Pre - Budget Memorandum 2019 – 20

Direct Taxes
(Revised May 2019)

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Direct Tax Recommendation

1. Corporate Taxation

1.1. Reduction in income tax rates

In 2015 Budget Speech, the Hon'ble Finance Minister had announced a roadmap for reduction of corporate tax rates from 30 percent to 25 percent over the next 4 years. As part of the plan to lower rates, the government had in 2016 budget lowered the corporate tax rate to 29% for companies with revenue up to Rs.5 crores and also announced a concessional tax rate of 25% to new manufacturing companies that do not avail of any exemptions. Subsequently, in Finance Act 2017 and Finance Act 2018, the Government extended the 25% tax rate to all companies with turnover up to Rs.50 crores and Rs.250 crores in previous year 2015-16 and 2016-17 respectively.

Thus, linking of concessional tax rate criteria to turnover/ gross receipts of one specific financial year may bring in uncertainty such that the tax rate for companies may keep fluctuating on a year-to-year basis depending on their turnover for specified financial years and the Finance Act provisions for each year.

The uncertainty in tax rate impacts 'ease of doing business' while drawing up business plans for future or entering into long term contracts with customer or vendors. It also enhances risk factor for doing business in the form of company vis-à-vis other forms like LLP or partnership.

Recommendation:

With a view to remove tax uncertainty and improve 'ease of doing business', it is recommended that once a company qualifies for a concessional tax rate in a particular year, it may be allowed to continue to enjoy that benefit for at least next 5 years. This would bring in permanency and certainty in tax rate at which a company would be subjected to in each financial year.

Further the rate of 25% should be made applicable to all companies willing to forego tax incentives as in case of newly set up domestic manufacturing companies u/s 115BA of the Income Tax Act, 1961 ('the Act').

Further, the reduced tax rate of 25% should be made applicable also to firms and Limited Liability Partnerships ('LLPs') to put them at par with companies.

Similar reduction of tax rate should be made for foreign companies as well so as to maintain the initial gap of 10%.

1.2. Surcharge on corporate tax rate for domestic companies

The prevailing tax rate for companies is very high (30%). Moreover, vide Finance Act 2015 the rate of surcharge for domestic companies with income exceeding Rs 10 crores was further increased from 10% to 12%, resulting in additional tax burden on domestic companies.

Recommendation:

Since the government has already declared that it will be reducing corporate tax rates from 30 per cent to 25 per cent in a phased manner, the tax rates should be made inclusive of all surcharge.

Alternatively, the rate of surcharge for domestic companies with income exceeding Rs.10 crores should be rolled back to 10%.

Further, to ensure horizontal equity between different legal forms in which business is carried on, the rate of surcharge even for other unincorporated entities (LLP, Partnership, etc.) should be restored back to 10%.

1.3. Clarity on applicability of Deemed Dividend

Section 2(22)(e) of the Act provides that any loan or advance made to 'a shareholder, being a person who is the beneficial owner of shares' shall be taxed as deemed dividend. Relevant extract is as follows:

"Section 2
(22) "dividend" includes—
……
(e) any payment by a company, ……., by way of advance or loan to a shareholder, being a person who is the beneficial owner of shares (….) holding not less than ten per cent of the voting power, or to any concern in which such shareholder is a member or a partner and in which he has a substantial interest ……."

However, there is considerable dispute on whether a shareholder for the purposes of this section must be a 'registered shareholder' or a 'beneficial shareholder'. There are divergent views of the Supreme Court(SC) itself on the above matter. In **Ankitech Private Limited [2011] 11 taxmann.com 100)**, the High Court **(as affirmed by SC)** held that would apply only when the recipient of the loan is both beneficial and registered shareholder of the company providing the loan. However, in the recent decision in case of **National Travel Services [89 taxmann.com 332]**, the SC has stated that 'shareholder', for the purposes of this section needs to be only a 'beneficial shareholder', and that the Ankitech ruling requires reconsideration.

Recommendation:

The rationale laid down by the Hon'ble SC in case of Ankitech Private Ltd, i.e., a shareholder needs to be both registered as well as beneficial shareholder in order to attract provisions of section 2(22)(e) of the Act, is the correct interpretation of law and the same must be incorporated into the language of the section itself to settle the controversy and bring certainty.

It is recommended that the language of section 2(22)(e) be modified as under: -

"(e) any payment by a company, ……., by way of advance or loan to a shareholder, being a person who is the ***registered as well as the beneficial owner*** *of shares (….) holding not less than ten per cent of the voting power, or to any concern in which such shareholder is a member or a partner and in which he has a substantial interest ……."*

1.4. Payments made for use of copyrighted article

Explanation 2(v) to section 9(1)(vi) of the Act define the term royalty *as "(v) the transfer of all or any rights (including the granting of a licence) in respect of any copyright, literary, artistic or scientific work including films or video tapes for use in connection with television or tapes for use in connection with radio broadcasting, but not including consideration for the sale, distribution or exhibition of cinematographic films".*

On a plain reading of the provision, it can be understood that what is envisaged to be considered as 'royalty' under the phrase "transfer of all or any rights (including granting of a licence) in respect of any copyright" is consideration received on transfer/license of any right in a copyright (u/s 14 of the Copyright Act) and not sale of any product in which copyright subsist.

However, courts have held that receipt of consideration for obtaining a product in which copyright subsist without gaining any right/license in the copyright also constitutes royalty (*Karnataka High Court in the case of Samsung Electronics Co. Ltd. [2011] 16 taxmann.com 141)*. Moreover, divergent views also exist whereby consideration for license/sale of the product in which copyright subsist is not covered under the ambit of royalty since it does not amount to transfer of all or any rights including license in copyright (*Delhi High Court in the case of Infrasoft Ltd. [2013] 39 taxmann.com 88).*

Recommendation:

The ambiguity in taxation of consideration of copyrighted article should be put to rest by way of specific exclusion of consideration received on sale of copyrighted article from the definition of 'royalty' u/s 9(1)(vi) of the Act.

1.5. Fees for Technical Services ('FTS') – Payments made for use of standard facility

The term FTS has been defined u/s 9(1)(vii) of the Act and provides a fairly wide definition of FTS which covers consideration for "managerial, technical or consultancy services (including the provision of services of technical or other personnel)".

There is lack of clarity regarding classification of services rendered using technology i.e. standard facilities as opposed to technical services. As a result, the income tax authorities have often sought to erroneously classify services such as telecom services, internet charges etc. under FTS which are not per se technical services but are in the nature of standard facilities.

In certain cases, these standard services have been allegedly classified as equipment royalty in response to the arguments of the tax payers that the services are rendered using advanced equipments and automated processes.

The principle that provision of standard facilities does not constitute as FTS / royalty has been upheld by the Supreme Court in case of CIT vs. Kotak Securities Ltd (2016) 67 taxmann.com 356 and several other case laws.

Recommendation:

Payments for standard facilities and services (e.g. broadband, telephone, mobile, leased line, etc.) should be specifically excluded from the definitions of royalty and FTS u/s 9(1)(vi) and section 9(1)(vii) of the Act respectively.

1.6. Rationalization of provisions for computation of deduction u/s 10A and 10AA

Recently, the Hon'ble Supreme Court in case of HCL Technologies Ltd [404 ITR 719] has held that all charges/ expenses specified in Explanation 2(iv) to section 10A of the Act are liable to be excluded from the 'export turnover' as well as the 'total turnover' for the purposes of computation of deduction u/s 10A of the Act.

Further, CBDT vide Circular 4/2018 has affirmed the above decision.

Recommendation:

It is recommended that a suitable amendment be made in Section 10A of the Act to further confirm the acceptance of the Department on the rationale laid down by the Hon'ble Supreme Court.

It is further recommended that similar amendment be made to provisions of Section 10AA as well so as to provide that the same computation mechanism shall apply in case of the said section as well.

1.7. Specific provisions for Employee Stock Option Plan ('ESOP') expenses

The Security Exchange Board of India ('SEBI') guidelines prescribe for charging of ESOP discount to profit and loss account in the books of accounts. ESOP Discount cost is normally disallowed by Assessing Officers on the ground that it is a capital expenditure and is contingent in nature.

Many stock options come with a rider that employees cannot sell/transfer the shares exercised by them under Employee Stock Option Plan ('ESOP') for a particular period. This is primarily intended to retain the employees from leaving the employment once the options are exercised. Ownership of the property carries with it certain basic rights, such as a right to have the title to the property, a right to possess and enjoy it to the exclusion of everyone else, and a right to alienate it without being dictated to. The employees do not have economic freedom with respect to such shares. Due to restriction on alienation, the employees are the owners of shares with limited rights. Despite not being absolute owners, the employees are subjected to tax at the time of exercise of shares, taxable value being excess of fair value of shares over the exercise price.

Recommendation:

Specific provision should be brought in to state that ESOP expenses debited to profit and loss account by the assessee in compliance with applicable GAAP shall be allowed as a deduction.

Amend Explanation (c) to section 17(2) (VI) to postpone the incidence of taxability of shares from the date on which the shares are exercised to the date on which the individual becomes absolute owner of the shares.

1.8. Income chargeable under the head profits and gains of business or profession – section 28(iv) of the Act

Section 28(iv) of the Act seeks to tax income in the nature of any benefit or perquisite, whether convertible into money or not, under the head 'Profits and Gains of Business or Profession'. Section 28(iv) only refers to the 'income' which can be charged under the head 'profits and gains of business or profession' and therefore, when a particular advantage, perquisite or receipt is not in the nature of income, there cannot be any occasion to bring the same to tax u/s 28(iv) of the Act. Further it is settled law that a capital receipt, in principle, is outside the scope of income chargeable to tax.

It has been seen that income tax authorities are widely interpreting this section so as to charge to tax even the receipts which are purely of capital nature and which does not arise in the regular business dealings of the assessee.

Recommendation:

It is recommended that Government should suitably clarify as to the scope of section 28(iv) specifying absolute exclusion to capital receipts (arising out of the transfer of capital assets) which are covered under charging section 45 of the Act.

1.9. Highest depreciation to be restricted to 40% with effect from 1 April 2017 to all assets

Finance Act 2016, limited the rate of accelerated depreciation @ 40% on equipment which were earlier entitled to 60%, 80% or 100% Depreciation. It is pertinent to note depreciation at the rate of 100% on Pollution control equipment acted as an incentive to promote clean environment practices in line with the Global Practices. Further, computers and software were eligible for depreciation at 60% considering their fast obsolescence due to rapidly changing technology.

Recommendation

In line with the India's commitment to protect the environment and reduction in green-house gases, it is suggested to restore 100% depreciation for pollution control equipment.

Further, accelerated depreciation on computers should be restored given the pace at which technology is becoming obsolete. Further, most IT products also carry approximately the same, if not shorter, life cycle as computers and computer software and should therefore be eligible for accelerated depreciation @ 60% or higher.

1.10. Depreciation on intangible assets

The representations by telecom industry to clarify the tax treatment of spectrum payments was appreciated by Government through the introduction of new section – section 35ABA of the Act effective from financial year beginning from 1 April 2016, which provided for amortization of capital expenditure incurred specifically for acquisition of the 'right to use spectrum' over the tenure of the right. While the amendment clarified the tax treatment of Spectrum acquired on or after 1 April 2016, the position prior to 1 April 2016 is being interpreted differently by tax departments resulting into unnecessary litigated by department. The tax department, in some cases, is taking a view that the right to use telecom spectrum did not qualify as an intangible asset, instead the expenditure is amortizable u/s 35ABB of the Act. 'Right to use spectrum' acquired prior to 1 April 2016, being undisputedly a 'commercial' right should continue to be covered by provisions of section 32(1) of the Act and hence, eligible for tax depreciation u/s 32(1) of the Act.

Recommendation:

It is requested that an appropriate clarification should be issued to provide that the expenditure incurred towards 'right to use spectrum', which was acquired on or before 31 March 2016, would be governed by section 32(1) of the Act

It may also be provided that provisions of section 35ABB and section 35ABA shall not apply to spectrums acquired upto 31 March, 2016.

1.11. Depreciation on non-compete fees

Considering the present dynamic economy, it is common for companies to acquire business from other companies as a going concern on a slump sale basis. Also, during such acquisition, normally non-compete fees are paid to the seller for a definite period with the intention that within the said period, the company would stand firmly on its own footing and can sustain later on.

The issue of depreciation on non-compete fees (being an intangible asset) has been subject matter of litigation for quite some time with conflicting decisions rendered by the Appellate authorities. Hence, it is imperative that the issue whether Non-Compete fees is an intangible asset or not and eligible for depreciation as contemplated u/s 32 of the Act requires certainty to protect the interest of buyer in any slump sale transaction.

Recommendation:

It is recommended that Explanation 3 to section 32(1) of the Act be suitably amended to include non-compete fees under expression intangible assets so as to specifically allow deprecation on the same under the Act.

1.12. Sunset clause should be extended u/s 32AC - Investment Allowance

Investment allowance (equal to 15% of actual cost of new assets) is available only where an assessee, being a company, engaged in the business of manufacture or production of any article or thing, acquires and installs new assets and the amount of actual cost of such new assets acquired during any previous year exceeds twenty-five crore rupees and such assets are installed on or before the **31st day of March, 2017**.

Recommendation:

- Such intensive provision should be extended to further years for atleast for 5 year period. For a successful 'Make in India' initiative, it is very much essential that tax linked incentives on capital expenditure are given consistently for longer periods. Extending sunset time will boost make in India programme.

- The investment allowance eligible for deduction u/s 32AC of the Act should be reduced while computing book profits of the company under the provisions of section 115JB of the Act.

Specific provisions for carry forward and set off of investment allowance for an indefinite period should be brought in the Act.

1.13. Deduction on in-house scientific research and development

Vide Finance Act, 2016, the deduction on expenditure on scientific research on in-house research and development is restricted to one and one-half time (150 percent) of the expenditure upto 31 March 2020. The same is further restricted to the 100 percent of the expenditure from FY 2020-21 onwards.

Recommendation:

With a view to encourage in-house research and development to manufacture/ produce articles/ things in India, the deduction u/s 35(2AB) on approved in-house scientific research and development should be retained at 150 percent of the expenditure.

1.14. Tax Incentives and Benefits - Section 35AD

Profit linked incentives for specified industries vis-a-vis investment-linked incentives - Section 35AD

Section 35AD of the Act extends investment linked incentives to taxpayers with respect to the capital expenditure incurred for setting up and operation of specified businesses. Further, once investment linked incentive for the capital expenditure is availed under this Section, no benefit shall be allowed in respect of such specified business under Chapter VI-A (Deductions in respect of certain incomes) and Section 10AA of the Act.

The Finance Act, 2016 had amended Section 35AD of the Act so as to reduce the deduction from 150 per cent to 100 per cent in the case of a cold chain facility, warehousing facility for storage of agricultural produce, an affordable housing project, production of fertilizer and building and operating hospitals with effect from 1 April 2017.

Deduction u/s 35AD of the Act is an alternate form of accelerated deduction for the capital expenditure in the specified business. However, the cash flows of these capital intensive industries suffer on account of levy of MAT. This is because book profits continue to be higher than taxable profits (given that deduction for capital expenditure is not taken to the profit and loss account other than in the form of depreciation) and hence, MAT is paid by the industry during the incentive period. While MAT is creditable against normal taxes in future, the period for recovery of MAT paid could result in being longer than under profit linked incentives. Further, given the restriction on the years for carry forward of MAT, it is possible that MAT

paid in initial years may not be recovered, especially for those taxpayers who have a longer period before reaching break-even.

Recommendation:

The profit-linked incentives currently available for infrastructure and crucial sectors should not only be expanded but also continued till the end of the next Five Year Plan to encourage investment and growth of India's infrastructure sector.

With the governments 'Make in India' campaign, there would be a need to bring under the ambit of deduction of Section 35AD of the Act more sectors to further strengthen the industrial base of the country, for e.g. the steel industry being a high capital intensive industry, capital expenditure should be allowed as a deduction on the amount of expenditure incurred.

It should be considered to further reduce the rate of MAT more so for the infrastructure sector as levy of the same defeats the very purpose of extending tax incentives to the industry, especially given the high rate of MAT now.

