PRE–BUDGET MEMORANDUM 2022-23: DIRECT TAXES

PART B – NON-LEGISLATIVE ISSUES WHICH CAN BE ADDRESSED BY CBDT THROUGH AMENDMENT IN RULES OR ISSUE OF NOTIFICATIONS OR CIRCULARS

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		Corporate Taxation
1.	**Amendment of Rules 6EA/B to align with extant RBI/NHB prudential guidelines/Ind-AS**	**Rationale**: ➢ The existing provisions of section 43D read with Rules 6EA/B of the Act, inter-alia, provides that interest income in relation to certain categories of bad or doubtful debts received by scheduled banks, public financial institutions, State financial corporations, State industrial investment corporations and certain public companies like Housing Finance companies, shall be chargeable to tax in the previous year in which it is credited to its profit and loss account for that year or actually received, whichever is earlier. ➢ These provisions have been extended to co-operative banks other than a primary agricultural credit society or a primary co-operative agricultural and rural development bank. ➢ RBI Guidelines applicable to Non-Banking Financial Institutions (‘NBFC’) provide that interest on non-performing assets (‘NPAs’) shall be recognized only on cash basis. ➢ Similar to banks, NBFCs too are engaged in financial lending to different sectors of society. ➢ The extension of coverage to deposit taking NBFCs and systematically important non-deposit taking NBFCs within scope of s.43D by Finance (No.2) Act 2019 to permit them to recognize interest on prescribed categories of bad and doubtful debts on actual receipt or credit to P&L, whichever is earlier is a welcome amendment and will address the challenges arising to such taxpayer due to ICDS IV which requires recognition of interest income on time basis regardless of absence of reasonable certainty of ultimate collection. ➢ However, presently there is controversy on Rule 6EA which prescribes the categories of bad and doubtful debts covered by s.43D. This rule was notified in 1992 based on RBI guidelines then prevailing and has not kept pace with evolving guidelines. It is not in sync with extant RBI guidelines. For instance, extant RBI guidelines treat debt

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		overdue for 90 days as NPA whereas Rule 6EA prescribes 180 days. This gives rise to controversy on taxation of notional interest income on overdue debts between 90 to 180 days despite non-recognition in books of account ➢ 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 s.43D in the Act along with Rules 6EA/B. Hence, a suitable amendment to this effect will be much appreciated **Recommendation**: ➢ Rules 6EA/B should be amended to align them with extant RBI guidelines by a generic reference to extant RBI guidelines. This will avoid the need to amend them from time to time with change in RBI guidelines. Further, the rules also need to be updated to accommodate new Ind-AS accounting standards where interest income on impaired loans need to be recognized at credit impaired rate.
2.	**Section 44AB (Clause 44 of Form 3CD) - Break-up of Total Expenses under GST**	**Rationale:** ➢ Vide Notification dated 20-07-2018, the CBDT changed the tax audit form 3CD, seeking GST related expense details under Clause 44 w.e.f. AY 2018-19; however CBDT has deferred implementation of the same every year and accordingly not made applicable till AY 2021-22; ➢ As per the said clause, Tax Auditor has to report break-up of total expenditure in respect of the entities registered or not registered under GST ➢ This is a voluminous exercise with lot of reconciliations and may not be even feasible for large organisations. ➢ Expenses like depreciation, bad debts, discounts/rebates, etc. are not supplies under GST and therefore cannot

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		be bifurcated as per requirements of this Clause. Further there may issues in classification/bifurcation of various other expenses viz. Provision for Expenses, Prepaid Expenses of earlier years debited to P/L, Salary Costs, Interest, Contribution to PF/ESI, Rates & Taxes, etc. **Recommendation:** ➢ Therefore, it is suggested to kindly appreciate all the concerns/issues of the industry as well as the tax auditors and accordingly omit Clause 44 of Form 3CD.
		Mergers/Acquisitions and Business re-organisation
3.	**Notify cases to which s.56(2)(x) and s.50CA will not apply**	**Rationale/ Recommendation**: ➢ Pursuant to industry representations, the Finance (No.2) Act 2019 amended s.50CA and s.56(2)(x) to give power to CBDT to notify cases to which these provisions will not apply. ➢ Obviously, such is the correct approach since it would be very difficult to provide for all bonafide situations to which notional capital gains in hands of seller and gift taxation in hands of buyer in the Act itself. ➢ However, the CBDT is yet to come out with Notification u/s. 50CA and s.56(2)(x). Hence, the challenges indicated in following illustrative cases in our earlier years' Pre-budget representations continue to be faced by the industry :- ➢ Sale of foreign company's shares where it is difficult to apply Rule 11UA valuation ➢ Exempt transactions like foreign amalgamation or demerger which involves transfer of shares of foreign company deriving substantial value from assets located in India u/s. 47(viab)/(vicc), conversion of bonds or debentures into shares u/s. 47(x), transfer of land of sick industrial company managed by workers' co-operative u/s. 47(xii), conversion of firm into company or company into LLP (s.47(xiii)/(xiiib)), etc.

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		➢ Fresh issue of shares in scenarios like Initial Public Offer (IPO), private placement, rights, bonus, etc. ➢ Investment made by holding company into its wholly owned subsidiary (domestic as well as foreign company) ➢ Time lag involved between fixing up share price by the parties under an agreement and actual allotment / transfer of shares due to time taken in making regulatory compliances and / or seeking shareholder or regulatory approvals ➢ Options or share warrants which are issued at a particular date giving option to the holder to subscribe for shares at a future date at the prefixed value which is generally at FMV on the date of issue of options/warrants ➢ Transfer or issue of shares or securities in case of corporate insolvency resolution process under IBC. **Recommendation**: ➢ Hence, it is recommended that CBDT should expedite the issue of Notification u/s. 50CA and s.56(2)(x). Further, prior to the issue of Final Notification, it is recommended that a draft Notification should be published for stakeholders' comments to ensure that all possible bonafide cases faced by industry get adequately represented in the Final Notification.
4.	**Section 50B and Rule 11UAE**	**Rationale:** ➢ Section 50B(2) was amended by the Finance Act, 2021 (at the enactment stage) and Rule 11UAE was notified on 24-05-2021 to provide for computation of consideration of slump sale/exchange at fair market value ('FMV'). ➢ The amended section 50B(2) provides that FMV of the undertaking as on the date of transfer, calculated in the prescribed manner, shall be deemed to be full value of consideration. This amendment is made effective retrospectively from 01-04-2020 i.e. AY 2021-22. There could be many bonafide situations where the actual transaction value is genuinely lower than Rule 11UAE value. It is for this reason that all anti-abuse provisions like

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		section 56(2)(x), 50C, 43CA, , 56(2)(viib) etc. have a 'safety valve' where the taxpayer is given opportunity to rebut the normative value. ➢ Further, the term 'immovable property' for the purpose of Rule 11UAE is not defined. **Recommendation:** ➢ Relief should be provided from retrospective application of Rule 11UAE for transactions which were publicly announced before 24-05-2021 but are consummated after 24-05-2021. ➢ Amend Rule 11UAE to provide an opportunity to taxpayer to rebut normative FMV [similar to section 50C(2)]. ➢ Similar to Rule 11UAD, in case of NCLT / Court approved scheme of slump sale between unrelated parties, consideration as per the scheme should be accepted. ➢ Valuation of undertaking arrived adopting internationally accepted method of valuation should be accepted. ➢ A clause be added to Rule 11UAE to define the term 'immovable property' to mean land or building or both to provide consistency with similar definition/ provisions in section 43CA, 50C, 56(2)(x), 194-IA and 194LA.
5.	**Rule 11UA, Rule 11UAA, Section 56(2)(x) and Section 50CA**	**Rationale:** ➢ Rule 11UA and Rule 11UAA provide for computation of fair market value for the purpose of section 56(2)(x) and section 50CA. ➢ In case of shares of a company, the said Rule provides for taking all assets and liabilities at book value except land and building, which is to be taken at stamp duty value. In case where such normative values are much higher than commercial fair value of the specified assets, there is no option to value shares of an entity by any other method such as DFC method, which is a method used worldwide to compute enterprise value of a business. ➢ The method prescribed Rule 11UA/11UAA is unreasonable and unequitable. Any acquisition of running business cannot be valued taking stamp duty value of land and building and book value of other assets and liabilities. Further, in case of leased land, there being restrictions on use and subsequent transfer on rights therein, the stamp duty value may not reflect the fair market value. **Recommendation:** ➢ Amend Income Tax Rules and allow valuation of shares of a company by a recognized merchant banker based of DCF method or any other internationally accepted method at the option of the taxpayer where taxpayer claims

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		that normative values as per Rule 11UA is higher than actual commercial fair value. ➢ Alternatively, in case the assessee contends that stamp duty value is not fair market value, then the AO should be empowered to refer the issue of valuation to a recognized government valuer for arriving fair market value.
6.	**Section 56(2)(x) – Clarification w.r.t. issue of shares** **Clarification of applicability of anti-abuse provisions w.r.t. issue of shares**	**Rationale**: ➢ As per the Section 56(2)(x), if any person "receives" any property on or after 1 April 2017, without consideration or for consideration which is less than the aggregate fair market value by an amount exceeding Rs 50,000, the difference shall be taxable under the head 'Income from Other Sources' in the hands of the recipient. The intent of legislation is to bring within ambit of taxation instances of 'transfer' for inadequate consideration and not 'issue' of shares. ➢ The Income tax rules 11U requires determination of value of share based on audited balance sheet as on the transaction date. This is very difficult to implement as audited balance sheet is generally available only on yearly / half yearly basis. **Recommendation**: ➢ Suitable clarifications may be issued that: • A suitable clarification may be issued that section 56(2)(x) is applicable only for transfer of shares and not for issue of shares. • Circular may be issued to direct the tax authorities to implement the provisions only in case of tax abuse and not otherwise. ➢ Separately, suitable amendment be made to consider the latest audited balance sheet, which is not older than six months from the transaction date for the purpose of valuation as per Rule 11U.
7.	**Indexing and cost of acquisition of shares/ securities after Split**	**Rationale:** ➢ Split of shares do not change the capital structure or enhance capital of a company. It is merely sub-division of existing shares / securities. ➢ There is apprehension that under section 48 of the Income Tax Act shares received on split will not be eligible for indexation from date of purchase of original shares / securities and shall be available from date on which new shares post-split is allotted.

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		➢ Further, section 55 of the Income Tax Act permits assessee to substitute fair market value as of 31st January 2018 against cost of acquisition. However, there is apprehension that in case of split shares, such substitution may not be available. **Recommendation:** ➢ CBDT should clarify that in case of split or subdivision, assessee shall be permitted to sub-divide the cost of acquisition of the original shares. Further, it should be clarified that the period of holding of such original shares include period from date of acquisition of original shares to the date of split or subdivision and therefore, the indexation benefit as also benefit available under section 55 to substitute market value as of 31st January 2018 in place of cost shall be available, with suitable adjustment for split.
		Tax deducted at source and Tax collected at source
8.	**Issuance of Master Circular for resident & non-resident payments**	**Rationale & Issue:** ➢ There is a seemingly lot of litigation, by both, the assessee and the department on various issues, most of which are generally common in nature. Circulars issued by the Hon. CBDT are used by the industry and the tax practitioners to interpret the T.D.S. provisions including the compliance aspect thereof. Over a period of time, there have been a plethora of Circulars/Clarifications/Instructions, reflecting Department's interpretation of the various T.D.S. provisions which the industry is required to navigate for compliance. **Recommendation:** ➢ Recommended that in case of any industry specific issue or any other common contentious issues, a guidance note/ circular shall be provided forthwith by the Tax Department just like the circular on FBT, the Handbook on negative service tax regime etc. which clarifies most of the doubts of the assesses. This will bring clarity and certainty in respect of various issues and reduce the litigation and save time for both, the assessee as well as the Department.

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		➢ It is also recommended that after the enactment of the Finance Bill every year, the Hon. CBDT should as a policy, issue one comprehensive Master Circular clarifying compliance aspects, procedures, relaxations, interpretations etc. covering all the provisions of T.D.S. under the Act.
9.	**Clarify person whose PAN should be considered in case of dividend payment on GDRs**	**Rationale and Issue** ➢ The TDS rate on dividend payment on GDR is 10% u/s. 196C. Following extracts from the erstwhile Issue of Foreign Currency Convertible Bonds and Ordinary Shares (Through Depositary Receipt Mechanism) Scheme, 1993 made it clear that dividend paying company can rely on PAN of overseas depository for making TDS compliance in India *"Taxation on shares issued under Global Depositary Receipt Mechanism.* *9. (1) Under the provisions of the Income-tax Act, income by way of dividend on shares will be taxed at the rate of 10 per cent. The issuing company shall transfer the dividend payments net after deduct tax at source to the Overseas Depositary Bank.* *(2) On receipt of these payments of dividend after taxation, the Overseas Depositary Bank shall distribute them to the non-resident investors proportionate to their holdings of Global Depositary Receipts evidencing the relevant shares. The holders of the Depositary Receipts may take credit of the tax deducted at source on the basis of the certification by the Overseas Depositary Bank, if permitted by the country of their residence."* ➢ Similar provision is not present in extant Depository Receipts Scheme, 2014. The issue was not relevant earlier since dividend was exempt u/s. 10(34). But now since dividend income is taxable in hands of shareholder, issue will arise in whose PAN is the dividend paying company supposed to do TDS compliance in India such that provisions of s.206AA requiring higher TDS @ 20% are not triggered.

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		Recommendation ➢ It may be clarified through a Circular, that TDS compliance on dividend payment on GDRs will need to be made under PAN of overseas depository
10.	**TDS on Dividend – Applicability of provisions of section 206AA to payments below the threshold mentioned in section 194 and reporting of transactions below the threshold limit in the TDS return**	**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 does not exceed Rs. 5000, then TDS is not required. ➢ Therefore, individual shareholders who are in receipt of dividend below the threshold limit are not subjected to TDS u/s 194 irrespective of whether those shareholders have PAN or not. ➢ For these transactions which are below the threshold limit, there may be cases where there is no PAN for some of the shareholders. If such transactions are to be reported in the TDS Return, the system will prompt / demand TDS at a higher rate of 20% as per section 206AA. **Recommendation:** ➢ Clarity to be provided by CBDT if these transactions below threshold limit need to be reported in return. Further, if they need to be reported, which flag/tag needs to be used in the utility. Also, utility to be amended accordingly
11.	**Provisions of Section 194IA – TDS on property transactions – Not to apply to SARFAESI sale cases**	**Rationale:** ➢ Section 194IA of the Act was introduced vide Finance Act, 2013 with a view to improved reporting of transactions and taxation of capital gains. It was believed that transactions of immovable properties are usually undervalued and under-reported with the transacting parties refrained from reporting their PAN while entering into such transactions. ➢ The Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act 2002) allows bank and other financial institutions including Housing finance companies and NBFCs

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		to recover their loans by taking possession/auction of assets which were kept as security by the defaulting borrowers. Under the SARFAESI Act, there is a Central Registry of Securitisation Asset Reconstruction and Security Interest of India (CERSAI) to register security interest created by banks and financial institutions covered under the SARFAESI Act. ➢ Thus, the SARFAESI Act is, in essence, a mechanism wherein the lender company can recover its dues from the defaulting borrower and pass on clear title of the secured property to the new buyer. However, when TDS is deducted from the sale consideration from such SARFAESI sale, the credit of the same is passed on the borrower and the lender company receives less consideration which eventually becomes irrecoverable resulting into loss. ➢ Further, many times, the buyers deduct taxes and report the same in the name of the lender company. Even in these cases, since the credit for TDS is not available, it results into loss for the lender company. **Recommendation:** ➢ Accordingly, we recommend that by way of issuing notification u/s. 197A(1F), all property sale transactions under SARFAESI shall be exempted from withholding provisions or a suitable clarification be made as to in whose favour the TDS is required to be made and allowed as a set off from the tax payable.
12.	**Impact of higher TDS rate on grossing up u/s. 195A in net of tax payment (Sec 206AB)**	**Rationale and issue:** ➢ The section is applicable on payments to non-residents having PE in India. In most cases, payments to NRs are on 'net of tax' basis i.e. withholding tax, if any, is borne by the Indian deductor. In such cases, if the non-resident has not filed the return, the rate of deduction can go as high as 80% which as per the provision has to be considered twice of normal rate which will be huge and unreasonable additional cost to the Indian deductor merely because the NR payee has not filed return. **Recommendation:** ➢ Suitable clarification needs to be issued for capping the maximum rate on which tax needs to be deducted. It may be clarified that in such cases, the grossing up u/s. 195A will be required at normal TDS rates while actual TDS may be at higher rate as per s.206AB

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13.	**Section 194C(6) - Nil TDS for payment to a transporter based on its declaration to the deductor confirming ownership of ten or less goods carriages at any time during the previous year**	**Rationale:** ➢ As per Section 194C (6) "No deduction shall be made from any sum credited or paid or likely to be credited or paid during the previous year to the account of a contractor during the course of business of plying, hiring or leasing goods carriages, where such contractor owns ten or less goods carriages at any time during the previous year and furnishes a declaration to that effect along with his Permanent Account Number, to the person paying or crediting such sum". ➢ Since the number of trucks of transporters keeps on changing during the year, it is not feasible for the deductors to call for such daily/ periodical declaration from the transporters regarding the number of goods carriages owned by them at any point of time during the year. ➢ Payments which are exempted by virtue of declaration given u/s. 194C(6) are required to be reported in quarterly e-TDS return and hence the information about the transporter and payments made to him by different customers becomes available to the Tax Department. **Recommendation:** ➢ Since the onus of complying with condition of s.194C(6) is primarily on the transporter, it may be clarified that the declaration given at the beginning of the year can be relied upon by the payer unless the transporter himself informs the payer that he is no more eligible for TDS exemption u/s. 194C(6). This will not prejudice the Tax Department since the information gets captured in quarterly e-TDS return.
14.	**Practical difficulties in e-TDS utility which does not recognize DTAA benefit in some cases and lower rate for s.194LC cases**	The department has constantly endeavored to automate the TDS system with the introduction of TRACES and the e-filing of the forms. However, we would like to highlight certain suggestions/points to make the system more robust and user friendly. **Benefit of Double Taxation Avoidance Agreements:** ➢ India has entered into agreements with various countries for avoidance of double taxation in case of incomes arising out of and being taxable in India and that other nation. As such, these agreements provide tax benefits on withholding of tax, if the amount is not taxable in India under DTAA.

