PRE–BUDGET MEMORANDUM 2024-25: DIRECT TAXES

PART A - ISSUES REQUIRING LEGISLATIVE AMENDMENTS

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PRE–BUDGET MEMORANDUM 2024-25: DIRECT TAXES

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	General Representations	
1.	**Refrain from carrying out retrospective amendments**	**Rationale and issue:** There were many amendments, inserted by FA 2021 and 2022, which were made effective from same financial year in which Budget was presented. Industry perceives them to be retrospective since they impact tax liabilities of past years or current year's advance tax liability. Some of them are briefly as follows :- Amendments made by Finance Act 2021 w.e.f. A.Y. 2021-22 ● Denial of depreciation on goodwill ● Taxation of slump exchange ● Taxation on cash settled capital account of retired partner, ● Disallowance of employee's PF contribution to employers Amendments made by Finance Act 2022 ● Disallowance of education cess w.e.f. A.Y. 2005-06 ● Exemption of amount received for medical treatment and on account of death due to COVID-19 w.e.f. A.Y. 2020-21 ● Disallowance of benefits/perquisites in violation of law and compounding fees w.e.f. A.Y. 2022-23

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		● Disallowance under section 14A in absence of exempt income during an assessment year w.e.f. A.Y. 2022-23 The amendment for Covid 19 relief is reconcilable since Covid 19 pandemic started from A.Y. 2020-21 and it is beneficial to taxpayers. Others have impact of overruling the court decisions favouring the taxpayer. On the other hand, the amendment to s.43B which also seeks to change the legal position laid down in SC ruling in the case of M M Aqua Technologies Ltd (129 taxmann.com 145) in the context of conversion of unpaid interest into debentures is applicable from A.Y. 2023-24 which is truly prospective. Another significant feature is wherever the amendments are made with effect from current year, the language used indicates as if the law was always required to be interpreted in the manner proposed by the amendment (eg. 'for the removal of doubts', 'shall be deemed to have always'). Use of such language creates uncertainty for the taxpayers whether the amendment is proposed to be retrospective or prospective. Courts have held that the amendment will not be retrospective merely because of use of such phrases (Refer, for instance, PCIT v. M/s Era Infrastructure [TS-577-HC-2022(Del) which held that amendment made to s.14A by Finance Act 2022 is not retrospective) The Government's professed tax policy is not to make retrospective amendments. The amendment made by Taxation Laws (Amendment) Act 2021 to remove the retrospective effect of indirect transfer related amendment for taxpayers who are ready to settle all outstanding case is a salutary step which clearly manifests the Government's commitment to such policy. Many times, the Explanatory Memorandum does not state the compelling reason for making such exception. Even otherwise, the justification provided for such retrospective amendments is that the interpretation by the courts is not in accordance with legislative intent and hence the

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		amendment is made in order to make the legislation clear and to make it free from any misinterpretation. It is submitted that this will be true for any amendment which seeks to overturn a court ruling in favour of taxpayer. Even the retrospective amendments made in respect of indirect transfer in 2012 were justified as bringing out the correct legislative intent but were subsequently made prospective considering the significant damage it caused to India's attractiveness in the eyes of international investors. • The retrospective amendments create tax uncertainty for businesses and vitiate the investment climate in the country. It sends out wrong signal to foreign investors that tax risk on account of sudden changes in tax law is very high. It adversely impacts 'ease of doing business' in India • Another aspect of concern for the industry is the statements made in the Explanatory Memorandum about interpretation given by the High Courts or various ITATs being against legislative intent. It is the constitutional duty of the courts to interpret the law on the basis of judicially settled principles of interpretation like literal interpretation, harmonious interpretation, Heydon's mischief rule, etc. If the Government feels that a particular interpretation by the Court is not correct and/or not aligned with legislative intent, it has right to appeal till Supreme Court. • It is heartening to note that Finance Act 2023 did not make any significant adverse amendments on retrospective basis (including effective from AY 2023-24 onwards). **Recommendations:** • The Government should not deviate from its professed tax policy of not making any retrospective amendment which puts additional tax burden on the taxpayer. Government should refrain from introducing any retrospective amendments going forward which adversely

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		impact taxpayer's liability for earlier or current financial years The amendments should be made truly prospective on lines of amendment to s.43B by Finance Act 2022. • Even otherwise, it may be desirable and helpful to the industry if amendments to the law are made immediately following a ruling contrary to the obvious legislative intent. The litigation can be nipped at the bud if such amendments are made immediately. This may not only remove uncertainty but also prevent Taxpayers from suffering retrospective demands due to taking a position on the basis of favourable court rulings prior to the statutory amendments. Else, the Government should wait for final outcome of the litigation by Supreme Court and then make truly prospective amendments on lines of s.43B. The current policy of making 'clarificatory' amendments does not help either the taxpayers or the Government to curb litigation. • The Government should also refrain from using phrases like 'for removal of doubts' or 'shall be deemed to have always' when making prospective amendments. Such phrases create more uncertainty for the taxpayers and create new grounds of litigation in addition to existing ones.
	Deduction of Expenses	
2.	**Denial of Deduction for interest payment on conversion of outstanding interest into an instrument to be allowed in certain bona fide cases**	**Rationale and issue:** • FA 2022 amended s.43B to provide that no deduction will be allowed for interest liability discharged by conversion of the same into debentures or any other instrument by which the liability to pay is deferred to a future date. • The amendment to s.43B appears to be intended to overturn the ratio of SC ruling in the case of M.M. Aqua Technologies Ltd (129 taxmann.com 145) but with a truly prospective effect from A.Y. 2023-24. The question before Supreme Court in that case was whether conversion of outstanding interest to debentures is hit by Explanations to s.43B. The SC held that interest

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		liability discharged by issuing debentures tantamounts to 'actual payment' and allowed the deduction u/s. 43B. This was in context of following factual scenario before the SC - ● payment by way of debentures was mutually agreed between parties ● such arrangement is not covered by express language of the hitherto existing Explanation which disallows interest payment converted to loans ● it resulted in extinguishment of interest liability in the year of deduction and ● there was no misuse of s.43B inasmuch as the lender had offered the interest income to tax in its own assessment One significant aspect which was considered by the SC, while ruling that conversion of unpaid interest into debentures constituted actual payment, was that the lender (ICICI in that case) had offered the interest income to tax on conversion into debentures. Hence, the SC held that there was no abuse of s.43B. Post amendment vide FA 2022, if the unpaid interest is converted into debentures or any other instrument by which liability to pay is deferred to a future date, it will be allowed as deduction only when such debentures or instruments are redeemed. On a literal reading of the amended provision, issue arises whether disallowance will get triggered in the hands of the borrower even if the lender has recognised interest income on conversion into debentures and offered it to tax in his own assessment. It is not correct to effect disallowance in the hands of the borrower if the lender has recognised and offered the interest income to tax. The object of s.43B (read with the Explanation thereof) was to prevent the misuse of mercantile method of accounting whereby the borrower claims deduction of interest expenditure even if not paid to lender and lender like bank or financial

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		institution covered by s.43D does not offer such interest income to tax. If the lender has offered the interest income to tax on conversion into debentures or any other instrument, then there is no such abuse or misuse. Accordingly, the borrower should get deduction for such interest. **Recommendations** A carve out may be provided in Explanations 3C, 3CA and 3D to provide that where the lender has offered the interest converted into debentures or any other instrument to tax in its own assessment, the interest expenditure will be considered as actually paid.
3.	**Relaxation of cases where disallowance arises on account of contravention of Indian or Foreign Law, regulation or Guideline**	**Rationale and issue:** The amendment to s.37 by Finance Act 2022 by insertion of new Explanation 3 disallows the following expenses:- ● Expenditure incurred for any purpose which is an offence or prohibited by Indian or foreign law ● Provision of any benefit or perquisite, in whatever form, to a person, whether or not carrying on a business or exercising a profession, and acceptance of such benefit or perquisite by such person is in violation of any law or rule or regulation or guideline, as the case may be, for the time being in force, governing the conduct of such person. ● Expenditure incurred to compound an offence under any Indian or foreign law. It is clear that post amendment to s.37, the business expenditure should not only be compliant with law from payer's perspective, but it should also be compliant from payee's perspective.

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		▯ However, there is nuance in the language of the three clauses of new Explanation 3. The first and third clauses refer to ***'law for the time being in force in India or outside India for the time being in force'***. ▯ However, the second clause relating to 'benefit or perquisite' is broadly worded and includes not only 'law' but also ***'rule or regulation or guideline…governing the conduct of such person'***. ▯ There is an apprehension whether a payment which is lawful but deviating from internal guidelines or code of conduct of recipient entity will also be hit by this provision. For instance, there may be an internal rule that employees shall not accept gifts beyond a particular value. If the payer gives a gift in breach of such internal guideline, there is apprehension whether it will be disallowed. If so, it will cast onerous burden on the industry and practical challenges to find out whether the gift is in violation of internal guidelines of the recipient's organisation which are not of statutory nature. ▯ Additionally, questions also arise on whether payments made for settlement of a commercial dispute under any settlement scheme/ arbitration/ mediation or out of court settlement will be covered by the disallowance. In this regard, courts have consistently made distinction between compensatory and penal payments. Compensatory payments like payments to settle commercial disputes or penalties/damages for breach of contract awarded in arbitration proceedings have been held to not hit by Explanation 1 to s.37. ▯ Another issue which arises is whether payment made to settle a regulatory proceeding without admission of guilt will be hit by the new Explanation 3. In such cases, the matters are settled with consent of regulatory authority without admitting any guilt on part of the taxpayer or its employees. It is nobody's case that any offence has been committed. ▯ Furthermore, the moot question which arises is whether the Assessing Officer or authorities under Income tax law are competent to decide whether the taxpayer has committed any

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		offence under any other Indian or foreign law when the appropriate regulatory authorities under the relevant law have not taken any action or the matter is pending in litigation and is not finally decided under the relevant law. The Madras HC in Cholamandalam MS General Insurance [TS-772-HC-2018(MAD)] was concerned with reinsurance premium ceded by Indian insurance companies (such as taxpayer) in favour of foreign reinsurers. The issue was whether reinsurance arrangement by taxpayer with a foreign reinsurance company was prohibited under Indian insurance laws and hence, whether reinsurance premium paid by the taxpayer to foreign reinsurance company was allowable u/s. 37(1). The Madras HC held that the AO/Tribunal have no jurisdiction to declare a transaction as prohibited/illegal under a different statute of Insurance Act or Regulations over which it has no control. Any such attempt by the Income tax authorities will amount to statutory overreach and unwarranted interference by the income tax authorities in the functioning of other judicial authorities. **Recommendations** • It may be clarified that the reference to ***'rule or regulation or guideline…governing the conduct of such person'*** appearing in the second clause of new Explanation 3 refers to rules or regulations or guidelines which are of statutory nature and does not cover internal rules or guidelines of a company. • It may further be clarified that payment made for settlement of a commercial dispute under any settlement scheme/ arbitration/ mediation or out of court settlement is not covered by disallowance under S.37(1) irrespective of whether the same is incurred in the context of domestic or foreign law. In other words, it may be clarified that the distinction between compensatory and penal payments is still intact even after insertion of Explanation 3. • It may also be clarified that payment made to settle a regulatory proceeding without admission of guilt will not be hit by the new Exp 3.

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		▪ Additionally, clarification may also be given that no disallowance can be made under new Exp 3 by the AO if appropriate regulatory authorities under the relevant law have not taken any action or the matter is pending in litigation and is not finally decided under the relevant law.
4.	**Deposits to Leave encashment dedicated funds to be treated as payment to employees and deduction to be allowed**	**Rationale** ▪ Section 43B allows certain expenditure only upon payment. Primarily, taxes and welfare expenditure on employees fall under this section. ▪ Effective 01/04/2002, a new clause (f) was inserted to permit deduction of any sum payable by the assessee as an employer in lieu of any leave at the credit of his employee, only upon payment. ▪ Large Corporates set up dedicated funds for 'Leave Encashment' and basis the actuarial valuation, contributes an amount equivalent to the liability to the said fund. In such cases, employer no longer retains the said funds in the business operations. ▪ However, Assessing Officers deny the expenditure on the pretext of 43B(f) as contribution to the fund is not considered by them to be equivalent to payment to employees. ▪ In this manner, a genuine business expenditure gets disallowed and the claim of expenditure is deferred. **Recommendation** To mitigate the hardship, it is suggested that an Explanation be inserted in Section 43B to the effect that payment to the fund would be equivalent to payment to employees
5.	**Allow amortization premium paid for lease hold land/ premises over**	**Rationale:**

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	the period of lease	▯ The leasehold rights for factories or premises against lump-sum payments, are treated as capital expenditure and not allowed in the computation of business or profession. Further, the claim for availing the depreciation is also denied by the department on a premium paid for leasehold land/premises. ▯ Under Ind-AS 16, the upfront premium paid for leasehold land held under an operating lease is treated as prepaid expenses and would need to be charged to the profit and loss account. The up-front premium lease payments for leasehold land are essential business expenditure and do not generate any capital asset. **Recommendation:** ▯ It is recommended to provide for amortization of upfront premium payments for leasehold land/premises over the period of lease.
6.	**Depreciation under section 32 on leased assets under various arrangements such as operating lease, finance lease, sale and lease back, etc.**	**Rationale:** ▯ A taxpayer may finance its requirement of capital assets from own funds, borrowed funds, or under lease arrangements. The depreciation claim in respect of assets acquired utilizing own funds or borrowed funds is allowed in the computation of profits and gains from business and profession. ▯ However, where the assets are acquired under the lease arrangements more specifically, under 'finance lease', 'sale and lease back', etc., the depreciation is not allowed in the hands of the lessee. ▯ There is no clarity on the treatment of depreciation in various lease cases like finance lease and operating lease. To minimize litigation on these aspects, a clarification should be issued regarding allowability of depreciation under different leasing arrangements.

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		Recommendation: • The Government should provide clarity in respect of persons who can claim depreciation on leased assets under various leasing transactions like operating lease, finance lease, sale and lease back, and other financing arrangements by laying down objective rules.
7.	**Deduction for Prior period expenses**	**Rationale:** • ITA does not allow deduction for prior period expenses. **Recommendation:** • Suitable provision be inserted in the Act whereby prior period expenses are allowed as deduction in the current year under section 37(1) of the Income Tax Act, 1961. • A limit (say not exceeding 1% of the turnover) can be prescribed for such expenditure. It will obviate administrative difficulties in claiming the deduction in respect of previous years and rectifications proceedings etc. There will not be any revenue loss to the government from this clarification, since corporate tax rates over a period of years have remained more or less the same.
8.	**ESOP expenditure**	**Rationale**: • Awarding ESOPs to employees is an important tool for talent retention adopted by most companies in India. It is one of the modes of compensating employees for their services. Granting of shares under ESOP is treated as perquisite in the hands of the employees and on this perquisite, tax is paid by employees. • Presently there is no express provision in the Act about allowability of ESOP expenditure while computing taxable income.

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		▯ SEBI guidelines prescribe method for charging of ESOP discount in the books of accounts of listed entities. Despite this, many times, in the absence of an express provision in the Act on allowability of ESOP expenditure as deduction while computing taxable income, tax authorities do not treat ESOP expense as deductible while computing the business income. ▯ This leads to litigation. There are Rulings from different Courts / tribunals giving favourable views regarding allowability of ESOP expenditure. Since ESOP expenditure is in the nature of employee compensation, the same should be allowed as revenue expenditure. ▯ However, there are further issues about quantification of such expense and timing of deduction. **Recommendation**: ▯ ESOP expenses debited to profit and loss account should be an allowable expense for deduction for computing the business income. ▯ It is suggested that a specific provision be incorporated permitting ESOP expenditure to be allowed as revenue deduction in the computation of income. Such provision may also consider the quantum of expenditure to be allowed and timing of deduction for consistency across all types of companies.
9.	**Tax payment in respect of income pertaining to Employee Stock Option Plan (ESOP)**	**Rationale:** ▯ The Finance Act 2020 amended section 17(2) of the Act read with Rule 3(8)(iii) of the Rules and Section 192(1C) of the Act to provide that in case of an eligible start-up referred to in section 80-IAC, the employer shall have to deduct tax within 14 days of the below events i. after the expiry of forty-eight months from the end of the relevant assessment year; or

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		ii. from the date of the sale of such specified security or sweat equity share by the assessee; or iii. from the date of which the assessee ceases to be the employee of the person; whichever is the earliest on the basis of rates in force of the financial year in which the said specified security or sweat equity share is allotted or transferred. • As per section 40(a)(ia) of the Act, in case where tax is deductible and has not been deducted, 30% of the said amount shall be disallowed. • ESOP expenditure is generally accounted as expense by the employer over the grant-to-vest period. However, as per the above section 192(1C), the liability to withhold tax would arise in the year in which the events (i, ii, iii, whichever is earlier) happen. • In such a case, there would be no tax deduction on ESOP expenditure recorded in the books, which may lead to disallowance of such ESOP expenditure under section 40(a)(ia), even though tax would be deductible in a later year as mandated under section 192(1C). **Recommendation:** • To provide the intended benefit to the start-up, it is recommended that a suitable clarification be incorporated so that disallowance u/s 40(a)(ia) is not made in the year of accounting for ESOP expenditure; it will be triggered only if tax is not withheld in a later year as per Section 192(1C).
10.	**Allow funding of leave salary in approved gratuity fund**	**Rationale:** • Income tax allows assessee to set up trust and fund the gratuity liability payable to employees on retirement / separation. This helps to de-risk business and secure employee dues.

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		▯ In addition to gratuity liability, employees are given facility to accumulate leaves and such accumulated leave can be either availed or encashed. It is seen that where entities pass through bad times, employee loose not only their employment but also leave encashment payment due to financial and other issues. ▯ In view of section 43B(f) of the Act, provision made by an entity towards leave salary is allowable on payment basis only. **Recommendation:** ▯ Approved gratuity fund related provisions of the Act and Rules be amended to allow funding of liability towards accumulated leave of employees on actuarial basis. This will secure interest of employee.
11.	**Rationalisation of disallowance u/s 40(ba)**	**Rationale:** ▯ Currently as per section 40 (ba) of ITA, any payment of interest, salary, bonus, commission or remuneration by whatever name called paid by an association (AOP) to it's member is not allowed as deduction. ▯ Leading EPC companies in India provide turnkey solutions for construction of roads, bridges, fully integrated rail & metro systems, commercial building & airports and setting up power generation plants, power transmission & distribution systems, etc. Such EPC companies have formed number of Joint Ventures in India in the form of AOP's with various partners (both overseas and local) for the purposes of bidding and execution of contracts. ▯ Several Large infrastructure projects require expertise in multiple discipline which is generally not available with any single company. Therefore, to meet overall project requirements few EPC Companies join together and submit bid as a Joint entity (JV) by bringing their respective expertise for executing complex project. Such joint ventures are purely to meet project criteria

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		requirements. However, payments made by Joint entity (JV) to members for expert service provided or towards executing work is disallowed as per section 40 (ba). This result into additional tax cost and ultimately increase the project cost. **Issue** • The provisions of Sec. 40 (ba) are completely unjustifiable and genuine business expenditures are also disallowed just because the payees are partners in JV. • The same also amounts to double taxation of the same income. • There are enough provisions otherwise in IT Act to address any unreasonable payments or transaction with sole objectives of tax evasion. **Recommendation:** • It is recommended to Amend Section 40 (ba) of ITA so as to restrict the disallowance in that section only to interest, salary, bonus, commission or remuneration paid to members of such Association. (i.e. disallowance of section 40 (ba) should not be apply to payment by Association to members towards work carried out and technical / professional service provided by members to joint entity/ Association if test of reasonableness is satisfied.
12.	**Reintroduce weighted deduction u/s 35(2AB) for inhouse R&D**	**Rationale**: • The Finance Act 2016 has reduced weighted deduction of R&D expenses under section 35(2AB) in respect of DSIR approved in-house R&D facility to 150% from April 2016 and 100% from April 2020. • The phasing out of weighted deduction for R & D incentives will not only discourage the various initiatives like “Make in India”, Digital India”, “e Governance”, “Clean Energy” etc. which are being aggressively pursued by the Government but also will dampen the spirit of innovation

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		which is essential for the robust growth of the Indian industry. The critical importance of R&D was acutely felt when the economy was facing a crisis due to Covid 19 pandemic and there was a race amongst pharma companies to come out with effective and safe vaccines at the earliest. • Innovation through R&D is also required to bring out generic versions of patented drugs which are going off-patent in near future. It is also necessary to meet the Government's objective of making cheaper drugs available to the Indian masses. • Incidentally, the current global trend is to encourage the R&D activities through provision of incentives e.g. such incentives are currently available in the USA, UK, Australia, France, Italy, China and Singapore to name a few. • Several countries have low corporate tax rates along with R&D incentives, eg Singapore (Tax rate 17 percent further reduced to between 5 to 10 per cent in respect of qualifying IP income; 100 to 250 percent of R&D expenditure), China (Tax rate 25 percent reduced to 15% in respect of High and New Technology Enterprise; 175 to 200 percent of R&D expenditure). Hong Kong has also amended its R&D tax benefit regime. Under the Hong Kong law, qualifying R&D expenditures on a qualifying R&D activity (wholly undertaken and carried on within Hong Kong) will be eligible for a 300% deduction for the first HK$2 million (USD250k), and the remainder, a 200% deduction without limitation. Non-qualifying R&D expenditures will continue to be eligible for the normal 100% deduction. Additionally, Hong Kong has also recently commenced Public Consultation on a new patent box tax incentive regime proposing to offer a concessionary tax rate at 8.25% (subject to public consultation). • Also, present regime of in-house R&D expenditure being regulated by DSIR which approves R&D expenditure as per its own subjective standards beyond statutory guidelines prescribed in Rule 6(7A), makes unilateral changes to its guidelines without any prior consultation with industry and applies the changes on retrospective basis to past years' claims is highly unsatisfactory and

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		adversely impacts 'ease of doing business' for industry. For instance, DSIR revised its guidelines in 2017 which disqualifies expenditure reflected as 'Capital Work in progress'. There is no explanation for the basis of such disqualification. There is also no exception made for genuine R&D expenditure which may be reflected as CWIP (eg. machinery acquired in Year 1 which is installed in Year 2 and hence reflected as CWIP in Year 1 or developmental expenses capitalized in books as per requirements of AS-26). Inspite of several recommendations made in this regard, the same has not been taken note of so far. • Further, the weighted deduction for R&D Expenditure under Sec. 35(2AB) is not available in case Section 115BAA is opted. **Recommendation**: • In view of the above, it is once again strongly recommended to continue not only the erstwhile scheme of weighted deduction but also introduce new R&D incentive schemes which are administratively easy to implement. • Scope of R&D deduction should be expanded to partially outsourced activities and commercial R&D companies • The DSIR's role should be restricted to approval of R&D facility and expenditure claims should be verified by Assessing Officers as per statutory guidelines prescribed in Rule 6(7A) • Delink the R&D deduction with the Option of 115BAA/115BAB by allowing "Weighted Deduction on R&D@ 200% of expenditure.
13.	**CSR expenses – Explanation 2 to Sec 37(1)**	**Rationale:**

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

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		▯ Alternatively, deduction under Section 80G should be allowed for eligible expenditure / donations incurred by companies which have exercised the option of lower tax rate by making suitable amendment in Section 115BAA, 115BAB to allow Chapter VIA deduction – under Section 80G even if lower tax rate is availed/ exercised.
14.	**Provisions of section 36(1)(viia) – Deduction for provisions for bad and doubtful debts**	**Rationale:** ▯ Post 2008-09 financial meltdown, the shadow financial sector of India had been buoyant till late 2017. However, in FY 2019, defaults by leading NBFCs shook the entire sector leading to negative sentiments in the stock market and a dearth of liquidity in the sector. The fourth quarter of FY 2020 started showing green flags as far as growth and liquidity were concerned which earlier were restricted to large NBFCs. However faced with the unforeseen effects of the COVID-19 pandemic and the ongoing Russia-Ukraine war as also volatile situation in Middle East region, the financial sector including NBFCs, unsurprisingly, has borne the maximum brunt of the cascading effects of the pandemic. Cash flow of companies is squeezed and creditworthiness of borrowers is uncertain. There is no question that the impact on the banking sector and resultant NPAs will be massive. In a scenario where credit financing and repayment are weak, NBFCs would need to do provision for unforeseen NPAs in the near term. ▯ This representation aims to draw your attention to income-tax provisions w.r.t. Section 36(1)(viia) of the Income Tax Act, 1961 (‘the Act’) and the need for amending the provisions to increase the maximum permissible amount of deduction, which is currently capped at 5% of the Gross total income. **A. Section 36(1)(viia) deduction in its current state:** ▯ It is a prerequisite that an NBFC creates a provision in its books towards bad and doubtful debts for it to claim any deduction under Section 36(1)(viia).

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		▯ The intent of the statute seems to be, to give deduction for provisions created in books in line with the norms framed by the RBI, but to restrict the deduction to a percentage of taxable profits. The allowable deduction is restricted to the amount of provisions actually made or 5% of total income whichever is lower. ▯ It is interesting to note that this cap of 5% on total income is to be calculated before claim of deduction under Section 36(1)(viia) and before claim of deduction under Chapter VI-A. The phrase used is 'total income' which is a defined in Section 2(45) of the IT Act. Total income essentially means the amount on which income tax is payable and is computed by giving effect to all the provisions of the IT Act. Therefore, total income will include income chargeable under all heads of income and will also take into account set off of all eligible brought forward or current period losses. ▯ As an example, if the provisions actually made is Rs.100 and the amount calculated at 5% of total income works to Rs.150, then, the deduction will be restricted to Rs.100. Conversely, if the provisions actually made is Rs.150 and the amount calculated at 5% of total income works to Rs.100, then, the deduction will be allowed for Rs.100. And, if the NBFC has incurred a loss, no deduction would be allowed under this section. ▯ Additionally, under Ind AS, loans are no longer be bucketed into standard/ sub-standard/ doubtful or loss categories (as currently prescribed under the RBI norms). Thus, the RBI Norms/ Guidelines are not applicable, and the classification of loan is based on days past due and other qualitative criteria and are bucketed into Stage 1, Stage 2 and Stage 3. ▯ In the current scenario, it is imperative that the NBFCs will have higher provisioning for bad and doubtful debts in view of volatile and uncertain situation. Under Section 36(1)(viia) of the Act, an amount not exceeding 5% of the total income of NBFCs is allowable as deduction for provision for bad and doubtful debts. NBFCs / HFCs are regulated entities and have migrated to

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		Indian Accounting Standard (Ind –AS) from April 1, 2018. Under Ind AS, asset classification and provisioning are based on the Expected Credit Loss (ECL) model and such provisions are termed as Expected credit loss – impairment allowance. Thus, the HFCs have to provide for the Expected Credit Loss on Stage 3 loan under Ind AS as compared to provision for non-performing assets under IGAAP. Further, in view of the current challenging economic scenario, the deduction for provision for bad and doubtful debts should be increased from present 5% limit to make it at par with the deduction of 8.5% available to Banks. **Recommendation:** We request that the following amendments be brought in the provisions of Section 36(1)(viia) of the Act: It is recommended that limit of deduction should be increased to make it at par with the banks. Alternatively, capping of maximum deductible amount be increased to 10% (Currently – 5% for NBFCs) of the Gross Total Income; Clarification as to provisioning on which stages of loan shall qualify for deduction under section 36(1)(viia) of the Act. It is recommended that it should be clarified that Expected Credit Loss on Stage 3 accounts as per IndAS is allowable under section 36(1)(viia)(d). **B. Extension of limit of deduction u/s. 36(1)(viia) for NBFC at par with banks** **Rationale:** Without prejudice to above, we would also like to bring to your attention that Section 36(1)(viia) of the IT Act provides that a bank shall be allowed a deduction of provision of bad

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		and doubtful debts to the extent of 8.5 percent of the total income and an amount not exceeding 10% of the aggregate average advances made by the rural branches of such bank (computed before making any deduction under this section and Chapter VIA). Budget 2016 extended similar benefit to NBFCs and permitted them to deduct provision of bad and doubtful debts to the extent of 5 percent of the total income (computed before making any deduction under this section and Chapter VIA). Such disparity is unwarranted since NBFCs are subject to regulatory norms in all the key areas similar to banks, including requirement of minimum capital adequacy ratio of 15 percent (9 percent for banks under Basel III norms), maintenance of leverage ratio and compliance with Know Your Customer norms, provisions of Prevention of Money Laundering Act, 2002 and other prudential norms. • Further we would like to highlight that the amendment as suggested below would not lead to any revenue loss to the Government since: (i) the said deduction only prepones the event of deduction to creation of provision instead of actual write off in books (ii) Combined reading of First proviso to Section 36(1)(vii), Explanation 2 to Section 36(1)(vii) and Clause (v) to Section 36(2), ensures that the no deduction is claimed twice - once, at the stage of provisioning and again, at the stage when the bad debts are actually written off. • However, the same is critical to provide the additional liquidity and temporary lower tax effect to the NBFC sector which is currently crippling with increasing provision for bad and doubtful debts on one hand and lower profits due to lower business volumes due to slowdown in economy and higher NPA provisions. **Recommendation:**

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		▯ Given the above, it is recommended that the threshold of deduction of 5 percent under section 36(1)(viia) applicable to NBFCs is at least increased to 8.5 percent to be at par with the banks and a level playing field be created for NBFCs. **C. Extension of limit of deduction u/s. 36(1)(viia) for provisions made towards NPAs** **Rationale and Issue:** ▯ Indian and Foreign Banks are allowed tax deduction for provision in respect of NPA only to the extent of 8.5% or 5% respectively of adjusted taxable income under section 36 (1) (viia) of the ITA. ▯ Banks are also required to follow prudential norms fixed by RBI, which are considered minimum required provisioning. In case of most of the banks, the amount of NPA provision made in accordance with RBI norms exceeds the deduction presently available under section 36(1)(viia), which results in disallowance of a substantial portion of provisions made for NPA. Provisions made in NPA accounts should be allowed in full in computing Profits & Gains of Business in the year of making provisions. ▯ Separately, in case of foreign banks, the deduction for provision for bad and doubtful debts is available only up to 5 percent of the total income as against 8.5% for Indian banks. The argument put forth for differential rates is that Indian banks are subject to Priority Sector Lending (PSL) norms (such as lending to the agriculture and education sectors). However, it may be pointed out that foreign banks are subject to similar PSL norms as Indian banks. ▯ Further, foreign banks are already subject to a higher tax rate. Thus, tax provisions for Indian banks and Indian branches of foreign banks are not at par. **Recommendation:**

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		▯ It is recommended that banks should be allowed to claim tax deduction for 100% provisioning made as per accounting principles instead of the present restriction of 5% in section 36(1)(viia). ▯ At the very least, it is suggested that Indian branches of foreign banks be brought at par with Indian banks and allowed a deduction of provision for NPAs at 8.5% instead of the existing 5%.
15.	**The losses from the specified business under section 35AD should be made eligible for set-off against profits from other businesses of the taxpayer**	**Rationale:** ▯ Section 35AD allows the taxpayers to claim deduction in respect of expenditure of capital nature incurred for the purpose of any specified business carried on by him. The intention is to provide investment linked deduction to taxpayers engaged in the specified business. This upfront deduction towards capital expenditure allows the taxpayer to manage its cash flow in the initial phase of setting up capital-intensive specified businesses. However, section 73A restricts the taxpayer to set-off the losses from the specified business under section 35AD against the profit of non-specified business. ▯ Permitting set-off of losses would reduce tax liability of the taxpayer in the initial years of investment and help the taxpayers to manage its liquidity and cash requirements efficiently. **Recommendation:** ▯ The losses from the specified business under section 35AD should be made eligible for set-off against profits from other businesses of the taxpayer, and not restricted to be set-off against only the specified businesses (as it is currently restricted under section 73A).
16.	**Resolving practical difficulties in identifying MSE to avoid deduction of delayed payments on actual payment basis [S.**	**Existing provision** ▯ Provisions of section 43B provide for deduction of specified expenditures on actual payment basis.

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	43B]	▯ Further, where during a financial year, taxpayer is not able to make actual payment of the expenditure incurred by the taxpayer during the relevant financial year, still such expenditure can be claimed as a deduction by the taxpayer – subject to making actual payment of such expenditure within the due date of furnishing the tax return of such financial year. ▯ Finance Act 2023 inserted a new clause (h) is in section 43B which provides that, any sum payable by the taxpayer to a micro or small enterprise (MSE) beyond the time limit specified in section 15 of the Micro, Small and Medium Enterprises Development Act, 2006 (MSME Act) shall be allowed as a deductible expenditure only on actual payment. The impact of the amendment is that any sum which becomes payable to MSE and remains overdue in the same financial year, then such expenditure will be allowed as a deductible expenditure only in that financial year in which the actual payment is made. If the actual payment is made during same financial year – even if delayed beyond time limit u/s. 15 of MSME Act, it will be allowed as deduction in same financial year. ▯ Amendment is also made to add the proviso to section 43B to exclude new clause (h) from the ambit of the said proviso. The impact of the amended proviso is that, with regard to the expenditure of the nature referred to in clause (h) to section 43B, the buyer shall not be granted benefit of making actual payment of such overdue sums till the due date of furnishing its return of income. Accordingly, deduction for such overdue sums shall be allowed only where such sums were actually paid within that financial year. **Issue** ▯ Reference made in clause (h) to section 43B is to a sum payable to a “micro or small enterprise”. The term, “micro enterprise” and the term, “small enterprise” has been defined in the amended clause (e) & (g) to Explanation 4 to section 43B.

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In terms of the amendment to Explanation 4, for the purpose of defining the terms, “micro enterprise” and “small enterprise”, reference is drawn to section 2(h) and section 2(m) of the MSME Act, respectively. In terms of section 2(h) and section 2(m) of MSME Act, an enterprise shall be classified[1] as a “micro enterprise” or a “small enterprise” depending upon the quantum of investment in the plant & machinery and annual turnover.
The classification of MSEs is based on their investment and turnover as follows :-

<table>
<tr><th>Classification</th><th>Micro enterprise</th><th>Small enterprise</th></tr>
<tr><td>Investment in Plant & Machinery</td><td>< Rs. 1 Cr.</td><td>< Rs. 10 Cr.</td></tr>
<tr><td>Annual Turnover</td><td>< Rs. 5 Cr.</td><td>< Rs. 50 Cr.</td></tr>
</table>

The MSME Act only refers to a criterion of turnover and investment in plant & machinery so as to qualify as a “micro or small enterprise” in terms of section 7 of the MSME Act. It is unclear as to whether, the enterprise should file a memorandum under section 8 of the MSME Act that it fulfill the criteria for qualification as a “micro or small enterprise” (in terms of section 7 of MSME Act) i.e., registration on Udyam portal. Hence, there is an ambiguity as to whether an enterprise (not registered under the MSME Act) fulfilling the criteria for being recognized as a “micro or small enterprise” under section 2(h)/(m) of MSME Act, shall qualify as a “micro or small enterprise” as referred to in amendment to Explanation 4 of section 43B?
It is practically challenging for any taxpayer to identify whether its vendor satisfies the MSE criteria in absence of a simple procedure. Self-declaration by the vendor may not fully address

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</table>

[1] Limits have been revised and criteria for classification also includes turnover of the enterprise (refer Notification No. F. No. 2/1(5)/2019 dated 1 June 2020 issued by the Ministry of Micro, Small and Medium Enterprises

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		this issue since vendors may give false declarations just to receive payments earlier than normal trade practice. It may be noted that the Hon'ble Supreme Court in the case of Silpi Industries Ltd. v. Kerala State Road Transport Corporation & Anr. (Civil Appeal No. 1570-1571 of 2021) held that only MSEs registered on Udyam portal can claim benefit of MSMED Act **Recommendations** It may be clarified that the provisions of non-allowability of overdue expenditure are applicable only where the expenditure is incurred in relation to enterprises which are registered under MSME Act on Udyam portal.
	Corporate Taxation	
17.	**Applicability of Section 43CA for stressed assets.**	**Issue** Section 43CA prescribes that in case the consideration of a land, building or both (not being capital asset) is less than the value adopted as per stamp duty regulations, the latter will prevail for the purpose of computation of business income. This creates a situation where the bank selling such assets as a part of a debt resolution plan without any ulterior motive of tax evasion is hindered. Banks who have entered into resolution deals with stressed borrowers often receive land, buildings etc. in settlement of such debts. These items are carried as non-Banking assets in financials of the Bank. Banks receive strict mandate from RBI to dispose of such non-banking assets in a time bound manner. Given the strict timelines which are enforced by the Banking regulator, the Banks are not able to attain a commercial price discovery. Accordingly, Banks end up disposing such items at a price which is far lower than the commercial price/stamp duty valuation. Given the language of the section, Banks are forced

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		to pay taxes on notional profits in order to comply with RBI regulations of time bound sale. Section 43CA valuation measure is put in place in order to discourage sale value reduction in favour of cash exchanges. Banks being regulated entities cannot indulge in such activities. Further in order to comply with RBI regulations time bound disposal is mandated thwarting price discovery thereby severely impairing the debt resolution proposals. **Recommendation** An amendment should be made by way of providing for an exemption from applying Section 43CA valuation in case of sale of underlying security (i.e. immovable properties) for stressed loans. Alternatively, in such cases the valuation report which is received from a reputed valuer can be considered to be the fair market value of such non-banking asset being immovable property. Additionally, Section 55A reference to Valuation officer should be made inapplicable in all such cases.
18.	**Extension of cut-off dates for eligibility to claim concessional tax under s.115BAB by 2 years**	**Existing provision** S. 115BAB of the Income Tax Act, 1961 (ITA), introduced vide The Taxation Laws (Amendment) Ordinance, 2019 ('the Ordinance') and subsequently enacted by the Parliament, taxes newly established manufacturing domestic companies at the concessional rate of 15% subject to certain conditions. One of the conditions to be eligible for the benefit is that the new company is required to be set-up and registered on or after 1 October 2019 and commence manufacturing or production on or before 31 March 2023. The sunset date of 31 March 2023 for commencement of manufacturing and production was extended to 31 March 2024 by Finance Act (FA) 2022 considering the impact of the COVID-19 pandemic but contrary to industry expectation, it was not extended further by Finance Act 2023.

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		Issue • Given the volatile and uncertain global macroeconomic factors arising from Russia-Ukraine war, military action by Israel on Gaza and recessionary trends creeping in world-wide, a further extension of sunset date will be helpful to attract foreign investment to India. Apart from enabling India to remain attractive for making fresh capital and debt investments, such extension will also boost the forex reserves of the country in volatile times as also encourage the domestic economy while encouraging exports. • Such extension will also promote the 'Make in India' initiative by helping India in maintaining attractiveness for setting up new manufacturing units mainly to promote exports in accordance with the China Plus One strategy by providing an alternative to multinational groups to set-up manufacturing hubs at locations other than China and Taiwan. • Prior announcement of longer sunset date provides sufficient lead time to the foreign investors to make a planned and systematic implementation after evaluation of business plans, raising funds and setting up the new manufacturing facility. • Furthermore, s.115BAB(7) requires companies desirous of availing the benefit to exercise the option by filing Form 10ID on or before the due date for filing the return of the first year for which the company is required to file return. S.139(1) mandates every company to furnish return of income for every year regardless of the level of income. This indicates that the new company should file Form 10ID on or before due date for filing the return for its first year even if the new manufacturing facility is not set up. Given the current sunset date of 31 March 2024, new companies which are already set up and required to file return for FY 2022-23 but do not expect to meet this deadline may not file Form 10ID. If the sunset date is subsequently extended by next year's Finance Bill, it will become difficult for them to avail the benefit since they would have already missed filing Form 10ID to claim benefit of s.115BAB in the first year.

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		Hence, an advance intimation of extension of sunset date will help such companies to file Form 10ID in timely manner to avail the benefit instead of getting caught in litigation on compliance of s.115BAB(7) **Recommendations** • Accordingly, the sunset date for newly established manufacturing domestic companies u/s 115BAB may be extended till 31 March 2026.
19.	**Tax on income of certain domestic companies (S. 115BAA) and related MAT issue**	**Rationale:** • A new section, i.e. S.115BAA was introduced vide The Taxation Laws (Amendment) Ordinance, 2019 ('the Ordinance') & subsequently regularised through The Taxation Laws (Amendment) Act 2019 wherein the total income of certain domestic companies for previous year relevant to assessment year beginning on or after April 1, 2020 would at the option of the company be taxed at the rate of 22% (plus surcharge and cess). • The option to avail the reduced rate of tax is subject to fulfilment of certain conditions prescribed therein. (which mainly requires giving up certain specified tax incentives). Further, once the option is exercised for any previous year, the same shall not be withdrawn. • As per the clarifications issued by CBDT on October 2, 2019 vide Circular No. 29/ 2019, a company opting for a concessional tax rate would not be able to carry forward for set-off, the loss or depreciation relatable to specified tax incentives and will not be allowed to avail MAT credit as well. • The CBDT vide Circular No. 29/ 2019 dt 2 Oct 2019 also clarified that domestic company opting for 22% rate shall not be allowed to claim set-off of any brought forward loss on account of

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		additional depreciation in the year in which option is exercised or any subsequent AY. The Circular further suggested that since there is no time limit within which company can opt for 22% rate, domestic company having brought forward losses on account of additional depreciation may, if it desires, exercise the option after set-off of losses so accumulated • However, through a proviso inserted to s.115BAA(3), companies opting for s.115BAA in A.Y. 2020-21 were allowed benefit of reinstatement of tax WDV to the extent of unabsorbed additional depreciation as on 1 April 2019 and Rule 5 was also amended to prescribe the methodology for such reinstatement. • It is submitted that CBDT's suggestion leads to double jeopardy for the companies. While availing the set off-of carried forward additional depreciation, the company becomes liable to MAT. Thereafter, the company will also need to wait till MAT credit is fully utilized. Further, with expansions and replacements happening on regular basis and additional depreciation being a mandatory allowance, it will be difficult for company to switchover to s.115BAA in distant future if it waits for complete utilisation of unabsorbed additional depreciation loss and resulting MAT credit. This will defeat the very object of introducing s.115BAA to have a lower corporate tax rate without tax incentives to spur economic activity and reduce tax litigation. One time facility for reinstatement of tax WDV if option is exercised in A.Y. 2020-21 is highly restrictive and lacks sufficient rationale. Since, s.115BAA gives option to choose lower tax rate in any AY in future, the reinstatement of tax WDV should also happen in any AY in which company opts to get governed by s.115BAA. • To the extent there is unabsorbed additional depreciation loss or unabsorbed loss on account of section 35AD deduction for capital assets, the taxpayer cannot be regarded to have availed any tax incentive since the cost of the assets to that extent are not set off against profits of the business. Reference, in this regard, may be made to provisions of s.35AD(7B) which provides for 'claw-back' of deduction allowed u/s. 35AD if the asset is diverted from the specified business

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		but even while clawing back the deduction allowed in past, the provision permits deduction for normal depreciation and WDV of the asset is also stepped up to that extent (refer, proviso to Explanation 13 to s.43(1)). This supports that the taxpayer should not be deprived of normal depreciation if conditions of s.35AD are not fulfilled **Recommendation:** • Section 35AD was introduced to reinvest the profits in the qualifying sectors and in turn channelise the huge investment in qualifying sectors. Overall intention of introduction of lower tax provisions is to boost the economy in an immediate period of time. Denial of the set off brought forward losses for the past 35AD claims will delay the favourable impact of lower corporate tax rate as companies may not opt for lower tax rates immediately. It is therefore recommended that the CBDT may reconsider its view on allowability of set-off of brought forward loss attributable to additional depreciation and s.35AD deduction (@ 100% of cost of assets). Companies may be permitted to recoup the unabsorbed loss representing cost of the asset while paying lower tax @ 22%. This will provide more meaningful benefit to the industry and provide incentive to move over to lower tax rate (without availing incentives) at the earliest • Alternatively, it may be clarified that once domestic company opts for 22% rate and is denied the benefit of set off of unabsorbed loss represented by additional depreciation or s.35AD deduction, correspondingly, the WDV of the asset will be reinstated on which the company can claim normal depreciation.
20.	**Tax on income of newly established domestic manufacturing companies (S. 115BAB)**	**Rationale/ Recommendations:** • Similar to S. 115BAA as discussed above, S. 115BAB was introduced vide the Ordinance to tax newly established manufacturing companies i.e. companies set-up and registered on or after

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		October 1, 2019 and has commenced manufacturing before March 31, 2024 (as extended vide FA 2022) at the rate of 15% subject to the following conditions: ● It is not formed by splitting up or reconstruction of a business already in existence; ● Does not use any plant or machinery previously used for any purpose; ● Does not use any building previously used as a hotel or a convention centre, in respect of which deduction u/s. 80ID has been claimed and allowed; ● The company is not engaged in any business other than the business of manufacturing of any article or thing and research in relation to, or distribution of such article or thing manufactured or produced by it; ● The total income has been computed without claiming any deduction u/s 32, 32AD, 33AB, 35AD or under Chapter VIA etc, set-off of loss relating to the said provisions, depreciation under section 32(1)(iia). **Eligibility** The said section applies to any company engaged in the business of 'manufacture or production' of any article or thing. However, it is unclear whether food production industry viz for hotel, air catering are also covered within the scope of s. 115BAB. One of the conditions imposed by s. 115BAB is that the company should not use any second-hand plant and machinery. Restriction on "use" instead of "transfer" (which term is generally used in other profit linked incentives such as u/s 10A, 10AA, 35AD, 80IA, 80IB, 80IC) of any plant or machinery previously used for any purpose in S. 115BAB could have unintended consequences and the same needs to be corrected. Also, the restriction should apply to the

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		undertaking and that too only at the formation stage and not to the entity as a whole over its entire lifespan, as is the case with other profit linked incentives. ▯ While the Government did consider industry representations to extend the sun-set date to 31 March 2024, given the volatile and uncertain global macroeconomic factors arising from Russia-Ukraine war, volatile situation in Middle East due to military action by Israel and recessionary trends creeping in major developed countries like US, UK, etc, it is necessary to maintain attractiveness of India for setting up new manufacturing units mainly to promote exports and provide alternative to other manufacturing hubs like China and Taiwan. A further extension of sunset date till 31 March 2026 will enable India to remain attractive for making fresh capital investment, provide boost to domestic economy and also encourage exports. **Recommendation:** ▯ Restrictive conditions under the erstwhile profit linked incentive provisions have been tested over time and introducing the new ambiguous language shall result in new interpretational issues and unintended consequences. Accordingly, the restrictions on use of second-hand machinery should be worded appropriately. The purpose will be adequately served if the language which has been hitherto consistently used for incentive deductions is adopted as part of this section as well. The restriction should be applied to use of plant and machinery previously in use which is transferred to the company.
21.	**Clarification on impact of any restructuring in the subsequent years on Section 115BAB benefit**	**Rationale** ▯ Section 115BAB allows a domestic company to opt for payment of tax at the rate of 15 percent on its total income subject to fulfilment of various conditions provided therein including u/s 115BAB(2). Further, Explanation to sub-clause (ii) to clause (c) of S. 115BAB(2) specifies that in

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		case of an amalgamation, conditions of S. 115BAB(2) are required to be satisfied by amalgamated company on continuous basis. • Separately, the option under this section is to be exercised on or before the due date for filing the first of the income tax return which the company is required to furnish under the provisions of the Act. In the subsequent years if any restructuring exercise is undertaken by the relevant company or there is a merger/ demerger into the relevant company, there is no clarity on how availability of S. 115BAB benefit will be impacted. **Recommendation** • Specific clarity should be provided on impact on Section 115BAB availability in respect of any restructuring exercises.
22.	**Extension of sunset date for commencing manufacturing operations for co-operative societies claiming CTR benefit of 15% tax rate [S. 115BAE]**	**Background** • As per the extant ITA provisions, the benefit of concessional tax regime of 15% tax rate is only available to new manufacturing domestic companies (S.115BAB). In order to provide level playing field to manufacturing cooperative societies, FA 2023 has introduced a new provision of S.115BAE to provide concessional tax regime(CTR) of 15% tax rate to new manufacturing cooperative societies. • In order to be eligible for 15% CTR, the new manufacturing co-operative societies are required to satisfy various conditions. • One of the conditions is that the cooperative society should be set up and registered on or after 1 April 2023 and commences manufacturing on or before 31 March 2024.

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		▪ Other conditions which cooperative society needs to satisfy are that it should be resident in India, engaged in the business of manufacturing or production of article or thing, investment in unused plant and machinery, compliance with 80:20 ratio if plant and machinery is previously used for any purpose, satisfaction of formative splitting up/reconstruction conditions of a business already in existence, dealings between related parties should be at arm's length etc. **Issue:** ▪ The CTR benefit of 15% has been extended to provide boost to manufacturing operations in India and benefit is extended to manufacturing co-operative societies in order to provide level playing field with that of manufacturing companies. However, the time limit for formation of new co-operative society and commencing manufacturing operations is too short, i.e., the period should be between 1 April 2023 to 31 March 2024 (merely one year) as compared to time limit provided to domestic companies for formation of new company of around 4.5 years (i.e., on or after 1 October 2019 to on or before 31 March 2024). ▪ The short period of one year for co-operative societies is likely to render the amendment redundant in many cases because the gestation period to commence manufacturing activities is generally on a higher scale and it may be practically impossible when a mere period of one year is prescribed. **Recommendations** ▪ In order to boost growth of manufacturing co-operative societies , it is recommended that time limit of commencing manufacturing operations for co-operative society should be extended at least up to 31 March 2026 to allow sufficient time to raise funds and set-up of new manufacturing unit.

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23.	**Fillip to Education Sector - Tax incentivizing investment in education sector including Indian investments by foreign universities/ educational institutions**	**Issue** ▪ At present, there is a lack of incentives to encourage private investment in education. Following measures will facilitate in the much-needed quality expansion of education, skilling and research ecosystem in the country. **Recommendations** ▪ Govt. to incentivize higher education sector which requires investment in world-class & state-of-the-art infrastructure through – (i) Benefit of S.115BAB (Lower 15 percent tax rate) could be extended to foreign universities setting-up campuses/ educational institutions in India with fresh investments (ii) Income of foreign universities from tie-up with Indian educational institutions which involve transfer of know-how, curriculum, technology could be taxed at a lower tax rate (say 5 percent) ▪ A simplified tax regime could be introduced for educational institutions in India to encourage and move from Trust structure to Corporatization, conserve foreign exchange outgo and prevent migration of educated & trained resources from India
24.	**DTA/ SEZ Units completing 15 years of scheme should be allowed to opt for lower Tax Regime under section 115BAA even where other**	**Rationale:** ▪ A new section, i.e. S.115BAA was introduced vide The Taxation Laws (Amendment) Ordinance, 2019 ('the Ordinance') & subsequently regularised through The Taxation Laws (Amendment) Act 2019 wherein the total income of certain domestic companies for previous year relevant to assessment year beginning on or after April 1, 2020 would at the option of the company be taxed at the rate of 22% (plus surcharge and cess).

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	SEZ Units are still claiming S. 10AA deduction	▯ The option to avail the reduced rate of tax is subject to fulfilment of certain conditions prescribed therein. (which mainly requires giving up certain specified tax incentives such as deduction under section 10AA). Further, once the option is exercised for any previous year, the same shall not be withdrawn. ▯ The benefit of reduced rate of tax is available for a domestic company as a whole. ▯ The sunset date for of set-up of SEZ unit to claim s.10AA benefit was 30 September 2020. Hence, the tenth year for any taxpayer to claim s.10AA benefit will be or 2030-31. It can extend to another 5 years by earmarking profits to Special Reserve. ▯ Many corporate taxpayers have several SEZ units set up over different points of time. If the tax holiday period expires for any SEZ unit, or even in respect of a DTA unit, the company would like to opt for s.115BAA lower tax rate benefit for such unit. But s.115BAA precludes such claim since it applies to company as a whole. As a result, the company has to wait till the last of its SEZ units finishes its tax holiday period or opt in when it finds that the trade off between s.10AA deduction with MAT liability for qualifying units and lower tax rate u/s. 115BAA for entire company goes in favour of the latter. ▯ However, if the company is provided option to avail lower tax rate u/s. 115BAA for DTA units or those SEZ units which have crossed tax holiday period of 10 years, it will facilitate moving into the new regime faster. ▯ Providing benefit of lower tax rate qua particular SEZ unit is not inconsistent with object of s.115BAA. There are several tax benefits and lower tax rates in the Act which are aligned to qualifying units or specific streams of incomes. For instance, even if a company has opted for s.115BAA effective tax rate of 25.17%, it can still avail further lower tax rate of 10% on royalty on patents developed and registered in India u/s.

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		115BBF. **Recommendation:** • To facilitate ease of doing business, it is recommended that the SEZ units should be allowed to opt for reduced rate of tax under section 115BAA after completing 10 years under the scheme.
25.	**New Tax regime for service sector**	**Rationale:** • S. 115BAB was introduced vide the Ordinance to tax newly established manufacturing companies i.e. companies set-up and registered on or after October 1, 2019 and who have commenced manufacturing before March 31, 2023 at the rate of 15% (plus surcharge and cess) subject to the fulfilment of certain conditions • However, there is no such provision available for the services sector. • Further, the existing tax holiday under Section 10AA has also expired on 30 September, 2020, making the Indian services sector, highly uncompetitive in the international environment. • Service sector has a prominent role in the Indian economy. It has a strong multiplier effect on outcome and employment. For instance, as per International Civil Aviation Organisation (ICAO) study, the output multiplier and employment multiplier are 3.25 and 6.10 respectively in Civil Aviation sector (Para 1.2 of National Civil Aviation Policy of 2016). There is similar multiplier effect for all other service sectors which can be analysed by the Government for a fiscal stimulus. • With the momentum gained from the recently ended Indian Presidency of the G20 and with increasing regional co-operation seen inter-alia through CEPA, QUAD, I2U2, there is a clear

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		scope to broaden scope of services performed from India which are entitled for concessional tax regime. Also there is aggressive competition from countries like Philippines which are positioning themselves as a regional hub for services within Asia Pacific. **Recommendation:** It is recommended that the benefit of the reduced rate of tax @ 15% (plus surcharge and cess) should be extended to the service sector as well. Alternatively, it is recommended to permit prioritized export sectors (as stipulated by institutions like DGFT) with minimum employment and investment criteria to seek the tax rate of 15 percent.
26.	**Rationalisation of corporate tax rate for foreign companies**	**Rationale:** The Taxation Laws Amendment Act, 2019 cut down the domestic corporate tax rate to 22% where benefit of certain exemptions is not availed. Additionally, the Finance Act 2020 has abolished the Dividend Distribution Tax (DDT) payable by a domestic company on dividends declared, distributed, or paid on or after 1 April 2020. However, tax rate for a foreign company still continues at 40% as compared to 22% for domestic companies. Globally, the general practice is to have parity for corporate tax rate across all companies. Examples of such countries include all BRICS countries excluding India, majority of OECD countries (e.g., UK and Japan) and countries like Singapore Foreign banks make a significant contribution to the economy in the form of large capital commitments & related Foreign Direct Investment (FDI) from annual profits, employment

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		creation, facilitation of Foreign Portfolio Investors (FPIs) / FDIs & cross-border trade, attracting Multinational Corporations (MNCs), bringing best-in-class practices to India (e.g. customer service, risk management, technological advancement), supporting the government borrowing program and contributing to the CSR agenda. • Removal of DDT further widened the tax disparity as post the downward revision of the tax rate in September 2019, the tax rate differential between domestic companies/ banks vis-à-vis branches of foreign companies/ banks has gone up to almost 18% i.e., 22 % for the domestic banks vis-à-vis 40% for the foreign banks. This creates a very significant distortion against the foreign banks which play an equally important role for the Indian economy. • The foreign companies operate in India as a Permanent Establishment due to regulatory and commercial reasons. The reduction in corporate rate cut for such foreign companies will provide the level playing field as compared to domestic companies. • Effective 1st April 2020, any dividend declared/ distributed/ paid by Indian companies is taxable in the hands of the shareholders. Most tax treaties provide beneficial dividend taxation rates for foreign shareholders varying from 5% to 15%, depending on the country of residence of the foreign shareholder. To match the taxation on dividend, a tax on profits remitted from India by the Branches of Foreign banks, may be introduced. This tax could be levied at the time of actual remittance of post-tax profits from India. Rate for Branch profit remittance tax may be 10%, representing average rate of tax on dividends for foreign shareholders). **Recommendation:** • In order to provide necessary impetus to foreign companies to do business in India, it is recommended that the corporate tax rate for foreign companies to be at par with domestic companies.

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27.	**Withdrawal of section 145A(a) as it doesn't have relevance in light of introduction of GST**	**Rationale:** • As per Indian Accounting Standards, income and expenses get accounted net of excise duty, VAT, etc. in the Statement of Profit and Loss Account in cases where indirect tax credits are available. • Section 145A(a) mandatorily requires restatement of sales, purchases and inventory inclusive of such taxes • With introduction of GST Law, GST paid on purchase of goods or services becomes available for input tax credit • Further, there remains no distinction between input tax credit available in relation to purchase of goods and that with respect to services • In such scenario, arriving at value of inventory inclusive of taxes becomes difficult as this will require identification of input credit attributable to goods and services purchased • This becomes an onerous compliance / disclosure requirement even for tax audit purpose • Hon'ble Supreme Court in Indo-Nippon Chemical Co. Ltd. (261 ITR 275) has held that either of the method (inclusive or exclusive of taxes) does not result in any change in the taxable income of an entity • However, as the provision stills exists in the Act and pursuant to specific disclosure requirement in the tax audit report, gives rise to unnecessary litigation and are onerous from compliance perspective **Recommendation:**

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		▯ The provision of section 145A(a) requiring restatement of purchases, sales and inventory (on inclusive basis) be withdrawn with retrospective effect ▯ Similarly, the Income Computation and Disclosure Standard for inventories and Tax Audit Report (Form 3CD) be suitably modified to that effect
28.	**Taxability of loan processing fees earned: Point of taxation**	**Rationale:** ▯ Loan processing fee is a one-time fee that is levied on the borrower at the time of processing of a loan. ▯ Under the erstwhile Indian GAAP, while there was no guidance in terms of when such processing fee should be offered to tax, there were varied practices of recognizing this income where some recognized this in the profit and loss account in the year of receipt whereas some recognized this over the period of loan. ▯ Now, under Ind AS, the processing fee is required to be adjusted in the loan amount and amortized over the period of loan on the basis of effective interest rate model. **Recommendation:** ▯ Considering the introduction of Ind AS provision, it is recommended that the processing fee earned by NBFCs could be offered to tax in line with the accounting practice adopted to avoid differentiated approach for books and tax purposes, this being a matter of mere timing difference.
29.	**Amendment to Section 43D – Taxation of Interest income on realization basis in case of**	**Rationale:** ▯ Section 43D of the Act specifically provides for taxation of interest income from Non-performing loans, having regard to prudential guidelines of RBI / NHB, to be taxed on

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	Non-performing loans	realization basis or credit to Statement of Profit and loss, whichever is earlier. This provision is applicable to all banks, financial institutions, NBFCs and HFCs. - However, it may be noted that all the HFCs and NBFCs have adopted the Ind AS accounting regime wherein interest income has to be recognized on such loans, generally classified as Stage 3 Loans, in the Statement of Profit and loss at credit impaired rate, whether or not the company has received such income. This creates an anomaly as the company is forced to pay taxes on incomes which is not received. Further, it defeats the very intent of the introduction of the section in the Act. Hence, a suitable amendment to this effect will be much appreciated. - Thus, this will create undue hardships to the HFCs / NBFCs to pay tax on such interest income wherein the actual receipt of the same is not realized. **Recommendation:** - It is suggested that the section 43D read with Rule 6EA be suitably amended to tax interest income from Non-performing loans, classified as Stage 3 loans, of HFCs / NBFCs under Ind AS accounting framework to be taxed solely on receipt basis.
30.	**Time limit for eligibility of deduction claim under section 24 for any interest payment**	**Rationale:** - Section 24 of the Act allows deduction of Rs. 200,000 in respect of any interest paid on account of loan taken for purchase or construction of properties. However, such deduction is not permissible in case the construction of the property is not completed within 5 years. - The COVID-19 pandemic along with lock down had significantly impaired the pace of construction activities and resulted in many projects missing the deadline which ended up losing the tax benefits. This resulted in undue hardships to the taxpayers that were already suffering on account of the pandemic.

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		▯ Even post pandemic, many borrowers stand to lose the benefit if the developer does not complete the project on time. **Recommendation:** ▯ Accordingly, keeping in view the genuine difficulty on developer's default, suitable amendment may be introduced in the Act, may be an extension of 2-year period, for taxpayers so that they do not lose out on the eligible deduction.
31.	**Reduce holding period for REIT/Invit units to one year to turn long term to align with holding period for equity instruments**	**Issue** ▯ Business trusts like REITs and InvITs have gained increasing popularity as a means of investment in assets in the infrastructure sector. Recognizing the same, the Government has also provided pass-through status for investments made through business trusts. ▯ However, investment in units of REITs and InvITs will turn long term only on holding the investment for a minimum of 36 months as against a period of 12 months prescribed for investment in listed securities. Such long period disincentivizes investors from seriously considering investment through business trusts given the higher tax rate attracted when the gains are short term in nature. ▯ REITS and InvITS are envisaged to play major role in success of Government's National Monetisation Pipeline of Rs. 6 lakh crores. To increase the attractiveness of such investment for both foreign and domestic investors, it should have same treatment as listed equity instruments. **Recommendation** ▯ Accordingly, it is recommended to bring down the period of holding for units in REITs and InvITs to be classified as long term to 12 months at par with listed securities.

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32.	**Long Term Capital Gains on debt-oriented growth mutual funds**	**Rationale:** • Period of holding of debt-oriented mutual funds was increased from 12 months to 36 months in 2015 for qualifying as Long-Term Capital Asset • Reducing the period of holding will give flexibility to corporate to plan and manage their working capital requirements and investments in tax efficient manner. It also brings parity on holding period between different financial instruments. **Recommendation:** • Period of holding of debt oriented mutual funds may be reduced to 12 months to turn long term
33.	**Clarify eligibility of set-off of brought forward losses against presumptive income [S. 44BB]**	**Existing provision** • Section 44BB was introduced vide Finance Act 1987, as a measure of simplification providing for determination of income of a taxpayer engaged in the business of providing services or facilities in connection with, or supplying plant and machinery on hire used, or to be used, in the prospecting for, or extraction or production of, mineral oils [commonly referred to as “eligible assessee”] at 10% of aggregate receipts as provided in sub-section (2). • Consequently, Finance Act 2003 amended section 44BB by way of inserting sub-section (3) to provide that an assessee may claim lower profits and gains than the profits and gains specified under sub-section (1) of section 44BB if he keeps and maintains such books of accounts and gets his accounts audited. • By virtue of the said amendment, an eligible assessee is allowed to maintain books of accounts in order to claim profits lower than 10% of aggregate receipts.