Dilution of tax incentive u/s 35AD by insertion of Section 73A

The underlying idea behind allowing the investment linked incentive granted u/s 35AD of the Act is to enable the taxpayer to set-off the business losses incurred by this write-off against the taxable profits from their existing businesses and reduce their tax liability in the year of deduction and thereby to provide part of the resources of investment required for setting up of the businesses. However, the incentive so intended cannot be achieved owing to the insertion of Section 73A of the Act, which restricts the set-off/ carry forward of losses by specified business only against the profits and gains, if any, of any other specified business carried on by the taxpayer in that Assessment Year (AY) and the amount of loss not so set-off can only be carried forward and set-off against profits from specified business in the subsequent AYs.

Recommendation:

The losses from the specified business u/s 35AD of the Act ought to 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 not always the case that the taxpayer would only be carrying on the 'specified business'. In light of the above, Section 73A of the Act should be deleted.

Clarification on amendment to Section 35AD(3)

The amendment to Section 35AD(3) of the Act introduced by the Finance Act, 2010, seeks to prevent a taxpayer from claiming dual deduction in respect of the same business.

It appears that if a taxpayer carrying on a specified business does not claim deduction u/s 35AD of the Act, he may opt for deduction under the relevant provisions of Chapter VI-A or Section 10AA of the Act, if the same exist for such business and it is more beneficial.

Recommendation:

A clarification should be issued that the taxpayer may exercise an option (where available to the taxpayer) to avail tax incentive u/s 35AD or Chapter VI-A/ Section 10AA of the Act, depending upon which is more beneficial to the taxpayer.

Further, it is suggested that a clarification may also be issued that in the event the taxpayer opts for the investment linked incentive u/s 35AD of the Act and the same is denied/ rejected at time of assessment proceedings (could be on account of non-satisfaction of prescribed conditions), in such a case the taxpayer should be eligible to make an alternative claim under Chapter VI-A or Section 10AA of the Act, on satisfaction of the conditions provided therein, notwithstanding the requirement stipulated in Section 80A(5) or 10AA of the Act. This is because, a taxpayer

who is otherwise entitled to deduction in respect of qualifying profits of the specified business would lose such deduction on account of Section 80A(5) of the Act that mandates a claim for deduction under chapter VI-A be made in its return of income. As the taxpayer would not have claimed deduction under the provisions of Chapter VI-A/ Section 10AA of the Act in its return of income since claim was made u/s 35AD, such taxpayer would be precluded from claiming deduction in view of Section 80-A(5)/ Section 10AA of the Act.

1.15. Section 36(1) (va) –Employees' contribution to Provident Fund

Section 43B of the Act allows deduction towards employer contribution to PF/ any other fund for the welfare of the employees if the same is deposited upto the date of filing the return of income. However, deduction for employees' contribution to PF/ ESI or any other fund is governed by section 36(1)(va) of the Act which mandates that the employees' contribution should be credited to the relevant fund by the due date specified under the relevant Act, rule, order or notification governing that fund.

Recommendation:

It is recommended that suitable amendment should be made in the Act so as to bring the provisions relating to the Employees' contribution towards employee welfare funds in line with the employer's contribution towards such funds.

1.16. Allowability of Corporate Social Responsibility (CSR) expenses as deduction u/s 37

Finance Act 2014 has amended provisions of section 37 of the Act to provide that any expenditure incurred on activities relating to CSR referred to in section 135 of the Companies Act 2013 shall not be deemed to be an expenditure incurred for the purposes of business.

On the other hand, the Companies Act, 2013 has mandated every company fulfilling certain criteria to spend at least 2% of its average net profit for the immediately preceding three financial years on CSR activities. Since there is statutory obligation of companies to spend specified sum on CSR activities, such expenditure represents an integral part of conducting business operations of the tax payer company. Furthermore, allowing tax deduction may encourage corporates to incur expenditure in excess of the prescribed sums. While donation for specified purposes entitles the payer to deduction u/s 80G provisions, where CSR expenditure deduction is not allowed, this shall be discriminatory for corporates who may be carrying out CSR activities for their own defined purposes.

Recommendation:

A deduction of the expenditure on community/ social development (both capital and revenue) be introduced, covering critical focus areas for CSR such as education, health, women empowerment, etc.

Deduction may be allowed for the CSR expenditure incurred over and above statutory threshold limit (i.e. 2% of Average profit before tax).

Alternatively, a partial deduction may be worked out subjected to satisfaction of certain conditions. A project completion report may be referred and expenses may be verified by a certified accountant.

Even in cases where the company has its own trust or foundation, the deduction in respect of expenditure incurred for CSR activities should be allowed.

Such expenses however may be subject to a limit of say 5% of total income.

1.17. Disallowance of payments to non-residents on non-deduction of tax u/s 40(a)(i)

As per the current provision of section 40(a)(i), payment made to a non-resident without deducting tax at source is fully disallowed. However, disallowance u/s 40(a)(ia) is restricted to only 30% of the expenditure. This is apparent discrimination between two provisions of law.

Recommendation:

It is suggested that disallowance u/s 40(a)(i) should restricted to 30 percent of the amount of expenditure as per section 40(a)(ia) of the Act as in case of Resident.

1.18. Disallowance u/s 40(a)(ia) of the Act

Section 40(a)(ia) of the Act provides for disallowance to the extent of 30% of any sum payable to a resident on which tax is deductible at source under Chapter VIIB and same has not been deducted.

The Assessing Officer during the course of assessment proceedings is disallowing the expenditure u/s 40(a)(ia) even in cases where the proceeding under section 201(1) has not been initiated or proceeding having been initiated but the assessee is not treated as an assessee in default under Chapter VIIB.

Recommendation:

It is recommended that suitable amendment should be made in section 40(a)(ia) to restrict disallowance of expenditure in cases where no TDS assessment has been initiated or proceeding having been initiated but the assessee is not treated as an assessee in default under Chapter VIIB. The order u/s 201 holding an assessee as 'assessee in default' should be made a condition precedent before invoking the penal provisions of disallowing the expenditure section 40(a)(ia) of the Act**.**

1.19. Relaxation in rule 6DD for payment of more than Rs. 10,000 in cash in foreign country - section 40A (3)

Section 40A(3) of the Act disallows cash payments made in excess of Rs 10,000 subject to payments made in those cases and circumstances as mentioned in Rule 6DD. Section 40A(3) does not restrict itself to transactions in Indian rupees but also covers cash payment in foreign currency.

With globalization, there is increase in foreign currency transactions. There are number of cases where companies send their employees on business trips or for short duration assignments outside India or for supervising overseas projects.

In such scenario, companies may provide their employees with foreign currency travel card as also certain foreign currency to meet their daily expenses abroad. However, it has been observed that cash payments in foreign currency exceeding Rs. 10,000 is quite common feature in most of the cases because of various reasons such as:

- High cost of living in developed countries
- Risk of online fraud in some countries in view of which employees are reluctant to carry travel card
- There may be reluctance on accepting card by the payee at many places
- Insufficient balance in card
- Technical issues in functioning of card

While the intention is not to evade tax or make payments in cash only, due to unavoidable circumstances, expenses may be incurred in cash by the employees on behalf of the company and such amount could easily exceed Rs 10,000 on account of stronger foreign currency.

Triggering section 40A (3) disallowance in the hands of company in such a case causes undue hardship resulting in multiple disallowances amounting to a huge figure.

Recommendation:

Accordingly, it is recommended that suitable relaxation may be provided in Rule 6DD where cash exceeding Rs 10,000 is used in foreign country by employees on behalf of the company having regard to various factors such as high cost of living, risk of online fraud etc. subject to condition that foreign currency carried in each foreign trip is within permitted limits as per Foreign Exchange Management Act.

1.20. Set off of short term capital loss with income under the other heads

As per the existing provisions of section 71(3) where in respect of any assessment year, the net result of the computation under the head "Capital gains" is a loss and the assessee has income assessable under any other head of income, the assessee shall not be entitled to have such loss set off against income under the other head.

Short term capital gains other than that referred to in section 111A of the Act, is subject to tax at the normal rate of tax. As the rates of tax applicable to short term capital gains are the same as those applicable to income under any other heads, there is no justification for not allowing set off of short term capital loss against income under any of the other heads.

Recommendation:

Short term capital loss under the head capital gains be allowed to be set off against income under the other head. Thus, where the rate of tax on short term capital gains under the head capital gains and the rate of tax with respect to income falling under the other heads of income is the same, such loss may be allowed to set off against income under the other heads.

1.21. Section 2(22) - Insertion of Explanation 2A in section 2(22) - Accumulated profits of amalgamating company included in Accumulated Profits ('AP') of amalgamated company

With a view to prevent abusive arrangements whereby companies with large Accumulated Profits (AP) adopt amalgamation route to circumvent DDT levy on capital reduction, Finance Act, 2018, inserted Explanation 2A to Section 2(22) to provide that the AP for the purposes of DDT levy in case of an amalgamated company shall be increased by the accumulated profits of the amalgamating company as on the date of the amalgamation.

The amendment is applicable to each of the deemed dividend clauses specified in section 2(22)(a) to 2(22)(e), and is applicable from AY 2018-19.

The determination of AP has direct impact on DDT liability of the company. DDT liability of the company u/s 2(22) of the Act is based on AP on the date of distribution or payment in respect of deemed dividend.

The amendments to Section 115-O regarding DDT liability have always been made on a prospective basis. The coverage of section 2(22)(e) within the scope of section 115-O by the Finance Act, 2018 has also been made applicable prospectively in respect of payment made post 1 April 2018.

It needs to be kept in view that amalgamations may have been concluded in a number of years prior to the date of distribution of dividend. Say, for example, a company which was established a century back may have undergone amalgamations decades back. A specific clarification may be provided that Explanation 2A is applicable in respect of amalgamations made on or after 1 April 2018.

Recommendation:

Clarification should be provided that that the provisions of Explanation 2A of Section 2(22) of the Act apply to mergers made on or after 1 April 2018.

1.22. Section 2(19AA) - Tax Neutral Merger

Currently, Section 2(19AA) of the Act provides that demerger shall be tax neutral, if transfer of assets and liabilities is at book value. However, Ind AS 103 provides that if the demerger is not under common control transactions, assets and liabilities shall have to be transferred and recorded at fair value. Thus, there is ambiguity on tax neutrality of demerger transactions which are not common control transaction in terms of Ind- AS 103.

Finance Act, 2018 has already removed effect of fair value accounting under Ind-AS (applicable in transaction which are not common controlled) for MAT purposes u/s 115JB of the Act. Any gain arising on fair value of undertaking by the demerged company is exempt from the provisions of MAT. Similar exemption should also be provided for non-taxability of any gain arising on said fair valuation.

Recommendation:

Thus, a clarification should be provided in Section 2(19AA) of the Act that if resulting company is recording assets and liabilities in terms of Ind-AS 103, then the demerger shall be tax neutral.

1.23. Benefit of Section 72A to be extended to service sector

Currently, Section 72A of the Act allows carry forward of loss and accumulated depreciation in case of amalgamation/ demerger of the following type of companies:

- a company owning an industrial undertaking or a ship or a hotel with another company
- a banking company
- one or more public sector company or companies engaged in the business of operation of aircraft

Apparently, the benefit is not available to all the companies engaged in the business of providing services. Considering the facts that many multinational companies have entered in the Indian service market and it has become imperative for the small companies to consolidate their resources to survive, the benefit available under the provision of Section 72A of the Act should be extended to all companies irrespective of their line of operations.

Recommendation:

Section 72A of the Act should be amended to extend the benefit to the service sector.

The amendment will facilitate smooth operational reorganisation across the economy including infrastructure sector if the benefit of this provision is extended to service providers such as Telecom Infrastructure Service Provider (TISP), Direct-to-Home (DTH) operators, etc. Further, e-commerce sector should also be included in this provision as such sector requires acquisition/consolidation for growth and expansion/diversification.

1.24. Carry forward of losses u/s 79 in the case of intra-group share transfer

Provisions of section 79 is produced as under :

Notwithstanding anything contained in this Chapter, where a change in shareholding has taken place in a previous year, —

(a)…… no loss incurred in any year prior to the previous year shall be carried forward and set off against the income of the previous year, unless on the last day of the previous year, the shares of the company carrying not less than fifty-one per cent of the voting power were beneficially held by persons who beneficially held shares of the company carrying not less than fifty-one per cent of the voting power on the last day of the year or years in which the loss was incurred

Provisions of section 79 of the Act state that carry forward of loss shall not be allowed in case there is a change of 'beneficial' shareholding of the company during the year.

There are conflicting decisions of judiciary, some holding that the change in immediate shareholding should be tested, and others holding that the change in ultimate shareholding should be tested, to invoke Section 79.

Recommendation:

In the case of business reorganization within the group, effectively, there is no change in shareholding as envisaged by the section. If the carry forward of loss is denied in such cases by invoking provisions of section 79 of the Act, it would cause avoidable financial loss to the Companies.

It is recommended that an explanation should be inserted in Section 79 to provide that in a case of a business reorganization within a group such that the ultimate shareholder of the company remains the same, provisions of section 79 shall not be applicable.

1.25. Introduction of Debt Linked Savings Schemes (DLSS) and allowing deduction for investment in DLSS u/s 80C

At present, benefit of deduction u/s 80C read with Notification No. 226/2005, dated 3-11-2005 is available to investors only for investment in Equity Linked Saving Scheme (ELSS) of Mutual Funds.

Recommendation:

It is proposed that, apart from the existing Equity Linked Savings Scheme (ELSS) available to investors for tax deduction u/s 80C, the benefit be extended to debt oriented mutual fund schemes having underlying investment in debt instruments, with a lock-in period of three years which will be known as DLSS.

CBDT may issue separate guidelines in this regard.

Recognizing the need for penetration into the debt markets through mutual funds at low transaction costs and liquidity, there is the need to introduce mutual fund schemes which channelize the retail investor's savings into debt markets by offering tax incentive.

The introduction of DLSS will help small investors participate in debt markets at lower costs and also incur comparatively lower risk as compared to equity markets. It may also help in deepening the debt market.

Hence, this will increase the visibility of debt markets in India by allowing larger retail participation in mutual funds through DLSS. This will also bring debt oriented mutual funds on par with tax saver bank fixed deposits, where deduction is available u/s 80C.

This initiative will also bode well with the overall objective of deepening the corporate bond market in India.

1.26. Introduction of new provisions similar to section 80-IB and 80-IC

In order to promote certain areas of India, government introduced section 80-IB and 80-IC by allowing certain incentives by way of giving deduction from income under said sections.

Recommendation:

It is recommended to introduce certain provisions for development of rural and under developed areas across India similar to provisions u/s 80-IB and 80-IC of the Act. This will allow India to prosper holistically and will be in line with the vision of 'make in India' compaign.

1.27. Deduction for employment generation u/s 80JJAA of the Act

Deduction for employment generation shall be available in respect of cost incurred on any employee whose total emolument is less than or equal to Rs. 25000/- per month u/s 80JJAA. The capping of salary limit will make the claim ineffective especially in case of Software Industry. The industry is absorbing the fresh talent from colleges/IIT/IIM's with attractive salaries as part of hiring process. Also one of the agenda of the Government is job creation; this capping will discourage the Industry from creating more jobs for the unemployed youth.

Additionally, there is no express clarity as to whether the deduction to be allowed over 3 years is in the nature of standard deduction whereby the quantum is ascertained with reference to additional wages paid in Year 1 and deduction to the extent of 30% of such additional wages thereon is allowed in Years 1 to 3 or is it linked to wages paid to qualifying workers in each of the years 1 to 3. There could be variation in the amount of deduction in Year 1, 2 and 3 based on wages paid to the same worker.

Recommendation:

- Government should either roll back the capping of salary limit to Rs 25,000 per month or increase the limit to a minimum of Rs 50,000 per month.

- A clarification is sought whether total emoluments may be computed based on per month basis or on average basis for the purpose of satisfying the limit of Rs. 25,000.

- Condition of minimum working period of less than 240 during the previous year for new workmen is very difficult to comply. It is suggested that new workmen joined during the year for less than 240 days should be allowed to carry over in the next year as new workmen.

It may also be clarified that the deduction u/s 80JJAA of the Act is in the nature of standard deduction for Years 1 to 3 based on additional wages paid in Year 1.

1.28. Dividend Distribution Tax ('DDT')

DDT levy leads to double taxation on corporate sector and hence, should be done away with.
As per the provisions of Section 115-O of the Act, an Indian company declaring dividends must pay DDT at the rate of 20.56 per cent (including surcharge and cess) on the amount of dividend declared, paid or distributed. Further, as per Section 10(34) of the Act, such dividend income is tax-free in the hands of shareholders.

