

**PRE-BUDGET MEMORANDUM 2024-25: 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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<b>Corporate Taxation</b>		
1.	<b>Amendment of Rules 6EA/B to align with extant RBI/NHB prudential guidelines/Ind-AS</b>	<p><b>Rationale:</b></p> <ul style="list-style-type: none"> <li>☐ 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.</li> <li>☐ 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.</li> <li>☐ RBI Guidelines applicable to Non-Banking Financial Institutions ('NBFC') provide that interest on non-performing assets ('NPAs') shall be recognized only on cash basis.</li> <li>☐ Similar to banks, NBFCs too are engaged in financial lending to different sectors of society.</li> <li>☐ 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&amp;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.</li> <li>☐ 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</li> </ul>

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		<p>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</p> <p>☐ 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</p> <p><b>Recommendation:</b></p> <p>☐ 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.</p>
2.	<p><b>Section 44AB (Clause 44 of Form 3CD) - Break-up of Total Expenses under GST</b></p>	<p><b>Rationale:</b></p> <p>☐ 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; But it is now applicable from AY 2022-23</p> <p>☐ 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</p> <p>☐ This is a voluminous exercise with lot of reconciliations and may not be even feasible for large organizations.</p>

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		<p>☐ Expenses like depreciation, bad debts, discounts/rebates, etc. are not supplies under GST and therefore cannot 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 &amp; Taxes, etc.</p> <p>☐ Moreover, post introduction of E-invoice, substantial GST data is already available with Government</p> <p><b>Recommendation:</b></p> <p>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.</p>
3.	<p><b>Appropriate valuation rules to be prescribed for receipt of VDA as gift or inadequate consideration</b></p>	<p><b>Rationale</b></p> <p>☐ Finance Act 2022 has amended definition of “property” under clause (d) of Explanation to S.56(2)(vii) to include VDA. Such definition of “property” is applicable in case of S.56(2)(x) by virtue of Explanation to S.56(2)(x).</p> <p>☐ S.56(2)(x)(c) provides for taxation of income where property is transferred for NIL or inadequate consideration as compared to fair market value (FMV). The difference between FMV and consideration in excess of Rs. 50,000 is considered as income in hands of recipient.</p> <p>☐ Explanation to S.56(2)(x) r.w. clause (b) of Explanation to S.56(2)(vii) defines fair market value of property as per prescribed method. Rule 11UA prescribes the manner of determination of FMV of property.</p> <p>☐ The amendment provides for gift taxation of receipt of VDA in hands of recipient where the VDA is received for NIL or inadequate consideration. While VDA has been included within the definition of property u/s.56(2)(x), there is no valuation mechanism prescribed for determination of value of VDA under Rule 11UA.</p>

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		<p>☐ In absence of valuation mechanism for determining FMV of VDA, it is difficult to determine income chargeable to tax under S.56(2)(x)(c).</p> <p><b>Recommendation</b></p> <p>☐ Considering the nature of VDA and volatile nature of pricing of VDA, it is recommended that appropriate valuation rules should be introduced in Rule 11UA for valuation of VDA after giving due consideration to current market practices and without casting unreasonable burden on the taxpayers</p>
4.	Application for approval of the Fund as per Rule 10VA(3) and applicability of Rule 10VA(8)	<p><b>Background:</b></p> <p>☐ As per Rule 10VA(3), the application for seeking approval under section 9A shall be made 3 months before the beginning of the previous year for which the fund seeks the approval and as per Rule 10VA(8), the approval once granted, shall be applicable for the previous year and subsequent previous years unless it is withdrawn by the Board.</p> <p><b>Rationale and Issue:</b></p> <p>☐ The current rule implies that the approval for tax safe harbor shall be applicable only from the beginning of the next fiscal year. This leads to genuine hardship in cases where either the eligible investment Fund is newly incorporated during the year or seeks to appoint an Indian fund manager during the year.</p> <p><b>Recommendation:</b></p> <p>☐ It is recommended that approval under section 9A of the Act be made effective from the date of receipt of the approval under section 9A of the Act such that Indian fund managers are allowed to start managing offshore funds with immediate effect pursuant to receiving the approval.</p>

Sl no.	Subject	Comments / Recommendations
<b>Mergers/Acquisitions and Business re-organization</b>		
5.	<b>Notify cases to which s.56(2)(x) and s.50CA will not apply</b>	<p><b>Rationale/ Recommendation:</b></p> <ul style="list-style-type: none"> <li>☐ 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.</li> <li>☐ 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.</li> <li>☐ 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:- <ul style="list-style-type: none"> <li>☐ Sale of foreign company's shares where it is difficult to apply Rule 11UA valuation</li> <li>☐ 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)/(xiiiib)), etc.</li> <li>☐ Fresh issue of shares in scenarios like Initial Public Offer (IPO), private placement, rights, bonus, etc.</li> <li>☐ Investment made by holding company into its wholly owned subsidiary (domestic as well as foreign company)</li> <li>☐ 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</li> </ul> </li> </ul>

Sl no.	Subject	Comments / Recommendations
		<ul style="list-style-type: none"> <li data-bbox="696 336 2051 448">☐ 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.</li> <li data-bbox="696 483 2051 719">☐ Conversion of an existing instrument into equity shares as per the terms specified at the time of issuance based on the valuations at that time - The CBDT on 21 January 2019, issued a Circular clarifying that the section 56(2)(viii)/ section 56(2)(x) of the Act (as the case may be), applies to “issuance” of shares by a company other than a company in which the public are substantially interested. This implies that the provisions of section 56(2)(x) of the Act are applicable pursuant to conversion of an existing instrument into equity shares.</li> <li data-bbox="696 754 2051 821">☐ Transfer or issue of shares or securities in case of corporate insolvency resolution process under IBC or stressed companies, whose book value of assets is much higher than the actual realizable value.</li> <li data-bbox="696 857 2051 1051">☐ Where companies forming part of the same group need to enter into transactions for realignment of shareholding due to number of reasons such as synergies of business, consolidation of shareholding etc. Transfer of shares amongst ultimate holding and any step-down subsidiary or amongst fellow subsidiaries should be exempted from the applicability of section 50CA and section 56(2)(x) of the Act. For consistency, the definition of holding company and subsidiary company should be defined as per the Companies Act, 2013.</li> <li data-bbox="696 1086 2051 1117">☐ Transfer of assets between relatives for consideration lower than FMV or on account of family settlement</li> <li data-bbox="696 1152 2051 1219">☐ Transfer of shares of a listed company through an off-the-exchange transaction at a pre-determined value (where SEBI takeover code is applicable)</li> </ul> <p data-bbox="651 1254 875 1284"><b>Recommendation:</b></p> <ul style="list-style-type: none"> <li data-bbox="651 1319 2051 1386">☐ 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</li> </ul>

Sl no.	Subject	Comments / Recommendations
		<p>stakeholders' comments to ensure that all possible bonafide cases faced by industry get adequately represented in the Final Notification.</p>
6.	<p><b>Clarification on applicability of anti-abuse provisions</b></p>	<p><b>Background:</b></p> <ul style="list-style-type: none"> <li>☐ 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.</li> </ul> <p><b>Rationale and Issue:</b></p> <ul style="list-style-type: none"> <li>☐ The intent of legislation is to bring within ambit of taxation instances of ‘transfer’ for inadequate consideration and not ‘issue’ of shares.</li> <li>☐ 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.</li> </ul> <p><b>Recommendation:</b></p> <ul style="list-style-type: none"> <li>☐ Suitable clarifications may be issued that section 56(2)(x) is applicable only for transfer of shares and not for issue of shares.</li> <li>☐ Circular may be issued to direct the tax authorities to implement the provisions only in case of tax abuse and not otherwise.</li> </ul> <p>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</p>

Sl no.	Subject	Comments / Recommendations
7.	<p><b>Relax investment at high premium by bona fide non-resident investors from “angel tax” u/s. 56(2)(viib)</b></p>	<p><b>Background:</b></p> <ul style="list-style-type: none"> <li>☐ FA 2023 had amended provisions of section 56(2)(viib) of ITA so as to tax receipt from NR for issuance of shares in case where the consideration received for issue of shares exceeds the face value of such shares.</li> <li>☐ Subsequently, Notification No. 29/2023 dated 24 May 2023 (May 2023 Circular) has been issued wherein various classes of persons fulfilling specified conditions have been specified for the purpose of exclusion from the ambit of provisions of section 56(2)(viib) of ITA.</li> </ul> <p><b>Rationale and Issue:</b></p> <ul style="list-style-type: none"> <li>☐ Considering that provisions of section 56(2)(viib) are anti-abuse provisions which are introduced to curb money laundering, at present, there are specific entities based out of specified 21 countries which are granted exemption from applicability of provisions of section 56(2)(viib) of ITA. The specified list of 21 countries does not include all FATF whitelist countries. Intent of including receipt from NR within the scope of provisions of section 56(2)(viib) even from white-list countries may affect the investment climate in the country given FDI helps in boosting infrastructure, increasing productivity and creating employment.</li> <li>☐ SEBI registered CAT I FPI investors, endowment funds and pension funds etc. should fulfil the condition of being regulated and established, incorporated or resident in 21 jurisdictions as specified in the May 2023 Circular. SEBI registered Category I FPI investors are subject to disclosure requirement of beneficial owners under SEBI regulations. Also, India has wide network of Tax Information Exchange framework under DTAA's and Multilateral Agreements. Hence, for these sub-categories there should be no jurisdiction-based requirement.</li> </ul> <p><b>Recommendation:</b></p> <ul style="list-style-type: none"> <li>☐ It is recommended to extend exemption for FDI from FATF whitelist countries and expand list of jurisdictions for certain categories of investors.</li> </ul>



Sl no.	Subject	Comments / Recommendations
		<ul style="list-style-type: none"> <li>☐ Further, it is recommended that the list of countries as per Annexure in point (iii) of the notification, be expanded to cover countries like Singapore, Mauritius, Netherlands and Luxembourg.</li> <li>☐ Also, Notification No. 29/2023 be also made retrospectively applicable from 1 April 2023 to avoid any valuation dispute.</li> </ul>
8.	<b>Section 50B and Rule 11UAE</b>	<p><b>Rationale:</b></p> <ul style="list-style-type: none"> <li>☐ 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').</li> <li>☐ 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 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.</li> <li>☐ Further, the term 'immovable property' for the purpose of Rule 11UAE is not defined.</li> </ul> <p><b>Recommendation:</b></p> <ul style="list-style-type: none"> <li>☐ 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.</li> <li>☐ Amend Rule 11UAE to provide an opportunity to taxpayer to rebut normative FMV [similar to section 50C(2)].</li> <li>☐ 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.</li> </ul>

Sl no.	Subject	Comments / Recommendations
		<ul style="list-style-type: none"> <li>☐ Valuation of undertaking arrived adopting internationally accepted method of valuation should be accepted.</li> <li>☐ 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.</li> </ul>
9.	<p><b>Rule 11UA, Rule 11UAA, Section 56(2)(x) and Section 50CA</b></p>	<p><b>Rationale:</b></p> <ul style="list-style-type: none"> <li>☐ Rule 11UA and Rule 11UAA provide for computation of fair market value for the purpose of section 56(2)(x) and section 50CA.</li> <li>☐ In case of shares of a company, the said Rule provides for taking most assets and liabilities at book value<sup>1</sup> 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 DCF method, which is a method used worldwide to compute enterprise value of a business.</li> <li>☐ 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.</li> </ul> <p><b>Recommendation:</b></p> <ul style="list-style-type: none"> <li>☐ 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 that normative values as per Rule 11UA is higher than actual commercial fair value.</li> </ul>

<sup>1</sup> Certain assets like jewellery, bullion, etc are to be valued at fair market value

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		<p>☐ 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.</p>
10.	<p><b>Section 56(2)(x) –</b></p> <p><b>Clarification of applicability of anti-abuse provisions w.r.t. issue of shares</b></p>	<p><b>Rationale:</b></p> <p>☐ 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.</p> <p>☐ 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.</p> <p><b>Recommendation:</b></p> <p>☐ Suitable clarifications may be issued that:</p> <ul style="list-style-type: none"> <li>• A suitable clarification may be issued that section 56(2)(x) is applicable only for transfer of shares and not for issue of shares.</li> <li>• Circular may be issued to direct the tax authorities to implement the provisions only in case of tax abuse and not otherwise.</li> </ul> <p>☐ 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.</p>

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11.	<p><b>Relax investment at high premium by bona fide non-resident investors from “angel tax” u/s. 56(2)(viib)</b></p>	<p><b>Existing provision</b></p> <ul style="list-style-type: none"> <li>☐ Prior to amendment by Finance Act 2023, S.56(2)(viib) was triggered when a closely held company (CHC) issues shares (including preference shares) to a resident at a premium and receives consideration which is in excess of fair market value (FMV) of shares.</li> <li>☐ The FMV was computed at higher of (i) Book value of shares as per Rule 11UA(2)(a) (ii) Discounted Cash Flow (DCF) computed by Category I merchant banker as per Rule 11UA(2)(b) (iii) subjective satisfaction of Assessing Officer based on value of intangibles</li> <li>☐ This provision only excludes (1) SEBI registered Category I and II Alternative Investment Funds (AIFs) and (2) Funds registered in GIFT IFSCA</li> <li>☐ In this respect, second proviso to S.56(2)(viib) empowers Central Government to notify companies which are outside the scope of the provision. Accordingly, vide CBDT Notification No. 13/2019, CBDT has notified start-ups who fulfil conditions enumerated in DPIIT Notification No. 19 Feb 2019 and who have filed declaration in Form 2 as being eligible entities outside scope of S. 56(2)(viib). This carve out is very restrictive and applies only to small start-ups (Turnover &lt; Rs. 100 Cr + Aggregate of Share Capital &amp; Premium &lt; Rs. 25 Cr) and which are less than 10 years old. Share capital cap of Rs. 25 Cr excludes issue of shares to non-residents &amp; frequently traded listed companies. One of the conditions under DPIIT Notification No. 13/2019 is that the start-up company is restricted</li> </ul>

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		<p>from investing in enlisted non-qualifying assets<sup>2</sup> within 7 years from the end of the latest financial year in which shares are issued at premium (i.e., end-use condition).</p> <p>☐ Finance Act 2023 extended the operation of S.56(2)(viib) to non-residents as well. Hence, where a CHC issues shares to non-residents for a consideration in excess of FMV of shares, the excess premium shall be taxable in hands of company.</p> <p>☐ This makes the provisions of S.56(2)(viib) applicable for receipt of consideration for issue of shares at high premium from any person irrespective of the residential status.</p> <ul style="list-style-type: none"> <li>● Several representations were made to the Government by stakeholders on practical challenges for non-resident investors and potential for litigation on valuation.</li> <li>● Pursuant to the above, on 24 May 2023, CBDT issued Notification No 29 and 30 of 2023 which prescribe as under: <ul style="list-style-type: none"> <li>○ Notification No. 29/2023 (effective from 24 May 2023) enlists categories of persons whose investments in CHC shall not be subject to trigger of angel tax provisions like (i) Government and Government related investors, (ii) banks or regulated entities involved in insurance business and (iii) investors resident in any of the 21 jurisdictions and regulated in the country where it is established, incorporated or resident like category-I foreign portfolio investors, endowment funds, pension funds and broad-based pooled investment vehicles or funds.</li> <li>○ Notification No. 30/2023 (effective retrospectively from 1 April 2023) exempts start-up companies from the angel tax provision if the start-up company fulfils the conditions specified by DPIIT in para 4 of its Notification No. G.S.R 127(E) dated 19 February 2019 and files a self-declaration to that effect.</li> </ul> </li> </ul>

<sup>2</sup> Such non-qualified assets include immovable property not used for business, loans and advances (other than in money-lending business), shares & securities, jewellery (except stock-in-trade), etc.

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		<p>The exemption is applicable where a start-up company issue shares for a consideration at a premium to any person (whether resident or non-resident)</p> <ul style="list-style-type: none"> <li>● The CBDT also announced certain amendments to valuation rules (i.e. Rule 11UA) vide Press Release dated 19 May 2023 and issued draft of amended Rule 11UA for public comments on 26 May 2023.</li> <li>● Post public consultation, the CBDT notified the final amended Rule 11UA with effect from 25 September 2023. The salient features of the amended Rule 11UA are as under: <ul style="list-style-type: none"> <li>○ The amended Rule 11UA provides separate valuation mechanism for Compulsorily Convertible Preference Shares (CCPS) and also provides option to adopt Fair Market Value (FMV) of unquoted equity shares for determining FMV of CCPS.</li> <li>○ The erstwhile Rule 11UA prescribed two methods (viz. NAV or DCF ) for determining the FMV of equity shares issued to resident investors. The amended Rule 11UA provides five more methods of valuation for issue of unquoted equity shares or CCPS to NR investors viz. Comparable Company Multiple Method, Probability Weighted Expected Return Method, Option Pricing Method, Milestone Analysis Method and Replacement Cost Methods.</li> <li>○ The price matching facility as per draft rules for both resident and NR investors is extended to CCPS . In terms of such price matching facility, the price at which unquoted equity shares or CCPS are issued by closely held companies to notified NR entities/ venture capital funds (VCF)/ specified funds shall be adopted as FMV for the purposes of benchmarking equity and CCPS investments by both resident and NR investors, subject to compliance of certain conditions.</li> <li>○ In relation to price matching facility, the amended Rule 11UA provides clarity on window period of 90 days both before and after issue of shares to notified entities/specified funds/VCF for benchmarking of shares which are subject to valuation</li> </ul> </li> </ul>

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		<ul style="list-style-type: none"> <li>o The erstwhile Rule 11UA required merchant banker DCF valuation report as on the date of issue of shares. The amended Rule 11UA provides flexibility by making valuation report issued up to 90 days prior to the date of issue of equity shares or CCPS for computing FMV for investments by both resident and NR investors.</li> <li>o Lastly, amended Rule 11UA introduces safe harbor limit of 10% for valuation of equity shares and CCPS for both resident and NR investments</li> </ul> <p><b>Issue</b></p> <p>☐ While the Notifications and amendment to Rule 11UA address major concerns of stakeholders, the following issues still persist and has potential to give rise to litigation on valuation disputes in future.</p> <p><b><u>A. Restriction on methods of Valuation prescribed</u></b></p> <p>☐ The pricing guidelines notified under FEMA provisions provide flexibility to non-resident to invest as per any internationally accepted valuation methodology. The reason for restricting the Angel tax provision to certain prescribed methodologies as mentioned under the amended Rule 11UA as against any internationally accepted valuation methodologies as provided under FEMA pricing guidelines is unclear.</p> <p><b><u>B. Restriction on usage of five new methodology with respect to equity share/CCPS issuance to non-resident investors</u></b></p> <p>☐ Further, the rationale of limiting the five new methods of valuation (in addition to existing NAV and DCF) to equity/CCPS investments made by non-resident investors is unclear. This could create practical challenge and discrimination for resident investors.</p> <p>☐ To illustrate, in the same round of funding by resident and non-residents at same price of say- Rs. 200 per share arrived by using comparable company multiple method, where DCF value is say, Rs. 150 per share, while there will</p>

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		<p>be no trigger of angel tax for investment by non-resident, the investment by residents will face angel tax valuation dispute for the differential of Rs. 50.</p> <p>☐ It is true that the investment by resident investor will not face angel tax if it fits within the price matching facility under amended Rule 11UA(2)(c)/ Rule 11UA(2)(e) or safe harbour of 10% under Rule 11UA(4). However, these reliefs may not be sufficient to protect all bonafide investments by residents. For instance, there may be no investment by excluded non-resident investor in the same round or the value differential between DCF and five new methods may be higher than 10%.</p> <p><b><u>C. Quantum of permissible investment by resident and non-resident investors in price matching facility</u></b></p> <p>☐ As per Rule 11UA(2)(c) and Rule 11UA(2)(e), to avail relief under price matching facility, the consideration received from other investors at such FMV should not exceed aggregate consideration received from notified/excluded entity.</p> <p>☐ This appears to be an anti-abuse measure. For instance, a very small token investment by Sovereign Wealth Fund (say, 1%) should be not used to claim exemption in respect of substantial investments by other resident or non-resident investors.</p> <p>☐ However, it is submitted that the quantum limit is very low. It should be increased to at least twice (200%) of quantum of investment by notified non-resident investor. This will increase ability of the Indian company to raise more funding from resident and non-resident investors without the hassle of angel tax. This will have positive impact on growth and jobs in the Indian economy.</p> <p><b><u>D. Valuation Report</u></b></p>



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		<p>☐ As per amended Rule 11UA(3) - “Where the valuation report by merchant banker for the purpose of sub-rule (2) is not more than ninety days prior to the date of issue of shares which are the subject matter of valuation, such date may, at the option of the assessee, be deemed to be the valuation date”</p> <p>☐ As per FEMA pricing guidelines, valuation report of an Indian company for inbound investment is valid for a period of 180 days. Further, Rule 3(8)(iii) for the purpose of perquisite taxation also allows the usage of valuation report for a period of 180 days.</p> <p>☐ Therefore, the validity period of 90 days for valuation report is not consistent with the time limits as specified under FEMA pricing guidelines and/ or under other provisions of the Income-tax Act</p> <p><b><u>E. Safe harbour/tolerance limit of 10%</u></b></p> <p>☐ The press release dated 19 May 2023 indicates that 10% tolerance limit is provided to cover variation in price on account of forex fluctuations, bidding processes, variation in other economic indicators which may impact valuation.</p> <p>☐ However, the tolerance limit of 10% may not be sufficient to address all these changes.</p> <p><b><u>F. Extension of exemption for FDI from FATF whitelist countries</u></b></p> <p>☐ Given that section 56(2)(viib) of the Act is an anti-abuse provision introduced to curb money laundering, strategic FDI into Indian companies from all jurisdictions other than those identified by FATF for increased monitoring (“grey list”) or high risk jurisdictions (“black list”) should not be subjected to angel tax provisions. This is important for the investment climate in the country given the role capital flows via FDI in boosting infrastructure, increasing productivity and creating employment.</p> <p><b><u>G. Expansion of list of jurisdictions for certain categories of investors</u></b></p>