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		▯ Finance Act 2023 amended section 44BB by inserting sub-section (4) which states that no set off of unabsorbed depreciation and brought forward loss shall be allowed to the assessee where income is offered to tax under sub-section (1) i.e., at 10% of aggregate receipts. ▯ Sub-section (4) in S. 44BB states as follows: *(4) Notwithstanding anything contained in sub-section (2) of section 32 and sub-section (1) of section 72, where an assessee declares profits and gains of business for any previous year in accordance with the provisions of sub-section (1), no set off of unabsorbed depreciation and brought forward loss shall be allowed to the assessee for such previous year.* ▯ The aforesaid amendment implies that unabsorbed depreciation and brought forward loss can be set off only when assessee offers income under net basis i.e., prepares books of accounts and gets them audited. Also, there is an ambiguity that limitation of S. 44BB(4) may trigger even if taxpayer is willing to maintain books and offer higher income as technically net basis taxation is available only when income is less than 10% of the gross receipts as preparation of books is permitted only if expected income is less than 10% of gross receipts under section 44BB(3) of the Act. **Issue** ▯ It is pertinent to note that the Oil & Gas industry witnessed a downfall from 2014 onwards which led to massive losses which also led to several industry players becoming bankrupt and shutting down business operations. The industry again faced a hit during the COVID-19 pandemic which added to the bucket of losses. It is now that the Oil & Gas market is recovering, and the industry is making profits and such losses could be set off. It may be appreciated that

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		the losses incurred and claimed by the assessees' in their tax returns are actual losses on account of several reasons such as: (i) Cost overruns, (ii) Under budgeting of costs, (iii) Bidding for contracts at lower rates to secure business, etc. • S.44BB(4) restricts set off of losses already incurred and claimed in the return of income. Such restriction to that extent becomes retrospective in nature. • The intent of the amendment as stated in the memorandum to Finance Bill 2023 is to restrict claiming of losses as per sub-section (3) against profits under sub-section (1). An extract of the memorandum is as follows: *"taxpayers opt in and opt out of presumptive scheme in order to avail benefit of both presumptive scheme income and non-presumptive income. In a year when they have loss, they claim actual loss as per the books of account and carry it forward. In a year when they have higher profits, they use presumptive scheme to restrict the profit to 10% and set off the brought forward losses from earlier years. Conceptually, if assessee is maintaining books of account and claiming losses as per such accounts, he should also disclose profits as per accounts. There is no justification for setting off of losses computed as per books of account with income computed on presumptive basis."* • As regards unabsorbed depreciation, the same is anyway deemed to be allowed under section 32(2) where the eligible assessee files income-tax return on gross basis, i.e., under section 44BB(1) of the Act, as the provision has a "non-obstante" clause w.r.t. section 28 to section 41 and section 43 and 43A. Thus, an assessee can never obtain the benefit of unabsorbed depreciation unless it opts to offer income on net basis in the subsequent year (which is

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		allowed only where profits are lower than 10% of aggregate receipts). Hence, even under the current regime, benefit of unabsorbed depreciation is not available to the assessee who opts for section 44BB(1). To this extent, the said amendment is academic. • However, the amendment could result in a scenario when losses incurred by the assessee cannot be set off at all. For example, if an assessee incurred losses in earlier years and the income under net basis in subsequent years is marginally higher than 10%, say 11% or 12%, still the assessee may not be able to prepare books of accounts [as per one plausible reading of section 44BB(3)] and none of the losses would be utilized. This will lead to a discrimination between assessee referred to in section 44BB vis-a-vis all other assesses. Further, such brought forward losses may get lapsed due to limitation on expiry of 8 years under section 72 of the Act. Thus, this could result into significant financial impact. • It is respectfully submitted that the law granted a right to the assessee to claim losses and allowed set off of such losses against future profits irrespective of the method chosen to offer income to tax. Such right granted by the law is a vested right. Keeping in mind the general principle that vested rights cannot be divested, it is a statutory right of the assessee given by the law to set off the losses against the profits irrespective of the method under which income is offered to tax. • Given the above and the significant nature of such amendment, the amendment ought to be prospective in nature and applicable to the losses incurred from 01 April 2023 onwards. Restriction on set off past losses is against the principle of vested rights and would put participants in the Oil & Gas sector at a significant disadvantage via-a-vis other assessees. • Current language of the amendment suggests that an eligible assessee cannot claim any past incurred losses as well from income offered under section 44BB(1). Hence, there is an anomaly

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		that the said amendment restricts the right vested for assessee's which already have brought forward losses of the past and to such extent, such amendment is retrospective in nature. In this regard, reliance is placed on the decision of Supreme Court in the case of Chairman, Railway Board v/s C.R. Rangadhamaiah [RR1] [AIR 1997 SC 3828 (3837)] wherein it is stated that a retrospective amendment cannot be imposed in order to strike down a "vested right" held by the appellant and thereby taking away the benefits available under the said rules. The relevant extract of the decision is as follows: *"Para 17 - In many of these decisions the expressions "vested rights" or "accrued rights" have been used while striking down the impugned provisions which had been given retrospective operation so as to have an adverse effect in the matter of promotion, seniority, substantive appointment, etc., of the employees. The said expressions have been used in the context of a right flowing under the relevant rule which was sought to be altered with effect from an anterior date and thereby taking away the benefits available under the rule in force at that time. It has been held that such an amendment having retrospective operation which has the effect of taking away a benefit already available to the employee under the existing rule is arbitrary, discriminatory and violative of the rights guaranteed under Articles 14 and 16 of the Constitution. We are unable to hold that these decisions are not in consonance with the decisions in Roshan Lal Tandon (supra), B.S. Yadav (supra) and Raman Lal Keshav Lal Soni and others"* Further, the Indian Government has also time and again stated that it is not in the favour of introducing any retrospective amendments. Hence, the aforesaid amendment may also be considered to be made prospective, i.e., for losses incurred on or after 01 April 2023. **Recommendation**

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		▪ Section 44BB(4) should be modified to make it applicable for unabsorbed depreciation and brought forward loss incurred 01 April 2023 onwards. Unabsorbed depreciation and brought forward loss incurred prior to 01 April 2023 should be allowed to set off against profits under sub-section (1). Also, it may be specifically clarified that S. 44BB(4), does not apply when taxpayer earns income higher than 10% of gross receipts and decides not to have benefit of presumptive taxation.
34.	**Carry forward and set-off of losses by start-ups incorporated as LLPs – Section 78**	**Rationale:** ▪ The provisions of section 79 have been amended to provide relaxation to eligible start-ups for carry forward of losses. As per the amendment, a company being an eligible start-up (other than in which the public are substantially interested) can carry forward the losses if any of the below condition is satisfied: o If at least 51% shareholding (voting power) on the last day of the year in which the loss is incurred continues to remain with the same shareholders, on the last day of the year in which the loss is carried forward or set off; or o All shareholders (holding shares with voting power) on the last day of the year in which the loss was incurred, continue to hold shares on the last day of the previous year in which the loss is carried forward or set off. ▪ The carry forward of losses for LLPs is governed by the provisions of section 78. As per the said provisions, a change in constitution of the LLP would result in the lapse of losses proportionate to the share of the retired or deceased partner. **Issue:**

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		▯ Relaxation u/s 79 available to start-up companies has not been extended to eligible start-ups which are incorporated as LLPs. **Recommendation:** ▯ It is recommended to amend section 78 so as to extend the relaxation / benefit for carry forward and set off of losses (in line with section 79) to eligible start-ups incorporated as LLPs, to make it at par with an eligible start up incorporated as a company.
35.	**Section 79 - Expiry of Tax Loss: Business Loss to be expired within 8 years**	**Rationale:** ▯ Health insurance companies generally have longer gestation period to break even due to reserving requirement & investment in distribution and operations. This leads to expiration of tax losses due to the current tax laws of allowing the carry forward of losses only until 8 years from the respective years of incurred loss. **Recommendation:** ▯ Extension in time period for expiry of Tax losses from 8 years to 12 years for Health Insurance Companies
36.	**Impact on life insurance company on account of shift from DDT to classical system**	**Rationale:** ▯ Life insurance industry provides safety and security, generates financial resources, encourages savings and safeguards against loss of source of livelihood and generates employment, hence it

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		an important sector which contributes to Indian economy is big way. Having said this, the penetration and reach of life insurance in India is still at an abysmally low level @ 3.2%[2]. • Lack of awareness of need for life insurance, unstructured savings, traditional mind-set of savings being in bank deposits or gold, lack of tax attractiveness, etc. are some of the few factors that contribute to low level of insurance penetration. • The shift from DDT to classical system of dividend taxation by Finance Act 2020 has a negative impact on the insurance sector • Under DDT regime, the taxation of dividend was a win-win for both policyholder and the life insurance company. The switch to classical system has led to taxability of dividend in the hands of insurance company (being the recipient of the dividend) and subsequently no exemption is available u/s. 10(34) of the Act. • Unit Linked policy insurance plan (ULIP plan), which comes with inbuilt 10 times life coverage and thereby strengthen the social and financial security of the policyholder. ULIP are the products offered by life insurance companies which not only helps policyholder save money, but also create wealth while securing life risk with 10 times life cover. • The life insurance companies invest majority of the premium received under ULIP policies in the capital market in the nature of long-term investment. Return earned along with dividend by the insurance company from the capital market is subsequently transferred to the policyholders. At the time of maturity of the policy, policyholder receives extra money over and above the sum assured. This extra money received helps policyholder in its wealth creation. The tax regime for ULIPs with annual premium > Rs. 2.50 lakhs issued on or after 1 Feb 2021 has changed and the gains on maturity of non-exempt ULIPs is now taxable as capital gains.

[2] Source: https://www.ibef.org/industry/insurance-sector-india

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		? Since the insurance company is the recipient of the dividend, after the amendment such dividend income is now taxed in the hands of insurance company. It is pertinent to note that under ULIP plans, in principal insurance companies act as an intermediary between policyholder and investee company. Therefore, taxing of dividend income in the hands of insurance company merely because it is recipient of the dividend creates undue hardship and financially challenging. The difficulty is aggravated with non-exempt ULIPs now being under capital gains taxation regime. Thus the dividend income suffers dual taxation in the hands of life insurance company as also policy holder. ? Looking at the conditions of the insurance industry, any undue pressure will push back the industry for decades and revival from that would be far more challenging. Further this amendment will invite financial and profitability pressure on the insurance companies, which be eventually shifted on the policyholders through change in the product pricing. The switch to classical system of dividend taxation requires suitable calibration in hands of life insurance companies to protect the yields to policy holders. **Recommendation:** ? The exemption u/s. 10(34) of the Act, should be continued to be available to the life insurance companies; or ? The monetary benefits passed on to the policyholders to be considered as dividend distributed and accordingly, deduction u/s. 80M of the Act be allowed to the life insurance companies; or ? A new deduction be introduced under the Act in order to provide deduction to the life insurance companies for the dividend received by them.

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37.	**Unreasonable restriction on deduction against dividend income and ambiguity with regard to use of phrase "total income" under proviso to Section 57 which allows interest deduction only if dividend income is included in "total income"**	**Rationale** • The proviso to s.57 restricts deduction of expense against dividend income to interest expenditure up to 20% of gross dividend income and provides that deduction shall not exceed twenty percent of the dividend income, or income in respect of units, included in the "total income" for that year, without deduction under this section. This creates ambiguity on the interplay/priority between deduction u/s. 57 and deduction under s.80M for inter corporate dividends. • It is well settled by Supreme Court ruling in the case of Distributors (Baroda) Pvt. Ltd v. UOI (155 ITR 120) (SC) that deduction u/s. 80M is required to be computed w.r.t net dividend income after deduction of expenses. However, the use of the phrase "total income" in proviso to s.57 creates ambiguity whether the deduction of interest expenditure is to be made after allowing deduction u/s. 80M for inter corporate dividends. Any such suggestion will be contrary to the law settled by SC in Baroda Distributors' case (supra). It will further restrict the scope of deductible expense against dividend income. • In any case, introduction of artificial restriction of 20% of dividend income for interest expenditure and disallowance for any other expense is not consistent with classical system of dividend taxation. The tax policy intent behind introducing such artificial restriction is not clear. The switch from DDT regime to classical system was motivated by one of the reasons being that DDT regime resulted in artificial disallowance of genuine expenditure by taxing dividend on gross basis in hands of dividend paying company and disallowing corresponding expenditure in hands of dividend receiving entity. The artificial restriction of 20% will create great hardship for companies which make investment in shares with borrowed funds for various commercial reasons. It is very common in insolvency resolution plans to set up an SPV to pool funds from acquirer and lenders to acquire a company undergoing insolvency resolution under IBC. The tax cost of such arrangements will become very onerous and adversely impact resolution of

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		stressed companies. It may be noted that there is no carry forward benefit for loss under Income from other sources and hence the introduction of artificial cap lacks sufficient rationale. • Further, it may be noted that the equity investments are not always made to merely earn dividend income, especially when such investments are made for strategic shareholding. In case of strategic investments, the objective is to control the business and have commercial transactions between two or more entities. Incidentally the income from such investments would also be in the form of dividend income. Since the main purpose of making such investments is to run business and make commercial profits, any expenditure in relation to such investments be allowable as deduction and the restriction under section 57 should not be made applicable in such cases. • In case of strategic investments, where the objective of acquiring the controlling stake requires certain expenditure to be incurred, it should be allowed as a deductible expense as the objective is not restricted to earn dividend income and therefore such dividend is essentially in the nature of business income. **Recommendation** • The artificial restriction of 20% of dividend income for interest expenditure and disallowance of other expenses should be removed. • Alternatively, the deduction be granted upto 80% of dividend income. The deduction could be of any nature of expenditure including interest on borrowings. Further, for dividend on strategic investment, such restriction should not be made applicable. • Alternatively, the reference in proviso to s.57 to “total income” may be modified to “gross total income” to make it clear that deduction of interest expense is required to be allowed against gross dividend income and not net dividend income after s.80-M deduction.

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38.	**Additional deduction u/s. 80M for foreign dividends to compensate for incurrence of foreign taxes**	**Rationale:** • Finance Act 2020 abolished the dividend distribution tax on domestic companies and withdrawn sec. 115-O (7) of Income Tax Act. Consequently, dividend income received by a shareholder is taxable in the hands of shareholders. • Finance Act 2020 also re-enacted s. 80M to remove the cascading effect of taxes on inter corporate dividend. Section 80M permits the deduction of dividend received from the domestic companies as well as foreign companies and used for further distribution of dividend to the shareholders. • Several countries have provisions for withholding taxes @ 5%/10% on the dividend distribution. Even India also mandates TDS @ 20% on the dividend payout to the foreign shareholders. Hence when the domestic companies receive dividend from the foreign subsidiaries it suffers withholding tax in the distributing company's country. • This impedes the company's ability to claim full s.80M deduction. For instance, if the gross foreign dividend is Rs. 100 and tax paid in foreign country as per treaty is Rs. 15, the company receives net dividend of Rs. 85. The company can only distribute net dividend of Rs. 85 to its shareholders. This leads to cascading impact of taxation of foreign dividend of Rs. 15 in hands of Indian company. • In contrast, if dividend of Rs. 100 is received from domestic company, even if there is TDS of 10% and net dividend received is Rs. 90, the company can distribute dividend of Rs. 100 to its shareholders, claim s.80M deduction for Rs. 100 and claim refund of TDS of Rs. 10. This is not possible for foreign dividends. This is for the reason that foreign tax credit for the foreign dividend will not be available due to absence of 'doubly taxed' income once s.80M deduction is allowed.

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		▯ In case a view is taken that credit of WHT on dividend distribution by the foreign companies is not allowable, the cascading impact will continue and will defeat the purposes of providing deduction u/s 80M. **Recommendation:** ▯ It is recommended that the provisions of s.80M be suitably amended or CBDT may issue suitable circular to clarify that deduction u/s. 80M will be granted w.r.t foreign dividends on gross amount even if dividend actually distributed to shareholders is net of foreign taxes.
39.	**Benefit restricted to 'true and first inventor of the invention': A non-starter under Patent Act which does not acknowledge company or firm as a 'true and first inventor'(S.115BBF)**	**Rationale**: ▯ The benefit of s. 115BBF is restricted to 'true and first inventor of the invention'. Even a person who is jointly registered with 'true and first inventor' should be 'true and first inventor'. ▯ In view of following features under the Patent law, the benefit of the provision may be denied to firms/LLPs/companies who register the patents jointly with 'true and first inventor' who may be an employee even though they may have incurred significant expenditure for development of the patent and they are first economic owners of such patent. ▯ Under the Patents Act, following persons can apply for patent (a) a person claiming to be true and first inventor of the invention (b) an assignee of the true and first inventor in respect of right to make an application and (c) legal representative of a deceased person who immediately before his death was entitled to apply. ▯ It is also settled under the Patent Act that a company or firm cannot claim to be 'true and first inventor'. They can only apply as assignee of true and first inventor.

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		▪ Similarly, whether an invention made by employee should belong to employer depends upon contractual relations, express or implied. It is possible that, absent any contractual obligation, an employee may apply for an invention in his own name even though he developed the invention in the course of employment and by using employer's resources. **Recommendation**: ▪ It is, hence, recommended that the condition of joint patentee also being 'true and first inventor' be omitted. If the intent is to allow benefit only to first person to register patent, the phrase 'being the true and first inventor of the invention' used in context of joint person may be substituted with the phrase 'being the assignee of the true and first inventor in respect of the right to make an application for a patent'.
40.	**Patent registered in India as also in a foreign country may be regarded as qualifying under Patent Box regime (S.115BBF)**	**Rationale**: ▪ The requirement of patent being registered in India under the Patents act raises an ambiguity whether royalty received from overseas in respect of patent which is registered both in India and outside India will be denied the benefit on the ground that the royalty is relatable to foreign patent and not Indian patent. ▪ It may be noted that Patent law is territorial in nature and monopoly cannot be exercised in any country unless the patent is registered in that country as per local patent law. ▪ The condition of patent being developed in India ensures that the benefit of PBR is restricted to inventions which are developed in India. Benefit should not be denied for royalty received from overseas countries for the same invention by registering it outside India. **Recommendation**:

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		▯ It should be clarified that royalty received from overseas for a patent which is registered in India as also in a foreign country also qualifies for concessional rate of tax. The benefit should not be denied on the ground that such royalty is attributable to foreign patent.
41.	**Section 115BBF – Rationalizing patent tax regime**	**Rationale and Issue** ▯ India introduced its patent box regime vide Finance Act 2016 with effect from 1 April 2017. Under the regime, royalty income in respect of a patent developed and registered in India shall be taxable at a flat rate of 10%. ▯ The existing patent box regime suffers from the following issues: (i) The patents to be 'registered' in India - It is unclear as to whether a patent which has been applied for, but for which registration has not been granted will qualify under this regime. (ii) Coverage of regime has been restricted to Patents - Patent Box regime is not available to other IPRs, like industrial design, copyrights, trademarks, etc. (iii) No guidelines on outsourcing of IP development - There are no guidelines on outsourcing of R&D functions. Thus, limited outsourcing may also raise an issue on availability of benefit under patent box regime. **Recommendations** ▯ Following suggestions are intended to rationalise existing Patent tax regime: (i) It may be clarified that benefit of regime may be obtained where a patent is applied for, but registration has not yet been granted under the Patent law.

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		(ii) It is suggested that the Patent Box regime should be extended to other forms of IPRs, like industrial design, copyrights, trademarks, etc. so as to promote IPR registration in India. (iii) It may be clarified that benefit of the regime shall be available, subject to a reasonable threshold, in cases where IP development is outsourced.
42.	**Taxation of Category III AIFs - Complete tax pass through status to Category III AIFs**	**Rationale and issue:** The current tax framework for AIFs does not extend 'tax pass through status' for Category III AIFs and there is no separate taxation code for Category III AIFs (i.e. general principles of trust taxation are followed). Thus, the current tax regime and the uncertainty around it serves as a disincentive or a deterrent for new investors to consider investing in a Category III AIF. Accordingly, a pass through taxation structure will help reduce a tremendous pain point for the PE/ VC industry. It will also develop the Indian Category III Industry and attract more foreign investors to this asset class. **Recommendations:** Complete tax pass through status should be accorded to Category III AIFs for administrative ease and simplification. This will be in line with taxation practice in IFSC and also the practice for category I and category II AIFs
43.	**Relaxation u/s. 68 to Cat I and Cat II AIF**	**Background:** Currently, provisions of section 68, which provide for levy of tax on unexplained cash credits are applicable to Category I and Category II SEBI registered AIFs. **Rationale and Issue:** Section 68 was amended by Finance Act 2012 to require unlisted companies to explain 'source of source' in respect of share application / capital / premium, etc and also introduced section

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		56(2)(viib) to tax excessive premium received by unlisted companies from residents. But in both provisions, exception was carved out for share capital raised from Venture Capital Fund / Venture Capital Company. Finance (No.2) Act 2019 has amended section 56(2)(viib) to extend the carve out to all the Category I and Category II SEBI registered AIFs. However, similar consequential amendment is not made in section 68. **Recommendation:** Since Category I and II AIFs are regulated entities like VCC/VCF, they should be exempted from section 68 as well.
44.	Taxability of income earned by AIF from securitisation trust	**Background:** As per the provisions of section 115TCA of ITA, any income earned by securitisation trust is exempt in its hands and is taxed directly in the hands of investors depending upon the characterisation of the said income in the hands of securitisation trust. Given the nature of activity carried out by securitisation trusts, the income earned by such Trusts is typically characterised as business income and taxed accordingly in the hands of investors. **Rationale and Issue:** In a scenario where AIF invests in a securitisation trust and earns income, the same is taxed as business income at maximum marginal rate (42.74%) at AIF level. This is causing disparity and unintended hardship to non-resident investors in the AIF. Had the non-resident investor invested in the securitisation trust directly (instead of investing through an AIF), income distributed by securitisation trust would not have been subject to taxes.

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		Typically, where non-resident investors do not have any permanent establishment in India, business income earned by them is not subject to tax in India. On account of this, AIFs which have become such a significant growth engine for the economy, cannot channelise their foreign capital towards resolution of non-performing loans by securitisation trusts. **Recommendation:** It is recommended that pass through treatment should be accorded to business income earned by AIFs from securitisation trust.
45.	Uniform rate of surcharge on income earned by a Specified Fund in IFSC vis-à-vis a foreign company	**Background:** As per the extant provisions of ITA, with regard to the capital gains income earned by a Specified Fund in IFSC (set-up as a Category III-AIF being a Trust), the base rate of tax on capital gains shall be increased by a surcharge rate, maximum being 15% where the total income of such Specified Fund in IFSC exceeds INR 10 million. **Rationale and Issue:** Income earned by non-resident corporate FPI directly investing in India, base rate of tax is increased by a surcharge rate of 2%/ 5% where the total income of such non-resident investors exceeds INR 10 Mn/ INR 100 Mn respectively. Also, a Specified Fund (which is constituted as a non-corporate) is required to pay a higher surcharge of 15% whereas an FPI (which is constituted as a company) would be required to pay maximum surcharge of 5%. Hence, in order to bring the taxation of a Specified Fund at par with Offshore fund (say in Singapore or Mauritius) directly investing in India from treaty favourable

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		jurisdiction, it is imperative to restrict surcharge rate applicable on capital gains on transfer of shares for Specified Fund to 5%. **Recommendation:** - It is recommended that the rate of surcharge on capital gains on transfer of shares applicable for Specified Fund in IFSC be capped to 5%.
46.	**Deduction u/s 80JJAA to be liberalised**	**Rationale**: - As per the provisions of section 80JJAA, an additional deduction of 30% of the additional wages paid to new regular workmen employed by the company during the year is allowed for three consecutive years if certain conditions are fulfilled. - S.115BAB was introduced vide the Ordinance to provide an impetus to the domestic manufacturing companies by allowing a reduced rate of tax. However, as witnessed, the beneficial reduced tax rate is only provided for companies engaged in the production or manufacture of any article or thing. Similarly, s.80JJAA provides benefit in the form of deduction of 30% of additional employee cost. - Additional employee cost is defined to mean the total emoluments paid / payable to 'additional' employees employed during a particular year and whose emolument is not more than Rs 25,000 per month. - The threshold of Rs 25,000 is too low given the current scenario in India as well as globally. - Further, it is not clear whether s.80JJAA is a standard deduction for three years based on wages paid to qualifying new employees in Year 1 or is it a year-on-year deduction which can change with change in wages paid to qualifying new employees in subsequent years.

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		▪ S.80JJAA(2)(b) provides that the deduction shall not be available if the business is acquired by the assessee by way of transfer from any other person or as a result of any business reorganisation. This is intended to deny deduction in respect of employees who newly join the taxpayer-entity by virtue of such transfer/business reorganisation. However, a literal reading of this provision can lead to erroneous interpretation that the taxpayer will become permanently disqualified to claim s.80JJAA deduction even in respect of employee who newly join post the transfer/business reorganisation. This can lead to litigation. It is submitted that the object of the deduction being to encourage new employment, the employees who join post the transfer/business reorganisation should not be disqualified. ▪ In order to incentivise organisations to generate new employment opportunities, additional employee cost deduction benefit should be enhanced, if an organisation has generated any new employments during a financial year. **Recommendation**: ▪ It is recommended that the monthly employee cost limit of INR 25,000 be done away with. Alternatively, it is recommended to increase the threshold to at least Rs 100,000. ▪ Clarity may be provided on whether s.80JJAA is a standard deduction or year-on-year deduction. Further, Explanatory Circular may be issued on computing quantum of s.80JJAA deduction in different practical scenarios like newly formed business, amalgamation, demerger, slump sale, etc. ▪ S.80JJAA(2)(b) may be amended to provide that nothing contained in that clause will apply to additional employee who is not employed by virtue of such transfer or business reorganisation. ▪ Each new employment opportunity leading to an additional employee cost being incurred by the business should be entitled for additional deduction / tax benefit.

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47.	**Restriction on setoff of House property loss to Rs. 200,000 be removed**	**Rationale:** • The Finance Act 2017 inserted sub-section (3A) in section 71 of the Act which restricted the setoff and carry forward of losses from House property by capping the maximum setoff permissible to Rs. 200,000 in the year it accrues. Section 71 of the Act describes the provisions pertaining to the inter head setoff loss from House property. • The above amendment has reduced the benefit available to the taxpayer under income from house property. Earlier provisions allowed the taxpayer to claim the entire loss from House property against gains from any other head without any upper limit. Further, the balance loss, although available to be carried forward and setoff in future years, will in practice will not be available till the interest for the current year falls below Rs. 2,00,000. • There is a need to stimulate the rental market in India. According to the World Bank, we are one of the few countries in the world where participation of rental markets has declined sharply since the 1970s. This trend is contrary to other countries where economic growth has been associated with a significant increase in rental market activity. Rental markets are important as every city in India has a 20 to 30% floating population, not necessarily wanting to buy houses. Moreover, India is rapidly urbanising as currently 32% of our total population live in urban areas. By the year 2030, it is estimated that 40% of the population or 600 million people will be living in cities and towns. Higher urbanisation would require a vibrant rental market which needs to be encouraged so that cities are able to absorb and house the migrating population. • Sub-section (5) of s. 23 provides that for real estate developers, annual value of property held as stock in trade shall be NIL for first 3 years (and by implication, full annual value thereafter). The restriction on set off of house property loss to Rs. 2 lakhs in such cases will result in great hardship. For instance, if a builder completes housing project having 100 flats in Year 1 and sells 40 flats in that year, he will be unable to set off interest cost (including pre-construction period

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		interest cost) pertaining to unsold 60 flats in excess of Rs. 2 lakhs against profit of 40 flats. This is because, as per Tax Authority, interest pertaining to unsold 60 flats will be processed under House Property chapter. Further, the interest cost pertaining to 60 flats of Year 1 cannot be set off against profit on sale of such 60 flats itself in future year because such profits shall be assessable as Business income whereas House Property loss can be set off only against House Property income. This would be quite unfair for the builder since interest represents a commercial cost incurred to earn profit from sale of flats. Artificial denial of interest deduction will result in taxation of unrealistic and hypothetical income. • Even in case of individuals owning a second home which is actually let out, it is well known fact that interest cost generally does not cover full rental income since market rates of rent are not commensurate with capital cost. The loss set off limitation will virtually result in interest expenditure going down as sunk cost in view of inability to absorb it against rental income of next 7 years **Recommendation:** • It is recommended that the restrictive amendment be relooked and suitably amended so that earlier law could be restored. Alternatively, the limit for setoff of loss on account of interest should be increased to Rs. 500,000. • It is also recommended that there be no restriction in setting off the house property losses and hence, the earlier law should be restored. Further, any carried forward house property loss should be allowed to be set off against any other head of income in future years. • As another alternative, the entire scheme of house property taxation should be changed. The taxation of notional fair value should be eliminated and no deduction should be granted for vacant properties. The interest deduction for two self occupied house properties can be granted as Chapter VIA deduction from Gross Total Income. Taxpayers should be taxed on actual rent

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		income in case of let out properties against which standard deduction of 30% and full deduction for municipal/local taxes and interest expenditure should be allowed. This will simplify house property taxation, reduce litigation and eliminate the inequity caused due to restriction of house property loss set off.
48.	**Taxation of deferred consideration under capital gains**	**Rationale:** • With the growth of the Indian economy and rapid globalisation, business restructuring has gained significant prominence in India with entities perennially on the look-out for funding and/ or inorganic growth opportunities. Among others, one of the major drivers of decision making is the tax efficiency of such restructuring. • One of the common features of such new-age business reorganisations is to link the payment of consideration for transfer with the future growth prospects of the business i.e. the consideration is contingent upon certain parameters such as growth, profits, EBIDTA, etc. achieving their prescribed level. • This is especially true for the start-up sector where given the large valuations seen based on future potential, there is often a difference in value perception between the promoters and the potential investors. • However, the currently prevailing provisions of the Act do not have clarity on the taxation of such contingent consideration i.e. whether the tax implications would relate back to year of transfer or the same would be brought to tax in year of receipt. Even the judiciary seems to be divided on this issue with rulings for and against both views[3].

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

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		Recommendation • In order to provide clarity, as well as to boost the Indian Start-up sector, appropriate provisions may be introduced to clarify that such capital gains taxation will arise only in the year in which contingent consideration becomes due as per terms of agreement. • This would also be in line with the rationale adopted for taxation of enhanced compensation on compulsory acquisition which is taxed in year of receipt [in S. 45(5)] or taxation of capital gains arising from conversion of capital asset into stock in trade which is taxed in year of sale of such stock [in S. 45(2)].
49.	**Denial of depreciation on goodwill**	**Rationale** • The term 'intangible assets' is defined in s.2(11)(b) and s.32(1)(ii) to include know-how, patents, copyrights, trademarks, licences, franchises or any other business or commercial rights of similar nature • The Supreme Court, in the landmark case of CIT v. Smifs Securities Ltd (348 ITR 302) in 2012, held that 'goodwill' qualifies as 'intangible asset' under the residual category of 'any other business or commercial rights of similar nature' and hence qualifies for depreciation. The decision settled the controversy whether goodwill qualifies as 'intangible asset'. The judgement was applied in favour of taxpayer in many cases involving business acquisition on payment of cash and amalgamations. Notably, the cost substitution provisions applicable to amalgamation was specifically noticed in some of the above favourable rulings and yet depreciation was allowed on goodwill acquired on amalgamation. • The Finance Act 2021 amended the treatment of depreciation on goodwill in a very significant manner. Henceforth from A.Y. 2021-22 onwards, no depreciation will be admissible on goodwill

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		irrespective of its source of acquisition. Furthermore, wherever depreciation was allowed in the past, CBDT has notified Rule 8AC to carve out the goodwill from the block of assets. The rationale explained in Explanatory Memorandum of Finance Bill 2021 is briefly as follows :- *"… while Hon'ble Supreme Court has held that the Goodwill of a business or profession is a depreciable asset, the actual calculation of depreciation on goodwill is required to be carried out in accordance with various other provisions of the Act, including the ones listed above. Once we apply these provisions, in some situations (like that of business reorganization) there could be no depreciation on account of actual cost being zero and the written down value of that assets in the hand of predecessor/amalgamating company being zero. However, in some other cases (like that of acquisition of goodwill by purchase) there could be valid claim of depreciation on goodwill in accordance with the decision of Hon'ble Supreme Court holding goodwill of a business or profession as a depreciable asset.* *It is seen that Goodwill, in general, is not a depreciable asset and in fact depending upon how the business runs; goodwill may see appreciation or in the alternative no depreciation to its value. Therefore, there may not be a justification of depreciation on goodwill in the manner there is a need to provide for depreciation in case of other intangible assets or plant & machinery. Hence there appears to be little justification for depreciation on goodwill…"* **Issue** The amendment made by Finance Act 2021 became applicable from financial year F.Y. 2020-21 (relevant to A.Y. 2021-22) onwards and thus it applied to goodwill acquired in past transactions. This is against the stated intent of the government that no retrospective tax will be introduced to the detriment of the taxpayers.

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		▪ Goodwill is an integral business right acquired in any business organisation, which allows acquirer to leverage upon inherent business advantages and carry on business smoothly ▪ In any kind of business reorganisation, be the case of amalgamation or slump sale, the entire business including all employees and all commercial rights associated to the business are transferred to the transferee. ▪ In true sense, Goodwill is ultimately a cost incurred towards bundled assets and business rights acquired by an acquirer and hence, an intangible asset being acquired for which a price is paid at the time of its acquisition ▪ The rationale that the Goodwill value does not depreciate does not necessarily hold good in business acquisitions ▪ Till now, businesses have been taking significant decisions such as pricing of M&As, fair exchange ratio etc. based on the judicial precedence that goodwill will be allowed depreciation for tax purposes, at least for acquisition in non-tax neutral transaction. The retrospective amendment by Finance Act 2021 has unsettled all these decisions, with significant impact on business deals. ▪ If Goodwill becomes a cost for the acquirer, the same would significantly impact valuation of businesses, pursuant to which the seller will receive a lower consideration. Specifically, in cases of foreign investments, it would mean lower cash inflow to the Indian Seller. ▪ Further, there may be a renewed focus on comparative valuation of separately identifiable assets and residual goodwill and the tax authorities may challenge valuations by questioning whether goodwill value has been artificially suppressed / shifted to other intangible assets. This will result in more litigation and higher uncertainty for taxpayers.

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		Recommendation • The provisions introduced vide Finance Act 2021 should be rolled back and depreciation should be allowed on goodwill. • At a minimum, the amendment should be on prospective basis such that the denial of depreciation on goodwill is applied only to goodwill acquired on or after 1 April 2021. All goodwill acquired in the past should be 'grandfathered'. • Reconsider the denial of depreciation on goodwill acquired in non-tax neutral transactions that are subject to capital gains tax in the hands of the seller. The Explanatory Memorandum to the Finance Bill states that there is 'valid claim' of depreciation on purchased goodwill in view of Smifs case. Goodwill is tested for impairment in accounts and provision is made for impairment on happening of adverse event. • Reconsider the denial of depreciation for goodwill acquired in tax neutral merger/demerger. This is because goodwill is not recognised in books of amalgamating company and is recognised for the first time in the books of amalgamated company as per applicable accounting standards and approved by NCLT. The shareholder of amalgamating company will pay tax on sale of shares of amalgamated company. However, the amalgamated company will be deprived of cost deduction. • Goodwill may be defined clearly for proper tax treatment and to avoid litigation. It should be distinguished from specified intangible assets like know-how, patents, copyrights, trademarks, licences and franchises and also from the residual category of intangible assets, i.e., 'any other business or commercial rights of similar nature'.
50.	**Allow deduction for employee's contribution**	**Rationale:**

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	towards welfare funds paid beyond statutory due date but prior to filing of ROI in hands of employer	▯ S.36(1)(va) allows deduction to the employer of sum referred to in s. 2(24)(x), i.e. employee's contribution towards provident fund (PF), superannuation fund (SF) or any other fund set up under the Employee's State Insurance (ESI) Act, 1948 or any Employee Welfare Fund, if said contribution is credited to employee's account in the relevant fund on or before the statutory due date. ▯ S. 43B allows deduction for employer's contribution to any welfare fund on actual payment basis, if paid on or before the due date of filing of ROI u/S. 139(1). ▯ There was judicial conflict on the issue whether S. 43B is applicable for employee's contribution also and accordingly, deduction of employee's contribution u/s. 36(1)(va) can be allowed even if paid beyond statutory due date if actually paid prior to filing of ROI by employer. The judicial conflict was settled by SC in the case of Checkmate Services (P.) Ltd v CIT [2023] 290 Taxman 19 (SC) rendered on 12 October 2022 against the taxpayer. The Hon'ble SC held that the time limit for deposit of employee's contributions and employer's contributions are different. The employee's contributions are disallowable if not paid beyond the relevant statutory due date. ▯ Finance Act 2021 inserted the following provisions which turned out to be prophetic in view of subsequent SC ruling in Checkmate's case – ● Explanation 5 to s. 43B stating that the provision of s. 43B shall not apply and shall be deemed never to have been applied to any sum received as referred in s. 2(24)(x) by the taxpayer from his employees. ● Explanation to s. 36(1)(va) stating that the provisions of s. 43B shall not apply and shall be deemed never to have been applied for purpose of determining the statutory due date provided under clause (va). **Issue**

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		▯ The SC ruling and amendment will adversely impact industry. It may be noted that employer faces interest, penalty and prosecution consequences under respective social welfare legislations for delayed payments. The permanent disallowance in income tax further adds to the difficulties of genuine businessmen even where there is no intent of unjust enrichment. ▯ In view of favourable judicial rulings, wherever employer is facing cash crunch, it was possible in the past for employer to pay part or whole of the net salary to the employees immediately and pay employees' contribution to welfare funds later with interest and penalty without risk of losing tax deduction. This is more desirable from employees' perspective. While the intent of amendment is that employer should not unjustly enrich himself with employee's funds, the amendment may have counterproductive impact of employer giving priority to payment of employees' contributions over the net cash salary to employees or worse, not pay salary at all to avoid the permanent disallowance. ▯ At times, normal delays in PF/ESI deposit do happen for various genuine reasons viz. technical issues, non-functioning of payment portal, bank issues, practical issues in account maintenance, factory strike, office lockdown, unforeseen and unavoidable circumstances, new joinees and employee transfers, etc. ▯ Delay in PF deposit invites penal proceedings under the PF Act and any penalty payment towards such violation of the PF Act/Rules are disallowed under Explanation 1 to Section 37(1) of the Income Tax Act. **Recommendation** ▯ It is recommended that amendment made by Finance Act 2021 should be amended to provide more flexibility to the employers to pay employees contributions – say, 90 days from the

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		respective statutory due date to address bonafide cases of delay. The permanent disallowance may apply if the dues are not paid within such extended period of 90 days.
51.	**Levy of surcharge on income earned by a Specified Fund having all corporates as its members**	**Background:** • Section 2(9)(b) of Finance Act, 2023 provides for rate of surcharge applicable to individual or Association of Persons (AOP) on computation of advance tax for AY 2024-25. • Finance Act 2023 introduced an exemption from applicability of surcharge in respect of income from securities (other than short-term/ long-term capital gains) for Specified Funds as referred to in section 10(4D) of ITA. **Rationale and Issue:** • Currently, benefit of exemption from surcharge has been limited to Specified Fund set-up as AOP except in a case of AOP having all corporate members. • Presently, many offshore investment entities are proposing to have a presence in GIFT IFSC. Such investment entities may have only corporates investors which are not eligible for exemption from surcharge. Accordingly, Specified Funds having only corporate members makes them stand at a disadvantageous position when compared with Specified Fund having at least one non-corporate member. **Recommendation:** • It is recommendation is to extend the benefit of non-levy of surcharge on computation of advance tax to all Specified Funds referred to in section 10(4D) of the Act irrespective of their constitution as AOP with or without corporates members. This would be aligned to the overall intention of Government of India to encourage fund regime in IFSC.

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52.	**Exclude income earned by banking unit of IFSC of foreign banking company from the scope of section 115A**	**Rationale:** • Finance Act, 2019 has amended the Act with following welcome amendments for IFSC unit of foreign banking company: (a) Section 80LA of the Act provides for deduction of 100% of income for 10 consecutive years, at the option of the assessee, out of 15 years. (b) Finance Act, 2019 inserted a proviso to sub-section (4) that the conditions contained in sub-section (4) shall not apply to a deduction allowed to a unit in an IFSC under section 80LA of the Act. Accordingly, Gift city branch can now claim profit exemption inspite of provision of Section 115A of the Act. • We appreciate the Government's efforts to promote development and bring these IFSC at par with similar IFSC in other countries. However, once tax holiday period mentioned under Section 80LA expires, IFSC unit of foreign company is subject to provision of section 115A and this will lead to harsh consequence whereby banking unit of foreign bank in IFSC will be liable to pay tax on gross interest income even in case of net loss. • In view of provision of section 115A, in absence of claim of deduction under section 80LA, banking unit of foreign banks in IFSC can be said to be liable to pay tax at the rate of 20% or 5% on gross interest income earned on foreign currency borrowings or debt granted to Government or Indian concerns. Thereby, it will lead to harsh consequence whereby banking unit of foreign bank in IFSC will be liable to pay tax on gross interest income even in case of net loss. • Considering the above, suggest that appropriate amendment be carried out in provision of section 115A of the Act.

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		Recommendation: • It is recommended to amend section 115A of the Act to exclude the income earned by banking unit of IFSC of foreign banking company from the scope of section 115A of the Act. This can be achieved by inserting sub-section (6) in Section 115A of the Act • "(6) The provision of this section shall not apply to the interest income [accrued or arising from any business carried on] received by or is payable to, or fees for technical services rendered by, a Banking Unit of the International Financial Services Centre from its business for which it has been approved for setting up in such a Centre in a Special Economic Zone [of foreign banking company]"Further, to provide complete tax exemption to Gift city branch, it is suggested that MAT provision should not be applicable to Gift city branch in a year where deduction under section 80LA is claimed.
53.	**Benefits to be provided to foreign Fund Managers moving to International Finance Services Centre (IFSC)**	**Rationale and Issue** • This change can provide an incentive to organisations to seriously consider the relocation of their existing fund managers and staff operating in popular fund manager hubs such as New York, London, Hong Kong, Singapore, etc. to the IFSC. **Recommendations** • Foreign fund managers and other foreign employees moving to IFSC should be treated as non-residents and their income should be taxed at a lower tax rate as prevailing in the other popular offshore jurisdictions for e.g. income derived by a Singapore fund manager from managing or advising a qualifying fund is taxed at a concessionary tax rate of 10%.
54.	**Allowability of 100% head office expenditure which are Executive and General**	**Rationale:**

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	Administration Expenditure (EGA)	▪ Section 44C of the ITA states that the head office expenditure which are in the nature of EGA shall be allowed as deductible expenses subject to the cap of 5% of the taxable income. ▪ As the head office expenditure which are in the nature of EGA determined for Indian branch are attributable to its business operations in India and governed by transfer pricing regulations, it should be allowed for full amount of actual Head Office executive and general administrative expenses attributable to the Indian branch operations, without any cap. This will provide relief to the Foreign banks as in some situations expenses are disallowed even if they are actually incurred by the Foreign banks and sufficient documentation is in place to prove the same. ▪ Under the present day tax regime, sufficient checks are in place under the Act to assess any related party transactions, given that India has full-fledged transfer pricing rules to determine the arm's length amount of deductible head office expenditure which are in the nature of EGA. Hence, where the documentation and reporting requirements are any way being adhered to, any limitation on quantum of deduction is unwarranted and irrelevant and should accordingly be done away with. **Recommendation:** ▪ It is therefore recommended that the 5% cap on deductibility of head office expenditure which are in the nature of EGA should be removed.
55.	**Impetus to domestic lenders**	**Recommendations** Enable parity of domestic lenders/specified Indian funds with Sovereign Wealth Fund as defined in S.10(23FE), to ensure domestic class of investors get to participate in India's infra growth story and reap benefits of providing patient capital.
56.	**Amend section 115JAA to allow MAT credit to the**	**Rationale:**

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	successor in the case of amalgamation, demerger, or any other form of reorganization	▯ The Act treats specified business restructuring transactions such as amalgamation, demerger, etc. as tax-neutral events and allows the successor to step into the shoes of the predecessor with express provisions such as transfer of brought forward losses, transfer of cost of acquisition and period of holding from predecessor to successor, etc. ▯ However, the Act is silent regarding the transfer of Minimum Alternate Tax ('MAT') credit to the successor which is analogous to advance tax. Despite the MAT credit has been allowed to the successor in some of the cases, the matter is not free from litigation, and it has led to the dispute between the tax department and the taxpayers. **Recommendation:** ▯ Section 115JAA can be amended to provide that a successor in case of amalgamation, demerger, or any other tax-neutral reorganization, should be eligible to claim the benefit of MAT Credit. This amendment will settle the issue and stop litigation on this front.
57.	**Applicability of Section 44AD / 44ADA to Limited Liability Partnerships (LLPs)**	**Rationale:** ▯ There are certain special provisions for the computation of profits and gains of business or profession on presumptive basis such as section 44AD and 44ADA. Section 44AD deals with presumptive taxation of business income, whereas section 44ADA deals with presumptive taxation of income arising from professional activities. ▯ Presently, sections 44AD and 44ADA are available for eligible resident taxpayers i.e. individuals, HUFs, and partnership firms. While under the Act, partnership firms and LLPs are equated with each other and treated at par, the presumptive taxation under sections 44AD and 44ADA is not extended to LLPs.

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		▯ While the LLPs are required to maintain their books of accounts under the LLP Act, the determination of taxable income, the claim of deductions for expenses and allowances, production of evidence, etc. are onerous procedures. ▯ The threshold of turnover for availing the benefit of presumptive taxation ensures that only small taxpayers are covered and hence, it does not lead to tax loss to the Revenue. **Recommendation:** ▯ LLPs should be allowed to offer business/professional income on the presumptive basis under section 44AD/44ADA similar to partnership firms, HUFs, and individuals.
	Issues related to TDS on dividends	
58.	**Dividend surcharge mismatch for different classes of non-resident taxpayers and mismatch with income from mutual funds and units of business trusts**	**Rationale** ▯ The amendments at enactment stage to FB 2020 have reduced surcharge rates on dividend for individuals, HUFs, AOP, BOI and AJP to maximum 15% (as compared to highest surcharge of 37%) as per original budget proposal. ▯ The amendments carried out to FB 2020 at enactment stage are at Parts II and Part III of First Schedule to FB 2020 which are linked to 'rates in force' referred in s.2(5) of FB 2020. Thus, wherever the relevant final rate or TDS provision refers to 'rates in force', the maximum surcharge on dividends stands reduced to 15%. ▯ However, many final rate and TDS provisions provide for specific rates of tax on dividend income. They are covered by s.2(6) and s.2(9) of FB 2020. Unfortunately, s.2(6) and s.2(9) of FB 2020 have not been amended at enactment stage to reduce maximum surcharge to 15% for dividend income. This anomaly has percolated into Finance Acts of 2021, 2022, 2023 and 2024 also.

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

Recommendation

The anomaly of higher surcharge for certain classes of non-resident taxpayers and mismatch between TDS rates and advance/final tax rates should be removed.

Table summarising dividend surcharge rate mismatch for different classes of non-resident taxpayers.
<table>
<tr><th>Section</th><th>Nature of payment to non-resident</th><th>TDS rate prescribed (rates in force or specified rate)</th><th>Whether covered by s.2(5) r.w Part II of First Schedule or s.2(6) of Finance Act 2024?</th><th>Whether TDS at higher or lower surcharge?</th><th>Whether final tax liability for advance tax purposes at higher or lower surcharge?</th></tr>
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		194LBA	Dividend income from business trust	Rate specified - section 194LBA(2) – 10%	s. 2(6) of Finance Act, 2024	Higher surcharge	Higher surcharge Rate – 20% S.115A(1)(a)(i)r.w. clause (a) of third proviso to s.2(9) of Finance Act 2024
		194LBB	Dividend income from Alternative Investment Fund	Rates in force - section 194LBB(ii)	s. 2(5) of Finance Act, 2024	Lower surcharge	Higher surcharge S.115A(1)(a)(i)r.w. clause (a) of third proviso to s.2(9) of Finance Act 2024
		194LBC	Dividend income from Securitisation Trust (Practically possibility of dividend from securitisation trust is less likely but cannot be	Rates in force - section 194LBC(2)	s. 2(5) of Finance Act, 2024	Lower surcharge	Higher surcharge S.115A(1)(a)(i)r.w. clause (a) of third proviso to s.2(9) of Finance Act 2024

<table>
<tr><th>Sr. No.</th><th>Subject</th><th>Comments / Recommendations</th></tr>
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<tr><td></td><td>completely ruled out)</td><td></td><td></td><td></td><td></td></tr>
<tr><td>195</td><td>Dividend income</td><td>Rates in force</td><td>s. 2(5) of Finance Act, 2024</td><td>Lower surcharge</td><td>Higher surcharge
S.115A(1)(a)(i)r.w. clause (a) of third proviso to s.2(9) of Finance Act 2024</td></tr>
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<tr><td>59.</td><td>Higher surcharge on mutual fund income & income from units of business trusts (ReITs/InvITs) may be reduced to bring at par with 15% surcharge on dividend incomes.</td><td>Background and Issue
 While maximum surcharge on dividend income is reduced to 15%, there is no corresponding reduction in surcharge for income from mutual fund units and units of business trusts (REIT/Invits). This creates mismatch between different classes of capital market equity instruments.
 It may be noted that the capital gains income from equity oriented mutual funds and units of business trust are subjected to lower surcharge upto 15%. Similarly, there should be parity between surcharge on dividend income and income from mutual fund units/units of business trust.
Recommendation</td></tr>
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		▯ Income from mutual funds and business trusts may be put at par with dividend income by restricting maximum surcharge to 15%.
60.	**TDS on Dividend – clarification on threshold of Rs. 5000 under section 194**	**Rationale:** ▯ As per section 194 of the Income Tax Act, if the amount of dividend paid/distributed/likely to be distributed or paid to the Indian resident shareholder is not exceeding Rs. 5000 in a financial year, then there is no requirement for withholding tax on such payment. ▯ There would be cases where companies distribute dividends more than once in the same financial year. In such cases, there is a possibility, that in the first dividend payout, a shareholder was below the threshold limit, but with the second/ subsequent dividend payout, the aggregate dividend payout (including the earlier dividend in the same year), exceeds the threshold limit of Rs. 5000 in a financial year. In this scenario, with the existing tax provisions, the company is required to deduct tax on the whole/ aggregate amount of dividend paid to the shareholder. There could be cases where the TDS on the aggregate dividend paid out is more than the second/ subsequent dividend to be paid to the shareholder. This is anomalous situation, which needs to be addressed at the earliest. This creates administrative difficulty for listed companies dealing with lakhs of shareholders to keep track of dividends paid to small shareholders. **Recommendation:** ▯ It is recommended that in case of resident individuals, tax should be deducted on dividends exceeding Rs. 5000. Dividends up to Rs. 5000 should not be subjected to tax deduction; any amount over and above the Rs 5000 should be subjected to tax deduction at source. Further, the limit of Rs 5000 should be applied to each dividend distributed.
	TDS and TCS Provisions	

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61.	Applicability of Section 194R	**Rationale** • TDS provision under section 194R of the Income Tax Act, 1961 ('the Act') 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. • CBDT has issued guidelines/clarifications through Circular No. 12/2022 dated 16 June 2022 and Circular No. 18/2022 dated September 13, 2022 for removal of difficulties in application of withholding provision section 194R which came into effect from 1 July 2022. • The CBDT Circular No. 12/2022 dated 16 June 2022, seems to traverse beyond the realm of the legislative intent with which S. 194R was introduced viz. to create a withholding tax mechanism and reporting framework and casts a vast net in which transactions likes reimbursements of expenses to business associates in normal course of business, small gifts/ mementoes given to business partners on special occasions and even a unilateral write back of liability in the books of accounts is caught. • Further, as the point of taxation of S. 194R not linked to the payment or credit in the books of accounts, there are a lot of practical challenges in identifying the exact point of time when the benefit/ perquisite has arisen and accounting for the same. • Also, the limit of Rs. 20,000 for deduction of tax u/s 194R is set at lower limit. **Recommendation** • The provision should be confined to the intent with which the section was introduced.

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		▯ It is also recommended to have specific definition of 'benefit' or 'perquisite' on lines of Section 17(2) with appropriate valuation rules to have better clarity and consistency of application. ▯ TDS rate of 10% is high; it is recommended to lower the TDS rate to avoid working capital issues for the businesses / professionals. ▯ The limit prescribed of Rs. 20,000/- for deduction of tax u/s 194R should be increased to Rs 1,00,000/- so as to reduce burden on tax deductors.
62.	**Clarify that write off of trade debts or waiver of loans does not attract TDS under S.194R**	**Existing provision** ▯ S.28(iv) brings to tax value of any benefit or perquisite, whether convertible into money or not, arising from business or the exercise of a profession. This provision has existed in the Act since A.Y. 1964-65. ▯ FA 2022 introduced S.194R mandating a person responsible for providing any benefit or perquisite to a resident arising from the business or profession carried on by such resident to deduct tax at the rate of 10% of the value or aggregate value of such benefit or perquisite. The proviso to s.194R provides that if the benefit or perquisite is provided wholly in kind or partly in cash & partly in kind but the cash component is not sufficient to meet the TDS on whole of the benefit, then the provider should ensure that tax required to be deducted is paid. ▯ FAQ 1 of CBDT Circular No. 12 of 2022 dated 16 June 2022 clarified that the provider of benefit or perquisite is not required to ascertain taxability of benefit in the hands of recipient whether it is taxable under S.28(iv), S.41(1) or any other section. FAQ 2 clarified that s.194R covers cash benefits also. FAQ 3 thereof while clarifying that s.194R can also cover capital assets gave an illustration of principal amount of loan waiver under One-Time Settlement (OTS) by referring to CIT v. Ramaniyam Homes (P) Ltd – (2016)(68 taxmann.com

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		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 & Mahindra (404 ITR 1)(SC). Also, the waiver of loan does not result in capital asset in the hands of the taxpayer. • But subsequently, FAQ 1 of CBDT Circular No. 18 of 2022 dated 13 September 2022, in case of waiver of loan, notes that saddling the banks with an obligation to withhold taxes on OTS, would cast an additional burden on the banks to pay additional amount in the form of taxes which are required to be withheld in addition to the haircut already suffered on account of loan waiver. In order to remove such difficulty, the CBDT Circular clarifies that withholding under S.194R will not be applicable to waiver of loan granted on one-time loan settlement by 10 categories of financial institutions. The FAQ further clarifies that exemption from TDS would not impact taxation in the hands of the borrower. • 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-realisable, 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-realisable & therefore, TDS cannot be deducted. Further, in case the taxpayer has to gross up the TDS & 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. • 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,

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		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. S.28(iv) and S.194R as amended by FA 2023 clarify that provisions would apply to any benefit or perquisite, whether in cash or in kind or partly in cash and partly in kind. **Issues** The above referred amendment creates ambiguity for write off of trading debts and loans & advances (even by 10 categories of financial institutions who are exempted from TDS u/s. 194R by FAQ 1 of Circular No. 18/2022) Both s.28(iv) and S.194R imply that there is intent on the part of giver of benefit to provide benefit to the other person. It should be a voluntary gesture or a contractual obligation on the part of giver. However, bad debt write off of trading debts is more often than not a unilateral action on part of the creditor due to compulsive circumstances – more particularly, since s.36(1)(vii) grants bad debt deduction only upon write off in books of account. The right of creditor to recover the amount from debtor continues in which case there is no benefit to debtor as its liability towards creditor continues. Even in case of bad debt write off through negotiated settlement, such settlements are usually entered to settle disputes and move ahead in life and not with a view to grant any benefit or perquisite to the debtor. The above amendment also has an unintended and far-reaching impact on resolution of companies which are undergoing under Corporate Insolvency Resolution Process (CIRP) under Insolvency and Bankruptcy Code 2016 (IBC), and currently awaiting an order from the

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		National Company Law Tribunal (NCLT) and all companies where lenders / banks / financial institutions / creditors contemplate to take the distressed companies where lending institutions are saddled with large NPAs. Under the IBC proceedings, after following due process, a corporate lender is able to recover part of its debts from a new buyer who is willing to take over the distressed company which has defaulted its financial obligations. As an outcome of IBC proceedings, the lenders (including sundry creditors, operational creditors, government dues, employee, and workmen dues, etc.) take a haircut on outstanding dues, and settle their dues at an amount as approved by NCLT submitted by the highest bidder and validated by Committee of Creditors (COC). • Pursuant to NCLT approval, there is write back of loan debts in the books of account of the distressed company for the portion of liability, which is no longer payable to its lenders. At present, this benefit in cash is not covered by the scope of Section 28(iv) of the Act which is upheld by various courts and tribunals [including the Hon'ble Supreme Court in Mahindra and Mahindra (93 taxmann.com 32)]. However, with the amendment by Finance Act 2023, there is apprehension that the above write backs would fall within the scope of Section 28(iv) of the Act and will attract huge tax liability on corporate debtor / distressed company. • In view of above background, it is important to remember the object of IBC, that is to rescue the corporate debtor by bringing a new buyer by settling all the debts of a distressed company, which otherwise would never get paid and lead to liquidation of the company, loss of employment, huge loss to lenders and ultimately adversely impact the industrial development. Hence, if such write back of loan liabilities are taxed as business perquisite income in the hands of the distress company (which is under the control and management of new buyer), it will defeat the object of IBC, as it will decrease the settlement amount as approved by NCLT to the extent of tax on such write backs, which will lead to a reduction in recovery made by the lenders.

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		• Further, if the above is to be taxed, the new buyer would factor the tax cost on the write backs in the offered price of one-time settlement, and ultimately it would be injustice to the lenders who are anyways at the receiving end of accepting write offs of their dues and further reduction in settlement price would dampen their hopes in the IBC process and restructuring of debts. • The benefit of writeback of liabilities to a distressed company is not a unilateral or bilateral act as per mutual understanding between the parties. It is basis the resolution plan submitted by various bidders and upon recommendation of COC, NCLT approves the plan, and as per the approved plan, the new buyer discharges the agreed consideration towards full and final settlement of dues of the distressed company. In fact, it is a benefit granted under the operation of provisions of the IBC and the distressed company is under obligation to follow the same. Thus, the same cannot be brought to tax as it would not give a fair deal to the new buyer which has intention to revive the distressed company. • Write off of bad debts is driven by commercial reasons of not being able to realise the debts and not with a view to grant any benefit or perquisite to the debtor. Insistence on TDS on such write offs will result in double whammy of being burdened with TDS obligation in addition to commercial loss of write off. Furthermore, in case of unilateral write off, the creditor can still pursue the debtor for recovery of the debt and any such recovery is taxable in the hands of the creditor u/s. 41(4). • Party wise details of write off of bad debts of Rs. 1 lakh or more are already available with the Income tax Department through the Return of Income filed by corporate assessees. Additional details required, if any, can be obtained by the Dept. by widening the scope of such reporting to ensure collection of taxes u/s 41(1). **Recommendations**

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		▯ A suitable clarification may be provided that capital receipts are not covered within the scope of the section of 28(iv) and 194R. ▯ Separately, it is recommended to clarify that withholding under S.194R is not required on write off of bad debt by creditor. It is recommended that similar relaxation as provided under CBDT Circular No. 18 of 2022 w.r.t. one-time settlements by specified financial institutions, may be extended to write off of trade debts both u/s. 28(iv) and s.194R. ▯ An exception under Section 28(iv) should be provided for not taxing the loan written back as a result of resolution plan under IBC as approved by NCLT as 'cash benefit / perquisite' ▯ It should also be clearly stated that merely because another taxpayer has deducted TDS u/s 194R on certain payments may not be subject to tax in the hands of recipient. ▯ It should also be clarified that bad debts accounted by Corporates as per accounting principles is outside the scope of Section 194R of the Act. ▯ It should be clarified that write off of bad debt whether by financial or operational creditor is not liable to TDS u/s. 194R. ▯ Without prejudice, in the alternative, TDS rate in respect of write-offs be reduced from 10% to 1%.
63.	**Deduction of tax at a higher rate in case of credit/payment to non-filers of returns**	**Rationale:** ▯ Prior to amendment by Finance Act 2021, a higher TDS rate of 20% was attracted if the payee does not hold PAN (s.206AA). There are similar provisions in TCS for collecting TCS at higher rate of 5% (s.206CC). These provisions were inserted to improve the tax compliance and track data of non-filers

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		▪ As per S.206AB inserted by Finance Act 2021 w.e.f. 1 July 2021 and as amended by FA 2022 and FA 2023, any person (deductor) making payment to a specified person (deductee) will be required to deduct tax on amount paid, or payable or credited, higher of the following rates: i) at twice the rate specified in the relevant provision of the Act; or ii) at twice the rate or rates in force; or iii) at the rate of five per cent. ▪ But if PAN of the deductee is not available, then higher of rate u/s. 206AA or s.206AB will apply. ▪ "Specified Person" means any person who meets two conditions viz (a) who has not filed return for the assessment year relevant to the financial year immediately prior to the financial year in which tax is required to be deducted and for which the time limit to file return u/s. 139(1) has expired and (b) the aggregate amount of TDS and TCS in his case exceeds INR 50,000 or more in the said previous year. ▪ This is a non-obstante provision and will override the TDS rates under the Chapter XVIIB (except where TDS is required to be deducted u/s. 192, 192A, 194B, 194BB, 194-IA, 194-IB, 194LBC, 194M or 194N) ▪ Similar to S.206AB, S.206CCA was also introduced in context of TCS. Both these provisions were made effective from 1 July 2021. ▪ The rationale of these provisions as explained in Explanatory Memorandum is to ensure filing of return of income by those persons who have suffered a reasonable amount of TDS/TCS. In other words, while the Government possesses data of the persons who suffer reasonable amount of TDS and can take action against these persons by invoking section 142(1)(i) or 147,

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		yet the Government desires the industry to make higher TDS/TCS to compel these persons to file returns. - In this regard, CBDT has made available a functionality on Income tax e-filing website to identify 'specified persons' on an individual basis and also in bulk. CBDT also issued Circular no. 11/2021 dated 21 June 2021 (as stand modified by Circular no. 10 of 2022 dated 17 May 2022) which provided administrative relief by clarifying that 'specified person' status needs to be checked only once at the beginning of the financial year such that if the person is not identified as 'specified person' at the beginning of financial year, he will not be regarded as a 'specified person' for whole of the year even if he defaults in filing return for immediately preceding year and technically becomes 'specified person'. - Under this functionality, bulk search can be performed through downloadable file, however, the bandwidth is only of 10,000 records in a single search. Large corporates who are required to make payment to large number of recipients can complete the search only through multiple uploads, which is very tedious and cumbersome process, especially in case of dividend payout to shareholders where in time is also a big constraint. **Issue** - The above referred provisions put additional compliance burden on the industry to verify 'specified person' status of the deductees/collectees and accordingly calibrate the rate of TDS/TCS. 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. - For illustrative purposes, one may consider a listed company with lakhs of individual shareholders. It will be required to verify ROI filing compliance for each shareholder from e-filing website which will be extremely cumbersome and time consuming. The exercise will

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		need to be repeated at the time of each interim dividend and final dividend payment. This is for the reason that the new shareholders may get added in the intervening period. - Since the government already has the details of non-filers, existing machinery provisions of the Act can be used to achieve the objective of return filing. The compliance burden cast on industry should be commensurate with the benefits by way of higher revenue collection. The time and costs to be incurred by industry will be much higher than the TDS collected at higher rates and that too, when Government already has data and statutory powers to pursue the non-filers. These provisions cast unreasonable burden on the industry and also expose them to litigation, additional demands, interest, penalty and prosecution risk. This adversely impacts the 'ease of doing business' in India. - Section 206AB of the Act is applicable on payments to non-residents having PE in India. It is not applicable to payment to NRs who do not have PE in India. Hence, generally, payments like interest, dividend, royalty, FTS and capital gains where the NR does not have PE in India will not attract s.206AB. However, if the NR payee has PE in India, then even payments like interest, dividend, royalty, FTS and capital gains will attract higher TDS even if such payments are not connected to PE in India. - 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. - This also 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

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		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. **Recommendation:** - Considering the unreasonable compliance burden, it is recommended that the provisions of s.206AB & 206CCA be withdrawn. - Without prejudice, if the provision is retained, following recommendations may be considered- ● TDS on dividend under section 194 should be excluded for listed companies due to very high fluctuating base of resident shareholders and strict timelines to pay dividend from record date. ● Further, there is a separate SFT reporting requirement for the dividend payouts under Rule 114E(5A) by which Tax Department will be in possession of all the information related to dividend payouts and can be easily made use of by the Tax Department. - A relaxation from deduction of tax at a higher rate under section 206AB of the Act 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 under section 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 section 206AB of the Act. - Suitable API should be developed to process the data in one go or functionality should be developed whereby search process can be integrated with taxpayer ERP.

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		▯ 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.
64.	**Section 194J - TDS on Fees for Professional/Technical Services - rate to be reduced to 2% to avoid characterisation dispute**	**Rationale:** ▯ The Finance Act 2020 has reduced the TDS rate u/s 194J to 2% (from existing 10%) in case of FTS payments but retained TDS rate at 10% for fees for professional services. ▯ The Explanatory Memorandum clarifies that the amendment was proposed since there are large number of litigations on the issue of short deduction arising out of characterisation dispute between Sec 194C and Sec 194J. ▯ While provision of 2% rate for FTS payments is a welcome change, the amendment will give rise to a new litigation in the form of distinction between professional services and technical service. Thus, such selective amendment for providing lower rate only for FTS payments is in direct conflict with the rationale in the Explanatory Memorandum that it is intended to avoid litigation on short deduction issues. ▯ There is significant overlap between scope of FTS which covers managerial, technical or consultancy services and fees for professional services which, inter alia, includes profession of technical consultancy, engineering services, information technology, etc. Hence, disputes will arise whether payments for such services will be liable for TDS @ 2% or TDS @ 10%. ▯ Further, without prejudice, the issue persists in case of individual and HUF as TDS rate for individual and HUF under section 194C of the Act is 1% while the rate of TDS under section 194J of the Act is 2%. **Recommendation:**

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		▯ Hence, it is recommended that TDS rate on professional services should also be reduced to 2% to avoid characterization disputes between fees for technical services and fees for professional services. Alternatively, “professional services” should be defined to be restricted to regulated professions. ▯ Alternatively, CBDT should issue proper guidance with illustrations for uniform implementation of revised TDS rates by the payers and avoid characterization disputes. ▯ As a broader measure to simplify TDS compliance, the disparity in TDS rates for payments to residents under different provisions like Sec 194, 194A, 194C, 194H, 194I, 194J, etc should be eliminated and a uniform TDS rate should be provided for all payments to residents to avoid characterization disputes.
65.	**Increase in threshold for Non deduction of TDS on Interest in case of Fixed deposits with HFCs**	**Rationale:** ▯ Interest income from fixed deposits is subject to withholding taxes at the rate of 10% under section 194A of the Act subject to threshold of Rs. 40,000 for non-deduction in case of Banks including Co-operative banks, post offices etc. However, the aforesaid limit is restricted to Rs. 5,000 in case of HFCs and NBFCs. ▯ Finance Act 2018, further, increased the aforesaid threshold to Rs. 50,000 in case of deposits held by Senior citizens in case of Banks including Co-operative banks, post offices etc. ▯ It may be noted that Fixed deposits accepted by HFCs are subject to NHB regulations and therefore should be on par with the banks, cooperative banks, post offices etc. **Recommendation:** ▯ It is recommended that the treatment of threshold for Non deduction of TDS on Interest in case of Fixed deposits in case of HFCs should be at par with Banks, post offices etc.

