Post - Budget Memorandum 2020 - 21

Direct Taxes

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AMCHAM INDIA
Post Budget Memorandum 2020-21

Post-Budget Memorandum: Direct Taxes

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S. NO.	ISSUE	SUGGESTION	JUSTIFICATION
	Points in relation to Section 194(O):		
1.	Widening the scope of Tax Deduction at source (TDS) on E-commerce transactions through insertion of section 194-O	Section 194-O proposed to be inserted by the Finance Bill, 2020 should be dispensed with. The intent of legislation can be achieved by requiring ecommerce operators to share seller wise reports including the Permanent Account Numbers (PAN), and gross merchandize sales (both gross and net sales) with the income tax authorities. This mechanism will ensure that the tax authorities have the relevant information to achieve the policy goal without negatively impacting the working capital of the sellers and also reduces the compliance costs for sellers.	Under the proposed new section 194-O, the ecommerce operators are required to withhold 1% TDS on gross amount of sales. It negatively impacts the working capital of the sellers and disincentivizes businesses and could lead to reduced trading activity and thereby impact economic growth. Additionally, this would increase compliance costs and efforts for the sellers.
2.	Widening the scope of Tax Deduction at source (TDS) on E-commerce transactions through insertion of section 194-O	**Without prejudice to above, it is recommended that-** The TDS rules apply uniformly to online and offline sellers to eliminate channel disparity and ensure a level playing field.	The new section applies only to sellers selling on ecommerce marketplaces. This disincentivizes sellers from selling on the ecommerce marketplaces and could result in businesses not expanding to other channels and could lead to reduced trading activity and thereby impact economic growth.
3.	Section 194-O - Mechanism for computation of TDS on gross amount of sales or services.	TDS should apply on sales excluding any taxes i.e. GST and should account for any sales returns.	Under other TDS provisions, there is already a CBDT circular which clarifies that TDS should not apply on the GST portion of payment for goods or services. Further, sales returns need to be excluded for determining the value of goods or services on which TDS should be applied.
4.	Clarification on who will withhold TDS in cases where multiple e-commerce Companies are involved in the transaction chain	The obligation for TDS should be on the e-commerce operator who is making payments to the Vendor. Appropriate explanation/amendment should be introduced in the proposed provision to specify that only the first Ecommerce	There could be case where multiple e-commerce companies (EC) are involved in the transaction chain. Say for example, Vendor lists it product on the platform of EC1 but EC1 further has an affiliate EC2. Customer buys the goods or services

		Company contracted with Vendor would be liable to withhold TDS. The other Ecommerce Companies in the chain who are not contracted with Vendor would not be required to withhold TDS on the same transaction again.	through EC2 who in turn report the transaction back to EC1. EC1 is the person who is contracted with vendor, therefore EC1 reports the sale transaction to vendor. Payment may also flow in the same manner. Since the objective of the proposed provision is to report the transaction executed by the vendors, and EC1 has privity of contract with vendor (and not EC2), only EC1 would be in position to withhold the TDS on the vendor and report it against the PAN of the vendor. Again, similar provisions are available under GST-TCS whereby EC1 who has contracted with Vendor is supposed to collect GST-TCS and remaining e-commerce Companies in the chain are not required to collect GST-TCS again.
5.	Applicability to sale of Gift Cards (GCs)	We request that a clarification is provided that GCs are excluded from the TDS rules given GCs are in the nature of money or equivalent of money, and should neither qualify as goods or services.	Currently, the proposal covers sale of all goods and services through digital or electronic means. Since the term 'goods' is not defined and services is defined in an inclusive way, this may be wide enough to cover sale of GCs on the marketplace. Gift cards are an equivalent of money, and could be considered to be out of the ambit of goods.
6.	'Deemed payer'	It is recommended that the concept of deemed payer is excluded due to the difficulty in collection of TDS in the case where the money does not flow through the ecommerce operator.	As per Section 194-O, any payment made by a purchaser of goods or recipient of services directly to an e-commerce participant shall be deemed to be amount credited or paid by the e-commerce operator to the e-commerce participant and shall be included

			in the gross amount of such sales or services for the purpose of deduction of income-tax. In this case the consideration for sale of goods or service do not flow through Ecommerce operator and is directly paid by customer to the vendor. In absence of flow of money, E-commerce operators will have significant hardships in collection of TDS from vendors. We would also like to bring to your attention that even in case of GST-TCS where the payment is not routed through the Ecommerce Companies and is directly paid to vendor, the Ecommerce Company is not liable to collect TCS on such transactions. In view of above, there would be hardships in the case of services like 'cash on delivery' for the e-commerce participant to withhold TDS when the amounts have been directly collected by the vendor and not the e-commerce operator.