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		➢ However, the TRACES system does not recognize this benefit and do not allow the DTAA flag to be updated in the form. As such, the system continues to show a short deduction of tax even though the same has been adhered to in a legitimate manner. Although this is an administrative difficulty, we would suggest that if the forms could be modified in order to incorporate the requisite fields in the form, so as to allow ease of compliance and proper reporting. **Lower TDS rate for s.194LC cases:** ➢ Further, in case of payment of interest on ECBs or bonds made overseas to Companies, Section 194LC provides for a lower rate of withholding tax. The said benefit is not recognised in the TRACES system, since the PAN is not available in most of the cases. This gives rise to demand for the differential amount of tax between the rate for the Companies and that for Non-Companies. ➢ The above referred practical difficulties may be resolved through appropriate changes in e-TDS filing utilities and TDS statement processing systems.
15.	**Form 26AS to include PAN of deductor and the Unique TDS Certificate Number**	**Rationale**: ➢ Currently, Form 26AS contains the details of Name and TAN of the deductor. However, PAN of the deductor does not appear in the statement. In absence of PAN, it is difficult to match the TDS as per 26AS with the books of the accounts of the deductee-companies since the customer details are generally PAN based. ➢ Similarly, in case of large companies, matching of TDS as per 26AS with TDS as per books becomes very difficult. **Recommendation**: ➢ Form 26AS should also incorporate the PAN of the deductor and the unique certificate number so that the same can be reviewed and matched with the books of accounts of the company.

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16.	**Onerous Form 15CA/15CB compliance in respect of dividend payment to Non-Resident [Rule 37BB of Income Tax Rules, 1962]**	**Rationale:** ➢ As per Rule 37BB of the Income Tax Rules, 1962 ("IT Rules"), any person responsible for making any payment to a Non-Resident is required to furnish information in Form 15CA (there are different parts prescribed in the Form for furnishing information w.r.t. foreign remittances) as well as obtain CA certificate in Form 15CB. ➢ As per the above provisions of the Act and IT Rules, any company responsible for paying dividend to a Non-Resident shareholder, is required to deduct tax at source and issue Form 15CA as well as obtain CA certificate in Form 15CB in respect of the said payment ➢ Such Forms are required to be uploaded on the income tax portal in respect of each & every non-resident shareholder and acknowledgment thereof is required to be shared with AD bank for remitting the money to the shareholders. ➢ For a large listed company which may have several Non-Resident Shareholders, this becomes a massive exercise as though the dividend remittance has to happen within 30 days from the date of declaration, the list of shareholders become available only on the record date and hence there is a very limited time available for the company to prepare these Forms and upload them on the income tax portal, in respect of each shareholder,. This adds to unnecessary compliance burden on the company ➢ Since Form 15CA is merely a declaration of remitter and is used as a tool for collecting information in respect of payments which are chargeable to tax in the hands of recipient non-resident, as long as TDS has been deducted by the company at the time of payment of dividend to non-resident shareholder, the same level of information is anyways available with Income Tax authorities through TDS return filed by the company. Therefore, furnishing Form 15CA does not aid in collecting any additional information, except for increasing compliance for the company.

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		➢ Further, Form 15CB declaring whether cross border payments prescribed in the Form 15CA is chargeable to tax or not is also not binding on the department and the information is anyway reported in the quarterly TDS returns. **Recommendation** ➢ The requirement to issue Form 15CA and obtaining Form 15CB in respect of dividend payment to non-resident shareholder should be relaxed where the payment does not exceed Rs. 50,000. This would significantly reduce the compliance burden for the company. ➢ Alternately, one single Form 15CA and Form 15CB each should be allowed to be uploaded/ obtained for all non-resident shareholders with a suitable annexure, where PAN & other details of individual shareholders can be provided.
17.	**Liberalise Rule 30(3) by expanding scope coverage and laying down transparent guidelines prescribing circumstances in which such facility can be availed**	**Rationale:** ➢ Rule 30(3) permits TDS AO to permit quarterly payment of TDS instead of monthly payments. But this rule has several attached conditions as follows :- • The facility is permitted only in 'special cases' but there is no definition or guidance on what such 'special cases' could be • The facility is permitted only for four types of TDS on payments viz. (a) salary TDS u/s. 192 (b) payment of interest other than interest on securities to residents u/s. 194A (c) payment of insurance commission to residents u/s. 194D and (d) payment of commission/brokerage to residents u/s. 194H • The TDS AO is required to obtain prior approval of JCIT before granting such facility ➢ Further, the process for obtaining approval under Rule 30(3) is a manual process unlike the process for obtaining lower/NIL TDS certificates u/s. 197.

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		➢ Due to highly discretionary nature of the facility under Rule 30(3), it is seldom being used by the industry which makes the facility a dead letter in the Rules. **Recommendation** ➢ To streamline the process and enable more taxpayers to avail the facility of quarterly TDS payments – especially during Covid-19 pandemic impacted period, the following suggestions may be considered :- • The facility may be made more broad-based and extended to all TDS provisions • The nature of 'special cases' may be defined either through Rules or CBDT guidelines to provide more transparency and guidance to both taxpayers and Tax Authorities • Timebound online procedure for making and disposing applications under Rule 30(3) may be introduced
18.	**Section 197 - Lower Withholding Tax Certificate**	**Rationale**: ➢ Generally, there is an upper limit specified in concessional TDS Certificates issued u/s 197 ➢ In case of large organisations, it is very difficult to keep a track/check of the amount of payments on which concessional TDS rate has been applied for each of the various deductees so that the concessional rate is not applied beyond the threshold limit **Recommendation**: ➢ In order to avoid the complexities, it is requested to look into the possibility of either not to keep any upper limit for the said concessional certificates u/s 197 or not to give any concessional certificates u/s 197.

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		Issues relating to TDS u/s. 194-O
19.	**Certain issues w.r.t implementation of s. 194-O which can be addressed by CBDT Guidelines** **(TDS on e-commerce transactions)**	At the enactment stage, FA 2020 has introduced S.194-O(4) and (5) which empowers CBDT to issue binding guidelines in relation to S.194-O. While this is a welcome move, it is recommended that the CBDT should follow consultative approach for issuing guidelines (similar approach was adopted for issue of POEM Guidelines, Notification u/s.115JH, Rule 11UA). It is recommended that in order to ease implementation of S.194-O, CBDT should issue, inter-alia, the following clarifications: ➢ **Clarify that amount liable for TDS under S. 194-O is net amount of sales and not gross sales receipts** ➢ **Amendment by FA 2020** ▪ S.194-O(1) provides that the e-commerce operator shall be required to deduct tax at source on credit or payment made to e-commerce participants. The tax is to be withheld on "gross amount of such sales or services or both". ➢ **Issue** ▪ In marketplace models and e-commerce industry, the "gross" amount of sale price of goods or services is not always recovered from the customer. It is common for marketplace to provide features of discount, guaranteed returns etc. The actual sale price after allowing discount is significantly lower than the gross value of sale of goods or services. Further, there is usually a 15-day window period for the buyers to return goods purchased through its platform. In such case, use of the term "gross" may result in difficulty for undertaking TDS compliance as the e-commerce operator becomes liable to pay tax on gross amount of sale price rather than the actual sale price. ▪ Even under GST law, TCS at the rate of 1% is collected by e-commerce operator on net taxable value of supplies which excludes sales return.

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		➢ **Recommendation** ▪ In order to avoid ambiguity and cascading effect, it is recommended that the CBDT Guidelines should explicitly clarify that the gross amount of sale of goods or services for S.194-O should be computed after deducting discounts, sales return etc. ➢ **Clarify that TDS is not to be withheld on the GST/ indirect tax portion** ➢ **Amendment by FA 2020** ▪ S.194-O(1) provides that the e-commerce operator shall be required to deduct tax at source on credit or payment made to e-commerce participants. The tax is to be withheld on "gross amount of such sales or services or both". ➢ **Issue** ▪ Further, under GST provisions, e-commerce operators charge and collect GST along with base sale price of goods or services. The use "gross amount" implies that the e-commerce operator is required to collect TDS even on the value of GST charged on goods or services. ▪ However, the CBDT has time and again clarified vide various circulars that TDS is not required to be deducted on service tax or GST component where the agreement/ contract or invoice specifies the amount of indirect taxes separately. This has been recently reiterated in Circular No. 13/2021 dated 30 June 2021 in context of TDS u/s. 194Q ➢ **Recommendation** ▪ Similar to clarifications issued under other TDS provisions, it should be clarified that e-commerce operator is not required to withhold tax on the amount of GST/ indirect tax that is collected from the customer.

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		➢ **Exclude shares, securities, actionable claims, money, etc. from the scope of "goods" and "services"** ➢ **Amendment by FA 2020** ▪ The definition of electronic commerce under clause (a) of Explanation to S.194-O is provided to mean supply of goods or services or both, including digital products, over digital or electronic network. But the term 'goods' is not defined. ➢ **Issue** ▪ It is not clear whether the definition of "goods" needs to be interpreted as per the Sale of Goods Act or the GST Act or some other legislation. For instance, whether the term "goods" includes shares, securities, money/ foreign currency, electricity etc. within its scope is not clear since there are different inclusions and exclusions within scope of 'goods' under various laws. ▪ Further, there is ambiguity on whether sale of actionable claims like gift cards are covered within the scope of S. 194-O. ▪ For instance, 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 industry had, therefore, sought clarification that 'goods' will not include items like shares, securities, actionable claims, money, foreign currency, etc. ▪ However, vide Circular No. 17/2020, CBDT has exempted transactions in securities entered through recognized stock exchanges or cleared & settled by recognized clearing corporations and transactions in electricity & energy certificates entered through registered power exchanges. The exemption has been granted on the ground that one to one identity between buyer & seller is not possible in such transactions. This has enhanced ambiguity for transactions in above referred items entered outside stock/power exchanges.

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		➢ **Recommendation** ▪ It is recommended that exemption granted to stock/power exchange based transactions should be extended to all transactions in shares, securities, actionable claims, money, etc. since there is ambiguity on whether these items are at all included within the definition of 'goods'. Generally, these items are traded in well-regulated financial markets and there is no need for imposing TDS by e-commerce operators. ➢ **Clarification on person liable to withhold tax where multiple e-commerce operators are involved in the transaction chain** ➢ **Amendment by FA 2020** ▪ S. 194-O requires an e-commerce operator to withhold taxes on transaction of sale or service that is facilitated by such e-commerce operator. ➢ **Issue** ▪ The digital business models are highly integrated with multiple e-commerce operators being involved in the transaction chain. ▪ For instance, consider business models where there is one e-commerce operator (ACo) which merely lists the products of various other online sellers/ e-commerce operators (say BCo). In such case, where customer gets search results on ACo's platform and wants to buy a particular product, he will be redirected to BCo's platform. The customer can buy the product only on BCo's platform. ▪ In such case, there is a concern whether both ACo and BCo will be liable to withhold tax under S. 194-O specially since this may create duplicated levy of TDS on the same transaction. It also creates misperception on person who is actually liable to deduct TDS.

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		➢ **Recommendations** ▪ It is recommended that CBDT Guidelines should clarify that the e-commerce operator which enters into contract for sale or service with e-commerce participant and has privity with the e-commerce participant for such transaction shall be covered u/s.194-O. Similar provisions are also present under GST law which required e-commerce operator to collect TCS. ➢ **Exclusion of payment aggregator or payment gateways (covered under RBI Guidelines 2020 dated 17 March 2020) from S.194-O:** ➢ **Amendment by FA 2020** ▪ S. 194-O requires an e-commerce operator to withhold taxes on transaction of sale or service that is facilitated by such e-commerce operator. ➢ **Issue** ▪ The broad scope of S. 194-O may also cover payment aggregators or payment gateways which act as intermediary by facilitating collection and settlement of payments between customers and e-commerce participants. As aforesaid, the RBI Guidelines also require that the payment function should be undertaken through a separate entity as against the marketplace function. This will further reduce the visibility of payment systems over the transaction. The payment entities merely assist in completion of payment arm of the transaction and are not involved in selling of goods or services. ▪ However, the CBDT Circular No. 17/2020 has merely granted exemption to payment gateways involved in e-commerce transactions and not to those involved in conventional (‘brick and mortar’) transactions. This has considerably enhanced ambiguity for payment gateways whose function is limited to facilitating the payment for the transaction.

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		➢ **Recommendation** ▪ It is recommended that the CBDT Guideline should specifically clarify all payment aggregators and payment gateways which are governed by RBI Guidelines are not covered under S.194-O and not merely those involved in e-commerce transactions. ➢ **In case of sales by consignment agent on behalf of principal, it may be clarified that obligation to collect TCS shall be on Principal** ➢ **Amendment by FA 2020** ▪ S. 206C(1H) requires every person being seller to collect TCS from the buyer of goods on receipt of sale consideration exceeding in aggregate Rs. 50L in any previous year. The section excludes particular class of persons from the scope of buyer and seller ➢ **Issue** ▪ The provision of s. 206C(1H) provides that every person being a seller shall collect TCS from the buyer. In case of sales by consignment agent on behalf of principal, question may arise whether TCS obligation is on the principal (who is the legal seller) or the agent who receives sales consideration from the buyer ➢ **Recommendation** ▪ It may be clarified that the legal obligation to collect TCS is on Principal and not on the agent undertaking sales activity on behalf of Principal. Hence the primary obligation to comply with TCS is on the principal being the legal seller of goods ▪ But since, practically, the sales consideration is first received by the agent, it may also be clarified that where agent collects TCS from the buyer and deposits with Government using his own TAN and issues TCS certificate to the buyer, there shall be no adverse consequences for principal for non-collection of TCS.