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66.	**Exemption from TDS on interest income earned by NBFCs under Section 194A**	**Rationale and Issue** As per Section 194A, any person making payment of interest is required to deduct tax at source. There are certain exemptions given under this section wherein the person making payment to various institutions like Banking Company, Life Insurance Companies and UTI etc., is not required to deduct tax at source. The NBFC Sector has grown significantly over last decades and has immensely contributed to the government's objective of financial inclusion by lending to masses. However, no exemption has been provided to NBFCs from the applicability of Section 194A. This needs to be relooked at for the following reasons: ● Administrative hardship in relation to TDS: Due to enormous transactions with retail customers, NBFCs have to face severe administrative hardship in terms of collection of TDS certificates from their thousands of customers. Also, in certain instances the clients of the NBFC entities do not deposit the tax deducted. Consequently, the NBFC entity is not allowed credit for the TDS by the tax authorities and are in-fact saddled with demand. Thus, resulting in double whammy for the NBFC entities. ● Liquidity impact: Generally, NBFCs engaged in financing activities operate on a very thin margin on the interest and many of these NBFCs have high cost of operations and low profitability. Deduction of taxes at source (by virtue of section 194A) on the gross interest income earned by such NBFCs puts them in a disadvantageous position as it creates cash flow constraints. Moreover, at times the tax deductible on the gross interest income is much higher than the profitability of the NBFCs ie to utilize the TDS of 10% on gross amount approximately 25% profit margin needs to be earned at the current tax rates. This results into significant refund position to the taxpayers.

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		● No loss to the Revenue: Tax on the income earned by NBFCs could be paid in the form of 'advance-tax', ensuring no revenue loss to the Government. ● Large Volumes: NBFCs carry on the financing business mostly with retail customers who could be large in number spread across various geographies and sectors, including unorganized sectors. Due to the large customer base, it becomes almost impossible for NBFCs to regularly follow up with every customer for TDS certificates every quarter (details of which are mandatory for claiming the same in the Income-tax return). Also, practically it is very difficult to collate and collect details from such customers. In this regard, it is highlighted that like Banks, even NBFCs are regulated by Reserve Bank of India (RBI) and are mandated to follow RBI guidelines. RBI has been tightening the regulatory framework for NBFCs and has brought convergence in regulation for NBFCs with Banks i.e. registration requirements, higher capital norms, tightened asset classification and provisioning norms, credit concentration norms, enhanced reporting and supervision, corporate governance framework, etc. Non-applicability of TDS on interest components paid/ payable to Banks put them as a more preferred lender as compared to the NBFCs as computation of interest in every EMI becomes more tedious for the borrower. Considering the role played by NBFCs in growth of Indian economy and its future potential, the Government has also been trying to create a level playing field for NBFC with Banks. Amendments to Section 43D (Taxability of interest income on sticky advances) and allowability of deduction on provision for bad and doubtful debts under section 36(1) (viia) are few such examples. **Recommendations** As nature of lending business for banking units and NBFC's are almost similar, TDS exemption should be made applicable to NBFC's as well, by notifying them under the recently introduced

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		provisions of Section 194A(5). This will significantly reduce the compliance burden on the NBFCs' and its customers, while ensuring no loss to the government revenue.
67.	**Clarify applicability of treaty benefit while deducting tax on payments to non-residents under provisions which provide for specific rate of TDS (as distinguished from 'rates in force' under s.195)**	**Background facts: Supreme Court judgment in the case of PILCOM** a) The Hon'ble Supreme Court in the case of PILCOM v. CIT (2020)(116 taxmann.com 394) held that the payer cannot consider DTAA benefit available to the non-resident payee at the stage of TDS on payments to such non-resident payees, in a case where the transaction was not covered by S.195 of ITA. b) The SC was concerned with a case where PILCOM made payments in nature of guarantee money to non-resident sports association related to the cricket matches played in India, Sri Lanka and Pakistan during Cricket World Cup 1996. The SC held that once it is established that the payments made to the non-resident sports associations were 'in relation to' to the matches played in India, such guarantee money can be said to be earned from a source in India and hence, the income is deemed to accrue or arise in India attracting corresponding withholding obligation for the payer. c) In context of consideration of DTAA benefit for TDS purposes, the SC held at para 18 of its ruling as follows :- ***"18.*** *We now come to the issue of applicability of DTAA. As observed by the High Court, the matter was not argued before it in that behalf, yet the issue was dealt with by the High Court. In our view, the reasoning that weighed with the High Court is quite correct. The obligation to deduct Tax at Source under Section 194E of the Act is not affected by the DTAA and in case the exigibility to tax is disputed by the assessee on whose account the deduction is made, the benefit of DTAA can be pleaded and if the case is made out, the amount in question will always be refunded with interest. But, that by itself, cannot absolve the liability under Section 194E of*

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

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		Amongst others, the following apprehensions are raised by taxpayers :- a) Whether the ratio of PILCOM ruling will be restricted to a case covered by section 194E or will it apply to all other provisions of ITA where specific TDS rate is specified within the section? b) Whether the ratio of PILCOM ruling be considered by CBDT to be applicable also in a case where the tax payable by income recipient is nil either as a result of DTAA or as a result of S. 10 or other exemption provisions of ITA or as a result of certain other international agreements under which exemption may have been conceded by India. c) Do the earlier judgments of SC continue to hold the field, and if yes, the extent to which CBDT will consider various judgments to be reconcilable in terms of compliance by the taxpayer. d) Will PILCOM judgment have prospective implication in terms of compliance expectation from the tax deductors? e) Whether Tax Department will reopen past cases based on this ruling to recover shortfall of TDS being the difference between TDS rate as per Act and tax rate as per treaty to raise demands along with interest u/s. 201(1A)? f) Whether Tax Department will also levy penalty u/s. 271C or initiate prosecution u/s. 276B? g) Going forward, whether non-residents will suffer higher TDS due to application of ratio of PILCOM ruling and will necessarily be required to file return to claim refund of excess TDS? h) Will CBDT consider appropriate Circular to be issued under S. 119 and/or notification under S.197(1F) of ITA to permit the taxpayers, under the shelter of administrative dispension, to follow the same course of action as was being followed prior to PILCOM ruling?

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		i) FA 2021 inserted a proviso to section 196D(1) to provide that payer shall withhold tax at the rate of 20% or rate specified in DTAA (whichever is lower) where, ● DTAA entered between India and other country is applicable to FII payee ● Payee has furnished TRC Similar amendment was made by FA 2023 to s.196A(1) in respect of payment of income on mutual fund units. However, it is not clear why other NRs are not granted similar treatment. **Our submissions in brief for consideration:** a) As a matter of tax policy, India has, till date avoided the policy of 'retain and refund', and has consistently adopted a tax policy where TDS is restricted to the amount of the actual tax liability incurred by the NR recipient of income. This has eased compliance on the taxpayers as also administrative burden for the Tax Department. b) Such tax policy, if continued to be applied, may harmonize with the thinking that TDS is secondary tax obligation and should ideally follow the primary tax obligation. c) In order to avoid any form of differentiation or discrimination, the tax policy may adopt procedure which, on principles, treats all the taxpayers at par. d) In deference to representations made, FA 2021 inserted a proviso to section 196D(1) of ITA w.e.f 1 April 2021 to provide that, payer shall withhold tax at the rate of 20% or rate specified in DTAA (whichever is lower) where, ● DTAA entered between India and other country is applicable to FII payee ● Payee has furnished tax residency certificate

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		This was specifically in view of PILCOM ratio. Similar amendments are required for other provisions which provide for fixed rate of TDS on payments to non-residents. e) Similar amendment was made by Finance Act 2023 to s.196A in respect of payment of income on mutual fund units to non-residents w.e.f 1 April 2023. **Our representations in brief** a) Without prejudice to our other submissions, it is submitted that the CBDT may clarify the following and/or adopt appropriate legislative process to so as to avoid hardship to the taxpayers and to ease the burden of compliance :- o It may be clarified that any payment made to a non-resident, except in a case which is specifically excluded under S. 195 of ITA, may be considered as covered by S. 195 of ITA concurrently with any other provision of the Act so that treaty benefit can be considered by the payer for TDS purposes. o Even in respect of payments which are specifically excluded from s.195 being interest covered by s.194LB, s.194LC and s.194LD, it may be clarified through a Circular and/or notification may be issued u/s. 197A(1F) that treaty benefit can be considered by the payer for TDS purposes. o It may be clarified that the ratio of SC judgment in PILCOM's case will be considered to have prospective application in terms of the expectation of compliance obligation from the taxpayers and accordingly, no notices will be issued and/or demands will be raised for past years where payers have considered treaty benefits while making payments under TDS provisions requiring TDS at specific rates. **o** Without prejudice, in harmony with the tax policy adopted so far, and in exercise of the powers contained in S. 119 and/or S.197(1F), it may be clarified through a

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Circular/Notification (failing which, through suitable legislative amendment) that even where TDS is provided at specific rate for payment to non-resident (as distinguished from ‘rates in force’), the payer can consider treaty benefit for TDS purposes.

o Amendments on lines of proviso to section 196D(1) may be made to all other provisions (like 194E, 194LB, 194LBA, 194LC, 196B, 196C etc.) which provide for fixed rate of TDS for payments to non-residents in order to allow the NR taxpayers take benefit of the lower tax rates provided in tax treaties.

List of sections dealing with payment to non-resident which may be impacted by SC ruling in PILCOM’s case:
<table>
<tr><th>Sr. No.</th><th>Section</th><th>Particulars</th><th>Withholding rate (excluding surcharge and cess)</th></tr>
<tr><td>1.</td><td>194E</td><td>Payment to non-resident sportsmen/ sports association</td><td>20%</td></tr>
<tr><td>2.</td><td>194LB</td><td>Payment of interest on infrastructure debt fund</td><td>5%</td></tr>
<tr><td>3.</td><td>194LBA (2)</td><td>Payment of interest and dividend income by business trust</td><td>5%/10%</td></tr>
<tr><td>4.</td><td>194LC</td><td>Payment of interest by an Indian company or a business trust in respect of money borrowed in</td><td>5%/4% (IFSC unit)</td></tr>
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<tr><td></td><td></td><td>foreign currency</td><td></td></tr>
<tr><td>5.</td><td>194LD</td><td>Payment of interest on rupee denominated bond of an Indian company or government securities to a foreign portfolio investor</td><td>5%</td></tr>
<tr><td>6.</td><td>196B</td><td>Income from units (including long-term capital gain on transfer of such units) to an offshore fund</td><td>10%</td></tr>
<tr><td>7.</td><td>196C</td><td>Income from foreign currency bonds or Global Depository Receipts (GDR) of an Indian company (including long-term capital gain on transfer of such bonds or GDR)</td><td>10%</td></tr>
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</td></tr>
<tr><td>68.</td><td>Section 196C – TDS on dividend on GDRs</td><td>Rationale:
In case of GDRs, identity of beneficial owner of GDR is not known to the Company. The rate of surcharge is different for different categories of payees. Therefore, the deductor company cannot determine applicable rate of surcharge on TDS on dividend paid to GDR holders.</td></tr>
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		▪ Vide Circular No. 3P dated 01-05-1966, CBDT has clarified that, when shares are registered in the name of banking company, TDS should be deducted at the rates in force applicable to the banking company without regard to the beneficial owner of shares. **Recommendation:** ▪ CBDT may clarify that while deducting tax at source u/s 196C surcharge should be as applicable to the custodian.
69.	**Direct Payment to E-commerce Participant**	**Rationale** ▪ Section 194-O provides that an e-commerce operator who, through his digital or electronic platform, facilitates sale of goods or supply of services of e-commerce participant shall be liable to undertake TDS @ 1% on the gross amount of such sale or service at the time of credit or payment to e-commerce operator, whichever is earlier ▪ Explanation to S.194-O(1) deems that direct payment made by customer to e-commerce participants for sale of goods or services is deemed to be amount paid or payable by e-commerce operator to e-commerce participants. Also, S.194-O(6) provides that the e-commerce operator shall be deemed to be a person responsible for paying to the e-commerce participants. ▪ Further, the terms 'digital' or 'electronic platform' are not defined. This has led to wide coverage of transactions which can also bring traditional ways of carrying business also into the net of TDS. ▪ In certain types of electronic commerce transactions, where the sale of goods or provision of service takes place directly between buyer and seller, the e-commerce operator does not have

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		visibility over the transaction. In such cases, the e-commerce operator may not be aware of the pricing of the goods, conclusion of the contract, etc. • Also, there are numerous e-commerce models or aggregators where e-commerce operators are not contractually obliged to collect or pay the transaction amounts or at times even involved in conclusion of transaction. In fact, the suppliers/ participants are required to make commission payments to such platforms. • Levying TDS obligation on such e-commerce models not only creates difficulty in deducting TDS in absence of payments but also adds to administrative inconvenience and working capital hurdles. It casts an unnecessary obligation on platforms who are not involved in consummation of the transaction between buyer and the seller. This is completely against the philosophy of TDS obligations which otherwise arise only on payments or credits to the contracting party. **Recommendation** • Section should explicitly carve out transactions where any sale contract is concluded over an email, telecom, etc. • Deeming proviso in the section should be removed. Appropriate clarifications or guidelines may be issued to clarify that where the transactions which are strictly between the end-user/customer and e-commerce participant and where no payment is ever due from the e-commerce operator to the ecommerce participant, such transaction will not be covered within the scope of S.194-O. • Alternatively, it may be clarified that TDS obligation will extend to only such transactions where customer has a choice to either pay through e-commerce operator or directly to

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		e-commerce participant and e-commerce operator holds information of consummation of transaction between customer and e-commerce participant (e.g. radio cab service).
70.	**TDS in respect of purchase of goods (S.194Q) and TCS on sale of goods u/s 206(1H)**	**Rationale:** • S.206C(1H) requires a seller whose turnover exceeded Rs. 10 Cr in preceding financial year and receives sale consideration towards goods of more than Rs. 50 lakhs from a buyer to collect TCS @ 0.1% (0.075% till 31 March 2021 - subject to certain exceptions) • Additionally, FA 2021 introduced a new TDS provision u/s.194Q on purchase of goods w.e.f. 1 July 2021. As per this provision, the buyer while making payment to resident seller for purchase of goods having value exceeding fifty lakh rupees in the previous year is required to withhold taxes at the rate of 0.1%. • Deduction shall be at the time of credit of such sum to the account of the seller or at the time of payment by any mode, whichever is earlier. The provisions are attracted even if the amount is credited to 'suspense account' • Explanation to s.194Q(1) defines 'Buyer' as a person whose total sales, gross receipts or turnover from the business carried on exceed INR 10 cr during immediately preceding financial year in which the purchase of goods is carried out. • As per s.194Q(5), the above provisions would not be applicable in cases where payment is already subject to TDS under other provisions of the Act or TCS under S.206C other than 206C(1H) • CBDT also issued Circular No. 13/2021 dated 30 June 2021 to clarify certain issues and remove difficulties in application of the provisions of s.194O, 206C(1H) and 194Q.

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		▯ Earlier the Government introduced TCS on sales w.e.f. 1 October 2020 to widen and deepen the tax net. The industry had raised many concerns on the new TCS which were partially addressed by issuing guidelines dated 29 September 2020. ▯ Neither TCS on sale of goods nor TDS on purchase of goods appears to be a revenue collection exercise since the TCS/TDS rate is kept very low at 0.1%. Hence, it appears to be information collection exercise for Government. Contrary to intent of deepening and widening the tax net, the compliance burden and impact of TDS/TCS falls on those taxpayers who are already within the tax net. ▯ Further, such transactions being subject to GST, there is already an audit trail available with the GST Department which can be easily leveraged by the Income tax Department through electronic sharing of data on automated basis and making use of Artificial Intelligence to mine the data to detect tax evasion. TDS and TCS on sales results in multiple levy of tax on same transaction. ▯ Further, there are business transactions where a seller receives advance payments for future sale / supply of goods. Such advance received per-se cannot constitute a sales consideration, rather is in nature of an advance receipt towards future sales. Also, there can be instances where the advance is returned as the actual sale transaction doesn't take place. ▯ In such cases, if an advance receipt is considered as liable for TDS / TCS and subsequent sale / purchase does not fructify, it results in unnecessary practical challenges w.r.t. TDS/ TCS compliances. ▯ The intent of TCS provisions is to create a system trail of buy and sale transactions and thereby bring taxpayers escaping tax on sale of goods under the tax net. All regulated transactions such as banking / securities always leave a distinct electronic / physical trail and can be easily traced

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		back the concerned counterparties. Thus, they do not pose risk of non-disclosure leading to escaping tax net that may arise in transactions for purchase of physical goods. **Issues:** - The new TDS provision result in an additional compliance cost and burden to the industry by way of keeping a track of transactional level details of realisation for each sales transaction, withholding, issuance of TDS certificate, return filing etc. TDS provisions apply on accrual system whereas TCS provisions apply on collection basis. The application of these sections parallelly creates ambiguity and increases lot of compliance burden on the both the parties. - Like in case of TCS for sale of goods u/s. 206C(1H), the new TDS on purchases also does not specifically make distinction between sales made to the intermediate customers (B2B transactions) and sales made to the final customers (B2C transactions). In absence of specific exclusion for B2B transactions, the provision appears to apply for all types of sale transactions, irrespective of whether the transaction involves sales to intermediate entities/ customers or it is sale to final customers. - Applicability of TDS or TCS provisions to B2B transactions as well may result in tax being collected at multiple levels, in turn, may lead to cash blockage at entity level. In a supply chain structure consisting of manifold entities (as is usually prevalent in the retail sector), this would result in tax being deducted or collected multiple times on the same transaction. Deduction/collection of tax at multiple entity levels increases the administrative compliance burden, transaction costs and results in cash flow trap. - Since B2B transactions are made with multiple vendors, it is administratively burdensome to apply for lower/ NIL TDS for all vendors. Further, benefit of lower/ Nil TDS has not been extended to s. 194Q since s.197 is not amended to include s.194Q.

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		▯ The combined interplay between TDS and TCS will lead to further litigation and disputes. This is because like in case of TCS on sales, the term 'goods' is not defined. It is not clear whether the definition of "goods" needs to be interpreted as per the Sale of Goods Act or the CGST Act or some other legislation as the term 'goods' is not defined under the ITA. For instance, whether the term "goods" includes shares, securities, money/ foreign currency, actionable claims etc. within its scope is not clear since there are different inclusions and exclusions within scope of 'goods' under various laws. Under GST law, items like share, securities, money, actionable claims are specifically excluded from definition of goods but under the Sale of Goods Act, goods include stock and shares. ▯ For complying with regulatory prescriptions as well as managing various risks, Banks invests and trades in securities regularly. The Sale of Goods Act, 1930 specifically includes some of the securities like stocks and shares. The definition of securities is very wide under the provisions of Securities Contract (Regulations) Act, 1956 ('SCRA'). For example, Government securities, debentures, mutual fund units do not find any mention in the Sale of Goods Act, 1930 but form part of 'securities' under SCRA ▯ Further, transactions in securities including Priority Sector Lending Certificates, derivatives, etc. are voluminous, real time, involve multiple IT systems and complex derivative products like interest rate/ cross currency swaps, options, forwards, etc. In anonymous order matching system of stock exchange/RBI trading platform, it is not possible to ascertain the identity of the buyer and thus the mechanism for levy and collection of TCS would fail, in case TCS is required to be collected. ▯ The intent of the introducing Section 206C(1H) of the Act was to widen and deepen the tax base. Banking and financial services sector is subject to stringent regulations and do not pose risk of non-disclosure of transactions.

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		▯ Considering the intention of introduction of the new section, banking / security related contracts that are well regulated in the financial space should be out of the purview of TCS provisions. ▯ It would not be out of place to mention that this is an important issue and is capable of having avoidable operational disruption for banks and consequent domestic financial market disruption if not clarified by the Government. The situation could lead to commercial and tax disputes for the entire financial sector. Further, considering some transactions are automatically consummated on electronically on exchange etc., it may be impossible to recover additional TCS by any of the counterparties. ▯ The expanded scope of TDS and TCS severely impact 'ease of doing business' in India. Neither TCS on sale of goods nor TDS on purchase of goods appears to be a revenue collection exercise since the TCS/TDS rate is kept very low at 0.1%. Hence, it appears to be information collection exercise for Government. Contrary to intent of deepening and widening the tax net, the compliance burden and impact of TDS/TCS falls on those taxpayers who are already within the tax net. ▯ Implementation of 194Q have separate set of implementation challenges, some of which are listed below: ● Changes in ERP system ● Communication with customers and vendors and changes with contracts. ● Impasse on account of application of TCS and TDS in same transactions ● Challenges of application of Section 206AB

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		● Treatment on Purchase/Sales Return if the seller is credited by the buyer and goods are returned **Recommendation:** ⍰ It is recommended that both TDS u/s. 194Q and TCS u/s. 206C(1H) be withdrawn completely for transactions which are already within the GST regime and/or B2B transactions. The provisions be made applicable only to payees or payers who are not registered with GST. This will then align with the Government's intention of widening and deepening the tax net. ⍰ Without prejudice to the above, to remove difficulties of compliance, there should be only one section which should prevail, either Section 194Q or Section 206C(1H). Alternatively, there should be an option made available to the buyer / seller that basis their mutual understanding, either of them to be held accountable for TDS/ TCS compliance. ⍰ It is recommended that meaning of "goods" may be clearly defined for better clarity of applicability of this provision. ⍰ While we believe that the intention of the legislature is not to apply TCS provisions to securities as it will impact the entire financial markets including stock markets, there is a continuing ambiguity on account of different definitions under various statutes. Thus, it is also recommended that exemption be granted to all transactions in shares, securities, actionable claims and foreign currency since there is ambiguity on whether these items are at all included within the definition of 'goods'. Generally, these items are traded in well-regulated financial markets and there is no need for imposing TDS/TCS by 194Q/206C(1H) when the relevant information can be easily obtained from financial intermediaries.

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		▯ Specific exclusion may be granted to Banking companies and financial service sector from applicability of these provisions considering that they are subject to stringent regulations and do not pose risk of non-disclosure of transactions. ▯ Consequential clarification with respect to TCS/TDS reconciliation vs income / purchases or GST returns ought to be brought in to avoid future litigations / denial of credit to the assessee. ▯ S.197 may also be amended to enable the seller to obtain lower/NIL TDS certificate. ▯ The turnover limit for applicability of TCS / TDS provisions to the prescribed assessees can be increased from INR 10 Crores to INR 50 Crores ▯ The transactional threshold for applicability of the said provisions should also be increased from INR 50 Lakhs to INR 10 Crores ▯ Section 197 of the Act may also be amended to enable the seller to obtain lower/NIL TDS certificate.
71.	**Rationalisation of TCS provisions for non-resident investors under Section 206C(1H)**	**Rationale and Issue** ▯ In absence of specific definition of "goods" for TDS/TCS purposes, conflicting definitions of "goods" under Sale of Goods Act and CGST Act and TDS/TCS exemption granted through Circulars issued u/s. 206C(1I)/194Q(3) only to listed shares through recognized stock exchanges, currently, any non-resident investor acquiring shares of an Indian company or foreign company (where shares derive substantial value from Indian assets in accordance with Explanation 5 to section 9(1)(i) of the Act) is being considered as subject to TCS provisions under Section 206C(1H), i.e., the seller is required to collect tax at the rate of 0.1% of consideration from such non-resident investor, subject to certain conditions.

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		▯ The TCS obligation arises in cases where (a) shares are purchased from residents but non-resident buyers do not have TDS obligation u/s. 194Q in absence of fixed place PE in India or (b) shares are purchased from non-resident sellers but there is no TDS obligation u/s. 195 on the non-resident buyers in view of loss being incurred by the non-resident sellers or such non-resident sellers being eligible for treaty benefits (i.e Shares acquired prior to 1 April 2017 under Singapore or Mauritius treaty) ▯ Typically, such non-resident investors do not have any income accruing or arising in India in initial years of making investments. However, such non-resident investors become obligated to file income-tax return in India solely for the purpose of claiming refund of the TCS collected by the seller. ▯ The TCS provisions not only become onerous for the non-resident investor, but also impacts its liquidity since tax is collected in advance despite absence of any accrual or deemed accrual of income. ▯ A relaxation from TDS is given to certain non-resident buyers under Section 194Q who do not have fixed place PE in India (Refer FAQ 4.4 of Circular No. 13/2021 dated 30 June 2021). A similar type of relaxation should also be given under above TCS provisions. **Recommendations** ▯ Clarificatory amendment should be made for relaxing application of TCS provisions under Section 206C(1H) where buyer is a non-resident and does not have a permanent establishment in India.
72.	**Relaxation of provisions for assessee-in-default and facility for lower TCS**	**Rationale**

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	certificate to be also extended to sub-sections (1F)/(1G)/(1H) of s. 206C	o S. 206C(6A) provides that if the person responsible for collecting tax (say, seller) does not collect whole or part of the tax amount or fails to pay after collecting, he shall be deemed to be an assessee-in-default. o The proviso to s. 206C(6A) provides that such person/ seller responsible for collecting tax u/s 206C shall not be deemed to be assessee-in-default if the buyer has: ▪ Furnished his return of income u/s 139(1) ▪ Taken into such amount (on which TCS was collectible) for computing income in his return of income, and ▪ Paid tax due on income declared by him in the return of income o Further, s.206C(9) provides facility to buyer to apply to AO for lower TCS certificate. **Amendment by FA 2020** o FA 2020 has restricted the benefit of the proviso to s.206C(6A) only to sub-section (1) and (1C) of s. 206C. In other words, the relaxation has not been extended to expanded scope of TCS such as sub-section (1F)/(1G)/(1H) of section 206C in relation to sale of motor cars, LRS, overseas tour program package and sale of goods. o Further, no consequential amendment is made to s.206C(9) to permit remitters/buyers covered by s.206C(1F)/(1G)/(1H) to apply for lower TCS certificate **Issue** o The underlying rationale of proviso to s. 206C(6A) is statutory recognition of legal position clarified by CBDT vide its Circular No. 275 dated 29 Jan 1997 upheld by Supreme Court in the case of Hindustan Coca Cola Beverages (P) Ltd v. CIT (293 ITR 226) and Ely Lilly & Co(I)

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		Pvt. Ltd (312 ITR 225) viz. once the payee/ buyer has paid tax and filed return, the purpose of TDS/ TCS of ensuring tax collection is achieved and hence, the payer/ seller should no more be considered as an assessee-in-default. Hence, the rationale of not extending the relaxation granted by the proviso to other sub-sections is not clear. o In case where the buyer has already done the compliance as stated in the proviso to s. 206C(6A), not extending the benefit to the sellers/ persons responsible for collecting tax u/s 206C(1F)/ (1G)/ (1H) will lead to double whammy and create unnecessary administrative and tax compliances for the seller/ buyer. o Further, the omission to amend s.206C(9) to cover TCS newly introduced u/s. 206C(1F)/(1G)/(1H) seems to be unintentional. There is no reason why remitters/buyers under these provisions should not be permitted to apply for lower TCS if their total incomes justify lower/NIL TCS. **Recommendation** o Accordingly, it is recommended that the relaxation provided by the proviso to s. 206C(6A) may be extended to the other provisions of TCS such as sub-section (1F)/(1G)/(1H) of section 206C also, since once the buyer has already done the necessary compliance, not extending the benefit of the proviso will lead to double whammy and create unnecessary administrative and tax compliances for the seller/ buyer. o Further the facility to apply to lower/NIL TCS certificates may be extended to remitters/buyers covered by TCS u/s. 206C(1F)/(1G)/(1H) by amending s.206C(9)
73.	**Relaxation from punitive TDS/TCS rates [S. 206AB/**	**Existing provision**

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	206CCA] be expanded	▯ S. 206AB/s. 206CCA are a non-obstante provisions which provide higher rates for TDS/ TCS in case of payment made to 'Specified Person' (SP) – intended to improve ROI filing compliance by non-filers ▯ **SP means a person who satisfies the following criteria cumulatively:** (i) Who has not filed ITR for the financial year (preceding FY) immediately preceding the financial year in which tax is required to be deducted or collected (current FY) and for which the time limit to file ITR u/s. 139(1) has expired; [ROI condition] and; (ii) The aggregate amount of TDS and TCS in his case is INR 50,000 or more in the preceding FY [Threshold condition] ▯ Definition of SP excludes a non-resident who does not have a permanent establishment in India ▯ Further, CBDT Circular No 10/2022 dated 17 May 2022 also grants relaxation from strict application of the provision. If payee/payer is indicated as not a SP at beginning of the year, he can be treated as non-SP for whole of the year even if he fails to furnish ROI for immediately preceding previous year by due date of filing ROI falling within current year. ▯ As a rationalization measure, S. 206AB, 206CCA were amended by FA 2023 to exclude a person who is not required to furnish the return of income for the preceding FY and who is notified by the Central Government in the Official Gazette in this behalf. ▯ Making the relaxation conditional to Notification appears unreasonable - If taxpayer is not required to file ROI under the ITA, the intention of not applying punitive rates will be satisfied. Thus, amendment has no effect unless some Notification is issued. [Till date, no notification has in fact been issued] **Recommendations**

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		▯ Where an exemption to file return of income is provided under the Act itself, such taxpayers should be automatically relieved from punitive rates of TDS and TCS E.g., NR covered by S. 115A(5), 115AC(4) subject to TDS under S. 195. Such relaxation provided in the Act should not be subject to notification issued which will be an additional administrative act. ▯ Further, notification may be used as an additional method to exclude persons other than those stated above, who are otherwise exempt from filing return under ITA.
74.	**Provide relief from deduction of tax at source on payments that are accrued but are not due to the payee and for which the payees are not identifiable and represents only a provision made on a month end and year end basis on estimated basis**	**Rationale:** ▯ Most of the companies record provision entries towards various expenditures on a monthly basis to report performance to their parent entities. These entries are reversed in the subsequent month. ▯ These accruals are made on very broad estimates. The tax officers have been insisting that tax be deducted on these provisional entries. ▯ Year-end provisions are made by assessees to follow accrual system of accounting. Very often provision for expenses at the year-end are made based on best estimates available with the assessee even if the supporting invoice is received at the subsequent date. In most of the cases, even the identity of the payee is not known and a consolidated liability is provided on an entirely ad-hoc basis. Owing to such ad-hoc nature of such liabilities, they are mostly reversed at the start of the succeeding year and whenever identity of the payees and amounts payable to them becomes clear, liability for the same is provided subsequently. ▯ As per the current tax regime, tax is required to be deducted on such provisions which often leads to excess deduction and deposit of tax, disputes with the vendor and causes hardship to the assesses.

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		▯ Reference may be made to Bangalore Tribunal ruling in the case of Sasken Network Engineering Ltd. (TS-539-ITAT-2021-Bangalore), where the taxpayer faced difficulty of obtaining TDS credit where the customer had deducted tax on the basis of provision made in customer's books based on purchase orders which ultimately did not match with actual invoices raised by the taxpayer. The Tribunal adopted a strict view of not granting TDS credit in absence of corresponding income offered to tax. This highlights the practical challenges which both payer and payee face if TDS is insisted on month/year end provisions. **Recommendation** ▯ It is recommended that relief from deduction of tax at source should be given on payments that are accrued but are not due to the payee and for which the payees are not identifiable and represents only a provision made on a month end and year end basis on estimated basis for reporting purpose and are reversed subsequently.
75.	**TDS on income from funds in escrow account**	**Rationale:** ▯ There are circumstances where funds are kept in escrow account and based on outcome on an identified event or happening of certain event, it is decided as to who will be beneficiary of the funds and accretion thereto. ▯ The problem arises as to TDS compliance. Payer of interest insist for deduction of tax at source, but it is not clear as to who will be beneficiary of the income. **Recommendation:** ▯ In case of escrow arrangements, the payer of income be allowed to comply with TDS provisions on actual payment basis rather than accrual basis.
76.	**Similar to S. 50C, permit a**	**Rationale and issue:**

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	tolerable variance between stamp duty value and sale consideration of 10% for the purpose of S. 194-IA	▯ Section 194-IA was amended by FA 2022 to provide that TDS is to be deducted at the rate of 1% on sales consideration payable or stamp duty value of property, whichever is higher. ▯ Section 50C permits tolerable band of 10% for immovable assets for difference between stamp duty value and actual sales consideration. However, amendment in Section 194-IA does not consider the same. Hence, issue might arise where TDS is deducted on stamp duty value under section 194-IA whereas income is taxed on sales value under section 50C as it is within tolerance limit of 10%. **Recommendation** ▯ To bring parity, it is suggested a suitable amendment be brought in the amendment to consider stamp duty value of property or sales consideration whichever is higher subject to 10% tolerance limit.
77.	**Extend deferral of taxation on Employee Stock Options Plans (ESOPs) to all employees**	**Rationale:** ▯ In case of ESOPs, the employer company issues ESOPs to eligible employees. After the completion of the vesting period, the ESOPs are vested with the employees. The employees can exercise such ESOPs with payment of the exercise price and receive shares of the employer company. ▯ As per the existing provisions, taxability arises in the hands of the employees on allotment of shares pursuant to the exercise of ESOPs. This results into double cash outflow for the employees (i) investment in the exercise price of the shares and (ii) tax liability. ▯ Currently, the withholding provisions are relaxed for the start-up employees allowing the deferment of taxation i.e earlier of (i) actual transfer of such shares or (ii) ceases to be employee or (iii) 48 months from the end of the relevant year.

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		Recommendation: • ESOPs are considered as one of the most potent tools to enable employees to participate in wealth creation of their employer company, should thereby bridging income inequalities. The current provisions for deferral of perquisite tax payable on exercise of ESOPs be modified to- • Defer payment of perquisite tax on ESOPs offered by any employer whose securities are not listed till the earliest of the following- o 8 years from the date of exercise; or o Liquidity event in respect of securities offered under ESOP, or o Sale of securities acquired under an ESOP.
78.	**Expand scope of section 197 to other TDS provisions**	**Existing provision** • Provisions of section 197 empower the tax authority to issue a certificate on application by the taxpayer, whereby tax can be deducted at NIL or specified reduced rate by a payer on payments made to the recipient taxpayer. • Presently, section 197 specifies a list of payments/ credits on which tax shall be deducted/ withheld at lower/ nil rates as compared to the rates specified in the main TDS provision. However, such list is not exhaustive and does not cover various tax withholding provisions under the ITA such as, s.194IA (TDS on immovable property), s.194R (Business perquisites), s.194Q (TDS on purchases) etc. • The Finance Act 2023 included s.194LBA (TDS at 5% by business trust on interest income of non-resident unit holders) in s.197 **Issue**

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		▪ Section 197 covers wide range of sections , however, its scope is not exhaustive. As enumerated above there are other sections also which are not covered by section 197. ▪ For instance, provisions of section 194-IA (TDS on immoveable property) provide for withholding of taxes in case where the consideration payable for transfer of immoveable property or stamp duty value of such property is higher than Rs. 50 Lakh. In absence of any reference to section 194-IA in section 197, the payer is required to withhold taxes even if the taxable income arising on such capital gains is less than the maximum income not chargeable to tax. ▪ This issue may be especially compounded in cases where a borrower's immovable property, held as security for debt issued by the lender, is sold by such lender on failure of borrower to repay the debt. Tax withholding in such case only results in reduced recovery in respect of a secured debt in favour of payment of taxes (which incidentally under the Insolvency and Bankruptcy Code has lesser priority under the waterfall mechanism). ▪ Similarly, even S. 194R (TDS on business perquisites) is not covered by S. 197. ▪ Additionally, there is no comparable provision for non-collection of taxes u/s 206C of the ITA. **Recommendations** ▪ The application submitted by the taxpayer under section 197 is subject to verification by tax authority u/s. 197(1). Hence, S. 197 may be extended in application to all TDS and TCS provisions under Chapter XVII of the ITA to apply wherever the tax authority is satisfied regarding the validity of the claim of the recipient taxpayer, the certificate of lower/non deduction/ collection of tax of tax may be issued. ▪ This will ease cash flow crunch of taxpayer and facilitate ease of doing business.

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79.	**Clarify exact controversy and intent behind amendment to S. 201(1A) whereby interest on TDS to apply in accordance with order made by the AO**	**Rationale and issue:** • S.201(1A) is amended by FA 2022 to provide that where an order is made by an AO for TDS default, the interest shall be paid by the person in accordance with such order. • The Explanatory Memorandum states that this amendment is to clarify the legislative intent in respect of computation of interest where the default for deduction/collection of tax or payment of tax continues (i.e. the TDS amount is not paid by the defaulter). **Recommendations:** • The exact controversy which is sought to be addressed by the amendment is not becoming clear from the language of the amendment. If the intent is to prevent taxpayers from taking a stand that the TDS/TCS amount being unpaid, there is no terminal date for levy of interest u/s. 201(1A) and hence interest cannot be levied u/s. 201(1A), then the appropriate changes may be made to the language of the amendment to correctly bring out such intent.
80.	**No withholding w.r.t. Tax exemption granted to Sovereign Wealth Funds (SWFs) / Pension Funds (PFs)**	**Rationale and Issue** • Section 10(23FE) provides exemption to SWF/PF from the income in the nature of dividend, interest, any specified sum referred in s.56(2)(xii) or long-term capital gains arising from an investment made by it in India. An exclusion from withholding provisions would avoid tax lock-up in the hands of SWF /PF. **Recommendations** • Given that the income of SWFs/PFs is exempt, no tax withholding should be done under Section 194LBA [payment by Infrastructure Investment Trust (InvIT)], Section 194LC (loan agreement/ rupee denominated bond), Section 196D (Income of FPIs from securities) for income exempt under Section 10(23FE).

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81.	**TDS on payment to non-resident for purchase of goods connected with a Permanent Establishment in India under Section 195**	**Rationale and Issue** • It may not be possible each time for the vendor having a PE in India to timely approach the department for lower deduction certificate. This causes conflicts between the vendor and the assessee since the assessee is duty bound to deduct tax, which at times results in deduction at 40% on gross remittance. **Recommendations** • Procedure for arriving at a profit component on sale of goods by non-residents can be defined in the Act for calculating TDS. Alternatively, suitable rate of deduction in case of goods purchased from such non-residents may be notified.
82.	**Restoration TDS exemption under section 193 on listed securities**	**Rationale and Issue** • Finance Act 2023 has introduced TDS on any interest payments on listed securities in demat form. This has extensively widened TDS compliance manifolds to capture interest payments on any listed securities. • Listed securities are freely traded in the market and hence it poses a practical challenge for the deductor for application of TDS while making interest payments, as the holder of security keeps changing. • Furthermore, application of TDS while changing hands of holder of securities leads to mismatch between actual income and TDS done in the holder's name on a specific date. For instance, an investor purchases securities in April and annual coupon is due in May, while the investor held the investment for a month and offering the income on an mercantile basis for a month he will have to suffer TDS for entire year. On other hand, the investor who has sold the securities, will escape TDS application all together.

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		Recommendation • For the sake of smooth compliance and keeping in mind practical challenges involved in application of TDS on interest on listed securities, it is requested to retain the erstwhile exemption. • The intent given in the memorandum for the amendment is to keep in check under reporting of interest income by the recipient due to above TDS exemption. This challenge can be easily addressed by bringing the interest payments on listed securities under purview of SFT reporting. • Without prejudice to above, we recommend that such interest income received by Banks should be exempted from TDS u/ s 193 similar to mutual funds and insurance companies (in lines with the existing provision of section 194A) considering the fact that Bank's have substantial investments in such securities as a part of its routine business. The proposal is tax neutral as the concerned Bank will discharge its tax liability by way of advance Tax.
83.	**TDS under section 194-IA on mortgage property sold through auction sale**	**Rationale and Issue** • Section 194-IA of the Act, provides provision for deduction of TDS where consideration for the transfer of an immovable property is more than fifty lakh rupees. This section does not provide any specific guideline with regards to sale of immovable property under auction for the purpose of recovery of loan defaults/ wilful defaulter customer. As of now, 1% TDS is deducted by the buyer and remitted under the PAN of the property owner (seller). • Defaulting customer claims benefit to the extent of 1% of sale value of the property (being the legal owner of the property) in the form of claimable TDS credit at cost of bank losing 1% of the sale value of the property during recovery. Further, the buyers deduct taxes and report the same in the name of the lender company. Even in these cases, there is practical difficulty in

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		claiming the credit for TDS in absence of corresponding income, which results into loss for the lender company. **Recommendation:** • In order to avoid unjust enrichment to the defaulter customer and financial loss to Bank, mortgage properties sold through auction sale by Bank on operation of SARFAESI Act, etc. should not be subjected to TDS u/s 194-IA. Specific exemption notifying the same to be issued. • However, if the CBDT desires to have the details of such transactions, an SFT report may be stipulated on such transactions.
	Taxation of Virtual Digital Assets	
84.	**Clarification on determination of cost of acquisition where VDA is held as inventory**	**Relevant provision of the Act** • S.115BBH(2)(a) provides that no deduction is allowable in respect of expense or allowance or set-off of any loss in computing income from transfer of VDA except for "cost of acquisition", if any. • The Hon. Minister of State for Finance has also clarified in Lok Sabha on 21 March 2022 that infrastructure costs incurred in mining of VDAs will not be treated as cost of acquisition as the same will be in the nature of capital expenditure which is not allowable as deduction as per the provisions of the Act. **Issue for consideration** • The exact scope of "cost of acquisition" not being defined can result in ambiguity. Taxpayers may hold VDA as capital asset or stock in trade – although s.115BBH does not make any such distinction.

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		▪ S.49 and S.55 of ITA provide for determination of cost of acquisition of a capital asset. Incidentally, the term 'transfer' which was not defined in s.115BBH as per Finance Bill 2022 has been defined at enactment stage by borrowing the meaning from s.2(47) regardless of whether VDA is held as capital asset or not. ▪ In case of traders who hold VDA as stock in trade may treat the VDA as inventory in books of accounts under applicable accounting standards. Under ICAI AS-2, inventory is required to be measured at cost or net realisable value (NRV) whichever is less. Ind AS 2 also requires the inventory to be valued at lower of cost and NRV except in case of commodity broker-trader, where inventory is valued at fair value less cost to sell. ▪ The Income Computation and Disclosure Standards (ICDS) notified u/s 145(2) are relevant for determining income computation under profits and gains from business or profession and income from other sources. S.145A(i) r.w. ICDS II provides for valuation of inventory at cost or NRV whichever is lower. ▪ In case of individuals who are not subject to tax audit, provisions of ICDS are not applicable. **Our recommendation** ▪ It may be clarified how "cost of acquisition" should be computed in respect of VDA. ▪ As one possible alternative, for VDAs held as capital asset, it may be clarified that "cost of acquisition" will be determined as per s.49 and s.55. This will be consistent with meaning of 'transfer' borrowed from s.2(47) ▪ In case where VDA is held as inventory, in order to provide consistency of tax treatment by all taxpayers, it may be clarified that cost of acquisition of such inventory has to be determined

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		basis principles of S.145A(i) r.w. ICDS II rather than general principles of accounting – even if ICDS II is not applicable to such taxpayer (like individual not liable for tax audit).
85.	**Clarification on manner of computation of "cost of acquisition" referred to in S.115BBH(2)(a)**	**Relevant provision of the Act** • S.115BBH(2)(a) provides that no deduction is allowable in respect of an any expenditure or allowance or set-off of any loss in computing income from transfer of VDA except for the cost of acquisition, if any. **Issue for consideration** • Since VDAs are stored in digital wallets, issue arises whether taxpayer is mandatorily required to apply FIFO method to determine 'cost of acquisition' or can taxpayer apply other basis like weighted average or LIFO **Our recommendation** • Where VDAs are held in digital wallet, it may be clarified whether taxpayer has to adopt FIFO or can adopt any other method like weighted average or LIFO for the purposes of computing 'cost of acquisition'. Reference in this regard may be made to Section 45(2A) which mandates FIFO method for securities held in Demat account.
86.	**Determination of cost of acquisition where VDA received as gift**	**Relevant provision of the Act** • S.56(2)(x) provides that where VDA is received for NIL or inadequate consideration, the difference between FMV and consideration will be taxed as income in hands of recipient. • On subsequent transfer of VDA, S.115BBH taxes income on transfer of VDA at the rate of 30%. While determining income from transfer of VDA, S.115BBH allows deduction of cost of acquisition of VDA.

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		Issue for consideration • S.49(4) provides that "*where capital gains arises from transfer of property"* which is taxed u/s. 56(2)(x), the FMV determined u/s. 56(2)(x) r.w. Rule 11UA is taken as cost of acquisition. S.49(4) is triggered when property is held as a capital asset resulting in capital gains on transfer. Likewise, S.49(1) provides that where capital asset is acquired by way of gift, the cost to previous owner is considered as cost in hands of done. • In the case of VDA, income from transfer will be subject to 30% tax under S. 115BBH. Hence, issues may arise whether provisions of S. 49(4)/ 49(1) in the present form will apply to VDA transfer covered under S. 115BBH? If answer to above is negative, issue arises what should be considered as cost of acquisition of such VDA which is received under S. 56(2)(x)? **Our recommendation** • It is recommended to clarify that in context of VDA, the FMV which is taxed in hands of recipient u/s. 56(2)(x) shall be treated as 'cost of acquisition'.
87.	**Determination of situs for non-residents earning income from transfer of Virtual Digital Asset (VDA)?**	**Relevant provision of the Act** • S. 5 provides for taxation of income of NR which accrues/arises/ deems to accrue or arise in India. Section 9(1)(i) of ITL ('source rule') provides that any income accruing or arising, whether directly or indirectly, through or from any business connection in India, through or from any property in India, or through or from any asset or source of income in India or through the transfer of any capital asset situated in India, shall be deemed to accrue, or arise in India. • Section 115BBH provides for taxation of income from the transfer of any VDA. Further, amended S. 56(2)(x) provides for taxation of receipt of VDA for no or inadequate consideration in the hands of recipient of such VDA.

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		Issue for consideration Taxation under the new provisions apply for both resident as well as NR taxpayers. However, for creating a charge in the hands of NR, it would be imperative that the income is taxable under S. 5/ 9 of the Act. Issue arises in what circumstances VDA can be considered as located in India or having its situs in India, to trigger taxation under S. 5/ S. 9(1)(i) of the ITA. In other words, which place should be considered as of situs of a VDA? To illustrate, the above issue will be relevant to determine tax charge in cases like – ● Where non-resident sells VDA through an Indian crypto exchange or ● where non-resident sells VDA directly to a resident of India or ● where the non-resident carries on trading in crypto assets through an Indian crypto exchange. ● For residents of India to declare a VDA as foreign asset in its tax return in India. **Our recommendation** Situs of VDA can be related to one of the following places – ● Place of the residence of owner of VDA – This is supported by the HC rulings in India dealing with situs determination of intangible assets[4] as well as guidance of the UK HMRC guidance[5]

[4] CUB Pty Limited v. UOI & Ors. (2016) (71 taxmann.com 315) (Delhi HC); Followed in Mahyco Monsanto Biotech Ltd. v. UOI [74 taxmann.com 92]; Lal Products v. Intelligence Officer [WP © 13408/2009] [Kerala HC]
[5] CRYPTO22600 - Cryptoassets Manual - HMRC internal manual - GOV.UK (www.gov.uk)

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		● Place of IP Address of Block which represents the VDA – Each VDA is stored on a Block in the Blockchain which will have a unique IP Address of the node where the Block is created. Considering the VDA will always be stored on the particular Block, locale of such IP Address may be considered as situs of the VDA. ● Place of underlying asset (where VDA is digital representation of an underlying asset] – As per UK HMRC Guidance, where a virtual currency is issued as a representation of beneficial interest in any underlying asset (e.g gold bullion), the location of virtual currency is determined by reference to the location of the underlying asset. ● Place of utilization/ exploitation of VDA (E.g. VDA frequently traded on a crypto-exchange or VDA used as payment made for services/ goods) □ Unlike shares, VDA is neither issued by any particular entity nor it is held in any digital account in any specific country. VDA is held on a decentralised digital ledger (DLT) which is not based on any particular location, though it has a unique address/ number on a block chain and is also owned by a person. It is recommended that ● Situs of VDA may be linked to place of residence of owner of such VDA. Such parameter of situs will be certain, easily determinable and can be applied for all forms of VDA including NFTs, stable coins. ● As a second option, place of IP Address of the block may be considered which will be unique and determinable through the information on the DLT. □ It is recommended that the situs of VDA should not be place of exploitation which may vary at different points of time. Further, place of underlying asset may be relevant only for stable coins whose value is pegged to an underlying asset. This will also have additional consideration of finding situs of the underlying asset.

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88.	**Set off of loss from Virtual Digital Asset against the gains from the transaction of another virtual digital assets**	**Relevant provision of the Act** • Pursuant to Sec 115BBH(2)(b) the losses incurred from one kind of virtual digital assets (VDAs) cannot be set off against the gains from any transaction involving another VDA while computing tax **Issue for consideration** • The government has atleast acknowledged cryptocurrencies in India by defining them as Virtual Digital Assets (VDA) but still need to be regularised in India which is currently very indeterminate. A complicated tax framework has dampened the spirit of overseas investment by global exchanges in India which hampers the economic growth of India. One of the most scaling platforms of cryptocurrency exchange (Polygon, an Ethereum), has shifted most of its operations from India to other countries due to the policy uncertainty constituting the Indian crypto business transactions. Furthermore, crypto exchanges are shifting their base from India to overseas which makes investments more difficult for Indian investors due to FEMA regulations attracted in cross-border transactions. • Although the government recognizes the huge potential for tax revenue from the transactions of VDAs but the stringent laws governing non set off VDA losses against VDA gains is one of the hindrances to the VDA growth and thereby tax revenue loss. **Our recommendation** • Losses incurred from one kind of virtual digital assets (VDAs) should be allowed to set off against the gains from any transaction involving another VDA while computing tax. Non allowance of set off Virtual Digital Assets (VDA) has been very harsh on investors and has negative impact on market

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89.	**Scheme for Taxation of Non-Fungible Tokens (NFT's)**	**Background and Relevant provision of the Act** • A non-fungible token (NFT) is a unique and non-interchangeable unit of data which is stored on a digital ledger termed as blockchain and can be traded with interested buyers [6]. • The process of creation of NFT involves creating a digital record of the underlying asset on the blockchain. The underlying asset may be a physical asset such as a painting or a digital asset such as a music video. At times, a gas fee may be charged by the blockchain administrator/NFT marketplace for creation of the NFT on the blockchain. • An NFT is a proof, i.e. token of ownership of the underlying digital/physical asset, which is stored on a secured digital ledger, i.e. blockchain. It may be equated to a share certificate evidencing ownership of the share. An NFT may not have any independent attributable value which can be delinked from the underlying asset. • Many physical assets such as paintings and real estate[7] have been sold recently via NFTs and the NFT market has been booming recently. These NFTs can also be used for secondary transfers of the underlying asset or spreading the ownership of underlying asset amongst several persons who can then independently sell their fractional ownership. • Prior to insertion of s.115BBH, tax implications on sale of NFT were dependent on the tax implications of the sale of the underlying digital/physical asset tagged to the NFT. • The sale of the underlying asset may be taxed under the head 'income from business or profession', 'income from capital gains' or 'income from other sources' depending on the intent of holding the underlying asset, nature of asset and nature of income earned. Additionally, a

[6] https://en.wikipedia.org/wiki/Non-fungible_token
[7] https://propy.com/browse/propy-nft/
https://www.thehindu.com/scitech/technology/internet/virtual-real-estate-plot-sells-for-record-24-million/article37656785.ece

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		deduction may be possible for costs associated with minting, i.e. creation of the NFT (gas fees) and charges paid to the NFT marketplace on the sale of the NFT under the respective head of income. In this background, considering that NFT is merely a title record of underlying property, in the context of the new scheme of taxation for VDA introduced vide s.115BBH, it may not be justified to accord the same stiff tax treatment as is introduced for VDAs like bitcoins. This is primarily because bitcoins and NFTs do not share the same attributes and risk profile for taxpayers and Government. **Relevant provision** As per amendment by Finance Act 2022 – (i) S.2(47A) is inserted to define the term 'virtual digital asset'. S.2(47A) (b) states that VDA means, inter alia, "a non-fungible token or any other token of similar nature, by whatever name called". The class of NFT to be covered by the VDA definition as per s.2(47A) will be notified by the Central Government in the Official Gazette (hereinafter referred to as 'notified NFTs'). But the definition also covers any other token which is similar in nature to notified NFTs without requirement of separate notification for such other NFTs. (ii) S.115BBH states that any income from transfer of a VDA (and consequently NFTs) shall be taxed at 30 per cent with no deduction allowed except for cost of acquisition. No set of off loss incurred on transfer of a VDA (and consequently NFTs) shall be allowed against income computed under any provision, including that from other VDA.

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		(iii) S.194S provides for withholding at 1% on transfer of VDAs (and consequently NFTs) to a resident person subject to certain specified conditions. (iv) Receipt of a VDA (and consequently NFTs) for no consideration/ inadequate consideration attracts tax in the hands of the recipient under s.56(2)(x). (v) By way of illustration, if NFT attached to M. S. Dhoni's bat used by him in 2011 World Cup final is transferred which results in legally enforceable transfer of ownership of such physical bat, it is subject to normal tax treatment. On the other hand, if NFT is attached to digital photo of the same bat, then it is subject to special/stiff tax treatment as described above. (vi) It may be noted that prior to FA 2022 amendment, both the above types of NFTs were subject to normal tax treatment. But after FA 2022 amendment, while NFT relating to physical bat continues to be subject to normal tax treatment whereas NFT relating to digital photo of same bat is now governed by stiffer tax treatment. This is despite the fact that both NFTs merely represent ownership in the underlying asset. **Rationale for removing discriminatory tax treatment for NFTs representing ownership in physical assets vs. digital assets.** - The distinction between NFTs representing physical assets and digital assets does not appear to be based on sound policy reasons. As stated earlier, both types of NFTs were subject to normal tax treatment prior to FA 2022 amendment. The amendment by FA 2022 has resulted in bias towards physical assets and discrimination towards digital assets.

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		▪ The notified NFTs may include various types of digital assets such as pictures, music, videos, sports collectibles etc. The NFTs in such assets are very similar to physical assets like paintings, antiques or sports collectibles. They generally act as pride of possession for the owner. ▪ In case of a businessman dealing in intangible assets such as photos, videos and collectibles via NFTs, the disallowance of business expenditure (other than cost of acquisition) due to coverage under the VDA regime of taxation through Notification No. 75 would be very harsh. ▪ NFTs are not comparable to other assets contemplated to be covered under VDA definition as per s.2(47A)(a) such as bitcoin, Ethereum, etc. These crypto assets are not backed by an underlying asset. The bitcoin, Ethereum represents an asset in itself. The basis for the determination of the value of the NFT is definite, i.e., value of underlying asset, whereas the market forces of demand and supply may tend to lend bitcoin and Ethereum like assets more price volatility. ▪ From a tax policy perspective, it is reconcilable that crypto assets like bitcoins and ethers are subjected to stiff tax treatment which acts as a disincentive for investors in such assets – more particularly, considering that there are no specific regulatory norms or regulator governing the trade in such items. As per RBI, they pose systemic risks to the country's financial systems and in fact, RBI favours complete prohibition of such assets. The tax policy of subjecting such transactions to stiff tax treatment is, therefore, understandable. However, similar risks do not exist for NFTs to warrant a stiff tax treatment. ▪ International experience (illustratively guidance from Singapore and Australia) also supports that taxation of NFTs is largely based on taxation of the underlying asset rather than NFT being a separate class of assets . In other words, NFTs are provided the same treatment as underlying assets. For instance, since Singapore does not tax capital gains, capital gains from NFTs are not taxable in Singapore.

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		▯ Mere tokenization of an intangible asset should not attract onerous tax consequences such as higher rate of tax at 30%, no allowance for any expenditure other than cost of acquisition and no set off of losses against income computed under any provision of the ITL. Further, coverage of sale of intangible assets via NFT under the VDA regime will discourage transactions in the digital and blockchain space which would be against the intent of the Government to provide a boost to the digital economy. The intention of the Government to give impetus to the digital economy and blockchain technology is brought out in the Budget Speech to Finance Bill 2022, at para 111 where Government has clarified its vision to use blockchain and other technologies to issue digital currency. Refer following extracts : *"Introduction of Central Bank Digital Currency (CBDC) will give a big boost to digital economy. Digital currency will also lead to a more efficient and cheaper currency management system. It is, therefore, proposed to introduce Digital Rupee, using blockchain and other technologies, to be issued by the Reserve Bank of India starting 2022-23."* ▯ Further, the taxation of NFT as VDA is harsher than taxation of speculative incomes such as income from horse racing and gambling. The ITA allows loss from such activity to be set off against the income from same activity. The taxation of VDA is harsher in as much as it does not allow set off of losses of any kind. It is submitted that mere tokenization of an asset for the purpose of improving its marketability should not lead to such dire consequences, more so from the perspective of encouraging transactions in the digital space. ▯ The prevalent policies on NFTs are already having an adverse impact on the nascent NFT industry. Such policies will act as a deterrent to innovation and technological development in India. Given the potential opportunities which NFTs present for the economy including employment generation and to stop further brain drain of tech talent from India, the policies should be liberalized.

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		Recommendation It is submitted that Notification No. 75 may be withdrawn with retrospective effect so that NFTs are kept out of VDA tax regime for the time being. It can be reconsidered in future after compiling relevant economic data and assessing the risks from tax policy perspective. In the interregnum, if the Government is keen to keep track on such transactions, it may be clarified that it is covered by TDS u/s. 194Q dealing with purchase of "goods" and TCS u/s. 206C(1H) dealing with sale of "goods" at the rate of 0.1%.
	Mergers & Acquisitions and Business reorganisation related suggestions	
90.	**Clarify that definition of 'undertaking' in section (s.) 2(19AA) covers hive-off of business through divestment of shares of operating subsidiary**	**Rationale** S. 47(vib)/(vid) of the Income tax Act ('Act) provides for exemption from capital gains taxation to the resulting company as well as the shareholders in case of a 'demerger' where resulting company is an Indian company. Similar exemption is also provided in s.47(vic) w.r.t. capital gains arising from transfer of shares of an Indian Company or shares of a foreign company deriving substantial value from shares of an Indian company, held by the demerged foreign company to the foreign resulting company. For this purpose, the term 'demerger' is defined in s. 2(19AA) to mean a transfer of one or more 'undertakings' by the demerged company to a resulting company subject to satisfaction of conditions specified therein. Explanation 1 to s. 2(19AA) defines 'undertaking' to include any part of an undertaking, or a unit or division of an undertaking or a business activity taken as a whole but specifically excludes individual assets or liabilities or any combination thereof not constituting a business activity.

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		▪ In many cases, businesses are housed in an operating subsidiary company for regulatory or commercial reasons. ▪ For instance, extant RBI or IRDA or SEBI guidelines do not permit banking, NBFC, insurance or AMC business to be undertaken along with any other business activity under the same legal entity. Any business group desiring to enter any such regulated business is required to set up a separate SPV/subsidiary to undertake such business. ▪ Similarly, in infrastructure sector, separate SPVs are required to be set up for executing individual infrastructure projects due to mandate of tender conditions issued by NHAI. ▪ Even commercially, business groups find it more expedient to commence any new business within the fold of a new subsidiary for diverse reasons like protection of existing business from risks of new business, invite PE investors, ease of divestment, etc. ▪ In this regard, it may be noted that, while the business/ project may be housed in a separate subsidiary/SPV, the holding company and its management are actively involved in the business of the SPV. The holding company raises borrowing for the SPV through its own credentials. The financial parameters of the holding company and other subsidiaries like turnover, net worth, work experience, past performance, etc. are considered for granting new projects to SPV. The operating subsidiary is virtually identified as extension of business group. ▪ S.2(19AA) refers to transfer of an 'undertaking' from one company to another. There is an ambiguity whether it encompasses ownership of business through operating subsidiary and transfer of shares of such operating subsidiary as a mode of transfer of business. ▪ More particularly, in regulated businesses, it is difficult to transfer the business from one legal entity to another. Even the acquiring business group is required to house the business activity in

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		a separate company. Hence, the transfer of shares of the operating subsidiary is a more efficient mode of hive off of business. • This also resonates with divestment programme of Government where Government transfers shares representing controlling interest in an operating company (like Air India) to successful bidder from private sector instead of transferring the business from the legal entity. • S. 2(19AA) already has protective conditions in respect of court approved scheme, continuity of business in the form of transfer of all assets and liabilities, going concern requirement, 75% of shareholders of demerged company becoming shareholders in resulting company, etc. Further, it requires consideration for transfer to be paid in the form of issue of shares of resulting company to shareholders of demerged company. • If the definition of 'undertaking' is expressly clarified to include shares representing controlling interest in operating subsidiary, it will clear the ambiguity in the matter and enable business groups to undertake demerger of operating subsidiary in a tax efficient manner. There is no revenue loss to the Government since the resulting company and shareholders of demerged company inherit the same tax cost as demerged company. The tax cost of shares of operating subsidiary in the hands of the demerged company will become tax cost in hands of resulting company (Refer, s.49(1)(iii)(e)). In the hands of shareholders of demerged company, the tax cost of demerged company shares is pro-rated on the basis of net book value of assets and split between shares of demerged company and shares of resulting company (Refer, s.49(2C)/(2D)). • For transfer of business undertaking in demerger, s.72A(4) permits transition of business loss and unabsorbed depreciation relatable to the demerged undertaking to the resulting company. In case of transfer of shares of operating subsidiary, there will be no requirement to transition such loss or unabsorbed depreciation since the losses/unabsorbed depreciation remain within the fold of subsidiary company. However, a consequential amendment is required in s.79 to

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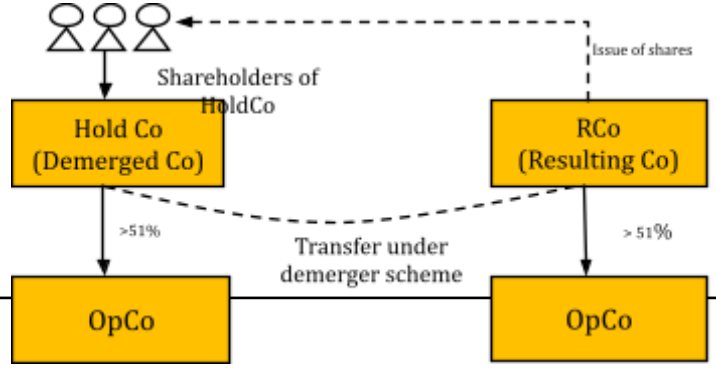
		protect the carry forward of business loss in the hands of the operating subsidiary, being a closely held company, in view of change in shareholding beyond 49%. **Recommendations** - It is recommended that S. 2(19AA) be amended to expressly clarify that shares of operating subsidiaries qualify as eligible undertaking capable of being demerged in a tax-neutral manner under a court-approved scheme. - Furthermore, a consequential amendment be also made to s.79 to protect the carry forward of business loss in the hands of the operating subsidiary, being a closely held company, in view of change in shareholding beyond 49% by such court approved demerger. **<u>Illustration to demonstrate ability of existing tax framework to ensure that 'tax neutrality' granted to hive-off of business through divestment of shares of operating subsidiary does not result in tax leakage</u>** Below is a simple illustration which shows that once such amendment is made, the existing framework of demerger related provisions in the Act ensure that the transaction is tax neutral for demerged company, its shareholders and resulting company. 

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		Assume that Hold Co (Demerged company/DCo) holds more than 51% shares in OpCo which is an operating subsidiary in a regulated business. The transaction of demerger involves transfer of shares in OpCo to RCo (Resulting company) under NCLT approved demerger scheme in consideration of which RCo issues its own shares to shareholders of DCo. All three companies DCo, OpCo and RCo are Indian companies. All other conditions of 'demerger' u/s. 2(19AA) are fulfilled as follows :- 1. Entire shareholding in Opco is transferred by DCo to RCo which results in transfer of all the assets and liabilities of regulated business carried on by OpCo getting transferred to RCo by virtue of demerger 2. The transfer of shares of OpCo is at value incompliance with clause (iii) of s.2(19AA) 3. In consideration of demerger, RCo issues its own shares to shareholders of DCo on a proportionate basis 4. Shareholders holding not less than 75% of value of shares in DCo become shareholders in RCo by virtue of demerger 5. The control over regulated business carried on by OpCo is transferred on a going concern basis through the medium of transfer of shares

<table>
<tr><th>Sr. No.</th><th>Subject</th><th>Comments / Recommendations</th></tr>
<tr><td></td><td></td><td>
The Balance Sheet of DCo prior to demerger is as follows :-
<table>
<tr><th>Liabilities</th><th></th><th>Rs. in Cr</th><th>Assets</th><th>Rs. in Cr</th></tr>
<tr><td>Share Capital (A)</td><td>500</td><td></td><td>Shares of OpCo</td><td>1000</td></tr>
<tr><td>General Reserves (B)</td><td>1500</td><td></td><td>Other Assets</td><td>2000</td></tr>
<tr><td>Net worth (A + B)</td><td></td><td>2000</td><td></td><td></td></tr>
<tr><td>Liabilities (unrelated to OpCo shares)</td><td></td><td>1000</td><td></td><td></td></tr>
<tr><td>Total</td><td></td><td>3000</td><td>Total</td><td>3000</td></tr>
</table>
RCo will issue its own shares to shareholders of DCo on proportionate basis based on fair exchange ratio as determined by registered valuers/merchant bankers and approved by shareholders and creditors of both DCo and RCo, NCLT and other regulatory authorities like RBI, IRDA, SEBI, etc.