However, section 115BBDA of the Act provides that the Specified Assessee (i.e., persons other than domestic company, trust etc.) having dividend income aggregating to Rs 10 lakh or more, are required to pay tax @ 10% (plus applicable surcharge and cess)
Recommendation:

- It is recommended to consider replacing tax on distributed profits with withholding tax.

- It is recommended that to abolish the additional income tax in the form of DDT. Alternatively, DDT rate is recommended to be reduced to 10% from the current effective rate of 20% (after including education cess, surcharge and grossing up of DDT).

- It is recommended that the rate of tax for the purpose of dividend distribution to non-resident shareholders should be as per the respective DTAA.

- It is suggested that we go back to the earlier regime of taxation, wherein dividend income was taxed in the hands of the shareholder itself and relieve the companies of the burden of DDT.

- All dividends on which DDT has been paid, be allowed to be reduced from dividends irrespective of the percentage of equity holding keeping in mind that investment companies which do not necessarily own/have subsidiaries as they invest in various companies in the open market, be also should be eligible for such benefit.

- It is recommended that DDT on industrial undertakings or enterprises engaged in infrastructure development which are eligible for deduction u/s 80IA of the Act, should be abolished. This will help to incentivize the investment in infrastructure sector.

- Further, exemption from DDT may also be granted to the 'infrastructure capital company / fund' with the condition that it invests the dividend received from its subsidiary in the infrastructure projects.

1.29. Exclusion of Mutual Funds from section 115BBDA of the Act

Presently, Mutual Fund has not been specifically included in the list of persons where section 115BBDA is not applicable.

Recommendation:

Finance Act, 2017 amended Section 115BBDA of the Act. Under the existing provisions, income by way of dividend in excess of Rs. 10 lakh is chargeable to tax @ 10% on gross basis in case of a resident individual, Hindu Undivided Family or firm. With a view to ensure horizontal equity among all categories of tax payers deriving income from dividend, the Finance Act 2017 provides that this Section shall be applicable to all resident assesses except:

(i) a domestic company; or
(ii) a 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; or
(iii) a trust or institution registered u/s 12AA.

Total Income of the Mutual Fund is exempted u/s 10 (23D) and hence mutual funds should be included in the above list u/s 115BBDA of the Act.

Association of Mutual Funds in India (AMFI) has issued a letter to CBDT dated June 7, 2017 seeking amendment in the above section.

1.30. Taxation of income from Securitisation Trusts

As per the Explanation in Chapter XII-EA, CBDT is supposed to prescribe the eligibility conditions for a trust to qualify as a Securitisation Trust. The requirement was originally introduced in 2013-14 and CBDT is yet to prescribe the conditions. This leaves ambiguity about the tax treatment to Securitization Trusts already formed under RBI guidelines as CBDT may prescribe conditions with retrospective effect. Taxation of Securitisation Trusts is currently in dispute. Given the stand taken by the Tax department in previous cases about the nature of a

Securitisation Trust, it is important for investors to know the conditions to be fulfilled by a Securitisation Trust to claim benefits of chapter XII-EA of the Act.

Further, section 115TCA introduced by the Finance Act, 2016 specifies the provisions on the taxation treatment of investors in a Securitization Trust to increase penetration in the securitization market. However, this cannot be achieved as the current tax provisions lack clarity on the eligibility of a Securitisation Trust to qualify to claim benefits of chapter XII-EA of the Act.

Recommendation:

Section 115TCA introduced by the Finance Act, 2016 specifies the provisions on the taxation treatment of investors in a Securitization Trust to increase penetration in the securitization market. However, this cannot be achieved as the current tax provisions lack clarity on the eligibility of a Securitisation Trust to qualify to claim benefits of chapter XII-EA of the the Act. It is recommend that CBDT should prescribe eligibility conditions for a trust to be qualified as a Securitization Trust or alternately, that this sentence about conditions being prescribed be deleted from the relevant sections of the Act.

1.31. Making taxation regime of Category III Alternative Investment Fund (AIF) at par with Category I and II AIFs to provide pass through status

Unlike Category I and II AIFs, tax pass-through status has not been accorded to Category III AIFs. As per the report published by SEBI, 30% of the investment raised by Alternative Investment Fund is in Category III Funds.

At present, the AIF is taxed under the tax structure applicable to a trust and the uncertainty regarding the determinate and indeterminate characteristics of the trust leads to an ambiguous tax regime for investors.

The Alternative Investment Policy Advisory Committee appointed by SEBI has emphasized the need to give pass through status to Category-III AIFs of their report.

Recommendation:

It is recommend that a similar tax regime for all categories of AIFs be applied. Category-III AIF may be allowed pass through status similar to Category-I and II AIFs.

1.32. Taxability of subsidy/grant/incentive/drawback, etc. on receipt basis

The Finance Act, 2018 introduced Section 145B(3), which provides that income referred to Section 2(24)(xviii) of the Act shall be deemed to be the income of the previous year in which it is received, if not charged to income tax for any earlier previous year.
The income referred to in Section 2(24)(xviii) of the Act dealing with government grants, subsidy, duty drawback, etc. is to be taxed in the year in which it is received.

When a government gives a grant, the right to receive the grant is bestowed upon the taxpayer upon satisfying certain conditions linked with the grant which generally are to be satisfied in the subsequent years. The income in such a situation would accrue not only when it becomes due but it must also be accompanied by a corresponding liability of the other party to pay the amount.

The result of the amendment is that the year in which the government grant is taxed in the hands of the taxpayer may be different from the year in which the said entitlement ultimately becomes due to the taxpayer upon satisfying of the linked conditions in the subsequent year and consequential corresponding liability of the third party.

It is possible that the taxpayer may not satisfy the conditions in the future that are linked to the bestowing of the grants. If the conditions that are linked to the grant are not satisfied, the grant may be withdrawn resulting in taxing the receipt/grant in the earlier years which is actually not received by the taxpayer. This would result in an anomaly leading to a situation where the grants are taxed in an earlier year whereas the grant bestowed on the taxpayer has been withdrawn subsequently.

Further, in a subsequent year when the grant has been withdrawn, it is possible that the taxpayer could incur a loss due to withdrawal of the grant or due to unfavourable economic conditions of the business. In such a situation, there is no provision to write back the loss of a subsequent year against the profits of the earlier years which was taxed since it was offered as such.

Recommendation:

It is thus suggested that the grants received by the taxpayer should be taxed when the amount corresponding to the grant becomes due upon satisfying of the conditions linked to the grant and it must also be accompanied by a corresponding liability of the other party to pay the amount. This would also be in line with the general principles of accounting discussed by the Supreme Court in the case of CIT v. Excel Industries [2013] 38 taxmann.com 100 (SC).

Without prejudice to the above suggestion, a provision dealing with write back of losses incurred in the subsequent years against the profits offered to tax in the earlier year should be introduced under the Act. Further sufficient time should be given to the taxpayer to revise return of the earlier year in such a case.

1.33. Amortization of capital expenditure

Presently, there is no provision in the Act for amortization of capital expenditure such as fees paid for increase in authorized share capital and payment made towards elimination of competition or premium paid on acquisition of leasehold rights in land etc. Such expenditure being capital in nature cannot be charged to revenue as there is no provision for claiming these expenses in computing the income.

Recommendation:

It is suggested that provisions may be incorporated in the Act to allow amortisation of such capital expenditures which are essential to run the business.

1.34. Expeditious refunds of corporate taxes

It has been the experience of many corporate tax payers that the income tax refunds receivable by them on account of appellate orders, revised returns and rectification applications remain pending for long period of time. Expeditious verification and issuance of refunds may be encouraged to avoid hardship to tax payers and to promote a culture of tax compliance. This results into blockage of working capital for corporate tax payers.

Recommendation:

We recommend introducing a legislative requirement under the Act to issue legitimate refunds in a time bound manner. Further section 241A of the Income-tax Act 1961 must be deleted because it is leading to undue holding up of refunds and harassment of taxpayers.

1.35. Section 145A – Income Computation and Disclosure Standards ("ICDS")

The introduction of ICDS impacts largely only timing of tax. However, the ICDS, along with IndAS create a significant burden for taxpayers to prepare detailed reconciliations each year for

purposes of tax, without any significant impact on overall tax over a period. It also has a significant potential for disputes and litigation.

Recommendation:

ICDS should be scrapped altogether.

2. Withholding Tax ("TDS")

2.1. Issues in claiming TDS credit

Currently, the Income Tax Department allows TDS credit to the deductee based on the entries appearing the Form 26AS. The Form 26AS is populated based on the TDS returns filed by the respective deductors. However, on many occasions TDS credit may not reflect in the Form 26AS due to error on part of the deductors. Examples of such errors are as follows:

- The deductor may not file TDS returns;
- The deductor may enter an erroneous PAN number of the deductee.
- The deductor may mention a financial year that is different from the financial year in which the deductee reports the income.

In all of the above cases, TDS credit would be denied to the deductee leading to undue hardship for no fault of the deductee.

Recommendation:

It is recommended that a mechanism be devised to allow TDS credit to the deductee even if the same is not appearing in his Form 26AS, if there is evidence that tax has been deducted at source on the income.

2.2. Non applicability of Section 195(6) of the Act and rule 37BB of the Income Tax Rules, 1962 ('the Rules') to the Mutual Funds

As per Section 195(6) of the Act, a person responsible for paying any sum to a non-resident individual is required to furnish information in Form 15CA and 15CB (prescribed under Rule 37BB). Mutual Funds make payments of redemption proceeds/ dividends into NRE/ NRO bank accounts of NRI's on a daily basis. Submission of the prescribed forms on a daily basis is operationally impractical. There is no foreign remittance involved in respect of dividend/ redemption payment. Further, Dividend from Mutual fund units is completely tax free in the hands of the investors. The AIR submitted by Mutual Funds contains transactions of NRI investors as well

Recommendation:

Payments made by Mutual funds which is not chargeable under the provisions of the Act should be included in the Specified list under Rule 37BB and the requisite information be permitted to be included in the Annual Information Report (AIR) on an Annual basis.

2.3. Non-residents having no place of business in India to comply with tax deducted at source obligations u/s 195

The Finance Act, 2012 extended the obligation to deduct tax by any person responsible for paying to a non-residents whether or not the non-resident has—

- a residence or place of business or business connection in India; or
- any other presence in any manner whatsoever in India.

The aforesaid amendment was introduced with retrospective effect from 1 April 1962.

The amendment results in expansion of the scope of provisions dealing with a deduction of tax at source under the Act and may cover non-residents, regardless of their presence/connection with India.

The amendment by the Finance Act, 2012, however, seeks to expressly extend the scope of TDS obligations to all persons including non-residents, irrespective of whether they have a residence/ place of business/business connection or any other presence in India.

Recommendation:

The amendment (inserted by way of an Explanation) should be removed as it causes undue hardship to persons who genuinely do not have any income chargeable to tax in India.

Even for taxpayer's who may have created a taxable presence in India, but do not have any place of business in India, e.g. in case of a service PE being constituted in India, it results in practical challenges in complying with the TDS provisions.

2.4. TDS on year end provisions entries in books of account

Year-end provisions are made by taxpayers to follow accrual system of accounting. Very often provision for expenses at the year-end are made based on best estimates available with the taxpayer even if the supporting invoice is received subsequently. In certain instances, even the payees are not identifiable, however the year-end provisions are made by the taxpayers.

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 unnecessary burden casted on the payer in carrying extensive reconciliations.

Recommendation:

Relief from deduction of tax at source should be given to the payee on payments that are accrued but are not due and represents only a provision made for reporting purpose that are reversed on the first day of the subsequent year. Further, the relief should also be given from deduction of tax at source on payments for which the payees are not identifiable. The Tribunal has also held the same in following cases:

- Industrial Development Bank of India v. ITO (2007) (107 ITD 45) (Mum)
- Dishnet Wireless Limited (ITA Nos. 320 to 329/Mds/2014) (Chennai)

2.5. Mandatory time limit for issue of certificate

There is currently no time limit prescribed under the Act for issuance of certificates u/s 197 of the Act for lower/nil rate of deduction of tax at source. As a result, the applications may not be disposed in a time bond manner, resulting in unnecessary inconvenience to the taxpayers.

Recommendation:

It is recommended that a suitable timeline be inserted in the Act for disposing of applications for lower/nil rate of deduction of tax.

2.6. Calculation of the Interest u/s 201(1A) of the Act for the delay in deposit of TDS

The current provision u/s 201(1A) states that interest is payable from the date of deduction to the date of payment. Even a part of the month is to be considered as a month for the purpose of such levy of interest. Even in a situation where the delay is of 1 day (i.e. TDS deposited on 8th of the succeeding month instead of 7th), at present, interest will be calculated for 2 months.

Recommendation:

Government should bring out clarity on this issue since even a single day's delay leads to a 2 months' period instead of 1 month which is penal in nature.

Section 201(1A) of the Act needs to be amended to provide that interest will be levied only for the period of delay from the due date and not from date of deduction otherwise due date will be of no relevance.

Moreover, calculation of month on calendar basis is not justified since it will lead to one month extra interest. Further law doesn't prescribe for calculation on calendar month basis. Suitable changes should also be made in the TDS utility adopted by the Central Processing Centre (CPC).

2.7. Time limit for TDS assessment in case of payments to non-residents

As per sub section (3) of section 201 of the Act, in respect of default in TDS on payment to a resident, no order u/s 201 shall be made after the expiry of 7 years from the end of the financial year. The same limitation does not apply in case TDS default on payment to a non-resident and the assessment can be done for any financial year. However, the court has held 4 years to be a reasonable period.

Recommendation:

It is recommended that amendment should be made in sub section 3 to section 201 to include similar time limit of 7 years for assessment with respect to payments made to non-residents as in the case of payments to residents to bring in parity.

2.8. Generation of TDS certificates in case TDS is deducted @20% u/s 206AA of the Act

As per current instruction and configuration at TIN system, entries without PAN cannot be filed in the TDS return. For companies, it is now mandatory to generate TDS Certificate online. For deductees in the absence of PAN, TDS is deducted as per the provisions of Section 206AA read subject to rule 37BC of the Act. For these entries, TDS certificate is not generated online through TIN system.

Recommendation:

A clarification regarding the procedure for providing TDS Certificate to make the process easy and smooth and better compliance of the Act may be provided.

Additionally, procedure for issuing TDS certificate should also be clarified in cases where non-residents do not furnish PAN and comply with requirements of section 206AA(7) of the Act.

2.9. TDS on reimbursement of expenses

It has been legally established that TDS is not applicable in case of reimbursement of expenses since there is no income involved. However, very often disputes crop up, leading to unnecessary litigation and harassment.

Recommendation:

It is suggested to issue a suitable clarification in the Income Tax Law or by way of a CBDT circular in this regard.

2.10. Penalty for failure to furnish information or furnishing inaccurate information u/s 195 of the Act

The Finance Act, 2015 has introduced penalty u/s 271I of the Act in case of failure to furnish information or furnishing of inaccurate information as required to be furnished u/s 195(6) of the Act, to the extent of Rs. one lakh. It is not clear whether the penalty is qua the payment made or qua the transaction.

Recommendation:

The same should be clarified in a suitable manner.

2.11. TDS from payments to non-residents having Indian branch/ fixed place PE

The corporate tax rate for non-resident companies being 40% (plus surcharge and education cess) results in requiring a non-resident company to file return of income to claim refund of excess taxes deducted. This creates cash flow issues for the non-resident company having operations through an Indian branch unviable, when compared with its Indian counterparts.

Recommendation:

It is recommended that payments which are in the nature of business income of non-residents having an India branch office or 'a place of business within India' should be subject to similar TDS requirements as in case of payments to domestic companies.

2.12. Lower withholding rate of 5% under section 115A should be extended to rupee denominated loans

Generally all borrowings by a resident in India from a country outside India will be in foreign currency. It is impossible that a foreign lender will lend to an Indian in Indian currency. The currency in which the borrowing document or the borrowing instrument is denominated or the party who bears the foreign exchange fluctuation risk, being lender or borrower, should not have anything to do with determining a pure factual question, namely, whether the borrowing is in foreign currency. Yet, the confusion on this leads to uncertainty in applying section 115A in taxing the interest on INR denominated bonds/ debentures and other instruments even if the subscriber/ lender is based in other country. To make the law clear on this the requirement of borrowing in 'foreign currency' should be deleted from section 115A and all borrowing from outside India should qualify for section 115A.