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		▪ Further, it may also be clarified that credit of TCS to the buyer would be available in all cases even in case where the TCS is collected by agent and not the principal on whose behalf sales are undertaken ➢ **Clarification regarding non-applicability of s. 194O to Insurance brokers regulated under IRDAI operating a digital/tech portal, as broker does not have any access or control on premium paid to Insurance companies** ▪ Insurance Brokers are registered with the Insurance Regulatory and Development Authority of India (‘**IRDAI**’) and are engaged in providing direct insurance broking for corporate and retail customers and offers a range of products for the non-life and life segments. ▪ The Brokers also manages a digital/tech insurance platform to help customers select and buy insurance policies online as per the guideline issued by Insurance Regulatory and Development of India (IRDAI) vide no. IRDA/INT/GDL/ECM/055/03/2017 dated 9th March, 2017. ➢ **Guidelines on Insurance e-commerce by IRDAI:** ▪ The objective of the guideline issued by the IRDAI is to use e-commerce as an effective medium to ***increase insurance penetration and enhance financial inclusion in cost efficient manner***. ***The authority as a part of its development mandate, issued these guidelines to promote e-commerce in insurance space which is expected to lower the cost of transacting insurance business, bring higher efficiencies and greater reach.*** ➢ **Broker role in payment of insurance premium either directly or indirectly:** ▪ Broker enables customers to search for policies, compare features, buy and renew policies through tech-platform; ▪ Broker has partnered with multiple Insurance Companies to offer standalone health, general and life insurances to its customers on its tech-platform;

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		▪ At the back-end, it consumes the Application Programming Interface ("API") services given by the insurance companies of its specific product. **This means that there is direct integration of the platform with the systems of the insurance company;** ▪ At the front-end, user enters the asset details (for which insurance is required) or insured's details for which cover is required. **This information forms part of the "Request for Quote" sent to the partnered insurance companies using the API services**; ▪ In return, the insurance companies provide a real-time premium quote for the "Request" received. **This is called "Response";** ▪ All such "Responses" received from the participating insurance companies are listed out, to offer the customer a choice to select from. These responses are thus displayed to the customers on the tech platform; ▪ On the platform, the User can compare various parameters such as features, coverages, exclusions, premium amount, payment options etc. and thereafter select a particular product of his / her choice; ▪ Upon selecting an insurance product, and entering other relevant inputs / additional details required for a policy issuance, the user further proceeds to make payment and is redirected to payment gateway page of Insurance Companies or makes an RTGS/NEFT/Cheque payment to the Insurance Companies; ▪ The payment gateway is an independent third party which enters into a contract with the insurance companies or insurance brokers. However, in the present case, the Broker has not entered into any contract with payment gateways. The URL (United Resource locator) where such customer is transported to, is that of the concerned insurance company and not of webpage of intermediary i.e. the broker; ▪ On the customer making payment, money gets transferred to the payment gateway. Once the payment is successful, the payment gateway sends an intimation to the insurance company;

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		▪ The money so collected is credited by the payment gateway to the account of insurance company. This credit may be done on T+1 or T+2 days as per the arrangement between the insurance company and its payment gateway; ▪ **Thus, the Broker has no role to play in terms of handling of the payment of premium as same is directly settled by the customer to the Insurance company.** ▪ At no point of time the Broker is in a position to access or even control the flow of premium from the customer to the insurance company. ➢ On receipt of the amount, the insurance company immediately issues a policy and through the API informs about the success of the payment along with particulars of the issued policy number; ➢ Once payment is completed, the customer sees a payment success message and the issued policy number with a link to view/download the same; ➢ **Broker enters into an agreement only with the Insurance companies for rendering broking services to the Insurance companies**. ➢ **As per provisions of Section 64VB of the Insurance Act, Brokers facilitates the Insured to pay the premium directly to the Insured via different modes like cheque, NEFT, Demand Draft etc.** ➢ **The provisions of Section 194-O of Income Tax Act are thus contradictory to the provisions of Section 64VB of the Insurance Act.** ➢ **<u>Manner in which the Broker is remunerated to facilitate the Insurance companies</u>** ▪ The Broker is remunerated by the Insurance companies through brokerage and / or rewards as per agreed terms as specified by the IRDAI.

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		▪ Insurance company shares a consolidated brokerage statement of all transactions (i.e. online transactions and offline transactions) executed during a period and based on such data, the Broker raises brokerage invoice on the insurance company for the executed transactions, usually on a fortnightly / monthly basis, which is then paid by the insurance companies. ▪ Thus, the Broker receives brokerage income from the insurance companies and but there are no transactions in which the Broker is required to pay any amount or income to the insurance companies. ➢ **<u>Applicability of section 194O to broker, criteria only are the deeming provision</u>:** ▪ On a literal interpretation of Section 194O, it would appear that the Broker is required to deduct tax under section 194O of the Act on the deemed gross sales amount received by the insurance companies, even though broker do not handle payment of premium and the customers directly make payment of premium to the insurance companies. ▪ **First explanation to Section 194-O, is the biggest challenge for the broker to implement as they do not have any access or control in payment of premium by the customer either partially or fully and also, directly or indirectly.** ▪ **The provision of Explanation to subsection 1 of Section 194O can be made mandatory where the E-commerce operator/service provider handles the payment either partially or fully.** ▪ **In this case, Explanation to subsection 1 of Section 194O deviates from the commercial and business rationale wherein it fails to appreciate the fact that the payment for services is not routed through the broker (E-Commerce Operators) however mandating the broker (E-Commerce Operators) to pay tax on behalf of the Insurance companies (E-commerce participant), even though the Insurance companies has been receiving the full payment directly from the policyholder (Customer).**

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		▪ **The Broker (E-Commerce Operator) shall experience immense difficulties in recovering the TDS from the Insurance companies as they do not handle/have any hold on premium. Thus, if the TDS amount is not reimbursed by the insurance companies (E-commerce participant), the said amount (TDS on premium) has to be borne by the broker (E-Commerce Operator), resulting its business becoming unviable.** ▪ **This mechanism of collection and payment of TDS on premium which is not handled by the broker will lead to undue hardship to the broking fraternity and it is against the fundamental principle of ease of doing business.** ▪ It is pertinent to note that, as per Circular no. 17 of 2020 dated September 29, 2020, there is a relief available to the insurance intermediary in case the premium is paid by the policyholder/customer directly in the subsequent year. It is to be appreciated that in the flow of transaction referred to above also, there is no involvement of the Broker in transactions between the insurance company and the buyer of the insurance policy (except for making available the platform for use by the potential insured). As a matter of fact, as can be seen, there is no such involvement even in the first year itself. ▪ Further, as stated above, no income flows from the Broker to the insurance company. TDS provisions are generally applicable on the payments made by the payer to the payee or credited to its account which contain an element of income. In this case, the Broker is not liable to make any payment to or credit any sum to the account of the insurance companies ▪ So logically, though the Broker may be viewed as an e-commerce operator as defined in Section 194O, the business carried on by it does not satisfy the basic condition of the section warranting deduction of tax at source, which is making of payment to the e-commerce participant. ▪ The scheme of the Act does not provide for reimbursement of such withholding amount of tax from the insurance company (payee) to the insurance broker (payer).

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		▪ Since the business model in which business is carried on by insurance brokers like the Broker is not what is contemplated by Section 194O, it naturally results in unworkable situations. For instance, the Broker will have to ask the Insurance companies to reimburse the tax amount on its behalf and deposit the same in the treasury and certificate for the same would have to be issued by the Broker; any default by the Insurance companies would either mean that the Broker would be out of pocket or expose itself to penal consequences. the Broker has no handle on the same. ▪ All parties will have to keep tab of these deductions and payments and continuously reconcile their inter se accounts. ▪ There would be several other similar problems which would arise once the Broker is forced to comply with the provisions of section 194O. ▪ 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. 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. ➢ **Request for consideration:** ▪ Having regard to the above position in law and the practical realities**, we respectfully pray that a clarification be issued excluding the insurance broker from the ambit of applicability of provisions of Section 194O as broker (e-commerce operator) do not handle and is not responsible for paying of premium to insurance companies (e-commerce participant).** ▪ Without prejudice to above, the Board may please clarify on following aspects: ➢ Insurance Broker industry should be exempted from the provision of Section 194-O due to practical difficulties as they are not responsible for paying premium to insurance companies as well as no

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		access and control on premium directly paid to insurance companies by policyholders as per IRDA regulation? ➢ How Insurance broker industry will comply with section 194O as broker does not have any control or access to single rupee of premium paid directly to the Insurance Companies by policyholder/customer? ➢ As per section 200(1) r.w. Rule 30 of the Income-tax Rules, 1962 any person deducting tax is required to pay such tax on or before seven days from the end of the month in which the deduction is made. Since, the Broker is not required to make any deduction as they are not liable to make any payment, hence, what would be the due date on which insurance brokers like the Broker would be required to pay TDS to the government's account? ➢ Would insurance brokers be deemed to be an 'assessee in default' under section 201 of the Act, inspite of the fact that they are not involved in the payment transactions?
Issues relating to TCS		
20.	**Benefit of lower TCS rate should also be extended to remittances for medical treatment similar to benefit granted for remittances out of education loan**	**Rationale** ➢ As per the amendment by FA 2020 to s. 206C(1G)(a), Authorised Dealer (AD) is not required to collect TCS where the amount or aggregate amount of remittances outside India under LRS, other than for purchase of overseas tour package, is less than INR 7 lakh in a FY. Further, TCS is required to be collected at the rate of 5% on the amount which is in excess of INR 7 lakh. ➢ However, in case where the remittance is out of the loan obtained from any financial institution (as defined in s. 80E of ITA) for the purpose of pursuing any education, AD is liable to collect TCS at the rate of 0.5% (instead of 5%) on the amount or aggregate of the amounts in excess of INR 7 lakh remitted by the buyer in a financial year.

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		This beneficial provision was introduced during the enactment stage of FB 2020. **Issue** ➢ Amendment providing for lower rate of TCS @ 0.5% on remittances out of education loan availed from a qualifying financial institution is a welcome move by the Government. ➢ However, considering the importance of education and medical sectors, it is not clear why similar benefit is not extended to remittances made for medical expenses/ assistance, subject to suitable safeguards as the Government may impose. ➢ In many cases, remittances are made to foreign hospital for advanced medical treatment. Just as in case of foreign education, the remittance is made for genuine purpose. Imposing TCS at high rate of 5% results in cash trap for the remitter at a time he is facing distress due to medical emergency. In fact, it is a better case for lower TCS on unplanned expenditure than foreign education which is a planned expenditure. **Recommendation** ➢ Considering the importance of education and medical sectors, it is recommended that the TCS provisions should not apply in case of remittances made outside India under LRS for study/ education abroad or for availing medical treatment or incurring medical expenses abroad, with suitable safeguards as the Government may deem fit. ➢ Alternatively, akin to lower rate of TCS for remittances out of education loan, benefit of lower TCS rate @ 0.5% should also be extended for remittances made in relation to medical expenses/ relief ➢ The above referred relief can be granted by issue of guidelines u/s. 206C(1-I)

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		Issues relating to TCS on sale of goods
21.	**TDS / TCS in case of large companies**	**Rationale:** ➢ The basic objective of TDS / TCS is to collect revenue at the time of transaction itself. In case of large companies, the transactions subject to TDS / TCS are voluminous and require lots of efforts in compliance. These large companies are making quarterly payment of advance tax. If such large companies are exempted from TDS / TCS, it will save time and efforts of assessee as well as Revenue. **Recommendation:** ➢ CBDT may issue circular that companies making payment of advance tax over Rs 50 crore in last three financial years should be issued certificate for no deduction of TDS / TCS.
22.	**Section 206C(1H) – TCS on consignment sales**	**Rationale:** ➢ Seller has been defined as a person whose turnover, gross receipts or total sales during the preceding year exceeds INR 10 Crores ➢ In case of sales by consignment, agent acts on behalf of principal (who is the legal seller), however, the sale consideration is received by the agent first from the customers and then the sale proceeds are transferred by the agent to the seller after deduction of costs incurred / commission in respect of sale of goods ➢ Section should provide that in case of consignment sales, the agent can collect TCS from the end customers only on behalf of the Principal and the same should be passed on to the Principal along with the sale consideration realised ➢ TCS collected should then be deposited by the Principal to the government. All the related TCS compliances should be undertaken by the Principal

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		➢ The agent should not have an obligation to carry out the compliances related to TCS on sale of goods **Recommendation:** ➢ To avoid litigation and ease of compliance, CBDT may clarify that in case of consignment sales, seller is the Principal and not the agent; thereby casting an obligation of compliance on the Principal and not on the agent. It may also be clarified that if consignment agent does TCS compliance (even if in his own name), it will exempt the principal from TCS compliance since there cannot be duplicated TCS compliance on same transaction.
23.	**Clarify applicability of TCS provisions on composite sale**	**Rationale** ➢ As per section 206C (1H) of the Act, TCS is applicable on sale of Goods but to be collected at the time of receipt of sale consideration. The section is not clear how to deal with sales which are composite in nature – i.e. where both Goods and Service are involved in a sale. There may be certain kinds of contract which are primarily service contracts but may involve transfer of Goods. Instances of such composite contract would include, (i) Sale of Food & Beverages by a restaurant (or) Banquet service contract by a hotel, or (c) works contract in EPC where both service and sale of goods would be involved. **Recommendation** ➢ It may be clarified that TCS on sale of goods is not applicable to composite contract – more particularly where such composite contract is liable to TDS u/s. 194C or any other provision.
24.	**Higher TDS / TCS on non-filers of Income Tax Return (Sec 206AB)**	**Rationale and issue:** ➢ Finance Act 2021 has introduced section 206AB and 206CCA which provides for higher rates for tax for TDS and TCS for a person who has not filed the income tax return in the two preceding years for which the time limit of filing the return u/s 139(1) has expired and the aggregate of TDS and TCS in each of the two years is Rs. 50,000 or more.

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Applicability of this provision in the case of TDS on dividend under section 194 is a huge challenge for large listed companies having lakhs and lakhs of shareholders and the short time available within which the dividend payment and TDS obligations need to be discharged.
Higher TDS u/s. 206AB is applicable to NRs who have PE in India. It is not applicable to payment to NRs who do not have PE in India. Hence, generally, payments like interest, dividend, royalty, FTS and capital gains where the NR does not have PE in India will not attract s.206AB. However, if the NR payee has PE in India, then even payments like interest, dividend, royalty, FTS and capital gains will attract higher TDS even if such payments are not connected to PE in India.

This puts onerous burden on the payer to verify whether the NR has PE in India. In case of interest, dividend, royalty, FTS and capital gains, the payer takes ‘No PE’ declaration from the NR payee only if the NR payee wishes to avail treaty benefit. Therefore, if tax is to be deducted at rates provided in the Act without availing treaty benefit, no such declaration is taken. Thus, s.206AB casts additional burden on the payers to verify existence of PE even where no treaty benefit is availed.

Recommendations:

TDS on dividend payouts by listed companies which may fall under various sections of the Income Tax Act such as section 194, 195, 196D etc., should be excluded from the ambit of this section considering the practical difficulties for the listed companies.
Further, there is a separate SFT reporting requirement for the dividend payouts under Rule 114E(5A) by which Tax Department will be in possession of all the information related to dividend payouts and can be easily made use of by the Tax Department.
A relaxation from deduction of tax at a higher rate u/s. 206AB may be provided in case of payments like interest, dividend, royalty, FTS and capital gains even if the NR payee has PE in India. It may be noted that these payments are provided relaxation from application of higher TDS rate u/s. 206AA read with Rule 37BC of the Income-tax Rules, 1962 in case PAN is not available. Similar relaxation may be provided from applicability of s.206AB.

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		Assessment related issues
25.	**Section 139(5) & Section 239 – TDS credits / additional TDS credit claim**	**Rationale** ➢ As per Section 139(5), a return cannot be revised before 3 months prior to the end of relevant assessment 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.
26.	**Disclosure in New Income Tax Return Forms**	**Rationale** ➢ The CBDT vide notification No. 14/2012, Dated: March 28, 2012 has prescribed the Income Tax Return forms - wherein a resident individual has to make additional disclosures if he holds any assets located outside India or has a signing authority in a bank account located outside India.

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		Issue: ➢ Normally a company operates its bank account through their employees who are given the signing authority. The effect of the above notification is that even if an individual has a signing authority to operate company's bank account located outside India, he is required to disclose these bank accounts in his individual Income Tax Return. This creates hardship for those individuals who merely operate bank accounts on behalf of the company. In the current scenario of globalization, it is very likely that the employees would be authorized to sign the bank accounts opened in overseas countries. **Recommendation:** ➢ In view of the above, it is recommended that the bank accounts where employee is a signatory on behalf of employer may be required to be disclosed separately to make it clear that the employee merely acts in fiduciary capacity as signing authority for the employer and the funds in such bank account do not belong to the employee. The name of employer (or client of employer) may also be required to be disclosed.
27.	**Section 139 (read with Rule 12)/Section 92E read with Rule 10E [ITR and Form 3CEB] – No scope of Disclosure in ITR and Form 3CEB**	**Rationale:** ➢ The current format of electronic Income Tax Return (ITR) and electronic Form 3CEB (TP Certificate) do not provide any scope for the taxpayer/TP Auditor to include separate voluntary disclosure statements/ remarks. ➢ The assessee at times wishes to voluntarily disclose certain items or tax positions for bonafide reasons to avoid any potential penalty exposure. **Recommendation:** ➢ It is requested to modify the formats of electronic Income Tax Return (ITR) and electronic Form 3CEB (TP Certificate) to enable the taxpayer/TP Auditor to include separate disclosure statements / remarks.

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28.	**Section 240/245 - Refunds arising out of Order giving effect to Order of ITAT/CIT-A**	**Rationale:** ➢ In case any Demand is paid by an assessee against Order issued by TDS Officer for alleged short deduction/ deposit of TDS and subsequently the Appellate Authority decides the Appeal (filed by the assessee against the said Order) in favour of the assessee based on which the Appeal Effect/Refund Order is passed by the TDS Officer, the assessee then has to file online Refund Application by giving online declaration as to whether there is any Outstanding Demand under any TAN/PAN of the assessee company; ➢ Incase there is outstanding demand under PAN (even if such demands are stayed by the Appellate Tribunal), the TDS Officer does not grant cash refund and also cannot adjust such TAN Refund against PAN Demand u/s 245 due to constraint in Department's IT system to adjust TAN Refund against PAN Demand. ➢ Such refunds are held up by the tax department and the same are neither granted in cash to the assessee company nor adjusted u/s 245 against PAN Demand **Recommendation:** ➢ It is requested to make necessary system changes in the Department's IT system so as to either enable the TDS Officer to adjust TDS/TAN Refund against PAN Demand of the assessee company u/s 245 OR grant cash refund to the assessee
29.	**Section 220(2) - Interest recovery without passing any Speaking/Appealable Order**	**Rationale:** ➢ In the status of Outstanding Demands under the Income Tax e-filing portal, CPC also updates separate demand amounts as payable u/s 220(2) without issuing any separate Speaking Order and separate Demand Notice u/s 156 to the assessee; ➢ Also, such Demand Amounts u/s 220(2) are recovered by CPC from the Refunds arising out of Intimation u/s 143(1) processed by CPC for other year.