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		<p>Without prejudice to the above, It is not clear why the first three sub-categories under the third category of NR investors (viz. SEBI registered Category I FPI investors, endowment funds and pension funds) should have further condition of being regulated and established, incorporated or resident in 21 jurisdictions listed in the Annexure. SEBI registered Category I FPI investors are subject to disclosure requirement of beneficial owners under SEBI regulations. Also, India has wide network of Tax Information Exchange framework under DTAs and Multilateral Agreements. Hence, for these sub-categories there should be no jurisdiction based requirement. At the highest, the list of jurisdictions should be very wide which covers all FATF white list countries and/or countries with which India has Exchange of Information network.</p> <p><b><u>H. Addition to the list of countries included in the notification</u></b></p> <p>The Annexure to the Notification lists 21 countries viz. Australia, Austria, Belgium, Canada, Czech Republic, Denmark, Finland, France, Germany, Iceland, Israel, Italy, Japan, Korea, New Zealand, Norway, Russia, Spain, Sweden, United Kingdom, United States.</p> <p>It is not clear why some prominent well-regulated jurisdictions such as Singapore, Mauritius, Netherlands, Luxemburg from which India receives significant FDI are excluded from the above referred list. Excluding such prominent jurisdictions will create tax hurdle by way of angel tax for soliciting FDI from investors coming from such jurisdictions.</p> <p><b><u>I. Investment through controlled entities</u></b></p> <p>Furthermore, for diverse commercial reasons like leverage and co-investor participation, the global funds invest in India through entities that are owned or controlled by entities referred in Notification. The Notification recognises this aspect in Government related investors when it refers to entities in which direct or indirect ownership of the Government is 75% or more. Similarly, it is recommended that entities in which at least 75% is directly or</p>

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		<p>indirectly held by one or more of the excluded entities referred in the Notification may also be exempted from angel tax.</p> <p><b><u>J. Effective date of Notification No.29/2023</u></b></p> <p>☐ While Notification No. 30/2023 in relation to non-resident investment in DPIIT registered start ups is made applicable with retrospective effect from 1 April 2023, Notification No. 29/2023 in relation to notified categories of non-resident investors is made applicable from date of notification viz. 24 May 2023.</p> <p>☐ This will create challenges for investments made by entities referred in Notification no. 29/2023 in closely held companies between 1 April 2023 and 23 May 2023 which can be susceptible to valuation disputes</p> <p><b><u>K. Clarity on non-applicability of angel tax to issue of shares on conversion of convertible instruments which were issued prior to 1 April 2023</u></b></p> <p>☐ There could many cases where convertible instruments (like Compulsorily Convertible Debentures or Compulsorily Convertible Preference Shares) are issued prior to 1 April 2023 but get converted post 1 April 2023 at exchange ratio fixed prior to amendment. Such conversions post amendment may also face difficulty of valuation dispute.</p> <p><b>Recommendations</b></p> <p>☐ Amended Rule 11UA should allow the flexibility to use any internationally accepted valuation methodology for the purpose of determining fair market valuation (FMV) of Indian company to avoid the need for potentially obtaining multiple valuation reports under different regulations.</p> <ul style="list-style-type: none"> <li>● Further, the five new methodologies to be prescribed under amended Rule 11UA should be equally available for investments by resident investors as well.</li> </ul>

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		<ul style="list-style-type: none"> <li>● Rule 11UA(2)(c) and Rule 11UA(2)(e) should be amended to allow price matching upto 200% of investment made by VCF/VCC, Specified Fund or Notified entity instead of 100% as per amended Rule 11UA</li> <li>● In order to align the provisions of FEMA and other provisions of Income-tax Act, a period of 180 days should be provided instead of 90 days for validity of valuation report</li> <li>● It is suggested to increase the tolerance limit/safe harbour for valuation from 10% to 25% which may be considered as sufficient for meeting price gaps owing to factors such as forex fluctuations, price negotiations, bidding processes and other economic indicator</li> <li>● Notification No. 29/2023 dated 24th May 2023 should be amended to include all non-resident entities investing from jurisdictions other than those identified by FATF as falling in grey list or blacklist</li> <li>● The requirement of being regulated and established, incorporated or resident in 21 jurisdictions listed in the Annexure should be removed for first three sub-categories of investors (viz. SEBI registered Category I FPI investors, endowment funds and pension funds) in the third category. Alternatively, there should be a wider list of jurisdictions for these categories of investors which covers all FATF white list countries and/or countries with which India has Exchange of Information network</li> <li>● Without prejudice to our above requests, it is recommended that the list of countries as per Annexure in point (iii) of the notification, be expanded to cover countries like Singapore, Mauritius, Netherlands and Luxembourg</li> <li>● Additionally, entities in which at least 75% is directly or indirectly held by one or more of the excluded entities should also be included in the Notification</li> <li>● It is recommended that Notification No. 29/2023 be also made retrospectively applicable from 1 April 2023 to avoid any valuation dispute</li> </ul>

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		<ul style="list-style-type: none"> <li>● Liberalize DPIIT norms as per 2019 Notification but limited to exemption from angel tax u/s. 56(2)(viib) to               <ul style="list-style-type: none"> <li>○ remove the condition of turnover not exceeding Rs. 100 Cr – this condition will continue for profit linked tax holiday u/s. 80IAC since it is prescribed in s.80IAC itself as also for other regulatory purposes.</li> <li>○ relax aggregate limit of INR 25 Cr in the share capital and share premium; and</li> <li>○ liberalize end use conditions for not investing in loans and advances or capital contribution to other entity or shares &amp; securities to permit use for bona fide business purposes like granting loans to employees or acquiring other businesses through share acquisitions or mergers/demergers and/or for temporary deployment of funds in mutual funds pending use for business purpose</li> </ul> </li> <li>● The above measures will ensure that the Indian companies are able to raise funds from genuine sources for bona fide business purposes without any hassles of establishing FMV or substantiating value to tax authority. It shall reduce the dispute over valuation and avoid unnecessary litigation.</li> <li>● To give true prospective effect to the amendment, it may also be clarified that the provision will not apply to conversion of convertible instrument (like CCDs or CCPS) into shares on or after 1 April 2023 where the convertible instrument was issued prior to 1 April 2023.</li> </ul>
12.	<b>Indexing and cost of acquisition of shares/ securities after Split</b>	<p><b>Rationale:</b></p> <ul style="list-style-type: none"> <li>☐ Split of shares do not change the capital structure or enhance capital of a company. It is merely sub-division of existing shares / securities.</li> <li>☐ 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.</li> </ul>

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		<p>Further, section 55 of the Income Tax Act permits assessee to substitute fair market value as of 31<sup>st</sup> January 2018 against cost of acquisition. However, there is apprehension that in case of split shares, such substitution may not be available.</p> <p><b>Recommendation:</b></p> <p>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 31<sup>st</sup> January 2018 in place of cost shall be available, with suitable adjustment for split.</p>
<b>Tax deducted at source</b>		
13.	<b>Issuance of Master Circular for resident &amp; non-resident payments</b>	<p><b>Rationale &amp; Issue:</b></p> <p>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.</p> <p>Separately, given the substantive amendments in TDS provisions (194 Q/194 O), provisions relating to NR taxation (SEP, EL, FTC) and under the domestic law (194R, Explanation to S.37), in the past two years, business need positive and negative illustrations to make suitable changes in their business and ensure full compliance.</p> <p><b>Recommendation:</b></p>

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		<p>☐ 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.</p> <p>☐ 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.</p> <p>☐ Additionally, CBDT may also consider issuing circulars/instructions annually giving complete details of the amendments introduced during a fiscal year to the taxpayers.</p>
14.	<p><b>Clarify person whose PAN should be considered in case of dividend payment on GDRs</b></p>	<p><b>Rationale and Issue</b></p> <p>☐ 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 Depository Receipt Mechanism) Scheme, 1993 made it clear that dividend paying company can rely on PAN of overseas depository for making TDS compliance in India</p> <p><i>“Taxation on shares issued under Global Depository Receipt Mechanism.</i></p> <p><i>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 Depository Bank.</i></p> <p><i>(2) On receipt of these payments of dividend after taxation, the Overseas Depository Bank shall distribute them to the non-resident investors proportionate to their holdings of Global Depository Receipts</i></p>

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		<p><i>evidencing the relevant shares. The holders of the Depository Receipts may take credit of the tax deducted at source on the basis of the certification by the Overseas Depository Bank, if permitted by the country of their residence.”</i></p> <p>☐ 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.</p> <p><b>Recommendation</b></p> <p>☐ 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</p>
15.	<p><b>Provisions of Section 194IA – TDS on property transactions – Not to apply to SARFAESI sale cases</b></p>	<p><b>Rationale:</b></p> <p>☐ 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.</p> <p>☐ 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 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</p>



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		<p>Interest of India (CERSAI) to register security interest created by banks and financial institutions covered under the SARFAESI Act.</p> <p>☐ 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.</p> <p>☐ 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.</p> <p><b>Recommendation:</b></p> <p>☐ 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.</p>
16.	<b>Impact of higher TDS rate on grossing up u/s. 195A in net of tax payment (Sec 206AB)</b>	<p><b>Rationale and issue:</b></p> <p>☐ 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.</p> <p><b>Recommendation:</b></p>

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		<p>☐ 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.</p>
17.	<p><b>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</b></p>	<p><b>Rationale:</b></p> <p>☐ 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”.</p> <p>☐ 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.</p> <p>☐ 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.</p> <p><b>Recommendation:</b></p> <p>☐ 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.</p>
18.	<p><b>Form 26AS /Annual Information Statement ( AIS)</b></p>	<p><b>Rationale:</b></p>

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	<p><b>to include PAN of deductor, Unique TDS Certificate Number and Invoicewise break for Sales data</b></p>	<ul style="list-style-type: none"> <li>☐ With Section 194Q and Section 206C(1H) introduced for TDS / TCS on purchase / sale of goods, the volume of transactions covered under the ambit of TDS / TCS has increased.</li> <li>☐ Currently, Form 26AS/Annual Information Statement (AIS) 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.</li> <li>☐ Similarly, in case of large companies, matching of TDS as per 26AS with TDS as per books becomes very difficult. Further, there can be various sales returns on which the large corporates, for ease of compliance, may not be reversing the TDS deducted and already deposited with the government. This leads to a challenge in claiming of TDS / TCS reconciliation and TDS / TCS credit claim.</li> <li>☐ Also, while sales data from GST returns is captured in AIS and sales/purchase data is captured from TDS u/s. 194Q or TCS u/s. 206(1H), there is no invoice wise break up available which will facilitate automated reconciliation through software to identify data mismatches.</li> </ul> <p><b>Recommendation:</b></p> <ul style="list-style-type: none"> <li>☐ TDS credit should be allowed basis the Form 26AS credit, irrespective of the timing difference of purchase / sales recorded in books of taxpayer vs TDS / TCS credit appearing in a different financial year.</li> <li>☐ Alternatively, Form 26AS/AIS 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.</li> <li>☐ Furthermore, the reporting of TDS u/s. 194Q or TCS u/s. 206C(1H) in quarterly TDS/TCS statements should include invoice wise break up such that it is reflected in Form 26AS/AIS of the taxpayer and facilitates reconciliation with books of account.</li> </ul>

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19.	<p><b>Onerous Form 15CA/15CB compliance in respect of ODI</b></p>	<p><b>Rationale and Issue:</b></p> <ul style="list-style-type: none"> <li>☐ 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. Form 15CA Part D is furnished when income is not chargeable to tax. Further the authorized dealer bank is also required to furnish a quarterly statement in Form 15CC providing details of Form 15CA/ 15CB.</li> <li>☐ The primary purpose of these forms is to assure the Tax Authorities that remittances outside India is made post deduction of appropriate taxes.</li> <li>☐ However, for ODI transactions in IBU is exempt but still the compliance for the form 15CA Part D is applicable.</li> <li>☐ Generating form 15CA before every remittance is a significant compliance burden for IBU resulting in delay in remittance which would impact the experience of the non resident investors in comparison to other Financial centres like Singapore, etc.</li> </ul> <p><b>Recommendation</b></p> <ul style="list-style-type: none"> <li>☐ To reduce compliance burden, one single Form 15CA should be allowed to be uploaded/ obtained for all non-resident investors with a suitable annexure on a periodic basis – six monthly or annually. Since the income is exempt, delayed-filing of form 15CA would not result in any revenue loss.</li> </ul>
20.	<p><b>Liberalise Rule 30(3) by expanding scope coverage and laying down transparent guidelines prescribing circumstances in which such</b></p>	<p><b>Rationale:</b></p> <ul style="list-style-type: none"> <li>☐ 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 :-</li> </ul>

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	<p><b>facility can be availed</b></p>	<ul style="list-style-type: none"> <li>● The facility is permitted only in ‘special cases’ but there is no definition or guidance on what such ‘special cases’ could be</li> <li>● 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.</li> <li>● The TDS AO is required to obtain prior approval of JCIT before granting such facility</li> </ul> <p>☐ 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.</p> <p>☐ 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.</p> <p><b>Recommendation</b></p> <p>☐ To streamline the process and enable more taxpayers to avail the facility of quarterly TDS payments, the following suggestions may be considered :-</p> <ul style="list-style-type: none"> <li>● The facility may be made more broad-based and extended to all TDS provisions</li> <li>● 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</li> <li>● Timebound online procedure for making and disposing applications under Rule 30(3) may be introduced</li> </ul>
21.	<p><b>Section 197 - Lower Withholding Tax Certificate</b></p>	<p><b>Rationale:</b></p> <p>☐ Generally, there is an upper limit specified in concessional TDS Certificates issued u/s 197</p>

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		<p>☐ 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</p> <p><b>Recommendation:</b></p> <p>☐ 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</p>
22.	<p><b>Representations on FAQs covered in Circular No. 12/2022 and Circular No. 18/2022 issued for removal of difficulties in giving effect to TDS on business perquisites/benefits</b></p>	
	<p><b>Executive Summary</b></p>	<p>☐ FAQ 1 of Circular No. 12/2022 may be reconsidered and it may be clarified that TDS u/s. 194R is applicable only to payment of benefit or perquisite which is taxable u/s. 28(iv). Appropriate consequential clarifications are also required in FAQ 2 and FAQ 3 which reiterate that deductor is not required to check if the benefit or perquisite is taxable in the hands of recipient. It is also desirable to have specific definition of 'benefit' or 'perquisite' on lines of s.17(2) with appropriate valuation rules to have better clarity and consistency of application</p> <p>☐ The illustrations in FAQ 3 in Circular No. 12/2022 may be revisited and proper guidance may be given to taxpayers by citing those decisions where receipt of capital asset by taxpayer was held to be benefit or perquisite arising from business or exercise of profession.</p>

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		<p>It may be specifically clarified that any write off of debt whether unilateral or through negotiated settlement even for taxpayers other than 10 categories of financial institutions specified in FAQ 1 of Circular No. 18/2022 is not a benefit or perquisite arising from business or exercise of profession and hence not liable to TDS u/s. 194R</p> <p>The clarification provided in FAQ 4 of Circular No. 12/2022 with respect to free samples may be reconsidered and it may be clarified the provisions of free samples for testing or customer evaluation does not constitute benefit or perquisite liable to TDS u/s. 194R. If required, to avoid abuse, a safe harbour like total sample cost not exceeding 2% or 5% of total sales may be considered as a bonafide sales promotion activity</p> <p>Doctors are statutorily required to use free medical samples for clinical evaluation purposes only by providing them to patients. It cannot be sold or monetised by them. Thus, it does not result in any benefit or perquisite to the doctors. If the pharmaceutical companies and healthcare professionals follows the guidelines laid down by various statutory pharmaceutical bodies such as 2019 Organisation of Pharmaceutical Producers of India (OPPI) Code of Practice, the Uniform Code of Pharmaceutical Marketing Practices by the Department of Pharmaceuticals, 2014, the Indian Medical Council (Professional Conduct, Etiquette and Ethics), Regulations 2002 (MCI Code), etc. in respect of free medicine samples, then TDS related provisions under Section 194R should not apply. Hence, TDS on free medical samples is not justified since it does not represent 'benefit' or 'perquisite' for the doctors. Hence, it is humbly requested that the CBDT should not impose such burden on the industry. Rather it should be clarified that TDS u/s. 194R will not apply on free samples distributed in compliance with statutory guidelines. FAQ 4 may be revisited and modified to that extent</p> <p>In case of brand reminders, the item / incentive predominantly benefits the provider as it increases its visibility and promotes its brand and the benefit arising to the recipient, if any, is purely tangential and negligible. Further these brand reminders are small value items for daily use with minimum life cycle and having practically no independent utility for the recipient. These are provided by various companies as per industry practice. Such promotional expenditure is incurred only to aid promotion of provider's products and create market awareness about the medicines or drugs of the pharmaceutical company and not intended to provide any benefit to the</p>

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		<p>recipient of such items. Further the receipt of such brand reminder items is not taxable as income under Section 28(iv) of the Act for the recipient in absence of any benefit or perquisite arising to him. Accordingly, the recipient may refuse to provide their PAN number to the companies or even receive any such free items from the companies. It therefore causes undue hardships to the businesses. Brand reminders such as items provided with the company's logo etc. should be outside the ambit of TDS under Section 194R as they are provided for the benefit of the provider of items itself or alternatively a threshold be prescribed for each transaction of brand reminder.</p> <p>☐ On FAQ 5 of Circular No. 12/2022 in respect of valuation of benefits/perquisites, we request the CBDT to issue illustration considering the factors such as date of FMV, related party etc. In absence of any clarification from CBDT, confusion and ambiguity may get created in the minds of stakeholder which may lead to increase in possibilities of TDS default and selection of scrutiny assessment / litigation</p> <p>☐ Appropriate considerations may be given in social media influencer illustration in FAQ 6 of Circular No. 12/2022 for one time use products or products permitted to used for its economic life or services consumed</p> <p>☐ FAQ 7 of Circular No. 12/2022 may be modified to clarify that reimbursement of personal expenses incurred by the service provider is a benefit or perquisite liable to TDS u/s. 194R</p> <p>☐ Small value Diwali or other festival or event related (like dealer conference or 25/50 years of company, etc) small value corporate gifts/souvenirs may be exempted from TDS u/s.194R under a separate sub-limit</p> <p>☐ FAQ 7 of Circular No. 18/2022 may be modified to clarify that bonus and rights issue by all companies whether widely held or closely held does not trigger TDS obligation u/s. 194R</p> <p>☐ We most humbly request to take the above representation on record and issue required clarification / guidance / illustration to resolve the confusion and ambiguity in the minds of stakeholders mentioned above. Further, we</p>



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		request CBDT to grant opportunity for in-person meeting with our representative to put forward the stakeholder views in more detail.
	<b>Detailed representations</b>	<p>☐ <b>Rationale and recommendations</b></p> <p>☐ This has reference to guidelines/clarifications issued by the Central Board of Direct Taxes (CBDT) through Circular No. 12/2022 dated 16 June 2022 and Circular No. 18/2022 dated 13 September 2022 for removal of difficulties in application of new withholding provision section 194R which has come into effect from 1 July 2022.</p> <p>☐ This representation seeks to put forth stakeholders views why some of the FAQs and/or illustrations provided therein need to be reconsidered by CBDT having regard to inconsistency with correct legal position and/or practical challenges in application of FAQs.</p> <p>☐ Object of TDS u/s. 194R is to capture incomes u/s. 28(iv) hitherto unreported by recipients</p> <p>☐ The new TDS provision u/s. 194R requires the payer to deduct tax @ 10% on provision of ‘benefit’ or ‘perquisite’, whether convertible into money or not, arising from business or exercise of profession, to a resident. The section provides a de-minimus threshold of Rs. 20,000 for applicability of TDS such that no TDS is required if the aggregate value of benefits or perquisites provided to a single person during a financial year does not exceed Rs. 20,000.</p> <p>☐ As per Explanatory Memorandum to Finance Bill 2022, the object of the new TDS provision is explained as follows which makes it clear that the intention is to capture those benefits which are admittedly taxable u/s. 28(iv) but were escaping assessment in absence of reporting framework :-</p> <p style="text-align: center;"><i><b>“As per clause (iv) of section 28 of the Act, the value of any benefit or perquisite, whether convertible into money or not, arising from business or exercise of profession is to be charged as business income in the hands of the recipient of such benefit or perquisite. However, in many cases, such recipient does not report the receipt of benefits in their return of income, leading to furnishing of incorrect</b></i></p>

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		<p><i>particulars of income. Accordingly, in order to widen and deepen the tax base, it is proposed to insert a new section 194R to the Act to provide that the person responsible for providing to a resident, any benefit or perquisite, whether convertible into money or not, arising from carrying out of a business or exercising of a profession by such resident, shall, before providing such benefit or perquisite, as the case may be, to such resident, ensure that tax has been deducted in respect of such benefit or perquisite at the rate of ten per cent of the value or aggregate of value of such benefit or perquisite.”</i></p> <p>☐ The Budget Speech of Finance Minister while introducing Finance Bill 2022 referred to the provision as follows :-</p> <p><i>“137. It has been noticed that as a business promotion strategy, there is a tendency on businesses to pass on benefits to their agents. Such benefits are taxable in the hands of the agents. In order to track such transactions, I propose to provide for tax deduction by the person giving benefits, if the aggregate value of such benefits exceeds Rs. 20,000 during the financial year. “</i></p> <p>☐ The above extracts suggests that S. 194R was introduced with an intent to establish a withholding obligation in respect of income which is chargeable to tax u/s 28(iv). In fact, the language of S. 194R is also identical to S. 28(iv).</p> <p><b>1. FAQ 1 of Circular No. 12/2022 on scope of s.194R requires reconsideration in the light of conflict with legislative object of introduction of s.194R and practical challenges</b></p> <p>☐ FAQ 1 states that S. 194R applies to a benefit or perquisite irrespective of whether such benefit is chargeable to tax and irrespective of the provision under which it is chargeable to tax. As an illustration, FAQ 1 suggests that S.194R can apply even where the benefit is taxable u/s. 41(1) of ITA. This expands the scope of s.194R much beyond s.28(iv).</p> <p>☐ Although, s.194R does not expressly refer to s.28(iv), the language of s.194R(1) is identical to s.28(iv) viz. any benefit or perquisite, whether convertible into money or not, arising from business or the exercise of a profession.</p>

