Pre - Budget Memorandum 2021 - 22

Direct Tax

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AMCHAM Pre-Budget Memorandum
Recommendations for Union Budget 2021-22

Direct Tax

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Provisions pertaining to digital economy

SL. No	Area of Challenge	Issue	Recommendations
1.	Equalization Levy (EL)	• The scope of the EL has now been expanded by introduction of Section 165A of the Finance Act whereby EL has been made applicable to e-commerce supply or services made or provided or facilitated on or after April 1, 2020. However, the amended provision of Section 10(50) of the Act states that the above exemption will be applicable on or after the 1st day of April 2021", and not April 1, 2020 as should be the case.	• Request that Section 10(50) of the Act be amended to include income from transactions liable for EL under Section 165A of the FA from April 1, 2020 onwards • There is a time lag resulting in an income being charged to EL at the rate of 2 percent and to income-tax under the provisions of the Act for FY 2020-21. • Such date mismatch appears to be an inadvertent error and it is urged that suitable amendment should be made to s.10(50) to make it effective from 1 April 2020 i.e. FY 2020-21.
		• Under the current provision, any consideration received by a non-resident e-commerce platform for facilitating Indian sellers to export to markets outside India would be exposed to EL.	• It is strongly urged that facilitation fee earned by non-resident e-commerce operator on exports from India should be exempt from EL. • Such levy will not only impact the exports from India but also expand the scope of the levy to services consumed by final customers outside India.
		• The definition of 'e-commerce operator' is wide enough to cover many digital service providers such as banking or insurance companies, payment processing / payment facilitation	• The definition of 'ecommerce operator' should be clearly defined and aligned with e-commerce as understood in normal parlance. Further, it should be specifically clarified that any services provided by the non-resident e-commerce operator, which are not related to its electronic facility or

		companies, telecom, online education, healthcare and such other companies who are providing digital services through a website or portal or even a cloud service provider ('CSPs') which acts as an infrastructure service provider. All internet intermediaries and digital companies are not necessarily e-Commerce operators. Further, there are various terms which have not been defined in the provisions, such as 'digital facility' or 'electronic facility' or 'platform', etc. The term 'online' is defined but has a wide coverage.	platform for online sale of goods or online provision of services or both should be excluded from the definition of 'online services'. • The clarifications shall lead to minimisation of disputes by clarifying aspects of the new law and enable timely compliance. Further, owing to the wide scope of the definition of 'online' in its current form, there could be unintended consequences in case of traditional brick and mortar businesses. It may be noted that there is no business/ industry which does not use any form of digital medium to operate its business. For e.g. almost every business has a website and electronic/ digital form of payment.
		• The current definitions of expressions under the EL may unintendedly cover certain transactions and business models which are B2B supplies and therefore should be carved out of its scope, as these result in double taxation, such as inter-group services including IT/ ITES services, management support services, support services, etc. provided by foreign group companies to its group entity in India; and reseller/ distributor arrangements wherein digital services/ goods are sold by non-resident entities through Indian establishments acting as re-sellers/ distributors.	• Intra- group company transactions and reseller/distributor arrangements should be excluded from coverage of EL. A clarification may be issued to the effect that there shall be no double taxation of the same intra-company transaction between related group entities. • The Indian group entity pay due taxes in India on their income in accordance with the Indian tax and transfer pricing provisions. However, EL would levy an additional tax on the same transaction by virtue of the wide scope of 'e-commerce operator' under the EL provisions. Foreign companies transact their businesses globally through setting up different structures including by setting up a local presence (by way of a subsidiary, branch etc.) for genuine commercial reasons and this should not create additional layers of taxation for such company in India.

		• As per section 165A of the Act, EL shall be levied on the amount of consideration received or receivable by an e-commerce operator from e-commerce supply or services made or provided or facilitated by it. It is not clear if the 'consideration' in case of sale of goods/ services facilitated by the e-commerce operator refers to the gross consideration / value (i.e. value of goods/ services) or to the net margin earned / commission or listing fee charged by the ecommerce operator for the online facilitation of sale of goods and / or service for a third-party seller.	• It may be clarified that the levy will apply only on the facilitation fees earned by such marketplace for the online facilitation services or commission received by an e-commerce operator and not the total gross receipts/ consideration in case of sale of third party goods or services facilitated by non-resident e-commerce marketplace on their platforms. It needs to be further clarified that EL at the rate of 2 percent should be calculated on the amount of 'consideration', excluding any GST payable by the e-commerce operator. • Different industries and businesses follow different practices for accruing the gross margin. An EL on the gross consideration for online marketplaces/ aggregators with very low margins would place significant burden on the cash flow position of these entities. As an illustration, in case the customer pays INR100 on the e-commerce platform for purchase of a product, the platform retains INR2 and pays INR98 to the third party. Here, it is unclear whether EL shall be applicable on gross margin (INR2) or gross consideration or receipts (INR100). Levy of EL on gross consideration or receipts of INR100 would lead to onerous consequences and adverse implications on businesses operating on low margins. • A suitable clarification may be issued that EL is to be levied with reference to actual consideration received and accordingly, consideration attributable to sales returns or credit notes given to the customers on account of claims will be deducted to determine the base which will be subject to EL. • Further, a suitable clarification may also be provided that EL will be levied with reference to consideration flowing to