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		➢ By not issuing any separate speaking Order along with separate Demand Notice u/s 156 for such separate Demand Amounts u/s 220(2) updated on e-filing portal by CPC, the assessee is deprived of filing any Appeal against such Demand in absence of any Appealable Order, which is unjustified. **Recommendation:** ➢ It is requested to make suitable procedure so that separate Demands are not directly updated by CPC on the e-filing portal and such Demands u/s 220(2) are raised only by the jurisdictional Assessing Officer by way of issuing separate Appealable/Speaking Orders along with separate Demand Notice u/s 156
30.	**CPC processing**	**Rationale:** ➢ While processing tax returns, there are various discrepancies being raised by the system. Even if proper reply is filed by the assessee, such discrepancies are not removed. For example, a company engaged in manufacture of goods is not allowed depreciation on power plant assets on SLM basis on the ground that in the column of business, power generation is not stated. Power is intermediate product captively used for manufacture of goods. CPC ignores the explanation of the assessee and denies depreciation allowance on SLM basis. ➢ The only option left with the assessee is to file appeal and apply for stay of demand. **Recommendation:** ➢ CPC need to be prompt in making changes in the system based on explanation given by the assessee. Not attending the system issues on time results in increase of work for assessee and Department. ➢ CPC should not process returns in such cases and transfer the proceedings to the AO for action.

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31.	**Section 43B - Expense provisions disallowed in earlier year(s) cannot be taxed again in subsequent year when such provisions are reversed and credited to P/L Account – changes required in Tax Audit Report utility**	**Rationale:** ➢ Expense Provisions/Liabilities disallowed u/s 43B in earlier years • are subsequently allowed • the year in which the same are actually paid, OR • are not taxed again in the year in which the same are reversed and credited to Profit & Loss Account ➢ However, against such Expense Provisions/Liabilities disallowed u/s 43B in the earlier years, the Tax Auditors have the option in the Tax Audit 3CD Utility under clause 26(i)(A), to mention only (a) the amounts paid and (b) the amounts not paid. ➢ There is no separate option for the Tax Auditors to report “the amounts which have been reversed and credited to Profit & Loss Account” ➢ Generally, such Provisions/Liability amounts reversed and credited to Profit & Loss Account are reported by the Tax Auditors in the 3CD Utility under “Amounts not paid” with the remarks “Reversed and Credited to Profit & Loss Account” ➢ Accordingly the assessee in the Computation of Income Tax Return computes the Taxable Income by reducing the same from PBT; however in the 143(1) Intimation, the CPC does not reduce the same from PBT while computing the Assessed Taxable Income since the same are reported by the Tax Auditors under “Not paid” without considering the Remarks of the Tax Auditor “Reversed and Credited to Profit & Loss Account”; **Recommendation:** ➢ It is requested to make necessary modifications in the 3CD Utility by inserting another option “<u>Amounts Reversed and Credited to Profit and Loss Account</u>” under clause 26(i)(A) so that the Tax Auditors report such amounts under this option instead of reporting under “<u>Amounts not paid</u>” and accordingly the CPC should also

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		consider the same in computing assessed Taxable income by reducing from PBT while issuing the intimation Order u/s 143(1).
32.	**Clause 34(a) of Form 3CD (Expenses as per P/L vis-a-vis TDS against same)**	**Rationale**: ➢ With the introduction of Sections 194-Q [w.e.f. 1.7.2021] and 206C(1H) [w.e.f. 1.10.2020], almost all the purchase/sale transactions of a company are captured in the TDS/TCS Returns filed by the company as well as by the supplier/customer. ➢ Reporting the said transactions again under Clause 34(a) of Form 3CD may lead to unnecessary duplication of the activities on the part of the assessee. ➢ Moreover, ICAI Guidance Note on Tax Audit recommends maintenance of Reconciliation of the TDS/TCS Transactions vis-à-vis Books of Accounts for the purposes of Tax Audit of Clause 34(a) of the Form 3CD. ➢ It will be a huge daunting task for the large companies carrying on large volumes of purchase & sale transactions with multiple business complexities to arrange and maintain such reconciliations. **Recommendation**: ➢ Clause 34(a) of Form 3CD may be deleted for the convenience of the assessee
33.	**Section 41(1) - Expense provisions disallowed in earlier year(s) cannot be taxed again in subsequent year when such provisions are reversed and credited to P/L Account- changes required in Tax Audit Report utility**	**Rationale:** ➢ Section 41(1) has been incorporated in the Act to cover a particular fact/situation. This Section applies where a trading liability was allowed as a deduction in earlier years in computing the business income of the assessee and the assessee has obtained a benefit in respect of such trading liability in later year by way of remission or cessation of the liability. In such a case, the section says that whatever benefit has arisen to the assessee in the later year by way of remission of the liability will be brought to tax in that year. The principle behind the section is to ensure that the assessee may not get way with a double benefit once by way of deduction in an earlier assessment year and again by not being taxed on the benefit received by him in a later year with reference to the liability earlier allowed as a deduction.

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		➢ The tax auditor has to mention in Clause 25 of Form 3CD all such profits chargeable to tax u/s 41 irrespective of the fact whether the relevant amounts have been credited to Profit & Loss Account or not ➢ Once an Expense is offered/surrendered for taxation in one year cannot be disallowed again in subsequent year; hence expense provisions made in books which have been disallowed / offered / surrendered for taxation in one year should not be taxed again in the subsequent year when such provisions are actually utilized or written back and credited to Profit & Loss Account and therefore such reversal of provisions by credit to Profit & Loss Account cannot be taxed u/s 41(1). **Recommendation:** It is requested to: ➢ incorporate separate sections so that the expenses (mainly provisions made in books) which have been disallowed/offered/surrendered for taxation in one year should not be taxed again in the subsequent year when such provisions are written back and credited to Profit & Loss Account and accordingly to be reduced from Book PBT to compute the Taxable Income ➢ to incorporate specific clause in Form 3CD for the tax auditors to specify such amounts which have been actually utilized or written back and credited to Profit & Loss Account ➢ The principle behind the aforesaid proposal is to ensure that the assesses are not subjected to double taxation
34.	**Section 199(3) read with Rule 37BA(3) - Credit for TDS Deducted in earlier year to be allowed in the year in which the corresponding Income is offered to tax as per TDS Credit brought forward from earlier year and reported in ITR filed**	**Rationale:** ➢ TDS Credit as per 26AS can be availed by assessee in the year in which corresponding income is offered to tax; ➢ Accordingly, if the corresponding income is not offered to tax in Year 1, the assessee has to separately report the “TDS Credit amount carried forward to Year 2” under the relevant column of the TDS Schedule in ITR filed for Year 1. If that corresponding income is offered to tax in Year 2, the assessee has to separately report the “TDS Credit amount brought forward from Year 1” under the relevant column of the TDS Schedule in ITR filed for Year 2

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		➢ However, CPC while processing Intimation Order u/s 143(1) for Year 2 do not allow such TDS Credit Amount brought forward from earlier year and reported in the ITR filed for Year 2 by the assessee. ➢ Since the CPC while processing Intimation Order u/s 143(1) do not allow the TDS Credit Amount brought forward from earlier year and reported in the ITR filed by the assessee, the refunds granted by CPC is less than the Refund claimed as per ITR filed by the assessee. **Recommendation:** ➢ It is requested to make suitable process in place so that the CPC while processing Intimation Order u/s 143(1) considers the TDS Credit Amount reported in the ITR filed by the assessee as "brought forward from earlier year" and allows the same.
35.	**Section 139 read with Rule 12- Details of audited financials required to be filled-up in ITR even when audited financials forms a part of Form 3CD filed**	**Rationale:** ➢ In the existing Return Form (ITR-6), the tax payer have to fill up lot of information/details (viz. Balance Sheet, Profit/Loss A/C, Income Tax Depreciation Details, etc. etc.) which are already furnished as a part of the Tax Audit Report electronically filed by the Tax Auditor prior to filing of ITR-6 by the tax payer. ➢ The format is also not in line with the format of financial statements prescribed under the Corporate Law. For example, the ITR-6 requires a company to give trading account and P&L account separately. Such separate accounts are not prepared for financial reporting. In case of large multi divisional and multi-location entities it is huge task to prepare. In respect of certain cost, granule information is required which is not prepared in normal way. There is also no option to upload notes and explanation for position taken. ➢ Separately, inspite of filing such elaborate Return in ITR-6, the taxpayers are asked by the Assessing Officers (during Assessment) to furnish an abridged Tax Computation sheet in one/two-page format. ➢ Once the details relating to audited Accounts/Financials are already furnished/e-filed as a part of the Tax Audit Report, furnishing of similar details in the ITR-6 again results into duplication and time consuming.

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		Recommendation: We request for the following modification in the Income Tax Return (ITR-6) : ➢ Taxpayer (who have duly filed the Tax Audit Report u/s 44AB) may not be required to fill up all those details (Balance Sheet, Profit & Loss Account, Income Tax Depreciation, etc.) again in the Return Form, which are already there in the Tax Audit Report, to avoid duplication and save on time/complexities ➢ The Return form may be designed in a simple format so that the tax payer's may only fill up the Profits as per Books, one each line item for each of the Allowances / Additions / Disallowances / Exemptions to arrive at the Taxable Income instead of filling up the elaborate/complex/lengthy details in various sections/sheets of the existing Return Form. ➢ Options may be even given to the taxpayer to upload the audited Accounts [Balance Sheet and Profit/Loss Account] as separate attachment, if required, on the e-filing portal at the time of electronic filing of Return Form. This will also enable the Assessing Officers to extract/download their desired abridged and simple Tax Computation in one/two-page format as well as the audited Accounts.
36.	**Section 140(c) - Signing of Returns/Appeals**	**Rationale:** ➢ The company's Income Tax Returns and Appeal before ITAT and CIT-A are required to be signed by the Managing Director or any other director (only in case Managing Director is not available for unavoidable reasons) as per Rule 45(3) and rule 47(1) of the Income Tax Rules read with section 140 (c) of the Income Tax Act. ➢ In the Finance Act 2020, necessary amendments have been made in Section 140 (c) empowering the Board to specify by rules any other authorised person to sign the aforesaid Returns/Appeals ➢ In case of Indirect Taxes, the company's Returns can be signed by any authorised signatory of the company. ➢ While s.140(c) permits the CBDT to prescribe 'other person' who can sign return where managing director is unable to verify the return for unavoidable reason or where there is no managing director, the CBDT has so far

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		notified only interim resolution professional, resolution professional or liquidator appointed under IBC as persons authorised to verify return or appear as authorised representative (Refer CBDT Notification No. 93/2021). **Recommendation:** ➢ We therefore request the Board to issue necessary Notification/Circular to enable any signatory, who is authorised by way of a Resolution passed by the Board of Directors of the company, to sign the Returns, Appeals, and all other documents under the Income Tax Act so as to give effect to the amendments in Section 140(c) made vide the Finance Act 2020 and also to align with the rules prescribed under Indirect Taxes.
37.	**Rule 26, Rule 128 requiring SBI TT Buy rate for conversion**	**Rationale:** ➢ In case of foreign remittance or claim of foreign tax credit, the relevant income tax rules prescribe use of SBI TT Buy Rate for the purpose of conversion ➢ SBI TT Buy Rates are not easily available and again becomes an onerous compliance. SBI charges fees for giving this information. ➢ As the foreign remittances from India usually take place against well-accepted foreign currencies, the exchanges rates don't differ much within payment banks, RBI or SBI **Recommendation:** ➢ Rules should be suitably amended to allow use of foreign exchange rates for well-traded currencies at the transaction value itself or an average exchange rate prevailing on the date of transaction or relevant month.

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		International taxation
38.	Special transitional provision for POEM resident companies (S. 115JH)	**Rationale**/ **Recommendation**: ➢ **Requirement for increase in threshold of turnover for POEM evaluation:** ➢ The CBDT issued a Circular No. 8/2017 dated 23 February 2017, prescribing a threshold of INR 50 Cr of turnover or gross receipts in a particular financial year for application of the POEM guidelines to a foreign company. However, this threshold is too low for a foreign company. ➢ It is recommended that the thresholds are increased so that small and medium sized foreign companies or the ones which have marginal business from India should not fall within the garb of POEM to avoid undue burden of compliance. ➢ S.115JH to grant power to the Government of India to notify certain exceptions and adaptations to the existing provisions of the Act in relation to company which is treated as POEM resident of India. A Final Notification No.29/2018 dated 22 June 2018 was issued, to prescribe certain exceptions, modifications or adaptations, subject to which provisions of the Act will apply to a POEM resident foreign company which has raised certain concerns. ➢ **Due date of filing of return of income (ROI) in case of a foreign company which has hitherto not been assessed as a resident of India** ➢ If the foreign company which has not been assessed as a resident in any earlier year is considered as POEM resident pursuant to a finding u/s. 6(3), followed by completion of assessment proceedings, any ROI, furnished by foreign company for any previous year which ended before the date of completion of proceedings may be considered to have been furnished within the due date applicable to the company u/s. 139(1) of the Act, if such returns are furnished within 180 days from the date on which notice for furnishing ROI is received by the company for that previous year.

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		➢ Further, a POEM resident foreign company was unable to file ROI for tax year 2016-17 and 2017-18 as the Notification under S.115JH was issued on 22 June 2018, which is after the due date for furnishing ROI for the concerned tax years. Thus, the CBDT should introduce a one-time scheme for all first time POEM resident companies for filing ROI voluntarily for FY 2016-17 to FY 2018-19. The CBDT should prescribe a prospective and liberal due date u/s.139(1) to encourage voluntary compliance of POEM provision. ➢ The CBDT should specifically provide that ROI filed as per the extended due date is in compliance with s.139(1) of ITA and unintended consequences of interest (Section 234A, 234B, 234C, etc.), late fee, penalty shall not apply. ➢ **Compliance obligations: Tax audit report, transfer pricing report, ICDS etc.** ➢ Consistent with the philosophy and spirit of s.115JH, the foreign company should be relieved of all procedural compliances/obligations such as obtaining of tax audit report u/s. 44AB or TP documentation and TP audit report compliance, etc. ➢ If at all the obligation is imposed, the compliance obligation ought to take into account statutory obligations in the country of its incorporation about maintenance of books of account and supporting records. The company should not be expected to do those compliances which are not capable of being fulfilled having regard to norms of maintenance of books and records as per statutory requirements in the country of its incorporation. ➢ Without prejudice to the above, following may be considered: ▪ **Transfer pricing compliances** • With wide reach of BEPS projects and inclusion of meaningful countries in BEPS agenda, the requirements may be relieved in case of a foreign company which has been subject to transfer pricing and documentation related compliances in its home country, for any past year upto the year of completion of assessment proceedings u/s.6(3) of ITA.

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		• On an assumption that the foreign company is not eligible for dispensation as aforesaid, there should be *de minimis* threshold to exclude entities from purview of Chapter X for the previous years where the turnover of the company as per books of account in accordance with the accounting standards applicable in the country where it is assessed to tax is less than INR 250 Cr. • For companies not covered above, the time limit for compliance of obligation u/s. 92D in respect of maintenance of documentation and information and audit report u/s. 92E should be extended along the lines of time frame available for filing of ROI as stated above. ➢ **Country by Country reporting (CbCR) compliance** ▪ The compliance done by MNE Group under CbCR may be accepted to be due compliance in terms of s. 286 of ITA. ▪ If the group is not covered by CbCR for any reason for any of the years, S. 286 should be made inapplicable for all the previous year up to the end of previous year in which the company is upheld to be POEM resident for the first time. ➢ **Non-applicability of ICDS provisions to first time POEM resident foreign companies:** POEM companies should be relieved from applicability of ICDS for computation of income in order to reduce compliance burden. ➢ Consistent with philosophy of nationality non-discrimination provision in almost all comprehensive treaties which India has signed, the benefit of concession, exemption or relief which is available to an Indian company should, equally be extended to foreign company triggering POEM residency. Illustratively, this may include benefit of concessional rate of tax rate u/s. 115BBD in respect of dividend received from specified foreign company, capital gains exemption for transfer inter se between holding and subsidiary company covered by S.47(iv)/(v) etc.

