money which is available with its associated enterprise, if not repatriated to India within the time as may be prescribed, shall be deemed to be an advance made by the assessee to such associated enterprise and the interest on such advance, shall be computed in such manner as may be prescribed. ➢ S. 92CE provides for secondary adjustment in case where excess money (difference between transaction price and arm's length price), which remains outside India, due to the primary adjustment under TP is not repatriated to India. ➢ Taxable funds may remain outside India only in case where a foreign party is involved. In other words there may be possible base erosion only in case where one of the parties to the transaction of a foreign AE. A transaction between two domestic entities, will not lead to profits allocable to India, remaining outside India. ➢ S. 92CE deems the difference between the transaction price and arm's length price as advance (which is to be recorded in the books) and provides for imputation of interest on such advances. However, there is no specific provision to reverse the advances appearing in the books even in case where the AE relationship ceases to exist or in case where the excess money is repatriated. ➢ S. 92CE provides that the excess money is to be recorded as advance in the books. In case where the primary adjustment is made in the hands of a subsidiary in respect of its transaction with its parent, and it leads to a secondary adjustment leading to recording of advances in the books of the subsidiary, there may be allegations that there has been grant of advance by a subsidiary to its parent and the same should be considered as deemed dividend u/s 2(22)(e). ➢ S. 92CE requires that the advances representing the excess money be recorded in the books of the parties. Such recording of advance and its inclusion for MAT will lead to taxation of income which is already subjected to tax as normal income. ➢ The condition relating to primary adjustment that the adjustment made by AO has been accepted by the assessee is highly debatable. It is not clear whether condition will not apply if assessee has appealed against the addition before DRP or CIT(A). It is not clear whether the addition shall be treated as accepted by the assessee if he does not litigate till Supreme Court and does not file further appeal against adverse appellate order at intervening stage like CIT(A) or Tribunal with a view to avoid

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		further litigation, though aggrieved by the addition. Hypothetically, if the matter is litigated till Supreme Court but is decided against the assessee, it cannot be said that the addition is accepted by the assessee. This is because even if assessee is aggrieved there is no further remedy available to the assessee. Any other view may result in retrospective secondary adjustments after litigation is settled at some stage. **Recommendation**: ➢ Since there is huge litigation in India on primary adjustments itself, provision for 'secondary adjustments' should be deferred till litigation on primary adjustments is substantially reduced through alternative dispute forums like APA, DRP, etc. It will only result in perpetuating TP litigation. ➢ Further, since in cases of suo motu adjustment by assessee or where primary adjustment is made by AO and accepted by the assessee or as per safe harbor rules, it would be difficult to make secondary adjustment in the books of NR AE on account of unilateral action taken in India, the same should be deleted from the provision. ➢ As a matter of abundant caution and to avoid any unwarranted litigation, it may be clarified that S. 92CE applies only to international transaction and not domestic transactions as covered under S. 92BA. ➢ It may be specifically provided that the advances appearing in the books of the parties be reversed in following cases (1) AE relationship ceases to exist (2) Excess money is repatriated (3) additional tax as mentioned in 92CE(2A) is paid by the assessee. ➢ Once an amount is treated as a deemed advance and interest is imputed thereon under S. 92CE, then it should not again be subjected to tax by treating it as deemed dividend at the stage of advance. Further there is no grant of actual loan, but it is only by way of a deeming fiction that the excess money is treated as advance. Therefore, it may be clarified that once S. 92CE is applied and interest is imputed, S. 2(22)(e) will not apply. ➢ It should be clarified that if assessee disputes the primary adjustment made by Assessing Officer before higher appellate authority, it shall not be regarded as having been accepted by the assessee regardless of the outcome of the litigation.

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		➢ Disallowance of a royalty/ service fee in hands of the Indian entity would require foreign AE to repatriate the cash back into India. However, in light of the second proviso to section 92C(4), foreign AE would continue to be taxed on the original royalty/ service fee even though it has remitted the income it received to the Indian entity. Given this, a clarification/ guidance should be issued in this regard so that tax treatment in the hands of foreign AE is done in a logical manner.
90.	**Applicability of Secondary adjustment provisions on clause (i), (ii) and (iv) of Section 92CE(1) of the Act**	**Rationale:** ➢ Cases referred in clause (i), (ii) and (iv) are those where transfer pricing adjustments arise due to unilateral action in India and difficult to make secondary adjustment in the books of non-resident associated enterprises. ➢ Further, the non-resident associated enterprise may be prohibited from making the secondary adjustment or remitting money on account of statutory or regulatory restrictions in their respective jurisdictions. **Recommendation:** ➢ We recommend clauses (i), (ii) and (iv) be deleted from section 92CE (1) of the Act
91.	**Interest deduction limitation rule (s.94B)**	**Rationale**: ➢ To stimulate growth, Finance Act, 2020, has extended the benefit of concessional rate of TDS under s.194LC and s.194LD by another three years till 1 July 2023. The stated objective of such amendment as per the EM is to boost the economy by attracting foreign capital in India. Indian treaties also provide concessional rates of withholding for interest (around 10-15%). ➢ For many MNCs entering India, the preferred route is to use lending from overseas (or guarantee-based borrowing within India). In such an environment, the introduction of the thin capitalization rules are likely to adversely impact many subsidiaries of MNCs that operate in India and have huge capital requirement e.g. in the infrastructure and real estate sector. The amendment to limit interest deduction is likely to increase their tax outgo in the initial years; while there may not be ability to set off the interest disallowed in entirety where a high gestation period is involved.

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		➢ Limiting the interest deduction is likely to hamper their after-tax earnings and as a consequence the decision of the foreign investor to invest in India. ➢ Limiting interest deduction may work harshly on certain sectors such as real estate, power or infrastructure which do normally have funding from NR as also incur interest cost exceeding 30% of EBIDTA. ➢ S.94B(1) covers interest and "similar consideration" paid to a non-resident (NR) being an associated enterprise (AE). However, the scope of "similar consideration" is not clear. ➢ Proviso to s.94B(1) states that if an explicit or implicit guarantee is provided by an AE to a lender, the debt issued by such lender will be deemed to be debt issued by the AE for the purposes of s.94B(1). ➢ S.94B(3) excludes taxpayer engaged in the business of banking and insurance. However, the exact scope of such exclusion is not clear ➢ S.94B(2) does not provide whether the disallowance will be of gross interest expenditure incurred in favor of NR AE or net interest expenditure (after considering interest income, if any) incurred in favor of NR AE. ➢ S.94B does not exclude debt issued by NR AE in a financial year prior to 1 April 2017 (A.Y. 2018-19); hence, interest expenditure in respect of such debt incurred post 1 April 2017 (A.Y. 2018-19) will also be covered by s.94B which tantamount to retroactive application of the provision. ➢ Where a non-resident associated enterprise guarantees loan extended by a resident bank or provides a corresponding and matching amount of funds to the lender, there is no base erosion involved and hence interest limitation rule should not apply. But the language of the provision does not make this position clear and results in unwarranted litigation. **Recommendation**: ➢ In the spirit of promoting inflow of foreign capital and India's growth agenda, the introduction of s.94B should be altogether scrapped. Alternatively, its implementation may be deferred by another 5 years ➢ Alternatively, Thin Capitalisation rules with ideal debt-equity ratio for various industries should be considered as is presently applicable in countries like Australia, Canada, USA, Japan, etc

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		➢ Still alternatively, the introduction of a Group Ratio Rule in conjunction with Fixed Ratio Rule may be considered as recommended in BEPS Action Plan 4. This would allow due consideration for taxpayers that have high interest cost due to their highly leveraged nature of business. This would also avoid double taxation that results from restricting the interest expenditure to an artificial ceiling of 30% of EBIDTA. ➢ In the interests of boosting growth, taxpayers engaged in infrastructure sector should be altogether excluded from the applicability of s.94B. Alternatively, such sectors may be excluded from the applicability of s.94B for the first 5 years ➢ The term “interest” is well defined under s.2(28A) of the Act. Adding a new dimension in s.94B(1) by extending the scope to “similar consideration” creates ambiguity. We recommend that the scope of s.94B(1) should be modified to omit reference to “similar consideration”. ➢ The reference to “implicit guarantee” should be omitted, since it not possible to prove or disprove implicit guarantee. ➢ The scope of exclusion applicable to business of banking and insurance may be clearly defined. The scope of exclusion should also be extended to non-banking financial company (NBFC) ➢ The disallowance according to s.94B(2) should be to the extent of net interest expenditure incurred in favor of NR AE, after reducing interest income received from NR AE, if any ➢ S.94B should be applied only to interest expenditure in respect of debt issued on or after 1 April 2017 to avoid retroactive application of the provision ➢ To avoid any dispute and on the lines of the relaxation given to Indian branches of foreign banks, it should be clarified that debt issued by resident bank to an Indian resident company/permanent establishment based on guarantee provided by non-resident AE is also not covered within the scope of s.94B and shall be fully allowed as deduction.