			the operator and will exclude collections on behalf of Government, such as GST, indirect taxes, etc.
		• Post-discharge of Levy by a non-resident, in case a dispute arises as to the taxability of receipt [such as the existence of Permanent Establishment (PE) or characterization of royalty or Fee for Technical Services (FTS)], and the non-resident is made to pay the new tax demand and penalty and interest imposed by the tax authorities, the non-resident will be subject to double taxation and liable to pay penalty and interest for no fault on its part.	• In case a tax demand is made against the non-resident under any other grounds such as the existence of PE or characterization of royalty or FTS after the non-resident has discharged the Levy, such Levy paid by the non-resident should be adjusted against the tax demand. Further, no interest and penalty should be imposed on the non-resident with respect to such tax demand given the lack of clarity in the law regarding the applicable grounds for taxation of the non-resident. • In order to reduce litigation and avoid genuine hardship faced by non-residents, this becomes critical in cases where such transactions are already a subject matter of ongoing revenue audit or tax dispute/ litigation in India.
		• Digital companies cater to global needs and the customers are spread globally. It may be challenging for companies to track IP addresses of users and new systems will need to be built by companies to track such IP addresses, which may not be 100 percent accurate. Further, companies would need to commit significant resources for this purpose, which will clearly not serve the objective of digitization.	• Such transactions should be excluded from the ambit of EL as this may also apply to customers travelling overseas or to India. Alternatively, Government should provide guidance and clarity on the manner of determination of use of IP address in India and allocation of revenues based on purchases made through such IP addresses to ensure there are no varied interpretation. • We understand that the intention of new EL provisions is to levy tax on those non-resident entities which are making a profit from Indian customers. However, the levy applies even in the case of foreign e-commerce operators selling goods and services to non-residents who may be temporarily in India and using Indian IP addresses. In such a case, the seller and buyer are both outside India's

			jurisdiction and there is no basis for such taxation as no value is generated from Indian customers. The Levy will act as a deterrent for international businesses to even display their goods/ services in India and would deprive the Indian public of the latest innovations and technologies available over the internet as businesses will implement measures to ensure that anybody with an Indian IP address does not view their websites.
	Scope of Equalization Levy	• The current scope of the 2 percent Equalization Levy as introduced per April 1, 2020 has been defined so wide that it covers non-digital transactions like the sale of goods which has been confirmed over e-mail etc.	• Clarity required as to the scope of EL, i.e. to limit it to digital companies and not to include non-digital taxpayers. • Reference is made for instance to DST rules as introduced in European jurisdictions (e.g. France, Italy and UK) focusing on true digital companies / E-commerce platform providers rather than including manufacturers that partly use internet (platform) to arrange for sales of parts/products. Current EL-scope disincentivize sellers from selling B2B through new channels and could result in businesses not expanding to other channels and therefore reducing trading activity and economic growth. • Clarification is required to restrict EL to highly digitalised products and services and do not extend to e-commerce that merely facilitates communication, placement or conclusion of order.
		• The amendment means that any cross-border sales into India with a "bill to India" attracts 2 percent EL. This is over and above every other Indian tax applicable today and this additional tax	• It is suggested to address these issues and provide appropriate clarifications on these aspects. • There is no clarity on whether E-commerce supply or services (ESS) EL can be claimed as a credit against taxes payable in respective resident countries and whether ESS

		of 2 percent will need to be paid w.e.f. July 2020. • Ambiguities present in interpretation, given there are no FAQs or Explanatory Memorandum **Key issues with the Levy:** • Non-resident is required to obtain Permanent Account Number (PAN) to be able to comply with the EL. The law was introduced on 27th March and made applicable from 1st April, leaving no time for planning and implementation. • E-commerce operator will be liable to taxes in its resident country as well. There is no clarity on whether EL can be claimed as a credit against taxes payable in respective resident countries and whether EL can fall within the ambit of 'tax' as defined under the respective tax treaties to avail Foreign Tax Credit (FTC) • Compliance burden on non-resident foreign companies, who are already subject to multiple taxes. This will impact India's ease of doing business position	EL can fall within the ambit of 'tax' as defined under the respective tax treaties to avail FTC. To avoid double taxation and additional cost, it is recommended that it may be clarified that EL is a tax on income and this clarification will mitigate double taxation for taxpayers. • In order to ease the compliance burden for non-residents, a mechanism may be introduced for compliance whereby an authorised representative of non-residents in India can fulfil compliances under EL. Alternatively, certain thresholds may be specified exempting non-residents from undertaking compliances in India.