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		➢ Alternatively, the CBDT may consider adopting an approach whereby foreign companies would be taxed in India at a prescribed percentage of their book profits determined as per laws of foreign jurisdiction. Such approach shall relieve the first time POEM resident foreign company from tedious compliances under ITA. ➢ **General point on notification:** ➢ For providing abundant clarity, each of the guidelines may be explained by means of a suitable illustration. We believe that, but for illustration, Guidelines may be prone to varying interpretations and may become a source of litigation. ➢ **Brought forward losses and unabsorbed depreciation** ➢ In case of a foreign company assessed to tax in the foreign jurisdiction, Notification provides that brought forward loss and unabsorbed depreciation as per the tax record shall be determined year wise on the 1st day of the previous year and shall be deemed as losses or unabsorbed depreciation brought forward on the 1st day and shall be allowed to be set off and carried forward as per provisions of ITA. ➢ Further, for this purpose foreign jurisdiction may be considered as referring to the jurisdiction in which foreign company is taxed as a resident on comprehensive basis instead of considering jurisdiction of incorporation of the company. This will avert any issues that may arise in case of companies which are assessed to tax in more than one jurisdiction. ➢ We have understood this to mean that the losses which are appearing on the tax record will be presumed to be losses of the previous year for which assessment as a resident is made in India. ➢ It needs to be clarified specifically that the benefit of carry forward will be allowed notwithstanding that there may have been change in shareholding of any past year contrary to s. 79 and notwithstanding that ROI for year of residence may have been furnished beyond due date.

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		➢ Data as per assessment records or as per books of accounts of overseas jurisdiction will be accepted as valid and no independent evaluation will be done whether such ascertainment is in accordance with tax laws of overseas jurisdiction. ➢ It may be noted that the scheme of determination and characterization of losses as per tax/books of accounts of Foreign company can be different under ITA and under foreign law. For instance, short term capital loss and long-term capital loss has different tax treatment under ITA based on holding period whereas foreign jurisdiction may not have any such distinction or, may have different holding period of asset. Further, it is unclear on how the balance of loss appearing in books of accounts may be attributed to different types of loss incurred under each head of income and to unabsorbed depreciation. Thus, it is recommended that an appropriate mechanism (with suitable illustrations) for determining the nature of losses incurred in foreign jurisdiction may be notified by the CBDT to enable transition of such losses and unabsorbed depreciation. For instance, clarity may be provided with respect to bifurcation of losses into short term and long-term capital loss. ➢ It may be clarified that loss so quantified will be admissible irrespective of whether, as per Indian law, loss would have been admissible subject to certain conditions – say, for example, furnishing of return of income in time, change in shareholding, etc. ➢ **Non-applicability of MAT provisions to first time POEM resident foreign companies:** ➢ Presently, provisions of MAT are not applicable to a foreign company if the company is a resident of other country with which India has DTAA and the company does not have PE in India as per the applicable DTAA provisions. In case where there is no DTAA, the foreign company is a resident of other country and the company is not required to seek any registration under laws relating to company. ➢ Generally, foreign company is not required to maintain books of accounts in India and prepare financial statements under provisions of the Companies Act, 2013. Thus, a foreign company may not have financial statements which are prepared under the Companies Act, 2013 basis which MAT provisions are applicable.

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		➢ There is no clarity whether foreign company whose residence is determined in India will get benefit of the said exclusion from MAT provisions. Thus, POEM resident foreign company should be kept outside the purview of MAT provisions. ➢ **Compliance with withholding tax provisions by first time POEM resident foreign company:** ➢ Para A(ix) of the Notification No. 29/2018 prescribes that compliance by foreign company with provisions of TDS prior to it becoming resident is considered as sufficient compliance. ➢ A literal reading of Para A(xi) appears to provide exemption/protection only up to a period when F Co was a non-resident. ➢ Reference to "prior to its becoming Indian resident" may not strictly protect transitional years in which POEM residency is determined. ➢ Reference may be drawn to the intent of the Legislature expressed in Explanatory Memorandum to FB 2016 and as also reiterated in Explanatory Circular to FA 2016. The Legislature has admitted that there is difficulty faced by first time POEM resident company in complying with provisions of TDS and its related procedure. Further, the legislature has also noted that there shall be difficulty in compliance as POEM may be determined in assessment proceedings after closure of the relevant tax year. ➢ While the legislative intent is to apply the clause to first year of POEM residency, the plain language of the clause applies to period 'prior to company becoming Indian resident and is not aligned with the object. ➢ In order to avoid unintended litigation or ambiguity, CBDT should simplify that the language of Para A(xi) to state that the compliance of TDS provisions by foreign company in capacity of foreign entity shall be considered as sufficient compliance for the transitional year/s. It should also be expressly clarified that provisions of S.40(a)(i)/(ia) or 40(a)(iii) will have no applicability during such transitional period and the consequences of levy of interest and penalty would also not apply during transitional year/s.

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		➢ **Clarity on Para D of the Notification dated 22 June 2018** ➢ Para D of the Notification prescribes that any 'transaction' of F Co with any other person or entity shall remain unaltered even if there is change in residential status of F Co. The exact issue addressed by the said clause is unclear. It is also not clear the context in which Para D will operate and parties to which it wants to protect. ➢ The CBDT should amend the language of Para D in order to clarify the exact intent of introduction of Para D and appropriate illustrations can be provided for understanding the scope of the provisions. ➢ **Applicable exchange rate for conversion of balance sheet of foreign company** ➢ Rule 115 provides exchange rate for conversion of income arising in foreign currency for the purposes of computation of income under ITA. Notification No.29/2018 also prescribes for conversion of value expressed in foreign currency into INR in accordance with provisions of Rule 115. It may be noted that Rule 115 primarily applies to 'income' computed as per provisions of ITA which accrues or arises in foreign currency. ➢ While F Co may prepare P&L and balance sheet as per foreign accounting standards, the F Co may be required to convert such P&L and balance sheet into INR for reporting purposes in India. ➢ As Rule 115 is not applicable to items of balance sheet, it is suggested that CBDT should provide for a conversion mechanism for converting transactions recorded in foreign company balance sheet into INR. ➢ **Determining computation of income for intervening year of POEM residency** ➢ The language of S.115JH(1) provides that exception, modifications and adaptations (EMAs) notified under Notification No.29/2018 are applicable only for the previous year in which the F Co becomes POEM resident for the first time in India. ➢ Consider a situation where POEM is determined in India for a foreign company in Year 1 and 2. In Year 3,

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		such foreign company is thereafter regarded a Non-Resident whose POEM is outside India. However, in Year 4, POEM of such POEM is once again determined to be in India. ➢ The present language of S.115JH(1) does not cover strictly Year 4 in the illustration. There could therefore be challenge in computation of income of Year 4 in the hands of POEM resident F Co. Also, the Notification does not address such type of scenario. The CBDT should provide clarity on manner of computation of income in such scenario.
39.	**Foreign Tax Credit by employer in respect of taxes paid in overseas countries (S.192)**	**Rationale**: ➢ In the current scenario of globalization, substantial cross border movement of Indian employees is happening which results in double taxation of salaries of such mobile employees. The salaries are taxed in the home (India) country and in the host (country of deputation) country. This becomes a serious cash flow issue for such doubly taxed employee's especially since the employees can seek tax credit for the taxes paid in the overseas jurisdictions u/s 90/91 of the Act by filing tax returns in India. This leads to the avoidable administrative burden on the Department without any collection of additional revenue ➢ The principle that employers can consider foreign tax credit available to employees while discharging salary TDS obligation has been accepted by AAR in a few rulings. **Recommendation**: ➢ It needs to be clarified that the employer can allow credit at source in respect of foreign taxes paid by the employees overseas based on the foreign tax credit rules / clarifications.
40.	**Foreign Tax Credit on aggregate basis (Rule 128)**	**Rationale**: ➢ An option is available to the assessee to apply either the provisions of domestic law or of the treaty law, whichever is more beneficial to him, in respect of countries with which India has concluded DTAA. The CBDT has notified FTC rules according to which the tax payer is required to compute the FTC.

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		➢ Indian MNCs have global operations with permanent establishments in many countries. The present method of computing FTC for each country by referring to the relevant treaty is onerous for both the assessees as well as the tax administration in view of the fact that each tax treaty is a code in itself and has to be contextually interpreted. **Recommendation:** ➢ The domestic law should provide for a simpler method of granting FTC by aggregating all foreign sourced incomes. The taxes paid in foreign country should be allowed as credit on aggregate basis against the India tax liability.
41.	**Carry-forward of excess Foreign Tax Credit (Rule 128)**	**Rationale**: ➢ The FTC is restricted to the tax liability of the assessee in India. In the following situations, the assessee is not granted full credit for the foreign taxes paid: ➢ The working formula prescribed in Section 91 or the relevant tax treaty is not yielding optimal results by way of granting FTC. ➢ Where the assessee incurs a loss on its worldwide income for any assessment year, no FTC is granted. ➢ Where the Indian tax payable on the worldwide income is lower than the foreign tax paid, FTC is partially available. ➢ The method of computing the income in the foreign countries is different from the method of computing the income under the Income Tax Act. ➢ The time period within which tax credit should be claimed and allowed is not defined. Owing to differences in laws and practices in tax administration in foreign jurisdictions, the tax liability for any financial year could get determined much after the conclusion of assessment for the same year in India.

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		Recommendation: ➢ Assessees need to be allowed carry forward of the "unutilized" foreign tax credit for 5 years. It is recommended to suitably introduce the provisions to allow such relief which is due to the assessee. Accordingly, rule for FTC should provide for the carry forward of the FTC.
42.	**Tax Residency Certificate**	**Rationale**: ➢ Many of the India based companies execute cross border purchase and/or sale transactions. In case of purchase transactions, for getting the benefit of lower/nil rate of withholding of tax under the provisions of applicable Double Tax Avoidance Agreement signed with the payee's country, the Indian companies are required to provide Tax Residency Certificate/s (TRC) issued by the Income Tax Department. ➢ Procuring TRC is a time-consuming process which is an administrative burden both for the industry as well as for the Department. **Recommendation**: ➢ The entire process of issuing the TRC needs to be digitized which will enable companies to download the digitally signed Tax Residency Certificate from Department's website which may be linked to the filing of the Tax Return by the companies.
43.	**Tax Residency Certificates by Foreign Vendors**	**Rationale**: ➢ A non-resident taxpayer, to whom a DTAA applies, is not entitled to claim any relief under such DTAA unless a certificate of his being a resident in any country outside India is obtained by him from the Government of that country. ➢ Many countries do not have a provision for issue of TRC until the end of the relevant financial year. In such cases, it is not possible for the taxpayer to obtain a TRC within the relevant financial year itself on real time basis, which actually creates practical difficulties for the Indian payer and foreign payees.

<table>
<tr><th>Sl no.</th><th>Subject</th><th>Comments / Recommendations</th></tr>
<tr><td></td><td></td><td>Recommendation:
➢ In such cases, TRC of previous year or tax return etc. along with a declaration that there is no change in circumstances resulting in change of residential status during the current financial year, should be allowed.</td></tr>
<tr><td colspan="3">Issues relating to Equalisation Levy on E-commerce transactions</td></tr>
<tr><td>44.</td><td>Clarify explicitly that EL is a temporary measure while global consensus on taxation of e-commerce is achieved under BEPS 2.0 Pillar One. Accordingly, once India adopts direct tax measures pursuant to OECD BEPS agenda in which India is participating actively and on equal footing, EL will be abolished</td><td>➢ Background
➢ As part of Action Plan 1 of BEPS and in furtherance of global efforts, it is expected that concerns arising from new form of digital businesses particularly in the area of nexus, data and characterisation will be addressed. As part of BEPS 2.0 Pillar 1, a framework has been agreed and work is in progress to allocate taxing rights to market jurisdictions.
➢ The inclusive framework for Pillar 1 and Pillar 2 have already been agreed upon and announced by OECD in July 2021. More detailed reports on specific aspects of both Pillars are expected by end of October 2021. It is understood that each country will withdraw its unilateral Digital Service Tax once this framework is legislatively enacted. 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 without even the effective opportunity of eliminating such multi taxation.
➢ Recognising India's commitment to global consensus, the provisions of Significant Economic Presence as a nexus for taxing business profits has been deferred by Finance Act 2020 to 1 April 2021 from the earlier scheduled date of 1 April 2020.
➢ Recommendation
➢ In tandem with the above spirit, we understand that EL is a transit measure and will be abolished once global consensus is achieved. An explicit statement to the above effect will send assuring signals to the investors particularly as the scope of EL as now applicable is fairly wide.</td></tr>
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45.	**Need to provide for Explanatory Memorandum and object and purpose of the amendment**	➢ **Background and Issue** ➢ ESS EL came to be inserted under unprecedented circumstances. Customary Explanatory Memorandum and object statement supporting the levy are not available. ➢ The language of the provisions as can be seen from the subsequent paras are susceptible to alternative interpretations and are likely to create significant uncertainty on scope and magnitude of the levy. ➢ However, as per Press Reports, the Revenue Secretary has stated that the law is very clear and there is no need to issue any clarifications. Such attitude is quite unfortunate and contrary to the consultative process, transparency in tax administration and spirit of taxpayer's charter adopted by the Government. It is contrary to best practices adopted by tax administrations in developed countries. ➢ Since ESS EL is likely to be cost of doing business without ability of claiming credit in home country, it is likely to have significant impact for the businesses where the margins are slender, or the businesses are operating under losses. Since the levy can have significant impact on businesses particularly during the current scenario, it is utmost advisable for the businesses to have clarity on scope of their obligation and cost. ➢ **Recommendation** ➢ Hence, it is urged that a guidance or a clarificatory statement be issued which will reflect the intention of Government at this juncture and also serve as an aid to the industry stakeholders and the consultants/ advisers while interpreting the new provisions. ➢ Since the levy has already completed more than a year and further clarificatory amendments were made by Finance Act 2021, the clarifications may be provided at the earliest.

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46.	**Clarify that for each of the e-commerce operator, consideration excludes statutory levies such as GST, service tax or alike**	➢ **Background and Issue** ➢ ESS EL is levied with reference to the amount of consideration received or receivable by e-commerce operator from the specified services. As stated above, consideration is the amount which a person receives in lieu of his discharge of contractual obligations. It is a part of quid pro quo of the contract. ➢ In the context of various TDS provisions, CBDT has clarified that consideration for a given service is to be calculated without taking into account statutory levies which are collected for handing over to the Government. Refer CBDT Circular No. 1/2014 for service tax on rent and professional services and CBDT Circular No. 23/2017 on GST. ➢ **Recommendation** ➢ In view of the foregoing, 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.
47.	**Explicitly clarify that ESS EL is to be levied with reference to actual consideration received and accordingly, consideration attributable to sales returns or credit notes given to the customers on account of claims will be deducted to determine the base which will be subject to ESS EL**	➢ **Background and Issue** ➢ In case of sales of goods, 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. ➢ TCS under CGST Act 2017 also calculated with reference to net value of taxable supplies” after reducing he aggregate value of taxable supplies returned to the suppliers during the month. ➢ **Recommendation** ➢ Accordingly, without prejudice to our preceding representation, it would be fair to restrict levy to consideration towards net sales. 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 FA 2016. The fact that the related sale may pertain to earlier quarter may not be

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		relevant consideration while granting reduction so long as such sale was considered for ESS EL in the earlier quarter.
48.	**For ESS EL, scope of "goods" and "services" to exclude financial instruments, insurance, forex derivatives, actionable claims, shares, securities, bonds, debentures, etc.**	➢ **Background 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. It is not clear whether the definition of 'goods' has to be borrowed from Sale of Goods Act which includes shares and stocks but excludes actionable claims & money or definitions under CGST Act 2017 which exclude share, securities, money, actionable claims. ➢ This creates ambiguity on items like shares, securities, derivatives, insurance, actionable claims, foreign currency, etc. ➢ **Recommendation** ➢ Thus, it is recommended to introduce suitable definition or clarify through Guidelines to exclude certain items like shares, securities, money, actionable claims, foreign currency, etc. from scope of "goods" and "services".
49.	**Guidance and clarity on determination of use of IP address in India**	➢ As per s.165A(1), a person using IP address in India is reckoned as a proxy to trigger ESS EL. ➢ 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. ➢ Thus, it is imperative that a guidance about determination of IP address is provided

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50.	**Where NR e-commerce operator has paid EL @2% and claimed exemption u/s. 10(50) but Tax Department disputes it to be royalty/FTS liable to income tax @ 10%, allow adjustment of EL tax as credit or set off against the income tax payable in India by non-resident in case of litigation on such characterisation**	➢ **Background and Issue** ➢ There can be overlap between provisions of FA 2016 and the provisions of ITA. Further, there can also be a situation where the NR e-commerce operator pays EL on the basis that there exists no permanent establishment (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). ➢ 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? Whether e-commerce operator can claim a refund of the same or whether the EL tax can be adjusted/set off against the tax payable under the ITA? ➢ **Recommendation** ➢ It is prayed 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.
51.	**Compliance burden on NR e-commerce operator to be eased**	➢ **Background and Issue** ➢ Under the ESS EL provisions, the compliance burden is cast on the NR e-commerce operator as compared to the EL provisions of 2016, wherein the compliance burden was cast on the payer (being resident in India or NR having a PE in India). ➢ The scope of ESS EL is very wide and charge is created even in cases where the consumption of goods/ services is pursuant to an IP address located in India. ➢ Considering that the levy is broad and can include NRs who do not have nexus in terms of business in India, imposing compliance burden in terms of filing quarterly returns, obtaining PAN, digital signatures certificates

