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The Chamber of Tax Consultants

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Pre-Budget Memorandum 2023

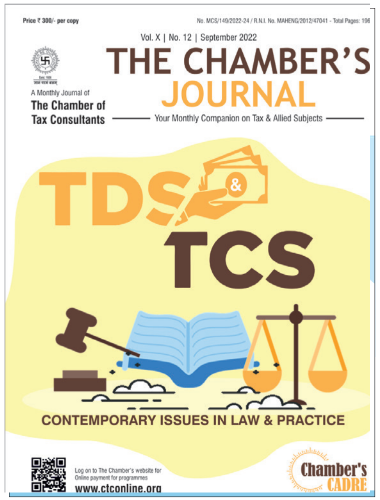
Suggested Amendments in respect of Direct Taxes for Finance Bill, 2023

Dated: 23rd November, 2022

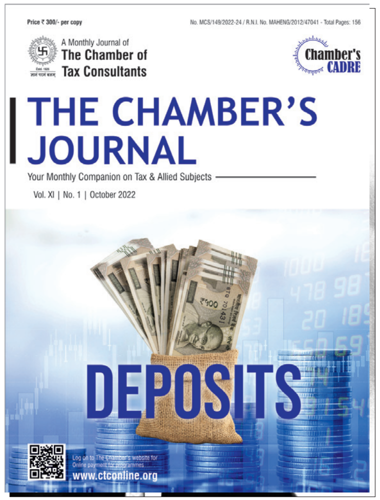
June 2022

July 2022

August 2022



September 2022



October 2022

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(A Monthly Journal of the Chamber of Tax Consultants)

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Mumbai | Delhi

23rd November, 2022

Shri Nitin Gupta,
Chairman,
Central Board of Direct Taxes,
Government of India,
Ministry of Finance,
Department of Revenue,
New Delhi –110001

Respected Sir,

Subject: Pre-Budget Memorandum 2023-2024–Suggestions on Direct Tax

We are pleased to submit our suggestions on Direct Taxes for the Budget of 2023. We have concentrated on only few suggestions which, we are sure, will meet with your approval. Each of the suggestions has been necessitated on account of the serious hardship or inconsistency in the law.

Thanking you,

Yours Sincerely,

For THE CHAMBER OF TAX CONSULTANTS

Sd/-	Sd/-	Sd/-
PARAG S. VED	**MAHENDRA SANGHVI**	**KETAN VAJANI**
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INDEX

1. DEFINITION

Sr. No.	Existing provision under the Income-tax Act, 1961 ("the Act")	Difficulties Obstacles / Hurdles either Interpretative, Administrative or otherwise	Suggestion or new clause Suggested
1.1	S. 2(41A) defines a resulting company to include the holding company. Meaning thereby, for a de-merger of undertaking in a wholly-owned subsidiary the shares can be issued by the holding company (and not the subsidiary company to which the business has been transferred) to the equity shareholders of the demerged company.	Difficulties arise in a case where the holding company of the amalgamated company issues shares to the shareholders of the amalgamating company since the same will not be covered by the definition. The merger provision was brought on statute much prior to the demerger provision and possibly, at that time this was not envisaged. But now we have the demerger provisions on the statute for more than two decades, but this inconsistency between the two regimes continues. There is no particular reason to not extend the same benefit in the case of a merger as that in the case of a demerger.	The concession of allowing the issuance of shares by the holding company should also be extended to the case of a merger i.e. the holding company of the amalgamated company should be allowed to issue shares to the shareholder of the amalgamating company.

2. SALARIES

Sr. No.	Existing provision under the Income-tax Act, 1961 ("the Act")	Difficulties Obstacles / Hurdles either Interpretative, Administrative or otherwise	Suggestion or new clause Suggested
2.1	Standard deduction of Rs. 50,000/- is allowed.	There are various expenses that employees incur during the course of employment which they cannot claim as deduction and the present limit does not adequately capture the same.	Justification: Employees during the course of their employment incur various expenses, including for upgrading skill for rendering their services as employees, which are much more in the case of employees having higher salary – a higher deduction for such expenses should be allowed. For avoiding leakage of revenue, such deduction may be certain percentage of salary, say 25% of the salary, and maximum amount may be restricted to Rs. 3,00,000/-. This would ensure that an employee who gets a salary is not put to any disadvantage compared to someone who draws the same amount as a Freelancer professional. Similar deductions are available under House property (standard deduction) and capital gains (cost inflation index).
2.2	Section 10(13A) r.w.r 2A provides an exemption of allowance from the	Presently, from income tax perspective it would be better to stay in rented premises rather than	To extend the benefit of HRA

	employee received towards rent payment (commonly known as HRA). Rule 2A provides for the computation of the eligible HRA which is primarily dependent on the salary of the employee and the quantum of rent paid by the employee.	buy a house. Both the options (buy or rent) should be at par from tax perspective and in any case renting should not be incentivized.	(exemption u/s 10(13A) even to EMI payment on home loan taken for acquisition of the first house by an employee. It may be clarified that double deduction of the same EMI payment would not be permitted i.e. same EMI cannot be claimed as an expense under the head house property or u/s 80C. This suggestion would also promote residential housing projects and also incentivize buy of property instead of paying rent.

3. HOUSE PROPERTY

Sr. No.	Existing provision under the Income-tax Act, 1961 ("the Act")	Difficulties Obstacles / Hurdles either Interpretative, Administrative or otherwise	Suggestion or new clause Suggested
3.1	Section 23- Explanation to Second Proviso: Interest on housing loan taken during construction period is allowed in five equal installments commencing from year of completion of construction.	Though the assesses have to pay Pre EMI interestto banks/ housing financial institution every yearthe deduction is postponed to future years putting more financial burden on borrower during construction period during which he mayalso be bearing the brunt of rent expenses. Manytimes, the projects are delayed, this adds further burden on the assessee.	The deduction for interest payable during construction period may be allowed in the year of payment itself. Justification: This will ease financial burden of the assesses who may been staying in rented accommodation during construction period and also promote ease of compliance as no need to keep track of interest paid during construction period to claim the same during further five years.
3.2	Amendment was made to S. 23(5), to tax the notional annual value of inventory where in the developer is unable to sell within a period of 2 years from receipt of Occupation certificate.	The concept of deemed annual value is made applicable on house property which is held as stock in trade. This provision being a deeming fiction has led to undue burden on the builders and developers. The builders and developers are being liable to pay tax on deemed annual value offlats held in stock beyond two years after the completion of construction. The builders / developers have tried to load the said cost into the price either directly or	Provision of house property income should not be made applicable to houseproperty held as stock in trade. Alternatively, if the above suggestion is not acceptable then the period of 2 years be extended to at least 5 years considering the real estate industry and current situation of real estate markets.

		indirectlyfor recovering from the proposed flat buyers. The deemed provision is a counterproductive measure to provide affordable housing in metrocities.	Justification: Considering the current slump in real estate market, this has resulted in undue hardship to developers who inspite of sufficient efforts to sell its inventory is required to discharge the tax on notional basis on unsold inventory.

4. BUSINESS INCOME & EXPENDITURE

Sr. No.	Existing provision under the Income-tax Act, 1961 ("the Act")	Difficulties Obstacles / Hurdles either Interpretative, Administrative or otherwise	Suggestion or new clause Suggested
4.1	The Finance Act, 2014 has added new Explanation in sub- section (1) of section 37 providing that any expenditure incurred by an assessee on the activities relating to CSR Referred to in section 135 of the Companies Act, 2013 shall not be deemed to be an Expenditure incurred by the assessee for the purposes of the business or profession and deduction shall not be allowed	As per the Companies Act, 2013, it is mandatory for specified companies (As per Section 135) to spend 2% of their average profits towards Corporate Social Responsibility. These expenses are all connected to social and charitable causes and not for any personal benefit or gain. It istherefore fair to allow the same as business expenditure. There is no bar on allow ability of CSR expenditure falling under other sections like35, 35AC etc. These expenses are statutorily required to be incurred under the Companies Act2013 and hence ought to be allowed as a deduction. These expenses are incurred towards CSR and go towards nation building.	There is a need to revisit this provision and the companies should be allowed 100percent deduction of CSR expenses undersection 37 with such safeguards as maybe needed. Since it is prescribed under thestatute.

4.2	Certain expenses being of revenue nature or of deferred revenue nature are considered as capital in nature and are Disallowed. They are not allowed even by way of amortization /depreciation. Amortization of long term Lease premium on Land & Building. Factory shifting or relocation expenses	Presently, expenditure of the nature described in first column suffers permanent disallowance. Mostof these are incurred during the process of expanding business and are in the nature of statutory expenses rather than discretionary and hence ought to be allowed at least to be amortizedover a 5-year period. Though there are several decisions allowing depreciation on some of such expenses, but in the absence of a clear legislative framework, it leads to litigation. In order to simplify the computation of business income, such expenditure requires to be allowed either	Expenditure which is incurred in the course of business may be allowed either as revenue or, if treated as capital, then, such expenditure is to be allowed in deferred manner or by way of depreciation. Hence, specific provisionmay be inserted.
4.3	Depreciation Allowance – Sec. 32Restoration of Depreciation Allowance in respect of cost of small items of assets.	In the past, with a view to avoid litigation on the point of nature of expenditure (i.e. capital or revenue) in respect of purchase of small items of assets, provisions had been introduced to treat cost of such assets as depreciation allowance. Earlier, the limit oncost of such assets was Rs. 750/-. This was then increased by the Finance Act, 1983 to Rs. 5,000/- again forthe same reasons. These provisions havebeen omitted w.e.f. Asst. Year 1996-97. The omission of the above provisions resulted in undue hardship and complexities. This was a useful provision to maintain simplicity and to avoid possible litigation on such small items of assets, based on principles of materiality.	The above provisions should be reintroduced, with a limit of cost of such asset being below Rs. 25,000/- Justifications: Such a provision will provide simplicityand avoid possible litigations.

4.4	Section 44AD relating to presumptive taxation which also covers income of Speculation and derivatives business. (F&O).	Justification: Speculation and F&O income, by their very nature, cannot have a net profit ratio of 8% of the total turnover or gross receipts. In fact, the turnover in such business is taken as profit and loss figures added up together. Applying a profit rate of 8% on such figure is absurd. It would ease the process if F&O income was excluded from the requirements of Section 44AD.	Income or losses from speculation or futures & options business, as specified under section 43(5), should be excluded from the purview of section 44AD.
4.5	Sub section (1) of Section 44ADA and section 44ADprovides that the section(1), be Deemed to have been already given full effect to and no further deduction under those sections shall be allowed including the salary and interest paid to Partners in case of Firms.		It is suggested to reduce the profit percentage to 25% for sec 44ADA. And, interest and salary to the partner should be allowed to all partnership firms including firm of professionals outof the Presumptive NP of the firm. Justification: Disallowance of salary and interest paid to partners would be unfair for partnership firms, where huge amount isa large sum is eligible to be drawn as salary by working partners in accordance with the partners' remuneration limits as suggested u/s 40(b) which is shown in the below examples and is taxable in their hands: <table><tr><td>Particulars</td><td></td><td></td></tr></table>

Section 44AD	Earlier Provision (Upto AY 2016 – 2017)	New Provision (From AY 2017 – 2018)
Turnover	80,00,000	80,00,000
Deemed Income @ 8%	6,40,000	6,40,000
Allowable Remunera tion	4,74,000	Nil
Total Income of Firm	1,66,000	6,40,000
Tax Payable by the Firm @ 30%	49,800	1,92,000
Tax Payable by	NIL	NIL

two partners		

Particulars Section 44ADA	Normal Provision	Under 44ADA
Gross Receipt of Firm	30,00,000	30,00,000
Deemed Income @ 50%	NIL	15,00,000
Regular Income (Say50%)	15,00,000	NIL
Allowable Remuneration	9,90,000	Nil
Total Income of Firm	5,10,000	15,00,000

			Tax Payable by the Firm @ 30%	1,53,000	4,50,000
			Tax Payable by two partners	49,000	NIL
			Total Tax Incidence	2,02,000	4,50,000

5. CAPITAL GAINS

Sr. No.	Existing provision under the Income-tax Act, 1961 ("the Act")	Difficulties Obstacles / Hurdles either Interpretative, Administrative or otherwise	Suggestion or new clause Suggested
5.1	Section 48 provides for the computation of capital gains. Broadly the section provides that the capital gains would be computed by subtracting from the full value of consideration accruing on the transfer of the capital asset, the cost of acquisition and cost of improvement of the capital asset.	In certain situations, the public shareholders, bond holders do not receive any consideration and their shares/bonds are cancelled pursuant to the resolution plan approved by the NCLT or RBI or under Banking Regulation Act. Therefore, commercially the shareholders/bondholder have lost their money and cancellation of shares/bonds also amount to extinguishment of the rights in such shares / bonds which is one of the mode of transfer as defined in section 2(47). Therefore, the shareholders should be entitled to claim the capital loss on cancellation of shares/bonds. However, Courts have taken a divergent view on the interpretation of Section 48. A suitable amendment in the Act will help in resolving the controversy and avoiding the unintended hardship to the stakeholders who have anyways lost their money on account of failure of the company.	A separate section may be inserted in the chapter of Capital gains so as to provide that in the case of extinguishment of any shares or bonds pursuant to NCLT order or under Insolvency and Bankruptcy Code or schemes approved under Banking Regulation Act or restructuring of any company under any circular issued by the Reserve Bank of India, the full value of consideration in respect of the shares / bonds so extinguished shall be considered as NIL for the purpose of section 48 of the Act. Alternatively, section 48 may be suitably amended to provide for this. We also recommend that since the purpose of this amendment is to avoid an unintended hardship the same shall be made with retrospective effect.

Suggestions on Capital Gains as submitted vide earlier letter dated: 01.11.2022

Part I – Simplification

1. Simplifying – Section 2(42A) and 49 of the Income-tax Act, 1961 ('the Act')

1.1. <u>Present provision</u>

Section 47 of the Act does not regard various transfers (like – gift, mergers, conversion, etc.) as chargeable to tax under Section 45 of the Act. Corresponding to such transfers, there are various clauses in Section 2(42A) which defines period of holding and Section 49 which provide for carry forward of the cost of earlier asset or cost to the previous owner.

1.2. <u>Issue</u>

Presently, Section 2(42A) and Section 49, are very detailed and individually deal with each type of transfer dealt by Section 47. This makes the sections very lengthy and difficult to read.

1.3. <u>Suggestions</u>

1.3.1. Section 2(42A), 49 and 55 – can be principle based.

1.3.2. Section 2(42A) would provide that if the asset becomes a property of the assessee pursuant to transaction covered by Section 47, then the period of holding of such assessee would include the period of holding of the earlier asset or previous owner, as the case may be.