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		<p>No other section in the Income tax Act bears the same language. Even s.41(1) which is referred as illustration in FAQ 1 refers to <i>“obtaining whether in cash or in any other manner whatsoever, any amount in respect of such loss or expenditure or some benefit in respect of such trading liability by way of remission or cessation thereof”</i>. It does not refer to <i>“any benefit or perquisite, whether convertible into money or not, arising from business or the exercise of a profession”</i></p> <p>☐ S.28(iv) and s.41(1) cover different types of business incomes. The scope of s.28(iv) was explained in CBDT Circular No. 20D dated 7 July 1964 by providing illustration of <i>“the value of rent-free residential accommodation secured by an assessee from a company in consideration of the professional services as a lawyer rendered by him to that company”</i>.</p> <p>☐ In contrast, s.41(1) is successor to s.10(2A) of 1922 Act which was required to be inserted in view of judicial precedents<sup>3</sup> which held that such remission of liability is not “income” at all in the hands of the taxpayer.</p> <p>☐ Similar rationale will apply to all other provisions which have different language and scope. Hence, it is incorrect to infer that TDS obligation u/s. 194R will extend to any benefit or perquisite and regardless of whether the amount is taxable or under which section it is taxable.</p> <p>☐ If FAQ 1 is accepted to be correct and it is applied on literal basis in conjunction with FAQ 2 and FAQ 3, then TDS u/s. 194R will become a residual or “catch all” TDS provision which covers all payments which are not already covered by other TDS provisions. This does not align with the legislative intent and express language of s.194R.</p> <p>☐ It also raises significant practical challenges. For instance, s.41(1) covers unilateral write back of trading liabilities by a debtor in his accounts even though creditor may not have written off as bad debt in his books u/s. 36(1)(vii).</p>

<sup>3</sup> Refer, for instance, British Mexican Petroleum Co. Ltd. vs. Jackson (1932) 16 TC 570 (HL), Mohsin Rehman Penkar vs. CIT (16 ITR 183)(Bom)), Baroda Traders Ltd v. CIT (57 ITR 490)(Guj )

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		<p>How can creditor keep track of write back in debtor's books? Instead of removing difficulties in giving effect to s.194R, this FAQ creates difficulties for taxpayers.</p> <p>☐ Hence, it is submitted that FAQ 1 may be reconsidered and it may be clarified that TDS u/s. 194R is applicable only to payment of benefit or perquisite which is taxable u/s. 28(iv). Appropriate consequential clarifications are also required in FAQ 2 and FAQ 3 which reiterate that deductor is not required to check if the benefit or perquisite is taxable in the hands of recipient. It is also desirable to have specific definition of 'benefit' or 'perquisite' on lines of s.17(2) with appropriate valuation rules to have better clarity and consistency of application.</p> <p><b>2. Illustrations provided in FAQ 3 of Circular No. 12/2022 on benefits received in the form of capital assets requires reconsideration</b></p> <p>☐ FAQ 3 correctly clarifies that benefit or perquisite u/s. 28(iv) may be received in the form of capital asset like motor car, land, etc. To this extent, the illustration of car given to assessee by his disciple who benefited from his preaching being held to be taxable u/s. 28(iv) in the case of CIT v. Ram Kripal Tripathi (1980)(125 ITR 408)(All) is apt.</p> <p>☐ However, references of other five judicial precedents create ambiguity and confusion to the stakeholders which is explained below.</p> <table border="1" data-bbox="772 1053 2049 1364"> <thead> <tr> <th data-bbox="772 1053 828 1117">Sr</th> <th data-bbox="828 1053 1433 1117">Gist of ruling in FAQ 3</th> <th data-bbox="1433 1053 2049 1117">Our observations</th> </tr> </thead> <tbody> <tr> <td data-bbox="772 1117 828 1364">1</td> <td data-bbox="828 1117 1433 1364">Assessee entered into an agreement with '1' for purchase of a plot of land and certain amount was paid as earnest money. However, possession of land was not given to assessee and seller entered into another agreement with a third party to develop the said plot. Assessee filed suit</td> <td data-bbox="1433 1117 2049 1364"> <ul style="list-style-type: none"> <li>• This case did not involve benefit received in the form of capital asset.</li> <li>• The taxpayer, as a buyer, received compensation for breach of contract for sale of land by seller.</li> </ul> </td> </tr> </tbody> </table>	Sr	Gist of ruling in FAQ 3	Our observations	1	Assessee entered into an agreement with '1' for purchase of a plot of land and certain amount was paid as earnest money. However, possession of land was not given to assessee and seller entered into another agreement with a third party to develop the said plot. Assessee filed suit	<ul style="list-style-type: none"> <li>• This case did not involve benefit received in the form of capital asset.</li> <li>• The taxpayer, as a buyer, received compensation for breach of contract for sale of land by seller.</li> </ul>
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			<p>in which a consent decree was passed and in pursuance of same certain amount as paid to assessee. On appeal it was held that such sum received in pursuance of consent decree was liable to tax as business income under section 28(iv). Ramesh Babulal Shah v CIT (2015) 53 taxmann.com 277 (Bom)</p> <ul style="list-style-type: none"> <li>● Taxpayer claimed it to be capital gains while the Bombay HC held that it was received in the course of adventure in the nature of trade and hence represented a revenue receipt taxable u/s. 28(iv).</li> <li>● Incidentally, taxpayer did not raise argument of benefit being monetary in nature and Bombay HC did not have benefit of SC ruling in Mahindra &amp; Mahindra's case delivered subsequently laying down ratio that s.28(iv) does not cover monetary benefit.</li> <li>● Nevertheless, what was received was monetary compensation and not a capital asset like car or land.</li> </ul>
		2	<p>The amount representing principal loan waived by bank under one time settlement scheme would constitute income falling under section 28(iv) relating to value of any benefit or perquisite, arising from business or exercise of profession. CIT v Ramaniyam Homes (P) Ltd (2016) 68 taxmann.com 289 (Mad)</p> <ul style="list-style-type: none"> <li>● This ruling on waiver of loan has been overruled by SC in Mahindra &amp; Mahindra's case (supra). Hence, its reference creates confusion.</li> <li>● In any case, the taxpayer received benefit of waiver of loan which according to SC in Mahindra &amp; Mahindra's case is not a benefit or perquisite arising from business or</li> </ul>

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				<p>carrying on of profession. There was no receipt of capital asset.</p> <ul style="list-style-type: none"> <li>• Please also refer our separate representations at para 6 below on write off/one time settlement of loans of constituents by banks/financial institutions.</li> </ul>
		3	<p>Value of rent free accommodation, furniture and fixtures given to director was held as taxable under section 28(iv). CIT v Subrata Roy (2016) 385ITR 547 (All)</p>	<ul style="list-style-type: none"> <li>• In this case, it was admitted that the taxpayer was an employee. Hence, the benefits were held primarily taxable u/s. 17(2). S.28(iv) was considered as secondary.</li> <li>• In any case, the decision does not clearly specify whether the taxpayer got ownership of the assets or was merely allowed use of the assets like accommodation, furniture &amp; fixtures, etc. There were other benefits also like services of servants, gardeners, etc</li> <li>• Hence, it does not represent an illustration of receipt of benefit in the form of capital asset.</li> </ul>
		5	<p>The assessee was a director of a company. In terms of an agreement with the promoters, shares were allotted to the director. On these facts, it was held that the shares received by the director were benefit or perquisite received</p>	<ul style="list-style-type: none"> <li>• In this case, the benefit of free shares received in the capacity as director was held taxable under predecessor provision of s.</li> </ul>

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			<p>from a company by the director and it was a benefit assessable to tax. D. M. Neterwala v CIT (1986) 122 ITR 880 (Born)</p> <p>2(24)(iv) in 1922 Act. S.28(iv) was not on statute at the relevant point of time.</p> <ul style="list-style-type: none"> <li>• S.2(24)(iv) taxes value of any benefit or perquisite, whether convertible into money or not, obtained from a company, inter alia, by a director and any sum paid by any such company in respect of any obligation which, but for such payment, would have been payable by the director. There is no need for the director to be engaged in business or carrying on profession for this purpose. Hence, this section is not comparable to s.194R which requires the resident recipient to receive the benefit in the course of carrying on business or profession.</li> <li>• Separately, perquisites provided to executive directors are covered by Salary TDS u/s. 192 and those provided to non-executive directors are covered by TDS u/s. 194J(1)(ba). Hence, it would not be covered by TDS u/s. 194R. Considering the above position, the reference to this decision creates ambiguity and confusion for the taxpayers.</li> </ul>

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		<p>6</p>	<p>Value of gift of land was held as a receipt by the assessee in carrying on of his vocation and was held as taxable. Amarendra Nath Chakraborty v CIT (1971) 79 ITR 342 (Cal)</p> <ul style="list-style-type: none"> <li>● In this case, the gift of land received was held as received in the course of exercise of vocation of preaching religion and hence not exempt as 'casual receipt' under predecessor provisions of s.10(3) (now deleted) of 1922 Act. S.28(iv) was not on statute at the relevant point of time</li> <li>● Since it was held to be regular income dehors s.28(iv), confusion arises how does this support the proposition that perquisite or benefit arising from business or exercise of profession u/s.194R can also include a capital asset.</li> </ul> <p>☐ Hence, it is represented that the illustrations may be revisited and proper guidance may be given to taxpayers by citing those decisions where receipt of capital asset by taxpayer was held to be benefit or perquisite arising from business or exercise of profession.</p> <p><b>3. Clarify that unilateral or agreed bad debt write off does not constitute benefit or perquisite even for taxpayers other than 10 categories of financial institutions specified in FAQ 1 of Circular No. 18/2022</b></p> <p>☐ Response to Question 3 of the Circular No. 12/2022 has sought to provide an illustrative list of the perquisites or benefits received in the form of capital assets that can be taxable in the hands of the recipient and therefore, subject to TDS under Section 194R of the Income-tax Act, 1961 ("the Act"). One of the illustrations provided relates to an amount representing principal loan waived by bank under one time settlement scheme would constitute income falling under section 28(iv) relating to value of any benefit or perquisite, arising from business</p>



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		<p>or exercise of profession. CIT v Ramaniyam Homes (P) Ltd (2016) 68 taxmann.com 289 (Mad). The inclusion of this illustration creates an ambiguity inasmuch as this ruling has been reversed by the Hon'ble Supreme Court in the case of CIT v. Mahindra &amp; Mahindra (404 ITR 1)(SC). Also, the waiver of loan does not result in capital asset in the hands of the taxpayer.</p> <p>❏ In this regard, clarification is required on the treatment of bad debts arising out of the general trade practice and the receivables required to be written off owing to non-recovery and / or by generally accepted accounting principles. The receivables towards the principal dues may be non-realizable, despite the genuine efforts of the taxpayer and such reasons can be attributable to the financial position of the debtor, debtor not being traceable, etc. The machinery provision of recovery of TDS in such cases cannot be exercised as the principal sum itself would be non-realizable &amp; therefore, TDS cannot be deducted. Further, in case the taxpayer has to gross up the TDS &amp; bear the TDS liability owing to bad debts' write-off in books, it leads to an out-of-pocket situation and undue hardship to the taxpayer.</p> <p>❏ Furthermore, a bad debt write off is a unilateral action taken in the books of the creditor and at times emanating out of accounting principles. The creditor is not legally precluded from pursuing the recovery from the debtor even after such unilateral write off and hence, the write off in books of creditor cannot be regarded as benefit or perquisite in the hands of the debtor. If a TDS were to be done on this and reflected in the Form 26AS, then it would make it even more difficult to recover any amounts against the debt from the debtor, as the debtor would then argue that the debt is no longer payable or the liability stands waived off.</p> <p>❏ In this regard, considering the above referred difficulties, in subsequent Circular No. 18/2022, it is clarified through FAQ 1 that TDS u/s. 194R will not apply for one time loan settlement/waiver by 10 categories of financial institutions. It is submitted that the rationale or logic equally applies to other taxpayers as well.</p>

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		<p>Therefore, a clarification may be issued on the non-applicability of TDS under Section 194R in cases of write-off of bad debts in the books of accounts of all taxpayers and not necessarily 10 categories of financial institutions referred in FAQ 1 of Circular No. 18/2022.</p> <p><b>4. Free non-medical samples given for testing are not ‘benefits’ or ‘perquisite’ – FAQ 4 of Circular No. 12/2022 may be reconsidered on this aspect</b></p> <p>FAQ 4 clarifies that the free samples would not fall under relaxation provided to sales discount, cash discount, rebate or quantitative discount referred in first three paras of FAQ 4.</p> <p>Business exigencies require provision of free samples for bonafide business purposes. For example, whenever any new product is launched (eg. new industrial chemical), the manufacturer needs to give free samples to its customers to test whether it meets their requirements before placing large orders. Similarly, plywood and laminate manufacturers provides samples of their product portfolio in catalogues to the retailers so that end customers can browse through a range of choices before shortlisting the final shade, design and quality. Such catalogues have no commercial value except for the purposes of display to customers. Another instance in FMCG industry are ‘tester products’ for items like perfumes which are kept at sales counter for the customers to try before purchasing the product.</p> <p>In case of FMCG companies it is a common practice to distribute samples of its products/goods for free through Marketing agencies to end consumers as an incentive / benefit. Such pass through of goods from Marketing agencies should not be treated as a benefit / perquisite in the hands of Marketing agency and suitable clarification should be issued in this regard. If the same is subject to TDS in the hands of Marketing agency it shall lead to significant hardships given 10% TDS deduction on value of goods can be exponentially higher as compared to marketing fees charged by the agency.</p>

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		<p>☐ Similarly, clarification may also be provided on non-applicability of TDS under Section 194R on Point of sale material (POSM) provided by Companies with its branding and logo to retail outlets / chains wherein its goods are sold as same is for brand &amp; business promotion and not a benefit / incentive to the retail outlet / chains</p> <p>☐ The illustrations of non-medical samples can be multiplied but the essence of all illustrations is that the samples are not for granting benefit or perquisite to the customers but for the purposes of customer’s evaluation before buying the products.</p> <p>☐ Imposition of TDS on such transactions will create huge practical challenges and become roadblock for genuine sales promotion activity. No customer will be ready to pay tax on value of such samples since the customers are not personally enriched.</p> <p>☐ Hence, it is requested to reconsider the clarification provided in FAQ 4 with respect to free samples and it may be clarified the provisions of free samples for testing or customer evaluation does not constitute benefit or perquisite liable to TDS u/s. 194R. If required, to avoid abuse, a safe harbour like total sample cost not exceeding 2% or 5% of total sales may be considered as a bonafide sales promotion activity.</p> <p><b>5. Free medical samples are not ‘benefits’ or ‘perquisites’ in the hands of doctors – FAQ 4 of Circular No. 12/2022 may be reconsidered on this aspect</b></p> <p>☐ FAQ 4 clarifies that the free samples would not fall under relaxation provided to sales discount, cash discount, rebate or quantitative discount referred in first three paras of FAQ 4. It further provides illustration of free medicine samples to medical practitioners as transaction liable to TDS u/s. 194R. It further provides for “dual TDS” mechanism where free samples are provided to employee or consultant doctors of hospital in terms of pharma company is required to do TDS u/s. 194R in name of hospital and hospital, in turn, is required to do TDS u/s. 192 for employee doctors and u/s. 194R for consultant doctors. It also provides alternative of pharma company doing direct TDS in the name of consultant doctor.</p>

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		<p>☐ The above clarifications in the guise of removal of difficulties creates huge compliance burden for the industry and unintended outcomes which is explained below.</p> <p>☐ It may be recollected that CBDT Circular No. 20D dated 7 July 1964 had explained the effect of s.28(iv) by providing illustration of “<i>the value of rent-free residential accommodation secured by an assessee from a company in consideration of the professional services as a lawyer rendered by him to that company</i>”. This itself suggests that s.28(iv) is intended to cover an item which results in personal benefit or enrichment to the taxpayer. It cannot cover free medical samples which doctors are statutorily required to use strictly for clinical evaluation purposes by giving them to patients and cannot be sold or monetised by them.</p> <p>☐ The Hon’ble Supreme Court ruling in the case of Eskayef v. CIT (245 ITR 116) supports that expenditure incurred on physician’s samples are for the purposes of advertisement, publicity or sales promotion – regardless of whether they are for the purposes of testing efficacy of new medicine or for promoting an established medicine.</p> <p>☐ FAQ 64 in CBDT Circular No. 8/2005 in context of erstwhile Fringe Benefits Tax (FBT) clarified that they are in the nature of ‘sales promotion and publicity’ and hence liable to FBT. But subsequently, S.115WB was amended firstly to exclude distribution of free samples of medicines or medical equipment to doctors by Finance Act 2006, and subsequently by Finance Act 2007 to distribution of samples either free of cost or at concessional rate of any products (not necessarily pharma products), from scope of FBT on the ground of being an ordinary selling expenditure which does not result in any fringe benefit for the employees.</p> <p>☐ The above judicial and legislative development shows that distribution of free physician samples is an ordinary/bonafide selling expenditure which cannot be regarded as resulting in benefit or perquisite to the doctors.</p> <p>☐ Providing samples of pharmaceutical products is not prohibited under either the Indian Medical Council (Professional Conduct, Etiquette and Ethics), Regulations 2002 (“MCI Code”) or the Uniform Code of Pharmaceutical Marketing Practices by the Department of Pharmaceuticals (“UCPMP”). The UCPMP prescribes</p>

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		<p>guidelines under which medical samples should be dispensed which ensure that they are used strictly for clinical evaluation purposes. Even the draft Uniform Code for Medical Device Marketing Practices (“UCMDMP”) published for stakeholder consultation on 16 March 2022 lays down guidelines to ensure that medical devices are distributed as samples for evaluation purposes only.</p> <ul style="list-style-type: none"> <li>☐ The Drugs and Cosmetics Rules, 1945 also recognizes the practice of providing drugs for distribution to medical professionals as a free sample by providing specific labelling requirements, requiring such sample to be labelled with the words ‘Physician’s Sample – Not to be sold’.<sup>4</sup></li> <li>☐ The above referred guidelines illustratively require following compliances by the pharma/medical devices industry <ul style="list-style-type: none"> <li>(a) Samples to be provided only to Health Care Professionals (HCP) or their authorised representatives</li> <li>(b) Quantity of samples should be very nominal – for medicines, it is restricted to prescribed dosage for 3 patients.</li> <li>(c) It should be accompanied by latest product information</li> <li>(d) The pharma/medical device company must maintain record of the quantities of samples distributed, details of the HCP to whom they were supplied and date of supply</li> </ul> </li> <li>☐ Relevant extracts from UCPMP and draft UCMDMP are provided in Annexure A</li> <li>☐ Considering the above referred strict conditions under which product samples are distributed to doctors, it is humbly submitted that distribution of free samples cannot be regarded as benefit or perquisite for the doctors. The doctors are required to administer them to patients. They cannot monetise them or personally enjoy them like other gift items like television, gold coins, free travel or hospitality, etc.</li> </ul>

<sup>4</sup> Drugs and Cosmetics Rules, 1945, rule 96 (ix)

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		<p>☐ We may also highlight the practical challenges which pharma/medical device industry and doctors may face if TDS is made on value of free samples. In most cases, the free samples will either be dispensed to patients or scrapped by the doctors and hence, the doctors may not perceive it as their income. This is not comparable to other freebies prohibited by MCI Guidelines.</p> <p>☐ The pharma/medical device company will, therefore, find it difficult to recover the TDS from the doctors. In fact, the doctors may simply refuse to accept the free samples if pharma/medical device company requests for TDS amount and PAN/Aadhar. The issue of recovery of TDS will cause friction between the industry and doctors defeating the purpose of statutory guidelines on dispensation of free samples. Ultimately, due to business considerations, the pharma/medical device industry may need to bear the TDS liability themselves by suitably grossing up the value of free samples in terms of s.195A and FAQ 9 which will result in additional cost burden on the industry.</p> <p>☐ Since the free samples are either distributed to patients or scrapped, the doctors should be entitled to corresponding deduction, if the value of free samples is considered as taxable in their hands. However, in absence of clarity, the issue of allowability of corresponding deduction for such expense in the hands of the doctors will also pose challenges. The employee doctors cannot claim any deduction from salary income for the free samples distributed to patients. It will result in unwarranted artificial taxation on such employee doctors.</p> <p>☐ Some doctors may wish to take position that the free samples do not constitute their income and hence not offer anything in their return of income nor claim corresponding TDS credit. But their AIS/Form 26AS will reflect TDS u/s. 194R made by pharma/medical device companies on value of free samples. This will result in the doctors facing action by the CPC u/s. 143(1)(a)(vi) while processing their returns to add the value of income appearing in Form 26AS or Form 16A to their returned income.</p> <p>☐ All in all, if TDS is made by pharma/medical device industry on value of free samples distributed to doctors, it will cause immense practical difficulties for both industry and doctors.</p>