One of the shareholders of DCo is Mr. X who holds 20% in DCo. The cost of such shares in his hands is Rs. 100. By virtue of demerger, he gets proportionate shares of RCo.

<u>Tax implications in hands of DCo (Demerged company)</u>

1. The transfer of shares of OpCo to RCo will be exempt from capital gains u/s. 47(vib)
2. The transfer of shares of OpCo of Rs. 1000 will be reduced from Reserves of DCo. But it is clarified by s.2(22)(v) that such reduction does not constitute ‘dividend’ in the hands of shareholders of DCo.

<u>Tax implications in hands of RCo (Resulting company)</u>
</td></tr>
</table>

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		1. The tax cost of OpCo shares in hands of RCowill be same as cost of acquisition in the hands of DCoi.e Rs. 1000. (Refer, s. 49(1)(iii)(e) r.w.s 47(vib)). 2. Furthermore, the holding period of shares of OpCo in hands of RCo will include the period for which shares were held by DCo. (Refer, Exp 1(b) to s. 2(42A)r.w.s 49(1)) 3. The receipt of shares of OpCo does not trigger 'gift tax' implications in hands of RCo u/s. 56(2)(x) in view of clause (IX) of proviso to s.56(2)(x) in terms of which transaction exempt u/s. 47(vib) is excluded from the applicability of s.56(2)(x) **Tax implications in hands of OpCo** 1. There is no tax implication in hands of OpCosince there is mere change in its shareholding. However, if OpCohas brought forward losses, it may lapse due to change in shareholding beyond 49% for which it is represented that consequential amendment may be made in s.79 to protect carry forward and set off of such losses. **Tax implications in hands of Mr. X – shareholder of DCo** 1. Mr. X gets shares of RCoin addition to holding in DCo. It is clarified by s.2(22)(v) that such receipt does not constitute 'dividend' in hands of Mr. X 2. The transaction of receipt of shares of RCois not regarded as 'transfer' u/s. 47(vid) 3. The receipt of shares of RCo is protected from 'gift tax' implications u/s. 56(2)(x) in view of clause (IX) of proviso to s.56(2)(x) in terms of which transaction exempt u/s. 47(vib)/(vid) is excluded from the applicability of s.56(2)(x)

<table>
<tr><th>Sr. No.</th><th>Subject</th><th>Comments / Recommendations</th></tr>
<tr><td></td><td></td><td>4. The cost of acquisition of shares of DCo of Rs. 100 will be split between shares of DCo and RCo in the proportion of net book value of assets of DCo to ‘net worth’ (i.e share capital + general reserves) of DCo. The split will be as follows :-
<table>
<tr><th>Particulars</th><th>Prior to demerger</th><th>Ratio of net book value to net worth</th><th>Post demerger</th><th>Section</th></tr>
<tr><td>Cost of shares of RCo</td><td>-</td><td>1000 (50%)</td><td>50</td><td>49(2C)</td></tr>
<tr><td>Cost of shares of DCo</td><td>100</td><td>2000</td><td>50</td><td>49(2D)</td></tr>
<tr><td>Total</td><td>100</td><td></td><td>100</td><td></td></tr>
</table>
Furthermore, the holding period of shares of RCowill include period for which shares of DCo were held by Mr. X (Refer, Exp 1(g) to s.2(42A))

In future, if Mr. X sells shares of RCo, the cost of acquisition will be taken at Rs. 50.</td></tr>
<tr><td>91.</td><td>Section 170(2A) - Expanding the scope of “business reorganization” to include the scenarios which may not result in succession of business</td><td>Rationale and issue:

The intent behind s.170(2A) is that proceedings carried on in the name of predecessor should not be invalidated due to retrospective effect of court order which takes effect from a past date.

For this purpose, it is deemed that the proceedings carried in the name of predecessor during the course of ‘pendency’ shall be deemed to be made on successor. The term ‘pendency’ is</td></tr>
</table>

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	and rationalization of provision where predecessor continues to be in existence post sanction of court scheme	defined to mean the period between the date of filing application before competent authority and the date of receipt of competent authority's order by the PCIT/CIT. In case of demerger, the demerged company continues after the demerger. The demerger involves transfer of one or more business undertakings from demerged company to resulting company. However, the new provision states that the assessment shall be deemed to have been made on the successor. Ideally, the tax liability pertaining to demerged undertaking alone should be assessed on the successor. **Recommendations:** Where the predecessor continues to exist (like in demerger or slump sale/exchange), it may be clarified that the proceedings carried on in the name of predecessor will continue to apply to the extent of assets and liabilities remaining with the predecessor.
92.	**Extension of benefits of carry forward of losses in intra-group reorganisation to all private sector companies**	**Rationale and issue:** S.79 facilitates intra-group reorganisation post strategic divestment of PSU where the ultimate control remains with the same acquirer company. For instance, now that Tatas have acquired Air India, if they decide to merge Vistara and/or Air Asia with Air India or bring them under a common vertical, S.79 will not be a hurdle in carry forward and set off of Air India's losses. The industry had made representations that such facility be also extended to private sector companies which carry out such intra-group reorganisation for various business reasons. This is also supported by The Karnataka High Court ruling in the case of AMCO Power Systems Ltd. [TS-607-HC-2015 (Kar)] held that the term beneficial shareholding as used in section 79 would apply to the ownership by ultimate holding company as well, and not be restricted to the immediate shareholding.

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		Recommendation • Since the tax policy principle of there being no abuse in intra-group reorganisation so long as ultimate holding company remains same is recognised for a public sector company which becomes part of private sector, it is strongly recommended that the same policy dispensation may be extended to private sector to avoid irrational discrimination between the two sectors. Accordingly, the benefit of carry forward of losses in intra-group reorganization may be allowed to all private sector companies where the ultimate holding company is the same before and after intra-group reorganization.
93.	**Exception to applicability of section 79 to stressed companies**	**Rationale:** • Section 79 of the Act restricts carry forward of losses where there is change of shareholding of more than 49% • Finance (No. 2) Act, 2019 provided exceptions to this section inter-alia to companies where change in shareholding takes place under Insolvency and Bankruptcy Code 2016. • Further exception has been provided to companies where change in shareholding takes place in a previous year pursuant to a resolution plan approved by the Tribunal under Section 242 of the Companies Act 2013. • Though the Budget Speech of the Finance Minister while introducing this amendment mentions about granting 'relief to stressed assets' there is no corresponding amendment to this effect. • However, no relief to Distressed companies for Carry forward and set off of losses in case of change in shareholding. **Recommendation:**

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		▪ It is recommended that there should be some clarification / exception and the above relief should be granted to 'stressed companies' who have not pursued the IBC route. ▪ This shall give a much needed impetus to the Bankers/ power sector entities, which has been finding difficult to find buyers for stressed companies. Also, it shall act as a push for those companies who venture to acquire and turnaround such stressed companies.
94.	**Tax on buy-back of shares under section 115QA be omitted**	**Rationale**: ▪ A domestic company doing buy-back of shares is liable to pay tax on the distributed income – which is defined to mean the consideration paid by the company on buy-back as reduced by the amount received by the company at the time of issue of shares. ▪ With effect from 5th July 2019 this section has been made applicable even to listed entities also. In case of listed entities, the shares get transacted quite frequently and the shareholder are liable to pay tax on the difference in prices in the form of capital gains. Thus, the real income earned by the shareholder by surrendering shares in the buy-back is the difference between the buy-back price offered by the company and his/her purchase price of such shares. ▪ However, the buyback tax gets levied on the company on the entire difference between the buy-back price and the issue price. To illustrate, if the issue price is Rs. 10 and the shares have changed hands frequently such that the last shareholder has acquired the shares for Rs. 100 and buyback is made at Rs. 120, the buyback distribution tax is levied on Rs. 110 (Rs. 120 – Rs. 10) even though all shareholders who sold the shares in the intervening period paid tax on Rs. 90 (Rs. 100 – Rs. 10). This results in double taxation of Rs. 90.

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		▯ This results into double taxation of the same income though in the hands of different assessee. Therefore, it is necessary to eliminate double taxation. Hence section 115QA be omitted and the buyback of shares be made taxable in the hands of respective shareholders. **Recommendation**: ▯ To eliminate double taxation the buy back tax under section 115QA be omitted and the gain on buyback be made taxable in the hands of respective shareholders by omitting section 10(34A).
95.	**Applicability of S. 115QA in the case of redemption of preference shares and capital reduction**	**Rationale**: ▯ Section 115QA of the Act provides that a company purchasing its own shares is required to pay buy back tax. Transactions such as cancellation of shares pursuant to capital reduction/redemption of preference shares though not treated as purchase of its own shares under the Companies Act, 2013, on a plain reading of the Act, unintendedly these are getting covered under section 115QA of the Act.. **Recommendation**: ▯ It is recommended that transfer of shares to the company which are not effectively buy-back of shares via a scheme of capital reduction or redemption of preference share should be carved out from applicability of section 115QA of the Act..
96.	**Liberalize the provisions to allow deduction of all legitimate expenses incurred for commencement or**	**Existing provision** ▯ S.35D allows an Indian company or any other resident person to amortize preliminary expenses, over period of 5 years, which are incurred before the commencement of business or towards extension of any undertaking post commencement of business.

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	extension of business [S. 35D]	▪ The eligible business expenditure which are allowed as deduction are enlisted under S.35D(2), these include: (i) Expenditure incurred towards preparation of the feasibility or project, conducting of the market survey or the engineering services. This is further subject to condition that work in this connection is carried out by the taxpayer itself or, prior to amendment by Finance Act 2023, a concern approved by CBDT. (ii) Legal charges paid for drafting agreements as necessary for setting up or conduct of the business of the taxpayer. (iii) Expenditure incurred towards legal charges for drafting or printing Memorandum and Article of company, registration of company, the issue of shares or debenture for public subscription being underwriting commission, brokerage, and charges for drafting, typing, printing and advertisement of the prospectus. (iv) Other expenditure as may be prescribed. ▪ The aggregate deduction under this section is further capped to 5% of 'cost of project' or in case of Indian company, at its option, 'capital employed in business' (excluding share premium). ▪ **FA 2023 has relaxed the condition about CBDT approval for concern carrying out feasibility studies. As a result,** the work pertaining to feasibility or project reports, survey, engineering services could be carried out by any concern even if not approved by CBDT. Pursuant to amendment there is no requirement for the work to be carried out by only such concerns as approved by CBDT. ▪ The taxpayer incurring such preliminary expenditure needs to prepare and furnish a statement before tax authority in prescribed form within a certain time limit.

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		Issues ▪ As a welcome step, the amendment would ease out the compliance burden for companies since they are not required to obtain feasibility or project reports from CBDT approved consultants. However, the scope of S.35D continues to be restrictive and covers limited expenditure within its scope. ▪ S. 35D still does not cover expenses for increase in share capital other than public issue. (i) Present scope of S.35D(2) restricts the allowability of expenses in connection with issue of shares (for increase in share capital) which is public offer. The expenses incurred towards issue of shares under private placement or to Qualified Institutional Buyers etc. are not within the ambit of section. (ii) Taxpayer incurs various expenses for raising funds from private players including statutory fees for increase in authorized capital, legal fees, certifications from auditors, payments made to merchant bankers etc. (iii) Since the expenditure incurred is in nature of capital and not revenue, the same is also not allowable as business deduction while computing business income. Further, expenditure cannot form part of “actual cost” of depreciable asset to claim depreciation allowance. (iv) The taxpayer raising funds from private issue are burden with cost of issue which is not allowable as revenue deduction or as depreciation or as preliminary expenditure under S.35D. ▪ The quantum of deduction is restricted to 5% of “cost of project” or “capital employed in business” (excluding share premium), whichever is lower

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		(i) The section presently limits the maximum amount of expenditure allowable as deduction. This is irrespective of fact that taxpayer incurs legitimate business expenditure before or post commencement of business. (ii) Taxpayer incurring legitimate business expenditure in excess of upper limit placed under section are burdened with such cost which is not allowable as revenue deduction or as depreciation or as preliminary expenditure under S.35. • S.35D was inserted by Taxation Laws (Amendment) Act, 1970 on the recommendation of Bhootalingam Committee on the principle that the tax law should allow deduction or amortization for all legitimate business expenditure. Since then, there is no change or modification to list of expenses under S.35(2) which are allowable as expenditure. The change in business models and regulatory requirement etc., requires taxpayers to incur several expenses in connection with commencement of business. Existing list fails to capture and allow deduction for such expenditure which are genuine in nature. • In either of the above situations, the additional cost may remain as sunk cost for taxpayers. Hence, there is need to liberalize the provisions to allow legitimate business expenditure. **Recommendations** • It is recommended that S.35D(2) be modified to allow expenditure incurred towards issue of shares whether through public offer or private placement. • It is recommended to remove limit of 5% of “cost of project” or “capital employed in business” (excluding share premium) to liberally allow amortization for all legitimate business expenditure.

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		▯ It is recommended to revamp the provision of S.35D(2) with more liberalized approach to allow genuine and legitimate expenses incurred in connection with commencement of business which neither depreciable nor allowable as revenue deduction.
97.	**Section 2(22) read with section 49** **Value of deemed dividend to be allowed as cost**	**Rationale**: ▯ Section 2(22) provides for taxation of distribution of profits in the form of assets, debentures, debenture stock, deposits etc as dividend in the hands of the shareholder. ▯ Once shareholder pays tax on receipt of asset in the form of dividend income – then the fair market value of the asset should be allowed as cost to the shareholder at the time of subsequent sale thereof. ▯ Similar provision exists on taxation of ESOP shares where the value on which tax has already been paid gets allowed as cost under section 49. ▯ There should be express provision in section 49 whereby the shareholder should be allowed cost of asset based on the value the basis of which tax has been paid by him as deemed dividend. **Recommendation**: ▯ Section 49 be amended to provide for cost of acquisition in relation to assets acquired / received by a shareholder on which income tax has been charged / paid by the shareholder as deemed dividend under section 2(22). ▯ This amendment should be made retrospective from the date the deemed dividend under section 2(22) has been introduced into the Statue in line with the fair principles of eliminating double taxation.

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98.	**Extend carry forward and set off of accumulated business loss and unabsorbed depreciation on amalgamation to other sectors not owning an 'industrial undertaking' (such as real estate/ infrastructure sector, service sector or organised retail/trading sector)**	**Rationale** • Provisions of s. 72A of the Act permit carry forward of business loss and accumulated depreciation in case of amalgamation only to certain specific types of companies such as those owning an industrial undertaking, banking companies, etc. Moreover, the provision deems such losses to be incurred in the year of amalgamation thereby resetting the 8-year clock for set-off of business losses against profits of subsequent years in the hands of the amalgamated company. • Companies in the real estate/ infrastructure sector, service or organized retail/trading sector are generally not eligible for such benefits. • This provision was inserted when India was a capital-intensive country. However, now-a-days, most of the newer companies have adopted a capital light model and existing players are also slowly shifting from capital intensive to a capital light model. • The services sector has been the bulwark of the Indian economy contributing about 54% of the total GVA in FY21[8]. It has also attracted significant foreign investment totaling to more than 16%[9] of the total FDI inflows into India. This sector also contributes significantly to India's exports wherein India's service exports in 2020-21 were USD 208.8 billion (constituting 41.8% of total exports)[10]. The sector provides large scale employment. As per ILO estimates (2019), services sector in India contributed 32% of the total employment in the country, with industry's share only at 25% and manufacturing sector's share at merely 12%. • However, with the advent of globalization and liberalization resulting in the influx of foreign entities into India, the increasing competition has resulted in a pressing need for small

[8] Ministry of Statistics and Programme Implementation (MOSPI)
[9] Finance, Banking, Insurance, Non-Fin / Business, Outsourcing, R&D, Courier, Tech. Testing and Analysis, Other
[10] Ministry of Commerce

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		companies in the service and organised retail/ trading to consolidate their resources to survive. Moreover, several service sector companies are looking for optimizing the operations by amalgamation with other companies even due to unprecedented Covid-19 situation. • With growing emphasis on the digitization of economy and major portion of Indian GDP being contributed by service sector there seems to be no rationale for treating the service sector differently than manufacturing sector and restricting the applicability of s.72A only to manufacturing sector and select service sector. • Even internationally, where transition of losses is permitted in major developed countries such as US, UK, Singapore or even developing countries such as China and Russia (which are members of BRICS), no such artificial distinction is made and transition of losses is permitted to companies in all sectors with the safeguards of continuity of business and/or continuity of ownership. • While admittedly, safeguards to ensure continuity of business in case of manufacturing sector [in terms of achieving production of 50% of installed capacity and maintenance of 75% of assets post-merger] may not be feasible for service/ trading sector, safeguards inserted internationally may be illuminative: o United Kingdom – Transition of losses to amalgamated company is subject to there being no scale down of business or change in its nature or ownership for 5 years subsequent to merger o Singapore – Transition of losses to amalgamated company is permitted subject to shareholders holding 50% or more shares being the same and there being no break in continuity of the business

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		o Hong Kong – Transition of losses is to amalgamated company is subject to bona fides. Where sole/ dominant purpose is utilization of losses and there is change in the nature of business such losses are lost. o China – Transition of losses to amalgamated company are permitted subject to satisfaction of the following conditions: ▪ The amalgamation must have bona fide business purpose and must not be carried out with the primary objective of reducing, avoid or deferring tax payments. ▪ At least 75% of equity interest in acquired company must be acquired in an equity acquisition or at least 75% of transferring company's assets must be acquired in an asset acquisition. ▪ At least 85% of total consideration received must be in the form of shares. ▪ There must be no change in the nature of activities for 12 months post amalgamation. ▪ Shareholders holding atleast 20% of shares in the amalgamating company must continue to hold shares in amalgamated company for atleast 12 months post amalgamation. The extension of s.72A to other sector will enable tax efficient business reorganization of companies and thereby protect value for shareholders. It will enable stronger companies to absorb small/weak companies, protect jobs and also secure the interests of financial and operating creditors by avoiding liquidation of financially stressed companies. The revenue's interest can be protected by providing appropriate safeguard based on international precedence.

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		▯ The parameter of employee headcount or payroll expenditure is recognized in several contexts of income tax as parameter indicating "substance" of the entity. Refer, the following illustrations :- **o Employee headcount** ▪ Prior to 2016, deduction u/s. 80JJAA was linked to condition of at least 10% increase in the number of 'regular workmen'. Post 2016, it is linked to increase by at least one employee as compared to last day of preceding year. ▪ Circular No. 6 of 2017 dated 24 January 2017 laying down guidelines for determination of 'place of effective management' (POEM) adopts number of employees in India and number of employees outside India as one of the criterion in 'active business outside India' (ABOI) test. For this purpose, it is clarified that the number of employees shall be the average number of employees as at the beginning and at the end of the year and shall include persons, who though not employed directly by the company, perform tasks similar to those performed by the employees. ▪ For testing newness of SEZ unit engaged in software development or ITES, it was clarified in CBDT Circular No. 14/2014 dated 8 Oct 2014 that taxpayer can demonstrate newness of the SEZ unit by satisfying any one of following two tests :- ● Number of technical manpower transferred in the first year of commencement of business of new unit does not exceed 50% of total technical manpower actually engaged in development of software/providing ITES

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		● The net addition of the new technical manpower in all units of the taxpayer is at least equal to the number that represents 50% of the total technical manpower of the new SEZ unit during the first year of commencement of business of new unit. ▪ Form No. 3CEAD (CbCR report) prescribed vide Section 286 r.w. Rule 10DB requires reporting entity to report, as one parameter, the number of employees in each tax jurisdiction ▪ In 'Under Taxed Payments Rule' (UTPR) under proposed Pillar 2 of BEPS laying down global minimum tax standard, one of the criterion for allocating UTPR to a jurisdiction is 50% of the ratio of number of employees in that jurisdiction as compared to number of employees in all UTPR jurisdictions. **o Payroll expenditure** ▪ Circular No. 6 of 2017 (POEM Guidelines) also adopts payroll expenses of employees in India and payroll expenses of employees outside India as one of the criterion in ABOI test. For this purpose, it is clarified that the term "pay roll" shall include the cost of salaries, wages, bonus and all other employee compensation including related pension and social costs borne by the employer ▪ The ongoing discussions on Pillar One in OECD proposes to compute "marketing and distribution safe harbour" to avoid double taxation of non-routine profits in a jurisdiction by adopting return on payroll cost (amongst others like depreciation). ▪ In 'substance based carve out' under Income Inclusion Rule under proposed Pillar 2 of BEPS laying down global minimum tax standard, one of the criterion for carve

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		out from minimum tax is 10% of eligible payroll expenditure in the source jurisdiction. - Hence, employee headcount or payroll expenditure can be adopted as a relevant parameter for evaluating business continuity condition in service sector. This condition ensures that jobs are protected while transitioning the losses. **Recommendation** - Benefit of carry forward and set off of accumulated business loss and unabsorbed depreciation prescribed under s. 72A be extended to amalgamation of service and organized retail/trading companies. - In Indian context, the following safeguards may be considered by the Government for service sector :- - <u>Conditions for amalgamating company</u> o Should be engaged in business in which the accumulated loss occurred or depreciation remains unabsorbed, for three or more years o Should continuously hold as on date of amalgamation at least three-fourths of the book value of the fixed assets held by it two years prior to the date of amalgamation o Should have a minimum number of average employee head-count (-say, 100 to 500) or average payroll expenditure of minimum threshold (- say, Rs. 5 Cr or Rs. 10 Cr) for two years prior to the date of amalgamation - <u>Conditions for amalgamated company</u>

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		o Should continue the business of the amalgamating company for minimum period of five years from the date of amalgamation o Should hold continuously for a minimum period of five years from the date of amalgamation at least three-fourths of the book value of fixed assets of the amalgamating company acquired in a scheme of amalgamation. o No fall in average employee head-count of employees or average payroll expenditure for 3 years post-merger beyond specified limit (-say, 75%). For this purpose, Government may also consider some further conditions like qualifying employees who are enrolled in PF and/or have PAN/Aadhar numbers. The reporting requirement in Form No. 62 to be furnished by practicing CA for verifying claim made u/s. 72A may also be expanded to cover the employee related details which the Tax Department can cross verify using Digital technology with PF records, UIDAI's Aadhar database, salary TDS returns, etc.
99.	**Conditions for carry forward of business losses in hands of resulting company in the case of demerger where demerged undertaking qualifies as "industrial undertaking", ship or hotel referred in s.72A(1)**	**Rationale:** In the case of amalgamation of companies involving industrial undertaking, ship, hotel, etc referred in s.72A(1), carry forward of business losses and accumulated depreciation of amalgamating company becomes the business losses and accumulated depreciation for the year in which the amalgamation takes place, thereby allowing fresh lease of life to business loss. However, in case of demerger, the resulting company is allowed to carry forward the business loss only for the remaining life. The rationale for limited benefit for demerger could be that there are no qualification conditions like s.72A(1) for loss transition in demerger

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		▯ But where the demerger involves demerger of undertaking which otherwise fulfils conditions of s.72A(1) in context of amalgamation, there is merit in extending the same benefit as amalgamation. **Recommendations:** ▯ It is recommended that a provision should be amended to bring parity on the carry forward of losses and unabsorbed depreciation between the amalgamation and demerger of companies in so far as demerger involves an undertaking which qualifies u/s. 72A(1). This would facilitate better reorganisation of businesses
100.	**Merger / demerger of LLP**	**Rationale:** ▯ There is no enabling provision for carry forward of losses in case of merger/demerger of two LLPs. **Recommendations:** ▯ It is recommended that benefits of section 72A of the Act be extended to merger and demerger undertaken between two or more LLPs.
101.	**Outbound merger**	**Rationale:** Merger of an Indian company into another Indian company is tax neutral if the prescribed conditions are satisfied. However, there is no specific exemption provided for merger of an Indian company into a foreign company. **Recommendations:**

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		It is recommended to provide for tax exemption on merger of an Indian company into a foreign company by way of a specific clause in section 47 of the Act with appropriate safeguards to ensure that the shareholder is taxed in India at subsequent stage on transfer of shares of the foreign amalgamated company – even if the shares of such foreign company do not derive substantial value from assets located in India – but only to the extent of value attributable to shares of Indian amalgamating company as compared to overall value of foreign amalgamated company at the time of amalgamation.
102.	**Exemption in the hands of foreign shareholders in case of merger**	**Rationale:** • Section 47(via) provides that transfer of shares of an Indian company transferred in a foreign amalgamation would not be regarded as a transfer provided certain conditions are satisfied. Similarly, Section 47(viab) provides that transfer of shares of a foreign company that derive value substantially from assets located in India, in an amalgamation, would not be regarded as a transfer provided certain conditions are satisfied. • However, unlike domestic mergers covered by S. 47(vii), there is no provision to provide relief to shareholders of amalgamating foreign company. Such shareholders may therefore be caught in the tax net in a case where the amalgamating foreign company derives value substantially from assets located in India. **Recommendations:** • It is suggested that specific provisions be incorporated in the Act to provide relief to the shareholders of the amalgamating foreign company, similar to section 47(vii) which exempts shareholders in a domestic amalgamation.

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103.	**Treat redemption of units of business trust as capital gains [S. 56(2)(xii)]**	**Existing Provision** • Section 56(2)(xii) provides that any 'specified sum' received by unitholder from business during previous year is taxable in the hands of unitholders. • 'Specified sum' is defined in Explanation to section 56(2)(xii) and is to be computed basis formula provided therein. Component A of the formula takes into account any sum distributed by business trust to unitholder during previous year. Considering the wide coverage of component 'A' amount received on redemption of units may be covered by Section 56(2)(xii) • On redemption, units held by unit holders are cancelled and in lieu of cancellation sum is paid by business trust to unit holders. • Units of business trust are capital assets. It is well settled that the event of redemption of unit is not a tax-free event. On redemption of units, there is 'extinguishment' of units and hence 'transfer of capital asset' and covered by capital gains chapter. **Issue** • Considering the wide language in parenthesis of section 56(2)(xii) – *'any sum received by unit holder from a business trust'*, amount received by unit holder on redemption can be covered by section 56(2)(xii). **Recommendation** • It is recommended that suitable amendment in language of section 56(2)(xii) or proviso should be inserted to section 56(2)(xii) to provide that income from redemption of unit shall be governed by capital gains chapter and not covered by section 56(2)(xii). Further, such distributions should be charged to tax in the hands of unitholders only when the distributions exceed the cost of acquisition of such units.

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		▪ Additionally, it is also recommended that an amendment shall be carried out to provide that no withholding shall be carried out at the time of sum paid on redemption as such leads to an onerous obligation on business trust to determine the taxability of each unit holder which is practically difficult if not impossible.
104.	**Provide for tax free pass through of exempt income earned by business trust and distributed to unit holders [S. 56(2)(xii)]**	**Existing Provision** ▪ In terms of SEBI (Investment Infrastructure Trust) Regulations, 2014 and SEBI (Real Estate Investment Trust) Regulations, 2014, business trust are permitted to park their funds in listed or unlisted debt, equity shares of listed companies, Government Securities, Money Market Mutual Fund etc. ▪ There are cases where business trusts have parked their funds in tax free Government Securities or tax-free bonds issued by Government companies[11] and income from such securities is exempt under section 10 of ITA. ▪ Exempt interest income earned by business trust does not enter computation provision on account of language employed in opening part of section 10[12]. Consequently, exempt income earned by business trust is not chargeable to tax under section 115UA(2) of ITA. **Issue** ▪ Section 56(2)(xii) *inter alia* provides that any sum received by unit holders from business trust and not chargeable under section 115UA(2) of ITA will become income in the hands of unit holders. Exempt income does not enter computation of income / does not form part of total income of business trust and hence not chargeable under section 115UA(2). If such exempt

[11] Bonds issued by NHAI, NABARD, PFC, IIFCL, HUDCO

[12] *In computing the total income of a previous year of any person, any income falling within any of the following clauses shall not be included -*

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		income is distributed by business trust to unit holders, same will be subjected to tax in the hands of unit holders **Recommendation** - The mechanism of partial pass through provided in section 115UA (to tax income once either in the hands of business trust or unit holders) and intent of insertion of section 56(2)(xii) do not seek to tax income which is otherwise exempt under general provisions of ITA. - Without prejudice to the recommendations made in above paras, section 56(2)(xii) may contain a carve out for exempt income [other than section 10(23FC)] of business trust distributed to unit holders.
105.	**Applicability in case of issue of shares upon merger/ demerger (tax neutral)**	**Rationale:** - Section 56(2)(viib) seeks to tax a company (other than a company in which the public are substantially interested) on issue of shares for a consideration higher than FMV as prescribed under super premium rules. There is no specific carve out for excluding cases of issue of shares pursuant to merger or demerger, which is a tax neutral transaction. **Recommendations:** - It is recommended that an appropriate clarification may be issued stating that section 56(2)(viib) would be inapplicable to transactions such as amalgamation and demerger.
106.	**Indirect transfer – Capital gains on transfer of shares of foreign entity deriving substantial value from assets located in India**	**Rationale**: - Finance Act 2012 introduced indirect transfer provisions, w.e.f. 1 April 1962, to tax income where a share or interest in an entity situated outside India derives substantial value, either directly or indirectly, in an Indian company.

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	(Proviso to S.9(1)(i))	▯ Circular 41 of 2016 issued pursuant to various queries raised by stakeholders seeking clarification on the scope of indirect transfer provision clarified that the provisions of IDT shall apply even to investors holding investment in India directly/ indirectly through FII/ FPI unless they are eligible for small shareholder exemption. This raised the risk of multiple taxation and Circular 41 was kept in abeyance pending decision in the matter. ▯ Addressing the above concerns, Finance Act 2017 inserted second proviso to Explanation 5 to s. 9(1)(i) wref 1 April 2015 stating Explanation 5 shall not apply to transfer of direct or indirect investment made by a non-resident in an FII registered as Category I or Category II FPI under the SEBI (FPI) Regulations, 2014 made under the SEBI Act, 1992. The exemption has also been extended to erstwhile FIIs notified for tax purposes prior to SEBI (FPI) Regulations, 2014 vide first proviso to Explanation 5 to s. 9(1)(i) applicable wref 1 April 2012. ▯ Certain categories of investors kept out of the purview: IDT provisions to apply in respect of such investors? o The amendment has left out non-resident investors making investments, directly or indirectly, in Indian Alternative Investment Funds and Venture Capital Funds, Infrastructure Investment Trusts, Real Estate Investment Trusts and mutual funds investing in Indian securities. Many such non-resident investors may directly or indirectly have assets that derive value from assets located in India and consequently the redemption/transfer of investment in the fund by these non-resident investors outside India may lead to tax liability in India. ▯ In the Budget Speech, it was mentioned that it is proposed to issue a clarification that indirect transfer provision shall not apply in case of redemption of shares or interests outside India as a result of or arising out of redemption or sale of investment in India which is chargeable to tax in India.

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		▯ Investment funds which are set up as multi-tier investment structures and making investments in India, may suffer multiple level taxation of the same income at the time of transfer / and then on repatriation of funds to foreign investors. ▯ Such taxability arises firstly at the level of the foreign company which holds investment in India and then at the level above at every upper-level investment fund entity on subsequent repatriation / upstreaming of funds which is undertaken by way of redemption or buyback of shares / interest of such foreign company / upper investment fund entity. This leads to double taxation of income arising practically from the same source. **Recommendations**: ▯ Modification in the definition of FII/ FPI to broaden their scope: It is recommended that the definition of FPIs is suitably modified to extend the benefit even for the following classes of FPIs: o SEBI registered Alternative Investment Funds [under the SEBI (Alternative Investment Funds) Regulations, 2014], SEBI registered Venture Capital Funds [under the SEBI (Venture Capital Funds) Regulations, 1996], SEBI registered Infrastructure Investment Trusts [under the SEBI (Infrastructure Investment Trusts) Regulations, 2014], SEBI registered Real Estate Investment Trusts [under the SEBI (Real Estate Investment Trusts) Regulations, 2014], SEBI registered mutual funds [under the SEBI (Mutual Funds) Regulations, 1996. ▯ We also expect that clarification exempting the applicability of the indirect transfer tax provisions to redemptions of shares or interests of any foreign entity having underlying Indian investments, as a result of or arising out of the redemption / sale of Indian securities which are chargeable to Indian tax, be issued.

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		▯ The following additional industry concerns are required to be addressed: ● To ease multiple-level taxation where private equity funds are set up as multi-tier investment structures, amendment should be brought in to clarify that the Explanation 5 of Section 9(1)(i) should not be applicable in respect of income arising to a non-resident on account of redemption / buyback of share / interest of the foreign company / entity deriving value substantially from India assets or where such income is not chargeable to tax in India under the Act in the hands of the first level foreign company. ● Exemption for (a) transfer of shares listed outside India (b) all forms of intra-group restructuring outside India (presently the provisions cover only amalgamation and demergers). ● The acquisition of rights/control and management is by virtue of additional issue of shares to either existing or new shareholders (could be rights shares issuance, or fresh shares issued to a new shareholder, etc.). It is recommended that such cases should not be covered under the definition of 'capital asset' and 'property' (see the discussion under Para 3.3 of the Expert Committee Report). ● As per the valuation rules, the manner for determining the FMV of shares of an Indian company has been prescribed without considering liabilities of the company. This is inconsistent with the valuation methodology generally followed and therefore FMV should also take into account the liabilities of the company. ● The valuation rules also remain silent on what criteria should be used when determining whether a particular methodology is internationally accepted or whether an accountant or merchant banker qualifies as having international repute. This may leave otherwise accurate FMV determinations, open to litigation.

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		● In view of the impracticality of tracking and reporting of all transactions, it should be clarified that the reporting be restricted to those transactions (a) whose income is covered within the ambit of indirect transfers which are deemed to accrue or arise in India (b) reporting entity would be the foreign transferor entity.
107.	**Exemption for transfer of Rupee Denominated Bonds from one non-resident to another non-resident outside India (S.47(viiaa))**	**Rationale**: Any transfer made outside India, of a capital asset being rupee denominated bond of an Indian company issued outside India, by a non-resident to another non – resident is exempt u/s. 47(viiaa). But no exemption is provided for buyback of RDBs by Indian issuing company from non-resident investors The terms of the issue of such bonds generally permit the Indian issuing company to buy them back, if so, permitted by RBI. It may be recollected that RBI had permitted Indian companies in past to buy back FCCBs which were trading at discount in overseas stock exchange. The buyback at discount benefits the Indian economy by reducing the outflow of foreign exchange (For example, if bond with face value of $ 100 is bought back at $ 75, it results in foreign exchange savings of $ 25 for India). But the exemption is restricted to transfer from one NR to another NR. It does not cover transfer by NR to Indian issuing company. Further, in case of transfer of listed bonds through stock exchange mechanism, the seller NR will be unable to ascertain whether purchaser on the other side is NR or Indian issuing company. This creates ambiguity and practical challenge for NR sellers **Recommendation**:

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		▯ The capital gains exemption u/s. 47(viiaa) be expanded to cover transfer of bonds from NR to Indian issuing company as well as a part of buyback.
108.	**New Long-Term Capital Gains (LTCG) regime @10% with 'grandfathering' of value appreciation till 31 January 2018 for equity shares, equity oriented MF units and units of business trust (w.e.f. A.Y. 2019-20)**	**Rationale**: ▯ **Clarify 'grandfathering' for listed shares held on 31 January 2018 in lieu of which shareholder may get shares of amalgamated or resulting company or subdivided subsequently** o An issue arises whether section 55(2)(ac) of the Act which provides for 'grandfathering benefit' for shares held on 31 January 2018 seeks to cover only listed shares that have been acquired before 1 February 2018 or whether it also cover the listed shares of the amalgamated company, received in lieu of the shares of the listed amalgamating company (which are acquired before 1 February 2018), by the shareholders of the listed amalgamating company pursuant to the Scheme. o The legal fiction of the Act in relation to amalgamation is to treat the event of amalgamation as a tax neutral event in the hands of the amalgamating company, amalgamated company and the shareholders of the amalgamating company. However, on a plain reading of the section, the Assessing Officer may suggest that section 55(2)(ac) will not apply in case where the shares of listed amalgamated company which are acquired post 1 February 2018 in lieu of the shares of the listed amalgamating company which were acquired by the shareholders prior to 1 February 2018.. This may lead to an unjust and unintended consequence in as much as the grandfathering of the gains up to 31 January 2018 would be denied resulting in the entire gain being held taxable. While it could be argued that such an interpretation of section 55(2)(ac) is unjustified and that the Act has to be read as a whole and section 55(2)(ac) ought to be read along with section 2(42A)- This could lead to unnecessary and avoidable litigation and uncertainty.

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		o Ironically, the definition of 'fair market value' contemplates a situation where the listed shares are acquired by way of transaction not regarded as transfer u/s. 47 in lieu of shares which are unlisted on 31 January 2018 (Refer Explanation (a)(iii)(B) to s.55(2)(ac)) but not shares which are listed on 31 January 2018. **Other tax neutral transactions where cost and holding period of previous owner is substituted in hands of successor which will face similar issue** o Similar issue arises in following illustrative cases where provisions of s.2(42A), s.47 and s. 49 provide for tax neutrality with cost and holding period substitution ● Shares of listed company held on 31 January 2018 which is demerged post 31 January 2018 and shareholders receive shares of resulting listed company. ● Shares of listed company held on 31 January 2018 which are subsequently subdivided into shares of smaller face value. ● Shares held by previous owner on 31 January 2018 which is received post 31 January 2018 under exempt transfer like gift, inheritance, settlement into trust, intra-group transfer between a Holding Company and its wholly owned subsidiary exempt u/s. 47(iv)/(v), corporatisation of firm, conversion of company into LLP, etc **Recommendation:** A specific clarification be issued that for the purpose of applicability of section 55(2)(ac) of the Act, the shares of the listed company received by the shareholders shall be deemed to be acquired from the date of acquisition of the previous owner, and/or as the case may be, assets in lieu of which shares listed on date of transfer were acquired, under transfer exempt u/s. 47.

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		▪ Further, it may also be clarified that, in a case where shares acquired are in lieu of shares listed as on 31 January 2018 under transfer exempt u/s. 47, the 'fair market value of such asset', for the purpose of section 55(2)(ac) of the Act, should be the fair market value of shares of the listed company held on 31 January 2018, which is the highest price of the equity shares of the listed company quoted on such exchange on 31 January 2018. ▪ In case of shares of demerged company held on 31 January 2018, the FMV of the shares of demerged company as determined in terms of Explanation (a) to s.55(2)(ac) may be pro-rated between shares of demerged company and resulting company as per the provisions of s.49(2C)/(2D). ▪ In case of sub division of shares, fair market value of shares as on 31 January 2018 be considered for the purpose of deriving cost of acquisition of shares received as a result of sub division
109.	**Exemption for exchange of shares in the course of delisting of listed subsidiary of listed parent under SEBI Delisting Regulations.**	**Rationale** ▪ The Board of SEBI has recently approved amendments to Securities and Exchange Board of India (Delisting of Equity Shares) Regulations, 2009 ('Delisting Regulations') which provide for delisting of a listed subsidiary through a scheme of arrangement. The amendments operate as follows: o Listed subsidiary can be converted into a wholly owned subsidiary of the listed parent through a scheme of arrangement where listed parent and listed subsidiary are engaged in same line of business.

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

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		o Further, the exchange of shares would not happen through stock exchange, instead, it would happen through scheme of arrangement as per the process laid down by SEBI. This would disentitle the public shareholders to substitute cost of shares in listed subsidiary with fair market value as on 31 January 2018 while computing capital gains. This would result in higher amount of capital gains thus higher incidence of capital gain tax. These tax implications to public shareholders (which may include a large number of small individual shareholders) would cause major hurdle in the implementation of the scheme and it is much likely that they may not vote in favour of the scheme of arrangement for delisting. As mentioned above the scheme of arrangement needs to be approved by 2/3 majority of the public shareholders. o Furthermore, the swap ratio in the scheme would be determined by independent valuers on a particular date (as may be determined by the Board of directors of the companies and approved by the shareholders/regulators). However, section 56(2)(x) read with rule 11UA requires valuation of shares on a valuation date (ie the date on which shares are received by the assessee) which would be certainly minimum 8 to 10 months ahead (considering the process involved) than the date considered for determination of swap ratio. Thus, there may be different fair values of the shares under consideration on the valuation date which is to be considered for the purpose of section 56(2)(x) read with rule 11UA and the date when swap ratio was determined. Such difference in fair value can result into unwarranted tax implications to the public shareholders as well as listed parent for a process which is highly regulatory driven. o Additionally, the listed parent would be required to withhold tax on the capital gains arising to non-resident public shareholders on account of exchange of listed subsidiary shares with its shares and undertake withholding tax compliances. Considering the

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		transaction would be in nature of share swap and without any cash consideration, it is administratively difficult to deduct tax and comply with withholding tax provisions. o The above tax incidence in the hands of public shareholders can cause major impediments in the implementation of this new way of reorganization and may not bring desired results of the scheme which is conceived and permitted by SEBI. o There are various existing provisions under the Act in relation to the business reorganization which provide tax neutrality (viz., merger, demerger, conversion of firms into companies or proprietary concerns into companies, transfer of capital asset by a company to its wholly owned subsidiary (and vice-versa), conversion of bonds / debentures / preference shares into shares / dentures / equity shares etc.). With the same end in view, new provisions should be inserted to provide tax neutrality on delisting of subsidiary through scheme of arrangement in accordance with the SEBI Regulations. It would also resolve the difficulties in compliance with withholding tax obligation while transacting with non-residents. These measures would also add to ease in doing business. To prevent any revenue leakage, capital gains arising on any future sale of shares of listed parent should be computed considering cost of shares in the listed subsidiary. o The economic impact on the shareholder of listed subsidiary who gets shares of listed parent is the same as shareholder of amalgamating company who gets shares of amalgamated company. The only difference is, there is no merger of the entities for the reasons cited in SEBI guidelines like regulatory restrictions, cultural differences, etc. Hence, from tax policy perspective, there is adequate justification for treating the exchange as tax neutral transfer. In addition to amalgamation and demerger, support can also be drawn from s.47(xvii) which treats transfer of SPV shares by promoter to

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		REIT/Invit in exchange for REIT/Invit units as tax neutral event for both normal tax and MAT purposes. o It would be impracticable to cover these transactions in Securities Transaction Tax regime (and consequential 10% LTCG regime u/s. 112A) since there is no cash flow involved in the transaction which is essentially a transaction of exchange or barter of listed subsidiary's shares with listed parent's shares. **Recommendation:** Accordingly, it is recommended that the following amendments should be made: **Tax treatment in hands of shareholder who receives shares of listed parent in lieu of holding of shares of listed subsidiary** o A new clause to be inserted in section 47 to provide 'any transfer, in a scheme of arrangement, of a capital asset being shares of a listed subsidiary where it becomes the wholly owned subsidiary of the listed parent pursuant to Delisting Regulations should not be regarded as transfer. o A new provision to be inserted in section 49 to provide that cost of acquisition of the shares in the listed parent company shall be deemed to be cost of acquisition of shares in the listed subsidiary. This would ensure that there is no tax leakage. o A new provision to be inserted in section 2(42A) to provide that in the case of a capital asset being shares in the listed parent which become the property of the assessee in a scheme of arrangement in accordance with Delisting Regulations, there shall be included the period for which shares in the listed subsidiary were held by the assessee.

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		o Benefit of substituting the cost of acquisition of shares in the listed subsidiary with fair market value of listed subsidiary shares as on 31st January 2018 should be allowed for the purpose of calculating any capital gains in future on transfer of shares in the listed parent. o Section 56(2)(x) should not be applied for any shares received by listed parent and public shareholders of listed subsidiary by way of transaction not regarded as transfer under newly inserted provision in section 47 of the Act w.r.t transfer of shares in a scheme of arrangement under Delisting Regulations. **Tax treatment in hands of listed parent which issues its own shares to shareholders of listed subsidiary in exchange of acquisition of shares of listed subsidiary** o The cost of acquisition of shares of listed subsidiary through Delisting should be taken at fair value as computed by Category I Merchant Banker for the purposes of arriving at swap ratio. **MAT exemption to shareholders of listed subsidiaries** o Similar to transaction of swap of shares held in SPV with REIT/Invit units by promoters which is treated as MAT neutral, the transaction of exchange of shares of listed subsidiary with shares of listed parent should also be made MAT neutral (and consequential deferment of MAT to year of transfer of shares of listed parent) by making following amendments :- ▪ Exclude any fair valuation gain/loss on exchange recognised in P&L

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		▪ Include actual gain/loss on transfer of shares (otherwise than through a tax neutral transfer) of listed parent computed with reference to cost of acquisition of shares of listed subsidiary ▪ Not to treat the exchange as per Delisting regulation as 'retired, disposed, realised or otherwise transferred' to trigger Ind-AS MAT impact under second proviso to s.115JB(2A) or first proviso to s.115JB(2C)
110.	**Conversion of LLP into company**	**Rationale:** ▪ Any transfer of capital assets by a firm/ LLP on conversion to a company are exempt from capital gains taxation u/s 47(xiii) of the Act, subject to certain conditions prescribed therein. However, no exemption is provided to partners of such firm/ LLP which is being converted into company. ▪ Similarly, an transfer of capital assets by a company on conversion to an LLP is also exempt from capital gains taxation u/s 47(xiiib) of the Act. Additionally, transfer of shares held in such Company to as a result of such conversation are also exempt from tax therein subject to prescribed conditions. **Recommendation:** ▪ It is recommended that section 47(xiii) of the Act be brought in line with provisions of section 47(xiiib) of the Act by providing specific exemption to partners pursuant to conversion.
111.	**Inclusion of other reserves (i.e. securities premium, capital reserve, retained earnings, balance in profit and loss account,**	**Rationale:** ▪ The Finance Act, 2000 introduced the computation mechanism of cost ratio for shares of demerged company and resulting company vide Section 49(2C) and 49(2D) of the Income-tax

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	etc.) while computing net-worth for the purpose of section 49(2C)	Act, 1961 (the Act). Section 49(2C) states cost of acquisition of shares of resulting company shall be determined as under: Cost of shares of demerged company X = Net book value of asset transferred / Net-worth of demerged company • Explanation to section 49(2C) and 49(2D) has defined 'net-worth'. Net-worth shall mean the aggregate of the paid up share capital and general reserves as appearing in the books of account of the demerged company immediately before the demerger. • The literal interpretation of the 'net-worth' definition has restrictive and unintended ramifications leading to absurd results on account of disparity between the numerator and denominator of the formulae. • Further, the cost ratio allocation is applicable provided a demerger is tax neutral. To be tax neutral, demerger needs to ensure that there is transfer of all assets and liabilities of the demerged undertaking. It is the book value of these assets and liabilities which forms the basis of numerator on a net basis. By implication, the numerator needs to be a carve-out from homogenous proportion of the denominator which should reflect net book value of assets of entire demerged company immediately before the demerger. • Given the above, there exists ambiguity towards inclusion of other reserves as specified above while computing cost ratio. • Moreover, other provisions of the Act like section 47(xii), 50B, 115JB etc. have defined net-worth either as 'share capital + free reserves (including share premium and any other reserves credited out of profits' or 'aggregate of total assets reduced by liabilities'. **Recommendation**

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		▯ Given the above, we believe the intent of the government appears to arrive at a logical result and provide accurate cost basis. Considering abovementioned reasons, it is recommended that the definition of net-worth as specified in explanation to section 49(2C) and 49(2D) be amended to provide as under: ● Alternative 1 – Net-worth shall mean aggregate of total assets less total liabilities as appearing in the books of account of the demerged company immediately before the demerger; or ● Alternative 2 – Net-worth shall mean aggregate of share capital + reserves (including but not limited to balance appearing in retained earnings, profit & loss account and share premium as also other reserves not available for distribution)
112.	**Determination of cost ratio under Section 49(2C) where net-worth of demerged undertaking is negative and/ or net book value of assets transferred is negative**	**Rationale** ▯ There are three possible scenarios here: ● Where net-book value of assets transferred is positive and net-worth of the demerged company is negative – In such a case, if one were to take a logical interpretation, entire cost should be allocated to resulting company shares; ● Where net-book value of assets transferred is negative and net-worth of the demerged company is positive – In such a case, if one were to take a logical interpretation, entire cost should be allocated to demerged company shares; ● Where both net-book value of assets transferred and net-worth of the demerged company are negative – In such a case, if one were to take a logical interpretation, the ratio should be applied inversely **Recommendation**

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		▪ Given that current 49(2C) formula does not envisage the aforesaid scenarios, this would lead to increased hardships to the taxpayer on account of litigation. Accordingly, it is recommended that section 49(2C) be amended to provide for the aforesaid scenarios.
113.	**Introduction of Group Relief for treating Parent and Subsidiary SPVs as one assessee for the purposes of Income Tax**	**Rationale:** ▪ Companies engaged in the generation of power and development of infrastructure projects are generally organized as SPVs which are owned by a parent. This is essential for the purpose of project finance as also considering the distinctive nature of each infrastructure project. ▪ As a result, for purposes of income-tax assessments, each SPV is treated as a distinct assessee and the profits / losses of one SPV are not available for set off against the profits / losses of other SPVs or of the parent. This creates a mismatch whereby while certain SPVs are necessarily incurring losses (in the initial years of any infrastructure project), the other SPVs or the parent forming part of the Group are required to pay income-tax on their profits. ▪ This anomaly is overcome in most countries by instituting Group Taxation. The concept of Group Taxation is to permit companies or SPVs in which the equity holding exceeds a specified percentage, say 75%, to be treated along with their parent and other SPVs as one Group so that the profits and losses of individual SPVs are set off against each other and the net profit of the Group is charged to tax. ▪ Group Relief is available under the tax laws of most countries including USA, UK, France, etc. and is an essential reform for the purpose of modernizing India's tax laws and bringing them on par with those of the world. ▪ On the Regulatory and Accounting fronts the law has already been amended, for example, under the Companies Act 2013, the parent company is mandatorily required to prepare consolidated financial statement including therein accounts of all its subsidiaries and associates.

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		The consolidated financial statements are required to be laid before the annual general meeting (Section 129). **Recommendation:** • Group Relief be introduced at least for companies engaged in the Infrastructure including Power Sector such that at the option of the parent, the entire Group of the parent and subsidiary SPVs is treated as one assessee for the purpose of income-tax.
114.	**Representation for granting cost step up consequent to withdrawal of exemption by s.47A on breach of s.47(iv)/(v) conditions**	**Background:** • Section 47(iv) of ITA provides exemption on transfer of capital asset by a holding company to a wholly owned subsidiary. The exemption granted is subject to conditions specified in section 47A of ITA. • Considering that the transaction of transfer of capital asset between holding company and wholly owned subsidiary is tax neutral, (a) cost of acquisition of capital asset in the hands of wholly owned subsidiary is equal to the cost of acquisition in the hands of holding company in terms of section 49(1)(iii)(e) of ITA (b) period of holding of capital asset in the hands of wholly owned subsidiary is reckoned from the date of acquisition of capital asset by holding company in terms of clause (i)(b) of Explanation 1 to section 2(42A) of ITA. • In case where the conditions laid down in sections 47(iv) read with section 47A of ITA are breached, the transferor is taxed on capital gains, earlier exempted, in the year of transfer of capital asset itself. Further, power has been granted to assessing officer under section 155(7B) of ITA to compute and charge the capital gains in the hands of transferor company in the year of transfer of capital asset.

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		▯ In case of trigger of section 47A of ITA, in terms of section 49(3) of ITA, the cost of acquisition of capital asset in the hands of the wholly owned subsidiary is equal to value for which subsidiary has acquired capital asset. ▯ It may be noted that, unlike section 155(7B) of ITA, there is no provision under ITA, for grant of cost step up in the hands of wholly owned subsidiary when the provisions of section 47A are triggered. In case where the capital asset transferred to wholly owned subsidiary is further transferred by wholly owned subsidiary prior to trigger of provisions of section 47A, there is no provision to recompute the income in the hands of wholly owned subsidiary. **Rationale and Issue:** ▯ The issue under consideration may be understood with the help of an example. Hold Co is a domestic company incorporated and resident of India. WOS, a domestic company, whose entire share capital is held by Hold Co. ▯ Hold Co had acquired immovable property in FY 2009-10 for Rs. 100 and such immovable property is held as capital asset. As a part of group restructuring, Hold Co is transfers immovable property to WOS for a consideration of Rs. 500 in FY 2023-24. Hold Co claims exemption under section 47(iv) of ITA and is not liable to pay tax on capital gains in FY 2023-24. ▯ In the hands of WOS, the cost of acquisition of immovable property is Rs. 100 in terms of section 49(1)(iii)(e) of ITA. Further, the period of holding of immovable property in the hands of WOS is to be reckoned from FY 2009-10 in terms of clause (i)(b) of Explanation 1 to section 2(42A) of ITA. ▯ Consider a case where, WOS transfers the immovable property in FY 2025-26 for Rs. 700. The transfer of capital asset received by WOS from Hold Co per se does not trigger provisions of

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		section 47A(1) of ITA. On transfer of immovable property, WOS will be required to discharge capital gains on Rs. 500 (Rs. 700 – Rs. 200)[13]. In FY 2030-31, Hold Co transfers the shares of WOS to third party. Transfer of shares of WOS will trigger provisions of section 47A(1) of ITA in the hands of Hold Co. Hold Co will be liable to pay capital gains in the year of transfer of capital asset i.e. FY 2023-24. Hold Co will be liable to pay capital gains on Rs. 400 (Rs. 500 – Rs. 100)[14]. Further, assessing officer has power under section 155(7B) of ITA to assess the capital gains income in the hands of Hold Co on breach of conditions laid down in section 47A(1) of ITA. In terms of section 49(3) of ITA, in case of trigger of provisions of section 47A, the cost of acquisition of capital asset in the hands of WOS will be equal to the transfer value i.e. Rs. 500. In the present case, WOS has discharged capital gains taking into account cost of acquisition as Rs. 100 in FY 2025-26 i.e. cost to previous owner. Unlike section 155(7B) of ITA, there is no specific provision under ITA, to give effect withdrawal of cost substitution by section 49(3) of ITA in the hands of WOS. Further, WOS may not be in a position file rectification application under section 154 or revision petition under section 264 of ITA as the time limit to file such application may have expired. In the present example, to the extent of Rs. 400, there will be double taxation – WOS has discharged taxes in FY 2025-26 of Rs. 600 and Hold Co will be required to discharge taxes in FY 2023-24 of Rs. 400. Total capital gains discharged is Rs. 1000 (Rs. 600 + Rs. 400). Had it been a case where Hold Co itself transferred the property to third party for Rs. 700, the capital gains discharged will be on Rs. 600 (Rs. 700 – Rs. 100).

[13] Indexation has been ignored for the present example
[14] Indexation has been ignored for the present example

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		Recommendation: • A provision along the lines of section 155(7B) of ITA must be inserted under ITA so as to recompute the capital gains income in the hands of wholly owned subsidiary on account of trigger of section 47A read with section 49(3) of ITA. This is merely a corresponding adjustment in the hands of wholly owned subsidiary on account of trigger of section 47A of ITA. • The above scenario and recommendation shall equal apply in case where wholly owned subsidiary has transferred capital asset to holding company and exemption is claimed under section 47(v) of ITA.
115.	**Representation on cost of acquisition of depreciable asset acquired under tax neutral transaction**	**Background:** • Section 47(iv) of ITA provides exemption on transfer of capital asset by a holding company to a wholly owned subsidiary. The exemption granted is subject to conditions specified in section 47A of ITA. • Consider a case where building held by holding company transferred to wholly owned subsidiary is to be used as office premises for its business. Accordingly, building is added to the block of asset of wholly owned subsidiary. • In terms of Explanation 4 to section 43(1) of ITA, actual cost of depreciable asset in the hands of wholly owned subsidiary is equal to cost in the hands of holding company had the transfer not taken place. Further, in terms of clause (a) of Explanation 2 to section 43(6) of ITA, the actual cost of depreciable asset in the hands of wholly owned subsidiary is equal to cost in the hands of holding company as reduced by actual depreciation allowed to holding company. In other words, the cost in the hands of wholly owned subsidiary is pegged down to cost in the hands of transferor company. The intent of Legislature seems to be to keep the transaction between holding company and wholly owned subsidiary as tax neutral in totality.

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		▪ As mentioned above, the exemption under section 47(iv) of ITA is subject to fulfilment of conditions laid down in section 47A. On trigger of section 47A(1) of ITA, holding company is required to discharge the taxes on capital gains which was earlier exempted. However, on trigger of section 47A of ITA, there is no back up provision in section 43(1) or section 43(6) of ITA to step up the cost in the hands of wholly owned subsidiary. **Rationale and Issue:** ▪ The issue under consideration may be understood with the help of an example. Hold Co is a domestic company incorporated and resident of India. WOS, a domestic company, whose entire share capital is held by Hold Co. ▪ Hold Co had acquired a building in FY 2020-21 for Rs. 100 and such building is held as capital asset. Hold Co has not used building for business purpose and hence not added in block of asset. As a part of group restructuring, Hold Co transfers building to WOS for a consideration of Rs. 500 in FY 2023-24. Hold Co claims exemption under section 47(iv) of ITA and is not liable to pay tax on capital gains in FY 2023-24. ▪ In the hands of WOS, the building is used as office premises and accordingly, building is added in block of asset and amount added is Rs. 100 in terms of section 43(1) / (6) of ITA. ▪ In FY 2030-31, Hold Co transfers the shares of WOS to third party. Transfer of shares of WOS will trigger provisions of section 47A(1) of ITA in the hands of Hold Co. Hold Co will be liable to pay capital gains in the year of transfer of capital asset i.e. FY 2023-24. Hold Co will be liable to pay capital gains on Rs. 400 (Rs. 500 – Rs. 100)[15]. Further, assessing officer has power under section 155(7B) of ITA to assess the capital gains income in the hands of Hold Co on breach of conditions laid down in section 47A(1) of ITA.

[15] Indexation has been ignored for the present example

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		? However, as mentioned above, on account of trigger of section 47A(1) of ITA, there is no provision under section 43(1) / 43(6) of ITA which provides that actual cost incurred by WOS to acquire the depreciable asset shall be considered as actual cost for claiming depreciation. ? In the present example, Hold Co will be liable to pay capital gains tax on Rs. 400 (Rs. 500 – Rs. 100)[16]. However, WOS continues to get depreciation on Rs. 100 only even where the transaction no more remains tax neutral. **Recommendation:** ? On the lines of section 49(3) of ITA, amendment may be carried out in section 43(1)/(6) of ITA to provide that the cost of acquisition of depreciable asset shall be actual cost incurred by wholly owned subsidiary in case of trigger of provisions of section 47A of ITA. ? The above scenario and recommendation shall equal apply in case where wholly owned subsidiary has transferred capital asset to holding company and exemption is claimed under section 47(v) of ITA.
	SEZ related	
116.	**New SEZ law to be introduced**	The Finance Minister in her Budget Speech for 2021 had announced that the existing SEZ Act will be replaced with a new legislation that will enable the states to become partners in 'Development of Enterprise and Service Hubs'. This will cover all large existing and new industrial enclaves to optimally utilize available infrastructure and enhance competitiveness of exports. In this light, we would like to make some recommendations on direct tax issues in current SEZ related provisions which can be addressed in the new legislation. The indirect tax issues are covered in our separate Post Budget representations on Indirect taxes. The direct tax issues are discussed

[16] Indexation has been ignored for the present example

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		below
117.	**Clarification to be provided on extending S.10AA benefits to SEZ units opting for work from home option**	**Rationale and issue:** • The pandemic has brought a paradigm shift in the ways of working across sectors, thus enabling employees to work from home. This trend can play an important role in ensuring balanced regional development, by enabling skilled professionals to work from anywhere in India, thus reducing congestion and infrastructural pressures on urban and semi-urban areas. • The Ministry of Commerce and Industry ('MOCI') has, inserted new Rule 43A 'Work from Home' in the SEZ Rules, 2006 vide Notification No. 775 dated 8 December 2022 giving much-awaited relief to India's sunrise sector of Information Technology / Information Technology Enabled Services. The rules, inter alia, provide clarity with regard to permission and procedure for an SEZ to allow WFH by its employees (including contractual employees). • While this is a welcome move, ambiguity on whether employees WFH should be considered as an extension of the SEZ facilities continues to persist (especially in cases where such employees are not connected to servers within the SEZ Unit through encrypted and secured networks while providing the required services to customers). **Recommendations:** • Expressly clarify that employees WFH should be considered as an extension of the SEZ facilities as long as there exists a direct nexus between the SEZ unit and the work done outside the SEZ unit and correspondingly the SEZ Unit is eligible for all corresponding tax and non-tax benefits in this regard. Such a clarification would be in line with similar clarifications issued in the past in relation to 'onsite' development of software, where tax benefits were made available.

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118.	**Redistributing the economic growth, improving disposable income of rural India and augmenting the tax base**	**Rationale** • The pandemic has shown that with work from home and adoption of digital technologies, businesses could be run from anywhere in the country. **Recommendations** In order to encourage more large business to move to hinterlands and provide gainful employment, the Govt could consider inter-alia: • Exempt capital gains arising from relocation with stipulated conditions including that these gains would be re-invested over a definite period, say within 3 years with local employment • Allow such investment into new IT parks developed in tier 2/3 cities by SEZ units to be treated as compliant with re-investment reserve requirements. • S.80JJAA deductions could be tweaked specifically to incentivize rural employment by corporates.
119.	**Clarification/ amendment to be sought on expanding the scope of utilization of SEZ Re-investment Reserve created for availing deduction under section 10AA of the Income Tax Act, to include all**	**Rationale and issue** • During 11th to 15th Year of operation (3rd Phase of 5 year Term) of the SEZ scheme, an Unit in SEZ can avail deduction under section 10AA of the Act provided it credits 50% the profit for a year to "Special Economic Zone Re-Investment Reserve Account". The same is required to be utilized for the purposes of the business for acquiring machinery or plant which is first put to use before the expiry of a period of three years following the year in which the reserve was created.

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	expenses of capital nature and certain expenditure which are operating expenses	▯ The provision is restrictive for IT Companies, as unlike manufacturing Companies, it does not require to invest in heavy Plant & Machinery. In fact SEZ units are required to invest in huge facilities and create delivery centers. The investment which falls under Plant & Machinery are laptop, desktop, servers and networking equipment etc. are not that significant. Further due to change in technology, the requirements on premises and assets have reduced considerably and companies are using third party clouds and infrastructure. **Recommendations** ▯ The requirement of creating a SEZ re-investment reserve as a pre-requisite for claiming deduction under section 10AA should be abolished. This will enable IT companies to use tax benefits available without any restriction taking into consideration sun set of tax holiday benefits. ▯ Alternatively, for the purposes of utilizing the re-investment reserve, in addition to plant and machinery, the scope of utilization to be expanded by allowing: o Investment in facilities created in form of Delivery centers owned by the SEZ Units, i.e., investment in building, infrastructure, workstation, interiors, furniture related cost etc. Further, investment in Delivery Centres obtained on lease by way of lease rentals etc. should also be included in the scope. **o** Operating expenses like cloud, and digital IT infrastructure platforms etc.
	Charity	
120.	**Rationalisation of charity related provisions pertaining to restrictive condition for carving out**	**Rationale** ▯ Prior to amendment by Finance Act (FA) 2021, S. 11(1)(d) of the ITA provides that any income in the form of voluntary contributions made with a specific direction that they shall form part of

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	corpus donation from application rule [S. 11(1)(d)]:	the corpus of the trust should not be included for 85% application rule. In other words, corpus donation is not required to be applied for charitable purposes in the year of receipt and hence do not form part of income in the hands of registered charitable trust. In terms of existing s. 13 (1)(d), all trust funds including corpus funds are required to be kept deposited or invested in prescribed manner in terms of s. 11(5). S. 11(1)(d) of the ITA is has been amended by FA 2021. For claiming benefit of s. 11(1)(d) of the ITA, a condition is attached that trust is required to invest or deposit such donation in one or more of permissible modes under s. 11(5) of the ITA maintained specifically for such corpus. **Issues:** The intent of the provision is to curb practice of utilising corpus towards other objects of the trust and claiming application thereof. Given that spending from out of utilisation of corpus is derecognised as application (and thereby addresses the purpose for which such condition is prescribed), there is no need for putting further condition for corpus donation invested in s. 11(5) of the ITA under specific investments. This is besides being making onerous compliance on trust may become cause of concerns and litigation for securing exemption by the trust under s. 11(1)(d) of ITA as illustratively indicated below: ● At what point of time, condition of corpus investment is to be seen. Suppose trust having received corpus donation with specific direction from donor on day 1, within what time, it should be invested by trust in s. 11(5) securities to avail exemption? ● What if investment is matured within short period, say, corpus of invested in bank fixed deposit of 3 months, and same is matured within the previous year in which corpus is received. Will it impact the exempt characteristic of corpus? ● Whether each corpus donation is required to be kept in separate mode? If yes, this will become an onerous obligation on the taxpayer.