Recommendation:

Rupee-denominated loans should be included in section 115A for a lower rate of taxation.

2.13. No withholding tax proceedings should be initiated against resident payers where reasonable due diligence was exercised while making payments to non-residents

The present provisions do not provide any safeguard for the payers who make payments to non-residents even where reasonable due diligence was exercised (eg: collection of No PE declaration, TRC and Form 10F). This is particularly where tax department allege PE of the non-resident recipients in India.

Recommendation:

Where the deductor is able to prove that due diligence was exercised while making the remittance, assessee should be not held as assessee in default for non-deduction of tax at source from payments made to the non-residents.

3. Return/Assessment /Penalty procedures

3.1. Section 68 – scrutiny examination of funds infused by non–residents

Section 68 of the Act provides that if any sum is found credited in the books of an assessee and the assessee fails to offer an explanation about the nature and source of money or explanation offered is found not to be satisfactory, then such income can be taxed as (unexplained) income in the hands of the assessee. Vide Finance Act 2012, section 68 was amended to provide that the nature and source of any sum credited, as share capital, share premium etc., in the books of a closely held company shall be treated as explained only if the source of funds is also explained by the assessee company in the hands of resident shareholder.

However, the Assessing Officers have been utilizing the amended provision for non – resident investors (of International Repute) also, which have not been covered by the amendment. The non-resident investors are compelled to submit even such information to the AO's during the course of scrutiny assessment proceedings of Investee Companies, over which AO has no jurisdiction or is totally irrelevant from the assessment perspective.

Additionally, section 56(2)(viib) of the Act provides that share premium received by an unlisted company upon issue of shares in excess of the fair market value shall be treated as income in the hands of such company and subject to tax accordingly. This law is applicable w.e.f. AY 2013-14.

Section 68 can be invoked in a situation wherein nature and source of funds remain unexplained by the recipient and the contributor. If the nature and source of funds stands explained, tax department could then have recourse u/s 56(2)(viib) only in situations where difference in technical aspect of valuation exist. However, the converse may not be true i.e. if Section 56(2)(viib) is invoked to tax the difference in technical aspect of valuation, the test of nature and source of funds stand automatically satisfied. The rigours of Section 68 should stop with the investigation into nature and source of funds and not extend to cater to the technical aspect of valuation dealt specifically u/s 56(2)(viib) as the Legislature may not have intended to provide two sections i.e. Section 56(2)(viib) and Section 68 to be used interchangeably. Section 68 also cannot be invoked in cases of genuine issue of shares by a company to joint venture partners or financial investors, i.e., private equity, venture capital funds etc.

Recommendation:

It is recommended that the scope and depth of examination / scrutiny with respect to financial affairs of the non-resident investors needs to be restricted. Especially considering that vast reporting requirements are prescribed for non-residents such as section 195(6) reporting, CbCR, TRC, Liaison Office reporting, requirement to quote PAN u/s. 206AA, reporting u/s. 285BA under FATCA etc.

Moreover the Government can also clarify that before the Assessing officer conducts an in-depth examination of financial affairs relating to source of funds of a non–resident investor, such investigation should be allowed only with the pre-approval of CIT / Pr. CIT on the basis of tangible material / evidence brought on record by the AO.

Provisions of section 56(2)(viib) and section 68 should be suitably amended to provide safeguards against its invocation interchangeably. Only if the tests laid down in section 68 do not stand to be fulfilled, section 68 can be invoked. Furthermore, once section 56(2)(viib) has been invoked, then the test of section 68 should be considered as automatically satisfied.

3.2. Misreporting covered cases of deliberate misconduct: section 270A(9)

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 section 270A(9) of the Act, 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 u/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 section 270A(9) of the Act, it is recommended that a suitable clarification by way of an Explanation or proviso be provided u/s 270A(9) suggesting that the cases intended to be covered by section 270A(9) is of deliberate / wilful misconduct on the part of taxpayer.

3.3. Section 270AA - Denial of benefit of immunity even if one of the items of under-reported income is arising as a consequence of misreporting of income

As per the provision of section 270AA(1) of the Act, 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 AO 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 from levy of penalty for all such additions / disallowance for which initiation of penalty is not is not by way of 'misreporting of income'.

3.4. Time limit for completion of appeals

Taxpayers are put to undue hardship due to continued delay in the proceedings. There is no certainty as of now as to how long the litigation battle with Indian Revenue authorities would continue. There should be certainty regarding the timelines which would assist the taxpayers to take prudent decision as to whether to go ahead with litigation in India or not. This will improve the investor sentiments and restore the faith in the Indian tax system. The existing timelines of one year for CIT(A) and four years for ITAT are persuasive and do not have mandatory effect.

Recommendation:

The Act should provide clear time lines for disposal of appeal proceedings at all levels.

Further, internal time limits need to be provided for appointment of counsels from the department side (wherever required).

Application for adjournment on the ground that counsel needs to be appointed should be curtailed.

The Government should direct the Appellate authorities / forums to adhere to the suggested timeline without attaching any importance to the value of the demand.

3.5. Demand of income tax where assessee has applied for stay of demand

Currently, in cases where assessments are completed pursuant to direction of DRP and demand is raised, the same is generally payable within 30 days of receipt of demand notice. However,

the period available to the tax payer for filing the appeal before the appellate authority is 60 days.

Recommendation:

It is suggested to align the period for payment of demand to 60 days instead of 30 days. This will lead to parity in the number of days for appeal and the demand payment.

3.6. Pre-payment of disputed demand

CBDT on 31 July 2017 has increased liability to deposit from 15% to 20% of disputed demand for granting stay of demand by department till disposal of first appeal. It is observed that frivolous demand raised on assessees by way of high pitched assessments causes undue hardship to genuine taxpayers and hence payment of 20% of such outstanding demand is unwarranted. Instead, it is suggested that there should be mechanism for early disposal of such cases where the income tax department feels that demand should be recovered at the earliest. The existing rate of 20% for pre-deposit seems to be on the higher side and detrimental to the business.

Recommendation:

It is suggested that the rate of 20% should be reduced to 10% of disputed demand.

4. Capital Gains

4.1. Period of holding in case of capital asset being shares acquired by way of conversion of Foreign Currency Exchangeable Bonds (FCEBs) and other Bonds & Debentures

Sec. 47 (xa) read with Sec. 49(2A) effectively provide that conversion of FCEB in to shares of any company will not give rise to capital gain and for the purpose of computing capital gain arising on sale of such shares at subsequent stage, cost of acquisition shall be taken as the relevant part of cost of FCEB. There is no corresponding provision for taking holding period of the shares from the day of acquisition of the Bonds [FCEB].
Similar difficulty exists in case of conversion of debentures and other bonds in to shares for which also similar provision exists in Sec. 47(x).

Recommendation:

It is suggested that appropriate amendment should be made in Sec. 2(42A) specifying the period of holding shares being capital asset acquired by way of conversion from FCEB/debentures /other bonds should be taken from the date of acquisition of FCEB/debentures/ other bonds and not from the date of allotment/conversion of shares.

4.2. Conversion of company into LLP – certain conditions need to be rationalised

Section 47(xiiib) of the Act provides tax neutrality to conversion of company into LLP subject to certain stringent conditions. LLP as a form of business organization is extremely important. The mid-size and smaller businesses are finding it extremely difficult to comply with very heavy compliance requirements under the Companies Act and this may prevent them from accessing the capital market. However, conditions for conversion of a company into LLP should be made less stringent or some relaxation should be provided in application of the same as follows:

Tax neutrality is available only to a company having turnover of Rs. 60 lakhs or less in any of the 3 previous years preceding previous year in conversion takes place. In the current economic scenario, this limit of Rs. 60 lakhs needs to be removed. There is no reason, why companies with large turnover, which otherwise qualify, should not be eligible for conversion with tax neutrality.

The conversion of a company into LLP will become more difficult now as a result of amendment made in Section 47(xiiib) of the Act by the Finance Act 2016 which denies exemption in a case where the company possessed total assets as per books of account exceeding worth Rs. 5 crores in any of the 3 previous years preceding previous year in conversion takes place.

Recommendation:

The turnover criteria as well as the asset base condition as specified in section 47(xiiib) should be relaxed/rationalised.

4.3. Merger/ demergers of Limited Liability Partnerships (LLPs) should be made tax neutral

Section 3 of the Limited Liability Partnership Act, 2008 provides that a limited liability partnership is a body corporate and is a legal entity distinct from its partners. Being similar in status to a company and since merger of companies are tax neutral, merger/ demergers of LLPs should also be made tax neutral. This will go a long way in the ease of doing business in India.

Recommendation:

Currently, there are no provisions exempting the merger/ demerger of LLPs. A specific provision should be made, making merger of LLPs as tax neutral.

4.4. Increase in capital gains exemption limit Rs.50 Lakhs to Rs.150 Lakhs u/s 54EC

Existing provisions of section 54EC entitled assessee to claim exemption from capital gains upon investment of sale proceeds in specified bonds within time limit prescribed in the section. Current exemption limit is Rs.50 Lakhs.

Recommendation:

The limit of Rs.50 Lakhs seems to be too low in the current economic scenario.
Increase in exemption limit will also help the Government in generating funds and on the other hand it will allow assessee to claim more exemption. This step will also will provide impetus to the infrastructure sector.

4.5. Exemption to a shareholder in case of foreign mergers

When 2 or more Indian companies amalgamate into another Indian company fulfilling condition contained in section 47(vii)(a), the shareholders of amalgamating companies who receive shares of the amalgamated company are also exempt from tax and not merely the amalgamating company (sections 47(vii) and 47(vi) respectively). However there is no corresponding provision to exempt shareholders of the amalgamating company from Indian tax when there is amalgamation of companies outside India and in the process shares of an Indian company or shares of a foreign company deemed to be situated in India get transferred. In these situations the law provides for exempting only the amalgamating foreign company. The Act should provide for exemption to shareholders as well similar to shareholders of amalgamating Indian company.

Recommendation:

In line with section 47(vii) there should be provisions exempting shareholder of the amalgamating company in situations referred to in sections 47(via) and 47(viab).

4.6. The requirement of 25% minimum shareholding under section 47(via) should be excluding the shares already held in amalgamating company by amalgamated company.

Under section 47(via), a transfer of shares of Indian company in the course of amalgamation of amalgamating foreign company to an amalgamated foreign company is exempt from capital gains in hands of amalgamating foreign company, subject to the following two conditions:

- At least 25% of shareholders of the amalgamating foreign company continue to be shareholders of amalgamated foreign company; and
- Such transfer in the course of amalgamation is exempt from capital gains tax, as per the local tax laws of amalgamating foreign company.

In a case where the amalgamated foreign company is the parent company of the amalgamating foreign company, the first condition of section 47(via) cannot be complied with, as 25% of the shareholders of amalgamating foreign company (being amalgamated foreign company) will not become shareholders of amalgamated foreign company, as the amalgamated foreign company cannot become its own shareholder. Hence the aforesaid threshold of 25% should be counted excluding the shares already held in the amalgamating foreign company by the amalgamated foreign company.

Recommendation:

Amalgamations where the amalgamated foreign company is a parent/ holding company of the amalgamating company, should be specifically brought within the purview by section 47(via) of the Income Tax Act.

5. Minimum Alternate Tax ('MAT')

5.1. Rationalization of MAT Rates

With the removal of incentives, the scope for taxable income being lower than the book profits has considerably reduced. The only major difference between the book profits and normal taxable income arises on account of depreciation rates. The difference in depreciation also gets reduced if the company is not expanding and a stage is reached when the tax depreciation is lower than the book depreciation.

On the other hand, the MAT rate has gone up to as high as 21.34%, which can even be considered as closer to the corporate tax rate of 34.61% on taxable profits.

Recommendation:

- At the outset, there is a need for a fundamental rethink on MAT at a conceptual level. MAT appears to be inconsistent with the current tax policy of low corporate tax rate of 25% and withdrawal of corporate tax incentives. MAT may therefore be withdrawn or significantly modified at the earliest.

- Even where it is decided to continue the MAT levy, following may be considered:

  - A roadmap may be announced for reduction in MAT rates to 7.5% of book profit (from current rate of 18.5%) over a period of five years.

  - MAT may be made applicable to only those entities which avail specified tax incentives in the normal computation (similar to section 115BA introduced by Finance Bill, 2016 which provides for 25% corporate tax rate to new domestic manufacturing companies who are willing to sacrifice specified tax incentives).

- The benefit of non-levy of interest u/s 234C be also extended to capital gains included under the MAT profits.

5.2. Computation of book profit for the purpose of MAT

As per the current provisions, while computing book profit for MAT, the company is required to set off brought forward loss or unabsorbed depreciation, whichever is less, from the book profit. This provision has its genesis in section 205 of the Companies Act, 1956 as it then stood when MAT provisions were introduced for the first time in 1987.

Under the Companies Act, 2013, before declaring dividend a company is required to set-off the entire brought forward loss including brought forward unabsorbed depreciation and there is no requirement of setting off the lower of the two. In fact this change was brought about in section 205 of the Companies Act, 1956 itself.

Because of this, books of accounts do not disclose separate figures of brought forward loss and brought forward unabsorbed depreciation.

Income-tax law however clings on to the aforesaid concept and it is impossible to get the required figure from audited accounts.

Hence, in line with development of Companies Act, on which MAT is squarely based, it is suggested that the requirement of setting off lower of brought forward loss and unabsorbed depreciation be deleted and replaced with setting off with the total of brought forward loss and unabsorbed depreciation.

Recommendation:

While calculating MAT, the entire book loss brought forward (including brought forward unabsorbed deprecation) should be allowed to be set off against the book profit.

5.3. Clarification on computation mechanism in case of companies following IND-AS based accounting

Companies following the IND-AS based accounting are facing challenges while computing its MAT liability on account of transition provision.

Recommendation:

It is recommended that a clarification should be provided that the transition adjustments arising out of the balance sheet items should not be considered for the purpose of computing MAT liability.

5.4. MAT on foreign dividend

The Finance Act 2011 introduced a new Section 115BBD in the Act which provided that dividend paid by a foreign company to an Indian company, in which the Indian company holds 26% or more of the equity share capital, would be taxed in the hands of the Indian company at the rate of 15% (plus applicable surcharge and cess).

Further, in order to remove the cascading effect in respect of dividend received by an Indian company from a foreign company, an amendment was introduced in Section 115-O of the Act. As per the said amendment, where an Indian company pays tax on dividend received from a foreign company u/s 115BBD and thereafter, such Indian company distributes dividend to its shareholder, then the dividend on which tax has already been paid by the Indian company (i.e.

u/s 115BBD) shall be reduced from the amount of dividend on which DDT is payable by the Indian company.

Domestic dividend is specifically exempt from the applicability of MAT provisions u/s 115JB. However, similar exemption is not available u/s 115JB in case of foreign dividend which suffers tax u/s 115BBD.

The consequence of this would be that Indian companies will end up paying an effective tax of 21.34% on foreign dividend due to applicability of MAT provisions as against the effective rate of 17.30% stipulated under the provisions of section 115BBD. Further, since the Indian companies have made outbound investments through investment companies which generally do not have any other source of income, the companies would not be able to utilize the MAT credit.

The higher rate of tax under MAT provisions would remain a disincentive for repatriating the funds to India and partially defeats the very purpose for which section 115BBD was introduced.

Recommendation:

It is recommended that similar to domestic dividend, foreign sourced dividend should also be exempt from MAT.

5.5. Carry forward of MAT credit

The Finance Act, 2017 amended Section 115JAA of the Act to provide that the tax credit in respect of MAT paid by companies u/s 115JB of the Act can be carried forward up to the fifteenth assessment year immediately succeeding the AY in which such tax credit becomes allowable. This amendment is effective from 1 April, 2018.

In cases where the MAT credit has already lapsed on or before assessment year 2016-17 or about to lapse in assessment year 2017-18 owing to completion of 10 years period basis the current provisions, having regard to the amendment, the question arises as to whether the benefit already lapsed or about to lapse will get a new lease of life. The ambiguity arises as extension of carry forward period to fifteen years shall take effect from 1 April 2018 (i.e. assessment year 2018-19).

Recommendation:

The issue in hand needs to be addressed so that taxpayers' whose MAT credit carry forward period has lapsed should not be at a disadvantage and suffer from the transitional impact of the proposed amendment.