1.3.3. Similarly, Section 49 would provide that:

a. If the asset becomes a property of the assessee pursuant to transaction covered by Section 47, then the cost of acquisition of asset in the hands of such assessee would be determined based on cost of acquisition of the earlier asset or previous owner, as the case may be.

b. Where the earlier asset also continues to be held by the previous owner, then the cost would be pro rata in the ratio of the value of net assets.

c. Where the acquisition of capital asset in the previous year or any subsequent year gives rise to income under the head capital gain (like u/s 47A, 45(5A)) or any other section (S. 56(2)(x), S. 115TD, S. 28(iv), etc.), the amount so charged would be deemed to be cost o acquisition of such asset.

1.3.4. To summarise, this concept-based sections would simplify the Act and the same time will not give any room for undue benefit to the taxpayers.

2. Simplifying the capital gains tax rate and period of holding

2.1. Present provision

2.1.1. The provisions in relation to tax rate *inter alia* provides for the following tax regimes –

- Listed shares (sold through exchange) : 10%
- Listed shares sold outside : 20% with indexation or 10% without indexation.
- Listed securities : 20% with indexation or 10% without indexation
- Unlisted shares : 20% with indexation
- Market Linked Debentures : 10% without indexation
- Equity linked MF – 10%
- Other than Equity Linked MF – 20% with indexation
- etc.

2.2. Issue

2.2.1. The present provisions in relation to rate of tax on capital gains and period of holding are very complex and cumbersome to apply.

2.3. Recommendations

2.3.1. Simplification of the tax rate and the period of holding. The division should only be between two class of assets – listed assets (anything which is listed and traded on an exchange) and all other assets.

Capital Gain Tax Rate –

- Listed assets – 10% (without indexation);
- Unlisted assets – 20% (with indexation)

Period of holding –

- Listed assets – 1 year;
- Unlisted assets – 2 years

3. Cost of bonus shares to be the same like stock split

3.1. Present provision

3.1.1. Presently the cost of acquisition of bonus shares (also units of mutual fund) is nil. Whereas the cost of acquisition of shares pursuant to stock split is the pro rata cost of original asset.

3.2. Issue

3.2.1. Both stock split and bonus issue are commercially the same transaction (though have different impact from accounting perspective).

3.2.2. Similar transaction having different tax impacts complicates the tax structure.

Further the bonus shares having nil cost gives an avenue of bonus stripping.

3.3. Recommendations

3.3.1. The cost of acquisition of bonus shares should be the pro rata cost of acquisition of the original asset, instead of nil. This will be similar to the cost of acquisition in case of split of shares (which is commercially identical to the bonus issue) and hence, simplify the tax regime and also remove the scope of bonus stripping.

Part II – Clarificatory amendments

4. Grandfathering price (listed shares)- transfer through Will, merger, etc.

4.1. Present Provision

4.1.1. The taxation regime for listed shares introduced in the year 2018, provided a benefit of step-up in the cost of acquisition (commonly referred to as grandfathering price) of the listed shares – by allowing the taxpayer an option to take the January 31, 2018 price as the cost price. Specific clause 55(2)(ac) was inserted for the same.

4.2. Issue

4.2.1. Section 55(2)(ac), *inter alia* requires that, the shares should be '*acquired before the 1st day of February, 2018*'.

4.2.2. It is not very clear, whether the condition would be satisfied in case of subsequent acquisition, where the period of holding of the previous asset/previous owner has to be considered or not (Section 47 transactions).

4.2.3. For example, in case of merger of HDFC with HDFC Bank, whether the shareholders of HDFC who are holding the shares of HDFC prior to 2018, but would be receiving the shares of HDFC Bank subsequent to the merger, say in 2023, whether they will get the benefit of the grandfathering price?

4.2.4. Similarly, if a son receives the shares of listed company pursuant to the will of his father on his demise after 2018, which his father was owning before 2018 – whether the son will get the grandfathering benefit?

4.3. Recommendations:

4.3.1. It is recommended that the date of acquisition for Section 55(2)(ac) is linked to Section 2(42A) (i.e. to consider the period of holding of the previous asset / previous owner) for determining the point of acquisition of the listed shares.

4.3.2. Corresponding changes in Income Tax Returns should be brought in where for long term shares, one has to enter ISIN number.

5. Grandfathering price (listed shares)- share split

5.1. Present Provision

5.1.1. The taxation regime for listed shares introduced in the year 2018, provided a benefit of step-up in the cost of acquisition (commonly referred to as grandfathering price) of the listed shares – by allowing the taxpayer to take the January 31, 2018 price as the cost price. Specific clause 55(2)(ac) was inserted for the same.

5.2. Issue

5.2.1. Section 55(2)(ac), *inter alia* requires that, the shares should be '*acquired before the 1st day of February, 2018*'.

5.2.2. It is not very clear, whether the condition would be satisfied in case of subsequent split of shares. For example a share of Rs. 10 face value is divided into two shares each of Rs. 5 face value.

5.2.3. Though the original cost of acquisition has to be considered (Section 55(2)(b)(v)(a)) there is no express provision dealing with the period of holding of shares acquired pursuant to split of shares. The concern is amplified as new share ISIN number is different for demat purposes.

5.3. Recommendations:

5.3.1. It is recommended that the date of acquisition for grandfathering price (Section 55(2)(ac)) considers the date of acquisition of original asset u/s 55(2)(b)(v) – i.e. date of acquisition of shares prior to the split of shares.

5.3.2. Corresponding changes in Income Tax Returns should be brought in where for long term shares, one has to enter ISIN number.

6. Section 2(19AA) – Definition of Demerger to include fast-tract merger and demerger effected under the Insolvency and Bankruptcy Code ('IBC').

6.1. Present provision

6.1.1. Demerger as per Section 2(19AA) of the Income Tax Act 1961 refers to a scheme of arrangement under Sections 391 to 394 of the Companies Act, 1956 which corresponds to section 230 to 232 of the Companies Act, 2013.

6.2. Issues

6.2.1. No specific reference to fast-track merger and IBC demerger in section 2(19AA).

6.3. Recommendations

6.3.1. A reference to companies Act, 2013 along with inclusion of section 233 therein and reference to demerger approved under IBC will clarify the matter and help in reducing the litigation. Considering the legislative intent in Section 2(19AA) specific reference to be added for fast-track merger and IBC demerger - pursuant to a resolution plan or under the liquidation proceedings.

7. Merger of Foreign Companies – exemption from issuance of shares in case of merger of subsidiary into holding company

7.1. Present provision

Section 47 provides for exclusion from the charge of capital gains tax *inter alia* in the case of merger and demerger transaction – both domestic and foreign. One of the conditions prescribed for claiming the exemption u/s 47 for merger and demerger transaction *inter alia* includes a condition of 75% / 25% of the shareholder(s) of the amalgamating company should become the shareholders of the amalgamated company.

7.2. Issue

In a normal scenario, it is possible to satisfy the condition of the shareholder of the amalgamating / demerged company becoming a shareholder of the amalgamated company / resulting company, as the case may be. However, in case of merger of wholly owned subsidiary with the holding company, this condition cannot be satisfied as the holding company cannot become its own shareholder. Therefore, the exemption in relation to domestic merger (Section 47(vii)) was amended by the Finance Act, 2012 to provide that, the condition will not apply when the shareholder itself is the amalgamated company. Relevant extract of Section 47(vii) –

(vii) any transfer by a shareholder, in a scheme of amalgamation, of a capital asset being a share or shares held by him in the amalgamating company, if—

(a) *the transfer is made in consideration of the allotment to him of any share or shares in the amalgamated company* ***except where the shareholder itself is the amalgamated company,*** *and . . .*

7.3. Suggestions

Section 47(via), (viab), (vic) and (vicc) – should be amended on similar lines to provide that the condition of issuance of shares would not apply when shareholder itself is the amalgamated/resulting company. The rationale behind this suggestion is that it does not seem to be the intention of legislature not to give the benefit of the exemption to a merger of wholly owned subsidiary into a holding company, but to give benefit to any other foreign company merger/demerger. This would be contrary intent of the legislature which is emphasizing on reducing the number of layers of companies under Companies Act and FEMA.

8. Clarity in computation of tax on capital reduction

8.1. Present provision

8.1.1. Section 66 of the Companies Act, 2013 read with rules made thereunder provides a statutory power to the Companies to undertake capital reduction of its shares, subject to the conditions mentioned in the said section and rules made thereunder. As per the said section, capital reduction can be undertaken by the Company pursuant to a special resolution passed by the members and subject to approval / sanction granted by the jurisdictional National Company Law Tribunal ('NCLT').

8.1.2. Under the Act, prior to insertion of clause (d) to Section 2(22), capital reduction of shares was held to be extinguishment of right in the capital asset (i.e., shares) and thus, regarded as transfer within the meaning of section 2(47) of the Act. This was so held by Hon'ble Supreme Court in **CIT v. G. Narasimhan [1999] 236 ITR 327 (SC)** and **CIT v. Kartikeya v. Sarabhai [1997] 228 ITR 163 (SC)**.

8.1.3. Presently, Section 2(22)(d) of the Act provides that any distribution made by the Company to its shareholder pursuant to a capital reduction, shall be taxable as dividend to the extent of accumulated profit, whether capitalised or not. Further, in general practice, if the amount distributed is in excess of accumulated profit, then such excess amount is offered to tax as capital gains in the hands of shareholder. Hence, in case of a capital reduction of shares, entire computation shall be dividend in following two parts:

... **Receipt of amount up to accumulated profit**: Taxed as dividend under section 2(22)(d).

... **Amount accrued or received exceeding accumulated profit**: Taxed as capital gains or losses pursuant to capital reductiona

8.2. <u>Issue</u>

8.2.1. The distribution on capital reduction to the extent of accumulated profits of the Company is taxable as dividend u/s. 2(22)(d) of the Act, however, the provisions for taxability of any amount in excess of accumulated profit as 'capital gains' is not explicitly mentioned under the Act.

8.2.2. At this juncture, attention is invited on the provisions of section 2(22)(c) read with section 46(2) of the Act. The said sections deal with the taxability of distribution of money or other asset made by the Company in the event of liquidation. In case of liquidation also, entire computation is divided in following two parts:

... **Receipt of amount up to accumulated profit**: Taxed as dividend under section 2(22)(c).

... **Amount accrued or received exceeding accumulated profit**: Taxed as capital gains or losses pursuant to a liquidation under section 46(2).

8.2.3. As seen above, it is important to note that section 46(2) of the Act explicitly provides that in case of a liquidation, full value of consideration for computing capital gains is the total amount of money received, or fair market value of asset received by the shareholder as ***reduced by*** the amount which has already been taxed as divided under section 2(22)(c) of the Act. Such balance amount, if any, shall be treated as full value of consideration accruing or arising as a result of transfer of shares pursuant to a liquidation.

8.2.4. However, unlike computation mechanism provided for liquidation of a Company, no similar computation mechanism is provided for capital reduction of shares, even though the taxability of capital gains in both the scenario is similar.

8.2.5. In absence of any specific provisions relating to taxability of receipt of amounts received in excess of accumulated profits, it may be contended by parties that such excess amount is not taxable in law. Hence, to provide clarity and to remove any difficulties, mechanism for computing capital gains in case of a capital reduction should be provided explicitly under the provisions of the Act.

9.1. Present Provision

9.1.1. Presently, there is no provision under the Act to deal with any indemnity cost (or repayment of part of the sales consideration, bad debt, etc.) borne by seller at future date.

9.2. Issue

9.2.1. All the commercial transactions undertaken in the present world are always subject to indemnity obtained from the sellers. Such indemnity is not restricted to income-tax related issue but may also because of various commercial considerations (such as continuity of contracts, maintenance of employment base, etc.) and the period of indemnity generally is more than 3 years going upto 10 years and sometime is also linked to the outcome of any ongoing litigation. There are also cases where seller has to return certain amount of consideration if the Company does not achieve agreed milestones.

9.2.2. In an event if the seller is contractually made bound to refund any part of consideration at a future event, then there is no relief to the seller on the incidence of capital gains (which is paid basis higher consideration), especially if the refund of sales consideration is subsequent to the period of filing the revised return.

9.3. Recommendations:

9.3.1. It is recommended that a new provision under the scheme of section 155 of the Act may be introduced to enable taxpayers to revise the return of the year in which capital gains was offered in an event of seller refunded any part of the consideration or bad debt.

9.3.2. This will be in line with the philosophy that only real income should be brough to tax and notional income (if any) shall not be subjected to tax.

10. Distress Sale/IBC Sale of undertaking/Bank Auction – applicability of anti-abuse provisions

10.1. Present Provision

10.1.1. Section 50C and 50CA requires the adoption of fair market value as per Rule 11UAE. Rule 11UAE requires the adoption of FMV being the higher of FMV-1 vs. FMV-2. The FMV-1 is computed based on the prescribed formula. Further, FMV-2 also prescribes a formula in case of receipt of non-monetary consideration. In addition, Section 50C or 50CA also requires the substitution of actual consideration with FMV prescribed under the relevant section r.w. Rules.

10.2. Issue

10.2.1. The substitution of FMV as per the prescribed formula as against the commercial consideration poses an additional income tax levy in case of certain transactions viz., Sale of undertaking/shares/assets under Insolvency Proceedings (IBC), Sale under Bank auction route, or distress sale undertaken by the taxpayer to revive the entity/business. It may be noted that the transaction undertaken under these circumstances are not at the control of the taxpayers, and the price at which the transaction is concluded is purely a process driven.

10.2.2. To illustrate, the Sale under the IBC proceedings are based on the resolution plan proposed by the insolvency professional (who is an independent party appointed by the National Company Law Tribunal ('NCLT')) and accepted by the aggrieved parties. The plan proposed is put into action by inviting bids from the interested parties, and based on the parameters fixed, the best bid is selected. Even in the case of the Bank Auction, the best quote made by the prospective buyer is approved, and the capital asset is sold. In these circumstances, the prices are derived by market forces, and same may not be equated with the guideline value/FMV as prescribed under the Rule.

10.2.3. Under the above circumstances, the best possible prices are determined through the above-mentioned process between the independent parties, and the same should be regarded as market value as against the FMV derived through the formula prescribed under the Rules.

10.3. Recommendation

10.3.1. The purpose of introducing the substitution of FMV against the actual consideration is an anti-avoidance measure. Therefore, such provisions should not be applied unanimously to all transactions. The transaction(s) undertaken through IBC/Bank Auction/Distress sales are all genuine & independent transactions where the assets are sold to the highest bidder or Insolvency Plan approved by the NCLT or the Banks.