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92.	**Allowability of Deduction u/s 10A/10AA of the Act on transfer pricing adjustment arising out of APA/MAP**	**Rationale:** ➢ As per first proviso to section 92C(4) of the Act, no deduction under section 10A/10AA shall be available on transfer pricing adjustment made by the Assessing officer. However, the department has extended this provision to apply even in cases of transfer pricing adjustments arising out of APA/MAP. ➢ This results in undue hardship to taxpayers who have opted for alternative dispute resolution mechanism to get certainty on their related party transactions and also infact, ensure excess money being brought back to India, to align with the transfer pricing outcomes. **Recommendation:** We recommend that it is explicitly clarified in section 92C(4) that first proviso shall not be applicable to cases where transfer pricing outcomes are derived on account of APA/MAP.
	Dispute Reduction Measures	
93.	**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

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		➢ 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 amendment 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.

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94.	**Making alternate claim, fresh claim during assessment.** **(Section 143(3) / 148)**	**Rationale** ➢ Many times out of abundant caution and also to avoid certain penalty provisions, assessee restrains from taking certain aggressive position in its Return of Income irrespective of the fact that there are many supporting/favourable judgements available to him at that point of time. ➢ Further, the time limit for filing revised return has also been reduced from one year from end of assessment year to 9 months from end of relevant financial year. Hence, there are greater chances of assessees missing out on putting forth additional claims in the return of income. ➢ In these cases, the assessee prefers to make such claims before the assessing officer during the course of assessment proceedings. In most cases, AOs disallow such claim by stating that those were not made in the return of income (relying upon the SC decision in the case of Goetze). This jeopardies assessee's position. **Recommendation** ➢ It is recommended that necessary amendments be made to the existing provisions to enable a taxpayer to make fresh claims at the assessment stage also.
95.	**Opportunity to taxpayers to settle contentious issues without levy of penalty**	**Rationale** ➢ It is seen in practice that taxpayers keep the issue alive in litigation only on account of fear of levy of penalty. Many of the issues may be owned by the taxpayers by paying up tax and interest if there is no threat of penalty. ➢ S.270AA provides immunity from penalty and prosecution only if taxpayer owns up all the additions made by the Assessing Officer. There is no mechanism to settle small or repetitive issues while keeping larger issues pending. ➢ Currently there is no facility for the Assessee to disclose his stand on any tax issue through return of income by way of notes, working or even supporting. Those are called only if the case is selected for scrutiny. Therefore, in most such cases assessee give their notes, working and stands on tax issues during the course of assessment. However, the AOs normally initiate penalty proceedings for each ground ignoring asseessee's suo moto submissions.

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		Recommendation: ➢ S.270AA should be amended to permit taxpayers to settle small issues (like additions not exceeding 20% of total income or losses and/or threshold quantum of addition of Rs. 1 Cr) by paying up requisite taxes and interest without levying any penalty or initiating prosecution while allowing taxpayer to litigate other larger issues. This will significantly reduce litigation to major issues involving large quantum of tax. ➢ It is recommended that no penalty provisions should be invoked in cases where Assessee has made full disclosure of facts by way of notes, working, supporting about his stand on tax issues at the time of filing return of income.
96.	**DRP directions and departments Appeal thereon (S.253)**	**Rationale:** ➢ Section 253 which deals with appeals to the Appellate Tribunal, has been amended with effect from 1-4-2016. The amendment has deleted sub-clauses (2A) and (3A) which permitted the Principal Commissioner or Commissioner to direct the Assessing Officer to file an appeal against the directions of the DRP. ➢ The Explanatory Memorandum to the Finance Bill 2016 clarifies that the amendment is pursuant to Government's decision to minimize the litigation. The same reads as under :- *"In line with the decision of the Government to minimise litigation, it is proposed to omit the said sub-sections (2A) and (3A) of section 253 to do away with the filing of appeal by the Assessing Officer against the order of the DRP. Consequent amendments are proposed to be made to sub-section (3A) and (4) of the said provision also."* ➢ The effect of the above amendments has been that the Hon. DRP has expressed its opinion, during the course of hearings, that though they may have decided the issue in favor of the assessee in earlier years, for the years post amendment, they will take a decision against the assessee, if the Assessing Officer has appealed against the direction in the earlier year. The rationale explained by the Members of the Panel is that the issue raised by the Department should be kept alive. ➢ Thus the litigation that the Department has perpetrated in the earlier year, will now need to be

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		carried forward by the assessee with added burden of tax demand, thereby rendering legislative intent of DRP as an alternate dispute forum, futile and ineffective. ➢ The DRP panels have indicated that they are willing to accept an application filed u/s 158A(i.e. to avoid repetitive appeals) wherein if there is any favorable order of ITAT in earlier years (in favor of assessee) and Department is in appeal before HC and the question of law is being admitted, in such scenario, the assessee can file application u/s 158A before DRP and DRP will follow favorable order of ITAT with a condition that whenever HC order is available, the assessment order can be modified accordingly. **Recommendation**: ➢ Subsections (2A) and (3A) to s. 144C may be reinstated as they stood prior to the amendment by Finance Act 2016 to grant power to Department to file appeals. ➢ Alternatively, the DRP be empowered with a specific provision to stay the demand raised in respect of such directions, which have been affirmed by the DRP only for the purpose of keeping the issue alive. ➢ Without prejudice, the scope of s.158A may be extended even to issues which are pending before Tribunal at the behest of the Department.
97.	**Grant of Stay by Tribunal – Mandatory pre-deposit of 20% of tax demand and vacation of stay beyond 365 days even if the delay in disposing of the appeal is not attributable to the applicant assessee**	**Rationale** ➢ With effect from April 1, 2020, ITAT can grant any stay or extend any stay already granted subject to depositing of 20% of the tax, interest, penalty, fee etc or by providing security of an equivalent amount. ➢ Separately, the Third Proviso to s. 254(2A), as amended w.e.f. 1.10.2008, provides that if the appeal filed by the assessee is not disposed off within the period of stay granted by the Tribunal (which cannot exceed 365 days), the order of stay shall stand vacated. ➢ The mandatory requirement to deposit 20% of the outstanding disputed interest and penalty amount in addition to the tax amount without any cap on upper limit is unjustifiable and inconsistent with other applicable laws. The Central GST Act, 2017 provides that the assessee is required to deposit 10% of the disputed tax demand (excluding penalty and interest) at first

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		appellate level and 20% of the disputed tax demand (excluding penalty and interest) at second appellate level, with the overall cap at Rs 50 crores ➢ Also, once the time period of 365 days for a stay granted matter has elapsed and the matter is pending disposal due to reasons which are not under assessee's control, the assessee will have to pay the balance demand immediately thereafter. There will accordingly be a huge cash outflow for the assessee. This provision has recently been held to be unconstitutional by the Hon'ble Supreme Court in the case of Pepsi Foods Limited [2021] 126 taxmann.com 69 (SC) to the extent the stay gets automatically vacated even if delay is not attributable to taxpayer **Recommendation** ➢ It should be left to the ITAT to decide about the percentage of demand to be paid by the assessee depending on the case facts and issue involved. Such powers are given to the AO by the CBDT and there is no reason why ITAT should be denied off such powers. ➢ Alternatively, the provisions for stay of demand should be uniform across all tax laws. Hence, the provisions of stay of demand under income tax should be brought in line with prevailing provisions in GST Law. ➢ This would serve the dual purpose of providing assured contribution to the revenue targets of the department and would simultaneously provide immunity / surety to the tax payers from any further demand being recovered from them. This would lead to situation in which Appellate Authorities/Courts time would be only utilized in deciding issues on merit, leading to faster disposal of issues and reducing overall pendency in Courts. ➢ The percentage of pay-out should be restricted to disputed tax demand and should not be extended to disputed interest and penalty amount to make it consistent with other applicable laws. ➢ No payment should be insisted on issues which are already covered in taxpayer's favour in earlier years ➢ Also, where the delay is not attributable to the taxpayer, to codify the SC ruling in Pepsi Foods case (supra) a relaxation should be provided for extending the stay beyond 365 days if the delay in disposing of the appeals is not attributable to the applicant assessee.