5.6. Carry forward of MAT credit by amalgamated company

There is no clarity under the Act, whether on amalgamation/merger of companies, MAT credit available to amalgamating company can be availed by amalgamated company post amalgamation.

Recommendation:

Specific provisions should be introduced for carry forward of MAT credit by the amalgamated company.

6. Provisions in respect of Units established in Special Economic Zones

6.1. Clarity on utilization of SEZ re-investment reserve

Section 10AA is produced as under:

(1) ……..
(i)……..
(ii) for the next five consecutive assessment years, so much of the amount not exceeding fifty per cent of the profit as is debited to the profit and loss account of the previous year in respect of which the deduction is to be allowed and credited to a reserve account (to be called the "Special Economic Zone Re- investment Reserve Account") to be created and utilized for the purposes of the business of the assessee in the manner laid down in sub-section (2).

(2) The deduction under clause (ii) of sub-section (1) shall be allowed only if ...:—
(a) the amount credited to the Special Economic Zone Re-investment Reserve Account is to be utilized—
(i) ……..
(ii) until the acquisition of the machinery or plant as aforesaid, for the purposes of the business of the undertaking …….. [Emphasis Supplied]

There is ambiguity in the language of section 10AA(2) which raises the following doubts on the manner of utilization of the SEZ re-investment reserve:-

1) Whether the Plant & Machinery acquired using the SEZ reserve is to be used for the business of:
   - the same SEZ unit which created the reserve; or
   - any SEZ unit of the assessee; or
   - any unit of the assessee (SEZ/STPI etc.)

Since the objective is to promote business carried out of SEZs, it is suggested that utilization from SEZ reserve be allowed for all SEZ units of the assessee.

Recommendation:

It is recommended that the necessary amendment be made in Section 10AA(2) of the Act to provide that the Plant and Machinery acquired out of the SEZ reserve, as well as the funds until such acquisition, can be used for *any SEZ unit of the assessee*.

6.2. Sunset clauses in section 10AA of the Act

U/s 10AA of the Act, an SEZ Unit is eligible for a deduction (for a period of 5 consecutive assessment years) of 50% of SEZ Reinvestment Reserve, created by the assessee after expiration of 10 year tax holiday period. Creation of a re-investment reserve hampers the ability of an SEZ unit, especially ones in the manufacturing process. Presently, SEZ Units need to commence operations/ manufacturing on or before 31st March 2020 to claim tax benefit.

Further, Companies operating in capital goods, infrastructure / manufacturing industries have made huge investments to create local job opportunities as well as to boost domestic industry. Tax holiday period has been provided to, inter alia, enable them to recover their investments faster. Due to subdued market performance, they have not been able to recover their investments due to lower than anticipated profits and most of the companies have either exhausted the period of 5 years or are close to exhausting the said period.

Recommendation:

- Sunset clause for units in SEZ should be removed. Time limit for commencement of operations for SEZ units should be extended beyond 2020 to encourage exports and generate employment.

- In line with the Government of India's 'Make in India' initiative, it is recommended that the provision of creation of SEZ Reinvestment Reserve be done away with for SEZ Units engaged in manufacturing activities.

- It is recommended to enhance the 100% holiday limit to 10 years (from 5 years) so that the Companies can recover the investment faster and also provide additional funds for expansion / modernization as well as job creation, thereby contributing to the welfare of the country.

6.3. Exemption of SEZ profits from MAT calculation

Finance Act, 2011 has widened the scope of MAT by bringing SEZ units under the ambit of MAT, thereby significantly diluting benefits offered under the popular SEZ Scheme. Now, tax is also required to be paid on profits of SEZ units, though these were envisaged to be tax free when the provision was enacted.

Recommendation:

It is recommended to remove SEZ profit from MAT calculation, thereby, reducing taxation impact on the Companies and leaving profits with the Companies for further investment. This will provide a significant relief to exporters who are already finding it difficult to sell their products in the wake of a struggling global economy.

7. International Tax

7.1. Significant Economic Presence

7.1.1 Implementation of SEP provisions

The Organisation for Economic Co-operation and Development (OECD) issued Action Plan 1 to address Base Erosion and Profit Shifting (BEPS) issues in the digital economy (DE). The report proposes three options to tackle the DE BEPS (1) Significant Economic Presence (SEP) (2) withholding taxes on digital income from goods or services ordered online and (3) Equalisation Levy.

The report states that these measures could be imposed through domestic legislation and are not recommended as an international standard. However, it is important to note that countries may wish to impose these measures to address DE BEPS concerns if they believe that the BEPS concerns are not adequately addressed by OECD's Recommendation, or as a 'stop-gap' measure until the OECD's Recommendation are fully implemented.

The Task Force on the DE will continue its work by monitoring new DE business models and the effectiveness of BEPS measures with the objective of issuing a report on its work by 2020.

On 21 March 2018, the European Commission proposed a Digital Services Tax (DST) at 3 per cent[1]. Recently, European Union (EU) Finance Ministers discussed the recent European Commission's proposal on a DST and have broadly agreed that it would be a temporary levy till the time global consensus is reached.

[1] DST will apply from 1 January 2020.

Until global consensus emerges on the introduction of SEP provisions, the introduction of such provisions may create unintended consequences and is likely to adversely impact the ease of doing business in India.

A comparative chart of SEP provisions introduced under the Act and Action Plan 1 is given below:

Provisions	Action Plan 1	Indian SEP
Digital economy	A non-resident enterprise would create a taxable presence in a country if it has SEP in that country on the basis of factors that have purposeful and sustained interaction with the economy by the aid of technology and other automated tools.	The manner in which SEP provisions are worded, it may also cover transactions relating to physical goods within its ambit.
Revenue based factor combined with other factors	Revenues will not be sufficient in isolation to establish nexus but they could be considered as a basic factor that, when combined with the other factors, could potentially be used to establish nexus in the form of SEP.	SEP provisions prescribe either revenue based threshold or user based threshold to be fulfilled.
Various factors to determine SEP	Following three factors are prescribed to determine SEP: • Revenue based factors • Digital factors • User based factors	SEP provisions prescribe only following two factors to determine SEP: • Revenue based factors • User based factors
	All these factors have been explained in detail.	Factors to determine SEP are not clearly defined/clarified at this point in time.
User based factor	User based factors are prescribed on the basis of Monthly Active Users (MAU), online contract conclusion and data collected.	SEP provides user based factor on the basis of systematic and continuous soliciting of its business activities or engaging in interaction with such number of users as may be prescribed, in India through digital means. Factors such as ***active*** users, online contract conclusion and data collected have not been considered. SEP provisions are widely worded and terms such as 'systematic and continuous soliciting of its business activities' and 'engaging in interaction with such number of users' may encompass various situations which may not necessarily be revenue generating in nature.
	The terms MAU, online contract conclusion, data collected are explained in Action Plan 1.	Terms such as 'systematic and continuous soliciting of its business activities' and 'engaging in interaction with such number of users' are not defined.
'Stop gap' measure	SEP measures to be introduced as 'stop-gap' measure until the OECD's Recommendation are fully implemented.	SEP provisions have already been introduced in the Act and seem to have been introduced in an irreversible manner.

Action Plan 1 suggested implementation of three options to tackle DE BEPS i.e. Equalisation Levy, withholding tax and SEP. Action Plan 1 also states that countries may wish to impose these measures to address DE BEPS concerns if those countries believe that the BEPS concerns are not adequately addressed by the OECD's Recommendation, or as a 'stop-gap' measure until the OECD's Recommendation are fully implemented.

India already has detailed withholding tax provisions under its domestic tax law. It also introduced Equalisation Levy in 2016.

Action Plan 1 also states that adoption of these measures requires further calibration/ adaptation to ensure consistency with the existing international legal commitments.

Introduction of SEP provisions without an international consensus may pose challenges like double taxation, compliance and administrative cost, uncertainty, litigation, etc.

Recommendation:

In view of the above, either the SEP provisions should be abolished or its implementation should be deferred till the global consensus is formed on taxation of DE.

Having said the above and without prejudice thereto, the following suggestions are made in relation to the provisions of SEP under the Act:

7.1.2 SEP provisions should cover only digital transactions and not transactions relating to physical goods

Explanation 2A(a) to Section 9(1)(i) of the Act covers within its purview 'transaction in respect of any goods, services or property carried out by a non-resident in India' to determine the SEP. This provision is so broadly worded that it may cover not only digital transactions but also transactions relating to physical goods, within its ambit. However, in clause (b) the term 'through digital means' has been referred to tax digital transactions only.

The Memorandum to the Finance Bill, 2018, while introducing the SEP related provisions states the following rationale:

*'For a long time, nexus based on **physical presence** was used as a proxy to a regular economic allegiance of a non-resident. However, with the advancement in information and communication technology in the last few decades, new business models operating remotely through digital medium have emerged. Under these new business models, the non-resident enterprises interact with customers in another country **without having any physical presence** in that country resulting in avoidance of taxation in the source country. Therefore, the existing nexus rule based on **physical presence** does not hold good anymore for taxation of business profits in the source country. As a result, the rights of the source country to tax business profits that are derived from its economy is unfairly and unreasonably eroded*

*OECD under its BEPS Action Plan 1 addressed the tax challenges in a **digital economy** wherein it has discussed several options to tackle the direct tax challenges arising in **digital businesses**. One such option is a new nexus rule based on 'significant economic presence'. As per the Action Plan 1 Report, a non-resident enterprise would create a taxable presence in a country if it has a significant economic presence in that country on the basis of factors that have purposeful and sustained interaction with the economy **by the aid of technology and other automated tools**. It further recommended that revenue factor may be used in combination with the aforesaid factors to determine 'significance economic presence'.*

The Memorandum further states that since emerging business models such as **digitized businesses**, **which do not require the physical presence** of itself or any agent in India, **is not covered within the scope of Section 9(1)(i) of the Act,** the scope of Section 9(1)(i) of the Act was amended to provide that SEP in India shall also constitute 'business connection'.

The above clearly shows that the Government's objective behind the introduction of SEP related provisions is to tax digital transactions. However, the manner in which Explanation 2A(a) to Section 9(1)(i) of the Act has been worded, it may also cover non-digital transactions within its ambit.

Recommendation:

Therefore, it is suggested to appropriately clarify that SEP related provisions will apply to digital transactions/ businesses only.

7.1.3 Meaning of term 'property'

The Finance Act, 2018 introduced an amendment to the definition of 'Business Connection' to include any business activity carried out through a person who, acting on behalf of the non-resident has and habitually exercises in India, an authority to conclude contracts or habitually concludes contracts or habitually plays the principal role leading to conclusion of contacts by that non-resident. It is further provided that the contracts should be:

(i) In the name of the non-resident; or
(ii) For the transfer of the ownership of, or for the granting of the right to use, property owned by that non-resident or that the non-resident has the right to use; or
(iii) For the provision of services by that non-resident.

Further as per clause (a) of Explanation 2A, transaction in respect of any goods, services or property carried out by a non-resident in India above the specified limit of amount may result into SEP.

The term 'property' is not defined in the provisions. There is no clarity whether such property means a capital asset or business assets. 'Property' is a wide term and may include various class of assets which may be taxable under the other specific provisions of the Act. An only business property should be considered to determine business connection and transaction with respect to capital assets should be clarified to be outside the purview of these provisions. There are specific provisions under the Act which deal with the transfer of capital assets.

Recommendation:

It is suggested that the term 'property' should be defined to cover business property only.

7.1.4 Recommendation / Clarity with respect to certain terms not defined under the SEP provisions

i. The term 'transaction' needs to be defined

The term 'transaction' has not been defined and is very wide in scope, resulting into various broad interpretations, for e.g. Explanation 2A(a) may cover physical transaction as well, it may also cover several functions like marketing, etc. which may not result into generation of any revenue.

Hence, it is suggested that the term 'transaction' should be appropriately defined and it should be clarified it would cover digital transactions only.

ii. The phrase 'carried out by a non-resident in India' needs to be defined

SEP provisions provide that it would cover 'transaction in respect of any goods, services or property ***carried out by a non-resident in India***'. There is no clarity on how the term 'carried out by a non-resident in India' is to be interpreted.

Therefore, it is suggested that it should be clarified as to under what circumstances a non-resident can be said to be carrying out a transaction in India.

iii. Terms 'systematic and continuous soliciting of business' and 'engaging in interaction' need to be defined

Terms such as 'systematic and continuous soliciting of its business activities' and 'engaging in interaction with such number of users' appearing in the SEP provisions are not defined. The meaning of such terms should be clarified and should be subject to SEP provisions only when they result into generation of income.

While defining the user base factor, Action Plan 1 provides the concept of MAU, which is one factor reflecting the level of penetration in a country's economic life. It is the number of 'monthly **active** users' on the digital platform that are habitually resident in a given country in a taxable year. The term MAU refers to **a registered** user who logs in and visits a company's digital platform in the 30-day period ending on the date of measurement. Further it also provides **online contract conclusion** as another factor indicating the level of participation of an enterprise in the economic life of a country.

Action Plan 1 suggests certainty of business by using terms like 'active' and 'regular conclusion of contracts'.

Therefore, to bring clarity on the scope of SEP provisions, terms 'systematic and continuous soliciting of its business activities' and 'engaging in interaction' should be defined in such a manner that it covers only activities which directly result in generation of revenue for the non-resident. Further, any threshold to be applied for 'users' should be with reference to users who make a payment to the non-resident.

iv. The term 'through digital means' needs to be defined

The term through 'digital means' is not defined in the SEP provisions. This may result into unintended consequences.

Therefore, it is suggested that the term 'digital means' should be clearly defined.

7.1.5 TDS provisions v. SEP

Currently, some of the taxable payments with respect to digital transactions are liable to TDS under the provisions of the Act for e.g. software royalty. However, after implementation of SEP provisions, conflict may arise between such TDS provisions and SEP provisions. The SEP provisions are wide enough to cover non-resident software/data service providers. In various cases, the tax authorities have sought to tax such payments as royalty and the Courts/Tribunal in some of the cases have held such payments as royalty. SEP provision would result into overlap of these provisions with respect to taxability of such transactions.

Recommendation:

Therefore, it is suggested that appropriate clarification should be issued with respect to such transactions vis-à-vis applicability of SEP/TDS provisions. It should also be clarified as to how, from an administrative perspective, the payer's obligation with respect to TDS provisions will be discharged.

7.1.6 Equalisation Levy

Equalisation Levy is one of the options suggested by the Action Plan 1 to tackle the issues with respect to DE BEPS. India has already introduced Equalisation Levy which is applicable at 6

per cent on gross consideration payable for a 'Specified Service'. 'Specified Service' is defined as follows:

- Online advertisement.
- Any provision for digital advertising space or facilities/ service for the purpose of online advertisement.
- Any other service which may be notified later.

There could be an overlap between the SEP provisions and the provisions dealing with Equalisation Levy.

Recommendation:

Therefore, an explicit clarification should be issued, stating that the provisions of SEP would not apply to a transaction which is subject to Equalisation Levy.

7.1.7 Incremental reporting requirement

Introduction of the SEP provisions would require taxpayers to maintain additional details with respect to revenue from the digital means, number of users vis-à-vis systematic and continuous soliciting of its business activities or engaging in interaction with users. Maintaining such data and reporting of the same would trigger incremental efforts for non-residents. It would also result into increase in compliance cost for such non-residents.

Recommendation:

Therefore, it is suggested to provide upfront clarity with respect to data to be maintained to track active users, revenue from the digital means, etc.

7.1.8 Attribution of income

The second proviso to Explanation 2A provides that "only so much of income as is attributable to the ***transactions or activities*** referred to in clause (a) or clause (b) shall be deemed to accrue or arise in India."

Guidelines should be provided (after due consensus building) as to what portion of the total income should reasonably be attributable to the transactions or activities referred to in the SEP provisions, and the computation mechanism thereof.

Recommendation:

To provide clarity and certainty, it is suggested to issue appropriate guidelines on how to attribute profits to SEP, if created in India.

7.2. Provisions regarding the indirect transfer of capital asset situated in India

The Finance Act, 2015 has amended provisions dealing with the indirect transfer of capital asset situated in India as follows:

- Share or interest in a foreign company or entity shall be deemed to derive its value substantially from Indian assets only if the value of Indian assets (whether tangible or intangible) as on the specified date exceeds the amount of Rs. 10 crores and represents at least 50 per cent of the value of all the assets owned by the foreign company or entity.