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		<p>☐ TDS on free medical samples is not justified since it does not represent ‘benefit’ or ‘perquisite’ for the doctors. Hence, it is humbly requested that the CBDT should not impose such burden on the industry. Rather it should be clarified that TDS u/s. 194R will not apply on free samples distributed in compliance with statutory guidelines. FAQ 4 may be revisited and modified to that extent.</p> <p><b>6. Clarification sought on Sales discount, cash discount and rebates referred in FAQ 4 of Circular No. 12/2022</b></p> <p>☐ Response to Question no. 4 of the Circular states that Sales discounts, cash discounts or rebates allowed to the customers from the listed retail price represent lesser realisation of the sale price itself. To that extent purchase price of customer is also reduced.</p> <p>☐ In normal trade practice prevalent in FMCG industry, the sales discounts or rebates are generally passed on to the customers via credit notes. In addition to discounts linked directly with the price of a particular product, these discounts could also be offered on the basis of certain volume of purchases by the distributor or for making payments in a reduced credit period or could be linked to various other parameters/ targets, normally referred as post-sales or target-linked discounts. In all such scenarios, the discounts will lead to lower sales realization in the books of the manufacturer and lower purchase price in the books of the purchaser. However, the use of the word “listed retail price” is causing ambiguity in interpretation in scenarios where discounts lead to a lower purchase price but is not linked to a specific product (e.g., cash discount or target-linked discounts) or may not be passed on to the end consumer in the chain (e.g., volume discount or other such trade discounts).</p> <p>☐ In many cases, such discounts are directly passed to end-customers or downstream intermediaries by way of monetary payments to ensure that they are not retained by intermediaries</p> <p>☐ Therefore, to avoid ambiguity, it may be clarified that any kind of sales discounts, trade discounts, volume discounts or adjustments by way of credit notes, which will effectively reduce the purchase price of the buyer,</p>

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		<p>should be kept outside the ambit of TDS under Section 194R. It may be clarified that discounts directly passed on to end-customers or downstream intermediaries by way of monetary payments are not covered by TDS u/s. 194R.</p> <p>☐ Response to Question no. 4 of the Circular has granted relaxation to the seller for giving "its" free items given from its stock in trade along with purchase of certain quantity of items e.g., in a situation where 2 items are offered free with purchase of 10 items. However, the reading of the answer has created an ambiguity that such relaxation can be applied only where the free items given are the same items being purchased by the buyer and not where, the free items are from the other product portfolio of the seller (2 toothpaste with 10 soap bars) or purchased by the seller from another manufacturer (e.g., a plastic mug free with 10 soap bars).</p> <p>☐ Given that the underlying principle remains the same in situations where free product offered with the main product is of another type, whether or not manufactured by the seller, it is requested to clarify that the seller can give free items, which are either purchased by the manufacturer or own manufactured products and the same relaxation would apply to free items of different class/ category.</p> <p><b>7. Valuation of benefits / perquisites – FAQ 5 of Circular No. 12/2022 – Issuance of illustrations</b></p> <p>☐ The CBDT has also mentioned about the valuation of benefit / perquisites in FAQ 5. As per the FAQ 5, the valuation of the benefit or perquisite would be based on fair market value ('FMV'). The CBDT should issue more clarification / guidance or provide illustration for the calculation of FMV. For instance, it is not clear whether it appropriately covers captive services provided by service providers like free stay in hotel provided by hotel to its agents.</p> <p>☐ It is better to provide valuation rules on lines of Rule 3 to prescribe different valuation rules for different types of benefits/perquisites.</p>



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		<p>☐ We request the CBDT to issue illustration considering the factors such as date of FMV, related party etc. In absence of any clarification from CBDT, confusion and ambiguity may get created in the minds of stakeholder which may lead to increase in possibilities of TDS default and selection of scrutiny assessment / litigation.</p> <p><b>8. Appropriate considerations may be given in social media influencer illustration in FAQ 6 of Circular No. 12/2022 for one time use products or products permitted to used for its economic life or services consumed</b></p> <p>☐ As per FAQ 6, no tax is to be deducted if products like car, mobile, outfit, cosmetics etc returned after use. However, to avoid confusion and litigation, it is also necessary to clarify that no tax is required to be deducted even in following scenarios:</p> <ul style="list-style-type: none"> <li>(a) Product is allowed to be used till the end of economic life but only for business purposes (eg. refrigerator with manufacturer’s logo provided for storing soft drinks or food items) and is returned /scrapped.</li> <li>(b) Product cannot be reused by any other person due to nature of such product (eg cosmetics - hygiene reasons). Accordingly, it may be scrapped and not returned by the influencer</li> <li>(c) Services consumed in the rendering of advertisement services like free hotel stay provided by a hotel for the purposes of content creation to be released on social media for promotion of the hotel.</li> </ul> <p>☐ Accordingly, it may be clarified that TDS u/s. 194R will not apply in above referred situations.</p> <p><b>9. Reimbursement of out of pocket expenses to service providers for expenses incurred in rendering of services is not a benefit or perquisite – FAQ 7 of Circular No. 12/2022 and FAQ 2 of Circular No. 18/2022 may be revisited</b></p> <p>☐ FAQ 7 of Circular No. 12/2022 clarifies that any expenditure which is the liability of a person carrying on business or profession, it met by the other person is in effect benefit/perquisite by the second person to the first person in the course of business/profession. It further provides illustration of reimbursement of hotel and travel expenses of consultant and clarifies that if the underlying invoices are not in the name of client, the client should deduct</p>

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		<p>TDS u/s. 194R whereas if the underlying invoices are in the name of client, no TDS needs to be made. FAQ 2 of Circular No. 18/2022 has reiterated this aspect with further clarification that if GST input tax credit of underlying expenditure is claimed by the agent/intermediary, then its reimbursement is liable to TDS u/s. 194R. It is, however, further clarified that in case of “pure agent” status of the agent/intermediary since GST input tax credit can be claimed by client and not by agent/intermediary, reimbursement of expenditure incurred by “pure agent” will not be liable to TDS u/s. 194R.</p> <p>☐ It is submitted that reimbursement of expenditure which is necessarily required to be incurred for providing of services to client cannot be regarded as benefit or perquisite. (Refer Owen vs. Pook (1969)(74 ITR 147)(HL). It does not matter whether the invoice of the expense is in the name of service provider or client. Moreover, such reimbursement of expense at actuals does not partake a character of income in the hands of the service provider and therefore should be excluded from the applicability of TDS u/s. 194R</p> <p>☐ On the other hand, reimbursement of some personal expenditure incurred by the service provider (like personal electricity bills or rent for residential accommodation) which has no connection with rendering of services to client would be a benefit or perquisite on which TDS u/s. 194R can apply.</p> <p>☐ As a trade practice, there are instances where in the contract for appointment of a consultant, the Company states that it would be their responsibility to take the Consultant to the desired place of work at their cost and expenses and shall either arrange for tickets or shall reimburse the same, the Consultant will not be “liable” to incur any expenses towards the traveling costs. In such case, TDS u/s 194R should not get attracted.</p> <p>☐ Further, whenever a Contract says “Consultants fees + out of pocket expenses at actuals”, the service receiver actually undertakes the liability of all out of pocket expenses actually incurred by the service provider in rendering the services, whether the invoice for the same is in the name of service provider or service receiver. However third-party invoice to claim the reimbursement, is a must. However, when a consultant claims reimbursement of</p>

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		<p>expenses towards ink and paper or printing expenses used/incurred in the process of rendering his opinion, the same is his liability and obligation which is met by the service receiver.</p> <p>☐ The consultant gets reimbursement not because the Company wants to provide him with some benefit or perquisite but the Company reimburses on account of its contractual obligation towards the consultant, for the same. So if the contract provides for reimbursement, there is no question that the liability of service provider is taken over by the service receiver, irrespective of the fact whether the third-party invoice is in the name of service provider or service receiver. Further the case of reimbursement does not attract any tax in the hands of recipient u/s 28(iv). Firstly, because it is a cash receipt and secondly it is P&amp;L neutral. Even if the amount of reimbursement is credited in the hands of the service provider, the same is also allowed as his/her business expenditure u/s 37(1). The dictionary meaning of the word “reimbursement” is to make restoration or payment of an equivalent amount. Hence, doing the hair-splitting as to whether the invoice is in the name of service provider or service receiver, for a revenue neutral case is unwarranted.</p> <p>☐ As earlier stated, S. 194R does not refer to a situation of benefit or perquisite provided either in cash or partly in cash and partly in kind where cash component is sufficient to discharge TDS obligation on whole of the benefit or perquisite. We therefore believe that since the reimbursement of out of pocket expenses is nothing but a cash payment to a service provider and hence should be outside the ambit of S. 194R.</p> <p>☐ While FAQ 2 of Circular No. 18/2022 purports to clarify that TDS u/s.194R will not apply to reimbursements to “pure agents” since such agents cannot claim GST input tax credit on underlying expenses, it may be noted that the disability to claim ITC is on account of underlying expense invoice being in the name of client and not in the name of agent. Hence, FAQ 2 of Circular No. 18/2022 does not offer any further relief for “pure agent” cases as compared to FAQ 7 of Circular No. 12/2022.</p> <p>☐ Hence, it is submitted that FAQ 7 may be modified to clarify that reimbursement of personal expenses incurred by the service provider is a benefit or perquisite liable to TDS u/s. 194R.</p>

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		<p><b>10. Small value Diwali or other festival or event related (like dealer conference or 25/50 years of company, etc) small value corporate gifts/souvenirs may be exempted from TDS u/s.194R under a separate sub-limit</b></p> <p>☐ Typically, corporate events have leisure element necessarily built in to sustain participants’ engagement at the event in the interest of the business. While the option provided in section 194R (where the transactions are in kind) to ask the other parties to deposit tax or otherwise, to seek reimbursement for tax from them. However, the same is not often practically feasible and would only go to increase the cost of these transactions for the organization as the payer entity itself would have to eventually bear the taxes. Also, the fallout would be that businesses would ultimately start curtailing these costs, which would have an adverse impact on several other industries such as MSME, food and beverages, travel and tourism leading also to fall in GST collections. We do not believe that to be the desired impact of the section.</p> <p>☐ Separately, gifts and souvenirs are essential to build and nurture the relationships with business associates. It is important to duly recognise this human aspect and go beyond just being transactional. The Courts have repetitively held that the taxman should not sit in judgement and decide what is appropriate for the business. Thus, a broader perspective should be adopted in understanding whether or not an activity can be seen as giving rise to a benefit or perquisite. Having said that this creates humungous administrative challenges in monitoring these transactions.</p> <p>☐ In case of salary taxation, there is separate sub-limit of Rs. 5000 for gifts on ceremonial occasions or otherwise for employees in Rule 3(7)(iv).</p> <p>☐ Thus, from that perspective and also from perspective of ease of doing business, the CBDT may alternatively consider enhancing the threshold value for such gifts to attract implications under section 194R or having a separate threshold of – say, Rs. 5000 for such gifts</p>

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		<p><b>11. Clarify that bonus and rights issue by closely held companies does not result in benefit or perquisite liable to TDS u/s. 194R</b></p> <ul style="list-style-type: none"> <li>☐ FAQ 7 of Circular No. 18/2022 while seeking to clarify that TDS u/s. 194R does not apply to bonus and rights issue by widely held companies (i.e company in which public are substantially interested as defined in s.2(28) of the Act) has raised ambiguity and uncertainty on applicability of TDS u/s. 194R on similar issue of shares by closely held companies.</li> <li>☐ The rationale provided in FAQ 7 of Circular No. 18/2022 for non-applicability of TDS (viz. there is no benefit to shareholders on bonus issue since their overall value and ownership remains unchanged and cost of acquisition of bonus shares is taken at NIL) equally applies to closely held companies.</li> <li>☐ To remove the ambiguity and uncertainty for stakeholders, FAQ 7 of Circular No. 18/2022 may be modified to clarify that bonus and rights issue by all companies whether widely held or closely held does not trigger TDS obligation u/s. 194R.</li> </ul> <p><b>Our requests: In view of the above, we most humbly request to take the above representation on record and issue required clarification / guidance / illustration to resolve the confusion and ambiguity in the minds of stakeholders mentioned above.</b></p> <p><b>Annexure A</b></p> <p><b>Extracts from Uniform Code of Pharmaceuticals Marketing Practices (UCPMP) and draft Uniform Code for Medical Device Marketing Practices (UCMDMP) on distribution of free samples</b></p> <p><b><u>From UCPMP</u></b></p> <p><b>Samples</b></p>

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		<p>☐ Free samples of drugs shall not be supplied to any person who is not qualified to prescribe such product.</p> <p>☐ Where samples of products are distributed by a medical representative, the sample must be handed directly to a person qualified to prescribe such product or to a person authorized to receive the sample on their behalf.</p> <p>☐ The following conditions shall be observed in the provision of samples to a person qualified to prescribe such product:</p> <p>(i) Such samples are provided on an exceptional basis only (see (ii) to (vii) below) and for the purpose of acquiring experience in dealing with such a product;</p> <p>(ii) Such sample packs shall be limited to prescribed dosages for three patients for required course of treatment;</p> <p>(iii) Any supply of such samples must be in response to a signed and dated request from the recipient;</p> <p>(iv) An adequate system of control and accountability must be maintained in respect of the supply of such samples;</p> <p>(v) Each sample pack shall not be larger than the smallest pack present in the market;</p> <p>(vi) Each sample shall be marked “free medical sample - not for sale” or bear another legend of analogous meaning;</p> <p>(vii) Each sample shall be accompanied by a copy of the most up-to-date version of the Product Information (As required in Drug and Cosmetic Act, 1940) relating to that product.</p> <p>☐ A pharmaceutical company shall not supply a sample of a drug which is an anti-depressant, hypnotic, sedative or tranquillizer.</p>

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		<p>☐ The companies will maintain details, such as product name, doctor name Quantity of samples given, Date of supply of free samples distributed to Healthcare practitioners etc.</p> <p><b><u>From draft UCMDMP</u></b></p> <p><b>Evaluation Samples</b></p> <p>☐ Free evaluation samples of Medical Devices shall not be supplied to any person other than HCPs or as per hospital protocol to reach the HCPs.</p> <p>☐ Where evaluation samples of products are distributed by a medical representative, the sample must be handed directly to a person qualified to use &amp; prescribe such product or to a person authorized to receive the sample on their behalf.</p> <p>☐ The following conditions shall be observed in the provision of evaluation samples to a person qualified to prescribe such product:</p> <p>(i) Such samples are provided for the purpose of acquiring experience in using such a product, hands on experience and evaluation.</p> <p>(ii) An adequate system of control and accountability must be maintained in respect of the supply of such samples by all Companies including maintaining proper documentation and rationale.</p> <p>(iii) Each sample shall be accompanied by a copy of the most up-to-date version of the Product IFU/DFU/ e-IFU (link to the website/digital IFU), wherever applicable, relating to that product.</p> <p>(iv) The number of evaluation samples (single use products) provided at no charge should not exceed the quantity reasonably necessary for the adequate evaluation of the products.</p>

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		<ul style="list-style-type: none"> <li data-bbox="647 336 2058 448">☐ The Companies will maintain details, such as product name, HCP’s name&amp; contact information, Quantity of evaluation samples given, Date of supply of evaluation samples distributed to HCPs, relevant product traceability information.</li> <li data-bbox="647 483 2058 762">☐ Demonstration products: Company demonstration products are different from Evaluation Samples. Demonstration products can be either single use products, mock-ups, temporary software or equipment that are used for HCP and Patient awareness &amp; education. Demonstration products are typically identified as not intended for patient use and demonstration equipment are taken back by Company after the demonstration period is over. However, consumables used in live procedural demonstration usually cannot be taken back. Clause 5 of this code does not apply to demonstration products and is limited to Evaluation Samples only. Demonstration products shall be specifically identified and tracked by the Company.</li> <li data-bbox="647 794 2058 906">☐ The documents/records required to be maintained under this Clause shall be maintained by Company for a period, as per applicable laws specific to category of document/record and in absence of such applicable laws as per Company’s record management policy.</li> </ul>
23.	Unintended consequence of Rule 31AA in light of sections 194Q and 206C(1H)	<p data-bbox="647 943 770 967"><b>Rationale</b></p> <ul style="list-style-type: none"> <li data-bbox="647 1002 2058 1114">☐ In case of purchase of goods on which the purchaser is obliged to deduct TDS u/s. 194Q, the seller is still required to incorporate the details of such sale under Rule 31AA (Return) along with the details of TDS deducted on purchase for the purpose of Sec. 206C(1H).</li> <li data-bbox="647 1145 1697 1169">☐ In order to incorporate the details of TDS, the seller has to collect the details of TDS.</li> <li data-bbox="647 1201 2058 1313">☐ It would be difficult for the seller to collect the related information with regards to TDS applied by the buyer and then incorporate the same in TCS return under Rule 31AA. Even if, the seller is not responsible for collection of TCS on sale of goods u/s. 206C(1H), he will have to update in the return.</li> </ul>



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		<p><b>Representation</b></p> <p>☐ It is requested to make suitable amendments in Income Tax Rules, 1962 to exempt such requirement as per Rule 31AA</p>
24.	Credit for the taxes deducted at source	<p><b>Rationale</b></p> <p>☐ In case Engineering &amp; Construction [E&amp;C] business, customers deduct tax at source either at the time of booking of the bills or while making the payment.</p> <p>☐ As per the Ind-AS 115, income from E&amp;C business is recognised based on percentage of completion method [‘POC’] whereas TDS applies on invoices raised on customer.</p> <p>☐ ITR Forms require details of TDS and disclosure of corresponding income. It is practically difficult to correlate the income which is recognised based on POC method and the TDS.</p> <p><b>Recommendation</b></p> <p>☐ It is necessary to ease burden on taxpayer by doing away with the requirement of linking TDS credit entitlement with the income recognized in terms of Ind-AS 115. In cases involving recognition of revenue on POC basis, TDS credit should be granted based on the TDS actually deposited by the customers without its linkage with revenue recognition.</p>
25.	Amendment in Rule 29B to align with amended provisions of section 195	<p><b>Rationale and Issue</b></p> <p>☐ As per section 195 (1), any person responsible for paying to a non-resident, any interest or any other sum chargeable under the provisions of this Act (not being income chargeable under the head "Salaries" ) shall, at the time of payment or credit deduct income-tax thereon at the rates in force. The income chargeable under the head "Salary" has been specifically excluded from scope of the section 195 (1). Similar to salary, dividend income was</p>

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		<p>also out of scope of section 195 (1). However, such exception was deleted by Finance Act, 1991 and dividend is now covered under the scope of section 195 (1).</p> <p>☐ As per section 195 (3), receipt of income referred to in section 195 (1) can make an application to tax department and obtain NIL withholding certificate authorizing it to receive such income without any tax deduction. The certificate under section 195(3) can be uniformly applied for all payments received by the holder of the certificate.</p> <p>☐ As per Rule 29B:</p> <p><i>(1) Any person entitled to receive any interest, or other sum, on which income-tax has to be deducted under sub-section (1) of section 195 may, if he fulfils the conditions specified in sub-rule (2), make an application for the grant of a certificate under sub-section (3) of section 195 authorising him to receive without deduction of tax under sub-section (1) of that section any such income as is specified hereinbelow, namely :—</i></p> <p><i>(i) where the person concerned is a banking company or an insurer which is neither an Indian company nor a company which has made the prescribed arrangements for the declaration and payment of dividends within India, and which carries on operations in India through a branch, any income by way of interest, not being [interest on securities (other than interest payable on securities referred to in proviso to section 193)], or any other sum, not being dividends;</i></p> <p><i>(ii) in the case of any other person who carries on a business or profession in India through a branch, any sum, not being interest or dividends</i></p> <p>☐ From the above, it may be observed that ‘dividend’ has not been deleted from Rule 29B although the same has been deleted from section 195(1) in 1991.</p>

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		<p>☐ WEF 2020-21, dividend income is taxable in the hand of the shareholder. Thus, due to Rule 29B, there is ambiguity whether the certificate issued under section 195 (1) by the tax department can be applied on dividend income</p> <p><b>Recommendation</b></p> <p>☐ In order to bring Rule 29B in line with the provisions of section 195, it is recommended that reference to the word “any other sum, not being dividend” be deleted from Rule 29B.</p>
<b>Issues relating to TDS u/s. 194-O</b>		
26.	<p><b>Certain issues w.r.t implementation of s. 194-O which can be addressed by CBDT Guidelines</b></p> <p><b>(TDS on e-commerce transactions)</b></p>	<p>It is recommended that in order to ease implementation of S.194-O, CBDT should issue, inter-alia, the following clarifications:</p> <p>☐ <b>Clarify that amount liable for TDS under S. 194-O is net amount of sales and not gross sales receipts</b></p> <p>☐ <b>Amendment by FA 2020</b></p> <ul style="list-style-type: none"> <li>▪ 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”.</li> </ul> <p>☐ <b>Issue</b></p> <ul style="list-style-type: none"> <li>▪ 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</li> </ul>

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		<p>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.</p> <ul style="list-style-type: none"> <li>▪ 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.</li> </ul> <p>🔍 <b>Recommendation</b></p> <ul style="list-style-type: none"> <li>▪ 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.</li> </ul> <p>🔍 <b>Clarify that TDS is not to be withheld on the GST/ indirect tax portion</b></p> <p>🔍 <b>Amendment by FA 2020</b></p> <ul style="list-style-type: none"> <li>▪ 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".</li> </ul> <p>🔍 <b>Issue</b></p> <ul style="list-style-type: none"> <li>▪ 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.</li> <li>▪ 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</li> </ul>