10.3.2. Since these transactions are genuine transactions and the consideration is being commercially agreed based on bid/auction should be treated as fair market value as against the FMV prescribed under the Rule. Reference is also invited to the proviso to Section 56(2)(x), wherein certain exceptions are provided for non-application of this clause, including powers to prescribe a certain class of person to whom this clause may not apply. A similar exception may be brought under Section 50C, 50CA etc., in the case of above-mentioned transactions.

11. Section 45(5A) – benefit to all the taxpayer

11.1. <u>Present provision</u>

11.1.1. Section 45(5A) defers capital gains tax in case of a redevelopment project to the year in which the redevelopment of the project is completed or the under construction property is sold by the landowner/tenant. However, the benefit of deferral is presently, restricted to Individuals and HUF.

11.2. <u>Issue</u>

11.2.1. The benefit of deferral is presently, restricted to Individuals and HUF and not extended to all other tax payers. Entering into the redevelopment agreement triggers capital gains tax on a non-cash transaction which results practical difficulty – a requirement of cash funds for discharging tax obligations.

11.3. <u>Recommendations</u>

11.3.1. To extend the benefit of Section 45(5A) to all the taxpayers.

12. Rule 11UA - Requirement of an audited balance sheet as on the date of the transaction

12.1. <u>Present Provision</u>

12.1.1. For determination of Fair Market Value (FMV) u/s 50CA and 56(2)(x) of the Act, is governed by Rule 11UA. Rule 11UA(1)(c)(b) requires the Assessee to compute the FMV as on the valuation date. Further, the Rule prescribes the manner of computation with reference to the balance sheet. The term 'valuation date' and 'balance sheet' is defined in Rule 11U. The valuation date is reckoned to be the date on which the property or consideration is received. Further, Rule 11U(b)(ii) requires the 'balance sheet' to be drawn up to the valuation date and mandates an audit of the balance sheet by the auditor of the Company.

12.2. Issue

12.2.1. The requirement of drawing the balance sheet to the valuation date and having it audited by the statutory auditor poses significant practical challenges for taxpayers. The finalization of the Company's accounts followed by an audit is a detailed procedure, as it involves professional judgment by the Management as well as the Statutory auditors. For example, the shareholders may transfer the shares of the entity on April 15 or August 25 or November 20, etc. It is not feasible to prepare financial statements as of that date.

12.2.2. At times, the shares of the Company are transferred multiple times during the year by various shareholders. Under the Rule, the value of shares is required to be derived on every such transfer. In case the entity holds investments in other entities, then the Rule also mandates the substitution of FMV of those investments. In a situation where a Company has ten subsidiaries or step-down subsidiaries, the Rule requires the substitution of FMV of such subsidiaries and step-down subsidiaries on the balance sheet date. In effect, the subsidiaries and step-down subsidiaries are also required to be audited as on the balance sheet date.

12.2.3. Even in the context of listed companies, the listing regulations mandate publishing quarterly and half-yearly results on their website. Further, these results are only subject to limited review from the Statutory Auditor. Therefore, mandating the audit of closely held companies during each transfer of shares creates significant compliances and challenges for the entities. This involves the preparation of multiple special purpose financial statements and the mandate of an audit, posing practical challenges and adds to significant cost and efforts to the company.

12.2.4. There are so many small shareholders who are not part of the management and for them to get audited balance sheet on the date of transaction is going to be impposible.

12.3. Proposal

12.3.1. Rule 11U(a), in case of determination of the value of shares at the time of issue of shares, permits the use of a balance sheet immediately preceding the valuation date, which has been approved and adopted in the annual general meeting. In other words, this Rule permits the use of the last audited balance sheet to determine the value of shares.

12.3.2. A similar exception be extended to determining the valuation of shares for Section 50CA of the Act. Alternatively, the Rule may permit certain relaxations, such as using the unaudited balance sheet of a particular period ending for determining FMV. Respite in this regard will avoid drawing of balance sheet and getting this audited by the statutory auditor.

13. Rule 11UA – Alternate method of valuation

13.1. Present Provision

13.1.1. For determination of Fair Market Value (FMV) u/s 50CA and 56(2)(x) of the Act, is governed by Rule 11UA. Rule 11UA(1)(c)(b) requires the Assessee to compute the FMV as on the valuation date.

13.1.2. Rule 11UA for unlisted shares only prescribes the cost approach/balance sheet approach (subject to modification for few assets like immovable property, shares, etc).

13.1.3. Rule 11UA for S. 56(2)(viib) provides for alternative method of discounted cash flow. However, no similar method is prescribed for Section 56(2)(x) and Section 50CA.

13.2. Issue

13.2.1. The balance sheet approach many a times does not represent the true value of the shares being transacted, for example –

13.2.1.1. Any minority discount or holding company discount is not factored in

13.2.1.2. The tax cost of sale of underlying investments like shares is not considered, though the appreciation in the value is considered

13.2.1.3. Fictitious assets like deferred tax asset, preliminary expenses, etc. are not factored

13.2.1.4. Contingent liablities or any unrecorded liabilities, legal suits, etc. are not considered

13.2.1.5. Immovable property is value at the stamp duty value, without considering any title disputes, downside of particular plot of land like open swage, access problem, encroachment, etc.

13.3. Proposal

Similar to Rule 11UA(2) for Section 56(2)(viib), even for Section 50CA and Section 56(2)(x) as an alternate to modified book value method, Rule 11UA(1) should also permit use of any internationally accepted valuation methodology.

14. Tax implications on conversion of Company into Limited Liability Partnership ("LLP")

14.1. Present provision

14.1.1. The Act provides exemption to a specified company (i.e. a private company or unlisted public company) in an event of transfer of any capital asset or intangible asset by a company to an LLP upon conversion of such company into LLP. Consequently, exemption is also available to the shareholders of the company from capital gains who receives interest in LLP against the shares in converging company.

14.1.2. The said exemption is condition ridden. Amongst other conditions, the exemption is available only to conversion of a company having turnover less than INR 60 lac and asset base of INR 5 crore of last 3 financial years. Therefore, the aforesaid exemption is limited to small taxpayers only.

14.2. Issues

14.2.1. For large companies, virtually the benefit of exemption under the Act upon conversion into LLP is not available.

14.2.2. There is no clarity on computation of any capital gains in the hands of converting company and/or in the hands of its shareholders.

14.2.3. It is often contended that Tax Authority may levy taxation in the hands of company and as well as on the shareholders. Though there are equally good arguments to be made that neither of them should be taxed in case of conversion. Even from economic perspective there is no particular gain, except the gain of saving of tax on dividend, if and when any funds are withdrawn by the partners from the LLP.

14.2.4. Rather than arguments being made on both the sides for taxation and non-taxation of the transaction. A specific single tax regime would reduce the risk of such conversion and also improve the tax collection.

14.3. Recommendations

14.3.1. To provide clarity to the stakeholders, it is recommended that legislature may introduce a separate provision in the capital gains chapter for single taxation of non-compliant conversion of company into LLP either in the hands of converting company or in the hands of its shareholders.

14.3.2. Our recommendation would be a tax is levied based considering the transfer of shares for interest in partnership and the for the LLP the cost base of the assets transferred from the company to the LLP is continued. So that, the revenue is not losing any tax, but only deferring the tax on sale of assets of the LLP (erstwhile Company) at the time of actual sale of such asset.

15. Specific exemption for merger / de-merger of LLP

15.1. Present provision

15.1.1. Section 47 of the Act does not regard amalgamation of companies / de-merger of companies as 'transfer' for the purposes of Section 45 of the Act. Thus, transfer of assets pursuant to amalgamation and de-merger of companies and consequent, transfer of shares by the shareholders, is not subject to taxation under the head 'Capital Gain'.

15.2. Issue

15.2.1. The Limited Liability Partnership Act, 2008 ('LLP Act') does provide for merger or restructuring of two LLPs through the National Company Law Tribunal ('NCLT') approval process. The Act has provisions for mergers/ demergers involving companies and prescribes conditions for tax neutrality of such mergers/ demergers in the hands of the transferor entity, its shareholders and the transferee entity. Further, the Act also provides for tax neutrality to conversion of LLP to Company or vice-a-versa subject to fulfilment of certain conditions. However, there are no specific provisions under the ITA providing tax neutrality for mergers or restructuring of LLPs akin to merger of companies. In absence of any such specific exception, the position is litigious. While one may argue, relying upon the old judicial precedents of amalgamation and demerger, that merger and de-merger of LLPs does not involve any transfer of assets and is a tax neutral transaction, however, it may give rise to litigation between the taxpayers and the Income-tax Department.

15.3. <u>Recommendations</u>

15.3.1. As all forms business reconstitution specifically excluded from transfer definition U/s. 47 of the Act and concept of LLP is a subsequent evolution of business form. Thus, there is need to introduce provisions similar sections 47(vi), 47(vib), 47(vid), 47(vii) for LLP merger / demerger.

16. Explicit provision for clarifying date of transfer and date of acquisition of capital asset in certain scenarios

16.1. <u>Present Provision</u>

16.1.1. Charge of tax u/s. 45 of the Act is attracted in the year of transfer of capital asset. The receipt of sales consideration in the hands of vendor is not a decisive factor to decide the taxability of capital gains, unless specifically mentioned in the Act.

16.1.2. The meaning of the term 'transfer' is defined under section 2(47) of the Act, which *inter-alia* includes sale, relinquishment, extinguishment, exchange, conversion of asset etc. Further, period of holding in respect of any capital asset is also defined in section 2(42A) of the Act.

16.1.3. The Act also provides few exceptions where the capital gains are chargeable to tax only upon happening of specified event and not at the time of transfer of a capital asset. Few of them are listed as below:

... Section 45(1A) – Receipt of insurance money on account of damage or destruction of capital asset – **Taxable in the year of receipt of money**

... Section 45(1B) – Receipt of any sum by a policyholder from ULIP – **Capital gains arising from such transfer shall be taxed in the year of receipt**

... Section 45(2) – conversion of capital asset into stock in trade – Capital gains shall be chargeable tax in the year of sale of stock in trade

... Section 45(5) – Compensation including enhanced compensation on compulsory acquisition of capital asset – **Capital gains shall be chargeable to tax in the year of actual receipt of compensation or enhanced compensation**

16.2. Issue

16.2.1. In view of above, it is seen that whenever legislature wants to provide a specific criterion in relation to chargeability and timing of chargeability of capital gains, the same has been provided by way of a specific provisions in the Act. However, if the instance is not covered by any specific exceptions, then what should be the date of transfer of capital asset is not defined in the Act or Rules. Hence, this creates a dispute between the assessee and tax department regarding determination of date of transfer and resultant period of holding and nature of capital gains.

16.3. Proposal

16.3.1. Hence, it would be appropriate to provide a suitable amendment in the Act to provide clarity on the date of transfer. Few of the examples where the clarity is required for determining a date of transfer or acquisition are listed as below:

16.3.2. **Liquidation of the Company**

... In case of a liquidation of the Company, period of holding under section 2(42A) provides that the **period subsequent to the date on which the Company goes into liquidation shall be excluded**.

... In the Act, no clarity has been provided as to what should be treated as the *"date on which the Company went into liquidation"*. It could be either the date on which petition or application for liquidation is filed or the date on which order of liquidation is passed or the date on which the shareholders receive money or other asset from a liquidator.

... The Gujarat High Court in case of **CIT v. Jayakrishna Harivallabh Das [2000] 112 Taxman 683 (Guj.)**, has held that the term 'liquidation' used in section 46 must necessarily refer to the date on which the Company is wound up or winding up process is completed. Explaining further, it was observed that the Hon'ble Gujarat High Court that until the Company is finally wound up, the right of shareholders or members to receive the surplus, if any, remains intact, which is the only right that survives in a shareholder of a Company in the liquidation, and it comes to an end or gets extinguished only on completion of winding up.

... From a plain reading of section 2(42A) of the Act, reference to the phrase 'when Company goes into the liquidation', one may seek to contend the meaning of the same is construed as commencement of liquidation proceedings. However, Gujarat High Court in case of CIT v. Jayakrishna Harivallabh Das *(Supra)* held that capital gains shall be chargeable to tax in the year in which the liquidation proceedings are completed. Generally, period of holding of capital asset is ending as on the date on which property or capital asset is not cease to exist /

extinguished / transfer by the Assessee. Hence, judicial interpretation with respect to the date of transfer and period of holding as defined in section 2(42A) of the Act are not in sync.

... In view of above discussion and in order to provide clarity and to reduce potential litigation, suitable amendment may be made in the Act to provide clarity with respect to the date of transfer of capital asset in case of a liquidation of a Company.

... Further, under the Insolvency and Bankruptcy Code 2016 and regulations made thereunder, even after the liquidation of the Company is ordered by the NCLT, various companies used to file a private bid before the Hon'ble NCLT for acquiring the Target Company on a going concern basis for the purpose of its revival and rehabilitation. Generally, in such cases, normal provisions with respect to the date of transfer of shares in a liquidation may not work having regard to the facts of each case.

... Hence, suitable amendment for these kinds of cases should also be made in the Act.

16.3.3. **Capital reduction of the shares of a Company**

... In case of a capital reduction, payment or distribution to the extent of accumulated profit is assessed as dividend income and any distribution or payment exceeding accumulated profit assessed as capital gains or losses.

... Further, as per the provisions of section 2(22) of the Act read with Explanation thereof, profits ***up to the date of distribution or payment*** referred to in section 2(22)(d) shall be considered as 'accumulated profits'.

... As per the provisions of the Companies Act, 2013, process of capital reduction is an NCLT driven process (that may take 4-6 months) and is ideally completed when Registrar of Companies or any other competent authority issues a certificate of registration of capital reduction. Ideally, payment of consideration pursuant to a capital reduction takes place only after completion of entire capital reduction process.

16.3.4. **Share purchase agreement**

... Generally, in case of a share purchase agreement entered into between parties, date of transfer is the date on which share purchase agreement is executed between the parties. However, when share purchase agreement is entered into between third parties, there may be a possibility that agreement may contain certain conditions precedents or covenants or a clause of deferred payment of consideration. Further, it also provides that in case, either party does not fulfil such condition or covenant or breach any of the term or condition, share transfer may not be considered as effective and transfer may get struck down.

... **CBDT Circular No. 704 dated 28 April 1995** also clarified that in case of transfer of shares, date of contract is treated as date of transfer of shares provided it is followed up by actual delivery of shares and transfer deed (should not be applicable in case of demat form of shares).

... Also, there are various judicial precedents **[ACIT v. Max Telecom Ventures Ltd [2008] 114 ITD 46 (Amritsar), ACIT v. Mrs. Hami Aspi Balsara (2009-TIOL-789-ITAT-MUM)]**, where it was held that transfer of a share shall be regarded as complete only when all the conditions precedent in respect of such transfer is completed.