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		● Whether change in investment option within permissible modes will trigger any consequences? ● By very nature of the amendment, it would apply when donations are received in cash and not in kind. However, present language hit adversely to those corpus donations which are received in kind. As per language, such donations in kind will never qualify as exempt under s. 11(1)(d). This will create hardship and injustice to may trust who receive corpus donations in kind. **Recommendations:** The amendment made by FA 2021 may be reversed. At the highest, if desire is to regulate corpus donation received in money form, investment pattern for such corpus donation may be prescribed under s. 13 instead of tagging it as the condition in s. 11(1)(d).
121.	**Set-off of unclaimed applications in the form of past deficits**	**Rationale** Prior to FA 2021, there was no provision in law governing the set-off and carry forward of excess spending in the hands of registered charitable trust. Such excess spending may generally arise either due to spending in excess of income through utilisation of corpus or loan borrowing or past years 15% permissible accumulations. In case of spending through loan borrowing, there was potential scope of trust claiming double deductions as application of actual spending on objects of the trust as also on repayment of loan from out of income in later year. FA 2021 has inserted new Explanation to s. 11(1) of the ITA to provide that for computation of income required to be applied or accumulated during the previous year, no set off or deduction or allowance of any excess application, of any of the year preceding the previous year, shall be allowed. However, if the excess application was made out of corpus donation or loan, the

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		replenishment of corpus or repayment of loan shall be allowed as application. This shows that the intent is to allow deduction once but do not permit double deduction. **Issues** • The language of Explanation appears to suggest that it will apply to past deficits created under the old regime and hence may not be allowed to be set off against income under new regime even in cases where there is no case of double deduction. • Consider a case where taxpayer has made excess application under old regime (say- year 2018) from out of loan funds. In the year of spending, it may have resulted in some deficit which is carried forward for future year. Trust repaid loan in the year 2020 but not claimed any application thereof. Even in case of deficit carried forward, trust could not claim set off till 2021 in absence of sufficient income. Now, if trust has ability to set off deficit say in year 2020 under the new regime, there is apprehension that tax authority may deny benefit of set off by referring to Explanation 5 and applying it retroactively. In such case, trusts may be deprived of a deduction of legitimate spending against income of the trust despite there is no case of double benefit. Such may not be intention of the legislation. **Recommendation:** • In view thereof, it may be recommended to clarify that in relation to Assessment Year 2021-22 and earlier year, Explanation 5 will trigger only where trust had already obtained benefits of application in one or other form of application in those year/s and any further benefit of set off of excess application thereof will result in double benefit.
122.	**Partial denial (i.e. 15%) of application for donor trust when donation is made to**	**Background:**

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	another registered charitable trust (NGOs) [Explanation 4(iii) to section (s.) 11(1) of the Income Tax Act, 1961 (ITA)]	Earlier, donation from one charitable trust out of income of trust to another charitable trust (other than corpus donation) qualified as application of income completely. FA 2023 introduced a new Explanation 4(iii) to s. 11(1) of the ITA whereby: ● Donation made by NGO to another NGO is allowed as application only to the extent of 85% in the hands of donor NGO. ● The amendment is effective from FY 2023-24 and onwards. The objective of the amendment was to discourage the practice of accumulating 15% funds at each NGO level for cases where donation is made from one NGO to another at multiple levels. **Rationale and Issue:** While the object of amendment is laudable, extension of the amendment across all NGOs is resulting in hardship in many bonafide cases. For instance, donations to grass root NGOs who implement the projects in remote areas where donor NGO do not have infrastructure and ability to cater to, will get adversely affected. Similarly, Corporate Social Responsibility (CSR) collection trusts which get CSR spending done through implementing trusts/NGOs will also be adversely affected. The impact of disallowance of application is severe. It results in taxation of 15% of donation. Spending of balance income also will not save on taxation of 15% disallowed amount. In the hands of Donor Trust, despite actual spending by way of donation of 100, only 85% will qualify as application. This will create shortfall in application by Rs. 15 which donor trust will have to make efforts to spend further amount of charitable purpose to meet with threshold of 85%. Consider following illustration which reflects impact of amendment:

<table>
<tr><th>Sr. No.</th><th>Subject</th><th>Comments / Recommendations</th></tr>
<tr><td></td><td></td><td>
<table>
<tr><th>Particulars</th><th>As per provisions Prior to Amendment</th><th>Amended Provision</th></tr>
<tr><td>Income of the Donor Foundation (A)</td><td>100</td><td>100</td></tr>
<tr><td>Spend by way of donations to other NPOs (B)</td><td>100</td><td>100</td></tr>
<tr><td>Less: Application by way of donation</td><td>100
(100% of B)</td><td>85
(85% of B)</td></tr>
<tr><td>Less: Other application (C)</td><td>Not required</td><td>Not possible in absence of cash</td></tr>
<tr><td>Taxable income</td><td>Nil</td><td>15</td></tr>
</table>

In order to address the above issue, the CBDT vide Circular No. 3 / 2024 dated 6th March 2024 clarified that donations made by one charitable entity to another shall be treated as valid application for charitable purpose only to the extent of 85% of such donations. Further, it also clarified that amount of ineligible application (i.e. 15% amount) is not required to be deposited in specified modes of investment as the said entire income thereof is donated to other charitable entity. In view of the CBDT circular, trust is not required to deposit INR 15 in specified modes and accordingly, no tax implications will arise in the hands of trust.

Recommendation:

The clarification issued by CBDT through administrative circular shall be incorporated in law by making specific amendment.
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123.	**Application shall be allowed only on payments basis [Explanation to s. 11(1) and Explanation to s. 10(23C)]**	**Background and Issue** • Earlier, the application of income in the hands of trust was allowed on the basis of commercial principles. This was subject to certain specific provisions (such as no application shall be allowed made out of corpus funds, loan funds, etc.) • FA 2022 introduced a provision in the scheme of s. 11 and s. 10(23C) of ITA to allow application only on actual payment basis. • The amendment was effective from FY 2021-22 itself. • It is a settled proposition that income of the trust is to be computed on the basis of commercial principles. The amendment unsettles this principle. • Trusts are allowed to maintain books of accounts on cash basis or mercantile basis of accounts. In case if trust prepares the accounts on mercantile basis, then there will be apparent mismatch between the books of accounts and tax computation. This will become annual feature and will add to administrative inconvenience and hassle. The mismatch represents only timing difference. • Generally, payment for operating expenses of the month of March are paid in the month of April or May. In such cases, trust will not be allowed application for the month of March which may result in surplus. However, there may not be any real surplus with the trust to that effect. **Recommendation:** • In view of the above, the amended provision should be withdrawn.
124.	**Roll back or extend period for depositing back of corpus and repayment of**	**Background:**

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	loans or borrowings within 5 years	▯ Till 1 April 2021, amount applied for charity from loans or borrowing was an eligible application. There was an issue whether subsequent repayment of loan or borrowing from out of income of the charity will also qualify as application once again. This could have resulted in duplicated application i.e., in the year of raising of loan as also in the year of repayment of loan. ▯ Likewise, amount spent from corpus funds of the charity was eligible as application. Like in case of loans, corpus was considered as source of funds for spending. However, there was an issue as to on one hand corpus donation is exempt from application rule and on the other hand, charity claims spending out of such corpus donation as application. This was perceived as charity availing dual benefits. ▯ By way of amendment to s. 11(1) with effect from 1 April 2021 (AY 2022-23), application of funds from loan or corpus is not to be reckoned as qualifying application in the year of spending out of these funds but will qualify as eligible application only upon repayment of actual loan or upon restoration of corpus by investment/reposting back from income of given previous year. ▯ However, there was no timeline applicable within which loan repayment or corpus restoration is to be made to qualify as application. ▯ FA 2023, vide Explanation 4 to section 11(1) provided that loan repayment/corpus restoration from out of income of charity will qualify application only if the same is made within 5 years of spending from the corpus or loan. ▯ Explanatory Memorandum to FB 2023 observes that indefinite time available for repayment of loan/ restoration of corpus made implementation of provisions difficult. **Rationale and Issue:** ▯ Amendment providing for period of 5 years:

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		● Amendment has raised multiple issues of concern to the charities. Firstly, there is no need to place restriction on period. Trust which may not have ability to repay loan or restore corpus within specified period may lose benefit of application permanently. This may result in double whammy. Trust would neither get benefit of application at the stage of spending out of corpus or loan nor at the stage of repayment or restoration. Surely such cannot be legislative intent as well. ● For instance, consider a case where trust borrows money -say, to provide aid to affected people of some natural calamity as part of its objects, may not be able to build up income to repay loans in short period of 5 years. Despite spending being on objects of the trust and for bonafide purposes, trust would lose the benefit of application. There could be many such scenario where repayment of loans or restoration of corpus within 5 years period may be practically difficult. It is not a case of misuse of provision. ● Also, it is not clear which sort of implementation difficulty the Explanatory Memorandum envisages. It may be good to work around resolving such difficulty, if any, rather than capping time limit on the taxpayers bonafide activities. As one alternative, necessary detail or information may be captured in ITR form or Audit report about spending so that same can be retrieved in future to verify the claim of the taxpayer, if so required. Digital mode makes it easy to retrieve information for any period. Still alternatively, taxpayer may be asked to maintain and furnish certain specified evidence -say, auditor's certificate in support of claim for valid application in the year of repayment of loan or restoration of corpus. ● Still, if there are serious concerns on implementation of new regime provisions as suggested in Explanatory Memorandum, Government may consider restoring the pre 2021 law and grant benefit of application to trust in the year of spending on charitable objects

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		from out of loan or corpus and deny the same when loan is repaid or corpus is restored. This can also solve apprehension of double deduction. ● Without prejudice, period of 5 years is too low. There are many scenarios where ITA itself provide longer period for claims which have so far did not pose any challenge in its implementation. For instance, for set off of claims for losses in case of Start-ups, 10 years period or in other cases, 8 years is provided. In the midst of such realities, there is no warrant to discriminate with charitable institutions which do noble cause, with a provision for shorter period of 5 years. Amendment prescribing 5 years period has retroactive effect: ● Without prejudice, period of 5 years within which corpus restoration or repayment of loan is provided for application is likely to have retroactive application. Language provides calculation of period from year of application of corpus or loans or borrowings and may turn time barred even before enactment of FA 2023. ● Suppose loan borrowing was utilised on objects of the trust in – say, in 2017-18 but no application was than claimed. If loan is repaid even in year 2024, taxpayer may not qualify for application as claim turns time barred on 31 March 2023 viz before implementation of provisions of Finance Act 2023. ● It is fit case for making application of the amended provision prospectively to reckon period of 5 years for any spending out of loan or corpus made on or after 1 April 2023. **Recommendation:** The amendment placing cap of 5 years may be rolled back completely.

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		▯ Alternatively, pre 2021 law may be restored to grant benefit of application at the stage of spending on charitable purposes out of corpus or loans or borrowings and deny benefit on repayment of loan or restoration of corpus. ▯ Without prejudice, period of 5 years is too short and may be elongated to at least 10 years. ▯ Still, without prejudice, the amendment may be made prospective to reckon period of 5 years for any spending out of loan or corpus made on or after 1 April 2023.
125.	**Allow Non-Profit Organisations to receive Corpus donations in the form of shares of an Indian Company**	**Background:** ▯ Under the extant provisions of ITA, registered charitable institutions are neither permitted to accept shares as corpus donation nor hold/ make investments in shares (other than shares of public sector companies). ▯ In case registered charitable institutions receive shares in companies (other than public sector companies) as non-corpus donation after a particular prescribed date, the same need to be converted into prescribed modes of investment within a period of one year, failing which they become taxable in the hands of such institute (to the extent of amount of such investment in violation). **Rationale and Issue:** ▯ Wealth of Ultra HNIs and HNIs is often concentrated in the form of equity stake in companies and similar assets and a logical way of starting philanthropic activity would be to donate part of their shareholding towards charity. However, in terms of the prevailing provisions of ITA, charitable institutions are not permitted to accept grant/hold shares of non-public companies, thereby becoming a huge deterrent for expansion of private philanthropic capital in India.

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		▯ Prior to 1975, there was no prohibition on investment or holding shares in any company. Such prohibition was introduced vide Taxation Law (Amendment) Act, 1975 for non-public sector company with the intent to regulate the mode and form of deposit or investment of the trust's funds. It seems to be a policy decision and there was no allegation of any mischief or misuse being plugged. Holding of shares received as a corpus donation may not jeopardize the said legislative intent. ▯ Globally, charity and tax laws in many countries (viz. Australia, US, UK, Singapore, Germany and Canada) permit charitable institutions to accept shares as donation and hold the same as investment. Also, it is an accepted practice globally for High Net-worth Individuals (HNIs) to donate a part of their shareholding in companies to charitable foundations ensuring a regular income stream in the form of dividend for the charitable institutions to undertake their philanthropic activities. ▯ Upfront settlement of shares in charitable institutions ensures that regular income from such shares will be available for charitable activities and subject to the same rule of application as applied to any other income streams of the trust. Without upfront settlement of shares, it is difficult for business promotors to ensure that their successor honour their commitment to donate dividend income to the NPOs globally. **Recommendations:** ▯ ITA may be amended (through Rule 17C) to permit charitable institutions to accept shares of non-public sector Indian companies as corpus donation and hold the same as investment, without losing their tax exemption. Further, the exemption could be extended only in respect of: ● Shares donated (or given pursuant to a Will) to the registered charitable institution;

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		● Bonus shares received on the shares so donated; ● Rights' share acquired upon exercise of rights' entitlement to the shares so donated; ● Shares acquired upon amalgamation/ demerger of the company in which donated shares are held, if the amalgamation/ demerger is exempt under section 47 of the IT Act. In any case, shares being a property other than money, their donations will in any case not qualify for deduction in the hands of the donor, hence there is no tax break enjoyed by the donors. [Explanation 5 to section 80G of ITA] Also, any such trusts will continue to be governed by disciplines of the taxation scheme such as 85% application rule, utilization of income from its objects, non-grant of any benefit to related party, etc. Thus, interest of revenue is also preserved.
126.	**Resolve ambiguity in 2nd proviso to Explanation 4 to S. 11(1) dealing with pre 2021 application**	**Background:** F A 2021 inserted Explanation 4 to s. 11(1) of ITA with two clauses (i) and (ii). Clause (i) provides that with effect from 1 April 2021 application of funds from corpus is not to be reckoned as qualifying application in the year of spending out of these funds. Proviso thereto, however, provides a facility to claim benefit of application upon restoration of corpus by investment/reposting back from income of given previous year. Similarly, clause (ii) provides with effect from 1 April 2021 application of funds from loan or borrowing is not to be reckoned as qualifying application in the year of spending out of these funds. Proviso thereto, however, provides a facility to claim benefit of application upon repayment of loan from income of given previous year. Both provisos granting benefit of application apply in a case where amount of part thereof was "not so treated as application" in the year of spending from corpus or loan or borrowing. Thus,

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		qualification to claim application in the year of repayment or restoration is that the trust should have not claimed benefit of application in the year of spending out of loan or borrowing or corpus. This is obvious and is with a view to avoid case of duplicated benefit. • FA 2023 inserted Fourth proviso respectively to clause (i) and Clause (ii) to Explanation 4 to s. 11(1) which reads as under: *"Provided also that nothing contained in the first proviso shall apply where application from the corpus is made on or before the 31st day of March, 2021"* *"Provided also that nothing contained in the first proviso shall apply where application from any loan or borrowing is made on or before the 31st day of March, 2021"* • Explanatory Memorandum to FB 2023 clarifies as under: *"2.2 While implementing the recent changes vide the Finance Act, 2021 to the provisions related to corpus and loan or borrowing, it has come to the notice that application from corpus or loan or borrowings have already been claimed as application prior to 01.04.2021. Hence, allowing such amount to be application again as investment or reposting back in corpus or repayment of loan or borrowing will amount to double deduction.* *2.5 In order to ensure proper implementation of both the exemption regimes, it is proposed to provide that application out of corpus or loans or borrowings before 01.04.2021 should not be allowed as application for charitable or religious purposes when such amount is deposited back or invested in to corpus or when the loan or borrowing is repaid."* **Rationale and Issue:** • Intent of respective Fourth provisos appear to clarify that any spending from corpus or loan or borrowing made prior to 1 April 2021 and is claimed as application of income in that year, such

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		taxpayer is not entitled benefit of application again when it repays loan or restores corpus. Accordingly, applicability of proviso to Explanation 4 which provides for benefit of application in the year of repayment of loan or investment/depositing back in corpus is proposed to be denied in such case. However, proviso to Explanation 4 itself grants benefit of application only if it was earlier 'not so treated as application'. And, now by excluding application of proviso completely for spending done prior to 1 April 2021, trust will be completely denied benefit of application in the year of repayment of loan or restoration of corpus even where trust as a matter of fact, had not claimed benefit of application in the year of spending. • Secondly, language of amended Fourth proviso is ambiguous and prone to give rise to litigation. It denies applicability of first proviso where application from any loan or borrowing or corpus is made on or before the 31st day of March, 2021. Reference to "application" is prone to an interpretation and may cover every loan or corpus funds which are applied /utilised on or before 31 March 2021 even where trust had not claimed benefit of application thereof in computing trust's income in that year. This is contrary to intent expressed in Explanatory Memorandum. **Recommendation:** • Amendment by way of Fourth proviso in clauses (i) and (ii) to Explanation 4 to s. 11(1) by FA 2023 be rolled back. • Alternatively, it may be clearly brought out that said Fourth proviso will apply to cases where benefit of application under s. 11 was claimed by the trust on or before 31 March 2021.
127.	**Computation of trust's income under specified circumstances [Refer s.**	**Background and Issues** • S. 13(10) read with s. 13(11), as amended by the FA 2022, provide a mechanism to claim deduction of application of income on objects of the trust in certain specified situations where

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	13(10) and 13(11)]	trust loses benefit of deduction under s. 11 for the given year viz (a) when business income of the trust (having object of general public utility) exceeds 20% of trust receipt, (b) Where books of accounts are not maintained, audit is not conducted, or (c) Where return of income is not filed within time limit. S. 13(10)/(11) provide that income will be calculated without granting deduction for following: ● Expenditure which is capital in nature ● Expenditure incurred outside India ● Expenditure incurred out of corpus standing as on the end of financial year immediately preceding the previous year relevant to the assessment year ● Expenditure from loan or borrowing ● Claim of depreciation in respect of an asset, acquisition of which has been claimed as application of income in any year ● Expenditure by way of contribution or donation to other person ● Disallowance of 30% of expenditure when deduction of taxes as required under Chapter XVII-B of ITA is not carried out or after deduction taxes have not been paid - s. 40(a)(ia) of ITA ● Expenditure by way of payment to any person in excess of Rs. 10,000 per day otherwise than by way of specified mode - s. 40A(3) of ITA Further, in computing income, s. 13(11) provides a blanket prohibition, for any deduction in respect of any expenditure or allowance (which may include deprecation as well) or set-off of any loss which may be allowable under any other provisions of ITA [S.13(11)]

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		▯ While the amendment is welcome, the language of s. 13(10) read with s. 13(11) is prone to an ambiguity. While intent seems to be to allow as an additional facility, deduction of application of income on the objects of the trust after income of the trust from various sources such as business income or capital gains income etc. has been computed, apprehension is that the tax authority may erroneously read the provisions as creating an embargo against deduction of any other expenses including in computation of business income or capital gains income, such that Trust's entire income from whatever forms would get only deductions specified in the amended provision. In other words, there is scope that tax authority may disallow expenses incurred in earning business income or cost of acquisition of asset while computing capital gains on sale of such asset by the trust. ▯ S. 13(10) inter alia disallows expenditure incurred from out of corpus and loan funds. This is consistent with Explanation 4 to s. 11(1) of ITA introduced by Finance Act 2021. However, along the lines of provisos to said Explanation 4 to s. 11(1) of ITA, there is no back up provision made in s. 13(10) to allow deduction when corpus is restored or loan is repaid from income of the trust in current year or subsequent year. Similarly, s. 13(10) provides for disallowance of 30% of expense due to tax withholding default by applying provision of s. 40(a)(ia) but does not specifically provide for allowance of 30% expenditure on compliance of conditions of proviso to s. 40(a0(ia). These may be an unintentional omission or lapses. ▯ Clause (d) of S. 13(10) provides for disallowance of expenditure by way of contribution or donation 'to any person'. The language is too wide to disallow help provided to poor or medical expenditure of poor or needy person borne by charitable trust by direct payment to hospital or for purchase of medicine, etc. These may get adversely disallowed under the present limb despite the fact that trust has directly incurred expense in terms of its objects. **Recommendation:**

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		▯ A suitable language correction may be made in s. 13(10) in parathesis to bring out the intent that provision shall apply post computation of income of the trust under the respective provision of ITA. ▯ A suitable back up provision may be provided to allow deduction of expenses which are disallowed under specified circumstance when corpus is restored or loan is repaid from income of the trust in current year or subsequent year ▯ Clause (d) of s. 13(10) may modified as under: *(d) such expenditure is not in the form of any contribution or donation* ***~~to any person~~*** *to any trust or institution registered under section 12AA or section 12AB or to any fund or institution or trust or any university or other educational institution or any hospital or other medical institution referred to in sub-clause (iv) or sub-clause (v) or sub-clause (vi) or sub-clause (via) of clause (23C) of section 10.*
128.	**Proposed penalty for cases where benefit is passed on to related parties appears to be stringent and without benefit of reasonable cause- [S. 271AAE]**	**Background and Issue** ▯ S. 273B provided that penalty leviable for breach of provisions of various sections specified therein shall not be levied on the taxpayer, if he proves that there was reasonable cause for the said failure. ▯ FA 2022 introduced new penalty provision for the charitable trusts/institutions when benefit is being passed on to specified persons. Penalty under s 271AAE is to be levied at sum equal to benefit applied in the first year and a sum equal to 200% in the subsequent year ▯ However, said new section is not included in s. 273B. ▯ In absence of back up amendment in s. 273B to provide protection to the trust for reasonable cause, the penalty provision makes trust liable on automatic basis even where breach is unintended or innocent. This appears to be unintended lapse.

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		Recommendation: • Provisions of s. 273B of ITA should also be amended to include s. 271AAE of ITA to allow benefit of reasonable cause to the trust. • Additionally, it is recommended to provide threshold of benefit alleged to have been given to related party say 5% of total receipts of the trust of the year (similar to threshold provided in section 13(4)) beyond which alone the penal provisions should trigger.
129.	**Provide option to acquire another capital asset to claim application for s.10(23C) charities**	**Rationale and issue** • S.11 allows application to trust if capital gains earned during the year by the trust is reinvested to acquire another capital asset to be held for charitable purposes. This is to provide relief to trust so that entire amount of sale consideration need not be spent out on the year of sale and to keep the asset base of the trust intact. • S.10(23C) which is very similar to S.11 does not have a similar provision. **Recommendations** • The intention of the legislation is to bring the scheme of s. 11 to 13 and s. 10(23C) on parity. Therefore, it is recommended that similar provision may be brought in 10(23C) as well.
130.	**Simplification of language of s. 10(23)**	**Rationale and issue** • There are around 24 provisos in the text of s. 10(23C) along with multiple sub-provisos and Explanations. This makes it very cumbersome for a taxpayer to read and apply. The legislative intent of several amendments to charity related provisions of Finance Act 2022 is to align the scheme of s.10(23C) and s.11. Hence, it would be more expedient to combine both provisions in a single section by avoiding multiple provisos.

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		Recommendations For the sake of convenience for the stakeholders, both s.10(23C) and s.11 may be combined into one section. If this is not feasible, at least the multiple provisos of s.10(23C) may be properly numbered or converted into sub-clauses to a new section.
131.	Migration of charitable entity governed by s. 10(23C) regime into the scheme of s. 11 of ITA and vice versa.	**Background and Issue** The provisions relating to registration of the charitable trust are revamped completely. Earlier, the charitable trust could seek registration under the regime of s. 10(23C) as well s. 12A/ 12AA of ITA. In such case, the trust had option to claim exemption under either regime. However, provisions of s. 11(7) of ITA were amended to provide that trust which were registered under both the regimes then registration under s. 12A or s. 12AA or s. 12AB shall be made inoperative. Mechanism is provided for migration of such entities from the scheme of s. 10(23C of ITA into the scheme of s. 11 of ITA by making suitable application in the prescribed form within prescribed time limit. However, no enabling provision is prescribed for cases where the trust which was hitherto registered only under s. 10(23C) of ITA can now migrate its registration under the regime of s. 11 of ITA. It is undisputed that the scope of charitable activities which can be carried on by s. 11 trust is much wider than an entity which is registered under s. 10(23C) of ITA. The language of residuary clause of seeking registration (s. 12A(1)(ac)(vi) of ITA) is not worded happily and does not cover cases where trust which were hitherto governed by the scheme of s. 10(23C) of ITA but is now wants to seek registration under s. 11 of ITA for the first time. This is because the present language of residuary clause covers only two categories of trust i.e. (i) new trust which are yet to commence their activity or (ii) trust which have already commenced their activity but had not claimed exemption under s. 10(23C) of ITA for any of the past years. Similar difficulty exists in the scheme of s. 10(23C) of ITA wherein there is no enabling provision

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		for migration of registration from s. 11 of ITA to the scheme of s. 10(23C) of ITA. If the law allows trust which were hitherto registered under both the regimes to choose between the regime of s. 10(23C) of ITA and s. 11 of ITA, there is no apparent reason that such option shall not be made available to the trusts which were registered only under s. 10(23C) of ITA. In any case, the eligibility of exemption is based on compliance of all the conditions prescribed under the regime in which exemption is claimed. **Recommendations:** Suitable amendment shall be made in s. 11 scheme to allow migration of s. 10(23C) entity into the regime of s. 11 of ITA and vice versa.
	Measures to discourage cash transactions	
132.	**Levy of additional tax on cash holding & cash expenditure**	**Rationale/ Recommendations** With a view to discourage cash holdings, additional tax (akin to wealth tax) may be levied on holding cash over specified threshold limit as on the last day (i.e. 31st March) of financial year: o For taxpayers engaged in business or profession, ▪ who are liable to tax audit under the ITA - Rs. 10 lakhs; ▪ other taxpayers - Rs. 5 lakhs o For individuals and HUFs not in business or profession - Rs. 5 lakhs With a view to discourage cash expenses, there should be levy of some tax on expenses in cash beyond the specified limit as under: o For taxpayer engaged in business or profession:

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		▪ who are liable to tax audit under the ITA - if aggregate expenditure exceeds Rs. 25 lakhs ▪ other taxpayers – if aggregate expenditure exceeds Rs. 10 lakhs o For individuals and HUFs, in relation to personal expenses, if aggregate expenditure exceeds Rs. 10 lakhs Tax incentive may also be provided to e-commerce companies introducing various modes of digital payments such as digital wallets, mobile wallets, etc. particularly creation of instruments which are user friendly and capable of being operated without internet connectivity.
	Filing of Updated Return	
133.	**Relaxation of Stringent Requirements for Eligibility to File Updated Return**	**Rationale and issue:** The Finance Act 2022, via Section 139(8A) introduced a new provision permitting taxpayers to file an updated return within 2 years from the end of the relevant AY, only if it results into additional tax liability, subject to additional tax payment of 25%/50%, as prescribed. The new window of taxpayer suo-motu filing updated return within a period of 2 years from end of AY with payment of 25%/50% additional tax is a very welcome and pragmatic step by the Government. It helps both taxpayers and Government. Taxpayers get opportunity to regularise their returns and avoid litigation. Government gets its fair share of taxes with additional compensation for delay. Unlike s.139(5) which permits revision of return only if taxpayer discovers 'omission or wrong statement', the new s.139(8A) does not provide any positive circumstance in which updated return may be filed. However, it gives a long negative list of circumstances in which updated

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		return cannot be filed such as case of decrease of tax liability/increase of refund or cases where assessment/reassessment/re-computation/ revision is pending or completed. - Due to long negative list, it appears the window is available only in a limited situation where taxpayer himself discovers the omission. It is not available where the omission is already detected by the Tax Department and action has been initiated. - However, there are certain issues which require further consideration and clarity from the Government. **Recommendations:** - Since the window is provided to correct only inadvertent and bonafide errors, the requirement of payment of additional tax of 25%/50% is quite punitive and virtually penalises the taxpayer. It may be noted that if the same additions are made in scrutiny assessment, there is scope for the taxpayer to urge that it does not constitute 'underreporting' and hence no penalty should be levied u/s. 270A. Alternatively, there is immunity from levy of penalty and prosecution u/s. 270AA if taxpayer pays up the demand and does not file appeal. Considering this, the requirement of payment of additional tax should be reduced to a more reasonable level – say, 5% to 10% to improve voluntary compliance in line with intent of the provision. - Under s.139(8A), the taxpayer cannot file updated return if any proceeding for assessment or reassessment or re-computation or revision of income under this Act is pending. If return is filed but intimation u/s. 143(1) is not received, it is not clear whether an updated return can be filed. This is because there is ambiguity whether the assessment or re-computation of income is pending in such case. In context of s.281, the SC in the case of Auto and Metal Engineers (229 ITR 399) held that filing of ROI leads to commencement of assessment proceedings and same

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		may be regarded as pending till time limit of issuance of notice has expired. It is recommended to remove the ambiguity to make the provision clear and free from any misinterpretation. Similarly, if intimation u/s. 143(1) is received either accepting returned income or making some additions on account of certain apparent errors whereas updation of return is for a different issue, it should be permitted. Please note that the amount of additional tax is computed after increasing the amount of refund, if any, issued in respect of return filed earlier u/s. 139(1)/ (4)/ (5) which is possible only if intimation is received. Under s.139(8A), updated return cannot be filed if the Tax Department has discovered some incriminating information under various laws or through exchange of information with other countries or prosecution proceedings have been initiated under Chapter XXII. The taxpayer cannot file updated return even if the additional incomes sought to be offered by the taxpayer have no relation to such information with the Tax Department or prosecution initiated by the Tax Department. For instance, prosecution may be initiated for TDS default whereas the updated return may be filed by the taxpayer to offer some income which appears in AIS but was inadvertently not included in original return of income. There is no sufficient justification for not permitting such taxpayer to file updated return for unrelated incomes. Hence, it is recommended to amend the provisions to permit taxpayer to file updated return in respect of income which has no connection with the proceedings initiated by the Tax Department. Along with filing updated tax returns, there could also be a situation wherein simultaneous impact is applicable to tax audit report or transfer pricing reports. The current Finance Bill does not provide for corresponding provisions to permit amendment and filing of updated Tax audit reports or Transfer pricing forms. It is suggested a suitable amendment be provided in case of filing for updated tax audit reports or transfer pricing forms.

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		▯ There is no clarity on what happens to additional taxes paid if the updated return filed by the taxpayer is not accepted as valid return. It should be clarified in such cases that the additional tax will be treated as S.A / regular tax paid by the taxpayer and refunded/adjusted on completion of assessment/reassessment
134.	**Taxpayers filing Updated Return to be relieved from rigors of Black Money Act**	**Rationale and issue:** ▯ S.4 of the Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015 [“Black Money Act”] defines scope of undisclosed foreign income as that not disclosed in return of income specified in s.139(1)/(4)/(5). There is no consequential amendment by the Finance Act 2022 to amend s.4 of Black Money Act to cover updated return to be filed u/s. 139(8A). ▯ This will have effect of taxpayer offering foreign incomes or disclosing foreign assets in updated return not being protected from adverse implication of Black Money Act. **Recommendations:** ▯ Since the updated return requires payment of additional tax of 25%/50% and is a voluntary measure prior to any action taken by Tax Department, it is submitted that the taxpayer may be granted immunity from adverse consequences of Black Money Act upon filing of updated return. S.139(8A) prohibits filing of updated return where the AO has information in respect of such person for the relevant assessment year in his possession under, inter alia, Black Money Act and the same has been communicated to him, prior to the date of furnishing the updated return. This is sufficient to safeguard Tax Department’s interests. Hence, a consequential amendment may be made in S.4 of Black Money Act to add reference to return of income filed u/s. 139(8A).
	International taxation	

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135.	**Issues related to Significant Economic Presence (SEP)**	**Background** In order to address Base Erosion and Profit Shifting arising from the rapidly digitalising economy, Finance Act 2018 expanded the concept of business connection to include a new nexus rule based on SEP to tax the digital economy, which hitherto enabled entities world over to carry out business in India without an actual physical presence, and thereby escape taxation in India. As per SEP provisions, a Business Connection will be constituted in India based on below parameters: a) Revenue-linked condition: Any transaction in respect of any goods, services or property carried out by a Non-Resident with any person in India, including provision of download of data or software in India, if the aggregate of payments arising from such transaction or transactions during the tax year exceeds the amount as may be prescribed; or b) User-linked condition: Systematic and continuous soliciting of its business activities or engaging in interaction with such number of users in India as may be prescribed Further, once an SEP is triggered, only so much of income as is attributable to the transactions or activities referred to in (a) or (b) above shall be taxable in India. Additionally, income attributable to transactions and activities referred to in condition (a) and (b) shall also cover income from: ● Such advertisement which targets a customer who resides in India or who accesses the advertisement through internet protocol (IP) address located in India; ● Sale of data collected from a person who resides in India or who uses IP address located in India; and

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

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		currently, 142 countries[17] of BEPS inclusive framework (IF) have agreed on the key components of the Pillar One framework including, scope, nexus, allocation of profits under Amount A etc. - The provisions of SEP are fairly different from agreement solution under Pillar One. The key difference being while SEP determines taxable nexus of NR at entity level qua the transactions/ activities undertaken with person/ users in India, Pillar One proposes to establish nexus and attribution profits at Multinational enterprise (MNE) group level. - Since SEP was introduced in light of BEPS discussions, it is our humble suggestion that provisions of SEP be tailored to fit them in line with global consensus solution. The Blueprint released by OECD in October 2020 also acknowledged that implementation of Pillar One proposals will require changes not only in treaty but also in domestic laws. The report states that BEPS IF members would need to create domestic taxing rights consistent with the design of Amount A, provide method for elimination of double taxation for residents, dispute prevention and resolution mechanisms, etc. **Recommendation:** In order to ensure consistency with Pillar One solution, we propose the following changes be made to SEP provisions: - **Applicability of SEP to MNE groups with global turnover or gross receipts of above €750 million and having profitability of 10[18]%:** Similar to global consensus, a MNE level revenue threshold should be introduced in the Act. While the currently agreed revenue threshold of €20 billion (to be subsequently reduced to €10 billion after 7 years) may be fairly high, India may consider a threshold in line with CbCr provisions i.e. €750 million qua MNE group. It will ensure

[17] Data as on 31 May 2024
[18] Profit before tax/revenue

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		that the companies covered under CbCr are also covered under new SEP provisions under the Act. This will also ensure that domestic source rule taxation is wider than treaty threshold and entities of MNE group not having treaty protection will be covered under domestic taxation. **Exclusion for extractive industry and Regulated Financial services sectors:** Businesses engaged in extractive industry[19] and financial sector[20] such as banking, insurance, asset management etc. be excluded from scope of SEP in line with Pillar 1 scope exclusion. **Establish taxable nexus in India basis revenue generated by MNE group:** Under Pillar One IF solution, an MNE group establishes nexus with a market jurisdiction only where such MNE earns revenues of more than € 1 million from such market (€ 250,000 from countries with GDP less than € 40 billion) . On similar lines, SEP provisions need to be amended where MNE earns revenues from Indian market above certain threshold. Since domestic taxation rules need to be wider, the threshold of € 250,000 may be considered for SEP. Thus, the user-based nexus rule under existing SEP rule should be deleted. The attribution based on targeted advertisement audience from India or data collection from India or sale of goods/services based on data collected from India should also be deleted. **Introduce profit attribution rules in line with Pillar One solution:** Under Pillar One proposal, a portion of MNE level profits are allocated to market jurisdiction basis a formulary approach. As

[19] Extractive businesses are those engaged in the exploration for, and extraction from the earth's crust of, non-renewable natural resources such as hydrocarbons and minerals, the processing and refining of those resources into usable commodities, and the sale of those commodities. As per the OECDs "Tax Challenges Arising From Digitalisation – Report On Pillar One Blueprint" dtd 12 October 2020, taxes on profits from the extraction of a nation's natural resources can be considered to be part of the price paid by the exploiting company for those national assets, a price which is properly paid to the resource owner.

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

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		per the formula agreed, 25% of MNE non routine profits[21] will be allocated to market jurisdictions with nexus using a revenue-based allocation key. Such formula agreed under global consensus needs to be introduced under the Act as well - ***Without prejudice to above, if the provisions of SEP are not amended in light of Pillar One discussions and/or pending implementation of Pillar One proposals, we humbly request to consider following representations on issues related to SEP.*** **B. Exemption should be provided from procedural requirements (like obtaining PAN, filing return, etc.) where SEP is triggered but treaty protection is available** **Rationale:** - While the SEP provisions have become operational as source rule, it may have no applicability to taxpayers who are from treaty jurisdictions. Such fact is also noted by the Explanatory Memorandum to Finance Bill 2018 which observed that *"unless corresponding modifications to PE rules are made in the tax treaties, the cross border business profits will continue to be taxed as per the existing treaty rules".* - However, given the fact that taxpayers fall within the ambit of the source rule within the Act, the Tax Authorities may insist that such taxpayer should comply with various procedural requirements of the Act, such as obtaining PAN, filing return of income, etc. Any such measure merely increases compliance burden for NR entities, adversely impacts 'ease of doing business' with India and provides no revenue benefit to India – except, perhaps statistical information of

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

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		revenues flowing from India which is already available from alternative sources like foreign remittance filings by banks. **Recommendations** • To avoid unwarranted compliance burden for NR entities, it may be explicitly provided that the taxpayers from treaty jurisdiction who remain completely outside the scope of the extended nexus rule will not be required to undertake procedural compliances under domestic law (say, obtaining PAN, filing ROI, withholding obligations, etc.). **C. Guidance should be provided on determination of "users in India" w.r.t user linked condition** **Rationale** • Under the User-linked condition above, SEP is determined basis number of users in India. However, ascertaining the number of users is complex and volatile having regard to differing features and level of participation by users in different types of apps/websites. **Recommendations** For determining the user threshold of 3 lakh users, it is recommended that sufficient guidance be provided for various industry segments to deal particularly with the following illustrative aspects: • The guidance must comprehensively deal with scenarios such as repeated use by the single user, multiple accounts by single user, fake accounts or fake information provided by users etc. • Transient users such as tourists must be excluded while determining "users in India".

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

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

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		● Grant of IP license by content owner to the licensee for exploitation through digital means is royalty taxable at par with royalty taxable for grant of IP license for exploitation in physical world ▯ The new provision is apparently not meant to create any different tax treatment for such business enterprises who are otherwise covered by specific charging provisions of the Act. ▯ For instance, interest which is taxable at concessional tax rate @ 5% u/s. 194LC should not be covered by SEP **Recommendations** ▯ To avoid unintended litigation and in the interest of clarity and certainty, it should be provided that any revenue which is otherwise considered to be chargeable as per any other provision of law should be understood as being outside the scope of this newly introduced SEP provision. For example, if any part of the revenue comprises of royalty income or FTS income, or the like, which is covered by special provisions, the same should be kept out of the revenue base as also the attribution base under Explanation 2A. ▯ Thus, no part of the revenue which is hitherto considered chargeable to tax should be considered within the net of new taxation policy. The principle will hold good even if such income were to be considered non-taxable by reason of an exemption under the domestic law or by reason of a provision of treaty, etc. For example, fees for technical service should be kept out of the attribution base even if the technical service fee may not be actually subjected to tax since the treaty is operating on the principle of included services (or 'make available' clause). **F. Clarify the year in which NR triggers SEP where buyer makes advance payment but sale takes place in separate financial year**

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		Rationale: ▯ SEP of NR is triggered where any transaction in respect of any goods, services or property is carried out by a NR with any person in India if the **aggregate of payments arising from such transaction or transactions during the previous year** exceeds INR 2 crore ▯ In business transactions**,** it is common phenomenon for buyers to make advance payment (say in year 1) and the sale or service transactions takes place subsequently (say in year 2). In such case, where advance payment made in year 1 exceeds INR 2 crore, doubts arise whether SEP triggers ● in year 1 when advance payment is received by NR, or ● in year 2 when sale transaction takes place, or ● both year 1 and 2 ▯ Out of the above options, it may be improper to trigger SEP qua the same transaction in two different years. **Recommendation** ▯ Explicitly clarify that where payment is made in advance and transaction takes place in subsequent financial year, SEP triggers only in one year either in year of payment or year of sale/service – more preferably, in the year of sale/service. **G. Relieve obligation of payers as withholding agents and/or representative assessee** **Rationale:** ▯ Predominantly large part of the revenue generated by business players are B2C transactions such that there are millions of users/ customers and each of the user/ customer contributes to

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		a moderate amount of the revenue earned by the business enterprises. The user base is relatively wide, comprised of people of all ages and educational / economic background and from all corners of the geography. • The present tax withholding provisions, if applied in a strict sense, all the users/ customers who contribute to revenue of business enterprises, which is chargeable to tax under the Act will be required to withhold taxes and comply with related procedures. It can include even payers who would have carried out a small transaction, of say Rs 100, to have monthly subscription of online content. • It would be extremely onerous to expect such users/ customers of moderate means to comply with the tax withholding provisions and/or to expect them to be treated as representative assessees on behalf of non-residents. The sheer scale of customer base (considering the India population) and the model of business world may require that the recovery and collection model cannot be at par with conventional recovery and collection model. The difficulty multiplies in case of user linked condition wherein payment is not a pre-condition. • Further, the cost incurred by revenue officers targeting the withholding non-compliance and also catching hold of representative assessee is likely to be not commensurate with the benefit one may derive due to deployment of additional force, tracking every order, every customer etc. • BEPS Action 1 also states that in the case of B2C transactions requiring withholding from the payer would be more challenging as private consumers have little experience nor incentive to declare and pay the tax due and moreover, enforcing the collection of small amounts of withholding from large numbers of private consumers would involve considerable costs and administrative challenges. The relevant extracts from BEPS Action 1 are:

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		"In the case of B2C transactions, however, requiring withholding from the payor would be more challenging as private consumers have little experience nor incentive to declare and pay the tax due. Moreover, enforcing the collection of small amounts of withholding from large numbers of private consumers would involve considerable costs and administrative challenges." • The report also acknowledged that one possible solution in such B2C cases would be to require intermediaries processing the payment to withhold taxes.[22] The difficulty in collecting levy in B2C transactions and hence, equipping payment gateways for tax collection is also recognised in EL Report[23]. However, any such administrative mechanism will require creation of suitable infrastructure but will be essential for simplified and consistent implementation of any such novel levy having wide scale impact. This also highlights that till such time a country is ready with suitable infrastructure, the implementation may need to be deferred to a later date. • Litigation on TDS default has consequential liability as an assessee-in-default as also has interest and penal consequences. Disallowance of expenditure particularly when the quantum of profit attribution is uncertain can have significant tax impact for the payer. • There is also an apprehension about possible coverage of multiple of small customers within the scope of S.163, if trigger of SEP is regarded as trigger of business connection and/or an opportunity of earning income directly or indirectly from such customers or users in India. While the exposure u/s. 163 cannot be beyond the amount which is earned through a particular customer, it only highlights uncertainty and possible risk of litigation.

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

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

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		Recommendations • In the initial years of SEP, the provisions may be implemented and enforced only against the primary taxpayer and there should be general notification under S.197A(1F) that provisions of Chapter XVII B will not be made applicable to the payments which may get covered by provisions of Explanation 2A to S.9(1)(i). In any case, such notification must cover those payees which are covered by treaty jurisdictions and it is clear that provisions do not apply to them till there is a suitable treaty modification. • Without prejudice to the above, a mechanism along the lines of provisions of S.195(3) may be introduced for the payees such that there is ring fencing of the TDS obligation and certainty of implementation from the perspective of the payers. • In addition thereto, the following carve out may also be provided: ● In view of onerous obligation on small users in case of B2C, it is recommended that the primary as also the secondary tax liability of collection should be squarely on the recipient of the income and the payer should be relieved completely of its obligation as a withholding agent or representative assessee irrespective of whether the payee is from treaty jurisdiction or non-treaty jurisdiction. ● Further, in case of B2B transactions, a threshold of INR 10 million may be prescribed such that in those B2B cases, the payer may be required to withhold taxes only when estimated aggregate payments exceeds INR 10 million. **H. Separate cell for dispute resolution or redressal of SEP cases** **Rationale**

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

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		▯ Raw customer data, in itself does not result in any value creation and there is, if at all, very small weightage which can be assigned to such raw data. Data can have value to an enterprise only if it is aggregated and structured in a way that the analytical tools deployed by the enterprise can determine relationships among the individual data points. That value is created solely through the development and deployment of the enterprise's platform and data base analytics tools, which in most cases is located outside India. Also, the R&D efforts relevant to such tools involve huge cost and risk. Hence, careful study and sufficient weightage from different factors such as high entrepreneurial risk, large capital, long maturity period, infrastructure, artificial intelligence, software, research and development and innovative skill and significant people function of business may be relevant to be undertaken before reaching to any approach ▯ Any profit attribution approach adopted for SEPs would have to acknowledge that huge losses – particularly in initial years - can be attributed to the SEP. In fact, many digitalized enterprises sustain losses for many years, as they seek to establish a stable market presence. There would need to be explicit guidance on the attribution of such losses, including the prescription of a rule which, in a transit year, recognises all accumulated losses to date for prior years. ▯ Any global formulary approach will be contrary to ALP principles and revenue linked presumptions levy often has vice of being passed on to customers ▯ Risk of double count of income attributable under clause (a) and (b) of Explanation 2A needs to be eliminated **Recommendations:** ▯ The existing principles/ rules relating to profit attribution to business connection would need to be modified substantially before they can be applied in a meaningful manner to determine

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		profits attributable to a SEP. The modification will require evolution of norms of assessing value contribution of certain features of highly digitalised business models. The rules for allocating profits to a SEP should be built on the current transfer pricing framework based on the arm's length principle by treating the SEP as a separate and independent activity for the purpose of identifying assets used, functions performed, and risks assumed, adapted suitably to include attributes of digital business. Raw data in itself may not be valuable hence, careful and proper weightage needs to be given to consumer data while attributing profits The transfer pricing framework would need to be adapted in a consistent manner to reflect the way value is created in digital activities. For instance, the functional analysis of a SEP, while one may consider the relevance of raw data and users, it also needs to take into account role played by factors like high entrepreneurial risk, large capital, long maturity period, infrastructure, research and development and innovative skill and significant people functions of business and has to suitably dovetail risk of such factors borne overseas. **Exclusion needed for loss making entities and/or the entities which do not earn income from third parties; 'one size fits all' approach is unlikely to work** ● Business models in digital industry are peculiar. While the digital world is highly innovative, the rate of technological obsolesce is also very high and many players who are unable to keep up with such pace of innovation fade quickly in this fast paced digital market. Accordingly, the guidance on attribution needs to carefully consider such features and peculiarities of loss making enterprises, obsolescence risk, prospects of loss of loyalty etc. ● Further, while data and user interaction may be relevant, it may be noted that these inputs do not contribute to income or profits until they are monetised. Also, revenue covered by

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		(a) should not be again attributed to activities of clause (b). Further, the headcount of users will need to exclude such users who have contributed to earning of revenue. ● A key element of the business model of many digital firms is that they first aim at rapid growth by creating a large user base, even if this does not initially generate much revenue or profits. This only highlights the need for a nuanced approach while dealing with this issue rather than trying to develop a "one-size-fits-all" model. More specific guidelines on the allocation of profits would need to be developed to provide clarity and certainty. ▯ Adoption of global formulary approach or presumptuous basis of taxation is contrary to ALP principles and also has vice of being passed on to the customers as transaction cost. Unlike indirect tax levy, such cost does not provide input credit to the customer and enhances the cost of business.
136.	**Place of effective management (POEM) (S.6(3))**	**Rationale:** ▯ Finance Act 2015 had introduced the concept of Place of Effective Management (POEM) in the Income tax Act 1961. Later the Finance Act 2016 deferred the concept to financial year 2016-17 and onwards. ▯ The objective behind introduction of POEM is to identify the right place of generation of profits and enable the respective country to levy tax thereon. It may be noted that the concept of POEM has been introduced with the intention to stop the tax evaders who form shell companies in tax haven countries and thereby misusing the Double Tax agreement benefits. ▯ The CBDT has issued guidelines for determination of POEM which lay down several criteria. Further it has also been mentioned in the guidelines that inspite of meeting some or all of the conditions still substance would prevail over form. This has created a lot of uncertainty in the

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		mind of Indian Multinational companies who are doing operative business outside India through its subsidiaries and that too in non-tax haven countries. • When the subsidiaries of Multinational companies already are liable to pay tax in the respective countries then only question remains is about determination of correct share of profit for each country. This aspect gets take care of by transfer pricing provisions that exist in almost all countries including India. • Further it may be noted that the Finance Act 2016 has also introduced reporting of transfer pricing on a global basis by way of introduction of section 286 relating to furnishing of report in respect of international group. Thus, there are adequate measures available to identify country-wise profitability. Even otherwise the transfer pricing regulations have ability to identify jurisdictional profits and levy tax thereon. • In light of the above, the requirement of POEM compliance will be cumbersome and will affect the ease of doing business of Indian multinational groups **Recommendation** • The companies which have active business and are operating in non-tax haven countries such as US, Australia, South Africa, China etc. be made exempt from the compliance of the POEM provisions. • Without prejudice to above, penalty and prosecution provisions should be waived till the time law is settled.
137.	**Section 6(3) amended with effect from AY 2017-18 – POEM application should be**	**Rationale:** • Section 6(3) of the Income-tax Act has been amended w.e.f. 1st April 2017 (AY 2017-18) whereby the residential status of a company shall be determined based on the location of place

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	restricted to companies in tax haven countries	of effective management. Emphasis has been kept on the physical place of management. It may be seen that situation like Covid 19 had forced people in most of the countries to work from their residence. Thus, it has been proved that virtual work and presence is going to be the new normal. • The intention of POEM is to restrict companies shifting their place of residence to tax heaven countries to avoid tax. • However, in most of the countries where the corporate tax rates are more than 15% to 20%, there is no incentives for corporates to artificially create residence in a particular country. Also, in case of loss making companies the question of planning the place of residence and thereby saving / avoiding income tax does not arise. • The provisions of POEM are resulting into hindrance in the global growth of Indian multinationals and are affecting ease of doing business. • Further, the CBDT has issued circular No 6 dated 24 January 2017 to provide POEM guidelines. In the said guidelines, emphasis has been given on the place of taking key decisions. The place of Board meetings is an important event wherein the key personnel of the company resolve major decisions. The inference of the provisions is that the persons taking/ attending meetings should be personally present at the venue of meeting, which would establish the place of effective management pertaining to such meetings and decisions. • In para 8.2 clause (d) of the circular, it has also been mentioned that the modern technology impacts POEM in many ways. It is no longer necessary for the persons taking decision to be physically present at a particular location. Therefore, physical location of board meeting or executive committee meeting or meeting of senior management may not be where the key

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		decisions are in substance being made. In such cases, the place where the directors or the persons taking the decisions or majority of them usually reside may also be a relevant factor. • The aforesaid para needs a review post COVID-19 scene, wherein it was almost impossible and unsafe to travel to the place of meetings and attend personally to take decisions. The meetings were getting conducted in virtual manner since March 2020 onwards. Even subsequently, the new-normal has necessitated remote means of working. Therefore, it is necessary to relax such conditions whereby due to virtual presence the country where directors are ordinary resident no longer remains a factor in determining POEM. **Recommendations:** • In case of companies having active business outside India, it has been stated that majority of the Board meetings should be held outside India. Considering the new normal way of operations, this criteria be removed and therefore the primary presumption should be based on the first criteria as mentioned in the Guidelines as issued by CBDT in this regard. • Clause (d) of Para 8.2 of the CBDT circular be suitably modified. The venue of board meeting be considered as the place of decision making in case of virtual meeting provided that at least one director or key managerial personnel is attending and recommending / proposing decisions from such venue of meeting.
138.	**Deduction for taxes paid on income to the provincial/local tax bodies like the State, Cities, Countries in overseas tax jurisdictions etc.**	**Rationale**: • In order to mitigate the rigours of double taxation in respect of cross border transactions, India has entered into Double Tax Avoidance Agreements (DTAAs) with many overseas tax jurisdictions. The provisions of the DTAAs prescribe tax relief to resident of a contracting country either by way of exemption method or tax credit method. Generally, the DTAAs entered into by India are with the central governments of overseas countries.

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		? However, in case of countries like the USA, Canada, and Switzerland which have Federal structure of governance, the local governments at the provincial/state, cities, counties, which also levy taxes on income, are not party to the DTAA, and hence, taxes on income levied by such jurisdictions are not covered by the Scope of Taxes of such DTAAs. Such local taxes are merely not covered because the respective Federal Governments lack the necessary constitutional authority to contract on behalf of the local tax jurisdictions in view of the peculiar prevalent Federal structure of governance. ? Though the levy of such local taxes on income also amounts to double taxation of income, the relief is denied by the tax authorities in India on an erroneous ground that such local taxes are not covered by the applicable tax treaty. ? The anomaly becomes more apparent in cases where India has not signed a DTAA with any country. The provisions of section 91 which allows tax relief in such cases, do not distinguish between taxes on income levied by the Federal and/or provincial/local bodies and allows tax credit even for local taxes on income. **Recommendation**: ? The FTC should be allowed for taxes on income levied by overseas provincial/local tax jurisdictions by amending s.91 or alternatively the taxes paid should be allowed as deduction from the total income of the assessee.
139.	**Filing of Form 67 to claim FTC under revised return or during assessment**	**Rationale and Issue** ? As per the provisions of section 90 read with Rule 128 and Form 67, an assessee is entitled to relief of the tax paid in foreign country on the income which is also taxed in India, as per the prescribed guidelines. As per Rule 128, for claiming the tax credit under section 90, the assessee needs to file Form 67 along with the proof of payment of tax on or before the end of

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		the assessment year relevant to the previous year in which FTC is claimed by an assessee [as per the recent CBDT Notification No. 100 of 2022]. • Form 67 was required to be furnished on or before the filing of original return. Recently, the CBDT issued clarifications to allow claim of FTC in respect of Form 67 filed after the due date, but before the end of the relevant assessment year. This gives flexibility to file form 67 anytime during the relevant assessment year. However, this facilitates individuals to claim credit only vide original return/ belated return/ updated return, as applicable. • There have been cases wherein the individual files original return without claiming any credit on the taxes paid outside for want of relevant supporting documents and thereafter revise the return (for claiming treaty benefits). Given this, the government may consider allowing filing of Form 67 for revised return as well. • Tax returns and payments in certain jurisdictions (eg: Singapore) are furnished much after the due date of filing Indian tax returns. Accordingly, proof of payment is not available at the end of the Assessment Year. Further, there the quantum of tax paid and eligible FTC is also not accurately determinable while filing India tax returns. Given this, the government for such cases may consider allowing filing of Form 67 even after the end of the Assessment Year and allow such FTC during assessment or on filing rectification application by the assessee. Further, the government may consider giving the amendment a retrospective effect as well. **Recommendations** The CBDT may consider allowing FTC claim expressly under revised return. Further such amendment should be made applicable with retrospective effect. Separately, the Government should amend the FTC Rule to allow FTC claim even after the end of the assessment year basis the filing of revised Form 67 or on filing rectification application by the assessee.

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

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		years to get resolved and if the limitation period is considered to be 4 years from the date of the original order, the taxpayer may not get credit for taxes which he has actually paid. Such may not be the intent of the amendment. A similar provision is contained in S.155(16) which provides that where the compensation for compulsory acquisition is reduced by any Court or Tribunal, then the period of limitation shall be reckoned to be 4 years from the end of the year in which the order of the Court or Tribunal is passed. The time limit should be amended to provide for 6 months from date of settlement of dispute or date of effect of the amended order passed u/s. 155(14A), whichever is later Clarification should be provided on what is the documentation which shall constitute as sufficient evidence for justifying that the dispute has been settled. This may be done by specifying an illustrative set of documents, which shall constitute as evidence for settlement of dispute. Illustratively the following may be considered as evidence for settlement of dispute o Final assessment order/ final demand notice of the tax authority of the foreign country o Judgment of the Court of Law along with the final demand notice of the tax authority based on the judgement o Proof of payment of taxes o Self-declaration
141.	**Foreign companies having incomes liable to presumptive scheme of**	**Rationale**:

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	taxation u/s. 44B/BB/BBA/BBB excluded from MAT (w.e.f. A.Y. 2001-02)	▯ The retrospective amendment to S. 115JB by FA 2018 to clarify that MAT provisions do not apply to a foreign company, where its total income comprises of profits and gains from business referred to in S.44B/BB/BBA/BBB and such income has been offered to tax at the rates specified in those sections, is a welcome amendment which provides relief to foreign companies engaged in shipping, aircraft, oil & gas exploration and turnkey power project execution. ▯ But relief from MAT is limited to cases where such foreign company derives income which is 'solely" from the specified business in S.44B/BB/BBA/BBB. This is likely to be interpreted to mean that if such foreign company has any other income (– say, from sale of capital asset used for specified business or interest on income-tax refund or interest on temporary deposits with banks, etc), the exclusion will not apply and the foreign company will be fully exposed to MAT even on income from specified business. This will render the MAT protection academic since most foreign companies engaged in specified businesses are likely to have one or other incidental incomes like interest income. The object of the provision will be defeated by such onerous & impractical condition. **Recommendation**: ▯ It may be provided that, income covered by presumptive provisions will be excluded from MAT by inserting a specific clause on the lines of exclusions provided in clause (f) and (fb) for capital gains or interest/royalty/FTS income earned by foreign companies. ▯ As next best alternative, it may be provided that earning of income which is ancillary/ incidental to the specified business of foreign company will not disqualify the Taxpayer from relief under MAT.
142.	**Relaxation in s.9A(3) on**	**Existing provision**

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	"indirect" participation of resident persons in offshore funds	▯ The Finance Act 2015 introduced section 9A into the ITA to mitigate potential adverse tax consequences for an offshore fund that is managed by an Indian fund manager. The tax safe harbor under section 9A of the ITA is subject to the conditions prescribed therein. ▯ One of the conditions prescribed in clause (c) of Section 9A(3) states as under: *"the aggregate participation or investment in the fund, directly **or indirectly**, by persons resident in India does not exceed five per cent of the corpus of the fund.* *Provided that for the purposes of calculation of the said aggregate participation or investment in the fund, any contribution made by the eligible fund manager during the first three years of operation of the fund, not exceeding twenty-five crore rupees, shall not be taken into account."* ▯ The objective of these conditions ostensibly relates to safeguarding the quality of the offshore funds that are sought to be managed from India in terms of the jurisdictions that they belong to, their ownership pattern, how the fund manager is being remunerated, etc. ▯ In this backdrop, the amendments made from time to time to the provisions of section 9A of the ITA and the Rules made thereunder to mitigate certain impediments, to enable offshore funds to avail the benefits of this regime and promote Indian fund management capabilities are acknowledged. Further, the pragmatic and progressive approach adopted by the CBDT while considering the approval for safe harbor in recent applications filed by certain offshore funds is also appreciated. These developments have sent an encouraging message to the industry participants with regard to the Government's intention in developing India's domestic fund management industry. **Issue** ▯ Having said the above, the provisions of Section 9A of the ITA with the amendments thereto have been completely inadequate for fund managers in India to be able to manage foreign

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		funds. Section 9A has not been able to achieve its objective to encourage the domestic fund management industry, as the conditions of the section have been stifling for foreign funds and the Indian managers. • One particular key contributor towards this is the condition in section 9A(3)(c) above, pertaining to tracing participation by Indian investors in such offshore funds, which has perhaps been the most challenging for the funds/fund managers to comply with. • The purpose of this condition is to ostensibly check round tripping of Indian monies via global funds. While the Funds seeking approval under section 9A of the ITA are able to validate the participation of direct investors (being natural persons in the Fund), in the context of the global fund industry, a significant set of investors in such Funds would include institutional investors or reputed discretionary wealth managers who allocate a portion of the wealth managed by them on behalf of their clients to specified asset managers. In such cases, the eligible investment managers have no access to the investors in those funds or the clients of the wealth managers. • In order to alleviate the above challenge, Rule 10V(2) of the Income-tax Rule, 1962 (Rules) was introduced to provide that where the direct investor is the Government / Central bank / sovereign fund / appropriately regulated investor, the fund should obtain a written declaration from the direct investor regarding the participation, if any, of Indian residents in that fund. • Additionally, where the direct investor in the Fund is an unregulated fund, the fund is required to undertake 'appropriate due diligence' to ascertain the indirect Indian participation and the extent thereof. There is currently no clarity on what would be deemed to be appropriate due diligence but in approvals that have been granted by the CBDT to date, Funds have been intimated that they *'should be in a position to provide information of ultimate beneficial owners being Indian residents, when called for, in case their investment in the Applicant exceeds 5%'*.

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		▯ Practically, obtaining such declarations from institutional investors is extremely difficult since: (i) It is practically impossible to verify participation by Indian residents on an ongoing basis in cases where the eligible investment fund is an open-ended fund or listed on overseas stock exchanges. (ii) Given the broad-based nature of these funds, obtaining declarations for each investor (solely to validate Indian tax residence) is not practically possible. (iii) Despite several efforts by fund administrators, most sovereign investment funds and government / state pension funds have practically refused to provide such declarations on account of the amount of diligence that would need to be done to provide such a declaration. Furthermore, the India allocation of the corpus may also be a small portion of the global fund. (iv) In many cases, the institutional investors may themselves have institutional investors and getting such declaration up the chain is impossible. (v) There is no real incentive to go through all the documentation effort and monitor such participation as there is no tax benefit provided to the fund manager upon obtaining an approval under section 9A and the fund could very well continue to operate without any such requirement by simply moving/keeping the fund manager outside India. **Recommendations** ▯ It is a humble recommendation that the requirement to track the **indirect** participation by persons resident in India be deleted. ▯ The 9A regulations were introduced to promote fund management in India; however, based on the current provisions of the ITA, the requirement to trace Indian ownership is more onerous

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		than KYC/AML regulations which have been designed to identify natural investors/ track money laundering/round tripping. In addition, in the FPI context, participation or investment by Indian residents is adequately regulated and monitored by SEBI. SEBI, from time-to-time, issues guidelines on restrictions of investment by Indian residents in an FPI. Given that SEBI already prescribes Guidelines in this regard, which are well understood and followed by market participants, there should not be any additional requirement under section 9A of the ITA with respect to the participation of Indian residents. As per the extant SEBI (Foreign Portfolio Investors) Regulations, 2019, the aggregate contribution of NRIs, OCIs and Indian tax residents is permitted upto 49% of the total contribution in the corpus of the FPI with a single resident permitted to invest upto 25% of the corpus. Furthermore, only FPI applicants that are themselves resident in, or have an investment manager that is resident in an FATF member country are accorded Category - I FPI status with non-FATF member country FPI's subject to more stringent KYC requirements with regard to ultimate beneficial owners (UBO). This demonstrates SEBI's strict oversight over tracking ultimate ownership which would be readily available to Government authorities as required. Separately, per the recent Foreign Exchange Management (Overseas Investment) Directions, 2022, a person resident in India has also now been permitted to invest in a foreign entity that has invested or invests into India, directly or indirectly, up to two layers of subsidiaries, without RBI approval. Considering the above, it is humbly submitted that the ITA is neither an appropriate statute for governing and regulating this aspect, nor will it be able to keep pace with the updates/ amendments made by the relevant Regulator from time-to-time resulting into compliance with such onerous requirement on an ongoing basis.