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		<p>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</p> <p>☐ <b>Recommendation</b></p> <ul style="list-style-type: none"> <li>▪ 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.</li> <li>▪ Further, TDS should be aligned with TCS provisions under GST</li> </ul> <p>☐ <b>Exclude shares, securities, actionable claims, money, etc. from the scope of “goods” and “services”</b></p> <p>☐ <b>Amendment by FA 2020</b></p> <ul style="list-style-type: none"> <li>▪ 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.</li> </ul> <p>☐ <b>Issue</b></p> <ul style="list-style-type: none"> <li>▪ 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.</li> <li>▪ Further, there is ambiguity on whether sale of actionable claims like gift cards are covered within the scope of S. 194-O.</li> <li>▪ 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.</li> </ul>

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		<ul style="list-style-type: none"> <li>▪ The industry had, therefore, sought clarification that ‘goods’ will not include items like shares, securities, actionable claims, money, foreign currency, etc.</li> <li>▪ However, vide Circular No. 17/2020, CBDT has exempted transactions in securities entered through recognized stock exchanges or cleared &amp; settled by recognized clearing corporations and transactions in electricity &amp; energy certificates entered through registered power exchanges. The exemption has been granted on the ground that one to one identity between buyer &amp; seller is not possible in such transactions. This has enhanced ambiguity for transactions in above referred items entered outside stock/power exchanges.</li> </ul> <p>📌 <b>Recommendation</b></p> <ul style="list-style-type: none"> <li>▪ 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.</li> </ul> <p>📌 <b>Facilitation of transactions</b></p> <p>📌 <b>Rationale</b></p> <ul style="list-style-type: none"> <li>▪ There are some digital platforms which merely allow sellers to list their products and their contact information of the portal and potential buyers to solely view such product information. Thereafter, the role of the platform ends. The platform is not even aware whether or not sale has taken place.</li> </ul>

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		<ul style="list-style-type: none"> <li>▪ However, owing to the wide meaning of the term “facilitate”, doubts may arise whether such platform which act as classified repositories and have no role to play in completion of sale or service will also be obligated to withhold under Sec. 194-O.</li> </ul> <p>☐ <b>Recommendation</b></p> <ul style="list-style-type: none"> <li>▪ Clarification should be provided on the on the term ‘facilitation’ to exclude platofrms which do not play an active role in the transaction of online supply</li> </ul> <p>☐ <b>Clarification on person liable to withhold tax where multiple e-commerce operators are involved in the transaction chain</b></p> <p>☐ <b>Amendment by FA 2020</b></p> <ul style="list-style-type: none"> <li>▪ 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.</li> </ul> <p>☐ <b>Issue</b></p> <ul style="list-style-type: none"> <li>▪ The digital business models are highly integrated with multiple e-commerce operators being involved in the transaction chain.</li> <li>▪ 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</li> </ul>

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		<p>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.</p> <ul style="list-style-type: none"> <li>▪ 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.</li> </ul> <p>🔍 <b>Recommendations</b></p> <ul style="list-style-type: none"> <li>▪ 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.</li> </ul> <p>🔍 <b>Exclusion of payment aggregator or payment gateways (covered under RBI Guidelines 2020 dated 17 March 2020) from S.194-O:</b></p> <p>🔍 <b>Amendment by FA 2020</b></p> <ul style="list-style-type: none"> <li>▪ 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.</li> </ul> <p>🔍 <b>Issue</b></p> <ul style="list-style-type: none"> <li>▪ 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</li> </ul>



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		<p>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.</p> <ul style="list-style-type: none"> <li>▪ 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.</li> </ul> <p>☐ <b>Recommendation</b></p> <ul style="list-style-type: none"> <li>▪ 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.</li> </ul> <p>☐ <b>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</b></p> <ul style="list-style-type: none"> <li>▪ 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.</li> <li>▪ 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 9<sup>th</sup> March, 2017.</li> </ul> <p>☐ <b>Guidelines on Insurance e-commerce by IRDAI:</b></p> <ul style="list-style-type: none"> <li>▪ The objective of the guideline issued by the IRDAI is to use e-commerce as an effective medium to <i>increase insurance penetration and enhance financial inclusion in cost efficient manner. The authority</i></li> </ul>

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		<p><i>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.</i></p> <p><b><u>2</u> Broker role in payment of insurance premium either directly or indirectly:</b></p> <ul style="list-style-type: none"> <li>▪ Broker enables customers to search for policies, compare features, buy and renew policies through tech-platform;</li> <li>▪ Broker has partnered with multiple Insurance Companies to offer standalone health, general and life insurances to its customers on its tech-platform;</li> <li>▪ At the back-end, it consumes the Application Programming Interface (“API”) services given by the insurance companies of its specific product. <b>This means that there is direct integration of the platform with the systems of the insurance company;</b></li> <li>▪ At the front-end, user enters the asset details (for which insurance is required) or insured’s details for which cover is required. <b>This information forms part of the “Request for Quote” sent to the partnered insurance companies using the API services;</b></li> <li>▪ In return, the insurance companies provide a real-time premium quote for the “Request” received. <b>This is called “Response”;</b></li> <li>▪ 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;</li> <li>▪ 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;</li> </ul>

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		<ul style="list-style-type: none"> <li>▪ 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;</li> <li>▪ 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;</li> <li>▪ 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;</li> <li>▪ 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;</li> <li>▪ <b>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.</b></li> <li>▪ 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.</li> <li>☐ 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;</li> <li>☐ Once payment is completed, the customer sees a payment success message and the issued policy number with a link to view/download the same;</li> </ul>

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		<ul style="list-style-type: none"> <li data-bbox="745 336 2051 405">❑ <b>Broker enters into an agreement only with the Insurance companies for rendering broking services to the Insurance companies.</b></li> <li data-bbox="745 440 2051 509">❑ <b>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.</b></li> <li data-bbox="745 544 2051 612">❑ <b>The provisions of Section 194-O of Income Tax Act are thus contradictory to the provisions of Section 64VB of the Insurance Act.</b></li>   <li data-bbox="745 711 1778 738">❑ <b><u>Manner in which the Broker is remunerated to facilitate the Insurance companies</u></b> <ul style="list-style-type: none"> <li data-bbox="745 774 2051 842">▪ The Broker is remunerated by the Insurance companies through brokerage and / or rewards as per agreed terms as specified by the IRDAI.</li> <li data-bbox="745 877 2051 1027">▪ 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.</li> <li data-bbox="745 1062 2051 1133">▪ 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.</li> </ul> </li> <li data-bbox="745 1168 1749 1195">❑ <b><u>Applicability of section 194O to broker, criteria only are the deeming provision:</u></b> <ul style="list-style-type: none"> <li data-bbox="745 1230 2051 1299">▪ 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,</li> </ul> </li> </ul>

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		<p>even though broker do not handle payment of premium and the customers directly make payment of premium to the insurance companies.</p> <ul style="list-style-type: none"> <li>▪ <b>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.</b></li> <li>▪ <b>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.</b></li> <li>▪ <b>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).</b></li> <li>▪ <b>The Broker (E-Commerce Operator) 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.</b></li> <li>▪ <b>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.</b></li> <li>▪ <b>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</b></li> </ul>

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		<p>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.</p> <ul style="list-style-type: none"> <li>▪ 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</li> <li>▪ 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.</li> <li>▪ 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).</li> <li>▪ 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.</li> <li>▪ All parties will have to keep tab of these deductions and payments and continuously reconcile their inter se accounts.</li> <li>▪ There would be several other similar problems which would arise once the Broker is forced to comply with the provisions of section 194O.</li> </ul>

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		<ul style="list-style-type: none"> <li>▪ 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. Pursuant to such direction, CBDT issued Circular No. 20/2021 dated 25 Nov 2021 which clarifies that e-auctioneer shall not be regarded as “facilitating” e-commerce transactions where it is merely responsible for price discovery function and does not get involved in any other aspects of the transaction like negotiation, execution/conclusion, payment, etc. However, in case of insurance brokers, all such strict conditions may not get satisfied and hence practical difficulty persists.</li> </ul> <p>☐ <b><u>Request for consideration:</u></b></p> <ul style="list-style-type: none"> <li>▪ Having regard to the above position in law and the practical realities, <b>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).</b></li> <li>▪ Without prejudice to above, the Board may please clarify on following aspects: <ul style="list-style-type: none"> <li>☐ 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 access and control on premium directly paid to insurance companies by policyholders as per IRDA regulation?</li> </ul> </li> </ul>

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		<ul style="list-style-type: none"> <li>☐ 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?</li> <li>☐ 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?</li> <li>☐ 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?</li> </ul>
<b>Issues relating to TCS on sale of goods</b>		
27.	<b>TDS / TCS in case of large companies</b>	<p><b>Rationale:</b></p> <ul style="list-style-type: none"> <li>☐ 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.</li> </ul> <p><b>Recommendation:</b></p> <ul style="list-style-type: none"> <li>☐ 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.</li> </ul>



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28.	Section 206C(1H) – TCS on consignment sales	<p><b>Rationale:</b></p> <ul style="list-style-type: none"> <li>☐ Seller has been defined as a person whose turnover, gross receipts or total sales during the preceding year exceeds INR 10 Crores</li> <li>☐ 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</li> <li>☐ 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</li> <li>☐ TCS collected should then be deposited by the Principal to the government. All the related TCS compliances should be undertaken by the Principal</li> <li>☐ The agent should not have an obligation to carry out the compliances related to TCS on sale of goods</li> </ul> <p><b>Recommendation:</b></p> <ul style="list-style-type: none"> <li>☐ 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</li> <li>☐ 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.</li> </ul>

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		<p>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.</p>
29.	<p><b>Clarify applicability of TCS provisions on composite sale</b></p>	<p><b>Rationale</b></p> <p>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 &amp; 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.</p> <p><b>Recommendation</b></p> <p>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.</p>
30.	<p><b>Higher TDS / TCS on non-filers of Income Tax Return (Sec 206AB)</b></p>	<p><b>Rationale and issue:</b></p> <p>Finance Act 2021 has introduced section 206AB and 206CCA which, post amendment by Finance Act 2022, provides for higher rates for tax for TDS and TCS for a person who has not filed the income tax return in the immediately preceding year for which the time limit of filing the return u/s 139(1) has expired and the aggregate of TDS and TCS in such year is Rs. 50,000 or more.</p> <ol style="list-style-type: none"> <li>1. 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.</li> <li>2. Higher TDS u/s. 206AB is applicable to NRs who have PE in India. It is not applicable to payment to NRs</li> </ol>

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		<p>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.</p> <p>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.</p> <p><b>Recommendations:</b></p> <ul style="list-style-type: none"> <li>☐ 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.</li> <li>☐ 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.</li> <li>☐ 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.</li> </ul>
<b>Assessment related issues</b>		

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31.	<b>Schema for ITR forms</b>	<p><b>Issue</b></p> <ul style="list-style-type: none"> <li>☐ While the Income Tax Department has been notifying the new ITR forms for each year on the first day of assessment year since last few years, the schema and utilities are not updated on the income tax return filing portal till June.</li> <li>☐ The due date for furnishing Salary TDS certificate by employers is 15<sup>th</sup> June whereas the ITR filing due date for non-corporates is 31<sup>st</sup> July. This hardly leaves a time of 45 days for individuals to compile the relevant data and file ITRs.</li> <li>☐ There should be reasonable time available to non-corporate taxpayers to compile the relevant tax data and fill in their ITRs as per latest utility to make the ITR filing experience hassle free.</li> </ul> <p><b>Recommendation</b></p> <ul style="list-style-type: none"> <li>☐ It is recommended that the along with notification of ITR forms, the utilities and schema of new ITR forms should also be released simultaneously so that taxpayers can compile and keep ready relevant tax data ahead of time and then immediately file ITR on receipt of Form 16. The scheme and utilities should not be changed frequently expect for debugging errors.</li> </ul>
32.	<b>Disclosure in New Income Tax Return Forms</b>	<p><b>Rationale</b></p> <ul style="list-style-type: none"> <li>☐ 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.</li> </ul> <p><b>Issue:</b></p> <ul style="list-style-type: none"> <li>☐ 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</li> </ul>

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		<p>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.</p> <p><b>Recommendation:</b></p> <p>☐ 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.</p>
33.	<p><b>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</b></p>	<p><b>Rationale:</b></p> <p>☐ 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.</p> <p>☐ The assessee at times wishes to voluntarily disclose certain items or tax positions for bonafide reasons to avoid any potential penalty exposure.</p> <p><b>Recommendation:</b></p> <p>☐ 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.</p>
34.	<p><b>Section 240/245 - Refunds arising out of Order giving effect to Order of ITAT/CIT-A</b></p>	<p><b>Rationale:</b></p> <p>☐ 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,</p>

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		<p>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;</p> <p>☐ 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.</p> <p>☐ 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</p> <p><b>Recommendation:</b></p> <p>☐ 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</p>
35.	<b>Section 220(2) - Interest recovery without passing any Speaking/Appealable Order</b>	<p><b>Rationale:</b></p> <p>☐ 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;</p> <p>☐ 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.</p>

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		<p>☐ 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.</p> <p><b>Recommendation:</b></p> <p>☐ 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</p>
36.	<p><b>Rationalization of Central Processing Centre (CPC) processes</b></p>	<p><b>Background</b></p> <p>☐ Currently, income tax returns e-filed by taxpayers are centrally processed at CPC, Bangalore u/s 143(1) of the Income Tax Act (Act). The objective for establishing CPC was to expeditiously determine the tax payable or any refund due to the taxpayers or check for any mistakes apparent in the income tax return.</p> <p>☐ Statutorily, the return processing framework is governed by s.143(1) to s.143(1D) of the Act and Centralized Processing of Returns Scheme. S.143(1)(a) permits CPC to make following adjustments while processing the ITRs:-</p> <p>(i) any arithmetical error in the return</p> <p>(ii) an incorrect claim apparent from any information in the return. This is defined to mean a claim, on the basis of an entry, in the return,-</p> <p>a. of an item, which is inconsistent with another entry of the same or some other item in such return;</p>

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		<p>b. in respect of which the information required to be furnished under the Act to substantiate such entry has not been so furnished; or</p> <p>c. in respect of a deduction, where such deduction exceeds specified statutory limit which may have been expressed as monetary amount or percentage or ratio or fraction</p> <p>(iii) disallowance of loss claimed, if return of the tax year for which set off of loss is claimed was furnished beyond the due date specified u/s. 139(1)</p> <p>(iv) disallowance of expenditure or increase in income indicated in the audit report but not taken into account in computing the total income in the return</p> <p>(v) disallowance of deduction claimed u/s. 10AA or Chapter VIA-C if the return is furnished beyond due u/s. 139(1)</p> <p>☐ The first proviso to s.143(1) casts statutory obligation on CPC to give prior intimation of proposed adjustment to taxpayer and consider taxpayer's response before making such adjustment. It further provides for minimum thirty days time for taxpayer to provide response to the proposed adjustment.</p> <p>☐ However, there are various hardships being faced currently by taxpayers in such processing which are summarized below:-</p> <ul style="list-style-type: none"> <li>● Anomalies in ITR utility</li> <li>● Anomalies in CPC return processing software</li> <li>● Non-provision of statutory opportunity of prior intimation before making adjustment</li> <li>● Non-consideration of taxpayer's response to prior intimation – adjustments are mechanically made</li> </ul>



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		<ul style="list-style-type: none"> <li>● Delays or refusal in carrying out rectifications</li> <li>● Non-redressal of adjustments made u/s. 143(1) in scrutiny assessment</li> </ul> <p>☐ Each of them are explained and illustrated in following paras.</p> <p><b>Rationale</b></p> <p><u>a) Anomalies in ITR utility</u></p> <p>☐ It is often seen that ITR utility contains anomalies which lead to adjustments u/s. 143(1). For instance, if there is no change in method of valuation of closing stock, the ITR utility does not permit reporting of figures of increase or decrease in profit due to s.145A adjustments for adding the amounts of taxes, duties, etc. This leads to s.143(1) adjustment based on number reported in tax audit report (TAR) towards increase in profit as part of s.145A adjustment by ignoring the numbers reported towards decrease in profit.</p> <p><u>b) Anomalies in CPC return processing software</u></p> <p>☐ The CPC return processing software merely picks up adjustments leading to increase in total income by ignoring the adjustments reported in audit report leading to decrease in total income on the same issue. It is true that s.143(1)(a)(iv) permits CPC to make adjustment in respect of disallowance of expenditure or increase in income indicated in the audit report but not taken into account in computing the total income in the return. But it is submitted that such adjustments should be with respect to net figure of disallowance of expenditure or increase in income as reported in audit report and not the gross figure</p> <p>☐ As another illustration, Clause 25 of tax audit report requires reporting of amount of profit chargeable to tax u/s. 41 even if it is already credited to P&amp;L. But it is again added by CPC ignoring that the said amount is already credited in books of accounts under “Other Income” and is offered to tax in the return form.</p>

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		<p>☐ In Schedule MAT, the amount of tax (net-off of deferred tax) is required to be added back to compute the book profit. However, in Schedule Part A – P&amp;L, the amount of current tax and deferred tax are to be reported separately. Ideally, the addition made in Schedule MAT should be compared with total amount of current tax + deferred tax reported in Schedule Part A – P&amp;L. However, in cases where the deferred tax amount is negative, the addition made in Schedule MAT is compared with current tax only, and an addition is being made to book profit computed as per section 115JB. Such adjustment ought not to be made, and suitable changes be made to the CPC return processing software.</p> <p>☐ It may be noted that role of tax auditor as explained by ICAI in its Guidance Note on Tax Audit u/s. 44AB is to furnish the facts required by the Assessing Officer to determine whether or not disallowance is required. The tax auditor’s opinion about disallowance of expenditure or taxability of receipt is not binding either on taxpayer or Assessing Officer. Hence, it is submitted that the power to make adjustment u/s. 143(1)(a)(iv) with respect to disallowance of expenditure or increase in income indicated in audit report must not be used indiscriminately to make adjustments merely because it is indicated so in the tax audit report. The power must be used with appropriate care and caution to make adjustments only in respect of patently is allowable items or inadvertently missed incomes after affording proper opportunity of hearing to taxpayer.</p> <p><u>c) Non-provision of statutory opportunity of prior intimation before making adjustment</u></p> <p>☐ It has been experienced that various unilateral adjustments as illustrated above are being made by CPC without even affording an opportunity to the taxpayer for some of the adjustments thereby even violating the principles of natural justice. It is also contrary to express statutory requirement of first proviso to s.143(1) to give prior intimation to taxpayer and consider his response before making any adjustment.</p> <p>☐ There have been instances where details of the proposed adjustments are not shared with the taxpayer apart from the mention of the schedule of the return of income where unexplained adjustment has been carried out.</p>

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		<p><u>d) Non-consideration of taxpayer’s response to prior intimation – adjustments are mechanically made</u></p> <p>☐ Even where prior intimation is given for response of the taxpayer, it is noticed that simple and straight forward response of the taxpayers are not considered at all while issuing final intimation under section 143(1). There is no express mention why taxpayer’s response is not considered/rejected by CPC. It is not clear whether taxpayer’s response is considered by a competent officer who can easily identify the erroneous nature of adjustment proposed or by software algorithm or by a person not equipped to deal with such issues. There is no opportunity of personal hearing to taxpayer to explain the issue. In fact, Rule 12 of Centralised Processing of Returns Scheme specifically prohibits any personal appearance before CPC. This makes it difficult for the taxpayer to explain why a particular proposed adjustment is not warranted.</p> <p>☐ Also, it is observed that, in certain cases, sufficient time is not provided to the taxpayer to furnish its response to the adjustments proposed to be carried out which is against the statutory requirement of granting 30 days from issue of intimation of proposed adjustments as provided under second proviso to section 143(1) (a) of the Act.</p> <p><u>e) Rectification of mistakes</u></p> <p>☐ It is noticed that rectification application filed by taxpayers against the erroneous adjustments made under section 143(1) of the Act are not considered and as a result the rectification applications are kept pending constraining the taxpayer to approach the appellate authorities for seeking appropriate relief. The taxpayer continues to receive reminders and notices for coercive actions for outstanding demands despite pendency of disposal of rectification petitions.</p> <p>☐ Where erroneous adjustments are proposed by the CPC in 143(1) order, during the 143(3) proceedings, the AO has, in some cases, not been able to rectify such errors resulting into undue hardship to the Assessee. In certain cases, the rectification rights are transferred to Jurisdictional AO whereas the assessment is done by Faceless AO. Accordingly, such errors do not get rectified by the Faceless AO and separate channel gets opened with the</p>

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		<p>Jurisdictional AO. In few other cases, rectification rights are not transferred to the Jurisdictional AO and stay with the CPC and the income tax portal also does not reflect the actual status of the same.</p> <p>☐ It may also be mentioned that the CPC does not respond to taxpayer’s communication despite sending several reminders.</p> <p><u>f) Non-redressal of adjustments made u/s. 143(1) in scrutiny assessment</u></p> <p>☐ Where adjustments are made on processing returns u/s. 143(1) and the case is subsequently picked up for regular scrutiny or reassessment, it is noticed that the Faceless Unit/AO starts with total income after s.143(1) adjustments and not total income as per return. The Faceless unit/AO does not give opportunity to taxpayer to explain why adjustments made u/s. 143(1) against which rectification petitions or appeals are pending should not be perpetuated in the regular assessment/reassessment order. In fact, the Faceless Unit/AO who are statutorily required to give personal hearing to the taxpayer are best placed to understand and rectify the erroneous adjustments whether arising out of anomalies in ITR utility or CPC return processing software or due to inadvertent mistakes by taxpayer while filing ITR.</p> <p>☐ The adjustments being made under section 143(1) of the Act are leading to unnecessary harassment to the taxpayer forcing the taxpayer to approach appellate authorities over trivial matters and resulting in waste of time and resources over such matters for both taxpayers and Government, thereby increasing tax litigation.</p> <p><b>Recommendations</b></p> <p>In order to achieve desired objectives of section 143(1) of the Act and CPC Scheme 2011, following measures are recommended for kind consideration of CBDT:-</p> <p>☐ The anomalies in ITR utility and CPC return processing software as pointed out in foregoing part of these representations may be addressed at the earliest. There may be many such anomalies experienced by large number of taxpayers across the country. While there exists helpline and email support on ITR filing portal, in many</p>