7.	Deferment of applicability of section 194-O	Instead of April 1, 2020, we recommend at least a deferral of the provision by 9-12 months to enable e-commerce operators to comply with the resource and infrastructure requirements of implementing the provision. During the deferral period, in the interim, as a temporary measure and to support the intent of legislation, E-Commerce operators can share seller wise reports including the Permanent Account Numbers (PAN), and gross sales (both gross and net sales) with the income tax authorities. This mechanism will ensure that the tax authorities have the relevant information to achieve the policy goal. Alternately, in the interim, CBDT can leverage the information available with the CBIC through the provisions of GST-TCS whereby the transactions of Sale of Goods and/or services by vendors are reported by Ecommerce operators.	While E-commerce operators are concerned about the significant compliance burden that the TDS rules impose on them and the impact on the overall ease of doing business and growth of the digital economy, the implementation of these rules would also necessitate significant augmentation of resources and infrastructure of E-Commerce operators. Further, the implementation of the rules need various aspects to be clarified, some of which have been explained in the below section. The Government would also need time to upgrade/ update the TDS platforms to enable collection of data and putting in place a mechanism for analysis of the same. This would be required to implement the amendment effectively. The infrastructure pertaining to the TDS platforms will have to be updated and some time will have to be set aside for the same.
8	Definition of e-commerce operator	The definition of e-commerce operator is to be made specific. Our recommendation is that payment processing companies or payment gateways which are only providing payment processing or payment facilitation on ecommerce marketplaces, similar to a transaction with a banking company, be excluded from the TDS rules. Such an exclusion would avoid ambiguity and align with the overall intent of applying this provision to marketplace entities which facilitate the purchase and sale of goods and	Currently, the provisions refer to sale of goods or services of an ecommerce participant facilitated by an e-commerce operator through its digital or electronic facility or platform. E-commerce operator is defined to mean any person who owns, operates or manages digital or electronic facility or platform. This broad definition could end up covering payment gateways as well which facilitate payment for transactions initiated on an e-commerce platform.

		services, rather than entities which merely facilitate the payment for such sales.	
9	There is no clarity on the meaning of term 'facilitated' by the e-commerce operators.	The term 'facilitated' should be clarified to mean supply of goods or services through the digital or electronic facility or platform of the e-commerce operator, and thus should not include merely an advertisement – which redirects the customer to website of other entity / supplier.	This would clarify the scope of the provision and guide the e-commerce operators on its applicability.
10	Threshold of INR 0.5 million is too low	The threshold of INR 0.5 million is too low and may not provide relief to the sellers. Further, this safe harbour may create disparity between Individual or HUF vs Company or LLP, as sellers.	The threshold should be increased to INR 0.10 million and should also be extended to company or LLP. This will provide relief to a wide range of sellers and also give an impetus to other person (such as company or LLP)
11	No clarity on the meaning of term 'facilitated'	There is no clarity on the meaning of term 'facilitated' by the e-commerce operators	The term 'facilitated' should be clarified to mean supply of goods or services through the digital or electronic facility or platform of the e commerce operator, and thus should not include merely an advertisement – which redirects the customer to website of other entity / supplier. This would clarify the scope of the provision and guide the e commerce operators on its applicability.
12	Applicability of section 204 v 194-O	The amendment in Section 204 should only apply with respect to the provisions of Section 194-O and not to the entire Chapter XVII.	Section 204 which defines 'person responsible for paying any sums' has been proposed to be amended to provide that in the case of a person not resident in India, the person himself or any person authorised by such person or the agent of such person in India including any person treated as an agent under section 163 shall be treated as 'person responsible for paying any sums'. Even though the Memorandum explaining the provisions of the Finance Bill 2020 states that the amendment to Section 204 is consequential to introduction of Section 194-O,

			the way Section 204 has been worded, it will apply to the entire Chapter XVII which deals with TDS/TCS provision.
	Points in relation to TCS - Section 206C		
13	Widening the scope of section 206C to include TCS on foreign remittance through Liberalised Remittance Scheme (LRS) and on selling of overseas tour package as well as TCS on sale of goods over a limit.	TCS rules to be relaxed and alternatively require the sellers to provide informational reports to the tax authorities providing details of sales exceeding INR 5 million. This will reduce any compliance costs and efforts for the traders.	This disincentivizes the trading businesses and could lead to reduced trading activity of the products and in turn reduce consumer consumption. Additionally, this would increase compliance costs and efforts for wholesalers as these wholesalers would need to undertake TCS compliances and reconciliation of TCS data at their end.
14	Deferment of need for industry to comply with amendment of section 206C	Given that the implementation of the new TCS provision would necessitate significant augmentation of resources and infrastructure by the wider industry, we request the Government to defer the effective implementation by 9-12 months (i.e the application of the proposed levy to enable companies to comply with the onerous resource and infrastructure requirements, may be deferred by 9-12 months).	This will help companies prepare for the TCS rules and achieve its effective implementation.
15	Levy of Tax Collected at Source (TCS) on sale of goods	Given the ambiguity in language, this provision may be applied for foreign companies selling goods into India and Indian companies exporting goods from India. Thus, it should be clarified to exclude import and export transactions to/from India from levy of TCS.	Certain specified sellers having turnover exceeding INR 100 Mn are required to collect TCS at the rate of 0.1% on sale of goods exceeding INR 5 million
	Others		
16	Clause 47 – Proposal to amend sub-section 5 of section 115A of Income Tax	In order to reduce the tax compliance of foreign companies in India, whose tax has already been deducted at the applicable rate	For reducing the tax compliances for foreign companies in India, it is proposed that the foreign companies earning royalty or fees for technical services (FTS) from