- The value of an asset shall be its Fair Market Value (FMV). The date of valuation of assets (without reducing the liabilities) shall be as at the end of the accounting period preceding the date of transfer. However, in case the valuation of assets as on the date of transfer exceeds by at least 15 per cent of book value of the assets as on the date on which the accounting period of the company/entity ends preceding the date of transfer, then the specified date shall be the date of transfer.

- Exemption from applicability of the aforesaid provision has been provided in certain situations.

Recommendation:

- Clarification should be provided for the phrase 'assets located in India' mentioned in Explanation 5 to Section 9(1)(i) of the Act, given that the following interpretations are possible:

    - Whether the section refers to shares of an Indian company as assets located in India; or
    - Whether it is referring to the assets owned and held by the Indian company whether in India or outside India.

- Since the objective of the amendment is to tax indirect transfer through shell companies, a listed company should not be considered as a shell or conduit company. The same was also suggested by the Shome Committee. It is recommended that exemption should be provided in respect of transfer of shares in a foreign company (listed on a stock exchange outside India) having substantial assets located in India.

- Intra-group transfers as part of group re-organisations (other than amalgamation and demerger) should also be exempt from the indirect transfer provisions.

- While Explanation 5 to Section 9(1)(i) of the Act provides that shares of a foreign company which derives directly or indirectly its substantial value from the assets located in India shall be deemed to be situated in India. Section 47(vicc) of the Act provides an exemption only if the shares of foreign company derive substantial value from shares of an Indian company. While the intent may be to exempt all cases of demerger where foreign company derives substantial value from assets located in India, the reading of Section 47(vicc) of the Act indicates that the said exemption would be available only in cases where the shares of the foreign company derive substantial value from shares of Indian company. Due to this inconsistency in the language of Section 47(vicc) vis-à-vis Explanation 5 to Section 9(1)(i), transfer of shares of a foreign company which derives its value predominantly from assets located in India (other than shares of an Indian company) under a scheme of demerger may be deprived of the aforesaid exemption.

  It is recommended that Section 47(vicc) of the Act should be amended to provide that "any transfer in a demerger, of a capital asset, being a share of a foreign company, referred to in Explanation 5 to clause (i) of sub-section (1) of section 9, which derives, directly or indirectly, its value substantially from the assets located in India, held by the demerged foreign company to the resulting foreign company, if,—....."

- It is suggested that a similar amendment should also be made u/s 47(viab) of the Act (in case of amalgamation).

- The Finance Act, 2015 prescribes a threshold for applicability for the indirect transfer provisions. There should also be a minimum threshold prescribed for reporting of transactions by the Indian entity. It should be clarified that the same threshold will apply for reporting of transactions u/s 285A of the Act.

- The onus of reporting has been cast on the Indian entity. Generally, the Indian entity may not have information relating to overseas indirect transfer, therefore, the onus of reporting should not be cast on the Indian entity. Considering that the provisions relate

to indirect transfers, the onus, if at all, should be cast on the parties to the transaction and not the Indian entity.

- Provisions of Section 234A, 234B, 234C and 201(1A) of the Act should not be applied in cases where demand is raised on a taxpayer on account of the retrospective amendment relating to the indirect transfer. An appropriate amendment should be made in the respective provisions of the Act.

- The CBDT Circular no. 28/2017 does not extend the benefit of exemption to indirect investors in entities other than specified funds (such as Foreign Direct Investment (FDI), Foreign Venture Capital Investor (FVCI), Category III AIF and Category III FPI entities) and accordingly, indirect transfer provisions continue to apply to investors in such entities. While the circular provides relief for certain types of foreign investment routes, the benefit should also be extended to such foreign investment routes wherein income has been charged to tax in India.

7.3. Taxation of Fund Managers in India - Section 9A

The current section 9A of the Act is extremely prescriptive with 13 conditions that need to be fulfilled by the offshore fund, and 4 conditions that need to be fulfilled by the India-based Fund Manager, for the offshore fund to qualify for exemption from a business connection risk and the risk of having a Permanent Establishment (PE) under the Act.

The existing stringent conditions, which are difficult to fulfil or are open to interpretation are as under:

- Minimum 25 non-connected persons in each fund;
- 10 non-connected persons to hold more than 50% fund assets;
- Direct and indirect holding by Indian resident along with connected persons to be less than 5% of the corpus of the fund;
- No business connection of the offshore fund in India and no person acting on its' behalf
- Remuneration paid to fund manager is
  - not less than the arm's length price; and
  - restricted to maximum of 20% of profits of the fund

Pursuant to HR Khan committee report, SEBI in consultation with the Ministry of Finance has revised the KYC conditions and eligibility conditions applicable to FPIs. As per the revised norms an Indian resident Investment Manager is allowed to offer investment advisory and management services to FPIs. SEBI has also permitted 100% NRI investment in an FPI which makes 100% of its investment in Mutual Funds schemes in India.

While the SEBI regulation encourages additional foreign inflows to India, conditions prescribed u/s 9A still act as an impediment for an Indian resident Investment Manager to offer its services to FPIs.

Taxation of FPI investment in India is well organized and the regulatory infrastructure applicable for settlement of trade ensures that appropriate tax recovery is made before repatriation of funds by FPIs.

Recommendation:

It is recommended as below:

- Mutual funds (including feeder funds) investing in offshore funds to be considered as 'institutional entity', thereby entitling a "look-through basis", prescribed in Rule 10V of the Income-tax Rules

- Given that the offshore funds comply with 'know your customer' ('KYC') as required in the prospectus, no additional documentation should be required to satisfy that the members of the offshore funds are not "connected persons"

- The conditions should not be made applicable in the initial year of launch and last year of winding up of the offshore fund.

- Inclusion of a prospective prohibition in the prospectus of a fund on sale / distribution of the fund units/shares to Indian Resident investors should be sufficient to satisfy this requirement.

- Suitable clarification/ amendment may be provided that:
  - outsourcing a part of the back office / support functions of the fund manager (such as fund administration, fund accounting etc.), to an outsourcing entity in India (which is a group entity of the fund manager), or
  - appointment of banker, custodian or broker in India by the fund or fund manager would not result in non-fulfilment of this condition.

- It should be clarified that the remuneration would be deemed to be at an arm's length price as long as the fees to be paid by the fund are detailed in the publicly disclosed prospectus.

- The condition of maximum 20% of profits should not be required and should be deleted as it may be contrary to the arm's length price and can mandate the fund manager not to charge any fee in case of loss to the fund.

- In view of the recent regulatory changes, we request you to carve out FPIs from the applicability of section 9A. FPIs have well defined tax regime and SEBI registered FPIs may be allowed to take investment management and advisory services from resident Indian Investment Managers within the existing tax framework applicable to FPIs.

7.4. Extended provisions of section 115A

Existing provisions of Section 115A(5) of the Act provides relaxation from filing of income tax return u/s 139(1), subject to appropriate withholding of tax as per provisions of Chapter VII-B of the Act, only in respect of dividend and interest income. Such relaxation is not available in respect of Royalty and Fee for Technical Services (FTS) income. This is despite the fact that the Act as well as most of the DTAAs entered into by India provide for specific rates of tax withholding in respect of FTS/ Royalty incomes.

Recommendation:

Relaxation as per section 115A (5) with respect to filing of income tax return, must be extended to Royalty and FTS income of Non Resident in order to reduce compliance and procedural part for non-resident assessee.

7.5. Taxability of reimbursements of salary and other costs in respect of personnel seconded to India

Typically, foreign multinational companies in IT industry depute their personnel to their Indian affiliates to make better use of their talent pool.

The Indian tax authorities often contend that reimbursement of salary cost disbursed to the personnel on behalf of the Indian entity to the overseas entity is in the nature of 'Fee for technical services' as per the provisions of section 9(1)(vii) of the Act and hence subject to withholding in India u/s 195, despite the fact that the seconded employee has paid tax on salary in India. Further, courts in India have also taken divergent views on taxability of such reimbursements leading to more ambiguity.

The taxability of such salary costs poses an unnecessary tax burden on the foreign companies in India despite the fact that no income actually arises in hands of such foreign companies since the entire amount is passed on by the company to the seconded personnel. Further, tax is duly deducted at source in India on the salary income of the seconded personnel.

Recommendation:

It is recommended that a clarity may be provided on the tax treatment on account of secondment of expatriates. Further, it is recommended that the provisions of Section 9(1)(vii) of the Act be suitably modified to provide that in a case where: -

- the complete costs of the deputed person are effectively borne by the Indian Company and the Indian company merely reimburses the salary cost to the foreign affiliate, and
- Tax is duly paid in India on salary income of the seconded personnel

the amount paid by the Indian company to the foreign affiliate towards such salary costs should not be treated as Fee for Technical Service.

Accordingly, payment of such salary and other costs should also not attract Withholding tax provisions.

7.6. Indian branch of foreign company

As per section 115A, income (royalty and fees for technical services) earned by foreign person gets taxed at concessional rate when the payment is made by an Indian concern.

Recommendation:

In order to provide level playing field, Indian branch of foreign company should be considered as “Indian concern” for the purposes of this section.

7.7. Place of Effective Management (‘PoEM’)

The final PoEM notification June 22, 2018, fails to address the following key issues:

- Whether such foreign companies who are Indian residents due to its POEM would have to comply with ICDS?
- Post amendment in Finance Act, 2016 regarding exemption of MAT on foreign companies, it would be apposite to simplify whether MAT provisions are applicable on such foreign companies becoming PoEM resident, if yes then what would be its repercussion on set-off of brought forward of business losses.
- Whether transfer pricing provisions would be applicable to such foreign companies?

Recommendation:

Appropriate amendment/ clarifications to be issued w.r.t. issues highlighted.

7.8. Interest payment by India branch to Head office

Finance Act 2015 amended the law that the payment of interest by the Indian branch to the Head Office or any branch outside India engaged in the business of banking shall be chargeable to tax in India and liable withholding tax in India. As Head Office and branch (es) are part of the same legal entity, the taxability of the intra-group interest income would be against the principle of mutuality.

Recommendation:

It is recommended that the amendment regarding taxability of interest paid by India branch to Head Office should be withdrawn.

8. Personal Tax

8.1. Reduction in rate of tax

Currently, the peak tax rate of 30% is made applicable over an income of Rs. 10 Lakhs for individual taxpayers. However, the income level on which peak rate is applied in other countries is significantly higher. Hence, there is a need for further raising the income level on which the peak tax rate would trigger to make the same compatible with the international standard. Moreover, in order to align with the cost of living, there is a need for raising the income level on which peak tax rate would trigger.

Recommendation:

It is recommended that income level on which peak rate tax rate would apply should be increased from existing level of Rs. 10 lakhs to Rs.20 Lakhs.

8.2. Standard deduction

Appropriate amendment should be made to increase the quantum of standard deduction.

Recommendation:

Standard deduction on salary of INR 40,000 does not provide any substantial relief to salaried persons and needs to be increased. Standard deduction is not meaningful to large number of salaried tax payers as substantial portion of the deduction is offset by levy of additional cess of 1% which was levied vide Finance Act, 2018.

8.3. Leave Travel Concession u/s. 10(5)

Benefit should not be limited to 2 journeys in a block of 4 calendar years, but should be allowed every year. The exemption should be made available in respect of at least one journey in each calendar year. Also, the exemption should be provided on accommodation and meals as well.

Recommendation:

Exemption for leave travel concession or allowance is currently restricted to the value incurred for travel and it does not include expenses incurred on accommodation or meals. In case of travel, significant costs would be incurred on accommodation and food and hence, the exemption should cover these as well.

8.4. Removal of Surcharge

Surcharge levied @ 10% of income tax, in case of taxable income above Rs. 50 lakhs and @15% of income tax in case taxable income above Rs. 1 crore.

Recommendation:

It is recommended to remove the surcharge being levied on individual's taxable income as they are under the highest tax bracket of 30% which is creating undue hardships to such individuals.

8.5. Increase in limit of various salary related allowances exempt from tax

As per existing provisions of the Act, certain allowances are exempt from tax in hands of employee subject to prescribed threshold limit. For example, exemption limit for children education allowance and children hostel allowance is Rs.100 per month per child and Rs.300 per month per child respectively. These threshold limits were fixed decades ago. These threshold limits are very low in comparison to cost of living and therefore need to be increased.

Recommendation:

It is recommended to increase the exemption limit of certain allowances in order to meet the today's cost of living.

8.6. Removal of limit on set-off of loss arising under the head "Income from house property'

Finance Act, 2017 has inserted a new sub section (3A) to section 71 of the Act, restricting the set-off of losses arising under the head 'Income from house property' to Rs. 2,00,000.

Introducing such provisions is causing undue hardship and discouraging investments in immovable properties.

Recommendation:
It is recommended that to remove the restriction of set-off of losses arising under the head 'Income from house property'.

8.7. Increase in threshold limit u/s 80C

Over the years, investments made in various alternatives/avenues available u/s 80C of the Act have helped he government to raise funds as well as the individuals to save tax.

However, section 80C prescribes a number of investment alternatives with deduction amount of just Rs. 1,50,000. Generally individual assessees opt for section 80C deduction to save tax by investing various investment alternatives prescribe in said section. With low amount of deduction available to individual assessees, it discourages them to make further investment.

Recommendation:

It is recommended that to increase the overall deduction limit to at least Rs. 3,00,000 to boost further investment and increased tax savings for individual assessees.

8.8. Investment in infrastructure bonds

Deduction u/s 80CCF was available for subscribing the notified long term infrastructure bonds and such deduction was available over and above the existing aggregate limit of deduction allowable u/s 80C, 80CC and 80CCD of the Act. However, the said deduction was discontinued w.e.f. assessment year 2013-14.

Recommendation:

The intent behind this introduction of this section is to promote the raising of funds for infrastructural development. Accordingly, it is recommended that suitable changes be made in this section in order to provide this deduction under this section in future years.

8.9. Deduction in respect of interest on deposits in saving account

At present, deduction u/s 80TTA is available to individual assessee other than senior citizens of Rs. 10,000. In budget 2018, section 80TTB was introduced for allowing deduction to senior citizens of Rs. 50,000.

Recommendation:

On similar lines, it is recommended to increase the deduction amount of Rs. 10,000 to at least Rs. 25,000

8.10. Taxation of long term capital gains (LTCG) on sale of equity shares of a company or a unit of equity oriented fund or a unit of business trust

The Finance Act, 2018 has withdrawn the exemption u/s 10 (38) of the Act and introduced a new Section 112A in the Act so as to provide that LTCG arising from transfer of such long-term capital asset exceeding INR one lakh will be taxed at a concessional rate of 10 percent.

The long-term capital gains will be computed by deducting the cost of acquisition from the full value of consideration on transfer of the long-term capital asset. The cost of acquisition for the long-term capital asset acquired on or before 31st of January, 2018 will be the actual cost. However, if the actual cost is less than the fair market value of such asset as on 31st of January, 2018, the fair market value will be deemed to be the cost of acquisition. Further, if the full value of consideration on transfer is less than the fair market value, then such full value of consideration or the actual cost, whichever is higher, will be deemed to be the cost of acquisition.

Recommendation:

In order to encourage taxpayers to invest in mutual funds and shares, the gains from sale of such units/ shares should be made more tax-friendly by removing the taxability on such sale of long term capital assets.

8.11. Taxability of National Pension Scheme

Currently, the National Pension Scheme (NPS) works on Exempt, Exempt, Tax (EET) regime whereby the monthly/ periodic contributions during the pension accumulation phase are allowed as deduction for Income-tax purposes, the returns generated on these contributions during the accumulation phase are also exempt from tax, however, the terminal benefits on exit or superannuation, in the form of lump sum withdrawals, are partially taxable in the hands of the taxpayer in the year of receipt of such amount. An amendment was introduced by Finance Act, 2016, wherein forty percent of the accumulated corpus upon withdrawal/ superannuation

was made tax-free whilst balance corpus of sixty percent continues to be taxable. Finance Act, 2018 has extended such benefits to non- salaried assesses too.

Recommendation:

In order to encourage taxpayers to make voluntary higher contributions towards NPS, it should be made more tax-friendly as the objective of this scheme is to create a pensionable society. Accordingly, the tax regime of NPS should be made Exempt, Exempt, Exempt (EEE) from the current EET regime on the lines of other retirement schemes like Employee Provident Fund and Public Provident Fund.