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98.	**Direct tax amnesty scheme**	**Rationale:** ➢ There are still various direct tax litigations pending, even after VSV ➢ The predominant reason for the same being that VSV was in a way not very lucrative (as the application could be made only per-appeal) ➢ Further, the demand to be settled was also 100% for assessees' appeal **Recommendation:** ➢ A similar scheme can be brought in with a view to bring down the pending direct tax litigations, however, with certain tax relief and a scheme that allows application issue-wise
	Procedural matters	
99.	**Rationalisation of Re-opening of assessment:**	**Rationale and issue:** ➢ The new regime for reassessment introduced by Finance Act 2021 has done away with the time tested safeguard of 'reason to believe' and substituted it with 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

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		of 'reason to believe'. The third proviso to amended s.149(1) contemplates that the new 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 new 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 new 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 new 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

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		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. ➢ As per the erstwhile re-assessment scheme, the AO was 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 new 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. ➢ Separately, it may be noted that, under the erstwhile reassessment regime, the third proviso to S.147 reproduced below clearly restricted the powers of the Tax Authority to reassess matters which were subject matter of appeal, reference or revision: *"Provided further that the Assessing Officer may assess or reassess such income, other than the income involving matters which are the subject-matter of any appeal, reference or revision, which is chargeable to tax and has escaped assessment."* ➢ However, a comparative provision is conspicuous by its absence in the new reassessment regime. This may result in overzealous Tax Authorities trying to reopen assessments even in respect of matters which have attained finality causing needless litigation. Further, this may also vitiate the principle of tax certainty. ➢ Under the new 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

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		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. ➢ In line with the professed stand of the government to reduce tax uncertainty, a clarificatory provision may be reintroduced prohibiting the tax authority from undertaking reassessments w.r.t issues which are subject matter of appeal, reference or revision ➢ 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. ➢ 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

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100.	**Recommendations in respect of Faceless Assessment**	The honorable prime minister had launched '**Transparent Taxation – Honouring the Honest**' platform and unveiled Faceless assessments on 13th August 2020. During the launch, the Government said that technology, data analytics and artificial intelligence will be the key drivers of the platform which will ease compliance burden, provide more certainty, bring in fair/ just system while removing physical interface between tax department and taxpayer. Though the scheme of faceless assessment was introduced with the aim to ease the compliance of the assessee and provide the certainty to taxpayers, however the manner in which the same has been implemented by tax department, it has caused genuine hardship to the taxpayers and increased the difficulty of compliance. Therefore, based on the various scrutiny notices received from National e-Assessment Center we would like to highlight the following grievance and recommendations by the taxpayers: **A. Faceless Assessment is not suitable to Large Corporates** **Rationale:** ➢ In the past, during the assessment proceedings large corporates were submitting details called for by the assessing officer in multiple box files. During the faceless assessment proceedings, the assessing officer is calling for the information such as ledger accounts, copies of the invoices etc., which is practically difficult to upload considering the size constraints and huge volume of the data for large corporates. ➢ Additionally, there are complex issues involved in the assessments of large corporates wherein it is practically challenging to explain the same in writing and a discussion between the assessee and tax officer is desirable to explain the issue properly. These issues can be dealt in a better way during the course of personal hearing/ interaction with the Assessing Officer, rather than mere technical submission.

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		➢ It has been experienced that the questionnaires being served are quite lengthy and comprehensive, requiring submission of voluminous information which is not feasible for large corporates; specially if the books of accounts are audited. ➢ This leads to substantial time and effort in collation of information, converting the same in specific file formats and then uploading with a constraint in upload size. This leads to filing of multiple partial responses which is backed by system / portal challenges [At times, it takes long hours (even upto 6 to 8 hours) for merely uploading a response to single notice/ questionnaire as the portal also ends up in run-time sessions]. ➢ It has also been observed that the ask in the notice is not quite clear, and clarification is then sought in writing, which delays the process. The responses can be filed only after clarity is furnished. ➢ Further, even the responses filed are not being considered before issuance of subsequent show-cause notice, leading to reiteration of submissions involving additional time and efforts. ➢ It is also observed that the disallowances continue basis preceding years, despite the tax assessee placing adequate facts/ documents and explanations, as well as placing a reliance upon favourable jurisdictional ITAT/ HC judicial pronouncements. ➢ There are various other challenges w.r.t issuance of draft / final assessment orders also. The orders are being served without an adequate opportunity of being heard; thereby leading to further Writs being filed. ➢ Sometimes the final assessment orders are passed without properly complying with the binding directions of DRP ➢ Further, the scheme also stipulates to cover Transfer Pricing Assessments for domestic companies. Transfer Pricing benchmarking is usually industry driven, business segment driven and may require discussion / explanation to be put forth before the Transfer Pricing Officer

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		➢ Any non-compliance of the notices from the Large Tax Assessees owing to genuine business difficulties may not be considered in right spirit and may pose discomfort for both the tax office and the assesee **Recommendations:** ➢ In view of the above-mentioned practical difficulties, it is recommended that the large corporates above certain turnover limits (say Rs 1,000 crores) should be shifted from 'Faceless assessment' to 'E-assessment'. ➢ LTU should be reconstituted in case of large tax- payers. ➢ To reduce administrative burden on assesses, Department should seek targeted explanation on identified issues rather than merely asking for voluminous transaction level information such as listing of Sundry Debtors, Sundry Creditors, Sales, Purchases, etc. especially in cases of Large Tax Assessees which have robust internal controls and undertake statutory/ tax audits. ➢ Further, such entities have compliance requirements under various laws. Therefore, falsification of transactions / documents is not possible in such companies. Also, the information cannot be mis-handled in an ERP environment which meet the highest data integrity standards and hence, the information is not mishandled. Thus, furnishing of large volume of information merely for record will not serve any purpose. ➢ Rather, department should build-in capabilities of analysing transactions using industry ratio, company ratio, etc. and only if required seek for explanation rather than merely asking for voluminous transaction level information. ➢ Department should also analyse books of accounts of such assessees following procedure of system audits / assessments and walk-through of the processes in place. ➢ IT challenges should be addressed to ease out information submission.

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		➢ Procedure of natural justice should be followed. ➢ The opportunity for personal hearings through video conferencing should be liberally provided as and when taxpayer seeks such opportunity. ➢ Common technical positions being adopted by the department uniformly across the country under faceless assessments should be shared with the assesses. ➢ All Supreme Court judgements should be followed uniformly under faceless assessments by the department ➢ There should be no addition made despite presence of ruling in favour of taxpayer merely to keep the issue alive in litigation. The Tax Department should track and monitor such cases separately with digital technology at its access and take remedial action within the provisions of the law as and when the favourable ruling is overturned by higher court. **B. Time to comply with notice issued by National e-Assessment Centre** **Rationale:** ➢ It has been observed that faceless scrutiny notices provide very short time to submit the response. ➢ Further, in some cases it has been observed that notice has been issued on Friday after office hours and taxpayer has been asked to furnish the reply on Monday. ➢ Additionally, it is observed that without giving the adequate time to the assessee, the notices also mention that no adjournment will be given and penalty will be imposed in case of non-compliance. This is clearly unfair and unjust treatment with taxpayer and against the objective of Faceless Assessment scheme and the ‘tax-payer charter’.