	Act w.r.t furnishing of return of income of foreign companies	under the DTAA, it is requested to extend the exemption of filing income tax return in India to these companies as well.	the Indian Company are not required to file tax returns in India if the said income is subject to tax in India which is not lower than the tax stated in the specified provision i.e. Section 115A of the domestic Act. Where the taxes have been withheld on Royalty or FTS at the rate prescribed under the relevant Double tax avoidance treaty being more beneficial to the payee, then also the payee is not exempted from filing income tax return in India. The Payee in a DTAA country whose income has been subject to TDS under the DTAA at a lower rate would be faced with undue compliance requirement of applying for a PAN and filing income tax return in India as compared to a payee in a non DTAA country whose income has been subject to TDS at the domestic rate Since the requisite tax has already been withheld at the applicable rates, requirement to file returns would just be additional compliance.
17	Granting of tax exemption for Creche Facility extended by the employer as mandated under Maternity Benefits Act	It is recommend inserting a specific provision in Income-tax Act exempting the creche facility provided by the employer to employees eligible to claim such benefit under Maternity Act.	The Maternity Benefits (Amendment) Act,1961- As per section 11A of the said Act, every establishment having fifty or more employees shall have the facility of créche within such distance as may be prescribed, either separately or along with common facilities. As per Section 17(2)(iv) of the Income-tax Act, 1961, "perquisite" includes— “(iv) any sum paid by the employer in respect of any obligation which, but for such payment, would have been payable by the assessee;” Under the current Income-tax provisions, given the wider definition of perquisite, any benefit extended by an employer to an employee would be taxable unless the

			same is specifically exempted. In the absence of a specific exemption, creche facility shall be taxable under the residuary provisions of the perquisite taxation, inspite of this being mandated to employer under Maternity Act. This additional tax burden on employee (eligible under Maternity Act) would discourage many new mothers to avail the creche benefit and defeat the whole purpose of the recent amendments to the Maternity Act. Apart from above, there are several challenges in quantifying the total cost to the employer wherein the creche facility is maintained and run by the employer. This will lead to a situation wherein it will not be possible to determine the cost per employee as well. Also under the erstwhile Fringe Benefits Tax regime creche facility was specifically exempted. This change in Income-tax Act would encourage more women employees, who are new mothers to join back work and also increase their efficiency, which is the goal of the recently amended Maternity Act.
18	As per Finance Bill, 2020 the due date for filing report under section 44AB of the Income-tax Act, 1961 (i.e. tax audit report) has been proposed to be the date one month prior to the due date of filing of return of income under section 139(1) of the Act.	The due date of filing tax audit report should be the same as due date of filing of income tax return as it is available in the current regime of income tax laws. Thus, the due date of filing tax audit report and tax return should be 31st October (or 30th November for transfer pricing cases).	The changes proposed in Finance Bill, 2020 will deprive the taxpayers to claim the genuine and eligible deductions for bonus, etc. paid after filing of tax audit report but before filing return of income within due date. Currently while processing the return of income, under section 143(1) of the Act, the Centralised Processing Centre (CPC) is electronically matching the deductions claimed in tax returns with the deductions as uploaded on tax portal in tax audit report. In case any specific genuine and eligible deduction is not uploaded electronically in tax audit report but the same is claimed while filing return of income, CPC disallows such deduction and raises tax demand along with applicable interest thereon. Introducing a gap of one month

			between due dates for tax audit report and tax returns will substantially increase such cases and will cause hardship to bonafide taxpayers. Retaining the same due dates for filing tax audit report and tax returns will help the taxpayers to avail the genuine deductions as per law.
19	Source rule – Section 9(1)(i)	It is suggested that the applicability of source rule provisions should be deferred in line with the SEP provisions. Further it would be apt to come with a detailed guideline considering these issues relating to determination of income attributable to aforesaid activities.	The Bill has expanded the scope of the source rule under Section 9(1)(i) to provide that the income attributable to the operations carried out in India shall include income from – • such advertisement which targets a customer who resides in India or a customer who accesses the advertisement through internet protocol address located in India; • sale of data collected from a person who resides in India or from a person who uses internet protocol address located in India; and • sale of goods or services using data collected from a person who resides in India or from a person who uses internet protocol address located in India. It could be difficult to determine whether the advertisement actually targets Indian customers when there is an advertisement on global television channels/mobile app considering the global audience. Similarly it will be difficult to determine income attributable to sale of data collected from a person who resides in India and sale of goods or services using data collected from a person who resides in India. Further discussion on the SEP is still going on in G20-OECD BEPS project and the report is expected by the end of December 2020. In these circumstances, it is proposed to defer the applicability of SEP provisions under the Act

			starting from AY 2022-23. However, source rule provisions for taxing advertisement income under Section 9(1)(i) has been introduced from AY 2021-22. Further the discussion is also going on at an international forum with respect to income from advertisement that targets customers of a particular country, income from data collected, income from sale of goods or services using such data collected. Therefore, source rule provisions should also be applicable only when there are consensus at an international level.
20	Section 254(2A) - Provision for e-penalty.	ITAT is a judicial body and must be allowed to determine the amount of tax payment required basis merits of the case. Prescribing of a minimum tax payment of 20% is unfair to the taxpayer, hence the proposed amendment should be deleted. Alternatively, some exceptions to the rule be provided for genuine cases (eg. cases where demand has been deleted on similar issue in past years), similar to what is given in CBDT O.M. dt 29/02/2016	Prescribing a fixed % of tax payment will only create hardship for taxpayers but will also interfere with the independence of the judiciary. Further, this will also lead to misuse of the provisions by tax department, wherein, a frivolous tax demand would be created at an assessment stage, only to ensure collection of 20% tax and meet revenue targets.
21	Section 254(2A) - Provision for e-penalty. Stay allowed by Income Tax Appellate Tribunal (ITAT) cannot exceed a period of 365 days	• Clarification be given in respect of cases where stay has been granted earlier but an extension of stay is sought post April 1, 2020. • Instead of prescribing a cap on the stay period, it is suggested that other measures be taken by the ITAT administration to ensure swift disposal of appeals.	It is observed that in majority cases, appeal before ITAT is not disposed-off within 365 days due to repeated adjournments taken by Department Representative (DR). Time taken by DR should not lead to hardship to Taxpayer by any means. Several courts have held the cap on Stay period of 365 to be unconstitutional especially where delay is not attributable to the Taxpayer. Hence, it is suggested that other measures be introduced to ensure timely disposal of appeals at ITAT level.