8.12. Partial double taxation of contribution to superannuation fund

Section 17(2)(vii), as amended by the Finance Act, 2016, provides that any contribution to an approved superannuation fund by the employer, to the extent it exceeds one lakh and fifty thousand rupees, will be taxable as a perquisite in the hands of the employee.

Contributions to superannuation fund may or may not result in superannuation benefits to the employees, since there are various conditions to be fulfilled by the employees like serving a stipulated number of years, reaching a certain age etc. Further, the pension payments are subject to tax at the time of actual receipt by the employee after his retirement. This may lead to partial double taxation for the employee where the contributions had been taxed earlier also (when the contributions exceeded INR one lakh and fifty thousand).

Recommendation:

It is recommended that the employer contributions to an approved superannuation fund should be made fully exempt from tax. This will also encourage one of the key focus areas of the Government of creating a pension based society.

8.13. Taxation of specified security or sweat equity shares allotted to employees under Employee Stock Option Plans (ESOPs) in case of migrating employees

Taxation of ESOPs creates an issue in the case of migrating employees, who move from one country to another, while performing services for the company during the period between the grant date and the allotment date of the ESOP. The domestic tax law is unsettled on the taxation of such migrating employees and does not clearly provide for such cases.

Recommendation:

During the erstwhile Fringe Benefits Tax regime, there was a specific clarification on the taxability, where the employee (who qualified as a non-resident/ not ordinary resident) was based in India only for a part of the period between grant and vesting. However, there is no specific provision in this regard under the amended ESOP taxation regime from 1 April 2009.

The Government may look at providing clarity on the taxability of ESOP's for such mobile employees.

8.14. Provision for the employer to provide tax treaty benefits while calculating TDS

Under the current tax regime, there is no provision under the Act which enables an employer to consider admissible benefits under the respective Double Taxation Avoidance Agreements (e.g. credit for taxes paid in another country/ treaty exclusions of income etc.), while computing tax to be deducted u/s 192 at the time of payment of salaries to employees. Further, the foreign tax credit rules notified by the CBDT in June 2016 also does not contain explicit provision for providing credit for taxes paid in another country by the employer at the time of deduction of tax on salary payments.

Recommendation:

Due to the above, it creates cash out-flow issues to the employees (migrating employees coming to and leaving India) who are initially subject to full TDS by their employers and thereafter required to claim refunds on account of tax treaty benefits while filing their income tax return. Many of these employees may complete their assignments and leave India prior to obtaining their tax refunds which also creates hardships with respect to receiving back the refund amounts.

Further, Authority for Advance Rulings has recently held that Foreign Tax Credit may be considered at the withholding stage by the Indian employer while determining withholding tax on salary income for employees qualifying as Resident and Ordinary Resident in India.

8.15. Timeline for filing a revised tax return

The Finance Act 2017 curtailed the time limit to file a revised return from the existing time available of two year from end of financial year to one year from end of financial year.

This impacts many tax payers who have moved abroad for employment and qualify as Resident and Ordinary Resident (ROR) of India in the financial year of departure from India or any other ROR tax payer who has overseas income.

This is on account of the fact that the relief to be claimed (if any) on any overseas income offered to tax could depend on the tax return to be filed in the host country/ country of source of income. It is possible that the tax return filing deadline is such country may be later than the timeline for filing the revised tax return. E.g. Mr. A moving to USA on 1 Jan 2019 and qualifying as a ROR of India for FY 18-19. His Jan 19- March 19 US income will be taxable in India subject to relief under the Indo-USA Double Tax Avoidance Agreement (DTAA). However, this relief can be determined based on his US returns for calendar year 2018 as well as 2019.

Recommendation:

Considering the hardship that can be caused on this account the deadline for filing a revised return should be restored to two years from end of the relevant financial year.

9. Transfer Pricing

9.1. Deemed international transaction – Guidance on kind of arrangements that should get covered as deemed international transactions

Currently there is no clarity on quadrangular arrangements. The present regulations only talks about triangular arrangements between associated enterprise and such other person (Resident).

Recommendation:

Specific guidance should be issued on kind of arrangements that should get covered as deemed international transactions with specific directions on revenue neutral transactions.

9.2. Range concept - Use of inter-quartile range

The current rules proposing narrow range does not address the concern of the tax payers. Also, use of inter-quartile range would ensure consistency with international transfer pricing principles and minimize risk of economic double taxation merely on account of difference in use of statistical tools.

Recommendation:

Use of inter-quartile range could be considered instead of 35th to 65th percentile range as per current rules for computation of Arm's Length Price.

9.3. Intra group services – Guidance on supporting documentation

Currently there is no clarity on kind of supporting documentation to be maintained for intra group services.

Recommendation:

Specific guidance should be issued on kind of documents that should be maintained by tax payers as in the absence of adequate documentation tax authorities tend to disallow such expense.

9.4. Safe harbor provisions – To increase coverage for additional sectors/ transactions (including transaction involving payment of trademark royalty)

Currently transactions in telecom sector is not covered under safe harbor provisions. Further, the current regulations do not provide a safe harbor for transactions involving payment of trademark royalty. Payment of royalty has been subject to long-drawn litigation basis the presumption of tax authorities that Indian taxpayer has not obtained any benefit from use of such trademark and the royalty payment is not justified.

Recommendation:

Could serve as an additional dispute resolution mechanism for tax payers in telecom sector (including transaction involving payment of trademark royalty).

9.5. Additional transfer pricing compliance requirements for foreign affiliates in relation to related party transactions undertaken with group entity in India (that are also subject to transfer pricing compliances in the hands of the Indian taxpayer).

In case of transactions, such as payment of trademark royalty by Indian taxpayer to its foreign affiliate, the expense is claimed as a business expenditure in the tax-return of the Indian taxpayer. Further, the foreign affiliate is also required to file a tax return in India as the income received from the Indian taxpayer is taxable in the hands of foreign affiliate.

Section 92(1) of the Act requires that any income arising from an international transaction be computed having regard to the arm's length price. Further, allowance for any expense or interest arising from an international transaction shall also be determined having regard to the arm's length price.

Given the above read with the decision held in the case of Instrumentarium Corporation Ltd [TS-467-ITAT-2016], both the Indian taxpayer as well as the Foreign taxpayer are required to prepare separate transfer pricing documentation to demonstrate the arm's length price for the same transaction.

Considering that any downward adjustment to the expense in the hands of the Indian taxpayer will increase the income of the foreign affiliate or any upward adjustment in the income of the foreign affiliate will result in decrease in expense claimed as deduction in the hands of the Indian taxpayer, the overall income base for India is expected to remain the same.

This results in additional compliance burden for multi-national groups in India.

Recommendation:

A clarification may be provided that separate transfer pricing documentation of the foreign affiliate is not required where the transaction is already benchmarked in the hands of the Indian taxpayer.

9.6. Limitation on Interest on debt extended or guaranteed by AE

Section 94B was introduced from 1 April 2017 to limit deduction on account of interest incurred in certain cases where debt is borrowed from an AE being a non-resident or where the debt is borrowed from a non-AE (subject to implicit or explicit guarantee provided by AE to the lender).

The interest deduction is restricted to 30% of earnings before interest, taxes, depreciation and amortization ('EBITDA') of the borrower.

It is pertinent to note that all the taxpayers' products/ services would not be undergoing the same phase of business life-cycle as others, some may be in the initial phases of product development or product promotion where significant resources are deployed by the company to develop, commercialize and promote the product.

Such extensive use of resources would be associated with high costs resulting in low profits even at EBITDA level.

The limitation of interest deduction for such companies with high operating expenditure will result in higher tax cost which is an additional burden for such taxpayers.

Recommendation:

An exception may be created for applicability of the provisions of Section 94B on companies which have incurred significant operating expenditure resulting in low EBITDA along with requisite guidelines.

10. Other Provisions

10.1. General Anti Avoidance Rules ('GAAR') provisions should not apply when a tax treaty contains the Principal Purpose Test ('PPT') / Limitation of Benefits ('LOB') clause

The FAQ's issued by CBDT on 27 January 2017 while dealing with the question (Question 2) on whether GAAR would be applied to deny treaty eligibility in a case where there is compliance with (Limitation of Benefit) LOB test of the treaty, clarified as follows:

Adoption of anti-abuse rules in tax treaties may not be sufficient to address all tax avoidance strategies and the same are required to be tackled through domestic anti-avoidance rules. If a case of avoidance is ***sufficiently addressed*** *by LOB in the treaty, there shall not be an occasion to invoke GAAR…..*
(emphasis supplied)

Whether the case of avoidance has been sufficiently addressed may further involve an element of subjectivity as the term 'sufficiently addressed' has not been explicitly defined and there could be an unintended situation where the case would be subjected to both the rigors of the anti-abuse provisions as well as GAAR.

Recommendation:

It should be provided by way of an exception that when an arrangement/transaction is subjected to the anti-abuse provisions [particularly the LOB and the Principal Purpose Test (PPT) provisions] dealt with by the tax treaty between India and the respective country, the same should not be further subjected to GAAR provisions.

10.2. Overlapping of the GAAR provisions with the anti-abuse provisions introduced through the Multilateral Instrument

India has signed the 'Multilateral Instrument' (MLI) in accordance with the BEPS Action Plan 15 of the OECD, which, inter alia, deals with the denial of tax treaty benefits in certain cases of anti-abuse arrangements/transactions entered into by the taxpayer. The MLI provides for insertion of anti-abuse provisions (the PPT and the LOB provisions) in the tax treaties so as to deny tax treaty benefits in case of abusive arrangements/transactions being entered into by the taxpayer. The anti-abuse provisions inserted through the MLI would be effective once the same are ratified by both the signatories to the MLI. With India having signed the MLI, there could be a possibility that the same transaction/arrangement could be subjected to multiple anti-abuse provisions, one would be through the anti-abuse provisions inserted in the tax treaty network through the MLI and second by way of the same transaction being subjected to the GAAR provisions which also targets anti-abuse provisions.

Recommendation:

It is suggested that GAAR provisions should not be made applicable to abusive transactions (in the case of Multinational enterprises {MNE's}) which are subjected to anti-abuse provisions under the tax treaty pursuant to the adoption of the MLI provisions. Once the anti-abuse provisions are inserted in the respective tax treaties through the MLI, the government could then assess the situation and examine if GAAR provisions should be made applicable in the case of the said non-resident taxpayers' (MNE's). This would also pave the way for a conducive economic environment and persuade the global multinationals to establish their footprint in India with clarity on the domestic tax laws prevalent in the country.

10.3. The meaning of the terms 'Substantial' and 'Significant' in Section 97(1) of the Act

Section 97(1) of the Act provides that an arrangement shall be deemed to be lacking commercial substance, if inter alia;-

- it involves the location of an asset or of a transaction or of the place of residence of any party which is without any substantial commercial purpose other than obtaining a tax benefit for a party; or
- it does not have a significant effect upon business risks, or net cash flows apart from the tax benefit.

The terms 'substantial commercial purpose' and 'significant effect' in the context of GAAR have not been defined in the Act.

Recommendation:

- It needs to be clarified what shall constitute as "substantial commercial purpose' and "significant effect' for the purpose of Section 97 of the Act.

- The substantial commercial purpose may be explained with reference to the terms used viz. location of an asset/transaction or place of residence of a party (for e.g. specified the value of assets located; the value of a transaction as comparable to the total assets of the business or any other such related parameter).

- Similarly, what will constitute as 'significant effect' vis-a-vis business risks / net cash flows needs to be clarified.

10.4. Clarity on provisions of General Anti Avoidance Rules (GAARs)

- U/s 97(2) round trip financing is meant to include transactions where funds are transferred among the parties to the arrangement and such transfer of funds lacks substantial commercial purpose. The definition contains the phrase 'substantial

commercial purpose'. However, the said phrase is not defined and the word substantial may lead to varied interpretations leading to possible difficulties.

- Sections 98 and 99 of the Act provide that as a consequence of attracting GAAR provisions any corporate structure may be disregarded. Under the Companies Act, only High Court is empowered to pierce the corporate veil and disregard the Corporate Structure. Empowering the Department to so disregard the Corporate Structure may lead to conflict of Constitutional Powers.

Recommendation:

- It is suggested that the word substantial be dropped so as to bring the definition in line with section 97(1). Alternatively, substantial commercial purpose may also be defined in the Act u/s 102 like other terms used in the chapter.

- A clarity on disregarding any corporate structure is required so as to avoid any subjective interpretational difficulties and proper, just and equal applicability of the Chapter to all persons covered by it. A mechanism may be provided whereby instead of the Department disregarding any corporate structure it may be authorized to approach the court in order to decide whether a corporate structure may be disregarded. The said amendment / clarity is required so as to avoid any conflict of constitutional powers.

10.5. Clarification on the term 'tax benefit' as defined u/s 102(10) of the Act

The term 'tax benefit' as defined u/s 102(10) of the Act includes,—
(a) a reduction or avoidance or ***deferral of tax*** *or other amount payable under this Act; or*
(b) an increase in a refund of tax or other amount under this Act; or
(c) a reduction or avoidance or deferral of tax or other amount that would be payable under this Act, as a result of a tax treaty; or
(d) an increase in a refund of tax or other amount under this Act as a result of a tax treaty; or
(e) ***a reduction in total income****; or*
(f) ***an increase in loss****,*

in the relevant previous year or any other previous year;

(Emphasis supplied)

Clause (e) and (f) in the definition refer to "reduction of total income" and "increase in loss" as tax benefit. An ambiguity arises as to how tax benefit is conditioned at income / loss level. This may also defeat the objective of Rs. 3 crore tax benefit threshold as provided in Rule 10U of the Rules.

Computation of tax benefit on deferral of tax (which is merely a timing difference) needs to be clarified. As observed by the Expert Committee, in cases of tax deferral, the only benefit to the taxpayer is not paying taxes in one year but paying it in a later year. Overall there may not be any tax benefit but the benefit is in terms of the present value of money.
Further, as observed by the Expert Committee, the term tax benefit has been defined to include tax or other amount payable under this Act or reduction in income or increase in loss. The other amount could cover interest.

Recommendation:

- Clause (e) and (f) should be appropriately worded to correspond with the 'tax' amount. In other words, the reference to income/loss should not be the base for defining the term 'tax benefit'.

- In line with the Expert Committee Recommendation, it is suggested that:

the tax benefit should be computed in the year of deferral and the present value of money should be ascertained based on the rate of interest charged under the Act for shortfall of tax payment u/s 234B of the Act.

10.6. Requirement to obtain Permanent Account Number

- Section 139A of the Act casts an obligation on every person to obtain a Permanent Account Number (PAN) under certain prescribed situations. Such situations are enumerated in clauses (i) to (iv) of sub-section (1) to section 139A. The Finance Act, 2018 inserted the following two new clauses viz. (v) and (vi) in section 139A(1):

  "Every person, -
  (i)…..

  (ii)….
  ……..
  (v) being a resident, other than an individual, which enters into a financial transaction of an amount aggregating to two lakh fifty thousand rupees or more in a financial year; or

  (vi) who is the managing director, director, partner, trustee, author, founder, karta, chief executive officer, principal officer or 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)

  and who has not been allotted a permanent account number shall, within such time, as may be prescribed, apply to the Assessing Officer for the allotment of a permanent account number".

- The term 'financial transaction' is not defined u/s 139A. In absence of the same, the question arises that what could be termed as 'financial transaction' for the purpose of Section 139A(1)(v) of the Act.

The term 'financial transaction' is not defined under the Act. The provisions of Section 285BA contain definition of a 'specified financial transaction'. Such definition may however, have limited application in the context of Section 139A(v) of the Act considering that the said definition is for the purpose of section 285BA(1) of the Act and even otherwise, it deals with 'specified' financial transaction', thereby limiting its scope. Section 139A(5)(c) of the Act casts an obligation on every person to quote PAN in all documents pertaining to such 'transactions' as may be prescribed. These 'transactions' are prescribed in Rule 114B viz. sale or purchase of motor car, sale or purchase of shares of unlisted company, opening of demat account with depository, etc. Coverage under this subsection seems to cover all prescribed transactions whether or not financial in nature.

In absence of any generic definition of financial transaction under the Act, one may understand it in general parlance. Accordingly, the term 'financial transaction' as envisaged in the amendment appears to be very wide and likely to cover all transactions carried out between two or more parties impacting the finance of a person.