	Carve out to financial services from EL	• EL is a deemed tax at the rate of 2 percent on consideration without a credit mechanism. Its wide reach could have unintended consequences and severe implications. The highly regulated nature of financial services industry means financial services marketplaces are often closed environments with strict rules and limitations about how financial services businesses/marketplaces interact with users, including restrictions on the products and services they are able to offer. Financial services businesses often bear significant risk. The wider macroeconomic risks financial institutions inherently present to the economy mean financial services businesses are typically required to hold capital against these risks and their direct or indirect exposure to other market participants. The regulated nature of the financial services sector means that much of their activity is localized to the markets they operate. The concern about unrecognized value creation due to the nature of current international tax rules does not apply to banking groups which adhere to	• A specific carve out from the Equalization levy for the financial services industry

		transfer pricing rules for attribution of income and payment of expenses.	
	Appeal / grievance mechanism for Non-resident to challenge the charge of EL	• Under section 174 of the Act, right to appeal by a taxpayer to the Commissioner of Income-tax (Appeals) [CIT(A)] is restricted only to penalty order issued under the EL provisions. • EL provisions do not give right to the e-commerce operator to file appeal against any other grievance emanating from these provisions – such as challenging the applicability of EL on the e-commerce operator.	• An appeal mechanism should be introduced to enable the Non-resident to challenge the applicability of EL provisions
2.	Clarity in provisions relating to TDS under section 194-O	• Section 194-O of the Act provides for levy of taxes on the gross amount of sales or services for which amount is remitted by the e-commerce operator to the e-commerce participant. The provisions are currently widely worded, i.e. amount of sales has not been defined in terms of what relevant items it should include. • In case of sales of goods, sales returns are very common in both retail and wholesale scenarios. In categories like fashion merchandise, the returns can be as high as 25 percent of the sales. TDS on gross level adversely affects the working capital of the e-commerce	• It may be clarified that Sales returns or cancellations shall be excluded while computing the 'gross amount' for the purpose of section 194-O of the Act and the withholding applies to the net amount of sales, similar to GST.

		participant. The provisions of TCS on e-commerce operators under GST specifically provides for a reduction of "taxable supplies returned to the suppliers through the e-commerce operator" from the sales value to arrive at the 'net value of taxable supplies' on which the provisions of TCS are applicable.	
		• Further, in addition to the sale of the goods or service, incidental charges such as delivery or transport charges, packing charges, gift wrap charges, convenience fee, etc. are charged by sellers to customers and form part of the invoice raised by the sellers. • The incidental charges such as delivery, packing etc. charged to end customers by e-commerce participants represent the actual expenses incurred for availing services from the e-commerce operator. Accordingly, such incidental charges should not be subjected to TDS.	• It may be clarified that such charges incidental to the sale of the goods or service do not fall within the ambit of section 194-O of the Act and shall be excluded while computing the 'gross amount' for the purpose of section 194-O of the Act, provided, the same is separately shown on the invoice.
		• Further, for the purpose of other provisions of TDS under the Act, a	• It may be clarified that circulars and general clarifications pertaining to other withholding tax provisions should apply to section 194-O of the Act as well. These would include the clarification that TDS should not apply on the GST and

		CBDT[1] circular already clarifies that wherever the component of GST on services is indicated separately in an invoice for payment, tax shall be deducted at source on the amount excluding such GST.	Tax Collection at Source under section 206 of the Act component of the invoice, where separately shown on the invoice.
		• As per the provisions of section 194-O an exemption of INR 500,000 is provided to Individual and HUFs on the gross sales in a financial year. However, once the amount exceeds INR 500,000, TDS is required to be deducted on the entire amount during the financial year. • In the context of an online marketplace, it is inherently difficult, at the start of the year, to forecast whether the cumulative sales of a particular small and medium seller will cross INR 500,000 during the year and start applying TDS from the first sale itself – also, given increasing digitization, a lot of new small and medium sized sellers are getting on boarded which will amplify this situation and impact these sellers. An interest of at the rate of 1 percent per month will also be unfairly triggered on deducting TDS for the	• It is requested that the exemption threshold for TDS deduction be increased to at least INR 4 million) for individuals and HUFs, aligned with the threshold for GST registration prevailing in majority of the states. Further, it may be clarified that the withholding tax under section 194-O for individuals or HUFs, being e-commerce participants shall apply only on the incremental amount exceeding the minimum threshold during the financial year.

[1] CBDT circular 23/2017 dated July 19, 2017

		sales below INR 500,000 once the sales cross INR 500,000.	
		• The levy covers sale of all goods and services through digital or electronic means. Since the term 'goods' is not defined and services is defined in an inclusive way, pre-paid instruments such as gift cards, which are essentially money's equivalent, may be inadvertently interpreted to be covered.	• It may be clarified that pre-paid instruments (such as gift vouchers etc.) are excluded from the definition of goods and services. • Pre-paid instruments represent only a form of payment. Accordingly, it is essential to clarify that the TDS provisions do not apply to them.
		• Many Indian businesses use e-commerce channels to export products outside of India. TDS under section 194-O will add to the working capital burden of the e-commerce participant who usually operate on very thin margins. • India has exported products worth INR84 Bn billion through the ecommerce channels in 2018-19. The B2C ecommerce exports is an INR28 trillion opportunity for India and INR21 trillion for the MSME sector and is a welcome step towards reducing the trade deficit of India. Also, e-commerce plays an integral role in growing exports from India and the Government is evaluating new measures to boost exports from India through online channels. Given this vision of the Government to promote exports, TDS	• It may be clarified that provision of section 194-O will not apply when the e-commerce operator facilitates sale of goods or services by a resident seller to a customer outside India i.e. only sales to customers in India are covered under the provisions