... Hence, in order to provide more clarity and to avoid litigations, suitable amendment may be provided in the Act to explicitly provide for what should be regarded as the date of transfer of shares.

... Take the following facts for instance:

Sr. No.	Event	Date	Accumulated profits till that date (in Rs.)
1	Shareholders' Resolution (factoring the profitability as on date date)	15/01/2022	1,00,00,000
2	Application to NCLT	05/02/2022	1,10,00,000
3	Order of NCLT	10/07/2022	75,00,000
4	Registration with ROC	05/08/2022	50,00,000
5	Date of payout	25/08/2022	60,00,000

... Questions arise as regards:

(a) What should be considered as the "date of distribution or payment" for the purpose of section 2(22) – this will also have a bearing on the balance amount to be taxed as capital gains (as discussed earlier)? As a reference, in case of liquidation provided for in section 2(22), accumulated profits are to be seen till the date of liquidation. Should similar provisions i.e. "date of capital reduction" be introduced for capital reduction, and the concept of "date of distribution or payment" should be done away with to explicitly provide one of the aforementioned dates /events as the "date of capital reduction?

(b) What should be the amount of accumulated profits for the purpose of taxability as "dividends"?

(c) When should the dividends and capital gains be taxed – FY 2021-22 or FY 2022-23?

... Hence, suitable amendment may be made in the Act to provide for answers to the above.

6. AMALGAMATION

Sr. No.	Existing provision under the Income-tax Act, 1961 ("the Act")	Difficulties Obstacles / Hurdles either Interpretative, Administrative or otherwise	Suggestion or new clause Suggested
6.1	S. 72A(1) and (2) r.w.r. 9C, subject to specified conditions, provides for carry forward and set-off of losses in case of amalgamation of a company having an industrial undertaking, hotel or ship. S. 72A(7) inter alia defines Industrial Undertaking to primarily include manufacturing or infrastructure related business activities.	Presently, it is only a specified class of business which are entitled to carry forward of business loss in case of amalgamation and does not include a host of different industries. Broadly, the service industry (amongst others industries) is not entitled to the benefit. More than 50% of the contribution to the Indian GDP is by the service sector and also, from the policy perspective, income tax policy for all businesses should be unified unless a specific exception is necessary. It is unjust to restrict the benefit of carry forward loss to selected sectors/industries and inter alia not to provide the benefit to the entities operating in the service sector – which is the highest employer today and the largest contributor to the inflow of foreign exchange.	The benefit of carrying forward business loss on amalgamation should be made available to any business undertaking and should not be restricted to manufacturing/ infrastructure related industrial undertaking.

6.2	S. 79 provides that in case of a change of shareholding of more than 49% in an unlisted company – the company would not be entitled to carry forward any loss.	Many a times a person in the initial phase of business may incur losses and decides to bring in investors/3rd party funding to revive/push the business. Not allowing to carry forward loss would result in a disadvantageous position for raising finance and especially when otherwise the company is under stress. Therefore, the anti-abuse provision should be made applicable only to companies which have been inexistence for more than 5 years, in that way it provides a breather to the new entities and allows them freely collaborate and raise funding in the initial years of their operation. One is aware that these provisions do not apply to start-up registered with DIPB – but every business does not qualify for registration	To apply the section only to seasoned companies i.e. not to apply the section to new companies for the first five years.

7. TDS & TCS

Sr. No.	Existing provision under the Income-tax Act, 1961 ("the Act")	Difficulties Obstacles / Hurdles either Interpretative, Administrative or otherwise	Suggestion or new clause Suggested
7.1	Fresh scheme of tax collection insteadof TDS	Reducing compliance burden and reducing rectification applications.	Large size Companies including PSU, may be allowed to pay the taxes quarterly/monthly in lieu of TDS from their customers, on granting of no tax to be deducted u/s 197. These Companies may be given an option. The taxes to be deposited quarterly/monthly will be based on TDS claimed in the return of Income in last two A.Y's. this will reduce avoidable and unnecessary hardship caused to the deductor and the deductee (for taking credit)
7.2	Credit for Tax Deducted at Source : a) As per the current scenario, the credit for tax deducted at source is allowed on the basis of TDS reflected in Form 26AS, whereas, the assessee claims the TDS on the basis of the income offered to tax. These results in mismatch of credit submissions of various details by the	In respect of mismatch in year or other reasons, Assessee is unable to get credit of tax deducted and larger infructuous demands are raised	a) It is suggested that rule 37BA(3) should be amended, to provide that the credit for tax deducted at source should be allowed in the assessment year immediately following the financial year in which the tax has been deducted at source. In other words, it also means that the credit to the deductee should not be denied on account of mistake in data uploaded by the deductor or non-

	assessee. The reasons for mismatch are many, e.g, the deductor Following mercantile system of accounting, therefore TDS is deducted at the time of credit and on the other hand deductee following cash system of accountingand claiming credit for TDS in the year in which the income is actually received by him and vice- versa. As per the Finance Act,1987, effective from 01/06/1987, the requirement for giving credit for TDS in the assessment year in which the income is assessable was introduced and has been applicable since then. Sec.199 r.w. rule 37BA(3) states that credit for tax deducted and paid to the Central Government shall be given for the assessment year in which the income is assessable. b) In case deductor does not upload the details of tax deducted of the payee correctly, credit of the tax deducted is notallowed to the deductee there by causingundue		payment of TDS with the Treasury of the Government by the deductor as the deductee has no control over Rule 37BA(3) of the Income Tax Rules should be amended to the extent that in case of default on the part of the deductor for non-deposit of tax deducted at source, the deductee should not be denied the credit of such tax deducted and futurerefunds should not be adjusted against demands Arising out of non- payment by deductor. Justification: The assessee should not be denied credit for tax deducted at source merely because of different methods of accounting followed by the deductor and the deductee. Or because of mistake of the deductor. This will reduce unproductive and unnecessary work of the department as well as the assessee. In many cases, the demand remains

	hardship to the deductee.		outstanding in the department's records on account of non-deposit of TDS by the deductor and the same are incorrectly adjusted against subsequent refunds due to the deductee, resulting in unnecessary hardship to the assessee from whom the tax is wrongly recovered. There are sufficient provisions in the law to recover the amount not deposited by the deductor who is an assessee in default.
7.3	Sub-section (1H) has been inserted in Section 206C by Finance Act, 2020 forcollection of TCS by the seller on sale of any goods. Though collection of TCS on sale of certain goods were already covered under different sub-sections of Section 206C, however, all the remaining goods, which we're not so covered under other provisions of section 206C, have now been brought under the ambit of TCS by inserting sub-section (1H) in Section 206C.The new TCS levy is going to result in a significant compliance burden. We believe that TCS @ 0.1% is not likely to result in significant increase in	The compliance burden under TDS and TCS has been substantially increased and any default results into interest / penal consequence etc. Further section 194Q has been introduced for deduction of tax at source on purchases made by the buyer. This creates confusion, complexity and unnecessary burden on the deductor as well as deductee.	This section needs to be deleted for the reasons stated as under: 1) Considering the high threshold of Rs. 50 lakhs sales per buyer, the relevant sales data is already reflected in the GST return filed by the seller, in fact the exemption threshold is lower i.e. Rs 40 lakhs in aggregate in case of Goods and Service Act. Thus, the datarelating to the sale of goods is already available with the Government through the GST administration and the construct of GST Number is such that sales data can be easily collated for each PAN. It is to be noted that the exemption

	revenue base (offset by lower payment of advance tax) but would only result in increasing compliance burden by reporting of sale of goods above Rs. 50 lakhs and thereby increase in cost of such Compliance		threshold is lower i.e. Rs. 40 lakhs in aggregate in case of Goods and Service Act. Thus, the datarelating to the sale of goods is already available with the Government through the GST administration and the construct of GST Number is such that sales data can be easily collated for each PAN. It is to be noted that CBDT and CBIC have signed a Memorandum of understanding(MOU) for the data exchangeincluding the data from GSTN. Accordingly, the objective of the newly introduced provision of TCS which is to "widen and deepen the tax net" is already achieved by the Government. 2) Further section 194Q has been introduced where the buyer who is responsible for paying any sum to the resident for purchase of goods of the value or aggregate of such value exceeding Rs. 50 lakhs is required to deduct TDS. As a result of which the purpose of the government is achieved for capturing relevant data of purchase

			and sales of buyer and seller. 3) In view of the above explanations provision of section 206C (1H) should be deleted.
7.4	Section 206C(1G) (a) – TCS on remittanceout of India: Section mandates an authorised dealer, who receives an amount, for remittance out of India from a buyer of foreign exchange, being a person remitting such amount out of India under the Liberalised Remittance Scheme of the Reserve Bank of India, to TCS @ 5% if such amount exceeds Rs. 7.50 lakhs in a financial year. Sec.194N: Tax at Source to be deducted by Bank or Co-operative Society and post office @ 2% on the withdrawal of cash exceeding Rs.1 crore ………..		(a) As per the basic tenet of Income Tax Law, income tax shall be levied on the Income of a person. TDS and TCS provisions are mechanism to collect income Tax in advance from a person and it does not travel beyond section 4 of the Income Tax Act. It means if thereis no income there is no Income tax andtherefore there is no question of TDS and TCS. Thus the provisions of section 206C(1G) (a) is against the basic principle of Income Tax Act , TDS and TCS as well. The TDS and TCS provision are applicable only when there is any income element is involved. The person remitting money outside India from histaxable income (his own money) should not be subject to TCS as there is no element of income involved. By any stretch of imagination such remittancesmade by person under LRS can be brought within the purview of TCS.

			(b) Secondly the person sending the remittance outside India under LRS needs to file necessary forms (A2) withthe authorised dealers where he makes necessary disclosures and provide his PAN number etc. and such informationcan be submitted to the Income Tax Department through the AIR reporting. One should not resort tothe TDS provisions on transactions which are otherwise not taxable for the sake of capturing the data. There are other means are available for capturingthe data/information Section 194N: Similarly, if a person withdraws cash fromhis own account out of his taxable income,there is no question of income element involved. When there is no income, there no question of payment of income tax or deduction of Tax at Source as stated above. Hence provisions of Sec.194N requires to be deleted. The intention of the legislature is to capture such transaction. However, the said information can be submitted by the concerned person under AIR reporting to the Income Tax department.

8. RECTIFICATION OF ORDERS

Sr. No.	Existing provision under the Income-tax Act, 1961 ("the Act")	Difficulties Obstacles / Hurdles either Interpretative, Administrative or otherwise	Suggestion or new clause Suggested
8.1	Section 154 – Rectification of Mistakes Sub-section (8) of section 154provides that where an application is made by an assessee or a deductor, the authority shall pass an order within a period of six months from the end of the month in which the application is made by either (a) making the amendment or (b) refusing to allow the claim.	Inspite of the specific provisions of subsection (8), it is observed that the authorities take unusually long time in deciding the rectification application either way. Many a times in fact the rectification orders are never passed for years and in the meantime the department keeps on the recovery proceedings and also adjusts the subsequent refunds against the demand for which the rectification applications are pending disposal. As a result the provisions of Sec.154(8), providing the time limit of six months for carrying out rectification has become redundant. This results in tremendous hardship to genuine taxpayer.	It is humbly suggested that the sub-section (8) shall be modified so as to provide that if the authority concerned do not decide the rectification application of the assessee or the deductor within the prescribed period of six months, then the application should be deemed to have been allowed and the tax liability will be deemed to have been reduced in accordance with the rectification application of the assessee. And all rectification applications shall be made online and pending status of the such application can be tracked online and it should show the period of delay. Justification: Such provision will result in easing the hardship caused by the assessee and will create transparency. It will also bring in the sense of responsibilities amongst the authorities to adhere to the statutory time limit provided by the legislation and will ultimately result in better and efficient administration of the provisions of the Act.

9. PENALTIES

Sr. No.	Existing provision under the Income-tax Act, 1961 ("the Act")	Difficulties Obstacles / Hurdles either Interpretative, Administrative or otherwise	Suggestion or new clause Suggested
9.1	S. 269T provides that repayment of loan or deposit should only be through account payee cheque or prescribed electronic modes	The objective of the section is to curb cash transactions. The section is not meant to impact or regulate other modes of settlement of loans – like conversion of debt into equity where transfer of funds is not involved. However, the same has been a subject matter of litigation. Therefore, to bring an end to the ongoing litigation it would be advisable to amend the section (or a common explanation for the entire Chapter XXB) and clarify the same.	It should be clarified that the section (or entire Chapter XXB) only applies in case of repayment through the transfer of funds and does not apply to modes of repayment where the movement of funds is not involved like conversion of debt into equity
9.2	Section 270A of the Act provides for levy of penalty in cases of (a) under-reporting of income and (b) mis-reporting of income by an assessee. Section 270AA of the Act grants an immunity from levy of penalty u/s. 270A subject to certain conditions as specified. The primary condition is that the tax and interest payable as per the order of assessment or reassessment is paid within the period specified in the notice of demand and no appeal is preferred	It is seen on many occasions that the assessment order passed considers a particular addition / disallowance to be on account of misreporting of income though as a matter of fact the same is not getting covered by any of the clauses of sub-section (9) of section 270A. This results in tremendous hardship to the concerned assessee on various counts as explained hereunder : Once the concerned addition / disallowance has been classified as misreporting of income, the rate of penalty which the assessee has to pay is 200% of tax amount as against 50% which is to be paid for the cases of underreporting of income.	We recommend that the provisions of section 270AA shall be suitably amended to provide as under : (A) In a case where the assessee has to prefer an appeal only challenging the incorrect classification of the addition / disallowance from misreporting of income to the correct classification being underreporting of income as confirmed by any of the appellate forums, the immunity shall also

	against the assessment or reassessment order. Further as per sub-section (6) of section 270AA no appeal or revision petition is permissible in a case where immunity is allowed to the assessee. Sub-section (3) of section 270AA provides for grant of immunity from penalty and prosecution. However, such immunity can be claimed only where the case of the assessee pertains to under-reporting of income. Immunity is not permissible in cases where the assessment order considers the concerned addition / disallowance as misreporting of income as per sub-section (9) of section 270A.	The bigger difficulty is that the assessee is not permitted to take the benefit of the immunity as provided in section 270AA. Difficulties arise merely due to wrong classification of the concerned addition / disallowance by the assessing officer. For getting the classification altered from misreporting of income to underreporting of income also the assessee has to prefer an appeal before the appellate authorities. However, once the appeal is filed, the assessee loses the chance to get the immunity u/s. 270AA. Effectively therefore, the assessee is left with no choice but to indulge in litigation not only for the assessment but also for the penalty which is levied subsequently. This is against the basic intent of provisions of section 270AA and also the broad objective of the government to reduce the litigation to a considerable extent.	be available to the assessee in such a situation once the order of the appellate authority is passed. (B) In such a case, the time limit to file an application for immunity from penalty shall be provided with reference to the date of receipt of the order of the appellate authority instead of the date of the assessment order as at present. Alternatively, we also recommend that at least the filing of Revision petition before the CIT u/s. 264 should not result in denial of the immunity. The CIT being a senior person would understand the correct classification of the addition / disallowance. This will provide an opportunity for the assessee to avoid the litigation. The assessee can take recourse to revision proceedings u/s.264 of the Act and avoid the appeal route. At the same time the assessee will be able to get the addition /disallowance correctly classified by a senior officer of the department namely the CIT. In such a

			situation, the time limit for filing immunity application shall be reckoned from the revision order passed u/s. 264 of the Act instead of the assessment order. Since no further litigation is provided against the order of the CIT u/s. 264, the revenue should also not have any grievance if the matter is looked into by a senior officer.