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		➢ Even the CBDT notification dated 13th August 2020, in procedure for assessment provided that the assessee may, within fifteen days from the date of receipt of notice file his response to the National e-assessment Centre. ➢ From the above it can be seen that faceless assessment scheme has nowhere provided certainty to taxpayers but has resulted in more uncertainty along with the ongoing covid-19 related challenges **Recommendation:** ➢ Reasonable time of minimum 15 days should be given to the assessee to submit their response. ➢ Assessee should be allowed reasonable adjournment opportunity. ➢ **Option of Video Conferencing:** ➢ The faceless assessment scheme provides for the option of hearing through video conferencing. However, there is no option on income tax e-filing portal to opt for the same. ➢ Thus, the mechanism of opting for hearing through video conferencing must be provided on income tax e-filing portal. **C. Rectification mechanism post final order** **Rationale:** ➢ Currently after passing the final order through faceless assessment, in case of any rectification is required for prima facie errors there is no mechanism/ guidelines available with the jurisdictional Assessing Officer basis which he can act upon. It is observed that the jurisdictional officers showing inability to dispose the applications filed under section 154 in the absence of clear guidelines/ SOPs.

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		Recommendations: ➢ CBDT should issue proper guidelines / SOP how the rectification process to be followed by the jurisdictional Assessing Officer once the final order is passed through faceless assessment.
101.	**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, FA 2021 has inserted 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 and is currently a subject matter of many writs filed before various High Courts since they were not conducted by adhering to the principles of natural justice. ➢ 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.

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		➢ 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 implementation 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
102.	**Clarifications on constitution of Board for Advance Ruling (BAR) to replace Authority of Advance Ruling (AAR)**	**Rationale** ➢ Before amendment by Finance Act 2021, AAR was 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 was binding on the applicant as well as Tax Authority. However, a constitutional remedy of filing a writ petition before the HC was available to the parties. ➢ Withdrawal of application was allowed within 30 days from the date of the application. However, in practice AAR was allowing withdrawal of application even after 30 days i.e. at the advanced stages of hearing.

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		➢ 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. ➢ The Finance Act 2021 has replaced 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 provides 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 is also provided 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.

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		➢ 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

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		• 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.
103.	**Sec 201(3)** **Time limit for TDS assessments of payments made to residents** **Introduction of similar time limit for TDS assessments of payments made to non-residents and limitation of time limit for payment to residents be made to 4 years instead of 7 years**	**Rationale**: ➢ Under section 201 of the Act, presently, there is a time limit of 7 years U/S 201(3) for initiating & completion of TDS proceedings in respect of payments made to residents. However, no time limit has been specified for payments made to non- residents. Thus, the TDS returns can be scrutinized by the assessing officers for past years without any limit, which has resulted into enormous difficulty for the assessee as it becomes practically difficult to store & retrieve data such as invoices, agreements tax certificates etc beyond four years of filing of TDS returns.

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		Recommendation: ➢ At the outset, it is recommended that similar to reduction of time limit for assessment under section 147 the time limit for completion of TDS assessments u/s 201(3) be also restricted to 3 years from the year of filing such statement / return. ➢ Notwithstanding, it is recommended that the time limit prescribed under section 201 subsection (3) also be made applicable to completion of TDS statements / returns being filed even for non-resident payees.
104.	**Section 139(5) & Section 239 – TDS credits / additional TDS credit claim**	**Rationale:** ➢ As per Section 139(5), a return cannot be revised after 9 months from the end of relevant financial year ➢ This has led to reduction in time-limit during which an assessee can follow up for tax credits (specially in case of foreign tax credits) and revise the return ➢ Further, once the claim is not made in the return of income; the lower tax authorities deny the benefit / claim leading to unnecessary litigation ➢ Further in cases where the years are not picked up for complete scrutiny assessments, an assessee doesn't even have an opportunity to get the additional claim adjudicated in its favour; thereby leading to unnecessary financial loss **Recommendation:** ➢ Time-limit for revision of return should be extended ➢ Alternatively, clarificatory provision should be inserted so that additional tax credit claim can be adjudicated in favour of assessee even during the assessments even if not specifically claimed in the return of income
105.	**Onerous compliance w.r.t. issuance of TDS / TCS certificates**	**Rationale:** ➢ Provisions of section 203 of the Income Tax Act, 1961 read with rule 31 require every deductor to issue certificate of **tax deducted at source (in Form 16A)** within 15 days from the due date for furnishing the statement of tax deducted at source

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		➢ Failure to comply with the provisions of the Act will attract penalty under the provisions of section 272A of the Act, a sum of Rs. 100 for every day during which the failure continues ➢ Currently, TDS certificates in Form 16A to be issued are to be downloaded from Income Tax website. The same is on the basis of the TDS return filed by the deductor which gets reflected in form 26AS of the payee. ➢ With increasing reliance on Form 26AS by the deductees for claim of TDS /TCS credit and information being auto updated in the returns of income, such certificates are not much of relevance. ➢ The requirement of issuing TDS certificates has become obsolete and if continued, leads to substantial administrative inconvenience without adding any corresponding value to the compliance requirement of service vendors or service providers. ➢ Issuance of such certificates is only a cumbersome process ➢ Further, in light of compliance requirement for Section 194Q and 206C(1H) issuance of certificates has become a humongous task ➢ The need for issue of TDS certificates in the present circumstance exists only in following three cases viz. (a) Salary TDS certificates in Form 16 – This is an important document for salaried employees (including pensioners) which is used for many commercial transactions like borrowing loan, buying insurance policies, etc (b) Non-residents – Issue of TDS certificate is essential to enable them to claim FTC in their home country (c) S.206AA/s.206CC cases where PAN is not available since the TDS/TCS cannot be populated in Form 26AS in such cases. **Recommendation** ➢ The requirement to issue TDS / TCS certificate can be done away for bring in ease of compliance. Section 203 of the Income Tax Act, 1961 (Certificate for tax deducted) should be modified accordingly to define an end date to the said provision. However, exceptions should be made for (A) Salary TDS certificates in Form 16, (B) TDS certificates to non-residents and (C) TDS certificates in s.206AA cases where PAN is not available.

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106.	**Relaxation of regulations applicable to Representative Assessees u/s.163**	**Rationale / Recommendation:** ➢ The existing provisions of s.161 do not provide relief to the representative assessee with respect to existing or future tax demands raised on non-resident's income even where the non-resident himself pays taxes in India. ➢ In line with the amendment in s.201 and s.40(a)(i) where the payer is not treated as assessee-in-default once payer's TDS default is made good by the non-resident payee, a relief may be introduced to relieve the payer from being assessed as 'representative assessee' of the non-resident payee where the latter has filed return in India and paid taxes payable, if any, as per returned income.
107.	**Exposure of penalty levy u/s 270A even when entire tax amount is deposited by way of advance payment of taxes (no credit for taxes withheld, advance taxes paid, self-assessment tax, etc.)**	With an intent to bring in objectivity, certainty and clarity in penalty provisions, Finance Act 2016, w.e.f. AY 2017-18, introduced s. 270A to provide for levy of penalty in lieu of s. 271(1)(c) of the ITA. The scheme of new penalty provision seems to be comprehensive and provides for detailed mechanism for the manner of computation of under-reported income, exclusions therefrom, cases of misreporting of income, the rate of penalty levy, computation of tax payable for determining quantum of penalty, etc. It also provides window to the taxpayer for applying for immunity after fulfilling conditions specified in s. 270AA of the ITA **Rationale:** ➢ As per Explanation 3 of erstwhile penalty provisions under s. 271(1)(c), in case where return of income is not furnished, penalty will be calculated with reference to tax on income assessed reduced by credit of the taxes deducted or advance tax paid by taxpayer to arrive at the net figure of 'amount of tax sought to be evaded'. ➢ As against that, no similar provision exists under the penalty regime under s. 270A. This may create avoidable hardship in case of taxpayer who are not required to furnish return of income under s. 115A(5) of the ITA since their entire income earned and chargeable to tax in India has been subject to withholding, and in the course of assessment the income determined is the amount of income which has already suffered taxes by way of withholding in India. In such cases, the whole of the income, as assessed, may be considered as under-reported income.