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		▯ A progressive regime enabling the management of offshore funds from India will help create an ecosystem for fund management, employment, talent, investment flows and nurturing of global best practices in the market. In particular, it would also help create employment opportunities in the fund management industry and encourage talent to remain in the country and contribute to the economic growth. ▯ The Government of India in the Economic Survey 2019-20 (Chapter 9 – Services Sector) also recognized the need for the development of the offshore fund management industry to boost financial services exports with the following comments in relation to the need to rationalize section 9A of the ITA. *"….., most offshore funds have been unable to utilize the 'safe harbour' provisions (under section 9A) since they have to satisfy a total of 17 stringent eligibility conditions related to the fund's structure, investor composition, investment activity and fund manager's activity and remuneration. Some of these conditions are not in sync with the structure and investment pattern of offshore funds and nature of FPI inflows into India, and lead to dual compliance burden for offshore investors since they are also required to comply with RBI and SEBI regulations related to end-investors in FPIs and round- tripping.* *In comparison, in key fund management jurisdictions such as USA, UK, Singapore and Hong Kong, the eligibility conditions under 'safe harbour' provisions for offshore funds are fewer and less stringent in many cases, with discretion available to tax authorities to evaluate the offshore fund's structure and investment pattern and allow for exceptions on a case-by-case basis.* *In view of the above challenges, the Commerce Ministry's High-Level Advisory Group (HLAG) Report (September 2019) recommended simplifying the tax framework and removing tax residency risk for offshore funds wanting to on-shore their fund management activity given that the offshore fund and fund manager are registered with SEBI and compliant with SEBI regulations. Operationalizing*

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		the 'safe harbour' regime of Section 9A, Income Tax Act (1961) would enable on-shoring the fund management activity of India-focused offshore funds, and potentially, regional/global offshore funds with partial allocation to India. It would also enable greater delegation of fund management activity of FPIs to India as FPI inflows continue to rise in the coming years." • Basis the information available in public domain and EY research, it is attempted to forecast the benefits to the Government of India in terms of incremental tax revenues as a result of simplifying the section 9A regime. • Even with a conservative estimate of 20% of the assets under management of FPI (USD 627 bn[24]) , Private Equity / Venture Capital funds (~USD 409 bn[25]) being managed from India and a 0.5% management fee, rationalizing this regime could yield inflows amounting to USD 1.03 bn. A booming fund management industry helps to develop several ancillary services such as trusteeship services, custodial services, and fund administrators. (i) Section 9A of the ITA is not an incentive scheme but merely confers a protection to offshore funds from any potential adverse Indian tax consequences. (ii) The offshore funds will continue to discharge appropriate taxes on their gains from investment in Indian capital markets (irrespective of the location of the fund manager). (iii) FPIs and Indian fund managers are registered with and regulated by SEBI; and (iv) SEBI monitors compliance with KYC and anti-money laundering norms by FPIs on an ongoing basis.

[24] Source: AUC – FPI (September 2022) - NSDL
[25] Source: EY Research

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		▯ Hence, in order to provide a fillip to the development of India's fund management industry and Government of India's Make in India initiative as also provide a significant boost to the participation of Indian fund managers seeking to manage global pools of capital under the section 9A regime, the above recommendations may be accepted.
143.	**Relaxation of conditions under section 9A(4)(a) of the Act**	**Background:** ▯ Section 9A(4)(a) reads as follows, "The eligible fund manager, in respect of an eligible investment fund, means any person *who is engaged in the activity of fund management and fulfils the following conditions, namely:—* *(a) the person is not an employee of the eligible investment fund or a connected person of the fund;"* **Rationale and Issue:** ▯ Rule 10V(14) provides that a fund manager shall not be considered to be a connected person of the fund merely for the reason that the fund manager is undertaking fund management activity of the said fund. ▯ Definition of connected persons is extremely wide and adapted out of context. Further, in a typical fund structure, the Indian fund manager holds nominal management shares or voting rights to merely manage the Fund, while economic rights are with investors. This condition therefore renders offshore funds ineligible to qualify for the scheme of section 9A of the Act. ▯ These conditions deprive many potential foreign Funds from locating their Fund management operations in India. In most of the countries having similar regime for approval, there is no such bar of connected persons. **Recommendation:**

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		▯ It is recommended to omit the condition as prescribed above since the condition is not in sync with the Fund structure and commercial realities. ▯ Alternatively, the holding of such management shares/ management rights or shares carrying economic rights, directly or indirectly, by the Fund manager itself or its shareholder/owner or affiliate entity in the eligible investment fund, should be specifically excluded.
144.	**Clarify definition of 'Indian concern' under section 115A to include an Indian branch**	**Rationale:** ▯ Section 115A deals with taxation of dividends, royalty, and technical service fees in the case of foreign companies including an interest income received from an 'Indian Concern'. The term 'Indian concern' is not defined under section 115AC. This leads to a dispute whether an Indian branch would qualify as an Indian concern and thereby whether the concessional tax rate provided under section 115A would be allowed to non-resident persons or foreign companies when such income is paid by an Indian branch to the head office/overseas branch offices. **Recommendation:** ▯ It is recommended that the definition of the term 'Indian concern' may be introduced to include 'Indian branch' in the provisions of section 115A and the benefit of concessional tax rate under section 115A should be expressly extended to the income received by foreign companies from its Indian branches.
145.	**Taxation of ESOPs for migratory employees**	**Rationale:** ▯ The Act levies tax on the global income of a resident individual. India has a huge source of global brain power. India is home to a large migratory population. Indian youth visit foreign countries for employment and return with skills and experience of working with global institutions. As a part of employment compensation, such employees receive ESOPs from foreign employers.

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		▯ As per the present provisions, the income arising from the vesting of ESOPs is taxable in the hands of the employees at the time of exercise. In the case of employees returning back to India, the ESOPs would be taxable in India on exercise despite the absence of any nexus between employment and Indian jurisdiction. The taxation of ESOPs is provided under section 17(2)(vi) read with Rule 3. It provides that any security allotted by an employer or former employer, free of cost or at a concessional rate, is considered as a perquisite. This taxability arises proportionately with the residential status. This imposes difficulty in determining the residential status of migratory employees and further in the taxation of ESOPs. This increases the tax cost of the employees. **Recommendation:** ▯ It is recommended to specifically provide for the taxability of only proportionate ESOP benefits based on the residential status of the individual, where an employee was based in India for only a part of the period between grant and vesting. Alternatively, rebate may be allowed from the tax liability of such ESOPs.
	Equalisation levy	
146.	**Scope of "online sale of goods" or "online provision of services"**	**Rationale and issue:** ▯ In today's world, every business (including traditional brick and mortar business) has embraced technology to bring greater efficiency to its business operations. The technology could be adopted with various different goals in mind. Very often, technology is being used to make the activity more time and cost efficient (e.g. collection of Purchase Orders through an online link as against emailing or posting), or as a mode of communication (e.g. email for correspondence)as against letter or phone call), or collection payment (e.g. weblink to make

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		payment as against a wire transfer), or receipt of inquiry on company's website which would be construed as acceptance or placing of order (e.g. inquiry box or contact us links). - Where traditional or digital business participate substantially in India's vast market through digital means, India could certainly look at a recompense for erosion of its tax base where laws are not sufficient to create a taxable nexus. It is, therefore, important to determine what will constitute such digital nexus that ought to be taxed - Finance Act 2021 expanded the scope of 'online sale of goods' or 'online provision of services' to one or more of the following online activities viz. (a) acceptance of offer for sale; or (b) placing of purchase order; or (c) acceptance of the purchase order; or (d) payment of consideration; or (e) supply of goods or provision of services, partly or wholly. - The amendment seeks to widen the scope of EL provisions to physical/ offline supply of goods and services where any one of the specified activities take place online. Such approach perhaps has an unintended, and certainly undesirable, effect of covering traditional businesses wherein technology plays only an incidental or trivial role. In such cases, the digital or electronic facility is utilised not for availing the principal goods or service but merely for seeking information or for confirming the booking or simply streamlining supply chain. The primary object of such business continues to be purchase of physical goods or availment of physical services. This perhaps was also not the intent of the expert committee which was set up to examine Equalisation Levy in 2016 as could be noted from para 3 of Appendix 2 of the committee report. - Such a wide scope does not align with global discussion with regard to digital economy taxation. Most of the Digital Service Taxes (DST) imposed or proposed by various countries are restricted to digital goods or services.

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		▯ It may also be noted that the unusually wide ambit of India's EL is criticised in investigation report issued by the United States Trade Representative (USTR) under Section 301 of the Trade Act, 1974. India's response to this particular observation has been that India is seeking to tax only those transaction which have sufficient nexus with India that would have otherwise given it taxing rights. This argument may get diluted with the broad expanse now the levy would have post amendments. ▯ It virtually taxes all activities which constitute 'business with India' rather than taxing activities constituting 'business in India'. There will hardly be any import of goods or services which will not involve any of the above referred specified online activities. In the least, all payments for imports of goods or services are made through digital channels involving some payment facility through digital or telecommunication network ▯ It is appreciated that the intent of the Government is to create a level playing field between non-residents and residents but this rationale misses the point that the non-residents are also taxable on the same income in their home jurisdiction. Imposition of tax on 'business with India' extending beyond the 'digital' sphere of activities goes much beyond the current global debate on taxation of digital economy. It must be noted that level playing field between residents and non-residents is created by imposing customs duty and GST on import of goods into India. **Recommendations:** ▯ In terms of Explanation to s.164(cb), the applicability of EL should be restricted only to those cases wherein all or substantially all activities take place online. ▯ It should also be clarified that the intent is to tax e-commerce transactions and therefore, instances such as online ordering systems (or such similar internet based systems), or Enterprise Resource Planning (ERP) software, or corporate websites through which orders

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		are received, or purchase orders received vide emails or a common portal (such as a document management and storage system) using the internet, through which orders are received by non-residents, should not be brought within the ambit of EL, only because they have used telecommunication network for such interaction. Such systems are used only as a means to achieve operational efficiency and not to effectuate sales or solicit customers. In other words, the ambit of provisions should exclude what is not normally regarded as "e-commerce", e.g. email, ERP, intranet etc. • Provide also clarity that functions which were traditionally being carried out offline and have been made online only due to Covid-19 travel restrictions should not be covered within the ambit of EL
147.	**Specific exclusion for payment gateways/ payment aggregators**	**Rationale and issue:** • Given the expanded scope of EL, the non-resident payment gateways, or aggregators may be liable to EL, even though they are only facilitating payment leg of the transaction for an offline transaction, or a transaction facilitated by another e-commerce operator. • Promoting digital payments is one of the policy initiatives placed by the Government. To give impetus to digital payments, the Honorable Finance Minister in her Budget Speech 2021 declared that an amount of INR 1,500 Crores will be earmarked to promote digital mode of payments. Another amendment introduced vide Finance Act 2021 is to increase the turnover threshold for tax audit to INR 10 crores, if 95% of receipts and payments are executed through digital modes. Thus, the Government itself has been incentivizing the taxpayers to use digital mode of transactions. In such situation, it may be contrary to the Government's initiatives to levy EL on transactions merely on the ground that payment has been made online or through digital means.

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		▯ Further, it may be difficult, rather impossible, for the payment processor to determine whether the consideration is chargeable under EL, for instance, whether it is in the nature of royalty/ fees for technical services (FTS), if subjected to advertisement EL, etc. **Recommendations:** ▯ Without prejudice to our representation to restrict the levy only to digital goods or services, it is requested to eliminate clause (d) of Explanation to s.164(cb), viz. “payment of consideration”. ▯ Alternatively, a specific exclusion for payment gateways/ payment aggregators should be considered. It should at least be clarified that transaction is not covered under ESS EL if entire transactions take place offline (booking, acceptance, confirmation, delivery) but payment take place online. ▯ Please also clarify that where the payment gateway is collecting monies from an Indian resident on behalf of the non-resident ecommerce operator, it is in-effect providing collection services to the non-resident ecommerce operator under their agreement. Indian resident, if at all, is merely agreeing to the terms of use of payment gateway operator. Therefore, such transaction will not be subjected to equalisation levy ▯ Reference may be made to clarification provided at para 4.2 of Circular No. 17/2020 dated 29 September 2020 in the context of TDS u/s. 194O where it is clarified that payment gateway will not be liable to do TDS if tax has been deducted by the e-commerce operator on the same transaction. Similar logic will apply even in context of EL except for the aspect that it may be difficult for payment processor/gateway to find out whether the recipient is NR E-commerce operator and whether such NR E-commerce operator is liable to EL. In any case,

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		the payment processor/aggregator merely provides payment service and the scope of EL should not extend beyond consideration receivable for such payment services
148.	**Clarify that EL will not apply where services are availed outside India**	**Rationale and issue:** • Consider a scenario where the services of overseas hotels are booked online, and the actual accommodation services consummated outside India. In such cases, the contract is for use of room rights and not rendering online services of booking. The broad scope of EL covers such situations merely on the premise that booking takes place online from India or is done by a person resident in India. • Place of consumer is the very basis of granting taxing rights to market jurisdiction as per the ongoing debate in the context of digital economy. Coverage of such situation within the realm of EL may amount to extra-territorial application of the law. • Even under the existing source-based taxation principles, the FTS/ royalty payments which are for the purpose of business or source outside India are not subjected to tax in India. The broad scope of EL may also cover unintended cases where FTS/ royalty payments meant for business outside India is not taxable in India by virtue of source rule exclusion under ITA but is subjected EL because order is placed online or payment is made online from India. • Please also consider a scenario where an Indian resident reserves a ticket for a theme park attraction or a natural wonder or sports event or a theatrical performance outside India and pays for it online. The services of the physical attraction are availed physically outside India. Now the entire reservation fees could be subjected to EL India only because payment was made online **Recommendations:**

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		▯ The scope of EL should exclude cases where objects of consumption are outside India and the physical consumption of goods or services, therefore, takes place outside India
149.	**Clarify that internal goods/ services management systems are not covered by the levy**	**Rationale:** ▯ Both traditional and new economy organisations employ various electronic systems in the form of ERP, content management systems, inventory management including Just-in-time systems, workflow systems, accounting, payroll and compliance management, knowledge sharing and information systems, etc. ▯ All these systems are primarily driven towards promoting efficient business operations. For example, the system may make it more efficient to place an order which could otherwise be placed through physical means or over a telephone or email. R&D in pharma industry or solutions in consulting industry could be more easily be accessible over internal systems by the group companies. ▯ The scope of EL perhaps unintentionally may extend to these systems. **Recommendations:** ▯ A clarification may be provided that such systems do not constitute e-commerce and therefore, will be excluded from the purview of EL.
150.	**Clarity on terms "acceptance", "offer for sale"**	**Rationale and issue:** ▯ Amendment employs the terms such as "offer for sale", "acceptance" or "placing" of purchase order. Presently, there is no clarity as to the scope and coverage of these terms. It is possible that in some businesses entire negotiation of agreement take place offline and the necessary documents are sent online or uploaded on an internal system. In such

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		circumstances, there is an apprehension that mere sharing of relevant documents may tantamount to placement of purchase order or acceptance of offer for sale. **Recommendations:** • Suitable clarifications should be provided in this regard. It may be clarified that mere "receipt" of purchase order or offer for sale is excluded from the scope of the levy
151.	**Clarification on person liable to EL where multiple e-commerce operators are involved in the transaction chain**	**Rationale** • Finance Act 2021 inserted an Explanation in S. 164(cb) to provide that where even a specific activity such as placement/ acceptance of purchase order, payment of consideration, any part of sale or supply etc. is carried out online, such activity constitutes an "online sale of goods" or "online provision of services" and thereby trigger EL charge. **Issue** • The digital business models are highly integrated with multiple e-commerce operators sometimes being involved in the transaction chain. • For instance, consider business models where there is one e-commerce operator (ACo) which merely lists the products and permits placement of purchase orders thereon with respect to various other online sellers/ e-commerce operators (say BCo). In such case, on acceptance of the purchase order, the customer will be redirected to BCo's platform where the sale will be actually concluded. The customer can buy the product only on BCo's platform. Further, payment may be made using platform of payment gateway (say CCo). • In such case, there is a concern whether all ACo, BCo and CCo will be liable to pay EL on gross transaction amount specially since this may create multiple levy on the same transaction.

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		Recommendation ▪ Appropriate guidelines may be issued to clarify on which party the primary responsibility to discharge EL will lie. Further, it may be provided that if the consideration on which EL is so paid covers facilitation fees, if any, earned by other e-commerce operators from the same transaction, the other e-commerce operators be exempted from EL levy to avoid multiple levels of taxation on same stream of income in hands of different entities.
152.	**Clarify that EL is restricted only to the convenience fees earned by the e-commerce intermediary for facilitating the transaction**	**Rationale and issue:** ▪ E-commerce operators are liable to 2% EL on the amount of consideration "received or receivable" from e-commerce supply or services. The amendment made to s. 165A(3)(b) appears to impose EL on the gross consideration collected by intermediary/ aggregator. ▪ It may be noted that when the aggregator/ facilitator collects consideration from the customer, it collects the same on behalf of the seller/ service provider (e-commerce participant) and has no right over such consideration. The intermediary is entitled only to commission or facilitation fees as a consideration for its facilitation or marketplace services. In such situation, to impose a levy on a consideration which does not even belong to the e-commerce operator may not be fair and justified. ▪ Also consider an instance where Indian resident makes an offer for purchase of an overseas property online, and thereafter consummates the deal offline. EL may bring to tax the entire value of the property to tax in India ▪ This may also impact eligibility of aggregators to claim de-minimis exemption of INR 2 Crs under s.165A(2)(iii) if the consideration received on behalf of e-commerce participants is reckoned to the account of e-commerce operator. Also, where non-resident seller or service

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		provider has a PE in India, EL on gross consideration may result in application of EL despite the exemption under s.165A(2)(i). - Further, taxing gross consideration may result in duplicated levy wherein the e-commerce participant itself is liable to EL for the consideration received for online sale of goods or online provision of services. Also, in certain cases, online sale transaction may take place through multiple e-commerce operators and charging EL to each such operator may result in multiple taxation with cascading effect leading to increased cost of the transaction. - In certain types of electronic commerce transactions, especially those falling within the expanded scope of "online sale of goods" and "online provision of service" discussed above, where the sale of goods or provision of service takes place directly between buyer and seller, the e-commerce operator does not have visibility over the transaction. In such cases, the e-commerce operator may not be aware of the pricing of the goods, conclusion of the contract, etc. - Also, there are numerous e-commerce models or aggregators where e-commerce operators are not contractually obliged to collect or pay the transaction amounts or at times even remain involved in conclusion of transaction. In fact, the suppliers/ service providers are required to make commission payments to such platforms. - Bringing such transactions within the scope of EL not only creates difficulty in discharging the tax obligation in absence of payments but also adds to administrative inconvenience and working capital hurdles. It casts an unnecessary obligation on platforms who are not involved in consummation of the transaction between buyer and the seller. - Even GST law also imposes a Tax Collected at Source ('TCS') of 1% on e-commerce operators from the consideration received by it on behalf of a supplier of goods or services through its

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		online platform. In other words, there is no GST TCS obligation where the sale consideration is not routed through the e-commerce operator. 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.[26] 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. This will get further complicated if one e-commerce operator has a PE in India or its income is in the nature of royalty/ FTS and hence avail benefit of exclusion, will be excluded from the scope of EL provisions, however, the other e-commerce operator may still face the burn of ESS EL on same transaction. Equally, where supply being made is in the nature of royalty or FTS, but intermediary services do not follow that characterisation will also create complications. It may also be noted that a transaction facilitated by an e-commerce operator is already subjected to withholding tax under s.194O. The exemption under s.10(50) may also not relieve the TDS under s.194O which is with reference to the gross amount of sale or service and is not linked to income of e-commerce participant.

[26] Order Sheet; WPO/441/2021

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		Recommendations: - The amendment in s. 165A(3)(b) on the scope of consideration received or receivable" should be reversed. - It should be clarified that the amount of consideration received or receivable by the e-commerce operator for facilitating the transaction will be restricted to convenience fees received or receivable by such operator in its own rights. - Without prejudice to the above, aggregator/ facilitator should be relieved from compliance with EL to the extent of value of third party supply it has facilitated, where the payment has not been routed through the operator. Equally, third party supplier cannot be asked to made good on EL liability of the aggregator/ facilitator - In such case, if necessary, the EL law may be amended to make the NR sellers/service providers liable to EL in such cases and a reporting mechanism may be built into the EL provisions wherein such e-commerce operator will be required to provide details of the buyer, supplier/ service provider, amount of consideration and other information (to the extent available with him) to ensure the transactions are adequately captured in the Indian tax net.
153.	**Specific relief to seller or service provider if the aggregator or intermediary discharges EL on the gross consideration**	**Rationale and issue:** - The seller or service provider itself may be liable to EL if qualifies as e-commerce operator. Thus, there is a possibility of duplicated collection of EL. **Recommendations:**

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

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		is discharged even on the part of consideration earned by e-commerce participant, it is fair to exclude such transactions from the gamut of withholding obligation u/s. 194O.
155.	**"Consideration received or receivable" to exclude sales returns, collections of taxes on behalf of Government, such as GST, service tax or alike**	**Rationale and issue:** • In case of sales of goods or services by e commerce operator, sales returns are very common in both retail and wholesale scenarios. In certain categories like fashion merchandise, the returns can be as high as 25% of the sales. Refunds are also common either due to certain technical issues or non-delivery of standard services to the customers. • Further, in the context of various TDS provisions, CBDT has clarified that consideration for a given service is to be calculated without taking into account statutory levies which are collected for handing over to the Government. Refer CBDT Circular No. 1/2014 for service tax on rent and professional services, CBDT Circular No. 23/2017 on GST and para 4.3.2 of Circular No. 13/2021. **Recommendations:** • Accordingly, without prejudice to our representation in the above paras, it would be fair to restrict levy to consideration towards net consideration received or receivable. Also, the e-commerce operator should be permitted to make adjustment of sales returns and credit notes in the quarter of the financial year to which it pertains while doing quarterly compliance u/s. 166A of the FA 2016. The fact that the related sale may pertain to earlier quarter may not be relevant consideration while granting reduction so long as such sale was considered for ESS EL in the earlier quarter. Please note that TCS under CGST Act 2017 is also calculated with reference to net value of taxable supplies" after reducing the aggregate value of taxable supplies returned to the suppliers during the month.

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		▯ Further, a suitable clarification may be provided that ESS EL will be levied with reference to consideration flowing to the operator and will exclude collections on behalf of Government such as GST.
156.	**ESS EL not to apply on financial services entities**	**Rationale:** Finance Act 2020 expanded the scope of Equalisation Levy (EL) from 1 April 2020 to introduce a 2% levy on consideration received/ receivable by Non-Resident (NR) E-commerce Operators (EOP) for providing or facilitating Ecommerce Supply or Services (ESS) to certain specified persons. The way the EL provisions are worded, these are extremely wide and could have undesired consequences especially for Financial Service sectors. There are various factors which distinguish the functioning of the financial services industry from the other sectors and thereby necessitates the need for a specific carve out from the scope of ESS EL. ▯ Financial sector players are highly regulated. The regulators oversee the functioning of the financial services industry, clientele, sources of earning income, movement of funds within/ outside India, accounting and reporting requirements, etc. ▯ For providing digital services, customers can be onboarded only after carrying out necessary due diligence, Know Your Customer (KYC) checks, Anti-Money Laundering, etc. Thus, due to already existing extensive tax reporting obligations, the income from such services is appropriately recognised and taxes are discharged timely in the jurisdiction of the customers. ▯ A large portion of the digital services rendered by offshore financial services entities are rendered to their Indian Group companies. These are subject to GST (under the reverse charge mechanism). A levy of EQL will further increase the cost of rendering services from

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		India. Further for banking entities given that only fifty percent credit is available for GST this is a significant cost increase. • Basis above, an exclusion has been provided by United Kingdom, France, Italy, Spain and New Zealand to financial services industry players from the levy of Digital Service Tax (equivalent of EL) **Recommendation:** • Given the way the financial services entities operate in India and given that they in almost all cases are required to be both regulated and have a presence in India to operate in India, ESS EL should not apply to the financial services industry. This exclusion is especially relevant for financial organisations that have access to customers in different jurisdictions i.e., multinational financial institutions across the banking, asset management, insurance, etc.
157.	**Instructions for Indian resident payer**	**Rationale:** • It is quite possible that there will be several transactions where there could be debate on applicability of EL vis-à-vis royalty/ FTS. • It is also possible that Indian resident payer may decide to err on the conservative side and withhold income tax on the payment by treating as royalty or FTS only to protect against adverse consequences of failure to withhold taxes. **Recommendations:** • It should be clarified that where non-resident has duly discharged EL on its receipt and evidenced it to Indian resident, then Indian resident payer should not be considered as an 'assess-in-default' and should not be made liable to consequences of failure to withhold taxes. Form 15 CA / 15 CB procedures could carry suitable disclosures to this extent.

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		▯ Indian tax authorities will in any case have the opportunity to audit the EL compliances made by the non-resident and where for any reason royalty/ FTS characterisation or existence of PE is determined, EL paid should be adjusted against tax demand raised to prevent undue hardship.
158.	**Clarify that clarifications are 'retrospective in nature' and without prejudice, they should come into effect only from FY 2021-22, except applicability of s.10(50) of the ITA**	**Rationale and issue:** ▯ The EL were introduced at enactment stage as a surprise package and without any supporting Memorandum or clarificatory document. Given such situation, the taxpayers have been grappling with the interpretational issues and procedural hurdles. Stakeholders had been seeking clarifications time and again to gain clarity and certainly with regard to the applicability of the levy. ▯ Post 10 months of the levy, the Government, vide Finance Act 2021, made certain amendments with retrospective effect from 1 April 2020. The Explanatory Memorandum to FB 2021 states that the amendments to EL have been introduced with a view to provide *"clarifications to correctly reflect the intention of various provisions concerning this levy"*. ▯ It may be noted that the amendments are substantive in nature and significantly widen the scope of EL provisions. The amendments have resulted in covering the business models which were otherwise outside the net of EL; also, the base of levy has underdone change by virtue of the amendment to "consideration received or receivable". Such amendments are causing significant hardships to the taxpayers with no breather to comprehend the provisions and immediately comply with the same. **Recommendations:** ▯ The present Government has always fostered the policy of prospective amendments. Aligning with such philosophy, the amendments to EL chapter (except applicability of

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		s.10(50)) should be made prospective with effect from 1 April 2021 (FY 2021-22). Retrospective amendments negatively impact the sentiments of the stakeholders.
159.	**Provide for protection from interest and penalty under ITA as well as EL**	**Rationale and issue:** On account of retrospective amendment, following issues may arise: (a) Additional EL liability for the e-commerce operator who adopted a view that EL is restricted to digital goods and services alone (b) Additional EL liability for intermediaries or aggregators who discharged EL on the net consideration received (c) Income-tax liability to e-commerce operators who claimed exemption under s.10(50) with respect to royalty/ FTS income (d) Withholding tax liability to payers of royalty/ FTS who did not deduct tax at source relying on s.10(50) exemption **Recommendations:** For above referred genuine cases, it should be explicitly clarified that no interest and penalty will be levied for additional income-tax or EL or withholding tax liability arising pursuant to the retrospective amendments.
160.	**Definition of terms "goods" and "services"**	**Rationale and issue:** ESS EL applies to online sale of goods or online provision of services or facilitation thereof. The terms "goods" or "services" are not defined.

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

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		happen that ad revenue is not earned only when a customer clicks on the ad. In such cases, the revenue cannot be attributed to the Indian customers who merely views the advertisements but does not click on it. Reference can be made to the draft guidance released under France Digital Service Tax (DST) which provides guidance on what is "targeted advertising". According to the said guidance, "targeted advertising" is characterized by three cumulative conditions: (i) services are marketed to advertisers or their agents; (ii) advertising messages are placed on a digital interface; and (iii) the messages are targeted based on user's data (either collected on the interface itself or collected/generated when users consult other digital interfaces). The guidance clarifies that targeted advertising messages are designed, at least partially, based on data from the user of the digital interface on which the message is placed. Such data, notably keywords in a search engine, identification username or password and personal or non-personal data, could have been collected on any digital interface. However, it does not apply in cases where the data is not collected or generated via digital interfaces; data that have no influence on the recipient or the content of the advertising message; and data related to the digital interface itself but not specifically related to the user of the digital interface. **Rationale and issue:** **Sale of data between non-residents -** Clause (ii) of Section 165A(3) aims to apply the EL on transactions relating to *"sale of data collected from a person who is resident in India or from a person who uses internet protocol address located in India".* While the language is clear to include only sale or disposal of data transactions, the language does not specify the nature of

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		'data' sought to be covered by the provision. Further, the provisions purport to tax sale of data irrespective of whether it was collected in the past. **Recommendations:** - The nature of 'data' intended to be covered should be clarified. Clarification should also be provided to with respect to the period to which the 'data' relates. - Further, some users may not provide the correct contact information, thereby, making it all the more difficult to ascertain if the data is collected from persons resident in India. It is humbly prayed that suitable clarification be brought in to address this issue as collation of reliable information and attribution thereof is almost impractical.
162.	**Guidance on determination of IP address, residential status**[27]	**Rationale and issue:** - As per s.165A(1)(i), ESS EL shall be charged on the amount of consideration received or receivable by an e-commerce operator from e-commerce supply or services made or provided or facilitated by it to a 'person resident in India' or a person using IP address in India. - Whether a person is a resident or not in India is a fact specific exercise and may be challenging for the 'e-commerce operator' to verify the residential status for its customers. Further, it may be impractical for companies to keep track of the IP address of every user and data flows. It also raises questions regarding whether the IP address requirement is sufficient, reliable and verifiable indicator of nexus in all cases. There could also be security concerns while adopting IP address as criteria to trigger ESS EL (e.g. a hacker to sabotage the

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

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		company by a DDoS attack (or a method of masking IP address) can create a risk for company) **Recommendations:** - Thus, it is imperative that a guidance about determination of IP address is provided and determine residential status of a person
163.	**Appeal remedy against all EL disputes**	**Rationale and issue:** - Presently, remedy for filing appeal only against order imposing penalty under EL for default in deduction or payment of EL and/or filing of annual statement. **Recommendations:** - Therefore, appeal remedy should also be available for any EL disputes.
164.	**Scope of 163 to be made restrictive for the purpose of EL**	**Rationale and issue:** - S.178 of the FA 2016 states that the provisions of Chapter XV of the ITA shall so far as may be, apply in relation to equalisation levy, as they apply in relation to income-tax. Chapter XV of the ITA provides liability in special cases and includes provisions with regard to representative assessee as well. S.163 of the ITA which provides meaning of agent with respect to NR provides various limbs and one such limb covers a person in India from or through whom the non-resident is in receipt of any income, whether directly or indirectly (S.163(1)(c) of the ITA). **Recommendations:** - It may be noted here that the reason for shifting the compliance burden on NR for ESS EL is due to the fact that it captures even B2C transactions and making every customer who is in

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		receipt of online sale or supply of services as agent of NR can become clumsy and non-feasible. On similar basis, it is prayed that limb (c) can be deleted or modified in a manner that liability of representative assessee is not cast on the customers in case of B2C transactions
165.	**Set off of EL liability against liability under ITA and vice-versa. Also, provide clarity on refund mechanism for excess EL liability paid**	**Rationale and issue:** • There can also be a situation where the non-resident e-commerce operator pays EL on the basis that there exists no PE in India, however in appellate proceedings, it is finally concluded that e-commerce operator has a PE in India and hence the income is taxable under the provisions of ITA and not under FA 2016 due to s.165A(2)(i). Similarly, situation may arise where tax department alleges that the payment is royalty/FTS and in appellate proceedings the payment is held as not subject to EL but liable to tax as royalty/FTS under the provisions of ITA. • It is also possible that Indian payer may approach the Indian Revenue under s.195 for determination of appropriate taxes where non-resident ecommerce operator has already discharged ESS EL and represented such income to be eligible for exemption under s 10(50). • In such cases, an issue arises as to how should the EL tax which has been paid initially by the e-commerce operator be treated. Currently, there appears to be no mechanism for e-commerce operator to claim credit or refund for ESS EL already discharged. **Recommendations:** • It is recommended that in the absence of any clear directions in this regard, the amount paid as EL should be treated as advance tax for ITA purposes and accordingly, the amount should be available for set off/ adjustment against the income tax payable under the ITA.

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		▯ Further, as a corollary, it should also be clarified that in a case where resident payer, conservatively withholds @ 10% as royalty/ FTS while the payee believes it is liable to EL, a credit of 10% withholding tax against EL liability of 2% (as also facility to claim of refund of excess 8% taxes) should be available through EL annual return itself. This will eliminate the concerns over cash blockage for taxpayer to the extent of tax withheld by the payer (since otherwise NR e-commerce operator will have to claim refund of taxes withheld in the ROI).
166.	**Extension of due dates prescribed for making the quarterly payments of ESS EL**	**Rationale and issue:** ▯ As per Section 166A, every e-commerce operator is required to pay EL to the credit of the Central Government for the quarter of the financial year within the due dates specified. While in respect of quarters ending in June, September and December, the due dates for deposit of EL are 7 July, 7 October and 7 January, respectively' in respect of the quarter ending 31 March, the due date to deposit EL is 31 March itself. ▯ As per the general business practices, the sales reports are generated/ finalised in 3-4 working days after the end of the month. Basis such sales reports, the amount of ESS EL shall be calculated and finalised. Further, the NR needs to remit the payment to Indian banks for subsequent payment to the Indian treasury which further consumes time. **Recommendations:** ▯ Given that the e-commerce operator will be required to assess transactions and amounts on which EL is required to be discharged which may take time, it is prayed that the due dates for making the payment of ESS EL should be relaxed to 30 days after the end of each quarter. ▯ Without prejudice, it is recommended that at least the due date for the March quarter is specified as 30 April, same as the due date for deposit of TDS for March quarter.

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167.	**Measurement/ attribution issue**	? Basis the guidance provided under Report of the Committee on Taxation of E-Commerce, it appears that basis of 2% tax effectively is derived based on 5% margin attributable to India operations, which is taxable at 40%. For MNC groups already present in India through their local subsidiaries, this is an incremental tax on 5 % margin in addition to what the local subsidiaries are already paying on a transfer pricing basis. ? Further, where global audited financials of e-commerce operator report losses for immediately preceding fiscal year, such companies should be exempt from EL. As per draft "CBDT proposal for amendment of rules for profit attribution to permanent establishment" dated 18 April 2019, loss making companies were supposed to be 2% and even if that guidance were to be accepted, the rate of tax for loss making companies cannot be in excess of 0.8% and such EL paid should be allowed to be credited in future. ? With the scope of EL, and the low threshold of 2Cr, companies at various levels of growth maturity – right from start-ups to unicorns to large MNC would get covered. Equally, the products and services they deal with, will have very different margin scenarios. This problem is also recognised by BEPS Pillar 1. ? Therefore, to tax every company at such a high attribution % may not be fair. Accordingly, it is urged that provisions similar to s.197 of ITA can be introduced in EL chapter such that business models with lower or no profits can apply for a lower tax certificate and EOP can pay EL at such lower % on consideration.
	Transfer pricing	
168.	**Time Limit for Audit Proceedings**	**Rationale** ? Currently, the time limitation for concluding assessments under section 153 of the ITA does not provide for keeping the TP assessment/audit under abeyance for the years covered under the

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		APA (including roll back) until the conclusion of APA. This is resulting in administrative inconvenience for the taxpayers by simultaneously going through the rigorous audit proceedings in spite of opting for an APA regime. **Recommendation**: • Since APA is a mechanism to negotiate the arm's length pricing of inter-company transactions, the participation of both the parties in such discussion would essentially take time. • Therefore, non-consideration of the time being spent on APA negotiations under the "exclusions" of s. 153 of the ITA would effectively require the taxpayers to go through normal audit proceedings for the years covered under the APA (including rollback years). • In case a taxpayer files APA, suitable provisions be incorporated in the law such that no TP audit proceedings are initiated for the years covered under the APA. However, in case the Applicant withdraws the APA subsequently, the provision should then enable authorities to initiate TP audit, if deemed appropriate, even if assessment proceeding time limit has lapsed.
169.	**Implementation of Country by Country report (CbCR) (S.286)**	**Rationale** & **Recommendations**: • As per the provisions of s. 286 of the ITA, the ultimate parent entity, preparing consolidated financial statement, is responsible to file CbC report within 12 months from end of reporting accounting year. • In case the parent company, based in India, does not have any international transactions or SDTs, s. 92E is not applicable to it. Conversely, will it have to file CbC report by the due date? o There are certain areas in CbC reporting and Masterfile where further clarity would help the taxpayer to understand the provision in a better way thus publishing a CbC reporting and Masterfile FAQ may help to achieve the objective.

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		▯ Guidance could be issued on how to deal with permanent establishments for CbC reporting. o For the purposes of Table 1 of CbC reporting, the revenue, earnings before tax (EBT), tax figures and headcount of the permanent establishment should be included in the aggregated results of the jurisdiction in which it is situated. o The ease with which the results of PEs can be identified varies from group to group. Many taxpayers treat PEs as separate entities in their consolidating working papers/ERP systems and therefore their results would be easy to identify. The challenge here has been to ensure that representative offices are not treated as PEs. Other taxpayer's ERP systems have not been set up to account for branches separately and there may be challenges for determining CbC Data for such cases. ▯ Dispensation from filing of the CbC by the ultimate holding company in India and instead CbC can be filed by each of the operating companies that consolidate other subsidiaries i.e. allowing an alternate reporting entity within India. o Many MNCs operate with multiple group companies operating in different businesses and industries. Ownership of these independently run businesses is through a holding company which is the ultimate parent entity. Some of the businesses may also be separately listed and may be preparing consolidated financial statements that includes its subsidiary companies. The ultimate parent entity may be consolidating all the different businesses and preparing its own consolidated financial statements for management information purposes and not for listing requirements. o As per a plain reading of the Income-tax Act, 1961, the CbC would have to be prepared by the ultimate parent entity.

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		o The holding company, operating as an investor has limited visibility and control on the operations of the operating company and its subsidiaries that are managed independently. Therefore, the holding company is dependent on the operating company for both collation of data as well as understanding of businesses of various subsidiaries. o It may also be noted, that in case of risk-based assessment and subsequent queries from tax authorities, the same would have to be addressed by the operating company, since the holding company as an investor, will not be in a position to respond on the operations of the operating company and its subsidiaries. An option could be provided to the group, wherein if both the holding company i.e. Company A and the operating company i.e. Company B, cross the 750 Million Euro threshold, then either Company A or Company B could file the CbC. This would not lead to non-compliance due to non-reporting on the part of the Group. However, it will significantly ease the administrative burden on the company.
170.	**Section 92C - % of variance requires to be increased**	**Rationale:** With aftermath crisis of Covid-19 and the ongoing Russia-Ukraine war & volatile situation in Middle East, the global economy has shrunk as also, there has been severe impact on Indian companies The impact may be long lasting and would require an entire revamp of some of the business activities. In such scenarios, the entities may be required to enter into certain transactions which can be exceptional and may require different methods of pricing to be adopted to meet the need of the business.

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		▪ This would also entail some different methodology of benchmarking of transactions with associated enterprises. ▪ In order to avoid litigation in coming years, some relaxations are required to be brought in the provisions of International Transfer Pricing prevailing under the Act. **Recommendation:** ▪ Safe harbour rules and mark-ups / benchmarks prescribed need to be reconsidered in the current context. ▪ % of variance between transaction value and ALP should be increased from 3% to 5%, considering the impact which the assessees may have pursuant to Covid-19 and war crisis and the impact can be long lasting.
171.	**Secondary TP adjustment (s.92CE)**	**Rationale** ▪ S. 92CE provides that in case where a primary adjustment is made in respect of an assessment year commencing on or after 1 April 2016, the excess money (difference between ALP determined by way of primary adjustment and actual transaction price) is not repatriated and lying outside India, will be treated as an advance in the hands of the assessee in whose hands the primary adjustment is made. ▪ S. 92CE(2) provides that, where as a result of primary adjustment to the transfer price, there is an increase in the total income or reduction in the loss, as the case may be, of the assessee, the excess money which is available with its associated enterprise, if not repatriated to India within the time as may be prescribed, shall be deemed to be an advance made by the assessee to such associated enterprise and the interest on such advance, shall be computed in such manner as may be prescribed.

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

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		or Tribunal with a view to avoid further litigation, though aggrieved by the addition. Hypothetically, if the matter is litigated till Supreme Court but is decided against the assessee, it cannot be said that the addition is accepted by the assessee. This is because even if assessee is aggrieved there is no further remedy available to the assessee. The assessee is bound by the SC ruling. Similar rationale should apply if the assessee decides not to agitate the issue beyond – say DRP or Tribunal or High Court. Any other view may result in retrospective secondary adjustments after litigation is settled at some stage. **Recommendation**: • Since there is huge litigation in India on primary adjustments itself, provision for 'secondary adjustments' should be deferred till litigation on primary adjustments is substantially reduced through alternative dispute forums like APA, DRP, etc. It will only result in perpetuating TP litigation. • It is also suggested that deeming fiction need not be applicable so long as tax on primary adjustment has been deposited by the Assessee as there is no loss to revenue. • Further, since in cases of suo motu adjustment by assessee or where primary adjustment is made by AO and accepted by the assessee or as per safe harbor rules, it would be difficult to make secondary adjustment in the books of NR AE on account of unilateral action taken in India, the same should be deleted from the provision. • As a matter of abundant caution and to avoid any unwarranted litigation, it may be clarified that S. 92CE applies only to international transaction and not domestic transactions as covered under S. 92BA.

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		▯ It may be specifically provided that the advances appearing in the books of the parties be reversed in following cases (1) AE relationship ceases to exist (2) Excess money is repatriated (3) additional tax as mentioned in 92CE(2A) is paid by the assessee. ▯ Once an amount is treated as a deemed advance and interest is imputed thereon under S. 92CE, then it should not again be subjected to tax by treating it as deemed dividend at the stage of advance. Further there is no grant of actual loan, but it is only by way of a deeming fiction that the excess money is treated as advance. Therefore, it may be clarified that once S. 92CE is applied and interest is imputed, S. 2(22)(e) will not apply. ▯ It should be clarified that if assessee disputes the primary adjustment made by Assessing Officer before DRP or higher appellate authority, it shall not be regarded as having been accepted by the assessee regardless of the outcome of the litigation. ▯ Disallowance of a royalty/ service fee in hands of the Indian entity would require foreign AE to repatriate the cash back into India. However, in light of the second proviso to section 92C(4), foreign AE would continue to be taxed on the original royalty/ service fee even though it has remitted the income it received to the Indian entity. Given this, a clarification/ guidance should be issued in this regard so that tax treatment in the hands of foreign AE is done in a logical manner.
172.	**Applicability of Secondary adjustment provisions on clause (i), (ii) and (iv) of Section 92CE(1) of the Act**	**Rationale:** ▯ Cases referred in clause (i), (ii) and (iv) are those where transfer pricing adjustments arise due to unilateral action in India and difficult to make secondary adjustment in the books of non-resident associated enterprises. ▯ Further, the non-resident associated enterprise may be prohibited from making the secondary adjustment or remitting money on account of statutory or regulatory

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		restrictions in their respective jurisdictions. **Recommendation:** • We recommend clauses (i), (ii) and (iv) be deleted from section 92CE (1) of the Act
173.	**Safe harbours to be introduced for foreign banks**	**Rationale:** • Central Board of Direct Taxes in an effort to address the increasing number of transfer pricing audits and prolonged disputes introduced the safe harbor rules. Safe harbor is an indication of sincere intent of the Indian tax authorities to provide a non-adversarial tax regime. • Safe harbor rules which provide for simple set of rules under which transfer prices are automatically accepted by the revenue authorities is not extended to foreign banks **Recommendation:** It is, therefore, recommended that: • Safe harbor rules be introduced for banks. • Relaxation be also granted from maintenance of documentation to foreign bank in local office considering that details are already maintained at Head Office.
174.	**Interest deduction limitation rule (s.94B)**	**Rationale**: • Indian treaties provide concessional rates of withholding for interest (around 10-15%).

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		▯ For many MNCs entering India, the preferred route is to use lending from overseas (or guarantee-based borrowing within India). In such an environment, the introduction of the thin capitalization rules are likely to adversely impact many subsidiaries of MNCs that operate in India and have huge capital requirement e.g. in the infrastructure and real estate sector. The amendment to limit interest deduction is likely to increase their tax outgo in the initial years; while there may not be ability to set off the interest disallowed in entirety where a high gestation period is involved. ▯ Limiting the interest deduction is likely to hamper their after-tax earnings and as a consequence the decision of the foreign investor to invest in India. ▯ Limiting interest deduction may work harshly on certain sectors such as real estate, power or infrastructure which do normally have funding from NR as also incur interest cost exceeding 30% of EBIDTA. ▯ S.94B(1) covers interest and “similar consideration” paid to a non-resident (NR) being an associated enterprise (AE). However, the scope of “similar consideration” is not clear. ▯ Proviso to s.94B(1) states that if an explicit or implicit guarantee is provided by an AE to a lender, the debt issued by such lender will be deemed to be debt issued by the AE for the purposes of s.94B(1). ▯ S.94B(3) excludes taxpayer engaged in the business of banking and insurance. However, the exact scope of such exclusion is not clear. Also, it does not excludes Non-banking financial company (NBFC). NBFC carries out functions akin to that of banks and is also regulated by Reserve Bank of India.

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		▯ S.94B(2) does not provide whether the disallowance will be of gross interest expenditure incurred in favor of NR AE or net interest expenditure (after considering interest income, if any) incurred in favor of NR AE. ▯ The interest expense which is not wholly deducted (due to limitation of cap) against income will be allowed to be carried forward and setoff up to 8 assessment years to the extent of maximum allowable interest expenditure in that year. For certain businesses, the breakeven period is higher compared to already established companies so there may be losses or reduced profits in initial years which may not absorb current period interest and set off brought forward interest of earlier years. ▯ The provision does not provide computation methodology for 'Earnings before interest, taxes, depreciation and amortisation' (EBITDA). ▯ S.94B does not exclude debt issued by NR AE in a financial year prior to 1 April 2017 (A.Y. 2018-19); hence, interest expenditure in respect of such debt incurred post 1 April 2017 (A.Y. 2018-19) will also be covered by s.94B which tantamount to retroactive application of the provision. ▯ Where a non-resident associated enterprise guarantees loan extended by a resident bank or provides a corresponding and matching amount of funds to the lender, there is no base erosion involved and hence interest limitation rule should not apply. It is the commercial and regulatory factors which necessitate the debt to be guaranteed. But the language of the provision does not make this position clear and results in unwarranted litigation. **Recommendation**:

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		? In the spirit of promoting inflow of foreign capital and India's growth agenda, the introduction of s.94B should be altogether scrapped. Alternatively, its implementation may be deferred by another 5 years ? Alternatively, Thin Capitalisation rules with ideal debt-equity ratio for various industries should be considered as is presently applicable in countries like Australia, Canada, USA, Japan, etc ? Still alternatively, the introduction of a Group Ratio Rule in conjunction with Fixed Ratio Rule may be considered as recommended in BEPS Action Plan 4. This would allow due consideration for taxpayers that have high interest cost due to their highly leveraged nature of business. This would also avoid double taxation that results from restricting the interest expenditure to an artificial ceiling of 30% of EBIDTA. ? In the interests of boosting growth, taxpayers engaged in infrastructure sector should be altogether excluded from the applicability of s.94B. Alternatively, such sectors may be excluded from the applicability of s.94B for the first 5 years. ? The term "interest" is well defined under s.2(28A) of the Act. Adding a new dimension in s.94B(1) by extending the scope to "similar consideration" creates ambiguity. We recommend that the scope of s.94B(1) should be modified to omit reference to "similar consideration". ? The reference to "implicit guarantee" should be omitted, since it not possible to prove or disprove implicit guarantee. ? The scope of exclusion applicable to business of banking and insurance may be clearly defined. The scope of exclusion should also be extended to non-banking financial company (NBFC) ? The disallowance according to s.94B(2) should be to the extent of net interest expenditure incurred in favor of NR AE, after reducing interest income received from NR AE, if any

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		▪ It is recommended to grant indefinite carry forward of disallowed interest. It needs to be clarified that EBITDA needs to be arrived as per books of accounts. ▪ S.94B should be applied only to interest expenditure in respect of debt issued on or after 1 April 2017 to avoid retroactive application of the provision. ▪ To avoid any dispute and on the lines of the relaxation given to Indian branches of foreign banks, it should be clarified that debt issued by resident bank to an Indian resident company/permanent establishment based on guarantee provided by non-resident AE is also not covered within the scope of s.94B and shall be fully allowed as deduction.
175.	**Allowability of Deduction u/s 10A/10AA of the Act on transfer pricing adjustment arising out of APA/MAP**	**Rationale:** ▪ As per first proviso to section 92C(4) of the Act, no deduction under section 10A/10AA shall be available on transfer pricing adjustment made by the Assessing officer. However, the department has extended this provision to apply even in cases of transfer pricing adjustments arising out of APA/MAP. ▪ This results in undue hardship to taxpayers who have opted for alternative dispute resolution mechanism to get certainty on their related party transactions and also infact, ensure excess money being brought back to India, to align with the transfer pricing outcomes. **Recommendation:** ▪ We recommend that it is explicitly clarified in section 92C(4) that first proviso shall not be applicable to cases where transfer pricing outcomes are derived on account of APA/MAP.
176.	**Downward adjustment in**	**Rationale:**

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	the case of APA / MAP	▪ The provisions of Section 92(3) states that TP provisions shall not apply in a case which has the effect of reducing the income chargeable to tax or increasing the loss, as the case may be, computed on the basis of entries made in the books of account in respect of the previous year in which the international transaction or specified domestic transaction was entered into. ▪ This leads to undue hardship to both resident and non-resident taxpayer, as no downward TP adjustment is allowed under the India tax laws. ▪ The objective of APA / MAP is to eliminate double taxation and provide economic relief / certainty to both the parties in the transaction. If downward adjustment is not allowed to the Indian taxpayer, the objective of APA / MAP may not be met and could result in double taxation. **Recommendation:** ▪ It is suggested to make relevant amendment in Section 92 to allow downward TP adjustments in case of APA / MAP.
	Dispute Reduction Measures	
177.	**Background**	▪ Tax litigation is a matter of serious concern. As on March 2022, more than INR 10.4 lakh crores (INR 10.4 trillion) were blocked in direct tax disputes. ▪ In terms of number of cases, 5.6 lakh (0.56 million) direct tax cases were pending at various levels as in FY 2020-21. More than 80% of pending cases are blocked at the Commissioner (Appeals) level. Based on statistics available from the Economic Survey 2017-18, appeals filed by Income Tax Department constituted 80%-85% of the appeals with its success rate being less

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		than 30%. That means, of the tax demand stuck in litigation, only 30% (or lesser) can be collected by the Government. • As per information sourced through Right to Information Act, about 4.92 lakh cases are pending before CIT(Appeals) as at 31 March 2023 across the country. • The pendency at CIT(Appeals) has accumulated over last four years since the Government tried to implement Faceless Appeal Scheme on lines of Faceless Assessment Scheme. In the recent Budget 2023, an amendment was to create post of Joint CIT(Appeals) to expedite clearance of pendency before CIT(Appeals). • You will appreciate that pendency of litigation at various levels – more particularly at CIT(Appeals), adversely impacts the industry in terms of pending demands, coercive recovery by Tax Department, blockage of working capital, disclosures to stakeholders like shareholders, regulators, etc. It vitiates the "Ease of doing business" in India and sends out a wrong signal to foreign investors.
178.	**<u>Strengthen CIT (Appeals) and Joint CIT (Appeals)</u>**	**Rationale:** • Finance Act 2020 brought in certain amendments, vesting powers with the government to notify a proper scheme for implementing Faceless Appeals. The Central Board of Direct Taxes ("CBDT"), vide its notification dated September 25, 2020, notified the Faceless Appeal Scheme 2020 "(the "Scheme"/ "Faceless Appeal Scheme"). • While the appeals before the CIT(A) were already being filed online through the official income tax portal, now even the adjudication of such appeals, right from the issuance of notice for the hearings to subsequent adjudication, will be carried on through a centralised communication centre, without any physical interaction between the CIT(A) and the appellant. The Scheme entails setting up of a National Faceless Appeal Centre ("NFAC"), serving as a central point of

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		communication and responsible for assigning the appeals to specific Appeal Units (“AUs”), consisting of CIT(A)s, in Regional Faceless Appeal Centres (“RFAC”) through an automated allocation system. • Suitable posts had been created and CIT(A)’s were transferred to NFAC and RFAC for adjudicating the appeal. However, the Scheme did not provide for granting opportunity of hearing to the Appellant. • Against the Scheme, Chamber of Tax Consultants filed a Writ (later converted to PIL) wherein primary issue raised was that if even at the first appellate stage, an opportunity for a personal hearing is not granted, then the assessee would go without any oral hearing opportunity at two stages. Also matter was subjudice before Supreme Court in case of CBDT vs Laqshya Buddhiraja. • Pursuant to challenge in Bombay High Court and Supreme Court, Vide Notification No.139 of 2021 dated 28 December 2021, CBDT amended the Scheme to provide for Mandatory Virtual hearing, wherein the same is requested by the Appellant as well as eliminated RFAC, whereby review of order and draft order was eliminated. • The Finance Act 2023 further brought about an amendment to create additional post of Joint CIT(Appeals). As per Hon’ble Finance Minister’s Budget Speech, it was proposed to deploy about 100 Joint Commissioners for disposal of small appeals. • On 29 May 2023, vide Notification No. 33/2023, the CBDT notified e-Appeals Scheme, 2023 for Faceless appeals before Joint CIT(A). On 14 June 2023, vide Notification No. 40/2023, the CBDT created 100 posts of Additional/Joint Commissioner of Income-tax (Appeals) across the country. On 16 June 2023, vide Instruction No. F. No. 370149/97/2023-TPL, the CBDT transferred pending small appeals before CIT(Appeals) to Joint CIT(Appeals) (barring certain exceptions)

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		▪ However, even after substantial amendments, the functioning of faceless appeals is not upto mark. ▪ Currently, there are about 22,000 cases pending before Income Tax Appellate Tribunals. Once the cases before CIT(A) start getting cleared, it will increase the pendency before the Tribunals which will be inundated with huge number of cases getting filed within a short period of time. ▪ In order to make the clearance of pendency smooth & effective and grant justice to close to 4.92 lakh pending appeals, following steps should be taken: **Recommendations** ▪ The clearance of pendency should be undertaken on FIFO basis so that oldest matters are disposed first. ▪ Both CIT(Appeals) and Joint CIT(Appeals) should earnestly take up the pending appeal matters (whether large or small cases) for hearing on expeditious basis. ▪ It is seen from faceless appeals that even though the submissions and explanations are filed and are on portal, yet without looking into them fresh notices are issued on the same issue. The appellate authorities may be instructed to issue notices after considering the submissions and explanations already filed and available on portal. ▪ On Income Tax Portal, there is no grievance, rectification, early hearing mechanism or petition to be filed before faceless CIT(A). It is quite necessary which will avoid filing of second appeals in many cases before the ITAT. ▪ Appeals in case of High pitched assessments where the assessed income is more than 3-4 times should be speedily taken up, the assessment and the appeal orders should be monitored by

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		independent quasi-judicial authority, which may be constituted for the purpose so that the officers get tuned in making just and reasonable assessment.
179.	**Resolving frequently litigated Issues**	**Rationale:** • A large volume of litigation is concentrated around a few issues and sections of the Income tax Act. The volume of such litigation can be reduced by adequately amending the provisions or by clarifying the legal provisions through circulars. For instance, in case the High Court takes a position that is in favour of the taxpayer, CBDT should give benefit of such view to taxpayers by issuing circulars, clarifying acceptability of particular position in favour of taxpayer. Manual of all circulars could be issued and updated annually (similar to master directions issued by RBI). • We understand that the work on the settled/ departmental view circulars has already been initiated in the Directorate of Income Tax (Legal & Research). The working of the Central Technical Committee (CTC) needs to be strengthened to make it more proactive. **Recommendations** The following measures are suggested: • Adequate manpower should be provided to the CTC secretariat and participation of the members in the meetings of the committee should be ensured. • The contentious issues must be taken up on a regular basis • The Regional Technical Committees (RTC) should meet on a regular basis and to ensure the same, the RTC work should be made part of Compliance Assurance Process (CAP) or some such report.

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		▪ The data of most contentious issues at the level of the CIT(A) could also be taken periodically by the CTC. ▪ CTC should also solicit areas of concern from the public at large, market associations, professional bodies and academic institutions etc. Besides making the tax policy more interactive, it will also improve the image of the department as a responsive tax administration. ▪ CTC should issue FAQ and guidance on frequently litigated issues. For example, FAQ's on FBT issued in the past was extremely helpful and has resulted in minimum ligation on FBT issues. The most recent example could be guidance on indirect transfer provisions, FATCA/ CRS manual, FAQ issued on GST
180.	**Statutory scheme for waiver of interest, penalty and prosecution on issues which are admitted by High Court involving substantial question of law**	**Rationale:** ▪ One of the major causes of continuation of litigation at taxpayer's behest is the fear of levy of penalty and initiation of prosecution. Heavy interest burden and effect of adverse ruling acting as res judicata for subsequent years, if not appealed further, are other causes of taxpayer preferring to keep the litigation alive. ▪ Presently, power to grant waiver of interest u/s. 220(2) and penalty u/s. 270A are provided to tax authorities under section 220(2A) and 270AA of the ITA respectively. Besides, vide CBDT Order F. No. 400/129/2002-IT(B)], dated 26 June 2006, power was granted to the specified tax authorities to grant waiver of interest u/s. 234A, 234B, 234C in specified circumstances. ▪ However, these measures have not been effective in reducing litigation due to the following issues: o In order to avail benefit of immunity, taxpayer has to refrain from filing of appeal against all the additions made in assessment order despite the fact that penalty may be initiated only on some of the issues and/or taxpayer is keen to contest only some of the

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		issues. This forces the taxpayer to file appeal against all the additions to avoid the levy of penalty and interest. o The provisions of s. 220(2A) and/or CBDT Circular grant discretionary powers to the tax authorities to grant waiver of interest. They do not grant powers to waive penalty or prosecution. Also, the circumstances under which waiver can be granted are very restrictive. For instance, in context of section 220(2A), waiver can be granted only under subjective circumstances – e.g., where payment of interest would cause genuine hardship to the taxpayer, default in payment of interest was due to circumstances beyond the control of the taxpayer, etc. Similarly, in the context of section 234A/B/C, the waiver can be granted only in specified circumstances – e.g., issue was covered in taxpayer's favour by jurisdictional High Court decision which is reversed by Supreme Court ruling or retrospective amendment or subjective circumstance like return could not be filed due to unavoidable circumstances. • It is a normal experience that discretionary powers are seldom exercised by the tax authorities, understandably due to fear of such action being looked upon as granting of unwarranted favours to the taxpayers inviting adverse action by audit, vigilance and investigative agencies. • Separately, Currently there is no facility for the Assessee to disclose his stand on any tax issue through return of income by way of notes, working or even supporting. Those are called only if the case is selected for scrutiny. Therefore, in most such cases assessee give their notes, working and stands on tax issues during the course of assessment. However, the AOs normally initiate penalty proceedings for each ground ignoring asseessee's suo moto submissions. **Recommendations:**

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		▯ It is recommended that no penalty provisions should be invoked in cases where Assessee has made full disclosure of facts by way of notes, working, supporting about his stand on tax issues at the time of filing return of income. ▯ <u>Statutory amendment to s.270AA to enable taxpayers to settle select issues.</u> The taxpayer may be permitted to seek immunity on select issues by paying up tax and interest thereon while permitting him to contest other issues in further appeal. For example, if additions are made on five issues, the taxpayer may wish to settle four issues and contest only one issue. The present law requires the taxpayer to either seek immunity for all five issues or contest all five issues as evident from requirement enumerated under section 270AA(1)(b) of ITA. This does not provide adequate incentive to settle the matter. Hence, the provision may be so amended such that the taxpayer in his application can identify the issues on which he seeks to settle the dispute by paying up tax and interest thereon. ▯ <u>Introduction of statutory scheme for waiver of interest, penalty and prosecution on issues which are admitted by High Court by involving substantial question of law.</u> Presently, after the appeal is decided by the Tribunal, the taxpayer or tax authority can file further appeal before High Court. The tax authority can file appeal only if the quantum of demand exceeds the specified threshold limit. The High Court admits the appeal only on issues which involve substantial question of law. Thus, the litigation continues on such issues at the level of High Court and more often than not, further before the Supreme Court. Due to huge pendency of appeals before all High Courts, shortage of judges and adjournments sought by litigants, the matters continue in litigation for more than 10 to 15 years.

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		An effective way of reducing litigation at this level is to provide an option to the taxpayer to settle the dispute by full payment of taxes and part of interest with waiver of balance interest, penalty and prosecution. Further, in order to minimise the litigation on penalty issues, penalty provisions should be appropriately amended to not levy penalty on issues which are admitted before the High Court as these would be question of law and legitimate points of disputes.
181.	**Repetitive Assessments**	? Internationally, most assessments are done for a block of 2-3 years which avoids repetitive litigation on the same matter. India too should consider a mechanism to pick up assessments for all open years together. ? Mostly, issues under assessments are repetitive and the scrutiny assessment for each year separately entails a lot of repetitive work. Similar information on facts is required to be provided every year. Unfortunately, the conclusion on the issues is also the same as in the earlier years, despite favourable appeal outcome, until Supreme Court rules on the matter. Carrying out a separate assessment for every year result in wastage of time and resources of the taxpayer and the tax department. ? All of these can be avoided, if assessments are done in block of at least 2-3 years. Appeals must be heard together without the requirement to file separate appeal memos and paperwork. This can avoid duplicity in pendency of appeals as well. Block assessment will free up administrative resources for the revenue also and will also reduce the litigation burden of the taxpayer. ? An alternative method of reducing the repetitive administrative efforts on Transfer Pricing (TP) and non-TP assessments is to delink the two assessments and make them independent of each other. Thus, both or either of them can be taken up independently for a block of 2-3 years based on risk assessment criteria.

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		▯ Alternatively, considering that certain transactions such as royalty, intra-group services, etc., are cyclical in nature and mostly have an impact over a period of time, they need not be assessed on an annual basis. In such cases, a detailed assessment in the first year of the prescribed block should be made applicable for the remaining years of the block. The government can prescribe appropriate rules to lay down certain conditions to be fulfilled, similar to what has been adopted as a part of the APA process (where there is no change in facts and circumstances on year-on-year basis).
182.	**Repetitive Appeals**	**Rationale:** ▯ With effect from 1 April 2022, section 158AB has been introduced, thereby enabling the tax department, on recommendation of collegium of high ranking Departmental officials, to not to file an appeal in respect of identical questions of law pending before the jurisdictional High Court or Supreme Court, whether in the taxpayer's own case or in the case of another taxpayer, subject to fulfilment of prescribed conditions. ▯ As per the judgement of the Apex Court in Union of India v. Kamalakshmi Finance Limited - AIR 1992 SC 711, the orders of appellate authority are to be followed unreservedly followed by subordinate authorities unless the operation of the same is stayed by the competent court. ▯ However, there are several instances where the favourable order of the higher appellate authorities on identical issue is not followed at the adjudication by the Assessing Officer/ Dispute Resolution Panel/ CIT(A), Revenue's appeal against the favourable order of the higher appellate authority is pending before the Supreme Court. **Recommendations:** ▯ The new section 158AB may be implemented expeditiously with formation of requisite collegiums and instructions to the field level authorities.

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		▯ Furthermore, the Assessing Officer may be empowered to do protective assessment in case of taxpayers and keep the assessment in abeyance till the issue is decided by the Supreme Court. In this regard, the Assessing Officer may take note of: o Common tax issue for which Revenue's appeal is pending before Supreme Court o Amount involved in the said issue for relevant year Similar provision of protective assessments is already there in Excise law, GST law etc. It is proposed that assessment order should be passed at two stages (i) protective assessment order at the time when identical issue is pending for adjudication before the Supreme Court and (ii) final assessment order after the issue has been decided by the Supreme Court. The tax demand on identical issues should be raised only in final assessment order and not at the stage of protective assessment order. ▯ Separately, suitable clarifications may be issued to enable the tax department to apply the provision of section 158AB issue-wise (instead of applying the provision appeal-wise). ▯ Similar provisions should be made applicable for assessee's appeals as well. ▯ Further, if an issue has been decided by the first appellate authority in favour of the assessee in one of the years, then department should not be allowed to file an appeal on such issue if the tax demand involved for that particular issue is not more than Rs. 10 lakhs. Further, disallowance should not be made on the same issue in subsequent years if the amount involved in not more than Rs. 10 lakhs. This will help in reducing unnecessary litigation on repetitive issues. ▯ Further, the timeframe for disposal of appeals should be set and strictly adhered.

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183.	**Recommendation on applicability of New dispute resolution scheme ("DRS")**	**Rationale:** • The ITA provides for alternate dispute resolution through Dispute Resolution Panel which is collegium of three PCIT/ CITs but the facility is restricted to taxpayers being non-residents or taxpayers having TP disputes. • FA 2021 has inserted S. 245MA resolving specified disputes in relation to specified Taxpayers and New Dispute resolution committee (DRC) to be set up to undertake dispute resolution in a faceless manner involving dynamic jurisdiction. Constitution of DRC and the overall scheme was notified on 5 April 2022 vide Notification No. 26 /2022 and 27/2022. • The DRC will have powers to reduce or waive any penalty or grant immunity from prosecution where dispute is resolved through this forum • The scheme is available on a voluntary basis to Taxpayers and is alternate to appeals mechanism. Taxpayers will be provided an option for settlement of disputes arising due to a variation in the specified order in respect of a specified taxpayer who satisfies prescribed conditions • The variation in the specified order should be less than or equal to 10 Lakhs (disputed amount) • If return has been filed by taxpayer for the AY relevant to the specified order, then the returned income should be less than 50 Lakhs • The specified order should not have been passed pursuant to search or survey proceedings or pursuant of exchange of information under tax treaties/ international agreements **Issue** • The amendment is in deference to industry representations for mediation as an alternate dispute resolution forum and we welcome it. India has large number of pending tax cases in

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		absolute terms and in terms of the notional value of litigation. The life cycle of a tax litigation from assessments to first appeal to Tribunal and then the Courts can take anywhere between 10-15 years or even more. • To reduce litigation, this needs to be addressed on a war footing basis. • However, the scheme is limited to small taxpayers where the returned income is less than INR 50 lakhs and disputed addition is less than Rs. 10 lakhs. The rationale for keeping out mid-sized and large sized taxpayers outside the scheme is not clear. **Recommendation:** • It is recommended that the current threshold limits of returned income of INR 50 lakhs and disputed amount of INR 10Lakhs should be eliminated to cover mid-sized and large sized taxpayers as well. • If necessary, to start with, this process can be limited to large disputes beyond a defined monetary threshold with various safeguards built in. For instance, the process can be driven by senior officials from the Ministry of Finance and Law, with the active participation of an outside expert [e.g., retired High Court Judge or a member of the Income-tax Appellate Tribunal (ITAT)] • This can help the government avoid prolonged litigation and unlock revenues that would have otherwise not been realized within a reasonable period of time.
184.	**Making alternate claim, fresh claim during assessment.** **(Section 143(3) / 148)**	**Rationale** • Many times out of abundant caution and also to avoid certain penalty provisions, assessee restrains from taking certain aggressive position in its Return of Income irrespective of the fact that there are many supporting/favourable judgements available to him at that point of time.