		under section 194-O will add to the working capital burden of the e-commerce participant and thereby reducing his competitive advantage vis-à-vis other countries. This would only negatively impact the growth of the export sector for India.	
		• The e-commerce operator is obligated to withhold tax even where the payments are made directly by the purchaser of goods/services to the service provider. • In such scenario, the e-commerce operator have no control over the payments made directly to the service providers and hence, practically it is impossible for e-commerce operator to withhold any tax from such amount. To comply with the withholding tax provisions, the e-commerce operator will have to deposit taxes from their pocket, thereby heavily impacting their working capital and their business profits.	• Relaxation should be provided from the withholding tax provisions under section 194-O of the Act where payment is made directly by the purchaser of goods/services to the service provider. Necessary guidelines should be issued by the CBDT under section 194-O(4) of the Act to this effect.
3.	<u>Clarification on Significant Economic Presence ('SEP')</u>	• There is presently no clarity on the applicability of the SEP provision as it is widely worded and extends to all transactions in goods, services and property. • There is no clarity on phrases such as "carried out in India", "systematic and	• More clarity is required on the coverage. It is recommended to exclude from the SEP, transactions in goods, services or property done from outside India and with no nexus with India. • Clarification on "carried out in India". Examples of cases under which a non-resident can be said to be carrying out a transaction in India should be provided.

		continuous soliciting of business", "engaging in interaction" and "download of data or software in India".	• Phrases such as "systematic and continuous soliciting of business", "engaging in interaction", "download of data and software in India" are open ended and should be deleted or clarified in precise and identifiable terms. • Determining SEP based on the user participation should be removed. Without prejudice to this, threshold of number of users should be determined with reference to 'active users. Difference should be carved out between 'active users' and 'passive users. • The phrase "carried out in India" is ambiguous. In a transaction of sale of goods to an Indian customer, the title and risk in the goods are transferred outside India and no activity is undertaken by the non-resident seller in India. In cases where the overseas seller does not have any business connection in India, this sale transaction concluded outside India should not to be taxed in India since there is no nexus with India. This was the position prior to the introduction of the SEP provision through Finance Act, 2018 and this position should continue. • The scope of the terms "systematic and continuous soliciting of business" and "engaging in interaction" should be defined in a manner such that only those non-residents should be taxed in India when there is a direct generation of income from India. • To avoid ambiguities meaning of "download of data and software in India" should be clarified. Given the volatility involved in ascertaining an accurate user base the methodology dependant on user base is likely to be unreliable and may lead to incoherent economic outcomes. This may therefore lead to significant hardship for companies practically and it make compliances

			burdensome. This is because, determination of user participation would be expensive, highly unreliable, could alienate users and may contravene data privacy laws. Under various circumstances, multiple or fake user accounts are created. Thus, while determining the thresholds, it is pertinent that only 'active users' should be considered while calculating the threshold.

Tax and depreciation rates

SL. No	Area of Challenge	Issues	Recommendation
1.	Tax rates for business in India	• Presently, companies whose gross receipts or turnover do not exceed INR 400 crore in FY 2018-19 are eligible for a reduced tax rate of 25 percent (plus surcharge and cess). Other entities such as companies exceeding these thresholds, LLPs, are taxable at 30 percent (plus surcharge and cess). India should evaluate its tax rate to maintain competitiveness in the market as this would lead to spur in economic growth and increase tax collections. This is especially relevant considering that several tax exemption/ incentive schemes have been phased out. • There is a need to continue with the scheme of reduced tax rate for entities	• To reduce the income-tax rate to 25 percent (plus surcharge and cess) for all companies, LLPs and other forms of enterprises across all industries. • The increased rate of surcharge and cess makes cost of doing business in India significantly high. These increased tax costs impact investor sentiment and economic growth. Therefore, it would be appropriate to consider removing / reducing the levy of surcharge and cess.

		across all industries in India and to extend this to all forms of enterprises.	
2.	Maintenance, Repair and Overhaul (MRO) industry	• In order to make, Indian MRO industry attractive, the Government should consider providing tax concessions/benefits in the direct tax area.	• Reduced corporate tax rate of 15 percent to be extended to MROs keeping at par with manufacturing companies. • Lower rate of withholding at the rate of 2 percent on payments made by Indian operator to MRO, similar to contractor payments in order to address cash-flow issue.
3.	Rate of depreciation on Computers and Computer software to be increased from 40 percent to 60 percent	• Companies in the IT sector make significant investment in computers, software and other IT equipment. Further, due to rapid advancement in technology, computers and software become obsolete in 2-3 years only. Hence, depreciation rate of 60 percent (useful life of around 3 years) is more appropriate for computers and software as compared to the rate of 40 percent (useful life of around 5 years)	• Hence, it is recommended that the rate of depreciation allowable be increased again to the earlier level of 60 percent by making the necessary amendment in Appendix I of the Rules.
4.	Consistent Corporate tax rate for domestic and foreign companies/ banks	• Foreign banks contribute significantly to the growth of the Indian economy by boosting international transactions and also increasing employment opportunities in the country. The growing Indian economy has benefitted by the sophisticated high-quality financial services offered by foreign banks due to their business model and range of product suite. Foreign banks have been innovative in identifying	• Amend Section 115BAA of the Act to grant the Branches of foreign companies/banks an option to opt for base tax rate of 22 percent akin to domestic companies/banks