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		(DSC), etc. can go against the basic principles of ease of doing business in India and can have an impact on how India is pursued by non-residents. ➢ **Recommendation** ➢ It is prayed that a mechanism can be adopted for compliance whereby an authorised representative in India can do the compliance without saddling the NR with compliances in terms of PAN, DSC, returns etc. or there can also be a mechanism wherein certain thresholds are specified which exempts the NR from undertaking compliances in India on similar lines as found under ITA, say S.115A wherein return obligation is done away with subject to conditions.
		Transfer Pricing
52.	**Amendments to rules**	10F to 10TG | 92CB and 92CC | Pursuant to expansion of scope of safe harbour and APA provisions to cover income from business connection in India, the corresponding rules also require consequential amendments.
53.	**Relaxation should be specifically provided to taxpayers from doing TP documentation/ Form 3CEB where an APA is already concluded and the applicant is filing the Annual Compliance Report (ACR)**	**Rationale** ➢ Rule 10T(1) of the Rules provides that "*Mere filing of an application for an agreement under these rules shall not prevent the operation of Chapter X of the Act for determination of arms' length price under that Chapter till the agreement is entered into*." ➢ From the abovementioned rule, it is clear that mere filing of an APA application does not absolve the taxpayer from the requirement of compliances prescribed under Chapter X of the Act till the APA agreement is entered into. However, it is uncertain as to whether the Chapter X compliances relating to maintenance of Rule 10D documentation and filing of accountant's report (i.e. Form 3CEB) continue to apply to the taxpayer even after the APA agreement is entered into

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		Recommendation: ➢ Although there is no specific provision in the Act/ Rule providing an exemption to the taxpayer from maintaining documentation as per Rule 10D or filing Form 3CEB, the APA mechanism as a whole serves the purpose which was intended for such compliance requirement u/s 92D and 92E of the Act. Therefore, there is no need for the taxpayer to maintain documentation u/s 92D and file Form 3CEB u/s 92E in respect of the transactions covered under APA once the APA is signed due to the following reasons: ➢ The ALP determined under APA overrides the determination of ALP u/s 92C and 92CA of the Act ➢ APA process itself involves collection and analysis of detailed documents and information by the taxpayer to the tax authorities in respect of the covered transactions ➢ APA is binding on the taxpayer as well as the tax authority and hence the need to maintain information and other documentation/filing requirements and regular audit of the same becomes redundant ➢ The APA agreement, ACR and compliance audit, together addresses the requirements of maintaining TP documentation and filing Form 3CEB ➢ Compliance with the TP documentation requirement and filing of Form 3CEB in addition to filing ACR (as required by Rule 10-O) would lead to duplication of cost and compliance burden for the taxpayer ➢ Absence of explicit provision in the APA rules, requiring maintenance of documentation and filing Form 3CEB once the APA is signed, like in the case of Safe Harbour Rules [Rule 10TC(5)] ➢ However, in a case where the taxpayer has entered into some other transactions during the year which are not covered under the APA, it would be necessary to maintain documentation in accordance with Rule 10D in relation to such transactions and file Form 3CEB.

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54.	**Clarification in case of Transfer pricing reporting for issue of shares**	**Rationale**: ➢ Clause 16 of the Form 3CEB requires the reporting of particulars in respect of the purchase or sale of marketable securities, issue and buyback of equity share, optionally convertible/ partially convertible/ compulsorily convertible debentures/ preference shares. Bombay High Court in the case of "Vodafone India Services Pvt. Ltd. vs. UOI (Dated – 10th October 2014)" has held that Chapter X of the Income Tax Act 1961 i.e. Transfer Pricing Provision does not apply on any transaction involving issue/receipt of share capital money (including issued on premium) as no income/expense will arises from such transaction. **Recommendation**: ➢ It is suggested that clause 16 of Form No. 3CEB should be amended so as clarify that share Capital transaction is not required to be reported /justified in Form 3CEB.
55.	**Issues in Master File (MF) filing**	**Whether non-taxable transactions should be considered for evaluating MF thresholds or reporting in MF** **Rationale** ➢ The newly inserted Section 92D(1), which is applicable from AY 2020-21 and onwards, reads as under: **(1)** ***Every person:*** ***(i) who has entered into an international transaction or specified domestic transaction shall keep and maintain such information and document in respect thereof, as may be prescribed;*** ***(ii) being a constituent entity of an international group, shall keep and maintain such information and document in respect of an international group as may be prescribed.*** ➢ Person is defined under section 2(31) of the Act to include company which also includes corporates incorporated outside India i.e. foreign company. Constituent entity is also defined under section 286(9)(d) to include any

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		separate entity of an international group that is included in the consolidated financial statement of the said group for financial reporting purposes. ➢ Section 92D(4) applicable upto 1 April 2020 made a reference to Rule 10DA of the Rules for the information / documents required to be reported by the constituent entity. However, it is pertinent to note that the substituted section does not make an explicit reference to Rule 10DA. ➢ Rule 10DA also states as follows: ***"10DA. (1) Every person, being a constituent entity of an international group shall,-*** ***(i) if the consolidated group revenue of the international group, of which such person is a constituent entity, as reflected in the consolidated financial statement of the international group for the accounting year, exceeds five hundred crore rupees; and*** ***(ii) the aggregate value of international transactions,-*** ***(A) during the accounting year, as per the books of accounts, exceeds fifty crore rupees, or*** ***(B) in respect of purchase, sale, transfer, lease or use of intangible property during the accounting year, as per the books of accounts, exceeds ten crore rupees"*** ➢ Hence, on reading of above, it can be concluded that every person including foreign company which is constituent entity of the group, is required to comply with Indian Master File provisions, if it meets the threshold for Part B. Part A applies irrespective of any thresholds. **Recommendations:** ➢ Rule 10DA is prescribed under the proviso to Section 92D(1). Therefore, proviso and the rule made thereunder would need to be construed harmoniously with s. 92D(1) and it cannot be dissected from the provisions of s. 92D(1) in its interpretation.

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		➢ The circumstances prescribed for maintaining additional information/ documentation are based on the value of international transactions of that person. Hence, the international transaction referred to in Rule 10DA(1)(ii) would be the international transactions for which person prepares/ maintains documentation under s. 92D(1). ➢ To the extent a person considers the transactions as international transaction for which documentation under s. 92D(1) is required to prepared and maintained, the same needs to be considered for the purpose of Rule 10DA(1)(ii) and value as per books of accounts would need to be used for measuring the value. ➢ Further, since international transactions referred to in s. 92D(1) needs to be reported/disclosed in Form 3CEB and Form 3CEB requires disclosure of value of the international transactions as per books, practically, all international transactions reported in Form 3CEB along with value as per books reported in form would be the basis for determining whether the person is covered by Rule 10DA(1)(ii) or not. ➢ However, an alternative view to above is that although MF is prescribed as proviso to Section 92D, it has a different purpose and is not concerned with computation of income of the taxpayer under Section 92(1). Such a view may lead to coverage of "ALL" transactions under Section 92B, irrespective of same being taxable in India. This may lead to unintended outcome especially in case of foreign companies who have only purchase/sale transaction with Indian AEs or invests more than INR 50 crores, which are not taxable in India. In such case, foreign entity may not be under obligation to file tax return/maintain TP documentation under Section 92D/file Form 3CEB under Section 92E. ➢ We recommend that only international transactions which have bearing on taxability should be considered and suitable clarifications must be brought in this regard to clarify the law. This is required to be clarified by the CBDT by way of the circular or by amending the relevant Rule 10DA.

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56.	**Fast-track APAs**	**Rationale** ➢ As per the Press Release by CBDT dated 1 October 2019, a total of 300 APAs have been signed out of more than 1000 applications received in the last 5 years. ➢ Further, the Annual APA report by CBDT indicates that the unilateral APAs have taken an average of ~32 months for conclusion, which is better than the time taken in other jurisdictions such as the US. Despite the growing number of APAs which are being concluded, potential investors into India seek clarity for their investment decisions given the current level of pendency of APA applications. **Recommendation**: ➢ For the new potential investors who intend to invest into the country and who need clarity on their transfer pricing (TP) model, the government could create a parallel process of obtaining a fast-track APA solution that would aid companies with respect to their investment decisions. A six-month time frame for APA for a prospective investor, would help in furthering the 'Make in India' agenda.
57.	**Allocate more resources to Advance Pricing Agreement (APA) program to clear existing backlog and new cases arising due to Covid related impact**	**Rationale** ➢ The Advance Pricing Agreement (APA) mechanism for settlement of TP disputes was introduced in 2012 with the objective of providing much needed tax certainty to MNEs operating in India with regard to their intra-group transactions. ➢ While the program has attained success invoking significant interest with over 1000 applications being filed and over 300 APAs being signed, at the same time, it has also faced certain challenges such as augmentation of resources (which are also acknowledged by the CBDT). ➢ APAs play a significant role in enhancing ease of doing business and avoiding tax litigation. Accordingly, there is an acute need to enlarge the benefits of the program, as well as to cope with the increased burden resulting out of the COVID-19 pandemic which has caused much uncertainty on business models.

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		Recommendation ➢ At the outset, augmentation of the APA teams with appropriate number of officers having the appropriate skills, knowledge and subject matter expertise may be imperative to bring down the pendency of cases along with providing a stability of tenure to such personnel. ➢ A review may be conducted of the entire lifecycle of APA process and the process may be streamlined to improve on timelines by reducing bureaucratic delays by use of technology. For instance, video calls may be held instead of physical meetings.
58.	**Conducting virtual site visits for APA**	**Rationale** ➢ One of the vital elements in the APA process is the site visit, where the APA team visits the premises of the applicant taxpayer to understand and validate the transactions, business and operations by conducting interviews and discussing with the business/functional leaders of the organization. ➢ However, the physical site visit should not be set as a mandatory rule and the APA Authorities should consider virtual site visits based on certain criteria (risk parameters involved in the APA, the size of operations, the nature of transactions, renewal cases, etc.). ➢ Further, given the COVID-19 pandemic and the consequent travel restrictions, a physical site visit may not be possible and hence are currently not being undertaken. This has delayed the conclusion of APAs and exacerbated uncertainty for taxpayers on their transfer pricing matters. **Recommendation**: ➢ We humbly suggest the CBDT to consider permitting "E-site visit" to be conducted electronically through video conferencing. The APA team & the team from the Indian Competent Authority office (as warranted) can join a video conferencing platform for a virtual tour of the taxpayer's premises and presentation /functional interviews with the taxpayer Applicant's business personnel. The site visit that otherwise would have been done physically can be replaced with an electronic process.

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59.	**Strengthening the core APA team**	**Rationale** ➢ Currently, a huge backlog of APA cases is pending before the APA Commissioners and there are numerous APA Applications which are being filed by Applicant, thereby showing immense trust in the APA Program. The APA Program has been very successful in providing certainty on transfer pricing matters to the taxpayer. **Recommendation:** ➢ As the APA is expected to provide upfront certainty to the taxpayer with respect to its covered international transactions, it is important to ensure that the CBDT allocates more resources to the APA team and strengthens the core APA team. ➢ A dedicated APA team with adequate resources ensures speedy closure of the pending APA Applications, thereby ensuring tax certainty for the taxpayer. Also, with more entities opting for APA, the number of cases for litigation will substantially reduce, thereby reducing the tax administration cost for CBDT.
60.	**Waiver of interest under section 234B and 234C of the Act, post signing of the APA**	**Rationale** ➢ As per the provisions of Section 234B of the Act, interest is levied if there is a default in payment of advance tax resulting from a shortfall beyond 10% of the assessed tax / tax on returned income. Interest shall be payable for a period beginning from the 1st day of assessment year to the date of completion of regular assessment. ➢ As per the provisions of Section 234C of the Act, interest is levied if the payment of advance tax installments is less than the specified percentage of taxes due on returned income. ➢ In the case where the Applicant has entered into an APA with the CBDT, the interest under section 234B and section 234C of the Act should not apply, as the tax payer could neither estimate the income to be eventually assessed for such year(s) nor was there an obligation on the tax payer to deposit the advance tax on such enhanced income, which is finalised subsequent to the end of the relevant previous year. This position remains same for all the years including the years for which assessments are yet to be completed.

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		Recommendation ➢ Since the additional income pursuant to APA was not capable of being estimated / anticipated at the time when the instalments of advance tax were due during the concerned previous year, interest under section 234B and 234C of the Act should not be levied on the shortfall in payment of advance tax vis-à-vis the assessed tax on account of impossibility of performance ➢ Further, the provisions of 234B currently do not envisage a situation to modify the interest on enhancement of total income as a consequence of the order passed under Section 143(3) read with 92CD(3) of the Act. ➢ Accordingly, it is recommended to waive the interest under section 234B and section 234C arising on enhanced income pursuant to signing of the APA.
61.	**Downward adjustment in the case of BAPA/MAP**	**Rationale and Recommendation** ➢ The provisions of Section 92(3) states that TP provisions shall not apply in a case where the computation of income under sub-section (1) or sub-section (2A) or the determination of the allowance for any expense or interest under sub-section (1) or sub-section (2A) or the determination of the allowance for any expense or interest under sub-section (1) or sub-section (2A), or the determination of any cost or expense allocated or apportioned, or, as the case may be, contributed under sub-section (2) or sub-section (2A), has the effect of reducing the income chargeable to tax or increasing the loss, as the case may be, computed on the basis of entries made in the books of account in respect of the previous year in which the international transaction or specified domestic transaction was entered into. ➢ This leads to undue hardship to both resident and non-resident taxpayer, as no downward TP adjustment is allowed under the India tax laws. ➢ The objective of BAPA/MAP is to eliminate double taxation and provide economic relief/certainty to both the parties in the transaction. If downward adjustment is not allowed to the Indian taxpayer, the objective of BAPA/MAP may not be met and could result in double taxation.

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62.	**Rollbacks to be made applicable to all years and not just 4 years**	**Rationale** ➢ As per the current India TP regulations, "roll backs" in the case of unilateral/ bilateral APAs can be entered only up to 4 preceding financial years. However, a practical difficulty arises in scenarios where the taxpayer has opted for BAPA with countries such as the US which permit "rollback" for all the open previous years. Therefore, such limitation in the existing Indian TP provisions would require the taxpayer to mandatorily go for MAPs for those years which fall outside "4 years" term even though the foreign jurisdiction allows for all the open years **Recommendation**: ➢ In order to make the dispute resolution mechanisms more effective, a suitable amendment may be issued to remove the restriction to access APA rollback with other countries for all the open years. ➢ This step would benefit large number of taxpayers who have been facing administrative inconvenience due to the requirement to file simultaneous application for MAP/ BAPAs for dispute resolution. ➢ This would also help taxpayers in resolving issues arising from mismatch (if any) in the financial years of the AE and the Indian taxpayer
63.	**Consistency in applying the results of the BAPA with one country in a unilateral APA (UAPA) with another country if the functional and risk (FAR) profile of the transaction is the same**	**Rationale** ➢ A question arises whether a taxpayer can apply for a UAPA in respect of certain international transactions and BAPA in respect of certain other transactions as part of the same APA application. The existing FAQs on APAs issued by CBDT (refer FAQ no 22) clarifies that it would be possible to do so and a single application could be filed with an appropriate type of APA request. ➢ A related issue which arises is whether the taxpayer can apply for an UAPA in respect of international transactions with certain AEs where a BAPA/ MAPA have been entered into in respect of similar transactions with certain other AEs.

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		➢ This question arises on account of reading of section 92CC(1) of the Act which is as follows: As per section 92CC(1) of the Act, *"The Board, with the approval of Central Government, may enter into an agreement with any person,* ***determining the arm's length price or specifying the manner in which an arm's length price is to be determined****, in relation to* ***an international transaction*** *to be entered into by that person"* **Recommendation**: ➢ As per Rule 10B(2), comparability of an international transaction with uncontrolled transactions shall be judged with respect to the following, namely: ➢ Specific characteristics of property transferred or services provided; ➢ Functions performed, taking into account assets employed or risks assumed by respective parties; ➢ Contractual terms (whether or not such terms are formal or in writing) of the transactions which lay down explicitly or implicitly how the responsibilities, risks and benefits are to be divided between the respective parties to the transactions; and ➢ Conditions prevailing in the markets in which the respective parties to the transactions operate, including the geographical location and size of the markets, the laws and Government orders in force, costs of labour and capital in the markets, overall economic development and level of competition and whether the markets are wholesale or retail ➢ Further, as per Rule 10A(d), "transaction includes a number of closely linked transactions". ➢ In light of the above provisions, if the comparability factors laid out under Rule 10B(2) are same/ similar for transactions covered under UAPA and BAPA, then the methodology and the pricing agreed for transaction with an AE under a BAPA could be extended and applied for the transaction with another AE as well, which may be part of a separate UAPA discussion.