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		▯ Further, the time limit for filing revised return has also been reduced from one year from end of assessment year to 9 months from end of relevant financial year. Hence, there are greater chances of assessees missing out on putting forth additional claims in the return of income. ▯ In these cases, the assessee prefers to make such claims before the assessing officer during the course of assessment proceedings. In most cases, AOs disallow such claim by stating that those were not made in the return of income (relying upon the SC decision in the case of Goetze). This jeopardies assessee's position. **Recommendation** ▯ It is recommended that necessary amendments be made to the existing provisions to enable a taxpayer to make fresh claims at the assessment stage also.
185.	**DRP directions and departments Appeal thereon (S.253)**	**Rationale:** ▯ Section 253 which deals with appeals to the Appellate Tribunal, has been amended with effect from 1-4-2016. The amendment has deleted sub-clauses (2A) and (3A) which permitted the Principal Commissioner or Commissioner to direct the Assessing Officer to file an appeal against the directions of the DRP. ▯ The Explanatory Memorandum to the Finance Bill 2016 clarifies that the amendment is pursuant to Government's decision to minimize the litigation. The same reads as under :- *"In line with the decision of the Government to minimise litigation, it is proposed to omit the said sub-sections (2A) and (3A) of section 253 to do away with the filing of appeal by the Assessing Officer against the order of the DRP. Consequent amendments are proposed to be made to sub-section (3A) and (4) of the said provision also."*

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		? The effect of the above amendments has been that the Hon. DRP has expressed its opinion, during the course of hearings, that though they may have decided the issue in favor of the assessee in earlier years, for the years post amendment, they will take a decision against the assessee, if the Assessing Officer has appealed against the direction in the earlier year. The rationale explained by the Members of the Panel is that the issue raised by the Department should be kept alive. ? Thus the litigation that the Department has perpetrated in the earlier year, will now need to be carried forward by the assessee with added burden of tax demand, thereby rendering legislative intent of DRP as an alternate dispute forum, futile and ineffective. ? The DRP panels have indicated that they are willing to accept an application filed u/s 158A(i.e. to avoid repetitive appeals) wherein if there is any favorable order of ITAT in earlier years (in favor of assessee) and Department is in appeal before HC and the question of law is being admitted, in such scenario, the assessee can file application u/s 158A before DRP and DRP will follow favorable order of ITAT with a condition that whenever HC order is available, the assessment order can be modified accordingly. **Recommendation**: ? Subsections (2A) and (3A) to s. 144C may be reinstated as they stood prior to the amendment by Finance Act 2016 to grant power to Department to file appeals. ? Alternatively, the DRP be empowered with a specific provision to stay the demand raised in respect of such directions, which have been affirmed by the DRP only for the purpose of keeping the issue alive. ? Without prejudice, the scope of s.158A may be extended even to issues which are pending before Tribunal at the behest of the Department.

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186.	**Grant of Stay by Tribunal – Mandatory pre-deposit of 20% of tax demand and vacation of stay beyond 365 days even if the delay in disposing of the appeal is not attributable to the applicant assessee**	**Rationale** • With effect from April 1, 2020, ITAT can grant any stay or extend any stay already granted subject to depositing of 20% of the tax, interest, penalty, fee etc or by providing security of an equivalent amount. • Separately, the Third Proviso to s. 254(2A), as amended w.e.f. 1.10.2008, provides that if the appeal filed by the assessee is not disposed off within the period of stay granted by the Tribunal (which cannot exceed 365 days), the order of stay shall stand vacated. • The mandatory requirement to deposit 20% of the outstanding disputed interest and penalty amount in addition to the tax amount without any cap on upper limit is unjustifiable and inconsistent with other applicable laws. The Central GST Act, 2017 provides that the assessee is required to deposit 10% of the disputed tax demand (excluding penalty and interest) at first appellate level and 20% of the disputed tax demand (excluding penalty and interest) at second appellate level, with the overall cap at Rs 50 crores • Also, once the time period of 365 days for a stay granted matter has elapsed and the matter is pending disposal due to reasons which are not under assessee's control, the assessee will have to pay the balance demand immediately thereafter. There will accordingly be a huge cash outflow for the assessee. This provision has been held to be unconstitutional by the Hon'ble Supreme Court in the case of Pepsi Foods Limited [2021] 126 taxmann.com 69 (SC) to the extent the stay gets automatically vacated even if delay is not attributable to taxpayer **Recommendation** • It should be left to the ITAT to decide about the percentage of demand to be paid by the assessee depending on the case facts and issue involved. Such powers are given to the AO by the CBDT and there is no reason why ITAT should be denied such powers.

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		▪ Alternatively, the provisions for stay of demand should be uniform across all tax laws. Hence, the provisions of stay of demand under income tax should be brought in line with prevailing provisions in GST Law. ▪ This would serve the dual purpose of providing assured contribution to the revenue targets of the department and would simultaneously provide immunity / surety to the tax payers from any further demand being recovered from them. This would lead to situation in which Appellate Authorities/Courts time would be only utilized in deciding issues on merit, leading to faster disposal of issues and reducing overall pendency in Courts. ▪ The percentage of pay-out should be restricted to disputed tax demand and should not be extended to disputed interest and penalty amount to make it consistent with other applicable laws. ▪ No payment should be insisted on issues which are already covered in taxpayer's favour in earlier years in line with the CBDT Instruction No. 1914 dated 02-02-1993. ▪ Also, where the delay is not attributable to the taxpayer, to codify the SC ruling in Pepsi Foods case (supra) a relaxation should be provided for extending the stay beyond 365 days if the delay in disposing of the appeals is not attributable to the applicant assessee.
187.	**Direct tax litigation settlement scheme**	**Rationale:** ▪ There are still various direct tax litigations pending, even after VSV. ▪ The predominant reason for the same being that VSV was in a way not very lucrative (as the application could be made only per-appeal). ▪ Further, the demand to be settled was also 100% for assessees' appeal.

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		Recommendation: • A similar scheme can be brought in with a view to bring down the pending direct tax litigations. • Department should release a position paper on recurring issues, so that option of availing scheme issue wise can be made feasible.
188.	**Some other dispute resolution suggestions**	**Recommendations** • Number of adjournments sought by Revenue Department in Tribunal / Courts may be restricted • Increase the number of benches in case of ITAT/High court to expedite the pending tax litigation • Expansion of team with experienced personnel within Advance Pricing Authorities and Advance Pricing Rulings for expediting the pending applications • Issuance of internal instructions to tax officers like public release of manuals prepared for HMRC staff in UK to accord clarity on the intent and provide indicative guidance. • No Revenue collection targets to tax officers as this places undue pressure for making frivolous tax adjustment and unsettling tax positions leading to undue harassment and unwarranted prolonged litigation. • Following the Asia Initiative Declaration (Bali Declaration) signed by India recently, Govt could roll out co-operative compliance regime in a phased manner permitting voluntary adoption. As part of this, it is suggested inter-alia (i) Revive the concept of LTU; making it work seamlessly across GST and income tax permitting faster refunds, customs clearance and five-star service to taxpayers (ii) Allow taxpayers participating in this scheme to aspects such as upfront advance ruling on key tax positions, amend tax returns without penalties, permit fiscal consolidation &

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		multi-year assessment cycle where in one go a taxpayer can have finality on tax positions for a block of years **(iii)** Assessee under this scheme could opt out of faceless assessments
	Procedural matters	
189.	**Rationalisation of Re-opening of assessment:**	**Rationale and issue:** The new regime for reassessment introduced by Finance Act 2021 has done away with the time tested safeguard of 'reason to believe' and substituted it with lower threshold of 'information which suggests that income chargeable to tax has escaped assessment'. It may be recollected that in 1987, it was proposed to substitute 'reason to believe' with 'opinion' of the Assessing Officer. But in the wake of representations from taxpayers, the proposal was withdrawn and 'reason to believe' was reinstated. The following clarification was provided in CBDT Circular No. 549 dated 31 Oct 1989. *"**7.2** Amendment made by the Amending Act, 1989 to reintroduce the expression "reason to believe" in section 147 - A number of representations were received against the omission of the words "reason to believe" from section 147 and their substitution by the "opinion" of the Assessing Officer. It was pointed out that the meaning of the expression, "reason to believe" had been explained in a number of court rulings in the past and was well settled and its omission from section 147 would give arbitrary powers to the Assessing Officer to reopen past assessments on mere change of opinion. To allay these fears, the Amending Act, 1989 has again amended section 147 to reintroduce the expression "has reason to believe" in place of the words "for reasons to be recorded by him in writing; is of the opinion". Other provisions of the new section 147, however, remain the same."*

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		▪ It is submitted that there is no justification for moving away from time and judicially tested safeguard of 'reason to believe'. The third proviso to amended s.149(1) contemplates that the new pre-reassessment process of conducting inquiry and providing opportunity before issue of notice u/s. 148 may be stayed by court and hence provides for exclusion of such stay period from the time limit for initiating reassessment. This shows that the litigation which has so far ensued on 'reason to believe' can also arise on the new concept of 'information flagged by Risk Management Strategy' or information which 'suggests' escapement of income. There is no clarity that information flagged in RMS will not emerge from original assessment record and hence, there cannot be 'review' of original assessment order. Same may also be true for reassessment initiated on the basis of information received from foreign jurisdiction under an agreement entered into u/s. 90 or section 90A or even information received under a scheme notified under section 135A. ▪ The new scheme of re-assessment provides that reassessment can be initiated, inter alia, on the basis of information in accordance with the Risk Management Strategy of the CBDT. Whilst this is a welcome move making the process more objective rather than subjective, the reporting of information by the concerned parties needs to be error-free, else it is likely to result in penalising honest taxpayers in situations where the information reported by third parties (which would be used by the automated systems for flagging) is incorrect or mis-reported – this has been the experience in case of data reported in the Annual Information Returns ('AIR') where Courts have held that additions cannot be made only on the basis of data reported in the AIR and that the onus is on the AO to prove that the transaction pertains to the tax payer. In this respect, the scope of section 148 was further enlarged by FA 2022 through removal of the requirement of 'flagging' of information by risk management strategy of the CBDT. ▪ Various judicial precedents have held that an assessment cannot be re-opened only on the basis of CAG Audit objections. These decisions are sought to be over-ruled by virtue of this

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		amendment and will increase uncertainty and result in undue hardship to taxpayers. Additionally, FA 2022 brought within scope of coverage 'all' audit opinions basis which cases can be reopened. • Additionally, the Finance Act, 2022 introduced certain additional parameters for re-opening of cases for the purposes of re-assessment i.e., information requiring action pursuant to an order of the court/ tribunal, information received under an agreement entered into between India and Government of a foreign country under section 90 or 90A of the Act, etc. • Under the current scheme of re-assessment, the outer time limit for issuing re-assessment notice is six years from the end of the assessment year (other than cases pertaining to income from assets located outside India where it is 16 years). However, under the new re-assessment scheme, by setting this limit to 10 years, it will increase uncertainty for taxpayers and lengthen the time limit for attaining finality of proceedings. More so since under old regime, re-opening beyond 4 years but up to 6 years in cases where is prior scrutiny assessment was permissible only if there was a failure on the part of the taxpayer to disclose fully and truly all material facts necessary for the assessment. However, under the new scheme, the re-opening is permitted on the basis of books of account, documents or evidence in the possession of the AO which 'reveal' that income chargeable to tax, represented in the form of an asset which has escaped assessment amounts to or is likely to amount to Rs.50 lacs or more. Further FA 2022 also extended the scope of the extended 10 year limitation period to cover cases where escaped income was represented in the form of expenditure in respect of a transaction, an event or occasion or an entry/ entries in the books of account. It is submitted that there is no justification for reopening beyond 3 years if there has been no failure on assesse's part in making full and disclosure of all material facts. The assessee should not be harassed for oversight on AO's part – more particularly, when the assessment under new regime is done in faceless manner with a team based assessment with dynamic jurisdiction with internal peer

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		review process. Based on the speech of the Hon'ble Finance Minister and the Explanatory Memorandum to Finance Bill, 2021, taxpayers believed that the earlier limit of 6 years was reduced to 3 years whereas 10 years was the time limit for search/ survey cases. However, it now appears that the time limit of 6 years with undisclosed income threshold of INR Rs. 1L which existed prior to Finance Act 2021, amendment is virtually extended to 10 years with higher threshold of INR 50 Lakhs due to the extension in scope vide FA 2022. As per the erstwhile re-assessment scheme, the AO was required to record reasons for re-opening the assessment and obtain approval of the higher authorities before he issues a re-opening notice. Further, in cases where the AO notices any income escaping assessment subsequently during the re-assessment proceedings, he can re-assess such income. There are conflicting judicial decisions in respect of the issue as to whether the AO can make additions for issues which came to his notice subsequently during the re-opening proceedings, in case no additions are made on account of the issues for which reasons were recorded for re-opening, However, as per the new re-assessment scheme, whilst the AO is empowered to make additions for issues which he notices subsequently, he is not required to obtain approval of the higher authorities for such issues – this could lead to frivolous additions being made and increase litigation. Separately, it may be noted that, under the erstwhile reassessment regime, the third proviso to S.147 reproduced below clearly restricted the powers of the Tax Authority to reassess matters which were subject matter of appeal, reference or revision: *"Provided further that the Assessing Officer may assess or reassess such income, other than the income involving matters which are the subject-matter of any appeal, reference or revision, which is chargeable to tax and has escaped assessment."*

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		▯ However, a comparative provision is conspicuous by its absence in the new reassessment regime. This may result in overzealous Tax Authorities trying to reopen assessments even in respect of matters which have attained finality causing needless litigation. Further, this may also vitiate the principle of tax certainty. ▯ Under the new re-assessment scheme, the re-opening is likely to be largely information-driven and/ or basis data flagged by automated systems. Experience has shown that information recorded in AIR statements many a times is incorrect and does not pertain to the concerned taxpayer – accordingly, sufficient time should be provided to the tax payer to approach the third parties who have reported the information and reconcile the same if necessary before responding to the AO. Minimum time of 7 days is too short for the taxpayer to verify the information and respond to the show cause notice. **Recommendations:** ▯ Risk Management strategy of CBDT should be made publicly available to enable transparency and certainty amongst taxpayers. Further, once the taxpayer has confirmed that the particular transaction does not pertain to him, there should be a mechanism whereby the AO takes action on the third party who has mis-reported the information rather than re-opening the assessment of the taxpayer ▯ The amendments introduced by the Finance Act, 2022 which expands the scope and time period of reopening of assessments thereby increasing uncertainty and ambiguity be reconsidered. Specifically, in the context of private equity funds with a defined life, this uncertainty impedes ease of doing business in India. ▯ Re-opening of assessment on the basis of audit objections should be rolled back since the fault does not lie with the taxpayer in such cases. Under the new faceless assessment system, there is process of peer review and monitoring of the assessment order before it is finally issued.

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		When the final assessment order is passed after such checks and balances, the taxpayer should not be harassed for audit objection. In line with the professed stand of the government to reduce tax uncertainty, a clarificatory provision may be reintroduced prohibiting the tax authority from undertaking reassessments w.r.t issues which are subject matter of appeal, reference or revision Outer time limit for issuing notice for re-opening assessment should be retained at 6 years from end of the assessment year in place of the new limit of 10 years to bring certainty and closure to past matters. Alternatively, it is requested that the Government clarify that the time limit of 10 years applies only to search cases. Without prejudice to the above, additionally, clarity is required in respect of the relevance of the terms 'income chargeable to tax represented, in the form of (i) an asset or (ii) expenditure in respect of a transaction or in relation to an event or occasion or (iii) an entry or entries in the books of account', to trigger the 10-year time limit. It is recommended that it be clarified that "asset" or "expenditure" or "entries in books of accounts" for purposes of section 149(1) shall not include any property or item related to income which has been disclosed by the taxpayer along with the return of income or during the assessment proceedings under section 143(2) of ITA. It is suggested that AO should be required to take approval of higher authorities and give opportunity to taxpayer as per new s.148A even in case of any issue which subsequently comes to his notice It is recommended that the minimum time limit provided to a taxpayer to respond to a show cause notice seeking to re-open the assessment should be at least 15 days

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190.	**Dilution of Stringent Conditions for reopening of proceedings under New Regime introduced vide Finance Act 2021**	**Background** With a view to provide certainty to taxpayers and reduce litigation, Finance Act (FA) 2021 substantially revamped the procedure for reopening of cases under the Income Tax Act 1961 (ITA) w.e.f. 1 April 2021. The new procedure had the following features: ● Shift from criteria of "reason to believe" that income chargeable to tax has escaped assessment to requirement of "information" which "suggests" that income chargeable to tax has escaped assessment. ● Such information which suggests that income chargeable to tax has escaped assessment exists where the following objective criteria are met [Explanation 1 to S. 148],148 of the ITA], namely: a. Any information flagged in case of taxpayer for relevant AY in accordance with Risk Management Strategy (RMS) formulated by CBDT from time to time; b. Any final objections raised by C&AG to the effect that assessment in case of taxpayer for relevant AY has not been made in accordance with provision of ITA. ● Formalisation of procedure for reopening of cases laid down by the Supreme Court in the case GKN Driveshaft [2002] 125 Taxman 963 (SC) in S. 148A of the ITA. ● Need for approvals at various steps even prior to issue of notice for reopening to avoid frivolous/ arbitrary reopening by tax authorities. In addition to the above, the general limitation period for reopening was also reduced to 3 years from the end of the AY sought to be reopened as compared to the earlier 4 years. Moreover, while the extended limitation period was enhanced to 10 years from the erstwhile 6

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		years, such extended limitation period was to be applicable only in cases where tax authority was in possession of books, documents or evidence that income amounting to Rs. 50L or more which is represented in the form of an asset has escaped assessment [S. 149(1)(b)].) of the ITA]. In this backdrop, the Budget Speech of the Finance Minister in 2021 read with the Annexure thereof indicated that the extended limitation period of 10 years would apply only in limited cases involving "serious tax fraud/ evasion" where there is "evidence of undisclosed income" in the form of an asset. On similar lines, even the Finance Minister's reply to the Lok Sabha on the New Regime clearly stated that : *"……We have not increased the number of years for which the scrutiny or assessment survey could be done. What was six years was brought down to three years. Already for ten years, when it can be opened up, we actually brought in a condition by saying, only where up to Rs. 50 lakh of undisclosed income is in question, and only in such cases, will it be opened and it can be opened for up to ten years……"* **Amendment vide FA 2022** FA 2022 amended Explanation 1 to S. 148 of the ITA whereby the following objective criteria for presence of information which suggest that income chargeable to tax has escaped assessment are met: a. any information in the case of taxpayer in accordance with the risk management strategy formulated from time to time by CBDT; b. any audit objection to the effect that assessment in the case of the taxpayer was not in accordance with the provisions of the ITA;

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		c. any information received from a foreign jurisdiction under an agreement entered into u/s. 90 or section 90A; d. any information requiring action in consequence of a tribunal/court order; e. information received under a scheme notified under section 135A (Dealing with information collected by tax authorities electronically under different provisions of ITA) • Separately, even the requirement of multiple approvals prior to issue of notice u/s 148 has been dispensed with in favour of streamlined approvals for conduct of enquiry prior to issue of notice and issue of order stating that case is fit for reopening. • Further, FA 2022 also amended S. 149(1)(b) wherein escaped income which hitherto was to be represented in the form of an asset, may now also take the following forms for application of Extended period of limitation: ● Expenditure in respect of a transaction; ● Expenditure in relation to an event or occasion; or ● An entry or entries in the books of account. **Issue** • Enlarging the scope of Explanation 1 to S. 148 by removing the requirement of flagging of information by RMS and/ or the coverage of all audit opinions (whether draft or final, whether C&AG or otherwise) within the ambit have the potential to enable tax authorities to reopen a host of cases.

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		▪ The amendments have the effect of reversing settled jurisprudence on the impermissibility of reopening of proceedings on the basis of borrowed satisfaction from audit opinion [illustratively refer Delhi HC in Kelvinator of India Ltd[28]]. ▪ Separately, questions also arise on the breadth of the requirement in S. 149(1)(b) which has been extended to cover cases where income is represented in the form of an expenditure or book entry. ▪ All in all, the above amendments dilute the very intention with which the Finance Act 2021 introduced the New Regime – viz. to provide certainty to taxpayers by limiting cases which can be reopened as well as reducing the time period and therefore, reduce litigation on account of reassessment. ▪ Moreover, with the increased scope of information, there's thin line of distinction / no distinction left between normal scrutiny proceedings and reassessment proceedings. **Recommendation** ▪ Considering the intent with which the New Regime was introduced vide FA 2021, it may be prudent to reconsider the amendments by FA 2022 expanding the scope and ambit of the reopening of proceedings particularly amendments to Explanation 1 to S. 148 pertaining to information which suggests that income chargeable to tax has escaped assessment and S. 149(1)(b) pertaining to trigger of extended limitation period.
191.	**Restriction of Extended Limitation Period of 10 years to only cases of reopening pursuant to**	**Rationale and issue:** ▪ There was a paradigm change in the reassessment provisions by Finance Act 2021 to bring about transparency, objectivity and certainty. The taxpayers got an impression that earlier time

[28] [2002] 256 ITR 1 (Delhi); Subsequently affirmed by SC in [2010] 320 ITR 561

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	search, requisition or survey	limit of 6 years for normal cases was reduced to 3 years whereas 10 years time limit for search/survey cases involving undisclosed income represented by asset of more than Rs. 50 lakhs continued as it is. This was fortified by following statements made by Honourable Finance Minister and clarification provided in Explanatory Memorandum :- ● "In serious tax evasion cases, where there is evidence of concealment of income" (FM Speech) ● "Only if there is evidence of undisclosed income" (Part B of Budget Speech) ● "In specific cases where the AO has in possession evidence that reveal that income escaping assessment, represented in the form of asset amounts to Rs 50 L" (Explanatory Memorandum) ● "And if you have some proof in your hand, then you may open it" (FM's reply to debate in Loksabha) □ However, FA 2022 amended that extended time limit of 10 years to also apply to undisclosed income represented by expenditure in respect of a transaction or in relation to an event or occasion or an entry/entries in the books of account. □ This gives an impression as if the time limit of 6 years with undisclosed income threshold of Rs. 1 lakh which existed prior to FA 2021 amendment is virtually extended to 10 years with higher threshold of Rs. 50 lakhs. In other words, the extended time limit of 10 years is not merely for search/survey cases but also for regular cases. □ This appears to be in direct conflict with the objectives as explained while making amendments through Finance Act. **Recommendation**

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		▯ In line with object of the new reassessment regime to bring certainty and closure of matters, it should be provided that the extended time period of 10 years is applicable only in cases where undisclosed income is found in search, survey or requisition proceedings and not otherwise. ▯ It is recommended to define or clarify terms ‘in the form of asset’ 'expenditure in respect of a transaction or in relation to an event or occasion' and 'entry or entries in the books of accounts' to give clarity on what kind of cases will get covered to avoid litigation and bring certainty.
192.	**Ambiguities on Reopening pursuant to information requiring action in consequence of a Tribunal/ Court order**	**Background and Issues** ▯ As discussed above, FA 2022 expanded the objective criteria for information which suggests that income chargeable to tax has escaped assessment to include information requiring action in consequence of a Tribunal/ Court order. ▯ Various terms used in such provision, as inserted, are defined neither in the ITA nor in the General Clauses Act, such as “require”, “action”, “in consequences of”, “Court” and “Tribunal”. ▯ The afore-mentioned terms therefore lead to uncertainty on the scope of the amendment and may be susceptible to broad interpretation which may be unintentional. For instance, ● Whether orders passed in the case of a Third Party can be said to “require action in consequence” thereof in the case of a Taxpayer? ● Whether the Board for Advance Ruling (BAR) is a Tribunal, and if yes, whether a BAR ruling passed in case of a Third Party can result in reopening in the case of a Taxpayer despite such ruling not being applicable and binding to the Taxpayer?

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		● Whether Tribunals constituted for the purpose of other laws such as NCLT would also be covered? **Recommendation** ⍰ It is therefore recommended that the terms Court or Tribunal be specifically defined to cover Income Tax Appellate Tribunal, High Court or Supreme Court only. ⍰ Further, it may be clarified that "information requiring action in consequence of a Tribunal/ Court order" would cover only those cases where the court has given a specific direction regarding reopening of proceedings for reassessment in the case of the same Taxpayer whose assessment is sought to be reopened.
193.	**Recommendations in respect of Faceless Assessment**	The honorable prime minister had launched '**Transparent Taxation – Honouring the Honest**' platform and unveiled Faceless assessments on 13th August 2020. During the launch, the Government said that technology, data analytics and artificial intelligence will be the key drivers of the platform which will ease compliance burden, provide more certainty, bring in fair/ just system while removing physical interface between tax department and taxpayer. Though the scheme of faceless assessment was introduced with the aim to ease the compliance of the assessee and provide the certainty to taxpayers, however the manner in which the same has been implemented by tax department, it has caused genuine hardship to the taxpayers and increased the difficulty of compliance. Therefore, based on the various scrutiny notices received from National e-Assessment Center we would like to highlight the following grievance and recommendations by the taxpayers: **A. Faceless Assessment is not suitable to Large Corporates**

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		Rationale: • In the past, during the assessment proceedings large corporates were submitting details called for by the assessing officer in multiple box files. During the faceless assessment proceedings, the assessing officer is calling for the information such as ledger accounts, copies of the invoices etc., which is practically difficult to upload considering the size constraints and huge volume of the data for large corporates. • It has been experienced that the questionnaires being served are quite lengthy and comprehensive, requiring submission of voluminous information which is not feasible for large corporates; specially if the books of accounts are audited. • This leads to substantial time and effort in collation of information, converting the same in specific file formats and then uploading with a constraint in upload size. This leads to filing of multiple partial responses which is backed by system / portal challenges [At times, it takes long hours (even upto 6 to 8 hours) for merely uploading a response to single notice/ questionnaire as the portal also ends up in run-time sessions]. • It has also been observed that the ask in the notice is not quite clear, and clarification is then sought in writing, which delays the process. The responses can be filed only after clarity is furnished. • Further, even the responses filed are not being considered before issuance of subsequent show-cause notice, leading to reiteration of submissions involving additional time and efforts. • It is also observed that the disallowances continue basis preceding years, despite the tax assessee placing adequate facts/ documents and explanations, as well as placing a reliance upon favourable jurisdictional ITAT/ HC judicial pronouncements.

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		▪ There are various other challenges w.r.t issuance of draft / final assessment orders also. The orders are being served without an adequate opportunity of being heard; thereby leading to further Writs being filed. ▪ Sometimes the final assessment orders are passed without properly complying with the binding directions of DRP ▪ Further, the scheme also stipulates to cover Transfer Pricing Assessments for domestic companies. Transfer Pricing benchmarking is usually industry driven, business segment driven and may require discussion / explanation to be put forth before the Transfer Pricing Officer ▪ Any non-compliance of the notices from the Large Tax Assessees owing to genuine business difficulties may not be considered in right spirit and may pose discomfort for both the tax office and the assesee. **Recommendations:** ▪ In view of the above-mentioned practical difficulties, it is recommended that the large corporates above certain turnover limits (say Rs 1,000 crores) should be shifted from 'Faceless assessment' to 'E-assessment'. ▪ LTU should be reconstituted in case of large tax- payers. ▪ To reduce administrative burden on assesses, Department should seek targeted explanation on identified issues rather than merely asking for voluminous transaction level information such as listing of Sundry Debtors, Sundry Creditors, Sales, Purchases, etc. especially in cases of Large Tax Assessees which have robust internal controls and undertake statutory/ tax audits. ▪ Further, such entities have compliance requirements under various laws. Therefore,

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		falsification of transactions / documents is not possible in such companies. Also, the information cannot be mis-handled in an ERP environment which meet the highest data integrity standards and hence, the information is not mishandled. Thus, furnishing of large volume of information merely for record will not serve any purpose. • Rather, department should build-in capabilities of analysing transactions using industry ratio, company ratio, etc. and only if required seek for explanation rather than merely asking for voluminous transaction level information. • Department should also analyse books of accounts of such assessees following procedure of system audits / assessments and walk-through of the processes in place. • IT challenges should be addressed to ease out information submission. • Common technical positions being adopted by the department uniformly across the country under faceless assessments should be shared with the assesses. • All Supreme Court judgements should be followed uniformly under faceless assessments by the department • There should be no addition made despite presence of ruling in favour of taxpayer merely to keep the issue alive in litigation. The Tax Department should track and monitor such cases separately with digital technology at its access and take remedial action within the provisions of the law as and when the favourable ruling is overturned by higher court. **B. Time to comply with notice issued by National Faceless Assessment Centre** **Rationale:** • It has been observed that faceless scrutiny notices provide very short time to submit the

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		response. • Further, in some cases it has been observed that notice has been issued on Friday after office hours and taxpayer has been asked to furnish the reply on Monday. • Additionally, it is observed that without giving the adequate time to the assessee, the notices also mention that no adjournment will be given and penalty will be imposed in case of non-compliance. This is clearly unfair and unjust treatment with taxpayer and against the objective of Faceless Assessment scheme and the 'tax-payer charter'. • Even the CBDT notification dated 13th August 2020, in procedure for assessment provided that the assessee may, within fifteen days from the date of receipt of notice file his response to the National e-assessment Centre. • From the above it can be seen that faceless assessment scheme has nowhere provided certainty to taxpayers but has resulted in more uncertainty along with the ongoing covid-19 related challenges **Recommendation:** • Reasonable time of minimum 15 days should be given to the assessee to submit their response. • Assessee should be allowed reasonable adjournment opportunity. **C. Rectification mechanism post final order** **Rationale:** • Currently after passing the final order through faceless assessment, in case of any rectification is required for prima facie errors there is no mechanism/ guidelines

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		available with the jurisdictional Assessing Officer basis which he can act upon. It is observed that the jurisdictional officers showing inability to dispose the applications filed under section 154 in the absence of clear guidelines/ SOPs. **Recommendations:** • CBDT should issue proper guidelines / SOP how the rectification process to be followed by the jurisdictional Assessing Officer once the final order is passed through faceless assessment. **D. Practical difficulty** **Rationale** • Number of Attachments and size per attachment is the major constraint while uploading details. Number of errors are thrown by system, which includes error in file name, repeat document (some reply needs repetitive attachments). • The attachments accepted are only in pdf, excel, csv format. Zip files and videos should also be accepted, to enable better explanation of queries **Recommendations** • Steps should be taken to mitigate these practical difficulties
194.	**Proposal of Faceless Scheme for conducting Income Tax Appellate Tribunal (ITAT) - to be**	**Rationale:** • In the recent past substantial amendments have been introduced in the ITA for enabling Government to notify faceless schemes, introduction of Faceless Assessment Scheme 2019, Faceless Appeal Scheme 2020, Faceless Penalty Scheme etc.

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	restricted to low effect appeal matters	In line with the above, FA 2021 has inserted new provisions u/s. 255 to enable the Central Government to frame a faceless scheme for conducting Income Tax Appellate Tribunal (ITAT) proceedings. **Issue** Introduction of enabling provisions for faceless ITAT proceedings have given rise to lot of apprehensions in the minds of the taxpayers considering lack of experience in the field of faceless assessment and faceless appeal scheme introduced in 2020. The ITAT is the last fact-finding authority in the appellate hierarchy for the income tax matters. When the facts are not properly appreciated by lower authorities, ITAT is the only forum for analysis of facts and legal issues and requires lot of advocacy in person. The Supreme Court and High Court admits and decides only on the question of law and not on question of facts. During Covid 19 pandemic, different benches of the Tribunals implemented protocols for virtual hearings. However, both Members and representatives of taxpayers and Tax Department faced many practical challenges in conducting the hearings. Government has already implemented almost all other tax proceedings in the faceless system. The taxpayers may face severe hardship if the in-person hearings are not granted even at ITAT level**.** **Recommendation** It is recommended that faceless ITAT be implemented for only low effect appeal matters in the initial phase, that too, at the option of the taxpayers, and other large cases be gradually covered in future.

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		▯ The scheme for faceless ITAT proceedings should also provide for adequate opportunity of being heard at all stages of the hearing. Video conferencing facility need to be liberally made available and not on discretion basis.
195.	**Clarifications on constitution of Board for Advance Ruling (BAR) to replace Authority of Advance Ruling (AAR)**	**Rationale** ▯ Before amendment by Finance Act 2021, AAR was headed by SC/HC judges. Power and functions of AAR is discharged by its 3 benches, comprising of - Chairman, Vice-chairman, one Revenue member and one Law member. ▯ Advance ruling was binding on the applicant as well as Tax Authority. However, a constitutional remedy of filing a writ petition before the HC was available to the parties. ▯ Withdrawal of application was allowed within 30 days from the date of the application. However, in practice AAR was allowing withdrawal of application even after 30 days i.e. at the advanced stages of hearing. ▯ The time interval between date of application and date of rejection/pronouncement of ruling is excluded while computing the period of limitation for completion of assessment. Also, if the period left after such exclusion is less than 60 days, the limitation period is extended by 60 days. ▯ The working of AAR has been stalled due to difficulties faced in filling up vacancies in Chairman and there are more than 450 applications pending for a period upto 5-6 years defeating the very purpose of constitution of such forum. ▯ The Finance Act 2021 has replaced the AAR with BAR run by two members, each being an officer not below the rank of Chief Commissioner ▯ Advance ruling pronounced by the BAR shall not be binding on either of the parties.

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		▯ A new provision on appeal provides for an appeal from a ruling of the BAR to both the parties to the High Court, within 60 days of date of communication of the ruling. ▯ The 30 days period for withdrawal of application from date of application will continue to apply. ▯ Pending applications in respect of which no order has been passed before the notified date, such application along with all the relevant records, documents or material, on the file of the AAR shall be transferred to the BAR and shall be deemed to be the records before the BAR for all purposes ▯ It is also provided to make the advance ruling schemes faceless. **Issue** ▯ The relegation of the AAR to BAR makes the system a lot less attractive to foreign taxpayers since the rulings are not binding and the process is no longer one which will be examined from the viewpoint of a fair and unbiased retired HC/ SC judge. DRP is a good example, which consists of three CITs and yet it is very difficult for them to take an independent view considering the revenue impact of their decisions – they have inherent conflict of interest in discharging their functions. Foreign taxpayer may not apply to BAR as there is an apprehension that decision may go against them. ▯ Non-binding nature of the advance ruling proposal will put the HCs overburdened as the applicant as also the tax department may file appeal in almost every case where the outcome of advance ruling is not in their favour. ▯ Since there is change in constitution of forum, the taxpayers whose applications are pending for a long time may no more wish to pursue their applications. The limitation of 30 days from date of application will preclude them from withdrawing their applications. It is not clear

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		whether BAR will permit them to withdraw the applications as judiciously as erstwhile AAR – despite stiff opposition from Tax Department. **Recommendation** Following are some specific recommendations in relation to functioning of BAR ● The advance ruling should be made binding on the Tax Department. ● It may be clarified that where neither of the party has gone into appeal against order of the BAR, the same becomes binding on both the parties ● Where pending applications are transferred to the BAR and the applicant wishes not to pursue application with the BAR, the application may be allowed to be withdrawn at any stage of the proceedings. The application fee may be refunded to them after deducting certain portion. ● If 2 members of BAR have disagreement, there should be an enabling provision to solve such disagreement. ● There is also a need to ensure that consistency in rulings is maintained between the different benches of BAR. Different benches must be consistent in the approach and must follow the Orders passed by the coordinate benches. ● Since the taxpayers applied to AAR for expeditious resolution of contentious issues, the time limit for completing assessment after withdrawal of application or pronouncement of BAR should be reduced to 6 months from such withdrawal or pronouncement.
196.	**Sec 201(3)** **Time limit for TDS**	**Background:**

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	assessments of payments made to residents **Introduction of similar time limit for TDS assessments of payments made to non-residents and limitation of time limit for payment to residents be made to 3 years instead of 7 years**	▪ Under section 201 of the Act, presently, there is a time limit of 7 years for initiating & completion of TDS proceedings in respect of payments made to residents. **Rationale and Issue:** ▪ At present, no time limit has been specified for payments made to non- residents. Thus, the TDS returns can be scrutinized by the assessing officers for past years without any limit, which has resulted into enormous difficulty for the assessee as it becomes practically difficult to store & retrieve data such as invoices, agreements tax certificates etc. beyond four years of filing of TDS returns. In this regard, even Bombay HC in Mahindra & Mahindra Ltd. [(2014) 365 ITR 460] had favoured proceedings should be initiated within a reasonable time limit. ▪ Specifically in the context of private equity funds which transact with each other, this creates significant uncertainty for the purchaser in terms of his withholding tax obligation. **Recommendation:** ▪ At the outset, it is recommended that similar to reduction of time limit for assessment under section 147 the time limit for completion of TDS assessments under section 201(3) be also restricted to 3 years from the year of filing such statement / return. ▪ Notwithstanding, it is recommended that the time limit prescribed under section 201 subsection (3) also be made applicable to completion of TDS statements / returns being filed even for non-resident payees.
197.	**Extend time limit to file revised/belated return**	**Rationale:** ▪ The timeline for furnishing the original return in case of taxpayers liable to tax audit under section 44AB is October 31, whereas the taxpayers liable to audit under section 92E (transfer pricing regulations) is November 30 of the relevant assessment year. As per section 139(4)/(5),

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		the time limit to file the revised or belated return is December 31 of the relevant assessment year. • The time gap between the original return and the revised return is limited i.e. one month in the case of taxpayers covered under the transfer pricing audit and two months in the case of taxpayers liable to tax audit under section 44AB. Further this limited time period does not permit the taxpayers to avail the foreign tax credit in respect of taxes paid in other jurisdictions following different tax periods although time limit for furnishing Form 67 is extended till end of AY. • The current time limit does not provide adequate time to taxpayers to identify and rectify the error and omission if any occurred while filing the original tax return. While the taxpayers are allowed to file an updated return within 2 years from the end of relevant assessment years, however, the functionality of an updated return can be accessed in limited cases along with payment of additional taxes. The updated return cannot be filed for the case where the taxpayer has a refund or reduction in tax liability. **Recommendation:** • It is recommended that the period for filing revised/belated return may be extended so as to ensure that the mechanism to file revised/belated returns is effective enough with adequate time to rectify omissions and errors. The time limit for filing the revised/belated return can be extended to March 31 as it was previously available. This would also help the taxpayers to avail the foreign tax credit once the tax is paid and the return is filed in the overseas jurisdiction.
198.	**Section 139(5) & Section 239 – TDS credits / additional TDS credit**	**Rationale:** • As per Section 139(5), a return cannot be revised after 9 months from the end of relevant financial year

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	claim	▪ This has led to reduction in time-limit during which an assessee can follow up for tax credits (specially in case of foreign tax credits) and revise the return ▪ Further, once the claim is not made in the return of income; the lower tax authorities deny the benefit / claim leading to unnecessary litigation ▪ Further in cases where the years are not picked up for complete scrutiny assessments, an assessee doesn't even have an opportunity to get the additional claim adjudicated in its favour; thereby leading to unnecessary financial loss. ▪ Even the provisions of S. 139(8) to file an updated return leads to unwarranted adverse consequences in the form of additional tax of 25-50% for no fault of the assessee. **Recommendation:** ▪ Time-limit for revision of return should be extended ▪ Alternatively, clarificatory provision should be inserted so that additional tax credit claim can be adjudicated in favour of assessee even during the assessments even if not specifically claimed in the return of income.
199.	**Onerous compliance w.r.t. issuance of TDS / TCS certificates**	**Rationale:** ▪ Provisions of section 203 of the Income Tax Act, 1961 read with rule 31 require every deductor to issue certificate of **tax deducted at source (in Form 16A)** within 15 days from the due date for furnishing the statement of tax deducted at source. ▪ Failure to comply with the provisions of the Act will attract penalty under the provisions of section 272A of the Act, a sum of Rs. 100 for every day during which the failure continues.

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		▯ Currently, TDS certificates in Form 16A to be issued are to be downloaded from Income Tax website. The same is on the basis of the TDS return filed by the deductor which gets reflected in form 26AS of the payee. ▯ With increasing reliance on Form 26AS by the deductees for claim of TDS /TCS credit and information being auto updated in the returns of income, such certificates are not much of relevance. ▯ The requirement of issuing TDS certificates has become obsolete and if continued, leads to substantial administrative inconvenience without adding any corresponding value to the compliance requirement of service vendors or service providers. ▯ Issuance of such certificates is only a cumbersome process. ▯ Further, in light of compliance requirement for Sections 194Q, 194R and 206C(1H) issuance of certificates has become a humongous task ▯ The need for issue of TDS certificates in the present circumstance exists only in following three cases viz. (a) Salary TDS certificates in Form 16 – This is an important document for salaried employees (including pensioners) which is used for many commercial transactions like borrowing loan, buying insurance policies, etc (b) Non-residents – Issue of TDS certificate is essential to enable them to claim FTC in their home country (c) S.206AA/s.206CC cases where PAN is not available since the TDS/TCS cannot be populated in Form 26AS in such cases.

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		Recommendation • The requirement to issue TDS / TCS certificate can be done away for bring in ease of compliance. Section 203 of the Income Tax Act, 1961 (Certificate for tax deducted) should be modified accordingly to define an end date to the said provision. • However, exceptions should be made for (A) Salary TDS certificates in Form 16, (B) TDS certificates to non-residents and (C) TDS certificates in s.206AA cases where PAN is not available.
200.	**Relaxation of regulations applicable to Representative Assessees u/s.163**	**Rationale / Recommendation:** • The existing provisions of s.161 do not provide relief to the representative assessee with respect to existing or future tax demands raised on non-resident's income even where the non-resident himself pays taxes in India. • In line with the amendment in s.201 and s.40(a)(i) where the payer is not treated as assessee-in-default once payer's TDS default is made good by the non-resident payee, a relief may be introduced to relieve the payer from being assessed as 'representative assessee' of the non-resident payee where the latter has filed return in India and paid taxes payable, if any, as per returned income.
201.	**Exposure of penalty levy u/s 270A even when entire tax amount is deposited by way of advance payment of taxes (no credit for taxes withheld, advance taxes**	With an intent to bring in objectivity, certainty and clarity in penalty provisions, Finance Act 2016, w.e.f. AY 2017-18, introduced s. 270A to provide for levy of penalty in lieu of s. 271(1)(c) of the ITA. The scheme of new penalty provision seems to be comprehensive and provides for detailed mechanism for the manner of computation of under-reported income, exclusions therefrom, cases of misreporting of income, the rate of penalty levy, computation of tax payable for determining quantum of penalty, etc. It also provides window to the taxpayer for applying for immunity after fulfilling conditions specified in s. 270AA of the ITA

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	paid, self-assessment tax, etc.)	**Rationale:** • As per Explanation 3 of erstwhile penalty provisions under s. 271(1)(c), in case where return of income is not furnished, penalty will be calculated with reference to tax on income assessed reduced by credit of the taxes deducted or advance tax paid by taxpayer to arrive at the net figure of 'amount of tax sought to be evaded'. • As against that, no similar provision exists under the penalty regime under s. 270A. This may create avoidable hardship in case of taxpayer who are not required to furnish return of income under s. 115A(5) of the ITA since their entire income earned and chargeable to tax in India has been subject to withholding, and in the course of assessment the income determined is the amount of income which has already suffered taxes by way of withholding in India. In such cases, the whole of the income, as assessed, may be considered as under-reported income. • Further, the language of the provisions of s .270A was amended by Finance (No.2) Act 2019 to equate the case of filing of tax return for the first time in response to notice issued under s. 148 with a case of non-filing of tax return. Consequently, computation of under-reported income and tax payable thereon would be determined on the similar as is applicable to case of non-filing of tax return. • Under the erstwhile provisions of s. 271(1)(c), in terms of Explanation 3 r.w. clause (c) of Explanation 4, amount of tax sought to be evaded was calculated after taking into consideration credit for pre-paid taxes already paid by the taxpayer • In absence of provision for grant of credit for pre-paid taxes in s. 270A(10) it may result in genuine hardship to the taxpayer in cases where whole of the tax has been deposited either by way of TDS or by way of payment of advance tax. Despite the fact that there is no revenue loss to the Government, the taxpayer will expose itself to penal consequences of s. 270A.

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		Recommendation: • Hence it is recommended for insertion of separate provision similar to Explanation 3 to s. 271(1) to avoid genuine hardship to the taxpayer in cases where there is no loss to the revenue. • S. 270A(10) be suitably amended to provide for credit for pre-paid taxes (TDS, advance tax and self-assessment tax) along the lines of erstwhile Explanation 3 to s. 271(1)(c), in computing amount of tax payable on under-reported income
202.	**Misreporting covered cases of deliberate misconduct: s. 270A(9)**	**Rationale:** • Levy of penalty in respect of misreporting of income is 200% of tax payable as against penalty of 50% in case of under-reported income. • Cases of misreporting of income covers instances of 'suppression', 'misrepresentation', 'false' and 'failure'. Terms 'suppression' and 'false' indicate a deliberate/ wilful act of misconduct. However, dictionary meanings of the term 'misrepresentation' and 'failure' suggest that it has both shades of meaning namely a deliberate mistake as well as an innocent mistake. If the comprehensive dictionary meanings of the term 'misrepresentation' and 'failure' are imported for the purpose of s. 270A(9), even mistakes which are not deliberate or are innocent and where there is a bonafide reason for such mistake would also be covered by the harsh consequences of 200% penalty levy under s. 270A(9) which may not be in sync with the legislative intent of providing a carve out for specific cases of penalty levy. **Recommendation:** • In order to avoid above mentioned unintended consequences of covering even bonafide / innocent mistakes within the ambit of s. 270A(9), it is recommended that a suitable clarification by way of an Explanation or proviso be provided under s. 270A(9) suggesting that the cases

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		intended to be covered by s. 270A(9) is of deliberate / wilful misconduct on the part of taxpayer.
203.	**Denial of benefit of immunity even if one of the items of under-reported income is arising as a consequence of misreporting of income (s. 270AA)**	**Rationale:** • As per the provision of s. 270AA(1), the taxpayer will not be allowed to apply for immunity from penalty if penalty is initiated for the circumstances referred in s. 270A(9). In a case where there are 5 additions made by the Assessing Officer for which penalty is initiated, only 1 addition was classified as 'misreporting of income'. Thus taxpayer will be denied of the benefit of immunity in relation to other 4 additions even though conditions specified in s. 270AA of the ITA are complied with. **Recommendation:** • Since the provisions for immunity are introduced to avoid litigation, it is advised to make immunity provision qua addition / disallowance and not qua assessment order. Hence the taxpayer should be allowed to apply for immunity for all such additions / disallowance for which initiation of penalty is not as 'misreporting of income'. • Taxpayer may also be permitted to seek immunity on select issues by paying up tax and interest thereon while permitting him to contest other issues in further appeal. Scope of immunity under section 270AA of the Act may be expanded to any assessment order passed on or after the date of amendment. • Permit one-time settlement scheme of erstwhile regime's S.271(1)(c) cases u/s 270AA.
204.	**Rationalisation of penalty provisions under section 271AAD**	**Rationale**

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		FA 2020 introduced Section 271AAD in the ITA for imposing penalty in relation to recording of false entries, omission of entries, use of fake invoices, falsified documents, etc. in the books of accounts. This provision is applicable with effect from 1 April 2020. Penalty under Section 271AAD is triggered if, during the course of any proceedings under the ITA, it is found that any of these requirements are met: ● books of accounts contain any false entries (as defined in the section); or ● there is omission of any entry in the books of accounts to evade tax liability. Section 271AAD of the ITA as introduced by FA 2020 is reproduced hereunder: *"(1) Without prejudice to any other provisions of this Act, if during any proceeding under this Act, it is found that in the books of account maintained by any person there is—* *(i) a false entry; or* *(ii) an omission of any entry which is relevant for computation of total income of such person, to evade tax liability,* *the Assessing Officer or the Joint Commissioner (Appeals) or the Commissioner (Appeals), may direct that such person shall pay by way of penalty* ***a sum equal to the aggregate amount of such false or omitted entry****.* *(2) Without prejudice to the provisions of sub-section (1), the Assessing Officer or the Joint Commissioner (Appeals) or the Commissioner (Appeals) may direct that any other person, who causes the person referred to in sub-section (1) in any manner to make a false entry or omits or causes to omit any entry referred to in that sub-section, shall pay by way of penalty a sum equal to the aggregate amount of such false or omitted entry.*

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		Explanation.—For the purposes of this section, "false entry" includes use or intention to use— *(a) forged or falsified documents such as a false invoice or, in general, a false piece of documentary evidence; or* *(b) invoice in respect of supply or receipt of goods or services or both issued by the person or any other person without actual supply or receipt of such goods or services or both; or* *(c) invoice in respect of supply or receipt of goods or services or both to or from a person who does not exist." (emphasis supplied)* The intention behind introducing the aforesaid section can be gauged from the Explanatory Memorandum to FA 2020 which reads as under: *"In the recent past after the launch of Goods & Services Tax (GST), several **cases of fraudulent input tax credit (ITC)** claim have been caught by the GST authorities. In these cases, fake invoices are obtained by suppliers registered under GST to fraudulently claim ITC and reduce their GST liability. These invoices are found to be issued by racketeers who do not actually carry on any business or profession. They only issue invoices without actually supplying any goods or services. **The GST shown to have been charged on such invoices is neither paid nor is intended to be paid**. Such fraudulent arrangements deserve to be dealt with harsher provisions under the Act."* Further, while proposing the above amendment, the Hon'ble Finance Minister in the Budget Speech stated that *"to discourage taxpayers to manipulate their books of accounts by recording false entries including fake invoices to claim wrong input tax credit in GST, it is proposed to provide for penalty for these malpractices".*

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		▪ Thus, in order to address bona-fide cases where assesses suo-moto disclose irregularities identified at a later stage and take necessary steps to regularize such defaults, the provisions of Section 271AAD of the ITA may be amended as under: **<u>Proposition 1 – Deleting penalty provisions under section 271AAD or reducing the quantum of penalty in alignment with penalty under Sections 74 and 122 of the CGST Act:</u>** ▪ As can be seen from the above, the intention behind introducing the penalty under Section 271AAD of the ITA was to curb the practice of issuance of fake invoices without actual supply of goods or services for claiming fraudulent ITC under the GST law ie. in cases where the underlying GST is neither paid nor intended to be paid. ▪ At the outset, it can be appreciated that GST laws already contained penalty provisions under section 74 and 122 to punish taxpayers for such defaults. ▪ As per section 74 of the CGST Act, in cases where GST is not paid or short paid or erroneously refunded or input tax credit wrongly availed or utilised <u>by reason of fraud or any willful misstatement or suppression of facts</u>, penalty shall be levied as per prescribed rates. Further, section 122 of the CGST Act provides for penalty where any taxable person issues an incorrect/ false invoice with regard to any supply of any goods or services or issues any invoice without supply of goods or utilizes input tax credit without supply of goods. In addition, Section 126 of CGST Act provides for 'General Disciplines related Penalty' for minor breaches of tax regulations or procedural compliances/ omissions/ etc, which are rectifiable and made without fraudulent intent or gross negligence. Further, GST law also provides for arrest of directors, employees or professionals involved in such acts during investigation proceedings. ▪ As can be seen from the above, there are already multiple penal provisions under GST law which punishes taxpayers for offences for which taxpayers are penalized under section 271AAD.

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Further, as could be seen from the EM and budget speech, the object behind introduction of section 271AAD was to address manipulation of books of accounts by recording false entries including fake invoices to claim wrong input tax credit in GST. However, the language of section 271AAD is very broad and covers not only cases involving GST frauds but also cases where there is no GST fraud involved but there are manipulation of books and records (eg. employee expense frauds etc.). Thus, the provision has a wide coverage and would impact cases over and above fraud GST input tax credit claims.
Separately, while Section 271AAD of the ITA was introduced with an intention to penalize cases of fraudulent Input-tax credit (‘ITC’) claims where underlying GST is not paid/ not intended to be paid, the quantum of penalty under the said Section 271AAD of the ITA is not in line with the penalty provided for the same cases under the CGST Act.
To provide a context, summarized below is the penalty provisions for similar defaults under the CGST Act:

(i) As per Section 74 of the CGST Act, penalty shall be levied as under:
<table>
<tr><th>Timelines</th><th>Penalty</th></tr>
<tr><td>Payment of tax, interest and penalty before issuance of show case notice under Section 74(1) of the CGST Act (‘SCN’)</td><td>15% of tax amount</td></tr>
<tr><td>Payment of tax, interest and penalty within 30 days of issuance of SCN</td><td>25% of tax amount</td></tr>
<tr><td>Payment of tax, interest and penalty within 30 days of issuance of order</td><td>50% of tax amount</td></tr>
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Payment of tax, interest and penalty beyond the above timelines	100% of tax amount

(ii) Similarly, Section 122 of the CGST Act provides that where any taxable person undertakes, inter-alia, any of the offences similar to those covered in Section 271AAD of the ITA i.e.:

- issues an incorrect/ false invoice with regard to any supply of any goods or services or both;
- issues any invoice or bill without supply of goods or services or both;
- takes or utilises ITC without actual receipt of goods or services or both

such person shall be liable to pay a penalty of Rs 10,000 or an amount equal to tax evaded/ incorrect ITC availed, whichever is higher.

- As can be seen from the above, penalty under Section 271AAD of the ITA is equal to the aggregate value of transaction of false or omitted entries in the books of accounts, whereas the penalty for similar cases under the CGST Act is computed only with respect to the amount of tax (ie GST) on such transactions.
- It may further be highlighted that the penalty prescribed under Section 74 of the CGST Act i.e. for cases involving fraud / willful misstatement/ suppression of facts is also levied in a graded manner depending on the timing of payment of tax and interest by the assessee. In other words, prompt action and co-operation on the part of the assessee is considered to reduce the quantum of penalty. Further, even in cases warranting maximum penalty, the quantum of penalty does not exceed the tax amount involved.

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		▯ Additionally, under penalty chapter of the ITA, there are sections where the penalty is levied in a graded manner viz. 271AAB and the concept of levying graded penalty would not be an exception. **Recommendations** ▯ It is respectfully submitted to remove penalty provisions under section 271AAD from the ITA. ▯ Without prejudice, even if such a separate penalty is intended to be levied under the ITA for the same default. it should allow and take a cognizance of the circumstances resulting in such irregularities and also the actions taken by the assessee to rectify its books of accounts/ income tax filings etc. For eg: where an assessee discovers any false entries and takes appropriate steps to rectify its books of accounts such as intimating tax authorities, filing revised/ updated/ modified tax returns (as applicable) etc, such cases should be considered on a different footing. ▯ It is further requested that the provisions of Section 271AAD be omitted from the ITA. Alternatively, the provisions be amended to limit quantum of penalty to the amount of tax liability sought to be evaded by recording of false entries or omission of entries in the books of account. Further, where an assessee has made adequate disclosures and taken appropriate steps to regularize the income tax filings for the impacted years, a lower rate of penalty could be prescribed for such cases to encourage suo-moto disclosure and compliance. ***Proposition 2 - Amendment in the provisions of Section 273B of the ITA*** ▯ As mentioned above, the reasons for existence of irregularities (ie. false entries, omission of entries etc) in the books of accounts of an assessee, particularly in cases of bonafide conduct by assessees (ie. steps taken to regularize books of accounts/ income tax filings after discovering such irregularities) should be considered differentially while determining levy of penalty under Section 271AAD of the ITA.

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		The way the provisions of Section 271AAD introduced in the ITA are currently worded, once any false entry or omission of entry is found in the books of accounts of an assessee, penalty under the said section could be initiated more in an automatic manner without giving an opportunity to taxpayer to establish a reasonable cause for failure on his part. In this context, we refer to the provisions of Section 273B of the ITA which provides that penalties prescribed under certain specified provisions of the ITA shall not be levied if the assessee proves that there was "reasonable cause" for the same. The relevant extracts of the said section are reproduced below for easy reference: *273B. Notwithstanding anything contained in the provisions of clause (b) of sub- section (1) of section 271, section 271A, section 271AA, section 271B, section 271BA, section 271BB, section 271C, section 271CA, section 271D, section 271E, section 271F, section 271FA, section 271FAB, section 271FB, section 271G, section 271GA, section 271GB, section 271H, section 271-I, section 271J, clause (c) or clause (d) of sub-section (1) or sub-section (2) of section 272A, sub-section (1) of section 272AA or section 272B or sub-section (1) or sub-section (1A) of section 272BB or sub-section (1) of section 272BBB or clause (b) of sub-section (1) or clause (b) or clause (c) of sub-section (2) of section 273,* ***no penalty shall be imposable on the person or the assessee, as the case may be, for any failure referred to in the said provisions if he proves that there was reasonable cause for the said failure****. (emphasis supplied)* As can be seen from the above, Section 273B of the ITA provides an opportunity to the assessee to prove if any reasonable causes led to the acts or omissions which trigger penalties under various sections of the ITA specified therein in which case the Tax Authority is precluded from levying the penalty. However, penalty under Section 271AAD of the ITA is not covered in Section 273B of the ITA.

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		Recommendations ▪ Without prejudice to the recommendations at Proposition 1 above, it is submitted that the current provisions of Section 273B of the ITA should be amended to include Section 271AAD of the ITA within its ambit so as to provide an opportunity to assessees and enable them to explain reasons for false entries/ omission of entries in their books of accounts, particularly in cases involving employee frauds where, post discovery of such frauds, appropriate disclosures to tax authorities and amendments in the books of accounts/ income tax filings have been suo-moto done by the management of the assessee. ▪ Pursuant to the above, in line with the principles of natural justice, assessees would have an opportunity of being heard for demonstrating if there was a reasonable cause which led to recording of false entries or omission of any entries in the books of accounts and for explaining the steps taken by the assessee to regularise such defaults on a case-to-case basis. This would also encourage assesses to come forth and disclose any irregularities identified in their books of accounts owing to circumstances beyond their control and result in higher tax revenues for the Government without prolonged litigation. ***Proposition 3 - Non applicability of penalty under Section 270A of the ITA where penalty under Section 271AAD has been levied*** ▪ Penalty under section 270A has a two tier structure providing penalty @ 50% of tax payable in cases of mis-reporting of income and @200% of tax payable in cases of mis-reporting of income. ▪ On a plain reading of Section 270A and Section 271AAD of the ITA, it could be noted that penalties under both sections can be applied simultaneously for the same offence. Unlike Section 271AAB (which deals with penalty in cases where search has been initiated) or Section 271AAC of the ITA (which deals with penalty in respect of unexplained income/ expenses/

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		assets etc), Section 271AAD of the ITA does not provide for a specific exclusion with respect to levy of penalty under Section 270A of the ITA. It is a well-accepted principle that no person shall be prosecuted and punished twice with respect of the same offence. In this context, reference can also be drawn to Article 20 of Constitution which protects assessee from the rigour of dual punishment. Further, this rule is also embodied under Section 26 of the General Clauses Act, 1977 which provides that where an act or omission constitutes an offence under two or more enactments, then the offender shall be liable to be prosecuted and punished under either or any of those enactments but not punished twice for the same offence. **Recommendations** Applying the above principles, it is requested that Section 271AAD of the ITA should be appropriately amended to provide that where penalty under Section 271AAD of the ITA is levied for any transactions, penalty under Section 270A of the ITA shall not be levied in respect of the same transactions.
205.	**Roll back or rationalize provisions regarding withholding of interest on refunds by revenue authorities [S. 245]**	**Existing provision** Prior to amendment by FA 2023, the ITA had two separate provisions dealing with withholding of refund due to a taxpayer in certain specific circumstances as below: (i) S. 245 gave powers to the tax authority to withhold, vide an intimation, refunds due to a taxpayer where there already exists an unpaid demand determined in the case of the same taxpayer in respect of any year. (ii) S. 241A gave powers to the tax authority to withhold refunds in respect of AY 2017-18 and subsequent AYs, vide a speaking order, where a notice has been issued u/s 143(2) in

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		respect of the same AY for which the refund is determined u/s 143(1) and the tax authority believes that grant of refund is likely to adversely affect the revenue. - From the above, it may be noted that, prior to amendment by FA 2023, while refunds could be set-off against already existing demands of any year, set-off was permitted against prospective demands that may arise in case of pending proceedings only where the prospective demand relates to the same year to which the refund pertains, and the refund is determined u/s 143(1). - This proposition has also been upheld by the Bombay High Court (HC) in the case of Vodafone Idea Limited [2020] 117 taxmann.com 597 (Bombay) wherein it was observed that there is no power vested in tax authority to adjust/retain admitted refund against tax dues of another year which are not even adjudicated upon and may arise in future. - Separately, S. 244A(1) also prescribed for tax authority to pay interest on refund at 6% per annum (p.a.) from 1 April of the relevant AY till date of grant of the refund (where the refund arises out of excess TDS/ TCS/ Advance tax paid) qua refunds arising from a Giving Effect Order passed by a tax authority pursuant to the order of an appellate authority. - Such refund was enhanced vide S. 244A(1A) to 9% (viz. an additional interest of 3%) in case there is a delay beyond 3 months in the tax authority passing the Giving Effect Order. Such additional interest of 3% is payable from the expiry of 3 months till the date on which such refund is actually granted. - At this juncture it may also be worth noting the provisions of S. 234B of the ITA which requires a taxpayer to pay interest at 12% per annum from 1 April of relevant AY till date of completion of assessment on shortfall of advance tax as compared to assessed tax. - FA 2023 consolidated the existing provisions of S. 241A and S. 245 into a new S. 245 where:

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		(i) Sub-section 1 is at par with old S. 245 whereby tax authority may withhold refunds due to a taxpayer against an already existing unpaid demand determined in the case of the same taxpayer in respect of any year. (ii) Sub-section 2 whereby the existing provisions of S. 241A are expanded and powers are given to the tax authority to withhold refunds due to the taxpayer in respect of any AY if proceedings of assessment or reassessment for any AY are pending in the case of the same taxpayer and the tax authority believes that grant of refund is likely to adversely affect the revenue. In other words, withholding of refund on pendency of proceedings which was earlier restricted only to pendency of proceedings in respect of the same AY (being after AY 2017-18) where refund was determined u/s 143(1), is now permitted in respect of pendency of assessment or reassessment proceedings of any other AY too irrespective of the proceedings in which the refund is determined. Further, S. 244A(1A) is also amended vide introduction of a proviso to state that additional interest at 3% as indicated above will not be payable in cases where refund is withheld u/s 245(2) of the ITA. **Issue** While no one can dispute the need for enabling powers to tax authority to withhold refunds to protect revenue interests, there is no provision in the existing ITA for a taxpayer to be given an adequate opportunity of being heard before withholding of refunds and/ or their adjustment against existing demands. Taxpayer will be merely given intimation of such action [along with the speaking order under s.245(2), as applicable].