10. UPDATED RETURNS

Sr. No.	Existing provision under the Income-tax Act, 1961 ("the Act")	Difficulties Obstacles / Hurdles either Interpretative, Administrative or otherwise	Suggestion or new clause Suggested
10.1	Sub-section (8A) of section 139, as inserted by the Finance Act, 2022 provides for updated Return. It permits an assessee to file an updated Return within 24 months from the end of the relevant assessment year. The updated Return can be filed with an additional tax liability of 25% if the updated Return is filed within 12 months from the end of the assessment year and 50% if the updated Return is filed beyond 12 months from the end of the assessment year.	The first proviso to sub-section (8A) of section 139 prohibits the filing of updated Return in cases where the Return is a Return of Loss or has the effect of decreasing the total tax liability determined on the basis of Return filed earlier or results in refund or increases the refund due on the basis of the return furnished earlier. The following difficulties are envisaged : A) The effect of the first proviso is that the updated Return works only to the advantage of the revenue and an assessee can no way take benefit by filing an updated Return. The time limits for filing the belated returns have reduced considerably in recent past. Further following the ratio of the Hon. Supreme Court in the case of Goetze (India) Ltd. v. CIT (2006) 284 ITR 323 (SC), any claim missed out by an assessee has to be made only by way of filing a Return. At times, it is seen that a genuine claim by the assessee is missed out and the same is noticed beyond the period where the Return can be revised by the assessee. Due to this difficulty, an assessee is deprived of the right to make genuine claim.	(A) We recommend that the time available for filing revised return be extended to the end of the assessment year, so that any claim can be made in the revised return. As such filing of revised return within 2-3 months of filing original return has no material meaning. (B) We recommend that the updated Return shall also be permitted to be filed where the assessee has genuinely missed out to make a claim for an eligible deduction in the Return of Income. We also appreciate that there has to be some back-up provision for discouraging assessees to have a complacent approach and keep on updating the Return as and when they wish to. To overcome such a situation, there can be a provision of a lumpsum filing fees for filing such updated Return where the updated Return has the effect of reducing the income of

		One more difficulty which is arising is that the updated Return cannot be filed in a case where it is a Return of Loss. Please consider a situation that the loss as per original Return was Rs. 10 Crores and the assessee wants to file an updated Return of loss declaring a reduced loss say Rs. 8 Crores. In such a situation also, due to the language of the first proviso, since the updated Return will continue to be a Return of Loss, the assessee is not permitted to file an updated Return.	the assessee. This will give a level playing field vis-à-vis two assessees – one who wants to show a higher income and another who wants to make a genuine claim for a legally supported reduction in income. The filing fees will take care of administrative costs which the revenue has to incur for processing of such Returns. An assessee has to pay a fee of Rs. 500 for filing an application of revision u/s 264 of the Act. Similar fees can be proposed. Further, any Return filed by an assessee can always be subjected to an assessment where the claim of the assessee will be evaluated and will be allowed if it is legally sustainable. As such, there is no question of any assessee taking undue advantage of such updated Return and at the same time allowing an assessee to raise a genuine claim with a nominal cost. This will be leading to a good governance of tax laws and will be highly appreciated by the tax

			payers of the country. As regards the cases of reduction of loss in the updated Return, we feel that there should not be any objection against the same since it ultimately serves the purpose for which the provisions of updated Return have been introduced. We are merely seeking a corrective action for an unintended and inadvertent lapse in drafting the provision of the first proviso to sub-section (8A) of section 139

11. TAXATION OF DIVIDEND

Sr. No.	Existing provision under the Income-tax Act, 1961 ("the Act")	Difficulties Obstacles / Hurdles either Interpretative, Administrative or otherwise	Suggestion or new clause Suggested
11.1	Section 56: taxes Dividend as Income from other Sources. Section 115A(1)(a)(i) taxes Dividend Income of a Non-Resident or a Foreign Company at the rate of 20%. Many Double Taxation Avoidance Agreements tax Dividends earned from Indian companies at an even lower rate ranging from 5% to 10%. Most treaties permit India to tax dividend at 10% in the hands of the foreign shareholders.	There is discrimination currently as under: A resident pays tax on Dividend earned at as high as 30% plus a surcharge and cess – whereas for a similar dividend earned by a Non-Resident for an investment made in India the Tax rate is 20% under the Act or lower rate (usually 10%) under a tax treaty. A company is therefore, at times discouraged from distributing dividend, preferring to unlock value for the shareholders by issue of bonus shares. An LLP is taxed at 30%. A Company would be taxed at 22% plus a tax on distribution, i.e. dividend being taxed in the hands of the shareholders at the rate applicable, resulting in an effective tax which is much much higher – resulting in a discrimination against the corporate form of organization of business.	With a view to encourage doing business as corporates – which is more transparent it is suggested that the tax rate on dividends should not exceed the rate of 15%, which will rationalize the effective tax rate on corporate profits and bring it closer to the effective tax rate on LLP profits. Dividends may continue to be taxed in the hands of shareholders but this should be done at a flat tax rate of not more than 15%.
11.2	Section 57 provides that no deduction shall be allowed from the dividend income, or income in respect of units of a Mutual Fund specified under clause (*23D*) of section 10 or income	If expense has been incurred to earn Dividend, the same must be allowed as a deduction, particularly because Dividend is not taxed at a flat lower rate. There is no other way to allow Interest expense. Do also note that Dividend is	This Proviso should be removed. Alternately the cap of 20% at least must be removed. Alternately and as a last option, the expense can be capped to Dividend

	in respect of units from a specified company defined in the Explanation to clause (35) of section 10, other than deduction on account of interest expense, and in any previous year such deduction shall not exceed twenty per cent of the dividend income, or income in respect of such units, included in the total income for that year, without deduction under this section.	specifically taxable as income from other Sources and for an assessee who is in the business of investing, disallowing such expenses is unfair. Further, there is no rationale to cap interest allowance at 20% of income earned. If money is borrowed to make an investment and income is earned the same ought to be allowed in totality. There can be no case for artificially restricting the allowance of actual expense incurred, when the entire income earned is taxable.	Income.

12. OTHER PROVISION & PROCEDURAL ISSUES

Sr. No.	Existing provision under the Income-tax Act, 1961 ("the Act")	Difficulties Obstacles / Hurdles either Interpretative, Administrative or otherwise	Suggestion or new clause Suggested
12.1	Currently person, having only exempt income, is not required to file return ofincome	Persons earning huge tax-exempt income and not filing return of income are not subject to verification whether income is exempt or not and itleads to abuse of law.	Every person earning income which is not chargeable to tax e.g. agricultural income, exceeding Rs 10,00,000 should be mandatorily required to file return ofincome. As of now this applies only to capital gains.
12.2	Only a person having total income of more than Rs 50 lacs is required to disclose assets held by him. There is no provision that requires government employees if he earning less than Rs 50 lacs to disclose his total assets.	... It is difficult to implement benami transaction law with its full rigor. ... Reduce corruption, black money in the Indian System and transparency in the system.	It is proposed that, a government employee having taxable income should be mandatorily be required to disclose assets by him and his immediate relative. The clerical staff generally does not have taxable income so the lowest income group would automatically be excluded from application of a foresaid disclosure requirement.
12.3	Section 171 Section 171(3) requires Assessing officer to pass order recording partition of HUF. However, there is no time limit under the Act for the same.	Assessees have to make regular follow-ups with the assessing officer and the same at times becomes futile.	It should provide for time limit of say six months otherwise it should be presumed that the application is accepted as submitted.

13. CHARITABLE TRUST

Sr. No.	Existing provision under the Income-tax Act, 1961 ("the Act")	Difficulties Obstacles / Hurdles either Interpretative, Administrative or otherwise	Suggestion or new clause Suggested
13.1	Section 11(1)(d) read with 11(5): Income in the form of voluntary contributions made with the specific direction that they shall form the part of the corpus of the Trust or institution and if invested in specified mode as specified in section 11(5), shall not be included in the Total Income.	Many times, corpus donations are received for acquiring capital assets with the direction that it shall form part of the corpus of the trust such as equipment's / furniture / fixtures etc or it many, receives donation in kind of the above said capital assets, in this situation it is not possible for the trust to invest the donation amount in the modes specified u/s 11(5). Such donation amount cannot be invested if used for acquiring the capital assets or if invested in mode specified u/s 11(5) then cannot be used for acquiring the capital assets which is against the directions of the donor. For the purpose of section 11 (1)(d), if the corpus is not invested in the mode specified it will be considered as Income of that year and provision of act will apply accordingly with respect to taxability of such income, which should not be intention of the Act.	Appropriate concessions shall be provided in the Act so as to address the difficulty as envisaged under the situation.
13.2	Explanation 2 to section 10(23C) and Explanation 5 to section 11(1): clarifies	The trust or institutions have been registered for perusing the charitable or other specified objects	The set off shall be permissible for the past excess application of funds by the

	that calculation of income required to be applied or accumulated during the previous year shall be made without any set off or deduction or allowance of any excess application, of any of the year preceding the previous year.	and in many cases there is an excess application of income by the trust or institutions and in subsequent year such trust / institution may generate surplus, if one aggregates the total income and application still there may be deficit. So by not allowing the deficit or excess application over income (book losses), such trust / institution are put to hardship as they have scarcity of financial resources.	trust or institution.
13.3	Section 10(23C) Under section 10(23C) (iiiad) and (iiiae) of Income-tax Act, it is provided that the income of University / Educational institutions / hospitals / other institutions specified therein will be exempt provided they comply with the conditions stipulated therein. Also, it is provided that "aggregate annual receipts" of such institutions shall not exceed the amount of annual receipts as may be prescribed. Annual receipts have been prescribed at Rs. 5 crores (from AY 2022 – 2023).	(a) What constitute "annual receipts" for educational / hospital institutions has not been specified which results into controversies; (b) There is no clarity whether the casual receipts, other income received, voluntary contribution, donation in kind and capital gains etc which are not operational income will form part off of the annual receipts or not? (c) The amount of Rs. 1 crore has been specified in the rule 2BC of the Income tax Rules which creates confusion.	Considering the operations of university / hospital / other associations the limit of Rs. 5 crores as specified in clause 3(iiiad) and (iiiae) is still lower. We seek that the limit shall be suitably increased to at least 25 crores. We also seek better clarity for the terms used like "annual receipts" and also on constitution of casual receipts.

13.4	Exemption Section 10(23C) and Section 11	(2) Section 10 (23C) and section 11 to 13 specify provisions for claiming exemption from income subject to satisfaction of conditions laid therein. Section 10(23C) of the Act provides for exemption of income received by any person on behalf of different funds or institutions etc. specified in different subclauses. In other words, exemption to funds, institutions, trusts etc. carrying out religious or charitable activities is provided under section 10(23C) of the Act and sections 11 and 12 of the Act. Section 12A of the Act, inter alia, provides for procedure to make application for the registration of the trust or institution to claim exemption under section 11 and 12. Section 12AB is the new section which comes into effect from 01.04.2021. As per current provisions, both Section 11 and section 10(23C) are not simultaneously available for the same assessee. It creates difficulties and complexity for trust registered u/s. 10(23C). Eg. The annual receipts of the trust registered under section 10(23C) crosses the ceiling of Rs. 5 crores then it loses the exemption u/s. 10(23C) and then it will not get the benefit u/s. 11 also. There appears to be no reasonable and sound logic as the object of charity is already pursued. Such trusts object remains the same. This these results into hardship.	We request that suitable amendments shall be made with a view to address the difficulties as narrated.
13.5	Section 12AB – Registration / renewal of registration	The Finance Act 2020 inserted a new section 12AB providing for procedure for fresh	We request that the provisions of obtaining fresh registration every 5

		registration for charitable trust after every 5 years. The trusts are charitable in nature and does not have necessary wherewithal or infrastructure and object are always charitable in nature from the date it comes into existence. So, registration after every 5 years creates unnecessary burden on the charitable trust. Further the charitable trusts are also subject to income tax scrutiny year on year basis. So, this creates unnecessary burden on the charitable trust.	years may please be dropped as it is resulting in unnecessary compliance burden on the trusts.
13.6	Section 12A (1)(ac): The said section sets the time limit for a new charitable trust to file application for registration atleast one month prior to the commencement of previous year relevant to the assessment year from which registration is sought	As per sub -clause (vi) of section 12A(ac) requires the trusts/ institutions wanting to register for the first time under section 12A of the Income Tax Act, needs to make an application at least one month prior to the commencement of the previous year relevant to assessment year for which the registration is sought. Though it is welcome step, but it is difficult to comprehend why the condition of making application one-month prior to commencement of previous year relevant to assessment year, is required. Such condition has been diluted due to Covid for AY 2022-23, by bringing amendment in the sub rule (7) to rule 17A. However, it is not so for subsequent assessment years, in that case if the Trust in between the year makes an application, its	The condition of making application one-month prior to commencement of the previous year shall be dropped as it does not have any relevance.

		applications shall be valid only for the subsequent previous year. On the contrary rather than facilitating the trusts/institutions by issuing provisional certificate, it will create more delays and hence the purpose will be lost.	
13.7	Explanation 3 to clause (23C) of section 10 and Explanation given below the section 11(7) which is effective from 01/04/2022: "Explanation. —*For the purposes of this section, any sum payable by any trust or institution shall be considered as application of income in the previous year in which such sum is actually paid by it (irrespective of the previous year in which the liability to pay such sum was incurred by the trust or institution according to the method of accounting regularly employed by it)"*	The explanation envisages claiming of expenses on cash basis. This results into lot of difficulties and undue hardship to trusts, following accrual basis of accounting. Larger Trusts are maintaining accounts on accrual basis of accounting for e.g. Hospitals, for there internal control and for reporting purpose. Also, Trust registered under section 8 of Companies Act, 2013 or section 25 of Companies Act, 1956, needs to maintain account on accrual basis as per the Companies Act. Also, the trust following accrual basis of accounting needs to deduct Tax at Source, as and when the transactions are recorded in the Books, but at the same time the said expenses will not be considered as application, if paid in the subsequent year. As per Technical Guide on Accounting for Not-for-Profit Organisations issued by the Institute of Chartered Accountants of India, "Accrual is the	We humbly submit that it is not appropriate to insist on cash basis for the purpose of expenses incurred by the trusts considering various difficulties as explained. Accordingly, we request that the Explanation shall please be deleted. We also request to delete the same with retrospective effect.

		scientific basis of accounting and has conceptual superiority over the cash basis of accounting. It is, therefore recommended that all NPOs, including non-company NPOs, should maintain their books of account on accrual basis." Further, trusts need to make provision for expenses which are actually payable, there can be non-recovery of income, nonpayment to suppliers in a particular year, etc and making all such adjustments for arriving at the amount of application on cash basis, is a difficult task. The trust needs to maintain two separate accounts which further drain on the resources of the trust where they are pursuing charitable objects.	