22	Section 115BAA (clause 51 of FB 2020)	It is suggested that proposed amendment in Section 115BAA and 115BAB be deleted and the provisions of Taxation (Amendment) Laws, Act 2019 be maintained as is.	In the Taxation (Amendment) Laws, Act 2019, it was provided that only benefits under heading 'C – Deductions in respect of incomes' are to be foregone. This will result in unintended loss of Section 80G or 80GGA deduction to corporates. Every company is mandated to make contribution towards various social, civil and scientific projects carried by NGOs and Government bodies. In turn, Companies obtained benefit by claiming the deductions against taxable income. Further, as stated by Hon'ble FM in Budget 2014 speech, the intention of government is to do away with income-linked tax exemptions, however, with this amendment, even payment-based tax deductions are being denied to Taxpayers.
23	Removing dividend distribution tax (DDT) and moving to classical system of taxing dividend in the hands of shareholders/unit holders.	• The benefit provided under Section 80M may be extended to include the dividend received under Section 115BBD. • The beneficial tax rate applicable to non-residents under Section 115A may be extended to resident shareholders to bring parity and to avoid undue increase in tax burden for residents. • Part II of First Schedule of the Bill should be amended to include 10 per cent withholding tax rate for dividends paid to non-resident shareholders in line with withholding tax rates for resident shareholders.	• Proposed deduction under Section 80M of the Act is applicable only to dividend received from domestic company (unlike the exemption available under current Section 115-O which provides for removal of cascading effect with respect to domestic as well as foreign subsidiaries). Further, Section 115BBD levies 15 per cent tax on dividends received by an Indian company from specified foreign subsidiary without the benefit of set-off. • Dividend income is proposed to be taxed in the hands of shareholder at applicable marginal tax rates. While the intention of the proposed amendment is to shift the burden of tax from the company to the shareholder, the actual tax outgo would increase where a resident shareholder could be liable to tax on dividends upto 42.74 per cent whereas current dividend tax is much lower (i.e. 20.56 per cent on

		• Deduction of interest expense may be allowed fully and restriction of deduction upto 20 per cent of the dividend income be done away with. • Section 115JB of the Act should be amended to provide for reduction of dividend related cascading effect under Section 80M for computation of book profits under MAT provisions. • To maintain the status quo with respect to dividends distributed by a unit of IFSC, exemption should be provided for dividend income received by the shareholder from a unit of such IFSC deriving income solely in convertible foreign exchange. • The beneficial tax rates under the tax treaty should be allowed to dividend income received from AIF. • In order to avoid double taxation, it is suggested to bring a suitable amendment in the cases where companies will issue dividend on or before 31 March 2020 and the shareholders will receive the same on or after 1 April 2020.	grossed up basis). Therefore, there is an unintentional increase in burden of tax in the hands of certain resident shareholders. • Dividend income arising to non-resident shareholders could be subject to tax under Section 115A of the Act at the rate of 20 per cent (where beneficial tax rate is not available under a tax treaty). Section 195 of the Act provides that tax shall be deducted at 'rates in-force' for payments to non-residents. Part II of First Schedule of the Bill has not been amended to include 20 per cent withholding tax rate applicable to dividends under Section 115A and therefore, companies may be required to withhold tax at much higher rate of 40 per cent (plus cess/ surcharge). It appears that this is an inadvertent omission. • The Bill proposes that withholding tax obligation will arise on dividend payments. This could create practical difficulties for companies with large shareholder base, especially where non-resident shareholders are involved to compute the tax deductible and undertake the necessary procedural compliances. • The restriction of deduction of interest expense to the extent of 20 per cent of the dividend income applies to any interest expenditure irrespective of whether it is paid to an associated enterprise or third party. This would lead to denial to interest expense in case of genuine third party borrowings. • In case of a domestic company paying taxes under the Minimum Alternate Tax (MAT) regime, in absence of corresponding provision for reduction of dividend income received from another domestic

			company for computation of the book profits, such companies would still be liable to pay MAT on such divided income component. • Under the extant provisions of Section 115-O, no DDT was chargeable in respect of the income of a unit of an International Financial Services Centre (IFSC), deriving income solely in convertible foreign exchange, either in the hands of the company or the shareholders receiving such dividend. Pursuant to the adoption of the proposed amendment, dividend income shall now be chargeable to tax in the hands of the shareholders. This seems to be an unintended consequence. • Under the proposed provisions of the Act, dividend income received by Alternative Investment Fund (AIFs), REITs and InvIT is chargeable to tax in the hands of the unit holder (i.e. pass through status has been provided). Interpretation challenges may arise with respect to application of a tax treaty on such dividend incomes, since language used in most tax treaties is 'dividend paid by a company'. Suitable clarification should be provided to ensure that the beneficial tax rates under the tax treaty will be allowed to dividend income received from AIF. • The Bill proposes to remove DDT with effect from FY 2020-21. Thus, dividend declared before such date would be liable for DDT. On the other hand when such dividends are received by the shareholders after 1 April 2020, it will be taxable in their hands and companies would be liable to deduct taxes on such dividends under Section 194. Thus, it will result into double taxation of the same income.