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		➢ Reference could be drawn to OECD TP Guidelines, 2017 (Para 22 of Annexure II to Chapter IV – Page 478), which emphasizes the need for similarity in the facts and circumstances across jurisdictions for application of a single TP methodology in a multilateral APA discussion
64.	**Commitment to conclude BAPA cases within 2 years in in line with MAP**	**Rationale** ➢ As per the APA Annual report 2019, 211 BAPA Applications have been filed by 31 March 2019. Also, as per the press release of CBDT dated 1 October 2019, the CBDT has signed only 33 BAPAs out of the potential 250 + BAPA Applications received. ➢ As per the APA Annual Report 2019, the average time taken to conclude BAPA is ~ 42.10 months which is significantly higher. Through BAPA, a taxpayer wishes to obtain certainty on its international transactions from the perspective of both the countries. ➢ Significant investment of time by the CBDT to conclude BAPAs is leading to incurrence of significant tax cost in the form of tax, interest and other administrative cost for the Applicant which shall defeat the very purpose of applying for a BAPA. **Recommendation** ➢ As per the OECD's peer review report relating to the implementation of the BEPS minimum standard under Action 14 (Making Dispute Resolution Mechanisms more effective) for India, states India's commitment to resolve MAP cases within 24 months from the date of filing for a MAP. ➢ In line with the above commitment to resolve MAP cases by India with its treaty partner, India should also strive to commit for resolving BAPA cases within 24 months from the date of filing of the BAPA Application. ➢ A commitment to resolve BAPA cases within the stipulated time frame shall ensure that the inventory of pending BAPA cases with the competent authorities are reduced and the taxpayer is able to effectively utilize the benefits

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		accruing from the APA Program. The progress of the APA scheme strengthens the Government's resolution of fostering a non-adversarial tax regime, thereby attracting more investments from MNEs in India, furthering the 'Make in India' agenda.
65.	**MAP Applications**	**Rationale**: ➢ While the department has now mandatorily prescribed a period of 24 months for disposal of MAP applications by Indian CA, we have been experiencing various on-ground challenges in this aspect. The pending MAP applications past several years are pending disposal and nothing has really progressed, even after last department notification on the subject matter. ➢ The taxpayers continue to live with uncertainty and also face challenges w.r.t. traditional route of litigation **Recommendation**: ➢ The applications should be expeditiously disposed off and Indian CA should be appropriately staff to handle the huge pending volume of such applications ➢ In case of recurring TP issues, MAP applications may also be tagged together and disposed off in one-go
66.	**Immunity against initiation of penalty proceedings by AO in case of BAPA/MAP cases**	**Rationale** ➢ A taxpayer applies for a BAPA/MAP, and a resolution is reached under BAPA/MAP which results in determination of arm's length price acceptable to the taxpayer. ➢ The domestic tax law (prior to its amendment with effect from 1 April 2017) provided for TP penalty for concealment of income if the taxpayer could not demonstrate that the arm's length price was determined, in good faith and with due diligence. ➢ However, the penalty section i.e. S. 270A(6) provides cases/circumstances which are not considered as cases of under-reporting of income. One such scenario under clause (d) to S. 270A(6) is where under-reported income is

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		represented by any addition made in conformity with the arm's length price determined by the TPO provided the taxpayer had maintained information and documents as prescribed u/s. 92D, declared the international transaction under Chapter X, and, disclosed all the material facts relating to the transaction. ➢ When clause (d) to S. 270A(6) is read literally, it seems to cover only cases where ALP is determined by TPO. Thus, a question arises whether addition pursuant to MAP proceedings is also protected under this clause. In other words, whether ALP agreed to under MAP can be considered as determined by TPO. **Recommendation** ➢ Most of India tax treaties enables the competent authorities of the contracting states to resolve TP disputes through MAP/ APA, including by way of corresponding adjustments. ➢ Sec 92CD is a specific provision which provides a mechanism for implementing an APA. MAP is considered to be an alternative to APA and hence the legislative intent may not be to treat both of them differently. Hence, logically MAP should be implemented in a manner similar to an APA as provided under S. 92CD ➢ In case of an APA, understand that enhancement of income due to APA is not akin to a deliberate concealment of income. Penalty u/s 271 applies only to TP adjustments made during assessment proceedings and does not apply to APA adjustment, as in case of an APA, modified return is filed and all the provisions of the Act accordingly applies as if it is a return furnished u/s 139. Thus, the income pursuant to APA which is reflected in the modified return cannot be considered as concealment. ➢ Further, pursuant to filing of modified return, the ALP will be re-determined in line with the APA agreed and hence it would not tantamount to under-reporting as per section 270A(6)(d). ➢ Since, under MAP, the arm's length price is decided based on mutual negotiations between the competent authorities, the same cannot be considered as akin to deliberate concealment of income or under reporting of income to levy a penalty under the Act.

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67.	**Mutual Agreement Procedure (MAP) proceedings - Stay of demand**	**Rationale:** ➢ In case where the transfer pricing adjustment is made in the assessment order, income tax department is insisting on the assessee paying the demand/ adjustment even though the assessee has preferred MAP, except in cases where a specific Memorandum of Understanding pursuant to the tax treaty is signed to specifically stay the demand till the disposal of MAP e.g. as in the case with USA, UK, Sweden and Korea. ➢ Currently, there is no mandatory time-limit for closure of MAP/APA and interest is to be levied on the tax demand from the date of the tax demand arises till the actual date of payment; hence, the interest liability may become material as compared to the primary adjustment, defeating the very purpose of the MAP/APA. Also, generally, there is NIL or a very minimal interest rate in the overseas jurisdictions on refund of excess taxes paid in that country. **Recommendation:** ➢ In order to avoid this hardship to the assessee, once the assessee has preferred MAP, the demand should be stayed automatically till the disposal of MAP in case of countries with whom India has signed a Tax Treaty. ➢ There should be mandatory time-limit (may be 3 years) for closure of MAP/APA. Also, in case of any tax demand arising due to conclusion of MAP / APA, interest should be waived off on the same or alternatively, if interest is to be charged, the same should be equal to the amount of interest received on the refund in the overseas jurisdiction by the AE.
68.	**Rollback / APA provisions should apply in case of merger/demerger/conversion situations, where there is no change in FAR of the transactions**	**Issues when the applicant merges with other entities** **Rationale** ➢ Subsequent to the introduction of the roll back provisions through Finance Act, 2014 and notified through Rules 10MA and 10RA of the Rules, CBDT issued clarification through Circular No 10/ 2015, in the form of FAQs. ➢ One of the FAQs issued by the CBDT is with regard to limiting the eligibility for rollback in case of reorganisation and reads as follows:

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		"In case of merger / de-merger of companies which company can claim the benefit of the APA? *The APA is between the CBDT and a person (company). The principle to be followed is that the company who makes the APA application would only be entitled to enter into an APA and claim the benefit of rollback in respect of the international transaction(s) undertaken by it in the rollback years. Other companies that have merged with the applicant company later or have demerged from the applicant company would not be eligible for the rollback provisions under the APA."* ➢ The mere fact that the company merging has ceased to exist and thereby not entitled to a roll back would be unfair to the taxpayers since the past years continue to be audited. **Recommendation**: ➢ In case of an amalgamation (merger) / demerger, the transferor entity ceases to exist and all the assets and liabilities would vest with the transferee entity. Typically, the scheme of amalgamation / demerger explicitly provides for the same. Therefore, the transferee entity will stand liable for the pending assessments/ taxes etc. of the transferor entity on amalgamation / demerger. ➢ Further, given that amalgamation / demerger is a succession by the transferee entity as per Section 170 of the Act, the assessment shall be made on the successor in similar manner as it would have been made on the predecessor. Therefore, in case of an amalgamation, the successor would continue to be liable for pending assessments/ taxes etc. given that the predecessor ceases to exist. ➢ Extending the same analogy, the benefit of rollback should be made available to the successor provided the terms of the transaction and the functional analysis remains materially the same as of the transactions covered in the APA. Further, the provisions relating to APA in the Act do not prohibit the predecessor to continue with the APA roll back process and thus FAQ should not be limiting the scope of application of the provisions.

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		➢ Thus, it is suggested that there should be flexibility in the above fact pattern, such that merged entities are also entitled for rollback **Conversion of a company into LLP** **Rationale** ➢ The FAQs do not provide any guidance in case of conversion of a Company into LLP during the APA period. **Recommendation**: ➢ Conversion of a Company into LLP is merely a change in the constitution and hence, the resulting LLP will continue to be liable for all the pending disputes/ assessments etc. which is similar to the case of a merger/ de-merger. ➢ Extending the same analogy, the benefit of APA should be made available to the new entity (LLP) provided that the terms of the transaction and the functional analysis remains materially the same as of the transactions covered in the APA. ➢ Therefore, in cases of conversions, the APA should not be automatically deemed void. The APA program should review the transaction/ functional analysis post conversion and provide for either continuation of the existing terms or revision of the terms of the APA.
69.	**Impact on non-resident taxpayers by virtue of an APA agreed in the case of an Indian taxpayer**	**Rationale** ➢ Any applicant who intends to enter into an APA shall make payment of the requisite fee as specified by the Rules. However, there may be cases where the same transaction could be regarded as an international transaction in the hands of both the transacting parties in India. ➢ For instance, an Indian entity makes payment of royalty to its overseas associated enterprise (AE) at 5 percent of the net sales generated by the entity. Payment/receipt of royalty will be an international transaction in the

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		hands of both the transacting entities (i.e. Indian entity and overseas AE). Let us assume that the Indian entity decides to opt for an APA for such transaction. Under the APA, the ALP for such royalty payment is negotiated and determined at 3 percent of the net sales. In the meanwhile, the Indian entity while remitting royalty payment, deducts tax at source on a higher sum (royalty calculated at 5%) as against the arm's length sum (royalty calculated at 3%). In such a scenario, the Indian entity would give effect to the terms of the APA/MAP by offering the excess royalty to tax. However, there are no automatic provisions available to obtain refund of excess taxes withheld by the Indian entity from the AE. The only possible option could be for the AE to file a BAPA in India so that the ALP determined in the case of Indian entity, if applied, would result in refund of excess taxes withheld. ➢ **In the above fact pattern, an issue arises as to whether the initial APA statutory filing fee should be collected from the AE also in relation to the same transaction (Royalty income received by AE from the Indian entity)?** **Recommendation**: ➢ While a literal interpretation would suggest that separate filing fee needs to be paid by each of the APA applicant, in the overall interest of the taxpayers, it is suggested that only one filing fee is collected in such cases given that the incremental efforts involved in conclusion of the APA in the hands of the AE is likely to be minimal.
70.	**Rollback of the transaction covered in the APA with different AE countries should be permitted**	**Rationale** ➢ As per Rules 10MA(2)(i), rollback provisions apply to the "same" international transaction to which the APA applies. It has been clarified in the FAQs that "same" implies same nature of transaction and undertaken with the same associated enterprise (AE). ➢ Another FAQ states as under: *"The term same international transaction implies that the transaction in the rollback year has to be of same nature and undertaken with the same associated enterprise(s), as proposed to be undertaken in the future*

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		years and in respect of which agreement has been reached. In the context of FAR analysis, the restriction would operate to ensure that rollback provisions would apply only if the FAR analysis of the rollback year does not differ materially from the FAR validated for the purpose of reaching an agreement in respect of international transactions to be undertaken in the future years for which the agreement applies." ➢ It is possible that the same international transaction may, for a variety of reasons, be undertaken with a different AE in future years as compared to the period to which rollback applies. **Recommendation**: ➢ It should be noted that Rule 10MA only refers to the "same international transaction" and not to the "same AE". Accordingly, the applicability of rollback should not be prohibited to transactions undertaken with different AE in past years as long as the functional analysis of the transaction in the future period remains unchanged. In case of APAs for forward looking period, typically the APA agreed approach is followed as long as the functional analysis of the transaction continues to be the same even though the AE may have changed. ➢ In light of the above, it is suggested that the APA rollback be permitted in case of AEs different than the existing AEs if the functional analysis has remained consistent.
71.	**Clarification w.r.t. Transfer Pricing compliance w.r.t. Non-Resident AEs receiving merely dividend income from Indian corporates**	**Rationale**: ➢ Pursuant to abolishment of DDT, dividend is taxable in the hands of recipient ➢ There are various corporate business structures where the foreign shareholders would earn dividend from Indian corporates ➢ While there has been a guidance on the income-tax return filing, clarification should also be introduced w.r.t. Transfer Pricing compliances ➢ As dividends earned by the foreign AE cannot be benchmarked, filing of Form 3CEB and preparation of local documentation as Transfer Pricing rules become additional compliances to be undertaken by foreign investors.

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		Recommendation: ➢ Suitable clarification/rules to be prescribed whereby exemption can be provided from TP compliances if appropriate taxes are withheld by Indian corporate and dividend is the only international transaction.
72.	**Specifically exempt APA applicants from filing ACR for rollback years**	**Rationale** ➢ Rule 10-O requires the taxpayers to file ACR in Form 3CEF for each year covered in the APA agreement. The said rule was introduced before the introduction of the rollback provisions. No amendment was made to the rule after introduction of the rollback provisions. Further, Rule 10RA (introduced at the time of introduction of rollback provisions) which provides the procedure for giving effect to rollback provisions in an APA agreement does not require the taxpayer to file ACR for the rollback years. ➢ **Given the above, whether the requirement to file ACR in Form 3CEF applies even to the years covered under rollback provisions?** **Recommendation**: ➢ Unlike the prospective years covered under APA, the ALP for the covered transactions in respect of rollback years is generally agreed in an APA only after detailed analysis of the nature of transactions, functions performed and risks assumed by the parties involved in the transaction, price/ margin involved in the transaction and all other relevant factors. All the information/ documents required to be provided in the ACR would have already been provided to the APA authorities in respect of the rollback years. The ALP for rollback years is agreed by the APA authorities only after detailed analysis of all such information/ documents. Thus, requiring the taxpayer to file ACR in respect of rollback years will only lead to duplication of cost and increase the compliance burden for the taxpayer. ➢ Further, Rule 10RA, which deals with the procedure for giving effect to rollback provisions, only requires the taxpayer to file modified return of income in accordance with Section 92CD of the Act. It does not specifically require the taxpayer to file ACR in Form 3CEF in order to be eligible for the rollback provisions.

<table>
<tr><th>Sl no.</th><th>Subject</th><th>Comments / Recommendations</th></tr>
<tr><td></td><td></td><td>➢ Thus, the requirement to file ACR in Form 3CEF should only apply to the prospective years covered under APA and shall not extend to the rollback years. This fact could also be clarified accordingly in the APA agreements</td></tr>
<tr><td>73.</td><td>Arm’s length price as agreed by CBDT under APA must be respected by Central Board of Excise and Customs (CBEC) for customs valuation and vice-versa (i.e. price as agreed by the CBEC should also be accepted as arm’s length price under APA)</td><td>Rationale

➢ Currently, there exist no guidance which clarifies that ALP as agreed under APA by CBDT would be factored by custom authorities under CBEC to determine the value of goods imported and vice-versa. Such an anomaly causes undue hardship to the taxpayer in terms of duplication of efforts and differential expectations of the authorities.

Recommendation:

➢ It is suggested that the ALP determined/ manner of determining ALP as agreed with CBDT, is duly taken note of by the customs authorities as well to avoid the duplication in efforts to arrive at the arm’s length price/ fair value.

➢ Similar position has been adopted by countries like Canada wherein APA agreed price is duly recognised by the respective custom authorities. Reference is drawn to Para 31 of the Memorandum D13-4-5 issued by the Canada Border Services Agency which states that:

“31. The CBSA will accept a transfer price established through an APA as the price paid or payable of imported goods and the basis for their value for duty, but may require that a correction to the value for duty be made if compensating adjustments are made to the transfer price.”

➢ Similar analogy should also apply to arm’s length price determined by the CBEC and should be accepted by CBDT.