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		➢ Further, the language of the provisions of s .270A was amended by Finance (No.2) Act 2019 to equate the case of filing of tax return for the first time in response to notice issued under s. 148 with a case of non-filing of tax return. Consequently, computation of under-reported income and tax payable thereon would be determined on the similar as is applicable to case of non-filing of tax return. ➢ Under the erstwhile provisions of s. 271(1)(c), in terms of Explanation 3 r.w. clause (c) of Explanation 4, amount of tax sought to be evaded was calculated after taking into consideration credit for pre-paid taxes already paid by the taxpayer ➢ In absence of provision for grant of credit for pre-paid taxes in s. 270A(10) it may result in genuine hardship to the taxpayer in cases where whole of the tax has been deposited either by way of TDS or by way of payment of advance tax. Despite the fact that there is no revenue loss to the Government, the taxpayer will expose itself to penal consequences of s. 270A. **Recommendation:** ➢ Hence it is recommended for insertion of separate provision similar to Explanation 3 to s. 271(1) to avoid genuine hardship to the taxpayer in cases where there is no loss to the revenue. ➢ S. 270A(10) be suitably amended to provide for credit for pre-paid taxes (TDS, advance tax and self-assessment tax) along the lines of erstwhile Explanation 3 to s. 271(1)(c), in computing amount of tax payable on under-reported income
108.	**Misreporting covered cases of deliberate misconduct: s. 270A(9)**	**Rationale:** ➢ Levy of penalty in respect of misreporting of income is 200% of tax payable as against penalty of 50% in case of under-reported income. ➢ Cases of misreporting of income covers instances of ‘suppression’, ‘misrepresentation’, ‘false’ and ‘failure’. Terms ‘suppression’ and ‘false’ indicate a deliberate/ wilful act of misconduct. However, dictionary meanings of the term ‘misrepresentation’ and ‘failure’ suggest that it has both shades of meaning namely a deliberate mistake as well as an innocent mistake. If the comprehensive dictionary meanings of the term ‘misrepresentation’ and ‘failure’ are imported for the purpose of s. 270A(9), even mistakes which are not deliberate or are innocent and where there is a bonafide reason for such

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		mistake would also be covered by the harsh consequences of 200% penalty levy under s. 270A(9) which may not be in sync with the legislative intent of providing a carve out for specific cases of penalty levy. **Recommendation:** ➢ In order to avoid above mentioned unintended consequences of covering even bonafide / innocent mistakes within the ambit of s. 270A(9), it is recommended that a suitable clarification by way of an Explanation or proviso be provided under s. 270A(9) suggesting that the cases intended to be covered by s. 270A(9) is of deliberate / wilful misconduct on the part of taxpayer.
109.	**Denial of benefit of immunity even if one of the items of under-reported income is arising as a consequence of misreporting of income (s. 270AA)**	**Rationale:** ➢ As per the provision of s. 270AA(1), the taxpayer will not be allowed to apply for immunity from penalty if penalty is initiated for the circumstances referred in s. 270A(9). In a case where there are 5 additions made by the Assessing Officer for which penalty is initiated, only 1 addition was classified as 'misreporting of income'. Thus taxpayer will be denied of the benefit of immunity in relation to other 4 additions even though conditions specified in s. 270AA of the ITA are complied with. **Recommendation:** ➢ Since the provisions for immunity are introduced to avoid litigation, it is advised to make immunity provision qua addition / disallowance and not qua assessment order. Hence the taxpayer should be allowed to apply for immunity for all such additions / disallowance for which initiation of penalty is not as 'misreporting of income'.
110.	**Interest on income tax refund u/s. 244A**	**Rationale** ➢ Interest is paid on the refund due to the assessee @ 6% p.a. and the same is chargeable to tax. However, interest paid by the assessee under various sections is generally @ 12% and not allowed as a deduction while computing the total income. Accordingly, there is a difference in rate and the treatment when the interest is received by the assessee and paid by the assessee. The interest paid is for the use of money and is compensatory in nature.

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		Recommendations ➢ Since the interest paid by the tax payers under various sections of the law is compensatory in nature, it should be allowed as deduction in computing total income. Alternatively, the interest received by the tax payer on refund should be exempted from tax. In the least, there should be parity in interest rates for taxpayers and Government. **Rationale:** ➢ It is noted that the Revenue raises unreasonable demands on the taxpayer for collection of taxes and meeting the revenue targets. The taxpayers are unduly burdened with high tax demand. Even though the taxpayer files an appeal before the higher appellate authorities, it is usually required to deposit a certain percent of the total demand with the government treasury pursuant to the final assessment order. **Recommendations:** ➢ In the event the demand is reversed by higher appellate authority, the interest on refund to the tune of 1% for every month or part of the month should be provided from the date of the assessment order till the date of credit of refund to the account of the tax payer. **Rationale:** ➢ As per the existing provision of the Act, in case of belated return, interest on income tax refund is granted after excluding period of delay from the first day of the assessment year till the date of filing of return. ➢ The amendment in Finance Act 2016 provides that in case of belated return, the interest shall be paid to the assessee from the date of filing of the return to the date of refund. Here, it is not out of place to mention that a penalizing provision already exist for filing belated return of income. Introduction of this provision will lead to double penalty on the assessee.

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		Recommendation: ➢ In the fair interest of the assessee, if the excess taxes are paid on or before 31 March of a particular assessment year, the interest should be granted from the 1st day of the assessment year and not from date of filing of return of income.
111.	**Tax Effect of Orders**	**Rationale:** ➢ Order giving effect to favourable appellate orders is not being provided by assessing officers in a timebound manner. Lots of follow ups and efforts are required from Assessee to get order giving effect of orders ➢ Section 244A(1A) provides for grant of additional interest @ 3% pa where the authorities fail to give effect to an appellate order and grant refund to the assessee within the time specified u/s 153(5) [viz. three months period extendible to 9 months in case approval is received from PCIT/ CIT]. ➢ At times, the authorities pass order giving effect to the appellate order, but correct and full amount of refund is not released ➢ The Memorandum to Finance Bill 2016 justified the objective behind the amendments to S. 153 as on the basis of desirability to finalise assessments on a more expeditious basis. ➢ In this backdrop, it may be seen that even S. 154 provides for a six month time limit to the Tax Authority to pass a rectification order on application made by the Taxpayer, but in practice, this time limit is not followed. Even after making rectification application, it requires great amount of follow up and invariably there is delay in passing rectification order and consequent issue of refund. **Recommendation:** ➢ It is recommended that an online system of filing of any rectification request or request to pass order giving effect to order of appellate authority be introduced. Each such request should be given a unique serial number. The tax authority should dispose such cases serially. ➢ This will bring transparency. Department authorities will come to know pendency of such requests and tenure of pendency. ➢ Further, it is suggested to define specific provision in Income Tax Act for assessing officers to issue order giving effect to appellate orders within a specified time limit.

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		➢ Further, provision of section 244A(1A) be amended to also cover cases where a rectification application by assessee is not disposed within six months i.e. as time limit given in section 154, then the department need to pay additional interest of 3% pa to the assessee. This will make authorities accountable, and taxpayer need not face administrative hurdles for legal dues.
112.	**201(1A), 220(2), 234A, 234B, 234C, 244A [Interest payable and Interest receivable]**	**Rationale** ➢ Interest payable by the assessee is 1% per month or 1.50% per month as per sections 201(1A), 220(2), 234A, 234B and 234C whereas interest receivable by the assessee is 0.5% per month as per section 244A ➢ Also, the Interest is calculated for the entire month in which the actual default amount is paid ➢ Money has only one colour and therefore the rate of interest may be same irrespective of whether Interest is paid to the department or received from the department **Recommendation** It is requested to amend the provisions ➢ so as to align the rate of interest payable with the rate of interest receivable so that interest is calculated only upto the date of payment instead of for the entire month in which the payment is made.
113.	**Specific provision of immunity for DRP based assessments (s. 270AA)**	**Rationale:** ➢ The provision of s. 270AA envisages the immunity in case of assessment order which is appealable before CIT(A) under s. 246A and may not apply to order which is appealable directly to ITAT like DRP based assessment order. Such cases may not be eligible for the benefit of immunity under s. 270AA of the ITA **Recommendation:** ➢ There seems to be no specific reason for denying benefit for DRP based assessment. To avoid any ambiguity, specific amendment shall be made under s. 270AA for providing immunity benefit to such assessments also