24	Section 194J - Reducing the rate of TDS on fees for technical services (other than professional services).	Though this is a welcome amendment intended to reduce litigation on 194J vs 194C, however, this will create a fresh round of litigation as to whether a particular service would fall under the category of 'professional service' or 'technical service' It is recommended as follows : (a) lower TDS rate of 2% be made applicable to both Professional as well as Technical service. (b) Alternatively, 2% to 5% should be made applicable for entire section 194J.	This is likely to lead to disputes on what constitutes Technical service and what constitutes Professional service
25	TDS on FTS	In order to bring Section 194J in parity with Section 194C, it is suggested that the rate of TDS under Section 194J on FTS should also be bifurcated in the same manner as in Section 194C providing rate of one per cent on payments to individuals/HUF and rate of two per cent in other cases.	The Bill has amended Section 194J to reduce the rate of TDS on Fees for Technical Services (FTS) to two per cent as against the earlier ten per cent. The reduction was aimed at reducing tax litigations on account of short deduction of tax where assessee deducts tax under Section 194C while the tax department alleges that the tax was deductible under Section 194J. However, Section 194C provides dual rates of one per cent on payments made to an individual or a HUF and two per cent in other cases. Thus, the government's attempt to reduce litigation would be undermine in case of payments made to individual/ HUF where the rate of one percent has been provided under Section 194C however, Section 194J provides a rate of two percent.
26	Direct Tax Amnesty scheme (i.e. The Direct Tax Vivaad Se Vishwas Bill, 2020) ("DTVSVB 2020")	Hence it is recommended that: • In case the "Disputed Tax" determined u/s 201(1), 200A, or	Collecting the taxes twice on the same income is undue hardship to the taxpayer.

		206C(6A) or 206CB, the Consequential tax effect on disallowance u/s 40(a) should be reduced while computing the Disputed Tax for Order u/s 143(3). • Alternatively, in such a situation the new proviso should be inserted to provide the allowability of expenses in the year of payment of taxes under section 201(1).	
27	Section 2(j)(i) &(ii) of DTVSVB 2020:	The Designation Authority must consider the application for rectification order u/s 154 and reduce the tax impact of such rectification while arriving at the "Disputed Tax".	In case the Rectification Application u/s 154 is pending before the Tax Officer, which results in reducing the disputed tax. Will such rectification request be considered by Designation Authority before computing the Disputed Tax. Non – provision of genuine rectifications will lead to undue hardship on the taxpayer and this may lead to taxpayers not opting for the Amnesty Scheme, which can result into continued litigations.
28	Amnesty scheme – Vivad Se Vishwas Bill , 2020.	Submitted below are points which can bring more clarity to this scheme : • In case of disputes involving only interest – whether interest is to be considered as quantified by the disputed assessment order OR it needs to be computed till settlement of this dispute under the scheme. • If disputed order contains more than 1 disallowances which is in appeal – assessee should be allowed to settle only few issues in the said assessment order.	Clarifications required.

29	Deferring TDS or tax payment in respect of income pertaining to Employee Stock Option Plan (ESOP) of start- ups.	1. It would be recommended that a clarification is issued on the point of qualification (i.e. whether at the time of grant/ vesting/ exercise/ allotment/ sale etc.) for the eligible start-up as per Section 80-IAC for the purpose of withholding taxes under Section 192(1C). Also, whether these TDS provisions apply to the eligible start-up where the shares are issued by the holding Company of the eligible start-up to the employees of the eligible start-up. 2. To avoid genuine hardship to employees discontinuing the employment with the company, the condition with respect to taxability of ESOP tax within 14 days from the date on which employee ceases to be employed should be done away with. Further, to create level playing field for all the employees, the benefit of deferral of tax on exercise of ESOPs should be extended to all the employees.	The question on the timeline as to when the start-up should qualify as eligible start-up for the purpose of tax deduction is unclear as there are various stages in the life cycle of ESOP such as grant, vesting, exercise, allotment/ sale. Also, there is no clarity on whether these provisions apply to cases whether ESOP/ sweat equity are issued by the holding Company of the eligible start-up to the employees of the eligible start up. The deferral of ESOP tax is subject to continuation of employment in the start-up and therefore, creates an imperative for lock-in for the employee. This would cause hardship to employees discontinuing with the employment for genuine reasons, although there may not be a monetary market for their ESOP. Further, for any employee receiving shares on exercise of ESOP, encashment occurs only upon sale of shares and not on exercise. Therefore, it is critical to maintain consistent tax position for employees of start-ups and other employees, particularly for unlisted companies.
30	Introduction of new optional tax regime	It is recommended that a clarification is provided on whether the employer may consider the benefit of new tax regime at the time of monthly payroll withholding. In addition, a clarification in respect of specific perquisites provided in the income-tax rules which are required to be specifically	• There is a lack of clarity whether employer can consider the new tax regime at the time of withholding taxes. Where the employer deducts taxes as per the rates in force at the time of monthly withholding and subsequently the employee opts for the new tax regime at the time of filing the return, there may be a refund arising to the individual. As