14. INTERNATIONAL TAXATION

TRANSFER PRICING, APA & DISPUTE RESOLUTION PANEL

A. Detailed Recommendations - Transfer Pricing

A.1. Exemption for filing of Form no 3CEB filing for taxpayers exempt from filing return of income as per section 115A of the Income-tax Act, 1961

Background

- As per the amendment vide the Finance Act, 2020, a non- resident taxpayer is not required to file a return of income in India if it is assessable to tax in India for dividend, interest, royalty or fee for technical services, and the taxes have been appropriately withheld on such taxable income as per the provisions of section 115A of the Income-tax Act, 1961 ("the Act").

Issue

- Section 92E has not been amended consequent to the above exemption under section 115A(5) of the Act, thus raising a question about the taxpayer's obligation for filing Accountant's Report in Form no 3CEB. Non-reporting of international transaction in Form no 3CEB attracts multiple penalties under sections 271AA, 271BA, 271G and 270A of the Act.
- Consequently, a situation arises where a non-resident need not file a return of income in India but would still need to file Form no 3CEB to avoid any penalty for non-reporting of the international transaction.

Recommendation

- Considering the above inconsistency in the provisions, it is recommended that section 92E be amended to provide exemption to non-resident taxpayer from filing Form no 3CEB, where they are exempted under section 115A(5) from filing a return of income in India.

A.2. Statutory provisions for filing revised Accountants Report in Form no 3CEB as per section 92E

Background

- Section 92E of the Act provides that every person who has entered into an international transaction or specified domestic transaction during a previous year is required to file an Accountant's Report in Form no 3CEB on or before the due date specified under section

92F. However, there is no provision in the Act for revising Form no 3CEB as in the case of return of income [under section 139(5) of the Act] even though the income-tax e-filing website allows filing of revised Form no 3CEB.

Issue

- There may be situations of an inadvertent omission or misreporting in filing Form no 3CEB for which the taxpayer may require to revise the Form no 3CEB in bonafide cases. Misreporting/inaccurate reporting in Form no 3CEB are subject to penal consequences. Hence, the taxpayers do revise Form no 3CEB in such cases. However, since there is no statutory provision in this regard and often the tax authorities question the legality and timeline for filing revised Form no 3CEB.

Recommendation

- It is recommended that statutory provisions allowing filing of revised Form no 3CEB be introduced under the Act to avoid any genuine hardship to the taxpayers.

A.3. Amendment in Form no 3CEB not requiring reporting of issue / subscription of equity shares and other similar instruments

Background

- The CBDT issued Instruction No. 2/2015, on 29.01.2015 for accepting the decision of the Bombay High Court in the case of Vodafone India Service Private Limited [TS-308-HC2014(BOM)-TP-Vodafone India Services]. As per the said Instruction, the CBDT stated that premium arising on issue of shares is a capital account transaction and will not give rise to income and would hence not liable to transfer pricing ("TP") adjustment.

Issue

- Clause 16 of Form no 3CEB still requires reporting of transaction of equity shares and other similar instruments as under: "***international transactions of purchase or sale of marketable securities, issue and buyback of equity shares, optionally convertible/ partially convertible/ compulsorily convertible debentures/ preference shares***".
- In view of the specific reporting requirement in clause 16, the taxpayers are bound to report issue of shares transaction as international transaction even after the CBDT instruction No. 2/2015.

Recommendation

- It is recommended that Form no 3CEB be appropriately amended to bring it in line with the CBDT instruction No. 2/ 2015.

A.4. Interquartile Range to determine Arm's Length Price ("ALP") be allowed

Background

- The third proviso to section 92C(2) of the Act read with Rule 10CA of the Income-tax Rules, 1962 provides for the range concept from 35th percentile to 65th percentile for 6 or more comparables and arithmetic mean for less than 6 comparables. However, most of the tax administrations around the world follow interquartile range for determining the ALP.

Issue

- International groups confront challenges to substantiate the arm's length standards across different jurisdictions for the same / similar international transactions.

Recommendation

- It is recommended that the interquartile range (25th percentile – 75th percentile) be allowed to justify the arm's length standards to be consistent with various other tax administrations.

A.5. Applicability of plus / minus 3 percent range as per second proviso to section 92C(2) even in case of a single comparable company

Background

- As per the proviso to section 92C(2) of the Act, where more than one price is determined by the most appropriate method, the ALP shall be taken to be the arithmetical mean of such prices.
- Further, the second proviso to section 92C(2) states that if the variation between the ALP so determined and price at which the international transaction or specified domestic transaction has actually been undertaken does not exceed such percentage not exceeding 3 percent of the latter, as may be notified by the Central Government in the Official Gazette, the price at which the international transaction or specified domestic transaction has actually been undertaken shall be deemed to be the ALP.

Issue

- The Assessing Officer ("AO") and TPO have been interpreting that the second proviso to section 92C(2) of the Act is dependent on the first proviso, to conclude that the advantage of the plus / minus range prescribed under the second proviso to section 92C(2) of the Act is only available in a case where the first proviso is applicable, i.e., more than one price is determined by the most appropriate method.
- Consequently, the range benefit is disallowed to the taxpayers in a case where there is only one price determined by the most appropriate method, thereby expecting the taxpayer to transact at an identical price as that of the comparable without any flexibility which is extremely unreasonable.
- Courts have also been passing contrary decisions in this matter.

Recommendation

- It is recommended that a clarification be issued by way of an explanation allowing the applicability of plus / minus 3 percent range even in case of a single comparable company.

A.6. Definition of Associated Enterprise ("AE") under section 92A(2) should cover Limited Liability Partnership ("LLP") firms

Background

- The constitution of AE is defined under section 92A of the Act, which provides the basic test for determination of AE relationship. Section 92A(2) provides thirteen conditions by virtue of which two or more enterprise would be deemed to be AEs. These conditions primarily relate to the participation in capital, management and / or control of one enterprise into other.
- LLP firms are extensively used forms of enterprises that are being constituted in recent times. However, a majority of the conditions for determination of AE relationship as provided in section 92A(2) does not apply to a LLPs. Section 92A(2)(a)/(b) cover direct, indirect, or common holding of enterprises involving 'shares carrying not less than 26 percent of the voting power'. However, LLPs are constituted by partnership interest and consequently do not issue shares carrying any voting power.
- Section 92A(2)(l) covers AE relationship in case of firms (which include LLPs). However, as per section 92A(2)(l), the two enterprises can be said to be AE where one enterprise is a firm, Association Of Persons ("AOP") or Body Of Individuals ("BOI") and the other enterprise holds not less than 10 percent interest in such firm, AOPs or body of individuals. Therefore, the section only provides AE relationship for direct holding. It does not cover persons holding indirect participation in capital, management, or control of a person, which is not in alignment with the basic test provided in section 92A(1).

- Also, a provision similar to section 92A(2)(b) constituting an AE with a fellow subsidiary is not covered by any of the clauses involving an LLP.

Issue

- Due to current provisions of section 92A(2), there is a risk of litigation regarding the coverage of persons as AE in the case of LLPs.

Recommendation

- It is recommended that the provisions of section 92A be amended to cover newly constituted form of organisations like LLPs.

B. **APA and dispute resolution**

B.1. Removal of restriction under section 92(3) for unilateral APAs

Background

- Section 92(3) of the Act is a restrictive tax provision. Under this provision, the taxable income of the taxpayer already reported in the return of income cannot be reduced or the losses cannot be increased on account of TP adjustment.

Issue

- There are circumstances when the ALP agreed in an APA is lower than the price at which the international transaction has actually been undertaken in the past covered years and/or the rollback years which may result in lowering of the taxable income of the taxpayer.
- Due to restrictions imposed by section 92(3) of the Act, benefit of lower ALP and taxable income for past covered years or roll back years are not allowed to the taxpayer. This often results in substantial tax cost to the taxpayer for the past APA years/rollback years and denies the benefit of independent thinking in determination of A]LP by the tax department. The taxpayer ends up paying higher tax even when the agreed ALP is lower which is prejudicial to the taxpayers.

Recommendation

- APA is a dispute prevention mechanism. It should be kept independent of the regular income-tax provisions since it involves a negotiation between the taxpayer and the tax department, which can ensure that the outcome of APA is beneficial to both, the taxpayer, and the tax department. Accordingly, the provisions of section 92(3) of the Act.

B.2. Keeping regular assessment in abeyance till APA conclusions

Background

- As per Rule 10T of the Income-tax Rules, 1962, mere filing of an application for an APA shall not prevent the operation of Chapter X of the Act for determination of ALP under that Chapter till the APA is entered into.

Issue

- For the taxpayer who has applied for an APA, two procedural tracks - APA process as well as regular TP assessment and litigation end up running in parallel, leading to time and resource wastage at the taxpayer's end.
- Once an APA is concluded, all pending appeals are required to be withdrawn. This leads to inefficiencies and resource wastage at the tax department's end as well without any revenue gain.

Recommendation

- Assessment process can be suspended for a reasonable period (say for 2 years or so) or till the APA has either been concluded or withdrawn, whichever is earlier. This will relive the taxpayers of large compliance work and will make the APA process more attractive. This will also incentivize the taxpayers and the tax department to conclude the APA proceedings at a quicker pace.
- Mature tax jurisdictions like Japan, the US, the UK keep the assessment proceeding on hold, till the conclusion or withdrawal of the APA. Indian tax law could be aligned with such global best practices.

B.3. Clarity on the implications of High Court proceedings where Mutual Agreement Procedure ("MAP") are closed based on Income-tax Appellate Tribunal ("ITAT") order

Background

- CBDT issued MAP guidance on MAP on 7th August 2020 (MAP Guidance). It has been categorically mentioned in the MAP Guidance on page 10, that if the ITAT order is issued on merits with respect to the same dispute that is subject matter of MAP, the Competent Authority of India will follow the order of the ITAT and will not deviate from that position. In such cases, the Competent Authority will only request the Competent Authority of the other country to provide correlative relief based on the ITAT order. These MAP cases shall be closed as having been resolved through domestic remedy.

Issue

- In cases where MAP is resolved after negotiations between the two competent authority, Rule 44G provides a detailed procedure for giving effect to MAP resolution by the AO once it is accepted by the taxpayer. As per Rule 44G(11) of the Income-tax Rules, 1962, after the submitting of the proof of payment by the taxpayer, the AO shall withdraw all the pending appeals pertaining to the dispute resolved under MAP.
- However, in cases where MAP is closed by domestic remedy as mentioned above, pursuant to the ITAT order; there is no clarity about the pending appeals before the High Court or Supreme Court. Practically, in many instances, the Indian Competent Authority is closing the cases where ITAT orders are received on merits while the appeal continues in the High Court or Supreme Court. In these situations, there is no clarity whether MAP fails in these situations, or the taxpayer can again request for MAP negotiations after these appellate proceedings.

Recommendation

- Rule 44G should provide for withdrawal of all pending appeals after the resolution of MAP under domestic appeal if the taxpayer accepts the ITAT order. This would create parity in the MAP resolution in both circumstance ie. when resolved by the negotiations between the Competent Authority and when resolved through domestic remedy. Ultimately, in both the situations, it is the position adopted by the Competent Authority. If accepted by the taxpayer, it cannot be appealed further by any of the parties to the dispute.

B.4. Penalty protection under MAP

Background

- The Hon'ble Karnataka High Court recently dismissed a writ petition filed by Toyota Kirloskar[1] against the levy of concealment penalty on TP adjustment under MAP under the relevant tax treaty. In this case, the High Court held that unless a specific provision is made in the Double Taxation Avoidance Agreement ("DTAA") with respect to penalty, provisions of section 271(1)(c) would continue to apply to TP adjustment under MAP.
- The Hon'ble High Court held that the onus lies on the taxpayer to establish that the TP adjustment arrived under MAP is not due to concealment of income or furnishing of inaccurate particulars.

Issue

- Under MAP, the competent authorities of the two countries discuss, negotiate, and finally decide the TP adjustment to the international transaction to avoid double taxation under article 25 of the DTAA. The two competent authorities review the case and resolve the dispute as an alternative dispute resolution procedure.
- Considering that the decision on TP adjustment in MAP is arrived at by two sovereign countries based on negotiations, any levy of penalty in a routine manner should not be availed unless the taxpayer has not acted in good faith and with due diligence

Recommendation

- An explanation may be added in section 271(1)(c) to state that no penalty for concealment of income for TP adjustments under MAP be levied unless there are reasons to say that the taxpayer has not acted in good faith and with due diligence, and thereby concealed facts or furnished inaccurate particulars.
- Effective MAP program in a country is one of the minimum standards under BEPS. Unless exceptions are created for such implementation issues, it would render the MAP program less effective.

B.5. Streamlining Safe Harbour to reduce APA filings

Background

- The Indian Government tried to streamline the safe harbour rates in June 2017 to make it reasonable and closer to comparable benchmarks. However, even after 2017, not many taxpayers have adopted the benefit of safe harbour to avoid litigation.

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- The safe harbour benefit has been restricted to very small companies thus making it inaccessible to medium-scale and large-scale companies.
- Safe harbour rates are still higher than the comparable benchmark which make it commercially unviable for taxpayers to adopt. Moreover, only few safe harbour applications are filed by the taxpayers, which are mainly consisting of IT and ITeS. There is hardly any taxpayer for most of the other transactions covered in Safe harbour.