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		<p>cases, taxpayers face difficulty in explaining the issues over a call or on email. It would be good if DGIT (Systems) or relevant offices in CPC hold regional camps to interact with taxpayers and professional/industry chambers to understand such anomalies and appropriate way to address them.</p> <p>☐ Scope of processing of income tax returns by CPC should strictly be limited to determination of any tax payable or refund due to the taxpayer or determination of any mistake apparent from the record and not beyond the same. It must be clarified that the scope of jurisdiction of CPC u/s. 143(1) is the same as jurisdiction u/s. 154 to rectify errors apparent from record and not delve into debatable issues.</p> <p>☐ Instructions may be given to CPC to clarify that adjustments in respect of disallowance of expenditure or increase in income indicated in audit report can be made only in respect of patently disallowable items or inadvertently missed incomes after affording proper opportunity of hearing to taxpayer. In particular, no such disallowance or addition can be made where the issue is covered in taxpayer's favour by any judicial precedent.</p> <p>☐ There should be proper service level escalation framework of CPC communicated to taxpayers to ensure transparency and accountability in functioning of CPC. The CPC (included outsourced agency) staff should be adequately trained to identify debatable issues for which adjustments cannot be made and there should oversight of experienced senior officials to keep a check on unwarranted adjustments.</p> <p>☐ Any adjustment proposed to be made by the CPC should only be made after providing complete details of the adjustment as well as sufficient time as per law for the taxpayer to furnish a response. The response must be considered by competent officer who can understand the technical and legal nuances of issues involved.</p> <p>☐ Rule 12(i) which prohibits personal appearance before CPC may be amended to permit personal appearance through video conferencing for the limited purposes of explaining why proposed adjustment or rectification prejudicial to the taxpayer should not be made. This is very critical since one cannot expect algorithms and data</p>

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		<p>processors to appreciate the nuances of income tax law. A personal interaction with taxpayer to understand the issue enables faster resolution of the issue and avoids repetitive reminders and rectification applications.</p> <p>☐ Rectified applications or rectified return of income filed electronically should be disposed off within reasonable time which will surely eliminate the need to unnecessarily approach the appellate authorities seeking redressal of the unwarranted adjustments. There should be clarity on who can make the rectification and the taxpayer should not be made to shuttle between CPC/Faceless Unit and Jurisdictional AO.</p> <p>☐ Before adopting the total income as per s.143(1) intimation as start-point for regular assessment, the AO must follow the same process as adopted for making additions in regular assessment i.e. after giving proper opportunity of hearing to the taxpayer including personal hearing where so desired by the taxpayer.</p> <p>☐ CPC should commission a process review or an audit to identify process gaps and faulty logic and unwarranted manual overrides which result in denial of TDS credits appearing in Form 26AS of taxpayer and claimed by taxpayer in return of income.</p>
37.	<p><b>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</b></p>	<p><b>Rationale:</b></p> <p>☐ Expense Provisions/Liabilities disallowed u/s 43B in earlier years</p> <ul style="list-style-type: none"> <li>● are subsequently allowed</li> <li>● the year in which the same are actually paid, OR</li> <li>● are not taxed again in the year in which the same are reversed and credited to Profit &amp; Loss Account</li> </ul> <p>☐ 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.</p>

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		<p>☐ There is no separate option for the Tax Auditors to report “the amounts which have been reversed and credited to Profit &amp; Loss Account”</p> <p>☐ Generally, such Provisions/Liability amounts reversed and credited to Profit &amp; Loss Account are reported by the Tax Auditors in the 3CD Utility under “Amounts not paid” with the remarks “Reversed and Credited to Profit &amp; Loss Account”</p> <p>☐ 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 &amp; Loss Account”;</p> <p><b>Recommendation:</b></p> <p>☐ 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 consider the same in computing assessed Taxable income by reducing from PBT while issuing the intimation Order u/s 143(1).</p>
38.	<b>Clause 34(a) of Form 3CD (Expenses as per P/L vis-a-vis TDS against same)</b>	<p><b>Rationale:</b></p> <p>☐ Clause 34(a) in Form 3CD requires reporting of all TDS/TCS transactions of the taxpayer even if there is no default.</p> <p>☐ With the introduction of Sections 194R [w.e.f 1.7.2022], 194-Q [w.e.f. 1.7.2021] and 206C(1H) [w.e.f. 1.10.2020], almost all the transactions of a company are captured in the TDS/TCS Returns filed by the company as well as by the supplier/customer.</p>

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		<ul style="list-style-type: none"> <li>☐ 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.</li> <li>☐ 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.</li> <li>☐ It will be a huge daunting task for the large companies carrying on large volumes of transactions with multiple business complexities to arrange and maintain such reconciliations.</li> <li>☐ The reporting should be restricted to cases of TDS/TCS default whether by way of failure to deduct/collect or short deduction/collection or failure to deposit tax after deducting/collecting.</li> </ul> <p><b>Recommendation:</b></p> <ul style="list-style-type: none"> <li>☐ Clause 34(a) of Form 3CD may be deleted for the convenience of the assessee. Alternatively, it may be modified to report only cases of TDS/TCS default rather than report all the transactions.</li> </ul>
39.	<p><b>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</b></p>	<p><b>Rationale:</b></p> <ul style="list-style-type: none"> <li>☐ 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.</li> </ul>



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		<ul style="list-style-type: none"> <li>☐ 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 &amp; Loss Account or not</li> <li>☐ 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 &amp; Loss Account and therefore such reversal of provisions by credit to Profit &amp; Loss Account cannot be taxed u/s 41(1).</li> </ul> <p><b>Recommendation:</b></p> <p>It is requested to:</p> <ul style="list-style-type: none"> <li>☐ 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 &amp; Loss Account and accordingly to be reduced from Book PBT to compute the Taxable Income</li> <li>☐ 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 &amp; Loss Account</li> <li>☐ The principle behind the aforesaid proposal is to ensure that the assesses are not subjected to double taxation</li> </ul>
40.	<p><b>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</b></p>	<p><b>Rationale:</b></p> <ul style="list-style-type: none"> <li>☐ TDS Credit as per 26AS/AIS can be availed by assessee in the year in which corresponding income is offered to tax;</li> <li>☐ 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</li> </ul>

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	<p><b>Credit brought forward from earlier year and reported in ITR filed</b></p>	<p>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</p> <p>☐ 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.</p> <p>☐ 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.</p> <p><b>Recommendation:</b></p> <p>☐ 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 “<u>brought forward from earlier year</u>” and allows the same.</p>
41.	<p><b>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</b></p>	<p><b>Rationale:</b></p> <p>☐ 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.</p> <p>☐ 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&amp;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, granular information is required which is not prepared in normal way. There is also no option to upload notes and explanation for position taken.</p>

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		<ul style="list-style-type: none"> <li>☐ 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.</li> <li>☐ 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.</li> </ul> <p><b>Recommendation:</b></p> <p>We request for the following modification in the Income Tax Return (ITR-6) :</p> <ul style="list-style-type: none"> <li>☐ 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 &amp; 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.</li> <li>☐ 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.</li> <li>☐ 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.</li> </ul>
42.	<b>Section 140(c) - Signing of Returns/Appeals</b>	<b>Rationale:</b>

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		<p>☐ 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.</p> <p>☐ 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.</p> <p>☐ In case of Indirect Taxes, the company's Returns can be signed by any authorised signatory of the company.</p> <p>☐ 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 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).</p> <p><b>Recommendation:</b></p> <p>☐ 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.</p>
43.	<b>Rectification Application against 143(1) Intimation</b>	<p><b>Rationale:</b></p> <p>☐ Currently, Income tax e-filing portal doesn't have option for filing of rectification application against 143(1) intimation and application for rectification of any error in intimation issued by CPC u/s 143(1) is being made offline to jurisdictional AO.</p> <p>☐ In case of faceless assessment, rectification filed with jurisdictional AO may not flow to NFAC in a timely manner to consider the same during assessment proceedings.</p>

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		<p>Further, jurisdictional AOs may not have rights assigned on e-filing portal for making any rectification in case file is under faceless assessment.</p> <p>In case 143(1) intimation has demand, it is getting adjusted by CPC against any other refund due and pending disposal of rectification application with AO.</p> <p><b>Recommendation:</b></p> <p>It is suggested that option of filing Rectification application against 143(1) intimations be made available on e-filing portal which can also flow to NFAC / CPC for making necessary corrections during assessment proceedings.</p> <p>There should be clear mandate on the designated officer to act upon rectification application within the specified time.</p>
44.	<b>Rule 26, Rule 128 requiring SBI TT Buy rate for conversion</b>	<p><b>Rationale:</b></p> <p>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</p> <p>SBI TT Buy Rates are not easily available and again becomes an onerous compliance. SBI charges fees for giving this information.</p> <p>As the foreign remittances from India usually take place against well-accepted foreign currencies, the exchange rates don't differ much within payment banks, RBI or SBI</p> <p><b>Recommendation:</b></p>

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		<ul style="list-style-type: none"> <li>☐ 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.</li> </ul>
<b>International taxation</b>		
45.	<b>Special transitional provision for POEM resident companies (S. 115JH)</b>	<p><b>Rationale/ Recommendation:</b></p> <ul style="list-style-type: none"> <li>☐ <b>Requirement for increase in threshold of turnover for POEM evaluation:</b> <ul style="list-style-type: none"> <li>☐ 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.</li> <li>☐ 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.</li> </ul> </li> <li>☐ 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.</li> <li>☐ <b>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</b> <ul style="list-style-type: none"> <li>☐ 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.</li> </ul> </li> </ul>

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		<p>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.</p> <p>☐ <b>Compliance obligations: Tax audit report, transfer pricing report, ICDS etc.</b></p> <p>☐ 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.</p> <p>☐ 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.</p> <p>☐ Without prejudice to the above, following may be considered:</p> <ul style="list-style-type: none"> <li>▪ <b>Transfer pricing compliances</b> <ul style="list-style-type: none"> <li>● 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 and India has an information sharing agreement with such jurisdiction.</li> <li>● On an assumption that the foreign company is not eligible for dispensation as aforesaid, there should be <i>de minimis</i> threshold to exclude entities from purview of Chapter X for the previous years where</li> </ul> </li> </ul>

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		<p>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.</p> <ul style="list-style-type: none"> <li>● 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.</li> </ul> <p>☐ <b>Country by Country reporting (CbCR) compliance</b></p> <ul style="list-style-type: none"> <li>▪ The compliance done by MNE Group under CbCR may be accepted to be due compliance in terms of s. 286 of ITA.</li> <li>▪ 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.</li> </ul> <p>☐ <b>Non-applicability of ICDS provisions to first time POEM resident foreign companies:</b> POEM companies should be relieved from applicability of ICDS for computation of income in order to reduce compliance burden.</p> <p>☐ 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 upto A.Y. 2022-23, capital gains exemption for transfer inter se between holding and subsidiary company covered by S.47(iv)/(v) etc.</p>



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		<ul style="list-style-type: none"> <li data-bbox="696 336 2049 448">☐ 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.</li> <li data-bbox="696 480 1059 507">☐ <b>General point on notification:</b></li> <li data-bbox="696 544 2049 655">☐ 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.</li> <li data-bbox="696 687 1350 715">☐ <b>Brought forward losses and unabsorbed depreciation</b></li> <li data-bbox="696 751 2049 903">☐ 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 1<sup>st</sup> day of the previous year and shall be deemed as losses or unabsorbed depreciation brought forward on the 1<sup>st</sup> day and shall be allowed to be set off and carried forward as per provisions of ITA.</li> <li data-bbox="696 935 2049 1086">☐ 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.</li> <li data-bbox="696 1118 2049 1198">☐ 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.</li> <li data-bbox="696 1230 2049 1342">☐ 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.</li> </ul>

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		<ul style="list-style-type: none"> <li data-bbox="696 336 2054 448">☐ 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.</li> <li data-bbox="696 483 2054 879">☐ 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.</li> <li data-bbox="696 914 2054 1026">☐ 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.</li> <li data-bbox="651 1061 1709 1090">☐ <b>Non-applicability of MAT provisions to first time POEM resident foreign companies:</b></li> <li data-bbox="696 1125 2054 1278">☐ 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.</li> </ul>

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		<ul style="list-style-type: none"> <li data-bbox="696 336 2049 448">☐ 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.</li> <li data-bbox="696 480 2049 592">☐ 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.</li> <li data-bbox="651 624 2049 655">☐ <b>Compliance with withholding tax provisions by first time POEM resident foreign company:</b></li> <li data-bbox="696 687 2049 759">☐ 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.</li> <li data-bbox="696 791 2049 863">☐ A literal reading of Para A(xi) appears to provide exemption/protection only up to a period when F Co was a non-resident.</li> <li data-bbox="696 895 2049 967">☐ Reference to “prior to its becoming Indian resident” may not strictly protect transitional years in which POEM residency is determined.</li> <li data-bbox="696 999 2049 1198">☐ 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.</li> <li data-bbox="696 1230 2049 1302">☐ 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.</li> </ul>

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		<p>☐ 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.</p> <p>☐ <b>Clarity on Para D of the Notification dated 22 June 2018</b></p> <p>☐ 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.</p> <p>☐ 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.</p> <p>☐ <b>Applicable exchange rate for conversion of balance sheet of foreign company</b></p> <p>☐ 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.</p> <p>☐ While F Co may prepare P&amp;L and balance sheet as per foreign accounting standards, the F Co may be required to convert such P&amp;L and balance sheet into INR for reporting purposes in India.</p> <p>☐ 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.</p>

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		<p>☐ <b>Determining computation of income for intervening year of POEM residency</b></p> <p>☐ 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.</p> <p>☐ Consider a situation where POEM is determined in India for a foreign company in Year 1 and 2. In Year 3, 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.</p> <p>☐ 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.</p>
46.	<p><b>Foreign Tax Credit by employer in respect of taxes paid in overseas countries and credit for TCS suffered by employee u/s. 206C (S.192)</b></p>	<p><b>Rationale:</b></p> <p>☐ 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</p> <p>☐ 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.</p> <p>☐ Furthermore, the levy of TCS on some of the personal transactions of employee out of tax paid salary income results in cash flow blockage for employee. For instance, TCS on purchase of motor vehicle costing &gt; Rs. 10 lakhs</p>

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		<p>u/s. 206C(1F) or TCS on LRS remittances or purchase of overseas tour program package u/s. 206C(1G). It may be noted that with amendment of FEMA regulations in August 2022, employees' remittances towards foreign ESOPs are also treated as LRS – although cap of USD 2,50,000 per annum does not apply to such remittances (but remittances for foreign ESOPs are counted for determining cap of USD 2,50,000 for other remittances). This results in dual levy of TCS on LRS remittance towards exercise price of foreign ESOPs and Salary TDS on discount between FMV of foreign ESOPs and exercise price which is treated as 'perquisite' u/s. 17(2)(vi). To avoid cash flow blockage for the employee w.r.t TCS amount, the employers should be permitted to consider TCS credit appearing in Form 26AS/AIS of the employees for adjusting Salary TDS. There is no revenue loss for the Government. In fact, such measure saves Government interest u/s. 244A to be paid to such employees along with refund of TCS.</p> <p><b>Recommendation:</b></p> <ul style="list-style-type: none"> <li>☐ 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.</li> <li>☐ The employers should also be specifically permitted to consider TCS credit appearing in the name of the employees in Form 26AS/AIS for adjusting Salary TDS.</li> </ul>
47.	<b>Foreign Tax Credit on aggregate basis (Rule 128)</b>	<p><b>Rationale:</b></p> <ul style="list-style-type: none"> <li>☐ 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.</li> <li>☐ 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 assesseees 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.</li> </ul>

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		<p><b>Recommendation:</b></p> <ul style="list-style-type: none"> <li>☐ 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.</li> </ul>
48.	<p><b>Carry-forward of excess Foreign Tax Credit (Rule 128)</b></p>	<p><b>Rationale:</b></p> <ul style="list-style-type: none"> <li>☐ 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: <ul style="list-style-type: none"> <li>☐ The working formula prescribed in Section 91 or the relevant tax treaty is not yielding optimal results by way of granting FTC.</li> <li>☐ Where the assessee incurs a loss on its worldwide income for any assessment year, no FTC is granted.</li> <li>☐ Where the Indian tax payable on the worldwide income is lower than the foreign tax paid, FTC is partially available.</li> <li>☐ The method of computing the income in the foreign countries is different from the method of computing the income under the Income Tax Act.</li> <li>☐ 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.</li> </ul> </li> </ul> <p><b>Recommendation:</b></p> <ul style="list-style-type: none"> <li>☐ Assesseees 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.</li> </ul>

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49.	<b>Tax Residency Certificate</b>	<p><b>Rationale:</b></p> <ul style="list-style-type: none"> <li>☐ 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.</li> <li>☐ Procuring TRC is a time-consuming process which is an administrative burden both for the industry as well as for the Department.</li> </ul> <p><b>Recommendation:</b></p> <ul style="list-style-type: none"> <li>☐ 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.</li> </ul>
<b>Issues relating to Equalization Levy on E-commerce transactions</b>		
50.	<b>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</b>	<ul style="list-style-type: none"> <li>☐ <b>Background</b> <ul style="list-style-type: none"> <li>☐ 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.</li> <li>☐ The inclusive framework for Pillar 1 and Pillar 2 have already been agreed upon and announced by OECD in October 2021 with detailed documents on specific aspects of both Pillars are being made available subsequently. 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</li> </ul> </li> </ul>



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	<p><b>equal footing, EL will be abolished</b></p>	<p>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.</p> <p><b>Recommendation</b></p> <p>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.</p>
<p>51.</p>	<p><b>Clarify that for each of the e-commerce operator, consideration excludes statutory levies such as GST, service tax or alike</b></p>	<p><b>Background and Issue</b></p> <p>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.</p> <p>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.</p> <p><b>Recommendation</b></p> <p>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.</p>

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52.	<p><b>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</b></p>	<p>☐ <b>Background and Issue</b></p> <p>☐ 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.</p> <p>☐ TCS under CGST Act 2017 also calculated with reference to net value of taxable supplies” after reducing the aggregate value of taxable supplies returned to the suppliers during the month.</p> <p>☐ <b>Recommendation</b></p> <p>☐ 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 relevant consideration while granting reduction so long as such sale was considered for ESS EL in the earlier quarter.</p>
53.	<p><b>For ESS EL, scope of “goods” and “services” to exclude financial instruments, insurance, forex derivatives, actionable claims, shares, securities, bonds, debentures, etc.</b></p>	<p>☐ <b>Background and Issue</b></p> <p>☐ 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 &amp; money or definitions under CGST Act 2017 which exclude share, securities, money, actionable claims.</p> <p>☐ This creates ambiguity on items like shares, securities, derivatives, insurance, actionable claims, foreign currency, etc.</p> <p>☐ <b>Recommendation</b></p>

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		<p>☐ 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”.</p>
54.	<p><b>Guidance and clarity on determination of use of IP address in India</b></p>	<p><b>Rationale and Recommendation</b></p> <p>☐ As per s.165A(1), a person using IP address in India is reckoned as a proxy to trigger ESS EL.</p> <p>☐ 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.</p> <p>☐ Thus, it is imperative that a guidance about determination of IP address is provided.</p>
55.	<p><b>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</b></p>	<p>☐ <b>Background and Issue</b></p> <p>☐ 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).</p> <p>☐ 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?</p> <p>☐ <b>Recommendation</b></p>

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		<p>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.</p>
56.	<p><b>Compliance burden on NR e-commerce operator to be eased</b></p>	<p><b>Background and Issue</b></p> <ul style="list-style-type: none"> <li>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).</li> <li>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.</li> <li>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 (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.</li> </ul> <p><b>Recommendation</b></p> <ul style="list-style-type: none"> <li>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.</li> </ul>
<b>Transfer Pricing</b>		
57.	<p><b>Amendments to rules</b></p>	

Sl no.	Subject	Comments / Recommendations			
		<table border="1"> <tr> <td data-bbox="651 331 779 475">10F to 10TG</td> <td data-bbox="779 331 922 475">92CB and 92CC</td> <td data-bbox="922 331 2040 475">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.</td> </tr> </table>	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.
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.			
58.	<b>Clarification in case of Transfer pricing reporting for issue of shares</b>	<p><b>Rationale:</b></p> <p>☐ 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 arise from such transaction.</p> <p><b>Recommendation:</b></p> <p>☐ It is suggested that clause 16 of Form No. 3CEB should be amended so as to clarify that share Capital transaction is not required to be reported /justified in Form 3CEB.</p>			
59.	<b>Issues in Master File (MF) filing</b>	<p><b>Whether non-taxable transactions should be considered for evaluating MF thresholds or reporting in MF</b></p> <p><b>Rationale</b></p> <p>☐ Section 92D(1), which is applicable from AY 2020-21 and onwards, reads as under:</p> <p><b>(1) Every person:</b></p> <p><b>(i) who has entered into an international transaction or specified domestic transaction shall keep and maintain</b></p>			

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		<p><i>such information and document in respect thereof, as may be prescribed;</i></p> <p><i>(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.</i></p> <p>☐ 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 separate entity of an international group that is included in the consolidated financial statement of the said group for financial reporting purposes.</p> <p>☐ 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.</p> <p>☐ Rule 10DA also states as follows:</p> <p><b><i>“10DA. (1) Every person, being a constituent entity of an international group shall,-</i></b></p> <p><b><i>(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</i></b></p> <p><b><i>(ii) the aggregate value of international transactions,-</i></b></p> <p><b><i>(A) during the accounting year, as per the books of accounts, exceeds fifty crore rupees, or</i></b></p> <p><b><i>(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”</i></b></p>