		excluded for the purpose of the new tax regime is to be provided.	well as this could result in mis-match of salary income as per Form no. 26AS (which flows through the e-TDS return filed by the employer basis the calculation under existing tax regime) and the salary income as per return of income filed by the taxpayer choosing new optional tax regime. • While the Finance Bill, 2020 *inter-alia* mentions excluding perquisite for the purpose of opting the new tax regime and the memorandum specifies the exclusion of perquisite relating to free food only. There is a non-clarity in respect of what are the perquisites that need to be forgone while opting the new tax regime.
31	Non-extension of Sunset clause	The extension of the sunset clause in Section 10AA should be implemented.	The budgets in the recent years have always focused on the start-ups, while the benefits to existing companies seeking expansion has been ignored.
32	Secondary Adjustment Tax Rate	It is suggested that with the abolition of DDT, the secondary adjustment tax rate should be amended and linked to the tax treaty rate or rate as per the Act for dividend, whichever is lower. This would help and serve the intent of the Section.	The secondary adjustment provisions were amended with effect from 1 September 2019 to provide an option of payment of additional tax to stop its applicability. This option stated that if the excess money or part thereof has not been repatriated in time, the taxpayer is granted an option to a pay one-time additional tax at 20.16 per cent (18 per cent tax plus surcharge of 12 per cent) on such non-repatriated amount. The intent and the rate of tax on such non-repatriated amount seemed to indirectly take care of the dividend income which could have been paid but not paid on such amount by the Indian Company. With the abolition of the dividend distribution tax (DDT) if the tax rate of approx 20 per cent on secondary adjustment still continues, it would be unfair on part of the Indian companies.

33	Impact on dividend income earned by Real Estate Investment Trusts (REITs) and Infrastructure Investment Trusts (InvITs)	It appears that the proposed amendment in Section 10(23FD) withdrawing current dividend exemption to REIT/ InvIT unitholders is unintentional and accordingly, in line with the government policy to encourage REITs/InvITs in India, it is suggested that status-quo is maintained with respect to exemption of dividend income in the hands of unitholders of REITs/ InvITs.	The Bill amended Section 10(23FD) of the Act to exclude dividend income received by a unit holder from business trust (REITs/ InvITs) from exemption, such that the dividend income shall become taxable in the hands of unit holder of the business trust. At present, the REIT / InvIT framework provides for a single incidence of tax (which is paid by the 100 per cent SPV of such REIT / InvIT by way of corporate taxes) with respect to the income up-streamed by way of dividends wherein the unitholders effectively become fractional owners of the underlying real estate asset. Under the provisions of the Act, no DDT is chargeable on any amount declared, distributed or paid by a 100 per cent SPV by way of dividends (whether interim or otherwise) to a business trust out of its current income. Furthermore, under Section 10(23FD) of the Act, dividend income is exempt from tax in the hands of unit holders. Further, in case of REITs / InvITs, even where dividend income is chargeable in the hands of the unitholders directly (and not in the hands of REIT/ InvIT), no exemption has been provided from withholding obligation for the domestic company distributing dividends to the REIT/ InvIT. However, exemption has been provided with respect to interest paid by a domestic company to REIT/ InvIT under S194A of the Act. Amendment proposed by the Bill for taxing dividend income in the hands of the unitholders will negatively impact the REITs/ InvITs market and investments in India. Further, this will also cause undue hardship to the investors who have invested in existing structures based on certain cash flows / return estimates considering that the dividend tax will not apply.

34	Section 10(23FE)	It is suggested that the following clarifications may be issued: • The term 'commercial activity' would exclude investment and related activities • The exemption will be available where investment is made by specified person in an AIF/ InvIT which further invests in infrastructure facility. • All SPVs of SWF will be eligible for exemption where SWF has been notified by government. • The benefit of such exemption should also be extended to other sub-sectors which are otherwise included in the definition of infrastructure. Reference in this regard can be made to the notification F. No. 13/1/2017-INF dated 14th November, 2017 of Ministry of Finance where harmonized master list of infrastructure sub-sectors was notified.	Currently, the exemption under section 10(23FE) is proposed for a SWF which invests in a company or enterprise carrying on the business of developing, or operating and maintaining, or developing, operating and maintaining any infrastructure facility as defined in the Explanation to section 80-IA(4)(i). Such benefit has not been extended to other sub-sectors which are otherwise included in the definition of infrastructure. In order to incentivise the investment by 'specified persons' (being SWFs of foreign governments) in the priority sectors, the Bill proposes Section 10(23FE) to grant 100 per cent tax exemption to their interest, dividend and capital gains income in respect of investment made in infrastructure and other notified sectors before 31 March 2024 and with a minimum lock-in period of 3 years. One of the proposed conditions for SWF to qualify for exemption is that it does not undertake any commercial activity whether within or outside India. Clarification is required with respect to the meaning of the term 'commercial activity' because the investment and asset holding business may not qualify as 'commercial activity' for this purpose. Where investment is made by a specified person in an AIF/ InvIT, which in turn invests in infrastructure facility through a portfolio company, it is unclear whether the income arising to the specified person (as a pass-through income from AIF/ InvIT) would be eligible for exemption. Further, exemption is proposed to be allowed to an SWF which is, *inter-alia*, wholly owned and controlled, directly or indirectly, by the government of foreign country and it is notified by Central Government. It is not