		needs of corporates, creating products and have enabled Indian corporate client's access to global markets. Branches of foreign banks are treated at par with Indian banks for nearly all matters and are subject to the same prudential regulations and norms. For income-tax purposes, the method for computation of business profits and taxable income is the same for both Indian and foreign banks. Domestic Indian banks have opted for a lower rate option at the rate of 22 percent (plus surcharge and cess) under the tax laws. As similar lower tax rate option is not available to foreign companies, it has created significant disparity between Indian banks and Foreign Banks. Branches of foreign companies/ banks are taxed at the base rate of 40 percent (plus surcharge and cess). There should be parity in corporate tax rates for branches of foreign companies with domestic companies in line with global practice of corporate tax parity across all companies. Examples of countries with tax rate parity include all BRIC countries ex India, majority of OECD countries (e.g. UK, Japan) and	

		countries like Singapore and Hong Kong.	
5.	Rationalisation of Holding Periods and Rates of Tax for computation of Capital Gains	• Currently, there are 3 different holding periods for different types of assets to qualify as long-term capital assets. There is a period of 12 months for listed equity shares, listed securities, units of equity-oriented funds, and zero-coupon bonds, a period of 24 months for unlisted shares and immovable property, and a period of 36 months for all other assets. The classification of an asset into one of these categories often creates confusion and avoidable litigation. • Similarly, there are different rates of tax and availability of indexation for various categories of capital assets. 10 percent without indexation for long term listed equity shares, equity oriented mutual funds, zero coupon bonds and other listed securities, 10 percent without indexation (only for non-residents) in case of unlisted shares, 15 percent without indexation for short term listed equity shares or units of equity oriented mutual funds, 20 percent with indexation for all other long term capital assets, and 30 percent (normal rates) for all other short-term capital assets.	• Both holding periods as well as rates of tax need to be rationalized. Holding period should be 24 months for all assets, other than listed equity shares or equity oriented mutual funds, where it can continue to be 12 months. • Rate of Tax should be 10 percent without indexation for all listed securities, unlisted securities held by non-residents and all units of equity oriented mutual funds, with 20 percent indexation for all other long-term capital assets.

Carry forward and Set Off of losses

SL No	Area of challenge	Issues	Recommendation
1.	Carry forward of losses under Section 79 in the case of intra-group share transfer	• Section 79 - Notwithstanding anything contained in this Chapter, where a change in shareholding has taken place in a previous year, • 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 51 percent of the voting power were beneficially held by persons who beneficially held shares of the company carrying not less than 51 percent of the voting power on the last day of the year or years in which the loss was incurred. • 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 case of any business reorganization within a group such that the ultimate shareholder of the company remains the same, provisions of section 79 shall not be applicable.

		• The only exception under the existing provisions is with respect to any change in the shareholding of an Indian company which is a subsidiary of a foreign company as a result of amalgamation or demerger of a foreign company subject to the condition that 51 percent shareholders of amalgamating or demerged foreign company continue to be the shareholders of the amalgamated or the resulting foreign company.	
2.	Carry forward of losses and unabsorbed depreciation in the case of amalgamation	• Benefit of carry forward of losses and unabsorbed depreciation are not allowed in case of amalgamation of companies not owning an 'industrial undertaking'. • Under the existing provisions of Section 72A, the benefit of carry forward of losses and unabsorbed depreciation is not available to all the companies especially companies engaged in the business of providing services. Today, there is unprecedented increase in adoption of digital services such as payments, e-governance, e-commerce and entertainment which will necessitate consolidation in these sectors for growth. Thus, extending	• The benefit under section 72A of the Act to carry forward of loss and depreciation on amalgamation should be extended to the service industry.

		this provision to the service industry can encourage rapid consolidation, growth and to make India a competitive country for foreign investment in services sectors.	

Withholding tax related provisions and other aspects

SL No	Area of challenge	Issues	Recommendation
1.	Interest on non-deduction of TDS	• Delay in deduction of TDS within the same month attracts interest at the rate of 1 percent under section 201 of the Act. Even if there is a single day delay in deduction of TDS, a full month interest is applicable even when the deduction is made within the same month and liability remitted on time as per the due date. • The Act does not specify any time limit for completion of withholding tax proceedings under section 201 in case of non-residents.	• Amend the provisions to provide relaxation in cases where TDS is deducted within the same month and dues are paid on time within the due dates. • Specify a reasonable time limit for completion of withholding tax proceedings in case of non-residents (*similar to the period limitation specified for residents in Section 201(3) of the Act*).
2.	Simplifying requirement to issue and maintain TDS certificates	• TDS certificates are required under law to be issued by the payer within timelines and maintained by payees for claiming tax credit. However, in	• Remove the requirement for payers to issue TDS certificates and prescribe Form 26AS in the tax laws as the basis for tax authorities to granting tax credit.