Issue

- Due to present safe harbour regime, many taxpayers have to apply for APA to attain tax certainty. Generally, APA should only involve cases with complex transactions and business models that require in-depth business and economic analysis for agreeing on the transfer prices.

Recommendation

- In view of the above, the Government may re-evaluate the safe harbour provisions on the following three aspects
– Reduce the class of transactions from the safe harbour and restrict it to only simpler transactions like IT, ITeS, business support etc;
– Provide the safe harbour rates closer to comparable benchmarks with a little premium for certainty; and
– Increase the threshold to cover almost 75 percent of the companies under this spectrum. This can serve dual purpose of providing tax certainty to taxpayers and easing the burden of the APA.

B.6. Dispute Resolution Panel ("DRP") to provide speedy and judicial dispute resolution; Alternative and innovative mechanisms of speedy appellate procedure in the faceless assessment scheme

Background

- DRP has been empowered to reduce, enhance, or confirm the variation proposed by the TPO/AO. However, DRP does not have power to set aside any proposed variation or issue any direction for further enquiry. The orders of DRP are not appealable by the tax department.

Issue

- The legislative intent for constitution of DRP was to provide speedy resolution to the taxpayers. However, since the orders of the DRP are not appealable by the tax department, it is often noticed that the DRP does not provide any relief to the taxpayer and generally confirms the order of the TPO/ AO. Thus, effectively, and practically, the DRP has become a fast-track channel for reaching Income tax Appellate Tribunal in a period of 9-10 months and deferring the payment of taxes. This has led to extended TP audit cycle and pendency of a high number of TP cases before the ITAT on routine matters.

Recommendation

- The DRP should be made an effective mechanism to settle disputes by critically reviewing the proposed variation by the TPO and AO and pass order based on the merits of the case so that large number of cases do not clog before the ITAT. The government should re-work the DRP scheme to make it more effective in line with its purpose and intent.
- In the new regime of faceless assessment with no personal interaction between the AO and taxpayers, the assessment orders are expected to be more critical and independent. In such a case, the DRP route may even be abolished with a new mechanism for speedy appeal process.
- The Government may also introduce an Alternate Dispute Resolution (ADR) body may be constituted which may comprise of members from Revenue and industry experts. This can be in the form of a mediation mechanism between the taxpayers and tax authorities, which once agreed cannot be litigated further by either party. The Vivad se Vishwas scheme is an example of a successful ADR scheme.

B.7. Mandatory timeline for CIT(A) to pass the order

Background

- The Act does not provide any mandatory timeline for CIT(A) to pass the order. It only suggests a timeline of one year from the year in which appeal is filed.

Issue

- Though there are timelines for AO and DRP to pass their order / directions, there are no similar timelines prescribed for the CIT(A). It is seen that in many cases, appeals are pending before the CIT(A) for over 4 to 5 years, thus delaying the litigation process, and making the entire CIT(A) route ineffective.

Recommendation

- The above snag can be cleared by introducing a concept for time barring appeals which can be brought at CIT(A) stage as well. CIT(A) is an administrative appellate mechanism and imposing a timeline for disposal at CIT(A), will help in reducing the time gap withing which the taxpayer can get certainly in relation to dispute resolution.

- This concept is already prevailing under the DRP route and hence there should not be any difficulty for CIT(A) route as well. A time limit should be introduced, say, 12 months, extendable to further 3 months depending upon the complexity of the case.

14.1 OTHERS

Sr. No.	Existing provision under the Income-tax Act, 1961 ("the Act")	Difficulties Obstacles / Hurdles either Interpretative, Administrative or otherwise	Suggestion or new clause Suggested
A.	**Equalization Levy operational from FY 2020-21**		
1.	EL to apply only to pure E-commerce Marketplace activities and digital trading platforms	Section 164(ca) of the Finance Act 2020 defines "e- commerce operator" means a non-resident who owns, operates, or manages digital or electronic facility or platform for online sale of goods or online provision of services or both. Today all business has online transaction element. In view of same, the wide definition of 'e-commerce operator' inadvertently seems to covers traditional brick and mortar businesses and many other businesses which are not e-commerce platform or marketplace in nature. These businesses included service providers such as banking or insurance companies, payment processing / payment facilitation companies, telecom, online education, healthcare and such other companies who are providing their services through a website or portal or even a cloud service provider ('CSPs') and use them as an infrastructure to do business like a physical computer / office, etc.	The term 'ecommerce operator' should be defined and aligned to tax pure e-commerce marketplace as is understood in normal parlance where multiple sellers interact with multiple buyers like any open-market and not to two or more parties who know each other and chose to communicate using digital means. Alternatively, it can be clarified that Parties involved in traditional brick and mortar businesses, banking and financial services, payment platforms, cloud service providers and inter-group goods and services type transactions should not be construed as e-commerce operator as they are engaged in traditional business using digital tools.

2.	Rationalization of the definitions for the purposes of EL	For the purpose of levy of EL, there are various terms which have not been defined in the provisions, such as 'digital facility' or 'electronic facility' or 'platform', 'data' etc. The standard and general use of emails, telecommunications, digital conferences, website and all of forms electronic communication with basic and need based customization cannot be considered as "online" for applicability of EL but there is no specific clarity in EL provisions. This could lead to unwarranted interpretation issues and litigation.	... The standard and general use of email/ telecom/ internet, etc. be kindly clarified to fall outside the ambit of platform/ facility, etc. ... The term platform for EL should be clarified to mean a highly customized electronic or digital platform or facility for online sale of goods or online provision of services or both as deployed by e-commerce marketplace operators and similar trading platforms. ... Similarly, the various internal and multi-purposes close ended platforms (e.g. ERP) especially in the context of inter-group transactions should not be construed as digital or electronic facility or platform for levy of EL. It is also suggested that the meaning of services for levy of EL to be restricted to "Automated digital services" as outlined in the draft Article 12B proposed to the UN Model convention.
3.	Preparatory activities not to be treated as online sale of goods and online provisions of services for purposes of EL	The Explanation to 164(cb) of the Finance Act 2020 added by the Finance Act 2021 has expanded the ambit of online sale of goods and online provision of services significantly. It includes	It is suggested that only the proper and actual online sale of goods and online provisions of services entirely provided / facilitated by the non- r esident e-

		preparatory / auxiliary activities done online such as acceptance of offer, placing of purchase order, acceptance of purchase order, payment of consideration, supply of goods / services (fully or wholly). The above coverage for purpose of EL is very unreasonable as goods may not have been even manufactured or delivered or services may have been entirely rendered physical form but EL still gets attracted for minor activities which are preparatory / ancillary in nature which countries vide tax treaties have always agreed not to tax in country of source due to their minimal contribution to the business profits.	commerce operator through its online platform should be liable to EL It is therefore requested that the said Explanation to Section 164(cb) be deleted / modified suitably.
4.	Adjustment of taxes between income-tax and EL	There is a possibility of disputes on whether a payment is liable to EL or to income-tax as royalty or FTS. The payers generally deduct tax on payments to non-residents as royalty / FTS on conservative basis. Thereafter, the non-resident file their income-tax return in India and claim refund. In such cases, EL may be attracted or asserted in tax assessment. There is currently no mechanism for adjustment of taxes on income of non-resident withheld / paid as royalty/FTS to be adjusted against EL applicable or asserted to be applicable at assessment stage. This anomaly creates double outflow of taxes in India for a non-resident on the same income.	It is requested that the taxpayer be allowed to offset the EL liability against any income-tax withheld / paid on the same income as royalty / FTS. No interest should be charged on EL till the amount is so adjusted against subsequent tax demand. Further, where taxes are withheld on gross basis as Royalty/FTS and taxation is claimed and accepted under EL provisions, then on the consequential refund, interest should be granted till the refund of EL considering taxes withheld / paid as royalty / FTS as payment of EL.

5.	Appeal/ grievance mechanism with respect to grievances emanating from EL provisions	While the right to appeal before the Commissioner of Income-tax (Appeals) against penalty order issued under the EL provisions is provided under Section 174 of Finance Act, 2016, there seems to be no mechanism provided under the existing EL provisions for the non-resident e-commerce operator to file an appeal against any other grievance arising under these provisions.	It is suggested that an expressed appeal/ grievance mechanism be provided for non-resident e-commerce operator with respect to assessment and other issues emanating from the EL provisions, including the applicability and charge of EL. These provisions of appeal, rectification, revisions, etc., to be on the same line as currently existing in the Income-tax Act.
B.	**Liable to tax under Section 2(29A)**		
1.	Anomaly surrounding the definition of liable to tax	Section 2(29A) defines liable to tax – "*liable to tax" in relation to a person and with reference to a country, means that there is an income-tax liability on such person under the law of that country for the time being in force and shall include a person who has subsequently been exempted from such liability under the law of that country;]* The current definition of 'liable to tax' talks about income-tax liability only on such person under the law of that country. It is submitted that in several countries such as US, UK and Germany, partnership firms and other form of corporate are pass through entities. In such cases, the income is liable to tax in the resident country but not on such entity but its shareholders / partners. In such cases, the pass-	It is suggested that the criteria for liable to tax be expanded to include cases where there is an income-tax liability on all income of such person or on such income, the liability is on any other person (e.g. partners) under the income-tax law of the resident country. In other words, in the context of person, it should also include all forms and mechanism of taxing and the person directly or taxing its partner or anyone else (say its shareholders) pursuant to pass-through status or any other such reason. Further, the tax residency certificate issued by the Income Tax Authorities

		through entities should be eligible for tax-treaty benefits as all that is happening is all the income of such partnership firm is taxed in country of residence but the charge and liability is on the partners.	of that jurisdiction even if issued in any modified form or with different name or those issued for the taxable partners be notified as satisfying the 'liable to tax' definition for such entity /partnership.
C.	**Residence under Section 6**		
1.	Control and Management for persons other than companies	Under Section 6(2) of the Act, for persons other than companies and individuals (i.e., for partnership firm, etc.), even if part of their Control and Management is in India then it is considered as an Indian tax resident. This provision is quite harsh and is not in accordance with global principles surrounding tax residency.	It is requested that the residence test for partnership firm / other entities be placed on similar lines as in case of companies. i.e., tax residence in India only if Place of Effective Management is in India. This change will also be in line with the provisions of existing Indian DTAAs.
2.	Meaning of the term 'visit' for individuals	With respect to individuals, there is a controversy on the meaning of "visit" to India under explanation 1(b) to section 6(1). As the term "visit" is not explained, it may and is likely to leads to unwarranted litigation.	It is suggested that the term "visit" be deleted to eliminate any controversy and making the applicable criteria only of physical presence in India. Further the term visit should exclude days where the individual is forced to stay back in India in certain circumstances such as Covid19. Currently, these cases are being evaluated by the CBDT on case by case. We submit that guidelines in this respect be incorporated in the Rules and a mechanism be provided

			for the individual to place his case to the CDBT even prior to such events
D.	**Significant Economic Presence provisions under Section 9(1) of the Act**		
1.	Attribution of profits to SEP in India of non-resident not specified	The SEP provisions are applicable for FY 2021-22 and are still pending enactment of Rules on how profits/incomes are to be attributed to an SEP of Non-Resident in India. In the absence of clear detailed rules, divergent approach can be adopted by different tax officers and taxpayers alike, which would lead to unwarranted uncertainty and litigation.	It is requested that the rules for attribution of profits to SEP of NR in India be notified at the earliest.
2.	Increasing SEP threshold	The revenue thresholds for triggering SEP are currently set at INR 2 crores which is a very low threshold. Further, threshold is independent of the criteria of soliciting of business activities or engaging in interaction with such number of users in India. Thus, SEP gets triggered for all non-resident irrespective of the criteria of soliciting business or number of users which consequence.	It is suggested that SEP monetary be matched with the those under the OECD Pillar 1 at EUR 1 million. The above value threshold to be also made conjoint with the other criteria to constitute SEP i.e., soliciting of business activities or engaging in interaction with prescribed number of users in India.
3.	Relaxation of deduction of tax at source under Section 195	In case of a non-resident, where SEP provisions are triggered, there is an obligation to withhold tax thereon under Section 195 of the Act and currently no computation rules have been enacted.	It is requested that the provision of Section 195 of the Act be relaxed for SEP transaction with non-resident and in all such cases, the income-tax liability should be discharged directly by the non-resident.

		In most cases, the payer in India may not have any ability to obtain the required data from the non-resident at the transaction stage or it is likely that the threshold for the non-resident are met after the transaction of the resident with the non-resident. It is also possible that the non-resident is unable to compute such income when the accounting / tax year has not ended and profits/ income are not determined. Further, many of the customers of the non-residents may be consumers (B2C) and not businesses (B2B) and would not be in position to obtain details / information for withholding tax purposes.	
E.	**Transfer Pricing**		
1.	Absence of minimum threshold for TP applicability and increasing the threshold of TP documentation obligation	Transfer pricing provisions do not stipulate any threshold above which they become applicable and thereby the underlying compliances are burdensome and expensive especially for small and new companies and businessmen. Similarly, the documentation obligation threshold at Rs. 1 crore is too low Also, the maintenance of TP documentation obligation at Rs. 1 crore is too low	It is suggested that a minimum threshold be introduced in transfer pricing provisions and the provisions of Chapter X of the Act should apply only when it is exceeded. This threshold can be in the range of Rs. 10 to 15 crores in any financial year. It is also suggested that the minimum threshold for maintenance of TP

			documentation be increased to Rs. 5 crores.
2.	Correlative adjustment to be allowed for other Associated Enterprises (AE)	Under second proviso to Section 92C(4) of the Act, if any adjustment is made to the income of AE for payment to another AE on which tax has been deducted / deductible, no corresponding recomputing of recipient's AE's income is permitted.	It is submitted that the restriction by the second proviso to Section 92C(4) of the Act is unfair and be deleted as it results in taxing the same income twice for the payer and the recipient. It is therefore requested that if an AE's expenditure is disallowed due to TP adjustment, then the other AE's (recipient's) taxable income be allowed to correspondingly be reduced.

3.	Secondary Adjustments: Section 92CE of the Act in case of Non-Residents	Sub-section (2) of Section 92CE of the Act stipulates repatriation into India of the excess money as stipulated or levy of interest as deemed advance in the manner prescribed. Further sub- section (2A) provides an alternative to pay additional tax at the rate of eighteen percent on such excess money if not repatriated to India. There is no relaxation for these provisions for non-resident who only have India source taxable income and no other formal / legal presence in India.	It is suggested that when transfer pricing adjustments are made in cases of non-residents, especially those having no legal presence in India, they should be exempted from the obligation to repatriate the excess money under Section 92CE(2) as well as from the rigors of paying additional tax under Section 92CE(2A) of the Act.