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		<p>☐ 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.</p> <p><b>Recommendations:</b></p> <p>☐ 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.</p> <p>☐ 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).</p> <p>☐ 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.</p> <p>☐ 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.</p> <p>☐ 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.</p> <p>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,</p>

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		<p>foreign entity may not be under obligation to file tax return/maintain TP documentation under Section 92D/file Form 3CEB under Section 92E.</p> <p>☐ 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.</p>
60.	<p><b>Improving the effectiveness and efficiency of Indian Advance Pricing Agreement programme</b></p>	<p><b>Executive summary</b></p> <p>The Advance Pricing Agreement (APA) programme is an important policy initiative of the Ministry of Finance for resolving long standing transfer pricing (TP) issues, reducing litigation in transfer pricing matters and provide tax certainty to Multinational Enterprises (MNEs) doing business in India.</p> <p>The progress of APAs in recent years, however, has been slow which has caused a significant backlog of cases, resulting in delay in collection of taxes for the Government and exacerbating uncertainty to taxpayer. By their very nature, TP issues are subject to alternative views and interpretations. Thus, many taxpayers have either opted for, or would like to opt for, an APA to obtain tax certainty. Such a trend has led to increasing number of APA applications every year.</p> <p>From the Government perspective, there have been challenges in terms of processing these APA applications on time. This can largely be attributed to inadequate resources of APA teams, absence of specialized knowledge, periodic rotation of personnel as well as multi-level approval process for closing every application. In the absence of an effective dispute prevention mechanism like APA, there is also a greater risk that the tax collections may not be possible at a quick pace for the Government. Thus, the efficiency and effectiveness of the APA programme is critical for achieving triple objectives, viz. (a) providing conducive environment for the taxpayers (b) swift collection of taxes and (c) uplifting the economy with more investments into India.</p> <p>In this regard, certain immediate measures as well as structural, long-term reforms have been suggested below to</p>



SI no.	Subject	Comments / Recommendations				
		<p>improve the functioning of the APA programme.</p> <table border="1" data-bbox="651 391 1986 1165"> <thead> <tr> <th data-bbox="651 391 1319 459">Immediate measures</th> <th data-bbox="1326 391 1986 459">Structural measures</th> </tr> </thead> <tbody> <tr> <td data-bbox="651 459 1319 1165"> <ul style="list-style-type: none"> <li>● Consider adopting ‘framework’ approach for resolving pending APA cases with low complexity/ risk, e.g., cases involving information technology (IT) / IT enabled services (ITES) transactions</li> <li>● Allocate additional and specialist resources to the APA team</li> <li>● Use online media for preliminary consultations, site visits and negotiations</li> <li>● Create a special window – ‘Accelerated APA’ - for clearing up old cases (similar to Vivad Se Vishwas Scheme)</li> <li>● Fast track APA renewals</li> <li>● Delegate authority for approval of APAs for faster processing</li> </ul> </td> <td data-bbox="1326 459 1986 1165"> <ul style="list-style-type: none"> <li>● Rationalise safe harbour rules to make them attractive and thus reduce the load on APAs (which are perceived as the only option for tax certainty)</li> <li>● Issue detailed APA guidance to set the right expectations</li> <li>● Allow opt-ins for “roll forward” options for APA renewals</li> <li>● Endeavor to conclude APA in a timely manner</li> <li>● Bring transparency in the overall APA process</li> <li>● Keep the regular TP assessment in abeyance during the APA process, in line with international practices.</li> </ul> </td> </tr> </tbody> </table> <p><b>Detailed representation:</b></p> <p><b>Background</b></p>	Immediate measures	Structural measures	<ul style="list-style-type: none"> <li>● Consider adopting ‘framework’ approach for resolving pending APA cases with low complexity/ risk, e.g., cases involving information technology (IT) / IT enabled services (ITES) transactions</li> <li>● Allocate additional and specialist resources to the APA team</li> <li>● Use online media for preliminary consultations, site visits and negotiations</li> <li>● Create a special window – ‘Accelerated APA’ - for clearing up old cases (similar to Vivad Se Vishwas Scheme)</li> <li>● Fast track APA renewals</li> <li>● Delegate authority for approval of APAs for faster processing</li> </ul>	<ul style="list-style-type: none"> <li>● Rationalise safe harbour rules to make them attractive and thus reduce the load on APAs (which are perceived as the only option for tax certainty)</li> <li>● Issue detailed APA guidance to set the right expectations</li> <li>● Allow opt-ins for “roll forward” options for APA renewals</li> <li>● Endeavor to conclude APA in a timely manner</li> <li>● Bring transparency in the overall APA process</li> <li>● Keep the regular TP assessment in abeyance during the APA process, in line with international practices.</li> </ul>
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		<p>☐ The APA programme of the Central Board of Direct Taxes (CBDT), introduced in 2012, has been very successful in providing certainty on TP matters to taxpayers. The taxpayers have been appreciative of the flexible and solution-oriented approach of the APA authorities while determining tax positions. From merely 134 applications filed in the FY 2012-13 (i.e. first year of APA programme), till 1,659 applications filed till date, including both unilateral and bilateral APA applications.</p> <p>☐ In the initial few years, the number of APAs concluded was quite large. From financial year (FY) 2015-16 to FY 2017-18, a total of 210 APAs were concluded representing around 40% of the total APAs concluded till date. Each APA requires a complex analysis before conclusion and the CBDT must be lauded for creating a global benchmark in providing such certainty to the taxpayers. We understand that as of today, more than 516 APAs have been concluded, which is no small achievement.</p> <p>☐ In recent years, however, the progress of APAs has slowed down considerably, resulting in a large pendency of cases (nearly 70% of applications filed till date are currently pending). Timely completion of APA process is critical to ensure that taxpayers' confidence in this programme is sustained. In fact, one of the commitments in the Taxpayers' Charter unveiled by the CBDT recently emphasizes that the Income Tax Department is committed to provide timely decisions to taxpayers and holds its authorities accountable. Recognizing the seriousness of the problem, the Hon'ble Finance Minister while addressing the National MNCs Conference 2020, organized by the Confederation of Indian Industry (CII) observed, that "APAs were taking too long and should be expedited because it was creating a huge burden on multinationals' books. APAs can be expedited. Otherwise, it defeats the very purpose and non-conclusion within the five years is definitely not acceptable."</p> <p><b>1. Current pendency of APA cases</b></p>

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		<p>☑ As on 20 December 2019, 763 APA applications out of 1,165 applications filed were still under processing<sup>5</sup>. At the average current pace of about 50 agreements being signed every year; it could take up to 16 years to clear the current inventory. Meanwhile, more filings every year will continue to add to the backlog.</p> <p><b>2. Reasons for the slow-down of APA process</b></p> <p>☑ Following are some of the key reasons for the slowdown in APAs:</p> <ol style="list-style-type: none"> <li>I. In the recent years, the number of APA applications have increased significantly due to factors such as absence of options for controversy and dispute prevention is driving MNCs to APA option.</li> <li>II. In addition to the above, wherever the MNCs have desired tax certainty with mitigation of double taxation risks, the taxpayers have looked at filing bilateral APA applications. In the recent years, the number of bilateral APA applications has increased significantly due to factors such as:             <ol style="list-style-type: none"> <li>(a) Relaxation in Article 9(2) of tax treaties (which provides for co-relative relief) in order to invoke bilateral APAs. This has opened more doors for bilateral APAs.</li> <li>(b) Opening of bilateral APAs by the United States of America (US) in 2016 and conversions from unilateral to bilateral APAs.</li> </ol> </li> <li>III. APA renewal process has, so far, been essentially a “repetition” of the original APA process, requiring submission of documents from scratch, site-visits and filing detailed responses rather than leveraging the work done in the original APA. This is bringing down the efficiency of the programme and causing the delay as well.</li> </ol>

<sup>5</sup> Annual Report 2019-20, Ministry of Finance

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		<p>IV. Multiple levels of approvals within the APA programme slow down the decision-making framework. There is also a long-time gap between processing of APA file and conducting site visits.</p> <p>V. Despite such increased workload, the number of APA officials in CBDT have not increased commensurately to deal with the rising inventory. Further, frequent transfers/team changes are adversely impacting the turnaround time for some closures.</p> <p>VI. Also, with transfers/ new deputations, difficulty is also faced in terms of lack of experience/ training for the newly inducted team members in the APA teams.</p> <p><b>3. The need to improve speed of the APA programme</b></p> <p>☐ The slow-down in the overall APA process has had an adverse impact on India’s ability to minimize disputes and collect taxes on time, which in turn impacts tax certainty. The efficiency and effectiveness of the APA programme is important for achieving triple objectives for the Government, viz. (a) providing conducive environment for the taxpayers (b) swift collection of taxes and (c) uplifting the economy with more investments into India.</p> <p><b>4. Recommendations for enhancing the efficacy of APA programme in India</b></p> <p>☐ As discussed above, given the existing backlog of cases as well as influx of new applications, a twin-fold approach to resolve the APA cases is recommended viz. (1) immediate measures (2) structural measures.</p> <p><b>4.1 Immediate measures</b></p> <p><b>I. Consider adopting “framework” approach for resolving pending APA cases with low complexity/ risk</b></p> <p>☐ Many taxpayers with simple fact patterns/low complexity have opted for APA to have certainty, as this is easily accessible. This has resulted in huge influx of APA applications primarily involving low complexity cases/ fact patterns.</p>

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		<ul style="list-style-type: none"> <li data-bbox="728 335 2049 654">☐ Given the maturity curve in the Indian APA programme, it should be possible to segregate the pending APA cases into high, medium and low complexity/ risk buckets having regard to the nature and complexity of cases. Typically, cases involving intellectual property transfer, high end research &amp; development activities, licensing, marketing intangibles, financial transactions, profit attribution to permanent establishment may be considered as “high complexity/risk” category; whereas cases such as typical routine distribution/ contract manufacturing types of activities can be put into “medium complexity/risk”. The balance can be considered as “low complexity/risk” cases e.g. routine back office IT/ ITES centers, business support services etc.</li> <li data-bbox="728 686 2049 758">☐ There could be some additional checks and balances as referred to in Section 6.2.(I) while categorizing the cases into least complex and most complex.</li> <li data-bbox="728 790 2049 1069">☐ A large portion of the long pending applications pertains to information technology IT/ ITES followed by other sectors. Therefore, given the extensive experience of the Indian APA teams in dealing with such IT/ITES cases, efforts should be made to conclude such standard rather low complexity/risk cases as part of a “framework” (agreeing on a specific rate/margin). Such an approach would clear large part of the pending cases. For the balance cases involving high and medium complexity cases, appropriate attention can be given by the respective teams. This would also reduce the workload to greater extent and brings in quality and efficiency in terms of closing some complex matters.</li> </ul> <p data-bbox="728 1101 1500 1133"><b>II. Allocate additional and specialist resources to the APA team</b></p> <ul style="list-style-type: none"> <li data-bbox="728 1165 2049 1356">☐ The Indian APA programme has seen some of the best people in administrative as well as operational roles. However, with the promotions and retirements, unfortunately some of these senior officers had to move out of the APA regime. Given the current backlog of cases, the Government can support the APA programme by bringing back some of these experienced officials, on special duty, to help in resolving all pending APA cases. This can be done in specific window (say for 6 months or so). Further, the services of</li> </ul>

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		<p>such senior and experienced officials can be availed for resolving “high” and “medium” complexity cases so that appropriate attention is given to resolve the pending backlog on priority basis. Further, support can be requested from third party industry experts to quicken up the process.</p> <p>☐ With faceless assessment in place, the Indian APA team can also get some support from the Technical Unit specializing in TP matters to support resolution of existing backlog of APA cases specifically involving “low complexity/risk” or “framework” cases. This can be done in specific window (say for 6 months or so). The support from Technical Unit would also be helpful in faster revenue collections from standard APA cases.</p> <p><b>III. Use online media for preliminary consultations, site visits and negotiations</b></p> <p>☐ It is relevant to note that the coronavirus pandemic has changed the working style across industry sectors and government organizations. Under the pandemic constraints, there has been greater dependence on the virtual working modes. The new working ways have brought tax administrations around the world closer. In fact, the US Internal Revenue Services has noted that such virtual environment has actually helped in more closure of APA cases due to greater collaboration<sup>6</sup>. CBDT too should consider adopting virtual ways to connect with taxpayers and tax authorities for certain APA stages in order to enable speedy resolutions. This includes increased use of technology for site visits and for other negotiations as well.</p> <p>☐ In most of the standard cases such as IT/ITES, a site visit can be completed quickly and through online media (e.g. video conferencing, conference calls). The CBDT can consider permitting “lite versions” of the site visits - to be conducted either through conference calls, management representation at APA office or electronically through video conferencing. This would optimize costs and provide flexibility to the APA teams and taxpayers in terms of availability of personnel. Thereafter if required, the APA team can decide as to whether a full-fledged physical site visit is required or not. Further, in cases involving specific</p>

<sup>6</sup> Andrew Velarde, Virtual Environment a Boon to IRS Mutual Agreement Work, Tax Notes Today (12 February 2021).

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		<p>transactions (such as financial transaction), option to conclude APAs without site visit should also be included.</p> <p><b>IV. “Accelerated APA” - special window for clearing up old cases</b></p> <p>☐ Similar to the Vivad Se Vishwas Scheme, the Government can also introduce a limited period window i.e. “Accelerated APA” to clear all backlog of APAs wherever the site visits are concluded or where limited fact finding is needed. For this purpose, as mentioned above, depending on the complexity and risk, additional teams (with people who have extensive experience as well as use of Technical Unit) can be allotted to resolve the pending cases. This approach could very well be appreciated by the investor and taxpayer community.</p> <p><b>V. Fast track APA renewals</b></p> <p>☐ APA renewals could be expedited in cases where facts have remained unchanged from the original APAs. In such cases, site visits could be exempted to achieve faster closure. Countries such as US and Denmark have also introduced measures for fast tracking of APA renewals cases. Given such international best practices on APA renewal, similar process is recommended in India so as to bring quick closure to APA renewal cases.</p> <p><b>VI. Delegation of authority for approval of APAs</b></p> <p>☐ As highlighted earlier, there is a long-time gap between processing of APA file and conducting site visits. This is primarily because there are multiple levels of approvals within the APA programme. To reduce the time lag, it is suggested that depending on the complexity level, the authority for approval can be delegated. High complexity cases may be approved by CBDT members whereas the approvals for medium risk can be delegated to the Joint Secretary – FT&amp;TR Division and low risk cases can be approved by Chief Commissioner of Income Tax (APA). Such delegated approval ladder would quicken the process of resolving APA cases.</p>

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		<p>☐ Even the TP orders are currently passed in a similar way as suggested above. Depending on the risk factors, Joint Commissioner can approve some orders for medium to low risk cases whereas Commissioners would only look at the approval of high-risk cases. Reference can also be made to mutual agreement procedure (MAP) resolutions where officials at Commissioner rank would have the power to negotiate and agree on range of margins which are broadly well within the blanket approval given by CBDT.</p> <p><b>4.2 Structural measures</b></p> <p><b>I. Bring necessary changes to safe harbour rules to reduce the load on APAs (which are perceived as the only option for tax certainty)</b></p> <p>☐ The safe harbour rules may be rationalized (based on trends in concluded APAs) to make them more attractive for taxpayers, so that the burden on APAs can be reduced. The safe harbour rules must cover additional sectors/ transactions to ensure maximum coverage. The intention should be to reduce the risk of double taxation by ensuring that the rate isn't beyond arm's length range and reduce the substantial compliance costs.</p> <p>☐ <b>The key benefit of this suggestion is that the eligible taxpayers would also start looking at simple and easy to follow certainty routes, thereby reducing the load on APAs.</b></p> <p><b>II. Issue detailed APA guidance to set the right expectations</b></p> <p>☐ It would be useful to inform both tax authorities and taxpayers as to what would be acceptable filing positions, expected documents/ information for effective negotiation, minimum expectations of the Government from such APAs (sector-wise) and possible resolution. This would reduce the uncertainty and</p>



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		<p>subjectivity (to some extent) specifically on the APA process and brings in much required consistency and uniformity across all APA Commissionerate. This would also provide a basis for much speedier APA resolutions. In order to enhance the clarity, possibility of publishing actual APA outcomes in some complex matters on an anonymous basis, may also be considered just to show-case how both tax authorities and taxpayer worked together to resolve the matter.</p> <p>☐ <b>The key benefit of this suggestion is that this would set the expectations from the taxpayers for speedy APA resolutions.</b></p> <p><b>III. Opt-ins for “roll forward” for APA renewals</b></p> <p>☐ One of the key hindrances of the APA renewal programme is the time taken to conclude the renewal, even though the facts and circumstances are the same. APA renewal process essentially repeats the entire original APA process, requiring submission of documents from scratch, site-visits and filing detailed responses rather than leveraging the work done in the original APA.</p> <p>☐ It is suggested that in year 5 of the APA term, an option should be given to the taxpayers to opt in for “roll forward” the ongoing APA upon establishing the fact that there would be no change in the facts, functional profile and other circumstances of the APA. Taxpayers can provide a management representation by way of a meeting with APA teams or by way of a written confirmation. Having such an option in the year 5 greatly saves the time in rolling forward the APA benefits. In this regard, it is also useful to look at some of the country practices in relation to “roll forward” options such as Germany and China who provide for simpler forms for such extension requests.</p> <p>☐ <b>The key benefit of this suggestion is that this relieves a lot of burden on the APA officials; thereby enabling them to focus on key APA cases which have more revenue potential.</b></p> <p><b>IV. Endeavor to conclude APA in a timely manner</b></p>

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		<p>☐ As discussed above, there is no stipulated time for closure of APA cases under the law. This leads to delays (whether intentional or unintentional) both at the end of taxpayers and APA teams. A firm commitment on time for closure will make both taxpayers as well as APA team accountable for speedy resolution. In cases where taxpayers are non-responsive, the CBDT could direct the APA application to be closed after providing an opportunity of being heard within a reasonable time (say 6 months) and clear the pending inventory. Further, efforts should include quick timelines for issue of questionnaires, site visit map, expected timeline for negotiation and closure, thereby reflecting the strong commitment to close APAs in a time bound manner.</p> <p>☐ <b>The key benefit of this suggestion is that it expedites the closure; thereby leading to faster collection of revenues for the Government. It also brings in more efficiency in the overall process.</b></p> <p><b>V. Bring transparency in the overall APA process</b></p> <p>☐ One of the concerns is the lack of transparency in providing the taxpayers the basis of negotiations as well as movement of APA cases within APA teams and the CBDT. In the absence of adequate information from APA teams, taxpayers are unable to have conversations with their foreign counterparts in a meaningful manner. They are also unaware about the status of the application. With greater digitalization, we recommend that the process be made online wherein all the status of each application can be seen on the dashboard of respective taxpayers' profile on the Income Tax e-Filing Portal with clear information on the below elements:</p> <ul style="list-style-type: none"> <li>● Status of pending application, where it is pending including the official's details (who is reviewing the file) as well as reason for such pendency and time left to resolve the APA case.</li> <li>● Basis for arriving at a particular rate/ margin</li> <li>● E-filing will allow expeditious handling and maintenance of voluminous documents/records.</li> </ul>

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		<p>☐ <b>This will be helpful in bringing in transparency in the overall process and help in forecasting a reasonable time for closures.</b></p> <p><b>VI. Keeping the regular TP assessment in abeyance during the APA process</b></p> <p>☐ Currently, the time limit for concluding assessments does not consider keeping TP assessment under abeyance or extending the time limit until the signing of APA for the APA covered years including roll back. Further, the Income-tax Act, 1961 does not provide for suspension in collection of tax until signing of APA. This results in administrative inconvenience for the taxpayers to simultaneously go through the rigorous assessment proceedings despite having opted for APA regime. Given the inordinate delay in APAs, the Government can consider extending the time limit for completing TP assessments for APA applicants/ APA covered international transactions by a couple of years on putting the assessment on hold for the period when the APA is pending. Such interim period could be excluded for purposes of the statutory assessment timelines. Similar practices or rules for keeping the assessments in abeyance or deferral of assessments are followed in countries such as the US, Australia, Germany and Hong Kong, as part of their bilateral APA or MAP programme. Also, if the APA does not get concluded within the prescribed time as mentioned above, possibility of having a “blocked assessment” for the APA covered years can also be recommended in order to bring in efficiency for the CBDT.</p> <p>☐ <b>The key benefit of this suggestion is that it would bring in “ease of doing business” for the taxpayers and encourage them to opt for APA route.</b></p> <p><b>5. Conclusion</b></p> <p>☐ APAs have contributed to the Government’s commitment to a non-adversarial tax regime and faster revenue collections. We believe timely conclusion of APAs will continue to help achieve the programme’s objective of:</p> <p style="padding-left: 40px;">a) providing certainty,</p>

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		<ul style="list-style-type: none"> <li>b) collecting fair amount of taxes on timely basis,</li> <li>c) promoting non-adversarial tax regime, and</li> <li>d) boosting the country's attractiveness to foreign investors</li> <li>e) improving India's ease of doing business quotient</li> </ul> <p>☐ The suggestions above may be considered and necessary steps may be taken to strengthen the APA programme.</p>
61.	<p><b>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)</b></p>	<p><b>Rationale</b></p> <ul style="list-style-type: none"> <li>☐ Rule 10T(1) of the Rules provides that <i>"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."</i></li> <li>☐ 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</li> </ul> <p><b>Recommendation:</b></p> <ul style="list-style-type: none"> <li>☐ 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:</li> </ul>