		practice, tax authorities have been relying on Form 26AS for granting tax credit during tax assessments. • From an ease of doing business perspective and given GOI's vision of digitization, prescribing Form 26AS as the basis for granting tax credit should suffice for claiming tax credit. This would reduce costs and efforts for document maintenance.	
3.	Issues in claiming Tax Deducted at Source (TDS) credit	-	• It is recommended that a mechanism be devised to allow TDS credit to the deductee even if the same is not appearing in the Form 26AS, if there is an evidence that tax has been deducted at source on the income.
4.	TDS obligation in certain cases	• Where any sum referred to in sub-section (1) is credited to any account, whether called "Suspense account" or by any other name, in the books of account of the person liable to pay such income, such crediting shall be deemed to be credit of such income to the account of the payee and the provisions of this section shall apply accordingly. • Companies are required to publish financial results for each quarter and for the purpose of management information financial results are needed on monthly basis. Passing of entries for provision towards expenditure is essential for arriving at result for the	• It is recommended that provisions of Chapter XVII-B are suitably amended to provide that obligation to deduct TDS arises only when the payee as well as the amount payable to the payee are known with certainty. • Suitable amendments to be made to provide that compliance of TDS provisions is not required with respect to period end entries towards provision.

		month/quarter/period. Such entries are reversed on next day.	
5.	TDS rate u/s 194J	• Any person, not being an individual or a Hindu undivided family, who is responsible for paying to a resident any sum by way of: (a) fees for professional services, or (b) fees for technical services, or Shall, at the time of credit of such sum to the account of the payee or at the time of payment thereof in cash or by issue of a cheque or draft or by any other mode, whichever is earlier, deduct an amount equal to 2 percent of such sum in case of fees for technical services (not being a professional services)	• It is recommended that provisions of Section 194J be amended to expand the scope of 2 percent rate of TDS to professional services as well.
6.	Extension of sunset clause under Section 194LC and 194LD	• Currently, both these sections have a sunset clause of 30 June 2023. The benefit of the concessional withholding tax has been appreciated by the foreign investing community who has invested heavily into Indian debt market making full use of the aggregate government debt investment limit for foreign portfolio investors. To retain the attractiveness of Indian bonds for foreign investors and align consistency in interest payments to foreign	• Make base rate of 5 percent for deduction of tax at source a permanent feature on interest on External Commercial Borrowing and Rupee Denominated Bonds, as well as, for Foreign Portfolio Investors (FPIs) on interest on Government Securities / INR denominated corporate bonds.

		investors irrespective of the currency of loan or interest payments i.e. Indian Rupees or Foreign Currency, the sunset date for both sections i.e. 194LC and 194LD should be extended perpetually. This would incentivize the investors to invest for a longer period and build market for this segment and therefore would broaden the investor base. This will provide a much-needed boost to the Indian bond market which is yet to achieve its full potential.	
7.	Withholding tax provisions on payment to FPIs	• FPIs are subject to tax at varying rates depending on the country of residence and the provisions of the tax treaties India has entered into with the home country of the FPI. The income tax act currently has specified withholding tax provisions applicable to FPIs on various sources of income like interest, dividend and capital gains. To illustrate, capital gains are exempt from withholding tax whereas dividend and interest income (other than loans/bonds taxed at the rate of 5 percent) are subject to withholding tax at the rate of 20 percent plus applicable surcharge and cess. This creates a cash flow anomaly as the FPIs are	• No withholding of taxes on dividend and interest income. Tax will be discharged by way of advance taxes/ on repatriation similar to capital gains. • Alternatively, FPIs be permitted to obtain certificate for lower rate of tax by applying to the tax officer under section 197 of the Act.

		subject to lower tax rates under the tax treaty with country of residence and obtain refunds only after a lock in of 1-4 years which creates inefficiencies. Exemption from withholding on all sources of income in the hands of FPIs will ensure that FPIs discharge applicable tax by way of advance tax on remittance outside the county as per the certification issued by a CA.	

Litigation and Dispute Resolution related provisions

SL No	Area of concern	Issues	Recommendation
1.	Time limit for completion of appeals by the Appellate Authorities	• The Act does not specify any time limit within which the appeals filed before the appellate authorities must be disposed of although there are recommendatory guidelines. This results in undue hardship and overbearing litigation cost to the taxpayer	• Suitable provisions may be incorporated in the Act to prescribe specified time limits for disposal of appeals in a timely manner at all appellate levels • A prescribed time limit will enable the taxpayer in reducing the compliance burden and enable expedited and timely resolutions.
2.	Adjustment of refunds against demand stayed by the tax officer	• Companies that are subject to Income-tax scrutiny year on year often have several ongoing litigations across years. Companies deposit the specified demand under protest say 20 percent and rest of the demand is stayed until	• Amend the provisions suitably to not adjust demands against pending refund when a formal stay has been granted.

		disposal of appeal. However, any refunds for a different year is automatically adjusted against pending demand even though the demand has been stayed.	• In several cases, litigations span over years and adjusting of demands against refunds adversely impacts the working capital requirements of the Company.
3.	Institutional mechanism for settlement of tax litigation	• Amongst Asian countries, India stands out as one with the largest number of pending tax cases in absolute terms and in terms of the notional value of litigation. The lifecycle of a tax litigation from assessments to first appeal to Tribunal and then the Courts can take anywhere between 15-20 years or even more. For the purposes of ease of doing business, this needs to be addressed on war footing. Hence, there should be a mechanism in place, whereby the taxpayer should also be allowed an option to opt for a negotiated settlement before a Collegium of Commissioners on receipt of the draft order. Once settled, interest and penalty should not be applicable on the negotiated settlement amount.	• The taxpayer should be allowed an option to opt for a negotiated settlement before a Collegium of Commissioners on receipt of the draft order.
4.	Litigation management – Authority for Advance Rulings (AAR)	• AAR is an important judicial body formed to provide certainty to the taxpayers has not been effectively functioning. Appropriate and immediate action is required to be taken to make all three benches of AAR function properly and effectively, so as	• Mandatory time limit of 6 months from date of receipt of application be fixed for pronouncement of AAR order.

		to provide certainty to the taxpayers and investors, before entering into a transaction.	