			clear whether exemption will be available to a wholly owned subsidiary (SPV) of such SWF, since the same are also indirectly owned and controlled by the government of a foreign country. Further, it is also unclear that where exemption is available to an SWF, whether all the SPVs of the SWF need to be separately notified by Central Government for claiming the exemption.
35	Definition for visits in respect of residential status	Incorporation of a proviso or an explanation in Section 6, with either an inclusive or an exhaustive definition of the term 'visit'.	Individuals, prior to Budget 2020 would have qualified as residents only if they were physically present in India for more than 181 days during the subject year. However, Budget 2020 reduced the timeline for such category of individuals to 119 days. In short, if such individuals are now present in India for less than 120 days, they would be considered as Non-resident in India. However, since time immemorial, there is an ambiguity regarding the meaning of the term "visit". It would provide much needed clarity over the term visit and its distinction from the permanent repatriation of an overseas employed Indian.
36	Deemed residency in case of NRIs	Refer next column. The incorporation of these clarifications in the law is a must to ensure correct interpretation and to ensure this clause has the effect it always intended to have. A reframing of this clause could also be the right way to go about it as from the wordings, it is not very evident that only the "India sourced Business/profession income" of stateless individuals are under consideration.	A new clause (1A) was inserted in Section 6, whereby an individual, being citizen of India, shall be deemed to be resident in India in any previous year, if he is not liable to tax in any other country or territory by reason of his domicile or residence or any other criteria of similar nature. There was also a press release issued by the Government clarifying the intent to tax only income accruing outside India from a business/ profession controlled/ set-up in India.

			As per Budget 2020, income arising to Indian Citizens (qualifying as Non-Resident in India) who avoid taxation by becoming a non-resident of any other country / tax friendly jurisdictions (by planning their physical stay in and outside India) could now be subjected to tax. However, based on the clarifications issued, the intention of taxing such individuals is still unclear especially for people living overseas (more specifically people living in middle east countries) who are permanently outside for employment and generating income from respective jurisdictions. This new clause essentially regards Indian citizens as resident of India for tax purposes (irrespective of their stay in India) provided they are not liable to tax in any other country / territory outside India. There are various judicial precedents (Green Emirate Travels, MA Rafiq, Aazadi Bachao Andolan etc. wherein specially for UAE it has been held that as individuals are a taxpayer however not paying taxes on account of decree they are still liable to tax there) in context of the term 'liable to tax' which would need to be referred to in the interpreting this provision. As a result of this, on plain reading, if an India citizen who otherwise was a non-resident based on his limited physical presence in India could become a resident of India if he/ she is not liable to tax in those countries on account of domicile/ residence or similar criteria. Specially in the context of middle east countries an individual in those countries is as such a taxable entity however not required to pay tax on account of a decree of the country. Hence, one can argue (basis case laws above in context of UAE) that he/ she is not liable to tax in any country outside India. This could impact many Indians living and working in such and various other countries with similar tax laws for many years.

			Further, if he satisfied certain other conditions, he could also be regarded as resident and ordinary resident of India. This would entail his / her being taxable in India on global income (subject to benefits if any under a tax treaty) and disclosure of overseas assets. As a result of the media and NRI attention to this provision, the Government on 2 February 2020 has issued a press release clarifying the intent of the provision. As per the said press release, the Government seems to be suggesting that they do not intend to include in tax net those Indian citizens who are bonafide workers in other countries. They have further stated that the intent was that in case of an Indian citizen who becomes deemed resident of India under this proposed provision, income earned outside India by him shall not be taxed in India unless it is derived from an Indian business or profession.
37	Employers' contribution to social security funds taxable above specified limit	The proposed limit of INR 0.75 million should be increased for expatriate employees since the contribution to social security funds is on total CTC instead of basic salary which will result in higher tax liability for such expatriate employees.	It has been proposed to tax employers' contribution to social security funds in excess of INR 0.75 million during a fiscal year in aggregate and accrued interest thereon in the hands of employees.
38	Taxability of employer contribution to Recognised Provident Fund (PF)/ National Pension System (NPS)/ Superannuation Fund	It is recommended that a clarification is issued on whether the existing individual limit for each of the employer's contribution to RPF/ NPS (viz. 12% of salary and 10% of salary respectively) should be considered prior to applying the monetary cap of INR 7,50,000.	The proposed monetary limit of INR 7,50,000 is proposed in respect of cumulative contributions towards employer's contribution to RPF, Superannuation and NPS. There is a dearth of clarify in respect of whether the proposed limit shall be superimposed over the individual existing limits for each such contribution.