Further, considering the language of clause (v) and given that obtaining PAN is a compliance requirement, it seems that the scope of term 'financial transaction' would include exchange transactions as well. It will result into unnecessary hardship on taxpayers. Further it is not appropriate to ask non-residents to take PAN for entering into negligible transactions.

- The legislature has used the specific words 'sum of money' [e.g. section 56(2)(x)] wherever it was so intended (as against the use of words 'an amount' in given case). In light of this, the term 'amount' may not be considered as restricted to only 'sum of money' and may also include payment in kind (i.e. transactions for non-monetary consideration).

Basis the above, considering the current language of the clause (v) and given that obtaining PAN is a compliance requirement, the scope of term 'financial transaction' may include exchange transactions as well.

- As per clause (vi), Every person, who is the managing director, director, partner, trustee, author, founder, karta, chief executive officer, principal officer or office bearer of the person referred to in clause (v) or any person competent to act on behalf of person referred to in clause (v).

Issue may arise in case where an entity satisfies the requirement of clause (v), whether all the specified personnel (e.g. all directors in case of company, all partners in case of a firm) would be required to comply with PAN requirement irrespective of their involvement in the financial transaction.

Clause (vi) when read with the opening words of the section i.e. 'Every person' in Section 139A(1), it seems that it would cover every person referred to in clause (vi) to meet the requirement of obtaining PAN. Further, clause (vi) also covers 'any person competent to act on behalf of the person referred to in clause (v)'. It seems that it envisages to cover any person who is competent to act on behalf of the person referred to in clause (v) irrespective of whether the person has/was actually involved in any financial transaction. Thus, on a literal reading of the clause (vi), merely basis the competency of the personnel to act on behalf of the entity specified in clause (v), such person may be required to apply for PAN.

It would result into an unnecessary burden on large entities if every officer is required to take PAN. It would be a cumbersome compliance burden on the large entities.

Recommendation:

- It is suggested that the term 'financial transaction' should be defined appropriately to cover only specified transactions.
- It would be apt to make a suitable amendment in the provision to clarify that the said reporting requirement will not cover transactions having non-monetary consideration/exchange transactions.
- A suitable amendment should be made to provide that only one of the officers/executives of an entity should be required to take PAN.
- The requirement to obtain PAN by foreign directors of a resident company should be relaxed where the resident companies and its resident directors have obtained PAN.

10.7. Other Recommendation

S .No.	Issue	Recommendation	Justification
1.	S.194A	Limit should be increased to Rs. 50,000 from Rs.10,000	Threshold limit for this TDS provision need to be reset and increased, to reduce cost and effort of paperwork for low value transactions.
2.	S.194H	Limit should be increased to Rs.50,000 from Rs.15,000/-	Threshold limit for this TDS provision need to be reset and increased, to reduce cost and effort of paperwork for low value transactions.
3.	S.194J	Limit should be increased to Rs.50,000 from Rs.30,000	Threshold limit for this TDS provision need to be reset and increased, to reduce cost and effort of paperwork for low value transactions.

S .No.	Issue	Recommendation	Justification
4.	TDS rates too high	In view of huge refunds granted every year, it needs to be analysed which class of investors received refund and accordingly, the rates of TDS for that class/ category should be reduced.	Taxes are deducted at source, inter alia, on interest, royalties, fees for technical services, etc. Tax deducted by various segments of business vary somewhere between 1-42%. The tax department issues refunds every year and therefore, there is a need to relook at the TDS rates.
5.	S.44AB - Clarification for assessees with gross receipts exceeding Rs.1 crore regarding maintenance of account books.	Clause (a) of s.44AB should be appropriately modified to increase the threshold limit specified thereunder from Rs.1 crore to Rs.2 crores.	This amendment is suggested to avoid any ambiguity in interpreting the true intent of the law regarding maintenance of books of account and their audit, where total turnover/ gross receipts is between Rs. 1 crore and Rs. 2 crore. Further, the current limit took effect from 1 April 2013. Factoring the impact of CPI inflation for the past four years and the next two years, the increase sought is fair.
6.	Transactions without consideration or for inadequate consideration – s.47/ s.56(2)(x) of the IT Act	Since section 56(2)(x) of the Act is an anti-abuse provision intending to curb tax avoidance, it should be applicable to transactions liable to tax and not otherwise. Thus, this section should be applicable to receipt of shares not covered u/s.47. Further, it should be clarified that the following transactions would be excluded from its ambit: o Issue of Shares inclusive of: ▪ Right issue; ▪ Preferential allotments; ▪ Conversion of financial institution; ▪ Bonus shares; ▪ Split/ Subdivision/ Consolidation of Shares; ▪ Receipt under stock lending scheme; ▪ Receipt by Trustee company; ▪ Buyback of shares; ▪ By offshore investors where purchase price is determined by Indian laws (such as FEMA guidelines, etc.); Genuine business/ commercial transactions.	Section 56(2)(x) is applicable where any person receives from any person any property, other than immovable property without consideration or with inadequate consideration. S.47 exempts certain transactions from capital gains tax. However, proviso to section 56(2) (x) excludes only some of such exempted transactions from its applicability. Consequently, those transactions which may otherwise be exempt u/s.47 are still liable to tax u/s 56(2)(x).

S .No.	Issue	Recommendation	Justification
7.	Power of AO to ask for Valuation Report u/s. 142A to be restricted to exceptional cases	i) The power of reference to the Valuation Officer should be available in the following manner: a) The power to the AO should be restricted to specific exceptional circumstances/ conditions. b) AO should record reasons for invoking power u/s 142A and assessee should be able to access these recorded reasons. c) AO should take prior approval of higher authority not below rank of Commissioner. ii) Valuation Report submitted by the Valuation Officer should be binding on the AO. iii) Specific guidelines/ rules should be brought to define "any asset, property or investment."	The scope of section 142A has been enlarged enormously *vide* Finance (No. 2) Act, 2014, to give blanket powers to the AO to make reference to Valuation Officer to estimate the value, including fair market value, of "any asset, property or investment," as against the earlier scope restricted to unexplained investments, cash credits, etc. This reference is for the purpose of "assessment or reassessment." In addition, the AO can resort to valuation whether or not he is satisfied about the correctness or completeness of the assessee's accounts. The provisions also empower the AO to disregard the report from the Valuation Officer. Such blanket powers will increase the litigation and hardship to assessees.
8.	Provisions related to special audit u/s 142(2A) should be restricted to avoid undue hardship to assessee	Provisions related to special audit should be watered down, and only under exceptional circumstances, when there is clear evidence of revenue exposure due to complexity, or if the assessee's accounts are not audited under the new Companies Act, should special audit provisions be triggered.	Scope of section 142(2A) (related to special audit) has been enlarged to enable tax authorities to initiate special audit even in situations where the assessee has fully cooperated, and provided all information sought by the tax officer.
9.	Enlarged scope of Special Audit u/s.142(2A) – should be dropped	The amendment to section 142(2A) made *vide* Finance (No. 2) Act, 2014, should be withdrawn. The original scope of the section, which permitted special audit under specific circumstances, should be restored.	The amendment to section 142(2A) *vide* Finance (No. 2) Act, 2014, has enhanced scope of special audit and empowers the AO to conduct special audit in cases involving volume of accounts, doubts about correctness of the accounts, multiplicity of transactions in accounts, or specialised nature of the assessee's business activity. This power is in addition to existing provisions wherein the AO can ask for a special audit, considering the nature and complexity of accounts. The test of volume and multiplicity of transactions will result in special audit in almost all circumstances. All big corporates are already subject to statutory audit and tax audit. Hence, enlarging the coverage of cases for special audit is not warranted.
10.	Section 148 – Reasons for reopening to be sent along with notice for	The government should clarify, either by issuing a circular or issuing internal instruction to AOs that the "reasons for reopening" have to be sent along with the notice for reopening of assessment. This will	Section 147 empowers an AO to reopen an assessment if he has "reasons to believe" that income has escaped assessment. The section does not have any procedural requirements, but a practice has developed and been laid down by the SC in the GKN

S .No.	Issue	Recommendation	Justification
	reopening of assessment	simplify the reassessment proceeding procedure.	Drive Shafts case, to be mandatorily followed while reopening assessment. Presently notice is issued u/s 148. Later, the assessee has to request for the "reasons for reopening" from the AO.
11.	Consequences of non-clearance of 154 application and stay application filed by the taxpayer.	It is suggested that a legal mechanism for ensuring disposal of rectification and stay applications filed by the taxpayers should be made. A provision may be added in section 154 that in case the tax officer does not pass the rectification order or an order for stay acceptance/ rejection within six months of filing, the rectification/ stay application shall be deemed to be accepted.	In most cases, the rectification and stay applications filed by the taxpayers are overlooked/ unattended by tax officers.
12.	No adjustment of refund from the demand already stayed by the AO	It is suggested that a provision be placed for resolving the concern of corporates that where any stay has been granted until the disposal of appeal, the refunds arising to taxpayer for any other assessment year or any other matter (say corporate v. TDS) should not be adjusted against stayed demand.	Generally, all the big corporates are assessed by the income tax department and may have pending litigations where stay has been granted upon payment of partial demand. Even after payment of partial demand, the balance demand appears on the system resulting in non-granting of refund of other assessment years.
13.	Clarification for rupee denominated loans in sections 194LC and 194LD	• Rupee-denominated loans should be included in sections 194LC and 194LD for a lower withholding rate of 5%.	The Finance Act, 2017 amended section 194LC for lower a withholding rate on offshore rupee- denominated bonds but no specific amendment was brought for rupee-denominated loans. It is suggested that rupee-denominated loans should also undergo a lower withholding rate of 5%, as these are also raised in pursuance of Track III of the ECB regulations. Similar amendment is required in section 194LD of the Act.
14.	Change in due dates for payment of advance tax – Section 211	The provision requiring payment of 15% as advance income tax on or before 15th June in each year be scrapped. The schedule for payment of advance tax should be fixed in such a way that not more than 75% is payable as advance income tax on or before the 31st March each year, and 100% by 15th June of next financial year. This will save interest for assesees, as they can predict and pay correctly. Revenue collection of government will not be affected, as government will receive last instalment of advance tax in June, instead of first instalment. We suggest 1st instalment (25%) in	U/s. 211, Companies and individuals have to pay 15% advance income tax on or before the 15th June each year. This causes unnecessary hardship. Further, it is extremely difficult to compute taxable income within 75 days from the commencement of the financial year - projections for depreciation (due to new acquisition or sell), TDS certificates that may be received, for example, cannot be ascertained accurately. Moreover, projections of profitability/ income tend to vary from month-to-month. Also, the requirement to pay 100% of the amount computed as income tax on or before 15th day of March each year results in curtailing cash inflows of companies.

S .No.	Issue	Recommendation	Justification
		Sept, 2nd instalment in Dec (30%), 3rd instalment in March (30%) and 4th instalment in June (15%).	
15.	Clarity on applicability of interest u/s 234C in case of interest on income tax refund	The benefit of non-levy of interest u/s 234C should be extended to interest on income tax refund received during the financial year.	Interest u/s 234C should not be levied in case of failure to estimate the interest on income tax refund since interest on income tax refund is to be offered to tax only when it is actually received.
16.	Interest u/s.244A	Section 244A of the Act should be amended to increase the rate of interest on refunds due to the taxpayer from 0.5% p.m. to 1% p.m.	• For delay in payment of tax, the Revenue charges interest at 1% p.m. u/ss 234A, 234B and 234C of the Act. The interest on refund due to the taxpayer is calculated at 0.5% p.m. The rate of interest charged on the taxpayer as well as the rate of interest payable to the taxpayer should be kept the same.
17.	Amendment to S.263 relating to revision of orders prejudicial to revenue	Explanation to s.263(1) should be withdrawn.	The amendment to s.263(1) by insertion of an Explanation provides that an order passed by an AO shall be deemed to be erroneous insofar as it is prejudicial to the interests of the revenue, if, in the opinion of the Principal Commissioner or Commissioner, the order i. is passed without making inquiries or verification which should have been made; ii. is passed allowing any relief without inquiring into the claim; iii. has not been made in accordance with any order, direction or instruction issued by the CBDT u/s.119; or iv. has not been passed in accordance with any decision which is prejudicial to the assessee, rendered by the jurisdictional HC or SC in the case of the assessee or any other person. Such broad rights and powers to invoke s.263 defeat the purpose of simplifying the law and reducing litigation.
18.	Sections 273A, 273AA and 220(2A) – time limit for disposing petitions for waiver of penalty, and for waiver of interest u/ss.220, 234A/B/C	Sections 273A, 273AA and 220(2A) should be suitably amended, and the CBDT should issue suitable directions u/s 119(2)(a), providing for time limit for disposal of petitions, for waiver of interest thereunder, and providing for time limit for disposal of petitions for waiver of interest u/ss 234A, 234B and 234C.	A time limit of one year has been prescribed for disposal of an assessee's revision petition u/s 264, but there is no such time limit for disposal of petitions for waiver of penalty u/ss 273A and 273AA and for waiver of interest u/ss 220, 234A/ B/ C. Consequently, assessees' petitions on these points remain unattended for long. It is desirable that a limit of one year from the end of the financial year, in which the petition is filed, be prescribed in all these cases.

S .No.	Issue	Recommendation	Justification
19.	Section 276B – Clarification w.r.t initiation of prosecution proceedings where tax and interest paid in full	An explanation should be inserted to section 276B, clarifying that no prosecution will be initiated in cases where assessee has made good the default by depositing the amount with interest as prescribed under the relevant provisions of the Act, and also clarifying that in cases where assesses are not repeat defaulters, prosecution provision shall not be applicable. This will encourage compliance with the law in a time bound manner and reduce litigation. Alternatively, section 276B of the Act to be amended to provide that the prosecution proceedings should not be initiated if the default is for a period less than six months or amount is less than INR 100,000, where the subject default is *suo moto* rectified by the assessee.	Retention of government dues beyond the due date is an offence liable for prosecution u/s 276B. The defaulter, if convicted can be sentenced to rigorous imprisonment for three months to seven years. As per revised guidelines, defaulters who have retained TDS deducted and failed to deposit it in government account within due date shall be liable for prosecution, irrespective of the period of retention. Although the offence can be compounded by the Chief Commissioner having jurisdiction over the assessee, the initiation of prosecution leads to hardship in genuine cases where assessees have *suo moto* discovered the default and made payments of TDS along with interest (even before show cause notice for initiation of prosecution is issued to them). Once the assessee has made good the default with interest (as default only causes temporary financial loss to the exchequer), he should not face punitive measures twice (i.e. once penalty, and subsequently, prosecution) for the same default.
20.	Claim made during the assessment proceedings	The Act should be suitably modified to provide that the tax officer is duty bound to allow legitimate claims of taxpayers made during the assessment proceedings.	Tax officers reject claims made by taxpayers during assessment proceedings which are omitted in the return of income relying on the Supreme Court ruling in the case of Goetze (India) Ltd. *v.* CIT (2006) 284 ITR 323 (SC) wherein the Court held that the Assessing Officer cannot entertain a claim of deduction otherwise than by filing a revised return.
21.	Authority for Advance Rulings	• It should be ensured that the time limit prescribed for passing orders should be adhered to by the AAR.	The Authority for Advance Rulings (AAR) has a significant backlog of cases. Obtaining an advance ruling within a reasonable time has become extremely difficult.
		• Considering that the objective behind AAR is to provide faster dispute resolution mechanics, it should be specifically provided that mere filing of income tax return should not debar the taxpayer in approaching the AAR.	Certain contrary recent judicial precedents (including of AAR rulings) has created ambiguity regarding the maintainability of AAR in case the return of income has been filed.
22.	Deduction should be available for allowing GST input tax for which credit is not available	There should be a specific provision in the income-tax law allowing for deduction of any portion of input tax for which credit is not available under GST.	Input tax, if not allowed as credit under GST, becomes an item of cost. There is no reason why an assessee should not get expense deduction in respect of input tax credit not available to him, provided the denial of input tax credit is not attributed to the assessee's own fault.

S .No.	Issue	Recommendation	Justification
23.	Deduction for allowing compensation paid for anti-profiteering cases	Anti-profiteering compensation, being an expenditure incurred in the course of business should be allowed as a deduction.	The excess profit made due to rate reduction of GST or due to availability of input tax credit would be treated as income. Correspondingly, the compensation paid for making the excess profit should be allowed as an expenditure.