Taxation of dividend

SL No	Area of concern	Issues	Recommendation
1.	Dividend taxation	• Shifting of tax liability on dividend income from the company to the shareholders has resulted in significantly higher tax outflow for individual shareholders falling in the higher tax bracket. This defeats the purpose of the change in the regime.	• To broad-base the capital markets and encourage savings and investments in equity, the dividend tax rate should be a concessional rate – say, dividend income upto INR 10 lakhs should be taxed at the rate of 10 percent and beyond that to be capped at the rate of 20 percent • Deduction of expenses pertaining to dividend income under section 57 should be allowed and in any case, there should be no restriction on allowance of interest expense.
2.	Taxation of foreign dividends	• As per the existing provisions of Section 115BBD, dividend income received by Indian companies from specified foreign companies (i.e. where shareholding of the Indian company is 26 percent or more) is taxed at the rate of 15 percent .	• It is recommended that Indian companies receiving dividend income from all foreign companies (irrespective of the level of holding of the Indian company in the foreign company), should be taxed at the rate of 15 percent . • Further, this provision should also be extended to LLPs earning dividend income from foreign companies.

Other areas

SL No	Area of concern	Issues	Recommendation
1.	Travel restrictions during COVID-19	• The CBDT has introduced relaxations when determining the residential status of an individual for FY 2019-20, for individuals who came to India before 22 March 2020 and were stranded on account of lockdowns and travel bans. Similar clarification is pending for FY 2020-21. Further, the employees may not qualify for short-stay exemption generally available under tax treaties under 'Dependent Personal Services'.	• Request a similar Circular for FY 2020-21 for the period impacted by lockdown, considering the lockdown and travel restrictions had greater impact in the current fiscal. The Circular should take into consideration specific dates of Lockdown, Unlock phases, and implications of the Vande Bharat Mission. Also, clarify that this forced stay owing to Covid-19 should not be considered for the purpose of evaluating the threshold criteria under Dependent Personal Services, for both FY 19-20 and FY 20-21.
2.	Clarity on furnishing of the income tax return ('ITR') for non-residents	• As per the amendment in Budget 2020, tax return filing exemption is available if taxes are deducted under section 115A. However, in a scenario where tax rate under Treaty is less than the rate under the Act or income is exempt under the Treaty, the same may not be available, which will defeat the purpose of the amendment and introduce compliance burden for non-resident.	• Provide exemption from filing return of income, in line with the amendment of Budget 2020, where applicable taxes are deducted under Treaty where beneficial Treaty rate is applied or when exemption is claimed under the Treaty. • Further, the Government should specifically clarify that where a foreign company has a Permanent Establishment ('PE') in India, then the requirement to furnish an ITR should trigger. A clarification will enable the non-resident in ease of undertaking tax compliances, and the clarity will help in avoiding litigation and achieve the objective for which it was introduced.

3.	Applicability of valuation rules under section 56(2)(x) and 50CA of the Act	• Valuation rules for section 56(2)(x) and section 50CA are applicable even in cases of genuine internal restructuring where ultimate ownership does not change.	• Suitable amendments should be made in Rule 11UA to provide that FMV of the underlying assets for valuation of an unquoted equity share should only be adopted in cases of transactions resulting in change in control and management in the company. Further, to determine, 'control' or 'ownership of the company', precedence can be taken from prevalent practices/rules followed under the Act and may be appropriately provided for in the rules. • The rules for determination of FMV of unquoted equity shares for section 56(2)(x) and 50CA of the Act had been introduced as anti-abuse provisions and intended to curb transfers of unquoted shares at nominal value despite such shares holding underlying assets of substantial value. However, it would be inequitable to apply the rule in cases where control in the company has not changed. Genuine cases of internal restructuring where the ultimate ownership does not change should be provided an exemption from adopting FMV as in case of rearrangement within the same owner group. • It may be considered to exempt valuation of unquoted equity shares at FMV if the transferor holds less than 25 percent of the shares. • Further, it would be impossible for a minority shareholder to be able to materialise the transaction based on FMV of the underlying assets, as practically, a minority shareholder may not have access to such information and hence, may not be able to compute value according to this rule. Thus, exemption from valuation when transferrer has less than 25percent should also be considered. • Clarification should be provided regarding determination of FMV of listed shares and securities under section 56(2)(x)

			of the Act in cases where applicable law prescribes a price protection mechanism. • It may be clarified that in cases where a price has been negotiated in terms of the applicable law / regulations, such price shall be deemed to be the FMV of such listed shares and securities for the purposes of section 56(2)(x) of the Act. • It could not have been the legislative intent to visit such genuine, *bona fide* transactions and taxpayers with a liability in such cases where the pricing determination is made within the framework of application Indian regulations.
4.	Clarity on utilization of SEZ re-investment reserve	• Section 10AA (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). • The deduction under clause (ii) of sub-section (1) shall be allowed only if ...:	• It is recommended that the necessary amendment should be made in Section 10AA(2) to clarify 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.