		Further, the provisions of the Foreign Exchange Management Act 1999 and its applicable Rules/ Regulations may not support such repatriation to India followed by remittance back to outside India.	
4.a	No exemption / relaxation of Limitation of interest deduction under Section 94B of the Act in bonafide cases :	The provisions of Section 94B of the Act are applicable in all scenarios (except banks /insurance companies as stipulated) and do not consider situations such as large gestation period in case of capital-intensive projects or infrastructure projects, initial years of set-up / operations, etc. Thus, they operate irrespective of underlying business conditions and even the carried forward period is subject to eight-year limitation	It is suggested that Section 94B of the Act be made applicable only after completion of gestation period in case of capital intensive and infrastructure project (i.e. five to ten years) and in other cases post initial years of set-up / commencement of business operations say 3 to 5 years. Further, the carried forward of excess interest needs to be allowed indefinitely on par with unabsorbed tax depreciation as there is no case to subject it to the limitation period of eight years.
4.b	Computation anomaly in disallowance of interest deduction under Section 94B of the Act	The formula for computing excess interest considers total interest paid by the borrower including interest paid to non-AEs and even on borrowing not guaranteed or supported by non-resident AEs. This creates a situation of interest paid to or guaranteed or supported by non-resident AE being disallowed first.	This rigor is requested to be relaxed and only the proportionate interest with respect to AE and non-AE borrowing in excess of 30 percent should be subject to interest limitation provisions.

5	Secondary adjustments obligation to make adjustment in the books of account of the AE	The Section 92CE(3)(v) of the Act in a case where taxpayer brings the funds into India then the taxpayer and its AE are required to make an entry in their books of accounts to reflect the actual allocation of profits.	It is suggested that the obligation with respect to the accounting entry in the books of the AE is unwarranted as the accounting norms in that jurisdiction may request such payments / entry to be reflected in different shape and forms as per local transfer pricing and accounting rules / standards prevalent and would be beyond the control of the taxpayer in India. Accordingly, it is requested that this requirement of accounting in AE's books be accordingly done away with.
6	Transfer Pricing Report under Section 92CE of the Act where income-tax return filing is not obliged for nonrresidents	Section 115A of the Act has been amended to provide that non-resident are not required to file income-tax return in India if their income comprises of specified category (interest, dividend, royalty, fees for technical services) and taxes have been deducted as stipulate therein. However, for such non-residents there is no relaxation from filing of transfer pricing reports.	It is submitted that Non-Resident not obliged to file income-tax returns be granted relaxation from filing transfer pricing report under Section 92E of the Act. In such cases, a declaration to obtained based on TP report filed under Section 92E of the Act filed by the Indian AE for the transactions with the Non-Resident AE.
F.	**Overseas Mergers / Demerger – Direct and Indirect Transfer**		

1.	Absence of carve out with respect to exemption from capital gains tax in the context of foreign merger/demerger – direct transfer as well as indirect transfer.	Sections 47(via), 47(viab), 47(vic) and 47(vicc) inter alia requires that the shareholders of the amalgamating company / de- merged company should continue as the shareholder of the amalgamated company / resulting company (as the case maybe) for constituting transactions not regarded as transfer to qualify for exemption from taxation as capital gains. There are however no carve out for cases where amalgamated / resulting company is the shareholder of amalgamating / demerged company as in domestic cases as under: • Section 2(1B) of the Act dealing with domestic amalgamation carves out an exception for shareholding continuation condition which does not apply to the shares of the amalgamating company that are held by the amalgamated/resulting company or its subsidiary. This is because when the subsidiary is merged into the Holding company, the Holding company cannot allot shares to itself under the merger. Similarly, Section 2(19AA) of the Act provides for an exception from this condition where the resulting company itself is the shareholder of the demerged company.	The logical carve out for Parent-Subsidiary be incorporated in the existing exemptions relating to merger/de- merger of foreign companies – direct transfer as well as indirect transfer cases. This will bring clarity to all such cases rather than relying on general principles / judicial precedents for such conclusion. It is therefore requested that the Sections 47(via), 47(viab), 47(vic) and 47(vicc) of the Act be amended to provide that the requirement of continuity of shareholders will not apply to the shares of the amalgamating company / demerged company that are held by the amalgamated company (or its subsidiary) in the case of amalgamation and resulting company in the case of demerger.
G.	**Easing compliance burden on non-residents**		

1.	Relaxation from filing of income-tax return for non-residents in India	Sub-section 5 of Section 115A of the Act was amended by the Finance Act 2020 w.e.f. 1 April 2020 to provide relief to non-residents from filing income-tax return in India if their income in India consists of items covered therein (interest, royalty, fees for technical services, etc.) and tax has been deducted in accordance with the provisions of Part B of Chapter XVII of the Act. No such relief seems to be directly available if tax is withheld in accordance with the provision of the tax treaty. Many of the Indian tax treaties provide for the withholding tax rate in respect of income earned by way of royalty or FTS (i.e., not effectively connected to a permanent establishment) at 10%. The difference between Treaty rate in such cases and those stipulated under provisions of the Act is the surcharge and additional surcharge in the form of education cess(considered subsumed / included in the tax treaty rate). This by itself should not or should not be construed to disentitle the non-residents from the benefit of non-filing return of income under Section 115A(5) of the Act or make adoption of such position as ambiguous and litigative.	It is suggested that the relief from filing of income-tax return to non-resident under Section 115A(5) of the Act be extended to cases where taxes have been deducted at the tax treaty rate if they are same as the basic rate stipulated in Section 115A/Part B of Chapter XVII of the Act (basic rate is the rate excluding the surcharge / education cess).

2.	Relaxation to Non-resident from income-tax return filing not available for basket of incomes	There seems to be an inadvertent error in clause (a) of sub-section 5 of section 115A as it grants relief from filing return of income only to cases falling in clause (a) or clause (b) of sub-section (1) of section 115A. In other words, if a non-resident has income under both sub-clause (a) and (b) of Section 115A(1) of the Act then this relief from filing of income-tax return is not available. This seems to be an anomaly and clearly unintentional.	It is suggested that the relief from filing of income-tax return should be extended to cases of Non-Residents having income taxable under both clause (a) and (b) of sub-section 1 of Section 115A of the Act and not only to cases having income either under clause (a) or (b) of Section 115A(1) of the Act as currently stipulated.
3.	Relaxing TCS provisions under Section 206C(1H) of the Act for Non-Resident Investors	It seems that a non-resident investor including those who has no taxable income / presence in India and acquiring shares of an Indian company or foreign company [for shares deriving substantial value from Indian assets in accordance with Explanation 5 to section 9(1)(i) of the Act] is subject to TCS provisions under Section 206C(1H) of the Act. In other words, the seller is required to collect tax at the rate of 0.1% of consideration from such non-resident investor, subject to certain conditions. This, TCS is then required to be claimed as refund by filing return of income in absence of any taxable income in India of such non-resident investor.	It is submitted that such non-resident investors do not have any taxable income in India in the years of investment and they suffer TCS and need to file income-tax return in India only for claiming refund of the TCS collected by the seller. This is very onerous and unwarranted compliance in case of such non-residents. It is requested that a relaxation from TCS provisions be given to non-resident investor whose purchase of shares of Indian Company / Foreign Company (deriving substantial value from India) do not result in any taxable income in India.

4.	Reduction in basic corporate tax rate for non-resident/foreign company from 40% to 30%	The basic corporate tax rate for Indian Company has been reduced gradually over a period of time and it can now be opted at 22% (Section 115BAA) or at 15% (Section 115BAB). On the other hand, the basic corporate tax rate for non-resident has remained the same at 40% is very high and has not been reduced for several years.	It is suggested that basic corporate tax ate for foreign company be reduced from 40% to 30% and pass on the benefits of ease of doing business in India to foreign entity setting up branch office, or project offices in India especially in the infrastructure projects.
5.	Introduction of presumptive taxation regime for non-residents having permanent establishment in India.	There are various types of presumptive schemes for taxation of residents but very few for non-resident foreign companies especially regular companies constituting permanent establishment in India on account of services PE, etc. The computing of income attributable to the PE is complex, subjective and enshrined with lot of issues and options. It is onerous for smaller projects and foreign companies. Thus, there is a strong need of presumptive taxation for non-residents having PE in India and wanting to tax their income on presumptive basis	An alternative and optional presumptive taxation regime taxing such onshore income of foreign company constituting a permanent establishment in India on gross basis say at 10 percent on gross basis for services and 2% for goods be introduced. This would eliminate the uncertainties and compliance burden significantly especially on small and mid-size projects of foreign company. It will promote ease of doing business and also contribute to the revenue.

15. THRESHOLD LIMITS

Sr. No.	PRESENT PROVISION/PRACTICE			SUGGESTED MODIFICATION	RATIONALE FOR CHANGE
	Section / Rule	Provision	Present Limit		
I	Monetary limits				
	GENERAL				
1	10(32)	Exemption limit for clubbing of minor's income	1,500	10,000	Since 1993
	SALARIED EMPLOYEES				
2	10(10B)	Exemption limit for retrenchment compensation	500,000	1,000,000	Since 1997
3	10(10C)	Exemption for amount receivedon voluntary retirement or termination in accordance with a scheme of voluntary separation	500,000	1,000,000	Since 2001
4	10(14)(ii) Rule 2BB	Children Education Allowance	100 p.m.	2,000 p.m.	Since 1997. It is so miniscule that if relief is intended then it should be increased OR removedaltogether.
5	10 (14) (ii) r.w. Rule 2BB	Children Hostel ExpenditureAllowance	300 p.m.	2000 p.m.	Since 1997. It is so miniscule that if relief is intended then it should beincreased OR removed altogether

6	17(2)(vi)	Medical Treatment outside India is subject to condition that gross total income does not exceed Rs 2,00,000	2,00,000	500,000	Since 1993
7	17 (2)(viii) r.w. Rule 3	Perquisite in respect of thefollowing a) perquisite for interest freeloan in excessof b) lunch /refreshment c) Value of any gift etc. on ceremonial occasionsor otherwise	20,000 50 5,000	1,00,000 200 25,000	} Since 2001
	TAX DEDUCTION AT SOURCE				
8	193	TDS on Interest on Securities	5,000	20,000	Since 1989. Will reduce hardship to many.
9	194-J	TDS on Professional Fees etc.	30,000 and there is no separate aggregate limit	30,000 per contract and aggregate limit of Rs.1,00,000	To align with limits u/s.194C

II.	Monetary Ceilings				
10	208	Applicability of payment of advance tax when tax payable exceeds	10,000	20,000	Since 2009
11	285 BA	Second Proviso of sub-section (2) states that the value of aggregate transactions to be furnished shall not be less than Rs.50,000/-	50,000	500,000	since 1-4-2004

NOTES

NOTES

The Chamber of Tax Consultants

Estd. 1926

Vision Statement

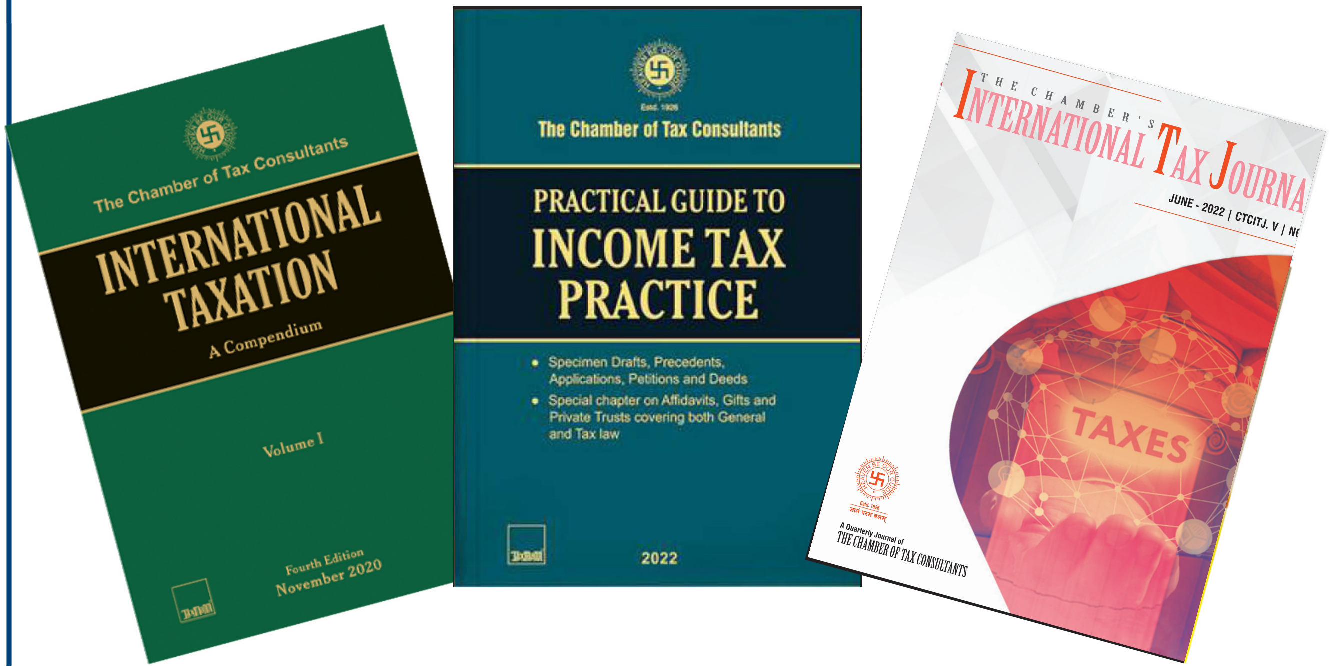
The Chamber of Tax Consultants (The Chamber) shall be a powerhouse of knowledge in the field of fiscal laws in the global economy.

The Chamber shall contribute to the development of law and the profession through research, analysis and dissemination of knowledge.

The Chamber shall be a voice which is heard and recognised by all Government and Regulatory agencies through effective representations.

The Chamber shall be pre-eminent in laying down and upholding, among the professionals, the tradition of excellence in service, principled conduct and social responsibility.

Unveiled by **Shri S. E. Dastur**, Senior Advocate on 30th January, 2008.



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The Chamber acts as power house of knowledge in the field of fiscal law, always proactive in contributing to the development of law and profession through research, analysis and dissemination of knowledge and by tendering suggestions to authorities. The Chamber provides networking platforms to professionals through interactive meetings and seminars

Some of the renowned personalities like Shri Soli Dastur, Shri Y. P. Trivedi, Late Shri V. H. Patil, Shri S. N. Inamdar have led the Chamber as President.

The Chamber shall preeminent in upholding among the professional, tradition of excellence in service, principal conduct and social responsibility.