➢ The same could be considered by the Indian government to boost the confidence of MNE groups operating in in India</td></tr>
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74.	**Commencement of APA period**	**Rationale** ➢ As per section 92CC(4) of the Act, *"The agreement referred to in sub-section (1) shall be valid for such period not exceeding five consecutive previous years as may be specified in the agreement."* ➢ For instance, a taxpayer (contract manufacturer) wishes to enter into an APA for the international transactions undertaken with its AEs and remunerated on cost plus mark-up basis effective from FY 2013-14 for 5 consecutive years and let us assume that the terms of the APA are finalised by FY 2014-15. Due to certain unforeseen circumstances, the taxpayer was unable to implement the contract manufacturing model from FY 2013-14 (start of the APA period) but was able to implement the model only in the following year (i.e.) FY 2014-15. In such a scenario, what would be the impact on the APA filed? **Recommendation**: ➢ It is suggested that the arm's length price determined/ manner of determining arm's length price as agreed with CBDT be applicable from the year in which the taxpayer is able to implement the agreed business/ billing model. The APA program should be flexible and allow deferment to the start of the APA period i.e., in the above case, the APA period should be allowed to commence from FY 2014-15 instead of FY 2013-14 for prospective 5 years.
75.	**Issues in Country-by-Country Report (CbCR) filing**	**Rationale** **CbCR compliance for Investment holding entity** ➢ As per plain reading of the Income-tax Act, 1961, the CbC report would have to be prepared by the ultimate parent entity i.e. the holding company for the group as a whole. Therefore, currently the governing principle to determine an MNE Group is based on the ownership or controlling interest. ➢ However, challenges could arise if an investment holding entity files a consolidated CbC report after incorporating results of all its flagship diversified operating subsidiaries. Given the overall objective of the OECD

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		and tax regulators to use the CbC report as a source of relevant and reliable information for high-level transfer pricing risk assessment purposes, obtaining a report filed by the investment holding company may not serve the stated objective fully. **Recommendations:** ➢ It is suggested that an option may be given for such investment holding entities in India to file a separate CbC report for each of the independent business entity / business division wherein the investment is held by holding company. Thus, it will likely provide tax authorities with better details and more relevant information for the purpose **of conducting the initial risk** assessment. This will also ease the administrative burden on the holding company in terms of collating and providing the required information in the CbCR. Therefore, each of the independent business shall be allowed to file its own CbCR separately.
76.	**R&D - Liberalise Circular 6/ 2013 and promote setting up regional R&D centre in India**	**Rationale** ➢ In recent times, India has been considered as a hub for carrying out R&D and other technical activities by the MNEs. India competes with several other countries Turkey, Thailand, Malaysia, China, Hungary, Poland, Indonesia, Brazil, Mexico, Russia, Vietnam, Singapore for investment in these areas. While these countries provide incentives to MNEs to set-up Global R&D hub in their countries, the position of the Indian administration is not very clear. ➢ CBDT had issued Circular 06/2013 which lists down the conditions for a R&D development center to qualify as a contract R&D center with insignificant risks. According to the circular, economically significant functions involved in research or product development cycle, have to be performed by the foreign AE through its own employees. The conditions in Circular 6 act as a barrier to these companies to scale up their Indian operations. **Recommendations** ➢ If critical decisions have to be based outside India for characterisation as a contract R&D unit, companies are inclined to locate their senior resources outside India. This prevents the Indian company to go up the value chain and it remains a low-end service provider.

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		➢ If India needs to inculcate a culture of innovation and high-end R&D, an ecosystem of research needs to be created. By dissuading companies from moving high value-added work to India, the Circular 6 acts as a barrier to India developing as an innovation hub. The terms of Circular 6 therefore, need to be reworked to encourage multinationals to move their key decision making to India, to move the Indian R&D centres up the value chain

77.	**Intangibles: Marketing and Technology**	**Rationale**
		➢ Cross border flows of technology, monetary and human capital enables MNEs to organise the global development, enhancement, maintenance, protection, and exploitation (DEMPE) of intangibles activities in an efficient manner, driving innovation and growth. MNEs are keen to explore the developing / emerging markets such as India with a balance between core technology protection and local market based customisation.
		➢ However, the treatment of intangibles, in terms of issues like DEMPE functions, legal ownership and economic value, has been a long-standing area of dispute amongst Indian tax authorities and MNEs.
		➢ This dispute has majorly centered around two broad categories of intangible:
		  ➢ Marketing Intangible - The focus by the Indian tax authorities on marketing intangibles has resulted in a de facto conclusion that any "excess" local brand building efforts (by way of Advertising, Marketing and Promotion (AMP) expenditure) by the Indian subsidiary of a foreign affiliate should be reimbursed with a mark-up by the foreign affiliate.
		  ➢ Technology Intangible - Similarly, royalties paid by the Indian subsidiary for brands or trademarks have also been questioned or disallowed under the premise that the local entity develops the brand in India and therefore does not enjoy the benefits from such "foreign owned and developed" brands in the Indian market. The key issue regarding technology intangibles has been the challenge to the royalty rate paid by the Indian entity.

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		➢ OECD BEPS Action Plan 8 was initiated to evaluate TP issues related to intangibles which may lead to base erosion and profit shifting. The OECD's perspective states that TP evaluation of intangibles start from the legal ownership and accounting aspects but expands to creation of economic value for the owner or user of the intangible. This focus on economic value creation has placed significance on FAR analysis related to DEMPE of intangibles due to which, on one hand, legally registered intangibles may not have economic significance from TP perspective, while on the other hand, unique or non-routine intangibles (business value drivers) may be created in course of business dealings which may not necessary gain legal protection under local IPR laws. **Recommendation**: ➢ Currently, Indian TP regulations provide little guidance on the methods to be used for valuing intangible property. This has resulted in ambiguity on the appropriate methodology for evaluating intangible pricing policies. As a result, the number of disputes has increased with significant adjustments made. ➢ Accordingly, in line with international practice and OECD principles, guidance should be issued to recognise certain methodologies/approaches for evaluating the arm's length character of transactions involving marketing and technology intangibles.
78.	**Concept of base erosion by considering non-resident entity and resident entity together and not on a stand-alone basis**	**Rationale** ➢ Currently law on TP in India is debatable on the concept of Base Erosion. Non- resident AE and the resident AE have historically been looked at a consolidated basis rather than stand-alone basis for the purpose of base erosion evaluation. However, in the case of Instrumentarium Corporation, the Special Bench has circumscribed the application of the theory qua taxpayer by looking at the impact for each tax year. The Special Bench noted that since the Indian TP law does not contain provisions enabling a correlative allocation in case of a primary TP adjustment, imputing arm's length income in the hands of a potential income recipient does not automatically result in a corresponding expense deduction in the hands of the payer. Ignoring such principle and examination of both the entities individually poses the risk of double taxation.

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		Recommendation: ➢ It is therefore, recommended that clarification in this regard be brought to uphold the principles of base erosion by considering non-resident entity and resident entity together and not on a stand-alone basis. ➢ Further, government initiatives to ease compliance burden of foreign Taxpayers, the CBDT could consider issuing a notification exempting foreign companies from undertaking transfer pricing compliances in India in cases where appropriate taxes have been withheld or paid in India on the transaction and the Indian entity complies with the TP regulations with respect to the said transaction. ➢ Such a step will help improve the ease of doing business in India and providing certainty to taxpayers.
79.	**Intra-group Services**	**Rationale** ➢ In recent years, the appropriate treatment of the intragroup services has become a critical TP issue in India. These cross charge of management services to Indian subsidiary have been disallowed by the Indian Income-tax authorities when there is insufficient evidence that the services were rendered or whether they in fact resulted in a benefit to the local Indian entity. ➢ MNEs structure their global operations to generate internal efficiencies through the centralization of services. These efficiencies accrue to the global organization and can take the form of scale efficiencies (lower costs per unit of output) or improved competitive positioning (increased revenues and profits through the benefits of specialization). ➢ While there is a valid economic rationale for charging the costs of these services to the members of the MNE group, the recipient of these charges seek additional justification and documentation to corroborate the charges and allow them as valid deductions from a local country perspective.

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		➢ Using similar grounds, the Indian tax authorities have disallowed the deduction of expenses toward allocated management charges to the Indian subsidiary, resulting in significant TP adjustments ➢ These types of transactions have been increasingly made susceptible to audit by the Indian tax authorities. The nature and extent of enquiry has put an onerous burden on most taxpayers, as documentation of these categories of transactions often lags behind documentation for transactions involving tangible goods. Absence of specific TP rules in India in this regard and the controversial nature of the issue has resulted in complex and monetarily significant TP disputes and risks of double taxation. **Recommendation**: ➢ The OECD in its BEPS project report on Action Plan 10 provides for a 5 percent mark-up in case of low value intra-group / management services. It provides that service must provide a benefit; however, it provides for a simplified benefit test documentation i.e. tax administrations should consider benefits by categories of services and not on specific charge basis and there is a need to only demonstrate that assistance was provided and not to specify. ➢ Countries such as US, Germany, Singapore, etc. have issued specific legislations for IGS charges including principles (such as benefit test documentation, characterisation of routine services, cost allocation, etc.), which are broadly in line with OECD guidelines. ➢ Acknowledging the need and necessity for MNEs to have IGS arrangements, the CBDT had amended the safe harbour rules vide notification dated June 07, 2017 to incorporate low value adding IGS. The safe harbour rules provide for definition of low value adding IGS and an indicative permissible limit to the mark-up of 5 percent. However, there is no guidance on the documentation required to be maintained. ➢ While the India Chapter of the 2016 Draft of UN TP Manual states that India has rejected the simplified approach for such intra-group services charges, a domestic circular on the lines of Action Plan 10 with suitable India specific conditions can be brought to reduce litigation.

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80.	**Range to determine Arm's length price**	**Rationale**: ➢ As per the existing provision of Income tax Rules, interquartile range can be used to determine arm's length price (ALP) only if there are six or more comparables. ➢ However, as per the international practice, interquartile range can be used to determine ALP if there are four or more comparable. ➢ Further, interquartile range as per Indian regulations (35th and 65th percentile) is narrower than the global practices which allow the range of 25th and 75th percentile. ➢ When number of comparables are less than six, in that case benefit of range is not available and mean of comparable is to be considered as ALP. **Recommendation**: ➢ India interquartile range rule should be aligned with the international practice and necessary amendment should be made in the law.
81.	**Issue of economic adjustments**	**Rationale** Adjustment for risk level differences ➢ Given the quality of information available in the databases, generally the comparables selected for analysis include companies, which may perform additional functions (while being engaged in undertaking comparable services/activity) and bear more risks akin to any third party vis-à-vis the taxpayer. In this regard, even though the comparable companies broadly perform functions that are similar to the taxpayer, the functional similarity does not adequately address the impact of risk differential on the expected return of the taxpayer under arm's length conditions. In the absence of specific guidance, Taxpayers usually do not resort to "risk adjustments" in their documentation. However, the approach adopted for performing the risk adjustment has been subjective and arbitrary.

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		Capacity utilization adjustment ➢ In general, a company will have a higher profit margin (both gross and net), if it operates at the level of activity beyond its break-even point. Since the determination of capacity utilization is a critical determinant of its profit margins, adjustment for differences in this factor could be made to comparable data. **Depreciation adjustment** ➢ This adjustment results from differences in the depreciation policy between the tested party and the comparable companies. In practice, certain companies follow the straight-line method of depreciating the assets whereas certain companies follow the written-down value method of depreciating assets. This adjustment ensures that the effect of different depreciation policies of the companies on the operating margin are normalised, by measuring them against gross fixed assets. **Recommendation**: Summarized below are the issues/ areas that could benefit from additional clarity: ➢ Some of the differences between the controlled taxpayers and the comparable companies (such as difference in level of risks, difference in capacity utilized etc.) would have a significant impact on the transfer price as well as the comparability. ➢ It is therefore important that the Indian TP regulations give due recognition to the approaches which need to be considered by Taxpayers and tax authorities for making such economic adjustments. ➢ Some of the economic approaches for making these adjustments (e.g. risk adjustment based on Capital Asset Pricing Model etc.) could be suggested by the CBDT by way of a circular which would provide some guidance. Additional details on the economic approaches can be discussed in due course.

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		Dispute Reduction Measures
82.	**Issuance of Guidance note/ Circular by the Tax Department on contentious issues**	**Rationale**: ➢ A lot of time, money and energy of the taxpayers and Department gets wasted in litigating various issues which are generally common in nature or affecting industry as a whole. **Recommendation**: ➢ It is recommended that in case of any industry specific issue or any other common contentious issues, a Guidance note/ Circular should be provided forthwith by the Tax Department just like the Circular on FBT, the Handbook on negative service tax regime etc. which clarified most of the doubts of the assessees. This will bring clarity and certainty in respect of various issues and reduce the litigation and saving the Department and the assessees of time. ➢ Alternatively, such common contentious issues affecting industry as a whole should be clubbed and disposed off together by the Tax Department, thus providing at least a partial relief to the taxpayers in case where other issues are also under litigation.
83.	**Section 271 (Issue of penalty notices mechanically)**	**Rationale**: ➢ There is an increasing tendency of initiating penalty proceedings mechanically under section 271(1)(c) of the Act in respect of all the additions/disallowances made by assessing officer in the assessment Orders and many times despite orders of the higher judicial forums being favourable to the Assessees **Recommendations**: ➢ Clear cut guidelines may be issued on the specific circumstances when penalty proceedings may be initiated by the assessing officers viz. concealment/ deliberate suppression of facts, etc.

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		➢ Interpretation issues or tax positions supported by the rulings of higher appellate forums should be outside the ambit of the penalty proceedings
84.	**Dispute Resolution Mechanism**	**A. Appeal disposal on FIFO basis** **Rationale:** ➢ It has been the industry's perception that the "hearings" before the Commissioner of Income Tax (Appeals) are influenced by the Demand/Refund position of that case. Preference is normally given to the high demand appeals and the "refund" appeals are normally kept aside increasing the "pending" list of matters to be heard. **Recommendation:** ➢ It is recommended that the appeals shall be instructed to be disposed off on the basis of filing dates of appeals i.e. on F.I.F.O. basis and not by demand/refund position and in cases where issues are recurring year over year and pending for hearing, block of years should be taken and heard. **B. Statutory Time Limit for CIT (Appeals)** **Rationale:** ➢ Currently, there is no statutory time limit for passing the order by the Commissioner of Income Tax (Appeals). ➢ Similarly, wherever the remand report is sought by the CIT (A) from the AO, the same also does not have statutory timeline. **Recommendation:** ➢ Just like assessment, a reasonable statutory time limit (say 3 years from the filing of appeal) shall be set for disposing of the appeal by CIT(A) as well as for disposal of the remand report by the AO. This will ensure the speedy disposal of appeal.

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85.	**Persuasive Value of ITAT Order**	**Rationale:** ➢ ITAT is judicial authority separate from tax department and regarded as final fact-finding authority. Further, with ITAT ruling on record, the taxpayer cannot opt for alternative dispute mechanism such as APA/MAP or the competent authorities are not allowed to deviate from findings of ITAT. **Recommendation:** ➢ Considering the recognition and weight assigned to ITAT decisions in Indian tax litigation system, the taxpayer should be allowed with option to consider arm's length price determined by ITAT as economic analysis for future transfer pricing compliance under same circumstance. This will be relief to taxpayers in terms of cost saving from performing economic analysis and reduce risk of levy of ad-hoc penalties by TPO.
86.	**Adjustment of Refund against the amount stayed as per the CBDT circular**	**Rationale:** ➢ CBDT vide its office memorandum dated 29th Feb 2016 has laid down the guidelines for stay of demand at the first appellate level. As per the office memorandum, the assessing officer shall grant the stay of demand till disposal of first appeal on the payment of 15% of the disputed demand. The rate was subsequently increased prospectively to 20% vide circular dated 31st July. It has been observed that in spite of the above office memorandum, CPC is adjusting the subsequent refunds against the said demand which is stayed as per the above memorandum. **Recommendation:** ➢ A process/functionality needs to be put in place which enables the assessing Officer to update the ITBA with such Orders granting stay on tax demand to avoid administrative challenges and litigation as otherwise the ITBA will adjust the tax refunds without taking the cognizance of the stay order

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87.	**Section 245 - Demand of one year recovered by way of adjustment of Refund of another year even when the Demand is stayed by ITAT**	**Rationale**: ➢ The Departments adjusts the Refunds of one A.Y. arising out of Appeal Effect Orders, 143(1) Intimation Orders, etc. against the Outstanding Demands of another A.Y. even if the outstanding Demands are stayed by the Hon'ble ITAT ➢ Refund adjustment against outstanding Demand is as good as making cash payment against the said outstanding demand; therefore if refund is adjusted against outstanding demand even when such demand is stayed by the Hon'ble ITAT, then the same is unjustified and the very purpose of "Stay granted by Hon'ble ITAT" gets defeated. **Recommendation**: ➢ It is requested to make suitable amendments so that the Refunds of one A.Y. are granted in cash to the assessee instead of adjusting the same against the outstanding Demand of another A.Y. if the said outstanding demands are stayed by the Hon'ble ITAT.
88.	**Adjustment of Income Tax Refund due against the Advance Tax payable**	**Rationale & Issue:** ➢ There are quite a few instances where the assessee is entitled to a refund of tax including interest thereon and simultaneously is required to pay advance income tax instalment. Because of the internal administrative norms within the Department, receipt of refund and payment of advance tax creates administrative and cash flow challenges to the Department and the taxpayer. **Recommendation:** ➢ For ease of doing business, it is recommended that an opportunity should be provided to the taxpayer for choosing an option whether assessee would like to receive the refund in his bank account or the same should be adjusted against the future advance tax liability.

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89.	**Corporate restructuring and IT system of Department**	**Rationale:** ➢ In case of merger / demerger, TDS, TCS, advance tax, MAT credit etc. lying in the PAN of amalgamating/demerged company is to be transferred to the amalgamated/resulting company, effective from appointed date. ➢ Currently, the IT system of the Department is not having this functionality and due to which practical difficulties are faced by taxpayers in making such adjustments **Recommendation:** ➢ IT system of the Department should be modified so that in case of merger / demerger, from the appointed date, TDS, TCS, advance tax, losses, MAT credit etc. can be transferred by the AO to the amalgamated / resulting company.