		(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 …… • 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: - • Whether the Plant & Machinery acquired using the SEZ reserve is to be used for the business of: o the same SEZ unit which created the reserve; or o any SEZ unit of the assessee; or o 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.	
5.	<u>Taxability of reimbursements of salary and other costs in</u>	• 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	• It is recommended that the provisions of Section 9(1)(vii) of the Act be suitably modified to provide that in a case where: -

	respect of personnel seconded to India	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.	○ 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 Services'. • Accordingly, payment of such salary and other costs at the time of reimbursement should also not attract withholding tax provisions.
6.	Allowability of Corporate Social Responsibility (CSR) expenses as deduction under /Section 37	• Explanation 2 to Section 37- For the removal of doubts, it is hereby declared that for the purposes of sub-section (1), any expenditure incurred by an assessee on the activities relating to corporate social responsibility referred to in section 135 of the Companies Act, 2013 (18 of 2013) shall not be deemed to be an expenditure incurred by the assessee for the purposes of the business or profession. • Considering that CSR expenses are statutorily required to be incurred as per the Companies Act, 2013, they should be allowed unconditionally as	• It is suggested that Section 37 be amended by withdrawing "Explanation 2" so that a company can claim deduction of its CSR expenses as being incurred wholly and exclusively for the purpose of its business. • Instead, CSR expenses can be brought under Section 43B allowing the same as deduction on actual payment/expensed date as against provision in the accounts. It is further recommended that Companies opting for tax under section 115BAA/115BAB of the Act be allowed at least a deduction u/s 80G of the Act in respect of CSR donations made to eligible entities, which has been withdrawn vide Finance Act, 2020.

		expenditure incurred wholly and exclusively for the company's business like any other statutory payments.	
7.	Clarity on applicability of Deemed Dividend	• 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. • It is our view, 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.
8.	Prosecution proceedings under section 276CC of the Act	• Section 276CC of the Act lays down prosecution in cases of failure to file the ITR within the due date. However, a non-resident may not file an ITR due to a non-taxable position adopted in cases	• Prosecution proceeding is an onerous proceeding with wide implications and should be reserved in cases that merit the initiation of such proceedings based on a proper examination of facts and circumstances.

		of tax treaty applicability or where there is lack of clarity in the Act or where two views are possible. • Multinational companies are subject to regulatory provisions of their home country and have been compliant with provisions in spirit. There are several instances where positions are taken by such companies in view of treaty provisions or ambiguous interpretation under the Act, where two views of interpretation are possible or where the company provides bonafides, etc. These are genuine cases and adverse proceedings like prosecution can act as a significant deterrent for multinationals to do business in India. At most instances it is seen that cases that go up to higher appellate levels, the ratio of winning of the taxpayer is relatively higher	• It is suggested that prosecution proceedings must not be invoked in genuine cases of claims made in relation to non-taxability. It is further suggested that parameters for identifying genuine cases should be introduced. This will be in line with the Government's recent push to decriminalise offences under various commercial laws. • In fact, CBDT may consider establishing a panel of 3 Commissioners (*similar to the procedure provided for GAAR*) responsible for according approval for the initiation of prosecution proceedings. This may result in prosecution proceedings in fit cases after proper application of mind.
9.	<u>Removal of cap on deduction for head office expenses under Section 44C</u>	• Section 44C was introduced in 1970s to protect India's tax base, particularly for the costs incurred outside India, with no specific mechanism under the Act to check related party transactions. Under the present-day tax regime, enough checks are in place under the Act to assess any related party transactions. Hence, a limitation on	• Cap of 5 percent of tax profits on tax deduction for Head Office expenses should be removed. Deduction u/s 44C of the Act to be explicitly extended to permanent establishments as well.

		quantum of deduction is irrelevant and should accordingly be done away with.	
10.	Definition of goods under section 206C(1H) - levy of tax collection at source (TCS) on sale of goods	• The term 'goods' is neither defined under section 206C nor under any other section of the Act which gives rise to ambiguities. TCS provisions should not apply on securities such as shares, stocks, etc.	• The term 'goods' should be defined as every kind of movable property other than money, actionable claims and securities including derivatives. 'Securities' should be referenced to the Securities Contracts (Regulation) Act, 1956, and the Reserve Bank of India Act, 1934.
11.	Deduction for Work from Home (WFH) expenses	• Support for business continuity would be ideal at this time. Many companies and firms shifted to Work-From-Home practices during the lockdown. The Government has encouraged employers to opt for such practices and these should be promoted, as these come with benefits such as decongesting roads, potentially increase female labour participation and so on.	• Expenses incurred by companies in enabling WFH for its employees should be allowed as an eligible business expense. For FY 2020-21, weighted deduction of 150 percent can be considered. This could include expenses towards development of Virtual Private Networks, data storage facilities, etc., as well as reimbursement of expenses incurred by employees such as electricity and internet connection charges, routers, necessary furniture, etc.