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114.	**Non-disclosure of reason recorded for search/survey (S.132/132A)**	**Rationale**: ➢ S. 132 and s. 132A as amended by the Finance Act 2017 provide for non-disclosure of 'reason to believe' or 'reason to suspect' for taking search or survey action, as the case may be, to any person or any authority or the Appellate Tribunal with retrospective effect from insertion of search and survey related provisions. ➢ Explanatory Memorandum justifies amendment on grounds that (a) confidentiality and sensitivity are key factors of proceedings u/s.132 and 132A and (b) certain judicial pronouncements have created ambiguity in respect of disclosure of ‘reason to believe’ or ‘reason to suspect’ recorded by the tax authority. ➢ Hon’ble FM in his budget speech stated the object of amendment is to maintain the confidentiality of the source of the information and the identity of the informer. ➢ SC in the case of DGIT (Inv.) vs. Spacewood Furnishing (P) Ltd. [2015] 374 ITR 595 (SC)] in the context of section 132, after referring to number of other SC rulings has re-iterated various principles governing search cases. SC held that recording of reasons by authority is a jurisdictional condition and recording is must before issuing of authorization under section 132. SC further held that reasons recorded need not be communicated to person against whom warrant is issued at that stage; but, may be made available on demand at the stage of commencement of assessment. ➢ SC ruling clearly bring out the matter of disclosure of reasons and the stage at which reasons may be disclosed to taxpayer and the court. In terms of clear mandate of SC ruling, no ambiguity survives therewith. The reference in Explanatory Memorandum to ambiguity arising out of judicial pronouncement in the matter of disclosure of reasons is not clear. ➢ The reasoning of confidentiality of informer has no bearing on the evaluation whether the reason to believe has been acquired on the basis of nexus with information. ➢ Taking away right of the taxpayer to reasons may result in lack of transparency and is prone to misuse by tax authority.

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		➢ Even if search is held to be invalid, tax authority is entitled to use material gathered in search against the taxpayer and can re-open the assessment/s. No prejudice is thus caused to tax authority if validity of search/assessment is examined at the initial stage. ➢ In terms of SC ruling, authority is bound to disclose reasons before the court in the event of challenge to formation of belief by the authority. Taxpayers who could have closed the issue of validity of search in regular appellate forum may now approach High court in writ and thereby burden the High Courts which are already over flooded with matters. ➢ The amendment conflicts with Government moto to provide predictable tax regime. ➢ Also, amendment with retrospective effect from inception of section is against the philosophy of the present Government. **Recommendation**: ➢ Status quo of tax position be retained under section 132/132 (1A) by omitting the above amendment.
115.	**Prosecution for failure to file return of income for companies (S.276CC)**	**Rationale**: ➢ The amendment by FA 2018 withdraws relaxation in case of 'company' assessees from prosecution where tax liability (net of advance tax and TDS) does not exceed Rs. 3,000 and hence, the risk of prosecution can arise under s.276CC even if the tax liability is Nil and is fully met by TDS ➢ Intent of the amendment as clarified in Explanatory Memorandum (EM) is to plug the loophole in case of shell companies or companies holding Benami properties. The amendment goes beyond the stated object and may also cover foreign companies whose income is largely covered by TDS. ➢ It may be noted that foreign companies earning incomes in the nature of dividend, interest, royalty, FTS u/s. 115A which is fully covered by TDS are exempted from filing returns if the TDS is at rates provided in s.115A. But there is no exemption when the foreign company claims treaty benefit of lower tax rate/exemption or earns some other steam of income like capital gains. ➢ It may be noted that information pertaining to payments to such companies is getting transmitted to the Tax Department in a dual mode viz. once through s.195(6) compliance made by payers in Form

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		15CA/B and also through quarterly TDS returns filed by the payers. Further, the payers of dividend, royalty/FTS, capital gains can be proceeded against as 'representative assessee' of the foreign companies u/s. 163 if the Tax Department wishes to investigate whether activities of such companies trigger PE in India or treaty benefit is correctly availed. Further, if the royalties/FTS, capital gains are from related entities in India, the Indian payers would be making TP compliance by maintaining TP documentation and filing TP audit report. Thus, filing of filing ROI for such companies becomes an academic formality. It may be noted that s.206AA exempts such foreign companies from obtaining PAN to avoid higher TDS if they are able furnish TRC and other information to the payer. Thus, there is a strong case to exempt foreign companies having only dividend, royalty/FTS or capital gains income fully covered by TDS or covered by treaty benefit from filing returns in India which will enhance 'ease of doing business' in India and will also protect them from expanded scope of prosecution u/s. 276CC. **Recommendation:** ➢ Having regard to intent expressed in the EM as also Government's thrust on 'ease of doing business', exemptions/relaxation should be provided to foreign companies as also genuine bonafide companies from prosecution u/s. 276CC.
116.	**Extended scope of persons mandated to obtain PAN (s.139A)**	**Rationale**: ➢ FA 2018 has introduced additional clause (v) and clause (vi) to s. 139A(1) extending the scope of the persons who are mandated to obtain PAN. The amendment seeks to cover the following persons: • Clause (v): Non-individual entities which enter into financial transaction of an amount aggregating to INR 2.5 lakhs or more in a financial year. • Clause (vi): Natural persons being managing director, director, partner, trustee, author, founder, karta, chief executive officer, principal officer, office bearer of the person referred to in clause (v) or any person competent to act on behalf of the person referred to in clause (v) ➢ The term 'financial transaction' is not defined specifically under ITA for the purpose of s. 139A(1). Ambiguity may arise on common parlance of the term 'financial transaction' which would be a very wide connotation since common parlance meaning may include any transaction which involves

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		'monetary consideration'. It may cover every sale, purchase, exchange, barter, etc. thereby making the scope of the proposed cl. (v) to s. 139A(1) unclear. ➢ It is clarified that clause (v) applies to residents but clause (vi) does not contain this condition. This may be invoked against foreign directors of Indian companies to obtain PAN. The amended section provides a very burdensome requirement to obtain PAN. For illustration, even the non-resident Directors of a company or a person representing the company in any legal case outside India will be required to obtain PAN under this section, who otherwise don't need to obtain PAN. ➢ Also, the scope of the term 'principal officer' used in clause (vi) is ambiguous. A variety of persons can be considered as principal officer of the enterprise and each of them will be under a clinical obligation to obtain PAN. ➢ Separately, vide FA 2019, an additional clause ie clause (vii) was introduced to expand the instances where a person is required to obtain PAN. Per the amended section, if a person "***intends***" to enter into such transactions as may be prescribed by Board in the interest of revenue, it will need to apply for PAN. There is ambiguity in language of the provision. Literal reading would mean that provision requires a person to obtain PAN merely on the basis of 'intention' to undertake prescribed transaction, irrespective whether or not the transaction is actually undertaken/consummated **Recommendation:** ➢ Definition of "financial transaction" may be provided in ITA in the context of s. 139A. Alternatively, CBDT may be delegated with an authority to prescribe a specific list of 'financial transactions' (provided, not covered by (i) to (iv)) for the purpose of s. 139A(1)(v) ➢ If the scope of 'financial transactions' needs to be borrowed from Rule 114E/ Rule 114B, the same may be incorporated with such modifications so as to ensure that only those NRs who have nexus with India may be sought to be covered. ➢ Scope of clause (vi) be accurately delineated and it may be held to be a sufficient compliance of s. 139A(1) if any one of the person (being resident in India or operating in India) acting on behalf of the enterprise covered by clause (v) obtains PAN.