		Further, a clarification is recommended to be issued on the taxability of the contributions (already taxed as proposed above), considered as perquisite in the year of contribution, at the time of withdrawal.	No corresponding changes have been made Rule 6 of Part A of Schedule IV which deals with employer's contribution to RPF. With respect to NPS, no corresponding change has been made in Section 80CCD(2) to cap the deduction to the taxable employer contribution. This may give way for taxpayers to go ahead and claim deduction of entire employer contribution to NPS, while not offering the entire amount to tax at the first place. As per the current provisions, withdrawal from all the specified funds (RPF, Superannuation Fund and NPS) may be taxable as per respective provisions, subject to the fulfilment of certain conditions. Given this, in cases where the aggregate employer contribution to the specified funds gets taxed as per the proposed amendment (i.e. contributions more INR 7,50,000), the taxability of the same at the time of withdrawal is unclear. Suitable amendments should be made in the provisions which deal with taxability of these specified funds to avoid possible effective double taxation.
39	Taxability of income/ accretion from RPF/ NPS/ Superannuation Fund	Necessary clarification is recommended on the method of computing interest/ dividend attributable to such contributions exceeding the INR 7,50,000 limit which could be taxable in the year of contribution.	As per Section 17(2)(viia) the annual accretion in the nature of interest, dividend or as the case may be to the extent it relates to the taxable employer's contribution as per Section 17(vii) is treated as a taxable perquisite. As per the newly inserted section 17(2)(viia), Government intends to tax income on contributions which are taxable as per section 17(2)(vii) i.e. income on employer contribution to the specified funds in excess of INR 7,50,000. Such income can be in the nature of interest (in case of RPF/ superannuation) and dividend (in case of NPS). Further, as per the proposed amendment of taxing the employer contributions to the specified funds and the income on such contributions in

			excess of INR 7,50,000, the method of computation of such eligible part of income pertaining to relevant contributions needs to be explicated.
40	CHAPTER VI/MISCELLANEOUS/PART I-AMENDMENTS TO THE INDIAN STAMP ACT, 1899 As per: "73B. The Central Government may,–– (a) issue directions relating to such matters and subject to such conditions, as it deems necessary; (b) in writing, authorise the Securities and Exchange Board of India established under section 3 of the Securities and Exchange Board of India Act, 1992 or the Reserve Bank of India constituted under section 3 of the Reserve Bank of India Act, 1934 to issue instructions, circulars or guidelines, for carrying out the provisions of Part AA of Chapter II and the rules made thereunder".	As per: "73B. The Central Government may,–– (a) issue directions relating to such matters and subject to such conditions, as it deems necessary; (b) in writing, authorise the Securities and Exchange Board of India established under section 3 of the Securities and Exchange Board of India Act, 1992 or the Reserve Bank of India constituted under section 3 of the Reserve Bank of India Act, 1934 to issue instructions, circulars or guidelines, for carrying out the provisions of Part AA of Chapter II and the rules made thereunder".	As per the proposed amendment, SEBI or RBI can be authorised by the central government to issue instructions, circulars or guidelines for section 9A and 9B related matters. However, this authority may not be enough for SEBI or RBI to exempt certain securities based on the commercial viability of such securities for the reasons mentioned in the justification below. Since the Act itself does not confer any power to the Central Government to exempt certain securities, the central government may not be able to delegate the same to SEBI or RBI. In view of the same, we suggest the following amendment as highlighted below: "73B. The Central Government may,–– (a) issue directions relating to such matters and subject to such conditions, as it deems necessary; (b) grant exemption to certain category of securities and in writing, authorise the Securities and Exchange Board of India established under section 3 of the Securities and Exchange Board of India Act, 1992 or the Reserve Bank of India constituted under section 3 of the Reserve Bank of India Act, 1934 to issue instructions, circulars or guidelines, for carrying out the provisions of Part AA of Chapter II and the rules made thereunder". Justification :

			As per section 2(23A) of the Indian Stamp Act, Securities include securities as defined in clause (h) of section 2 of the Securities Contracts (Regulation) Act, 1956(SCRA). The definition of 'securities' given in SCRA covers all kind of securities including units of passthrough vehicles such as Mutual Fund and AIF. MFs and AIFs predominantly invest in other instruments falling within the definition of 'securities' and applying stamp duty on such pass-through vehicles will cause multiple levy of stamp duty on the same investment. Given the recent initiatives taken by the government to avoid duplicate levy of taxes, we are hopeful that appropriate steps will be taken by the government to exempt pass through vehicles from the ambit of stamp duty. In addition to the above, it may be noted that approximately 20% (INR 5.44 trillion) of the MF industry assets are held in the Liquid Fund and overnight fund category. Overnight Fund and Liquid Fund are preferred by investors seeking investment opportunity for a short period such a day or a week. As per article 56A of the Indian Stamp Act, the total stamp duty liability (both at the time of subscription or redemption of units) on the investor will amount to 0.20% which will be higher than the rate of return offered by overnight funds and liquid funds in a 1 to 3 days period of investment. The stamp duty impact will also result in substantial reduction in the return compared to other overnight or weekly investment products available in the market. This will eventually make both overnight funds and liquid funds commercially unviable from an investors point of view.

			Both SEBI and RBI are better equipped to understand the nature and commercial viability of investment products falling within the definition of 'securities' and we welcome the step taken by the government to empower them to issue appropriate directions in the administration of stamp duty applicable to instruments attracting the definition of 'securities'. • While we are reasonably sure that the regulators will take steps to avoid cannibalization in the financial service sector, the law in its current form may not give them appropriate authority to exempt certain 'securities' from the scope of stamp duty. We suggest an appropriate modification in the law to authorize the government or its delegatee to exempt certain securities from the ambit of stamp duty.