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		<ul style="list-style-type: none"> <li>☐ The ALP determined under APA overrides the determination of ALP u/s 92C and 92CA of the Act</li> <li>☐ 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</li> <li>☐ 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</li> <li>☐ The APA agreement, ACR and compliance audit, together addresses the requirements of maintaining TP documentation and filing Form 3CEB</li> <li>☐ 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</li> <li>☐ 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)]</li> <li>☐ 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.</li> </ul>
62.	<p><b>Waiver of interest under section 234B and 234C of the Act, post signing of the APA</b></p>	<p><b>Rationale</b></p> <ul style="list-style-type: none"> <li>☐ 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.</li> <li>☐ 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.</li> </ul>

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		<p>☐ 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.</p> <p><b>Recommendation</b></p> <p>☐ 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</p> <p>☐ 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.</p> <p>☐ Accordingly, it is recommended to waive the interest under section 234B and section 234C arising on enhanced income pursuant to signing of the APA.</p>
63.	<b>Advance Pricing Agreement (APA) and Mutual Agreement Procedure (MAP) regime</b>	<p><b>Rationale</b></p> <p>☐ Currently, there is no guidance issued by the Central Board of Direct Taxes (CBDTs) on timeframe to conclude APAs/ MAPs. It is generally observed that the time taken to conclude APAs/ MAPs are often stretched and has significantly increased from past years. Till the APA/ MAP is concluded, the element of uncertainty on pricing and position with respect to covered years continues. This can be mitigated by providing guidance on completion of APA/MAP proceedings within reasonable time.</p>

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		<p><b>Recommendation</b></p> <ul style="list-style-type: none"> <li>☐ CBDT may appropriately prescribe a 24-36 months' time-limit as a guidance, to conclude APAs/ MAPs.</li> </ul>
64.	<p><b>Rollbacks to be made applicable to all years and not just 4 years</b></p>	<p><b>Rationale</b></p> <ul style="list-style-type: none"> <li>☐ 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.</li> <li>☐ Separately, the taxpayer may have cases pending before the Income-tax Appellate Tribunal (ITAT) for a period more than 4 previous years as there is no time limit for disposal of cases before the ITAT.</li> <li>☐ Roll back provisions allow taxpayers to resolve pending TP disputes for past years and get certainty thereto. Under bilateral APAs, roll back option can be opted for if both the concerned countries have such roll back option covering the years for which taxpayers wants to apply to get covered under the APA. Hence, it is essential that the limit of 4 roll back previous years be done away with (including for existing APAs under negotiation).</li> </ul> <p><b>Recommendation:</b></p> <ul style="list-style-type: none"> <li>☐ 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.</li> <li>☐ 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.</li> </ul>

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		<ul style="list-style-type: none"> <li>☐ This would also help taxpayers in resolving issues arising from mismatch (if any) in the financial years of the AE and the Indian taxpayer.</li> <li>☐ Alternatively, CBDT should allow atleast 6-8 years limitation of years on the roll back option</li> </ul>
65.	<p><b>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</b></p>	<p><b>Rationale</b></p> <ul style="list-style-type: none"> <li>☐ 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.</li> <li>☐ 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.</li> <li>☐ This question arises on account of reading of section 92CC(1) of the Act which is as follows: <ul style="list-style-type: none"> <li>As per section 92CC(1) of the Act, <i>“The Board, with the approval of Central Government, may enter into an agreement with any person, <b>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”</b></i></li> </ul> </li> </ul> <p><b>Recommendation:</b></p> <ul style="list-style-type: none"> <li>☐ As per Rule 10B(2), comparability of an international transaction with uncontrolled transactions shall be judged with respect to the following, namely: <ul style="list-style-type: none"> <li>☐ Specific characteristics of property transferred or services provided;</li> <li>☐ Functions performed, taking into account assets employed or risks assumed by respective parties;</li> </ul> </li> </ul>



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		<ul style="list-style-type: none"> <li>☐ 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</li> <li>☐ 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</li> <li>☐ Further, as per Rule 10A(d), “transaction includes a number of closely linked transactions”.</li> <li>☐ 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.</li> <li>☐ 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</li> <li>☐ It is recommended to bring consistency in results being applied in BAPA and UAPA for same set of transactions if comparability factors defined as per Rule 10B(2) are met.</li> </ul>
66.	<b>Immunity against initiation of penalty proceedings by AO in case of BAPA/MAP cases</b>	<p><b>Rationale</b></p> <ul style="list-style-type: none"> <li>☐ 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.</li> </ul>

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		<p>☐ 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.</p> <p>☐ 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 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.</p> <p>☐ 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.</p> <p><b>Recommendation</b></p> <p>☐ 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.</p> <p>☐ 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</p> <p>☐ 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.</p>

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		<p>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).</p> <p>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.</p>
67.	<p><b>Rollback / APA provisions should apply in case of merger/demerger/conversion situations, where there is no change in FAR of the transactions</b></p>	<p><b>Issues when the applicant merges with other entities</b></p> <p><b>Rationale</b></p> <p>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.</p> <p>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:</p> <p><i>“In case of merger / de-merger of companies which company can claim the benefit of the APA?</i></p> <p><i>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.”</i></p> <p>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.</p> <p><b>Recommendation:</b></p>

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		<p>☐ 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.</p> <p>☐ 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.</p> <p>☐ 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.</p> <p>☐ Thus, it is suggested that there should be flexibility in the above fact pattern, such that merged entities are also entitled for rollback</p> <p><b>Conversion of a company into LLP</b></p> <p><b>Rationale</b></p> <p>☐ The FAQs do not provide any guidance in case of conversion of a Company into LLP during the APA period.</p> <p><b>Recommendation:</b></p> <p>☐ 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.</p>

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		<ul style="list-style-type: none"> <li data-bbox="647 336 2067 448">☐ 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.</li> <li data-bbox="647 480 2067 592">☐ 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.</li> </ul>
68.	<p><b>Impact on non-resident taxpayers by virtue of an APA agreed in the case of an Indian taxpayer</b></p>	<p><b>Rationale</b></p> <ul style="list-style-type: none"> <li data-bbox="647 691 2067 802">☐ 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.</li> <li data-bbox="647 834 2067 1233">☐ 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 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.</li> <li data-bbox="647 1265 2067 1345">☐ <b>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)?</b></li> </ul>

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		<p><b>Recommendation:</b></p> <p>☐ 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.</p>
69.	<p><b>Rollback of the transaction covered in the APA with different AE countries should be permitted</b></p>	<p><b>Rationale</b></p> <p>☐ 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).</p> <p>☐ Another FAQ states as under:</p> <p style="padding-left: 40px;"><i>“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 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.”</i></p> <p>☐ 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.</p> <p><b>Recommendation:</b></p> <p>☐ 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</p>

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		<p>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.</p> <p>☐ 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.</p>
70.	<p><b>Specifically exempt APA applicants from filing ACR for rollback years</b></p>	<p><b>Rationale</b></p> <p>☐ 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.</p> <p>☐ <b>Given the above, whether the requirement to file ACR in Form 3CEF applies even to the years covered under rollback provisions?</b></p> <p><b>Recommendation:</b></p> <p>☐ 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.</p>

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		<p>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.</p> <p>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.</p>
71.	<p><b>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)</b></p>	<p><b>Rationale</b></p> <p>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.</p> <p><b>Recommendation:</b></p> <p>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.</p> <p>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:</p> <p><i>"31. The CBSA will <b>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</b>, but may require that a correction to the value for duty be made if compensating adjustments are made to the transfer price."</i></p> <p>Similar analogy should also apply to arm's length price determined by the CBEC and should be accepted by CBDT.</p>



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		<p>☐ The same could be considered by the Indian government to boost the confidence of MNE groups operating in in India</p>
72.	<b>Commencement of APA period</b>	<p><b>Rationale</b></p> <p>☐ As per section 92CC(4) of the Act, <i>“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.”</i></p> <p>☐ 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?</p> <p><b>Recommendation:</b></p> <p>☐ 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.</p>
73.	<b>MAP Applications</b>	<p><b>Rationale:</b></p> <p>☐ 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.</p>

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		<p>☐ The taxpayers continue to live with uncertainty and also face challenges w.r.t. traditional route of litigation</p> <p><b>Recommendation:</b></p> <p>☐ The applications should be expeditiously disposed off and Indian CA should be appropriately staffed to handle the huge pending volume of such applications</p> <p>In case of recurring TP issues, MAP applications may also be tagged together and disposed off in one-go</p>
74.	<p><b>Mutual Agreement Procedure (MAP) proceedings - Stay of demand</b></p>	<p><b>Rationale:</b></p> <p>☐ 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.</p> <p>☐ 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.</p> <p><b>Recommendation:</b></p> <p>☐ 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.</p> <p>☐ 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</p>

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		<p>be charged, the same should be equal to the amount of interest received on the refund in the overseas jurisdiction by the AE.</p>
75.	<p><b>Clarification w.r.t. Transfer Pricing compliance w.r.t. Non-Resident AEs receiving merely dividend income from Indian corporates</b></p>	<p><b>Rationale:</b></p> <ul style="list-style-type: none"> <li>☐ Pursuant to abolishment of DDT, dividend is taxable in the hands of recipient</li> <li>☐ There are various corporate business structures where the foreign shareholders would earn dividend from Indian corporates</li> <li>☐ While there has been a guidance on the income-tax return filing, clarification should also be introduced w.r.t. Transfer Pricing compliances</li> <li>☐ 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.</li> </ul> <p><b>Recommendation:</b></p> <p>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.</p>
76.	<p><b>Issues in Country-by-Country Report (CbCR) filing</b></p>	<p><b>Rationale</b></p> <p><b>CbCR compliance for Investment holding entity</b></p> <ul style="list-style-type: none"> <li>☐ 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.</li> <li>☐ 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 and tax</li> </ul>

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		<p>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.</p> <p><b>Recommendations:</b></p> <p>☐ 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 <b>of conducting the initial risk</b> 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.</p>
77.	<p><b>R&amp;D - Liberalise Circular 6/ 2013 and promote setting up regional R&amp;D centre in India</b></p>	<p><b>Rationale</b></p> <p>☐ In recent times, India has been considered as a hub for carrying out R&amp;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&amp;D hub in their countries, the position of the Indian administration is not very clear.</p> <p>☐ CBDT had issued Circular 06/2013 which lists down the conditions for a R&amp;D development center to qualify as a contract R&amp;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.</p> <p><b>Recommendations</b></p>

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		<ul style="list-style-type: none"> <li>☐ If critical decisions have to be based outside India for characterisation as a contract R&amp;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.</li> <li>☐ If India needs to inculcate a culture of innovation and high-end R&amp;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&amp;D centres up the value chain\</li> </ul>
78.	<b>Intangibles: Marketing and Technology</b>	<p><b>Rationale</b></p> <ul style="list-style-type: none"> <li>☐ 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.</li> <li>☐ 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.</li> <li>☐ This dispute has majorly centered around two broad categories of intangible: <ul style="list-style-type: none"> <li>☐ <u>Marketing Intangible</u> - 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.</li> </ul> </li> </ul>

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		<p>☐ <u>Technology Intangible</u> - 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.</p> <p>☐ 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.</p> <p><b>Recommendation:</b></p> <p>☐ 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.</p> <p>☐ 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.</p>
79.	<b>Concept of base erosion by considering non-resident entity and resident entity together and not on a</b>	<p><b>Rationale</b></p> <p>☐ 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</p>

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	stand-alone basis	<p>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.</p> <p><b>Recommendation:</b></p> <ul style="list-style-type: none"> <li>☐ 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.</li> <li>☐ 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.</li> <li>☐ Such a step will help improve the ease of doing business in India and providing certainty to taxpayers.</li> </ul>
80.	Intra-group Services	<p><b>Rationale</b></p> <ul style="list-style-type: none"> <li>☐ 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.</li> <li>☐ 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</li> </ul>

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		<p>unit of output) or improved competitive positioning (increased revenues and profits through the benefits of specialization).</p> <ul style="list-style-type: none"> <li>☐ 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.</li> <li>☐ 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</li> <li>☐ 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.</li> </ul> <p><b>Recommendation:</b></p> <ul style="list-style-type: none"> <li>☐ 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.</li> <li>☐ 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.</li> </ul>



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		<p>☐ 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.</p> <p>☐ 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.</p>
81.	<b>Range to determine Arm's length price</b>	<p><b>Rationale:</b></p> <p>☐ As per the existing provision of Rule 10CA of Income tax Rules, Arm's Length Range can be used to determine arm's length price (ALP) only if there are six or more comparables. Further, such Arm's Length range as per Indian regulations (35th and 65th percentile) is narrower than the global practices which allow the range of 25th and 75th percentile (Inter-quartile range).</p> <p>☐ In contrast, as per the international practice, interquartile range can be used to determine ALP if there are four or more comparable. 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.</p> <p><b>Recommendation:</b></p> <p>☐ India Arm's Length Range rule should be aligned with the international practice [viz. Inter-quartile range (25th to 75th percentile) should be adopted] and necessary amendment should be made in the law.</p>
82.	<b>Issue of economic adjustments</b>	<p><b>Rationale</b></p> <p>Adjustment for risk level differences</p>

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		<p>☐ 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.</p> <p><b>Capacity utilization adjustment</b></p> <p>☐ 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.</p> <p><b>Depreciation adjustment</b></p> <p>☐ 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.</p> <p><b>Recommendation:</b></p>

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		<p>Summarized below are the issues/ areas that could benefit from additional clarity:</p> <ul style="list-style-type: none"> <li>☐ 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.</li> <li>☐ 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.</li> <li>☐ 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.</li> </ul>
<b>Dispute Reduction Measures</b>		
83.	<b>Section 270A (Issue of penalty notices mechanically)</b>	<p><b>Rationale:</b></p> <ul style="list-style-type: none"> <li>☐ There is an increasing tendency of initiating penalty proceedings mechanically under erstwhile section 271(1)(c)/current s. 270A 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 Assesseees</li> </ul> <p><b>Recommendations:</b></p> <ul style="list-style-type: none"> <li>☐ 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.</li> <li>☐ Interpretation issues or tax positions supported by the rulings of higher appellate forums should be outside the ambit of the penalty proceedings.</li> </ul>
84.	<b>Persuasive Value of ITAT</b>	<b>Rationale:</b>

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	Order	<p>☐ 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.</p> <p><b>Recommendation:</b></p> <p>☐ 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.</p>
85.	Adjustment of Income Tax Refund due against the Advance Tax payable	<p><b>Rationale &amp; Issue:</b></p> <p>☐ 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.</p> <p><b>Recommendation:</b></p> <p>☐ 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.</p>
86.	Corporate restructuring and IT system of Department	<p><b>Rationale:</b></p>

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		<p>☐ 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.</p> <p>☐ 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</p> <p><b>Recommendation:</b></p> <p>☐ 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.</p>
87.	Provide clarity on validity of reopening assessment for AY 2014-15 and prior years	<p><b>Background and Issues</b></p> <p>☐ As discussed above, FA 2021 amended the reassessment scheme of the income tax act to effect a paradigm shift in the reassessment procedure and limitation period w.e.f. 1 April 2021. Where the old reassessment regime permitted reassessment upto 4 years from the end of the AY in general cases and 6 years from the end of the AY in cases of escaped income exceeding Rs. 1L, the new reassessment regime permitted reassessment upto 3 years from the end of the AY in general cases and 10 years from end of the AY in cases of escaped income exceeding Rs. 50L subject to certain other conditions.</p> <p>☐ In this regard, one of the conditions prescribed at Proviso to S. 149(1) attached to apply extended limitation period, was that reassessment in respect of AY 2021-22 and earlier AYs cannot be undertaken beyond the 6 year extended limitation period prescribed for reassessments under the old reassessment regime.</p> <p>☐ Despite the enactment of the new reassessment regime as above, CBDT vide The Taxation and Other Laws (Relaxation and Amendment of Certain Provisions) Act 2020 [Relaxations Act] permitted Tax Authorities to take issue notice for reassessment till 30 June 2021 for the years which were getting time barred as on 31 March 2020</p>

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		<p>or 31 March 2021 and such notices could be issued following the procedure for reassessment as effective till 31 March 2021.</p> <ul style="list-style-type: none"> <li data-bbox="649 438 2049 758">☐ The question of validity issue of such notices issued between April and June 2021 under the old reassessment regime despite the provisions of the new reassessment regime being active, was dealt with by various HCs, most of which ruled in favour of the Taxpayers. Accordingly, the matter travelled to the SC in the case of Ashish Agarwal (Civil Appeal No. 3005/2022; dtd 4 May 2022), which invoked extra-ordinary jurisdiction under Article 142 of the Constitution to uphold the validity of the notices. Having done so, the SC permitted the Tax Authority to proceed further with the reassessment proceedings under the new regime, subject to compliance with all the procedural requirements and the defences which may be available to the Taxpayer, including with respect to limitation period.</li> <li data-bbox="649 790 2049 861">☐ Subsequently, CBDT issued Instruction No. 1/2022 providing guidance to Tax Authority on implementation of the SC ruling.</li> <li data-bbox="649 893 2049 1045">☐ Among others, CBDT permitted reopening for AY 2013-14 and AY 2014-15 subject to satisfaction of the 6 year threshold for reassessment in accordance with First Proviso to S. 149(1) of the new reassessment regime. Such CBDT Instruction has also been upheld by the recent Delhi HC ruling in the case of Touchstone Holdings Private Limited<sup>7</sup>.</li> <li data-bbox="649 1077 2049 1149">☐ This has led to ambiguity since, it may be noted that notices for AY 2013-14 and AY 2014-15 got time barred on 31 March 2021 and consequently notices could not have been issued under new regime also.</li> <li data-bbox="649 1181 2049 1252">☐ Some High Courts have ruled in favour of taxpayers holding that notices for AY 2013-14 and AY 2014-15 are time barred under new reassessment regime.</li> </ul>

<sup>7</sup> WPC 13102/2022, [TS-726-HC-2022(DEL)] dtd. 9 September 2022

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		<p><b>Recommendation</b></p> <ul style="list-style-type: none"><li data-bbox="638 391 2067 470">☐ The never-ending saga of litigation around the limitation period for reassessment goes against the stated objective of introduction of the new reassessment regime of providing certainty to taxpayers.</li><li data-bbox="638 494 2067 614">☐ Accordingly, it is desirable that it be expressly clarified that cases for AY 2013-14 and AY 2014-15 where notices were issued between April 2021 and June 2021 under the old regime are not revived by the SC ruling in Ashish Agarwal and are hence time barred.</li></ul>
<b>Personal Taxation</b>		

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88.	<p><b>Seeking a proper valuation base for housing accommodation perquisite valuation [S.17(2)(i)/(ii)]</b></p>	<p><b>Background:</b></p> <ul style="list-style-type: none"> <li>☐ S.17(2)(i) provides for taxation of rent-free accommodation (RFA) provided by employer as “perquisite” in the hands of the employees. Valuation of RFA is governed by Rule 3(1) of the Income-tax Rules.</li> <li>☐ S.17(2)(ii) provides for taxation of accommodation provided at a concessional rate by the employer as perquisite in the hands of the employees. Erstwhile Explanation 1 to 4 to S.17(2)(ii) created a deeming fiction in respect of concessional rent to arise where rent recovery is less than specified rate. Where there is a concession due to the deeming fiction, valuation rules prescribed under Rule 3 becomes applicable.</li> <li>☐ Erstwhile valuation rule for employer owned accommodation was based strictly on percentage of salary. On the other hand, in cases like leased or hotel accommodation, the actual rent payable by employer is considered if lower than specified percentage of salary.</li> </ul> <p><b>Rationale and Issue:</b></p> <ul style="list-style-type: none"> <li>☐ Finance Act 2023 amended s.17(2)(i)/(ii) to provide a uniform methodology for valuing the RFA perquisite and concessional accommodation perquisite. With an intent to rationalize the provisions, S. 17(2)(i) and (ii) were amended to empower the Government for prescribing rules of valuation of RFA and Concessional Accommodation Perquisite.</li> <li>☐ The erstwhile rule 3(1) provided for a valuation mechanism linked to percentage of salary which created a challenge for the taxpayers. Under the erstwhile Rule, two employees, though provided with similar type of accommodation faced different perquisite taxation if their salary was different. Furthermore, if the employee’s salary was increased, there resulted in automatic increase in accommodation perquisite value even though employee continued in the same accommodation. Also, employees provided with employer-owned accommodation faced higher perquisite valuation as compared to employer-leased or rented accommodation. This</li> </ul>



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		<p>was because the perquisite value in respect of employer-leased/rented accommodation was capped to the rent paid or payable by the employer.</p> <p>☐ The above challenges posed by the existing rule resulted in employer-owned housing becoming extremely tax disadvantageous as compared to employer-leased/rented accommodation or employee making his/her own arrangement for accommodation by availing HRA from the employer.</p> <p>☐ Having taken cognizance of the above challenges, New Rule 3(1) has been introduced with effect from 1 September 2023. New Rule 3(1) continues to be largely based on percentage of salary of the employee, however, it has rationalized the valuation in respect of employer-owned accommodation and also ensures that the increase in salary of the employee does not result in an artificial rise in value of the perquisite beyond the inflation level in the country. The relief provided to the employees vide the New Rule is by way of (a) reduction in perquisite value as percentage of salary and (b) introduction of a new inflation linked capping rule.</p> <p>☐ While the New Rules have partially addressed the difficulty posed by the existing rules and are welcome, since the valuation mechanism is still linked with percentage of salary, same type of accommodation provided to employees with two different scales of salary will have different perquisite value. The one with higher salary may be exposed to higher perquisite, when compared to the other during the first year of provision of accommodation and determination of value of such perquisite.</p> <p><b>Recommendation:</b></p> <p>☐ It is prayed that the New Rules be modified to provide for uniform methodology for perquisite valuation in the year in which employer provides accommodation owned by him for use to the employee. The same may address the above-mentioned anomaly by considering a different base for perquisite valuation. For instance, the annual fair rental value can be taken at 1% or 2% of stamp duty ready reckoner value instead of valuing it as a percentage of salary or basis fair rental valuation.</p>