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		➢ It is recommended that requirement for obtaining PAN should be relaxed for non-resident directors of Indian company who have no presence or income from India. ➢ In case of clause (vii), suitable amendment be made to clarify that a person will be liable to obtain PAN before entering into or execution of prescribed transactions.
117.	**Hardship in obtaining Tax Residency Certificate (TRC) [Section 90(2)]**	**Rationale:** ➢ Section 90(2) of the Act provides the relief to an assessee (non-resident person) to whom a DTAA (i.e. Tax Treaty) applies, the provisions of the Act shall apply to the extent they are more beneficial. ➢ However as per sec. 90(4) TRC is required to be furnished by the assessee to get the relief. This provision applies to all non-residents irrespective of the nature of income and amount involved. **Recommendation:** ➢ In the case when amounts involved is very small, this provision for obtaining the TRC creates unintended hardship to both non-resident recipients and the resident payer as it involves cost/time cost to obtain such TRCs. ➢ We would like to suggest introducing some threshold limit for obtaining the TRC from non-resident recipients, it would smooth the business transaction of the Corporates.
118.	**Restriction on cash collections of loans/ interest – Section 269ST of the IT Act**	**Rationale:** ➢ NBFCs face several difficulties in collection of loans granted to borrowers in remote areas of the country (especially the agricultural and rural loans). In many cases, cash collection agents are appointed by NBFCs who post rigorous follow-up and efforts locate defaulting borrowers and manage to collect the outstanding amounts from such borrowers. ➢ Such collections are usually effected in cash and may be of an amount of INR 200,000 or more **Recommendation:** ➢ It is recommended to exempt NBFCs (like banks) from the provisions of section 269ST of the IT Act.

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119.	**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. ➢ 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). ➢ Finance Act 2021 introduced a cap u/s 10(11) and 10(12) where starting from 1 April 2021 interest earned with respect to **employee contribution** in excess of INR 2.5L per annum (threshold increased in INR 5L in case there is no contribution by employer) in a fund will not be eligible for exemption. Further the computation of interest ineligible for exemption has been prescribed by notifying Rule 9D. ➢ 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

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		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.

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		➢ Separately, clarification is required as to who is required to deduct TDS; Whether employer has to deduct TDS u/s 192 or TDS has to be deducted by the PF Trust u/s 194A incase this interest is to be treated taxable under Income from Other Sources ➢ It is difficult for the employer/PF Trust to determine the actual PF interest at the year-end as there is substantial delay in declaration of PF Interest rates and accordingly the interest for a financial year gets credited after the close of the relevant financial year and after the due date of filing the TDS Returns for the last quarter of the financial year. This may result in unnecessary interest liability u/s 234C on employees towards shortfall in Advance Tax instalments of initial quarters since it does not seem to be obligatory for the Employer/PF Trustee to deduct/deposit TDS while crediting such PF interest income to the account of the employees. ➢ Further, if TDS is deducted by PF Trust u/s 194A, then TDS Funding will have be made by the Trust from employees PF Account which will then lead to reduction of Accumulated PF balance of the employee; **Recommendation** ➢ It is strongly recommended that the above referred amendments 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. ➢ It is recommended to prescribe a mechanism whereby the employer may obtain a declaration from the employee w.r.t. the Interest Income u/s 192(2B) and the employer can then deduct TDS u/s 192(2B) on such interest income, in which case the TDS funding can be conveniently done by the employer from the employees Salary Account.

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		➢ The PF Interest rate must be declared latest by March so as to compute the exact Interest Income and deposit correct TDS by the due date of depositing March TDS; alternatively, the interest accrued for the FY 2021-22 may be allowed to be considered in the income of FY 2022-23 and so on.
120.	**Taxation of interest allowed by Recognized Provident Fund post retirement / termination of employment**	**Rationale:** ➢ On retirement, the accumulated balance becomes due to employee is exempt u/s 19(12). Rules permits member keep the accumulated balance for three years post-retirement. However, interest credited on balance of member after retirement is not exempt. ➢ In case of Government PF interest credited on balance post retirement is exempt u/s 10(11). **Recommendation:** ➢ It is recommended that tax treatment of interest earned on PPF balance with Government Provident Fund and Recognized Provident Fund should be at par. Accordingly, interest earned by an assessee from recognized provident fund even after retirement or termination of employment should be exempt.
121.	**Double whammy under S.17(1)(viii) and new S.17(2)(vii) be removed**	**Rationale** ➢ **Existing provisions** o S.17(1)(viii) provides that the employer's contribution to national pension scheme (NPS) shall be taxable as salary income of the employee. However, s. 80CCD(2) grants deduction for such contribution upto 10% of salary [subject to gross total income (GTI) limit]. Hence, to the extent of 10% of salary, employer's contribution to NPS is not effectively taxed in the hands of the employee. ➢ **Amendment by FA 2020** o FA 2020 has substituted S.17(2)(vii) to provide that, to the extent employer's contribution to provident fund, NPS and approved superannuation fund in the aggregate exceeds Rs. 7,50,000, the excess shall be taxable in hands of the employee in the year of contribution.

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		○ Further, a new clause (viia) has been added to s.17(2) to provide that the annual accretion by way of interest, dividend or any other amount of similar nature during the previous year to the balance of the credit of the fund or scheme referred in s.17(2)(vii) to the extent it relates to contributions in excess of Rs. 7.50 lakhs which is taxed u/s. 17(2)(vii) shall also be treated as perquisite and added to taxable income for which the accretion shall be computed in a manner to be prescribed by rules. ➢ **Issue** ○ As per Explanatory Memorandum to Finance Bill 2020, the intent of introducing the amendment is to withdraw undue tax benefit accruing to high salary income earning employees. However, in case of such high salaried individuals, there arises a risk of double taxation of employer's contribution to NPS under S.17(1)(viii) and S.17(2)(vii). ○ Firstly, employer's contribution to NPS is taxable in the hands of employee as "salary" under S.17(1) due to specific provision in clause (viii). Secondly, the definition of "salary" also includes perquisite. Hence, employer's contribution to PF, NPS etc. in excess of the threshold of Rs.7,50,000 u/s 17(2)(vii) is again considered as salary income in hands of the employee. This results in inclusion of same income twice in GTI of the employee. ○ Thereafter, the employee may be able to claim deduction of such employer's contribution to NPS, but, the relief is available only upto 10% of salary income. ○ The aforesaid results in unintended hardship in hands of the high salary earning employees. It also acts as disincentive for the employees to invest in NPS and lowers the retirement corpus of the employees. ○ It may be noted in case of NPS and approved superannuation fund, the accretion is not in the nature of interest like in case of provident fund. The accretion is by way of increase in net asset value of the corpus (like mutual fund units) and it will not be easy to identify the accretion in respect of excess contributions. Further, the net asset value may also go down if the stock market value falls. It is not clear whether the employee will be allowed deduction in case of such fall in value during the year – which is a likely scenario considering the adverse impact of Covid 19 pandemic.

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		➢ **Recommendation** o It is recommended that the provisions of S.17 should be suitably amended to address the issue of double taxation by amending provisions of S.17(2)(vii) to exclude income taxable under S.17(1)(viii). o Alternatively, the CBDT may issue a circular or notification to address the issue of unintended double taxation.
122.	**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. Further the employer is required to deduct TDS on the same. ➢ In this regard, Rule 3B, notified on 5 March 2021 prescribes a formula based approach for computing the taxable value of annual accretion on excess contributions: o The Rule considers the annual accretion to the specified funds and then computes the following amounts for inclusion in taxable income: ▪ Accretion on current tax year’s contributions in excess of INR 750,000

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		▪ Accretion on past tax years' contributions in excess of INR 750,000 ▪ Accretion on income taxed under s.17(2)(viia) in past years o Since the contributions may be made throughout the year, the Rule brings in proportionality by considering 50% of excess contributions for current tax year and average of opening and closing balance of past years' excess contributions and accretions thereon. o Further, considering that there may be withdrawals from the specified funds, the Rule considers a situation where the opening balance may be less than past years' excess contributions and accretions thereon. In such situation, the Rule requires ignoring of such shortfall. In other words, in case of withdrawals, it is presumed that the withdrawals are first made out of exempt contributions (including accretions thereon) and the continuing balance represents the excess taxable contributions (including accretions thereon). **Issue** The Rule does not address following practical challenges :- ➢ Identification of specified fund to which excess contributions are made - There is ambiguity regarding which fund should be picked for excess contribution if there is a contribution by the employer to both EPF and NPS (whether the Rule 3B formula be applied to each fund on individual basis or all the funds on aggregate basis) ➢ 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. While it may be possible for employee to apply the Rule while filing return of income, it will create practical challenges for the employer for salary tax withholding throughout the relevant tax year in absence of relevant data. If employer starts recovering TDS on this accrual it will complicate matter as the determination of income is ambiguous. Further, the sourcing of relevant data for the employer may also become difficult if the data is available only to the employee. The practical challenges for employer will be higher in case of employees who have newly joined or left during the year.