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		▪ Further, it is seen that on the ground, tax officers routinely make various adjustments to the returned income resulting in demands. In this light, the instant amendment will effectively result in withholding of refunds pending assessment/reassessment for one or other AY on perennial basis. ▪ Additionally, it is practically seen that such refunds are adjusted against demands even where a stay has been granted in terms of CBDT instruction or by the Income Tax Appellate Tribunal (ITAT). ▪ Withholding of refund for open assessment / reassessment proceedings suggest there is going to be an adjustment while practically this may not be true in each & every case. Each year is a separate year and should not affect proceedings for other years. Also, if there are favorable rulings in assessees own case from HC or ITAT for same issue for which adjustment is done by AO year on year basis, then withholding due refund will be unjust to taxpayer as refund will get stuck for very longer duration. ▪ The above causes serious hardship to the taxpayer, wherein blockage of funds results in reducing the ease of doing business and hampers the image of India as a business-friendly destination for attracting foreign investment. ▪ Even harsher is amendment to S. 244(1A) that if the refund amount is withheld pending assessment/ reassessment and then released post completion of such assessment/ reassessment, the taxpayer will not be entitled to additional interest at 3% p.a. u/s. 244A(1A) which is paid on delay in passing Giving Effect Order beyond 3 months. [In other words, only normal interest u/s 244A(1) of 6% will be payable.] ▪ While taxpayer receives interest on refund at maximum rate of 9% p.a. (including additional interest for the period post 3 months), interest payable by the taxpayer u/s 234B is at 12%p.a which is discriminatory. The amendment only seeks to further widen this differential by

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		disqualifying taxpayer from receiving additional interest for the period when refund is withheld under s.245(2). - Such disparity is inexplicable considering that interest is paid for use of money and is compensatory in nature [as held by the SC in Dr. Pranoy Roy [2009] 179 Taxman 53 (SC)]. Thus, ideally, money, having only a single colour, should invoke the same amount of interest whether it is to be paid to the tax department or receivable therefrom. - Moreover, provision to pay additional interest was introduced with the intention to bring down inordinate delays in processing refunds arising out of OGEs. With the amendment by FA 2023, intent of the section is defeated. **Recommendations** - At the outset, it is recommended that amendment to S. 245 to allow withholding of refunds against pending proceedings of other years (not being the year in which refund arises) be rolled back/ withdrawn. At the very least, it may be clarified that such refund sought to be withheld is only the refund determined in accordance with intimation issued u/s 143(1) of the ITA. - Separately, the practice of adjusting refunds against stayed demands is also recommended to be discontinued. Additionally, set-off of refunds may also not be carried out in cases where there exist favorable judicial precedents (especially in the taxpayer's own case for earlier years) in regard to the same issue. - Notwithstanding the above, it is recommended to insert a provision requiring the tax authority to give the taxpayer an adequate opportunity of being heard before taking action of adjustment or withholding of refund. Further, adjustment or withholding of refund must be vide a speaking order only [and not an intimation as u/s 245(1)] which may be made appealable before CIT(A).

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		▪ It is also recommended that the provisions of grant of interest on refunds be brought at par with interest payable by taxpayer on taxes payable to revenue authorities. Alternatively, the refund withheld should be treated as regular payment of tax to reduce interest u/s. 234B @ 12% p.a. for the period from date of withholding till date of completion of assessment/reassessment. ▪ At the very least, there seems to be no warrant for the Government in not paying interest for the period when refund is withheld pending completion of assessment/reassessment. Accordingly, the proviso to s.244A(1A) denying additional interest @ 3% p.a. should be omitted. Further, in the fair interest of the assessee, if the excess taxes are paid on or before 31 March of a particular assessment year, the interest should be granted from the 1st day of the assessment year and not from date of filing of return of income.
206.	**Tax Effect of Orders**	**Rationale:** ▪ As per the provisions of section 153 of the Act, in connection with the order giving effect to the order of CIT(A) or ITAT, a time limit of 3 months has been prescribed. ▪ In reality, none of the time limits are being adhered to by the revenue authorities. Applications are pending with a delay of 5-10 years, in most of the cases. This delay leads to miscarriage of justice ▪ Order giving effect to favourable appellate orders is not being provided by assessing officers in a timebound manner. Lots of follow ups and efforts are required from Assessee to get order giving effect of orders. ▪ At times, the authorities pass order giving effect to the appellate order, but correct and full amount of refund is not released. They do not consider the pending rectification and order giving effect applications. This leads to undue harassment of Assessee.

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		▯ The Memorandum to Finance Bill 2016 justified the objective behind the amendments to S. 153 as on the basis of desirability to finalise assessments on a more expeditious basis. ▯ In this backdrop, it may be seen that even S. 154 provides for a six month time limit to the Tax Authority to pass a rectification order on application made by the Taxpayer, but in practice, this time limit is not followed. Even after making rectification application, it requires great amount of follow up and invariably there is delay in passing rectification order and consequent issue of refund. **Recommendation:** ▯ It is recommended that an online system of filing of any rectification request or request to pass order giving effect to order of appellate authority be introduced. Each such request should be given a unique serial number. The tax authority should dispose such cases serially. ▯ This will bring transparency. Department authorities will come to know pendency of such requests and tenure of pendency. ▯ Further, it is suggested to define specific provision in Income Tax Act for assessing officers to issue order giving effect to appellate orders within a specified time limit. ▯ Further, number of adjournments sought by Revenue Department in Tribunal / Courts can be restricted. ▯ To reduce litigations, proactive clarifications on lines of practice notes similar to Singapore/Hong Kong may be issued. Similarly, issuance of internal instructions to tax officers like public release of manuals prepared for HMRC staff in UK can accord clarity on the intent and provide indicative guidance.

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		▯ Provision of section 244A(1A) be reintroduced and additionally such provision may also cover cases where a rectification application by assessee is not disposed within six months i.e. as time limit given in section 154, then the department need to pay additional interest of 3% pa to the assessee. This will make authorities accountable, and taxpayer need not face administrative hurdles for legal dues. ▯ CPC should be mandated to issue intimation under section 245 of the Act in case of any proposed adjustments. Also, wherever applications are pending, refund adjustment should be prohibited. ▯ No Revenue collection targets to be set for tax officers as it places undue pressure for making frivolous tax adjustment and unsettling tax positions leading to undue harassment and unwarranted prolonged litigation.
207.	**201(1A), 220(2), 234A, 234B, 234C, 244A [Disparity in Interest payable and Interest receivable]**	**Rationale** ▯ Interest payable by the assessee is 1% per month or 1.50% per month as per sections 201(1A), 220(2), 234A, 234B and 234C whereas interest receivable by the assessee is 0.5% per month as per section 244A ▯ The interest on refund is again taxed as income in the hands of the assessee while the interest paid on tax due is not allowed as a deductible expense. ▯ Also, the Interest is calculated for the entire month in which the actual default amount is paid ▯ This is discriminatory and hence parity should be brought between the interest rate charged on tax dues and refund due from the department. Money has only one colour and therefore the rate of interest may be same irrespective of whether Interest is paid to the department or received from the department.

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		Recommendation It is requested to amend the provisions • so as to align the rate of interest payable with the rate of interest receivable • so that interest is calculated only upto the date of payment instead of for the entire month in which the payment is made. • It is further recommended that the rate be linked to any 'reference rate' thereby making it dynamic.
208.	**Specific provision of immunity for DRP based assessments (s. 270AA)**	**Rationale:** • The provision of s. 270AA envisages the immunity in case of assessment order which is appealable before CIT(A) under s. 246A and may not apply to order which is appealable directly to ITAT like DRP based assessment order. Such cases may not be eligible for the benefit of immunity under s. 270AA of the ITA. **Recommendation:** • There seems to be no specific reason for denying benefit for DRP based assessment. To avoid any ambiguity, specific amendment shall be made under s. 270AA for providing immunity benefit to such assessments also
209.	**Non-disclosure of reason recorded for search/survey (S.132/132A)**	**Rationale**: • S. 132 and s. 132A as amended by the Finance Act 2017 provide for non-disclosure of 'reason to believe' or 'reason to suspect' for taking search or survey action, as the case may be, to any

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

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		▯ Even if search is held to be invalid, tax authority is entitled to use material gathered in search against the taxpayer and can re-open the assessment/s. No prejudice is thus caused to tax authority if validity of search/assessment is examined at the initial stage. ▯ In terms of SC ruling, authority is bound to disclose reasons before the court in the event of challenge to formation of belief by the authority. Taxpayers who could have closed the issue of validity of search in regular appellate forum may now approach High court in writ and thereby burden the High Courts which are already over flooded with matters. ▯ The amendment conflicts with Government moto to provide predictable tax regime. ▯ Also, amendment with retrospective effect from inception of section is against the philosophy of the present Government. **Recommendation**: ▯ Status quo ante of tax position be retained under section 132/132 (1A) by omitting the above amendment.
210.	**Prosecution for failure to file return of income for companies (S.276CC)**	**Rationale**: ▯ The amendment by FA 2018 withdraws relaxation in case of 'company' assessees from prosecution where tax liability (net of advance tax and TDS) does not exceed Rs. 3,000 and hence, the risk of prosecution can arise under s.276CC even if the tax liability is Nil and is fully met by TDS ▯ Intent of the amendment as clarified in Explanatory Memorandum (EM) is to plug the loophole in case of shell companies or companies holding Benami properties. The amendment goes beyond the stated object and may also cover foreign companies whose income is largely covered by TDS.

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		▯ It may be noted that foreign companies earning incomes in the nature of dividend, interest, royalty, FTS u/s. 115A which is fully covered by TDS are exempted from filing returns if the TDS is at rates provided in s.115A. But there is no exemption when the foreign company claims treaty benefit of lower tax rate/exemption or earns some other steam of income like capital gains. ▯ It may be noted that information pertaining to payments to such companies is getting transmitted to the Tax Department in a dual mode viz. once through s.195(6) compliance made by payers in Form 15CA/B and also through quarterly TDS returns filed by the payers. Further, the payers of dividend, royalty/FTS, capital gains can be proceeded against as 'representative assessee' of the foreign companies u/s. 163 if the Tax Department wishes to investigate whether activities of such companies trigger PE in India or treaty benefit is correctly availed. Further, if the royalties/FTS, capital gains are from related entities in India, the Indian payers would be making TP compliance by maintaining TP documentation and filing TP audit report. Thus, filing of filing ROI for such companies becomes an academic formality. It may be noted that s.206AA exempts such foreign companies from obtaining PAN to avoid higher TDS if they are able furnish TRC and other information to the payer. Thus, there is a strong case to exempt foreign companies having only dividend, royalty/FTS or capital gains income fully covered by TDS or covered by treaty benefit from filing returns in India which will enhance 'ease of doing business' in India and will also protect them from expanded scope of prosecution u/s. 276CC. **Recommendation:** ▯ Having regard to intent expressed in the EM as also Government's thrust on 'ease of doing business', exemptions/relaxation should be provided to foreign companies as also genuine bonafide companies from prosecution u/s. 276CC.
211.	**Roll back expansion of**	**Existing provision**

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	prosecution provisions to TDS defaults on payments in kind [S. 276B]	▯ The ITA, inter alia, has the following provisions where a payer is required to deduct taxes at source: (i) TDS is applicable at the rates in force in respect of any payment being made by way of winnings from any lottery or crossword puzzle or card game and other game of any sort of an amount exceeding Rs. 10,000 (section 194B). (ii) TDS is applicable @10% of the benefit or perquisite in cash/kind or partly in cash/kind arising from business/profession (section 194R). (iii) TDS is applicable @1% of the consideration for transfer of a Virtual Digital Asset paid partly in cash/kind or wholly in kind (section 194S). ▯ In this respect, it is specifically provided that the payer is required to withholding tax or otherwise ensure payment of tax as above even in cases where payment of the above nature is made in cash/ kind or partly in cash/ partly in kind. ▯ For this purpose, Para 51.2 of Circular No. 763 dated 18 Feb 1998 clarifies that **ensuring payment of tax** in respect of winnings in kind may be made, as one example, by the payer recovering cash equivalent of taxes from the winner and paying to Government. Similarly, FAQ 9 of CBDT Circular No. 12/2022 dated 16 June 2022 in the context of TDS under section 194R provided for various alternatives for **ensuring payment of tax**, such as; (i) Requiring the payee to make advance tax payment equivalent of TDS amount and providing copy of such challan with declaration to the payer, (ii) Deduction of tax by payer and payment to Government after reckoning that such tax paid by him as TDS is also a benefit u/s. 194R (i.e. by appropriate grossing up for net of tax payment).

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		▯ In this respect, ITA already has the following provisions to address cases of default in tax withholding: (i) Provisions of section 271C provide for levy of penalty equal to the amount of tax not deducted in case where the taxpayer fails to deduct the whole or part of the tax. Additionally, penalty is also leviable in respect of failure to pay taxes in respect of winnings payable wholly or partly in kind. (ii) Provisions of section 276B provide for prosecution with fine & imprisonment for a term of 3 months extendible to seven years where the taxpayer fails to pay the tax deducted. Additionally, prosecution also triggers in respect of failure to pay taxes in respect of winnings payable wholly or partly in kind. ▯ Post amendment by FA 2023, the prosecution provision of section 276B have been extended to cover cases where there is failure to deduct tax under the provisions of section 194B/194R/194S. This is inconsistent with the base philosophy of ITA which draws a distinction between failure to deduct tax and failure to pay tax which is already deducted. The former is liable to penalty alone whereas latter is liable to both penalty and prosecution. **Issue** ▯ So far, barring cases of winnings, the tax policy has been that failure to deduct tax will attract penalty but not prosecution. Prosecution is attracted only if there is failure to pay taxes which are already deducted/collected – since such monies are held as agent for the Government. This policy will continue for payments in money but failure to deduct tax on payments in kind will henceforth attract prosecution in addition to penalty. ▯ S. 194R and S. 194S are as yet relatively nascent provisions while S. 194BA is just recently introduced vide FA 2023. The provisions have implementation and interpretational challenges

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		(for instance, u/s 194R issues persist around what is to be considered as benefits or perquisites, what is value of benefit in-kind, etc.) till date. Widening prosecution provisions for non-compliance (failure to deduct tax on payment in kind) are draconian and defeats larger objective. • Though Govt has tried to clarify quite a few issues but still there are practical challenges which needs clarity. Govt should allow some time for taxpayers to settle down on compliances before prosecution provisions are introduced. • There could be various controversial issues on TDS on payments in kind on whether a particular item constitutes benefit or perquisite, what should be its value, etc. Criminalizing such defaults is not a sound tax policy measure. It will merely lead to increase in litigation and adversely impact ease of doing business. • In other laws, the Government is decriminalizing certain administrative defaults. Even in income tax, Finance Act 2023 decriminalized certain administrative tax compliances by liquidator of company. However, the amendment to criminalize TDS default for payments in kind is a step in reverse direction of decriminalization. **Recommendations** It is strongly recommended that expansion of prosecution provisions for mere default of non-deduction of tax on in-kind payments should be rolled back/withdrawn. Prosecution should be applicable only in cases where tax is deducted but not paid to the Government. For instance, where provider of benefit in kind collects tax from the payee but does not pay to the Government, the provider can be prosecuted even under existing provisions.
212.	**Extended scope of persons mandated to**	**Rationale**:

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	obtain PAN (s.139A)	FA 2018 introduced additional clause (v) and clause (vi) to s. 139A(1) extending the scope of the persons who are mandated to obtain PAN. The amendment seeks to cover the following persons: ● Clause (v): Non-individual entities which enter into financial transaction of an amount aggregating to INR 2.5 lakhs or more in a financial year. ● Clause (vi): Natural persons being managing director, director, partner, trustee, author, founder, karta, chief executive officer, principal officer, office bearer of the person referred to in clause (v) or any person competent to act on behalf of the person referred to in clause (v) The term 'financial transaction' is not defined specifically under ITA for the purpose of s. 139A(1). Ambiguity may arise on common parlance of the term 'financial transaction' which would be a very wide connotation since common parlance meaning may include any transaction which involves 'monetary consideration'. It may cover every sale, purchase, exchange, barter, etc. thereby making the scope of the cl. (v) to s. 139A(1) unclear. It is clarified that clause (v) applies to residents but clause (vi) does not contain this condition. This may be invoked against foreign directors of Indian companies to obtain PAN. The amended section provides a very burdensome requirement to obtain PAN. For illustration, even the non-resident Directors of a company or a person representing the company in any legal case outside India will be required to obtain PAN under this section, who otherwise don't need to obtain PAN. Also, the scope of the term 'principal officer' used in clause (vi) is ambiguous. A variety of persons can be considered as principal officer of the enterprise and each of them will be under a clinical obligation to obtain PAN.

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		Recommendation: • Definition of "financial transaction" may be provided in ITA in the context of s. 139A. Alternatively, CBDT may be delegated with an authority to prescribe a specific list of 'financial transactions' (provided, not covered by (i) to (iv)) for the purpose of s. 139A(1)(v) • If the scope of 'financial transactions' needs to be borrowed from Rule 114E/ Rule 114B, the same may be incorporated with such modifications so as to ensure that only those NRs who have nexus with India may be sought to be covered. • Scope of clause (vi) be accurately delineated and it may be held to be a sufficient compliance of s. 139A(1) if any one of the person (being resident in India or operating in India) acting on behalf of the enterprise covered by clause (v) obtains PAN. • It is recommended that requirement for obtaining PAN should be relaxed for non-resident directors of Indian company who have no presence or income from India.
213.	**Hardship in obtaining Tax Residency Certificate (TRC) [Section 90(2)]**	**Rationale:** • Section 90(2) of the Act provides the relief to an assessee (non-resident person) to whom a DTAA (i.e. Tax Treaty) applies, the provisions of the Act shall apply to the extent they are more beneficial. • However as per sec. 90(4) TRC is required to be furnished by the assessee to get the relief. This provision applies to all non-residents irrespective of the nature of income and amount involved. **Recommendation:**

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		▯ In the case when amounts involved is very small, this provision for obtaining the TRC creates unintended hardship to both non-resident recipients and the resident payer as it involves cost/time cost to obtain such TRCs. ▯ We would like to suggest introducing some threshold limit for obtaining the TRC from non-resident recipients, it would smooth the business transaction of the Corporates.
214.	**Restriction on cash collections of loans/ interest – Section 269ST of the IT Act**	**Rationale:** ▯ NBFCs face several difficulties in collection of loans granted to borrowers in remote areas of the country (especially the agricultural and rural loans). In many cases, cash collection agents are appointed by NBFCs who post rigorous follow-up and efforts locate defaulting borrowers and manage to collect the outstanding amounts from such borrowers. ▯ Such collections are usually effected in cash and may be of an amount of INR 200,000 or more **Recommendation:** ▯ It is recommended to exempt NBFCs (like banks) from the provisions of section 269ST of the IT Act.
215.	**Rewording S. 170A to cover continuing concerns and not just successor entities**	**Existing provision** ▯ Section 170A of the ITA enables giving effect to the order of business reorganization issued by tribunal or court or an Adjudicating Authority under the Insolvency and Bankruptcy Code, 2016 by providing that, where a return of income is filed by a successor in respect of any AY, such successor shall furnish a modified return within six months from the end of the month in which such order of business reorganization was issued.

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		▪ In this regard, there were no further provisions to enable tax authority to modify its assessment in respect of such modified return. ▪ FA 2023 amended S. 170A whereby it permitted modified return filing by the successor where the return u/s 139 is filed by "an entity" ▪ Further, it also introduced enabling provisions for tax authority to finalize assessment based on such modified return by passing a modified assessment order. **Issue** ▪ There is scope for improvement in language of s.170A on account of the following: (i) Both prior and post amendment, S. 170A does not clearly cover modification of assessment of demerged company pursuant to NCLT order sanctioning demerger scheme. (ii) Further, it refers to resulting companies whereby only a resulting company can file a modified return. This may preclude a demerged company from doing so which is intended. **Recommendations** ▪ For better clarity, it is suggested that the instead of terms "entity" (which is undefined under the ITA) and "successor" (defined to mean all resulting companies in business reorganization) may be substituted with "person" as follows: "*170A. (1) Notwithstanding anything to the contrary contained in section 139, in a case of business reorganisation, where prior to the date of order of a High Court or tribunal or an Adjudicating Authority as defined in clause (1) of section 5 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as order in respect of business reorganisation), as the case may be, any return of income has been furnished by* ***a person***

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		to which such order applies under the provisions of section 139 for any assessment year relevant to the previous year to which such order applies, ***the person (or his successor)*** *shall furnish, within a period of six months from the end of the month in which the order was issued, a modified return in such form and manner, as may be prescribed, in accordance with and limited to the said order.*"
216.	**Introduce timelimit for initiation and completion of assessment/reassessment of modified return filed under section 170A(2)**	**Background:** • Section 170A of the Act enables giving effect to the order of business reorganization issued by tribunal or court or an Adjudicating Authority under the Insolvency and Bankruptcy Code, 2016 by providing that, where a return of income is filed by a successor in respect of any AY, such successor shall furnish a modified return within six months from the end of the month in which such order of business reorganization was issued. • FA 2023 amended S.170A(2) to introduce enabling provisions for tax authority to finalize assessment (completed or pending) based on such modified return by passing a modified assessment/reassessment order. **Rationale and Issue:** • Section 170A(2) requires the tax authority to pass an order modifying the total income of relevant tax year: ● If the assessment has been completed on the date of furnishing of the modified return, the tax authority is required to modify such completed assessment in accordance with such order of business reorganisation after taking into account modified return so furnished. ● If the assessment is pending on the date of furnishing of the modified return, the tax authority is required to pass an order assessing or reassessing total income of given year in

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		accordance with order of business reorganisation after taking into account the modified return so furnished. ● Thus, the above provisions which were hitherto stated to be covered by Rule 12AD(2) of the Income-tax Rules, 1962 have now been enacted into the provisions of section 170A(2) itself. □ Section 170A(3) states except for the provisions of S.170A(1)/(2), for assessment/reassessment of the relevant tax year, all the provisions of ITA as prevailing at that time shall be applicable. □ On comparison of the above provision with Section 92CD(5) which deals with regularisation of assessment/s of past year/s on conclusion of APA, it may be noted that Section 92CD(5) overrides the limitation period for completion of assessment under S.153 and provides for timeline for completion of assessment/reassessment (whether pending or completed) after giving effect to modified return filed under Section 92CD(1). It states that assessment order in case of completed assessment can be passed within one year of the end of the financial year in which modified return is filed. In case of pending assessments, the period of limitation is extended by 12 months. □ Such provision for determining time-limit of completion of ongoing or completed assessments/reassessment proceedings which consider effect of Section 170A(1) is conspicuously absent u/s. 170A(2). □ This gives rise to difficulty and uncertainty for the successor entity which has filed modified return of income u/s.170A(1). □ In case of completed assessment, there may also be a case where limitation period under section 153 (which provides for general time limit for completion of assessment/reassessment) may also have expired. In such case, the tax authority can pass an order at any time without being bound by any limitation period. This may create uncertainty for the successor entity and

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		gives undue discretion to the tax authority to give effect to the modified return. As a result, there can be delay in successor entity to claim tax credits, MAT credit, losses, unabsorbed depreciation etc. of the predecessor entity. In case of pending assessment, there may be uncertainty of passing an order giving effect of Court/tribunal order passing the scheme of business re-organisation within the limitation period. Consider an event where the Court/tribunal order is passed and modified return is furnished on the date which is at the fag end of the last date of passing order. The tax authority may not be vested with sufficient timelimit to complete the pending assessment after considering the modified return. There may be scope of breach of principles of natural justice while finalising assessment. This may lead to long drawn litigation. **Recommendation:** It is recommended that sufficient timelimit should be inserted under section 170A(2) so as to enable the tax authority complete ongoing or completed assessment proceedings after considering and giving effect to modified return filed u/s. 170A(1). Further, the modified return filed u/s. 170A(1) should be treated as return filed u/s. 139 by virtue of fiction in order to enable linkage with assessment/ reassessment provisions.
	Personal tax issues	
217.	**Restoring 182 days rule for visiting Non-resident Indians (NRIs)/Persons of Indian origin (PIOs)**	**Executive Summary** Prior to amendment by Finance Act 2020, Explanation 1(b) to s.6(1) of the Income-tax Act 1961, provided for extended residency rule for Non-resident Indians (NRIs) and Persons of Indian origin (PIOs) who being outside India come on a visit to India. In terms of such extended residency rule, they were considered as 'non-resident' if their stay in India was below 182 days during the relevant tax year even if their stay in India in

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		preceding four years was more than 365 days. This resulted in such taxpayers not being required to pay tax in India on their foreign sourced incomes. - Finance Act 2020 amended the above rule and introduced a graded extended residency rule as follows :- (a) Regardless of quantum of India sourced income, visiting NRIs/PIOs will be treated as non-resident if their stay in India during relevant tax year is less than 120 days (instead of 182 days) (b) If the quantum of India sourced income is less than Rs. 15 lakhs, such persons will continue to be treated as non-residents if their stay in India during relevant tax year is less than 182 days (as it existed prior to FA 2020 amendment) (c) If the quantum of India sourced income is more than Rs. 15 lakhs and who has been in India for 120 days or more but less than 182 days, such persons will be treated as 'not ordinarily residents' as per clause (c) of s.6(6) - The above change has resulted in adding more complexity to the extended residency rule for visiting NRIs and PIOs. Earlier, they simply had to keep a check on the period of stay in India below 182 days. Now, they also need to keep a tab on India sourced income of Rs. 15 lakhs as also their stay in preceding four tax years. This creates various issues and confusion for taxpayers - After introducing such complexity, what the amendment has achieved is that for visiting NRIs and PIOs, if their India sourced income is more than Rs. 15 lakhs and stay exceeds 120 days, they will be liable to be taxed on India sourced incomes at rates applicable to residents (as distinguished from non-residents) i.e. India sourced incomes get taxed at higher rates applicable to residents instead of lower rates applicable to non-residents.

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		▯ It is submitted that the above referred amendments need reconsideration and roll back for following brief reasons :- (a) The amended rule does not meet the original objective of making people carrying out substantial economic activity from India but dodging residency in India by limiting their stay to 182 days, pay tax on their global incomes in India (as per Explanatory Memorandum to Finance Bill 2020) (b) The incremental tax revenue which can be expected to be garnered is restricted to difference between normal slab rate and concessional rates applicable to non-residents (c) The targeted individuals can simply avoid the higher taxes by limiting their stay in India to below 120 days instead of 182 days. Thus, the tax policy measure of reducing threshold from 182 days to 120 days does not meet the desired objective. (d) On the other hand, the amended rule has a net negative revenue impact since NRIs/PIOs spending less time in India adversely impacts indirect and direct tax revenues from travel and hospitality sectors in India. Also, the lower threshold of 120 days' stay in India could lead to NRIs/ PIOs ceasing to create wealth/ additional investments in India to keep their Indian income below 15 lacs in any given year. This could result in lower investments and spending in India and thus, adversely affecting the economy (e) Restoration of 182 days rule will encourage such NRIs/PIOs to spend more time in India with their family and friends, spend more money on travel and stay and have a net positive revenue impact due to externalities. It encourages more investment with

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		India presenting better opportunities for investing in many sectors – more particularly, manufacturing and start ups. (f) It will remove the complexity and become simple to understand & administer for both taxpayers and Tax Department (g) Under the erstwhile 182 days regime, individuals could not have avoided taxes in India on active incomes like professional or technical fees from services rendered in India or business activities carried out in India – if they constituted 'substantial economic activities' as referred in Explanatory Memorandum to Finance Bill 2020. The domestic source rules and treaty provisions are wide enough to cover business incomes from physical presence in India from 120 days to 182 days. Thus, there is no perceived advantage of the 120 day rule. In view of above reasons, it is submitted that erstwhile limit of 182 days for visiting NRIs/PIOs may be restored without any income quantum restrictions. It will allow NRIs/PIOs to spend more time in India which has positive impact on the Indian economy **Detailed representations** **1. Position prior to amendment by Finance Act 2020 – 182 days rule** Prior to amendment by Finance Act 2020, Explanation 1(b) to s.6(1) provided for extended residency rule for Non-resident Indians (NRIs) and Persons of Indian origin (PIOs) who being outside India come on a visit to India. In terms of such extended residency rule, they were considered as 'non-resident' if their stay in India was below 182 days during the relevant tax year even if their stay in India in preceding four years was more than 365 days. This resulted in such taxpayers not being required to

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		pay tax in India on their foreign sourced incomes. Even for India sourced incomes, they could avail treaty benefits as treaty residents of countries in which they are located. - The above threshold of 182 days was introduced from financial year 1994-95 onwards by increasing it from erstwhile limit of 150 days. Following is the rationale explained in CBDT Circular No. 684 dated 10 June 1994 :- *"Suggestions had been received to the effect that the aforesaid period of one hundred and fifty days should be increased to one hundred and eighty-two days.* ***This is because the non-resident Indians who have made investments in India, find it necessary to visit India frequently and stay here for the proper supervision and control of their investments****. The Finance Act, therefore, has amended clause (b) of the Explanation to section 6(1)(c) of the Income-tax Act, in order to extend the period of stay in India in the case of the aforesaid individuals from one hundred and fifty days to one hundred and eighty-two days, for being treated as resident in India, in the previous year in which they visit India. Thus, such non-resident Indians would not lose their 'non-resident' status if their stay in India, during their visits, is up to one hundred and eighty-one days in a previous year."* - The earlier limit of 150 days was also an outcome of liberalisation in 1989 from earlier limit of 90 days in response to representations from NRIs that it was too short especially for those who had to supervise their investments in India. - Even as per Explanatory Memorandum to Finance Bill 2020, the intent of the above provision is explained as follows :- *"This provision provides relaxation to an Indian citizen or a person of Indian origin*

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		allowing them to visit India for longer duration without becoming resident of India." **2. Original proposal of Finance Bill 2020 – Reduction of 182 days to 120 days** As per original proposal of Finance Bill 2020, it was proposed to reduce the number of days from 182 to 120 days such that visiting NRIs/PIOs would turn resident in India if their stay in preceding four years is 365 days or more and stay in India during relevant tax year is 120 days or more. The rationale explained for such proposal was as follows :- *"Instances have come to notice where period of 182 days specified in respect of an Indian citizen or person of Indian origin visiting India during the year, is being misused. Individuals, who are actually carrying out substantial economic activities from India, manage their period of stay in India, so as to remain a non-resident in perpetuity and not be required to declare their global income in India"* **3. Substantial amendment at enactment stage of Finance Bill 2020 – Graded residency rule** However, at the enactment stage of Finance Bill 2020, the above proposal was changed and as per finally enacted provision, a graded extended residency rule was introduced as follows :- (a) Regardless of quantum of India sourced income, visiting NRIs/PIOs will be treated as non-resident if their stay in India during relevant tax year is less than 120 days (instead of 182 days) (b) If the quantum of India sourced income is less than Rs. 15 lakhs, such persons will continue to be treated as non-residents if their stay in India during relevant tax year is less than 182 days (as it existed prior to FA 2020 amendment)

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		(c) If the quantum of India sourced income is more than Rs. 15 lakhs and who has been in India for 120 days or more but less than 182 days, such persons will be treated as 'not ordinarily residents' as per clause (c) of s.6(6) **4. Impact of graded extended residency rule** • The above change has resulted in adding more complexity to the extended residency rule for visiting NRIs and PIOs. Earlier, they simply had to keep a check on the period of stay in India below 182 days. Now, they also need to keep a tab on India sourced income of Rs. 15 lakhs as also stay in preceding four tax years. • The period of stay in preceding four tax years could work either in favour or against the individual. That is, if an individual's stay during the preceding four tax years is less than 365 days, they would qualify as NR in India even if stay in current year exceeds 120 days but does not exceed 182 days. However, if the stay is for 365 days or more in the preceding four tax years, he/she could qualify as NOR in India as per the new 120 days rule for determining residency. • The amendment brings a disparity in determination of residential status of the targeted individuals in the year they leave India (if for the purposes of employment outside India) i.e. Explanation 1(a) to Section 6(1) of the Income-tax Act, 1961 (IT Act) and in subsequent years when they, being outside India, come on a visit to India i.e. Explanation 1(b) to Section 6(1) of the IT Act. In the year of leaving India, 182 days criterion is applied without income threshold of Rs. 15 lakhs. In the year of visit to India, 120 and 182 days criterion is applied based on income threshold of Rs. 15 lakhs. This creates confusion amongst the targeted individuals when determining their residential status in India in the first year of move and in subsequent years. Prior to the amendment, such determination was at par with each other.

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		▯ The amendment creates a circular loop to the extent it requires determination of 'total income' first to determine residential status. This creates a typical 'chicken or egg' situation to find out what should be determined first – residential status or total income. There are certain exemptions and deductions available which are linked to an individual's residential status in India such as exemption under Section 10(4), Section 10(15)(ix) etc of the IT Act which become difficult to apply due to combined criterion of stay in India and India sourced income threshold. ▯ After introducing such complexity, what the amendment has achieved is that for visiting NRIs and PIOs, if their India sourced income is more than Rs. 15 lakhs and stay exceeds 120 days, they will be liable to be taxed on India sourced incomes at rates applicable to residents (as distinguished from non-residents). For example, if they earn dividend from India, they will be liable to tax at slab rates instead of flat rate of 20%[29] u/s. 115A. ▯ Also, for claiming treaty benefits on such incomes, they will need to first qualify as residents of treaty countries as per domestic laws of such countries. Thereafter, being resident of both countries, they will need to tie break to treaty countries under residency tie breaker clause of treaties. But where treaty allocates taxing right to India without any cap, they will be liable to tax at rates applicable to residents. For instance, if treaty permits capital gains on unlisted shares to be taxed in India, they will be taxed on long term capital gains at normal rate of 20% (with indexation benefit) instead of 10% (without indexation benefit). ▯ To sum up, the impact of amendment is that India sourced incomes get taxed at higher rates applicable to residents instead of lower rates applicable to

[29] Plus applicable surcharge and cess

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		non-residents. **5. Need for reconsideration and restoration of erstwhile 182 days rule** ⍰ It is submitted that the above referred amendments need reconsideration and roll back for following reasons :- (a) The original intent of making people carrying out substantial economic activity from India but dodging residency in India by limiting their stay to 182 days, pay tax on their global incomes in India (as per Explanatory Memorandum to Finance Bill 2020) does not match with the finally enacted provision. As per finally enacted law, even in a worst case scenario where individual spends more than 120 days and India sourced income is more than Rs. 15 lakhs, he/she is treated as NOR and not required to pay tax on global incomes in India. (b) The amendment merely has effect of making such individuals pay tax on Indian incomes at rates applicable to residents. Hence, the incremental tax revenue which can be expected to be garnered is restricted to difference between normal slab rate and concessional rates applicable to non-residents. (c) The targeted individuals can simply avoid the higher taxes by limiting their stay in India to below 120 days instead of 182 days. In fact, with receding of Covid 19 pandemic and international travel becoming more easier, most NRIs/PIOs are likely to adopt this measure to avoid the higher taxes in India. Thus, the tax policy measure of reducing threshold from 182 days to 120 days does not meet the desired purpose making people carrying out substantial economic activity from India but dodging residency in India by limiting their stay to 182 days, pay tax on their global incomes in India.

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		(d) If NRIs/PIOs restrict their stay in India to less than 120 days, it will aggravate the negative impact on travel and hospitality sectors in India. Thus, on a balance, India may not gain much tax revenues from NRIs/PIOs whereas it may stand to lose indirect and direct tax revenues from travel and hospitality sectors in India. In other words, the measure has a net negative revenue impact. (e) There are a large number of Indians taking up overseas citizenship which could increase further. Also, the lower threshold of 120 days' stay in India could lead to NRIs/ PIOs ceasing to create wealth/ additional investments in India to keep their Indian income below 15 lacs in any given year. This could result in lower investments and spending in India and thus, adversely affecting the economy. (f) On the other hand, restoration of erstwhile limit of 182 days without any income threshold will encourage such NRIs/PIOs to spend more time in India with their family and friends, spend more money on travel and stay and have a net positive revenue impact due to externalities. The original intent of allowing such NRIs/PIOs to spend more time in India to take care of their investments is more relevant today with India presenting better opportunities for investing in many sectors – more particularly, manufacturing and start ups. (g) It will remove the complications caused by graded residency rule based on physical stay in India and quantum of India sourced income. The residency rule will become more simpler to understand and administer for both taxpayers and Tax Department. (h) Under the erstwhile 182 days regime, individuals could not have avoided taxes in India on active incomes like professional or technical fees from services rendered in India or business activities carried out in India – if they constituted 'substantial economic activities' as referred in Explanatory Memorandum to Finance Bill 2020. The existing

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		source rules of 'business connection' u/s. 9(1)(i) and fees for technical services u/s. 9(1)(vii) are wide enough to capture such incomes. As per Hon'ble Supreme Court ruling in the case of Formula One World Championship Ltd v. CIT [2017] 394 ITR 80 (SC), even a short presence of 2 to 3 days in India where non-resident has full authority to conduct business from a place in India constitutes a Permanent Establishment (PE) in India and gives right to India as a source country to tax such income. Relief can be claimed only under treaty by virtue of absence of Permanent Establishment (PE) or fixed base in India and/or restrictive scope of fees for technical services in some treaties. Treaty relief continues to be available under new regime of 120 days subject to individual tie breaking residency to other country. The status does not change if such individuals restrict their stay in India to less than 120 days. Thus, there is no perceived advantage of new 120 day rule. • In view of above reasons, it is submitted that erstwhile limit of 182 days for visiting NRIs/PIOs may be restored without any income quantum restrictions. It will allow NRIs/PIOs to spend more time in India which has positive impact on the Indian economy.
218.	**Rationalisation of taxability of interest on employee's contribution to EPF in excess of INR 2.5 Lakhs per annum**	**Rationale:** • S. 10(11) provides for exemption with respect to any payment (including accumulated interest) from provident fund to which Provident Fund Act, 1925 applies or other notified provident fund set up by Central Government. • S. 10(12) provides for exemption with respect to accumulated balance due and becoming payable to an employee participating in recognized provident fund subject to, inter alia, employee having rendered continuous service with employer for at least five years or

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		alternatively employment is terminated due to reasons beyond the control of the employee such as ill-health, discontinuation of business by employer, etc. - Finance Act 2020 introduced provision to tax employer's contribution to PF, NPS and Approved Superannuation Fund in excess of Rs. 7.5 lakhs per annum and interest accruing on such excess contributions (to be computed as per rule 3B, inserted by Income Tax (First Amendment) Rules 2021, w.e.f. 1 April 2021). - Finance Act 2021 introduced a cap u/s 10(11) and 10(12) where starting from 1 April 2021 interest earned with respect to **employee contribution** in excess of INR 2.5L per annum (threshold increased in INR 5L in case there is no contribution by employer) in a fund will not be eligible for exemption. Further the computation of interest ineligible for exemption has been prescribed by notifying Rule 9D. - India does not have a universal social security system applicable to all citizens and hence middle & upper class taxpayers have to provide for their own social security. - Provident fund has been traditionally a safe avenue for salaried taxpayers to build up a retirement corpus to maintain the same standard of living and/or for life events like marriage of children or buying of new home, etc. - As per Explanatory Memorandum to Finance Bill 2021, the amendment is intended to tax those employees who are contributing huge amounts to these funds and enjoying full exemption on interest on such funds. Newspaper reports carry certain statistics of HNIs having substantial PF deposits. Out of 4.5 crore EPF contributors, more than 1.23 lakh accounts belong to HNIs who have been parking huge sums on monthly basis. As of FY19, HNI's contribution was Rs 62,500 crore. One of the highest contributors, for instance, had a balance of Rs 103 crore in his PF

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		account, while another held more than Rs 86 crore. The top 20 HNIs have about Rs 825 crore in their accounts, while the top 100 have a balance of over Rs 2,000 crore. • It is submitted that employee's contributions come out of tax paid incomes of the employees and HNIs would have paid tax at highest rate on the amounts so deposited. For high salaried earner who wishes to create a retirement corpus through PF, there is no choice on quantum of contributions to be made. If the employee opts for PF, he is statutorily bound to contribute 12% of salary as employee's contributions. Hence, it is unfair to make distinction between contribution upto Rs. 2.50 lakhs and contributions in excess of Rs. 2.50 lakhs. • There could be a valid case for not granting exemption on voluntary PF contributions in excess of stipulated statutory rate of 12% since such excess contributions are made voluntarily to earn tax free incomes. But in absence of facility under PF rules to limit employee's contribution to Rs. 2.50 lakhs, it is unfair to tax the interest on contribution in excess of Rs. 2.50 lakhs made out of statutory mandate. • The new wage code is likely to impact the salary structure as according to the provisions of Wage Code the allowances cannot be more than 50% of the total remuneration. This may necessitate enhancing of Basic Salary to maintain same level of CTC for the employees. Consequently, PF outgo @ 12% of Basic Salary + DA will also rise and bring those employees who are presently contributing less than Rs. 2.50 lakhs within the scope of amendment made by FA 2021. • The interest earned on contributions made in excess of Rs. 2.50 lacs in a year will be taxable not only in the year of deposit but that portion of Interest income will be included to compute the taxability in all future years also; in view of such annual compounding, tracking interest across years that is attributable to only employee contributions will pose lot of challenges/complexities.

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		▪ In absence of specific charging section on lines of s.17(2)(vii)/(viia) introduced in 2020, it is not clear whether the interest on employees' contribution in excess of Rs. 2.50 lakhs will be taxable in year of accrual in PF account or in the year of withdrawal on cessation of employment. As per current language of law, it seems to be taxable in the year of withdrawal. In such case, there should be relief provided from higher surcharge which may become applicable to the employee due to cumulative taxation of interest accumulated over several years. ▪ Separately, clarification is required as to who is required to deduct TDS - whether employer has to deduct TDS u/s 192 or TDS has to be deducted by the PF Trust u/s 194A in case this interest is to be treated taxable under Income from Other Sources. ▪ It is difficult for the employer/PF Trust to determine the actual PF interest at the year-end as there is substantial delay in declaration of PF Interest rates and accordingly the interest for a financial year gets credited after the close of the relevant financial year and after the due date of filing the TDS Returns for the last quarter of the financial year. This may result in unnecessary interest liability u/s 234C on employees towards shortfall in Advance Tax instalments of initial quarters since it does not seem to be obligatory for the Employer/PF Trustee to deduct/deposit TDS while crediting such PF interest income to the account of the employees. ▪ Further, if TDS is deducted by PF Trust u/s 194A, then TDS Funding will have be made by the Trust from employees PF Account which will then lead to reduction of Accumulated PF balance of the employee; **Recommendation** ▪ It is strongly recommended that the above referred amendments should be withdrawn. ▪ Alternatively, it should be made applicable on voluntary PF contribution in excess of statutory minimum limit (i.e. contribution over and above 12% of Basic + D.A).

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		▪ Still alternatively, the PF rules should be modified to provide an option to the employees not to make contribution in excess of 12% to avoid rigors of this provision. ▪ At the very least, the threshold limit of Rs. 2.50 lacs for exempt interest income should be reconsidered and a higher limit should be prescribed. Simultaneously, the Govt. should also look to increase the PPF contribution limit of Rs. 1.50 lacs per person per year. ▪ It may be clarified that the taxation will be triggered in the year of withdrawal from PF and appropriate relief from higher surcharge may be provided in that year due to cumulative taxation of interest accumulated over several years. ▪ It is recommended to prescribe a mechanism whereby the employer may obtain a declaration from the employee w.r.t. the Interest Income u/s 192(2B) and the employer can then deduct TDS u/s 192(2B) on such interest income, in which case the TDS funding can be conveniently done by the employer from the employee's Salary Account. ▪ The PF Interest rate must be declared latest by March so as to compute the exact Interest Income and deposit correct TDS by the due date of depositing March TDS; alternatively, the interest accrued for the FY 2021-22 may be allowed to be considered in the income of FY 2022-23 and so on.
219.	**Taxation of interest allowed by Recognized Provident Fund post retirement / termination of employment**	**Rationale:** ▪ On retirement, the accumulated balance of recognised provident fund becomes due to employee is exempt u/s 10(12). Rules permits member to keep the accumulated balance for three years post-retirement. However, interest credited on balance of member after retirement is not exempt. ▪ In case of Government PF interest credited on balance post retirement is exempt u/s 10(11).

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		Recommendation: • It is recommended that tax treatment of interest earned on PPF balance with Government Provident Fund and Recognized Provident Fund should be at par. Accordingly, interest earned by an assessee from recognized provident fund even after retirement or termination of employment should be exempt.
220.	**Double whammy under S.17(1)(viii) and new S.17(2)(vii) be removed**	**Rationale** • **Existing provisions** o S.17(1)(viii) provides that the employer's contribution to national pension scheme (NPS) shall be taxable as salary income of the employee. However, s. 80CCD(2) grants deduction for such contribution upto 10[30]% of salary [subject to gross total income (GTI) limit]. Hence, to the extent of 10% of salary, employer's contribution to NPS is not effectively taxed in the hands of the employee. • **Amendment by FA 2020** o FA 2020 has substituted S.17(2)(vii) to provide that, to the extent employer's contribution to provident fund, NPS and approved superannuation fund in the aggregate exceeds Rs. 7,50,000, the excess shall be taxable in hands of the employee in the year of contribution. o Further, a new clause (viia) has been added to s.17(2) to provide that the annual accretion by way of interest, dividend or any other amount of similar nature during the previous year to the balance of the credit of the fund or scheme referred in s.17(2)(vii) to the extent it relates to contributions in excess of Rs. 7.50 lakhs which is taxed u/s. 17(2)(vii) shall also be

[30] 14% in case of employees of central and state governments

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		treated as perquisite and added to taxable income for which the accretion shall be computed in a manner to be prescribed by rule 3B. **Issue** o As per Explanatory Memorandum to Finance Bill 2020, the intent of introducing the amendment is to withdraw undue tax benefit accruing to high salary income earning employees. However, in case of such high salaried individuals, there arises a risk of double taxation of employer's contribution to NPS under S.17(1)(viii) and S.17(2)(vii). o Firstly, employer's contribution to NPS is taxable in the hands of employee as "salary" under S.17(1) due to specific provision in clause (viii). Secondly, the definition of "salary" also includes perquisite. Hence, employer's contribution to PF, NPS etc. in excess of the threshold of Rs.7,50,000 u/s 17(2)(vii) is again considered as salary income in hands of the employee. This results in inclusion of same income twice in GTI of the employee. o Thereafter, the employee may be able to claim deduction of such employer's contribution to NPS, but, the relief is available only upto 10% of salary income. o The aforesaid results in unintended hardship in hands of the high salary earning employees. It also acts as disincentive for the employees to invest in NPS and lowers the retirement corpus of the employees. o It may be noted in case of NPS and approved superannuation fund, the accretion is not in the nature of interest like in case of provident fund. The accretion is by way of increase in net asset value of the corpus (like mutual fund units) and it will not be easy to identify the accretion in respect of excess contributions. Further, the net asset value may also go down if the stock market value falls. It is not clear whether the employee will be allowed deduction in case of such fall in value during the year c.

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		Recommendation o It is recommended that the provisions of S.17 should be suitably amended to address the issue of double taxation by amending provisions of S.17(2)(vii) to exclude income taxable under S.17(1)(viii). **o** Alternatively, the CBDT may issue a circular or notification to address the issue of unintended double taxation.
221.	**Representation on introduction of clause (vii) and (viia) of sub-section (2) under Section 17 in the Income Tax Act, 1961**	**Rationale:** As per the earlier provision (sub-clause (vii) of Section 17(2)) of the Income-tax Act employer's contribution to superannuation fund, in excess of Rs.1.5 lacs were to be treated as perquisite, hence made taxable. The above said clause has been amended by the Finance Act, 2020 wherein exempt contribution an employer can make towards recognized Provident Fund (PF), National Pension scheme (NPS) and Superannuation Fund (hereinafter collectively referred to as 'employee welfare schemes') is capped at Rs. 7.5 lacs. The amended clause provides contribution to 'employee welfare schemes' if in excess of Rs. 7.5 lacs, the differential shall be taxed as perquisite in the hands of the employee. Further, sub-clause (viia) provides that interest/dividend accrued on any contribution to employee welfare schemes made by the employer, exceeding Rs. 7.5 lacs shall also be taxed as perquisite in the hands of the employees. Further the employer is required to deduct TDS on the same. In this regard, Rule 3B, notified on 5 March 2021 prescribes a formula based approach for computing the taxable value of annual accretion on excess contributions:

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		o The Rule considers the annual accretion to the specified funds and then computes the following amounts for inclusion in taxable income: ▪ Accretion on current tax year's contributions in excess of INR 750,000 ▪ Accretion on past tax years' contributions in excess of INR 750,000 ▪ Accretion on income taxed under s.17(2)(viia) in past years o Since the contributions may be made throughout the year, the Rule brings in proportionality by considering 50% of excess contributions for current tax year and average of opening and closing balance of past years' excess contributions and accretions thereon. o Further, considering that there may be withdrawals from the specified funds, the Rule considers a situation where the opening balance may be less than past years' excess contributions and accretions thereon. In such situation, the Rule requires ignoring of such shortfall. In other words, in case of withdrawals, it is presumed that the withdrawals are first made out of exempt contributions (including accretions thereon) and the continuing balance represents the excess taxable contributions (including accretions thereon). **Issue** The Rule does not address following practical challenges :- ▯ Identification of specified fund to which excess contributions are made - There is ambiguity regarding which fund should be picked for excess contribution if there is a contribution by the employer to both EPF and NPS (whether the Rule 3B formula be applied to each fund on individual basis or all the funds on aggregate basis)

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		▯ Further PF and SAF interest rates are declared after the close of the financial year, hence it is not very clear as to how the same would be taken for tax computation in the previous year. While it may be possible for employee to apply the Rule while filing return of income, it will create practical challenges for the employer for salary tax withholding throughout the relevant tax year in absence of relevant data. If employer starts recovering TDS on this accrual it will complicate matter as the determination of income is ambiguous. Further, the sourcing of relevant data for the employer may also become difficult if the data is available only to the employee. The practical challenges for employer will be higher in case of employees who have newly joined or left during the year. ▯ Income on NPS account is a notional gain on a year-on-year basis as there is change only in net asset value of the fund. It is not clear as to how income on NPS for employer's contribution exceeding the specified limit will be taxed annually as no real income gets credited to the employees account. ▯ Furthermore, the presumption made in the formula that withdrawals are out of past exempt contributions/accretions is averse to the taxpayer and will trigger perquisite taxation till the balance is fully withdrawn. **Recommendations:** ▯ The concept of Exempt-Exempt-Exempt (EEE) for social security schemes such as PF, SAF and NPS is being diluted for the high-income group. This may discourage long term investment and may even be contradictory to the principles of good tax governance. It is therefore requested to review section 17(2)(vii) i.e. on taxing Employer contribution beyond Rs 7.5 Lakhs and interest accretion thereon u/s 17(2)(viia). ▯ Alternatively, as indicated above, there is lack of clarity as to how the taxable perquisite amount is to be computed and CBDT should issue detailed guidelines to quantify perquisite u/s

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		17(2)(vii) and 17(2)(viia) in different circumstances like contributions to multiple funds, new joiners, employees leaving in middle of the year etc.. Even further, CBDT should consider exempting the employers from salary withholding obligation on the annual accretions. The employees may be directed to report the income directly in their income tax returns.
222.	**Remove practical difficulty in identifying non-qualifying life insurance policy while deducting tax under S.194DA by life insurance companies**	**Existing provision** **S.10(10D) as it stood prior to FA 2023 amendment, provides that any sum received under a life insurance policy, including sum allocated by way of bonus on such policy shall be exempt, subject to certain specific exceptions:** (i) Amounts received under s. 80DD(3) – insurance policy for disabled dependent (ii) Sum received under Keyman insurance policy (iii) Insurance policy issued from 1 April 2003 to 31 March 2012 for which premium payable for any of the years during the term of the policy exceeds 20% of actual sum assured (except death benefit) (iv) Insurance policy issued on or after 1 April 2012 for which premium payable for any of the years during the term of the policy exceeds 10% of actual sum assured (except death benefit) (v) ULIP issued on or after 1 Feb 2021 where the premium (or aggregate premium) payable for any of year the term of ULIP (or more than one ULIP) exceeds INR 2.50L (except death benefit) – treated as capital gains u/s. 45(1B) r.w. Rule 8AD

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		▪ Prior to FA 2023 amendment, barring ULIPs, there was no cap (in terms of absolute value) on the amount of annual premium being paid by any person during the term of the policy to claim exemption ▪ However, several HNIs avail S.10(10D) exemption by investing in policies having large premium contribution (like investment policy) ▪ FA 2023 withdrew exemption in respect of life insurance policies issued on or after 1 April 2023, where the premium payable for any of the previous years during the term of such policies exceeds Rs. 5L and tax the proceeds from such policies under Income from other sources as per S.2(24)(xviid) r.w. S.56(2)(xiii). However, death benefit on such policies will continue to be exempt. ▪ Where a Taxpayer pays premium on multiple life insurance policies issued on or after 1 April 2023, exemption under S.10(10D) shall be applicable only to those policies where aggregate premium (of all policies) does not exceed INR 5L in any of the previous years during the 'term' of any of those policies. ▪ Since the payout from such insurance policies are now taxable, there will be corresponding withholding obligation on life insurance companies under S.194DA at 5% of net income from payouts of survival benefits. ▪ CBDT Circular No. 15 of 2023 dated 16 August 2023 has also provided clarifications and illustrations on identification of qualifying and non-qualifying policies when multiple policies are taken out by taxpayer. **Issue**

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		▪ On withholding obligation u/s. 194DA, if the premium paid on individual policy exceeds INR 5L, there is no difficulty for life insurance company to identify it as non-qualifying policy and deduct tax on pay-outs of survival benefits thereon. ▪ However, if the premium on individual policy is less than INR 5L, the choice is with the policy holder to choose out of those multiple policies whose aggregate premium is less than INR 5L in a financial year to claim exemption u/s. 10(10D) and pay tax on other policies. This is supported by clarification given in Example 8 of Circular No. 15/2023. For instance, an individual may take out 6 policies of Rs. 1 L each with different insurance companies and choose any five of them as qualifying u/s. 10(10D) and balance one as non-qualifying. Unless the taxpayer informs the life insurance company of his choice, it is not possible for life insurance company to identify such policy for TDS compliance u/s. 194DA. **Recommendations** ▪ It is recommended that an amendment be carried out to provide that no withholding is required by the insurance company as it leads to an onerous obligation to determine the taxability of each policy holder which is practically difficult if not impossible. Alternatively, in order to avoid any default on the part of life insurance company, it may be provided that life insurance company is not liable to deduct tax on survival benefit payouts where the annual premium payable on the policy was less than Rs. 5 lakhs. The life insurance companies may be mandated to furnish information of such pay outs in annual statement of financial transaction u/s. 285BA ▪ Alternatively, clarify that the life insurance company may be required to consider only those policies for computing aggregate annual premium threshold of Rs. 5 lakhs which are issued by the same life insurance company to the same policyholder. In other words, a life insurance

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		company need not consider policies taken out by policyholder from other life insurance companies. Alternatively, it is suggested to clarify a mechanism for policy holder to inform his choice to life insurance company, which the life insurance company can consider for deducting or not deducting tax u/s. 194DA. More specifically, the life insurance company should not be held to be in default if it bona fide relies on declaration given by the policy holder for not deducting tax even though it is discovered subsequently that the policy holder was not entitled to exemption u/s. 10(10D) on such policy.
223.	**Any gains from a ULIP policy shall be treated as capital gains in case the premium paid for any year exceeds Rs 2.5 lakhs.**	**Rationale:** Under the erstwhile provisions of the Income Tax Act before amendment by Finance Act 2021, there was no cap on the amount of annual premium being paid by any person during the term of the policy. The Unit Linked Insurance Plan (ULIP) so far was an EEE (exempt, exempt, exempt) category tax saving instrument, tax-free under Section 10(10D) of the Income Tax Act. The FA 2021 has provided that where the ULIP premium is above ₹2.5 lakh per annum, the maturity proceeds will be taxed as equity mutual funds and so they come on par with mutual funds. The rules will apply for ULPs issued on or after 1 February 2021. Capital gain tax like equity oriented mutual fund (i.e. 10 percent exceeding Rs 1 lakh) has been provided. However, if the amount is received by the nominee after the death of subscriber irrespective of date of subscription of the plan, the amount will be exempt from income tax in the hand of the nominee.

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		▯ Security transaction tax will be levied on sale or surrender or redemption of a unit of an equity-oriented fund to the insurance company, on maturity or partial withdrawal, with respect to unit linked insurance policy issued by such insurance company on or after February 1, 2021. ▯ The amendment is applicable only on plan issued on or after 1 February 2021. **Issue:** ▯ We believe that the new tax regime for ULIPs, while bringing in some additional tax revenues, may hinder other benefits that were being provided until now. Consequently, the net benefit may be negative, because of the following reasons: 1. ULIP and equity MF are products with very different characteristics: a) ULIP is a long-term product with a minimum lock in period of 5 years while equity MF has no such lock in period except ELSS MF which has a lock in period of 3 years. However, ELSS MF AUM is at Rs 1.2 trillion which is only 10% of the total equity MF AUM as of December 2020. Thus, equity MFs are primarily perceived by customers as short-term products with very high liquidity. b) ULIP has a built-in life cover equal to 10 times of the annual premium (for age of policyholder < 45 years). Equity MFs don't provide any risk cover by way of insurance and are a purely an investment product. 2. ULIP is a long-term goal based financial solution with dual benefits of protection and investment. Along with this, EEE category tax implications for the taxpayers made ULIP a very attractive product for individuals who still are not comfortable to buy term insurance plans for their protection needs. This new tax regime will make ULIP less

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		attractive and could further deteriorate the insurance penetration in India, currently at 4.2[31]% of GDP (2020 and 2021) against global average of 7.4%. 3. Due to long term nature of ULIP, it is feasible to invest the funds under ULIP in long tenure debt instruments e.g., bonds issued by infrastructure companies. As of 31st March 2023, 9.42%[32] of the total AUM with life insurance sector was in housing & infrastructure investments. With the new tax regime, ULIP would lose favor as long-term investment product and make it less feasible to fund the infrastructure related projects. And this may run counter to the government's push for infrastructure building at an accelerated pace now. **Recommendation:** • The limit of aggregate premium of **Rs 2.5 lacs** may be too low to determine customers as HNI. Considering this and the disruption it may create, the Chamber recommends enhancing the limit at **Rs 10 lacs** of aggregate premium.
224.	**Remove anomaly in amendment to s.54 in relation to determination of Cost of Acquisition of new residential house where transfer is within the limitation period of 3 years, actual cost of new house is more than INR 10**	**Existing provision** • Section 54 provides capital gains exemption to individual and HUF arising from transfer of long-term capital asset (being buildings or land appurtenant thereto and residential house) where taxpayer has purchased one residential house property in India either 1 year before the transfer or 2 years after the transfer or constructed a house within 3 years (referred as New House) after such transfer. • To illustrate, if the indexed cost of old residential house is Rs. 5 Cr and it is sold for Rs. 25 Cr, as per provision prior to FA 2023 amendment, it was possible for taxpayer to claim full LTCG

[31] Source: Economic Survey 2021-22; Para 4.47, Economic Survey 2022-23; Para 4.54

[32] Source: IRDAI Annual Report 2022-23; Table I.18

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	Cr and capital gains on sale of old house is more INR 10 Cr [S. 54]	exemption of Rs. 20 Cr by investing in another house costing at least Rs. 20 Cr within the prescribed time limit. - As per section 54(1)(i), in case where such actual capital gains are more than cost of new residential house property purchased then capital gains chargeable to tax is the difference between actual capital gains and cost of new asset. Further, in case where such new asset is transferred within a period of 3 years then due to fiction created by section 54(1)(i), while computing capital gains, the cost of new house is taken as NIL. This is a claw back provision for not fulfilling the condition of exemption granted earlier. - As per s. 54(1)(ii), in case where capital gains are equal to or less than cost of new house then in such case entire capital gains is exempt. Further, in case where such new asset is transferred within a period of 3 years then as per Section 54(1)(ii), while computing capital gains the cost of new house will be original cost as reduced by capital gain exempted earlier. - FA 2023 has inserted third proviso to s. 54(1) which provides that in case the cost of new asset is greater than INR 10 Cr then for the purposes of this section, the cost of new asset is restricted to INR 10 Cr. - To illustrate, if indexed cost of old residential house is Rs. 5 Cr and it is sold for Rs. 20 Cr, as per law prior to FA 2023 amendment, it was possible for taxpayer to claim full LTCG exemption of Rs. 15 Cr by investing in another house costing at least Rs. 15 Cr. But under the new regime, even if the taxpayer buys another residential house of Rs. 15 Cr or more, the capital gains exemption will be restricted to Rs. 10 Cr and he will be required to pay LTCG tax on balance gains of Rs. 5 Cr

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		▯ As a result of above amendment, an unintended lacuna emerges in one scenario where the new house for which exemption is claimed u/s 54 is sold within 3 years. The lacuna exists in limited cases where LTCG is more than cost of new property. ▯ Continuing the above example, if the new house is purchased for Rs. 12 Cr, LTCG tax is paid on Rs. 2 Cr and the new house is sold within 3 years, due to operation of s.54(1)(i), the cost of new house is deemed to be NIL despite the fact that taxpayer has already suffered LTCG on Rs. 2 Cr. Logically, the cost of new house should be considered as Rs. 2 Cr (i.e., excess over Rs. 10 Cr) to avoid double taxation **Recommendations** ▯ A suitable amendment may be made in s.54(1)(i) to avoid the above referred unintended double taxation
225.	**Applicability of TDS on notice period pay or joining bonus recovered from resigning employee**	**Rationale:** ▯ As per the prevalent norm, the employees are required to serve notice within the stipulated time before leaving the organisation. In case of shortfall in service of notice period, the present employer recovers specified amount for shortfall in service of notice period. In many cases, this is reimbursed by the new employer. ▯ Furthermore, it is a common practice to give conditional joining bonus to employee which becomes refundable if the employee resigns within a specific period like one year or two years. There is no dispute that receipt of joining bonus in the year of joining employment is taxable as salary income since s.15 taxes salary income on earlier of receipt or due basis. But there is ambiguity whether the recovery of the joining bonus can be reduced from the salary of the year of leaving the employment. Such recovery may also be funded by the new employer.

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		▯ In such cases, many-a-times, in the absence of any clarity, the present employer deducts TDS on notice pay recovery and joining bonus recovery. Further, in cases of reimbursement, the new employer also includes the said amount in the total income of the employee and deducts TDS even if such income belonged to the ex-employer and is taxable in his hands. Therefore, it leads to double taxation in the hands of employee, though no payment is received by the employee. **Recommendation:** ▯ It should be clarified that since notice pay amount is not received by the employee, the same is not chargeable to tax in the hands of employee but is chargeable in the hands of ex-employer. Similarly, the joining bonus recovery should be explicitly allowed as deduction to the employee in the year of recovery to avoid 'double whammy' of taxation in the year of joining as well as non-grant of deduction in year of recovery.
	Other Representations	
226.	**Relaxation for bona fide cases from expanded scope of s.68 to explain 'source of source' of loans and borrowings**	**Rationale and issue:** ▯ Prior to amendment to s.68 by Finance Act 2022, taxpayer was required to explain 'source' of cash credits like loans and advances, share capital, etc. i.e. to explain the identity of lender, creditworthiness of lender and genuineness of the lending. There was no requirement to explain 'source of source' in lender's hands i.e. from where lender got the funds, his creditworthiness and genuineness. ▯ Under s.68 as it existed prior to amendment by Finance Act 2022 , the requirement to explain 'source of source' was restricted to closely held companies raising share capital from residents. ▯ There is limited exemption in respect of amounts received from Category I/II AIFs.

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		▯ S.68 was amended by Finance Act 2022 to provide that every taxpayer will be required to explain 'source of source' of 'loan or borrowing or any such amount'. It applies to every taxpayer whether listed or unlisted company, bank, firm/LLP, AOP, individual, etc. ▯ The intent of the above amendment is to catch dubious transactions (eg. where lender has given loan from cash deposits made in his bank account). ▯ A fall out of the amendment is that the same amount can be taxed in the hands of two persons. For instance, if A has lent monies to B and A is unable to explain the source in his hands, the amount can be added in the hands of both A and B. ▯ However, a significant concern for the industry is that the language is very broad to cast onerous requirement on even genuine/bonafide loans – say, borrowings from regulated entitles like banks/NBFCs, overseas borrowings by issue of forex or Rupee bonds, etc. Even banks/NBFCs will need to explain 'source of source' of savings, current, fixed, recurring deposits from customers. ▯ Another issue is whether the expression 'any such amount' will include items like deposits, advances from customers, EMD, Security Deposit etc. Explanatory Memorandum to Finance Bill 2022 uses the expression 'or any other liability'. ▯ The information of 'source of source' is not required to be furnished in return of income but will need to be furnished in scrutiny assessment. But taxpayers cannot wait till case is picked for scrutiny. They need to compile information beforehand and hence the amendment casts onerous burden on bonafide taxpayers. It is in direct conflict with 'ease of doing business' principle. **Recommendations**

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		▯ While we appreciate the intent behind the amendment, it is humbly submitted that the amendment be deleted in its entirety. As long as the details of the lender, his PAN, bank account information is furnished by the borrower, he should not be compelled to prove the 'source of the source'. Further, it is strongly recommended to grant relaxation for bona fide cases. It may be clarified that the such expanded requirement will not apply to following illustrative cases :- ● Borrowings from banks, NBFCs and financial institutions and any other well-regulated intermediary duly licensed to operate by an Indian regulator established under any Act enacted by the Central or the State Government. ● Borrowing made by banks, NBFCs and financial institutions themselves ● Deposits, advances from customers, EMD, Security Deposit etc. accepted in ordinary course of business from customers or vendors. ▯ Alternatively, for this purpose, power may be given to CBDT to notify 'white list' of such bonafide cases. This measure has been adopted in context of other provisions like gift taxation u/s.56(2)(x), transfer of unlisted shares u/s. 50CA, etc. ▯ It may be noted that taxpayer raising borrowing may or may not be able to collect data from his lender/creditor, considering confidentiality or other issues. Hence, it is suggested that the CBDT adopts a milder approach and allows acceptance of declaration from the lender/creditor as sufficient compliance to explain source of funds. This can be provided in the Income-tax Rules, 1962. Any further investigation can be done by the tax authorities directly with the lender as per the provisions of the Act.