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		➢ 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. ➢ Furthermore, the presumption made in the formula that withdrawals are out of past exempt contributions/accretions is averse to the taxpayer and will trigger perquisite taxation till the balance is fully withdrawn **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, as indicated above, there is lack of clarity as to how the taxable perquisite amount is to be computed and CBDT should issue detailed guidelines to quantify perquisite u/s 17(2)(vii) and 17(2)(via) in different circumstances like contributions to multiple funds, new joiners, employees leaving in middle of the year etc.. ➢ Even further, CBDT should consider exempting the employers from salary withholding obligation on the annual accretions. The employees may be directed to report the income directly in their income tax returns.
123.	**Taxation of interest allowed by Recognized Provident Fund post retirement / termination of employment**	**Rationale:** ➢ On retirement, the accumulated balance becomes due to employee is exempt u/s 19(12). Rules permits member keep the accumulated balance for three years post-retirement. However, interest credited on balance of member after retirement is not exempt. ➢ In case of Government PF interest credited on balance post retirement is exempt u/s 10(11).

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		Recommendation: It is recommended that tax treatment of interest earned on PPF balance with Government Provident Fund and Recognized Provident Fund should be at par. Accordingly, Interest earned by an assessee from recognized provident fund even after retirement or termination of employment should be exempt.
124.	**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 FA 2021 has provided 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 will 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 amendment is 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:

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		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. 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 3.76[13]% of GDP against global average of 7.23% 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. 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.

[13] Source: Economic Survey 2020-21

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125.	**Applicability of TDS on notice period pay recovered from resigning employee**	**Rationale:** ➢ As per the prevalent norm, the employees are required to serve notice within the stipulated time before leaving the organisation. In case of shortfall in service of notice period, the present employer recovers specified amount for shortfall in service of notice period. In many cases, this is reimbursed by the new employer. ➢ In such cases, many-a-times, in the absence of any clarity, the present employer deducts TDS on this amount. Further, in cases of reimbursement, the new employer also deducts TDS. Therefore, it leads to double taxation in the hands of employee, though no payment is received by the employee. **Recommendation:** ➢ It should be clarified that since notice pay amount is not received by the employee, the same is not chargeable to tax in the hands of employee.
126.	**Interest related deduction for senior citizens holding deposits – Section 80TTB of the IT Act**	**Rationale:** ➢ As per the newly introduced provisions, senior citizens are entitled to a deduction (upto a maximum of INR 50,000) in respect of interest income earned in deposits with banks, co-operative societies engaged in the banking business and post office. ➢ NBFCs are kept out of the purview of such benefit. **Recommendation:** ➢ In order to encourage deposits with NBFCs, it is recommended to include NBFCs in the list of eligible entities for the specified income related deduction in the hands of senior citizens.
	Other Issues	
127.	**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

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		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 kept deposited or invested in prescribed manner in terms of s. 11(5). ➢ S. 11(1)(d) of the ITA is has been amended by Finance Act 2021. 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 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.

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		Recommendations: ➢ The amendment made by Finance Act 2021 may be reversed. ➢ At the highest, if desire is to regulate corpus 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 carry 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. ➢ FA 2021 has inserted 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

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		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.
121.	**No need to change existing scheme of registration for registered charitable trust since there are enough safeguards in present statute [S. 12A(1)(ac)]**	**Rationale** ➢ Finance Act 2020 has introduced provisions to revamp the entire process of obtaining and continuing registration under s. 12A / s. 12AA of the ITA for existing registered trusts as well as new trusts. ➢ As explained in the Explanatory Memorandum to FB 2020, the intention of such proposal is to ensure that the conditions of registration are adhered to for want of continuance of exemption. This is also for having a non-adversarial regime and not conducting roving inquiry by the tax authority in the affairs of the exempt entities on day to day basis. ➢ The provision provides for different period of limitation for making an application of registration for different classes of trusts for the purposes of claiming benefit of s. 11 and 12 of the ITA. For example, an existing charitable trust registered as on 1 June 2020 will have to make an application for fresh registration under the new provisions within a period of 3 months (although this date has been deferred), for renewal of registration earlier granted under s. 12AB of the ITA, the trust is required to approach the tax authority at least 6 months prior to the expiry of registration etc. ➢ Also, the trust will be granted either provisional registration or final registration depending on the respective clause of s. 12A(1)(ac) under which the registration was sought.

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		➢ However, there is no change in the powers of the tax authority for cancelling the registration. In other words, the powers of tax authority enabling cancellation of registration are not modified and it may be cancelled by the tax authority at any point of time subject to certain conditions ➢ The provision so enacted is very complex and bifurcated into multiple scenarios. Some of the scenarios contemplated under s. 12A(1)(ac) are even overlapping which will create further confusion and ambiguity. ➢ Also, there are different time limits depending upon specific fact pattern under which the trust falls and even delay of one day in adhering to such strict time limits is prone to adverse consequences such as loss of exemption for the year in which delay took place. ➢ As per the plain reading of the provisions for making an application and granting registration for new trusts under the new regime, the new trust can get registration only from the next year in which application is made and not from the same year. For instance, a trust formed in January 2021 is required to make an application at least one month prior to the commencement of the previous year (i.e. FY 2021-22) relevant to the assessment year from which the said registration is sought. Therefore, the provisional registration will be granted to such trusts from next year and the trust will not be able to claim exemption under s. 11 to 13 of the ITA for FY 2020-21. The issue is more relevant for a trust which is formed in the last month of a financial year and hence will not be able to claim exemption even for the immediate next financial year. This does not appear to be the intention of the legislature. **Recommendations** **Do not change the present system** ➢ The new provisions convert the earlier system of 'rule of exception' to new system of 'rule of compulsion'. As per erstwhile law, the trust's registration can be cancelled only if it is found that the trust's activity is not carried on in required manner. Otherwise, there is no adverse impact on such registration. Separately, the assessing officer has independent power to verify the claim of the taxpayer on year on year basis as per the provisions of s. 11 to 13 of the ITA.

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		➢ Therefore, there were enough safeguards in the Act for keeping check on the activities of the charitable trust and hence, there is no need for any change in the process of registration. ➢ Assumption in the Explanatory Memorandum that the trusts are being harassed on day to day basis by conducting roving inquiries doesn't appear to be correct. Assuming that is true, the solution should be to insert a provision which is deterrent to erring officials, alternative of the new registration regime is to push the taxpayer to the Tax Authority who are privy to such alleged harassment. Thus, the remedy is counter-productive and will create greater harassment for the trusts. ➢ It does not appear to be logical that, at the end of 5 years, each trust automatically loses exemption even if it might have conducted its activities without any blemish. It would put a vast and predominant number of trusts to regular hardship in an effort to find out a handful wrong doers. We submit that a compromise alternative could be to make a provision (instead of the proposed amendments) that a trust which is of a materially sizeable size is subjected to special scrutiny every 5 years by an independent panel of experts / Tribunal, to satisfy whether the activities are or are not carried on in the spirit of charity. Based on adverse comments of this independent panel, the registration may be deemed to have been cancelled. All other trusts may continue to enjoy the benefits of uninterrupted registration ➢ Alternatively, frequency for re-application of Charitable organisations formed by companies for the purpose of employee or society welfare objectives can be increased from 5 years to 10 years ➢ Separately, the timeline for issuance of the order in response to application made can be revisited **Ensure that new trusts are not deprived of registration in the first year of application under the new regime** ➢ It is recommended to remove lacuna in the language of the provisions relating to new trusts such that new trusts are granted benefit of provisional registration (which is granted on automatic basis) from the year of formation or at least from the year in which application is made by new trust. **Note** - Similar changes in the registration process are made for the entities registered under s. 10(23C) of the ITA as well. In line with the aforesaid discussion, the consequential changes should be made in the new registration regime under s. 10(23C) of the ITA as well